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CATV

a history of community antenna television

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Contents

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PART I

An american phenomenon

1

Introduction

By 1948, television was on its way to national popularity. Production and Factory Value figures indicate that factory production of television sets from 1946 to 1948 increased from 6,000 sets to 1,160,000; sales to consumers climbed from 6,000 to 977,000 in the same period; and the figures on sets in use went from 5,000 to 975,000.[1] Television master distribution systems had been developed and were installed in multiple dwellings and hotels, such as the Waldorf-Astoria in New York City. Although the Roller Derbys, the Hopalong Cassidys, and the Milton Berles gained national acclaim over television, it is contended that the real captivating power of television lay in the medium itself rather than in the programming it transmitted.[2]

Television at this point was offering only limited service in the large cities and virtually no service in rural areas or towns more than fifty miles from the metropolitan centers with television stations. Geographical factors, such as terrain or distance from a broadcast television transmitter, and the 1948 Federal Communications Commission freeze on the licensing of new TV stations, which threatened to restrict television to a few privileged urban areas, left the residents of other regions with little hope of having television. Although large equipment manufacturers were distrib-

1. *Television Factbook: Services Volume, 1968-69* (Washington, D.C.: Television Digest, 1968), II, no. 38, 55-a.
2. Interview with Martin F. Malarkey, November 5, 1968.

uting television receivers in rural and fringe areas, they had not tried to resolve the peculiar reception problems in these areas. Consequently, local television distributors had an overstock of television receivers which they could not sell before special receiving and distribution system equipment was designed, developed, and installed. Both the populace and the appliance dealers wanted television to come to town!

Community antenna television is a product of demand. No one man was solely responsible for its development. Although there is some question about who did what precisely where and when, there is no question that CATV pioneers were involved with similar concerns at about the same time. Each of these small businessmen took steps initially to solve the problems and answer the demand of a small, local sector of the potential viewing public. It seems reasonable to state that CATV would have made its appearance with little difference in time, procedure, or product even if any one of these pioneers had not been active during the late 1940s and early 1950s.

To study the CATV industry in historical perspective it seems advisable to make both horizontal and vertical analyses in time. The horizontal analysis, Part I, will focus on early CATV time; it will be essentially a detailed account of one representative system, in Astoria, Oregon. This system was chosen because it solidly documents many of the later issues and policies of the industry. The vertical analysis will proceed through time and trace systematically the history of regulatory concern with CATV.

The development of CATV in America must necessarily be studied with an awareness of both the technological and the business aspects of that industry.

Briefly, in regard to the technological development of CATV, one can observe the movement from the use of simple means of transmission (twin-lead wire) to the final field design of a reliable system using sheathed coaxial cable and specially designed amplifiers. The story of the efforts of Robert Tarlton and Milton Jerrold Shapp at the Panther Valley Television Company in Lansford,

Pennsylvania, describes the field design mode of development of a technologically complete CATV system and further illustrates the early evolution of the CATV equipment business. This system is noteworthy also for having received widespread attention in the popular press.

The fiscal growth of the industry can be analyzed as having proceeded from experimental to commercial. Television buyers did not pay for the early experiments in reception; usually the financial incentive for these was the sale of television receivers. Further, two types of commercial enterprises grew with CATV: the CATV equipment industry and the CATV service. The development of the CATV equipment industry is probably best described in the story of Shapp, founder of Jerrold Electronics Corporation. The origin of the notion of the CATV system service as a business enterprise in and of itself is claimed by many pioneers, including L. E. Parsons, Robert Tarlton, and Martin F. Malarkey.

2

CATV and success for the common man

John Walson, formerly John Walsonovich, claims to have developed the first commercial CATV system, in Mahanoy City, Pennsylvania. Much of his documentation, however, such as bills and receipts, was destroyed by fire in 1952. Consequently, the story of the development of his system can be regarded only as an interesting recollection. It is worth passing mention, however, for its human interest value and for its further support of the statement that many persons were engaging in similar activities relevant to CATV at approximately the same time. The story runs as follows.

John Walson was a maintenance man for the Pennsylvania Power and Light Company, and also had an interest in an appliance store in the mountain-ringed town of Mahanoy City. By 1948, he had begun to handle television sets. His market for these, however, was severely restricted, because normal home reception high in the mountains usually offered less variety of signals and was of a poorer quality than reception in Walson's shop, and reception in the valleys or on mountainsides was generally so poor, because of interference from the mountains, that these areas could not even be considered potential markets.

In early 1948, Walson devised a plan to help sell the television sets. His only antenna was a device he had built at the top of a

neighboring mountain. To this antenna he attached army surplus heavy-duty twin-lead cable and strung it from tree to tree down the mountain. He added some poles of his own and managed to run the wire to his shop in Mahanoy City. Consequently, in his shop he was able to receive pictures for each of the three television stations in Philadelphia, Channels 3, 6, and 10.

In June, 1948, Walson claims to have received oral permission from Robert Gray, manager of the Pennsylvania Power and Light Company, to place his wire on the telephone company poles. Subsequently, on October 2, 1950, he received a thirty-day temporary wire attachment permit from Pennsylvania Power and Light; a second permit commencing October 16, 1950; and a third permit for one year commencing November 1, 1950, and allowing attachment to nineteen poles at the rate of $1.50 per pole per annum, or $28.50 annual rental. Walson still has copies of these documents.

A few days after Walson had extended the wire to his shop, Dr. Aaron Liachowicz, his optometrist and a neighbor, asked Walson to extend the twin-lead wire to his house. Walson accomplished this task within a few days. He then extended his twin-lead system from his shop to his own house and further on to anyone who would buy one of his television receivers. Supposedly, people had been clamoring for his television service. John Walson claims to have had 727 subscribers to his operating system by June, 1948. Soon John Walson's cable was seen moving down the mountain on trees, traveling across Mahanoy City from pole to pole and ultimately into houses. Residents were willing to pay to have the television wire installed in their houses, but Walson refused payment from the spring of 1948 to the end of that year.

During 1948, Walson bought sheathed wire from an army surplus store for his system. Although before this time there had been no complaints of interference or other trouble from the FCC, Walson knew that eventually he would need the sheathed wire for his system. Accordingly, he purchased enough to serve all his existing subscribers, and by 1949 he was supposed to have been operating his system with a permanent type of coaxial cable and charging

his customers $2 per connection per month after an installation charge of $100.

Walson presents a note dated September 30, 1950, as his request to the local municipal authorities for franchise privileges—an early form of local municipal franchise bid. Interestingly enough, perhaps because of the local requirement for CATV assistance for TV reception, no percentage of the gross has ever been required by the municipality in Mahanoy City as payment for franchise privileges.

In 1950 a second CATV system is said to have been developed in Mahanoy City. When John Walson was initially demonstrating TV reception in his shop, crowds of townspeople congregated in front of his store window to watch. The crowds were so thick that they blocked the street. The chief of police, William McLaughlin, who came by to move the crowds, was intrigued with the phenomenon of television reception. He discussed how this was accomplished with Walson and by 1950 had initated his own CATV system to serve the other end of town.[1]

The City TV Corporation of Mahanoy City operated by McLaughlin, together with Jerrold Electronics Corporation, received notice in the National Community Television Association's *News Bulletin.*

> The Jerrold Electronics Corp., 26th and Dickinson Sts., Philadelphia 46, Pa., displayed 5-channel community antenna equipment October 15th to 37 operators at a meeting in Mahanoy City, Pa. It featured flexibility, expandability, efficiency and complete control of signals through use of individual channel amplifiers. The City TV Corp. system managed by William McLaughlin, had previously carried only three channels but was successfully converted to carry five.[2]

The same story added a line which gives some evidence of a first for Walson and a double feature for Mahanoy City.

1. Interview with Robert D. L'Heureux, November 20, 1968; John Walson, Sr., November 23, 1968, and July 21, 1970; John Walson, Jr., December 4, 1968.
2. "Extra Channel Systems," *NCTA News Bulletin,* 1 (November 14, 1953), 5.

> Mahanoy City can boast of two 5-channel systems [;] the Service Electric Company, John Walsonovich, Manager, also distributes 5-channels and lays claim to a "first."

In 1970 Walson purchased this second CATV system in Mahanoy City.

The modest start of Walson's adventure in cable exemplifies the typically American feature of the CATV industry: Small-town maintenance man for Power and Light Company becomes lucky in high-risk business. He realizes success through efforts in his own family business geared to answer the needs of the local public. Walson eventually became the largest single CATV owner, with over eighty-five thousand subscribers.[3]

3. Interview with John Walson, Sr., July 21, 1970.

3

A model system

> Good Morning, Ladies and Gentlemen: The city of Astoria is one of the more historic cities west of the Mississippi River. As we stand here this morning we can look out to the mouth of the mighty Columbia River—discovered by Captain Robert Gray—the river that brought the first white man to this part of the continent. We can look across Youngs Bay to the site where Lewis and Clark ended their trek west and wintered in 1805-6 before starting their journey back to St. Louis. We can look upon the first city in Oregon, our city of Astoria, the site of the first U.S. Customs House and Post Office west of the Rockies, and many other historic firsts too numerous to mention. Today we are here to commemorate another first—the birth of cable television, the fastest growing medium in the communications industry.[1]

L. E. (Ed) Parsons, an Astoria radio station (KAST) operator, had flown his wife, Grace, to broadcast conventions in Chicago in 1946 and 1947 where she first viewed television. Further, she liked it!

When it was announced in the summer of 1948 that KRSC-TV, Channel 5, Seattle, Washington, planned to go on the air, she insisted to her husband that she would like television and implied

1. Introductory comments by G. L. Davenport, regional manager, Cox Cablevision, at monument dedication for the twentieth anniversary of CATV, Coxcomb Hill, Astoria, Oregon, May 23, 1968.

that if anyone could bring it to Astoria, he could.[2] So he had a set shipped to Astoria.

Astoria is approximately 125 air miles from Seattle, and much of that area consists of pine-covered mountains. Although reception had been noted in different parts of the United States from as far away as England, such phenomena were considered merely freaks. Fifty miles over fairly level terrain was the accepted maximum radius for consistent television transmission. Because of the mountains, therefore, Astoria had been effectively deprived of broadcast television reception.

To do what could not be done, to bring television pictures to his wife in Astoria, Oregon, Parsons faced the initial task of locating usable signals somewhere in Astoria from the Seattle station. Loading his car with frequency-survey equipment, Parsons covered Clatsop County.

The signals from KRSC-TV were received in Astoria in an unexpected pattern. Instead of picking up signals on hilltops, Parsons picked them up on the sides of hills, in valleys, and in other assorted spots. Invariably, the signals were at awkward locations for experiments. KRSC-TV signals seemed to reach Astoria in fingerlike bands about one to two city blocks wide. Although the signal in some bands was stronger than in others, within each band the signal was constant from street level to building top.

Eventually Parsons retreated with his survey equipment to his apartment atop a two-story structure across Commercial Street and a short distance down from the eight-story John Jacob Astor Hotel in the center of Astoria. He was able to pick up a signal, which meant that a television "finger" was pointing right at his roof top. The signal was weaker than some of the others he had found, but for experimental purposes it performed adequately. Further, he now had a convenient place to work.

2. Rafe Gibbs, "Small Town Television," *Popular Mechanics*, XCIII (April, 1950), 114. KING-TV, Seattle, Washington, began operation on November 25, 1948, as KRSC-TV and was sold to the present licensee in August, 1949 (*Television Digest*, Vol. V, no. 20 [May 14, 1949], no. 23 [June 4, 1949], no. 30 [July 23, 1949]).

Parsons brought a standard television set and a variety of television aerials to his apartment. He tried one aerial after another but got no television reception. Consequently, he began to devise his own aerials, his own booster equipment.[3] For weeks that television receiver and its many parts, plus various coils, condensers, and tubes, overflowed from card tables onto the living room rug.[4]

Parsons approached the manager of the John Jacob Astor Hotel for permission to mount an antenna on the hotel roof.[5] He set up his lines to lead from the roof of the penthouse to his living room TV set. While Mrs. Parsons sat in the living room reporting on picture reception over a walkie-talkie system, Parsons tinkered with the aerial on the roof. Eventually the picture came in.

What Parsons had done was to pick up KRSC-TV on one channel (no. 5—76 to 82 megacycles) and send it out over another channel (no. 2—54 to 60 megacycles). The change was made so the outgoing signal would not interfere with the incoming signal.[6]

"Reception was not of a quality that would be salable today, but we received a picture and started attracting guests," stated Parsons. That was Thanksgiving Day, 1948. The number of guests in the Parsons' home soon multiplied. The house was packed each time KRSC-TV was on the air. "Literally we had no home," recalled Parsons. Christmas Eve he is supposed to have chased everyone out, locked the door, and resolved to do something about the dilemma.[7]

Parsons had proved that television could be picked up efficiently over a considerable distance, even when transcending mountainous barriers. But now he had to devise some manner of sending television reception out beyond his home receiver to other locations in Astoria.

He began developing a receiving-sending unit. Starting with a three-tube system, he worked his way up to one with eight tubes.

3. Gibbs, "Small Town Television," pp. 114–17.
4. *Portland Oregonian*, July 28, 1949.
5. *Ibid.*, September 11, 1967.
6. Gibbs, "Small Town Television," pp. 117, 270.
7. *Portland Oregonian*, September 11, 1967.

The unit was kept relatively simple and small.[8]

He dropped a line from the converter on the hotel roof both to the lobby of the John Jacob Astor Hotel and across the street to Cliff Poole's music store, so that Astorians would have two other sets to watch. Poole was thus the first documented cable customer in the nation.[9] These extensions of Parsons' original service were in operation by January 1, 1949.[10]

Parsons had no FCC license to resend a telecast, but since there was no law against piping KRSC-TV programs by coaxial cable to other residents of Astoria, he strung cable up buildings, down elevator shafts, and through underground tunnels carrying utility lines. The cable went into private homes, taverns, and stores.[11] As of March, 1949, the installations were not set up as permanent arrangements.

In order to overcome the problem of reaching people's homes, in Parsons' words, "We would run from house to house through a city block—and Astoria has some pretty large blocks—we'd come to the street, then we would set up a little radiating antenna with one of our amplifiers feeding it and pick it up on the other side of the street and continue for another block. We'd run all around town this way."[12]

Parsons did not rent the cable. Rather the lines and the reception equipment were considered the cooperative property of all participants in the project. The "coax" passed over only private property, except where it crossed a street from roof to roof.

Parsons' crews were initially handling an average of twenty installations a month at an approximate charge of $100 per installation. These installation charges plus the profits realized on the sale of the television sets constituted the income support for Parsons' operation.[13]

8. Gibbs, "Small Town Television," p. 117.
9. *Daily Astorian*, April 10, 1962.
10. *Portland Oregonian*, September 11, 1967.
11. Gibbs, "Small Town Television," pp. 115, 117.
12. Interview with Parsons, June 28, 1970.
13. *Portland Oregonian*, March 25, 1950.

The history of L. E. Parsons' television distribution system includes encounters which point to later issues and problems the industry faced. There are threads sewn into the fabric of the story of Astoria which concern: the Seattle television station, in granting retransmission consent, and the American Society of Composers, Authors, and Publishers (ASCAP), representing copyright holders; the Federal Communications Commission; public demand and opinion; the Astoria City Council, representing municipal interests; and the telephone company, representing utility interests.

As of December, 1968, retransmission consent became a potential thorn in the side of the CATV system operator. Nearly twenty years earlier Parsons had requested a similar permission from KRSC-TV, Channel 5, Seattle, to rebroadcast the signals of KRSC-TV.

In a letter dated May 18, 1949, Robert E. Priebe, general manager of KRSC-TV, responded to a request from Parsons that he would grant "permission to rebroadcast the television signals of KRSC-TV" under the following conditions:

1. That the rebroadcasts will be for experimental use only.
2. That there will be no use made of the rebroadcasts commercially.
3. That if any condition arises which we feel might be detrimental to KRSC-TV, such permission can be revoked immediately.

Priebe further indicated that he was "very much interested in your [Parsons'] experiment and would appreciate hearing about the progress of your project."

A letter dated October 19, 1949, from Hugh Feltis of the successor station, KING-TV, reaffirmed the earlier arrangements, recommending that "everything continue 'as is.' "

On July 28, 1949, an article in the *Portland Oregonian* which carried the headline "Astorian Brings Seattle's Video to Home City" featured Parsons' system. The column attracted ASCAP attention. That organization subsequently demanded payment for

the material Parsons was using on the cable system. Parsons responded by excluding ASCAP music from his radio station operation and relying on Broadcast Music, Inc. (BMI) music. One year later ASCAP capitulated and allowed Parsons use of its music on the cable if he would sign a contract to use ASCAP material on KAST, his radio station.[14]

Other newspapers told of this new-style television network which was linking some twenty-five taverns and homes in Astoria, Oregon. On August 1, 1949, T. J. Slowie, secretary of the FCC in Washington, D.C., sent a letter to Parsons noting the press coverage and requesting that he "furnish the Commission full information with respect to the nature of the System which it appears you may have developed and may be operating," for the Commission had "no information at its offices in Washington, D.C. with respect to this matter and no record of any discussion or correspondence with you in connection therewith." The issue was further complicated because Parsons had applied for an experimental UHF band. The Commission turned him down on the latter request but dropped the cable inquiry.[15]

During 1949 the press was reporting reactions to Parsons' experiment:

> [July 26, 1949] Federal Communications Commission officials believe his experiments may mean television for hundreds of towns not on existing coaxial hookups.[16]

> [July 26, 1949] The Seattle station okayed the rebroadcasts because it broadened the audience and the Federal Communications Commission told him to go ahead—although doubting it could be done. He did it—and kept the FCC advised.
>
> Parsons expects soon to be able to rebroadcast the original signal directly and do away with the cable. He has asked the FCC for approval.[17]

14. *Ibid.*, September 11, 1967; interview with Parsons, August 11, 1970.
15. *Portland Oregonian*, September 11, 1967.
16. *Evening Star* (Washington, D.C.).
17. *Times Herald* (Washington, D.C.).

> [August 1, 1949] FCC authorities in Washington declined to comment on the development [of Parsons' system] pending receipt of official notification and details from Mr. Parsons or the FCC field engineers in the area.[18]

On August 13, 1949, Parsons answered the FCC letter as follows:

> The Associated Press story is a rewrite of several stories appearing in both Portland and Astoria papers dealing with different subjects, and in combining the stories all was confused.
>
> Some of the stories dealt with an amplifier we built and are using to pick up signals from KRSC and are transmitting around town over coax cable. This was developed and installed experimentally without cost to anyone except myself as a means of testing the dependability of our reception of TV signals in preparation for the requesting of a construction permit for an experimental station locally in the UHF.
>
> We have now under laboratory experiments a transmitter for video broadcasting at 600 megs. and application forms 318 and 309 together with the written permission of KRSC to rebroadcast their signals experimentally have been prepared for transmission to the FCC as soon as present laboratory tests are completed.
>
> Other stories referred to my attendance at the NAB Chicago Convention and that I had spoken briefly with Mr. Willoby of the FCC with regard to the possibility of licensing an experimental TV station and also to the trip I made to the Commission's offices in Washington, D.C., on May 31st when I . . . further discussed with Commission personnel in the TV section requirements for an experimental station.
>
> Since that time we have conducted a systematic survey of the signal strength from Seattle and have noted a number of very peculiar phenomena rather difficult to account for, some of which may be of interest to Commission engineers.
>
> Astoria is located at sea level with a 700 foot high mountain ridge running east and west through the center of the city. Directly across the Columbia River towards Seattle is a 3000 foot mountain range. Our surveys show that the signals are coming in a direct line from Seattle and not by reflection from a mountain. They arrive in three fingers, these fingers being only a few city blocks wide with many

18. *Broadcasting*.

blocks between the fingers where practically no signal can be detected. The signal on these fingers is of almost equal strength from sea level to about 500 feet elevation. Above this it disappears. At no place is the signal strong at or near the top of the hills. In one experimental installation the signal ten feet above the ground was found adequate for satisfactory reception but when the aerial was raised on an eighty foot pole the signal strength as measured at the antenna was down 15 DB.

In clear weather the position of these fingers remains absolutely constant. However, in certain clear weather there seems to be some horizontal movement reminiscent of the aurora borealis, giving the appearance of fading. The use of two receiving locations, one on either side of the maximum signal strength on these fingers, eliminated the fade.

The amplifier we have developed and are using for feeding our coax is a broad band amplifier, the first two stages on channel five with a converter and four stages of amplifying on channel two. It amplifies both video and audio signal without noticeable distortion. From one of the stations we have coax fanning out in three directions the longest run being approximately 2000 feet. By feeding the coax with a high level signal and reducing the signal in the terminating matching network at the sets all interference between sets has been eliminated.[19]

It was, in fact, Parsons' description of the propagation phenomenon that preoccupied the field engineers in the Western field office, to the neglect of the business aspects of the operation.[20] Parsons claims that the engineer assigned to his operation from the FCC Portland office was in fact of considerable help to him.

On August 13, 1949, *Television Digest* reported:

> Soon to apply for uhf experimental will be E. L. [sic] Parsons, owner of KAST, Astoria, Oregon, who got lots of publicity in AP dispatch about his pickups of Seattle's KING-TV (formerly KRSC-TV), 125 mi. away, with high gain directional array-feeding via coaxial cable to 25 "subscribing" neighbors. It's really a sort of "satellite" operation, but FCC engineers aren't too sanguine about

19. Parsons to Slowie.
20. Interview with Parsons, June 28, 1970.

> idea, wonder whether he's charging for service (if he is, must file tariff with Commission); also whether Channel 5 signal is ground wave or topospheric. Parsons also runs marine radio service for Columbia River fishing boats.[21]

E. Stratford Smith, attorney on the staff of the Federal Communications Commission in 1949, recollects the Astoria, Oregon, situation and related staff activity as follows:

> A memorandum came to my desk from my superiors one day which had been prepared by one of the Commission's field engineers in Oregon. This memorandum was a brief summarization of a cable system built by a Mr. L. E. Parsons, who was then a radio broadcaster in Astoria, Oregon, and he had been experimenting with techniques for bringing signals over longer distances than the normal run between an antenna and television set in the hope that people without television signals close by would be able to get the service. He did not at the time charge for this service. It was something that he simply was tinkering with himself. It was sent to my desk at the FCC for a determination, or at least an opinion as to whether the Federal Communications Commission had any regulatory interest in the system. This was the first contact the Federal Communications Commission ever had with CATV.[22]

On behalf of the FCC, Smith visited one or two other systems that came to his attention and then completed a memorandum for the Commission "which is rather notorious today" because in it he concluded that the FCC had regulatory jurisdiction over CATV as a communications common carrier. It was also in this memorandum that Smith coined the term CATV, because he envisioned it as a master community antenna serving an entire community and the phrase was just too long to write out in a memorandum time after time.

The memorandum was an interoffice staff memorandum, was never published, and consequently is not available to the general

21. Vol. V, no. 33, p. 6.
22. Interview with Smith, November 20, 1968.

public. Further, it had never been formally presented to the Commission for a ruling when Smith left the Commission in December, 1952, to go into private practice. It was still passing through the law bureaus, the accounting bureaus, and to various staff members who would have had an interest in the final determination about what position would be taken. The memorandum was rewritten many times after Smith started it and after he left the Commission. Consequently, even if it were available, it would not accurately date the first use of the phrase CATV within the FCC. Smith states, however, that his original draft of the memorandum "certainly would have been begun in the fall of 1949 when the Astoria, Oregon, system was brought to the Commission's attention."[23]

Verification of Smith's original judgment on FCC jurisdiction over CATV and subsequent routing of the memorandum within the Commission is found in the 1958 Senate committee hearings on television. At this time Smith was representing the industry as general counsel for the National Cable Television Association. In these hearings Kenneth A. Cox questioned Smith about this staff memorandum of which Smith had just claimed, for the record, to have been part author:

> MR. COX. You reached in that memorandum the conclusion that the Commission did have jurisdiction?
>
> MR. SMITH. I reached the conclusion that the Commission could exercise common-carrier jurisdiction over community antenna systems.
>
> MR. COX. Do you know whether others on the staff at the time concurred with your conclusion?
>
> MR. SMITH. I know that the Chief of the Common Carrier Bureau at that time forwarded the memorandum to other departments for consideration and approval. Whether it was done with the recommendation that it be adopted or whether it was done for informational purposes, I am not quite clear. But I do know that I conferred with the Chief, and he thought enough of the memorandum at the time to send it on.

23. *Ibid.*

> MR. COX. That was Jack Werner?
>
> MR. SMITH. Yes.
>
> MR. COX. To your knowledge, did Ben Cottone, then general counsel, indicate agreement with the conclusions reached in the memorandum, subject possibly to the feeling that the conclusions could be strengthened?
>
> MR. SMITH. I have no knowledge that Mr. Cottone took that position.
>
> MR. COX. Do you know what disposition was finally made of the memorandum?
>
> MR. SMITH. I know now that it was never placed on the Commission agenda.
>
> MR. COX. Do you know why it was not?
>
> MR. SMITH. No, I do not. I left the Commission. I think it was probably shortly after that period. I don't recall the specific dates.
>
> SENATOR LAUSCHE. When did you leave the Commission?
>
> MR. SMITH. I left the Commission in 1952; I think December of 1952.
>
> MR. COX. I take it you don't agree with that memorandum today?
>
> MR. SMITH. No, Mr. Cox, I don't agree with the memorandum today. I have been representing this industry for several years, and am more familiar with the industry. I have argued this case before the courts—I have reference to it in here—and the courts have sustained my second judgment.[24]

The occurrences in Astoria, Oregon, and subsequently elsewhere, created a dilemma for the staff of the Federal Communications Commission which persisted for several years. The question was not merely one of the kind or degree of regulatory jurisdiction which should be imposed but rather a more basic determination of whether or not the FCC did, in fact, rightly possess juridical power over CATV. The FCC's position as of the late forties and early fifties seems to have been one of observation with no direct rule-making rather than the statement of a policy and the imposition of accompanying regulation. Consequently, the press reported that

24. U.S., Congress, Senate, Committee on Interstate and Foreign Commerce, *Television Inquiry: Hearings on S. Res. 224 and S. 376*, 85th Cong., 2d sess., 1958, pp. 3834–37.

the FCC had no objections to what was being done, although within the agency Smith's interoffice memorandum concerning the matter was still circulating.

By March, 1950, the advent of television reception in Astoria had caused significant changes in the living patterns of local residents, and various attitudes existed in regard to this new living room feature, television. The local newspaper reported that most of Astoria's television set owners were enthusiastic about their new sets and content with the changes they had made in their lives, but that some people resented the intrusion in their living rooms and the rescheduling of dinner hours to accommodate television programming schedules. Television watching had broken many of the habit of spending evenings out. Set owners began entertaining guests in their own homes, the major attraction and purpose of such evenings being to view TV. Some of the local home viewing groups were reported to number as many as forty, especially when sports events were broadcast. The new form of entertainment in many houses had necessitated the rearrangement of living room furniture to facilitate TV viewing. One TV buff reported his woes at losing sleep in attempting to get his money's worth by staying up until the station went off the air shortly before midnight.

Although teachers in the East had grown concerned about the influence of television on the studying and reading habits of school children, the Astoria newspaper reported that local teachers noted no detrimental effect. One Astoria couple believed that, rather than being detrimental, television was "wonderful" and offered educational values beyond the medium of print, for the children could see what was happening.[25]

By May 1, 1950, there were two antennas in Astoria serving approximately seventy-five subscribers each. Additionally there were a number of smaller groups of four to ten subscribers each, bringing the total number of sets in Astoria to about two hundred. Parsons began selling installations only in early 1950. His rate card read as follows:

25. *Portland Oregonian*, March 25, 1950.

PRICE LIST EFFECTIVE JANUARY 1, 1950

PARSONS' P-1 IN-LINE AMPLIFIER	$ 95.00
PARSONS' HIGH GAIN ANTENNA	100.00
PARSONS' TWO WAY BRANCHING BOX	7.00
PARSONS' THREE WAY BRANCHING BOX	8.50
PARSONS' TERMINATION BOX	1.50
COAXIAL CABLE (per lineal foot)	8.50

All Prices Subject to Change without Notice
Prices F.O.B. Astoria, Oregon
Terms: Cash or C.O.D.

Parsons had spent a year or more in experimentation to resolve the deficiencies in the system until he could offer a commercially dependable service.

In August, 1950, the *Electrical West* stated:

> Parsons' interest in the matter is only in performing a consulting service to locate signals and in supplying the antenna, coaxial cable, and the amplifiers. Of course, he sells television sets in his retail store, too. When as many as seven people go together to install television, the cost to each is only about $100, exclusive of the television receiver itself. For the larger numbers served from one antenna and one coaxial cable run, the cost, of course, is much less.
>
> Customers own all of the equipment so that Parsons is not in the utility business with franchise and other problems. The FCC has no objections to what is being done and the Seattle TV station is glad to be able to extend its coverage. The Astoria city council knows all about it and has no objections.

In December, 1951, *Electrical Merchandising* reported that Parsons' rates had been increased to $125 for installation and $3 for monthly rental. The chief source of profit for Parsons was in the charge for the original installation plus, of course, the sale of TV sets.

Parsons received hundreds of inquiries from all over this country and abroad seeking access to or advice about his equipment. One letter in particular, from Eldred, Pennsylvania, reflects typical small-town interest in CATV in the late 1940s:

> I am wondering just how many other radio service men have bothered you with a letter similar to this one which I am going to bother you with, but I hope you will excuse me for taking up your valuable time, but you see I am around 80 miles from a TV station here where I live and the few people whom I know that have been able to afford TV sets have very poor reception, and I was wondering if I would be able to buy or rent one of your machines to try out in this section of the country, for I too am located in a mountain range country where reception is weak, and if it will work here there would be a large market for your machine.[26]

With Byron E. Roman, Parsons developed a national consulting and sales business in Astoria. Letters went out from their small-town office which suggested solutions to commonly named problems in terms of the equipment devised and its cost. For the problem of spotty signals, they offered a $100 single-channel antenna to be placed in a strong signal area, along with a $95 amplifier to carry the signal from the antenna to a receiver. Additionally, not just one but up to four sets could be fed on one run of not over five hundred feet, an appealing factor to TV set dealers with an overstock of receivers. Coaxial cables could be acquired at $.083 per running foot; a two-way branching box for tapping the line for additional sets, for $7; a three-way branching box for splitting the line and sending the cable in two directions, for $8.50; and termination boxes required for each set, at $4.50 each.[27]

Parsons and Roman as associates can be credited with being the first CATV consultants because, in accordance with his earlier electronics experience, Parsons charged for his consulting time, and they realized income from the sale of equipment.[28]

As early as August, 1950, the press was reporting that the Astoria City Council, representing municipal interests, took a tacitly approving view of the operation. In January, 1951, however, the *Daily Astorian* reported the council's concern over the extension of the unfranchised cable:

26. León B. Frisbee to Parsons, December 19, 1949.
27. From sample letter: Byron E. Roman to L. Donald Elliott, January 16, 1950.
28. Interview with Parsons, August 15, 1970.

> An application for a franchise for "piping" television signals by coaxial cable from a central receiving station to all parts of the city was submitted to the city council Monday evening by the Pacific Television Company.
>
> Members of the company are L. E. Parsons, Byron Roman, Gordon Sloan, who appeared on behalf of the firm Monday night, and other individuals whose identity was not disclosed.
>
> The council directed the city manager and city attorney to get together with company officials and work out terms of a franchise that would be mutually agreeable.
>
> The council action was taken after Commissioner Eric Hauke had upbraided the firm for not having sought a franchise before.
>
> "This company generally does it first and asks permission afterwards," Hauke said. "You have lines strung all over town already."
>
> Sloan said in reply that the company had "grown like Topsy" and had already expanded considerably beyond the original expectations of its founders. . . .
>
> Neither city officials nor company officials were prepared to discuss today the amount the city might properly charge for a franchise. . . .
>
> City Manager Brewer Billie obtained a pledge from Sloan Monday evening that no more lines would be strung across streets until the franchise question is settled.
>
> "Television for Astoria is a fine thing, but there does come a time when we must get a definite agreement governing use of streets and other public property."[29]

In December, 1951, *Electrical Merchandising* cited still another sensitive area, the cost of erecting poles, and reported that there would be no further cable installations until an agreement had been reached with the telephone company.

Earlier, Parsons had found himself in an unfavorable stance with the local telephone company. The city of Astoria was built in such a manner that the downtown area had readily accessible underground ducts to house utility and other apparatus, and Parsons had freely used these ducts without special consideration of laid

29. *Daily Astorian*, January 16, 1951. Brewer Billie, Astoria city manager, was also a partner in an electrical and appliance store that sold television sets, according to the *Portland Oregonian*, March 25, 1950.

and operating equipment. As the *Daily Astorian* reported on June 25, 1969:

> Parsons' tinkering was less amusing to the Pacific Bell Company when they once discovered that every phone in Astoria was hooked up to KAST [Parsons' radio station]. Parsons had decided that he would do live broadcasts from a local night spot by running a wire from the club to his studio.
>
> The only convenient place for the wire was in the same underground tunnels that were used by the telephone company. When Parsons' wire was installed adjacent to Pacific Bell's, the wires became perfect receiving antennae.

