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COMMUNICATIONS LAW

CABLE TELEVISION: A CHANGING MEDIUM RAISES NEW LEGAL ISSUES

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Despite a growing amount of writing on the subject, misunderstandings about the cable television medium persist. Although cable television's first amendment status is now widely recognized,¹ this status conflicts sharply with ingrained attitudes about cable television and the propriety of various local governmental controls.

The federal courts, including a significant number of district courts located in the Ninth Circuit, are increasingly being asked to resolve these conflicts. The Ninth Circuit, however, has not yet considered the issues raised by cases such as *Community Communications Co. v. City of Boulder*.² Before such consideration occurs, it is appropriate to summarize the issues which are now emerging in the cable television context.

Although the purpose of this article is to briefly outline certain questions of federal law relevant to cable television in the 1980s, some attempt will also be made to correct misconceptions

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1. See, e.g., *Community Communications Co. v. City of Boulder*, 660 F.2d 1370 (10th Cir. 1981) ("Cable operators, like publishers and wireless broadcasters, are entitled to First Amendment protection." *Id.* at 1376). Altogether, there are five reported Boulder decisions. Hereinafter they will be referred to as follows: *Boulder I* (485 F. Supp. 1035 (D. Colo. 1980)) is the first trial court injunction; *Boulder II* (630 F.2d 704 (10th Cir. 1980)) is the 2-1 decision reversing *Boulder I*; *Boulder III* (496 F. Supp. 823 (D. Colo. 1980)) is the second trial court injunction; *Boulder IV* (660 F.2d 1370 (10th Cir. 1981)) left the second injunction in place, but augmented it, and remanded for a full trial; *Boulder V* (455 U.S. 40 (1982)) reversed *Boulder II* (the first Tenth Circuit decision).

2. *Boulder V*, 455 U.S. 40 (1982).

about cablecasters.³ There are, of course, differing opinions regarding these factual issues, but an attempt to correct misconceptions is nonetheless warranted, since no analysis of the legal issues affecting contemporary cable television can ignore the current factual environment. Some background discussion thus precedes examination of various legal issues now before those federal courts in the Ninth Circuit where cable television litigation is pending.

BACKGROUND INFORMATION REGARDING CABLE TELEVISION

A. *The Early Years: 1950-1970*

Early cable television developed in the 1950s as a means of filling in service gaps where off-air television signals did not reach.⁴ Thus, in places where television was otherwise unavailable or reception was poor, an entrepreneur, by erecting an antenna on a high elevation, could gather off-air television signals and deliver them for a fee to customers by use of a cable, together with simple amplifiers to boost the signals along the cable. These early cable television systems were literally community antenna television services, or "CATV".⁵ They were almost always small enterprises, conducted locally, and initially delivered little more than the three national network services which, it was generally assumed, were principally what viewers wanted.

CATV, to the extent people thought about it at all, was viewed as a sort of a utility or, at the very least, as a service which did not have to be duplicated. Occasionally, cable television companies were required to obtain utility-type "franchises" for a finite term. This response to CATV's "electrical wire" appearance went relatively unchallenged in the industry's infancy, and thus acquired an aura of legitimacy. Not all cities used a "franchise" mode, however. Simple non-exclusive permits or licenses were used, often annually renewable, and safe street use

3. Some older authorities only use the term cablecasting in reference to such activities as origination of local programming, but the term is generally being adopted as a useful reference to anyone who uses cable television facilities to engage in first amendment dissemination. This would even include retransmitting the programming of another, just as newspapers clearly engage in first amendment activity when they carry UPI or AP wire stories.

4. M. HAMBURG, *ALL ABOUT CABLE* 5-6 (1979).

5. *Id.* Many publications discuss the early years of cable television. See, e.g., CABLE TELEVISION INFORMATION CENTER, *CABLE: AN OVERVIEW* 5-11 (1972).

was insured by generic laws and state regulations controlling aerial construction by "the public utility, with whom [cable television] contracts for poles on which to string its cables."⁶ Safe street and utility pole use by cable television was thus insured by the same laws and regulations.

