

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE

**THE SUPREME COURT  
OF THE  
UNITED STATES**

CAPTION: FEDERAL COMMUNICATIONS COMMISSION AND  
UNITED STATES, Petitioners v. BEACH  
COMMUNICATIONS, INC. ET AL.

CASE NO: 92-603

PLACE: Washington, D.C.

DATE: Mondy, March 29, 1993

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1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   FEDERAL COMMUNICATIONS                   :

4       COMMISSION AND UNITED STATES,       :

5                   Petitioners                   :

6               v.                               :   No. 92-603

7   BEACH COMMUNICATIONS, INC.,           :

8       ET AL.                                 :

9   - - - - -X

10   Washington, D.C.

11   Monday, March 29, 1993

12               The above-entitled matter came on for oral  
13 argument before the Supreme Court of the United States at  
14 10:02 a.m.

15 APPEARANCES:

16 JOHN F. MANNING, ESQ., Assistant to the Solicitor General,  
17 Department of Justice, Washington, D.C.; on behalf of  
18 the Petitioners.

19 DEBORAH C. COSTLOW, ESQ., Washington, D.C.; on behalf of  
20 the Respondents.

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

2 (10:02 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 first Number 92-603, the Federal Communications Commission  
5 and the United States v. Beach Communications, Inc.

6 Mr. Manning.

7 ORAL ARGUMENT OF JOHN F. MANNING

8 ON BEHALF OF THE PETITIONERS

9 MR. MANNING: Thank you, Mr. Chief Justice, and  
10 may it please the Court:

11 A divided panel of the D.C. Circuit took the  
12 extraordinary step of invalidating a portion of an act of  
13 Congress, the Cable Act of 1984, on rational basis grounds  
14 under the Fifth Amendment.

15 In particular, the court rejected Congress'  
16 judgment that there is less reason for imposing a  
17 franchise requirement when cable facilities serve only  
18 commonly owned, controlled, or managed multiple-unit  
19 dwellings. Instead, the court concluded that the only  
20 rational dividing line between franchised and unfranchised  
21 facilities in the use of public rights-of-way.

22 We submit that the court of appeals erred in  
23 redrafting the reasonable line drawn by Congress in  
24 defining the term, "cable system," under the Cable Act of  
25 1984.

1           The crux of the issue in this case is the proper  
2   classification of satellite master antenna television, or  
3   SMATV. Unlike traditional cable systems, which pick up  
4   distant signals at a remote antenna and transmit them to  
5   the community through wires running under or over the city  
6   streets, an SMATV facility typically sets up a rooftop  
7   antenna and then transmits programming by wire to units in  
8   a building or group of buildings.

9           In enacting the Cable Act of 1984, Congress had  
10   to decide whether and when an SMATV system should be  
11   treated like a traditional cable facility and made subject  
12   to franchise requirements.

13           Contrary to the court of appeals' decision, the  
14   line drawn by congress was a reasonable one: an SMATV  
15   system is exempt from any franchise requirement if the  
16   system serves only multiple-unit dwellings under common  
17   ownership, control, or management, and uses no public  
18   rights of way.

19           QUESTION: Are they generally free from FCC  
20   regulations, as well?

21           MR. MANNING: Well, the crux of this case is  
22   what a cable system is, and a cable system determines --  
23   one's status as a cable system determines whether one is  
24   subject to franchise requirements, but there are also  
25   other Federal requirements that apply to cable systems as

1 well, such as --

2 QUESTION: There are other --

3 MR. MANNING: There are --

4 QUESTION: Requirements that these cable  
5 operators, that these small cable operators are subject  
6 to.

7 MR. MANNING: That's right. There are, for  
8 example, technical requirements dealing with signal  
9 interference, with the quality of the signal, and there  
10 are other requirements pertaining to rate regulation and  
11 so forth that apply to cable systems, but the only thing  
12 that's at issue here is whether it's constitutional to  
13 impose a franchise requirement on an SMATV facility that  
14 serves only commonly-owned buildings.

15 In enacting the so-called private cable  
16 exemption with its common-ownership requirement, Congress  
17 made the judgment that it did not want to impose franchise  
18 requirements on a building owner or condominium  
19 association that decides to put a satellite antenna on the  
20 building and provide cable television to its residents,  
21 perhaps as an amenity.

22 QUESTION: Mr. Mann, when you are talking about  
23 a franchise requirement, are you talking about a  
24 requirement imposed by Congress, or a requirement that --  
25 franchise that allows local governments to impose?

1 MR. MANNING: Under 47 U.S.C. section 541,  
2 Congress has provided that with the exception of  
3 facilities that are grandfathered under subsection (b) of  
4 that section, a cable operator -- that is, a person who  
5 operates a cable system -- must obtain a franchise before  
6 beginning to provide cable service.

7 QUESTION: And a franchise from the Federal  
8 Government.

9 MR. MANNING: Franchise -- a franchising  
10 authority -- it's not clear what they mean by franchise.  
11 The act describes a franchise authority as a Federal,  
12 State, or local authority that has power to issue a  
13 license, but in practice what it means is a State or local  
14 franchise, not a Federal franchise, Your Honor.

15 QUESTION: So although the act may not be clear,  
16 that is in practice what happens. If you're subject to  
17 this requirement you must get a franchise from a State or  
18 local government.

19 MR. MANNING: That's correct. That's correct,  
20 it's a State or local -- in practice a State or local  
21 franchise requirement, and what Congress decided was that  
22 if a building owner or a condo association decides to put  
23 a satellite dish on the roof of the building and provide  
24 cable service to its tenants, then that would not be  
25 subject to a local franchise requirement.

1           Similarly, if the same building owner or condo  
2       association ran a couple of buildings, or ran a building  
3       complex and put a satellite antenna on the roof to provide  
4       cable television to all the residents in the complex, that  
5       also would not be subject to a local franchise  
6       requirement.

7           But where a satellite antenna is set up to serve  
8       multiple, separately-owned buildings, or if its wires run  
9       over or under the city streets, Congress made the  
10      determination that the facility looks more like a  
11      traditional cable system and should be subject to  
12      franchise requirements accordingly.

13           QUESTION: Mr. Manning, is that the right-of-  
14      way criterion, whether it goes over city streets?

15           MR. MANNING: That's correct, Your Honor.

16           QUESTION: So in New York City, you could wire  
17      up an entire city block without using city rights-of-way.

18           MR. MANNING: That's correct, and it could be --  
19      as your question suggests --

20           QUESTION: Which is a lot of people.

21           MR. MANNING: It could be quite a number of  
22      people, and the judgment that Congress made, that the  
23      common-ownership requirement in addition to the right-of-  
24      way requirement was a rational basis for distinguishing  
25      between franchised and unfranchised facilities, was a

1 reasonable line.

2           The essence of the rational-basis test is that  
3 debatable policy judgments are left to Congress, not the  
4 Federal courts, and as this Court explained most recently  
5 in Sullivan v. Strop, a classification in a piece of  
6 socioeconomic legislation must be sustained if any state  
7 of facts may reasonably be conceived to justify it. Under  
8 that standard, the line drawn by Congress in this case  
9 easily passes constitutional muster.

10           If a satellite antenna serves only a commonly  
11 owned building or set of buildings, a plausible legislator  
12 could think that it is more likely that the service is  
13 being provided as part of the package of services that  
14 management provides to its residents, that it's an  
15 incident of residency.

