

CABLE TELEVISION: A REGULATORY DILEMMA

INTRODUCTION

At its inception in the late 1940's, cable television¹ (CATV) was welcomed as a means to achieving an integrated national television structure. Using a relatively simple system composed primarily of a large antenna and coaxial cable, CATV brought television to people in areas situated beyond the range of broadcast television transmitters which were then located almost exclusively in large cities. Viewers in communities lying outside major urban areas were provided better reception and a larger selection of signals than was previously possible. Cable television, however, far more than merely providing another means of carrying broadcast television signals, has the long range potential for revolutionizing the media by the formation of a new national communications network, which some experts have referred to as the "wired nation."² With the ability to carry twenty to sixty or more channels, cable systems will be able to satisfy fully the demands of broadcast signal carriage and still have remaining a large number of unused channels.³ These channels could be utilized to provide a nonbroadcast bandwidth whose function would be to serve individual communities and, ultimately, the nation with a self-contained interactive cable network.⁴

Even in its most rudimentary application, CATV's nonbroadcast operations could provide essential communications services for the communities it serves. Unlike broadcast television, whose program format is restricted to scheduled presentations, CATV can make its services available on demand. In its August 5, 1971, regulatory pro-

¹ Cable television is defined by the Federal Communications Commission as a "community antenna television system." 47 C.F.R. § 74.1101(a) (1971).

² Smith, *The Wired Nation*, *The Nation*, May 18, 1970, at 582.

³ In fact, according to experts, with present technology cable may be able to carry as many as 80 channels. *Id.* at 584. Twenty channel systems now in operation may be expanded to any range of capacity at low incremental cost. L. Kestenbaum, *Common Carrier Access to Cable Communications: Regulatory and Economic Issues* 13, March 19, 1971 (unpublished report prepared for the Sloan Commission on Cable Communications, Alfred P. Sloan Foundation, New York City) [hereinafter cited as Kestenbaum].

⁴ In response to the Commission's request for comments on its proposed CATV rules (Notice of Proposed Rulemaking and Notice of Inquiry, 15 F.C.C.2d 417, 441-43 (1968)) (discussed in text at p. 336 *infra*), Control Data Corporation and the Industrial Electronics Division of the Electronics Industry Association (IED/EIA) first proposed creation of a national broadband communications system. The IED/EIA, in its presentation, "The Future of Broadband Communications," regarded "such systems as being of 'national resource' dimensions and the development of these resources as a national goal." Comments of IED/EIA, FCC Docket No. 18397, Oct. 27, 1969, at 1. It projects development of a switched video telephone system similar to AT&T's "Picturephone," but with computer access and facsimile reproduction units, and a nonswitched broadband cable network (BCN) with a limited return bandwidth to accommodate specific subscriber requests and responses. Discussed in H. Goldin, *The Cable Problem: Alternative Regulatory Policies* 28-40, Aug. 1970 (unpublished report prepared for the Sloan Commission on Cable Communications, Alfred P. Sloan Foundation, New York City).

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posals, to be effective as of March 1, 1972, the Federal Communications Commission (FCC) observed that:

The structure and operation of our system of radio and television broadcasting affects, among other things, the sense of "community" of those within the signal area of the station involved. Recently governmental programs have been directed toward increasing citizen involvement in community affairs. Cable television has the potential to be a vehicle for much needed community expression.⁵

CATV's direct connection with the home of each subscriber would play an important role in preserving community cohesion and in developing specialized local interests. Fulfillment of this service potential might appreciably dispel the sense of alienation brought about by both the isolation of urban living and the one-way nature of the television medium.

CATV can distribute either live or taped programs directly over the cable to a well defined audience. For instance, broadband cable programming can be directed to political divisions such as congressional and school districts without overlapping into other constituencies or communities. The presentation of local news, special events, political campaigns and governmental information services would provide a means for achieving greater community awareness.⁶ Nonbroad-

⁵ This conclusion was included in the most recent cable regulatory proposals which were presented in a 55 page letter to Senator John O. Pastore, Chairman of the Senate Communications Subcommittee, and Representative Torbert H. MacDonald, Chairman of the House Subcommittee on Communications and Power. Commission Proposals for Regulation of Cable Television, 31 F.C.C.2d 115, 127 (1971). The proposals put forward followed months of special hearings and review and form the most comprehensive statement on the subject. Each of the policies on which agreement was reached "[was] designed to be part of a single package because each has an impact on all the others. . . ." *Id.* at 116. These aspects of cable regulation include carriage of television broadcast signals, use of nonbroadcast cable channels, technical standards, and federal, state and local jurisdictional responsibilities. Since the results of final documents will not be released until the latter part of 1971, the Commission urged Congress to consider its proposals in the interim.

⁶ Such service is especially crucial in areas not served by over-the-air television where viewers must rely solely on broadcasts from adjacent communities or states for, at best, minimal coverage of local news and events. In urging passage of a bill providing for regulation of CATV, Senator Harrison A. Williams, Jr., of New Jersey, noted that within the entire state of New Jersey—the most densely populated state in the Nation—there is not a single VHF television station, and that UHF television broadcasting is extremely limited in both scope and geographic coverage. Thus New Jerseyites must rely largely upon the good will of broadcasters in adjacent states for coverage of events in New Jersey, and I am sorry to say that this coverage is woefully lacking. Our neighboring State of Delaware suffers from this same situation, one to which CATV can offer an effective alternative.

117 Cong. Rec. 13065 (daily ed. Aug. 4, 1971) (remarks of Senator Williams on introduction of S. 2427). The FCC has been aware that CATV exposure would reduce the cost of political campaigning, thereby making the electoral process more democratic. First Report and Order, Docket No. 18397, 20 F.C.C.2d 201, 209 (1969). As part of the FCC's proposals of August 5, 1971, the FCC would require operators to allocate, on a

cast services need not be limited to presentations of governmental interest or operator-originated news. Public access to the cable media would provide a much needed outlet for local self-expression. Matters of concern to the community or major subcommunities within the overall societal complex could be presented by local groups or citizens seeking a forum to express their views.⁷ Subscribers would be able to watch their neighbors participate in PTA meetings, forums, panel discussions and even local drama or concert presentations. Entertainment programming, provided by commercial users, could be presented to viewers on leased channels.⁸ The technology of CATV already permits delivery of programs to specialized users within a community, such as attorneys, bankers, doctors and clergymen. Special unscrambling devices would be used to insure that such programming would be delivered exclusively to the predetermined audience. Similar devices could be used to direct educational and instructional programs to institutions such as schools, hospitals and churches.⁹

In its most advanced form, nonbroadcast services would provide two-way switching devices to facilitate the rapid exchange of data and information between the subscriber's unit and central switching mechanisms, data storage banks and computers. Such a system would be easily adaptable to the needs of special interest groups and institutional users who would be able to communicate directly with each other over exclusive channels. In general, the potential for individual homes to function as virtual communications centers in which the subscriber could both send and receive information may very well abrogate McLuhan's fear that the media is becoming the message. With the installation of consoles combining the functions of telephones,

developmental basis, free use of a channel by state and local governments for five years after completion of the basic trunk line. 31 F.C.C.2d at 128.

⁷ To open up "new outlets for local expression [and promote] added diversity in television programming," the FCC plans to "require that there be one free, dedicated, noncommercial, public access channel available at all times on a non-discriminatory basis." 31 F.C.C.2d at 128.

⁸ The new proposals (see note 5 *supra*) will allow cable operators to lease channels to commercial users to the extent that such leasing does not interfere with the first priorities of public access, education and governmental use. *Id.* at 128-29. According to a study made by the Sloan Commission, programmers on leased channels may be compensated by one or more of several revenue sources: commercial advertising, subscriber payments for programming, public or non-profit funding and cable system support. There is reason to hope that presentation of low cost community interest programming, carried on a system offering equal tuning convenience and transmission to VHF-TV, will enable cable users to attract acceptable audience levels. Kestenbaum, *supra* note 3, at 25.

⁹ Together with "the promotion of added diversity in television programming . . . and the increased information services of local governments," one of the basic goals of the Communications Act for which cable may be responsible is "the advancement of educational and instructional television." 31 F.C.C.2d at 128. Accordingly, the FCC plans to allocate a channel for such purposes on the same basis as the local government channel.

computer teletypewriters, facsimile printers and, of course, television screens, a subscriber could request and instantaneously receive what he wants to see or have transmitted in facsimile. He could also respond to specific questions and express views on commercial programming or issues of community interest.

Reference in recent FCC proposals to some of the foreseeable uses of two-way communication indicates a growing public recognition of CATV's potential importance. The Commission has noted that "[s]uch two-way communication, even if rudimentary in nature, can be useful in a host of ways—for surveys, marketing services, burglar alarm devices, educational feed-back, to name a few."¹⁰ More imaginative projections of nonbroadcast uses include highly sophisticated applications of cable's two-way capacity.¹¹ With respect to educational and cultural matters, CATV may be instrumental in reviving the Socratic method of individualized teaching by making possible direct student-teacher contact. Furthermore, it would facilitate library use through reception of books or other publications either as page-by-page visual images or as exact facsimile copies. Other institutional purposes, such as the social care of invalids and the elderly, would also be served by CATV's capacity to transmit diagnoses and prescriptions over the cable. Police and traffic surveillance, credit card checks, employment information and an electronic substitute for mail delivery are just some of the other services that would be available for public use. Private users could use channels for shopping, meter reading, video telephone calls and participation in political issues and topics of current local interest. Moreover, cable delivery of facsimile newspapers and requested data would provide the home and business user with rapid reception of general news and concise information on selected topics or events.

Even the most advanced of CATV's functions is now within the reach of present technology. The Commission has indicated that two-way communication "is apparently now feasible at a not inordinate additional cost, and its availability is essential for many of cable's public services."¹² The imminence of these potential services, however, raises serious questions concerning the possibility that CATV technology may surpass effective regulatory control. Without positive governmental action, both in the administrative and legislative branches, the projected benefits of CATV's nonbroadcast uses may never be fully realized. Although investment in the development of CATV's nonbroadcast services must be encouraged, it must be done without sacrificing adequate safeguards designed to preserve community interests.

¹⁰ *Id.* at 130.

¹¹ See note 4 *supra*.

¹² 31 F.C.C.2d at 129-30.

I. THE FCC'S CONTROL OVER CATV

A. *The Ban on Distant Signals*

The Federal Communications Commission stresses that, in the near future, nonbroadcast utilization of CATV's low cost multichannel capacity may be both instrumental in achieving the goals of communications policy as well as consistent with the economic incentives of the cable operator. "Indeed, it may be the critical factor making for cable's success."¹³ Nevertheless, simply recognizing the potential benefits of cable development or its prospective profitability will not produce hoped for results. In order to provide new services, CATV must generate surplus profits to finance additional facilities, equipment and personnel.¹⁴ Significant CATV penetration into the one hundred largest television markets, containing more than ninety percent of the nation's population,¹⁵ is necessary to produce the revenue needed for such outlays. Although most of these metropolitan areas enjoy adequate reception of local signals,¹⁶ CATV operators could induce subscriber support by offering programming carried on distant signals. In fact, according to recent studies, "distant signal importation alone is sufficient to change dramatically the likelihood of CATV penetration to almost 50% of all TV homes in the country."¹⁷

Despite favorable market conditions, CATV growth has been hindered by administrative and legislative commitment to full scale

¹³ Id. at 127. According to a study made by the Brookings Institute, some supplemental services proposed for CATV will generate revenues in excess of incremental costs, and others will equal incremental costs imposed on the system; therefore, the social gains from CATV will be realized by market forces. J. McGowan, R. Noll and M. Peck, *Prospects and Policies for CATV* 25, March, 1971 (unpublished report prepared for the Brookings Studies in the Regulation of Economic Activity, The Brookings Institution, Washington, D.C.) [hereinafter cited as *Brookings*]. Operators would develop access rates to cover direct costs of equipment and personnel attributed to the service plus a return on investment, discounted by return expected from additional subscriber fees. Kestenbaum, *supra* note 3, at 22.

¹⁴ One of the major issues of the Brookings study concerned the market place incentives necessary to induce development of CATV's potential nonbroadcast uses. The study found that:

Any notion that CATV could be a major instrument for change is predicated, of course, on its wide spread use. The "surplus" of such a system would be its profits over and above those necessary to induce CATV investment. Unless such a system generates high profits there will be no surplus available to finance new services.

Brookings, *supra* note 13, at 1.

¹⁵ The list of the top 100 markets is composed largely from the American Research Bureau's 1970 prime time households ranking.

¹⁶ Only in several large cities, such as New York, where buildings often interfere with broadcast signals, is over-the-air reception a major problem.

¹⁷ *Brookings*, *supra* note 13, at 8. A recent Rand Memorandum agrees that CATV thrives where several broadcast stations cannot be received satisfactorily with a simple indoor antenna; therefore, importation of distant signals is necessary to make CATV economically viable. Feldman, *Cable Television: Opportunities and Problems in Local Program Origination* 19 (Rand Corp. Memorandum, Sept., 1970).

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support of UHF-TV development.¹⁸ Having convinced Congress that UHF broadcasting was "not only the best but the only practical way of achieving an adequate commercial and educational system in the United States,"¹⁹ the FCC spurred passage of a law requiring all new television sets to include a UHF tuner.²⁰ Concern over the growing concentration of power in the hands of the VHF networks led to government efforts to open up the UHF spectrum as an alternative source of programming which would emphasize the local viewpoint.²¹ Ironically, the FCC sponsored this development of UHF-TV with the hope of realizing the very same goals that it later recognized could more adequately be achieved by "opening up cable's potential to serve the public. . . ."²²

The imposition of regulatory restraints on CATV was a concomitant of these efforts to promote UHF-TV. FCC jurisdiction was predicated on the grounds that CATV constituted unfair competition and was likely to cause a substantial adverse impact upon the continuance of "free" television service.²³ The Commission's primary

¹⁸ When first confronted with the efforts of the broadcast industry to contain CATV growth, the FCC refused to assume jurisdiction. 26 F.C.C. 403, 427-28 (1959). Reexamination of CATV's potential impact soon followed and, by 1963, the Commission asserted jurisdiction to hear cases involving application for CATV microwave relay facilities. *Carter Mountain Transmission Corp.*, 32 F.C.C. 459, aff'd, 321 F.2d 359 (1962), cert. denied, 375 U.S. 951 (1963). In 1966, the FCC assumed jurisdiction over both microwave fed and off-the-air CATV systems. Second Report and Order, 2 F.C.C.2d 725 (1966). The Supreme Court upheld the Commission's authority in *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968). See discussion at p. 345 infra.

