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UNITED VIDEO, INC. v. FCC: JUST ANOTHER EPISODE IN SYNDEX REGULATION

I. INTRODUCTION

Recently, cable viewers have been flipping channels looking for their favorite syndicated shows and have, to their disappointment, not found them. The reason? Syndication Exclusivity Rules ("Syndex"). Syndex is a complex regulatory scheme promulgated by the Federal Communication Commission ("FCC") that restricts the syndicated programming offered by cable stations.

Syndex became fully effective on January 1, 1990. The new rules require cable operators who import broadcast signals to delete syndicated programs at the request of local broadcasters who have purchased the exclusive local rights of these programs. As a result of Syndex, some

2. "Syndicated programming, supplied by independent producers, consists of either programs previously broadcast on network stations or newly produced programs. Unlike network programming, simultaneous broadcasting of syndicated programs is infrequent because the independent stations do not all purchase the same programs." Malrite TV v. FCC, 652 F.2d 1140, 1143 n.1 (2d Cir. 1981).

The new Syndex rules define "syndicated programming" only as "non-network." Under Section 76.5(m), "a network program is any program delivered simultaneously to more than one broadcast station regional or national, commercial or non-commercial." Under trade usage, "Cheers" is a syndicated program. But because it is distributed simultaneously and nationally by satellite to its licensees, it is arguably a network. Pending clarification by FCC, one should look to intention of underlying exhibition contract.


3. A cable system is a "facility that in whole or in part receives signals of one or more television broadcast stations licensed by the FCC and makes secondary transmissions of such signals to subscribing members of the public who pay for the service." H.R. REP. No. 1476, 94th Cong., 2d Sess. 99 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5714. "Cable subscribers pay a monthly fee to receive a basic set of channels plus an optional fee for special channels." Malrite, 652 F.2d at 1143.


5. Id. § 76.151. In order to invoke Syndex, a broadcaster must "notify affected cable systems within sixty calendar days of the signing of such a contract." Id. § 76.155(b). The FCC further explained the 60-day requirement by stating that if a broadcaster failed to provide notice within 60 days of the contract's signing, the broadcaster would lose its Syndex rights under the contract. CHARLES D. FERRIS ET AL., 1 CABLE TELEVISION LAW: A VIDEO COMMUNICATIONS PRACTICE GUIDE ¶ 7.11[4][b] (1991). Further, the broadcaster could only recover the rights by renegotiating the contract. Id.

The requisite notice must contain the name, address and television broadcast station of
popular syndicated programs such as Star Trek have been deleted from the cable programming schedule.

For example, a local television station may purchase the television program I Love Lucy. At the same time, a cable station offering services to the same region may import a broadcast signal from a station in a distant state\(^6\) that also had local exclusive rights to I Love Lucy. Pursuant to the FCC's new rules, the cable network must substitute I Love Lucy with another program or black out the channel for that time slot, upon the local channel's request. This denies cable viewers their preferential viewing time and imposes a burdensome administrative responsibility on cable operators.

The promulgation of these rules is not the first encounter the FCC has had with Syndex. In 1972, the FCC implemented Syndex rules prohibiting any cable operator from carrying a syndicated program in the top one hundred major television markets for a period of one year following the local sale or licensing of the program.\(^7\) After implementation of the Copyright Act of 1976\(^8\) ("Copyright Act"), the FCC repealed Syndex, believing broadcasters would be able to compete effectively with cable operators.\(^9\) In response to the tremendous growth in the cable in-

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\(^6\) A broadcast signal is distant if retransmitted by a cable system located more than one hundred miles from the signal's point of origin. National Ass'n of Broadcasters v. Copyright Royalty Tribunal, 675 F.2d 367, 373 n.3 (D.C. Cir. 1982).

\(^7\) Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to Community Antenna Television Systems; and Inquiry into the Development of Communications Technology and Services, 36 F.C.C.2d 143 (1972), aff'd sub nom., ACLU v. FCC, 523 F.2d 1344 (9th Cir. 1975), modified sub nom., Midwest Video Corp. v. FCC, 571 F.2d 1025 (8th Cir. 1978) (codified at 47 C.F.R. §§ 76.151-.161 (1980) (repealed 1980)) [hereinafter Cable Television Report & Order].


industry, however, the FCC once again changed its position on the need for Syndex regulation.\textsuperscript{10}

Upon the promulgation of these new FCC rules, many cable operators,\textsuperscript{11} including United Video, Inc. ("UVI"),\textsuperscript{12} questioned the FCC's authority to implement these rules.\textsuperscript{13} In \textit{United Video, Inc. v. FCC}\textsuperscript{14} ("\textit{United Video}"), the District of Columbia Court of Appeals upheld the FCC's decision to reinstate Syndex.\textsuperscript{15}

This note questions the \textit{United Video} court's affirmation of the FCC's authority to adopt new Syndex rules, particularly in light of the Copyright Act\textsuperscript{16} and the Cable Communications Policy Act of 1984 ("Cable Act").\textsuperscript{17} Additionally, this note asserts that Syndex is "arbitrary and capricious," and therefore the \textit{United Video} court should have vacated the regulations.

\section{II. Statement of the Facts: \textit{United Video, Inc. v. FCC}}

In 1987, the FCC launched an investigation into an earlier decision that eliminated Syndex.\textsuperscript{18} After an extensive inquiry, the FCC promulgated new Syndex rules in 1988.\textsuperscript{19} Many cable operators,\textsuperscript{20} whose distant signal\textsuperscript{21} offerings would be restricted by Syndex, initiated actions against the FCC.\textsuperscript{22}

In 1989, UVI and several other cable operators petitioned the Dis-


\textsuperscript{12} UVI is a communications satellite common carrier furnishing broadcast signal transmission services to cable television users. \textit{Id.} at 3.

\textsuperscript{13} See United Video, Inc. v. FCC, 890 F.2d 1173 (D.C. Cir. 1989).

\textsuperscript{14} 890 F.2d 1173 (D.C. Cir. 1989).

\textsuperscript{15} \textit{Id.} at 1192.


\textsuperscript{17} 47 U.S.C. §§ 521-559 (1988).

\textsuperscript{18} Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries, 2 F.C.C.R. 2393 (1987) [hereinafter Notice of Inquiry and Notice of Proposed Rulemaking].