The tendency of some to regard CATV as essentially a public utility service was questionable even in the 1950s. For example, in a progressive 1956 decision, a unanimous California Supreme Court likened cable television to "music halls, theaters, and newspapers," and expressly held that cable television is not a "telephone corporation or within any other class of utility."⁷ Some federal courts also realized the non-essential non-utility status of cable television early on,⁸ but the issue was in fact rarely addressed since cable television served only a small percentage of the population and was commonly viewed as merely an interim service that would slowly disappear as the broadcast networks filled in most service gaps during the 1950s and 1960s.⁹

B. *The Middle Years: 1970-1975*

Although it became clear during the 1960s that cable television would not be displaced by over-the-air, free broadcast television, development of the medium was still modest,¹⁰ and was severely hampered by the fact that it had little to offer other than enhancement of broadcast television signals and perhaps some supplementation of the number of broadcast stations received.¹¹ However, where it did develop in the 1960s, cable television required enough of an investment that commercial financing was needed, and lenders frequently sought greater evidence of longevity than an annually renewable permit. Accordingly,

6. *Boulder II*, 630 F.2d at 712; *Cable Franchise Investigation: Hearings Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Committee on Energy and Commerce*, 97th Cong., 1st Sess. 582 (1981).

7. *Television Transmission v. Public Util. Comm'n*, 47 Cal. 2d 82, 88-89 (1956).

8. *Greater Fremont, Inc. v. City of Fremont*, 302 F. Supp. 652, 644-65 (N.D. Ohio 1968), *aff'd sub nom. Wonderland Ventures, Inc. v. City of Sandusky*, 423 F.2d 548 (6th Cir. 1970).

9. See HAMBURG, *supra* note 4, at 6-7.

10. In 1965, there were only 1,325 operating systems nationwide, with barely over 1 million total subscribers, or less than 0.5% of the population. CABLE TELEVISION INFORMATION CENTER, *CABLE: AN OVERVIEW* 9 (1972).

11. However, now-repealed FCC restrictions on importation of distant signals severely hampered the ability of cable television through the 1970s to supplement the number of stations beyond those available locally.

franchise contracts were often executed, and came to be unthinkingly accepted as appropriate in the CATV context.

By 1970, it was the rare community that had no free, off-air television at all, and meaningful development of the cable television medium thus continued to await development of a product available only via cable television.¹² Although some unique services, such as local origination, were in the experimental stages in the early 1970s, the economic downturn in the early 1970s, plus a lack of proven consumer demand for any of the experimental services, continued to retard the growth of cable television.¹³ Progress was also hampered by restrictive FCC regulations which were adopted in 1972 in a well-intentioned but controversial effort to improve the media through regulation. As the Eighth Circuit said in 1978 in striking down one of these FCC regulations (the mandatory public access rule for cable television), governmental attempts to improve the media offend the first amendment.¹⁴ The Eighth Circuit stated:

Regulations like those before us, profoundly altering the obligations of a private business, requiring a fundamental change in its nature, and imposing costs on its consumer-subscribers, should be based on more than an uncertain trumpet of expectation alone. In enforcing regulations designed by the regulator to make futuristic visions come true, courts must proceed with a care proportional to the risk of delivering thereby into the regulator's hands an awesome power. For that way may lie not just a totally regulated future, unpalatable as that may be to a free people, but a government-designed, government-molded, government-packaged future.

The public interest rubric encourages judicial deference to an agency's expertise, not to its prescience. Findings may be presumptively correct. Not so futuristic guesses.¹⁵

12. See *The Role of Congress in Regulating Cable Television and the Potential for New Technologies in the Communications System: Hearings Before the Subcomm. on Communications of the House Committee on Interstate and Foreign Commerce, 94th Cong., 2nd Sess. 1090-1091 (1976).*

13. *Id.* at 1085-86.

14. *Midwest Video Corp. v. FCC*, 571 F.2d 1025, 1045, 1053-56 (8th Cir. 1978), *aff'd sub nom. FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979).

15. 571 F.2d at 1045.

These comments are even more timely now than they were in 1978.

C. *The Watershed Years: 1975-1976*

In the 1975-76 period, a dramatic technical breakthrough finally enabled cable television to enter urban markets and other areas receiving good off-air reception. Due to the advent of satellite technology, cable television at last obtained the capability for the unique programming which it needed to emerge as a significant member of the media and cultivate urban markets. After 1975, program suppliers could use satellites to deliver a wide variety of programming to local cable television companies. Each local company would set up its own "earth station" in order to receive this satellite-delivered programming. Soon, uncut recent movies, cultural programs, 24-hour news services, live coverage of Congress, sports channels, and other special programming quickly became available over cable only, and the medium began to grow. This phase of cable television's history, and the impact of satellite technology, is set forth in some detail in the *Boulder* trial court's first opinion.¹⁶

