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Cable, Competition, and the Commission

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Twenty-five years ago there arose a few innovative business enterprises in scattered rural sections of the nation. They were called "community antenna television systems." Their function was to provide paying subscribers with access to the programming of the approximately 100 television stations operating during the 1948-52 Federal Communications Commission's "freeze." These early CATV systems supplied the same service to the country resident that apartment building master antenna systems offered the city dweller, namely, a better television picture.

Today CATV is called "cable television." Although CATV's functions remain primarily to receive and distribute off-the-air television station signals, the system often provides its subscribers with more than just a clear picture. CATV expands the number of receivable signals by using microwave relay to import signals of television stations too distant to be received off-the-air. It provides channels that are programmed independently of television stations, and a small proportion of cable systems offer a form of pay-as-you-see programming, or "pay cable." In addition, cable has the technological potential to distribute simultaneously a virtually unlimited number of audio-visual signals; to serve as a two-way communication device; to replace the gas, electric, and water meter reader; to act as an electronic day and night watchman; to ameliorate the energy shortage by making it unnecessary for many to travel to work or store or polling place; and to develop into a flexible communications system that could be used concurrently for mass communication and interpersonal communication.

Professor DeFleur has observed that each successive mass communication medium has diffused through American society more rapidly than its prede-
cessors. For example, television gained popularity almost as soon as its postwar reintroduction in the late 1940's; by the end of 1952 almost one-half of all Americans had a television set in their homes. Radio broadcasting diffused more slowly than television. The motion picture was slower yet, and the newspaper diffused least rapidly. It may seem strange, then, that in 25 years CATV has reached only about 15 percent of the households in the United States.

The apparent enigma is explained partially by the natural reluctance of CATV operators to lay cable in the most sparsely populated sections of their service areas. But this explanation is untenable in view of the high probability that concentration on, and successful penetration of, the more densely populated sections of rural America and urban areas would produce rapid diffusion that would come to include all but the most remote regions of the nation. Concentration on areas of high population density would enhance rather than curtail CATV's rapid spread. A better explanation for its slow penetration is that CATV failed to offer a sufficiently attractive service to enough people to permit faster diffusion. For a city dweller who can adequately receive three or more television stations off-the-air, slightly improved signal quality is not a persuasive incentive to subscribe to cable. Unless CATV systems could offer more to the potential urban subscriber, cable's growth would be greatly inhibited. Additional factors which help to explain cable's slow spread are the recent high cost of raising capital, the pricing of CATV services, and the difficulty of negotiating with apartment house owners in the cities. But while these factors have contributed to short term decelerations of CATV's growth, the major impediment to faster development of the medium has been the Federal Communications Commission.

The FCC enacted rules regulating cable television for the first time in 1965. Significant new rules were issued in 1966, 1969, and 1972. Each new set of rules has been more restrictive and coercive than the prior set, and more rules are expected at this writing. This article will not trace the regulatory progression from the early compulsory carriage and nonduplication requirements of 1965 to the imposition of quasi-licensing procedures.

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and mandatory "access" channel capacity in 1972; rather, it focuses on
the development of the rationale which led to the FCC's assumption of
jurisdiction over CATV, for this early evolution of public policy has con-
tinued to shape subsequent Commission actions.

I. THE FORMATIVE YEARS

The speedy growth of CATV in response to public demand for television
service during and immediately after the 1948-52 "freeze" prompted the
FCC to make its first official mention of CATV in 1953:

The rapid development of so-called community antenna systems
to bring TV programs to weak signal areas poses interference prob-
lems and the question whether such services constitutes [sic] common carrier or some other operation which comes within the Com-
misson's jurisdiction. These antenna do not transmit on the air,
but pick up programs and send them by coaxial cable to the homes
of subscribers.10

Some CATV systems were already using microwave relay facilities to import
distant signals at this time.

In 1954,11 the Commission continued to study whether CATV systems
were subject to FCC jurisdiction and particularly whether such systems were
common carriers,12 but the issue was still unresolved by 1956 when the first
formally noted economic injury protest against CATV was filed by a group
of 13 broadcasters against 288 CATV system operators.13 The Commission
considered the matter for another two years, as more CATV systems were
constructed14 and additional protests were initiated by broadcasters.15

Economic injury was a familiar concept to the Commission. Prior to the
1940's, the FCC had considered economic injury protests made by existing
AM station licensees intervening to protest new station applications.16

