

5-1972

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Recommended Citation

Roscoe L. Barrow, *The New CATV Rules: Proceed on Delayed Yellow*, 25 *Vanderbilt Law Review* 681 (1972)

Available at: <https://scholarship.law.vanderbilt.edu/vlr/vol25/iss4/1>

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The New CATV Rules: Proceed on Delayed Yellow

*Roscoe L. Barrow**

Elites largely govern our nation's current decision-making process. The average citizen's failure to participate in that process perhaps derives largely from his inability to inform himself adequately on all the issues. However, the ability of cable television (CATV)¹ to place each person in complete command of his informational and entertainment environment has thrust society upon the threshold of an electronic communications revolution. Indeed, if CATV is allowed to develop its full potential, the individual will not have to receive information and entertainment passively. Rather, CATV's virtue of two-way communication will permit him to transmit as well as receive information. His access to the total storehouse of information will, therefore, increase, and as a result CATV will restore the average citizen to his rightful role in deciding vital issues.

On February 2, 1972, the FCC adopted a new set of rules governing CATV.² The rules do not provide the green light for which existing and potential CATV operators had hoped. They do, however, permit CATV

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Travel expense incident to research for this article was granted by the Walter E. Meyer Research Institute of Law.

1. The terminology used in cable communications borrows needlessly from the nomenclature of broadcasting. "Community antenna television," from which the letters "CATV" derive, "cable television," and "cablecasting" obviously are adaptations of "television" and "broadcasting." However, electronic cable communications are a complete system of telecommunications, of which broadcasting is a component part. A new terminology should be developed. For example, cable communications systems might better be called "Cable Communications (CACOM)." Nevertheless, in this article, the terminology used by the FCC in the new cable rules is employed.

2. 37 Fed. Reg. 3252-3341 (1972).

to proceed on the delayed yellow. This article will focus upon the technology, economics and uses of CATV. It will outline public policy goals for CATV service and discuss FCC jurisdiction over CATV. Finally, it will evaluate and recommend changes in the new CATV rules.

I. THE MODERN CATV SYSTEM

When CATV began in the early 1950's,³ its modest goal was to import television signals into communities either receiving no signal or receiving signals of inferior quality. The CATV operator used an antenna placed on a tall tower to capture his television signals and then delivered them by cable to subscribers, who paid a fee for the service. Despite these modest beginnings, the number of CATV systems grew steadily. In 1971, there were 2,570 cable systems in operation serving 5,300,000 subscribers.⁴

A. Technological Characteristics

Today's advanced cable system contrasts sharply with the simplicity of the 1950's.⁵ The modern CATV operator may still place an antenna on a tall tower in order to capture broadcast signals from the air, but he can also use a microwave relay tower to import them. Cables

3. Barnouw, *The Image Empire*, in 3 A HISTORY OF BROADCASTING IN THE UNITED STATES 247-48 (1970). Barnouw finds that the first use of antenna and cable to capture and carry signals to subscribers for a fee was in 1923, when radio signals were captured and delivered in Dundee, Michigan.

4. TV DIGEST, TV FACTBOOK 81-a (1971-72).

5. The technological descriptions of cable systems in this article are based principally on L. JOHNSON, W. BAER, R. BRETZ, D. CAMPH, N. FELDMAN, R. PARK & R. YIN, CABLE COMMUNICATIONS IN THE DAYTON MIAMI VALLEY: BASIC REPORT (1972) (a report of the Rand Corporation, Santa Monica, California, prepared with financial support from the Kettering and Ford Foundations) [hereinafter cited as BASIC REPORT]; L. JOHNSON, CABLE COMMUNICATIONS IN THE DAYTON MIAMI VALLEY: SUMMARY REPORT (1972) [hereinafter cited as SUMMARY REPORT]; MITRE CORPORATION, URBAN CABLE SYSTEMS (1971) (a report prepared under a grant by the Markle Foundation; Barrow & Manelli, *Communications Technology—A Forecast of Change*, 34 LAW & CONTEMP. PROB. 205-43, 431-51 (1969). See also SPINDLETOP RESEARCH, INC., IDENTIFICATION AND ANALYSIS OF THE ALTERNATIVES FOR ACHIEVING GREATER TELEVISION PROGRAM DIVERSITY IN THE UNITED STATES (1968) (a report prepared for the President's Task Force on Communications Policy); NATIONAL ASSOCIATION OF BROADCASTERS, TELEVISION AND THE WIRED CITY—A STUDY OF THE IMPLICATIONS OF A CHANGE IN THE MODE OF TRANSMISSION (1968) (a report commissioned for the President's Task Force on Communications Policy); Comments of Jansky and Bailey, Atlantic Research Corporation, on Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to Community Antenna Television Systems, No. 18397 (FCC, filed April 30, 1969); SLOAN COMMISSION ON CABLE COMMUNICATIONS, ON THE CABLE—THE TELEVISION OF ABUNDANCE (1971); Barnett & Greenberg, *A Proposal for Wired City Television*, 1968 WASH. U.L.Q. 1.

carry the signals from the tower to a headend placed near the tower to preserve signal quality, which houses signal processing, amplifying and relay equipment. The FCC requires the CATV operator to produce programming, as well as carry program services provided by others.⁶ Hence, the operator also must have studio broadcasting equipment available. Regardless of whether he captured or originated his signals, the CATV operator introduces them into a coaxial cable at the headend.⁷ From the headend, trunk lines of coaxial cables radiate to the neighborhoods served. Within each neighborhood, feeder lines attached to the trunk lines extend to within 100 feet of each subscriber's home or office. Both the trunk and feeder lines are attached to poles or laid in underground conduits, for which the CATV operator pays a rental fee to the telephone or electric utility company owning the poles or possessing the permit to excavate the conduits. Finally, a drop cable attached to the feeder cable runs to the subscriber's receiving terminal, usually a television set.

Signals lose strength as they pass through the cable. Therefore, the CATV operator must install about four amplifiers per mile along the cable route in order to maintain the signal at the required strength. Unfortunately, each amplifier introduces some noise and distortion into the signal. If the operator installs more than 20 amplifiers on a continuous cable, the resulting noise and distortion greatly impair the signal's quality. As a result, the maximum feasible length of each cable is approximately five miles.⁸ Hence, each headend installation can serve an area having no more than approximately a five mile radius. Several cables radiate from each headend installation. Accordingly, the pattern best calculated to serve a large metropolitan area is a group of regional headend installations, each serving an overlapping circular area having a radius of around five miles.

A centrally located microwave relay tower can coordinate several regional headends. Thus, the CATV operator can broadcast programs of interest to subscribers within a single headend's region through the cable serving that region alone, without sending the program to subscribers throughout the system. Moreover, switching devices enable a single

6. 37 Fed. Reg. 3687 (1972), to be codified at 47 C.F.R. §§ 76.201, 76.59.

7. A typical cable is approximately 3/4 of an inch in diameter. It consists of an inner conductor, such as a copper wire, and an outer conductor, such as aluminum. The conductors are separated by a filler in which a magnetic field is maintained. The cable is covered to protect it from the elements and to retard power attenuation and signal leakage. Most cable now in use can carry 13 channels. However, some cables of 20 and 40 channel capacity are in use, and cables of 60 and 80 channel capacity will become available within three years.

8. See BASIC REPORT, *supra* note 5, at 20.

headend to distribute programs among the separate neighborhoods it serves without distributing the program to all the neighborhoods within its radius. Consequently, each political unit does not need to franchise a CATV system in order to serve the political, civic and social needs of its citizens. CATV instead can serve the special needs of each political unit without sacrificing its ability to deliver a full spectrum of services.

On the other hand, a configuration of regional headends—each serving an area having a radius of approximately five miles—readily lends itself to the licensing of a number of neighborhood cable systems. Neighborhood systems can be interconnected in the manner described above to carry programs of general interest throughout the metropolitan area served by the several systems. A group of separately licensed cable systems could open the door to CATV ownership by blacks and other minorities that have been unable to gain a foothold in the ownership of broadcasting. In communities in which such minorities are a local majority, the desire to own and control cable systems is particularly great.

The coaxial cable in general use today carries frequencies between 3 and 270 megahertz.⁹ A television signal requires a bandwidth of six megahertz. Arithmetically, a coaxial cable's maximum capacity therefore cannot exceed 44 channels. Several factors, however, reduce the number of usable channels. The FCC requires the CATV operator to carry all local over-the-air television signals,¹⁰ but he cannot carry the signals on the same frequency used for the over-the-air broadcasts. Instead, the CATV operator must convert them to another frequency in order to avoid the "ghost" effect caused by small differences in time required for the same signal to reach the television set by over-the-air broadcast and by cable transmission. Hence, the channels utilized by over-the-air broadcasters usually are avoided by CATV operators.¹¹ Moreover, the CATV operator, like the over-the-air broadcaster, must maintain separation between channels in order to avoid interference between signals. Ordinarily, he can achieve the requisite separation by allowing some frequency space between adjacent channels to go unused. Finally, intermodulation and harmonic interference problems, which

9. The term "hertz" is synonymous with "cycles per second" and honors the pioneer investigator of electromagnetic waves, Heinrich Hertz. One megahertz is equal to one million cycles per second.

10. 47 C.F.R. § 74.1103 (Supp. 1971).

11. SUMMARY REPORT, *supra* note 5, at 8. Under some circumstances, these channels can be used for limited purposes. With improvements in technology, most of them will be put into use. If a converter is used at the receiving end, the "ghost" effect disappears because the condition which creates it—the reception of over-the-air signals at the points at which the cable attaches to the receiver—is eliminated.

are aggravated by amplifiers, further reduce the number of usable channels. Thus, in the existing state of the art, each cable can carry from 20 to 25 usable channels.¹²

The CATV subscriber can alleviate the problem of limited channel capacity in several ways. For example, the installation of two cables and a switch on his terminal would double the number of available channels and permit him to select the cable carrying a desired program simply by turning the switch.¹³ The subscriber could also install a converter on his terminal that would change all channel frequencies into one single frequency.¹⁴ Of course, the combination of two cables and a converter would further increase the number of receivable channel frequencies. Eventually the state of the art will render it practical to broadcast on the UHF television spectrum, which includes frequencies above 270 megahertz. That technological advance will permit many more channels to be carried on a single cable.¹⁵

CATV's most exciting prospect is its capacity to provide two-way or interactive communication, in which the subscriber receives information and responds by sending messages to the CATV origination point.¹⁶ The responses are digital, audio or visual. At present, digital and audio response equipment can be incorporated into CATV systems without excessive cost to subscribers. Visual response equipment, however, is so expensive that its use may be limited to business and professional firms for some time. Nevertheless, digital and audio responses can provide many valuable services and participative activities. For example, interactive autotutorial or dialogue-based educational and entertainment

12. *Id.*

13. The Rand Study concluded that the Dayton-Miami area should use the dual cable approach. This avoids the cost to subscribers of a converter. SUMMARY REPORT, *supra* note 5, at 9. Both cables should, however, be installed at the same time. *Id.*

14. The Mitre study concluded that for the Washington, D.C. area, the converter approach was better because Washington has 4 VHF television signals. Therefore, 4 channels had to remain vacant and 4 other channels had to be used to carry the transformed frequencies of these stations, altogether accounting for 8 channels on the cable. Nevertheless, in order to permit future expansion, CATV operators should initially lay two cables. See MITRE CORPORATION, URBAN CABLE SYSTEMS 177-79 (1971) [hereinafter cited as URBAN CABLE SYSTEMS]. For potential uses of the vacant channels see material cited *supra* note 11.

15. Until coaxial cable can carry frequencies above the VHF television spectrum, the ordinary television receiver, which is the most commonly used terminal, will limit the number of receivable channels. The VHF tuner receives only 12 channels and the UHF tuner only receives channel frequencies higher than those currently carried on the cable. Hence, without converters or dual cable, the maximum number of receivable channels is 12—less those rendered useless by interference with over-the-air broadcast signals.

16. See URBAN CABLE SYSTEMS, *supra* note 14, at 89-110; BASIC REPORT, *supra* note 5, at 5-1 to -24.

programs, preference polling on political issues or marketing questions, and health or employment counseling can be conducted without visual response equipment.