These emergency programming services represented an advancing use of existing cable capacity, and did not involve any greater intrusion on the public rights-of-way than that which existed previously. The new services being provided by cablecasters also rendered many older "CATV" decisions (pre-satellite, pre-1977 decisions) inapposite to modern cablecasting issues. It is now recognized that cable television is no longer properly referred to as "CATV". Cable television is a first amendment speaker which provides neither common carrier nor some form of essential public utility service; in effect, cable television is an "electronic newspaper" which must make editorial decisions regarding such matters as program timing, selection, format, and marketing.¹⁷

D. *The Emergence of a Medium: The "RFP" Clashes with New Realities and New Legal Challenges*

After 1976, cable television's new-found ability to enter ur-

16. *Boulder I*, 485 F. Supp. at 1036-37.

17. See, e.g., *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 46 (D.C. Cir.), cert. denied, 434 U.S. 829 (1977).

ban markets naturally led to efforts to develop those markets. It was generally assumed that a given market could only be developed if the city in question first agreed to a franchise contract.¹⁸ After 1976, the larger cities were acutely aware of this new interest in their markets, and formal Requests for Proposals (RFP) procedures were soon adopted by many of these cities for the purpose of receiving and comparing cable television proposals.¹⁹ It is no secret that the cable television RFP process became controversial by the late 1970s, as the demands which cities made on cable television companies multiplied.²⁰ The RFP process was made more controversial because it was calculated to award an entire undeveloped market to the single company which would offer the city the most.²¹ As a result, cable television companies had little choice but to constantly increase their offers in an attempt to out-bid one another.

Soon smaller communities with *existing* cable television systems, such as Boulder, Colorado, began to envy what larger cities had exacted from cable television companies. They thus adopted RFPs of their own in order to do such things as "extract some additional concessions"²² from companies with existing contracts, or replace companies with another which would offer more.²³

18. The word franchise is actually no longer appropriate in the cable television context, if it ever was. The word "franchise" connotes a "special privilege" for monopoly, utility-type service. See, e.g., 12 E. McQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 34.01, at 7 (3d ed. 1970). Cable television is not a utility, *Television Transmission*, *supra* note 7, and exclusive contracts have been held illegal in most states. See, e.g., *TM Cablevision v. Daon Corp.*, No. 15067 (San Diego Super. Ct., Jan. 22, 1981), *reprinted in* 6 *MEDIA LAW REP.* (BNA) 2576, 2578 (1981).

19. The RFP mode was presumably borrowed from procedures used by cities to collect bids for such things as new city buildings, vehicle procurement, etc. The "RFP" was thus inappropriate in the cable television context, which involve authorizations to engage in a first amendment business rather than city purchases. Still, the RFP mode was adopted when urban markets developed.

20. See, e.g., J. Marks, *Outrageous! How Franchise Documents Have Escalated!*, *TVC MAGAZINE* 48 (August 15, 1982) ("cost is getting too great—and too much [is demanded] in non-productive assets—incredible excess in channel capacity, community studios, extra institutional networks and civil giveaways."). One commentator has called franchising ordinances "big sticks" on the apparent theory that they can be used by local governments to exact concessions from cablecasters and "evade" certain federal and state laws. See W. Marticorena, *The Cable Television Franchising Ordinance—The City's "Big Stick"* 25 (article submitted to California League of Cities in 1981).

21. See, e.g., *Boulder II*, 630 F.2d at 709-20 (Markey, C.J., dissenting).

22. *Boulder III*, 496 F. Supp. 823, 827 (D. Colo. 1980).

23. The RFP process is such that the *Boulder* trial court felt it appropriate to com-

The *Boulder* case involved a 1979 RFP, and presents a microcosm of many of the issues involved in subsequent cable television cases. Before 1978, a cablecaster in Boulder, Community Communications Company (CCC), had provided service to the poor reception areas of the City pursuant to a non-exclusive permit.²⁴ In 1978, CCC started plans to develop the rest of the City and bring in satellite delivered programming. In early 1979, CCC advised the City of these plans, and the City's initial response was enthusiastic.

