

# STUDENT COMMENTS

## CATV REGULATION—A COMPLEX PROBLEM OF REGULATORY JURISDICTION

After nearly two decades of unregulated growth, community antenna television (CATV) has become a powerful force in the television industry. In an effort to cope with some of the many problems caused by CATV activity, the Federal Communications Commission has recently asserted jurisdiction over CATV, and promulgated rules for its future expansion. The Commission's authority to regulate that segment of the CATV industry which operates without the use of microwave transmission facilities<sup>1</sup> has been tested by two United States Courts of Appeals, with conflicting results.<sup>2</sup> This comment will review CATV's impact on the television industry and, in the light of this recent litigation, examine the FCC's authority to regulate CATV under the powers granted by the Communications Act of 1934.<sup>3</sup>

### I. CATV: ITS GROWTH AND DEVELOPMENT

CATV was originally developed in the early 1950's to bring television to remote and mountainous areas where—because of their distance from a broadcasting station, or their local terrain—satisfactory reception was not possible. In the typical CATV system, a sensitive master antenna, placed at a point of good reception, captures a broadcast signal; the signal is amplified, brought to the community via microwave relays or coaxial cable, and is distributed by cable to the homes of subscribers. If the subscriber wishes to receive broadcasts from a local television station not carried on the CATV cable, an additional switch must be provided so that he may select either the CATV input or his conventional home antenna. The cost to the subscriber for CATV service normally comes in the form of an initial installation fee and monthly service charges.<sup>4</sup>

It soon became apparent to CATV companies that public demand for CATV service was not limited to areas which could not otherwise receive any television programming. Many television viewers living in areas al-

---

<sup>1</sup> The word "microwave" in a strict technical sense, refers to the frequency at which signals are transmitted, regardless of the means used to transmit them. Throughout this comment, however, the term is used in its commonly understood sense—i.e., referring to any equipment which is employed to relay signals between two points *through the atmosphere*, via transmitting and receiving antennae.

<sup>2</sup> *Southwestern Cable Co. v. United States*, 378 F.2d 118 (9th Cir.), cert. granted, 88 S. Ct. 235 (1967); *Buckeye Cablevision, Inc. v. FCC*, 387 F.2d 220 (D.C. Cir. 1967).

<sup>4</sup> Service charges average approximately \$5 per month. For a thorough discussion of the economic aspects of the CATV industry, see generally Seiden, *An Economic Analysis of Community Antenna Television Systems and The Television Broadcasting Industry* (1965) [hereinafter cited as *Seiden Report*], Hearings Before the Subcomm. on Communications of the Senate Comm. on Commerce, 89th Cong., 1st Sess., ser. 89-18, App. A at 51-111 (1965).

ready served by local independent and network-affiliated stations welcomed the additional television service which CATV provided, and were willing to pay the additional costs for a greater choice in television programs.<sup>5</sup> By extending distant station programming into such markets, CATV began to compete with local stations for their viewing audience. Free from federal regulation,<sup>6</sup> the CATV industry has grown to become a significant threat to the economic stability of local broadcasting stations.

The economic impact of CATV activity on local broadcasting stations comes in the loss of advertising revenue. Unlike the addition of a conventional broadcasting station, the entrance of a CATV system into a local market adds as many channels as the CATV company can place on its cable. If the number of channels is large, and if the company attracts an appreciable percentage of the viewing public as subscribers, the local station's audience could be substantially reduced. Since businessmen pay advertising costs in the hope of reaching large numbers of people, this fragmentation of viewing audience might well induce local advertisers to choose another medium, such as radio or newspapers, instead of a local television station.<sup>7</sup>

In a study conducted for the FCC in 1965,<sup>8</sup> it was found that CATV penetration had not caused a decline in local station revenue. This lack of impact was attributed to the absence of data available to advertisers regarding CATV systems and the number of their subscribers, which "prevented advertisers . . . from taking CATV into account in evaluating a station's audience."<sup>9</sup> However, as CATV has become more entrenched in local station markets, and as the number of channels and subscribers has increased, it seems safe to assume that local advertisers have considered CATV activity as an increasingly significant factor in determining whether or not to choose local television as an advertising medium.<sup>10</sup>

In the last three years the CATV industry has expanded spectacularly. In 1965, there were approximately 1,300 systems serving four million viewers.<sup>11</sup> At that time the average CATV system provided only five channels.<sup>12</sup> Today an estimated 1,800 CATV systems are in operation, serving nearly ten million viewers,<sup>13</sup> with another 1,600 granted municipal franchises not yet in operation.<sup>14</sup> Improved technology has enabled CATV

<sup>5</sup> *Id.* at 71.

<sup>6</sup> Prior to 1966, the CATV industry was substantially free from any direct regulation. Nevada and Connecticut have regulated CATV as a public utility. With these exceptions, the only direct regulation of CATV has been the obtaining of municipal franchises. *Id.* at 83.

<sup>7</sup> *Id.* at 95-97.

<sup>8</sup> Seiden Report, *supra* note 4.

<sup>9</sup> *Id.* at 58.

<sup>10</sup> Dr. Seiden concluded that, "as CATV data improve and knowledge of this subject becomes more widespread, a more direct economic impact will develop." *Id.* at 59.

<sup>11</sup> Notice of Inquiry re All CATV Systems, 1 F.C.C.2d 453, 454-55 (1965) [hereinafter cited as *Inquiry*].

<sup>12</sup> Seiden Report, *supra* note 4, at 57.

<sup>13</sup> Wall Street Journal, Oct. 18, 1967, at 1, col. 1.

