Commercial Law: CATV: Let the Cables Grow

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The Community Antenna Television (CATV) industry has progressed along two lines, correlative with location. The traditional systems are located in remote areas where, because of distance or geographical terrain, the community is unable to receive off-the-air television. A tall master antenna is erected, from which a coaxial cable connects subscribers desiring television service. Having the primary function of providing the community with previously unobtainable television signals, this system acts as a supplement to over-the-air broadcasters. In the urban areas, on the other hand, because of the larger subscriber base, CATV is able to effectuate the multiple capabilities of a community wired with coaxial cable. A television set connected to such a cable can visually present as many messages as the set has channels, thus making the uses of such a receiver seemingly infinite. Education, entertainment, news, free political broadcasting, stock quotations, minority expression, computer hookups, stereo music, vocational training, medical observation, and the multi-uses of two-way communications constitute only a few of the many possibilities.1 Serving a different function than it does in remote areas, CATV in urban America is a communications medium competitive with over-the-air broadcasters and capable of satisfying the total communications needs of our population centers.

The Federal Communications Commission has been studying CATV potential since 1959 and has maintained jurisdiction over the industry since 1965. Yet, not until August 5, 1971, did it take a positive step toward effectuating its potential to serve the public

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1. For a recent suggestion calling for a "regulatory environment" that would permit the development of the wired city concept, see ELECTRONICS INDUSTRIES ASSOCIATION, COMMENTS FILED BEFORE THE FCC, Doc. No. 18397 (October 27, 1969).
interest. In fact, prior to 1971, the Commission purposely restricted CATV development in large market areas.

The obvious question is, why? The answer lies with a critical analysis of the Commission's CATV regulatory policy. In this writer's opinion, the Commission erred. It hesitated before it assumed jurisdiction over the CATV industry and overreacted when it did. For too long it maintained a stubborn commitment to the development of UHF, a medium directly competitive with CATV. Most importantly, it failed to distinguish the communications goals of small and large market areas and failed to recognize CATV's capability of meeting those goals.

I. THE LONG ROAD TOWARD ASSUMPTION OF JURISDICTION

Initially serving rural areas by making available distant signals, CATV promoted the interests of all parties. Indeed, between 1948 and 1952, CATV performed the valuable service of extending a broadcast spectrum frozen by the FCC.2

In 1952, the Commission ended its freeze on TV grants and, in its Sixth Report on Television Allocations,3 established the "priorities" by which it would regulate the television industry, the first four being:

(1) To provide at least one television service to all parts of the United States.
(2) To provide each community with at least one television broadcast station.
(3) To provide a choice of at least two television services to all parts of the United States.
(4) To provide each community with at least two television stations.4

In 1952, there were 70 operating CATV systems serving 14,000 subscribers.5 By 1958, what had originally been a means of providing remote areas with one television signal was obviously becoming a multiple-service technology. CATV had moved into markets already served by one and two signals. Encouraged by a rapid growth

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3. FCC, SIXTH REPORT ON TELEVISION ALLOCATIONS, 1 P & F RADIO REG. 91:599 (1952) [hereinafter cited as 1952 REPORT].
4. Id. at 91:620.
in subscribers to 450,000 in 1958, the industry began to compete with the local broadcast stations. The broadcasters turned to the FCC for relief.

In *Frontier Broadcasting Co. v. Laramie Community TV Co.*, the Commission was urged to declare CATV systems "common carriers," as defined by the Federal Communications Act, and institute rule-making proceedings looking toward adoption of rules regulating the industry. However, because the subscriber did not control the particular signal, the Commission ruled that CATV did not operate as a "common carrier" within the meaning of Section 3(h) and, hence, did not come within the provisions of Title II, applicable to carriers. Further, because CATV operated by means of wire lines, the FCC declined to take jurisdiction of CATV as a "broadcaster."

Still faced with the question of whether it should assume jurisdiction over cable television, the Commission, in 1959, undertook a detailed investigation, wherein it considered three basic issues: (1) Was there any basis under present law for the assumption of licensing and regulatory powers over CATV systems? (2) Could the Commission deny authorization for common carrier

6. *Id.*
   "Common carrier" or "carrier" means any person engaged as a common carrier for hire in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this chapter; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.
9. 24 F.C.C. at 251.
10. *Id.* at 253-55.
11. *Id.* at 255-56. "Radio communication" has been defined in 47 U.S.C. § 153(b) (1970) as
   the transmission by radio of writing, signs, signals, pictures and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.
   The term "broadcasting" has been defined in 47 U.S.C. § 153(o) (1970) as
   the dissemination of radio communications intended to be received by the public directly or by the intermediary of relay stations.
12. See FCC, IN THE MATTER OF INQUIRY INTO THE IMPACT OF COMMUNITY ANTENNA SYSTEMS, TV TRANSLATORS, TV "SATellite" STATIONS, AND TV "REpeaters" ON THE ORDERLY DEVELOPMENT OF TELEVISION BROADCASTING, 26 F.C.C. 403 (1959) [hereinafter cited as 1959 REPORT AND ORDER].
13. *Id.* at 426.
facilities serving CATV systems on the ground of adverse competitive impact upon an existing local or nearby television station? (3) Would economic injury to a television station be a valid public-interest justification for denial of authorization to auxiliary services which compete with such station?

Unable to find a basis for regulating CATV under existing law,\textsuperscript{14} the Commission reaffirmed its decision in \textit{Frontier} to the effect that CATV could be considered neither a "common carrier"\textsuperscript{15} nor an industry "engaged in broadcasting."\textsuperscript{16} Further, the Commission believed it lacked "plenary power" over communications "to regulate any and all enterprises which happen to be connected with one of the many aspects of communication."\textsuperscript{17} And, although deciding to recommend to Congress that an amendment to Section 325(a) be enacted to extend the "consent" requirement to CATV, the Commission was unwilling to conclude that CATV was subject to either Section 325 or a property right which would allow the Commission to issue a "cease and desist order."\textsuperscript{18}

Emphasizing the fact that the "public-interest" considerations which pertain to the grant of a communications common carrier include not the "content" of the signal\textsuperscript{19} but, rather, the availability of frequencies, and the legal, technical and financial qualifications of the applicant, the Commission, in considering the second issue, concluded that it lacked the authority to deny an application. To hold otherwise "would place the Commission in the anomalous position of acting as a censor over public communications."\textsuperscript{20}

On the final question, the Commission approved the "public-interest" standard but refused to rule that the evidence showed damage caused solely by CATV. Reaffirming its earlier decision in \textit{Carrol Broadcasting Co. v. FCC},\textsuperscript{21} the Commission held that there was justification for denial of authorization to an auxiliary

\textsuperscript{14} It should be noted that this statement is subject to the exception of regulation under Part 15 of the Commission's rules with respect to radiation of energy. \textit{Id.} at 431.

\textsuperscript{15} \textit{Id.} at 428.

\textsuperscript{16} \textit{Id.}

\textsuperscript{17} \textit{Id.} at 429.

\textsuperscript{18} \textit{Id.} at 430.

\textsuperscript{19} \textit{Id.} at 432.

\textsuperscript{20} \textit{Id.} at 432-33.

\textsuperscript{21} 258 F.2d 440 (D.C. Cir. 1958). In this case, it was held that the Commission must afford an existing licensee (in a protest case) an opportunity to present evidence that no economic injury amounting to a public detriment would result from the grant of the application involved.
service which would be in competition with the local stations when the economic injury would affect the public interest. However, after a thorough review \(^{22}\) of the only three \(^{23}\) cases in which stations had gone off the air claiming CATV competition as the cause of their demise, the Commission ruled that the broadcasters had not satisfied the "heavy burden" \(^{24}\) required in Carrol and denied jurisdiction.

Thus, while recognizing the potential threat to the local stations, the FCC was unable to determine the full economic impact. \(^{25}\) Consequently, it recommended amendments in the Communications Act to require that CATV systems both obtain the consent of the stations whose signals are transmitted and carry the local stations, should the local stations so request. In 1959, although legislation was introduced in the Senate, \(^{26}\) favorably reported, \(^{27}\) and debated, \(^{28}\) it was defeated on the floor and returned to committee, where it died. \(^{29}\)

Recognizing that it lacked adequate data on the economic impact of the cable industry and that it would have been a strained interpretation of the Communications Act to take jurisdiction without proof of "economic injury affecting the public interest," the Commission, nevertheless, was concerned about the possibility of an unregulated CATV industry disrupting the "priorities" \(^{30}\) established in 1952. It, therefore, responded by assuming indirect control over CATV.