In 1951 a pole attachment agreement was required as a condition for the procurement of a municipal franchise. Pursuant to a decision between Parsons and representatives of the Pacific Telephone and Telegraph Company and the Pacific Power and Light Company on November 29, 1951, a three-way formal and mature agreement consisting of thirty sections in thirteen pages plus attachments was executed on December 17, 1951. In January, 1952, the Common Council of Astoria formally granted permission to Parsons, under Ordinance no. 52–01, to continue installing his cable.

Parenthetically, in regard to firsts, it should be noted that John Walson, in Mahanoy City, Pennsylvania, can produce a copy (rather than an original) of a "Temporary Wire Attachment Permit" dated October 2, 1950, with Pennsylvania Power and Light Company "to make temporary attachments to thirteen (13) poles."

G. L. Davenport, Northwest regional manager of Cox Cablevision, brings the status of the Astoria Cable System up to date, as of December 17, 1968:

> Parsons encountered difficulties. His original operation was acquired from a receivership in late 1952 or early 1953 by thirteen Astoria professional and business men. The company was then reorganized under the name of Clatsop Television Company.

> The original group of thirteen stockholders reduced to seven on November 1, 1954 and 50% of the stock was sold to a group of Seattle and Aberdeen, Washington CATV investors who owned Harbor Television Corporation, located in Aberdeen, Washington. The group acquired additional systems in Seaside, Oregon, The Dalles, Oregon, and Long Beach, Washington in 1962. In June 1964 final negotiations were completed with Cox Cablevision Corporation to purchase all of the Clatsop properties retroactive to January 1, 1964.[30]

In May, 1968, Parsons was acknowledged as the father of community antenna television. A granite monument was unveiled on Coxcomb Hill at the base of the famed "Astoria Column." On it is inscribed:

> Site of the first community antenna television installation in the United States completed February 1949 Astoria, Oregon. Cable television was invented and developed by L. E. (Ed) Parsons on Thanksgiving Day, 1948. The system carried the first TV transmission by KRSC-TV, Channel 5, Seattle. This marked the beginning of cable TV.

30. Davenport to author, December 17, 1968.

4

Problems with the federal government

In the late summer of 1951, agents of the Internal Revenue Service attempted to enforce an 8 per cent excise tax against CATV systems in the towns of Honesdale and Lansford, Pennsylvania. Such taxation was perceived as a common threat by owners of similar operations. Consequently, on September 18, 1951, representatives from community television companies in the Pennsylvania towns of Harrisburg, Wilkes-Barre, Honesdale, Palmerton, Pottsville, Lansford, Mahanoy City, Ashland, and Philadelphia, as well as a visitor from Seattle, Washington, met at the Neccho Allen Hotel in Pottsville, Pennsylvania, "for the purpose of bringing to light the seriousness of the 8% Federal Excise Tax, which is being levied against [the CATV systems] in two cities."

> It was unanimously decided that there was need for a National Community Television Council, which could take up the problems for the industry as a whole. If these video Companies were to form a National Organization of this kind, they no doubt as a group would be able to employ the best Tax Consultants and lawyers to contest these immediate problems facing them.[1]

The initial organizational meetings of the National Community Television Council were held September 18, 1951, September 26,

1. Minutes of organizational meeting of National Community Television Council, September 18, 1951.

1951, October 10, 1951, and January 3, 1952. The formal organizational meeting, often referred to as the first meeting of NCTA, was held in Pottsville on January 16, 1952, and was followed by a special meeting on January 28, 1952, at which the name National Community Television Association, Incorporated, was adopted.

At the September 18, 1951, meeting there was a discussion about what cash receipts were taxable, as well as about rates of depreciation for this type of community project and standardization of accounting procedures for the new industry.

In the area of financing, a Philadelphia accountant, Edward J. Mallon, made a historically notable contribution to the welfare of the CATV industry in its early stages. His initial attack on the financial problem was to seek a mode of construing the high installation fees charged in the early days as funds other than totally and exclusively income of that year, and to determine a way of justifying deferral of payment of the tax on such monies over a period of future years of operation of the company.

Mallon developed a theory and related procedures based on practices of the power and light companies. These companies had been collecting fees for connections in rural areas by agreement with the parties involved whereby anyone living beyond the established power lines could get a line run to his house provided he contributed to the cost of that line. Not only had the power and light companies received permission not to pay taxes on the money collected on the users' contributions-in-aid-of-construction costs but, in the earlier years, they had been permitted to depreciate the full cost of the equipment or facilities even though they had never used their own money for it.

Mallon is credited with applying this theory to CATV systems so that the installation charges, which ran as high as $125 to $200 a month in the early days, could be treated for tax purposes as contributions-in-aid-of-construction, rather than as income. The majority of the early systems followed this tax treatment and thus were able to avoid paying income tax on those "contributions" and could devote the full amount of money to financing the cost of

construction of systems. The practicalities of the situation in early 1950 indicated that at worst the systems would eventually have to pay the tax. A hidden danger lurking in the contributions-in-aid-of-construction theory for the legal welfare of the industry was the threat of inviting regulation by establishing precedents based on utility practices.[2]

This issue was the subject of extended litigation involving Teleservice Company of Wyoming Valley, Pennsylvania. In that case, the tax court refused to uphold Mallon's accounting theory.[3] The controversy, however, consumed several years, and so the net result favored the industry, which had the advantage of employing the contributions-in-aid-of-construction financing method for building systems during this time. When the adverse decision was ultimately rendered, most systems were equipped financially to restate their tax returns for past years and treat the funds as income.

Ultimately, through the use of this tactical procedure in accounting, the industry, which had lost the court battle, in fact enjoyed a three-pronged victory:

1. The industry had the tax money during its early, lean years when it needed it the most for systems construction.
2. The depreciation schedule finally applied, in fact, yielded considerable financial advantage for the industry.
3. The argument, which consistently plagued the industry, that CATV should be deemed a public utility by nature was rejected, and the case constituted an early precedent on the point in favor of CATV.[4]

The above-mentioned 8 per cent excise tax constituted another difficult financial problem during the developmental stage of

2. Interview with Mallon, August 5, 1970; E. Stratford Smith, July 28, 1970.
3. *Teleservice Company of Wyoming Valley* v. *Commissioner of Internal Revenue*, 27 Tax Court 722 (1957), aff'd. 254 F. 2d 105 (CA 3, 1958).
4. This position obtained until *TV Pix, Inc.* v. *Taylor*, 304 F. Supp. 459 (D. Nev., 1968), aff'd. 396 U.S. 556 (1970); see chap. 10 for expanded treatment of this case.

CATV. The government had attempted to enforce the tax on CATV systems when the industry first developed, on the grounds that CATV was a communications service. This tax was perhaps the prime issue which stimulated the formation of the original national association. The National Community Television Council, as it was first known, then sought to have the government required by law to acknowledge the fact that a cable system really was not a communications service but was simply an antenna facility furnished to people in poor television reception areas.

The national association instituted litigation to contest the tax; the Meadville Master Antenna Company of Meadville, Pennsylvania, was the CATV system involved, and Gust Pahoulis, a resident of Meadville and a subscriber to that system, was the plaintiff.

The issue was whether the amount paid by a subscriber for CATV antenna service is within the intendment of section 3465(a)(2)(B) of the Internal Revenue Code (1939), which assesses "a tax equivalent to 8 per centum of the amount paid for any wire and equipment service (including stock quotation and information services . . .)."

Pahoulis had paid $70.49 as the tax required under the above section of the Internal Revenue Code for use of the Meadville Master Antenna community television service for the periods April 1, 1953, through December 31, 1953, and June 1, 1954, through December 1, 1954.

While the industry was awaiting the decision of the district court (the court of original jurisdiction) in the *Pahoulis* case, it was learned that the 8 per cent excise tax had also been contested in West Virginia. Litigation had been concluded there, and the district court in West Virginia had ruled that the tax was applicable to CATV before the national association learned of the case.

The association immediately asked DeForrest Lilly, the party litigant, for permission to assume responsibility for the case and to litigate it on appeal. Lilly granted permission.

In the meantime, the *Pahoulis* case was decided in the district court in Pennsylvania. The ruling held that the tax did apply. The

authority for this decision was the *Lilly* case.[5]

The *Lilly* case was then appealed under the auspices of the association, and in 1956 the Fourth Circuit Court of Appeals reversed the district court and said that the tax was not applicable.[6] The *Pahoulis* case was appealed to the Third Circuit, which ruled that the tax was not applicable and cited the Fourth Circuit decision in the *Lilly* case as its authority.[7] The government ceased attempting after these decisions to collect the tax.

There did remain, however, the question of the millions of dollars which had been collected from the beginning of the CATV industry until the time of the decision and how and to whom this money was to be refunded. The association, through its counsel, worked out an arrangement with the Internal Revenue Service, and forms were given to each subscriber on which he was to claim the amount of tax he had paid over the years. Each CATV system gave individual reports to its subscribers stating the amount of money paid to the government for this tax. In conservative estimates, the total refund made by the government to CATV subscribers is believed to have exceeded $20,000,000.[8]

5. Interview with Smith, July 28, 1970.
6. *Lilly* v. *United States*, 238 F. 2d 584 (CA 4, 1956).
7. *Pahoulis* v. *United States*, 242 F. 2d 345 (CA 3, 1957), reversing 143 F. Supp. 917 (W.D., Pa., 1956).
8. Interview with Mallon, August 5, 1970; Smith, July 28, 1970; Robert J. Tarlton, July 24, 1970.

5

National publicity for cable

The CATV system that developed in Lansford, Pennsylvania, attracted the attention of the national popular press and the American public.

The efforts of Robert J. Tarlton, owner of Panther Valley Television Company, and Milton Jerrold Shapp, founder of Jerrold Electronics Corporation, were supplementary, cooperative, and mutually beneficial. Tarlton was interested in experimenting with Jerrold's line of equipment for use in realizing his idea of a community television system at the same time that Shapp was attempting to locate a field testing site for development of equipment to serve a community as opposed to just an apartment house.

In May, 1949, Jerrold demonstrated its first master antenna equipment at the National Electronics Distributors Association (NEDA) Convention show in Chicago. This equipment was designed for use by television dealers to demonstrate and sell their television sets.

In early 1950, Jerrold got its first contract for installing a master antenna system in an apartment house. This pilot project on the Jerrold dealer display equipment was conducted at Parkview Apartments in Collingswood, New Jersey. The special attention given the installation made it a success.

The problems faced by any experimental attempt to wire a community before 1950 were twofold: (1) The electronic amplifiers that were being used were not designed for cascading and conse-

quently could not function in a community system reliably; and (2) generally, the flat, unshielded twin-lead wire that was commonly found connecting home antennas to television sets was being used to wire communities. The characteristics of this cable changed with different types of weather.[1] An illustration of another annoying drawback found in the twin-lead wire systems was that if the residents of the first house turned off their set at 9:00 P.M., the rest of the neighbors' sets went off right down the twin-lead line—they were effectively without television.[2] Consequently, with unreliable amplifiers and with a cable that changed with the weather, these systems were not capable of delivering consistent pictures to home sets.

In preparation for operation the Lansford group had already received permission from the Pennsylvania Power and Light Company and the local telephone company to attach coaxial cables to the power and light poles, at the rate of $1.50 per year per pole.[3]

An eighty-five-foot tower was constructed on top of Summit Hill, which is about seventy air miles from the Philadelphia transmitters and three miles from Lansford. Three giant antennas, one for each of the Philadelphia stations, were mounted on the tower. Panther Valley Television Company, referred to as PVTV, ran a coaxial cable through amplifiers from the top of the tower down through Lansford's main street. The cable was strung by the five-man crew of the Le High Navigation Coal Company after their regular working hours. The design required that the main cable be tapped at each of Lansford's seven cross streets and that antenna distribution outlet (ADO) boxes, which feed the wires and signals into the houses, be installed at necessary intervals.[4]

The installation was completed and all the dealers' stores in

1. Interview with Shapp, November 14, 1968; Tarlton, July 24, 1970.
2. National Community Television Association, *So You Want to Be a CATV Operator: A CATV Primer* (Washington, D.C.: National Community Television Association, n.d.), p. 6.
3. Interview with Shapp, November 14, 1968; Tarlton, July 24, 1970.
4. "For Fewer Dead Spots," *Newsweek*, XXXVII (January 15, 1951), 54.

Lansford were connected in time to demonstrate and sell television sets during the week before Christmas, 1950. The day the system was turned on resembled a carnival day. Thousands of people came to Lansford to see the TV demonstrations. Many sets were sold. The system was a success.[5]

Soon the system and Jerrold Electronics received substantial national publicity. The *Chicago Journal of Commerce* edition of *The Wall Street Journal* for January 3 devoted the front-page center-column article to community antenna systems that were being installed in Pennsylvania. The story featured the Lansford system. In regard to equipment manufacturers, the article stated:

> Jerrold Electronics Corp. of Philadelphia at present is the sole producer and installer of community aerials. However, Radio Corp. of America is eyeing the development with considerable interest. A half-dozen R.C.A. engineers recently "looked over" the terrain and power supply at Pottsville, Pa., heart of the anthracite coal region. Philco Corp. took notice of the television set sales possibilities of community aerials last summer when it contracted to sell Jerrold's systems through its own distributors. Jerrold also has a sales force.
>
> Three years ago the system of bringing television to dead spots was only an engineer's dream. The engineer, Milton J. Shapp, is now president of Jerrold Electronics. His dream and an initial investment of $500 got the company started.

Within a fortnight, *Television Digest* reported the story:

> "MOUNTAIN-TO-MOHAMMED" EASES FREEZE: *A sort of "antidote to the freeze"*—limited, to be sure, but possessing intriguing possibilities—is the *"community" receiving antenna.* It received strong hypo this week.
>
> *Idea is quite simple: High-gain receiving antenna* is installed on an elevated point in or near town located in valley or too far away to get good signals (fringe area). *Signals are amplified, fed into homes via coaxial.*
>
> *Nor is idea new:* First installation we recall was that in *Astoria, Ore.*, where engineer E. L. [sic] Parsons picked up Seattle's KING-TV, 125 miles away. . . .

5. Interview with Shapp, November 14, 1968; Tarlton, July 24, 1970.

What is new is heavy weight being put behind projects. Philco is giving plan tremendous push, garnering reams of publicity (including big stories in Jan. 3 Wall Street Journal, Jan. 15 Newsweek, etc.) for itself and Philadelphia's Jerrold Electronics Corp. Latter makes the equipment ("Mul-TV"), also used for apartments, which is distributed by both companies. . . .

They installed antenna on nearby Summit Hill, fed signals into town (stringing cable on light and phone poles), began *signing up subscribers* who have choice of all 3 *Philadelphia signals* at all times. So far, about 100 sets have been connected, *with installation charge of $100* plus *$3 monthly service charge* at cost of $15,000. Entrepreneurs estimate "reasonable potential" of *750 homes can be hooked up* within 6 months, at total expenditure of $30,000. But *income would be $75,000* (for installation) plus some $2500 monthly in service charges. . . .

FCC is not involved—in fact gave go-ahead—because no radio transmissions are employed. State utility commission has said installations aren't public utilities. So legal barriers seem few.

Only 2 catches are suggested at moment, neither vital just now. First, *equipment may soon be hard to get,* although Jerrold President Milton Shapp is reported saying he has *enough parts on hand* to insure high production rate through June. Second, *when and if new stations* start operating, post-freeze, some of them may create intolerable interference and/or eliminate need for special installations. But *new stations are long ways off,* and re-engineering of community antennas may very well minimize interference.[6]

Newsweek also described how television came to Lansford and reported on the costs, difficulties, and popularity of the system as follows:

> PV-TV's system was not cheap. Besides the initial cost of his set, the Lansford televiewer pays $100 for PV-TV's tie-line and $3-a-month maintenance. Nonetheless, the company's chief difficulty is in meeting demand. Wired television was first demonstrated in Lansford last October. More than 1,000 people turned out of the town's 2,300 homes to see it—and place orders. But the small wire crew works slowly and the power and light company called a two-month halt to set specifications for use of its poles. Last week, however, PV-TV finally hit a stride of 30 to 40 installations a week and already had brightened the lives of some 100 home owners.
>
> The people of Coaldale, less than 1,500 feet from Lansford, are clamoring for an extension of PV-TV's service.[7]

6. *Television Digest,* VII (January 13, 1951), 2.

Parenthetically it should be noted that because of the war the industry faced a shortage on materials necessary for systems construction.

All this publicity created tremendous interest in the "aerial" system and brought overwhelming attention to the small company in Philadelphia and to PVTV in Lansford. Reports have it that hundreds of groups came to Philadelphia and Lansford from all over the country wanting to prepare for construction of similar systems.

The press and the public considered the PVTV installation a success for having delivered television pictures to the town of Lansford.

7. "For Fewer Dead Spots."

6

Practicality and creativity for a local need

Pottsville, Pennsylvania, the town that Martin F. Malarkey developed for cable television in late 1950, had been completely without television signals. It was surrounded by mountains, which acted as barriers for the signals from the Philadelphia stations.

Malarkey's family had been in the music business for many years and owned a number of music stores in the area. By 1949, the Malarkey stores, local dealers for RCA, had a substantial inventory of television receivers that could not be sold except in certain areas at high elevations in and around Pottsville.

When Malarkey presented the idea of a community aerial to RCA, their agents were intrigued enough to offer to furnish the engineering talent free of charge if Malarkey would conduct the tests on RCA equipment. An agreement was reached.

The article in the *Chicago Journal of Commerce* that announced and described the Lansford operation mentioned the RCA engineers' interest in Pottsville. It also quoted Malarkey, Sr., who was in the process of forming a company there, on the fact that the community aerial had tremendous possibilities, because Pottsville was ninety-six miles from a station and might never otherwise get television reception.[1]

Within a few weeks after the Lansford system made its first

1. *Chicago Journal of Commerce* edition of *The Wall Street Journal*, January 3, 1951.

cable connections, the Pottsville system was able to make its initial installations.

People were coming into the little office Malarkey had established and paying $135 in order to get a connection from the cable to their houses. They also agreed to pay a continuing charge of $3.75 a month for the service.

One of the industry's early concerns was with the possible impact the lifting of the freeze on the licensing of new television stations would have on the continuing growth of the systems Malarkey was building. In 1952, it was announced that the FCC had, in fact, lifted the 1948 freeze. The warnings had been that television stations would spring up all over the countryside and that there would be one or two in such potential CATV towns as Lansford and Pottsville. Consequently, there would no longer have been a need for a cable system of the type that Malarkey was developing.

Within about a year and a half it became apparent that the cost of constructing and operating a television station was such that, in order to be economically viable, stations could only be built in the larger metropolitan areas. This meant that Pottsville and other small communities throughout the United States would not have television stations. There would be a continuing need for cable television.

Soon after the Pottsville system began to operate the FCC sent a two-man task force, Bernard Strasberg and E. Stratford Smith, to visit Malarkey in Pottsville.[2] They spent a day with Malarkey and indicated to him that at some time, perhaps soon, the FCC was going to be forced to take a long look at what impact the growth of cable television would have on the new allocations table, the problem which had led to the 1948 freeze.

In the very early days of cable television, requirements for the granting of municipal franchises to build cable television systems were generally lenient. In Malarkey's case, in Pottsville, the franchise was merely a resolution adopted by the city council that gave him permission to construct a cable system over and across the streets, alleys, highways, and, where necessary, within the city limits. The nearby Minorsville City Council adopted a similar resolution.[3]

2. Interview with Malarkey, November 5, 1968; Smith, November 20, 1968.

During the FCC visit to the Pottsville system, Smith recalls, Malarkey had in his office a small Dage closed-circuit camera. He had already televised over the cable by closed circuit one local origination before the winter of 1951. Consequently, he probably originated the first closed-circuit television programs into private homes, although such programs had been seen in factories and public places. Smith states: "I can give him [Malarkey] credit for being the very first, in any event."[4]

In fact, during its early years, Malarkey's system received national acclaim by the industry for its local originations. The first edition of the *Monthly Bulletin* of the National Community Television Association, the only official voice of the industry, carried the following story:

> Trans-Video Corp., Pottsville, Pa., put on a half hour live show June 27th in cooperation with one of their local radio stations. This show was staged at the antenna site and included interviews of city officials, heads of civic organizations, system personnel, visiting dignitaries, professional artists and most touching, an interview of the winner of the Soap Box Derby and his family. Here, too, many compliments were received.[5]

The service gained such popularity with the townspeople that it bred problems in the living room. The *Lansford Evening Record* described some of these problems:

> There has been a beating of gums around these parts lately, wholly among the males of the specie, about the failure of the

3. Interview with Malarkey, November 5, 1968.
4. Interview with Smith, November 20, 1968.
5. *NCTA Monthly Bulletin*, I (August 15, 1953), 2.

Panther Valley Television Company to cable Channel 11 to its subscribers as a regular diet. It's one of the greatest domestic problems ever to face this tranquil vale. And if it ever blows up, head for the hills Gents.

Channel 11 carries a fine program of sports. It specializes in football, baseball and basketball. Pop wants it and claims TV companies in nearby areas are providing it.

He wants to know what's wrong with PVTV. So this inquiring reporter asked PVTV what's wrong. The answer is very explanatory, very authentic and a bit technical.

PVTV started its service here with three channels. Then for special occasions PVTV pioneered the idea known as "shared, selective basis" (programming—ed.). This plan permits a cable company to choose between Channel 6 or Channel 11. One or the other can be sent along the wires. You can't send both at the same time. Nobody can, it seems, says the local TV Company. It boils down to this: You can only cable three channels at one time. Now the question arises: What channels shall be cabled?

Right from the beginning here, PVTV cabled Channel 6 with all its homey, interesting programs—many of them serials—to which the lady of the house began listening. She became immersed in Mike's Other Spouse, Betty Finstersmucker In The Kitchen, The Problems of Poor Petronella, etc. We use these fictitious titles because, frankly, we don't know what's on Channel 6. But PVTV does know . . . and learned to its sorrow that the Mrs. wants to hear them every day and every night—and no bedamned tampering because somebody wants to see a basketball game. When PVTV switched from 6 to 11 on several occasions there was a mighty roar of protest from the kitchen.

So that's the story, gentlemen. You want Channel 11. Your gal-folks want Channel 6. You can't have both. The PVTV originally contracted to provide Channel 6 and might even get into a legal mess if it alters its policy. The nearby companies, which came later, did not establish such a policy—for the good woman to get accustomed to. It's a feud of the front room, gentlemen. Stop nagging at poor old PVTV. That good, reliable firm of trustworthy gentlemen does not want to bust up your home.[6]

The history of Martin F. Malarkey's activities from 1949 to 1969 represents the evolution and development of the commercial

6. Quoted in *ibid.*, I (November 15, 1953), 4–5.

CATV system service to answer the needs of the people of his small, local area, which otherwise would have been without reasonable television reception potential. A typical CATV pioneer, he had a concern and respect for the practical aspects of the community antenna television service as it was developing and an open, creative mind and approach to its use and development.

The contribution of the CATV pioneers was given recognition in a speech before Congress in 1962 by the Honorable Oren Harris, chairman of the House Committee on Interstate and Foreign Commerce. He praised "the ingenuity of the small American businessman" in overcoming the problems of geographical restrictions and the 1948 FCC freeze.

> The idea [of CATV] did not generate with the large and powerful electronics corporations such as the RCAs, the General Electrics, and the Philcos. . . . Essentially . . . the industry was born in small town America. It can take credit for its development and it still retains much of this original flavor. It is a real example of grass-roots demand and development.[7]

What some may have called unorthodox technology in 1949 can in the 1970s be said to have been creative. What some may have called expedient commercial practices in 1949 can now be said to have been sound business management techniques. The industry in its present form can be accepted as merely an elaborate extension of the industry in its early years.

In the late forties and early fifties, although the CATV industry was relatively unknown through the country, many people were keeping a watchful eye on it. The industry grew rapidly in miles of cable, in numbers of subscribers, in influence affecting the habits of individual subscribers, and, perhaps most importantly and impressively, in the degree of entrenchment in the life of each local community it was serving.

7. U.S., Congress, House, *Congressional Record*, 87th Cong., 2d sess., 1962, CVIII, pt. 8, 11087.

PART II

Regulatory concern

7

The beginning of federal regulation

Throughout the period of development of CATV, its entrepreneurs and their legal counsel have maintained a vigilant watch on the actions and reactions, in this area, of the various regulatory agencies—federal, state, and municipal—that have or might claim jurisdiction for various reasons. It is before such regulatory bodies and the courts that the members of the CATV industry and their opponents find a forum for discussion and disputation about their problems and disagreements. For present purposes, therefore, a consideration of the procedures by the FCC and the litigation before the various courts, supplemented by a discussion of the activity—or inactivity—of Congress, plus such official pronouncements as opinions of state attorneys general and positions by municipalities in the field of franchises, supplies essential data for a comprehensive historical study of the CATV industry. Consequently, it seems appropriate to treat successively the various governmental areas of regulation, adjudication, and authoritative opinion—federal, state, and municipal.

FCC and common carrier jurisdiction

In 1948, after public hearings, the FCC established a television allocations program that proposed a distribution of twelve

VHF channels to 340 cities.[1] The allocations were based on the engineering predictions that television signals would be limited to thirty-five miles. It was soon found, however, that television signals carried farther than had been anticipated and that stations had been too closely spaced. Accordingly, later in 1948, the Commission declared a temporary freeze on all new television applications and commenced further rule-making proceedings.[2] The hearings continued until the fall of 1951, and in May, 1952, the Commission issued its order setting a new table of television allocations.[3] During this freeze period the demand for television increased, and thus the CATV industry, with its ability to supply television service to many areas without local stations, was given impetus.

The first indication that CATV had attained adequate stature to warrant a determination by the FCC about whether it had jurisdiction over the industry appeared in late 1949 or early 1950. At that time E. Stratford Smith, discussed above in connection with the Astoria, Oregon, situation, had been asked by his superiors for a legal opinion on whether the FCC had a regulatory interest in the cable antenna system being developed in Astoria by L. E. Parsons. According to Smith's testimony, quoted earlier, at the 1958 Senate committee hearings on television, he reached the conclusion, subsequently recorded in a memorandum, that "the Commission could exercise common-carrier jurisdiction over community antenna systems." Although the memorandum was forwarded to various departments "for consideration and approval," it was never placed on the Commission agenda. Parenthetically, it should be noted that at the time of the Senate committee hearings, Smith testified that he no longer agreed with the conclusion in his memorandum, and as grounds for the change in position he pointed out that he

1. U.S., FCC, *Allocation of Television Channels: Notice of Rule Making*, Docket nos. 8736, 8975, 13 Fed. Reg. 2629 (May 5, 1948).
2. U.S., FCC, *Order*, Docket nos. 8975, 8736, 13 Fed. Reg. 5860 (September 30, 1948).
3. U.S., FCC, *Sixth Report and Order*, Docket no. 8736, 17 Fed. Reg. 3905–4100 (May 2, 1952).

had been representing the industry for years as its counsel and had become more familiar with CATV. Also, he stated that "the courts have sustained my second judgment."[4]

Frontier Broadcasting v. *Collier*. The evolution of the law in this regard warrants consideration as a significant factor in the development of CATV. On the specific point mentioned by Smith in his memorandum that the FCC could exercise common carrier jurisdiction over CATV systems, reference should be made to *Frontier Broadcasting Co.* v. *Collier*.[5] In this case, a complaint was filed under the Communications Act of 1934 by licensees or permittees of standard or television broadcast stations against 288 CATV system operators in thirty-six states. The complainants requested that the FCC exercise jurisdiction over CATV systems as communications common carriers and that it formulate policies to be used as guides in determining under what circumstances and for what periods of time CATV systems should be authorized to operate as communications common carriers and in establishing a basis on which reasonable charges, practices, classifications, and regulations could be determined. It appears that the primary reason for the complainants' interest in subjecting CATV systems to the Commission's common carrier jurisdiction was the alleged economic impact of such systems on local television broadcast stations. It was contended that certain of the CATV operations tended to defeat the objectives of the Commission's *Sixth Report and Order*, which include the provision of at least one local television broadcast station to each community.[6] It was further alleged that the operation of a CATV system which brings to its area service from a distant metropolitan station at no additional cost to advertisers over that station diminishes the revenues available to support the establishment of a local station because of the obvious

4. U.S., Congress, Senate, Committee on Interstate and Foreign Commerce, *Television Inquiry: Hearings on S. Res. 224 and S. 376*, 85th Cong., 2d sess., 1958, pp. 3834–47.
5. 24 FCC 251, 16 RR [Pike and Fischer Radio Regulation] 1005 (1958).
6. FCC, *Sixth Report and Order* (1952).

reluctance of advertisers to pay extra for the coverage they are already receiving.

The opinion of the Commission noted that the question was whether CATV systems conform to the traditionally accepted concept of common carriers and hence become communications common carriers. It added that fundamental to the concept of common carrier is that such carrier hold itself out or make a public offering to provide facilities by wire or radio whereby all members of the public who choose to employ such facilities and to compensate the carrier therefor may communicate or transmit intelligence of their own design and choosing.[7] In other words, the carrier provides the means of communication for the transmission of such intelligence as the subscriber may choose to have transmitted. The choice of the specific intelligence to be transmitted is, therefore, the sole responsibility or prerogative of the subscriber and not of the carrier. Even though the operation of a CATV system may have several attributes in common with the operation of a communications common carrier, one significant difference is that the specific signals received and distributed are, of necessity, determined by the CATV system and not by the subscriber. No individual subscriber has the option, nor may he compel the CATV system to receive and deliver a particular signal at a given time; nor has he the option or right to compel the CATV operator to receive and deliver signals different from, or in addition to, those offered or selected by the CATV system. In short, the CATV operator makes the selection of signals, and the subscriber has no right to dictate policy concerning these matters. From such considerations the Commission concluded that CATV systems are not engaged in a common carrier undertaking.

In 1958, the year of the *Frontier Broadcasting* opinion by the FCC, Senate committee hearings were held on the question of proposed legislation relating, among other things, to Commission

7. As the opinion pointed out, the term "intelligence" is used to denote writing, signs, signals, pictures, and sounds, unless otherwise specifically indicated.

regulation of CATV.[8] Both sides—television broadcasters, who were the complainants, and the National Community Television Association group, who represented the CATV systems—presented their views, but Congress took no definitive action.

Cox Report. At this point reference should be made to the Cox Report of December 26, 1958, which was prepared for the Senate Committee on Interstate and Foreign Commerce and concerned the problem of television service for smaller communities.[9] It is interesting to note that this report represents one of the strong indictments against CATV in particular (but also related services such as satellites, boosters, and translators) and of the FCC's handling of the matter. It was prepared by Kenneth A. Cox, a rather outspoken opponent of CATV and later to be a commissioner of the FCC. Cox pointed out that in all the Senate hearings through 1958, the Interstate and Foreign Commerce Committee had repeatedly indicated its interest in the provision of adequate television service to small communities, particularly those remote from the major population centers. He added, however, that, with a few minor exceptions, CATV systems were providing none of the services furnished by a local station or satellite; that normally such systems had no studios and no cameras or other equipment necessary for the origination of broadcasts; and that thus:

> A CATV system cannot cater to local preferences in programming, cannot serve local merchants, cannot provide a local news and weather service, cannot promote local civic and charitable enterprises, and cannot furnish a forum for discussion of local problems. Instead, it repeats the local programming designed for another community, the advertising of businessmen in that community and the news, public service announcements and political and other discussions aimed at the residents in that other community.

8. Committee on Interstate and Foreign Commerce, *Hearings on S. Res. 224 and S. 376*, 85th Cong., 2d sess., 1958, pp. 3834–47.

9. U.S., FCC, *The Television Inquiry: The Problem of Television Service for Smaller Communities*, prepared for the Senate Committee on Interstate and Foreign Commerce by Kenneth A. Cox (Washington, D.C.: Government Printing Office, 1959). This document is commonly known as the Cox Report.

> Whereas the network programming of the distant stations repeated is normally popular everywhere, the transportation of the local programming carried by those stations into different communities—and often into different States—results in a parody on local service.

The Cox Report further stated that until shortly before the report was prepared the various devices for extending television service to smaller communities had been employed according to local choice, and with little interplay between them; that after the first part of 1958 sharp conflicts of interest arose between small local broadcasters and operators of CATV systems; that one of the important reasons for the problem was the Commission's decision in the *Frontier Broadcasting* case against a group of small-town broadcasters who asked that the FCC regulate CATV systems as common carriers; and that the Commission's decision in this case made it perfectly clear that it did not intend to regulate CATV systems in any way whatsoever, thus "certainly removing any lingering hope the broadcasters may have had that they could look to regulation by the FCC as an answer to any of the growing difficulties they were having with their community antenna competitors" (p. 18). Cox indicated that he supported the charges that CATV operations would drive broadcasters in small communities off the air, that the destruction of local television would leave these small communities with inferior service, and that, if carried to the logical extreme, the results of unrestrained CATV (booster or translator) competition might eventually have caused large regions, or even entire states, to be deprived of all local television service—or be left, at best, with nothing more than a limited satellite service. Cox also sympathetically stated the contentions of the small broadcasters that local stations were unfairly treated by CATV systems in that (1) in the installation of cable systems, the subscriber's receiving set was so connected to the cable that he was prevented from receiving a good signal over the air from the local station, and (2) if the CATV system carried the local station, it degraded the signal. He concluded that admittedly the problems discussed in the

report were difficult ones for which no simple solution could be found but that this could be no excuse for failure to act by the Commission; that it was unfair to impose standards of public service on some of those who furnished television service to the public while leaving others similarly engaged free of all such obligations; that the Commission should give immediate attention to the advisability of requiring common carriers serving CATV systems to furnish proof that they had the consent of the stations whose signals they were carrying; that the FCC must have full authority over all elements of the television industry, must have well-defined policies designed to encourage the highest possible character of service for each area, and must act carefully to fit the various services available into their proper places so that they would supplement rather than destroy each other; and that "in essence" what was necessary was that the Commission regulate CATV systems (and similar services) as it does regular stations and satellites to the end that they all perform in the public interest—with such variation in regulations from service to service as may be appropriate. In closing the discussion of the Cox Report, it should be noted that Cox admitted in the report that the Commission was already overburdened and to handle the suggested program might require an expansion of staff and operating expenses, and that the problems considered in the report then affected relatively few communities and could be confined to reasonable limits if the Commission acted promptly and aggressively.

