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A Step Into the Regulatory Vacuum: Cable Television in the District of Columbia

Philip R. Hochberg*

Before cable television (CATV) can become a reality in the District of Columbia, one important jurisdictional question must be settled: Who has the authority to regulate CATV in the District? At present, there is a conflict of opinion as to whether the District government, or Congress alone, is empowered to franchise a cable system. The District’s chief legal officer has said that the city does not have the power to assert jurisdiction over CATV; however, some members of the City Council feel that the District has the present authority to do so. Article I, section 8 of the Constitution lies at the root of this jurisdictional dilemma. It gives Congress the power “To exercise exclusive Legislation in all Cases whatsoever, over such District . . . as may . . . become the Seat of the Government of the United States . . . .”

The United States Supreme Court has held that the Federal Communications Commission (FCC) has pervasive jurisdiction over cable television. The FCC, on the other hand, has allowed wide latitude to the local jurisdictions. As we have seen, Congress has total jurisdiction over the affairs of the District of Columbia. This paper considers whether the actions of the FCC or Congress, or both, prevent the District from exercising jurisdiction over cable television and concludes that, in fact, both the FCC and Congress have left an avenue open for the city. To comprehend the implicit nature of this permission, it is

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1. Memorandum from C. Francis Murphy, Acting Corp. Counsel, to Julian R. Dugas, Director, Dep’t of Economic Development, November 2, 1970.
2. CITY COUNCIL’S ECONOMIC DEVELOPMENT AND MANPOWER COMMITTEE REPORT 1 (1971).
necessary first to consider the manner in which both bodies have dealt with cable television, then to compare their actions with the general regulatory authority that Congress has delegated to the District of Columbia.

**Regulation by the Federal Communications Commission**

CATV began in the late 1940's in Pennsylvania and Oregon communities where television reception was poor because of the terrain. Enterprising businessmen erected antennas and ran cables to their subscribers' homes. Initially, the CATV operators simply wanted to sell television sets, but they soon realized that a business potential existed both in improving reception and originating telecasts expressly for the cable system. CATV grew slowly in its early years, serving only as a supplement to existing television stations. Its expansion was nearly negligible during the FCC's "freeze" on the growth of television stations from September 1948 to July 1952.\(^6\) When the "freeze" ended there was speculation that many new stations would go on the air, thus eliminating the need for cable systems.\(^7\) However, new local stations did not fill the gaps:

> [T]he economics of the television industry were such that many communities did not get local stations, and this situation was compounded by the difficulty soon encountered by UHF stations because of their unequal competitive position in intermixed or overshadowed markets. After a temporary pause, the rate of growth of CATV systems again picked up. . . .\(^8\)

In 1954, FCC cable regulation was first sought. WJPB-TV, a small market station in Fairmont, West Virginia, complained that in 1953 a cable system had gone on the air and wired up 30 percent of the market, while refusing to carry WJPB-TV. The station asked the FCC to define its jurisdiction over the cable system and to apply the same rules to it that were applied to television stations.\(^9\) The Commission took no action on this request. Previously, speeches and testimony by its members had expressed doubt as to the FCC's power to regulate CATV.\(^10\)

Thereafter, on April 6, 1956, a small group of radio and television operators

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6. See Report and Order F.C.C. 48-2182, providing that "no new or pending applications for the construction of new television broadcast stations would be acted upon by the Commission. Sixth Report and Order, 1 RR 91:601, para. 2 (1952).


8. Id.


10. See supra note 7 at 17.
asked the FCC to either declare that the nation's 288 CATV systems were common carriers, or institute a formal hearing to consider the inclusion of cable operators under common carrier regulation. The FCC decided that Congress did not intend the common carrier regulations to be applied to persons who were not common carriers in the "ordinary" sense of the term.