<sup>14</sup> Petitioner's Brief for Certiorari at 4, *United States v. Southwestern Cable Co.*, cert. granted, 88 S. Ct. 235 (1967).

systems to increase their cable capacity to twelve channels, and twenty channel capacity has been predicted for the near future.<sup>15</sup> Furthermore, many CATV systems have begun to originate their own programming, providing the same kind of services as local broadcasting stations.<sup>16</sup>

With these recent developments, CATV activity has gained major importance in the television industry and there is every indication that its significance will increase in the future. With system owners like CBS, General Electric, Kaiser Industries, Newhouse interests, RCA, Time, Inc. and Westinghouse, strong financial support alone should insure CATV's continuing importance.<sup>17</sup> Perhaps the best indication of CATV's significance is the participation of broadcasters themselves, who represent nearly 50 percent of the franchise applications filed within the last year.<sup>18</sup>

## II. FCC ACTION AND THE COMMUNICATIONS ACT OF 1934

Since 1959, numerous broadcasters have brought pressure upon the Federal Communications Commission to promulgate rules limiting CATV's competition with broadcasting stations.<sup>19</sup> However, it was not until 1966 that the Commission finally adopted such rules for all CATV systems.<sup>20</sup> The Commission's initial reluctance and the present conflict between two United States Courts of Appeals indicate the problems of justifying the Commission's regulation within the rulemaking powers conferred on the Commission by the Communications Act of 1934.<sup>21</sup>

The relevant portions of the Act are divided into three main sections. Title I, the "General Provisions,"<sup>22</sup> defines the purposes of the Act, its application, and, in addition to delineating the structure of the Commission, grants the Commission general rulemaking powers. The stated purpose of the Act was to provide for a rapid and efficient nationwide and worldwide system of wire and radio communications.<sup>23</sup> To achieve this goal, the Act

<sup>15</sup> Inquiry, *supra* note 11, at 709.

<sup>16</sup> Wall Street Journal, *supra* note 13. According to that report, 180 systems had begun their own program origination in 1967, and that number is expected to increase to 350 this year. In addition, a CATV network was expected to have begun by January 1, 1968, providing programs such as taped bull fights, nightclub acts, stock-car races, and recent movies to an estimated 500 CATV systems. "Nonnetwork" systems generally offer old movies and local affairs programming.

<sup>17</sup> See Saturday Review, Nov. 11, 1967, at 96.

<sup>18</sup> *Id.*

<sup>19</sup> Inquiry Into CATV and TV Repeater Services, 26 F.C.C. 403 (1959) [hereinafter cited as 1959 Report].

<sup>20</sup> CATV, 2 F.C.C.2d 725 (1966).

<sup>21</sup> 47 U.S.C. §§ 151-609 (1964).

<sup>22</sup> *Id.* §§ 151-55.

<sup>23</sup> *Id.* § 151.

"Wire communication" or "communication by wire" means the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.

*Id.* § 153(a).

"Radio communication" or "communication by radio" means the transmission

creates the Federal Communications Commission, and consolidates in that agency the regulatory power over all interstate and foreign communication by wire and radio.<sup>24</sup> In this title, the Commission is authorized to make any necessary rules and regulations, not inconsistent with the Act, to carry out its functions.<sup>25</sup> These powers are more specifically defined by the succeeding provisions of titles II and III.

Title II,<sup>26</sup> gives the Commission authority over common carriers. Common carriers, such as telephone companies and microwave relay systems, are interstate operators of wire or radio apparatus that carry signals at the customer's request.<sup>27</sup> Under this title, the Commission is granted powers to regulate rates,<sup>28</sup> charge penalties for violations,<sup>29</sup> and grant licenses for extension of services.<sup>30</sup>

Title III, "Special Provisions Relating to Radio,"<sup>31</sup> prescribes the Commission's authority over radio broadcasters.<sup>32</sup> Operators of equipment engaged in the transmission of energy, communications, or signals by radio must obtain licenses from the Commission,<sup>33</sup> and the Commission is directed to distribute these licenses—along with frequencies, powers, and hours of operations—to achieve an efficient and equitable distribution of radio service throughout the country.<sup>34</sup> Among the powers given by title III are the authority to establish the areas or zones to be served by stations<sup>35</sup> and the authority to make additional rules and regulations, not inconsistent with law, as may be necessary to carry out the provisions of the Act, "as public convenience, interest, or necessity requires."<sup>36</sup> To effectuate these provisions

---

by radio of writing, signs, signals, pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.

Id. § 153(b).

<sup>24</sup> 47 U.S.C. § 152 (1964).

<sup>25</sup> Id. § 154(i).

<sup>26</sup> Id. §§ 201-22.

<sup>27</sup> "Common carrier" or "carrier" means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this chapter; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.

Id. § 153(h).

<sup>28</sup> Id. § 205(a).

<sup>29</sup> Id. § 205(b).

<sup>30</sup> Id. §§ 214(a)-(d).

<sup>31</sup> Id. §§ 301-97.

<sup>32</sup> "Broadcast station", "broadcasting station", or "radio broadcast station" means a radio station equipment to engage in broadcasting as herein defined." Id. § 153(dd) (Supp. II 1965-66). "Broadcasting" means the dissemination of radio communications intended to be received by the public, directly or by the intermediary of relay stations." Id. § 153(o) (1964). See note 23 *supra* for the statutory definition of "radio communication."

<sup>33</sup> 47 U.S.C. § 301 (1964).

<sup>34</sup> Id. § 307(b).

<sup>35</sup> Id. § 303(h).