In 1959, shortly after the Cox Report was submitted to the Senate, and by the Senate to the FCC, another drive for congressional action, spearheaded by practically the same small group of local television broadcasters who had previously been vociferous and active against CATV, resulted in extended hearings by the Communications Subcommittee of the Senate Committee on Interstate and Foreign Commerce.[10] Then, again in 1959, a *Report and Order* issued by the FCC made an inquiry to determine the

10. U.S., Congress, Senate, Committee on Interstate and Foreign Commerce, Communications Subcommittee, *Hearings on S. 2653*, 86th Cong., 1st sess., 1959.

economic impact on regular television broadcasting of CATV and other auxiliary services. It reaffirmed its holding in *Frontier Broadcasting* that under the provisions of the Federal Communications Act it had no jurisdiction over CATV systems as common carriers and conceded that it had no power of regulation over CATV. In addition, it recommended that Congress empower the Commission to make it mandatory that CATV systems carry local stations and to require such systems to obtain consent from television broadcasters before carrying their signals.[11] In regard to the common carrier question, at this point it might be noted that some years later the FCC reiterated its position that CATV systems are not common carriers in *Philadelphia Television Broadcasting Co. v. Rollings Broadcasting, Inc.* and was sustained by the United States Court of Appeals.[12]

In 1959, pursuant to the Commission's recommendations, several bills were introduced in Congress. The one which reached the floor of the Senate proposed amendment of the Communications Act of 1934 to give the FCC jurisdiction over CATV systems. The bill would limit FCC jurisdiction to CATV systems within the contours of a single television station and exclude CATV systems from the definitions of common carrier and broadcasting.[13] After debate before the Senate, the bill was defeated.

In 1961, bills proposed by the FCC were introduced in both houses. They, too, would exclude CATV from the definition of broadcasting and common carrier but would provide for discretionary authority by the Commission to adopt rules and regulations, in the public interest, to govern CATV systems in any area covered by both a CATV system and a local television station.[14] No action was ever taken on these bills.

11. U.S., FCC, *Report and Order*, Docket no. 12443, 26 FFC 403, 18 RR 1573 (April 13, 1959).
12. 5 RR 2d 677 (1965), aff'd.; *Philadelphia Television Broadcasting Co. v. FCC*, 359 F. 2d 282 (CADC, 1966).
13. Communications Subcommittee, *Hearings on S. 2653*, 86th Cong., 1st sess., 1959.
14. S. 1044 and H.R. 6840, 87th Cong., 1st sess., 1961.

Carter Mountain v. FCC. Although CATV developed and grew, and the FCC suggested and invited statutory amendments to the Communications Act of 1934, Congress considered but did not adopt any pertinent legislation. In this climate the Commission approached the landmark case of *Carter Mountain Transmission Corp.*, in which a challenge was made to the power of the FCC to refuse to grant permission to a common carrier by radio to construct facilities to be used by CATV systems because of the possible impact on an existing television station. This was the "economic impact" theory being advanced for some time by small, local television broadcasters against CATV.[15]

In this case, Carter Mountain Transmission Corporation, a common carrier by radio, filed an application with the FCC for permission to construct a microwave radio communication system to transmit signals from television stations in several distant cities to CATV systems in a number of relatively small Wyoming towns. The CATV operator in these towns was Western Television Corporation. A protest against the application was filed by a television station in one of these towns. After taking the evidence, the hearing examiner designated by the Commission recommended denial of the protest. The Commission reversed this decision and concluded that granting the application of Carter Mountain would not serve the "public interest, convenience and necessity." Its reasoning was essentially this: to permit Carter Mountain to bring in outside programs for the CATV systems would result in the demise of the protesting local television station and the loss of service to a substantial rural population not served by the CATV systems and to many other persons who did not choose, or were unable, to pay the cost of subscribing to the CATV systems, and that the need for the local outlet outweighed the value of the improved service which Carter Mountain's proposed new facilities would bring to those who subscribed to the CATV systems. The Commission, however, gave Carter Mountain permission to refile

15. *Carter Mountain Transmission Corp.*, 32 FCC 459 (1962).

its application if and when it could show that the CATV systems would carry the signal of the local station and would not duplicate its programming. This did not satisfy Carter Mountain or Western Television, and the case was taken to the Court of Appeals.[16]

The Court of Appeals stated that in determining whether the authorization requested by Carter Mountain would be in the public interest, the Commission was obliged to consider the use to which the facilities and frequencies were to be put and to weigh that use against such other legally relevant factors as the effect on existing local stations. Carter Mountain argued, however, that the Commission had no direct jurisdiction or authority over community antenna systems, and in fact had asked Congress, without success, for such authority. It added that nevertheless the Commission had attempted to regulate Western, the CATV proprietor, without legal authority, when, as noted above, it included in the order denying Carter Mountain's application permission to refile "when a showing can be made that the duplication of programming is adequately avoided and a satisfactory arrangement is arrived at by which the cable system will carry the local . . . service." The Court of Appeals did not agree that this amounted to an attempt to regulate Western's CATV system, even though it might have had an indirect effect on that system. The court added that the Commission was simply considering Carter Mountain's application in its relevant setting, and that the quoted clause conditioned its denial of that application by granting Carter Mountain the opportunity to show that the threatened damage to the local television station would not in fact occur, that is, that Western would not duplicate the local television station's programs and would transmit its signal to Western's subscribers. The Commission deemed adequate protection of the local station to be in the public interest, and instead of denying outright Carter Mountain's application, as it could have done, it accorded Carter Mountain the opportunity to secure the permission it was seeking, if it protected

16. *Carter Mountain Transmission Corp.* v. *FCC*, 321 F. 2d 359 (CADC, 1963).

the public interest. The court accepted this approach as being fully within FCC jurisdiction.

The case has been criticized as being predicated on a paucity of evidence that there would be a substantial adverse economic impact on the local station. The court's succinct comment on the pertinent facts, therefore, seems appropriate:

> If [Carter Mountain's] application were granted, the service which could be offered by the Western systems would be improved, Western could offer subscribers a better picture. It is probable that new subscribers would be attracted and that many, if not most, of the subscribers would view only the stations on the CATV cable. The conclusion is certainly warranted on these facts that the local station would find it increasingly difficult to sell advertising, its best source of income, in the light of the potential shift in listener-viewer reception, and its survival would be seriously jeopardized. [P. 365.]

A prognostication of what might happen under given circumstances is at all times difficult, but where, as here, it becomes necessary, it must be based on all the available pertinent facts and be passed on by an expert. Here the court obviously, and appropriately, depended on the expertise of the FCC, the agency to which Congress delegated authority and supervision in this area, and clearly, from the above quotation, was satisfied that "the conclusion is certainly warranted on these facts."

The significant fact is that the position of the FCC was approved by the Court of Appeals, and the case constitutes one of the important initial steps in the establishment of FCC jurisdiction over CATV.

Economic studies of CATV

In 1964, Congress still had not taken action on the suggestions by the FCC regarding legislation for the regulation of CATV. During July of that year, the Commission engaged Dr. Martin H. Seiden, an economic consultant, "to compile and analyze the important factual data relating to the CATV to make

recommendations which his research showed to be necessary." In early 1965, the Seiden Report was submitted to the Commission, for the stated purpose of assisting the Commission in its comprehensive study of the significant issues of national policy concerning "the proper relationships of the basic broadcast service and the wired CATV services and their integration into a nationwide communications service."[17]

For portions of its content rather than its impact, the Seiden Report warrants consideration in a historical study of CATV. It noted that in 1952, in the *Sixth Report and Order*, mentioned above, the FCC had established a basic plan of station locations and priorities that thereafter guided the industry's growth; that a key principle underlying the plan gave rise to a conflict between consumer demand and Commission policy; that this conflict concerned the Commission's desire to encourage a system of small-town broadcasters while the public wanted to receive all three network signals, which in effect would have required larger regional stations; and that, as a result, CATV and other auxiliary services had been supported by the public to achieve their objectives of more complete program fare.

Seiden added that the FCC was concerned with the competitive effect of CATV on the television broadcasting industry; that its approach had been sound in that it had avoided asserting general jurisdiction over CATV systems, for such broad control would have required involvement in rates, facilities, service, and choice among applicants; and that the Commission should focus on regulating the spectrum space and its efficient use by broadcasters. In this regard, Seiden recommended that CATV systems be required to carry the local station and not be permitted to duplicate its signal.

Seiden stated that there were then 265 television markets in the continental United States, but only 93 had 3 or more stations; of

17. U.S., FCC, *An Economic Analysis of Community Antenna Television Systems and the Television Broadcasting Industry*, prepared by Martin H. Seiden (Washington, D.C.: Government Printing Office, 1965), p. iii. This document is commonly known as the Seiden Report.

the other 172 markets, more than half had only 1 station, and the remainder had 2 stations. Where it had not been possible for an area to receive the three networks off-the-air, the public had usually demanded and accepted alternative means of obtaining this broad choice of television programs; and to the extent the existing and future structure of the broadcasting industry did not completely satisfy consumer demand for as full a choice of programs as was available anywhere, CATV and other alternative methods would continue to grow. With consumer demand for full network service unsatisfied, private capital would be ready to invest in CATV systems, since they could provide the selection of programs generally desired.

Seiden considered the economic impact of CATV on broadcasters through a study of the sources of television income, the advertisers, who may be divided into three classes: network, spot, and local. He concluded that CATV competition for audience at that time had had little direct effect on the selection of broadcasters by network advertisers. From extensive conversations with the leading spot advertisers, he learned that in practice CATV had not yet entered their consideration, because they were not certain of its effect, and, of greater importance, there was almost a complete absence of reliable data related to CATV. Seiden found, however, that local advertisers were definitely aware of the extent of CATV penetration in a television broadcasting market and that they were able to judge the effect, if any, of the fractionalization of the audience by the sales response obtained from the local television advertisements. Although available information indicated that CATV had not had a direct impact on the advertisers' choice of markets and stations, it had had an indirect effect on broadcasters' revenues, according to recent rating studies. After indicating the deficiencies in the procedures on which this conclusion was based, Seiden admitted, "There is too little information regarding the actual number of systems and subscribers in each county to develop reliable parameters" (p. 66).

Seiden treated in detail the report by Professor Franklin Fisher

submitted to the Commission by the National Association of Broadcasters in 1964.[18] Seiden pointed out that the Fisher Report was one of the first attempts at empirical research on the controversy over the economic impact of CATV on broadcasters and therefore warranted special attention. The report was divided into three parts. In the first part Fisher established the value of a television home in terms of gross prime time broadcasting revenue, and the result is an estimate that such a home was worth, in 1963, an average of $27 per year in gross revenue. For broadcasters in one- and two-station markets the average prime time value of a television home was $29 a year. In the second part of his study Fisher attempted the complicated and controversial task of estimating the loss in audience suffered by a broadcaster through the presence of a local CATV. (Seiden conceded, however, that "Here there is little to go by except for the extreme situation" of a monopoly in the field.)[19] In the last phase of his study Fisher combined the dollar value of television homes with the number of television homes estimated as lost to CATV to arrive at an estimate of the dollar value of economic damage to broadcasters.

As the CATV group was quick to point out, the Fisher Report was secured by the National Association of Broadcasters as an obvious counterbalance to the statistics produced by the National Community Television Association and its members, and to their related argument that any general rule previously proposed by the Commission had ignored the plain logic that the public should not be deprived of the opportunity to pay for the television reception service offered by CATV systems and thus be able to select the television signals of their choice unless there was clear proof that the public would be deprived thereby of the services of a local television station which presents a substantial choice of original programs of local interest. The argument concluded that these facts

18. See *Reply Comments of National Association of Broadcasters*, In the Matters of Docket nos. 14895 and 15233 before the FCC, October 26, 1964.
19. Seiden Report, p. 70.

could be ascertained only after a full hearing on a case-by-case basis.[20]

In response to the publication of the Fisher Report, a spokesman for the CATV industry cited the so-called Arkin Report, by Dr. Herbert Arkin, which, in his words, "completely demolished the conclusion of the 'Fisher Report' by stating its lacunae."[21] He added that a few brief extracts would "illustrate the uselessness of the 'Fisher Report.'" Arkin is quoted as follows:

> An analysis of the [Fisher] report discloses that a considerable amount of time, energy and money has been expended demonstrating an obvious truism which, nevertheless, does not of necessity provide support for the final conclusions.
>
> To fully appreciate the nature of the effort, it must be noted, as the report itself emphasizes, that the investigation constitutes an analysis of a situation as of a point in time. Page 12 of [the] Fisher Report observes, "We have, therefore, analyzed a cross section of television stations at one moment of time . . ."
>
> The report demonstrates that if an area has a community antenna system which brings in signals from non-local television stations as well as the local station and if at a given time some of the viewers, with the community antenna system service, are watching some of these non-local transmissions, then not everybody in the area who is viewing is watching the local programs. It is not necessary to use multiple regression analysis to demonstrate this point, it is an obvious fact. . . .
>
> . . . There is no reason to assume that all of these viewers of non-local programs would watch local station programs if the non-local programs were not available. . . .
>
> Further, in some of these instances, conversion to a CATV subscription does not automatically rule out local viewing even when the CATV system does not carry the local station. Some CATV systems supply an antenna switch which makes possible the alternate use of the subscriber's own antenna. In other cases, the subscriber himself installs such a switch.

20. Robert D. L'Heureux, "The History, Nature and Scope of CATV," p. 17. Reprinted (1966) from *TV Communications*, n.d.
21. *Ibid.*, p. 17.

> A check on the CATV systems for which information was available and which were included in the Grade A zone areas of the 172 stations (the "study stations") . . . indicates that only 18 do not carry the local station and of these 18, a total of 5 provided such switches for their subscribers.
>
> Thus, at least some of the CATV subscriber viewers, all of whom were counted as a total loss to the local station, actually are part of the local station potential off-the-air audience even though the CATV system does not carry the local station, while others could or would not be viewers of the local station before or after their CATV subscription or would not change the extent of their local station viewing.
>
> Secondly, it may well be that the inception of a Community Antenna System in a given locality causes an increased interest in television viewing and results in an increase in the number of sets or amount of viewing in the area. This increase in the audience may be more than enough to offset the numbers who reduce local station viewing to view non-local stations, and, indeed, may have resulted in a total increase in the local station audience. Since the study was conducted on a point in time basis, this factor would not be reflected by the analysis.[22]

Arkin's opinion of the Fisher Report, which he felt was based on faulty statistical techniques, was blunt: "The conclusions in the report, about the effect of CATV subscriptions on the financial position of local television stations, are at best of dubious validity and at worst a possible complete misstatement."[23]

The relationship between the Fisher Report, the Arkin Report, and the Seiden Report is interesting. Although Seiden gave extensive consideration to the Fisher Report, he agreed with Arkin that Fisher's technique of varying the audience from which he drew his statistics was perhaps not sufficient to give an accurate picture.[24] Seiden added a further qualification on the Fisher Report:

22. Herbert Arkin, quoted in *ibid.*
23. *Ibid.*
24. Seiden Report, p. 68.

> Advertisers do not buy audience but rather markets. The degree of price rationality on the part of the advertisers implied in Fisher's approach is therefore limited. Stations have not been affected by adverse advertiser decisions attributable to CATV penetration of their markets if only because the advertisers do not know the facts about CATV penetration. There is a problem posed by the CATV bias in rating samples which Fisher does not take into account, but beyond this problem there is no evidence that the market place is sufficiently well informed of CATV's presence or its effects to have acted in the manner implied by the Fisher Report. [Pp. 71–72.]

Thus, it is evident that even Seiden, who generally trusted the Fisher Report, expressed doubt as to its complete validity. After extended analysis of various pertinent factors, Seiden concluded that the underlying cause of the "CATV problem" was the large number of families who could not, without buying expensive equipment, receive the three networks off-the-air. He added that CATV had grown because it tended to close that gap; that, in order to eliminate the existing conflicts between CATV and broadcasters and, in fact, between CATV and the FCC, the FCC should adopt a policy which would focus on the underlying cause—the shortage of three-station markets; and that to effect this policy the FCC must reexamine its table of television assignments and the existing geographical organization of the television broadcasting industry. Finally, Seiden noted that the areas of CATV expansion were the small markets where full network programming was still unavailable, and, in order to cope with this problem, broadcasters should be given expanded coverage areas so that three stations could be superimposed on the same general location. The ultimate conclusion reached by the Seiden Report was that this policy of granting expanded coverage areas would alleviate present and future threats to the survival of small broadcasters then posed by CATV.[25]

Although Seiden submitted his report to the FCC shortly before the release of its important *First Report and Order* of April 22, 1965, the FCC did not follow his major suggestions about expand-

25. *Ibid.*, pp. 89–90.

ing coverage for broadcasters to create larger, regional stations but reaffirmed its intention to foster local broadcasters through small-town stations.[26]

First Report and Order

The purpose of the *First Report and Order* was to determine whether CATVs which relied on microwave service should be required to carry local television signals and to avoid duplicating programs of the local stations. Early in the report, the Commission pointed out that the proceedings out of which the report had come had been pending for about two years and that during this time the nationwide growth of CATV had posed issues going beyond those with which the proceedings were concerned. In response to these broader issues, the Commission in this *First Report and Order* determined as an initial matter that the Communications Act vested in the Commission appropriate rule-making authority over all CATV systems, including those which do not use microwave relay service (the so-called off-the-air systems), and it issued a *Notice of Proposed Rule Making* calling for comments on the jurisdictional issue and proposing rules governing the carriage and nonduplication of local television signals by all such systems.

Notwithstanding such changes in the situation, the Commission expressed the opinion that it was then appropriate to resolve the original questions of carriage and nonduplication by CATVs that rely on microwave service, since they were important, although not the entire problem. Various comments of significance had been received by the Commission from interested persons, including particularly the broadcasters and the CATV group. The Commission deemed such comments of adequate importance to receive detailed consideration.

The broadcasters complained that CATV systems had a substantial adverse impact on local stations, particularly UHF stations

26. U.S., FCC, *First Report and Order*, Docket nos. 14895, 15233, 38 FCC 683, 4 RR 2d 1725 (April 22, 1965).

and stations in small markets, through loss or division of audience and a resulting reduction in revenues. They noted that generally, when a television set was connected with a CATV system, the antenna capable of receiving a local station was disconnected. Thus, if the local station was not carried on the CATV system, it could not be received by subscribers unless the antenna was physically reconnected or a switching device was installed; and usually CATV subscribers would not go to the trouble of obtaining or using a switching device, with the result that CATV subscribers were effectively lost to the local station unless its signal was put on the cable.

The broadcasters also stressed their argument against duplication. A local station that was presented on the cable was less likely to attract its audience when the same programming was duplicated on the CATV by one or more distant signals, and particularly when the same material had been broadcast earlier by distant signals rather than by the local station. The broadcasters also asserted that, even when the CATV carried the local station, subscribers were likely to watch other channels, because the signal was often of lower quality than the distant signals brought in by the CATV.[27]

The broadcasters supported their assertions by reference to, among other sources, the Fisher Report, which concluded that there is a direct correlation between increases in audience size and station revenues, and that an increase in a station's average hourly prime time audience of one television home, will, on the average, increase its annual revenue by approximately $27. In this regard, the FCC observed:

> Using a variety of measures, Dr. Fisher shows that *if his basic projections are correct*, the impact of CATV non-carriage duplication or simple fractionalization of station audience through additional program choices upon the profits of a large number of sta-

27. *Ibid.*, pars. 4–10.

tions can be serious and, in the case of stations already marginal, disastrous.[28]

The principal contention of the CATV interests was that the broadcasters had supplied no proof that CATV had had, or was likely to have, a substantial adverse impact on local television stations, and that this would be an unwarranted assumption on the part of the Commission. The National Community Television Association asserted not only that CATV had not hindered the development of UHF, but that CATV systems had definitely aided UHF stations by carrying their signals and providing a ready audience without the use of UHF converters or all-channel sets. It was likewise asserted that CATV assisted educational television (ETV) by distributing the signals of ETV stations to schools which either could not receive an ETV station off-the-air or could not receive a good signal, and that CATV thus gave schools access to high quality educational material far beyond local means and enabled school systems which might lack the financial resources to establish a local ETV station to obtain ETV at a price they could afford. In addition, NCTA claimed that CATV assisted many local stations by extending their service areas; and it pointed out that, in all its arguments, it did not distinguish between CATV systems which used microwave and those which did not, noting that only a relatively small number received microwave service.[29]

The NCTA also noted the arguments from the Arkin Report that the advent of CATV could stimulate viewing and thus result in increases in the number of television homes and hours of viewing. The audience supposedly "lost" to the local station through noncarriage or competition and duplication might be composed in part of an audience which the station would never have had in the absence of CATV and be compensated by a new audience for the local station resulting from CATV's stimulating effect on viewing generally.

28. *Ibid.*, par. 25 (italics added); see also par. 22.
29. *Ibid.*, pars. 29–34.

Indicating clearly that it had considered the arguments of both sides, the Commission noted that, pursuant to its statutory responsibilities, it must make such decisions within its jurisdiction as would "provide a fair, efficient, and equitable distribution of radio service" among the several states and communities.[30] Toward this end it could not permit the distribution of distant signals through CATV to curtail the viability of existing or potential local service. The Commission explained its position as follows:

> Because of the prohibitive cost of extending the cables beyond heavily built-up areas, CATV systems cannot serve many persons reached by television broadcast signals. Persons unable to obtain CATV service, and those who cannot afford it or who are unwilling to pay, are entirely dependent upon local or nearby stations for their television service. The Commission's statutory obligation is to make television service available, so far as possible, to all people of the United States on a fair, efficient, and equitable basis (Sections 1 and 307 (b) of the Communications Act). This obligation is not met by primary reliance on a service which, technically, cannot be made available to many people and which, practically, will not be available to many others.
>
> Nor would it be compatible with our responsibilities to permit persons willing and able to pay for additional service to obtain it at the expense of those dependent on the growth of television broadcast facilities for an adequate choice of services.[31]

In short, it was the Commission's view in the *First Report and Order* that it must recognize the importance of making it possible for a large number of communities to obtain television assignments of their own, and that as many communities as possible should have the opportunity of enjoying the advantages that derive from having local outlets that will respond to local needs. Further, consistent with the all-channel receiver legislation enacted in 1962, the importance of local outlets and local service must be recog-

30. *Ibid.*, pars. 25–41. The term "radio service" as used in the Communications Act of 1934 includes television service.
31. *Ibid.*, par. 44.

nized, and an expansion of the present system through the creation of new station outlets in the UHF bands should be sought.[32]

The Commission stressed the point that if CATV should eliminate television broadcasting service, the public would lose far more in free service, particularly to outlying areas, and in local service with local control and selection of programs, than it would gain; but it was quick to add that this was not to minimize the very real contribution which CATV service makes to the public interest, that CATV serves the public interest when it acts as a supplement rather than a substitute for off-the-air television service.[33]

The *First Report and Order* continued by noting that the competition between CATV systems and television stations presents two features which contain elements of unfair competition: (1) If the CATV system which carries the signals of distant stations does not also carry the signals of a local station which the subscribers can receive if they do not have cable, the result in most cases will be the effective loss of potential viewers for the local station;[34] and (2) a local station is subject to competition among broadcasters for programming service, whereas a CATV system does not enter the market for programming.[35]

As the Commission pointed out, the CATV systems are not concerned about arrangements for purchasing programs. They are not subject to the prohibition against rebroadcasting programs

32. U.S., 76 *Stat.* 150, 151.
33. FCC, *First Report and Order* (1965), pars. 46–51.
34. As pointed out in *ibid.*, par. 51, the CATV operator may not provide the subscriber with a switch to permit a choice between off-the-air and cable reception, or the antenna for off-the-air reception may be dismantled upon cable installation; or, if a switch is installed, the subscriber will very probably consider its use an inconvenience to the point of disregarding it.
35. Television stations obtain their programs, for the most part, from program suppliers. The principal ones are the national television networks. In addition, material is obtained from distributors of feature films, cartoons, and syndicated and sports programming. The station obtains the right to exhibit network programs by offering to the network attractive audience circulation and a major portion of compensation from the advertising sponsor. The station usually obtains nonnetwork programs by outright payments to nonnetwork program suppliers (FCC, *First Report and Order* [1965], par. 52).

without the express authority of the originating station.[36] They are not involved in the competition for network affiliations, or for syndicated programs, feature films, or sports events. They need not bid against other broadcasters for choice programs or bargain with program suppliers for time and exclusive rights to a territory. They are not concerned with the question whether a program from a distant station may be exhibited in any particular market through their CATV facilities, because the distant station whose signal is carried has no control over the CATV's use of its signal. In brief, the local broadcaster must obtain access to the product in the program distribution market. The CATV operator need not enter this market at all but obtains the same product at no cost.[37]

The *First Report and Order* stated that these considerations about carriage of the local station's signal and duplication of its programming had led the Commission to "certain broad conclusions":

1. The failure by a CATV system to carry the signal of a local station is inconsistent with the FCC belief that CATV service should supplement, but not replace, off-the-air television service. This practice gives the distant stations an unfair advantage over the local stations in competing for the subscribers' attention. It is also destructive of the FCC goals in allocating television channels to different areas and communities.
2. For the reasons given in (1), a CATV system's failure to carry the signal of a local station is inherently contrary to the public interest.
3. A CATV's duplication of local programming via distant signals is unfair competition, since broadcasters and CATV systems do not compete for programming on an equal footing. The FCC therefore recommended "a reasonable measure of exclusivity" to protect both the program suppliers and the stations.

36. 47 *United States Code*, sec. 325.
37. FCC, *First Report and Order* (1965), pars. 51–55.

4. A CATV system's duplication of local programming is also inconsistent with CATV's appropriate role as a supplementary service, because it is likely to affect the audience for the specific programs involved. The FCC therefore favored some restrictions on this ability to duplicate in order to help equalize the conditions under which CATV and broadcasting service competed.[38]

The Commission stated that the foregoing grounds were sufficient to justify regulatory action and that "every station affected is entitled to appropriate carriage and non-duplication benefits—irrespective of the specific damage which any individual CATV system might do to the financial health of the individual station."[39]

Another reason the Commission gave for taking this position was the economic impact of CATV on television broadcast stations. The Commission stressed the fact that the issue was not whether to bar CATV entry into any market or markets, but whether to permit the use of microwave facilities to serve CATVs, while imposing some restrictions on the manner in which the relevant cable systems competed with local television stations. Thus, the Commission, as it pointed out, had to determine not only whether CATV competition might destroy or prevent the establishment of stations, but also whether it might seriously impair the ability of stations to properly serve the needs and interests of their communities. To assist in its determination, the Commission analyzed the facts and figures available to it and pertinent to the question of economic impact and concluded that, with the data at hand, it was impossible "to isolate reliably the effects of CATV competition from all of the other factors which operate to produce particular financial results in differing settings." Considering,

38. *Ibid.*, par. 57. The importance of this material, in the opinion of the Commission, is indicated by the fact that these conclusions are quoted in full in U.S., FCC, *Second Report and Order*, Docket nos. 14895, 15233, 15971, 2 FCC 2d 725, 6 RR 2d 1717 (1966).

39. FCC, *First Report and Order* (1965), pars. 58, 76.

however, the nationwide trends affecting the nature of CATV service offerings, the character of the markets entered, and the degree of penetration, the Commission deemed it plain that "CATV competition can have a substantial negative effect upon station audience and revenues, although we lack the tools with which to measure precisely the degree of such impact." The Commission also predicted that the competitive impact of CATV "will be more serious in the future than it has been in the past"; and, in addition, the Commission expressed fear of the effect by CATV on the development of potential new television stations which must operate in the UHF bands.[40] It is interesting to note that the Commission's ultimate position in this area was predicated less on past experience than on the indicated trends, which, in its opinion, suggested that action was necessary at that time to protect the public interest in the future.[41]

The *First Report and Order* concluded that "rule making action is amply justified" for the following reasons:

1. Requirements of carriage and reasonable nonduplication are appropriate to create reasonably fair conditions for competition between CATV and broadcasting stations.
2. The adoption of rules imposing minimum carriage and nonduplication requirements would relieve the damaging impact of CATV on existing and potential local stations. In answer to the argument that no serious elimination of existing stations had yet taken place, the Commission noted that deferring action until there was a serious loss of existing and potential service would be clearly contrary to the public interest.
3. Rule-making action is far more effective to solve the problem than individual adjudicatory proceedings. Such proce-

40. *Ibid.*, pars. 58–75, esp. 68, 69, 71. In support of the statement in the text, the *First Report and Order* pointed out (par. 69) that the typical national advertiser, whether network or non-network, was then barely aware of the effect of CATV on station audiences or its role in making the programs broadcast in one market available in others.

41. FCC, *Second Report and Order* (1966), par. 28.

dure, which establishes "minimum across-the-board requirements," informs in advance all interested parties, including CATV operators, broadcasters, program suppliers, and advertisers, what the basic governing conditions will be. All parties can thus plan their activities with full knowledge of the requirements of permissible operation.

4. Reasonable carriage and nonduplication requirements should impose no substantial burden on CATV operators. The NCTA argument that no rule is necessary since in most cases cable systems already carry the signals of local stations on a voluntary basis suggests that a rule recognizing their apparently acceptable practice can hardly warrant reasonable objection. As to nonduplication, NCTA concedes that a requirement of simultaneous nonduplication would injure very few CATV systems. It argues against nonsimultaneous duplication but this simply "goes to the form of the specific rules adopted."[42]

In the *First Report and Order* the Commission adopted rules which in substance provided: (1) within the limits of its channel capacity, any CATV system receiving microwave service shall carry the signals of operating or subsequently authorized and operating television broadcast stations within the designated order of priority, upon the request of the licensee or permittee of the relevant station; and (2) where a television broadcasting station is entitled to exclusivity from a CATV system (the exclusivity right resulting from their geographical relationship as set forth in the rules), the CATV system shall, on the request of the station licensee or permittee, refrain from duplicating any program broadcast by such station, simultaneously or within a period of fifteen days prior or subsequent to its broadcast by the station.[43]

Finally, in regard to the *First Report and Order*, it should be noted that opponents of the rules asserted, prior to their adoption,

42. FCC, *First Report and Order* (1965), pars. 76–80.
43. *Ibid.*, secs. 21.710, 21.712 of *Rules of Federal Communications Commission*, as amended.

that, if applied to common carrier stations serving CATVs, the rules would exceed the Commission's statutory authority. The Commission responded to these charges by pointing out that the arguments were substantially the same as those rejected in the *Carter Mountain* case.[44]

On April 23, 1965, the day after the adoption of its *First Report and Order*, the FCC issued a *Notice of Inquiry and Notice of Proposed Rule Making*, which divided the proceeding into two parts.[45] Part I concluded that the Commission has jurisdiction over all CATV systems, whether employing microwave facilities or not, and proposed to extend to CATV systems not served by microwave the substantive provisions of the rules on carriage and nonduplication which had been adopted for CATVs served by microwave. Part II initiated an inquiry toward possible rule-making on questions stemming from the trend of CATV development, including the effect of CATV entry into major cities on UHF independent stations.

Second Report and Order

Predicated on its *Notice of Inquiry and Notice of Proposed Rule Making*, the Commission on March 8, 1966, issued its *Second Report and Order*, which followed the format of the *Notice* and was also divided into two parts. Part I dealt with what has been termed the traditional or historical role of CATV as a supplement to the broadcast service, and Part II dealt with the new, revolutionary approach of CATV, that is, its attempt to gain access to the major markets, and the possible impact of such CATV expansion, particularly on UHF.

In Part I the Commission recognized that its proposal to the effect that the substantive provisions of the carriage and nondupli-

44. *Ibid.*, par. 7, n. 5. See also the Commission's memorandum on jurisdiction appended to U.S., FCC, *Notice of Inquiry and Notice of Proposed Rule Making*. (see n. 45 below). This memorandum is also attached as App. C to FCC, *Second Report and Order* (1966).
45. FCC, *Notice of Inquiry and Notice of Proposed Rule Making*, Docket no. 15971, 1 FCC 2d 453, 4 RR 2d 1679 (1965).

cation rules controlling microwave CATV systems be extended to all CATV systems presented two important issues: (1) whether the Commission possessed adequate statutory authority; and (2) whether any special problems, particularly of substance, are created by rules relating to nonmicrowave systems, which require special treatment.

