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CATV REGULATION: A JUMBLE OF JURISDICTIONS

MICHAEL BOTEIN*

The community antenna television (CATV) industry is rapidly becoming a major element of the communications media. Unfortunately, attempts to regulate the industry have not kept pace. Local, state and federal authorities were slow to recognize the need for CATV regulation and, when they finally entered the field, their efforts were uncoordinated and inadequate. But, recent activity in the field by city and state authorities, the Federal Communications Commission and the Congress signals the emergence of a multi-jurisdictional system of CATV regulation. The author describes this system and suggests improvements that will encourage CATV to realize its full potential.

THE explosive growth of CATV was anticipated by few communications experts and even fewer governmental officials. When the need for regulation finally became apparent, however, response came from every governmental level—cities, states and the Federal Government. This surge of activity has produced a regulatory nightmare, haunted by overlapping jurisdictions and conflicting regulations. Although relief is not yet in sight, resolution of the major issues has at least begun.

I

LOCAL AND STATE REGULATION

In *TV Pix, Inc. v. Taylor*¹ the Supreme Court by way of a no-opinion affirmance held that states, and by implication local governments, had the power to regulate those aspects of CATV upon which the Federal Communications Commission (FCC) had not acted. The Court's summary disposition of the issue indicates a more or less blanket grant of authority, but the three-judge district court's opinion raises a noteworthy question. The lower court held that state regulation of CATV did not unduly burden interstate commerce since a CATV, even though clearly within the federal commerce power,² is basically a local operation and thus not subject to any risk of multiple and inconsistent regulation by different states.³ Although sensible in the context of *TV*

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¹ 396 U.S. 556 (1970), aff'g mem. 304 F. Supp. 459 (D. Nev. 1968).

² *United States v. Southwestern Cable Co.*, 392 U.S. 157, 168-69 (1968).

³ 304 F. Supp. 459, 463 (D. Nev. 1968). The court also held that the FCC had

Pix, i.e., CATV operation solely within the state of Nevada, the reasoning of the decision does not solve the problems raised by CATV operation in more than one municipality or state. Inconsistent regulation here would whipsaw the CATV, and thus pose, by analogy to the common carrier cases,⁴ the thorny constitutional problem of deciding which regulatory scheme to sustain. With the exception of such literally borderline cases, however, *TV Pix* is a fairly reliable grant of power. Realistically, the Supreme Court could have reached no other result since state and local governments were already deeply entrenched in the field.

A. Local Regulation

Perhaps the safest generalization about local CATV regulation is that it has been somewhat less than well-planned and executed. In a limited number of areas CATVs are not supervised at all,⁵ while in others regulation has taken the form of simply auctioning off franchises.⁶ Franchising has become the most common form of control, and some cities, most particularly New York, are making good use of it.

Despite some politically bitter disputes as to the city's failure to require competitive bidding in two cases,⁷ the uniform

not yet preempted the field. *Id.* at 464-65. It did not, however, offer any opinion as to the extent of the FCC's power to preempt. *Id.* at 465. Although the FCC has recently taken the position that it can totally preempt any local action, Notice of Proposed Rule Making, Federal-State or Local Relationships, 35 Fed. Reg. 11,044 (1970) [hereinafter Federal-State Notice], it is uncertain that its power would be held to extend to matters of such seemingly local interest as rate regulation.

⁴ E.g., *Bibb v. Navajo Freight Lines*, 359 U.S. 520 (1959); *Morgan v. Virginia*, 328 U.S. 373 (1946).

⁵ *Huntley & Phillips, Community Antenna Television: A Regulatory Dilemma*, 18 Ala. L. Rev. 64, 69 (1965).

⁶ Anthony, *A Regulator Looks at State CATV Regulation*, 82 Pub. Util. Fort., Dec. 5, 1968, 28, 29; Taylor, *The Case for State Regulation of CATV Distribution Systems*, 23 Fed. Com. B.J. 110, 112 (1969).

⁷ Quite a furor developed over the Board of Estimate's proposal to grant two Manhattan franchises to existing CATVs without competitive bidding. N.Y. Times, July 24, 1970, at 63, col. 1; *id.*, Mar. 29, 1970, at 60, col. 3. In an emotional editorial the *Times* was moved to denounce the lack of competitive bidding. N.Y. Times, July 28, 1970, at 30, col. 2. The franchises were finally granted without competitive bidding, although it will be required for franchises in other boroughs. N.Y. Times, July 29, 1970, at 1, col. 2.

All of the political sound and fury was probably misdirected. Competitive bidding seems to be a rather inappropriate means of awarding CATV franchises, since the services rendered are less standardized than, for example, building contracts. A recent study of the question indicates that competitive bidding, whether based on lump sum payments, percentages of gross receipts or required services, is positively detrimental to the public interest. R. Posner, *Cable Television: The Problem of Local Monopoly* 14-20 (1970). Instead, Professor Posner suggests that cities adopt a "bargaining" approach and attempt to deal with applicants for the best

contract for all New York CATVs is notable for its comprehensive scope. It not only imposes detailed contractual terms but also reserves a broad grant of future rulemaking power to the city,⁸ thereby avoiding any risk of the city's being locked into a long-term obsolete contract. More importantly, the contract recognizes and provides for the development of CATV's ability to connect individual households with other homes, commercial enterprises and cultural institutions. Thus the contract requires an extremely large present channel capacity, an even larger future one⁹ and the development of two-way CATV com-

"service-rate package"—with no resulting payoff to the city. *Id.* at 20. The proposal seems sound in theory, but the means of implementing it are fraught with problems too numerous to be discussed here.

Another peculiarity of the New York City situation is that franchises are not exclusive. New York City Proposed Form of Contract § 2(c) [hereinafter N.Y.C. Contract]. This somewhat anomalous situation is produced not by the city's choice, but rather by N.Y. Const. art. 3, § 17 which prohibits exclusive franchises. In practicality, the nonexclusive nature of the franchise presents no real risk to the contracting CATV. N.Y.C. Contract, *supra* § 3(c) requires that the contracting CATV make service available to its whole franchise area within four years from the granting of the franchise—thus giving it, as of that time, a *de facto* franchise. See L. Johnson, *The Future of Cable Television: Some Problems of Federal Regulation* 64 (1970). Interestingly enough, Professor Posner takes the position that CATVs should not get exclusive franchises on the grounds that some competition between them is possible if potential subscribers are given a choice of different services. Posner, *supra* at 8. This argument seems to overlook the fact—which Professor Posner admits—that once one CATV is firmly entrenched in a community it becomes almost impossible for another CATV to move in. *Id.* at 10. Moreover, it also assumes that all potential operators will offer their services simultaneously and that subscribers will not be swayed by advertising.

⁸ N.Y.C. Contract, *supra* note 7, § 8(d).

⁹ *Id.* § 3(a) requires that a CATV immediately offer 17 channels and that it increase its total capacity to 24 within three years from the granting of the franchise. Of the 17 channels immediately required, 11 are merely for local stations, whose carriage has long since been required by the FCC. 47 C.F.R. § 74.1103 (1970). The remaining channels are divided into four different categories. The one "company channel" is designed for origination by the CATV system. N.Y.C. Contract, *supra* note 7, § 1(p). The granting of only one channel for origination is the product of two FCC rulings. The first requires a CATV to originate on one—but only one—channel. First Report and Order, 20 F.C.C.2d 201, 206 (1969). The second pre-empts local governments from any interference with such origination. Clarification of CATV First Report As to Scope of Federal Pre-emption, 20 F.C.C.2d 741, 742 (1969). The two "city channels" are reserved for the use of the city. N.Y.C. Contract, *supra* note 7, § 1(n). This provision is perhaps unfortunate since it seems unrealistic to expect that the city will be able, at any time in the foreseeable future, to originate enough programming to make real use of two channels, even on a part-time basis. The provision for two "public channels," *id.* § 1(o), is perhaps the most interesting of the four as it provides for common carrier access to the CATV. *Id.* § 4(e). The fourth and final type of channel—the "additional channel"—calls for an apparently modified form of common-carrier operation; non-CATV programmers must be given priority in access to it, but the CATV may use it when there are no other customers available. *Id.* §§ 1(q), 4(f).

One strange aspect of the contract concerns the order of allocation of channels above the immediately required 17, i.e., one city channel, two public channels and three additional channels. *Id.* § 4(c). This requirement makes it extremely difficult

munication.¹⁰ It also provides for CATV service for minority interests and small geographical areas,¹¹ as well as the future possible development of a CATV network through CATV interconnection.¹²

Unfortunately, however, New York has been unable to resist the temptation of treating CATV as an unexpected but needed windfall of ready cash.¹³ The city's demand for franchise fees of 5 per cent or more of gross receipts¹⁴ may be unwise both practically and legally. The effect of such fees could be to restrict CATV operations, especially in light of the other obligations to be imposed on CATV by federal regulations and statutes now under consideration.¹⁵ Also the present fee arrangement is of questionable legality. First, and most significantly, the FCC has proposed to limit municipal CATV franchise fees to 2 per cent of gross receipts.¹⁶ Second, the Sixth Circuit has recently held that a municipi-

for a New York CATV to import the four distant independent signals which the FCC is now proposing to allow. See text accompanying note 75 *infra*. In order to import distant signals the CATV first would have to add the above total of six new channels, then, petition the City's Director of Communications for still more channels if there were enough non-CATV use of the four additional channels to prevent carriage of all four distant signals on them. N.Y.C. Contract, *supra* note 7, § 22(c). This may be desirable in that it promotes the development of multichannel capacity, but it may also unduly delay New York CATVs' use of distant signals.

¹⁰ *Id.* § 3(h). A CATV with such two-way capability would allow not only the sending of signals into the home, but also a response to them—thus opening up a panoply of new services.

