THE DEREGULATION OF CABLE TELEVISION*

STANLEY M. BESEN†
ROBERT W. CRANDALL**

TABLE OF CONTENTS

 The views expressed in this paper are solely those of the authors and do not necessarily represent those of the Rand Corporation or the Brookings Institution.

†Senior Economist, The Rand Corporation.
**Senior Fellow, The Brookings Institution.

Only twenty years ago the Federal Communications Commission (FCC) declined to extend its regulatory powers to the cable television industry, asserting that cable provided no threat to television broadcasting. By 1966, however, this new industry had grown to the point where the Commission began to restrict cable growth in the largest metropolitan areas of the country, arguing that otherwise the development of cable would seriously threaten the viability of the over-the-air television system. Over the next six years, the Commission drafted a complex series of rules for cable operations, limiting distant signal carriage, restricting pay television offerings, requiring program originations, mandating minimum channel capacity, and imposing a variety of technical and administrative standards. Now, only eight years later, many of these rules have been abandoned by the Commission or overturned by the courts, and the FCC is considering a proposal to eliminate virtually all of the remaining provisions of the rules. In just twenty years, the Commission has thus come almost full circle, from advocating no regulation to imposing highly restrictive regulations, and finally to proposing the elimination of all cable regulation once again. In a world in which regulatory commissions and policies last for decades (and even for a century in some cases), such rapid change is novel if not unique.

The cable television industry provides an interesting case study of regulation for several reasons. First, like trucking or intrastate natural gas, the cable television industry developed as a substitute for a regulated service. Television broadcasting had been regulated by the FCC for some time when cable television operators began to offer retransmissions of distant broadcast signals. It is not surprising that this new industry was soon viewed as a threat to the established, regulated television industry. Extension of regulation of the new challenger was a natural response for the regulators.

Second, cable television offers a classic example of how markets operate to thwart regulators' attempts to cross subsidize "meritorious" services. The FCC has limited the number of television outlets in each major market and required that part of the profits generated as a result be devoted to "public service" programming, i.e., nonremunerative local, news, and public affairs programs. Cable television, a new distribution technology capable of adding immensely to the number of signals available in a market, by increasing the competition broadcasters face, can reduce local broadcasters' ability to offer these merit programs. Perceiving a threat to its policy of cross-subsidization, the Commission could be expected to attempt to limit competition.

Third, cable television provides an excellent example of how difficult it is to restrict entry when technology is changing rapidly. Just as the Interstate Commerce Commission (ICC) has seen its ability to regulate railroads compromised by the invention of the truck and then the airplane, the FCC has found it difficult to continue to protect its television broadcast licensees from the onslaught of technology. While it was possible to regulate cable television as a new medium, as we will argue, further developments in technology have made it extremely difficult for the Commission to continue to constrain cable growth. If technological change is sufficiently rapid, deregulation may be unavoidable in almost any sector.

Fourth, the case of cable television regulation demonstrates how difficult it is to make a sustainable and convincing case for protecting the public from competition.

Virtually all of the premises upon which the Commission regulated cable television have been shown to be invalid. This is, and was, no surprise to students of the industry who argued that they were invalid from the outset. The rapid change of direction by the Commission must be attributed, at least in part, to the mounting evidence which demonstrates that the Commission's fears of the effects of cable growth were exaggerated.

Finally, the FCC has never had specific legislative authority to regulate cable television, a technology which was unknown when the Communications Act was passed in 1934. It justified its regulatory embrace of cable by reference to general language in a statute passed thirty years earlier,[1] inviting Congress to clarify this authority. Congress never accepted this invitation, but the Commission proceeded to place a regulatory yoke over cable operators nonetheless.[2] Then, with no change in legislation, the Commission almost immediately began to reduce this regulatory burden, proposing virtually complete deregulation less than a decade after erecting its elaborate cable rules.[3]

I

THE INDUSTRY

Cable television is simply the distribution of video signals to households by coaxial cable.[4] There is no technological reason why this form of distribution should not have preceded distribution via the electromagnetic spectrum, but in fact it did not. Cable television began as "community" antenna television service, simply retransmitting local broadcast signals in areas of poor reception. A tower or antenna would be erected on a nearby hill or tall building, and the signals from this antenna distributed to local residents by coaxial cable.

Cable operators soon realized that viewers might value additional viewing options, so they began to "import" signals from nearby markets. At first, these broadcast signals were received by the main antenna; in time, operators began to use microwave relay systems to import them, sometimes over great distances. The fact that the cable industry offered signals of licensed broadcasters imported by regulated communications common carriers was an obvious invitation for regulation of this new medium.

The growth of the industry was rapid throughout the 1950s and 1960s (see Table I), but as late as 1969 only about 6 percent of the nation's households subscribed to a cable service.[5] In the 1970s, growth slowed somewhat as the industry expanded to more than 14 million subscribers or nearly 20 percent of all television households.[6] Most of these subscribers are still located outside the major markets, however, due to the quality of off-the-air television service in the larger

1. 48 Stat. 1064 (1939).
2. *See* 86-91, *infra.*
3. *See* 91-101, *infra.*
4. *See generally,* C. Pilnick & W. S. Baer, *Cable Television: A Guide to the Technology*, Rand Corporation, R-1141-NSF (June 1973).
5. In 1969, there were 60.6 million households with television sets. Broadcasting Yearbook, B-176 (1978).
6. Television Digest, TELEVISION FACTBOOK, Services Volume 83a, 108a (1979).

cities, the FCC policy of limiting distant-signal imports into these markets, and important restrictions (now removed) on programming which could be offered on a per-program or per-channel fee.

TABLE I

THE GROWTH OF THE CABLE TELEVISION INDUSTRY

Year	*Number of Systems*	*Number of Subscribers*
1955	400	150,000
1956	450	300,000
1957	500	350,000
1958	525	450,000
1959	560	550,000
1960	640	650,000
1961	700	725,000
1962	800	850,000
1963	1,000	950,000
1964	1,200	1,085,000
1965	1,325	1,275,000
1966	1,570	1,575,000
1967	1,770	2,100,000
1968	2,000	2,800,000
1969	2,260	3,600,000
1970	2,490	4,500,000
1971	2,639	5,300,000
1972	2,841	6,000,000
1973	2,991	7,300,000
1974	3,158	8,700,000
1975	3,506	9,800,000
1976	3,681	10,800,000
1977	3,832	11,900,000
1978	3,997	13,000,000
1979	4,150 (e)	14,100,000 (e)
e = estimated		

SOURCE: TELEVISION FACTBOOK, Services Volume 83a (1979 ed).

The average cable television system is small, having fewer than 3,500 subscribers and, most systems are located in relatively small cities. Most are owned by corporations with other media interests: broadcasters (30.4 percent of all systems), newspapers (12.7 percent), book or magazine publishers (10.8 percent), program producers or distributors (17.5 percent), and theaters (4.1 percent).[7] The six largest owners of cable systems account for 29 percent of all cable subscribers.[8] These companies are the most aggressive bidders for new franchises. Thus, while the

7. TELEVISION FACTBOOK, Services Volume, 83a, (1979).
8. FCC Network Inquiry Special Staff, Preliminary Report on Prospects for Additional Networks, app. (January 1980, preliminary) (Recent Trends in Cable Television Related to the Prospects for New Television Networks).

industry is largely comprised of small-scale operations due to its concentration in the smaller towns and cities, there are already a number of large, national companies operating cable systems and bidding for the rights to wire the major markets.

In the past five years, there has been a new development. Cable operators are no longer relying solely upon retransmission of local and distant broadcast signals to attract subscribers. They now offer nonbroadcast channels of motion pictures, sports, religious programming, and children's fare to viewers either as part of the basic service or on a "pay" channel for which a separate fee is charged.[9]

While there have been numerous proposals for expanding cable television from an entertainment service into a multiple-purpose communications system providing shopping services, educational programs, meter reading, burglar alarms, computer interconnection, and a myriad of other one- and two-way communications services, progress in this direction has been slow, and the newer services are not likely to be a major source of revenues for cable systems in the foreseeable future. For immediate policy concerns, cable television remains a home entertainment and information service.

The following Section details the history of cable television regulation from the origins of the industry to the present. Next, the development of the cable industry during the brief period of deregulation which began in 1972 is described. Then, we summarize the available evidence and present some new evidence on the effect of cable on broadcasting, a subject which has preoccupied the FCC since the early 1960s. Finally, we briefly consider some policy issues which would remain even if all restrictions were removed on the entertainment services that cable systems can offer.

II
THE REGULATORY HISTORY

The first cable television (CATV) system began operation in Astoria, Oregon in 1949; the first commercial system was initiated one year later in Lansford, Pennsylvania.[10] By the end of the 1950s, there were approximately 640 systems serving about 650,000 subscribers, and the nascent industry had begun to receive the attention of the FCC.[11] It is fair to say, however, that during this period the attitude of the Commission was essentially one of "benign neglect," of permitting cable to develop without government intervention absent a definitive showing that such growth was not in the public interest.

A. The "Auxiliary Service" Inquiry

The Commission's early views on cable television are provided extensively in its *Report and Order* in its inquiry into the effect of cable and other "auxiliary services"

9. See text at 108-110 *infra* for a discussion of the new services.

10. Inquiry into the Impact of Community Antenna Systems, TV Translators, TV "Satellite" Stations, and TV "Repeaters" on the Orderly Development of Television Broadcasting, 26 FCC 403, 408 (1959) [hereinafter cited as Auxiliary Services Inquiry]. Robinson dates the first system as beginning service in Mahoney City, Penn. in 1948. Robinson, *Introduction and General Background*, in DEREGULATION OF CABLE TELEVISION 5 (P. A. MacAvoy ed. 1977).

11. TELEVISION FACTBOOK, Services Volume, 76a (1978 ed.).

on the development of television broadcasting.[12] The Commission's basic concern, one that continued over the two decades of cable regulation, was stated at the outset of its Report:

> . . . [t]here is presented a problem of conflicting interests and objectives. On the one hand are the interest of the general public of the areas involved in the preservation of a local television outlet, with the attendant advantages which a community gains from having a local means of self-expression, and (in some cases but not in all) the preservation of the *only television service* to some of the public, such as rural residents who cannot be served by CATV. On the other hand is the interest of another group, such as city residents who want and can afford to pay for CATV service, in obtaining *multiple television service*, . . .[13] [emphasis in original]

The conflict the Commission described was the basis of the claims of some broadcasters who argued that, where cable systems carry signals which viewers in their markets cannot receive over-the-air, local stations lose audiences and advertising revenues. This, in turn, leads to a reduction in local service and, in the extreme, to the local station being forced off the air. Thus, the broadcasters held, if cable were permitted to import distant signals, some viewers might lose their only television service. It is illuminating to study how this claim influenced the next two decades of government regulatory policy toward cable.

In examining the "evidence" presented on the relation of station viability to the existence of cable and the other auxiliary services the Commission first concluded that:

> Of some 96 stations which have gone off the air since 1952 . . . in only 3 cases has the existence of an auxiliary service in the station's community or service area . . . been mentioned as a factor in the demise. We have no reason to believe that there are any other cases in which the presence of an auxiliary service has been a substantial factor.[14]

The Commission then examined the impact of the auxiliary service, CATV, in the three cases mentioned. It pointed out that in one case the station was actually a satellite which rebroadcast the signal of another station and that it operated under severe technical handicaps. It noted that a second station had resumed operation; in any event, it was in a small market where other stations could be received over the air. Finally, it pointed out that other signals could be received over the air in the third station's market and it suffered from the fact that it operated in the UHF band. In short, the Commission's reading of the evidence led it to conclude that while "there is an impact upon television stations . . . from the operation of auxiliary services of substantial size which bring competing signals into the stations's home communities. . . . we cannot tell at what point . . . this impact becomes serious enough to threaten the stations's continued existence or serious degradation of the extent and quality of its service."[15]

The Commission indicated at this early date that it intended to examine allegations of economic injury to local broadcasters that affect their ability to

12. Auxiliary Services Inquiry, *supra* note 10.
13. *Id.* at 405-06.
14. *Id.* at 415.
15. *Id.* at 421-22.

provide local service. In a case decided the previous year, the courts held that the Commission was required to provide an opportunity to a broadcaster to make a showing that the licensing of a competing station would result in a diminution of service to the public.[16] The Commission indicated that it would permit similar showings with respect to auxiliary service stating: "[w]e will take into account—*when and to the extent that it can be established*—such adverse economic impact (of such character as to be of detriment to the public interest) as may result to the local station." It should be noted, however, as the court pointed out in *Carroll*, that proof of such economic injury "'is certainly a heavy burden.'"[17] [emphasis in original]

In short, the Commission made it clear that it believed the public would benefit substantially from essentially unfettered growth of auxiliary services, including cable: ". . . [W]e do not now envision where we could find that the public interest would be disserved by affording an opportunity for choice of service and the benefits of competition and diversity of expression."[18] The only *possible* exception might be where it was the only local broadcast service whose existence was threatened: ". . . [T]here is some merit in the broadcasters' position [that the 'only service' must be maintained] . . . especially . . . where the number losing their only service is considerably greater than the number who would receive the multiple service."[19] Although the Commission thought that a better case might be made for limiting cable where it threatened the existence of the only local service, even in such instances, the elimination of local service would not, by itself, be determinative. A comparison of the numbers of viewers involved would also be required.

The Commission also reached a judgment about the use of its licensing of common carriers to carry distant signals to cable systems:

> . . . it has been urged by most of the broadcasters that the Commission is obligated . . . to consider the impact upon a television broadcaster of the grant of radio facilities to a communication common carrier, where the common carrier facilities will be used for the purpose of providing communication service to a community antenna system operating in competition with the broadcaster. . . . In essence, the broadcasters' position shakes down to the fundamental proposition that they wish us to regulate in a manner favorable toward them vis-à-vis any non-broadcast competitive enterprise. . . . The logical absurdity of such a position requires no elaboration.[20]

The Commission did feel that regulation might be required in two areas. First, the Commission had been asked to rule that Section 325(a) of the Communications Act, which forbids the rebroadcast of the signal of a broadcast station without its permission, applied also to the retransmission by cable systems of broadcast signals.

16. Carroll Broadcasting v. FCC, 258 F.2d 440 (1958).
17. *Supra* note 10, at 435.
18. *Id.* at 437.
19. *Id.* at 438.
20. *Id.* at 431-32. In J. E. Belknap and Associates, 18 FCC 642 (1954), the Commission had made its first authorization for the construction of microwave relay stations to carry distant signals to cable systems. The considerations the Commission deemed relevant to the grant were the absence of diversion of traffic from other carriers and the fact that the grantee was legally, financially, and technically qualified. The economic impact on local broadcasters was not even mentioned.

