Regulation of Pay-Cable and Closed Circuit Movies: No Room in the Wasteland

Since the passage of the Communications Act,¹ new modes of communication have developed, many of which are not clearly, or not at all, within the categories over which the Federal Communications Commission (FCC) was granted regulatory powers. While community antenna television (CATV) has received the lion's share of regulatory, judicial, and scholarly attention,² several of the other new media present similar problems.

After seventeen years of rule making proceedings,³ the FCC in 1972 authorized over-the-air broadcasting on a per program charge basis.⁴ The FCC is now considering subscription cable television,⁵ and has proposed rules that would severely restrict the type and timing of programming pay-cable could present.⁶ At the same time, the Commission has refused to assert jurisdiction over the showing of movies and sporting events, by leased-wire arrangements with telephone companies, in hotel rooms in major cities, while suggesting possible future regu-

¹ 47 U.S.C. § 151 *et seq.* (1970).

² See, e.g., Barnett, *Cable Television and Media Concentration*, 22 STAN. L. REV. 221 (1970); Botein, *Access to Cable Television*, 57 CORNELL L. REV. 419 (1972); Park, *Prospects for Cable in the 100 Largest Television Markets*, 3 BELL J. ECON. & MGT. SCI. 130 (1972); Note, *Cable Television and the First Amendment*, 71 COLUM. L. REV. 1008 (1971); Note, *The Federal Communications Commission and Regulation of CATV*, 43 N.Y.U.L. REV. 117 (1968).

³ The FCC's rule making proceeding in Docket No. 11279 was begun in 1955. See R. HORTON, *TO PAY OR NOT TO PAY* 1-6 (1960); Brown, *The Subscription Television Controversy: A Continuing Symptom of Federal Communication Commission Ills*, 24 FED. COM. B.J. 259, 260-64 (1971).

⁴ Blonder-Tongue Broadcasting Corp., 25 P & F RADIO REG. 2d 104 (F.C.C. Jul. 26, 1972). This authorization followed adoption of severe restrictions on the programming that could be shown through subscription television, see 47 C.F.R. §§ 76.641-76.644 (1972), and judicial approval of those regulations. See *National Ass'n of Theatre Owners v. FCC*, 420 F.2d 194 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 922 (1970).

⁵ Pay-cable consists of offering TV programming to viewers via cable at a per program or per channel charge. The wires carrying the signals may be leased from a common carrier, laid by the pay-cable operation, or shared with a CATV operation. There is no necessity that any broadcast signals be carried by the cable subscription television (STV) operator.

⁶ 47 C.F.R. § 76.225 (1972).

lation if competition with commercial television becomes more effective.⁷

This comment examines the legal and logical bases for the FCC's assertion of jurisdiction over pay-cable television. After reviewing the origins and purposes of the FCC's regulatory authority, the comment discusses the nature of ancillary jurisdiction and analyzes the impact of new media on regulatory policies. This analysis suggests that the FCC should regulate neither pay-cable nor closed-circuit movies.

I. REGULATORY RATIONALES

Regulation of radio was prompted by broadcast interference.⁸ Without frequency allocation, two or more users often attempted to broadcast simultaneously on the same frequency, and as a result, neither could be understood. The Radio Act of 1912,⁹ was designed to enable the Navy to use radio for safety and navigation purposes free from interference, and, as a byproduct, to reduce interference generally.¹⁰ The Act required radio station operators to obtain licenses from the Secretary of Commerce specifying the wave length or lengths to be used and the hours of use.¹¹ Because, however, the act did not limit the grant of licenses, all applicants meeting the statutory criteria had to be licensed even though there were no frequencies or hours available.¹² Interference, therefore, could not be abated, and, even before the great increase in interference brought about by the advent of commercial radio broadcasting in 1920,¹³ Navy Secretary Daniels had declared that government monopoly of radio was required.¹⁴

Following a plethora of congressional commentary on the bedlam then prevailing on the airwaves,¹⁵ Congress passed the Radio Act of 1927,¹⁶ creating the Federal Radio Commission and investing it with

⁷ *Sterling Manhattan Cable Television, Inc. v. New York Tel. Co.*, 26 P & F RADIO REG. 2d 610 (F.C.C. Jan. 17, 1973).

⁸ L. WHITE, *THE AMERICAN RADIO* 128-31 (1947).

⁹ 37 Stat. 302 (1912), *repealed*, 44 Stat. 1174 (1927).

¹⁰ S. Rep. No. 698, 62d Cong., 2d Sess. 5 (1912); Coase, *The Federal Communications Commission*, 2 J. LAW & ECON. 1, 2 (1959).

¹¹ Coase, *supra* note 10, at 2-3.

¹² *Hoover v. Intercity Radio Co.*, 286 F. 1003 (App. D.C. 1923); *United States v. Zenith Radio Corp.*, 12 F.2d 614 (N.D. Ill. 1926).

¹³ Between the first of March and the first of November, 1922, the number of radio broadcast stations increased from 60 to 564. Coase, *supra* note 10, at 4. By March 1927, the number of broadcast stations was 732. FEDERAL RADIO COMMISSION, *ANNUAL REPORT* 2 (1927).

¹⁴ Coase, *supra* note 10, at 3.

¹⁵ See, e.g., 68 Cong. Rec. 32, 1704, 2576, 3029 (1926-1927); S. Rep. No. 772, 69th Cong., 1st Sess. (1926).