¹⁹ H.R. Rep. No. 1559, 87th Cong., 2d Sess. 4 (1962); S. Rep. No. 1526, 87th Cong., 2d Sess. 7 (1962).

²⁰ 47 U.S.C. § 303(s) (1970).

²¹ Scarcity of space on the VHF broadcasting spectrum band, together with the high costs of producing programs and transmitting over-the-air signals, has created an oligarchical broadcast television structure. A Rand Memorandum explores this problem in some detail. The problems of spectrum scarcity and high costs had restricted the number of VHF commercial broadcasting stations to 499 by the end of 1968. L. Johnson, *The Future of Cable Television: Some Problems of Federal Regulation 1-2* (Rand Corp. Memorandum, Jan., 1970). According to the Commission, the authorized station count increased to 522 during the 1969 fiscal year. Federal Communications Commission, 35th Annual Report/Fiscal Year 1969, at 122.

²² 31 F.C.C.2d at 115.

²³ See Chazen and Ross, *Federal Regulation of Cable TV: The Visible Hand*, 83 Harv. L. Rev. 1820 (1970). Copyrighters claimed that cable carriage of broadcast programs amounted to use of their products without compensation, and that distant signal importation spoiled their chances for later sale of imported programs to a local station. Broadcasters complained that any competition from cable-carried distant signals was unfair since cable systems "pirated" their programming while broadcasters paid in full. *Id.* at 1823-24. The Justice Department has consistently opposed the FCC's application of the "unfair competition" argument to the cost savings which adhere to CATV operations. In support of its position, the Department notes that the FCC has "turned over to broadcasters publicly-owned spectrum at no charges, and allows them to use it at nominal charges. . . . Under the Commission's analysis, this constitutes 'unfair competition' by broadcasters against all other media of communications, including CATV." Comments of the United States Dep't of Justice, FCC Docket No. 18397-A, Dec. 7, 1970, at 5.

concern was the effect of distant signal importation upon the audience and revenues of local UHF stations. The commissioners foresaw a need to "thoroughly examine the question of CATV entry into the major markets, and authorize such entry only upon a hearing giving reasonable assurance that the consequences of such entry would not thwart the achievement of the congressional goals [of encouraging UHF development]."²⁴ Consequently, a rule was adopted which, by preventing CATV operators from importing distant signals into the top one hundred television markets, denied them their principal selling weapon in major urban areas.²⁵

B. *The FCC's Change in Posture toward CATV*

The Commission's attempt to further the development of UHF²⁶ by curtailing the expansion of CATV has had little success. As recently as 1969, one half of all UHF network affiliates and all but two independents were still losing money.²⁷ As a result, despite the ban on CATV's use of distant signals, UHF operations have been unable to offer more diversified programming or to provide effective community services.²⁸ Increasing dissatisfaction with the failure of UHF to achieve its early promise was indicated by a change in regulatory policy.²⁹

²⁴ 2 F.C.C.2d at 776.

²⁵ The adoption of the distant signal rule, 47 C.F.R. § 74.1107 (1971), was reported in 2 F.C.C.2d at 769 (1966). This regulation followed two other major rules reported in the First Report and Order, 38 F.C.C. 683 (1965). These rules, known as the mandatory carriage and nonduplication rules, are listed at 47 C.F.R. § 74.1103 (1971). According to an order of priorities based on signal contours, CATV systems must carry all local broadcast television signals and refrain, upon request, from carrying any program of a distant station on the same day as its broadcast by the local outlet. Under the more recent rule, a CATV operator in one of the nation's major metropolitan areas can no longer import distant signals unless he is able to prove in an evidentiary hearing that such importation would not "be inconsistent with the public interest, taking into account particularly the establishment and healthy maintenance of television broadcast service in the area." 47 C.F.R. § 74.1107(c) (1971). Petitions for waivers or special relief may be filed pursuant to the procedures set forth in 47 C.F.R. § 74.1109 (1971). By preventing CATV operators from offering diversified programming, the rule has, in effect, curbed the entry of CATV into the major markets.

²⁶ The FCC proposed to hinder further the use of distant station signals by imposing a retransmission consent requirement. Notice of Proposed Rulemaking and Inquiry, 15 F.C.C.2d 417 (1968). See text discussion at p. 344 *infra*.

²⁷ Brookings, *supra* note 13, at 21-22. The aggregate loss approximates \$43 million.

²⁸ The primary reason for the failure of UHF is lack of capital resources. With existing sources of advertising revenue nearly depleted, there is not enough available revenue to support an independent UHF station. This problem is made especially acute by the recent ban on cigarette advertising. 15 U.S.C. § 1335 (1970). Lacking an adequate financial base, UHF stations have been unable to afford the expensive equipment needed to transmit the weaker ultra-high frequency signals. As a result, UHF outlets generate signals of inferior strength and clarity. Moreover, UHF cannot meet the expense of securing existing television programming with which to gain a significant share of the urban market. Long term exclusive arrangements between copyright holders and UHF broadcasters have restricted UHF program fare primarily to reruns of prior network shows.

²⁹ Prior to the August 5, 1971, proposals, the FCC had proposed "that CATV systems in the top 100 markets in addition to local signals, may carry four distant independent

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While still maintaining its interest in protecting local broadcast television, the FCC has adopted a more encouraging posture toward the cable industry. The objective of the current proposal is "to get cable moving so that the public may receive its benefits and to do so without, at the same time, jeopardizing the basic structure of over-the-air television."⁸⁰ Underlying this reversal of policy is the recognition "that cable can make a significant contribution toward improving the nation's communications system—providing additional diversity of programming, serving as a communications outlet for many who previously have had little or no chance of ownership or of access to the television broadcast system, and creating the potential for a host of new communications services."⁸¹

In resolving the fundamental question of the number of distant signals that cable should be permitted to carry, the FCC agreed upon a specific formula which it hoped would realize the newly announced objectives. While CATV systems in large cities would be allowed to import at least two television broadcast signals from other cities, they would be required to give first priority to carrying the signals of UHF stations.⁸² The FCC was confident that development of nonbroadcast

signals, but will be required to delete commercials from independent distant stations and replace them with commercials provided by local stations." Preference would be given to independent UHF stations. Second Notice of Proposed Rulemaking and Notice of Inquiry, 24 F.C.C.2d 580, 582 (1970). According to a Sloan study, importation of distant signals would increase the system's worth, but the commercial substitution requirement would more than offset the benefit. Moreover, hidden considerations, such as commercial transfer costs and complex commercial scheduling problems, would preclude implementation of this requirement. J. Adler and J. Karl, *The Financial Impact of Proposed Federal and State Regulations on a Typical CATV System* 7-11, March 16, 1971 (unpublished report prepared for the Sloan Commission on Cable Communications, Alfred P. Sloan Foundation, New York City). Recognizing that this proposal and an earlier one based on retransmission consent (see note 26 *supra*), "simply will not wash," the Commission replaced them with the August 5, 1971, proposals. 31 F.C.C.2d at 117.

⁸⁰ *Id.*

⁸¹ *Id.* at 115.

⁸² Under the new proposal the mandatory carriage rule would be revised to require carriage of the signals of all stations licensed to communities within 35 miles of the CATV community; where markets overlap, an adjacent market station would have to be carried if there were "significant" over-the-air viewing of the signal in the cable community. Since it was found that "[c]onsistent with other public interest considerations, cable viewers should have at least a minimum number and choice of signals," the FCC determined that distant signals could be imported to meet specified standards. 31 F.C.C.2d at 120. CATV systems in the top 50 markets would have to carry three full network stations and three independents; in the next 50, the requirement would be three networks and two independents; in other markets, it would be three network stations and one independent. CATVs in the top 100 markets would be permitted to carry two signals over and above their requirements, but distant signals carried to provide minimum service would be counted against these additional signals. In smaller markets, CATV would be allowed to import only enough signals to meet minimum standards. To improve prospects for UHF-TV stations, cable systems in the top 100 markets would have to import an independent UHF from within 200 miles, if possible. The second imported signal would not be restricted as to point of origin. Sports events blacked out locally could not be shown by importing distant signals. 31 F.C.C.2d at 117-26.

services would be assured by conditioning CATV's right to import distant signals upon acceptance of an "obligation to provide for substantial nonbroadcast bandwidth."⁸³ Accordingly, the FCC plans to require cable systems to provide equal bandwidth for broadcast and nonbroadcast uses.⁸⁴ With the financial success of CATV hopefully provided for by the FCC's ruling on distant signals, a second and perhaps more crucial problem has preempted the controversy surrounding cable television. This issue, which first emerged with proposals requiring operators to originate their own programming, involves the authority of the FCC to regulate or even compel use of nonbroadcast channels. Included within current proposals are the policy arguments upon which the FCC justifies its assertion of authority over the nonbroadcast bandwidth:

Having provided for these access channels, we turn to the question of the regulation of the public access and other channels presenting non-broadcast programming. First, we believe that such regulation is properly the concern of this Commission. This is not just because we have required the creation of such channels and specified their initial or continuing priority. As stated, the channels are designed to fulfill Communications Act purposes and are integrally bound up with the broadcast signals being carried over the system. It is by no means clear that the viewing public will be able to distinguish between a broadcast program and an access program; rather, the subscriber will simply flick across the dial from broadcast channels to public access or leased channel programming, much as he now selects television fare. Further, the leased channels will undoubtedly involve interconnected programming, via satellite or interstate terrestrial facilities, matters that are within the Commission's jurisdiction. Similarly, it is this Commission that must make the decisions as to conditions to be imposed on the operation of pay channels, and we have already taken steps in that direction.⁸⁵

Despite the apparent soundness of these arguments, cable operators have shown an unwillingness to submit to FCC regulation; and, it is likely that they will challenge those aspects of the current rules which prove adverse to their interests. Although they have not enjoyed any success in convincing the courts to deny the FCC jurisdiction over carriage of broadcast signals, CATV interests have been able to thwart preliminary attempts to regulate nonbroadcast services. The FCC's failure to implement the rule compelling program origina-

⁸³ *Id.* at 127.

⁸⁴ *Id.* at 128.

⁸⁵ *Id.* at 130.

tion illustrates CATV's effectiveness in frustrating the Commission's efforts in this area of regulation.³⁶

II. THE PROGRAM ORIGATION RULE

A. *Objectives of Program Origination*

The Commission first expressed an interest in CATV program origination during a major market hearing concluded in 1968.³⁷ Having denied a San Diego cable television company the right to import signals from Los Angeles,³⁸ the FCC decided to encourage cable origination of local affairs programs as a "nonharmful diversification of sources of local viewpoints."³⁹ Accordingly, a test of unrestricted CATV program origination in the San Diego market was permitted; nevertheless, still wary of unforeseen risks posed by cablecasting, the FCC excluded advertising from originations in order to protect UHF revenue sources.⁴⁰

The potential for filling the void left by UHF-TV's failure to increase the number of local outlets was only one reason for the FCC's emphasis on CATV development. The Commission also recognized other positive contributions that only CATV could provide. Cable transmission increases the public's choice of programs while leaving valuable spectrum space available for other demands, such as land-mobile radio use.⁴¹ Secondly, since CATV is not restricted by limited channel capacity, it can provide different types of programs or services on some channels without affecting service simultaneously provided on others. Moreover, while the community or local signal of the typical broadcasting station can at best serve a large, poorly defined audience, CATV's cable connection allows for precise service. The Commission has recognized that the community CATV station can truly be a local outlet.⁴² Furthermore, since CATV is financed through subscription fees, the FCC determined that local entrepreneurs would be more likely to present programs of minority interest on some channels without having to worry about attracting enough

³⁶ This rule appears at 47 C.F.R. § 74.1111 (1971). 47 C.F.R. § 74.1101(j) defines "cablecasting" as programming distributed on a CATV system by a CATV operator or by another entity, exclusive of broadcast signals carried on the system.

³⁷ *Midwest Television, Inc.*, 13 F.C.C.2d 478, 503-08 (1968).

³⁸ The Commission decided that "unlimited CATV expansion carrying Los Angeles signals would probably preclude or substantially impair potential UHF development in San Diego and frustrate the Commission's allocations to the detriment of the public interest." *Id.* at 501-02.

³⁹ *Id.* at 503.

⁴⁰ *Id.* at 506.

⁴¹ "[T]he demand for mobile radio for both public safety and business purposes far outstripped the projections which had been made [in the general spectrum allocations proceedings of the late 1940's]." As a result, there has been increasing demand for spectrum space. *Cox, The Federal Communications Commission*, 11 B.C. Ind. & Com. L. Rev. 595, 612 (1970).

⁴² 13 F.C.C.2d at 505.

viewers to make individual programs commercially successful. Finally, CATV program origination would furnish diversified programming without raising questions of "unfair competition" posed by the importation of broadcast signals from another market.⁴³

The success of the San Diego test resulted in a "Notice of Proposed Rulemaking" which suggested adoption of the program origination requirement.⁴⁴ Contained within this proposal was a possible secondary application of CATV nonbroadcast service. As an adjunct to its ability to originate programs, CATV could also serve the community by leasing empty channels on a common carrier basis. It was suggested that the "public interest would be served by encouraging CATV to operate as a common carrier on any remaining channels not utilized for carriage of broadcast signals and CATV origination."⁴⁵

According to the FCC, direct public access to the television medium would provide a twofold benefit. Independent programmers, unable to afford time on broadcast television, would be given an opportunity to present programs of their own choosing free from owner control. In contrast to over-the-air television, where spectrum scarcity has dictated adherence to similar commercially proven formats, cable's multiple channel space would permit innovation and experimentation. Secondly, at the other end of the cable, viewers would enjoy additional diversity in program choices and services.⁴⁶ Since programming on these channels is likely to be directed to specialized interests, commercial broadcasting stations would not suffer significant decreases in audience levels.⁴⁷ What the FCC failed to mention was that common carrier operations would facilitate the advent of specialized cable services such as two-way communications.⁴⁸ Common carrier access for both private and public users alike provides the basis for establishing the nonbroadcast delivery service currently envisioned for CATV.

B. *Burdens Imposed by the Program Origination Rule*

Prepared to take such remedial action as it felt necessary, the Commission decided, in October, 1969, to adopt rules designed to "encourage" origination. Effective January 1, 1971, cable systems servicing 3500 or more subscribers would have to cablecast in order to continue to carry broadcast television signals.⁴⁹ According to the Com-

⁴³ For a more complete discussion of CATV's potential benefits, see 13 F.C.C.2d at 505-06.

⁴⁴ 15 F.C.C.2d 417 (1968).