The Commission indicated that it did "not believe that . . . [S]ection 325(a) in its present form includes the requirement that CATVs get the consent of the stations whose signals they carry."[21] But, the Commission went on, ". . . [W]e intend to recommend to Congress that an appropriate amendment to [S]ection 325(a) be enacted, so as to extend the 'consent' requirement to CATVs."[22] This marks the first public-policy pronouncement in favor of "retransmission consent," an issue which has remained before the Commission for over two decades in one form or another.

The Commission also found favor with the suggestion that cable systems be required to carry the signals of local or nearby stations (if they so request) and indicated that it would recommend such an amendment to the Communications Act.[23] However, it rejected a proposal that cable systems be forbidden to duplicate programs carried by local stations,[24] even when those stations protest the duplication.

A final concern of the Commission was its jurisdiction over CATV. Four possible bases for regulation had been suggested by broadcasters. The Commission reaffirmed its decision in *Frontier Broadcasting Co. v. Collier*[25] that cable systems could not be regulated as common carriers under the Communications Act since cable systems, not subscribers, choose what is carried.[26] The Commission also concluded that CATV systems could not be regulated as broadcasters under the Act since such systems do not broadcast, but transmit by wire.[27] Third, the Commission rejected the proposition that it had plenary power over cable because of its impact upon an activity, broadcasting, which the Commission does regulate.[28] Finally, as noted above, the Commission determined that Section 325(a) of the Act did not grant it jurisdiction over cable, but indicated that it would seek an amendment applying this section to cable as well as to broadcasters.

The 1950s ended with a Commission doubtful about its jurisdiction over cable and, more importantly, with little inclination to seek to extend its mandate to give it increased authority over the new medium. Both of the changes it sought—the extension of the retransmission consent requirement to cable and the requirement that cable systems carry local signals—would be accomplished through legislation and the Commission would not engage in detailed regulation. Indeed, the Commission appeared to view quite modestly its ability to determine whether cable entry into a particular market was likely to harm the public interest. While it felt obligated to permit local broadcasters to demonstrate such harm, it clearly believed that successful showings would be rare. The shift in Commission policy which would occur in the next decade could thus not be predicted by examining its view at the end of the 1950s.

21. *Supra* note 10, at 430.
22. *Id.*
23. *Id.* at 439.
24. *Id.*
25. 24 FCC 251 (1958).
26. *Supra* note 10, at 427-28.
27. *Id.* at 428-29.
28. *Id.* at 429.

B. A Change in Policy: Carter Mountain

The first policy change occurred in connection with what appeared to be a routine authorization of microwave facilities to carry broadcast signals to cable systems.[29] Carter Mountain Transmission Corp. had applied for FCC authorization and, nine days after the Commission's report on the impact of "auxiliary services" on television broadcasting, its application was granted without a hearing. Shortly thereafter, a protest was filed by a local broadcast station and the effective date of the authorization was suspended. In 1961, the Commission's Hearing Examiner, echoing the Commission's views in the auxiliary services inquiry, denied the protest:

> . . . whatever impact the operations of the CATV systems may have on protestant's operation of station KWRB-TV, these are matters of no legal significance to the ultimate determination made that a grant of the subject application of Carter, a bona fide communications common carrier, will serve the public interest.
>
> Even if considered, the record precludes any reliable approach to an accurate estimate of that 'impact.' . . . How can it be determined in what manner and to what extent the boosters admittedly in operation, the operating CATV systems, and/or other media such as radiobroadcasting or newspapers contribute to the competition to which KWRB-TV is exposed?[30]

A year later, on appeal to the Commission, the authorization was denied.[31] In what can only be regarded as a startling reversal of its earlier views, the Commission argued:

> A grant of common carrier radio facilities requires a finding that the public interest will be served thereby; certainly the well-being of existing television facilities is an aspect of this public interest. Thus it is not only appropriate, it is necessary that we determine whether the use of the facility applied for would directly or indirectly bring about the elimination of the only television transmission or reception service to the public.[32]

Moreover, the Commission apparently no longer harbored doubts about its ability to determine whether cable would harm broadcasters: "If the CATV pattern is permitted to be altered . . . [the local station] . . . would find it more difficult to sell its advertising in face of split audience, and this situation . . . results in our judgment that the demise of this local operation would result."[33]

Finally, where previously it could find no reason why it should not afford "an opportunity for choice of service and the benefits of competition and diversity of expression" it now found:

> . . . [A] grant of the instant application would permit the rendition of better service by the CATV, but at the expense of destroying the local station and its rural coverage. . . . It must be concluded . . . the need for the local outlet and the service

---

29. The history of this proceeding is recounted in Carter Mountain Transmission Corp., 32 FCC 459 (1962).

30. *Id.* at 486 n. 31.

31. Carter Mountain Transmission Corp., 32 FCC 459 (1962), *aff'd*, 321 F.2d. 359 (D.C. Cir. 1963), *cert. denied*, 375 U.S. 951 (1963).

32. 32 FCC at 461.

33. *Id.* at 464.

> which it would provide to outlying areas outweighs the need for the improved service which Carter would furnish . . .[34]

The Commission invited Carter to refile its application if it could show that the cable system would carry the signal of the local station and not carry the signals of other stations which duplicated its programming.

C. Rules Concerning Microwave-Served CATV

Three years later, the Commission moved to codify its policies respecting the authorization of microwave facilities which served cable systems.[35] First, it asserted broad jurisdiction over cable television: "We have determined . . . that the Communications Act vests in this agency appropriate rulemaking authority over all CATV systems, including those which do not use microwave relay service. . . ."[36] Second, the FCC stated a clear intention to treat cable as a service supplementary to the basic broadcast service: "The fundamental question we consider . . . [is] whether we should impose by rule certain conditions upon microwave grants designed to limit and regulate the manner in which CATV competes with the basic, off-the-air television broadcast service *to which it is an adjunct.*" [emphasis added][37] It determined that cable would be permitted to provide a supplementary service in areas of poor television reception where it provided only the signals of local stations or where it extended broadcast signals into areas beyond the range of any off-the-air signals, i.e., where it did not compete with local broadcasters.

Third, the Commission clearly articulated the objectives of its policies: ". . .[I]f CATV operations should drive out television broadcasting service, the public as a whole would lose far more — in free service, in service to outlying areas, in local service with local control and selection of programs — than it would gain."[38] The Commission argued, further, that its plan for the assignments of television stations, "is predicated upon the social desirability of having a large number of local outlets with diversity of control over disseminating sources rather than a few stations serving vast areas of populations."[39]

Finally, on the issue of harm, the Commission stated clearly that it would err on the side of caution:

> Our responsibilities are not discharged . . . by withholding action until indisputable proof of irreparable damage to the public interest in television broadcasting has been compiled . . . we must plan in advance of foreseeable events, instead of waiting to react to them.[40]
>
> . . . [T]hese proceedings do not turn upon a showing that CATV competition is demonstrably certain to cause widespread and serious damage to the public interest in television broadcasting. We think the basic fact that CATV service, while entirely dependent upon television broadcasting, also offers substantial competition to

34. *Id.* at 464-65.
35. Rules re Microwave-Served CATV, 38 FCC 683 (1965).
36. *Id.* at 685.
37. *Id.* at 684.
38. *Id.* at 700.
39. *Id.* at 699-700.
40. *Id.* at 701.

television station outlets is enough to justify regulation designed to insure that the competition involved is conducted under fair and reasonable conditions.[41]

There were to be two kinds of regulations, both in the form of conditions imposed on the authorization of microwave facilities to serve cable systems. One requirement was that the cable system carry the signals of all local stations.[42] The second rule was that a cable system not carry the programs of a distant station when they duplicated the programs of local stations during a period of fifteen days before or after the local broadcast.[43]

Both requirements derived from the Commission's view that the competition provided by cable television systems to local broadcasters is different from the competition provided by additional broadcast stations. When a cable system did not carry the local signals, a viewer subscribing to the service could only receive a local station by disconnecting the cable and attaching an antenna. To the extent that this proved cumbersome, access to cable subscribers was denied to local broadcasters. The requirement that local signals be carried was designed to remedy this difficulty.[44]

The nonduplication requirement was designed to deal with the fact that cable systems carried broadcast signals without obtaining the consent of either the originating station or the producers of its programs.[45] The Commission held: "The CATV system that provides its subscribers with the signals of distant stations presently stands outside of the program distribution process. . . ."[46] Also: ". . . [I]n the absence of a market in which the question of competitive access to programming by stations and CATVs can be resolved, our aim is to preserve for stations the competitive exclusivity they have been able to obtain as against other stations, but nothing more."[47] The asserted rationale for the nonduplication rule was preservation of this exclusivity.

Although the Commission's stated purpose in adopting these rules was to make competition between broadcasting and cable "fair and reasonable," the Commission clearly was concerned as much with the outcome as with the fairness of the process: "The question at the heart of these proceedings is whether and to what extent rulemaking action is necessary or appropriate to integrate CATV service into our existing television system—to ensure that CATV performs its valuable

41. *Id.* at 706-07.

42. Since the channel capacity of most cable systems was highly limited, a system of priorities was established to determine which signals would be carried. As a result, some systems could not carry any distant signals at all. *Id.* at 716-19.

43. The Commission had invited Carter Mountain to refile its application if it could meet similar conditions. *Id.* at 721-30.

44. As the channel capacity of the typical cable system grew over time, this requirement became increasingly innocuous. By the mid-1970s, more than 90 percent of all systems had at least a 12 channel capacity, 1976 CATV SYSTEMS DIRECTORY, at A-2.

45. In the previous year, a broadcast station had sought to prevent the carriage of its signal by a cable system and had been advised to seek relief under the Copyright Act. Cable Vision, Inc. v. KUTV, Inc., 335 F.2d. 348 (1964). It took almost a decade for the issue of copyright liability to be resolved definitively by the courts, and then it was determined that cable systems were not liable.

46. 38 FCC at 704.

47. *Id.* at 720.

supplementary role without unduly damaging or impeding the growth of television broadcast service."[48]

The Commission continued to be concerned with the impact of cable in the smallest markets, but its list of concerns had grown since 1959:

> We think it clear . . . that the most serious effects will be felt by (1) stations in smaller one-and two-station markets, where the public does not receive the full services of all three national networks off-the-air, (2) by marginal stations in larger markets, and (3) by new stations coming on the air.[49]

Since, by definition, there will always be marginal stations in larger markets so long as not all channel assignments are filled, the Commission was no longer limiting its purview to situations in which the only local broadcast service was threatened. Indeed, it was likely that every market would contain at least one station in one of the Commission's three areas of concern.

D. The Second Report and Order

The following year, 1966, was a watershed in the regulation of cable. Never, before or since, has the Commission's regulation of cable been more wide-ranging or restrictive. In adopting its *Second Report and Order*,[50] the Commission restated the two bases of its previous policies:

> Our determination to adopt the carriage and nonduplication requirements rested on two basic grounds: (1) that failure to carry local stations and duplication of their programs are unfair competitive practices, which are inconsistent with the supplementary role of CATV . . . , and (2) that these requirements were necessary to ameliorate the risk that the burgeoning CATV industry would have a future adverse impact on television broadcast service, both existing and potential. . . .[51]

In other words, the Commission's actions were designed to prevent "unfair" competition by cable systems and to foreclose any "adverse impact" on broadcasting that CATV growth might produce. The role of cable was to be that of a "supplement" to the over-the-air broadcast system.

The *Second Report and Order* marked three notable shifts in FCC policy. First, the Commission had progressed from 1959, when it claimed that it was unable to measure the harm caused by cable, to a point where, seven years later, it stated confidently that: "the materials before us would appear to indicate substantial growth and substantial impact by CATV in the large markets."[52]

---

48. *Id.* at 701.
49. *Id.* at 711.
50. Second Order and Report, 2 FCC 2d 725 (1966). For an analysis of the Commission's actions, see E. Greenberg, *Wire Television and the FCC's Second Report and Order on CATV Systems*, 10 J. L. & ECON. 181 (1967).
51. 2 FCC 2d at 736.
52. Interestingly, the bulk of the evidence to which the Commission refers is based on a study of audience diversion in one and two station markets. The "Fisher report" was produced for the National Association of Broadcasters and some of its findings appear in F. M. Fisher & V. E. Ferrall, *Community Antenna Television Systems and Local Television Station Audiences*, 80 Q. J. ECON., 227 (1966). An amusing sidelight in view of later developments is that evidence designed to minimize the impact of cable was presented by the Columbia Broadcasting System which owned a number of cable systems. 2 FCC 2d at 744 n. 30.

Second, as the previous quotation indicates, the Commission's locus of concern had shifted from markets where the only local broadcast service is threatened by cable to the major markets which have many stations:

> We have selected the top 100 markets for special attention because it is in these markets that UHF stations or wire pay-TV based upon CATV operations are most likely to develop and therefore the problems raised are most acute. . . .the top 100 markets include roughly 90 percent of the television homes in this country. Our policy therefore focuses on the critically important areas.[53]
>
> In markets below the top 100, the independent UHF (or VHF) station is much less likely to develop; the stations in such markets are apt to be three or less in number and network affiliated. This means, in turn, that the nonduplication provision is effective. . . . Further, it is in the markets below 100 that there may be underserved areas where CATV can make its most valuable and traditional contribution.[54]

Indeed, the Commission remarked that many small markets were not served by all three networks and that cable could provide this service. But although rules preventing cable systems from carrying distant signals that duplicate the programs of local stations would provide some protection, the carriage of the programming of the other networks could be expected to have a large effect on the audiences of these stations.[55] Thus, to the extent that cable extended network service to these markets, it was bound to threaten the viability of local stations and, thus, their ability to serve as media of local self-expression. Nevertheless, the Commission was apparently willing to run this risk.

Third, for the first time in its deliberations respecting cable, the Commission expressed concern for the impact that cable growth might have on the emergence of UHF television stations, especially in the major markets. The Commission's policy of placing many television allocations in the UHF band and intermixing VHF and UHF stations in the same markets, established in its *Sixth Report and Order on Television Allocations,*[56] had encountered serious problems. Many of the UHF stations which had gone on the air in 1954 had failed.[57] More than 40 percent of UHF stations reported operating at a loss compared to less than 15 percent of VHF stations.[58] A variety of Commission policies designed to deal with the UHF problem had run into Congressional resistance and had been abandoned.[59]

With the passage of the All-Channel Receiver Act in 1962, and the subsequent enactment of Commission rules to implement its provisions, the Commission assumed responsibility for the healthy growth of UHF. In its *Second Report and Order,* the Commission determined that the expansion of cable would harm the

---

53. 2 FCC 2d at 783.

