



SPECIAL SUPPLEMENT  
TO MAY 1965 ISSUE

# TV & Communications

## **PROPOSED CATV LEGISLATION AND REGULATION**

**PART: I:** Address by Rep. Oren Harris summarizing objectives of his Bill on control of Community Antenna Television.

**PART: II:** Complete text of Federal Communications Commission Notice of Proposed Rule Making relating to CATV. And, complete text of Federal Communications Commission Report and Order to control microwave-served Community Antenna Television Systems. Dissenting statements of Commissioners Lee Loevinger and Robert Bartley.

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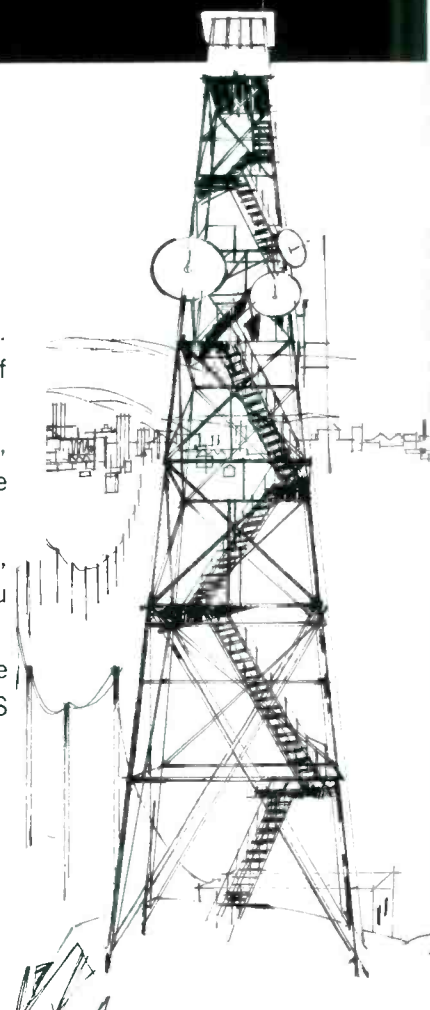
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# PART I

## THE FUTURE OF TELEVISION

*An address by the  
Honorable Oren Harris  
before the House of Representatives  
April 28, 1965*

Mr. Speaker, I am introducing today a bill aimed at dealing with an important aspect of television in the United States today and, more importantly, perhaps, with the future of television in the United States. The bill seeks to deal with the role of Community Antenna Television Systems in relation to television broadcasting.

On Friday last, April 23, the Federal Communications Commission adopted a course of action which makes consideration of this legislation by the Congress urgently necessary. The Commission announced that it will regulate Community Antenna Television systems by imposing on the operations of such systems certain requirements with regard to carrying programs of local television stations and prohibiting, for a period of 30 days, the duplication of programs carried by such stations.

The course of action adopted by the Commission is a source of deep disappointment to me. I have urged the Commission repeatedly over a period of years, and particularly in recent months, to submit to the Congress legislative recommendations aimed at dealing in a comprehensive manner with the problem presented by CATV systems. Instead of proceeding in this manner, the Commission contends that it has statutory authority under the provisions of the Communications Act of 1934 to exercise regulatory control without additional legislation.

I seriously question the contention of the Commission that it has sufficient statutory authority to exercise adequate control. The Commission bases its contention on general language in the 1934 act authorizing the Commission to regulate broadcasting in the public interest. It is the Com-

mission's contention that the statutory authority over broadcasting with its power to regulate instrumentalities like Community Antenna Television Systems on the ground that their operations directly affect broadcasting.

If Congress fails to take action clarifying the situation it would be for the courts to decide whether or not the Commission has the regulatory authority over Community Antenna Television systems which it now claims to have. The spoke of that authority, however, would remain in doubt unless the courts give to the Commission *cart blanche* to proceed in any way it sees fit.

There was a time when this same Commission, with a somewhat different membership thought differently on this point. In 1959, the Commission denied that it had regulatory authority over Community Antenna systems. Also, during the 86th Congress, the other bodies gave extensive consideration to legislation giving such authority to the Commission. By a vote of 39 to 38 the other bodies voted to recommit to the Committee on Interstate and Foreign Commerce of that body legislation which would have granted to the Commission regulatory authority over CATV systems because the grant of authority was considered too broad.

Now, in spite of this background, the Commission has adopted a course of action which, in my opinion, *is not in the best interest of the future television* in the United States, and it places the Commission in the wrong posture vis-a-vis the Congress. Mr. Speaker, as I said, I am greatly disappointed. I want to stress, however, that I am not mad at anybody.

My disappointment is all the greater because the present course of action

of the Commission with regard to CATV does not constitute an isolated instance. There have been similar instances in recent years with regard to other acts of broadcasting where the Commission acting on its own has sought to extend its regulatory activities without a sufficient mandate and guidance from the Congress to undertake such activities.

I would like to remind the members of this body and the members of the Commission that this unfortunate approach has not been limited to broadcast matters. In the case of Communication Satellites, the Commission sought to pursue a similar course of action. In that case, Congress acted promptly to establish public policies which took into consideration the broad interests of the American people in international communication as well as the interests of the various industries segments here at home.

The Commission originally was bent on a course of action which would have made communication satellites an adjunct to existing cable and radio services. The legislation establishing the communications satellite corporation provided a novel and greatly different approach from the one pursued by the Commission. Mr. Speaker, a similar situation appears to exist with regard to CATV. The Commission acclaims the statutory authority to regulate CATV operations as an adjunct to television broadcasting. In approaching the problem in this manner the Commission has failed in two respects.

First, the approach to CATV is a piece-meal approach which is motivated by bringing about what the majority of the Commission considers fair competition between broadcasters and CATV.

Secondly, being a piece-meal approach, the Commission has failed to ask itself the all-important question: What should our national policy be with regard to the future of television in the United States?

Such a policy, Mr. Speaker, can be established only by the Congress and only after taking into consideration many, many factors which the Commission in acting on CATV has failed to take into consideration.