¹¹ *Id.* § 3(e) requires that a CATV divide its franchise area into at least ten subdistricts, each capable of receiving its own specialized programming, within four years from the granting of its franchise.

¹² *Id.* § 3(d) requires a CATV to interconnect with any other CATV adjacent to it. This is in accord with the FCC's present policy in favor of interconnection. CATV Technical Standards, 35 Fed. Reg. 11,036, 11,037-38 (1970). Oddly enough, in its negotiations with the broadcast industry the National Cable Television Association was willing, during at least one period, to accept a ban on interconnection in exchange for limited use of distant signals. National Cable Television Ass'n Resolution § 5 (May 28, 1969) [hereinafter NCTA Resolution]. The pact was rejected by the National Association of Broadcasters. National Ass'n of Broadcasters Resolution (June 20, 1969).

¹³ This practice is also common among other financially desperate city governments. See Federal-State Notice, *supra* note 3, at 11,045; Anthony, *supra* note 6, at 30.

¹⁴ N.Y.C. Contract, *supra* note 7, § 7(a) requires that a CATV pay to the City 5% of its gross receipts from all normal channel subscriptions, 10% of its gross receipts from any other services and a percentage fixed by the Board of Estimate of its gross receipts from any pay channels.

¹⁵ See text accompanying notes 16, 81 *infra*. Or the city may, like the Commission and the Congress, be prepared to have subscribers ultimately assume the cost. See text accompanying note 179 *infra*.

¹⁶ Federal-State Notice, *supra* note 3, at 11,045. See also National Ass'n of Regulatory Util. Comm'rs, Model State CATV Regulatory Surveillance Act § 9 (1970) [hereinafter NARUC 1970] which provides for a similar, though unspecified, limit on franchise fees.

pal gross receipts franchise fee violates the commerce clause.¹⁷ Although the court's rationale seems to be inadequate,¹⁸ it may have some limited validity in the case of overlapping boundaries.¹⁹

The New York regulatory experience presents a good example of another problem in local CATV regulation, *i.e.*, obtaining jurisdiction over CATVs which operate by leasing telephone company lines. Various cities have attempted to regulate such CATVs, only to be judicially or administratively rebuffed. New York suffered the most striking of these setbacks.

In *City of New York v. Comtel*²⁰ a lower state court construed some broad language in the New York City Charter²¹ to deny the Board of Estimate the power to franchise enterprises which used the streets but which did not make some form of mystical "physical" or "tangible" contact with public property.²² The court further complicated the jurisdictional problem by indicating in dictum that because the telephone company had amplified the signals before transmitting them over their lines, the signals were telephone signals rather than those of the CATV.²³ This piece of judicial sorcery somehow survived review by two appellate courts with the somewhat anomalous result that

¹⁷ *Wonderland Ventures, Inc. v. City of Sandusky*, 423 F.2d 548 (6th Cir. 1970).

¹⁸ The court based its decision on two grounds: (1) the franchise fee amounted to an unconstitutional tax on the gross receipts of an interstate business, and (2) the ordinances imposing the fee were too vague for the regulation of an area involving first amendment considerations. Both grounds seem questionable. The case relied upon by the court in support of its first point, *Fisher's Blend Station, Inc. v. Tax Comm'n*, 297 U.S. 650 (1936), is distinguishable since the tax there held to violate the commerce clause was imposed on radio stations which broadcast to numerous states and presumably derived some of their revenue from out-of-state sources. Most CATVs, on the other hand, are local operations based solely within one state or municipality. More in point is the recent case of *Pacific Broadcasting Corp. v. Riddell*, 427 F.2d 519 (9th Cir. 1970), where the court upheld a Guam privilege tax on the gross receipts of a radio station, apportioned to the amount of advertising revenue obtained in Guam. The court's second point seems equally weak. The Supreme Court has imposed strict vagueness requirements only where regulation of expression is involved, not where merely financial burdens are imposed upon a means of expression. *Associated Press v. United States*, 326 U.S. 1 (1945).

¹⁹ Where a CATV is subject to taxation by more than one state or local entity, more than its total gross receipts might be taxed, thus creating a form of multiple taxation probably violative of the commerce clause. *General Motors Corp. v. Washington*, 377 U.S. 436 (1964).

²⁰ 57 Misc. 2d 585, 293 N.Y.S.2d 599 (Sup. Ct.), *aff'd mem.*, 30 App. Div. 2d 1049, 294 N.Y.S.2d 981 (1st Dep't 1968), *aff'd mem.*, 25 N.Y.2d 922, 252 N.E.2d 285, 304 N.Y.S.2d 853 (1969).

²¹ New York City, N.Y., Charter § 362 (1963) gives the Board of Estimate "the exclusive power in behalf of the city to grant franchises . . . providing for or involving the occupation or use of any of the streets."

²² 57 Misc. 2d at 593, 293 N.Y.S.2d at 606.

²³ *Id.* at 590-91, 293 N.Y.S.2d at 604.

telephone-based CATV is not subject to city franchising while all other CATVs are.²⁴ Unfortunately, *Comtel* is not an isolated aberration; at least one other state court and one other state administrative agency have arrived at similar results.²⁵

Comtel-type rulings, however, do not create a total regulatory void; a telephone-based CATV can be indirectly regulated through state and federal regulation of the telephone company. Thus a state public service commission can control, to a limited extent, a telephone-based CATV's rates and services by controlling the relevant telephone company tariff.²⁶ On the federal level the FCC has long been concerned with the relation between telephone companies and telephone-based CATVs,²⁷ and has exercised its indirect powers under the Communications Act of 1934²⁸ to require that telephone companies obtain certificates of public convenience and necessity for CATV channel leasing.²⁹ As will be discussed, the FCC's interest in the area culminated most recently in a total ban on telephone company ownership of telephone-based CATVs.³⁰

B. State Regulation

Chairman Taylor of the Nevada Public Service Commission recently warned his fellow state utility commissioners that unless they moved into CATV regulation the FCC would preempt the whole field.³¹ Nevertheless, the FCC does not appear to be moving

²⁴ The FCC has recently involved itself in the situation and has ordered Comtel's franchised competitors not to expand their systems, pending full Commission review of a hearing examiner's approval of the telephone company's leasing channels to Comtel. See Memorandum Opinion and Order, No. 70-1094 (F.C.C., Oct. 7, 1970). The hearing examiner, while apparently not very impressed with New York City's regulatory efforts, expressly took no position as to the validity or wisdom of them. In re Better T.V., Inc., No. 70-D-29, at 106 n.41 (F.C.C., July 20, 1970).

²⁵ *City of Waterville v. Bartell Tel. TV Systems*, 233 A.2d 711 (Me. Sup. Ct. 1967); *City of Jackson v. Michigan Bell Tel. Co.*, 63 P.U.R.3d 384 (Mich. Pub. Serv. Comm'n 1966).

²⁶ In re New York Tel. Co., 34 P.U.R.3d 115 (N.Y. Pub. Serv. Comm'n 1960). See also In re Pacific Tel. & Tel. Co., 56 P.U.R.3d 419 (Cal. Pub. Util. Comm'n 1964).

²⁷ In In re American Tel. & Tel. Co., 7 P & F Radio Reg. 2d 179 (1966), the FCC requested telephone companies to file tariffs for CATV channel leasing services. It codified its request in Memorandum Opinion and Order, 7 P & F Radio Reg. 2d 673 (1966).

²⁸ 47 U.S.C. § 214 (1964).

²⁹ See General Tel. Co., 13 P & F Radio Reg. 2d 667 (F.C.C. 1968), aff'd, 413 F.2d 390 (D.C. Cir.), cert. denied, 396 U.S. 888 (1969).

³⁰ See text accompanying notes 139-42 *infra*.

³¹ Taylor, *supra* note 6, at 112-15 (1969). In a slightly conspiratorial tone, Chairman Taylor warned his colleagues that "certain staff members" of the FCC were responsible for planning the move. *Id.* at 113.

in this direction,³² and most states have not heeded Chairman Taylor's admonition. At present only five states regulate CATV to any significant extent.

Wyoming, the first state to do so, proceeded by perhaps the easiest method: its Public Service Commission simply declared CATV to be a public utility and thus within its jurisdiction.³³ The California Public Utility Commission attempted to follow the same course, only to be reversed by the Supreme Court of California.³⁴ The four other states now regulating CATV took the more orthodox and somewhat better-planned approach of placing CATV within their general scheme of public utility regulation by statutory enactment.³⁵ In addition to requiring that CATVs obtain a certificate of public convenience and necessity,³⁶ these statutes establish at least the semantic basis for rate regulation by classifying CATV as a public utility.³⁷ They differ, however, in two significant respects.

First, the scope of the powers granted to each state's public service commission varies. Nevada, the only state to adopt the Model CATV Act,³⁸ broadly authorizes its commission to make any regulations which it deems "necessary or convenient."³⁹ On

³² See text accompanying notes 54-60 *infra*.

³³ *In re Cokeville Radio & Electronic Co.*, 6 P.U.R.3d 129, 133-35 (Wyo. Pub. Serv. Comm'n 1954). The Wyoming Commission reaffirmed its position several times. *In re Community Television Sys. of Wyoming*, 23 P.U.R.3d 444 (Wyo. Pub. Serv. Comm'n 1958); *In re Rawlins Community Television Co.*, 12 P.U.R.3d 208 (Wyo. Pub. Serv. Comm'n 1956). More recently, the Attorney General of Hawaii rendered an opinion that CATV was a public utility. Opinion Att'y Gen. of Hawaii, 1969 Util. L. Rep. ¶ 21,206. No action, however, appears to have been taken to implement the ruling. But see *In re Seneca Radio Corp.*, 57 P.U.R.3d 67 (Ohio Pub. Util. Comm'n 1964); *In re Edwin Frances Bennett*, 89 P.U.R. (n.s.) 149 (Wis. Pub. Serv. Comm'n 1951) (state commissions denying jurisdiction over CATV). Cf. *Staminski v. Romeo*, 310 N.Y.S.2d 169 (Sup. Ct. 1970); *Aberdeen Cable T.V. Serv., Inc. v. City of Aberdeen*, No. 10731-r-CSH (S.D. Sup. Ct., May 5, 1970) (CATVs held to be public utilities in nonregulatory context).