\textsuperscript{20} See supra note 11.

\textsuperscript{21} Distant signals are those additional signals which cable operators offer to subscribers and which are not available on the local broadcast stations. Pamela B. Gullett, Comment, 34 AM. U. L. REV. 557, 557-58 n.4 (1985).

\textsuperscript{22} See United Video, Inc. v. FCC, 890 F.2d 1173 (D.C. Cir. 1989).
trict of Columbia Court of Appeals to set aside the FCC’s Report and Order\(^2\) adopting Syndex.\(^3\) The petitioners challenged the rules as arbitrary and capricious,\(^4\) and as violative of the Copyright Act,\(^5\) the Cable Act,\(^6\) and the First Amendment.\(^7\)

After a lengthy exploration of the turbulent history between the FCC and the cable companies,\(^8\) the United Video court examined the FCC’s purpose in reinstating Syndex. The court accepted the FCC’s reasoning that Syndex rules would increase the diversity of television programming.\(^9\) Additionally, the court found that the FCC had fully considered the adoption of Syndex.\(^10\) Therefore, the court concluded, Syndex was neither arbitrary nor capricious.\(^11\)

After ruling that the FCC acted impartially when it adopted Syndex, the court examined the FCC’s jurisdiction to enforce these rules.\(^12\) The court upheld the FCC’s authority to implement Syndex, noting that the Communications Act grants broad power to the FCC when making necessary rules and regulations for the public interest and convenience.\(^13\) The court found that neither the Copyright Act nor the Cable Act precluded the FCC from reinstating Syndex regulation.\(^14\) Thus, the court held that the implementation of Syndex was within the FCC’s rulemaking authority.\(^15\)

As a result, the United Video court upheld the Report and Order\(^16\) adopting Syndex, and Syndex went into effect on January 1, 1990.\(^17\) To better understand the effects of this decision and to place the role of Syndex in context, it is necessary to trace the history of Syndex.

24. United Video, 890 F.2d at 1176.
25. Id. at 1178.
26. Id. at 1182.
28. Id.
29. See id. at 1176-78.
30. Id. at 1181.
31. Id.
33. Id. at 1182-92.
34. Id. at 1182-83.
35. Id. at 1182.
36. Id. at 1176.
III. SYNDEX BACKGROUND

A. The Growth of Cable

The first cable system was introduced in 1949 to bring television signals to remote and isolated areas. Using a studio and a coaxial cable, the cable system could transmit an electronic signal over wires to television sets. Since cable was the only way to furnish remote areas with television service, television broadcasters welcomed cable and the additional viewers it brought. As technology improved, however, cable became a vigorous competitor in the communications market, luring viewers away from local broadcast programming.

In 1961, for example, a cable operator began serving San Diego, a region that already had three Very High Frequency ("VHF") network affiliates. With the extra cable reception, San Diego viewers received four additional independent stations which offered sports, old motion pictures and reruns of network shows. San Diego consumers were willing to subscribe to cable in order to receive more diversified programming. The cable subscribers benefitted significantly from the additional programming.

As cable television offered an attractive alternative to the programming provided by local, over-the-air stations, "television broadcasters

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40. Amendment of Subpart L, Part 11, to Adopt Rules and Regulations to Govern the Grant of Authorizations in the Business Radio Service for Microwave Stations to Relay Television Signals to Community Antenna Systems, 38 F.C.C. 683, 698 ¶ 43 (1965) [hereinafter Rules re Microwave-Served CATV].

41. A coaxial cable physically connects the studio with the television set of every user of the system. MARC A. FRANKLIN & DAVID A. ANDERSON, CASES AND MATERIALS ON MASS MEDIA LAW 886 (1990).

42. Id. A single cable is capable of carrying 55 or more television channels. Id.

43. Id. at 887.

44. See id.

45. Id. at 887.

46. FRANKLIN & ANDERSON, supra note 41, at 887.

47. Id.

48. Id.

49. [Cable] makes possible the provision of a variety of program choices, particularly the three full network services, to many persons in areas with no local station and in
began to view cable transmission as a competitive threat." Consequently, a regulatory battle ensued between local broadcasters and cable operators.

B. Syndex Regulation

1. Initial Cable Regulations

The FCC was initially reluctant to regulate cable systems because it was unsure whether it possessed the requisite jurisdiction over this new communications medium. The FCC first declined to assert regulatory jurisdiction because the Communications Act of 1934, the source of the FCC's power, did not expressly grant statutory authority. This apprehension, however, was short-lived.

In 1962, the FCC asserted limited jurisdiction over cable in Carter Mountain Transmission Corp. v. FCC. In this decision, the FCC denied a common carrier's application to construct a microwave radio com-

one- and two-station markets. . . . [Cable] systems also afford a means of providing nonnetwork commercial and educational services to many persons in areas with insufficient population to support local broadcast outlets of this nature. . . . [Cable] systems make important contributions by providing good quality reception of color signals and improving reception of local signals in areas within the predicted contours of local stations where off-the-air reception is inferior or precluded because of terrain, manmade structures, or other factors.

Amendment of Subpart L, Part 91, to Adopt Rules and Regulations to Govern the Grant of Authorizations in the Business Radio Service for Microwave Stations to Relay Television Signals to Community Antenna Systems, 2 F.C.C.2d 725, 745 ¶ 47 (1966) [hereinafter Amendment of Subpart L, Part 91].

50. FRANKLIN & ANDERSON, supra note 41, at 887.

51. See generally Inquiry into the Impact of Community Antenna Systems, supra note 39, at 427-31 ¶¶ 58-71. See, e.g., Frontier Broadcasting Co. v. Collier, 24 F.C.C. 251 (1958) (FCC held that cable operators were not common carriers, and therefore not within FCC regulatory jurisdiction, since it is the cable operators rather than the subscribers who determine which signals are to be carried); Inquiry into the Impact of Community Antenna Systems, supra note 39, at 428-29 ¶ 62-63 (FCC declined to assert jurisdiction over cable systems as broadcasters because cable signals were transmitted by wire, not airwaves). The FCC sought a determination as to its jurisdiction and introduced legislation in the Senate in 1959. United States v. Southwestern Cable Co., 392 U.S. 157, 164-65. The bill, however, was ultimately returned to committee and was never passed. Id. at 165.