9. See note 1 supra.
11. At this time there were approximately 300 CATV systems serving more than
150,000 subscribers. 20 FCC ANN. REP. 93 (1954).
12. Id. at 92. The Commission noted, however, that at that time it did require "that
all wired TV systems be operated so as to not cause harmful [electrical] interference
to regular radio services." Id. at 93. Common carriers, which are defined in 47 U.S.C.
13. 22 FCC ANN. REP. 40 (1956). The broadcasters were seeking "to have the
Commission exercise jurisdiction over such systems as common carriers." Id.
14. By 1957 it was estimated that over 500 CATV systems were in operation, serving
500,000 homes. 23 FCC ANN. REP. 112 (1957).
15. Id.
Following the Supreme Court's decision in *FCC v. Sanders Brothers Radio Station,* however, the Commission refused to consider economic injury protests until July 1958 when, in *Carroll Broadcasting Co. v. FCC,* the United States Court of Appeals for the District of Columbia Circuit held that the FCC must hear and decide such protests when a licensee substantiated the claim that financial hardship stemming from increased competition from a new station would cause detriment to the public interest through "diminution or destruction of service."

The first FCC decision involving economic injury arising from CATV was handed down in January 1958. Intermountain Microwave had been granted permission by the FCC to construct supplemental microwave facilities to transport distant television signals to a distribution point for three Montana CATV systems. The Hill County TV Club of Havre, Montana, operator of two translators in north central Montana, petitioned the FCC for rescission of the grant on grounds that the introduction of live network programming in the petitioner's area posed "a direct threat to its investment through possible loss of voluntary contributions necessary for its continued operation" and that the operation of community antenna television systems might adversely affect the operations of a Great Falls, Montana station whose programs petitioner rebroadcast through its translators. Additionally, Hill County alleged that Intermountain's supplemental facilities might "inhibit the introduction . . . of improved or other broadcast facilities." In denying relief to the petitioner, the Commission invoked its pre-*Carroll* interpretation of the *Sanders Brothers* doctrine and, relying on its 1950 decision in *The Voice of Cullman,* stated:

The petition before us establishes only that Hill County may be financially injured as a result of our grant to Intermountain Microwave. Such injury, as we have indicated, confers upon Hill County standing to petition for reconsideration under section 405 of the

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17. 309 U.S. 470 (1940). In *Sanders Brothers,* the Court held that in ruling upon an application for a broadcast license, the FCC is not required to weigh the resulting economic injury to a rival station except as that injury affects the public convenience, interest or necessity. *Id.* at 473.


19. *Id.* at 443.


21. *Id.* at 56.

22. *Id.*

23. L.E. Duffey (The Voice of Cullman), 14 F.C.C. 770 (1950). "[A]s a matter of policy, the possible effects of competition will be disregarded in passing upon applications for new broadcast stations." *Id.* at 776.
[Communications Act of 1934]. But injury to Hill County is not necessarily injury to the public. . . . The allegations of injury to the public, as a consequence of economic injury to petitioner . . . are too speculative to form the basis of any rational judgment. . . . We can find no reason to attempt to deprive the public of a choice between competing modes of television service.24

Two months later, the FCC similarly rejected a television station's request that the Commission vacate its grant of permits to extend certain microwave facilities relaying television programs to CATV systems; the television station had alleged that the grant would "enable CATV to enjoy an enhanced competitive position in relation to the service of [the] protestant."25

Finally, in April 1958, the Commission adjudicated the economic injury protest action which had been brought before the FCC two years earlier.26 The complainants asserted that the Commission should subject CATV systems to common carrier regulation because such operations tend to defeat the objectives of the FCC's Sixth Report and Order27 through economic injury to local broadcast stations. Plaintiffs alleged that because advertisers would be reluctant to duplicate coverage they already received over CATV, the CATV systems would diminish the revenue available to establish local stations. Additionally, the complainants alleged that for the same economic reasons, the presence of CATV in an area affected both the quality of programming and the construction of satellite stations, and that "since the physical limitations of CATV systems do not make it economical for them to serve rural areas . . . such systems by their adverse effect on the establishment of local TV stations and satellites deprive such rural areas of any television service whatsoever."28 The CATV systems involved in the complaint denied that they were common carriers or that they were "responsible for the economic plight of local television stations," and maintained that they were "performing a beneficial public service."29

The FCC found that it could not regulate CATV systems as common carriers because the specific system signals are, of necessity, determined by the CATV itself rather than by subscribers.30 The Commission speculated

24. 24 F.C.C. at 57-58.
29. Id.
30. Id. at 254. The United States Court of Appeals for the District of Columbia Circuit has affirmed the Commission's determination that the Communications Act of
that even if it were possible to regulate CATV systems as common carriers, it would be impossible to control entry or operation to protect or foster television broadcasting under the common carrier provisions of the Communications Act.\textsuperscript{31} The FCC also noted that the CATV systems could not be regulated under the broadcasting provisions of the Act because wire transmission was involved, rather than radio transmission.\textsuperscript{32} Accordingly, the broadcasters' complaint was dismissed.