16           Equivalently, a reasonable legislator could  
17 conclude that the service provided by such a satellite  
18 antenna would be less likely to be run in the nature of an  
19 independent business venture, but even if you take a  
20 building complex --

21           QUESTION: What would be the virtue of that  
22 conclusion, that it would be less likely to be run as an  
23 independent business venture?

24           MR. MANNING: Well, you would think that if you  
25 were an owner of a building and you were putting up a

1 satellite dish and providing the service to your tenants,  
2 that your primary interest would be in keeping your  
3 tenants happy, because you are making a lot more money  
4 from their rent, or from their condo fee, than you are  
5 from providing them with cable service.

6 So in that situation, you could conclude that  
7 there would be less need to interpose a franchising  
8 authority to provide consumer protection, when the  
9 building itself is really the provider of the service.

10 But even if you have a situation where the  
11 building is making a contract with an outside SMATV  
12 company to set up a satellite antenna on the building, to  
13 run the wires, own the wires, service the building,  
14 arrange for the programming, and bill the tenants  
15 separately, that company is still accountable to one set  
16 of owners for the service that it provides from that dish.

17 Every subscriber who gets service off of that  
18 satellite antenna can voice his or her complaints or  
19 desires to a single set of owners, and the ownership has a  
20 strong incentive to keep the subscribers happy, since  
21 there is a substantial interest in keeping the rental fees  
22 and the condo fees flowing.

23 QUESTION: Mr. Manning, is it correct, I guess  
24 almost as a matter of definition, that on the scenario  
25 you're just describing, every unit of buildings is going

1 to have to have its own complete system?

2 I mean, there's going to have to be an antenna,  
3 and so on, so the -- what I'm getting at is the investment  
4 is going to be much greater in the cases subject to the  
5 exception and the cancellation of the business would  
6 consequently be far more disastrous.

7 MR. MANNING: That's correct, Justice Souter.

8 I mean, it wouldn't necessarily be a single  
9 business, but it would be a single -- a single building --  
10 I'm sorry, a single building, but it would be a building  
11 or building complex.

12 And what you would do is, you would -- it would  
13 involve the construction of a satellite head end, and it  
14 may or may not involve wiring the buildings, because a lot  
15 of these buildings have the old mater antenna television  
16 system wiring already in place, so you might or might not  
17 be able to use that.

18 So there is a substantial investment in building  
19 the satellite head end facility, and if you were serving a  
20 single set of buildings, and the ownership cancels that  
21 contract, then you've lost out a lot.

22 QUESTION: You simply have more at stake in  
23 keeping them happy.

24 MR. MANNING: Right, whereas if you're serving  
25 10 different buildings, then no one owner has that degree

1 of leverage over your service.

2 And what's more, if a satellite antenna is not  
3 limited to serving commonly owned buildings, as Justice  
4 Scalia pointed out, it may well be expected, or a  
5 reasonable legislature could at least think that you would  
6 tend to have more subscribers served by that satellite  
7 antenna, because you could wire an entire city block in  
8 New York by running a wire from building to building. In  
9 that case --

10 QUESTION: And the owner would have real  
11 monopoly power over that -- at least over all the people  
12 within that block.

13 MR. MANNING: The owner would have substantial  
14 leverage, because the alternative for any of the buildings  
15 on that block --

16 QUESTION: Is to put up --

17 MR. MANNING: Would be to build your own system.

18 QUESTION: Right.

19 MR. MANNING: And now, I would like to --

20 QUESTION: And therefore greater need for rate  
21 regulation, which the franchising authority would do.

22 MR. MANNING: That's exactly right, and you  
23 could have -- a franchise authority with consumer  
24 protection jurisdiction could more profitably exercise  
25 control over the rates and consumer service of a satellite

1 antenna that serves separately owned buildings.

2 And what's more, if you assume, as a reasonable  
3 legislator could, that the size of the market served by  
4 that facility, served by that head end satellite antenna  
5 equipment, is larger if the common-ownership requirement  
6 is not met, then the costs of franchising could be spread  
7 among a greater number of consumers, and so Congress could  
8 have reasoned that the cost-benefit ratio of imposing a  
9 franchise requirement on a facility that serves separately  
10 owned buildings would be more favorable.

11 QUESTION: There's a lot of reasons you can  
12 think of, aren't there? I mean -- but none of these  
13 really appears, as far as we know, in any of the debates.

14 MR. MANNING: Well, Your Honor, this Court has  
15 made perfectly clear in a number of cases, most recently  
16 Nordlinger v. Hahn, but perhaps most clearly in the case  
17 of Railroad Retirement Board v. Fritz, that the rationale  
18 for a piece of legislation does not have to appear in the  
19 legislative history or even in purposes articulated on the  
20 face of the statute.

21 That issue was raised very clearly in the Fritz  
22 case, where the dissent said that the evidence in that  
23 case involved a question of line-drawing between those who  
24 would be eligible for dual benefits under the social  
25 security system and the railroad retirement system and

1 those who would not be eligible for that double-dipping,  
2 and Congress drew a line based on whether one was serving  
3 in the -- to summarize very sketchily, whether one was  
4 serving in the railroad industry or had a current  
5 connection in 1974.

6 The dissent said that that line disserved the  
7 purposes of the statute as expressed in the legislative  
8 history because it didn't provide all of the people who  
9 had vested railroad retirement benefits with their  
10 ultimate benefits, and this Court said that the purposes  
11 of a statute for purposes of the rational-basis test did  
12 not have to be reflected in the legislative history, and  
13 that it was "constitutionally irrelevant whether the  
14 rational basis was articulated by the legislature at all."

15 The Court also stated that the best evidence of  
16 the legislative purpose is the text of the statute itself.

17 QUESTION: Well, lots of times a bill starts out  
18 intending to do one thing and amendments are tacked on, so  
19 there may be several different purposes not necessarily  
20 consistent with one another.

21 MR. MANNING: That's exactly right, Mr. Chief  
22 Justice.

23 It's very difficult -- as this Court has  
24 explained many times, it's very difficult to know  
25 precisely why a legislator is moved to vote for or against

1 a particular piece of legislation, and if the rationality  
2 of a statute were measured in terms of the reasons  
3 suggested by some legislators on the floor or by a  
4 committee in a report, it would be very difficult indeed  
5 to sustain the validity of much legislation, and it would  
6 be quite an impingement on the independence of the  
7 legislative branch.

8 In rejecting the rational justification, what we  
9 call the consumer welfare rationale, the court of appeals  
10 offered very little explanation in this case. Consumer  
11 welfare rationale was suggested by Judge Mikva, Chief  
12 Judge Mikva in his concurring opinion, and endorsed by the  
13 FCC on remand.

14 Rather than addressing the substance of that  
15 justification, the court of appeals merely dismissed it by  
16 saying, we have no basis for assuming its validity, and by  
17 calling it a "naked intuition" that the FCC has wholly  
18 failed to flesh out.

19 QUESTION: Mr. Manning, can I ask you a question  
20 about the -- I'm not quite sure I entirely understand your  
21 rationale. Are you sort of assuming that one of these  
22 singly owned complexes is a separate market?

