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Cable Television's Emerging Two-Way Services: A Dilemma for Federal and State Regulators

*Frank W. Lloyd**

Cable television as an entertainment medium has been the subject of various federal, state, and local regulatory schemes since its inception in the 1950's. The introduction of nonvideo two-way cable services that provide a capacity for responsive data and voice transmission between users of the two-way system has renewed interest in the appropriate role of government in the regulation of two-way cable services. Telephone companies in particular have pressed state and federal regulators to identify cable two-way systems as common carriers and to impose on them two-way cable common carrier regulations. In this Article Mr. Frank Lloyd discusses actual and possible bases for federal, state, and local jurisdiction over two-way cable services and presents an analysis of the attempts of regulatory bodies to impose common carrier restrictions on these cable systems. Mr. Lloyd argues that common carrier regulation of nonvideo two-way cable services is inappropriate because an interactive cable system is analogous to print publishers subject to first amendment protections, fails to meet the tests for public utility regulation, is a "nondominant" medium, and will suffer from premature regulation. He also discusses the anticompetitive motivation of telephone companies that seek to block the entry of cable into the two-way services market. Mr. Lloyd concludes that preemptive FCC action or federal legislation is needed to prevent undue regulation from inhibiting cable's development of an interactive capacity.

I. Introduction

Debates in legislatures and in administrative agencies about the role of cable in the communications regulatory scheme have focused for three decades on the impact of cable television as a home entertainment video challenger to traditional over-the-air broadcasting services.[1] The recent removal, however, of regulatory

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1. For a discussion of the issues debated during the earlier years of cable, see Barrow,

restrictions on cable pay movie and sports[2] and imported distant broadcast signal[3] offerings has lessened the significance of the home entertainment video issue. Nevertheless, a new and equally profound controversy has emerged: the role of cable in the provision of two-way telecommunications services such as burglar alarm services, home banking, and interoffice business transmissions, an area previously the monopoly province of the telephone company.

Federal, state, and local regulators, with predictions that by 1990 two-way cable will pass up to 40 million homes, are beginning to pay more attention to the role of cable in the provision of two-way services. In addition, many state public service commissions and local telephone companies, because many two-way cable services are similar to services offered in the past over telephone lines, seek to impose "common carrier" public utility status on cable operators that offer these two-way services.

Thus, the telephone industry, which already has access to homes and businesses by wire, may overwhelm the cable industry before cable has had the opportunity to develop its two-way service capability into a mature industry. The telephone companies now realize that cable with its high channel capacity may be able to provide not only new nonvideo two-way services, but also may provide basic data and voice transmissions in which telephone companies traditionally have held a local distribution monopoly. Furthermore, cable may be able to provide these transmission ser-

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Antitrust and the Regulated Industry: Promoting Competition in Broadcasting, 1964 DUKE L.J. 282; Chazen & Ross, *Federal Regulation of Cable Television: The Visible Hand*, 83 HARV. L. REV. 1820 (1970); Ford, *Some Current Problems in Broadcast Regulation*, 17 FED. COM. B.J. 76 (1960); Heckman, *Diversification of Control of the Media of Mass Communication—Policy or Fallacy?*, 42 GEO. L.J. 378 (1954); Park, *Cable Television, UHF Broadcasting, and FCC Regulatory Policy*, 15 J.L. & ECON. 207 (1972); Pearson, *Cable: The Thread by Which Television Competition Hangs*, 27 RUTGERS L. REV. 800 (1974); Note, *State Regulation of Radio and Television*, 73 HARV. L. REV. 386 (1959); Comment, *Federal, State, and Local Regulation of CATV—After You, Alphonse . . .*, 29 U. PITT. L. REV. 109 (1967).

2. *See* Home Box Office v. FCC, 567 F.2d 9 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977), in which the court held that FCC regulations restricting cable systems' offerings of these forms of entertainment violated the first amendment because the FCC failed to show an important or substantial governmental interest in restricting cable systems and not broadcasters competing for the same audience.

3. An imported distant broadcast signal reaches the cablecaster from microwave relays or orbiting communications satellites. The cable system transmits the distant signals to viewers, expanding their program choices by bringing to them stations out of normal UHF or VHF reception range. In Malrite T.V. of New York v. FCC, 652 F.2d 1140 (2d Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982), the court upheld the FCC's repeal of its distant signal rules, 47 C.F.R. §§ 76.59(b)-(e), 76.61(b)-(f), 76.63 (1980), because the repeal reflected a "rational weighing of competing policies." 652 F.2d at 1152.

vices more cheaply or more efficiently than the phone company can provide them.

Part II of this Article describes cable's new two-way services and defines the issue whether federal or state regulators should impose common carrier status on cable's delivery of these new services. Part III examines past, present, and proposed future bases for federal jurisdiction, while Part IV analyzes early attempts by the FCC to regulate cable's two-way services, describes the response of the courts to this FCC regulation, and outlines the present state of the law as well as current proposals for imposing common carrier status on cable two-way services. Part V of the Article explores the emerging efforts of state and local governments to regulate cable two-way services. Part VI outlines the arguments against imposing public utility requirements on cable, and Part VII concludes with a description of proposed solutions that will insure cable's ability to develop two-way services without undue governmental interference.

II. Background

A. *New Services Offered By Cable in the 1980's*

Cable television service began in the 1950's when private entrepreneurs recognized cable's ability to bring better reception of over-the-air television stations to mountainous or rural areas with limited off-air reception. Cable television became more attractive in urban areas in the mid-1970's with the launch of domestic communications satellites that allowed cable systems economically to import more distant television stations—such as Ted Turner's WTBS in Atlanta—that became known as "Superstations."[4] National satellite delivery enabled cable operators to offer new specialized services including pay entertainment services such as Home Box Office, Showtime, and the Playboy Channel, all-sports channels like ESPN, all-news channels such as Cable News Network (CNN), children's services such as Nickelodeon, cultural services such as Bravo and ARTS, and services designed for minority audiences such as Black Entertainment Television and Spanish International Network. In addition many cable systems recently added networks carrying full time music, weather, or health information.

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4. For a history of the development of cable, see, *e.g.*, Malrite T.V. of New York v. FCC, 652 F.2d 1140 (2d Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982); P. MacAvoy, Deregulation of Cable Television (1977).

The two-way broadband capacity of cable allows cable systems to expand dramatically the individualized services they can offer home or business customers.[5] The expansion of cable system transmission capacity[6] and the development of higher-capacity optical fiber cable with information carried by laser beam[7] have led entrepreneurs to view cable as a means of transmitting many two-way interactive services—both traditional and exotic.[8]

Some two-way cable services perform mechanical functions without a human agent at one or both ends. Such "passive" two-way services can meet important basic home and business needs such as security alarm monitoring, which cable systems in a number of communities presently offer. Sensors sweep smoke detectors, burglar alarms, and other home security devices in cable homes every few seconds and changes recorded by the sensors alert local fire and police departments. Several cities have a system of computerized traffic light control by cable.[9] Cable also is experimenting with remote home and business energy management and meter reading.

Active two-way services, however, particularly participative home viewer services, have grabbed the greatest share of media attention. The QUBE system in Columbus, Ohio since 1977 has offered two-way subscriber opinion polling on issues ranging from program schedules to political candidates. Cable operators are installing similar interactive systems in other newly franchised cities. Cable systems can adapt the same hand-held keypad used for home viewer polling to use for ordering particular programs on a pay per view basis, for home banking or shopping, or for data base retrieval. Business can make newspaper text or other individualized software deliveries overnight by cable and load this information into storage in home computer terminals.[10] While these per-

5. *See* SLOAN COMM'N ON CABLE COMMUNICATIONS, ON THE CABLE: THE TELEVISION OF ABUNDANCE 11-16 (1971) [hereinafter cited as ON THE CABLE].

6. *See id.* Cable has the potential to expand from the original 12-channel systems to 100 or more channels in major urban areas.

7. Optical fiber cables contain one or more special fibers through which modulated laser light carries information faster and in less space than possible with traditional copper or aluminum wires. *See* CABLEVISION, June 1, 1981, at 158 (new cable technology will bring two-way service to 28 million homes by 1990).

8. Interactive cable service provides for electronic transmission of information in one direction ("downstream") and a response in the opposite direction ("upstream"), in contrast to traditional cable service which does not allow the user to send a responsive upstream transmission.

9. *See* Young, *The Wired City*, N.Y. MAG., May 25, 1981, at 28.

10. *See id.*

sonal services are attracting marketing studies and entrepreneurial attention, many people believe the largest market for interactive cable will be interoffice business data transmission.[11] Coaxial cable, which has far greater data carrying capacity than conventional copper telephone wires, allows companies to send high speed data from computer to computer and transmit interoffice electronic mail.

The use of cable for switched voice transmission is the two-way frontier. MCI Communications, however, a long distance telephone service competitor to AT&T, announced in 1982 that it is seeking cable partners to bypass telephone companies as the local distribution loops for its long distance voice service, and that it planned a cable-voice delivery test over the Omaha, Nebraska cable system.[12]

B. The Central Issue: Whether Cable Interactive Services Should Be Subject To "Common Carrier" Public Utility Regulation

The local telephone company, facing a competitor for a portion of its business, often raises the arguments for imposing common carrier status on cable.[13] In other cases a service provider such as a security alarm company requests rulings that cable must offer nondiscriminatory access at a uniform tariffed rate because the alarm company fears that the cable company will either exclusively offer competing alarm services or allow a competitor the exclusive right to reach homes through the cable conduit.[14] Banks, newspapers, shopping services, and long-distance telecommunication competitors to AT&T also are beginning to claim that some regulatory body should require cable to provide nondiscriminatory "leased access" to all vendors of two-way services desiring to use cable's pathway to the home or business customer. These companies argue that a local cable system will not act as a fair gatekeeper but will be a monopoly bottleneck, excluding others and advancing cable's

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11. *See, e.g., Cable Gets Ready for Business*, BUS. WK. Nov. 22, 1982, at 119; Schley, *Industry Execs Look to Businesses to Fuel Growth of Interactive Cable*, MULTICHANNEL NEWS, Oct. 11, 1982, at 21.

12. *See* Schley, *MCI Chairman Seeks Alliance with Cable*, MULTICHANNEL NEWS, Nov. 29, 1982, at 1.

13. *See e.g.*, Cable Television, Mem. Opinion & Order, 49 F.C.C. 2d 1078; *infra* notes 78-81 and accompanying text.

14. *See In re* Public Commercial Access to Broadband Cable TV Distribution Systems for Public Safety Purposes, F.C.C.R.M. 4164; *infra* notes 108-109 and accompanying text.

own self interest.[15]

Proponents of two-way services regulation have not resolved the issue whether the proper forum for regulation of cable's provision of these services should be the FCC, state public utility commissions, or local government. Several state public utility commissions are actively pursuing these issues, and several groups recently filed petitions with the FCC advocating federal regulation.[16] In addition, the Senate has passed a bill that would bar the FCC or states and municipalities from regulating rates or service requirements of any two-way telecommunications facilities or services, other than "basic telephone service," offered by or over a cable system.[17] Telephone companies during the last ten years have appeared before both the FCC and state regulatory bodies seeking full "common carrier"-like rate and service regulation of cable's interactive services.[18] Some jurisdictional forums are more friendly than others to telephone company attempts to keep cable from becoming a competitive local loop. The telephone companies at this point seem to have moved these battles into a friendly forum, the state public utility commissions; the FCC has been less hospitable to telephone company arguments for similar regulatory protection against other competitors.[19]

Two-way cable television may become a fully competitive service in the total broadband communications arena, or its two-way services may be destined to be only a small portion of a market that the telephone companies eventually will control. The outcome of the debate over whether federal or state authorities should impose common carrier-like regulation to provide leased access for vendors of cable two-way services at tariffed rates may determine this question.

15. *See infra* note 104.

16. *See infra* notes 103-109 and accompanying text. These groups seek to justify FCC jurisdiction over cable in part because of the alleged monopoly characteristics of cable.

17. Cable Telecommunications Act of 1983, S. 66, 98th Cong., 1st Sess. (1983). Senator Barry Goldwater (R.-Ariz.) introduced the Act on January 26, 1983. Section 607(c) of this bill would preclude federal, state, or local regulation of two-way cable services.

18. *See infra* notes 115-128 and accompanying text; *see also* Sloan & Baker, *AT&T Versus Cable: War of the Wires*, 127 FORBES, May 11, 1981, at 204; *Broadcast/Phone Hybrid Seen as Two-Way Cable Challenger*, 18 COM. NEWS, Sept. 1981, at 92.

19. *See infra* notes 78-86 and accompanying text; *see also* Comment, *Of Common Carriage and Cable Access: Deregulation of Cable Television by the Supreme Court*, 34 FED. COM. L. J. 167 (1982).

III. Potential Models for Federal Jurisdiction Over Cable Television

Title I of the Communications Act of 1934[20] grants the Federal Communications Commission plenary jurisdiction over "all interstate and foreign communication by wire or radio . . . ."[21] Title II of the Act[22] gives the FCC express authority over communications common carriers, while Title III[23] governs the FCC's jurisdiction over users of the electromagnetic radio spectrum. The courts also have construed the Communications Act to grant the FCC authority under the doctrine of "ancillary jurisdiction" over certain activities not expressly addressed by either Title II or Title III.[24] This part will examine each of these potential bases of federal jurisdiction over cable television's two-way services.