B. Economic Factors

Although the economic prospects for advanced CATV systems are favorable, each service area has its own special characteristics and a thorough study of the proposed service area is a prerequisite for launching a successful CATV venture. Every study in any service area must account for certain factors. For example, a careful assessment of the probable number of subscribers is always necessary. In time, cable rental fees and advertising charges will augment cable operators' income substantially, but for the next decade, fees paid by subscribers must constitute the major source of CATV income.¹⁷ Hence, in order to attract investment capital,¹⁸ the potential service area must include a sizeable population. Moreover, a probability of 40 to 60 percent penetration of the potential viewing market is necessary.¹⁹ Of course, the fee charged subscribers will directly affect penetration. As the subscription fee increases, penetration decreases. Moreover, until the full spectrum of CATV services becomes available, financial success of the venture must depend upon subscribers' willingness to pay for the opportunity to view additional conventional television signals.²⁰ Hence, for the next few years, availability of imported television signals will be the only major incentive to obtain a CATV subscription. In view of that fact, a subscription fee of six dollars per month appears to be the maximum charge that will provide the minimum penetration of 40 percent of the potential subscribers.²¹ Forty percent penetration, in a service area having a population of 600,000, should return fourteen percent on the total investment and thereby assure the economic success of the venture.²² If the popula-

17. See SUMMARY REPORT, *supra* note 5, at 12.

18. Major capital outlays for an advanced CATV system include: a tower and headend with microwave relay equipment, computer and program origination equipment—\$320,000-\$943,000; above ground cable installation expense—\$8,500 per mile; additional expense for a system encompassing a large metropolitan area—\$1,241,000. See BASIC REPORT, *supra* note 5, at 1-11, -28, -30. Digital response equipment can be installed in subscribers' homes for \$100. See URBAN CABLE SYSTEMS, *supra* note 14, at 251.

19. The requisite penetration for an economically sound cable system is a product of several factors: density of population; average income of the population in the service area; competition for investment capital; and the size of fees charged to subscribers. For a detailed study of the effect of these factors on penetration see BASIC REPORT, *supra* note 5, at ch. 2.

20. See notes 130-34 *infra* and accompanying text.

21. BASIC REPORT, *supra* note 5, at 2-7, -9.

22. *Id.* at 2-7.

tion of the area served increases, the operator can decrease the subscription fee proportionately while maintaining substantially the same profit ratio.²³

C. *The Potential of Modern CATV Systems*

Present CATV service consists largely of television programs captured from the air and distributed to subscribers. When CATV achieves substantial penetration of homes and offices in large segments of a metropolitan area, however, it will then be economically feasible to provide many new services.²⁴ For example, CATV's large number of available channels will encourage the formation of information and entertainment utilities from which the discriminating subscriber will select freely. Similarly, CATV will be able to offer selected dramas, sports events, and the like, to subscribers upon payment of a per program charge (pay-TV). Further, local government officials could discuss community problems and obtain direct responses from their electorate on the issues. Political candidates also will have greater access to the electorate. Police and fire departments likewise could perform many of their duties by cable.

Since CATV profitability will be based largely upon subscription fees and cable rentals, the advertiser's cost-per-thousand viewers standard will not encumber operations, and a great variety of programming can be presented to fulfill the needs of small organizations. Minority and underprivileged groups will have a forum for discussion of their common problems. Channel space will be available for programs of interest to special groups, such as children, the aged, or gardening enthusiasts. Similarly, public information channels can provide information and counseling regarding employment, welfare, and health.

In the business and professional field, doctors will transmit records by cable to special clinics and consult via two-way video. Similarly, lawyers will conduct research by cable, retrieving precedents from electronic data banks. Businessmen will use CATV more, and the airplane less, to conduct their affairs. Merchants will display goods by cable and

23. URBAN CABLE SYSTEMS, *supra* note 14, at 248. Thus, in Washington, D.C., where there are 263,000 households in the prospective service area, anticipated subscriber fees are \$3.50 for one cable.

24. For detailed descriptions of the potential uses of CATV see URBAN CABLE SYSTEMS, *supra* note 14, at 73-111, 207-44; BASIC REPORT, *supra* note 5, at ch. 5-8. See also W. BAER, INTERACTIVE TELEVISION: PROSPECTS FOR TWO-WAY SERVICES ON CABLE (1971) (a report of the Rand Corporation prepared under a grant by the Markle Foundation); N. FELDMAN, CABLE TELEVISION: OPPORTUNITIES AND PROBLEMS IN LOCAL PROGRAM ORIGINATION (1970) (a report prepared by the Rand Corporation for the Ford Foundation).

the housewife will shop without leaving the home. Bankers will debit and credit checking and charge accounts by two-way cable response. In fact, newspapers, mail, library materials, and virtually any other kind of data can be delivered to the subscriber by facsimile receiver.

The potential effects on education are equally great. Students and teachers will conduct raw research by retrieving information stored in electronic data banks. Educational television stations will use CATV to increase the variety of educational services offered to schools and the public, and universities can implement the "university without walls" concept, delivering programs of higher education to the student's home with great savings in time and cost. Indeed, CATV has the overall potential to become a complete telecommunications system, linking together space satellites, radios, television sets, facsimile receivers, telephones, teletypes, computers, data storage and retrieval mechanisms, and other communications technology into a complete cable-to-home communications system giving every individual the key to the world's storehouse of knowledge.²⁵ In such a salubrious informational environment, the individual will have a great opportunity to achieve self-fulfillment and to participate in self-government.

II. PUBLIC POLICY GOALS FOR CATV SERVICE

CATV, being potentially a complete telecommunications system capable of serving the public in ways far beyond the capacity of broadcasting or telephone and telegraph, is *sui generis*. While new public policy goals for CATV service should be developed, it is not now possible to define all the goals for a telecommunications system that is in its infancy. Many components of the system have been invented and are in use, but many others remain to be discovered. A great variety of potential CATV services are known and can be delivered now; yet many additional services will be developed in the future. Accordingly, many desirable goals of CATV service must await future identification. Some of the goals, however, are clearly visible now. These should be described and the regulation of CATV developed to ensure that the technology and responsibilities of licensees are shaped to achieve them. In its present state, CATV has characteristics of both broadcasting and wire communications. Public interest goals for these means of communication already exist in considerable detail. Accordingly, these public interest goals should be examined, and those which are meritorious and compat-

25. For a description of the technology supportive of CATV see Barrow & Manelli, *supra* note 5.

ible with CATV applied to this new communications development. Nevertheless, the search should continue for sound public interest goals which CATV is uniquely capable of achieving.

A. *The Communications Act of 1934*

One potential source of policy goals for CATV regulation is the Communications Act of 1934,²⁶ the statute by which the FCC exercises regulatory authority over CATV. The Communications Act differentiates between two contrasting communications services—"common carriers" and "broadcasters." Common carriers—for example, wire and telephone services—are identifiable by their exercise of monopoly power. Since neither the forces of competition nor the antitrust laws discipline their activity, the Act provides for economic regulation. Thus, common carriers by wire or radio must provide communications service "upon reasonable request" and for "just and reasonable" rates;²⁷ consequently, the Act ensures everyone an equal opportunity to use the common carrier's services. On the other hand, broadcasters, although subject to the natural limitations of the electromagnetic spectrum, operate in an otherwise competitive market. Thus, the Act simply empowers the FCC to regulate broadcaster's services in the "public interest, convenience, and necessity,"²⁸ and expressly declares that radio broadcasters are not common carriers.²⁹

CATV possesses characteristics of both radio and wire common carriers and radio and television broadcasters. When customers utilize CATV to provide computer, data storage and retrieval information services, the cable system performs functions similar to those of telephone and telegraph companies. Therefore, when it acts in those capacities, economic regulation is desirable and necessary for CATV. When subscribers utilize CATV to participate in the political process and discuss controversial issues, or satisfy their needs, tastes and desires for information, entertainment and participation, CATV functions like a broadcasting station, and regulation in the public interest becomes the

26. 47 U.S.C. § 151-609 (1970).

27. 47 U.S.C. § 201 (1970).

28. 47 U.S.C. § 303 (1970). The grant, modification or renewal of a license to broadcast also is based upon a finding of public interest, convenience or necessity. 47 U.S.C. §§ 307, 309 (1970).

29. 47 U.S.C. 151(h) (1970). The Act also expressly makes the anti-trust laws applicable to broadcasting and provides for the preservation of competition in broadcasting. 47 U.S.C. §§ 313-314 (1970). For an analysis of the accommodation of the antitrust and regulatory approaches in broadcasting see Barrow, *Antitrust and the Regulated Industry: Promoting Competition in Broadcasting*, 1964 DUKE L.J. 282.

appropriate standard. Unfortunately, however, the Act does not specify standards that identify the applicable regulatory role for many situations. Congress enacted the Communications Act of 1934 long before the advent of either television or CATV. Moreover, despite the vast technological, economic, and service differences between telephone and radio on the one hand, and television and CATV on the other, Congress has refused to remodel the Act. As a result, the Communications Act provides few helpful policy guidelines. Nevertheless, CATV regulation ought to comply with the spirit of the Act and provide a reasonable and uniform rate structure while at the same time satisfying the needs, tastes and desires of the public for information, entertainment and participation.

B. *The Regulatory History of Public Interest Broadcasting*

Since the Communications Act itself does not designate specific policy guidelines for CATV service, the regulatory history of public interest broadcasting is the best source of policy standards.³⁰ Even at its inception, Congress wisely recognized that the powerful new medium of broadcast communications could become concentrated in the hands of a few interests eager to control public opinion and the election process.³¹ In order to guard against that danger, Congress declared that ownership of the broadcasting channels was held by the people.³² It granted political candidates equal opportunities to use broadcasting facilities for political purposes,³³ and, in order to protect that grant, empowered the FCC to regulate broadcasting in the "public interest, convenience, or necessity."³⁴ To implement its mandate, the FCC strives to achieve several goals through its regulatory policy.

1. *Diversity of Viewpoints and Program Choice.*—One major goal promoted by the FCC is diversity of viewpoints and program

30. For a description of the public interest in broadcasting see HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, NETWORK BROADCASTING, H.R. REP. NO. 1297, 85th Cong., 2d Sess. 53-169 (1958) [hereinafter cited as HOUSE NETWORK BROADCASTING REPORT].

31. For a description of the legislative history of the regulation of broadcasting see Barrow, *The Equal Opportunities and Fairness Doctrines in Broadcasting: Pillars in the Forum of Democracy*, 37 U. CIN. L. REV. 447, 449-63 (1968).

32. See 47 U.S.C. § 301 (1970) (The purpose of the Act is "to maintain the control of the United States over all the channels . . . and to provide for the use of such channels, but not the ownership thereof."); 47 U.S.C. § 304 (licensee required to waive any property claim in the frequency arising from use thereof); 47 U.S.C. § 309(h)(1) ("The station license shall not vest in the licensee . . . any right in the use of the frequencies designated in the license beyond the term thereof . . .").

33. 47 U.S.C. § 315 (1970).

34. 47 U.S.C. § 303 (1970).

choices.³⁵ The FCC seeks to achieve diversity in broadcasting through a number of policies,³⁶ the most important one of which is that broadcasters must provide a well balanced program structure.³⁷ Unfortunately, commercial broadcasting's use as a marketing instrument primarily serving an advertising function renders the FCC's effort to attain a balanced program service difficult, if not impossible. In the important prime viewing hours, the national network services provide programs designed to attract the maximum audience for exposure to the advertisement of mass consumer goods. The advertiser measures the success of the program in terms of the cost per thousand viewers seeing his advertisements. Accordingly, television producers pitch their programming to the lowest common denominator of audience appeal. Thus, Gresham's law³⁸ operates to oust programming of interest to minority audiences and to inaugurate programming attractive to the maximum number of viewers.

Furthermore, perceptive observers point out that when advertisers utilize television as a marketing device in order to sell mass consumer goods, the resulting imbalance in program service significantly decivilizes mankind,³⁹ incites aggressive behavior in the young and impressionable,⁴⁰ and erodes and impedes the popular arts and public informa-

35. "[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market" *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

36. See generally HOUSE NETWORK BROADCASTING REPORT, *supra* note 30.

37. *Id.* at 128-29. The limited success of the FCC in achieving balanced program service in television and some recommendations for attaining this goal are analyzed in Barrow, *The Attainment of Balanced Program Service in Television*, 52 VA. L. REV. 633 (1966).

38. Gresham's law is the principle of currency that "bad money drives out good."

39. "Without intention, the radio-TV pablum becomes weighted in favor of the animal end of the emotional scale; and the incidental education moves not from the primitive to the advanced, but from the advanced to the primitive . . ." Hocking, *Principles of Mass Communications by Radio and Television from the Angle of Philosophy and Psychology*, in FCC, HEARINGS ON THE STUDY OF RADIO AND TELEVISION NETWORK BROADCASTING 1226 (1959-1966). See also FCC, OFFICE OF NETWORK STUDY, SECOND INTERIM REPORT, TELEVISION NETWORK PROCUREMENT—PART II at 36-37 (1965).

40. In the competition between networks for viewers, a network may inject violence and sex into programming although it is not necessary to the theme. This is sometimes done over the objection of the advertiser. For example, in an episode of the "Bus Stop" series, entitled "A Lion Walks Among Us," advertisers complained that the show was objectionable. The National Association of Broadcasters asked, and was denied, permission to preview the show, and many affiliates refused to carry it. After the network had exhibited the show over a majority of affiliated stations, the NAB found it to be "outside the spirit and intent of the television code in theme, execution and characterization." See FCC, HEARINGS ON THE STUDY OF RADIO AND TELEVISION NETWORK BROADCASTING, *supra* note 39, at 9492; FCC, OFFICE OF NETWORK STUDY, SECOND INTERIM REPORT, TELEVISION NETWORK PROCUREMENT—PART II, *supra* note 39, at 313-16.