II. EXPLORING FOR JURISDICTION

The FCC considered the general policy questions posed by CATV's impact on broadcasting in a study published in April 1959.\textsuperscript{33} The Commission found that "there is a likelihood, or even a probability, of adverse economic impact from auxiliary services [such as CATV] upon regular television stations,"\textsuperscript{34} but concluded that due to the insufficiency of data, it was not justified in taking action, or seeking authority to bar CATV's growth.\textsuperscript{35} In light of the District of Columbia Circuit's decision in \textit{Carroll},\textsuperscript{36} however, the Commission determined for the first time that economic injury to a local television station \textit{could} be a valid public interest justification for denial of authorization to a competing auxiliary service.\textsuperscript{37}

The Commission also affirmed its previous view that the Communications Act of 1934\textsuperscript{38} did not confer jurisdiction upon it to regulate CATV systems

\textsuperscript{31} 24 F.C.C. at 255. The Commission noted that "[a]lthough CATV systems, as common carriers, might be subject to the rate-making and other conventional regulatory powers of the Commission, such systems in most instances would not be required to obtain any authorization or certification from the Commission prior to commencement of operation . . . ." \textit{Id.} The Commission cited, for example, 47 U.S.C. § 214(a) (1970). That section, which has not been amended since 1958, controls the construction of new lines and extension of old lines. It exempts all lines within a single state (unless any line constitutes part of an interstate line) and all local, branch or terminal lines not exceeding 10 miles in length from obtaining certification from the Commission.


\textsuperscript{33} Report and Order on CATV & TV Repeater Services, 26 F.C.C. 403 (1959).

\textsuperscript{34} \textit{Id.} at 423.

\textsuperscript{35} \textit{Id.} at 424. The Commission did, however, take a small step towards claiming authority over CATV systems in finding that the microwave carriers that serve CATVs are, as licensees of the FCC, subject to its jurisdiction. \textit{Id.} at 434.

\textsuperscript{36} See text accompanying notes 18 & 19 supra.

\textsuperscript{37} 24 F.C.C. at 434-35. The Commission emphasized, however, that "in arriving at this answer, all we say is that . . . we will take into account—when and to the extent that it can be established—such adverse economic impact." \textit{Id.} at 435.

either as common carriers or under the broadcasting provisions, and further, that neither its “plenary power” over communications, “property right” concepts implied by the rebroadcasting provisions of the Act, nor the fact that CATV exercised a substantial adverse economic impact upon broadcasting constituted an adequate basis “for asserting jurisdiction or authority over CATVs, except as we already regulate them under part 15 of our rules with respect to their radiation of energy.” The Commission expressed its intention, however, to seek congressional legislation requiring CATV systems to secure the permission of any television station whose signals were transmitted by CATV to subscribers and to carry local television stations’ signals without degradation at the request of such stations.

The FCC submitted its legislative proposal to Congress, but CATV interests were simultaneously seeking legislation to bring cable operators under FCC control in order to end broadcaster harassment of CATV and eliminate “pressures by state public utility commissions to assert jurisdiction over TV cable companies.” The CATV-sponsored bill was amended by the Senate Communications Subcommittee of the Committee on Interstate and Foreign Commerce after hearing from broadcasting interests. The original CATV proponents then opposed the amended measure since it would have provided more stringent regulation than had initially been proposed.

Hearings were held in 1959 and in May 1960, the bill reached the floor of the Senate, but was ultimately recommitted to committee by a vote of 39-38, after what appeared to be a lobbying contest between the CATV and broadcasting factions. In January 1961, the FCC proposed legislation

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   (a) No person . . . shall knowingly utter or transmit . . . any false or fraudulent signal of distress . . . nor shall any broadcasting station rebroadcast the program or any part thereof of another broadcasting station without the express authority of the originating station.
40. 26 F.C.C. at 431.
41. Id. at 441.
44. Kroeger, Community Antenna Television: Friend or Foe?, TELEVISION MAGAZINE, June 1962, at 85.
47. 106 CONG. REC. 10547 (1960).
which would have granted it limited rulemaking authority over CATV systems. The proposal was never reported out of committee.49

III. ASSERTING JURISDICTION: THE RISE OF PROTECTIONISM

The Commission’s first ad hoc assumption of CATV jurisdiction occurred in 1962, when it reversed the initial decision of its hearing examiner and denied the application of Carter Mountain Transmission Corporation to build microwave facilities to provide additional service to CATV systems in Riverton, Lander, and Thermopolis, Wyoming.50 The grant was opposed on the ground of economic injury by KWRB-TV, the only television station located in Riverton.