Fundamental to the concept of a communications common carrier is that such a carrier holds itself out or makes a public offering to provide facilities by wire or radio whereby all members of the public who choose to employ such facilities and to compensate the carrier therefor may communicate or transmit intelligence of their own design and choosing between points on the system of that carrier and other carriers connecting with it. In other words, the carrier provides the means or ways of communication for the transmission of such intelligence as the subscriber may choose to have transmitted. The choice of the specific intelligence to be transmitted is, therefore, the sole responsibility and prerogative of the subscriber and not the carrier.\(^{11}\)

Since CATV subscribers did not have a choice of the signals to be transmitted over the cable (that choice was determined by the system itself) the FCC concluded that CATV systems were not "ordinary" carriers.\(^{12}\)

Six weeks later, on May 22, 1958, the FCC released a *Notice of Inquiry* stating its intention to look toward resolution of the CATV question on an overall, rather than piecemeal, basis.\(^{13}\) The FCC determined a year later not to attempt to regulate cable systems as common carriers; moreover, it refused to exercise jurisdiction on Title II grounds, *i.e.*, on any of the following bases: that of the FCC's plenary power, that the CATV operator was a broadcaster, that he had a rebroadcasting right, or that CATV had an adverse effect on broadcasting.\(^{14}\) For the first time, the FCC asked Congress to provide it with some guidance on the regulation of cable television:

> [It appears to us that there is no question as to the power of Congress to regulate CATV's or give the Commission jurisdiction to do so, if it desires. But, as an administrative agency created by Congress, we are of course limited by the terms of the organic statute under which we were created, and must look to that statute to find the extent of our jurisdiction and authority.\(^{15}\)]


\(^{12}\) Id.


\(^{14}\) Id. at 427-31.

\(^{15}\) Id. at 427. The Commission also included specific requests for legislation relating to rebroadcasting consent and local station carriage as they related to CATV. See id. at 430, 438, and 441.
In 1962, when Congress still had not acted, the FCC began to assume jurisdiction over CATV, even without a specific mandate. In *Carter Mountain Transmission Corp.*, the FCC denied a permit to install a common carrier microwave radio relay system because it felt the economic impact of a microwave-fed CATV system would jeopardize a local television station in Thermopolis, Wyoming. The FCC stated that it would allow the application to be refiled when the cable operator (rather than the microwave common carrier) agreed to certain protections for the local station: (1) to carry the local station and (2) not to duplicate, (i.e., to “nonduplicate”) the local station’s programs for a 30-day period prior or subsequent to airing by the local station. The FCC had managed to regulate CATV, not by regulating the unlicensed cable operator, but by back-door regulation of the already licensed common carrier feeding the cable system. In December, 1962, the FCC issued a *Notice of Proposed Rulemaking* in Docket No. 13895 in which it suggested that Business Radio Service licenses be conditioned on (1) the cable operator’s carriage of the local station and (2) his nonduplication of the local station’s programming. After its assertion of jurisdiction over common carrier microwave-fed CATV systems was affirmed by the court of appeals, the FCC extended the scope of the rulemaking proceeding to include all microwave-fed CATV systems (in Docket No. 15233).

The two dockets culminated in the *First Report and Order*, made effective on June 1, 1965. All microwave-fed cable systems, whether fed by common carrier or by privately owned Business Radio, were ordered to carry all local television stations and to nonduplicate for 15 days before and after the broadcast. Although it had taken a truly significant step, the FCC still sought guidance from Congress: “We must . . . take into consideration the fact that if Congress legislates in this field any rules we now adopt may have to be adjusted.” Concurrently with the issuance of the *First Report and Order*, the FCC began taking the final step in assuming total jurisdiction over cable television. The FCC issued a *Notice of Inquiry and Notice of Proposed Rulemaking*.

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16. The subject of congressional involvement in cable regulation will be treated in the text accompanying notes 48-57 infra.
18. *Id.* at 465.
20. These stations were owned by and licensed to the particular cable operator and served only him; common carriers served anyone and were much broader in terms of service.
24. *Id.* at 6039, 38 F.C.C. at 685 (1965).
Rulemaking in Docket No. 15971,\textsuperscript{28} beginning an investigation into the regulation of all CATV, especially major market cable. As in the First Report and Order, the FCC adhered to the position that "clarifying legislation would be desirable, and [we] have no intention of by-passing congressional action in this field."\textsuperscript{28} Furthermore:

[T]he Commission would welcome (i) a Congressional guidance as to policy and (ii) Congressional clarification of our authority, which would lay the troublesome jurisdictional question at rest . . . . The rule-making proceeding instituted by this notice will . . . be conducted concurrently with legislative consideration, with final Commission decision withheld for an appropriate period to afford Congress an opportunity to act.\textsuperscript{27}

In the far-reaching Second Report and Order,\textsuperscript{28} the FCC proceeded to promulgate new rules regarding carriage, nonduplication, notice of commencement of CATV service and a host of other procedural guidelines.\textsuperscript{29} Nevertheless, the FCC continued to look to Congress:

