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THE FCC'S PROPOSED CATV REGULATIONS

Michael Botein†

For many years after community antenna television (CATV) first appeared, the Federal Communications Commission persisted in viewing it as a mere "auxiliary" communications medium.¹ However, the Commission has recently begun slowly—albeit grudgingly—to change its attitude. CATV has shown the ability to survive and even flourish in areas which are fully served by ordinary TV stations;² as a result, the Commission has been forced to see CATV as an important and inescapable part of any realistic national communications policy instead of as a threat to its 1952 television master plan. CATV's growth is now considered something to be channeled rather than delayed. The latest manifestation of this change in attitude is the Commission's proposed CATV rules.³ Whether the Commission's vision is clear enough, and its policy farsighted enough, remains to be seen.

I

THE PROPOSED RULES

The present CATV regulations⁴ pigeon-hole CATVs into two groups: those located in the so-called "major markets"—the one hundred communities with the highest number of viewers—and those located in all other markets. Major market CATVs may import "distant signals"⁵ only with Commission permission. Smaller market

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¹ First Report and Order, Rules re Microwave-Served CATV, 38 F.C.C. 683, 698-99 (1965).

² *E.g.*, CATV's explosive development in New York City.

³ Further Notice of Proposed Rulemaking, CATV, 34 Fed. Reg. 7981 (1969), *amending* Notice of Proposed Rulemaking and Notice of Inquiry, CATV, 15 F.C.C.2d 417, 33 Fed. Reg. 19028 (1968)[The earlier Notice of Proposed Rulemaking is hereinafter cited as Notice].

⁴ 47 C.F.R. §§ 74.1101-1109 (1969). The proposed regulations are presently operable to a limited extent, in that petitions by major market CATVs to import distant signals will be allowed only if they conform to the proposed regulations—*i.e.*, if the CATV has obtained retransmission consent from the station broadcasting the distant signal. Notice at 437-38, 33 Fed. Reg. at 19036-37. This prospective application of the proposed rules has created quite a furor in the CATV camp (CATV Interim Processing Procedures, Docket No. 18397, 16 P & F RADIO REG. 2d 1517, 1529-30 (1969) (Bartley, Commissioner, dissenting) and may be a violation of the Administrative Procedure Act. Note 32 *infra*.

⁵ 47 C.F.R. § 74.1101(i) (1969) defines "distant signal" as the signal—*i.e.*, program—

CATVs, at least in theory, are free to bring in any signals;⁶ as a practical matter, however, procedural requirements insure that these systems may import signals only after an administrative proceeding.⁷

The proposed rules set up a new classification of CATVs. The new rules replace the old division into major market and smaller market CATVs with four categories: major market CATVs, CATVs within the specified zone⁸ of a commercial station, CATVs within the specified zone of only an educational station, and CATVs beyond the specified zone of any station.⁹ This categorization, in the abstract, is a slight improvement over the former one; it makes at least some attempt to differentiate between the smaller market with a few commercial stations and that with only one or two commercial TV stations or just an educational station.¹⁰ But in practice the latter two

of a station that does not broadcast a Grade B contour over the CATV's community. Both the Grade A and Grade B contours "indicate the approximate extent of coverage over average terrain in the absence of interference from other television stations." *Id.* § 73.683. Although the actual coverage may vary with the terrain, this is not considered in licensing proceedings. *Id.* The diameter of a station's Grade A and Grade B contours is a function of its power, frequency, and type of antenna and may vary greatly according to these factors.

⁶ *Id.* § 74.1107(a).

⁷ 47 C.F.R. § 74.1105 (1969) requires that a CATV give notice to local TV stations before importing distant signals. It further provides that if a petition opposing the importation is filed under 47 C.F.R. § 74.1109 (1969) within 30 days of the notice, the CATV may not begin the service until the Commission has decided the proceeding. As a practical matter, as soon as a notice is filed a petition will quickly follow—thus beginning a proceeding very similar to a major market proceeding. See Memorandum Opinion and Order, CATV, 6 F.C.C.2d 309, 338 (1967) (Bartley, Commissioner, dissenting). The only significant differences between the two proceedings are the position of the parties and the possible absence under § 74.1109 of a "full evidentiary hearing," which the Commission requires in a major market proceeding, 47 C.F.R. § 74.1107(a) (1969).

⁸ Proposed FCC Rule 47 C.F.R. § 74.1101(m), 34 Fed. Reg. 7984 (1969), defines "specified zone" as simply 35 miles from a given reference point in the community of the TV station. Under the present regulations, the relevant standard is the Grade A contour of the station (47 C.F.R. § 74.1107(a) (1969)) which, like the Grade B contour, may vary. Note 5 *supra*. This change obviously provides greater predictability and administrative convenience. It will probably be a reasonably accurate measure of most smaller stations' spheres of influence; the greatest opposition to it will probably come from proprietors of more powerful stations.

⁹ Proposed FCC Rules 47 C.F.R. §§ 74.1107(b), (d), (e), 34 Fed. Reg. 7984-85 (1969). The definition of "major market" is clarified considerably by the proposed rules. Under the present regulations, the 100 major markets are those periodically determined by the American Research Bureau. 47 C.F.R. § 74.1107(a) (1969). As a result, a given community's status may change from time to time. The proposed § 74.1107(a) sets out a list of the 100 major markets, increasing predictability at the cost of relatively unneeded flexibility.

¹⁰ One- and two-station markets are generally common only below the 150th market; the 100 market line of demarcation is by no means an inherent one. See 38 T.V. FACTBOOK, Services Volume 40-a to 42-a (1969).

categories are probably of little importance, since most educational stations are located in comparatively large markets¹¹ and since CATV growth is of greatest concern to broadcasters within existing markets.