23 MR. MANNING: That's correct.

24 QUESTION: But aren't they -- aren't there a lot  
25 of these condominium associations in a big city like

1 Washington, or New York?

2 MR. MANNING: There are a number of these  
3 condominium associations, but --

4 QUESTION: Do they each negotiate separately, or  
5 is there a rate that generally applies to all of them?

6 MR. MANNING: That I'm not certain of, Your  
7 Honor.

8 QUESTION: But if they're just part of a market,  
9 why are they a different part of a larger market if 10  
10 buildings are owned by one person on the one hand and  
11 they're all owned by 10 separate people on the other?

12 MR. MANNING: Well, I think the thing that makes  
13 them a market is that what you're talking about when  
14 you're talking about a facility, which is the unit that  
15 you use to measure whether something's a cable system,  
16 you're talking about the hardware, the satellite antenna  
17 system, and as Justice Scalia pointed out, if you have a  
18 building, you have a satellite antenna that's placed on a  
19 building, then the people who own that building and --

20 QUESTION: Well, if it's just one building, I  
21 guess it doesn't matter, because if it's one building it  
22 would be owned by one person or one association, but isn't  
23 the only -- doesn't the problem only arise when you've got  
24 a complex of buildings on the one hand owned by a single  
25 owner and on the other hand by separate owners?

1 MR. MANNING: I'm sorry, I'm not sure what  
2 you're asking. If you have a complex of buildings -- if  
3 you have the same 10 buildings, and in one case it's owned  
4 by a single owner --

5 QUESTION: Right.

6 MR. MANNING: You have a satellite dish on  
7 building 1. It serves all 10 buildings.

8 QUESTION: Right.

9 MR. MANNING: The same set of 10 buildings are  
10 all separately owned. You have the satellite dish on  
11 building 1 and a wire is run among all 10.

12 QUESTION: Right.

13 MR. MANNING: Why -- that is the same market in  
14 each case, but --

15 QUESTION: Then let's assume that there are 100  
16 parallels throughout the city. 50 of them are singly  
17 owned, and 50 of them are owned by the 10 separate owners.

18 Now, you're saying that if you don't have  
19 regulation, they would all get different rates.

20 MR. MANNING: Well, I think that it stands to  
21 reason -- now, the record does not reflect what the actual  
22 practice is.

23 QUESTION: No, but your theory is that this is  
24 what Congress must have thought.

25 MR. MANNING: The theory is that Congress must

1 have thought that when you're putting the satellite dish  
2 on your own buildings --

3 QUESTION: That units that are economically  
4 identical would receive different treatment in an  
5 unregulated market.

6 MR. MANNING: That would have to be the theory,  
7 yes, Your Honor.

8 QUESTION: Do you think that's sound?

9 MR. MANNING: I think that it's debatable, which  
10 is the only thing that's required under the rational-  
11 basis test.

12 I mean, you and I may disagree just as the --

13 QUESTION: Is there any economic support for  
14 that hypothesis at all?

15 MR. MANNING: Well, the support is common sense  
16 and the way the world works.

17 I mean, we may differ in what we think the right  
18 answer is to whether you'll get a better deal if you're  
19 served by a satellite antenna that only serves people in  
20 your building or if you're served by a satellite antenna  
21 that serves you and 10 other buildings, and we may  
22 disagree over whether the person in building 1 has more  
23 leverage because it's part of a collection of 10 buildings  
24 that negotiate as one for the service as opposed to 10  
25 separate negotiators for the same service --

1 QUESTION: Well, there are no brokers, there are  
2 no people that represent owners in dealing with the  
3 franchise companies in this --

4 MR. MANNING: Again, the record is not clear,  
5 and the crux of the rational-basis test is that Congress  
6 is not disabled from legislating unless it can -- it is  
7 not disabled from legislating at the risk of not being  
8 able to prove that its policy judgments are empirically  
9 justifiable or even correct. That is the very clear  
10 import --

11 QUESTION: Or have any scholarly support  
12 whatsoever for them.

13 MR. MANNING: Well, I mean, if you just take a  
14 case like Railway Express Agency v. New York, in that case  
15 New York City passed an ordinance, and the ordinance  
16 provided that there was to be a ban on advertising on  
17 trucks, but the ordinance also exempted self-  
18 advertisements on the same trucks.

19 The court said -- the court upheld that  
20 classification on the ground that a legislator may well  
21 assume that those who advertise their own wares present  
22 less of a traffic safety concern given the nature and  
23 extent of the advertisements on their trucks.

24 There was no record support for that. They  
25 didn't cite any scholarly treatises, they didn't cite any

1 traffic reports, any economic textbooks.

2 What the court did was, it indulged in the  
3 democratic process by accepting plausible although  
4 unverified assumptions about the way the world works.

5 QUESTION: Is it your position that it's  
6 plausible in the situation put by Justice Stevens to say  
7 that in the case where there's single ownership there is  
8 more leverage and therefore the market is different?

9 MR. MANNING: We think it's very plausible to  
10 think that.

11 We think that a reasonable legislator certainly  
12 could assume that when you have a satellite dish that's  
13 being put on a building that a) it's more likely that the  
14 satellite service is being offered as an amenity to the  
15 tenants, that it may not even be a separate market where  
16 the SMATV company comes in, puts on the satellite, bills  
17 the tenants and runs it separately.

18 But secondly, we think it's much more likely  
19 that when you have the negotiation focused between one set  
20 of owners for use of this very expensive piece of hardware  
21 and a satellite company, even if it runs a hundred of  
22 these satellite dishes around town, that the people who  
23 live within that building are more likely to have leverage  
24 over the product consumed than if you have the same  
25 company putting a dish on and running it to 10 buildings.

1 Not only is the accountability more focused, but  
2 if a satellite dish can only serve multiple-unit  
3 dwellings, it is more likely that you are going to have  
4 fewer subscribers, and that means that each subscriber is  
5 going to have more leverage over the product produced, and  
6 that the cost of franchising will be more significant  
7 for -- per subscriber for subscribers who live in  
8 buildings under common ownership.

9 QUESTION: Now, Mr. Manning, if you prevail on  
10 this argument, and in this case it's your position that we  
11 should remand to the court of appeals for the  
12 determination of whether or not some other more rigorous  
13 standard applies?

14 MR. MANNING: That's correct, Your Honor.

15 The court of appeals raised the question whether  
16 a fundamental rights equal protection analysis should be  
17 applied, but the court did not reach that question, and we  
18 believe that the Court should leave it for the court of  
19 appeals in first -- in the first --

20 QUESTION: Does the FCC have a position as to  
21 what standard applies if there is content significance to  
22 the regulations?

23 MR. MANNING: Well, the -- this Court's cases  
24 suggest that -- no, we -- actually, we have not taken a  
25 position in that case, and we would prefer that the Court

1 not address that issue because it has not been addressed  
2 by the court of appeals and we think it would be  
3 preferable to leave it for consideration by the court of  
4 appeals on remand.

5 QUESTION: Well, two answers -- number 1, it  
6 would be preferable, and number 2, you don't have a  
7 position.

8 MR. MANNING: We don't have a position, no.

9 In -- we believe that the court of appeals'  
10 error in this case stemmed largely from the fact that it  
11 perceived that the line drawn by Congress was different  
12 than the line traditionally applied by the administrative  
13 agency in deciding whether the franchise requirement  
14 should be applied -- namely, the crossing of public  
15 rights-of-way.