The threshold jurisdictional question is twofold (a) whether the Commission has jurisdiction as a matter of law over non-microwave CATV systems under the present provisions of the Communications Act, and (b) whether it would be appropriate to exercise any such jurisdiction without any legislative enactment on the subject.\textsuperscript{30}

In fact, the FCC appeared to take special pains to avoid criticism for usurping jurisdiction in an area previously denied to it by the Congress:

In this report, we stress again the desirability in our view of congressional guidance in this important area. But thus far, the congressional guidance or clarification has not been forthcoming; and in the present circumstances, our decision cannot properly turn on a desire to avoid litigation or on the hope of obtaining policy guidance in the CATV field.\textsuperscript{31}

The FCC specifically outlined those areas which particularly warranted congressional attention. Generally, it said: "We therefore state again that we would welcome congressional guidance as to policy and congressional

\textsuperscript{26} Id. at 6083, 1 F.C.C. 2d at 465.
\textsuperscript{27} Id. at 6083, 1 F.C.C. 2d at 466.
\textsuperscript{29} See Sections 74.1103(a), 74.1103(e), 74.1105, 74.1107 and 74.1109 of the Commission's Rules.
\textsuperscript{31} Id. at 4543, 2 F.C.C.2d at 734.
clarification of our authority in all respects in this field.”’32 One of the areas in which the FCC specifically asked for guidance was that of dealing with local franchising problems: “Congress will be asked to consider the appropriate relationship of Federal to State-local jurisdiction in the CATV field, with particular reference to initial franchising, rate regulation, and extension of service.”’33

Despite the FCC’s repeated requests, Congress still had not acted in 1968 when the Supreme Court upheld the FCC’s jurisdiction over the regulation of CATV, in United States v. Southwestern Cable Co.34 The basic question presented to the Court was whether the FCC had the authority to regulate CATV. Speaking for the majority, Justice Harlan reviewed the history of the FCC’s junket into CATV regulation, then went on to note that the Communications Act of 1934 applies to “all interstate and foreign communication by wire and radio,” and that the FCC is entrusted with the responsibility to “... make available ... to all the people of the United States a rapid, efficient, Nation-wide, and world-wide radio communication service.”’35 He proceeded to deal with respondent’s contention that by Congress’ refusal to explicitly grant jurisdiction to the FCC, it intended that the agency should refrain from regulating cable systems. The Court found the congressional inaction argument unpersuasive: “We cannot derive from the Commission’s requests for legislation anything of significant bearing on the construction question now before us.”’36

The Court took specific cognizance of congressional inability or unwillingness to act in the matter of cable television:

The Commission’s requests for legislation evidently reflected in each instance both its uncertainty as to the proper width of its authority and its understandable preference for more detailed policy guidance than the Communications Act now provides.37

In December 1968, the FCC issued another Notice of Proposed Rulemaking and Notice of Inquiry in Docket No. 18397,38 in which it attempted to adopt a “retransmission consent concept” requiring cable systems to obtain permission from the originating station before they imported a distant signal. Several areas of inquiry were outlined in yet another Notice of Proposed Rulemaking39

32. Id. at 4564, 2 F.C.C.2d at 787.
33. Id. at 4564, 2 F.C.C.2d at 788.
34. 392 U.S. 157 (1968).
35. Id. at 167.
36. Id. at 171.
37. Id. at 170.
this one in July, 1970, in Docket No. 18397A—in which the FCC again noted that it was seeking congressional guidance. And still another Notice of Proposed Rulemaking—this dealing with the federal and local relationship in Docket No. 18892—was also issued in which the FCC noted that despite its requests for legislation, “to date, no legislative resolutions of these issues have been reached.”

The FCC’s assertion of jurisdiction over CATV has been somewhat jeopardized by Midwest Video, Inc. v. United States. There, the Eighth Circuit struck down the FCC’s mandatory origination rules which required all CATV operations with over 3,500 subscribers to originate programming to a “significant extent.” The court relied on Fortnightly Corp. v. United Artists Television, Inc. for the proposition that a CATV operator is not a broadcaster. Consequently, the Communications Act did not authorize the FCC to compel program origination. The court specifically declined to comment on “the power of the FCC to permit CATV’s to originate programs and to prescribe reasonable rules for such CATV operators who voluntarily choose to originate programs.” However, it did say that: “[t]he Commission’s power to adopt rules requiring cablecasting to the extent that it exists must be based on the Commission’s right to adopt rules that are reasonably ancillary to its responsibilities in the broadcasting field.”

