Access to Cable Television

Michael Botein
New York Law School, michael.botein@nyls.edu

Follow this and additional works at: http://digitalcommons.nyls.edu/fac_articles_chapters
Part of the Communications Law Commons, and the Science and Technology Law Commons

Recommended Citation
57 Cornell L. Rev. 419 (1971-1972)
ACCESS TO CABLE TELEVISION

Michael Boteint†

Ever since cable television1 (CATV) first began to attract a significant number of subscribers,2 the Federal Communications Commission has been preoccupied with cable's least novel but most politically important capability: importation of distant signals.3 The Commission has adopted a series of artificial tactics to delay cable's growth. In 1966 it promulgated rules barring cable television systems from importing distant signals unless authorized after a lengthy evidentiary hearing;4

† Ford Urban Law Fellow, 1971-72, Columbia University; Assistant Professor of Law, Brooklyn Law School. B.A. 1966, Wesleyan University; J.D. 1969, Cornell University.

1 Cable television is also known as community antenna television (CATV)—a name which indicates its origin as a means of providing television signals to areas that could not receive over the air television broadcasts. A cable television system has four main components. (1) Television signals are received by an antenna or a microwave relay system, or are originated at some local point. (2) The signals are relayed to a "headend," where they are amplified and sometimes changed in frequency. (3) They are then sent out over trunk and feeder lines to different areas of the community. (4) Finally, drop lines carry the signals from the trunk or feeder lines into each subscriber's home. For a simple but accurate description of the process, see Knox, Cable Television, SCIENTIFIC AM., Oct. 1971, at 22.

2 In 1963, roughly 1,000 cable television systems had a total of 950,000 subscribers. As of 1970 there were 2,799 cable systems with 4.4 million subscribers. 1971 BROADCASTING YEARBOOK 14 (1971).

3 A distant signal is the signal of a television station which does not normally reach the CATV's community. Under the FCC's new cable rules (Fourth Report and Order, 37 Fed. Reg. 3251 (1972)), there are a number of alternative tests for determining whether a signal is local or distant, depending on the size of the market. Id. at 3284-85. A television station's signal is measured by three main standards of increasing coverage and decreasing signal quality: (1) principal community contour, (2) Grade A contour, (3) Grade B contour. 47 C.F.R. §§ 73.683(a)-.685(a) (1971). Each contour varies in relation to the transmitting station's power, frequency, antenna height, and so forth.

4 Second Report and Order, 2 F.C.C.2d 725 (1966). 47 C.F.R. § 74.1107 (1971) put the burden on a cable television system to show that importation of distant signals into the 100 largest television markets would "be consistent with the public interest, and specifically the establishment and healthy maintenance of television broadcast service in the area." Though the rule was by its terms applicable only to the major markets, a combination of two other rules resulted in the imposition of a virtually identical requirement for markets below the top 100. Under id. § 74.1105, a cable system was required to give notice to local television stations before importing distant signals; if a petition opposing the planned importation was filed (id. § 74.1109) within 30 days of the notice, the system was not allowed to begin the service until the Commission had instituted proceedings and rendered a decision. As a practical matter, a petition quickly followed the filing of a notice. See Memorandum Opinion and Order, 6 F.C.C.2d 309, 339 (1967) (dissenting opinion). The Supreme Court refused to review a decision upholding the validity of the automatic stay provision. Bucks County Cable TV, Inc. v. United States, 427 F.2d 438 (3d Cir. 1970), cert. denied, 400 U.S. 831 (1970).
only one of these hearings was ever actually completed.\textsuperscript{5} When this approach began to look like footdragging, the Commission in 1968 initiated, by way of proposed and "interim" regulations,\textsuperscript{6} a requirement that cable systems obtain unobtainable "retransmission consent" of stations broadcasting distant signals.\textsuperscript{7} When this in turn started to resemble poaching on congressional copyright territory,\textsuperscript{8} the Commission in 1970 effectively abandoned it by proposing as an "alternative" the "public dividend plan," under which cable systems would pay five percent of their subscription revenues to public television and substitute local stations' commercials on distant signals.\textsuperscript{9} Less than a year later, however, the Commission changed its signals once again and apparently dropped both the retransmission consent and public dividend plans. Having helped force a deal between cable and broadcasting interests,\textsuperscript{10} it has now allocated distant signal importation according to market size, subject to very stringent "exclusivity rights."\textsuperscript{11}

\textsuperscript{5} Midwest Television, Inc., 13 F.C.C.2d 478 (1968).
\textsuperscript{6} Notice of Proposed Rulemaking and Notice of Inquiry, 15 F.C.C.2d 417 (1968). The Commission stated that pending the conclusion of the proposed rule making, it would suspend proceedings under the 1966 rules and would process only applications consistent with the proposed rules. The decision provoked internal Commission dissension and was alleged to have violated the publication requirements of the Administrative Procedure Act (5 U.S.C. §§ 552-53 (1970)). CATV Interim Processing Procedures, 16 P & F RADIO REG. 2D 1517, 1530 (1969) (dissenting opinion).
\textsuperscript{7} Under the retransmission consent plan, to carry distant signals a cable system would have needed the permission of the stations broadcasting them. Even if stations were inclined to grant such permission, they were usually not contractually free to do so. See Botein, \textit{The FCC's Proposed CATV Regulations}, 55 \textit{Cornell L. Rev.} 244, 246-47 (1970).

To date, apparently only one cable system has been able to get retransmission consent even on an experimental basis. Top Vision Cable Co., 26 F.C.C.2d 869 (1970); 23 F.C.C.2d 958 (1970); 18 F.C.C.2d 1051 (1969). In fact, the Commission probably never intended to grant interim authorization in more than a very few situations. \textit{Hearings on Regulation of CATV Systems Before the Subcomm. on Communications and Power of the House Comm. on Interstate and Foreign Commerce}, 91st Cong., 1st Sess. 17 (1969) (statement of R. Hyde, Chairman, FCC).
\textsuperscript{8} See Botein, supra note 7, at 252.
\textsuperscript{10} On November 11, 1971 the National Cable Television Association, National Association of Broadcasters, and Association of Maximum Service Telecasters signed a distant signal pact under the sponsorship of the Commission. See Botein, \textit{Cable TV: A One-Degree Thaw in the Freeze?}, N.Y.L.J., Nov. 29, 1971, at 1, col. 1.
\textsuperscript{11} Fourth Report and Order, 57 Fed. Reg. 3251 (1972). The new rules are basically an amalgam of the cable-broadcaster pact (note 10 supra) and the Commission's 1971 letter of intent to the Congress (22 P & F RADIO REG. 2d 1759, 1761-65 (1971) (letter from Dean Burch, Chairman, FCC, to the Subcomm. on Communications of the Senate Comm. on Commerce, August 5, 1971) [hereinafter cited as Burch Letter]). Although they allow importation of two independent distant signals into the major markets, the new rules allow broadcasters to prevent carriage of any given program by contracting with copyright owners for exclusivity. 57 Fed. Reg. at 3286.
The cable freeze is a fact of life which everyone except the Commission acknowledges.\(^\text{12}\) The tactic is not new to the Commission, however, and has traditionally been favored by regulators faced with a new technology;\(^\text{13}\) a freeze was once applied to radio by the Secretary of Commerce,\(^\text{14}\) and then later to television by the FCC.\(^\text{15}\) The CATV freeze, however, has transformed the distant signal issue into a political question. In the process, the Commission has largely lost sight of cable's ability to develop innovative services and programs.

Since cable television can potentially provide extremely diverse programming, it poses a number of thorny regulatory problems. The desirability of increased diversity may be open to question; but even if it is not, effective methods to ensure diversity on cable television have not yet emerged. Conventional modes of broadcast regulation appear at best inappropriate and at worst futile. Regulation of cable ownership is more promising, but not the ultimate solution. Only an enforceable right of access will guarantee that all programmers can use the cable and, conversely, that viewers will see a wide range of programming. Implementing a right of access, however, is far more difficult than creating it. None of the three possible alternatives—marketplace regulation, administrative regulation, and formula regulation—is itself satisfactory. A combination of all three approaches thus seems most appropriate.

I

DIVERSITY, ACCESS, AND THE RIGHT TO HEAR

Although program diversity has always had a talismanic quality, the FCC has never adequately defined its form or the method for effectively achieving it. In lifting the television freeze,\(^\text{16}\) for example, the Commission set a goal largely incompatible with diversity—"maximum local service."\(^\text{17}\) The Commission established a frequency allocation

\(^{12}\) CATV Interim Procedures, 16 P & F Radio Reg. 2d 1517, 1529 (dissenting opinion); Hearings, supra note 7, at 76 (statement of F. Ford, President, National Cable Television Association); Botein, supra note 7, at 257.


\(^{14}\) See Minisian, The Political Economy of Broadcasting in the 1920's, 12 J. Law & Econ. 391, 396-97 (1969). The Secretary of Commerce continually discouraged applicants for radio licenses, refusing to issue them as late as 1926. Id.


\(^{17}\) Id. at 3912.
system that gave priority to applicants who would serve areas not served by any other station. This noble plan turned out to be a notable flop. The "UHF handicap"—the poor signal quality of ultra high frequency (UHF) stations and the lack of UHF tuners on most television receivers—apparently scared away potential applicants who calculated that UHF stations would get smaller audiences than very high frequency (VHF) stations. Even the All-Channel Receiver Act\textsuperscript{18} and the resulting increase in UHF set penetration\textsuperscript{19} failed to encourage many investments.\textsuperscript{20} But although most observers have abandoned the plan,\textsuperscript{21} the Commission still remains wedded to its dead or dying goals\textsuperscript{22} and has somewhat fanatically sought to preserve them, even to the point of authorizing translator and satellite transmitters to fill in the white areas left by unbuilt UHF stations.\textsuperscript{23}

Responsibility for this debacle cannot, of course, be laid solely at the Commission's door. Commissioner Nicholas Johnson recently remarked that the basic problem is attributable to the economic structure of broadcasting, a fact which cannot be changed for all the "vast wasteland speeches" in the world.\textsuperscript{24} Advertising revenue is, of course, a broadcaster's lifeblood, and advertisers pay only on the basis of the number of viewers. As Marshall McLuhan has noted, advertisers "would gladly pay the reader, listener, or viewer directly for his time and attention if they knew how to do so."\textsuperscript{25} Broadcasters thus operate under an economic imperative to cast their appeal broadly\textsuperscript{26} and to avoid offend-

\textsuperscript{19} By 1970, 68% of all television sets could receive UHF signals. W. Jones, Regulation of Cable Television by the State of New York 13 (N.Y. Pub. Serv. Comm'n 1970) [hereinafter cited as Jones].
\textsuperscript{22} The Commission seems to feel that because of the investment the nation has made in UHF sets and stations—a figure which Webbink sets at $6,000,000 per UHF station (Webbink, supra note 20, at 552-53)—CATV cannot be allowed to destroy UHF. Notice of Inquiry and Notice of Proposed Rulemaking, 1 F.C.C.2d 453, 469 (1965). The Commission fails to recognize that its own insistence on UHF's success has created this very investment.
\textsuperscript{23} Further Notice of Proposed Rulemaking and Notice of Inquiry, 8 F.C.C.2d 569 (1967); Memorandum Opinion and Order, 1 F.C.C.2d 15 (1965).
\textsuperscript{24} Junker, The Greening of Nicholas Johnson, Rolling Stone, April 1, 1971, at 32.
\textsuperscript{25} M. McLuhan, Understanding Media: The Extensions of Man 185 (1964).
ing viewers—the kitsch factor. In its infancy, radio idealistically eschewed advertising in favor of public service. The harsh facts of economic life, however, almost immediately forced broadcasters to accept advertising and thus advertiser sovereignty, a situation now actively perpetuated by the networks and the National Association of Broadcasters. Moreover, the quest for mass appeal is common not just to broadcasting, but to all mass media. As newspapers, magazines, and motion pictures came of age, each in turn surrendered to the requirements of mass appeal to maximize profits.