For a recent analysis of the impact of television violence on children see THE SURGEON

tion.⁴¹ Fortunately, however, an advanced CATV system will greatly increase diversity of viewpoints and program choices. Diversity, therefore, ought to be a major public interest goal in CATV service. If regulation is necessary to achieve that goal, it should be provided.

2. *Optimum Service at Least Cost.*—In order to secure further diversity of ideas, variety of programming, and increased quality, the FCC consistently encourages new entry and competition in broadcasting.⁴² Theoretically, the public could derive the benefits of competition by franchising two or more CATV systems in the same area. Practically, however, the economics of CATV dictate in favor of a local monopoly⁴³ because the division of subscribers between competing CATV systems would drive subscription fees beyond the maximum level at which minimum penetration could be achieved. Thus, new entry and competition is an unrealistic policy goal for CATV. Accordingly, CATV monopolies should be subject to rate regulation so that users can receive service for just and reasonable fees. Furthermore, whenever a local CATV monopoly is granted, some authority should regulate the character and quality of its service. For example, in the heyday of railroad passenger trains, the government regulated not only their rates, but also the frequency of their departures and arrivals and the adequacy of their accommodations. Local governments can partially regulate the character and quality of CATV service by a franchising procedure that requires competing applicants to submit contract offers specifying the character and quality of their proposed service. Since, however, local governments typically grant CATV franchises of ten to fifteen years duration, conditions that are satisfactory in the initial contract likely will not remain so throughout the entire franchise period. Hence, the FCC also should regulate the character and quality of CATV service in the public interest. Accordingly, the goal should be to provide optimum service at the least cost to the subscriber.

3. *Preventing Concentrations of Power.*—The FCC strictly limits

GENERAL'S SCIENTIFIC ADVISORY COMMITTEE ON TELEVISION AND SOCIAL BEHAVIOR, UNITED STATES PUBLIC HEALTH SERVICE, REPORT TO THE SURGEON GENERAL, TELEVISION AND GROWING UP: THE IMPACT OF TELEVISED VIOLENCE 99-125 (1972).

41. "In the field of television . . . [t]hird-and fourth-rate material seems increasingly to replace the better shows as the merchandiser reaches out for a wide market. The managers of the broadcasting companies seek the same large audience in order to sell their broadcasting time." PRESIDENT'S COMMISSION ON NATIONAL GOALS FOR AMERICANS, REPORT 132 (1960).

42. See HOUSE NETWORK BROADCASTING REPORT, *supra* note 30, at 67-76. See also Voice of Cullman, 6 R.R. 164 (1950).

43. R. Posner, Cable Television: The Problem of Local Monopoly 1 (1970) (Rand Corporation Research Memorandum, RM-6309-FF, prepared under a grant from the Ford Foundation).

undue concentration of power in television broadcasting,⁴⁴ by providing that the same party may not own more than five VHF and two UHF television stations.⁴⁵ Two considerations prompted the FCC to enforce controls on concentration in the broadcast industry—prevention of monopoly power over broadcasting and promotion of competition in broadcasting.⁴⁶ Without such controls, the resulting monopoly power would undermine the viability of the diversity of viewpoints principle. On the other hand, about 2,000 interconnected local telephone systems provide valuable nationwide service in the form of the national Bell system,⁴⁷ and interconnections between local CATV systems can provide a similar service. The accommodation of nationwide service, however, does not conflict with limitations on undue concentrations of power. Thus, to the extent that CATV originates programming or determines access to the cable, it also holds the same potential to control public opinion and the election process that exists in broadcasting. Accordingly, FCC regulation of CATV service should prevent undue concentrations of ownership power.

4. *Equalizing Competitive Opportunities.*—The FCC also seeks to equalize competitive opportunities between the various components of the broadcasting industry.⁴⁸ Thus, its *Sixth Report and Order*⁴⁹ made assignments of television channels, and the *Selective Deintermixture Report and Order*⁵⁰ tried to encourage the development of UHF television. Predictably, since CATV offers competition to other media, both the broadcasting industry and the telephone industry⁵¹ have sought to hinder the development of CATV. Instead of trying to equalize the competitive opportunities between CATV and its competitors, however, the FCC has consistently tried to restrict CATV's development. The new CATV rules⁵² continue FCC protection of the existing television structure. The telephone industry, however, likely will compete for licenses to operate CATV systems, which in turn may continue to hinder

44. See HOUSE NETWORK BROADCASTING REPORT, *supra* note 30, at 82-90.

45. 47 C.F.R. § 3.636 (1958).

46. See HOUSE NETWORK BROADCASTING REPORT, *supra* note 30, at 82-90.

47. Symons, *Public Responsibilities of the Independent Telephone Industry*, PUBLIC UTILITIES FORTNIGHTLY, Apr. 24, 1969, at 32.

48. See HOUSE NETWORK BROADCASTING REPORT, *supra* note 30, at 76-82.

49. 17 Fed. Reg. 3905 (1952).

50. *The Selective Deintermixture Report and Order* is discussed in HOUSE NETWORK BROADCASTING REPORT, *supra* note 30, at 76-77.

51. Note, *Regulation of Community Antenna Television*, 70 COLUM. L. REV. 837, 846 (1970).

52. 37 Fed. Reg. 3252-3341 (1972).

the independent development of CATV.⁵³ So long as the FCC tries to protect the existing communications structure from competition by innovations like CATV, it will stunt the progress of telecommunications and thwart its goal of equalizing competitive opportunities in the broadcasting industry. The FCC should encourage CATV to fulfill its role of service in the public interest.

5. *Prohibiting Anticompetitive Practices.*—The FCC also seeks to prohibit any anticompetitive practices in broadcasting.⁵⁴ Hence, it designed the Chain Broadcasting Rules⁵⁵ to restrict network control over affiliated broadcasting stations in order to promote competition between components of the broadcasting industry and provide the licensed broadcaster freedom to satisfy the programming needs of persons within range of his signal. Similar problems may arise between local CATV systems and network or other informational and entertainment service centers. Therefore, the FCC should enable CATV systems to fulfill their potential role of service in the public interest and protect the entry of supportive informational and entertainment utilities into the system.

C. *The President's Task Force on Communications Policy*

A third potential source of policy goals for CATV regulation is the President's Task Force on Communications Policy. Its report stressed diversity in program service as the major public policy goal for communications.⁵⁶ The *Report* observed that broadcasting provides uniform programs from limited sources⁵⁷ and recommended a balanced use of CATV and over-the-air broadcasting in order to achieve diversity.⁵⁸ The Task Force suggested that over-the-air broadcasting should receive some protection from competition by CATV,⁵⁹ but also took the view that CATV can provide a major public service.⁶⁰ The Task Force therefore recommended a regulatory policy that encourages, rather than restricts, the development of CATV. Furthermore, the Task Force judiciously cautioned the FCC to give close scrutiny to the problems of

53. Note, *supra* note 51.

54. See HOUSE NETWORK BROADCASTING REPORT, *supra* note 30, at 90-97, 608-32.

55. FCC, REPORT ON CHAIN BROADCASTING (1941).

56. See PRESIDENT'S TASK FORCE ON COMMUNICATIONS POLICY, FINAL REPORT, ch. 7, at 2 (1968).

57. *Id.* at 4.

58. *Id.* at 9.

59. *Id.* at 10, 40.

60. *Id.* at 9-10.

domination of and access to CATV.⁶¹

D. *The Sloan Commission Report*

1. *General Recommendations.*—Another source of policy goals for CATV regulation is the report of the Sloan Commission on Cable Communications. Its report places minimum reliance on regulation⁶² and recommends strong protection of the existing broadcasting structure.⁶³ At the same time, however, the Commission urges the continued development of CATV.⁶⁴ During CATV's growth period, the Commission thought it undesirable to preclude CATV operators from originating programming and speculated that CATV ultimately would assume common carrier status.⁶⁵ Of course, the typical CATV operator does not wish to originate programming because it is costly. Nevertheless, the public interest in variety of programming demands that CATV operators originate programming. The Commission also cautioned against franchises longer than ten years⁶⁶ and undue concentrations of ownership in CATV.⁶⁷ Furthermore, the report favors ownership of CATV systems by Public Broadcasting Television stations⁶⁸ and other non-profit organizations.⁶⁹

2. *Participation in the Political Process.*—The Sloan Commission also made the controversial recommendation that the equal opportunities and fairness doctrines applied in broadcasting⁷⁰ should not apply to CATV.⁷¹ The reasons advanced for its positions are unsound.

The Commission reasoned that the fairness doctrine should not apply to CATV because CATV will provide an increased number of channels through which to express opinions.⁷² Furthermore, the Commission argued that requiring CATV to provide time for an opposing

61. *Id.* at 48-49.

62. See SLOAN COMMISSION ON CABLE COMMUNICATIONS, ON THE CABLE—THE TELEVISION OF ABUNDANCE 163 (1971) [hereinafter cited as ON THE CABLE].

63. *Id.* at 155.

64. *Id.* at 173.

65. *Id.* at 147-48, 176.

66. *Id.* at 174.

67. *Id.* at 148-49, 175-76.

68. *Id.* at 141.

69. *Id.*

70. For a discussion of the doctrines in the context of broadcasting see Barrow, *supra* note

31.

71. ON THE CABLE, *supra* note 62, at 178. The President's Task Force on Communications Policy did not consider whether participation in the political process should be a goal of CATV regulation.

72. ON THE CABLE, *supra* note 62, at 92.

view would discourage robust news reporting and public affairs programming.⁷³ An increased number of available channels does not mean, however, that the public will hear both sides of a controversial issue. If half the people hear one side of an issue on one channel, and the other half hears the other side on a different channel, neither group becomes well informed on the issue and the eventual decision likely will be unsound. Moreover, the fairness doctrine will not hamper CATV news reporting and public affairs programming. Broadcasters have made the same argument in attempts to rid themselves of their responsibility to serve the public interest.⁷⁴ However, a questionnaire sent by a congressional committee to all broadcasters elicited responses showing that the fairness doctrine does not inhibit the great majority from presenting programs on controversial issues.⁷⁵ In fact, the FCC should revoke the license of any broadcaster inhibited by the fairness doctrine from presenting programs on controversial issues for failure to serve the public interest. In so important a matter as the informing of our citizenry on controversial issues of public importance, CATV operators should be under a duty both to carry programs on these issues and to give reasonable time for the presentation of both sides.

The Sloan Commission sought to justify its recommendation that the equal opportunities doctrine should not apply to CATV on two grounds: (1) public access and rental channels will ensure candidates adequate opportunities for voter exposure, and (2) the equal opportunities doctrine in broadcasting discourages the allocation of any time to political candidates.⁷⁶ The equal opportunities doctrine contemplates that political candidates need an opportunity to reach substantially the same audience under equally persuasive circumstances. But a candidate renting channel "a" on Wednesday, will seldom reach the audience his opponent had on channel "b" last Sunday. Moreover, the discouragement broadcasters experience with the equal opportunities doctrine occurs only when there are many candidates for the same office, some of whom are candidates in name only. One proposed solution to the problem requires the broadcaster to grant access but permits him to vary the amount of time granted on the basis of demonstrated voter or petition strength.⁷⁷

In our free society, sound self-government depends upon an in-

73. *Id.* at 92-95.

74. *See* Barrow, *supra* note 31, at 480-95.

75. *Id.* at 486.

76. *See* ON THE CABLE, *supra* note 62, at 121-22.

77. For a proposed statute using this approach see Barrow, *supra* note 31, at 535-37.

formed citizenry and a fair election process. Thus our civic well being requires CATV service to encourage the active participation of each person in deciding vital issues.⁷⁸

III. THE FCC AND CATV: JURISDICTION AND REGULATION

Broadcasters complaining about the deleterious economic impact of CATV on television broadcast stations made the first attempt to induce the FCC to assert jurisdiction over CATV in *Frontier Broadcasting Co. v. Collier*.⁷⁹ The FCC, however, refused to assert jurisdiction, stating, "It is doubtful that the Commission could restrict or control the entry or operation of CATV systems in the interest of protecting or fostering television broadcasting service"⁸⁰ The FCC held that CATV was not a common carrier because the CATV operator, rather than the subscriber, determined the specific signals received and distributed by the CATV system.⁸¹ Further, the FCC ruled that CATV was not within the radio licensing provisions of the Communications Act because "such systems operate by means of wire lines and . . . involve no radio transmission."⁸²

The FCC reiterated its refusal to assert jurisdiction over CATV on the basis of its economic impact upon the broadcasting industry in the *CATV and TV Repeater Services Report*,⁸³ in which it stated:

In essence, the broadcasters' position shakes down to the fundamental proposition that they wish us to regulate in a manner favorable toward them and vis-a-vis any nonbroadcast competitive enterprise. Thus, for example, we might logically be requested to invoke a prohibition against . . . all the entities which compete with broadcasters for the time and attention of potential viewers and listeners. The logical absurdity of such a position requires no elaboration.⁸⁴

The FCC did admit that Congress has the power to regulate CATV, given its close relation to interstate commerce,⁸⁵ but concluded that Congress had not granted the FCC any such power and instead sought legislation to clarify the jurisdictional issue.⁸⁶ In 1959, Congress exten-

78. For additional views on regulation of CATV see L. JOHNSON, THE FUTURE OF CABLE TELEVISION: SOME PROBLEMS OF FEDERAL REGULATION (1970) (a report of the Rand Corporation prepared under a grant from the Ford Foundation).