Midwest would appear to have the most validity if the FCC had chosen to totally pre-empt the local franchising area—a situation which does not exist. This too might constitute FCC expansion into a “non-ancillary” area of broadcasting. Nevertheless, such an assertion does not exist and, to that extent, Midwest is not applicable to the instant problem. Nevertheless, it must still be noted that in Midwest Video, the court contrasted Congress’ preemption of the licensing of radio and television operators with its history of inactivity in the CATV field. Thus, the lack of congressional guidance has once again returned to haunt the FCC. As Chairman Burch said in testimony given shortly after the Midwest decision was handed down:

[1]n the 60’s the FCC lost the Southwestern case in the 9th Circuit, and it was argued that we lacked all authority to regulate off-the-

40. Id. at 11047, 24 F.C.C.2d at 585.
42. See note 32 supra.
44. 441 F.2d 1322 (8th Cir. 1971).
46. 441 F.2d 1322, 1326 (8th Cir. 1971).
47. Id.
48. Id.
air cable. At that time, while asserting that we believed that we did have authority to take the actions in question, we also said that clarifying legislation would be desirable. All that is just as true today. We would welcome such legislation. It would settle the authority problem once and for all.\textsuperscript{49}

And he further stated:

\textit{[W]hile we believe we have sufficient authority to take the actions in question, I want to repeat what we have said on a number of prior occasions—that clarifying legislation would be most welcome. It would settle the authority problem once and for all.}\textsuperscript{50}

\textit{Congressional Legislation}

At the time the FCC first decided to refrain from taking jurisdiction over CATV,\textsuperscript{41} Congress began investigating the cable question. The Communications Subcommittee of the Senate Committee on Interstate and Foreign Commerce held hearings in the summer of 1958. One product of the hearings was the "Cox Report"\textsuperscript{52} which concluded that the FCC had been too conservative in refusing to regulate CATV:

\textit{It may be that the courts would hold that the Commission does not have the power to regulate CATV operations—or that the possibility of such an ultimate ruling renders congressional clarification advisable. However, up to this point the Commission has shown no inclination to seek authority in the field through amendment of the Communications Act. As is suggested below, it is difficult to see how the Commission can discharge its overall responsibilities without authority over this important aspect of television service.}\textsuperscript{53}

Measures to provide for the regulation of cable were introduced in the 86th Congress\textsuperscript{54} and hearings were again held in July 1959. The Senate Communications Subcommittee followed these by introducing a measure on its own which provided for cable licensing, as well as other protection for television stations.\textsuperscript{55} The cable industry, at first, was divided on the measure but ulti-

\textsuperscript{49.} Statement of F.C.C. Chairman Dean Burch, before the Communications Subcommittee of the Senate Committee on Interstate and Foreign Commerce, June 15, 1971.

\textsuperscript{50.} Statement of F.C.C. Chairman Dean Burch, before the Communications Subcommittee of the House Committee on Interstate and Foreign Commerce, July 22, 1971.

\textsuperscript{51.} See text accompanying notes 7-12 supra.

\textsuperscript{52.} See note 7 supra.

\textsuperscript{53.} STAFF OF SENATE COMM. ON INTERSTATE AND FOREIGN COMMERCE, 85TH CONG., 2D SESS., REPORT ON THE TELEVISION INQUIRY—THE PROBLEM OF TELEVISION SERVICE FOR SMALLER COMMUNITIES 6 (Comm. Print 1959).


mately opposed it. By throwing its full weight against the bill, the industry was able, by a one-vote margin, to have it recommitted to Committee.

As has been discussed, the FCC petitioned Congress for jurisdictional legislation on a number of occasions in 1965. However, the legislation was not forthcoming. In 1966, the FCC specifically sought congressional authorization to permit it to regulate CATV. The bill was favorably reported by the House Committee on Interstate and Foreign Commerce, but failed to reach the floor for debate. In December 1968, in July 1970, and again in June and July 1971, the FCC asked for congressional guidance. Still Congress has not acted. In light of the history of the Commission's action and specific congressional inaction, it is a valid conclusion that Congress has left regulation totally to the FCC; the FCC has in turn, left some very specific areas to the local jurisdictions. To await specific congressional action in the area may be to wait fruitlessly.