In mid-1979, another cable television company advised the City of Boulder that it too would like a non-exclusive permit to compete with CCC. CCC did not oppose such competitive proposals but instead recognized that competition was possible and could not be prevented by law.²⁵ Nonetheless, the City decided to adopt an RFP containing numerous demands for additional city control and proprietary benefits which could not be obtained through the police power.²⁶ When CCC declined to abandon its contract and refused to accept the RFP process, the City unilaterally revoked the company's contract, and imposed a new contract which contained a moratorium on development work which CCC had already started. The moratorium was concededly for the purpose of allowing the City of Boulder to complete its RFP selection process.

CCC did not view the moratorium as valid, and thus filed suit in federal court alleging, *inter alia*, antitrust and first amendment claims. The City of Boulder had two primary contentions in response to CCC's antitrust claims: (1) that it is exempt from liability under the antitrust laws; and (2) that even if the City cannot invoke state action immunity, its attempts to

ment at one point: "Stated bluntly, may the City exact tribute for its favor?" *Boulder I*, 485 F. Supp. at 1040.

24. The facts of the *Boulder* case are set forth in considerable detail in *Boulder I*, *Boulder II*, and *Boulder III*. Until the advent of satellite-delivered programming, it was not economically feasible to serve the good-reception areas of Boulder.

25. *Boulder III*, 496 F. Supp. at 830.

26. The City had adopted a contract approach "[a]pparently upon the view that any lack of regulatory authority could be finessed by the use of a contract approach . . ." *Boulder I*, 485 F. Supp. at 1037. Chief Judge Markey described the contract embodied within Boulder's RFP to be a "total-control" contract, 630 F.2d at 719, but later RFPs are even more demanding, involving many more pages of requirements than just the 22 pages involved in *Boulder*. See, e.g., G. SHAPIRO, CURRENT DEVELOPMENTS IN CATV 1981 245-335 (P.L.I. Series, 1981).

control the cable television market are lawful because cable television is a "natural monopoly." The City also contended that: (3) cable television, as a "natural monopoly," involves the type of "scarcity" that justifies controls similar to those imposed on broadcasters by the FCC; and (4) no first amendment issues are present if the City does not dictate or interfere with the content of CCC's programming. These last two contentions were made in response to the first amendment claims in the *Boulder* case.

Each of the City's four contentions is flawed, as the record of the *Boulder* case shows. However, variations of each of these four contentions continue to be vigorously asserted by local governments. It is thus appropriate to examine each position separately.

E. *Conventional Antitrust and First Amendment Principles Do Apply To Modern Cable Television*

1. *There is No Municipal Immunity*

In *City of Lafayette v. Louisiana Power & Light Co.*,²⁷ the Supreme Court made it clear that local governments have no antitrust immunity of their own. Of course, municipalities can cloak themselves with the states' exemption when they implement an affirmatively expressed, clearly articulated and supervised *state* policy to replace competition in a relevant market with some form of monopoly regulation dictated by the state.²⁸ In all other cases, though, cities "must obey the antitrust laws."²⁹

In the *Boulder* case, the City argued that it was specifically authorized by the Colorado Home Rule provisions under which it operated to regulate the use of its streets and issue franchises. It thus argued that the State of Colorado must have contemplated that Boulder might adopt a cable television RFP and award the market to only one company. From this argument the City concluded that it was entitled to state action immunity under the rationale of *City of Lafayette*.

As the Supreme Court pointed out, such an argument to-

27. 435 U.S. 389, 410-13 (1978).

28. *Id.* at 410-13.

29. *Id.* at 416.

tally misconceives what the High Court means when it says that a clearly articulated, affirmatively expressed, and actively supervised state policy is required before a city can avail itself of the state's exemption from federal antitrust laws. Not any affirmative state policy will do; the affirmative state policy must actually replace competition in a given market with some form of comprehensive, monopoly regulatory mode which the state has outlined or fashioned.³⁰ As the *Boulder* Court noted, a general state authorization can never suffice.³¹

In other words, if state law appears indifferent as to whether or not competition is displaced in a given market, there can be no antitrust immunity. As one commentator has stated, "the possibility that two cities could adopt opposite policies consistent with the same state authorization dooms the claims for immunity under *Boulder*."³² Were the rule otherwise, cities could "make economic choices counseled solely by their own parochial interests and without regard to their anticompetitive effects,"³³ and this is exactly what *Boulder* and *City of Lafayette* forbid.