79. 24 F.C.C. 251 (1958).

80. *Id.* at 253.

81. *Id.* at 254.

82. *Id.* at 255-56.

83. 26 F.C.C. 403 (1959).

84. *Id.* at 431.

85. *Id.* at 427.

86. *Id.* at 428, 438. A minor exception was the exercise by the FCC of control over technical standards for the purpose of preventing radio emissions which would interfere with broadcast signals. For a comprehensive review of the FCC's early regulatory treatment of CATV see

sively considered a bill for this purpose but returned it to committee.⁸⁷

A. Early Jurisdictional Theories

Nevertheless, as more CATV systems began operation, the justifications for regulation increased, and the regulatory ship gradually changed course 180 degrees.⁸⁸ Lacking a statute enacted in the light of the circumstances surrounding this monumental communications innovation, the FCC sought its jurisdictional bearings from landmarks set by Congress to guide AM radio. Thus, ruling without congressional guideposts adopted especially for CATV, the FCC has encountered substantial problems and the regulatory ship may yet founder on the jurisdictional shoals.

1. *Indirect Jurisdiction.*—In 1962, in *Carter Mountain Transmission Corp.*,⁸⁹ the FCC asserted “indirect” jurisdiction over microwave relay carriers used to import television signals for transmission by cable to subscribers. Having previously held that CATV is not a common carrier, the FCC did not exercise jurisdiction over CATV because it is a common carrier per se. Rather, the Commission held that it could regulate CATV “indirectly” through its licensing power over the auxiliary microwave relay carriers serving CATV. The jurisdictional theory underlying this approach is that CATV systems are mere extensions of microwave relay carrier or telephone lines carrying signals and, hence, CATV is engaged in “interstate communication by wire” within the meaning of the Communications Act of 1934.⁹⁰ Consequently, the FCC denied the microwave relay application, believing that the CATV system served by the relay would harm a local television station. On the basis of the *Carter Mountain* decision, the FCC began regulating CATV systems served by microwave relay carriers.⁹¹ Similarly, in 1968, the FCC regulated the leasing of telephone wires and facilities to CATV in order to control the CATV activities of telephone companies.⁹²

Hearings on H.R. 7715 Before the House Subcomm. on Communications and Power, 89th Cong., 1st Sess. 121 *et seq.* (1965); *Hearings on H.R. 12914, H.R. 13286, & H.R. 14201 Before the House Comm. on Interstate and Foreign Commerce*, 89th Cong., 2d Sess. 115 *et seq.* (1966).

87. S. 2653, 86th Cong., 1st Sess., 106 Cong. Rec. 10416-10436, 10520-10548 (1960).

88. For an excellent analysis of the jurisdiction of the FCC over CATV see Note, *Regulation of Community Antenna Television*, 70 COLUM. L. REV. 837, 856-75 (1970).

89. 32 F.C.C. 459 (1962), *aff'd* 321 F.2d 359 (D.C. Cir. 1962).

90. See 47 U.S.C. §§ 152, 153(a) (1970). See also Second Report and Order on CATV, 2 F.C.C.2d 725, 729, 793-97 (1966); materials cited note 95, *infra*.

91. Rules re Microwave Served CATV, 38 F.C.C. 685 (1965).

92. General Telephone Co., 13 F.C.C.2d 448 (1968), *aff'd* 413 F.2d 390 (D.C. Cir.), *cert. denied*, 369 U.S. 888 (1969).

2. “Ancillary” Jurisdiction.—“Indirect” jurisdiction hinges upon the FCC’s power to regulate common carriers. As a result, the common carrier statute and regulations constitute an inherent limitation upon FCC power. Jurisdiction to regulate CATV cablecasting in the public interest must rest upon some other jurisdictional basis. Hence, in its *Second Report and Order on CATV*,⁹³ the FCC asserted jurisdiction over all of CATV on the ground that its authority to regulate broadcasting gave it “ancillary” jurisdiction over CATV in any degree necessary to prevent frustration of its policies and regulations relating to broadcasting.⁹⁴ The FCC erroneously emphasized in the *Second Report* that regulation of the growing CATV industry was necessary to prevent impairment of over-the-air broadcasting service, especially that of the UHF stations.⁹⁵

3. *The Aftermath of United States v. Southwestern Cable Co.*—In *United States v. Southwestern Cable Co.*⁹⁶ the Supreme Court upheld both the “indirect” and “ancillary” jurisdictional theories. The Court emphasized that Congress had conferred broad power, which encompassed authority to regulate innovations in wire and radio service such as CATV, on the FCC.⁹⁷ Since only public interest regulations were

93. *Second Report and Order on CATV*, 2 F.C.C.2d 725 (1966).

94. *Id.* at 733-35.

95. *Id.* at 726, 737, 770, 781, 783, 793-97. Actually, CATV gives UHF broadcasters an advantage over VHF broadcasters because CATV must convert and carry all local broadcasting signals. Thus, UHF and VHF signals carried via cable are of the same quality. Furthermore, since CATV is expected to attain 40 to 60% penetration of its market, the UHF audience would be increased. It is really the VHF broadcasters who may be disadvantaged by development of CATV. They are typically network affiliates with a lion’s share of the viewers. The importation of the signals of network affiliated stations into markets not served by an affiliate of that network or independent broadcasting stations into markets having only network signals would divide viewers of VHF stations among a larger group of program offerings. The FCC’s asserted concern for the development of UHF is one of the saddest pages in the history of the regulation of broadcasting. UHF could not get off the ground because television receivers were manufactured to receive VHF only. Consequently, the set owner had to have his set wired and an antenna installed at considerable expense in order to receive a UHF signal. Set owners were not motivated to modify their sets because UHF stations could not offer attractive programs because advertisers would not pay for time to broadcast, since the viewers could not receive the signal. Obviously, the only way to break this chain of circumstances was to require that television receivers shipped in interstate commerce be wired to receive UHF as well as VHF. The FCC, however, maintained that it did not have the authority to require complete television sets. Congress also long refused to lift a hand to brighten the marquee of the 76 “dark theatre” channels. As a result, UHF entrepreneurs were forced into bankruptcy. The three national networks and their VHF affiliates consequently were protected from competition from the UHF. The FCC’s denial of authority to require all channel receivers is in marked contrast to rules with respect to the installation of receiving equipment on CATV and subscription television. *See, e.g.*, 37 Fed. Reg. 3270 (1972).

96. 392 U.S. 157 (1968).

97. *Id.* at 172-73.

at stake in *Southwestern Cable Co.*, the Court may say in the future that its decision relied solely on the ancillary theory of jurisdiction.⁹⁸

Nevertheless, the Supreme Court's holding that the FCC has jurisdiction to regulate CATV bore no glad tidings for CATV operators. New FCC regulations took the form of restrictions upon CATV's growth and development. For example, the FCC's 1966 rules prohibited CATV from importing television signals into any of the 100 largest television markets without prior FCC authorization.⁹⁹ Furthermore, the Commission only granted authorization after a showing that such importation was in the public interest and consistent with "the establishment and healthy maintenance of television broadcast service in the area."¹⁰⁰ In addition, the Commission required CATV to carry all local television broadcasts.¹⁰¹ As a result, CATV's plight resembled that of the would be swimmer:

"Mother, may I go out to swim?
Yes, my darling daughter:
Hang your clothes on a hickory limb
And don't go near the water."

In 1968, the FCC modified its earlier stance and proposed new rules permitting CATV systems within 35 miles of the 100 largest television markets to import distant television signals if the CATV operator obtained retransmission consent from the distant television station on a per program basis.¹⁰² In 1970, the FCC proposed a second alternative which permitted cable systems within 35 miles of the 100 largest markets to carry four distant, nonnetwork television signals if the CATV operator deleted all advertising from the imported signals and substituted advertising from local broadcasting stations.¹⁰³ Because of the technological difficulties and high costs involved in substituting advertising or obtaining consent on a per program basis, however, the proposed rules proved themselves to be impractical.

Overly restrictive regulation of innovations that compete with broadcasting is not a new tactic to the FCC. The Commission's treatment of pay television (STV) is a particularly good example. In 1955,

98. *See id.* at 178.

99. 47 C.F.R. § 74.1107 (Supp. 1971).

100. *Id.*

101. *Id.* § 74.1103.

102. Amendment of Part 74, Subpart K. of the Commission's Rules and Regulations Relative to Community Antenna Television Systems, 15 F.C.C.2d 417, 436 (1968).

103. Second further Notice of Proposed Rulemaking in Docket No. 18397-A, 24 F.C.C.2d 580 (1970).

the FCC authorized an experimental subscription television operation in Hartford, Connecticut, in order to study the potential impact of STV on "free" television.¹⁰⁴ After thirteen years of experimentation, STV had penetrated less than one percent of the television market, indicating that it would have minimal impact on conventional broadcasting.¹⁰⁵ Despite the long period of study, the FCC concluded that "the programming of a single over-the-air trial operation . . . cannot form the basis for completely certain predictions about the programming that would be shown if nationwide STV were authorized,"¹⁰⁶ a conclusion which, of course, was obvious from the very beginning. The FCC's flaccid attitude not only has irreparably harmed STV, but for all practical purposes may prohibit pay television on CATV.¹⁰⁷

B. Plenary Jurisdiction Over CATV

The FCC might argue that it has plenary jurisdiction over CATV.¹⁰⁸ The Communications Act gives the FCC authority to "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."¹⁰⁹ Since that provision appears in "Title I—General Provisions," a court could soundly conclude that it confers power beyond that granted in Title II, relating to common carriers, and Title III, relating to radio broadcasting. Moreover, the broad view of FCC power upheld in *Squthwestern Cable* reinforces the argument for plenary jurisdiction over CATV. Nevertheless, the FCC has reservations about the arguments. When the Commission issued its new CATV rules regulating the character of CATV programming, it did not rely on a plenary theory of jurisdiction. Instead, it purported to derive its authority from its ancillary power to control the effects of CATV on broadcasting. For example, the rule requiring CATV to originate programming begins: "No cable television system . . . shall carry the signal of any television broadcast station unless the system also operates

104. Advertising-financed television is popularly called "free" television. It is free only in the sense that there is no direct charge to the viewer. Conventional television, however, is not free. Whether an advertiser pays for capital equipment, raw materials, labor or advertising, a well-kept account book knows no difference. Each cost item finds its way into the price charged to the consumer.

105. Amendment of Part 73 of the Commission's Rules and Regulations to Provide for Subscription Television Service, 10 R.R.2d, ¶ 64, at 1617 (F.C.C., 1967).

106. *Id.* ¶ 48.

107. *Id.* ¶ 304.

108. For an analysis reaching this conclusion see Note, *supra* note 88, at 864.

109. 47 U.S.C. § 154(i) (1970).

to a significant extent as a local outlet by originating cablecasting

...¹¹⁰

Indeed, unless Congress amends the Act and makes the FCC's authority to regulate CATV explicit, confusion over the jurisdictional issue will continue. *Midwest Video Corporation v. United States*¹¹¹ illustrates the dilemma. In 1968, the FCC amended its CATV rules to require CATV operators who carry television signals also to originate programming.¹¹² The Eighth Circuit Court of Appeals denied the FCC any power to issue CATV rules not "reasonably ancillary to its responsibilities in the broadcasting field."¹¹³ The Supreme Court has granted certiorari and probably will reverse the Eighth Circuit, thus sustaining the broad view of jurisdiction expressed in *Southwestern Cable*. Congress, however, should follow a sounder course and assume its legislative responsibility toward what could become the greatest communications innovation since the printing press. Moreover, the appropriate congressional committees have followed the development and regulation of CATV closely and could provide statutory standards without excessive hearings and debate.

C. *The Copyright Problems of CATV*

The Copyright Act¹¹⁴ gives a copyright holder an exclusive right to perform the copyrighted work in public for a profit.¹¹⁵ In *Fortnightly Corp. v. United Artists Television, Inc.*,¹¹⁶ a copyright holder alleged that CATV operators who captured over-the-air broadcasts and retransmitted them over the cable violated this copyright. The Supreme Court disagreed and held that retransmission by CATV merely extended the performance by the broadcaster and did not constitute an illegal "second performance" within the meaning of the Copyright Act.¹¹⁷ The FCC must regulate the retransmission of broadcast signals

110. 37 Fed. Reg. 3287 (1972), to be codified at 47 C.F.R. § 76.201(a).