As a result, broadcasters engage in a rigorous form of self-censorship. Compounding the irony, they invoke the first amendment to oppose any requirements which might reduce their mass appeal and hence their advertising revenue. But there are now faint signs of change. Commentators have posited a first amendment right of access to the mass media and, correlatively, a first amendment right to hear. The

30 N. Minow, Equal Time: The Private Broadcaster and the Public Interest 40 (1964); Bryant, supra note 29, at 622-29.
31 See Hearings, supra note 7, at 307 (testimony of D. Anello, General Counsel, National Association of Broadcasters). In fact, it appears that the NAB's initial call for broadcasters to avoid programming on controversial issues was prompted by advertisers.
33 See Wood, Magazine Publishing Today, in id. 172, 174-76.
34 See Inglis, The Social Role of the Screen, in id. 204, 205-10.

The broadcasters' selective invocation of the first amendment is shown by their willingness, and even enthusiasm, to accept radical restrictions on their range of expression, as long as the expression involved is not profitable. Thus the Commission's famous Mayflower ban on radio editorializing (Mayflower Broadcasting Corp., 8 F.C.C. 335 (1940)) went unchallenged and was apparently welcomed by broadcasters. See L. White, supra note 28, at 177; Sullivan, Editorials and Controversy: The Broadcaster's Dilemma, 32 Geo. Wash. L. Rev. 719, 735-36 (1964); but cf. Note, The Mayflower Doctrine Scuttled, 59 Yale L.J. 759 (1950).
labels are unimportant, however, since each formulation is just an alternative means of approaching the same problem of diversity. Although the courts have yet to accept these broad rights, in recent years the Supreme Court has shown an increasing concern with access, at least by way of dictum.38 The courts appear at least ready to uphold regulatory provisions favoring diversity against traditional attacks based on first amendment slogans.39

Expecting traditional broadcasters to change their orientation at this late date without a total industry restructuring would be unrealistic. As a new and accordingly malleable medium, however, cable television can be styled to provide a quantum jump in diversity. The problem thus is to ensure that it does so.

Broadcast technology restricts a television station to only one channel, but cable technology allows a cable system to have a still undetermined maximum number of channels. Few existing systems actually operate more than twelve channels,40 but forty or fifty channel capacities are technologically feasible even now.41 CATV thus makes it possible to shift communications from an economy of "scarcity"42 to one of "abundance."43 The traditional kitsch factor accordingly becomes unnecessary and perhaps even unprofitable;44 conversely, catering to specialized interests becomes economically feasible.

Cable television is not, however, the Übermensch of the communications world. Cable's development of new communications services has been touted too highly45 by both members of the industry and inhabitants of the wasteland.46 Thus, two-way communications services between subscribers are not likely to be available in the near future; the

40 Only 157 out of 2,578 CATV systems have more than 12-channel capability. 41 TELEVISION FACTBOOK: SERVICES VOLUME 82-a (1971).
41 Burch Letter 1771-72.
42 See text accompanying note 275 infra.
43 Burch Letter 1771.
44 See notes 117-19 and accompanying text infra.
necessary switching and filtering equipment is far beyond current or even envisioned cable capabilities. Even the most optimistic planner must contemplate working with a high capacity but—aside from limited nonvoice feedback—essentially one-way system.

The FCC has, of course, long recognized CATV's ability to provide program diversity, and it has become increasingly aware of possible new services. Although at one point the Commission was apparently attempting to equate cable with subscription television, more recently it has taken limited steps towards exploiting its capabilities. In doing so it has, unfortunately, only barely suggested the dimensions of the diversity problem.

Even assuming that the Commission is capable of styling cable's growth to create maximum feasible diversity, the ultimate problem is whether it should bother to do so. "Diversity," "access," and "the right to hear" are attractive slogans, but they may be devoid of any real meaning. The McLuhan attitude would presumably dismiss any effort to encourage diversity as just another futile attempt to control the uncontrollable. The logical extension of this reasoning, however, would simply be to cashier the whole Commission and save the taxpayers some money, a notion not without a certain appeal. Even McLuhan might stop short of such reasoning, however, since the only method of medium control he acknowledges is a change of medium, which CATV certainly represents.

In addition, even if not foredoomed to failure, attempts to promote diversity may not be desirable. The short answer to the quest for diversity may simply be that the public, as distinguished from the often obscure "public interest" which the Commission administers, gets kitsch because it wants kitsch. As one commentator has noted, it may be unfair to "reproach the television industry for the immorality of

47 See Jones 176-80.
50 See text accompanying notes 104-19 infra; see also Burch Letter 1171-72.
51 See Botein, supra note 7, at 257-58.
52 See text accompanying notes 104-19 infra.
53 M. McLuhan, supra note 25, at 52.
54 See generally id. at 7-8.
55 Blank, supra note 26, at 449-50.
Many people are satisfied with one source of programming, and even minority groups may prefer soothing trivia to disturbing "social realism." More important, tailoring programs to individual preferences may only facilitate the isolation of already alienated individuals. Diversity may be only an elitist slogan and mass appeal programming may be necessary partly to hold society together.

Our society is fundamentally pluralistic, however, and thus must tolerate and promote diversity. Diversity is a double-edged concept, important not only to those receiving communication but also to those seeking to communicate. Inability to communicate may lead to frustration, and frustration may lead to violence. A riot, the late Doctor Martin Luther King said, is the "language of the unheard." The Kerner Commission indicted the media precisely for contributing to this frustration, noting that "the communications media, ironically, have failed to communicate." Moreover, airing diverse views may enable society eventually to understand and thus resolve its divisions; increased cultural diversity may also result. Though the cries to improve the quality of television programming may well be elitist in nature, cable television's huge channel capacity may allow it to serve a wide variety of individual tastes, from opera to minority group drama to motorcycle races.

If CATV can provide increased diversity, the problem is to ensure that it does so. There are, in fact, a number of available alternatives.

59 Barrow & Mannell, Communications Technology—A Forecast of Change (Part II), 54 LAW & CONTEMP. PROB. 431, 444 (1969). On the other hand, regular television programming may have already created its own distinct dependency. G. Steiner, The People Look at Television 25, 37, 99 (1963). One of Steiner's subjects remarked, "When [the set] is out of order I feel like someone is dead." Id. at 25.
60 Television has traditionally been less desired and viewed by the more affluent and better educated segments of the population. Roper Organization, Inc., An Extended View of Public Attitudes Toward Television and Other Mass Media 1959-1971, 5-6 (1971). The classic study of viewer attitudes found a marked disparity between what programs the more affluent and better educated viewers thought television should provide and what they actually chose to watch. G. Steiner, supra note 59, at 158-60.
61 See Address by R. Jencks, supra note 58.
63 Quoted in Johnson 101.
64 National Advisory Comm'n on Civil Disorders, Report 210 (1968).
In four decades of regulating single-channel broadcasting, the FCC has, of necessity, adopted a number of devices to encourage diversity. Most have promoted this goal only indirectly, however, and all have been administered somewhat less than enthusiastically.

First, the Commission has always required a potential licensee to show that it will provide better service than any competing applicant.\(^{65}\) Though fine in theory, comparative licensing hearings have never worked for a variety of reasons, most of them attributable to the FCC itself. The Commission has never bothered to enumerate the relevant comparative factors,\(^ {66}\) and has often applied its existing broad criteria inconsistently.\(^ {67}\) To compound this confusion, comparative hearings have often reflected a degree of political influence.\(^ {68}\)

Thus the CATV comparative hearing requirement proposed by some observers\(^ {69}\) might do little to encourage diversity. A Commission unable to discharge its existing obligations adequately\(^ {70}\) is unlikely to be capable of effectively licensing several thousand more entities.\(^ {71}\) Perhaps in recognition of this inability, the FCC until recently left all questions of character qualifications to the discretion of the local cable...
franchising authorities;\textsuperscript{72} the new regulations, however, specify that the franchising authority must evaluate the applicant's character after a "full public proceeding affording due process."\textsuperscript{73} Recent disclosures of corruption in cable franchising\textsuperscript{74} indicate that the local level may be more rife with undue influence than the federal level.

Second, the Communications Act always required the FCC to consider petitions opposing renewal of a station's license.\textsuperscript{75} But if comparative hearings are ineffective at times, renewal proceedings are almost farcical. Broadcasters treat their licenses as vested rights,\textsuperscript{76} not as the privileges which they are by law.\textsuperscript{77} Thus when an undermanned Commission\textsuperscript{78} after twelve years of litigation finally refused to renew the license of WHDH-TV,\textsuperscript{79} it unnerved many broadcasters. Under threat of impending legislation,\textsuperscript{80} a reconstituted Commission immediately sought to immunize licensees from challenges,\textsuperscript{81} only to be reversed, in what has become a familiar scenario, by the District of Columbia Circuit.\textsuperscript{82} Basically the same drama has been performed with license transfers.\textsuperscript{83} The Commission recently proposed a requirement that renewal applicants submit a survey of their communities' programming needs;\textsuperscript{84}


\textsuperscript{73} Fourth Report and Order, 37 Fed. Reg. 3251, 3281 (1972).

\textsuperscript{74} See, e.g., N.Y. Times, April 21, 1971, at 95, col. 2; \textit{id.}, March 28, 1971, at 31, col. 1; \textit{id.}, March 24, 1971, at 78, col. 6. In October 1971, Irving Kahn, president of TelePrompTer, the largest of the CATV franchisers, was convicted of bribing local Pennsylvania officials. \textit{Id.}, Oct. 21, 1971, at 1, col. 2.


\textsuperscript{76} \textit{Johnson} 20.


\textsuperscript{78} Only four commissioners participated in the WHDH decision, with one concurring and one dissenting. WHDH, Inc., 16 F.C.C.2d 1 (1969).

\textsuperscript{79} \textit{Id.}

\textsuperscript{80} S. 2004, 91st Cong., 1st Sess. (1969) was introduced by Senator John O. Pastore to overturn the WHDH precedent.

\textsuperscript{81} The Commission said that licenses would be renewed as long as the applicant could show that his performance had been "substantially attuned to meeting the needs and interests of [his] area"—admittedly a rather low standard. Policy Statement Concerning Comparative Hearings Involving Regular Renewal Applicants, 22 F.C.C.2d 424, 424-25 (1970) (footnote omitted). The Commission also made challenges even more difficult by refusing to approve out of pocket expense settlements between licensees and challengers. KCMC, Inc., 25 F.C.C.2d 603 (1970).

\textsuperscript{82} Citizens Communications Center v. FCC, 447 F.2d 1201 (D.C. Cir. 1971).

\textsuperscript{83} Citizens Comm. v. FCC, 436 F.2d 263 (D.C. Cir. 1970).

whether this only represents public relations, however, remains to be seen.

If the Commission's record in broadcast license renewals has been less than satisfactory, Commission control of cable franchise renewals would be totally ineffective in encouraging diversity, since franchises usually run for terms much longer than the statutory three-year license. Moreover, the Commission is no more able to handle this additional regulatory burden than comparative hearings.

Third, the Commission's fairness doctrine requires that broadcasters give reply time if they carry programs that express one side of a controversial issue. The scope of the fairness doctrine, always unclear, has been further obfuscated since the FCC held it applicable to cigarette advertisements but not to other product commercials. The doctrine requires broadcasters affirmatively to seek out opposing points of view only after one side of a controversial issue has been broadcast. As a result, many licensees effectively avoid the duty to provide reply time by remaining silent on particular controversial issues. Fairness

---


86 See Burch Letter 1781.


88 WCBS-TV, 9 F.C.C.2d 921 (1967); 8 F.C.C.2d 381 (1967). See also National Broadcasting Co., 30 F.C.C.2d 643 (1971), where the Commission held the doctrine applicable to advertising by the Standard Oil Company of New Jersey concerning the proposed Alaska pipeline.

89 In Friends of the Earth v. FCC, 449 F.2d 1164 (D.C. Cir. 1971), the court mandated for reconsideration a case in which the Commission had refused to extend fairness to automobile advertisements on the ground that it could find no rational distinction between the advertising of automobiles and cigarettes. See Note, The Fairness Doctrine, the Automobile, and Ecological Awareness: An Affirmative Role for the Electronic Media in the Pollution Crisis, 57 Cornell L. Rev. 121 (1971). The Commission has recently announced a full scale inquiry into the efficacy of the fairness doctrine. Notice of Inquiry, 30 F.C.C.2d 26 (1971).


