

# COMMENT

## FEDERAL AND STATE REGULATION OF CABLE TELEVISION: AN ANALYSIS OF THE NEW FCC RULES\*

Cable television, or CATV,<sup>1</sup> was initially designed to provide television reception in isolated communities beyond the range of conventional television signals. By 1971, however, it served nine percent of the nation's television viewers and is presently growing in geometric proportions.<sup>2</sup> From a system that carried but a few broadcast signals, the cable can now transmit on 42 channels or more and is capable of

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\* The federal CATV regulations considered in this comment were released by the FCC on Feb. 3, 1972. Cable Television Report & Order, \_\_\_\_ F.C.C.2d \_\_\_\_ (Docket No. 18397, etc., FCC No. 72-108) (1972). The originally projected date for the promulgation of these rules was during 1971; the major reason for the delay has been a conflict between the broadcast industry and cable interests over the regulations governing distant signal importation by cable television systems and the protection from duplication to be given the programming broadcast by a television station located in a community served by CATV. See BROADCASTING, Oct. 25, 1971, at 28; Nov. 15, 1971, at 16; Dec. 13, 1971, at 42; Jan. 10, 1972, at 45, for an account of this dispute. The CATV Order added Cable Television Service, Part 76, to title 47 of the *Code of Federal Regulations*, and changed the section number of most regulations affecting CATV. All current regulations will be cited to the revised C.F.R. designations.

1. "The term 'community antenna television system' ('CATV system') means any facility which, in whole or in part, receives directly or indirectly over the air and amplifies or otherwise modifies the signals transmitting programs broadcast by one or more television stations and distributes such signals by wire or cable to subscribing members of the public who pay for such service. . . ." 47 C.F.R. § 76.5(2) (1972), 37 Fed. Reg. \_\_\_\_ (1972).

THE FOLLOWING HEREINAFTER CITATIONS WILL BE USED IN THIS COMMENT:

PRESIDENT'S TASK FORCE ON COMMUNICATIONS POLICY, FINAL REPORT (released 1969) [hereinafter cited as PRESIDENT'S TASK FORCE];

TASK FORCE ON CATV and TELECOMMUNICATIONS, A REPORT OF CABLE TELEVISION AND CABLE TELECOMMUNICATIONS IN NEW YORK CITY (1968) [hereinafter cited as MAYOR'S REPORT];

N. FELDMAN, CABLE TELEVISION: OPPORTUNITIES AND PROBLEMS IN LOCAL PROGRAM ORIGINATION (Rand Corp. 1970) [hereinafter cited as PROBLEMS IN LOCAL PROGRAM ORIGINATION];

L. JOHNSON, THE FUTURE OF CABLE TELEVISION: SOME PROBLEMS OF FEDERAL REGULATION (Rand Corp. 1970) [hereinafter cited as FUTURE OF CABLE TELEVISION];

R. PARK, POTENTIAL IMPACT OF CABLE GROWTH ON TELEVISION BROADCASTING (Rand Corp. 1970) [hereinafter cited as IMPACT OF CABLE GROWTH];

R. POSNER, CABLE TELEVISION: THE PROBLEM OF LOCAL MONOPOLY (Rand Corp. 1970) [hereinafter cited as THE PROBLEM OF LOCAL MONOPOLY];

Note, *Who's Afraid of CATV?*, 16 N.Y.L.F. 187 (1970) [hereinafter cited as *Who's Afraid of CATV?*];

Letter from FCC Chairman Dean Burch to Senate Communications Subcommittee, Aug. 5, 1971 [hereinafter cited as FCC Chairman's Letter].

2. Note, *Common Carrier CATV: Problems and Proposals*, 37 BROOKLYN L. REV. 533 (1971).

providing two-way communication.<sup>3</sup> Moreover, experiments are being conducted to ascertain the feasibility of replacing the coaxial cable between the central antenna and the individual subscriber with less expensive microwave signals beamed through the open air or through underground conduits.<sup>4</sup> Federal, state and local governments are presented with the problem of channeling this new and rapidly evolving technology in a manner most advantageous to the public interest. CATV's value to the public is clear; it promises to "provide an abundance of channels at a relatively low cost per channel; it is potentially adaptable to selective distribution to particular audiences, even if they are scattered throughout a city or area; it provides an effective vehicle for raising money through subscription fees to support television from the viewers themselves, thereby increasing the resources available for the support of additional programming; and it is already a thriving business able to prosper without governmental subsidy or protection."<sup>5</sup> The challenge presented by cable television is how to avoid the detrimental effects of nonregulation while, at the same time, encouraging the full development of CATV.<sup>6</sup>

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3. A 42 channel system is partially ready for operation in San Jose, Calif. BROADCASTING, Feb. 2, 1970, at 36. As to the number of channels to be required in the future see notes 170-77 *infra* and accompanying text.

Cable systems with two-way capability are presently being constructed in Akron, Ohio and in San Jose, Calif. BROADCASTING, *supra*. The FCC, having concluded that two-way communication is now technically and economically feasible, requires all new systems to have two-way capability. 47 C.F.R. § 76.251(a)(3) (1972), 37 Fed. Reg. \_\_\_\_ (1972). See note 177 *infra* and accompanying text. Services that may be provided include: facsimile reproduction of newspapers and other written documents; electronic mail delivery; business links to branch offices; special communications systems to reach particular neighborhoods or ethnic groups within a community; educational and training programs; and governmental surveillance for crime detection, fire detection and air pollution control. Notice of Proposed Rule Making and Notice of Inquiry, 15 F.C.C.2d 417, at ¶ 8 (1968). For a discussion of the communications services that may be possible through cable television, see Industrial Electronics Division/The Electronics Association (EIA) Response to the CATV Inquiry, *The Future of Broadband Communications* (submitted to the FCC Oct. 28; 1969) excerpted in BROADCASTING, Nov. 3, 1969, at 3. See also MAYOR'S REPORT 11-13; Note, *Regulation of Community Antenna Television*, 70 COLUM. L. REV. 837, 840-42 (1970).

4. Alternatives to coaxial cable, such as microwave, as the means of transmitting signals to individual subscribers are being considered. TIME, Apr. 12, 1971, at 59. For a discussion of the advantage of microwave over coaxial cable as a means of local distribution, see note 21 *infra*.

For a history of the development of cable television see M. SEIDEN, AN ECONOMIC ANALYSIS OF COMMUNITY ANTENNA TELEVISION SYSTEMS AND THE TELEVISION BROADCASTING INDUSTRY (1965); Note, *The Wire Mire: The F.C.C. and CATV*, 79 HARV. L. REV. 366 (1965).

5. PRESIDENT'S TASK FORCE ch. 7, at 10.

6. *Id.* at 10-11. The social cost of non-regulation would consist of the adverse impact on the broadcasting industry, see notes 129-45 *infra* and accompanying text, and the economic

National communications policy as originally stated in the Federal Communications Act of 1934<sup>7</sup> was to encourage the larger use of the radio in the public interest.<sup>8</sup> The President's Task Force on Communications Policy has subsequently identified six major objectives to be sought in future regulation of the broadcast industry: the industry should be capable of catering to a wide variety of tastes; television should perform an array of social functions; an effective means of local expression and local advertising should be provided; the cost of access to the broadcast medium should be as low as possible; television should be made available to as many people as possible, "rural as well as urban, poor as well as affluent"; and finally, concentration of control over communications media should be avoided.<sup>9</sup>

The Federal Communications Commission (FCC), created by the Communications Act,<sup>10</sup> is charged with the responsibility of defining the above goals in terms of specific regulations. With respect to cable television, the Commission in 1968 moved from a position of extremely limited regulation to the point of asserting full plenary jurisdiction over CATV. As the result of four separate rule-making proceedings, the Commission has promulgated regulations governing the origination of programming by CATV,<sup>11</sup> and has now issued regulations governing the number of television broadcast signals which may be carried by CATV,<sup>12</sup> minimum channel capacity and other technical standards for cable systems,<sup>13</sup> and the relationship between federal

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costs resulting from an unregulated monopoly, see notes 216-24 *infra* and accompanying text. While there is disagreement over who should regulate CATV, there is general agreement that regulation is necessary. See, e.g., PRESIDENT'S TASK FORCE ch. 7; MAYOR'S REPORT; Baker, *The CATV Problem from the Telephone Carrier's View*, PUB. UTIL. FORT., Sept. 25, 1969, at 72; Barnett & Greenberg, *A Proposal for Wired City Television*, 1968 WASH. U.L.Q. 1; Schildhouse, *CATV—From the Regulatory Point of View*, PUB. UTIL. FORT., Sept. 25, 1969, at 78; Symposia, *Antitrust and Monopoly Policy in the Communications Industries*, 13 ANTITRUST BULL. 867 (1968); Witt, *CATV and Local Regulation*, 5 CAL. W.L. REV. 30 (1968); Note, *CATV—The FCC's Dilemma*, 3 SUFFOLK U.L. REV. 343 (1969); Note, *Federal, State, and Local Regulation of CATV—After You Alphonse . . .*, 29 U. PITT. L. REV. 109 (1967). But cf. Matthews, *CATV from the Industry Viewpoint*, PUB. UTIL. FORT., Sept. 25, 1969, at 66, 68-69; Shafer, *Cable Television: Is State Regulation Needed?*, PUB. UTIL. FORT., July 3, 1969, at 23; Note, *The FCC's Proposed CATV Regulations*, 21 STAN. L. REV. 1685, 1710-13 (1969).

7. 47 U.S.C. § 151 *et seq.* (1970).

8. *Id.* at § 151.

9. PRESIDENT'S TASK FORCE ch. 7, at 3-4.

10. 47 U.S.C. § 151 (1970).

11. 47 C.F.R. § 76.201 (1972), 37 Fed. Reg. \_\_\_\_ (1972).

12. 47 C.F.R. § 76.51-.65 (1972), 37 Fed. Reg. \_\_\_\_ (1972).

13. 47 C.F.R. §§ 76.251, 76.601-.617 (1972), 37 Fed. Reg. \_\_\_\_ (1972).

and state-local regulation of cable television.<sup>14</sup> The resulting regulations will have a significant impact upon the future of cable television and should be analyzed as to their consistency with the national goals for broadcasting.

This comment will briefly treat the development of FCC regulation of CATV and will consider in detail the regulations recently promulgated by the FCC. In the latter regard, the initial question is whether the FCC has the authority under the Communications Act to issue the regulations. It is also necessary to consider the substantive validity of the regulations on both legal and policy grounds. Finally, the regulatory framework of state and local governments must be surveyed in order to determine the governmental impact on cable television to date, and the effect which the FCC's regulations will have on existing state and local regulation. By way of conclusion, consideration will be given the questions of whether the traditional rationale for governmental regulation of the communications industry is an appropriate justification for the present CATV regulations and whether this same form of regulation is adequate to meet new problems presented by cable television.

#### THE ORIGINAL VIEW: CATV AS A SUPPLEMENTAL MEANS OF COMMUNICATION

Since 1960, when microwave carriers serving CATV were first regulated,<sup>15</sup> the FCC has asserted that limited jurisdiction over cable television was necessary to achieve the purpose of the Communications Act.<sup>16</sup> In 1965, the microwave regulations were extended to cover CATV systems being served by microwave carriers.<sup>17</sup> After concluding that regulation of CATV was necessary to prevent irreparable damage to existing broadcasters, especially UHF stations,<sup>18</sup> the FCC

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14. 47 C.F.R. § 76.31 (1972), 37 Fed. Reg. \_\_\_\_ (1972).

15. See *Carter Mountain Transmission Corp.*, 32 F.C.C. 459 (1962), *aff'd* 321 F.2d 359 (D.C. Cir. 1963) (sustaining FCC regulation of microwave carriers). A microwave carrier transmits television signals received in one location to a cable system located in a distant community. *Id.* at 361. Microwave carrier service is primarily utilized when the distant television signal cannot be received by an antenna constructed by the cable operator. This service should be distinguished from the possible use by CATV operators of microwave in lieu of a cable to transmit programming locally to subscribers. See note 4 *supra* and accompanying text.

16. 47 U.S.C. § 151 (1970).

17. See *Rules Re Microwave-Served CATV*, 38 F.C.C. 683 (1965).

18. *Second Order & Report*, 2 F.C.C.2d 725, at ¶ 123 (1966). See notes 136, 144 *infra* and accompanying text for a discussion of the potential impact of CATV on broadcasting. See notes 26, 120 *infra* for a discussion of the FCC's efforts to protect UHF television. *But see* text accompanying notes 136-39 *infra*.

in 1966 asserted jurisdiction over limited aspects of all cable television systems.<sup>19</sup> The resulting regulations, prescribing the programming that could be transmitted, were premised on the Commission's conclusion that cable television should be a supplement to broadcast television rather than an independent means of communication.<sup>20</sup> Because CATV relies on cable as a means of distribution, it is presently available only in areas with a concentrated population and even then is available only to those willing to pay the subscription fee.<sup>21</sup> By treating CATV as a supplement to, rather than as a substitute for, broadcast television, the Commission sought to promote broadcast television, which would be available to a greater percentage of the population.<sup>22</sup>

The Commission premised its authority to promulgate rules covering limited aspects of cable television on two theories of ancillary jurisdiction: one based on its jurisdiction over broadcasters; the other, on its jurisdiction over common carriers.

#### *Jurisdiction Ancillary to Broadcast Regulation*

The major service furnished by CATV has been providing a system whereby subscribers obtain better television reception than that possible with individual antennas and providing additional signals which otherwise cannot be received. By strategically locating large antennas or by utilizing a microwave carrier,<sup>23</sup> cable television can import distant signals into an area.<sup>24</sup> When the city in which the system is located has local stations providing network programming and the quality of the local broadcast picture is good, non-network programming which is originated in a distant city and imported is the major selling factor of cable television.

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19. 2 F.C.C.2d 725, at ¶ 46.

20. *Id.* at ¶ 47. For a description of these regulations, see notes 27-29 *infra* and accompanying text.

21. *Id.* at ¶ 155. One of the defects of cable television and a major reason given for protecting conventional broadcasting is the cost of the distribution system which limits the service to residents of areas of high population concentration willing and able to pay the subscription fee. Providing an inexpensive substitute for coaxial cable, such as microwave, would encourage the rapid development of CATV, making it available to many more people.

22. *Id.* at ¶ 155.

23. See note 15 *supra*.

24. Initially cable television developed as a means of providing television programming to areas that could not otherwise receive broadcast signals. See text accompanying note 2 *supra*. It was the development of cable television in areas that *could* receive broadcast signals that prompted FCC action. First Order & Report, 38 F.C.C. 683 (1965).