⁴⁵ *Id.* at 427. Although the FCC would not require common carrier operations, it felt that a "local or State requirement might appropriately be imposed in this area." *Id.*

⁴⁶ See 15 F.C.C.2d at 427 and 20 F.C.C.2d at 205-07.

⁴⁷ In fact, according to Brookings, in a 20 channel system three common carrier channels will get only a 2-3% audience share. Brookings, *supra* note 13, at 49-50.

⁴⁸ See Johnson, *supra* note 21, at 55.

⁴⁹ 47 C.F.R. § 74.1111(a) (1971) was reported in 20 F.C.C.2d 201, 222-23 (1969). The effective date was later postponed until April 1, 1971, to afford operators additional preparation time. Memorandum Opinion and Order, 23 F.C.C.2d 825 (1970). The

mission, the "public interest [would be] best served by conditioning, where practicable, carriage of broadcast signals upon the requirement of program origination."⁵⁰ While smaller systems, at least for the present, could cablecast on a voluntary basis, larger operations would be required to contribute a meaningful program alternative to their subscriber's viewing selection. Thus, in addition to carrying local broadcasts, the larger systems would have to operate "to a significant extent as a local outlet by cablecasting and would have to make available facilities for local production and presentation of programs other than automated services."⁵¹

The Commission argued that its rule was in accordance with a basic tenet of communications policy which holds that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."⁵² This principle of diversity was designed to encompass not only diversity of control over the content of programming, but also diversity of program choices available to the public. Since the requirement was primarily designed to insure that community outlets would provide a "significant additional choice of programming,"⁵³ further regulation was imposed to restrict CATV from entering into any arrangement which would prevent or inhibit the use of "[cablecasting] facilities for a substantial portion of time (including the time period 6:00-11:00 p.m.), for local programming designed to inform the public on controversial issues of public importance."⁵⁴

The Commission found further application of this tenet necessitated by a recent Supreme Court decision. In *Red Lion Broadcasting Co. v. FCC*,⁵⁵ the Court considered the constitutional and statutory challenge brought by radio broadcasters against the FCC's imposition of the "fairness doctrine" and the Commission's promulgation of personal attack and political editorializing regulations.⁵⁶ The FCC

Commission recognizes that its present cutoff point covers less than 10% of existing systems, but the rule will cover most systems in the nation's large communities. Realizing that more than 70% of the systems now originating each have fewer than 3,500 subscribers, the FCC stresses that the cutoff point is not permanent. 20 F.C.C.2d at 213.

⁵⁰ 20 F.C.C.2d at 208.

⁵¹ 47 C.F.R. § 74.1111(a) (1971). Some systems provide time, weather, news and stock market quotations on excess channels. These services cannot be counted against the requirement.

⁵² 20 F.C.C.2d at 205, quoting *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

⁵³ 20 F.C.C.2d at 205-06.

⁵⁴ This additional requirement in 47 C.F.R. § 74.1111(a) (1971) is reported at 23 F.C.C.2d 825, 827 (1970).

⁵⁵ 395 U.S. 367 (1969).

⁵⁶ The personal attack and political editorializing aspects of the fairness doctrine were codified by the Commission subsequent to the commencement of the *Red Lion* litigation. 32 Fed. Reg. 10303 (1967). In *Radio Television News Directors Ass'n v. United States*, 400 F.2d 1002 (7th Cir. 1968), the Seventh Circuit ruled that these rules were unconstitutional. The decision rested on the conclusion that:

In view of the vagueness of the Commission's rules, the burden they impose

had accused Red Lion of failing to present both sides of public issues and of denying individuals who had been personally attacked and political opponents of candidates endorsed by the station a reasonable opportunity for reply.⁵⁷ The Court, in affirming the FCC's authority, found that broadcasters had no First Amendment right to monopolize the radio frequency to the exclusion of other citizens in the community. Instead, licensees, "given the privilege of using scarce radio frequencies," are to be treated as "proxies for the entire community, obligated to give suitable time and attention to matters of great public concern."⁵⁸ The Court concluded that:

It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee.⁵⁹

Although the "scarcity of frequencies" rationale underlying the *Red Lion* decision is not equally applicable to CATV, the Commission nevertheless found sufficient justification for imposing First Amendment requirements on CATV operators. It determined that since retransmission of broadcast signals assures CATV of subscriber support, regulation in pursuance of the public interest should be extended to cover CATV program originations. The FCC also noted that CATV systems have developed noncompetitive ownership patterns within individual service areas and, like broadcasters, have thus acquired monopolistic control over channels of access into subscriber homes. Accordingly, the same "fairness" requirements imposed upon television broadcasters by Sections 315 and 317 of the Communications Act⁶⁰ are now applicable to cablecasters as well. CATV operators must provide equal time to political candidates,⁶¹ furnish a reasonable opportunity for presentation of conflicting ideas on issues of public importance,⁶² and comply with sponsorship identification regulations.⁶³

Despite these restrictions, the origination rule is sufficiently flexible to allow a reasonable opportunity for cablecasting operations to

on licensees, and the possibility they raise of both Commission censorship and licensee self-censorship . . . the personal attack and political editorial rules would contravene the first amendment.

400 F.2d at 1020. Finding that the rules "are both authorized by Congress and enhance rather than abridge the freedoms of speech and press protected by the First Amendment," the Supreme Court reversed the Seventh Circuit decision. 395 U.S. at 375.

⁵⁷ 395 U.S. at 369-71.

⁵⁸ *Id.* at 394.

⁵⁹ *Id.* at 390.

⁶⁰ 47 U.S.C. §§ 315, 317 (1970).

⁶¹ 47 C.F.R. § 74.1113 (1971).

⁶² 47 C.F.R. § 74.1115 (1971).

⁶³ 47 C.F.R. § 74.1119 (1971).

become established.⁶⁴ The rule noticeably lacks specific provisions regarding technical standards, hours of origination, categories of programming, and types of cablecasting equipment. To achieve greater diversity, the rules were designed to permit the operator maximum opportunity for innovation and experimentation.⁶⁵ In light of this motive, the Commission refused to adopt proposals to limit operator originations to one channel,⁶⁶ and, instead, promoted CATV interconnection "on a regional or national basis for any purpose, including the distribution of entertainment type programming."⁶⁷ Furthermore, the Commission has not completely ruled out pay-TV operations on cable systems. Higher monthly fees or per program charges can be made for certain limited interest programs.⁶⁸

While not requiring common carrier operations, the FCC strongly encourages the leasing of cable space to others as a means of promoting diversity and local expression.⁶⁹ In any case, the program origination requirement will require owners to have on hand video cablecasting equipment—thus ensuring the availability of origination facilities for use by others on common carrier channels. The obligation of CATV, like that of broadcast television, "to give suitable time and attention to matters of great public concern,"⁷⁰ can be fulfilled in part by increasing the public's opportunity for television communication free from operator control over program content.

C. Advertising Restrictions

To compensate for the additional expenses imposed upon CATV operators by the origination rule, the FCC permits a limited amount

⁶⁴ States and localities, however, may impose more stringent requirements, subject to FCC approval. 15 F.C.C.2d at 425 & n.11.

⁶⁵ 20 F.C.C.2d at 214. Less than a year later, however, the Commission made plans to narrow considerably the range of flexibility originally allowed CATV operators. Notice of Proposed Rulemaking 25 F.C.C.2d 38 (1970). If adopted, the proposed regulations would require a minimum channel capacity, installation of two-way capability, and provisions for community programming on an allotted channel. In addition, the FCC planned to adopt technical standards designed to ensure quality of service and sufficient compatibility among systems to secure national as well as international interconnection. Accordingly, CATV operators would be required to "perform and report certain performance measurements at least once a year." 25 F.C.C.2d at 42.

⁶⁶ A one channel limitation designed to promote diversity of control was proposed in 15 F.C.C.2d at 426-27. The Commission later decided not to adopt the proposal. 23 F.C.C.2d at 828.

⁶⁷ 20 F.C.C.2d at 207-08. The FCC's ultimate design appeared to be directed at creating new television networks which would compete with present national systems.

⁶⁸ The term "pay-TV" is not usually applied to the monthly cable subscription fees. Pay-TV, whether over-the-air or by cable, refers to charges made for specific programs. The FCC offers cable operators some opportunity to run a pay channel. 20 F.C.C.2d at 216. Such an operation is strictly regulated by 47 C.F.R. § 74.1121 (1971).

⁶⁹ 20 F.C.C.2d at 205. The FCC states that common carrier access may ultimately be required.

⁷⁰ 20 F.C.C.2d at 209.

of advertising on the origination channel.⁷¹ Projected costs of cable-casting operations indicate the need for generating advertising revenue in addition to subscription fees.⁷² Nevertheless, for the present, at least, advertising is to be allowed only at "natural breaks" within a cable-cast so that program continuity will not be interrupted.⁷³ Policy reasons seem to have dictated the Commission's reluctance to allow full scale advertising on cable originations. The limitation of advertising to natural breaks both improves cable programming, by restricting interruptions, and lessens the adverse effect on advertising revenue available to local broadcasting stations. Even limited advertising, however, is desirable; it helps to defray some of the costs of origination while at the same time offering local merchants a low-cost advertising outlet.⁷⁴

*D. The Basis of the FCC's Authority to Impose the
Origination Requirement*

The Commission bases its authority to regulate CATV upon a broad statutory mandate issued by Congress.⁷⁵ Section I of the Communications Act of 1934 created the Federal Communications Commission to unify national administrative authority over wire and radio in order to "make available, so far as possible, to all the people of the United States a rapid, efficient, Nationwide, and world-wide wire and radio communication service"⁷⁶ The broad scope of this delegated authority extends to "all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio"⁷⁷

To achieve the goals of the Act, the Commission is directed to "perform any and all such acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions."⁷⁸ This mandate, which has been upheld as "coterminous with the scope of agency regulation itself,"⁷⁹ makes it essential that the Commission have power to fulfill the specific

⁷¹ Id. at 215.

⁷² Stressing that CATV systems are free to originate without commercials, the FCC claims that a broad subscriber base might permit production and distribution of programming financed solely through subscription fees. Id. at 216.

⁷³ This restriction is part of 47 C.F.R. § 74.1117 (1971), which regulates CATV advertising. The FCC justifies imposition of restriction solely with regard to CATV advertising on the grounds that broadcast television depends exclusively on advertising revenue while CATV also receives subscription fees. 20 F.C.C.2d at 218.

⁷⁴ 20 F.C.C.2d at 218.

⁷⁵ Communications Act of 1934, ch. 652 §§ 1 et seq., 48 Stat. 1064, as amended, 47 U.S.C. §§ 151 et seq. (1970).

⁷⁶ 47 U.S.C. § 151 (1970).

⁷⁷ 47 U.S.C. § 152 (1970).

⁷⁸ 47 U.S.C. §§ 154(i), 303(r) (1970).

⁷⁹ American Trucking Ass'n, Inc. v. United States, 344 U.S. 298, 311 (1953).

obligations written into the statute. Paramount among these obligations is the promotion of the public interest. In particular, the Commission emphasizes its role of "encouraging the larger and more effective use of radio . . . as public convenience, interest, or necessity requires . . ."⁸⁰ and providing "a fair, efficient, and equitable distribution of radio service . . . among the several States and communities . . ."⁸¹

The Commission has attempted to apply these statutory provisions to CATV in furtherance of its goal of providing additional outlets in as many communities as possible. Although CATV is not specifically mentioned in the Act, the Commission has maintained that the program origination rule was a necessary adjunct to the effective performance of its statutory responsibilities. The Commission recited in its "Notice of Proposed Rulemaking"⁸² that its "authority to regulate the use of broadcast signals as a base for CATV program origination encompasses power to adopt regulations reasonably designed to prevent such operations from having detrimental consequences to the public interest and to promote their development along lines likely to maximize the potential benefits to the public."⁸³

In essence, the FCC has maintained that its statutory authority to regulate the use of broadcast signals entitles the Commission "to look to and evaluate the 'end use', to the extent reasonably necessary" to perform its duty of protecting the public interest.⁸⁴ Since CATV operates substantially by distributing interstate broadcast signals, the FCC has asserted constitutional and statutory authority to prohibit CATV systems from using these signals in a manner contrary to the Commission's stated objectives.⁸⁵ As far as the cable viewer is concerned, reception of broadcast programs and CATV originated material is indistinguishable. Thus, according to the Commission, the end use theory authorizes it to control all aspects of CATV from broadcast signal carriage to operator originated programming. For this reason, "unified regulation is necessary if the Commission is to fulfill its responsibility of making adequate television service available to all people of the United States on a fair, efficient and equitable basis."⁸⁶

III. OPPOSITION TO THE ORIGINATION RULE

A. *Broadcaster's Objections*

Both over-the-air broadcasters and CATV operators have expressed dissatisfaction with the intended program origination requirement. Wary of the potential competition of CATV origination, broadcast interests have urged that cablecasting be restricted to public

⁸⁰ 47 U.S.C. § 303(g) (1970).

⁸¹ 47 U.S.C. § 307(b) (1970).

⁸² 15 F.C.C.2d 417 (1968).

⁸³ *Id.* at 422.

⁸⁴ 13 F.C.C.2d at 504.

⁸⁵ *Id.*

⁸⁶ *Id.* at 504 n.26.

service programming on a nonadvertising basis.⁸⁷ The argument raised by broadcasters is that prohibition of CATV origination "is necessary to prevent potential fractionalization of the audience for broadcast services and a siphoning off of program material and advertising revenue now available to the broadcast service."⁸⁸ Implicit in this argument is the fear that CATV origination would jeopardize the public interest by threatening the public's continued reception of "free" programs.

The FCC has been cognizant of the threat to the public interest posed by the loss of "free" over-the-air television service. Whereas CATV can reach the majority of the nation's population, it cannot serve outlying, sparsely populated areas where it will be economically infeasible or where viewers cannot afford or are unwilling to pay for the services.⁸⁹ Nevertheless, the Commission failed to see any factual basis for believing that such a loss would result. CATV is not yet in an economic position to challenge established broadcasting enterprises.⁹⁰ Moreover, even where limited advertising is allowed to help defray the costs of origination, cries of alarm appear unjustified. CATV advertising, in terms of rates, is much more analogous to the advertising typical of radio than to that of VHF or UHF television.⁹¹

Recognizing that broadcast television may eventually be affected by CATV origination, the FCC nevertheless has concluded that the public should not be "deprived of an opportunity for greater diversity merely because a broadening of selections may spread the audience and reduce the size of the audience for any particular selection."⁹² Only where the result is a net reduction of television service does either loss of audience or advertising revenue concern the public interest.⁹³ Any minimal decrease in broadcast service would be adequately compensated by the increased diversity of program choice resulting from local CATV origination as well as continued broadcast signal carriage. Apparently, the FCC feels that the fair competition between broadcast television and CATV resulting from program origination on CATV systems would be beneficial to the public interest. Both enterprises, the FCC claims, stand on an equal footing in acquiring program material.⁹⁴ However true this assumption may be, cablecasting could loosen the grip that the networks have been able to exert over

⁸⁷ 20 F.C.C.2d at 202. Broadcasters fear that an enlarged subscriber base might in the future enable CATV to outbid free television for the most attractive programming.