54. *Id.*

55. Subsequent studies confirmed this point. *See* R. G. NOLL, M. J. PECK & J. J. MCGOWAN, ECONOMIC ASPECTS OF TELEVISION REGULATION 162-63 (1973); R. E. PARK, POTENTIAL IMPACT OF CABLE GROWTH ON TELEVISION BROADCASTING 68 (1970).

56. 1 RAD. REG. (P&F) 91:599, pt. 3 (1952).

57. D. W. Webbink, *The Impact of UHF Promotion: The All Channel Television Receiver Law,* 34: 3 L. & CONTEMP. PROB. 535, 545-46 (1969).

58. FCC, TV BROADCAST FINANCIAL DATA—1966, Table 5 (August 5, 1967).

59. For a history of these efforts see Note, *The Darkened Channels: UHF Television and the FCC,* 75 HARV. L. REV. 578 (1962).

prospects for UHF.[60] Thus, the Commission concluded, cable development would have to be tightly circumscribed in those markets where it believed that UHF prospects were brightest, the top 100.

The Commission's new cable policy had two facets. First, it extended to all cable systems, not just those employing microwave, the requirement that all local stations be carried and that imported signals not duplicate local programming.[61] Second, and more importantly, the Commission announced that it would not permit the carriage of a distant broadcast signal into one of the top 100 markets without a showing in an evidentiary hearing that such carriage "would be consistent with the public interest, and particularly the establishment and healthy maintenance of UHF television broadcast service."[62] Thus, even cable systems which adhered to the local carriage and nonduplication rules would still be required to demonstrate that their carriage of distant signals would not threaten even marginal UHF stations.[63]

The requirement of an evidentiary hearing, had it been followed in every case, would have imposed an enormous burden on the resources of the Commission. Indeed, a significant backlog developed.[64] However, in a number of cases the Commission waived the hearing requirement when it could be determined, on the basis of information provided by the cable system and local broadcasters, that importation of a distant signal would not adversely affect established or proposed UHF stations.[65] These waivers tended to be granted when the cable system served a small community on the fringe of a market.[66] In the only evidentiary hearing completed for a major market,[67] the Commission reversed the decision of its Hearing Examiner and imposed restrictions on the ability of one of the San Diego cable systems to carry the signals of Los Angeles independent stations. This decision, combined with the administrative burden of the evidentiary hearing process, made it clear that the development of cable in the major markets would be stopped completely unless the rules were regularly evaded by staff action or were abandoned completely.

The Commission also discussed four areas in which it thought Congressional action might be required. First, it sought clarification concerning its authority to

60. 2 FCC 2d at 774-77. In doing so, the Commission rejected the contention, made by the National Cable Television Association, that UHF stations would benefit from the presence of cable because it would deliver their signals on a par with those of VHF. This contention was supported by independent studies carried out subsequently. *See, e.g.*, PARK, *supra* note 55.

61. The nonduplication protection was reduced to the same day. 2 FCC 2d at 743.

62. 2 FCC 2d at 782.

63. The activities of cable systems that were already carrying distant signals into the major markets were "grandfathered." Thus, Mission Cable TV in San Diego, which began operation in 1962 and is presently the largest system in the country, was permitted to continue to carry the signals of Los Angeles stations.

64. D. R. LEDUC, CABLE TELEVISION AND THE FCC 173-74 (1973).

65. *See, e.g.*, Resort Television Cable Co., 12 FCC 2d 272 (1968); Unicable, Inc., 6 FCC 2d 771 (1967); Gateway Cable T.V., Inc., 6 FCC 2d 412 (1967).

66. One observer attributes this to the ability of the Commission's Cable Task Force to obtain waivers "for cable systems operating in markets too small to be of particular interest to the Commission." R. O. BERNER, CONSTRAINTS ON THE REGULATORY PROCESS: A CASE STUDY OF THE REGULATION OF CABLE TELEVISION 19 (1976).

67. Midwest Television, Inc., 13 RAD. REG. (P&F) 2d 698 (1968).

regulate cable. Second, it requested legislation forbidding cable systems from originating programs since it feared that otherwise cable might bid programs away from "free" television and viewers would be forced to pay for such programs. Third, it requested consideration of an amendment to the Communications Act to require that cable systems obtain the consent of the originating station before retransmitting its programs.[68] Finally, it sought a clarification of the division of jurisdictional responsibilities between the Federal government and the states and localities.

E. Affirmation of Jurisdiction

The years immediately following the *Second Report and Order* were eventful ones for cable regulation. Despite the fact that the Commission did not obtain Congressional support on the question of its jurisdiction over cable (indeed, it has yet to do so), the Commission's authority to adopt the rules contained in its *Second Report and Order* was upheld by the Supreme Court in *Southwestern Cable.*[69] While Southwestern pointed to the failure of the Congress to authorize the regulation of cable—despite requests by the FCC that it do so—as evidence that the Commission lacked such authority, the Court concluded otherwise. Relying on the Communications Act, which obligates the Commission to provide "a fair, efficient, and equitable distribution" of television service, and on the Commission's findings that achievement of this goal requires the use of the UHF band and that cable threatens UHF television, the Supreme Court upheld the Commission's authority to regulate cable. Without determining the limits of the Commission's regulatory authority, the Court found that the rules adopted in 1966 were "reasonably ancillary" to the fulfillment of the Commission's responsibilities in regulating broadcasting.[70]

F. The Copyright Question

As the Commission made clear in its *Second Report and Order,* the fact that when cable television imported distant signals it "stands outside of the program distribution process" was a matter of some concern. Henry Geller, General Counsel to the Commission at the time has argued that the *Second Report* can best be understood as a holding action until this issue was definitely resolved in the courts. He argued, further, that the Commission was prepared to relax or eliminate its distant signal rules, when, as was generally anticipated, federal courts held that cable systems were liable when they carried distant signals without obtaining permission.[71]

The matter received the attention of the courts when a program supplier, relying on the Copyright Act of 1909, sued a cable system for carrying the

---

68. The "reasonably ancillary" criterion has been invoked elsewhere in extending the range of Commission jurisdiction. For example, the Commission's authority to regulate the granting of access to political candidates to the time of the networks has been upheld recently on the grounds that such regulation is "reasonably ancillary" to the achievement of the Commission's statutory mandate to provide access to the time of stations. CBS, Inc. v FCC, No. 79 2403 (D.C. Cir. March 14, 1980).

69. A similar request had been made in 1959.

70. United States v. Southwestern Cable Co., 392 U.S. 157 (1968).

71. Personal communication, from Henry Geller to Stanley Besen, reviewing manuscript for the Rand Corporation.

supplier's programs on an imported signal. Both the District Court[72] and the Court of Appeals[73] ruled that the cable system was engaged in a "performance" within the meaning of the Act and was liable for copyright infringement. However, in 1968, the Supreme Court, reversing the decisions of the lower courts, held that the carriage of the signals in question was not a violation on the grounds that the activities of cable systems are closer to those of viewers than of broadcasters.[74]

That same year, the Commission issued a *Notice of Proposed Rulemaking and Notice of Inquiry* in Docket 18397.[75] In the *Notice* in which the Commission solicited comments on prohibition of cross-ownership of cable systems and broadcast stations in the same market, limitation of the multiple ownership of cable systems, and restriction of originated programming to only a single cable; it also announced that it was abandoning its hearing procedures for granting permission to import distant signals into the major markets.[76] It concluded that the facts which these proceedings were designed to elicit were now clear:

> . . . [P]otential CATV penetration is likely to be substantial on the order of half the homes in [for example, the San Diego] market. . . . We are also convinced that a penetration of this order could pose a real threat to UHF development and that the unfair competition would be significant.[77]

In place of the hearing procedure the Commission proposed that importation of distant signals be permitted only when a cable system obtained the consent of the originating station. It announced, further, that it would entertain requests to authorize distant signal carriage only from systems operating in accordance with the proposed retransmission consent rules.

G. Cablecasting: Prescriptive Rather than Proscriptive Regulation

In 1969, the Commission addressed the issue of origination by requiring all cable systems with 3,500 or more subscribers to originate programming.[78] The Commission described the benefits which could be expected from origination and why it had refused to accede to broadcaster requests that origination be banned entirely because it would divert audience from "free" television:

> . . . [W]e do not think that the public should be deprived of an opportunity for greater diversity merely because a broadening of selections may spread the audience and reduce the size of the audience for any particular selection. Such competition is not unfair, since broadcasters and CATV . . . originators stand on the same footing in acquiring the program material with which they compete.[79]

In addition, the Commission saw benefits from the potential for cable networking of originated programming:

72. United Artists Television, Inc. v. Fortnightly Corp., 255 F. Supp. 177 (S.D.N.Y. 1966).
73. 377 F.2d 872 (1967).
74. Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968).
75. 15 FCC 2d 417 (1968).
76. *See* the discussion of the administration of the hearing procedures in 392 U.S. at 000.
77. 15 FCC 2d at 430.
78. First Report and Order, 20 FCC 2d 201 (1969).
79. *Id.* at 203.

> We strongly believe that the promise of this new technology should not be stifled by foreclosing the possibilities that some of these . . . channels might be opened to others on a common carrier basis and that significant new diversity of programming and other services might be brought to the American people through regional or national interconnection, including competition to the present three national television networks.[80]

But despite the Commission's words, some doubts remained about its sincerity. First, the Commission imposed a rule limiting advertising on originated programming to "natural breaks" which reduced the attractiveness of providing such programs on an advertiser-supported basis. Second, by leaving the question whether to permit advertising on cable network operation "open," it discouraged such networking. Finally, while it stated that it saw no need to place limits on originated programs supported by direct subscriber payments, in the following year it did just that.

In extending the rules which had been applied to over-the-air pay television to pay-cable operations, the Commission stated that:

> where cablecasting is accompanied by a per-program or per-channel fee, it is akin to subscription television and presents the same threat of siphoning programs away from free television in favor of a service limited to those . . . to whom the cable is geographically available. Remedial action in this area should not wait upon the threat becoming actuality.[81]

The rules prevented cablecasting for which a per-program or per-channel charge was made of:

(i) movies which had been in theatrical release more than 2 years prior to the cablecast,
(ii) sporting events which had been telecast in the community on a non-subscription basis during the previous two years, and
(iii) series programming of any type.

These regulations also limited feature films and sporting events to 90 percent or less of total programming hours and banned advertising on pay channels entirely. It is hardly surprising, with the array of restrictions which the Commission had imposed on originated programming, that little cable origination occurred and that the industry expended efforts both to be free of the origination requirement and of the restrictions on the programming that could be offered.

H. After the Freeze—Cable Television in the Seventies

Cable entered the 1970s as a small business[82] relegated principally to rural areas and small communities[83] and held hostage by television broadcasters to the Commission's hope for the development of UHF. The opportunity for cable to

80. *Id.* at 207-08.

81. Memorandum Opinion and Order, 23 FCC 2d 825, 828 (1970). The pay rules for over-the-air stations appear in Rules and Regulations to Provide for Subscription Television Service, 15 FCC 2d 466 (1968).

82. On January 1, 1970, there were 2,490 operating systems with 4.5 million subscribers. TV FACTBOOK, Services Volume 76a (1978 ed.).

83. A few larger systems existed in major cities but these were constructed prior to 1966 or in areas with poor over-the-air reception. See TV FACTBOOK, Services Volume, for a listing of all cable systems.

break these shackles occurred when Dean Burch replaced Rosel Hyde as Chairman of the FCC, several other Commissioners' terms expired, and the Office of Telecommunications Policy was established under Clay T. Whitehead.

Is is not very difficult to characterize the political obstacles to cable development which faced Burch and Whitehead. They were:

(i) The continuing fear that distant signal importation would imperil the development of UHF broadcasting and reduce the rents flowing from VHF broadcasting in major markets.

(ii) The failure of the courts and Congress to resolve the cable copyright problem which caused copyright owners (producers, artists, motion picture companies) to ally themselves with broadcasters.

(iii) The concern that cable systems would not serve "the public interest" by extending an array of new services to the communities they served. Some feared that they would simply augment the entertainment choices for subscribers while threatening to diminish the choices available on advertiser-supported commercial stations for households unable to afford subscriptions to cable services.

If large-market UHF protection could have been assured and a few bones could have been thrown to the proponents of public service programming, a political compromise might have been possible to allow the cable to grow in the larger market.

The first attempt at compromise was unsuccessful, but it managed to reinvigorate the policy discussion. The "public dividend" plan proposed in June 1970 would have allowed importation of four distant broadcast signals into the major markets in return for a payment of 5 percent of their revenues by cable systems into a fund for the Corporation for Public Broadcasting, a schedule for copyright payments to be legislated by Congress, and a requirement that cable systems substitute local UHF stations' commercials for those originally included in the programs on imported broadcast signals.[84] The proposal was obviously designed to obtain the support of public broadcasters and UHF operators for relaxing the rules on distant signal carriage.[85] The proposed rulemaking was adopted by a 4-to-3 vote with one of the dissenting opinions holding that the proposed rules were too restrictive. The proposals proved too complex to win public acceptance, however, and the rules were never adopted.

Burch initiated a second attempt at compromise with an August 1971 letter to the Congressional communications subcommittee chairmen.[86] The letter detailed a proposal which Burch would attempt to have the Commission adopt quickly unless Congress objected. The proposal, which was very similar to the final "consensus" which emerged as the Commission's 1972 rules, included provisions to allow

84. Second Further Notice of Proposed Rule Making in Docket 18397-A, 24 FCC 2d 580 (1970).

85. *See* LeDuc, *supra* note 64, at 191-92 for a discussion of this proposal and the activities which followed.

86. Cable Television Report and Order, 36 FCC 2d 241, 260-79 (1972).

importation of sufficient signals to allow cable systems in the top 50 markets to offer three network plus three independent signals; systems in markets 51-100 were allowed three network plus two independent signals; systems outside the top 100 markets could import three network signals plus one independent. Systems more than 35 miles from the nearest licensed station would be exempt from these limitations, but all systems would be subject to "leapfrogging" restrictions— requiring the importation of the nearest UHF or VHF independent station, rather than the most attractive one. All home market signals had to be carried, and each station could import two "wild card" signals if its minimum service requirements could be achieved using only local signals.

As a fillip to the public service proponents, the Commission proposed mandatory origination requirements on at least three channels and a minimum twenty-channel capacity. These requirements had the incidental effect of increasing the cost of cable service,[87] thereby reducing its potential threat to broadcasters, but increasing its allure to those who wanted to force cable to be more than a mere entertainment service.