¹⁶ 44 Stat. 1162 (1927), *repealed*, 48 Stat. 1102 (1934).

broad regulatory powers. The Act conditioned the grant of a license on waiver of any claim to any other use of the airwaves,¹⁷ and limited the license term to a renewable three years. This licensing program effectively reduced interference and was incorporated without substantial change into the Communications Act of 1934,¹⁸ which transferred the Radio Commission's powers to the newly created Federal Communications Commission.¹⁹

Early Supreme Court decisions recognized that the interference of some uses of radio with others, rather than a congressional interest in dispersion of communications facilities, spurred Congress to regulate radio:

The plight into which radio fell prior to 1927 was attributable to certain basic facts about radio as a means of communication—its facilities are limited; they are not available to all who may wish to use them; the radio spectrum simply is not large enough to accommodate everybody. There is a fixed natural limitation upon the number of stations that can operate without interfering with one another. Regulation of radio was therefore as vital to its development as traffic control was to the development of the automobile.²⁰

Although, as Professor Coase noted some forty-seven years after the advent of radio regulation in America, radio frequencies are no more "scarce" than any other resource, and multiple use and interference was attributable to the lack of private ownership,²¹ it was clear that Congress believed that scarcity was the predicate for regulation.

¹⁷ Coase, *supra* note 10, at 5-6. This provision was taken from an earlier joint resolution, S.J. Res. 125, 67 Cong. Rec. 12959, 13046 (1926), and is presently contained in § 304 of the Communications Act of 1934, 47 U.S.C. (1970). The language of this provision seems directed at complaints of deprivation of property without due process occasioned by earlier regulatory efforts. See, e.g., *Munn v. Illinois*, 94 U.S. 113 (1877). Proponents of radio regulation in the 1920's, aware of those complaints, carefully couched their urgings in terms of the public nature of radio. E.g., *FOURTH NATIONAL RADIO CONFERENCE, PROCEEDINGS AND RECOMMENDATIONS FOR REGULATION OF RADIO 6* (1925) (remarks of Herbert Hoover), *quoted in* W. EMERY, *NATIONAL AND INTERNATIONAL SYSTEMS OF BROADCASTING 8* (1969).

¹⁸ 47 U.S.C. § 151 *et seq.* (1970).

¹⁹ The legislative history of the Communications Act indicates that Title III was premised on the same bases and sought the same ends as the Radio Act of 1927. The radio regulation title was included in the 1934 Act to centralize regulatory control of broadcasters and common carriers by wire or radio in a single administrative agency. S. Rep. No. 781, 73d Cong., 2d Sess. 1 (1934); H.R. Rep. No. 1850, 73d Cong., 2d Sess. 3 (1934).

²⁰ *National Broadcasting Co. v. United States*, 319 U.S. 190, 213 (1943).

²¹ Coase, *supra* note 10, at 14. Professor Coase argues that the problem of allocating radio resources could better have been managed by creation of private property rights in frequencies. Interference could then have been controlled in much the same way as interference with the use of tangible property is controlled, through actions to abate

It was necessary to devise a mechanism for allocating frequencies, which were believed to be too "scarce" to allow all "desirable" uses. The FCC has jurisdiction to determine the types of programs for which radio will be used and the geographical location of the licensed stations only because of this necessity.²² To prevent interference, it is necessary to limit the number of radio users; rather than allow the most valuable use of any frequency to be determined by having potential users bid for, and the highest bidder pay for, the use of an interference-free frequency,²³ Congress determined that frequencies would be dispensed without charge. The problem, then, was to determine what use would be the most valuable. First it was determined that radio should be used to promote local expression.²⁴ Therefore, by limiting broadcast power, licenses restrict the area to which a station can broadcast and allow more stations to broadcast, each to a localized audience. Second, Congress decided that some restriction should be imposed on what the broadcaster said, since the broadcaster was supposed to serve the public.²⁵ Congress listed a few types of speech that broadcasters could not air but left to the FCC the decision whether licensing a particular broadcaster served the public's interest in radio use.²⁶ Thus, local

nuisances, to redress trespasses, etc. *Id.* at 25-27. The present system of allocating radio frequency use results in misallocation due to the government's inability to gain sufficient information about all possible uses for all frequencies and from the difficulty of assigning relative values to uses absent a monetary measure. *Id.* at 18. Professor Coase also notes the lack of evidence indicating that it is less costly to regulate frequency allocation than it would be to develop and operate a market for such allocation. *Id.* at 18-19.

There does appear to be one case, decided just before the passage of the joint resolution declaring the absence of property rights in frequencies, that implicitly recognized such rights and granted nuisance relief for interference. *Tribune Co. v. Oak Leaves Broadcasting Station* (Cir. Ct. Cook Co. 1926), noted in 68 CONG. REC. 216 (1926). Professor Coase concludes that, but for the adoption of federal regulatory schemes, the courts would have worked out solutions to the problems of interference, using notions of private property rights. Coase, *supra* note 10, at 30-31.

²² See *Hearings on H.R. 5589 Before the House Comm. on Merchant Marine and Fisheries*, 69th Cong., 1st Sess. 40, 47-52, 128-30, 149-76, 206-14 (1926). Congressmen frequently expressed preference for achieving the greatest possible diversity in both aspects of allocation—a little something for everyone—and the Commission has attempted to comply. See *FCC v. Allentown Broadcasting Co.*, 349 U.S. 358 (1955); *Newman Broadcasting Co.*, 11 F.C.C. 1369, 1377 (1947).

²³ See Coase, *supra* note 10.

²⁴ See *Hearings*, *supra* note 22, at 40, 128-30, 207-11.

²⁵ See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386-91 (1969).

²⁶ See 18 U.S.C. § 1464 (1970); 47 U.S.C. § 307 (1970). The provisions presently in force were taken from the 1927 Act. Although the Radio Act of 1927 explicitly eschewed any intent to authorize program censorship, see 47 U.S.C. § 326; Coase, *supra* note 10, at 6, it banned obscene language, required identification of persons paying for or furnishing programs, prohibited rebroadcasting programs without the originating station's consent, and mandated provision of equal time for political announcements. Coase, *supra* note 10, at 6.

expression and program diversity are not independent regulatory goals but are, instead, only standards to guide the Commission in allocating the radio spectrum among competing uses.

