

tionalizing the court's actions in throwing out the pay-cable rules while tentatively affirming the same rules for over-the-air pay television. There is no evidence of harm there, either. And if the ex parte contacts marred the record at all, they marred it with respect to the subscription-television aspect, as well. However, the court ordered the commission to hold a hearing to determine what off-the-record comments were made. It will value a make a final decision after receiving the commission's report on the hearing.

As for the thrust of the opinion, most lawyers agreed that it did not rule out commission regulation of pay cable. But no one thought the opinion leaves the commission an easy task if it attempts to reassert its authority.

The rules at issue deny to pay cable specific sports events such as the World Series and the Super Bowl, put restrictions on the amount of regularly scheduled sports events pay-cable systems might carry, and generally limit the films they may present to films that are less than three or more than 10 years old. (Films between three and 10 years old may be shown in a community if they are licensed to a station or network serving the market.) The rules also bar pay-cable systems from devoting more than 90% of their time to sports and films and prevent them from presenting commercials.

In rejecting those rules, the court, in an opinion by Judges J. Skelly Wright, George E. MacKinnon and Stanley A. Weigel, the last a U.S. judge of the North-

ern District of California, who was sitting by designation, began at the beginning. It questioned the commission's premise, as expressed in the notice of rulemaking that led to the pay-cable rules, that cablecasting should "be regulated to provide a beneficial supplement to over-the-air broadcasting without at the same time undermining the continued operation of that 'free' television service." The court said the commission had not justified its relegation of cable to a supplementary role.

Essentially, the court overturned the rules on jurisdictional and First Amendment grounds. It said the commission had not demonstrated how the rules are "ancillary" to the regulation of broadcasting—the test the Supreme Court laid down in the case in which the commission's jurisdiction over cable television was upheld. And even assuming jurisdiction, the court added, the commission had failed to state clearly the harm the regulations are designed to remedy "and its reason for assuming the harm exists."

That second factor was critical to the holding on First Amendment grounds. The court said the First Amendment would not prohibit the adoption of pay-cable rules if they were shown to serve an important and substantial interest. But, it said, the commission "has not put itself in a position to know whether the alleged siphoning phenomenon is a real or merely a fanciful threat to those not served by cable."

The reactions among broadcast industry

parties was generally predictable. Spokesmen for the National Association of Broadcasters, CBS and ABC said they would appeal, although they have not yet decided whether they will seek rehearing before the appeals court panel on the full nine-member bench, or seek Supreme Court ruling. But NBC and Metromedia Inc., which are also involved in the case, had not yet reached a decision on whether to appeal.

More important, the FCC had not yet reached a decision, and there was no certainty what that decision might be. The attitude of the lawyers and commission members regarding the ex parte section of the opinion indicated that was a likely target of attack on appeal.

But the commission has been taking a more deregulatory approach to broadcast and cable matters over the past several years. And even when the pay-cable rules were adopted, there was less enthusiasm for the rules dealing with movies than with those aimed at preventing the loss of sports.

As a result, there seemed to be the possibility last week that the commission might take a pragmatic, even coldblooded approach: Seek reversal of the ex parte section, but abandon the fight for the rules themselves. Then, if the normal, unfettered operation of pay cable leads to harm to stations and to the public they serve, the commission could again seek to adopt rules governing pay cable. As one commission lawyer said, "We'd have the evidence we need."

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