111. 441 F.2d 1322 (8th Cir. 1971), cert. granted, 404 U.S. 1014 (Jan. 10, 1972).

112. 15 F.C.C.2d 417, 422 (1968).

113. *Midwest Video Corp. v. United States*, 441 F.2d 1322, 1326 (8th Cir. 1971).

114. 17 U.S.C. §§ 1-216 (1970).

115. 17 U.S.C. § 1(c) (1970).

116. 392 U.S. 390 (1968). Substantial treatments of the copyright problem are contained in 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: On a Clear Day You Can See Forever*, 52 *VA. L. REV.* 1505 (1966).

117. 392 U.S. at 399-401. In *Columbia Broadcasting Sys. v. TelePrompTer*, Civil No. 64-3814 (S.D.N.Y., filed May 2, 1972), discussed in *BROADCASTING*, May 8, 1972, at 19, a refinement on the issue in *Fortnightly* was involved. *TelePrompTer* involved distant signals captured at the origination point rather than in the vicinity of the community served by the CATV system. The court held that the capture and retransmission of the signals did not infringe the copyright.

by CATV consistently with the *Fortnightly* decision. Indeed, justifications for two FCC policies flow from the case. FCC rules limiting the importation of distant signals supposedly restrict the audience to an area where the copyright fee is paid.¹¹⁸ Similarly, FCC rules requiring CATV systems to carry all local television signals supposedly protect the copyright by assuring a local audience to purchasers of the copyright.¹¹⁹ On the other hand, courts should invalidate FCC rules which operate to extend the copyright protection beyond that provided in *Fortnightly*.¹²⁰

The *Fortnightly* case does not, of course, preclude amendment of the Copyright Act to give copyright holders protection from retransmission of broadcast signals by CATV operators. In fact, the case prompted a number of legislators to introduce bills extending the coverage of the Copyright Act to CATV retransmissions. Congress, however, deferred action in the hope that the industries involved would voluntarily agree on legislation acceptable to all.¹²¹ That hope bore fruit when such an agreement was reached.¹²² Under the terms of the agreement, CATV recognizes its obligation to pay reasonable copyright fees; however, copyright owners must grant compulsory licenses enabling CATV to retransmit those local and distant signals authorized by the FCC.¹²³ Moreover, if the parties cannot agree on a reasonable fee, they must submit the issue to compulsory arbitration.¹²⁴ The FCC anticipates legislation complying with the terms of the agreement.¹²⁵ Regardless of the terms of the agreement, however, Congress should have allowed all interested parties to help shape the legislation and therefore should have invited representatives of the public sector to participate.

IV. THE NEW CATV RULES AND RECOMMENDED CHANGES

The FCC adopted the new CATV rules after holding extensive hearings on two prior rule proposals¹²⁶ and after representatives of the industries involved reached a compromise agreement concerning the scope of the new rules.¹²⁷ In general, the new rules preserve the regula-

118. See Lipper, *The Congress, The Court, and The Commissioners: A Legacy of Fortnightly*, 44 N.Y.U.L. REV. 521, 528-29 (1969).

119. See *Black Hills Video Corp. v. FCC*, 399 F.2d 65 (8th Cir. 1968).

120. *Id.*

121. 37 Fed. Reg. 3260 (1972).

122. 37 Fed. Reg. 3260, 3341 (1972).

123. 37 Fed. Reg. 3341 (1972).

124. 37 Fed. Reg. 3341 (1972) (Appendix D).

125. 37 Fed. Reg. 3260 (1972).

126. See text accompanying notes 100-04 *supra*.

127. 37 Fed. Reg. 3260-61, 3341 (1972).

tory framework of earlier proposals¹²⁸ and require CATV to carry all local and other significantly viewed television signals. The rules extend protection against duplication of local programming to syndicated as well as network television programs. Furthermore, they limit the importation of distant television signals and require CATV to originate substantial programming. The new rules do, however, permit per-program charges (pay-TV) on a restricted basis and advertising on programs originated by the CATV system. In addition, CATV must provide three free channels for public access, education, and government. The rules adopt the equal opportunities and fairness doctrines and the operator must lease rental channels on a nondiscriminatory basis. Technologically, each CATV system must have a broadband capacity of at least 20 channels and the potential for two-way digital communication. Moreover, it must meet prescribed technical standards intended to assure quality reception. Finally, the new rules give state and local governments authority to determine the qualifications of franchisees and power to grant franchises and determine subscription fees. Specific aspects of the rules, however, deserve more detailed treatment.

A. *Television Broadcast Signal Carriage*

Once CATV establishes itself in the largest viewing markets, information and entertainment utilities and other CATV supportive programming services will develop rapidly. Until that time, however, CATV's ability to attract subscribers will depend substantially on the degree to which the FCC permits it to import locally unavailable television signals. By granting CATV permission to import a substantial number of such signals, the FCC could have triggered the rapid growth and development of CATV. Unfortunately, however, the television broadcasters and networks convinced the FCC that substantial signal importation would cause them economic injury and decrease the quality of conventional television.¹²⁹ Therefore, the FCC restricted the importa-

128. The basic regulatory framework of the new rules is substantially the same as that provided by the 1966 rules which required CATV to carry local television signals and gave local television stations protection against duplication of their programs on CATV. The 1966 rules also limited importation of distant television signals and permitted state and local governments to franchise CATV operators and regulate their subscription fees. See Second Report and Order on CATV, 2 F.C.C.2d 725 (1966). For a commendable comment on the new rules, printed before the Federal Register could publish the rules see Comment, *Federal and State Regulation of Cable Television: An Analysis of the New FCC Rules*, 1971 DUKE L.J. 1151. For a description of the rules see WEEKLY TELEVISION DIGEST WITH CONSUMER ELECTRONICS, August 9, 1971, (entire issue consists of reprint of an August 5, 1971 letter from the FCC to Congress) [hereinafter cited as FCC Letter to Congress].

129. 37 Fed. Reg. 3259-67 (1972).

tion of distant television signals and excluded much of the programming broadcast over them.

1. *Limitations on the Number of Signals Carried.*—In the 50 largest viewing markets, CATV systems must carry all commercial and educational television signals in the local market and television signals from other markets that are significantly viewed in the area served by the system.¹³⁰ The new rules also permit the CATV system to import enough commercial television signals to provide—when added together with the local and significantly viewed television signals carried on the cable—a total of three full network affiliated and three independent stations. In addition, the CATV system may import as many as two independent television signals—reduced, however, by the total of network and independent television signals imported in order to aggregate the three network and three independent stations.¹³¹ For example, in Cincinnati-Newport, the seventeenth largest market, there are three full network affiliated and one independent television station, with no significantly viewed distant television signal. In order to aggregate the three network and three independent stations, the rules would permit two independent television signals to be imported into the area. However, those are the only commercial television signals that a CATV system in the Cincinnati-Newport area could import. In addition, program exclusivity and sports blackout provisions¹³² of the new rules provide that only portions of the program schedules of the two imported stations may be carried on the cable. As a result, CATV operators in the Cincinnati-Newport area will find it difficult to persuade viewers receiving three network and one independent television signals to subscribe to CATV when the only additional commercial television program fare will be parts of the schedules of two independent stations.

2. *Limitations on the Type of Programs Carried.*—Other new rules adopted by the FCC prevent CATV from carrying the full program schedule of imported distant television stations. Thus, if an im-

130. See 37 Fed. Reg. 3262 (1972); 37 Fed. Reg. 3284-85 (1972); *to be codified at* 47 C.F.R. § 76.61.

131. 37 Fed. Reg. 3284-85 (1972), *to be codified at* 47 C.F.R. § 76.61. In the 51st to the 100th largest television markets, the carriage provisions are essentially the same except that 2 rather than 3 independent stations are aggregated. 37 Fed. Reg. 3285 (1972), *to be codified at* 47 C.F.R. § 76.63. Cable systems located in markets below the top 100 markets also have similar carriage provisions except that the entire complement of commercial stations carried cannot exceed 3 network and one independent, 37 Fed. Reg. 3284 (1972), *to be codified at* 47 C.F.R. § 76.59. A CATV system serving an area receiving no television signals can import an unlimited number of signals. 37 Fed. Reg. 3284 (1972), *to be codified at* 47 C.F.R. § 76.57. However, an area with a population so small that no television signal serves it, probably could not support financially a CATV system importing more than 3 network and one independent signals.

132. See text accompanying note 133 *infra*.

ported distant signal carries network programming that duplicates the network programming of a local television station, the CATV system may not cablecast the local network program on another channel simultaneously or, in some circumstances, on the same day.¹³³ Beyond this, the FCC will also give full effect to contracts between local television stations and CATV operators that give even greater degrees of network exclusivity.¹³⁴ The rules give syndicated programming even greater protection. They provide that a CATV system in the top 50 markets may not broadcast a syndicated program for one year after the program was first licensed. Moreover, they prohibit any CATV system in any other major television market from carrying a syndicated program for as long as a television station or copyright holder in the same market has an exclusive license.¹³⁵ In regard to sports events, the rules black out CATV broadcasts of home games into the home territory.¹³⁶ Finally, leapfrogging rules¹³⁷ further limit CATV's choice of distant television signals by requiring that whenever it imports the signal of a network affiliate, it must import the signal of the closest such affiliate.¹³⁸ Similarly, if the imported signal is that of an independent station from within one of the top 25 television markets, the CATV operator must capture an independent signal from the nearest such market.¹³⁹

3. *Effect of the Rules' Limitations on CATV Service.*—Nearly all of the 100 largest television markets receive the three network signals over the air; moreover, most of the 50 largest television markets similarly receive at least one independent television signal. Hence, in the 100 largest markets, the FCC's new signal carriage rules, with rare exception, will operate to permit the importation of only two distant commercial television signals, both of which typically will be independent signals.¹⁴⁰ The FCC adopted this standard because "[i]t appears that two signals not available in the community is the minimum amount of new service needed to attract large amounts of investment capital for the construction of new systems and to open the way for the full develop-

133. 37 Fed. Reg. 3285-86 (1972), to be codified at 47 C.F.R. §§ 76.91, -.93, -.95, -.97 (1972). See also 37 Fed. Reg. 3266-67 (1972).

134. 37 Fed. Reg. 3286 (1972), to be codified at 47 C.F.R. § 76.95.

135. 37 Fed. Reg. 3286 (1972), to be codified at 47 C.F.R. §§ 76.151, -.153 (1972).

136. 37 Fed. Reg. 3258-59.

137. See 37 Fed. Reg. 3265 (1972). Two significant proposed limitations on CATV, retransmission consent on a program by program basis and the deletion and insertion of advertising on imported distant signals, were abandoned in the new rules. Comments and experiments indicated that these procedures were costly and impractical. See 37 Fed. Reg. 3254-56, 3260, ¶ 59 (1972).

138. 37 Fed. Reg. 3265 (1972).

139. *Id.*

140. See FCC Letter to Congress, *supra* note 128, at 16-19.

ment of cable's potential."¹⁴¹ The FCC did, in fact, recognize the crucial question—whether the importation of two distant signals will attract sufficient subscribers, who in turn will furnish and attract capital. Its conclusion, however, may not withstand scrutiny. CATV's supportive information and entertainment utility services cannot develop substantially until CATV establishes itself in most of the 100 largest metropolitan areas. Since the three networks and at least one independent station already serve most of those markets, viewers may be reluctant to subscribe to a CATV service initially offering only an additional two independent television signals, particularly since the programming of those two signals partially will be blacked out by network and syndication programming protection.

The FCC's restrictive policy toward CATV broadcasts of distant television signals substantially resembles its inept treatment of UHF television.¹⁴² Nevertheless, the FCC does recognize that its past restrictions of CATV, based on the premise that CATV might impair the development of UHF television, were ill-founded.¹⁴³ The Commission now frankly admits that it is unable to predict the eventual impact of CATV on VHF television.¹⁴⁴ Despite its uncertainty, the FCC unhesitatingly seeks to protect television from the speculative economic impact that the broadcasters and networks contend CATV would have upon the television industry.¹⁴⁵ In fact, a Rand study concluded that the importation of four distant television signals—twice the usual number imported under the new standards adopted by the FCC—would cause only an eighteen percent revenue loss for local television stations in this decade and an even smaller loss in the next.¹⁴⁶ That same study also found that CATV would least affect local television in the larger markets.¹⁴⁷ At the same time, the study determined that CATV would minimally affect UHF network affiliates and substantially benefit local independent UHF stations.¹⁴⁸ The Sloan Commission also disagreed with the FCC's unswerving protection of the existing broadcast structure. Its recommendations sought to maximize the total public service provided by television *and* CATV, even at the expense of undermining the exist-

141. 37 Fed. Reg. 3265 (1972).