<sup>36</sup> Id. § 303(r).

the Commission has been granted two sanctions: the power to revoke licenses<sup>37</sup> and, since 1952, to issue cease-and-desist orders.<sup>38</sup>

In 1959, when the FCC made its first study of the CATV industry,<sup>39</sup> the Commission concluded that it did not have authority to regulate CATV.<sup>40</sup> At that time CATV did not present a significant threat to broadcasting stations: CATV penetration was limited to small markets, largely, though not entirely, in the West, and the likelihood of significant economic impact was still an open question.<sup>41</sup> But as the CATV industry grew, the Commission became increasingly concerned with the effect of CATV on the television industry, and by 1966 had completely reversed its stand.<sup>42</sup>

In this reversal, the Commission's concern was primarily focused upon two aspects of CATV's impact. The Commission's first concern was CATV's economic impact on local broadcasters, especially independent ultra high frequency (UHF) stations.<sup>43</sup> Ever since Congress had determined that the development of UHF was "not only the best but the only practicable way of achieving an adequate commercial and educational system in the United States,"<sup>44</sup> the FCC has fostered the growth of UHF stations.<sup>45</sup> Yet CATV activity threatened to undermine this development. Even without the additional problems caused by CATV activity, independent UHF stations are subject to economic instability. The range of independent UHF stations is limited to local areas and, therefore, these stations depend largely upon local advertisers for their revenue. And since the typical independent station reaches relatively few people,<sup>46</sup> UHF is a comparatively unattractive

<sup>37</sup> Id. § 312(a).

<sup>38</sup> Id. § 312(b). Title V of the Act provides criminal penalties for persons who operate without obtaining a license, or wilfully violate regulations of the Commission. Id. §§ 501-10.

<sup>39</sup> See generally 1959 Report, *supra* note 19.

<sup>40</sup> The Commission concluded that CATV systems did not operate as common carriers, on the basis that, unlike the usual common carrier, the choice of signals transmitted is that of CATV, not the subscriber. The Commission further concluded that it could not license CATV systems as radio broadcasters under title III. These provisions, the Commission found, refer only to transmission of signals by radio, while CATV transmission is by wire. It rejected the argument that it had regulatory power over all phases of the communications field, and concluded that it could not assert jurisdiction over CATV on the basis of an adverse effect upon licensee stations because, even if that were a valid basis for asserting jurisdiction, the Commission was unable to determine when an adverse effect took place. Id. at 427-31.

<sup>41</sup> Id. at 405, 421-26.

<sup>42</sup> See CATV, *supra* note 20.

<sup>43</sup> UHF stations (channels 14-83) are playing an increasingly significant role in educational television. For example, the number of UHF channels reserved for educational stations outnumber VHF channels (2-13) by nearly 5 to 1. These represent approximately 25 percent of all UHF reservations under the FCC's present assignment table. S. Rep. No. 222, 90th Cong., 1st Sess. 2 (1967).

<sup>44</sup> H. Rep. No. 1559, 87th Cong., 2d Sess. 4 (1962); S. Rep. No. 1526, 87th Cong., 2d Sess. 7 (1962).

<sup>45</sup> As part of its effort to encourage the development of UHF stations, the Commission sought and received authorization from Congress to require all television sets sold in interstate commerce to be equipped to receive UHF stations. 47 U.S.C. § 303(s) (1964).

<sup>46</sup> All nonnetwork stations reach only approximately 10 percent of the viewing

advertising medium. A further reduction in viewers resulting from the entrance of a multichannel CATV system could leave the station with almost no audience. This would almost certainly result in decreasing revenue, and could put the station out of business.<sup>47</sup>

The second area of concern was the reduction or loss of television service to those who either could not afford or for other reasons could not obtain CATV service. For example, CATV has not been able profitably to extend lines into large, sparsely populated areas.<sup>48</sup> These areas, therefore, depend solely upon broadcasting stations located in nearby cities whose signals can be picked up by home antennas. If a CATV system were to enter into the nearby city and, by attracting subscribers in the city, drive the broadcasting station out of business, these rural areas would be deprived of their only source of television programming. In one such situation, the Court of Appeals for the District of Columbia observed that out of a total population of 73,966 persons in an area served by a broadcasting station, 40,000 of these persons would be deprived of television service if the local station discontinued operations.<sup>49</sup> Such a result would contravene the FCC's first priority objective, to provide at least one source of television service to all parts of the United States.<sup>50</sup>

In an effort to cope with these problems, the FCC adopted rules designed to limit CATV's competitive advantage over broadcasting stations and prevent CATV from competing with marginal stations. In order to lessen the effect of audience fragmentation, the rules provided that, upon request of a local station, a CATV system must carry the local station's signals.<sup>51</sup> They also prevented systems from carrying a program from a distant station on the same day that a local station broadcast that program.<sup>52</sup> To effectuate these rules, CATV companies were required to notify interested parties, including the Commission and local stations, of an intention to commence or extend service.<sup>53</sup> Finally, the rules provided for a hearing before a CATV system could bring signals from beyond the originating station's normal reception radius, termed its Grade B contour, into one of the nation's top 100 markets.<sup>54</sup> This requirement was designed to prevent

---

audience during prime time. See Brief for Respondents at 26, *Black Hills Video Corp. v. FCC*, No. 18052 (8th Cir. Sept. 18, 1967).

<sup>47</sup> For a complete discussion of CATV's economic impact on UHF stations, see CATV, *supra* note 20, at 770-78.

<sup>48</sup> *Id.* at 775.

<sup>49</sup> *Carter Mountain Transmission Corp. v. FCC* 321 F.2d 359, 365 (D.C. Cir.), cert. denied, 375 U.S. 951 (1963).