The FCC concluded that by importing programming without copyright payment, which both duplicated programming provided by local stations and provided additional programming as well, CATV posed a threat to local broadcasting.<sup>25</sup> The importation of additional programming was also thought to inhibit the development of new local broadcast stations.<sup>26</sup> To protect existing broadcasters and avoid discouraging future applicants, the Commission issued its 1966 regulations requiring that local programming be carried on the cable system if so requested,<sup>27</sup> that such programming not be duplicated on other channels within 24 hours of its local broadcast,<sup>28</sup> and that the number of imported distant signals be limited.<sup>29</sup>

The Commission's authority to issue the regulations was upheld in *United States v. Southwestern Cable Co.*<sup>30</sup> The Court, while not considering the limits of FCC jurisdiction,<sup>31</sup> held that under the general provisions of the Communications Act,<sup>32</sup> the Commission could issue regulations "reasonably ancillary to the effective performance of [its] various responsibilities for the regulation of television broadcasting."<sup>33</sup> Regulatory authority over CATV was premised on the need to protect the forms of communication under the direct jurisdiction of the FCC. The Court reasoned that unregulated importation of signals could destroy local broadcasters, which would be to the

25. Second Order and Report, 2 F.C.C.2d 725, at ¶ 122 (1966).

26. *Id.* at ¶ 127. The FCC has for many years been concerned with encouraging the development of new television stations, Sixth Order and Report, 17 Fed. Reg. 3905 (1952), particularly UHF broadcasters, in order to improve the diversity of programming available. The All Channel Receiver Act of 1962, 47 U.S.C. §§ 303(s), 330 (1970), was enacted to increase UHF penetration. See generally Webbink, *The Impact of UHF Promotion: The All-Channel Television Law*, 34 LAW & CONTEMP. PROB. 535 (1969). For further discussion of the FCC's efforts to protect UHF stations, see note 120 *infra*. But see notes 136-47 *infra* and accompanying text for a discussion of CATV's actual impact on UHF television.

27. 47 C.F.R. § 74.1103(a) (1970).

28. 47 C.F.R. § 74.1103(f) (1970).

29. 47 C.F.R. § 74.1107 (1970). For a discussion of these rules see Note, *The FCC's Proposed CATV Regulations*, *supra* note 6.

30. 392 U.S. 157 (1968).

31. See notes 80-106 *infra* and accompanying text for a discussion of the parameters of the FCC's statutory authority.

32. See 47 U.S.C. § 152(a) (1970), which provides that the Communications Act shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, . . .

33. 392 U.S. at 178.

detriment of the public interest, given the limited number of people who would be able, in turn, to subscribe to cable television.<sup>34</sup>

### *Jurisdiction Ancillary to Common Carrier Regulation*

The FCC's jurisdiction in *Southwestern Cable* was upheld as ancillary to its plenary authority over broadcasting. The Commission has also exercised regulatory authority over CATV as ancillary to its plenary jurisdiction over telephone companies and other common carriers. A CATV system consists of three components: a receiving apparatus which receives radio and television signals either by antenna or microwave transmission; a "headend" which converts, modifies and modulates the signal to be transmitted; and the coaxial cable distribution system which carries the signal to the subscriber.<sup>35</sup> A cable television operator may either construct the distribution system himself or lease the distribution system by means of a lease-back arrangement<sup>36</sup> with a common carrier. Even where the CATV operator constructs his own distribution system, he may lease space on the utility poles owned by the telephone or power company rather than place the coaxial cable on his own poles.

The FCC has asserted jurisdiction over these lease-back arrangements<sup>37</sup> based on its authority under section 214 of the Communications Act,<sup>38</sup> which requires a carrier to obtain a certificate of convenience and public necessity prior to constructing new lines or extending existing lines. Regulation was deemed necessary to insure fair rates to CATV operators and to enable cable television to develop independently of common carriers rather than as subsidiaries.<sup>39</sup> Local

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34. See *id.* at 175 n.43.

35. *General Tel. Co. of Cal. v. FCC*, 413 F.2d 390, 393 (D.C. Cir. 1969). A brief description of the technology of cable television is set out in Barnett & Greenberg, *Regulating CATV Systems: An Analysis of FCC Policy and an Alternative*, 34 LAW & CONTEMP. PROB. 562, 565-66 (1969). See also Barnett & Greenberg, *supra* note 6; Johnson, *New Technology: Its Effect on Use and Management of the Radio Spectrum*, 1967 WASH. U.L.Q. 521, 538-40.

36. A lease-back arrangement is one whereby the telephone company furnishes the cable operator with the coaxial cable to carry the signal from the headend apparatus to drop lines which lead to the subscribers' television sets. For a description of the service provided by the telephone company see *City of New York v. Comtel, Inc.*, 57 Misc. 2d 585, 588-90, 293 N.Y.S.2d 599, 602-04 (Sup. Ct. 1968), *aff'd without opinion*, 30 App. Div. 2d 1049, 294 N.Y.S.2d 981 (App. Dep't), *aff'd without opinion*, 25 N.Y.2d 922, 252 N.E.2d 285, 304 N.Y.S.2d 853 (1969).

37. *General Tel. Co. of Cal.*, 13 F.C.C.2d 448 (1968).

38. 47 U.S.C. § 214(a) (1970).

39. 13 F.C.C.2d at 463. The Commission, in an effort to enable CATV to be independent of common carriers, has prohibited telephone companies or their affiliates from furnishing cable

regulations normally did not apply to CATV systems which employed lease-back arrangements; in many situations, not even state agencies had authority to supervise the terms of the agreement.<sup>40</sup>

While the Commission had previously concluded that CATV was not a common carrier,<sup>41</sup> this determination was not deemed applicable to telephone companies which provided distribution systems. A cable system was not a common carrier because the specific signals carried were determined by the operator with the subscriber having no control;<sup>42</sup> however, the telephone company's lease of channel service to cable television operators who in turn determine the signals to be carried, does constitute common carrier service.<sup>43</sup>

Under this theory, the Commission has insured that the rates

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service themselves in their service area and has disallowed the telephone company from constructing a distribution system for an independent cable operator without first giving the CATV owner the option of placing his own cable on the company's poles. 47 C.F.R. §§ 63.54-63.57 & 64.601-64.602 (1970). The Commission's authority to promulgate these regulations was sustained in *General Tel. Co. of the Southwest v. United States*, \_\_\_ F.2d \_\_\_ (5th Cir. 1971).

40. See, e.g., *New York v. Comtel, Inc.*, 57 Misc. 2d 585, 293 N.Y.S.2d 599 (Sup. Ct. 1968), *aff'd without opinion*, 30 App. Div. 2d 1049, 294 N.Y.S.2d 981 (App. Dep't), *aff'd without opinion*, 25 N.Y.2d 922, 252 N.E.2d 285, 304 N.Y.S.2d 853 (1969). A city whose regulatory authority over cable television is premised on its authority over the city streets cannot regulate a cable system which has leased the distribution system from a common carrier. See notes 193-206 *infra* and accompanying text. While the state utilities commission has jurisdiction over telephone companies, this jurisdiction may not include the authority to regulate services provided by the common carrier in addition to telephone service. See note 214 *infra*. Also, if the state utilities commission does not have general jurisdiction over cable television, it is unlikely to be in a position to adequately regulate the lease-back arrangements. See notes 213-15 *infra* and accompanying text.

41. *Frontier Broadcasting Co.*, 24 F.C.C. 251 (1958). This position was upheld in subsequent proceedings. *Philadelphia Tel. Broadcasting Co. v. FCC*, 359 F.2d 282 (D.C. Cir. 1966). The Supreme Court indicated that CATV systems are not common carriers within the meaning of the Communications Act. *United States v. Southwestern Cable Co.*, 392 U.S. 157, 169 n.29 (1967). For a discussion of conditions under which cable television *would* be providing common carrier service, see notes 171-77 *infra* and accompanying text.

42. *Frontier Broadcasting Co.*, 24 F.C.C. 251 (1958).

43. *General Tel. Co. of Cal.*, 13 F.C.C.2d 448 (1968) upheld the Commission's assertion of jurisdiction. In *General Tel. Co. of Cal. v. FCC*, 413 F.2d 390 (D.C. Cir.), *cert. denied*, 396 U.S. 888 (1969), the Commission's regulations were upheld. While section 214 of the Communications Act exempts from FCC regulation common carriers whose "lines" are wholly intrastate, 47 U.S.C. § 214(a)(1) (1970), the term "line," rather than referring to the physical object, denotes points of origin and ultimate destination of the communication and not the facilities of the specific carrier. The court in *General Telephone* indicated that it was accepting the Commission's definition of "line" to be "any channel of communication established by the use of appropriate equipment." 413 F.2d at 402. Therefore, even if the actual distribution system were intrastate and only local stations' signals were being carried, because broadcast signals are a part of a "channel of interstate communication," *id.*, the carriage is still a part of interstate communications, and as such, subject to the regulation of the FCC. *Id.* at 403.

charged by the common carrier are reasonable and that the service is adequate. However, this authority has also been used to frustrate efforts of CATV operators to circumvent local regulation through use of lease-back arrangements.<sup>44</sup> The Commission considers local regulations relevant to the determination of the necessity of issuing a certificate, as well as the conditions which should be imposed on the certificate, to ensure such regulations are not circumvented and frustrated by lease-back agreements.<sup>45</sup>

Indirect regulation through section 214 certificates of convenience has no effect upon CATV systems with their own distribution systems.<sup>46</sup> The Commission is, however, presently considering the possibility of regulating agreements between cable television and public utilities to attach the coaxial cable to poles owned by public utilities.<sup>47</sup> While such a move would greatly enlarge the number of CATV systems affected by the regulation, the substantive portion of such regulation would nevertheless be limited as are present section 214 regulations.<sup>48</sup>

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44. It is conceivable that the FCC could set standards for cable television systems and refuse to issue the certificate to the telephone company if the cable system refused to comply. However, the scope of these conditions would be limited by the limitations upon the Commission's independent regulatory authority over cable television. See notes 147-49 *infra* and accompanying text. See also *Regulation of CATV*, *supra* note 3, at 856-58. Also, because of the limited number of cable television systems affected by such regulations, it would be an unsatisfactory means of regulation.

45. *New England Tel. & Tel. Co.*, 17 F.C.C.2d 33, at ¶ 9 (1969). However, the Commission ordered Telepromter, Inc. and Sterling, Inc., New York City franchise holders, to cease further construction of cable television facilities pending the outcome of hearings concerning the lease-back arrangement between Comtel, Inc., a CATV system, and New York Telephone Co. to provide cable service in New York City in competition with the franchise holders. *BROADCASTING*, Oct. 12, 1970, at 26. This illustrates the problems likely to arise from the failure to clearly define the regulatory authority of different levels of government and the resulting delay and inconvenience to the cable operator and the public. For a discussion of federal, state and local regulation of CATV, see section beginning at note 191 *infra*.

46. Because cable television is not a common carrier, see note 41 *supra*, it is not required to obtain a certificate of convenience from the FCC to construct its own distribution facilities.

47. *California Water & Tel. Co.*, 22 F.C.C.2d 586 (1970). Proceedings were initiated in order to ascertain if there was a factual basis upon which the FCC could assert jurisdiction. *Id.*

In *California Water & Tel. Co.*, 23 F.C.C.2d 840 (1970), the Commission ruled that the factual inquiry could proceed prior to a final determination of the jurisdictional issue. The Commission concluded that a finding of fact was necessary before the jurisdictional issue could be decided.

48. The FCC's jurisdiction over cable television, being ancillary to its common carrier jurisdiction, would be limited to those measures necessary to insure the efficacy of its common carrier regulations. See notes 84-86 *infra* and accompanying text.

THE PRESENT VIEW: CATV AS AN INDEPENDENT MEANS OF COMMUNICATION

In 1968 the FCC significantly changed its view of cable television.<sup>49</sup> Rather than focusing on CATV as a supplement to existing broadcasting, the Commission expressed an interest in seeing it develop as an independent means of communication.<sup>50</sup> An initial step was taken in the promulgation of a rule requiring CATV systems with more than 3500 subscribers to originate programming as a condition of carrying programming originated by television broadcasters.<sup>51</sup> Cable television was to become a "cablecaster" and operate as an outlet for local self-expression.<sup>52</sup> In addition, the FCC proposed major revisions of the distant signal importation rules,<sup>53</sup> which would enable cable television to provide a greater variety of programming—though protection of local broadcasters is still deemed a relevant goal.<sup>54</sup> Use of channel capacity for purposes other than carrying broadcast signals was also considered,<sup>55</sup> presaging a new role for CATV as a common carrier<sup>56</sup> and raising the concomitant issue of

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49. See Notice of Proposed Rulemaking, and Notice of Inquiry, 15 F.C.C.2d 417 (1968). While the Commission did begin to re-evaluate the function of cable television at this time, the actual effect of the FCC's action since 1968 has been characterized as a freeze on CATV development. See LeDuc, *The FCC v. CATV et al.: A Theory of Regulatory Reflex Action*, 23 FED. COM. B.J. 93 (1969).

50. It has been suggested further that there might be interconnection of local cable systems and the terminal facilities of high capacity terrestrial and/or satellite intercity systems, to provide numerous communication services to the home, business, and educational or other center on a regional or national basis. The advent of CATV program origination in such cities as New York and Los Angeles (where there is also CATV activity) gives rise to the possibility of a CATV origination network or networks. The so-called 'wired city' concept embraces the possibility that television broadcasting might eventually be converted, in whole or in part, to cable transmission (coupled with the use of microwave or other intercity relay facilities), thereby freeing some broadcast spectrum for other uses and making it technically feasible to have a greater number of national and regional television networks and local outlets. 15 F.C.C.2d 417, at ¶ 9 (1968).

51. 47 C.F.R. § 76.201 (1972), 37 Fed. Reg. \_\_\_\_ (1972). These regulations have since been held invalid, *Midwest Video Corp. v. United States*, 441 F.2d 1322 (8th Cir. 1971), cert. granted, 40 U.S.L.W. 3309 (U.S. Jan. 11, 1972) (No. 71-506). For a discussion of the FCC's authority to require CATV to originate programming see notes 80-106 *infra* and accompanying text.

52. *Midwest Tel., Inc.*, 13 F.C.C.2d 478, at ¶ 62 (1968).

53. Distant signal importation rules, first promulgated in 1966, limited the number of signals a CATV system may import from another geographic area to its own community. See notes 27-29 *supra* and accompanying text.

54. See Notice of Inquiry, 15 F.C.C.2d 417, at ¶¶ 31-59 (1968).

55. 15 F.C.C.2d, at ¶ 26.