53. Inquiry into the Impact of Community Antenna Systems, supra note 39, at 428-31 ¶¶ 63-71 (FCC specifically states, "We find no basis . . . for the assumption of authority over these systems."). The Communications Act of 1934 was drafted long before the first cable system began operation and therefore it did not address the FCC's jurisdiction over cable television. See Southwestern Cable, 392 U.S. at 164-65 (FCC's reluctance to regulate cable is due to no express statutory grant of authority).


55. "A microwave common carrier serves as a relay link between distant broadcast stations and cable operators. . . . The microwave carrier transmits to the cable operator's antenna
munication system to transmit distant signals to cable systems where potential economic injury could result to a broadcaster. As a result of this holding, common carriers were required to demonstrate that broadcasters would suffer no economic harm before they could receive a license to construct a cable system. This represented a definite, though indirect, assertion of jurisdiction by the FCC over cable.

In an effort to expand its jurisdiction over cable, the FCC promulgated regulations for cable systems in 1965. These rules only regulated cable operators that received microwave signals. In 1966, however, the FCC expanded these rules to include all cable systems.

Among the rules adopted were uniform non-duplication rules that protected both network programming and syndicated programming, for which local broadcasters had negotiated exclusive exhibition rights. The non-duplication rules were detailed and mandated numerous administrative formalities. Under these rules, cable systems within the top one hundred markets were required to notify the FCC before they could carry any broadcast signal. These rules severely restricted the growth of cable television services by requiring the cable operator to show that importation of distant signals would be in the public interest.

only those signals that the operator wants to receive.” Gullett, supra note 21, at 560 n.16 (citation omitted).

57. See id.
58. “[The FCC] asserted jurisdiction over cable operations to prevent fragmentation of audiences and revenues between local broadcasters and competing cable systems which were bringing distant broadcast signals into local markets.” Home Box Office, Inc. v. FCC, 567 F.2d 9, 22 (D.C. Cir. 1977).
59. Rules re Microwave-Served CATV, supra note 40, at 741-46. The rules were later modified in Amendment of Subpart L, Part 91, supra note 49.
60. Amendment of Subpart L, Part 91, supra note 49, at 745 ¶ 46.
61. Id.
62. Cable Television Report & Order, supra note 7, at 148 ¶ 13. These rules prohibited a cable operator from retransmitting a distant signal 15 days before and 15 days after local exhibition. Rules re Microwave-Served CATV, supra note 40, at 725 ¶¶ 125-27. In 1966, the FCC modified the rule to prohibit cable operators from retransmitting on the same day of the broadcast. Amendment of Subpart L, Part 91, supra note 49, at 749-50 ¶ 57.

In every instance where the Commission was called on to judge whether a cable system should be permitted to carry distant or local signals, the test was the general public interest standard of the Communications Act, and more specifically the consistency of the carriage with “the establishment and healthy maintenance of television broadcast service in the area.”
In 1968, the United States Supreme Court in *United States v. Southwestern Cable Co.* granted certiorari to determine two issues—whether the FCC had jurisdiction over cable systems and whether the FCC could regulate cable operators' importation of distant signals. The Supreme Court affirmed the FCC's limited jurisdiction over cable systems, holding that the FCC's authority "is restricted to [that which is] reasonably ancillary to the effective performance of the [FCC's] various responsibilities for the regulation of television broadcasting." Further, the Court upheld the FCC's promulgation of the non-duplication rules, thus sanctioning the creation of a rudimentary form of Syndex.

The FCC resisted taking further action, anticipating that Congress would enact copyright legislation to mark the boundary between permissible and impermissible retransmission. Despite requests from television broadcasters, the FCC had repeatedly expressed its reluctance to address the cable copyright issue, largely because the agency believed the regulation of intellectual property rights fell outside of its jurisdiction.

To the FCC's disappointment, Congress failed to pass legislation to resolve this dilemma. By 1968, the FCC was approving every distant signal which was imported into a local market through cable retransmission. Recognizing its responsibilities to the communications industry, the FCC launched an inquiry into the long-range development of cable television.

2. The 1972 Syndex Rules

In 1972, in an effort to protect local broadcasters and ensure the
continued supply of television programming, the FCC adopted comprehensive regulations for the cable industry, including the first official Syndex regulation. The FCC rules addressed the continuing policy debate over whether cable operators should face copyright liability for the programs they retransmitted to subscribers. The rules formed a compromise between the broadcasters, cable operators, and copyright holders.

The FCC's first set of Syndex rules allowed broadcast stations licensed in the top one hundred television markets to demand that cable systems in those markets delete certain syndicated programs from distant broadcast signals. On the other hand, the FCC "relaxed the restrictions on the number of distant signals that a system could import and the types of programming that could be [re]transmitted." Although the 1972 rules were not as severe as the 1966 restrictions, they still strongly protected broadcasting interests.

The FCC's purpose in adopting the 1972 Syndex rules was to create a substitute for copyright liability, which neither Congress nor the courts were willing to impose on the cable industry. The legal effect of Syndex was to allow copyright holders to disseminate programming in

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75. Cable Television Report & Order, supra note 7, at 211 ¶ 191 (codified at 47 C.F.R. §§ 76.151-161 (1980) (repealed 1980)). The regulations also included must-carry rules, distant signal rules, network program exclusivity rules, access channel requirements, technical standards, crossownership rules, and franchising and rate regulation rules. See id. at 212-47 for the text of these rules.
76. Id. at 181-82 ¶ 100.
78. Id. at 1146; see also Notice of Inquiry and Notice of Proposed Rulemaking, supra note 18, at 2396 ¶ 19.
79. Malrite, 652 F.2d at 1146; see also Notice of Inquiry and Notice of Proposed Rulemaking, supra note 18, at 2396 ¶ 19.
80. Id.
81. Brenner, supra note 65, at 263.
82. Malrite, 652 F.2d at 1144.
84. The Supreme Court had consistently held cable systems were not liable under copyright laws for their use of copyrighted broadcast programs without the owner's consent. See Teleprompter Corp. v. Columbia Broadcast Sys., Inc., 415 U.S. 394 (1974) (superseded by statute); Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968) (superseded by statute). "As a result of these rulings, while the broadcasting industry spent billions of dollars to create and purchase programming, cable operators could retransmit those programs
certain markets "either by broadcast alone or . . . by both broadcast and through distant signal carriage." Further, "[t]he practical effect was to superimpose upon an arguably obsolescent copyright statute [the FCC's] view of the proper balance to be struck between protecting the public's interest in obtaining reasonable access to creative (copyrighted) works while providing sufficient incentive to artists (copyright owners) to stimulate further creativity."

