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HOME BOX OFFICE AND THE FCC'S REASONABLY ANCILLARY JURISDICTION

Uncontrolled access to the broadcast spectrum by radio entrepreneurs in the first two decades of this century virtually reduced that field to chaos.¹ Broadcasters selected transmission frequencies at will and blared out programming freely, inevitably resulting in a situation in which "nobody could be heard."² In response to this confusion, Congress enacted the Communications Act of 1934,³ which created the Federal Communications Commission (FCC), and gave it broad regulatory authority over the radio communications field.⁴ The principal purpose of the Commission was to control access to and use of the broadcast spectrum to promote public convenience, interest, or necessity.⁵ Congress thus designed the Commission to facilitate federal regulation of broadcasting, to prevent interference among those using the airwaves, and to allocate that scarce resource for the best practicable communications service.⁶

A rapidly developing communications technology, however, soon compounded the regulatory problems confronting the Commission.⁷ Not long after entering the field, broadcast television⁸ replaced radio as the dominant electronic communications medium. Like radio, broadcast television

¹ See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 375-76 (1969); Berman, *CATV Leased Access Channels and the FCC: The Intractable Jurisdiction Question*, 51 *NOTRE DAME LAW.* 145 (1975) [hereinafter cited as Berman].

² *National Broadcasting Co. v. United States*, 319 U.S. 190, 212 (1943).

³ Communications Act of 1934, ch. 652, 48 Stat. 1064 (1934) (current version at 47 U.S.C. §§ 151-609 (1970 & Supp. V 1975)).

⁴ The FCC's original authority encompassed all interstate and foreign communications by wire or radio including those by "writing, signs, signals, pictures, and sounds of all kinds." Communications Act of 1934, ch. 652, § 3(b), 48 Stat. 1065 (1934) (presently codified at 47 U.S.C. §§ 152(a), 153 (1970)).

⁵ See *National Broadcasting Co. v. United States*, 319 U.S. 190, 214-15, 217 (1943).

⁶ Congress regulated radio through the FCC to prevent signal interference and to allocate scarce spectrum space to broadcasters. Unrestricted access to and use of the broadcast spectrum by radio broadcasters had produced such distortion and overlapping of signals that communication was often impossible. Some coordination of the use of radio signals was imperative to avoid this signal interference. See Hagelin, *The First Amendment Stake in New Technology: The Broadcast-Cable Controversy*, 44 *U. CIN. L. REV.* 427, 440 (1975) [hereinafter cited as Hagelin]. In making its regulatory decision, Congress also recognized that the electromagnetic spectrum utilized by radio broadcasters is a physically limited natural resource. Since relatively few broadcasters could make use of the spectrum if communication were to be possible, the government determined in the Communications Act that the Commission should allocate use of the airwaves. See *S. REP. NO. 781*, 73d Cong., 2d Sess. 1-3 (1934); *H.R. REP. NO. 1918*, 73d Cong., 2d Sess. 19-23 (1934). Broadcasters gaining access to the spectrum thereby would enjoy a privilege, but would be required to use that privilege to serve the needs of the public. See Hagelin, *supra* at 441.

⁷ See *D. LEDUC, CABLE TELEVISION AND THE FCC* 55 (1973) [hereinafter cited as *LEDUC*].

⁸ Broadcast, or conventional, television transmits programming by radio signal through the broadcast spectrum. The programming may be received by anyone with proper television reception devices within the broadcast range. See *W. JONES, CASES AND MATERIALS ON ELECTRONIC MASS MEDIA* 1-2 (1976).

transmitted through the airwaves and therefore presented the same problems of unregulated electrical interference and spectrum scarcity that plagued early radio history.⁹ Because the FCC's statutory authority was founded on the allocation of the scarce radio broadcast spectrum and specifically encompassed radio transmissions of pictures,¹⁰ the Commission was the obvious regulatory authority to oversee broadcast television.¹¹ The Commission's regulatory problems increased even further with the appearance of community antenna television during the 1950's. Community antenna television, commonly known as cable TV, offered, for a fee, enhanced reception of broadcast signals in areas where broadcast signals were weak.¹² Unlike broadcast television, this system did not interfere with other communications services because it transmitted the signals by cable directly to subscribers' homes. Because cable TV transmitted by wire and made no demands on the broadcast spectrum, the FCC initially considered that medium to be beyond its jurisdiction.¹³ Broadcasters later applied the cable TV concept to over-the-air transmissions and offered subscription television (STV) to viewers, a service that made available to subscribers originally produced programming not carried over conventional broadcast TV.¹⁴ Subscription television broadcasted over the air, like conventional television, but scrambled the transmissions so that only subscribers paying

⁹ See LeDuc, *supra* note 7, at 55-56.

¹⁰ See note 4 *supra*.

¹¹ See Hoffer, *The Power of the FCC to Regulate Cable Pay-TV: Jurisdictional and Constitutional Limitations*, 53 DEN. L.J. 477 (1976) [hereinafter cited as Hoffer].

¹² A cable television system is

[a]ny facility that, in whole or in part, receives directly or indirectly over the air and amplifies or otherwise modifies the signals transmitting programs broadcast by one or more television or radio stations and distributes such signals by wire or cable to subscribing members of the public who pay for such service. . . . 47 C.F.R. § 76.5(a) (1976).

In a cable television system, a master antenna installed at a favorable location near the area to be served by the cable system receives signals from television stations and transmits them by wire to the cable serving the community. Customers' television sets are linked to the cable, and relay amplifiers located along the cable boost the signals to provide clearer reception. See *Carter Mountain Transm'n Corp. v. FCC*, 321 F.2d 359, 361 n.1 (D.C. Cir.), *aff'g* *Carter Mountain Transm'n Corp.*, 32 F.C.C. 459 (1962), *cert. denied*, 375 U.S. 951 (1963).

¹³ The FCC initially disclaimed regulatory authority over cable television, holding that Title II of the Communications Act, which grants the FCC regulatory authority over common carriers, did not extend to cable TV. See *Memorandum Opinion and Order*, 24 F.C.C. 251, 253-55 (1958). Furthermore, the Commission noted that because cable operations do not constitute broadcasting, such operations could not be regulated directly under Title III of the Act, which gave the FCC jurisdiction to regulate broadcasters. See *id.* at 255-56.

The Commission first asserted jurisdiction over cable television indirectly by regulating cable use of microwave common carriers. A common carrier in the communications field provides a means of communication to anyone wishing access. See 47 U.S.C. § 153(h) (1970). By restricting cable use of facilities clearly within FCC regulatory authority, the Commission indirectly could regulate cable TV to promote established goals in the field of television broadcasting. See *Carter Mountain Transm'n Corp.*, 32 F.C.C. 459, 465 (1962). For a historical development of FCC regulatory authority over cable television, see LaPierre, *Cable Television and the Promise of Programming Diversity*, 42 *FORDHAM L. REV.* 25, 36-89 (1973).

¹⁴ See *First Report*, 23 F.C.C.2d 532, 542-43 (1957).

a monthly fee for use of a decoding device could receive the transmissions in an intelligible form.¹⁵ By making use of the scarce broadcast spectrum, STV came within FCC regulatory jurisdiction,¹⁶ and the Commission, to ensure that STV would be distinct from conventional television,¹⁷ imposed rules on the new service restricting the type of programming that could be shown.¹⁸

Cable entrepreneurs also pursued the idea of subscription television and in 1972 began to offer a similar service called pay-cablecasting or pay-cable TV. In addition to bringing stronger broadcast signals to customers' homes, the cable system enabled a cable operator to cablecast¹⁹ selected programs through the system to customers willing to pay to receive such programming.²⁰ Services such as first-run movies could be shown for a small fee without editing or commercial interruption, turning each subscriber's home into a virtual "home box office."²¹ Because such programming originated with the cable operator and was transmitted to his customers solely by wire, this new service placed no demands on the limited broadcast spectrum. Nevertheless, the rise of this service alarmed broadcasters who feared that revenues generated by cable operations might enable cable systems to bid away, or "siphon",²² the most profitable programming avail-

¹⁵ See First Report and Order, 52 F.C.C.2d 1, 2 (1975). See generally Hoffer, *supra* note 11, at 479-80.