Primarily flourishing in remote areas serving smaller markets, CATV often controlled the services of common carriers, which relayed signals to its master antenna. Only three months after the 1959 Report and Order, the Commission, through an amendment to its Rules and Regulations, \(^{31}\) in effect, refused to renew the

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23. Of the 96 stations which had gone off the air since 1952 (89 UHF and 7 VHF), the three reviewed were the only stations to mention CATV as a factor contributing to their demise. Id. at 415.
29. Id. at 10547.
license of any system that provided over fifty percent of its total service hours to any customer who "controlled" the applicant. In the guise of allocating a "public frequency" to those who were satisfying a "public need," the Commission assumed indirect control over CATV. This amendment, adopted so soon after promulgation of the 1959 Report and Order, was strikingly inconsistent with the Report's rejection of the power to determine the validity of the end use of a common carrier's signal. Quite obviously, the Commission was searching for a way to control CATV.

In 1961, the Commission again introduced legislation, but no action was taken on the bill, which was labeled "too broad in scope, too discretionary and without necessary standards." Its attempt to gain control through legislative means having been thus thwarted, the Commission, in *Carter Mountain Transmission Corp. v. FCC*, expanded its jurisdiction of CATV through common carriers. Carter Mountain, a microwave carrier in Wyoming, applied for a license to expand its facilities in order to increase service to the area CATV systems. The application was denied, as the Commission believed that improved CATV service would adversely affect the local station, resulting in a diminution or destruction of local service. While not changing the basic concept of a competitive broadcast industry, the FCC concluded that the economic injury to the local station was a factor to be considered in determining whether the granting of a license would serve the public interest.

This decision, in the view of the Commission, was not an act of censorship. Rather than examining the content of the carrier's signal, it was merely regulating the economic impact of CATV as measured against the standard of "public interest, convenience or necessity." By taking control over the end use of the signal, the Commission reversed its prior refusal to regulate CATV through common carriers. Whereas in 1959 it was unable to determine "at

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32. *Id.*
37. *Id.* at 364. "A denial of a station license validly made because the standard of 'public interest,' convenience, or 'necessity' has not been met, is not a denial of free speech." *See National Broadcasting Co. v. United States, 319 U.S. 190, 226-27 (1943).*
what point, in terms of size of the market or auxiliary, the number of signals brought in, etc., this impact becomes serious enough to threaten the station's continued existence," in *Carter Mountain* the Commission concluded that it possessed the information needed to determine that the end use would adversely affect the "public interest." 38

In December of 1963, the Commission commenced hearings to explore the question of whether it should assume jurisdiction over all microwave-served CATV systems. 40 Before the Commission was the specific issue of whether it should permit microwave facilities to serve CATV systems, but impose some restriction upon the manner in which the relevant cable systems would compete with local television systems. Narrower in scope than the 1959 hearings to determine that economic impact which would justify the barring of CATV in any particular market, these hearings merely involved the issues of whether the *Carter Mountain* doctrine should be extended to all microwave-served CATV systems and, if so, what restrictions should be adopted to insure that the competition involved would be conducted under fair and reasonable conditions.

Out of these hearings there was born the 1965 Report and Order, through which the Commission assumed jurisdiction over all microwave-served CATV systems and instituted restrictions intended to equalize the competition between CATV and the local station. 41 This report articulated the role CATV was to play in the fulfillment of the objectives outlined in the 1952 Report. Reaffirming the order of priorities set out in the earlier Report, the Commission emphasized its intention that CATV act as a supplement to, rather than a substitute for, off-the-air television. Although it realized that cable systems were capable of making a valuable

38. 1959 Report and Order at 422.

39. The appellate court approved consideration of the "end use" in determining the "public interest." The court cited Federal Power Commission v. Transcontinental Gas Pipe Line Corp., 365 U.S. 1 (1961), wherein the Supreme Court held that the Federal Power Commission is authorized to consider end uses in determining "public convenience and necessity." By parity of reasoning, the appellate court held that the Federal Communications Commission, in determining this issue, could consider the "end use" or "end result" of the application made to it by appellant.


41. See In the Matter of Amendment of Parts 21, 74 (proposed subpart J), and 91 (Docket 15,971), 30 Fed. Reg. 6078 (1965); In the Matters of Amendment of Subpart L, part II, and Amendment of Subpart I, part II, and Amendment of Subpart I, Part 21 (Dockets 14,895 and 15,233), 30 Fed. Reg. 6038, 38 F.C.C. 683 [hereinafter cited as 1965 Report and Order].
contribution toward the achievement of expanded television service, the Commission concluded that CATV, with its multiple reception service, would often conflict with the local television service, such conflict resulting in either complete curtailment of local service or a diminution of operations. Cable television was not to be favored over local television service, for while the local service was available without cost to everyone, cable television would be unavailable to those the cable could not economically reach and to those either unable or unwilling to pay the subscription price. The Commission's statutory obligation is to make television service available, "so far as possible, to all people of the United States" on a "fair, efficient and equitable" basis. It was concluded that this obligation could not be met "by primary reliance on a service which, technically, cannot be made available to many people and which, practically, will not be available to many others." The Commission was not willing to provide multiple television service at the expense of those dependent upon the local station for their only service.

Having established certain priorities to effectuate the public interest, and recognizing the enormous effect of CATV upon that interest, the Commission realized that in order to attain its goal, it had to regulate CATV. Yet its piecemeal approach toward regulation was not complete. Although a substantial number of CATV systems serving the remote areas were within the microwave jurisdiction, a great many escaped regulation because they did not require microwave relay. This included not only those serving distant markets but, also, a new type of CATV developing in the larger markets. Penetration of CATV into the larger markets, where ninety percent of the population resided, posed a very real threat to the Commission's rules of priority. The distinction between microwave-served and nonmicrowave-served systems was

42. See Final Report: President's Task Force on Communications Policy ch. VII, at 41 (1968) [hereinafter cited as President's Report]. A study conducted by Complan Associates for the Task Force indicates that the present cost of wiring the whole country is prohibitive.
45. 1965 Report and Order at 699.
46. See 1952 Report at 620. The first priority is the provision of at least one television service (signal or station). The loss of the local broadcaster would prevent some viewers from receiving even one signal.
47. Id.
artificial. Aware of the fact that cable television had an economic impact on the broadcaster regardless of how signals were received, the Commission acted to take jurisdiction over all CATV systems. In April of 1965, the Commission issued a notice of inquiry and proposed rulemaking on the question of jurisdiction over all CATV systems, whether or not microwave facilities were used. After having again introduced regulatory legislation which, although favorably reported, failed to reach the floor for debate, the Commission, in March of 1966, issued its Second Report and Order on CATV, which stated that the FCC had jurisdiction over all CATV systems as a matter of law. Holding that cable systems were engaged in interstate communication by wire, to which the provisions of the Communications Act were applicable, the Commission concluded that its statutory powers included "authority to promulgate necessary and reasonable regulations to carry out the provisions . . . of the Act and to prevent frustration of the regulatory scheme by CATV operations."

This assumption of jurisdiction was immediately tested. In United States v. Southwestern Cable Co., the Supreme Court upheld the Commission's act, recognizing both that in 1934 Congress could not have foreseen the development of CATV and that Congress conferred upon the Commission broad powers to deal

49. H.R. 13286, 89th Cong., 2d Sess. 16 (1966). The Commission informed Congress that it desired legislation in order to "confirm [its] jurisdiction and to establish such basic national policy as [Congress] deems appropriate."
51. In the Matter of: Amendment of Subpart L, Part 91 (Docket No. 14895), To Adopt Rules and Regulations to Govern the Grant of Authorizations in the Business Radio Service for Microwave Stations to Relay Television Signals to Community Antenna Systems; Amendment of Subpart I, Part 21 (Docket No. 15233), To Adopt Rules and Regulations to Govern the Grant of Authorizations in the Domestic Public Point-to-Point Microwave Radio Service for Microwave Stations Used to Relay Television Broadcast Signals to Community Antenna Television Systems; Amendment of Parts 21, 74, and 91 (Docket No. 15971), To Adopt Rules and Regulations Relating to the distribution of Television Broadcast Signals by Community Antenna Television Systems, and Related Matters, 2 F.C.C.2d 725 (1966) [hereinafter cited as 1966 REPORT AND ORDER].
52. Id. at 728-34.
54. 47 U.S.C. §§ 154(i), 303(f), (g), (h), (r) (1970).
56. 1966 REPORT AND ORDER at 734.
57. 392 U.S. 157 (1968). Contra, Buckeye Cablevision Inc. v. FCC, 387 F.2d 220 (D.C. Cir. 1967), wherein the court of appeals concluded that the Communications Act permitted regulation of CATV.
with its responsibilities. In the view of the Court, the assumption of jurisdiction was a necessary step in effectuating the "obligation of providing a widely dispersed radio and television service" with a "fair, efficient, and equitable distribution" of service among the several states and communities.