56. These proposals contemplated CATV systems having transmission capacity to lease to

who would control and use the extra channels. The resulting regulations envision cable television as providing three separate services: continued transmission of programming originated by broadcast television, thereby functioning as a conduit for such programming; functioning as a broadcaster by originating programming available only to subscribers; and finally, to the extent that the channel capacity is made available to transmit programming produced by third persons, providing common carrier service.<sup>57</sup> Anticipating that these regulations would have an effect on state and local regulatory attempts, the FCC has also promulgated rules concerning the relationship of federal and state regulation over cable television.<sup>58</sup>

Initially the new regulations raise questions as to the FCC's statutory jurisdiction. Additionally, the substantive features of the importation, origination and common carrier regulations demand close scrutiny to determine whether they are consistent with sound national communications policy. Finally, the appropriateness of the FCC's allocation of regulatory authority between federal and state government needs to be considered.

### *The FCC's Jurisdiction to Regulate CATV*

*The Importation Rules and Federal Copyright Policy.* Premised on the theory of ancillary jurisdiction, the rules regulating importa-

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third persons and the capability of two-way communication. See notes 168-90 *infra* and accompanying text. The Commission is also setting minimum technical requirements including specifications for frequency boundaries, visual carrier frequency levels, aural carrier frequency levels, channel frequency response, terminal isolation, and system radiation. See 47 C.F.R. § 76.601-.617 (1972), 37 Fed. Reg. \_\_\_\_ (1972).

57. The FCC proposals envision CATV operating under requirements similar to those contained in the New York City franchise which requires that a cable system carry a minimum of 17 channels by 1971: 11 to be used to transmit broadcast signals, one for origination by the operator, three at the disposal of the city, and two to be leased for transmitting programming produced by third persons. MAYOR'S REPORT 55-61. For a summary of the New York City Franchise provisions see BROADCASTING, Aug. 13, 1970, at 19. For a discussion of the New York franchise see Botein, *CATV Regulation: A Jumble of Jurisdictions*, 45 N.Y.U.L. REV. 816, 817-20 (1970). The FCC indicated its preference concerning the future role of CATV when it said: "We believe that the public interest would be served by encouraging CATV to operate as a common carrier on any remaining channels not utilized for carriage of broadcast signals and CATV origination." 15 F.C.C.2d, at ¶ 26.

The regulations proposed by the FCC are discussed at: 24 F.C.C.2d 580 (1970) (Importation of Distant Signals); 23 F.C.C.2d 825 (1970) (Program Origination); 25 F.C.C.2d 38 (1970) (Minimum Channel Capacity and Other Technical Standards).

58. 47 C.F.R. § 76.31 (1972), 37 Fed. Reg. \_\_\_\_ (1972).

tion are clearly within the authority granted to the FCC by the Communications Act.<sup>59</sup> The jurisdictional issue with respect to the rules is not the FCC's authority under the Communications Act, but the possibility that such rules are inconsistent with the policy of the Copyright Act.<sup>60</sup> Because the Copyright Act grants a copyright holder the exclusive right to "perform it [the copyrighted material] in public for profit,"<sup>61</sup> an issue raised at the inception of CATV was whether the secondary transmission of broadcast signals constituted a "performance" within the meaning of the Act. The Court of Appeals for the Second Circuit in *United Artists Television, Inc. v. Fortnightly*<sup>62</sup> concluded that the cable television operator intended the program to be viewed by subscribers, and secondary transmission was, therefore, a performance.<sup>63</sup> The Supreme Court reversed, indicating that CATV functionally had little in common with a broadcast system, but was essentially a means of television signal reception and that CATV's retransmission was therefore not a performance.<sup>64</sup> The effect of this decision could be to give cable television a significant advantage over small local broadcasters.<sup>65</sup> However, to hold otherwise could result in CATV's becoming a tool of the networks, thus destroying it as an independent means of communication. The Court declined to render a compromise decision,<sup>66</sup> thereby leaving to Congress the task of revising the Copyright Act if it so chose.<sup>67</sup>

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59. See note 33 *supra* and accompanying text.

60. 17 U.S.C. § 1 *et seq.* (1970).

61. *Id.* § 1(c).

62. 377 F.2d 872 (2d Cir. 1967).

63. *Id.* at 879.

64. *Fortnightly Corp. v. United Artists Tel., Inc.*, 392 U.S. 390, 399-401 (1968).

65. CATV's competition is mainly from local television broadcasters, see notes 218-19 *infra* and accompanying text; therefore, if cable television is able to obtain programming without paying the copyright holder while broadcast stations must pay, the cable operator's competitive position is improved.

66. The Solicitor General urged the Court to ". . . hold that CATV systems do perform the programs they carry, but [to] 'imply' a license for the CATV 'performances.' This 'implied in law' license would not cover all CATV activity but only those instances in which a CATV system operates within the 'Grade B Contour' of the broadcasting station whose signal it carries." *Id.* at 401 n.32. This result would have been similar to the proposed revision of the Copyright Act. See note 78 *infra*.

67. Congress was thereafter presented with a proposed amendment to the Copyright Act, but did not act upon the proposal. See note 116 *infra*.

For a discussion of the Copyright issue generally, see Comment, *CATV: The Continuing Copyright Controversy*, 37 *FORDHAM L. REV.* 597 (1969); Note, *CATV and Copyright Liability*, 80 *HARV. L. REV.* 1514 (1967); Note, *CATV and Copyright Liability*, 52 *VA. L. REV.* 1505 (1966).

In short, the policy of the Copyright Act<sup>68</sup> is clearly to limit the legal monopoly created therein to that granted by the statute.<sup>69</sup> Since *Fortnightly* clearly placed secondary transmission by CATV outside the legal monopoly created by the Copyright Act,<sup>70</sup> any attempt by the FCC to restrict secondary transmission is arguably inconsistent with the Copyright Act and would result in an administrative nullification of *Fortnightly*. While administrative rules may have the force of law, they are not the equivalent of acts of Congress. The invalidity of FCC regulations can result not only from the Commission's exceeding its authority under the Communications Act<sup>71</sup> but also from its promulgation of rules that are inconsistent with the policy of other Acts of Congress.<sup>72</sup> Thus, if the FCC's importation rules do in fact conflict with the Copyright Act, they are invalid. However, in *Black Hills Video Corp. v. FCC*<sup>73</sup> the FCC's earlier rules limiting the importation of distant signals and requiring carriage and nonduplication of local programming were held to be consistent with the Copyright Act.<sup>74</sup> The nonduplication and mandatory carriage rules were, in fact, said to be effectuating the monopoly granted in the Act.<sup>75</sup> By protecting the broadcasting of copyrighted material from being duplicated by one in the same geographic area who had not purchased the copyrighted material, the rules protected the holder's exclusive grant. Otherwise, the number of persons interested in paying for the material

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68. 17 U.S.C. § 1 (1970).

69. *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964); *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234, 237 (1964).

70. In the instant situation, Congress has, in conferring a limited monopoly upon copyright holders, excluded from that monopoly the right to control the simultaneous secondary transmission via CATV of broadcast signals containing copyrighted material. To this extent, the copyrighted material is in the public domain, free to all who desire so to use it . . . [W]here the Copyright Act fails to confer private exploitation rights with respect to material of a copyrightable nature, it is central to the policy of the Act that such rights reside in the public and do not, on some other guise, inure to the benefit of the copyright holder. Lipper, *The Congress, The Court, and The Commissioners: A Legacy of Fortnightly*, 44 N.Y.U.L. REV. 521, 526-27 (1969).

71. *FCC v. ABC*, 347 U.S. 284 (1954).

72. *United States ex. rel. Hirshberg v. Cooke*, 336 U.S. 210 (1949) (naval regulations held invalid as inconsistent with the policy of other congressional acts); *Manhattan Gen. Equip. Co. v. Commissioner*, 297 U.S. 129 (1936); *International Ry. v. Davidson*, 257 U.S. 506 (1922) (treasury regulations held invalid as beyond the agency's enabling legislation).

73. 399 F.2d 65 (8th Cir. 1968).

74. The FCC's jurisdiction to promulgate these rules was upheld in *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968). See text accompanying note 30 *supra*.

75. 399 F.2d at 70.

could be significantly reduced, thereby impairing the legal monopoly created by the Act.

It does not necessarily follow, however, that all regulation of distant signal importation would be valid. The authority of the FCC to regulate distant signal importation depends upon a factual finding that without regulation, the present broadcast network would be injured to the detriment of the public.<sup>76</sup> Even if the regulation protects broadcasters, it would be inconsistent with the policy of the Copyright Act if it extended the copyright holder's monopoly. An earlier FCC proposal, for example, which would have allowed a cable operator to import programming only if he obtained the express permission of the television station originating the programming,<sup>77</sup> would have effectively given control over secondary transmissions to the holder,<sup>78</sup> and would thus be invalid.<sup>79</sup> The new rules, essentially the same as the rules validated in *Black Hills Video*, are thus valid because they do not give the copyright holder additional control over his material.

*The Program Origination and Common Carrier Regulations: Plenary Jurisdiction.* Cable television, by its nature, does not necessarily fit into the category of "common carrier"<sup>80</sup> or "broadcaster"<sup>81</sup> as defined by the Communications Act.<sup>82</sup> While cable television could

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

77. Notice of Proposed Rulemaking and Notice of Inquiry, 15 F.C.C.2d 417, at ¶ 38 (1968).

78. The television station originating the programming would have to obtain from the copyright holder the right to give this consent—presumably for a fee which would be ultimately paid by the CATV operator. See *Who's Afraid of CATV?* 202. For a discussion of the retransmission consent proposals, see notes 112-13 *infra* and accompanying text.

79. See Lipper, *supra* note 70, at 528-29.

80. A common carrier is one who leases the means of transmitting to third persons. 47 U.S.C. § 153(h) (1970). It is arguable that the CATV operator who only transmits programming originated by television operators is a common carrier because the subscribers, in effect, "lease" the transmission facilities. However, as noted, note 41 *supra* and accompanying text, the cable operator, retaining control over the signals carried, is not considered to be a common carrier. The subscribers, rather than "leasing" transmission facilities, are paying for a service—better television reception.

Should channel capacity be leased to third persons who provide the programming, the cable operator would be a common carrier. Once the operator begins offering common carrier service the FCC would have direct authority over the system. 47 U.S.C. § 214(a) (1970).

81. A cable system engaged solely in secondary transmission of television programming is not engaged in broadcasting. *Fortnightly Corp. v. United Artists Television*, 392 U.S. 390, 399-401 (1968). However, if the cable system, by either producing its own programming or purchasing programming from another producer, becomes the primary transmitter of programming, it would become a broadcaster within the meaning of the Act.

82. 47 U.S.C. § 151 (1970). Currently, however, there is pending an amendment to the Communications Act of 1934 which would give the FCC explicit regulatory authority over cable

be so operated as to constitute a "common carrier" or a "broadcaster," it is not clear that the FCC can *require* CATV to operate in such a manner. The Commission has asserted its authority to require cable operators to meet specific program origination and common carrier requirements by making these requirements pre-conditions to the carrying of any broadcast signals.<sup>83</sup> The theory advanced by the Commission is that having ancillary jurisdiction over cable television to regulate the broadcast signals carried, the Commission can condition the carriage of the signals on the operator's meeting specified requirements. But while setting conditions can be a creative way of implementing the congressional purpose in establishing the regulatory agency,<sup>84</sup> it does not follow that conditions can be used to extend an agency's authority over an area not contained in the original delegation of authority. The issue presented is not whether conditions can be used when there are alternative means provided by the statute,<sup>85</sup> but whether conditions can be used to accomplish indirectly what cannot be done directly. The validity of the regulations must depend upon the authority of the Commission to assert direct jurisdiction.<sup>86</sup> Otherwise, the FCC would be permitted, in practical effect, to amend its own grant of authority.

*Midwest Video Corp. v. United States*<sup>87</sup> held invalid the FCC's requirement that a CATV owner originate programming. In *Midwest Video*, the court appeared to adopt an ancillary theory of the FCC's jurisdiction over cable television.<sup>88</sup> Because the Commission did not have direct jurisdiction over cable television, said the court, conditioning carriage of broadcast signals on the owner's compliance with the origination requirement was beyond the authority delegated by the Communications Act.<sup>89</sup> If the Commission lacks the authority to

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television. S. 792, 93d Cong., 1st Sess. (1971) was introduced and referred to the Commerce Committee on Feb. 17, 1971.

83. See, e.g., 15 F.C.C.2d 417, 422 (1968) conditioning the carriage of television broadcast signals upon CATV originating programming.

84. Cf. *Atlantic Refining Co. v. Public Serv. Comm'n*, 360 U.S. 378 (1959) (pointing out the possibility of using conditioning power as an alternative to other means provided within the statute).

85. *Id.*

86. See Note, *Administrative Regulation by Conditions in Certificates of Public Convenience and Necessity*, 21 STAN. L. REV. 188, 194-97 (1968).

87. 441 F.2d 1322 (8th Cir. 1971).

88. "The Commission's power to adopt rules requiring cablecasting to the extent that it exists must be based on the Commission's right to adopt rules that are reasonably *ancillary* to its responsibilities in the broadcasting field." *Id.* at 1326 (emphasis added).

89. *Id.*

require that the cable operator function as a cablecaster, an attempt to require the cable operator to function as a common carrier is equally invalid.

However, the decision in *Midwest Video* appears to offer an alternative ground for holding the origination requirement invalid. Judge Gibson, in a concurring opinion, expressed the view that the regulation was "confiscatory and hence arbitrary" but that the FCC had direct jurisdiction over cable television.<sup>90</sup> While the majority opinion makes it clear that it is holding that the FCC does not have direct authority over CATV, language in the opinion indicates that the court also considered the regulation to be arbitrary.<sup>91</sup> If the majority opinion accepted Gibson's view of the substantive defect in the regulations, a question is raised as to the need to reach the broader issue of the Commission's jurisdiction.

Notwithstanding the court's holding in *Midwest Video*, it is submitted that a theory of jurisdiction based on a broad interpretation of section 152(a)<sup>92</sup> of the Communications Act would support the FCC's direct authority over CATV. In *United States v. Southwestern Cable Co.*<sup>93</sup> the Court indicated that "the Act's provisions . . . [apply] to all interstate and foreign communication by wire and radio,"<sup>94</sup> thus giving a broad interpretation of the Commission's authority. This authority is not static; rather, the court "view[s] the Federal Communications Act as the kind of legislation where Congress has delegated to the executive agency not only the power to regulate in a certain broad area of national interest, but the power of supersession as well. The dynamic, rapidly changing technology of radio and television broadcasting is ill-suited to specific Congressional guidelines to regulatory authority."<sup>95</sup> The legislative history of

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90. [T]he Commission's particular order on origination, at this time at least, would be extremely burdensome and perhaps remove from the CATV field many entrepreneurs who do not have the resources, talent and ability to enter the broadcasting field. The order is thus oppressive and arbitrary at this time . . . *Id.* at 1328 (Gibson, J., concurring).