142. See note 95 *supra*.

143. See 37 Fed. Reg. 3261 (1972).

144. *Id.*

145. *Id.*

146. R. PARK, POTENTIAL IMPACT OF CABLE GROWTH ON TELEVISION BROADCASTING 74-80 (1970) (a report prepared by the Rand Corporation under a grant from the Ford Foundation); 37 Fed. Reg. 3261, ¶ 69 (1972).

147. R. PARK, *supra* note 147, at 80.

148. *Id.* at 80.

ing broadcasting structure.¹⁴⁹ Likewise, the Justice Department admonished the FCC to allow CATV to compete with over-the-air broadcasting and to regulate CATV only to the extent necessary to assure a minimum of "one, two or perhaps even three" over-the-air television stations.¹⁵⁰

4. *Limitations on Signal Importation and Their Effect on First Amendment Freedoms.*—The FCC's strict limitations on the importation of distant television signals pose substantial problems regarding the first amendment. Government regulation that opens the channels of communication contributes to freedom of speech. Thus, in *Red Lion Broadcasting Co. v. FCC*,¹⁵¹ the Supreme Court held that the fairness doctrine in broadcasting did not violate the guarantees of freedom of speech and press. The Court emphasized that the rights of viewers and listeners to participate actively in the free interchange of ideas were superior to those rights asserted by the broadcasters.¹⁵² On the other hand, government regulation that clogs the channels of communication violates the freedoms of speech and press. Therefore, *Weaver v. Jordan*¹⁵³ held that a California statute prohibiting pay television was unconstitutional because it abridged the freedom of speech. Similarly, in *Business Executives' Move for Vietnam Peace v. FCC*,¹⁵⁴ the District of Columbia Circuit Court of Appeals reversed on first amendment grounds an FCC decision sustaining a broadcaster's refusal to broadcast statements of opinion on important issues in commercial time periods for the usual rate.

In a similar vein, the new CATV rules substantially restrict the opportunity to speak via cable. Equally as important, the listeners and

149. "In our consideration of all these issues [the impact of cable on over-the-air television], we find ourselves in clear conflict with the FCC. In its report to Congress, the FCC has written '. . . our objective throughout has been to find a way of opening up cable's potential to serve the public without at the same time undermining the foundation of the existing over-the-air broadcast structure.' This [the Sloan] Commission does not feel the weight of any such objective. We have sought to maximize the service to the public that can be provided by television as a whole [i.e., both over-the-air television and CATV]. If, in that process of maximization, the existing structure of over-the-air television is undermined, we believe that the public interest must still remain paramount." ON THE CABLE, *supra* note 62, at 80-81.

150. See 37 Fed. Reg. 3259 (1972).

151. 395 U.S. 367 (1969).

152. "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. . . . It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee." *Id.* at 390.

153. 64 Cal. 2d 235, 411 P.2d 289, 49 Cal. Rptr. 537, *cert. denied*, 385 U.S. 844 (1966).

154. 25 F.C.C.2d 242 (1970), *rev'd*, 450 F.2d 642 (D.C. Cir. 1971), *noted in* 40 U. CIN. L. REV. 870 (1971).

viewers of CATV, whose rights freely to receive ideas were recognized by the *Red Lion* decision, cannot fully participate in the marketplace of ideas. The FCC seeks to justify its limitation of CATV on the ground that this limitation protects over-the-air television and thereby contributes to the public interest.¹⁵⁵

Certainly, the FCC cannot limit the importation of distant television signals beyond that point which maximizes the overall public interest. Whenever FCC regulation exceeds that optimum point, it then restricts the free flow of ideas in order to promote the economic interests of over-the-air television at CATV's expense. In its explanation of the new rules, the FCC stated that restriction in that degree might become necessary.¹⁵⁶ But the merit of that opinion appears dubious, because in *FCC v. Sanders Bros. Radio Station*,¹⁵⁷ the Supreme Court held that the FCC cannot shield broadcasters from lawfully exercised competitive forces. Although *Southwestern Cable* held that the FCC had jurisdiction to regulate CATV,¹⁵⁸ the FCC regulation involved was merely an interim order forbidding the importation of distant television signals into the San Diego area until the Commission could hold hearings and ascertain its eventual impact on broadcasting in San Diego.¹⁵⁹ Indeed, the Supreme Court has not yet recognized any power that permits the FCC to prevent most of the American people from receiving information by limiting importation of distant television signals without contravening the guarantee of free speech. In fact, the Supreme Court has stated in other contexts that "any attempt to restrict [freedom of speech] must be justified by [a] clear public interest, threatened not doubtfully or remotely, but by [a] clear and present danger."¹⁶⁰ When fundamental-constitutional rights are involved, the Court will not consider itself bound by legislative judgments pertaining to the necessity for a restriction upon those rights.¹⁶¹ In view of the substantial role played by CATV in furthering free speech, the Supreme Court likely would take a dim view toward any FCC limitation upon the free flow of ideas and subject

155. 37 Fed. Reg. 3260, ¶ 60 (1972).

156. See 37 Fed. Reg. 3261, ¶ 72 (1972).

157. 309 U.S. 470 (1940).

158. 392 U.S. 157, 172-73 (1968).

159. *Id.* at 179.

160. *Thomas v. Collins*, 323 U.S. 516, 530 (1945). See also *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 639 (1943), in which the Supreme Court stated that first amendment rights "are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect."

161. See, e.g., *Thomas v. Collins*, 323 U.S. 516, 531 (1945); *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 639 (1943); *Thornhill v. Alabama*, 310 U.S. 88, 96 (1940); *Schneider v. State*, 308 U.S. 147, 161 (1939).

the limitation to more rigorous scrutiny than it normally applies to the routine adjudicatory and rule making decisions of the FCC. Certainly, whenever the government imposes restrictions upon the freedom of speech, it should apply the restrictions only in absolutely the smallest degree necessary to achieve its purpose. In the context of broadcasting, if experience shows that further restrictions on CATV vis-à-vis over-the-air television are necessary in order to further the overall public interest, then—but only then—could the FCC validly impose an additional degree of restriction.

Finally, it is grossly discriminatory to impose a restriction on one medium of communication because that medium might have an adverse impact on another. Indeed, such treatment might well be a sufficient basis in itself for invalidating the discriminatory limitations on CATV.¹⁶²

B. Program Origination by CATV

The new rules require CATV to originate programming “to a significant extent”¹⁶³ and maintain facilities for the local, live production of programs.¹⁶⁴ During the hearings on the new rules, some commentators opposed rules requiring CATV to originate programming and advised the Commission to limit CATV’s role to that of a common carrier.¹⁶⁵ Concerns that CATV would gain so much control over program production and selection that it might impede the development by others of information and entertainment utility services for CATV use prompted those commentators to oppose rules requiring CATV to originate programming. The FCC, however, rejected their recommendations, saying that in the present state of the art the CATV operators, rather than potential information and utility services, were best equipped to originate programming.¹⁶⁶

In addition to imposing a nondelegable duty to originate programming on broadcasters,¹⁶⁷ the FCC seeks to achieve for each broadcaster the character of a local institution having a grass-roots interest in the

162. *Cf. International Business Machines Corp. v. United States*, 343 F.2d 914 (Ct. Cl. 1965), *cert. denied*, 382 U.S. 1028 (1966) (Contrasting treatment of 2 taxpayers in similar factual contexts held invalid because discriminatory).

163. 37 Fed. Reg. 3287 (1972), *to be codified at* 47 C.F.R. § 76.201.

164. *Id.* The FCC bases its power to require CATV to originate programming upon CATV’s carriage of distant television signals and its “ancillary” jurisdiction over CATV. *See also* note 110 *supra*, and accompanying text.

165. *See* 37 Fed. Reg. 3272, ¶ 146 (1972).

166. *Id.*

167. 37 Fed. Reg. 3287 (1972), *to be codified at* 47 C.F.R. § 76.201(a).

service and program needs of the community he serves.¹⁶⁸ Thus, the FCC describes the broadcaster's responsibility for programming as a "diligent, positive, and continuing effort by the licensee to discover and fulfill the tastes, needs, and desires of his community or service area, for broadcast service."¹⁶⁹

The FCC should explicitly impress a similar character and responsibility upon CATV operators. The large number of CATV channels provides an opportunity for the utilization of a variety of concepts to achieve greater service of the public interest. The new rules make free channels available for public access, educational, and governmental programs.¹⁷⁰ Similarly, the rules require other channels to be leased on a nondiscriminatory basis.¹⁷¹ Furthermore, information and entertainment utilities will offer services to subscribers using leased channels. These free access and common carrier concepts should not, however, supplant the duty of a CATV operator to ascertain and supply the programming needs of his community. Actually, unless the FCC imposes this duty on CATV, it will tend to develop as a carrier of over-the-air television signals and industrial-commercial-financial services and sales information. Instead, the FCC has wisely ruled that CATV should serve all these purposes, including the origination of local, live programming.

The FCC should, however, define more quantitatively the extent of CATV's duty to originate programming. The applicable rule provides that the operator shall originate programming "to a significant extent" and that this programming "shall be limited to one or more designated channels which may be used for no other purpose."¹⁷² The standard is too vague and indefinite. Finally, the FCC should concretize requirements specifying the types of originated programming—for example, news and public affairs—which will best serve the public interest.¹⁷³

C. Per Program Charges

Ordinarily, the CATV operator provides general service for a monthly fee. In addition, the new rules permit him to make a per

168. HOUSE NETWORK BROADCASTING REPORT, *supra* note 30, at 124-27.

169. F.C.C., Public Notice B, July 29, 1960, *reprinted in* H.R. REP. NO. 281, 88th Cong., 1st Sess. 157, 170 (1963).

170. *See* note 187 *infra*, and accompanying text.

171. *See* note 199 *infra*, and accompanying text.

172. 37 Fed. Reg. 3287 (1972), *to be codified at* 47 C.F.R. § 76.201.

173. The FCC does have specific requirements regarding the types of programming best calculated to serve the public interest for the broadcasting industry. *See* FCC, Public Notice B, *supra* note 169, at 168.

program charge for some special programs on a very limited basis.¹⁷⁴ The FCC long has lent a sensitive ear to broadcasters' concerns that CATV would become a back door to pay-TV.¹⁷⁵ The new rules continue to reflect that sensitivity. For example, they substantially grant over-the-air television a monopoly on the use of feature films, film series, and sporting events.¹⁷⁶ They do not allow CATV to cablecast a feature film released from two to ten years prior to the desired cablecast except "upon a convincing showing to the Commission that [a] bona fide attempt has been made to sell the films for conventional television broadcasting and that they have been refused," or that the owner of the exhibition rights to the films will not permit their exhibition on over-the-air television.¹⁷⁷ The CATV operator may carry feature films released during the two-year period preceding the date of their proposed cablecast for a per program charge, but producers typically would not license such feature films to CATV because CATV broadcast would undermine their theatre market. Moreover, the new rules allow CATV to cablecast only one feature film released more than ten years prior to the cablecast during each calendar month.¹⁷⁸ Similarly, the rules prohibit the cablecast of sports events for a fee if they were televised live on a nonsubscription basis during a two-year period preceding the desired cablecast.¹⁷⁹ Finally, the rules do not permit the CATV operator to cablecast a series of programs at a per program charge,¹⁸⁰ nor do they permit advertising on per-program charge cablecasts other than announcements of coming per-program charge attractions.¹⁸¹

The virtual monopoly given to conventional television over the use of feature films, film series, and sports events on a per-program charge basis will influence CATV to seek programming not available over-the-air. For example, CATV broadcasts of legitimate theatre, opera, symphony, and boxing matches would add variety to programming and advance the overall public interest. Nevertheless, the FCC's per program charge cablecasting rule may violate the antitrust laws.¹⁸² If holders of the exhibition rights to films released from two to ten years prior to the proposed exhibition date have no objection to exhibition over-the-

174. See 37 Fed. Reg. 3288-89 (1972), to be codified at 47 C.F.R. § 76.225.

175. See notes 104-07 *supra*, and accompanying text.

176. See 37 Fed. Reg. 3288-89 (1972), to be codified at 47 C.F.R. § 76.225.

177. 37 Fed. Reg. 3288 (1972), to be codified at 47 C.F.R. § 76.225(a)(i).

178. *Id.*

179. 37 Fed. Reg. 3288 (1972), to be codified at 47 C.F.R. § 76.225(a)(2).

180. 37 Fed. Reg. 3288 (1972), to be codified at 47 C.F.R. § 76.225(a)(3).

181. 37 Fed. Reg. 3288 (1972), to be codified at 47 C.F.R. § 76.225(a)(5).