KWRB-TV served almost 37,000 people, and covered an area of 13,845 square miles. The FCC found the station’s operations to be in the public interest, especially insofar as it served community needs through its local programs. Although the station had operated at a loss since its inception,51 KWRB-TV had hopes of eventually showing a profit. In fact, the gap between its operating expenses and revenues had become progressively smaller during successive years of operation. Part of the station’s success in competing with the CATV systems operating in its sparsely populated service area was attributed to the fact that the station’s picture was clearer than the pictures transmitted by the CATV systems. Hence, the station was afraid that if the microwave application were granted, the resulting expanded and improved CATV service would ultimately increase the gap between its expenses and revenues.

The Commission agreed with KWRB-TV’s economic injury contention and found that the granting of the application would place the station in a difficult position since it would be unable to demonstrate to a potential advertiser that a viewer was watching a program on KWRB-TV instead of on another channel supplied by CATV. The station’s one advantage, a clearer picture, would be removed if the CATV systems could receive microwave signals. The FCC found that a grant to Carter Moun-


51. One reason given for the operating losses was the competition of CATV. It was found that the station derived a disproportionately large share of its revenue from towns in which CATV had made no serious inroads into the television market. For example, the town of Lander contributed almost six times the amount of revenue to KWRB-TV as did the town of Worland, even though the population of Worland was larger than that of Lander. This was attributed to the fact that in Worland as many as 75 percent of the homes were CATV subscribers. Id. at 463.
tain would result in the demise of KWRB-TV. In denying Carter Mountain's application, the Commission reasoned that:

A grant of this application will not contemplate an extension of coverage for the entire area included in KWRB-TV's contours, since it is too costly for CATV to enter the rural areas. Thus, the rural people would be left with nothing at all. . . . In this instance, if KWRB-TV, the local outlet, should be forced to cease operation, the rural people would be left without any service. We do not agree that we are powerless to prevent the demise of the local television station, and the eventual loss of service to a substantial population . . . . Thus, after weighing the public interest involved in Carter's improved facility against the loss of the local station, it must be concluded, beyond peradventure of a doubt, the need for the local outlet and the service which it would provide to outlying areas outweighs the need for improved service which Carter would furnish . . . .\(^{52}\)

The FCC indicated that it would look favorably upon Carter Mountain's reapplication if it showed that KWRB-TV would be carried by the CATV systems and that the systems would not duplicate network programs carried by KWRB-TV.\(^{53}\)

After the Commission denied its petition for reconsideration,\(^{54}\) Carter Mountain appealed to the United States Court of Appeals for the District of Columbia.\(^{55}\) The court dismissed the argument that the Commission was in effect regulating CATV without statutory authority by requiring Carter Mountain to carry the local station's service and to not duplicate programming as a condition of approving its application. The court reasoned that because the conditions would not be imposed if Carter Mountain could show that "the threatened damage to the local station would not in fact occur," the Commission was not attempting to regulate the CATV system even though it may have had an indirect effect on that system.\(^{56}\)

_Carter Mountain_ is highly significant in that it permitted the FCC to get its foot in the door after first having disclaimed jurisdiction and then having been denied the regulatory authorization it requested from Congress. By depending heavily on the economic injury aspect in _Carter Mountain_, the Commission disregarded its established policy of avoidance (except for UHF-TV protec-

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52. _Id._ at 465.
53. _Id._
54. 32 F.C.C. 1181 (1962).
56. _Id._ at 363-64.
tionism) in intramedium economic injury and its absence of policy in inter-
media economic injury.57 Standing alone, this would be of minor importance. But Carter Mountain did not stand alone for very long.

The FCC proposed rules imposing conditions on Business Radio Service microwave grants serving CATV systems in December 1962,58 and for common carriers in the Domestic Point-to-Point Microwave Relay Service a year later.59 During the pendency of these rulemaking proceedings (which resulted in the adoption of rules in 196560), the Commission refused to make microwave grants serving CATV systems unless applicants agreed to abide by the conditions contained in the proposed rules.61 CATV systems served by microwave had to carry local television station signals "without material degradation" and refrain from duplicating the programs of local stations for a period of 30 days before and after local broadcast.62 Both conditions were applicable only if the local television station requested them, however.