¹⁶ In 1955, the FCC invited comments from the public to determine whether the public interest would be served by authorizing television broadcast stations to transmit programming paid for on a subscription basis. See Notice of Proposed Rulemaking, 20 Fed. Reg. 988, 989 (1955). After reviewing these comments, the Commission concluded that the FCC had the power to license STV operations but required trial demonstrations of such a system before approving the service. First Report, 23 F.C.C. 532 (1957). After the requisite demonstrations, the Commission authorized a permanent, nationwide system of subscription television in 1968 and established rules governing the system. See Fourth Report and Order, 15 F.C.C.2d 466 (1968), *aff'd sub nom.*, National Ass'n of Theatre Owners v. FCC, 420 F.2d 194 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 922 (1970). Although four STV systems have been licensed since 1968, none are operating today. See Brief for Respondent FCC at 56-57 & n.58, Home Box Office, Inc. v. FCC, 567 F.2d 9 (D.C. Cir. 1977), *cert. denied*, 46 U.S.L.W. 3190-91 (U.S. October 4, 1977) (Nos. 76-1724, 76-1841, 76-1842).

¹⁷ The FCC authorized STV operations but imposed rules requiring the transmission on subscription channels of programming which would not merely duplicate programming already available on conventional television. Subscription television thus would be a beneficial supplement to existing television service. See Fourth Report and Order, 15 F.C.C.2d 466, 483-88 (1968). See also text accompanying notes 85-93 *infra*.

¹⁸ See Fourth Report and Order, 15 F.C.C.2d 466 (1968) (presently codified at 47 C.F.R. § 73.643 (1976)). See also text accompanying notes 85-93 *infra*.

¹⁹ Cablecast programming is programming originated by cable operators and received only by cable viewers. See *United States v. Midwest Video Corp.*, 406 U.S. 649, 653-54 (1972).

²⁰ See Hoffer, *supra* note 11, at 480-81.

²¹ *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 24 (D.C. Cir. 1977).

²² Siphoning describes the purchase of talent of programming from conventional television programming suppliers by subscription or cable television competing with the broadcast industry. *Id.* Hoffer, *supra* note 11, at 481. Both broadcasters and the Commission argue that cable operators, relying on subscriber revenues, will have sufficient economic strength to outbid commercially supported broadcast operators for the best television talent and programming. See First Report and Order, 52 F.C.C.2d 1, 72 (1975) (Statement of Commissioner

able.²³

To protect conventional television's programming sources and to ensure free public access to such programming, broadcasters asked the FCC to promulgate a series of "anti-siphoning" rules restricting the type of programming that may be cablecast for either a per-channel or per-program fee.²⁴ When the Commission initially considered imposing anti-siphoning rules on pay-cable TV, however, the FCC found no evidence substantiating charges of siphoning and concluded that no rules were needed.²⁵ Nevertheless, eight months later, before any pay-cable operations had begun, the Commission reversed itself, found that pay-cable presented a threat of siphoning to broadcast TV similar to that posed by subscription television, and extended program restraints governing STV to pay-cable TV.²⁶ The rule imposed on pay-cable by the FCC protected conventional broadcasters by restricting cablecasts of feature films, sports events, and commercial advertising by cable operators.²⁷

Glen O. Robinson dissenting and concurring); Memorandum Opinion and Order 23 F.C.C.2d 825, 828 (1970); Berman, *supra* note 1, at 176.

²³ See First Report and Order, 20 F.C.C.2d 201, 202 (1969). The most profitable programming available, and that which broadcasters feared was most subject to siphoning, includes feature films, sports events, and series programs, such as soap operas. See Memorandum Opinion and Order, 23 F.C.C.2d 825, 827-28 & n.6 (1970).

²⁴ See First Report and Order, 20 F.C.C.2d 201 (1969).

²⁵ *Id.* at 203.

²⁶ The FCC first imposed anti-siphoning rules on cable television in Memorandum Opinion and Order, 23 F.C.C.2d 825 (1970) (presently codified in 47 C.F.R. § 76.225 (1976), as amended by Second Report and Order, 35 RAD. REG. 2d (P&F) 767 (1975)). See Hoffer, *supra* note 11, at 480-81; Krasnow & Quale, *Developing Legal Issues in Cable Communications*, 24 CATH. L. REV. 677 (1975).

²⁷ The FCC limited cablecasting of feature films, sports events, and commercial advertising because such programming constitutes the bulk of broadcast fare and thus is most likely to be siphoned. See Memorandum Opinion and Order, 23 F.C.C.2d 825, 828 (1970). Under the rules, only those feature films which have been in general release in theatres for less than three years, for more than ten, or those to which a local broadcast station holds exhibition rights are available for pay-cablecasting. 47 C.F.R. § 76.225(a) (1976). Foreign films may be shown without regard to release date, provided they are not "dubbed" in English. *Id.* at § 76.225(a)(iv).

The rules divide sports programming into specific events (i.e., the World Series) and non-specific events (i.e., New York Yankees home games). A specific event which has appeared on conventional television during any of the five seasons preceding the proposed cablecast may not appear on pay-cable under the rules. *Id.* at § 76.255(b). If a regularly recurring event takes place at intervals greater than one year (i.e., the Olympics), then cablecasters may not exhibit the event unless conventional television has not shown the event for ten years. *Id.* Cablecasters may not transmit current specific sports events for five years from their creation. Thereafter, the general rule governing specific events applies. *Id.* The rules promulgate a complicated formula severely restricting the number of non-specific events that may be shown. See *id.* at §§ 76.225(b)(3)(i), (ii). For an analysis of this formula, see Brief for Respondent United States at 6-7, Home Box Office, Inc. v. FCC, 567 F.2d 9 (D.C. Cir. 1977). In addition, the combined pay-cablecast hours of film and sports material may not exceed ninety percent of total pay-cable programming. 47 C.F.R. § 76.225(c) (1976). Finally, the rules prohibit cable operators from carrying commercial advertising on their pay channels. *Id.* at § 76.225(d).

Immediately after imposition of the rules on pay-cable TV, Home Box Office, Inc. a national cable systems supplier, and several motion picture corporations petitioned the FCC for reconsideration.²⁸ Upon denial of the petitions by the Commission,²⁹ the Court of Appeals for the District of Columbia Circuit granted the parties a review of the rules.³⁰ In *Home Box Office, Inc. v. FCC*,³¹ these petitioners posed three issues: whether the Commission had exceeded its authority in promulgating the anti-siphoning rules; whether the rules violate petitioners' first amendment rights;³² and whether the rules are arbitrary and capricious.³³ After finding that the FCC had not established regulatory jurisdiction over pay-cable TV sufficient to support promulgation of the rules, the court vacated the rules imposed on cable operations.³⁴ Furthermore, the court found that the rules unnecessarily limited petitioners' first amendment rights³⁵ and constituted an arbitrary exercise of the Commission's power.³⁶

In addressing the jurisdictional question, the *Home Box Office* court

²⁸ See Memorandum Opinion and Order, 23 F.C.C.2d 825 (1970).

²⁹ See Notice of Proposed Rulemaking and Memorandum Opinion and Order, 35 F.C.C.2d 893 (1972).

³⁰ *Home Box Office, Inc. v. FCC*, 567 F.2d 9 (D.C. Cir. 1977). The court consolidated fifteen cases for purposes of argument and decision in *Home Box Office*.