My contention is that the Commission should have regulatory authority with regard to CATV operations. Such authority, however, should be granted to the Commission by the Congress. Such authority should be granted only after the Congress has had an opportunity to consider all aspects of the future of television in the United States and has been able to provide what role CATV operations should play in this respect.

The bill which I am introducing today is more than a CATV bill. The bill seeks to establish a national television policy which gives frank recognition to some of the realities of television today. The bill would establish as the goal of the national television policy "to give to the people of the United States access to the greatest practicable diversity of local, network, educational, and other television programs."

It is my purpose in this way to make more specific the all too general "public interest" standard which presently constitutes the sole yardstick guiding the Commission and regulating television broadcasting. This standard is insufficient to guide the Commission with regard to the complex regulatory question relating to local, network, educational, and other television programming.

The bill would clarify the authority of the Commission to regulate Community Antenna Television Systems without regard to whether microwave or wires are used by such systems. Mr. Speaker, I believe that this clarification of the present authority of the Commission is urgently needed if the broadcasting and CATV industries are to escape from prolonged uncertainty which would result from judicial tests of the Commission's authority to issue the Community Antenna Television regulation which it has proposed.

The bill would make clear that the

Commission is authorized to regulate CATV systems but not to license them. It would also make clear that CATV systems should not be deemed to be common carriers.

The bill further recognizes that state statutes and local ordinances may affect the accomplishment of the national television policy. The bill, therefore, would call for the prevention for exclusive federal regulations of "those aspects of intrastate and local television communications which may affect the accomplishment of national television policy."

Most importantly, the bill would provide that no CATV rules promulgated by the Commission should take effect prior to the expiration of 90 calendar days following the date of promulgation.

The purpose of this provision is to give the appropriate committees of the Congress and the Congress itself, an opportunity to review such rules before they become effective.

I realize that this provision proposes an important change in the traditional relationship by the regulatory agencies and the Congress. It is my considered opinion that such change is urgently called for on a selective basis in the case of those rules which involved the exercise of broad rule-making authority under rather general statutory standards.

This provision calls for a procedure whereby rules promulgated by the Commission with regard to CATV may be reviewed by the Congress before they become effective. This procedure is designed to strengthen the hands of the Commission. The Commission cannot function in a vacuum. If broad policy rules promulgated by the Commission are to be viable they must have substantial congressional support. A 4 to 3 or 3 to 2 vote by the Commissioners does not suffice.

On the other hand, such a provision places an important responsibility on the Congress. Such responsibility can and must be exercised in selected important areas if the Congress rather than the Commission is to be the policy making body in these United States and the future of television in the United States is important enough for the Congress to be concerned.

There is no use complaining that the FCC and other independent regulatory agencies frequently steer an erratic course in discharging their

regulatory responsibilities. In many instances the mandate given by the Congress to such agencies simply is not specific enough to give them needed backing for their regulatory efforts. It is my hope that the proposed procedure will set a pattern for a more effective relationship between regulatory agencies and the Congress on the one hand and regulators and the regulated industries on the other hand.

In addition, my bill would provide that any interim procedure adopted by the Commission with regard to CATV systems which was adopted without following the rule-making provisions of the administrative procedure act shall be null and void. Mr. Speaker, the practice has grown in several regulatory agencies and particularly in the FCC to "freeze" for an indeterminate period of time or to impose so-called voluntary regulation pending completion of formal agency rule making. In my opinion, this approach violates the spirit, if not actually the provisions, of the administrative procedure act, and should be specifically prohibited.

Finally, the bill would authorize the Commission to secure full and complete information on CATV operations using subpoenas if necessary as provided elsewhere in the act. This is absolutely necessary if we are to have effective regulation of CATV in the public interest.

In conclusion, Mr. Speaker, by introducing this bill, it is my purpose not only to propose legislation with regard to CATV operations. It is my additional purpose to propose a national television policy and a procedural pattern of legislation and regulation which will enable the FCC and the Congress to become more effective in reaching important policy decisions with regard to the future of television in the United States.

#### SUMMARY OF PROVISIONS

The Bill would:

First. Establish a national television policy "to give to the people of the United States access to the greatest practicable diversity of local, network, educational, and other television programs." This language would make more specific the "public interest" provisions contained elsewhere in the act.

Second. State that in order to accomplish this national television policy, it is imperative that inter-state

television communications—whether by wire or by radio—be regulated. This would clarify the authority of the Commission to regulate CATV systems without regard to whether microwave radio or wires are used by such systems.

Third. Preempt for exclusive federal regulation “those aspects of intrastate and local television communication which may affect the accomplishment of the national television policy.”

Fourth. Authorize the Commission to regulate CATV systems but not li-

cense them. Make clear that CATV systems shall not be deemed to be common carriers.

Fifth. Provide that no CATV rules should take effect prior to the expiration of 90 calendar days following the date of promulgation of such rules by the Commission. This would give the Congress an opportunity to review such rules.

Sixth. Make null and void any interim procedure adopted by the Commission with regard to CATV systems which was adopted without following

the rule making provision of the administrative procedure act. Such interim procedure has been put into effect by the Commission making microwave licenses conditional upon “voluntary” acceptance by the licensee of certain operational limitations with respect to nonduplication and carrying local stations.

Seventh. Authorize the Commission to secure full and complete information on CATV operations using subpoenas, if necessary, as provided in section 409 of the act.

## HARRIS BILL ON CATV

### A BILL

To amend the Communications Act of 1934 to establish a national television policy and to provide a method by which rules of the Federal Communications Commission with regard to community antenna television systems may be reviewed by the Congress before they become effective.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled; That title III of the Communications Act of 1934 (47 U.S.C. 301-386) is amended by adding at the end thereof the following new part:

### “PART V - TELEVISION

#### “Findings and Purposes

“Sec. 398. The Congress hereby finds that, in addition to the purposes of this Act as set forth in sections 1 and 301, it shall be the purpose of this part to give to the people of the United States access to the greatest practicable diversity of local, network, educational and other television programs; and that to accomplish the purpose of this part it is imperative that interstate television communications (whether by wire or radio) be regulated. The Congress further finds that it is necessary for the Federal Government to regulate those aspects of intrastate and local television communications which may affect the accomplishment of the purpose of this part and that such regulation should be the exclusive concern of the Federal Government.

