1986

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THE CHANGING REGULATORY TERRAIN OF CABLE TELEVISION

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Recent legislation, judicial decisions, and administrative actions are creating and shaping a new era of cable television regulation. The Cable Communications Policy Act of 1984 (Cable Act) was enacted October 30, 1984, as a comprehensive amendment to the Communications Act of 1934. Effective December 29, 1984, the Cable Act established a national regulatory policy for cable television. The Federal Communications Commission (FCC) has initiated several rulemaking proceedings to adopt regulations interpreting and implementing this new law.

The judiciary also has played an active role in reshaping cable policy. On July 19, 1985, the twenty-year-old FCC "must carry" rules were declared unconstitutional by the United States Court of Appeals for the District of Columbia Circuit in *Quincy Cable TV, Inc. v. FCC,* and *Turner Broadcasting System v. FCC.* Those rules, which required cable operators to carry all local broadcast signals as part of their basic cable service, were held to violate the first amendment rights of cable operators and programmers.

On November 12, 1985, the United States Supreme Court granted review

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4. 768 F.2d 1434 (D.C. Cir. 1985).

5. Id.

6. Id.
to hear arguments on appeal from the decision of the United States Court of Appeals for the Ninth Circuit in Preferred Communications, Inc. v. City of Los Angeles. The Ninth Circuit had ruled that, under the first amendment, a city had no right to limit the number of competing cable systems serving the same area. The long standing practice by which each community granted one cable company an exclusive cable television franchise to serve that community is thus now under challenge.

Cable operators recently have petitioned the FCC to preempt certain state Public Utilities Commission (PUC) regulations alleging that the impact of those regulations has been to freeze the development of cable television nonvideo services. The FCC recently voted to preempt certain Nebraska state regulations because they prevented a cable company from competing with telephone companies for intrastate and interstate nonvideo business.

This article will review the Cable Act and the recent judicial and administrative decisions that are reshaping cable regulatory policy and which will so profoundly influence the future development of cable television.

I. CABLE TELEVISION AND FEDERAL JURISDICTION

A. Development of Federal Jurisdiction over Cable Television

The FCC began asserting regulatory jurisdiction over cable operators in the mid-1960's. Initially, the FCC regulated the cable industry by establishing rules for cable systems receiving broadcast signals from microwave service. Shortly thereafter, the FCC concluded that the Communications
Act implicitly authorized direct cable regulation and subsequently it imposed comprehensive regulations on all cable systems.\textsuperscript{11} In prescribing rules governing cable operations, the FCC emphasized the necessity of imposing restrictions on cable systems as a means of preventing the cable industry from frustrating the achievement of statutory objectives for broadcasting.\textsuperscript{12}

In 1968, the Supreme Court affirmed FCC jurisdiction over cable television in \textit{United States v. Southwestern Cable Co.}.\textsuperscript{13} The Court held that the FCC was given broad responsibility to regulate all aspects of communication, including cable television, by virtue of the Communications Act.\textsuperscript{14} At the same time, however, the Court limited FCC regulation of cable television to that which is "reasonably ancillary to the . . . performance of the Commission's various responsibilities for the regulation of television broadcasting."\textsuperscript{15}

In its continuing concern for the protection of the broadcast industry, the

\begin{itemize}
\item Relay Television Signals to Community Antenna Systems, 38 F.C.C. 683 (1965), \textit{aff'd sub nom.} Black Hills Video Corp. v. FCC, 399 F.2d 65 (8th Cir. 1968) (first FCC cable regulations only imposed on cable operators that received microwave signals).
\item 11. \textit{See In re Amendment of Subpart L., Part 91, To Adopt Rules and Regulations To Govern the Grant of Authorization in the Business Radio Service for Microwave Stations To Relay Television Signals to Community Antenna Systems, 2 F.C.C.2d 725 (1966), \textit{aff'd sub nom.} Black Hills Video Corp. v. FCC, 399 F.2d 65 (8th Cir. 1968). The FCC stated for the first time that the statutory basis for its jurisdiction over cable was provided by § 2(a) of the Communications Act, 47 U.S.C. § 152(a), which empowered it to regulate "interstate communication by wire." 2 F.C.C.2d at 734. The FCC also derived its regulatory authority from § 307(b), which requires the FCC to distribute broadcast service in a "fair, efficient and equitable" manner "among the several States and communities." 47 U.S.C. § 307(b) (1982).
\item 12. Many independent UHF (ultra high frequency) stations were failing in the mid-1960's, and the FCC concluded that the cable industry was hindering UHF prospects, 2 F.C.C.2d at 782. Thus, the FCC imposed certain regulatory restrictions on cable operators. They included the extension of the "must-carry" and distant signal nonduplication rules. Those restrictions, formerly applicable only to microwave-fed cable systems, were then extended to all cable operations.
\item The FCC also established a burdensome rule requiring cable operators in the top 100 markets who wanted to import distant broadcast signals to demonstrate first in a hearing that such signal importations "would be consistent with the public interest," and particularly the establishment and health and maintenance of UHF television broadcast service. 2 F.C.C.2d at 782. The FCC allowed cable systems outside of the top 100 markets to carry local and distant signals after a 30-day notice period, if no objections were filed at the FCC, 47 C.F.R. § 74.1105(c) (1970).
\item 13. 392 U.S. 157 (1968).
\item 14. \textit{Id.} at 181. The Supreme Court agreed with the FCC that § 2(a) of the Communications Act provided the FCC with cable jurisdiction, and that the regulation of cable was a necessary and legitimate means of fostering the FCC's statutory objectives for the broadcast industry. 392 U.S. at 172-74.
\item 15. 392 U.S. at 178.
\end{itemize}
FCC promulgated comprehensive cable regulations in 1972. In United States v. Midwest Video Corp. (Midwest Video I), the Supreme Court upheld an FCC rule requiring cable television systems with 3,500 or more subscribers to originate local programming and to distribute a significant amount of programming that was not derived from broadcast television stations. The Court in Midwest Video I vastly expanded the scope of FCC cable jurisdiction without formally abandoning the “ancillary to broadcasting” standard articulated in Southwestern. The former concept of FCC cable authority had been limited to preventing harm to the broadcasting industry. It was now extended to include promoting broad statutory objectives “to assure that in the retransmission of broadcast signals viewers are provided suitably diversified programming.”

The Supreme Court subsequently curtailed the expansive FCC authority
over cable television pronounced in *Midwest Video I* by its 1979 decision in *FCC v. Midwest Video Corp. (Midwest Video II).* The *Midwest Video II* decision struck down the FCC's 1976 access rules imposing various requirements on cable television systems, one of which was to make available for access by public, educational, and local government users certain channels, termed "PEG" access channels. The FCC argued that the access rules were designed to promote the same objectives that were upheld as within its jurisdiction in *Midwest Video I,* i.e., greater programming diversity and increased outlets for self expression.

The Court stressed that the access rules virtually deprive cable operators of all discretion as to what may be transmitted on the PEG channels. Those rules, therefore, were rules unlike the program origination rules upheld in *Midwest Video I* that did not abrogate the cable operator's control over the composition of programming.

The Court invalidated the access regulations because it found that they imposed common carrier status on cable systems, and that the Communications Act barred the FCC from compelling broadcasters, including cable operators, to act as common carriers. Although *Midwest Video II* deprived the FCC of some jurisdictional authority over cable television, the Supreme Court subsequently broadened other aspects of the FCC's jurisdiction over cable television.

In 1984, the Supreme Court unanimously struck down on federal preemption grounds, an Oklahoma ban on cable liquor advertising in *Capital Cities Cable, Inc. v. Crisp,* suggesting that the FCC could assert virtually unbounded authority over cable television. The respondent in the *Crisp* case conceded that enforcement of the Oklahoma advertising ban conflicted with both FCC regulations and federal copyright law, but argued that the

21. 440 U.S. 689 (1979), rev'g 571 F.2d 1025 (8th Cir. 1978).
22. 440 U.S. at 708-09; see also *Cable TV Capacity and Access Requirements, Report and Order,* 59 F.C.C.2d 294 (1976).
23. 440 U.S. at 699.
24. Id. at 700-01.
25. Id.
26. Id. at 689, 701.
27. Id. at 706. Section 153(h) of the Communications Act provides that "common carrier" . . . means any person engaged as a common carrier for hire, in interstate or foreign communications by wire or radio or interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this chapter; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.
29. Id. at 2700.
Oklahoma statute should prevail in this conflict because of the state's broad power under the twenty-first amendment to regulate intoxicating liquor. The Court agreed that the states enjoy broad regulatory powers under the twenty-first amendment, but concluded that this power did not supersede the FCC's regulatory authority.

The Crisp Court's preemption analysis emphasized three major points: (1) federal law can preempt state law in a variety of circumstances; (2) federal regulations have no less preemptive effect than federal statutes; and (3) the FCC clearly had authority to regulate cable television. The Crisp Court, interpreting its earlier decision in Southwestern, found that the FCC has comprehensive authority to regulate cable systems. Further, the Court explained that the FCC's regulatory powers encompass all actions necessary to ensure fulfillment of its statutory responsibilities. It reasoned that any FCC determination to preempt an area of cable regulation and to accommodate any conflicting policies in a reasonable manner would preclude the enforcement of conflicting state regulations.