92 A refusal to treat major issues might be regarded as a violation of a licensee's general public service responsibilities. See FCC, Report on Public Service Responsibility of a Broadcast Licensee (1946). The Commission has never taken this position, however. On the other hand, in Business Executives' Move for Vietnam Peace v. FCC, 450 F.2d 642
has been supplemented by "lifted eyebrow" regulation, but only to a limited extent.

The FCC has expressly applied fairness to cable-originated programs. But the doctrine's requirement of an initial one-sided statement makes fairness an inappropriate vehicle for providing diversity on cable's many channels; fairness may indeed create practical difficulties on a public access channel. In fact, the doctrine would actually provide proportionately less diversity on CATV than on broadcast television because of cable's greater channel capacity.

Finally, the Commission has always exerted subtle control over program content. The "Blue Book" lays down some general programming guidelines, although in practice it has proven too vague to be effective. Additionally, the FCC continually vacillates between a hands off policy, as with the "Selling of the Pentagon," and a heavy handed treatment of particular programming, as with the "drug lyrics" confusion. More recently, the Commission has proposed requiring minimum percentages of public service programs and has launched an inquiry into children's programs. These efforts may well turn out to be window dressing, however, owing to the subjective nature and administrative difficulty of program content control.

So far, the Commission's only attempt to shape cable programming has come somewhat indirectly, through the origination requirement (D.C. Cir. 1971), the D.C. Circuit broke new ground by holding that a potential user had a first amendment right to buy advertising time.

Sullivan, supra note 35, at 724. See also Note, supra note 68, at 703; Comment, The Federal Communications Commission and Program Regulation—Violation of the First Amendment?, 41 NEB. L. REV. 826, 886 (1962).


Text accompanying note 205 infra.


FCC, supra note 92.

Cox, supra note 26, at 594-96.


Licensee Responsibility To Review Records Before Their Broadcast, 28 F.C.C.2d 409 (1971). The Commission advised broadcast licensees that it expected them to examine, before broadcast, the selections played by the station and to make a "good faith" effort to ascertain the words or lyrics and their meaning. Later the Commission issued a clarification, in which it maintained that it had not meant to lay down a rule for licensees, but rather just to draw their attention to a matter within their discretion. Memorandum Opinion and Order, 21 P & F RADIO REG. 2d 1698 (1971).


See Jaffe, Program Control, 14 VILL. L. REV. 619 (1969); Note, supra note 37, at 881-82.

and the antisiphoning regulations.\textsuperscript{105} Although it appears to be an
article of faith\textsuperscript{106} that all cable systems with more than 3,500 subscribers
must originate their own programming "to a significant extent,"\textsuperscript{107} the
Commission as late as 1966 still opposed even voluntary cable origination.\textsuperscript{108} Like the National Association of Broadcasters,\textsuperscript{109} the FCC
apparently feared that cable would develop into subscription television,\textsuperscript{110}
which it was then attempting to freeze.\textsuperscript{111} The Commission has, how-
ever, now come full circle: it has not only authorized pay channels,\textsuperscript{112}
but has also criticized cable systems for not originating enough pro-
grams.\textsuperscript{113} After finally winning acceptance,\textsuperscript{114} though, origination has
turned out to be considerably more difficult and expensive than initially
expected.\textsuperscript{115} As a result, origination alone will not create diversity on
cable.\textsuperscript{116}

\textsuperscript{106} Burch Letter 1770.
\textsuperscript{107} The rule has been at least temporarily invalidated by Midwest Video Corp. v.
United States, 441 F.2d 1322 (8th Cir. 1971). For a discussion of that decision's validity,
see text accompanying notes 253-56 infra.
\textsuperscript{108} Second Report and Order, 2 F.C.C.2d 725, 765 (1966); First Report and Order,
38 F.C.C. 683, 751-52 (1965). Although the policy has now been changed (Fourth Report
and Order, 37 Fed. Reg. 3251, 3292-97 (1972)), the Commission also had made it difficult
for cable systems to originate their own programs when it prevented the use of the
Community Antenna Relay Service to send CATV-produced programs to a cable head-end.
Second Report and Order, 11 F.C.C.2d 709 (1968). By contrast, the Canadian Radio-
Television Commission very quickly and easily decided that origination should be en-
couraged. See Hearings, supra note 7, at 290-91.
\textsuperscript{109} See Hearings, supra note 7, at 289-92 (testimony of D. Anello, General Counsel,
National Association of Broadcasters).
\textsuperscript{110} Notice of Inquiry and Notice of Proposed Rulemaking, 1 F.C.C.2d 453, 474 (1965);
Memorandum Opinion and Order, 6 F.C.C.2d 309, 329 (1967) (dissenting opinion); Second
Report and Order, 2 F.C.C.2d 725, 808 (1966) (dissenting opinion).
\textsuperscript{111} In many ways, the history of subscription television is similar to that of CATV,
since both have been the victims of delaying tactics. For the tortured background of
subscription television, see Fourth Report and Order, 15 F.C.C.2d 466 (1968); Notice of
\textsuperscript{113} Id. See also N. Feldman, Cable Television: Opportunities and Problems in Local
Program Origination (1970); Ford Foundation, supra note 69, at 9-10.
\textsuperscript{114} Even Broadcasting, the journal of the broadcaster establishment, seems to regard
origination favorably. It has denounced cable systems for not originating to a greater
extent, although it may have the ulterior motive of relieving broadcasters of the pressure
to produce more public service programming. Broadcasting, May 10, 1971, at 66 (edi-
torial).
\textsuperscript{115} One observer found that even where cable systems had high penetration and
strong community support, local programming was difficult to create and finance. N.
\textsuperscript{116} Moreover, even if feasible, origination would result in only a limited increase in
diversity, since the FCC leaves content control in the hands of the cable owner. To create
more television "voices," cable systems must not just originate their own programming,
but must also carry programming from independent sources. For this reason some ob-
The antisiphoning rules, on the other hand, hold more promise, even though they were politically motivated and designed primarily to protect conventional broadcasting.\footnote{117 See Botein, supra note 72, at 833-34.} These rules prohibit cable systems from showing (1) films which have been released in movie theaters within two years prior to cablecasting, (2) sports events which have been broadcast over a local television station within two years,\footnote{118 In 1970, the Commission proposed lengthening the sports delay period to five years, apparently motivated by the threat of possible legislation. Notice of Proposed Rulemaking, 35 Fed. Reg. 11040 (1970).} and (3) conventional television serial programs. By keeping CATV out of the market for hitsch, 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.\footnote{119 See text accompanying note 172 infra.}

The tools that the Commission has forged to regulate broadcasting will promote little diversity on cable, not only because of their basic inadequacy, but also because of the quantitative and qualitative differences between the two media. New approaches are therefore necessary.

III

REGULATION OF MEDIUM OWNERSHIP

Regulating medium ownership is one means of indirectly regulating program content\footnote{120 JOHNSON 46; Cox, supra note 26, at 598-97.} and possibly avoiding the necessity of enforcing a right of access.\footnote{121 See Barnett, Cable Television and Media Concentration, Part I: Control of Cable Systems by Local Broadcasters, 22 Stan. L. Rev. 221, 247 (1970).} Medium ownership is an especially important issue today, because control of the mass media is highly concentrated. Many major newspapers, magazines, and broadcast stations are under common and often cross ownership.\footnote{122 Wood, Magazine Publishing Today, in MASS MEDIA AND COMMUNICATION 172, 173 (C. Steinberg ed. 1966); C. Sterling, Ownership Characteristics of Broadcasting Stations and Newspapers in the Top 100 Markets: 1922-1967 (NAB, March 1971).}

Common ownership and cross ownership are terms of art as used in mass communications. Common ownership means control of two or more of the same medium by one owner; cross ownership means control of two or more different media by the same owner. Thus a corporation which owns several newspapers and broadcast stations is both a common and a cross owner.

servers have seen the origination requirement, by itself, as an antidiversity factor. Brief for American Civil Liberties Union as Amicus Curiae at 8-9, Midwest Video Corp. v. United States, 441 F.2d 1322 (8th Cir. 1971).
only with the most noticeable symptoms of concentrated ownership. Real reform must wait for a basic restructuring of the media. 123

This problem is particularly acute with a new medium such as CATV. Owners of existing media have always shown a tendency to expand into any new medium they cannot destroy, 124 not only to profit from technological innovation, but also to neutralize possible competition. 125 Thus the first major investors in radio and television were, quite naturally, newspapers. 126 Such investment practices, however, inject capital but no new talent or attitudes into a new medium.

The current heavy cross ownership of cable is therefore not surprising. Perhaps fifty percent of existing cable systems are owned by telephone, broadcasting, or publishing interests. 127 Moreover, cross owners often control large or multiple system operations. In New York City, for example, Hughes Aircraft effectively controls TelePrompTer, which serves ten percent of the nation's cable subscribers, 128 and Time-Life owns a voting majority of Sterling's stock. 129

The effect of cross ownership on diversity is probably incapable of exact quantification. 130 Considering those instances in which cross owners' attempts to influence their media have been documented, 131 however, it seems fair to assume that cross ownership is generally an antidiversity factor. 132 Cross ownership of CATV is especially danger-

---

123 See Johnson 23.
124 See Wilcox, supra note 57, at C-17 to -18; Sterling, supra note 122, at 22.
126 See Head, supra note 125, at 278; Sterling, supra note 122, at 102-37.
127 41 Television Factbook: Services Volume 82-2 (1971) lists broadcaster ownership at 29.7%, telephone at 5.1%, and publishing at 6.8%. On the other hand, Jones gives figures of 36.5%, 5.8%, and 8.2% respectively. Jones 165.
128 Jones 164. Jones also notes that 20% of all subscribers are served by four CATV companies and 30% by eight. Id.
131 For example, IT&T exerted pressure to get favorable publicity for its merger with the American Broadcasting Company. See Johnson 55-57.
132 See Barnett, supra note 121, at 294; H. Levin, supra note 130, at 44. The theory is that cross owners are motivated not only to censor their media, but also to downgrade one medium in order to upgrade another. Thus the reasoning behind the Commission's ban on cable ownership by a local television station (note 136 infra) is that the owner will either hold back the cable system's development to protect his station or will
ous, since the owner controls not just one or two channels, but rather one or two dozen, and potentially, under a "wired nation" concept, all. Thus, the most basic step in ensuring cable diversity is to free it from the control of other media.

Only recently has the FCC begun to move in this direction. For obvious reasons broadcasters have always favored broadcast cross ownership of CATV, and at one point the Commission appeared to agree. More recently, however, the Commission has banned cable system ownership by networks, local television stations, and telephone companies. The efficacy of the prohibition seems doubtful. Some owners abandon the station in favor of the more profitable cable system. Though such monopoly conduct is attractive because of its relative ease, it may be economically irrational; the sophisticated cross owner can probably maximize his profits by fully developing both media along different and minimally competitive lines, for example, by providing traditional mass appeal programming on his television broadcasts and innovative and specialized programming on his cable system. Too many cross owners, however, are not so sophisticated about their self-interest and thus restrictions become necessary.

133 Smith, supra note 125, is responsible for this phrase which forecasts a nation in which every household has broadband cable service.

134 Hearings, supra note 7, at 297 (testimony of D. Anello, General Counsel, National Association of Broadcasters).

135 In its First Report, the Commission actually said that there is an element of unfairness in certain aspects of the competition offered by CATV systems to television broadcasting stations. Therefore it seems appropriate to permit this unfairness to be eliminated, in some cases, at least, by the union of the economic interests involved.

1 F.C.C.2d 387, 389 (1965). This attitude was abandoned in 1967 (see Notice of Inquiry, 7 F.C.C.2d 853 (1967); Order, 7 F.C.C.2d 856 (1967)) and comments on the general problem of cross ownership were solicited in the 1968 proposed rule making. Notice of Proposed Rulemaking and Notice of Inquiry, 15 F.C.C.2d 417, 426 (1968).