#### “Opportunity for Review “of Rules by Congress

“Sec. 399(a). In order to accomplish the purpose of this part, the Commission is authorized to regulate community antenna television systems but may not provide for the licensing of any such system. No rule relating to community antenna television systems shall take effect prior to the expiration of ninety calendar days following the date on which such rule is promulgated.

“(b) When the Commission promulgates any rule under this part, it shall publish a statement setting forth in detail (1) the factors taken into account by it in determining how such rule would accomplish the purpose of this part and (2) if any alternative approaches to achieving such purpose have been submitted to the Commission in the course of the consideration of such rule, the reasons why the rule promulgated by the Commission is preferable.

“(c) Any interim practice or procedure relating to community antenna television systems which is being followed by the Commission on the date of enactment of this part shall from and after such date be void and have no force or effect if (1) it was adopted by the Commission pending promulgation of a rule or rules relating to such systems and (2) was adopted without following the rule-making procedure of the Administrative Procedure Act.

#### LEGISLATIVE PROPOSALS

“Sec. 400. (a) If, in order to carry out the purpose of this part, the Commission determines that additional legislative authority is necessary, it shall prepare a report setting forth its recommendations as to the legislation necessary and submit it to the Congress.

“(b) Accompanying each such report

shall be a statement setting forth in detail (1) the factors taken into account by the Commission in proposing such legislation and (2) any alternative approaches which might be considered by the Congress to accomplish the purpose of this part.

“(c) In order to facilitate the promulgation of a rule or rules under section 399 and the proposing of legislation under this section with respect to community antenna television systems, the Commission may obtain from such systems and persons having an interest in them full and complete information in the same manner and with the same authority as is provided in section 409 with respect to matters under investigation.”

Sec. 2. (a) Subsection (h) of section 3 of the Communications Act of 1934 is amended to read as follows:

“(h) ‘Common carrier’ or ‘carrier’ means any person engaged as a common carrier for hire, in interstate or foreign communications by wire or radio or in interstate or foreign transmission of energy except, where reference is made to common carriers not subject to this Act; but a person engaged in radio broadcasting or in operating a community antenna television system shall not, insofar as the person is so engaged be deemed a common carrier.”

(b) Such Section 3 is further amended by adding at the end thereof the following new subsection:

“(hh) ‘Community antenna television system’ means a facility utilizing a receiving antenna or antennas, connecting wire, cable or relay facilities and associated equipment, for the reception and simultaneous distribution to subscribing members of the public of the signals of one or more television broadcast stations.”

## PART II

# CATV NOTICE OF INQUIRY & PROPOSED RULE MAKING

**EDITOR'S NOTE:** On April 22, 1965 the Federal Communications Commission concluded many months of debates, hearings, analyzing of petitions, comments and pleadings. The following day, the Commission released a **Notice of Inquiry and Notice of Proposed Rule Making** to adopt rules and regulations controlling community antenna television systems. The Commission has assumed jurisdiction over all of CATV. And, it is now looking to establish CATV rules and regulations. Just as significant, however, is the dissenting comments to the proposals by Commissioners Robert T. Bartley and Lee Loevinger. Since the Commission is unable to make the complete text of the decision available and since we believe this to be of vital importance to our readers we are printing the entire Notice.

In the Matter of Amendment of Parts 21, 74 (proposed Subpart J), and 91 to adopt rules and regulations relating to the distribution of television broadcast signals by community antenna television systems, and related matters.

### **NOTICE OF INQUIRY and NOTICE OF PROPOSED RULE MAKING**

By the Commission: Commissioners Bartley and Loevinger concurring in part and dissenting in part and issuing statements.

1. Notice is hereby given of inquiry and proposed rule making in the above-entitled matter.

2. The Commission has received a number of requests that it assert jurisdiction over the distribution of television broadcast signals by community antenna television systems (CATVs) and promulgate rules and regulations governing such distribution. Many of these requests were made informally in comments on the rule making in Docket Nos. 14895 and 15233 with respect to the licensing of microwave facilities used to relay television signals to CATV systems.<sup>1/</sup> In addition, five formal petitions have been filed.<sup>2/</sup>

3. a). On October 16, 1964, the American Broadcasting Company (ABC) filed a "Petition for Commission Regulation of the Carriage of Television Signals by Community Antenna Television Systems," requesting the Commission to promulgate rules establishing areas and zones to be served by television stations and limiting the use of the stations' signals beyond such areas and zones (RM No. 672). Various pleadings in support of, or opposition to, the ABC petition have been submitted, and ABC has filed a reply. b). On December 18, 1964, Springfield Television Broadcasting Corporation (Springfield) filed a "Request for Declaratory Ruling" that all CATV systems, whether utilizing microwave facilities or acquiring television signals off-the-air, are subject to the Commission's jurisdiction and required to comply with operating provisions similar to those proposed in Docket Nos. 14895 and 15233. c). On January 22, 1965, Boise Valley Broadcasters, Inc., licensee of Station KBOI-TV, Boise, Idaho (Boise), filed a "Petition for Interim Relief," requesting the Commission to assume complete jurisdiction over all CATV systems and impose a "freeze" on all microwave applications for CATV use pending the promulgation of rules governing all CATV systems. d). On February 12, 1965, Westinghouse Broadcasting Company, Inc., filed a "Petition for Consolidation of Proceedings and Assertion of Jurisdiction over Community Antenna Television Systems," requesting the Commission to institute rule making governing all CATV systems, consolidate that proceeding with Docket Nos. 14895 and 15233, and stay immediately operations by CATVs in those areas which now or in the near future will be served by three commercial television stations pending the adoption of final regulations. e). On March 10, 1965, the Association of Maximum Service Telecasters, Inc., (MST) filed a "Petition of Association of Maximum Service Telecasters, Inc., for Rule Making" (RM-742), calling for the immediate exercise of regulatory authority by the Commission over all CATV systems and the adoption of comprehensive rules of general applicability.<sup>2a/</sup> The

stated bases of the five petitions are summarized below.

