

Recent Development

FCC v. Midwest Video Corporation: One Less Cable Restraint

I. INTRODUCTION

A controversial aspect of the Federal Communications Commission's (FCC) regulation of cable television was squelched by the United States Supreme Court in *Federal Communications Commission v. Midwest Video Corporation (Midwest Video II)*.¹ As will be shown, the holding of *Midwest Video II* is not as broad as it may appear at first glance, and its value as a guide to future Court treatment of FCC cable regulation is thus diminished.

At issue in *Midwest Video II* were the FCC's rules² requiring most cable systems to expand their channel capacity and to devote at least one channel to public access use. Public access users were to be any local third parties who wished to produce and transmit their own programming through the use of a cable system's facilities. The FCC rules specifically prohibited cable operators from interfering with or in any other way censoring these public access programs, save for obscenities, commercial messages, and lottery information.³ Cable operators were further required to make at least one access channel and all necessary production equipment available free of charge to public access users on a nondiscriminatory, first-come basis. The remaining access channels, if any, were to be open to public access use for a nominal charge.⁴

In the court of appeals, respondent cable operators had successfully challenged⁵ these aspects of the FCC rules as imposing common carrier requirements on them in violation of section 3(h)⁶ of the Communications Act, which reads: "[A] person engaged in radio broadcasting⁷ shall not, insofar as such person is so engaged, be deemed a common carrier."

Section 3(h) is of little help in spelling out just what is a common carrier, since its definition is circular: "[c]ommon carrier' or 'carrier' means any person engaged as a common carrier for hire"⁸

Accordingly, in sustaining the Eighth Circuit's decision against the FCC, the Supreme Court refined the meaning of common carrier status;

1. 440 U.S. 689 (1979).

2. 47 C.F.R. §§ 76.252-258 (1977).

3. 47 C.F.R. § 76.256(b), (d) (1977).

4. 47 C.F.R. § 76.256(c), (d) (1977).

5. *Midwest Video Corp. v. Federal Communications Comm'n*, 571 F.2d 1025 (8th Cir. 1978).

6. 47 U.S.C. § 153 (h) (1976).

7. "Radio broadcasting" has been held to include over-the-air television broadcasting and cable transmissions. 440 U.S. at 696-98.

8. 47 U.S.C. § 153(h) (1976).

"[w]ith its access rules . . . the Commission has transferred control of the content of access cable channels from cable operators to members of the public who wish to communicate by the cable medium. Effectively, the Commission has relegated cable systems, *pro tanto*, to common-carrier status."⁹ The Court went on to reiterate the FCC's own definition of a communications common carrier as one that offers its facilities in such a way that "all members of the public who choose to employ such facilities may communicate or transmit intelligence of their own design and choosing. . . ."¹⁰

In *Columbia Broadcasting System, Inc. v. Democratic National Committee*¹¹ (CBS), relied on by the Court in *Midwest Video II*, the Court analyzed the legislative history of the statutory common carrier provision, noting that Congress had inserted the common carrier prohibition in section 3(h) of the Act in order "to preserve the values of private journalism."¹² The Court in CBS viewed the choice as one between government and private censorship, with Congress legislatively opting for the less pervasive private censorship.¹³ *Midwest Video II* does not treat the question whether the access rules, which on their face bar private censorship by cable operators, in fact impose some form of governmental censorship. It can be argued, however, that the FCC rules result in no censorship at all, save for the obscenity, lottery, and commercial message prohibitions.

The Court had previously upheld steadily increasing jurisdictional claims made by the FCC over cable television¹⁴ that had been made in the absence of specific statutory authority.¹⁵ In *United States v. Southwestern Cable Co.*,¹⁶ the Court found FCC power over cable in the very broad language of the Communications Act, but limited such regulatory power to that which is "reasonably ancillary to the effective performance of the Commission's . . . regulation of television broadcasting."¹⁷ Four years later, in *United States v. Midwest Video Corp. (Midwest Video I)*,¹⁸ a closely divided court upheld an FCC regulation¹⁹ that forced certain cable systems to originate their own programs in addition to merely carrying the

9. 440 U.S. at 700-01.

10. *Id.* at 701.

11. 412 U.S. 94 (1973).

12. *Id.* at 109.

13. *Id.* at 105, 116.

14. The term "cable television" includes several methods for generating or retransmitting programs—all having in common the final distribution by coaxial cable to individual homes—in contrast to regular radio and television broadcast stations, which transmit their programs over-the-air to the antennae of individual radio and television receivers. The capacity (number of channels) of over-the-air broadcasting is limited by natural phenomena, while the capacity of cable TV is theoretically vast. W. FRANCOIS, MASS MEDIA LAW AND REGULATION 291 (1975).

15. Cable television is not mentioned in the Communications Act.

16. 392 U.S. 157 (1968).