⁸⁸ *Id.*

⁸⁹ Moreover, continuation of conventional broadcasting serves the public interest by providing a competitive check against policies of cable operators. L. Johnson, *The Future of Cable Television: Some Problems of Federal Regulation* 64 (Rand Corp. Memorandum, Jan., 1970).

⁹⁰ 20 F.C.C.2d at 203.

⁹¹ *Id.* at 217.

⁹² *Id.* at 203.

⁹³ *Id.* The FCC bases this conclusion on prior court rulings. See *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940); *Carrol Broadcasting Co. v. FCC*, 258 F.2d 440 (D.C. Cir. 1958).

⁹⁴ 20 F.C.C.2d at 203.

the industry. The end result would be greater community control over the television communications media. In pursuance of this objective, the Commission adopted a rule prohibiting cross-ownership of CATV systems and broadcast television stations.⁹⁶ The FCC remained confident that any problems raised in the broadcasters' objections to program originations could be prevented by appropriate regulation.⁹⁰

B. CATV's Objections

CATV proponents have not opposed the concept of cablecasting. They agree that program origination is in the public interest, and operations with sufficient capital have expressed a willingness to cablecast on a *voluntary basis*.⁹⁷ What CATV operators do oppose are the inequities of a *requirement* denying systems with over 3500 subscribers each any choice but to cablecast as a condition to carrying local broadcast television signals.⁹⁸ The broad sweep of such a rule fails to recognize that the demand for local origination varies according to the needs and opportunities of the individual market. In cities like New York, where there already exists intense competition for the viewing audience, it is unlikely that CATV could finance acceptable programming that would attract additional subscribers.⁹⁹ The industry indicated that, to be economically viable under the proposed origination rule, CATV's urban operations, in addition to carriage of local stations, must be allowed to import signals from distant stations. Local program origination even with the assistance of limited advertising will not garner enough financial support to make CATV commercially stable.¹⁰⁰

⁹⁶ 47 C.F.R. § 74.1131 (1971) is reported at 23 F.C.C.2d 816 (1970). A further notice proposed to exclude cross ownership of CATV and local radio stations and newspapers. In addition, rulemaking was suggested to limit multiple ownership of CATV systems. Notice of Proposed Rulemaking and of Inquiry, 23 F.C.C.2d 833 (1970).

⁹⁷ 20 F.C.C.2d at 204; 23 F.C.C.2d at 829.

⁹⁸ 20 F.C.C.2d at 202; 23 F.C.C.2d at 825-26. There is some question as to whether the FCC could have prohibited cable origination. As a prior restraint, such a ruling might have been in violation of the First Amendment. See *Red Lion*, where the Court contended that "the FCC is free to implement [the requirement that licensees use their stations for discussion of public issues] by reasonable rules and regulations which fall short of abridgement of the freedom of speech and press, and of the censorship proscribed by § 326 of the Act." 395 U.S. at 382.

⁹⁹ 20 F.C.C.2d at 202.

¹⁰⁰ New York City viewers receive one educational, three network, and four independent stations. As a Sloan study has noted, even the fine educational station (Channel 13) in New York City seldom registers more than 1% of the viewing audience. See, J. Adler and J. Karl, *The Financial Impact of Proposed Federal and State Regulations on a Typical CATV System* 13, March 16, 1971 (unpublished report prepared for the Sloan Commission on Cable Communications, Alfred P. Sloan Foundation, New York City). Equipment costs can vary from \$20,000 to \$200,000. For quality live programming in black and white, equipment and installation cost \$40,000. The annual cost of personnel to operate the facility varies from \$26,500 on a 21 hour schedule per week to \$34,000 on a 42 hour week. *Id.* at 12.

¹⁰⁰ While the costs of cablecasting may be a fraction of the expense of over-the-air broadcasting, CATV systems, nevertheless, do not have the resources to finance quality

The Commission, not entirely convinced of CATV's arguments, made plans to adopt even more stringent distant signal measures than were already in effect. As part of the same "Notice" in which the cablecasting rule had been proposed,¹⁰¹ the Commission expressed its future intention to require CATV systems operating within the top one hundred markets to obtain retransmission consent from originating broadcast stations before importing signals from beyond the market being served by the CATV operator.¹⁰² For the present, however, faced with increasing demands for evidentiary hearings requesting waivers of the distant signal rule, the Commission decided to "freeze out" altogether CATV's use of distant signals.¹⁰³ The immediate aim of the Commission's action was to insulate local UHF stations from competition by completely stripping CATV of its principal marketing weapon in major cities.¹⁰⁴ By forcing CATV to provide its own program material, it was hoped that CATV and over-the-air television would enter separate fields—*i.e.*, local innovative or experimental offerings and mass appeal entertainment programming, respectively;¹⁰⁵

programming. CATV operators in urban areas must be allowed to carry distant station signals. See, N. Feldman, *Cable Television: Opportunities and Problems in Local Program Origination* vii (Rand Corp. Memorandum, Sept., 1970).

¹⁰¹ Notice of Proposed Rulemaking and Notice of Inquiry, 15 F.C.C.2d 417 (1968).

¹⁰² *Id.* at 432-41. The FCC determined that the best way of eliminating the unfair competition threatened by CATV's free use of distant signals was to impose a retransmission consent requirement. Although the ultimate objective may, as the FCC maintained, have been in the public interest, the proposal arguably contravened a Supreme Court ruling which refused to apply copyright liability on CATV operations. See *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968). Under the proposed rule, copyright owners under contract with licensee broadcasting stations could determine whether consent should be given. As Eugene V. Rostow, Chairman of The Presidential Task Force on Communications Policy (1968), told the House Subcommittee on Communication and Power: "What I have seen of the FCC's position is that it seems to be trying to bring copyright back in despite the Supreme Court's decision (that a CATV operator is not liable for copyright charges on the basis of the 1909 copyright law)." 25 Cong. Q. Almanac 767 (1969).

¹⁰³ 15 F.C.C.2d at 434. The Commission decided to terminate the burdensome market hearings until further action is taken either by Congress or the FCC.

¹⁰⁴ The Commission later proposed the "deletion-substitution" formula as an alternative to retransmission consent. 24 F.C.C.2d 580 (1970). It stated at the time that its "prior approach on retransmission consent was to 'fence in' markets to protect UHF but that [such an approach] does not affirmatively promote its development." 24 F.C.C.2d at 581-82.

¹⁰⁵ The long range goal of the Commission's actions may have been to prod Congress into passing legislation establishing copyright payment for CATV operations. The FCC promised not to take final action "until an appropriate period is afforded to determine whether there will be congressional resolution of this crucial issue of unfair competition. . . ." 15 F.C.C.2d at 433. Legislation was introduced which would have vitiated the effect of *Fortnightly*, and compelled CATV to pay copyright fees. In December, 1969, the Copyright Subcommittee of the Senate Judiciary Committee reported out a general copyright bill, S. 543. After an unfavorable response and subsequent revision, Senator John L. McLellan reintroduced the bill as S. 644, 92d Cong., 1st Sess. (1971). Section 111 of the bill may accommodate the FCC's August 5th proposals with regard to broadcast signal carriage. The bill establishes "adequate television service" standards (subsection (c)(3)(A),(B)) similar to the FCC's minimum services require-

and that as CATV began to offer its own programs, it would stop drawing viewers interested in broadcast television.¹⁰⁶ Unable to secure any significant relief from the Commission,¹⁰⁷ CATV turned to the courts to challenge the FCC's authority to enforce its regulatory scheme.

IV. LITIGATION OVER THE ORIGATION REQUIREMENT

A. *The Southwestern Doctrine*

In resolving the threshold question of whether the FCC has sufficient statutory power to meet unanticipated developments in the broadcast industry, courts can draw on a substantial body of precedent. In fact, prior to the jurisdictional struggle involving program origination, the courts had assumed that "[underlying the Communications Act of 1934] is recognition of the rapidly fluctuating factors characteristic of the evolution of broadcasting and of the corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to these factors."¹⁰⁸ Aware of the nature of the statute's intent, the Supreme Court determined that in "the context

ments and allows an increase in the number of signals carried subject to FCC approval (subsection (e)(2)(B)). Within the signal quotas, CATV would be granted a compulsory license, subject to certain restrictions (subsection (c)), and would be required to pay copyright fees based on a sliding scale from one percent of the subscriber revenue in small systems to five percent in large systems (subsection (d)(2)). While the bill may alleviate the impact of the distant signal ban, the law nevertheless relies on retransmission consent. Provisions contained in the bill would bar cable operators in major markets from importing programs for which the local broadcasters hold exclusive contracts (subsection (c)(4)(B)).

The bill does not seem viable. Copyright owners most likely would prefer to negotiate the amount of copyright payment. In addition, the FCC has opposed the attempt to regulate CATV via copyright as a usurpation of its function. (Subsection (e)(1) provides that, with certain limited exceptions, "on and after January 1, 1973, all Federal, State, and local laws and regulations restricting the right of a cable system to make secondary transmissions in any case made subject to compulsory licensing by this section are preempted by this title.") In response to a request by the Senate Commerce Committee for review of Section 111 of S. 543 (the predecessor to S. 644), Dean Burch, Chairman of the FCC, replied that the bill would have a "substantial impact on our broadcast-cable television regulating policies" and criticized the "attempt to deal in such detail with a dynamic, changing field such as is here involved." Instead, he hoped that the copyright bill would simply bestow upon CATV systems a compulsory license and "leave the remaining communications policy matters for resolution by the Commission in appropriate rule making and other proceedings, or by the Congress through general CATV legislation and subsequent agency regulation." 117 Cong. Rec. 1377-78 (daily ed. Feb. 17, 1971) (letter of Dean Burch introduced by Senator Pastore).

¹⁰⁶ Botein, *The FCC's Proposed CATV Regulations*, 55 Cornell L. Rev. 244, 257 (1970). The plan might result in the loss of some viewers from broadcast television but the siphoning off would be limited because of the subscription fee. Id.

¹⁰⁷ The Commission denied CATV systems reconsideration of the cablecasting requirement. 23 F.C.C.2d 825 (1970).

¹⁰⁸ *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940); accord, *National Broadcasting Co., Inc. v. United States*, 319 U.S. 190 (1943); *Red Lion Broadcasting Co., Inc. v. FCC*, 395 U.S. 367 (1969); *Philadelphia Television Broadcasting Co. v. FCC*, 359 F.2d 282 (D.C. Cir. 1966).

of the developing problems to which it was directed, the Act gave the Commission not niggardly but expansive powers.¹⁰⁹

A test of the breadth of this authority as it affects CATV arose in San Diego soon after imposition of the distant signal rule.¹¹⁰ Pending a hearing on the merits of a complaint brought by Midwest Television, Inc., a local broadcaster, the FCC had restricted expansion of CATV service, including that of Southwestern Cable Company, by limiting distant signal carriage from Los Angeles to subscribers in the areas in which CATV already operated.¹¹¹ A petition for appellate relief brought by the local cable companies crystallized the jurisdictional dispute over CATV. In an attempt to retain their business viability, they averred that the Commission lacked the authority to issue the order in question. The Ninth Circuit's determination¹¹² favorable to CATV was reversed by the Supreme Court in *United States v. Southwestern Cable Co.*,¹¹³ which held that the broad language of the Communications Act entitled the Commission to jurisdiction over CATV and that the prohibitory order did not exceed or abuse the FCC's authority.¹¹⁴

The *Southwestern* decision laid to rest any question concerning the Commission's authority to regulate CATV's use of broadcast signals in a manner ensuring the availability of adequate over-the-air television service.¹¹⁵ Since, as noted above, a CATV enterprise operates primarily by distributing interstate broadcast signals, the entire operation falls within the purview of the Act "even where . . . the intercepted signals emanate from stations located within the same State in which

¹⁰⁹ 319 U.S. at 219.

¹¹⁰ Also in question were the special relief procedure rules. See note 25 supra.

¹¹¹ *Midwest Television, Inc.* 4 F.C.C.2d 612 (1966). *Midwest Television* received temporary relief under 47 C.F.R. § 74.1109(f) (1971) because the Commission saw reasonable grounds to support the station's fear of audience fragmentation and an accompanying reduction in advertising revenue. Since the foreseeable consequence would be a curtailment of local television service, the FCC viewed the cable companies as operating in conflict with the public interest.

¹¹² *Southwestern Cable Co. v. United States*, 378 F.2d 118, 120 (9th Cir. 1967).

¹¹³ 392 U.S. 157 (1968).

¹¹⁴ *Id.* at 178, 181.

¹¹⁵ A contemporaneous decision, contrary to the lower court's holding in *Southwestern*, had clouded the issue. In *Buckeye Cablevision, Inc. v. FCC*, 387 F.2d 220 (D.C. Cir. 1967), the court upheld the FCC's power to issue cease and desist orders under the distant signal rules. Regulation was found not to be an illegal prior restraint under the First Amendment since such restraint was reasonably required to effectuate the public interest requirements of the Communications Act in regard to CATV. With particular reference to CATV's use of broadcast signals, the court found that it would "frustrate the purpose for which [the Act] was brought into being [if Congress had attempted] an itemized catalogue of the specific manifestations of the general problems for the solution of which it was establishing a regulatory agency." *Id.* at 225, quoting *National Broadcasting Co. v. United States*, 319 U.S. 190, 219 (1943).

It thus appears that the District of Columbia Circuit Court of Appeals reached an opposite result from that of the 9th Circuit Court in *Southwestern*. An attempt to resolve this conflict is found in Comment, *CATV Regulation—A Complex Problem of Regulatory Jurisdiction*, 9 B.C. Ind. & Com. L. Rev. 429 (1968).

the CATV system operates."¹¹⁶ The Court followed the guidelines set down in earlier decisions:

We have elsewhere held that we may not, "in the absence of compelling evidence that such was Congress' intention . . . prohibit administrative action imperative for the achievement of an agency's ultimate purposes." . . . There is no such evidence here, and we therefore hold that the Commission's authority over "all interstate . . . communication by wire or radio" permits the regulation of CATV systems.¹¹⁷

Subsequent application of the *Southwestern* doctrine effectively demonstrated the Commission's authority to impose restrictions on CATV's use of broadcast signals.¹¹⁸ Nevertheless, these cases did not reach the question of the extent of the FCC's statutory authorization to regulate CATV's potential nonbroadcast uses. Resolution of this issue was to face a federal circuit court several years later in an action brought by Midwest Video Corporation challenging the Commission's program origination rule.