Among the many comments filed with the FCC during the rulemaking proceeding was the Fisher Report,63 a study of the economic impact of CATV competition on commercial television broadcasting stations. Using data derived from American Research Bureau studies, the FCC, and the National Community Television Association, Professor Fisher performed

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57. The Commission's inconsistency in economic injury matters is treated in Kahn, Economic Injury and the Public Interest, 23 FED. COM. B.J. 182 (1969).
58. 27 Fed. Reg. 12586 (1962). The proposed rules provided in part that when a CATV system operates within the predicted Grade A contour of any television station in operation, "the CATV system must not duplicate simultaneously or 30 days prior or subsequent thereto a program broadcast by such television broadcast station, provided the CATV operator has received at least 30 days advance notification from the broadcast station licensee of the date of such broadcast." Further, if requested by such television station, the CATV system must carry the signal of such station without any material degradation of quality. Id. at 12586-87.
61. 38 F.C.C. at 685; 31 FCC ANN. REP. 82 (1965). This interim procedure was impliedly sanctioned by the United States Court of Appeals for the District of Columbia in Wentronics, Inc. v. FCC, 331 F.2d 782 (D.C. Cir. 1964).
statistical analyses that showed high correlations between television station audiences and revenues, and between station revenues and expenses. Based on these data and other findings, Professor Fisher calculated the "average effects of CATV competition" on 127 stations located in one- and two-station markets and found that a local station's revenues could be reduced as much as $14,000 a year for every 1,000 television homes subscribing to CATV. The report concluded that CATV penetration of television markets can have serious impact upon television station profits.

An economic consultant to the FCC, Martin H. Seiden, issued a report in 1965 which contradicted some of the findings of Professor Fisher. Seiden's report considered the contents of the Fisher Report and data concerning 86 stations that experienced a decline in local revenue in 1963, and concluded that "CATV penetration has not been a direct cause of declining [broadcast] revenue." Seiden added, however, that at the present time CATV exerts an indirect economic impact on small television stations, owing in part to biases in audience rating surveys, and that in the future a

64. Id. at 21-30.
65. Id. at 31-37.
66. Professor Fisher calculated that:
   1. For every additional 1000 TV homes, formerly able to view only the local station, which subscribe to a CATV not carrying the local station, that station's annual revenue is reduced on the average by a minimum of $14,000.
   2. For every additional 1000 TV homes, formerly able to view both the local station and another, which subscribe to a CATV not carrying the local station, the local station's annual revenue is reduced on the average by a minimum of almost $8,000 or about one-third of average net profits for the smaller stations.
   3. For every additional 1000 TV homes, formerly able to view only the local station, which subscribe to a CATV carrying the local station with average duplication, that station's annual revenue is reduced on the average by a minimum of $9,400.
   4. For every additional 1000 TV homes, formerly able to view both the local station and another, which subscribe to a CATV carrying the local station with average duplication, the local station's annual revenue is reduced by a minimum of $2,900.
   5. One additional half hour of prime time duplication per week above present average levels reduces local station annual revenue by $380 for every 1000 CATV subscribers. This is the equivalent of about 1.6 percent of average net profits for the smaller stations.

67. Id. at 1-2.
68. M. Seiden, An Economic Analysis of Community Antenna Television Systems and the Television Broadcasting Industry, Feb. 12, 1965. This report is a broad survey of the cable industry and its effects on broadcasting together with the author's recommendations for regulatory action.
69. Id. at 4.
more direct economic impact would develop. He nevertheless pointed out that the competition of additional television stations was a more serious threat to existing stations than CATV. Therefore, he cautioned that "economic protection alone cannot be the basis of restricting CATV operations if the Commission continues, as it should, to encourage the growth of the television broadcasting industry which could have a greater economic impact on existing broadcasters than CATV."

Although Seiden's report recommended that the FCC require nonduplication and local station carriage by CATV systems, the report indicated that the emergence of CATV was merely the result of the Commission's allocation and assignment plans which had left 16 million families unable to receive the three networks off-the-air. Accordingly, the report recommended that this underlying cause of the CATV problem be remedied by increasing the number of three-station markets.

When the FCC formally adopted rules affecting microwave-served CATV

70. Seiden explained the basis of this prediction by stating:

In the future, as CATV data improve and knowledge of this subject becomes more widespread, a more direct economic impact will develop. Thus, the extension of the audience of larger market stations by means of CATV will bring audience duplication. The use of small stations will become redundant since the penetration of small-station markets by CATV will reduce the value of the local broadcaster as a means of reaching the smalltown audience. These smaller markets will be reached through the big-city stations via CATV. This situation has already begun to develop.

71. Id. at 72-73. Seiden showed that the impact of a CATV system is not as great as the impact of a new broadcaster in small markets. The CATV system will affect "a relatively small proportion of the broadcaster's audience," but when a new broadcaster enters an area the entire broadcast audience is affected. Id.