³⁴ *Television Transmission, Inc. v. Public Util. Comm'n*, 47 Cal. 2d 82, 301 P.2d 862 (1956), where the court held it to be *ultra vires*.

³⁵ See Conn. Gen. Stat. Rev. §§ 16-330 to -333 (1966); Nev. Rev. Stat. §§ 711.010 to .180 (1969); R.I. Gen. Laws Ann. §§ 39-19-1 to -8 (Supp. 1969); Vt. Stat. Ann., tit. 30, §§ 501-07 (Supp. 1970).

³⁶ Conn. Gen. Stat. Rev. § 16-331 (1966); Nev. Rev. Stat. § 711.090 (1969); R.I. Gen. Laws Ann. § 39-19-3 (Supp. 1969); Vt. Stat. Ann., tit. 30, § 503(a) (Supp. 1970) (a license required in addition to a certificate).

³⁷ Conn. Gen. Stat. Rev. § 16-1 (1966) ("public service company"); Nev. Rev. Stat. § 74.020(1)(a) (1969) ("public utility"); R.I. Gen. Laws Ann. § 39-1-2 (Supp. 1969) ("public utility"); Vermont does so indirectly, since under Vt. Stat. Ann., tit. 30, § 201 (Supp. 1970) any company subject to the Public Service Board's jurisdiction is considered a "public service" company.

³⁸ National Ass'n of Regulatory Util. Comm'rs, Model State Community Antenna Television System Act (1966) [hereinafter NARUC 1966].

³⁹ Nev. Rev. Stat. §§ 711.090, .140 (1969).

the other hand, Rhode Island seems to narrowly limit its commission to the power of placing conditions on certificates before issuance.⁴⁰ In between, Vermont merely expands its commission's traditional regulatory powers to include CATV⁴¹ while Connecticut allows the commission to create new conditions on certificates after they have been issued if the "public interest" requires.⁴² The differences in powers, however, may be academic; since each statute defines CATV as a public utility, each state agency may be authorized to exercise the broad powers granted by its general enabling statute.

Second, the four acts differ in their approach to the issue of rate regulation. Only the Nevada statute explicitly gives its commission the power to set rates;⁴³ the Connecticut and Vermont statutes are totally silent on the subject; and the Rhode Island statute prohibits discriminatory rates⁴⁴ but does not explicitly give its commission any power to make rates. Once again, however, the lack of an express grant of power may not be determinative; all three commissions have a general authority to regulate public utility rates which presumably extends to CATVs by nature of their definition as such.⁴⁵

Rate regulation has been one of the most sensitive issues in both local and state CATV regulation. The CATV industry has

⁴⁰ The Rhode Island statute clearly gives the commission the authority to impose conditions in certificates. R.I. Gen. Laws Ann. § 39-19-4 (Supp. 1969). It is, however, unclear as to the breadth of the commission's authority. One section of the act appears to limit the commission's power to regulating a CATV's physical structures. *Id.* § 39-19-2. Another seems to define the commission's jurisdiction in somewhat broader, though by no means expansive, terms as including "reasonable rules and regulations" in relation to the operation—though not the programming—of CATVs. *Id.* § 39-19-6.

⁴¹ The Vermont statute's grant of power is made by the very simple means of incorporating by reference the general powers of the Public Service Board. *Vt. Stat. Ann.*, tit. 30, § 504 (Supp. 1970). These powers include a broad grant of general regulatory authority, ratemaking power and control over service. *Id.* §§ 209, 218-19.

⁴² *Conn. Gen. Stat. Rev.* § 16-331 (1966) empowers the commission to "specify in the certificate at the time of issue *and* from time to time thereafter such terms as the public interest may require." (emphasis added).

⁴³ *Nev. Rev. Stat.* § 711.150(3) (1969).

⁴⁴ R.I. Gen. Laws Ann. § 39-19-6 (Supp. 1969).

⁴⁵ See *Conn. Gen. Stat. Rev.* § 16-19 (1966); R.I. Gen. Laws §§ 39-3-10 to -11 (Supp. 1969); *Vt. Stat. Ann.*, tit. 30, § 218 (1970). Rhode Island, it should be noted, has a provision which is strange but not totally out of character for the state which spawned the morals policing system struck down in *Bantam Books, Inc., v. Sullivan*, 372 U.S. 58 (1963). R.I. Gen. Laws § 39-19-8 (Supp. 1969) empowers the commission to revoke the certificate of any CATV system "whose programs originating within this State are offensive to commonly accepted standards of morality and decency of the community."

had a traditional fear of rate regulation,⁴⁶ and there appears to be a certain squeamishness on the part of some states to impose it⁴⁷—perhaps due to the belief that CATV lacks sufficient public utility characteristics to constitutionally support such regulation.⁴⁸ The proposition, however, seems doubtful. Most CATVs usually have an exclusive franchise and thus fall within any classical definition of a public utility. Moreover, even if a CATV does not have an exclusive franchise, it certainly seems to meet the Supreme Court's exceedingly liberal test of a business "affected with a public interest."⁴⁹

The real problem with CATV rate regulation seems to be not its validity but rather its standards. The use of traditional valuation methods creates a risk of setting the rate base either too high or too low. Since CATV involves a large initial investment with small immediate return, a newly constructed CATV may require setting an artificially low rate base.⁵⁰ On the other hand, if the CATV is well-established and has been depreciated over a

⁴⁶ Note, *The Wire Mire: The FCC and CATV*, 79 Harv. L. Rev. 366, 373 (1965).

⁴⁷ Taylor, *supra* note 6, at 117. It is noteworthy that an alternative to the position taken in NARUC 1966, *supra* note 38, § 9 has now been proposed. See NARUC 1970, *supra* note 16, § 10 which, like the Rhode Island statute, provides only that rates must not be discriminatory.

⁴⁸ At least one commentator has argued that CATV should not be considered a public utility on the grounds that it is not a "necessity" and that it competes with broadcast television. Shafer, *Cable Television: Is State Regulation Needed?*, 84 Pub. Util. Fort., July 3, 1969, at 23, 25-26. This overlooks the fact that a CATV has a monopoly as to a particular form of service different from broadcast television. The same author also rests his argument on the somewhat naïve proposition that price and service abuses by CATVs are of minor importance, since CATV abuses are not yet widespread. *Id.* at 26-28.

⁴⁹ The traditional test of "affected with a public interest" originates, of course, with *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 rather were, at least theoretically, in competition with each other. A CATV on the other hand, has a de facto monopoly simply because of the prohibitive costs of laying cable. Johnson, *supra* note 7, at 64. Moreover, it appears that in some subdivisions the developer will contract for CATV service and, at the same time, prohibit use of rooftop antennas—thus making CATV subscription an absolute necessity. Witt, *CATV and Local Regulation*, 5 Cal. West. L. Rev. 30, 39 (1968). Finally, the Court has been increasingly liberal in its definition of "affected." In *Olsen v. Nebraska*, 313 U.S. 236 (1941), the Court announced a "drift away" from its older, more stringent standards and held the state could regulate an employment agency—a business certainly having far less exclusive control over the public than a CATV. *Id.* at 245-46.

⁵⁰ At least one state commission has recognized this problem. In *In re Rawlins Community Antenna Television Co.*, 12 P.U.R.3d 214, 216-17 (Wyo. Pub. Serv. Comm'n 1956), the commission allowed a CATV to charge higher initial installation charges—returnable at a future date—in order to finance the initial cost of constructing the system. Accord, *In re Robert M. Carollo*, 13 P.U.R.3d 581 (Wyo. Pub. Serv. Comm'n 1956).

substantial period of time, a higher base would be appropriate.⁵¹ Thus, rates must be based upon a flexible formula that correlates the high cost of constructing a CATV with the comparatively low cost of operating it.

Thus, local and state regulation of CATV is presently in a state of flux and confusion. Unfortunately, the governmental entities involved have made no effort to work out a sophisticated, uniform set of regulatory standards. And, despite Chairman Taylor's predictions,⁵² no solution seems to be forthcoming from the federal level.

The efforts of Congress to regulate CATV have been principally concerned with compulsory copyright licensing and have had virtually no effect on state and local regulation.⁵³ Moreover, the FCC has not attempted to coordinate federal, state and local CATV regulation; it candidly admits that it has not had any "overall plan"⁵⁴ and that it does not presently have the ability to implement one.⁵⁵ The FCC, however, is considering indirect supervision of matters now regulated solely by local or state governments. One approach in its newly proposed CATV regulations would require local governments to certify to the FCC that they had considered various criteria in granting a franchise.⁵⁶ This type of approach not only is consistent with the FCC's desire for extensive local CATV regulation,⁵⁷ but also seems to be the only pragmatic alternative. The FCC has sufficient trouble with its non-delegable regulation of 7500 radio and television stations that it seems quixotic to expect it to supervise in detail several thousand more enterprises.⁵⁸ Moreover, there are many details of CATV operation which simply cannot be handled on any other than a local level.⁵⁹ It therefore seems likely that local and state govern-

⁵¹ Taylor, *supra* note 6, at 118. Moreover, CATV depreciation rates are still far from standardized and reliable. Posner, *supra* note 7, at 28.

