Fordham Law Review

Volume 42 | Issue 1 Article 2

1973

Cable Television and the Promise of Programming Diversity

D. Bruce Lapierre

CABLE TELEVISION AND THE PROMISE OF PROGRAMMING DIVERSITY*

D. BRUCE LAPIERRE†

I. Introduction

IN 1972 the Federal Communications Commission (FCC) issued a lengthy report and promulgated a comprehensive set of regulations governing cable television. The commission's action was intended to resolve years of indecisive balancing of the proper relationship between cable and broadcast television and to establish a new role for cable television in the provision of television programming and communications services. In Part II, this article will explore briefly the technology of cable television, the growth and status of the cable industry, and the potential of this new communications service to restructure the existing framework of information exchange. Part III will direct attention to the FCC's regulation of cable television from its inception through the comprehensive rulemaking of 1972. With this background, Part IV will evaluate cable's promise of diversified television programming and the FCC's cable-casting rules which will guide the potential metamorphosis of the television medium.

II. Cable Television: Technology, Industry, Potential

The phenomenon of cable television is widely believed to hold forth the promise both of radically new television programming and of a variety of two-way communications services that would permit individuals to conduct a large portion of their daily lives from a console in their living rooms. Although the technology capable of fulfilling these promises exists, the cable television industry is mired in operational realities divorced from its technological potential. Movement toward achieving the technological potential will be accompanied initially by an opportunity for an expanded range of television programming and only in the more distant future by the possibility of advanced two-way communications services.

---

* This Article was the co-winner of the 1973 E.B. Convers Prize at Columbia University School of Law. The author wishes to note that research was completed on or about Jan. 15, 1973, but substantial developments subsequent to this date and prior to publication are incorporated.

† A.B., magna cum laude, Princeton University; J.D., 1973 Kent Scholar, Columbia University School of Law. Mr. LaPierre is presently law clerk for Judge Milton B. Conford, Presiding Judge for Administration, Superior Court of New Jersey, Appellate Division.

A. *The Technology*

A cable television system[1] is a facility that, unlike conventional over-the-air broadcasting, delivers television signals directly by wire to the viewer's receiver. The physical plant of a cable television system may be divided for descriptive purposes into the headend and the distribution system.[2] The headend transmits the television signals carried on the distribution system to the viewers' homes, but the signals themselves may be derived from a number of sources. For example, the signal of a local broadcasting station may be picked up by an antenna and fed into the headend, or the signal of a more distant conventional broadcasting station may be picked up by an antenna and transmitted to the headend by a microwave connection. A third source of signals is a television studio connected directly to the headend by the cable system operator.

The distribution system is composed of coaxial cable[3] trunk and feeder lines placed in underground conduits or on telephone poles which form a "tree network"[4] carrying the signals from the headend to the area to be served. When an individual decides to subscribe to cable service, his tele-

1. Until 1972, cable television systems generally were known as community antenna television (CATV) systems; however, a shift to the more inclusive term "cable television (CTV) system" recommended by the Federal Communications Commission (FCC) is appropriate in light of the broader functions now proposed for these facilities. Cable Television Report and Order on Rules and Regulations Relative to CATV Systems, 36 F.C.C.2d 143, 144 n.9 (1972). In this Article the older terminology will be used where appropriate in the context. A CTV, or alternatively a CATV, system is defined as "[a]ny facility that, in whole or in part, receives directly, or indirectly over the air, and amplifies or otherwise modifies the signals transmitting programs broadcast by one or more television or radio stations and distributes such signals by wire or cable to subscribing members of the public who pay for such service, but such term shall not include (1) any such facility that serves fewer than 50 subscribers, or (2) any such facility that serves only the residents of one or more apartment dwellings under common ownership, control, or management, and commercial establishments located on the premises of such an apartment house." 47 C.F.R. § 76.5(a) (Oct. 1972). The FCC is contemplating initiating a rulemaking which would modify this definition to include cable systems in apartment buildings or condominiums. Television Digest With Consumer Electronics, 12 Weekly Television Digest, Oct. 16, 1972, at 2 [hereinafter cited by volume as Weekly TV Digest].

2. The description of cable television technology is drawn primarily from the final report of the Sloan Commission on Cable Communications. Sloan Commission on Cable Communications, On The Cable: The Television of Abundance 11-16 (1971) [hereinafter cited as Sloan].

3. Coaxial cable is the "wire" of cable television. It is composed of a small diameter, inner conductor, an insulating layer of plastic foam, a tubular outer conductor, and a protective sheath. Id. at 13 (diagram).

4. The nature of a "tree network" is perhaps best understood in contrast with the more familiar "hub network" of telephone service. In a tree network each television set is connected with the headend; however, unlike the telephone system, there is no switching center at a hub by which individual subscribers may be interconnected. Id. at 14 (diagram).

vision set is connected by a drop line which simply taps into the trunk and feeder lines to draw off the television signals that are being carried. Although coaxial cable is theoretically capable of carrying forty television channels, the number of television signals that may actually be utilized depends on the sophistication of the distribution system and related equipment.

A basic single cable distribution system is restricted to offering signals only on the twelve standard very high frequency (VHF) channels of the normal television receiver. The capacity of coaxial cable to carry forty channels on different VHF frequencies is rendered useless by the fact that existing television receivers are designed to handle only the twelve standard VHF channels used in over-the-air broadcasting.[5] A two-cable distribution plant connected to standard television sets can increase channel capacity to twenty-four with the addition of a switch which allows the subscriber to select between the two cables.[6] In practice, the twelve and twenty-four channel configurations for single and dual cable systems are upper limits, as interference problems, especially in urban areas, reduce the number of usable channels.[7]

Through use of a third type of distribution plant—an augmented channel system[8]—cable can carry additional non-standard VHF frequencies by introducing into the system either a channel converter[9] attached to the subscriber's television receiver or a special television set designed to handle both standard and non-standard VHF frequencies.[10] Notwithstanding coaxial cable's forty channel capacity, the number of signals that can actually be transmitted by a single cable augmented channel system is limited by the capacity of present converters (twenty-five to twenty-six channels)[11] and by the capacity of the amplifiers (ap-

5. Cable systems are unable to take advantage of the high channel capacity of television receivers equipped to receive UHF signals because coaxial cable cannot carry these frequencies. Ward, Present and Probable CATV/Broadband-Communication Technology, in Sloan, app. A, 179, 185 [hereinafter cited as Ward].

6. Id. at 188.

7. Id. at 185-87.

8. Id. at 192-95.

9. By performing channel tuning in a shielded environment and by showing the signals on a "quiet channel," the converter reduces interference from direct over-the-air pickup and from adjacent channels and avoids the receiver's limited tuning capacity of 12 VHF frequencies. Id. at 192; 11 Weekly TV Digest, July 12, 1971, at 9-10.

10. The National Cable Television Association (NCTA) has filed recommendations on receiver standards for all-cable channel sets with the FCC. 11 Weekly TV Digest, June 14, 1971, at 8. Before such sets can be designed, it is essential that there be standardization of cable channels. Id., July 12, 1971, at 9. At least one television set manufacturer, Philco, has undertaken the production of modified receivers which can handle all of the VHF frequencies that are used by one particular CTV system. Id., Sept. 20, 1971, at 7-8.

11. Ward, supra note 5, at 192.

proximately twenty channels)[12] that must be installed on all cable lines to maintain signal strength.

The combination of a multi-cable system with the augmented channel approach would appear to set the outer limits on the number of channels that a cable system can provide. At present a dual-cable, augmented channel tree network system has the capacity to deliver forty to fifty-two channels; improved[13] converters would stretch this capacity to seventy channels.[14] Although hub network, switched systems are undergoing experimentation,[15] it is reasonable to expect that most high-channel-count cable systems will adopt some permutation of the multi-cable, augmented channel, tree network approach.[16] It is difficult to estimate the costs of implementing this technology.[17] Nevertheless, an instructive guide is

12. Sloan, supra note 2, at 15.

13. The cable equipment manufacturing industry is expending a great amount of money and energy in providing improved equipment and in wooing cable system operators, as a review of the advertisements in the industry's professional journal, TV Communications, will suggest.

14. Ward 180.

15. In a cable system using the hub network switched system, channel selection is performed at a hub rather than at a subscriber's receiver and only one channel of the many available is transmitted to the subscriber. The system's advantages rest in reduction of many of the interference problems of carrying a large number of channels on cable, the use of a cheaper "wire" for transmission, and less expensive receivers. However, the system requires that subscriber "drop lines" be extended to a central hub for switching and requires expensive switching equipment similar to that used in telephone systems. Two CTV systems have initiated trial operation with a switched system, but they would appear to be competitive with a multicable converter system only at very high levels of penetration. Id. at 195-200.

16. The Sloan Commission has predicted flatly that it is this configuration that cable systems will follow over the next decade. Sloan 39. Two major proposals for urban cable systems have favored this approach. Baer & Park, Financial Projections for the Dayton Metropolitan Area, in L. Johnson (study director), Cable Communications In The Dayton-Miami Valley: Basic Report 2-1, 2-7 (Rand Memorandum 1972) [hereinafter cited as Dayton Report]; The Mitre Corp., Urban Cable Systems II-16 (1972) [hereinafter cited as Mitre Report].

17. The cost for the distribution plant of a dual cable system using improved converters to provide 70 channels has been estimated at $120 per subscriber. Ward 180. The fact that this estimate rests on the dual assumptions of 100 percent penetration and the use of an aerial plant means that it is extremely low. Penetration cannot be expected to exceed the Sloan Commission's optimistic estimate of 60 percent and is more likely to range between 20 and 25 percent. See text accompanying note 239 infra. With these lower penetration rates, the same largely fixed costs of the physical distribution plant will have to be distributed over a far smaller number of subscribers, thereby raising sharply the cost per subscriber. Similarly, the fact that this estimate assumes an aerial plant means that costs would have to be revised upward for an urban area which requires an underground plant, which is from three to twelve times as expensive to construct as an aerial plant. See Ledbetter, An Overview of Cable Television, in Cable Television in the Cities: Community Control, Public Access, and Minority Ownership 7, 10 (C. Tate ed. 1971).

furnished by the estimate of a total capital cost of $31 million for a thirty channel, one cable system with converters capable of reaching all of the 263,000 households of Washington, D.C.[18]

B. *The Industry*

The cable television industry began operations in the early 1950's[19] with the most basic of the headend and distribution systems described above. The earliest cable television facilities were known as CATV (Community Antenna TeleVision) systems, an acronym that rather accurately suggests the parameters of their operations. These CATV systems utilized a large antenna to take local signals off the air and distributed them on a single cable to anyone who paid both an installation charge and a monthly service fee. Nascent CATV systems drew little regulatory attention as long as their operations were confined to providing improved service for rural areas where direct over-the-air reception was difficult or impossible.[20] However, when CATV operators sought to increase the number of signals available at the headend by importing the signals of distant stations on microwave connections,[21] a period of increasingly restrictive regulation by the FCC commenced.[22] As a result of these restrictive regulations the cable television industry as a whole has remained closely bound to the basic technology and to the role of providing improved reception that characterized early CATV systems. Although the number of CTV systems has grown from seventy serving 14,000 subscribers in 1952 to 2,770 serving 6,000,000 subscribers as of January 1, 1972,[23] the average system has only 2,272 subscribers.[24] Furthermore, most CTV systems are located in

18. Mitre Report II-36.

19. The first CATV is said to have been tested in Astoria, Oregon in 1949, and the first commercial CATV began operation in 1950 in Lansford, Pa., 31 FCC Ann. Rep. 78 (1965). A CATV for radio signals is reported to have been established as early as 1923. E. Barnouw, A History of Broadcasting in the United States, Vol. III: The Image Empire 247 n.6 (1970).

20. See Part III A(1) infra.

21. The first requests for microwave relays to CATV systems were granted by the FCC in 1954. 20 FCC Ann. Rep. 37 (1954). By 1958, the occasion of the first intensive regulatory scrutiny of CATV, the FCC had approved a total of 77 microwave stations to serve 79 CATV systems. 24 FCC Ann. Rep. 41 (1958).

22. See Part III A(2) infra.

23. Television Digest, Television Factbook 1972-73, 75a (1972) [hereinafter cited as TV Factbook]. A recent estimate of industry growth during 1972 indicates that 6.3 to 6.5 million homes, or approximately ten percent of the 62.35 million television homes in the United States, were served by CTV systems as of August 1, 1972. 12 Weekly TV Digest, Aug. 21, 1972, at 1.

24. 12 Weekly TV Digest, Aug. 21, 1972, at 1. The largest CTV systems include San Diego (65,000), New York City's TelePrompTer (45,000), Northampton, Pa. (45,000), New York City's Sterling (43,501), and Altoona, Pa. (42,500). There are 17 other CTV systems which serve 20,000 plus subscribers, 83 serving 10,000-19,999 subscribers, 215 serving 5,000-9,999

small towns and cities.[25] In most markets, the development has been predicated solely on supplementing partial over-the-air service or improving service in areas with particular reception difficulties.[26] The fact that over eighty-seven percent of all operational CTV systems have a channel capacity of twelve or less[27] evidences the tremendous gap between the current status of the industry and its technological potential.

Notwithstanding the limited development of the CTV industry to date, it is frequently predicted that by the end of this decade cable television systems will be serving between forty and sixty percent of the television homes in the United States.[28] While there are clear indications[29] that CTV systems will continue to expand from the current base of serving ten percent of television homes,[30] growth of the predicted magnitude has been

subscribers, and the remaining 2,500 plus CTV systems serve under 5,000 subscribers. TV Factbook 74a-75a.

25. Sloan, supra note 2, at 1; 37 FCC Ann. Rep. 59 (1971).

26. In 1952, the FCC allocated channels for television service. Sixth Report and Order on Rules Governing Television Broadcast Stations, 17 Fed. Reg. 3905 (1952). The result of this allocation was that less densely populated areas were alloted less service than the major urban areas. The FCC's regulation of cable television (Part III A infra) generally has allowed CTV systems to supplement the number of signals in areas that were slighted by this allocation plan. Thus, in rural areas and small towns, CTV operations have been able to develop on the basis of offering both additional signals and improved reception. On the other hand, the FCC's rules generally have restricted the introduction of additional television signals into more urban areas that are deemed to be served fully under the allocation plan. As a result, since CTV systems could only offer improved reception in urban areas that already enjoyed good over-the-air signals, until recently there has been only nominal incentive to serve these areas. The few exceptions to the exclusion of CTV systems from major cities is explained by the existence of peculiar reception problems. In New York City, large buildings create interference problems, particularly for color signals. In San Diego and Los Angeles (canyons), and in San Francisco (hills) geographical conditions prevent good over-the-air reception for many homes. R. Park, Prospects for Cable in the 100 Largest Television Markets 2 (Rand Memorandum 1971) [hereinafter cited as Park]; Sloan 26-27.

27. Only 361 CTV systems have a channel capacity of 13 or more. See TV Factbook 75a. The largest system, with a 64-channel capacity, is being constructed in Akron, Ohio. See Johnson & Gerlach, The Coming Fight for Cable Access, 2 Yale Rev. L. & Social Action 217, 221 (1972).

28. Sloan 38-39, 173; M. Price & J. Wicklein, Cable Television: A Guide for Citizen Action 8 (1972) (30 million subscribers predicted by 1980) [hereinafter cited as Price & Wicklein].

29. Among the indications of continued expansion for the CTV industry are the plans of the top 50 cable operators to increase the mileage of their networks by 28 percent in 1973. 12 Weekly TV Digest, Sept. 25, 1972, at 2; id., Oct. 2, 1972, at 3. Also indicative of continued expansion are the facts that there are 1,682 CTV systems which have been granted franchises but have not yet begun operation and that there are 2,797 applications for CTV franchises pending. Television Digest, Television Factbook, Weekly CATV Addenda, Aug. 14, 1972, at 1.

30. See note 23 supra.

questioned by some observers.[31] The future development of the cable television industry is examined fully in Part III *infra*, but it is important to note at this point that these optimistic predictions are an integral part of most visions of cable television's role in reordering the pattern of communications in the future.

C. *The Potential*

The capacity of the coaxial cable used in CTV systems to carry heavily loaded information signals like television signals has excited much interest and speculation[32] in recent years about the potential of cable television to restructure the existing framework of information exchange.[33] The catalog of the communications services projected for cable television systems is extensive,[34] and for analytical purposes it is profitable to categorize them as one-way television services and as two-way cable services.

The projections of improved one-way television services are grounded on the belief that the availability of a large number of television channels in a cable system would permit a diversity of programming heretofore

31. Kalba, The Cable Fable, 2 Yale Rev. L. & Social Action 195, 196 (1972) (suggesting that 20 to 25 percent penetration by 1980 is a more reasonable estimate and would in itself be a substantial development).

32. See President's Task Force on Communications Policy, Final Report, ch. 7 (1968) [hereinafter cited as Communications Policy Report]. See generally Sloan, supra note 2; Price & Wicklein. The Ford Foundation, the Kettering Foundation, and the Markle Foundation have financed a number of studies of cable television which have been published by the Rand Corporation and are referred to throughout this article.

33. "Cable technology, in concert with other allied technologies, seems to promise a communications revolution." Sloan 2.

34. A representative, but by no means all-inclusive, list was compiled by the FCC in 1968, and it included "facsimile reproduction of newspapers, magazines, documents, etc.; electronic mail delivery; merchandising; business concern links to branch offices, primary customers or suppliers; access to computers; e.g., man to computer communications in the nature of inquiry and response (credit checks, airlines reservations, branch banking, etc.), information retrieval (library and other reference material, etc.), and computer to computer communications; the furtherance of various governmental programs on a Federal, State, and municipal level; e.g., employment services and manpower utilization, special communications systems to reach particular neighborhoods or ethnic groups within a community, and for municipal surveillance of public areas for protection against crime, fire detection, control of air pollution, and traffic; various educational and training programs; e.g., job and literacy training, preschool programs in the nature of 'Project Headstart,' and to enable professional groups such as doctors to keep abreast of developments in their fields; and the provision of a low cost outlet for political candidates, advertisers, amateur expression (e.g., community or university drama groups) and for other moderately funded organizations or persons desiring access to the community or a particular segment of the community." Notice of Proposed Rulemaking and Notice of Inquiry into Rules and Regulations Relative to CATV Systems, 15 F.C.C.2d 417, 419-20 (1968). A "popularized" version of the above list may be found in Price & Wicklein, supra note 28, at 2-3, 19-28.

prohibited by the scarcity of channels available for conventional over-the-air broadcasting.[35] This diversity is to be achieved by filling the extra channels, unused by signals taken from the air, with programming produced by local community groups, educational institutions, municipal governments, public agencies, and new program producers attracted by the abundance of channels for television service.

The more grandiose predictions of cable's impact on communications patterns involve the introduction of various types of return signal capacities and equipment into the technology of cable systems. The simplest type of two-way system is a "narrow-band subscriber response service" in which a digital return signal for each subscriber is monitored or polled by a central computer at the headend.[36] Such a basic two-way system would permit services like meter reading and alarm surveillance and could encompass viewer response on a very limited yes-no or few numerical digits level.[37] More highly developed two-way cable systems[38] would include: (1) a voice and video return signal to the headend, which would greatly expand the possibilities for home educational instruction; (2) subscriber initiated services, which would permit the individual subscriber to request information from a variety of sources to be printed out or visually displayed on special equipment attached to his receiver, and (3) point-to-point services to enable a subscriber to transmit voice, video, or data directly to another subscriber.[39]

The FCC recently has required that "there be built into cable systems the capacity for return communications on at least a non-voice basis."[40] The "non-voice" requirement has been construed widely to be the equivalent of the narrowband subscriber response service.[41] As the FCC im-

35. A concise explanation of the physical laws that govern the radiation of electromagnetic waves and limit the number of channels available for over-the-air broadcasting may be found in Sloan, supra note 2, at 16-20. Within this framework of a limited number of channels, federal regulation of television broadcasting has championed a policy of localism instead of national or regional outlets. To the extent that local stations have relied on the networks for the bulk of their programming and have neglected local programming, neither diversity nor local service has been provided. See Broadcasting in America and the FCC's License Renewal Process: An Oklahoma Case Study, 14 F.C.C.2d 1 (1968). The promise, then, of cable's multiple channels is that it can deliver both diversity and local service.

36. W. Baer, Interactive Television: Prospects for Two-Way Services on Cable 37 (Rand Memorandum 1971) [hereinafter cited as Baer].

37. Id. at 24, 37.

38. Id. at 25-32.

39. It is in connection with the development of point-to-point services that the experiments with hub network switched systems are of particular significance. See note 15 supra.

40. Cable Television Report and Order on Rules and Regulations Relative to CATV Systems, 36 F.C.C.2d 143, 192 (1972); 47 C.F.R. §§ 76.5(cc), 76.251(3) (Oct. 1972).

41. See, e.g., Bryan & Maxwell, Cable Communications: A New World of Extras, 9 TV Communications, June 1972, at 48, 52 [hereinafter cited as Bryan & Maxwell].

plicitly recognized by not requiring the installation of subscriber response terminal units,[42] however, there is a vast difference between providing for two-way capacity and actually implementing two-way services.[43] It is generally estimated that the costs of installing two-way capacity will increase the cost of a single cable, one-way distribution plant by fifteen to thirty percent.[44] Response terminal costs range from fifty to one hundred dollars per subscriber for the basic unit needed to effectuate a limited digital return signal.[45]

Although most of the two-way systems described above are feasible technologically,[46] in light of these costs it is doubtful that any return signal other than a narrowband subscriber response system will be economically feasible for at least eight years.[47] It is, then, reasonable to conclude that projections of millions of homes equipped with subscriber response terminals capable of printing out facsimile newspapers, mail and library material ordered by the subscriber, and with the capacity for voice and

42. Cable Television Report and Order on Rules and Regulations Relative to CATV Systems, 36 F.C.C.2d 143, 192-93 (1972).

43. Baer, supra note 36, at v.

44. Id.; see Ward, supra note 5, at 180.

45. Ward 182. The costs increase rapidly for return terminals required for the more advanced return capabilities described in text accompanying notes 38 & 39 supra. See id.

46. Baer at v. Among the services that have been demonstrated are audience counting, direct viewer response, remote shopping, market surveys, instructional television with simple feedback, and meter monitoring. Id. at 37-45. At least one successful voice and video return for home-bound students has been demonstrated by a CTV system in Overland Park, Kansas. As of June 1972, there was a total of 16 CTV systems experimenting with two-way capacity. Bryan & Maxwell 49 (chart). A Japanese CTV system has operated the first successful facsimile newspaper transmission. N.Y. Times, Nov. 5, 1972, § 1, at 80, col. 5.

47. See Baer v; Sloan, supra note 2, at 173 (digital return will be the response signal for the foreseeable future). The higher capital costs of introducing two-way capacity and of providing subscriber response terminals mean that additional revenues, at least in part from increased subscriber fees, will be necessary to break even on two-way services. Increased subscriber fees may have the consequence of reducing market penetration; however, it is also possible that the availability of two-way services would stimulate cable's growth in urban areas that are already well-served by broadcast signals. See Baer 2. The major proposal for a cable system in Washington has taken this latter position that if cable is to be viable in urban areas with good reception, it will have to deliver new services and programs including two-way response. The addition of a subscriber response capability will require an increase of subscriber fees as the capital cost for the Washington system will rise from $31 million for a 30 channel one-way service (see note 18 supra and accompanying text) to $61 million for an additional 30 channels of one-way service and four channels with return response capacity. Mitre Report, supra note 16, at v, I-13, II-41. Notwithstanding the indications that the introduction of two-way services may be essential to successful cable operations in urban areas, the fact that the Washington proposal plans for graduated introduction of one-way services and then increasingly sophisticated two-way services beginning with narrowband subscriber response bears out the basic conclusion that response services in the immediate future will be limited to simple digital returns.

video return to both a central facility and other subscribers are futuristic.[48] These services, alternatively known as "wired city television," and "broadband communications,"[49] are not in cable television's immediate future.[50]

This Article will focus on the one-way television service potential of cable for two reasons. First, the combination of a number of regulatory decisions by the FCC[51] with the fact that many CTV systems already in operation have multi-channel capacities[52] suggests the probability that cable will offer expanded one-way services (and perhaps limited digital return signals) long before "wired city" type operations are initiated. Secondly, although there are a number of alternative approaches and technologies, cable is regarded as a promising means of increasing the diversity of one-way television signals[53] and, indeed, has begun to make limited contributions to diverse programming.

Alternative approaches resting on revitalization of existing broadcast technology do not seem promising. Increased use of over-the-air pay television,[54] development of a fourth or fifth network on Ultra High Frequency (UHF) stations,[55] and increased governmental regulation suffer from a number of inherent problems and do not approach cable's multiple channel capacity. A return to a regional broadcast system such as that postulated by Allen DuMont and rejected by the FCC in 1952[56] would

48. Baer 33.

49. There are a number of valuable discussions of broadband communications services. E.g., Barnett & Greenberg, A Proposal for Wired City Television, 1968 Wash. U.L.Q. 1 (1968); Mitre Report III-34 to -60; Smith, The Wired Nation, 10 The Nation, May 18, 1970, at 582 (an expanded version of this article may be found in R. Smith, The Wired Nation: Cable TV: The Electronic Communications Highway 1 (1972)).

50. The cable industry has been urged to bring the blue sky promises of two-way communications down to reality because foundation-sponsored studies have "persisted in emphasizing the futuristic prospects to the detriment of the realities implicit." Bryan & Maxwell, supra note 41, at 49.

51. See Part IV infra.

52. See note 27 supra and accompanying text.

53. "We conclude that the distribution of television to the home via cable is a promising avenue to diversity." Communications Policy Report, supra note 32, ch. 7, at 9 (emphasis omitted).

54. See generally Fourth Report and Order on Subscription Television Service, 15 F.C.C.2d 466 (1968).

55. UHF stations have been notably unsuccessful. See note 180 infra and accompanying text.

56. DuMont had proposed a plan for allocation of television assignments which emphasized high power stations located in major urban areas. This plan would have limited the total number of television stations, but might have had the effect of increasing the variety of programming available since each area would have received a greater number of signals than are provided under the scheme adopted by the FCC which stressed providing a local broad-

encounter even greater broadcasting industry opposition than cable has withstood to date[57] and would necessitate a tradeoff of localism for diversity that cable television is not forced to make.

On the other hand, the developing technology of video tape recorders (VTR) and direct-to-the-home satellite broadcasting will have an impact on cable, although they do not pose an immediate competitive threat. Video tape recorders[58] are now entering the market[59] and will offer the viewer a wider choice in programming.[60] Nevertheless, the high cost of VTR sets,[61] which will restrict distribution to those classes in society that already enjoy the widest access to entertainment resources, coupled with the fact that VTR technology—unlike cable—precludes material requiring live or simultaneous broadcast[62] means that VTR will not be competitive directly with cable television. Direct-to-the-home satellite broadcasting, for which the basic technology exists,[63] has the potential to eliminate the need both for cable's costly physical plant and for conventional over-the-air broadcasting. However, this technology will not be competitive with cable or broadcast television services over the next decade.[64] Thus, al-

casting station for as many communities as possible. Sixth Report and Order on Rules Governing Television Broadcast Stations, 17 Fed. Reg. 3905 (1952); see Broadcasting in America and the FCC's License Renewal Process: An Oklahoma Case Study, 14 F.C.C.2d 1, 7 (1968).

57. The history of the broadcast industry's efforts to stifle the development of CTV systems is examined in Part III infra.

58. Video tape recorders usually contain a color television set, equipment to record programs off-the-air, and equipment to play back both prerecorded and off-the-air taped programs. They often include a video and sound camera for producing programs at home. See generally Television Digest, Videocassette Sourcebook (1971).

59. Although Sony has had a VTR package for a number of years, home VTR systems first were marketed substantially in Chicago in June 1972, and they are now reaching other markets like New York City. 12 Weekly TV Digest, June 19, 1972, at 10; id., Jan. 24, 1972, at 8; N.Y. Times, Nov. 19, 1972, § 1, at 59, col. 2 (advertisement for Teledyne Packard Bell's Cartridge TV).

60. The expanded programming offered by VTR systems consists of two elements. A program may be recorded at the time of broadcast for later and repeated viewings in the home, and tapes of movies and other programs not available on broadcast television will be rented for home viewing by commercial distributors. A "Cartridge Rental Network" with an inventory of approximately 3,000 tapes is in the process of development. 12 Weekly TV Digest, Oct. 2, 1972, at 9-10; id., May 1, 1972, at 9-10.

61. Sears' Cartrivision VTR system without camera will be sold for $1,350, and Teledyne Packard Bell's Cartridge TV will be marketed at $1,495. The addition of a video camera raises both prices by $250. 12 Weekly TV Digest, Jan. 24, 1972, at 8; N.Y. Times, Nov. 19, 1972, at 59, col. 2. Technological innovations may reduce these costs substantially. See 12 Weekly TV Digest, Sept. 11, 1972, at 8.

62. Communications Policy Report, supra note 32, ch. 7, at 35.

63. NASA planned to launch an ATS-F satellite in May 1973 to beam educational programs directly to homes and schools in the eight-state Rocky Mountain region. 12 Weekly TV Digest, Feb. 7, 1972, at 4.

64. Communications Policy Report ch. 7, at 33. Indeed, after many years of delay, the

though there are a number of alternatives,[65] cable television will have an ample opportunity in the coming years to demonstrate its ability to increase the diversity of one-way television programming.[66]

The realization of varied television programming through the medium of CTV technology will depend on both the continued development of cable television systems and the uses to which cable's multiple channel capacity is put. Part III *infra* reviews the pattern of regulation which has restricted the growth of cable television and examines the type of developments that can be expected in the future. Part IV *infra* considers in depth the possibilities for one-way television services on the manifold channels of cable television.

III. Regulation of Cable Television: Rules in Search of a Role

The regulation of a new technology poses a difficult problem: since the full potential of a new technology is usually obscure at the time of its emergence and only becomes clear with its evolution, it is impossible to determine what role the technology can or should play; at the same time, any regulation undertaken prior to a determination of the technology's role is likely to alter the course of its development and to limit it to the parameters implicit in the rules. The problem, in short, is that rules formulated without consideration of the role or function of the regulated technology have in themselves the effect of determining the role.

In the case of cable television, the Federal Communications Commission decided in 1962—early in the development of cable technology—to regulate the competitive impact of cable on broadcast television. This regulation, an almost exclusive preoccupation of the FCC, has been the decisive force in shaping both the types of services offered by cable television and

---

FCC only recently has taken steps which will permit the development of domestic communications satellites for a more limited role than direct-to-the-home broadcasting. Second Report and Order on Establishment of Domestic Communications-Satellite Facilities by Non-Governmental Entities, 35 F.C.C.2d 844 (1972).

65. Carriage of television on laser rays eventually may pose an alternative to coaxial cable; however, until less expensive and less complicated equipment can be devised, laser video will not present a competitive challenge. See Field, Laser Video Is Intriguing, But Is It Useful?, N.Y. Times, Sept. 18, 1972, at 37, col. 3; id. at 39, col. 3.

66. To the extent that cable television gains a secure foothold before VTR or direct-to-the-home satellite broadcasting becomes more competitive, it is reasonable to expect that the CTV industry will be able to enlist the aid of the FCC in fending off any new competitors. The National Cable Television Association (NCTA) is already looking to federal preemption to save the industry from state public utility regulation. 12 Weekly TV Digest, Oct. 16, 1972, at 2. The chief of the FCC's Cable Television Bureau wants to regulate pay movies via closed circuit in hotel rooms because he believes that these operations reduce the value of a cable television franchise. Id. These two facts suggest that cable television is moving apace in its efforts to "capture" the previously hostile regulatory body.

the types of communities served by CTV systems. Aspects of cable television operations not related directly to cable's use of television broadcast signals were for a long time relegated either to generally inadequate municipal regulation (with occasional state supervision) or to the benign neglect of multiple, but inconclusive, hearings by the FCC. It was only in 1968 that the commission undertook serious evaluation of what role cable television should play in the provision of television services and not until 1972 that the FCC formulated a more comprehensive view of cable television. Thus, the cable television industry by and large has been shaped by rules formulated without a guiding conception of the role of cable television. One could argue that, by delaying implementation of regulation until the technological potential was clear enough to permit a determination of cable's role in the provision of television services, the FCC could have avoided the problem of regulating cable television without a systematic plan. However, given the pressures for regulation, the essential shortcoming is not that regulation proceeded, but rather that it proceeded for such a long time without adequate attention to defining a coherent and consistent view of cable's role in the overall communications framework.

A. *Regulation of Cable's Competitive Impact on Broadcast Television; The Carriage of Broadcast Signals*

Since the television signals distributed by cable systems are taken for the most part either off the air from local broadcasting stations or from more distant stations by means of microwave connections,[67] the activities of CTV systems have—with the exception of an initial period of indifference—been regarded by the broadcast television industry[68] as an undesir-

67. See Part II A supra. The third source of signals, those originating from a studio directly connected to the headend, is a comparatively recent product of FCC regulations and is discussed infra at notes 332, 369.

68. The principal elements of the television industry are the local stations (network affiliates and independents), the networks, and the program producers. The networks occupy the preeminent position. They provide their affiliates with a steady diet of programming in exchange for the right to market the stations' advertising time. With the large number of viewers that they can command through their affiliates, the networks can obtain substantial advertising revenues. A part of these advertising revenues is returned to the affiliate, and the remainder is used to purchase television shows from program producers. The producers rely almost entirely on the networks for purchase of their product because only the networks have sufficient advertising revenues to cover the costs of developing and producing first-run television programs. Local independent stations are almost totally excluded from this tight organization of the television program market because they do not have enough viewers to generate the large advertising revenues necessary to bid for first-run programs. Consequently, they are reduced to showing second-run material which severely hampers their ability to compete with local network affiliates for viewers and advertising revenues. See Chazen & Ross, Federal Regulation of Cable Television: The Visible Hand, 83 Harv. L. Rev. 1820, 1821 (1970) [hereinafter cited as Chazen & Ross].

able intrusion. The FCC has responded to the complaints of the television industry with a variety of rules and proposals designed to limit cable's competitive impact on broadcast television. Although the commission has chosen to view its regulations in terms of preserving the pattern of national television service it established in 1952,[69] it has never fully resolved the question of what should be the proper relationship between CTV systems and conventional broadcasting stations in the provision of television programming; that is, whether CTV should be a supplemental service filling in the gaps of broadcast television; whether CTV should function as a substitute for over-the-air television by providing television programs not otherwise locally available; or whether CTV should (as the broadcasters fear) entirely supplant conventional television broadcasting.