Thus, the early cable regulatory environment left undefined the limits of FCC jurisdictional authority over cable television. Early court decisions and FCC administrative rulings represent a struggle between interpretations of FCC cable authority that created a web of local and federal regulatory poli-

30. Id.
31. Id. The Court interpreted the Supremacy Clause, U.S. CONST. art. VI, cl. 2, to require federal preemption of state laws in the following situations: when there is clear congressional intent to preemp; when Congress has comprehensively legislated in a certain area; when compliance with both state and federal law is impossible; or when the state law hinders congressional objectives. 104 S. Ct. at 2700.
32. Crisp, 104 S. Ct. at 2700-01.
33. Id.
34. Id. at 2700 (citing Fidelity Fed. Savings & Loan Ass'n v. De la Cuesta, 458 U.S. 141 (1982)).
35. Id. at 2700-01.
36. Id. at 2701 (citing United States v. Southwestern Cable Co., 392 U.S. 157, 177-78 (1968)).
37. Id.
38. Id. Writing for the Court, Justice Brennan stated, "[I]f the FCC has resolved to preempt an area of cable television regulation and if this determination 'represents a reasonable accommodation of conflicting policies' that are within the agency's domain, we must conclude that all conflicting state regulations have been precluded." 104 S. Ct. at 2701 (citation omitted) (quoting United States v. Shimer, 267 U.S. 374, 383 (1961)).

In Crisp, the Court explained that the FCC's assertion of exclusive jurisdiction over the signal carriage of cable systems was a determination to preempt state regulations that reasonably accommodated conflicting federal and state policies. 104 S. Ct. at 2708-09. Justice Brennan found that the FCC's objective of ensuring diverse cable services and programming through a uniform national policy would be undermined by state and local regulations that interfered with the transmission of cable signals by operators pursuant to federal authority. Id.
cies governing different facets of the cable television industry. The Supreme Court ruling in *Crisp* confirmed the FCC's comprehensive regulatory authority over cable television and indicated that federal jurisdiction would prevail over conflicting local cable regulatory policies. Subsequent to *Crisp*, however, the cable industry was to confront yet another regulatory measure when Congress enacted a new federal cable law.

### B. The Cable Communications Policy Act of 1984

The Cable Communications Policy Act of 1984\(^39\) represents the first major revision of the Communications Act of 1934,\(^40\) and the first successful legislative effort to create a national regulatory policy for cable television. The Cable Act expressly provides the FCC with cable jurisdiction under the Communications Act.\(^41\) Although the Cable Act provides the FCC with central authority over cable, Congress recrafted a balance between local and federal cable regulation.\(^42\) The Cable Act generally limits the power of state and local governments to regulate cable operators, but permits some state regulation that the FCC previously had preempted.\(^43\)

This section will review various provisions of the new Cable Act that impose new federal regulatory policies on cable operators dealing with commercially leased access channels,\(^44\) protection of subscriber privacy,\(^45\) equal employment opportunity,\(^46\) and other provisions that will have a significant effect on the industry such as rate regulation\(^47\) and franchise fees.\(^48\)

#### 1. Rate Regulation

In 1972, the FCC set minimum standards relating to the cable franchise process, which included procedures for franchisee selection, construction

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\(^39\) Cable Act, §§ 601-639 (codified at 47 U.S.C.A. §§ 521-559 (West Supp. 1985)).  
\(^41\) Cable Act, § 601 (codified at 47 U.S.C.A. § 521 (West Supp. 1985)).  
\(^42\) The Cable Act represents a series of compromises that emerged from hearings, discussions, and negotiations between members of Congress, and representatives of cities and the cable industry. See 130 CONG. REC. H10,435 (daily ed. Oct. 1, 1984).  
\(^43\) Legislative history identifies local franchising authorities as the “primary means of cable television regulation.” H.R. REP. No. 934, 98th Cong., 2d Sess. 19, 24 (1984) (local authority is in best position to develop franchises tailored to community’s needs). Cf. *Crisp*, 104 S. Ct. at 2702 n.8 (FCC has comprehensive jurisdictional authority except over nonoperational aspects of cable franchising).  
\(^44\) Cable Act, § 612 (codified at 47 U.S.C.A. § 532 (West Supp. 1985)).  
\(^45\) Id. § 631 (codified at 47 U.S.C.A. § 551 (West Supp. 1985)).  
\(^46\) Id. § 634 (codified at 47 U.S.C.A. § 554 (West Supp. 1985)).  
\(^47\) Id. § 623 (codified at 47 U.S.C.A. § 543 (West Supp. 1985)).  
\(^48\) Id. § 622 (codified at 47 U.S.C.A. § 542 (West Supp. 1985)).
timetables, fees, rate regulation, and processing subscriber complaints. The FCC eliminated these standards in 1976 and suggested they be used as voluntary guidelines. The only remaining federal franchise standard relating to rate regulation was the preemption of pay cable services rate regulation. Prior to enactment of the Cable Act, local authorities could regulate rates for basic cable service.

The Cable Act provisions regarding rate regulation of cable services are a compromise between local authorities, which wanted to regulate basic cable service rates, and the cable industry, which believed the marketplace should control rates.

Under the new Cable Act, cable systems subject to "effective competition" must be free of all local rate regulations beginning December 29, 1986. The FCC adopted a new rule section that defines "effective competition" as the presence in the cable community of "at least three unduplicated television signals." These three signals include any television broadcast signal


50. For an example of franchise guidelines, see 47 C.F.R. § 76.31 (1984) (repealed by 50 Fed. Reg. 18,637, 18,661 (1985)).

51. See In re Amendment of Subparts B and C of Part 76 of the Commission's Rules Pertaining to Applications for Certificates of Compliance and Federal-State/Local Regulatory Relationships, 66 F.C.C.2d 380, 401 n.21 (1977); see also In re Community Cable TV, Inc. [hereinafter cited as Nevada I], 95 F.C.C.2d 1204, 1215-16 (1983) (FCC preemption of local rate regulation of satellite-delivered programming), quoted in Crisp, 104 S. Ct. at 2702 n.9; Clarification of Cable Television Rules, 46 F.C.C.2d 175, 199-200 (1974) (concluding there should be no rate regulation of cable at any government level), aff'd sub nom. Brookhaven Cable TV v. Kelly, 573 F.2d 765 (2d Cir. 1978), cert. denied, 441 U.S. 904 (1979).

52. Basic service consists of service regularly provided to all cable subscribers. See Clarification of Cable Television Rules, 46 F.C.C.2d at 199; Cable Television Report and Order, 36 F.C.C.2d 143, 209 (1972); see also Nevada I, 95 F.C.C.2d at 1212-18 (local regulation for basic cable service).


54. Options Hearings, supra note 53, at 50 (statement of Thomas E. Wheeler, president, National Cable Television Association).

55. Cable Act, § 523 (codified at 47 U.S.C.A. § 623 (West Supp. 1985)). Cable systems operating under franchises granted on or before Dec. 29, 1984, are subject to rate regulation until Dec. 29, 1986, whether or not they are in a community where they are subject to "effective competition." Such systems will be deregulated on Dec. 29, 1986, if they are in areas subject to effective competition on that date. Cable systems will be subject to regulation after Dec. 29, 1986, under the terms set out in the Cable Act, if they are in areas not subject to effective competition on that date. See 47 C.F.R. § 76.33 (1985).

56. See Report and Order, In re Amendment of Parts 1, 63 and 76 of the Commission's Rules To Implement Various Provisions of the Cable Communications Policy Act of 1984, 58
that (1) places a predicted grade B contour over any portion of the cable television community;\(^5^7\) (2) is deemed "significantly viewed" within the cable community;\(^5^8\) or (3) is transmitted from a translator station located within the cable community.\(^5^9\)

The Cable Act provides a two-year grandfather period that allows local authorities to regulate basic cable service pursuant to provisions in existing franchise agreements.\(^6^0\) Thereafter, local authorities may not regulate rates for any cable service if the cable system confronts effective competition in its market.\(^6^1\) During this two-year period, the Cable Act also permits cable operators to increase basic service rates by five percent without local approval,\(^6^2\) unless an existing franchise agreement provides that rates will be frozen at a particular rate for a fixed period of time.\(^6^3\)

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\(^{58}\) The predicted grade B contour of a television signal is determined through a formula contained in 47 C.F.R. § 73.683(a) (1985) and is based on signal strength expectations given various factors such as station frequency, transmitter power, antenna height, and antenna gain. See also 47 C.F.R. § 76.5(e) (1985).

\(^{59}\) Significantly viewed signals include those that are listed in the appendix to part 76 of the FCC's rules governing cable television. The list, originally compiled in 1972, is organized by state and county, and signals that are significantly viewed in a county are deemed by the FCC to be significantly viewed within all communities in that county. See 47 C.F.R. § 76.53 (1985). Rule 76.54 also permits an individual determination to be made for "significantly viewed" stations for television signals for specific cable communities. 47 C.F.R. § 76.54 (1985). This determination requires a precise survey of the viewership in noncable homes. Id. The standards for "significantly viewed" stations are 3% share and 25% net weekly circulation for a network station and 2% share and 5% net weekly circulation for an independent television station. Id.

\(^{60}\) There is no power limitation specified in rule § 76.33, so presumably even a one-watt translator could qualify. 47 C.F.R. § 76.33 (1985). The translator signal will not count if it retransmits a signal, grade B contour or significantly viewed, already used in the three-signal effective competition count. The Report and Order does not address low-power television, and it is unclear whether those stations count toward the effective competition quota. Furthermore, a franchising authority, by following prescribed procedures in accordance with FCC rule § 73.686, may rebut a determination that a signal counts toward the effective competition signal quota. 47 C.F.R. § 73.686 (1985).