The most radical change made by the new rules is in the freedom of CATVs to import distant signals. Under the proposed rules a major market CATV may carry a distant signal only when the originating station has "expressly authorized the system to retransmit the program."¹² A similar requirement is applicable to smaller market CATVs within the specified zone of a commercial station, except to the extent that distant signals are necessary to give the CATV a full complement of three network stations, one independent station, and one educational station.¹³ Though the retransmission consent requirement is a marked departure from the present rules, it does not come as a great surprise. The Commission indicated its support for such a measure a decade ago,¹⁴ and the present requirement that a CATV not duplicate the programming of local stations¹⁵ may have been intended originally as a more limited form of such protection.¹⁶

The rationale behind the retransmission consent system¹⁷ is to permit "market forces to eliminate the unfair competition"¹⁸ between CATVs and TV stations. Remarks in an earlier opinion¹⁹ suggest that the "market forces" the Commission has in mind are competition with TV stations in buying program material. Requiring retransmission consent, therefore, may contemplate transforming originating stations into conduits between CATVs and copyright holders.

Such an arrangement presents two difficulties. First, the system of obtaining consent from the originating station may prove a bit unwieldy. Copyright holders will license TV stations to grant re-

¹¹ See 38 T.V. FACTBOOK, Stations Volume 801-b (1969).

¹² Proposed FCC Rule 47 C.F.R. § 74.1107(b), 34 Fed. Reg. 7984 (1969).

¹³ *Id.* § 74.1107(d), 34 Fed. Reg. at 7984-85.

¹⁴ Report and Order, CATV and TV Repeater Services, 26 F.C.C. 403, 438 (1959). It should be noted that in doing so the Commission was following a request of the broadcasting industry.

¹⁵ 47 C.F.R. §§ 74.1103(e), (f) (1969). A CATV must refrain from duplicating the program only on the same day it is broadcast by the station.

¹⁶ First Report and Order, Rules re Microwave-Served CATV, 38 F.C.C. 683, 702-06 (1965). The Commission disclaimed any intention to affect "copyright or other rights that broadcasters or others may have in television program material." *Id.* at 740.

¹⁷ It is unclear what form the consent is supposed to take—oral permission, an informal letter, or some type of operative legal instrument.

¹⁸ Notice at 430, 33 Fed. Reg. at 19034 (footnote omitted).

¹⁹ First Report and Order, Rules re Microwave-Served CATV, 38 F.C.C. 683, 703 (1965).

transmission consent²⁰ only if the TV station increases its normal license payment by the amount which a CATV will pay for its signals. The initial difficulty of balancing each party's payments is not the only problem, however. An independent producer may be perfectly happy to have a CATV pay for his programs, but a network may be less willing if the CATV is located near an affiliate, out of fear that the CATV will weaken the affiliate.

Second, even if copyright holders are willing to indirectly license CATVs, the retransmission consent requirement seems to invite combinations by TV stations; individual station owners may decide that it is in their own self-interest to refuse retransmission consent to a distant CATV, on the implied or express understanding that other stations in other areas will reciprocate. Any express combination would violate the antitrust laws,²¹ but proving the overt agreement might be next to impossible, since the self-interest of each station owner would encourage an industry-wide unspoken arrangement. One indication of the potential power of TV stations is the failure—perhaps the inability—of any TV station to give a CATV retransmission consent during the first six months after the rules were proposed.²² Even a station owner who did not harbor such base motives might well refuse retransmission consent simply on the ground that acting as an intermediary between CATV and the copyright owner is an unrewarded job; some method of making such a role financially attractive to TV stations is obviously necessary. The problem is compounded by the fact that under the retransmission consent requirement, unlike certain types of copyrights,²³ a prospective user may not obtain a compulsory license.

As an alternative to obtaining retransmission consent, CATVs may go directly to the copyright holder and buy a license to originate the material themselves.²⁴ This raises the same question as the conduit

²⁰ At present, standard network affiliation contracts do not allow stations to grant retransmission consent. This may in practice be unimportant; a CATV within the Grade B contour of a network affiliate will already be carrying most, if not all, of the network signals and thus will have little incentive to import distant network signals.

²¹ See *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 143-44 (1948).

²² CATV Interim Processing Procedures, Docket No. 18397, 16 P & F RADIO REG. 2d 1517, 1529 (1969) (Bartley, Commissioner, dissenting).

²³ 17 U.S.C. § 1(e) (1964).

²⁴ CATVs apparently must obtain copyright permission for any material which they originate; origination of a program seems to constitute enough activity to impose copyright liability. In *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968), the Supreme Court held that a CATV was not subject to copyright liability for carrying signals. The Court based its decision, however, largely upon the passive nature of the activity involved and noted:

approach as to the network's willingness to foster competition with its affiliates. It may, however, be a facet of the Commission's policy in favor of CATV origination.²⁵

Although the retransmission consent requirement is the most striking innovation of the proposed regulations, other features of the distant signal rules present difficulties. First, while the present rules apply to both commercial and educational distant signals, the proposed rules place no restriction at all on importation of distant educational signals.²⁶ This change is anomalous, since bringing in educational programs may hurt local educational stations by reducing the community's motivation to subsidize them—a consideration emphasized by the Commission in the past.²⁷

Second, under the proposed rules the number of commercial signals a CATV may carry varies radically with its location. A major market CATV is limited to the commercial stations in its community, barring retransmission consent from other stations;²⁸ a CATV within the specified zone of a commercial station is limited to four commercial signals, again barring retransmission consent;²⁹ and a CATV within the specified zone of only an educational station or of no station at all may carry as many commercial signals as it wants.³⁰ A CATV viewer in a totally "white" area might thus receive several dozen commercial signals, while a CATV viewer in an area with one commercial station would see only four and a CATV viewer in a smaller major market might see only three. Such a result makes

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

Id. at 400 (footnotes omitted). CATV origination of a copyrighted program would thus presumably be held to constitute a "performance" within 17 U.S.C. §§ 1(c), (d) (1964).