3. Congressional Legislation Addressing the Cable Copyright Issue

The regulatory situation changed in 1976 when Congress enacted legislation establishing terms and conditions for cable operators in retransmitting copyrighted materials. Congress recognized that compelling cable systems to negotiate with every copyright owner whose work was retransmitted by a cable system was unrealistic and unreasonable. Therefore, in the Copyright Act of 1976, Congress created a compulsory licensing scheme that required cable companies to pay a set administrative fee for the retransmission of any television program. This scheme permitted cable systems to retransmit broadcast signals pursuant to a compulsory license without obtaining the express consent of copy-


85. Malrite, 652 F.2d at 1146.
86. Cable Television Syndicated Program Exclusivity Rules, 71 F.C.C.2d 951, 962 ¶ 35.
87. Id. at 962-63 ¶ 35.
89. E.g., H.R. Rep. No. 1476, supra note 3, at 89, reprinted in 1976 U.S.C.C.A.N. at 5704. "The [Congressional] Committee recognize[d] . . . that it would be impractical and unduly burdensome to require every cable system to negotiate with every copyright owner whose work was retransmitted by a cable system." Id.
91. Id. § 111(d)(1)(B).

A compulsory license permits an individual to exercise one of the rights of someone else's copyrighted work, with or without the owner's consent, so long as a government-determined copyright royalty fee is paid to the owner. This does not mean that the owner and user may not negotiate different terms. In fact negotiated usage outside the compulsory license . . . has occurred in . . . the cable licenses.

Robert Cassler, Copyright Compulsory Licenses — Are They Coming or Going?, 37 J. COPYRIGHT SOC'Y OF THE USA 231, 232 (1990) (footnotes omitted).

The initial rates were chosen arbitrarily, as part of a political compromise, and without regard to the marketplace value of the programming affected . . . . [T]hey were geared to what the cable industry of the early to mid-1970's said it was willing and able to afford in light of: (1) the industry's depressed financial condition; (2) the uncertain ability of the industry to expand (particularly in large urban markets); and (3) the heavy costs imposed by substantial FCC regulation, much of which was designed to protect copyright owners.

Hatfield & Garrett, supra note 38, at 437.
right owners. Additionally, cable systems were able to retransmit despite objections made by broadcasters. Thus, Congress established a new balance between the cable operator and copyright owners.

The Copyright Act also created the Copyright Royalty Tribunal ("CRT"). The CRT is an independent legislative agency empowered to adjust the compulsory licensing fees and to distribute royalty fees collected from copyright users to copyright owners. Pursuant to section 801 of the Copyright Act of 1976, the CRT seeks to "maximize the availability of creative works to the public" and reflect the relative economic roles of the copyright owner and the copyright user.

Under the Copyright Act of 1976, Congress established initial fee schedules for cable carriage of distant broadcast signals. Congress granted the CRT broad regulatory powers which allow it to determine the copyright fees charged to copyright users. The CRT is congressionally authorized to adjust the compulsory license fee to account for inflation, changes in the average cable subscription rates, and changes in

92. This method of copyright liability differs from most other copyright royalty arrangements, which are privately negotiated by the parties. Cassler, supra note 91, at 232.


96. 17 U.S.C. § 801(b)(2) (1988). The CRT is also authorized to adjust compulsory licenses for making and distributing phonorecords, id. § 115; and for public performances by means of jukeboxes, id. § 116.

97. Id. § 801(b)(3).

In July of each year, any person entitled to share in the cable royalty fund must file a claim with the CRT. Claimants are limited to those copyright owners whose works were included in a secondary transmission of a distant nonnetwork television station, or in a secondary transmission identified in a special Statement of Account, or in a distant nonnetwork program consisting entirely of aural signals. The CRT each August determines whether there is a controversy with respect to the distribution of royalty fees. If no controversy exists, the CRT then distributes the fund to entitled copyright owners. Thus far, every year has seen bitter disputes among various programming interests over the proper allocation of funds.

Ferris, supra note 5, at ¶ 7.12[9][a]. See Ferris, supra, at ¶ 7.12[9][a][i]-[iii] for a discussion of these bitter disputes.

98. Id. § 801(b)(1)(A).

99. Id. § 801(b)(1)(B)-(C).

100. Id. § 111(d)(1)(B)-(D). See MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8.18 [E][4][B] (1990) for a good discussion on the calculation of compulsory licensing fees.


102. Id. § 801(b)(2)(D).

103. Id.
the FCC rules regulating the cable industry. Adjustments may be initiated by any interested party who files a petition with the CRT requesting an adjustment of the rate. Additionally, in calendar years ending in zero and five, parties affected by a change in the FCC rules and regulations may petition the CRT to reconsider the compulsory license fee.

4. The Elimination of Syndex

The 1976 Copyright Act constituted the long-awaited legislative determination of cable operators' copyright liability. After the promulgation of the Copyright Act, the FCC initiated an extensive inquiry into the benefits gained by continued enforcement of Syndex. The FCC determined that Syndex was generally disadvantageous and imposed significant burdens on consumers. Specifically, the FCC found that Syndex retarded the growth of cable, for which consumers were willing to pay subscription fees, and restricted the quantity of programs offered to the consumers. The FCC found that Syndex did not enable local broadcasters to better serve the viewing public. Moreover, the FCC concluded that the elimination of Syndex significantly benefitted cable subscribers by increasing television programming. Consequently, in 1980, the FCC repealed the rules.