Section 402 of the Communications Act authorizes appeal of the Commission's final anti-siphoning orders. 47 U.S.C. § 402(a) (1970). Jurisdiction over the action is granted by 28 U.S.C. § 2342 (1970) which provides in part that "[t]he court of appeals has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of—(1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of Title 47. . . ." See also Memorandum Opinion and Order, 51 F.C.C.2d 317 (1975), holding that the anti-siphoning rules were final and binding and would not be waived.

³¹ 567 F.2d 9 (D.C. Cir. 1977).

³² U.S. CONST. amend. I states in relevant part, "Congress shall make no law . . . abridging the freedom of speech or of the press."

³³ See *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 18, 40 (D.C. Cir. 1977).

³⁴ *Id.* at 34. Similar anti-siphoning rules governing STV and challenged in *Home Box Office* were left intact by the court. *Id.* at 59-60. See text accompanying notes 77-88 *infra*. Subsequent to *Home Box Office*, the FCC vacated the anti-siphoning rules imposed on STV. 46 U.S.L.W. 2339 (FCC January 3, 1978).

³⁵ See *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 50-51 (D.C. Cir. 1977).

³⁶ *Id.* at 40.

³⁷ *Id.* at 25-26. See text accompanying notes 3-13 *supra*.

³⁸ Communications Act of 1934, ch. 652, § 1, 48 Stat. 1064 (1934) (current version at 47 U.S.C. § 151 (1970)). The Supreme Court has stated that the basic goal of the first amendment, incorporated in the Communications Act, is to ensure "the widest possible dissemination of information from diverse and antagonistic sources. . . essential to the welfare of the public." *Associated Press v. United States*, 326 U.S. 1, 20 (1945). Pursuant to this policy, the FCC has regulated the communications industry to increase "the number of outlets for community self-expression and [augment] the public's choice of programs and types of services." First Report and Order, 20 F.C.C.2d 201, 202 (1969), *rev'd sub nom.* *Midwest Video Corp. v. United States*, 441 F.2d 1322 (8th Cir. 1971), *vacated*, 406 U.S. 649 (1972). These policies of diversity and localism have become important subgoals in the FCC regulatory plan. See note 43, *infra*.

noted that the traditional basis for FCC regulatory authority is missing because pay-cable TV makes no demands on scarce spectrum space.³⁷ The court, therefore, looked to the Communications Act and recent case law to define FCC regulatory authority in the cable field. Although the Communications Act charged the Commission with the development and regulation of a national and world-wide communications service,³⁸ FCC regulatory jurisdiction encompassed only broadcasters and common carriers.³⁹ In *United States v. Southwestern Cable Co.*⁴⁰ and *United States v. Midwest Video Corp.*,⁴¹ however, the Supreme Court reviewed FCC authority over cable television and held in both cases that the FCC may exercise authority over cable operations but only to the extent that such regulation is reasonably ancillary to the Commission's jurisdiction over the broadcast television industry.⁴²

In postulating the reasonably ancillary jurisdictional standard, the *Southwestern Cable* Court upheld FCC authority to prohibit cable importation of distant television signals.⁴³ Because cable television qualified as an instrument of interstate and foreign communication by wire within the

³⁹ See note 13 *supra*.

⁴⁰ 392 U.S. 157 (1968). In *Southwestern Cable*, the Court upheld FCC authority to prohibit the importation of "distant signals" into the San Diego television market by cable system operators to promote localism in broadcasting. *Id.* at 159-60; see note 43 *infra*. Distant signals are television signals beyond a viewer's normal reception range that may be received with the assistance of a cable television system. See 47 C.F.R. §§ 76.61, 76.63 (1976).

⁴¹ 406 U.S. 649 (1972). The Court in *Midwest Video* affirmed FCC authority to require cable operators to cablecast on certain channels programming produced exclusively for the cable system. *Id.* at 662-63. In upholding the regulatory action, the Court noted that the cablecasting requirement furthered Commission policies of program diversification and enhancement of local television service. *Id.* at 667-70.

⁴² *Id.* at 670; 392 U.S. at 178.

⁴³ The importation of distant television signals frustrated a long-held and congressionally approved objective of fostering the development of locally controlled broadcast television. See *United States v. Southwestern Cable Co.*, 392 U.S. 157, 174-75 (1968); Walsh, *CATV: Let the Cables Grow*, 55 MARQ. L. REV. 205, 214, 227 (1972) [hereinafter cited as Walsh]. For a criticism of the localism policy, see Hagelin, *supra* note 6, at 476, 503; Walsh, *supra*, at 229-31. The distant signals divided audiences and revenues in the local television market between the cable system and struggling UHF and educational stations. *United States v. Southwestern Cable Co.*, 392 U.S. 157, 173-76 (1968). Reduced audiences meant reduced revenues for community broadcast stations. See Report and Order, 26 F.C.C. 403, 413-25 (1959), *modified*, Carter Mountain Transm'n Corp., 32 F.C.C. 459, 465 (1962). The competitive effect of distant signals thus threatened the survival of local stations and warranted protective measures. See Comment, *Federal and State Regulation of Cable Television: An Analysis of the New FCC Rules*, 1971 DUKE L.J. 1151, 1156. The Commission, therefore, held that cable operators would not be allowed to extend broadcast signals beyond authorized areas at the expense of important regulatory policies. See Decision, 13 F.C.C.2d 478, 505 (1968).

In upholding FCC authority to regulate the importation of such signals, the *Southwestern Cable* Court noted that the Commission "has been charged with broad responsibilities for the orderly development of an appropriate system of local television broadcasting." 392 U.S. at 177. Since FCC authority over use of broadcast signals was also firmly established, the regulations in *Southwestern Cable* were a proper exercise of FCC jurisdiction.

meaning of section 152(a) of the Communications Act,⁴⁴ the Court held that the Commission could restrict cable use of broadcast signals.⁴⁵ Since the distant signal rules merely regulated use of television broadcast signals, the Court reasoned that this exercise of FCC authority was reasonably ancillary to the performance of the Commission's regulatory responsibilities over television broadcasting.⁴⁶ In executing those duties, the Commission could, therefore, issue necessary rules and regulations.⁴⁷

In *United States v. Midwest Video Corp.*,⁴⁸ the Supreme Court reconsidered and narrowly affirmed the *Southwestern Cable* construction of FCC authority over cable television. A four judge plurality adopted *Southwestern Cable's* "reasonably ancillary" standard as defining the limit of Commission jurisdiction over cable television⁴⁹ and affirmed FCC rules requiring cable operators to cablecast original programming on certain cable channels.⁵⁰ The plurality posited FCC jurisdiction on section 152(a) of the Communications Act⁵¹ but noted that the section establishes no proper regulatory objectives to support Commission jurisdiction over cable TV.⁵² The Court held that FCC jurisdiction over cable is reasonably ancillary to the regulation of broadcasting only if the regulatory action

⁴⁴ See note 4 *supra*. The programming received and distributed by cable systems is produced principally for and distributed to national television networks for eventual dissemination throughout the country. The *Southwestern Cable* Court thus found cable systems, insofar as they use broadcast signals, to be in the stream of interstate communication and thereby within the regulatory jurisdiction of the FCC. 392 U.S. at 168-69.

⁴⁵ 392 U.S. at 168-69.

⁴⁶ See *id.* at 175-78.

⁴⁷ *Id.* at 178. See 47 U.S.C. § 303(r) (1970) (granting the Commission general rulemaking authority). The Court, however, limited its holding to the specific facts and refused to define the limits of the Commission's authority to regulate cable television under § 152(a) because of the narrow jurisdictional question presented. 392 U.S. at 178. The two functions ascribed to cable television by the *Southwestern Cable* Court are facilitation of reception of local broadcast stations in adjacent areas and transmission of distant broadcast signals beyond the reception range of the community. *Id.* at 163. In carefully limiting the holding to the "circumstances" of the case and the rules promulgated, the Court restricted confirmation of FCC ancillary jurisdiction to the functions described above. See *Buckeye Cablevision, Inc. v. FCC*, 387 F.2d 220, 225 (D.C. Cir. 1967); Berman, *supra* note 1, at 153-54.