B. *The Midwest Video Litigation*

On July 28, 1970, Midwest Video Corp. filed a petition in the Eighth Circuit Court of Appeals for review of the cablecasting requirement.¹¹⁹ Several of Midwest Video's cable systems operating in Missouri, New Mexico and Texas each served more than 3500 subscribers and were therefore governed by the origination requirement. Like other CATV operations, the corporation had entered into business with the purpose of offering potential subscribers a more efficient television service. Midwest Video protested that it had no intention or desire to cablecast¹²⁰ but that, under the new rule, it could no longer continue to function as a carrier of television broadcast signals unless it also operated "to a significant extent as a local outlet by cablecasting"¹²¹

Again, the legal issue which confronted the court concerned the extent of the statutory authority vested in the FCC. Here, the dispute centered on the Commission's power to condition CATV's

¹¹⁶ 392 U.S. at 168-69.

¹¹⁷ *Id.* at 177-78.

¹¹⁸ In *Midwest Television, Inc. v. FCC*, 426 F.2d 1222 (D.C. Cir. 1970), which was decided on the basis of the *Southwestern* case, the court agreed that there was "adequate support for the conclusion that there would be substantial penetration from an expanding CATV, with a harmful impact of such penetration on assumed UHF service and audience." *Id.* at 1228. Finding that "the Commission's position as thus stated is a permissible one," the court upheld the FCC's measures to restrict cable growth. *Id.* at 1227.

¹¹⁹ The requirement consists of the orders of FCC Docket No. 18397. This docket includes 15 F.C.C.2d 417 (1968), 20 F.C.C.2d 201 (1969) and 23 F.C.C.2d 825 (1970). The case was ultimately reported in 441 F.2d 1322 (8th Cir. 1971).

¹²⁰ 441 F.2d at 1328.

¹²¹ *Id.* at 1324, citing 47 C.F.R. § 74.1111(a) (1971).

use of broadcast signals upon performance of a nonbroadcast function—that is, program origination. The Commission asserted authority to impose the cablecasting requirement pursuant to its obligations to the public under the Communications Act of 1934.¹²² Midwest Video, on the other hand, denied that authority to prescribe the cablecasting rule was vested in the FCC, either by the Act or otherwise.¹²³ Despite the weight of precedent, the court resolved the issue in favor of the petitioners and set the requirement aside. The court concluded that “the FCC is without authority to impose the program originating rule on existing cable television operators.”¹²⁴

The decision followed an examination of the established parameters of the Commission's authority to regulate CATV. Since CATV had come into existence nearly two decades subsequent to the adoption of the Communications Act,¹²⁵ no direct authority over cable was conferred in the FCC. Moreover, while Congress clearly intended to give the Commission broad regulatory powers over broadcast television, repeated attempts to enact legislation covering CATV had failed to meet with success.¹²⁶ Without congressional guidance, the court directed its attention not to the question of whether Congress had the power to regulate CATV, but, rather, to whether it had in fact given such regulatory powers to the FCC.¹²⁷ As interpreted by the Eighth Circuit, the Supreme Court's decision in *Southwestern* had strictly limited the Commission's authority to adopt rules applicable to CATV systems. The Supreme Court had upheld the Commission's authority to “issue ‘such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law,’ as ‘public convenience, interest, or necessity requires.’”¹²⁸ Nevertheless, the Court suggested a basis for narrowing the scope of the FCC's discretionary power:

There is no need here to determine in detail the limits of the Commission's authority to regulate CATV. It is enough to emphasize that the authority which we recognize today under § 152(a) is restricted to that reasonably ancillary to the ef-

¹²² 47 U.S.C. §§ 151 et seq. (1970).

¹²³ 441 F.2d at 1323.

¹²⁴ *Id.* at 1328. Judge Gibson, concurring, thought that while the FCC might have authority, its order was “confiscatory and hence arbitrary.” *Id.*

¹²⁵ The first cable television operation was begun in the late 1940's in Lansford, Pa.

¹²⁶ 441 F.2d at 1324. The *Southwestern* Court dealt with this issue:

In 1966, the Commission informed Congress that it desired legislation in order to “confirm [its] jurisdiction and to establish such basic national policy as [Congress] deems appropriate.” . . . In response, the House Committee on Interstate and Foreign Commerce said merely that it did not either agree or disagree with the jurisdictional conclusions of the Second Report, and that “the question of whether or not . . . the Commission has authority under present law to regulate CATV systems is for the courts to decide

392 U.S. at 171.

¹²⁷ 441 F.2d at 1324.

¹²⁸ *Id.* at 1325, quoting 392 U.S. at 178.

fective performance of the Commission's various responsibilities for the regulation of television broadcasting.¹²⁹

Although recognizing that the Act's provisions are applicable to CATV operations, *Midwest Video* was careful to limit the extent of this authority to that "reasonably ancillary" to the Commission's responsibilities in the broadcasting field.¹³⁰

The court in *Midwest Video* approached the authority problem by examining the extent of the nexus between CATV and broadcasting. *Fortnightly Corp. v. United Artists Television, Inc.*,¹³¹ an earlier inquiry by the Supreme Court into CATV's role in television communications, suggested a resolution. In refusing to hold Fortnightly liable for copyright infringement, the Court stated that "the function of CATV has little in common with the function of broadcasters."¹³² In effect, the Court analyzed the precise activities in question. Since "[b]roadcasters select the programs to be viewed [while] CATV systems simply carry, without editing, whatever programs they receive," the Court held that "CATV operators, like viewers and unlike broadcasters, do not perform the programs that they receive and carry."¹³³ Instead, a cable system functions merely as a transmitter—a "passive beneficiary" of the broadcast signals that are within the public domain.

Midwest Video also relied on the fact that CATV, unlike broadcast television, is licensed by state or municipal regulatory boards.¹³⁴ Unconvinced by the Commission's argument that it had primary jurisdiction over CATV operations,¹³⁵ the court concluded that this view represented an "encroachment on state and municipal rights to franchise CATV."¹³⁶ In so doing, the court observed that neither had Congress authorized federal preemption of state and municipal authority nor had the Commission maintained a right to license CATV operators.¹³⁷ In contrast, federal preemption of the licensing of television broadcasters is specifically "spelled out in the statute."¹³⁸

Since CATV cannot be included with broadcast television as a federally licensed performer of programs, it is not equally subject to the Commission's regulatory powers. Yet, *Southwestern* had found a

¹²⁹ Id. at 1324-25, quoting 392 U.S. at 178.

¹³⁰ Id. at 1326.

¹³¹ 392 U.S. 390 (1968).

¹³² Id. at 400.

¹³³ Id. at 400-01.

¹³⁴ 441 F.2d at 1326.

¹³⁵ The FCC asserts "that State or local regulations or conditions inconsistent with these Federal regulatory policies are . . . preempted." 20 F.C.C.2d at 223.

¹³⁶ 441 F.2d at 1326.

¹³⁷ Id. In 23 F.C.C.2d at 829, the Commission expressly delayed consideration of the licensing question. The latest proposals admit "that federal licensing at this time would place an unmanageable administrative burden on the Commission." 31 F.C.C.2d at 136.

¹³⁸ "Provisions with respect to periods for which licenses may be issued and standards to be applied in granting licenses are spelled out in the statute." 441 F.2d at 1326.

nexus sufficient to establish some authority in the Commission. *Midwest Video* ultimately identified this link as being "primarily economic."¹³⁹ While the FCC maintained that its "end use" theory was compatible with its statutory authority, the *Midwest* court felt that "the Commission's origination requirement [went] far beyond the regulation of the use made of signals captured by CATV as authorized in *Southwestern Cable Co.*"¹⁴⁰ In sharp contrast to its earlier objective of curtailing "deleterious competition from CATVs which would financially cripple conventional licensed broadcasters and discourage prospective broadcasters," the Commission now regards the encouragement of such competition as beneficial to the public interest.¹⁴¹

The court in *Midwest Video* did not fail to recognize the possibility that the origination requirement might benefit the public.¹⁴² Unlike the Commission, however, it accorded greater weight to the possibility that the rule might inflict irreparable harm upon the CATV industry and ultimately upon the public as well. As *Fortnightly* indicates, CATV presently serves the public interest by making television available in areas where distance and topography otherwise impair favorable reception.¹⁴³ The origination requirement would have necessitated substantial expenditures for additional equipment and trained personnel. The burden of these outlays was magnified by the limited reach of the normal CATV operation. There existed then "a distinct possibility" that the rule would, in fact, have damaged the public interest by forcing CATV operators to increase rates and, in some instances, by driving them out of business altogether.¹⁴⁴

Ultimately, the court determined that promoting the public interest did not provide a sufficient statutory basis for justifying the Commission's application of the "end use" theory.¹⁴⁵ The requirement that CATV operators engage in the entirely distinct business of program originations was found to be an arbitrary extension of the

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 1327.

¹⁴¹ *Id.* at 1327-28. "Competition with conventional television operators is encouraged by requiring cablecasting and permitting advertising with certain limitations, all over the strong protest of licensed broadcasters." *Id.* at 1328.

¹⁴² *Id.* at 1327. "[T]he public interest standard of the Communications Act incorporates the basic national policy in favor of competition as expressed by the antitrust laws in areas such as this where the competition does not relate to the use of the radio frequency spectrum." *Id.*

¹⁴³ 392 U.S. at 399.

¹⁴⁴ 441 F.2d at 1327.

¹⁴⁵ *Id.* The court directly confronted the Commission's reliance on *FPC v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1 (1960). While the Supreme Court had allowed the FPC to consider the end use of gas, it had expressly limited the exercise of this jurisdiction. "The Commission cannot order a natural gas company to sell gas to users that it favors; it can only exercise a veto power over proposed transportation and it can only do this when a balance of *all* the circumstances weighs against certification." 365 U.S. at 17. Thus, the "end use" theory should not be advanced as a rationale for an unrestricted grant of power.

regulatory powers recognized in *Southwestern*.¹⁴⁶ As *Midwest Video* observed, "[t]he Communications Act confers no authority to the Commission to favor one mode of electronic communication over another."¹⁴⁷ CATV was established strictly as a carrier of broadcast signals and it continues primarily to serve that function. Under the contested rule, cable operators would have been encouraged to compete with broadcasters. In fact they were offered no choice other than "between the rock and the whirlpool—an option to forego a privilege which may be vital to [their] livelihood or submit to a requirement which may constitute an intolerable burden."¹⁴⁸ In addition to finding no authority in the Act for the origination rule, the court saw "no balance of public interest which [required] stretching the Act. . . ."¹⁴⁹ Since, as held in *Fortnightly*, CATV's connection with broadcast television is merely that of a transmission facility, there was no jurisdictional basis for compelling an operator to step over the line into the field of broadcasting.

C. Immediate Consequences of the Ruling

The *Midwest* decision, in addition to forcing the FCC's suspension of the cablecasting requirement,¹⁵⁰ put in question "the extent of the Commission's jurisdiction to regulate [other] aspects of cable that do not reach to its economic impact on broadcasting. . . ."¹⁵¹ Although regulations dealing with mandatory carriage and distant signal importation remain viable, the court's holding renders uncertain the validity of proposed or considered regulations regarding nonbroadcast functions, such as common carrier operations and the development of two-way communications services. The Commission has filed a petition for certiorari seeking judicial review of the Eighth Circuit decision.¹⁵² There is a possibility, however, that Congress may render the issue moot. Proposals for legislative action covering cable television have appeared since 1966. Recently, there has been renewed

¹⁴⁶ The extent of the arbitrariness is illustrated by the FCC's implied admission that it has "no accurate estimate of the increased cost that would be involved," and "that there is no consensus as to the appropriate cutoff point or ability to provide origination." 441 F.2d at 1325. See 20 F.C.C.2d at 209-13.

¹⁴⁷ 441 F.2d at 1327.

¹⁴⁸ *Id.*, citing *Frost & Frost Trucking Co. v. Railroad Comm'n of Cal.*, 271 U.S. 583, 593 (1925).

¹⁴⁹ *Id.* at 1326.

¹⁵⁰ Public Notice, F.C.C. 71-577, May 27, 1971, 36 Fed. Reg. 10876 (1971). Since the court did not pass on the power of the FCC to "prescribe reasonable rules for such CATV operators who voluntarily choose to originate programs" (441 F.2d at 1326), the other FCC rules governing cablecasting remain in effect. 47 C.F.R. §§ 74.1113 et seq. (1971).

¹⁵¹ Statement of Dean Burch, Chairman of the FCC, presented in a paper before the Communications Subcommittee of the Senate Commerce Committee, on June 15, 1971, reprinted and entitled "Cabletelevision: Growth and Future Evolution," at 13. Consequently, Burch asserted that "we [the FCC] are currently seeking Supreme Court review of the scope of our authority." *Id.*

¹⁵² Petition for cert. filed, 40 U.S.L.W. 3182 (U.S. Oct. 19, 1971) (No. 71-506).

interest and it appears to be only a matter of time before explicit legislation will be enacted granting specific power to the FCC, or perhaps some other agency,¹⁵³ to regulate CATV. For this reason, the impact of *Midwest Video* might be short-lived; nevertheless, the ruling may prove to be the catalyst necessary to hasten passage of comprehensive legislation.

Adoption of such legislation would most likely be applauded by both the Commission and CATV interests. The FCC has repeatedly emphasized that it "would welcome congressional guidance as to policy and legislation conferring direct general authority over CATV."¹⁵⁴ On the other hand, CATV owners would benefit from knowing the bounds within which administrative regulation must operate. Traditionally, an administrative agency empowered by the broad statutory mandate granted the FCC has been able to define its own jurisdictional limits.¹⁵⁵ If Supreme Court review should result in reversal of the *Midwest Video* holding, the Commission would be entitled to interpret the ancillary authority established in *Southwestern* as justifying broad unrestricted jurisdiction over the cable industry. Specific legislation would limit the exercise of the Commission's power by delineating specific regulatory powers.