4. a). **The ABC Petition.** ABC petitions the Commission to regulate the distribution of television signals by CATV systems on the ground that such action is essential to our ability to discharge statutory responsibilities and within the Commission's present authority. ABC urges that the present and likely future trend of CATV development threatens to undercut the discharge of our statutory responsibilities "to make available, so far as possible, to all the people of the United States a rapid, efficient, nationwide, and world-wide wire and radio communication service" (Section 1 of the Communications Act, 47 U.S.C. 151), equitably apportioned "among the several States and communities" (Section 307(b), 47 U.S.C. 307(b)).

5. In support of the claim of increasing CATV impact upon Commission and Statutory policies, ABC points to major changes in CATV operations since the Commission's 1959 Report and Order in Docket No. 12443, "In the Matter of an Inquiry into the Impact of Community Antenna Systems, TV Translators, TV 'Satellite' Stations, and TV 'Repeaters' on the Orderly Development of Television Broadcasting," 26 F.C.C. 403, 18 Pike & Fischer, R.R. 1573. According to ABC, the number of CATV systems has grown from approximately 550, serving an estimated 1,500,000 viewers, to approximately 1300 CATV systems serving over 4 million viewers. Moreover, CATV franchises, sought or granted, have been running at the rate of one a day during the last ten months, in 345 communities in 40 states. Whereas the number of channels offered to CATV subscribers was typically three in 1959, the emphasis now is on broad band systems with a capacity for 11 or 12 channels. In 1959, CATV operations were largely confined to small or fairly small markets; today there are plans to extend New York City stations to substantial communities many miles away in upstate New York and Pennsylvania. Predicting that the next step will be for CATV to bring New York City independent stations into major cities like Boston, Philadelphia, Balti-

1. The following specifically requested that the Commission assume jurisdiction over all CATVs: Aroostook Broadcasting Corp., Association for Competitive Television, Channel Seven, Inc., and WLUC-TV. Other parties filing comments indicated that they held the same views.

2. Similar petitions have also been received from Capital Cities Broadcasting Corporation (RM-755, filed on April 7, 1965) and Taft Broadcasting Company (RM-766, filed on April 13, 1965). Any further petitions of this nature will be placed in this Docket and treated as comments.

2a. Thirteen dissenting members of AMST have filed comments expressing a contrary position.

more and Washington, ABC expresses fear that this might lead to combined CATV and Pay-TV operations which would siphon off top attractions from free TV.

6. Before summarizing the further bases for ABC's claim of adverse impact, we note in this connection that two UHF permittees in Philadelphia have expressed concern over the effect of pending CATV applications for franchises in that city. William Fox, permittee of a new UHF station, WIBF-TV, which expects to commence operation in Philadelphia in mid 1965, filed a statement supporting the ABC petition and commented **inter alia** as follows:

"As set forth in the ABC petition, there are now several applications pending for CATV franchises in Philadelphia. The successful operation of UHF station WIBF-TV in Philadelphia, which now has three operating VHF stations, will be dependent on its ability to bring outstanding programming not now available to the Philadelphia audience and on adequate protection of this programming from uncontrolled carriage of signals from other markets by CATV systems serving Philadelphia. Unregulated carriage of television signals by CATV systems in Philadelphia will prevent implementation of the Commission's basic television allocation policy which looks toward the operation of UHF and VHF stations in intermixed markets throughout the United States."

In addition, ABC points out that the permittee of UHF station WPHL-TV, which has suspended operation in Philadelphia but plans to go back on-the-air in mid-1965, wrote a syndicated film supplier on December 10, 1964 as follows:

"As you may know, a great deal of CATV activity has emerged in Philadelphia and vicinity. Rollins Broadcasting has just been granted an exclusive franchise for Wilmington, Delaware. Jerrold Electronics has applied for Camden, New Jersey; and more than a half dozen applicants are seeking franchises for Philadelphia, including Triangle, Storer, the Bulletin Company, etc. All proposed systems would be operating within our principal coverage area. Their main offering is to be the programming of WNEW-TV, WOR-TV and WPIX. The New York indies may represent damaging competition to Philadelphia UHF stations should their programming be admitted to this market. We, therefore, must ask that any film purchase permit WPHL-TV options for cancellation, without penalty, in the event the same film shows are available from New York indies via local cable systems. I am sure you will understand that this measure is a necessity."

7. The ABC petition notes further that the enactment of the all-channel receiver law in 1962 (76 Stat. 150, 151) has committed Congress and the Commission to a long-range television plan in which the expanded use of UHF will be paramount, and asserts that unregulated CATV poses a substantial threat to UHF development.

By way of example, ABC notes that a Binghamton, New York UHF station, in operation since 1957, has recently advised the Commission that UHF service would terminate there (leaving the city with one VHF station in place of one VHF and two UHF) if CATV were permitted to bring in four New York City independent stations. ABC also points to applications for CATV franchises in a number of Connecticut towns where UHF channels are either in use or allocated, noting that the CATVs propose to bring in New York City stations as well as others. ABC further lists 70 communities with UHF allocations where CATV franchises were sought between August 21 and November 26, 1964, and 95 communities with UHF allocations where CATV franchises were granted during the same period.

8. In addition to the impact on UHF, ABC urges that unregulated CATV has had, and will have, substantial adverse effect on service by local television stations, since the splitting of audience resulting from a multiplicity of additional signals brought in by CATV inevitably causes the station to lose audience and advertising revenues. ABC claims that the rule making in Docket Nos. 14895 and 15233 is wholly inadequate to insure that local television service can survive effectively, and that CATV cannot be an adequate substitute for local television broadcast service for three reasons: "First, CATV systems do not serve the public living in the sparsely-populated areas that, because of low population density, are considered uneconomical for cable systems to reach; **Second**, CATV systems do not serve those who, though within the wired-up areas, cannot afford the subscription fee; and **Third**, CATV systems do not provide the benefits of a locally originated television service, available to all without a charge, benefits which are important to the continued welfare of our political, economic and social systems."