⁵² See text accompanying note 31 *supra*.

⁵³ See Section III *infra*.

⁵⁴ Federal-State Notice, *supra* note 3, at 11,044.

⁵⁵ Memorandum Opinion and Order, 35 Fed. Reg. 10,901-02 (1970).

⁵⁶ Federal-State Notice, *supra* note 3, at 11,045. The Commission posed three alternative modes of regulation: totally federal, the present intermixed type and the certification proposal. The first was obviously meant to be somewhat rhetorical as the Commission by way of understatement noted that "for this approach to be effective, considerable resources would have to be made available to this agency." *Id.* at 11,044.

⁵⁷ Notice of Proposed Rulemaking and Notice of Inquiry, 33 Fed. Reg. 19,028, 19,031 (1968).

⁵⁸ See *Broadcasting in America and the F.C.C.'s License Renewal Process: An Oklahoma Case Study*, 14 F.C.C.2d 1 (1968) (Johnson & Cox, Comm'rs, dissenting).

⁵⁹ For example, New York City requires its CATVs to provide minimum

ments will continue to exercise most of their present regulatory powers.⁶⁰ While they may operate subject to a slightly baleful FCC eye, it seems unlikely that the FCC will be willing or able to exert much more than a moral influence in the near future.

II

FCC REGULATION

When the Commission was initially confronted with the problem of CATV in 1959, its first reaction was simply to hide its head in the sand by denying that it had any jurisdiction over CATV at all.⁶¹ During the next seven years, however, CATV refused to disappear or even to become the "auxiliary" communications system which the Commission considered it.⁶² It not only grew in a manner which the Commission later termed "explosive,"⁶³ but also began to make increasing use of programs from television stations outside its service area—so-called "distant signals."⁶⁴ This latter phenomenon disturbed the broadcast industry since a CATV's offering of attractive and otherwise unavailable programs presumably results in a fragmentation of a local station's audience. As a result, the Commission was finally moved to action⁶⁵ and in 1965 decided that it did, after all, have jurisdiction⁶⁶ and promulgated a set of regulations which amounted to a total freeze on all CATV use of distant signals,⁶⁷ presumably

liability insurance, a security fund and equal opportunity employment. N.Y.C. Contract, *supra* note 7, §§ 12-14.

⁶⁰ It is not clear how the proposed certification provision would apply to those states which presently regulate CATV. The Commission certainly seems to be thinking in terms of regulation by cities, rather than by states. At the same time, it is highly unlikely that the FCC would preempt the jurisdiction of the states. Federal-State Notice, *supra* note 3, at 11,045.

⁶¹ Report and Order, 26 F.C.C. 403, 427-31 (1959).

⁶² First Report and Order, 38 F.C.C. 683, 698-99 (1965).

⁶³ Second Report and Order, 2 F.C.C.2d 725, 738 (1966).

⁶⁴ A distant signal is defined in terms somewhat opposite of what might be expected, i.e., by the area from which it is taken, rather than by the area into which it is imported. Thus, 47 C.F.R. § 74.1101(i) (1970) defines a distant signal as the signal of a station which does not broadcast a Grade B contour over the CATV's community. The coverage of a television station's signal is measured by three main standards of increasing coverage and decreasing signal quality—Principal Community contour, Grade A contour and Grade B contour. *Id.* §§ 73.683(a) to .685(a).

⁶⁵ It is perhaps unfair to suggest, as one Commissioner recently did, that the Commission has been "captured by the broadcast industry." N. Johnson, *How To Talk Back To Your Television Set* 201 (1970). The Commission, however, has been heavily committed to the development and perpetuation of broadcast television ever since it issued its first scheme of allocations in 1952. Sixth Report and Order, 17 Fed. Reg. 3905 (1952).

⁶⁶ First Report and Order, 38 F.C.C. 683, 685 (1965).

⁶⁷ 47 C.F.R. §§ 74.1101 to .1111 (1970); Second Report and Order, 2 F.C.C.2d

hoping that either Congress or the Supreme Court would resolve the underlying question of CATV copyright liability. When neither did,⁶⁸ it attempted to do so itself by proposing a new set of rules under which major market CATVs⁶⁹ would be allowed to import distant signals only after securing the "express authorization" of the station originating the distant signal.⁷⁰ To further complicate matters, the Commission allegedly left the 1966 rules in effect but at the same time laid down so-called "interim procedures"⁷¹ which provided that future applications to carry distant signals would be handled in accordance with the proposed rules. The decisiveness of the Commission's action is reflected in the fact that the proposed rules have not yet been promulgated and the interim procedures are still in effect.

The Commission's newly proposed regulations must be viewed against this confused background. In June 1970 the Commission disgorged a variety of documents—opinions, orders, reports, notices of rulemaking and notices of inquiry—which changed its direction once again and set out a radically new course for CATV regulation.⁷² As with its past reversals, the Commission's reasons

725 (1966). The freeze resulted in two ways. First, a lengthy evidentiary hearing was required before a CATV could import a distant signal into a major market. 47 C.F.R. § 74.1107 (1970). (Only one such proceeding has ever been completed.) Second, the combination of two other rules resulted in the imposition of a virtually identical requirement for markets below the top 100. *Id.* § 74.1105 requires that a CATV give notice to local television stations before importing distant signals. It further provides that if a petition opposing the planned importation is filed under *id.* § 74.1109 within 30 days of the notice, the CATV may not begin service until the Commission has decided the proceeding. The Supreme Court recently declined 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.), cert. denied, 39 U.S.L.W. 3147 (U.S. Oct. 12, 1970) (No. 443). As a practical matter, a petition will quickly follow the filing of a notice. See Memorandum and Order, 6 F.C.C.2d 309, 339 (1967) (Loevinger, Comm'r, dissenting).

⁶⁸ Congress failed to act and the Supreme Court held that CATV was not subject to copyright liability. *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968).

⁶⁹ 47 C.F.R. § 74.1107(a) (1970) defines major market CATVs as those in the 100 largest television markets according to the market ratings of the American Research Bureau, a private organization. The 1968 proposed rules substitute for this a list of markets and thus rule out the risk that a CATV's position might change from week to week. 1968 Proposed F.C.C. Rule, 47 C.F.R. § 74.1107(a) (1970). The most recent proposal suggests following the 1968 standards, but leaves the issue open for comment. Second Further Notice of Proposed Rule Making, 35 Fed. Reg. 11,045, 11,046 n.6 (1970).

⁷⁰ 1968 Proposed F.C.C. Rule, 47 C.F.R. § 74.1107(b) (1970).

⁷¹ Notice of Proposed Rulemaking and Notice of Inquiry, 15 F.C.C.2d 417, 437-39 (1968).

⁷² Second Further Notice of Proposed Rulemaking, 35 Fed. Reg. 11,045 (1970) [hereinafter *Public Dividend Notice*]; Federal-State Notice, *supra* note 3; Notice of Proposed Rulemaking and of Inquiry, 35 Fed. Reg. 11,042 (1970) [hereinafter *Multiple Ownership Notice*]; Notice of Proposed Rulemaking, 35 Fed. Reg. 11,040

and motivations are not entirely clear and may range from a change of personnel⁷³ to a decreasing belief in the danger of importing distant signals.⁷⁴ In any event, these newly proposed regulations represent the Commission's most creative attempt to resolve the CATV problem. The new policy basically tries to protect television stations from audience fragmentation by CATV while, at the same time, developing CATV's full capabilities.

A. Protection of Television

1. Public Dividend Plan.

The first aspect of this new approach is embodied in the precedent-breaking proposal that CATVs be allowed to import distant signals within certain limitations. Although the proposal, which has not yet been drafted as a definite proposed rule, is billed as an "alternative" to the 1968 proposed regulations, it seems intended to supersede the de facto rule status of the interim procedures.⁷⁵ Moreover, the Commission seems to be committed to adopting the proposal with somewhat less than its usual delay.⁷⁶

(1970) [hereinafter Sports Delay Notice]; Notice of Proposed Rulemaking, 35 Fed. Reg. 11,036 (1970) [hereinafter Technical Notice]; Second Report and Order, 35 Fed. Reg. 10,903 (1970) [hereinafter Crossownership Order]; Memorandum Opinion and Order, 35 Fed. Reg. 10,901 (1970) [hereinafter Origination Order].

⁷³ Cf. First Report and Order, 38 F.C.C. 683, 758 (1965) (Loevinger, Comm'r, dissenting): "The only thing that has changed since the Commission last disclaimed the jurisdiction it now asserts is the personnel of the Commission." See also LeDuc, *The FCC v. CATV et al.: A Theory of Regulatory Reflex Action*, 23 Fed. Com. B.J. 93 (1969), for the proposition that the Commission's initial resistance to CATV was the product of bureaucratically entrenched staff members' dislike of change.

⁷⁴ Johnson, *supra* note 7, at 20-26, suggests that importation of distant signals does not injure local television stations at all. His theory, however, is based on the assumption that the local television station's signal will also be imported into another CATV's area, thus increasing the local station's viewers in the distant area. Even assuming that advertisers are willing to pay for such distant viewers, Professor Johnson's theory is accurate only in the unlikely event of two relevant CATV's importing equally and having the same audience with the same viewing habits. It seems doubtful that the audience which a New York City independent television station would lose by CATV importation of a Philadelphia signal would be equaled by a Philadelphia CATV's importation of the New York City television station's signal. At least some members of the Commission's staff, however, now seem to agree with Professor Johnson—even in situations not balanced like the one which he creates. A recent staff report took the position that importation of distant independent signals into major markets would cause little audience fragmentation. FCC, staff report prepared by Broadcast Bureau Research Branch, *The Economics of the TV-CATV Interface* 16-22 (1970) [hereinafter Staff Report].