182. See note 29 *supra*, and accompanying text.

air, but simply prefer to grant the exhibition rights to CATV operators planning to charge viewers on a per program basis, the FCC rule requiring them to make bona fide efforts to sell the rights to over-the-air television prior to granting them to CATV limits their market and in effect excludes CATV from the market altogether. Since neither broadcasting nor CATV is subject to pervasive regulation, the antitrust laws are applicable to both.¹⁸³ Accordingly, when opportunity to broadcast feature films, film series, and sports events given by the FCC to over-the-air television is no greater than necessary to further the overall public interest in the combined service of over-the-air television and CATV, then the protection given is valid as a proper accommodation of their regulation by the FCC. If the opportunity to broadcast feature films, film series, and sports events granted to either over-the-air broadcasting or CATV favors either industry at the expense of the other, without furthering the overall public interest in service by the combined industries, then the undue restraint on freedom of the film market and the opportunity of the other industry to compete therein ought to be held violative of the antitrust laws.

D. Advertising

The new rules permit CATV to carry advertising material liberally. On the free channels for public access and educational and governmental programming, advertising is not permitted.¹⁸⁴ The rules permit the CATV operator to carry advertising on originated cablecasts only at the beginning and end of the cablecast and at natural intermissions or other breaks in the program¹⁸⁵—a limitation which will make viewing more pleasant and could be extended beneficially to over-the-air broadcasting. The FCC left the advertising pattern of leased channels open to experimentation by CATV operators.¹⁸⁶ For example, a CATV operator might devote a channel or channels exclusively to advertising, broadcasting specific classification of goods and services according to a known time schedule.

E. Free Channels

The new rules require the CATV operator to dedicate three chan-

183. See note 29 *supra*; cf. *United States v. Radio Corp. of Am.*, 358 U.S. 334 (1959) (The Department of Justice has primary jurisdiction in antitrust actions against broadcasters).

184. 37 Fed. Reg. 3289 (1972), to be codified at 47 C.F.R. § 76.251 (11)(i), (ii).

185. 37 Fed. Reg. 3288 (1972), to be codified at 47 C.F.R. § 76.217.

186. See 37 Fed. Reg. 3271, ¶ 138 (1972).

nels for use without charge.¹⁸⁷ One channel must be a public access or "soapbox" channel. The operator must provide access to the channel on a nondiscriminatory basis. In order to facilitate its public use, he must maintain the minimum facilities and equipment necessary for program production;¹⁸⁸ if the program exceeds five minutes in length, however, he may assess the user for production costs but may make no charge for use of the channel itself.¹⁸⁹ The rules require a second channel for local educational authorities and a third is reserved for use by local governments. The CATV operator must permit free use of the educational and governmental channels for five years after completion of the system's basic trunk line.¹⁹⁰ In addition, when all of the three channels are in use for four out of the five weekdays for 80 percent of the time during any consecutive three-hour period for six consecutive weeks, the operator must dedicate another channel for the needed purpose or purposes.¹⁹¹

The CATV operator cannot control the content of programming on the three free channels. He must, however, establish rules providing for nondiscriminatory access and prohibiting advertising, lotteries and obscenity on the three channels.¹⁹² Further, he must file his rules with the FCC and allow the public to inspect them at his office.¹⁹³ Lack of control over program content on the public access channel has caused CATV operators to voice concerns that someone might sue them for libel because of statements made from the CATV "soapbox."¹⁹⁴ Since any utterance on the public access channel probably would involve "a matter of public or general interest," however, a libelled plaintiff would have to overcome the substantial burden of imputing "actual malice" to the CATV operator in order to recover from him.¹⁹⁵ Nevertheless, Congress should remove any doubt about the liability of CATV operators for libel on the free access channel by adopting appropriate legislation.

F. The Equal Opportunities and Fairness Doctrines

Almost from the beginning of broadcast regulation, the FCC re-

187. 37 Fed. Reg. 3289 (1972) *to be codified at* 47 C.F.R. § 76.251(a)(4)-(6).

188. 37 Fed. Reg. 3289 (1972), *to be codified at* 47 C.F.R. § 76.251(a)(4).

189. 37 Fed. Reg. 3289 (1972), *to be codified at* 47 C.F.R. § 76.251(a)(10).

190. 37 Fed. Reg. 3289 (1972), *to be codified at* 47 C.F.R. § 76.251(a)(8).

191. *Id.*

192. 37 Fed. Reg. 3289 (1972), *to be codified at* 47 C.F.R. § 76.251(a)(11).

193. *Id.*

194. *See* 37 Fed. Reg. 3271, ¶ 140-41 (1972).

195. *See* *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971) (actual malice test applied to radio station).

quired broadcasters to provide opposing political candidates with equal opportunities to use broadcasting facilities for political purposes and to observe fairness in the presentation of programs involving controversial issues of public importance by providing reasonable time to present both sides of the issues.¹⁹⁶ In the new rules, the FCC applies the equal opportunities and fairness doctrines to CATV in the same manner and to the same extent that they apply to broadcasting.¹⁹⁷

The public should commend the FCC for its appreciation of the impact that CATV could have on deciding controversial issues of public importance and on the political process.¹⁹⁸ The potential of CATV to provide a "town meeting" in which citizens could consider local political, social, and economic issues vastly exceeds that of over-the-air broadcasting. Its virtue of interactive two-way communication can enable citizens to participate actively in the decision-making process and make their self-fulfillment the capstone of the public interest. Unfortunately, the concentration of power into the hands of elites has substantially diminished the role of the individual in decision-making. CATV's most exciting prospect is its potential to restore the individual to his rightful role in that process. It was therefore of utmost importance that the FCC apply the equal opportunities and fairness doctrines to CATV. Moreover, as CATV continues to develop, the FCC should seek new ways to utilize it to provide a more vital political process. If interactive two-way communication does bring back the "town meeting," all of the electorate should have access to CATV and the appropriate response equipment.

G. Leased Access Channels

The CATV operator must offer channels for lease on a nondiscriminatory basis¹⁹⁹ and establish rules specifying "an appropriate rate schedule."²⁰⁰ Although the local franchising authority is expressly authorized to regulate the fees charged to subscribers,²⁰¹ it has no express authority to control the rates charged to lessees of channels. Nevertheless, the FCC apparently does not plan to regulate the rates charged to lessees. CATV's resulting freedom to establish rates for the lease of

196. See generally Barrow, *supra* note 31.

197. See 37 Fed. Reg. 3287-88 (1972), to be codified at 47 C.F.R. §§ 76.205, -209.

198. Some authorities recommended that the equal opportunities and fairness doctrines should not be applied to CATV. See notes 70-78 *supra*, and accompanying text.

199. 37 Fed. Reg. 3289 (1972), to be codified at 47 C.F.R. § 76.251(a)(7), (11)(iii).

200. 37 Fed. Reg. 3289 (1972), to be codified at 47 C.F.R. § 76.251(a)(11)(iii).

201. 37 Fed. Reg. 3281 (1972), to be codified at 47 C.F.R. § 76.31(a)(4).

channels is unique in public utility regulation. No doubt the FCC considers rate regulation for leased channels unnecessary at the current stage of CATV development. Absent FCC control, the local franchising authority could theoretically franchise more than one CATV operator and thereby provide a competitive rate structure. That tactic, however, is not economically feasible, and since the number of available channels likely will exceed demand for some time, excess supply will tend to hold rates in line.

“Nondiscriminatory” access connotes the application of a uniform rate schedule, but “an appropriate rate schedule” suggests that different rates could be charged different types of lessees. Nonprofit institutions may not be able to compete with profit-making institutions for access to leased channels. Schools and universities view CATV as an opportunity to increase their instructional programs, using a “university without walls” concept. Since educational television stations are limited to a single over-the-air channel, they may wish to rent several CATV channels in order to increase their educational services. In addition, educational television stations apparently will not have access to the educational access channel. On the other hand, CATV’s great potential to serve industrial, commercial and financial corporations will result in heavy demands for the use of CATV channels in profit-making endeavors. In time, the fee that profit making enterprises are willing to pay for cable use will set the rates for everyone else as well. Nonprofit institutions cannot financially compete with profit making enterprises and pay the high rates a CATV operator could extract from a profit maker. Since the FCC will not permit state and local governments to regulate the use of leased channels,²⁰² further rate and access regulation must occur at the federal level. Accordingly, the FCC should amend its rules to provide that the rates charged by CATV for leased channels can vary to account for the public interest in the uses being made of the cable—for example, education or business—and the character of the lessee—for example, nonprofit or profit making. In addition, the FCC should also amend the rules to permit an appropriate governmental authority, probably the franchising authority, to review CATV rate schedules and establish reasonable rates in appropriate cases, determined after a due process hearing. Meanwhile, the FCC, incident to issuance of the certificate to begin CATV operations, should approve differentials in rates agreed to by the licensee in the state and local licensing process that are based on lessees’ character as profit-making

202. See 37 Fed. Reg. 3270-71, ¶ 131 (1972); 37 Fed. Reg. 3289 (1972), to be codified at 47 C.F.R. § 76.251(a)(11)(iv).

or nonprofit public interest institutions.

H. *Broadband Capacity and Other Technical Standards*

The new rules impose uniform technological requirements throughout the 100 largest markets.²⁰³ CATV systems must have a broadband capacity of at least 20 channels.²⁰⁴ Each system also must possess the technical capacity for nonvoice return communication; however, the Commission did not require the installation of return communication devices at the subscriber's terminal.²⁰⁵ The new rules also prescribe technical standards intended to assure a quality signal.²⁰⁶ When the operative channels are in substantially full use, the CATV operator must activate another channel.²⁰⁷ If the initial capacity is 20 channels, however, the cost and effort of adding a twenty-first channel are tantamount to adding a new cable of twenty-channel capacity. Franchisers and franchisees should account for the factor in the licensing process. Finally, a franchisee must accomplish significant construction within one year after receiving his certificate from the FCC and must "equitably and reasonably" extend his trunk cable to a substantial percentage of the franchise territory each year.²⁰⁸

Understandably, the FCC is reluctant to burden CATV at its inception with a capacity and technical standards that require burdensome expense in relation to its initially small operational income. Nevertheless, since the cost of laying cable greatly increases when cables are laid at different times,²⁰⁹ the FCC perhaps should have required greater broadband capacity and voice return communications in the larger metropolitan areas. Moreover, the FCC should amend the rules to establish technological requirements on the basis of market size and practical ability to supply large markets with programming.

I. *State and Local Regulation*

1. *The Federal-State and Local Authority Relationship.*—The FCC requires CATV operators to obtain a certificate of compliance

203. See 37 Fed. Reg. 3289 (1972), to be codified at 47 C.F.R. § 76.251.

204. 37 Fed. Reg. 3289 (1972), to be codified at 47 C.F.R. § 76.251(a)(1).

205. See 37 Fed. Reg. 3270 (1972).

206. See 37 Fed. Reg. 3290-92 (1972), to be codified at 47 C.F.R. §§ 76.601-.617.

207. See 37 Fed. Reg. 3270, ¶ 126 (1972).

208. 37 Fed. Reg. 3281 (1972), to be codified at 47 C.F.R. § 76.31(a)(2). "Equitably" means that the lines may not bypass low-income areas in which a lower percentage of the population might be expected to subscribe.

209. See note 12 *supra*, and accompanying text.

from the FCC prior to operating,²¹⁰ but leaves the actual franchising of CATV operators to state or local franchising authorities.²¹¹ Although the Commission could have relied on *Southwestern Cable* to preempt substantially the regulatory field, it instead elected to share its regulatory function with state and local governments. The FCC has stated that "except for the government channel, local regulation of access channels is precluded;"²¹² and, "[e]xcept on specific authorization . . . no legal entity shall prescribe any other rules concerning the number or manner of operation of access channels."²¹³ The FCC, while professing merely to set minimum standards to control state or local authorities in the franchising process, has therefore exercised substantial preemption.²¹⁴ As a consequence, state and local regulation that does not go beyond the authorized scope of regulation or that, while exceeding such scope, is specifically authorized by the FCC incident to certification, is valid.²¹⁵

In order to obtain a certificate of compliance from the FCC prior to beginning operations, the franchisee must show that the state or local franchising authorities conducted a public hearing affording due process, which considered the legal, financial, character, technical, and other qualifications of the applicants to operate the CATV system.²¹⁶ The term of the initial franchise and of any renewal must be "of reasonable duration,"²¹⁷ which in most cases would not exceed fifteen years,²¹⁸ and the franchise must require the CATV operator to accomplish significant construction within one year after the certificate issues.²¹⁹ In addition, the operator must equitably and reasonably extend his trunk cable to a substantial percentage of his franchise area annually, ordinarily about 20 percent.²²⁰ The franchise must also contain procedures for the resolution of complaints regarding service.²²¹ The franchising authority

210. 37 Fed. Reg. 3280 (1972), to be codified at 47 C.F.R. § 76.11.

211. 37 Fed. Reg. 3281 (1972), to be codified at 47 C.F.R. § 76.31.

212. See 37 Fed. Reg. 3270-71, ¶ 131 (1972).

213. 37 Fed. Reg. 3289 (1972), to be codified at 47 C.F.R. § 76.251(a)(11)(iv). The term "access channels" includes both dedicated and rented channels.