16 The FCC's traditional basis for imposing  
17 franchise requirements on cable facilities, however, is  
18 irrelevant to the constitutional question before this  
19 Court. Congress has no constitutional duty to adhere to  
20 agency precedent or even to give a reasoned explanation  
21 for departing from it.

22 In any case, it is wrong to say that the only  
23 dividing line for franchise requirements had been the use  
24 of public rights-of-way. Under FCC regulations in the  
25 1970's, a facility that did not satisfy the common-

1 ownership requirement could be classified as a cable  
2 system and thus made subject to franchise requirements  
3 whether or not it crossed public rights-of-way. That  
4 ruling is reflected in the FCC's Bayhead decision which is  
5 cited in footnote 26 of our brief.

6 In addition, the FCC's 1983 Earth Satellite  
7 decision confirms that the Commission never preempted  
8 franchise requirements for the type of facility at issue  
9 here -- SMATV facilities that serve separately owned  
10 buildings by wire.

11 QUESTION: May I ask one other question about  
12 the common-ownership requirement?

13 MR. MANNING: Certainly.

14 QUESTION: What is it that must be commonly  
15 owned? A condominium, for example, each person living in  
16 the building owns his or her own apartment, but what is it  
17 they have a -- just the satellite dish, or --

18 MR. MANNING: The common-ownership requirement  
19 we use as a shorthand for common-ownership control or  
20 management, so that a condominium association that had  
21 multiple units that were under the control or management  
22 of a condo association would satisfy the common-ownership  
23 requirement, as we call it.

24 QUESTION: What if a group of neighbors had an  
25 association to manage their satellite dish, with --

1 MR. MANNING: If they had an association --

2 QUESTION: Common ownership of the satellite  
3 dish? That would not count.

4 MR. MANNING: I think it probably would not  
5 count. I think that what -- it's not clear from the FCC's  
6 precedents, but I would think that an organization that  
7 was formed simply to, in effect, evade the franchise  
8 requirement would be insufficient to do so under the FCC's  
9 regulations.

10 QUESTION: Well, to perform all the management  
11 functions that the management of the condominium  
12 association performs when it's handling television  
13 matters.

14 MR. MANNING: Yes, but the common ownership  
15 control and management requirement generally means that  
16 you have a bunch of units that are joined by a common  
17 economic link, that the management is providing a number  
18 of services. It collects garbage, it may provide plumbing  
19 services, it may provide an answering service at the front  
20 desk that serves all these units.

21 So there is an integrated economic unit.  
22 There's something that holds these units together, and  
23 when that's the case, I think that what the common-  
24 ownership requirement does is, it gives some assurance the  
25 cable system is simply --

1 QUESTION: But common ownership of the  
2 television-related facilities would not be sufficient.

3 MR. MANNING: Well, if it's simply another  
4 incident of a number of services that are provided by the  
5 same group in common --

6 QUESTION: Well, say you have a neighborhood  
7 association that handles the collection of garbage for all  
8 the homes on the block, and handles some private security  
9 force -- some neighborhoods have that -- and maybe has --  
10 and then decides also to buy a satellite dish.

11 MR. MANNING: Well, the more -- I mean, the  
12 question is, when do you have something under common  
13 management for purposes of the rule, and certainly the  
14 more services that you add on that are handled in common,  
15 the more that it looks as if these buildings are under  
16 common management for some purposes. I'm not --

17 QUESTION: What if you just have garbage,  
18 security protection, protest of tax bills, and management  
19 of the satellite dish?

20 MR. MANNING: I'm not --

21 QUESTION: Is that enough?

22 MR. MANNING: Your Honor, I'm not sure exactly  
23 where the line would be drawn, but I think the proper test  
24 would be whether one could say that, apart from the cable  
25 television services, that there is a substantial and bona

1       fide common management or control of the buildings.

2               QUESTION: With leverage in the marketplace.

3               QUESTION: I don't see how that fits with your  
4       rationale that people that are watching the television  
5       have diffused control where there's single ownership.

6               MR. MANNING: Well --

7               QUESTION: If they get together and they have  
8       single control, isn't that precisely --

9               MR. MANNING: When the --

10              QUESTION: The goal that the Government is  
11       trying to reach?

12              MR. MANNING: Well, I mean the question is not  
13       the constitutional question here but the question of how  
14       to interpret the regulation, and it's true that perhaps a  
15       group of people could get together and in some cases  
16       negotiate together to provide for cable services.

17              But Congress doesn't have to draw perfect  
18       classifications, and what it decided was that it was going  
19       to use common ownership control and management in general  
20       as a proxy for those situations when all the tenants  
21       together have sufficient focus and accountability and  
22       bargaining power to get the services they want with the  
23       proper consumer responsiveness.

24              If there are no further --

25              QUESTION: Did this definition just date from

1 '88, 1988?

2 MR. MANNING: No, Your Honor. The definition  
3 goes back to 1965.

4 In the first set of cable rules, there was what  
5 was called an apartment house exception that went through  
6 some changes that are not material here. Along the way,  
7 they had a common ownership --

8 QUESTION: Were there satellite dishes in those  
9 days?

10 MR. MANNING: In those days, the exception  
11 applied mainly to what's known as master antenna  
12 television, which was an antenna that was put on the roof  
13 and wired to buildings to get broadcast signals so that  
14 you wouldn't have a forest of antennas.

15 Satellite antenna -- satellite master antenna  
16 television was developed in the late 1970's, but in the  
17 Earth Satellite decision in 1983 the Commission made very  
18 clear that the common ownership exemption clause --

19 QUESTION: Is this case the first time the  
20 distinction has been challenged in court?

21 MR. MANNING: There were two other cases that  
22 raised statutory questions of whether an SMATV facility  
23 would be a cable system. Those were two district court  
24 cases which are cited in the FCC opinion. This is the  
25 first constitutional challenge to that distinction.

1 QUESTION: And the Congress has revisited this  
2 area several times since '65, I take it.

3 MR. MANNING: Congress passed the Cable Act of  
4 1984, in which it adopted the common ownership exception,  
5 and in 1992 it passed another Cable Act in which it left  
6 the exemption unchanged.

7 QUESTION: Where there was testimony before the  
8 committees opposing this distinction.

9 MR. MANNING: The FCC report on remand says that  
10 the matter in this case was brought to the attention of  
11 the committee, but I'm aware of no testimony that relates  
12 to the question whether to retain the common exemption.

13 QUESTION: Did the Commission have a position on  
14 it?

15 MR. MANNING: The Commission initially took the  
16 position in interpreting the 19 -- you mean in the 1992  
17 legislation?

18 QUESTION: No. The first time this distinction  
19 appears you said was in 1964.

20 MR. MANNING: 1965, in the Commission's first  
21 set of rules, yes.

22 QUESTION: '65. Did the Commission have a  
23 position then, or did they propose it?

24 MR. MANNING: They -- I'm not sure, Your Honor.  
25 If there are no further questions --

1 QUESTION: Thank you, Mr. Manning.

2 Ms. Costlow, we'll hear from you.

3 ORAL ARGUMENT OF DEBORAH C. COSTLOW

4 ON BEHALF OF THE RESPONDENTS

5 MS. COSTLOW: Mr. Chief Justice, and may it  
6 please the Court:

7 Of all interstate media of communications not  
8 using the public streets and rights-of-way to deliver  
9 their signal, only a single media -- that is, an SMATV  
10 facility serving separately owned and managed multiple  
11 dwelling units by wire has to obtain a franchise from a  
12 municipality in order to enter the market and is subjected  
13 to treatment as a cable system.