\(^{61}\) See Cable Act, § 623(c), (g) (codified at 47 U.S.C.A. § 543(c), (g) (West Supp. 1985)).


\(^{63}\) Under the Cable Act, a cable operator's request for a 5% increase will be considered granted if the franchising authority fails to act on the request within 180 days. Cable Act, § 625 (codified at 47 U.S.C.A. § 543(d) (West Supp. 1985)). The cable operator and franchising authority may agree to an extension of the 180-day period. Id.

\(^{63}\) Cable Act, § 623(e) (codified at 47 U.S.C.A. § 543(e) (West Supp. 1985)). This provi-
2. Franchise Fees

The Cable Act eliminated all FCC authority to regulate the amount or use of cable television franchise fees.\textsuperscript{64} Earlier FCC regulations limited franchise fees to three percent of a cable system's gross revenues, or five percent upon a showing of adequate need.\textsuperscript{65} The Cable Act increases the amount of franchise fees collected to five percent of a cable system's gross revenues\textsuperscript{66} and provides that payments above this ceiling may be collected under certain circumstances.\textsuperscript{67}

3. Access Channels

\textit{a. PEG}

In 1979, the Supreme Court in \textit{Midwest Video II}\textsuperscript{68} overturned the FCC's 1976 access regulations that required cable operators to make public, educational, governmental (PEG), and commercially leased channels available for...
use on a nondiscriminatory basis. As a result of this decision, various states enacted their own access requirements. Under the authority of Crisp, the FCC preempted such locally imposed programming bans and mandatory provision for access channels.

The Cable Act provides little or no opportunity for cable operators to reduce existing PEG requirements. With respect to franchises and franchise renewals granted after the Cable Act's effective date, the Cable Act expressly allows franchising authorities to establish requirements for the designation and use of PEG access channels.

69. In overturning the FCC's public access regulations, the Court noted that the FCC may have had jurisdiction to promulgate less intrusive access regulations. See id. at 705 n.14.

See In re Amendment of Part 76 of the Commission’s Rules and Regulations Concerning the Cable Television Channel Capacity and Access Channel Requirements of Section 76.251, 59 F.C.C.2d 294 (1976); see also Cable Television Report and Order, 36 F.C.C.2d 143, 190 (1972), aff'd sub nom. American Civil Liberties Union, 523 F.2d 1344 (9th Cir. 1975) (federal cable requirements for access channels for public, educational, governmental (PEG) and leased access programming for systems in the top 100 television markets). By requiring cable operators to provide PEG and leased access channels from their available channels, the FCC implemented, in part, its policy of opening new outlets for local expression, promoting diversity in television programming, restoring a sense of community to cable subscribers, aiding in the functioning of democratic institutions, and improving informational and educational communications resources. Amendment of Part 76, 59 F.C.C.2d at 296.

70. See, e.g., CAL. GOV’T CODE § 53066.1 (West Supp. 1983 & 1986) (California does not regulate rates of cable entities if certain criteria are met, one of which is the provision of public access channels); CONN. GEN. STAT. § 16-333(c) (West Supp. 1985) (Connecticut requires at least one noncommercial public access channel); see also Harrison, Access and Pay Cable Rates: Off-Limits to Regulators After Midwest Video II?, 16 COLUM J.L. & SOC. PROBS. 591, 619-30 (1981); Berkshire Cablevision v. Burke, 571 F. Supp. 976 (1983), vacated, 773 F.2d 382 (1st Cir. 1985) (where First Circuit upheld a state imposed requirement for mandatory cable access channels).

71. See Crisp, 104 S. Ct. at 2700-03.

72. PEG channel requirements in existing franchises are given a uniquely protected status in the Cable Act. Section 637 of the Cable Act effectively grandfathered all PEG equipment, service, facilities, and funding commitments made by cable operators in existing franchises. Cable Act, § 637 (codified at 47 U.S.C.A. § 557 (West Supp. 1985)). Section 622(g) of the Cable Act, excludes from the 5% franchise fee ceiling the cost to the cable operator of implementing existing PEG commitments. Cable Act, § 622(g) (codified at 47 U.S.C.A. § 542(g) (West Supp. 1985)). Section 611(c) of the Act preserves the right of franchising authorities to enforce "any requirement in any franchise" regarding provision or use of PEG channel capacity. Cable Act, § 611(c) (codified at 47 U.S.C.A. § 531(c) (West Supp. 1985)). Modification of PEG commitments in existing franchises is strictly limited by the Cable Act. Section 625(a)(1)(A) restricts any modifications of PEG "facilities or equipment" unless the cable operator can demonstrate that compliance would be "commercially impracticable." Cable Act, § 625(a)(1)(A) (codified at 47 U.S.C.A. § 645(a)(1)(A) (West Supp. 1985)). Further, § 625(c) states that the modification procedures under the Act are not available to a cable operator seeking relief from requirements for "services" relating to PEG. Cable Act, § 625(e) (codified at 47 U.S.C.A. § 645(e) (West Supp. 1985)).

73. Section 611(b) expressly permits franchising authorities to issue requests for proposals requiring that a specific number of channels be set aside for PEG use. Cable Act, § 611(b)
franchising authorities also may permit unused PEG channels to be used for other purposes. In addition, the Cable Act directs franchising authorities to adopt new rules under which cable operators may program unused PEG access channels. Although cable operators are expressly prohibited from exercising editorial control over PEG channels, the Cable Act indemnifies cable operators from liability for PEG channels' program content.

b. Leased Access Channels

The Cable Act also requires cable systems with thirty-six or more “activated” channels to designate a certain percentage of their channels for

74. Section 611(d) provides that the franchising authority shall establish:
   1. rules and procedures under which the cable operator is permitted to use such [PEG] channel capacity for the provision of other services if such channel capacity is not being used for the purposes designated, and
   2. rules and procedures under which such permitted use shall cease.

Cable Act, § 611(d) (codified at 47 U.S.C.A. § 531(d) (West Supp. 1985)). The legislative history expressly prohibits franchising authorities, when implementing their rules, from adding any PEG requirements in excess of those contained in the existing franchise. H.R. REP. No. 934, 98th Cong., 2d Sess. 47 (1984), reprinted in 1984 U.S. CODE CONG. & AD. NEWS at 4684. The House committee stated that franchising authorities would better serve their communities by allowing cable operators to provide other cable services on the unused PEG channels, rather than having those channels remain unused until PEG use increased. Id., reprinted in 1984 U.S. CODE CONG. & AD. NEWS at 4684.


76. Cable Act, § 638 (codified at 47 U.S.C.A. § 558 (West Supp. 1985)) (exempts cable operators from liability for "libel, slander, obscenity, incitement, invasions of privacy, false or misleading advertising, or other similar laws" for any program carried on any PEG channel).

77. In the Matter of Amendment of Parts 1, 63, and 76 of the Commission’s Rules To Implement the Provisions of the Cable Communications Policy Act of 1984, 58 RAD. REG. 2d (P & F) 1 (1985). The Commission clarified the term “activated channel” to mean: all channels used for the provision of video and other programming services generally available to subscribers, i.e., any channel used to provide cable service to subscribers. In addition, those channels not carrying any programming but capable of delivering cable service to subscribers without additional engineering modification of the system will be considered activated for the purpose of access channel allocation.

Id. at 13.
lease to unaffiliated parties for commercial use.\textsuperscript{78} Programming in place on a cable system on or before July 1, 1984, is grandfathered and need not be displaced to make room for commercially leased access users.\textsuperscript{79} Cable operators are expressly authorized to establish the price, terms, and conditions for leased access use, and must consider the nature of any proposed programming for purposes of setting a reasonable price.\textsuperscript{80} The Cable Act also permits cable operators to set conditions and prices to ensure that the leased access use "will not adversely affect the operation, financial condition, or market development of the cable system."\textsuperscript{81} Any persons aggrieved by a cable operator's failure or refusal to make leased access channels available or offer access only on unreasonable terms may bring an action in the federal district court in the district in which the cable system is located.\textsuperscript{82} As with PEG channels, cable operators may not exercise editorial control over proposed programming\textsuperscript{83} and have no liability for the transmission of obscene or constitutionally unprotected matter on leased channels.\textsuperscript{84}

\begin{footnotes}
\textsuperscript{78} Cable Act, § 612 (codified at 47 U.S.C.A. § 532 (West Supp. 1985)). Systems with 36- to 54 activated channels must set aside 10\% of "available channels" for leased access. \textit{Id.} Systems with 55- to 100 activated channels must set aside 15\% of "available channels." \textit{Id.} Systems with more than 100 activated channels must set aside 15\% of all channels. \textit{Id.} In determining the system's number of "activated channels," only those "engineered at the headend" are counted. \textit{Id.} Cable systems with fewer than 36 "activated channels" are exempt from this provision but still must comply with any existing franchise requirements regarding leased access channels. \textit{Id.}

\textsuperscript{79} Cable Act, § 612(b)(1)(E) (codified at 47 U.S.C.A. § 532(b)(1)(E) (West Supp. 1985)).

\textsuperscript{80} Cable Act, § 612(c)(1) (codified at 47 U.S.C.A. § 532(c)(1) (West Supp. 1985)). The House report makes clear that cable operators may take into account the effect of the leased access programming on the marketing and the mix of its existing services, the potential market fragmentation and the impact on subscriber and advertising revenues. \textsc{H.R. Rep.} No. 934, 98th Cong., 2d Sess. 51 (1984), \textit{reprinted in} 1984 U.S. CODE CONG. & AD. NEWS at 4688.