The Commission's assumption of jurisdiction was the result of a determination of adverse economic impact upon the local station. Whereas in 1959 that determination could not be made, and in 1962 there was evidence of but isolated incidents, in 1966 the probable future impact was deemed serious enough to warrant action. However, the holding in Southwestern Cable Co. indicates that such analysis was wrong—a finding of economic impact was not necessary. CATV clearly affected the Commission's obligation to provide for the effective use of radio to all people on a fair and equitable basis. Proof of economic injury to the local station was an "effect" of greater degree than that needed to be shown before the Commission could take jurisdiction. This holding is of primary importance, as it is doubtful that proof of economic injury to the local stations in the larger market areas has ever been clearly proven.

II. REGULATORY POLICY

The Commission's authority to regulate CATV is predicated upon its grant of power "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting." Accordingly, from its inception, CATV was necessarily regulated so as not to interfere with the Commission's television policy—a policy of effectuating the "priorities" established in 1952. These "priorities" are the result of the Commission's commitment to "localism." To understand this concept is to understand the objectives of CATV regulation.

"Localism" can be defined as the encouragement of local communications—the establishment of local stations to satisfy the

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60. 1959 REPORT AND ORDER at 431.
62. 1966 REPORT AND ORDER.
needs of the community in which the transmitter is located. It involves a local station reflecting community expression—a media form responsive to, and identifying with, the local community which it serves. The transmission of local messages, rather than the reception of distant signals, is the end sought. The converse of "localism" is the existence of regional broadcasters, whereby four or five powerful broadcasters serve multiple communities. While this makes possible a greater choice of programming, few local stations are able to survive competition with the regional broadcasters. And, since the loss of local stations is the loss of a local outlet, the cost of the increased programming is the loss of local expression.

The Commission's commitment to the concept of "localism" has its genesis in the addition of Section 307(b)\(^{65}\) to the Communications Act of 1934, which provided that the approval of licenses was to reflect a "fair, efficient and equitable distribution" among the states and communities. Adoption of this section constituted a reaction against the then existing distribution of radio licenses. The large urban areas were monopolizing the radio frequencies with powerful transmitters which served the surrounding communities, but failed to provide "local expression." Section 307(b), in effect, denounced such distribution and endorsed the concept of "localism."

The "priorities" announced in 1952 affirmed "localism" as also being the policy for television, the local broadcast stations being given a higher priority than regional broadcasters. However, the marriage of "localism" and television policy created certain technological problems. Television broadcasting required more spectrum space than did radio. In the very high frequency (VHF) band\(^{66}\) only twelve channels were available and, because of probable interference, only seven channels were usable in any one area. Hence, to effectuate the Commission's objective of preserving at least one local station for each community, additional spectrum space was needed. The television industry had not been attracted to the use of the ultra high frequency (UHF) band\(^{67}\) because of the lower range capabilities, in comparison with VHF. A complementary problem was that those viewers within range of a UHF signal


\(^{66}\) 6-216 megacycles, received on channels 2-13.

\(^{67}\) 470-890 megacycles, received on channels 14-83.
were often without a television set adapted to UHF reception.\footnote{68} Set manufacturers had declined to install the expensive adapters in light of the few UHF signals on the air.

Despite these problems, it was believed that UHF was the only solution. In its 1952 Report and Order, the Commission pronounced UHF the appropriate vehicle of "localism."\footnote{69} Seventy additional channels in the UHF band were allocated to television. Believing that the technology of UHF had progressed to the point where, but for sets without adapters, a UHF station could compete on an equal basis with stations in the VHF band, the Commission immediately began efforts to pass legislation requiring all television sets to be equipped with UHF adapters.\footnote{70}

Having adopted the concept of "localism" and having determined that the appropriate vehicle of "localism" was UHF development, the Commission sought to regulate CATV so as to restrict its impact on the healthy growth of UHF. In 1965, it adopted regulations for all microwave-served CATV systems.\footnote{71} The Commission concluded that the public interest required CATV systems to carry the local stations at all times and refrain from duplication of any program fifteen days before and fifteen days after the program is presented by the local station. These rules were premised on two basic assumptions: (1) that failure to carry local stations and duplication of their programs constituted unfair competitive practices which were inconsistent with the supplementary role of CATV,\footnote{72} and (2) that these requirements were necessary to decrease the existing or potential adverse impact on television broadcast service.\footnote{73}

The carriage rule required the CATV system to carry all stations placing a grade B\footnote{74} signal above the community.\footnote{75} The Com-

\footnote{68. The adapters were not thought necessary because the only signals that reached these persons were VHF.}
\footnote{69. 1952 REPORT.}
\footnote{70. The result was the All Channel Receiver Legislation, 47 U.S.C. § 303 (1970), requiring all television sets manufactured after a certain date to be equipped with UHF adapters and tuners.}
\footnote{71. 1965 REPORT AND ORDER.}
\footnote{72. Id. at 706-713.}
\footnote{73. Id. at 713-16.}
\footnote{74. 47 C.F.R. § 73,683(a) (1965). The Grade B countour is a line along which good reception may be expected 90% of the time at 50% of the locations.}
\footnote{75. The required carriage of the local signals was not thought to be a burden on the CATV system. Over 80% of the CATV systems which responded to a questionnaire voluntarily carried local stations. See 1966 REPORT AND ORDER at 767.}
mission recognized that to extend the carriage requirement to the maximum limits could, in some instances, outrun the capacity of those systems. Therefore, it established an exception: at any stage, the system would not have to carry a signal if it substantially duplicated the signal of a higher grade and carrying it would, because of limited channel capacity, prevent the system from carrying a non-network signal which would contribute to the diversity of its service. Because of this flexibility, the carriage rules proved to be a small burden. In addition, channel capacity was increasing. The two- and three-channel CATV systems were quickly being replaced by the larger capacity systems, and those small systems that did remain very often had only one signal with which to compete.

The 1966 Report included two major changes from the 1965 rules. First, the period during which nonduplication was required was changed from fifteen days before and after to the single day of the broadcast. The thirty-day period had created a disruption of the public's viewing habits. Further, it was subject to abuse by the broadcasters. The single-day period would insure the availability of the program to the CATV audience the same day and, in the case of network prime-time programs, that same evening. Just as important, the Commission intended to encourage a strong competition between CATV and the local stations in the smaller markets. The reduction in time manifested a discouragement of multiple network affiliations. At the very least, one could conclude that the broadcasters desired only simultaneous nonduplication.

The second major change dealt exclusively with large-market

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76. 1965 Report and Order at 717. See also Seiden, An Economic Analysis of Community Antenna Television Systems and the Television Broadcasting Industry I at 52 (1965), wherein the author notes that 34% of all systems provided less than five channels and that an additional 37% provided only five channels.

77. 1965 Report and Order at 717.

78. The Commission established certain exceptions. First, the CATV system need not delete prime-time (6-11 p.m.) network programs which are shown outside what would be considered prime time by the local network. Secondly, the CATV system need not delete programs ignored by the local station where time of the presentation is of special significance, such as with a speech or a sporting event. 1966 Report and Order at 746.


80. See Television Service and the FCC, 46 Texas L. Rev. 1100, 1148 (1968).

81. 1966 Report and Order at 748.
The Report concluded that before a CATV should be allowed to import a distant signal into one of the top one hundred television markets, it should be required to show, in an evidentiary hearing, that importation would not hurt UHF stations in that market. The Commission reasoned that UHF stations, and particularly independent UHF stations, were likely to survive only in the top one hundred markets. The larger viewing audience, it was argued, was the only factor that would overcome the low range capability and tuning problems of television in the UHF band. Accordingly, the Commission concluded, if at an evidentiary hearing it was determined that the importation of distant signals would substantially reduce the revenues of the local UHF stations so that their programming would be adversely affected, the CATV application would be denied. Only the local station’s effectiveness, not its demise, would be the measure of public interest.