⁴⁸ 406 U.S. 649 (1972).

⁴⁹ *Id.* at 662-63.

⁵⁰ The rules, affirmed by the *Midwest Video* plurality, required a cable television system with 3500 or more subscribers to operate to a significant extent as a local TV outlet by cablecasting original programming and to make available cable TV facilities for local production and presentation of programming. *Id.* at 653-54. The Rules, originally codified at 47 C.F.R. § 76.201 (1973), were later rescinded by the Commission in Report and Order, 49 F.C.C.2d 1090 (1974). Although cablecasting would compete with local broadcast stations for audiences, the programming would also serve FCC regulatory goals of fostering the development of local television outlets and diversification of programming and types of services offered to the public. See notes 38 & 43 *supra*. Since the programming did not involve broadcast signals beyond an authorized range, the Commission held that the question of unfair competition did not arise. See Notice of Proposed Rulemaking and Notice of Inquiry, 15 F.C.C.2d 417, 421 (1968); Decision, 13 F.C.C.2d 478, 506 (1968).

⁵¹ 47 U.S.C. § 152(a) (1970). See 406 U.S. at 660-61; note 44 *supra*.

⁵² 406 U.S. at 661.

pursues a proper objective of the Communications Act.⁵³ The Commission can demonstrate that such an objective underlies a chosen regulatory action if that action will "further the achievement of long-established regulatory goals in the field of television broadcasting."⁵⁴ Because the rules challenged in *Midwest Video* required program origination by cable operators,⁵⁵ the plurality determined that the rules furthered FCC policies of program diversification and enhancement of locally controlled television service.⁵⁶ As such, the cable regulations served proper objectives of FCC regulatory authority and, therefore, came within the reasonably ancillary standard.⁵⁷

In *Southwestern Cable* and *Midwest Video*, the Supreme Court thus recognized and affirmed an expansive jurisdiction for the FCC based on section 152(a) of the Communications Act. Consistent with the spirit of the Act,⁵⁸ the Court accorded the FCC great flexibility and broad regulatory authority to enable the Commission to respond more readily to the rapidly changing technology of the communications industry.⁵⁹ Nevertheless, the Court circumscribed that discretion in both decisions by permitting the FCC to regulate cable television only when such action satisfied the purposes justifying federal regulation of broadcast TV.⁶⁰ Unless the Commission demonstrates that a regulation of cable television will further established goals in the field of television broadcasting, and, therefore, is reasonably ancillary to FCC authority over broadcasting, such regulation will not withstand judicial review.

⁵³ See *id.* at 667-70; text accompanying notes 3-6 *supra*.

⁵⁴ 406 U.S. at 667-68, quoting First Report and Order, 20 F.C.C.2d 201, 202 (1969). See notes 38 & 43 *supra*.

⁵⁵ See note 50 *supra*.

⁵⁶ Fostering diversity and development of localism in television service, both established FCC regulatory policies, underlie the Commission regulations in both *Southwestern Cable* and *Midwest Video*. The cablecasting requirement in *Midwest Video* was upheld as furthering Commission policies of fostering program diversity and developing local outlets for community expression. 406 U.S. at 667-70. See Brief for Petitioner Home Box Office, Inc. *et al.* at 55-56, *Home Box Office, Inc. v. FCC*, 567 F.2d 9 (D.C. Cir. 1977). See notes 40, 43 & 47 *supra*.

⁵⁷ See 406 U.S. at 667-70.

⁵⁸ See text accompanying notes 5-6, 38, 43 *supra*.

⁵⁹ See, e.g., *National Broadcasting Co. v. United States*, 319 U.S. 190, 219 (1943); *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940) (each construing Communications Act to allow FCC sufficient flexibility and authority to respond to rapidly changing communications technology).

⁶⁰ In neither *Southwestern Cable* nor *Midwest Video* did the Supreme Court authorize sweeping FCC authority over cable television as a whole, but rather the Court required that every assertion of jurisdiction over cable be justified independently as reasonably ancillary to the Commission's authority over broadcasting. See *United States v. Midwest Video Corp.*, 406 U.S. 649, 662-70 (1972); *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968). See also *National Ass'n of Regulatory Utility Comm'rs. v. FCC*, 533 F.2d 601, 612-13 (D.C. Cir. 1976). The FCC admits that its authority does not extend to any and all enterprises which may be connected with some aspect of communications. Regulatory authority over operations related to broadcasting may be exercised by the Commission only if such an exercise is ancillary to FCC authority over broadcasting. The Commission thus claims no "plenary power" over cable television. See Report and Order, 26 F.C.C. 403, 429 (1959).

The *Home Box Office* court applied the FCC jurisdictional standard defined in *Southwestern Cable* and *Midwest Video* to the anti-siphoning rules regulating pay-cablecast programming by inquiring whether the rules furthered an established goal in the regulation of broadcasting.⁶¹ The D.C. Circuit noted that established Commission policy regarding regulation of broadcast programming allows conventional TV broadcasters full discretion in selection of programming.⁶² Although the Commission must strike a balance between maintaining a competitive broadcast system and placing restraints on broadcasters to serve the public interest,⁶³ the FCC has not attempted to control program content.⁶⁴ The *Home Box Office* court observed that although the Commission argued that the first amendment and the anti-censorship provisions of the Communications Act⁶⁵ "strip it of any authority to require or to prohibit [the] broadcast of any particular material,"⁶⁶ the FCC has not avoided entirely the question of program content restraint. Under certain circumstances, the D.C. Circuit has required FCC regulation of programming. In *Citizens Committee to Save WEFM v. FCC*,⁶⁷ for example, that court held that the FCC must determine whether the assignment of radio license, resulting in the loss of an entire program format, would serve the public interest.⁶⁸ Because such a

⁶¹ See *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 28-29 (D.C. Cir. 1977). The *Home Box Office* court noted that the *Southwestern Cable* analysis of FCC regulation of competition between cablecasters and broadcasters was not applicable to the *Home Box Office* facts because the FCC did not allege that pay-cable operations would divide audiences and revenues to such an extent as to threaten the existence of broadcast stations. *Id.* at 29; see note 43 *supra*.

⁶² *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 29-30 (D.C. Cir. 1977). The Commission has stated that agency regulation of programming is unnecessary because public acceptance and economic necessity alone will force broadcasters to meet a community's programming needs. See Memorandum Opinion and Order, 40 F.C.C.2d 223, 230 (1973), cited with approval in Notice of Inquiry, 57 F.C.C.2d 580, 580-81 (1976).

⁶³ See *Network Programming Inquiry*, 25 Fed. Reg. 7291, 7293 (1960).

⁶⁴ In restricting cable use of common carrier facilities prior to *Home Box Office*, the FCC insisted that it was not "acting in any fashion which would constitute 'censorship.'" Decision, 32 F.C.C. 459, 462 (1962).

⁶⁵ The Communications Act provides that the FCC has no power to censor radio communications and may in no way interfere with the right of free speech through such communications. See 47 U.S.C. § 326 (1970).

⁶⁶ *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 30 (D.C. Cir. 1977). See *In re Request by Hon. Ronald Reagan*, 38 F.C.C.2d 378 (1972) (refusing to prohibit broadcast of national elections projections). The Commission may regulate broadcasting in limited respects but may not engage in censorship. See, e.g., *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 396 (1969); *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940).

⁶⁷ 506 F.2d 246 (D.C. Cir. 1974).