1. The Refusal to Assume Jurisdiction

When CATV first appeared in the early 1950's as a large antenna connected by wire to subscribers' sets, it was one of a number of auxiliary services[70] designed to bring television programs to potential viewers who could not pick up signals directly from the air. As long as CATV operations were confined to providing improved reception of local stations, they functioned as a valuable asset to the local stations by increasing the size of their audiences. In the absence of any complaints by broadcasters, CATV drew little regulatory attention[71] from the FCC other than the implementation of rules designed to limit electrical interference to channels being received off the air, which interference was caused by incidental

69. Sixth Report and Order on Rules Governing Television Broadcast Stations, 17 Fed. Reg. 3905 (1952).

70. The other auxiliary services included "satellite" stations, "translators," and "boosters," and they brought television service to unserved areas or communities with bad reception by rebroadcasting the signal of the broadcast station. These three services received FCC authorization or approval conditioned on the consent of the primary station whose signal they rebroadcast. W.K. Jones, Cases and Materials on Regulated Industries, 1233-34 (1967). CATV operators experienced competition from the other auxiliary services, but they were unsuccessful when they petitioned the FCC for relief from such competition. See Report and Order on Authorization of Television Translator Stations, 13 P & F Radio Reg. 1561, 1564 (1956); Palm Springs Translator Station, Inc., 15 P & F Radio Reg. 70 (1957). Although competition from the other auxiliary services has not been, as one early commentator predicted, a major problem for CATV systems, some conflict has persisted. Cole, Community Antenna Television, the Broadcaster Establishment, and the Federal Regulator, 14 Am. U.L. Rev. 124, 128 (1965); see H & B Communications Corp. v. FCC, 420 F.2d 638 (D.C. Cir. 1969).

71. See Clarksburg Publishing Co. v. FCC, 225 F.2d 511, 516-17 (D.C. Cir. 1955). In attempting to resolve a question of concentration of control of the broadcast media, the Clarksburg court complained that review of an FCC decision was frustrated by the lack of knowledge of the nature of CATV operations.

radiation of signals carried on the cable.[72] However, in 1954 CATV systems began to expand the range of their operations by importing programs from distant stations on microwave relays.[73] Although the FCC routinely granted authorizations for microwave relays to serve CATV systems until 1958,[74] broadcaster opposition to CATV's attempt to offer subscribers greater program choice than that available on local channels surfaced as early as 1956 when a group of broadcasters filed a "complaint" with the FCC asking it to exercise jurisdiction over CATV systems as common carriers.[75]

The broadcasters' first attack on CATV's efforts to provide diverse programming met with an uncharacteristic failure. In April 1958, the FCC ruled that CATV systems were not common carriers and refused to undertake regulation on that basis.[76] Notwithstanding this decision, the broadcasters' position was vindicated a little over a month later when the FCC initiated an inquiry[77] into the impact of auxiliary services on television broadcasting and suspended final action on all pending applications for microwave relays to CATV systems.[78] Although this inquiry extended to all of the auxiliary services, the broadcasters argued only against CATV operations.[79] The essential argument against CATV was that the importation of distant signals had an adverse economic impact on small market stations because the availability of additional signals "fragmented" the

72. First Report and Order on Rules Governing Restricted Radiation Devices, 13 P & F Radio Reg. 1543 (1955); Second Report and Order on Rules Governing Restricted Radiation Devices, 13 P & F Radio Reg. 1546a (1956).

73. The first requests for microwave relays to serve CATV systems apparently were granted by the FCC in 1954. 20 FCC Ann. Rep. 37 (1954).

74. By 1958, the FCC had authorized microwave relays to serve CATV systems in 79 communities. 24 FCC Ann. Rep. 41 (1958); see note 21 supra.

75. 22 FCC Ann. Rep. 40 (1956).

76. Frontier Broadcasting Co., 24 F.C.C. 251, 253-54 (1958), aff'd, Report and Order on 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, 441 (1959) [hereinafter cited as CATV & TV Repeater Services]. In a case arising from a summary denial of a request to regulate CATV as a common carrier, the FCC position that CATV systems were not engaged in common carrier operations was affirmed. WSTV, Inc., 23 P & F Radio Reg. 184 (1962); see United States v. Southwestern Cable Co., 392 U.S. 157, 169 n.29 (1968) (citing approvingly Philadelphia Television Broadcasting Co. v. FCC, 359 F.2d 282, 284 (D.C. Cir. 1966) wherein this principle was also approved).

77. Notice of Inquiry into Impact on the Orderly Development of Television Broadcasting, Community Antenna Systems, TV Translators, TV "Satellites" and TV "Repeaters," 23 Fed. Reg. 3746 (1958).

78. 24 FCC Ann. Rep. 41 (1958).

79. CATV & TV Repeater Services 412. Similar arguments were raised in congressional hearings in May and June 1958. See Hearings on S. Res. 224 & S. 376 Before the Senate Comm. on Interstate and Foreign Commerce, 85th Cong., 2d Sess., pt. 6 (1958).

local station's audience.[80] The broadcasters also claimed that CATV connection to a receiver made over-the-air reception difficult and that CATV operators degraded or refused to carry the local signal.[81] The FCC concluded: (1) that although there was an impact, it was impossible to determine at what point a station's continued existence was threatened so as to justify barring CATV entry into a particular market,[82] (2) that the commission did not have jurisdiction[83] over CATV operations under the Communications Act of 1934,[84] and (3) that there should be congressional legislation which would require CATV systems to have the consent of the stations whose distant signals they carry and to carry the local television station when requested.[85] The commission also determined

> that it would *not* constitute a legally valid exercise of regulatory jurisdiction over common carriers to deny authorization [for microwave relays to CATV systems] . . . on the ground that such facilities would abet the creation of adverse competitive impact by the CATV on the construction or successful operation of local or nearby stations.[86]

Accordingly, normal processing of applications for microwave relays to serve CATV systems was to be resumed[87] although this decision shortly would begin to undergo comprehensive revision.

80. CATV & TV Repeater Services 413. The audience fragmentation argument was essentially that the importation of distant signals reduced the number of viewers that the local station could command, in turn reduced its advertising revenues, and hence placed its economic survival in jeopardy.

81. Id. at 425, 426. While it was true that a CATV connection to the receiver made local over-the-air reception difficult or impossible, this objection was insignificant in light of the fact that almost all CATV systems carried the local signal without degradation as it was in their economic interest to offer subscribers as many signals, including local signals, as possible.

82. Id. at 421-22, 424, 436. The FCC saw the "impact" claim as raising the dilemma of preserving the local television outlet which was the only possible source of service for areas not reached by CATV while respecting the interest of CATV subscribers in "multiple television service." See id. at 405.

83. The commission determined that it did not have jurisdiction over a CATV system (1) as a common carrier under Title II of the Communications Act [47 U.S.C. §§ 201-23 (1970)], (2) as a broadcasting station or instrumentality of broadcasting under Title III [47 U.S.C. §§ 301-99 (1970)], (3) under a plenary power to regulate an enterprise having a substantial adverse impact upon broadcasting activities over which the FCC had jurisdiction, or (4) under 47 U.S.C. § 325(a) (1970) which requires consent of the primary station for rebroadcast of its signal. CATV & TV Repeater Services, supra note 76, at 427-32.

84. 47 U.S.C. § 151 et seq. (1970).

85. The proposal to require CATV systems to have the consent of the stations whose signals they carried was viewed as a mechanical extension of the rebroadcast consent provision [47 U.S.C. § 325(a) (1970)] which already applied to translators and satellite stations. CATV & TV Repeater Services 433-34.

86. Id. at 433.

87. Id. at 434.

2. Indirect Regulation of CATV through Microwave Relays

The FCC signalled the retreat from the refusal to control CATV systems by regulating common carrier relays within three months of the completion of the first inquiry. On July 24, 1959, the FCC issued a procedural rule stating that applications for renewals in the Domestic Point-to-Point Radio Service had to make a showing that fifty percent of the usage of the microwave facilities would be by customers unrelated to the applicant.[88] The rule affected the CATV industry because many of the microwave relays were directly tied to the CATV systems that they served.[89] Its practical effect was to force microwave systems either to search out customers in addition to the CATV system or to switch to the private frequencies in the Business Radio Service where microwave licenses were granted to individual applicants for uses directly connected to their businesses.[90] Although Congress held hearings on CATV in 1959,[91] it failed to enact any legislation to give the FCC direct authority over CATV systems.[92]

The FCC for several years demurred, awaiting congressional authority for direct regulation before it sounded full reversal of its earlier position that it would not undertake indirect regulation of CATV operation through its unquestionable authority over microwave relays.[93] In its *Carter Mountain* decision of February 1962, the commission denied a microwave relay in the Domestic Public Radio Service to a CATV system on the ground that if it were allowed to improve its service the one local station would be destroyed and rural areas without cable service would then have no access

---

88. Order on Renewal of Station Licenses, 24 Fed. Reg. 6052 (1959). The rule provided for renewal of station licenses. The rationale for the rule was that a common carrier licensee in the public microwave service should be in fact "public" in the sense of serving customers other than those in which it had a financial interest. See Note, Community Antenna Television: Survey of a Regulatory Problem, 52 Geo. L.J. 136, 146 (1963) [hereinafter cited as Survey].

89. Survey 145.

90. Note, The Wire Mire: The FCC and CATV, 79 Harv. L. Rev. 366, 370 (1965).

91. See Hearings on S. 1739, S. 1741, S. 1801, S. 1886 & S. 2303 Before the Subcomm. on Communications of the Senate Comm. on Interstate and Foreign Commerce, 86th Cong., 1st Sess. pt. 1 (1959).

92. An original committee bill that would have given the FCC direct licensing authority over CATV systems reached the Senate floor where it was defeated by one vote. S. 2653 & S. Rep. No. 923, 86th Cong., 1st Sess. (1959); 106 Cong. Rec. 10547 (1960); see Survey 169-72.

93. In 1961 the FCC had its own proposed legislation introduced. S. 1044 & H.R. 6840, 87th Cong., 1st Sess. (1961). While these bills were pending, the commission declined to undertake any rulemaking actions concerning CATV. See Memorandum Opinion and Order on Distribution of Television Programs by Community Antenna Systems, 23 P & F Radio Reg. 1624, 1626-27 (1962).

to television.[94] Although the evidentiary support for its conclusion was minimal,[95] the FCC stated that the necessity of regulating microwave common carriers in order to achieve indirect regulation of CATV systems was no reason to ignore its "obligations in the field of television."[96] The decision denied the microwave application without prejudice to refiling upon a showing that the CATV system to be served would avoid duplication of the local station's programming and would carry the local station's signal.[97] These two conditions were proposed in a rulemaking at the end of 1962 for the other microwave service, the Business Radio Service, which was available to serve CATV systems. Moreover, pending the outcome of the proposed rulemaking, grants in this service were not to be made unless the applicant voluntarily accepted the nonduplication and the carriage conditions.[98]

By the end of 1962, then, the FCC had developed substantial barriers to CATV's ability to provide more diverse television programming through the importation of distant signals on microwave links. In the Domestic Public Radio Service, common carriers serving CATV systems had to have fifty percent unrelated customers and faced the potential application of the nonduplication and carriage rules applied in *Carter Mountain*. In the Business Radio Service, private microwave grants were made only upon voluntary compliance with the nonduplication and local carriage requirements. Following court approval of the *Carter Mountain* decision in mid-1963,[99] the FCC formally proposed that the nonduplication and local carriage requirements previously suggested for the Business Radio Service be applied also to common carriers in the Domestic Public Radio Service and instituted a freeze on further grants for any microwave service unless the applicants would guarantee that the CATV systems would meet the proposed conditions.[100] The impact of these two conditions is discussed

94. Carter Mountain Transmission Corp., 32 F.C.C. 459, 465 (1962), aff'd, Carter Mountain Transmission Corp. v. FCC, 321 F.2d 359 (D.C. Cir.), cert. denied, 375 U.S. 951 (1963).

95. The FCC reversed the hearing examiner's contrary finding as to the CATV system's impact on the local station. In its affirmance of the FCC decision, the court of appeals noted that there was no showing that the improved service by the CATV system would be the decisive factor in the predicted demise of the local station. 321 F.2d at 365.

96. 32 F.C.C. at 461. The commission also acknowledged that this indirect regulation was a modification of its previous position. Id. at 465; see text accompanying note 86 supra.

97. 32 F.C.C. at 465.

98. Notice of Proposed Rule Making on Authorizations for Stations to Relay TV Signals to CATV Systems, 27 Fed. Reg. 12586 (1962).

99. Carter Mountain Transmission Corp. v. FCC, 321 F.2d 359 (D.C. Cir.), cert. denied, 375 U.S. 951 (1963).

100. Notice of Proposed Rule Making on Grant of Authorizations in Business Radio Service and Domestic Public Point-to-Point Microwave Radio Service, 28 Fed. Reg. 13789 (1963).

infra in connection with the formal adoption of these proposals in 1965, but the use of the freeze procedure[101] meant that, for all practical purposes, the policy of restricting CATV systems by rules applicable to their microwave relays was fully in effect by the end of 1963.

3. The FCC Undertakes Comprehensive Regulation of CATV Systems

On April 22, 1965, the Federal Communications Commission adopted the carriage and nonduplication provisions which had been in effect on an interim basis since December 1963.[102] These rules applied to microwave relays in both the Domestic Public Radio Service[103] and the Business Radio Service.[104] The carriage rule provided that all microwave-served CATV systems had to carry, on the request of the local station, all local signals within the bounds of its channel capacity according to a priority based on the quality of the local signal in the area served by the CATV system. The carriage had to be without material degradation of the local signal and preferably on the channel on which the station was transmitting.[105] The local carriage rule had no significant impact on CATV operations as it was entirely consistent with their interest to provide local signals for their subscribers. The nonduplication rule required that microwave-served CATV's refrain from duplicating the programs of local commercial stations, both simultaneously and within fifteen days before or after local broadcast.[106] By providing the local stations with program exclusivity, the nonduplication rule's principal effect was to limit the importation of network programming on distant signals. The programs of distant independent stations were unlikely to correspond with the programming of either local independent or network affiliate stations and could be imported without violating the nonduplication rule.

The prescriptions of the carriage and the nonduplication rules were premised on the FCC's belief that CATV systems should serve as a supplement rather than as a substitute for broadcast television service.[107]

101. The interim freeze procedure was sustained by the court. Wentronics, Inc. v. FCC, 331 F.2d 782 (D.C. Cir. 1964).

102. First Report and Order on Grant of Authorizations in the Business Radio Service for Microwave Stations to Relay Television Signals to Community Antenna Systems, 38 F.C.C. 683 (1965) [hereinafter cited as First Report and Order], modified, Memorandum Opinion and Order, 1 F.C.C.2d 524 (1965), aff'd, Black Hills Video Corp. v. FCC, 399 F.2d 65 (8th Cir. 1968), approved, United States v. Midwest Video Corp., 406 U.S. 649, 659 n.17 (1972).

103. 47 C.F.R. §§ 21.710, 21.712, 21.714 (1966). The present status of microwave service for CTV systems is discussed infra at notes 139, 381.

104. 47 C.F.R. §§ 91.557, 91.559, 91.561 (1966).

105. Id. §§ 21.712(c)-(f), 91.559(a)-(d) (1966).

106. Id. §§ 21.712(g)-(i), 91.559(e)-(g) (1966).

107. First Report and Order, supra note 102, at 701.

Notwithstanding the fact that CATV systems offered multiple television reception services, the FCC reasoned that a CATV system's proper role was as a supplement because it could not provide reception service for rural areas where homes were too widely scattered to support the cost of cable's physical plant, serve those unwilling or unable to pay, or perform the local station's role as a means for local self-expression.[108] Having chosen to view CATV's role as supplemental to broadcast television, the FCC determined that CATV should not be allowed to damage the services offered by television broadcasters.[109] The fact that CATV systems had an unfair competitive advantage over local broadcasters because they did not have to bid in the program distribution market[110] was seen as a sufficient basis to control CATV's possible[111] adverse economic impact on broadcast service, in particular on the UHF stations.[112]

On the same day that it adopted the local carriage and nonduplication rules for microwave-served CATV's, the FCC initiated a proposal to apply these conditions to CATV systems not served by microwave.[113] The commission asserted its jurisdiction to regulate non-microwave-served CATV systems,[114] proposed to limit the entry of cable television into major markets already well-served by multiple television facilities where the commission believed that UHF stations had great potential,[115] and adopted an interim policy requiring a special showing by microwave-served CATV systems that they would not pose a substantial threat to the development of independent UHF stations before entry into a major market would be permitted.[116] These 1965 proposals to give the FCC comprehensive power over all CATV systems irrespective of microwave service were adopted in early 1966 in the *Second Report and Order*.[117] Since

108. Id. at 699.

109. Id. at 700.

110. Id. at 704.

111. As in 1958, the FCC had no clear evidence that CATV operations had or would have a serious adverse impact on television broadcasting, and it was unable to sort out the conflicting claims of the broadcasters and the CATV interests. Id. at 688-96, 706. Nevertheless, the commission resolved that "it is plain that CATV competition can have a substantial negative effect upon station audience [sic] and revenues, although we lack the tools with which to measure precisely the degree of such impact." Id. at 710-11.

112. The focus of the FCC's concern had shifted from 1958 to 1965 from small market stations to UHF stations. See note 80 supra and accompanying text.

113. Notice of Inquiry and Notice of Proposed Rule Making on All CATV Systems, 1 F.C.C.2d 453 (1965) [hereinafter cited as Proposal on All CATV Systems].

114. Id. at 463-65, 478-82 (memorandum on jurisdiction).

115. Id. at 468-72.

116. Id. at 471.

117. Second Report and Order on Grant of Authorizations in the Business Radio Service for Microwave Stations to Relay Television Signals to Community Antenna Systems, 2 F.C.C.2d 725 [hereinafter cited as Second Report and Order], stay denied, 3 F.C.C.2d 816

the rules adopted in 1966 were destined to regulate the interrelationship of CATV systems and broadcasters until 1972, it is important to consider in some depth the basis of the FCC's jurisdiction, the substantive rules adopted, and the underlying policies.

a. Jurisdictional Basis for Direct Regulation of CATV Systems

Unlike the previous rules which had governed CATV by imposing conditions on microwave authorizations, the *Second Report and Order* imposed obligations directly on CATV systems. Although the commission had long sought congressional guidance[118] and would have preferred specific legislative authorization, it decided, in the absence of congressional action,[119] to assert jurisdiction directly over all CATV systems so as to reach the major portion of the industry which had not previously been subject to regulation.[120] The FCC grounded its case for jurisdiction over CATV systems on a holding that they were engaged in interstate communication by wire and therefore subject to regulation under sections 2(a) and 3(a) of the Communications Act of 1934.[121] The commission rejected the argument that these sections merely prescribed the forms of communications to which the Act's other provisions could be applicable. It asserted that although neither Title II nor Title III was directly applicable to CATV systems[122] the protection of the commission's television

(1966), reconsideration denied, 6 F.C.C.2d 309 (1967), aff'd, Black Hills Video Corp. v. FCC, 399 F.2d 65 (8th Cir. 1968), approved, United States v. Midwest Video Corp., 406 U.S. 649, 659 n.17 (1972).

118. CATV & TV Repeater Services, supra note 76, at 441; Proposal on all CATV Systems, supra note 113, at 465.

119. Although Congress again considered legislation on CATV systems in 1965 and 1966, no action was taken. See Hearings on H.R. 7715 Before the Subcomm. on Communications and Power of the House Comm. on Interstate and Foreign Commerce, 89th Cong., 1st Sess. (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. (1966).

120. Second Report and Order 728.

121. Id. at 733-34. The Communications Act of 1934, 47 U.S.C. §§ 151-609 (1970), is the source of the Federal Communications Commission and its statutory responsibilities. Section 2(a) of the Act provides that "[t]he provisions of this chapter shall apply to all interstate . . . communication by wire or radio" and Section 3(a) defines "wire communication" or "communication by wire" as "the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission." 47 U.S.C. §§ 152(a), 153(a) (1970). The commission brushed aside the contention that a CATV system located entirely in one state was not engaged in interstate activity by noting that they form a link in an interstate chain of broadcast communication. Proposal on All CATV Systems, supra note 113, at 479; see Idaho Microwave, Inc. v. FCC, 352 F.2d 729, 732 (D.C. Cir. 1965).

assignment plan and policies[123] under sections 1 and 307(b) of the Act[124] required exercise of regulation under the commission's statutory powers.[125] The shift from clear jurisdiction over microwave relays to bootstrapped direct jurisdiction over CATV systems provoked a strong dissent from Commissioner Loevinger who argued that the FCC's precedents, prior statements, and requests to Congress for authorizing legislation made the assertion of a jurisdiction previously explicitly disclaimed presumptive.[126]

b. Substantive Provisions of the 1966 Rules

The substantive provisions[127] of the *Second Report and Order* extended the carriage and nonduplication rules to CATV systems not

---

122. Communications Act of 1934, tit. II, 47 U.S.C. §§ 201-23 (1970), deals with the commission's regulatory powers over communications common carriers. Communications Act of 1934, tit. III, 47 U.S.C. §§ 301-99 (1970), deals with the commission's powers to regulate radio (television) broadcasting.

123. Sixth Report and Order on Rules Governing Television Broadcast Stations, 17 Fed. Reg. 3905 (1952).

124. Section 1 of the Communications Act sets forth that the Federal Communications Commission is to regulate interstate communication by wire and radio "so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nationwide . . . wire and radio communication service with adequate facilities at reasonable charges . . . ." 47 U.S.C. § 151 (1970). Section 307(b), governing radio broadcasting, gives the commission power to govern the distribution of television services in the following terms:

"In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same." 47 U.S.C. § 307(b) (1970).

125. The commission drew its statutory powers to regulate cable television from both Title I and Title III of the Communications Act. In Title I, Section 4(i) provides that:

"The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions." 47 U.S.C. § 154(i) (1970). From the provisions governing radio broadcasting in Title III, the commission claimed regulatory authority. Sections 303(f), (h), and (r) provide the power to:

"(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this chapter . . . ."

"(h) Have authority to establish areas or zones to be served by any station . . . ."

"(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter . . . ." 47 U.S.C. § 303(f), (h), (r) (1970).

126. Second Report and Order, supra note 117, at 820 (Loevinger, Comm'r, dissenting).

127. 47 C.F.R. §§ 74.1101-.1109 (Jan. 1972).

The 1972 C.F.R. was published both in January and October. The January edition contains the regulations, 47 C.F.R. § 74 (Jan. 1972), which governed cable television prior to the promulgation of the Reconsideration of the Cable Television Report and Order, 36 F.C.C.2d 326 served by microwave and implemented the major market-distant signal policy. The carriage rules did not differ significantly from the previous rules,[128] and a CATV system on request of the local station was required to carry the signals of all commercial and educational stations within whose Grade B contours[129] the system was located. The carriage was according to a priority based on the relative strengths of the local signals.[130] The nonduplication rule[131] continued to provide program exclusivity for stations entitled to local carriage, but the time period in which the CATV system had to avoid duplicating a program shown on a local station was reduced from fifteen days to one day; and an exception to the nonduplication requirement was made for color programs not carried in color by the local station.[132] The carriage and nonduplication rules also introduced protection for translator stations[133] and educational television stations.[134]

The principal provision, however, was the major market-distant signal policy which provided that a distant signal (a signal carried beyond the normal reach of its Grade B contour) could not be carried into the top one hundred television markets by a CATV system operating in one of these markets except upon a showing made in an evidentiary hearing that such operation would be consistent with the public interest, and particularly with the establishment and healthy maintenance of UHF television broadcast service in that market area.[135] This policy was designed to rectify the situation whereby the nonduplication requirement protected only the local network affiliates and was of little value to independent stations since in practice their programming was rarely duplicated by the programs on imported distant signals.[136] In the proffer of complete exclu-

(1972). The new rules appear in new sections of the C.F.R. 47 C.F.R. §§ 76, 78 (Oct. 1972). For clarity the two editions of Title 47 are distinguished herein according to the date of publication.

128. Second Report and Order 746.

129. The FCC defines the areas of service, contours, of television broadcast stations according to the percentage of time that certain percentages of viewers in that area can receive a good signal. In a Grade A contour, 70 percent of viewer locations get picture quality 90 percent of the time. In a Grade B contour, 50 percent of viewer locations get good reception 90 percent of the time. 47 C.F.R. § 73.683(a) (Oct. 1972).

130. 47 C.F.R. § 74.1103(a)-(d) (Jan. 1972).

131. Id. § 74.1103(e)-(g) (Jan. 1972).

132. Second Report and Order, supra note 117, at 746-47.

133. Id. at 756-58.

134. Id. at 760-64.

135. Id. at 782; 47 C.F.R. §§ 74.1107(a), 74.1101(i) (definition of distant signal) (Jan. 1972).

136. Second Report and Order 778; see text following note 106 supra. Local independent and distant stations rarely carry the same syndicated program on the same day so the nonduplication rule provided little protection to the local independents which already had the

sion of distant signals, the FCC planned to give independent stations (primarily UHF's) in the top one hundred markets complete protection from audience fragmentation, but local network affiliates also benefited from this expanded version of program exclusivity. These substantive rules were adopted on February 15, 1966,[137] and CATV operations already in effect on that date were exempted, in FCC parlance "grandfathered," from the major market-distant signal rules.[138] The rules governing microwave operations were retained with modifications to reflect the new substantive provisions of the *Second Report and Order*.[139]

---

smallest share of the market audience. Verrill, CATV's Emerging Role: Cablecaster or Common Carrier?, 34 Law & Contemp. Prob. 586, 594 (1969).

137. The rules were announced by FCC Public Notice 79927 on Feb. 15, 1966, but were not adopted formally by the FCC until Mar. 4, 1966. Second Report and Order, supra note 117. The rules were not published in the Federal Register until Mar. 17, 1966. 31 Fed. Reg. 4540 (1966). This highly unusual procedure was chosen to avoid a race by CATV systems to undertake new operations before the rules became effective. Memorandum Opinion and Order on Grant of Authorizations in the Business Radio Service for Microwave Stations to Relay Television Signals to Community Antenna Systems, 3 F.C.C.2d 816, 822 (1966). Although it was asserted that the commission had violated proper administrative procedures, challenges on this ground were rejected. Id. at 819-25; see also id. at 828 (Bartley, Comm'r, dissenting). Court challenges on the ground of improper administrative procedure also failed. Black Hills Video Corp. v. FCC, 399 F.2d 65, 70 (8th Cir. 1968); Buckeye Cablevision, Inc. v. FCC, 387 F.2d 220, 227 (D.C. Cir. 1967).

138. Second Report and Order 784-85; 47 C.F.R. § 74.1107(d) (Jan. 1972).

139. Second Report and Order 776-77, 797-808. The FCC previously had established a new microwave service, Community Antenna Relay Service (CARS), to replace the existing private microwave stations serving CATV systems in the Business Radio Service (BRS) frequencies and to encourage common carriers in the Domestic Public Radio Service serving CATV systems either to gather more unaffiliated customers or to shift to the new CARS frequencies. Notice of Proposed Rule Making on Licensing of Stations Used to Relay Television Signals to CATV Systems, 29 Fed. Reg. 11458 (1964); First Report and Order and Further Notice of Proposed Rule Making on the Commission's Rules and Regulations Relative to the Licensing of Microwave Radio Stations Used to Relay Television Signals to CATV Systems, 1 F.C.C.2d 897 (1965); 47 C.F.R. §§ 74.1001-.1083 (Jan. 1972). The substantive rules of the Second Report and Order thus were applied to microwave operation in the new CARS and the BRS and Domestic Public Radio Service frequencies. The transition of microwave service for cable television systems from the BRS frequencies to the CARS frequencies is scheduled for completion on Feb. 1, 1976. Report and Order on Rules to Provide that Stations Licensed in the Business Radio Service May Not Be Used for the Transmission of Program Material to CATV Systems, 37 F.C.C.2d 609, 609-10 (1972). Common carriers in the Domestic Public Radio Service can continue to provide microwave service for cable systems although the FCC is still in the process of determining the appropriate frequencies for such service. See Second Report and Order on the Commission's Rules and Regulations Relative to the Licensing of Microwave Radio Stations Used to Relay Television Signals to CATV Systems, 11 F.C.C.2d 709 (1968); Order on the Commission's Rules and Regulations Relative to the Licensing of Microwave Radio Stations Used to Relay Television Signals to CATV Systems, 12 F.C.C.2d 321 (1968); Memorandum Opinion and Order on the Commission's Rules and Regulations on the Licensing of Microwave Radio Stations Used to Relay

c. Policies Underlying the 1966 Rules

The assertion of jurisdiction by the FCC over all CATV systems and the particular rules adopted in the *Second Report and Order* reflected an underlying policy determination that although CATV systems performed a valuable supplementary role they should not be allowed to damage unduly or to impede the growth of television broadcast service.[140] CATV systems, from the FCC's point of view, posed the danger of injuring television broadcast service because they engaged in unfair competition and would have an adverse economic impact on UHF broadcast stations.[141] Unfair competition was said to follow from the fact that CATV systems did not have to make any payment for the programs imported on distant signals, whereas independent stations had to bid in the program market for the very same programs.[142] The unfair competition argument incorporated the claims for copyright[143] protection by program owners who objected that CATV systems used their product without compensation and that importation of programs on distant signals hurt chances for later sale of the program to a local station in the CATV's area.[144] The FCC believed that the anomalous conditions under which CATV systems and broadcasters competed in the program market, and the fact that both cable and independent stations sought to grow by providing programs not available on the networks, meant that if cable were allowed to develop it would fragment the audience interested in non-network programming on which independent stations would depend for

Television Signals to CATV Systems, 21 F.C.C.2d 284 (1970); Memorandum Opinion and Order on Rules to Reflect the Availability of Land Mobile Channels, 32 F.C.C.2d 48 (1971).

140. Second Report and Order, supra note 117, at 745-46.

141. Id. at 735-36, 770.

142. Id. at 778-79.

143. Early attempts to apply the doctrine of unfair competition or to claim a quasi-property right in regard to cable's use of broadcast television programs without compensation were unsuccessful. Cable Vision, Inc. v. KUTV, Inc., 335 F.2d 348 (9th Cir. 1964), cert. denied, 379 U.S. 989 (1965); Intermountain Broadcasting & Television Corp. v. Idaho Microwave, Inc., 196 F. Supp. 315 (D. Idaho 1961). Revisions of the Copyright Act of 1909 that would have forbidden CATV transmission of broadcast signals without permission of the copyright owners were unsuccessful. See Hearings on H.R. 4347, H.R. 5680, H.R. 6831 & H.R. 6835 Before Subcomm. No. 3 of the House Comm. on the Judiciary, 89th Cong., 1st Sess. (1966). The short-lived victory of the broadcasters in applying the 1909 Copyright Act to CATV operations had no impact on the rules adopted in the Second Report and Order. Black Hills Video Corp. v. FCC, 399 F.2d 65, 67 n.4 (8th Cir. 1968); United Artists Television, Inc. v. Fortnightly Corp., 255 F. Supp. 177 (S.D.N.Y. 1966), aff'd, 377 F.2d 872 (2d Cir. 1967), rev'd, 392 U.S. 390 (1968); Memorandum Opinion and Order on Grant of Authorizations in the Business Radio Service for Microwave Stations to Relay Television Signals to Community Antenna Systems, 6 F.C.C.2d 309, 314 (1967) [hereinafter cited as Grant of Authorizations], aff'd, Black Hills Video Corp. v. FCC, 399 F.2d 65, 67 n.4 (8th Cir. 1968).

144. Chazen & Ross, supra note 68, at 1824.

advertising revenues and economic survival.[145] Although unsure that cable's development would have this adverse impact,[146] the commission decided that it was necessary to act before cable television became entrenched in order to protect the development of independent UHF stations—the chosen means of diversified (non-network) programming.[147]

In making the decision to protect the development of UHF stations, the FCC was bolstered by its view that cable television could not serve as an outlet for local expression,[148] could not serve rural areas,[149] and was a form of pay television.[150] The commission also found support for its position in the argument that it was only protecting UHF stations in the top one hundred markets where there was generally no lack of television service and where UHF stations had the greatest potential.[151] Although the commission claimed that it did not intend to deprive the public of the enriched programming which CATV made available,[152] its preoccupation with cable's impact on broadcast television[153] reflected a failure to consider thoroughly cable's technological potential or the proper role of cable in the provision of television services.[154]

---

145. Second Report and Order, supra note 117, at 770-75.

146. Id. at 773, 781.

147. In 1952, the commission had added 70 channels of UHF television in order to overcome the scarcity of VHF channels so as to provide many channels for local service. Sixth Report and Order on Rules Governing Television Broadcast Stations, 17 Fed. Reg. 3905 (1952). Although the development of UHF channels had been quite limited, the FCC took the view that the passage of the All-Channel Receiver legislation [47 U.S.C. §§ 303(s), 330 (1970)] had the effect of increasing the number of sets capable of receiving UHF signals and that 1966 was a watershed year for UHF broadcasting. Second Report and Order 770-71. Cable thus appeared as a threat to the commission's plan of allocating television service, albeit the commission preferred to speak in terms of protecting the congressional goal of diversity through UHF stations. Id.

148. Second Report and Order 775. UHF stations would be local stations, whereas cable would bring in distant independent stations that did not serve local interests. The commission apparently paid no attention to the fact that some CATV systems had already undertaken local origination. Cf. First Report and Order, supra note 102, at 699.