With regard to cable television, some cities have argued that *Boulder* does not apply in states such as California, which have a statute authorizing cities to enter into contracts with cable television companies.³⁴ However, such statutes are nothing more than general authorizations to enter into almost any type of contractual arrangement imaginable, or not to enter into such contracts, as each city wishes. Such state neutrality on the subject falls short of a clear, affirmatively expressed state policy to displace competition in the cable television market, and even before *Boulder*, district courts in the Ninth Circuit so ruled.³⁵

30. *Id.* at 413; *Ronwin v. State Bar of Arizona*, 686 F.2d 692, 697 (9th Cir. 1981); *Corey v. Look*, 641 F.2d 32, 36 (1st Cir. 1981).

31. *Boulder V*, 455 U.S. at 54-56.

32. *Municipal Antitrust Liability, Prospects After the Boulder Case*, FED. CITY RPTR. at 6 (February 5, 1982).

33. *City of Lafayette*, 435 U.S. at 408.

34. California has such a provision in its government code. See CAL. GOV'T CODE § 53066 (West 1982).

35. See, e.g., *Televants, Inc. v. City of Martinez*, No. C 81-2376 TEH (N.D. Cal., Oct. 23, 1981) (Order denying defendants' Motion to Dismiss because "neither the papers nor the oral arguments of defendants establish that California Government Code §§ 53066 and 53066.1 clearly articulate a state policy to displace competition in cable television." *Id.* at 2); *Liberty Communications, Inc. v. Washington County*, Civ. No. 80-471-PA

Since attempts by municipal leagues to have the California Legislature adopt legislation replacing competition with a state plan for monopoly regulation of cable television have failed, it is all the more clear that *Boulder*-type immunity arguments must fail in states like California.³⁶

It is also self-evident that *Boulder* requires a *valid* state policy before any state action immunity can arise.³⁷ This recognizes that there are constitutional limits on exercises of state police power. For example, any state (or even congressional) policy to displace competition among first amendment disseminators would violate the first amendment, and thus be invalid, no matter how clearly articulated, affirmatively expressed or actively supervised.³⁸

2. Cable Television is Not a "Natural Monopoly"

The City of Boulder also argued strenuously that cable television is a natural monopoly. Therefore—even though it was clearly preventing competition—the city contended that its attempts to control a natural monopoly were lawful.

The natural monopoly assertion is, of course, an assertion of fact, to which Chief Judge Markey responded:

On appeal, the city's sole defense is to pretend, disingenuously and contrary to the extensive, uncontradicted testimony and the specific findings of the trial judge, and contrary to its own City At-

(D. Ore., Sept. 23, 1980) (Consent Decree and Final Judgment entered after preliminary injunction issued against county).

36. The California Legislature did introduce a bill, AB 3130, with the view that it might be adequate to confer antitrust immunity, but AB 3130 was not enacted. At hearings on AB 3130 though, the City Attorney for the City of Torrance, representing the League of California Cities and the "view of really all city attorneys who have studied cable television," testified correctly "that Section 53066 of the Government Code is inadequate" to confer antitrust immunity because "it is neutral" and "not a clearly articulated, affirmatively expressed state policy as it now exists." *Special Joint Hearing of Subcommittee on Cable Television and Assembly, Local Government Committee, Local Government Franchising and Regulation of Cable TV in California after Boulder and AB 3130*, 1982 Spec. Sess. 49-50 (1982) (statement of Stanley Remelmeyer, City Attorney for the City of Torrance, California).

37. See Brief for Petitioner at 35 n.19, *Community Communications Co. v. City of Boulder*, 445 U.S. 40 (1982).

38. See, e.g., Transcript of *Special Joint Hearing of Subcommittee on Cable Television and Assembly Local Government Committee*, *supra* note 36, at 29-32.

torney's advice, that cable is a "natural monopoly." The city's sole argument in this case is that because there can be only one cable operator in Boulder, the moratorium was necessary to prevent CCC from "wiring the entire city" before the city could conduct its bid process and select what it considered the "best" company to enjoy that monopoly. Not to put too fine a point on it, that argument is today simply fallacious. As the trial judge found, and as the record makes clear, modern technology makes free and open competition both practically and economically available to the city by at least four competing cable communicators.³⁹

Moreover, cable television is increasingly subject to vigorous competition from other suppliers of video news, information, and entertainment, none of whom are burdened by the demands which cities are now making of cable television.⁴⁰

More importantly, the "thin market" argument is flawed from a legal standpoint.⁴¹ First, since cable television is not a utility, those courts which discuss the natural monopoly concept as if cable television was a utility have failed to recognize the true nature of this emerging member of the media.⁴² Second, in

39. *Boulder II*, 630 F.2d at 712.