⁶⁸ *Id.* In *WEFM*, the court reviewed FCC approval of a radio license assignment to a purchaser. *Id.* at 249. Upon Commission approval of the assignment, the purchaser intended to change the radio station's program format from classical to rock music. *Id.* at 249. Because such a change would result in the loss of a type of programming, the *WEFM* court held that the FCC had the authority and duty to determine whether such an assignment would serve the public interest. *Id.* at 262. The *WEFM* court noted, however, that the loss of specific programs through competition should not be considered in establishing regulatory policy. The court therefore held that the only valid policy consideration to regulation of programming is the loss of entire program formats due to a licensing assignment. See *id.* at 250.

finding became prerequisite to approval of the license assignment,⁶⁹ the FCC was forced to regulate programming, at least to a limited extent, in contravention of its established policy.

Although since *WEFM*, the FCC has made public interest findings concerning assignments of radio licenses, which involved the FCC in the regulation of programming to a limited degree, the Commission insists that it has no statutory authority to regulate program formats.⁷⁰ The Commission, therefore, continues to allow conventional broadcasters complete freedom in program selection.⁷¹ Since the anti-siphoning rules imposed on pay-cable TV regulate program content contrary to the Commission's own established broadcasting regulatory policy,⁷² the *Home Box Office* court held that the rules serve no proper objective of the Communications Act and thus are beyond the FCC's reasonably ancillary jurisdiction over cable.⁷³ Although holding that the FCC had not sufficiently established jurisdiction over pay-cable to justify promulgation of the anti-siphoning rules, the *Home Box Office* court did not require the Commission to support FCC rulemaking with specific statutory authority.⁷⁴ The court's decision effectively will require the Commission to demonstrate that any regulation of cable television serves a purpose for which the FCC legitimately can regulate conventional broadcasting operations.⁷⁵ By showing that a

⁶⁹ *Id.* at 262.

⁷⁰ See Memorandum Opinion and Order, 60 F.C.C.2d 858, 859-61, 865-66 (1976). The Commission argued that regulation of broadcast programming is analogous to imposing common carrier responsibilities on broadcasters. *Id.* at 860. The Communications Act requires common carriers to obtain FCC approval to commence or discontinue communications services. See 47 U.S.C. § 214 (1970 & Supp. 1975). The Act specifically excludes broadcasters from common carrier status, *id.* at § 153(h), and does not require them to obtain FCC permission to commence or discontinue programming. Memorandum Opinion and Order, 60 F.C.C.2d 858, 859 (1976). The Commission argues that by directing the FCC to regulate broadcast programming, the court imposed common carrier obligations on broadcasters while the Communications Act had specifically excluded them from such obligations. *Id.*

⁷¹ See Notice of Inquiry, 57 F.C.C.2d 580, 580-81 (1976). By allowing broadcasters freedom in programming selection, the Commission does not violate the directive of *WEFM*. *WEFM* only requires the FCC to determine whether a license assignment, resulting in the loss of an entire program format, would serve the public interest. See note 68 *supra*.

⁷² The Commission has stated that the anti-siphoning rules seek to ensure that films shown on pay-cable are so recent that they will not appear on broadcast television. The rules also eliminate competition between cablecasters and broadcasters for the same programming by limiting the programming available to pay-cable. See Memorandum Opinion and Order, 51 F.C.C.2d 317, 322 (1975). See also First Report and Order, 52 F.C.C.2d 1, 55 (1975).

⁷³ See *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 31-32 (D.C. Cir. 1977).

⁷⁴ *Id.* at 34. The court in *Home Box Office* held that to construe the Communications Act to require specific statutory support for FCC regulatory action would defeat the congressional purpose of according the Commission sufficient flexibility to enable the agency to respond readily to the rapidly changing communications industry. *Id.* at 34. See *United States v. Southwestern Cable Co.*, 392 U.S. 157, 172-73 (1968); *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940).

⁷⁵ Although the *Home Box Office* court recognized that the FCC's authority over communications is broad and flexible, the court held that the Commission may regulate pay-cable

cable regulation furthers an established goal for which the Commission can regulate broadcasting, the FCC will establish that the regulation serves a proper objective of the Communications Act⁷⁶ and thus is within the reasonably ancillary standard adopted in *Southwestern Cable* and *Midwest Video*.⁷⁷

After vacating the anti-siphoning rules because the Commission failed to establish jurisdiction, the *Home Box Office* court, to avoid multiple remands, chose to address petitioners' charges that the rules violate the first amendment and are arbitrary and capricious.⁷⁸ Petitioners alleged that the FCC had impaired cablecasters' first amendment rights by restricting without justifiable cause the programming available to pay-cable systems.⁷⁹ The FCC responded that *National Association of Theatre Owners v. FCC*,⁸⁰ which upheld similar but more stringent subscription television rules⁸¹ in the face of a first amendment attack, likewise supported the constitutionality of the cable rules.⁸² The *Home Box Office* court held, however, that the *NATO* decision does not support limitations on first amendment rights of cablecasters.⁸³ The court reasoned that because the regulatory problems created by scarce spectrum space, central to the analysis in *NATO*, are missing in the pay-cable context, the restrictions on first amendment rights approved in *NATO* may not be extended to pay-cable operators.⁸⁴

The question addressed in *NATO* was whether first amendment prohibitions of limitations on freedom of speech are violated by conditioning the grant of a television broadcast license on the type of programming to be offered to the public.⁸⁵ The grant of a broadcast license necessitates alloca-

TV only after establishing that such an exercise of regulatory power falls within the reasonably ancillary standard. *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 34 (D.C. Cir. 1977); accord, *United States v. Midwest Video Corp.*, 406 U.S. 649, 667-68 (1972). See also text accompanying notes 50, 55 & 60 *supra*.

⁷⁶ See *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 34 (D.C. Cir. 1977).

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ See Brief for Petitioners *Home Box Office, Inc., et al.* at 30-33.

⁸⁰ 420 F.2d 194 (D.C. Cir. 1969), cert. denied, 397 U.S. 922 (1970). Theatre owners in *NATO* sought to block Commission authorization of subscription television operations by arguing that § 151 of the Communications Act, see text accompanying note 16 *supra*, prohibits the Commission from withdrawing any of the limited channels of the broadcast spectrum for use only by those willing to pay to receive programming. 420 F.2d at 198, 200. The D.C. Circuit, however, affirmed FCC authorization of STV operations. *Id.* at 208; see note 34 *supra*.

⁸¹ In *NATO*, the D.C. Circuit affirmed substantially the same anti-siphoning rules at issue in *Home Box Office* against challenges by STV operators. 420 F.2d at 207-08. The FCC argued that the first amendment analysis governing the *NATO* court's decision, see text accompanying notes 85-93 *infra*, should apply with equal force in the cable context. Brief for Respondent FCC at 32-33, 40-41, *Home Box Office, Inc. v. FCC*, 567 F.2d 9 (D.C. Cir. 1977).

⁸² Brief for Respondent FCC at 32-35, 37-38, 40-41.

⁸³ *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 43-44 (D.C. Cir. 1977).

⁸⁴ *Id.* at 44-45.

⁸⁵ *National Ass'n of Theatre Owners v. FCC*, 420 F.2d 194, 207 (D.C. Cir. 1969).

tion of spectrum space to one of the many persons seeking access to that limited resource.⁸⁶ In making such a grant, the FCC seeks to develop a diverse and uninhibited broadcast service.⁸⁷ In the regulatory action which gave rise to *NATO*, the FCC had determined that the allocation of one of the few broadcast channels to a private subscription service would be justified only if the service's programming would be distinct from that already available on conventional television.⁸⁸ Thus, the FCC had imposed anti-siphoning rules on subscription television to ensure that subscription programming would better serve the community by offering diverse programming and not merely duplicate "free" or conventional TV.⁸⁹ Because of the necessity of allocating limited spectrum space,⁹⁰ the *NATO* court affirmed the conditioned licensing and the STV anti-siphoning rules.⁹¹ By approving a licensing process that includes comparative considerations as to the type of programming to be offered by the proposed broadcaster,⁹² the *NATO* court thus enabled the FCC to grant licenses to persons who will provide diverse programming and alternative services to the public, thereby improving the overall communications service.⁹³

Programming considerations governing allocation of scarce spectrum space and television licenses, the basis of FCC regulation of broadcast television, are not applicable to the cable industry. As the *Home Box Office* court recognized, problems requiring government allocation, such as electrical interference among stations and scarce spectrum space, are absent.⁹⁴ The ability of cable to be subdivided into channels eliminates any possible interference between stations or programs in a cable system.