9. In sum, ABC states, the present and prospective trend of CATV growth poses a threat to the kind of local television service now enjoyed by a great many communities throughout the country and fostered by the Commission for many years. It asserts that if CATV "systems of the type now being proposed in many major markets of the country

come into being carrying a dozen or more channels, the ability of stations now serving these markets to provide local service will be substantially impaired and UHF stations scheduled to go on the air in these markets may never get off the ground." Fundamentally at stake, according to ABC, is the question of whether CATV is to be permitted to rework the basic framework of the established broadcasting system from a multiplicity of local stations into a nationwide distribution of signals from major metropolitan centers like New York, Chicago, and Los Angeles. If this were to become the objective of national communications policy, contrary to longstanding Commission and Congressional views as to the public interest, more efficient and satisfactory means than CATV distribution could be devised, such as space satellites.<sup>3/</sup>

10. While taking the position that the Commission's general powers under the Communications Act include authority to prevent persons other than licensees from causing an undue burden on interstate commerce in conflict with the basic purpose of the Act and the responsibilities of the Commission,<sup>[4]</sup> ABC invokes particularly the specific authority conferred by Section 303(h) to "establish areas or zones to be served by any station" (47 U.S.C. 303(h)). It requests the Commission to propose and adopt rules which would define the areas and zones normally to be served by television stations and prohibit the use of the stations' signals to serve other areas except upon prior consent of the Commission or in accordance with established regulations defining the basis upon which the signal could be extended beyond the normal service area of the station.<sup>[5]</sup> ABC urges that the power to determine the areas or zones to be served by any station necessarily includes the correlative power to make these determinations effective against non-licensees pursuant to the provisions of Section 4(i), 303(r), 312(b) and 502 of the Communications Act. It notes that these sections do not in terms restrict the Commission's authority to the imposition of limitations on licensees themselves, and that explicit authority to deal with specific practices is not required. **National Broadcasting Company v. United States**, 319 U.S. 190, 218-219; **American Trucking Association v. United States**, 344 U.S. 298, 309-312; **Federal Communications Commission v. Pottsville Broadcasting Co.**, 309 U.S. 134, 138; **United States v. Pennsylvania R. Co.**, 323 U.S. 612. And, finally ABC requests the Commission to exercise this authority promptly to prevent imminent frustration of the development and growth of local services through the

3. ABC points out that the National Association of Broadcasters expressed a similar concern about the trend of CATV in its comments in Docket Nos. 14895 and 15233 as follows:

"If multiple signal choices were to be the prime objective of communications policy of the United States, as developed by Congress and the Commission, it would have been a rather simple matter to provide for satellites scattered throughout the country, interconnected with New York and Los Angeles. By this means, every community would receive several television signals. But the Congress and the Commission have decided otherwise; that a paramount objective of television broadcasting is to provide each community with at least one local facility.

"If the microwave complex is permitted to relay signals over long distances, an advertiser will soon find that he can secure wide coverage simply by buying a few stations in large metropolitan areas. Non-duplication prohibitions would not remedy this condition. This proliferation of distant signals will result in curtailed buying of local markets by advertisers, which in turn will soon exert economic pressure on countless local outlets with a corresponding depressing influence upon the ability to program locally.

"Accordingly, we submit that the Commission should extend its consideration of microwave applications to include factors beyond simple non-duplication restrictions. It should examine and evaluate the effect the extension of a station's signal far beyond its designated service area would have on overall allocation policies."

4. ABC notes that the National Community Television Association has taken the position before the Connecticut Public Utilities Commission that "a community antenna television system is directly concerned with television broadcasting" and that "the matter of protection of local television stations" lies in a "sensitive area of regulation which the Federal Government has wholly preempted."

5. ABC also requests the Commission to issue a policy statement to the effect that local television broadcasters should be preferred in the issuance of CATV franchises in their communities.

uncontrolled use of station signals by CATV systems.

11. b). **The Springfield Request for Declaratory Ruling.** Springfield, the licensee of UHF station WRLP (Channel 32) in Greenfield, Massachusetts,[6] requests a declaratory ruling that all CATV systems are subject to the Commission's jurisdiction on the ground that there is an immediate and urgent need for the Commission not only to assert jurisdiction over all CATV systems but also to provide provisional relief from unfair and prejudicial competition to local stations by off-the-air CATV systems. Using its own situation as an example, Springfield states that the number of CATV systems in competition with WRLP has grown from nine in 1957 to over 20 at present. These CATV systems bring into the WRLP service area television signals from such distant cities as Albany, Schenectady, Utica and New York, New York; Poland Spring, Maine; Manchester and Durham, New Hampshire; Boston, Massachusetts; and New Haven and Hartford, Connecticut. Since only one of the CATV systems uses microwave, the rule making in Dockets Nos. 14895 and 15233 will afford WRLP little relief. Springfield has been unable to reach any satisfactory arrangement with the off-the-air CATVs concerning the carriage and non-duplication of the WRLP signal, and, because of declining revenues, has been forced to discontinue local program origination on WRLP.

12. Springfield predicates Commission jurisdiction on the theory that CATV systems, in receiving and distributing television signals by wire to the public, are engaged in interstate communication by wire within the purview of Sections 2(a) and 3(a) of the Communications Act. Section 2(a) states that the provisions of the Act "apply to all interstate and foreign communication by wire or radio" and Section 3(a) defines "communication by wire" as the "transmission of writing, signs, signals, pictures and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission." Springfield asserts that CATV systems are an integral part or connecting link in the dissemination of television signals between the originating facility and the viewing public, and hence are incidental to interstate transmission. For, while the CATV systems themselves are usually located within one community within one state, it is established that the television signals intermediately received, forwarded and delivered by the CATV are interstate commerce.

13. Like ABC, Springfield finds ample basis for Commission jurisdiction over

all CATV systems in Sections 4(i), 303 and 307(b) of the Communications Act and the principles laid down in cases such as **National Broadcasting, American Trucking, and Pennsylvania R. Co.**, in upholding a regulatory agency's use of the broad powers conferred in its enabling statute to protect the integrity of the regulatory scheme.[7] It requests the Commission to issue a declaratory ruling that all CATV systems are subject to the Commission's jurisdiction and to impose interim operating provisions similar to those adopted in Docket Nos. 14895 and 15233. Springfield claims that prompt action is essential to the success of the all-channel law and expanded use of UHF in small and medium size markets, as the rapid expansion of unregulated "off-the-air" CATV systems is inhibiting investor interest in UHF television and may permanently stunt the growth of UHF. Asserting further that relief accorded only after lengthy proceedings would come too late, Springfield states that interim provisions are required during the pendency of final rule making and, being "procedural" in nature, could be imposed summarily.