136 See Fourth Report and Order, 37 Fed. Reg. 3251, 3290 (1972). In Allied Broadcasting, Inc. v. FCC, 455 F.2d 68 (D.C. Cir. 1970), the court upheld the Commission's denial of a radio station license on the grounds, inter alia, that the applicant also owned a local cable system.

A number of state and local authorities also have either taken or proposed action to limit cross ownership. See, e.g., Nev. Rev. Stat. § 711.170 (1969); Better Broadcasting Council, A Model Ordinance for Cable Television for the City of Chicago § 2.15 (1970); (1971) Ill. Sen. Int. No. 169 § 5(b) (Mr. Clarke); (1970) N.Y. Ass'y Int. No. 6700-A § 671(3) (Mr. Kelly); New York City Bd. of Estimate, supra note 85, § 18.


The Commission's concern over telephone company dominance appears more than justified. The Better T.V. case showed a pattern in both New York City and rural communities of telephone company conduct designed to use its control over duct space and pole attachments to force cable systems to lease telephone channel facilities rather than use their own cables. Better T.V., Inc., 31 F.C.C.2d 984 (1970), rev'd, 31 F.C.C.2d 989
have already traded off cable or broadcast television properties to avoid a local cross ownership prohibition, and CBS was able, despite stockholder and Commission opposition, to spin off its cable interests into a single corporate package.\textsuperscript{135} More importantly, there seems no reason to limit the prohibition to local stations, networks, or telephone companies. The Commission is apparently concerned with developing more local voices, not with preventing conflicts of interest.\textsuperscript{139} The ban should therefore be extended to all cable cross ownership.\textsuperscript{140}

The case against common ownership, however, is somewhat weaker than that against cross ownership. Although once comparatively rare,\textsuperscript{141}
common ownership of cable systems is now apparently increasing as indicated by the emergence of TelePrompTer as the industry giant.\footnote{442} A common owner can, to be sure, control a number of voices,\footnote{443} but he has less economic incentive to do so than a cross owner.\footnote{444} On the other hand, because of its huge channel capacity, common ownership of CATV is far more dangerous than common ownership of other media. Common ownership does, of course, facilitate creation of the cable networks now apparently favored by the Commission;\footnote{445} in fact, TelePrompTer has already planned such operations.\footnote{446}

Although aware of the problem of common ownership,\footnote{447} the Commission has not yet attempted to resolve it. In its 1970 rule-making proceeding it proposed two alternative limitations on common ownership, one based on geography, the other on number of subscribers.\footnote{448} Neither is satisfactory.\footnote{449} Widespread network control over affiliates shows that interconnection can be achieved without common ownership. Although attracting venture capital to cable systems is a very real problem, the FCC has until recently\footnote{450} left the terms of cable franchises to local governments and thus to negotiations between cable systems and local authorities.\footnote{451}

A total ban on cross ownership and common ownership would

\footnotetext{442}{See note 128 and accompanying text supra. CATV common owners are often cross owners as well, as TelePrompTer again illustrates.}
\footnotetext{443}{See H. Levin, supra note 130, at 6-8.}
\footnotetext{445}{Burch Letter 1774.}
\footnotetext{446}{Broadcasting, June 14, 1971, at 28.}
\footnotetext{447}{Notice of Proposed Rulemaking, 35 Fed. Reg. 19028, 19032 (1968).}
\footnotetext{448}{Notice of Proposed Rulemaking and Notice of Inquiry, 35 Fed. Reg. 11042 (1970). The first alternative, apparently the product of a compromise between the Commission's general counsel and the Cable Television Bureau (Broadcasting, June 15, 1970, at 18), would limit a common owner to a total of 50 cable systems, with further limitations on the number he may own within various standard metropolitan statistical areas, states, and adjoining states. 35 Fed. Reg. 11042, 11043 (1970). The second alternative, which apparently originated with the Commission itself, would simply limit a cable system owner to a total of two million subscribers. Id.}
\footnotetext{449}{See Botein, supra note 72, at 838-39.}
\footnotetext{450}{Fourth Report and Order, 37 Fed. Reg. 3251, 3281 (1972).}
\footnotetext{451}{One of the more interesting means proposed for ensuring high quality cable performance and, at the same time, avoiding the difficulties of attracting venture capital is to give preference to non-profit operators. Ford Foundation, supra note 69, at 11-13. Although there is apparently no noncommercial cable system in operation yet, such an approach would certainly cure some of the ills created by cross and common ownership, since a non-profit operator would presumably have no particular economic drum to beat. It is not a panacea, however, because even noncommercial operators may have a particular viewpoint to sell.}
have a number of beneficial effects. First, knocking the major powers out of the game might encourage more competition among prospective cable systems in the initial franchising process and perhaps even in providing service within the same franchise area. Second, the combination of the origination requirement, the antisiphoning rules, and an ownership ban might make cable a meaningful competitor of broadcast television. Intermedia competition is presumably desirable in a free enterprise system, and CATV might force broadcast television to improve or at least change its programming, just as television affected radio. So far, other types of television have been unable to do so. Public television has been an unwanted though sometimes patronized stepchild of commercial television, and subscription television has practically been aborted. Cable television, however, is becoming economically viable and might thus give commercial television genuine competition. If the FCC is truly dedicated to providing the public "the most efficient and effective nationwide communications service possible," it should foster direct competition between CATV and broadcast television.

Diversity of ownership can thus significantly encourage program

152 Competition between cable systems in the same territory has generally been rejected as economically wasteful and not feasible. See, e.g., L. Johnson, The Future of Cable Television: Some Problems of Federal Regulation 64 (1970). One commentator, however, has maintained that local competition is possible as long as it is kept on a reasonably equal plane. R. Posner, Cable Television: The Problem of Local Monopoly 8-11 (1970). Professor Posner's argument, however, seems to overlook the fact—which he admits—that once a cable system is firmly entrenched in a community it becomes almost impossible for another system to move in. Id. at 10. In the Better T.V. case, the hearing examiner felt that competition between a franchised and an unfranchised cable system might produce beneficial effects. Better T.V., Inc., 31 F.C.C.2d 984 (1970), rev'd, 31 F.C.C.2d 939 (1971). In reversing the hearing examiner, however, the Commission found that in the context of the case competition between an independent and a telephone-based cable system would be "wasteful and unnecessary." 31 F.C.C.2d at 948.

153 See Head, supra note 125, at 290-91.

154 The FCC has recognized this potential result of competition between commercial television and both cable and subscription television. Fourth Report and Order, 15 F.C.C.2d 466, 505 (1968); First Report and Order, 38 F.C.C.2d 683, 704 (1965).

155 See M. McLuhan, supra note 25, at 307. As one cable equipment manufacturer rather bluntly remarked, radio was "fat, dumb, and happy and prosperous ... and didn't have to [diversify programming] until some other competitive medium made them do it." Hearings, supra note 7, at 127 (testimony of M. Shapiro, President, General Instrument Co.).


157 See note 111 and accompanying text supra.


159 The FCC itself is probably most responsible for centralizing CATV ownership. The cable freeze (see notes 12-15 and accompanying text supra) has made the business so
diversity on cable. But because the effect of diverse ownership is necessarily indirect, more affirmative action is necessary as well.

IV

OPENING THE WIRE: IMPLEMENTING A RIGHT OF ACCESS

A. Threshold Considerations

Even in the absence of cross or common ownership, giving a cable operator complete control over all his channels invites neglect and even abuse.\textsuperscript{160} Concentrated control over cable's many channels is inherently dangerous even without detailed documentation of overt abuse.\textsuperscript{161} Moreover, the issue of access has now become a political hot potato; many different groups—poor people, public interest groups, educators, small advertisers—are now demanding access. Professional politicians, including those traditionally wedded to broadcasting interests,\textsuperscript{162} are becoming increasingly interested in the exposure CATV offers.\textsuperscript{163} Access clearly cannot be left solely to the cable operator's discretion. But although the concept of access is almost universally accepted, no one has yet proposed a workable means of implementation.\textsuperscript{164}

Access does, of course, have its costs. Valuable allocations are distributed for free or for less than their highest market value, and for purposes which do not produce income. It also imposes a social burden in that viewers are exposed to programming which they might otherwise not select. The economic cost, however, is comparatively slight, and the social burden is less than that involved in requiring an individual to cross a street if he wishes to avoid a streetcorner speaker; both, moreover, are justified by the increased diversity and decreased frustration which access can provide.

In theory, regulation of access might be unnecessary if cable made

\textsuperscript{160} See Botein, \textit{supra} note 72, at 839.

\textsuperscript{161} See \textit{JOHNSON} 52-53; H. Levin, \textit{supra} note 130, at 7, n.11.

\textsuperscript{162} Many politicians are currently tied to broadcasting not only because of their obvious dependence on it for favorable coverage but also because they have significant broadcasting investments. \textit{See}, e.g., Smith, \textit{supra} note 125, at 592.

\textsuperscript{163} During the 1968 presidential campaign, the major political parties distributed videotapes to over 350 cable systems. Smith, \textit{supra} note 125, at 587. The Democratic National Committee has already approached cable operators about possible carriage of its videotapes during the 1972 elections. In addition, congressmen from areas not adequately served by traditional broadcasting have an obvious interest in CATV. \textit{See Hearings, supra} note 7, at 247-48 (testimony of Congressman E. Foreman).

\textsuperscript{164} See Barnett, \textit{supra} note 121, at 244.
available an infinite number of channels, since every potential user would then be guaranteed an allocation. But unlimited capacity is, to say the least, still a highly speculative proposition.\textsuperscript{165} Moreover, even if available, it would not guarantee users an allocation with a significant audience.

The first requirement is sufficient channel capacity, more accurately called bandwidth, to accommodate potential users. The FCC's new rules require major market cable systems to have non-broadcast bandwidth equal to the amount used for carriage of broadcast signals and a minimum capacity of twenty channels.\textsuperscript{166} Though generous, this approach may be too sweeping in its emphasis on the number of broadcast signals carried, neglecting actual local needs. It would, for example, require a San Francisco cable system to have almost as much non-broad cast bandwidth as a New York City cable system,\textsuperscript{167} even though the former market is one-fourth the size of the latter.\textsuperscript{168} In determining bandwidth requirements, it would be more appropriate, albeit more complicated, to use a population standard as the Commission has attempted to do with broadcasting.\textsuperscript{169}

B. Policy Alternatives

A difficult and perhaps unanswerable problem is who gets access and how. To date, no one has provided an adequate answer. There are, of course, a number of alternatives. The first and simplest would be to do nothing, allowing access to be determined by the marketplace. This approach is attractive in theory, since it would not only eliminate the difficulties and costs of regulation but would also provide for system development according to demands for access. It is subject, however, to both pragmatic and philosophical objections. A cable operator, like any other entrepreneur, will presumably charge as much for access as a free market will bear, thus making access available only to large business or political organizations. Moreover, in an unregulated situation a cable

\textsuperscript{165} Notes 40-41 and accompanying text supra. The Commission's "N + 1" formula (note 188 and accompanying text infra) seems designed partially to reach this infinite channel capacity. But it falls far short. First, it guarantees at most that a user has a chance of eventually paying for an allocation. Second, it seems doubtful that the FCC would actually require a cable operator to expand his channel capacity indefinitely; after the system's initial capacity has been reached, further expansion would require prohibitively expensive system rewiring.


\textsuperscript{167} See Burch Letter app. B.

\textsuperscript{168} New York City has a net weekly circulation of 5.5 million while San Francisco has one of 1.4 million. 41 TELEVISION FACTBOOK: STATIONS VOLUME 56-a (1971).

operator might quite reasonably hesitate to risk the huge sums necessary for expansion of capacity, and instead choose to maximize profits simply by raising his prices. The free market approach would thus re-create in microcosm the present broadcasting structure.