At the outset, the Commission was faced with the primary question whether it had jurisdiction over nonmicrowave CATV systems under the existing provisions of the Communications Act and whether jurisdiction should be exercised without specific legislation on the jurisdictional factor by Congress. The *Second Report and Order* pointed out that although the Commission would welcome congressional "clarification of our authority which would lay the troublesome jurisdictional question at rest," the case for jurisdiction was adequately strong to warrant present action by the Commission in the important areas under consideration.[46]

The "Commission's Memorandum on its Jurisdiction and Authority," attached to the *Second Report and Order*, gave the basic argument in favor of jurisdiction: Section 1 of the Communications Act states that the purpose of the Act is "regulating interstate and foreign commerce in communication by wire and radio" and to secure "a more effective execution of this policy" authority over such commerce is given to the FCC. Section 2 adds that the provisions of the Act "shall apply to all interstate and foreign communication by wire or radio, . . . and to all persons engaged within the United States in such communication." Section 3 of the Communications Act defines "communication by wire" as the "transmission of . . . 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." "Communication by radio" is defined as "the transmission by radio of . . . pictures, and sounds of all kinds,

46. Par. 5

including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission."[47]

The literal language of these definitions seems to establish conclusively that CATV systems are engaged in interstate communications by wire or radio. Since they transmit "pictures, and sounds . . . by aid of wire" and are "instrumentalities . . . (used for) . . . the receipt, forwarding, and delivery of communications . . . incidental to such transmission," their activities clearly fall within the definition of "communication by wire" or "wire communication" of said section 3 of the Communications Act. Further, CATV systems constitute *interstate* communication by wire, forming, as the Commission's memorandum notes, "a connecting link in the chain of communication between the point of origin (the transmitting station) and reception by the viewing public (the CATV subscriber)—a chain which 'is now well established . . . as interstate communication.' *Capital City Telephone Co.*, 3 FCC 189, 193 (citing *Federal Radio Commission* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266)."[48]

The law is also clear, according to the Commission's memorandum, that the mere location of facilities of communication wholly within one state does not render the communication service supplied over such facilities as an *intrastate* service; and that a communication service can be interstate in nature and thus subject to FCC jurisdiction although all of its tangible facilities are located within one state. Any reasonable analysis of the pertinent facts in the light of the Communications Act establishes that CATV systems are extensions of the interstate service of the television broadcast stations whose signals they carry, and, consequently, they constitute "interstate . . . communication by wire," to which the provisions of the Act are applicable.[49]

The CATV group, for obvious reasons, vigorously opposed any

47. 47 *United States Code*, secs. 151–53.
48. FCC, *Second Report and Order* (1966), App. C
49. 47 *United States Code*, sec. 152(a).

assumption of jurisdiction by the FCC in this area; and the argument most vehemently pressed against jurisdiction was that the Commission was "estopped" or precluded from assuming jurisdiction at that time by reason of its prior disclaimers of jurisdiction over CATV systems and congressional acquiescence in those disclaimers. The opposition cited the principle of statutory construction to the effect that a consistent, long-standing administrative interpretation is entitled to great weight, especially where Congress is aware of the administrative position and thereafter amends the statute without modifying the applicable section. In response, the Commission's memorandum noted that in areas close to the claimed basis for jurisdiction, the precedents do not disclose a consistent, contrary position, and, in fact, reflect a "switch." For example, although the FCC initially disclaimed jurisdiction to deny a common carrier microwave authorization to relay television signals to CATV systems, this disclaimer was later reversed in the *Carter Mountain* decision, which was sustained by the United States Court of Appeals on review.[50]

Of even greater significance in the opinion of the Commission was the point that, regardless of any actual or apparent inconsistencies in its prior rulings in this troublesome field, it is not estopped from correcting a ruling on the law which appears to be clearly erroneous, as in the *Carter Mountain* case. Also, as the Supreme Court noted in sustaining the Federal Power Commission's authority over gas leases for resale in interstate commerce despite past disclaimers of jurisdiction, "even consistent error is still error."[51]

After careful consideration of all the arguments, the Commission concluded

> that the case for present jurisdiction is a strong one . . . and . . . that CATV systems are engaged in interstate communication by

50. *Intermountain Microwave*, 24 FCC 54 (1958); *CATV and TV Repeater Services*, 26 FCC 403 (1959). *Carter Mountain Transmission Corp.*, 321 FCC 459, aff'd. 321 F. 2d 359 (CADC, 1963), cert. denied 375 U.S. 951 (1963).
51. *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 678 (1953), n. 5.

> wire to which the provisions of the Communications Act are applicable . . . and that our statutory powers . . . include authority to promulgate necessary and reasonable regulations to carry out the provisions of . . . the [Communications] Act and to prevent frustration of the regulatory scheme by CATV operations, whether or not microwave facilities are used. The rules proposed . . . are within our legal authority.[52]

The Commission, in the *Second Report and Order*, then considered the crucial question of whether jurisdiction over nonmicrowave CATV should be exercised at that time. It pointed out that, although the congressional guidance and clarification which it had invited had not been forthcoming, the element of public interest which had afforded a sufficient standard for the decision in the *First Report and Order* to adopt the carriage and nonduplication requirements for microwave-served CATV systems, applied equally to give a sufficient standard for adopting substantially similar rules for nonmicrowave CATV systems. The Commission noted, "This is necessary in the public interest to avoid unreasonable competitive disadvantage and prejudicial effect on existing and potential television broadcast service."[53]

Most of the comments submitted to the FCC prior to the publication of its *Second Report and Order* agreed that, prescinding from the jurisdictional basis, there is no significant difference between microwave and nonmicrowave systems. NCTA asserted, however, as it had at the time of the *First Report and Order*, that adverse impact of CATV on local broadcasters had not been adequately established to warrant restrictions on CATV operations, and particularly that regulatory action should not be taken in the absence of a showing that stations have ceased operations or are about to cease operations. Conceding that it was impossible with the data at hand to isolate reliably the effects of CATV competition on television broadcasters, the Commission stressed, as it had in the *First Report and Order*, that its judgment was based more

52. FCC, *Second Report and Order* (1966), par. 19.
53. *Ibid.*, par. 21.

on evident trends than on past results, and that it would definitely be inconsistent with the public interest to delay action until there was a serious loss or impairment of existing and potential service.

The *Second Report and Order* in very definitive manner asserted that, in view of the rapid surge in CATV growth since the proceeding was instituted (April 23, 1965), its statutory obligations required it to act in the areas proposed and to end the then unwarranted distinction between microwave and nonmicrowave systems. The Commission stated that its goal was "to integrate the CATV service into the national television structure in such a way as to promote maximum television service to all people of the United States." Toward that end the Commission expressed the opinion that adoption of the proposed rules constituted "the minimum measures it believes to be essential to insure that CATV continues to perform its valuable supplementary role without unduly damaging or impeding the growth of television broadcast service."[54] To insure effective integration of CATV within a fully developed television service, all CATV systems, both those which require microwave licenses and those which receive their signals off-the-air, were made subject to the new rules, which the Commission summarized as follows:

> Under the new rules, a CATV system will be required, upon request and within the limits of its channel capacity, to carry without material degradation the signals of all local television stations within whose Grade B contours the CATV system is located, in order of priority of signal grade. A CATV system will be required, upon request, to avoid duplication of the programs of local television stations carried on the system during the same day that such programs are broadcast by the local stations. This non-duplication protection, as under the existing rules, will apply to "prime time" network programs (i.e., presented by the network between 6 and 11 P.M., Eastern Time) only if such programs are presented by the local station entirely within what is locally considered to be "prime time". Non-duplication protection will not be afforded to programs which

54. Par. 47.

> are carried in black and white by the local station and are available in color from a more distant station on the CATV system.[55]

The Commission pointed out that although the carriage requirements made applicable to all CATV systems would be substantially the same as those previously applied to microwave-served systems by the *First Report and Order*, the new nonduplication rules embodied two substantial changes from those adopted in the *First Report and Order:* (1) the period of time for the new nonduplication requirement was reduced from 15 days before and after local broadcast to the single day of the local broadcast; and (2) a new exemption from the nonduplication requirement was added with regard to color programs not carried in color by local stations.

As noted above, the *Second Report and Order* applied to all CATV systems substantially the same carriage requirements as were adopted for microwave-served systems in the *First Report and Order*. Thus, within its channel capacity limits, a CATV system must carry the signals of all commercial and educational television stations "within whose Grade B contour the system is located, giving priority: first, to principal community signals; second, to Grade A signals; and third, to Grade B signals."[56]

Further, where it is required that a signal be carried, the signal must be carried without material degradation in quality and must be carried in full except to the extent that nonduplication of higher priority signals may be required under the rules.

Nonduplication, an element of protection for local television broadcasters, is definitely required in the public interest at the same time that a local broadcast is being carried on the cable. It

55. Par. 49.

56. Par. 66. The three grades of predicted contours required by the FCC are: (1) Principal City Service: satisfactory service expected at least 90 per cent of the time for at least 90 per cent of the receiving locations; (2) Grade A Service: satisfactory service expected at least 90 per cent of the time for at least 70 per cent of the receiving locations; (3) Grade B Service: satisfactory service expected at least 90 per cent of the time for at least 50 per cent of the receiving locations.

will be recalled that in the *First Report and Order* it was determined that some degree of protection beyond simultaneous nonduplication was required in the public interest, and that a fifteen-day before-and-after period was appropriate. In the *Second Report and Order*, however, the Commission reconsidered the time element in regard to nonduplication because the rules would thereafter be applied to a much larger number of existing systems and would affect their existing service to the CATV subscribing public. Under all of the circumstances, it was deemed better to eliminate the fifteen-day before-and-after nonduplication requirement, and instead, to provide by rule, as noted above, for same-day nonduplication for all systems, whether microwave-served or off-the-air. In support of this change, these points, among others, were made: (1) same-day nonduplication is clearly sufficient to provide against the time zone differential problem; and (2) it will afford the station affiliated with more than one network some leeway in presenting the most attractive programs of each for the benefit of the non-CATV audience.

Further in regard to nonduplication, certain provisions adopted by the *First Report and Order* were retained by the *Second Report and Order:* (1) the provision requiring the local station to present prime-time network programming entirely within prime-time hours in order to be entitled to nonduplication;[57] and (2) the provision that the CATV will not be required to delete any program for which time of reception is of unique importance, such as a significant speech or a well-recognized sports event, except where the program is being simultaneously broadcast by the local station.[58]

Color duplication received interesting treatment. In the *First Report and Order*, the Commission decided that the public interest would best be served by some provision which would permit a CATV system to duplicate the programs of a local station in color where the local station transmits only in black and white, but only after a "threshold" showing that a prescribed percentage of its

57. Prime time is between 6:00 and 11:00 P.M., Eastern Time.
58. FCC, *Second Report and Order* (1966), pars. 51–57.

subscribers possess color receiving sets. Interestingly, most of the comments, from broadcasters as well as from CATV interests, favored permitting color duplication across the board, without any threshold showing by the CATV system. Accordingly, the Commission determined to permit color duplication of local black-and-white transmissions without requiring any preliminary showing by the CATV system. The specific reason given in the *Second Report and Order*, in addition to the favorable comments, was that this move encourages the wider distribution of color programming, which is consistent with the supplementary role of CATV, and any local station deeming itself at a disadvantage can install equipment for the transmission of network color programs at relatively little expense.[59]

The treatment of educational television in the *Second Report and Order* warrants special consideration. The rules previously in effect required the carriage of noncommercial ETV stations but did not proscribe duplication of their programs by CATV systems.[60] Comments on the subject, other than from educational interests, opposed nonduplication protection for ETV, on the grounds that in the public interest educational material should have the widest possible dissemination. On the other hand, the educational television associations vigorously insisted that local ETV stations, though in a different financial category than commercial stations, have an even greater need for nonduplication and interim protection because the entry of distant ETV programs through the medium of CATV undermines local interest and local financial support, which are essential to the existence of the noncommercial ETV. The ETV groups also pointed out, as a fact of business life, that if CATV imports outside educational programs, local businesses and local residents will lack incentive to support the local ETV station, because obviously they will feel that pay-

59. *Ibid.*, pars. 59–61.
60. FCC, *First Report and Order* (1965). This approach was employed because those proceedings were concerned essentially with commercial stations and much of the material discussed in the *First Report and Order* appeared to be inapplicable to ETV.

ment is being duplicated: once by subscription for CATV, and again by contribution to the local ETV station.[61]

The Commission rejected the argument that the public interest is served by the widest dissemination of educational material and accepted the contention of the ETV organizations that the possibility of adverse effect from unfettered competition brought in by CATV is sufficiently strong to warrant some special protection for ETV. The ETV groups contended, however, that something more than the same-day rule was required but could not agree on a longer period. The Commission determined to amend the exclusivity provisions to encompass ETV stations, applying all of the pertinent rules, including the same-day rule, equally to all stations.

An annoying problem raised by the ETV interests was the possibility that CATV, by carrying distant educational signals into communities where educational assignments had been reserved but not yet activated, would draw off enough local support to prevent the establishment of an educational station in the community. Recognition of the fact that some time may elapse before local educational stations can be developed has led to the policy of reserving channels for such anticipated stations. Further, although CATV supplies an effective service by bringing ETV to smaller communities where it is not yet locally available, this practice should not preclude the later establishment of a local ETV service. The Commission therefore determined that a CATV system proposing to bring in an ETV signal from outside the area must give notice of its intent to do so to the local superintendent of schools and to the state and local ETV agencies, if any, at least thirty days prior to commencing service. Where a local ETV station is in reasonable prospect, the Commission, on objection from the local school authorities, normally would disapprove importation of the outside ETV signal in the absence of a showing that this would not be detrimental to the initial establishment or subsequent maintenance of a local ETV station.[62]

61. FCC, *Second Report and Order* (1966), pars. 87–88.
62. *Ibid.*, App. D, amendment to sec. 74.1105.

At the beginning of Part II of the *Second Report and Order* the Commission noted that it was at a watershed in the development of UHF broadcasting; that UHF had generally suffered a very serious setback in the 1950s and limped along until passage of the legislation in 1962 which required that new television sets imported or shipped in interstate commerce for sale must be equipped to receive all stations, including UHF;[63] and that in enacting this legislation, Congress determined that development of UHF "is not only the best but the only practicable way of achieving an adequate commercial and education system in the United States." The Commission stated that such a system would "permit all communities of appreciable size to have at least one television station as an outlet for local self-expression," provide "at least three competitive facilities in all medium-sized communities," and make provision "for at least four commercial stations in all large centers of population"; and that this fourth station might make possible a fourth national network or the formation of "FM-type networks" in television and also would be "valuable particularly for local programming and self-expression," which is an important need in many markets "because all of the available stations are network affiliates." Clearly, Congress and the American public have staked a great deal on the development of UHF.

The Commission expressed the opinion that the all-channel set requirement was having the desired effect of causing greatly increased interest in UHF. For example, from 1962 through 1965, UHF commercial stations increased from eighty-five to one hundred and the number of pending applications increased from nineteen to eighty. In fact, there were indications of a possible fourth network involving UHF as well as VHF stations in some major markets. With this increase in interest in UHF, the Commission expected the next few years to furnish the answer to whether the congressional goal of a truly nationwide television system of both UHF and VHF would be achieved.[64]

63. 47 *United States Code*, sec. 303(S).
64. FCC, *Second Report and Order* (1966), pars. 114–15.

The *Second Report and Order* then discussed the CATV trend, observing that it was even more pronounced than the UHF trend, and categorized it as "explosive" with every indication of continuing its phenomenal spurt. The supporting statistical data are rather startling. From 1959 to 1965, the time of the *First Report*, the number of CATV systems increased from 550 to 1,300 and when the *Second Report* was issued, one year later, the number had jumped to 1,565; in addition, 1,026 CATV franchises had recently been granted but were not yet operating, and the pending applications for franchises totaled 1,958. Further figures show that in 1959 the average CATV system provided three signals to its subscribers; in 1965 the majority supplied five or more; in 1966 at the time of the *Second Report* the average system had twelve-channel capacity; and at that time twenty-channel systems were in prospect. The centers of the most intense CATV development changed from the small markets to large cities, such as New York, Philadelphia, and Cleveland; and the CATV entrepreneurs believed they could attain financial success in the large cities because they could assure better reception, particularly in color, and could deliver the programming of important independents.

The *Second Report and Order* expressed serious concern about the parallel trends of UHF and CATV toward the larger markets and how these trends might mesh in future years. The NCTA, relying substantially on the Seiden Report, contended that in a large community CATV can have little effect on the healthy existence of UHF stations.[65] Knowledgeable and important people in the CATV field, however, disagree with the Seiden Report, and they have predicted that within the foreseeable future almost all

65. The Seiden Report states: "It is noted that applications for franchise have been made in Albany, Syracuse, Galveston, Philadelphia, and Cleveland. The author is not clear as to what these CATV promoters will offer that makes them think they can gain substantial numbers of subscribers in such areas. Signals of other network affiliates are to be brought in but they essentially duplicate present signals in these areas. The signals of independent stations are also to be brought in and while these do provide alternative programming, is this enough to support CATV?" (p. 80).

American cities will be wired for television and that by the middle of the 1970s approximately 85 per cent of all television sets in the United States will be receiving their programs by cable rather than over the air.[66]

The Commission refused to accept either the contention of the NCTA or the contrary position but stated that with the facts then before it, it could not give a definitive answer about the future growth of CATV, including its penetration in the major markets and its impact on UHF development in these markets. If the CATV systems can acquire very substantial numbers of subscribers in the large markets (50 per cent or more of each market) the UHF stations might be faced with an almost insurmountable hurdle. As the *Second Report* noted, the audience for non-network stations was limited to about 10 per cent of the market, but CATV would bring to this limited audience the choice non-network programming of the top distant independents. Thus, any gain in better reception of the UHF signals through carriage on CATV would probably be counterbalanced by the fragmentation of the limited audience for independent programming. In the opinion of the Commission, these factors posed "a grave danger to UHF broadcasting";[67] and ignoring the problem would be inconsistent with the public interest, because: (1) CATV did not serve the rural areas nor had it demonstrated that it could do so; (2) CATV requires payment for its television service and so must be deemed a form of pay-TV; and most important of all (3) CATV does not serve as an outlet for local self-expression. The Commission then succinctly stated its position on the economic impact of CATV on UHF as follows:

> To summarize, we have reached no final conclusion in this area—i.e., the effect of CATV development in the major market of UHF broadcasting. But we have concluded that there is a substan-

66. Morris J. Gelman, "Will Wire Take Over?", *Television Magazine*, XXII (December, 1965), 30.

67. FCC, *Second Report and Order* (1966), par. 123; also pars. 116–22.

> tial problem of great significance to the public interest, which must be thoroughly explored. A critical consideration would appear to be the question of CATV's growth in the major market, since (i) if that growth is of a high order, its impact on UHF development may be most serious; and (ii) based on present considerations, the latter consequence will not serve "the public interest in the larger and more effective use of radio." In view of these conclusions, we think that our course of action is clear. We must thoroughly examine the question of CATV entry into the major markets, and authorize such entry only upon a hearing record giving reasonable assurance that the consequences of such entry will not thwart the achievement of the Congressional goals. We cannot sit back and let CATV move signals about as it wishes, and then if the answer some years from now is that CATV can and does undermine the development of UHF, simply say, "Oh well, so sorry that we didn't look into the matter."[68]

The *Second Report* then considered the matter of fair competition between CATV and UHF.[69] It pointed out, as a major item, that CATV systems were not subject to the proscription against "any broadcasting station" rebroadcasting "the programs or any part thereof of another broadcasting station without the express authority of the originating stations."[70] Nor, as stressed in the *First Report*, did CATV systems have to compete for network affiliation, access to syndicated programs, feature films, or sports events.[71] The Commission observed that the objective of both the UHF broadcasters and the CATV industry was the same: to provide access to non-network programs to as large a segment of the public as possible in the major markets. Under these circumstances, the competitive situation seemed most unfair, since the parties operated under entirely different sets of basic rules. The answer that the CATV system was simply a master television antenna and so deserved exclusion from the rules of the business,

68. *Ibid.*, par. 126.
69. *Ibid.*, pars. 131–38. This problem was also treated in FCC, *First Report and Order* (1965), pars. 52–57.
70. 47 *United States Code*, sec. 325(a).
71. FCC, *First Report and Order* (1965), pars. 54–55.

failed to withstand analysis.[72] In any event, it was difficult to appreciate why a distant signal should be freely available to broadcast stations in the area. On this point also, the Commission stated its position:

> Here again we have reached no final determination but rather have concluded that this is a question warranting thorough exploration in the hearing process. It may be that whatever the disparate conditions for operation, there is no need for concern because the CATV will not significantly affect the development or healthy maintenance of UHF television broadcast service. But as stated we cannot make that determination on the record now before us. It follows that on this ground also, there is need for a procedure pegged to full exploration of the issue in the context of an evidentiary hearing.[73]

The Commission then turned to the "major market" restriction which it was adopting and its reason for the major market rule. It acknowledged the contribution in the public interest of CATV to broadcasting, even in the major market, where there might have been no shortage of service but where CATV could increase viewing opportunities and furnish better reception. It warned, however, that these public interest contributions by CATV should not be accepted at the expense of UHF operations. The Commission stated that in this area also it had made no definitive conclusion:

> We have reached no determination on this critical matter. Rather, we have decided that a serious question is presented whether CATV operations in the major markets may be of such nature or signifi-

72. The support for this statement in FCC, *Second Report and Order* (1966), par. 137, seems so persuasive it deserves quotation: "A CATV system which proposes to employ microwave to bring in signals 400 or 500 miles away is not a master TV antenna service. It cannot seriously be argued that CATV proposals to bring the New York independents to Dallas–Ft. Worth represent master TV antenna arrangements. Nor, whatever its validity in many instances, can the argument appropriately be made when a very tall antenna is employed on a high elevation, with many miles of cable and electronic gear to distribute the distant signals."
73. *Ibid.*, par. 138.

> cance as to have an adverse economic impact upon the establishment or maintenance of UHF stations or to require these stations to face substantial competition of a patently unfair nature.[74]

Consequently, relating to the major market problem, the Commission adopted a procedure under which a television broadcast station's signal may not be extended beyond its Grade B contour into the top one hundred markets by a CATV operating in such market, unless evidence adduced at an administrative hearing shows that such operation would be in the public interest and consistent with the establishment and sound maintenance of UHF television broadcast service.[75] Its reasons for selecting the top one hundred markets for special attention were twofold: (1) In these markets UHF stations or wire pay-TV based on CATV operations are most likely to develop; and (2) about 90 per cent of the television homes in this country are located in the top one hundred markets.

The *Second Report and Order* pointed out that the Commission's categorization of markets was essentially a division between CATV in its traditional sense and the new, revolutionary approach of CATV as it was seeking substantial entry into the major markets. Obviously, in the opinion of the Commission, "it is the latter which peculiarly requires the most thorough examination in the context of an evidentiary hearing."[76]

Consistent with the text of its *Second Report and Order*, the Commission adopted rules effecting amendments in several respects. For Part I, it provided that its nonduplication and compulsory carriage rules (as modified), which were previously applicable only to CATV systems served by microwave, should be extended to all CATV systems, whether or not they employed

74. *Ibid.*, par. 139.
75. The ranking is determined by the American Research Bureau on the basis of net weekly circulation of the largest station in the market.
76. FCC, *Second Report and Order* (1966), par. 145; see also pars. 139, 141, 144.

microwave in their operation.[77] For Part II, provisions were adopted to the effect that no CATV system operating within the Grade A contour of a television broadcast station in the one hundred largest television markets would be permitted to extend the signal of a television broadcast station beyond the Grade B contour of that station, except on a showing, in an evidentiary hearing, that such operation would be consistent with "the establishment and healthy maintenance of television broadcast service in the area," the obvious reference being to UHF stations as the ones to be protected.[78]

In closing its *Second Report and Order*, the Commission addressed to the Congress legislative proposals which it deemed desirable in four areas, as follows:

1. The Commission requested congressional guidance on the formulation of policy on new and important questions and on the clarification of its authority in all respects in the field.
2. The Commission sought prohibition on restriction on program origination by CATV systems on the grounds that a hybrid CATV–pay-TV operation would be inequitable in that it would use the broadcast industry's product as a basis for wire pay-TV operation which could adversely affect or even supplant that industry, and it would be inconsistent with the public interest, since the public would receive for a fee what it now receives without charge.
3. Congress should consider the application to CATV systems of the statutory provision prohibiting broadcasting stations from rebroadcasting the program of another broadcasting station without the express authority of the originating station.
4. Congress should give consideration to the appropriate relationship of federal to state-local jurisdiction in the CATV

77. U.S., FCC, *Rules and Regulations*, 47 CFR [Code of Federal Regulations], secs. 21.710, 21.712, 74.1033, 74.1103, 91.559.
78. *Ibid.*, sec. 74.1107.

field, with particular reference to initial franchising, rate regulation, and extension of service.[79]

Consistent with portions of these FCC recommendations, a bill to amend the Communications Act of 1934 was submitted and favorably reported to the House in June, 1966, by the House Committee on Interstate and Foreign Commerce. Among other things, the bill provided that (1) the FCC may, by rules and orders, control the operation of CATV systems; (2) no CATV system may transmit any program other than that which it receives off-the-air from a broadcast station (thus precluding originations), except where, in the opinion of the Commission, such transmission would serve the public interest; and (3) nothing in the Communications Act shall preempt state legislation in regulation of CATV systems except to the extent of direct conflict with the provisions of the Communications Act or regulations under it adopted by the Commission.[80] Congress adjourned without taking action on the bill.

79. FCC, *Second Report and Order* (1966), par. 153.
80. H.R. Report no. 1635, 89th Cong., 2d sess., 1965, to accompany H.R. 13286.

8

Significant federal litigation

A series of cases—two decided by the Supreme Court and two by the FCC, in 1968—contain opinions and involve decisions extremely important to the CATV industry.

United States v. *Southwestern Cable*

The first of these is *United States* v. *Southwestern Cable Co.*, decided on June 10, 1968. It is interesting to note that in substantial part the opinion amounts to a summary of some of the most significant pronouncements of the FCC, and that the Court lent its approval to practically all of these pronouncements.

The case stems from an FCC proceeding initiated by requests of Midwest Television for relief against various respondents under 74.1107 of the FCC rules for the regulation of CATV systems.[1] The Midwest petition charged that its San Diego television station was adversely affected by the transmission into the San Diego area, by respondents' CATV systems, of signals of Los Angeles stations. In its complaint Midwest stated that the San Diego audience had been fragmented by the importation of Los Angeles programs, that the advertising revenues of local stations would be reduced, and that, as a consequence, the operation by local television stations in San Diego would be curtailed or terminated. In

1. 47 CFR.

addition, Midwest asserted that the fragmentation of the local audience was increased by the fact that the signals of the local San Diego stations carried by respondents' systems were materially degraded in quality. Midwest requested the Commission to limit respondents' systems in the carriage of the Los Angeles signals. Pending full hearing on the merits of Midwest's complaint, the Commission entered an order restricting respondents against expanding their service in areas wherein they had not operated on February 15, 1966.[2]

On review, the Court of Appeals held that the Commission lacked authority to issue such an order under the Communications Act of 1934.[3] The Supreme Court accepted the case because it presented an "important question of regulatory authority" and reversed the Court of Appeals.

Examining the background of CATV, the Supreme Court noted that normally programming is not produced by CATV systems, nor are broadcasters recompensed by them for the programs which are received and distributed by cable, and that CATV systems, unlike television broadcasters, charge their subscribers installation and periodic service fees. Quoting statistics, the opinion stated that "CATV growth is clearly explosive in nature." It added that CATV performs either or both of two functions: It provides good reception of local stations in situations where satisfactory reception would not otherwise be possible; and it transmits to its subscribers programs of distant stations which local antennas could not under any circumstances receive. The Court pointed out that, with the expansion and development of CATV systems, their major function had more frequently become the importation of distant signals and that they gave promise to furnish a national communications network in which signals from "selected broad-

2. Under 47 CFR, sec. 74.1107(d) of the Commission's rules and regulations grandfather rights accrued as of February 15, 1966. ("Grandfather" rights are created by provisions in regulatory statutes or rules that extend certain rights or prerogatives to persons theretofore established in the professions, occupations, or businesses regulated.)

3. *Southwestern Cable Co.* v. *United States*, 378 F. 2d 118 (CA 9, 1967).

casting centers would be transmitted to metropolitan areas throughout the country" (392 U.S. 157, at p. 164).

Outlining the steps which the FCC had taken in regard to CATV regulation, the opinion noted that although the Commission had found CATV to be "related to interstate transmission," it had determined that CATV systems were beyond its regulatory area because they were neither common carriers nor broadcasters, who constitute the principal groups covered by the Communications Act. The opinion also noted the Commission's declarations that it had not received authority over "any and all enterprises which happen to be connected with one of the many aspects of communications"; and that it would seek appropriate legislation "to clarify the situation." Although amendatory legislation could not be obtained from Congress, the FCC gradually assumed jurisdiction over CATV: (1) In the *Carter Mountain* case it restricted common carrier microwave facilities that serve CATV systems; (2) with its *First Report and Order* it adopted the rule requiring carriage by CATV systems of the signal of any station into whose service areas they brought competing signals, and the further rule proscribing duplication of the local station's programming for a period of fifteen days before and after the local broadcast, these rules being, however, explicitly restricted to systems served by microwave; and (3) in its *Second Report and Order*, it held that the Communications Act conferred on it regulatory authority over all CATV systems, whether or not served by microwave. It adopted revised rules making the provisions for carriage of local signals and nonduplication of local programming applicable to all CATV systems and forbidding the importation by CATV of distant signals into the one hundred largest television markets (except if such service was offered on February 15, 1966), unless it would be consistent with the public interest, particularly the welfare of local television broadcasting. Shortly after the Commission adopted the *Second Report and Order* (March 8, 1966), Midwest initiated these proceedings.

The principal issue in the case was whether the FCC had author-

ity under the Communications Act to regulate CATV systems. From President Roosevelt's message to Congress recommending adoption of the Communications Act of 1934, from the House and Senate reports, from the Supreme Court's own previous statements, and from the Act itself, the Court noted that the provisions of the Act were applicable to "all interstate and foreign communication by wire or radio"; that the Commission was required to "make available . . . to all the people of the United States a rapid, efficient, Nation-wide and world-wide wire and radio communications service"; that the Commission was expected to be the "single Government agency" with "unified jurisdiction" and "regulatory power over all forms of electrical communication, whether by telephone, telegraph, cable, or radio"; that, toward this end, it was given "broad authority"; and that by the Communications Act Congress "formulated a unified and comprehensive regulatory system for the (broadcasting) industry" (at p. 168).

As an additional factor which would "amply suffice to reach respondents' activities," the Supreme Court pointed out that the phrase "communication by wire or radio" is defined by the Act itself to encompass "the transmission of . . . signals, pictures, and sounds of all kinds," whether by radio or cable (at p. 168). Nor did the Court doubt that CATV systems were engaged in interstate commerce, even where, as here, the intercepted signals emanated from stations located within the same state in which the CATV system operated. The Court stated: "To categorize respondents' activities as intrastate would disregard the character of the television industry, and serve merely to prevent the national regulation that 'is not only appropriate but essential to the efficient use of radio facilities'" (at p. 169).

In reply, respondents insisted that the Communications Act did not warrant the regulation of CATV systems for the reason, among others, that in 1959 and 1966 the Commission had requested Congress to adopt legislation specifically permitting such regulation and that Congress had failed to act. The Court was not impressed with the point, observing that (1) "it is far from clear

that Congress believed, as it considered these requests for legislation, that the Commission did not already possess regulatory authority over CATV"; (2) Congress may well have been more concerned by the Commission's unwillingness to regulate than by any belief that it was unable to regulate; and (3) according to the House Committee on Interstate and Foreign Commerce, the question whether or not the Commission is given jurisdiction under the existing law to regulate CATV systems is for the courts to decide.

The respondents further urged that since the broad areas of coverage under the Communications Act involved common carriers and broadcasters and since CATV systems were included in neither category, the Act could have no application to them. In rejecting this argument, the Court stated that (1) by its terms the "provisions of [the Act] shall apply to all interstate and foreign communications by wire or radio" (sec. 152[a]); (2) similarly, the legislative history indicated that the Commission had been given "regulatory power over all forms of electrical communication"; and (3) regulatory authority over CATV was imperative, as the Commission had concluded, if it was to handle effectively certain of its other obligations. The Commission had determined, and Congress had agreed, that these obligations required that all communities of appreciable size should have at least one television station for local self-expression; that communities must be encouraged to utilize the television channels reserved for educational purposes; and that the unregulated, explosive growth of CATV could place these purposes in jeopardy. In this latter regard, the particular danger existed that CATV, by dividing audiences and revenues, could render fatally serious the characteristic financial difficulties of UHF and educational television broadcasters.

Finally, the Supreme Court stated that, as found by the Commission, the effective performance of the Commission's duties demanded immediate and adequate regulation of CATV; and that, in the absence of compelling evidence of congressional intention (which did not appear in this case), the Court should not prohibit administrative action imperative for the achievement of an agen-

cy's ultimate purposes. The Court therefore held that "the Commission's authority over 'all interstate . . . communications by wire or radio' permits the regulation of CATV systems."

Some CATV people believed that there should be no regulation and that the *Southwestern Cable* decision would be a material setback which would retard the astounding growth of the industry. This attitude, however, was narrow and unrealistic. Some regulation was bound to be imposed; the FCC possesses the expertise to perform effectively the regulatory function; and the CATV now knows the source for appropriate guidelines. Under all of the circumstances, it appears that this decision has resulted only in benefit to the CATV industry.