Establishing no adverse effect upon the local station was an impossible burden. The local independent was not protected by the nonduplication rule, as few signals duplicated independent programming. Every distant signal competed with the independent. It was inevitable that CATV competition would fracture the local independent’s already small share of the market. Hence, to deny the development of CATV in the larger markets because it might adversely affect the development of UHF was to deny per se the development of CATV wherever independent UHF stations existed or might exist. The effect of this was to freeze CATV out of the top one hundred markets, where ninety percent of the viewing public resided.

Also protected by the 1966 Report was educational television (ETV). While realizing that the widest possible dissemination of educational material would be in the public interest, the Commission simultaneously recognized competing interests that required

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82. The attraction of CATV in the larger markets lies not in the opportunity it provides for receiving additional network programs, for the larger markets already have three network affiliates. Rather, CATV offers distant non-network signals, effective local origination, and, in the case of large urban areas, better quality reception of local signals which would otherwise be distorted by large structures.

83. 47 C.F.R. § 74.1101(i) (1966). The term “distant signal” has been given, by the Commission, the specialized definition as a signal which is extended or received beyond the Grade B contour of that station.


some restriction on indiscriminate importation of educational signals. Although national policy encouraged the full development and expansion of educational television, as was evidenced by grants-in-aid legislation, the greatest financial support came from local sources. Local educational broadcasts could not develop without local support. However, local support could not be expected if CATV were already satisfying the public's demands with distant signals. Recognizing this problem, the Commission established a procedure whereby the CATV system, before importing a distant ETV signal, was to give notice to the local educational interest thirty days prior to commencing service. This would give the local interests time to object and, at the same time, bring ETV signals to an area not yet locally provided with any.

The 1966 Report and Order was a reflex action. The FCC determined that it had to assume jurisdiction over CATV in order to protect the goals of its television policy. It had repeatedly asked Congress for guidelines, but Congress consistently ignored the requests. It established the hearing requirement as a source of information, as well as a forum to explore alternatives. Unfortunately, the effect was to stop the development of CATV.

Perhaps the issue of copyright infringement necessitated the burden placed upon CATV. The Commission objected to the fact that the cable system picked a television signal out of the air without the consent of the originating party and transmitted it by wire to its subscribers. If the CATV system had not thereby incurred a copyright liability, it was at least, in the belief of the Commission, engaging in unfair competition. Consequently, a copyright revision bill was introduced to the Ninetieth Congress in both the House and the Senate. The House bill, containing a provision dealing with CATV, was favorably reported, but the CATV provision was struck from the bill on the House floor prior to enactment.

87. See notes 26 and 49, supra.
88. 1966 REPORT AND ORDER at 786:
As we gain more knowledge in this important area, particularly from the hearings being held, we shall revise or terminate the procedure, as the experience dictates.
92. 113 CONG. REC. 8398-8601, 8611-8613, 8618-8622, 8990-8992. The provision was deleted in order to refer the matter to the Interstate and Foreign Commerce Committee, which has jurisdiction over communications. It was believed that CATV should not be
Congress refused to solve the problem. Similarly, the judiciary failed to provide guidance. In June of 1968, the United States Supreme Court, in *Fortnightly Corp. v. United Artists Television Inc.*, 93 held that the CATV system did not "perform" 94 within the purview of the Copyright Act and, thus, did not infringe upon any of the exclusive rights granted by the Act.

On December 13, 1968, the Commission issued a notice of proposed rulemaking and inquiry to explore the full potential of CATV 95 and determine its appropriate role in the total communications policy. The proceedings, which are still being conducted and are expected to continue well into 1972, will examine such areas as program origination, diversification of ownership, common carrier operations, reporting requirements, technical standards, microwave applications, and importation of distant signals. The decisions to be made and regulations to be established will have a greater impact on communications policy than any prior decisions made with regard to radio and television.

During the pendency of the rulemaking, the Commission halted all major-market hearings and established certain interim procedures to govern the importation of distant signals. Forsaking the UHF economic impact analysis, the Commission instituted a rule whereby a CATV system could import a distant signal into a market only after obtaining retransmission consent from the originating station. This consent requirement was a result of Commission frustration with Congressional inaction 96 and the *Fortnightly* copyright decision. The Commission concluded that retransmission

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controlled through the copyright laws but, rather, that supervision should come from the legislative committee having direct jurisdiction over communications.


94. *Id.* at 402. In effect, the Court felt that CATV functioned more as an extension of television sets than as a broadcaster:

   The function of CATV systems has little in common with the function of broadcasters. CATV systems do not in fact broadcast or rebroadcast. Broadcasters select the programs to be viewed; CATV systems simply carry, without editing, whatever programs they receive. Broadcasters procure programs and propagate them to the public; CATV systems receive programs that have been released to the public and carry them by private channels to additional viewers.

*Id.* at 400-01.

95. In the Matter of Amendment of Part 74, Subpart K of the Commission's Rules and Regulations Relative to Community Antenna Television Systems; and Inquiry into the Development of Communications Technology and Services to Formulate Regulatory Policy and Rule Making and/or Legislative Proposals (Docket No. 18397), 15 F.C.C.2d 417 (1968) [hereinafter cited as 1968 PROPOSED RULES].

96. See notes 29, 50, and 92, *supra*.  
consent would be an effective mechanism to deal with what it considered the unfair competition aspects of CATV. However, the retransmission consent requirement proved to be unworkable. In practice, it produced an absolute freeze upon CATV penetration into the larger markets. No guidelines were established as to what would satisfy the requirement. Further, the originating stations refused to consent to retransmission for fear that CATV systems in their own market would also import distant signals. In addition, a legal question was raised as to whether the originating stations could even grant permission. They had purchased only the right to transmit a certain program in their own television market and not the right to extend the program into another market, thereby impairing the marketability of the program owned by the copyright holder. And, requiring the CATV system to obtain consent from each copyright holder would impose an impossible administrative burden.

A more serious criticism of the retransmission consent requirement is that it is markedly inconsistent with the *Fortnightly* decision. The Commission's attempted distinction between copyright liability and unfair competition was improper. The United States Supreme Court held that there was no copyright liability, yet the retransmission consent requirement would seem to be necessary only if there was. The Commission, by imposing a copyright solution, required CATV systems to do that which the Supreme Court held was not necessary.

On October 24, 1969, the Commission issued the First Report and Order, which generally provided that:

1. CATV systems with more than 3,500 subscribers would be required to provide original programming to a significant extent as of January 1, 1971.

2. CATV systems would be allowed to present paid advertis-

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97. 1968 PROPOSED RULES at 432.
98. In the Matter of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to Community Antenna Television Systems; and Inquiry into the Development of Communication's Technology and Services to Formulate Regulatory Policy and Rule Making and/or Legislative Proposals (Docket No. 18397), 20 F.C.C.2d 201 [hereinafter cited as 1969 FIRST REPORT AND ORDER].
99. In Midwest Video Corporation v. United States, 441 F.2d 1322 (8th Cir. 1971), the court of appeals ruled that the FCC lacked power to impose this requirement. The FCC had indicated that it would appeal the ruling. However, a subsequent proposed change in CATV regulations may make the decision moot.
ing during natural breaks in the programs originated.

(3) Equal-time, fairness, and sponsorship-identification rules would be applicable to the cable-originated programs.

(4) The leasing of channels to others for program origination and interconnection on a regional and national basis for any purpose would be encouraged.

As the first indication of the Commission's consideration of a competitive, rather than complementary, role for CATV, this Report is extremely significant.

As expected, the broadcasting industry protested.\textsuperscript{100} The broadcasters feared the direct competition. It was argued that the origination requirement and permission to advertise would erode the local broadcasters' ability to promote adequate local service. However, the FCC saw no basis for this speculation. CATV origination posed no threat of unfair competition, as CATV and broadcasters stood on the same footing in acquiring competitive program material. Further, CATV origination would provide a greater diversity of communications media to the public—a diversity that should not be sacrificed because it might reduce the size of the audience for any particular media. Advertising and interconnection were encouraged in order to supplement the financial support needed to originate good programming.