17. *Id.* at 178.

18. 406 U.S. 649 (1972).

signals of broadcast stations. *Midwest Video I* continued the "reasonably ancillary" rule²⁰ and added a second requirement—that any FCC regulation of cable systems support the public interest.²¹ In both *Southwestern Cable* and *Midwest Video I*, the Court invoked the "reasonably ancillary" test in the absence of specific statutory authority.²²

Midwest Video II appears to have continued application of the "reasonably ancillary" test. It is difficult to understand, however, why application of this test was necessary in *Midwest Video II* in light of the Court's finding that the access rules at issue were proscribed by the common carrier language of section 3(h).²³ Having found Congress' "outright rejection of a broad right of public access on a common-carrier basis,"²⁴ to be controlling on the validity of the FCC rules, the case would appear to have been decided at that point. As a result, the Court's subsequent consideration of the reasonable ancillarity of the access rules must be considered dictum. In contrast to the Eighth Circuit, the Court refused to consider the first amendment rights of cable operators, although it hinted that the issue is "not frivolous."²⁵

II. THE BACKDROP AGAINST WHICH *Midwest Video II* WAS DECIDED

The growth of the cable television industry has been explosive.²⁶ There were 2,678 systems in operation at the time *Midwest Video I* was decided.²⁷ Current figures show 4,000 operating systems and 1,200 more approved but not operating.²⁸ The 12.8 million subscribing households account for as many as 40 million viewers—18 percent of the television audience in the United States.²⁹

The FCC's regulation of cable has not been as consistent. While the first commercial cable system was established in 1950,³⁰ it was not until 1965 that the Commission adopted rules³¹ regulating cable and asserting its jurisdiction over all cable systems.³² These rules were adopted in large

19. 47 C.F.R. § 76.201(a) (1972). This provision was subsequently removed.

20. 406 U.S. at 663.

21. *Id.* at 671.

22. In *Southwestern Cable*, the Court found justification for FCC regulation of cable television in the broad language of the Communications Act to the effect that the Act applies to "all interstate and foreign communication by wire or radio. . . ." 47 U.S.C. § 152(a)." 392 U.S. at 167.

23. 440 U.S. at 691, 708.

24. *Id.* at 708.

25. *Id.* at 709 n.19. In addition to avoiding a constitutional issue, this result also avoids any balancing of the first amendment rights of potential access channel users with those of cable operators.

26. *United States v. Midwest Video Corp.*, 406 U.S. at 651.

27. *Id.* at 651 n.2.

28. BROADCASTING CABLE SOURCEBOOK 7 (1979).

29. *Id.*

30. *United States v. Southwestern Cable Co.*, 392 U.S. at 162.

31. 1 F.C.C.2d 453 (1965).

32. M. HAMBURG, ALL ABOUT CABLE: LEGAL AND BUSINESS ASPECTS OF CABLE AND PAY TELEVISION 13 (1979).

part to protect broadcasters from the perceived threat of the emerging cable TV industry.³³ Broadcasters had claimed that unrestricted growth of cable TV would jeopardize their investments and revenues.³⁴ It was these rules that led to the *Southwestern Cable* case³⁵ in 1968, in which the Court found "broad authority" for extending the FCC's jurisdiction to include all cable systems, albeit within the reasonably ancillary test.³⁶ In 1972 the Commission adopted what are basically the rules governing federal regulation of cable television today.³⁷ When the Court considered the mandatory programming origination rule in *Midwest Video I*,³⁸ the swing vote in the 5-4 decision was Chief Justice Burger's concurrence, in which he found that the Commission had "strain[ed] the outer limits" of its jurisdiction.³⁹ The Chief Justice, however, reluctantly deferred to the judgment of the Commission.⁴⁰

The 1972 rules⁴¹ had included somewhat more stringent public access requirements than those struck down in *Midwest Video II*. In 1976, however, cable operators obtained a dilution of these rules and a deadline extension.⁴²

One year later, a proponent of deregulation was in the White House. The person that President Carter appointed to chair the FCC has been quoted to the effect that deregulation is "the new religion in [Washington]".⁴³ In Congress, the massive proposed rewrite⁴⁴ of the Communications Act exempted cable television from federal regulation, and prohibited all state and local regulation as well.⁴⁵ In April 1979, the FCC initiated rulemaking that would delete current restrictions, designed to protect broadcasters,⁴⁶ on cable's ability to import distant television programs, and would soften certain exclusivity rules that limited cable's competition with local broadcast stations.⁴⁷ In a separate statement

33. D. LEDUC, *CABLE TELEVISION AND THE FCC: A CRISIS IN MEDIA CONTROL* 1-2, 137-39 (1973).

34. *Id.* at 137-38.

35. 392 U.S. 157 (1968).

36. *Id.* at 178.

37. 36 F.C.C.2d 143 (1972).