Fortnightly v. *United Artists*

The second of the above-mentioned series of decisions important to CATV was handed down by the United States Supreme Court in the case of *Fortnightly Corp.* v. *United Artists Television, Inc.*, 392 U.S. 390, on June 17, 1968, one week after the Court's determination on FCC regulation in the *Southwestern Cable* case.

Fortnightly Corporation owns and operates CATV systems in Clarksburg and Fairmont, West Virginia, and carries to its subscribers the signals of the two local stations and three located in larger, distant cities. At the time of the case, Fortnightly neither edited the programs received nor originated any programs of its own. It charged its subscribers a flat monthly rate.

United Artists Television holds copyrights on several motion pictures which are pertinent here. The company granted licenses to each of the five television stations in question to broadcast these copyrighted motion pictures, and such broadcasts were received by Fortnightly's Clarksburg and Fairmont CATV systems and carried to its subscribers. Fortnightly obtained no licenses under the copyrights. United Artists sued Fortnightly for copyright infringement in the United States District Court in New York and obtained a favorable ruling. The Court of Appeals affirmed the

decision.[4] The Supreme Court then accepted the case because it involved an important copyright question.

United Artists contended that Fortnightly's CATV systems infringed its exclusive right under the Copyright Act to "perform . . . in public for profit" its nondramatic literary works and its exclusive right to "perform . . . publicly" its dramatic works.[5]

Initially, the Supreme Court pointed out that it was clear the CATV systems did not "perform" these copyrighted works in any manner contemplated by Congress in 1909 when it enacted the law but that the statutory language must be read in the light of drastic technological changes. The Court stated further that "resolution of the issue before us depends upon a determination of the function that CATV plays in the total process of television broadcasting and reception" (at pp. 395–97).

The Court then analyzed the activities of broadcasters and viewers. The broadcaster selects and procures the program, converts the images and sounds into electronic signals, and broadcasts the signals at radio frequency for public reception. Members of the public receive these electronic signals and reconvert them into visible images and audible sounds of the program by means of their television sets and antennas. The Court, putting the matter another way, noted that, unlike the exhibitor of a motion picture, who supplies his audience with visible images, the television broadcaster furnishes his audience only with electronic signals. Also television viewers do more than theater audiences by providing the equipment necessary to convert electronic signals. Although these factors differ substantially from the situation envisioned by the Congress which passed the Copyright Act, court decisions have considered broadcasters as exhibitors, and viewers as a theater audience.

The significant distinction in the eyes of the Court was that broadcasters should be considered active performers, the members

4. *United Artists Television* v. *Fortnightly Corporation*, 377 F. 2d 872 (CA 2, 1967).
5. 17 *United States Code*, sec. 1(c), (d).

of the viewing public passive beneficiaries. The further analysis of the opinion warrants quotation:

> When CATV is considered in this framework, we conclude that it falls on the viewer's side of the line. Essentially, a CATV system no more than enhances the viewer's capacity to receive the broadcaster's signals; it provides a well-located antenna with an efficient connection to the viewer's television set. It is true that a CATV system plays an "active" role in making reception possible in a given area, but so do ordinary television sets and antennas. CATV equipment is powerful and sophisticated, but the basic function the equipment performs is little different from that performed by the equipment generally furnished by a television viewer. . . .
>
> The function of CATV systems has little in common with the function of broadcasters. CATV systems do not in fact broadcast or rebroadcast. Broadcasters select the programs to be viewed; CATV systems simply carry, without editing, whatever programs they receive. Broadcasters procure programs and propagate them to the public; CATV systems receive programs that have been released to the public and carry them by private channels to additional viewers. We hold that CATV operators, like viewers and unlike broadcasters, do not perform the programs that they receive and carry. [At pp. 399–401.]

The Supreme Court concluded from the foregoing that there had been no copyright infringement by the Fortnightly CATV systems and therefore reversed the decision of the Court of Appeals. This favorable ruling constituted an unexpected windfall for the CATV industry. It eliminated the possibility of successful civil litigation against the CATV operators for copyright violations and, in addition, supplied the industry with leverage in any bargaining procedure for revision of the old copyright law.

In the Matter of General Telephone Company of California

The first of the two important cases decided by the FCC in 1968 is *In the Matter of General Telephone Company of Califor-*

nia, handed down on June 26.[6] Prior to the commencement of the proceedings, considerable friction had developed between CATV operators and the telephone companies, which viewed with concern the insertion by others of second communication lines (besides those owned by the telephone companies) into homes of a large portion of the public. This case involved one phase of their controversy. The definition of a CATV system contained in the opinion and the description of its component parts are deemed of adequate value to justify quotation in full:

> A CATV system is a facility which receives television signals and FM radio signals off the air by means of high antennas or by microwave transmission, amplifies the signals, and distributes such signals by coaxial cable to the premises of its subscribers who pay a fee for the service. The system consists of a number of connecting sections which may be characterized as the reception, headend, and distribution systems. At the beginning of the system are located the towers, antennas, microwave receivers, and other equipment necessary to receive the program material. The headend section consists of the electronic equipment used to convert, modify and modulate the signals bearing the intelligence received at the antenna before traveling into the wire distribution system. Generally, the headend equipment is not essential. The distribution system consists of feeder or trunk lines which originate at the headend and may be branched repeatedly to reach different sections of the system; the smaller distribution cables which carry the signal to the immediate vicinity of the subscriber; and the "drop" wires which carry the signal from the distribution cable to a terminal block on the premises of the individual subscriber. The final link in the system is the cable extending from the terminal block to the television set of the subscriber. [Par. 2.]

In some cases the CATV owner constructs his own distribution system but often has his cable strung on the poles of a utility company for a fee. In other cases the local telephone company constructs the distribution facilities to provide the channel service

6. 13 FCC 2d 448, 13 RR 2d 667 (1968).

transmission to the new CATV system. Although on occasion the telephone company provides the headend equipment, it normally supplies service only from the headend to the premises of the subscribers.

In this litigation the question involved only channel service offerings by telephone companies to CATV systems. The legal issue was whether a certificate of public necessity and convenience pursuant to section 214(a) of the Communications Act must be obtained by a telephone company before commencing construction of distribution facilities to provide channel service to a CATV system. In substance section 214(a) provides that no carrier shall undertake the construction of a new line or of an extension of any line, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require such additional or extended line. The section provides an exception from such certificate requirement, however, for (1) a line within a single state, unless such line constitutes part of an interstate line, or (2) local, branch, or terminal lines not exceeding ten miles in length.

One of the arguments the telephone companies made against the right of jurisdiction by the FCC was that the channel service they supplied to CATV systems could not in this context be categorized as common carrier communications service. Apparently they relied on the fact that the Commission in *Frontier Broadcasting* v. *Collier* had held that the CATV operator is not a common carrier. The FCC opinion therefore noted the distinction pointed out in *Frontier Broadcasting* that the specific signals received by and distributed on the CATV system are determined by the CATV operator and not by the subscribers; whereas, in the situation then under consideration, the telephone companies made no determination about the television signals to be carried on the CATV system but merely furnished the channels of communication to the CATV operator, who alone selected the signals to be transmitted over the facilities. To clinch the point, the Commission added:

> Since the telephone companies hold out the channel service for hire, invite all existing and prospective CATV operators to use the facilities, and have indicated a willingness and an ability to carry out this hire, the channel service offerings constitute a common carrier service.[7]

The Commission then pointed out that CATV channel service offerings of the carriers unquestionably were intended to provide an interstate communications service; that the interstate nature of the communication was the basis for the Commission's assertion of jurisdiction over nonmicrowave CATV systems; and that in *United States* v. *Southwestern Cable*, the Supreme Court upheld the Commission's authority to regulate CATV systems. Conceding the interstate character of the CATV operation as such, the telephone companies argued, however, that, since the input and output points of the telephone companies' cable facilities for each CATV system were located within the confines of one state, the transmission was purely intrastate so far as the telephone companies' common carrier operation was concerned. The Commission dismissed this contention as follows:

> The processing is no different from that which takes place in connection with the transmission by microwave and wire of any live coast-to-coast broadcast. . . . The controlling facts here are that the cable facilities furnished by the telephone companies are links in the continuous transmission of the signals from the point of origin to the set of the viewer, and the intelligence received by the viewer is essentially the same as that transmitted by the broadcaster. Irrespective of the location of its physical facilities, the common carrier which thus participates as a link in the relay of television signals is performing an interstate communications service.[8]

The opinion proceeded to point out that Congress intended by section 214 of the Communications Act unequivocally to confer on

7. *Id.*, par. 12.
8. *Id.*, par. 13.

the Commission broad supervisory control over construction by communications common carriers to insure that such construction would not be inconsistent with the public interest, that is, not wasteful or unnecessary. The telephone companies agreed but were quick to point out that the cable facilities furnished by the carriers to each of the CATV systems were located within the confines of a single state and that therefore they were entitled to the exemption of section 214(a)(1) concerning a "line within a single State unless such line constitutes a part of an interstate line." In response, the opinion stated that: (1) "the definition of a line manifests a primary Congressional concern over the channel of communication, rather than merely over the wires and cables used to establish the channel"; and (2) the broadcaster's signal is an interstate channel of communication and the CATV channel distribution system which is a link in the transmission of the signal to the television set of the viewer is part of that interstate channel. To stress the importance of countering the telephone companies' argument that their CATV facilities are not part of an "interstate line," the Commission expanded on its answer as follows:

> In our view, neither the provisions of the Act nor any judicial precedent called to our attention supports the carrier's contention that the "interstate line," i.e., the interstate channel of communication, referred to in Section 214 is limited to interstate common carrier lines; and we are persuaded that Congress intended no such limitation. On the contrary, we conclude that cable facilities furnished by a telephone company for the purpose of transmitting television signals from the CATV tower or headend to the premises of the CATV subscribers is part of an interstate channel of communication and consequently is not exempt from the certificate requirements of Section 214 by reason of the provisions of subdivision (a)(1).[9]

Finally, the telephone companies contended that, under any circumstances, the CATV channel service facilities come within

9. *Id.*, par. 20.

the exemption of section 214(a)(2) as "local, branch, or terminal lines not exceeding ten miles in length." The Commission stated emphatically that "this contention must likewise be rejected," because the exemption was intended essentially to apply to minor additions or improvements to existing facilities or services, with the expenditure involved ordinarily being small; whereas the construction under consideration in this proceeding involved far more than a minor addition to existing services, but rather a considerable amount of new construction by the telephone companies in order to provide new customers with a type of service significantly different from that previously provided in their communities. Although, in the language of the Commission, "each cable distribution system furnishes service only to a local CATV system, such construction does not . . . relate to the 'local, branch, or terminal lines' contemplated by the Section 214(a)(2) exemption, but relates, instead, to 'main' communication lines which should have been certificated."

On the basis of its opinion the FCC ordered that each of the respondent telephone companies cease and desist from the further construction of any facilities for the purpose of providing channel service to CATV systems until applications for certificates of public convenience and necessity were filed as required by section 214 of the Communications Act. It further ordered that within thirty days after the release of its decision the respondent telephone companies cease and desist from the operation of any CATV channel distribution facilities which were completed and in operation before the release of its decision. If the companies file the section 214 certification applications, however, they may continue to operate the facilities under conditions specified by the Commission.

The telephone companies were vehemently opposed to the Commission's opinion and orders in this case and took the matter, for review, to the United States Court of Appeals. On April 30, 1969, the Court of Appeals for the District of Columbia affirmed the position of the Commission. The opinion of the court, point by

point, considered the various arguments by the telephone group against FCC jurisdiction, and, in all respects, sustained the Commission's reasoning and conclusions.[10] It is interesting to note that in the process the court reviewed the development of CATV law and considered particularly a number of the Commission's releases and judicial pronouncements previously discussed herein including *Fortnightly* v. *United Artists*, *United States* v. *Southwestern Cable*, *Carter Moutain* v. *FCC*, the 1965 *First Report and Order*, and the 1966 *Second Report and Order*.

The rationale of the court is clearly indicated by its statement regarding construction of the Communications Act:

> Our evaluation of the Commission's interpretation of the scope of its jurisdiction must take into account the Act's broad purposes and objectives. We cannot ignore specific exemptions and limitations which narrow its regulatory powers, but neither can we overlook that Congress sought to establish a pervasive jurisdiction over broadcasting. The Act must be construed in light of the needs for comprehensive regulation and the practical difficulties inhering in state by state regulation of parts of an organic whole.[11]

The court, later in the opinion, enlarged on its analysis of the matter, as follows:

> As we view the record now before us and consider it in light of our own holdings and the relevant holdings of the Supreme Court it seems clear that as the outlines of the CATV problem emerged the Commission acted within the scope of the Act and consistently with the broad purposes of the Act by treating its responsibilities as comprehensive and pervasive. Any other determination would tend to fragment the regulation of a communications activity which cannot be regulated on any realistic basis except by central authority; fifty states and myriad local authorities cannot effectively deal

10. *General Telephone Co. of California* v. *FCC*, 413 F. 2d 390 (CADC, 1969). An attempt was made by the telephone companies to obtain further review by the United States Supreme Court, but the request was refused (396 U.S. 888 [October 27, 1969]).

11. 413 F. 2d 390, at p. 398.

> with bits and pieces of what is really a unified system of communication. The Supreme Court aptly characterized the functional aspect of the CATV systems as an "essentially uninterrupted and properly indivisible" stream of communication. [*Southwestern Cable* at p. 169.][12]

The San Diego case

The second of the important June, 1968, FCC decisions was *Midwest Television, Inc.* v. *Mission Cable TV, Inc., Southwestern Cable Co., et al.*, otherwise known as the San Diego case.[13] The matter in dispute was the carriage of Los Angeles television signals into San Diego, and the parties in the case were essentially the same as those involved in *United States* v. *Southwestern Cable*.

The petitioner, Midwest Television, Incorporated, alleged that the respondent CATV companies were expanding rapidly into new geographical areas, that the carriage of Los Angeles signals would adversely affect the service of existing San Diego television stations, and that the FCC should limit such expansion. Respondent CATV companies claimed that they were not extending Los Angeles signals in violation of section 74.1107 because San Diego, the fiftieth largest market, is within the Grade B contour of the Los Angeles stations. As noted above, section 1107(a) provides that no CATV system operating in a community within the predicted Grade A contour of a television broadcast station in the one hundred largest television markets shall extend the signal of a television broadcast station beyond the Grade B contour of that station, "except upon a showing approved by the Commission that such extension would be consistent with the public interest." In a preliminary order on this point, the Commission found this to be a classic case for a hearing with respect to the issue of expansion of respondents' CATV systems throughout the San Diego area, so far as the question of the effect of CATV operations on the growth of

12. *Id.*, at p. 401, referring to *U.S.* v. *Southwestern Cable Co.*, 392 US 157, at pp. 167-69.

13. 13 FCC 2d 478, 13 RR 2d 699 (1968).

UHF is concerned. On the assumption respondent CATV systems were factually correct in their claim that the Grade B contours of the Los Angeles stations reach San Diego, the Commission concluded that this would not remove the necessity for a hearing.[14] In support of this position, the Commission referred to the *Second Report and Order*, wherein it had pointed out that CATV activity which does not involve extension of a signal beyond the Grade B contour may continue "with possibly only the rarest exception."[15] This exceptional situation exists where two major markets fall within each other's Grade B contour, and the importation of signals of one market into the other would equalize the quality of the distant signals and possibly change the viewing habits of the recipient community and have an effect on the development of its independent UHF stations. Assuming that the respondents' CATV systems were within the predicted Grade B contours of the Los Angeles stations, which was exactly the situation presented, a hearing was indicated under the provisions of the exception contained in the rule (section 1107).

It should be noted that the order designating this case for hearing presumed a situation identical in basic facts with an example set forth in the *Second Report and Order*, which is deemed worthy of direct quotation:

> If two major markets each fall within one another's Grade B contour (e.g., Washington and Baltimore), this does not mean that there is no question as to the carriage by a Baltimore CATV system of the signals of Washington; for in doing so and thus equalizing the quality of the more distant Washington signals, it might be changing the viewing habits of the Baltimore population and thus affecting the development of the Baltimore independent UHF station or stations. Such instances rarely arise, and can, we think, be dealt with by appropriate petition or Commission consideration in the unusual case where a problem of this nature might arise. [Par. 151, n. 69.]

14. U.S., FCC, *In the Matter of Midwest Television, Inc.*, 4 FCC 2d 612 (released July 25, 1966).

15. U.S., FCC, *Second Report and Order*, Docket nos. 14895, 15233, 15971 (1966), par. 151.

As a primary point, it should be noted that, on the basis of the record and the examiner's report, the Commission found approximately 50 per cent potential penetration by CATV into homes passed in the San Diego area. In answer to the CATV response that one-third penetration is more accurate, the Commission cogently observed that even "a penetration on the order of one-third would be very substantial in a market the size of San Diego" and that the record in this case on penetration "clearly refutes the argument before us at the time of the *Second Report* that CATV will not obtain any substantial number of subscribers in major television markets."[16]

The Commission continued by stating that the impact of CATV on network-affiliated UHF stations in San Diego would warrant no restrictive action on CATV, but the effect of unlimited expansion on proposed or potential service by independent UHF stations in San Diego posed a problem requiring treatment. The Commission found that in half of the homes in the San Diego market an independent UHF station would be competing with four Los Angeles independents for the same minority audience on the basis of the same type of program format, and that inevitably the result would be a significant loss of potential audience for the San Diego UHF independent station. The opinion observed that the record does not afford any positive assurance that San Diego independent UHF stations could attract audiences large enough to insure commercial success even without CATV-produced competition, but unless the Commission is convinced that UHF has no potential chance to succeed there in any event, it should offer reasonable protection to UHF against CATV. The opinion then details and analyzes numerous pertinent factors, discounts the failure of KAAR, a poorly managed and low-powered UHF station, then adds:

> There is no other evidence in this record which warrants a conclusion that UHF could not succeed in this market within a reasonable

16. 13 FCC 2d 478, 13 RR 2d 699 (1968), par. 31.

> period, absent unlimited CATV expansion. On the contrary, there is considerable indication that it stands a fair chance for success. We cannot, of course, make a finding that it *will* succeed, any more than we can find, with absolute certainty, that unlimited CATV expansion will doom it to failure. The only sure way to find out is to afford San Diego UHF a reasonable period to develop free from widespread competition from Los Angeles signals. For, based on the record as a whole, our judgment as to the probabilities is that unlimited CATV expansion would preclude or substantially impede potential UHF service in San Diego. The last consideration should be stressed. As we pointed out in the First and Second Reports, it is not just a matter of whether UHF will collapse completely because of unlimited CATV expansion. The public interest would also be adversely affected if UHF, while not destroyed, was significantly crippled, so that it only limped along, falling short of the goals sought by the Congress and the Commission. . . . However, if UHF does not succeed in San Diego after a reasonable period, we can review the situation in light of that circumstance and readily turn to other means of augmenting service in the San Diego area. Thus, to the extent that there are uncertainties, the public interest is better served by following the course which presently preserves the best possible opportunity for the development of the basic *local* broadcast service to the entire area . . . and still retains the opportunity for remedial action once the uncertainty has been removed. In short, it was not necessary for the hearing process here to afford a definitive answer and indeed, as we pointed out at the outset, such ironclad answers are impossible of attainment. The process served a most useful purpose in establishing the seriousness of the possible danger to UHF. Once that was established, the public interest compels the result we reach here. [Par. 44.]

The opinion significantly pointed out that in equalizing the quality of the Los Angeles and San Diego signals, the CATV systems were undercutting the Commission's allocations and jeopardizing a full realization of the service allocated to San Diego; that the Commission's allocation policies did not intend that San Diego be merely a television satellite of Los Angeles, without the advantages of its own broadcast outlets for self-expression; and that if such a result were in the public interest, it would have permitted increased

height and power for the Los Angeles stations to be available to the San Diego public off-the-air.

The Commission concluded that unlimited expansion of CATV 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. Thus, in order to effect the goals of the all-channel receiver legislation and to preserve television opportunity to the San Diego public, the Commission prohibited carriage of Los Angeles signals by CATV systems in the San Diego area, except as they existed on August 23, 1966, the date of a Court of Appeals order on the point.

An interesting factor in the case is that although local originations by CATV systems did not appear to constitute an important issue in the proceedings, the FCC gave the subject major consideration. Midwest and others urged the Commission to prohibit all originations, or to limit originations to local affairs and to prohibit commercials.[17] On this point, the Commission felt, in accordance with its examiner's finding, that CATV originations of a local affairs nature would constitute a nonharmful diversification of sources of local viewpoints. This is consistent with its prior determination that the public interest is served by encouraging CATV systems to act as additional outlets for community self-expression.[18]

The contention was made in the proceeding that the FCC lacks jurisdiction under the Communications Act and the First Amendment to impose restrictions on CATV program origination because the originated signal is transmitted entirely by wire over the complete path from the point of origin to the home receiver, and no portion of the signal's path utilizes radio waves or crosses state lines. The opinion responded that although the Commission may have no authority over wire originations, where no use is

17. *Id.*, pars. 49, 51, 56.
18. U.S., FCC, *Notice of Proposed Rule Making*, Docket no. 17999, 33 Fed. Reg. 3188 (1968).

made of broadcast signals and the program material is not obtained by microwave or other interstate facilities, a CATV system is by definition a facility which, in whole or in part, *distributes television broadcast signals* to subscribing members of the public, and therefore its authorization should stem from the Commission after appropriate proceedings.

Interestingly enough, the opinion stated that the Commission's "authority to regulate the use of broadcast signals as a base for CATV program origination seems clear," but added:

> We nevertheless believe that this case does not afford an adequate vehicle for the formulation of overall policy in this area. We agree with the Examiner's view that this would be more appropriately done in a general proceeding in which all interested persons have an opportunity to comment rather than in an evidentiary hearing limited to CATV systems and stations in one community. [Par. 60.]

The opinion noted that a general proceeding on CATV program originations would be appropriate because the possibility of widespread CATV program origination raises important questions, such as whether television broadcast service would be adversely affected by a siphoning-off of popular program material available free off-the-air or by a loss of audience and advertising service.

On the other hand, CATV program origination holds promise as a means for increasing the number of local outlets for community self-expression and for adding to the choice of programs and types of service available. Almost every community of any appreciable size could have its own CATV system and thus its own local outlets, whereas television broadcast stations must serve a much broader area encompassing a larger community or communities. Since the CATV operation is based on subscriber fees, the CATV operator is largely free of the broadcaster's economic requirement that the programming of each channel be such as to attract sufficient audience and advertising revenue to make that channel pay for itself. The CATV operator has more flexibility to offer programs to minority interests on some channels. And, finally, programs originated by CATV systems avoid the question of unfair

competition involved in importing broadcast signals from other markets.

The Commission stated that while determination of these competing considerations was a matter of overall policy in a general rule-making proceeding, or perhaps for Congress in connection with legislative enactments, it had decided not to prohibit San Diego CATV systems from using broadcast signals as a base for entertainment originations in the interim. The opinion added significantly important position statements as follows:

> We believe that a test now of unrestricted CATV program origination without commercials in the San Diego market would provide valuable information and insight as to its potential, and would not unduly prejudice existing and potential broadcast service in the San Diego area. A prohibition against commercials appears necessary to protect the opportunity for UHF development in San Diego in view of the evidence in this record as to the critical importance of advertising revenue to the viability of the UHF stations and the probable adverse effect of CATV competition for the available potential advertisers. Moreover, even if the CATV systems were to originate the same kind of programs presented by the broadcast services the absence of commercials would provide a different kind of service—thus affording diversity—and should provide useful information on how television audiences react to this type of service. This would not be the case if CATV origination simply copied the commercial pattern of the free broadcast service. Further, the prohibition against commercials comports with our position in the subscription television broadcasting field that the public should not pay twice for programs containing commercials—once through subscriber fees and again through the inclusion of advertising costs in the prices of the products advertised. Finally, . . . we believe that a test on the viability and effect of such CATV origination (i.e., without commercials) is most desirable, and, based on the results of the test, we would then be in a position to formulate the most appropriate policy or recommendations to the Congress. [Par. 63.]

The Commission asserted that the foregoing constituted a fair compromise of the issues presented by the case, for the reasons, among others, that the limitation on further expansion of Los Angeles signal service would preserve the San Diego market and

its potential for UHF development and prevent San Diego from becoming a satellite of Los Angeles; that the public would not lose any existing service and would very probably obtain additional services through new UHF stations and CATV originations; that existing Los Angeles CATV service would be grandfathered (see chapter 8, n. 2); that CATV operations in major markets should be successful by being able to offer a package consisting of better reception of local signals and of color programs, time, weather, news, sports, local affairs programs, and so forth, and unrestricted program origination; and that the prohibition against CATV commercials was a fair trade-off for the other advantages accorded CATV systems in the San Diego area.[19]

This San Diego decision has been interpreted in some quarters as a setback for the CATV industry, particularly because of the prohibition against advertising. On the other hand, cable operators can take solace from the fact that the FCC, in this proceeding, recognized the significance of local origination by CATV systems.

When the decision was appealed, the Court of Appeals for the District of Columbia affirmed the FCC decision and stressed the points that the evidence on which the Commission depended to ascertain the public convenience and necessity in the reasonably foreseeable future properly included estimates, forecasts, and opinions on future events; that by this approach the Commission had sufficient factual basis to support its conclusion that penetration into the San Diego market from an unrestricted expanding CATV would be so substantial as to have a harmful impact on "assumed UHF service and audience"; and that the record did not establish that a "high-powered well-managed UHF in San Diego" could not succeed within a reasonable period, absent from unlimited CATV expansion. Accordingly, the Court of Appeals was "not persuaded to disagree with the Commission" that "UHF's stand a fair chance for success" if properly protected against CATV intrusion, and the court sustained the FCC order granting such protection.[20]

19. 13 FCC 2d 478, 13 RR 2d 699 (1968), par. 65.
20. *Midwest Television Inc. v. FCC*, 426 F. 2d 1222 (CADC, February 4, 1970).

9

Further developments in federal concern

The FCC proposed that an inquiry be held into the possibility of changing the rules governing CATV systems in its *Notice* of December 13, 1968.[1] The Commission intended to explore the question of how most effectively to obtain, consistent with the public interest, the full benefits of CATV potential services and what regulations might be adopted to further this goal.

Program origination

The proceeding considered two major factors: CATV program origination, and importation of television signals. As background, the *Notice* referred to the San Diego case, wherein, as noted above, the Commission had recently authorized a test of program origination without commercials by CATV systems in the San Diego area. Also, to establish the fact that there were substantial indications of anticipated CATV operation on a broader scale and for new uses, the *Notice* quoted from a recent (September 14, 1968) report to the mayor of New York City by the Mayor's Advisory Task Force on CATV and Telecommunications, as follows:

> The promise of cable television remains a glittering one. While progress towards realizing this promise has been slow, there is now

1. U.S., FCC, *Notice of Proposed Rule Making and Notice of Inquiry*, Docket no. 18397, 15 FCC 2d 417, 33 Fed. Reg. 19028 (December 13, 1968).

> an abundance of venture capital ready and able to extend cable television throughout the City. For venture capital sees the possibility of rich rewards. Those who own these electronic circuits will one day be the ones who will bring to the public much of its entertainment and news and information, and will supply the communications links for much of the City's banking, merchandising, and other commercial activities. With a proper master plan these conduits can at the same time be made to serve the City's social, cultural, and educational needs. A master plan can be effective now. It will not be a decade hence if stop-gap expedients prevail.[2]

The Commission suggested in the *Notice* that through possible interconnection of local cable systems, or satellite intercity systems, or both, numerous communication services could be supplied for homes and businesses, and for education, on a regional or national basis. The Commission also observed that the commencement of program origination by CATV systems in the large cities suggested the possibility of a CATV origination network or networks; and there was the further possibility of the "wired city," which meant that television broadcasting might ultimately be converted, in whole or in part, into cable transmission.

After establishing the above background, the Commission considered its rule-making proposals in the area of program origination by CATV systems. This field is within the Commission's statutory authority, but since the whole area involved new and important questions of policy and law, the Commission welcomed

2. *Ibid.*, par. 7. Some of the predicted services, as enumerated in the *Notice*, include: "facsimile reproduction of newspapers, magazines, documents, etc.; electronic mail delivery; merchandising; business concern links to branch offices, primary customers, or suppliers; access to computers, . . . information retrieval (library and other reference material, etc.), and computer to computer communications; the furtherance of various governmental programs on a Federal, State and municipal level, e.g., employment services and manpower utilization, special communications systems to reach particular neighborhoods or ethnic groups within a community, and for municipal surveillance of public areas for protection against crime, fire detection, control of air pollution and traffic; various educational and training programs, . . . and to enable professional groups such as doctors to keep abreast of developments in their fields; and the provision of a low cost outlet for political candidates, advertisers, amateur expression."

congressional guidance in the form of legislation. The tentative conclusion, pending the adoption of legislation, was that "CATV's program origination is in the public interest," particularly because it would increase the number of local outlets for community self-expression and increase the public's choice of programs and types of service.

The Commission proposed that for the right to carriage of television broadcast signals, local or distant, CATV systems be required to originate programs and thus operate to a significant extent as local outlets. The requirement would be consistent with the long-range goal under the Communications Act to have as many local outlets in as many communities as possible.[3] This inevitably leads to a discussion of the cost of origination and the employment of advertising to defray the cost. Conceding that the regulation of advertising in connection with CATV origination is a complex issue, the Commission came to no definitive conclusion about the proper approach but mentioned several alternatives for financing such operations: (1) increased subscriber fees; (2) per-program charge; or (3) limited commercials, permitted only at natural breaks, with no interruption of program material. Comments on this, as well as all other issues raised in the *Notice*, were specifically invited.[4]

The *Notice* then treated several items the Commission deemed important about CATV origination. The first item involved a number of significant national policies now applicable to broadcasters under the Communications Act and, in the opinion of the FCC, equally relevant to CATV systems originating programs, namely: the allowance of equal time for political candidates; the announcement of sponsored programs; and the fair presentation of conflicting views on issues of public importance.[5] In the *Notice* the Commission suggested rules which would apply such requirements to any CATV system that engages in program origination, as a

3. 47 *United States Code*, sec. 307(b).
4. FCC, *Notice of Proposed Rule Making* (1968), pars. 9–13, 15–17.
5. 47 *United States Code*, secs. 315, 317, 315(a).

condition to the carriage of television broadcast signals.

The Commission then considered areas for local concern and stated that instead of its licensing CATV systems to provide some element of consumer protection, it would rely on local authorities to demand that CATV meet local communication requirements and needs to the satisfaction and best interests of the community. This consideration involved such matters as quality of service; reasonableness of rates; technical standards; the franchise applicant's qualifications in the area of technical, financial, legal, and character fitness; the localities to be serviced; and the allocation of channels for municipal or other public use.[6]

To further the national policies about diversification of control of the media of mass communications, particularly in view of the origination aspects of CATV, the Commission in the *Notice* proposed three measures: (1) prohibiting cross-ownership of television broadcast stations and CATV systems within the station's Grade B contour; (2) limiting multiple ownership of CATV systems, and, in addition to prescribing the maximum number of CATV systems which any one entity could own or have an interest in, based on the number of subscribers and the size of the communities, limiting the number of such systems that could be located within the same state or adjoining states or major metropolitan areas; and (3) limiting to one channel the presentation of originated programming by any one CATV system, the purpose being to prevent any one entity from having control over what programming is offered to the public on a large number of channels.

The *Notice* also considered the possible common carrier aspect of CATV operation. In the opinion of the Commission, the public interest would be served by encouraging CATV systems to operate as common carriers on any channels not employed for carrying television broadcast signals and CATV origination. Such procedure would supply an outlet for others to make program presentations of their own selection, without any content control by the

6. FCC, *Notice of Proposed Rule Making* (1968), par. 22; see also par. 21.

CATV operator, except as required by statute or Commission rules. The Commission made it clear that if a CATV system carried television broadcast signals it would not necessarily be required to operate as a common carrier; it might do so if it chose, subject to necessary state or local authorization and regulation.[7]

Importation of TV signals

The second major area covered by the *Notice* of December 13, 1968, and related proceedings was importation of television signals. This discussion was introduced by a review of the 1965 *First Report and Order*, which had provided that, in order to protect the programming of the local station, CATV systems using microwave facilities must carry the local signals and may not within fifteen days duplicate local programming, and the 1966 *Second Report and Order*, which had limited the time to the same day and extended these requirements to all CATV systems, regardless of whether microwave was used.

It will be recalled that, according to the procedures adopted in the *Second Report* regarding the carriage of broadcast signals by CATV systems in major markets, a CATV system may not carry a distant signal (that is, beyond the Grade B contour of the station) within the Grade A contour of a station in the one hundred largest markets unless a showing is made in an evidentiary hearing that such operation will be consistent with the public interest. In the 1968 *Notice*, the Commission proposed to substitute for the evidentiary hearing procedure a definitive policy under which the Grade A contour would be replaced by a mileage zone. This major market hearing procedure was predicated on the possibility that substantial CATV growth in major markets might have a serious adverse impact on the development or retention of UHF independent stations in these markets and also that independent television broadcasters, who have to purchase their programs in the program distribution market, would be faced with unfair competition from

7. *Ibid.*, pars. 23–26.