72. Id. at 73.

73. Id. at 6. Seiden reasoned that:

Nonduplication provides protection to broadcasters in one- and two-station markets by reducing the distraction of the viewing audience and permitting these broadcasters to assert temporary jurisdiction over the better network programs. . . . Compulsory carriage ameliorates the effect of the CATV to the extent that its subscribers would not be a total loss to the local broadcaster.

74. Id. at 89.

75. To implement this policy, the coverage area of the 172 1- and 2-station television markets operating in the continental United States should be expanded to the point that the potential audience in each case is sufficiently large to support 3 stations superimposed on the same general area. This will eliminate the chronic problems of marginal stations which have plagued the Commission over the years—essentially by expanding most of these broadcasters out of their undersized audience.

Id. at 7.
systems, it asserted jurisdiction over all CATV systems, and announced its intention to extend the exercise of its newly discovered authority to nonmicrowave CATV systems in the future. The Commission's immediate exercise of jurisdiction over microwave-served CATV was premised on its finding that the basic conditions under which CATV competed with open-circuit television were unfair when compared to the conditions under which television stations competed with one another; that CATV serves the public interest when it supplements, rather than replaces, off-the-air television service, and that although it was impossible to accurately state the precise effects of CATV on existing and potential television stations, these effects were serious enough to warrant protective rulemaking, particularly in light of CATV's "explosive" growth since the FCC's 1959 Report and Order.

Regarding CATV impact on existing and future broadcast station operations, the Commission said:

In both instances, we stress, the question is not only whether CATV competition may destroy or prevent the establishment of stations (and thus frustrate achievement of the "fair, efficient, and equitable" distribution of both local and nonlocal television service contemplated by section 307(b) of the Communications Act), but also whether it may seriously impair the ability of stations fully to serve the needs and interests of their communities.

The rules which the Commission adopted were substantially the same as those proposed several years earlier, and provided that a microwave-served CATV system must, at the request of local stations, carry such stations on...

76. 38 F.C.C. 683 (1965). The FCC rejected arguments that it was exceeding its statutory authority and found the Carter Mountain decision to be dispositive. Id. at 687 n.5. The American Telephone and Telegraph Company had argued that Carter Mountain was not dispositive in cases in which "a common carrier serving the public generally with a wide variety of communications services also offers microwave service to a CATV system." The Commission stated, however:

The essential point is that, in the cases with which we are concerned, microwave facilities subject to a license under the public interest standard of the Communications Act are being used to transmit television broadcast signals . . . to a user who in turn distributes those signals to members of the public.

77. Id. at 701-06. The Commission stated that this was not the usual competitive situation because broadcasters "must . . . obtain access to the product in the program distribution market, with its various restrictions and conditions [while] [t]he CATV operator need not enter this market at all." Id. at 704.

78. Id. at 685, 706-13. Although the FCC indicated in its rulemaking decision that it would not and did not rely on the Fisher Report conclusions as to "the dollar effects of CATV competition and their significance in different settings," id. at 710, the Commission lauded the work as "a substantial advance toward the goal of isolating and predicting the effects of CATV competition . . . ." Id.

79. Id. at 707.
their usual channel positions without material degradation, and afford them 15 days before-and-after protection against duplication of their programming. The FCC believed the imposition of the mandatory carriage and nonduplication rules was “required in order to ameliorate the adverse impact of CATV competition upon local stations, existing and potential.”

Rules affecting all CATV systems were adopted by the FCC a year later. The Commission considered and rejected various arguments that it had no statutory authority over CATV, concluding that CATV systems are engaged in interstate communication by wire and thus within sections 2(a) and 3(a) of the Communications Act. The Commission found that it was empowered to promulgate regulations to carry out the provisions of sections 1, 307(b), and 303(s) of the Act “and to prevent frustration of the regulatory scheme by CATV operations, whether or not microwave facilities are used.” Additionally, the Commission stated that, in light of the rapid growth of CATV, it was statutorily bound to act in the proposed areas to “end the unwarranted distinction between microwave and nonmicrowave systems,” and to effectuate the rules prior to the disposition of pending CATV applications.

On the basis of the increasing threat posed to open circuit television by CATV systems, the FCC made the following rules applicable to all CATVs:

(1) Within the limits of a CATV's channel capacity, local stations must be carried at their request without degradation of quality.

(2) Upon request, a CATV system must avoid duplication of the programs

80. *Id.* at 741-46. Early cases in which these rules were applied are Minnesota Microwave, Inc., 38 F.C.C. 773 (1965) and Black Hills Video Corp., 38 F.C.C. 1323 (1965). The United States Court of Appeals for the District of Columbia Circuit affirmed the FCC's right to attach such conditions to microwave grants even when the microwave operations are contained in a single state, where transmission of the signals crosses a state line. Idaho Microwave, Inc. v. FCC, 352 F.2d 729 (D.C. Cir. 1965).