Absent a direct market determination of what the public values, the Commission has inquired whether programming meets the Commissioners' idea of what the public generally is interested in hearing and whether programming conforms to community sentiment as determined by local surveys.²⁷ The premise for regulating broadcasters' programming is the need, without economic determinants, to ensure that public, not private, interests are served. It seems, however, that economic determinants exist that can ensure, more accurately and less expensively than the FCC that the public interest is served. The broadcaster who sells commercial advertising to support his programming wants to derive the greatest possible profit from such advertising. To maximize advertising revenue, the broadcaster must reach the greatest possible audience. It is thus in the commercial broadcaster's interest to present programming that the greatest number of persons desires to see or hear.²⁸

II. EXTENSION OF JURISDICTION TO NEW MEDIA

The first commercial community antenna television system in the United States was constructed in 1950 in Lansford, Pennsylvania.²⁹ For the next decade CATV systems limited their activities almost exclusively to the importation of signals from larger urban areas into small communities, such as Lansford,³⁰ that otherwise would have had no local station or only poor reception of distant stations' signals.³¹ In

²⁷ The FCC has looked at programming in individual, e.g., *Mayflower Broadcasting Corp.*, 8 F.C.C. 33 (1940), and comparative, see *Policy Statement on Comparative Broadcast Hearings*, 5 P & F RADIO REG. 2d 1901 (1965), proceedings to determine whether a broadcast license applicant offers communications of sufficient importance, see *Young People's Ass'n*, 6 F.C.C. 178 (1938), and responsiveness to public needs, see *Henry v. FCC*, 302 F.2d 191 (D.C. Cir.), cert. denied, 371 U.S. 821 (1962), to justify use of a radio frequency. The FCC has expressed concern that the few stations operating in any market provide the public with limited choice in programs and editorial viewpoints. See *Editorializing by Broadcast Licensees*, 13 F.C.C. 1246 (1949).

²⁸ See text at notes 62-68 *infra*.

²⁹ Witt, *CATV and Local Regulation*, 5 CAL. WESTERN L. REV. 30 (1968).

³⁰ In 1950, Lansford, Pennsylvania had fewer than 8,000 inhabitants. NEWSPAPER ENTERPRISE ASSOCIATION, WORLD ALMANAC 287 (1970).

³¹ See Note, *Regulation of Community Antenna Television*, 70 COLUM. L. REV. 837, 837-38 (1970). CATV systems operate by the reception of signals at a master antenna, transmission through microwave relay systems or coaxial cables equipped with amplifiers at set intervals, and distribution of the signals by cable to the viewers' television sets. See, Comment, *CATV Regulation—A Complex Problem of Regulatory Jurisdiction*, 9 B.C. IND. & COM. L. REV. 429 (1968).

1959, the FCC completed its study of CATV and concluded that there was no place within its jurisdiction for the regulation of CATV.³²

Cable TV soon moved into larger, more lucrative markets, evoking protests from broadcast TV stations. By 1965, the FCC had decided that some regulation of CATV was required,³³ and by 1966, the FCC completely reversed its position of seven years earlier.³⁴ In asserting jurisdiction over CATV, the FCC noted the "substantial competition" of CATV with commercial broadcasting³⁵ and the probability that cable had an adverse impact on commercial television.³⁶

This extension of jurisdiction was challenged in *United States v. Southwestern Cable Co.*³⁷ The Supreme Court upheld the regulation of CATV, giving an elastic interpretation to the Commission's jurisdiction that allowed it to regulate any medium of interstate communication affecting the FCC's policies. CATV reception and transmission of signals was found to be interstate communication since much television programming is devised for national audiences.³⁸ The Court then reasoned that although the Radio Act was originally enacted to curtail interference, achievement of the goal required the FCC to allocate frequencies in an efficient manner to achieve maximum broadcasting consistent with no interference.³⁹ The FCC has stated that it is necessary to promote the use of ultra-high frequency (UHF) and educational television (ETV) in order to accomplish efficient use of available frequencies.⁴⁰ Since the existence of cable television arguably

³² *Inquiry Into CATV and TV Repeater Services*, 26 F.C.C. 403, 427-31 (1959).

³³ *Rules Re Microwave-Served CATV, First Report and Order*, 38 F.C.C. 683, 707-14 (1965). The Commission required cable systems using microwave relay to carry all local stations and prohibited duplication of local programming within fifteen days. See Chazen & Ross, *Federal Regulation of Cable Television: The Visible Hand*, 83 HARV. L. REV. 1820, 1825 (1970). The Court of Appeals for the District of Columbia Circuit had upheld an earlier FCC foray into cable regulation in *Carter Mountain Transmission Corp. v. FCC*, 321 F.2d 359 (D.C. Cir.), *cert. denied*, 375 U.S. 951 (1963). In that case, the Commission had denied a permit for the construction of microwave relay facilities to be used for CATV operation on the ground that CATV would have an adverse impact on local broadcasting.

The 1965 decision presaged further FCC action since it affected only 12 percent of then-operating CATV systems, Comment, *supra* note 31, at 435, n.56, and since the decision to invoke indirect jurisdiction was couched in language better suited to an assertion of ancillary jurisdiction.

³⁴ *Rules Re Microwave-Served CATV, Second Report and Order*, 2 F.C.C. 2d 725 (1966).

³⁵ See *Rules Re Microwave-Served CATV, First Report and Order*, 38 F.C.C. 683, 707 (1965).

³⁶ *Id.* at 713-14.

³⁷ 392 U.S. 157 (1968).

³⁸ *Id.* at 168-69.

³⁹ *Id.* at 173-74; see text at note 55 *infra*.