²⁵ See note 80 *infra* and accompanying text.

²⁶ Proposed FCC Rules 47 C.F.R. §§ 74.1107(b), (d)(4), (5), (e), 34 Fed. Reg. 7984-85 (1969). Any such importation by CATVs within the specified zone of any TV station is subject to objection filed under § 74.1109 by local educational authorities. *Id.* § 74.1107(b), 34 Fed. Reg. at 7984. This provision makes no real change, however, since under the present rules a § 74.1109 petition is proper in such a situation. Note 7 *supra*. The only real limitation on bringing in distant educational signals is that priority must be given to stations in accordance with their proximity to the CATV community. Proposed FCC Rules 47 C.F.R. §§ 74.1107(b), (d)(4), (5), 34 Fed. Reg. 7984-85 (1969).

²⁷ Second Report and Order, CATV, 2 F.C.C.2d 725, 761-63 (1966).

²⁸ Proposed FCC Rule 47 C.F.R. § 74.1107(b), 34 Fed. Reg. 7984 (1969).

²⁹ *Id.* § 74.1107(d), 34 Fed. Reg. at 7984-85.

³⁰ *Id.* §§ 74.1107(d)(5), (e), 34 Fed. Reg. at 7985. There is, however, a requirement that the CATV give priority to the stations nearest to it.

sense in that CATV poses no threat to commercial television in a totally unserved area and little threat in an area served only by an educational station, but it is anomalous that the number of signals in an area should vary in inverse proportion to the population of the area—the opposite of the Commission's avowed goal.³¹

The proposed regulations are, therefore, subject to criticism in many of the particulars of their operation. The overall wisdom of the Commission's policy will be considered later.

II

THE VALIDITY OF THE RULES³²

A. *Authority of the Commission to Promulgate the Rules*

Since the Commission first began to regulate CATV, the source of its authority has been many things to many people. With a bit of understatement, the Supreme Court recently commented that "[t]he Communications Act is not notable for the precision of its substantive standards."³³ It is difficult at any given time to pin down the basis for the Commission's jurisdiction and, accordingly, to be sure of the scope of the Commission's power.

The confusion is due directly to the Commission's own pronouncements on the subject. When it promulgated the present regulations in 1966, the Commission conjured up a two-stage argument. It maintained that the statement in section 152(a) of the Federal Communications Act of 1934 that "[t]he provisions of this chapter shall apply to all interstate and foreign communication by wire or radio"³⁴ gave it jurisdiction over CATV. It then argued that other provisions in the Act gave it the authority to make regulations.³⁵

³¹ Sixth Report and Order, Rules Governing Broadcast Stations, Docket Nos. 8736, 8975, 8976, 9175, 17 Fed. Reg. 3905, 3912 (1952).

³² As a separate issue, the validity of the interim procedures (note 4 *supra*) has been drawn in question. The interim procedures are alleged to be invalid on the ground that they were promulgated without the advance publication required by the Administrative Procedure Act, 5 U.S.C. § 553(b) (Supp. IV, 1965-68). CATV Interim Processing Procedures, Docket No. 18397, 16 P & F RADIO REG. 2d 1517, 1530 (1969) (Bartley, Commissioner, dissenting). The interim procedures certainly seem to be "substantive rules" under the Act, since they greatly affect the rights of CATVs; at the same time, however, they may fall under 5 U.S.C. § 553(d)(3) (Supp. IV, 1965-68), which contains an exception to the publication requirements "as otherwise provided by the agency for good cause found and published with the rule," in that the Notice gives a fairly complete justification for the adoption of the interim procedures. Notice at 437-38, 33 Fed. Reg. at 19036-37.

³³ Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 385 (1969).

³⁴ 47 U.S.C. § 152(a) (1964).

³⁵ Second Report and Order, CATV, 2 F.C.C.2d 725, 793-97 (1966).

This approach is conceptually difficult, since notions of jurisdiction and rulemaking power are so intertwined that their severance inevitably leaves loose ends dangling.

Every court to pass on the issue has come up with its own distinctly individual analysis. In *Buckeye Cablevision, Inc. v. FCC*,³⁶ the District of Columbia Circuit 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;³⁷ though it briefly mentioned the Commission's argument,³⁸ it did not analyze or adopt it. In apparently³⁹ striking down the regulations, however, the Ninth Circuit, in *Southwestern Cable Co. v. United States*,⁴⁰ concerned itself only with the Commission's rulemaking power, without ever discussing whether section 152(a) was an effective grant of jurisdiction.⁴¹ In finally deciding the issue in *Southwestern Cable*,⁴² the Supreme Court grounded the Commission's juris-

³⁶ 387 F.2d 220 (D.C. Cir. 1967).

³⁷ *Id.* at 224-25. The District of Columbia Circuit's reliance upon its "implied agency authority" concept (*id.* at 225) seems highly questionable. First, the cases on which it is based are distinguishable from the CATV situation, since in each one an agency already had jurisdiction over the given activity and was trying only to impose new regulations. See *American Trucking Ass'ns, Inc. v. United States*, 344 U.S. 298 (1953); *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943). Second, such a doctrine would expand the jurisdiction of all administrative agencies to a point at which their enabling statutes would become meaningless.

³⁸ 387 F.2d at 223.

³⁹ See note 44 *infra*.

⁴⁰ 378 F.2d 118 (9th Cir. 1967), *rev'd*, 392 U.S. 157 (1968).