149. The signals imported by a cable system would not be available in sparsely populated rural areas because of the cost of the physical distribution plant, whereas the UHF signal would be available in these areas.

150. These three reasons why cable was presumed, unlike UHF stations, to be incapable of serving the public interest are neatly summarized by Commissioner Cox. Grant of Authorizations, supra note 143, at 341-42 (Cox, Comm'r, concurring).

151. Second Report and Order, supra note 117, at 782-83.

152. Id. at 745-46.

153. One commissioner urged that the FCC had defined the "public interest" as protecting the private interest of broadcasters by suppressing actual or potential competition by CATV systems. See Grant of Authorizations 337 (Loevinger, Comm'r, dissenting).

154. Commissioner Loevinger claimed that the FCC had failed to consider the basic issue. "But the basic issues are not mentioned. These are what the function of CATV's should be,

4. Operation and Impact of the 1966 Rules

The Federal Communications Commission's jurisdiction to regulate CATV systems directly was sustained ultimately by the Supreme Court in the *Southwestern Cable Co.* decision of 1968.[155] The rules adopted pursuant to this jurisdiction in the *Second Report and Order* established a complicated regulatory scheme which involved the commission in burdensome and lengthy evaluation of almost every proposed expansion of CATV operations. Although the particular rules and the FCC's determinations under them generally were sustained in court challenges, the impact of the rules was only to inhibit CATV system development without the countervailing expansion of UHF broadcasting upon which the restrictive regulations were premised.

The 1966 rules established, in essence, a scheme of regulation by petition.[156] A CATV system was required to give notice when commencing operations or when bringing in distant signals to any television stations within whose Grade B contours it intended to operate.[157] In the case of television broadcasting stations located in the one hundred largest television markets, no CATV system operating within the predicted Grade

---

and what ultimate mode and system can be developed or encouraged to provide the greatest service to the greatest number." First Report and Order, supra note 102, at 749 (Loevinger, Comm'r, dissenting in part).

155. In two proceedings immediately following the adoption of the Second Report and Order, the commission issued cease and desist orders to two non-microwave CATV systems carrying distant signals in violation of the new rules. Midwest Television, Inc., 4 F.C.C.2d 612 (1966); Buckeye Cablevision, Inc., 3 F.C.C.2d 798 (1966). On petitions for review, two circuits reached contradictory conclusions as to the FCC's authority under the Communications Act [47 U.S.C. §§ 151-609 (1970)] to regulate CATV systems. Buckeye Cablevision, Inc. v. FCC, 387 F.2d 220 (D.C. Cir. 1967), aff'g 3 F.C.C.2d 798 (1966); Southwestern Cable Co. v. United States, 378 F.2d 118 (9th Cir. 1967), modifying 4 F.C.C.2d 612 (1966). Ruling in the case brought by Southwestern Cable Co., the Supreme Court held that the commission's authority over "all interstate . . . communication by wire or radio" [47 U.S.C. § 152(a) (1970)] permitted the regulation of CATV systems. United States v. Southwestern Cable Co., 392 U.S. 157, 178 (1968). The Court basically followed the FCC's jurisdictional argument (see note 121 supra and accompanying text), but apparently qualified its acceptance of FCC jurisdiction with the phrase "the authority which we recognize today under § 152(a) is restricted to that reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting." Id. The decision itself was limited to sustaining the FCC's general regulatory authority and the authority to issue a temporary prohibitory order to the CATV system. The validity of the specific rules was not before the Court. Id. at 167. An attack on the carriage and nonduplication rules was rejected in Black Hills Video Corp. v. FCC, 399 F.2d 65 (8th Cir. 1968), and the correctness of this and other decisions affirming the validity of the regulations was noted subsequently by the Supreme Court. United States v. Midwest Video Corp., 406 U.S. 649, 659 n.17 (1972).

156. M.H. Seiden, Cable Television U.S.A.: An Analysis of Government Policy 95 (1972) [hereinafter cited as Seiden].

157. 47 C.F.R. § 74.1105(a) (Jan. 1972).

A contour of that station could extend the signal of another broadcast station beyond its Grade B contour (*i.e.* import a distant signal into the Grade A contour of a television station located in a major market), except upon a showing in an evidentiary hearing that extension of the signal was consistent with the public interest.[158] A CATV system was entitled by petition under 47 C.F.R. § 74.1109 (Jan. 1972) to request waiver of this major market-distant signal policy. Carriage of distant signals in television markets below the top one hundred could commence thirty days after notice.[159] However, if opposition to such carriage was filed within thirty days of notice,[160] such carriage automatically was stayed until the commission ruled on the merits of the objection.[161] All CATV systems were required to carry local signals and to provide them with program exclusivity under the nonduplication rules.[162] The regulation from petition arose from the fact that in almost every case in which a CATV sought to expand operations, either it would file a petition for waiver of the rules or a broadcaster would file a petition objecting to the proposed operation. No action could then be taken until the commission resolved the issues presented by the petition.

As to the top one hundred markets, only one evidentiary hearing was ever held,[163] and the commission subsequently reversed the hearing examiner's determination that the CATV system should be allowed to import distant signals.[164] The failure to hold the required evidentiary hearings meant that CATV systems largely were precluded from bringing distant signals into major markets, although the hearing was waived and cable systems were exempted from the rules on a number of occasions.[165]

158. Id. § 74.1107(a) (Jan. 1972).

159. Id. § 74.1105(c) (Jan. 1972).

160. Id. § 74.1109 (Jan. 1972).

161. Id. § 74.1105(c) (Jan. 1972); see id. § 74.1107(c) (Jan. 1972).

162. Id. § 74.1103 (Jan. 1972). The nonduplication rule has withstood a prolonged and varied series of court challenges. See Winchester TV Cable Co. v. FCC, 462 F.2d 115 (4th Cir.), cert. denied, 409 U.S. 1007 (1972); Port Angeles Telecable, Inc. v. FCC, 416 F.2d 243 (9th Cir. 1969); Great Falls Community TV Cable Co. v. FCC, 416 F.2d 238 (9th Cir. 1969); Total Telecable, Inc. v. FCC, 411 F.2d 639 (9th Cir. 1969); Community Television, Inc. v. United States, 404 F.2d 771 (10th Cir. 1969); Titusville Cable TV, Inc. v. United States, 404 F.2d 1187 (3d Cir. 1968); Black Hills Video Corp. v. FCC, 399 F.2d 65 (8th Cir. 1968); Conley Electronics Corp. v. FCC, 394 F.2d 620 (10th Cir.), cert. denied, 393 U.S. 858 (1968); Wheeling Antenna Co. v. United States, 391 F.2d 179 (4th Cir. 1968); cf. Meadville Master Antenna, Inc. v. FCC, 443 F.2d 282 (3d Cir. 1971); Community Service, Inc. v. United States, 418 F.2d 709 (6th Cir. 1969).

163. Midwest Television, Inc., 13 F.C.C.2d 514 (1967) (report of hearing examiner).

164. Midwest Television, Inc., 13 F.C.C.2d 478 (1968) (commission decision), reconsideration denied, 15 F.C.C.2d 84 (1968), modified, 22 F.C.C.2d 899 (1970), further modified, 28 F.C.C.2d 62 (1971).

165. A study of 449 of the 455 petitions by CATV systems for waiver of the distant signal

In markets below the top one hundred, the FCC had contemplated that CATV systems could commence or expand operations without prior commission approval. However, when a petition, under section 74.1109, was filed objecting to the new operations, the cable system, under section 74.1105(c), was not allowed to operate until it received specific commission approval.[166] In an attempt to extend the major market rule to the smaller television markets,[167] broadcasters frequently invoked this automatic stay of CATV operations.[168] The net effect of these rules was both to hinder cable's development in the smaller markets through the delay and expense of meeting broadcasters' petitions, and to prevent cable operations from entering the top one hundred markets which contain eighty-seven percent of the viewing public.[169]

The FCC's restrictions on the development of CATV systems are troublesome for a number of reasons. First, the commission imposed the rules without any real evidence that cable would have an adverse impact on UHF broadcasting.[170] In the one evidentiary hearing that was held,

rule revealed that 105 waivers were granted, 91 waivers were denied and scheduled for evidentiary hearings, and the remainder were frozen by the commission's decision to halt all major market hearings (see note 196 infra and accompanying text). The grants of waiver were concentrated in the lower part of the top 100 markets with the result that the greatest protection was afforded in the largest cities. The principal reason for denial of waivers was the possible development of a UHF station, rather than protection of an existing UHF outlet. Seiden, supra note 156, at 97-100, 105. The courts sustained the commission's waiver of distant signal rules. Channel 9 Syracuse, Inc. v. FCC, 385 F.2d 969 (D.C. Cir. 1967); see Indiana Broadcasting Corp. v. FCC, 407 F.2d 681 (D.C. Cir. 1968).

166. Grant of Authorizations, supra note 143, at 338 (Loevinger, Comm'r, dissenting).

167. More than 350 objections to operations in markets below the top 100 were filed by broadcasters by the end of 1968. The commission rejected 147, granted 19, and the rest were left pending or designated for a hearing when the 1968 interim procedures were adopted (see note 195 infra and accompanying text). Seiden 96; see Cedar Rapids Television Co. v. FCC, 387 F.2d 228 (D.C. Cir. 1967) (upholding the commission's refusal to hold a hearing on CATV operations in a market below the top 100).

168. The courts upheld the validity of this § 74.1105(c) "automatic stay" provision. Bucks County Cable TV, Inc. v. United States, 427 F.2d 438 (3d Cir.), cert. denied, 400 U.S. 831 (1970); see City of Trenton v. FCC, 441 F.2d 1329 (3d Cir. 1971).

169. "The result was a 'freeze' in the cable industry, at least in those areas where most Americans live." Sloan, supra note 2, at 29. There is widespread agreement that the 1966 rules amounted to a freeze because cable systems were unwilling to undertake operations without being able to offer the additional programs available on distant signals. See, e.g., Communications Policy Report, supra note 32, ch. 7, at 17; Price & Wicklein, supra note 28, at ix; Botein, CATV Regulation: A Jumble of Jurisdictions, 45 N.Y.U.L. Rev. 816, 826 (1970). In light of the fact that there is a major question as to whether a CATV system can be successful in a city already well served by many broadcast signals, even if it is allowed to import distant signals (see note 348 infra and accompanying text), it is perhaps most accurate to view the freeze as preventing CATV systems from finding out if they could succeed in the major cities. See Seiden, supra note 156, at 92.

170. See notes 111, 146 supra and accompanying text. The commission also specifically

the FCC claimed to find the adverse economic impact on which its regulations rested.[171] In that hearing, the commission found that, notwithstanding the previous failure of the UHF station, an expected penetration of cable to fifty percent of the homes in the market would seriously impair the chances for UHF development because the cable system would fragment the small audience interested in the same programs that either cable or UHF could offer.[172] While it was true that programs offered on cable systems would fragment the audience available to local stations,[173] the commission gave only passing attention to the fact that cable carriage of UHF stations enables them to increase the size of their potential audience by overcoming a number of technical handicaps[174] that are faced in competition with VHF stations. A number of commentators have concluded that had cable been allowed to carry distant signals, the resulting audience fragmentation suffered by the local UHF station would have been offset by the increase in potential audience size through local carriage of its signal.[175] The ironic consequence of restricting cable's growth in the top one hundred markets in order to protect non-network UHF stations from the competition of distant signals has been that these stations have been deprived of the technical help that cable carriage could provide them in competition with VHF stations; that is, the "attempt to foster more UHF independents has probably resulted in

rejected a request to authorize an experimental CATV operation so that a factual determination of cable's impact could be made. Suburban Cable TV Co., 9 F.C.C.2d 1013 (1967).

171. The evidentiary strength of the commission's conclusion is suspect because the hearing examiner had reached a contrary decision on the same record. However, the court upheld the commission's conclusion that cable penetration would hurt local UHF stations. Midwest Television, Inc., 13 F.C.C.2d 514 (1967), rev'd, 13 F.C.C.2d 478 (1968), aff'd, Midwest Television, Inc. v. FCC, 426 F.2d 1222, 1228-29 (D.C. Cir. 1970).

172. Midwest Television, Inc., 13 F.C.C.2d 478, 490-98 (1968).

173. By increasing the number of signals available in a given locality, cable carriage of distant signals reduces the audience of the local broadcasters. Although carriage of a local station as a distant signal to another area increases its potential audience, this increase has only a marginal benefit because advertisers do not value distant and local audiences in the same manner. Moreover, not all local stations are carried as distant signals. See Seiden, supra note 156, at 49-62; L. Johnson, The Future of Cable Television: Some Problems of Federal Regulation 22-24 (Rand Memorandum 1970) [hereinafter cited as Future of Cable Television].

174. The technical handicaps faced by UHF stations include the facts that many television sets do not have a UHF tuner or antenna, that the continuous UHF tuner is less desirable than the VHF click tuner, and that operation on relatively low power makes reception at market edges difficult. Carriage of a UHF signal on the cable means that it is received on the same basis as a VHF signal. Comanor & Mitchell, The Costs of Planning: The FCC and Cable Television, 15 J. Law & Econ. 177, 184 (1972).

175. Park, Cable Television, UHF Broadcasting, and FCC Regulatory Policy, 15 J. Law & Econ. 207, 229-30 (1972) [hereinafter cited as UHF Broadcasting]; see Seiden 101; Future of Cable Television 39-40.

fewer."[176] In sum, it is the local VHF broadcasters in the major markets, rather than the small market VHF broadcasters with whom the FCC was concerned in 1958, who have benefitted from the FCC's prohibition on the carriage of distant signals because they would have suffered from audience fragmentation without any significant offset by carriage on cable.[177]

The second troublesome aspect of the FCC's restrictive regulation of cable television was that its commitment to UHF broadcasting as the best means for increasing television channels reflected a very narrow view of cable's technological potential.[178] Even if all of the UHF channels currently allocated by the FCC were eventually used, the total number of signals available on both VHF and UHF frequencies in each metropolitan area would be quite limited in comparison with the possibility of seventy channels on cable.[179] In any event, the growth of UHF broadcasting has been disappointing, and it is far from fulfilling the FCC's expectations.[180] In subsequent considerations of the relationship of cable television and conventional broadcasting, the commission shifted its justification for restrictive regulations on cable from the potential adverse impact on UHF stations to the element of unfair competition in CATV systems' failure to pay for the programming that they obtained from broadcast television signals.

5. A New Rationale: Two Proposals

a. Retransmission Consent Proposal

Following the Supreme Court's holding in 1968 that CATV systems were not liable for copyright payment for the programs they received on broadcast signals,[181] the FCC proposed new rules which in practical

176. UHF Broadcasting 231.

177. Grant of Authorizations, supra note 143, at 337 (Loevinger, Comm'r, dissenting).

178. The FCC's stated reasons for preferring UHF broadcasting over cable are set out at note 151 supra.

179. Future of Cable Television 7 (six to nine signals in the top 50 markets, five to seven signals in markets 51 to 75, and four to six signals in markets 76 to 100).

180. UHF Broadcasting 207-08. At the end of 1968 only 183 of the 654 channels allocated to UHF broadcasting were in use, and only two of the 37 UHF independents reported a profit. Comanor & Mitchell, The Costs of Planning: The FCC and Cable Television, 15 J. Law & Econ. 177, 185 (1972).

181. In June 1968, the Supreme Court held that CATV operators did not "perform" the programs that they picked up off television broadcast signals and, thus, were not liable for payments under the Copyright Act of 1909 [17 U.S.C. §§ 1(c)-(d) (1970)]. Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968). The Fortnightly decision was limited on its facts to cable use of local broadcast signals. However, in a recent decision, the Second Circuit Court of Appeals held that a cable system is liable for copyright payments on programs imported on distant signals. Columbia Broadcasting System, Inc. v. Teleprompter

effect amounted to a reversal of this decision.[182] In the 1968 proposal, the commission announced that it would no longer focus on whether CATV systems with distant signals would kill or cripple UHF stations. It was sufficient to find that the unfair competitive effect of CATV's non-payment for programs was significant and should be eliminated under the public interest standard of the Communications Act.[183] Although the FCC disclaimed any intention of acting to protect program copyright owners,[184] the new rules clearly had the effect of instituting copyright clearances.[185] The protection for copyright owners derived from the requirement that the cable system obtain "retransmission consent" on a program-by-program basis from the originating station before carrying the distant signal.[186] Since the nature of their agreements with program owners precluded broadcasters from granting such permission,[187] program copyright owners had complete protection.

The retransmission consent policy was principally applicable to the top one hundred markets where the FCC proposed that cable systems within thirty-five miles of designated communities in the one hundred largest television markets[188] could carry no distant signals in the absence of retransmission consent.[189] It apparently was the commission's intent that this proposed rule should act as a complete bar—with the exception of a few experiments—to CATV entry into major markets until final

Corp., 476 F.2d 338 (2d Cir. 1973), cert. granted, 42 U.S.L.W. 3173 (U.S. Oct. 9, 1973) (Nos. 1628 & 1633).

182. Chazen & Ross, supra note 68, at 1825-26.

183. Notice of Proposed Rulemaking and Notice of Inquiry into Rules and Regulations Relative to CATV Systems, 15 F.C.C.2d 417, 431 (1968) [hereinafter cited as 1968 Proposal], modified, 22 F.C.C.2d 589, further modified, 22 F.C.C.2d 603 (1969).

184. 1968 Proposal 431.

185. Id. at 463 (Bartley, Comm'r, dissenting); Smith, The Wired Nation, 10 The Nation, 582 (1970). "To one dubious role, that of protecting the nation's broadcasters, the FCC has added a second and even more far fetched one—that of protecting the nation's copyright holders." Id. at 597.

186. 1968 Proposal 432.

187. Chazen & Ross, supra note 68, at 1826; Barnett & Greenberg, Regulating CATV Systems: An Analysis of FCC Policy and an Alternative, 34 Law & Contemp. Prob. 562, 568 (1969).

188. The previous rules had applied to CATV systems operating in the Grade A Predicted Contour which could extend up to 60 miles in radius. Chazen & Ross 1826. The 1968 Proposal substituted the smaller and definite figure of a 35-mile radius. § 74.1101(m) in 1968 Proposal, supra note 183, at 459. The proposed rules also established a definite list of the 100 major markets and their included communities (designated communities) instead of the previous fluctuating definition resting on advertising ratings. See §§ 74.1101(j)-(k), 74.1107(a) in 1968 Proposal 459-61.

189. The major market rule was set out in proposed § 74.1107(b), 1968 Proposal 461. The rule exempted noncommercial educational TV retransmission from the consent requirement.

resolution of the proposal.[190] In any event, only two experiments with the retransmission consent proposal were ever conducted,[191] and although some consents were received, the experiments were failures.[192] In the smaller television markets,[193] cable systems within thirty-five miles of the television station could carry any distant signals necessary to provide three network, one independent, and any noncommercial educational signal, with the caveat that a signal could not be "leapfrogged" over closer signals of the same type. Any additional signals could be imported only with retransmission consent. CATV systems outside the thirty-five mile zone of any television station could carry an unlimited number of distant signals as long as they refrained from leapfrogging.[194]

The commission also established interim procedures to govern CATV operations when a conflict arose between the 1966 rules and the 1968 proposals.[195] Under these procedures, all major market evidentiary hearings were suspended,[196] and action on requests for authorizations to carry distant signals were considered only if the carriage would be consistent with the 1968 proposals. The effect of these rules and procedures was to exclude completely CATV entry with distant signals into the top one hundred markets. Greater leeway was provided by the reduction of the

190. Memorandum Opinion and Order on Rules and Regulations Relative to CATV Systems, 22 F.C.C.2d 589, 599 (1969) (Hyde, Chairman, concurring).

191. One cable system was granted authorization to carry programs from several distant stations for which it could try to obtain retransmission consent and was required to report every 60 days on its efforts to obtain this consent. Top Vision Cable Co., 18 F.C.C.2d 1051 (1969), modified, 23 F.C.C.2d 958, further modified, 26 F.C.C.2d 869 (1970). A second experiment was terminated before any useful results were obtained. Tri-Cities Cable TV, Inc., 22 F.C.C.2d 533 (1970), modified, 27 F.C.C.2d 432 (1971).

192. Cable Television Report and Order on Rules and Regulations Relative to CATV Systems, 36 F.C.C.2d 143, 153-54 (1972).

193. Proposed rule § 74.1107(d) in 1968 Proposal, supra note 183, at 461-62.

194. Proposed rule § 74.1107(e) in 1968 Proposal 462.

195. 1968 Proposal 434; Memorandum Opinion and Order on Rules and Regulations Relative to CATV Systems, 22 F.C.C.2d 589 (1969); Further Notice of Proposed Rulemaking on Rules and Regulations Relative to CATV Systems, 22 F.C.C.2d 603 (1969).

196. The 1968 proposed rules also established a fixed rule governing the so-called "footnote 69 situations" where a CATV system operated in the overlapping area of two major market television stations. Although CATV systems were required to carry all Grade B signals of local stations under 47 C.F.R. § 74.1103 (Jan. 1972), footnote 69 of the Second Report and Order, supra note 117, at 786 n.69, opened the door to evidentiary hearings as to whether, in certain circumstances, carriage of Grade B signals from one major market might be considered as distant signals when carried by a cable system located in the vicinity of a second major market. The 1968 proposed rule § 74.1107(b) [1968 Proposal 461] required retransmission consent in this situation, and the interim procedures, as in other major market matters, suspended further evidentiary hearings. In a case arising from the suspension of a major market footnote 69 hearing, the interim procedures of 1968 were sustained by the court. Buckeye Cablevision, Inc. v. United States, 438 F.2d 948 (6th Cir. 1971).

zone of a television market from the Grade A Predicted Contour to the fixed standard of thirty-five miles, and some additional breathing room was provided by the specification of the distant signals that CATV systems were entitled to carry. However, the nonduplication requirements of the 1966 rules were still applicable, and the notice of service and petition of objection rules still enabled the broadcasters to delay the development of new CATV operations.[197] Having shifted from the rationale of protecting UHF broadcasting to the rationale of preventing unfair competition (protecting copyright owners), the effect of the 1966-1968 rules and proposals was to provide almost complete protection for broadcasters in the major television markets from the development of CATV systems carrying distant signals, but to give very little protection to broadcasters in small television markets. This situation prevailed until the adoption of the 1972 rules.

b. Commercial Substitution Proposal

Prior to the adoption of the 1972 rules, the FCC announced in 1970 one other proposal to govern the carriage of television broadcast signals by CATV systems.[198] This proposal suggested (1) that CATV systems would be allowed to carry four distant non-network signals into the top one hundred markets, but with the commercials of the distant stations deleted and replaced with commercials provided by local UHF stations, (2) that five percent of the cable system's gross subscription revenues would be given to public broadcasting, and (3) that a flat percentage of gross cable revenues would be taken to compensate program copyright owners for use of the distant signal programs.[199]

In essence, this "commercial substitution" proposal represented an attempt to consolidate the rationale of the 1966 rules of furthering the development of the UHF stations and the tenets of the 1968 proposed rules and interim procedures that the interests of copyright owners deserved protection.[200] The furtherance of development of UHF stations was to be achieved by requiring cable systems (that would presumably enter the major markets now that carriage of distant signals was to be permitted) to substitute commercials of the local UHF stations for commercials carried on the distant signal. It would no longer be necessary to fence off UHF stations in the top one hundred markets from the com-

197. See notes 166-68 supra and accompanying text.

198. Second Further Notice of Proposed Rulemaking on Rules and Regulations Relative to CATV Systems, 24 F.C.C.2d 580 (1970) [hereinafter cited as Commercial Substitution Proposal].

199. Id. at 582-83, 585.

200. See id. at 581-82.

petition of CATV systems carrying distant signals because the CATV would help increase the UHF's audience and advertising revenues.[201] Protection of copyright owners would be achieved by the payment of a flat percentage of gross cable revenues.[202] The payment to public broadcasting was a new twist, apparently resting on the theory that this type of programming deserved equal stimulation along with the UHF stations.

Notwithstanding the commission's attempt to cater to all interests, the broadcasters objected because cables carrying distant signals would be allowed to enter the major markets. The copyright owners rejected the compulsory license and flat payment features. CATV interests objected particularly to the payment to public broadcasting. Although the plan had a number of both advantages and problems,[203] the major practical difficulty was the technical and economic feasibility of the deletion and insertion of commercials.[204] Only one experiment with commercial substitution was ever undertaken,[205] and the proposal was discarded with the adoption of the 1972 rules.

6. The 1972 Rules: The Freeze Is Lifted

In February 1972, the Federal Communications Commission attempted to resolve the vexing problem of cable carriage of television broadcast signals with which it had so long been preoccupied.[206] Rejecting both its

201. Id. at 583. The commission also recognized, apparently for the first time, that CATV carriage of the UHF signal would eliminate the technical handicaps faced in competition with VHF stations. See note 174 supra and accompanying text. The FCC claimed that VHF stations could handle the audience fragmentation created by the distant signals, but posited that a VHF station in the smaller markets could participate in the commercial substitution plan if its viability were threatened. Commercial Substitution Proposal 584.

202. A method of calculating the amount of compensation to which distant signal program owners were entitled was shown to demonstrate the feasibility of the proposal. Id. at 589. Nevertheless, the commission felt that resolution of the copyright issue was properly a matter for congressional resolution which had not yet been forthcoming.

203. L. Johnson, Cable Television and the Question of Protecting Local Broadcasting 2-10 (Rand Memorandum 1970).

204. The equipment for substituting commercials was expensive, and there was doubt that equipment could be designed which would "signal" the length of the commercial carried on the distant signal so that a commercial of appropriate length could be inserted locally. See Cable Television Report and Order on Rules and Regulations Relative to CATV Systems, 36 F.C.C.2d 143, 154 (1972).

205. Bucks County Cable TV, Inc., 27 F.C.C.2d 178, reconsideration denied, 28 F.C.C.2d 4 (1971).

206. Cable Television Report and Order on Rules and Regulations Relative to CATV Systems, 36 F.C.C.2d 143 (1972) [hereinafter cited as Cable Television Report and Order], stays denied, 34 F.C.C.2d 165, 170, 172, 174, 176, 178, 180, reconsideration denied, 36 F.C.C.2d 326 (1972).

previous regulations and proposals[207] and the numerous alternatives[208] which the imperfection of the existing rules had inspired, the commission in the *Cable Television Report and Order* announced a new plan to get cable development in the major cities underway without jeopardizing the structure of conventional over-the-air broadcasting.[209] The plan was an amalgam of a 1971 proposal[210] and a "consensus agreement"[211] of broadcasters, copyright owners, and cable interests. Cable television was to be given the impetus to enter the major markets by permitting the carriage of distant signals, but the preservation of conventional broadcasting was to be achieved by restricting the number of distant signals and by providing program exclusivity for both network and non-network programming. The commission felt that the goals which had motivated its earlier regulation of cable's competitive relationship with broadcasters would be served by the 1972 rules. In explaining that the audience frag-

207. Cable Television Report and Order 164-65.

208. Id. at 160-64. No legislation emerged from Congress to provide guidance for the FCC. See H.R. 10268, H.R. 10510, 91st Cong., 1st Sess. (1969); H.R. 19926, 91st Cong., 2d Sess. (1970); S. 792, S. 2427, 92d Cong., 1st Sess. (1971).

209. Cable Television Report and Order 164-65.

210. In August 1971, the FCC addressed a report to Senator John O. Pastore, Chairman of the Senate Communications Subcommittee of the Senate Committee on Interstate and Foreign Commerce, and to Representative Torbert H. MacDonald, Chairman of the House Subcommittee on Communications and Power of the House Committee on Interstate and Foreign Commerce, which report proposed to regulate the number of distant signals that cable could carry in particular television markets in accordance with the estimated ability of these markets to withstand distant signal competition. The copyright question of payment for programs carried on these distant signals was to be left to congressional resolution in light of the FCC's new regulatory framework. Commission Proposals for Regulation of Cable Television, 31 F.C.C.2d 115 (1971) [hereinafter cited as Letter of Intent].

211. The Consensus Agreement is set out in the Cable Television Report and Order, supra note 206, at app. D. See also id. at 165-68 (discussion of the Agreement). The Agreement itself was the product of conferences between major broadcast, copyright, and cable interests, Chairman Burch of the FCC, and an organ of the White House, the Office of Telecommunications Policy [Exec. Order No. 11556, 3 C.F.R. 300 (1973)] and it was essentially a response to the failure of the Letter of Intent to provide for the protection of the interests of copyright owners. The chief feature of the Agreement was the provision of program exclusivity for non-network programming. The modification of the Letter of Intent to include the changes of the Consensus Agreement in the final Cable Television Report and Order provoked a bitter dissent (and an equally vitriolic defense from Chairman Burch) from Commissioner Nicholas Johnson who charged that the compromise amounted to the big three interests carving up the action at the public expense and that the White House interference made a mockery of FCC procedure. Cable Television Report and Order 306 (N. Johnson, Comm'r, dissenting and concurring in part); id. at 287 (Burch, Chairman, concurring). The inclusion of the Consensus Agreement in the final report has been characterized by an uninvolved observer as "remarkable in terms of procedure, substance, and lawmaking theory." Barnett, State, Federal, and Local Regulation of Cable Television, 47 Notre Dame Law. 685, 688 & n.25 (1972) [hereinafter cited as Barnett].

mentation suffered by local UHF stations through the introduction of additional channels on distant signals would be offset by clearer UHF reception over a wider area by means of carriage on the cable, the commission turned 180 degrees from its previous view that UHF stations would be hurt by the introduction of cable systems.[212] The problem of unfair competition would be met by the program exclusivity rules which also would assure that copyright owners could continue to derive the revenues necessary to sustain the production of television programs.[213]

The carriage rules[214] provide that cable systems must carry specified local signals,[215] and the number of distant signals that may be carried is tailored to the size of the television market in which the cable system is operating. Cable systems may carry distant signals sufficient to fill a quota of three networks and three independents in the first fifty markets,[216] a quota of three networks and two independents in the second fifty markets,[217] a quota of three networks and one independent in all other television markets,[218] and an unlimited number in areas outside the thirty-five mile zone of any television station.[219] All cable systems operating within the thirty-five mile zone of a television station are allowed to carry certain additional distant signals,[220] but carriage of distant signals is subjected to leapfrogging restrictions.[221] The net effect of the

212. Cable Television Report and Order 169; see notes 174, 201 supra and accompanying text.

213. Cable Television Report and Order 169-70.

214. 47 C.F.R. §§ 76.51-.65 (Oct. 1972). A useful chart explaining the carriage rules may be found in A Television Digest White Paper, 12 Weekly TV Digest, Aug. 7, 1972 (special supplement). See Cable Television Report and Order 170 (chart).

215. 47 C.F.R. § 76.61(a) (Oct. 1972) (local carriage rules for top 50 markets); id. § 76.63 (Oct. 1972) (local carriage rules for second 50 markets); id. § 76.59(a) (Oct. 1972) (markets below the top 100); id. § 76.57(a) (Oct. 1972) (local carriage rules for cable systems outside 35-mile zone of any television market). The local carriage rules are similar to the previous rules. See id. § 74.1103(a)-(d) (Jan. 1972). The "footnote 69 situation" of overlapping major markets is handled by a rule that carriage of a signal from one overlapping market into the next can only take place if that signal has a significant over-the-air audience in the cable system's community. Cable Television Report and Order, supra note 206, at 174-75; 47 C.F.R. §§ 76.61(a)(1), 76.54, 76.5(f), (k) (Oct. 1972).

216. 47 C.F.R. § 76.61(b) (Oct. 1972).

217. Id. § 76.63(a) (Oct. 1972).

218. Id. § 76.59(b) (Oct. 1972).

219. Id. § 76.57(b) (Oct. 1972).

220. Cable systems operating in the top 50, second 50, and smaller television markets may also carry, in addition to their quota, (1) state agency educational television signals [id. §§ 76.61(d), 76.63(a), 76.59(c) (Oct. 1972)], (2) foreign language stations [id. §§ 76.61(e)(1), 76.63(a), 76.59(d)(1) (Oct. 1972)], and (3) a network program which will not be carried by a station normally carried by the system [id. §§ 76.61(e)(2), 76.63(a), 76.59(d)(2) (Oct. 1972)].

221. As to distant network signals, priority must be given to the closest or nearest in-state

carriage rules is that all cable systems in the top one hundred markets are entitled to carry at least two distant signals,[222] which is believed to be the minimum number necessary to open the way for cable development in a community.[223]

The program exclusivity rules continue the previous protection of network programming through nonduplication rules[224] and provide exclu-

network station. Id. §§ 76.61(b)(1), 76.63(a), 76.59(b)(1) (Oct. 1972). For distant independent signals, except educational and foreign stations, the signal may be taken from anywhere unless it is taken from one of the top 25 markets in which case it must be from one or both of the two closest such markets. Id. §§ 76.61(b)(1), 76.63(a), 76.59(b)(1) (Oct. 1972). In the top 50 markets where a third independent signal may be imported, it must be from a UHF within 200 miles or, if none is available, then any VHF within 200 miles or any independent UHF. Id. § 76.61(b)(2) (Oct. 1972). The restriction on distant independent signals to the nearest of the top 25 markets (eliminating for many cable systems such coveted independents as New York City, Chicago, and Los Angeles) was a product of the Consensus Agreement. See Cable Television Report and Order, supra note 206, at 165-66. Compare Letter of Intent, supra note 210, at 122 with Cable Television Report and Order 179.

222. In the top 100 markets, the cable system may import two independent signals less any distant signals used to fill the quota. 47 C.F.R. §§ 76.61(c), 76.63(a) (Oct. 1972). The cable system is assured the use of distant signals by the provision that it may substitute, subject to the exclusivity rules, another signal for a program deleted from an independent signal if the deletion was made either to meet the exclusivity requirements or because the program was of primary interest to the community of the distant station. Id. §§ 76.61(b)(2)(ii), 76.63(a) (Oct. 1972). This provision giving cable flexibility in the use of distant signals has been a source of particular irritation to broadcasters. See Memorandum Opinion and Order on Reconsideration of the Cable Television Report and Order on Rules and Regulations Relative to CATV Systems, 36 F.C.C.2d 326, 332-33 (1972) [hereinafter cited as Reconsideration of Cable Television Report and Order].