State and Local Regulations

State Regulation

The various attempts to impose state-wide jurisdiction have been haphazard at best. Although the United States Supreme Court refused to overturn Nevada's assumption of jurisdiction over CATV, few states have jumped into the breach. Only seven states regulate cable television in any significant manner: Nevada, Wyoming, Connecticut, Rhode Island, Vermont, Hawaii, and Illinois. Massachusetts is expected to assume regulation shortly.

The cable industry—which once fought tooth and nail to avoid jurisdiction by the FCC—now feels that it possesses and should assert complete jurisdiction to prevent any state usurpation in the cable jurisdiction vacuum. The

56. See Smith, supra note 9, at 974.
59. See text accompanying notes 38-43 infra.
60. See text accompanying notes 69-71 infra.
62. NEV. REV. STAT. § 711.090 (1967).
64. CONN. GEN. STAT. REV. § 16-331 (1966).
69. VARIETY, Nov. 7, 1971, at 68.
70. Supra note 41, at n. 3.
spectre of rate regulation seems to have sent the cable operators to the FCC.\(^7\)

**Local Regulation**

If state regulation can be referred to as haphazard, then local regulation may be termed totally bewildering. Although most local jurisdictions will attempt to derive some monetary gain from the authorization of cable franchises, some do not require a franchise at all. In one notable case, despite a city's adoption of a very strict franchising ordinance with a comprehensive scope, a state court ruled that use of the telephone company lines places a cable system beyond the purview of the city's franchising authority.\(^7\) The FCC has long been aware of the position of the cities in the cable picture. For instance, in the *Notice of the Proposed Rulemaking* in Docket No. 18892,\(^7\) it stated that a combined local-federal approach was best for the orderly growth of cable. Earlier it had said that the local entity should focus on certain specific matters, such as:

- the legal, technical, financial and character qualifications of the franchise applicants; the area to be served; the showing as to plans or arrangements for pole line attachments with the public utility or arrangements with a common carrier or other appropriate feasibility plans; the reasonableness of the rates to be charged; the quality of service and repair in specific areas, etc.\(^7\)

Even more recently, in the "Letter of Intent" sent by Chairman Dean Burch to members of those congressional committees concerned with CATV, the Chairman stated the FCC's intention to "leave a number of areas to local regulation..."

(a) Local franchising authority will set "reasonable deadlines" for construction and operation of systems. Moreover, the Commission will require that the franchise impose a duty on the cable system to have an operable head-end within one year after a certificate of compliance from the Commission. The Commission also stated it believes a fifteen (15) year franchise with a reasonable renewal period would be satisfactory.

(b) The local franchising authority should maintain programs for review of subscriber rates and technical standards.

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\(^{71}\) For an excellent treatment of this area of the regulatory aspects, see Botein, *CATV Regulation: A Jumble of Jurisdictions*, 45 N.Y.U.L. Rev. 816 (1970).


\(^{73}\) See note 41 *supra*.

\(^{74}\) *Supra* note 38 at 19032, 15 F.C.C.2d at 425.
(c) The Commission recommends a three percent limit on franchise fees exacted by the city; in such cases as the three percent limit is exceeded, "the franchising authority shall submit a showing of the appropriateness of the fee specified, particularly in light of the planned local regulatory program."

At present, the regulatory power of the local jurisdictions is somewhat confused. In *Wonderland Ventures, Inc. v. City of Fremont,* the Sixth Circuit invalidated ordinances which regulated and imposed a gross receipts tax on CATV. The court found the ordinances invalid because they imposed a gross receipts tax in violation of article I, section 8, of the Constitution and because they did not contain definite standards for regulation and administration. As to the issue of federal preemption, the court stopped short. It said: "In view of our disposition of the issue of the invalidity of the ordinances, we do not find it necessary to determine on this appeal to what extent regulation of CATV has been preempted by the Federal Government or to what extent reasonable regulations may be imposed by municipal ordinance."

**Authority of the District of Columbia**

The authority of the District of Columbia to issue a cable franchise is principally grounded in two sections of the District of Columbia Code: Section 1-226 concerning the police power and Section 1-244(d) concerning the issuance of revocable permits in the construction of tunnels and laying of conduits.

**Police Power**

Section 1-226 of the District of Columbia Code authorizes the Commissioners to make whatever reasonable and normal regulations are necessary "for the . . . comfort . . . of all persons . . . within the District of Columbia."