Implicit in the Commission proposal was the assumption that Congress would legislate copyright provisions for cable signal importations and that all parties would support such legislation. The letter of intent became the basis for the rules which were finally adopted. However, in order to bring broadcasters into the consensus, a more restrictive rule for the definition of local signals from nearby markets, extending program exclusivity to non-network fare, and strengthening the leapfrogging rules were included.[88]

The 1972 cable rules can only be described as baroque (see Table II). They limited the importation of distant signals in a manner which varied with market size; they provided that "significantly viewed" signals from adjacent markets could be carried in addition to the distant-signal quota and provided an intricate test for determining whether a signal was "significantly viewed," they continued the mandatory carriage requirement for local signals; they provided for two different forms of exclusivity protection for non-network (syndicated) programs; and they placed a rather heavy burden of local origination, franchising, and technical standards upon all cable operators. These rules are detailed in Table II; a thorough discussion of them is beyond the scope of this paper. As we shall see, thorough enforcement of them proved to be beyond the wherewithal of the Commission.

Despite the numerous restrictions on cable services that they contained, the new rules were clearly a liberalization of policy. Where distant signal importation into major markets had previously been virtually prohibited, now at least a modicum of such importation could take place. But why did the Commission move from its rigid anti-cable stance? Why did broadcasters allow such a liberalization? There are a number of possible answers.

---

87. For an assessment of these costs, see Comanor and Mitchell, *The Costs of Planning: The FCC and Cable Television*, 15 J. L. & ECON. 177, 183-88 (1972).

88. Cable Television Report and Order, 36 FCC 2d 241, 284-86. The rules are analyzed in Besen, *The Economics of the Cable Television 'Consensus'*, 17 J. L. & ECON. 39 (1974).

TABLE II

SUMMARY OF 1972 CABLE RULES

	Markets 1-50	*Markets 51-100*	*Smaller Markets*	*Outside all Markets*
Must carry	All local signals	All local signals	All local signals	All local signals*
Minimum service	3 network stations 3 Independents	3 network stations 2 Independents	3 network stations 1 Independent	
Additional Service	2 Independents**	2 Independents**	None	Any other signals
Leapfrogging	If either or both of the first two independents is from among the top 25 markets they must be from one or both of the two closest such markets.			None
Exclusivity	No carriage of a syndicated program during a period one year after the program is sold anywhere in the U.S. During run of exclusive contract to a local station	During run of exclusive contract to a local station	None	None
Channel capacity	Minimum of 20 Channels		No requirement	
Program origination	Required of all systems with 3,500 or more subscribers.			
Access	Free public, educational, and government access channels (one each); leased access required for all unused channels.			
Expansion of capacity	Whenever all channels are in use 80 percent of weekdays for 80 percent of the time during any 3 hour period for 6 weeks running an additional channel must be added.			

*The definition of local signals is slightly less stringent for stations outside a television market.
**Can be carried only to the extent they were not employed to meet the minimum service standard.

First, the personalities had changed. For whatever reason, Burch and Whitehead clearly were interested in promoting a policy which would permit some cable growth in the major markets.

Second, the agreement on the part of cable interests to accept some form of copyright liability when they retransmitted distant signals served to reduce the opposition of program producers to cable growth.

Third, a number of economic studies published between 1966 and 1972 may have allayed some of the Commission's fears.[89] Several of these studies—particularly

89. *See*, for example, R. E. Park, *Cable Television and UHF Broadcasting*, The Rand Corporation, R-689-MF (1971); R. E. Park, *Cable Television, UHF Broadcasting, and FCC Regulatory Policy*, 15 J. L. & ECON. 207 (April 1972); J. J. McGowan, R. G. Noll & M. J. Peck, *Comments Regarding the Public Interest in Commission Rules and Regulations Relating to Cable Television, Signal Importation and the Development of UHF Independent Commercial Stations*, FCC Docket 18397-A (Feb. 10, 1971).

those undertaken at the Rand Corporation[90]—demonstrated that UHF stations might actually benefit from the presence of a local cable system. For many UHF stations, the gain from being able to compete on an equal basis with local VHF stations in homes served by cable was greater than any loss they might experience from audience diversion to distant stations. Moreover, these studies demonstrated that the gain in viewer welfare from the increase in viewing choices afforded by cable could be substantial.[91]

Finally, while the extent of the influence of these studies upon policy makers remains an open question, they clearly provided support for the positions taken by an increasingly powerful cable industry. That industry continued to grow between 1966 and 1970, nearly trebling in size as it continued to wire the smaller markets. Simultaneously, large multiple system owners and equipment suppliers acquired wider representation in Washington and some broadcasters acquired substantial positions in cable, making it difficult for that industry to take a monolithic position with respect to cable.

As the cable industry passed the 5 million subscriber level in 1971, with no demonstrable harm to broadcasters, it became increasingly difficult to ignore the accumulating evidence that the Commission's fear of injury to broadcasters was overdrawn and the growing political power of groups that would benefit from cable growth. Some liberalization of the cable rules became an obvious course.

I. The 1972 Rules: A Vulnerable Rationale for a Policy of Protection

The 1972 rules reflected almost precisely the OTP-Burch-Industry agreement. While these rules did not represent the high water mark for broadcast protectionism, they were close. The obvious intent of rules was to continue to protect large-market broadcasters while unburdening cable somewhat. But the detailed compromise which was constructed had to withstand judicial and legislative scrutiny.

The FCC would defend its rules on the basis of the following considerations:

(i) Television would continue to be a local broadcast medium and the role of cable would be as a supplement to the basic broadcast system. This required that marginal broadcast stations—particularly UHF stations in large markets—be protected from major audience diversion.

(ii) To the extent possible, cable systems would be required to originate programming and to provide local access channels. Cable would thus have to offer more than mere retransmission of distant broadcast signals.

(iii) The threat of program siphoning by pay-cable operators would be limited in order to assure broadcasters a continuous flow of attractive programming.

This policy could succeed only as long as the Commission could be persuaded, and could, in turn, persuade the courts, that the threat to broadcast revenues was

---

90. *See* R. E. Park, *supra* note 89 and R. E. Park, *A Bayesian Framework for Thinking about the Role of Analysis*, in THE ROLE OF ANALYSIS IN REGULATORY DECISIONMAKING (1973).

91. *See* McGowan, Noll & Peck, *supra* note 89.

sufficiently large to endanger traditional broadcast service, or at least to imperil the provision of local and other public service programming. If experience were to demonstrate that this threat did not exist, support for detailed regulation of cable to protect broadcasting could crumble.

A second threat to the cable rules was a jurisdictional one. Although *Southwestern Cable* had upheld the Commission's power to limit distant signal importation, it was not clear whether that ruling extended to mandatory origination, minimum channel capacity, and access requirements. Furthermore, the Commission's jurisdiction over pay cable had never been upheld. Simply because the product offered by pay cable was also offered by television licensees could not alone provide a basis. The Commission clearly had no jurisdiction over motion picture theaters, the legitimate stage, or professional sports arenas which also offer products that can be seen on television.

In short, two potential threats confronted the consensus and the rules which followed. On the one hand, the empirical rationale for the rules might be shown by experience to be flawed. The supply of local television broadcasting services might not be affected much by cable expansion. Equally important, though, was the possibility that the courts would find that the Commission's protection of broadcasting exceeded its jurisdiction. Both threats materialized quickly in the next few years.

J. The "Reregulation" Effort

The political tide against regulation had already begun to turn by 1974. Senator Kennedy had held hearings aimed at deregulating the airlines.[92] Some reaction against the newer forms of health, safety and environmental regulation was beginning, and by 1975, the White House had identified regulation not only as a major problem, but as a contributor to inflation.

These political forces immediately affected the FCC. In 1974, the Commission instituted a "Reregulation Task Force" for cable television, and began to reexamine its 1972 rules. Two years later, the House Communications Subcommittee issued a report which was clearly hostile to the protectionist nature of the 1972 rules.[93] The President's Council of Economic Advisers even attempted to adopt cable deregulation as a plank in the Administration's regulatory reform platform.[94] A strong reaction from broadcasters forced the White House to withdraw its proposals for relaxation of distant-signal and pay-cable rules, but the FCC reregulation effort proceeded with implicit support from Congress.

It was clear that full enforcement of the rules by the new Cable Bureau would be very difficult, if not impossible. They were extremely detailed, requiring approval of franchise agreements, supervision of the number and identity of all signal importations, enforcement of technical requirements, and enforcement of

92. Subcommittee on Administrative Practice and Procedure of the Senate Subcommittee on the Judiciary, *Oversight of Civil Aeronautics Board Practice and Procedure*, 94th Cong., 1st. Sess. (1975).

93. STAFF OF SUBCOMMITTEE ON COMMUNICATIONS OF THE HOUSE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE, CABLE TELEVISION: PROMISE VERSUS REGULATORY PERFORMANCE, 94th Cong., 2d Sess., (Subcomm. Print 1976).

94. These efforts are described in Robinson, *supra* note 10, at 13-21.

program exclusivity on every imported commercial signal in the largest 100 markets. With more than 3,000 systems in operation, it would be naive to expect thorough, consistent enforcement of all of these rules.

Equally important, the numerous provisions could hardly be justified as necessary to protect UHF broadcasting. If, for instance, very small systems were granted exemptions from the rules, it would be unlikely that UHF stations would be imperiled. Similarly, if signal-carriage requirements were waived during periods of limited viewing, it could not be argued that broadcast stations would suffer. Nor was there reason to believe that the leapfrogging requirements would protect UHF stations.[95] The Reregulation Task Force recognized the vulnerability of many of these provisions. Accordingly, it attacked them one at a time.

The reregulation effort produced only small changes at first. In 1974, the Commission allowed cable systems to import unlimited signals during periods in which local stations were not broadcasting.[96] This rule was adopted because the Commission concluded that . . ."importation . . . would have no adverse impact on stations which already were off the air."[97] Further liberalization occurred in 1976, when the Commission allowed importation of foreign language and religious stations without limit.[98] That same year, the FCC permitted cable systems to offer network news feeds not broadcast on the stations normally carried by the cable system.[99] Together these rules changes were rather inconsequential—a factor which must have been important in selecting them as the first candidates for liberalization. Each was adopted because the Commission held that no significant injury to broadcasters would result.

A more important change for cable operators was the abandonment of the leapfrogging restrictions.[100] Several reasons were given for this change in policy. Although the Commission had hoped that such restrictions would lead cable owners to import nearby stations, which served communities with cultural or economic ties to the cable system market, it now found such ties did not exist in many cases.[101] The Commission also cited the economic burden which resulted when the construction of special microwave routes to import these signals was required. Finally, the Commission was moved to reconsider because it felt that the threat of the development of "superstations" (independent stations in major markets

95. The proposed leapfrogging rules in Chairman Burch's Letter of Intent had provided specific protection for UHF stations but this provision was dropped in the rules finally adopted.

96. Rules and Regulations Relative to Carriage of Late-Night Television Programming by Television Systems, 48 FCC 2d 699 (1974).

97. 48 FCC 2d 699 (1974).

98. Rules and Regulations Relative to Adding a New Definition For "Specialty Stations" and Specialty Format Programming and Amending the Appropriate Signal Carriage Rules, 58 FCC 2d 442 (1976); *reconsid. denied*, 60 FCC 2d 661 (1976).

99. Rules and Regulations Relative to Cable Television Systems and the Carriage of Network News Programs on Cable Television Systems, 57 FCC 2d 68 (1976).

100. Rules and Regulations with Respect to Selection of Television Signals for Cable Television Carriage, 57 FCC 2d 625 (1976). Some waivers of these provisions had been granted previously.

101. In some cases, the effect of the rule was to force the carriage of stations where the tie was weaker. For example, systems in western New York state were required to carry signals from Pittsburgh or Cleveland and those in northeast New York were required to carry signals from Boston or Hartford, rather than signals from New York City.

whose signals would be carried by cable systems nationwide) was overstated. As it turned out, this threat materialized within a year or two.[102]

After the leapfrogging provisions were eliminated, the Commission issued a most significant ruling for cable systems, authorizing the use of 4.5, meter, receive-only satellite earth stations.[103] While not a liberalization of the cable rules, the decision represented a major cost-saving for cable operators who previously had been required to use earth stations of a minimum diameter of 9 meters. As a result, the economics of distant-signal importation and pay-cable changed dramatically.[104]

Finally, the Commission acted to exempt small systems with fewer than 1,000 subscribers from all exclusivity and signal-carriage rules.[105] This decision was based once again on the assumption of minimum injury to broadcasters in the absence of dispositive contrary evidence. Because these systems comprised over 40 percent of all systems, this decision reduced substantially the administrative burden on the Cable Bureau.

Each ruling moved the Commission away from its presumption that the whole panoply of regulations it had adopted in 1972 was necessary for the protection of broadcasters. In each case, the FCC invited broadcasters to demonstrate injury from the prospective liberalization. When they could not, the Commission further relaxed the regulations. But the only liberalization through 1978 which had a significant effect upon cable was the relaxation of the leapfrogging restrictions. The others merely set a pattern for more significant decisions to come.

The most important of these later decisions occurred in connection with a routine request for waiver of the Commission's "significant viewing" standard. Under this standard, cable operators were permitted to carry signals from adjacent markets without counting them against their distant signal quota if they were independent stations viewed over-the-air by at least 2 percent of the homes in the market or if they were network affiliates viewed by at least 3 percent of the homes. However, the Commission had occasionally entertained waivers of these requirements for cable systems which could show that the carriage of certain of these "inconsistent" signals would not harm the local broadcasters' ability to serve the public interest *and* that there were "unique or anomalous" circumstances involved. An example of such anomalous circumstances occurred where the Commission had found that without a waiver the cost of the cable system would be so high that the area would be denied cable service.[106] In such cases, the Commission balanced the benefits which would result from granting the waiver against the resulting harm to local stations in determining whether the waiver should be granted.

102. A discussion of superstation development appears at 107-08, *infra*.

103. American Broadcasting, Inc., 62 FCC 2d 901 (1977).

104. In this decision, the Commission concluded that cable operators could judge for themselves if the quality of their offerings from satellite signals received on a 4.5 meter dish was sufficient to attract consumer interest. If it was not, one would presume that cable operators would not use the 4.5 meter antenna.

105. Rules and Regulations with Respect to the Definition of a Cable Television System and the Creation of Classes of Cable Systems, 63 FCC 2d 956 (1977). *But see* Clearview TV Cable of Enumclaw, Inc., 68 FCC 2d 1179 (1978).