Television broadcasting and programming interests appealed the FCC's decision to the Second Circuit. In Malrite Television v. FCC, the petitioners questioned the agency's authority to repeal Syndex, arguing that the Copyright Act mandated the retention of Syndex regulation. The court held that the FCC had correctly interpreted the

104. Id. § 801(b)(2)(C). This section states:
   In the event of any change in the rules and regulations of the Federal Communications Commission with respect to syndicated and sports program exclusivity . . . , the rates established by section 111(d)(1)(B) may be adjusted to assure that such rates are reasonable in light of the changes to such rules and regulations, but any such adjustment shall apply only to the affected television broadcast signals carried on those systems affected by the change.
105. Id. § 804(a)(2).
108. Id. at 985 ¶ 91.
109. Id.
110. Id. at 987-88 ¶ 96.
111. Id.
112. Cable Television Syndicated Program Exclusivity Rules, supra note 9.
115. Id. at 1143.
116. Id. at 1147.
Copyright Act to constrain, rather than expand, the FCC's authority to adopt regulations directed at copyright-related objectives\(^\text{117}\) and that repealing Syndex was therefore appropriate.\(^\text{118}\)

Additionally, the Malrite court concluded that the public interest would best be served by the elimination of Syndex and thus rejected assertions that the FCC had acted in an arbitrary and capricious fashion.\(^\text{119}\) The court found that the FCC had based its decision to repeal Syndex on a "careful reassessment . . . of the gains and losses to the public interest from deregulation."\(^\text{120}\)

Shortly after Syndex was repealed, the National Cable Television Association\(^\text{121}\) petitioned the CRT to adjust the statutory compulsory license fee.\(^\text{122}\) After reviewing the supporting evidence, the CRT found that "copyright owners were economically harmed by the programming duplication occasioned by cable importation of distant signals."\(^\text{123}\) The CRT reasoned that compulsory licensing was "intended to compensate for the losses caused by the elimination of exclusivity protection, not for the increased exploitation of copyrighted works by cable operators."\(^\text{124}\)

Therefore, the CRT adjusted the compulsory license fee, creating a surcharge that reflected the FCC's repeal of Syndex.\(^\text{125}\) The CRT also assessed an additional 3.75% fee of a cable operator's gross receipts for every distant signal that a cable operator added after the repeal of Syndex.\(^\text{126}\) As a result, a cable operator that had added three additional distant signals after 1980 would suffer a drastic 11.25% loss of gross re-

\(^{117}\) Id. at 1147-48. The court found that the FCC was not free to adopt regulations which would be inconsistent with the basic arrangement established under the Copyright Act. Id. at 1148.


\(^{119}\) Id.

\(^{120}\) Id. at 1148.

\(^{121}\) The National Cable Television Association is "the principal trade association of the cable television industry in the United States, representing the owners and operators of cable television systems serving over 80 percent of the nation's cable subscribers." Comments for the Nat'l Cable Television Ass'n, at 1, Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries, 3 F.C.C.R. 5299 (1988) (No. 87-24).

\(^{122}\) National Cable Television Ass'n v. Copyright Royalty Tribunal, 724 F.2d 176 (D.C. Cir. 1983).

\(^{123}\) Id. at 188.

\(^{124}\) National Ass'n of Broadcasters v. Copyright Royalty Tribunal, 809 F.2d 172, 181 (D.C. Cir. 1982).

\(^{125}\) 37 C.F.R. § 308.2(c)-(d) (1990).

\(^{126}\) Id. § 308.2(c)(3).
ceipts to copyright charges. The District of Columbia Court of Appeals in National Cable Television Ass'n v. Copyright Royalty Tribunal upheld the CRT's decision to adopt a surcharge and impose an additional 3.75% fee.

5. The Return of Syndex

The Malrite ruling, which affirmed the FCC's 1980 decision to repeal Syndex, marked the end of the FCC's first experiment with Syndex. Syndex was never forgotten, however, and remained a frequent subject of disagreement between cable operators and broadcasters.

It was not until 1984 that Congress definitively determined the FCC's jurisdiction over cable television by adopting the 1984 Cable Act. The Cable Act explicitly granted the FCC jurisdiction over cable systems. In light of the FCC's congressionally determined authority, the broadcasting interests petitioned the FCC to adopt new Syndex rules limiting the ability of cable operators to broadcast syndicated programs. The FCC denied the broadcasters' request, finding "no changed circumstances which would lead [the FCC] to believe that a re-evaluation... would produce different results."

Four years later, the FCC again changed its position on the need for Syndex, much to the regret of the cable companies. The FCC determined in 1988 that its 1980 decision to repeal Syndex reflected an "imperfect understanding of the role cable was to assume in the ensuing

128. 724 F.2d 176 (D.C. Cir. 1983).
129. Id. at 181.
130. See infra notes 131-38 and accompanying text.
131. 47 U.S.C. §§ 521-559 (1988). The Cable Act was passed in the last days of the 98th Congress. It was the result of several years of intensive efforts on the part of the cable television industry, the local government community, and the Congress to establish a national policy for the regulation of cable television. Like most major pieces of legislation involving controversial issues and competing ideologies and approaches, the Cable Act [was] a compromise...
134. Id. at 629.
135. See Notice of Inquiry and Notice of Proposed Rulemaking, supra note 18.
1. The Copyright Act of 1976

The Copyright Act of 1909\textsuperscript{146} made no provision for cable operators' copyright liability as construed by the United States Supreme Court.\textsuperscript{147} The Copyright Act of 1976, however, expressly imposed liability upon cable operators.\textsuperscript{148} Specifically, it created a compulsory licensing scheme that required cable operators to compensate copyright holders for the use of their works.\textsuperscript{149} This enactment of a statutorily mandated compulsory license effectively foreclosed the FCC from adopting regulations concerning intellectual property matters.\textsuperscript{150}

Although Congress recognized that cable regulation involved both copyright and communications elements,\textsuperscript{151} it explicitly drafted the Copyright Act to exclusively govern copyright material.\textsuperscript{152} Congress wanted to avoid the conflict between the Copyright Act's provisions and the FCC's authority over communications policy.\textsuperscript{153} Congress also wanted to prevent the FCC, under the pretense of communications policy, from interfering with intellectual property issues resolved by the Copyright Act.\textsuperscript{154} Additionally, Congress intended to prohibit the FCC from considering intellectual property interests in the development of communications policy.\textsuperscript{155} According to the FCC, "[c]opyright protection is a matter of Congressional concern and not a communications policy issue within the [FCC's] jurisdiction."\textsuperscript{156} In order to impose Syndex, therefore, the FCC had to show a valid communications purpose that was wholly unrelated to copyright concerns.\textsuperscript{157}


\textsuperscript{147} See Teleprompter Corp. v. Columbia Broadcasting Sys., Inc., 415 U.S. 394 (1974) (holding that the importation of distant signals from one community into another did not constitute a performance under the 1909 Copyright Act) (superseded by statute); Fortnightly Corp. v. United Artist Television, Inc., 392 U.S. 390 (1968) (holding that cable retransmission was not a "performance" of television broadcast and therefore it did not violate the copyright) (superseded by statute).