\textsuperscript{81} Cable Act, § 612(c)(1) (codified at 47 U.S.C.A. § 532(c)(1) (West Supp. 1985)).

\textsuperscript{82} Cable Act, § 612(d) (codified at 47 U.S.C.A. § 532(d) (West Supp. 1985)). The Cable Act specifically provides that the offer made by the cable operator is presumed to be reasonable and that the burden is on the aggrieved party to prove otherwise by "clear and convincing evidence." \textit{Id.} The Cable Act gives the court the authority to review the obligations of the cable system to determine whether the refusal to make channel capacity was lawful and to review the negotiations to determine whether the price, terms and conditions offered by the cable operators were unreasonable. \textit{Id.} If the court agrees that the price, terms, and conditions were unreasonable, it may set the price, terms, and conditions and may award damages, if appropriate. \textit{Id.}

\textsuperscript{83} Cable Act, § 612 (codified at 47 U.S.C.A. § 532 (West Supp. 1985)).

\textsuperscript{84} Cable Act, § 638 (codified at 47 U.S.C.A. § 558 (West Supp. 1985)) (provides for federal immunization of the cable operator from liability for any program carried on a leased access channel under Cable Act, § 612 (codified at 47 U.S.C.A. § 532 (West Supp. 1985))). \textit{See supra} note 76.
\end{footnotes}
4. Subscriber Privacy

The Cable Act creates a nationwide standard for the protection of subscriber privacy by regulating the collection, use, and disclosure by cable operators of personally identifiable information regarding cable subscribers. 85 All cable operators were required under the Cable Act to provide written privacy rights notices to existing subscribers by June 23, 1985 and annually thereafter. 86 New cable subscribers must receive notice at the time they enter into a contract or service agreement with the cable system. 87

Under the Cable Act, cable operators cannot collect personally identifiable information without the prior written or electronic consent of the subscriber. 88 Exceptions are provided, however, where such information is necessary to render service to the subscriber, 89 or to detect unauthorized reception of cable communications. 90 Further, cable operators are prohibited from disclosing personally identifiable information of subscribers unless

85. Cable Act, § 631 (codified at 47 U.S.C.A. § 551 (West Supp. 1985)). "Personally identifiable information" includes such personal subscriber information as names and addresses, telephone numbers, social security numbers, and any other personal identifiers, codes, or numbers. Aggregate information about subscribers that does not contain names, addresses, or other personal identifiers, is not "personally identifiable information." H.R. REP. No. 934, 98th Cong., 2d Sess. 79 (1984), reprinted in 1984 U.S. CODE CONG. & AD. NEWS at 4716.

86. Cable Act, § 631 (codified at 47 U.S.C.A. § 551 (West Supp. 1985)) (requires cable operators to give notice to subscribers clearly and conspicuously setting out privacy rights).

87. Although the legislative history states that the privacy notice must be provided within 180 days of the time a subscriber begins to take cable service, the Cable Act requires notice to be given to new subscribers "at the time of entering into an agreement." Cable Act, § 631(a)(1)(E) (codified at 47 U.S.C.A. § 551(a)(1)(E) (West Supp. 1985)). See H.R. REP. No. 934, 98th Cong., 2d Sess. 77 (1984), reprinted in 1984 U.S. CODE CONG. & AD. NEWS at 4714.

The privacy rights notice must contain the nature of the personally identifiable information the cable operator collects, and for what purposes it will be used, Cable Act, § 631(a)(1)(A) (codified at 47 U.S.C.A. § 551(a)(1)(A) (West Supp. 1985)); the particulars of to whom and when the information may be disclosed, id. § 631(a)(1)(B) (codified at 47 U.S.C.A. § 551(a)(1)(B) (West Supp. 1985)); the length of time the cable operator will maintain the information, id. § 631(a)(1)(C) (codified at 47 U.S.C.A. § 551(a)(1)(C) (West Supp. 1985)); when and where the subscriber may access information pertaining to him or her, id. § 631(a)(1)(D) (codified at 47 U.S.C.A. § 551(a)(1)(D) (West Supp. 1985)); limitations imposed on the cable operator to collect and disclose personally identifiable information, id. § 631(a)(1)(E) (codified at 47 U.S.C.A. § 551(a)(1)(E) (West Supp. 1985)); and, that the subscriber may enforce the Cable Act’s limitations on collection and disclosure by civil suit, id.


the cable subscriber consents, the information is necessary to render a
cable service or conduct a legitimate business activity related to a cable ser-
vice, or a cable operator receives a court order requiring him or her to
disclose personally identifiable information concerning a particular sub-
scriber or subscribers.

The Cable Act also requires that each cable subscriber be given access to
all personally identifiable information pertaining to him or her that is main-
tained by the cable operator. Such subscriber information must be de-
stroyed when it no longer is necessary for the purpose for which it was
collected. The privacy provisions of the Cable Act may be enforced by a
civil suit and cable operators sued under these provisions are subject to
substantial penalties.

91. Cable Act, § 631(c)(2) (codified at 47 U.S.C.A. § 551(c)(2) (West Supp. 1985)).
Names and addresses of subscribers may be disclosed if the subscriber is given the opportunity
to limit or prohibit such disclosure, and the disclosure reveals neither the extent of viewing or
other use by the subscriber of a cable service nor the nature of any transaction made by the
subscriber over the cable system. Id. § 631(c)(2)(C)(ii) (codified at 47 U.S.C.A. § 551(c)(2)(C)(ii) (West Supp. 1985)). These privacy provisions are in addition to other state
privacy laws to which a cable operator may be subject. Id. § 631(f)(3) (codified at 47 U.S.C.A. § 551(f)(3) (West Supp. 1985)).

The cable operator also must notify the subscriber that he or she is disclosing personally identi-
fiable information pursuant to a court order. Id. If the court order was obtained by a govern-
ment agency, the agency must comply with certain procedural requirements such as offering
clear and convincing evidence that the subscriber is reasonably suspected of engaging in crimi-
nal activity, and that the information sought would be material evidence in the case, and the
subscriber is afforded the opportunity to appear and contest disclosure. Id. § 631(h) (codified
at 47 U.S.C.A. § 551(h) (West Supp. 1985)).

94. This information must be made available to the subscriber at a convenient place desig-
nated by the cable operator, and the subscriber must be given a reasonable opportunity to
change or correct any error in the information. Id. § 631(d) (codified at 47 U.S.C.A. § 551(d)
(West Supp. 1985)).

95. Id. § 631(e) (codified at 47 U.S.C.A. § 551(e) (West Supp. 1985)). This information
must be destroyed provided there are no pending requests for access to such information. Id.

96. The Cable Act allows any person aggrieved by any act of a cable operator in violation
of the privacy provisions to sue the cable operator in the United States District Court. Id.
by persons other than cable subscribers, such as franchising authorities, may be brought under
the broad language of this provision. Id.

97. Id. § 631(f)(2) (codified at 47 U.S.C.A. § 551(f)(2) (West Supp. 1985)). This provision
provides that penalties for violation may include liquidated damages of $100 per day for each
day of violation or $1,000, whichever is higher. Id. Punitive damages, reasonable attorneys’
fees, and other reasonable litigation costs may also be imposed by the court. Id.
5. Equal Employment Opportunity

The equal employment opportunity (EEO) provision of the Cable Act\(^98\) codifies the FCC's prior policy\(^99\) prohibiting cable operators from discriminating in employment on the basis of race, color, religion, national origin, or sex, and expands the scope of this policy by covering age discrimination\(^100\).

Prior to the Cable Act, FCC cable rules required all cable television operators to afford equal employment opportunity to all qualified persons.\(^101\) Cable operators were not allowed to discriminate against any persons in employment for the reasons stated previously except for age. In addition, each cable operator was required to establish and file with the FCC an EEO program that included specific practices designed to ensure equal opportunity in employment.\(^102\)

The Cable Act broadens the scope of systems subject to the EEO provision by including satellite master antenna television systems (SMATVs).\(^103\) SMATVs serving less than fifty subscribers are not subject to the EEO requirements.\(^104\) SMATV operators are subject to the EEO provision regardless of whether the systems serve only commonly owned apartments on private property.\(^105\) If an SMATV system is operated by the owner of a multiple-unit dwelling, the EEO requirements apply only to those employees who are primarily engaged in cable communications.\(^106\)

The Cable Act requires each cable operator to establish a program to ensure equal employment opportunities.\(^107\) Moreover, the Act specifies that

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98. Cable Act, § 634 (codified at 47 U.S.C.A. § 554 (West Supp. 1985)).
100. Cable Act, § 634(b) (codified at 47 U.S.C.A. § 554(b) (West Supp. 1985)).
101. 47 C.F.R. § 76.311(a) deleted by EEO Report and Order, 58 RAD. REG. 2d (P & F) 1572, 1606 (1985).
102. Id.
107. This program must include "defining and monitoring managerial and supervisory performance of equal employment opportunity goals; informing employees, employee organizations, and sources of qualified applicants of the entity's equal employment opportunity policy; and monitoring the entity job structure and employment practices" to "eliminate prejudice and discrimination and to insure equal opportunity" throughout the organization. See H.R.
cable operators must file an annual statistical report with the FCC and the
Act also defines the contents of that report.\textsuperscript{108} The FCC also must certify
annually\textsuperscript{109} those cable systems that comply with the EEO provision and
periodically must investigate the employment practices of each cable system
to review and verify its compliance with the prescribed EEO standards.\textsuperscript{110}

The Cable Act also requires the FCC to promulgate rules to implement a
regulatory program to investigate EEO complaints and violations and to en-
force EEO protections.\textsuperscript{111} In response to that mandate, the FCC amended
its formal Memorandum of Understanding (MOU) with the Equal Employ-
ment Opportunity Commission (EEOC) regarding the exchange of informa-
tion and the disposition of discrimination complaints involving broadcast
licensees to include cable operators and multiple system operators.\textsuperscript{112} Congress intended that the FCC develop an MOU regarding cable television sys-
tems similar to one that currently exists for broadcast licensees.\textsuperscript{113} The
former MOU provided that the FCC and EEOC share information regard-
ing the employment practices and policies of broadcast licensees.\textsuperscript{114} In addi-
tion, the EEOC sent quarterly reports to the FCC regarding all
discrimination charges against broadcasters. This MOU established the di-
vision of responsibilities between the two agencies to process discrimination
complaints against broadcasters.