106. Delta Video, Inc., 41 RAD. REG. (P&F) 2d 706 (1977).

In ARTEC,[107] the cable television system in the Washington, D.C. market wished to offer cable service in an area in which Master Antenna Television Services (MATVs) offered Baltimore signals. To forbid ARTEC to carry signals offered by MATV systems in the same area was obviously a difficult policy to defend. Therefore, the Commission granted the waiver of the significant-viewing standard and allowed the importation of the signals.

In its ruling on ARTEC's waiver request, the Commission indicated that while it had earlier required a showing of anomalous circumstances, henceforth only a showing of no adverse impact would be required. ARTEC was a potentially significant decision because it substantially reduced the burden on a cable system in seeking relief from the Commission's rules. Indeed, in its reconsideration of the decision, the Commission indicated that after a cable system established a *prima facie* case of no adverse impact, the burden of proof shifts to the broadcasters. This would apparently require that the broadcasters provide data showing that granting a waiver would endanger their ability to provide service. Moreover, the Commission went so far as to suggest that ". . . we would anticipate that *prima facie* showings of little or no impact could be made in the larger markets."[108] Thus, by 1979, the Commission had been moved to argue that the growth of cable facilitated by the 1972 rules and the waivers granted from them had not placed large-market stations in peril. It was beginning to recognize that it had overprotected broadcasters.

In 1977, the Commission announced a detailed inquiry into the relationship between cable television and television broadcasting. Coming only five years after the adoption of 1972 Cable Rules, this Inquiry could only be a signal that the Commission had reached a point in *reregulation* where *deregulation* might be considered. The principal results of this Inquiry are summarized below, but for the present purposes, it is sufficient to note that it resulted in the issuance of Notices of Proposed Rulemaking to drop all distant-signal carriage rules and to eliminate the syndicated exclusivity rules. The Commission had thus arrived at a position where it was willing to undo the Consensus Agreement altogether only eight years after Burch and Whitehead had fashioned it.

K. Court Interpretations of the Commission's Rules

Two actions taken by the courts were especially important for the development of cable during this period. The first, and more significant, came when, in *Home Box Office v. FCC*, the Court of Appeals for the District of Columbia vacated the Commission's pay cable rules.[109] These rules had sharply limited the ability of cable systems to offer feature films and sports events on subscription channels in order to prevent the "siphoning" of programming from broadcasting to cable. In effect, the Commission was regulating a nonbroadcasting activity, pay cable, in order to provide protection to broadcasters. Although the court ruled that ". . . we think that the strategy the Commission has employed in implementing its interest in

107. Arlington Telecommunications Corp. (ARTEC), 65 FCC 2d 469 (1977).

108. 69 FCC 2d at 1938-39. Based on its decision in ARTEC, the Commission granted a waiver request which it had previously denied, Tulsa Cable Television, 74 FCC 2d 382 (1979).

109. Home Box Office v. FCC, 567 F.2d 9 (1977).

preventing siphoning creates a restriction 'greater than is essential to the furtherance of that interest,'"[110] it also appeared to say that, in any event, it would not have affirmed any pay-cable rules because of doubts that the Commission had jurisdiction to impose them. The court's discussion of Commission jurisdiction concludes that "(w)ithout further explanation of the function these rules are meant to serve, we cannot affirm the Commission's authority to promulgate them."[111] In light of this chastisement by the court of appeals, the Commission has not tried to reimpose pay-cable rules.

A second significant ruling occurred in *FCC v. Midwest Video Corp.*[112] In *United States v. Midwest Video Corp.*,[113] the Supreme Court had ruled, in a five-to-four decision, that the FCC had the authority to require cable systems to originate programming. A plurality of four found that there was no rational distinction between regulations designed to avoid adverse impact, such as those upheld in *Southwestern Cable,* and those whose purpose was to enhance the quality of television service, such as the Commission's origination rules. Indeed, the origination requirements could be thought of as imposing on cable systems obligations similar to those imposed on broadcasters to provide certain kinds of unremunerative programming.

In *Midwest Video II,* however, the Commission's rules requiring that channels be made available by cable operators for access by third parties on a non-discriminatory basis and that cable systems be required to have a minimum capacity of 20 channels were overturned by the Supreme Court. The majority argued that, while the origination rules required cable operators only to fulfill a role comparable to that played by broadcasters, the access rules required them to operate as common carriers. The Communications Act prohibits the imposition of common carrier regulation of broadcasters and the majority reasoned that this stricture applied to cable systems as well. The minority argued that the access requirements should be sustained since they furthered the statutory objectives. At present, therefore, no federal rule prohibits the operator of a cable system from controlling access to all of its channels.

L. The Copyright Problem Again

The consensus agreement committed all parties (broadcasters, cable operators, and program suppliers) to support and seek the early passage of copyright legislation. Under the terms of the agreement, compulsory licenses would be granted for all signals whose carriage would be authorized under the 1972 rules. While additional signals might, in the future, be authorized by the Commission, no compulsory license would be granted for the carriage of such signals. Unless cable and copyright interests could agree on a fee schedule, the legislation would provide for compulsory arbitration.

---

110. *Id.* at 50, *citing* United States v. O'Brien, 391 U.S. 367, 377 (1968).
111. 567 F.2d 9, 34.
112. FCC v. Midwest Video Corp., 440 U.S. 689 (1979) [hereinafter cited as Midwest Video II].
113. United States v. Midwest Video Corp., 406 U.S. 649 (1972) [hereinafter cited as Midwest Video I].

During the year in which the consensus agreement was being negotiated, a bill providing for compulsory licensing of distant signal carriage by cable systems was introduced in the Senate.[114] Where previous proposals for revision of the Copyright Act had called for full copyright liability for the carriage of at least some signals, this concept was totally absent from S. 644.[115] The bill specified, for markets of various sizes, the number of signals for which a compulsory license would be granted and the fee which would be imposed.[116] It also provided a formula for increasing the fee if the FCC permitted a larger number of signals to be carried.

At about the same time, a second cable copyright case, *CBS v. Teleprompter,*[117] began wending its way through the courts. The Columbia Broadcasting System attempted to distinguish this case from *Fortnightly* by arguing that Teleprompter had employed microwave relays to carry signals over hundreds of miles to its cable systems while Fortnightly had used nothing more than a strategically placed antenna. Thus, CBS argued, its copyrights had been infringed by Teleprompter even if Fortnightly was not liable on the facts of its case. In 1974, on essentially the same grounds that it had employed in *Fortnightly,* the Supreme Court ruled that Teleprompter was not liable for an infringement of copyright.

This set the stage for the enactment of the General Revision of the Copyright Act in 1976.[118] The Revision contained, as had S. 644, a compulsory license provision but the fee schedule was substantially lower. In addition, while the consensus agreement had called for a compulsory license only for those signals authorized by the 1972 cable rules, the General Revision provided for a compulsory license for all signals authorized by the FCC. Unlike S. 644, which provided for a statutory increase in fees whenever the Commission relaxed its carriage rules, the General Revision created a Copyright Royalty Tribunal which would be required to consider adjustments to the fee schedule whenever the carriage rules were changed.

M. The Economic Inquiry and Its Aftermath

By 1978, the Commission had dropped many of the limitations upon cable which it had imposed in 1972, and the courts had forced abandonment of others. The major remaining rules related to distant signals carriage and syndicated exclusivity, but, a year earlier, the Commission had initiated an *Economic Inquiry* directed at examining whether to retain even these rules.[119] The FCC's Cable Bureau, aided by a group of academic economists specializing in communications policy research, reported its findings to the Commission in 1979. This report,

---

114. S. 644, 92d Cong., 1st Sess. (1971).

115. For a brief history of the legislative proposals concerning copyright through S. 644, see S. M. Besen, W. G. Manning, & B. M. Mitchell, *Copyright Liability for Cable Television: Compulsory Licensing and the Coase Theorem,* 21 J. L. & ECON., 67, 73-76 (1978).

116. The bill did provide that local broadcast stations would obtain exclusivity as against cable carriage.

117. CBS v. Teleprompter, 415 U.S. 394 (1974).

118. Copyright Revision Act of 1976, 17 U.S.C. §§ 101-18 (1976) 17 USCA §§ 1-810 (1977) (effective Jan. 1, 1978).

119. Notice of Inquiry in Docket 21284, 65 FCC 2d 9 (1977).

which was adopted by the Commission, concluded that cable provided only a minor threat to broadcasters' profits and even less to their ability to perform in the public interest. As a result, the Commission adopted a Notice of Proposed Rulemaking[120] looking toward complete elimination of the broadcast signal carriage and syndicated exclusivity rules.

The Commission's decision to accept the *Economic Inquiry* report and to issue the Notice of Proposed Rulemaking marked the first time since 1959 that it had voted to accept the proposition that television broadcasters did not require protection from cable to survive, prosper, and serve the public interest. How could it have reached such a conclusion so much at odds with the policies it had adopted in 1972 or 1966? One possible answer is that broadcasters did not argue very strongly in favor of continuing the restrictive distant signal rules during the *Economic Inquiry*. These rules had been designed to protect large market broadcasters, and cable's threat to the development of UHF stations had been the asserted rationale for such a policy. But as the evidence accumulated that cable did not provide much of a threat to large-market stations, it became increasing difficult to defend this rationale.

The National Association of Broadcasters commissioned a study by Wharton Economic Forecasting Associates (WEFA)[121] which showed a very small impact on local station audiences as a result of distant signal importation. The Commission's own study, carried out by Dr. Rolla Edward Park,[122] showed a slightly *larger*, but still quite small, effect. Table III provides a comparison of the results of two studies.

Park's results show generally larger effects for somewhat smaller increases in imported independent signals and lower ultimate cable penetration. For instance, for a market with three network VHF stations, Park estimates an ultimate cable penetration of 41 percent of homes in the market when the number of independent signals carried by cable increases from two to six and cable carries three duplicate network signals. He predicts that this increase will divert 15 percent of the local audience to the imported stations. The WEFA study estimates that an increase from one to six independent signals will generate 50 percent ultimate cable penetration, but a loss of only nine percent of the local stations' audience.

Both the Park and the WEFA studies suggest that the ultimate impact on audiences of stations located in the top 100 markets from a large increase in imported distant signals from present levels will be in the six to fifteen percent range.[123] This loss will only occur when each market is fully wired, a task which will certainly require the better part of a decade. Thus, it is not unreasonable to conclude that elimination of the distant signal rules would generate audience losses

120. Notice of Proposed Rulemaking in Dockets 20988 and 21284, 71 FCC 2d 1004 (1979).

121. Wharton EFA, Inc., The Impacts of Cable TV on Local Station Audience (March 1978) (Prepared for the National Association of Broadcasters).

122. ROLLA EDWARD PARK, AUDIENCE DIVERSION DUE TO CABLE TELEVISION. A STATISTICAL ANALYSIS OF NEW DATA Rand Corp. R-2403-FCC (January 1979).

123. The NAB also submitted a study by Charles River Associates, showing a close relationship between broadcast station revenues and audiences, a conclusion which surprised no one.

TABLE III

ESTIMATES OF AUDIENCE LOSS FROM INCREASING IMPORTED BROADCAST SIGNALS

Local Market Signals	Assumed Ultimate Cable Penetration	Increase in Imported Independent Signals	Estimated Loss in Audience (%) WEFA	Park
(1) 2NV	52	From 1 to 6	11	
	52	From 2 to 5		12
(2) 2NV-1NU	34	From 1 to 6	3	
	36	From 2 to 5		8
(3) 3NV	52	From 1 to 6	9	
	43	From 3 to 6 (+3N)		15
(4) 3NV-1IV	50	From 1 to 6	11	
3NV-2IU	39	From 2 to 6 (+3N)		13
(5) 3NV-3IV	50	From 1 to 6	13	
3NV-3IV-2IU	37	From 2 to 6 (+3N)		10

NV = network VHF Station
NU = network UHF Station
IV = independent VHF Station
IU = independent UHF Station
(+3N) = plus an additional three imported network signals.

SOURCE: Inquiry into the Economic Relationship Between Television Broadcasting and Cable Television, 71 FCC 2d 232 (1979), at 680, 685.

for local broadcast stations of perhaps one to two percent per year over a ten-year transition in the largest 100 markets.[124] In many markets, particularly those with "grandfathered" cable systems, the loss would be substantially less.

These results are surprisingly consistent with projections made by economists with more limited data prior to the imposition of the 1972 rules. The Noll-Peck-McGowan study,[125] published in 1973, but available as a working paper two years earlier, and Park's 1970 analysis[126] offer predictions of the effect of increased importation of broadcast signals which are very close to those reported by Park in 1979. (See Table IV.) These two earlier studies foresaw a reduction in local television audience of from 4 to 24 percent as the result of importing four distant signals into a market of three or more local television signals. Park's 1979 study estimates audience losses of 8 to 18 percent in the same circumstances. The range of uncertainty has been narrowed and the optimistic projections for the impact upon UHF stations have been tempered, but the forecasts of the effect of cable signal importations in 1979 were virtually the same as those available to the Commission in 1971.

Given the central role of local public service programming in the FCC's broadcast policy, it is surprising how little information exists on the determinants

124. Total audiences of these stations might actually grow to the extent that the growth of population offsets the effect of audience fragmentation.
125. NOLL, PECK, & MCGOWAN, *supra* note 55, at app. A.
126. PARK, *supra* note 55.

TABLE IV

COMPARISON OF EARLIER STUDIES WITH PARK'S 1979 ANALYSIS OF THE EFFECT OF CABLE ON LOCAL-STATION AUDIENCE

Local Market Signals				*Imported signals*	*Estimated Impact Upon Local Audience (percent)*								
					Park (1970)			*Noll-Peck-McGowan (1973)*			*Park (1979)*		
NV	*NU*	*IV*	*IU*		*NV*	*IV*	*IU*	*NV*	*IV*	*IU*	*NV*	*IV*	*IU*
3	0	1	0	4	-16	-16		-4	-24		-8	-18	
3	0	0	1	4	-18		-20	-8*		+145*	-11		+10
3	0	0	0	4	-16			8			-11		
2	0	0	0	4	-34			-29			-22		

*Assumes only 3 imported signals.
All estimates are based upon the assumption that ultimate cable penetration will be 90 percent in 3- or 4-station markets and 60 percent in 2-station markets.

SOURCE: R. E. PARK (1979).

of the time devoted to such fare. The *Economic Inquiry* cites only three studies and concludes that unlimited distant signal importation would reduce it by no more than five minutes per week per station.[127] However, it is clear that, if it wished, the Commission could offset this miniscule reduction simply by announcing that it would require greater local programming efforts of its licensees. In any event, viewers are unlikely to lose much socially-valuable local or informational programming as a result of even a radical change in the FCC's cable policies.[128]

With the battle over pay-cable having been lost in the *Home Box Office* case, with new developments such as expanded subscription television, videodiscs and videocassettes, and direct satellite-to-home broadcasting on the horizon posing potentially greater threats than cable, and with substantial broadcaster ownership interests in cable, it is hardly surprising that broadcaster participation in *Economic Inquiry* seemed perfunctory.[129] Indeed, the "new" economic evidence provided by broadcasters varied little from the "old" evidence available to the Commission in the early 1970s.