On July 1, 1970, the Commission issued two further notices of proposed rulemaking. Comments were invited concerning federal, state, and local regulatory jurisdiction.\textsuperscript{101} Citing recent litigation\textsuperscript{102} with regard to jurisdictional regulation between federal, state, and municipal governments, the Commission wished to discuss three separate approaches to the relationship between these governmental entities:

(1) Total federal preemption similar to that exercised in the broadcast field;

(2) Federal regulations, the approach exercised in previous

\textsuperscript{100} See Broadcasters Fault Origination, Broadcasting Magazine, Dec. 8, 1969, at 46.

\textsuperscript{101} In the Matter of Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to Federal-State or Local Relationship in the Community Antenna Television Systems Fields; and/or Formulation of Legislative Proposals in this Respect (Docket No. 18892), 25 F.C.C.2d 50 (1970).

years; or

(3) Federal regulation of some aspects, with local regulation of others under federal prescription of standards for local regulators.\textsuperscript{105}

The Commission also dealt with the maximum allowable franchise fee to be charged by the municipal body. Recognizing a court decision\textsuperscript{104} which invalidated franchise fees as an unconstitutional gross receipts tax on interstate commerce, the Commission recommended a standard of two percent.

In a second further notice of proposed rulemaking,\textsuperscript{105} the Commission suggested drastic new solutions to the problem of cable regulation. It was proposed that CATV systems in the top one hundred markets be allowed to carry four distant independent signals in addition to the local signals already required to be carried. In consideration for the distant signal allowance, the CATV system would be required to delete commercials from the independent signals they carry and replace them with commercials provided by the local stations on a priority basis.\textsuperscript{106} Priority would be given first to the independent UHF station, then to the network-affiliated UHF station (with a provision for new applicants to the UHF band), and then to any local station upon the showing of a threat to its viability or its ability to adequately serve the public.\textsuperscript{107}

It was proposed that the ban on distant educational signals be continued at the option of the local educational station. In the alternative, it was proposed that if the local station did not object, the CATV system would be required, at its own expense, to delete appeals for funds on the distant stations and substitute appeals provided by the local entity.\textsuperscript{108}

It was further proposed that the cable system be required to make a contribution to public broadcasting. Under this plan,

\begin{itemize}
\item \textsuperscript{103} 25 F.C.C.2d at 52.
\item \textsuperscript{104} Wonderland Ventures, Inc. v. City of Sandusky, 302 F. Supp. 642 (N.D. Ohio 1908), aff'd 423 F.2d 548 (6th Cir. 1908).
\item \textsuperscript{105} In the Matter of Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to Community Antenna Television Systems; and Inquiry into the Development of Communications Technology and Services to Formulate Regulatory Policy and Rule Making and/or Legislative Proposals (Docket No. 18397-A), 24 F.C.C.2d 580 (1970).
\item \textsuperscript{106} See Chazen & Ross, Federal Regulation of Cable Television, 83 HARV. L. REV. 1820 (1970), wherein the authors suggest and defend this proposal.
\item \textsuperscript{107} 24 F.C.C.2d at 582.
\item \textsuperscript{108} Id. at 583.
\end{itemize}
CATV systems importing any distant stations would be compelled to pay five percent of their subscription revenues quarterly to public broadcasting. In return for the right to import distant signals, the Commission would, thus, require the CATV industry to subside public broadcasting.

Comments were also invited on a planned dedication of access channels. The Commission recognized that even with the allowance of distant signals, the CATV systems in the major markets would have available numerous additional channels. It was proposed that the cable system be required to make available free or at a minimum cost certain channels for specific purposes. To be discussed was the proposal that the CATV system be required to make available a local government channel and a number of local public access channels. For the first time, CATV was viewed by the Commission as a medium providing a maximum diversification of editorial viewpoints.

In March of 1971, the Commission held extensive hearings on all subjects and rules proposed since 1968. The testimony received, comments given, and questions asked clearly indicated that the Commission began to perceive a different role for CATV than that envisioned in 1966 and affirmed in 1968.

III. ANALYSIS OF CATV REGULATORY THEORY

Prior to 1971, CATV had been restricted so as not to interfere with the healthy development of UHF, which was determined to be the sole means of effectuating the Commission's commitment to "localism." Inasmuch as this determination resulted in the restriction of CATV in the major market areas, it was error. Although the development of UHF was vital to the success of "localism" in the smaller markets, the decision to protect UHF development in the larger markets failed to take into account the fact that neither the 1952 concept of "localism" nor the development of UHF constituted appropriate means of satisfying the true television goals of urban America. New needs and new goals, far different than those considered in 1932, demand satisfaction. CATV, rather than UHF, is the appropriate vehicle for satisfying those needs and goals. In any event, unrestricted CATV will not result in the total demise of UHF development; rather, a complementary

109. Id.
110. Id. at 586-87.
system of communications will develop—a system combining the best of both technologies and operating in the public interest.

The small television markets of today are analogous to the small radio markets of the Thirties. Neither the size nor the character of the population in such markets have changed since that time. Their television and radio goals are the same: local expression and local identity. For them, the concept of "localism" as defined in 1932 is just as applicable today.

Because allocation of the VHF band was substantially reserved for the larger market areas, the local stations in the smaller markets were primarily UHF. Such broadcasters faced a very real threat when CATV penetrated their market. It was contrary to the goals of "localism" for CATV to duplicate the local station with distant signals and, at the same time, fail to carry the local broadcaster. The second priority\(^\text{111}\) was threatened when the effect of such competition was to provide the local community with three or four signals at the expense of the only broadcast station. And, for those who for various reasons were unable to use the cable, the threat was all the greater. To allow the unregulated development of CATV in the small market areas was to deny them the service of even one television signal, in frustration of the first priority\(^\text{112}\) of the 1952 Report. The ultimate result of unregulated CATV in the underserved markets would have been a return to regional broadcasting. The local stations, unable to compete with CATV, would have lost effectiveness, and the public would have lost its only outlet for local expression. CATV would have circumscribed the concept of "localism." The protection provided the local broadcaster\(^\text{113}\) was a necessary and positive step.

The broadcasters in small market areas have traditionally been affiliated with a network; hence, the duplication and carriage rules provide adequate economic protection. It is presently proposed\(^\text{114}\) that CATV be allowed to carry such distant signals as are necessary to provide the three networks, one independent station, and, absent objection from the local educational station, any number of educational stations. Whether such proposal should be adopted depends on the final decision with regard to distant signals in the

\(^{111}\) "To provide each community with at least one television broadcast station." 1952 \textit{Report} at 91:620.

\(^{112}\) "To provide at least one television service to all parts of the United States." \textit{Id.}

\(^{113}\) 1966 \textit{Report and Order}.

\(^{114}\) 1968 \textit{Proposed Rules} at 440. See also 1971 proposals discussed \textit{infra}. 
larger market areas. However, if it is independently determined that protection is needed for the local broadcaster, the concept of "localism" demands adoption of a limit to distant signals regardless of the distant signal policy in the major markets.

In the major market areas, the Commission has adopted a policy of seeking diversification within the concept of "localism" by encouraging development of the maximum number of local stations. This encouragement of additional stations necessarily means the development of independent UHF stations. The network already has affiliates in the major markets and the spectrum limitations of VHF demand that all additional (independent) stations operate in the UHF band. Thus, because UHF transcends the technological limitations of "localism," the Commission has found itself choosing between an independent UHF station and a CATV system. The Commission has approached this problem as it approached the "localism" versus regional broadcaster situation.115 But, by restricting CATV importation of distant signals, it has frozen out of the major markets the system that offers the greatest potential to better effectuate the use of television in the public interest.

A. A New Standard for New Goals

The standard of "localism," by which the Commission has concluded the independent UHF should be protected, falls short of being a proper or workable standard because it fails to reflect the difference by which "localism" is satisfied in a major market. A large city communications policy demands far more than that which satisfied the concept of "localism" as perceived in 1952. The large city of today should not be forced to accept what the Commission at that time thought the limits of communications would be, as the major urban areas now have needs beyond that which we previously thought possible to satisfy. If a technology exists which better satisfies those needs, it should not be restricted in order to preserve a medium of communications which ignores the responsibility of fulfilling those needs.116

115. 1968 PROPOSED RULES at 434-35.
116. At least one Commissioner believes there is another reason for the restrictions. See N. JOHNSON, HOW TO TALK BACK TO YOUR TELEVISION SET 161 (1969), wherein the author states:

As things stand now, it is likely that some future observers will look back upon the present hiatus as a government-enforced pause which lasted just long enough to give...
The television goals of urban America involve the assumption of complete responsibility in communications. Television should provide an outlet for local expression and build a sense of community. It should do more than merely entertain; it should inform, educate, and provide for cultural and political expression. Television should reflect and enrich our cultural pluralism by speaking to and with the minority groups so often ignored by an industry which seeks the largest possible audience. It should provide a diversification of programming so as to increase the demand for the many creative people presently overlooked as a result of mass appeal. From a technological standpoint, television must continually search for ways to limit its use of the spectrum. It is inefficient, and its present frequency allocation is at the expense of many industries wishing to take advantage of radio technology. Further, it should be made available to the greatest number of viewers at a minimum cost. And, most importantly, television, as a public medium, should provide maximum access. The public interest demands that television act as a channel of communications with maximum access to all.