⁴⁰ 392 U.S. at 174-75.

could have an impact on UHF or ETV and thus interference with the FCC's method of promoting efficient use, the Court found that regulation of CATV might be necessary to implement the policies of the Communications Act.⁴¹ It therefore followed, the Court held, that the FCC must have ancillary jurisdiction over CATV.⁴²

III. PAY-CABLE UNDER ANCILLARY JURISDICTION

In conjunction with its exercise of ancillary jurisdiction over CATV systems,⁴³ the FCC has assumed jurisdiction over all pay-cable opera-

⁴¹ *Id.* at 175-77. The Court also noted that the Senate Committee on Interstate and Foreign Commerce feared that unrestricted growth of CATV would eliminate local broadcasting, listing four anticipated ill effects: (1) communities would be deprived of local service; (2) suburban and rural areas might be deprived of all service; (3) residents of central communities would be deprived of all service if unable to pay cable fees; (4) entire regions might be deprived of local service. *Id.* at 175-76 n.43, citing S. Rep. No. 923, 86th Cong., 1st Sess. 7-8 (1959). The Court did not indicate what weight it attached to these statements of congressional fear of unregulated CATV.

⁴² 392 U.S. at 177. After this open-ended grant of authority to the FCC, the Court, somewhat mysteriously, explained that it expressed "no views as to the Commission's authority, if any, to regulate CATV under any other circumstances or for any other purposes." *Id.* at 178.

⁴³ The FCC has employed its jurisdiction to impose a variety of restrictions on CATV operation. Under the Commission's rules, CATV systems must carry the signals of all stations within thirty-five miles, 47 C.F.R. §§ 76.5(f), 76.59, 76.61, 76.63 (1972), and are prohibited from carrying certain, more distant signals in preference to those of less distant stations. 47 C.F.R. § 76.61(b) (1972); see *Comment, Regulation of Cable Television: The Federal Communications Commission's 1972 Rules*, 1972 ILL. L.F. 608, 616. CATV systems may, however, carry foreign language stations and governmentally operated educational TV stations free of these restrictions. 47 C.F.R. §§ 76.59(c), (d), 76.61(d), (e) (1972). CATV systems cannot simultaneously duplicate programming shown by broadcast stations entitled to exclusivity. 47 C.F.R. § 76.93(a) (1972). This provision is limited by the requirement that the station claiming exclusivity give notice to the CATV system. Systems in the top 100 markets cannot carry any syndicated series within one year of its sale to a local station if the copyright holder makes a proper claim of exclusivity. 47 C.F.R. § 76.151(a) (1972). In the major television markets, cable systems are required to have at least twenty channel capacity with as much bandwidth for nonbroadcast as for broadcast use, 47 C.F.R. § 76.251(a) (1), (2) (1972), to provide a minimum of four free and leased access channels, 47 C.F.R. § 76.251(a)(4)-(7) (1972), and, if the system has 3,500 or more subscribers, to originate programming "to a significant extent," 47 C.F.R. § 76.201(a) (1972).

The origination requirement, one of the most costly requirements for CATV systems, see Comanor & Mitchell, *Cable Television and the Impact of Regulation*, 2 BELL J. ECON. & MGR. SCI. 154 169-70 (1971), was upheld by the Supreme Court in *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972). The plurality opinion found the requirement to be within the FCC's authority under its ancillary jurisdiction, pointing out that the rule promotes program diversity just as the FCC does in its regulation of radio and television broadcasting. *Id.* at 665-69. The opinion seeks to harmonize this result with the intended reach of the Communications Act:

To be sure, the cablecasts required may be transmitted without use of the broadcast spectrum. But the regulation is not the less, for that reason, reasonably ancillary to the Commission's jurisdiction over broadcast services. The effect of the regulation, after all, is to assure that in the retransmission of broadcast signals

tions and has adopted regulations to govern them⁴⁴ while instituting further rule making proceedings to consider modification of those regulations.⁴⁵ The stringent restrictions proposed for subscription cable are expected to diminish the competitive impact of that medium.⁴⁶

The FCC has not yet asserted jurisdiction over the screening of first-run movies in hotel rooms, since the Commission believes that the impact of such operations on commercial television is minor, but has commenced rule making proceedings to determine whether regulation of this and related media is necessary.⁴⁷ *Sterling Manhattan Cable Television, Inc. v. New York Telephone Co.*⁴⁸ involved the operations of Trans-World Communications, a division of Columbia Pictures that

viewers are provided suitably diverse programming—the same objective underlying regulations sustained in *National Broadcasting Co. v. United States*, . . . , as well as the local carriage rule reviewed in *Southwestern* and subsequently upheld. *Id.* at 669.

Chief Justice Burger, concurring, declared that the regulation “strains the outer limits of even the open-ended and pervasive jurisdiction that has evolved by decisions of the Commission and courts,” but concluded that the regulation should be upheld because Congress has failed to enact specific legislation regulating CATV. *Id.* at 675–76. There were four dissenters, Justices Douglas, Stewart, Powell, and Rehnquist.

⁴⁴ The regulations that the Commission has proposed to govern the showing of television programs through cable with a per channel or per program charge include: prohibition, with limited exceptions, of cablecasting feature films that have had general release anywhere in the United States more than two years prior to the cablecast, 47 C.F.R. § 76.225(a)(1) (1972), proscribing showing of sports events within two years of airing on commercial television and of events, such as the Summer Olympics, that regularly occur at intervals greater than two years, the last regular occurrence of which was shown on commercial TV, 47 C.F.R. § 76.225(a)(2) (1972), a total ban on the showing of TV series, 47 C.F.R. § 76.225(a)(3) (1972), requiring sports events and movies to comprise less than 90 percent of cablecast hours, 47 C.F.R. § 76.225(a)(4) (1972), prohibition of commercial advertising, 47 C.F.R. § 76.225(a)(5) (1972), and banning the showing of live or same day delayed sports events of a type televised to the same community on a nonsubscription basis during any of the previous five years, 47 C.F.R. § 76.643(b) (1972). If the sports event occurs regularly at greater than one year intervals, the ban covers events broadcast on commercial TV in any of the prior ten years.