A. *Title II Jurisdiction Over Common Carriers*

1. Definition of Common Carrier

Section 153(h) of the Communications Act defines a "common carrier" as "any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or interstate or foreign radio transmission of energy . . . but a person engaged in radio broadcasting shall not . . . be deemed a common carrier."[25] Courts have interpreted this circular definition to entail three elements: First, the FCC or reviewing court must find in the enterprise a "quasi-public character" because the carrier "undertakes to carry for all people indifferently."[26] Second, business practice controls the determination of common carrier status. "[A] carrier will not be a common carrier where its practice is to make individualized decisions, in particular cases, whether and on what

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20. 47 U.S.C. §§ 151-156 (1976 & Supp. V 1981).

21. 47 U.S.C. § 152(a) (1976).

22. 47 U.S.C. §§ 201-224 (1976 & Supp. V 1981).

23. 47 U.S.C. §§ 301-399 (1976 & Supp. V 1981).

24. *See* National Broadcasting Co. v. United States, 319 U.S. 190 (1943); *see infra* notes 51-70 and accompanying text.

25. 47 U.S.C. § 153(h) (1976); *see also* Comment, *The Proposed Deregulation of Domestic Common Carrier Telecommunications*, 69 Calif. L. Rev. 455 (1981).

26. *See* Semon v. Royal Indemnity Co., 279 F.2d 737, 739 (5th Cir. 1960); *see also* National Ass'n of Reg. Util. Comm'rs v. FCC, 525 F.2d 630, 641 (D.C. Cir.), *cert. denied*, 425 U.S. 992 (1976) (*NARUC I*); Home Ins. Co. v. Riddell, 252 F.2d 1, 3 (5th Cir. 1958); Ciaccio v. New Orleans Pub. Belt R.R., 285 F. Supp. 373, 375 (E.D. La. 1968); State v. Sinclair Pipe Line Co., 180 Kan. 425, 439, 304 P.2d 930, 941 (1957); Utility Comm'n v. Gulf Atlantic Towing Corp., 251 N.C. 105, 109, 110 S.E.2d 886, 889 (1959).

terms to deal."[27] Thus, "[a] particular system is a common carrier by virtue of its functions, rather than because it is declared to be so."[28] Last, the user, not the carrier, chooses the particular intelligence to be transmitted over the system.[29]

Under this definition the FCC has subjected traditional telephone and telegraph companies to Title II regulation. The courts have questioned the discretion of the FCC to determine whether a cable system is acting as a common carrier. The Court of Appeals for the District of Columbia Circuit in *Philadelphia Television Broadcasting Co. v. FCC*[30] upheld the FCC's exercise of its discretion to classify cable systems as "adjuncts of the nation's broadcasting system."[31] The court stated that this approach was "a rational and hence permissible choice by the agency,"[32] but the court's opinion seemed to leave room for the FCC to choose common carrier classification for cable. The Supreme Court, however, two years later in *United States v. Southwestern Cable Co.*,[33] indicated that the FCC had no discretion under the Communications Act to deem cable systems common carriers. In addition, the D.C.

27. *NARUC I*, 525 F.2d at 641 (footnote omitted).

28. *Id.* at 644 (footnote omitted); *see also* Philadelphia Television Broadcasting Co. v. FCC, 359 F.2d 282 (D.C. Cir. 1966) (upholding FCC determination that cable systems are not common carriers).

29. *See, e.g.*, National Ass'n of Reg. Util. Comm'rs v. FCC, 533 F.2d 601, 609 (D.C. Cir. 1976)(*NARUC II*). The NARUC II court added a fourth element to the definition of common carrier; a common carrier is under a legal or judicial compulsion to provide nondiscriminatory service. *NARUC II*, 533 F.2d at 608. The fourth indicia, however, is really a conclusion about the *effect* of common carrier classification, rather than a means to identify a common carrier, and results in a circular definition—a system is a common carrier because it must offer services on a nondiscriminatory basis, and it must offer services on a nondiscriminatory basis because it is a common carrier.

30. 359 F.2d 282 (D.C. Cir. 1966). The broadcasting company petitioned the FCC to prevent Rollins Broadcasting, Inc. from constructing and operating a community antenna television (CATV) system until Rollins complied with the common carrier requirements of 47 U.S.C. §§ 201-222. The court upheld the FCC's dismissal of the petition, rejecting the petitioner's charge that cable systems are common carriers within the meaning of the Communications Act. The court deferred to the FCC's congressional grant of authority and considered that the agency's proposed scheme for regulating cable systems as "adjuncts of the nation's broadcasting system" was more appropriate than common carrier regulation. *Id.* at 283-84.

31. *Id.* at 284.

32. *Id.*

33. 392 U.S. 157 (1968). Petitioners in *Southwestern Cable*, like those in *Philadelphia Broadcasting*, sought FCC regulation of a cable company as a means to preserve their broadcast market. The Supreme Court stated that "[t]he Commission and the respondents are agreed, we think properly, that these CATV systems are not common carriers witbin the meaning of the [Communications] Act," *id.* at 169 n.29, but found that the FCC did have authority to regulate cable as "communication by wire or radio" under 47 U.S.C. § 152(a). *Id.* at 178.

Circuit in 1976 rejected the FCC's claim to "unfettered discretion" to classify a cable system, stating that a "particular system is a common carrier by virtue of its functions, rather than because it is declared to be so."[34]

Under this functional jurisdictional test, a particular entity can determine its status as a common carrier by tailoring the manner in which it offers its services. The critical portion of the test for treatment as a common carrier is whether the cable system "holds out" its services to all potential customers indifferently. A cable system will not be a common carrier if it makes individual decisions, in particular cases, whether and on what terms to provide particular services.[35] Cable systems, therefore, should examine each transaction offering two-way services to see if it meets all parts of the test, particularly whether services are "held out indifferently" to the public. This part of the definition, however, is also circular, because if an entity is found to be a "common carrier," the FCC requires that it *must* offer services to customers on a nondiscriminatory basis.[36]

2. The Consequences of Common Carrier Classification

The FCC has comprehensive authority under the Act to regulate common carriers. The FCC has direct authority over the types of common carriage offered, the ownership of transmitting facilities, the conduct of the authorized firm, and the prices charged by the carrier for its services.[37] Interstate common carriers are subject to FCC regulation in two principal areas: (1) authorization of service—section 214 of the Communications Act requires a common carrier to obtain FCC approval based on "present or future public convenience and necessity" before beginning, expanding, or cutting back a telecommunications service,[38] and (2) tariff filing—sections 201 through 205 require that common carriers provide service to any customer upon reasonable request and file tariffs with the FCC containing the prices, terms and conditions under which they will offer telecommunications services. These tariffs must be just, reasonable, and nondiscriminatory. The FCC may prescribe different prices, terms and conditions if it determines that the public inter-

34. *NARUC I*, 525 F.2d at 644.
35. *NARUC II*, 533 F.2d at 608-609; *see also* Miller & Beals, *Regulating Cable Television*, 57 WASH. L. REV. 85 (1981).
36. *See* 47 U.S.C. § 202 (1976).
37. *See* 47 U.S.C. §§ 201, 202, 205, 211, 215, & 218 (1976).
38. 47 U.S.C. § 214 (1976).

est so requires.[39]

Competitors or customers may challenge either service authorization or tariff filings at the FCC. An interstate common carrier also must file certain other FCC reports, such as its charter and incorporation of partnership papers, and annual financial and employment reports. Carriers must also interconnect with other carriers on demand.[40] Thus, if another cable system or a separately licensed interstate satellite or radio transmission service wanted to interconnect with a cable system that had been classified as an interstate common carrier, the FCC might require the "carrier" cable system to cooperate.

B. Title III Jurisdiction Over Radio Spectrum Users

Title III of the Communications Act provides the FCC with authority to allocate radio spectrum space among competing users and to issue licenses to qualified applicants.[41] The FCC has broad administrative discretion to accomplish this allocation and licensing function for "the public convenience, interest, or necessity."[42] The Commission pursuant to this mandate established a broadcast television licensing scheme to promote the objectives of "localism"[43] and "diversity."[44] The courts have interpreted these objec-

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39. 47 U.S.C. §§ 201-205 (1976). Section 201 grants the FCC authority to regulate common carriers and their charges and contracts in the public interest; § 202 prohibits common carriers from unjust and unreasonable discrimination in establishing charges and performing services; § 203 requires common carriers to file their charges and schedules with the FCC; § 204 grants common carriers the right to hearings before the FCC on rates, tariffs, and services; and § 205 authorizes the FCC to impose on common carriers "just and reasonable" charges and penalties for failure to comply with FCC regulations.

40. *See, e.g.*, Lincoln Tel. & Tel. Co. v. FCC, 659 F.2d 1092 (D.C. Cir. 1981). The court in *Lincoln* required the telephone company to connect with MCI Telecommunications because the FCC had determined the connection would be in the public interest and the telephone company had not shown that the interconnection would harm either its telephone system or the public interest. *Id.* at 1105-06.

41. 47 U.S.C. §§ 301-399 (1976 & Supp. V 1981).

42. *Id.* at § 307(a). The FCC pursuant to this section grants television licenses for a period of up to five years with renewal provisions for five year terms.

43. The FCC recognizes " 'the need for adequate reflection in programs of local interest, activities, and talents.' " Note, *Cable Television and the First Amendment*, 71 COLUM. L. REV. 1008, 1013 n.48 (1971)(quoting FCC, PUBLIC SERVICE RESPONSIBILITY OF BROADCAST LICENSEES 37 (1946) [hereinafter cited as PUBLIC SERVICE RESPONSIBILITY]); *see also* CATV, 20 F.C.C.2d 201, 202 (1969).

44. " 'It has long been an established policy . . . of the Commission that the American system of broadcasting must serve significant minorities among our population, and the less dominant needs and tastes which most listeners have from time to time.' " Note, *supra* note 43, at 1013 n.47 (quoting PUBLIC SERVICE RESPONSIBILITY, *supra* note 43, at 15); *see also* CATV, 20 F.C.C.2d at 202.

tives to justify, in part, FCC rules regarding cable television.[45]

In furtherance of localism, the FCC has encouraged local, community-oriented programming service by broadcasters. Spectrum allocation decisions[46] and comparative hearings for new station licenses evidence this localism policy. In addition, the FCC in granting or renewing licenses repeatedly has recognized the need for local programming.[47]

The "diversity" objective in Title III regulation developed from Supreme Court cases establishing that the first amendment requires "the widest possible dissemination of information from diverse and antagonistic sources."[48] The FCC has implemented this principle through restrictions on cross-ownership of broadcast media that diversify control and encourage diverse programming.[49] The FCC under Title III has authority to control some aspects of programming content, although the Communications Act expressly forbids the FCC to exercise censorship.[50] Congress considers broadcasting licensees to be public trustees because the licensees use a public resource—the electromagnetic spectrum—and thus the Act attaches certain affirmative obligations to the issuance of a license.[51]

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45. *See* United States v. Midwest Video Corp., 406 U.S. 649 (1972); *infra* notes 66-70 and accompanying text.

46. *See, e.g.*, Television Assignments, Sixth Report & Order, 17 Fed. Reg. 3905 (1952). The FCC in devising the Table of Assignments in 1952 for television signals listed as its highest priorities: (1) "[t]o provide at least one television service to all parts of the United States," and (2) "[t]o provide each community with at least one television broadcasting station." *Id.* at 167.

47. *See, e.g.*, United States v. Southwestern Cable Co., 392 U.S. 157 (1968) (noting that importing distant television signals could destroy local programming benefits); Carter Mountain Transmission Corp., 32 F.C.C. 459 (1962)(the possible demise of a local television station prompted the FCC to deny a CATV system permission to install a microwave antenna), *aff'd*, 321 F.2d 359, 364 (D.C. Cir.), *cert. denied*, 375 U.S. 951 (1963).

48. Associated Press v. United States, 326 U.S. 1, 20 (1945); *see also* FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775, 794-95 (1978)(upholding FCC rule prohibiting cross-ownership of broadcast stations and newspapers in the same community because common ownership tends to limit sources of information); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969)(FCC order requiring radio station to provide political candidate opportunity to respond to personal attack aired on the station properly furthers first amendment objectives).

49. *See* 47 C.F.R. § 73.636 (1982). These cross-ownership restrictions promote increased competition in the "marketplace of ideas" and reflect the FCC's commitment to establishing diversified speech forums.

50. *See* 47 U.S.C. § 326 (1976); *see also* FCC v. Midwest Video Corp., 440 U.S. 689, 704 (1979)(holding that the FCC may not deprive cable operators of their discretion regarding use of access channels).

51. *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 383 (1969)(The personal attack and fairness doctrines place affirmative obligations on the broadcast station to present

C. *"Ancillary" Jurisdiction Over Cable Television*

The FCC in addition to statutory jurisdiction has authority over certain aspects of cable communications through ancillary jurisdiction, a doctrine that developed in recognition of the unique aspects of rapidly expanding communications technologies. The Supreme Court stated in 1943 that "Congress was acting [in 1934] in a field of regulation which was both new and dynamic. . . . In the context of the developing problems to which it was directed, the Act gave the Commission not niggardly but expansive powers."[52] Since Congress did not contemplate cable television at the time it passed the Communications Act courts have analyzed the FCC's regulatory jurisdiction over cable television by reference to this "expansive" grant of power, ancillary to the specifically enumerated responsibilities contained in the Act.