The FCC also amended section V of the MOU so that the FCC “will
confer, to the extent legally permitted, with the EEOC prior to Commission
action on nonrestricted EEO rulemaking proceedings.”\textsuperscript{115} This change per-
mits FCC staff to disclose nonrestricted rulemaking items to the EEOC,
such as notices of inquiry and certain reports and orders, prior to FCC ac-
tion on such items. The amended MOU attempts to develop “a more or-
derly exchange of information between the Commission and the EEOC and
permits a more effective federal policy in this area.”\textsuperscript{116}

\textsuperscript{108} Cable Act, § 634(d)(3) (codified at 47 U.S.C.A. § 554(d)(3) (West Supp. 1985)).
\textsuperscript{109} Id. § 634(e)(1) (codified at 47 U.S.C.A. § 554(e)(1) (West Supp. 1985)).
\textsuperscript{110} Id. § 634(e)(2) (codified at 47 U.S.C.A. § 554(e)(2) (West Supp. 1985)).
\textsuperscript{111} Id. § 634(d)(1) (codified at 47 U.S.C.A. § 554(d)(1) (West Supp. 1985)); see also EEO
Report and Order, 58 RAD. REG. 2d 1572 (1985).
\textsuperscript{112} Memorandum of Understanding Between the Federal Communication Commission
and the Equal Employment Opportunity Commission, 70 F.C.C.2d 230 (1978); see also EEO
Report and Order, 58 RAD. REG. 2d at 1604-06.
CONG. & AD. NEWS at 4729.
\textsuperscript{114} EEO Report and Order, 58 RAD. REG. at 1604.
\textsuperscript{115} Id. at 1605.
\textsuperscript{116} Id. at 1606.
Both employees and applicants for employment who believe they are being discriminated against by a covered cable operator may file a complaint with the FCC.\textsuperscript{117} Under the Cable Act, a party-in-interest to a formal cable EEO complaint “shall be anyone, or group representing said person, residing within the cable system's franchise areas” who alleges noncompliance and, according to the Cable Act, “signs and swears to a written description of the allegations.”\textsuperscript{118} The FCC will not process formal complaints that do not meet these Cable Act requirements. The FCC will notify a complainant whether certain matters alleged in an EEO complaint raise a prima facie question of noncompliance with the statute or FCC rules.\textsuperscript{119} When a complaint does raise a prima facie question of noncompliance, the FCC will forward it to the cable entity for a response.\textsuperscript{120} The FCC then will evaluate the cable entity’s response and determine what, if any, action is appropriate.

A covered cable operator who has “failed to meet or failed to make best efforts to meet” the EEO requirements is subject to statutory penalties.\textsuperscript{121} A cable operator is subject to a penalty of $200 a day, accruing for up to 180 days, prior to FCC notification to the cable operator of any EEO violations. This penalty can accrue indefinitely after notification.\textsuperscript{122} Further, this penalty is added to any other penalty or remedy that may be available to the FCC under this or other laws.\textsuperscript{123}

\section{II. Judicial Decisions and Administrative Actions Affecting the Cable Industry}

\subsection*{A. First Amendment Implications of Cable Television Regulation}

The summer of 1985 marked another significant change in the regulation of cable television. In a landmark decision, \textit{Quincy Cable TV, Inc. v.}

\begin{thebibliography}{99}
\item 117. Cable Act, § 634(g) (codified at 47 U.S.C.A. § 554(g) (West Supp. 1985)).
\item 118. EEO Report and Order, 58 RAD. REG. at 1605.
\item 119. \textit{Id.}
\item 120. \textit{Id.}
\item 121. Cable Act, § 634(f)(2) (codified at 47 U.S.C.A. § 554(f)(2) (West Supp. 1985)). Microwave licenses held by cable operators also may be suspended until the FCC determines that any failure to comply with EEO requirements is corrected. \textit{Id.} Cable operators who knowingly make false statements or submit falsified documentation in connection with an application for certification also violate the Cable Act and are subject to its proscribed penalties. \textit{Id.} Both the public and appropriate franchising authorities will be notified of any penalties imposed under the EEO provisions. \textit{Id.} § 634(f)(4) (codified at 47 U.S.C.A. § 554(f)(4) (West Supp. 1985)).
\item 122. \textit{Id.} The EEO provisions do not preclude the establishment of more stringent EEO requirements by state or local franchising authorities. \textit{Id.} § 634(i)(1) (codified at 47 U.S.C.A. § 554(i)(1) (West Supp. 1985)).
\item 123. \textit{Id.} § 634(f)(2) (codified at 47 U.S.C.A. § 554(f)(2) (West Supp. 1985)).
\end{thebibliography}
Changing Regulatory Terrain

FCC, a precedent was established when the United States Court of Appeals for the District of Columbia Circuit declared unconstitutional the twenty-year-old FCC mandatory carriage or "must-carry" regulations. Those rules, requiring cable operators to carry local broadcast signals as part of their basic cable service, were held to violate the first amendment rights of cable operators and programmers.

The Supreme Court has never addressed the constitutional validity of the must-carry rules or of any other analogous FCC regulations affecting cable television. The lower federal courts initially sustained regulations against first amendment and due process challenges. In recent years, however, the courts have subjected FCC regulation of cable television to a far more rigorous constitutional analysis and have established that cable operators engage in conduct protected by the first amendment.

Prior to the Quincy decision, which will be discussed in greater detail below, various courts have grappled with the question of defining the first amendment rights of cable television operators. The United States Court of

126. Quincy, 768 F.2d at 1463.
127. In Southwestern, the Court explicitly disclaimed reaching any question concerning the validity of the FCC's cable rules. 392 U.S. at 167. The plurality in Midwest I stated in a footnote that the United States Court of Appeals for the Eighth Circuit had correctly upheld the validity of several cable regulations. 406 U.S. at 659 n.17. The reference makes clear, however, that the plurality merely suggested that the Eighth Circuit had correctly held that the particular rules at issue comported with the standards set out in Southwestern for testing the reach of the FCC's jurisdiction. The Midwest II Court later acknowledged that the plurality's footnote in Midwest I was "dicta." 440 U.S. at 697 n.7. Although the Midwest II Court did not reach any constitutional questions implicated by the particular cable regulations before it, it described those questions as "not frivolous." 440 U.S. at 709 n.19.
128. See, e.g., Black Hills Video Corp. v. FCC, 399 F.2d 65, 69 (8th Cir. 1968) (cable television indistinguishable from broadcast media for purposes of first amendment analysis); Titusville Cable TV v. United States, 404 F.2d 1187, 1189-90 (3d Cir. 1968) (nonduplication rule does not conflict with the dictates of the first amendment); Buckeye Cablevision v. FCC, 387 F.2d 220, 225 (D.C. Cir. 1967) (cable regulations restrain speech no more than reasonably required to serve important interest of preserving local broadcasting); Carter Mountain Transmission Corp. v. FCC, 321 F.2d 359 (D.C. Cir. 1963) (denial of a station license is not a denial of free speech), cert. denied, 375 U.S. 951 (1963).
129. See, e.g., Preferred Communications, 754 F.2d 1396, 1403 (9th Cir. 1985) (first amendment protection exists for cable television); Quincy, 768 F.2d 1434 (D.C. Cir. 1985); TeleCommunications of Key West v. United States, 757 F.2d 1330, 1337-39 (D.C. Cir. 1985) (plaintiff alleging differential treatment of cable operators on military base stated a viable first amendment cause of action); Midwest Video, 571 F.2d 1025, 1053 (8th Cir. 1978) ("government control of business operations must be closely scrutinized when it affects communication of information and ideas"); Home Box Office, Inc. v. FCC, 567 F.2d 9, 44-45 (D.C. Cir. 1977) (per curiam) (sustaining first amendment challenge that cable regulation is an incidental burden on speech).
Appeals for the Eighth Circuit in *Midwest Video II* addressed first amendment issues in dicta, concluding that in the context of public access requirements, the first amendment rights of cable operators were analogous to those of newspaper publishers. The court referred to cable as a "private electronic 'publication,'" and reasoned that, in light of *Miami Herald Publishing Co. v. Tornillo*, a cable operator could not be compelled to provide access.