40. STV (coded UHF signal pay TV), MDS (microwave distributed pay TV), DBS (Direct Broadcast Satellite pay TV), master antenna system, SMATV (satellite), video cassettes and video disks constitute just some of the competing services now available. See, e.g., *Fielding Competition: Beware of the Growing List of Competition*, CABLEVISION 23 (May 17, 1982).

41. It is preferable to use the less pejorative phrase "thin market" to describe the so-called "natural monopoly" situation. See L. SULLIVAN, ANTITRUST § 45, at 115 (1977).

42. A recent Seventh Circuit case illustrates this point. See *Omega Satellite Prod. v. City of Indianapolis*, 694 F.2d 119 (7th Cir. 1982). Although dealing with a satellite pay service which "compete[s] with cable television systems" rather than cable television itself," *id.* at 121, the court considered the natural monopoly defense in dictum because Omega had applied for a permit to make some use of the public ways. After reviewing principles of "public utility franchising," plus various gas, telephone and other utility and common carrier cases, the *Omega* court speculated that a natural monopoly argument might justify some form of government control over such a market, although the scope such controls could lawfully assume can only be determined on a case-by-case basis after factual findings at trial. *Id.* at 125-27. However, once it is more widely recognized that cable television is a member of the media and not a utility, it is doubtful that courts will adopt the *Omega* rationale. See, e.g., *Union Leader Corp. v. Newspapers of New England, Inc.*, 284 F.2d 582, 584 (1st Cir. 1960) (in non-utility context, competitive market forces must be allowed to operate).

non-utility contexts, the natural monopoly cases have never stood for the proposition that, outside the utility or common carrier context, government can predetermine whether a market is a thin market, or select who the one supplier will be in a thin market.⁴³ This is particularly true when first amendment businesses are involved.⁴⁴ It thus appears that municipalities have no viable defense to section 1 and section 2 Sherman Act claims, especially when contractual relationships are involved, which automatically satisfies section 1's two-actor requirement.⁴⁵

3. *Novel First Amendment Issues and Misconceptions About "Scarcity"*

Once cable television's first amendment character is acknowledged, it is quite apparent that first amendment issues are raised by any procedure which excludes one member of the media from a market in order to give the market to another company that would pay the city more. In the *Boulder* case, the City responded to these concerns by adopting a position which was an extension of its natural monopoly argument.

In essence, *Boulder* argued that there are two types of media: over-the-air broadcasters and print media.⁴⁶ It was also as-

43. As the cablecaster in the *Boulder* case argued to the Supreme Court, "The City essentially argues that it should be allowed to determine in advance that a market is a thin market, and then should be allowed to designate the monopolist. Both actions would be illegal under the antitrust laws. Whether a thin market exists can only be determined by the free play of competitive forces. See, e.g., *Union Leader Corp. v. Newspapers of New England, Inc.*, 284 F.2d 582 (1st Cir. 1960). Even if a municipal predetermination of thin market status was not illegal, the City still could not designate a monopolist. The antitrust laws require that an 'elimination bout' determine who the supplier shall be in a thin market, which cable television is not. *Id.* at 584 n.4." Brief for petitioner at 13 n.4, *Community Communications Co. v. City of Boulder*, 445 U.S. 40 (1982). In the utility context, of course, states have often displaced competition with monopoly regulation, but in exchange have also guaranteed the utilities a reasonable rate of return on their investments—a guarantee which is not extended by regulation to the non-utility business of cable television. See, e.g., *Orange County Cable Communications Co. v. City of San Clemente*, 59 Cal. App. 3d 165, 130 Cal. Rptr. 429 (1976).

44. See, e.g., *Union Leader Corp. v. Newspapers of New England, Inc.*, 284 F.2d at 584; *Omega Satellite Prod. v. City of Indianapolis*, 694 F.2d at 128 "[it] should be noted that while today most newspaper markets are natural monopolies, no one thinks that entry into those markets could be regulated without creating profound First Amendment problems").

45. See *Boulder I*, 485 F. Supp. at 1039, citing *Perma-Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968); *Boulder II*, 630 F.2d at 714-15.

46. See Brief for Appellant, at 31-50, *Community Communications Co., Inc. v. City of Boulder*, 660 F.2d 1370 (10th Cir. 1981).

serted that different first amendment standards apply to each.⁴⁷ The City then argued that cable television was more like broadcasting than the print media because both broadcasters and cable television involve scarcity situations. The City thus concluded that it could lawfully control cable television in all the ways the FCC can control broadcasters.