\textsuperscript{149} Id. § 111(d).

\textsuperscript{150} Comments for Nat'l Cable Television Ass'n at 20, Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries, 3 F.C.C.R. 5299 (1988) (No. 87-24).


\textsuperscript{152} 17 U.S.C. § 801(a) (1988).


\textsuperscript{154} Id.

\textsuperscript{155} Id.


\textsuperscript{157} See Geller v. FCC, 610 F.2d 973, 979-80 (D.C. Cir. 1979).
decade as a full competitor to broadcast television." Therefore, the FCC found it necessary to reimpose the Syndex rules that it had repealed only eight years earlier. The FCC based its decision on a concern that the absence of Syndex protection, together with the compulsory licenses, were limiting the ability of program suppliers and broadcasters to contract freely for exclusive rights at marketplace prices.

IV. Analysis

A. The FCC Lacks Jurisdiction to Adopt Syndex

Following the FCC's adoption of Syndex rules, critics raised the concern that both the Copyright Act and the 1984 Cable Act presented jurisdictional hurdles to the adoption of Syndex. Specifically, the Copyright Act of 1976 limited the FCC's rulemaking authority to areas of communications policy. Syndex includes, however, regulation of impermissible copyright motives and is therefore violative of the Copyright Act. Additionally, the Cable Act of 1984 specifically prevents the FCC from imposing requirements regarding the content provisions of cable service programs. In restricting the syndicated programming offered by cable operators, Syndex disregards this command of the Cable Act.

136. United Video, Inc. v. FCC, 890 F.2d 1173, 1177 (D.C. Cir. 1989). "By late 1989, cable systems had been installed in 50.9 million (56 percent) of the nation's 90.4 million television households. (Cable was available to 74 million homes.) The 8,000 systems (servicing some 20,000 communities) vary in size from a few hundred subscribers to some in larger cities with hundreds of thousands of subscribers." FRANKLIN & ANDERSON, supra note 41, at 889.


141. Commission's Rules Relating to Program Exclusivity, supra note 10, at 5320 ¶ 124. Among the critics were the National Cable Television Association and Cole, Raywid & Braverman, attorneys for UVI.

142. Cable Television Syndicated Program Exclusivity Rules, supra note 9, at 788-813; see also ARTEC, 70 F.C.C.2d 2291, 2306 (1976) (stating that "in adopting the Copyright Act of 1976 ... Congress instructed the Commission to refrain from letting copyright matters interfere with development of communications policy). The Department of Justice, the Congressional Research Service, and the Copyright Office also determined that the Copyright Act prohibited the FCC from adopting regulations affecting the allocation of intellectual property rights. Cable Television Syndicated Program Exclusivity Program Rules, supra note 9, at 782 ¶¶ 267-69.

143. See infra notes 158-63 and accompanying text.


145. See infra notes 173-76 and accompanying text.
Similar to the 1976 Copyright Act, Syndex establishes and protects proprietary interests in intellectual property. Furthermore, an objective behind Syndex was to correct the perception that cable operators were not subject to full copyright liability. In promulgating Syndex, the FCC not only intended to grant copyright holders the “power to determine what programming” a cable operator could transmit, but also to provide program suppliers with the opportunity to “garner remuneration that reflects the full incremental value of their efforts.” Moreover, the FCC wanted to place cable operators and broadcasters in the same position when negotiating for the rights to syndicated programming. These goals are clearly copyright-related concerns: “[T]he ‘protection’ and ‘remedies’ of Syndex constitute the [FCC’s] own supervening version of copyright.”

Since the FCC’s goals in promulgating the Syndex rules are copyright concerns, the rules impermissibly encroach upon the scope of statutory copyright law. Under the Copyright Act, copyright protection by the FCC is an impermissible motive that falls outside the FCC’s jurisdiction. If a perceived market failure arises regarding the compensation of copyright holders of syndicated programming, the Copyright Act provides that parties requesting relief must address their concerns either to the CRT or Congress. Thus it is Congress, not the FCC, that has the authority to determine if Syndex is necessary.

2. The Cable Act of 1984

The 1984 Cable Act extensively amended the Communications

159. See Notice of Inquiry and Notice of Proposed Rulemaking, supra note 18, at 2397 ¶ 25 (FCC stated that rather than adopting Syndex, an alternative way to address the issue would be to revise the compulsory licensing scheme).
160. Id. at 2400 ¶ 42.
161. Id. at 2393 ¶ 2.
162. Id. at 2399 ¶ 39.
164. Id. at 12.
Act of 1934 and established the national policy for regulating the cable television industry. The Cable Act explicitly grants the power to regulate cable television to the FCC. The Act, however, prohibits the FCC from promulgating rules that affect "the provision or content of cable service." It specifically states that "[a]ny Federal agency, State, or franchising authority may not impose requirements regarding the provision or content of cable services, except as expressly provided in this subchapter." Thus, the plain language of the Cable Act defines the scope of the FCC's jurisdiction over cable television. The Cable Act expressly prohibits the FCC from adopting "any regulatory measures, including syndicated exclusivity rules, which directly or indirectly place conditions on or otherwise restrict the carriage of certain programs by cable operators."

Contrary to the command of the Cable Act, Syndex regulates the content of cable television and imposes restrictions on protected programs. It does this by prohibiting a cable operator from carrying particular programs or channels. Additionally, Syndex imposes mandatory conditions on cable operators before they are able to retransmit certain programming. These constraints directly reduce the content and variety of cable programming and therefore contravene the essence of the Cable Act. In adopting Syndex, the FCC has overstepped the bounds of its jurisdiction under the Cable Act.