⁸⁶ See *National Broadcasting Co. v. United States*, 319 U.S. 190, 216 (1943).

⁸⁷ See *National Ass'n of Theatre Owners v. FCC*, 420 F.2d 194, 207 (D.C. Cir. 1969).

⁸⁸ See Fourth Report and Order, 15 F.C.C.2d 466, 484 (1968).

⁸⁹ *Id.*; see *National Ass'n of Theatre Owners v. FCC*, 420 F.2d 194, 207-08 (D.C. Cir. 1969).

⁹⁰ See text accompanying notes 1-6 *supra*.

⁹¹ See *National Broadcasting Co. v. United States*, 319 U.S. 190, 226 (1943).

⁹² The *NATO* court relied on *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943), in which the Supreme Court held that the scarcity of broadcast channels allows restrictions on first amendment rights of broadcasters and an allocation plan designed to provide the best possible communications service, see *id.* at 216; *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940); *National Ass'n of Theatre Owners v. FCC*, 420 F.2d 190, 207-08 (D.C. Cir. 1969). In *National Broadcasting Co.*, the Supreme Court affirmed chain broadcasting regulations promulgated by the FCC. The regulations attacked allegedly anti-competitive practices by network broadcasters which restricted the control local affiliates exercised over programming. 319 U.S. 190, 197-209 (1943). By denying broadcast licenses to radio stations engaging in such practices, the regulations practically countered their effect. In dismissing network claims that the regulations abridged free speech, the Court recognized that the FCC has a duty under the Communications Act to allocate scarce spectrum space to ensure the best practicable communications service for each community. *Id.* at 216-17. Because broadcasters seek access to this limited resource at the expense of others, the Court held that the Constitution permits a requirement that broadcasters using the airwaves serve the public interest as defined by the FCC. *Id.* at 216-17, 226-27.

⁹³ See *National Ass'n of Theatre Owners v. FCC*, 420 F.2d 194, 208 (D.C. Cir. 1969).

⁹⁴ *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 44-45 (D.C. Cir. 1977); see Hoffer, *supra* note 11, at 492; Note, *Cable Television and the First Amendment*, 71 COLUM. L. REV. 1008, 1018 (1971) [hereinafter cited as *Cable TV and the First Amendment*].

Cable operators control channel access and programming. Furthermore, cable technology eliminates the problem of limited channel capacity. While cable systems presently are required to have a capacity of at least twenty channels,⁹⁵ available technology can expand capacity to eighty channels, and future channel capacity may be unlimited.⁹⁶ Thus, the scarcity rationale justifying governmental licensing control breaks down in the cable field.⁹⁷ Because pay-cable makes no use of scarce spectrum space, no underlying support exists that justifies FCC programming restrictions similar to those limiting the first amendment rights of STV operators. Cable's multiplicity of channels obviates any need for government allocation of a limited communications resource. Absent a substantial governmental interest,⁹⁸ therefore, restrictions on the first amendment rights of pay-cable

⁹⁵ 47 C.F.R. § 76.252(a)(1) (1976).

⁹⁶ See Note, *The Limits of Broadcast Self-Regulation Under the First Amendment*, 27 STANFORD L. REV. 1527, 1542 n.67 (1975).

⁹⁷ See *Cable TV and the First Amendment*, *supra* note 94, at 1020. The NATO court permitted the FCC to restrict STV programming to ensure that subscription service would provide a beneficial supplement to conventional television. See text accompanying notes 88-93 *supra*. With the anti-siphoning rules challenged in *Home Box Office*, the Commission attempted to relegate pay-cablecasting to a similar role. See First Report and Order, 52 F.C.C.2d 1, 5 (1975); Memorandum Opinion and Order, 35 F.C.C.2d 891, 898 (1972). The Commission, however, never explained why pay-cable should serve merely as a supplement to broadcast television, and no reason is readily apparent. *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 36 (D.C. Cir. 1977).

In *Home Box Office*, the FCC admitted that pay-cable makes no use of the broadcast spectrum but insisted that such use is not central to the validity of pay-cable regulations. See Brief for Respondent FCC at 35. The Commission argued that the anti-siphoning rules serve a broadcast purpose and promote the public interest, relying on *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972) and *ACLU v. FCC*, 523 F.2d 1344 (9th Cir. 1975) for support. Brief for Respondent FCC at 35 & n.37. The Commission's reliance on these cases, however, was misplaced. Both cases concerned FCC rules designed to promote diversity and increase the quantity of programming available to a community. *United States v. Midwest Video Corp.*, 406 U.S. 649, 654-55 (1972); *ACLU v. FCC*, 523 F.2d 1344, 1348-49 (9th Cir. 1975). Neither decision contemplated restrictions on pay-cable programming, the essence of the rules challenged in *Home Box Office*. See Comment, *Regulation of Pay Cable and Closed Circuit Movies: No Room in the Wasteland*, 40 U. CHI. L. REV. 600, 616 (1973). The court in *Home Box Office* thus held that absent a need for restrictions on first amendment rights, such as public access to a limited communications resource, the scarcity theory espoused in *National Broadcasting Co.* will not support FCC regulatory action over pay-cable. *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 44-46 (D.C. Cir. 1977).

⁹⁸ A regulation may be justified if the regulation serves an important and substantial governmental interest that is unrelated to the suppression of free expression and if the restrictions are no greater than necessary to serve that interest. *United States v. O'Brien*, 391 U.S. 367, 377 (1968). The defendant in *O'Brien* was convicted of burning his selective service registration certificate in violation of federal law. *Id.* at 369. The defendant argued that burning the certificate was "symbolic speech" communicating his protest of the war in Vietnam, and thus protected by the first amendment. *Id.* at 376. The Court affirmed defendant's conviction and held that the challenged law facilitated operation of the selective service system. *Id.* at 382, 386. Since the law furthered the substantial governmental interest of ensuring the availability of registration certificates for use by the selective service system, and since the infringement on defendant's first amendment rights was no greater than essential to further that interest, the Court found the law consistent with the first amendment.

operators cannot stand.⁹⁹

In addition to the first amendment challenge, the petitioners in *Home Box Office* attacked the anti-siphoning rules by arguing that promulgation of the rules constituted arbitrary and capricious action by the FCC.¹⁰⁰ As a product of informal rulemaking under section 303 of the Communications Act,¹⁰¹ the anti-siphoning rules are subject to reversal by a reviewing court only if found to be arbitrary, capricious, or otherwise not in accordance with law.¹⁰² To satisfy this measure, however, the Commission must prove

Id. at 377-78; 381-82. See generally Alfange, *Free Speech And Symbolic Conduct: The Draft Card Burning Case*, 1968 SUP. CT. REV. 1; Velvel, *Freedom of Speech And The Draft Card Burning Cases*, 16 U. KAN. L. REV. 149 (1968).

⁹⁹ The NATO court affirmed program restraints imposed on STV by which the FCC sought to allocate the limited broadcast spectrum to promote diversity and ensure that subscription television did not merely duplicate conventional TV. *National Ass'n of Theatre Owners v. FCC*, 420 F.2d 194, 207-08 (D.C. Cir. 1969). Because the restraints served the substantial governmental interest of fostering a diverse communications system while efficiently allocating the scarce broadcast spectrum, the rules were affirmed. See *id.* This interest is missing in the cable context.

¹⁰⁰ Brief for Petitioner's Home Box Office, Inc. *et al.* at 58, *Home Box Office, Inc. v. FCC*, 567 F.2d 9 (D.C. Cir. 1977).