Most of these goals are unique to large urban areas. They reflect the existence of substantial minority groups and large special interests that request and would support a greater diversification of program fare. They further reflect a desire to harness a technology that can satisfy the needs of large-scale education, business, and diverse cultural groups. Manifested through these goals is an awareness of the need to encourage continuing developments believed to be impossible in 1952.

These goals cannot be satisfied by the 1952 concept of "localism." The impetus for protection of local stations understandably arose in those areas where there would be one local station or none at all. In the major markets, however, the competitive line-up is different. These markets already have three network affiliates. The requested protection is, thus, not for the only local broadcaster but, rather, for a fourth local broadcaster. Viewed in that manner, "localism" via the development of UHF becomes a questionable

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117. This requirement is not demanded only by communication experts. See R. May, Love And Will 31 (1969), wherein the author notes: "In the alienated state of mass communication, the average citizen knows dozens of TV personalities who come smiling into his living room in an evening—but he himself is never known."
concept. If local outlets (the network affiliates) already exist, it is difficult to envision any need for protecting and developing additional local outlets (independent UHF's) at the expense of a new technology with the potential for attaining those goals which the present television is either unable or unwilling to meet.

When met with the contention that the existence of a fourth local broadcaster is not as important as the first, the Commission has traditionally responded that the fourth broadcaster would be an independent one and, thus, able to devote more time to local expression. But even assuming that an increased quantity of local broadcasting would result in improved local expression, and ignoring the substantially better program resources of a network station, the attempt by the Commission to compare the potential of the independent and network broadcaster exposes the second fallacy of the "localism" standard. It does not necessarily follow that if the independent, rather than the network station, performs better as a local outlet, the independent should be protected per se from CATV penetration. Before any restrictions were imposed, a comparison between the independent station and CATV complemented by the existing network stations should have been made. The Commission failed to recognize the fact that CATV would not be the only media but, rather, would complement the network stations as a local outlet. The network stations, because they receive full protection through the carriage and non-duplication rules, would always remain. To conclude that the development of independent stations, rather than CATV, better serves the concept of "localism" is to ignore the fact that the proper consideration should be that of CATV complemented by network stations.

The final and most important reason that the concept of "localism" as developed in 1952 is not the proper vehicle by which our goals can be reached is that it fails to reflect the changing responsibilities of an imaginative communications policy. "Localism" is the result of a policy decision to favor local over regional broadcasters. Its failure lies in its rigidity; it goes no further. No stan-

118. 1966 Report and Order at 770. Such a fourth station (UHF independent) might make possible a fourth national network or the formation of "FM-type networks" in television, and also would be "valuable particularly for local programing and self-expression"—an important need in many markets "because all of the available stations are network affiliates." H.R. Rep. No. 1559, 87th Cong., 2d Sess. 3 (1962); S. Rep. No. 1526, 87th Cong., 2d Sess. 4 (1962).
standard is provided by which to compare two mediums, both capable of local expression. In the end, then, the question is one of determining which medium, UHF or CATV, best satisfies the communications goals of the major market areas.

B. Satisfaction of Goals

An independent UHF broadcaster only partially satisfies the television goals of a major market area. Although it succeeds in its role as a local outlet and provides a sense of community, it fails to provide an accessible medium of communications and fails to serve minority interests. The independent broadcaster cannot afford to seek out and speak to the minority interests of a community. Over-the-air broadcasters are captives of their revenue structure. Within the community it serves, the independent station must practice mass appeal. Profitability depends upon the maximization of the available audience. An attempt to speak directly to a minority group restricts the available audience below any level of profitability. In short, the independent station is to the minority interests what the regional broadcaster was to the surrounding communities. Like the regional broadcaster, the independent UHF station is unable to serve the needs of the smaller interests.

A further difficulty is that even if the broadcaster chose to reach a certain minority group, it would be technologically able to reach only one interest at a time. The limits of one signal are further apparent when the economics of network competition and unprofitability of duplication are taken into consideration. The independent broadcaster has neither the technological capabilities nor the financial base to serve as an effective channel of communications for all the community. Such a channel must provide more than "local expression." It must offer both an accessibility to the medium by all people at a minimum cost and the opportunity to present diverse ideas, thereby reflecting our cultural pluralism. Rather than merely allow the reception of a signal by a minority interest, it must provide an opportunity for that minority to expose its problems and philosophy to the whole community. The independent broadcaster cannot succeed as the vehicle of such expression. To pay only the expenses of the operation would be beyond the financial resources of any minority group.

Aside from the inability of UHF broadcasters to serve certain vital needs of urban America, there exists the very real question of whether UHF operations protected from CATV penetration would become sufficiently profitable to provide that "local expression" which the Commission erroneously concluded to be the sole standard of the public interest. The development of UHF has not been successful. The All Channel Receiver Act,\textsuperscript{120} the increase in UHF grants, and the recent development of low-cost equipment have not produced profitable results. By the end of 1968, only 163 of 654 channel allocations were operating,\textsuperscript{121} and revenues for the year fell short of expenses by approximately twenty percent.\textsuperscript{122} Further, if favorable prospects for UHF are dependent upon the development of a fourth network,\textsuperscript{123} the future of UHF becomes even more speculative absent a change in its operations.\textsuperscript{124}

In summary, it is questionable whether independent UHF stations can meet the goals of an imaginative communications policy. Technological limitations aside, there are indications that off-the-air broadcasters haven't performed as well as they might. Attempts under the federal licensing program to require balanced programs and encouragement of pay television manifest an impatience on the part of the Federal Communications Commission. Federal aid to educational television\textsuperscript{125} and the formation of various public interest groups\textsuperscript{126} have reflected a desire to look elsewhere for the "more effective use of radio."\textsuperscript{127} If there exists a system of communications that will further the public interest, the people should not be deprived of it in the absence of well-substantiated judgments.\textsuperscript{128}

\textsuperscript{121} TELEVISION DIGEST, INC., TELEVISION FACTBOOK 1969-70 at 72a, 226a (1969). See also Staff Report to the Federal Communications Commission, The Economics of the TV-CATV Increase 9 (1970). Approximately 65% of the 169 UHF stations lost money in 1969, and on May 31, 1970, there were still 106 commercial and 65 educational UHF channels allocated but not used in the top 100 markets.
\textsuperscript{122} FCC, 34TH ANNUAL REPORT FISCAL YEAR 1968 at 122 (1969).
\textsuperscript{123} PRESIDENT'S REPORT ch. VII, at 25.
\textsuperscript{124} One author indicates that the very existence of CATV manifests a doubt as to UHF development. "Or put another way, Americans (in 1964) were paying $72 million yearly to purchase television fare that the FCC's master plan (UHF development) was not providing." L. KOHLMEIER, JR., THE REGULATORS 214 (1969).
\textsuperscript{126} For example, the National Citizens Committee for Broadcasting (NCCB).
\textsuperscript{127} 47 U.S.C. § 303(g) (1970).
\textsuperscript{128} "Free enterprise (CATV) should not be hampered by governmental interventions in the absence of well-substantiated judgments which strike an appropriate balance between the competing social values at stake." PRESIDENT'S REPORT ch. VII, at 44.
Cable television has the capability of satisfying the goals of an imaginative communications policy and offers the diversity and “localism” needed to resolve the unique needs of the large markets. Because it raises money primarily from viewers and not advertisers, CATV is not dependent upon mass appeal programming and, in fact, has an incentive to seek subscribers from minority interests by speaking directly to them. Its profitability is correlative with its ability to provide a variety of programs. The viewer will subscribe only if at least one program appeals to his interest, not because he happens to be part of the mass audience. In addition, CATV is not limited to one channel. The multi-channel capability of CATV allows it to reach many separate interests at the same time. The use of coaxial cables not only multiplies the amount of information available for the viewer, but also does so without an inefficient use of valuable spectrum space.