14 No franchise is required of an SMATV facility  
15 serving a single multiple-unit dwelling. No franchise is  
16 required for that same SMATV operator to install a series  
17 of separate satellite dishes in order to serve the exact  
18 same apartment dwellings throughout the municipality. No  
19 franchise is required if an SMATV operator wishes to  
20 interconnect separately owned or managed buildings by  
21 means of an 18-gigahertz microwave link. No franchise is  
22 required of an SMATV facility who seeks to interconnect  
23 those same separately owned or managed multiple dwelling  
24 units by means of an infrared link.

25 QUESTION: Ms. Costlow, what are the practical

1 consequences when a franchise is required? Does that mean  
2 that a cable operator will be subject to price regulation  
3 by the State or local government?

4 MS. COSTLOW: The burdens that would be imposed  
5 upon an SMATV facility that would have to obtain a  
6 franchise would be the same burdens that would be imposed  
7 upon traditional cable operators, but those burdens would  
8 not apply to any other interstate media of communications.

9 Those burdens would include, for example, having  
10 to get a license to speak at all. If the license is  
11 denied, then you cannot speak. Those burdens would  
12 include, on the local level, typically a requirement to  
13 wire the entire municipality, not simply to obtain a  
14 franchise to interconnect the particular separately owned  
15 multiple-unit dwellings that the operator wishes to  
16 interconnect. It would also include --

17 QUESTION: It would include some sort of the  
18 price regulation.

19 MS. COSTLOW: Yes, it would include price  
20 regulation as a result of the '92 act, depending upon  
21 whether or not under the statute that particular market  
22 and the players within that market are subject to  
23 effective competition.

24 They would always be subject to potential  
25 regulation on the Federal level by treatment as a cable

1 system because, as a result of the '92 act, any subscriber  
2 can bring a complaint to the Federal Communications  
3 Commission that the rates of the particular operator are  
4 unreasonable, and that kind of price and rate regulation  
5 is not imposed upon SMATV facilities serving a single  
6 building, serving commonly owned or managed buildings,  
7 serving those same buildings by means of microwave or an  
8 infrared link, leasing telephone company lines, for  
9 example, in order to interconnect those buildings, because  
10 you don't have to obtain a franchise to do that.

11 In other words, the only time a franchise is  
12 required to interconnect separately owned and managed  
13 buildings is when those separately owned and managed  
14 buildings are interconnected by a simple piece of wire, so  
15 the exact distinction here is that you cannot cross a  
16 public -- a private property boundary line in order to  
17 serve separately owned or managed buildings by means of a  
18 wire, but you can cross that same private property  
19 boundary line to interconnect those same separately owned  
20 and managed multiple-unit dwellings by means of a wireless  
21 facility.

22 QUESTION: It's a lot more expensive to -- both  
23 to install and operate, isn't it? I mean, you get a wire  
24 for a couple of dollars.

25 MS. COSTLOW: It is obviously interconnecting

1 separately owned or managed buildings by means of a piece  
2 of cable will be cheaper in all instances for any --

3 QUESTION: Virtually costless. Virtually  
4 costless.

5 MS. COSTLOW: I think it's 6 or 12 cents a foot,  
6 Your Honor, depending on how much cable is used.

7 The distinguishing characteristics here between  
8 the media who are subject to franchising requirements and  
9 the media who are not subject to franchising requirements,  
10 I do not believe that you should focus simply on an SMATV  
11 facility versus another SMATV facility, but must look at  
12 the entire interstate media that is potentially regulated  
13 as a result of the Communications Act and the Cable  
14 Television Acts which were a part of that act.

15 QUESTION: Well, do you think a State can choose  
16 to regulate telephones without regulating cable?

17 MS. COSTLOW: Telephone companies, Your Honor.

18 QUESTION: Yes. Yes, I --

19 MS. COSTLOW: There are incidences of telephone  
20 companies that are both intrastate and interstate service,  
21 and so there has been a dual regulatory scheme adopted for  
22 telephones --

23 QUESTION: No, but I --

24 MS. COSTLOW: Precisely because of that.

25 QUESTION: Well, let me use another example.

1 You think that a State or the Federal Government could  
2 choose to regulate wire communications without regulating  
3 nonwire communications.

4 MS. COSTLOW: I believe that the Feds and the --  
5 the Federal Government or the State government cannot  
6 discriminate in the circumstances in which they regulate  
7 particular speakers. In other words, if there are no  
8 distinguishing characteristics between the various  
9 interstate media of communications, then I submit that it  
10 is impermissible to apply a particular set of burdens and  
11 to single out --

12 QUESTION: Are you going to answer my question?  
13 Are you going to get to the answer to my question?

14 MS. COSTLOW: I'm sorry, Your Honor, I thought  
15 that I was answering your question.

16 QUESTION: I don't know --

17 MS. COSTLOW: I must be misunderstanding your  
18 question.

19 QUESTION: Well, if you have, I don't know  
20 whether it's yes or no. Can a State or the Federal  
21 Government choose to regulate wire communications and not  
22 regulate nonwire communications, or vice versa? Can it  
23 distinguish between the two media, yes or no?

24 MS. COSTLOW: Yes, but may I offer an  
25 explanation?

1 QUESTION: Okay, sure.

2 MS. COSTLOW: The explanation is that they can  
3 distinguish between those two media only if there are  
4 distinguishing characteristics that provide a  
5 justification for distinguishing between those media.

6 QUESTION: One's over the air, one isn't over  
7 the air. One's in wire, the other isn't in wire.

8 MS. COSTLOW: But that is a distinction without  
9 a difference. Whether you are operating a multipoint,  
10 multichannel distribution service or whether or not you  
11 are operating an SMATV service, you are offering news,  
12 entertainment, and information on a multichannel system.

13 You could have exactly the same programming  
14 services offered to subscribers, and I submit that the  
15 fact that you choose a particular technology, meaning a  
16 wire, versus a particular technology, which is microwave,  
17 to deliver those exact same services to consumers, is a  
18 distinction without a difference.

19 QUESTION: How about the line of cases from this  
20 Court that say that the legislature can confront evils one  
21 step at a time and you know, make exceptions if it wants  
22 to? It doesn't have to sweep every piece off the  
23 chessboard when it tries.

24 MS. COSTLOW: Your Honor, it is true that  
25 Congress can act one step at a time, but if you look at

1 the particular background and history and context of this  
2 particular regulation, the -- neither the Federal  
3 Government nor Congress have ever subjected interstate  
4 media of communications operating by wireless, for  
5 example, to local franchising regulation.

6 They have not subjected to local franchising  
7 regulation SMATV facilities serving multiple-unit  
8 dwellings either singly or under common ownership  
9 management or control, so the step here -- there is no  
10 indication that Congress is moving one step at a time to  
11 subject each of these interstate media to some sort of  
12 local franchising regulation. The step is in the opposite  
13 direction.

14 All interstate media have typically been exempt  
15 from local regulation and exclusively under Federal  
16 jurisdiction and control, and only in a very rare instance  
17 has the Federal Government conceded or permitted local  
18 jurisdiction and control over an interstate media of  
19 communications.