81. 38 F.C.C. at 713.


84. *Id.* §§ 151, 307(b), 303(s).

85. 2 F.C.C.2d at 733-34.

86. *Id.* at 745.

87. *Id.* at 752-56. The CATV systems were granted an exemption from carrying the signal of a local station if

(1) that station's network programming was substantially duplicated by one or more stations of higher priority, and

(2) carrying it would, because of limited channel capacity, prevent the station from carrying the signal of an independent commercial station or a noncommercial educational station.

*Id.* at 753.
of local television stations carried on the system during the same day that such programs are broadcast by the local stations;\textsuperscript{88}

(3) No CATV system can import a distant signal into any of the 100 largest television markets “except upon a showing made in an evidentiary hearing that such operation would be consistent with the public interest, and particularly the establishment and healthy maintenance of UHF television broadcast service”;\textsuperscript{89}

(4) CATV operators must file with the FCC information regarding system size and ownership, as well as stations carried and “the extent of any existing or proposed program origination by each CATV system.”\textsuperscript{90}

The FCC’s formal assumption of jurisdiction over CATV and the issuance of restrictive rules in 1965 and 1966 was based on the probable economic injury inflicted by CATV on open-circuit television broadcasting, despite the Commission’s euphemistic use of the terms “economic impact” and “fair competition” instead of “economic injury” and “television protectionism.” The agency persistently viewed cable as a mere auxiliary or supplementary service whose growth, unfettered by FCC supervision, would bring about “a system half wire, half free, which is destructive of the larger goals of additional networks, additional outlets for local expression, and which provides increased service to some in the city at the expense of those in the rural area or those who cannot afford to pay.”\textsuperscript{91}

Since 1966 the FCC has placed additional burdens on cable development.\textsuperscript{92} While some of the rules sought to compensate for previous over-regulation, each new major codification added more hardships than it relieved.\textsuperscript{93} Despite recurring moves toward relief for CATV,\textsuperscript{94} the federal agency is headed in the general direction of increased preemption of local and state authority, coupled with the imposition of still greater burdens on cable systems through rules characterized by one former Commissioner as “a

\textsuperscript{88} Id. at 746. It should be noted that this same-day nonduplication provision was a relaxation of the former 15-day before-and-after prohibition of duplication. The new rules also allowed duplication of a local station’s monochrome telecasts on another channel broadcasting the same program in color. Id. at 750-51. The current exclusivity rule has undergone further change. See 47 C.F.R. § 76.91-.159 (1974).

\textsuperscript{89} 2 F.C.C.2d at 782. The FCC thus shifted its regulatory emphasis from protecting small market telecasters to keeping cable from openly competing with stations in the large markets.

\textsuperscript{90} Id. at 765.

\textsuperscript{91} Id. at 788-89.

\textsuperscript{92} See, e.g., 47 C.F.R. § 76.1-.617 (1974).

\textsuperscript{93} See p. 855-56 & nn.6-8 supra.

\textsuperscript{94} See, e.g., Lid Is Off on Cable Rebuild Date, Broadcasting, July 14, 1975, at 22.
patchwork of protectionism."\textsuperscript{95} The net effect of FCC policy has been to keep the cable industry in a state of disequilibrium and defensiveness, while the stability of the broadcasting industry has been artificially bolstered through regulations designed to deter CATV encroachment. At the same time it cannot be said that the policy has achieved "the larger goals of additional networks, [and] additional [broadcast] outlets for local expression."\textsuperscript{96}

IV. CONCLUSION

If, as the FCC has often proclaimed, competition is our national policy in broadcasting, then the Commission's assumption and restrictive exercise of jurisdiction over cable television is explicable only if the agency is, indeed, the captive of the broadcasting industry it is supposed to regulate. However, as the Supreme Court has pointed out, "[t]he very fact that Congress has seen fit to enter into the comprehensive regulation of communications embodied in the Federal Communications Act of 1934 contradicts the notion that national policy unqualifiedly favors competition in communications."\textsuperscript{97} This being the case, the FCC is compelled by statute to determine the nature and extent of competition that serves the public interest in broadcasting, and when competitive effects produce detriment to the public interest, the public interest controls.\textsuperscript{98}

Unrestrained by the federal regulatory scheme that evolved in the last 10 years, CATV might have eventually replaced conventional over-the-air television broadcasting as the dominant mass medium, providing the nation with a "television of abundance"\textsuperscript{99} while freeing television broadcast spectrum allocations for other purposes. The nation has already been wired twice—once for electric power distribution and again for telephone communication. The FCC chose to act on the assumption that cable would not extend coverage to sparsely settled regions of the country, and then made its prophecy self-fulfilling by denying to cable the opportunity to build the economic foundation from which service could be spread to the hinterlands. To be more charitable, if the odds against CATV serving low population

\textsuperscript{95} Cable Television Report and Order, 36 F.C.C.\textsuperscript{2d} 143, 311 (1972) (Johnson, Comm'r, concurring in part and dissenting in part).