N. Summary

In a very short period, the FCC has marched up and down the hill of cable television regulation. As this paper is written, the FCC proposes to eliminate the last vestiges of the federal regulatory shackles imposed upon the cable industry

127. Park, *Television Station Performance and Revenues*, EDUC. BROADCASTING REV. (June 1971); Crandall, *Regulation of Television Broadcasting: How Costly is the 'Public Interest'?*, REGULATION (Jan/Feb 1978).

128. In a parallel proceeding, completed on the same day as the Economic Inquiry, the Commission concluded that the effect of its syndicated exclusivity rules was to deny benefits to some members of the viewing public without any offsetting gains to other viewers. Cable Television Syndicated Exclusivity Rules, 71 FCC 2d 951 (1979).

129. Interestingly, much of the effort at the Commission appears to have been expended by copyright interests seeking to resurrect the "retransmission consent" proposal. See Notice of Proposed Rulemaking, Docket 21284, at 68-100.

during an era of television broadcaster protection. It has, thus, required only fourteen years for the Commission to retreat almost totally from the most protective of its policies established in 1966. During this period, the regulatory regime for cable was first "liberalized" through a complex set of rules, which were difficult to enforce. It then proceeded through a phase of reregulation, designed to lighten the Commission's administrative burden while providing a glimmer of additional hope for cable operators. The process of reregulation was substantially accelerated when the courts failed to uphold the Commission's rules regarding pay-cable and non-broadcast service requirements.

The combination of court decisions unfavorable to rules restricting cable and Congressional hostility to the imposition of tight regulatory controls left the FCC in a strange position. It could continue to regulate cable as a retransmission medium while the industry evolved into something else. But why should it bother to do so? As we demonstrate below, the cable industry is changing so rapidly that to continue the rules limiting broadcast-signal importations may not offer much protection to broadcasters in the future. More importantly, paying virtually exclusive attention to whether, and to what extent, broadcasters should be protected had led the Commission and other policymakers to ignore fundamental issues concerning the appropriate structure of the cable industry. We turn to these issues in the concluding Sections of this paper.

III
CABLE DURING THE TRANSITION

The cable system of 1979 was quite different from the community antenna television system of the 1960s. In 1966, it may have been reasonable for broadcasters to try to limit cable importation of distant signals since without these signals cable had nothing to offer in areas of good local reception. Few people could have believed that local access channels were what subscribers wanted. A narcissistic desire on the part of viewers to see themselves on television was never detected in any of the empirical studies of cable demand.

If importing distant signals was the *sine qua non* of cable in the 1960s, it was because pay programming and other nonbroadcast services were not available. For a scattered population of 3,000 cable systems, program distribution was a major problem. "Bicycling" of videotapes or microwave interconnection of many systems to provide them with programming was simply too expensive, given the small scale of operation of the average system. Importing broadcast signals by microwave was not inexpensive, but some nearby stations could be imported, either by private microwave, by microwave common carriers, or directly from a remote antenna. There were, however, severe constraints upon such importations since private microwave networks could not be built to transport a very large number of independent signals around the country. Instead, cable systems were generally limited in their choices of broadcast signals to those few which were carried by specialized common carriers or those from nearby markets.

The 1972 cable rules continued to inhibit large-market cable growth because the limitations upon imported distant signals were sufficiently severe to make cable an unattractive option for most consumers. In 75 percent of the largest 100 markets, cable systems could have offered no more than the local stations plus two imported signals and they were not free to choose even these. In addition, if the Commission's syndicated exclusivity rules had been enforced, the attractiveness of a package cable offer would have been even more limited. Since most markets in the top fifty already had four or more commercial stations, the importation of only two additional independents could not be a major inducement to subscribe. Only when more diverse offerings became available in greater quantity and at a reasonable cost could these large-market systems hope to have something to offer potential subscribers.

The rate of growth of total cable subscribers declined modestly throughout the 1966-78 period as the growth opportunities in the smaller markets were exhausted. (See Table I, above.) It was not until new nonbroadcast services developed that cable could begin to penetrate the larger markets.

The abandoment of the leapfrogging restrictions, the reversal of the pay-cable rules, and the Commission's decision to authorize 4.5 meter satellite earth stations combined to produce a changed environment. In the next few years, satellites designed specifically to transmit television programming to cable systems were launched, a wide array of nonbroadcast programming was developed, and at least four broadcast "superstations" emerged. (See Table V.) At least ten separate pay cable services were offered by satellite by 1979. Another fourteen or more satellite services are now available to cable systems under a variety of financing arrangements. These include religious channels, children's channels, public affairs channels, and one which carries the House of Representatives sessions during daytime hours. (See Table VI.)

TABLE V

1979 SUPERSTATIONS

	Systems	*Subscribers*
Southern Satellite Systems/WTBS (Atlanta)	1,710	7.2 million
Satellite Communications Systems/KTVU (S.F.)	140	700,000
United Video/WGN (Chicago)	7,600	2.3 million (1.7 million on satellite)
Eastern Microwave/WOR (N.Y.)	410	2.3 million (400,000 on satellite)

SOURCE: F.C.C. Network Inquiry Special Staff, *Video Interconnection: Technology, Cost and Regulatory Policies*, at 68-73 (March 1980, preliminary).

The importance of these new services to cable operators is dramatically revealed by the rate of increase of subscribers since 1976. In both newer and older systems, the addition of a pay cable service added substantially to basic cable subscriptions. For systems started before 1970, those adding pay cable services in either 1976 or 1977 experienced an increase in subscribers between 1976 and 1978 which was

TABLE VI

NONBROADCAST SIGNALS AVAILABLE TO CABLE SYSTEMS, 1979

Pay Services:	*Systems*	*Subscribers*
HBO	800	2,000,000
Showtime	260	650,000
Star Channel	17	105,000
Hollywood Home Theatre/Prism	43	167,000
Optical Systems/Channel 100	10	25,000
Telemation (TPS)	56	309,000
Pay TV Services	11	35,514
Home Theatre Network	8	10,000
Cinemerica/Bestvision	37	43,000
Fanfare	25	7,000
Paid-for-Services		
UA/Columbia (3 Services)	300	3,000,000
Other Paid-for-Services and Free Services		
Nickelodeon	— Children	
ESPN	— Sports	
C-SPAN (House of Representatives)	— Public Affairs	
The Movie Channel	— Movies	
Black Entertainment Television	— Minority	
Galavision (Spanish)	— Minority	
Modern Satellite Network	— Varied	
SPN	— Varied	
PTL	— Religious	
CBN	— Religious	
Trinity	— Religious	

SOURCES: SAT Guide (March 1980); FCC, Network Inquiry Special Staff, *Recent Trends in Cable Television Related to the Prospects for New Television Networks*, at 53 (January 1980, preliminary).

more than double the rate for those not adding the service. For newer systems, the effect of pay cable upon subscribers has been even more dramatic, particularly in 1978. The addition of pay cable in these newer systems in 1978 was accompanied by a growth rate more than triple that of those systems not offering pay services.[130] Hence, pay cable has provided not only a major new source of revenue from existing customers, but appears to have substantially added to the demand for cable subscriptions.

Pay cable subscriber growth since 1976 has been dramatic. Between February 1976 and May 1979, the number of cable subscribers also buying one or more pay cable services increased from 650,000 to 3,300,000.

130. These results were obtained by regression analysis on a randomly drawn sample of 86 older (pre-1970) and 34 newer cable systems. (Data were obtained from the TELEVISION FACTBOOK, Services Volume (1977 & 1978 eds.)). The percentage change in subscribers between 1976 and 1978 was regressed on the percentage change in homes passed by the cable and dummy variables reflecting the initiation of pay cable service in 1975, 1977, or 1978. For the older systems, pay cable services begun in 1976 and 1977 had a statistically-significant effect upon subscriber growth, but for the newer systems, it was only the pay services begun in 1978 which significantly affected subscriber growth.

The development of a myriad of nonbroadcast services has been somewhat limited by the capacity of the RCA Satcom I satellite. As additional satellites are launched, more services will be available, making imported broadcast signals even less valuable. Professional and college sports are turning to satellite for pay cable distribution. Motion picture companies are increasingly using these satellite-distributed pay services as complements to their first run exhibition strategy, generally offering films to pay-cable subscribers prior to their exhibition on the networks. These services, being more specialized than broadcast station offerings and generally offering no advertising, are likely to be much more attractive than imported broadcast signals to subscribers.

All of these developments have stimulated interest in franchises in the nation's major cities. As of April 1980, only nine of the largest thirty markets had cable systems in their central cities. Franchises have been awarded for cities in six of the remaining twenty-one, applications are pending in three additional cities, and in the remaining twelve, the franchising procedure is only beginning.[131] In virtually every major market, however, there is considerable interest in accelerating the franchising process as the major cable companies and local groups eagerly press for the right to begin construction of systems offering the rapidly expanding array of cable services.[132]

In summary, the rather dismal projection for the future of cable television which was prevalent in the late 1960s and early 1970s has been replaced by a "gold rush" for new franchises. This has occurred because new programming services, distributed by a new technology, are replacing imported broadcast signals as the most attractive offering of cable television in the larger markets. Cable television is no longer the enhancement of local broadcast signals or the importation of nearby television signals. It is now a service which offers a much wider array of services—an array which will increase during the 1980s.

IV
THE ECONOMIC PERFORMANCE OF BROADCASTING DURING THE TRANSITION

Given the evolution of cable regulation, it is difficult to establish when the liberalization of the rules facing cable operator began. The most restrictive policies, particularly as they affected the largest markets, were probably those in effect between 1966 and 1972. Cable operators could not import new distant signals into these markets without an evidentiary hearing or, later, retransmission consent. As a result, while cable television continued to grow during this period, the growth occurred largely in the smaller markets. Even after the adoption of the consensus agreement in 1972, however, the remaining substantial limitation on the number of signals that could be imported into these markets, the leapfrogging rules which restricted which signals could be carried, and the pay cable rules combined to limit

131. *The Gold Rush of 1980*, BROADCASTING 52-56 (March 31, 1980).
132. *Id.*

cable growth. It was only after the *Home Box Office* decision in 1977, that large city cable systems became attractive investments, except in special circumstances.

Cable's difficulty in penetrating large markets is revealed in the FCC's *Economic Inquiry Report.* In 1978, 17.1 percent of television households subscribed to cable television, but in the metropolitan areas of the largest fifty markets, which contain 60 percent of all television households, only 8.3 percent of households were subscribers,[133] and 80 percent of these households did not even have access to cable.[134] The effect of the deregulation which occurred through 1978 could hardly have been substantial in the nation's major markets.[135] But the increase in the number of cable subscribers, the rapid expansion of satellite-distributed broadcast signals, and the growth of pay-cable in recent years should have made at least some impact. Have these impacts been greater than expected? How has the public been affected by those changes which have occurred? And what can be expected from further deregulation?

A. The Impact of Cable Growth on Television Broadcasters

Given the continuing growth of cable in the 1971-79 period, it should be possible to observe some impact upon television broadcasters. Cable television fragments local station audiences through its importation of distant signals and its provisions of originated programming services, but how has this audience loss affected the revenues or income of local stations?[136] To answer this question, we rely on two different sets of data: one for television stations which filed comments in the FCC's Economic Inquiry, claiming current or prospective damage from cable, and published FCC data for all markets with three or more stations.

Comments were filed on behalf of seventy-eight stations in the Economic Inquiry, most alleging actual or potential harm from increased cable penetration.[137] Complete data were available for sixty-nine of the stations. The Commission staff calculated that the income of these stations rose an average of 98 percent between 1972 and 1977 compared with only a 73 percent increase for all stations. Moreover, while the average cable penetration in these markets increased from 24 to 31 percent during this period, the change in penetration is uncorrelated with revenue growth. Hence, at this very crude level of analysis, it is impossible to detect any impact of cable penetration growth on station revenues.

The staff also selected the nineteen worst cases,[138] most of them drawn from small markets such as Cheyenne (Wyoming), Glendive (Mont.), and Elmira (N.Y.). Two exceptions are independent UHF stations in Kansas City and Boston.

---

133. ECONOMIC INQUIRY REPORT 41-43 (1979).

134. *Id.*

135. As noted above, the situation appears to be changing with the granting of franchises in a number of major cities. *See* BROADCASTING, *supra* note 131, at 35 (March 31, 1980).

136. Note that some stations may *benefit* from cable to the extent that they are carried by cable into many other markets. Indeed, a number of so-called "superstations" have developed as the combined result of the abandonment of the leapfrogging rules and the expansion of satellite service. Moreover, some studies have shown that UHF stations may benefit from cable since their signals are placed on a parity with VHF stations.

137. ECONOMIC INQUIRY REPORT 89 (1979 ed.).

138. The "worst" cases were those which evidenced no audience growth, declining real revenues, and

The Commission's analysis generally concluded that audience diversion due to cable in these markets has been slight. The few stations suffering more than a 10 percent audience loss are all in the smallest markets. For the seven stations in the largest 100 markets, the net impact of cable is estimated to range from a 5.3 percent audience reduction to as much as a 5 percent *increase* for the UHF independents. This finding is buttressed by the evidence that between 1972 and 1977, the Boston station's revenues increased by 119 percent and the Kansas City station enjoyed a 380 percent revenue gain. Thus, the Commission once more was confronted with evidence that its restrictive cable policies may actually have harmed rather than nurtured independent UHF stations. In Table VII, there are as many stations which gained audience as a result of cable as there are audience losers. On balance, the evidence from those stations which bothered to complain is that large market stations have essentially been unaffected by cable, but stations in small markets without three network signals have experienced audience losses on the order of 10 to 20 percent.

The impact of cable growth upon television industry revenues and profits is not even discernible from an examination of aggregate data. From 1966 through 1978, there was more than an eight-fold increase in cable subscribers: from 1.575 million to 13 million households.[139] During this period, television industry profits and revenues increased by an average of 4 percent per year[140] in *real* terms (see Figure 1), a substantially greater growth rate than that experienced by the entire economy, but less than that enjoyed by broadcasters during the 1950s, when television set penetration was growing rapidly. Since the 1970-71 recession, real television industry profits and total cable subscribers have been increasing at very nearly the same rate (approximately 13 percent per annum). In short, the 1970s were a period of substantial television industry profit growth despite the continuing increase of cable penetration. Certainly, the FCC could not have viewed the succession of industry profit reports in the 1972-77 period with much concern as the process of cable deregulation continued.