20 QUESTION: Well, maybe this -- maybe Congress is  
21 in the process of changing its mind and is beginning to go  
22 the other way.

23 MS. COSTLOW: Your Honor, the FCC has never done  
24 so. The FCC's Orth-O-Vision decision was issued in 1978,  
25 which specifically preempted local regulation and

1 control --

2 QUESTION: Yes, but Congress isn't bound by  
3 previous FCC decisions. I mean, Congress may have  
4 decided, look, maybe we want to get the States and local  
5 governments into some regulation. Let's try it out in  
6 this area and see how it works.

7 MS. COSTLOW: Your Honor, Congress in 1984 chose  
8 to adopt the Orth-O-Vision decision and exempt wireless  
9 from regulation. They just the 1992 Cable Act, and in  
10 that act they again did not subject any sort of wireless  
11 facilities to local franchising regulation, so that over  
12 the course of the entire history of when each of these  
13 media have come into the marketplace, Congress has not  
14 determined to impose local franchising regulation unless  
15 such facilities used a public street or right-of-way,  
16 except in this one, single instance.

17 QUESTION: Counsel, I take it there's just no  
18 evidence in the legislative history as to what Congress  
19 thought the justification was for this distinction.

20 MS. COSTLOW: No, Your Honor, there is not. I  
21 must admit that there is evidence that the -- at least in  
22 the context, that the -- that Congress' reason for  
23 exempting SMATV's facilities serving commonly owned, the  
24 exemption itself serving commonly owned or managed  
25 facilities was not system size, that the reason for --

1 QUESTION: Was not what?

2 MS. COSTLOW: Was not system size, which is the  
3 rationale presented by the Government.

4 What the rationale was is that was based on a  
5 decision issued by the Federal Communications Commission,  
6 the Earth Satellite decision, directly prior to the  
7 passage of the 1984 Cable Act.

8 And that decision exempted these types of  
9 facilities because they did not use a public street or  
10 right-of-way, they were indistinguishable from wireless,  
11 they were there to promote the open entry and the  
12 unfettered development of interstate satellite signals,  
13 and the Federal Communications Commission made a specific  
14 finding that local franchising jurisdiction and control  
15 acted as a barrier and chilled entry and therefore  
16 thwarted the FCC's policy in the unfettered development of  
17 interstate satellite signals. Congress in the -- that was  
18 a 1983 decision.

19 QUESTION: Do you think that decision was also  
20 irrational?

21 MS. COSTLOW: I don't think the decision to  
22 exempt SMATV facilities serving commonly owned or managed  
23 buildings was irrational. The FCC did not reach -- it  
24 specifically did not reach whether or not it would at some  
25 point exempt also facilities serving separately owned and

1 managed dwellings. They didn't say that they couldn't.  
2 They just didn't reach it, and in '84 Congress adopted  
3 that same exemption --

4 QUESTION: So you just think -- you think  
5 Congress was just thoughtless when they -- they just  
6 cribbed this out of a Commission decision.

7 MS. COSTLOW: That is certainly likely, Your  
8 Honor. The other presumption would be that it is  
9 irrational simply because those same interests in which  
10 they --

11 QUESTION: You would think that at some point  
12 since 1965 there would have been some considerable  
13 objections to this discrimination.

14 MS. COSTLOW: Your Honor, the first time Congress  
15 legislated in this area was '84, so when we were speaking  
16 of the definition being in existence since 1965 --

17 QUESTION: I thought counsel on the other side  
18 said this distinction first came on the books in '65.

19 MS. COSTLOW: At the Federal Communications  
20 Commission level, not on the congressional level. The  
21 first time Congress legislated was in '84.

22 When it came up at the FCC level, Your Honor,  
23 SMATV facilities did not exist. What existed were master  
24 antenna television facilities.

25 QUESTION: Yes.

1 MS. COSTLOW: SMATV did not really come into  
2 existence --

3 QUESTION: Well, when -- has there ever been  
4 objections made to Congress in their hearings since '84,  
5 because they certainly have been back in this area.

6 MS. COSTLOW: There's nothing to show anything  
7 on the record in the legislative history. In 1984, this  
8 is the first time that Congress legislated this particular  
9 distinction. When Congress was reconsidering the Cable  
10 Act in 1992, that is the time at which the lower court  
11 here issued its opinion. That was made known to Congress.

12 In fact, it was made known that they were  
13 considering issuing that opinion, and then after the  
14 opinion was issued, that opinion was also made known to  
15 Congress, and we would submit, Your Honor, that the fact  
16 that Congress in 1992 knew of the decision here and chose  
17 to do nothing about it means that in essence that they  
18 have adopted the district court ruling here, but there is  
19 nothing on the record that explicitly says that.

20 QUESTION: Even when that ruling was subject to  
21 appeal.

22 MS. COSTLOW: Your Honor, I find it implausible  
23 that if Congress truly wanted to keep this distinction,  
24 and this distinction had been held unconstitutional by the  
25 district of columbia circuit, that Congress would have

1       gambled on the fact --

2               QUESTION:   On us.

3               MS. COSTLOW:   That this Court was grant cert --

4               QUESTION:   Would have gambled on us getting it  
5       right?

6               (Laughter.)

7               MS. COSTLOW:   No -- I'm sure they would have  
8       gambled on this Court getting it right, and I submit that  
9       getting it right is affirming the decision below, but I  
10      don't think that if Congress felt strongly about this,  
11      they would have gambled on this Court potentially denying  
12      cert and therefore not reaching the issue.

13              QUESTION:   Ms. Costlow, what does an SMATV  
14      company do?   They construct the dish, and then they  
15      continue -- they decide what programming goes through the  
16      dish.

17              MS. COSTLOW:   It is incorrect to assume that  
18      satellite master antenna television systems are always  
19      landlord-provided.   In fact, in practice, that is less  
20      than 10 percent of the SMATV facilities that are out  
21      there.

22              These are independent suppliers of cable  
23      television services and what they do is exactly the same  
24      thing that traditional cable does, that multipoint,  
25      multichannel distribution services do, that 18-gigahertz

1 services do --

2 QUESTION: Are they competitive?

3 MS. COSTLOW: Yes, they are competitive.

4 QUESTION: Are there a number of competitors  
5 that come to buildings and say, we'd like to run an SMATV  
6 service?

7 MS. COSTLOW: And I tell you how they compete.  
8 They compete at the property line. The property owner  
9 looks out in the marketplace and says, I can receive  
10 services from traditional cable, I can receive them from  
11 SMATV, I can receive them from MMDS.

12 QUESTION: Okay. Now, if I'm a property owner  
13 that owns a whole square block -- I own all the buildings  
14 in the block -- I would assume I have pretty good  
15 bargaining power with the various SMATV companies, right?  
16 I can pretty much say, you know, I'd like to get it at  
17 such-and-such a price, I assume, if I have a whole city  
18 block in New York, who's all commonly owned, I control a  
19 whole block.

20 MS. COSTLOW: That property owner has the same  
21 bargaining power whether it's a traditional cable, or  
22 SMATV, or MMDS. Whatever bargaining power the owner  
23 has --

24 QUESTION: Sure, that's true, but now let's  
25 assume that the block is not all owned by one person.

1 There are a hundred different buildings on the block. One  
2 of the buildings signs up with a particular SMATV company.  
3 Do you think that there's any chance that the remaining 99  
4 buildings on the block will have a realistic choice which  
5 SMATV company they can use?