The rule prohibiting cablecasting of old movies contains an exception under which one film per month may be shown ten or more years after the film's general release; the film may be shown more than once, but all showings must take place within a single week each month. The rule also permits cablecasting of films that commercial television stations refused to show or that the film owner refused to let be shown by commercial TV stations. The cable operator would, however, be required to make a “convincing showing to the Commission” that the film owner and commercial television stations were unable to reach agreement after “bona fide” attempts. 47 C.F.R. § 76.225(a)(1) (1972).

⁴⁵ 37 Fed. Reg. 15173 (1972).

⁴⁶ *Id.* at 15174–75.

⁴⁷ 38 Fed. Reg. 2766 (1973). During the rule making proceeding, the FCC will focus on the competitive effect hotel movies have on broadcast and cable TV, and will suspend the restriction on what movies can be shown through pay-cable for hotel and motel viewing. *Id.* at 2766–67.

⁴⁸ 26 P & F RADIO REG. 2d 610 (F.C.C. Jan. 17, 1973).

leased closed-circuit video and audio transmission facilities from the New York Telephone Company to provide screening of first-run movies through the television sets in the rooms of five New York hotels.⁴⁹ Although the Commission concluded that such closed-circuit movie showings were not presently within its jurisdiction, its opinion held open the matter should competition grow, and also seemed to expand the nebulous limits of its jurisdiction. The *Sterling* opinion indicates that FCC jurisdiction extends to wholly intrastate operations⁵⁰ and to activities that affect operations, such as cable television, over which the Commission has only ancillary jurisdiction.⁵¹

Ancillary jurisdiction is founded upon the ultimate statutory goal, the prevention of interference with transmission of radio signals. Although *Southwestern* indicates that the FCC has jurisdiction over media that seem to pose a threat to free broadcasting, "to ensure the continued economic vitality of free television"⁵² and to prevent "adverse impact on, or unfair competition to, the basic free television service,"⁵³ the protection of free broadcasting is only a mediate goal.

The assertion of jurisdiction over pay-cable and the suggestion of possible jurisdiction over closed-circuit hotel movies cannot be de-

⁴⁹ At the time the FCC heard the complaint, based on Trans-World's failure to obtain a certificate to operate a new communications line, see 47 U.S.C. § 214 (1970), Trans-World had the capacity to carry live broadcasts and to interconnect with other closed circuit operations or with cable television and had extended service to 29,000 rooms in six cities. 26 P & F RADIO REG. 2d 610, 613.

⁵⁰ After explaining that there was no requirement for a certificate from the FCC for the operation of the lines used by Trans-World since the lines were wholly intrastate, the Commission went on to distinguish Trans-World's activities from cable television's, saying that "cable television systems . . . by definition are engaged in distributing broadcast signals" and citing the Supreme Court's decision in *Federal Radio Comm'n v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 279 (1933), that broadcast signals by definition constitute interstate communications. 26 P & F RADIO REG. 2d at 618. This distinction of cable, had the Commission stopped there, would seem to place Trans-World's activities beyond any jurisdiction the FCC could exercise, since even its ancillary jurisdiction had been restricted to communications activities that were interstate, although perhaps only by definition. The Commission, however, then based its refusal to assert either indirect or ancillary jurisdiction on the complainant's failure to show that Trans-World's activities had substantial impact on other companies' Commission-regulated operations. *Id.* at 620-21.

⁵¹ The Commission noted that: "Trans-World's proposals are directed to the showing of motion pictures in hotels, and thus would not appear to have any impact on broadcasting in the area and only limited possible impact on cable. We recognize that this picture could change At this time, however, we find no basis on this ground for asserting jurisdiction." 26 P & F RADIO REG. 2d at 620-21.

⁵² *National Ass'n of Theatre Owners v. FCC*, 420 F.2d 194, 208 (D.C. Cir. 1969), cert. denied, 397 U.S. 922 (1970).

⁵³ Cox, *Competition in and Among the Broadcasting, CATV and Pay-TV Industries*, 13 ANTITRUST BULL. 911, 918 (1968).

fended as necessary to prevent interference. Neither pay-cable nor closed-circuit movie operation employs the radio spectrum, and, therefore, neither can physically prevent other uses of scarce resources not presently allocated through market operation. In looking only to the effect on commercial broadcasting, and through that to the effect on distribution of and diversity among communications facilities, the Commission has taken the criteria for frequency allocation as self-generating goals.⁵⁴ Yet even on the assumption that the mediate ends are acceptable as ultimate goals, the argument for jurisdiction over pay-cable is inadequate.

A. Impact on Communications: Resources and Reason

It should be noted, first, that the argument for jurisdiction is circular; if the FCC desires to prevent an unregulated medium from adversely affecting a given aspect of communications, the FCC has jurisdiction over that medium provided the Commission can devise regulations that in fact prevent the adverse effect. The justification for jurisdiction over pay-cable is that pay-cable would reduce commercial television's revenues to such an extent that commercial stations would be forced out of business, but that pay-cable, even in combination with a CATV system engaged in distributing broadcast signals, would be unable or unwilling to fill the void left by the broadcast stations' departure.⁵⁵ This justification is unavailing unless unregulated pay-cable would have a significant impact on commercial stations' revenues.

Pay-cable could reduce commercial broadcasting revenues by siphoning either audiences or programs away from broadcast stations. Some audience fragmentation can always be expected from the addition of another channel to the pool from which viewers select.⁵⁶ The Commission has rejected audience fragmentation alone as a basis for preventing provision of a competitive station, in dealing with other broadcasting matters, even though the fragmentation may result in one competitor's failure.⁵⁷ In that event, the audience-preferred competitor will survive.