While the courts have given this expansive power to the FCC to regulate new communications technologies, internal jurisdictional constraints within the Communications Act[53] and constitutional doctrines developed under the first and fifth amendments[54]

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fairly opposing and competing viewpoints to the television community.). Specifically, the FCC imposes program content rules governing political broadcasting, 47 C.F.R. §§ 73.1930-.1940 (1982), the fairness doctrine, *id.* at § 73.1910-1.1920, and sponsorship identification, *id.* at § 73.1212. Other statutes prohibit broadcasters from airing obscene materials, 18 U.S.C. § 1464 (1976), or information about lotteries, *id.* at § 1304.

52. National Broadcasting Co. v. United States, 319 U.S. 190, 219 (1943).

53. *See, e.g.*, 47 U.S.C. § 153(h) (1976)(The FCC may not treat broadcasters as common carriers.); *id.* § 152(b) (Supp. IV 1981) (The FCC may not regulate activities of intrastate common carriers.).

54. The first amendment guarantees of freedom of speech and of the press extend to television and thus limit the FCC's regulatory power. *See, e.g.*, Hoffer, *The Power of the FCC to Regulate Cable Pay-TV: Jurisdictional and Constitutional Limitations*, 53 Den. L.J. 477, 490-98 (1976); Kreiss, *Deregulation of Cable Television and the Problem of Access Under the First Amendment*, 54 S. Cal. L. Rev. 1001 (1981); Miller & Beals, *Regulating Cable Television*, 57 Wash. L. Rev. 85 (1981); Note, *supra* note 43; Note, *Cable Television and Content Regulation: The FCC, the First Amendment and the Electronic Newspaper*, 51 N.Y.U. L. Rev. 133, 143-47 (1976). The Court in Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969), noted that "[i]t is the purpose of the First Amendment to preserve an uninhaibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee." *Id.* at 390.

The fifth amendment guarantee of due process further limits the FCC's ability to regulate cable television. Midwest Video Corp. v. FCC, 571 F.2d 1025, 1057-59 (8th Cir. 1978), *aff'd on other grounds*, 440 U.S. 689 (1979). The court stated that the FCC in promulgating rules "was not at liberty to disregard due process rights of cable operators, or of cable consumers to whom most if not all costs will be passed." *Id.* at 1057. *Cf.* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (New York law requiring landlords to permit cable installation on rental property, while serving a legitimate public purpose, represented an unconstitutional taking of property without due process.).

exist to limit the FCC's ability to regulate new technological developments in communications, including new services using the radio spectrum or providers that clearly fit the common carrier definition. Moreover, some technologies, like cable, fall squarely in neither Title II nor Title III. Cable uses wires, not broadcast spectrum,[55] and normally does not hold itself out as a carrier to anyone who wishes to transmit information for a fixed price.

The FCC at various times has chosen to assert that it has no jurisdiction over cable, based on the inability precisely to place cable activities under Title II or Title III of the Act; to ask for a further grant of power from Congress; and at other times to ignore the jurisdictional distinctions between its broadcast and common carrier regulatory schemes. This contradictory treatment of cable jurisdiction by the agency has left cable regulation a muddied area.

Debate over the proper regulatory model for cable originated in the 1950's. In its first public resolution of the cable issue, the FCC in 1958 stated that it had no jurisdiction over cable under either Title II or Title III.[56] The FCC reaffirmed this view in 1959[57] but also sowed the seeds of future regulation by focusing for the first time on the impact of cable on local broadcast stations as a possible basis for jurisdiction.[58] This link to FCC broadcasting localism policies ultimately led the FCC to conclude that federal authorities not only could, but should, regulate cable. The FCC, however, in the late 1950's still believed that clarifying legislation from Congress was a necessary precondition to its assertion of jurisdiction, yet Congress never gave the FCC a direct grant of authority over cable.

The FCC, however, in 1962 in *Carter Mountain Transmission*

55. Cable systems, however, do rely on the radio spectrum for the delivery of distant programming by microwave or satellite transmission.

56. *See* Frontier Broadcasting Co., 24 F.C.C. 251, 255-56 (1958). In *Frontier* thirteen broadcast stations filed a complaint with the FCC alleging that cable systems are common carriers within the meaning of the Communications Act and seeking FCC regulation of the cable systems on the grounds that cable threatens the economic stability of local broadcast television stations. The FCC dismissed the action, stating that it did "not believe that [cable] systems are engaged in performing the service of communications common carriers within the contemplation of the applicable provisions of the Communications Act." *Id.* at 253-54.

57. *See* CATV and TV Repeater Services, 26 F.C.C. 403, 428-29 (1959). The FCC again held that cable systems are not common carriers for purposes of the Communications Act "since it is the CATV, rather than the subscriber, who determines what signals are to be carried on the system." *Id.* at 427. The FCC acknowledged that cable systems pose a real threat to local broadcasting stations, but concluded Congress would have to pass appropriate legislation before the agency could regulate cable networks.

58. *See id.* at 430-31.

Corp.[59] abruptly changed its course. Many cable systems were beginning to do more than simply put up a larger antenna to catch nearby signals; they were using microwave radio to bring in broadcast stations from greater and greater distances. Because microwave relay stations required FCC licenses, the Commission unilaterally decided that, in the interest of protecting local broadcasters, it had the authority to regulate the microwave radio relay stations used by cable systems. The FCC in *Carter Mountain* stated that:

> [a] grant of common carrier radio facilities requires a finding that the public interest will be served thereby; certainly the well-being of existing television facilities is an aspect of this public interest. Thus it is not only appropriate, it is necessary that we determine whether the use of the facility, applied for would directly or indirectly bring about the elimination of the only television transmission or reception service to the public.[60]

The FCC, however, still believed that it could not regulate under either Titles II or III of the Communications Act cable systems not served by microwave radio. Thus, in the face of continued Congressional inaction, the FCC had to devise a new justification for its jurisdiction over all cable systems.

The FCC in 1966 first clearly articulated a proposed new basis for its cable jurisdiction, one that survives today.[61] The FCC, relying on its basic grants of authority in Title I of the Act, sections 152(a) and 153(a), concluded that cable systems engaged in "interstate communication by wire."[62] The FCC also found general rulemaking authority in the Act to prevent frustration by cable of section 307(b), which provides that the FCC shall distribute broadcast licenses to communities to "provide a fair, efficient, and equitable distribution of service."[63] Thus, the standard for cable regu-

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59. 32 F.C.C. 459 (1962), *aff'd*, 321 F.2d 359 (D.C. Cir. 1963), *cert. denied*, 375 U.S. 951 (1963).

60. *Id.* at 461. The FCC based on this reasoning denied a cable system's application for a permit to install a microwave radio relay to pick up distant television signals, thus implicitly adopting the *Auxilliary Services* rationale that protecting the interests of local broadcasting systems justified cable regulation.

61. CATV, 2 F.C.C.2d 725, 728-34 (1966). FCC concern with the potential adverse effects of rapid cable development triggered the issuing of this report and order. The FCC noted that the "removal of the present uncertainty [concerning cable regulation] would assist local franchising authorities, as well as franchise applicants." *Id.* at 728.

62. *Id.* at 730. Sections 152(a) and 153(a) of Title 47 allow the FCC to regulate all interstate wire communications. See 47 U.S.C. §§ 152(a), 153(a) (1976).

63. 47 U.S.C. § 307(b)(1976). The FCC also found applicable 47 U.S.C. § 303(h), which gives the FCC authority "to issue rules establishing the area or zone to be served by any station includ[ing] the power to prevent infringement of the rules by 'any person' . . . and encompass[ing] authority to specify by rule the conditions under which the station's signal may be extended beyond the prescribed service area or zone by CATV." *CATV*, 2 F.C.C.2d

lation developed at the agency level almost exclusively as a means of protecting the FCC's broadcast regulatory scheme.

The Supreme Court in 1968 in *United States v. Southwestern Cable Co.*[64] upheld and adopted the FCC view of jurisdiction over cable. Noting that "Congress 'formulated a unified and comprehensive regulatory system for the [broadcasting] industry' ",[65] the Court broadly read section 152(a) of the Communications Act as independently confering on the FCC jurisdiction over cable television as a form of wire communication. The Court also agreed that the FCC had broad power to impose restrictions on the growth of cable to achieve its objectives in the broadcast field. The Court said, however, that this authority was limited to that "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting."[66]

The Supreme Court in 1972 in *United States v. Midwest Video Corp.*,[67] (*Midwest Video I*) reaffirmed this "reasonably ancillary" interpretation of the FCC's independent cable jurisdiction. *Midwest Video I* represents the greatest judicially approved extension of FCC jurisdiction over cable. A plurality of the Court upheld the FCC's requirement that cable systems originate programming as well as retransmit the broadcast programming of others. The Court in *Midwest Video I* read *Southwestern Cable* as granting the FCC "authority to regulate CATV with a view not merely to protect but to promote the objectives for which the Commission had been assigned jurisdiction over broadcasting."[68]

The Court in *Midwest Video I* found that the FCC's Title III objectives of program diversity and localism in regulating broadcast spectrum use justified placing program origination requirements on cable systems, even if no actual use by a particular cable system of the broadcast spectrum existed. The Court reiterated that FCC "ancillary jurisdiction" was founded on Title I, section 152(a) of the Act, but the Court stated that this section "does not in and of itself prescribe any objectives for which the Commission's regulatory power over [cable television] might properly be exer-

at 729.

64. 392 U.S. 157 (1968).

65. *Id.* at 168 (quoting FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 137 (1940)).

66. *Id.* at 178.

67. 406 U.S. 649 (1972); *see also* CATV, Notice of Proposed Rulemaking and Notice of Inquiry, 15 F.C.C.2d 417, 422 (1968).

68. *Id.* at 667. The Supreme Court in *Southwestern Cable* authorized the FCC to regulate cable activity when "reasonably ancillary to the effective performance of the Commission's various responsibilities." 392 U.S. at 178.

cised," and thus that the FCC must find these objectives in another section of the Act.[69]

Chief Justice Burger's concurring opinion in *Midwest Video I* is significant for the present and future development of cable. The Chief Justice noted that "CATV is *dependent totally on broadcast signals* and is a significant link in the [communications] system as a whole and therefore must be seen as within the jurisdiction of the Act."[70] Implicit in Chief Justice Burger's comment is the recognition that if cable develops into a medium in which carriage of broadcast signals plays a far less significant part, the analysis of *Midwest Video I* no longer may provide a rationale for the FCC's Title III jurisdiction over cable. Chief Justice Burger, while recognizing that *Midwest Video I* granted the FCC "wide latitude" in regulating cable communications, cautioned that "the Commission's position strains the outer limits of even the open-ended and pervasive jurisdiction that has evolved by decisions of the Commission and the courts."[71]

The FCC as a result of *Midwest Video I* interpreted broadly its mandate to regulate cable to advance the Title III broadcasting objectives of its enabling statute. The FCC has defined these broadcasting objectives as primarily protecting existing broadcasting interests.

IV. FCC Attempts to Regulate Cable's Interactive Services

A. *Early FCC Regulation of Two-Way Cable*

A major policy debate in the early 1970's began over whether the FCC should dictate and regulate cable services other than carriage of broadcast signals. Many people, even then, saw the potential for cable to become a much more varied carrier of broadband two-way telecommunications services.[72]

The FCC in 1970 issued a proposed rulemaking to require

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69. *Id.* at 661.

70. *Id.* at 675 (Burger, C.J., concurring)(emphasis added).

71. *Id.* at 676 (Burger, C.J., concurring).

72. The Alfred P. Sloan Foundation, realizing the powerful nature of the newly emerging cable communications, established the Sloan Commission on Cable Communications in June 1970. The Foundation asked the Commission to "formulate a set of resolutions that could aid the [FCC], Congress, or any other relevant decisionmaking body." Price, *Requiem for the Wired Nation: Cable Rulemaking at the FCC*, 61 VA. L. REV. 541, 553 (1975). The Sloan Commission in 1971 recommended that the FCC reqnire future cable operators to build systems with two-way capacity to supply a return signal capable of being handled by computers located at the head end. ON THE CABLE, *supra* note 5, at 41.

cable systems to build two-way capability into their facilities.[73] The FCC in 1970 also announced a rule barring a telephone company from owning a cable system in the same service area.[74] Several telephone companies had become substantial holders of cable franchises in the 1960's, these companies saw home video delivery by cable as a natural extension of their wired local voice and data loops. The FCC believed divestiture of these cross-owned systems was necessary to protect the possibility for future competition between the two entities, particularly in the area of two-way nonvideo broadband services. In what proved to be a prescient statement, the FCC commented:

> [T]here is a substantial expectation that broadband cables, in addition to CATV services, will make economically and technically possible a wide variety of new and different services involving the distribution of data, information storage and retrieval, and visual, facsimile and telemetry transmission of all kinds. There is also a real potential that such services will be furnished over regional and national networks consisting of local broadband cable systems interconnected by intercity microwave, coaxial cable and communications satellite systems. . . . [T]here is, at present, ample basis for regarding the provision of CATV service within a community as, at least, one important gateway to entering the yet undeveloped market for these other widespectrum services. Thus, it is our purpose to insure against any arbitrary blockage of this gateway.[75]

The FCC in 1972 adopted its general regulatory blueprint for cable television development for the following decade.[76] In a 1972 *Report and Order* the FCC viewed cable television as far more tban a medium that simply would retransmit existing broadcast signals. To implement its broadened vision, the FCC required operators to construct each new cable system with the capacity for two-way communication and to provide channels for lease by other persons. By 1977 all cable systems already built would have to rebuild to provide this interactive capacity. The FCC stated that cable's two-way communication capacity could provide "surveys,

73. CATV, Notice of Proposed Rulemaking, 25 F.C.C.2d 38 (1970).

74. Section 214 Certificates, 21 F.C.C.2d 307, 325 (1970), *modified in part*, 22 F.C.C.2d 746 (1970), *aff'd sub nom.* General Tel. Co. of the Southwest v. United States, 449 F.2d 846 (5th Cir. 1971). The FCC stated that

> it shall be our policy to bar all telephone common carriers from furnishing CATV service to the viewing public in their operating territory except when . . . [the common carriers] make an appropriate showing in their applications that the proposed CATV customer or customers is unrelated to or unaffiliated directly or indirectly with the applicant.