The Supreme Court in *Tornillo* struck down as unconstitutional a Florida right-of-reply statute that granted political candidates the right to reply, without charge, to editorial attacks printed in newspapers. The *Tornillo* court determined that any governmental interference with the editorial content of a newspaper violates the first amendment. The Court acknowledged that the dissemination of a broad range of views was an important public interest. Although conceding the newspaper industry was highly oligopolistic, Chief Justice Burger, writing for a unanimous Court, refused to invoke a scarcity rationale to justify a right of access to newspapers. The Court in *Tornillo* concluded that a government-imposed right

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130. 571 F.2d at 1052-57.
131. *Id.* at 1056; see also *Home Box Office*, 567 F.2d at 46 (also analogized first amendment rights of cable operators to those of the print media).
132. 571 F.2d at 1056.
134. *FLA. STAT.* § 104.38 (1973) provided in relevant part:
   If any newspaper in its columns assails the personal character of any candidate for nomination or for election in any election, or charges said candidate with malfeasance or misfeasance in office, or otherwise attacks his official record, or gives to another free space for such purpose, such newspaper shall upon request of such candidate immediately publish free of cost any reply he may make thereto in as conspicuous a place and in the same kind of type as the matter that calls for such reply, provided such reply does not take up more space than the matter replied to.
418 U.S. at 244 n.2 (quoting *FLA. STAT.* § 104.38 (1973)).
135. 418 U.S. at 256. The *Tornillo* Court relying on precedent, observed that the Court, in its earlier decisions involving the first amendment rights of newspaper publishers, had expressed concern over the issue of government-enforced access. *Id.*
136. 418 U.S. at 249-50. The *Tornillo* Court stated that "debate on public issues should be uninhibited, robust, and wide-open." *Id.* at 252 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).
137. 418 U.S. at 249-50. The *Tornillo* Court observed that
   [l]ocal monopoly in printed news raises serious questions... What a local newspaper does not print about local affairs does not see general print at all. And, having the power to take initiative in reporting and enunciation of opinions, it has extraordinary power to set the atmosphere and determine the terms of local consideration of public issues.
   *Id.* at 250 n.15 (quoting B. BAGDIKIAN, THE INFORMATION MACHINES 127 (1971)).
138. 418 U.S. at 253-54.
of access contradicts the "First Amendment guarantees of a free press" by causing newspapers to avoid controversial issues in order to evade the statute's operation.\footnote{Id. at 258.}

In \textit{Tornillo}'s shadow, the \textit{Midwest Video II} court discussed the FCC's limited authority to infringe upon the first amendment interests of broadcasters.\footnote{Id. at 257.} Indeed, Chief Judge Markey, writing for the court in \textit{Midwest Video II}, noted that had it been necessary to rule on the first amendment issue, he would have found the FCC's cable access regulation unconstitutional.\footnote{571 F.2d 1025, 1053 (1978).}

In \textit{Berkshire Cablevision, Inc. v. Burke},\footnote{Id. at 257.} the United States District Court for the District of Rhode Island denied a cable operator's injunction based on a challenge to the constitutionality of a state regulation requiring public access to cable television.\footnote{571 F. Supp. 976 (D.R.I. 1983).} The \textit{Berkshire} opinion disagreed with the prior rulings of the Eighth and District of Columbia Circuits that cable operators are entitled to the same measure of first amendment protection as newspaper publishers.\footnote{571 F. Supp. at 985; see also supra note 131.} The court found that the government has a substantial interest in regulating cable franchises in that regulation limits the disruption to

\begin{footnotesize}
\begin{enumerate}
\item Id. at 258.
\item Id. at 257. This mandatory right of access "dampens the vigor and limits the variety of public debate." \textit{Id.} (quoting New York Times Co. v. Sullivan, 376 U.S. at 279).
\item 571 F.2d 1025, 1053 (1978).
\item Id. at 1056.
\item 571 F. Supp. 976 (D.R.I. 1983).
\item See Rhode Island Public Utilities Commission, Division of Public Utilities and Carriers, Rules Governing Community Antenna Television Systems, ch. 14 (Jan. 14, 1983). Section 14.1(b) provides:
\begin{quote}
Every CATV system operator shall make available to all of its residential subscribers who receive all or any part of the total services offered on the system at least one access channel in each of the categories in sub paragraphs (1), (2), (3) herein. The remaining channels reserved for access purposes shall be apportioned and designated in response to demonstrated community need.

Channels reserved for access purposes shall be designated as one of the following:

1. Public: Public access channels shall be made available for use by members of the general public on a first-come, first-served nondiscriminatory basis. The VHF spectrum shall be used for at least one of these channels;

2. Educational: Educational access channels shall be made available for use by local educational authorities and institutions (including, but not limited to, school departments, colleges and universities but excluding commercial educational enterprises);

3. Government: Government access channels shall be made available for use by municipal and state government;

4. Others: Other designations for access channels may include (but need not be limited to) religious, cultural, ethnic heritage, and library access;

5. Leased: Leased access channels shall be made available on a first-come, first-served nondiscriminatory basis.
\end{quote}
\item Id. at 979 n.3.
\item 571 F. Supp. at 985; see also supra note 131.
\end{enumerate}
\end{footnotesize}
public property caused by cable companies\textsuperscript{146} and shields the cable operator from competition as a natural monopoly.\textsuperscript{147}

After differentiating cable television and newspapers, the Berkshire court concluded that government regulation of cable operators' editorial control was warranted, although such regulation would be constitutionally impermissible if imposed on newspaper publishers.\textsuperscript{148} The court further noted that historically cable television, unlike newspapers, has not been free of government control over either its program content or its operations.\textsuperscript{149}

\textbf{B. The FCC Cable "Must-Carry" Regulations Held Unconstitutional}

The Quincy court consolidated two cases that addressed the constitutionality of the must-carry rules.\textsuperscript{150} In 1979, Quincy Cable TV, Inc., then a 650-subscriber cable system serving an area near Spokane, Washington, asked the FCC for a waiver of the must carry regulations because the regulations violated the system's first amendment rights.\textsuperscript{151} The cable firm explained that its system offered only twelve channels and that it wanted to provide subscribers with programs from the three network affiliates in Seattle. Quincy stated that to comply with the must-carry rules, it would have to transmit the three Spokane network affiliates' signals.\textsuperscript{152} In addition, Quincy argued that if it were required to dedicate six channels to over-the-air programming, there would not be enough channels left for the many cable movie, entertainment, and sports services available.\textsuperscript{153} Further, it ar-
changed that residents could receive the Spokane stations over the air without interference. Quincy also filed the results of a poll of more than one hundred subscribers, indicating that the subscribers preferred to receive the Seattle stations and the cable services, and not the local stations. The FCC's Cable Television Bureau twice denied Quincy's request and rejected its argument that the must-carry rules violated the first amendment. Quincy then appealed to the United States Court of Appeals for the District of Columbia Circuit. While the case was pending, the cable system was expanded to thirty-two channels and the court agreed to return the case to the FCC for review in light of this change. The FCC reaffirmed its earlier decision and fined the cable company for failure to comply with the must-carry rules. Quincy again appealed to the District of Columbia Circuit.

In 1980, Turner Broadcasting Co. (TBS) asked the FCC to abolish the must-carry rules alleging that they violate the first amendment rights of cable programmers, cable operators, and the viewing public. TBS argued that the basic premise underlying the rules, the preservation of community-oriented broadcasting, was invalid. TBS also claimed that its market was reduced because local cable systems were required to devote a significant number of channels to local over-the-air stations. When the FCC refused to act on the request, TBS asked the United States Court of Appeals for the District of Columbia Circuit to order the FCC to consider its petition. At the FCC's request, the court returned the case to the agency, which subsequently denied the petition. TBS returned to the District of Columbia Circuit and its case was consolidated with that of Quincy Cable TV, Inc.

The appeals court in Quincy observed that cable television warrants a standard of first amendment review distinct from that applied to broadcasters. The panel noted that broadcasters are subject to regulation which, if

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154. Id. at 1446.
155. Id. at 1446-47.
156. See In re Quincy Cable TV, 89 F.C.C.2d 1128 (1982).
157. See Quincy Cable TV, Inc. v. FCC, 730 F.2d 1549 (D.C. Cir. 1984).
158. 89 F.C.C.2d 1128, 1138 (1982).
160. Id. at 6-11.
161. Id.
162. See Memorandum Opinion and Order, FCC 84-136, Apr. 6, 1984. On March 21, 1983, TBS filed a Petition for Expedited Consideration. When that petition received no response from the FCC, TBS sought review in the court of appeals to compel the FCC to institute a rulemaking or at least to respond to its petition.
163. Id. at 3.
164. See Quincy, 768 F.2d at 1448-50 (discussion of scarcity rationale as applied to broadcasters).
applied to other media such as the conventional press, would violate the first amendment.\textsuperscript{165} The court reasoned that the first amendment standard applied to broadcasters is not appropriately applied to cable systems because the technology makes it possible to transmit far more signals than could be broadcast over the air.\textsuperscript{166}