14. c). **The Boise Petition for Interim Relief.** Boise, the licensee of station KBOI-TV in Boise, Idaho, states that it has also filed a petition to deny pending applications for microwave facilities which would relay signals of four stations in Salt Lake City, Utah (approximately 250 miles from Boise), to CATV systems in two communities within KBOI-TV's Grade A contour. Conceding that the remedy there requested would be adequate for its own immediate purpose, Boise says that concern over the broader interests of the public has compelled it also to file the instant petition affirmatively supporting ABC's request and presenting additional considerations.

15. Boise states that by allowing CATV to operate uncontrolled, the Commission is, to a considerable extent, abdicating its responsibilities under Section 315 (political broadcasts), 317 (sponsorship identification) and 310 (citizen control requirements) of the Communications Act, as well as under its own "fairness doctrine" (controversial issues), enunciated in **Report on Editorializing by Broadcast Licensees**, Docket No. 8516, 13 FCC 1246, and policies against undue concentration of control of communications media (multiple ownership rules). It urges that these provisions were enacted by Congress or promulgated by the Commission to ensure that the public receives an equal presentation by legally qualified candidates for public office and a fair presentation of controversial issues, is advised of the origin of advertising claims, and is secure in the knowledge that the material it receives has been distributed over facilities controlled and operated by United States citizens, with diversification of

ownership. The intent of Congress to protect the viewing public in these respects extends to all viewers, and it "is unrealistic to overlook the fact that, through the community systems" the subscribing members of the public "are receiving and are, in a sense, being served by the programs of the originating station." **Clarksburg Publishing Co., v. Federal Communications Commission**, 255 F. 2d 511, 517 (C.A.D.C.). CATV operators determine what their subscribers shall view, and being free of all regulation, need not be citizens, can achieve unlimited concentration of control, may censor, advertise without sponsorship identification, and ignore the "fairness doctrine" and equal time requirements for political broadcasts.

16. Boise accordingly urges that Commission jurisdiction over all CATV is necessary to achieve the purposes of Sections 310, 315 and 317 of the Communications Act, as well as to effectuate the Commission's fairness and diversification policies, and can validly be asserted under the doctrine of **American Trucking Association v. United States**, 344 U.S. 298. Alternatively, in the event that the Commission decides against asserting jurisdiction on the basis of its present authority, Boise seeks the imposition of a freeze on all microwave grants for CATV use, or at least those which would extend station signals more than 100 miles from the transmitter, to protect the integrity of the Table of Assignments pending the enactment of legislation in this field and the finalization of administrative rules. It further suggests that translator stations and CATV systems should be accorded like treatment by the Commission, i.e., that translators should not be barred from obtaining microwave facilities if they are made available for CATV use and that the rebroadcast permission required for translators under Section 325(a) of the Communications Act should similarly apply to CATV operations.

17. d). **The Westinghouse Petition.** Westinghouse[8] petitions the Commission to exercise plenary jurisdiction over all CATV systems, institute a new fact finding and rule making proceeding directed to all phases of CATV concern, and consolidate the proceedings in Docket Nos. 14895 and 15233, Docket No. 15415 (with respect to CATV ownership by broadcast licensees), and RM 672 (the ABC petition).[9] Specifically, Westinghouse recommends that CATV be limited to those areas outside the overlapping Grade A contours of three or more commercial television broadcast stations, except where it seeks only to provide better reception of local signals in poor reception pockets, and also that CATV be barred for a reasonable period from entering any two-station market where a construction permit has been secured for a third station.

6. Springfield is also the licensee of UHF stations in Springfield and Worcester, Massachusetts, and the permittee of a UHF facility in Dayton, Ohio. Previously, on July 28, 1964, Springfield filed a petition for rule making (RM-636) to establish technical standards for CATV operations. This petition, and comments already received, will be placed in this docket for further comment.

7. Springfield also cites **Federal Communications Commission v. Pottsville Broadcasting Co.**, 309 U.S. 134; **Phelps Dodge Corp., v. NLRB** 313 U.S. 177; **Houston, East and West Texas Railway Co. v. United States**, 234 U.S. 342.

8. Westinghouse bases its interest in this matter on its position as a licensee of television stations in Boston, Baltimore, Pittsburgh, Cleveland and San Francisco, and on the fact that a CATV microwave common carrier and four CATV systems are owned by its parent corporation, Westinghouse Electric Corp. Westinghouse also asserts an interest on the basis of its status as an independent program producer and distributor.

9. A "Motion in Support of Petition for Consolidation of Proceedings and in Opposition to Assertion of Jurisdiction over Community Antenna Television Systems," filed by National Community Television Association Inc., on February 19, 1965, apparently also seeks consolidation of Docket No. 15586.



18. Taking the position that CATV in its original role as an extension of service to inadequately served areas is a necessary and desirable adjunct of television broadcasting, Westinghouse states that the principal cause for alarm today is the altered direction of present CATV growth into larger and larger markets—many with three or more existing stations. It points, *inter alia*, to the six pending applications for CATV franchises in Philadelphia (noting that one of the applicants has announced his intention to spend approximately 40 million dollars in the development of a Philadelphia system); to the contract signed by Mohawk Valley Community Antenna for installation of a CATV system with 60,000 possible connections; and to the award of a CATV franchise for the suburban Philadelphia community of Upper Darby which is intended to be “the nucleus of CATV systems to serve many additional areas in the Delaware Valley.” Westinghouse predicts that within the next three months applications for CATV franchises will be filed in every major city of the country, and that the final step in the development of CATV will be a national CATV “network” making all the channels of New York, Los Angeles and perhaps other major cities available from coast to coast.