91. A high probability exists that cablecasting will not be self-supporting and that the burden thereof would likely cause substantial increase in the amount that subscribers are required to pay for CATV service and in some instances may drive the CATV operators out of business. *Id.* at 1327. Compare note 90 *supra*.

92. 47 U.S.C. § 152(a) (1970).

93. 392 U.S. 157 (1968).

94. *Id.* at 167.

95. *T.V. Pix Inc. v. Taylor*, 304 F. Supp. 459, 465 (D. Nev. 1968), *aff'd per curiam* 396 U.S. 556 (1970).

the Act also indicates that Congress intended to give the Commission broad jurisdiction, with "regulatory power over all forms of electrical communication . . . ." <sup>96</sup> Cable television would be a means of communication covered under section 152(a) even though it may not function as a broadcaster or a common carrier within the Act's express language.

The fact that cable television may be covered under Title I of the Communications Act does not necessarily give the Commission regulatory authority. Title I does not delegate specific powers to the Commission; rather, the grants are made under Titles II and III of the Communications Act. The Act contemplates a public utility type of regulation of common carriers under Title II and a licensing procedure for broadcasters under Title III. Although under section 154(i) "[t]he Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions," <sup>97</sup> this section could be interpreted to be only a general restatement of the specific delegation made elsewhere in the Act and not an independent source of rule-making authority.

However, the legislative history of the Act, reflective of a Congressional intent that the FCC have a great deal of discretion, would indicate that the authority delegated under Titles II and III is not exhaustive. <sup>98</sup> Rather, these titles represent congressional guidance on regulation of known means of communication at the time the Act was enacted but do not exclude different types of regulation over means of communication subsequently developed. A cable television system, possessing characteristics of a common carrier and of a broadcaster, presents a technological advance not contemplated when the Act was written. <sup>99</sup>

The Court in *Southwestern Cable* upheld the promulgation of the FCC's distant signal importation regulations on the basis of section 154(i). <sup>100</sup> The decision could be narrowly interpreted as holding that

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96. S. REP. NO. 781, 73d Cong., 2d Sess., at 1 (1934).

97. 47 U.S.C. § 154(i) (1970).

98. *National Assoc. of Theatre Owners v. FCC*, 420 F.2d 194 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 922 (1970); *General Tel. Co. v. FCC*, 413 F.2d 390, 402 (D.C. Cir.), *cert. denied*, 396 U.S. 888 (1969). The court in *National Assoc. of Theatre Owners* indicated that if the circumstances developed to justify regulation of television subscription rates, the FCC could impose such rates even though Title III does not grant this type of authority.

99. *United States v. Southwestern Cable Co.*, 392 U.S. 157, 172 (1968).

100. *Id.* at 181.

authority under this section only extends to that necessary to preserve the power delegated in the other titles. However, the language of the opinion indicates that the limits of authority under the section are a function of the particular circumstances. In these circumstances, said the Court, "the Commission's order limiting further expansion of [CATV] service pending appropriate hearings did not exceed or abuse its authority under the Communications Act."<sup>101</sup> Interpreting section 154(j) as an independent source of regulatory authority rather than limiting it to a restatement of the powers delegated in Titles II and III, gives the Commission authority to deal with emerging forms of communication and is consistent with the intent of Congress. This interpretation was echoed in *T.V. Pix Inc. v. Taylor*<sup>102</sup> where the Court said: "[S]ome day a case may be made for the validity of F.C.C. public utility type of regulation of community antenna companies as reasonably necessary to meet the broad responsibilities delegated to it . . . ."<sup>103</sup> Therefore, as noted in *Southwestern Cable*, even though cable television possesses characteristics of a common carrier and broadcaster, the Commission should not be restricted to the regulatory tools specified in Titles II and III.

The setting of conditions which must be met if a cable system is to be allowed to carry broadcast signals would appear to be an appropriate means of effectuating the purposes of the Communications Act. The Commission, under an obligation to make available a rapid and efficient communication system,<sup>104</sup> may determine that the conditions set will serve this end. The regulations requiring program origination or a minimum channel capacity sufficient to carry out a common carrier function are in a sense a departure from traditional regulations. Rather than prohibiting, they require affirmative action. These regulations, however, find justification in communications regulatory policy. Cable television by its nature is a natural or technical monopoly<sup>105</sup>—there is likely to be only one distribution system in one geographic area.<sup>106</sup> Therefore, the FCC should be able to insure that those who acquire this monopoly act in a way to effectuate national communications policy.

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101. *Id.*

102. 304 F. Supp. 459 (D. Nev. 1968), *aff'd per curiam* 396 U.S. 556 (1970).

103. *Id.* at 465.

104. 47 U.S.C. § 151 (1970).

105. See note 198 *infra* and accompanying text.

106. *Midwest Video Corp. v. United States*, 441 F.2d 1322, 1328 (8th Cir. 1971) (Gibson, J., concurring).

*Substantive Features of the FCC Regulations*

The FCC clearly has jurisdiction to regulate the importation of distant signals.<sup>107</sup> The Commission's authority to require CATV origination of programming and leasing of channel capacity to third persons is less clear.<sup>108</sup> However, even assuming that the FCC does not presently have jurisdiction to *require* program origination and common carriage, the substantive provisions of the program origination and common carrier regulations deserve attention, not only because of possible congressional action which would cure the jurisdictional defect,<sup>109</sup> but also because the regulations are presently applicable to cable systems which *voluntarily* originate programming or lease channel capacity.

*The Importation Rules.* The Commission in 1968 altered its views concerning the importation of distant signals.<sup>110</sup> Previously, the rules had required carriage of local signals, nonduplication of local programming on other channels, and strictly limited importation.<sup>111</sup> The rules proposed in 1968 provided that a cable system must carry local stations, and that, to the extent necessary to provide the programming of the three networks and one independent station, additional signals could be imported.<sup>112</sup> Other programming could be imported, but only after obtaining consent from the copyright holder for retransmission by the originating station.<sup>113</sup> While the proposed rules still exhibited an element of protection for local broadcasters, they reflected the FCC's recognition of cable television as an independent means of communication, with a concomitant view that CATV should pay for the programming as do broadcasters.

The Commission did not act upon the proposals, but issued the *Second Notice of Proposed Rule Making*<sup>114</sup> proposing alternatives to

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107. See notes 30-34 *supra* and accompanying text.

108. See notes 87-96 *supra* and accompanying text.

109. See note 82 *supra*.

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

111. The Commission had concluded that because the CATV system did not have to compete with the broadcaster for programming but could obtain programming free by importation, the competition between the local broadcaster and CATV was unfair. First Order and Report, 38 F.C.C. 683, 699 (1965).

112. 47 C.F.R. § 74.1107(b) (1970).

113. 15 F.C.C.2d at ¶ 38. For a discussion of these proposed rules see Botein, *F.C.C.'s Proposed CATV Regulations*, 55 CORNELL L. REV. 244 (1970); *Who's Afraid of CATV?* 195-211.

114. 24 F.C.C.2d 580 (1970).

the retransmission consent rules. Inaction on the earlier proposals was attributed to the unwillingness of cable television to enter into competition with broadcasters.<sup>115</sup> Also, Congress had not acted upon proposed revisions to the Copyright Act which would have clarified congressional intent<sup>116</sup> and, more importantly, would have remedied the jurisdictional flaw in the proposals.<sup>117</sup>

The alternative proposals were initially restricted to the top 100 markets,<sup>118</sup> and would have allowed cable television to import four independent broadcast signals in addition to carrying local signals.<sup>119</sup> The four imported signals could be selected at the discretion of the operator; the commercials from the imported programming would be deleted and replaced with commercials provided by the local television station.<sup>120</sup> CATV would be allowed to import any number of noncommercial educational stations if the local educational station did not object, but if requested to do so, appeals for money by the local entity would be substituted for appeals on the imported programming. Also, as a condition of importing distant signals, CATV would be required to make a payment equal to five percent of subscriber revenue to public broadcasting.<sup>121</sup>

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115. *Id.* at ¶ 3.

116. S. 543, 92d Cong., 2d Sess. (1970). This bill would have defined "performance" so as to include secondary transmissions. *Id.* at § 101. However, secondary transmission of material for reception in the area of primary reception would not infringe upon the exclusive rights of the copyright holder. *Id.* at § 11(a)(3). Liability for secondary transmission would be limited to a reasonable license fee where the area of reception is not encompassed by any transmitting facility. *Id.* at § 111(B)(f). The reason given for Congress' failure to act on the bill was the complexity of the CATV issue. BROADCASTING, Aug. 24, 1970, at 5. For a discussion of the congressional proposals concerning revision of the Copyright Act, see Botein, *supra* note 57, at 839-43. It is likely that new legislation, having the advance approval of both the cable and broadcast interests, will be introduced in the current session. BROADCASTING, Nov. 15, 1971, at 17.

117. See notes 76-79 *supra* and accompanying text.

118. The "top 100 markets" are defined in terms of the number of television households and the average number of hours viewed by each household. The major television markets are specified in 47 C.F.R. § 76.51 (1972), 37 Fed. Reg. \_\_\_\_ (1972).

119. 24 F.C.C.2d at ¶ 5.

120. The commercials would have been provided by the local independent UHF station; if there were no independent UHF stations in a market with both VHF and UHF network broadcasters (intermixed market), commercials would be provided by the local UHF affiliate; in an all-VHF or all-UHF market, the commercials of all local stations could be used if no new UHF applications were filed for two years following adoption of the rules; and commercials of any local stations could be used if no new UHF applications were filed for two years following adoption of the rules; and commercials of any local station could be substituted upon a showing by the broadcaster that his ability to adequately serve the public was threatened by cable television.

121. 24 F.C.C.2d at ¶ 6.

Following hearings on the proposed rules, the Commission modified its importation rules, deleting the commercial substitution provisions. The new rules require that a CATV system must carry all television stations within whose specified zone the system is located and stations significantly viewed in the CATV community.<sup>122</sup> In addition, a cable system will be permitted to import signals to provide its subscribers with "minimum service."<sup>123</sup> The nonduplication provisions of the previous regulations have been changed giving a broadcaster located in the CATV community protection from signals carried on the cable furnishing the same programming he has purchased and broadcast, for up to two years.<sup>124</sup>

The rules are designed to protect television broadcasters and at the same time enable CATV to provide a greater diversity of programming. The FCC has concluded that to allow cable television to freely import programming would subject local broadcasters to "unfair competition."<sup>125</sup> However, while cable television does not make a payment for the programming as does the local broadcaster, neither does CATV receive advertising revenue as does the broadcaster originating the programming. Moreover, by accepting programming with the advertising inserted by the originating station, CATV is in a position similar to a network affiliate broadcasting network programming except that it is not paid by the station originating the programming as is the affiliate. Were the cable operator to receive advertising revenue without paying for the program, it might be appropriate to label it as unfair competition.<sup>126</sup> However, this is not the case. If cable

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122. 47 C.F.R. §§ 76.57-.63 (1972), 37 Fed. Reg. \_\_\_\_ (1972).

123. Minimum service under the new rules varies depending on the size of the local television market. A cable system in the top 50 markets may carry three networks and three independent stations; those in the second 50 may carry three networks and two independent stations; while a cable system in a smaller market, below 100, can carry three networks and one independent station. Cable systems located within the top 100 markets would be allowed to carry two signals in addition to those it is required to carry. *Id.* at §§ 76.61-.63, 37 Fed. Reg. \_\_\_\_ (1972). However, any signal imported to provide minimum service would be considered as one of these additional signals. *Id.* A smaller market cable system would only be allowed to provide minimum service. *Id.* at § 76.59, 37 Fed. Reg. \_\_\_\_ (1972). A cable system located outside the broadcast zone of any commercial station can carry broadcast signals without restriction. *Id.* at § 76.57, 37 Fed. Reg. \_\_\_\_ (1972).

124. 47 C.F.R. §§ 76.91-.159 (1972), 37 Fed. Reg. \_\_\_\_ (1972).

125. See note 111 *supra*.

126. FUTURE OF CABLE TELEVISION 19-20.

competition is not per se unfair, the mere threat that such competition might put a local broadcaster out of business, is not sufficient justification for a policy of protecting the broadcaster. It must be shown that such competition will adversely affect the total service available to the public.<sup>127</sup>

A more compelling argument for regulation is the adverse effect upon the total programming available in the absence of regulation. Because the present means of CATV transmission is by coaxial cable, the cost makes it unavailable to individuals living in areas of low population concentration and individuals unwilling to pay the subscription fee. Encouragement of local broadcasters provides a means for making network programming as well as programming of a local nature available to all individuals. Cable television profits may result in a deterioration rather than an improvement in programming available to the general public because the development of cable television under free importation of programming will fractionalize the market, resulting in a reduction in advertising revenue available for programming.<sup>128</sup>

The use of free distant signals reduces revenue available for programming by eroding the advertising base. Cable television, carrying the additional programming, reduces the audience watching the local station, which results in a corresponding loss of advertising revenue. The station whose signal is being imported would receive additional advertising revenue because of the increase in audience size. However, the advertising value of a distant audience is about two-thirds the value of local audience;<sup>129</sup> therefore, there is a net loss in advertising revenue. "As a symptom of this reduction in revenues, copyright owners would complain (as they now in fact are complaining) that local stations are no longer able to pay enough for particular programming because the stations are forced to compete against local cable systems that import the same or similar programs without payment to copyright owners."<sup>130</sup> The loss of advertising revenue reduces the amount of money available for programming.

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127. *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940) and *Carroll Broadcasting Co. v. FCC*, 258 F.2d 440 (D.C. Cir. 1958) clearly indicate that adverse economic effect upon individual broadcasters is not sufficient reason to protect the broadcaster from competition. The factor becomes a relevant consideration if such competition causes a loss in the total service available to the public.

128. *FUTURE OF CABLE TELEVISION* 21.

129. *IMPACT OF CABLE GROWTH* 71.

130. *FUTURE OF CABLE TELEVISION* 21.