223. The carriage rules are, thus, a response to the claims of the cable television industry that it could not succeed in the major markets if denied the right to carry distant signals. See Letter of Intent, supra note 210, at 121. The commission's distant signal rules left open the associated and troublesome questions of importation of radio signals by CATV systems and the use of authorized distant signals when they include live sports events. The Consensus Agreement suggestion that a cable system which imports distant AM and FM radio signals must carry all local radio signals [Cable Television Report and Order app. D] was not incorporated into the Cable Television Report and Order. The FCC, however, has inaugurated a rulemaking and has adopted interim procedures restricting cable carriage of distant radio signals pending a final determination. Notice of Proposed Rule Making on Rules and Regulations to Govern Importation of Radio Signals by Cable Television Systems, 36 F.C.C.2d 630 (1972). With regard to the importation of live sports events on authorized distant signals, organized professional sports interests are seeking a rule which would prohibit such carriage. See Memorandum Opinion and Order on the Carriage of Sports Programs on Cable Television Systems, 36 F.C.C.2d 136 (1972). The FCC has initiated an inquiry into a possible blackout of distant signals carrying live professional sports events not broadcast on local stations. Notice of Proposed Rule Making on the Carriage of Sports Programs on Cable Television Systems, 36 F.C.C.2d 641 (1972); cf. note 519 infra and accompanying text.

224. 47 C.F.R. §§ 76.91-.99 (Oct. 1972). The nonduplication protection for network programming is essentially the same as that previously provided, with the exception that the

sivity for non-network or syndicated programming in the top one hundred markets.[225] The provision of exclusivity for syndicated programs[226] is designed to protect independent stations and copyright owners. Independent stations are protected because the programs they broadcast cannot be shown on signals imported on cable systems. Copyright owners benefit because their ability to sell the same program to many television stations in different areas is not hindered by the fact that a cable system might import the program. As the bulk of copyright owner revenues from syndicated programming is derived from sales in the top fifty markets, the rules provide the most protection in these markets, less protection in the second fifty markets, and no protection for syndicated programs in markets below the top one hundred or in areas outside any television market.[227] The exclusivity provisions are extremely complex,[228] but a general outline can be suggested. In the top fifty markets, cable systems must black out any program carried on a distant signal if it is a syndicated series or a feature film that is either under contract to a local station or was sold for the first time in a domestic market during the preceding twelve months. In the second fifty markets, a cable system distant signal must be blacked out (1) for an old network series during its first non-network broadcast in the market, but for no more than one year, (2) for any non-network series during its first broadcast in the market, but for no more than two years, and (3) for any feature film during the first two years it is available for non-network broadcast in the market.[229] The net effect of the exclusivity provisions is to render the distant signals that can be imported less attractive to potential CATV subscribers and hence less competitive.[230]

period of protection is reduced from one day to simultaneous nonduplication for all areas except the Mountain Standard Time zone. See id. § 74.1103(e)-(g) (Jan. 1972).

225. Id. §§ 76.151-.159 (Oct. 1972).

226. A syndicated program is defined as: "[a]ny program sold, licensed, distributed, or offered to television station licensees in more than one market within the United States for noninterconnected (i.e., nonnetwork) television broadcast exhibition, but not including live presentations." Id. § 76.5(p) (Oct. 1972).

227. Cable Television Report and Order, supra note 206, at 169-70; Reconsideration of Cable Television Report and Order, supra note 222, at 341.

228. 12 Weekly TV Digest, Feb. 7, 1972, at 2 ("It's going to take a computer to tell you which programs you can carry when."); see, e.g., Cable Television Report and Order 183 (example of exclusivity rules' effect in the Baltimore-Washington situation). An extremely helpful diagrammatic breakdown of the exclusivity rules may be found in A Television White Paper, 12 Weekly TV Digest, Aug. 7, 1972 (special supplement).

229. Park, After Exclusivity Blackouts, What's Left on the Horizon?, 9 TV Communications, Aug. 1972, at 46; 47 C.F.R. § 76.151 (Oct. 1972).

230. Seiden, supra note 156, at 120. Any future restrictions on the use of distant signals carrying live sports events (see note 223 supra) would also render distant signals less attractive to potential cable subscribers.

There seems to be general agreement that the total effect of the right to carry distant signals and of the exclusivity restrictions will be to permit the development of cable television systems in the bottom two-thirds of the top one hundred television markets where cable had previously been excluded.[231] Since the largest television markets that have three full networks and two or more independent stations with good over-the-air reception are already well-served by broadcast television, the distant signals can not be expected to sell many subscriptions.[232] Thus, although the exclusivity provisions will require about fifty percent of the distant signals to be blacked out, this will not have much impact on cable's development in these markets.[233] In the remaining top fifty markets which have only one independent station, the exclusivity rules will require that only about fifteen percent of distant signal time be blacked out, so that in these markets distant signals will be a "small but significant plus for cable operators."[234] In the second fifty markets where there are typically no independent stations, the exclusivity provisions will require blackout of only five percent of distant signal programs with the result that distant signals should help cable development in these markets.[235] Thus, the commission has officially eased the freeze[236] in all but the largest television markets where—barring the presence of peculiar reception difficulties[237]—cable development will be dependent on factors other than the importation of distant signals.[238]

231. 12 Weekly TV Digest, Feb. 7, 1972, at 2 (prediction of lively growth in markets 51-100, gradual creeping up through the lower part of the top 50); Cable Television Report and Order, supra note 206, at 293 (Burch, Chairman, concurring) (an opening to cable of over two-thirds of the top 100 markets); id. at 295 (Bartley, Comm'r, concurring); R. Park, The Exclusivity Provisions of the Federal Communications Commission's Cable Television Regulations 6 (Rand Memorandum 1972) [hereinafter cited as Exclusivity Provisions].

232. Exclusivity Provisions 6.

233. Id.

234. Id.

235. Id. at 8.

236. Although the commission has promised to implement the new rules on an expedited "go, no-go" basis, it has to date been very slow in processing the certificates of compliance which are required before the distant signal carriage permitted by the rules may be commenced. Reconsideration of Cable Television Report and Order, supra note 222, at 368; 12 Weekly TV Digest, Oct. 23, 1972, at 2. The commission principally has granted certificates of compliance which have been unchallenged; however, about 90 percent of all applications for the certificates have been opposed by the broadcasters. 12 Weekly TV Digest, Oct. 23, 1972, at 2; id., June 5, 1972, at 3. The FCC has a staff of 15 working on the certificates although a study has indicated a need for an additional 100 people; consequently, there are fears that the freeze, while lifted in name, will continue in fact for many years. Id., July 24, 1972, at 3; see id., Oct. 23, 1972, at 2.

237. See note 26 supra.

238. Exclusivity Provisions, supra note 231, at 6.

7. Evaluation of the FCC's Regulation of Cable Carriage of Broadcast Television Signals

The FCC's restriction on cable carriage of distant television signals has limited television program diversity, both by excluding programs that were not available in the local area and by preventing the viewing of identical programs in different time slots. Initially casting cable's role as a supplement to broadcast television service, the commission gradually came to the view articulated in the 1972 rules that cable could serve as a limited substitute for conventional broadcasting by providing some broadcast programming on distant signals that would not otherwise be available in the local area. This role for cable in relation to broadcast television is a rather inconclusive denouement to years of commission preoccupation with the problem. Although cable systems now will be allowed to carry distant signals in the major markets, carriage of these signals probably will form only the basis for a market penetration rate of twenty to twenty-five percent of all television homes in markets with three VHF stations.[239] In the larger markets with one or more independent stations, the capacity of distant signals to attract additional subscribers will be reduced; and in the largest cities with several independent stations, the availability of distant signals will have little effect in drawing subscribers.[240] Thus, there seems to be no immediate possibility that cable television will supplant or replace conventional broadcasting.[241] The commission, however, has locked cable into this role by not facing the basic issue of cable's access to programming. The failure

239. On market fringes and where one or more of the networks is on a UHF frequency, penetration rates will be higher. Park, supra note 26, at 36.

240. Exclusivity Provisions 6.

241. The broadcasters have long feared this consequence, but the Sloan Commission has argued that, at least in terms of releasing valuable spectrum space for other increasing needs, it would be desirable to put most television broadcasting on the cable. Sloan, supra note 2, at 22. Even if cable were to supplant a large portion of conventional broadcasting, television for rural areas—where homes were too widely scattered for economical service by cable—could be provided by retaining some broadcast stations. In this regard, it should be noted that a plan for providing, via microwave, cable's multiple channels to small towns that could not afford their own elaborate cable system has been formulated in connection with the proposal to build an advanced cable system in Dayton, Ohio. See Feldman, Coverage of the Five-County Miami Valley Region, in Dayton Report, supra note 16, at 3-16, 3-22. At least one congressman is interested in providing federally guaranteed loans for cable development in rural areas along the lines of the Rural Electrification Administration program. 12 Weekly TV Digest, Sept. 4, 1972, at 3. Also, the FCC has provided that cable television systems can use microwave connections to reach rural or suburban distribution plants that could not be economically reached by a direct cable connection from the headend. 47 C.F.R. §§ 78.5(b), 78.11(a) (Oct. 1972); see Report and Order on Rules and Regulations Relative to Community Antenna Relay Stations, 20 F.C.C.2d 415 (1969); note 381 infra.

to resolve the copyright issue means that cable systems will continue to have an advantage over local broadcasters in obtaining programs at no cost,[242] but the institution of a wide-ranging plan of program exclusives means that cable systems will have very limited access to programs.[243] Without equal access to television programs, cable cannot be fully competitive. While it cannot be said definitely that cable ought in some or all areas to replace conventional television broadcasting, the commission has formulated a scheme which will make it impossible to determine when or if cable should ever undergo such a metamorphosis. There has been, then, no final resolution of cable's role vis-à-vis broadcast television.

The commission is not concerned that it has locked cable into a role which will assure the survival of over-the-air television; indeed, this position explicitly is adopted.[244] In conjunction with this limited, but

242. The failure of cable systems to make any payment for programs imported on distant signals not only gives them a competitive advantage over local stations, but it also limits the total amount of assets available for program production. Conceivably if cable made some copyright payments, the additional funds would stimulate a wider range of program production. See Future of Cable Television, supra note 173, at 26-28. One of the goals of the Consensus Agreement had been to reach a compromise among the major interests which would facilitate the passage of copyright legislation which had not previously been possible. Cable Television Report and Order, supra note 206, at 166-67; see S. 543, 91st Cong., 1st Sess. (1969); S. 644, 92d Cong., 1st Sess. (1971). The Consensus Agreement has not settled contention over the proper resolution of the copyright issue, and legislation on this issue appears to be several years away. See Bryan, Perspective-on-the-news, 9 TV Communications, Sept. 1972, at 14 (at least two years off). The course of negotiations during 1973 between cable interests, broadcasters, and copyright owners subsequent to the completion of this Article has borne out the contention that any consensus on the copyright issue is illusory and that legislative resolution remains remote. See 13 Weekly TV Digest, Aug. 6, 1973, at 3. The decision of the Second Circuit in Columbia Broadcasting System, Inc. v. Teleprompter Corp., 476 F.2d 338 (2d Cir. 1973), cert. granted, 42 U.S.L.W. 3173 (U.S. Oct. 9, 1973) (Nos. 1628 & 1633), that cable systems are liable for copyright payments on programs imported on distant signals, may give impetus to the resolution of the copyright issue. Moreover, this decision is a distinct threat to all of the FCC's new 1972 cable policy since this policy hinges on the availability of distant signals. 13 Weekly TV Digest, Mar. 19, 1973, at 4.

243. The exclusivity rules give commission sanction to a long-standing industry practice by which programs are sold to one station on the basis that they will not be sold to any other station in the area for a certain period of time. The anti-competitive nature of exclusives is incisively explained in Chazen & Ross, supra note 68, at 1827-29. The effect of exclusivity will be that cable systems will not be able to break into the program market because the local VHF's, with a wider audience base, generally will outbid them. Id. The commission is considering shortening the length of exclusives and halting the practice by which VHF stations acquire the rights to programs with no intention of broadcasting, solely to keep the program off a competing cable system. 12 Weekly TV Digest, Mar. 27, 1972, at 6. While changing these practices would benefit cable systems in competing for programs, the commission is also considering the extension of syndicated program exclusivity to smaller television markets. See id., Apr. 17, 1972, at 7.

244. Cable Television Report and Order, supra note 206, at 164-65.

newly expanded role for cable in the provision of broadcast television programs, the FCC specified that cable's success in the major markets would depend on its development of innovative non-broadcast television services.[245] The FCC's recognition of cable's potential to provide non-broadcast television services and of other aspects of cable operations emerged only at a very late time during the commission's preoccupation with cable carriage of television broadcast signals. In Part III B *infra*, the development of the FCC's concern with the wider parameters of cable operations is traced. In Part IV *infra*, the potential of cable to offer non-broadcast television services and the types of services that can be expected under the 1972 FCC rules are examined.

B. *Recognition and Regulation of Non-Broadcast Aspects of Cable Television*

Until 1968 the Federal Communications Commission did not demonstrate any real concern with cable television other than its carriage of broadcast signals. In that year the commission formally noticed cable's technological potential[246] and broadened the area of its regulatory interest by: (1) recognizing that local franchising authorities often had failed to provide adequate consumer protection, (2) proposing regulation of the ownership of CATV systems, (3) initiating inquiry into the establishment of technical standards for cable, and (4) proposing that cable systems should originate their own television programs.[247] This belated recognition of the non-broadcast aspects of cable operations and of potential non-broadcast television services led the commission to propose a general inquiry into the role of CATV systems in the national communications policy.[248]

245. "In sum, we emphasize that the cable operator cannot accept the distant . . . signals that will be made available without also accepting the obligation to provide for substantial non-broadcast bandwidth. The two are integrally linked in the public interest judgment we have made." Letter of Intent, supra note 210, at 127 (emphasis deleted); see Cable Television Report and Order 190.

246. See note 34 supra.

247. 1968 Proposal, supra note 183, at 421-28. The recognition of the non-broadcast aspects of cable television operations was part of the same proceeding in which the FCC initiated its retransmission consent proposal. See note 183 supra.

248. "The possibility of a multipurpose local CATV communications system, and of national interconnection of such systems . . . raises a number of questions pertinent to the Commission's responsibilities and national communications policy . . . ." 1968 Proposal 441. The FCC proceeded to formulate a list of ten questions concerning the overall role of cable and invited discussion and comment. Id. at 442-43. The clear implication of the wording of these questions was that the commission intended to develop a comprehensive definition of cable's role in the communications framework, a definition that would no longer be premised solely on the competitive impact of cable's carriage of broadcast television signals.

This general inquiry, however, was never conducted as such. From 1968 to 1970 the FCC did investigate local incidents of cable television and the concomitant problems of the appropriate level of governmental jurisdiction, the ownership of cable systems, technical standards and associated issues, and origination of television programming by cable systems. This consideration of the non-broadcast aspects of cable is traced below. Nevertheless, the FCC's consideration of the non-broadcast aspects of cable on a piecemeal basis precluded the integrated evaluation promised in the initiation of the general inquiry. Consequently, by the time the commission published its comprehensive *Cable Television Report and Order* in 1972,[249] it had succeeded in pulling the non-broadcast aspects of cable under its regulatory umbrella, along with the carriage of broadcast television signals; but it continued to define cable's role in the national communications system—particularly cable's provision of non-broadcast programming—in terms of cable's carriage of broadcast signals.

1. The Local Incidents of Cable Television—Federal, State, and Local Jurisdiction

Until recently, the actual operation of a cable system in a particular community had been left to local governmental control. Municipal governments were able to assert control over the "local incidents" of CATV operations because the cable system needed a grant of authority to use public rights of way for construction of its distribution plant. This grant of authority most commonly took the form of a franchise.[250] Although the terms of each franchise varied greatly from one community to the next, there was usually a provision that in addition to the right of construction on public rights of way, the cable system would have the exclusive right to operate in the community or in an area of the city.[251] In exchange for these rights, the municipal government generally demanded payments to the city treasury[252] and imposed some operating

249. Cable Television Report and Order, supra note 206, at 143.

250. Barnett, supra note 211, at 685.

251. Cable systems generally are regarded as natural monopolies like telephone companies and electric utilities because there is only one physical distribution plant for a particular area. The franchise grant of the exclusive right to a section of a city transforms the natural monopoly into a legal monopoly. A thorough consideration of the local monopoly aspects of a cable system and an imaginative suggestion of how to avoid the adverse consequence of monopoly power may be found in R. Posner, Cable Television: The Problem of Local Monopoly (Rand Memorandum 1970).

252. Many municipal governments came to view the grant of a franchise primarily as a source of revenue. A study of approximately one-fourth of all the franchises granted between 1964 and 1968 revealed that only 16 percent required no payment to the community, whereas

conditions on the franchisee.[253] In some cities, cable systems were able to escape local regulation entirely by entering lease-back arrangements with the telephone company.[254]

Local regulation of cable television systems generally has been a failure.[255] The catalogue of problems and shortcomings is extensive.[256] The granting of franchises frequently has been marked by scandal and political favoritism,[257] and the franchises usually have exalted maximization of revenue for the municipal coffer at the expense of good service to the public. In particular, municipal governments have granted franchises of extended duration[258] and have permitted long delays in construction while the franchise passed through the hands of speculators.[259] The

30 percent of franchises granted prior to 1964 did not require any payment to the municipal government. Seiden, supra note 156, at 69-70.

253. The terms of performance required of the franchisee included such items as specifications of the rates charged to the subscribers, of the type of service to be provided, and of the extent to which homes within the franchise area had to be offered service. The actual provisions varied with each municipality, and most franchises did not make a comprehensive statement of required performance. For example, a basic provision that the cable system could not raise its rates to subscribers without municipal approval was included in only 45 percent of a representative sample of franchises issued before 1964 and in only 71 percent of a similar sample of franchises granted between 1964 and 1968. Seiden 77-78 (chart listing the percentage of franchises incorporating a number of basic provisions). Although it is evident that franchising authorities became increasingly specific in the obligations they imposed on cable systems in franchises granted after 1964, the requirements of a typical franchise could in no sense be considered comprehensive or exacting. See id. at 74, 77-78.

254. In a lease-back arrangement, the telephone company constructed the cable distribution plant on its telephone poles or in its underground conduits and then the cable system leased this facility. Since the cable system did not have to go before the municipal government for authority to use the public right of way but used an existing right of way, the city had no basis for imposing franchise terms. See City of New York v. Comtel, Inc., 57 Misc. 2d 585, 293 N.Y.S.2d 599 (Sup. Ct.), aff'd mem., 30 App. Div. 2d 1049, 294 N.Y.S.2d 981 (1st Dep't 1968), aff'd mem., 25 N.Y.2d 922, 252 N.E.2d 285, 304 N.Y.S.2d 853 (1969). The FCC's regulation of lease-back arrangements is discussed in note 314 infra.

255. Barnett, supra note 211, at 691; Center for Analysis of Public Issues, Crossed Wires: Cable Television in New Jersey ch. 4 (1971) (Report of the Center for Analysis of Public Issues, Princeton, N.J.) [hereinafter cited as Crossed Wires] ("the performance of local government in regulating CATV can only be termed a failure." Crossed Wires 65); see Botein, CATV Regulation: A Jumble of Jurisdictions, 45 N.Y.U.L. Rev. 816, 817 (1970) ("somewhat less than well-planned and executed"); Leone & Powell, CATV Franchising in New Jersey, 2 Yale Rev. L. & Social Action 252 (1972).

256. The experience in franchising 150 municipalities in New Jersey has been thoroughly examined, and there is no reason to believe that the problems documented there are unrepresentative of municipalities in other states. See generally Crossed Wires.

257. Barnett 691-93.

258. A study of franchises granted between 1964 and 1968 indicates that the most common length was 20 years although some franchises for up to 50 years were awarded. Seiden, supra note 156, at 69; Barnett at 697-98.

259. Barnett at 696-97.

franchises rarely imposed any comprehensive service requirements on the cable systems[260] and often allowed the CATV operator to provide service for affluent areas while neglecting poorer neighborhoods. Despite the Supreme Court's affirmance of the states' right to regulate those aspects of CATV operations not preempted by FCC regulation,[261] most states have not taken action to remedy the problems of local regulation. Prior to 1971, only five states had enacted legislation to regulate CATV systems;[262] however, during 1971 and 1972, there was a small, but significant, expansion of state regulation of cable systems.[263]

The FCC responded hesitantly to both the inadequacies of local regulation and the failure of state government to fill the void. In 1966 the commission took the position that Congress should determine the appropriate relationship of federal to state and local jurisdiction over questions of franchising and rate regulation.[264] By 1968 the FCC was aware that local regulation had failed to protect the public's interest in receiving good service from cable systems; however, the commission articulated the position that franchising was most appropriately a matter of local or state concern.[265] The only exception to local control of franchising was that a

260. See note 253 supra.

261. TV Pix, Inc. v. Taylor, 396 U.S. 556 (1970) (mem.), aff'g 304 F. Supp. 459 (D. Nev. 1968) (three-judge court).

262. Connecticut [Conn. Gen. Stat. Ann. §§ 16-330 to -333 (Supp. 1973)]; Hawaii [Hawaii Rev. Stat. §§ 440 G-1 to -14 (Supp. 1972)]; Nevada [Nev. Rev. Stat. §§ 711.010-.180 (1971)]; Rhode Island [R.I. Gen. Laws Ann. §§ 39-19-1 to -8 (Supp. 1972)]; Vermont [Vt. Stat. Ann. tit. 30, §§ 501-08 (Supp. 1973)]. All of these enactments take the form of public utility regulation, and those of Connecticut, Rhode Island, and Nevada are the most extensive. See Seiden, supra note 156, at 83 (Table—comparison of the significant particulars of the Nevada, Connecticut, and Rhode Island statutes). Other states considered but failed to enact legislation placing CATV systems under the jurisdiction of a public utilities commission. See Note, Regulation of Community Antenna Television, 70 Colum. L. Rev. 837, 851-52 (1970) (30 bills in 1969 met no success).

263. In 1971, New Jersey, New York, and Illinois imposed a moratorium on the grant of franchises by municipal governments in order to permit the states to develop regulatory schemes. Barnett, supra note 211, at 687; ch. 221, §§ 1-4 [1971] N.J. Laws 2d Sess. 1078; N.Y. Gen. Munic. Law § 88 (McKinney Supp. 1973). The New Jersey moratorium was repealed in 1972 and replaced with a regulatory scheme. N.J. Rev. Stat. § 48:5A-1 et seq. (Supp. 1972). Delaware imposed a public utility tax on CATV systems. Del. Code Ann. tit. 30 § 5502 (Supp. 1972). The most important development in 1971, however, was the adoption of a comprehensive scheme of regulation by Massachusetts which in essence provided for state supervision of local franchising. Mass. Ann. Laws, ch. 166A, §§ 1-20 (Supp. 1972); see Barnett 759-61. In 1972, New York became the second state to establish a comprehensive scheme of state supervision of local franchising procedures. N.Y. Exec. Law §§ 811-31 (McKinney Supp. 1973).

264. Second Report and Order, supra note 117, at 787-88.

265. See 1968 Proposal, supra note 183, at 425-26. The FCC did raise at this time the possibility that local scrutiny of franchises could be made a condition for the carriage of broadcast television signals.

municipal government could not impose restrictions on cable systems in regard to matters preempted by federal regulation.[266] In 1970, the FCC proposed that the federal role in regulation of the local incidents of cable systems be re-evaluated and suggested that the alternatives of federal licensing, enforcement of federal regulation through cease-and-desist orders, or local regulation under federally prescribed standards be considered.[267] The commission ultimately followed the third of these alternatives when it adopted, in the *Cable Television Report and Order* of 1972, rules specifying minimum requirements for the local franchising process.[268]

The 1972 rules[269] governing the distribution of federal-state and local jurisdiction over the local incidents of cable activity represent a substantial increase of federal regulation of franchising and are responsive to the major weaknesses of local regulation.[270] These rules provide that a cable system's franchise must meet a number of conditions including: (1) the franchisee's qualifications must be evaluated by the franchising authority as part of a full public proceeding affording due process;[271] (2) construction must proceed on a timetable determined by the franchising

266. Clarification of CATV First Report as to Scope of Federal Preemption, 20 F.C.C.2d 741 (1969). The FCC specified therein that franchising authorities could not impose conditions on origination of programs by cable systems that were inconsistent with the commission's rules. Interpretive Ruling on Request by Time-Life Broadcast, Inc., 31 F.C.C.2d 747 (1971) (FCC approval of pay television operations by cable systems rendered local franchise provisions to the contrary inoperative).

267. Notice of Proposed Rulemaking on Federal-State or Local Relationships in the CATV Systems Fields, 25 F.C.C.2d 50 (1970). The commission also proposed that local franchise fees should be limited to a maximum of two percent of the cable system's gross receipts. Id. at 53.

268. Cable Television Report and Order, supra note 206, at 204-10, modified, Reconsideration of Cable Television Report and Order, supra note 222, at 364-67; 47 C.F.R. § 76.31 (Oct. 1972); see Letter of Intent, supra note 210, at 136-39.

269. 47 C.F.R. § 76.31 (Oct. 1972). The FCC has premised its authority to regulate the local activity of a cable system on the carriage of broadcast signals. A cable system is defined in terms of carriage of broadcast signals, and all such systems are required to obtain a certificate of compliance. Id. §§ 76.5, 76.11 (Oct. 1972). One of the conditions for obtaining the certificate of compliance is that the cable system must have a franchise or appropriate authorization meeting specified provisions. Id. § 76.31 (Oct. 1972). The requirement that the cable system have an authorization would appear to meet head-on those cable systems that previously have escaped local regulation by entering into lease-back arrangements with local telephone companies. See note 254 supra and accompanying text. It seems clear that the commission has the power to expand its regulatory authority over the local activities of cable systems on the basis of its control over cable carriage of broadcast signals. See United States v. Midwest Video Corp., 406 U.S. 649 (1972); note 360 infra and accompanying text.

270. Barnett, supra note 211, at 750.

271. 47 C.F.R. § 76.31(a)(1) (Oct. 1972). The FCC has required only that there be a franchising procedure meeting the requirements of due process; it has not established any particular procedure.

authority;[272] (3) the initial franchise shall not exceed fifteen years;[273] (4) installation and subscriber rates must be approved by the franchising authority and there can be no increase in rates absent a public proceeding,[274] and (5) the franchise must provide a mechanism for investigation and resolution of subscriber complaints.[275] The rules also provide that the franchise fee paid to the municipal government must be "reasonable."[276] The immediate impact of these rules is reduced because cable systems operating at the time of their adoption are given until the end of the current franchise period or a five-year period concluding March 31, 1977, whichever occurs first, to bring their franchises within the terms of the rules.[277]

Although the FCC has now preemptively established standards governing the franchising process,[278] the franchising authority is left with a significant amount of discretionary power.[279] The commission's selection

272. 47 C.F.R. § 76.31(a)(2) (Oct. 1972). This rule also specifies that there must be "significant" construction within one year of certification and that thereafter service must be extended to the rest of the franchise area on an equitable basis. Although the commission suggested that the cable system be required to offer service to an additional 20 percent of the franchise area per year, the determination of the construction timetable and the division of the community for this purpose is left to the franchising authority. Letter of Intent, supra note 210, at 137.

273. 47 C.F.R. § 76.31(a)(3) (Oct. 1972). The Sloan Commission recommended that franchises should be limited to ten years. Sloan, supra note 2, at 174.

274. 47 C.F.R. § 76.31(a)(4) (Oct. 1972).

275. Id. § 76.31(a)(5) (Oct. 1972).

276. Id. § 76.31(b) (Oct. 1972). This section defines a "reasonable" fee as between three and five percent of gross subscriber revenues and notes that if the fee exceeds three percent there must be a special showing by the franchisee that payment will not interfere with federal regulatory goals and a showing by the franchising authority that the fee is appropriate in light of a well-planned local regulatory scheme. The FCC earlier had proposed that the fee be limited to two percent. See note 267 supra. Although state and local government opposed almost all federal prescription of standards, their fire was centered on this provision because of its impact on the size of governmental revenues. See Cable Television Report and Order, supra note 206, at 206. One circuit recently has ordered the City of Springfield, Mo., to hold new franchising proceedings, in part because the original franchise required payment, of a lump sum of $100,000 and 12.1 percent of gross receipts, substantially out of line with the subsequently published FCC standards. Springfield Television, Inc. v. City of Springfield, Mo., 462 F.2d 21, 27 (8th Cir. 1972).

277. 47 C.F.R. § 76.31(a)(6) (Oct. 1972). The commission later extended the grace period to cable systems substantially underway but not actually in operation at the time of the adoption of the rules. Reconsideration of Cable Television Report and Order, supra note 222, at 366.

278. See Notice on Franchise Provisions at Variance with Cable Television Rules, 37 Fed. Reg. 19397 (1972) (an explication of the extent to which franchising authorities can establish regulations different from those established by the FCC).

279. The rules specifically require the franchising authority to select the franchisee, to establish the construction timetable, to regulate rates, and to resolve consumer complaints. See notes 271, 272, 274, 275 supra and accompanying text.

of the neutral term "franchising authority" indicates no preference as to the distribution among state and local governments of the residual control over the local incidents of cable operations.[280] Nevertheless, it has been argued strongly that federal prescription of standards will not resolve all of the ills of local regulation absent state supervision.[281] The possibility of increased state regulation is being resisted stubbornly by cable interests which generally favor greater federal preemption.[282] Regardless of the ultimate distribution of franchising authority among state and local governments, it is perhaps most significant that, other than the franchise-regulating responsibilities directly left to these governmental levels, the FCC has almost completely preempted regulation of all other aspects of cable activity.[283]

2. Diversification of Control

As in the case of local incidents of cable operations, the FCC's preoccupation with cable's carriage of broadcast signals eclipsed concern with diversification of control in the cable television industry. The consequence of the commission's neglect has been a high degree of cross-ownership of cable systems by other media[284] and an increasing consolidation

280. See Order on Procedures in the Cable Television Service, 37 F.C.C.2d 611 (1972) (FCC ruling that where it is unclear whether the appropriate franchising authority is at the state or local level, the cable system should file applications for certificates of compliance at both levels of government).

281. The lack of expertise and resources, the presence of a financial stake in the success of the cable system, and the fact that cable systems often operate across municipal lines are some factors which among others suggest that local government has an inadequate institutional base to be the exclusive franchising authority and that state supervision of local decisions is necessary. Barnett, supra note 211, at 698-708, 750-53, 812-14; see Sloan, supra note 2, at 177-78. But see Seiden, supra note 156, at 84. A Cable TV Information Center has been established with $4,000,000 in foundation grants to assist states and localities in cable regulation. 12 Weekly TV Digest, Jan. 3, 1972, at 6.

282. Cable interests view federal preemption as a shield against state regulation which they fear will assume the form of public utility rate regulation. Cable Television Report and Order, supra note 206, at 206; Roth, Alright, Who Should Pull the Cable/Puppet Strings, 9 TV Communications, Aug. 1972, at 28. The fact that two state attorneys general recently have opined that the Cable Television Report and Order rules contemplate certain state public utility regulation suggests that cable operators' fears are not groundless. Op. Att'y Gen. Ariz. No. 72-14, Apr. 10, 1972, 24 P & F Radio Reg. 2d 2023 (1972); Op. Att'y Gen. Utah No. 72-026, June 30, 1972, 24 P & F Radio Reg. 2d 2126 (1972). See also Aberdeen Cable TV Service, Inc. v. City of Aberdeen, 85 S.D. 57, 176 N.W.2d 738 (1970), cert. denied, 400 U.S. 991 (1971) (ruling that CATV systems are public utilities under state law).

283. See Notice on Franchise Provisions at Variance with Cable Television Rules, 37 Fed. Reg. 19397 (1972). The FCC largely has preempted regulation of cable's carriage of broadcast signals, ownership of cable systems, technical standards of operation, and origination of programming.

284. Barnett, Cable Television and Media Concentration, Part I: Control of Cable Systems by Local Broadcasters, 22 Stan. L. Rev. 221, 286 (1970) [hereinafter cited as Media Concen-

of ownership among a limited number of cable operators.[285] This pattern of ownership raises a number of important issues. First, the cross-ownership of cable systems by other communications interests presents the problems of common ownership of potential competitors.[286] Second, concentrated ownership of a large number of cable systems poses the danger of monopoly power over an important means of information dissemination.[287] These two problems assume added dimensions in light of both the expectations of groups heretofore lacking a vehicle of expression that cable television could serve this function and the expected transition of cable systems from passive distributors of broadcast television programs to active originators of their own programming.[288] Although there is no documentation of the impact of this pattern of ownership,[289] it

---

tration]. A survey of 2,839 cable systems in operation as of March 30, 1972 reported that there was some degree of cross-ownership by broadcasters in 1,077 (37.9%), by newspapers in 180 (6.3%), by publishers in 75 (2.6%), by film producers in 217 (7.6%), and by theater interests in 97 (3.4%). TV Factbook, supra note 23, at 75a. The acquisition of cable systems by other media reflects a desire to participate in a profitable enterprise and to build a hedge against competition from cable. Mitre Report, supra note 16, at C-11.

285. Mitre Report C-10. The top 25 operators serve 59 percent of all cable homes and the top 50 reach 70 percent. 12 Weekly TV Digest, Sept. 25, 1972, at 2 (list of the top 25 operators); id., Oct. 2, 1972, at 3 (list of the second 25 operators). An operator of a number of cable systems frequently is termed a MSO (Multiple System Operator), and a convenient profile of the major MSO's may be found in S. Rivkin, Shaping Ownership and Control in the Cable Television Industry, app. A, Feb. 11, 1971 (A Report to the Sloan Commission on Cable Communications). The consolidation of cable systems reflects the high cost of wiring urban areas and the necessity of amassing sufficient capital to undertake these costs. Mitre Report C-11.