<sup>50</sup> For a complete description of the FCC's television allocation, see Sixth Report on Television Allocation, 1 P & F Radio Reg. 91:599, :620-27 (1952).

<sup>51</sup> 47 C.F.R. §§ 74.1103(a)-(d) (1967).

<sup>52</sup> *Id.* §§ 74.1103(e)-(g).

<sup>53</sup> *Id.* § 74.1105.

<sup>54</sup> *Id.* § 74.1107. The Commission divides receiving areas into three groupings: Principal City Grade, where a good picture is predicted 90% of the time at the best 90% of receiver locations; Grade A Contour, where a good picture is predicted 70% of the time at the best 90% of receiver locations; and Grade B Contour, where a good picture is predicted 50% of the time at the best 90% of receiver locations. See *Southwestern Cable Co. v. FCC*, 378 F.2d 118, 120 n.1 (9th Cir. 1967).

CATV from competing with marginal broadcasting stations, but to allow CATV to continue bringing additional channels into a community when existing and potential stations would not be jeopardized. The Commission reserved the right to waive any or all of the foregoing rules in cases when such waiver would be in the "public interest."<sup>55</sup>

To apply these rules, the FCC asserted jurisdiction over CATV systems using microwave transmission facilities to bring in television signals, and later over all CATV systems. A small percentage of CATV systems employ their own microwave towers to relay signals from their master antenna to the community.<sup>56</sup> Such systems, called microwave CATV, are clearly engaged in the transmission of signals by radio and, therefore, fall within the licensing provisions of title III.<sup>57</sup> The FCC licensed such systems, classified them as "Community Antenna Relay Systems," and applied the rules under the powers granted by title III.<sup>58</sup>

The vast majority of CATV systems, however, do not own or operate any microwave transmission equipment. These nonmicrowave systems receive broadcast signals either directly from broadcasting stations, or with the aid of common carriers, and carry these signals by wire from the master antenna to the homes of subscribers.<sup>59</sup> In asserting jurisdiction over these nonmicrowave systems, the Commission did not rely upon either the provisions of title II,<sup>60</sup> or the *licensing power* of title III.<sup>61</sup> Instead, the Commission found

<sup>55</sup> 47 C.F.R. § 74.1109 (1967).

<sup>56</sup> Microwave systems represented approximately 12% of the CATV industry in 1965. See Seiden Report, *supra* note 4, at 80.

<sup>57</sup> See notes 32 & 33 *supra* and accompanying text.

<sup>58</sup> See 47 C.F.R. §§ 74.1001-83 (1967).

<sup>59</sup> Nonmicrowave CATV systems comprise approximately 88% of the CATV industry. About 12% of these systems are served by common carriers and have been subject to a form of indirect regulation since 1962. Such indirect regulation began in *Carter Mountain Transmission Corp.*, 32 F.C.C. 459, *aff'd*, 321 F.2d 359 (D.C. Cir.), *cert. denied*, 375 U.S. 951 (1963). See p. 434 *supra*. *Carter Mountain Transmission Corporation*, a microwave carrier serving several Wyoming CATV systems, applied to the Commission for a license to expand its facilities. A local station which operated in an area served by these systems, protested on the ground that such expansion, and the resulting improvement in CATV service, would force it to discontinue operations. The Commission denied *Carter's* request for a license, but provided that *Carter* could reapply if it could show that its CATV customers would not duplicate local station programming by bringing in the same programs from a distant source, and that local station service would be carried on the CATV cables. Similar conditions were applied in 1965 to all CATV systems using microwave relays, including CATV systems which owned their own microwave towers. See *Rules re Microwave Served CATV*, 38 F.C.C. 683 (1965). However, approximately 75% of the systems in the CATV industry receive signals directly from broadcasting stations and do not operate any microwave equipment. These systems, therefore, could not be regulated through restrictions or conditions placed upon the granting of microwave licenses.

<sup>60</sup> See note 40 *supra*. The distinction asserted by the Commission, based on the fact that CATV subscribers cannot choose the signals to be carried, becomes increasingly doubtful as CATV systems expand the number of channels carried on their cables. With up to 20 channels available, the subscriber will likely be able to choose from all of the stations the CATV system could carry. In such a case, it seems meaningless to say that the subscriber does not have the initial choice. The Commission, however, continues to cite this distinction as the basis for refusing to regulate CATV as common carriers. See Hearings on H.R. 12914, 13286, 14201 Before the Subcomm. on Communications of

that since CATV operations fell within the definition of wire communication,<sup>62</sup> and since by extending television broadcasting CATV operations were in interstate commerce,<sup>63</sup> title I gave the Commission jurisdiction over CATV.

Having determined that it had jurisdiction, the Commission based its regulatory authority on the *rulemaking powers* of title III.<sup>64</sup> The Commission reasoned that by carrying signals beyond the areas allocated to a licensed station, CATV frustrates the Commission's authority to determine the areas to be served by its licensees, and undermines its efforts to provide an equitable distribution of television service. In the light of this disruptive effect of CATV activity, the Commission concluded that the rule-making powers of title III give it authority to regulate the operations of nonmicrowave CATV systems, even though these systems were not licensed.<sup>65</sup>

### III. THE CASES

*Southwestern Cable Co. v. United States*<sup>66</sup> was the first judicial challenge to the FCC's authority to regulate nonmicrowave CATV. Midwest Television, Inc., a licensee of a local San Diego television station, filed a petition with the FCC. It requested temporary and permanent relief, to prevent three nonmicrowave CATV companies from extending service into new geographical areas in and around San Diego. The companies concerned were carrying Los Angeles signals into San Diego, 120 miles away. Midwest claimed that, except for the far northern portions of the city, San Diego was beyond the Grade B contour of any Los Angeles station.<sup>67</sup> The Commission granted Midwest's request for temporary relief, pending a full hearing on the merits. The Commission's order allowed the companies to

---

the House Comm. on Interstate and Foreign Commerce, 89th Cong., 2d Sess., at 49-51 (1966).