The commercial substitution proposal, it should be noted, would have benefited those stations least hurt rather than the ones suffering the actual damage. CATV has the greatest impact in markets with few broadcast stations.<sup>131</sup> Given the present technology, duplication protection, and required carriage of local stations, cable television, at forty percent penetration, is likely to reduce revenue for all stations from local audiences by about eighteen percent in the top 100 markets, but the reduction in smaller markets will be in excess of thirty percent.<sup>132</sup> Commercial substitution, because it would not have been

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131. While it is difficult to forecast the actual effect on advertising revenue, the following hypothetical situation indicates that substitution of commercials would not offset the net loss of revenue. Assuming that in Market A there are four off-the-air broadcast signals, cable television has fifty percent penetration, the number of viewing hours are evenly split among all signals available, and each television household views television one-half of the viewing hours, the importation of four distant signals by cable television will reduce the local audience by one-fourth which results in net revenue loss of \$150 per hundred television households. The advertising value of a television household is estimated to be about \$25 per year. *IMPACT OF CABLE GROWTH* 37. Assuming that there are 100 television households in Market A, approximately twenty-five (one-half of the fifty CATV subscribers) will be viewing the imported distant signals resulting in a revenue loss of \$650 to the local broadcasters. However, this distant signal audience is worth \$16 per viewer (distant audience advertising value is approximately two-thirds that of a local audience, *id.* at 47, to the broadcasters whose signals are being imported resulting in revenue of \$400. The net revenue loss after subtracting that gained by the distant broadcaster from that lost by the local broadcasters would be \$150 for the 100 television households. If the cost of the substitution equipment would have been borne by the broadcaster benefiting from substitution, as the FCC contemplated, Second Notice of Proposed Rulemaking, 24 F.C.C.2d 580, at ¶ 8 (1970), the market would have to include at least 20,000 television households before the amount above the cost of substitution, without considering selling costs, will be equal to net revenue lost. The cost of the substitution equipment will be about \$50,000 per year. L. JOHNSON, *THE PROBLEM OF PROTECTING LOCAL BROADCASTERS* 6 (Rand Corp. 1970). Of the 20,000 household viewers, 5,000 would be viewing the imported signals. The value gained from having advertising inserted at the local level would be about \$10 per viewer (local audience value minus distant audience value) or \$50,000 for a 20,000 television household market. This figure, based on the assumption of equal division between all available signals, is unrealistic. Because network programming is unavailable for commercial substitution, the actual number viewing distant signals available through substitution proposals will be less than one-half of the subscribers. Thus, the actual number of television households in the market would have to be correspondingly larger even given the other assumptions.

132. *IMPACT OF CABLE GROWTH* 17. It is estimated that under the present conditions cable television will ultimately reach about forty to forty-five percent of the television households. *Id.* at 8. However, penetration is likely to be greater in those areas with fewer local stations. In an area with less than three local stations, penetration is likely to be about sixty percent. *Id.* at 17. Therefore, the reduction in revenue in smaller markets is likely to be greater than the estimate made assuming forty percent penetration.

applicable to the smaller markets,<sup>133</sup> would not confer benefits to compensate for the corresponding loss.<sup>134</sup>

The rules under consideration by the FCC are in effect a return to the rules in effect prior to the retransmission consent and commercial substitution proposals.<sup>135</sup> However, one significant change by the FCC is recognition that the independent UHF station will benefit rather than be harmed by development of cable television.<sup>136</sup> In markets where there is an independent UHF station, the audience has already been significantly fractionalized because the network programming is normally available resulting in several stations dividing the viewing audience. The independent UHF broadcaster, suffering from technical disadvantages in competing with VHF broadcasting,<sup>137</sup> will increase his revenue by about 51 percent by having his signal carried over a cable system having 40 percent penetration. The carriage by cable eliminates the technical difficulties of receiving UHF signals, and while the audience may be further fractionalized, the UHF broadcaster increases his audience by having his signal technically equal to VHF signal.<sup>138</sup> The revenue of network UHF stations in a market with VHF network systems is also increased by cable television.<sup>139</sup> The actual result with no restrictions on distant signal importation, assuming required carriage of local stations and duplication protection,<sup>140</sup> would benefit local UHF stations rather than cause irreparable damage and at the same time would encourage the rapid development of CATV.

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133. The FCC indicated in its proposal that only CATV systems located within the top 100 markets would be able to utilize commercial substitution and import additional signals. Second Notice of Proposed Rulemaking, 24 F.C.C.2d 580 (1970).

134. See notes 131-32 *supra*.

135. That is, the rules, first promulgated in 1966, which limited distant signal importation, and required carriage and nonduplication of local signals. These rules are discussed in text accompanying notes 27-29 and 73-76 *supra*.

136. The FCC's previous regulations have been premised on a concern that unregulated CATV development would preclude future UHF stations from developing and seriously impair the economic viability of existing UHF stations. See, e.g., note 120 *supra*. The Commission has for some time been encouraging the development of UHF television stations as a means of increasing the number of channels available in a geographic area. See Webbink, *supra* note 26.

137. UHF stations are at a competitive disadvantage because the reception is of a lower quality than VHF, not all television sets in use are equipped to receive UHF signals, and the channel selector makes it more difficult to switch to a UHF channel. PRESIDENT'S TASK FORCE ch. 7, at 24-25.

138. IMPACT OF CABLE GROWTH 71.

139. *Id.*

140. See note 135 *supra*.

While the rules recognize that UHF television stations do not need to be protected from CATV, they do not adequately protect against the adverse impact of cable television on the smaller market television broadcasters, and hence, do not touch on the problem of insuring adequate programming in rural areas. In the smaller markets to the extent that cable television is allowed to import signals necessary to provide the programming of the three networks and one independent—that is, minimum service<sup>141</sup>—the revenue of the local broadcaster will be reduced.<sup>142</sup> The impact of additional importation would not appear to be any more significant than in the larger markets. The fractionalization and revenue reduction would be attributable to the importation presently allowed. Therefore, as long as the Commission is willing to allow cable television to import signals to provide minimum service, the interests of television viewers for whom cable service is presently unavailable are best served by allowing cable television to rapidly develop less expensive means of transmission, such as microwave.<sup>143</sup> This will only be accomplished as cable television is able to expand its facilities to generate the funds necessary to support the research.

The probable impact of cable television importation on total revenue available for programming would be approximately a nine percent reduction.<sup>144</sup> The loss is small enough to be absorbed in annual revenue growth. If the concern is for the development of independent UHF stations in the larger market,<sup>145</sup> the free importation of signals will promote UHF stations and at the same time allow the full potential of cable television to be realized.

The new rules, while avoiding the defects of the commercial substitution proposals, do not significantly alter the importation restrictions previously imposed on cable television. Those systems located in the larger television markets will be allowed to import more programming than under previous rules. But the rules do not protect the smaller market broadcaster, and it is questionable whether the unlimited importation, assuming non-duplication protection, would add

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141. See note 123 *supra* and accompanying text.

142. The Rocky Mountain Broadcasters Association has criticized the FCC regulations for failing to adequately deal with the problems in small markets. See BROADCASTING, Nov. 22, 1971, at 40.

143. See note 4 *supra* and accompanying text.

144. IMPACT OF CABLE GROWTH 77.

145. See note 136 *supra*.

significantly to the adverse impact possible under the rules in both the larger and smaller markets.<sup>146</sup> Therefore, it is questionable whether the administrative cost of enforcing the rules is justified. Also, the rules in effect amount to a continuance of the FCC's freeze on the development of CATV<sup>147</sup> which may over the long run be more harmful to the public interest than unlimited importation.<sup>148</sup>

*The Program Origination Rules.* The FCC, in 1968, issued regulations requiring CATV systems with more than 3500 subscribers to originate programming as a condition to carrying broadcast signals.<sup>149</sup> Advertising was to be carried at natural breaks in the programming<sup>150</sup> to help meet the cost of origination.<sup>151</sup> The argument given for requiring CATV origination was to provide an additional source of local programming and thus encourage diversity in available programming.<sup>152</sup> While recognizing the requirement could further fractionalize the local audience, the Commission concluded that the possible harm to existing broadcasters was outweighed by the potential benefits to be derived from mandatory cablecasting.<sup>153</sup>

The program origination regulations were, of course, held invalid in *Midwest Video Corp. v. United States*,<sup>154</sup> ostensibly on jurisdictional grounds.<sup>155</sup> But because the jurisdictional defect is arguable,<sup>156</sup> and is at any rate likely to be cured by congressional action,<sup>157</sup> it is appropriate in spite of *Midwest Video* to consider the merits of the program origination rule.

The major argument against the rule is that its effect on diversification of local programming will be minimal while the economic burden it imposes will be great. The provision allowing advertising,

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146. See notes 131-34 *supra* and accompanying text.

147. See note 49 *supra*.

148. The freeze, by precluding CATV from fully developing or, at best, by slowing this development, will deny potential innovative CATV services to the public. See note 3 *supra*.

149. 47 C.F.R. § 76.201 (1972), 37 Fed. Reg. \_\_\_\_ (1972).

150. Natural breaks are defined by the FCC to be breaks in programming over which the cable operator has no control. *Id.* at § 76.217, 37 Fed. Reg. \_\_\_\_ (1972). If the programming being presented were a movie, the natural breaks would be at the beginning and the end of the movie.

151. *Id.*

152. First Report and Order, 20 F.C.C.2d 201 (1969).

153. *Id.*

154. 441 F.2d 1322 (8th Cir. 1971).

155. See text accompanying notes 87-89 *supra*.

156. See text accompanying notes 92-106 *supra*.

157. See note 109 *supra* and accompanying text.

for example, has been criticized as an unnecessary inducement to present programming which will appeal to a mass audience and will, thus, be indistinguishable from present broadcast programming.<sup>158</sup> Prohibiting advertising, however, could have serious effects on the financing of programming, making necessary an increase in subscription fees or a reduction in plant investment.<sup>159</sup>

Even with the inclusion of the advertising provision, however, the financial burden imposed by the origination requirement is not resolved, as the programming would still not be self-sustaining.<sup>160</sup> For example, it is doubtful under present conditions that program origination by cable television has any effect on CATV's ability to attract subscribers.<sup>161</sup> The question thus becomes which aspect of CATV's operation will be cut back in order to cover the cost of program origination? Paying for the originated programming out of subscriber revenue would not appear to be justified. Either other services will be cut back or fees will be raised, each of which would likely result in a loss of subscribers. An alternative source of revenue may be common carrier operations.<sup>162</sup> Cable television's greatest potential is said to lie in the area of providing more people the opportunity to present television programming through leased channels.<sup>163</sup> However, taking revenue from this area will result in slowing its potential development or increasing the cost of access.

Quite apart from the problem of cost, it is questionable whether the origination rules would actually encourage the development of more and better programming of a local nature. Under these rules, a cable television operator could satisfy the origination requirement by purchasing virtually the same type of programming as that obtained by importing a distant signal.<sup>164</sup> It is thus difficult to see how the rules would achieve the goal of providing a local outlet of expression.

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158. *Who's Afraid of CATV?* 215-16.

159. *FUTURE OF CABLE TELEVISION* 47.

160. *Midwest Video Corp. v. United States*, 441 F.2d 1322, 1327 (8th Cir. 1971).

161. *IMPACT OF CABLE GROWTH* 27. A cable system in Lakewood, Ohio (a Cleveland suburb), attempted to use program origination as the principle means of attracting subscribers. Six broadcast channels could be adequately received in the area. The cable system offered 11 to 14 hours a day of programming, six of which were devoted to locally-oriented programming. The system attracted only 1500 subscribers out of a possible 25,000.

162. *Who's Afraid of CATV?* 217-18.

163. *PRESIDENT'S TASK FORCE* ch. 7, at 10.

164. *FUTURE OF CABLE TELEVISION* 44.

Although this problem is easily solved by amending the rule, a more intractable problem remains. Any realistic attempt to improve the quality of locally-oriented programming must take into account the circumstances of each locality.

[T]he need for localism varies considerably from one locality to another depending on the adequacy of the local press, the number of nearby radio and television stations, the adequacy of local transportation as a partial substitute for communication and other factors. Many instances arise in which a uniform national regulatory policy confers only a modest or zero direct benefit to some localities, while imposing a concealed loss in the form of other benefits foregone.<sup>165</sup>

The problem of locally-oriented programming is, thus, most effectively handled at the local level. Rule making by the FCC which seeks to deal with the problem will not satisfactorily promote the public interest.<sup>166</sup> The present potential of cablecasting to add significantly to program diversity is not great enough to justify subsidization with revenue from other sources, especially when such a subsidy might delay the development of common carrier facilities which, in fact, provide the greatest hope for achieving diversity and locally-oriented programming.<sup>167</sup>

*The Minimum Channel Capacity, or "Common Carrier" Rules.*

The FCC indicated in *Notice of Inquiry*<sup>168</sup> that it was interested in setting technical standards for cable television, including a requirement that CATV lease transmission facilities to third persons.<sup>169</sup> The Commission invited comments on regulations requiring that a minimum number of channels be provided and that the system be capable of two-way communications.<sup>170</sup> The regulations are significant in that they, in effect, require CATV systems to operate as common carriers.

It is through providing the means whereby many people will have an inexpensive way to transmit their programming to the public that cable television is "the most promising avenue to diversity."<sup>171</sup> The FCC's regulation of cable television should, then, seek to enhance rather than thwart growth in the area of providing common carrier service.

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165. *Id.* at 47-48.

166. *Id.*

167. PRESIDENT'S TASK FORCE ch. 7, at 9.

168. 25 F.C.C.2d 38 (1970).

169. Notice of Proposed Rulemaking and Inquiry, 15 F.C.C.2d 417, 427 (1968).

170. 25 F.C.C.2d 38, at ¶ 8 (1970).

171. PRESIDENT'S TASK FORCE ch. 7, at 9. See also Barnett & Greenberg, *supra* note 35, at 578.

The Commission, under the new regulations, requires that all cable systems in the top 100 markets provide at least twenty channels.<sup>172</sup> For every channel used to carry broadcast programming, these systems must have one channel available for other uses.<sup>173</sup> Each cable system will also have to provide without charge one public access channel, one channel to state and local government, and one channel for educational use.<sup>174</sup> The cable operator would be allowed to lease any unused channel capacity including unused time on the public access channels.<sup>175</sup> A cable operator will be required to add an additional channel to his system whenever all of his present channels are being used on eighty percent of the weekdays, eighty percent of the time during any three hour period for six weeks.<sup>176</sup> The latter requirement is designed to insure the continuing availability of unused channel capacity. The FCC also requires that cable systems be capable of providing two-way communication.<sup>177</sup>

In connection with the provision setting minimum channel capacity and other technical standards, the interrelated policy questions of financing and control of the channel capacity must be considered.<sup>178</sup>

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172. 47 C.F.R. § 251(a)(1) (1972), 37 Fed. Reg. \_\_\_\_ (1972).

173. *Id.* at § 251(a)(2), 37 Fed. Reg. \_\_\_\_ (1972). The FCC has expressed concern that, unless minimum channel capacity is required, cable owners will only provide the capacity necessary for the carriage of broadcast signals. The FCC Chairman stated: "*In sum, [the commissioners] emphasize that the cable operator cannot accept the distant or overlapping signals that will be made available without also accepting the obligation to provide for substantial non-broadcast bandwidth. The two are integrally linked in the public interest judgment we have made.*" FCC Chairman's Letter 27.