286. The ownership of a cable system by a local broadcasting station or a newspaper poses the possibility that one of the enterprises will be favored to the detriment of the other, gives the owner consolidated control over several local outlets of information, reduces competition for advertising revenues, and discourages development of programs or services on the cable that would be competitive. Sloan, supra note 2, at 136-37; Media Concentration 292-310 (problems of cross-ownership of cable system and television broadcast station in the same market).

287. The ownership of a large number of cable systems by a single multiple system operator (MSO) is a separate issue from the fact that each individual cable system operates a large number of channels. Of course, to the extent that a cable system owns only the physical plant and has no control over the programming on the multiple channels, the concerns over multiple system ownership are reduced, albeit not eliminated. The extent of a cable system's control over its high channel capacity is discussed in text accompanying note 410 infra.

288. The origination of television programs by cable systems is discussed in text accompanying note 330 infra and in Part IV.

289. Absent documentation, the dimension of the problem is suggested by the following facts. The largest MSO, Teleprompter, operates the second largest individual cable system (TelePrompTer-New York City) and is itself principally controlled by Hughes Aircraft, a large manufacturer of cable equipment and the prospective operator of a satellite relay for interconnecting cable systems. In a similar vein, Time-Life (publishing) is the eleventh largest

seems clear that ownership of cable systems by other media interests is at best inconsistent with the full development of competitive services and programs on the cable. Moreover, concentrated ownership stifles competition at the franchising stage among prospective cable operators to offer new, innovative packages of services.[290]

The FCC had only given passing consideration[291] to the question of diversification of control in the cable television industry prior to 1968 when it first proposed rules governing cross-ownership and multiple ownership;[292] since then, the commission has taken but limited actions. In regard to cross-ownership, the commission did adopt in 1970 rules prohibiting local cross-ownership of CATV systems and television broadcast stations as well as network ownership interest in any cable system.[293]

MSO and the owner of a voting majority of the stock of Sterling Manhattan Cable, the fourth largest individual cable system in the country. See Botein, Access to Cable Television, 57 Cornell L. Rev. 419, 433 (1972) [hereinafter cited as Access to Cable Television]; note 24 supra; 12 Weekly TV Digest, Sept. 25, 1972, at 2.

290. See Access to Cable Television 434, 436-37. The Justice Department recently has filed an antitrust suit to block the merger of two major cable companies on the ground that it would discourage competition for franchises, especially in the nation's largest markets. N.Y. Times, Dec. 22, 1972, at 15, col. 6.

291. In its first evaluation of cable television in 1959, the commission discounted any problems of the ownership of CATV systems on the ground that since cable systems originated no programs there was no infringement of the principle of diversity of viewpoints. CATV & TV Repeater Services, supra note 76, at 438-39. This position prevailed through 1965 when the commission formally decided that cross-ownership between cable systems and television station licensees should be permitted in the absence of any showing of abuses contrary to the public interest. First Report on Acquisition of Community Antenna Television Systems by Television Broadcast Licensees, 1 F.C.C.2d 387, 388 (1965); see Lompoc Valley Cable TV, 2 P & F Radio Reg. 2d 22 (1964); Rust Craft Broadcasting Co., 36 F.C.C. 1549 (1964), vacated, Citizens TV Protest Committee v. FCC, 348 F.2d 56 (D.C. Cir. 1965). Two years later, the FCC decided that, in light of the possible development of cable systems with program origination capacity, the whole question of CATV ownership and cross-ownership should be reopened. Notice of Inquiry Into Developing Patterns of Ownership in the CATV Industry, 7 F.C.C.2d 853 (1967).

292. The 1968 proposal subsumed the inquiry commenced in 1967 (see note 291 supra) and suggested (1) that cross-ownership of a television station and a CATV system within that station's Grade B contour be prohibited and (2) that multiple ownership of CATV systems be limited according to a formula based on the number of subscribers, size of the community served, and regional concentration. 1968 Proposal, supra note 183, at 426 and n.12.

293. Second Report and Order on Rules and Regulations Relative to CATV Systems, 23 F.C.C.2d 816 (1970). The rule provided as follows:

"(a) Cross-ownership. No CATV system (including all parties under common control) shall carry the signal of any television broadcast station if such system directly or indirectly owns, operates, controls, or has an interest in:

"(1) A national television network (such as ABC, CBS, or NBC); or

"(2) A television broadcast station whose predicted Grade B contour . . . overlaps in whole or in part the service area of such system (i.e., the area within which the system is serving subscribers); or

At the same time, the FCC also proposed two alternatives for limiting multiple ownership of cable systems[294] and initiated an inquiry into the ownership of cable systems by microwave carriers, cable equipment manufacturers, advertising agencies and national news magazines.[295] In the 1972 comprehensive rulemaking, the commission simply adopted the exising cross-ownership rules governing local stations and networks,[296] and continued the inquiry into multiple ownership and other types of cross-ownership.[297]

The limited action that the commission has taken in regard to the ownership of cable systems is troublesome in a number of respects. First, although the FCC has restricted television broadcaster ownership of cable systems,[298] it has left the door open to cross-ownership by other

"(3) A television translator station authorized to serve a community within which the system is serving subscribers." 47 C.F.R. § 74.1131 (Jan. 1972) (footnotes omitted). The restriction on a television station's ownership of a local cable system which originates its own programming is consistent with the FCC's long-standing duopoly policy against ownership of more than one broadcast outlet of the same type in a particular community. Media Concentration, supra note 284, at 293-94. Although the FCC has not forbidden cross-ownership of local radio and broadcast stations, it has been argued strongly that radio-cable cross-ownership is contrary to the public interest. Id. at 320-29; see Allied Broadcasting, Inc. v. FCC, 435 F.2d 68 (D.C. Cir. 1970) (noting that the FCC could consider radio station applicant's interest in a cable system on the issue of diversification of control).

294. Notice of Proposed Rule Making and of Inquiry into Diversification of Control of CATV Systems, 23 F.C.C.2d 833 (1970). The first alternative premised the limits on multiple ownership on geographical concentration, and the second alternative simply placed a limit of two million subscribers on any multiple system operator. Id. at 836-37.

295. Id. at 838. The commission also continued an inquiry into cross-ownership of cable systems by local radio stations and daily newspapers. Id. at 834-35.

296. 47 C.F.R. § 76.501 (Oct. 1972). The text of the rule is almost identical to that of the previous rule. See note 293 supra.

297. Cable Television Report and Order, supra note 206, at 147.

298. The impact of the restrictions on television station ownership of cable systems is reduced by the fact that those restrictions only apply to a cable system within the station's broadcast area and do not prevent ownership of a non-local system. Second Report and Order on Rules and Regulations Relative to CATV Systems, 23 F.C.C.2d 816, 821 (1970). Although the rules require divestiture of all non-conforming television station ownership of local cable systems by August 10, 1973, there is evidence that the FCC is considering either extension of this deadline or "grandfathering" of existing cross-ownership. See 12 Weekly TV Digest, Oct. 23, 1972, at 2; Stauffer Publications, Inc., 25 P & F Radio Reg. 2d 98 (1972) (FCC permitted a broadcast station to increase its ownership of a local cable system). The networks have been forced to yield their cable interests; however, CBS was successful in spinning off its cable interests into a single package (Viacom International—the fifth largest MSO) over which one commentator believes that the network will be able to maintain substantial control. Access to Cable Television, supra note 289, at 435; 12 Weekly TV Digest, Sept. 25, 1972, at 2; see 37 FCC Ann. Rep. at 63-64 (1971). Subsequent to the completion of this Article, the FCC acted to protect cross-ownership which existed prior to July 1, 1970, the date of the initial proscription. See 47 C.F.R. § 76.501(b) (Oct. 1972) and text

interests which may pose a danger to the development of cable television.[299] While the merits of cross-ownership in providing capital and media experience for cable systems can be argued,[300] the danger of cross-ownership by cable hardware companies,[301] program suppliers,[302] and local newspapers[303] seems sufficiently clear that at a minimum it should

accompanying note 293 supra. The commission ruled that the grace period for divestiture of prohibited cross-ownership would be extended to August 10, 1975 and invited petitions for waiver of the mandatory divestiture requirement. Memorandum Opinion and Order on Rules and Regulations Relative to CATV Systems, 39 F.C.C.2d 377 (1973). The opinion openly indicated that the petitions would be "liberally" construed. Id. at 396 (Reid, Comm'r, concurring).

299. One commissioner has criticized the FCC's extended inquiries and urged in 1970 that there was enough information at that time to act on newspaper and radio station ownership of cable systems. See Notice of Proposed Rule Making and of Inquiry Into Diversification of Control of CATV Systems, 23 F.C.C.2d 833, 839 (1970) (Johnson, Comm'r, concurring). The FCC recently has received a report from its cable television advisory committee warning of the dangers of cross-ownership.

"Broadcasters, utilities, newspapers, owners of professional sports teams, manufacturers of cable television hardware, owners of companies whose primary activity or business is the production and distribution of CATV feature films or motion-picture films all represent that kind of cross-ownership danger, which must be guarded against.

"Each of these examples poses problems of competition or monopoly, or capacity to suppress that free flow of speech and communication which, if allowed, could stifle or stunt the growth and development of CATV in the national interest." N.Y. Times, Dec. 21, 1972, at 71, col. 1 (quoting from advisory committee report).

300. Sloan, supra note 2, at 137-39. The Sloan Commission recommended "that local commercial television stations and newspapers of general circulation be permitted to seek franchises within their own Standard Metropolitan Statistical Areas, provided no single such enterprise possesses franchises capable of reaching more than 10 percent of the households within the SMSA, and provided also that such franchises, in the aggregate, be capable of reaching no more than 40 percent of all households in the area . . . ." Id. at 175-76.

301. Ownership of a cable system by the manufacturer of cable hardware poses the dangers that the system will not buy the best equipment available from competitors and that there may be a diversion of assets from the cable system to the parent equipment supplier. See Smith, Ownership Policy and the Cable Industry, 2 Yale Rev. L. & Social Action 263, 269 (1972) [hereinafter cited as Ownership Policy]. The FCC's order that Hughes Aircraft separate its equipment manufacturing company from its satellite company, which proposes to distribute interconnected programming to cable systems, reflects an awareness of the potential conflict of interest in cable equipment suppliers' involvement in cable operations. Second Report and Order on Establishment of Domestic Communications-Satellite Facilities by Non-governmental Entities, 35 F.C.C.2d 844, 855 (1972); see note 492 infra and accompanying text.

302. Ownership of a cable system by suppliers of programs for cable origination poses the danger that the supplier will use his systems as an exclusive outlet and deny subscribers access to the diversity of products of other program suppliers.

303. Ownership of a local cable system by a daily newspaper reduces competition for advertising, creates the risk that the cable system's revenues may be diverted from programming and service to support the newspaper, and establishes centralized control over two major outlets of opinion and information.

not be allowed to continue without provision against the most fundamental abuses.[304] Secondly, the commission has not yet formulated any rule against concentration of ownership. This inaction[305] is particularly disturbing in light of the fact that multiple system operators are expected to be the only cable operators capable of attracting sufficient capital to wire the largest markets recently opened to cable television.[306] Without provision for regulation of this seemingly inevitable trend, the commission may be confronted with an undesirable degree of entrenched, concentrated ownership by the time it decides to act.[307] The consequences of extensive cross-ownership and large multiple system operations are that, in the absence of decisive action by the commission, it is reasonable to expect that diversity of programming on cable television will be inhibited to an undeterminable degree and that minority groups will be excluded from ownership of cable systems.[308]

---

304. The commission's Cable Advisory Committee has recommended that vigorous action be taken immediately to prevent cross-ownership problems from developing until such time as the permissible types and degrees of cross-ownership can be determined. N.Y. Times, Dec. 21, 1972, at 71, col. 1.

305. The commission's inaction stands in contrast to the Justice Department's decision to file an antitrust suit against the merger of two cable companies which would form the second largest multiple system operator. N.Y. Times, Dec. 22, 1972, at 15, col. 6; see 12 Weekly TV Digest, Sept. 25, 1972, at 2.

306. The high cost of wiring major cities means that a cable system will have to depend extensively on external financing. Capital sources plan to deal primarily with large multiple system operators with proven management because the new systems will no longer be able to rely on conventional off-the-air or imported signals for success in major cities that already have good multiple television broadcast service. See Exclusivity Provisions, supra note 231, at 6; text accompanying note 240 supra. In the view of capital investors, the success of cable in the major cities will depend on the provision of new television programming and services; moreover, since this is a new type of operation, they are interested in financing only those multiple system operators who already have built a strong base. Thus, lacking the requisite capital financing, small or new cable operators and minority groups will not be in a position to compete for franchises in the major markets. National Cable Television Association, Toward the Wired Nation—The Financial Implication of Developing Cable Communications, NCTA Seminar Transcript, June 30, 1971; see Ownership Policy, supra note 301, at 266-68.

307. The Sloan Commission has recommended that a limit of ten percent of all the households within reach of cable at a particular time be placed on multiple system operations. Sloan, supra note 2, at 140-41.

308. There has been wide interest in minority group ownership of cable television franchises both as a source of financial benefit to the community and as a public forum, and four major studies have noted the merits of community ownership. Tate, Community Control of Cable TV Systems, in Cable Television in the Cities: Community Control, Public Access, and Minority Ownership 15-38 (C. Tate ed. 1971); Sloan 176; Mitre Report, supra note 16, at C-28; Dayton Report, supra note 16, pt. 10, at 25. No cable franchises are wholly owned by blacks; only two are partly black owned. Ownership Policy 268. The prospect for increased minority ownership of cable systems is not good because these groups lack the capital and experience to compete with multiple system operators in the major cities that also have large

In contrast with its general inaction on the issues of ownership in the cable television industry, the commission has been more responsive to the problems posed by telephone company attempts to obtain control over cable enterprises. The telephone industry's attempt to control cable operations is a tribute to the vast potential of coaxial cable to provide new communications services[309] and a product of the fear of losing monopoly control over the wires to homes and offices. In their efforts to maintain their monopoly, the telephone companies had the upper hand because, in the construction of distribution plants, cable systems effectively were limited to a Hobson's choice of either (1) a lease-back arrangement whereby the telephone company constructed the coaxial cable distribution plant and then leased the facility to the cable system or (2) a pole attachment agreement whereby the telephone company gave the cable system permission to construct the distribution network on telephone poles in exchange for payment of a pole rental fee.[310] As a result of their dependence on local telephone companies for the construction of a distribution system, independent cable systems often found that a telephone company's subsidiary CATV was given preferential treatment or that they were forced, by the telephone company's refusal to rent pole attachment space, to enter expensive lease-back arrangements which often included limitations on the type of services for which the leased cable lines could be used.[311]

minority populations. See note 306 supra; Mitre Report C-14. One alternative to complete ownership may be for local groups to participate as partners in particular franchise areas with a large multiple system operator who has obtained the overall franchise. See Blacks to Own Half of CATV System in Dayton, O., 1 Cable Information, July 1972, at 1. To the extent that the demand for minority ownership is premised on a desire to control the cable medium and not solely to obtain community financial benefit, there is an unfortunate slighting of the principle at the base of all concern with ownership; that is, that the owner should not be in a position to dictate program content. Another nonprofit alternative to corporate ownership is municipal ownership. There are currently only 18 municipal cable systems, primarily in small towns, and opposition both from the cable industry and from minority groups presages a limited future for this approach, notwithstanding the possibility of lower subscriber costs achieved through public financing at low interest rates. Mitre Report C-25 to -28; Ownership Policy 271-73.

309. See note 34 supra and accompanying text.

310. A third alternative—cable system construction of the complete distribution network—would have limited the power of the telephone companies; however, this was rarely a viable alternative because most municipalities would not permit the construction of a duplicate set of poles or underground conduits by the cable company. Moreover, the cable operator who planned to construct his own distribution network faced the necessity of obtaining easements to enter private buildings which the telephone company already had in hand. See R. Smith, The Wired Nation: Cable TV: The Electronic Communications Highway 67 (1972) [hereinafter cited as Smith].

311. Since AT&T had entered an antitrust consent decree in 1956 which prohibited

The commission's first response in 1966 to telephone company dominance over cable systems was to require that the telephone companies file tariffs governing their lease-back service.[312] Two years later, the FCC ruled that telephone companies must obtain a certificate of public convenience and necessity under section 214 of the Communications Act [47 U.S.C. § 214 (1970)] prior to constructing a cable distribution system for lease-back.[313] The requirement that a certificate of convenience and necessity be obtained prior to construction enabled the commission to supervise rates and service by the telephone companies and to prevent the circumvention of local regulations by cable operators.[314] These commission actions, however, did not meet the problems of telephone company favoritism towards affiliated CATV systems[315] and telephone company refusals to enter pole attachment agreements in order to force

affiliation with CATV systems, only non-Bell system companies were able to engage in the tactic of creating a cable subsidiary to assure telephone company control and benefit from the development of cable services. All telephone companies were free to insist on lease-back arrangements simply by refusing to enter a pole attachment agreement. See Smith 66-67.

312. The commission reasoned that although CATV operations did not constitute common carriage, the provision of channels to a cable system was a common carrier's undertaking which necessitated the telephone company to file tariffs governing this service. Memorandum Opinion and Order on Requiring Common Carriers to File Tariffs, 4 F.C.C.2d 257 (1966). After the tariffs were filed, the FCC ordered an investigation into the lawfulness of the tariffs, and this inquiry was later expanded to encompass telephone company pole line attachment policies. Associated Bell Sys. Cos., 6 F.C.C.2d 433 (1967); General Tel. Sys., 6 F.C.C.2d 434 (1967); California Water & Tel. Co., 6 F.C.C.2d 440 (1967); California Water & Tel. Co., 5 F.C.C.2d 229, modified, 6 F.C.C.2d 175 (1966), amended, 6 F.C.C.2d 441 (1967); Associated Bell Sys. Cos., 5 F.C.C.2d 357 (1966), amended, 6 F.C.C.2d 660, further amended, 7 F.C.C.2d 37 (1967).

313. General Tel. Co., 13 F.C.C.2d 448 (1968), aff'd, General Tel. Co. v. FCC, 413 F.2d 390 (D.C. Cir.), cert. denied, 396 U.S. 888 (1969).

314. Although the commission found that a cable system's compliance with local regulations was an appropriate matter for consideration in a telephone company's application for a 214 certificate and that a CATV system should not be allowed to by-pass local regulations through a lease-back arrangement, there were often no local regulations to be enforced by this procedure. Better TV, Inc., 31 F.C.C.2d 939 (1971), reconsideration denied, 34 F.C.C.2d 142 (1972) (FCC refused certificate to construction of lease-back facilities for a CATV that did not hold a franchise from the community to be served); Chesapeake & Potomac Tel. Co., 21 F.C.C.2d 714 (1970); New England Tel. & Tel. Co., 17 F.C.C.2d 33 (1969). See also note 254 supra and accompanying text.

315. The preferential treatment accorded to affiliated cable systems in order to eliminate the threat of competition from an independent CATV has been well-documented in the activities of the General Telephone and Electronics Corporation (GTE) where the local General Telephone Company frequently favored a CATV subsidiary of GTE over unaffiliated cable operators in the provision and construction of a distribution network. Armstrong Util. Inc., 25 F.C.C.2d 385 (1970); Manatee Cablevision, Inc., 22 F.C.C.2d 841 (1970); TeleCable Corp., 19 F.C.C.2d 574 (1969).

independent cable systems into less desirable lease-back arrangements.[316] In 1970 the FCC acted to confront these problems by ruling (1) that telephone companies cannot enter into lease-back arrangements or pole attachment agreements with an affiliated CATV system in communities where they provided exchange service and (2) that, where a telephone carrier proposes to provide lease-back service to an unaffiliated CATV system, the telephone company must make a documented showing that the cable system has been offered pole attachment rights at reasonable charges and without undue restriction on the uses that may be made of the channel.[317]

Although the FCC's 1970 ruling was responsive to the worst practices of the telephone companies,[318] the telephone industry has retained a significant role in cable operations. A telephone company may own a cable system that is not located in its service area and may continue to provide lease-back or pole attachment services to unaffiliated cable systems in its exchange area. While a pole attachment agreement must be offered to a cable system as a prerequisite to telephone company construction of a lease-back distribution system, the commission currently has no rule requiring authorization for construction of cable systems utilizing pole attachment agreements. There is evidence that the telephone companies continue to engage in anti-competitive pole line attachment policies;[319] however, the commission has initiated an investigation into the

---

316. A thorough consideration of one telephone company's refusal to enter pole attachment agreements in order to force independent cable systems to accept a lease-back arrangement (referred to herein as "channel service") led the FCC to conclude that "N.Y. Telco subjected CATV operators who desired to construct their own CATV systems to undue and unreasonable prejudice and disadvantage and extended undue and unreasonable preference and advantage to its channel service customers and potential channel service customers. The purpose of the conduct established herein was to either induce the independent CATV operators to take unwanted channel service or to impede and delay construction of their CATV systems until a channel service customer could be obtained and channel distribution facilities could be constructed." Better TV, Inc., 31 F.C.C.2d 939, 967 (1971), reconsideration denied, 34 F.C.C.2d 142 (1972).

317. Final Report and Order on Applications of Tel. Cos. for Section 214 Certificates, 21 F.C.C.2d 307, 330-31, temporary stay granted, 22 F.C.C.2d 221, modified, stay and reconsideration denied, 22 F.C.C.2d 746 (1970); 47 C.F.R. §§ 63.54-.57, 64.601-.602 (Oct. 1972). The commission's ruling was upheld in General Tel. Co. v. United States, 449 F.2d 846 (5th Cir. 1971); see Smith, supra note 310, at 68-70.

318. General Telephone and Electronics Communications Corporation announced on Jan. 8, 1971 that it would sell all of its CATV systems in accordance with the 1970 ruling. See GTE Communications Inc., 29 F.C.C.2d 325 (1971).

319. TV Signal Co. v. American Tel. & Tel. Co., 462 F.2d 1256 (8th Cir. 1972); California Water & Tel Co., 22 F.C.C.2d 10 (1970).

possibility of regulatory review of pole line attachment agreements, terms and conditions.[320]

3. Technical Standards and Peripheral Concerns

In the course of the expansion of its regulatory interest in cable systems, the commission promulgated a number of rules governing peripheral aspects of cable operations which merit brief notice if for no other reason than that they suggest the extensive degree of regulation undertaken by the time all of the FCC's various proposals were incorporated in the 1972 *Cable Television Report and Order.* In 1970, the FCC proposed technical standards to govern cable carriage of broadcast signals,[321] and these standards were subsequently adopted in 1972.[322] To support the expanded regulation of cable, the commission adopted a schedule of fees for applications and other filings and established a fee of thirty cents per subscriber to be paid annually by each cable system.[323] The FCC has also acted to require reports by cable systems so as to develop an adequate information base.[324] Finally, a requirement that all cable operators afford equal employment opportunity has been issued.[325]

320. California Water & Tel. Co., 23 F.C.C.2d 840 (1970); California Water & Tel. Co., 22 F.C.C.2d 586 (1970); California Water & Tel. Co., 22 F.C.C.2d 10 (1970).

321. Notice of Proposed Rulemaking Technical Standards, 25 F.C.C.2d 38 (1970) (includes text of proposed §§ 74.1151-.1159). The provision for technical standards represented a reversal of an earlier position, but it was responsive to one of the purposes of the general inquiry of 1968. Compare First Report and Order, supra note 102, at 731 with 1968 Proposal, supra note 183, at 428.

322. Cable Television Report and Order, supra note 206, at 198-204; 47 C.F.R. §§ 76.601-.617 (Oct. 1972); see Letter of Intent, supra note 210, at 134-35. The technical standards only apply to cable carriage of broadcast signals and do not encompass cable originated programming, non-television service channels, or channels for return communications. See id. at 134; Cable Television Report and Order 196. Compare 47 C.F.R. § 76.5(z) (Oct. 1972) with 47 C.F.R. §§ 76.5(aa), (bb), (cc) (Oct. 1972). The lack of standards for cable channels has created some problems. See note 10 supra and accompanying text.

323. Report and Order on the Schedule of Fees, 23 F.C.C.2d 880, 883, 897-98 (1970), modified, Memorandum Opinion and Order on the Schedule of Fees, 28 F.C.C.2d 139, 150 (1971); 47 C.F.R. §§ 1.1102, 1.1116 (Oct. 1972). The fee schedule is independent from the rest of the cable regulations, so no additional action was necessary when the 1972 rules were adopted. The 1972 rules did, however, carry over the previous requirement that a report on the computation of the annual fee must be filed with the FCC. Compare Order on Rules and Regulations Relative to CATV Systems, 32 F.C.C.2d 923 (1971); 47 C.F.R. § 74.1125 (Jan. 1972) with 47 C.F.R. § 76.406 (Oct. 1972). The schedule of fees and annual cable fee were sustained in Clay Broadcasting Corp. v. United States, 464 F.2d 1313 (5th Cir. 1972), cert. granted sub nom. National Cable Television Ass'n v. United States, 411 U.S. 981 (1973). An additional source of revenue could develop if Congress grants the commission's request for authority to impose fines on cable systems. See 12 Weekly TV Digest, Sept. 11, 1972, at 3.

324. In 1971, the commission adopted two rules requiring cable systems to file an annual report providing general information on their operations and to file an annual financial report. Third Report and Order on Rules and Regulations Relative to CATV Systems, 32 F.C.C.2d

4. Origination of Television Programming by Cable Systems

The most important of the non-broadcast aspects of cable television is its potential to originate diversified television programming not available on broadcast television and to provide new communications services.[326] The commission initially took the position that cable systems should not be allowed to originate programming,[327] and its early consideration of cable carriage of broadcast signals reflected both a belief that origination by cable systems was of little significance and a general ignorance of cable's technological potential.[328]

Beginning in 1968, however, the commission began to reverse its position[329] and formally recognized at the end of that year that the origination of television programs by cable systems was in the public interest.[330] The decision that origination was in the public interest stemmed

13 (1971); 47 C.F.R. §§ 74.1123-.1124 (Jan. 1972). These reporting requirements were carried over by the 1972 rules. 47 C.F.R. §§ 76.401, 76.405 (Oct. 1972). A 1971 proposal that cable systems keep program logs was adopted in the 1972 rules. Notice of Proposed Rule Making on Maintenance of Program Logs, 27 F.C.C.2d 18 (1971); 47 C.F.R. § 76.305 (Oct. 1972).

325. The rules requiring cable to avoid discriminatory employment practices were proposed first in 1971 and were adopted subsequently and added to the Cable Television Report and Order rules in March 1972. Notice of Proposed Rule Making on Nondiscrimination in Employment Practices, 29 F.C.C.2d 18 (1971); Report and Order on Nondiscrimination in Employment Practices, 34 F.C.C.2d 186 (1972); 47 C.F.R. § 76.311 (Oct. 1972); see 47 C.F.R. § 76.409 (Oct. 1972) (annual employment report). Other than their substantive impact, the nondiscrimination rules are of particular interest because they rest on the assertion by the FCC that it has essentially the same jurisdiction over cable as it has over broadcast television. Report and Order on Nondiscrimination in Employment Practices, 34 F.C.C.2d 186, 189 (1972).

326. See Part II C supra.

327. As one of its legislative proposals, the commission urged that "Congress prohibit the origination of program or other material by a CATV system, with such limitations or exceptions as are deemed appropriate." Second Report and Order, supra note 117, at 787. The FCC was joined in its narrow view of cable television by many local franchising authorities who included in the terms of the franchise grant a specific prohibition on origination. Seiden, supra note 156, at 77-78 (a survey of franchises granted between 1964-1968 revealed that 23 percent forbade origination and only seven percent required origination).

328. See notes 108, 148, 154 supra and accompanying text.

329. As part of the only major market hearing on cable carriage of broadcast signals, the commission decided to authorize a test of cable program origination. The cable system involved in the hearing was permitted to originate program material so long as it refrained from originating any commercials. Midwest Television, Inc., 13 F.C.C.2d 478, 506, reconsideration denied, 15 F.C.C.2d 84 (1968), modified, 22 F.C.C.2d 899 (1970), further modified, 28 F.C.C.2d 62 (1971); see notes 163, 164 supra and accompanying text; Jefferson-Carolina Corp., 14 F.C.C.2d 601 (1968) (FCC declined to prohibit program origination that was accompanied by advertisements).

330. 1968 Proposal, supra note 183, at 421-25; see notes 34, 247 supra and accompanying text.

from findings that (1) cable offered promise as a means for increasing the number of local outlets for community self-expression and for augmenting the choice of programs without use of the broadcast spectrum and (2) origination did not entail unfair competition with respect to copyright and was unlikely to duplicate the programs of local broadcasters.[331]

The shift in the commission's position was completed in October 1969 when a rule was promulgated requiring all cable systems with 3,500 or more subscribers to operate as a local outlet by originating programming and by having available facilities for local production and presentation of programs.[332] This requirement permitted the cable operator to originate on more than one channel[333] and to present advertisements

331. Midwest Television, Inc., 13 F.C.C.2d 478, 505-06 (1968). The FCC also felt that cable origination could be used affirmatively to implement statutory policies and that the commission's concern with cable should not be limited to its adverse effects on television broadcasting. 1968 Proposal 422.

332. First Report and Order on Rules and Regulations Relative to CATV Systems, 20 F.C.C.2d 201 [hereinafter cited as First Report and Order on Origination], stay denied, 20 F.C.C.2d 899 (1969), modified, 23 F.C.C.2d 825 (1970), rev'd, Midwest Video Corp. v. United States, 441 F.2d 1322 (8th Cir. 1971), aff'd, 406 U.S. 649 (1972). The origination rule provided:

"Effective on and after April 1, 1971, no CATV system having 3,500 or more subscribers shall carry the signal of any television broadcast station unless the system also operates to a significant extent as a local outlet by cablecasting and has available facilities for local production and presentation of programs other than automated services: Provided, further, That the system shall not enter into any contract, arrangement or lease for use of its cablecasting facilities which prevents or inhibits the use of such facilities for a substantial portion of time (including the time period 6-11 p.m.), for local programing designed to inform the public on controversial issues of public importance." 47 C.F.R. § 74.1111(a) (Jan. 1972). The term "cablecasting" was defined as "programing distributed on a CATV system which has been originated by the CATV operator or by another entity, exclusive of broadcast signals carried on the system." 47 C.F.R. § 74.1101(j) (Jan. 1972).

The origination of programming on the cable was conditioned upon compliance with equal time, fairness, and sponsorship identification rules, familiar from their application to broadcast television. 47 C.F.R. §§ 74.1111(b), 74.1113, 74.1115, 74.1119 (Jan. 1972); see First Report and Order on Origination 219. The rules also contained a prohibition on lotteries and regulations governing originations for which a per-program or per-channel charge was made. 47 C.F.R. §§ 74.1116, 74.1121 (Jan. 1972). The FCC rested its jurisdiction to impose the origination rules on cable carriage of broadcast signals and specifically conditioned the use of broadcast signals on compliance with these rules. Midwest Television, Inc., 13 F.C.C.2d 478, 504-05 (1968); 1968 Proposal, supra note 183, at 422; First Report and Order on Origination 219-21. The origination provisions are discussed in connection with the superseding 1972 rules infra at note 391 and accompanying text.

333. The FCC's original proposal that cable operators be limited to originating on one channel was not adopted. Compare 1968 Proposal 426-27 with First Report and Order on Origination 206-07 and Memorandum Opinion and Order on Rules and Regulations Relative to CATV Systems, 23 F.C.C.2d 825, 829 (1970) [hereinafter cited as Memorandum Opinion and Order on Origination].

in conjunction with the originated programs.[334] Notwithstanding the broadcasters' fears that cable originated programs supported by advertising would result in the siphoning away of programs available on broadcast television and that there would be a loss of advertising revenues to local broadcast stations,[335] the decision to require cable origination, for a number of reasons, had very little impact. First, only ten percent of all cable systems had over 3,500 subscribers, and, even as to them, the rule was never effectuated.[336] Second, the rule was not drafted

334. In its first test of cable originations, the commission permitted origination only without commercials on the ground that if cable were allowed to originate advertisements UHF stations would suffer a loss of advertising revenues. See note 329 supra. The FCC subsequently changed its position and decided to permit advertisements at natural breaks in order to provide an economic basis for support of local origination. It was believed that this limitation (programs without commercial interruption) would provide a new service to the public, would provide a new outlet in terms of size and selectivity for advertisers, and would be less apt to affect the advertising revenues available to local broadcasters. First Report and Order on Origination 215-18; see 1968 Proposal 423-24. The rule on advertising provided that:

"A CATV system engaged in cablecasting may present advertising material at the beginning and conclusion of each cablecast program and at natural intermissions or breaks within a cablecast, Provided, That the system itself does not interrupt the presentation of program material in order to intersperse advertising: And provided, further, That advertising material is not presented on or in connection with cablecasting in any other manner." 47 C.F.R. § 74.1117 (Jan. 1972) (note defining "natural intermission" omitted).

335. Although the commission rejected the claims of the broadcasters about the impact of cable originated programs supported by commercials, it was more responsive to broadcaster worries that cable would be able to siphon some programs away from broadcast television by making special per-program or per-channel charges. Consequently, the FCC enacted a rule limiting cable origination of feature films, sports events, and series types of programs at a special additional charge. Compare First Report and Order on Origination, supra note 332, at 202-03 with Memorandum Opinion and Order on Origination, supra note 333, at 827-29. See also 47 C.F.R. § 74.1121 (Jan. 1972). Other parties were opposed to permitting cable to originate commercials on the more altruistic ground that allowing advertisements would lead to the motivation of attracting the largest possible audience at the expense of diverse programming appealing to minority tastes. First Report and Order on Origination 215; see Comment, Federal and State Regulation of Cable Television: An Analysis of the New FCC Rules, 1971 Duke L.J. 1151, 1176-77 (1971).