1. *Programming.* A more serious concern is that pay-cable will at-

⁵⁴ See Coase, *The Economics of Broadcasting and Government Policy*, 562 AMER. ECON. REV. 440, 446 (1966); Posner, *The Appropriate Scope of Regulation in the Cable Television Industry*, 3 BELL J. ECON. & MGT. SCI. 98, 124-27 (1972); Note, N.Y.U.L. REV., *supra* note 2, at 133. But see Kenny, *Closed Circuit Television: What Place in Our Regulatory Framework?*, 31 FED. B.J. 167, 177 (1972); Note, *supra* note 31 at 864-67.

⁵⁵ See note 41 *supra*; Cox, *supra* note 53, at 918-19.

⁵⁶ Park, *Cable Television, UHF Broadcasting, and FCC Regulatory Policy*, 15 J. LAW & ECON. 207, 208-09 (1972); Posner, *supra* note 54, at 103.

⁵⁷ E.g., *Southeastern Enterprises*, 22 F.C.C. 605 (1957).

tract programs with high viewer interest, requiring viewers to pay for or forego programs they otherwise could have viewed free of charge.⁵⁸ Many programs have shifted, without the FCC objecting, from one commercial broadcast station to another,⁵⁹ but pay-cable is thought to pose the threat of attracting all or nearly all of the most popular shows.⁶⁰ If pay-cable can do so, it must be for some reason other than the "unfair" advantage allegedly possessed by CATV⁶¹ since pay-cable proposes to originate all its programming, rather than to distribute for a fee broadcast signals received without charge by the cable operator.

Under the present commercially sponsored system, "the person who pays for the broadcast of a program is the advertiser. It follows that the programs broadcast are those which maximize the profits to be derived from advertising."⁶² Commercial sponsorship means that the viewer can consume television services without paying for them,⁶³ and, consequently, there is no measure of the intensity of viewer preference for particular programs. Pay television corrects these deficiencies of commercial television by collecting a fee for program service rendered. The direct payment for programs creates a market for programs separate from the market for advertising and allows the program producer to capitalize on the varying intensity of viewer preference for different programming.

Since it is possible for the commercial television viewer to consume the program without consuming the advertising by buying the advertised product,⁶⁴ the amount the advertiser is willing to pay for a program reflects the increased revenues to the advertiser of an additional sale diminished by the improbability of a viewer being induced to purchase the product. For inexpensive products the worth of an additional sale is slight, while for expensive products the likelihood of inducing a viewer to purchase the product is comparatively small. As a result advertisers are willing to spend only a few cents per viewer.⁶⁵ The minimal price per viewer necessitates an attempt to seek the largest possible audience in order to cover production costs. The producer

⁵⁸ Cf. 37 Fed. Reg. 15173, 15174 (1972).

⁵⁹ R. HORTON, *supra* note 3, at 7.

⁶⁰ See BROWN, *supra* note 3, at 274-75.

⁶¹ COX, *supra* note 53, at 918.

⁶² COASE, *supra* note 54, at 446.

⁶³ BROWN, *supra* note 3, at 268; Telser, *Supply and Demand for Advertising Messages*, 562 AMER. ECON. REV. 457, 459 (1966).

⁶⁴ Telser points out that advertising has a value to consumers, reflected in the generally higher prices of advertised goods, representing ease in finding products and perhaps increased confidence in or increased knowledge of the product. *Id.* at 457.

⁶⁵ Posner, *supra* note 54, at 103.

cannot seek a narrower audience with a high level of interest in a given program, since that audience will also be worth but a few cents per viewer to the advertiser. Pay television, on the other hand, can maximize its revenues by presenting programs to a smaller audience, each member of which will pay more than a few cents.⁶⁶

It seems likely, therefore, that fears that pay television will capture all of commercial television's most popular programs are unfounded. The two types of television lend themselves to the presentation of essentially different types of programming. Pay television could present programs for which there is only a small audience, but for which each viewer is willing to pay a great deal; such programs—for example, opera performances—are not now presented on commercial television. Commercial television, on the other hand, can present programs that attract a large audience, but for which each viewer would be willing to pay relatively little. Such programs are probably unsuitable for pay television since the program production cost and the administrative costs of billing and collecting might exceed subscriber revenues. It is probable that most programs shown on commercial television are of this type.

There are two other categories of programming: programs for which each member of a small audience would pay little and programs for which each member of a large audience would pay a large amount. Programs of slight interest that attract few viewers are unlikely to be shown on either pay or commercially sponsored television. Programs that attract relatively large audiences, and for which each viewer is willing to pay a relatively large sum, are probably shown rarely, if at all, on commercial television. If the value of the program to the viewer is significantly greater than the program's value to the advertiser, then other means of presenting such programs would be devised to capture that difference. Closed-circuit telecasting of heavyweight championship fights⁶⁷ and theater screenings of movies are two examples. It is likely, then, that pay television, instead of siphoning programs from commercial television, would present programs that are not now shown on commercial television and are available only by closed circuit, if they are televised at all.⁶⁸

The same analysis is applicable to the regulation of operations such as Trans-World's hotel movie scheme. Although the FCC concluded that the scheme would have little impact on television, the Commission seemed to attribute that conclusion to the restriction of screenings to

⁶⁶ See *id.* at 104-05.

⁶⁷ See Kenny, *supra* note 54, at 170-71.

⁶⁸ See Posner, *supra* note 54, at 105-06.

hotel rooms.⁶⁹ The real source of the lack of impact is that Trans-World's operation, like pay-cable, is financed by a mechanism different from the source of commercial TV revenues and offers a different type of programming.

2. *Geographic Diversity.* The Commission's concern with geographical distribution of communications facilities, like its concern with program diversity, originated with the need to allocate frequencies.⁷⁰ Fear that cable will have an adverse impact on dispersion of communications facilities, by eliminating local programming from smaller communities and importing signals broadcast from larger ones, springs from the same notion of destruction of commercial broadcasting that underlies the Commission's argument regarding content regulation. But pay-cable's impact on station distribution, like its probable impact on programming, is apt to be opposite to that predicted by the FCC as the predicate for its jurisdiction.