⁷⁵ Public Dividend Notice, *supra* note 72, at 11,045. That the Commission does intend to supersede the 1968 proposed regulations is further indicated by its disavowal of any power to impose copyright liability—a result which the retransmission consent requirement of the earlier proposal attempted to reach. *Id.* at 11,047.

⁷⁶ The Commission warned interested parties to "not follow what has all too often been the practice in these complex rulemaking proceedings—doing nothing

The heart of this so-called "public dividend plan"⁷⁷ is the provision that a major market CATV may carry four independent distant signals in addition to all its local and network signals if it deletes the commercials from the distant signals and offers the resulting time to local television stations for substitution of their own commercials.⁷⁸ The time is allocated by simply giving each local television station a distant signal on which to substitute its commercials. Each local television station is given its choice of the distant signals, subject to a priority system which gives first choice to UHF stations.⁷⁹ Where the stations cannot, subject to the priority system, agree upon distribution of the distant signals, the order of choice is rotated among the stations on an annual basis.⁸⁰ The final provision of the proposal requires CATVs to pay 5 per cent of their gross revenues through some unspecified medium to educational television (ETV).⁸¹

On its face, the public dividend plan seems the most imaginative method of resolving the distant signal problem, since it allows CATVs to import distant signals but compensates local television stations for resulting audience fragmentation. The plan, however, does raise some rather weighty problems of both policy and practicality.

a. Policy Considerations. On a policy level the plan introduces several new factors into the relationship between different classes of television stations. First, its decision to give priority in choice of distant signals—and thus presumably the most attractive distant signals—to UHF stations amounts to a subsidy of UHF at the expense of VHF. This is compounded by the fact that VHFs generally have larger audiences than UHFs and thus

for several months and then seeking extensions when the third month deadline looms upon them." *Id.* at 11,049.

⁷⁷ Broadcasting, June 15, 1970, at 17.

⁷⁸ Public Dividend Notice, *supra* note 72, at 11,046. The basic concept of the plan is remarkably similar to a proposal formulated by two commentators. Chazen & Ross, *Federal Regulation of Cable Television: The Visible Hand*, 83 Harv. L. Rev. 1320 (1970). The commentators differ from the Commission, however, in that they would use the techniques of commercial substitution and subsidization to different ends; the proceeds from the former would go to copyright owners, while the subsidy payments would go to local ultra high frequency (UHF) stations. *Id.* at 1339. The similarity between the two plans may not be so surprising, in light of the commentators' partially crediting their plan to a recent filing with the Commission. *Id.* at 1336 n.56.

⁷⁹ Public Dividend Notice, *supra* note 72, at 11,046. The order of priority is: first, to any independent UHF station in an intermixed market, then to any network UHF station in an intermixed market, then to all stations in an all very high frequency (VHF) or all UHF markets after a two year waiting period, and finally to any station able to show itself substantially injured by a CATV.

⁸⁰ *Id.* at 11,046 n.10.

⁸¹ *Id.* at 11,046-47.

will have larger CATV audience losses. Therefore, this priority system causes the station with the smallest audience loss to get the most attractive distant signal. While this seems to treat VHF's unfairly, it has a sound basis. The Commission has made a substantial commitment to UHF development⁸² and appears to feel that VHF's are now profitable enough to withstand the burden imposed by the plan, while UHF's need the subsidy the plan gives them.⁸³ Moreover, since CATV may increase both the total amount of television viewing⁸⁴ and the total viewing audience,⁸⁵ CATV development may result in more viewers, and consequently more advertising revenue, for all stations.

Second, the plan would also affect ETV growth by allowing a CATV to import any number of distant ETV signals.⁸⁶ Although this follows the Commission's 1968 proposed rules,⁸⁷ it seems inconsistent with the Commission's past encouragement of ETV⁸⁸ and, more particularly, with the public dividend plan's emphasis on funding ETV. The Commission may, however, no longer fear that importation of distant ETV signals will decrease local motivation to support an ETV. Also it may feel that the plan's "public dividend" will make ETV viable, despite competition with distant ETV signals. This seems to be a sensible tradeoff since the extent to which importation of distant ETV signals actually affects local ETVs has never been adequately established.

Third, and perhaps most important, the plan does not make any meaningful correlation between CATV-related audience loss and CATV-related audience gain via commercial substitution. For example, in a market with two stations and CATV, station A may lose only one-third the number of viewers that station B loses to CATV. Assuming that neither station has priority of choice, under the rotation method station A will be able to have the most attractive distant signal for at least one year, even though its

⁸² Notice of Inquiry and Notice of Proposed Rulemaking, 1 F.C.C.2d 453, 469-70 (1965).

⁸³ Public Dividend Notice, *supra* note 72, at 11,046-47. A recent Commission staff report took exactly this position in balancing off the relatively small loss to major market VHF's against their currently large profits. Staff Report, *supra* note 74, at 16.

⁸⁴ Fisher & Ferrall, Community Antenna Television Systems and Local Television Station Audience, 80 Q.J. Econ. 227, 248 (1966). The Commission's staff, however, has decided that it would not. Staff Report, *supra* note 74, at 11-15.

⁸⁵ First Report and Order, 20 F.C.C.2d 201, 203 n.1 (1969); Johnson, *supra* note 7, at 25.

⁸⁶ The only protection given an ETV would be to insert its own appeals for funds in distant signals and, as in the past, to file a petition protesting the proposed importation. Public Dividend Notice, *supra* note 72, at 11,046.

⁸⁷ 1968 Proposed FCC Rule, 47 C.F.R. §§ 74.1107(b), (d) (4)-(5), (e) (1970).

⁸⁸ Second Report and Order, 2 F.C.C.2d 725, 761-63 (1966).

audience loss is so much smaller than station B's. Moreover, the plan's provision for rotation of distant signal choice would not correct the imbalance; over a period of time this would result only in parity between the two stations in commercial substitution time, with station B still losing three times as many viewers as station A. Furthermore, an even greater risk of imbalance is created where one station has priority of choice. A UHF might, because of its comparatively small audience, suffer a small CATV audience loss and yet consistently pick the most attractive distant signal.⁸⁹ The real problem with the plan is that it assigns distant signals as units; instead, it should assign the number of distant signal viewers equal to the number of viewers lost by the local station. This latter type of equalization is, of course, much more complicated than the former, since it requires measuring each station's audience loss and each distant signal's audience gain—a task probably beyond current survey techniques. Nevertheless, such a system is necessary to prevent gross imbalances.

Finally, the imposition of the ETV payment raises some problems, even assuming that the 5 per cent figure is as reasonable as any other and that the Commission is capable of finding an appropriate body to administer the proceeds. It seems strange to single out CATV as the sole contributor to the fund.⁹⁰ The Commission justifies the payments on the grounds that the CATV's importation of distant signals is a use of the television system which benefits the CATV.⁹¹ This approach is questionable since it seems that CATVs will probably be subject to some form of copyright liability in the near future.⁹² Moreover, the flat 5 per cent figure is unfair to the CATV which imports less than the full four signals for which it is presumably paying.⁹³ Finally, there may be some question as to the Commission's power to impose the payments. Although the Commission's authority to

⁸⁹ This seems especially strange since mere carriage on a CATV decreases a UHF's inherent problems; i.e., tuner disadvantages and weak signal strength are avoided by CATV carriage of UHF and VHF stations on the same tuner. Staff Report, *supra* note 74, at 11.

⁹⁰ It seems only just that a national policy of subsidization be funded by the National Government. To this end congressional approval of substantial funding of the Corporation for Public Broadcasting seems to be in the offing. See *Broadcasting*, Sept. 21, 1970, at 38.

⁹¹ Public Dividend Notice, *supra* note 72, at 11,046.

⁹² See text accompanying notes 152-59 *infra*.

⁹³ This would not be a common situation since it is obviously in the CATV's best interests to offer as many signals as possible in order to attract subscribers. It might, however, be somewhat of a problem for older systems which lack channel capacity to carry all four distant signals in addition to the local stations and the required origination channel.

regulate CATV's importation of distant signals seems clear,⁹⁴ its ability to condition importation on monetary considerations is less certain. If the "public dividend" were held to be in the nature of a tax, it might be either ultra vires or even a violation of the revenue-raising provisions in the Constitution.⁹⁵

b. Practical Problems. On the practical level other problems are apparent. First, there might be, and certainly would have been under one past Senate bill, conflict between the distant signal provisions and CATV copyright legislation.⁹⁶ The most recent bill would have posed no such obstacle. Although it limited the number of signals for which a CATV has a compulsory license,⁹⁷ it also gave the Commission power to increase that number.⁹⁸

Second, practical difficulties arise from the plan's allocation of distant signals among local stations. The plan recognizes but does not resolve the difficulty created when a CATV imports fewer distant signals than there are local stations.⁹⁹ This situation could result either from the CATV's importing less than the full four signals, a rare occurrence, or simply from a market's having more than four commercial stations.¹⁰⁰ Moreover, the converse of this problem would exist in markets having less than four stations.¹⁰¹ This latter situation would present the Scylla and Charybdis problem of either overcompensating a local television station by giving it more than one distant signal or allowing some distant signals to retain their own advertisements. Some formula of signal allocation to cover both these situations is obviously needed.

Third, the plan does not make any provision for the classic "footnote 69" problem,¹⁰² *i.e.*, the situation in which a CATV is

⁹⁴ This would certainly seem to fall within the Supreme Court's grant to the Commission of all powers over CATV "reasonably ancillary" to the Commission's other powers, since importation of distant signals is such a central part of the CATV problem. *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968).