⁴¹ *Id.* At least one Supreme Court Justice took a similar approach. In finding that the Commission had jurisdiction, Justice White relied solely upon the 47 U.S.C. § 303(f) (1964) grant of rulemaking authority to "prevent interference between stations and to carry out the provisions of this chapter." 392 U.S. at 181 (concurring opinion). This position may be preferable in that it creates a less sweeping precedent than the course taken by the majority. See note 42 *infra*.

⁴² 392 U.S. 157 (1968). The Court's acceptance of § 152(a) as a grant of jurisdiction was perhaps a bit hasty. First, the context of the section indicates that it was probably conceived of as a safeguard against regulation of intrastate communication by the Commission. Subchapter I, in which § 152(a) is contained, is only a general outline of the Commission's structure; the specific regulatory powers are found in subsequent subchapters. Moreover, § 152(b) is a very explicit limitation on power rather than a grant of it. Second, if § 152(a) is in fact a grant rather than a limitation of power, it is a radical expansion of the Commission's authority; under such a formulation the Commission can presumably regulate any interstate communication by wire or radio, without the necessity of having a specific statutory grant of power. Thus § 301 of the Act, giving the Commission power to license radio transmissions, would appear to be redundant; moreover, the Commission can now presumably regulate such things as master antennas, intercoms, and radio sets, since all of these communicate signals which may have originated in another state. See 392 U.S. at 169. As a practical matter, however, such an expansive reading of § 152(a) must be seen as a product of the need for immediate regulation of CATV; the chances of its being applied in other areas are almost non-existent.

diction on section 152(a), making only a brief comment to the effect that section 303(r)⁴³ gave the Commission power to make rules.

The Court made clear that it was considering only the Commission's jurisdiction over CATV, not the validity of the present rules.⁴⁴ It commented only that "the authority which we recognize today under § 152(a) is restricted to that reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting."⁴⁵ The meaning of "reasonably ancillary"—a phrase already immortalized in the jargon of communications law—is less than clear. But by grounding the Commission's jurisdiction on the broad language of section 152(a) and its rulemaking power on the equally broad language of section 303(r) the Court has made it difficult to find a doctrinal basis for invalidating any but the most unreasonable regulation. Moreover, the Court seems to have been much impressed by the Commission's presentation of the need for immediate and comprehensive regulation of CATV.⁴⁶ Since the proposed rules articulate a reasonable method of working CATV into the national communications policy, they are unlikely to be held invalid as exceeding the Commission's rulemaking power.

B. Conflict with the Copyright Act

The retransmission consent requirement is very similar in effect to copyright liability;⁴⁷ the Commission has said as much and requested congressional resolution of CATV copyright liability to make Commission action unnecessary.⁴⁸ A cynic might posit that the broadcasters have gotten from the Commission what the Supreme Court withheld when it ruled in *Fortnightly Corp. v. United Artists Tele-*

⁴³ 47 U.S.C. § 303(r) (1964) provides that the Commission shall "[m]ake such rules and regulations and prescribe such restrictions and conditions . . . as may be necessary to carry out the provisions of this chapter . . ." That this section is really a grant of rulemaking authority over CATV seems questionable; its real purpose seems to be to give the Commission power to make rules for radio and TV licensees. Section 303 immediately follows 47 U.S.C. § 301 (1964), which contains the Commission's general grant of jurisdiction over radio transmissions. Moreover, the phraseology of the section—"restrictions and conditions"—indicates a licensing context.

⁴⁴ The issue of the Commission's jurisdiction may never have really been before the Court. The Ninth Circuit's decision may be viewed as based solely on the ground that the Commission lacked statutory power to issue the particular type of order in question. 378 F.2d at 124. The Supreme Court recognized this (392 U.S. at 161 n.6), but nevertheless went on to decide the broader issue of jurisdiction.

⁴⁵ 392 U.S. at 178.

⁴⁶ *Id.* at 162-64.

⁴⁷ See text at notes 17-20 *supra*.

⁴⁸ Notice at 433, 33 Fed. Reg. at 19034-35. The proposed rules may thus also be a political move by the Commission to force Congress to adopt a CATV copyright law.

vision, Inc.⁴⁹ that CATV systems do not incur copyright liability under existing law. The retransmission consent requirement arguably constitutes invalid poaching by the Commission on congressional copyright territory.

CATV copyright liability might be held to be a matter that only Congress should resolve. When requested in *Fortnightly* by the Solicitor General to formulate a compromise rule of liability, the Supreme Court replied: "We decline the invitation. That job is for Congress."⁵⁰ This expression of preference, however, may have no binding effect upon the Commission; aside from political considerations, there is nothing to prevent an agency from going where Congress fears to tread, so long as it has the requisite jurisdiction and rulemaking power—which the Commission certainly seems to have.

The retransmission consent requirement might also be held invalid as inconsistent with a congressional policy against CATV copyright liability, as evidenced by Congress's failure to impose such liability. There are, however, several difficulties with this approach. The strength of this supposed policy is doubtful; the failure to pass new copyright legislation appears to have been more the product of political indecisiveness than anything else. And it is unclear whether even a strong policy would preempt the Commission. The conflict here is between a policy born of congressional acquiescence and the pronouncement of a federal agency; the bar to a state's extending a federal law has no application because that bar is based upon the need for a uniform national policy.⁵¹ Moreover, there is authority for the position that only a statute may preempt federal administrative action; an implied congressional policy, no matter how strong, appears to be insufficient.⁵² Although no court has passed on the con-

⁴⁹ 392 U.S. 390 (1968).

⁵⁰ *Id.* at 401 (footnotes omitted).