Neither the Copyright Act nor the Cable Act grant the FCC the power to promulgate Syndex rules. Moreover, the Cable Act specifically prohibits the adoption of Syndex rules. Congress, not the FCC, is the

169. Id. § 152(a).
170. Id. § 544(f)(1).
171. Id.
173. See infra notes 174-76 and accompanying text.
175. See Brief for Joint Cable Parties at 28-29, CRT Docket No. 89-5-CRA, 55 Fed. Reg. 893 (1990). Under the 1990 rules, before the cable operator may transmit any programming, it must determine which broadcast signals are subject to Syndex. Id. Next, the cable operator must review the stations' programming schedules to determine whether any programming offered by these stations are subject to Syndex and thus must be deleted from the cable operators programming schedule. Id.
176. See supra text accompanying note 171.
177. See id.
governmental body empowered with the authority to determine the copyright responsibilities of cable operators.

B. Arbitrary and Capricious Rules

When formulating regulations, the FCC must ensure that its decision is supported by relevant data and is neither arbitrary nor capricious.178 Furthermore, the FCC is required to give a satisfactory reason for its action which includes a "'rational connection between the facts found and the choices made.'"179 Because the FCC changed its position on Syndex, the court was required to ensure that the agency supplied a "'reasoned analysis indicating that its prior policies and standards [were] being deliberately changed, not casually ignored.'"180 The FCC's decision to reimpose Syndex rested on its findings that Syndex increased the value of syndicated programming and promoted diversity.181 This reasoning is fallacious and therefore the FCC's decision to reinstate Syndex should have been vacated.

1. Reduction in Time and Episode Diversity

One of the primary reasons that consumers subscribe to cable is to gain access to more programming.182 Cable increases viewers' program choices, offering greater content and time diversity.183 Consequently, it diverts some portion of the viewing audience away from local broadcast stations to more distant ones.

In 1980, the FCC concluded that viewers benefitted from the repeal of the Syndex rules.184 Increased program diversity and the benefits of time and episode diversity outweighed any negative effects on broadcasters' revenues and program supply.185 Today, consumers still benefit from the diversity offered by cable television.

180. Id. (quoting Action for Children's Television v. FCC, 821 F.2d 741, 745 (D.C. Cir. 1987)).
181. Id. at 1178.
185. The FCC stated "'[d]uplicative programming can therefore offer many households true diversity. Thus, we believe that the syndicated exclusivity rules reduce both program diversity to some cable subscribers and time diversity to others. We believe these reductions diminish significantly the welfare that subscribers and potential subscribers derive from cable television.'" Cable Television Syndicated Program Exclusivity Rules, supra note 9, at 751 ¶ 202.
Without restrictions like those Syndex imposes on cable operators, viewers receive the benefit of time and episode diversity. With Syndex, however, cable subscribers are deprived of their preferred viewing options. Forcing cable operators to piece together program schedules in order to fill the deleted programming holes eliminates consumer choice. Furthermore, the substitute programming may be of no interest to the viewer or shown at a time that the viewer was expecting to see another program.

The FCC also minimizes the substantial benefits of time diversity by asserting that a majority of households own video cassette recorders ("VCRs") and therefore can create their own time diversity. This rationale is flawed. Not all cable subscribers own VCRs. Those who do not are penalized by the FCC's decision to reimpose Syndex. Additionally, many subscribers become patrons of cable, in part so that they can enjoy cable's time and episode diversity options.

Both broadcasters and cable operators agree that duplication of programs occurs. The FCC found that this duplication lessened the value of syndicated programs to broadcast stations and thereby reduced the price that syndicated program suppliers received for the programs. However, that is not always the case:

In 1981, the first year after the former exclusivity rules were abolished, the top syndicated program sold to broadcast stations generated $650,000 in revenues per episode for its syndicator, Paramount. The top selling syndicated program in 1987 will generate for its syndicator (Paramount again) $1.3 million per episode, exactly double the price set in 1981.

Moreover, in 1986, Viacom International made syndication history when it sold one hundred episodes of The Cosby Show for a record $515 mil-

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187. Id. at 5307 ¶ 47.
188. See generally id.
189. See id.
190. Id. at 5307 ¶ 45.
192. United Video, Inc. v. FCC, 890 F.2d 1173, 1178 (D.C. Cir. 1989) (citing Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries, 3 F.C.C.R. 5299, 5305 (1988)).
193. Comments for the Nat'l Cable Television Ass'n at 47, Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries, 3 F.C.C.R. 5299 (1988) (No. 87-24) (emphasis in original).
lion.\textsuperscript{194} Sales such as these demonstrate that syndicated programs still command lofty prices. Contrary to the FCC's assertions, the syndicated market is thriving, and broadcasters therefore do not need market protection.

2. Cost to Consumers and Cable Operators

The implementation of Syndex rules imposes numerous costs and burdens on cable operators and the subscribing public.\textsuperscript{195} Syndex rules apply to all cable systems that have one thousand or more subscribers\textsuperscript{196} and which are located within thirty-five miles\textsuperscript{197} of any television market. Therefore, the effects are far-reaching. A cable subscriber could not view a popular show like \textit{M*A*S*H}\textsuperscript{198} on a non-local channel at 7:00 p.m. if the viewer's cable company distributed to over one thousand subscribers and the local broadcaster requested Syndex protection.\textsuperscript{199} Instead, a filler program—or a blank screen—would take its place. The Syndex rules cause cable subscribers to lose access not only to popular syndicated programs but also to news and informational programming from the region and across the United States.\textsuperscript{200}

Consumers clearly suffer from the loss of programming imported from regional distant broadcast stations in major cities.\textsuperscript{201} Because broadcasters buy programs a year or more in advance of the premieres on their stations, purchasing national programming rights is difficult for re-


\textsuperscript{195} See infra notes 196-207 and accompanying text.

\textsuperscript{196} 47 C.F.R. § 76.156(b) (1990). A cable system which serves fewer than one thousand subscribers is not required to comply with the Syndex rules. \textit{Id.} Cable operators must inform both the FCC and each broadcast station entitled to invoke Syndex rights 60 days after it has enlisted one thousand subscribers. \textit{Id.}

\textsuperscript{197} Id. § 73.658(m). “The FCC's territorial exclusivity rule limits the territory in which a broadcaster may purchase syndex rights to 35 miles from the main post office of a broadcaster's city of license.” Paul Glist, \textit{A Field Guide to Syndicated Exclusivity and Signal Carriage}, in \textit{2 Cable Television Law 1990: Revisiting the Cable Act} 9, 16 (Frank W. Lloyd ed., 1990).