⁹⁵ U.S. Const. art. I, § 7, cl. 1, provides: "All Bills for raising Revenue shall originate in the House of Representatives . . ."

⁹⁶ See text accompanying notes 161-64 *infra*.

⁹⁷ S. 543, 91st Cong., 1st Sess. § 111(c)(2) (1969). Although the bill is technically pending, its passage is unlikely. Senator McClellan announced in August 1970 that the Senate Committee on the Judiciary's failure to report out the bill made further action on it during that session impossible. 116 Cong. Rec. 13,546 (daily ed. Aug. 17, 1970).

⁹⁸ S. 543, 91st Cong., 1st Sess. § 111(d)(3) (1969).

⁹⁹ Public Dividend Notice, *supra* note 72, at 11,046 n.10.

¹⁰⁰ See Staff Report, *supra* note 74, at 7-9 for a breakdown of the number of stations in the major television markets.

¹⁰¹ *Id.*

¹⁰² Second Report and Order, 2 F.C.C.2d 725, 786 n.69 (1966).

located within two overlapping major markets. Under the plan, such a CATV presumably could carry "local" signals from both markets¹⁰³ in addition to the four distant signals permitted. The Commission might easily resolve the issue by adopting a provision similar to one of its 1968 proposed regulations, which allowed a CATV to carry signals from both markets only if its community were wholly within range of both markets.¹⁰⁴

Fourth, the plan would retain the nonduplication rule¹⁰⁵ which prohibits a CATV from showing a distant signal program within twenty-four hours of its broadcast on local television.¹⁰⁶ This continued protection is inconsistent with the basic thrust of the plan. It seems unnecessary to guarantee a local station non-duplication protection when any CATV audience loss presumably will be made up by commercial substitution.

Finally, the plan is unclear as to how the switching equipment for commercial substitution will be financed and operated. The Commission proposes that the local station assume the expenses.¹⁰⁷ While this is sensible in light of CATV's many other financial burdens,¹⁰⁸ it seems strange to require a station to pay for what is in theory only the restoration of its rightful audience. A more reasonable approach might require the CATV to bear the full cost—with an appropriate reduction in its proposed ETV payments—or to share the cost with the local station as suggested by the Commission.¹⁰⁹

2. *Anti-siphoning Provisions.*

Subject to a few modifications the public dividend plan is a workable means of finally resolving the distant signal quandary. CATVs do more, however, than just carry television stations' signals; they are able, and are encouraged by the Commission, to originate their own programming.¹¹⁰ Consequently, the Commission is also concerned about CATVs using their economically stronger base of pay channels to outbid television stations for attractive programming. As a result, the Commission has now imposed on CATV pay channels¹¹¹ the same "anti-siphoning"

¹⁰³ Public Dividend Notice, *supra* note 72, at 11,046.

¹⁰⁴ 1968 Proposed FCC Rule, 47 C.F.R. § 74.1107(c) (1970).

¹⁰⁵ Public Dividend Notice, *supra* note 72, at 11,047.

¹⁰⁶ 47 C.F.R. §§ 74.1103(e)-(g) (1970).

¹⁰⁷ Public Dividend Notice, *supra* note 72, at 11,047.

¹⁰⁸ See text accompanying notes 16, 81 *supra*.

¹⁰⁹ Public Dividend Notice, *supra* note 72, at 11,047.

¹¹⁰ See note 123 *infra*.

¹¹¹ 47 C.F.R. § 74.1121 (1970).

provisions regarding movies,¹¹² sports events¹¹³ and conventional television serial-type programs¹¹⁴ to which STV is currently subject.¹¹⁵ At the same time, however, the Commission's decision to allow CATVs to operate pay channels is a bold one and a reversal of prior policy.¹¹⁶ Disregarding the sound and fury which broadcasters and theater owners inevitably raise, a per-program charge for television entertainment may be the most sensible way of financing high-quality and minority-oriented programming. Pay television, whether via CATV or STV, makes the production of programs for limited audiences economically feasible; advertiser-supported, supposedly "free" television, must of necessity attempt to appeal to the widest possible audience—with the public ultimately paying the price through the increased cost of advertised goods.¹¹⁷ There is, of course, always the possibility, recognized by the Commission, that pay television will ultimately produce the same low-quality programming that advertiser-supported television currently offers;¹¹⁸ however, this is merely a factor to be taken into account in the future, rather than a reason for banning pay television entirely.

The Commission's mechanical application of the STV anti-siphoning rules to CATV, however, does raise some policy questions. CATV may have a stronger economic base than television stations because of subscription fees as well as per-program charges. Thus there is substance in the Commission's fears that

¹¹² *Id.* § 74.1121(a)(1) prohibits the showing of films which "have had general release in theaters anywhere in the United States more than two years prior to their cablecast." It does, however, allow a CATV to show during one week per month a film more than ten years old.

¹¹³ *Id.* § 74.1121(a)(2) prohibits the showing of sports events which have been broadcast over a local station within two years; Sports Delay Notice, *supra* note 72, at 11,041 proposes to extend the time limit to five years. This lengthening of the ban, though perhaps politically wise, may actually turn the tables and be unfair to CATV and subscription television (STV) in bidding against television stations. First, the theory behind the inadequacy of the two-year period is questionable; in order for the owner of the sports event rights to reap a "bonanza" by withholding from television stations for one year, *id.* at 11,041, he would have to be assured that CATV or STV would be willing to outbid television stations by at least 50% per year during the next two years in order to even make good his loss. Moreover, the proposed five-year rule will allow a television station to cut CATV or STV off from any given programming by simply outbidding them once every five years. Thus a television station could outbid CATV or STV by 25% in any given year, and spread the cost over five years—thus making its actual cost only 5% per year.

¹¹⁴ 47 C.F.R. § 74.1121(a)(3) (1970).

¹¹⁵ *Id.* § 73.643(b).

¹¹⁶ See Second Report and Order, 2 F.C.C.2d 725, 787 (1966).

¹¹⁷ Fourth Report and Order, 14 P & F Radio Reg. 2d 1601, 1688 n.51 (1968); Coase, *The Economics of Broadcasting and Government Policy*, 56 *Am. Econ. Papers & Proceedings* 440, 446 (1966).

¹¹⁸ See Fourth Report and Order, 14 P & F Radio Reg. 2d 1601, 1625 (1968)

CATV could "hide" extra costs in subscription rates and not need per-program charges to outbid television stations.¹¹⁹ On the other hand, the strict STV anti-siphoning regulations may be inappropriate for CATV since it, unlike STV, is subject to local rate regulation.¹²⁰ Finally, the Commission's imposition of identical restrictions on the two media may throw them into the same competitive field—a situation the Commission apparently disfavored in the past.¹²¹ Since CATV is much more firmly established than STV, this might result in the stillbirth of STV.

Thus, through the public dividend plan and the anti-siphoning provisions, the Commission has been able to work out a basically viable means of protecting television and yet not unduly inhibiting CATV growth. At the same time the Commission has made its most affirmative commitment yet to the full development of CATV.

B. Development of CATV

In shaping CATV's future, the Commission's principal concern is with insuring its development into a multi-channel medium that is capable of making available its own programming, channels for independent producers and two-way communications.¹²² The Commission's most decisive step in this direction is its requirement that CATVs originate their own programming "to a significant extent."¹²³ While the effective date of the requirement has been delayed until April 1, 1971,¹²⁴ and while the requirement will initially be applied only to CATVs with more than 3500 subscribers,¹²⁵ the Commission seems firmly committed to lowering the 3500 limit.¹²⁶ The origination requirement is surely a major step towards exploiting CATV's capabilities. As the Commission well recognizes, however, it is no guarantee that CATVs will

¹¹⁹ Origination Order, *supra* note 72, at 10,902.

¹²⁰ In *National Ass'n of Theatre Owners v. FCC*, 420 F.2d 194 (D.C. Cir. 1969), cert. denied, 397 U.S. 922 (1970), the court expressly reserved decision on the "difficult question" of whether the Commission could regulate STV rates. *Id.* at 202.

¹²¹ Botein, *The FCC's Proposed CATV Regulations*, 55 *Cornell L. Rev.* 244, 257 (1970).

¹²² Public Dividend Notice, *supra* note 72, at 11,048.

¹²³ 47 C.F.R. § 74.1111(a) (1970). This requirement was first imposed in 1968 and was reaffirmed in the latest proposed regulations. See *First Report and Order*, 20 F.C.C.2d 201 (1969); Origination Order, *supra* note 72, at 10,901. A CATV recently filed suit challenging the origination requirement. *Broadcasting*, Oct. 19, 1970, at 40-41. Its chance of success seems minimal in light of the broad grant of authority the Commission derives from the "reasonably ancillary" test. See note 94 *supra*.

¹²⁴ Origination Order, *supra* note 72, at 10,901.

¹²⁵ 47 C.F.R. § 74.1111(a) (1970).

¹²⁶ *First Report and Order*, 20 F.C.C.2d 201, 213 (1969).

actually originate high quality programming.¹²⁷ Setting standards for CATV origination, let alone enforcing them, is a pragmatically and constitutionally difficult task; nevertheless, it will eventually have to be faced. The Commission has already applied its traditional doctrines of equal time, fairness and sponsorship identification to CATV.¹²⁸ It is only a small step for the Commission to create a CATV equivalent of the Blue Book—its general guidelines for broadcast programming.¹²⁹

The origination requirement is, however, only the most conspicuous aspect of the Commission's plans for CATV development. The Commission has also been moving in two other highly important fields—technical standards and CATV ownership.