The court found that the must-carry rules favor certain classes of speech (local broadcasters) over others, and bolster local broadcasters by giving them a competitive advantage over cable programmers.\textsuperscript{167} In addition, the court agreed that if cable systems are substantially filled with mandatory signals, cable programmers are denied access to the system and subscribers are denied the right to receive information they wish.\textsuperscript{168} Thus, the \textit{Quincy} court concluded that the must-carry regulations merit treatment as an "incidental" burden on speech and, accordingly, it applied the "important or substantial" governmental interest test announced by the Supreme Court in \textit{United States v. \textit{O'Brien}}.\textsuperscript{169} The \textit{O'Brien} Court had held that although regulations based on government disapproval of speech content are constitutionally prohibited, a regulation only incidentally restricting first amendment freedoms will be sustained if it "furthers an important or substantial governmental interest," and if the incidental restriction on first amendment liberties "is no greater than is essential to the furtherance of that interest."\textsuperscript{170} In \textit{Quincy}, the court of appeals determined that the FCC provided no evidence to support its purported substantial governmental interest claim that local television would be destroyed if the must-carry rules were abolished.\textsuperscript{171} Ultimately the court found that the rules in their current form were " 'grossly' over inclusive," because they "indiscriminately protect[ed] each and every broadcaster regardless of the quantity of local service available in the community and irrespective of the number of local outlets already carried by the cable operator."\textsuperscript{172}

The \textit{Quincy} court invited the FCC to redraft the must-carry rules in a manner more sensitive to first amendment concerns.\textsuperscript{173} At the same time, 

\begin{verbatim}
\textsuperscript{165} Id. at 1450.
\textsuperscript{166} Id. The Court noted that in light of cable's virtually unlimited channel capacity, the standard of first amendment review reserved for occupants of the physically scarce airwaves is plainly inapplicable. \textit{Id.}
\textsuperscript{167} Id. at 1451 (quoting \textit{Home Box Office}, 567 F.2d at 48).
\textsuperscript{168} Id. at 1451-52.
\textsuperscript{169} 391 U.S. 367, 377 (1968).
\textsuperscript{170} Id. at 377. Although \textit{O'Brien} involved symbolic speech, the test has been applied to pure speech regulations as well. \textit{See, e.g., Home Box Office}, 567 F.2d at 9.
\textsuperscript{171} 768 F.2d at 1440.
\textsuperscript{172} Id. at 1460, 1463.
\textsuperscript{173} Id. at 1463.
\end{verbatim}
the order requiring Quincy to transmit the local network affiliates' programs in addition to the Seattle stations was vacated by the court and the TBS petition was returned to the FCC. The court vacated the agency's ruling that refused to initiate rulemaking proceedings because the must-carry rules were constitutional.174

On August 2, 1985, over a strong dissenting opinion by Commissioner Quello,175 the FCC decided not to seek further review of the Quincy decision or to attempt to redraft the must-carry rules to conform with first amendment standards.176 After the filing of numerous petitions by broadcast interests177 and prompting from several members of Congress,178 the FCC issued a Notice of Inquiry and Notice of Proposed Rulemaking (Notice)179 to investigate and examine certain proposals to redraft the must-carry regulations to meet the constitutional test required by Quincy. The Commission currently is reviewing comments on this rulemaking.180 On February 28, 1986,

174. Id.

At this point we cannot conceive of a new set of rules which would accomplish the Commission's policy goals and would meet the constitutional test outlined in the Quincy decision. Accordingly, we believe that the better course is to seek an equitable realigning of free marketplace forces rather than another false equilibrium of intrusion on the rights of cable operators, broadcasters, and copyright holders.

Id.
177. On October 4, 1985, the FCC received a request for rulemaking filed by the Association of Independent Television Stations, Inc. (INTV), and a joint request filed by the National Association of Broadcasters (NAB), concerning cable carriage of television broadcast signals. This joint request also included the following parties: Association of Maximum Service Telecasters, Station Representatives Association, American Broadcasting Companies, Inc., CBS, Inc., National Broadcasting Company, Inc., ABC Affiliates Association, Spanish International Communications Corporation, Bahia de San Francisco Television Company, Seven Hills Television Company, and National Religious Broadcasters.

On October 15, 1985, a proposal on this matter was filed by the Corporation for Public Broadcasting, the National Association of Public Television Stations, and the Public Broadcasting Service (Public Broadcasters). See infra note 179.
178. See, e.g., Letter from Senator Barry Goldwater, Chairman of the Senate Telecommunications Committee, to FCC Chairman Fowler (Sept. 13, 1985); see also Letter from FCC Chairman Fowler to Senator Goldwater (Sept. 24, 1985).
180. Comments in this proceeding were due Jan. 29, 1986; reply comments were extended to March 21, 1986. See Order Granting Request for Extension of Time To File Reply Comments (In the Matter of Amendment of Part 76 of the Commission's Rules Concerning Carriage of Television Broadcast Signals by Cable Television Systems), MM Docket 85-349
three commercial television broadcast groups and the National Cable Television Association reached a compromise on revised "must carry" rules.\textsuperscript{181}

\textsuperscript{181} See Notice of Inquiry, supra note 179, at 2-3. In its request, INTV proposes the adoption of a specific rule based on § 111 of the Copyright Act, as follows:

Cable television carriage of television broadcast signals is permissible [sic], for purposes of Section 111(c) of Title 17 of the United States Code, if the cable system carries, as part of the basic tier of cable service regularly provided to all subscribers at the minimum charge, the entire signals of all local television broadcast stations without discrimination or charge. A television broadcast station is "local" as to a cable system if the cable system lies within the "local service area" of the television station, as defined in 17 U.S.C. § 111(f).

Section 111(f) of the Copyright Act states in pertinent part:

The "local service area of a primary transmitter" in the case of a television broadcast station, comprises the area in which such station is entitled to insist upon its signal being retransmitted by a cable system pursuant to the rules, regulations, and authorizations of the Federal Communications Commission in effect on April 15, 1976 Notice of Inquiry, supra note 179, at 2.

The NAB does not offer a specific rule proposal but instead suggests various general areas for consideration. The NAB states that the court opinion serves as a kind of traffic report on pitfalls to be avoided for new rules. They suggest that new rules would require on-channel carriage of local signals in their entirety, on the basic tier and without charge to the station, subject to specific guidelines provided by the Court decision. NAB indicates that under the Court's guidelines the Commission must have an empirical, not merely intuitive, basis for rules. NAB believes that a Notice of Proposed Rule Making would yield facts upon which the Commission could rely in this matter. Finally, the NAB states that the new rules could be drawn more narrowly and flexibly to accommodate the Court's concerns and afford cable programmers greater access to cable systems. For example, some of the areas suggested by the NAB for consideration in any new rules include: varying cable channel capacity, duplicative broadcast signals and the definition of local station.

Notice of Inquiry, supra note 179, at 2.

The Public Broadcasters, in their proposal, request that the Commission consider a rule requiring cable systems to carry on their basic tier all public television stations that provide Grade B service to the cable system's community. The petitioners believe that without mandatory carriage rules, the ability of local public television stations to reach significant portions of the audiences may be adversely affected and that this will undermine Commission and Congressional policies designed to assure the . . . widespread availability of diverse, quality public television programming. The Public Broadcasters believe that such a rule proposal would meet the Court's constitutional test.

Notice of Inquiry, supra note 179, at 3.

181. See Communications Daily, Vol. 6, No. 40, Feb. 28, 1986, at 1-4; see also Communication Daily, Vol. 6, No. 39, Feb. 27, 1986, at 1-2. Following is the full text of must-carry agreement as of February 28, 1986:

A. Rational for a Modified Must Carry Rule

The Communications Act sets up two principal forms of television distribution: free over-the-air broadcasting and subscription; closed transmission cable. Must carry is necessary to protect the public interest in a reasonable quantum of free television being available to the public.

B. Specifics of the Rule
The FCC currently is considering the industry compromise.

1. Cable systems with 20 or fewer activated channels are exempt.
2. Cable systems with more than 20 activated channels must carry all qualified local television stations. Such stations are defined as those which (a) are located within 50 miles, as measured from the principal cable headend to the reference point of the station's city of license and; (b) receive a 2% share and 5% net weekly circulation in non-cable homes, by county. (Qualified local stations which were classified as distant signals under the old must carry rules do not have to be carried where copyright obligations continue to require treatment as distant signals.)
3. New stations may, at any time after sign-on, demonstrate they meet the 2%/5% viewing standard by presenting survey evidence gathered by a recognized ratings service (e.g., Arbitron or Nielsen).
4. Must carry will only be accorded to primary full power television stations. Translators, low power, and other passive signal repeaters do not have to be carried.
5. Systems with 21 to 26 activated channels are not required to carry more than 7 qualified local stations. Systems with more than 26 activated channels are not required to devote more than 25% of those channels to carriage of qualified local stations. "Activated channels" means those channels engineered at the headend of the cable system for the provision of services generally available to residential subscribers of the cable system, less channels reserved against interference with aeronautical frequencies.
6. Where the number of qualified local stations exceeds the 7 or 25% caps, the system selects the stations to be carried. No preferences exist in this selection process for network affiliates or any other type of station.
7. Systems are not required to carry more than one qualified local network affiliate station of the same commercial or public network. The system makes the selection.
8. A system does not have to afford non-duplication protection where it chooses to carry more than one station affiliated with the same commercial or public network.
9. A system cannot charge for carriage of a non-distant signal which is covered by the compulsory license. Stations which qualified or would have qualified for must carry under the old rules and no longer so qualify for mandatory carriage are to have may carry status.
10. Systems are not required to carry signals contained in the vertical blanking interval (VBI), e.g., teletext, or other primary signal enhancements, e.g., multi-channel sound.
11. Systems are not required to carry stations on their channel positions, but must carry all qualified local stations in their entirety on lowest priced tier.
12. Must carry is conditioned upon delivery of a good signal by the broadcast station to the cable headend. "Good signal" is to be defined by engineers.