Id. at 325.

75. *Id.* at 324-25.

76. Cable Television, Report & Order, 36 F.C.C.2d 143 (1972).

marketing services, burglar alarm devices, and educational feedback."[77]

The FCC's 1972 Report was the result of a compromise between various affected interests—cable operators, broadcasters, and program copyright holders. The FCC saw cable's required provision of interactive services as one of the elements in this package specifically designed to benefit the consuming public. The new two-way services the FCC required cable to offer were part of a complex set of tradeoffs. The FCC allowed cable to take distant broadcast signals in return for providing—in addition to interactive capability—a number of channels for free access by government, educational institutions, and the public, and other channels for leased access by commercial interests. The "leased access" cable requirement was similar to the classic public utility requirements imposed on common carriers to provide capacity at uniform rates to all potential users.

B. *NARUC II*

The FCC in 1974 faced the first challenge by telephone companies to cable's provision of interactive services.[78] Three parties[79] opposed the FCC's attempt, included in the 1972 order to preempt state regulation of the nonvideo two-way services the FCC required new cable systems to provide. Although the FCC has sole authority to regulate broadcasting, it shares with the states jurisdiction over regulation of common carrier telecommunications services.[80] The telephone interests argued that nonvideo point-to-point services, whether distributed by cable channels or telephone wires, were essentially the same. If these services were purely intrastate, they were subject to the sole jurisdiction—including potential rate and entry regulation—of the states. The telephone parties further stated that two-way cable television was not a naturally federal

77. *Id.* at 52.

78. Cable Television, Memorandum Opinion & Order, 49 F.C.C.2d 1078 (1974).

79. GTE Service Corporation, an independent trade association, and the state regulatory bodies through the National Association of Regulatory Utility Commissioners (NARUC) challenged the FCC's preemption attempt. *Id.* at 1080-81.

80. *See* 47 U.S.C. § 152(b) (Supp. IV 1981).

> [N]othing in this [chapter] shall be construed to apply or to give the Commission jurisdiction with respect to . . . (2) any carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control witb such carrier.").

Id.

concern and thus, that the FCC had no power to preempt state jurisdiction over what were essentially telephone company services.[81]

In answer to the telephone company claims, the FCC asserted that: (1) cable was neither a common carrier nor a broadcaster, but a "hybrid service" that deserved its own unique regulatory scheme;[82] (2) all cable services, whether video or nonvideo, were "indivisible" and an "organic whole;"[83] (3) section 1 of the Communications Act gave the FCC a Congressional mandate to promote "rapid, efficient, nation-wide . . . wire and radio communications service"[84] for all citizens of the United States; (4) preemptive federal authority over two-way services was necessary to insure development of a "nationwide broadband communications grid by cable";[85] and, (5) allowing many different jurisdictions to impose conflicting regulations would frustrate the FCC's national goal of developing broadband services as a "synergistic mix of satellite, microwave, broadcast and cable technology."[86]

These arguments, however, failed to convince the Court of Appeals for the District of Columbia Circuit. The court in *National Association of Regulatory Utility Commissioners v. FCC (NARUC II)*[87] reversed the FCC's assertion of plenary federal jurisdiction over two-way cable. The court in *NARUC II* held that two-way cable services, when they do not cross state lines, are not subject to the jurisdiction of the FCC. The court, however, could not command a majority for a single decisional ground, but only for its result. Only one judge found explicitly that these nonvideo two-way cable services were in fact "common carrier" activities.[88]

Judge Wilkey in *NARUC II* found that the FCC had overreached in its "holistic" view of cable operations and had violated section 152(b) of the Communications Act, which bars the FCC from regulating intrastate common carrier activities.[89] Judge Wilkey said that cable could be a broadcaster for some purposes and a common carrier for others. He also rejected the FCC's goal of a "nationwide broadband communications grid" as an indepen-

81. *See* 49 F.C.C.2d at 1081.
82. *Id.* at 1082.
83. *Id.* at 1082-83.
84. *Id.* at 1084.
85. *Id.* at 1082.
86. *Id.* at 1083-84.
87. 533 F.2d 601 (1976).
88. *Id.* at 609, 611.
89. *See id.* at 608, 611.

dent ground for assuming total federal control over two-way services.[90] The FCC and the states had appeared to be able to resolve cross-jurisdictional issues in other regulatory contexts, and Judge Wilkey saw no reason why such issues could not be solved with cable interactive services.[91]

Judge Wilkey seemed disturbed not only by the FCC's preemption of all nonvideo two-way cable regulation but also by its apparent intention to issue no federal cable rate and service regulations. He thought that the absence of regulation created "the possibility for [competitive] abuse by the unregulated cable system."[92] In an open invitation to the states to step in and regulate cable services rates, Judge Wilkey said that "state regulatory agencies, engaged for years in regulating the existing competition to the proposed cable channels, are doubtless better fitted to fix those rates—in our opinion they have the right reserved by statute to do so."[93]

Judge Lumbard, while concurring in the finding that the FCC was without power to preempt state regulation of cable nonvideo two-way services, refused to reach the question of whether these were "common carrier" services within the meaning of Title II of the Communications Act.[94] Judge Lumbard said that the FCC had no authority to adopt any requirement for regulations concerning nonvideo point-to-point services over cable at all, since this area was not "ancillary to broadcasting," adopted by the Supreme Court in *Southwestern Cable* as the only legitimate standard for FCC cable regulation.[95]

Judge Wright vigorously dissented.[96] He pointed out that since interstate communications links by satellite or other carriers would probably connect cable's local two-way services in the future, the chance for any two-way cable services to be entirely intrastate in character would be highly unlikely. Judge Wright thought the FCC should have full power to regulate in an area of mixed intrastate and interstate carriage. Thus, the decision in *NARUC II* left two-

90. *See id.* at 613.
91. *See id.* at 614.
92. *Id.* at 616.
93. *Id.* at 616-17.
94. *Id.* at 621 (Lumbard, J., concurring).
95. *Id.* at 622 (Lumbard, J., concurring). Judge Lumbard's opinion foreshadowed the Supreme Court's decision three years later in FCC v. Midwest Video Corp., 440 U.S. 689 (1979) (*Midwest Video II*), which struck down the FCC's 1972 cable access and two-way capacity requirements by a similar rationale. *See infra* notes 97-101 and accompanying text.
96. *NARUC II*, 533 F.2d at 623-37 (Wright, J., dissenting).

way cable services regulation with a highly ambiguous split in jurisdiction between the states and the federal government.

C. *The Midwest Video II Case*

The Supreme Court in *FCC v. Midwest Video Corp. (Midwest Video II)*[97] confused further the cable regulation issue by in effect adopting the *NARUC II* dissent and finding that the FCC had impermissibly exceeded the limits of its ancillary jurisdiction over cable system operators by requiring free and leased access channels and two-way capacity. Section 3(h) of the Communications Act provides that "a person engaged in broadcasting shall not be deemed a common carrier."[98] The Supreme Court read this section of the Act and its decision in *Southwestern Cable*[99] to mean that the FCC can impose no Title II "common carrier" obligations on cable that it could not impose on broadcasters. The Court in *Midwest Video II* found that since the FCC order required cable operators to "hold out facilities indifferently for public use" by providing access channels, the FCC was in effect impermissibly treating the operators as classic common carriers.[100]

The focus of the Court in *Midwest Video II*, however, was on the Commission's free and leased access rules. The Court included almost no discussion in its decision of the relationship of the FCC's two-way capacity requirement to these access rules. In fact, the Court left the door open slightly for the FCC to revisit the two-way rules and separately justify them.[101]

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97. 440 U.S. 689 (1979). The FCC in 1976 promulgated regulations that required cable operators with 3500 or more subscribers to develop a minimum 20 channel capacity by 1986 and to make available certain channels for free and leased access. These rules prohibited cable operators from selecting the parties to utilize the access channels or the material to be transmitted. The rules also required cable systems to develop two-way capacity by 1986. Petitioner Midwest Video challenged these regulations on the ground that the FCC had exceeded its jurisdiction in adopting them. *Id.* at 691-94.

98. 47 U.S.C. 153(h)(1976).

99. 392 U.S. 157 (1968)(FCC authority "is restricted to that reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting.").

100. *Midwest Video II*, 440 U.S. at 706, n.16.

101. Although the Court in a footnote expressed a reluctance to accept the premise that the FCC would have promulgated one rule on grounds independent of the other rules, it refused to foreclose the possibility of revitalizing one or more of the stricken rules in another context. *See id.* at 708 n.18.

D. *The Current State of the Law Governing Cable Nonvideo Two-Way Services*

Previous cases and recent FCC history make clear only a few points. The FCC under *Midwest Video II* cannot force cahle operators to provide their own two-way services or to offer two-way capacity for lease by others. To reimpose this requirement the FCC would have to follow the suggestion of the Court and readopt the rnles with a justification different from that it articnlated in *Midwest Video II.*

Even so, the FCC is unlikely to attempt reinstitution of its former requirement that cable provide two-way capacity without a Congressional mandate. Competitive market forces and local demand for interactive services in new cable franchise agreements appear to be doing a far better job of stimulating development of two-way services than did the former FCC rules.[102] Competition among cable operators for local franchises is bringing two-way technology on stream at least as fast, and probably faster, than federal requirements could have done. Ordering companies to provide services that consumers appear to be getting without federal regulatory intervention is inconsistent with the current deregulatory philosophy of the FCC.

Midwest Video II, however, does not explicitly address the role the FCC can play when cable systems do begin to voluntarily offer nonvideo two-way services on an interstate basis. *Midwest Video II* leaves as an open question the FCC's authority to regulate these services, particularly if the services are interconnected on a regional or national basis. If cable operators voluntarily begin to "hold out facilities indifferently for public use," and become significant competitors for interstate data and/or voice transmission, cable's competitors again may make the argument that the FCC should regulate cable systems as Title II common carriers in the provision of these services.

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102. This is also true of free public, governmental, and editorial access channels. FCC rules established the maximum and the minimum number of access channels a municipality could demand when granting a cable franchise. Now, in the absence of the rules, franchise agreements often specify a greater number of access channels than the old FCC standards required.

E. *Current Proposals to Reimpose FCC Common Carrier Requirements on Cable Interactive Services*

Parties interested in the regulation of two-way cable services have filed with the FCC two separate pleadings that seek to reestablish federal regulations imposing on cable requirements similar to common carrier duties. The first, a petition for rulemaking filed by Henry Geller,[103] seeks to reimpose on high capacity cable systems a leased access channel scheme similar to that struck down by *Midwest Video II*.[104] Under the Geller scheme, the FCC would require cable systems with more than thirty channels to offer a fixed percentage of their channels for leased access.[105]

The Geller petition does not propose full common carrier rate regulation of these leased channels. The proposal suggests instead that if competitive abuses develop, the FCC should require use of a fully separated subsidiary for a cable system's own programming or other services, auction of leased channels, or arbitration. The FCC would use rate regulation only as a last resort.[106]

The second effort before the FCC is a petition by two security company trade associations[107] for a rulemaking proceeding that would require owners of large two-way cable systems to make commercial public safety channels available.[108] The petitioners, in urging the imposition of security alarm company access requirements on large cable systems argue that the FCC should require "all new urban" cable systems to provide security alarm systems. Since the petitioners admit that under *Midwest Video II* the FCC currently may not have jurisdiction to require two-way security alarm systems, they argue that the FCC should propose legislation to give it

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103. Geller is a former FCC General Counsel and former Director of the National Telecommunications and Information Administration (NTIA). The Geller petition has been pending at the FCC since October, 1981.

104. Petition of Henry Geller, *In re* Cable Leased Channel Access, F.C.C. R.M. 3999 (Oct. 9, 1981) [hereinafter cited as Petition of Henry Geller] (available in *Vanderbilt Law Review* office). The Geller proposal is based on cable's alleged position as an essential service, the ability of cable operators to use this essential facility as a bottleneck to prevent competitors from reaching cable-delivered markets, and the first amendment implications of control of a large amount of programming resting in a single entity. *Id.* at 6-9.

105. *Id.* at 50-51.

106. *Id.* at 52-53.

107. The National Burglar & Fire Alarm Association and the Central Station Electrical Protection Association are the petitioners.