These problems can be ameliorated by partially restricting the marketplace. First, rates could be subjected to regulation or at least surveillance to prevent pricing potential users out of the access market. Control of rates, however, is probably neither feasible nor efficient; and even if it were, the hand responsible for control would have to be exceptionally deft. If rates were too high, channel capacity would go unused; if rates were too low, demand for allocations would be greater than capacity would allow. Second, prices could be left to the marketplace with a guaranty of fair treatment for all potential customers. The Commission, like many local regulators, has attempted to do this by simply requiring cable operators to make public their leasing rates and to provide three separate channels—denominated access, educational, and governmental—on a "first-come, nondiscriminatory basis." This type of solution is, of course, administratively attractive, since it effectively remits the whole problem to the cable operator. It is basically inadequate, however, not only because it is an administrative default, but also because it unrealistically assumes that such a requirement will prevent the first served from becoming the only served. Finally, under the Commission's plan channel leasing is left largely to the marketplace, subject to the requirement that the cable operator provide the three free channels and post the schedule of rates. This approach is little more, however, than a sop to vocal minority interests. It gives no meaningful right of access to commercial users, who may potentially develop the most attractive new programming. And with noncommercial users it still leaves unresolved the basic problem of passing upon competing demands for access.

There are, however, ways of structuring the marketplace to provide for diversity, if not for access. Limiting a cable system's range of programming can make the marketplace favor diversity. The Commission's antisiphoning rules already do this, although only incidentally. Programming restrictions can, however, be tailored deliberately to encourage diversity. First, a cable system or independent producer could be allowed to offer a program, on either an advertiser or a pay basis, to only a maximum number of subscribers. In theory, this should make mass

170 See, e.g., BETTER BROADCASTING COUNCIL, supra note 136, §§ 2.31-32; JONES 192-93; New York City Bd. of Estimate supra note 85, § 3.
172 A similar approach has been proposed for common owners of television stations.
appeal impossible and the *kitsch* factor unprofitable; however, it might also increase the number of conventional programs, since each cable system and producer would presumably still attempt to attract as much as possible of the limited audience. Second, pay program charges could be structured to encourage specialized programs by decreasing the cable operator’s permissible charges per subscriber as the number of viewers increased: for example, $100,000 for the first 100,000 viewers, $75,000 for the next 100,000, and so forth. Although this might encourage a few small producers, it would still leave mass appeal programs most profitable. Finally, access rates could be structured either to increase or decrease in proportion to a program producer’s frequency of use. If rates increased, occasional users would gain an advantage over more common *kitsch* producers. If rates decreased, the cable operator would have an incentive to carry specialized producers. Unless the variations were extremely wide, however, mass appeal programs would still be most profitable. Most importantly, all these approaches give the cable operator ultimate program control. While increasing diversity incrementally, therefore, they would not effectively implement a right of access.

If even a somewhat tamed marketplace is unsatisfactory, the path of least regulatory resistance might be to leave all access determinations to the discretion of the appropriate level of government under a general rubric such as the “public interest.” Procedural safeguards should prevent the most visible abuses, even though probably few access determinations would ever reach the courts for review. Such an approach, however, would be an abdication of responsibility. The closest analogy, of course, is the Commission’s comparative licensing procedure, which has been characterized by inefficiency, inconsistency, vagueness, and undue influence. Such a system might be even more disastrous for access determinations since it would probably be administered by a local, comparatively inexperienced agency and since potential users would have limited resources with which to contest access determinations.

---

H. Levin, *supra* note 144, at 821. Alternatively, a cable operator might be required to program multiple channels on the theory that by using mass appeal programming he would only be competing with himself. This approach, however, would probably still encourage attempts to reach the largest audience possible on each channel.

173 See text accompanying notes 248-73 infra.

174 Professor Kenneth Culp Davis would presumably approve of such a delegation if it contained sufficient procedural protection. 1 K. DAVIS, ADMINISTRATIVE LAW TEXT § 2.05, at 37-38 (rev. ed. 1959). Moreover, it might be argued that access determinations present what Professor Lon Fuller has termed “polycentric problems” and are therefore susceptible only to political rather than adjudicative disposition. Fuller, *Adjudication and the Rule of Law*, 1960 PROG. AM. SOC’Y INT’L L. 1, 3-5.
A third alternative, then, to either marketplace or administrative regulation is adoption of a strict standard to govern who gets what and how: a formula for access.

C. A Formula for Access

1. Who

The Commission's requirement of three dedicated channels\(^17\) partially defines the "who" part of the access formula, since presumably only educational and governmental interests may use the channels allocated to those uses. But the Commission has not indicated precisely what educational and governmental mean, thus giving discretion once again to the cable operator. In addition, the Commission's failure to specify who may use the access channel makes all attempts at definition of these terms meaningless, since a potential user could conceivably qualify for all three channels. For example, a local school board might be considered an educational user, a governmental user, or an access user. While the Commission's intention may have been to make access channels available to literally anyone,\(^17\) this definitional vagueness complicates any access formula. The Commission may, in fact, have deliberately chosen an open-ended approach because of the administrative difficulty in categorizing potential users. As the New York City experience has shown, strict qualifying standards may inhibit potential users.\(^17\) Definition is, however, not only possible, but also necessary to ensure equitable bandwidth allocation. To facilitate the definitional task, the Commission at least could have suggested some existing criteria such as eligibility for tax exempt status or fourth class mailing privileges. Although these guidelines might be used to keep out some potential users and to justify veiled censorship,\(^17\) they show that the problem can be resolved.

Moreover, the channel dedication approach may be basically unsound, despite its general acceptance. First, it wastes resources if a channel may not be used for other than its dedicated purpose. The Commission has avoided this pitfall by allowing a cable operator to lease or use for his own purposes any excess time on a dedicated chan-

---

17 Text accompanying notes 170-71 supra.
176 Burch Letter 1772.
177 The New York City regulations, for example, require that a potential access user give the cable operator a preview of his program and allow him to delete potentially objectionable sections. In addition, they lay down a series of complicated procedures for application, copyright clearance, and bonding. New York City Bureau of Franchises, Rules Governing Access to Public Channels, June 29, 1971.
178 See note 238 and accompanying text infra.
nel.\textsuperscript{179} Second, and more important, the dedication approach puts non-commercial programming on a separate and inherently unequal footing. Confined to discrete channels, noncommercial programming will probably be automatically ignored by most viewers, just as public broadcast stations are today. Viewers develop very definite channel loyalties\textsuperscript{180} and thus may completely avoid channels they do not normally watch. A mix of commercial and noncommercial programming on each channel would create far more diversity. Accordingly, access must be apportioned between commercial and noncommercial users on the basis of time periods rather than channels. Thus noncommercial users would be entitled to a given percentage of a system’s total prime and non-prime time, rather than one or more separate channels. This system might complicate viewers’ lives somewhat by requiring more channel switching, but that seems to be a social cost well worth bearing.

Finally, though noncommercial groups have attracted the greatest attention, some commercial organizations also require access. Small businesses need an outlet for local low cost advertising.\textsuperscript{181} Giving the cable operator total control over commercial channel leasing might result in discrimination in favor of large commercial interests and long term leasing by large businesses. Instead, commercial interests should have an enforceable right of access, albeit on terms profitable to the cable operator. The Commission has now clarified some of the ambiguity in its prior letter of intent and now requires that commercial users receive “first-come, nondiscriminatory” access.\textsuperscript{182}

2. What

The “what” part of the access formula is even more complex than the “who” part, since it involves many intangible factors which cannot be identified, let alone quantified.\textsuperscript{183} Television viewers usually have

\begin{itemize}
\item \textsuperscript{\textsuperscript{179}} Fourth Report and Order, 37 Fed. Reg. 3251, 3289 (1972).
\item \textsuperscript{\textsuperscript{180}} See note 184 and accompanying text infra.
\item \textsuperscript{\textsuperscript{181}} See U.S. DEP’T OF JUSTICE, COMMENTS, FCC Docket No. 18397, at 9-11 (1969). A requirement that commercial as well as noncommercial users be given access creates its own definitional problems since it is often difficult to distinguish the two. An initial difficulty arises in deciding whether the factor relevant in categorizing a user is the nature of the user, the nature of the use, or both. Thus, a non-profit corporation might produce programs whose sole aim was to raise money; conversely, a business corporation might finance purely informational programs.
\item \textsuperscript{\textsuperscript{182}} Fourth Report and Order, 37 Fed. Reg. 3251, 3289 (1972). On the one hand, the Burch Letter spoke of nondiscriminatory access on leased channels. Burch Letter 1776. On the other hand, the Commission also stated that cable operators “may make available for leased uses” excess channel capacity. Id. at 1772. The Fourth Report and Order solves the problem, however, by providing that operators “shall offer” leased channels and by requiring fair treatment. 37 Fed. Reg. at 3289.
\item \textsuperscript{\textsuperscript{183}} L. JOHNSON, supra note 152, at 53.
\end{itemize}
loyalties to particular stations\textsuperscript{184} which might persist even in a "wired nation"; the person who has watched channel four for twenty years may still prefer it, even if it changes programming and becomes only one of forty channels.\textsuperscript{185} Similarly, even viewers without confirmed viewing habits may find some channel's programming particularly attractive and thus develop a new set of loyalties, though perhaps not so strong as those of contemporary viewers with only a limited choice of channels. In addition, specialized programming may increase the attractiveness of adjacent programs, an intangible factor with which the Commission has never really come to grips;\textsuperscript{186} a viewer content with one or more channels may have little incentive to switch through forty others in search of more interesting programming. As a result, a program's exposure may well become increasingly dependent on the time and channel allocated to it, a factor which the "what" portion of any access formula must take into account.

The Commission's "first-come, nondiscriminatory" standard totally ignores these considerations. Even if it is fairly administered by cable operators,\textsuperscript{187} which seems doubtful, the standard does not guarantee to a potential user an allocation with a significant audience. Moreover, it may not guarantee any allocation at all, since the Commission does not seem to contemplate preventing first comers from serving themselves with all desirable allocations by means of long term and large scale booking. If the Commission does, however, interpret its formulation as incorporating some notions of equity, it will have created a complex doctrine and a catalog of administrative difficulties.

The Commission's "$N + I$" formula\textsuperscript{188} will do little to dispel the uncertainty. It will require a cable operator to add a new channel to his system within six months of the time that all his 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."\textsuperscript{189} This approach may prove self-defeating, however, since it

\textsuperscript{184} Even the Supreme Court recognized the value of "confirmed habits of listeners and viewers" in Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 400 (1969).

\textsuperscript{185} One prerequisite to meaningful access is "equal dial accessibility," that is, selection of all channels through the use of one tuning mechanism, rather than the two separate knobs necessary for contemporary VHF and UHF reception. Note, supra note 46, at 538-39. Though such a difference may seem minimally important, it is psychologically significant since it segregates new channels from established ones.

\textsuperscript{186} According to one commentator, specialized programming may have the desirable side effect of creating "a new prime time." Note, supra note 46, at 545 n.71.

\textsuperscript{187} See, e.g., note 239 infra.

\textsuperscript{188} Fourth Report and Order, 37 Fed. Reg. 3251, 3289 (1972). "$N + 1$" means that the cable operator would be required to add one channel to his current number, "$N$.

\textsuperscript{189} Id.
gives a cable operator a built-in incentive to stay below the magic figures—which should be easy enough. Moreover, even if workable, the formula ignores the intangible factors discussed above; it ensures only that a potential user ultimately gets an allocation, but not that it is a meaningful one. Finally, it gives a potential user only a leased rather than a free channel.\textsuperscript{190}

The "what" part of the access formula therefore needs further development. It is now feasible to quantify the intangibles to some extent and thus to develop a theory with at least limited validity. Although judging a program's merits is constitutionally suspect and pragmatically unsound,\textsuperscript{191} it is relatively easy to predict the exposure value of a particular allocation. Each allocation can be assigned an "attractiveness index," by finding each allocation's audience share, as the Commission has done in determining distant signals.\textsuperscript{192} Each allocation would then have a definite value. The eventual development of limited two-way communications\textsuperscript{193} would make such measurements less expensive and more valid than today, since viewers' choices could be continually monitored.\textsuperscript{194}

Expanding the "what" part of the formula complicates the "who" part, since both politics and equity require some reasonable relation between users' needs and the benefits of allocations. There must therefore be some priority among users to resolve multiple demands for the same allocation. Such an approach is politically perilous and the Commission has accordingly shrunk from it. It can be implemented, however, upon comparatively neutral principles.