174. 47 C.F.R. § 251(a)(4) (1972), 37 Fed. Reg. \_\_\_\_ (1972). The Commission hopes that this regulation will open up new outlets for local expression and increased experimentation with possible uses of local television. FCC Chairman's Letter 28-29.

175. 47 C.F.R. § 251(a)(7) (1972), 37 Fed. Reg. \_\_\_\_ (1972). This requirement avoids the possibility of unused time on the dedicated channels while there is someone willing to pay for the transmission facilities.

176. *Id.* at § 251(a)(8), 37 Fed. Reg. \_\_\_\_ (1972). A cable system will have six months to add the additional channel.

177. *Id.* at § 251(a)(3), 37 Fed. Reg. \_\_\_\_ (1972). As has been noted, see text accompanying note 172 *supra*, these regulations are only applicable to CATV in the top 100 markets; the common carrier rules will be applicable to new systems, while existing systems will have five years to comply. Existing CATV in smaller markets will have to meet these requirements when the system is substantially rebuilt. 47 C.F.R. § 251(c)(1972), 37 Fed. Reg. \_\_\_\_ (1972).

178. "The Federal Communications Commission must be responsible for the human and sociological implications of its decisions, as well as the economic, technological, and political

Under the new rules the CATV operator has discretion in determining how the capacity is to be used, which allows the use of a valuable public resource in a manner which may or may not be for the benefit of the public. The possibility of interconnecting cable systems<sup>179</sup> promises to concentrate control over programming to a greater extent than is the case in the present broadcast industry.<sup>180</sup> The Commission's regulations envision that access will be on a nondiscriminatory first-come, first-served basis.<sup>181</sup> Presumably access to the dedicated channels would be limited to the indicated uses.<sup>182</sup> However, the dedication to prescribed uses raises a problem of determining the appropriate group to bear the cost of the free channel capacity. In requiring that the cable operator provide the service free, the Commission has effectively imposed the cost on the subscriber. This may also have the

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consequences. The structure and operation of our country's communication system—especially the mass media—affect, among many other things, the sense of 'community' of those who both benefit from and are used by the system." 25 F.C.C.2d 38, at ¶ 8 (1970) (concurring statement of Commissioner Johnson).

179. One future possibility is to interconnect cable systems, making possible cable networks. See note 50 *supra*. Interconnection offers specific advantages to offset the resultant potential for concentration of program control. The FCC has rightly identified as one of the advantages of CATV the potential for presenting specialized programming. However, the Commission has only concerned itself with programming oriented toward geographic groups. Interconnection also offers the potential for programming aimed at groups defined by employment, cultural interests, and educational needs. The possibility of presenting programming of limited appeal becomes economically feasible if the particular group can be reached within several geographic areas to increase the audience. Further, advertising revenue will result because the advertiser, rather than paying solely for the number of viewers, will pay to reach a special interest audience.

180. The owner of cable television, even if limited in the number of cable systems he could own, would still have complete control over the programming reaching subscribers within one geographic area. See Barnett, *Cable Television and Media Concentration, Part I: Control of Cable Systems by Local Broadcasters*, 22 STAN. L. REV. 221 (1970) for a discussion of media control. The potential control over communications through ownership of the distribution system has prompted one group to propose that non-profit corporations be created to own the distribution systems. The operation of the system would be financed by leasing out channels to the highest bidders with several channels retained for free public use. Recommendation of Center of Policy Research, reported in BROADCASTING, July 20, 1970, at 45. New York City, in requiring a minimum channel capacity, established a board to regulate the rates charged for leasing the channels. MAYOR'S REPORT 58-59. The franchise granted to the CATV operator by the city also limits the control which the operator has over the content of the programming. *Id.* at 56-57.

181. The Commission, recognizing the complexity of the problem, is applying a first-come, first-served nondiscriminatory standard for the present, with modifications to be made based on future experience. FCC Chairman's Letter 33.

182. For a discussion of the problems that may be encountered in determining who will be entitled to access on the dedicated channels, see Botein, *Towards a New Diversity: Access to CATV*, CORNELL L.Q. (1971).

indirect effect of reducing the revenue available for experimentation and new services.<sup>183</sup> The alternative would have been to impose the cost upon the user. The major objection to this would be that certain groups would be denied access, and the FCC would have had to regulate the rates for the service. However, under the present rules the rates charged to lessees of commercial channels will presumably have to be regulated, raising the question of the actual burden of regulating rates on non-commercial channels. Because the cable operator will also own the studio and may charge the non-commercial channel users for the use of production facilities<sup>184</sup> and because, presumably, this rate must be controlled, the additional burden of regulating non-commercial channel rates is even less significant.<sup>185</sup>

Another problem arising from the dedication of channels to prescribed uses is that of enforcing non-discriminatory treatment of potential users of both the commercial and non-commercial channel capacity. Resolution of the problem is apparently being left up to the operator, and the potential for abuse is great. Presumably anyone desiring to lease the capacity will be able to do so,<sup>186</sup> but no means exists under present rules of insuring equal treatment with respect to

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183. See, for example, the analogous argument made in text following note 161 and at 167 *supra* with respect to the effect of placing the cost of program origination on subscribers.

184. FCC Chairman's Letter 29.

185. The problem of regulating CATV rates arises from the difficulty in establishing the rate base, depreciation rates, and rate of return. Also, CATV has thus far been a business of comparatively high risk and needs venture capital, raising an argument against public utility type of regulation. THE PROBLEM OF LOCAL MONOPOLY 30-31.

186. The Commission recognized that any attempt to provide access to divergent groups would be frustrated by allowing the cable operator to exercise control over the content of the programming. Defining equal access only in terms of a nondiscriminatory right to purchase space or, if members of specific non-commercial groups—non-profit, educational, or government—to acquire free time, does not adequately deal with the problem. The time of day and the day of the week are factors in determining if two users actually were accorded equal treatment. Another, but less obvious factor is the channel assigned; the local viewers may identify one channel as having consistently superior programming making time on another channel less valuable. The FCC's present approach is essentially one of leaving the CATV operator in control. See Botein, *supra* note 182. The only possible source of difficulty is that while the CATV owner is prohibited from exercising any control, FUTURE OF CABLE TELEVISION 62, he is not necessarily relieved of criminal or civil liability for the programming. However, this threat is reduced because the intent necessary for a criminal conviction would probably not be imputed to the owner absent any control over the programming. See, e.g., Baird v. Arizona State Bar, 401 U.S. 1 (1971); *In re Stolar*, 401 U.S. 23 (1971); *Yates v. United States*, 354 U.S. 298 (1957). The inability to impute the necessary intent to the cable operator for a criminal conviction, in turn, makes it unlikely that he will be subject to civil liability. Presumably the suspect programming will concern "a matter of public or general interest," meaning that before the owner could be liable for such a statement he would have had to act with actual malice.

the desired time and channel.<sup>187</sup> Another possible abuse is in the use of the channel dedicated to governmental use. The potential advantage to incumbents in an election is readily apparent.

The administrative machinery necessary to implement the imposition of technical standards and the requirement that CATV act as a common carrier<sup>188</sup> also presents a potential problem. Any attempt by the FCC to regulate technical standards will require it to monitor the performance of a great many individual systems. Regulating access to the channel capacity will impose an equally heavy burden. While the imposition of national technical standards may be desirable, the regulation of third persons seeking to present programming involves a local problem, and stringent national guidelines will not necessarily prove beneficial.<sup>189</sup> As a cost of requiring common carrier operations, the Commission will be involved in making regulations concerning rates, defining and enforcing nondiscriminatory treatment of individuals seeking to lease channel capacity, controlling program content and ascertaining the number of channels and type of service in each community being served by cable television.<sup>190</sup>

### *The Relationship of Federal and State Regulation of CATV*

The exact relationship between federal and state governments in respect to cable television has been based on the doctrine of pre-emption and the impermissibility of burdening interstate commerce.

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Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971); see *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Even should the speech be outside the "actual malice" rule, it is nevertheless unlikely that the owner would be liable for damages caused by such speech. Assuming the regulations are a valid exercise of the FCC's authority, the regulation prohibiting CATV censorship in order to promote "robust, wide-open debate" is a manifestation of a federal policy. State law imposing tort liability on the cable owner who complied with the federal law would frustrate a national policy. Therefore, to effectuate a uniform federal policy, the regulation arguably pre-empts the area, making the state law invalid. *Cf. Farmers Educational & Coop. Union v. WDAY*, 360 U.S. 525 (1959).

187. Indeed, it is arguable, because of CATV's connection with the federal regulatory process, that action by the cable operator is state action, *cf. Reitman v. Mulkey*, 387 U.S. 369, 384-85 (1967); *Lombard v. Louisiana*, 373 U.S. 267, 281-83 (1963); *Garner v. Louisiana*, 268 U.S. 157, 182-84 (1961) (Douglas, J., concurring opinions), and that any attempt, therefore, to control programming presented by third persons would violate the first amendment. Compare *Johnson & Westen, A Twentieth-Century Soapbox: The Right to Purchase Radio and Television Time*, 57 VA. L. REV. 574, 587 (1971) with Note, *Free Speech and the Mass Media*, 57 VA. L. REV. 636, 637 (1971).

188. 47 C.F.R. § 76.251 (1972), 37 Fed. Reg. \_\_\_\_ (1972).

189. See notes 246-47, 249 *infra* and accompanying text.

190. See notes 185 & 187 *supra*.

The relationship was characterized in *T. V. Pix Inc. v. Taylor*<sup>191</sup> as one where the state was free to regulate whatever the FCC chose not to regulate so long as the state's regulation did not place a burden on interstate commerce. A recognition that these two doctrines may not be adequate to delineate the relationship prompted the FCC to propose that rules be adopted to further define the respective areas of federal, state and dual regulation.<sup>192</sup>

*State and Local Regulations.* During the initial phases of cable television development, state and municipal governments were the only governmental authorities seeking to regulate the growing industry. Because the advent of CATV had not been anticipated by state legislatures, it was unclear what statutes were applicable. Local and state regulation has thus evolved from general principles governing the authority of states and municipal corporations.

Where the CATV company contemplates constructing its own transmission facilities in the city, it is required to obtain permission from the state to use the public right-of-way in a manner not common to the public generally.<sup>193</sup> Where general enabling legislation grants a municipality the power to regulate the use of its streets through franchises,<sup>194</sup> the city clearly has the power to grant or deny a cable operator permission to use the streets for construction of the distribution system.<sup>195</sup> A problem arises, however, when the city's authority is limited to issuing franchises to public utilities. Generally when used in authorization statutes the term "public utility" is not defined within that statute.<sup>196</sup> "The question . . . does not depend on legislative definition, but on the nature of the business or service ren-

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191. 304 F. Supp. 459 (D. Nev. 1968), *aff'd per curiam* 396 U.S. 556 (1970).

192. Notice of Proposed Rulemaking, 25 F.C.C.2d 50 (1970).

193. 12 E. MCQUILLIN, MUNICIPAL CORPORATIONS § 34.10 (3d ed. 1950). "The power to grant franchises resides in the state; and a city, in granting a franchise, acts as agent for the state." *Id.*

194. See note 40 *supra* and accompanying text.

195. *Illinois Broadcasting Co. v. Decatur*, 96 Ill. App. 2d 454, 461, 238 N.E.2d 261, 264 (1968).

196. The term "public utility" is generally defined in the statute establishing the state utilities commission. But it would not necessarily follow that this definition should be applicable when the term is used in other authorization statutes. In fact, if "public utility" as used in granting municipal franchising is confined to the definition giving exclusive jurisdiction to the utilities commission, the delegation to the municipality is meaningless because whatever authority the city would have under the statute would be pre-empted by the jurisdiction of the utilities commission.

dered. . . .<sup>197</sup> Since the distribution system for cable television consists of coaxial cable, it is highly unlikely that more than two systems will provide service to the same geographic area. Under these circumstances, a cable television operator would have a technical or natural monopoly.<sup>198</sup> This aspect of CATV would indicate that it is the type of service which would be considered a public utility.<sup>199</sup>

If the municipality has the authority to issue franchises, very comprehensive regulation of CATV is possible. A franchise is a contract once it has been accepted by the applicant.<sup>200</sup> It is thus possible for the municipality to regulate aspects of the franchised business which it could not reach under its general regulatory power. For example, the city is able to charge as a franchise fee either a percentage of the gross revenue or a set rate per year, without being restricted by its taxing power. The provisions of the franchise, because of their contractual nature, do not have to be within the legislative power of the city.<sup>201</sup>

If the city does not have the power to issue franchises to a cable system, any regulation must be made on the basis of the city's police power. In such instances, the regulation must be reasonably related to the health, safety and welfare of the public. The regulations would have to be general in nature, and fees levied would be limited by the

197. *Aberdeen Cable TV Service, Inc. v. Aberdeen*, \_\_\_\_ S.D. \_\_\_\_, \_\_\_\_, 176 N.W.2d 738, 741 (1970), *cert. denied*, 400 U.S. 991 (1971).

198. THE PROBLEM OF LOCAL MONOPOLY I. See Posner, *Natural Monopoly and Its Regulation*, 21 STAN. L. REV. 548 (1969) for a discussion of the characteristics of a natural monopoly.

199. See *Aberdeen Cable TV Service, Inc. v. Aberdeen*, \_\_\_\_ S.D. \_\_\_\_, 176 N.W.2d 738 (1970), *cert. denied*, 400 U.S. 991 (1971), *Contra* *Hubbard Broadcasting Inc. v. Albuquerque*, 18 P&F RADIO REG.2D (Dist. Ct. N.M.), *rev'd on other grounds*, \_\_\_\_ N.M. \_\_\_\_, 20 P&F RADIO REG.2D 2118 (1970).