First, since pay-cable will not attract programming from commercial TV, it is unlikely to reduce broadcast revenues significantly, thus making an adverse effect on the distribution of television stations unlikely. Furthermore, to the extent that pay-cable operates over the same cable as CATV, the distribution of local television outlets will be enhanced. As one FCC Commissioner has noted, "it is economically and technically feasible for almost any community of appreciable size to have its own CATV system, and hence its own local outlet, whereas television broadcast stations generally require a substantial population base"⁷¹ Some communities, however, are too small even for cable. Cable operation in many locales involves heavy fixed costs for system construction, particularly for purchasing and laying the cables.⁷² Although the operating costs for cable may be less than for broadcasting,⁷³ the construction costs are sufficiently high to make many cable systems not connected with subscription cable operations unremunerative.⁷⁴ Since cable has usually been used in the past to retransmit broadcast signals, it has been engaged in providing the same type of program as that provided by commercial broadcasting stations. Pay-cable will often employ the same cable as that used for retransmission; cable system

⁶⁹ See note 51 *supra*.

⁷⁰ See text and notes at notes 8-27 *supra*.

⁷¹ Cox, *supra* note 53, at 919.

⁷² MITRE, INC., URBAN CABLE SYSTEMS (1972); RMC, INC., COST ANALYSIS OF CATV COMPONENTS (1972); Posner, *supra* note 54, at 112.

⁷³ Note, *supra* note 31, at 843. But see Posner, *supra* note 54, at 103, suggesting that costs for cable and broadcast operations are approximately the same.

⁷⁴ See MITRE, INC. *supra* note 72; RMC, INC., *supra* note 72; Comanor & Mitchell, *supra* note 43, at 196; Park, *supra* note 2.

owners will either supply pay-cable service themselves or lease channels to a separate pay-cable firm. In either case, because it can provide programming different from that now provided by commercial broadcasting,⁷⁵ pay-cable can offer an additional source of revenue to cable system owners. This might make profitable many CATV operations that, without pay-cable, could not be built. By enabling hitherto submarginal CATV systems to operate, pay-cable will promote television distribution by providing cable services to communities served by few or no commercial broadcast stations.

The increased viability of cable may also increase the distribution of communications facilities by improving the ability of UHF stations to survive. Examinations of the effect of cable on UHF, both contemporaneous with the Commission's assertion of cable jurisdiction⁷⁶ and more recently,⁷⁷ indicate that, since it can improve UHF reception, cable television is likely to aid, rather than impair, UHF stations' development.⁷⁸ UHF signals generally have an attractiveness index of less than half the average for VHF,⁷⁹ and only one in two sets presently are equipped to receive UHF signals.⁸⁰ The UHF audience gain from improved and expanded reception via cable more than offsets the audience diversion from UHF by cable's provision of additional channels.⁸¹ Although the necessity of using UHF channel allocations to promote distribution of TV outlets is doubtful where CATV is available as an alternative, the FCC's policies with respect to UHF would be advanced, rather than retarded, by pay-cable operation.

B. Monopoly in Cable

Another argument for jurisdiction over pay-cable, as well as over cable generally, is that regulation is needed since a single entity could monopolize cable services for a community.⁸² This argument equates cable with communications common carriers, which have been viewed as providing services of an essentially "public" nature that could be

⁷⁵ See text at notes 60-68.

⁷⁶ M. SEIDEN, AN ECONOMIC ANALYSIS OF COMMUNITY ANTENNA TELEVISION SYSTEMS AND THE TELEVISION BROADCAST INDUSTRY 5, 84-86 (1965).

⁷⁷ Park, *supra* note 56; Park also cites studies by the Kaiser Broadcasting Co. and Neilson Co., the latter study commissioned by the American Broadcasting Co., as supporting the conclusion that CATV is likely to benefit nonnetwork UHF stations. *Id.* at 225-29.

⁷⁸ *Id.* at 222.

⁷⁹ *Id.* at 230.

⁸⁰ Posner, *supra* note 54, at 103.

⁸¹ Park, *supra* note 56, at 222.

⁸² This argument has not been made with respect to closed circuit operations such as Trans-World's.

provided efficiently by only a single carrier.⁸³ Absent government regulation the monopolist would charge a supracompetitive price. It is in part to deprive the monopolist of this ability that common carrier services are subject to regulation.⁸⁴

At least one study of cable services has concluded that cable, like telephone service, has decreasing average costs in the relevant demand region and is therefore a natural monopoly.⁸⁵ If this is true, it is still not clear why regulation of cable should come from the federal government. Cable is not an interstate operation, and various proposals have been advanced for controlling cable's monopoly through state or municipal regulation.⁸⁶ One reason the state or local government can effectively regulate cable is that cable is a natural monopoly only within small geographic areas.⁸⁷

The federal concern with cable is not the rates that cable operators charge but the communications services that they furnish.⁸⁸ Despite the limited number of available communications channels, Congress has not delegated, nor has the FCC advocated, power to regulate program rates. Although the FCC has displayed some concern over the communications "monopoly" possessed by broadcast stations,⁸⁹ this is not a concern over enterprise monopoly; it is only a restatement of the "limited resource" argument invoked to justify the government's partial regulation of program content.⁹⁰ The limited number of channels available results in limited choice in programs and editorial viewpoints.⁹¹ To ensure diversity, the Commission asserts the need for

⁸³ See S. Rep. No. 781, 73d Cong., 2d Sess. (1934), A. KAHN, 2 *THE ECONOMICS OF REGULATION: PRINCIPLES AND INSTITUTIONS* 119-22, 127-29 (1970).

⁸⁴ See S. Rep. No. 781, 73d Cong., 2d Sess. (1934).

⁸⁵ Ohls, *Marginal Cost Pricing, Investment Theory and CATV*, 13 J. LAW & ECON. 439, 444 (1970).