38. 406 U.S. 649 (1972).

39. *Id.* at 676.

40. *Id.*

41. Cable Television Report and Order, 37 Fed. Reg. 3252, 3289-90 (1972).

42. Four access channels were originally required; this was subsequently modified to require only one access channel in many cases. The compliance deadline was extended from March, 1977 to June, 1986. Report and Order in Docket No. 20528, 59 F.C.C.2d 294 (1976). 47 C.F.R. § 76.252-258 (1979).

43. BROADCASTING 25 (June 11, 1979), quoting FCC Chairman Charles Ferris. His view continues to be widely held: "[t]he gospel of deregulation is winning more and more converts in government." Wall St. J., Sept. 4, 1979, at 1, col. 6.

44. H.R. 3333. A less sweeping deregulatory bill, H.R. 6121, has been substituted for H.R. 3333. 38 CONG. Q. 389, 389 (1980).

45. CABLE TELEVISION INFORMATION CENTER, NOTES FROM THE CENTER 1 (May, 1979).

46. LEDUC, *supra* note 33, 137-58.

47. Notice of Proposed Rulemaking in Docket No. 20988, 71 F.C.C.2d 951 (May, 1979).

supporting the philosophy behind this piece of proposed deregulation, the FCC chairman wrote: "[in regulating cable] we have attempted to put our finger in one hole of a dike which is looking more and more like a sieve, as over the air TV, video cassettes and discs, teletext and viewdata are all beginning to offer more video diversity."⁴⁸

In this deregulation climate, *Midwest Video II* seems more like an endorsement of current government stance and less like a defeat for the FCC. The true losers would appear to be the broadcasters, whose fears of cable competition have been a keystone of the FCC's policy of limiting cable's power.⁴⁹ Following *Midwest Video II*, cable operators have one less restraint. Also affected by the decision are potential users of access channels. One commentator claims that the emergence of a broad class of access users will result from *Midwest Video II*,⁵⁰ while another cites problems of financing and apathy that have prevented effective use of locally mandated access channels.⁵¹

Whatever its failings, the access movement was launched in pursuit of the same target as cable television in general: diversity.⁵² Cable has been seen as the answer to the dominance by the three major networks of most over-the-air programming. In practice, the FCC has had to force cable operators to offer more than a re-channelling of over-the-air programs by requiring them to originate some programs of their own.⁵³ The rules struck down in *Midwest Video II* were also aimed at diversity.⁵⁴ In addition to the provision of local access channels, most cable systems were required to enlarge their overall capacity from twelve to twenty channels.⁵⁵ The Court expressly rejected the Commission's argument that these rules be considered apart from the access rules, and, as a result, the Court struck down the whole package.⁵⁶ Whatever the prospects for cable diversity may have been, *Midwest Video II* has arguably dimmed them.

Cable operators have been subject to a wide number of state and local

48. *Id.* at 1001.

49. Note, *FCC's Cable Television Jurisdiction: Deregulation by Judicial Fiat*, 30 U. FLA. L. REV. 718, 726-27 (1978). If the current deregulatory movement were to remove a public policy underpinning of the FCC's regulation of cable—protection of the broadcast industry—it could lead to judicial reassessment of the Commission's jurisdiction over cable. See *United States v. Southwestern Cable Co.*, 392 U.S. 157, 177 (1968).

In a court of appeals case, it was held that the reasonably ancillary test is relevant only when cable practices threaten the existence of broadcasting. Otherwise, the test is one of "long-established regulatory goals." *Home Box Office, Inc. v. Federal Communications Comm'n*, 567 F.2d 9, 27-29 (D.C. Cir. 1977), cert. denied, 434 U.S. 829 (1977). See generally Comment, *Home Box Office, Inc. v. F.C.C.*, 27 CATHOLIC U.L. REV. 432 (1978).

50. CABLE TELEVISION INFORMATION CENTER, NOTES FROM THE CENTER 6 (November, 1978).

51. B. SCHMIDT, FREEDOM OF THE PRESS VERSUS PUBLIC ACCESS 207-10 (1976).

52. Report and Order in Docket No. 20508, 59 F.C.C.2d 294, 298 (1976), quoted in 440 U.S. at 694-95.

53. See text accompanying notes 18-19 *supra*.

54. See note 52 *supra*.

55. 47 C.F.R. § 76.252 (1979).

56. 440 U.S. at 708 n.18.

regulatory agencies in addition to the FCC.⁵⁷ *Midwest Video II* may create a vacuum by eliminating this area of federal preemption. For instance, one of the invalidated rules prohibited local authorities from requiring more access capacity.⁵⁸ Local regulators are now presumably free to negotiate greater access services than those just overcome in *Midwest Video II*. For some cable operators, the victory could prove to be a pyrrhic one.