200. E. McQUILLIN, *supra* note 193, at § 34.06.

201. *Illinois Broadcasting Co. v. Decatur*, 96 Ill. App. 2d 454, 462, 238 N.E.2d 261, 265 (1968); *H & B Communications Corp. v. Richland*, 79 Wash. 2d 312, 484 P.2d 1141 (1971). *Contra* *Wonderland Ventures, Inc. v. Sandusky*, 423 F.2d 548 (6th Cir. 1970). The court in *Wonderland Ventures* held that the franchise fee was an unconstitutional burden on interstate commerce. However, the city of Sandusky did not have the authority to grant franchises; therefore the provision held invalid was a tax rather than a franchise, or contractual provision. The decision can be criticized because the tax, while technically levied on a part of interstate commerce, did not discriminate against interstate commerce, the business affected was local in nature, and the commerce would not be subsequently taxed by another government. See *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250 (1938). For a general discussion of gross receipts taxes on broadcasting see Note, *Gross Receipts Taxation of Interstate Mass Media*, 55 IOWA L. REV. 1268 (1970).

taxing power of the municipality, which, in most cases, would be a license fee reasonably related to the cost of issuing the license.<sup>202</sup>

Even where the municipality has the authority to grant franchises to CATV on the basis of general franchising legislation, the authority does not extend to cable systems which do not use the public streets in construction of their distribution system.<sup>203</sup> If the cable operator, rather than constructing his own transmission system, enters into a lease-back agreement with a telephone company,<sup>204</sup> the city will not be able to require the CATV owner to obtain a franchise from the municipality. If, as is the case in most states,<sup>205</sup> the telephone company is subject to the regulation of the state utilities commission, the municipality's only authority to regulate the cable systems would be under its police power.<sup>206</sup>

In some states, the state utility commission itself has asserted jurisdiction over cable television.<sup>207</sup> Thus jurisdiction, normally based on general enabling legislation,<sup>208</sup> is limited by the specific language of the statute. In those states where the enabling statute gives the state commission authority to regulate "facilities for the transmission of intelligence by electricity," CATV comes under the commission's authority.<sup>209</sup> Where the authority of the utility commission is limited to "telephone companies and other common carriers," the courts have in the past reasoned that because a CATV system provides only

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202. In *Greater Fremont, Inc. v. Fremont*, 302 F. Supp. 652 (N.D. Ohio 1968), *aff'd sub nom.* *Wonderland Ventures Inc. v. Sandusky*, 423 F.2d 548 (6th Cir. 1970), because the city did not have the power to issue a franchise, the court held the city could not regulate cable television without regulating other media, establish rates, enforce a license fee which was not reasonably related to the cost of granting the license, or levy a special tax upon cable television. See note 201 *supra*.

203. *New York v. Comtel, Inc.*, 57 Misc.2d 585, 293 N.Y.S.2d 599 (Sup. Ct. 1968), *aff'd without opinion*, 30 App. Div.2d 1049, 294 N.Y.S.2d 981 (App. Div.), *aff'd without opinion*, 25 N.Y.2d 922, 252 N.E.2d 285, 304 N.Y.S.2d 853 (1969).

204. See notes 35-36 *supra* and accompanying text.

205. See, e.g., CAL. PUB. UTILITY CODE § 1001 (West 1956); N.Y. PUB. SERV. LAW § 5 (McKinney 1955).

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

207. See *Independent Theatre Owners v. Public Service Commission*, 235 Ark. 668, 361 S.W.2d 642 (1962).

208. At least three states, however, have enacted special legislation explicitly giving the state public utilities commission jurisdiction over cable television. See CONN. GEN. STAT. ANN. §§ 16-330 to 16-333 (Supp. 1967); NEV. REV. STAT. §§ 711.010 to 711.180 (1967); R.I. GEN. LAWS ANNOT. §§ 39-19-1 to 39-19-8 (Supp. 1970).

209. *Independent Theatre Owners v. Public Service Commission*, 235 Ark. 668, 361 S.W.2d 642 (1962).

a means for one-way communications, whereas a telephone company provides two-way service, the commission does not have jurisdiction over cable television.<sup>210</sup> Thus, for a cable system capable of providing two-way communications, this distinction between CATV and telephone companies would no longer be viable. Many more utility commissions will therefore acquire jurisdiction over CATV as cable operators comply with the FCC's requirement for two-way communication.<sup>211</sup>

Where the utility commission has regulatory authority, the cable operator must apply for a certificate of public necessity and convenience before commencing construction. In issuing the certificate, the commission is empowered to set rates, standards of service, and construction requirements. Thereafter, the cable system is subject to the continuing supervision of the utilities commission.<sup>212</sup>

The state utility commission may have indirect jurisdiction over cable television systems entering into lease-back arrangements with common carriers. If the state commission has the authority to disapprove additional services, the utility commission can condition its approval on the lease-back arrangement meeting minimum requirements.<sup>213</sup> The utility commission's authority in such instances will enable it to set rates charged by the common carriers for the service to CATV and possibly, by withholding approval unless the CATV system meets specific standards, supervise the rates charged to subscribers as well.<sup>214</sup> In the case where the municipality has authority to issue franchises to control the use of its streets, the utility commis-

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210. 47 Cal. 2d 82, 301 P.2d 862 (1956); *Minnesota Microwave, Inc. v. Public Service Commission*, \_\_\_ Minn. \_\_\_, 190 N.W.2d 661 (1971); *Ceracche Television Corp. v. Public Service Commission*, 49 Misc. 2d 554, 267 N.Y.S.2d 699 (Sup. Ct. 1960); 1965 OP. ATT'Y GEN. 402-04 (Ind.).

211. The two-way communication requirement is discussed at notes 170, 177.

212. *T.V. Pix, Inc. v. Taylor*, 304 F. Supp. 459 (D. Nev. 1968), *aff'd per curiam* 396 U.S. 556 (1970).

213. The theory underlying the state utilities commission's indirect authority would be the same as used by the FCC to regulate lease-back arrangements. See notes 37-48 *supra* and accompanying text.

214. However, in most instances, the public utility commissions have rejected taking jurisdiction over cable television and telephone company lease-back arrangements on a theory that the commission does not have authority to regulate the activities of a subscriber to the utility unless the activity of that subscriber interferes with the use of the utility by another subscriber. *New England Tel. & Tel. Co.*, 60 P.U.R. 3d 462 (Me. Pub. Util. Comm. 1965); *City of Jackson v. Michigan Bell Tel. Co.*, 63 P.U.R.3d 384 (Mich. Pub. Serv. Comm. 1966); *Seneca Radio Corp.*, 57 P.U.R.3d 67 (Ohio Pub. Util. Comm. 1964).

sion can authorize a telephone company to carry CATV even though the city has franchised another system to construct its own transmission facilities.<sup>215</sup>

*The Efficacy of State Regulation.* The basis of the argument made in support of franchising or utility regulation of cable television is that CATV is a natural monopoly.<sup>216</sup> In the absence of regulation, the monopolistic firm will be able to charge a price in excess of that justified by the cost of providing the service. Moreover, because the distribution system is placed upon public property, local regulation is necessary to prevent the misuse of a scarce public resource.<sup>217</sup> Finally, continuing regulation is necessary to insure that rates reflect the current cost of operation to prevent either the industry or the customer from receiving a windfall through changes in technology.

Regulating cable television as a public utility, however, tends to ignore significant aspects of the service. Under present conditions, cable television is a high-risk venture, as distinguished from a business normally classified as a public utility.<sup>218</sup> Also, while cable television may not be competing with other CATV systems, it must compete with broadcast television.<sup>219</sup> Under present conditions, the penetration of cable television is likely to be limited to approximately forty to fifty percent of the viewers in a given area,<sup>220</sup> leaving broadcast television as a viable alternative to subscribing to cable television. At this level of penetration, CATV's subscription price must be set to attract new subscribers and retain present customers. However, in the absence of competition from another cable television, a cable operator can set the subscription fee at a level which will include at least some degree of monopoly profits. While the number of subscribers will be reduced, gross income will be increased.<sup>221</sup> Nevertheless, the lack of competi-

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215. *New York v. Comtel, Inc.*, 57 Misc. 2d 585, 293 N.Y.S.2d 599 (Sup. Ct. 1968), *aff'd without opinion*, 30 App. Div. 2d 1049, 294 N.Y.S.2d 981 (App. Div.), *aff'd without opinion*, 25 N.Y.2d 922, 252 N.E.2d 285, 304 N.Y.S.2d 853 (1969).

216. See note 198 *supra* and accompanying text.

217. THE PROBLEM OF LOCAL MONOPOLY 12-13.

218. W. JONES, REGULATION OF CABLE TELEVISION BY THE STATE OF NEW YORK 122-23, 183 (1970).

219. See notes 164-67 *supra* and accompanying text.

220. IMPACT OF CABLE GROWTH 8.

221. . . . [t]he means by which the monopolist seeks to maximize profits may create inefficiency. Suppose that a widget costs 4 cents to produce (regardless of quantity) and that the widget monopolist can sell 10,000 at 7 cents, 12,000 at 6 cents, 13,000 at 5 cents, and 14,000 at 4 cents. Given this demand schedule, the profit-maximizing monopolist will sell at 7 cents, where his total cost is \$400, his total revenue \$700, and his monopoly

tion from other cable systems is more likely to result in a reluctance to extend the service to less profitable areas than in the cost of the service exceeding that expected under competitive circumstances. While the state's regulation of CATV as a public utility may keep down costs, it will not necessarily stimulate expansion of CATV services.

Like state regulation, the franchising system employed in most municipalities does not adequately cope with significant aspects of cable television. Normally, the franchise is granted by the city at set rates in return for payment of a concession fee by the successful applicant. The franchise gives the cable operator limited legal protection from possible competition from another cable system,<sup>222</sup> thus making the municipality a partner in exploiting a monopoly.<sup>223</sup> The subscription rate set in the franchise may represent an excess over cost of the service, the concession fee, and a reasonable profit, thereby including monopoly profits. Even if the rate is not excessive, there is no incentive to expand the system into areas where the cost per subscriber reduces profits. Also, the procedure of setting the rates as well as changing them may discourage technological improvements. Because of the regulatory lag in changing rates to reflect a new rate base or services the cable operator will be discouraged from investing funds.<sup>224</sup>

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profit \$300. Posner, *supra* note 198, at 551.

This problem is further accentuated by the fact that the cost per subscriber of the transmission system will differ in different parts of the community. The cost per subscriber will depend upon the density of the population in an area and the percentage of households likely to subscribe; therefore, it is possible that by selecting the area within the city with the lowest cost per subscriber and setting a monopolistic price, the operator will be able to maximize his income. This will, however, result in fewer people receiving service at a higher price than under competition.

<sup>222</sup> The power to grant an exclusive franchise is not implicit in the power to grant a franchise. E. MCQUILLAN, *supra* note 193, at § 34.23.

<sup>223</sup> The concession fee paid to the city will be taken from the monopolistic profit realized by the cable operator. THE PROBLEM OF LOCAL MONOPOLY 17. An alternative to the concession fee approach would be to auction off the franchise to the highest bidder. This would capture the monopoly profits for the public with a relatively low administrative cost. This does nothing to alleviate the monopoly problem, but the subscription fees would not be higher than under the concession fee approach and the administrative cost would be much less. Also, it is more likely that the entire monopolistic profit would be secured by the public because two competing bidders would force the lump sum to be paid for the franchise to a figure reflecting the expected monopolistic profit to be gained from the franchise. *Id.* at 14.

<sup>224</sup> However, if technological advancement would reduce the cable operator's costs the regulatory lag will increase his profits. *Cf.* Comment, *The Effluent Fee Approach for Controlling Air Pollution*, 1970 DUKE L.J. 943, 954.

Effective concession fee franchising will require an extensive administrative structure. In order to insure that competition among applicants will be effective to reduce the initial rates and provide adequate service, the terms of the franchise must be very comprehensive. The initial drafting together with the review of rates and continued regulation, will require expertise not possessed by most cities and will put a heavy burden on already overworked state utilities commissions. Moreover, this type of regulation fails to focus upon the problems of equal access to the transmission facilities and insuring that the service is made available to as many viewers as possible, and is likely to retard rather than stimulate the development of cable television.

*The Present Federal-State Relationship.* The validity of state and local regulations has been challenged on several grounds, one of which is that state regulation is void because it constitutes an unconstitutional burden on interstate commerce. That cable television is part of interstate commerce was made clear in *United States v. Southwestern Cable Co.*,<sup>225</sup> where the Court characterized the cable company as a point upon a stream of communication which is indivisible into interstate and intrastate components. However, to characterize CATV as within the flow of interstate commerce does not necessarily imply that all state regulation is prohibited. State regulation touching upon interstate commerce is not sufficient to invalidate the attempted regulation.<sup>226</sup> When a regulation based on a state's police power affects interstate commerce, the regulation is valid if it does not discriminate against interstate commerce and does not impinge upon an area which requires uniform national regulation.<sup>227</sup> By its nature, state regulation of cable television does not discriminate against interstate commerce; such regulation does not give preference to a local activity at the expense of the interstate activity, nor does it single out cable television because of its interstate character.

The stronger contention is that because of the nature of cable television as a part of a nationwide communications stream, it requires national uniformity of regulation. However, in *T.V. Pix Inc. v. Taylor*,<sup>228</sup> the court said that while there is one continuous interstate transmission to the viewer's television set, "the apparatus of the com-

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225. 392 U.S. 157, 169 (1968).

226. *Head v. Board of Examiners*, 374 U.S. 424, 429 (1963).

227. *Id.*

228. 304 F. Supp. 459 (D. Nev. 1968), *aff'd per curiam* 396 U.S. 556 (1970).

munity antenna system is an appendage to the primary interstate broadcasting facilities with incidents much more local than national, involving cable equipment through the public streets and ways, local franchises . . . and local intrastate collections."<sup>229</sup> The local CATV system's impact on interstate commerce, said the court, "is analogous to a local express or parcel delivery service or a local pilotage or lighter service organized to facilitate the final interstate delivery of goods to the named consignee."<sup>230</sup> Implicit in this description is the concept that cable television, rather than requiring uniform regulation, is particularly susceptible to dual regulation. The existence of state regulation "is not a burden upon a television signal or any item passing in interstate commerce."<sup>231</sup>

The argument has also been advanced that FCC regulations have pre-empted the area of CATV regulation from consideration by the states. The proposition is premised on a pre-CATV decision which held that the Communication Act, applying to all phases of broadcasting, precluded state action.<sup>232</sup> This decision was modified in *Head v. Board of Examiners*<sup>233</sup> which upheld state regulations affecting radio broadcasting. To determine whether or not an area of commerce has been pre-empted requires a consideration of the effect which enforcement of local regulation has upon federal regulation and the compatibility of the objectives sought to be achieved by the different levels of regulation. The test is not whether the purposes of the two regulations are parallel, but, rather, whether the two can exist together.<sup>234</sup> Absent a clear mandate from Congress to displace state regulation from an area of commerce, there seems to be no reason why federal and state regulations cannot exist at the same time.<sup>235</sup> In *T. V. Pix Inc. v. Taylor*,<sup>236</sup> it was decided that as long as the FCC has not, in fact, regulated the same area as the local regulation, the local regulation is valid. Thus, the question is not resolved by ascertaining whether the Commission has the authority to pre-empt an area;

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229. *Id.* at 463.