108. Petition of National Burglar & Fire Alarm Assoc. & Central Station Electrical Protection Assoc., *In re* Public Commercial Access to Broadband Cable TV Distribution Systems for Public Safety Purposes, F.C.C. R.M. 4164 (July 9, 1982) (available in *Vanderbilt Law Review* office).

the needed authority. Finally, petitioners argue that, in order to avoid potential competitive difficulties, the FCC should not permit cable systems subject to this requirement to provide or install monitoring equipment or alarm services. In the alternative, the cable company could provide alarm services through a separate corporate subsidiary dealing at arm's length with the cable system operator.[109]

V. State and Local Efforts To Regulate Cable's Two-Way Services

A cable company that offers an intrastate two-way telecommunications service must as a result of *NARUC II* convince regulatory authorities in the particular state that it is not a common carrier under state law. Cable operators will argue that state public utility commissions (PUCs) should not subject cable to the same degree of regulation as telephone companies even if the cable service technically meets the state common carrier definition. Cable systems that fail in this effort may be subject to extensive state schemes of rate and entry regulation. State regulatory commissions may require cable systems to file their two-way service offerings and proposed rates in advance of offering. State regulators may require uniform rates and conditions of cable-offered telecommunications services for all ultimate customers. States also may demand that cable operators provide to competitors offering the same service nondiscriminatory access to the cable system's channel capacity.[110] In states that have not taken an active role in cable regulation, local city franchising authorities still may impose their own layer of "leased access" or similar conditions on cable interactive services.[111]

Interactive data transmission and security alarm services of-

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109. *Id.* at 15-16. The impetus for the petition for leased access to cahle appears to be the security alarm industry's failure to obtain similar access to telephone company facilities. Twenty-nine alarm companies, shortly after filing this petition, filed an antitrust suit against AT&T in the Washington, D.C. federal district court claiming that AT&T has engaged in a conspiracy to monopolize the security alarm business. The alarm companies claimed that the telephone company employed various tactics designed to force alarm companies to use only AT&T equipment and services and that AT&T used information obtained by this process to develop competitive alarm system services. Among other forms of relief, the plaintiffs seek an injunction barring AT&T or any former AT&T company from furnishing remote alarm system services. *See* AAA Alarm Co., Inc. v. American Tel. & Tel. Co. No. 82-2907 (D.D.C. filed Oct. 12, 1982) (available in *Vanderbilt Law Review* office).

110. *See, e.g., Blizzard of Bills,* CABLEVISION, Jan. 17, 1983, at 65.

111. *See infra* note 133 and accompanying text.

fered by local cable systems have stimulated state regulatory bodies in New York, New Jersey, Connecticut and Nebraska to begin active proceedings to determine the state's proper role in the delivery of these services. All these states still are engaged in these deliberations. While several state PUCs with cable jurisdiction have not moved to tariff two-way cable services, bills or regulatory proceedings that would place cable within state PUC jurisdiction are pending in other states, such as West Virginia, Florida, Oregon, California, and New Mexico.[112]

A. *Pending State Regulatory Proceedings Involving Two-Way Cable Services*

1. New York

Manhattan Cable Television, Inc. first tested the use of cable for data transmission between business users in 1974.[113] In October, 1976, the New York State Public Service Commission (PSC) served Manhattan Cable with an order to show cause why the PSC should not require the company to apply for a "Certificate of Public Convenience and Necessity."[114]

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112. *See Blizzard of Bills, supra* note 110, at 65. The Oregon Public Service Commission in 1983 began considering whether to regulate cable data transmission as a "utility service." The PSC hearings arose in part at the request of Pacific Northwest Bell Telephone Co. (PNB), which had sought to block Cablesystems Pacific's offering by refusing to allow the cable operator to use PNB pole and conduit space. Cablesystems Pacific filed an antitrust suit against PNB, *see* Complaint, Cablesystems Pacific v. Pacific Northwest Bell Tel. Co., No. A8305-03156 (Ore. Cir. Ct. April ___, 1983), and petitioned the Justice Department for an interpretation barring PNB from the data market. *See* Communications Daily, Sept. 7, 1983.

The California Public Utilities Commission also has instituted hearings to determine the effects of competition on local and long distance telecommunications services, including cable's competitive impact. *See* Order Instituting Investigation, No. OII-83-06-01 (Cal. PUC June 29, 1983); Order Instituting Investigation, No. OII-83-02-01 (Cal. PUC Feb. 24, 1983). In New Mexico, Mountain Bell filed a request with the State Corporation Commission alleging that Albuquerque Cable TV's offering of a data transmission system was provision of telephone services without proper certification. *See* ALBUQUERQUE CABLE SYSTEM EXPERIMENTS WITH DATA TRANSMISSION; MOUNTAIN BELL OBJECTS, 2 Data Cable News, July 1983, at 4-5. The State Corporation Commission voted to stay the complaint and allow the cable system's experiment to continue. *See* Communications Daily, Sept. 9, 1983, at 4.

113. Manhattan Cable filed as an intervenor in *NARUC II* because of its concern with the potential of state entry, service, and tariff regulation in the two-way service field. *See* NARUC II, 533 F.2d at 601.

114. *See* Comments of Robert Abrams, Attorney General of the State of New York, Proceedings on Motion of the Commission as to Private Line Service Provided by MANHATTAN CABLE TV, New York Public Service Commission Case 27091, at 1 (Jan. 7, 1983) [hereinafter cited as Comments of Robert Abrams] (available in *Vanderbilt Law Review* office).

Although the issue lay dormant for several years, the New York PSC recently has revived the controversy.[115] On November 26, 1982, the New York PSC issued a new notice to obtain comments on the show cause order.[116] New York Telephone Co. argued that Manhattan Cable's two-way point-to-point broadband data transmission services, as well as other services that were offered or contemplated by the cable company, were indistinguishable from those offered by New York Telephone. Thus, New York Telephone argued, the regulatory treatment of the two entities should be the same because unregulated operation of cable company data services would lead to "uneconomic bypass" of the local regulated telephone company.[117]

The New York Attorney General also filed comments, proposing a different approach to the issue. The Attorney General felt that the fundamental question was not PSC jurisdiction over the particular data services offered by Manhattan Cable, but the overall nature of state regulation of cable's nonbroadcast channel offerings.[118] New York has a State Commission on Cable, with a separate statutory mandate to oversee the operations of cable systems in the state.[119] The Attorney General argued that the PSC had to address in a broadened inquiry the potentially overlapping jurisdiction over two-way services between the two commissions.[120]

2. New Jersey

A proceeding similar to that proposed by the New York Attorney General already is underway in New Jersey. The New Jersey Office of Cable Television exists as part of the overall State Board

115. The revival of interest in the original show cause order possibly was in response to a series of newspaper and magazine articles that indicated Manhattan Cable's two-way service operations generated over $1 million in annual revenue. *E.g., Common Carrier Look-Alike?*, CABLEVISION, Feb. 7, 1983, at 60. Manhattan Cable presently has one multi-user data trunk serving fourteen customers at forty locations, a 160-circuit data trunk serving Chase Manhattan Bank, and eight other dedicated lines. Affadiavit of Mr. Carl Gambello, Director of Data Services, Manhattan Cable Television, Inc., Jan. 7, 1983, at 2-5 (available in *Vanderbilt Law Review* office).

116. *See* Comments of Robert Abrams, *supra* note 114.

117. Comments of New York Telephone Co., Proceedings on Motion of the Commission as to Private Line Service Provided by Manhattan Cable TV, New York Public Service Commission Case 27091, at 4 (Jan. 7, 1982) [hereinafter cited as Comments of New York Telephone] (available in *Vanderbilt Law Review* office). "Uneconomic bypass occurs when an entity deflects traffic from the network of the regulated carrier, not as a result of economic efficiency but as a result of artificial differences between rates and costs." *Id.*

118. Comments of Robert Abrams, *supra* note 114, at 3-4.

119. *See* N.Y. EXEC. LAW §§ 814-816 (McKinney 1982).

120. Comments of Robert Abrams, *supra* note 114, at 2.

of Public Utilities, rather than as a separate entity as in New York.[121] In 1980, when Cablevision of Bayonne proposed to offer a two-way security and alarm system, New Jersey Bell argued that cable should offer these services only under the full panoply of state tariffing and other public utility regulation appropriate to common carriers.[122]

The Office of Cable Television decided two years later that instead of continuing to focus on the specific cable security service offering challenged by New Jersey Bell, it would launch a "generic inquiry" into the jurisdictional, economic, and regulatory questions surrounding provision of cable two-way services.[123] The affected cable companies and the National Cable Television Association have filed comments taking sharp issue with New Jersey Bell's argument that cable companies have a "monopoly" position in security services and other two-way offerings that calls for public utility regulation of cable rates and services.[124]

3. Connecticut

The Connecticut legislature gave the Connecticut PUC the power to regulate the rates of all cable systems in that state in the mid-1960's.[125] While the agency decided that traditional utility rate regulation was inappropriate during the early years of cable development, the PUC has been unable to treat cable as having an identity totally separate from conventional utilities.

The Connecticut PUC currently has before it a petition filed by the Connecticut Security Dealers Association (CSDA) that argues that the PUC has jurisdiction over security services offered by cable systems.[126] Since the Connecticut PUC requires cable compa-

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121. *See* N.J. STAT. ANN. § 48:5A-4 (West Supp. 1983-84).

122. Brief of New Jersey Bell Telephone Co., *In re* the Office of Cahle Television's Investigation, New Jersey Board of Public Utilities, No. 798C-6527, at 24 (Mar. 24, 1980) (available in *Vanderbilt Law Review* office).

123. *See* Reply Comments of Cablevision of Bayonne, *In re* the Office of Cable Television's Investigation, New Jersey Board of Public Utilities, No. 8111C-6837, at 1 (July 23, 1982) [hereinafter cited as Reply Comments of Cablevision of Bayonne] (available in *Vanderbilt Law Review* office).

124. *See id.* at 6-10. The cable companies argued that cable television possesses a separate character and identity from telephone common carrier-public utilities; that cable systems lack market power or a monopoly base from which to cross-subsidize their services; and that suhstitutes for cahle systems are too numerous and significant to generate the same concerns that telephone utilities present. *Id.*

125. *See* CONN. GEN. STAT. ANN. § 16-333d (West Supp. 1983-84).

126. Brief of Security Dealers Assoc., Application of Cablevision of Conn. for Approval of Initial Rates and Charges, Conn. Dept. of Public Utility Control No. 811115 (Apr. 12,

nies to comply with franchise promises and commitments, which include providing security alarm services, CSDA argues that the PUC should set cable system rates for security alarm services. CSDA also has argued that the PUC is obligated to consider the antitrust implications of the proposed security alarm service.[127]

4. Nebraska

The Nebraska Public Service Commission (PSC) began hearings in early 1983 to determine whether it should subject certain two-way services offered by Cox Communications, holder of the Omaha cable franchise, to common carrier regulation.[128] The Nebraska PSC examined its jurisdiction over two services offered by Cox: (1) CommLine, an institutional cable network carrying data and other business communications services, and (2) INDAX, a home interactive service that includes home banking and shopping, as well as pay per view entertainment events.

The Nebraska PSC in April, 1983 found that both CommLine and INDAX offered "telephone service in the territory of another telephone company," and issued an order requiring the Cox companies to obtain a certificate of public convenience and necessity

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1982) [hereinafter cited as Cablevision Docket] (available in *Vanderbilt Law Review* office).

127. *See id.* at 5-6. In June 1983 Southern New England Tel. Co. (SNET) intervened, asking the DPUC to declare that SNET is not required to provide pole and duct space to Cable operators that offer two-way nonvideo services such as security alarm systems. Comments of SNET, Cablevision Docket (June 20, 1983). SNET also has opposed Cablevision of Connecticut's proposal to offer two-way business data and voice services. Comments of SNET, Cablevision Docket (Sept. 16, 1983).

128. *See In re* Investigation into Proposed Operations of Cox Cable, MCI, and Commline, Order to Cease & Desist, Neb. Pub. Serv. Comm'n, (Apr. 19, 1983) (available in *Vanderbilt Law Review* office). The PSC investigation began at the instigation of Northwestern Bell, which argued that Cox planned to cream-skim large Omaha business users of high speed data. *See Northwestern Bell Says Commline Plan Poses Threat*, Omaha World-Herald, Mar. 8, 1983. Northwestern Bell also has filed joint pleadings with the Mountain States and Pacific Northwest telephone companies asking the FCC to defer action on Cox Cable's pending applications for digital termination facilities for Omaha, Tuscon, and Vancouver. *See* Letter to Gary Epstein, Chief, Common Carrier Bureau FCC (Feb. 25, 1983) (available in *Vanderbilt Law Review* office); Informal Objection to Grant, *In re* Applications of Cox Cable Communications, FCC File Nos. 10322/10324-CDM-P-82 (Mar. 11, 1983) [hereinafter cited as Objection to Cox Grant] (available in *Vanderbilt Law Review* office). The telephone companies argued that Cox proposes to use the Digital Terminations Systems (DTS) to interconnect with its cable systems, thus providing both long distance and local telecommunications services. The FCC has preempted state regulation of DTS, *see* Digital Termination Systems, 86 F.C.C.2d 360 (1981), *recons.*, 90 F.C.C.2d 319 (1982) *appeal pending sub nom.* National Ass'n of Reg. Util. Comm'rs v. FCC, No. 81-1556 (D.C. Cir. 1981), thus, the telephone companies fear that Cox will escape state jurisdiction by connecting interstate DTS facilities with its intrastate cable data transmission links.

before offering their services.[129] Cox immediately sought a ruling from the FCC declaring that the CommLine data services were federally preempted[130] and filed in federal district court for a stay of the Nebraska PSC's order.[131] The district court granted Cox a preliminary injunction, allowing CommLine to continue its services, but required Cox to seek a certificate of public convenience and necessity from the Nebraska PSC.[132]

B. Local Franchising Authorities: The Third Regulatory Tier

The local municipal franchising authority is a wild card in the state and local regulatory structure. With the removal of most FCC restrictions on local cable franchising, including the federal access rules that formerly operated as maximum limits on local demands, cities are far more aggressive in bargaining with cable systems for significant free and leased channel capacity. Some cities actually may prohibit cable systems from offering interactive services in competition with the local telephone company or other vendors.[133]

Cities may specify in their requests for proposals or final franchise agreements that cable systems must offer data or voice communications services to businesses, nonprofit institutions, or homes on a nondiscriminatory basis subject to published rates. A cable company may voluntarily offer a similar proposal as part of its franchise application. The cable system that uses terms of art such as "nondiscriminatory rates" or "rate of return" in an application might find that the local franchising authority interprets those terms as intent on the part of the cable franchise applicant to operate part of its proposed system in a common carrier mode.