The City's position seriously misconstrues what is meant by the term "scarcity" in the broadcast context. It is true that the electromagnetic spectrum is limited and that no two broadcasters can occupy the same space on the spectrum and transmit properly. This *physical* scarcity limitation justifies a system whereby the FCC allocates licenses to broadcasters.⁴⁸ However, all courts apparently agree that this *physical* scarcity problem does not exist with regard to cable television, which uses discrete cables rather than the air waves.⁴⁹ As the District of Columbia Circuit noted: "The First Amendment theory espoused in [the broadcasting cases] . . . cannot be directly applied to cable television since an essential precondition of that theory—physical interference and scarcity requiring an umpiring role for government—is absent."⁵⁰ Some have argued that *economic* scarcity (i.e., the possibility that a market can support only one supplier) should also justify government intervention and control of first amendment disseminators, but this argument has been expressly rejected with regard to both the print media and cable television.⁵¹

In the *Boulder* case, however, the Tenth Circuit coined the

47. The City, however, failed to recognize that, even though "[e]ach method [of communication] tends to present its own peculiar problems . . . the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary. Those principles, as they have frequently been enunciated by this Court, make freedom of expression the rule." *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952).

48. *See, e.g., Columbia Broadcasting v. Democratic Nat'l Comm.*, 412 U.S. 94, 101 (1973).

49. *See, e.g., Home Box Office, Inc. v. FCC*, 567 F.2d 9, 44-45 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977); *Boulder II*, 630 F.2d at 713.

50. *Home Box Office, Inc. v. FCC*, 567 F.2d at 44-45.

51. "[S]carcity which is the result solely of economic conditions is apparently insufficient to justify even limited government intrusion into the First Amendment rights of the conventional press, . . . and there is nothing in the record before us to suggest a constitutional distinction between cable television and newspapers on this point." *Home Box Office, Inc. v. FCC*, 567 F.2d at 46, citing *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 247-56 (1974).

phrase "media scarcity" to describe a situation analogous to economic scarcity.⁵² The Tenth Circuit then speculated that, if media scarcity existed in a community, the local government might be justified in selecting the one member of the media it deemed "best." As a legal proposition, the Tenth Circuit's media scarcity rationale is indistinguishable from earlier economic scarcity arguments, is thus untenable, and has been criticized by commentators.⁵³ Moreover, upon remand for findings of fact, the *Boulder* trial court approved stipulated findings of fact which are directly contrary to the factual suppositions the Tenth Circuit adopted in support of its media scarcity rationale.⁵⁴

52. *Boulder IV*, 660 F.2d at 1378.

53. See, e.g., Note, *Access to Cable Television: A Critique of the Affirmative Duty Theory of the First Amendment*, 70 CALIF. L. REV. 1393, 1406-07 (1982). See also an exhaustive article by Professor William Lee, entitled *Cable Franchising and the First Amendment*, which will appear in a 1983 edition of VANDERBILT LAW REVIEW. It is possible that the Tenth Circuit's position would conflict with the Supreme Court's recent admonition that "differential treatment" of first amendment disseminators presumptively violates the first amendment. See *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 51 U.S.L.W. 4315 (U.S. Mar. 29, 1983) (No. 81-1839). Most cable television RFP's and contracts treat cablecasters differentially and do not seek the least restrictive means of achieving any legitimate, compelling governmental interest which may exist.

54. On October 29, 1982, a stipulation and final judgment was approved and filed by the trial court. The trial court expressly found that the following stipulations of fact were supported by the evidence presented during several days of hearings on the two preliminary injunctions which had been entered in the case:

[Finding No. 3] CCC is a cable television company, and is thus a publisher of news, information and entertainment which it sometimes originates, and also selects or obtains from a variety of sources. Material published by CCC shall not be considered commercial speech. Although CCC may, incident to its dissemination activities, publish some advertising, CCC's predominant activity is the publication of protected, noncommercial speech.

[Finding No. 4] The cable television medium differs greatly from the broadcast medium. The physical scarcity problems associated with wireless use of the electromagnetic broadcast spectrum do not exist in connection with cable television, thus removing, as a practical matter, technological limitations on the number of cablecasters that can co-exist in the City.

[Finding No. 5] CCC is a First Amendment disseminator, and not a broadcaster, and is entitled to the protections of the First Amendment to the United States Constitution.