<sup>61</sup> Despite the Commission's determination that nonmicrowave CATV operations do not fall within the licensing provisions of title III, the language of the Act does not demand that conclusion. The Act states that, "[n]o person shall use or operate any apparatus for the transmission of energy or communications or signals by radio . . . except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act." 47 U.S.C. § 301 (1964). "Communication by radio" is defined as "the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds, including *all instrumentalities*, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) *incidental to such transmission*." Id. § 153(b) (emphasis added). Since CATV systems are instrumentalities engaged in the receipt, forwarding, and delivery of communications, incidental to radio transmission, a reasonable construction of these sections could include CATV operations. The FCC has itself suggested that CATV operations could fall within the definition of "communication by radio," but considered such a finding unnecessary in view of its present proposals. CATV, *supra* note 20, at 794 n.1.

<sup>62</sup> See note 23 *supra*.

<sup>63</sup> See *Idaho Microwave, Inc. v. FCC*, 352 F.2d 729 (D.C. Cir. 1965); *Allen B. Dumont Laboratories, Inc. v. Carroll*, 184 F.2d 153 (3d Cir. 1950), cert. denied, 340 U.S. 929 (1951).

<sup>64</sup> See p. 432 *supra*.

<sup>65</sup> For a thorough defense of the Commission's assertion of jurisdiction, see 1966 Report, *supra* note 20, at 728-34, 793-97. For a contrary argument, see Inquiry, *supra* note 11, at 482-95 (Commissioner Loevinger dissenting).

<sup>66</sup> 378 F.2d 118 (9th Cir. 1967).

<sup>67</sup> See note 54 *supra*.

continue the services provided up to the date of the order, and to extend their lines, but prevented them from extending any Los Angeles signals. The CATV companies petitioned the Ninth Circuit Court of Appeals for review of this order.

The Commission's order was set aside by the court of appeals, which held that the FCC lacks authority to regulate nonlicensees. The court did not deal with the question whether the FCC has authority to license non-microwave CATV systems, but having noted that the Commission had not attempted to license nonmicrowave systems, found that the Commission had exceeded its powers in regulating them.

The court cited *Regents of University System of Georgia v. Carroll*<sup>68</sup> as authority for limiting the Commission's rulemaking powers to licensees. In that case the FCC had granted a broadcasting license under title III on the condition that the station repudiate its contract with a third party. This condition was based upon the belief that the station could not remain economically stable under its present contract. When the station repudiated and was sued for breach, it claimed that since its action was required by the FCC for the retention of a station license, it was no longer bound by the contract. The Supreme Court of the United States found that the Commission's regulatory powers centered around the granting of licenses, and that the Commission did not have the power to invalidate contracts. The Court reasoned that the rulemaking powers given the Commission by the Communications Act must be interpreted in connection with its licensing powers, and could not be asserted over nonlicensees. The court in *Southwestern* refused to extend the Commission's authority beyond the limits indicated by the Supreme Court in *Carroll*.

In support of this conclusion the court noted that when *Carroll* was decided the only sanction authorized by the Act was the revocation of licenses, and that the additional power to issue cease-and-desist orders, granted in 1952, was limited to licensees. As evidence of this limitation, the court quoted from *Carroll*, where the Supreme Court had noted that the Commission had not sought the authority to issue cease-and-desist orders against nonlicensees,<sup>69</sup> and from the conference report on the 1952 amendments. This report stated that, "[i]t is believed that the authority to issue cease-and-desist orders will give the Commission a means by which it can secure compliance with the law and regulations by licensees."<sup>70</sup> (Emphasis added.) The court of appeals' decision in *Southwestern* will be reviewed by the Supreme Court, which granted certiorari last year.<sup>71</sup>

*Buckeye Cablevision, Inc. v. FCC*<sup>72</sup> was the second test of the FCC's regulatory authority over nonmicrowave CATV. Buckeye Cablevision, Inc., an owner and operator of a CATV system in Toledo, Ohio, had brought in signals of station WJIM-TV, Lansing, Michigan, without first obtaining Commission approval. (Lansing is approximately 90 miles from Toledo, and

<sup>68</sup> 338 U.S. 586 (1950).

<sup>69</sup> Id. at 602.

<sup>70</sup> Conf. Rep. No. 2426, 82d Cong., 2d Sess. (1952).

<sup>71</sup> 88 S. Ct. 235 (1967).

<sup>72</sup> 387 F.2d 220 (D.C. Cir. 1967).

is beyond that latter's Grade B contour). The Commission found that Buckeye was in violation of the Commission's hearing requirements<sup>73</sup> and issued an order demanding that Buckeye cease and desist from such activity. Buckeye appealed from this order to the Court of Appeals for the District of Columbia.

The court of appeals affirmed the Commission's action. It agreed that CATV operations were in interstate commerce, and reviewed the Commission's findings that CATV had a potential detrimental impact on UHF stations. In evaluating the Commission's effort's to meet the situation in major cities, the court found that "it has chosen an eminently reasonable course."<sup>74</sup>

Unlike the court in *Southwestern*, this court did not rely upon *Carroll*. Instead it found such reliance misplaced:

[T]he Court's view of this limitation [of authority only over licensees] was based largely on the agency's lack of authority at that time to issue cease and desist orders, against licensees or anyone else, to prevent violations of the [Communications] Act. Subsequently Congress conferred such authority, which correspondingly expanded the Commission's power to protect the regulatory scheme.<sup>75</sup>

The court concluded that whatever the viability of *Carroll*, it did not prevent the Commission from regulating nonmicrowave CATV.