¹⁰¹ See 47 U.S.C. § 303(r) (1970). All federal rulemaking is subject to the Administrative Procedure Act, 5 U.S.C. §§ 551-706 (1970 & Supp. 1975). Four types of agency regulation are created by the Act; in descending order of procedural formality, they are: (1) adjudication, *id.* at § 554, (4) formal rulemaking, *id.* at §§ 556-57, (3) informal rulemaking, *id.* at § 553(c), (4) non-formalized decisionmaking, *id.* at §§ 553(a)(b). See Note, *Judicial Review of the Facts in Informal Rulemaking: A Proposed Standard*, 84 YALE L.J. 1750, 1751 n.5 (1975) [hereinafter cited as *Judicial Review of the Facts*].

Formal adjudication and informal rulemaking are the two most common types of agency action. Formal adjudication requires a quasi-judicial hearing before an administrative law judge. 5 U.S.C. § 554 (1970). By contrast, informal rulemaking simply requires notice of a hearing, an opportunity for interested persons to comment, and a concise statement from the agency of the basis and purpose of the rules adopted. 5 U.S.C. § 553(c) (Supp. 1975). See Pedersen, *Formal Records and Informal Rulemaking*, 85 YALE L.J. 38, 40 (1975) [hereinafter cited as Pedersen]. Section 553(c) of the Administrative Procedure Act provides that when rules are required by statute to be "made on the record," formal rulemaking procedures must be observed. 5 U.S.C. § 553(c) (Supp. 1975). Nevertheless, section 303(a) of the Communications Act, which authorizes FCC rulemaking, does not require that the rules of that agency be made on the record. Thus, Commission rules constitute informal rulemaking and are subject to review. See note 102 *infra*. See generally Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review*, 59 CORNELL L. REV. 375 (1974); Verkuil, *Judicial Review of Informal Rulemaking*, 60 VA. L. REV. 185 (1974).

¹⁰² The appropriate standard of review of informal rulemaking is a confused area of administrative law and in reality may be a question of form over substance. One question raised on review of the anti-siphoning rules in *Home Box Office* was whether informal rulemaking is subject to review under the "arbitrary or capricious" standard or under the "substantial evidence" standard. See *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 34-35 (D.C. Cir. 1977). The simple response is that the substantial evidence standard of review governs only rulemaking meeting the formal procedural requirements of §§ 556-557 of the Administrative Procedure Act. The arbitrary or capricious standard, on the other hand, controls review of informal rulemaking. Because FCC informal rulemaking need not meet the procedural requirements of formal rulemaking, informal Commission action should be reviewed under the "arbitrary or capricious" standard. See *id.* at §§ 553, 706(A), (E); see, e.g., *Camp v. Pitts*, 411 U.S. 138 141 (1973); *National Nutritional Foods Ass'n v. Weinberger*, 512

that the regulation is necessary, because a regulation, although reasonable when considered alone, is capricious if the problem to be remedied does not exist.¹⁰³ Relying on this standard, the *Home Box Office* court examined the need for regulations¹⁰⁴ by questioning whether the record showed that siphoning would occur in the absence of any regulation.¹⁰⁵

Although judicial review of the Commission's rulemaking required a showing of necessity, the court found that the FCC supported the charge of siphoning with "scanty" evidence.¹⁰⁶ After previously dismissing broad-

F.2d 688, 700 (2d Cir.), *cert. denied*, 423 U.S. 827 (1975). See also Pedersen, *supra* note 101, at 48 n.48 and cases cited therein.

Although the substantial evidence standard governs judicial review of formal rulemaking under § 706(E), that standard also applies under the language of the statute to agency action "otherwise reviewed on the record of an agency hearing provided by statute." 5 U.S.C. § 706(E) (1970). Because informal rulemaking produces a record, the cited language arguably refers to informal rulemaking. See *Judicial Review of the Facts*, *supra* note 101, at 1752. The Supreme Court has not ruled directly on the reviewing courts, including the Supreme Court, however, repeatedly have applied the substantial evidence rule to informal agency rulemaking. See, e.g., *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 746 & 753 (1972); *United States v. Midwest Video Corp.*, 406 U.S. 649, 761, 763 (1972); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 414 (1971); *Chrysler Corp. v. Department of Transp.*, 472 F.2d 659, 667-68 (6th Cir. 1972). See also *Judicial Review of the Facts*, *supra* note 101, at 1753 & n.19. This apparent confusion among the courts raises the question whether the standard chosen and applied has any effect on the outcome of an appeal. Several courts have noted that as the scrutiny of agency action intensifies, the standards applied on review seem to merge. See *National Nutritional Foods Ass'n v. Weinberger*, 512 F.2d 688, 705 (2d Cir. 1975) (Lumbard, J., concurring); *Bunny Bear, Inc. v. Peterson*, 473 F.2d 1002, 1006 (1st Cir. 1973). See also Pederson, *supra* note 101, at 1758 n.42.

The FCC action in *Home Box Office* was subjected to a standard of review more deferential to Commission discretion than such an action would have received under the substantial evidence test because the arbitrary or capricious standard involves a less rigorous scrutiny of agency action. See *Ethyl Corp. v. EPA*, 541 F.2d 1, 37 n.79 (D.C. Cir.), *cert. denied*, 421 U.S. 941 (1976). Since the agency action was vacated, choice of standard apparently had no effect on the outcome of the case.

¹⁰³ *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 36 (D.C. Cir. 1977), quoting *City of Chicago v. FPC*, 458 F.2d 731, 742 (D.C. Cir. 1971). See Brief for Petitioner *Home Box Office, Inc. et al.* at 60.

¹⁰⁴ Although a court may not substitute its judgment for that of an agency, it must conduct a searching and careful review. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415-16 (1971). A court reviewing an agency action must enforce all pertinent procedural requirements. *Id.* at 417; *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 (D.C. Cir. 1977). The court also must examine the evidence supporting the action and determine whether it adequately justifies the agency's decision. *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 850 (D.C. Cir. 1970); *cert. denied*, 403 U.S. 923 (1971). See *Ethyl Corp. v. EPA*, 541 F.2d 1, 34-36 (D.C. Cir. 1976); *National Ass'n of Food Chains, Inc. v. ICC*, 535 F.2d 1308, 1314-15 (D.C. Cir. 1976). Furthermore, the court must ensure that the agency adequately has considered all relevant factors and has demonstrated a "rational connection between the facts found and the choice made." *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 (D.C. Cir. 1977), quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962); see *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

¹⁰⁵ *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 37 (D.C. Cir. 1977).

¹⁰⁶ *Id.* at 37.

casters' claims of potential siphoning by pay-cable,¹⁰⁷ the FCC later imposed anti-siphoning rules on cable television¹⁰⁸ without presenting evidence warranting this sudden and radical change of policy.¹⁰⁹ To explain the change and substantiate the charge of siphoning, the Commission introduced evidence in *Home Box Office* that championship boxing matches and a motorcycle stunt had appeared exclusively on pay-cable.¹¹⁰ Arguably, such instances of siphoning do support the FCC's contention that specific sports events may be bidden away from conventional television.¹¹¹ The court properly recognized however, that this evidence does not address the issue of pay-cable's impact on the distribution market of feature films and non-specific sports events.¹¹² Moreover, reliance on these instances to maintain a charge of future widespread siphoning by unregulated pay-cable ignores the likelihood of increased supply of original programming from production studios in response to growing market demands.¹¹³

The Commission also pointed to mathematical models prepared by broadcasters to demonstrate the potential siphoning ability of pay-cable.¹¹⁴

¹⁰⁷ The Commission held that broadcasters and cable originators stand on the same footing in acquiring programming. First Report and Order, 20 F.C.C.2d 201, 203 (1969). See text accompanying notes 24-27 *supra*.

¹⁰⁸ See text accompanying notes 26-27 *supra*.