On the technical front, the Commission has for the first time proposed minimal CATV operating standards.¹³⁰ These are vital to protect the individual CATV subscriber and to make possible future CATV interconnection and thus CATV "networks." Requiring type-approval of all CATV equipment would obviously be a more effective guarantee of interconnection ability. The Commission, however, specifically declined to do so on the ground that the proposed standards would hopefully create the "degree of compatability" necessary for interconnection.¹³¹ Whether or not this is so, at least they should encourage standardization among equipment manufacturers. Finally, the proposed standards also reflect the Commission's new interest in CATV's multi-channel capability; the Commission put CATVs "on notice" that it would demand expanded channel capacity—up to perhaps as many as forty channels—and also indicated that it might require CATVs to be equipped for two-way operation and local program production.¹³²

The Commission has only now begun to act on CATV ownership problems.¹³³ First it has finally attacked the very common—

¹²⁷ Origination Order, *supra* note 72, at 10,501-92.

¹²⁸ First Report and Order, 20 F.C.C.2d 201 (1969).

¹²⁹ FCC, Report on Public Service Responsibility of a Broadcast Licensee (1946).

¹³⁰ Technical Notice, *supra* note 72.

¹³¹ *Id.* at 11,038.

¹³² *Id.* at 11,037.

¹³³ The issue was first raised in First Report, 1 F.C.C.2d 387 (1965). This proceeding was terminated by Order, 7 F.C.C.2d 856 (1967), and a new proceeding was begun. Notice of Inquiry, 7 F.C.C.2d 853 (1967). The problem was eventually incorporated in the 1968 proposed rules proceeding. Notice of Proposed Rulemaking and Notice of Inquiry, 15 F.C.C.2d 417, 428 (1968).

To a limited extent the local governments and states have also been active in this area. N.Y.C. Contract, *supra* note 7, § 18 contains a very broad ban on cross-ownership by any other local communications medium. See also Vera Institute of Justice, A Report on New York City's Options for Cable Television Franchises 11

and perhaps most insidious—problem of cross-ownership of CATVs and television stations. The proposed regulations contain an outright ban on CATV ownership by any local television station or national television network.¹³⁴ The basis for the ban, however, is somewhat less than clear. In theory the public dividend plan's provision for commercial substitution should erase the most dangerous aspect of local cross-ownership—*i.e.*, a local station's deliberate downgrading of the local CATV in order to protect itself¹³⁵—by insulating the local station from audience loss. Therefore, the Commission's reasoning is probably based more on a desire for diversity of opinion—more “voices”¹³⁶—than on traditional economic considerations. But adherence to this rationale should also require banning CATV ownership by all other local major communications media since such a restriction would also create more “voices.” These situations, however, may seem less dangerous to the Commission because they provide a much less powerful incentive for the cross-owner to deliberately downgrade the CATV.¹³⁷ Finally, considering the ease with which divestiture of CATVs can be accomplished, the effectiveness of the remedy seems questionable.¹³⁸

Second, the Commission recently imposed a blanket ban on telephone company ownership of telephone-based CATVs.¹³⁹ This merely formalized the Commission's previous practice of refusing to grant certificates of public convenience and necessity to telephone companies for leasing of lines to their subsidiary or affiliated CATVs.¹⁴⁰ The more recent codification and expansion of the ban reflects the Commission's fear that telephone companies will use their monopoly position to force out all other potential CATV operators and thus preclude future CATV-telephone company

(1970); Nev. Rev. Stat. § 711.170 (1969) which provides that CATV ownership may not be changed without the state commission's permission. More recently, the Connecticut Commission was upheld in its attempt to regulate CATV ownership. *Connecticut Television, Inc. v. Public Util. Comm'n*, 19 P & F Radio Reg. 2d 2001 (Conn. Sup. Ct. 1970).

¹³⁴ Crossownership Order, *supra* note 72, 47 C.F.R. § 74.1131(a) (1970).

¹³⁵ Barnett, *Cable Television and Media Concentration, Part I: Control of the Cable Systems by Local Broadcasters*, 22 Stan. L. Rev. 221, 247 (1970).

¹³⁶ Multiple Ownership Notice, *supra* note 72, at 11,042. See Barnett, *supra* note 135, at 309.

¹³⁷ Radio/CATV crossownership may be less pernicious than television/CATV cross-ownership in that the two media have largely different audiences. See Barnett, *supra* note 135, at 323.

¹³⁸ One network merely spun-off its interests into a new corporation staffed by its former employees. *Broadcasting*, July 6, 1970, at 19.

¹³⁹ Final Report and Order, 18 P & F Radio Reg. 2d 1549 (1970).

¹⁴⁰ *General Tel. Co.*, 13 P & F Radio Reg. 2d 667, 683 (F.C.C. 1968), *aff'd*, 413 F.2d 390 (D.C. Cir.), *cert. denied*, 396 U.S. 888 (1969).

competition.¹⁴¹ Unfortunately, practice seems to indicate that these fears are well-founded.¹⁴²

Finally, the Commission has attacked the problem of multiple CATV systems through two alternative proposals.¹⁴³ The first, apparently the product of a compromise between the Commission's General Counsel and Cable Television Bureau,¹⁴⁴ would limit a multiple owner to a total of fifty CATVs, with further limitations on the number allowed within various Standard Metropolitan Statistical Areas (SMSAs), states and adjoining states, *e.g.*, only two CATVs within the top ten SMSAs, five within the same state and ten within adjoining states.¹⁴⁵ All numbers are reduced substantially where the CATV owner also has other major media interests.¹⁴⁶ Despite the fact that the numbers are necessarily somewhat arbitrary, the basic thrust of the proposal is sensible since it would prevent both national and local concentration of CATV ownership. The use of SMSAs as a base of computation, however, creates difficulties because there is no correlation between the size of an SMSA and the size of a CATV's franchise area. Thus, a CATV owner with two 50,000 person franchise areas and a CATV owner with two 100,000 person franchise areas within the top ten SMSAs would both be barred from further CATV acquisitions within the top ten SMSAs, even though the latter has twice as many potential subscribers as the former. The basic difficulty with the proposal is that it does not consider actual population or subscription figures. On the other hand, the second proposal, which apparently originated with the Commission itself,¹⁴⁷ is based solely on total number of subscribers; it would simply limit a CATV owner to a total of two million subscribers.¹⁴⁸ The upper limit imposed by this second proposal seems quite reasonable. Based on a very liberal figure of 50 per cent national CATV penetration—*i.e.*, about 28,500,000 television homes—this would allow a bare minimum of only fourteen mul-

¹⁴¹ Final Report and Order, 18 P & F Radio Reg. 2d 1549, 1567-68 (1970).

¹⁴² For example, in *International Cable Television Corp. v. All Metal Fabricators, Inc.*, 66 P.U.R.3d 448 (Cal. Pub. Util. Comm'n 1966), a CATV complained that a local telephone company discriminated against it in making available pole attachments. The California Commission sympathized, but said it had no jurisdiction over that phase of the telephone company's operations.

¹⁴³ Multiple Ownership Notice, *supra* note 72, at 11,043.

¹⁴⁴ See *Broadcasting*, June 15, 1970, at 18.

¹⁴⁵ Multiple Ownership Notice, *supra* note 72, at 11,043.

¹⁴⁶ *Id.*

¹⁴⁷ See *Broadcasting*, June 15, 1970, at 18.

¹⁴⁸ Multiple Ownership Notice, *supra* note 72, at 11,043. It also provides for a 10% increase over this figure in any given community if necessary to serve new subscribers.

multiple owners and thus avoid the present oligopoly market situation of the three national broadcast networks. But the second proposal, unlike the first, would allow an undue concentration of CATV ownership in any given part of the nation. A truly adequate proposal should combine the first proposal's geographical limitations and the second proposal's numerical limitations.

The Commission has made a good start towards forceful and creative development of CATV, though both technical standards and ownership restrictions might be more detailed and stringent. At the same time, however, it has failed to act on the very important issue of common carrier access to CATV—a problem which the Commission consistently delights in raising and then never resolving.¹⁴⁹ The Commission may be somewhat chary of the subject because it ruled in 1959 that CATV was not a common carrier.¹⁵⁰ It is, nevertheless, an issue which must be resolved before CATV achieves large-scale, multi-channel capacity; vesting control of forty or more communications channels in one entity invites their abuse. The creation of a common carrier formula is, of course, far more difficult for CATV than for a telephone or telegraph company. As one commentator has indicated, any definition of nondiscriminatory access to CATV involves many quasi-subjective determinations, *e.g.*, evaluating the time shown, the channel used and the adjacent programs.¹⁵¹ Although the problem is obviously not subject to exact resolution, some attempt must be made to formulate standards. The Commission's suggestion that CATVs assign channels to governmental and private groups is evidence of at least some thought on the subject.

III

CONGRESSIONAL REGULATION OF CATV

Congress obviously has the power to preempt any local, state or FCC action, but it has never done so despite the flurry of favorable or unfavorable bills which each new FCC ruling on CATV inevitably produces.¹⁵² Congress' main role in the area of CATV

¹⁴⁹ Origination Order, *supra* note 72, at 10,902; Notice of Proposed Rule-making and Notice of Inquiry, 15 F.C.C.2d 417, 443 (1968).

¹⁵⁰ Report and Order, 26 F.C.C. 403, 427-28 (1959). It should be noted that this ruling was made at a time when the Commission was avoiding jurisdiction over CATV.

¹⁵¹ Johnson, *supra* note 7, at 57-59. Compare the optimism in Vera Institute of Justice, *supra* note 133, at 9-10. With somewhat more candor, another commentator flatly states that no one has yet produced any workable, specific plans for CATV common carrier status. Barnett, *supra* note 135, at 244.