The greatest potential of CATV lies in its accessibility to the public as a channel of communications. Twenty-four channels are available in most large systems, and additional channel capacity may be obtained at only a small cost. Leasing a channel results in little additional cost to the CATV system, as it needn’t provide any extra equipment or sacrifice the use of its only transmitter. The low access charges will not only provide a pervasive medium by which the entire community can address itself to its common needs but it will also stimulate further expression, specialization, and opportunities. CATV will provide the much needed access; the public and the government can control the use.¹²⁹

Thus, we see, CATV is a system by which the goals of major market television can be achieved. The importation of distant signals, the ability to originate on numerous channels, and the availability and access to public channels of communications are the elements of the imaginative communications policy needed to satisfy the unique needs of urban America. To effectuate such a policy, CATV must be relieved of its present restrictions. Rather than being relegated to the position of a supplementary broadcasting system, CATV should, in the public interest, be encouraged to develop as a primary system of communications, competing on an equal basis with all broadcasters.

¹²⁹ See S. White, Toward a Modest Experiment in Cable Television, The Public Interest, September, 1969.
C. Development of a Complementary System of Communications

Prior to 1971 it was argued, and the Commission believed, that the complete demise of the independent broadcaster would be contrary to the public interest in that there would be a complete loss of service to those unable to subscribe because of either geographic or financial reasons. Such a fear is, at best, theoretical. The demise of the independent broadcaster would not necessarily result in the loss of all off-the-air signals to the viewers without cable service. The three network signals would always be available in the major market areas. Further, the loss of the independent station would not result in the loss of a significant outlet of expression. Because the economics of broadcasting require the independent to appeal to the masses of the city, the rural areas unable to receive cable service feel little sense of identity with the large city independent. In addition, the UHF signal is normally too weak to provide such areas with an adequate signal. Thus, it is a mistake to consider the demise of such a station a significant loss to the rural communities.

Although those people unable to afford cable services do suffer an overall loss in off-the-air signals, it is questionable what their loss is. Given the advertisers' desire to reach the groups with purchasing power and the lack of such power in those unable to afford cable services, attraction to mass appeal programming may be nothing more than the result of coincidentally similar interests. On the other hand, CATV would seek out and serve their particular interest. The city could condition a franchise on the free wiring of ghetto areas. Further, the operation of CATV as a partial common carrier would allow city agencies to reach these people with information not only to educate and inform but, also, to expose them to various occupational opportunities. It is not in the public interest to preserve an over-the-air signal that only perpetuates the existing status of these people, when to do so is to deny them, at the very least, an opportunity to share equally with others the advantages of a progressive technology. They are the first who should benefit from change. For them, the loss of one over-the-air signal is a small price to pay for the advantages of CATV. The Commission was misguided in its imposition of restrictions on

130. See note 42, supra.
CATV for fear that these people would lose a service which, in fact, was refusing to serve them.

A CATV industry freed of restrictions will not cause the demise of UHF development. Rather, unrestricted CATV development will result in a complementary system of communications, with both CATV and UHF operating in and effectively serving the public interest. Cable competition will stimulate a change in the basic role of independent stations, encouraging those broadcasters presently protected to create their own protection through programming more responsive to the public interest. Healthy competition between the two technologies will effectuate a diversification of media control and provide a much needed competitive check.

Analogies to the radio and movie industries indicate that independent broadcasters will not fail in the face of CATV competition but, on the contrary, will adapt to the competition and maximize profit with their own special capabilities. The reaction to CATV today is similar to that expressed when television first threatened the viability of radio. Yet, in twenty years, the number of broadcasting stations and total revenue have doubled. The same functional changes in radio and reasons for survival are equally applicable to television today. As radio responded by emphasizing "localism," so will the independent broadcaster respond; and as the development of transistors in a progressively mobile society preserve the importance of radio, so also will the development of a means of supplying a viewer separated from the cable with off-the-air signals preserve the importance of television. Radio changed because a new technology could perform better where radio had formerly performed alone. Television is as flexible an industry as radio. If, because of competition from CATV, the independent is found to be losing its audience, it, too, will adapt. The demand for off-the-air signals can never completely be replaced by CATV.

The experience of the movie industry is also analogous. Although it was first thought that television would destroy the movie industry, the number of movie theatres has remained constant, and

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131. The term "restrictions" as used in this sense refers to those prohibitions which have effectively frozen CATV development in the major market areas. Restrictions on distant signal importation, origination, and advertising carriage, as well as the non-duplication requirements, are reasonable and imperative to the survival of the local stations in the smaller markets.

receipts have risen approximately fifty percent.\textsuperscript{133} The continuing success of the movie industry does not appear to be at all threatened for two main reasons. First, much of the success of the industry can be attributed to a change from the expensive spectacles to the lower cost mixed fare appealing to a more limited audience—a change caused by the economics of television competition. Why should there be any doubt that competition with CATV would do the same for television? Secondly, the movie industry remains unthreatened because television is unable to outbid the theatres for first-run movies. Analogously, CATV could not afford to purchase the local sports schedule, a program traditionally presented by the independents in the large market areas. Certain programs, such as sports, lend themselves to mass appeal sales and, consequently, are a vital part of a broadcaster's schedule and less attractive to CATV systems. Of course, if CATV systems were to adopt the economics of a broadcaster because of permission to advertise, they would find themselves able to purchase such programs. However, imposition of restrictions similar to those presently applied to pay television\textsuperscript{134} could remedy the problem and encourage CATV to provide varied programming rather than carry the same signal.

Experience in Canada offers a direct example the broadcasters' survival despite unrestricted CATV growth. Although heavy penetration of cable can be found in the major Canadian cities, as yet, no adverse effects on revenues have been reported.\textsuperscript{135} Although Canada's experience with CATV has been too short to reflect any long-run results, the minimal data thus far reported indicates that whatever effect it may have, it will be neither as devastating nor as spectacular as the broadcasters have been predicting.

Analogies to radio and the movie industry and the example found in Canada do not provide the sole reason for believing that unrestricted CATV and the broadcasting industry can coexist. The most persuasive reason is found in the complementary relationship

\textsuperscript{133} L. JOHNSON, THE FUTURE OF CABLE TELEVISION: SOME PROBLEMS OF FEDERAL REGULATION 70 (The Rand Corp. 1970) [hereinafter cited as THE RAND REPORT].

\textsuperscript{134} The pay television industry can purchase certain sporting events only if the sport hasn't been presented over-the-air for a period of two years. (It should be noted that it has been recommended that this period be increased to five years). In effect, in order for the pay television industry to purchase these events, they would also have to pay for the previous two years.

\textsuperscript{135} The RAND REPORT at 67-68.
itself. Although there would be competition for audiences, great savings would be available in the sharing of costs. Programs, personnel, and service could be utilized more efficiently. Many arrangements would be possible. For example, CATV could permit the broadcaster to transmit CATV originations to viewers outside the cable community; or, the broadcaster could provide the city with public-interest programs to be carried on CATV channels operating as common carriers. The local broadcaster and distant CATV systems could provide programming for each other. The opportunities are many. Not only would the public benefit from the new diversity, but so, also, would the mediums through more efficient use of assets.