6 I mean, doesn't the SMATV company that signs up  
7 the first building have a lock on all other 99, because it  
8 costs a couple of bucks to just join the next building  
9 with a cable? How can any of the other SMATV companies  
10 hope to compete within that block?

11 MS. COSTLOW: Are we speaking of separately  
12 owned buildings, or commonly owned buildings?

13 QUESTION: I'm talking now of separately owned  
14 buildings.

15 MS. COSTLOW: Your Honor --

16 QUESTION: If they were commonly owned, as I  
17 say, there'd be some bargaining power at the outset, but  
18 one building gets the system. How can any of the other  
19 companies hope to compete for the other 99? Your company,  
20 if you're the one that gets the first one, you have a lock  
21 on the other 99 buildings. It costs you a couple of feet  
22 of cable, that's all.

23 MS. COSTLOW: If you can interconnect by wire --

24 QUESTION: Sure.

25 MS. COSTLOW: That may be potentially true, but

1 I don't think that it gives you a lot more than the  
2 traditional cable operator. The traditional cable  
3 operator has already installed its facilities in the  
4 public streets or rights-of-way. All it has to do is run  
5 the same cable to serve these buildings.

6 QUESTION: Well, that's right, but he's --

7 MS. COSTLOW: So their entry costs are no  
8 greater than the entry costs --

9 QUESTION: But he's regulated.

10 MS. COSTLOW: Of an SMATV provider.

11 QUESTION: But he's regulated --

12 MS. COSTLOW: He's regulated --

13 QUESTION: And that's all they're trying to do  
14 here -- regulate the SMATV provider.

15 MS. COSTLOW: Your Honor, everyone in the market  
16 has the potential to serve a separately owned building.  
17 They have only regulated SMATV operators who operate on  
18 private property serving a separately owned building. A  
19 wireless operator can serve a separately owned building  
20 without becoming regulated on the local level. An  
21 18-gigahertz operator can serve a separately owned  
22 building without being regulated on the local level, so  
23 the fact --

24 QUESTION: It's a lot more expensive. The  
25 monopoly differential is not as great. It costs them, to

1     serve each additional building, a lot more energy, whereas  
2     you just buy a couple of feet of wire and you've got the  
3     new building.

4             MS. COSTLOW: A wireless cable operator can  
5     install service to a multiple dwelling unit for somewhere  
6     around \$300. I don't see that as a significant entry  
7     barrier, so that in competition between a wireless cable  
8     operator meeting a multichannel, multipoint distribution  
9     service operator competing for access to that building --

10            QUESTION: Well, that may be, ma'am, but you  
11     see, now, I didn't know that, and maybe a reasonably  
12     informed legislator wouldn't know that, and would think,  
13     gee, if I'm -- you know, if I'm a company trying to  
14     compete with another company who's gotten one building in  
15     the block, I'm just out of competition, because they only  
16     have to -- I can see a legislator thinking that and  
17     saying, that's sort of a monopoly situation that we ought  
18     to allow to be regulated. I may be wrong, but I can't say  
19     that it's off the scope.

20            MS. COSTLOW: Your Honor, the purposes -- I  
21     would submit that the purposes of the '84 act as confirmed  
22     in the 1992 cable act are a deregulatory purpose, and the  
23     purpose of -- set forth and the objectives set forth in  
24     both those acts by Congress are that they sought to  
25     promote competition by free entry, not to impose

1 regulations on system or entry barriers to system.

2 And I would submit that Congress could not have  
3 sought to promote competition in these acts by means of  
4 singling out only a particular medium for this kind of  
5 regulation as opposed to applying whatever justifies  
6 regulation of us justifies regulation of other like-  
7 situated media.

8 The system size rationale is the rationale  
9 that's relied upon by the Government here, and I would  
10 submit that that system size rationale was expressly  
11 rejected by Congress when it adopted the 1984 act. Prior  
12 to the 1984 act --

13 QUESTION: Well, excuse me, the Government's  
14 relying on a leverage rationale, not a crude size  
15 rationale, isn't that clear?

16 MS. COSTLOW: The Government is relying upon the  
17 fact that Congress intended to regulate systems of larger  
18 size, because systems of smaller size would somehow be  
19 more subject to consumer control.

20 QUESTION: Well, it's resting on the assumption  
21 that certain systems will more likely be small and other  
22 systems will likely be larger, but the rationale  
23 ultimately on those assumptions is based on leverage, not  
24 a mere crude size cut-off, isn't that correct?

25 MS. COSTLOW: That is the Government's position,

1 you are correct. I would submit, however, that a consumer  
2 has as much leverage over the owner of that building,  
3 whether that owner of that building -- I mean, owns one  
4 building or three buildings.

5 QUESTION: That may be so, but that's a  
6 different argument. I mean, that is not an argument that  
7 Congress expressly rejected, and you started out by  
8 arguing that in rejecting the size rationale it had  
9 rejected the Government's argument, and I'm saying it's  
10 not quite that clear.

11 MS. COSTLOW: The distinctions between different  
12 media and who does and does not have to have a franchise,  
13 they did not determine that larger systems such as MMDS or  
14 DBS or any of the other private property systems would be  
15 subject to local franchising regulation.

16 I would submit that if Congress were concerned  
17 that larger, multichannel video programming distributors  
18 serving separately owned buildings because there would be  
19 less consumer leverage should be subject to local  
20 jurisdiction and control, that they would have subjected  
21 all larger systems to such regulation and not simply  
22 singled out this particular media.

23 The Government does not respond to that  
24 argument. The Government says, well, what they meant to  
25 do there was simply encourage SMATV facilities, these

1 kinds of SMATV facilities, to migrate to wireless  
2 spectrum, and I would submit, Your Honor, that it has  
3 never been telecommunications policy to encourage  
4 migration to scarce frequencies.

5           Rather, the policy has been to encourage  
6 migration away from such scarce frequencies, and the  
7 Government has never, in my mind, submitted a  
8 justification for the discriminatory classification  
9 between wired facilities and wireless facilities, and I  
10 submit that basing that on a migration to wireless  
11 spectrum analysis simply is implausible.

12           QUESTION: With wireless, I guess you can -- can  
13 you get -- does wireless use the public right-of-way if  
14 you shoot it across a street? Is that considered to be  
15 using the public right-of-way? It's not really using it.

16           MS. COSTLOW: That's exactly my point. None of  
17 the facilities at issue here use a public street or right-  
18 of-way. Neither do these SMATV facilities.

19           QUESTION: Why isn't the distinction between  
20 wireless and cable simply the distinction that it cost  
21 more, that you do not -- the single system that has sold  
22 its service to one building on the block has -- if it can  
23 connect by wire, it has a monopoly over all the other  
24 buildings on the block. Other cable systems cannot --  
25 other SMATV systems can't hope to get their business.

1           If, on the other hand, you made them do it by  
2   wireless, the other systems might well come in. Isn't  
3   that enough of a distinction?