¹⁵² For example, Representative Stratton obviously disliked the FCC's interim procedures, see text accompanying note 71 *supra*, and introduced a number of

regulation has, instead, been based on its control of the copyright law. It was never very clear whether a CATV's use of television signals subjected it to copyright liability,¹⁵³ and in 1968 the Supreme Court confirmed copyright owners' worst fears by holding that it did not.¹⁵⁴ Nevertheless, practically no one, including the CATV industry, disputes that CATV should be required to make some form of copyright payment;¹⁵⁵ the problem for Congress has been deciding the form of the liability. Unrestricted CATV copyright liability is not a feasible solution, since it would invite television stations, networks and independent producers to put CATV out of business.¹⁵⁶ Congress, however, has been unable to create a politically acceptable form of restricted liability, even though it has been attempting to revise the general copyright law since 1965.¹⁵⁷ In 1968 the FCC appeared ready to take the copyright law into its own hands by imposing the retransmission consent requirement;¹⁵⁸ but since that time, it seems to have reevaluated its statutory powers and retreated.¹⁵⁹

Congress has produced two copyright bills containing CATV provisions, the first in 1967 and the second in 1969. Although neither was ever reported out of committee,¹⁶⁰ the bills are noteworthy for they demonstrate both the evolution of congressional thought on CATV and the direction of future CATV legislation. The first bill,¹⁶¹ bearing a marked resemblance to the FCC's 1968 proposed regulations,¹⁶² would have allowed CATVs, subject to certain limitations,¹⁶³ to carry all local signals without copyright

measures to invalidate them. H.R. 10,268, 91st Cong., 1st Sess. (1969); H.R. Con. Res. 206, 91st Cong., 1st Sess. (1969); H.R. Con. Res. 205, 91st Cong., 1st Sess. (1969).

¹⁵³ In Report and Order, 26 F.C.C. 403, 438-39 (1959), the FCC requested Congress to amend § 325 of the Communications Act of 1934, 47 U.S.C. § 325(a) (1964), to require CATVs to get retransmission consent.

¹⁵⁴ *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968).

¹⁵⁵ E.g., NCTA Resolution, *supra* note 12, § 1 provided for limited copyright liability.

¹⁵⁶ Botein, *supra* note 121, at 247.

¹⁵⁷ See H.R. Rep. No. 83, 90th Cong., 1st Sess. 2 (1967).

¹⁵⁸ See text accompanying note 75 *supra*.

¹⁵⁹ See note 75 *supra*.

¹⁶⁰ See note 97 *supra*.

¹⁶¹ S. 597, 90th Cong., 1st Sess. § 111 (1967).

¹⁶² Unlike the proposed regulations, however, the bill gave CATVs what amounted to a compulsory license to carry distant signals in two narrow situations: 1) where the CATV's area received less than all three network signals and either no station within the area had an exclusive license or the CATV had not been given notice thereof, and 2) where there was no television station at all within the CATV's area. *Id.* §§ 111(c)(1), (d)(3). Thus while the bill did contain the important compulsory license, its stringent distant signal provisions would have made CATV nothing more than a carrier of network programming.

¹⁶³ See generally *id.* §§ 111(b)(1)-(6).

liability,¹⁶⁴ while imposing full copyright liability on the importation of distant signals.¹⁶⁵ This free carriage of local signals is somewhat anomalous since there seems little reason why a CATV should pay for distant, but not local signals. The FCC and the Congress may, of course, have assumed that advertisers would continue to pay local stations, and thus ultimately copyright owners, for local signals carried by CATV. This assumption is, however, totally inconsistent with traditional notions of CATV audience fragmentation.

The second bill,¹⁶⁶ unlike the first, seemed to have reflected the efforts of the CATV and the television industries rather than the FCC.¹⁶⁷ Under this bill a CATV would have had a compulsory license to carry all local signals¹⁶⁸ and subject to narrow limitations,¹⁶⁹ a compulsory license to import enough distant signals to give its subscribers "adequate service."¹⁷⁰ Moreover, the FCC was authorized to increase the number of signals constituting "adequate service",¹⁷¹ thus making a type of public dividend plan possible under the bill.¹⁷² Under such a plan, most major market CATVs would have been able to import at least some distant signals. In the very large markets like New York City, however, the local signals alone would have provided more than "adequate service." Thus, without FCC authorization CATVs in such areas would have been prevented from importing any distant signals. This seems inequitable in light of the size of these markets. To remedy this, perhaps the bill should have recognized a third type of "adequate service" for very large markets.

Also, the second bill would have established a far more sophisticated compulsory licensing system which would have avoided forcing CATVs and copyright owners to negotiate directly; instead, it would have required that CATVs make royalty payments to the Register of Copyrights, who in turn would have

¹⁶⁴ Id. § 111(a)(3).

¹⁶⁵ Id. § 111(c)(5)(B).

¹⁶⁶ S. 543, 91st Cong., 1st Sess. § 111 (c)(1)(B) (1969).

¹⁶⁷ It follows the NCTA Resolution, *supra* note 12, to a great extent.

¹⁶⁸ S. 543, 91st Cong., 1st Sess. § 111(c)(1)(B) (1969). NCTA Resolution, *supra* note 12, § 1(a)(1) contained a similar provision.

¹⁶⁹ There are limitations where an exclusive license or a blacked-out sports event is involved. S. 543, 91st Cong., 1st Sess. § 111(b)(4) (1969). See also NCTA Resolution, *supra* note 12, §§ 2(1)-(3).

¹⁷⁰ The bill defined adequate service in the top 50 markets as three network stations, three independent stations and one ETV. In all other markets, three network stations, two independent stations and one ETV were required. S. 543, 91st Cong., 1st Sess. § 111(d)(3). NCTA Resolution, *supra* note 12, § 1(a)(2) defined "adequate service" as three network stations and three independent stations.

¹⁷¹ S. 543, 91st Cong., 1st Sess. § 111(c)(2)(B) (1969).

¹⁷² See text accompanying notes 96-98.

allocated these payments among the copyright owners.¹⁷³ The amount of the copyright payments, however, may have been excessive for two reasons. First, the bill would have required CATVs to pay 5 per cent of gross receipts¹⁷⁴—an amount which seems somewhat arbitrary.¹⁷⁵ Second, this payment would have been in addition to the proposed 2 per cent local franchise fee¹⁷⁶ and the 5 per cent public dividend.¹⁷⁷ As a result, a CATV would have had to overcome an initial minimum loss of 12 per cent of its gross receipts. This burden seems especially severe considering that a CATV incurs its greatest expenses in beginning operations.¹⁷⁸ The FCC and the Congress may have felt that CATV is sufficiently profitable to carry such a financial burden;¹⁷⁹ or, on the other hand, they may have assumed that the increased costs would simply be passed on to subscribers. Nevertheless, although some form of CATV limited copyright liability will be essential in any future legislation, the total burden placed upon CATV should not be prohibitive.

The second bill was an improvement over the first since it contained far less in the way of regulatory provisions, an area properly left to the FCC and state and local governments.¹⁸⁰ Although the bill would have expressly preempted any interference with a CATV's carriage of a signal for which it had a compulsory license,¹⁸¹ it would have imposed no other restrictions on FCC, state and local action, and thus presumably left intact the present division of jurisdiction.

Despite the somewhat less than glorious history of politically-mandated Senate inaction, past proposals do suggest the direction which future legislation will probably take. The improved compulsory licensing provisions of the second bill indicate that this system, or some variation of it, is here to stay; the main political infighting between television and CATV interests will now

¹⁷³ S. 543, 91st Cong., 1st Sess. § 111(d) (1969).

¹⁷⁴ *Id.*

¹⁷⁵ Depending on the amount of signals used by the CATV, the amount necessary to compensate copyright owners will vary greatly. See Staff Report, *supra* note 74, at 33-34.

¹⁷⁶ See text accompanying note 16 *supra*.

¹⁷⁷ See text accompanying note 81 *supra*.

¹⁷⁸ See text accompanying note 50 *supra*.

¹⁷⁹ Once established, CATVs are highly profitable. A 1965 survey showed an average profit margin of 57% before taxes. M. Seiden, *An Economic Analysis of Community Antenna Television Systems and the Television Broadcast Industry* 27 (1965).

¹⁸⁰ See Comment, *The Copyright Law and Its Relevance to CATV: Can an Old Dog Be Taught New Tricks*, 19 *Buff. L. Rev.* 65, 88 (1969).

¹⁸¹ S. 543, 91st Cong., 1st Sess. § 111(c) (1969).

center on substantive provisions of the system—*i.e.*, the number of signals licensed and the size of payments required. Furthermore, the second bill's small number of regulatory provisions is also indicative of the future; Congress seems to recognize that regulatory policies should be implemented by the regulatory agency and, to a lesser extent, by the relevant state and local bodies.

IV

CONCLUSION

Despite its hesitant and uncoordinated beginnings, multi-jurisdictional regulation of CATV seems to be the trend of the future. State and local bodies have the potential to exercise the closest, most flexible regulation. Federal agencies, on the other hand, can provide the framework for developing uniform regulations and standards. Hopefully, some of the inefficiency and confusion of the past can be avoided by coordinated efforts on all jurisdictional levels.

On the federal level the FCC has recently demonstrated a willingness and ability to exert leadership in the area. Its proposed regulations, although not without problems, remove some of the stumbling blocks to full CATV development and are a major step in accommodating the often conflicting interests of CATV and broadcast television. Congressional attempts to resolve the copyright problems raised by CATV have been less encouraging. Political pressures have thwarted passage of two recent bills. Nevertheless, these bills indicate the ultimate form of Congress' response to the copyright problem.

CATV regulation is still in its infancy and confusion is widespread; but efforts are finally being made at all levels to minimize the inevitable growing pains. Increased cooperation and creative leadership will allow CATV to realize its full potential as an effective communications medium.