V. FUTURE LEGISLATIVE PROSPECTS FOR CATV

A. *How Should CATV Be Regulated?*

Despite the growing concurrence of opinion that specific legislation is needed, no systematic governmental approach to CATV regulation has yet been adopted. This lack of consensus has not been the result of apathy; on the contrary, increasing concern over CATV is indicated by both congressional hearings on the Commission's proposed rules¹⁵⁶ and the recent introduction of CATV bills in national and state legislatures.¹⁵⁷ The delay in enacting a comprehensive na-

¹⁵³ The President has established the Office of Telecommunications Policy as an executive branch of the White House, in part, to explore CATV regulation. Exec. Order No. 11556, 3 C.F.R. 158 (1971), 47 U.S.C. § 305 (1970). See text at pp. 364-67 *infra*.

¹⁵⁴ 15 F.C.C.2d at 421; 20 F.C.C.2d at 202.

¹⁵⁵ See, *General Telephone Co. v. FCC*, 413 F.2d 390 (D.C. Cir.), cert. denied, 396 U.S. 888 (1969), which sustained the Commission's power to require a certificate of public convenience and necessity for the construction of distribution facilities to provide channel service to CATV systems. The court of appeals found that the Commission, in exercising its powers, has "acted within the scope of the Act and consistently with the broad purposes of the Act by treating its responsibilities as comprehensive and pervasive." 413 F.2d at 401.

¹⁵⁶ In the August 5, 1971, CATV policy letter, FCC Chairman Dean Burch stated that:

In accordance with our commitment in my testimony before the Senate Communications Subcommittee on June 15, 1971—reiterated before the House Communications and Power Subcommittee on July 22, 1971—we are submitting this summary of the Commission's proposals for the near-term regulation of cable television. 31 F.C.C.2d at 115.

¹⁵⁷ The most expansive bills under consideration are S. 792, 92d Cong., 1st Sess. (1971), and S. 2427, 92d Cong., 1st Sess. (1971), which are discussed in text at pp. 353-55

tional bill may well be the result of the vast difference between forecasts for cable and CATV's original, and still primary, purpose of distributing broadcast signals. Consequent governmental uncertainty has prevented conclusive action in Congress and has necessitated highly flexible administrative rulemaking. Indeed, the FCC's comprehensive review of cable policies resulted in an acknowledgement that

the fundamental fact [is] that cable is not static but rather is an emerging technology, with a host of possible services still to come. It follows that our regulatory pattern must evolve as cable evolves—and no one can say, at this stage, what the precise direction will be.¹⁵⁸

Motivated by what it felt were attempts to regulate CATV through copyright legislation,¹⁵⁹ the FCC drafted a bill, S. 792, which was introduced by the Chairman of the Senate Subcommittee on Communications, Senator John O. Pastore.¹⁶⁰ In contrast to the detailed provisions of the copyright bill, the Commission's CATV bill merely sets forth general guidelines, leaving specific rulemaking powers to the FCC itself.¹⁶¹ Under S. 792, Title III of the Communications Act would be amended¹⁶² to include CATV as a broadcast medium subject to FCC jurisdiction. Enactment would place CATV within the ambit of the Commission's public interest mandate, entitling the FCC to exercise broad jurisdictional powers over both current and prospective uses for cable in the broadcast and nonbroadcast fields.¹⁶³ Since the FCC would be in a position to determine what the public interest required, the bill arguably suffers from an unduly expansive delegation of discretionary authority. Consequently, the proposal's principal advantage of flexibility may be substantially offset by the opportunities for abuse inherent in an unrestricted grant of administrative power. For instance, despite the inequities it observed in the cablecasting requirement, the *Midwest* court might have felt com-

infra. Recently, the Massachusetts House of Representatives passed a CATV regulatory bill. House No. 6076 (July 29, 1971).

¹⁵⁸ 31 F.C.C.2d at 141.

¹⁵⁹ See note 105 supra.

¹⁶⁰ S. 792, 92d Cong., 1st Sess. (1971).

¹⁶¹ In a letter to Senator Pastore dated March 24, 1970, Dean Burch stressed the need for the amendment. "Under these guidelines, Congress would be directing the Commission to effect the orderly accommodation of both cable and broadcasting in order to secure maximum diversity of programming through the maintenance and expansion of free broadcasting and the provision via cable of multiple reception, origination and related services." 117 Cong. Rec. 1378 (daily ed. Feb. 17, 1971) (introduced by Senator Pastore).

¹⁶² In another letter to Senator Pastore dated March 11, 1970, Burch remarked: "In short, the clear advantage of proceeding in this fashion (i.e., agency action under present or revised Congressional guidelines, with appropriate Congressional oversight of specific Commission actions) would be the retention of flexibility to adjust policies to changing circumstances." 117 Cong. Rec. 1378 (daily ed. Feb. 17, 1971).

¹⁶³ S. 792 proposed § 331.

pelled to rule in favor of the FCC, had there been such an expansive delegation of statutory power.

Other suggested proposals for regulating CATV also claim to promote the public interest, but, unlike the FCC sponsored bill, they are committed to a more structured approach. One of these alternatives would be outright state or municipal ownership of local CATV operations. Such a proposal was included in a CATV bill which cleared the Massachusetts House of Representatives and received initial approval in that state's Senate.¹⁶⁴ Section 20 of that bill would allow any city or town to purchase and maintain a CATV system subject to state regulation similar to that governing a privately owned operation.

The advantage of public control is that it facilitates fulfillment of the public interest objective of community service. In fact, ownership could exist at the neighborhood level¹⁶⁵ with financing arising from taxes, user fees, advertising, or even sales of public shares. Public control could effectively accommodate community needs for culture, education and civic participation while avoiding the pitfalls of private ownership with its emphasis on maximum profit taking through minimal capital investment and mass appeal programming.¹⁶⁶ Moreover, public ownership would eliminate any commercial incentive to restrict the availability of access channels to the public.¹⁶⁷ Notwithstanding its advantages, however, public ownership will probably never receive widespread acceptance. Even if municipalities were interested in ownership, government operation of existing systems would not only burden taxpayers with the expense of system maintenance but would also

¹⁶⁴ House No. 6076 (July 29, 1971). Similar proposals have also been advanced for ownership by nonprofit community organizations or even the Public Broadcasting System. To accommodate the latter, the FCC would have to amend 47 C.F.R. § 74.1131 (1971), which prohibits cross-ownership of local stations. Although not in favor of exempting noncommercial educational television stations from cross-ownership strictures, the Commission is considering the idea. 23 F.C.C.2d at 834 n.1.

¹⁶⁵ Although neighborhood systems will provide more localized service, offsetting difficulties arise whether ownership is public or private. As a Brookings study suggests, audiences will be fragmented for users wanting city-wide coverage, and subscribers of one system may be prevented from watching presentations of another. Also, smaller systems will create additional expenses because the cost of the head-end equipment, designed to amplify signals, will be the same. See, J. McGowan, R. Noll, M. Peck, *Prospects and Policies for CATV* 46-47, March, 1971 (unpublished report prepared for the Brookings Studies in the Regulation of Economic Activity, The Brookings Institution, Washington, D.C.) [hereinafter cited as Brookings].

¹⁶⁶ Fred W. Friendly, past president of CBS News, condemns CATV entrepreneurs for disregarding the interests of the community. He notes that of the 2,300 operating systems, only 26 have installed more than 12 channels, although twenty-channel lines are readily available. Friendly, *Saturday Review*, Oct. 10, 1970, at 58-60.

¹⁶⁷ The FCC recognizes that "A cable owner has an obvious economic incentive to devote his bandwidth to profitable channel leasing activities, and might thus be motivated to restrict use of the access channel. . . ." 31 F.C.C.2d at 129. Moreover, although some systems have no present intention to cablecast, at higher levels of penetration, program origination may bring in substantial advertising revenue. Consequently, it is evident that the commercial cable operator's interests may frustrate effective program competition.

have a deleterious impact on private businessmen who have invested large sums of capital into ongoing commercial CATV enterprises. The dynamic growth of the cable industry is largely attributable to these private investors. Unlike public control, which may tend to retard CATV development, continued private ownership under an effective regulatory pattern designed to promote competition for local franchises may well encourage accelerated construction and diversification of services. Further, one of the more pressing problems involves the potential abuses created by government domination of the means of access to the homes of private citizens. Inherent in public control is the possibility of government bias in the presentation of news and information and the denial of access to users whose views may be obnoxious to the incumbent government.¹⁶⁸ Just as governmental supervision over private industry is a necessary buffer between commercial enterprises and the recipients of their services, private ownership of the communications media is equally important to protect the public from total government control over CATV services, rates, and program content.

Another proposal which has received serious attention would subject CATV systems to public utility regulation.¹⁶⁹ A case for recognizing CATV as a "business affected with a public interest" is supported by many of the classic tests for imposing public utility status. Within its service area, the CATV transmission operation is an unavoidable monopoly.¹⁷⁰ Competition would result in wasteful duplication of facilities and services by placing excessive demands on valuable land space and requiring greater average unit costs.¹⁷¹ Monopoly

¹⁶⁸ Since a considerable amount of the programming and services carried by CATV is unrelated to the interests of the municipality, there is danger of government intervention in this respect as well. The Sloan Commission makes a similar argument against ownership by nonprofit or community groups. "We do not vest Madison Square Garden in a non-profit organization because there is an interest in its use for an occasional benefit performance." See L. Kestenbaum, *Common Carrier Access to Cable Communications: Regulatory and Economic Issues* 39, March 19, 1971 (unpublished report prepared for the Sloan Commission on Cable Communications, Alfred P. Sloan Foundation, New York City) [hereinafter cited as Kestenbaum].

¹⁶⁹ S. 2427, 92d Cong., 1st Sess. (1971).

¹⁷⁰ Such monopoly status extends only to the business of *transmitting* messages, not to program and service origination nor to equipment manufacture and distribution. See Comments of the Justice Department, Docket No. 18397-A, Dec. 7, 1970, at 18. Even with nonexclusive franchising, market forces would create monopoly ownership. In a speech before the National Cable TV Association in Chicago, on April 22, 1971, Commissioner Thomas J. Hauser noted that while multiple cable systems in a geographic area are theoretically feasible at a market penetration level of approximately 30%, the "economics of the situation would seem to clearly point to merger rather than competition. This situation may exist regardless of the existence of a non-exclusive franchising agreement or statute." FCC News Letter, No. 67441, April 22, 1971.

¹⁷¹ Richard A. Posner, a utility expert, has stated that:

In some respects, a cable system's grid or network of cable is similar to that of the local water, electrical, gas, or telephone company. As with the supply of these other services, running more than one company's cable to any home would involve unnecessary duplication, for a single cable system can carry all

control, on the other hand, would result in decreasing average unit costs as output increased. In addition, paradoxically, a single monopolistic transmission facility would increase a subscriber's choice of programs and services by eliminating the necessity of selecting one of several competing systems. The operator's economic incentives, together with minimal regulatory supervision, would assure a maximum range of offerings.

Given its extensive channel capacity and its public access and two-way switching capabilities, CATV will play an essential role in the indispensable service of distributing communications signals. Authorities have interpreted the First Amendment principles enunciated in *Red Lion*¹⁷² to extend to a CATV operation enjoying a transmission monopoly.¹⁷³ Accordingly, the operator must guarantee access to independent programmers on an equitable basis. In an absence of competition, it is similarly essential that governmental regulation insure the availability of such unique and socially important facilities to all potential users and subscribers within the service area.

In its most restrictive application, the public utility approach to CATV regulation would classify cable systems as common carriers.¹⁷⁴

the signals that a subscriber is likely to want and at substantially lower cost than two or more smaller cables.

R. Posner, *Cable Television: The Problem of Local Monopoly 1* (Rand Corp. Memorandum, May, 1970) [hereinafter cited as Posner].

¹⁷² "It is the purpose of the First Amendment to preserve an uninhibited market place of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market whether it be by the Government itself or a private licensee." 395 U.S. at 390.

¹⁷³ Analyzing *Red Lion* in light of the trends developing in the emerging CATV industry, the Justice Department has concluded that:

The same [First Amendment] principle is applicable to the CATV operator enjoying a transmission monopoly. He may not arbitrarily refuse to deal with an independent programmer, particularly where the CATV operator is in the business of programming himself. Reasonable and non-discriminatory access to the system must be provided to all in the trade.

Comments of the U.S. Dep't of Justice, appearing in Barnett, *Cable Television and Media Concentration*, pt I: Control of Cable Systems, 22 Stan. L. Rev. 221, 239 n.114 (1970).

The Justice Department's prohibition of the monopolization of a transmission facility may also be justified by resort to the antitrust laws. In a case dealing with a public utility's transmission of electricity, a United States District Court in Minnesota imposed a similar access requirement on a local electric utility company. *United States v. Otter Tail Power Co.*, 331 F. Supp. 54 (D. Minn. 1971). At issue was whether the public utility, in refusing both to sell electric power at wholesale and to transmit power for municipalities it formerly served at retail, had violated the Sherman Act. The court concluded that the company's unilateral refusal to deal with competitors was an illegal restraint of trade designed to preserve a monopoly over local transmission lines. In light of the FCC's public interest objective of securing diverse viewpoints and ideas, the CATV operator, enjoying an intrinsic transmission monopoly within his service area, might be equally governed by a fair access requirement. This obligation should be no less enforceable, regardless of whether the system is given public utility status.

¹⁷⁴ See L. Johnson, *The Future of Cable Television: Some Problems of Federal Regulation* 55-61 (Rand Corp. Memorandum, Jan., 1970). For a more detailed discussion see Kestenbaum, *supra* note 168. A number of CATV commentators have de-

Imposition of such status would sever the origination function from the transmission service, thereby stripping CATV operators of control over program content and services in order to achieve maximum competition.¹⁷⁵ Proponents of common carrier classification fear that the cable owner as an originator will attempt to thwart competition from independent programmers much as broadcasters have fought potential fragmentation of their audiences and revenues from expanding CATV operations. To enhance the value of his programming, an operator may charge excessive rates or, in some cases, deny access altogether. If, on the other hand, CATV were limited to leasing channels at standard rates, economic incentives would motivate CATV to provide television access, without operator interference, to individual users and groups unable to afford time on the broadcast medium.¹⁷⁶ At the same time, subscribers would benefit from increased diversity in innovative programming and specialized nonbroadcast services. In fact, according to at least one observer, "the only basis upon which the cable system can develop into the two-way switched public utility system for which it has such great potential is through its operation as a common carrier. . . ."¹⁷⁷

As an answer to the demands of some CATV critics, legislation was filed to amend the Communications Act to "specifically grant the FCC jurisdiction over CATV . . . [under a] clear national long-range policy . . . [which would establish] cable television as a public utility—a recognized monopoly"¹⁷⁸ The bill entitles the Commission

clared themselves at least partially in favor of common carrier classification. This list includes the President's Task Force on Communications Policy, the Justice Department, Americans for Democratic Action, the American Civil Liberties Union and the IED/EIA. See Barnett, *supra* note 173, at 242. The F.C.C. has noted that "[m]any of those who testified at our hearings urged that cable's tendency will and indeed should be more and more toward a common carrier concept. And, that, of course, would have profound regulatory consequences for which the Commission and the Congress must be prepared." 31 F.C.C.2d at 141.