CATV operators, who can acquire programs off-the-air. At the time of the *Second Report*, however, the Commission could not determine the critical question whether CATV growth in the major markets would attain substantial proportions. But, between 1966, when the *Second Report* was issued, and 1968 the uncertainty about the growth of CATV had been eliminated, and it had been established by the San Diego case that potential CATV penetration was likely to be substantial, that it could pose a real threat to UHF development, and that the unfair competition would be significant.[8]

The 1968 *Notice* pointed out that regulations therefore had to be considered for the elimination of this aspect of unfair competition. It added that probably the most effective procedure to eliminate the element of unfair competition would be to adopt a rule allowing the importation of distant signals in a major market but only on condition that the importing CATV system obtain retransmission consent of the originating station. In the light of the Supreme Court's decision in *Fortnightly* v. *United Artists*, however, the indications, according to the Commission, were that Congress might enact a law providing for fair and reasonable treatment of CATV, not only in the area of copyright and antitrust, but also in communications. The Commission expressed the opinion that it should therefore await possible congressional action to resolve the unfair competition aspect, and that in the meantime it should propose rules consistent with its position on CATV, to be considered for adoption if Congress failed to resolve the matter. The Commission position was that, under its statutory responsibilities, it could not permit the growth of substantial CATV operations carrying distant signals in major markets until the aspect of unfair competition was eliminated. It proposed rules that would clearly delineate the areas where carriage of distant signals is authorized only on compliance with the requirement for retransmission consent of the originating station.[9]

8. *Ibid.*, pars. 31–34; see also App. C.
9. *Ibid.*, pars. 37–40, 42–43.

The Commission also determined that it would adhere to the one hundred largest television markets as the basic dividing line because those were the areas where UHF independent television stations would most probably develop and the unfair competition problem would be most significant. In this regard, the Commission decided, in the interest of a clear and definitive rule, that it would accept as the permanent major markets the top one hundred markets as listed by the American Research Bureau for its 1967 rating. Such an approach would be far less disruptive than changing the list from year to year even though a few annual changes might be involved.[10]

In addition, the FCC proposed to adopt a mileage standard, in lieu of the Grade A contour, for measuring the area wherein distant signals may be carried by CATV systems with retransmission consent. The predicted Grade A contour varies in relation to different stations and may extend as far as sixty miles from the transmitter. It was felt that a fixed standard of mileage consistently applied would have administrative and practical advantages over the uncertainties of the old system. The zone suggested in the proposed rules was the area extending thirty-five miles from the main post office in each of the cities designated in the major market listing.

The Commission also considered the type of situation, such as had developed in San Diego, where a central metropolitan area of one major market falls within the contours of stations in another major market. For this situation it deemed the thirty-five-mile zone proper, and its proposed rules would prohibit a CATV system that was operating in a community completely within the thirty-five-mile zone of a television station in a major market from carrying the signal of a television station in another major market unless the community containing the CATV system is also within

10. *Ibid.*, par. 44. The proposed revised sec. 74.1107(a) set forth in App. C. of the 1968 *Notice* lists the major television markets and their designated communities.

the thirty-five-mile zone of the station in the other market or unless consent for retransmission is obtained.[11]

It should be noted that the FCC did not suggest any blanket proscription against carriage of distant signals or blanket requirement of retransmission consent in the television markets below the top one hundred. Instead, in the smaller markets, where a need for supplementary services may well exist, the Commission stated that it would seek to facilitate CATV operation in a fair and appropriate manner. It expressed concern, however, that CATV might undercut its basic allocations policies and structure by importing signals from unnecessarily distant centers or in such quantity as to unduly fractionalize the relatively small potential audience of stations in these smaller markets. Thus, in the view of the Commission, an important question was raised whether it would be consistent with fundamental allocation policies to allow CATV systems to employ the practice of "leapfrogging," for example, to bring the signals of New York City stations into Ohio or the Los Angeles stations into Texas, instead of importing the signals of stations of the same type that are located closer to the receiving community and thus are much more likely to have programming better attuned to the needs and interests of the community. In addition, the Commission pointed out that leapfrogging, which concentrates on the signals of the largest cities, creates questions of diversification of media of mass communications. The Commission suggested in its 1968 *Notice* that communities being inadequately served with television broadcast should receive additional service from the closest full network, independent and educational stations, in their region or within the same state.[12]

Accordingly, it proposed rules that would allow a CATV system operating within the thirty-five-mile zone of a station in a smaller market to carry only such distant signals as might be necessary to supply its subscribers with the signals, including local signals, of one full network station of each of the three national television net-

11. *Ibid.*, pars. 48–49.
12. *Ibid.*, pars. 55–56.

works and one independent station, with the requirement, however, that the supplementary distant signals would be taken from the closest source in the region or in the state of the system. The signals of any in-state or nearby educational stations could also be carried unless local or state educational interests objected. Other distant signals might not be brought in by the CATV system, unless the retransmission consent of the originating station had been obtained by the CATV system.

The Commission's proposal on CATV systems located beyond the thirty-five-mile zone of any station whether or not the station came within a major market provided that these CATV systems be permitted to choose the distant signals for carriage so long as they avoided leapfrogging.[13] The Commission deemed some flexibility appropriate in this context, and thus provided for grant of waivers for good cause, such as a showing "that (i) the community of the more distant station is located in the same State or (ii) the system's subscribers have a greater community of interest with the region served by the more distant station."[14]

Program origination, 1969

After months of receiving, analyzing, and digesting suggestions and criticisms, the Commission, on October 27, 1969, released its *First Report and Order* relating to certain of the matters involved in its *Notice* of December 13, 1968, namely, CATV program origination, its economic basis, and the proposed equal time, sponsorship identification, and fairness requirements.[15]

Initially, the Commission stated its major premise: "After full consideration, of the comments filed by the parties, we adhere to the view that program origination on CATV is in the public interest." It then pointed out that "for the present" the public interest

13. *Ibid.*, pars. 57–58. Leapfrogging is defined here by the Commission to mean: "carry a more distant station before carrying a closer station of the same type (e.g., full network stations of the same network, independent or educational stations)."
14. *Ibid.*, par. 58; App. C., sec. 74.1107(e)(2).
15. U.S., FCC, *First Report and Order*, Docket no. 18397, 20 FCC 2d 201; 17 RR 2d 1570 (adopted October 24, 1969; released October 27, 1969).

would best be served by encouraging CATV to experiment and develop its originations free from restrictions on interconnection or limitations on type of programming, in the expectation that the result would be significant added diversity for the viewing audience.

Since the 1968 *Notice* had proposed to limit originations by the CATV operator to one channel, the Commission noted that various comments had been received in this regard, that regulatory action was needed in this area and would be considered in subsequent reports, but that at the moment no limitation would be adopted on the number of channels that might be employed for program origination. Also, in the 1968 *Notice* the Commission had proposed that origination by all but small systems be required as a condition for the carriage of broadcast signals. The Commission reaffirmed its view in this regard, analyzed the available data on the size and number of CATV systems engaged in program origination, and concluded that the origination requirement should be applicable to systems with 3,500 or more subscribers. It observed that origination by smaller systems should continue to develop on a voluntary basis.

Addressing itself to what it described as the economic basis for required origination, the Commission, in the 1969 *First Report and Order*, "concludes that advertising should be permitted at natural breaks in originations with no interruption of program continuity" (par. 31). In support of this position, it noted that there are important public benefits to be gained from having cablecasting equipment available on as many systems as possible for local production of programs.[16] Some CATV systems, however, in areas where the need for local origination is greatest simply may not have enough subscribers to support the cost of cablecasting equipment and personnel. The Commission noted that all the CATV comments directed to this question insisted that subscriber fees alone could not support program origination, and summarized its reasons for

16. Cablecasting means programming distributed on a CATV system which has been originated by the CATV operator or by another entity exclusive of broadcast signals carried on the system.

determining that authorization to place advertising at natural breaks in CATV originated material would best serve the public interest as follows: (1) It would provide for additional CATV revenue to help defray the costs of origination; (2) it would afford the public a new type of service, in which commercials do not interrupt programs at the whim of the cablecaster; (3) it would supply to advertisers a new type of outlet in terms of size and selectivity of audience, vis-à-vis radio and television stations; and (4) this limited availability of commercials would not seriously affect advertising revenue of local broadcasting stations.

In view of its determination to encourage, rather than prohibit, CATV origination and to permit advertising, the Commission decided in the 1969 *First Report and Order* to require that cablecasting be conducted in accordance with the equal opportunity and fairness doctrine provisions of section 315 of the Communications Act and the sponsorship identification provisions of section 317 of the Act that were applicable to broadcasters. As the Commission noted in support of its position, there was general agreement in the comments that, if origination were to be permitted, it would be in the public interest for CATV systems to allow equal time to political candidates, to afford reasonable opportunity for presentation of conflicting views, and to identify sponsors. Accordingly, the Commission adopted rules, set forth in the appendix to the *First Report and Order*, that codified its position in these respects.[17]

In the appendix the Commission also reduced the position set forth in the *First Report* to the following rules: (1) any CATV system may originate programs without limitation on number of channels, and beginning January 1, 1971, any system with 3,500 or more subscribers is required to originate programs to a "significant extent";[18] and (2) any CATV may sell advertising to be pre-

17. New sec. 74.1113: cablecasts by candidates for public office; new sec. 74.1115: fairness doctrine, personal attacks, political editorials; new sec. 74.1119: sponsorship identification.

18. New sec. 74.1111: cablecasting in connection with carriage of broadcast signals.

sented only on "natural intermissions or breaks."[19] The Commission applied "significant extent" to something more than the origination of automated services (such as time and weather, or a news ticker or stock ticker) and aural services (such as music and announcements). Since one of the purposes of the originations requirement is to insure that cablecasting equipment be available, operation to a "significant extent as a local outlet" necessitates that the CATV operator have some kind of video cablecasting system for the production of local live and delayed programming (e.g., a camera and a video tape recorder).[20]

"Natural intermissions or breaks," during which commercials may be inserted, is defined as any natural intermission in the program material which is beyond the control of the CATV operator, such as time-out in a sports event, an intermission in a concert or dramatic performance, a recess in a city council meeting, or an intermission in a long motion picture.[21]

The Commission specifically stated in the *First Report* that it would refrain, at that time, from any initial regulation relating to the hours of origination, categories of programming, the type of cablecasting equipment, and technical standards because, as suggested in the comments, it seemed practical to allow a period for free experimentation and innovation by the cable operators.

A number of petitions were filed requesting reconsideration of the *First Report and Order*, and in a *Memorandum Opinion and Order* adopted June 24, 1970, and released July 1, 1970, the Commission addressed itself to the points presented in the petitions.[22] The Commission concluded that neither the public nor the CATV industry would be better served by deleting the requirement of cablecasting, whose value and importance were not questioned. It also adhered to its position in the *First Report* that CATV operators should be given a period of free experimentation and innovation and should not at that time be required to devote a minimum number of hours to local live origination. The Commission indicated concern, however, about the practice of some CATV operators of simply leasing their origination channel to a local radio station, which then offers its disc jockey shows over this channel for practically all of the broadcast day. This approach frustrates the main purpose of cablecasting, which is to provide an outlet for local expression. The Commission, therefore, amended section 74.1111(a) to make it clear that a CATV system may not enter into any arrangement or lease for use of its cablecasting facilities which prevents the use of such facilities for a substantial portion of time (including 6:00–11:00 P.M.) for local programming designed to inform the public about controversial issues of public importance.

19. New sec. 74.1117: advertising—FCC, *First Report and Order* (1969), App., sec. 74.1117.

20. FCC, *First Report and Order* (1969), par. 29.

21. Note to new sec. 74.1117—FCC, *First Report and Order* (1969), sec. 74.1117, n.

22. Docket no. 18397, 23 FCC 2d 825, 19 RR 2d 1766.

Further, in the *Memorandum*, the Commission agreed with the argument that when cablecasting is accompanied by a per-program or per-channel fee, it resembles subscription television and presents the same threat of siphoning programs away from free television in favor of a paying segment of the public. The Commission also expressed the belief that advertising should not be permitted where the public pays directly for the programs, as with subscription television. The Commission added a new section 74.1121 to restrict cablecasting operations for which a per-program or per-channel charge is made, especially in the area of feature films and sports events, to preclude, in effect, commercial advertising announcements. The section provides that sports events not be cablecast which have been televised live on a nonsubscription, regular basis in the community during the two years preceding their proposed cablecast.

Finally, the Commission noted in the *Memorandum* that the matter of lotteries raised in the 1968 *Notice* may now be approaching a problem stage in connection with CATV, and it adopted a new section 74.1116 to combat this problem.

The *Memorandum* concluded with reference to a request by the American Newspaper Publishers Association for a new section to

make it clear that the requirements on equal time for political candidates, fairness, political editorials and personal attacks, and advertising and sponsorship identification requirements are not applicable to newspapers. In response, the Commission stated that it was not necessary to amend the rules to make this clear, but it was quick to add that all ordinary cablecasting is covered by the rules, regardless of the originator. It makes no difference whether a newspaper is the originator, any more than if a newspaper sponsored a broadcast station program; and a news or public affairs program on a broadcast station owned by a newspaper is not exempt from fairness, sponsor identification, or related requirements.

Considerable dissatisfaction was indicated by the industry with the Commission's position on CATV originations, and a petition was filed with the Court of Appeals for the Eighth Circuit at St. Louis by Midwest Video Corporation for review of the Commission's *First Report and Order* (adopted October 24, 1969) and its *Memorandum Opinion and Order* (adopted June 24, 1970), which in effect affirmed, expanded, and explained the *First Report and Order*. Midwest Video operates CATV systems in Missouri, New Mexico, and Texas. Some of its systems have microwave authorization and some systems have more than 3,500 subscribers. Midwest Video contended before the Court of Appeals that Congress had not by the Communications Act or otherwise authorized the FCC to prescribe rules requiring all CATV systems with 3,500 or more subscribers to produce original programs to a significant extent and to have available facilities for the production of such programs after April 1, 1971 (originally January 1, 1971, but subsequently extended), as a condition to its right to continue to function as a CATV system. The Court of Appeals agreed with Midwest Video's contention and set aside the origination rule for the reasons set forth in its opinion (*Midwest Video Corporation* v. *United States of America and Federal Communications Commission*, 441 F 2d 1322 [CA 8, 1971]).

The opinion pointed out that no direct authority is granted to the

FCC by the Communications Act to regulate CATV systems; that many efforts to enact legislation covering CATV have been unsuccessful; and that the concern of the courts is not over the power of Congress to regulate CATV but over the authorization Congress has actually made to the FCC. The Court added that *Southwestern Cable* restricted FCC authority over CATV to that reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting, and that the FCC may, for these purposes, issue such rules and prescribe such restrictions and conditions, not inconsistent with law, as public convenience, interest, or necessity requires. The opinion bluntly stated that "The compulsory origination rule here goes far beyond the regulatory power approved in *Southwestern Cable Co.*" The traditional CATV operation differs greatly from that of originating programs. For origination, new and different equipment and additional personnel are needed. The Commission recognizes that smaller CATV stations could not afford to provide origination services, but then arbitrarily adopts 3,500 subscribers as the cut-off point.

The opinion in this case then referred to the holding in *Fortnightly Corp.* v. *United Artists Television, Inc.*, 392 U.S. 390, to the effect that the CATV operator is not a broadcaster and that the operation falls on the viewers' side of the line, and the opinion concluded that *Fortnightly* thus "affords strong support for the petitioner's [Midwest's] contention that the Communications Act does not authorize the FCC to compel program origination. We find no balance of public interest which requires stretching the Act to confer such authority." The Court added that, in its view, the Commission's origination requirement goes far beyond the regulation of the use made of signals captured by CATV as authorized in *Southwestern Cable*, and it specifically pointed out as unsupportable that "petitioner is required as a condition to its right to use the captured signals in their existing franchise operation to engage in the entirely new and different business of originating programs."

As applicable to the present situation, the court noted that a

state or governmental agency may deny a privilege or grant it on conditions, but it may not impose conditions which require the relinquishment of constitutional rights.

Finally, the opinion stated that it is highly speculative whether there is sufficient expertise or information available to support a finding that the origination rule will further the public interest, and that there is a distinct possibility that such requirement may force CATV operators out of business, thereby making unavailable the recognized useful service performed by CATV in areas where distance and topography impair favorable reception of television signals. The court concluded that "the FCC is without authority to impose the program origination rule on existing cable television operators."

The FCC is seeking review of the *Midwest Video* case by the United States Supreme Court, and, in the meantime, it has suspended its rules requiring CATV program originations.

Cross-ownership

In addition to the *Memorandum Opinion and Order* regarding CATV program originations, the Commission also adopted on June 24, 1970, and released on July 1, 1970, its *Second Report and Order* and various notices of proposed rule-making and inquiry.[23]

The *Second Report* concerned the diversification proposals set forth in the 1968 *Notice*. It pointed out that diversity of control over media of local mass communications is favored as a matter of policy; that the impact of that policy is not met by the positions and strong arguments of various opponents, including the National Association of Broadcasters, the National Cable Television Association, and parties with common CATV and broadcast interests; and that the prohibition against local cross-ownership of CATV systems and television broadcast stations will best serve the public interest. The *Second Report* extended the local TV-CATV cross-ownership ban to the predicted Grade B contour of the television station's normal service area and explained that the important factor is diversity to the public CATV subscribers and that cross-ownership should be barred if the CATV system is wholly or partially within the Grade B contour of the television station.[24] Also, the Commission expressed the belief that cross-ownership of a CATV system and a translator system should not be permitted (except on clear demonstration that such cross-ownership would not detrimentally affect service to the public).

23. U.S., FCC, *Second Report and Order*, Docket no. 18397, 19 RR 2d 1775.

Finally, the *Second Report* stated that because of the predominant nationwide position of the three national broadcast networks, they should not be allowed to maintain an interest in any CATV systems, even those situated beyond the service areas of network stations. This absolute bar to cross-ownership was intended, however, only for network-owned television stations, and joint ownership of other television broadcast stations (disassociated from the networks) and a nonlocal CATV system was not prohibited. In this regard, it is interesting to note that although grandfathering of existing local cross-ownerships was rejected by the Commission, it expressed no objection to exchanges of CATV systems among broadcasting stations with a view to eliminating the nonacceptable local cross-ownership element while maintaining an interest in the CATV field.

At the conclusion of the *Second Report*, the Commission adopted new rules in support of the position expressed therein.[25] The rules were immediately effective (thirty days after Federal Register publication) for all *new* acquisitions of CATV systems by broadcasting stations or network interests; but a grace period of three years was granted (subject to individual extensions for cause) for divestiture of local cross-ownership interest in existence at that time.

Notices of proposed rule-making, 1970

The several notices of proposed rule-making and inquiry adopted June 24, 1970, and released July 1, 1970, relate to the various aspects of the CATV problem.

24. Waivers should be considered on a case-to-case basis where a cross-ownership ban clearly would not result in greater diversity. *Ibid.*, par. 13.

25. App., pt. 74, subpt. K, sec. 74.1131.

One *Notice* stated that the Commission was seeking to encourage CATV operations in the larger markets on a basis consistent with the public interest, that such CATV operation appeared imminent, and that guidelines on multiple ownership should be established.[26] The Commission therefore submitted for consideration and comment alternative proposals as follows: (1) no CATV system may carry the signal of any television broadcast station if the system owns or operates more than fifty CATV systems (with designated limitations on areas of operation), and when the CATV system owns or controls more than one television broadcast station or more than two AM or FM stations or more than two newspapers, the maximum number of CATV systems should not exceed twenty-five (also with limitations on location); or (2) no CATV system may carry the signal of any television broadcast station if this system together with other CATV systems which it operates or controls serves more than two million subscribers (which figure may be increased by 10 per cent within the communities the system already serves).[27]

In its *Second Further Notice of Proposed Rule Making*, the Commission supplemented and modified certain of its outstanding proposals for distant signal operation with the stated purpose of attempting to assist the elements of broadcasting most in need of help, namely, the independent UHF station and ETV.[28] It proposed that CATV systems in the top one hundred markets carry, in addition to local signals, four distant independent signals, with the requirement that it delete the commercials of the independent

26. U.S., FCC, *Notice of Proposed Rule Making and of Inquiry*, Docket no. 18891, 35 Fed. Reg. 11042, par. 1: all docket 18397 matters relating to diversification of control of CATV and other media which were not disposed of in the *Second Report and Order* (1970) were reassigned to this new docket.

27. FCC, *Notice of Proposed Rule Making and of Inquiry* (1970), pars. 6, 9, 10. Par. 11: The Commission stresses that the proposals are set forth as a starting point to stimulate suggestions and may be modified. For example, it notes that in the first alternative the number of systems might be seventy-five or one hundred instead of fifty.

28. Docket no. 18397-A., 35 Fed. Reg. 11045 (adopted June 24, 1970; released July 1, 1970).

distant stations and substitute commercials provided by the local stations.[29] The *Second Notice* further proposed that CATVs importing distant signals pay 5 per cent of their subscription revenues for the needs of public broadcasting (ETV). The question of fairness to copyright owners was considered in the text of the *Second Notice* and in an appended analysis by the staff. It was recommended that Congress, which alone can now deal with the copyright payment problem, fix a small flat payment, suggested initially as 0.7 per cent of the annual subscription revenue per distant station carried.[30] Finally, the Commission pointed out that with the expansion of CATV systems into the heart of the large markets (Core City), these systems could appropriately be expected to play a greater role in shaping CATV's ability to advance the public interest by supplying channels for local and other public purposes. In addition to local origination, CATV might furnish: (1) at least one channel for use free by local governments and for political broadcasts; (2) channel time for presentation of views of public concern; (3) channels available for leasing to third parties for commercial operation; and (4) channels devoted to instructional uses.[31]

It is significant to note that three of the commissioners dissented, and Commissioner Cox issued a pointed and lengthy statement in which he stated that he was in "total disagreement with the proposals" and wished "to register the strongest possible dissent."

A third *Notice of Proposed Rule Making* adopted June 24, 1970, concerns the federal-state or federal-local relationship in the CATV field.[32] The United States Supreme Court had recently affirmed the right of a state to regulate aspects of CATV operations which the FCC had not acted to preempt.[33] Thus, although the Commis-

29. *Ibid.*, pars. 4–5. Par. 10: To effect the substitution, the *Notice* suggests an "automatic switching device," which itself might pose technological problems.

30. *Ibid.*, pars. 11–12; also, App. A, "Staff Analysis."

31. *Ibid.*, pars. 16–17.

32. U.S., FCC, *Notice of Proposed Rule Making*, Docket no. 18892, 35 Fed. Reg. 11044.

33. *TV Pix, Inc.* v. *Taylor*, 304 F. Supp. 459 (D. Nev., 1968), aff'd 396 U.S. 556 (1970).

sion possesses the power of preemption, it elected on the basis of policy consideration rather than on legal grounds to leave certain areas of regulation to local authorities, for example, choice of CATV operator on the basis of the character and nature of the proposal, areas to be served, and services and charges to the public. The *Notice* suggested three main approaches to the matter of the federal-local relationship: (1) federal licensing of all CATV systems; (2) federal regulations enforced by cease and desist orders, which is the approach that was then being followed; and (3) federal regulation of some areas, with local regulation of others under federal designation of standards for local regulators. The Commission stated that the third approach had "considerable merit" and invited comments on what standards should be prescribed by the Commission for local regulation.[34] The *Notice* itself suggested one specific area, local franchise fees, which warranted special comment, and it proposed, for public comment, a maximum fee of no more than 2 per cent of a CATV system's gross revenues.[35]

A fourth *Notice of Proposed Rule Making* adopted June 24, 1970, relates to siphoning, especially with regard to subscription television (STV) and, in particular, sports.[36] The *Notice* points out, however, that the *Memorandum Opinion and Order* issued the same day (and discussed above) adopted a rule (section 74.1121), essentially identical with an STV rule, that sports events shall not be cablecast which have been televised live on a nonsubscription regular basis in the community during the two years preceding the proposed telecast. The Commission felt that the two-year period should be lengthened for both STV and CATV, and it proposed to amend the sports rule for each to make the pertinent disenabling period five years instead of two.

34. The Commission added that it also recognized the need to consider the more comprehensive but less frequently encountered state regulatory efforts in this field and stated that it would cooperate fully with the states through representative agents such as the National Association of Regulatory Utility Commissioners (NARUC).

35. FCC, *Notice of Proposed Rule Making* (1970), pars. 3–8.

36. U.S., FCC, *Notice of Proposed Rule Making*, Docket no. 18893, 35 Fed. Reg. 11040.

Regarding the proposed rules and related subject matter in the four notices of proposed rule-making and of inquiry described above, the Commission requested and obtained various suggestions and comments. Considering the nature and complexity of the problems and consequent need for study, analysis, and conclusions by the Commission, it understandably has for some time retained the matter under advisement.

In closing the discussion on federal regulation we should note that recently President Nixon indicated his concern about the development and future of CATV, including its impact on the broadcasting field, and appointed a committee to study and report to him on the industry. In the light of past inaction on the part of Congress, however, it is felt that the president's committee must produce an impressive report establishing an important public need before legislation in the field can reasonably be anticipated. Of course, the Commission can be expected to give serious consideration to sound comments affecting areas in which it presently possesses jurisdiction and the authority to act.

10

The development of state regulation

In its 1965 *Notice of Inquiry and Proposed Rule Making*, the FCC indicated its anticipation that state commissions and municipal authorities would exert some regulation over CATV in addition to its own actions under the Communications Act of 1934. The Commission stated:

> In the event that it is ultimately determined that the Commission has jurisdiction over all CATV systems, we do not contemplate regulation of such matters as CATV rates to subscribers, the extent of the service to be provided, or the award of CATV franchises. Apart from the areas in which the Commission has specifically indicated concern and until such time as regulatory measures are proposed, no federal preemption is intended. Rather, we view our role as one of cooperating with local franchising authorities and state regulatory commissions to the maximum extent possible, such as by making information available to them, consulting with respect to technical standards for CATV operations, etc.[1]

In the 1966 *Second Report and Order*, the Commission considered the same subject and noted that it proposed to request that Congress consider the appropriate relationship of federal to state-local jurisdiction in the CATV field.[2]

1. U.S., FCC, *Notice of Inquiry and Proposed Rule Making*, Docket no. 15971, 4 RR 2d 1679 (1965), par. 32.
2. U.S., FCC, *Second Report and Order*, Docket nos. 14895, 15233, 15971, 2 FCC 2d 725, 6 RR 2d 1717 (1966), par. 153 (iv).

Also in 1966, discussing legislation before the House Committee on Interstate and Foreign Commerce, the Commission stated:

> The Commission believes that Congressional consideration should also be given to appropriate relationship of federal to state-local jurisdiction over community antenna systems, particularly with regard to initial franchising, rate regulation and related matters. The Commission generally has not proposed to exercise any jurisdiction with respect to these matters. . . . Rather, it has recognized that many local governmental bodies, usually in connection with the grant of franchises, have asserted some jurisdiction with respect to rates charged subscribers and similar matters. At least three states (Connecticut, New Jersey and Rhode Island) have held that CATV systems are public utilities.
>
> In our opinion, the public interest will best be protected by permitting state and local regulation to continue with regard to those matters not regulated by the Commission. We are therefore recommending legislation along the lines of the proposed section 331(c).[3] That section provides that there would be no federal preemption except to the extent of direct conflict with the provisions of the Communications Act or regulations enacted by the Commission. This would permit state and local action, but would not foreclose federal action to carry out the purposes of the Act and to promote the "public interest in the larger and more effective use of radio" (Sec. 303(g)), where such action becomes necessary.[4]

Adjudications by state regulatory bodies

Adjudications at the state level regarding CATV systems consider the pertinent question whether state regulatory bodies

3. In the Commission's proposed legislation, which was recommended by the committee but never acted on by Congress, sec. 331(c) became 331(d) and read: "Nothing in this Act or any regulation promulgated under it shall preclude or supersede legislation relating to, or regulation of, community antenna systems by or under the authority of any State, the District of Columbia, the Commonwealth of Puerto Rico, or any possession of the United States except to the extent of direct conflict with the provisions of this Act or regulations promulgated under it."

4. H.R. Report no. 1635, 89th Cong., 2d sess., to accompany H.R. 13286. Robert L. Winters (*Municipal Regulation of "CATV"—Community Antenna Television—Model Ordinance, Report No. 151* [Washington, D.C.: National Institute of Municipal Law Officers, 1967], pp. 22–24) suggests that the material in the text represents the FCC position on the relationship of federal to state-local jurisdiction over CATV.

have general jurisdiction over CATV systems, and this question raises ancillary questions about whether they are interstate in character and whether they should be classified as common carriers or other types of public utility.

In one of the earliest decisions, *Re Bennett* (89 PUR NS 149 [1951]), the Wisconsin Public Service Commission considered an application for authority to erect and operate a CATV system; and in declining to take jurisdiction, the Wisconsin PSC stated that even though the Wisconsin statute's definition of public utility might be broad enough to embrace CATV systems, this point was never reached because Congress, through the FCC, had completely occupied and preempted the field of television regulation and thus precluded state regulation. Television transmission is interstate in character, and the area is entirely within the powers of Congress and is not open to state regulation.

The state of Wyoming represents an interesting and evolving situation. The Wyoming Public Service Commission, in *Re Cokeville Radio and Electric Company* (6 PUR 3d 129 [1954]), considered the question whether it possessed authority to regulate CATV systems. It discussed *Re Bennett* and noted that the complete supervision by Congress over television transmission nullifies any jurisdiction the state might have. Under the applicable Wyoming statute, however, the opinion stated, "public utility" includes "any plant, property or facility . . . for the furnishing of facilities to or for the public for the transmission of intelligence by electricity," and the attorney general of Wyoming gave a ruling, based on that statute, that a CATV system is a public utility, that the operation is intrastate in character, and that it is subject to regulation by the Wyoming Public Service Commission. The PSC concluded with a reference to this ruling:

> Regardless of the holdings in other jurisdictions and the possibility of the courts holding that the continuous flow of TV programs from point of origin to the sets of CATV subscribers, by whatever means the same may be transmitted, is *interstate* commerce, we must fol-

> low the above-mentioned ruling of the Attorney General in this state, which is the law . . . in the absence of a controlling court decision; and accordingly we find that the commission has jurisdiction over the subject matter of the application in this proceeding. [At p. 135.]

In further support of its position, the Wyoming PSC noted that the FCC had not "yet decided whether it has or will assume jurisdiction over the installation and operation of such systems" (at p. 135).

The Wyoming Public Service Commission reaffirmed its position in *Re Community Television Systems of Wyoming* (23 PUR 3d 444 [1958]), where it concluded that CATV systems are engaged in intrastate commerce, that they are public utilities, and that they are subject to the Wyoming Public Utilities Act. On appeal from this decision, however, the District Court for the First Judicial District of Wyoming reversed the Wyoming PSC and held that it did not have jurisdiction over CATVs because their operations do not make them public utilities and because they are engaged in interstate commerce (17 RR 2135 [1958]).

In *Vetere Perfect TV, Inc.* (14 RR 2064 [1956]), the Utah Public Service Commission refused to grant a certificate of public convenience and necessity for authority to operate a CATV system in the state of Utah on the grounds that CATVs are not public utilities and therefore not within the jurisdiction of the Public Service Commission.

The Supreme Court of California, in *Television Transmission, Inc.* v. *Public Utilities Commission* (301 P. 2d 862 [1956]), had occasion to review a decision by the Public Utilities Commission of that state, which held that the CATV system in question operated as a telephone company and, consequently, was a public utility within its jurisdiction and accountable for providing inadequate service. The Supreme Court reversed the California PUC. It found that a CATV system does not operate as a telephone company and followed *Re Bennett,* where the Wisconsin PSC had stated that it

lacked jurisdiction because Congress had completely occupied the television field.[5]

Re Seneca Radio Corporation (57 PUR 3d 67 [1965]) involved an application for a certificate of convenience to operate CATV facilities in Ohio. Following *Television Transmission* v. *Public Utilities,* the Ohio Public Utilities Commission held that a company operating a CATV system which receives television signals from available sources, amplifies them, and sends them through a coaxial cable to subscribers' sets is not a telephone or telegraph company and thus is not within the jurisdiction of the state commission as a public utility.

In *Re Southern Bell Telephone and Telegraph Company* (65 PUR 3d 117 [1966]), the Florida Public Service Commission ruled that, although a CATV system strung its cables on rented space on telephone poles, its channels were not offered or intended for public use by a telephone company since the facilities used for such television signal transmission cannot be made available and are not made available to all members of the community requesting such service; and under such circumstances the CATV system cannot be deemed a public utility subject to the state commission's jurisdiction.

The case *Re New England Telephone and Telegraph Company* (60 PUR 3d 462 [1965]) warrants particular mention here because, in a situation where a telephone company was supplying facilities to a CATV system for transmission of television signals, the Maine Public Utilities Commission categorically stated: "CATV operators, who may utilize this service, are not public utilities."

Similarly, the North Dakota Public Service Commission very emphatically stated as a conclusion of law:

> The Community Antenna Television Systems, as they presently exist within the State of North Dakota are not sufficiently impressed

5. Although there was transmission by the use of poles, wires, etc., the transmission was not associated with and did not facilitate communication by telephone.

with the public interest . . . so as to be declared public utilities.