336. The rule was initially to take effect on Jan. 1, 1971; however, the effective date was postponed until Apr. 1, 1971 to provide additional preparation time. First Report and Order on Origination 213; Memorandum Opinion and Order on Origination 826-27. Although the commission later refused to stay the second effective date, it finally suspended the rule on May 26, 1971 pending Supreme Court review of an appellate court decision denying the FCC's authority to impose the rule. Memorandum Opinion and Order on Rules and Regulations Relative to CATV Systems, 27 F.C.C.2d 778 (1971); see Midwest Video Corp. v. United States, 441 F.2d 1322 (8th Cir. 1971), rev'd, 406 U.S. 649 (1972); Suspension of Community Antenna Television Mandatory Origination Rule, 36 Fed. Reg. 10876 (1971). The rule as revised in the 1972 Cable Television Report and Order remains suspended notwithstanding Supreme Court affirmance of the FCC's jurisdiction to impose the origination requirement in United States v. Midwest Video Corp., 406 U.S. 649 (1972), rev'g 441 F.2d 1322 (8th Cir. 1971). 12 Weekly TV Digest, Oct. 16, 1972, at 1.

in terms which would have achieved the FCC's goal of the cable system acting as an outlet for local expression.[337] Finally, even those cable systems that voluntarily undertook local origination found it both expensive and difficult to achieve the type of programming envisioned by the commission.[338]

In 1972, the FCC substantially expanded the origination requirement[339] and opened the way to the provision of non-television communications services by requiring that cable systems develop a technical capacity for two-way communications.[340] The rules governing cable-originated programming are explored fully in Part IV *infra*. At this point suffice it to note only that the FCC viewed the enlarged cable origination require-

337. The origination rule was drawn with two safeguards to assure local programming. 47 C.F.R. § 74.1111(a) (Jan. 1972) (see text accompanying note 332 supra). First, automatic services like news or stock tickers shown on the cable did not count as program origination. First Report and Order on Origination, supra note 332, at 214. Second, the system was required to have facilities for local production which could not be contracted out so as to prevent use of the facilities for local program production. Memorandum Opinion and Order on Origination, supra note 333, at 827. Nevertheless, the rule only specified that the system act as a "local outlet by cablecasting" and not that it provide locally produced programming. Consequently, a cable system could meet the rigors of the rule, albeit not the spirit thereof, by showing non-locally produced programs or films of a type available on broadcast television. See Future of Cable Television, supra note 173, at 44-45. Without a requirement of locally produced programming, there was little chance that cable would fill the role as an outlet for local community expression, and the FCC refused to impose such a rule. See Memorandum Opinion and Order on Origination 827. Although cable systems did show some local events like municipal hearings and high school sports, much of cable origination consisted of old movies and broadcast television reruns. Price & Wicklein, supra note 28, at 15-16.

338. The commission originally had estimated that the costs of establishing local origination facilities would be relatively low. However, other studies indicated that the costs would be appreciably higher, so the FCC relaxed the 3,500 subscriber standards by indicating that it would entertain waivers of the origination requirement for cable systems with under 10,000 subscribers. First Report and Order on Origination at 209-10; Memorandum Opinion and Order on Rules and Regulations Relative to CATV Systems, 27 F.C.C.2d 778, 779 (1971). The experience of one 10,000-subscriber cable system demonstrated the high expense of cable originations, the difficulty of attracting advertising revenues to defray even a portion of the costs, and the problems of producing or obtaining attractive programming. Anderson, Experienced Perspective on the Origination "Bug," 8 TV Communications, Mar. 1971, at 44.

339. Cable Television Report and Order, supra note 206, at 189-98; 47 C.F.R. §§ 76.201-.225, 76.251 (Oct. 1972); see Notice of Proposed Rulemaking on Technical Standards, 25 F.C.C.2d 38, 39 (1970).

340. "[W]e have decided to require that there be built into cable systems the capacity for return communication on at least a non-voice basis. Such construction is now demonstrably feasible. Two-way communication, even rudimentary in nature, can be useful in a number of ways—for surveys, marketing services, burglar alarm devices, educational feed-back, to name a few." Cable Television Report and Order 192 (footnote omitted); 47 C.F.R. § 76.251(a)(3) (Oct. 1972); see Notice of Proposed Rulemaking on Technical Standards, 25 F.C.C.2d 38, 40 (1970); text accompanying note 40 supra.

ment as a *quid pro quo* for allowing cable systems to undertake increased carriage of broadcast television signals.[341]

C. *Status of Cable Television Regulation—1972*

The foregoing examination of cable's carriage of broadcast television signals and of the non-broadcast aspect of cable television demonstrates the extent to which the FCC has undertaken comprehensive regulation. When the 1972 *Cable Television Report and Order* (in which the rules governing the various areas[342] of cable activity were pulled together)[343] is considered as a whole, it becomes clear that cable television is to be regulated as "intimately" and as intricately as is broadcast television.[344]

Notwithstanding the new breadth of its regulatory concern, the commission has continued to define cable's role in the national television communications system in terms of cable's carriage of broadcast signals. The rules governing cable carriage of broadcast signals will continue to assure the survival of broadcast television,[345] and even the newly mandated origination of television programming by cable systems is viewed by the FCC as a *quid pro quo* for cable's right to carry distant signals into major markets.[346] The general inquiry initiated in 1968[347] did not result in an open-minded consideration of cable's potential to replace broadcast television, and, as a consequence, the 1972 rules have tied cable to an expanded, but still limited, partnership with broadcast television. Although the formulation of the 1972 rules reflects a comprehensive view of cable television, the definition of cable's role in the provision of television programming remains a function of the commission's original and narrow feeling that cable should not be allowed to impinge unduly on broadcasting. Nonetheless, the commission's recognition of a role for cable as an originator of television programming and as a possible provider of new, two-way communications services is most significant. The FCC, albeit hesitantly, has opened the door to the development of cable's technological potential.

Although the commission formally has opened the door, there remains an important preliminary question of whether cable systems will be in a

---

341. See note 245 supra and accompanying text.

342. The 1972 rules governing cable carriage of broadcast signals, the local incidents of cable activity, ownership, technical standards, and origination are discussed in the text supra at notes 206, 269, 296, 322, and 339 respectively.

343. Cable Television Report and Order, supra note 206, at 147.

344. 12 Weekly TV Digest, Feb. 7, 1972, at 2; see note 325 supra.

345. See text accompanying note 241 supra.

346. See note 245 supra and accompanying text.

347. See note 248 supra and accompanying text.

financial position to assume this expanded role.[348] On the one hand, the number of homes that can be expected to subscribe to cable service with the carriage of distant signals permitted under the 1972 rules may be too low to support the new television programming and two-way services projected by the commission.[349] On the other hand, the provision of diverse television programming and cable communications services may push cable market penetration rates high enough to support these new functions.[350] The cable industry, thus, is faced with the dilemma that it will need more subscribers to support its new functions and that the development of the new services will be necessary to attract these subscribers.[351] In light of the facts (1) that two-way cable services represent a more expensive undertaking than program origination[352] and (2) that the FCC has required only that cable systems develop a two-way capacity[353] rather than a detailed and explicit origination requirement,[354] it is reasonable to expect that cable originated television programming will be the first of the new functions to emerge.[355] Nevertheless, the interdependence of the development of new cable programming and increased subscriber rates counsels caution as to expectations that the development of diversified television programs, discussed in Part IV *infra*, will be rapidly forthcoming.

A final point to note is that the comprehensive regulation of cable television undertaken by the FCC for all practical purposes has been sustained by the recent decision of the Supreme Court in the *Midwest Video* case.[356] Although this decision explicitly is limited to upholding the 1969

348. Notwithstanding an early period of high profitability, one long-time observer expects, as a result of the new federal regulatory policies and of the higher costs of wiring major cities, that the profits of the cable industry will be under pressure in the future. Seiden, supra note 156, at 46.

349. Park, supra note 26, at 37; see text accompanying notes 239, 240 supra.

350. Park 37.

351. Id. In this respect, the commission's judgment that cable's future lies in the development of non-broadcast television programming and two-way cable services is sound. "We envision a future for cable in which the principal services, channel uses, and potential sources of income will be from other than over-the-air signals." Cable Television Report and Order, supra note 206, at 184; see text accompanying note 240 supra; note 306 supra. Nevertheless, the failure of the FCC to resolve the relationship between cable and broadcast television and the possibility that the commission may stifle some aspects of cable's non-broadcast television programming continue to call into doubt the FCC's desire to permit the full development of cable technology. Note 518 infra and accompanying text; see text following note 243 supra.

352. See note 47 supra and accompanying text.

353. See note 340 supra and accompanying text.

354. See Part IV infra.

355. See text accompanying note 51 supra.

356. United States v. Midwest Video Corp., 406 U.S. 649 (1972), rev'g 441 F.2d 1322

origination requirement,[357] the Court's decision represents a significant expansion of the *Southwestern Cable*[358] jurisdictional theory, namely, that cable carriage of broadcast signals gives the commission jurisdiction to regulate cable in a manner "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting."[359] It is difficult to believe that this recognition of an expansive range of FCC jurisdiction would not subsume any future challenges to the commission's regulation of franchising, ownership, technical standards, or cablecasting rules under the 1972 *Cable Television Report and Order*.[360] Notwithstanding the seeming finality and comprehensiveness of the commission's 1972 rulemaking, there is a possibility that the FCC's regulatory scheme may be upset or significantly altered by the introduction of cable legislation by the present administration.[361]

(8th Cir. 1971). The Supreme Court held, in line with the Southwestern Cable decision, that the 1969 origination regulation "preserves and enhances the integrity of broadcast signals and therefore is 'reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting.'" 406 U.S. at 670. The Court also ruled that the origination requirement was "plainly supported by substantial evidence that it will promote the public interest." Id. at 673 (footnote omitted). The dissent in this plurality opinion argued rather simplistically that the rule forced cable operators against their will to become broadcasters. Id. at 677 (Douglas, J., dissenting). The dissent neglected more telling arguments. See Barnett, supra note 211, at 719-20.

357. 406 U.S. at 667. See 47 C.F.R. § 74.1111 (Jan. 1972); note 332 supra.

358. See note 155 supra.

359. United States v. Southwestern Cable Co., 392 U.S. 157, 178 (1968). This language was quoted in United States v. Midwest Video Corp., 406 U.S. 649, 651 (1972).

360. Barnett, supra note 211, at 718. Chief Justice Burger's concurring opinion noted that the origination rule strained the outer limits of the commission's jurisdiction. See United States v. Midwest Video Corp., 406 U.S. 649, 676 (1972) (Burger, C.J., concurring). Nevertheless, all of the FCC's regulation of the non-broadcast aspects of cable is premised on cable's carriage of broadcast signals (see, e.g., note 269 supra) and the regulation of franchising, ownership, technical standards, and cablecasting is no more tenuously related to the FCC's regulations of broadcast television than the origination requirement itself. It seems clear, then, that the Midwest Video decision will support the FCC's regulatory program. On the other hand, the manner in which the Cable Television Report and Order was adopted may be vulnerable to an attack in the courts. See note 211 supra.

361. At the end of 1971, a special cabinet level committee had composed a report outlining four options for cable television legislation; however, the report and legislative proposal which had been expected to emerge in January 1972 never appeared, the delay apparently resulting from an election year decision to avoid antagonizing any "influential group." 12 Weekly TV Digest, Jan. 17, 1972, at 4; 11 Weekly TV Digest, Dec. 13, 1971, at 1-3. The report, which has since undergone thorough revision, presumably was forwarded to the President in the fall of 1972, but the drift of any forthcoming legislative proposal is unclear. 12 Weekly TV Digest, Sept. 4, 1972, at 3. As of mid-1973, no administration legislative proposal had emerged.

IV. CABLECASTING: "IF YOU DON'T HAVE CABLE, YOU ONLY HAVE TELEVISION"

After years of preoccupation with cable's carriage of broadcast television signals, the FCC gradually has expanded its regulatory horizons by recognizing the technological potential of cable television. The immediate consequence of the commission's earlier restrictive regulation was that many television viewers were denied a diversity of broadcast television programming that cable could have provided through the importation of distant signals. Although the diversity of broadcast television now will be enhanced by the decision to liberalize signal importation rules, it is the development of cable-originated, non-broadcast programming which holds forth the promise of metamorphosing the television medium. The cablecasting rules adopted by the FCC in 1972 will initiate and guide the transition to diversified television programming. However, since the commission's prior regulations excluded cable systems from most of the major cities and provided no incentive to install a large channel capacity, the cable industry is largely unprepared to offer most viewers the wide range of programming envisioned in these rules. While the development of diverse programming will be an important achievement in itself, cable is not a technological panacea, and problems of assuring wide exposure of minority views will persist even in an age of television diversity.

A. *An Overview of Cablecasting*

Notwithstanding the self-serving overtones of a cable advertising claim that "[i]f you don't have cable, you only have television,"[362] cable has the potential to provide a fuller and more diversified range of television programming than is available on conventional over-the-air television. This potential to expand both the quantity and diversity of television programming rests on (1) the existence of a large number of television channels, (2) the programming of these channels by individuals, groups, or institutions currently excluded from broadcasting, and (3) the stimulation of a new programming rationale in which program producers will find it profitable to appeal to minority tastes.[363] Projections of the realization of cable's

362. This phrase appeared as part of a full-page advertisement for New York City's TelePrompTer Cable TV in the N.Y. Times, Sept. 19, 1972, at 62.

363. In broadcast television, programs are designed to appeal to the largest possible audience in order to maximize advertising revenues. Each of the three networks broadcasts programs of wide appeal because each would prefer to get a third of the overall audience rather than all of a smaller audience, ten percent for example, that is interested in a special type of program. With the proliferation of television channels introduced by cable, the audience can be divided among many more than three channels, and some program pro-

potential to provide diversified programming have not been lacking,[364] and although any catalogue of these projections is necessarily incomplete, consideration of one thorough proposal will suggest in concrete terms the tremendous expansion of television programming presaged by the development of cable television.

A proposal for a cable television system in Washington, D.C.[365] has projected that, in addition to the carriage of broadcast signals, the cable system would offer viewers automatic news, time, weather reports, FM radio stations, more movies and sports events not carried on broadcast television. A significant expansion of television programming would be accomplished by the allotment of certain channels for program production by the general public, educational institutions and the municipal government. A channel devoted to programming by the general public—a public access channel—would serve as a forum for individuals and community groups. Programming produced by educational institutions would be used both to enrich school curricula and to offer a broad scope of out-of-class instruction. The dedication of channels to the municipal government would provide the opportunity to explain government programs and to assist in the delivery of governmental services such as health care, job training, employment information and drug rehabilitation.

The cable system also would provide a number of channels which could be leased on either a part-time or full-time basis for the presentation of special interest programming supported either by advertisements directed at the projected selective audience or by payment of an extra fee by the audience. The presentation of this wide range of television programs would be enhanced by the possibility of selecting a limited audience of a particular community within the franchise area for the distribution of certain programs[366] and by the interconnection of cable systems on a regional,

---

ducers will be tempted to eschew the lowest common denominator approach of broadcast television and to program for minority tastes. Programming for minority tastes will depend on the extent to which advertisers will assume higher costs per viewer in exchange for a more selective audience. Alternatively, the development of a system of viewer payments for programming which the networks find especially attractive would cover the costs of high quality programming for a small audience. The development of programs for minority tastes is discussed more fully in connection with pay cable television operation at note 501 infra and accompanying text.

364. See, e.g., Mitre Report, supra note 16, at III-1 to -34; Price & Wicklein, supra note 28, at 1-5, 19-28.

365. Mitre Report III-1 to -34. The development of diverse cable television programming suggested by this proposal is assessed in connection with the FCC's rules in Part IV B infra.

366. The cable proposal for Washington, D.C. provided that there would be nine subsystems within the overall metropolitan franchise area. Mitre Report II-14, -15. The advantage of dividing a large franchise area into subsystems serving distinct communities, each having an individual program production facility, is that programs of primary interest to different parts

state or national basis in order to reach larger audiences.[367] The complete metamorphosis of the television medium suggested by this outline of the proposed cable system for Washington, D.C. has led, unfortunately, to a variety of uncritical prognostications.[368]

The cablecasting[369] rules adopted by the FCC in 1972 represent both a significant enlargement of the 1969 origination requirement[370] and an invitation for cable television to begin providing the whole new range of television programming considered above. The rules consist of two components. The first component is an origination cablecasting[371] requirement which is essentially a restatement of the previous origination rule,[372] specifying that the cable system operator must undertake program origination. The second component is an entirely new access cablecasting[373] requirement which mandates that the cable system develop a minimum twenty channel capacity[374] and that for each broadcast signal carried, an equivalent channel must be available for non-broadcast programming.[375] The

of the city can be shown simultaneously on the same channel. In addition to expanding channel capacity without increasing the number of channels, subsystem origination plans increase the number and availability of production centers for public and community group producers and provide a geographically discrete area for advertisers or political candidates who desire to reach only a particular group without paying for viewers not interested in their product. The possibility of matching the audience to a candidate's constituency may bring the television medium within reach of local political candidates who cannot afford broadcast television because of the higher rates based on a much larger audience. The same analysis would follow for small stores or services that cannot afford the high rates of broadcast television. See Sloan, supra note 2, at 117-18; H. Dordick & J. Lyle, Access by Local Political Candidates to Cable Television: A Report of an Experiment (Rand Memorandum 1971) [hereinafter cited as Dordick & Lyle]; N.Y. Times, Nov. 5, 1972, § 1, at 68, col. 4.

367. The importance of interconnection of cable systems in creating cable networks is discussed in text accompanying note 489 infra.

368. See, e.g., Price & Wicklein, supra note 28, at 4 ("Cable makes possible and practicable the freedom of speech guaranteed by the Constitution . . . .").

369. The commission has defined "cablecasting" as "[p]rograming (exclusive of broadcast signals) carried on a cable television system." 47 C.F.R. § 76.5(v) (Oct. 1972).

370. See text accompanying note 339 supra.

371. Origination cablecasting is defined as "[p]rograming (exclusive of broadcast signals) carried on a cable television system over one or more channels and subject to the exclusive control of the cable operator." 47 C.F.R. § 76.5(w) (Oct. 1972); see id. §§ 76.201-.225 (Oct. 1972).

372. See note 332 supra.

373. Access cablecasting is defined as "[s]ervices provided by a cable television system on its public, educational, local government, or leased channels." 47 C.F.R. § 76.5(x) (Oct. 1972); see id. § 76.251 (Oct. 1972).

374. 47 C.F.R. § 76.251(a)(1) (Oct. 1972) provides that "[e]ach such system shall have at least 120 MHz of bandwidth (the equivalent of 20 television broadcast channels) available for immediate or potential use for the totality of cable services to be offered . . . ."

375. Reconsideration of Cable Television Report and Order, supra note 222, at 354-55. The rule on allocation of the bandwidth between broadcast and cablecast channels provides that

access cablecasting rule also provides that one channel of the increased channel capacity must be reserved for programming by each of three users: the general public,[376] educational authorities[377] and the local government.[378] Any remaining channels are to be leased by the cable system, acting essentially as a common carrier, to other program producers.[379]

The origination and access cablecasting requirements establish an overall scheme in which cable television programming is to be provided by the cable system operator on the channels that he controls, by public, educational and governmental users of specifically designated channels, and by independent program producers who lease cable channels.[380] Since this scheme will play a major role in the development of non-broadcast programming, it is important to determine whether the FCC's plan will lead to fulfillment of cable's potential. It is clear that the FCC has taken two important steps[381] toward the development of program diversity in its pro-

---

"[f]or each Class I cable channel that is utilized, such system shall be capable of providing an additional channel, 6 MHz in width, suitable for transmission of Class II or Class III signals . . . ." 47 C.F.R. § 76.251(a)(2) (Oct. 1972) (reference omitted). Class I channels are for broadcast signals, and Class II and Class III channels are for cablecast and pay cablecast transmission respectively. See id. §§ 76.5(z), (aa), (bb) (Oct. 1972).

376. 47 C.F.R. § 76.251(a)(4) (Oct. 1972) (public access channel).

377. Id. § 76.251(a)(5) (Oct. 1972) (education access channel).

378. Id. § 76.251(a)(6) (Oct. 1972) (local government access channel).

379. Id. § 76.251(a)(7) (Oct. 1972) (leased access channels).

380. An interesting, albeit somewhat complicated, scheme for allocating non-broadcast channels among commercial and non-commercial users has been advanced in Access to Cable Television, supra note 289, at 439-50.

381. The FCC also has provided that the CARS microwave frequencies assigned to serve cable television systems (see note 139 supra) may be used to carry cablecast material. 47 C.F.R. § 78.5(a) (Oct. 1972). The original CARS rules had provided only for microwave carriage of broadcast signals, so the FCC's mandated transition of cable microwave service from the Business Radio Service (BRS) to the CARS frequencies necessitated an amendment of the CARS rules to permit microwave transmission of cable originated material. See Notice of Proposed Rule Making on Transmission of Program Material to CATV Systems, 32 Fed. Reg. 14852 (1967); Report and Order on Transmission of Program Material to CATV Systems, 37 F.C.C.2d 609 (1972); Notice of Proposed Rule Making on Transmission of Program Material Originated by CATV Systems, 33 Fed. Reg. 3188 (1968); Report and Order on Transmission of Program Material Originated by CATV Systems, 20 F.C.C.2d 422 (1969). The CARS microwave frequencies assigned to serve cable television systems may be used to carry cablecast material between cable systems, to remote sections of the distribution plant (local distribution service where it is uneconomical to have a direct cable link between the headend and a suburban distribution plant), from the cable studio to the system's headend, and from remote mobile pick-up stations at the scene of an event to the cable studio or headend. 47 C.F.R. §§ 78.5(a)-(d), 78.11(a) (Oct. 1972). The CARS rules were incorporated in the Cable Television Report and Order as the Cable Television Relay Service and were renumbered; however, this microwave service is still referred to by the acronym CARS. Cable Television Report and Order, supra note 206, at 247-60; 47 C.F.R. §§ 78.1-.115 (Oct. 1972).

visions for an expanded channel capacity and for attracting new program producers such as the system operator, the public, educational and municipal authorities, and independent program producers. Nevertheless, the full realization of cable's potential for diversified television programming will be dependent on the extent to which the cablecasting rules foster a programming rationale in which it will be profitable for program producers to appeal to minority tastes.

B. *Evaluation of the 1972 Cablecasting Regulations*

Before considering the particulars of the origination and access cablecasting requirements,[382] it is important to note the extent to which the rules are applicable to cable systems and the expected time span for the development of non-broadcast programming. The origination cablecasting rule applies only to cable systems serving over 3,500 subscribers.[383] As such, it affects approximately 480 cable systems.[384] Although the origination rule is still suspended,[385] it is expected to be put into force in the near future.[386] The access cablecasting requirement applies only to cable systems operating in the top one hundred television markets;[387] however, in other markets, local franchise authorities may require a cable system to provide access cablecasting to the extent specified by the FCC for the major markets.[388] The access cablecasting rules do not become effective until March 31, 1977. Prior to this date, cable systems that begin carriage of the additional broadcast signals authorized in the 1972 *Cable Television Report and Order* must provide one access channel for each signal added.[389] Notwithstanding this provision for accelerating the development

382. A valuable schematic guide to the cablecasting rules may be found in A Television Digest White Paper, 12 Weekly TV Digest, Aug. 7, 1972 (special supplement).

383. 47 C.F.R. § 76.201(a) (Oct. 1972). See text of rule at note 391 infra.

384. See TV Factbook, supra note 23, at 75a (list of cable systems by subscriber size). There is a possibility that the 3,500 standard will be raised to 5,000. 12 Weekly TV Digest, Oct. 16, 1972, at 1. In this event, only 320 cable systems would be required to undertake origination cablecasting. TV Factbook 75a.

385. See note 336 supra.

386. See 12 Weekly TV Digest, Oct. 16, 1972, at 1.

387. 47 C.F.R. § 76.251(a) (Oct. 1972) provides that:

"No cable television system operating in a community located in whole or in part within a major television market, as defined in § 76.5, shall carry the signal of any television broadcast station unless the system also complies with the following requirements concerning the availability and administration of access channels . . . ." The major market concept is defined in 47 C.F.R. § 76.5(g) (Oct. 1972), and these markets are listed at 47 C.F.R. § 76.51 (Oct. 1972). The access cablecasting requirements are discussed in the text accompanying note 420 infra.

388. Cable Television Report and Order, supra note 206, at 197-98; 47 C.F.R. § 76.251(b) (Oct. 1972).

389. 47 C.F.R. § 76.251(c) (Oct. 1972) provides in pertinent part:

of one or more of the access channels, the five-year period established for the expansion of cable channel capacity and for the development of access cablecasting would appear to be the minimum period before the widespread availability of these services.[390] Although it will be five years before the access cablecasting rules are effective and the exact timing and manner of reimposition of the origination cablecasting requirement is unclear, the rules do provide a strong indication of the type of programming that eventually will be available.

1. Origination Cablecasting

The origination cablecasting requirement[391] adopted by the commission in 1972 is drafted in substantially the same terms as the origination rule

---

"The provisions of this section [access cablecasting] shall apply to all cable television systems that commence operations on or after March 31, 1972, in a community located in whole or in part within a major television market. Systems that commenced operations prior to March 31, 1972, shall comply on or before March 31, 1977 . . . if such systems receive certificates of compliance to add television signals to their operations at an earlier date . . . for each such signal added, such systems shall provide one (1) access channel in the following order of priority—(1) public access, (2) education access, (3) local government access, and (4) leased access . . . ."

The commission originally had ruled that if a cable system undertook carriage of an additional broadcast signal it would have to provide all four of the designated access channels. However, in view of the fact that many systems might lack the necessary channel capacity and that the 20 channel minimum and the equal bandwidth requirements would not be applicable until 1977, the FCC ruled that only one access channel had to be provided for each additional broadcast signal carried prior to 1977. Reconsideration of Cable Television Report and Order, supra note 222, at 358-59.

390. As a consequence of the FCC's restrictive regulation of cable television, there are very few cable television systems in the major markets in which the access cablecasting rules apply. See text accompanying note 25 supra. Although the access cablecasting rules are immediately applicable to all cable systems that start operations in the major markets after March 31, 1972, there will be a time lag of a number of years before these systems are fully operational. More importantly, however, cable system operators may be reluctant to commence operations in the major cities and capital sources may be hesitant in supporting such undertakings until the profitability of this new type of operation is proven. See note 306 supra; text beginning at note 348 supra. To the extent that cable system entry into the major markets is delayed by this financial uncertainty, there will not be widespread access cablecasting although it will be available in those cities where cable systems are built.

391. 47 C.F.R. § 76.201 (Oct. 1972) provides that:

"(a) No cable television system having 3,500 or more subscribers shall carry the signal of any television broadcast station unless the system also operates to a significant extent as a local outlet by origination cablecasting and has available facilities for local production and presentation of programs other than automated services. Such origination cablecasting shall be limited to one or more designated channels which may be used for no other cablecasting purpose.

"(b) No cable television system located outside of all major television markets shall enter into any contract, arrangement, or lease for use of its cablecasting facilities which prevents or inhibits the use of such facilities for a substantial portion of time (including time period 6-11 of 1969.[392] The only major changes in the new rule are that: it directly authorizes the cable system operator to originate programs on more than one channel;[393] the channels for origination cablecasting must be designated specifically and can be used for no other cablecasting purpose,[394] and the restriction on contracting out the production facilities applies only to cable systems located outside the top one hundred television markets.[395] Since the system operator has control over the programming of originated material, the FCC has treated him as a conventional broadcaster in imposing the equal time,[396] fairness,[397] lottery,[398] obscenity[399] and sponsorship identification[400] standards that have long been applied to broadcast television.[401] The regulation of origination cablecasting has been preempted completely by the commission.[402]

---

p.m.) for local programing designed to inform the public on controversial issues of public importance.

"(c) No cable television system shall carry the signal of any television broadcast station if the system engages in origination cablecasting, either voluntarily or pursuant to paragraph (a) of this section, unless such cablecasting is conducted in accordance with the provisions of §§ 76.205 [equal time], 76.209 [fairness], 76.213 [lotteries], 76.215 [obscenity], 76.217 [advertising], 76.221 [sponsorship identification], and 76.225 [per-program or per-channel charges for reception of cablecasts]."

392. Cable Television Report and Order, supra note 206, at 195; see note 332 supra.

393. 47 C.F.R. § 76.201(a) (Oct. 1972) (text of rule at note 391 supra); see note 333 supra. The Sloan Commission recommended that the cable operator be limited to programming two channels and any leased channels for which no bidder appeared. Sloan, supra note 2, at 142-43. The only limit implicit in the FCC rules for major market cable systems is the amount of channel capacity left over after the access cablecasting designated channels are provided. In the markets below the top 100, where there are no access channels requirements, the cable operator would be free to program all of the system's non-broadcast channels.

394. The cable operator cannot program channels devoted to access cablecasting. See 47 C.F.R. § 76.201(a) (Oct. 1972).

395. Compare 47 C.F.R. § 76.201(b) (Oct. 1972) (text of rule at note 391 supra) with 47 C.F.R. § 74.1111(a) (Jan. 1972) (text of rule at note 332 supra). The FCC apparently has kept the requirement that a cable system cannot contract out its production facilities only for markets below the top 100 in order to prevent their use for local programming because the access cablecasting rules applicable to the major markets independently require the cable system to have production facilities available for public use. See 47 C.F.R. § 76.251 (a)(4) (Oct. 1972) (text of rule at note 433 infra). Nevertheless, the lack of a requirement that major market cable systems have available production facilities that cannot be leased out so as to prevent their use for local programming indicates that the FCC is no longer intent on the use of origination cablecasting as a source of local expression.

396. 47 C.F.R. § 76.205 (Oct. 1972).

397. Id. § 76.209 (Oct. 1972).

398. Id. § 76.213 (Oct. 1972).

399. Id. § 76.215 (Oct. 1972).

400. Id. § 76.221 (Oct. 1972).

401. These requirements were not imposed on access cablecasting on the grounds that these channels are free from cable system operator control and that access is guaranteed. Cable Television Report and Order, supra note 206, at 196.

402. Notice on Franchise Provisions at Variance with Cable Television Rules, 37 Fed. Reg.

There is little reason to expect that the origination cablecasting requirement will lead, as the FCC has envisioned, to cable systems operating as outlets for local community expression. The present rule repeats the mistake of the earlier rule in failing to specify that the cable system must originate locally produced programming.[403] Therefore, a cable system can meet the rigors of the rule by originating filmed or videotaped material unrelated to the community it serves.[404] Although the cable operator can support his origination material with advertisements inserted in natural breaks in the programs,[405] it is doubtful that the advertising revenues obtainable from the cable audience would be sufficient to induce the cable operator voluntarily to produce local programs.[406] Moreover, with the limited audience shares available to a cable system, advertising revenues will be sufficient only to cover the costs of programs such as old movies and broadcast television re-runs.[407] While some cable systems may undertake

19397, ¶ 11 (1972); see First Report and Order on Origination, supra note 332, at 223; Clarification of CATV First Report as to Scope of Federal Preemption, 20 F.C.C.2d 741 (1969).

403. See notes 337, 395 supra.

404. The rule specifies that a cable television system having 3,500 or more subscribers must operate "to a significant extent as a local outlet by origination cablecasting." 47 C.F.R. § 76.201(a) (Oct. 1972). However, the definition of origination cablecasting (note 371 supra) leaves the type of program material undefined with the exception that it cannot consist of broadcast signals and must be under the control of the cable operator.

405. 47 C.F.R. § 76.217 (Oct. 1972) provides that:

"A cable television system engaged in origination cablecast programing may present advertising material at the beginning and conclusion of each such program and at natural intermissions or breaks within a cablecast: Provided, however, That the system itself does not interrupt the presentation of program material in order to intersperse advertising: And provided, further, That advertising material is not presented on or in connection with origination cablecasting in any other manner." (note defining "natural intermissions" omitted) (emphasis deleted). See note 334 supra.

406. The cable operator starts with an initial disadvantage of having a smaller potential audience than local broadcast stations. He is then placed in the position of having to produce high quality (expensive) programming in order to draw an audience away from the local and distant signal broadcast programs carried on the other cable channels. It is unlikely that, with the possible exception of the largest cable systems, a cable operator will be able to generate a large enough audience and advertising revenues to support local programs. The general inadequacy of local programming on conventional broadcast stations suggests the futility of expecting a cable system, even with 100 percent penetration, to produce local programming. See Nathanson, Today's "Opportunity Unlimited": The Leasing of Unused Channels, 8 TV Communications, June 1971, at 52 [hereinafter cited as Nathanson]; Seiden, supra note 156, at 35.