IV. PROPOSED RULES AND NEW PROBLEMS

On August 5, 1971, the Federal Communications Commission, in an unprecedented change of direction, announced a new and completely different communications role for CATV. In a “letter of intent” submitted to the Senate and House Commerce Committees, the Commission outlined, at times in detail, that which it planned to incorporate into cable TV rules to be issued in December of 1971. Having admitted that its objective, throughout its years of regulation, had been to find a way of tapping cable’s potential to serve the public without simultaneously undermining the foundation of the existing over-the-air broadcasting structure, the Commission stated that it was unwilling to further restrict the contribution cable television could make toward improving the nation’s communications system. Envisioning cable as a medium “providing additional diversity of programming, serving as a communications outlet for many who previously have had little or no chance of ownership or access to the television broadcast system, and creating the potential for a host of new communications service,” the Commission announced that its basic objective was “to get cable moving so that the public may receive its benefit.” For the first time, the Commission questioned the speculative impact of CATV on the continued viability of over-the-air broadcasting. Acknowledging independent studies which suggested that UHF would be helped, rather than hurt, by cable, the Commission concluded that the improved reception provided by cable would substantially aid the UHF stations. Further restrictions upon CATV

136. Id. at 68-72.
growth would not be made.

The new rules will allow the importation of distant signals in the top one hundred markets. The concepts of retransmission consent\(^{137}\) and commercial substitution\(^{138}\) will be dropped and replaced by three new concepts which would determine the number of signals a cable system can carry. First, there will be a mandatory carriage requirement; that is, with certain exceptions for grade B signals not significantly viewed, a cable system will be compelled to carry the signals of all stations licensed to communities within thirty-five miles. Secondly, the concept of "minimum service" will be developed. A cable system in the fifty largest markets will be required to carry those signals which would make available three full network stations and three independent stations. A cable system in the next fifty largest markets will be required to carry those signals which would provide its market with three full network stations and two independents. A cable system in markets other than the top one hundred will be required to carry three full network stations and one independent. Thirdly, "additional service" will be allowed for those systems which do not need distant signals to comply with the minimum service requirement. In other words, cable systems in the top one hundred markets will, in any case, be permitted to carry two signals beyond those required under the mandatory carriage rules. Distant and out-of-market signals carried to provide minimum service will be counted against the additional signals. Cable systems in smaller markets, on the other hand, will not be permitted to import any network or independent television signals beyond the minimum service level required.

Priorities as to which distant signals should be carried were also recommended. Cable systems in the top one hundred markets carrying distant independent television signals will be required, as a first priority, to carry one UHF independent station from within two hundred miles. If there is no such UHF station, any VHF station within two hundred miles or any UHF station would be allowed. The second distant signal in these top one hundred markets will be free from restrictions as to point of origin. With respect to those systems in markets other than the top one hundred, car-


riage of the one independent distant signal will be free from restrictions as to point of origin. In those few markets where a third independent may be brought in, that signal will be required to originate either within the state or within two hundred miles. If no such signals are available, there will be no restrictions.

Undoubtedly, the most important proposal of the "Letter of Intent" is that which relates to the regulation of nonbroadcast channels. It is proposed that the cable systems in the top one hundred markets have a minimum of twenty channels. Consequently, each system would have, after mandatory carriage of certain broadcast signals, approximately thirteen channels for public use and lease purposes. If CATV is to truly open new outlets for local expression, promote added diversity in television programming, advance educational television, and provide increased informational services for local governments, effective use of these channels must be made. Accordingly, the Commission has proposed that three dedicated channels be required. The first would be a public access channel, available free at all times on an nondiscriminatory basis. The second channel is to be set aside for educational use, and the third for use by state and local government on a developmental basis. It has been proposed that such channels be made available without charge for the first five years. The remaining channels are to be free from restrictions and available for lease purposes. To the extent that the public access, educational, and governmental channels are not being used, these channels could also be used for leased operation.

Other proposals include that of imposing a requirement that all cable systems have both the capacity for two-way communication and the capability of expanding as the demand arises. As CATV development is to be encouraged for the very purpose of increasing diversity and access, the expansion requirement seems difficult to fault. Similarly, because it is hoped that CATV will develop its non-broadcast potential, a required capacity for two-way communication appears essential. In addition, the Commission has proposed various rules concerning CATV liability for program content. If, in fact, the CATV system is to act as a common carrier with regard to those channels, it does not itself originate, it is expected that there will be no liability for slanderous or obscene material. With respect to public access channels, it is envisioned

that present libel, slander, and obscenity rules will govern, but only as to those who control the content. The same rules that presently preclude the presentation of lotteries or of any advertising material will apply to the CATV systems.

Standards prescribing the method of measuring transmission performance or specifying the types of equipment that cable systems must use have not been set forth. Instead, the thrust of the proposed rules is to require that a signal meet certain standards of minimal performance on its arrival at any subscriber's terminal. A task force of experts is to be appointed to advise the Commission as to required technical standards.

Rather than entirely preempt the CATV regulation field, the FCC has specified certain areas in which joint jurisdiction with state or local authorities will not be allowed. These areas include problems relating to broadcast signals carried, technical standards, program origination, cross ownership of cable and other media, and equal employment opportunities. Further, the Commission has called for federal preemption of control over access channels. Neither state nor local governments would be allowed to control their use. Certain areas, however, will be reserved for local regulation. For example, the choice of a franchisee in a service area is to be made by the local entity. The Commission will only require that the franchise holder file with it a certificate that the franchising authority has complied with all federal rules and guidelines. The local entity will make the determination whether to divide up the city, county, or state, and, if so, how. In addition, establishment of the construction timetable and franchise duration will be left to the local entity. The Commission will only require that the local cable system have an operable headend within one year after a certificate of compliance has been granted and that it thereafter meet substantial percentage figures for extension of energized trunk cable. As a general guideline, the Commission has recommended a franchise duration of fifteen years, with a reasonable renewal period thereafter.

Also proposed is a requirement that the governmental authorities or franchisee specify or approve initial subscriber rates for services furnished by the franchisee, giving reasonable advance notice to the public of all rate changes. Recognizing the need for

140. In any event, the scope of such action has been severely restricted by recent court action. Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971).
flexibility in this area, the Commission has proposed to drop the present two percent limitation on local franchise fees. In doing so, however, the Commission is not abandoning its opposition to the concept of revenue raising by local authorities. A fee of not more than five percent is recommended, but when the fee (including all forms of consideration, such as initial lump sum payment) exceeds three percent, the franchising authority must submit a showing of the appropriateness of the fee specified, particularly in light of the planned local regulatory programs. The franchise fee is to be directly related to, and used only to pay for, the regulatory program necessitated by the existence of the franchise.

An examination of the proposed rules shows that many important areas of CATV regulation are not covered. Questions of multiple ownership, state and local jurisdiction, technical standards, and the appropriate accounting system are only briefly discussed. Indeed, from a study of those subjects covered, it is clear that the “Letter of Intent” represents only a general guideline and not any effort on the part of the Commission to articulate specific rules. Despite this, the significance of the Letter is not to be overlooked.\textsuperscript{141} The Commission has finally reversed its policy. Rather than restrict CATV for purposes of effectuating the goals of a clearly erroneous television policy, it now intends to encourage CATV growth in an attempt to effectuate a new and imaginative communications policy.

Of course, this change in direction has created new problems, but these problems are primarily those which accompany the introduction of any new industry.\textsuperscript{142} Upon the arrival of any industry, we naturally ask, “Who shall benefit from it, and who shall regu-

\textsuperscript{141} There are presently 1,959 franchises granted, but not operating. The new rules will probably cause immediate construction of these systems. In addition, there are 2,548 applications pending in 1,519 communities. The new rules will encourage early decision. The result is that the industry will be greatly expanded from its present level of 2,578 operating systems serving 4,235 communities and 5,300,000 subscribers. TELEVISION DIGEST INC., TELEVISION FACTBOOK 1969-70 at 372a, 81a (1969).

\textsuperscript{142} One of the problems often raised by those who fear CATV dominance is that it will become a necessity, and the cost to wire the nation will be prohibitively expensive. Not so, says the Electronics Industries Association, which predicts that while it may cost approximately $11 billion to wire the nation, there will be a savings to the economy of $50 billion each year—$6 billion in air travel, $6 billion in highways, $6 billion in postal service, and $28 billion in recreation. See Industrial Electronics Division, The Electronics Association Response to the CATV Inquiry, “The Future of Broadband Communications,” Proposed Rule Making and Notice of Inquiry, FCC Docket No. 18397 (October 29, 1969).
late it?" Already, state governments are attempting to take control of and benefit from franchise fees. Certain groups are ignoring the economic realities and demanding imposition of burdensome restrictions upon CATV operations. The newspaper industry, generally unaffected by a restricted CATV, now views cable television as a formidable competitor and is requesting favorable regulation from the Commission. Questions of access, priority, and price discrimination are necessarily unanswered.

However, these problems are matters which do not necessitate a regulatory policy which ignores the public interest and restricts the development of cable television. The Commission has finally recognized the true potential of CATV and has determined that a period of experimentation is needed to provide data upon which satisfactory solutions can be based. In that sense, for the first time, the cable industry and cable regulatory policy are moving in a positive direction.

143. In 1968, newspapers had interests in 225 cable systems and were seeking another 300 franchises. B. RUCKER, THE FIRST FREEDOM 181 (1965). The ANPA has urged the Commission not to prohibit CATV ownership by newspapers in the same market. ANPA Research Institute, R.I. Bulletin No. 1029 (September 25, 1970).