Can we even detect an effect of increasing cable penetration upon individual television markets? In the 123 markets for which the FCC publishes data (those with three or more stations), there is very little evidence that cable growth has had a measurable effect upon either revenues or profits. There is very little correlation between the growth in cable penetration and revenue or income growth since 1972 in these markets. Nor is there any correlation between the change in the growth rate of profits over the 1972-78 period and the increase in cable penetration. (See Table VIII.)

Nor is there any discernible pattern when cable penetration increases are arrayed in discrete increments. (Table IX) Finally, there is no correlation between changes in the amount of news, public affairs, or local programming and cable growth. Between 1973 and 1978, the amount of local programming actually

---

high cable penetration in the 1972-1977 period.

139. TELEVISION FACTBOOK, Services Volume 85a (1980 ed.).

140. FCC, *TV Broadcast Financial Data*, (annual issues 1966-78).

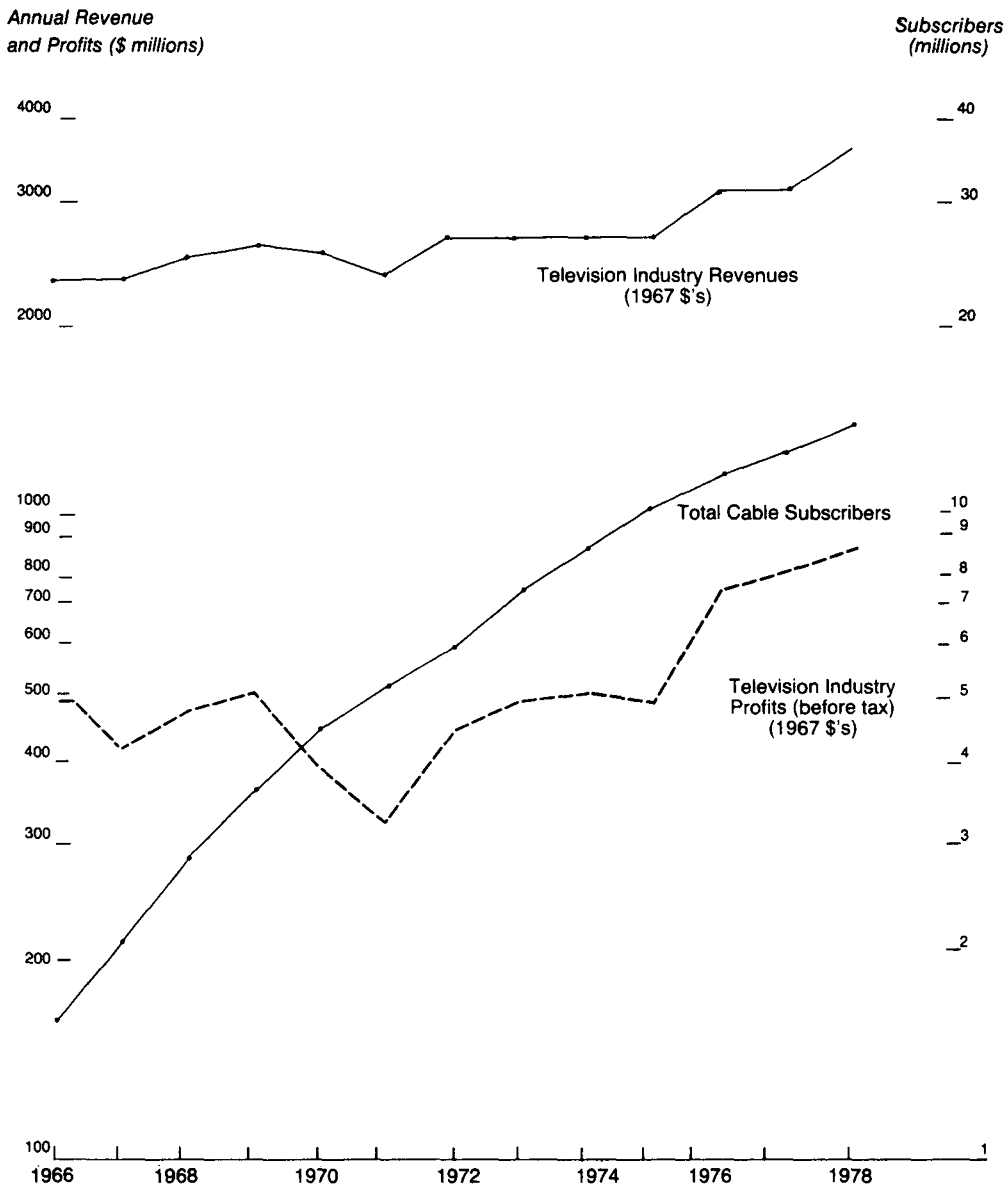

FIGURE 1 Cable Subscribers Growth Versus Real Television Industry Revenues and Profits 1966–1978

SOURCE: F.C.C., *The Broadcast Financial Data,* TV Digest, Television Factbook

TABLE VII

SUMMARY ANALYSIS OF NINETEEN WORST CASE BROADCAST STATIONS OR MARKETS ALLEGING CABLE IMPACT

Market or station	*Market rank*	*Estimated percent gain (loss) in average all-day audience within ADI due to cable based on* Rating	Share	*Off-air signals*	*CATV penetration (percent)* 1972	1977	*Percent increase (decrease) 1972-1977 revenue*	*Percent increase (decrease) 1973-1977 operating income*
KYUS(N)V Miles City, Glendive, Mt.	211	(13.4)	(26.1)	2NV[1]	44	62	53	*
WBOC(C)U Salisbury, Md.	166	(17.9)	(19.1)	1NV[1]	45	58	76	42
KGVO(C)V Missoula, Mt.	150	(7.4)	(13.8)	2NV[1]	37	36	36	(17)
KYCU(A) Cheyenne, Wy.	176	(9.2)	(14.5)	1NV[1]	32	42	66	3
KOSA(C)V Odessa, Tx.	147	(7.3)	(10.0)	3NV	36	50	85	89
WTOK(C)V Meridian, Miss.	170	(8.7)	(7.7)	1NV, 1NU[1]	19	25	40	48
WCTV(C)V Tallahassee, Fl.	153	(8.4)	(5.9)	1NV, 1NU	25	7	64	31
KID(C)V Idaho Falls, Id.	164	(3.0)	(8.0)	3NV	26	28	37	(21)
KTTC(N)V Rochester, Mn.	124	(5.3)	(7.5)	3NV	13	21	69	86
WICS(N)U Springfield, Il.	71	(1.6)	(5.3)	1NV, 2NU	15	36	69	101
WENY(A)U Elmira, N.Y.	159	0.3	5.4	2NU	68	63	111	166
WWLP(A)U Springfield, MA.	86	(1.0)	(1.5)	3NU[2]	10	16	61	157
WTVO(N)U Rockford, Il.	104	1.2	(3.0)	1NV, 2NU	12	34	48	19

TABLE VII *continued*

SUMMARY ANALYSIS OF NINETEEN WORST CASE BROADCAST STATIONS OR MARKETS ALLEGING CABLE IMPACT

Market or station	*Market rank*	*Estimated percent gain (loss) in average all-day audience within ADI due to cable based on* Rating	*Share*	*Off-air signals*	*CATV penetration (percent)* 1972	*1977*	*Percent increase (decrease) 1972-1977 revenue*	*Percent increase (decrease) 1973-1977 operating income*
WFMY(C)V Greensboro, N.C.	53	(0.5)	(1.4)	3NV	5	12	23	47
WHNB(N)U Hartford, Ct.	22	0.6	(0.3)	2NV, 2NU, 1IU[3]	N/A	14	31	(9)
KBMA(I)U Kansas City, Mo.	27	3.4	2.8	3NV, 1IU	3	12	380	**
WSBK(I)U Boston, Mass.	5	5.0	5.0	3NV, 2IU	5	10	119	136
WOWL(N)U Huntsville, Ala.	92	28.2	28.3	4NU[4]	28	33	46	306
WCFT(C)U Tuscaloosa, Ala.	191	*	*	1NU	32	41	82	130

*Data necessary to compute are unavailable.

**Operating income has increased quite substantially, but since it was negative in the base year, a percent change would be meaningless.

NOTE: I = Independent Station; U = UHF; V = VHF; A = ABC affiliate; C = CBS affiliate; N = NBC affiliate.

[1]One or more stations is a "cherry-picker," *i.e.*, receives programming from two or more networks.

[2]Two of the stations are NBC affiliates and one is an ABC affiliate. Thus, CBS is not available.

[3]Both UHF stations are NBC affiliates.

[4]Two of the stations are NBC affiliates.

SOURCE: 71 FCC 2d 632 (1979), at 708-09.

TABLE VIII

CORRELATION BETWEEN CHANGES IN CABLE PENETRATION AND TELEVISION MARKET REVENUES AND PROFITS, 1972-78 (N = 123)

	Percent Change in					
Percent Change in	*Television Market Revenues*			*Television Market Profits*		
Cable Penetration:	*1972-78*	*1974-78*	*1976-78*	*1972-78**	*1974-78***	*1976-78*
1972-78	−0.1692	0.1264	−0.1184	−0.0929	−0.0129	−0.0821
1974-78	−0.1227	0.0473	−0.0460	−0.0308	0.0205	−0.0558
1976-78	−0.0805	0.1767	−0.0464	−0.0833	0.0416	0.1198
Correlation at the .05 Confidence Level	0.1806	0.1806	0.1806	0.1860	0.1852	0.1806

*Excludes seven markets which reported negative profits in 1972.
**Excludes six markets which reported negative profits in 1974.

SOURCE: Calculated from data derived from FCC Television Broadcast Financial Data and American Research Bureau.

declined in our 123 market sample, but the decline seems to be somewhat *greater* in markets with the smallest cable growth. News and public affairs programming increased by less than 1 percent in the 1973-77 period, but there is no relationship between changes in this form of "merit" programming and increasing cable penetration. While a more sophisticated analysis accounting for changes in income, population, and other demographic variables and distinguishing between basic and pay cable might reveal some effect of cable penetration on station performance, it is unlikely to be very large.

TABLE IX

PERCENTAGE CHANGES IN REVENUES, PROFITS, AND "MERIT" PROGRAMMING FOR 123 MARKETS RANKED BY INCREASE IN CABLE PENETRATION, 1972-78

	Markets with Increase in Cable Penetration Between 1972 and 1978 of:					*All Markets*
Percentage Increase in:	*16% +*	*11-15%*	*6-10%*	*0-5%*	*Less than 0%*	*(n = 123)*
Revenues (1972-78)	17.3	17.8	11.6	18.8	20.4	15.8
Revenues (1974-78)	19.7	19.3	18.2	20.7	20.3	19.6
Revenues (1976-78)	14.1	13.6	12.3	13.5	17.9	13.3
Profits (1972-78)	36.6	29.0	26.3	33.1	31.7	30.4
Profits (1974-78)	38.8	32.8	13.1	36.9	36.6	26.3
Profits (1976-78)	16.8	13.1	12.0	18.5	23.8	15.8
News + Public Affairs Programming (1973-78)	0.7	3.4	0.3	−0.1	2.4	0.8
Local Programming (1973-78)	−0.3	−2.4	−1.3	−4.7	−2.9	−2.6

SOURCE: Calculated from data derived from FCC Television Broadcast Financial Data and American Research Bureau.

Available data on rates of return earned in television provide further corroboration of the thesis that television broadcasters have prospered during the recent period of deregulation. Assuming that tangible assets represent 80 percent of total station assets, between 1973 and 1978, the average return on assets (before taxes) for VHF stations has nearly doubled from 61.3 to 113.8 percent.[141] For UHFs, the increase is even more spectacular. Total UHF profits plus interest payments rose from only 1.0 percent of net assets in 1973 to 42.8 percent in 1978. The 1978 returns are obviously far above the return required to attract capital to the industry. Clearly, the scarcity value of a television license continues to be very large for the average broadcaster.

B. Summary

The evidence is quite clear: cable retransmission of broadcast signals has not injured television broadcasters in any noticeable fashion. The effects of cable growth are not noticeable in revenues, profits, or local programming offerings of the nation's larger television markets. In the 1970s, television broadcasters' profits have grown at a very rapid rate as cable television has continued to grow. The return on television broadcasters' assets is far above the cost of capital. The number of UHF stations on the air continues to grow, and the UHF broadcasters are even reporting sizable profits.

While the above evidence suggests that cable growth has not perceptibly injured broadcasters in the past few years, it is entirely possible that future cable growth will. Cable television will begin to penetrate the major markets on the basis of a myriad of new programming services other than broadcast retransmissions. The future of commercial off-the-air broadcasting is by no means assured, but the basis for protecting it which formed the foundation of the 1966 and 1972 FCC cable rules has simply been shown to be invalid.

V

DEREGULATION AND SOME UNRESOLVED ISSUES

It certainly seems possible that, in the near future, the FCC will abandon its remaining rules restricting cable retransmission of broadcast signals. On the same day that the Commission adopted the report of the *Economic Inquiry* it issued a *Notice of Proposed Rulemaking* looking toward total deregulation of distant signal carriage. However, there still remains a possible stumbling block—the issue of retransmission consent—which, as we have seen, the Commission has been wrestling with for more than two decades. Moreover, even if today there were no carriage rules, a number of important questions about the future of cable would remain unresolved, in part the result of the almost exclusive attention given to the economic impact of cable television on broadcasting in the deliberations over cable policy.

---

141. Crandall, *Regulation of Television Broadcasting: How Costly is the Public Interest?*, REGULATION (Jan./Feb. 1978) provides a discussion of this methodology. The rate of return is measured as (broadcast income plus interest) divided by (net tangible assets at the end of the year divided by 0.8).

A. Retransmission Consent Again, and Again, . . .

Almost from its earliest consideration of cable, the issue of whether cable systems should pay for the programs that they retransmit has occupied the attention of the FCC. There are a variety of views about both the desirability and practicality of imposing retransmission consent. Some hold that such an arrangement is practical and should be imposed because of its beneficial effects on the amount and nature of television programming.[142] Others argue that no benefits will result, and that the effect will only be to reduce the services that cable can offer.[143] Still others argue that such a system is not practical because of the high costs of the transactions that would be involved.[144]

The Commission has, variously, suggested that Congress amend the Communications Act to provide for retransmission consent, enacted rules which it argued were justified, in part, by the absence of such a requirement, and adopted (and later removed) its own requirement. Meanwhile, the Supreme Court twice ruled that cable systems were not liable for infringement under the Copyright Act of 1909 when they retransmitted broadcast signals, and Congress enacted a revision of the Act providing for a compulsory license at statutorily determined fees.