(Editor's note: The following language on political considerations originally was a part of the full agreement as Section C. It was taken out and will not be filed with FCC. In addition, this language was not released publicly by parties to the compromise.)

As a supplement to our letter of February 26, 1986, setting forth a proposed rationale and must carry rule, we also propose the following political undertakings:
C. First Amendment Effect on Local Regulatory Jurisdiction over Cable Television

Setting the stage for what could be another significant ruling on the first amendment rights of cable operators, the Supreme Court recently granted review to hear arguments on a lower court ruling that the first amendment prohibits a city from awarding an exclusive cable television franchise to only one cable company in a community. The United States Court of Appeals for the Ninth Circuit held in Preferred Communication, Inc. v. City of Los Angeles that, under the first amendment, a city could not limit access to a given part of the city to a single cable operator when public utility facilities in that area are physically capable of accommodating more than one system.

Preferred Communications, Inc., was organized to operate a cable television system in Los Angeles. Knowing that surplus space on public utility poles had been reserved for use by cable television companies, Preferred sought leases allowing it to install its cables on utility poles owned by the Pacific Telephone and Telegraph Co. and the Los Angeles Department of Water and Power. The utilities refused to negotiate leases with Preferred until it obtained a cable franchise from the city.

POLITICAL UNDERTAKINGS
1. This agreement is not finalized until a majority of FCC Commissioners and key Members of Congress have agreed to its specifics.
2. The undersigned organizations agree to withdraw their support of the Frank, Bryant and Trible-Gorton bills dealing with the compulsory license, will inform the sponsors of their position, and will not seek other legislation to repeal the compulsory license.

In addition, the undersigned organizations will not seek to stop or amend a bill to which NCTA and MPAA may agree which would replace the current distant signal rate schedule with a simplified "flat fee" plan.

EDWARD O. Fritts
President
National Association of Broadcasters

MARGITA E. WHITE
Coordinator
Television Operators Caucus, Inc.

PRESTON PADDEN
President
Association of Independent Television Stations


182. See Kamen, High Court Takes Cable TV Case, Wash. Post, Nov. 13, 1985, at A4, col. 1; Supreme Court To Hear Case Challenging Franchising on First Amendment Grounds, Multichannel News, vol. 6, no. 48, Nov. 18, 1985, at 1.
183. 754 F.2d 1396 (9th Cir. 1985).
184. Id. at 1399-1400.
185. Id. at 1400.
186. Preferred was advised by Los Angeles officials that because it did not participate in the cable franchise auction that had already been held, it had missed the opportunity to participate. The City of Los Angeles grants a monopoly franchise in each region of the city. Id. at 1401. To enter the auction, each bidder was required to pay a $10,000 filing fee and to promise
On appeal, the Preferred Court determined that there were no technological reasons for regulating cable operators in the way over-the-air broadcasters are regulated and the city's interest in protecting public resources did not warrant the extreme regulation provided by the franchise selection auction process. The court concluded that because the public utility poles could accommodate more than one set of cables, establishing monopoly franchises amounted to reserving a public forum for only one speaker, which violates the first amendment.

As with Preferred, the United States Court of Appeals for the District of Columbia Circuit also affirmed first amendment cable protections utilizing a public forum analysis in Tele-Communications of Key West v. United States. In Key West, a cable operator had been denied a franchise renewal by Homestead Air Force Base when the installation granted another franchise to a new cable operator. Applying a similar public forum analysis, the Key West court concluded that there was no reason the existing cable franchise could not have been renewed simultaneously with issuing another franchise to a new cable operator. At the same time, however, the court warned that although the existing franchisee stated a first amendment claim under public forum jurisprudence, it left open the possibility that a different and perhaps more appropriate first amendment analysis may be developed on remand.
Thus, once again the courts have carved out some form of first amendment protection for cable operators. The Supreme Court's ultimate decision inPreferred could have far-reaching implications on the future of local cable regulations and cable's access to public rights-of-way as a vehicle to further freedom of expression under the first amendment.

D. FCC Preemption of State Regulations over Cable Television Nonvideo Services

With the development of technology over the years, cable systems have enhanced their capabilities to provide nonvideo services.95 The role of cable in providing these services raises numerous questions concerning the FCC's cable jurisdiction and preemptive authority. The new cable legislation does not resolve these questions because the legislation intentionally "preserves the regulatory and jurisdictional status quo with respect to non-cable communications services."196

In a recent declaratory ruling requested by Cox Communications, Inc. (Cox), the FCC preempted the Nebraska Public Service Commission's (NPSC) prior certification requirements imposed on cable operators' provision of institutional transmission service.197 In its petition, Cox asked the FCC to enter a declaratory ruling that the FCC has jurisdiction over and has preempted state and local regulation of all facilities that are located wholly within one state and used to originate or terminate interstate communications, including such facilities that also distribute intrastate communications.198 Cox specifically claimed that the NPSC regulations requiring Cox to obtain a certificate of public convenience and to state the impact of its services on Northwestern Bell Telephone Company and other telecommunications carriers had an adverse effect on its marketing and business development.199 Cox urged the FCC to preempt such state regulation in order to encourage the rapid development of new and innovative cable services.200

propriate if it were shown that two cable systems significantly disrupted the public rights-of-way. Id.

95. Many cable systems constructed in recent years are capable of providing "two-way" communications services, including the transmission of voice and data, e.g., shopping and banking at home, burglar and fire alarm monitoring, video games, data retrieval, and the origination and termination of long distance voice and data retrieval.


98. 50 Fed. Reg. at 37,427.

99. Id.

200. Id.
The FCC ultimately ruled that "[a]ny state regulation of institutional services offered by cable companies that acts as a *de facto* or *de jure* barrier to entry into the interstate communications market . . . must be preempted." It reasoned that because Cox was originating and terminating interstate common carrier service for entities such as MCI Telecommunications Corporation, the Nebraska regulations interfered with federal policies, including those of encouraging traditional and alternative common carrier services and ensuring the efficient use of facilities. The FCC further noted that it encourages the use of cable facilities for services other than traditional cable services, and, if it did not preempt the NPSC certification requirement, Cox's transmission services might be impeded severely, if they developed at all.

The FCC stated that preemption was specific to the Nebraska situation where the cable system offered interstate service because "there may be instances in which cable companies wish to provide only intrastate service or in which a cable company's ability to provide intrastate service would have little impact upon its ability to provide interstate service." Cable operators continue to seek federal preemption of state authority to regulate cable's provision of data transmissions and other specialized services. Four Denver-area cable operators recently petitioned the FCC to preempt certain Colorado Public Utilities Commission (PUC) regulations that the operators claim virtually foreclose cable provision of institutional and nonvideo interstate services. Under current Colorado PUC rules, cable systems must get a certificate of public convenience and necessity before offering any intrastate service and can be denied such certificate if the Mountain Bell Telephone Company has offered or has proposed to offer similar services.

This petition would expand the FCC's Cox ruling in that it specifically seeks preemption of PUC rate regulation and tariff approval procedures along with PUC regulations concerning any service capable of offering interstate service whether it provides it or not. Some commentators have sug-

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201. *Id.* at 37,433.
202. *Id.* at 37,431-33.
203. *Id.* at 37,433.
204. *Id.*
207. *Id.*
208. *Id.*
gested that the Cox and Colorado proceedings should be extended to
national preemption of all PUC rules governing cable provision of nonvideo
services. 209

Both the new Cable Act 210 and the Crisp 211 decision may provide suffi-
cient ammunition to establish the FCC's jurisdictional authority to preempt
any state regulations that frustrate the development of cable television. The
resolution of this jurisdictional controversy undoubtedly will have a signifi-
cant impact on the future development of the cable television industry.

III. CONCLUSION

The evolution of the FCC's regulation of cable television has been inco-
sistent. The Commission initially concluded it would not regulate cable,
then subsequently moved to constrictive over-regulation. In recent years,
however, the FCC has been actively deregulating cable television. Mean-
while, the industry itself has progressed technologically and economically,
and cable has emerged as a strong communications medium. The FCC's
regulation has both influenced and been influenced by the continued emer-
gence of new technologies and services.

The recent Cable Act, at last, has embodied a national cable television
policy, providing guidelines for both federal and local regulatory authorities.
Such guidelines should lead to more consistent and predictable regulation.
Nevertheless, recent judicial decisions and administrative rulings suggest
that the evolution of cable television regulation is not yet ended. The courts
and the Commission can be expected to continue to strive to define the scope
of first amendment protections afforded to cable television. Local franchise
authorities can be expected to continue to assert their jurisdiction in areas
where the Cable Act has not fully resolved the question of who, if anyone,
has jurisdiction.

209. One commenter has noted that "[i]t's a lost game for cable if they try and play at the
PUC level because that's where the [Bell Operating Companies] live, that's their home." The
cable operators, he added, "[h]ave to have at the start of their businesses some regulatory room
to breathe in order to get their businesses going before they get slapped with a million-dollar
PUC approval proceeding." Multichannel News, supra note 205, at 9 (quoting cable attorney
Wes Heppler).

601(4) provides that one of the Cable Act's purposes is to "assure that cable communications
provide and are encouraged to provide the widest possible diversity of information sources and
services to the public." Id. This provision may be interpreted to empower the FCC to pre-
empt those state regulations that frustrate the achievement of the Cable Act's statutory goals.

211. 104 S. Ct. 2694 (1984). The Supreme Court's recent pronouncements in Crisp appear
to indicate that the FCC may preempt state regulation where it interferes with the provision of
increased and diversified cable services.