230. *Id.*

231. *Dispatch, Inc. v. Erie*, 249 F. Supp. 267, 271 (W.D. Pa. 1965), *vacated* 364 F.2d 539 (3d Cir. 1966), *dismissed on rehearing sub nom.* *Lamb Enterprises v. Erie*, 286 F. Supp. 865 (W.D. Pa. 1967), *aff'd per curiam*, 396 F.2d 752 (3d Cir. 1968).

232. *Allen B. Dumont Lab. v. Carroll*, 184 F.2d 153 (3d Cir. 1950).

233. 374 U.S. 424, 431 (1963).

234. *Florida Avocado Growers v. Paul*, 373 U.S. 132, 141 (1963).

235. *Id.* at 142.

236. 304 F. Supp. 459 (D. Nev. 1968), *aff'd per curiam*, 396 U.S. 556 (1970).

rather, it must be determined whether the FCC has, in fact, pre-empted the field.<sup>237</sup>

*The FCC Regulations.* The FCC has determined that the federal government should exclusively regulate as to signals carried, minimum channel capacity and other technical standards, program origination, and cross-ownership of cable and other media.<sup>238</sup> In addition the Commission has determined that it should pre-empt local regulation pertaining to common carrier services provided by a CATV system. Finally, the Commission contemplates dual regulation of minimum local service standards by requiring that a cable owner file a copy of his franchise with the FCC before permission is granted to carry broadcast signals.<sup>239</sup> Unless the local government has made provision within the franchise that service will be provided equally to all sectors of the franchise area<sup>240</sup> and included a requirement that the system be operable within one year and that service will be available to the entire franchise area within five years,<sup>241</sup> permission to carry broadcast signals will be refused. Moreover, the local government will be required to limit the duration of the franchise to a reasonable time, generally not exceeding 15 years,<sup>242</sup> and subscriber rates must be initially approved by the local government, with an established procedure to review rate changes and to review service complaints. In addition, the FCC will refuse permission if the franchise fee exacted by the local government is unreasonable—that is, if it produces revenue in excess of that necessary to cover the cost of regulating the CATV system.<sup>243</sup> In order to monitor the effects of its regulations on state and local efforts the Commission is proposing to establish a national committee composed of state, local and federal officials, and CATV and public interest representatives to review cable television regulations.

Thus, the selection of the franchise holder, regulation of rates, review of the progress of construction, and handling of service complaints will continue to be areas of state and local regulation through municipal franchising or utility commission jurisdiction. The FCC

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237. *Id.* at 465.

238. FCC Chairman's Letter 44.

239. 47 C.F.R. § 76.31(a) (1972), 37 Fed. Reg. \_\_\_\_ (1972).

240. *Id.*

241. *Id.*

242. FCC Chairman's Letter 48.

243. 47 C.F.R. § 76.31(c) (1972), 37 Fed. Reg. \_\_\_\_ (1972).

claims to retain authority to regulate distant signal importation, cablecasting and common carrier services. In theory, at least, the regulations contemplate dual regulation with respect to the setting of minimum local service standards. The only remaining question is whether this allocation of regulatory authority is the most desirable.

As for the regulations limiting the importation of distant signals, if this area is to be regulated at all,<sup>244</sup> it is clearly a federal function. The importation rules are not designed merely to protect local broadcasters from competition, but to protect the total service available to the public.<sup>245</sup>

National regulation over cablecasting, however, would either impose an intolerable administrative cost or lack the flexibility necessary to benefit local needs. In neither case would the possible benefit justify the cost.<sup>246</sup> If cablecasting is to provide an outlet for local expression, the programming must be locally oriented. However, the amount of locally-oriented programming which is actually feasible will depend on local circumstances. In this situation, local regulation should be considered.<sup>247</sup>

The regulation of CATV's common carrier operation should be allocated between federal and local governments rather than totally controlled at the federal level. Insuring that CATV systems meet minimum channel and technical standards is a federal problem. The problem of access, however, cannot adequately be handled at the national level since national enforcement would lack flexibility. Even more serious would be the expense involved in obtaining a hearing of alleged discrimination. If federal regulations governed access, one's complaint would have to be filed with the FCC. In this situation, very few individuals would be in a financial position to utilize the hearing procedure, thus effectively defeating the objective of expanding the number of individuals having access to the media.

Finally, whatever the theory behind it, the setting of minimum local service standards in practice makes the local entity an administrative agent of the FCC, by requiring the local government to enforce FCC standards. The FCC's ability to force the local government to enter into that agency relationship with the FCC is very limited, and

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244. For an argument that the present regulations have little positive effect, see notes 146-47 *supra* and accompanying text.

245. See note 127 *supra* and accompanying text.

246. See notes 165-67 *supra* and accompanying text.

247. FUTURE OF CABLE TELEVISION 48.

major reliance will have to be placed on the desire of local governments to have CATV, as the inducement to enact minimum standards. While cable television offers a source of revenue to local governments, thus making enactment of minimum standards more attractive, limiting the franchise fee would, in turn, negate the inducement.<sup>248</sup> Treating cable television as an independent source of revenue, on the other hand, may frustrate rather than implement national communications policy.

In short, conceiving the role of the federal government as encompassing the entire area of cable television will create a heavy administrative burden. Attempting to define the federal-local relationship in such a way that the local government becomes an administrative agent of the federal government, as is the case with the present rules, does not adequately cope with the problem. If the decision-making is to be at the federal level, regardless of state or local participation, the result will ultimately be complete pre-emption of the authority to regulate.

An alternate approach would be a recognition that many of the decisions must be made at the local level. The major strengths at the federal level are the expertise and the ability to gather information. The role of the federal government should be to provide uniform regulation of those aspects which actually will benefit from national regulation. However, in relation to local governments, the federal role should be one of encouraging experimentation with different approaches. The proposed committee composed of state, local, and federal officials to evaluate CATV regulation is a move in this direction. The federal goal should be to provide sufficient information and expertise to foster local regulatory structures, which will, in turn, achieve national policies.<sup>249</sup>

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248. BROADCASTING, Nov. 2, 1970, at 40. The authority to set these conditions is also questionable. If the FCC has not pre-empted the area, the local government retains the right to regulate cable television. See notes 84-89 *supra* and accompanying text for discussion of the use of conditions. If the Commission has in fact pre-empted the area, the cable operators' opportunity to engage in a business should not depend on the local government's willingness to assume the FCC's administrative burden.

249. The approach will have to be a more informal relationship between the FCC and state governments. Rather than attempting to use regulation as a means of forcing the state to further national policy, the federal government will have to use its superior expertise to encourage the establishment of a local regulatory framework that will be compatible with the national interest.

FUTURE PROSPECTS: CATV AS A SOLUTION TO THE PROBLEM OF  
ACCESS TO THE MEDIA

Governmental regulation of broadcasting is premised upon the assumption that such regulation is necessary to insure that those using the limited broadcast spectrum do so in a manner consistent with the national interest.<sup>250</sup> Traditionally, the opportunity to broadcast programming has been limited to a very few people. As a consequence, it has been deemed highly desirable that those having control over an important means of communication be regulated in the use of a scarce public resource. The FCC's regulation of broadcasting has thus been thought to be a means of protecting the first amendment guarantees of free speech rather than an abridgement of individual rights.<sup>251</sup>

Cable television is emerging as an entity which cannot be regulated under this rationale. A CATV system provides, as does broadcast television, the means of transmitting programming to viewers. However, as distinguished from broadcasting, a cable television operator does not and need not provide the programming which is transmitted.<sup>252</sup> Since cable television performs several functionally separable

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250. *NBC v. United States*, 319 U.S. 190 (1943).

251. *Id.* In addition to the *scarcity theory*, other rationales have been advanced to justify government regulation of broadcasting. The *public domain theory* is premised on the argument that the public owns the spectrum space and therefore has the right to regulate its use. See *RTNDA v. United States*, 400 F.2d 1002, 1019 (7th Cir. 1968), *rev'd sub nom.* *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). This theory would be an appropriate rationale for regulating cable ownership because the cable is normally placed on public property; however, this does not justify the regulation of those who use the cable. Analogous to the public domain rationale is the *privilege theory* that the government can attach conditions to the granting of a special privilege. See *Television Corp. of Michigan v. FCC*, 294 F.2d 730, 733-34 (D.C. Cir. 1961). However the concept of special privilege is based on the scarcity of available frequencies. The *impact theory* is premised on the argument that the media must be controlled because of their potential impact on the community. See *Kunz v. New York*, 340 U.S. 290, 307-08 (1951) (Jackson, J., dissenting). However, because of the greatly increased channel capacity of cable television, many more people will have the opportunity to present ideas, and the absence of a very few channels having a captive audience makes the impact rationale inapplicable to CATV. The *imposition theory* has been used to justify regulations designed to protect the viewer from offensive communication. See *Banzhaf v. FCC*, 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969). However this rationale is only applicable to short messages inserted among material the viewer may want to watch.

All of these rationales are essentially premised on the aspect of scarcity of spectrum space and greatly weakened by the increased channel capacity of cable television. For a full development and criticisms of the rationales to justify regulation of broadcasting, see Note, *Cable Television and the First Amendment*, 71 COLUM. L. REV. 1008 (1971).

252. While it is conceivable that separate control of the transmission facilities and of the programming would be possible with broadcasting, it would not result in a significant reduction of potential control by one individual. Because of limited spectrum space, regulation over the programming would still be necessary.

services, the entire justification for regulation needs to be reexamined.<sup>253</sup> Regulation of the owner of the distribution system would still be necessary to further the public interest, because it is not economically feasible to have more than one distribution system in one geographic area. Even if it were economically feasible, it is inconvenient and inefficient to the public to have many cables placed over or under public streets. However, it does not necessarily follow that regulation of the programming carried over that cable system is warranted. Heretofore, because only limited programming could be transmitted, it was deemed necessary to regulate programming. Cable television provides a means of transmitting a very large volume of programming. With this development, attempts to regulate the programming would conceivably constitute an abridgment of freedom of speech. The focal point of regulating cable television should be the transmission system. Issues presented by cable television which have not been present with broadcasting include access to the transmission facilities and insuring that the service is made available to the greatest possible number of people.

The simplest approach in determining who will be able to use the cable to transmit programming is for the owner to lease the service for whatever price the market will bear; however, there are serious policy objections to this approach. Under present conditions, it is doubtful if either a large enough demand for or a large enough supply of programming exists to maximize the transmission capabilities of a large cable system.<sup>254</sup> The cable operator would have a monopoly over the transmission facilities and, as such, would be able to charge a monopolistic price for the service.<sup>255</sup> The monopolistic price, in turn, by reducing the number able to afford to lease a channel, would result in a smaller amount of programming being carried by the cable.<sup>256</sup>

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253. The FCC is presently re-evaluating the fairness doctrine. However this re-evaluation appears to stop short of questioning the underlying theory of regulating broadcasting after the advent of CATV. See BROADCASTING, June 14, 1971, at 22.

254. While the Canadian experience, especially in Montreal, indicates that there is a large group of individuals who will seek to present programming, it does not appear that this demand would completely use forty-two or more channels. THE PROBLEM OF LOCAL ORIGINATION 9. However, this could be completely changed by using cable to transmit more than television programming. See note 3 *supra*.

255. See notes 221-23 *supra* and accompanying text. The objections to treating cable television as a monopoly would not be present here because there is no viable alternative for the individual to present programming.

256. See note 221 *supra*. The reduction would not be as dramatic as in the cited example because the cost of providing an additional unit of service would be less than the preceding unit.

Even assuming that the demand for the transmitting facilities exceeds the supply and the operator can maximize his profits by leasing his entire transmission capability, it is by no means certain that the type of programming presented would be the most desirable. To the extent that the programming is considered entertainment and the supplier is interested in making a profit, the programming would be of the type and quality demanded by the viewer.<sup>257</sup> Moreover, to the extent that the content of the programming is ideological, to allow only those able to pay a high price or those with whom the cable operator agrees to present their message does not encourage a free exchange of ideas.

Present governmental regulation does not adequately meet or even envision meeting this problem. As cable television increasingly provides programming not otherwise available, the problem will have to be faced. Despite the limitations of existing local regulation,<sup>258</sup> possibly the only way in which these problems can be solved is through local regulation.<sup>259</sup> The FCC, because of its expertise and information gathering capabilities, is in a position to establish technical standards and a minimum level of services to be provided by cable television, but the actual rates to be charged subscribers as well as individuals wishing to provide programming should be handled at the local level. Also, the expertise of the federal government should be available to the local government to establish requirements necessary for that locality. Rather than relying on the present concession fee approach,<sup>260</sup> the local government unit should allow the applicants to bargain over the rates to be charged for the required service with the concession going to the applicant proposing the lowest rate rather than the applicant willing to pay the city the highest fee, as under the concession fee approach.<sup>261</sup> Such an approach would relieve the local

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But the total units provided under monopolistic conditions will still be less than under perfect competition. However, if the monopolist charged a different price for each unit of service there would not necessarily be a decrease in the total number of units provided.

257. This does not necessarily mean that the programming would be identical to that presently offered. Because of the increased amount of programming, it is a reasonable proposition that rather than aiming at the mass audience, a significant amount of the programming will be aimed at particular audiences. This is even more reasonable if the individual supplying the program is not concerned with keeping a large audience constantly viewing the same channel.

258. For a criticism of local regulation see Botein, *supra* note 57, at 817-21; *Regulation of Community Antenna Television*, *supra* note 3, at 850-53.

259. One obvious disadvantage of allocating authority to many local governmental units is the increased possibility of corruption. BROADCASTING, Oct. 25, 1971, at 26.

260. See notes 222-24 *supra* and accompanying text.

261. THE PROBLEM OF LOCAL MONOPOLY 16. This would be similar to the present practice of awarding contracts for the construction of highways.

government of the burden of setting and reviewing rate structures while still insuring that the rates were reasonable.<sup>262</sup> Both federal and local governments would be free to insure that the standards were being met.

The most important service which needs to be provided by governmental action is insuring that individuals who seek and are denied the privilege of presenting programming over the cable have an inexpensive and expeditious recourse to the courts.<sup>263</sup> As it becomes possible to increase the amount of programming which can be presented, the state's regulation of programming loses its justification. But neither should the private owner of CATV be permitted to control the content of programming. Government is under an obligation to insure both that the individual can gain access to the transmitting facilities and that he can secure inexpensive judicial review if for some reason he is unable to present his message. If the promise of cable television is to provide diversity of programming, the unpopular, the unorthodox, as well as the accepted, should be available.

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262. The natural monopoly theory would not be applicable at the applicant stage assuming there was actual competition for the privilege to construct the system.

263. *Cf. Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969) (see especially Harlan, J., concurring); *Walker v. Birmingham*, 388 U.S. 307 (1967); *Poulos v. New Hampshire*, 345 U.S. 395 (1953).