4           MS. COSTLOW: I find the fact that Congress  
5   would have intended to only harm the market entry and  
6   growth of SMATV facilities and not somehow -- that they  
7   just -- they wanted to advance and promote some  
8   technologies over others, or some speakers over others,  
9   not to be a plausible reason for Congress' actions here,  
10   because if you assume that Congress meant to impose, on  
11   purpose, greater cost on SMATV facilities that they did  
12   not mean to impose on other like-situated media, Your  
13   Honor, I have problems with that.

14           I do not believe that Congress meant to impose  
15   additional costs, and if, in fact, what Congress'  
16   objective was here was to ensure that these particular  
17   SMATV facilities had to be regulated if they got larger,  
18   then I submit they haven't achieved their purpose, because  
19   everyone can evade that regulation, including these SMATV  
20   facilities.

21           It may cost them to evade that regulation, but  
22   they can evade it, and they can get as large as they want,  
23   and it just simply doesn't make sense to me that if  
24   Congress had meant to subject larger systems to  
25   franchising regulation, that they wouldn't have subjected

1 all larger systems to franchising regulation, and it  
2 wouldn't come down to the ownership of the building  
3 served, which isn't even a characteristic of those various  
4 interstate media, and it wouldn't have come down to  
5 whether or not it's interconnected by wire over a private  
6 property boundary line.

7 To me, that is an impermissible distinction, an  
8 impermissible line-drawing between like media of  
9 interstate communications. That line was drawn with  
10 respect to traditional cable prior to the Cable Act  
11 because of cable's unique use and burden upon the public  
12 streets and rights-of-way.

13 What does a franchise get an SMATV facility  
14 here, Your Honor? A franchise does not give them the  
15 right to speak on private property. All that a franchise  
16 does is give them the right to install facilities in  
17 public streets and rights-of-way.

18 They do not seek to install facilities in public  
19 streets and rights-of-way. They do not seek governmental  
20 benefits. All they seek to do is install facilities on  
21 private streets and rights-of-way, so the franchise that  
22 Congress has dictated that these facilities must obtain  
23 does not even give them the right which they seek, which  
24 is to speak on private property.

25 What gives them the right to speak on private

1 property is the private property owner. Now, let's say  
2 the franchise --

3 QUESTION: I suppose you could -- there is such  
4 a thing as franchising the ownership of television sets.  
5 I mean, the way public television is supported in England  
6 is by -- you have to get a franchise to own a television  
7 set.

8 I mean, I don't know that there's any necessary  
9 connection between franchising and public property. You  
10 can franchise things that occur only on private property.  
11 You can franchise certain businesses. You can't run a  
12 certain business on private property.

13 MS. COSTLOW: But when you franchise those  
14 businesses, that gives them the right to enter the market.  
15 When -- if you -- when you franchise an SMATV operator  
16 here, that alone does not give the SMATV operator the  
17 right to enter the market. The SMATV operator --

18 QUESTION: Yes, it does. It gives you the right  
19 to connect other buildings that aren't owned by the  
20 same -- by common control to connect other buildings with  
21 a little piece of cable.

22 MS. COSTLOW: Not without the permission of the  
23 private property owner. That is an additional act that  
24 must occur, so that even if I went and got a franchise  
25 which enabled me to interconnect separately owned and

1 managed dwellings, that alone would not give me the right  
2 to enter the market.

3 QUESTION: You can say the same thing about any  
4 private business that is franchised. It doesn't give him  
5 the power to sell something. He has to find somebody  
6 who's willing to buy it.

7 MS. COSTLOW: But why --

8 QUESTION: I mean, of course that's a condition  
9 of a franchise.

10 MS. COSTLOW: But why only harm the competitive  
11 entry of a particular interstate media? Why not place  
12 similar franchising entry burdens on all interstate media  
13 of communications similarly situated?

14 QUESTION: I agree. I think it may be a very  
15 bad idea, but one -- that isn't the issue, is it?

16 MS. COSTLOW: Well, the issue is whether or not  
17 there is some objective here that Congress sought to  
18 achieve that this particular regulatory or discriminatory  
19 classification actually serves.

20 QUESTION: May I ask you a factual question just  
21 to help me? When a local community grants the franchise  
22 that you're saying they should not have the right to  
23 grant, do they grant a general franchise to interconnect  
24 all the units in the city, or do they grant them on  
25 particular installation by installation?

1 MS. COSTLOW: Typically, in practice, a local  
2 franchise grants a franchise to extend cable facilities to  
3 extend cable facilities throughout the public streets and  
4 rights-of-way in the franchise area, which is usually  
5 equivalent to the individual municipality, the boundaries  
6 of the individual municipality.

7 QUESTION: So there isn't a case-by-case  
8 determination about whether the --your bargaining power's  
9 been abused in a particular apartment complex, or anything  
10 like that.

11 MS. COSTLOW: Exactly not, Your Honor. All that  
12 it does is determine that on an overall community basis,  
13 and in fact the danger posed here, after passage of the  
14 '92 act, Congress in the '92 act tried to eliminate or  
15 correct the past franchising practices of municipalities,  
16 which were to grant a single franchise for an entire  
17 municipality.

18 Congress realized, or at least found in the  
19 Cable Act that that had created undue market power for  
20 particular providers of these services in the marketplace.

21 QUESTION: Ms. Costlow, has your client applied  
22 for a franchise?

23 MS. COSTLOW: Your Honor, until the FCC's  
24 decision below -- the FCC after passage of the '84 act had  
25 determined that -- had interpreted the language such that

1 we would not have to obtain a franchise.

2 QUESTION: So your answer is no, it has not.

3 MS. COSTLOW: I'm sorry, Your Honor --

4 QUESTION: Is that correct?

5 MS. COSTLOW: My answer is no, it has not, and  
6 may I offer an explanation?

7 QUESTION: Well, no, I don't see that you should  
8 have to explain -- I mean, if it hasn't, it hasn't. My  
9 point is that you really don't know, then, what  
10 requirements any particular franchise you applied for  
11 might be -- might subject you to.

12 MS. COSTLOW: In the '92 act, which is what I  
13 was about to explain --

14 QUESTION: I -- any -- I mean, where does your  
15 client want to have its services? I mean, what  
16 geographical area?

17 MS. COSTLOW: The clients in front of this Court  
18 have these particular installations throughout the United  
19 States. The -- Pacific Cablevision, for example, has one  
20 in San Diego, California.

21 QUESTION: Do you know without having applied  
22 for a franchise in San Diego what sort of requirements you  
23 would be subject to by that franchise?

24 MS. COSTLOW: Yes, Your Honor. A State statute  
25 in California says to Pacific Cablevision that if you are

1 going to obtain a franchise in San Diego, your franchise  
2 has to be the same as the first franchise, which would  
3 mean that Pacific Cablevision would have to provide  
4 universal service throughout the entire municipality.

5 QUESTION: How about the other 49 States in  
6 which you might want to do business?

7 MS. COSTLOW: There are -- with respect to a  
8 uniform franchise statute, Your Honor, I believe that  
9 there are about nine or ten of those in various States  
10 throughout the country.

11 CHIEF JUSTICE REHNQUIST: Thank you. The case  
12 is submitted.

13 (Whereupon, at 11:02 a.m., the case in the  
14 above-entitled matter was submitted.)  
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# CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

✓ Federal Communications Commission & United States  
Beach Communications, Inc. Case No: 92-603

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Ann Marie Federico

(REPORTER)