⁵¹ In *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964), the Supreme Court struck down a state unfair competition law on the ground that it provided more protection than the federal patent laws contemplated. The Court noted a need for "uniform federal standards." *Id.* at 230.

⁵² In *Southern S.S. Co. v. NLRB*, 316 U.S. 31 (1942), the Court held invalid an NLRB order requiring the reinstatement of seamen who had violated federal anti-mutiny laws. The Court commented that "the Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another . . ." *Id.* at 47. The *Southern* case differs from the present situation. Not only was there an inconsistency between an administrative order and an express criminal statute, but the agency was attempting to condone conduct prohibited by Congress—just the opposite of what the Commission is trying to do.

flict considered here, the Eighth Circuit recently upheld against the preemption argument the present nonduplication rule⁵³—which, as pointed out previously,⁵⁴ provides a limited form of copyright protection.

A related argument is based upon section 325(a) of the Federal Communications Act of 1934, which provides that no broadcast station may "rebroadcast the program . . . of another broadcasting station without the express authority of the originating station."⁵⁵ The imposition of this requirement on broadcast stations may by implication have ruled out its application to CATVs. This position is bolstered by Congress's failure to amend section 325(a), as requested by the Commission when it first considered CATV, to make it applicable to CATVs.⁵⁶ But the limited application of section 325(a) may more realistically be viewed as a result of CATV's non-existence when the Act was passed.

C. First Amendment Considerations

The first amendment status of CATV is unclear. The Commission,⁵⁷ with the support of several lower federal courts,⁵⁸ maintains that CATV is entitled to the same first amendment protection as radio and television. Throwing CATV into this category limits rather than enhances its first amendment rights, for radio and television receive only diluted first amendment protection. Under the so-called "scarcity doctrine," radio and television may be regulated to a greater degree than other forms of speech because only a limited number of frequencies are available.⁵⁹

⁵³ *Black Hills Video Corp. v. FCC*, 399 F.2d 65, 70 (8th Cir. 1968).

⁵⁴ See text at notes 14-20 *supra*.

⁵⁵ 47 U.S.C. § 325(a) (1964).

⁵⁶ First Report and Order, CATV & TV Repeater Services, 26 F.C.C. 403, 430, 438-39 (1959). The Commission's former position would probably not be held to create any kind of estoppel-like bar to its present action. In the *Southwestern* case the Court rejected just such an argument as to the Commission's prior denial of jurisdiction over CATV:

The Commission's requests for legislation evidently reflected in each instance both its uncertainty as to the proper width of its authority and its understandable preference for more detailed policy guidance than the Communications Act now provides. We have recognized that administrative agencies should, in such situations, be encouraged to seek from Congress clarification of the pertinent statutory provisions.

392 U.S. at 170 (footnote omitted).

⁵⁷ Memorandum Opinion and Order, CATV, 6 F.C.C.2d 309, 310-11 (1967).

⁵⁸ *Titusville Cable TV, Inc. v. United States*, 404 F.2d 1187, 1189-90 (3d Cir. 1968); *Black Hills Video Corp. v. FCC*, 399 F.2d 65, 69 (8th Cir. 1968); *Conley Electronics Corp. v. FCC*, 394 F.2d 620, 624 (10th Cir.), *cert. denied*, 393 U.S. 858 (1968).

⁵⁹ See *National Broadcasting Co. v. United States*, 319 U.S. 190, 226 (1943).

Whether the scarcity doctrine should be accepted today is open to serious question. As one lower federal court correctly pointed out, there are presently far more radio and TV stations in any given community than newspapers.⁶⁰ Furthermore, since by no means are all available TV allocations actually in use,⁶¹ any limitations on entry to the field seem to be economic rather than technological. Nevertheless, the Supreme Court recently made it clear that the doctrine is still the law.⁶²

Application of the scarcity doctrine to CATV may also be open to challenge. The reasoning behind the doctrine may not be applicable to CATV at all because, unlike TV stations, CATVs do not use the airwaves. As a result, the number of entrepreneurs who can set up CATVs within a given area is limited only by the number of cables the local telephone company's poles can carry—a number greater than economic conditions will ever allow. However, in *Red Lion Broadcasting Co. v. FCC*,⁶³ the Supreme Court indicated that the real basis for its position is the entrenched, quasi-monopolistic position broadcasters achieve in a community.⁶⁴ The doctrine is applicable to CATVs on that ground, since by the very terms of their franchises they usually acquire a monopoly.⁶⁵

Even if CATVs are held to enjoy only a limited first amendment protection, the retransmission consent requirement might still be held to violate free speech guarantees. In passing on the constitutionality of the nonduplication regulation, the Third Circuit remarked:

[I]n the litigation before us the nonduplication rule is not an absolute bar to the broadcasting of a program. . . . In this situation

⁶⁰ Radio Television News Directors Ass'n v. United States, 400 F.2d 1002, 1019 (7th Cir. 1968), *rev'd*, 395 U.S. 367 (1969).

⁶¹ Note 73 *infra*.

⁶² *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). The Court made the seemingly naive statement that "[w]here there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unbridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish." *Id.* at 388.

⁶³ 395 U.S. 367 (1969).

⁶⁴ Even where there are gaps in spectrum utilization, the fact remains that existing broadcasters have often attained their present position because of their initial governmental selection Long experience in broadcasting, confirmed habits of listeners and viewers, network affiliation, and other advantages in program procurement give existing broadcasters a substantial advantage over new entrants, even where new entry is technologically possible.

Id. at 400.