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129. *Id.* at 2-3.

130. *See In re* Cox Cable Communications, Inc., Petition for Declaratory Ruling, F.C.C. File No. CCB DFD 83-1 (July 1, 1983).

131. *See* Cox Cable Communications, Inc. v. Simpson, No. 83-L-240, slip op. (D. Neb. Aug. 2, 1983)(mem.).

132. *See id.*, slip op. at 27-28. The court used the abstention doctrine to avoid deciding the constitutional questions raised by the case. *See id.* at 5-14. Nevertheless, the court indicated strong sympathy with Cox's arguments that Commmline services were "private carriage" and were federally-preempted because of their mixed interstate-intrastate character. *Id.* at 11, 19-27. The court also expressed concern with the "troubling element of selectivity" in the Nebraska PSC's decision to investigato Cox at the suggestion of Northwestern Bell, noting tbat the Nebraska Supreme Court had declared that "the regulatory mission of the [Nebraska] PSC is to serve the public interest, not to establish a monopoly for public utilities." *Id.* at 11-12.

133. Louisville, Ky. and Indianapolis, Ind. both bar cable companies from competing in the home security business. *See Common Carrier Look-Alike?*, CABLEVISION, Feb. 7, 1983, at 60-62.

If a local municipality requires a cable system to offer programmers or other service vendors nondiscriminatory access to channels at uniform charges, the cable system will have difficulty convincing the state or local public utility commission that the cable system is not operating as a common carrier subject to the commission's jurisdiction. Thus, despite cable's best intentions to avoid the common carrier label, without protective legislation or preemption, practical constraints such as pressure from municipal officials may force a cable system into de facto operation as a common carrier.

VI. Arguments Against Imposing Public Utility Requirements on Cable Interactive Services

Proceedings that argue for leased access, tariffed rates, and other indicia of common carrier status will continue to proliferate at both the state and federal level as two-way cable services grow. Cable's opponents will seek state regulation because the states have been much more sympathetic in the past to the arguments of telephone companies against letting unregulated competitors enter fields occupied by the telephone companies. Among the traditional telephone company arguments are claims that: (1) cable systems will cross-subsidize their data and information retrieval services with monopoly profits extracted from subscribers to their video services, particularly in the future when most homes will be obtaining their television programming from cable;[134] (2) cable, if allowed to become a real competitor to the telephone company's local loop, will cream-skim lucrative electronic funds transfer and other business data traffic, leaving the phone companies with the less profitable basic home ratepayer services;[135] (3) building two basic local broadband loops, a "natural monopoly" service, will lead to "destructive competition" and a waste of economic resources;[136] (4) cable is a "monopoly" broadband pathway to the home and business customer, and could use its position as an essential bottleneck facility to exclude other purveyors of similar services—alarm systems, electronic banking and shopping, or data transmission—from the marketplace.[137]

Cable companies, in response, argue that the telephone companies not only have an overly simplistic view of cable's existing or

134. *See* Reply Comments of Cablevision of Bayonne, *supra* note 123, at 6-10; Objection to Cox Grant, *supra* note 128, at 29.

135. *See, e.g., supra* note 128.

136. *See* Comments of New York Telepbone, *supra* note 117, at 4.

137. *See* Petition of Henry Geller, *supra* note 104, at 6-9.

potential market position, but also that they fail to recognize the unique character of cable as a communications medium.

A. *Cable As An Editorial Medium: The Telepublisher Argument*

Cable providers increasingly are argning for the full first amendment protections of a print editor or publisher.[138] Cable companies traditionally have not been passsive offerors of indiscriminate channel capacity to the public for hire, but active editorial agents selecting the material carried over their facilities. Cable, unlike broadcasting, offers a multitude of specialized channels and thus is like a publisher of a magazine or newspaper, which carries everything from news to features to personal want ads without being subject to requirements of nondiscriminatory access or other indicia of utility regulation.[139]

Constitutional protections restrict closely governmental bodies in their ability to impinge upon a cable operator's editorial decisions about how to best use the channel capacity cable technology affords. The Eighth Circuit Court of Appeals in *Midwest Video II* originally struck down the FCC's mandatory cable access rules in part because governmentally mandated access to cable was contrary to the cable operator's first amendment rights.[140] The court in *Midwest Video II* criticized the FCC's access rules for failing to consider the cable system's editorial discretion.[141]

While the Supreme Court affirmed *Midwest Video II*, it rested its decision on statutory grounds and chose not to reach the constitutional issues presented. The Court, however, expressly stated that the cable operators' first amendment grounds for attacking the FCC's rules were "not frivolous."[142] In addition, the D.C. Circuit Court of Appeals in *Home Box Office v. FCC*[143] found that

138. *See, e.g.*, National Cable Television Assoc., *The First Amendment, A New Interpretation Needed for Cable*, CABLEVISION, May 18, 1981, at 114.

139. *See* Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974)(Florida statute requiring newspapers to print replies to editorial criticisms of candidates for political office violated first amendment); Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973)(broadcasters not required to accept paid editorial advertisements).

140. 571 F.2d 1025 (8th Cir. 1978), *aff'd on other grounds*, 440 U.S. 689 (1979).

141. *See* 571 F.2d at 1053-54. The court stated that "[i]n wresting from cable operators the control of privately owned facilities," the access rules impermissibly risked "an enlargement of Government control over tbe *content* of [cablecast] discussion of public issues." *Id.* (emphasis added).

142. *See Midwest Video II*, 440 U.S. at 709, n.19.

143. 567 F.2d 9, 49-50 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977).

federal interference with a cable operator's editorial function in controlling the use of cable channel capacity for pay movies and sports contravened first amendment interests.

Cable systems claim that the decision to carry a security service or informational or entertainment programming on a particular cable channel is as much an exercise of a cable operator's editorial function as is a newspaper editor's decision to run a news story on home security protection in a particular column of his paper. This separate and unique first amendment character of cable as an editorial medium is retained regardless of whether a cable system provides ancillary services that are similar to services provided by or over the lines of traditional telephone utilities. Two-way services presently constitute a sufficiently small part of overall cable system operations and revenues, which are derived primarily from editorial functions, that state or federal regulation of cable as if it were truly in the common carrier-public utility business would be unreasonable.[144]

B. Failure to Meet Classic Tests For Utility Regulation

Cable companies also argue that cable interactive services do not meet the classic tests for state common carrier regulation. Historically the government has reserved utility regulation for "quasi-public" services "affected with a public interest,"[145] which provide a function, such as water, power, and basic voice telephone service, that is essential to society. While home security services and data transfer between businesses are important, cable's provision of security systems and data transmission links is not essential to society as the few such systems that currently exist and the many other providers of the same services evidence. The existing dominant position of the telephone company in most two-way information carriage markets demonstrates that competing two-way cable services are not truly essential.

Cable systems note that two-way services do not meet other elements of the classic common carrier definition enunciated in *NARUC I.* Cable systems normally do not hold themselves out to provide two-way services to all persons indifferently.[146] Rather,

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144. One party commenting in the New Jersey inquiry stated that "[c]able's provision of security services no more put it in the common carrier business than a telephone company's provision of Dial-A-Joke puts that utility in the entertainment business." Reply Comments of Cablevision of Bayonne, *supra* note 123, at 2.

145. *See, e.g., NARUC I,* 525 F.2d at 640 n.54.

146. *See NARUC I,* 525 F.2d at 641.

where two-way services exist, cable systems "make individualized decisions, in particular cases, whether and on what terms to deal,"[147] tailoring services to particular business or home customer needs. Cable companies in many cases offer these services on a joint venture, shared revenue basis with other service vendors, such as newspaper or alarm companies.[148]

Cable systems since *Midwest Video II* have offered their two-way services—whether self-generated or leased—without legal or judicial compulsion to serve all customers indiscriminately. The FCC currently does not require cable systems to provide particular two-way services to customers who do not meet cable's requirements. The business practice of the cable industry, which the *NARUC I* court held was a controlling consideration,[149] thus is to offer services in a manner inconsistent with common carriage.

Cable ancillary two-way services may be functionally similar to those that telephone companies or other independent suppliers offer. The *NARUC I* court, however, did not require the same regulatory treatment of all services that telephone companies happened to offer.[150] Telephone companies offer transmission facilities for entertainment programming and computer access but are not entertainment or computer companies. Similarly business practice, rather than services, is determinative of cable's common carrier status.

C. Cable As a "Nondominant" Medium

In response to state and federal efforts to bring cable services under a public utility regulation scheme, cable companies contrast the historical monopoly of the telephone company in switched local exchange services with the highly competitive cable marketplace.[151] State and federal agencies have regulated telephone companies because the telephone companies' position as monopoly suppliers of an essential service has given them the ability and the incentive to charge excessive rates and to provide service on dis-

147. *Id.*

148. *See* N.Y. Times, Jan. 7, 1981, § 4, at 4 (plan between Warner Amex, its subsidiary, Atari, and Compuserve Computer to provide a cable TV retrieval system allowing for news, shopping, and entertainment services).

149. *See NARUC I*, 525 F.2d at 642-44.

150. *See id.* at 641.

151. *See* N.Y. Times, Sept. 24, 1980, § 2 at 1 (seventeen companies bidding for franchise rights to the boroughs of New York City); N.Y. Times, July 27, 1980, at 1 (describing the intense competition for the right to provide cable service in Cincinnati).

criminatory terms. The economic characteristics of the local telephone services market today are substantially unchanged from when this public utility regulatory system was created, thus local phone companies still retain the ability either to charge excessive rates or to cross-subsidize their security, data, or other nonvoice services from their monopoly switched local exchange service base.[152]Telephone companies still can eliminate competition by charging uncompetitively low rates.

Cable systems do not have the ability to cross-subsidize their new two-way services from a monopoly base. Cable's non-two-way services exist in a highly competitive marketplace in which many other industries provide entertainment and information services to the home. Current cable video programming services have many substitutes, such as commercial, public, and subscription broadcast television, satellite master antenna television systems (SMATV), multi-point microwave carriers (MDS), video cassette recorders and video discs. In addition, the FCC recently has authorized new competitive services such as direct satellite to home broadcasting (DBS),[153] low power television stations (LPTV),[154] and multi-channel MDS.[155]

Thus cable has to compete not only with the telephone company for two-way data, security, and similar services, but also with many alternative networks being established by independent telecommunications providers. Many other noncable competitors stimulated by recent pro-competitive FCC policies favoring multiple entry in telecommunications fields are proposing new means of

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152. *See, e.g.*, Student Symposium, 69 CALIF. L. REV. 443, 486 (1981).

> Regulators have long been concerned about the effect of permitting a large regulated firm such as AT&T to enter adjacent unregulated markets. For its operations in regulated markets, Bell simply calculates its costs and capital investment and submits tariffs sufficient to cover those costs and provide a reasonable rate of return on its investment. Thus, by allocating disproportionate shares of costs and investment to its regulated operations, Bell effectively could subsidize its competitive operations. The result is that monopoly customers would overpay for services, and other firms operating in unregulated markets would find it difficult or impossible to compete with Bell. . . .
>
> Cross-subsidization can also take other forms, including transfers of personnel and information from monopoly to competitive services and preferential treatment of a corporate affiliato over its competitors.

Id.

153. *See* Direct Broadcast Satellites, Report & Order, 90 F.C.C.2d 676 (1982).

154. *See* 48 Fed. Reg. 21,478 (1983) (to be codified at 47 C.F.R. §§ 73, 74); 47 Fed. Reg. 30,495, 31,555 (1982).

155. *See* Report & Order & Further Notice of Proposed Rulemaking, No. 80-112, CC Docket No. 80-116, 48 Fed. Reg. 33,873 (1983).

competing with local telephone company loops for data, and perhaps even voice, service. Several applicants, for example, have sought FCC authority to construct a "digital termination service" (DTS) that would use microwave radio to carry intraurban data traffic.[156] Competitors also can use other radio spectrum frequencies, and even portions of broadcast television signals, for many of these data services.

Historically, regulatory agencies and the federal courts have imposed under antitrust theory open entry and access regulation only on truly unique and essential "bottleneck facilities."[157] The FCC has taken a similar approach and recently begun to classify telecommunications carriers as "dominant" or "nondominant," substantially reducing or eliminating traditional restrictions on services offered by the nondominant carriers.[158] Thus, even if a cable system's provision of two-way services met all the tests for a common carrier, such as holding out its services under published rates to all customers, the question would remain whether cable as a nondominant carrier should be subject to full public utility regulation.