For broadcasters, *Midwest Video I*'s holding may have a familiar ring. In its 1973 *CBS* decision,⁵⁹ the Court rejected common carrier obligations for broadcasters in its refusal to rigidly enforce the FCC's fairness doctrine.⁶⁰ The Court held that requiring broadcasters to accept all advertising whenever they accept some advertising would not only misconstrue the fairness doctrine, but would also have common-carriage implications.⁶¹ It found consistent congressional rejection of common carrier status for broadcast licensees beginning with the legislative debates surrounding the original Radio Act of 1927.⁶² The *Midwest Video II* court for the first time invoked the same pattern of Congressional disapproval and statutory proscription of common carrier status in the areas of cable television.⁶³

Justice Stevens' *Midwest Video II* dissent questioned the Court's application of the common carrier issue in some previous decisions. Stevens pointed out that, in *Midwest Video I*, the Court had upheld the mandatory origination-of-local-programming rule, which the FCC later repealed because it believed that the less onerous access rules would provide the necessary diversity. To Stevens, the majority in *Midwest Video II* was voiding less onerous versions of what it had upheld in *Midwest Video I*.⁶⁴ This argument loses weight when one considers that it is the FCC, not the Court, that has deemed the access rules less onerous. This finding is surely no more binding on the Court than the FCC's proclamation that the access rules do not impose common carrier obligations. Presumably, the Court is not bound by administrative determinations. Were it otherwise, every proposed rule could carry a finding that it is constitutional, within an agency's jurisdiction, and so forth.

Justice Stevens was also troubled by the *Southwestern Cable* precedent. The rules that gave rise to *Southwestern Cable* required cable systems to carry the signals of local broadcasters. To Stevens, this was a

57. COMMITTEE FOR ECONOMIC DEVELOPMENT, BROADCASTING AND CABLE TELEVISION 21 (1975).

58. 47 C.F.R. § 76.258 (1979).

59. 412 U.S. 94 (1973).

60. *Id.* at 105-14.

61. *Id.*

62. *Id.*

63. 440 U.S. at 701-04.

64. *Id.* at 709-10.

common carrier obligation that had passed muster.⁶⁵ He conceded, however, that the rules were not specifically reviewed in *Southwestern Cable*.⁶⁶ Stevens also recognized that the mandated carriage of local broadcast signals does not fit the majority's broad definition of common carriage, which it adopted from the FCC itself: making a "public offering to provide [communications facilities] whereby *all members of the public* who choose to employ such facilities may communicate or transmit intelligence of their own design and choosing. . . ."⁶⁷

Stevens' most telling argument was his contention that "the Court has misread the statute."⁶⁸ He pointed out that the definition of "common carriage" in section 3(h) is found in the definitional section of the Act and that "it does not purport to grant or deny the Commission any substantive authority."⁶⁹ Stevens claimed that section 3(h) prohibits the Commission from *deeming* a broadcast station to be a common carrier merely because it is engaged in broadcasting.⁷⁰ He found nothing to suggest that the Commission cannot impose an otherwise lawful obligation simply because it "might be termed a 'common carrier obligation.'"⁷¹ The *CBS* majority, however, marshaled impressive evidence from the congressional debates surrounding the various communications acts. It cited several attempts to insert common carrier obligations that were defeated because they would have impinged on broadcast licensees' journalistic integrity.⁷² *Midwest Video II* incorporated the reasoning of the *CBS* decision.⁷³

III. CONCLUSION

With the *Midwest Video II* decision, the cable industry seems to have taken a crucial step in its march to equality with broadcasters. A substantial handicap—lack of control over some of its channels—has been removed. Additionally, forced expansion of cable channel capacity is no longer an impending financial burden. This is not to say that cable has received full parity with broadcasting. For one thing, the holding may be read narrowly, with the result that the apparent continuation of the reasonable ancillarity rule is *dicta*,⁷⁴ thus clouding the situation. Moreover, the Court held open the possibility that less intrusive access rules might pass muster;⁷⁵ and it refused to decide whether cable operators

65. *Id.* at 712-13.

66. *Id.* at 712 n.4.

67. *Id.* at 701 (brackets in original, emphasis added).

68. *Id.* at 710.

69. *Id.*

70. *Id.*

71. *Id.* at 711.

72. 412 U.S. at 105-10. It was unable, however, to tie these rejections directly to the language of section 3(h).

73. 440 U.S. at 702-05.

74. See text accompanying notes 23-25 *supra*.

75. 440 U.S. at 705 n.14.

enjoy the same degree of journalistic control as broadcasters.⁷⁶ Even with these caveats, however, cable is emerging as a more formidable competitor for broadcast licensees. The heightened competitive stance is a victory for proponents of deregulation as well. There is, unfortunately, no apparent answer to the most important question: what does this mean for television viewers?

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76. *Id.* at 707 n.17.