Where there are no multiple demands for the same allocation, as is likely to be the case in the foreseeable future,\textsuperscript{195} the user may be given whatever time and channel he requests. Though perhaps a misallocation

\textsuperscript{190} Note 182 \textit{supra}.
\textsuperscript{192} See note 3 \textit{supra}.
\textsuperscript{193} See note 48 and accompanying text \textit{supra}.
\textsuperscript{194} See N. Feldman, \textit{supra} note 113, at 23. Many articles in the popular press have depicted such monitoring as an invasion of privacy. Though CATV does have a capability for intense surveillance of personal life, 1984 (a date which, as many have noted, will mark the fiftieth anniversary of the FCC) is not around the corner. Such monitoring, of course, should be optional with the subscriber, perhaps in return for a fee rebate. See Note, \textit{supra} note 46, at 540. More important, since the turn of the century we have somehow managed to live with the ordinary telephone, which has presented opportunities for at least audio surveillance.
\textsuperscript{195} There will presumably be a considerable time lag between the date at which access channels become available and the date at which they become used extensively, as the New York City experience has shown. N.Y. Times, Oct. 26, 1971, at 83, col. 1; \emph{id.}, July 2, 1971, at 67, col. 4. See note 177 \textit{supra}.

of resources, this freedom does little violence to the interest of either the public or the user; moreover, it follows the Commission's practice of summarily granting unopposed applications for far more valuable and permanent spectrum allocations.\(^\text{196}\)

Where there are multiple demands for the same allocation, though, the access formula must give priority to a timely application\(^\text{197}\) by the potential user with the greatest need. Determination of this need, however, should not be based on inherently subjective, and thus constitutionally objectionable, evaluations of the users' motivation and message. Instead, it can be grounded on a reasonably objective comparison of the competing applicants' abilities to gain public attention. First, potential users can be classified within commercial and noncommercial categories based on their ability to gain public attention. Commercial users could be classified according to their gross receipts into as many different groups as seem reasonable. Second, when there is a conflict between two potential users, commercial or noncommercial, within the same category, an access determination can be made by comparing three factors: (1) each user's gross receipts;\(^\text{198}\) (2) each user's previous medium expenditures and exposure;\(^\text{199}\) and (3) each user's amortized previous

---

196 See W. Jones, supra note 70, at 200.
197 Some outer cutoff date for filing is necessary to prevent a user from expecting an allocation, making expenditures in reliance, and then suddenly losing it to a higher priority user. Allocations could be reserved for users who, because of emergency needs, meet the priority but not the filing requirements; such allocations could also be distributed under the system of preferences outlined in notes 198-200 and accompanying text infra.
198 The gross receipts standard does create a potential element of unfairness, since two organizations could conceivably have identical gross receipts but differing amounts of money available for medium purposes. On the other hand, any other standard would require a time consuming examination of whether each organization had allocated its receipts in a reasonable fashion, an issue impossible of exact resolution.

As an alternative standard, the number of a non-profit organization's members and of a business organization's customers might be relevant. But this standard would create considerable difficulty in defining "member" and "customer"; moreover, it would be inappropriate for organizations such as legal service offices which have prospective beneficiaries rather than members.

199 Expenditures would, of course, be measured simply in terms of out of pocket expense. Exposure, on the other hand, would be measured in terms of fair market value, that is, what an advertiser would have paid for the equivalent amount of exposure. For commercial users, the exposure standard will often be almost the same as the expenditure standard, since most business organizations have to advertise in order to gain exposure. Use of both standards is, however, necessary.

The exposure standard creates the possibility of inaccurate measurement, since all exposure is by no means favorable. Conversely, it would be pragmatically impossible and constitutionally questionable to judge whether a given exposure were favorable or unfavorable. It might be feasible, however, to exclude from the exposure measurement all comments explicitly labeled as editorial, since advertisers generally cannot buy, at least directly, editorial comment.
use of access allocations. Although this system lacks mathematical certainty, its factors lend themselves to fast and accurate proof.

The use of quantifiable preferences would also facilitate resolution of complex situations such as requests for overlapping allocations and proposed repeat programming. In the somewhat unlikely case of a tie, the allocation decision could be made by the time-honored regulatory technique of flipping a coin.

This system of comparison admittedly does not take into account a host of relevant but intangible factors such as the prestige of the organizations, their reputation in the community, and the like. Although such considerations cannot be sufficiently quantified for the relatively objective, swift, and simple decisions required, they will be reflected to a large extent in the objective criteria used. More importantly, the exclusion of relevant but intangible factors permits making an allocation decision without the subjectivity and delay which have characterized the Commission’s comparative license proceedings.

Measuring the value of previous access allocations would be simple, since each allocation will presumably be subject to continuous monitoring. Note 194 supra. Each allocation’s “life,” the length of time for which the average viewer will remember the average program, must be “amortized” to avoid crediting a user with programming which lacks any current audience impact. No definitive study of program retention appears to exist, however.

Gross receipts for both non-profit and business corporations can be obtained by requiring surrender of their most current tax returns. Previous medium expenditures cannot be documented quite so effectively, but a competing user’s ability to discover, by legal process if necessary, the billing records and rate cards of the various media should keep the process reasonably honest. Similarly, instances of previous medium exposure can be uncovered easily by means of newspaper records and broadcasting logs; the value of each exposure can be readily determined by consulting the appropriate rate card. Information on previous access use will already be in the possession of the cable operator and regulatory agency and will require only proper amortization.

The user with the least prior access and current ability to secure access will receive priority. For example, organization $A$ with (1) $200,000 gross receipts, (2) previous medium expenditures and exposure worth $100,000, and (3) previous access use worth 200 points (as measured by the “attractiveness index”) might apply for an allocation also requested by organization $B$, with (1) $100,000 gross receipts, (2) previous medium expenditures and exposure worth $150,000, and (3) previous access use worth 200 points. In such a case, $B$ would have a preference of 50% on criterion (1), $A$ would have a preference of 66% on criterion (2), and neither would have any preference on criterion (3), thus giving final priority to $A$.

Where one user requests only part of the time desired by another user, the necessary preference can be decreased proportionately. Similarly, where a user desires to show a repeat program, his preference can be decreased by the unamortized life of the program.

Thus old, established, and prestigious organizations generally will have higher gross receipts and receive more gratuitous medium exposure than newer groups.

See R. Anthony, supra note 66. Professor Anthony proposes simplifying compara-
There are, of course, ways of beating this system. A group might deliberately fragment itself into small organizations to receive a higher priority in each category. In recent years, however, the courts have found no great difficulty in distinguishing "dummy" from bona fide corporations. More commonly, dissident members of an existing group might be encouraged to split off into a new organization by the promise of access allocations. In a pluralistic society this need not be considered an evil. A group might also deliberately restrict its medium exposures, advertising expenditures, and access use to create priority for itself in the future. This is, however, a matter of individual election and is already practiced today in budgetary planning.

The neutral and somewhat mechanical nature of this system, however, may create some unfortunate side effects. Splinter groups may consistently gain priority over more affluent groups which have a message many people consider important. This deficiency can be treated in two ways. The formula might contain a discretionary "fudge" factor for the administrator. Or the formula's criteria could be treated simply as guidelines rather than as standards. In practical effect, these two alternatives would operate identically. Adoption of either alternative, however, would remove the certainty and predictability which are the primary virtues of an objective test.

The best means for handling access determinations may in fact be to combine the marketplace, administrative, and formula approaches, since none seems adequate by itself. Thus, a "first-come, first-served" marketplace scheme would govern unless there were conflicting demands from potential users within the same category. In the event of such a conflict, the appropriate agency would resolve the issue under the criteria outlined above. Though this approach ensures neither absolute justice nor absolute ease of application, it accommodates both.

Finally, there is the question of whether the fairness doctrine should be retained under a formula for access. On the one hand, failure to require fairness would force a replying group to wait until it had sufficient priority for a given allocation. On the other hand, traditional arguments for fairness are weakened by a guaranty of access, since any group can plan for possible future needs. On balance, there seems to be little real reason for applying to cable a doctrine which both the broadcasters and the Commission have found unsatisfactory.205

205 The so-called "Whitehead Doctrine," named for the Director of the Office of Telecommunications Policy, proposed to do away with the fairness doctrine and substitute for it a rather ill-defined right of paid access. Director Whitehead appeared somewhat less
This combination of marketplace, administrative, and formula regulation is by no means perfect. Politics and the problems inherent in administering the system make a certain amount of inefficiency unavoidable. It is more valid than the Commission's race notice plan, however, and at worst would be no more irrational than the Commission's current system of allocating spectrum space.\footnote{203}

To obtain genuinely meaningful access, however, potential users will need production facilities as well as allocations; access is obviously useless without the ability to produce attractive programming. Many observers have proposed that the cable operator be required to provide production facilities,\footnote{207} and the Commission has at least made a gesture towards supplying access to such facilities.\footnote{208} There is no consensus, however, as to the extent of the cable operator's responsibilities.\footnote{209} Moreover, it is unclear whether production facilities should be provided free, at cost, or on a partially subsidized basis. The appropriate solution might be to subsidize separate production facilities,\footnote{210} rather than to place a vague and unenforceable burden on the cable operator.

3. How

a. Financial Terms of Access. The final part of the formula is the "how": the financial terms of access. Commercial users should, of concerned, however, with facilitating public use of broadcasting. In attacking the fairness doctrine he noted that

[quote]
[\textit{BROADCASTING, Oct. 11, 1971, at 14 [emphasis in original]. Director Whitehead obviously has a rather novel conception of the public interest. The Commission has apparently decided for the moment not to apply the fairness doctrine to either free or leased channels. See Fourth Report and Order, 37 Fed. Reg. 3251, 3288 (1972).}]
\end{quote}


\footnote{207 See, e.g., ACLU, \textit{Civil Liberties Requirements for the Regulation of Broadband Cable Systems for Television and Other Communications Content Services}, in \textit{COMMENTS ON PROPOSED RULEMAKING: FEDERAL-STATE REGULATORY RELATIONSHIPS, FCC Docket No. 18892} (1970); N. Feldman, \textit{supra} note 113, at 21; Note, \textit{supra} note 46, at 541.}

\footnote{209 For an illustration of the complexity inherent in setting strict requirements as to amount and type of production equipment, see the discussion in Note, \textit{supra} note 46, at 541-42.}

\footnote{210 One major public television spokesman, in fact, suggested that the Commission apply its proposed 5\% "public dividend" to subsidizing production of public interest programming on CATV. Statement of Hartford N. Gunn, President, Public Broadcasting Service, Before the Sloan Comm'n on Cable Television, Dec. 17, 1970, on file at the \textit{Cornell Law Review}.}
course, pay for allocations, since they will presumably profit from the exposure. Moreover, expansion of channel capacity is expensive, and to attract venture capital the cable operator must receive a substantial return on commercial channel leasing. Entrusting the cable operator's charges to the marketplace, however, risks freezing out small producers and advertisers.211 At the same time, extensive rate regulation is not only inappropriate but also not feasible.212 As a compromise between these two extremes, the cable operator might be required to publish nondiscriminatory rates, subject to adjustment by the appropriate administrative body.213

Noncommercial users must also be encouraged, although their use will not result in a profit to the cable operator. There appear to be only three methods of financing noncommercial users, each of which has distinct drawbacks. First, noncommercial users could simply receive access for free. Although this would obviously be preferable to broadcasting's high charges, the cable operator would just pass the cost on to subscribers.214 Second, noncommercial users could pay only the cost of using the cable system's facilities. Although these charges should, in theory, be low enough to discourage only a few potential users, the complexity of rate regulation makes this approach not feasible. Third, users and subscribers could share the cost.215 Though this approach somewhat mitigates the unfairness of the first alternative, it also shares the rate-making problems of the second.