¹⁷⁵ A paper prepared for the Sloan Commission analyzed an open access CATV system. According to the proposed model:

The cable operator will function in this system as a common carrier, required to provide facilities at reasonable rates to all who want to be subscribers and originators, in quantity reasonably adequate to meet demand. The operator will be legally prohibited from originating communications over the system and from controlling any use, except to apply uniform requirements necessary to the operation of the system. . . .

J. Pemberton, *Foreseeable Problems in a System of Maximum Access* 4-5, May, 1971 (unpublished report prepared for the Sloan Commission on Cable Communications, Alfred P. Sloan Foundation, New York City) [hereinafter cited as Pemberton].

¹⁷⁶ Although not in favor of full common carrier status, Kestenbaum agrees that "[t]he operation of cable systems on a common carrier basis lessens the emphasis on the character of the system operator, since benefits are not expected as a result of his good faith and public spiritness, but rather as a result of the varied initiatives brought by users of the system." Kestenbaum, *supra* note 168, at 38-39.

¹⁷⁷ Smith, *The Wired Nation*, May 18, 1970, at 604 (quoting the American Civil Liberties Union).

¹⁷⁸ 117 Cong. Rec. 13065 (daily ed. August 4, 1971) (remarks of Senator Williams on introduction of S. 2427).

to ensure the availability of cable's presently recognized as well as future uses. In addition, the bill would enable the FCC to impose upon CATV operators the obligations of strict public utility regulation:

The bill provides for the establishment, by the FCC, of standards of equipment, performance and quality of service, the establishment of uniform and technical standards for possible interconnection of cable systems, equality of service to all communities be they rich or poor and the establishment of rules insuring fair tariffs to the consumer and a fair rate of return to the cable system owner.¹⁷⁹

Contrary to the suggestions of proponents of common carrier status, the bill, while classifying CATV as a public utility, would nevertheless include it as a broadcast medium under Title III of the Communications Act. Common carrier access may be required, but operators would not be restricted from offering their own originations. Perhaps the bill took into account the fact that immediate elimination of CATV system presentations might create a void in suitable programming of local interest.¹⁸⁰

Individual programmers and community interest groups are probably not yet prepared to fill a substantial amount of channel time and space—even on a no cost basis. Although programming plans have been introduced by such nationwide packagers as Gridtronics, Inc., the offerings that they plan to distribute will not differ significantly from the material presented on broadcast television.¹⁸¹ In effect, imposition of common carrier status may sacrifice the very objectives its advocates hope to achieve. At least for the present, the public interest would best be served by permitting CATV operators to contribute local programs and services.¹⁸²

Another reason for not applying common carrier status to CATV is that such a classification would impose an inordinate financial and technical burden on local systems. As a common carrier, CATV would be required to provide uniform as well as universal service within its franchise area.¹⁸³ Without heavy governmental subsidization, cable

¹⁷⁹ *Id.* at 13066.

¹⁸⁰ This problem would be especially acute where there is inadequate over-the-air television service. See remarks of Senator Williams, *supra* note 6. In these areas, to attract additional subscribers, it may be consistent with the CATV operator's profit motive to provide local news and public service presentations.

¹⁸¹ Gridtronics plans to program over four channels: one each for information, instructional purposes, feature movies, and professional use. No provisions have been made to promote CATV's potential to serve specific community needs. *The Wired Nation*, *supra* note 177, at 588.

¹⁸² As for the present, the FCC has recognized that operator origination will ensure that facilities are available for use by others. 20 F.C.C.2d at 209. In addition, access to government and nonprofit users will probably not create serious competitive impact; and, since "the system operator is already competing for audience with local and distant over the air signals . . . the additional impact of [commercial] users is not likely to be substantial." Kestenbaum, *supra* note 168, at 31.

¹⁸³ The cable operator would be required to offer and maintain, without charge,

companies would not be able to bear the cost. This is especially true in areas where there is adequate broadcast coverage or where the expense would be prohibitive either because the cable must be laid underground or because extensive wiring is necessitated by sparse population density.¹⁸⁴

Even without direct imposition of common carrier status, the bill does permit elaborate regulation which is a traditional component of both public utility and common carrier status. The desirability of such regulation has been seriously questioned both for its efficiency and its effect on free market incentives.¹⁸⁵ Furthermore, it is doubtful that such regulation is presently warranted for cable systems.¹⁸⁶ While it may be true, as the Justice Department asserts, "that something stronger than encouragement is often needed to persuade a monopolist to grant access to a potential competitor—in this case a potential programmer,"¹⁸⁷ adequate access can be effectuated by limited regulatory intervention. In light of cable's multi-channel capacity and the resultant existence of excess space, minimal regulation is required.¹⁸⁸

100% subscriber connection throughout his franchise area to channels on the operator's broadband system that are devoted to educational usage, municipal services, political and nonprofit organizations, and perhaps even other services, such as first class mail. Such "free" service would stop short at entertainment and sports broadcasting, and commercial and banking services.

Model proposed in Pemberton, *supra* note 175, at 7.

¹⁸⁴ See Brookings, *supra* note 165, at 54. This study also denies the feasibility of a cross-subsidization plan, such as that used by the rural electrification system, because "potential revenues in the system are simply not as large as revenues for other utilities, yet the costs are considerably higher." *Id.* at 55.

¹⁸⁵ Posner, *Natural Monopoly and Its Regulation*, 21 *Stan. L. Rev.* 548 (1969).

¹⁸⁶ Currently five states—Connecticut, Nevada, Rhode Island, Vermont, and Hawaii—have conferred public utility status on CATV systems. 117 *Cong. Rec.* 13065 (daily ed. Aug. 4, 1971). The court in *TV Pix, Inc. v. Taylor*, 304 F. Supp. 459 (D. Nev. 1968), *aff'd*, 396 U.S. 556 (1969), held that, absent federal preemption, the states can regulate local aspects of CATV as a public utility. In these states, however, there has been little effort to construct cable systems. Aside from additional considerations pertaining to the individual states, the traditional limits on rate of return on investment and utility type rather than growth-type debt/equity ratios have discouraged low risk public utility investors because CATV is "unseasoned and has no proven earnings track record." J. Adler and J. Karl, *The Financial Impact of Proposed Federal and State Regulations on a Typical CATV System* 20, March 16, 1971 (unpublished report prepared for the Sloan Commission on Cable Communications, Alfred P. Sloan Foundation, New York City). See also Posner, *supra* note 171, at 27. In addition, public utility regulation on a national basis will not likely result. Regulating the thousands of cable systems operating throughout the nation would present a formidable undertaking to a single administrative agency. See 31 *F.C.C.2d* at 136.

¹⁸⁷ Comments of Justice Dep't, FCC Docket No. 18397, Sept. 5, 1969, at 10 in Barnett, *supra* note 173, at 245 n.150. The Department does not, however, favor public utility regulation. It asserts that "for CATV to reach its full potential [as a broadband communications medium], it is necessary that it be permitted to compete effectively, on its merits, with the broadcast and other mass media." Comments of Justice Dep't, FCC Docket No. 18397-A, December 7, 1970, at 15.

¹⁸⁸ A flexible regulatory procedure is now in force in New York City. The access obligation is ensured by requiring the system operator to lease time and studio facilities on a first-come, first-served basis. Rates will be revised if found unreasonably restrictive,

Full common carrier benefits can be achieved merely by the allocation of specified numbers of channels to serve designated functions¹⁸⁹ and by the requirement that the operator carry all acceptable programming on a fair and nondiscriminatory basis.¹⁹⁰ Satisfactory compliance with these obligations would ensure access to independent programmers at reasonable rates on a first-come, first-served basis while simultaneously permitting the operator to engage in origination on unused channels.

Market incentives indicate the inadvisability of detailed regulation of rate levels or return on investment. Since the operator's primary source of revenue accrues from the system as a whole, his principal means of inducing subscriber support is to emphasize the system's utility to the community as a multi-channel transmission facility. Significant market penetration would be achieved not so much by emphasizing the value of programming carried on any particular channel, as by offering would-be viewers a larger selection of attractive programs and essential services at minimal expense.¹⁹¹ Conse-

and amounts of time leased may be regulated to prevent long-term monopolization of leased channels. Kestenbaum, *supra* note 168, at 18.

¹⁸⁹ The FCC may have been heading in the right direction when it considered requiring the "development of sufficient channel availability on all new CATV systems to serve specific recognized functions." In addition to one allocated for local origination, channels would be allocated for government use, free public access, commercial leasing and instructional purposes. To insure the availability of such channels, the FCC proposed to establish a specified minimum channel capacity requirement and to condition importation of distant signals upon fulfillment of the requirements. 24 F.C.C.2d at 586-87. The Justice Department has specifically opposed any definite channel allocation requirement. It favors, instead, a broad general access obligation ensuring "development of channel utilization on a demand basis." The Department fears both that inflexible channel restrictions will prove "unnecessarily burdensome" by denying an opportunity for experimentation and learning, and that free channel access to some users will result in increased rates for others. Comments of the Justice Dep't, Docket No. 18397-A, Dec. 7, 1970, at 21-22. These concerns may be unnecessary. First, allocations could be enforced only to the extent necessary to ensure sufficient availability of CATV's channels for all prospective users. Channel designations need not be inflexible, but could be modified on an ad hoc basis according to the demands of each serviced community. Secondly, free or "at cost" use of only several of a CATV's channels would hardly put a dent in the operation's financial structure. Moreover, the offering of such services would attract potential subscribers during CATV's transitional growth stage.

¹⁹⁰ The FCC has adopted a nondiscriminatory access requirement in its proposed rules. 31 F.C.C.2d at 132. Such an obligation raises the question of potential civil and criminal liability. Citing the recent Supreme Court cases, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) and *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), the FCC has stated that "[t]here is little if any possibility of a criminal suit in a situation where the system has no right of control and has no specific intent to violate the law." As for libel suits, the FCC has indicated that "[t]he possible number and scope of such actions is . . . severely limited." 31 F.C.C.2d at 132-33.

¹⁹¹ The desirability of rate setting may be a factor where competition is inadequate to protect subscribers and users alike against monopoly abuses such as excessive charges and discrimination. Presently there is sufficient competition in both CATV's broadcast and nonbroadcast functions to warrant a more liberal regulatory policy. Cable rates are kept in check by the availability of free over-the-air broadcasting, especially from local UHF independents. Even in areas without adequate over-the-air television, "competitive limitations arise from the small size of the market, the yardstick of other markets, the

quently, the operator may be motivated to make the system's channels available at no cost to government and nonprofit users and at competitive rates to potential commercial programmers. If, in the future, cable penetration reaches such significant proportions that the operator's primary incentive will no longer be to attract additional subscribers but to maximize the revenues of his origination channels, then common carrier status might be entertained as a possible solution.¹⁰²

Since cable is developing into what may prove to be the most efficient means of delivering signals, CATV must assume some aspects of public utility responsibility. Nevertheless, to realize the prospect of a versatile communications network, regulation must maximize the incentive to construct and maintain CATV systems. Although the future of cable may be solely that of a carrier, for the present CATV can function as a carrier without being a common carrier subject to public utility regulation. Regarded as a quasi-common carrier, CATV would neither be subject to standardized pricing policies or detailed rate regulation nor be restrained from originating. The functions of the system would include delivery of broadcast television signals, carriage of user programs and services, and presentation of operator originated programming. While monopoly ownership may occur in the transmission phase of the operation, competition would be promoted in the business of originating programs and services.

B. *By Whom Should CATV Be Regulated?*

To ensure adequate regulatory standards, quasi-common carrier status should be established preemptively by the federal government. Lacking the necessary financial resources and expertise, states and municipalities have not been successful in asserting effective regulatory controls.¹⁰³ As the FCC has recognized, "absent affirmative Commis-

availability of other media to advertisers, etc." Kestenbaum, *supra* note 168, at 22. Rates for many potential nonbroadcast uses are likewise limited by competition from telephone and telegraph systems.

¹⁰² This alternative may be especially necessitated if broadcast television decides to operate over the cable. Nevertheless, CATV systems might be allowed to spin off separate affiliates which would continue to engage in programming. In fact, Commissioner Hauser does not rule out the long-range possibility of "some kind of CATV programming network—a resource for the creation, production, and distribution of programming of both limited and mass appeal." The network would operate by leasing time on individual affiliated cable systems. FCC Newsletter, No. 67441 (April 22, 1971). The advantage of ensuring such a long-range option would be immediately recognizable during the transitional phase of the industry's development. CATV operators, assured that they will not lose their origination rights upon attaining a certain level of subscriber penetration, would have an added incentive to provide quality programming.

¹⁰³ According to the President's Task Force, "local authorities have thus far been cautious in asserting appropriate regulatory controls." President's Task Force on Communications Policy, Final Report, ch. 7, at 51 (1968). Senator Williams, in his remarks on S. 2427, was more emphatic. "This city-by-city franchise approach to cable television development has been spectacularly unsuccessful. . . . And, there have been major scandals involving the awarding of franchises in New York, Pennsylvania, and Florida." 117 Cong. Rec. 13065 (daily ed. Aug. 4, 1971) (remarks of Senator Williams on introduction of S. 2427).

sion action, state and local bodies would be free in other areas of regulation to style cable growth in a manner at odds with the Commission's nationwide regulatory plan."¹⁹⁴ The problem remains as to how the responsibility of regulation should be structured. In practice, the regulation of thousands of cable systems throughout the country by a single administrative agency would be an unmanageable burden.¹⁹⁵ On the other hand, local governments, having special awareness of the problems and needs of their service areas, would be in an optimum position to perform specific regulating functions. For these reasons, complete federal regulation should be restricted to such concerns as carriage of broadcast signals, cross ownership of cable and other media, and equal employment opportunities. With respect to other aspects of CATV, federal regulation should be limited to establishing minimal standards designed to facilitate nationwide interconnection and to ensure fair and adequate service to all communities.¹⁹⁶

Since total preemption, accompanied by federal licensing, would not be feasible, the question remains as to whom the FCC should delegate the implementation and supervision of its broad regulatory standards. The Commission has not yet determined whether jurisdiction should be extended to both state and municipal authorities.¹⁹⁷ Proceeding in this area, the FCC should consider establishing a two-tiered division of authority—federal and municipal—which would bypass the state level. Elimination of state regulation would be helpful in removing utility-type standardization and taxation. Both the desirability of encouraging community involvement in the regulation of a primarily local service and CATV's need for free market regulation suggest the advantage of this approach. State regulation implies at least partial utility-type control over rate of return, quality of service and technical standards. Imposition of state authority over local aspects of CATV may thereby hinder the national goals of uniformity of service and system interconnection. Moreover, any industry can afford only so much regulation in terms of license and franchise fees. The Commission recognizes that "some provision to ensure reasonableness in this respect is necessary for a variety of reasons."¹⁹⁸ Its principal concern is that:

The ultimate effect of any revenue-raising fee is to levy an indirect and regressive tax on cable subscribers, and our

¹⁹⁴ 31 F.C.C.2d at 136.