19. In the view of Westinghouse, the rapid and unregulated growth of CATV in this direction endangers the Commission’s blueprint for television service, as set forth in the Sixth Report and Order, and will frustrate Commission policy with regard to UHF. It has been established, Westinghouse claims, that UHF stations have a much better chance of success in the major metropolitan areas where the opportunity for broad advertising support exists. Because of the all-channel receiver legislation, the growth of UHF might be stabilized by the promise of steadily increasing audiences but for investor uncertainty about the trend of CATV. Westinghouse states that if allowed unrestricted growth, CATV will almost certainly impede the development of new stations in markets otherwise capable of supporting them.

20. Westinghouse further states that CATV entry into the larger markets will undoubtedly have an adverse effect upon much of the independent programming now presented by stations in those markets, and on Westinghouse’s own activities as an independent program source. In keeping with the Commission’s policy of fostering diversity of programming sources, Westinghouse has actively endeavored to develop independent programming, such as the “PM East and PM West” series, the “Mike Douglas” show, “The Steve Allen Show,” the Civil War series, and “That Regis Philbin Show.” If programs such as these, which ordinarily would be sold to many independent stations across the nation, are carried by CATV into their markets, many of these stations would be unwilling to purchase the programs. Thus, Westinghouse’s economic base, upon which such substantial programming efforts necessarily depend, would gradually be destroyed by inability to make sufficient sales. Assuming a five-year growth of CATV systems in the East on

the scale established during the last two years, Westinghouse states that the cumulative adverse effect on independent programming sources in the larger markets would indeed be serious.

21. Westinghouse contends that its proposal for barring CATV from areas which now or in the near future will be served by three commercial stations, would further the public interest and effect a reasonable accommodation of the conflicting interests of the television broadcast and CATV industries, in harmony with the Commission’s policy on the development of stations. It urges that the millions of Americans throughout the United States living in areas not served by three or more television signals, and therefore unable to receive the major programming services, should not be compelled to wait indefinitely for service. CATV can fill the television needs of such areas today, and should be allowed to do so, since the larger, more densely populated areas offer more promise for new UHF stations in the near future than low density areas. While CATV would probably have some adverse economic impact on existing stations, this impact is offset in one and two station markets by the substantial benefit accruing to the public in the additional program choices provided by CATV. [10] No corresponding benefit can be demonstrated in three or more station markets, where the contribution of CATV is minimal. In such markets, CATV can offer the viewing public little more than a duplication of programming which either has been or soon will be available via the local stations. Moreover, the possible loss to the public is much greater because of the eroding effect CATV would have on the sources of independent programming. Accordingly, Westinghouse believes that barring CATV from such areas while permitting it to serve all areas not adequately receiving the three major programming sources would provide a tremendous benefit in terms of increased service to millions of Americans, while maintaining CATV in its traditional position as a fill-in service complementary to television broadcasting.

22. Westinghouse strongly urges that it is imperative for the Commission to stay immediately the commencement of operations by CATVs in those areas which now or in the near future will be served by three or more commercial stations pending the adoption of final regulations to this effect. It states that once CATV franchises are granted in the larger markets and construction is commenced pursuant to those grants, the Commission will in fact have lost effective control of television allocations in those areas. Should even a small part of the ambitious \$40,000,000 Philadelphia CATV plan be consummated, the practical and legal difficulties which the Commission would encounter in attempting to reverse the situation would be virtually insurmountable. Moreover, prompt Commission action is asserted to be essential to remove the uncertainty as to the future role of CATV which is discouraging investment in new UHF facilities. Westinghouse states that if the Commission fails to act within

the reasonably near future, Westinghouse will be obliged to file “protective” applications for CATV franchises in those cities it now serves through television broadcasting when applications are filed by others, even though disagreeing in principle that these adequately served markets should be open to CATV.

23. e) **The MST Petition for Rule Making.** The MST petition for comprehensive rule making governing all CATV systems renews, with some amplification, the jurisdictional arguments made by the other petitioners. In support of its request for prompt rule making action and a stay of microwave grants pending the adoption of rules, MST urges that “CATV’s rapidly accelerating movement away from its historic and proper role as an auxiliary, ‘fill-in’ service bringing television to areas unable to receive off-the-air broadcast service poses a grave threat to the growth of commercial and educational UHF television, to the integrity of the nationwide system of television allocations and to the continuation, improvement and expansion of free, competitive, local and area television broadcasting generally.” MST states that regulation of microwave CATV only, and the imposition of carriage and non-duplication requirements alone, would be insufficient to avert the threat. It asserts that the present trend of CATV development, if unchecked and inadequately regulated, would disrupt the growth of UHF television and frustrate the goals of the all-channel receiver legislation; could lead to the destruction of the system of television allocation through fractionalization, blacking out or impairing local and area broadcasting service; and might prove to be the means of a gradual transition from advertiser-supported free television to Pay TV. MST urges that CATV must be confined to its proper role as an auxiliary “fill-in” service, bringing television service into areas which cannot be expected to receive off-the-air broadcast service now or in the near future; for, CATV can appropriately supplement, but must not supplant, television broadcast service.

24. Accordingly, MST requests the Commission to assert jurisdiction over all CATV systems without further delay, pursuant to its existing authority, and to proceed expeditiously towards the adoption of rules which would achieve adequate regulation, since the “longer action is delayed, the more serious the impact of CATV, the more uncertain the rules of the game and the less effective the action.” Pending the adoption of rules, MST seeks a stay on microwave grants for CATV use. It states: “Such a stay is warranted here because of the scope of the problem, because conditions are changing at a rapid pace and because there are now no Commission rules dealing in any way with CATV except as to limited technical matters. Additionally, the Commission should put on notice all persons who now operate or who propose to operate CATV systems that CATV operations, whether or not microwave delay is used, will be subject to regulation, and that some CATV systems may be required to modify or cut back their operations.”

25. Specifically, MST requests the

10. Westinghouse would make an exception for two station markets where a construction permit for a third station has been granted, permitting CATV only in the event the third station was not on-the-air after a reasonable period like six months.