The FCC's Office of Plans and Policy (OPP), after an exhaustive analysis of the environment in which cable presently operates, concluded in 1981 that cable systems lack the economic and legal attributes of a natural monopoly because all major markets and submarkets in which cable competes—including two-way nonvideo broadband services—are workably competitive, with a number of alternative suppliers.[159] Common carrier regulation of cable is inappropriate particularly, for example, in the areas of provision of

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156. *See* Digital Termination Systems, 86 F.C.C.2d 360 (1981), *recons.*, 90 F.C.C.2d 319 (1982), *appeal pending sub nom.* National Ass'n of Reg. Util. Comm'rs v. FCC, No. 81-1556 (D.C. Cir. 1981); *see also Bell Facing Fresh Challenges*, N.Y. Times, Aug. 28, 1981, § 4, at 1.

157. *See, e.g.*, Otter Tail Power Co. v. United States, 410 U.S. 366 (1973) (distribution of electricity); Silver v. New York Stock Exchange, 373 U.S. 341 (1963)(provision of private wire connections); Associated Press v. United States, 326 U.S. 1 (1955)(provision of AP news to nonmembers and allowing members to block membership applications); United States v. Terminal R.R. Assoc., 224 U.S. 383 (1912)(unification of railroad terminal facilities).

158. *See* Competitive Carrier Rulemaking, First Report & Order, 85 F.C.C.2d 1, 6 (1981)(defining carrier as "dominant" if it has "substantial opportunity and incentive to subsidize the rates for its more competitive services with revenues obtained from its monopoly or near-monopoly services" and as "non-dominant" if it does not possess "the market power necessary to sustain prices either unreasonably above or below costs", *Id.*; Competitive Carrier Rulemaking, Second Report & Order, 91 F.C.C.2d 59, 65 (1982) (nondominant resale carriers would be free of 47 U.S.C. § 214 entry and exit requirements)).

159. *See* FCC Policy on Cable Ownership 124-25, F.C.C. Staff Report 107 (Nov. 1981)(available in *Vanderbilt Law Review* office).

alarm services or business data. Cable systems hold only a small position within the growing private security market, and compete directly with the telephone companies, radio service operators, and many other alternative networks. Likewise, cable holds a tiny share of the business data communications market, which includes telephone companies and other private networks.

D. *Premature Regulation as an Impediment to Development of Cable Interactive Services*

Cable company provision of interactive services has not yet developed a national pattern of business arrangement. Cable systems normally make different decisions in particular communities whether and how to offer two-way services—through a lease, joint venture, or through their own business capacity.[160] For the FCC, state PUC, or local franchising authority actions to fix these arrangements into a single public utility mold would be premature.

The FCC recently has acknowledged a preference for competition over regulation in many areas, especially in cable services, where extensive regulation halted cable's early growth without providing discernible commensurate benefits to the public interest.[161] Many regulatory schemes the FCC proposed in the past for cable were premised erroneously on the view that a cable system constitutes a "natural monopoly" that confers market power on a cable operator—the same rationale advanced today for common carrier status.[162] Regulators should not treat as a real or potential bottleneck technology a medium that, freed of some of these past restraints, has opened the door to expanded competition in the video industry and holds similar promise in the area of home security, data transmission, and other two-way services.

State or federal regulation of cable as a public utility would add regulatory costs far in excess of any reasonable expectations of return to the public for such regulation. In fact, premature regulation of cable television's beginning steps in providing two-way services might inhibit the financial community from making the investment in cable needed to develop these services.

160. *See supra* note 146.

161. *See, e.g., supra* note 1.

162. *See, e.g., supra* note 104.

E. *The Telephone Company's Anticompetitive Motivation For Blocking Cable's Entry Into Two-Way Services*

Finally, cable systems point to the lack of bona fides in telephone company efforts to bring cable under the common carrier umbrella. Telephone companies, not cable, are the true present and potential "bottleneck facilities". Telephone companies during the 1960's attempted to block cable's growth in ancillary services by refusing cable systems access to telephone poles or including clauses in telephone pole attachment contracts that bar cable operators from using the poles for purposes other than retransmission of broadcast signals.[163] The independent telephone companies, which the 1956 AT&T Consent Decree did not bar from offering cable service,[164] often followed these refusals by constructing their own cable television systems. The Bell operating companies competed by offering channel lease services to cable companies and discouraging independent cable operators from attaching to telephone company poles.[165]

The FCC beginning in the mid-1960's responded to this telephone company conduct with a series of actions that diminished the competitive advantages the telephone companies enjoyed. The FCC in 1966 ordered AT&T and GTE to file tariffs with the FCC for cable facilities offerings,[166] began a general investigation of telephone company practices in the cable field,[167] and required telephone companies to obtain section 214 certificates before beginning channel service.[168]

The FCC in 1970 adopted an order tbat restricted telephone

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163. *See In re* General Tel. Co. of Calif., 13 F.C.C.2d 448, 463 (1968), *aff'd*, 413 F.2d 390 (D.C. Cir.), *cert. denied*, 396 U.S. 888 (1969). ("By reason of its control over utility poles . . . the telephone company is in a position to preclude or to substantially delay an unaffiliated CATV system from commencing service and thereby eliminate competition.").

164. The 1956 Consent Decree provided that the "defendant AT&T is enjoined and restrained from engaging, either directly, or indirectly through its subsidiaries . . . in any business other than the furnishing of common carrier communication services." United States v. Western Electric Co., 1956 Trade Cas. (CCH) ¶ 68,246, at 71,138.

165. *See* General Tel. Co. of the Southwest v. United States, 449 F.2d 846 (5th Cir. 1971). The circuit court noted that the FCC's ruling in *General Telephone* in part was in response to cable operators' complaints that "the carriers favored their subsidiary CATV companies over the independents in a variety of ways and that independents were often required to lease channel services rather than being permitted to rent pole space." *Id.* at 851.

166. *See* Common Carrier Tarriffs for CATV Systems, 4 F.C.C.2d 257 (1966).

167. *See* California Water & Tel. Co., 6 F.C.C.2d 440 (1967).

168. *See* 47 U.S.C. § 214 (1976). This section—with certain exceptions—requires carriers to obtain a certificate from the FCC before beginning new lines or extending existing lines. *See also* Geneial Tel. Co. of Calif., 13 F.C.C.2d at 450.

companies to the offering of the facilities portion of cable television service.[169] The FCC currently is reviewing this rule. A 1981 FCC report on cable television cross ownership policies proposed to retain the rule,[170] but the United States Independent Telephone Association recently filed a new petition to eliminate it.[171] The FCC has not issued a formal notice of proposed rulemaking on this issue, but one is being prepared by the FCC staff.[172]

The telephone company-cable controversy abated somewhat after Congress enacted legislation in 1978 that empowered the FCC to regulate pole attachment rates in the absence of state regulation.[173] This history, however, indicates that, at least from the telephone company perspective, cable systems pose a threat to the telephone companies' local distribution monopoly. Implications also exist for the telephone companies' future behavior in competing with cable under the relaxed provisions of the Justice Department/AT&T Consent Decree.[174]

The Consent Decree provides that AT&T will divest its operating telephone companies and that these operating companies will provide only regulated communications services.[175] The Decree also modifies the 1956 Consent Decree by allowing AT&T to provide services beyond common carrier communications services. The Decree, however, bars AT&T from offering "electronic publishing services," presumably including most areas of traditional cable service, for seven years.[176] After seven years AT&T will be able to purchase individual systems or multiple system operators or apply for new cable franchises.[177] AT&T will have no market position in local exchange services, thus these cable acquisitions may not raise

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169. *See* Section 214 Certificates, 21 F.C.C.2d 307, *recons.*, 22 F.C.C.2d 746 (1970), *aff'd sub nom.* General Tel. Co. v. United States, 449 F.2d 846 (5th Cir. 1971).

170. F.C.C. Policy on Cable Ownership 124-25, F.C.C. Staff Report 107 (Nov. 1981) (available in *Vanderbilt Law Review* office).

171. Petition for Repeal of Rule, *In re* Repeal of . . . the Commission's Rules, F.C.C. R.M. 4241 (Nov. 5, 1982) (available in *Vanderbilt Law Review* office).

172. The FCC recently relaxed the cross-ownership rules for rural, but not urban, areas. *See* Cross-Ownership Rules, 82 F.C.C.2d 233 (1979), *recons.* 82 F.C.C.2d 254 (1980), *recons.* 86 F.C.C.2d 983 (1981).

173. *See* 47 U.S.C. § 224 (Supp. V 1981).

174. *See* United States v. Western Electric Co., 1982-2 TRADE CAS. (CCH) ¶ 64,900.

175. *See id.* at §§ 1, 2(D).

176. *See id.* at § 8(D). "'Electronic publishing' means the provision of any information which AT&T or its affiliates has, or caused to be, originated, authored, compiled, collected, or edited, or in which it has a direct or indirect financial or proprietary interest, and which is disseminated to an unaffiliated person through some electronic means." *Id.*

177. *See id.* The court may deny the application and extend the seven year period if it finds that competitive conditions require an extension.

substantial antitrust concerns.

Cable communications provide one of the easiest vehicles for AT&T to reenter the local distribution markets from which it is presently foreclosed. Cable operations would allow AT&T to vertically reintegrate its services. AT&T may develop cable systems—or threaten to develop them—as a means of deterring any monopoly power tendency of the new local operating companies.

The divested Bell operating companies may also significantly participate in cable. The Decree restricts Bell operating companies to the provision of common carrier local exchange services and specifically prohibits them from offering electronic information publishing services.[178] A strict reading of this provision apears to bar the divested BOCs from providing cable software. The Decree, however, provides a safety valve by allowing an operating company to apply to the court for removal of the ban on providing electronic publishing services in noncommon carrier markets if the BOC can show that no realistic possibility exists for abuse of monopoly power in that market.[179]

The Bell operating companies at minimum will seek to act as the facilities provider for new types of interactive cable services such as electronic mail and security systems. These facilities probably will remain regulated for dominant carriers. Regulated services, however, can be profitable, and local telephone companies may be able to rely on their existing state franchises to offer facilities for nonbroadcast "cable" services in competition with cable's channel leasing or joint venture offerings. If the operating companies replace their current twisted-pair copper wire plant with fiberoptic broadband capacity, they could offer these services on a basis competitive with cable.

The present FCC cable-telephone company cross-ownership rules only prohibit telephone companies from offering the over-the-air broadcast services transmitted by a cable system.[180] No present FCC rule, therefore, restricts telephone companies from providing the nonretransmission video or nonvideo portions of cable television service, such as pay TV, videotext, home shopping, electronic mail and banking, energy management and security systems. Only the Consent Decree bars the operating companies from

178. *See id.* at § 2(D).

179. *See id.* at § 8(C).

180. *See* 47 C.F.R. § 63.54-56 (1982). This limitation resulted from the Fifth Circuit's interpretation of the FCC's limited jurisdiction to regulate cable as ancillary to broadcasting. *See* General Tel. Co. of the Southwest, 449 F.2d 846, 859 (5th Cir. 1971).

providing these services.

The persuasion of state regulatory commissions to regulate cable companies as traditional common carriers is one of the most effective tactics available to the BOCs. If the telephone companies are successful in this effort, regulated rates may drive capital away from the cable industry. Moreover, if the telephone companies are able to get cable regulated as a leased access utility, their own channel leasing facilities offerings for both video and nonvideo services could become a more attractive alternative than they were in the 1960's and 1970's.[181]

The concerns raised by a cable operator's control of a large number of channels pales in comparison with the first amendment threat posed by telephone company dominance in this field. The historical pattern of AT&T efforts to throw competitive roadblocks in the path of cable's development demonstrates instead the dangers inherent in control of all access to the home resting in one entity, the telephone company. If the newly divested telephone companies similarly are able exclusively to occupy large segments of this field by burdening cable with overregulation, the public's interest in competition and diversity in information and entertainment services will suffer.

VII. Proposed Actions To Insure That Cable Remains Outside Public Utility Regulation

Preemptive FCC action or federal legislation is needed to insure that undue regulation does not inhibit cable's promise for developing interactive services. Contesting the actions of scores of state regulatory commissions or local franchising authorities could sufficiently drain the will and resources of the cable industry that a potential competitor in the interactive services market would be lost forever.

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181. Several local telephone companies, notably C&P Telephone in Washington, D.C., Michigan Bell in Bloomfield Hills, and Bell of Pennsylvania in Philadelphia, recently offered to construct and lease their cable facilities as part of the initial franchising process. *See Bell Units Weighing Cable TV Role,* N.Y. Times, Mar. 7, 1983, § 4, at 1. A Wisconsin telephone company has proposed a similar construction-leaseback partnership. *See* Wis. Telephone Contracts to Build Cable System in Milwaukee Suburb, Communications Daily (Oct. 25, 1983).

A. *FCC Preemption by FCC Action or Court Decision*

1. Preemption Based on FCC Title I Powers

The issue of FCC preemption of state regulation of two-way cable services arose in the Nebraska proceedings and is now before the FCC.[182] Since *NARUC II* is a shaky precedent, a frontal attack on it may well succeed. In 1978, two years after the court decided *NARUC II*, the Second Circuit in *Brookhaven Cable TV, Inc. v. Kelley*[183] strongly upheld the FCC's preemption of state jurisdiction to regulate rates or conditions of pay cable programming offerings, based on a federal policy to promote greater diversification of program types and sources. The decision in *Brookhaven*, while seemingly inconsistent with the decision in *NARUC II*, provides only indirect support for a ban against state rate regulation of cable's nonvideo ancillary services because the court in *Brookhaven* based preemptive FCC jurisdiction on the *Southwestern Cable* "ancillary to broadcasting" holding.[184] This rationale becomes more attenuated when applied to intrastate point-to-point nonvideo services, as both Judges Wilkey and Lumbard noted in *NARUC II*.[185]

Curiously, under present judicial interpretation the FCC cannot preempt state rate regulation or required leasing of cable channels for nonvideo transmissions, but can fully preempt state and local regulation of pay video services—apparently, under *Brookhaven's* broad language, whether these pay services are offered on an origination, joint venture, or leased access basis.[186]

Cable operators can attempt to link intrastate offerings sufficiently intimately with interstate telecommunications that the entire system requires federal preemption. Regional interconnects are operating or proposed in the San Francisco Bay area, Atlanta, Chi-

182. *See supra* note 130 and accompanying text.