407. McGowan, Noll & Peck, Prospects and Policies for CATV, Mar. 1971, at 51 (Brookings study in the regulation of economic activity) [hereinafter cited as McGowan, Noll & Peck]. In concluding that advertiser supported origination would be a failure, this study noted that "[p]roposals to create local originations on CATV are similar to proposals to add an independent station in a very small market with three networks and four strong independents." Id. See M. Price, Content on Cable: The Nascent Experience 3, Sept. 1970 (Report prepared for the Sloan Commission on Cable Communications).

a broader range of origination regardless of advertising revenues in order to attract subscribers,[408] the path to a higher quality of origination cablecasting lies in the interconnection of cable systems and the imposition of special charges for the programming.[409]

The origination cablecasting requirement has drawn a great amount of criticism, not because of this limited range of programming it may provide, but because it permits the cable system to operate and control the programming of a number of channels. The criticism is that if the cable system owner is allowed to do any programming it will be in his interest both to reduce the number of other users in order to have the maximum possible audience for his own programming and to eliminate any "offensive" programming which might drive off potential subscribers.[410] The corrective, it has been urged, is that the cable owner should do no programming and should act as a common carrier making all of his non-broadcast channels available for leasing.[411] The advantage of a complete common carrier approach is that it would motivate the cable operator to lease as much channel space as possible and that it would eliminate any system operator scrutiny of program content.[412]

---

408. There is little information about the nature of originations that cable systems have undertaken; but it has been reported that of 2,839 systems surveyed in March 1972, some 920 provided automatic originations such as news tickers and almost 600 had non-automatic originations. TV Factbook, supra note 23, at 75a. The study figures are not helpful in determining what type of programming comprises these non-automatic originations; however, the Sloan Commission concluded that there has been "little important origination." Sloan, supra note 2, at 33. Some systems, notably the New York cable systems, have undertaken or plan a wide range of originations. But in areas with a smaller potential audience and less access to local entertainment, it does not appear that a cable system will be able to generate sufficient advertising revenues to support high quality originations. Compare N.Y. Times, Oct. 10, 1972, at 1, col. 2 (cable TV plans for 23 major concerts) and 12 Weekly TV Digest, Aug. 21, 1972, at 5 (TelePrompTer plan for programs in Washington, D.C.) with N. Feldman, Cable Television: Opportunities and Problems in Local Program Origination, 14-18 (Rand Memorandum 1970) (Report prepared for the Ford Foundation).

409. The origination cablecasting rules provide that within rigid limits the origination channels may cablecast programs for which a per-program or per-channel charge is made. 47 C.F.R. § 76.225 (Oct. 1972). The interconnection of cable systems would create a larger audience base from which to derive advertising revenues, and imposition of special charges for programming would provide revenue to support programs that could not be financed out of the limited advertising revenues of one or many interconnected cable systems. See Seiden, supra note 156, at 35; Nathanson, supra note 406, at 56-58. The impact of interconnection and pay cable on origination cablecasting is discussed in the section beginning with note 500 infra.

410. Reconsideration of Cable Television Report and Order, supra note 222, at 352 (ACLU argument for common carrier status); Mitre Report, supra note 16, at C-18 to -19; Sloan, supra note 2, at 147.

411. Smith, The Wired Nation, 10 The Nation 582, 603-04 (1970); see Price & Wicklein, supra note 28, at 54.

412. Mitre Report at C-19. Regulation of cable systems as common carriers would neces-

Notwithstanding the obvious value of common carrier status in reducing a cable system operator's incentive to restrict the diversity of cable television programming,[413] the FCC suggested a hybrid approach in which the cable system would act as a broadcaster on the origination channel and as a common carrier on the access cablecasting channels.[414] The FCC grounded its decision that system operators should be allowed to originate programming on the belief that it is the cable system owner who has the greatest incentive to produce originated material in order to attract subscribers[415] and that the cable entrepreneur should be given some leeway since cable's successful entry into the major markets is uncertain.[416] The commission's decision to allow cable operators to derive the profits[417] of programming some channels is reasonable in light of the expected difficulty of financing major market cable systems.[418] Nevertheless, when cable systems operations are securely established, a transition to common carrier status would be desirable.[419]

2. Access Cablecasting

The access cablecasting requirements that a major market cable system develop a twenty channel capacity with a bandwidth available for non-broadcast programming equal to the bandwidth used for carriage of broadcast signals, and that channels be devoted specifically to public,

---

sitate revision of the FCC's established position to the contrary. See note 76 supra and accompanying text.

413. Complete common carrier status would also reduce the impact of concentrated ownership of cable systems. See note 287 supra and accompanying text.

414. "We reaffirm our view that cable systems are neither broadcasters nor common carriers within the meaning of the Communications Act. Rather, cable is a hybrid that requires identification and regulation as a separate force in communications." Cable Television Report and Order, supra note 206, at 211. See 1968 Proposal, supra note 183, at 427.

415. Cable Television Report and Order 197.

416. Reconsideration of Cable Television Report and Order, supra note 222, at 352.

417. The preceding discussion of origination cablecasting suggested that there would be very little advertising revenue available; however, use of these origination channels for pay cablecasting, especially with interconnection, could make them quite profitable. See note 500 infra and accompanying text.

418. See note 348 supra and accompanying text. The Sloan Commission also has taken the position that common carrier status would be an impediment to the development of cable systems: "We do not believe that investors would be willing to undertake the substantial capital expenditures of laying cable if they had no control over the use of the channels in the formative years and so were powerless to control the financial destiny of the system." Sloan, supra note 2, at 148.

419. The FCC has indicated that it will reinvestigate the possibility of imposing common carrier status when cable systems are well-established and there is a high demand for leased channels. However, in light of the difficulty of ousting an entrenched operation, it would have been better if the commission had established a definite time period for transition to common carrier status. See Cable Television Report and Order, supra note 206, at 197.

educational, governmental and leased uses represents the commission's principal attempt to promote local expression and diversity in television programming.[420] This general plan raises a number of questions beyond the specific problems posed by the rules governing the particular access channels. First, the twenty channel minimum capacity is far below the existing potential of cable technology.[421] Although the FCC may be correct in its implicit judgment that twenty channels will suffice for the immediate future,[422] the high cost of expanding capacity once the distribution system is built[423] suggests that a higher minimum capacity would have been more consistent with the goal of assuring a channel capacity "to accommodate all reasonable demands."[424] The FCC has put cable systems on warning that it will require an expansion of channel capacity as the need arises; however, the expansion formula lacks teeth.[425]

The twenty channel minimum requirement also suffers from the second defect that its across-the-board application to all major markets ignores the fact that very large cities such as New York, Los Angeles, or Chicago may have the need and the ability to program many more non-broadcast channels than an area such as Albuquerque, New Mexico which although

420. See Cable Television Report and Order 190. The FCC rested its jurisdiction to impose the access cablecasting requirements on cable's integral relationship to broadcast television and specifically conditioned the carriage of broadcast signals upon compliance with the access cablecasting rules. Reconsideration of Cable Television Report and Order, supra note 222, at 354; 47 C.F.R. § 76.251(a) (Oct. 1972) (text of rule at note 387 supra). As the commission claimed, the Supreme Court's decision in United States v. Midwest Video Corp., 406 U.S. 649 (1972), would appear to sustain the FCC's authority to impose the access cablecasting requirements. Reconsideration of Cable Television Report and Order 354; see note 360 supra and accompanying text.

421. See text accompanying notes 13, 14 supra.

422. Cable Television Report and Order 190.

423. See Ward, supra note 5, at 188-90.

424. Cable Television Report and Order 190. One commissioner, Nicholas Johnson, has argued that the initial channel capacity should have been set closer to 80 than 20. Johnson & Gerlach, The Coming Fight for Cable Access, 2 Yale Rev. L. & Social Action 217, 221 (1972) [hereinafter cited as Johnson & Gerlach].

425. Cable Television Report and Order 192. The rule for expansion of channel capacity provides that: "Whenever all of the channels described in subparagraphs [(a)](4) through [(a)](7) . . . [public, education, local government, and leased access channels] are in use during 80 percent of the weekdays (Monday—Friday) for 80 percent of the time during any consecutive 3-hour period for 6 consecutive weeks, such system shall have 6 months in which to make a new channel available for any or all of the above described purposes . . . ." 47 C.F.R. § 76.251(a)(8) (Oct. 1972). The FCC has qualified this expansion requirement by indicating that it would not demand expansion within six months when it will be necessary to rebuild or add extensive new plants in order to provide the increased channel capacity. Cable Television Report and Order 192. Thus, a cable system that builds a 20 channel system in compliance with the FCC's rules will be in a position to argue for delay in expanding its channel capacity.

it is one of the major markets has a population of only 316,000.[426] This problem is aggravated by the commission's position that franchising authorities in general should not be allowed to require more than twenty channels because of the possibility that such a requirement would exceed the state of the art, or place an undue burden on cable operators at the present stage of development in the major markets.[427]

The commission's plan for access cablecasting is marred also by a failure to make adequate provision for separate access facilities and channels where several communities are served by a single headend. Although the access cablecasting rules apply to each separate system,[428] the FCC apparently intends to apply the rules for existing operations only to the overall system,[429] with the consequence that the total number of access channels

426. See Access to Cable Television, supra note 289, at 439; 47 C.F.R. § 76.51(b) (Oct. 1972) (81st market); U.S. Dep't of Commerce (Bureau of Census), 93d Statistical Abstract of the United States 19 (1972) (population of the Albuquerque Standard Metropolitan Statistical Area).

427. Reconsideration of Cable Television Report and Order, supra note 222, at 355 n.25. The commission's position that a channel capacity in excess of 20 would exceed the state of the art is untenable, especially in view of its knowledge that cable systems of 40 to 60 channels currently are being built. See Cable Television Report and Order 190; text acompanying notes 13, 14 supra. The assertion that a high channel capacity would be an undue burden on the cable operator is difficult to understand in light of the fact that the operator voluntarily applies for the franchise and is free to allow the market to settle the number of channels that can be built economically. See Barnett, supra note 211, at 738; Sloan, supra note 2, at 174 (franchising authority should be free to require installation of augmented channel capacity if found necessary). The commission has provided, however, that a local franchising authority can require a higher channel count "upon a demonstration of need for such channel capacity and the system's ability to provide it." Reconsideration of Cable Television Report and Order 355 n.25; Notice on Franchise Provisions at Variance with Cable Television Rules, 37 Fed. Reg. 19397, ¶ 1 (1972); see Cable Television Report and Order 193 (FCC will consider waiver to allow additional public, educational, and local government channels where both the cable operator and the franchising authority are in agreement); 47 C.F.R. § 76.251(a)(11)(iv) (Oct. 1972) (pertinent text of rule at note 443 infra).

428. In the definition of a cable television system, the rules note that: "In general, each separate and distinct community or municipal entity . . . served by cable television facilities constitutes a separate cable television system, even if there is a single headend and identical ownership of facilities extending into several communities." 47 C.F.R. § 76.5(a)(Note) (Oct. 1972) (citations omitted); see note 1 supra [47 C.F.R. § 76.5(a) (Oct. 1972)—definition of a cable television system].

429. Reconsideration of Cable Television Report and Order, supra note 222, at 359; cf. Cable Television Report and Order, supra note 206, at 196. The commission intends to soften the access requirement in this manner only for cable systems already in operation, but new systems serving many communities with a single headend will be expected to comply fully with the access cablecasting rules. Reconsideration of Cable Television Report and Order 359 n.36. The FCC has granted at least one waiver of the requirement of separate access facilities and channels for each of several communities served by the same headend. Gerity Broadcasting Co., 36 F.C.C.2d 69 (1972).

and of production facilities will be reduced and less attuned to each community's needs.[430]

Finally, it should be noted that in rigidly separating the public, education, local government and leased access channels, the commission probably has consigned the programming of the first three to a more limited viewership than they could have obtained through intermixture with the more "professional" programming of the advertiser supported programs on the leased access and origination channels.[431]

a. Public Access Channel

The public access channel is viewed by the commission as a means for the general public "to participate in community dialogue through a mass medium."[432] To this end, the FCC's rule stipulates that a cable system must provide at least one channel on a first-come, non-discriminatory basis and must have available the minimum equipment and facilities necessary to program the channel.[433] No charge can be made for the one public access channel that the system is obligated to provide; however, production costs that are consistent with the goal of affording the public a low-cost television outlet may be charged for live studio productions exceeding five minutes.[434] Although the cable system is specifically forbidden to exercise control over program content,[435] the requirement that it establish operating

430. The commission's failure to require separate access channels for each of several communities served by a single headend discards, at least for existing cable operations, the advantages of having subsystems within the overall franchise area. See note 366 supra.

431. See Access to Cable Television, supra note 289, at 443. Since viewers tend to develop channel loyalties, they may ignore the programs of the public, educational, and government channels in favor of the more "professionally" programmed channels. Intermixture of the different types of programming on the same channel might give these limited appeal programs a wider exposure.

432. Cable Television Report and Order 191. Others have been less restrained in their evaluation of the prospects of public access cablecasting. See, e.g., Price & Wicklein, supra note 28, at 3 (on the cable system, there is room for every element in a given community to have its say).

433. The public access channel rule states: "Each such system shall maintain at least one specially designated, noncommercial public access channel available on a first-come, nondiscriminatory basis. The system shall maintain and have available for public use at least the minimal equipment and facilities necessary for the production of programing for such a channel." 47 C.F.R. § 76.251(a)(4) (Oct. 1972).

434. 47 C.F.R. § 76.251(a)(10)(ii) (Oct. 1972) provides for the assessment of costs as follows: "One of the public access channels described in subparagraph (4) of this paragraph shall always be made available without charge, except that production costs may be assessed for live studio presentations exceeding 5 minutes. Such production costs and any fees for use of other public access channels shall be consistent with the goal of affording the public a low-cost means of television access . . . ."

435. "Each such system shall exercise no control over program content on any of the channels described in subparagraphs [a](4) through [a](7) . . . [public, education, local

rules for the public access channel[436] gives the cable operator a large degree of oversight of public access channel programming. The only restraint on the system owner in formulating operating rules which assure first-come, non-discriminatory access and which prohibit commercial and political advertisements, lotteries, and obscene material is that the rules must be filed with the FCC and be available for public inspection at the cable system's office.[437]

The FCC's designation of the cable system operator as the sole body responsible for articulating and implementing the operating rules for public access channels has aroused fears that full and open access will be denied.[438] These fears rest on a number of grounds. First, the formula of "first-come, non-discriminatory access" is a general and weak prescriptive standard[439] that leaves the cable operator with little guidance to solve a wide range of practical problems.[440] Second, the cable operator is particularly unsuited to resolve the problems of public access because full public access is contrary to his economic interest[441] and administrative

government, and leased access channels]; however, this limitation shall not prevent it from taking appropriate steps to insure compliance with the operating rules . . . ." 47 C.F.R. § 76.251(a)(9) (Oct. 1972).

436. The requirement that the cable system establish operating rules for the public access channel is phrased in these terms:

"For the public access channel(s), such system shall establish rules requiring first-come nondiscriminatory access; prohibiting the presentation of: Any advertising material designed to promote the sale of commercial products or services (including advertising by or on behalf of candidates for public office); lottery information; and obscene or indecent matter (modeled after the prohibitions in §§ 76.213 and 76.215, respectively); and permitting public inspection of a complete record of the names and addresses of all persons or groups requesting access time. Such a record shall be retained for a period of 2 years." 47 C.F.R. § 76.251(a)(11)(i) (Oct. 1972). The reference to § 76.213 and § 76.215 is to the lottery and obscenity provisions applicable to origination cablecasting. It should be noted that the equal time and fairness doctrines have not been applied to access cablecasting. See notes 396, 397, 401 supra.

437. 47 C.F.R. § 76.251(a)(11)(iv) (Oct. 1972) provides in pertinent part: "The operating rules governing public access, educational, and leased channels shall be filed with the Commission within 90 days after a system first activates any such channels, and shall be available for public inspection at the system's offices."

438. See, e.g., Johnson & Gerlach, supra note 424, at 222.

439. Sloan, supra note 2, at 130 (the formula of first-come, nondiscriminatory access "is in practice to say nothing at all").

440. A partial list of the problems of operating a public access channel includes: how the applications for time are to be made, how access time is to be allocated among a surfeit of users, how and what type of production facilities are to be provided, how to provide advance notice of presentations, how to implement the operator's duty to prevent obscenity and lotteries without assuming control over content, and how to resolve disputes arising from the implementation of the rules. See Sloan at 128; Barnett, supra note 211, at 741-43.

441. Although the Sloan Commission has argued that excess capacity may lead the cable operator to encourage public access (presumably on the ground that those who are interested in access will become subscribers), the rules provide that unused time on the public access

convenience.[442] Finally, it has been argued persuasively that regulation of the public access channel by a governmental body would be more consistent with full access than regulation by the cable operator.[443]

---

channel may be used for leasing from which the cable operator can derive revenue; therefore, it is in the system's interest to discourage public access in order to have the channel available for leasing. Compare Sloan 128 with 47 C.F.R. § 76.251(a)(7) (Oct. 1972) (text of rule at note 474 infra) and Barnett 746. Moreover, since the complete use of the public access channel will place the cable operator under the necessity of expanding channel capacity, it will be in his interest to discourage access if he does not want to undertake the expense of expansion. See 47 C.F.R. § 76.251(a)(8) (Oct. 1972) (text of rule at note 425 supra); Barnett 746.

442. It is clear that the greater the number of users, the greater the time and expense of the cable operator in administering the channel and the inevitable disputes. Barnett 746. Additionally, a great variety of users will increase the system owner's worries about potential legal liability for obscenity or libel. The commission consistently has taken the position that, since the system is required by an FCC rule to exercise no control over program content, there can be no legal liability. Letter of Intent, supra note 210, at 132-33; Cable Television Report and Order, supra note 206, at 195-96; Reconsideration of Cable Television Report and Order, supra note 222, at 357. Nevertheless, cable operators remain uneasy at the prospect and expense of defending potential libel suits. 12 Weekly TV Digest, Oct. 16, 1972, at 2; Center for the Analysis of Public Issues, Public Access Channels: The New York Experience, Mar. 1972, at 27-28 (Report for the Fund for the City of New York) [hereinafter cited as NYC Public Access Experience]. The system operator's fears that near-obscenity will drive away subscribers or that outspoken comment will result in libel suits are certainly inconsistent with promotion of open access. The FCC's only response to the problem of obscene material is the suggestion that a "locked switch" might be installed to enable subscribers to control channel selection. Cable Television Report and Order 194; see Johnson & Gerlach, supra note 424, at 222 (criticism of the lock-switch proposal). A full discussion of the social ramifications of a system of uninhibited access and the parameters of appropriate regulation may be found in J. Pemberton, Foreseeable Problems in a System of Maximum Access (Paper prepared for the Sloan Commission on Cable Communications).

It is interesting to note that the cable operators' fears that sexually explicit programs would be aired on the public access channels were borne out by a series of programs shown on a New York City access channel in early 1973 which emphasized nudity and sexual aberrations. See Robinson, Unusual Airings: 1984 & the Cable, the Village Voice, Feb. 8, 1973, at 33, col. 1.

443. A local government body does not suffer from the same incentive to limit access that affects cable operators and would be more likely to seek public participation in the development of the channel's regulations. Barnett, supra note 211, at 746-47; accord, Sloan, supra note 2, at 130 (a public access commission); NYC Public Access Experience, supra note 442, at 26 (franchise board regulation). Although the FCC recognized that there would be many problems in administering the public access channels, it chose, on an interim basis, to forbid state or local regulation of the manner of operation of the public access channels. Cable Television Report and Order 193-94. In this regard, the pertinent section of the rules provides: "Except on specific authorization, or with respect to the operation of the local government access channel, no local entity shall prescribe any other rules concerning the number or manner of operation of access channels; however, franchise specifications concerning the number of such channels for systems in operation prior to March 31, 1972, shall continue in effect." 47 C.F.R. § 76.251(a)(11)(iv) (Oct. 1972) (preceding clause of the rule at note 437 supra). The grounds for the FCC's preemption of regulation were that it would permit a period of experimentation and that dual regulation would be "confusing and impracticable." Cable

Even assuming that the cable operator imposes no artificial restraints on the use of public access channels, there remains a substantial question as to the extent to which the FCC's rule will facilitate public use of the television medium. In the one city in which there has been at least one year's experience with public access channels, there has been a notable degree of success in putting a variety of programs on these channels.[444] This experience in producing relatively simple, technically unsophisticated programming for narrow interest groups revealed a number of difficulties in public access cablecasting. Initially, there is a problem in persuading people who are unfamiliar with the television medium that they can master its intricacies.[445] There are also the technical problems of equipment incompatibility and the poor transmission quality of the least expensive recording equipment and videotape.[446]

Perhaps the most important problem, however, is that of financing public access programming. The FCC's rules only provide for a free channel and, with the exception of live studio presentations under five minutes,[447] do not provide for free production facilities. Although production costs for unsophisticated programs are low,[448] the necessity of meeting these costs will exclude all but large, reasonably well-heeled groups from use

---

Television Report and Order 193-94. Nevertheless, the variety of local regulation that could be expected would seem to be consistent with a period of experimentation and no less confusing and impracticable than the dual FCC-cable operator rules of operation that the commission has mandated. One immediate consequence of the commission's decision to preempt local regulation of the manner of operation of public access channels and to substitute operator formulated rules will be that New York City will have to yield its regulation of access channels to the system operators. The city's prescription of two public access channels for extant cable systems will survive. See Barnett 739; NYC Public Access Experience 25-26. Since few other cities have had public access channels, the FCC's preemption will not be particularly disruptive of existing regulation.

444. New York City has had two public access channels since July 1971, and at the end of that year the channels were used for approximately five or six hours per day. The users of the channels have included artistic groups, educational agencies, ethnic associations, and assorted individuals. The programming has included literary critiques as well as programs for the deaf, the aged and consumers. NYC Public Access Experience 9-16; see Maxwell, Say the Magic Words—You're on the Cable, 9 TV Communications, Oct. 1972 at 30-36.

445. The New York success in utilizing the public access channels should not be generalized to other areas because of the unique media sophistication of a significant percentage of the city's population. NYC Public Access Experience 36.

446. Id. at 33.

447. See note 434 supra and accompanying text.

448. For example, the average cost for producing each of twelve 40 to 60 minute programs on half-inch videotape equipment was $233 per program or $400 to $600 per program when the cost of a producer-director is included. It should be noted that the technical quality of half-inch tape is inferior to that of network shows and that the costs of these programs directed to the difficulties of the aging were borne by a foundation. Othmer, Portable, Half-inch Production: A Note on Costs, 2 Yale Rev. L. & Social Action 238, 241 (1972).

of the public access channels.[449] In New York City, much of the public access programming has been foundation supported;[450] however, foundation financing over the long-run or for cities that lack New York's surfeit of publicly spirited institutions is an inadequate solution. While other alternatives for financing public access have been advanced,[451] the dependence of groups on external financing, no matter how intricately insulated from manipulation, raises doubts as to the likelihood of full freedom of access to the public channels. At any rate, utilization of the public access channels will be restricted until a method of supporting production costs is devised.

Assuming that the problems of restrictive rules imposed by the cable operator and of inadequate financing for production can be corrected, it remains, finally, to assess the potential impact of public access cablecasting. Initially, the low penetration rates of a cable system will restrict sharply the number of possible viewers.[452] Nevertheless, even when a cable system reaches a high percentage of the television homes in its franchise area, it is doubtful that public access cablecasting will achieve much public exposure for its programs. In competition with the technically superior, professionally produced and financed programming of upwards of twenty other channels, the public access channel will be able to draw only a very small audience share.[453] Public access can provide access to the television medium; it will not provide access to a mass medium. This is not to suggest that the problems of assuring free access and adequate funding are not important—there is clearly an intangible value in pro-

449. See NYC Public Access Experience, supra note 442, at 33. The Director of Open Channel, a New York City nonprofit organization working to promote open access, has been quoted as having said: "to permit easy, unhindered use of the channels, public access must be available on a free basis—both for air time and for production. Otherwise, the groups we are hoping to encourage just can't afford to go on. And, it's the old story of over-the-air broadcasting all over again." Freebairn, Public Access in New York City: An Interview with Theadora Sklover, 2 Yale Rev. L. & Social Action 227, 236 (1972) [hereinafter cited as Freebairn]. In this regard, it is significant that there has been less spontaneity and diversity on the public access channel of the New York City cable system that charges for production facilities than on the cable system with no such charge. NYC Public Access Experience 12.

450. Freebairn 236.

451. One alternative would be to require the cable operator to provide for production as well as channel space at no cost to the user; however, placing this additional cost on the operator would increase his incentive to discourage use of the public access channel. See note 441 supra; Dayton Report, supra note 16, pt. 9, at 45-46 (percentage of gross cable revenues to defray expenses of public access). A second alternative would be to reserve part of the city franchise fee to cover the costs of public access programming. Freebairn 236.

452. NYC Public Access Experience 33; Dordick & Lyle, supra note 366, at v.

453. McGowan, Noll & Peck, supra note 407, at 48-49 (two to three percent audience share). With small audience shares, the cost per person reached will remain high even if program costs are relatively low. Id.; NYC Public Access Experience 33.

viding a television outlet for groups that have been excluded from conventional broadcast television. This analysis does suggest, however, that public access cablecasting will not afford wide exposure for minority views[454] and will not, as some have suggested,[455] promote a minority-majority dialogue.

b. Education Access Channel

The requirement that a cable system provide one specifically designated non-broadcast channel for use by educational authorities[456] was designed to foster educational and instructional television.[457] The rules provide that this channel must be made available without charge for the first five years,[458] and the commission has indicated that at the end of this period consideration will be given to extending or curtailing this free status.[459] As in the case of the public access channel, the cable operator is to exercise no control over program content;[460] however, he is required to establish operating rules[461] proscribing commercial or political advertising,

454. "It would be unreasonable to expect that these two channels [the NYC public access channels], carrying programming unsupported by any traditional commercial market mechanisms, could function as a vigorous, countercasting force against the information and advertising presented on the other . . . channels." Freebairn, supra note 449, at 229.

455. Price & Wicklein, supra note 28, at 4. It is most likely that the viewers of minority-produced public access programming will consist of those already attuned to the particular point of view, much as fringe magazines are purchased primarily by sympathizers.

456. 47 C.F.R. § 76.251(a)(5) (Oct. 1972) provides: "Each such [major market] system shall maintain at least one specially designated channel for use by local educational authorities . . . ."

457. Cable Television Report and Order, supra note 206, at 190, 191.

458. The commission's rule on assessment of costs states: "From the commencement of cable television service in the community of such system until five (5) years after completion of the system's basic trunk line, the channels described in subparagraphs (5) and (6) of this paragraph [education and local government access channels] shall be made available without charge." 47 C.F.R. § 76.251(a)(10)(i) (Oct. 1972).

459. Cable Television Report and Order 191. Fears have been voiced that if use of this channel is not developed quickly, the FCC will abolish it at the end of the five-year period. Johnson & Gerlach, supra note 424, at 222.

460. 47 C.F.R. § 76.251(a)(9) (Oct. 1972) (text of rule at note 435 supra).

461. 47 C.F.R. § 76.251(a)(11)(ii) (Oct. 1972) directs the cable system operator to establish operating rules in these terms: "For the educational access channel(s), such system shall establish rules prohibiting the presentation of: Any advertising material designed to promote the sale of commercial products or services (including advertising by or on behalf of candidates for public office); lottery information; and obscene or indecent matter (modeled after the prohibitions in §§ 76.213 and 76.215, respectively) and permitting public inspection of a complete record of the names and addresses of all persons or groups requesting access time. Such a record shall be retained for a period of 2 years." The reference to §§ 76.213 and 76.215 is to the lottery and obscenity provisions applicable to origination cablecasting. See note 391 supra.

lottery information, and obscene or indecent matter. These operating rules, which must be filed with the commission and be available for public inspection,[462] have the inevitable effect of involving the cable operator in the daily administration of this channel.

In providing for only one educational channel, the FCC has tied educational programming to the one-program-at-a-time format of broadcast television and negated most of the proposals for education on cable which are dependent on the availability of many channels.[463] Nevertheless, this initial availability of one channel will provide an opportunity for demonstration of the value of an educational cable channel for both in-school[464] and at-home instruction. The educational cable channel will also provide added programming for cable viewers.

c. Local Government Access Channel

The local government access channel requirement is viewed by the commission as a means to increase the information services of these municipal agencies and departments.[465] The rules provide that at least one specifically designated channel must be made available for use by the local government[466] and that no charge can be made for the channel for the first five years of its availability.[467] The cable operator is directed to exercise no control over the program content,[468] and, unlike the other access channels,[469] the system owner does not establish operating rules for the municipal channel. The local government is given full latitude in the use of the channel and is responsible for its regulation.[470] Although a local government channel may well provide a wealth of valuable services,[471] the

462. 47 C.F.R. § 76 251(a)(11)(iv) (Oct. 1972) (pertinent text of rule at note 437 supra).

463. Molenda, CATV and Access to Knowledge, 2 Yale Rev. L. & Social Action 243, 247 (1972) [hereinafter cited as Molenda]; see Mitre Report, supra note 16, at III-13 to -18, III-24 to -26; Reconsideration of Cable Television Report and Order, supra note 222, at 355-56 (FCC rejection of expanded channel requirement for educational uses).

464. The costs of wiring a classroom and providing a monochrome receiver ($200-$300 per classroom) may limit the demonstration to suburban schools with the budget to support such an innovation. Molenda 247-48. A description of university programming of educational channels may be found in L. Johnson, Cable Television and Higher Education: Two Contrasting Experiences (Rand Memorandum 1971).

465. Cable Television Report and Order, supra note 206, at 190.

466. 47 C.F.R. § 76.251(a)(6) (Oct. 1972) provides: "Each such [major market] system shall maintain at least one specially designated channel for local government uses . . . ."

467. 47 C.F.R. § 76.251(a)(10)(i) (Oct. 1972) (text of rule at note 458 supra).

468. Id. § 76.251(a)(9) (Oct. 1972) (text of rule at note 435 supra).

469. See notes 436, 461 supra and accompanying text.

470. Cable Television Report and Order, supra note 206, at 191, 193; 47 C.F.R. § 76.251 (a)(11)(iv) (Oct. 1972) (pertinent text of rule at note 443 supra).

471. See text following note 365 supra. New York City, which has had a municipal chan-

establishment of such a channel raises a number of legitimate free speech concerns[472] which the FCC has ignored to date.

d. Leased Access Channel

The commission's requirement that a cable system make non-broadcast channels available for leasing represents an attempt to establish common carrier operation of a portion of the cablecasting bandwidth.[473] The rules provide that, having satisfied the origination and public, education and local government cablecasting requirements, a cable system shall offer other portions of the unused bandwidth for leasing.[474] To the extent that time is available on the other access channels for which no demand is made, it may also be leased; and on one of the leased access channels, priority must be given to part-time users.[475] The cable system is prohibited from exercising control over program content;[476] however, it is involved directly in administration of the leased channels by the FCC's requirement that it establish operating rules. The system operator is solely responsible for promulgating and administering operating rules which must provide for: first-come, non-discriminatory access; proscription of lottery information and obscene or indecent matter; identification of sponsors, and publishing an appropriate rate schedule.[477] The only restraint on the

---

nel for over a year, has done little in the way of imaginative programming and has confined its programs primarily to videotapes from the Board of Education's library. NYC Public Access Experience, supra note 442, at 20-21.

472. It is interesting to note that in a survey of government officials to evaluate the potential uses of a municipal channel, stopping short of overt politicalization, these officials revealed that a primary benefit of the channel would be to foster better attitudes toward city services. Mitre Report, supra note 16, at III-21.

473. It is this "leased channel" operation which critics of programming by the cable operator would like to establish in the place of origination cablecasting. See text accompanying note 411 supra.

474. 47 C.F.R. § 76.251(a)(7) (Oct. 1972) provides: "Having satisfied the origination cablecasting requirements of § 76.201, and the requirements of subparagraphs (4), (5), and (6) of this paragraph for specially designated access channels, such system shall offer other portions of its nonbroadcast bandwidth, including unused portions of the specially designated channels, for leased access services. However, these leased channel operations shall be undertaken with the express understanding that they are subject to displacement if there is a demand to use the channels for their specially designated purposes. On at least one of the leased channels, priority shall be given part-time users . . . ."

475. Id.

476. Id. § 76.251(a)(9) (Oct. 1972) (text of rule at note 435 supra).

477. 47 C.F.R. § 76.251(a)(11)(iii) (Oct. 1972) directs the system operator to establish operating rules as follows:

"For the leased channel(s), such system shall establish rules requiring first-come, nondiscriminatory access; prohibiting the presentation of lottery information and obscene or in-cable operator in formulating these rules is that they must be filed with the FCC and available for public inspection.[478]

The value of leased channels is the provision of a television outlet for independent program producers. Although there is no restriction of advertising to natural breaks as in origination cablecasting,[479] the more complete freedom to use commercials does not overcome the problem noticed in connection with origination cablecasting, [480] namely, that the limited audience available to most cable systems is unlikely to generate sufficient advertising revenues to support a high quality of programming. While the limited audience of one particular cable system may not attract much attention to leased channels from independent program producers, the interconnection[481] of numerous cable systems and the use of pay cablecasting[482] on the leased channels would both (1) create a larger audience base from which to derive additional advertising revenues to support a higher quality program and (2) introduce an alternative source of support for programming on the leased channels.[483]

Although the interconnection of cable systems and the introduction of pay cablecasting can be expected to induce independent program producers to undertake programming of the leased access channels, the FCC's rules give the cable system operator both the incentive and the capacity to limit the development of these channels. The incentive flows from the fact that since the cable operator can use an unlimited number of origination channels[484] under his control for pay cablecasting[485] it is to his advan-

---

decent matter (modeled after the prohibitions in §§ 76.213 and 76.215, respectively); requiring sponsorship identification (see § 76.221); specifying an appropriate rate schedule and permitting public inspection of a complete record of the names and addresses of all persons or groups requesting time. Such a record shall be retained for a period of 2 years."

The references in the rule to §§ 76.213, 76.215, and 76.221 are to the lottery, obscenity, and sponsorship identification requirement applicable to origination cablecasting. See note 391 supra. It should be noted that the equal time and fairness doctrines are not applied to the leased channels. See notes 396, 397, 401 supra.

478. 47 C.F.R. § 76.251(a)(11)(iv) (Oct. 1972) (pertinent text of rule at note 437 supra).

479. Compare id. § 76.217 (Oct. 1972) (text of rule at note 405 supra) with Cable Television Report and Order, supra note 206, at 195 wherein it is said: "[I]n contrast with origination cablecasting rules . . . we will not require commercials only at natural breaks on these [leased access] channels."

480. See text accompanying note 407 supra.

481. The commission has suggested specifically that the leased channels be used for interconnected programming. Cable Television Report and Order 193.

482. The cablecasting rules provide that the access channels may be used for operations in which a per-program or a per-channel charge is made. See 47 C.F.R. § 76.225 (Oct. 1972).

483. The impact of interconnection and pay cablecasting on program diversity is discussed in the text accompanying notes 490-533 infra.