In support of its conclusion that the FCC had regulatory authority over nonlicensees, the court quoted from *Philadelphia Television Broadcasting Co. v. United States*<sup>76</sup> and *NBC v. United States*.<sup>77</sup> In *Philadelphia Broadcasting*, the Court of Appeals for the District of Columbia sustained the Commission's refusal to regulate CATV systems as common carriers. The court reasoned that the FCC should have flexibility in dealing with a dynamic field like the television industry. While the court did not evaluate the basis of jurisdiction actually asserted by the Commission, it held that the decision not to regulate CATV systems as common carriers was "a rational and hence permissible choice . . . ."<sup>78</sup>

In *NBC*, the Supreme Court of the United States sustained the FCC's proposal to refuse station licenses to persons engaged in network practices which the Commission had determined were contrary to the best interests of the viewing public. The Court held that such action was within the Commission's authority even though such network practices were not mentioned in the Commission Act:

While Congress did not give the Commission unfettered discretion to regulate all phases of the radio industry, it did not frustrate the purposes for which the Communications Act of 1934 was brought into being by attempting an itemized catalogue of the specific manifesta-

<sup>73</sup> 47 C.F.R. § 74.1107 (1967); see p. 434 supra.

<sup>74</sup> 387 F.2d at 224.

<sup>75</sup> Id. at 224-25.

<sup>76</sup> 359 F.2d 282 (D.C. Cir. 1966).

<sup>77</sup> 319 U.S. 190 (1943).

<sup>78</sup> 359 F.2d at 284.

tions of the general problems for the solution of which it was establishing a regulatory agency.<sup>79</sup>

The court in *Buckeye* interpreted these cases as recognizing the Commission's implied authority over activities which affected the regulatory scheme entrusted to it by Congress.

#### IV. ANALYSIS AND CONCLUSIONS

The conflict between *Buckeye* and *Southwestern* is not easily resolved. While it may be freely conceded that regulation of CATV is necessary to the effective regulation of the television industry, the question to be settled is whether the method of regulation chosen by the Commission can be reconciled with its grant of authority. Any but the most tortuous interpretation of the entire Act and its history leads to the conclusion that Congress intended that the Commission's regulatory authority under title III be limited to the holders of licenses issued under its provisions. The first significant attempt at federal regulation was the enactment of the Radio Act of 1927,<sup>80</sup> when it was realized that the uncontrolled use of frequencies and powers could only result in so much interference between stations that eventually no station could be heard.<sup>81</sup> When Congress passed the Communications Act of 1934, the provisions of the Radio Act were incorporated in it as title III, to produce a direct and simple regulatory scheme: the Commission was charged with the surveillance of virtually every phase of the physical construction and technical operation of broadcast stations, and compliance with its rules was secured by withholding or withdrawing the authority of stations to operate.

There is little doubt that the Act was designed to accommodate future, more sophisticated forms of communications within the licensing scheme. The definitions of "radio communication" and "broadcast station" in the Act are broad enough to require the licensing of many types of electronic communications, including television,<sup>82</sup> which were generally unknown at the time the Act was passed. They are certainly broad enough to avoid the possibility that the emergence of new forms of communication might result in the problems of interference which precipitated Congress' action.

The *NBC* case, relied upon by the court in *Buckeye*, held that the Commission's control over licensees extended beyond the technical aspect of radio communication, into the broad area defined by the "public interest, convenience, and necessity." The Supreme Court in *NBC* relied heavily on the legislative history of the Act, from which it determined that the statutory powers to (1) "make special regulations applicable to radio stations engaged in chain broadcasting,"<sup>83</sup> (2) "generally encourage the larger and more effective use of radio in the public interest,"<sup>84</sup> and (3) adopt "such rules

<sup>79</sup> 319 U.S. at 219.

<sup>80</sup> Ch. 169, 44 Stat. 1162.

<sup>81</sup> See generally *NBC v. United States*, 319 U.S. 190, 210-14 (1943).

<sup>82</sup> See *Allen B. Dumont Laboratories, Inc. v. Carroll*, 184 F.2d 153 (3d Cir. 1950).

<sup>83</sup> 47 U.S.C. § 303(i) (1964).

<sup>84</sup> *Id.* § 303(g).

and regulations . . . as may be necessary to carry out the provisions of the Act"<sup>85</sup> gave the Commission the implied authority to prescribe restrictive networking practices, despite the fact that the Act contained no specific authority to delve into such practices.<sup>86</sup> The result in *NBC* established the Commission's power to restrict the business practices of licensees to the extent that they detrimentally affected the "public interest" in the unrestricted distribution of programming; except where broadly phrased excerpts can be borrowed, however, it offers no suggestion that the Commission can regulate those whom it does not license to operate under the provisions of the Act.

Any attempt to regulate nonlicensees prior to 1952 would, of course, have been impossible, since up to then the Commission had no available sanction for enforcement of regulations except the revocation of licenses or the threat of criminal proceedings.<sup>87</sup> When the cease-and-desist order was added to the Commission's arsenal, there was no suggestion that it would be applied to enforce a broad regulatory scheme over nonlicensees. On the contrary, legislative reports indicate that it was granted to provide the Commission with a flexible remedy which could be tailored to suit violations not serious enough to warrant the revocation of licenses.<sup>88</sup> The court in *Buckeye*, however, concluded without reference to this history that Congress had granted the power to issue cease-and-desist orders "against licensees or anyone else."<sup>89</sup>

Arguably, such construction of the statute without reference to its legislative history is improper.<sup>90</sup> Moreover, even without reference to the history of the Act and its amendments, the court might have interpreted

<sup>85</sup> *Id.* § 303(r).