183. 573 F.2d 765 (2d Cir. 1978), *cert. denied*, 441 U.S. 904 (1979).

184. *See id.* at 767. The court also relied upon United States v. Midwest Video Corp., 406 U.S. 649 (1972) in which the Supreme Court approved the FCC's mandatory cable origination rules as "reasonably ancillary" to "the achievement of long-established regulatory goals in the field of television broadcasting." 406 U.S. at 667-68. The *Brookhaven* court reasoned that "[i]t follows that the FCC may regulate cable TV if its regulation will further a goal which it is entitled to pursue in the broadcast area." *Brookhaven*, 573 F.2d at 767.

185. *See supra* notes 89-95 and accompanying text.

186. *See supra* part IV. The Second Circuit also has upheld FCC preemption of state regulation of master antenna television systems on the ground that state regulation could impede interstate multipoint distribution services (MDS) used for pay television. *See* New York State Comm'n on Cable Tel. v. FCC, 669 F.2d 58 (2d Cir. 1982).

cago, and Boston.[187] Creation of a multistate regional interconnect of cable interactive services may be sufficient to allow cable to raise the linkage argument that Judge Wright found persuasive in *NARUC II*.[188] The FCC also could premise preemption of cable regulation on its ancillary powers in Title I of the Communications Act not only to carry out its Title III broadcasting objectives, but also its Title II common carrier objectives, even where one portion of a cable system's two-way services are transmitted entirely intrastate.[189]

2. Preemption of "Enhanced Services"

Cable operators also could attempt to obtain a clear FCC or judicial ruling identifying the cable interactive services that are "enhanced services" under the FCC's *Computer Inquiry II* decision.[190] The FCC has characterized basic service as the mere "transmission pipeline" through which unprocessed and unmodified information passes from one source to another.[191] "Information storage and retrieval services," whether data or voice, are not subject to FCC Title II regulation when offered on an interstate basis or to state regulation when offered intrastate.[192] The D.C.

187. *See* Applications of Northeast Interconnect, FCC File Nos. 3572/76-CF-P-82 (July 13, 1982) (available in *Vanderbilt Law Review* office) (application for five point-to-point microwave stations to interconnect cable systems in eastern Massachusetts). The fear that this linkage would occur led Northwestern Bell to file against Cox Cable's DTS links for Omaha, Tuscon, and Vancouver. *See supra* note 128.

188. *See NARUC II*, 533 F.2d at 631; *supra* note 96 and accompanying text.

189. *See* Comments of Cablevision Systems Development Company, *In re* Cox Cable Communications, Inc., No. CCB DFB 83-1 (July 1, 1983).

190. Second Computer Inquiry, 77 F.C.C.2d 384, *recons.* 84 F.C.C.2d 50 (1980), *recons.* 88 F.C.C.2d 512 (1981).

191. *See* Computer Inquiry II, 84 F.C.C.2d 50, 54 (1980).

192. *Id.* at 55. The FCC in response to AT&T's argument that classifying voice storage services as enhanced would inhibit the development of "advanced calling" and "call answering" services stated:

> [T]hese offerings present only a small sample of the type of voice storage related services that may be offered consumers . . . . To alter the basic category as suggested by AT&T and GTE would be to bring within the scope of basic service a host of computer-based voice storage and retrieval applications and customer-interactive services that far exceed basic transmission and related switching and routing functions. Not only might this require common carrier regulation of such services under Title II, but it would undermine any workable demarcation as to the boundary between basic and enhanced services. Technological advances are negating network differentiation of voice or non-voice transmissions . . . . This compels that any enduring and workable demarcation between basic and enhanced services exclude information storage and retrieval services—both voice and data—from the basic category.

Id.; see also 88 F.C.C.2d at 541 n.34; GTE's Telenet Communications Corp., 91 F.C.C.2d 232, 237 (1982).

Circuit Court of Appeals last fall sweepingly upheld the FCC's preemption of all enhanced telecommunications services.[193]

To come within the *Computer Inquiry II* preemption, cable systems should insure that their services combine data processing and communications services in a manner falling within the FCC's definition of "enhanced." Services that offer the subscriber the ability to alter the form, content, or delivery of information under the subscriber's control, or involve "subscriber interaction with stored information,"[194] are enhanced. The FCC gave as an example of enhanced service AT&T's "Dial It" service in which subscribers dial a certain number to gain access to stored sports scores.[195] Many cable interactive services operate on a similar model.

The *Computer Inquiry II* decision appears to have resolved the issue whether a state could regulate the rates or conditions for a cable system's offer of interactive terminals to its subscribers. The FCC decision clearly establishes that the offering of customer premises equipment is not a common carrier activity subject to either federal or state regulation.[196] If the telephone company offers these terminals, the offering does not require uniform tariffed rates or availability to all customers.[197]

3. Preemption Based on *Competitive Carrier* Classification Scheme

If the FCC does not consider certain cable service offerings to be enhanced, the cable industry can make a broader preemption argument based on the FCC's adoption of a broad classification scheme for "dominant" and "non-dominant" carriers in *Competitive Carrier Rulemaking*.[198] The FCC has found public utility regulation of firms without market power[199] to be contrary to the public interest. Under this theory, if present or potential future

193. *See* Computer and Communications Indus. Ass'n. v. FCC, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 51 U.S.L.W. 3826 (1983).

194. Computer Inquiry II, 77 F.C.C.2d at 387.

195. *See* Computer Inquiry II, 84 F.C.C.2d at 55.

196. *See id.* at 65 ("[T]here is generally no dispute that CPE (customer premises equipment) should be provided on a competitive base. Given this, the issue before us, and the one receiving substantial comment on reconsideration, is the manner in which CPE should be deregulated.").

197. *See* Computer and Communications Indus. Ass'n v. FCC, 693 F.2d 206-14; *Second Computer Inquiry*, 84 F.C.C.2d at 67 ("As of this date new CPE and associated maintenance must be separated from a carrier's basic service and offered on a nonregulated basis").

198. 85 F.C.C.2d 1 (1981); *see also supra* notes 151-159 and accompanying text.

199. "Market power" is a firm's ability "to raise and maintain its prices above cost, including an allowance of a fair profit." *Second Computer Inquiry*, 84 F.C.C.2d at 450.

competition acts as a check on prices, the FCC has determined that common carrier rate and service regulation should be removed.[200] Competition is present, at minimum from the telephone company, to all or virtually all of cable's emerging services.

The FCC, explicitly warning that state action must not interfere with its deregulatory approach to competitive carriers, stated in 1981:

> We do not intend, by concluding that non-dominant communications entities are not subject to regulation as common carriers, to be merely opening the way for state commissions to impose that same kind of regulation. We have found that regulation inhibits the market forces which we believe will best serve federal communications policies and goals. . . . We intend to preclude the states from regulating non-dominant entities providing communications services in competitive markets on an interstate basis.[201]

This language should give cable another argument to use in seeking FCC preemption of their nondominant service offerings.[202]

B. Legislative Action to Preempt State or Local Public Utility Regulation

A second strategy cable can use to achieve federal preemption is to promote passage of legislation placing at the federal level all jurisdiction over cable interactive services. United States Senator Barry Goldwater, Chairman of the Senate Communications Subcommittee, introduced a bill proposing federal jurisdiction early in 1983.[203] The Goldwater bill is a comprehensive effort to establish in the Communications Act for the first time direct federal jurisdiction over cable television and a national policy to promote cable development, thus removing the need to justify cable regulation under the existing "ancillary to broadcasting" theory.

The bill, which underwent substantial revision before passage by the Senate in June 1983,[204] originally required cable operators to set aside a number of channels for free and leased access. The amended Senate bill leaves the leased access area to agreement be-

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200. *See id.* at 449. ("[T]he mechanisms Congress adopted in Title II are designed to be employed to limit the conduct of dominant firms and . . ., conversely, they are not effective, in the sense that they do not directly vary economic performance, when employed with respect to the conduct of firms without market power.").

201. *Id.* at 519.

202. *See* Competitive Carrier Rulemaking, 91 F.C.C.2d 60 n.22 (1982)(discussion of FCC's ability to forbear from common carrier regulation of cable).

203. The Telecommunications Act of 1983, S. 66, 98th Cong., 1st Sess., (1983).

204. *See* 129 CONG. REC. S8325-28 (daily ed. June 14, 1983). The revision was the result of a compromise between the National Cable Television Association and the National League of Cities. *See* N.Y. Times, July 16, 1983, § 4, at 12.

tween the cable systems and municipalities as part of franchise negotiations.[205]

The bill, however, specifically bans states and municipalities from regulating or restricting offerings by cable systems of two-way telecommunications services, except for basic telephone service.[206] The cable industry succeeded in having Congress define "basic telephone service" narrowly, restricting it to actual provision of switched voice service. The bill as passed allows state and local regulation of "two-way voice grade communications that is held out to the public and that would be subject to regulation by the Commission or any State if offered by a common carrier subject, in whole or in part, to title II of this Act."[207]

Congress should expand this legislation clearly to preempt all state and local regulation of cable's interactive services, including two-way voice communications. Cable is unlikely to become a dominant carrier of switched voice traffic in the foreseeable future. Thus, federal policy should allow cable to experiment in voice markets, as well as in other interactive markets, without immediately imposing rate and entry obligations. That a service "looks like" something the telephone company offers is no reason to regulate it in the same manner. The real concern in regulation is market power, and cable is even farther from possessing that power in the voice market than it is in data, banking, shopping, and home security.[208]

The Senate bill contains a residual conflict because it allows leased access channel agreements between cable companies and cities,[209] but prohibits states or municipalities from utility rate reg-

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205. S. REP. No. 98-67, 98th Cong., 1st Sess. 14 (1983). Section 606(b) before amendment stated that "[a]ny cable system operator subject to subsection (a) of this section, shall dedicate or set aside for access, from available channels, 10 percent of such available channels for use by public, educational, or governmental channel programmers."

206. S. 66 § 607(g)(1). States may require cable operators to file "informational tariffs" for other types of "intrastate telecommunications services," but may not reject or modify them, or otherwise restrict cable's entry into these markets. S. 66 § 607(g)(2)(A).

207. S. 66 § 603(2).

208. The cable industry accepted a compromise in S. 66 providing that states "shall deregulate" all providers of data and other intrastate telecommunications services (other than basic telephone service) if they find that these services are subject to "effective competition." S. 66 § 607(g)(3). This would let the telephone companies enter nonvoice markets on an untariffed, unregulated basis once cable and other competing systems obtained a foothold. ("Effective competition" is defined in detail in S. 66 § 607(g)(4)). Cable's fear of letting telephone companies participate immediately in these markets on an unregulated basis is based on the telephone companies' ability to cross-subsidize low rates to business users from their monopoly in the local exchange residential market.

209. *See* S. 66 §§ 606(a), 613(c).

ulation of these channels.[210] The cities that find cable operators do not meet their leased access commitments thus may only be able to find the cable operator in breach of its franchise obligations and remove the franchise or impose fines on the operator. Without first-come, first-served tariff regulation, however, cities will have difficulty creating a clear, reviewable standard by which to determine whether cable companies have unreasonably withheld leased access to competing data or security services.

This legislation, making its way through Congress, has attracted attention from newspapers, banks, security alarm companies and other potential vendors of both programming and nonprogramming services who want to lease cable channels to reach homes and businesses. These interested parties have placed increased pressure on cable to accept more limitations on its editorial rights to deal with independent programmers and interactive service providers. The parallel bill that House Telecommunications Subcommittee Chariman Timothy Wirth introduced in October 1983, H.R. 4103,[211] contains a sliding scale of channel set asides for leased access based on the size of a cable system's overall channel capacity.[212] As introduced, however, H.R. 4103 restricts these leased access provisions to "video programming," and does not require access for data and other nonvideo interactive services.[213]

Any compromise, however, that invites the states and localities to play a role in this process runs the risk of subjecting cable's editorial and business decisions to a patchwork of conflicting requirements and regulatory schemes. Cable should continue to press for full legislative deregulation of this area. If this is not possible, then federal preemption, with residual FCC authority to police unreasonably denied leased access, may be preferable to fixed statutory set asides. Such a scheme would mandate that the FCC forbear from immediate regulation and would allow it to impose regulation should cable become a "dominant" or "bottleneck" facility with market power in the interactive, nonservice area.

The issue of cable's emerging role as a provider of two-way business and home services will remain the focal point of cable's agenda in the 1980's. The answers hammered out between the

210. *See id.* at § 614.

211. H.R. 4103, 98th Cong., 1st Sess. (Oct. 6, 1983).

212. *See, e.g., id.* at § 613.

213. H.R. 4103, § 602 (12) defines video programming as "programming provided by or generally considered comparabale to programming carried by a television broadcast station."

cable industry, the states, the cities, the FCC, and Congress will determine whether regulators will extend to this medium the procompetitive policies present in other telecommunications fields, or whether cable's promise as more than a pure entertainment medium will remain unfulfilled as a result of unnecessary regulatory barriers.