⁸⁶ *Id.* at 446-48; Posner, *supra* note 54, at 113-24; Witt, *supra* note 29, at 41-43.

⁸⁷ Cf. Ohls, *supra* note 85, at 442.

⁸⁸ See *Rules Re Microwave-Served CATV, First Report and Order*, 38 F.C.C. 683 (1965); *Rules Re Microwave-Served CATV, Second Report and Order*, 2 F.C.C.2d 725 (1966).

⁸⁹ See, e.g., *UHF Allocation, Fourth Report and Order*, 41 F.C.C. 131, 135-37 (1951). A different concern of the Commission has been with control by a single individual of a number of communications outlets in a single locality. See 47 C.F.R. § 73.636 (1972). Since antitrust laws are applicable to broadcasters, 47 U.S.C. § 313(a) (1970), Commission attention to this latter problem may be unnecessary. Cf. Cox, *supra* note 53, at 912.

⁹⁰ E.g., *Commission Policy on Programming*, 20 P & F RADIO REG. 1901, 1906-14 (F.C.C. Jul. 29, 1960). The Commission insists that since broadcasters have an obligation to broadcast in the public interest, which follows from the government's selection of the broadcaster to use one of the limited number of radio frequencies, the broadcaster's program content must be subject to some FCC control.

⁹¹ See *United States v. Midwest Video Corp.*, 406 U.S. 649, 666-70 (1972); *Editorializing by Broadcast Licensees*, 13 F.C.C. 1246 (1949); *Mayflower Broadcasting Co.*, 8 F.C.C. 333 (1940).

regulatory jurisdiction.⁹² If this is the predicate for regulation, however, then cable television is the solution, not the problem, even though cable is monopolized in any given locality. Cable has the technical capacity to provide a large number of channels. Even if one entity owned all of the channels, it would find it profitable to lease some of them to any person or group wanting to present a viewpoint or program and willing to pay the system owner to forego use of the channel.⁹³ Cable would thus allow many different types of programming to compete with present broadcast stations.⁹⁴

The problem of enterprise monopoly can be dealt with by means of the antitrust laws, which apply to broadcasters and cable operators.⁹⁵ It is, in any event, distinct from the problem of insufficiently diverse programming, upon which the FCC has relied for asserting jurisdiction over pay-cable. Program uniformity, if caused by the scarcity of channels, will be promoted by cable and pay-cable. If, as seems to be the case, the method of financing programming is responsible for program uniformity, media such as pay-cable and closed-circuit television will promote diversity.⁹⁶ In neither case would the purported need to ensure diversity support assertion of ancillary jurisdiction over pay-cable or closed-circuit operations.

CONCLUSION

The Federal Communications Commission should use its present rule making proceedings concerning pay-cable and hotel movies to

⁹² Cf. *United States v. Southwestern Cable Co.*, 392 U.S. 157, 173-75 (1968).

⁹³ Cf. Ohls, *supra* note 85, at 457-59.

⁹⁴ To the extent, if any, that channel lessees pay for their own enjoyment of programs rather than for the opportunity to profit from presentation of advertiser sponsored programs, the leasing arrangement could operate as a form of pay television. It is unclear whether this would occur; the cost of leasing a channel, if channel time were not leased in relatively small blocks, may be sufficiently high that no individual or group would come forward to finance programming for its own enjoyment. This type of program financing, however, has occurred at times in radio broadcasting. See, e.g., *Trinity Methodist Church v. Federal Radio Comm'n*, 62 F.2d 850 (D.C. Cir. 1932), *cert. denied*, 288 U.S. 599 (1933); *Young People's Ass'n*, 6 F.C.C. 178 (1938).

⁹⁵ 47 U.S.C. § 313(a) (1970).

⁹⁶ The existence of much unused spectrum space at the present time, however, belies the notion that restricted channel availability is the key factor reducing competition in programming. Posner, *supra* note 54, at 103. Instead, it seems that the method of financing programming is responsible for the present program similarity. By depending on large audiences to make advertising attractive to program sponsors, commercially sponsored television places limits on the number of stations that can operate. Additional stations, which must strive to present the same type of low-interest, high audience programming presently broadcast, fragment the audience. Beyond a given level, fragmentation may diminish audience size sufficiently that advertisers will turn to other media and program revenues will decline below program costs. *Id.*

evaluate its extension of jurisdiction to that mode of communications and its suggestion in *Sterling* that it might also assert jurisdiction over closed-circuit television. The Communications Act's regulation of broadcasting was designed to provide a mechanism for allocating a limited communications resource in which no private property rights, prerequisite to the normal allocation process, had been recognized. Congress thought federally supervised allocation necessary to eliminate interference and to allow efficient use of the radio spectrum. Legislative concern with diversity of programming and distribution of stations reflected judgments as to the criteria the government should use in allocating that scarce resource.

Media such as pay-cable and closed-circuit hotel movies involve no such problem of resource allocation and thus fall outside the FCC's jurisdiction under Title III of the Communications Act. The Commission, however, as part of a pattern of protecting commercial broadcast stations from competition by other media, has claimed jurisdiction over subscription cable television and, while declining to assert jurisdiction over hotel movie screenings via closed-circuit television, has indicated the possibility of future regulation if significant impact on commercial broadcasting becomes evident. The FCC's concern with the impact that media like pay-cable and closed-circuit TV may have on commercial broadcasting, possibly hampering the Commission's ability to achieve diversity of broadcast programming and appropriate distribution of broadcast facilities, is misdirected. The Commission's promotion of diversity and distribution derives originally from the duty to parcel out a limited public resource; such promotion is not an independent legislative goal. But even taking diversity and distribution of communications facilities as goals, rather than standards for frequency allocation, jurisdiction over pay-cable and closed-circuit television cannot be justified, since these media are likely to promote, rather than impair, their achievement.

Ronald A. Cass