Under the police powers, the District may not do that which Congress has specifically refused to allow. However, the long history of congressional inaction regarding the jurisdiction of the FCC may not be interpreted as a

75. 31 F.C.C.2d 115, 136, 139 (1971).
76. 423 F.2d 548 (6th Cir. 1970).
77. *Id.* at 550.
79. *Id.* at § 1-244(d).
80. For a treatment of the applicability of the Reorganization Act, see text accompanying notes 99-101 infra.
refusal to allow the District to act. Rather, the total lack of congressional guidance is proof positive that Congress has virtually abandoned the CATV jurisdictional problem. Despite constant pleas from the FCC, Congress has not acted on any of the jurisdictional questions involving CATV. Specifically, it has not acted on the question of the federal-local relationship. The FCC proposes to allow local jurisdictions virtually unfettered freedom in granting franchises. The record is absolutely silent as to the wishes of Congress regarding CATV in the District of Columbia. It may therefore be validly assumed that this congressional “nonaction” is tantamount to congressional action permitting the FCC and the various local jurisdictions to move forward on their own. Congress’ failure to carve out an exception for the District of Columbia should not give rise to any reluctance regarding the assertion of jurisdiction on the part of the city.

The District of Columbia Court of Appeals touched on the very heart of this argument in *Filipo v. Real Estate Commission of the District of Columbia*. The Board of Commissioners had found that racial discrimination in housing had a potentially dangerous effect on the citizens of the District of Columbia due to overcrowded ghetto housing conditions, the result of racial discrimination. To alleviate the poor housing conditions, the Commissioners enacted Fair Housing Regulations pursuant to Section 1-226 of the Code. The District of Columbia Court of Appeals upheld the regulations, although there was no specific congressional authorization to enact them.

It found that the power of the Commissioners was increased to be comparable to that of any municipal corporation and said:

[T]here is no doubt that congressional legislation on a particular subject can preclude regulation of that subject by the Commissioners . . . but absent such unique limitations or congressional ‘occupation of the field,’ the Commissioners exercising their local legislative power may promulgate reasonable and usual police regulations.

The thrust of a regulation issued pursuant to Section 1-226 of the D.C. Code need not insure only the lives, limbs or health of the residents. Ultimately, it enhances their comfort, quiet and good order. Certainly, if “Fair Housing” regulations which have a great “impact upon the rights of property ownership” and the “freedom of . . . citizens to contract” and which “contemplate a

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82. See text accompanying notes 69-71 *supra*.
84. *Id.* at 271, 274-77 (dissenting opinion).
85. *Id.* at 272.
86. *Id.* at 275.
compromise between competing constitutional and statutory protections, 87 are to be upheld, then regulations involving CATV where an agency of the federal government has delegated specific functions to the municipalities should also be upheld.

The courts have upheld other exercises of the police power beside Filipo. In Taylor v. District of Columbia, 88 the Court of Appeals for the District of Columbia upheld the assignment of various vending spaces in downtown Washington. This suggests an analogy with the thrust of a major portion of the cable regulations: the assignment of business areas. While Taylor obviously involved a small merchant with a small business operating in a very small part of the city, the assignment of business areas for CATV is an extension of the Taylor theory with the operating area enlarged. Similarly, CATV franchises would qualify as "assigned" areas.

Ewing v. Chase 89 also upheld an exercise of the police power. There, regulations requiring alterations in the design of a theatre to aid the safety of theatre patrons were found to be a valid exercise of the police power. In Johnson v. District of Columbia, a law was upheld prohibiting cruelty to animals in the "interest of peace and order." 90

In the CATV case, the regulations may appear to be far afield from the normal context of police power regulations. However, the uses of regulations based on the police power to enforce commercial marketing practices, theatre design, prohibitions on animal cruelty, or fair housing laws also seem to be on the periphery of the police power. Since the laying of cables, the construction of conduits, the stringing of overhead wire and the overall construction of a CATV system may very well pose a threat to the lives, limbs, health, comfort and quiet of persons in the District of Columbia, regulations authorizing construction of CATV are an absolute necessity. 91 Furthermore, CATV concerns the comfort of citizens of the District of Columbia insofar as their comfort may be partially measured by the cable service they receive. Cable will add to their enjoyment by offering distant television signals or local origination channels. It can aid public awareness through local access channels.

87. Id.
It can provide services to the city through police and fire channels, traffic monitoring, and a myriad of other cable services. And it might be the forerunner of two-way communications.