214. See 37 Fed. Reg. 3276 (1972).

215. See *T.V. Pix Inc. v. Taylor*, 304 F. Supp. 459 (1968), *aff'd per curiam*, 396 U.S. 556 (1970). State and local regulation of CATV that effectuates a purpose within the police power, e.g., prohibition of location of a CATV tower in close proximity to an airport, is valid, however, even if the FCC preempts the field. See *Head v. Board of Examiners in Optometry*, 374 U.S. 424, 429-32 (1963).

216. 37 Fed. Reg. 3281 (1972), to be codified at 47 C.F.R. § 76.31(a)(1).

217. 37 Fed. Reg. 3281 (1972), to be codified at 47 C.F.R. § 76.31(a)(3).

218. See 37 Fed. Reg. 3276, ¶ 182 (1972).

219. *Id.* ¶ 181.

220. *Id.*

221. 37 Fed. Reg. 3289 (1972), to be codified at 47 C.F.R. § 76.251.

must approve the subscription fee charged CATV subscribers,²²² and the franchise fee which reimburses the state and local authorities for the cost of regulating CATV must be “reasonable”—usually three to five percent of gross subscriber revenues.²²³ Hence local governments will not be able to load on CATV the cost of providing other services to their citizens.

2. *Gaps in the Regulatory Framework.*—The dual jurisdictional approach adopted by the FCC leaves some gaps in the regulatory framework which may cause substantial future difficulties.

(a) *Overlapping local jurisdictions.*—A multitude of local governments exist within any large metropolitan area. If each entity franchises a CATV operator for its political unit, the potential number of subscribers within the unit will be inadequate to support an advanced CATV system.²²⁴ State governments should, therefore, remedy the problem by requiring the political units of large metropolitan areas to conduct studies ascertaining the CATV headend configuration best calculated to serve the needs of all the citizens in the entire area. Meanwhile, local governments should not undertake to grant franchises until a study has been made of the needs of their citizens for CATV service, the channel capacity and technology necessary to supply those needs, and the ownership model that is best calculated to fulfill the needs of their particular communities. Substantial confusion exists between state and local governments regarding which level, if any, has the authority to regulate CATV. State public service utility commissions question their own authority to regulate CATV,²²⁵ and few state legislatures require the state regulatory agencies to exercise jurisdiction. On the other hand, many cities question their authority to franchise CATV and doubt that they have the power to require telephone and electric companies to allow CATV to make use of their easements for a reasonable fee.²²⁶ Unless CATV gets access to telephone and electric companies' easements, the duplication of poles and under-street conduits would increase greatly the cost of CATV, result in a clear economic waste, and render the development of CATV much more difficult. The FCC has provided for an advisory committee composed of federal, state and local governments, the cable industry, and public interest groups to aid in the allocation of its regulatory functions.²²⁷ The FCC should organize the committee at

222. 37 Fed. Reg. 3289 (1972), to be codified at 47 C.F.R. § 76.31(a)(4).

223. 37 Fed. Reg. 3289 (1972), to be codified at 47 C.F.R. § 76.31(b).

224. See notes 17-23 *supra*, and accompanying text.

225. See Note, *supra* note 88, at 850-53.

226. *Id.*

227. See 37 Fed. Reg. 3277, ¶ 188 (1972).

once and begin studying the jurisdictional issue in each state, and when it finds legislation is needed, it should seek its immediate enactment. Also, this committee should prepare a monograph suggesting the planning of a model CATV system.²²⁸ This would save many local governments from unfortunate mistakes already made by a number of other local governments that lacked a knowledge of CATV comparable to that of their applicants.

(b) *Concentrations of control.*—Another substantial gap in the dual regulation of CATV is a lack of controls over undue concentrations of CATV ownership power. Both the President's Task Force on Communications Policy²²⁸ and the Sloan Commission²²⁹ warned of the dangers of undue concentrations of control over CATV. Undue concentrations of control pose the same risks in CATV as in conventional broadcasting. Thus, there is a real likelihood that without federal curbs on such concentrations, unfettered ownership power would undermine the diversity of viewpoints principle and generate disparate impact on public opinion and the election process. In broadcasting, the FCC does not permit the same interest to own more than a prescribed number of broadcast stations.²³⁰ Unfortunately, the standard applied to broadcasting is poorly calibrated because it does not account for the size of the population of each community reached by the broadcast signal. Therefore, the FCC should adopt a rule prohibiting franchising authorities from granting a franchise to an applicant already franchised to operate CATV systems in territories having a combined prescribed maximum population.

(c) *Preferences in granting franchises.*—In broadcasting, the FCC seeks to achieve for stations the character of local institutions having a grass-roots interest in the service and program needs of the community served.²³¹ When licensing broadcasters, the FCC ordinarily considers a large variety of factors, which makes it difficult to identify the criteria leading to the selection of a particular applicant.²³² This uncertainty has prompted criticism of the licensing process.²³³ One recommendation advocates that the FCC accord to local applicants a rebuttable presumption of higher qualification than absentee applicants when it licenses broadcasters because a person or institution having a

228. See note 61 *supra*, and accompanying text.

229. See note 67 *supra*, and accompanying text.

230. See notes 44-45 *supra*, and accompanying text.

231. See note 168 *supra*, and accompanying text.

232. Policy Statement on Comparative Broadcast Hearings, 5 R.R. 1901-20 (1965).

233. See Schwartz, *Comparative Television and the Chancellor's Foot*, 47 GEO. L.J. 655 (1959).

grass-roots interest in the community is in a better position to assess the needs of the community for service.²³⁴ The same considerations should apply when state or local authorities franchise CATV operators. Moreover, if the financial qualification can be met, a nonprofit institution likely would have greater concern for fulfilling the needs of its community than a profit-making enterprise.²³⁵ Accordingly, the FCC might advantageously amend its rules to require franchising authorities to give a rebuttable presumption in favor of local, nonprofit applicants meeting the other qualifications.

(d) *Satisfying local programming needs.*—The FCC rules do not permit franchising authorities to regulate the kinds of programming which the cablecaster presents in order to satisfy the programming needs of his community.²³⁶ At the same time, however, the rules themselves make no provision for federal regulation. Either the FCC or the franchising authorities should require CATV operators to determine the service needs of citizens in the areas reached by their cables and make good faith efforts to supply those needs. Moreover, the programming that the FCC requires the CATV operator to originate should also be designed to fulfill those needs. Meanwhile, local governments should include in their prelicensing planning study an analysis of the service needs of the community, should make this information available to applicants, and should base the comparative qualifications of applicants on their ability and willingness to supply such needs.

(e) *Software regulation.*—Neither the FCC rules nor the power granted to franchising authorities contemplates regulation of “software” for CATV systems. CATV has the potential to deliver information on a national and worldwide basis. However, unless the “software” of such a comprehensive system is planned properly, thousands of isolated granaries of information rather than one interconnected storehouse available to all likely could result. The FCC and its advisory committee might profitably turn their attention to the “software” problems affecting CATV at an early date.

V. CONCLUSIONS

CATV has the potential to place each person in complete command of his informational and entertainment environment. Indeed, if the FCC

234. See HOUSE NETWORK BROADCASTING REPORT, *supra* note 30, at 594-96.

235. The Sloan Commission also recommended that nonprofit institutions should be given preference in franchising. See ON THE CABLE, *supra* note 62, at 176.

236. See 37 Fed. Reg. 3270-71, ¶ 131 (1972); 37 Fed. Reg. 3289 (1972), to be codified at 47 C.F.R. § 76.251(a)(11)(iv).

permits CATV to realize its full potential, it will accelerate social change and restore the individual to his rightful role in decision making and the election process. Unfortunately, however, the FCC consistently has restricted the development of CATV in order to avoid possible adverse impact on over-the-air broadcasting. The new CATV rules continue that posture by requiring CATV to carry local over-the-air signals, limiting CATV's importation of distant television signals—with rare exception—to two, giving local over-the-air broadcasters extended protection against duplication of network and syndicated programs appearing on their own signals, and giving television a practical right of first refusal on the exhibition of feature films. In addition to restricting the development of CATV, the new rules may violate both the first amendment and the antitrust laws. Limitations upon the importation of distant signals raise free speech issues to the extent that the restrictions are greater than necessary to protect the overall public interest served by over-the-air broadcasting and CATV combined. Similarly, granting over-the-air broadcasting a practical right of first refusal on the exhibition of feature films raises an issue under the antitrust laws by giving television an unjustified economic advantage over CATV that does not serve the overall public interest in combined television and CATV services.

Many of the abuses dealt CATV by the FCC arise because the Commission is regulating CATV under a statute designed for the radio, telephone and telegraph industries. Since CATV is a unique medium potentially constituting a complete telecommunications grid, substantial jurisdictional problems have arisen because the existing statute does not fit this complex innovation. Moreover, until Congress exercises its full responsibility and enacts a statute providing for the regulation of CATV and specifying adequate regulatory standards to guide the FCC, uncertainty and confusion will continue to create problems.

Despite the lack of congressional guideposts, some features of the new CATV rules are highly meritorious. The combination of free access to some channels, required program origination on others, and the availability of channels for lease under common carrier principles permit CATV to utilize three different approaches in order to further the public interest. Additionally, the requirement that CATV operators must originate programming, as well as carry the signals of over-the-air television and the potential services of information and entertainment utilities, promise desirable variety. The requirement that CATV systems must possess the capability for interactive two-way communications enables CATV to fulfill an important public service because the application of the equal opportunities and fairness doctrines to CATV will not only

present both sides of all the controversial issues to the viewer, but also allow him to participate in their resolution.

The FCC also wisely adopted a dual system of regulation for CATV, limiting its area of preemption and leaving state and local authorities a substantial share of the regulatory function. The dual approach puts many decisions into the hands of state and local authorities who have a grass-roots interest in and knowledge of the needs of their community's citizens. Moreover, the approach will provide flexibility for experimentation in communities throughout the land from which everyone can profit, unless the FCC meddles in favor of established industry structures.

Unfortunately, the dual system of Federal and state/local regulation has left a number of gaps, which amendments to the FCC rules or state statutes should fill. Leaving the authority to franchise CATV systems to each local governmental unit, without requiring that all local governments in the metropolitan area jointly study and adopt a CATV configuration that is economically sound and calculated to provide the full spectrum of potential CATV services, inevitably will result in the franchising of CATV systems without a sufficient number of subscribers to provide a profitable economic base and lacking the capacity to provide the citizens of the community with available, needed services. In addition, there are no limitations on concentrations of control over CATV systems. As a consequence, concentrations of control could undermine the diversity of viewpoints principle and generate disparate impact on public opinion. Accordingly, the FCC should adopt a rule denying state or local authorities the power to grant a franchise to an applicant already franchised to operate CATV systems in territories having a combined prescribed maximum population. Similarly, the FCC should base its technical requirements on the population size of the area served, rather than adopting a uniform standard for all. The FCC also has offered state and local authorities little guidance regarding the qualifications of franchisees. Since local institutions and non-profit organizations are more likely to have a grass-roots interest in serving the needs of the community than absentee owners or profit-making enterprises, the FCC should add to its rule regarding the qualifications of franchisees a presumption in favor of local, nonprofit applicants. Although the new rules do not expressly permit state and local authorities to regulate the rates charged by CATV operators to lessees of channels or to require the operator to include services clearly within the public interest—such as news and documentaries on local problems—in his originated programming, both the rates and service of common carriers traditionally have been regulated. Hence, when CATV acts as a common carrier and leases channels, the rates it charges to

lessees should be regulated. Without regulation, nonprofit institutions will not be able to pay rates set on the basis of the anticipated high demand for channels from profit-making corporations. Similarly, when CATV originates programming, it serves a public interest function, and should be subject to broadcasting regulation requiring the licensee to ascertain, and make a good faith effort to fulfill, the programming needs of his community. These regulatory deficiencies may be overcome substantially by planning studies, voluntary agreements by franchisees to provide special services at specified rates, and seeking express approval from the FCC. Finally, the FCC has not yet planned to interconnect the "soft-ware" from which CATV will deliver data. Unless it does, the Commission will lose the opportunity to interconnect all CATV systems and their supportive information and entertainment utilities into a nationwide grid.

In sum, the new CATV rules permit CATV to proceed on the delayed yellow. Less restriction in importation of over-the-air television signals during the next few years, less exclusivity protection to local television broadcasters, removal of television's practical right of first refusal in the exhibition of feature films and amendment of the rules in the manner outlined above, would give CATV a well deserved green light.*

* On June 7, 1972, after this article was set in type, the Supreme Court announced its decision in *United States v. Midwest Video Corp.*, sustaining under the rationale of *Southwestern Cable* the FCC's power to require CATV operators to originate programming. 40 U.S.L.W. 4626 (June 7, 1972). For a discussion of this case see p. 702 *infra*.