\textsuperscript{198} \textit{M*A*S*H} (CBS television broadcasts 1972-1983).

\textsuperscript{199} 47 C.F.R. § 76.156(b) (1990).

\textsuperscript{200} See generally Commission's Rules Relating to Program Exclusivity, supra note 10, at 5307 ¶¶ 45-46.

\textsuperscript{201} Realistically, distant broadcast stations will be the only stations affected by Syndex. Memorandum from Nat'l Cable Television Ass'n to cable operators (Feb. 22, 1989) (on file with author). Although national superstations are distant broadcast stations, some superstations, like WTBS and WGN, will be affected less than other distant broadcast stations. \textit{Id.} These superstations have been able to take advantage of new FCC authority to acquire national programming rights. \textit{Id.} Basic cable networks like USA Network, Lifetime and Nickelodeon, and pay networks like HBO, Showtime, and The Disney Channel are not affected by Syndex. \textit{Id.}
regional operators. The FCC rules force cable operators to find substitute programming within a short period of time. Since popular syndicated programs are likely already contracted to television broadcasters, cable operators have little choice but to replace popular shows with lesser quality programs or black out the time slot. Therefore, consumers will be denied regional distant broadcasts of their favorite syndicated shows.

In addition to the confusion and frustration felt by the public, cable operators pay significant costs as a result of Syndex. Alternative programming and centralized switching equipment, which enable the most efficient compliance with the rules, are very costly. These costs may ultimately be passed on to the consumer either through advertisers' products or an increase in the monthly charge to cable subscribers. Regrettably, if a cable operator finds it too impractical to implement these changes, it is forced to drop the out-of-town channel entirely.

The FCC acted arbitrarily and capriciously when it promulgated new Syndex regulations. The FCC protected the economic interests of the broadcast stations at the expense of the cable operators, and, more importantly, to the detriment of the public.

There is more at stake here than a reduction in market competition between cable operators and broadcasters. By readopting Syndex, the FCC has created instability in its rules and regulations. When Syndex has rendered cable companies incapable of competing with local broadcasters, the FCC may be forced to once again deregulate the market. The United Video court has set a dangerous precedent by allowing a gov-

202. Id.
203. Id.
204. Id.
207. The Viacom Cable Company dropped one of its stations in favor of the 24-hour American Movie Channel because of Syndex. Colleen Patrick, Reader Advocate—The Times/P-I Agreement: Split Personality?, SEATTLE TIMES, Jan. 6, 1991, § A1 at 19. In Herrin, Illinois, the cable system imported NBC affiliate KSDK-TV St. Louis into the rural area for many years. The local broadcaster, WPSD-TV Paducah, Kentucky, asked for nonduplication rights, which would effectively black out 90% of the programming on KSDK-TV. Syndex Requests Present Problems for Cable Systems; TV Syndication Exclusivity Rules Knock Some Stations Off Some Cable Systems, BROADCASTING, June 26, 1989, at 56. The cable operator explained to subscribers and the city that Syndex would compel it to drop KSDK-TV. Id. After the cable operator dropped the station, the Herrin city council sued the cable operator, stating that the company had an obligation to carry the station. Id.
ernmental agency to transform an economic market solely because the agency believes that participants are on an unequal footing. Consequently, this author believes that the United Video court had a duty to vacate the Report and Order adoption the rules, and thereby leave the competitive broadcasting market unregulated.

V. RECENT DEVELOPMENTS IN CABLE REGULATION

Arguably, the present incarnation of Syndex is not having the desired effect. After Syndex became effective in 1990, cable interests petitioned the CRT to eliminate the Syndex surcharge. In that proceeding, the sole issue before the CRT was whether the Syndex surcharge was reasonable in light of the FCC’s regulatory changes.

In order to make that determination, the CRT compared the 1972 Syndex rules with the 1990 rules. The CRT found that the new Syndex rules were different from their 1972 counterparts. The CRT examined their differences to determine whether program suppliers had fewer or greater rights to demand blackouts. The CRT concluded that the new rules were at least as broad as the former rules and therefore justified eliminating the surcharge. Thus, the CRT eliminated the Syndex surcharge paid by cable systems in the top one hundred television markets.

213. Id. at 33,609.
214. Id.
215. Id. at 33,612. The CRT refused to make a determination as to whether the new rules were broader and, additionally, whether the compulsory license fee and the surcharge were reasonable in light of the changes in the rules. Id. It reserved these determinations for the next proceeding. Id.
216. The surcharge was sustained where a cable system is importing a distant commercial VHF station which places a predicted Grade B contour, as defined by FCC rules, over the cable system, and the station is not significantly viewed or otherwise exempt from the syndicated exclusivity rule in effect as of June 24, 1981. Adjustment of the Syndicated Exclusivity Surcharge, 55 Fed. Reg. 33,604, 33,612 (1990) (to be codified at 37 C.F.R. § 308.2(d)(1)-(2)).
Theoretically, the Syndex rules reduce competition between local broadcasters and cable companies, and allow the copyright owners to obtain more money for their programming.\textsuperscript{217} However, in light of the zealous opposition by broadcasters to the CRT’s reduction of the compulsory license fee, it seems that a reduction in competition may not have resulted.

VI. CONCLUSION

Syndex rules have been the subject of vigorous controversy since their inception in 1972. Fueled by the inconsistencies in the FCC’s policy goals, the conflicts have persisted through the years. The FCC has left the cable companies and the local broadcasters with erratic regulations that fluctuate repeatedly. Once again, the FCC is changing its position on Syndex and imposing unwarranted governmental barriers in a market that has brought cable viewers ever-widening access to information and entertainment.

In both 1980 and 1984, the FCC found no evidence to support the continuation of Syndex because the regulations served no valid communications purpose. After analyzing Syndex and its regulatory history, this author reaches the same conclusion today.

\textit{Paula Brown Hayton*}

\textsuperscript{217} See Notice of Inquiry and Notice of Proposed Rulemaking, \textit{supra} note 18, at 2393 \textsection 2; 2399 \textsection 39.

* To my husband, Bill, and to my family, for their boundless love, patience and support, and to my friends for their sincere interest and encouraging thoughts.