[Finding No. 6] Competition among more than one cablecaster in the City is economically possible.

Community Communications Co., Inc. v. City of Boulder, Civ. Action No. 80-M-62, 5-6 (D. Colo. Oct. 29, 1982) (Stipulation and Judgment).

It is thus apparent that governmental attempts to control cable television should be judged by the established first amendment standards which apply to all other non-broadcast members of the media.

4. *Content-Based Regulation is Not Lawful*

One last area of confusion deserves mention. In *Boulder*, the cablecaster contended that the City's actions had been based on considerations related to the content of the cablecaster's dissemination, and thus ran afoul of the absolute prohibition on content-based restrictions.⁵⁵ In response, the City stated that, since it was not dictating the actual content of programming, its actions were not content-based.

The City's position misunderstands the scope of the term "content" in the first amendment context. In addition to the substantive message being conveyed, the "content" of first amendment activity includes such things as the "form" of expression;⁵⁶ any "layout" or format involved;⁵⁷ the "size" or amount of space devoted to expression;⁵⁸ the number of channels provided,⁵⁹ and so forth. Thus, any selection process which is based on a comparison of such "content," or dictates standards regarding such "content" (as all cable television RFPs do), is content-based.⁶⁰

This would be true even if the first amendment disseminator is "not prevented . . . from saying anything it wishes."⁶¹ Choices are still being made on the basis of content, selections are being made on the basis of the identity of the speakers and what they propose to disseminate, and content is being influ-

55. Use of the word "restriction" rather than "regulation" is intentional. Cable television cases such as *Boulder* typically involve restrictions imposed by contract-ordinances which must be accepted in writing, rather than any form of police power regulation. See, e.g., *Boulder II*, 630 F.2d at 714-15.

56. *Cohen v. California*, 403 U.S. 15, 24 (1971).

57. See, e.g., *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376, 391 (1973).

58. See, e.g., *Miami Herald*, 418 U.S. at 257-58 & n.22.

59. See, e.g., *Midwest Video Corp. v. FCC*, 571 F.2d at 1056.

60. See, e.g., *Midwest Video*, 571 F.2d at 1053 (mandatory "public access" channel rules were content-based even though the substantive message was not regulated); *Miami Herald*, 418 U.S. at 253-58.

61. *Miami Herald*, 418 U.S. at 256.

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enced as a result. Since any government-imposed restriction which is content-based violates the first amendment,⁶² the RFP procedures now being pursued by some cities raise serious first amendment concerns.⁶³

CONCLUSION

Cable television is a somewhat misunderstood medium. As the federal courts continue to deal with important questions related to cable television, it will be increasingly necessary to explore such factual issues as the nature of the medium, the nature of the relevant market, and the effects of various mandatory contractual controls which local governments have proposed.⁶⁴ Such inquiries, it can be hoped, will facilitate both a better understanding of the media, and a wider application of legal standards which have been long-accepted in other contexts.

62. *Consolidated Edison Co. of New York v. Public Services Comm'n*, 447 U.S. 530, 536-38 (1980). The Tenth Circuit in the *Boulder* case agreed that, where such content-based restrictions develop, "a significant First Amendment issue" is presented. 660 F.2d at 1377 n.6.

63. Local government may sincerely feel that it would never use control of cable television to control the message being disseminated, but in reality government control of the media leads inevitably to control of the message. For example, some cable television companies are now hiring their own investigative reporters and camera crews, and covering local news. However, when one city manager heard of such a proposal, his reaction was as follows:

"I'm not sure if I'd have minicameras running around interviewing people on the street . . . They can ask their neighbor if they want to know what they think . . . What I'm talking about is quality programming . . . with good direction and control . . . [S]ome guy giving you his opinion about a war, [or] what a local City Councilman does with a cameraman sticking a camera in his face . . . that is not of interest . . ."

Transcript of Contra Costa County Cable Television Hearings, at 20, line 21 to p. 21, line 16 (February 10, 1982, Contra Costa County, California). With this degree of concern over the content and "quality" of programming, and with the apparent reluctance to have city officials exposed to a probing local news media, one must ask whether government influences over the message can be far behind?

64. Cities often ask courts to assume these disputed factual issues can be resolved in a way that supports the RFP process, and thus move for a dismissal of cablecasters complaints under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Federal courts have correctly recognized that such dismissals are inappropriate. *See, e.g., Televents, Inc. v. City of Martinez, supra* note 35.