No obvious solution to the problem of financing noncommercial users has emerged. The Commission's adoption of the first alternative216 is probably owing more to discretion than valor. From its experience in regulating common carriers, the Commission presumably knows all too well the pitfalls of rate regulation and thus is anxious to avoid them at almost any cost—that is, cost to the subscriber. Though economically

211 See text accompanying notes 169-70 supra.
212 See notes 170-72 and accompanying text supra.
213 Although the Commission has not adopted a full scale rate surveillance procedure, it does require cable operators to adopt rules for leased channels "specifying an appropriate rate schedule." Fourth Report and Order, 37 Fed. Reg. 3251, 3289 (1972).
215 The Better Broadcasting Council would make the user's cost equal to the amount paid by all subscribers for maintaining the cable system for the time period used. BETTER BROADCASTING COUNCIL, supra note 136, at § 2.4.
216 The Commission now requires that the public access channel be made available for free and that the educational and governmental channels be provided for free "until five (5) years after completion of the system's basic trunk line." Fourth Report and Order, 37 Fed. Reg. 3251, 3289 (1972).
inequitable, this method may well be the only realistic administrative alternative.

b. *The Rate-Making Thicket.* Although regulation of subscription and use rates poses a host of practical problems, there appears to be no legal bar to it. CATV is an inherent monopoly and usually has government sanction through an exclusive franchise. As such, it meets traditional definitions of a public utility and is affected with a public interest. Cable operators have always been opposed to public utility regulation, however, and few states have imposed it. Commentators and courts are about equally divided on the question.

Assuming that the FCC, state governments, or local authorities have the power and inclination to regulate rates, creating a proper rate base may prove extremely difficult. Appropriate cable rate base com-

---


219 The traditional test of "affected with a public interest" is that one who uses his property in such a way as to affect the public, grants the public an interest in that use, and to that extent submits to public control for the common good. Munn v. Illinois, 94 U.S. 113 (1877). It should be remembered, however, that the businesses involved in that case held no form of exclusive franchise but were, at least theoretically, in competition with each other. A cable system, on the other hand, has at least a de facto monopoly simply because of the prohibitive costs of laying cable. Moreover, in some subdivisions a developer will contract for cable service and at the same time prohibit use of rooftop antennas, thus making subscription a necessity. See Witt, *CATV and Local Regulation*, 5 Calif. W.L. Rev. 30, 39 (1968). Finally, the Supreme Court has been increasingly liberal in its definition of "affected." In Olsen v. Nebraska, 313 U.S. 236, 244-46 (1941), the Court announced a "drift away" from its older, more stringent standards and held that a state could regulate the rates of an employment agency, a business certainly having far less exclusive control over the public than a cable system.

220 See Note, *supra* note 21, at 373.

221 See Botein, *supra* note 72, at 821-24. The new regulations, however, require that initial rates be approved by the franchising body and that subsequent rate increases be allowed only after a public hearing. 37 Fed. Reg. at 9281.

222 Botein, *supra* note 72, at 822, n.33.

223 It is not entirely certain that the FCC has the statutory power to regulate cable rates, even if it chooses to do so. The basis for the Commission's jurisdiction over CATV is less than clear. Text accompanying notes 248-56 *infra*. If the Commission were held to have jurisdiction over CATV as a common carrier under Title II of the Communications Act, 47 U.S.C. §§ 201-29 (1970), it presumably could exercise its traditional common carrier rate making power. On the other hand, if CATV is considered to be within Title III of the Act (id. §§ 301-99), the Commission probably could not. In National Ass'n of Theatre Owners v. FCC, 420 F.2d 194, 202 (D.C. Cir. 1969), cert. denied, 397 U.S. 922 (1970), the court upheld the Commission's power to authorize subscription television, but noted in dictum that whether the Commission could set rates was a "difficult question."
ponents and valuation techniques have not yet been developed.\textsuperscript{224} Construction and maintenance costs vary significantly at this comparatively early stage of the medium's development.\textsuperscript{225} Moreover, the initial investment is large, owing to the high cost of laying wire,\textsuperscript{226} while the initial profits are small. Conversely, subsequent investments are likely to be small and subsequent profits likely to be large.\textsuperscript{227} Cable system depreciation rates are still unsettled\textsuperscript{228} and are likely to remain so because of unpredictable needs for extensive system rebuilding.\textsuperscript{229} Moreover, much of a system's value is its franchise, which, if depreciable at all,\textsuperscript{230} may not be subject to exact valuation.\textsuperscript{231} These difficulties are compounded by the unavailability of alternative means of measuring rate of return\textsuperscript{232} since no comparable service exists as an economic yardstick.

Establishing an appropriate rate base, however, is only the threshold problem in CATV rate regulation. Though perhaps adequate for subscriber rates, a conventional rate base is of little help in determining user rates, since different classes of users require different rates. Although common carrier regulation has traditionally set class rates, the

\begin{itemize}
\item \textsuperscript{224} In New York State, for example, local franchising authorities use a variety of different methods for setting subscription rates. Jones 123-50.
\item \textsuperscript{225} See Ohls, Marginal Cost Pricing, Investment Theory and CATV, 13 J. Law & Econ. 439, 441-42 (1970).
\item \textsuperscript{226} At least one state commission has recognized this problem. To finance the initial cost of constructing the system, Wyoming allowed a cable system to exact initial installation charges, returnable at a future date, higher than would otherwise have been allowed. Rawlins Community Antenna Television Co., 12 P.U.R.3d 214, 216-17 (Wyo. Pub. Serv. Comm'n 1956); accord, Albert M. Carollo, 13 P.U.R.3d 581 (Wyo. Pub. Serv. Comm'n 1956).
\item \textsuperscript{227} In 1965 Dr. Martin Seiden reported an average cable system profit margin of 57%. M. Seiden, supra note 141, at 27. Though his study is now a bit dated, it is probably still valid since William K. Jones came up with 56.7%—almost the identical figure—for New York State cable systems. W. Jones, supra note 19, at 162.
\item \textsuperscript{229} Thus the Commission's newly adopted requirement of minimum channel capacity (see note 166 and accompanying text supra) might require extensive system rewiring for some operators.
\item \textsuperscript{230} The value of a franchise is generally not depreciable, because it represents the monopoly position conferred on a public utility by law. E. Clemens, supra note 218, at 169. This would, however, not be true for the few unfranchised cable systems.
\item \textsuperscript{231} A cable franchise was held not depreciable for tax purposes, since there was a substantial likelihood that it would be renewed, in Toledo TV Cable Co., 55 T.C. 1107 (1971).
\item \textsuperscript{232} See F. Welch, Cases and Text on Public Utility Regulation 250-53 (rev. ed. 1968).
\end{itemize}
process has been difficult and often unsatisfactory.\textsuperscript{283} As a result, CATV rate regulation is probably inefficient at best and unworkable at worst.\textsuperscript{284}

Even if feasible, however, rate regulation may be strategically unwise. Compared to other media, CATV is a comparatively high risk business and needs massive infusions of venture capital. This funding will not be forthcoming if CATV's future promises only a conventional public utility return. Thus CATV must initially earn large and perhaps even exorbitant profits to develop the subscriber penetration and channel capacity necessary for access.\textsuperscript{286} The most sensible regulatory tactic might therefore be to allow almost unlimited profits at first and then to impose strict rate regulation after cable has fully developed.

D. Control of Access Content

Although access regulation is essential, conventional common carrier regulation would thus be inappropriate.\textsuperscript{287} Nevertheless, if access is to be meaningful the cable operator must be barred from controlling program content. Allowing the operator to act as a censor would frustrate access regulation and also probably violate the first amendment.\textsuperscript{288}

\textsuperscript{283} See E. CLEMENS, supra note 218, at 285-86, 291-93, 358; A. PRIEST, supra note 218, at 295-96, 340-42. Setting rates for the use of production facilities would be even more difficult, since it might require establishing a different rate for each piece of equipment. Compare the optimism in Note, supra note 46, at 543.

\textsuperscript{284} R. POSNER, supra note 152, at 30-33. The Canadian Radio-Television Commission has taken supervisory jurisdiction over rates charged to CATV subscribers, but apparently has not acted to reduce any rates. See Hearings, supra note 7, at 291.

\textsuperscript{285} Although broadcasting activities usually generate a considerably higher profit than other activities of conglomerate corporations (see BROADCASTING, Aug. 2, 1971, at 14-21), CATV's viability is much less secure than traditional broadcasting's.

\textsuperscript{286} See JONES 122-23, 183. Moreover, there may well be some relation between the amount of capital and the quality of programming. Thus to encourage venture capital the Canadian Radio-Television Commission has decided to grant cable systems licenses for the maximum statutory period. CANADIAN RADIO-TELEVISION COMM'N, Policy Statement on Cable-Television, in CABLE TELEVISION IN CANADA 31-32 (1971).

\textsuperscript{287} It is somewhat anomalous to find a commentator who fully recognizes the need for venture capital urging common carrier treatment for CATV. JONES 199.

\textsuperscript{288} Cable systems may be sufficiently entangled in the regulatory process, especially if subject to access requirements, for their operators' actions to constitute state action. Mr. Justice Douglas has equated government licensing with state action. See Reiman v. Mulkey, 387 U.S. 369, 384-85 (1967) (concurring opinion); Lombard v. Louisiana, 373 U.S. 267, 281-83 (1963) (concurring opinion); Garner v. Louisiana, 368 U.S. 157, 182-84 (1961) (concurring opinion). More recently, the District of Columbia Circuit held that a television station was so sufficiently intertwined with the federal regulatory process as to make its actions state action. Business Executives' Move for Vietnam Peace v. FCC, 450 F.2d 642 (D.C. Cir. 1971). But the Ninth Circuit has refused to equate a telephone company's conduct with state action. Martin v. Pacific N.W. Tel. Co., 441 F.2d 1116 (9th Cir. 1971).
Although the Commission has taken nominal steps to oust cable operators from program control, it is also concerned with protecting subscribers from involuntary exposure to offensive programming. It has even proposed requiring the cable operator to provide subscribers with a locking switch "should parents wish to control their children's viewing." This type of thinking is as misguided as it is futile. It is hardly the Commission's province to guard people against the consequences of their deliberate choice to subscribe to CATV. The impossibility of adequately fashioning such protection ensures that the Commission will do nothing more than assume a politically expedient posture of concern.

Cable operators are quite naturally somewhat less than willing to relinquish program content control. They predictably raise the spectre of possible criminal and civil liability for uncontrolled cablecast utterances or acts by judgment-proof users. These fears are largely unfounded. The very lack of control which so distresses the cable operators should also immunize them from liability. A user's acts are unlikely to be characterized as criminal, in light of the courts' tight restrictions on prosecutions for incitement to riot, criminal anarchy, and the like. Even where a user's speech is not protected, the cable operator would presumably not have the constitutionally required specific intent.

Similarly, the possibility of civil actions for defamation seems extremely remote in light of the Supreme Court's recent extension of first amendment protection to all speech involving "a subject of public or general

239 The new regulations require that a cable system "shall exercise no control over program content" on access or leased channels, but they also require cable systems to promulgate rules barring obscene and other materials. 37 Fed. Reg. at 3289. By thus encouraging program previewing, the new regulations invite abuse of discretion.

240 Burch Letter 1775.

241 Id.; see also Note, Cable Television and the First Amendment, 71 COLUM. L. REV. 1008, 1034 (1971).

242 A simple means of protecting the cable operator would be to require that a user post a bond as a prerequisite to obtaining access. In light of the damages usually requested in defamation actions, however, such a bond would have to be rather substantial and thus quite expensive for the user, whether he supplied it directly or employed a commercial bonding firm. Moreover, unless the amount of the bond were limited, it would allow the cable operator to make the price of access prohibitive. As a result, a bonding system seems inappropriate. If any security is needed, self-insurance by the cable operators would be more efficient.

243 In Brandenburg v. Ohio, 395 U.S. 444 (1969), for example, the Supreme Court held that a state criminal syndicalism statute could not be applied absent proof that the speech involved was "directed to inciting or producing imminent lawless action and [was] likely to incite or produce such action." Id. at 447 (footnote omitted).