⁶⁵ Whether CATVs should be subject to regulation similar to that exercised over public utilities demands a great deal of independent study. For now, the Commission apparently intends to leave such regulation solely to local authorities. Notice at 425, 33 Fed. Reg. at 19031.

we are satisfied that the nonduplication mandate does not conflict with the dictates of the First Amendment.⁶⁶

The retransmission consent requirement arguably is enough of an "absolute bar" to be unconstitutional. Such a holding seems unlikely, however, because CATVs are free both to carry local signals and to originate their own programming. Moreover, the absence of any challenge on first amendment grounds to the copyright law, the retransmission consent requirement's analogue, indicates that such an argument lacks substance.⁶⁷

III

THE PURPOSE AND POLICY OF THE RULES

A TV station's economic lifeblood is advertising revenue, which is determined by the number of people who watch the station. Though observers' estimates differ considerably,⁶⁸ it is safe to assume that CATVs draw a significant number of viewers away from TV stations.⁶⁹ Ordinarily, this phenomenon might be accepted as just another effect of market forces in a free enterprise economy. The Commission, however, has not viewed the process with such neutrality, since it is committed to a policy of developing broadcast television.

In 1952 the Commission promulgated its *Sixth Report and Order*,⁷⁰ which has largely determined the development of broadcast television since then. The goals of the *Sixth Report* were twofold: to provide as many signals as possible to individual viewers and to

⁶⁶ *Titusville Cable TV, Inc. v. United States*, 404 F.2d 1187, 1189-90 (3d Cir. 1968).

⁶⁷ Of course, the copyright law has an independent constitutional basis. U.S. CONST. art. I, § 8, cl. 8. Though this clause does not authorize any particular form of copyright protection, it at least makes explicit the power of Congress to create such a right.

⁶⁸ Cf. M. SEIDEN, *AN ECONOMIC ANALYSIS OF COMMUNITY ANTENNA TELEVISION SYSTEMS AND THE TELEVISION BROADCASTING INDUSTRY* 67 *passim* (1965) (FCC report); Fisher & Ferrall, *Community Antenna Television Systems and Local Television Station Audiences*, 80 Q.J. ECONOMICS 227 (1966) (National Association of Broadcasters study).

⁶⁹ This can happen in several ways. Installation of the cable may make reception of local stations impossible. First Report and Order, Rules re Microwave-Served CATV, 38 F.C.C. 683, 702, 731 (1965). More commonly, the CATV brings in from distant stations the same network or independent programs as the local station offers; where the local station is in a time zone different from that of the CATV, or where the local station delays the broadcast, the CATV may even be able to show the program before the local station. *Id.* at 722-23. And even if the CATV does none of the above, it inevitably fractionalizes the local station's audience by bringing in attractive programs from distant stations.

⁷⁰ Rules Governing Television Broadcast Stations, Docket Nos. 8736, 8975, 8976, 9175, 17 Fed. Reg. 3905, 3912 (1952).

encourage the growth of local stations in smaller communities.⁷¹ In establishing this latter goal, the Commission assumed, quite reasonably considering the contemporary clamor for TV allocations, that enterprising businessmen would soon have all frequencies in use.⁷² This assumption was unfortunate. Though practically all very high frequency (VHF) frequencies were taken, only a few ultra high frequency (UHF) stations were put into operation, probably because UHF signals do not carry as far as VHF signals and because until recently few TV sets were equipped to receive UHF signals. Just slightly more than three-quarters of all available TV allocations are now in use.⁷³ It was this allocation vacuum which CATV originally rushed in to fill; now, however, CATV is showing itself capable of prospering even where TV stations are firmly established.

The Commission, however, is still firmly attached to the *Sixth Report* plan, though perhaps less strongly than in the past. The 1962 "all-channel" legislation, requiring that all TV sets be able to receive UHF stations,⁷⁴ insures that UHF stations will eventually be able to appeal to all television viewers; over forty percent of all television households are capable of receiving UHF signals.⁷⁵ The Commission, therefore, sees UHF as going through a critical phase in the present and near future⁷⁶ and is determined to prevent it from being killed off at birth.⁷⁷ Thus the Commission's treatment of CATV is aimed more at negating threats to UHF than at developing the highest use of CATV. This approach is reflected in both the present and the proposed rules.

First, the Commission is trying to fight a delaying action against CATV. Though it has never said as much, it seems to be operating under the idea that if CATV growth is delayed for a few years, there will be enough UHF viewers to make UHF a paying proposition.⁷⁸

⁷¹ *Id.* at 3912.

⁷² *Id.* at 3913.

⁷³ As of August 1969 only 777 out of a total of 1,050 allocations were actually in use. BROADCASTING MAGAZINE, Aug. 18, 1969, at 72.

⁷⁴ 47 U.S.C. §§ 303(s), 330 (1964).

⁷⁵ Fourth Report and Order, Subscription Television Service, Docket No. 11279, 14 P & F RADIO REG. 2d 1601, 1631 n.33 (1968) [hereinafter cited as Subscription Report]. The Commission has taken the position that this represents a heavy investment for the American public. Notice of Inquiry and Notice of Proposed Rulemaking, CATV, 1 F.C.C. 2d 453, 469 (1965).

⁷⁶ Second Report and Order, CATV, 2 F.C.C.2d 725, 770-71 (1966).

⁷⁷ Notice of Inquiry and Notice of Proposed Rulemaking, CATV, 1 F.C.C.2d 453, 469-70 (1965).

⁷⁸ Two National Association of Broadcasters economists advocated such a tactic as a means of combatting CATV. Fisher & Ferrall, *supra* note 68, at 250.