¹⁰⁹ The Commission simply stated that "[r]emedial action in this action should not wait upon the threat becoming an actuality." Memorandum Opinion and Order, 23 F.C.C.2d 825, 828 (1970). Agency action based on the risk of harm, rather than on factual proof of the harm, has been sustained in certain situations. See, e.g., *Reserve Mining Co. v. EPA*, 514 F.2d 492, 507 (8th Cir. 1975) (approving agency action regulating air and water pollution); *Industrial Union Dept. v. Hodgson*, 499 F.2d 467, 474-76 (D.C. Cir. 1974) (approving agency rule setting safety level for concentrations of asbestos particles). Such cases, however, deal with rulemaking based on information at the fringe of scientific knowledge, where the consequences of actions affecting the health of the public and the environment are difficult to predict or reverse. Thus, more deference should be paid to the judgment of an agency in those areas. The consequences of actions affecting the marketplace are more easily measured, more predictable, and may be stopped or reversed more readily. In such circumstances more concrete evidence substantiating any rulemaking should be required. See Pederson, *supra* note 101, at 49-50.

¹¹⁰ See *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 37 (D.C. Cir. 1977); First Report and Order, 52 F.C.C.2d 1, 9 (1975).

¹¹¹ Because pay-cable systems have secured, in the past, exclusive exhibition rights to specific sports events, such as championship boxing matches, the systems have demonstrated sufficient purchasing power to siphon at least some programming from conventional television. See Brief for Respondent FCC at 55.

¹¹² *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 37 (D.C. Cir. 1977). The evidence of siphoning presented by the FCC in *Home Box Office* concerned specific sports events only. Because the evidence is so limited, no general conclusions can be drawn as to the likelihood of siphoning of feature films and non-specific sports events by pay-cable TV. *Id.*

¹¹³ When the rule banning series programs from pay-cable was deleted, the Commission acknowledged that increased demand for programming arising from competition by pay-cable would result in increased supply from production studios. See Second Report and Order, 35 RAD. REG. 2d (P&F) 767, 771-72 (1975). In spite of such a finding, the Commission has not applied the same logic to programming restricted by present anti-siphoning rules. See First Report and Order, 52 F.C.C.2d 1, 17 (1975).

The models projected the growth of pay-cable services and revenues and revealed that projected revenues would enable pay-cablecasting regularly to outbid broadcast networks for the most profitable programming.¹¹⁵ Because the figures used by those models are incommensurate, however, these conclusions are distorted.¹¹⁶ The conventional broadcasters who developed the models computed total cable revenues for 1980 based on projections of the rate of pay-cable growth throughout the country and then compared that figure with network expenditures in 1972.¹¹⁷ As the court noted, such use of figures not only improperly sets speculated future income against past expenses, but also ignores the question of whether broadcast television will be able to increase spending for feature films and sports programming without reducing profits below a competitive return.¹¹⁸

¹¹⁴ Home Box Office, Inc. v. FCC, 567 F.2d 9, 37-38 (D.C. Cir. 1977), quoting First Report and Order, 52 F.C.C.2d 1, 9-10 (1975).

¹¹⁵ *Id.*

¹¹⁶ Home Box Office, Inc. v. FCC, 567 F.2d 9, 38-39 (D.C. Cir. 1977).

¹¹⁷ *Id.*

¹¹⁸ The networks' mathematical models predicted fantastic growth for pay-cable and revealed that by 1980 pay-cablecasters will be able systematically to outbid conventional television for the best TV programming. Brief for Respondent FCC at 12 n.14, Home Box Office, Inc. v. FCC, 567 F.2d 9 (D.C. Cir. 1977). The Commission accepted those predictions without questioning whether such growth in pay-cablecasting actually will occur, and, if so, whether broadcasters will be able to compete for programming. Home Box Office, Inc. alleged that conventional television currently reaches 70,000,000 homes and has present annual revenues of \$4.5 billion and projected annual revenues of \$7 billion by 1980. Brief for Petitioners Home Box Office, Inc., *et al.* at 60. Pay-cable, on the other hand, claims only 400,000 subscribers, approximately ½ of 1 percent of commercial television. *Id.* Even with one million subscribers, pay-cable operators would have a maximum of \$2,400,000 monthly for the purchase of 8 feature films to be shown nationwide, an average of \$300,000 per film. See First Report and Order, 52 F.C.C.2d 1, 16 (1975). The average film purchased by networks in 1973, by contrast, cost \$750,000 and an additional \$250,000 to independent stations in syndication rights. *Id.* Given the disparity between prices paid by conventional television and the economic resources of pay-cable, siphoning is pure fiction. *Id.* Predictions of great economic power of pay-cable ignore "the high capital and labor costs to the cable industry; the division of revenues among program suppliers, channel lessee, and system operator; the multiplicity of operators purchasing different programs; and the impossibility that all subscribers would want to watch the same programs." *Id.* Each factor will work to divide whatever economic power pay-cable might accumulate, thus rendering competition by pay-cable still less a threat to broadcast television.

Even if pay-cable acquires significant economic power, conventional television may still be able to compete effectively in the program distribution market. As the *Home Box Office* court noted, this question was not even considered by the Commission before promulgating the anti-siphoning rules. Home Box Office, Inc. v. FCC, 567 F.2d 9, 39 (D.C. Cir. 1977). In 1969, broadcast television enjoyed a 20 percent return on sales, well above the average 8 percent enjoyed by other industry. See R. NOLL, M. PECK, J. MCGOWAN, *ECONOMIC ASPECTS OF TELEVISION REGULATION*, 16 (1973); Hagelin, *supra* note 6, at 477. Broadcasters can arguably use a portion of such apparently monopolistic profits to meet the competitive challenge for programming raised by pay-cable. Because the Commission imposed the anti-siphoning rules without considering the ability of broadcasters to compete with cable, the court properly held that any conclusion the FCC might draw from the evidence before it would be arbitrary. Home Box Office, Inc. v. FCC, 567 F.2d 9, 38-39 (D.C. Cir. 1977).

Because these defective models were at the heart of the Commission's contention that siphoning would occur,¹¹⁹ the court held that any regulatory action taken in reliance on such models would be arbitrary.¹²⁰ The *Home Box Office* court thus found the anti-siphoning rules imposed on pay-cable to be an arbitrary exercise of agency authority.¹²¹

In holding that the anti-siphoning rules were an arbitrary exercise of Commission authority and violative of the first amendment rights of cable operators and vacating those rules as beyond FCC jurisdiction, the court in *Home Box Office* checked the Commission's growing jurisdiction over cable television. By requiring the Commission to demonstrate clear support for regulatory actions, either in specific statutory language or in consistently held regulatory policies in the broadcasting field,¹²² the court gave meaning to the reasonably ancillary jurisdictional standard established by the Supreme Court in *Southwestern Cable* and *Midwest Video*. This definition of FCC authority forces the Commission back to its original purpose, regulation of a scarce resource to develop the best possible communications system. Moreover, this limitation of FCC jurisdiction does no violence to the spirit of the Communications Act. Because the holding prohibits the Commission from regulating cable television absent the necessary jurisdictional showing, the court has directed the FCC to foster the development of new media in accordance with the express policies set out in the Communications Act. Such an approach to the regulation of the developing communications industry is essential if cable television and other media services are to be viable alternatives in the communications network.

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¹¹⁹ See Brief for Respondent FCC at 12.

¹²⁰ *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 39 (D.C. Cir. 1977); see Brief for Respondent United States at 32, 38; First Report and Order, 52 F.C.C.2d 1, 75 (1975) (Statement of Comm'r Glen O. Robinson dissenting and concurring); Pearson, *Cable: The Thread by Which Television Competition Hangs*, 27 *RUTGERS L. REV.* 800, 822 (1974).

¹²¹ *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 39-40 (D.C. Cir. 1977).

¹²² See text accompanying notes 58-60 *supra*.