484. See text accompanying note 393 supra.

485. See note 409 supra.

tage to limit such programming on other channels which would reduce his audience.[486] The capacity to limit the development of the leased access channels stems from the operator's control over the rates for leasing[487] and the fact that the rules do not specify the division of excess non-broadcast channel capacity between origination and leased access channels.[488] The cable system operator's ability to restrict the development of leased access channels jeopardizes the diversity of programming that might be offered by independent program producers.

3. Interconnection of Cable Systems and Pay Cablecasting

The provision in the origination and access cablecasting rules for a number of non-broadcast channels and the invitation to system operators, the public, educational institutions, local governments, and independent program producers to utilize these channels will not in itself lead to a broad range of television programming. Although there will be a gain in diversity to the extent that the public, education, and local government access channels are used, the origination and leased access channels are likely to be under-used and restricted to a narrow range of conventional programs unless a larger audience base and sufficient revenues can be obtained to support high quality programming. The interconnection of cable systems would provide a larger audience base, and the introduction of pay cablecasting would provide a new and expanded source of revenue to support programming on these channels. These two developments also would create the circumstances in which a new programming rationale—appeal to minority tastes—might be both profitable and a significant source of diversity in the television medium.

a. Interconnection

From the time it first recognized cable's potential for program origination the FCC has looked with favor on the possible development of inter-

486. Barnett, supra note 211, at 745. See also text accompanying note 410 supra.

487. The cable operator sets the rate schedule for leasing. See note 477 supra. Although the FCC has indicated that it will initiate an inquiry into the rates charged for leased channels, the complexities of rate determination will leave the cable operator a significant capacity for self-serving manipulation. See Cable Television Report and Order, supra note 206, at 192. The Sloan Commission suggests that the market place will keep rates for leased channels low. Sloan, supra note 2, at 144. This suggestion neglects entirely the problems posed by the cable operator's economic incentives. Barnett 791.

488. In the requirement that at least one channel be available for part-time users, one can read an implicit requirement that the cable operator provide at least two channels for leased access. See 47 C.F.R. § 76.251(a)(7) (Oct. 1972) (text of rule at note 474 supra). With the exception of these two channels for leased access and the three other designated access channels, a cable operator would seem able to devote the rest of the non-broadcast bandwidth to origination cablecasting which is under his control; however, a strained reading of one paragraph of the FCC's report may support a higher allocation of the bandwidth for leased access use. See Cable Television Report and Order 192.

connection of cable systems, or cable networks.[489] In the middle of 1972, the commission authorized the development of domestic communication satellite facilities.[490] The reduced costs of interconnection made possible by satellite technology will facilitate the growth of cable networks.[491] For example, the Hughes Aircraft Company has plans to operate a satellite which will be devoted primarily to serving cable systems and which will be capable of providing eight channels of television programming or, in effect, eight networks.[492] Although Hughes Aircraft has not yet been given permission to operate its satellite, the FCC has authorized the operation of a domestic communications satellite system by Western Union.[493] Western Union, whose satellites will be operational beginning in 1974, plans to lease some services to cable television systems.[494]

The advent of satellite interconnection will provide a larger audience base for cable television programming. It is unlikely, however, that the advertising revenues available from even this expanded audience base will be able to support a full range of high quality programs on the non-broadcast channels of cable television. In the first place, even if cable penetration rates rose considerably above the current ten percent[495] of all television homes to forty or sixty percent,[496] and this potential audience were available through interconnection, an advertiser still would favor broadcast television where he could reach a larger potential audience.[497]

489. See, e.g., 1968 Proposal, supra note 183, at 420; First Report and Order on Origination, supra note 332, at 207-08; Cable Television Report and Order 193.

490. Second Report and Order on Establishment of Domestic Communications-Satellite Facilities by Non-governmental Entities, 35 F.C.C.2d 844 [hereinafter cited as Domestic Satellite Report], modified, 37 F.C.C.2d 184 (1972); see 12 Weekly TV Digest, June 19, 1972, at 3.

491. See Seiden, supra note 156, at 141.

492. Proposed Second Report and Order on Establishment of Domestic Communications-Satellite Facilities by Non-governmental Entities, 34 F.C.C.2d 9, 14-15 (1972). A grant to Hughes Aircraft to operate this satellite system will be conditioned on allowing the cable systems to operate their own ground stations and on nondiscriminatory access to the satellite for other program producers. Domestic Satellite Report 855; see O'Connor, The Wave of the Future May Sink a Few Ships, N.Y. Times, Nov. 12, 1972, § 2 (Arts and Leisure) at 17, col. 1 [hereinafter cited as O'Connor].

493. N.Y. Times, Jan. 5, 1973, at 1, col. 1.

494. Id. at 39, col. 2.

495. See note 23 supra.

496. See text accompanying note 28 supra. This estimate is certainly too high for the immediate future; a more reasonable estimate would be 25 percent. See text accompanying note 239 supra.

497. It should be noted that some advertisers will be attracted by the availability of a channel for programs geared to particular groups and will assume higher per viewer costs in order to reach the special audience that will watch their programs and advertisements.

With limited advertising revenues in comparison with broadcast television, commercially supported programming on the cable will be financed with a smaller budget, thereby necessitating some trade-off between quantity and quality. Finally, the amount of support which advertisers are willing to devote to television programming is not infinitely expandable; and with many channels each having a relatively small audience, advertising revenues may well be insufficient to cover the costs of programming all of the cable channels.[498] Thus, while interconnection will provide an audience sufficient to attract advertiser-supported programming of a higher order than that which a single cable system's audience can support, the true significance of interconnection is that it establishes a large audience base for pay cablecasting.[499]

b. Pay Cablecasting

The central importance of pay cablecasting is that it breaks the connection between advertiser-support and programming, and substitutes a system of viewer payments.[500] With the high channel count of cable television and a relatively large audience base created by interconnection, a program producer has the opportunity of reaching sizeable minority audiences with a variety of special interests;[501] nevertheless, the advertising revenues derived from these minority audiences would not be sufficient to support a high quality of programming. The payment of a special fee by the viewers, however, can provide a new revenue source to support this programming,[502] at the same time allowing viewers—rather than advertisers—to determine the types of programs presented. Thus, the introduction of viewer payments for cablecast programs permits the de-

498. See 12 Weekly TV Digest, Nov. 20, 1972, at 3 (remarks of C. Whitehead, director of the Office of Telecommunications Policy).

499. The Hughes Aircraft plan for nationally interconnected programming of eight channels will be supported by viewer payments. O'Connor, supra note 492, at col. 3.

500. Future of Cable Television, supra note 173, at 54.

501. Although each cable system will have a limited number of subscribers interested in ballet or ethnic group programs, interconnection of many cable systems will provide a much larger audience with these interests, and the availability of a large number of cable channels will provide program producers with a television outlet to serve them.

502. To continue the example of the previous note, since advertisers are willing to pay only a few pennies per viewer, a national cable audience of 400,000 ballet lovers would provide very limited program support. If these 400,000 viewers were induced to pay a dollar or two per home, there would be a revenue base on the order of $400,000 to $800,000. The one or two dollar figures do not seem unreasonable since the entire family could view the program at a much lower cost than four tickets to the ballet, and the performance would otherwise be unavailable for most viewers. See Sloan, supra note 2, at 66-68.

velopment of a new programming rationale[503] in which program producers can profit from programs designed to appeal to minority tastes.

It is this possibility for viewer-supported programming directed to minority tastes that is the key to cable's potential to create diversity in the television medium.[504] Projections for pay cablecasting include special news and documentary programs;[505] cultural, ethnic, and narrow interest (*e.g.*, horticultural and numismatic) programming; major sports events and first-run movies; and channels programmed to meet the needs of such professionals as doctors and lawyers.[506] Pay cablecasting will require additions to or modifications of the basic technology of cable systems in order to assess charges and exclude non-paying subscribers,[507] but the necessary technology is available at feasible costs.[508]

---

503. The programming rationale of broadcast television is discussed in note 363 supra.

504. The significance of viewer payments has been suggested aptly by Leland Johnson: "The handicap that television suffers as a consequence of not receiving payments from viewers can best be appreciated by imagining what would be the nature of today's magazine industry were it entirely dependent on revenues generated by advertising." Future of Cable Television, supra note 173, at 39 (footnote omitted).

505. The news and documentary programming could be supported by payments from viewers of particular political persuasions; thus, pay cablecasting offers the potential of a new national outlet for political expression. Nevertheless, this outlet for political expression would be limited to groups large or wealthy enough to support programming from viewer payments and would be confined to intragroup communication rather than intergroup expression, much as The New Republic and The National Review are supported and read by their subscribers. Since the methods of collecting viewer payments (see note 507 infra) do not lend themselves to charging one viewer and not another (everyone having the incentive to be a freeloader), a group could not simply offer its pay cablecast programs to all others who might be tempted to view if there were no charge. A group could, of course, forego the pay cablecast approach in order to reach a larger potential audience; however, this alternative sacrifices the option of tapping the financial resources of the audience for support. The group would then need revenue from other sources to support its programs.

506. See, e.g., Sloan, supra note 2, at 68-70; Price & Wicklein, supra note 28, at 72; R. Roud, Cable Television and the Arts, Mar. 1971 (Report to the Sloan Commission on Cable Communications). The increase of revenues for television programming derived from pay cablecasting also would provide additional funding for the activities that are cablecast; e.g., pay cablecasting of opera would provide more funds for opera production. Sloan 68.

507. See text accompanying notes 1-18 supra. Pay cablecasting can be conducted on either a per-channel or a per-program basis. The alternative technologies include placing a filter on the cable to block out signals to subscribers who do not want the pay channel(s), using encoded signals and a decoder attached to the converter, centralized switching of the subscriber's terminal, and plastic, electrically encoded "tickets" which permit tuning of particular channels. See Mitre Report, supra note 16, at B-43 (table of pay cable television systems); Future of Cable Television, supra note 173, at 53 (filters); 12 Weekly TV Digest, Jan. 31, 1972, at 5 (electrically encoded tickets).

508. In 1972 at least six cable television systems started market tests of pay cablecasting.

Although one of the grounds for the FCC's early restrictive regulation of cable television was that without more the installation and subscription fees made cable a form of pay television,[509] the 1969 decision to permit cable originations was followed quickly in 1970 by authorization (albeit restricted) to cablecast programs for which a per-program or per-channel charge was made.[510] The pay cablecasting regulations of 1970 were carried over into the 1972 rules,[511] and these regulations[512] proscribe in general pay cablecasting of feature films more than two years old, sports events of the type televised in the community during the preceding two years, and series type programs.

These limitations on pay cablecasting, frequently termed the "anti-

The equipment and operating costs of pay television on the cable are not expected to defeat profitable operation. 12 Weekly TV Digest, Sept. 25, 1972, at 6; Id., July 31, 1972, at 4; see Future of Cable Television 53.

509. See text accompanying note 150 supra; Second Report and Order, supra note 117, at 787.

510. Memorandum Opinion and Order on Origination, supra note 333, at 827-29; 47 C.F.R. § 74.1121 (Jan. 1972); see note 335 supra. The evaluation of pay cablecasting that lead to the final permission to undertake such operations on a limited basis also included a proposal for cable carriage of over-the-air subscription television signals which was never adopted. See Proposal on All CATV Systems, supra note 113, at 474; Further Notice of Proposed Rule Making and Notice of Inquiry into Subscription Television Service, 3 F.C.C.2d 1 (1966); Fourth Report and Order on Subscription Television Service, 15 F.C.C.2d 466, 579-87 (1968); Third Further Notice of Proposed Rule Making on Subscription Television Service, 15 F.C.C.2d 601 (1968).

511. Reconsideration of Cable Television Report and Order, supra note 222, at 353-54.

512. The pay cablecasting rule provides that:

"(a) Origination or access cablecasting operations for which a per-program or per-channel charge is made shall comply with the following requirements:

"(1) Feature films shall not be cablecast which have had general release in theaters anywhere in the United States more than two (2) years prior to their cablecast: [further provisions are made for feature films generally released either two to ten years or more than ten years prior to their proposed cablecast] . . . .

"(2) Sports events shall not be cablecast which have been televised live on a non-subscription, regular basis in the community during the two (2) years preceding their proposed cablecast: Provided, however, That if the last regular occurrence of a specific event (e.g., summer Olympic games) was more than two (2) years before proposed showing on cable television in a community and the event was at that time televised on conventional television in that community, it shall not be cablecast.

"(3) No series type of program with interconnected plot or substantially the same cast of principal characters shall be cablecast.

"(4) Not more than 90 percent of the total cablecast programing hours shall consist of feature films and sports events combined. . . .

"(5) No commercial advertising announcements shall be carried on such channels during such operations except, before and after such programs, for promotion of other programs for which a per-program or per-channel charge is made." 47 C.F.R. § 76.225 (Oct. 1972) (footnotes omitted) (emphasis deleted).

siphoning rules," were imposed at the insistence of the broadcast industry because of its fear that the revenues available from pay cable operations would be larger than the advertising revenues of over-the-air television and that, consequently, programs would be siphoned off broadcast television and to pay cable channels.[513] It is difficult to assess the extent to which pay cablecasting may be able to outbid a commercial sponsor as such an eventuality is dependent on both the nature of the particular program and the total penetration of cable television.[514] A reasonable conclusion would be that until cable achieves national interconnection and a much higher rate of penetration than the projected twenty-five percent,[515] there is little danger of substantial siphoning, with the possible exception of major championship sports events.[516]

The FCC recently has reopened the entire question of the appropriate rules for pay cablecasting.[517] Although there will continue to be some pay cablecasting, it is clear that the commission is very sensitive to the broadcasters' claims for protection.[518] The primary issues facing the FCC are

513. Memorandum Opinion and Order on Origination, supra note 333, at 827-29; see Access to Cable Television, supra note 289, at 432.

514. On the one hand, CBS has argued that cable will achieve 15 percent penetration by the end of the decade. Since broadcast television delivers pro football to homes at one cent each, cable would need to bid only seven cents for each home in order to outbid the broadcasters. It is likely that for professional football cable could induce each home to pay substantially more than seven cents. See 12 Weekly TV Digest, Jan. 10, 1972, at 3. However, not all of the homes that subscribe to cable will desire or be able to pay extra charges, and another observer has estimated that with 50 percent penetration, there would only be four percent use of pay cable channels. With this limited use of pay cable as a premise, it was concluded that pay cable posed no threat of siphoning as long as there was a prohibition of advertisements on the pay channels. McGowan, Noll & Peck, supra note 407, at 29-40.

515. See text accompanying note 239 supra.

516. Working with a forty to sixty percent penetration rate (note 28 supra), the Sloan Commission concluded that—with the exception of extraordinary sports events—there was no danger of siphoning and that, with this exception, the field of pay cablecasting should be opened up. Sloan, supra note 2, at 75-77, 174.

517. Notice of Proposed Rule Making and Memorandum Opinion and Order on Cablecasting of Programs for Which a Per-program or Per-channel Charge is Made, 35 F.C.C.2d 893, 896-97 (1972) [hereinafter cited as Cablecasting—Program Charges]. Although the original filing deadline for comments on this proceeding was Sept. 29, 1972, the time limit was extended twice so that final comments were not required until Nov. 15, 1972. 37 Fed. Reg. 18401 (1972); 37 Fed. Reg. 21857 (1972). At the time that the commission adopted the 1972 cable rules, it had announced its intention to initiate this inquiry. Reconsideration of Cable Television Report and Order, supra note 222, at 353-54.

518. The FCC rejected formulation of the issues in terms of the basic desirability vel non of pay cable and phrased the issue as: "how pay-cablecasting can best be regulated to provide a beneficial supplement to over-the-air broadcasting without at the same time undermining the continued operation of that 'free' television service." Cablecasting—Program Charges 898.

pay cablecasting of sports events and movies. The importance of these issues has attracted a cast of powerful antagonists.[519] As to sports events, the commission already has indicated that it intends to impose greater restrictions, primarily by increasing from two to five years the period for which sports events of the type previously carried on broadcast television may not be pay cablecast.[520]

The commission's final decision on rules for pay cablecasting of movies was not, unlike its attitude to sports events,[521] preordained in the notice of inquiry into pay cable operations. The very restrictive nature of the existing rules on movies already has retarded the development of pay cablecasting,[522] and there is substantial pressure to liberalize these rules.[523]

---

519. The National Association of Broadcasters (NAB), The Association of Maximum Service Telecasters (AMST), the networks, individual broadcast stations, and the National Association of Theatre owners (NATO) generally favor adding major restrictions to pay cable programming. On the other hand, the National Cable Television Association (NCTA), assorted cable interests (especially equipment manufacturers), the Motion Picture Association of America, Inc. (MPAA), and the Justice Department have filed comments requesting the liberalization of the rules. See 12 Weekly TV Digest, Nov. 6, 1972, at 5; Cablecasting—Program Charges 894-96.

520. This increase in the time period and a number of other restrictions previously were applied by the FCC to broadcast subscription television. Report and Order on Showing of Sports Events, 34 F.C.C.2d 271 (1972). In the inquiry on new pay cablecasting rules, the commission announced that it planned to adopt for pay cable operations the more restrictive rules that it had applied recently to over-the-air subscription television. Cablecasting—Program Charges 898.

521. The commission is, of course, very sensitive to the broadcasters' claims that pay cablecasting will deprive the public of "free" televising of professional sports in light of the tremendous popularity of these programs with the general public and with high ranking government officials.

522. It is reported that the lack of movies rather than technical difficulties has been the major problem in initiating pay cablecasting operations. 12 Weekly TV Digest, Sept. 25, 1972, at 6; id., May 22, 1972, at 4.

523. The Motion Picture Association of America (MPAA), the Association of Motion Picture and Television Producers, Inc., and nine producers and distributors of motion pictures have questioned the restrictive nature of the present rules. Cablecasting—Program Charges 895. The President of the MPAA has argued that pay cable will be the salvation of the troubled movie industry. 12 Weekly TV Digest, July 24, 1972, at 4. Although the cable industry also vigorously supports liberalization of the movie rules, some disunity has been introduced by the advent of closed circuit distribution of movies to hotels and large apartment houses. See Tomasson, Tenants Get In-House TV, and a Super as Late Man, N.Y. Times, Oct. 22, 1972, § 8 (Real Estate), at 1, col. 1 (apartment house closed circuit television); N.Y. Times, Oct. 25, 1972, at 94, col. 4 (hotel closed circuit). While the movie producers (and their telephone carriers) stand to gain from the wider distribution of their product through closed circuit operations, the cable industry feels threatened by this competition. See 12 Weekly TV Digest, July 17, 1972, at 4. It is reported now that the FCC intends to authorize closed circuit movie distribution, but films older than two years may not be used

Notwithstanding strong support for tighter regulation of movie pay cablecasts by theatre owners and broadcasters,[524] it is reasonable to expect that the FCC will liberalize to some extent the rules on pay cablecasting of movies.[525]

Although the FCC's final decision on the parameters of pay cablecasting of sports events and movies will have a major effect on the rate of development of pay cable operations,[526] the fact that the pay cable controversy is centered around the presentation of movies and sports to the exclusion of the other possibilities for pay cablecasting[527] is indicative of the type of programming that can be expected on pay cable channels in the future. Most of the initial pay cable operations undertaken in 1972 have emphasized sports and movies,[528] and there is strong indication that this type of programming will be the mainstay of pay cablecasting.[529] The emphasis of the industry is reinforced by the public's interest primarily in paying for more programming of the type already available on conventional television.[530]

---

and all authorizations will be conditioned on the outcome of the pay cable proceedings. Id., Dec. 4, 1972, at 3; id., Nov. 13, 1972, at 3-4.

524. Cablecasting—Program Charges 894-96. The Association of Maximum Service Telecasters would have the FCC ban pay cablecasting of all motion pictures that have been in theatrical release for more than one year. Id. at 895.

525. The phrasing of one of the specific questions raised by the FCC in its inquiry of pay cablecasting suggests a receptive attitude toward providing a larger market for the movie industry on cable television; to wit: "[h]ave there been significant and relevant changes in the motion picture industry that should be reflected in the rules?" Cablecasting—Program Charges 898.

526. If the FCC liberalizes the movie rule, there will be a larger number of existing films for immediate use in the development of pay cablecasting. Even if the commission makes the rule more restrictive and thus reduces the number of already produced films available for pay cable, the cable operators can still induce the movie producers to provide films especially for cable television, much as film makers have recently undertaken production intended directly for television broadcast rather than theatre distribution.

527. See text accompanying note 504 supra.

528. See, e.g., N.Y. Times, Oct. 24, 1972, at 86, col. 1 (pay TV on Long Island offers basketball and hockey); 12 Weekly TV Digest, Sept. 25, 1972, at 6; id., Sept. 11, 1972, at 3; id., Sept. 4, 1972, at 4.

529. See Ledbetter & Greene, An Overview of Pay Cable Television, 2 Yale Rev. L. & Social Action 209, 211 (1972) [hereinafter cited as Ledbetter & Greene]. The attitude of the industry is that movies will be the "bread" of pay cablecasting, but that other material like plays and opera will be necessary to create credibility for pay cable operations. 12 Weekly TV Digest, May 22, 1972, at 4.

530. The FCC's test of over-the-air subscription television in Hartford, Conn., resulted in much less cultural and far more general entertainment programming than had been expected; e.g., in the first two years over 86 percent of the programming consisted of movies. Ledbetter & Greene, supra note 529, at 210; McGowan, Noll & Peck, supra note 407, at 34. A survey conducted for Hughes Aircraft in anticipation of its plan for eight channels

In light of the cable industry's emphasis on movies and sports and the public's demand for the same, expectations for diverse television programming through the mechanism of pay cablecasting must be tempered.[531] When interconnection provides a large cable audience base, the incentive will be to program the channels with entertainment, movies, and sports which will attract the largest audience and hence the highest pay revenues. With the FCC's required twenty channel capacity in major market cable systems and the possibility of eight interconnected channels,[532] there should be some room for the development of pay cablecast programs directed to minority tastes. However, the minority tastes gratified by pay cablecast programming will be those that can provide the most revenues.[533] The full range of diversified television programming that pay cablecasting promises will have to await the development of a much larger interconnected channel capacity.

C. *The Impact of Cablecasting*

The FCC has made the decision that cablecast programming should develop in conjunction with the continuation of the present system of

---

of interconnected pay cablecasting revealed that the public primarily was interested in more movies and sports. O'Connor, supra note 492; see note 499 supra.

531. In this light also, stricter anti-siphoning rules take on a new aura because, although they may inhibit the development of pay cablecasting, they also may force cable to avoid programming that duplicates broadcast television, or, in other words: "[b]y keeping CATV out of the market for kitsch, these rules may have the side effect of forcing cable to develop innovative programming. Removing cable's ability to buy mass appeal programming may, in fact, be the most effective means of making it offer truly diverse programming." Access to Cable Television, supra note 289, at 432 (footnote omitted) (emphasis omitted).

532. The Hughes Aircraft plan is for a satellite to provide eight interconnected channels. With a 20 channel capacity which must also carry broadcast signals and meet the public, education, and local government access requirements, eight channels would seem near the limit of interconnected channels that most cable systems could handle. See note 492 supra and accompanying text. Although Hughes will be required to offer its satellite facilities to other program producers, it is interesting to note that Hughes plans to offer its eight channels of "diverse" programming as a package to viewers on an overall subscription basis. This "package" approach certainly reflects a mass appeal programming rationale. See O'Connor, supra note 492. Hughes presumably will lease the eight channels from each cable system as the FCC has declined to impose any limit on the number of channels a particular group can use. Reconsideration of Cable Television Report and Order, supra note 222, at 356-57; contra, Sloan, supra note 2, at 143 (suggesting a two channel limit to any lessee).

533. Either large groups able to pay relatively small amounts or smaller groups willing to make higher payments will be able to bid successfully for programs that suit their taste, to the extent that the pay cablecast channels are not given over entirely to movies, sports, and general entertainment. The areas wired by cable systems determine the subscribers who can bid with their dollars. The pattern in New York City where affluent Manhattan, but not Brooklyn, has cable service suggests the class which will be involved, at least initially, in the

broadcast television.[534] Although some cable systems already have undertaken programming, and the reinstatement of the origination cablecasting rule will require more programming in the near future, the bulk of cablecast programming and the required twenty channel capacity of the access cablecasting rules is not mandated until 1977. Since cable systems are just beginning to enter the major markets—and with only cautious financial support—the widespread availability of cablecast programming by 1977 is certainly open to question. Nevertheless, it is clear that cable will rise above its current ten percent penetration rate and that much of the growth will be in the major centers of population.

The cablecasting rules imposed by the commission will expand both the quantity and the diversity of television programming. The public, education, and local government access cablecasting requirements will permit persons, groups, and institutions excluded from broadcast television to become television program producers. When cable systems increase their penetration, interconnection will provide a relatively large audience base for professional program producers on the origination and leased access channels. The key to diversity of professional programming will rest with the institution of a system of pay cablecasting and with the availability of a sufficient number of interconnected channels to encourage pay cablecasters to move beyond the public demand for more conventional programming (*e.g.*, movies) to programming for minority tastes.[535]

Although cablecasting promises the gradual development of diversified television programming, it does not promise a solution to the problem of access to the mass media for minority views and expression. Public access cablecasting will provide a television outlet for minority views only to the extent that an adequate, independent source of financing program production costs can be devised. The unsophisticated, low-cost programming of these channels cannot be expected to draw large audience shares in competition with the professionally produced programming on the numerous other cable channels. Indeed, the viewing of public access programs will be confined largely to the very groups at which it is directed.[536] The other

bidding process. Thus, it is reasonable to expect that there will be professional programming for doctors and culture for the upper middle class before there will be pay cablecast programs for ethnic or racial minorities.

534. See note 245 supra; text accompanying note 341 supra; note 518 supra.

535. Pay cablecasting is gaining increasing recognition as the key to growth and development of cable television. See MacGregor, Pay-TV May Hold Key to Cable-TV's Future in Vast Urban Market, Wall St. J., May 17, 1973, at 1, col. 6.

536. In this respect, public access programming may have the effect of reinforcing social differences rather than tempering social malaise by providing an outlet for frustrations. It is also in this regard that the social utility of building cable subsystems (see note 366 supra)

principal source of diversity in cable television programming—pay cablecasting—does not offer any greater promise for mass exposure of minority tastes and expression. Although a nationally interconnected, large cable audience will provide the incentive to produce programs appealing to minority tastes,[537] pay cablecast programs by definition will be available only to those viewers who make special subscription payments. The diversity of television programming created by pay cablecasting will not be available simply by switching the dial, and the minority tastes and views that are aired on pay cablecast programs will be viewed only by that limited public which paid for them. In the midst of this diversity of television programming, there will, however, remain some true mass media channels.[538] Only the programs presented on these channels will receive wide exposure to a mass audience.

Cable television will provide an abundance of channels and diversity of programming but will not in itself resolve the problem of mass exposure for minority views. This fact raises an important question as to the type of communication valued by the society and the extent of government regulation appropriate to achieve the society's goals.[539] If as a society we are only interested in assuring that most groups have outlets for expression, then the technology of cable television has the capacity to take us a long way toward our goal. With the large number of channels that cable provides, government regulation can be confined to supervision of tech-

---

for discrete communities rather than for heterogeneous sections of a city has been questioned. See Yin, Cable Systems and the Social Geography of Dayton, in Dayton Report, supra note 16, at IV-6, -7; Access to Cable Television, supra note 289, at 426 (role of mass appeal programming in uniting a society).

537. Even under the most favorable conditions of a very high interconnected channel capacity and a high penetration rate, the minority tastes that successfully bid for pay cablecast programming are unlikely to include the smallest and poorest groups in the society.

538. Initially, the channels of mass exposure will be the channels carrying the broadcast signals of the networks. Even if cable achieves 100 percent penetration ("the wired nation"), it is reasonable to expect that the broadcasters simply will switch to interconnected cable channels and that advertisers will continue to be interested in mass appeal programming. In other words, it seems likely that in a mass society there will always be a mass television media.

539. The question is raised inescapably because the traditional basis of government regulation of program content in broadcast television, the scarcity of broadcast frequencies, is hardly applicable to cable television. See, e.g., Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 387-90, 396-401 (1969); National Broadcasting Co. v. United States, 319 U.S. 190, 226 (1943). Nevertheless, the FCC has given almost no consideration to either the inapplicability of the scarcity rationale or the type of regulation appropriate for the television medium as it is affected by cable. See Grant of Authorizations, supra note 143, at 310; id. at 330 (Loevinger, Comm'r, dissenting); First Report and Order on Origination, supra note 332, at 222 n.27.

nical standards and to such matters as the maintenance of open access to public channels and non-discriminatory rates for the leased channels. If, however, the society also places a value on exposing the majority to minority views, then it will remain important to assure that minority views are given exposure on the mass media channels of cable television.

A goal of assuring exposure of minority viewpoints on the mass media channels of cable television requires a brief consideration of the three doctrines by which the FCC has regulated broadcast television programming and an evaluation of the desirability of retaining these rules in cable's future era of abundance. The three traditional doctrines invoked by the commission to achieve presentation of minority viewpoints and interests in broadcast television are the "balanced programming" concept, the fairness doctrine, and the equal time provision.[540] Under the concept of balanced programming, the commission has outlined the type of programs to be provided in the public interest by broadcast station licensees[541] and has attempted to obtain compliance through the grant and renewal of broadcast licenses.[542] The fairness doctrine requires that broadcast stations present discussions of public issues and that each side of the issue be given fair coverage.[543] Under the equal time provision of the Com-

540. Two short discussions of the FCC's regulation of broadcast television may be found in Robinson, The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation, 52 Minn. L. Rev. 67, 97-150 (1967), and Note, Regulation of Program Content by the FCC, 77 Harv. L. Rev. 701 (1964).

541. The FCC's initial statement on programming balance was set forth in 1946. FCC, Public Service Responsibility of Broadcast Licensees (1946). In 1960, after emphasizing that responsibility for program selection rested with the individual station, the commission indicated that the major elements of programming necessary to serve the public interest of the local station's community would include: "(1) Opportunity for Local Self-Expression, (2) The Development and Use of Local Talent, (3) Programs for Children, (4) Religious Programs, (5) Educational Programs, (6) Public Affairs Programs, (7) Editorialization by Licensees, (8) Political Broadcasts, (9) Agricultural Programs, (10) News Programs, (11) Weather and Market Reports, (12) Sports Programs, (13) Service to Minority Groups, (14) Entertainment Programming." Report and Statement on Programming Policy, 20 P & F Radio Reg. 1901, 1913 (1960). More recently, the FCC outlined a proposal to test the local station's provision of "substantial service" by the percentage of programming devoted to local news, and public affairs programming. Notice of Inquiry into Formulation of Policies Relating to the Broadcast Renewal Applicant, 27 F.C.C.2d 580, 580-83 (1971).

542. Robinson, The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation, 52 Minn. L. Rev. 67, 114-21.

543. The fairness doctrine has its source in a 1949 Commission report. Report of the Commission on Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1257-58 (1949). Under this doctrine, the FCC has issued its "personal attack" and "political editorializing" rules. The former provides that when a personal attack is made on a figure involved in a public matter, the individual must be offered a reasonable opportunity to respond over the station's facilities. The latter rule maintains that when a candidate is endorsed in an editorial by the television

munications Act of 1934, a broadcast station which permits a candidate to use its facilities must afford an equal opportunity to all other candidates for the same office.[544]

With the introduction and growth of cable television, only the balanced programming concept can be abandoned without jeopardizing a mass media forum for minority views. The imposition of a balanced programming concept to guarantee a variety of television programs will be superfluous in a situation where a large number of program producers are competing for viewers' attention and support. The fairness doctrine and the equal time provision, on the other hand, should remain applicable to the mass media channels of cable television.[545] Without a requirement that both sides of an issue be given fair coverage or absent a requirement that a candidate have an opportunity to reply, there is a distinct possibility that a large percentage of the population would be exposed only to majority positions. In light of the potential availability of minority viewpoints on the other, limited-viewer channels of cable television, it is tempting to argue that no group has a right to force its ideas upon an unwilling viewer of the mass media cable channels. Nevertheless, the "First Amendment goal of producing an informed public capable of conducting its own affairs"[546] is better served by positive regulations which will encourage the exposure of minority views on the mass media channels of cable

---

station, other candidates or their spokesmen must be offered a reasonable opportunity to reply. 47 C.F.R. § 73.679 (Oct. 1972). The fairness doctrine and these regulations were sustained by the Supreme Court against a first amendment challenge in Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 375 (1969).

544. 47 U.S.C. § 315 (1970); 47 C.F.R. § 73.657 (Oct. 1972).

545. The FCC, albeit without the specific intention, has adopted this course because the mass media channels of cable—the channels carrying broadcast signals—are subject to the fairness and equal time requirements. The development of cable television will eventually create a difficult problem of defining the "mass media cable channels." To the extent that the analysis herein is followed, there may also be potential claims of unequal treatment by operators of the cable channels subject to the fairness and equal time rules. One commentator has argued that the fairness doctrine should be applied to broadcast stations during the period that they coexist with cable, thus, apparently recognizing the continued existence and importance of the mass media channels. However, the further argument that the eventual transition of broadcasters to major channel lessees on the cable would eliminate the necessity of a fairness rule (except for a transition period) neglects the fact that there would still be mass media channels in cable television. Note, Cable Television and the First Amendment, 71 Colum. L. Rev. 1008, 1037 (1971). The fact that the FCC has applied the fairness and equal time rules to the origination channels (see text accompanying notes 396-401 supra), but not to a large number of interconnected channels that will be under one organization's control (see notes 477, 532 supra), indicates that the commission has not yet conceived of the problem of exposure of minority views in terms of identifying the mass media channels.

546. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 392 (1969).

television. As unpalatable as mandated presentation of minority positions may seem in the context of cable's promise of diversity, the society can eschew government regulation of cable's mass media channels only at the cost of potentially further isolating the majority from the inputs of minority opinion.