The recent case of *Firemen's Insurance Co. of Washington, D.C. v. Washington*acamely supports the above thesis. In striking down regulations prohibiting geographic discrimination and arbitrary cancellation of policies within the District, the court noted that there was specific congressional legislation in the District of Columbia insurance field. The very specific occupation of the insurance field by Congress compared to the very specific nonaction in CATV provides the fundamental distinction.93

**Revocable Permits**

Section 1-244(d) authorizes the Commissioners "to grant revocable permits upon such terms, conditions, bonds and rentals as the Commissioners may propose for the construction of tunnels and the laying of conduits and pipes in the alleys, streets and avenues in the District of Columbia under the jurisdiction of the Commissioners."94 The wide scope of the authority granted under this section is evidenced by the virtual lack of any case law interpreting it. The only restriction placed on the Commissioners' authority under Section 1-244(d) is that regulations based on it must tend to promote the public health, safety and general welfare.95 Thus, it also would seem to authorize the levy of a franchise fee. There is no reason to allow the Commission to condition the granting of a permit upon payment of a bond or rental while not permitting it to do the same upon payment of a franchise fee.

It has been argued by the District's chief legal officer that the District of Columbia Public Space Rental Act operates to limit the issuance of a permit under Section 1-244(d). This argument manifests an unduly broad reading of the law. By the terms of the Space Rental Act, the Congress intended that:

[P]ublic space in the District which the Commissioner finds *is not required for the use of the general public* may be made available by him for use, for business purposes, by or with the consent of

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92. *Supra* note 77.
93. On the authority of the District to regulate CATV, see generally E. Jaffe, *Judicial Control of Administrative Action* at 43-44. Professor Jaffe contends that where Congress is unable to determine a policy on issues which demand congressional expression, the failure to act should be viewed as an abdication of its legislative authority.
94. *Supra* note 76.
96. Memorandum from C. Francis Murphy, Acting Corp. Counsel, to Julian R. Dugas, Director, Dep't of Economic Development, November 2, 1970.
the owners of private property abutting such space, upon payment to the District of compensation for the use of such space, and on the condition that such use will be discontinued in whole or in part whenever the Commissioner determines that all or part of the public space is required for the use of the general public.97

The entire thrust of the Space Rental Act is directed toward allowing the operators of private businesses abutting public space to use that public space for private gain,98 whereas Section 1-244(d) is designed to provide for the issuance of permits to private businesses which serve the public interest. Thus, if the space is required for the use of the general public, the terms of the Space Rental Act would be inapplicable and Section 1-244(d) of the D.C. Code would apply. There can be no doubt that a cable system would be for “the use of the general public” and beyond the purview of the Space Rental Act.

Furthermore, other sections of the Space Rental Act do nothing more in supporting the view of the District’s chief legal officer. Both Sections 7-90599 and 7-908100 of the D.C. Code (part of the Space Rental Act) deal with the rental of public space. Section 7-905 is concerned with the rental of public space on or above the surface; Section 7-908 is concerned with the rental of subsurface space. Section 7-905 provides “that nothing herein contained shall be construed as requiring the Council to require the payment of rent as a condition to the use of public space . . . .” This section merely does not require payments of rent by a public utility for installation of equipment or facilities. On the other hand, it does not prohibit a requirement that public utilities pay nor does it prohibit the granting of a permit to some other person.

Section 7-908 certainly does not prohibit the District from issuing a permit to a CATV system. That section allows a permit to be given to a private business on, among other conditions: (1) that the business agrees that the public interest is not waived, and (2) that even underground construction by the business may be subject to the introduction of any pipe or other “public . . . underground construction” so long as it is “in the public interest to place [the pipe] in or through” the private construction. Therefore, if the grant of a permit under Section 7-908 cannot pre-empt the paramount public interest, then the availability of CATV cannot be precluded by this section. Thus, it would certainly be permissible to introduce cable into an already constructed vault.