The Public Service Commission does not have jurisdiction extending to the regulation of Community Antenna Television Systems, or any part thereof with the exception of the functions of this Commission in enforcing electrical standards, within the State of North Dakota.[6]

Opinions by state attorneys general

There are various opinions by state attorneys general pertinent to this question whether CATV systems should be classified as public utilities. The majority of attorneys general who have dealt with the matter state that CATVs are not public utilities and cannot be regulated as such. A few examples of these pronouncements show the tone and temper of the opinions.

The attorney general of Texas was asked to reconsider his statement that "corporations providing TV cable service are public utilities in contemplation of law and subject to regulation." After discussing applicable cases, he concluded:

> A community antenna system is merely incidental to and an aid to the reception of television broadcast service, and inasmuch as the great weight of the authorities establish that television stations are not public utilities, it necessarily follows that such antenna systems are not public utilities.[7]

The question was posed to the attorney general of Arizona: "Does the Corporation Commission have jurisdiction over companies which seek to pick up television signals by means of a larger antenna or otherwise, then run cables throughout an area and allow individuals to tie or connect onto this cable in order to receive the TV signals, this tie-on or connection to be permitted for a fee?" The answer was in the negative. Although cable transmission might be that type of business that lends itself well to monopoly, the attorney general stated, the requisite public interest that would make it a public service corporation did not seem to be present.[8]

6. North Dakota Public Service Commission, *Finding and Order against Jurisdiction*, Case no. 6458, 8 RR 2d 2070 (October 17, 1966).

7. Opinion of the Attorney General of Texas, 8 RR 2d 2058 (no. C-702-A, October 10, 1966).

In an answer by letter to a county prosecuting attorney's question whether the Public Service Commission had jurisdiction over a CATV system, the attorney general of the state of Washington wrote:

> It is doubtful in our mind whether the state regulatory bodies have any jurisdiction to regulate television companies at this time, due to the broad authority given to the Federal government under the Federal Communications Act. The case of *Allen B. DuMont Laboratories* v. *Carroll*, 184 F. (2d) 153, cert. denied, 340 U.S. 929, is authority for this proposition. . . .
>
> . . . Based on the reasoning set forth above, it would appear that in spite of some authority to the contrary found in the opinion of the Attorneys general in other states, the sounder conclusion in this state under our public service law is that the Washington Public Service Commission does not have jurisdiction over a company supplying television programs by means of a coaxial cable.[9]

Also citing, and in fact quoting at length from, *DuMont* v. *Carroll*, the attorney general of Oklahoma expressed his opinion regarding CATV jurisdiction. He too believed that the federal government had preempted authority in the field of television, and until a federal court had ruled otherwise, it would be invalid to consider CATV systems as public utilities.[10]

In addition, attorneys general, public utilities commissions, and courts of a number of other states have rendered opinions and

8. Opinion of the Attorney General of Arizona, 12 RR 2094 (no. 55-206, October 18, 1955).

9. Opinion of the Attorney General of Washington, 14 RR 2059 (nos. AGO 53-55, 346, November 22, 1954).

10. Opinion of the Attorney General of Oklahoma, 1 RR 2d 2056 (no. 63-237, May 1, 1963).

handed down decisions consistent with the principles stated above.[11]

Federal court cases

Although the attitude of the federal courts in this respect has been touched on in the earlier treatment of federal regulation, additional comment seems pertinent to show their attitude and the involvement of the law with regard to the position of the state authorities. One of the most important cases in the field is *DuMont* v. *Carroll*. In holding that the states are precluded from regulation in the area of television, that opinion states:

> We agree with the court below that the Communications Act of 1934 covers the television, as well as the radio field. . . .
>
> Section 3(b), 47 U.S.C.A. § 153(b), defines "radio communication" as "The transmission by radio of writing, signs, signals, pictures, and sounds of all kinds . . . ." The television and radio industries have construed this definition to include television as "one form of radio transmission. . . ."
>
> . . . Senate Report No. 781 discussing Senate Bill § 3285 which later was enacted as the Federal Communications Act stated, "The purpose of this bill is to create a communications commission with regulatory power over all forms of electrical communication. . . . The language employed is so all inclusive as to leave no doubt but that it was the intention of Congress to occupy the television broadcasting field in its entirety. While Section 410(a) provides for a measure of cooperation between the Federal Commission and state regulatory bodies, it is clear that under the plan set out by that section the Federal Commission remains the dominant regulatory force, members of the state regulatory bodies being engrafted, as it were, temporarily upon the Federal Commission. . . .
>
> . . . We think it is clear that Congress has occupied fully the field of television regulation and that that field is no longer open to the States. Congress possessed the constitutional authority to effect this result. [At pp. 155–56.]

11. Smith, Pepper, Shack, and L'Heureux, *Legal Status of Community Antenna Television Systems under Federal and State Regulatory Statutes*. A position paper prepared on behalf of NCTA (Washington, D.C., June, 1968), pp. 23–28.

Since, as has been previously demonstrated, CATV is an integral part of television operation, it would seem to be included in the field that "Congress has occupied fully."

The broad authority accorded to the FCC by the Communications Act in the radio transmission field is indicated in *C. J. Community Services, Inc.* v. *FCC* (246 F. 2d 660 [CADC, 1957]), a case that involved a booster station, whose function in aid of television reception is similar to that of CATV. Here, the court stated its belief that federal control over "all channels of interstate . . . radio transmission" included the booster station in question.

It will be recalled that the landmark case of *Frontier Broadcasting* v. *Collier* decided that a CATV system operator is not a common carrier within the definition of the Communications Act, mainly because the operator, not the individual subscriber, has the ultimate control over the type of intelligence transmitted over the system, whereas for the ordinary communications common carrier, to which the Act was intended to have application, the determination of the specific intelligence to be transmitted is made solely by the subscriber, and not the carrier. The same general result is reached in *Philadelphia Television Broadcasting Co.* v. *Federal Communications Commission* (359 F. 2d 282 [CADC, 1966]). The court here is cautious, however, in its analysis and relies heavily on the expertise of the FCC in the field and on its prior judgments on the point:

> Petitioners urge that CATV systems are common carriers within the meaning of the Communications Act. . . .
>
> In approaching the problem of statutory interpretation before us, we show "great deference to the interpretation given the statute by the officers or agency charged with its administration. 'To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings.'"
>
> We think such deference to the agency's interpretation of its governing statute is reinforced where, as here, the legislative history is silent, or at best unhelpful, with respect to the point in question.

Congress in passing the Communications Act in 1934 could not, of course, anticipate the variety and nature of methods of communication by wire or radio that would come into existence in the decades to come. In such a situation, the expert agency entrusted with administration of a dynamic industry is entitled to latitude in coping with new developments in that industry.

The Commission, responsive to the increasing impact of CATV, has undertaken a system of regulation in the public interest. It began with CATV systems served by microwave carriers [*Carter Mountain Transmission Corp.*], and it now has asserted jurisdiction over all CATV systems under the general provisions of the Act and issued regulations.[12] The Commission had already announced proposed rules predicated on such jurisdiction, at the time it dismissed petitioners' complaint. Its holding that CATV systems are not common carriers thus comes before us in a context of regulation of the CATV systems under different provisions of the Communications Act. In a statutory scheme in which Congress has given an agency various bases of jurisdiction and various tools with which to protect the public interest, the agency is entitled to some leeway in choosing which jurisdictional base and which regulatory tools will be most effective in advancing the Congressional objective. It is the FCC's position that regulating CATV systems as adjuncts of the nation's broadcasting system is a more appropriate avenue for Commission action than the wide range of regulation implicit in the common carrier treatment urged by petitioners. This seems to us a rational and hence permissible choice by the agency. [At pp. 283–84.]

At this point it seems appropriate to recall *U.S.* v. *Southwestern Cable.*[13] This opinion demonstrates the areas of agreement over CATV between the Supreme Court and the state authorities. The Court particularly emphasized the fact that CATV is encompassed by the Communications Act, that it is interstate in character, and that the FCC possesses broad regulatory powers over CATV.

Also in this case, the Supreme Court, approving *Frontier Broadcasting v. Collier* and *Philadelphia Television Broadcasting* v. *FCC*,

12. See FCC, *Second Report and Order* (1966).
13. See above, pp. 93–98.

agreed with the position that "these CATV systems are not common carriers within the meaning of the Act" (at p. 169, n. 29).

In concluding this chapter, it seems appropriate to consider further the progress of legislation and litigation on the question whether or not the states may categorize CATVs as public utilities.[14] For example, the Connecticut statute adopted in 1963 asserted:

> 16–330. The term "community antenna television system" means any system operated in, under or over any street or highway for the purpose of providing antenna television service for hire.
>
> 16–331. . . . No person, association or corporation shall construct or operate a community antenna television system without having first obtained a certificate from the public utilities commission certifying that public convenience and necessity require the operation of such a service within the territory specified in such certificate.[15]

In the same year, 1963, Nevada amended its public utilities law to bring within its purview:

> (d) Any plant, property or facility furnishing facilities to the public for the transmission of intelligence via electricity. The provisions of this paragraph do not apply to interstate commerce.
>
> (e) Radio or broadcasting instrumentalities providing common or contract service and airship common and contract carriers.[16]

Attacks were launched in the courts against such statutes, and in each case their validity and constitutionality were questioned.[17] A landmark case in this area is *TV Pix, Inc.* v. *Taylor*, decided by a three-judge district court and affirmed by the United States

14. E. Stratford Smith, "The Emergence of CATV: A Look at the Evolution of a Revolution," *Proceedings of the Institute of Electrical and Electronics Engineers*, LVIII (July, 1970), 980. Smith points out that legislation had already been adopted by Connecticut, Nevada, Rhode Island, and Vermont, including CATVs as public utilities or treating them as quasi-utilities.
15. *Connecticut Revised Statutes*, title 16, chap. 277; see also secs. 332–33.
16. *Nevada Revised Statutes*, title 58, chap. 704, sec. 020.
17. Smith, Pepper, Shack, and L'Heureux, p. 27.

Supreme Court.[18] The judges in that action were concerned with the above-mentioned Nevada statute, which declared community antenna television companies to be public utilities, required a certificate of public convenience and necessity, required just and reasonable rates under supervision of the Nevada Public Service Commission, compelled safe and adequate service and facilities, and made other incidental requirements. The three-judge court that convened to consider the constitutionality of the statute described it as being "in the classic mode of utility regulation." The plaintiffs own and operate community antenna systems in Nevada, maintain reception equipment in Nevada by which they receive off-the-air signals of Salt Lake City, and distribute the signals to the subscribers in several Nevada communities. One of the plaintiffs, TV Pix, also has separate reception and antenna equipment in California from which it transmits signals picked up from California television stations to customers in California and Nevada. The plaintiffs attacked Nevada's proposed regulation of their business on the grounds that the statute, particularly in requiring a certificate of public convenience and necessity, imposes an unconstitutional burden on interstate commerce; that Congress has preempted the field of television communications; and that the statute deprives plaintiffs of their property without due process of law under the Fourteenth Amendment.

The opinion, quoting at length from *U.S.* v. *Southwestern Cable*, pointed out that CATV systems are engaged in interstate commerce, even when, as in certain aspects of the present situation, the intercepted signals emanate from stations located within the same state in which the CATV system operates. The court noted that "the pristine constitutional issue presented under the commerce clause of the Constitution is whether state regulation as a public utility of a business engaged in interstate commerce is forbidden by the commerce clause itself, regardless of action or inaction by the Congress in implementation of its powers." The

18. 304 F. Supp. 459 (D. Nev., 1968), aff'd. 396 U.S. 556 (1970).

answer was that such state regulation is not so forbidden.[19] Although the CATV business is in interstate commerce, the apparatus of the community antenna system has incidents much more local than national, involving cable equipment through the public streets, local franchises, local intrastate advertising and selling of services, and local intrastate collections. In this perspective, a CATV system is essentially a local business, and thus the court ruled that "appropriate state regulation of such primarily local facilities or services in interstate commerce, in the absence of federal legislative intervention, is not proscribed by the commerce clause of the Constitution." It is the view of the judges that the areas of regulation covered by the Nevada statute—the quality of and the rates and charges for community antenna service—are not of the character demanding national uniformity to the exclusion of state action, but, in fact, are subjects which lend themselves naturally to local control and supervision.

The plaintiffs, however, contended that federal preemption prevents state action in the field. In response, the opinion pointed out that the FCC had been vested with the power of Congress to preempt or not to preempt areas which might otherwise be invaded by the states, and that, therefore, whether preemption had actually occurred, invalidating the Nevada statute, depended on whether the FCC had, in fact, regulated in this area, and not on whether it has the power to do so.[20]

In this regard the court observes that not only has the FCC failed to promulgate regulations concerning rates, quality of service, and franchises of community antenna companies, but it has, through the years, sought to avoid the exercise of legislative authority in this area. Most significant in this regard are the Commission's own statements, and a persuasive specimen from its

19. Plaintiffs' attack was directed against the statute as it was enacted; and the court was careful to note that its holding that the statute does not per se unreasonably burden or obstruct interstate commerce was not meant to imply that future orders issued by the Nevada Public Service Commission may not warrant justifiable complaint under the commerce clause.

20. 304 F. Supp. 459 at p. 465.

1965 *Notice of Inquiry and Notice of Proposed Rule Making* is quoted by the court in a footnote.

> We do not contemplate regulation of such matters as CATV rates to subscribers, the extent of the service to be provided, or the award of CATV franchises. Apart from the areas in which the Commission has specifically indicated concern and until such time as regulatory measures are proposed, no Federal preemption is intended. Rather, we view our role as one of cooperating with local franchising authorities, and state regulatory commissions to the maximum extent possible.[21]

Finally, the plaintiffs contended that Nevada cannot control the service and cannot protect the plaintiffs from indiscriminate and ruinous competition, and so its attempt to regulate plaintiffs under the circumstances violates the due process clause of the Fourteenth Amendment. The court answered that there are local problems of safety and quality in the local installation that are properly of state concern and may be supervised without infringement on federal control, that CATV service is monopolistic in character and affected with the public interest, that the state of Nevada does have the power to protect the monopoly of its local TV service against other incipient CATV companies seeking a share of the market, and that therefore state supervision of plaintiffs as public utilities does not conflict with the Fourteenth Amendment.

The United States Supreme Court affirmed *TV Pix* v. *Taylor*, and thus the case is final judicial authority, among other things, for the important proposition that states can constitutionally regulate CATV systems as public utilities. This case may definitely be considered a landmark decision.[22] It is important now to observe,

21. U.S., FCC, *Notice of Inquiry and Notice of Proposed Rule Making*, Docket no. 15791, 1 FCC 2d 453; 4 RR 2d 1679 (April 22, 1965), par. 32.

22. *Wonderland Ventures, Inc.* v. *City of Sandusky*, 423 F. 2d 548 (Ca 6, March 26, 1970), decided shortly after the United States Supreme Court had affirmed *TV Pix*, should be mentioned. The case involves the validity of ordinances adopted by the cities of Sandusky and Tremont, Ohio, in order to regulate and impose a gross receipts tax on CATV. The opinion held the ordinances invalid because (1) they impose a gross receipts tax on proceeds from interstate commerce in violation of the commerce clause of the Constitution, and (2) they do not contain definite standards for regulation and administration. The Court noted that in view of its disposition of the issue of invalidity, it was not required "to determine on this appeal to what extent regulation of CATV has been preempted by the Federal Government, or to what extent reasonable regulations may be imposed by municipal ordinances. This issue is dealt with in some detail in *TV Pix, Inc.* v. *Taylor*."

as previously discussed, that in the *Notice of Proposed Rule Making*, published only a few months after the Supreme Court on February 2, 1970, affirmed the *TV Pix* case, the Commission specifically considered "Federal-State or local relationships in the CATV field" and pointed out that, although it possesses the power of preemption, it has determined, on the basis of policy rather than legal grounds, to leave certain areas of regulation to local authorities, subject to such appropriate standards as the Commission may see fit to prescribe for local regulation.[23]

23. Pars. 1–6.

11

The development of municipal regulation

The operation of a CATV system requires an exceptional use of city streets. This involves a complex network of coaxial cable and service drops over or under municipal public ways which connect residences, offices, and plants of the subscribers with the CATV's output of television signals. Such special use of city streets, however, which is not enjoyed by all citizens, is a right that must be accorded to the CATV system by a specific act of the governing municipal body.[1]

As previously noted, in the early days of CATV, the town fathers of the various small towns whose residents strongly desired television, despite their disadvantageous locations, were anxious to entice CATV systems to their areas and would proceed to grant the necessary rights for use of public ways by means of resolutions rather than through the formality of franchises. Such was the simple procedure employed by the Pottsville City Council in the case of Martin F. Malarkey, and shortly thereafter by the Minorsville City Council for another CATV system.

In the very early days of CATV, municipalities were so pleased to procure television for the community that, with a few exceptions, no charges were made for use of the streets to CATV sys-

1. Robert L. Winters, *Municipal Regulation of "CATV"—Community Antenna Television—Model Ordinance, Report No. 151* (Washington, D.C.: National Institute of Municipal Law Officers, 1967), pp. 32–33.

tems. In the unusual cases, the charges were negligible and were readily accepted and paid by the CATV entrepreneurs. Over the years, however, the practice has gradually been modified, and the charges have been increased significantly. Obviously, the municipal authorities observed the acclaim with which this new and satisfactory service was being accepted by the community, readily estimated the income to the CATV system in their locality, and determined that it represented a substantial source of revenue available to be tapped in more realistic amounts.[2]

Before charges made by municipalities against CATV systems are discussed, the right to impose such charges should be considered. This right stems from the fact that the municipality, as an arm of the state, has complete control over the streets within its borders and may impose a tax or fee on CATV systems for the privilege of using the streets.[3]

Taxes on telephone and telegraph companies, which are allowed the use of city streets or alleys for their poles and wires, have been consistently sustained where it appears that the tax in question is levied not for the privilege of doing business or as a revenue device but for the enforcement of appropriate local government supervision, or as a rental for permitting use of the public ways, or for the expense of inspection. The same principle is applicable to and has been accepted by CATV systems.

The key to the validity of the charge is "reasonableness." Thus, if a tax is levied only to compensate the municipality for the use of its streets or for the cost of supervision, and a reasonable relationship exists between the amount of the charge and the use or service to the CATV system, it should be sustained.

The fee, often called a license tax, is frequently measured in terms of gross receipts or by each pole or foot of wire. In either situation, to be valid, the franchise or ordinance must clearly indicate that the tax is imposed for the privilege of using the streets, which is a proper basis for regulation, and, as noted above, the

2. Interview with E. Stratford Smith, November 20, 1968.
3. Winters, *Municipal Regulation of "CATV."* p. 39.

evidence must establish that the charge is reasonable.[4] It should also be noted that franchise payments levied against CATV systems will be carefully scrutinized to determine whether they impose an unreasonable burden on CATV systems as media of interstate commerce, and if such unreasonable burden exists, the court, in the event of a controversy, should reject the payment provision.[5]

Since before the turn of the century, tax levies have been made on telephone companies and telegraph companies according to the number of poles erected and the miles of wire strung in the public ways of the municipality.[6] In recent years some municipal corporations have applied this method of taxation to CATV systems. It is difficult to categorize such charges in terms of dates or amounts because the facts and circumstances of each case, which determine the validity of the charges, vary considerably.

More data appear to be available on franchise fees consisting of flat charges, or a percentage of gross receipts, or a combination of the two. The figures in this regard indicate a wide variety of percentages, flat amounts, and graduated schedules. For example, Burbank, California, levied a flat 2 per cent fee for the entire twenty-five-year life of the CATV franchise; Auburn, California, made no charge for the first five years and charged 2 per cent per year thereafter; Decatur, Illinois, taxed the CATV system in its area the greater of $10,000 or 6 per cent of gross receipts per year; Wilmington, Delaware, levied a tax on its CATV system in an amount from 2 per cent to 5 per cent gross receipts depending on the number of subscribers; and Baton Rouge, Louisiana, adopted a complex graduated scale of fees starting at a flat 4 per cent for the first year, the greater of 4 per cent or $7,200 for the second year, and increasing this to the greater of 8 per cent or $21,600 plus "$100,000 addi-

4. *Village of Lombard* v. *Illinois Bell Telephone Co.*, 405 Ill. 209, 90 N.E. 2d 105 (1950); *City of Chicago Heights* v. *Public Service Co.*, 408 Ill. 604, 97 N.E. 2d 807 (1951); *Panther Valley Tel. Co.* v. *Borough of Summit Hall*, 376 Pa. 375, 102 A. 2d 699 (1954).
5. *Dispatch, Inc.* v. *City of Erie*, 364 F. 2d 539 (CA 3, 1966).
6. *City of St. Louis* v. *Western Union Tel. Co.*, 148 U.S. 92 (1893); *Western Union* v. *Richmond*, 224 U.S. 160 (1912); 408 Ill. 604, 97 N.E. 2d 807 (1951).

tional" for the eleventh year, with a flat fee thereafter increasing from $100,000 through the twentieth year to $300,000 through the twenty-fifth year.[7]

It should be noted that in some communities which are franchising CATV systems an announcement is published that sealed bids may be submitted and the successful bidder is chosen according to: the fee proposed to be paid to the municipality; the rate suggested for subscribers; and the channels to be received and offered to the subscribers.[8]

Duration of the franchise granted by a municipality is a very important consideration to any CATV system. In the early days of this type of operation, many of the franchises were granted for a period of twenty years—a figure which was initially selected more or less at random. In a few rare instances, franchises were granted with no time limitation. Others were for periods as short as ten or fifteen years. This last situation existed in the early 1960s, when the terms were being shortened because some municipal authorities were becoming disturbed about the extent and value of the rights they were according to the CATV systems and, consequently, refused to be bound for a long period.[9] Examples of short franchise periods are found in the CATV arrangements made by Concordia, Kansas; Lima, Ohio; Grand Forks, North Dakota; and Oak Ridge, Tennessee.[10] It should be observed that some CATV franchises are subject to renewal at the end of the prescribed term.

In the early years of CATV, relatively few of the ordinances or franchises referred to the rates to be charged subscribers, but only a few years after the industry began to develop, the practice became common for the municipality to require that the franchise specify what the initial rates and connection charges would be and also to provide that the rates might not be increased without prior approval by the municipality. The CATV leaders viewed this type of franchise provision with a great deal of uneasiness, particularly because

7. Winters, *Municipal Regulation of "CATV,"* pp. 54–62.
8. Interview with Smith, November 20, 1968.
9. *Ibid.*
10. Winters, *Municipal Regulation of "CATV,"* pp. 56, 58, 60.

such requirements smacked of public utility regulation of the industry, which they had consistently opposed.[11] In adopting the position that CATV systems are not common carriers or any other type of public utility, the CATV community has been solidly supported in law, and, clearly, opposition to rate regulation could have been successfully sustained in the federal courts. Many of the municipalities were insistent, however, about including rate provisions in their franchises to CATV systems, and most companies voluntarily acquiesced in order to obtain the franchise for which competitors would have been quite willing to make the rate concession.

A significant fact is that this type of rate control appears not to have unduly burdened the industry because in places where a CATV system could establish a reasonable justification for a rate increase, the involved municipality has generally granted authority for the advance in rate. As a practical matter, however, it appears that once CATV systems establish a rate, they seldom adjust it upward unless the increase becomes vital because the system is being completely rebuilt, its capacity is in the process of expansion to include more television stations, or it will offer more auxiliary services. In such instances, a relatively small increase in rate, such as $.50 or $.75 per month, will be sought to help defray the new costs. The history of the industry indicates that if a CATV system arbitrarily increased a rate even as much as $1, it might suffer drastic consequences, either through direct opposition from subscribers or through the grant of a competing franchise by the same municipality. Among other municipalities, Williamsport, Pennsylvania, granted a competing franchise because of a rate increase by the one CATV system in the city. It might be noted as standard procedure that rates are fixed only after expert consideration, because, in the normal course of events, any subsequent effort at an increase is subject to defeat, with the result that reasonable precaution dictates that the operators must abide by their initial rates.

A number of the early franchises have recently been, and are now,

11. Interview with Smith, November 20, 1968.

up for renewal. In some instances where no fees or only nominal fees were assessed by the municipality under the terms of the original franchise, substantial charges are requested because, unlike the situation which existed at the initial franchise grant, willing and able competitors are waiting in the wings.

It is interesting to observe that quite a few CATV operators who held advantageous franchises from various municipalities have, several years before their respective terms expired, sought extensions of their franchises in exchange for voluntary acceptance of substantially increased payments on their part to the municipalities.[12] In many instances this has clearly proved to be an astute move because at the time of the original termination, absent such extension, it would not be unreasonable to expect that a new entrepreneur would come before the city council and either compete for the one franchise or seek an additional franchise. On this point it should be noted that, generally, municipalities do not possess authority to grant exclusive franchises, and it is possible that many cities or towns, especially those of relatively substantial size, might issue a second or even a third franchise. If the city council is satisfied, however, with the existing CATV system, it might, even without authority to grant an "exclusive," issue only the renewal franchise to the present system, on the grounds that it would, in the city council's opinion, be unsafe, impractical, or inefficient, in terms of the public interest and safety, to have more than one CATV system in the city. Actually, it has not been the practice in the industry to have more than one CATV operator in a city. One notable exception is Williamsport, Pennsylvania, which, at one time, had three CATV systems, and the entire city enjoyed a choice of at least two CATVs, which created much duplication of coverage and other problems. The additional problems more than one CATV system causes include the adjustments and cost of accommodating another cable on the same poles as those used for the first CATV system or the difficulty of satisfactorily placing additional poles for the second system. The usual result of such duplication of service and coverage has been that one system buys out the other.

12. *Ibid.*

In regard to the exclusive versus nonexclusive franchise issue, the situation in New York City warrants mention. The city is massive and the need is real, particularly because of the many huge structures within its limits. The question of competition among CATV systems has reduced itself to competition at franchise time, and the problem of competition among operating CATV systems has effectively been eliminated by the city council through assignment of specific geographical regions to the respective companies.[13]

There are several standard provisions usually contained in the franchise agreements. One of these is that the grantee (the CATV system) will be liable for, and indemnify the city against, any damages or penalties which the city may be required to pay as a result of the franchise, including damages arising out of the installation, operation, or maintenance of the system. In this regard the CATV company is required to maintain adequate insurance for the protection of the city and also a faithful performance bond to guarantee the fulfillment of its obligations under the franchise. The grantee shall provide service to public schools within the city for educational purposes upon request by the city without cost and may elect to provide similar service to private, including parochial or other religious, schools. The grantee also agrees, upon request of the city council, to make available its facilities to the city to meet any emergency or disaster. In addition, the grantee stipulates that all petitions, applications, and communications submitted to the FCC, the Securities and Exchange Commission, or any other federal or state regulatory commission or agency shall simultaneously be submitted to the city council.[14]

13. *Ibid.*

14. National Institute of Municipal Law Officers, *NIMLO Model Ordinance Granting Community Antenna Television Franchise* (Washington, D.C.: National Institute of Municipal Law Officers, 1968), secs. 13-406, 413-14, 424.

PART III

A look to the future

12

The CATV industry

It is only the disappearing genie who considers conjecture anything but a risky task reserved exclusively for the foolhardy. The recommendation and prediction business, however, seems significantly less precarious, more desirable, and, in fact, appropriate and necessary as a conclusion in a historical examination of an increasingly active, promising, and evolving industry. Predictions and recommendations in this study will aim initially at describing the future in practicable terms, technically and economically, legally and politically, in order to contribute ultimately to a necessary awareness and readiness for capitalizing on and exploiting the potential of community antenna television.

Consideration of CATV as part of the communications system of the nation must focus on the physical resources used, and the public interest served and public service rendered.

The present allocations table issued in the 1952 *Sixth Report and Order* appears inadequate to meet the communications demands of today. Possible and needed services for the public using the present television portion of the electromagnetic spectrum far outstrip the capability of the current assignments chart to carry such traffic. Consequently, analysis or projection of any aspect of communications must relate directly to the carriage potential of the electromagnetic spectrum.

Two economists focusing on the present television broadcasting system have noted that

> The potentials of the marvelous television medium to entertain, inform, educate, and communicate could be better realized than today if there were more channels [, and] . . . if more operating stations are not possible, then some other solution is necessary, if greater program volume and diversity are to become available to the public.[1]

The solution advanced and defended by the writers was that of the Wired City, or WCTV.[2]

The authors saw CATV as a wire system, but possessing shortcomings incompatible with the WCTV notion, namely: (1) CATV does not originate programming; (2) CATV is a private rather than a common carrier operation and consequently determines the traffic on its lines; and (3) CATVs appear to be facing serious threats relative to the extent and course of FCC authority and copyright liability.

In regard to the first point, in June, 1968, some program origination was authorized by the Commission, only to be encouraged on a larger scale and more strongly six months later, and ultimately, in the October, 1969, *First Report and Order,* required of all systems with 3,500 or more subscribers.[3] As previously noted, however, the FCC suspended this origination requirement immediately following the decision by the Court of Appeals on May 13, 1971, in the *Midwest Video* case, declaring that the FCC was without authority to impose such origination rule on existing CATV operators.

In regard to the second point, in December, 1968, the FCC granted permission to CATV to operate as a common carrier on some of its unused channels, subject to state or local restrictions

1. Harold J. Barnett and Edward Greenberg, "A Proposal for the Wired City," *Washington University Law Quarterly,* 1 (Winter, 1968), 5.
2. *Ibid.*, pp. 10–25.
3. *Midwest Television, Inc.* v. *Mission Cable TV, Inc., et al.*, 13 FCC 2d 478, 13 RR 2d 699 (1968); U.S., FCC, *Notice of Proposed Rule Making and Notice of Inquiry,* Docket no. 18397, 15 FCC 2d 417, 33 Fed. Reg. 19028 (adopted December 12, 1968; released December 13, 1968); U.S., FCC, *First Report and Order,* Docket no. 18397, 20 FCC 2d 201; 17 RR 2d 1570 (adopted October 24, 1969; released October 27, 1969).

or both, and is still inquiring into the matter.[4] In regard to the third point, in June, 1968, the FCC's authority was upheld in the courts, and CATV was freed of the threat of retroactive copyright liability.[5]

CATV has emerged then as the real counterpart of the WCTV dream, possessing its ascribed assets and constituting a ready solution to the present spectrum problem.

President Johnson's Task Force on Communications Policy took a favorable view of CATV. Even during the months of official suppression of the report, and especially after the December 13, 1968, imposition of FCC Interim Regulations[6] and the following months of preliminary FCC hearings, oral arguments, and congressional hearings on CATV, consultants who had participated on that blue-ribbon advisory panel broke their silence and spoke out. They went on record expressing views strongly favoring cable. Leonard Chazen of Rutgers University Law School, for example, in a feature article in *The Atlantic,* stated:

> Cable television is the one development that promises the needed radical change, a chance for channels to become . . . plentiful. . . .
> . . . with the advent of cable television, we are entering an environment of channel abundance, where the old presuppositions about scarcity and the degrading effects of the marketplace no longer apply.[7]

Consistent with the early history of community antenna television and factors which caused its emergence during the era of the 1948–52 freeze on channel allocations, CATV is presently likely to offer an answer to the channel allocations problem and the desire of the public for increasing communications service.

4. *Ibid.*
5. *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968); *Fortnightly Corporation* v. *United Artists Television, Inc.*, 392 U.S. 390 (1968).
6. U.S., FCC, *Notice of Proposed Rule Making and Notice of Inquiry,* Docket no. 18397, 15 FCC 2d 417; 33 Fed. Reg. 19028 (December 13, 1968).
7. Leonard Chazen, "Viewpoint: The Price of Free TV," *The Atlantic,* CCXXIII (March, 1969), 59, 61.

Innovations in microwave links

Like the pioneers of the mid-century fledgling CATV industry, leaders and corporations in the industry today are progressive and innovative, and, independently, they are devising basically similar distribution processes on separate geographical fronts to overcome fundamental transmission problems. The Amplitude Modulated Link being developed by TelePrompTer, Incorporated, and the Quasi-Lasar Link System being developed by Lasar Link Corporation are examples of these innovations.

Certain geographical locations are particularly difficult to serve by wire transmission of CATV. Sparsely populated areas are for physical and economic reasons impractical for cable service. Highly populated and developed central urban areas invariably present the problem of unreasonably slow and expensive underground cable construction.

The problems in a large urban area are worthy of special analysis, for urban dwellers need CATV and it constitutes a potentially very desirable market. Artificial mountains of steel and concrete have effectively canceled the broadcast services of nearby TV stations. The requirements of color reception, the growth of UHF, and the inability of apartment house master antenna systems to meet current demands put CATV on very favorable footing.

The Amplitude Modulated Link and the Quasi-Lasar Link hold significant promise of bringing TV reception to such areas.

TelePrompTer Corporation was awarded a contract in December, 1965, by the city of New York for the construction and subsequent operation of a community antenna television system to serve one of the wealthiest but most unfavorable and deprived television reception areas in the country, the upper half of the borough of Manhattan. TelePrompTer's *1966 Annual Report* stated that the construction of this system had been severely hampered by delays in obtaining property-crossing rights and access to underground ducts.[8]

8. (New York: TelePrompTer Corporation, 1967), p. 4.