<sup>86</sup> 319 U.S. at 217-19.

<sup>87</sup> See notes 37 & 40 *supra* and accompanying text.

<sup>88</sup> S. Rep. No. 44, 82d Cong., 2d Sess. (1951); H. Rep. No. 1750, 82d Cong., 2d Sess. (1952); Conf. Rep. No. 2426, 82d Cong., 2d Sess. (1952).

<sup>89</sup> 387 F.2d at 225.

<sup>90</sup> Despite various attacks on its misuse, legislative history has become a standard aid in determining the meaning of a statute. See generally Note, A Re-Evaluation of the Use of Legislative History in the Federal Courts, 52 Colum. L. Rev. 125 (1952). Even when a statute may appear to have a "plain meaning," courts engaged in its interpretation have entered into "an examination of the legislative history to see whether that raises such doubts that the search for meaning should not be limited to the statute itself." *Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp.*, 348 U.S. 437, 444 (1955). Although grants of powers to administrative agencies have been interpreted liberally to attain the objectives for which legislation has been enacted, the scope of an agency's authority cannot extend beyond the limits imposed by Congress. See 1959 Report, *supra* note 19, at 427; 3 J. Sutherland, *Statutes and Statutory Construction* § 6603 (3d ed. 1943). Legislative history serves an important role in determining these limits, as a guide to "legislative intent." See generally *id.* §§ 6603-04. The use of legislative history seems particularly appropriate to determining the validity of the Commission's present assertion. The Supreme Court has made extensive use of legislative history in the past, as an indication of the FCC's authority. See, e.g., *NBC v. United States*, 319 U.S. 190 (1943); *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134 (1938). Furthermore, legislative reports provide a clear indication of the limited grant of authority intended by Congress when it conferred the power to issue cease-and-desist orders. See p. 437 *supra*. In such a case, legislative history might well demand a denial of the Commission's assertion. Cf. *Harrison v. Northern Trust Co.*, 317 U.S. 476 (1943).

the language of title I as including only those specifically licensed or regulated under the express provisions of titles II and III.<sup>91</sup> The Commission successfully argued, however, that the words of the statute should be construed to permit coverage of situations not foreseeable at the time of enactment, and that a doctrinaire approach to statutory interpretation is improper when an administrative agency seeks to employ reasonable means to prevent frustration of a statute's obvious goals.<sup>92</sup> In support of this position, the Commission cited *American Trucking Ass'ns v. United States*,<sup>93</sup> in which the Supreme Court permitted the Interstate Commerce Commission to regulate *lessees* of trucks under a statute giving it jurisdiction over *owners*.

It seems eminently reasonable for the courts to intervene in cases like *American Trucking*, where failure to do so would require "the Commission to sit idly by and wink at practices that lead to violations of [the Act's] provisions."<sup>94</sup> In that case, it was manifestly clear that the truckers who were leasing equipment were simply adopting a form of operation calculated to avoid the statute. In sustaining the ICC's regulations, the Court merely relied upon the premise that grants of power to administrative agencies need not specifically refer to "every evil sought to be remedied."<sup>95</sup> It is questionable, however, whether the same judicial enthusiasm should be expected in this case. For, unlike the situation in *American Trucking*, it cannot be said that Congress did not anticipate the significant difference between a licensing scheme on the one hand, and ad hoc regulation on the other. Under the licensing scheme of the Act, for example, all aspects of a broadcaster's operations which directly involve the distribution of communications are the responsibility of the federal government;<sup>96</sup> the mode of regulation chosen by the Commission for CATV, however, would give the Commission discretion to choose which aspects of CATV operations it will regulate, and which will be left for state regulation. If, as the Commission insists, CATV companies are within the purview of the Act, it is submitted that such discretion is beyond that which the Act can be fairly read to give. The Supreme Court has said that the Communications Act of 1934, like other statutes enacted under the commerce clause, permits the

---

<sup>91</sup> Applying the rule *ejusdem generis* would lead to such a result. The general words "persons engaged in interstate communication by wire or radio" found in title I are followed by the specific provisions relating to common carriers and broadcasters. (Although the rule is usually applied where general words follow specific, the converse is also true. 2 J. Sutherland, *Statutes and Statutory Construction* § 4909 (1966 Supp. to 3d ed.)) Under the rule, if the specifically enumerated persons or objects constitute but do not exhaust a class, the general language is to be restricted to the types specifically enumerated, unless the statute clearly evidences a contrary intent. *Id.* at § 4910. For an example of the application of the rule in a closely analogous case, see *Application of Central Airlines, Inc.*, 199 Okla. 300, 185 P.2d 919 (1947).

<sup>92</sup> Supplemental Brief for Appellee at 9-16, *Buckeye Cablevision, Inc. v. FCC*, 387 F.2d 220 (D.C. Cir. 1967).

<sup>93</sup> 344 U.S. 298 (1953).

<sup>94</sup> *Id.* at 311.

<sup>95</sup> *Id.* at 310-11.