Although Section 7-908 does not specifically deal with the issuance of a permit to construct cable, it would be pointless to prohibit construction of a

97. 82 Stat. 1156 (Emphasis added).
98. Section 302 further emphasizes the overriding public interest factor.
99. 82 Stat. 1157.
100. 82 Stat. 1158.
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A cable system designed to serve the public interest merely to wait upon prior construction by someone else so that cable might be introduced into it. This interpretation, when taken in conjunction with the specific grant of authority in Section 1-244(d), obviously allows the issuance of a permit. Moreover, the authority is in the Commissioner to determine what is in the public interest. 101

Power to License Business

Additional authority for the franchising of cable can be found in Section 47-2301, et seq. of the D.C. Code. Section 47-2301 states that no one may engage in a business for which a license is required without first having obtained that license. Section 47-2344 also grants a power "to require a license of . . . businesses or callings not listed in this chapter and which . . . require inspections, supervision, or regulation." In addition, Section 47-2345(a) grants the Commissioner the power to make "any regulation that may be necessary in furtherance of the purpose of this chapter. . . ." When taken in conjunction with Sections 1-226 and 1-244(d) of the Code, the above sections support the District of Columbia's assumption of jurisdiction over CATV. Although Congress has not given specific authority to the District to franchise cable systems, the general authority granted by Congress is sufficient to authorize the Commissioners to determine that CATV should be included in those businesses to be licensed. 102 Although the power of general legislation is reserved to Congress, the applicability of that legislation to certain businesses may be established pursuant to regulations issued by the District of Columbia. 103

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101. In its definitional section, Congress specifically excluded from the terms of the Public Space Rental Act the following:

"Vaults" shall not include public utility structures, pipelines, or tunnels constructed under the authority of Section (d) of the Act approved December 20, 1944, as amended (D.C. Code, Section 1-233(d)). . . .

It is obvious that in excluding "vaults" of public utilities from invasion by abutting private businessmen, Congress simply did not want abutting owners to have even the remotest chance of interfering with needed public utilities. The exclusion from the Public Space Rental Act would not run to construction "for the use of the general public."


103. Any fees for licenses must be commensurate with the cost of inspection, supervision or regulation. Nevertheless, there is a presumption that a fee is reasonable and in proportion to the cost of supervision. Abdow v. District of Columbia, 108 A.2d 374 (D.C. Mun. 1954). Furthermore, this does not limit the amount to be collected under the franchise fee. See text accompanying note 98.

It would be impossible for the District to characterize CATV as a public utility, then to assert jurisdiction over it without enabling legislation. Public utilities are statutorily defined pursuant to Section 43-103 of the Code. Thus, any attempt to bring a cable system under the jurisdiction of the Public Utility Commission must be supported by specific authority from Congress. However, attempted unfranchised use of telephone company facilities presumably would be subject to regulation by the District under Section 1-726 of the D.C. Code, 27 Stat. 21 (1892).
Power in Mayor-Commissioner or City Council

Reorganization Plan Number 3 of 1967 transfers those functions formerly performed by the Commissioners to the Mayor-Commissioner or the City Council. Section 401 transfers all functions to the Mayor-Commissioner except as otherwise provided. Section 402 transfers certain specified functions to the City Council. Furthermore, Section 406 grants a veto power to the Commissioner. Included in Section 402 are "Making regulations under D.C. Code, Sections 1-226 and 1-227." However, the reorganization plan appears to specifically omit the powers under Section 1-244(d) from vesting in the City Council. In light of the above, the power to make regulations and to grant franchises appears to be divided between the Mayor-Commissioner and the City Council.

The adoption of a regulation authorizing the Mayor to grant a franchise seems to be the proper procedure. Nevertheless, since the franchise must include an aspect of regulation which resides in the City Council pursuant to Section 1-226, any selection of a franchisee by the Mayor should be subject to the ultimate advice and consent of the City Council and thus dependent on whatever criteria it might set down.

Conclusion

The position that CATV must be classified by the Congress as a public utility or that the Space Rental Act must be amended to enable the District of Columbia Government to grant authority for a cable system is untenable. While specific legislation would be needed to have a cable system operate as a public utility, the Space Rental Act in no way prohibits the granting of a permit for the installation of a cable system.

Since the FCC has assumed total authority in the cable field (Congress having abdicated its authority) and the Commission has expressed a "hands-off" policy for local franchising, the District would be well within its authority to grant franchises. Specific support is provided by Sections 1-226, 1-244(d), 47-2344, and 47-2345(a) of the Code. Finally it has been shown that the divergence of responsibility in the Reorganization Act makes the better policy one of cooperation between the Mayor-Commissioner and the City Council.

106. The Reorganization Plan specifically vests power under the following Sections of the D.C. Code in the City Council: Section 1-244(a), Section 1-244(b), Section 1-244(f) and Section 1-244(h).