It has, therefore, slapped what amounts to a freeze upon CATV use of distant signals. The present major market rules—though now suspended—allow the importation of distant signals only after a lengthy hearing. The proposed major market rules—as currently operable—allow importation only with nearly unattainable retransmission consent. Smaller market CATVs remain, in effect, subject to the hearing requirement.⁷⁹

Second, the Commission is attempting to put CATV and TV into separate competitive fields. A major purpose of the distant signal limitations is to encourage CATV origination, and the Commission has under consideration a requirement that CATVs do a certain amount of origination.⁸⁰ As CATVs begin to offer their own programs, they will stop drawing away viewers interested in broadcast television programming. To be sure, this will take some viewers away from broadcast television completely, but the Commission's investigations of subscription television (STV) have shown that the siphoning effect of any system that charges a fee is remarkably small.⁸¹ The Commission also seems to be in the process of making CATV interconnections—and thus a national CATV "network"—impossible;⁸² as a result, CATVs would find it more difficult to combine and obtain the money necessary to originate first-rate programs.

Third, after almost a decade and a half of debate and delay, the Commission is allowing the adoption of STV by broadcast television stations.⁸³ The regulations require applicants for STV stations to al-

⁷⁹ See note 7 *supra* and accompanying text.

⁸⁰ Notice at 422, 33 Fed. Reg. at 19030. This represents a radical change from the Commission's former position. In the Second Report and Order, CATV, 2 F.C.C.2d 725, 787 (1966), the Commission requested Congress to prohibit all CATV program origination. In a recent Report and Order, Docket No. 18397 (Oct. 27, 1969), the Commission proposed a new 47 C.F.R. § 74.1111(a), requiring CATVs with 3500 or more subscribers to operate "to a significant extent as a local outlet."

⁸¹ Subscription Report at 1645.

⁸² Second Report and Order, Community Antenna Relay Service, 11 F.C.C.2d 709 (1968), amended the CARS rules to make it clear that CATV-originated signals could not be relayed. In a recent Report and Order, Docket No. 18397, at 9, ¶ 17 (Oct. 27, 1969), however, the Commission enunciated a general policy in favor of allowing interconnection.

This is obviously a matter of great importance to the CATV industry, but it was one of the items bargained away by the National Cable Television Association in a proposed peace treaty with the National Association of Broadcasters. NCTA Resolutions § 5 (May 28, 1969). The pact was rejected by the NAB. NAB Resolution, June 20, 1969.

⁸³ There have already been attacks upon the Commission's power to authorize STV. In Connecticut Comm. Against Pay TV v. FCC, 301 F.2d 835 (D.C. Cir. 1962), the court upheld the Commission's authorization of the Hartford, Connecticut experimental STV project against the argument that STV violated the 47 U.S.C. § 151 (1964) mandate that

ready either own or have applied for a construction permit for a broadcast station.⁸⁴ They also provide that an STV station must carry the same minimum hours of free programming as a broadcast station.⁸⁵ STV stations will be allowed only in large markets at the beginning.⁸⁶ Thus many potential STV operators may enter the market by building new stations rather than by the more costly method of buying existing ones.⁸⁷ Practically the only allocations available for such new stations are UHF; the Commission has commented that STV may, "as a practical matter," end up solely on UHF stations.⁸⁸ The Commission's hope appears to be that the rush to get in on the STV boom will result in activation of many now-dormant UHF allocations—all of which would, of course, also provide minimum normal television programming.

Finally, the Commission may be hoping for a certain amount of merger between TV and CATV financial interests. The limitations on CATV use of TV signals—most particularly the retransmission consent requirement—might make such an arrangement very attractive to CATV owners. The Commission once indicated its approval of TV-CATV combinations⁸⁹ and has proposed only a very limited ban on common ownership.⁹⁰ Mergers could be widespread; though

the Commission make radio communication available "so far as possible, to all the people of the United States." Any argument that the court's decision was based on the experimental nature of the operation was killed by the recent case of *National Ass'n of Theatre Owners v. FCC*, — F.2d — (D.C. Cir. 1969). The court there upheld the Commission's power to generally institute STV on the grounds that the Commission may plan a national television policy under which some viewers may pay and some may not. The court pointed out that only one out of every five TV stations in a market would be licensed for STV, that STV stations will still have to carry conventional programming, and that STV competition may improve the quality of broadcast TV stations.

⁸⁴ 47 C.F.R. § 73.642(a) (1969).

⁸⁵ *Id.* § 73.643(c).

⁸⁶ *Id.* § 73.642(a).

⁸⁷ Subscription Report at 1646.

⁸⁸ *Id.* at 1668.

⁸⁹ First Report, Acquisition of CATV Systems by Television Broadcast Licensees, 1 F.C.C.2d 387, 389 (1965):

[I]n the view of the majority, 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.

The proceeding went no further than this and was terminated by an order. 7 F.C.C.2d 856 (1967). A new proceeding was begun (Notice of Inquiry, Developing Patterns of Ownership in the CATV Industry, 7 F.C.C.2d 853 (1967)), but this proceeding has also shown no results so far.

⁹⁰ Notice at 426, 33 Fed. Reg. at 19031-32. The Commission's concern here, however, is only with common ownership of CATV systems within a TV station's Grade B contour and thus does not touch on the problem of industry-wide conglomerates.

the strands of ownership are impossible to trace, over 300 broadcast station owners are currently listed as having CATV interests.⁹¹

Given a national commitment to the goals of the *Sixth Report*, these measures make sense. The problem is that the *Sixth Report* analysis was faulty in its inception and has proven unsuccessful. CATV may be a medium with more potential usefulness than broadcast television.⁹²

First, CATV can provide a far wider range of services than broadcast television. The cable which brings one signal into a home can bring dozens—and not just entertainment, but services such as facsimile newspapers and videophones. Signals can go both ways on a cable, making possible a variety of home services—such as shopping or banking by cable.⁹³ The Commission has recognized this aspect of CATV without commenting on it.⁹⁴

Second, CATV lends itself to subscription use far better than broadcast television, since no complex scrambling and unscrambling equipment is required, and subscription television may be economically sounder than the present supposedly “free” television, which is supported by increased advertising costs on products.⁹⁵ Though the Commission is hardly ready to accept a nationwide subscription service—whether by cable or air—it now at least concedes that such an approach has some merit.⁹⁶

These aspects of CATV make it possible to abandon the traditional, advertisement-oriented concept of “broadcasting” for what one commentator has labeled “narrow-casting.”⁹⁷ Programs could be tai-

The Antitrust Division of the Justice Department currently favors national CATV interconnection, on the ground that it may make improved programming possible. The Division does not, however, seem to have considered the problem of control of such a CATV “network.” Comments of Dep’t of Justice Before the FCC, Docket No. 18397, at 17-18 (Sept. 5, 1969).