<sup>96</sup> In *Allen B. Dumont Laboratories, Inc. v. Carroll*, 184 F.2d 153 (3d Cir. 1950), the court of appeals held that the regulation of television programming was vested exclusively in the federal government, and that the states were powerless in the field.

states to enforce laws not conflicting with the Act, provided that the legislative history permits the conclusion that the relevant area does not require uniformity of regulation.<sup>97</sup> In the case of CATV, the activities which the Commission seeks to leave to state regulation principally involve rate charges and construction of facilities;<sup>98</sup> where these factors are concerned, it is hardly likely that Congress would have chosen to permit nonuniformity of regulation for CATV, when licensees are regulated by the federal agency.<sup>99</sup> Furthermore, the possibility of burdensome state rate regulations, which could adversely affect CATV, suggests that unless the Commission has control, it might never be able to accurately anticipate the ability of CATV to complement standard television broadcasting stations.<sup>100</sup> Where, as here, the Commission's inability to license CATV—and thus assume complete control—is not clear from a broad reading of the Act,<sup>101</sup> the argument which the Commission makes for its interpretation of the statute is less persuasive than that of the ICC in *American Trucking*.

A further factor which weighs against the Commission's position is that it has tried to obtain legislation specifically authorizing this type of discretionary rulemaking power over CATV and has failed.<sup>102</sup> This inability to obtain specific congressional approval tends to cast serious doubt upon any claim by the Commission of implied authority to regulate in this manner, however compelling the "public interest, convenience and necessity" may be made to appear.<sup>103</sup>

All of the foregoing suggests that the Commission can expect to encounter difficulty in its attempt to have *Southwestern* reversed by the Supreme Court. Regardless of the outcome of the present litigation, however, the problem of CATV regulation cannot be adequately resolved in the courts. The history of CATV regulation suggests that only by amendment of the Act will an effective, well-defined scheme of regulation be achieved. It is apparent that some degree of control over CATV is needed by the Commission—perhaps precisely the degree it has asserted in promulgating the present rules. But the basic premises beneath the present rules suggest some problems not present in *Buckeye* and *Southwestern*. For example, the Commission has said that its power to regulate activities which have an ad-

<sup>97</sup> *Head v. New Mexico Bd. of Examiners*, 374 U.S. 424 (1963).

<sup>98</sup> See Hearings on H.R. 12914, 13286, 14201 Before the Subcomm. on Communications of the House Comm. on Interstate and Foreign Commerce, 89th Cong., 2d Sess., at 49-51 (1966).

<sup>99</sup> See 47 U.S.C. §§ 201(b), 203, 205, 214, 308, 316 (1964). See also *Ivy Broadcasting Co. v. American Tel. & Tel. Corp.*, No. 29991 (2d Cir. Feb. 13, 1968), where the court concluded that the congressional purpose of uniformity of rates and service required the application of federal law in matters concerning the standards and service of common carriers.

<sup>100</sup> See Note, *The Wire Mire: The FCC and CATV*, 70 Harv. L. Rev. 366, 374 (1965).

<sup>101</sup> See note 61 *supra*.

<sup>102</sup> See S. 2653, 86th Cong., 1st Sess. (1960).

<sup>103</sup> See *FTC v. Bunte Bros.*, 312 U.S. 349, 352 (1941), where the Supreme Court found that the FTC's inability to obtain congressional approval for the extension of the Commission's authority over persons "affecting" interstate commerce "reinforced" the Court's conclusion that the FTC did not have such authority.

verse effect on television is not necessarily limited to persons engaged in interstate communications by wire or radio; in effect, a person need not fall within the broad limits of title I before he can be reached by the rulemaking powers of title III.<sup>104</sup> In discussing this possibility, the Commission has denied that it would attempt to regulate bowling alleys or movie theaters if these became an economic threat to television broadcasters.<sup>105</sup> It has, however, offered no more specific estimate of its authority; and, of course, it is free to reverse its position just as it did with respect to CATV. •

Any such attempt by the Commission to regulate as a class those who "affect" interstate communication, as well as those engaged therein, is not likely to succeed without clear evidence that Congress intended the Commission's reach to extend that far.<sup>106</sup> On the other hand, unless *some* activities not specifically "in" interstate communication can be regulated, the Commission may be disadvantaged. One example of this possibility is suggested by the recent trend among CATV companies toward originating their own programming.<sup>107</sup> If this trend continues, and the financial support behind CATV continues to grow, self-originating CATV may become a substitute for the development of new, independent broadcast stations. Yet these CATV systems, operating solely *intrastate*, could be beyond the reach of FCC regulations, no matter what their impact on the television industry and FCC policies.

The average American spends nearly one-fourth of his waking hours watching television and, as a result, the television industry has assumed staggering importance in our society.<sup>108</sup> CATV has become a significant part of that industry, and its effect may be expected to increase in the future. While the impact of CATV may not justify the method of regulation chosen by the FCC, it is certainly enough to warrant congressional action.

The problems of CATV regulation demonstrated by the history of FCC action and the decisions in *Buckeye* and *Southwestern* indicate the difficulties which have been encountered in applying the Communications Act to new forms of communications. Furthermore, no matter what decision is reached by the Supreme Court in its review of *Southwestern*, many of the problems presented by the rapid development of the television industry are likely to continue unabated. In the light of the present significance of the television industry, it would be well for Congress to provide new legislation which would enable the Commission, under a well-defined regulatory scheme, to deal effectively with the problems presented by CATV and those which these problems indicate are likely to arise in the future.

DAVID M. COBIN

---

<sup>104</sup> See CATV, *supra* note 20, at 730 n.6.

<sup>105</sup> *Id.* at 796 n.10.

<sup>106</sup> See *FTC v. Bunte Bros.*, 312 U.S. 349 (1941).

<sup>107</sup> See note 16 *supra* and accompanying text.

<sup>108</sup> See S. Rep. No. 222, 90th Cong., 1st Sess. 2 (1967).