The issue of copyright liability was supposed to have been resolved definitively by the enactment of the General Revision but the controversy refuses to die. The National Telecommunications and Information Administration of the Department of Commerce has recently urged the Commission to adopt retransmission consent as part of its deregulation effort,[145] but the Commission has expressed serious doubts that it has jurisdiction to do so.[146] Nonetheless, a number of commissioners succeeded in having the issue considered as part of the FCC's proposed rulemaking concerning the elimination of its carriage rules.[147]

More recently, the Chairman of the House Subcommittee on Courts, Civil Liberties, and the Administration of Justice, which deals with copyright matters, was reported to have written to the Chairman of the FCC requesting a delay in Commission action on deregulation because it "would not only have the effect of placing enormous burdens on a tribunal not fully prepared to meet them, but would also precipitate a panicked rush to Capitol Hill for remedial copyright legislation."[148] Under the terms of the Copyright Act, a Copyright Royalty Tribunal must reconsider the "reasonableness" of the compulsory license fee schedule whenever the Commission changes its carriage rules. Despite this provision, it is apparently still possible for the chairman of the subcommittee which drafted the legislation to argue, four years after its passage, that the Tribunal is "not fully

---

142. *See* Besen, Manning, and Mitchell, *supra* note 115, at 68.

143. *See, e.g.*, Chazen and Ross, *Federal Regulation of Cable Television: The Invisible Hand*, 83 HARV. L. REV. 1820, 1830-41 (1970).

144. *See, e.g.*, M. H. SEIDEN, CABLE TELEVISION U.S.A. 112 (1972).

145. Letter from Henry Geller to Charles D. Ferris and Petition for Rulemaking (February 14, 1979).

146. Cable Television Syndicated Program Exclusivity Rules, 71 FCC 2d 1004, at 1036-42 (1979).

147. *Id.* at 1035.

148. BROADCASTING, at 25 (March 24, 1980).

prepared"[149] to deal with such matters and that Commission action would trigger not a change in the fee schedule but "a panicked rush to Capitol Hill."[150]

It is thus a reasonable prediction that the issues of copyright liability and retransmission consent will be around for some time to come, and that the manner in which the problem had previously been resolved will make the achievement of total deregulation a more difficult task.[151] Moreover, one effect of deregulation would almost certainly be to intensify the difficulties faced by the Copyright Royalty Tribunal, which would become the focus of the debate over cable policy.[152]

B. Access

A number of commentators have argued that it is critical, given the potentially large channel capacity of a cable system, that limitations be placed on the number of channels that the cable operator can program, and that provision be made for guaranteed nondiscriminatory access by others.[153] Indeed, the three major bodies which examined cable policy in the early 1970s all recommended some form of "common carrier" status for cable. The Sloan Commission on Cable Communications recommended that the cable system owner be allowed to operate only two channels and that other channels be mandated for particular uses or made available for leasing on a nondiscriminatory basis.[154] The Committee for Economic Development argued that cable owners should be allowed to originate or control programming on a limited number of channels, but should be required to demonstrate affirmatively that they are not restricting the competitive access of others.[155] And a committee of cabinet officers recommended that cable operators should be required to offer their channels for lease to others on a nondiscriminatory basis except for channels used for retransmission of broadcast signals and one or two channels reserved for use of the operator.[156] The rationale for these recommendations is that it would be undesirable for the operator to control many channels in a medium which is generally recognized to be a natural monopoly.

In its 1972 rules the FCC did make provision for some channels which the cable operator would be required to lease on a nondiscriminatory basis in addition to three channels reserved for free access for specific uses. However, even this limited form of common carrier access was struck down in *Midwest Video II*. Thus, without

149. *Id.*

150. *Id.*

151. One proposal for an omnibus revision of the Communications Act would have resolved the issue by imposing a retransmission consent requirement. H. R. 3333, 96th Cong., 1st Sess., § 453 (a)(2) (1979). It appears, however, that passage of this or similar legislation is unlikely any time soon.

152. At this writing, the Tribunal is engaged in two proceedings, one which is concerned with the distribution of royalty fees and another which is responsive to a statutory requirement that the fee schedule be examined for reasonableness in 1980.

153. For an early statement see Owen, *Public Policy and Emerging Technology in the Media*, 18 PUB. POL'Y (1970).

154. SLOAN COMMISSION ON CABLE COMMUNICATIONS, ON THE CABLE—THE TELEVISION OF ABUNDANCE 141-44 (1971).

155. COMM. FOR ECON. DEVELOPMENT BROADCASTING AND CABLE TELEVISION—POLICIES FOR DIVERSITY AND CHANGE 70 (April 1975).

156. CABINET COMMITTEE ON CABLE COMMUNICATION, CABLE—REPORT TO THE PRESIDENT (1974).

Thus, without federal legislation, the future of cable will be one in which cable operators will control many channels and with no requirement that access be granted to others unless such requirements are imposed by local franchising authorities. So long as cable reaches a relatively small number of households, this may not be a matter of great concern, but imposition of access requirements on a mature cable industry is likely to meet considerable resistance. While local franchising authorities appear to be concerned with having the cable operator provide free or low-cost access to local citizens and public bodies, they seldom require the operator to make available a substantial number of channels on a nondiscriminatory, paid access basis. This issue is likely to become especially important if large numbers of cable programmers are denied access to cable systems. At this time, however, there appears to be little interest in the issue of access.

C. Ownership

Access is not the only issue that has received only limited attention in the debates over the regulation of cable. In the 1960s, the FCC did invite comments on the question of whether limitations should be placed on who could own cable systems, the number of cable systems that could be owned, or the number of subscribers who could be served by any one entity.[157] But despite the fact that the Commission adopted rules banning television networks from owning cable systems,[158] broadcaster ownership of cable systems in the same market,[159] and telephone company operation of cable systems,[160] it is fair to say that the Commission has not recently exhibited much interest in these questions.

This lack of interest is indicated by the treatment accorded to a number of recent mergers and joint ventures. The proposed merger between General Electric and Cox Broadcasting has apparently come under scrutiny only in connection with the broadcast properties owned by the merging partners. The fact that both parties have substantial cable interests, and that the merger would create the third largest cable system operator seems not to have attracted much attention. Similarly, the purchase by Time, the parent of the dominant pay cable programmer, Home Box Office, of American Television and Communications, a major multiple system owner, seemed to receive only perfunctory consideration by both the Department of Justice and the FCC. And, Showtime, a joint pay-cable programming venture between Viacom and Teleprompter, two major system operators, was treated similarly.

The point here is not necessarily that these developments are undesirable, although one might argue, for example, that mergers may reduce the number of

157. Notice of Proposed Rulemaking, 15 FCC 417 (1968).

158. Amendment of Part 74, Subpart K of the Commission's Rules and Regulations Relative to Community Antenna Television Systems, 23 FCC 2d 816, 822 (1970).

159. *Id.*

160. 18 RAD. REG. (P&F) 2d 1549; *reconsid. denied* 18 RAD. REG. (P&F) 2d 1798. The Commission's restriction on telephone company operation of cable systems is presumably based on the premise that cable may provide an alternative distribution system for non-entertainment services. If, however, cable proves simply to be an alternative distribution mechanism for television programs, the basis for this restriction may be eroded.

potential bidders for cable franchises. What is important is that, as compared to the attention lavished on the issues of distant signal importation, audience fragmentation, and program siphoning, the resources devoted to consideration of the appropriate structure of the cable industry seem woefully inadequate. Serious analysis of the effects of horizontal concentration and vertical integration has been virtually nonexistent, and these issues still seem at the periphery of the concerns of the Commission. Once again, the attention given to the question of economic injury may have diverted resources from the consideration of questions which may be far more significant in the long run.

D. Local Franchising

The 1980s will undoubtedly witness a shift of cable regulation from the federal government to the states and localities. In the process, attention will shift from limitations on the services that cable systems can offer to their subscribers to the regulation of subscriber rates and the imposition of service requirements by local franchising authorities. At present, there are hotly-contested franchise battles taking place in many of the major cities with the competitions being judged on the technical characteristics of the systems, the fees to be charged, and, especially, the services, including access channels, to be offered.

With the rewards to a successful franchise application being potentially very large, there is a growing tendency for applicants to offer very extensive packages of services. It seems clear that many of the services being proposed are designed as much to attract the attention of the franchising authorities as that of the public. Many will, therefore, likely prove to be unprofitable and local franchising authorities may be faced with having either to accept a reduction in services as cable systems seek to suspend these unremunerative offerings or to permit an increase in the rates that are charged for profitable services.

A related problem arises in connection with the services that are known to be unremunerative at the time of the franchise award. These services—which are either imposed by the franchising agency or proposed by the cable system—sometimes include free "basic" service, i.e., no charge is imposed if the household takes only retransmitted broadcast signals, and usually include free access channels, so that local governments, educational institutions, and members of the public can transmit programs at no charge. Franchise applicants accept a requirement or propose to provide these services because they believe that to do so enhances their prospects for being awarded the franchise. These services are likely to be especially vulnerable, therefore, if the overall package of services which the applicant has agreed to provide proves to be less profitable than expected. The franchising agency will then be faced with either permitting these services to be eliminated or allowing the imposition of a charge for basic service, or raising the rates on other services. In short, the act of granting the cable franchise should be regarded as the beginning and not the end of the process of local cable regulation.[161]

161. For a useful discussion of the difficulties facing a local franchising agency, *see* Williamson, *Franchise Bidding for Natural Monopolies—in General and With Respect to CATV*, Bell J. of Econ. (1976).

VI
CONCLUSION

In less than twenty years, the FCC has argued that no regulation of this new industry is required, then regulated the industry in such a manner as to preclude its development in any but the smallest television markets, and, finally, appears to be moving to almost total deregulation of the industry. This pattern of increasing regulation followed by deregulation is much more rapid than the recent experience in transportation, energy, or financial markets.

In part, the pace of deregulation of cable television has been driven by the rapid changes in the industry created by the technological revolution in communications. The development of satellite distribution and the continuing decline in even the nominal costs of this new technology during a period of accelerating inflation has transformed cable from a mere retransmission medium to an independent source of television programming. If the copyright issue were reopened and the FCC failed to change its broadcast-signal carriage rules, it is entirely conceivable that cable television could and would prosper in the 1980s without broadcast signals. But without such signals, the FCC's authority for regulating cable would virtually disappear, as the *Home Box Office* case demonstrated. Congress has steadfastly shown little interest in extending the FCC's jurisdiction to what is essentially a new industry—or at least a very different industry from the community antenna television industry of the 1960s.

As the industry was changing, evidence accumulated that the FCC rationale for regulating cable was flawed. Earlier academic studies had suggested that the development of cable would not cripple traditional television broadcasting through its retransmission of broadcast signals. Nor would it lessen the stations' ability to offer local programming. More than a decade has provided substantial evidence to corroborate these findings. The Commission is thus left without a rationale for continuing the detailed supervision of a new industry which has developed to compete with the regulated sector—television broadcasting. The evidence is clear that competition will not erode the ability of the FCC to require the cross-subsidization of programming which it finds to be in "the public interest." This situation contrasts with the current status of common carriage trucking, for example, where there is still concern for the cross-subsidization of small communities by regulated common carrier trucks. Rather, the evidence for cable television is more like that available in 1978 for the airline industry which demonstrated that cross-subsidization was not required to keep commuter services alive at numerous small airports throughout the country. For this reason, cable television deregulation has proceeded as rapidly as airline deregulation once the evidence was accumulated.

Despite the absence of any evidence that regulation was needed to protect television broadcasters from cable retransmission of their signals, one might still have expected deregulation to be resisted. In fact, some resistance remains, particularly among large-market broadcasters. But it appears that heading off the competitive threat from cable retransmissions is simply not a battle worth waging.

The home entertainment-information market is changing so rapidly that broadcasters, networks, film distributors, and others involved in the entertainment sector are scrambling to position themselves to profit from the new technological developments. Satellite distribution of signals directly to the home, the myriad of pay services possible through satellite distribution, STV, MDS, videodiscs, videocassettes, or traditional cable television are so enticing that protection of local broadcasters is no longer compelling (except to some of the owners of broadcast licenses).

The sad lesson to be learned from this experience in deregulation then, is that regulation can be dismantled—even its cartel-like strain—when it no longer matters. The retransmission of television broadcast signals is rapidly fading as an issue, joining the setting of canal rates and telegraph tariffs in an obscure niche of the history of regulation.

VII
EPILOGUE

On July 22, 1980, less than three months after this paper was originally delivered, the Federal Communications Commission eliminated its remaining distant signal carriage and syndicated exclusivity rules.[162] In adopting this policy the Commission stated: "Based on the wealth of information and analysis now before us, we believe the rule changes proposed should be adopted and that this will significantly benefit the public with no undue risk of injury to the broadcast service the public now receives."[163] In summarizing the evidence on the impact of deleting its signal carriage rules, the Commission indicated that "the relaxation of our distant signal carriage restrictions will promote substantial improvements in television service to the public without causing any signficant risk of loss of the existing levels of service provided by local television broadcast stations. We have found . . . that competition from cable television has improved television service to the public and will continue to do so in the future."[164] Relying on evidence that indicated little or no harm to broadcasters from elimination of the syndicated exclusivity rules and on the adoption of the 1976 Copyright Act the Commission concluded that, "These rules serve no valid communications policy purpose. On the other hand, we believe that the syndicated exclusivity rules impose significant costs upon the subscribers and potential subscribers of cable television. Therefore, . . . we conclude that the public will be served better without the syndicated exclusivity rules for cable television systems."[165]

Assuming that the Commission does not reconsider its actions and that they are upheld by the courts,[166] the era of FCC regulation of cable television programming

162. Cable Television Syndicated Program Exclusivity Rules and Inquiry into the Economic Relationship Between Television Broadcasting and Cable Television, 79 FCC 2d 652 (1980).

163. *Id.* at paragraph 4.

164. *Id.* at paragraph 191.

165. *Id.* at paragraph 242-243.

166. An appeal has already been filed, Paul Harris, Postcripts to FCC Scrapping of Two Key Cable TV Rules, Variety 47 (July 30, 1980).

service is now over. The Coypright Royalty Tribunal, the Congress, and state and local regulatory agencies now become the focal points for future policy deliberations and these deliberations will likely be concerned with industry structure, royalty fees, access to cable, and subscriber fees, rather than with the kinds of services cable systems are permitted to offer.