\textsuperscript{96} Second Report and Order on CATV, 2 F.C.C.\textsuperscript{2d} 725, 788 (1965).

\textsuperscript{97} FCC v. RCA Communications, Inc., 346 U.S. 86, 93 (1953).

\textsuperscript{98} See Carroll Broadcasting Co. v. FCC, 258 F.2d 440, 443 (D.C. Cir. 1958).

\textsuperscript{99} See generally, Sloan Commission on Cable Communications, On the Cable: The Television of Abundance (1971). The Sloan Commission on Cable Communications was established by the Alfred P. Sloan Foundation in 1970. Its purpose was to assess the potential of cable television.
density areas were high, the Commission's regulatory program made them higher. In so doing, the FCC, without clear statutory authority from Congress, began to regulate the new cable medium more closely and restrictively than it did the broadcast medium it was established to regulate under the Communications Act.\textsuperscript{100}

It is as untrue as it is unkind to characterize the FCC as the broadcasting industry's "captive"; the Commission is more the "father" of broadcasters. CATV was someone else's child which the FCC could not ignore because cable was making the agency's own children unhappy and perhaps even sickly, though proof of the latter was difficult to establish. Cable was hardly the only external threat against which the Commission paternalistically protected its progeny; over-the-air subscription television was authorized under such restrictive conditions\textsuperscript{101} that no pay television station operates to this day, and effective public participation in Commission licensing proceedings was discouraged like the plague.\textsuperscript{102}

One can admire a parent who so assiduously protects his children from harm, but the FCC has been anything but diligent in other aspects of child rearing. It has failed to require that broadcasters provide even a fraction of the opportunity for access it mandated for cable,\textsuperscript{103} and for the most part, it permits television stations to operate as they see fit and to determine for themselves what is in the public interest.\textsuperscript{104} It has neither assessed the relationship between competition and the public interest within broadcast-

\textsuperscript{100} The Supreme Court has twice upheld the Commission's authority to regulate CATV. In United States v. Southwestern Cable Co., 392 U.S. 157 (1968), the Court upheld the FCC's jurisdiction over CATV but added 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." \textit{Id.} at 178. In United States v. Midwest Video Corp., 406 U.S. 649 (1972), the Court, in a 5 to 4 decision, held that the FCC's 1969 rule requiring CATV systems with more than 3,500 subscribers to originate programming was consistent with the "reasonably ancillary" doctrine of \textit{Southwestern}. \textit{Id.} at 662. The rule was subsequently rescinded. Report and Order in Docket No. 19988, 49 F.C.C.2d 1090 (1974).

\textsuperscript{101} See Fourth Report and Order on Subscription Television, 15 F.C.C.2d 466 (1968).

\textsuperscript{102} Cases which have overruled the Commission's handling of public attempts to intervene in licensing proceedings are Citizens Communications Center v. FCC, 447 F.2d 1201 (D.C. Cir. 1971), and Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966).


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The FCC is thus a permissive as well as a protective parent when it comes to competition in the broadcast field.

This situation is to the liking of the children, for broadcasters enjoy the benefits of exercising valuable rights with relatively few responsibilities. They can occupy a protected channel and squeeze out as many dollars from it as “free enterprise” will allow, comforted by the knowledge that their benevolent parent will ward off interlopers as they arise. They enjoy unregulated profit at the same time that they are insulated from potentially effective competitors such as CATV. This is assumed by the Commission to serve the public interest. In terms of the metaphor, however, it is nurturing brats.

If “[t]he ability of a regulatory commission to protect or to promote a technical innovation that challenges the regulated (and sometimes sheltered) industry is a measure of the vitality and strength of that agency,” then surely the FCC died a long time ago. Future generations will come to regard the Commission’s handling of cable as a major failure of public policy formulation and administration in telecommunications, and one that is symptomatic of the agency’s general ineptitude in regulating competition.

105. See Kahn, supra n.57, at 198-201.
107. The broadcasters may even rejoice when an interloper comes to the Commission’s attention, for they know that their parent will be far too busy with the invader to control his own brood. In the case of CATV, the FCC actually adopted the newcomer because that was the best way to control its adverse influence on the broadcasters. With “daddy” so occupied attending to the unloved adopted child, the adored natural children received even less of the father’s limited supervision than otherwise might have been the case.