In 1966, Hughes Aircraft Company joined forces with TelePrompTer to purchase a minority interest in TelePrompTer Manhattan CATV Corporation. The FCC subsequently awarded an experimental license to Hughes Aircraft and TelePrompTer for the testing of a short-range microwave system with simultaneous carriage capacity of twelve color-grade television channels.[9] The design was constructed to use a single transmitter for the directional beaming of electronic signals on unused portions of the spectrum.[10]

As May, 1966, *TelePrompTings* stated:

> If successful, the technique could make underground cable virtually unnecessary and provide a major short cut in construction of both big city CATV systems like TPT's Manhattan franchise and isolated rural areas where the conventional pole-and-cable methods are very costly.[11]

Harold Osaki, manager of the Microwave Components Department of the Research and Development Division of Hughes Aircraft Company, and Lyle Stokes, Senior Scientist in the Systems Laboratory in the Research and Development Division of the Aerospace Group at Hughes Aircraft, have publicly documented the AML short-haul microwave concept as it was developed and implemented.

Stokes explained that in May, 1965, a TPT representative came to him with a notion of employing a microwave link to meet the following functional specifications: (1) it must carry a dozen TV channels to multiple receivers in a metropolitan area to avoid the expensive project of tearing up the streets to lay cable; (2) it must function as a system for point-to-point operation to satellite cities; and (3) it must be able to transcend such barriers as rivers. TPT had christened the unborn system Short Haul Multiple Microwave

9. *Ibid.*
10. Harold Osaki and Lyle S. Stokes, "Short Haul Microwave" (Paper delivered at Sixteenth Annual NCTA Convention, Chicago, Illinois, 1967), pp. 198–99.
11. VI (May, 1966), 1.

Link. Stokes notes that the people at Hughes persuasively suggested the less cumbersome name Amplitude Modulated Link, or AML.

The AML experiment was conducted at eighteen gigahertz because this region of the electromagnetic spectrum was neither crowded nor subject to excessive weather losses. A low-power transmitter sent a wide beam to cover a large section of the city and achieved the desired range of six miles. A phase-lock receiver was employed to eliminate competition from the TV station signal itself. Rain tests were conducted and the data analyzed:

> There is a very small time each year when we expect the signal to go down below the 45 db excellent picture quality. These two, three, or four hours, however will give us a type of "snow" picture . . . between midnight and three o'clock in the morning when not too many people will be watching.[12]

The experiment was a success.[13] As a short-haul, high-volume, low-noise, high-power microwave link operating in the eighteen gigahertz band, AML holds promise of playing a significant role in the future of communications of the country.

The Quasi-Lasar Link System is basically similar in function, though not in technology, to the AML. Joseph Vogelman, president of research at Chromalloy American Corporation, and Ira Kamen, president of Lasar Link, describe the Quasi-Lasar Link as a twelve-twenty-channel short distance link, presently limited in range to three miles in extremely bad weather. It employs quasi-optical wavelengths, including microwave, uses an uncluttered portion of the spectrum, the frequency range above forty gigahertz, and overcomes the high linearity problem inherent in microwave systems.[14] Like AML, the Quasi-Lasar Link offers a substantial contribution to improve communications.

12. Osaki and Stokes, "Short Haul Microwave," p. 200.
13. TelePrompTer Corporation, *1966 Annual Report.*
14. Joseph Vogelman and Ira Kamen, "The Quasi-Lasar Link System for CATV," *TV/Communications,* V (November, 1968), 52–53.

In July, 1970, the Commission approved the above-described short-haul CATV microwave distribution system.[15]

Technological advance is exceptionally, and will become increasingly, expensive in terms of resources and capabilities. Alliances such as those described above between TelePrompTer and Hughes Aircraft and between Chromalloy American and Lasar Link are becoming commonplace. This pattern can be expected to continue.

The ideas and efforts responsible for the AML and the Quasi-Lasar Link are somewhat similar in objective and accomplishment to those of Parsons, Shapp, Tarlton, and other pioneers twenty years earlier. This seeming duplication of activity can be expected to continue and contribute to a high degree of technical refinement and corporate competition in the future industry.

A reasonable move in the technological area on the part of the FCC to favor the public interest would be to require construction of receivers with "cable compatibility" as it enacted the all-channel receiver requirements to favor or make UHF comparable with VHF.[16]

Future growth of CATV industry

Just as the crank in the automobile and the phonograph were relegated from the active American scene to museum halls, and just as washing machines, street cars, ice boxes, stoves, and sewing machines have evolved to their present forms, so the 1948 traditional CATV system will develop to an entity of form, function, sophistication, and glamor significantly different from what exists today.

Equipment and system characteristics will describe patterns substantially modified from those of the founding days of CATV. The future will focus on the progressive and large system operator, especially in the major markets.

15. "Commission Gives CATV a Pair of Welcome Breaks," *CATV,* V (January 4, 1971), 43.
16. "Exploring Cable Capabilities," *Television Digest,* XI (January 11, 1971), 3.

The growth of the CATV industry as a system operation business will be determined by regulation. The issues and policies relative to future regulatory standards will be discussed in the next chapters. Several prognostications about system growth, however, are in order here.

The FCC is grandfathering existing systems and consequently is permitting expansion and development of presently held properties. This is a tremendous opportunity for the industry.

Systems engaging in local reception, even in the major markets, have not been frozen. In fact, a sufficiency of local signals plus poor off-the-air reception make most urban markets quite viable.

The Commission has proposed that systems in the top one hundred markets be allowed to import up to four distant commercial TV signals into their markets and that local UHF stations be allowed to sell advertising on those programs.

The regulations on importation of distant signals into smaller markets are judged by industry leaders to be of little significance since most such markets have already been developed.

The FCC requirement of program origination gives a boost to the industry by officially legitimizing what is a potentially very marketable public service and one the leaders are anxious to exploit.

A resolution of the multipronged copyright problem will probably ultimately come by act of Congress, and not by FCC ruling, in omnibus copyright legislation.

According to the law of supply and demand, an entrenched or needed property is endowed with inflated value as a result of the shortage of the property relative to the current demand. Freezing restrictions in any form or to any degree on CATV will probably tend to escalate the market value of present CATV properties.[17]

Limitations on the extent of CATV ownership have been issued for TV stations. All TV station owners who operate CATV systems in the same market must sell one or the other by August, 1973.

17. Irving B. Kahn (Paper delivered before New York Society of Security Analysts, New York City, January 2, 1969), pp. 8–10.

Some degree of swapping or trade arrangements as well as sale of these properties can be expected in response to this divestiture requirement.

Over the last twenty years CATV systems have grown progressively larger to reach an average size in system subscribership approximately nine times the original count. This trend will reasonably continue until the FCC determines that the "public interest, convenience, and necessity" require imposition of a regulatory standard prescribing a numerical ceiling on system growth.

Growth patterns of the industry and the demands of federal recommendations indicate that the survival of the small "traditional" system operator is precarious and that the continued growth of the CATV entrepreneur is most promising.

In the immediate future, the traditional system will remain relatively unchanged. Engaging in program origination with realistically modest initial commercial advertising income or improving the technical specifications of these systems, or both, offers the system operator little or no financial incentive in terms of increased subscriber rates in these already saturated markets. The failure of such system operators, however, to become expeditiously progressive may well constitute their crime of omission, an offense that will possibly be interpreted as having caused their demise. Even in those areas where the traditional system provides the only link to reasonable and minimal television reception, it can be expected eventually to be replaced or substantially supplemented.

Speculation may have it then that the CATV industry will describe a growth pattern similar to that of the automobile industry, where in the 1920s and 1930s there were many manufacturers who eventually disappeared or were absorbed by a few major companies. The 1990 outgrowth of the CATV industry of the 1970s will probably bear less than a score of names, with about ten leading the pack in general public reputation, awareness, sales, and service.

Consistent with the tradition of CATV's founders, industry leaders have recently expressed concern for a neglected sector of the

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Consistent with the tradition of CATV's founders, industry leaders have recently expressed concern for a neglected sector of the

American public—the rural dweller.

In 1964, when CATV pioneer Milton J. Shapp was president of Jerrold Corporation, he viewed rural service as a "thrilling frontier for CATV." In an address to the Federal Communications Bar Association, Shapp presented the following proposal calling for special legislation to help the rural community.

> The REA law should be amended by Congress to permit companies similar to rural electric and rural telephone companies to borrow funds to install cable systems for distribution of television signals on the same basis that money is now borrowed for installation and modernization of power and telephone systems.
>
> It would then be economically feasible in rural areas to install CATV systems that would not only bring multichannel television into all farm homes, but in addition, special educational programs, weather and crop reports could be provided via closed circuit at very little additional cost. . . .
>
> I hope that those who have shed so many tears on behalf of the rights of rural dwellers to enjoy television will join the fight to implement this program.[18]

No legislation resulted, and there seems to be little hope of implementing such a proposal through the political sector.

The research and development efforts of large equipment manufacturers and system operators, however, such as the AML and the Quasi-Lasar Link, hold real promise of linking rural areas to the nation's communications thoroughfares. As the economics and performance of such experimental technologies are verified, system operators are very likely to perform as they did twenty years earlier by initiating television service for those residing in rural America in the 1970s.

After a review is made of the movement of power, light, telephone, and broadcast television to the rural community, it becomes apparent that CATV at the early stages in its development, without legislative encouragement in the form of subsidies, loans, or taxation benefits, can only be commended for very realistically

18. Milton J. Shapp, "CATV—Past, Present, Future," *Television Digest—Special Supplement*, IV (December 14, 1964), 6.

anticipating and acting to provide rural service utilizing exclusively internal resources. Consistent with the movement of power, light, and telephone to the farm, however, legislative action to provide subsidy borrowing or tax advantage appears to be in order. Because of the present primary entertainment function of the service, a tax advantage now seems preferable. If CATV acquires characteristics of a common carrier service, however, a subsidy or borrowing advantage would be the recommended form of encouragement for providing financing for rural service.

Consistent with the history of CATV, experimental innovations initiated in the industry illustrate what is technically feasible and reflect its consistently progressive character. Innovations in technology and service will be witnessed primarily in systems constructed in major markets, particularly as they evolve into both home and urban communications systems. Present concern for development of recording devices for individual and private use could alter the nature and function of CATV communications service from that of a mass medium to that of a medium supplying personal services. A high subscriber saturation rate will be only one aim. The highlights of the new developments will be the many related services available to the urbanite through his cable equipment and subscription, such as books on microfilm, news and weather data, market information, movies and sports events, shopping services, remote public utilities meter readouts, currency and checking system services, mail service, and central security protection against fire and burglary.[19]

Although studies have been prepared proposing or assuming the end of off-the-air broadcasting in favor of cable, such efforts seem hardly more than interesting academic exercises.[20] Contemporary

19. Martin F. Malarkey, Jr., "Smart Bets in the Cable Stakes: A Frank Look at Our Future," *TV Communications*, VI (May, 1969), 59–60.

20. Barnett and Greenberg, "A Proposal," pp. 1–25; Herman W. Land Associates, Inc., *Television and the Wired City: A Study of the Implications of a Change in the Mode of Transmission*, Report to the President's Task Force on Communications Policy, commissioned by the National Association of Broadcasters (Washington, D.C.: National Association of Broadcasters, 1968).

political, legal, and economic realities suggest neither the disappearance nor obsolescence of other media but rather a dilution of some of the media in the consumption patterns of individuals. Just as people did not stop buying newspapers when radio was introduced or dispose of their radios with the advent of television, so it will predictably be with CATV. The media mix of the future American will involve the blend of an increasing number of media and will vary to satisfy the requirements and desires of each person.

The industry projected into and beyond the 1970s will continue its dynamic growth and development. The refinement of multichannel transmission modes and the inclusion of response facilities and supplementary services make the industry without doubt a most valuable commodity on the communications market, a promising investment for the future.

In brief, CATV holds substantial promise of assisting in entertainment supply, information delivery, and educational efforts, all of which are dependent on communications processes. The communications of the nation can reasonably be said to depend, to a substantial extent, on the healthy evolution of the CATV industry and its integration into the total communications complex.

The leaders in the information industry of the 1970s will not ponder the now merely academic problem of whether or not the cable will play a prominent role in the life of the nation. Rather, they will prepare themselves for the front line of battle. The issues now are: Whose cable will dominate the field? What degree of dominance will that wire attain in competition with the other media? What specifically will be its function? The settlement of such policy questions is within the periphery of governmental concern.

13

Federal regulation of CATV

Governmental involvement and regulation of the CATV industry will predictably increase at the national, state, and local levels.

On the national level, the scope, impact, and sophistication of CATV make that industry an inevitable target for increasing regulation. Industry leaders typically predict, "there will not be any substantial relief from the rules . . . for CATV."[1]

Consistent with this perspective, the industry is mounting a substantial effort to outline the parameters of such regulation by devoting some of its best talent to the definition and defense of what it sees as practicable and reasonable regulatory standards.

Through the 1960s the CATV industry's attempts to persuade Congress of the merits of its efforts and of the ogre role of the FCC suffered from politically established opponents. Since an increasing number of former CATV adversaries are beginning to share common interests with the CATV industry by buying CATV properties, this voice to Congress will probably become substantially broader and exponentially more influential.

CATV is faced with serious issues on many fronts. The most pressing, in terms of their potential effect on the form and function of the future cable industry, are program originations, the

1. Martin F. Malarkey, Jr., "Smart Bets in the Cable Stakes: A Frank Look at Our Future," *TV Communications*, VI (May, 1969), 58.

establishment of an economic base for origination, advertising, reporting requirements, and copyright liability.

Program originations

In its 1969 *First Report and Order* (par. 4), the FCC cogently noted that although the CATV industry almost uniformly opposed the proposal to require program origination as a condition for the carriage of broadcast signals, those commenting on behalf of CATV interests generally agreed that CATV program origination serves the public interest and should be encouraged. Although the *Midwest Video* case set aside the *First Report and Order*'s requirement that CATV operators originate programs as a condition of the continuation of their CATV operations, the opinion pointed out: "We are not passing on the power of the FCC to permit CATVs to originate programs and to prescribe reasonable rules for such CATV operators who voluntarily choose to originate programs."

Under all of the circumstances, it is anticipated that a substantial number of CATV systems will become interested, or retain their interest, in program origination on a voluntary basis.

A very basic problem for the traditional CATV system operator will be the acquisition of minimum essentials in technical equipment, software, and personnel for original programming. Many system operators have not followed a regular program of reinvesting an adequate percentage of their depreciation allowance, or profits, or both, in system improvements and presently do not meet tight technical specifications. Despite such operating practices, these systems have typically enjoyed a high market saturation rate. The establishment of reasonable technical standards will likely cause the demise of the marginal system operator.[2] The increased financial commitment on the part of cable system operators for improvement and originations will predictably require accounting expertise, for example:

2. *Ibid.*, p. 59.

> NIXON PLAN TO SPEED TAX WRITEOFFS on new or used equipment in service after last Dec. 31 [1970] would save money for *broadcasters, cablecasters, publishers, by allowing them 1) to shorten depreciation schedules up to 20% less than existing Treasury guidelines, 2) to take full-year tax credits for equipment bought anytime during the first half.* If not upset by Congress or court action, the new rules could, for example, more than double first-year tax savings—from $480 to $1200—on a $10,000 press or transmitter (assuming 10- and 8-year writeoffs using double declining balance and 48% tax rate).
>
> *Although most buildings won't be covered by the liberalized rules, press annexes, transmitter buildings and CATV head-end structures may be included* (when Treasury works out the details), if they are "special purpose structures . . . so integrally a part of, or closely related to, machinery or equipment which they house or enclose that their usefulness necessarily terminates with the termination of the usefulness of such machinery or equipment." . . . Cablecasters will feel especially disadvantaged by the provision in the new rules that, *where cable subscriber fees are regulated by a public utility agency, CATV equipment may not be entitled to the additional tax abatement.*[3]

The progressive system operators see a bright star ahead in the opportunity to originate programming. A spokesman for the industry views it as "a major thrust to one of the latent capabilities of CATV. . . . a rare opportunity."[4]

The nation's CATV leaders, in accordance with their published plans and recent activities, can be expected to establish or increase their origination potential through internal corporate development and acquisition of corporations with programming capabilities. Simultaneously, an industry of program suppliers will develop to sell programming and advertising-related services.

In the major markets CATV operators will immediately step up their origination efforts. In the more distant but predictable future, the industry will go through a partial transition in function as it

3. "Nixon Plan to Speed Tax Writeoffs," *Strauss Editors Report* (January 18, 1971), no. 79, p. 1.

4. Irving B. Kahn (Paper delivered before New York Society of Security Analysts, New York City, January 2, 1969), p. 9.

acquires the capability to provide glamorous and desired services, such as those detailed in chapter 12, for orderly urban life.

An economic base for origination

The FCC inaugurated a study into the problem of the financing of original programming by CATV systems. The alternative approaches to the issue on which the Commission requested comments were whether CATV originations should be sustained: (1) by regular subscriber rates, (2) by per-program charge or higher monthly fee basis, or (3) by limited commercials.

The Commission made specific suggestions about how to achieve a fiscally viable CATV system origination operation through regular subscriber rates:

> For example, we request comments upon the following: If $1 per month of the $5 monthly fee from one to two million subscribers in a city like New York was allocated to program origination, the programming fund would amount to $12–24 million annually. If CATV network operations were supported by a portion of the monthly subscriber fees paid to affiliated CATV systems throughout the country, the resulting financial base for network program origination and interconnection might well exceed the annual amount paid by a national television broadcast network for such purposes. The three television networks together annually spend about $750 million on programming and $45 million for interconnection, or an average of approximately $267 million apiece for both. Assuming widespread CATV operations in major cities as well as smaller communities and a subscriber base of 45 million of the present 58 million television homes in the nation, $1 per month per subscriber would provide annual funds in the order of $540 million. The foregoing is, of course, hypothetical. Comments are requested on the economic feasibility of CATV systems allocating $1 per month per subscriber to program origination.[5]

Without advertising revenue, CATV systems have a low margin of profit. Historically, systems have operated in the black, and

5. U.S., FCC, *Notice of Proposed Rule Making and Notice of Inquiry*, Docket no. 18397, 15 FCC 2d 417; 33 Fed. Reg. 19028 (December 13, 1968), par. 17.

large system operators have been attracted to the prospects of originations. In fact, even without any guarantee of a supplemental source of funding to finance programming, leading entrepreneurs of the industry have made heavy commitments in the direction of originating programming.

For the system in the competitive major market situation, additional channels of programming other than off-the-air channels enhance the appeal of the service to the subscriber. Through originations the industry can engage in a federally blessed and required activity. Such origination effort can be expected to accelerate.

Advertising revenue will derive principally from local and regional rather than national sources. Sponsors will be such agents as retailers, restaurants, banks, theaters, and newspapers. Local public interest programming will focus on local problems and politics, local sports, and dialogues with the community.

CATV will likely be used for commercial testing and program ratings.

Reporting requirements

The Commission has proposed a rule to require CATV operators to file annual reports which will provide

> current information on such matters as the location of the system, numbers of subscribers, channel capacity, broadcast signals carried, extent and nature of program origination, any other operations conducted on the system, financial data, ownership, and interests in other CATV systems, broadcast media and other business interests.[6]

Barring the filing of any suits in protest of Form 325 or any of its parts, as of March 1, 1972, each operating system will be required to file reports on franchise (inclusive of monthly rates and installation charges, term, area to be served, authority to use right of way, pole attachment agreements), ownership, other outside business

6. FCC, *Notice of Proposed Rule Making and Notice of Inquiry* (1968), par. 17.

interests of the CATV system exceeding 25 per cent of the owned property, related broadcasting interests, program origination, source information for programming, specifications, and types of programming similar to broadcasting logs, using specified week of December 1–7, 1971 (for the March 1, 1972, filing).

As of late 1971, the FCC adopted a Form 326 involving financial information of a confidential sort, such as rate of return, expenses, income, and depreciation. It can reasonably be expected that this requirement will be contested by industry interests.

In 1970, the FCC adopted an annual fee requirement due on April 1. This fee requirement involves reporting the average of the respective systems' quarterly report subscriber figures times thirty cents per subscriber and payment of the finally calculated amount to the FCC.

These practices seem justified by the industry's growth and impact on the nation. Further, they seem consistent with the status of respectability and stature that the industry is anxious to attain. In the light of the present practice by major systems of filing periodic reports with the United States Securities and Exchange Commission and submitting annual reports to their stockholders, it seems highly unlikely that any companies of significant size in the CATV industry will object to the adoption of the annual report proposal.

Copyright

The test case on the copyright issue, *Fortnightly* v. *United Artists*, was resolved by a United States Supreme Court decision in June, 1968. Although an undeniable victory for CATV interests in that it obviated the possibility of retroactive copyright liability, the case represents only a partial resolution of the CATV copyright problem.

Official representatives of CATV and the industry's supporters and opponents have been cooperating with the Office of the Register of Copyrights in the preparation and resolution of the omnibus copyright bill. The significance of these negotiations for the CATV

industry rests in the projected compensatory arrangement or accommodation to be reached between the CATV industry and the copyright holders.

The FCC seems to be looking for a compensatory agreement which would move CATV out into the free market and subsequently allow the market to determine the industry's position therein. Some of the burdensome problems which currently fall solely within the jurisdiction of the FCC would be resolved by the guidelines laid out in the future copyright legislation and by the contemporary market demand.

Advisors in the CATV industry question the cure-all value of a copyright solution. Martin F. Malarkey has called the copyright question "one step in the right direction," and he predicts that an accommodation will be made "with the copyright people."[7]

His frank opinion is, however, that the CATV industry will, even after the establishment of an acceptable and equitable copyright agreement, continue to face significant opposition from broadcasting interests. The broadcasters' effective efforts at the FCC and on Capitol Hill will maintain a steady focus, perhaps with increasing intensity, on the protection of their markets. They will continue to advance the theory that CATV tends to reduce the broadcaster's ability to serve the public interest because of fractionalization of the station's local audience. Although Malarkey calls this allegation "an unproven one, and, in my opinion, pure fiction," he points out that continued pressure from the broadcasters could be a serious obstacle to CATV in the resolution of regulatory matters.[8]

The National Cable Television Association has studied the copyright issue as it relates to CATV from both a practical and a philosophical point of view. A former general counsel of NCTA tersely describes the industry's position and the rationale supporting it. He states that basically and practically, "copyright is falling

7. Malarkey, "Smart Bets," pp. 58–59.
8. *Ibid.*

upon dangerous times," because of both international problems and technological developments.[9]

In the area of international copyright, the United States copyright should follow the lines of such other conventions as the Berne Convention. The revision must be suitable to or workable for the many interests affected.

Technological developments and processes such as satellites and computers, together with the international problems, complicate the total operational picture of copyright consideration to the point of requiring an examination of fundamental concepts and problems to reach a somewhat permanent solution rather than continually grasping for partial and temporary accommodations.

Basically, the industry's position focuses on the problem created by exclusive rights and the issue of access. In the area of copyright the notion of exclusive rights is in itself problematical. An exclusive right is sometimes interpreted as the right to withhold. A right to withhold, if exclusive rights are in fact such, can logically be construed as a monopolistic control of a property. To the degree that the right to withhold constitutes a monopoly or allows the exercise of monopolistic control, such right basically and philosophically is a dangerous right.

The NCTA assumes this premise that the right to withhold is dangerous. The CATV industry, according to the NCTA, is willing to pay for any signal that it gets, but it wants access to the signals. The industry wants the right to withhold to be kept out of the copyright agreement, to avoid the danger, for example, of a CATV system's being allowed to carry only local signals, but not distant signals.[10]

Resolution of the copyright issue warrants concerned attention, because the impending decisions will predictably determine the extent of growth and the characteristics of the future community antenna television industry.

9. Interview with Bruce Lovett, November 21, 1968.
10. *Ibid.*

The question of administrative overhaul

Dramatic proposals have been submitted by such groups as Presidential Task Forces on Communications Policy and the NCTA to the effect that regulation of CATV, exclusive of microwave activities, be removed from the authority of the FCC and be made at least temporarily the function of a cabinet-level officer, such as the Secretary of Commerce, until such hearings and a determination by Congress would cause the institution of a new governmental structure for the supervision of CATV's telecommunications function.[11]

Although the adoption of these suggestions is possible, the probability of any such drastic change would seem to be somewhat remote at the present time. In fact, the recently adopted annual fee requirement may assist in supporting the FCC in its financial problems.

Like Jack's beanstalk, the community antenna television industry has reached undreamed-of proportions almost overnight. As the industry grew, the FCC, after requesting but not receiving congressional authorization, was faced with the task of solving practical regulatory problems relative to CATV. Appropriately, it assumed jurisdiction over the CATV industry.

The much maligned FCC has been hampered by lack of funds, consequent understaffing, and general congressional pressure in facing the onerous and difficult task of CATV regulation.

To function effectively in the service of the public interest, the Federal Communications Commission should be given by Congress (1) a precise definition of its relationship to CATV and that industry's projected related outgrowth services, and (2) substantially increased funding for its operations.

11. Frederick W. Ford (Statement before the House Subcommittee on Communications and Power of the Committee on Interstate and Foreign Commerce, May 20, 1969), pp. 38–39.

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State regulation of CATV

The FCC has stated that it believes "the public interest would be served by encouraging CATV to operate as a common carrier."[1] Consequently, it granted its permission to CATV systems to lease channels not used for carriage of broadcast signals or for CATV program origination, subject of course to the imposition of state or local requirements. The Commission noted common carrier activity as an appropriate area for state or local authorization and regulation.

A CATV operator would not govern the content carried on such channels except as required by FCC regulations or relevant law (thus a clear basis would be established for the position that the CATV operator had become, by accepted statutory definition, a common carrier). The leased channels would be vehicles for other individuals, groups, and interests to reach the subscribing public. The Commission cited political candidates, advertisers, various modestly funded organizations and entities in the community who might otherwise be unable to use broadcasting facilities, and municipal authorities as potential lessees. It also mentioned the possibility of using such channels for programs on a subscription basis.[2]

1. U.S., FCC, *Notice of Proposed Rule Making and Notice of Inquiry*, Docket no. 18397, 15 FCC 2d 417; 33 Fed. Reg. 19028 (December 13, 1968), par. 26.
2. *Ibid.*

In the more distant future, consistent with the projected functional growth of the industry, an overabundance of channels, and the federal permission granted in December, 1968, the industry will probably lease some of its channels, or sell supplemental services on these channels, or both. As the function of the CATV operation takes on the characteristics of a public utility in that each system would not determine the intelligence it carries, it can reasonably anticipate some degree of public utility regulation. Such services will be easily isolated for analysis from the regular television entertainment service so that rate controls and the like can be uniformly and equitably administered.

It will be recalled that the *TV Pix* decision affirmed the right of Nevada, under a statute cast "in the classic mode of utility regulation," to regulate aspects of CATV operation which the FCC had not acted to preempt.[3] A number of states have now enacted or are considering enacting legislation to provide for various degrees of CATV regulation; and, in fact, as the Commission observes, the ad hoc committee on CATV regulation of the National Association of Regulatory Utility Commissioners (NARUC) has recommended a "Model State CATV Regulatory Surveillance Act" to its executive committee for adoption and submission to its members. On the other hand, the NCTA's Board of Directors has "endorsed in principle federal preemption of the field of CATV regulation consistent with the orderly growth of the cable television industry." The Commission rejected the latter approach and suggested that it should regulate some areas, while other areas should be regulated locally according to standards fixed by the Commission.[4] Because of the FCC's consistent position in the past and its pointed pronouncements, it is confidently felt that the Commission, as a matter of policy rather than legality, will continue to keep exclusive jurisdiction over the major and basic areas of regulation of CATV so far as its interstate characteristics are concerned and will leave to the local authorities such areas as choice of the CATV operator, areas to be served, repair services, expansion timetables, and rates or charges to the public.[5]

3. 304 F. Supp. 459 (D. Nev., 1968).
4. U.S., FCC, *Notice of Proposed Rule Making*, Docket no. 18892, 33 Fed. Reg. 3188 (1970), par. 3.

In the *Wonderland Ventures* case the Sixth Circuit Court of Appeals held that a CATV franchise which required payment of a local franchise fee based on gross receipts (i.e., a stated percentage of the gross proceeds from monthly charges) was invalid because it was an unconstitutional tax on interstate commerce.[6] Although the Commission, in its own words, did "not, of course, comment on the merits" of the case, the implication that it approved such fees was clear in its statement, "The question of setting a maximum percentage for local franchise fees is an area where we should set standards. Such a proposed maximum fee is no more than 2% of a CATV system's gross revenues."[7]

It seems obvious that for the foreseeable future the Commission proposes to permit state or local franchise fees based on gross receipts, subject to the standards fixed by the Commission, unless its position is rendered untenable by a Supreme Court pronouncement or congressional enactment.[8] As a matter of fact, the Commission may once more ask Congress to consider the appropriate relationship of federal to state-local jurisdiction in the CATV field, with particular reference to local franchise fees, but, as in the past, Congress may well leave the Commission to handle the matter without legislative intervention, feeling it can resolve the problem by rule or regulation.

Actually, it has been stated that the appropriate positions of the

5. *Ibid.*, par. 5.
6. See chap. 10, n. 22 for details of this case.
7. FCC, *Notice of Proposed Rule Making* (1970), pars. 3, 8.
8. It is interesting to note that this setting of maximum percentage has been characterized as a "preemption of local regulation." Whether it is such preemption or simply a standard adopted by the Commission, the end result, as of now, appears to be the same. The limitation on fees seems to be predicated on the view that under federal policy the FCC wishes to promote the viability of CATV, UHF, and ETV, and such policy cannot tolerate an undue burden in the form of state or local fees. See E. Stratford Smith, "The Emergence of CATV: A Look at the Evolution of a Revolution," *Proceedings of the Institute of Electrical and Electronics Engineers*, LVIII (July, 1970), 982.

federal government and the states in the regulation of CATV pose a "problem with which the CATV industry and the federal and state governments must come to grips immediately if CATV is not to become hopelessly mired in a morass of conflicting and burdensome rules and orders from the FCC on the one hand and 50 states and a myriad of local authorities on the other."[9] It is felt that this position may be somewhat pessimistic, particularly in terms of the FCC, which has indicated what seems to be a sincere desire to permit appropriate regulation by the states and local bodies and has clearly, by word and action, so far avoided any unnecessary preemption of the CATV field. Nor, on the other hand, for the most part, have the states or their subdivisions appeared to overstep or overreach in the area of regulation. Nevertheless, it is true that the potential for intervention by statute or regulation of so many diverse governmental bodies and regulatory commissions raises a specter which warrants concern and intelligent, imaginative planning on the part of interested and influential persons in government and in the CATV field.

9. *Ibid.*, pp. 971–72.

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Municipal regulation of CATV

The problems of federal-state or local relationships apply equally to federal-municipal relationships. In addition, future aspects of CATV relate particularly to municipalities and their problems.

Municipal interest in and control of the operations of the community antenna television industry will probably be on the upswing and will be evidenced in stricter municipal requirements for the granting of franchises. Soon another aspect of municipal franchising can be expected to draw concern: the bargaining and stipulations involved in franchise renewals.

Since franchises are normally selected from sealed competitive bids, and since the large system operators have been enjoying phenomenal success in franchise procurement, it may be said that city councilmen tend to entrust the CATV operation they authorize to the established industrial concerns. The reason for this trend is undocumented. Perhaps industrial entrepreneurs most aggressively solicit the greatest number of franchises. This examination, however, attempts to probe the elements of franchise procurement more basic than the facts of the quantitative award of franchises.

The corporate resources of the leaders in the CATV system operation business include the expertise, experience, and capital unavailable to the small system operator. To those who grant franchises such factors may generally offer some degree of assurance of a reli-

able operating system and service to the public. The large industry businessman may be the only one willing and able to afford the risk of establishing a local CATV business in a municipality that wants CATV but does not constitute a promising CATV market. Irving Kahn of TelePrompTer offers the following comment in illustration:

> Four of TelePrompTer's five largest systems were acquired under conditions in which previous proprietors thought they foresaw adverse competitive or regulatory situations. These systems have thrived and proved excellent investments.[1]

To the municipality granting an especially valuable property in its franchise, the resources in services and financial return to the city offered by a large system operator could reasonably compete most favorably with its smaller competitor. Consequently, there seems little reason to doubt that municipal franchises will increasingly be granted to the established and experienced elements of the industry.

In order to operate, the giant CATV operators must be equally, if not more, concerned with local service than their little brothers. A blend of local services and expansive geographical, as well as corporate, size will develop operating structural accommodations within the large corporations. Predictably, three alternatives might be: (1) a field system fully operated and managed by the owning corporation, as illustrated in the present practices of Sears department stores, and A and P supermarkets; (2) a field system affiliated by a corporate franchise pact, for example, Howard Johnson restaurants and motels; or (3) a field system "affiliated" with the parent company as broadcasting network operations are at present; or a combination of (2) and (3). Patterns for corporate central office–field relationships will emerge.

As the present CATV operation evolves into an urban communi-

1. Irving B. Kahn (Paper delivered before New York Society of Security Analysts, New York City, January 2, 1969), pp. 9–10.

cations system, it inevitably will be charged with increasing municipal accountability and control proportionate to its entrenchment in the more vital aspects of municipal life, just as cable channels in the distant future can expect increased state jurisdiction as they widen their function as a public utility.

As CATV becomes more entrenched in the communities of the nation and more responsive to the needs of the communities it serves, leaders in the CATV enterprise can consider their accomplishments and rewards valid, and in fact worthy of acclaim, since they have contributed substantially to resolving community needs through community antenna television service.

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