⁹¹ 38 T.V. FACTBOOK, Services Volume 550-a to 555-a (1969).

⁹² The President’s Task Force on Communications Policy, in a report issued four days before the Commission’s Notice, came to the conclusion that present broadcast TV stations are incapable of providing real diversity of programming, that sufficient UHF development will not come in the near future, and that CATV is “the most promising” way of providing an increased number of signals. PRESIDENT’S TASK FORCE ON COMMUNICATIONS POLICY, FINAL REPORT, *Future Opportunities For Television*, ch. 7, at 9, 27, 32-39 (1968) [hereinafter cited as TASK FORCE REPORT].

⁹³ Notice at 419-21, 33 Fed. Reg. at 19029; Johnson, *CATV: Promise and Peril*, SATURDAY REVIEW, Nov. 11, 1967, at 87.

⁹⁴ Notice at 419-21, 33 Fed. Reg. at 19029.

⁹⁵ Coase, *The Economics of Broadcasting and Government Policy*, 56 AM. ECON. REV. PAPERS AND PROCEEDINGS 440, 446 (1966).

⁹⁶ Subscription Report at 1688.

⁹⁷ Licklider, *Televistas: Looking Ahead Through Side Windows*, in PUBLIC TELEVISION: A PROGRAM FOR ACTION 201, 212 (Carnegie Comm’n on Educ. Television ed. 1967).

lored to any minority willing to pay for them⁹⁸ rather than aimed at a mass audience. CATV's large channel capacity would, as the Commission has recognized, allow the local programming which was one of the goals of the *Sixth Report*. Groups now unable to afford expensive television time might be able to meet the lesser costs of more limited CATV distribution.⁹⁹ Some channels might still be devoted to advertiser-supported programming, since manufacturers would presumably still need a forum for puffing their wares.

Aside from the political brawls involved in disturbing vested financial interests,¹⁰⁰ there are many problems with such a system. The high cost of laying cable¹⁰¹ might make rural service prohibitive. Under a subscription system, poor people might not be able to afford many programs. Single ownership of the exclusive means of signal distribution might reduce diversity of expression.

These problems, however, are capable of resolution. A decrease in the number of broadcast stations would free many frequencies for use in carrying programs to outlying areas.¹⁰² Governmental assistance to poor people could be adjusted to pay subscription costs;¹⁰³ moreover, the limited experience with off-air subscription TV has shown that lower-income families are able to allocate funds for programs, though there is no indication of the effect on their mode of living.¹⁰⁴ And CATV may have a much lower social cost than broadcast television when it provides dozens of channels and services. Finally, mo-

⁹⁸ Johnson, *supra* note 93.

⁹⁹ Notice at 427, 33 Fed. Reg. at 19032. These two latter uses of CATV seem to demand some form of common carrier regulation. The Commission has recognized this but has taken no position on the issue other than to make it a formal area of inquiry. *Id.* at 427, 443, 33 Fed. Reg. at 19032, 19038. See also TASK FORCE REPORT, *Future Opportunities For Television*, ch. 7, at 10-11. The Antitrust Division of the Justice Department favors such an approach, arguing that a denial of access may violate the Sherman Act. Comments, *supra* note 90, at 5-11.

¹⁰⁰ The growing amount of common ownership (*see* text at note 91 *supra*) might make the task less monumental than expected. Moreover, existing media forms may well be attracted by the variety of new services (*see* text at note 93 *supra*) that CATV can provide—and charge for.

¹⁰¹ It averages about \$4,000 per mile. SEIDEN, *supra* note 68, at 23.

¹⁰² It would also make available much-needed air space for industrial and business uses. See also TASK FORCE REPORT, *The Use and Management of the Electromagnetic Spectrum*, ch. 8, at 40-41 (related method of expanding broadcast facilities).

¹⁰³ A decrease in advertiser-supported programs would—at least in theory—free money for subscription programs by reducing the price of consumer products.

¹⁰⁴ Subscription Report at 1630. Somewhat surprisingly, families in the \$4,000 to \$6,999 income range actually spent more on subscription programs than families in the \$10,000 and over range.

nopoly abuses can be remedied by imposing the common carrier access requirements which the Commission has discussed.¹⁰⁵

CONCLUSION

The Commission's initial reaction to CATV was to see it as a menace to its *Sixth Report* plan and to try to make it as innocuous as possible. The Commission now realizes that such an approach is impossible. It appears to be moving toward a multi-tiered communications policy, assigning different functions and fields of competition to broadcast television, CATV, and STV.¹⁰⁶ While this is an improvement over the Commission's monolithic past commitment to broadcast television, it does not go far enough toward developing each medium's capabilities. The Commission has asked some very far-reaching questions about the future of CATV;¹⁰⁷ hopefully, it will follow through to their answers.

¹⁰⁵ Note 99 *supra*.

¹⁰⁶ See Subscription Report at 1624.

¹⁰⁷ Notice at 442-43, 33 Fed. Reg. at 19037-38.