It would be difficult to impute actual malice to a cable operator who lacked control over and knowledge of a program’s content. Even if a cable operator could be held liable, federal access regulations might well preempt a state court judgment. Finally, whatever minimal risk of liability might remain could be covered easily and inexpensively by self-insurance. The nature of the risk is now sufficiently speculative to make insurance either unobtainable or prohibitively expensive. After the initial shakedown period, however, the risk should turn out to be relatively low and predictable and the insurance comparatively inexpensive.

In reality, cable operators are probably more concerned about losing viewers than lawsuits. But this is hardly a paramount regulatory concern. It neither outweighs nor justifies the danger of censorship.

E. Jurisdiction to Enforce Access

Assuming then that access regulation is workable, the final problem is to determine what governmental entities have the authority and ability to impose it. Although the FCC’s general jurisdiction over CATV is now fairly well settled, it is not yet entirely clear whether it is plenary, since every court to pass on the issue has come up with its own distinctive analysis. Indeed, in United States v. Southwestern

---

245 Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 43 (1971). The plaintiff had attempted to recover for allegedly defamatory broadcasts concerning a police campaign against his nudist magazines.

246 One possible exception might be what has become known as the “second bite of the apple,” a situation in which an operator gives an allocation to a user who has already engaged in criminally or civilly proscribed conduct on an access channel or other medium. The difficulty here is in defining the “first bite.” Must it have resulted in the mere commencement of an action or in a judgment? How closely related in time to an access allocation request must it be? How related must the subject matter be? How substantial must the damages have been? Without a clear and understandable resolution of these questions, the cable operator will be in a very legitimate quandary, which he will quite reasonably respond to by barring all users who seem even colorably tainted. To avoid this result, the courts would probably be hesitant to hold that a user’s past conduct is sufficient to impute knowledge of his proposed statement to the CATV operator.


248 This confusion is partially owing to the FCC’s own pronouncements about its jurisdiction. When it promulgated the 1966 set of regulations (Second Report and Order, 2 F.C.C.2d 725 (1966)), the Commission developed a two-stage argument. It maintained that the statement in 47 U.S.C. § 152(a) (1970) that “[t]he provisions of this chapter shall apply to all interstate and foreign communication by wire or radio” gave it jurisdiction over CATV. It then argued that other provisions in the Act empowered it to make regulations. 2 F.C.C.2d at 793-97. This approach had some obvious conceptual drawbacks, since notions of jurisdiction and rule-making power are so intertwined that their severance inevitably leaves loose ends dangling. Thus, in Buckeye Cablevision, Inc. v. FCC, 387 F.2d 220 (D.C. Cir. 1967), the court
Cable Co.,249 the Supreme Court refused to pass on the validity of the 1966 regulations. Instead, it held that "the authority which we recognize today under § 152(a) [the statutory section partially relied upon by the FCC for its jurisdiction] is restricted to that reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting."250 This language has been interpreted in a number of ways. Some observers see it as a blanket grant of power to the Commission,251 while others have read it as authorizing the Commission only to regulate CATV's impact on broadcasting.252 Most recently, the Eighth Circuit chose the latter interpretation. In Midwest Video Corp. v. United States,253 the court invalidated the Commission's origination requirement on the ground that it had no relation to the protection of broadcasting. This reasoning would presumably bar the Commission from adopting an access formula, since that would directly aid potential users rather than broadcasters. Such a result, however, is not only unrealistic, but also at odds with the reasoning of Southwestern. Despite its "reasonably ancillary" language, the Supreme Court based its decision on "the language of § 152(a)."254 Though the Court may have violated both the letter and spirit of section 152(a) in doing so,255 adherence to this approach would nonetheless give the Commission plenary jurisdiction over CATV. Moreover, a

upheld the Commission's jurisdiction on the ground that the goal of a national communications policy would be frustrated if the Commission could not regulate CATV. Id. at 224-25. Though it briefly mentioned the Commission's rationale (id. at 223), it did not analyze or adopt it. Conversely, in striking down the 1966 regulations in Southwestern Cable Co. v. United States, 378 F.2d 118 (9th Cir. 1967), rev'd, 392 U.S. 157 (1968), the Ninth Circuit concerned itself only with the Commission's rule-making power, without ever discussing whether section 152(a) was an effective grant of jurisdiction. See note 249 infra.

249 392 U.S. 157 (1968). In fact, the issue of the Commission's jurisdiction over CATV may never really have been properly before the Court. The Ninth Circuit's decision may be viewed as based solely on the ground that the FCC lacked statutory power to issue the particular type of order in question. 378 F.2d at 124. The Supreme Court recognized this possibility, but nevertheless went on to decide the broader issue of jurisdiction. 392 U.S. at 161 n.6.

250 392 U.S. at 178.

251 See, e.g., DEP'T OF JUSTICE, supra note 181, at 11; Botein, supra note 7, at 251.

252 E.g., Jones 123; Note, Regulation of Community Antenna Television, 70 COLUM. L. REV. 837, 859-60 (1970).

253 441 F.2d 1322 (8th Cir. 1971), cert. granted, 92 Sup. Ct. 676 (1972).

254 392 U.S. at 172. See note 248 & text accompanying note 250 supra.

255 First, the context of the section indicates that it was probably conceived of as a safeguard against regulation of intrastate communication by the Commission. Second, this interpretation of section 152(a) would make section 301, which empowers the Commission to license broadcasters, redundant.
Court so strongly committed to encouraging diversity\textsuperscript{256} may well hesitate before striking down attempts to promote access.

If CATV were treated as a common carrier under Title II of the Communications Act,\textsuperscript{257} the FCC could, of course, exercise its traditional power to regulate rates and practices. For years, however, the Commission has held that CATV is not a common carrier,\textsuperscript{258} and the holding has received judicial approval.\textsuperscript{259} This approach may be due for a change, however, since CATV has changed—and would change further under an access formula—from a relayer of broadcast signals to a medium controlled by viewer and user.\textsuperscript{260}

The FCC probably has the authority to require access to CATV. Whether it has the inclination to do so, however, is a totally different and far more questionable proposition; so far, the Commission has painted access into its regulatory picture with only the broadest of strokes.\textsuperscript{261}

Although the Commission presumably can preempt state and local authorities,\textsuperscript{262} it has been loath to accept such a role\textsuperscript{263} and has recently admitted that it was "without any overall plan" for parceling out federal, state, and local regulatory responsibilities.\textsuperscript{264} Moreover, the Supreme Court has sanctioned, although somewhat ambiguously, state and local cable regulation.\textsuperscript{265} As a result, state and local authorities are free to invoke their respective police and franchise powers\textsuperscript{266} to regulate

\textsuperscript{256} See notes 38-39 and accompanying text supra.

\textsuperscript{257} 47 U.S.C. §§ 221(b), 222(a) (1970).

\textsuperscript{258} Report and Order, 26 F.C.C. 403, 427-28 (1959). This ruling was made, however, at the time when the FCC was attempting to avoid taking jurisdiction over CATV.

\textsuperscript{259} Philadelphia Television Broadcasting Co. v. FCC, 359 F.2d 282 (D.C. Cir. 1966).


\textsuperscript{263} Notice of Proposed Rulemaking, 33 Fed. Reg. 19028, 19031 (1968). In fact, the Commission seems to be reluctant to exercise its authority to impose affirmative requirements relating to cable regulation directly on state and local governments. Rather than deliberately imposing any direct obligations on state and local governments, it has attempted to achieve the same result indirectly by requiring a cable system to certify that its local franchise meets certain minimum standards. The new regulations do not impose minimum franchise requirements directly on local governments; rather, they provide that a cable system’s use of broadcast signals will not be approved absent such requirements. 37 Fed. Reg. at 3281.


\textsuperscript{265} In TV Pix, Inc. v. Taylor, 396 U.S. 556 (1970), the Court issued a per curiam no opinion affirmance of a three-judge district court’s decision that a state could regulate aspects of CATV not preempted by the Commission.

\textsuperscript{266} Botein, \textit{supra} note 72, at 817-23.
access. The real problem in defining state and local roles is political rather than legal. Many local governments have franchised cable systems for a long time and have no desire to lose either power or revenue. Divesting a local government of its authority would thus generate formidable political opposition. But joint state and local regulation, as proposed in several states, would create a three-tiered bureaucracy.

Access can, however, be split off from other CATV regulatory issues and administered by a separate body. Continuous surveillance is necessary even with federal standards, since even the most precise access formula requires interpretation and application. Moreover, an access formula must be administered quickly, since both allocations and users' needs are transitory in nature. A local regulatory body might well be most appropriate. Entricing such politically sensitive issues to a local agency inevitably creates a risk of undue influence, no matter how much insulation is provided. The political value of access, however, makes some risks inevitable, and these risks may be a reasonable price for speed. Moreover, making a local body's action reviewable before state courts and perhaps the FCC should keep it fairly honest.

The final problem raised by access regulation is the first amendment. Although the Supreme Court has dispelled any lingering illusions that broadcast regulation is not subject to the first amendment, it still embraces the "scarcity doctrine"—the notion that broadcasting may

267 Although there are no figures on unfranchised cable systems, the number is presumably very small since a local government has an obvious economic and regulatory incentive to require a franchise. In fact, most unfranchised systems are probably the product of rare cases in which state courts have held local governments without power to require a franchise of a CATV using leased telephone company cables. See id. at 820-21.

268 Id. at 819. Though most fees seem to run around 5% to 6% (Jones 127), some have been known to be as high as 37%. Anthony, A Regulator Looks at State CATV Regulation, 82 PUB. UTIL. FOR., Dec. 5, 1968, at 30.

269 E.g., (1971) Ill. Scn. Int. No. 169 (Mr. Clarke); (1970) N.Y. Assy. Int. No. 6700-A (Mr. Kelly). None of the bills was ever enacted.

270 See Note, supra note 46, at 546-47.

271 See note 74 and accompanying text supra.

272 The Better Broadcasting Council proposed the rather ingenious method of having officers of the local body elected by CATV subscribers. BETTER BROADCASTING COUNCIL, supra note 136, at § 3.2(b). Though this might keep conventional types of influence-peddling out, it would more probably just result in the creation of new forms. Moreover, it might be unfair to some nonsubscribers who have a real interest in cable regulation—e.g. prospective subscribers.

273 It is questionable how far the Commission can go in compelling a local government to take certain action. Note 263 supra. A system of ultimate Commission review might therefore require legislation.

be closely regulated because of the limited availability of frequencies.\textsuperscript{275} This theory is increasingly untenable in broadcasting,\textsuperscript{276} and seems inapplicable to CATV's economy of abundance.\textsuperscript{277} Access regulation might possibly violate the first amendment, since it prescribes how a cable operator may and may not program some of his channels.\textsuperscript{278} The cable operator's lament, however, should be no more persuasive than the broadcaster's, especially in light of the Court's commitment to diversity.\textsuperscript{279}

**Conclusion**

Broadcasting's economic structure has prevented it from developing real diversity. CATV can potentially turn this situation on its ear, but not if left to the dictates of the marketplace or to the caprice of individual operators. Traditional modes of regulation and diversification of ownership are likely to be no more effective with CATV than with broadcasting. Conversely, access regulation presents enormous practical and political problems. Nevertheless, it might just be worth a try, before the nation wanders from the vast wasteland into something even worse.

\textsuperscript{275} See National Broadcasting Co. v. United States, 319 U.S. 190, 226 (1943).

\textsuperscript{276} As one lower federal court noted, there are currently far more radio and television stations than newspapers in any given community. Radio Television News Directors Ass'n v. United States, 400 F.2d 1002, 1019 (7th Cir. 1968), rev'd sub nom. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

\textsuperscript{277} In Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 400 (1969), the Court indicated that another basis for Commission regulation may be the entrenched, quasi-monopolistic position of broadcasters in a community. See also Note, supra note 241, at 1018.

\textsuperscript{278} See Note, supra note 241, at 1015-16, 1020-21.

\textsuperscript{279} Notes 38-39 and accompanying text supra.