¹⁹⁵ *Id.*

¹⁹⁶ The FCC plans to adopt proposals in which its "provisions will be designed to impose a general standard of franchise responsibility while leaving specific substantive decisions to local authorities." *Id.* at 138. To safeguard the interest of the local communities, the areas of complete federal jurisdiction and those in which the FCC should establish only general guidelines should be set out in legislation. Naturally, provision should be made for exercising some flexibility, but the varying needs and wishes of these localities must be sufficiently protected against federal encroachment and unnecessary standardization.

¹⁹⁷ 31 F.C.C.2d at 138-39.

¹⁹⁸ *Id.* at 138.

further concern is that the combination of high local franchise fees and cable's other financial responsibilities may so burden the industry that it will be unable to carry out its part of an integrated national communications program.¹⁰⁹

Although the Commission's remarks are directed at instances of local exaction of "high franchise fees for revenue-raising rather than regulatory purposes," the effect of compounding federal, state, and municipal taxation (in addition to CATV's other expenses) would be even more damaging to the public interest. Adoption of a two-tiered system, without state involvement, would be most advantageous to subscribers, users and the CATV system itself.

In addition to being disadvantageous, state regulation may be entirely unnecessary. The FCC can attain its national objectives merely by establishing minimum requirements in the municipal franchising process. Issuing authorities would be obligated to acknowledge federal standards regarding quality of service, reasonability of subscriber and user rates, franchise fees, technical capacity and construction deadlines. Within the broad federal guidelines, municipalities would service complaints and set more detailed requirements concerning division of community coverage and specification of rates and channel uses.²⁰⁰ This system of regulation provides the advantage of maximum flexibility in tailoring CATV service to meet community needs while assuring sufficient national uniformity. The community could choose among the plans submitted by prospective CATV operators by bargaining for the system package offering the best schedule of rates, services and technical standards.

Most crucial in this system of dual regulation is federal supervision of the local franchising procedure. Since the CATV operator will be entrusted with limited monopoly rights over an essential community service, the Commission must ensure that the municipal authority has made provisions for fair public notice and hearing procedures prior to reaching a contract agreement. These provisions entail a public invitation for submission of bids and provision of an opportunity for interested persons to contest the awarding of the franchise to objectionable applicants.²⁰¹ Equally important, the issuing

¹⁰⁹ *Id.* The Commission notes "the likelihood that cable systems may, in the near future, be subjected to Congressionally-imposed copyright fees." Moreover, requirements for free public access and governmental and educational channels will also be financially burdensome.

²⁰⁰ As the Commission has asserted in the past, "reporting requirements . . . the Commission's complaint procedures, and the statutory cease and desist procedure would, however, provide a check against flagrant abuse of [the local government's delegated powers]." 15 F.C.C.2d at 425 n.11.

²⁰¹ The Commission plans to "require that the cable system, before commencing operation with broadcast signals, file a copy of its franchise with [the FCC] and a certificate showing that the franchising authority in a public proceeding has considered the system operator's legal and financial qualifications, and the adequacy and feasibility of his construction arrangements." 31 F.C.C.2d at 136. Nevertheless, the FCC makes

authority must be required at the contracting stage to take initial steps to preserve its bargaining power over the successful bidder. Accordingly, a reasonable limitation must be placed on the duration of the franchise to protect against a "franchise in perpetuity"; nevertheless, the duration should be sufficient to encourage long range planning.²⁰² The Commission suggests adoption of a fifteen year period with a reasonable renewal period.²⁰³ Such tenure may prove too long to prevent both inertia and, in effect, perpetual ownership. It is submitted that a ten year contract with successive five year renewal options, subject to mandatory public hearing requirements, would prove more advisable. This procedure would maximize protection of the public interest by generating "yardstick competition" among CATV systems servicing different franchises.²⁰⁴ Facing an effective threat of possible franchise loss, the CATV operator would be motivated by economic incentives to provide his franchise area with quality service at reasonable rates.

VI. THE LATEST DEVELOPMENTS

Fearing possible fragmentation of local audiences and a subsequent reduction in advertising revenue, broadcasters have argued that the FCC's August 5, 1971, proposals have given expansion-minded CATV interests an unwarranted competitive edge.²⁰⁵ In response to these complaints, the newly created Office of Telecommunications Policy (OTP)²⁰⁶ worked out a compromise plan which it offered on November 2, 1971.²⁰⁷ Although in general more palatable to broadcasters, the compromise does retain a substantial portion of the FCC's ideas and, in fact, in certain respects is even more favorable

no provisions for a right to challenge the local certification process at the federal level and only encourages provisions for public invitation of bids and public notice and hearing procedures. *Id.* These rights are essential if citizens are to be allowed an opportunity to protect their interests and if the enfranchising process is to be more than a mere formality.

²⁰² As the Commission recognizes "[t]his obviously requires striking a balance between a sufficient time scale to attract venture capital and, in effect, a franchise in perpetuity. The latter is unsatisfactory to state and local regulatory authorities and would be an invitation to obsolescence, because of cable's explosive technological development." *Id.* at 137-38.

²⁰³ *Id.*

²⁰⁴ Antitrust and multiple ownership rules must be adopted to preserve the community's opportunity to compare and choose among competing systems. The FCC was considering cross- and multiple-ownership restrictions in its 1970 proceedings. Docket No. 18397, 23 F.C.C.2d 816 (1970), later reassigned to Docket No. 18891, 23 F.C.C.2d 833 (1970). Efforts to promote diversity of ownership should balance enforcement of a total prohibition of single owner control, which would discourage competition, and imposition of ineffectual rules, which would create a "Mother Bell" among cable systems.

²⁰⁵ Wall Street Journal, Nov. 11, 1971, at 28, col. 3.

²⁰⁶ President Nixon established the Office of Telecommunications Policy by Exec. Order No. 11,556, 3 C.F.R. 158 (1971), 47 U.S.C. § 305 (1970).

²⁰⁷ On Nov. 2, the director of the Office of Telecommunications Policy, Clay T. Whitehead, handed National Cable Television Association board chairman John Gwin the OTP compromise plan Broadcasting, Nov. 8, 1971, at 16.

to CATV operations.²⁰⁸ Under the plan CATV would still be required to provide a minimum service of three independent and three network stations in the top fifty markets; two independent and three network stations in the next fifty markets; and one independent and three network stations below the top one hundred markets.²⁰⁹ If minimum quotas could not be fulfilled by carriage of local stations, CATV operators would be entitled to import distant signals. In addition, the compromise would enhance the originally proposed right to import two additional distant signals above the minimum service standards by elimination of the FCC requirement that at least one of the first two imported signals be that of a UHF station.

Despite its extension of many of the FCC's proposed rules, the OTP plan is overall more restrictive than the CATV policy put forward by the FCC. For this reason, although not without some objection,²¹⁰ broadcasters have found the new plan more acceptable. While not reducing the number of distant signals, the compromise would place strict limitations on their availability.²¹¹ Anti-leapfrogging regulations would restrict the point of origin of the first two imported signals, if taken from the top twenty-five markets, to one of the two closest such markets. For a third signal, priority would have to be given to UHF stations, as set forth in the FCC proposal. In addition, the compromise would facilitate the imposition of copyright regulation by subjecting larger cable operations to compulsory licensing and the payment of royalty fees. Most important, however, although protection for network programs would be reduced from same-day to simultaneous exclusivity, local broadcasters in the nation's top fifty markets would be able to prevent importation of movies and syndicated material for the duration of an exclusive contract. The same provisions would protect exclusivity rights in the 51-100 largest markets for a maximum length of two years. As some compensation, CATV would be able to substitute signals from any distant station when exclusivity requirements force it to delete programming from a distant top twenty-five station whose signal it normally carries.

Since CATV would be denied transmission of the most attractive distant station programs, the proposed regulations would significantly retard cable's entry into the largest television markets. Consequently, cable owners were initially reluctant to accept the OTP's redraft of the earlier proposal.²¹² Nevertheless, despite dissatisfaction with the

²⁰⁸ See discussion of the FCC's August 5, 1971, proposals in regard to signal carriage at note 32 and accompanying text *supra*.

²⁰⁹ For a text of the proposed compromise see *Broadcasting*, Nov. 8, 1971, at 16-17.

²¹⁰ The Association of Maximum Service Telecasters has termed the permission granted for cable's carriage of distant signals a subsidy. *N.Y. Times*, Nov. 12, 1971, at 83, col. 4.

²¹¹ Broadcasters fear that unlimited use of distant signal carriage will lead to a cable "superstation"—a conglomeration of cable systems throughout the country into a fourth national network. *N.Y. Times*, Nov. 11, 1971, at 19, col. 1.

²¹² The NCTA's first reaction was to resist efforts to impose the compromise. It saw a possibility for success on the grounds that while FCC Chairman Dean Burch "is not

compromise, the National Cable Television Association (NCTA) quickly agreed to accept the plan.²¹³ The compromise is widely supported by Congress and even the FCC,²¹⁴ which no doubt would rather adopt a revision of its own proposals than be without any effective regulatory procedure. Moreover, should the NCTA have refused to reach a settlement, the controversy would have shifted to Congress where indeterminable delays would necessarily result. Unquestionably, CATV would suffer the most from any such delays.²¹⁵ Acceptance of the compromise proposal, on the other hand, facilitates adoption of new rules within the Commission's original March 1, 1972, timetable.²¹⁶

Although the compromise will no doubt be adopted and promulgated by the FCC in forthcoming rules, the need for effective policy guidance from Congress should not be overlooked. Unfortunately, since CATV regulation has become such a controversial political issue, Congress has not yet shown a willingness to confront the necessity of legislative action.²¹⁷ Such congressional hesitancy may ultimately frustrate the public interest objective of the Communications Act, for two reasons. In light of the *Midwest Video* holding, the FCC may be without power to enforce a considerable portion of the proposed package of administrative rules, thus creating a potential for chaos in the communications field. The fact that the NCTA has agreed to the compromise is no guarantee that individual cable companies will submit to FCC authority. If Congress does, in fact, want to assure the implementation of a diversified communications system, it should provide the FCC with the necessary statutory guidance and power. Second, and most important, the accepted compromise is primarily concerned with the economic well-being of the broadcast and CATV industries. As is evidenced by the denial of full CATV services to the citizens of the largest cities, too little concern has been shown for the needs of the public. It would seem that CATV has become a tool of corporate profit-making rather than a servant of the community. Governmental decision-making with respect to CATV should be concerned foremost with effectuating such national policy as will most benefit the people CATV

opposed to agreement, . . . he never said that, in the absence of agreement, he would not go ahead with the commission's plans." *Broadcasting*, Nov. 8, 1971 at 18, (statement of John Gwin).

²¹³ Both the NCTA and the National Association of Broadcasters (NAB) gave their approval to the compromise on Nov. 10, 1971. *Wall Street Journal*, Nov. 11, 1971, at 28, col. 3.

²¹⁴ *Id.*; *Broadcasting*, Nov. 8, 1971, at 17.

²¹⁵ A continuation of the Commission's current regulatory posture with its ban on distant signal carriage will primarily benefit over-the-air broadcasters.

²¹⁶ According to *Broadcasting* magazine, Gwin admitted that acceptance of a compromise would establish a secure starting place for future cable growth. *Broadcasting*, Nov. 8, 1971, at 18.

²¹⁷ White House sources have indicated that the OTP may be preparing legislative proposals. *Id.* at 17. It is hoped that the introduction of executive policy recommendations will spur Congress to affirmative action.

is designed to serve.²¹⁸ It is submitted that by allowing adoption of compromise regulations designed to protect the monetary interests of competing industries, the federal government has neglected its obligation to promote the public interest.

CONCLUSION

From its modest beginnings as a simple antenna on the hill, CATV has developed in recent years into an important vehicle for preserving the socio-economic structure of the community. In contrast to the present over-the-air broadcasting structure, a wired system will make both public service and entertainment programming responsive to the demands of the people it serves. Cable programming, by its nature, is not diffused arbitrarily to mass audiences who happen to be situated within range of a station's antenna, but rather is directed solely to those subscribers specifically requesting certain presentations. CATV can thus serve the precise needs of local governments, demographic groups, institutional users, and, most importantly, individual citizens. In this manner, communities within the overall complex can receive optimum individualized service which, at the same time, integrates them within the national framework.

CATV thus awaits public acceptance. Adverse governmental reaction to CATV, however, has prevented cable television from effectively demonstrating its potential applications. In the past, the government's unfavorable posture has resulted directly from its misguided attempts to preserve "free" local television at all costs. Even now that a compromise proposal has been accepted, delays appear imminent. It is likely that acceptance of CATV will not be achieved until effective statutory regulation designed to promote the interests of the public, not those of the television industry, is established on a national scale. Unfortunately, a favorable solution has thus far been frustrated. Incumbent politicians who can afford broadcast coverage may not be willing to facilitate cable access to potential rivals. Moreover, with their political fortunes often dependent upon favorable broadcast television exposure and network-dominated news analysis, legislative and administrative officials may be wary of contravening the interests of over-the-air broadcasting systems.

The public should be made aware that cable television can play a vital role in fulfilling community needs for news, information and entertainment programming. Given its special technical capabilities, CATV should be recognized for its ability to expedite formation of public opinion and resolution of effective decision-making. In the political process alone, candidates and elected officials should find CATV exposure far more efficient than broadcast television as a means of reaching their constituents. More important, if cable is provided

²¹⁸ The Antitrust Division of the Justice Department, which has in the past fought the broadcast industry's efforts to stifle cable growth, may object because the compromise might hinder effective competition. *N.Y. Times*, Nov. 12, 1971, at 83, col. 2.

an opportunity to develop its market appeal, the resultant competition with broadcast television will alleviate any hesitancy on the part of the government to effectuate regulations necessary to improve the broadcast television medium. With an optimum balance of control between the government and private enterprise, television communications will finally be made responsive to the needs of the public.

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