Commission to initiate rule making of general applicability which would:

(1) Provide appropriate standards to govern the technical quality of signals distributed by CATV;

(2) Prevent CATV from duplicating within a specified period, the programming of television broadcast stations which serve, or which normally would be expected to serve, the community in question, and establish proper classifications to determine the circumstances under which CATV will not duplicate the programming of a station;

(3) Subject to non-duplication requirements, require the CATV system to carry the signal of any station within the Grade B or better contour of which the community served by the CATV is located;

(4) Permit a signal to be carried by CATV only if the community is located within a prescribed signal contour of the station carried, or is closer than a specified distance from the station, or is consistent with a standard combining both distance and signal contours.[11]

(5) Limit, with respect to television and visual material generally, CATV systems to reception and simultaneous retransmission of broadcast signals, without insertions or deletions;

(6) Require the filing of full information with respect to ownership interests in, direct and indirect control of, and officerships and directorships in CATV facilities.

#### DISCUSSION

26. The above-described petitions raise substantial questions of fundamental importance to the Commission's responsibilities under the Communications Act. We discuss in Part I below the requests for Commission action to extend the requirements of Docket Nos. 14895 and 15233 to all CATV systems, and in Part II the additional questions presented by petitioners' requests for other measures.

#### PART I

27. Insofar as petitioners urge that the rules governing CATV systems using microwave should extend to all CATV systems, we are in agreement. It has already been determined in the Report and Order in Docket Nos. 14895 and 15233 that CATV systems should carry local stations without duplication. The considerations underlying our conclusion that this is necessary in the public interest to avoid unreasonable competitive disadvantage and prejudicial effect on existing and potential television broadcast service, apply equally to all CATV systems and need no elaboration here. The main questions are therefore (1) whether the Commission

can appropriately proceed on the basis of its present statutory authority and (2) whether there are any special problems of substance or procedures inherent in an extension of the carriage and non-duplication requirements to non-microwave, or so-called 'off-the-air' CATV systems.

28. The Commission's jurisdiction to regulate non-microwave CATV systems under the present provisions of the Communications Act is obviously subject to reasonable difference of opinion. We have on more than one occasion in the past concluded that the Communications Act, without amendment, probably would not support broad jurisdiction, though not disclaiming jurisdiction to prevent adverse CATV impact on television broadcasting.[12] Moreover, we have previously taken the position that clarifying legislation would be appropriate, even assuming present jurisdiction, and have recommended such legislation to Congress: While the 86th Congress gave extensive consideration to some of the various proposals submitted by the Commission and others, no legislation was enacted and bills introduced in subsequent Congresses received no action.[13] However, neither the Commission's prior pronouncements nor the failure of Congress to act favorably on clarifying proposals is determinative of the legal question of the Commission's jurisdiction and authority over off-the-air CATV systems under the existing provisions of the Communications Act. **Helvering v. Clifford**, 309 U.S. 311, 337-338; **United States v. Price**, 361 U.S. 304, 310-313; **American Trucking Assoc. v. United States**, 344 U.S. 298, 314; **Carter Mountain Transmission Corp. v. F.C.C.**, 321 F. 2d 359, 364 (C.A.D.C.), **cert. den.** 375 U.S. 951 (1963)

29. Petitioners have made a strong case in support of present jurisdiction. We have carefully reexamined the pertinent provisions of the Communications Act in light of their arguments and the authorities cited. Upon such reconsideration, we conclude, for the reasons set forth in the attached memorandum as to jurisdiction, that CATV systems are engaged in interstate communication by wire to which the provisions of the Communications Act are applicable (Sections 2(a) and 3(a), 47 U.S.C. 152(a) and 153(a)). It would further appear that the Commission's statutory powers, particularly under Sections 4(i), 303(f), (h), and (r), include authority to promulgate necessary and reasonable regulations to carry out the provisions of Sections 1 and 307(b) of the Act and to prevent frustration of the regulatory scheme by CATV operations, irrespective of the use of microwave.[14]

30. For the reasons set forth in the Report and Order in Docket Nos. 14895 and 15233, it is desirable to extend the requirements there adopted to all CATV systems. We have accordingly decided to institute rule making to that effect. Although not specific rules are appended, it is proposed to make the substantive provisions of the rules adopted in Docket Nos. 14895 and 15233 applicable to all CATV systems. We repeat that two particular issues are raised—(i) the Commission's authority to promulgate such rules and (ii) the problems of substance or procedure posed by rules going to non-microwave CATV systems. In the latter respect we also point out that we shall take into account the experience gained, or additional information received, as a result of interim operation under the revised provisions adopted in Docket Nos. 14895 and 15233, prior to their becoming generally applicable. In this way, we shall be in a position (assuming favorable resolution of the jurisdictional issue) to promulgate rules affecting all CATV systems and fully and fairly implementing the public interest both with respect to establishment and maintenance of local broadcast service and the provision of multiple television services. See par. 6, FCC 65- , issued this day.[15]

31. Other matters should be pointed up. While we have initially concluded that we have jurisdiction, we would carefully consider comments addressed to this aspect. The attached memorandum presents the case for jurisdiction — a strong one in our view — and is set out in order to afford the interested parties a full opportunity to direct their comments to that case. Second, we adhere to our position that clarifying legislation would be desirable, and have no intention of by-passing Congressional action in this field. We are clearly concerned here with new and important questions of policy and law in the communications field. That being the case, the 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. It is our understanding that hearings will shortly commence. The information gathered in this proceeding will, we think, be of assistance to the Congress in its consideration of the matter. In short, by instituting this proceeding, we shall gather essential data, both for the Commission and the Congress, and will have conserved valuable time and be in a position to take final effective action in either of two eventualities: (1) Congress has enacted legislation in this field which does not preclude the

11. In a policy statement submitted to the Commission, MST suggested the Grade B contour of the station carried, or a distance of 80-90 miles.

12. See **Frontier Broadcasting Co. v. Collier**, 16 Pike & Fisher, R.R. 1005; **Report and Order in Docket No. 12443**, 26 F.C.C. 403; **Distribution of Television Programs by CATV Systems**, FCC 62-871.

13. Following the Report and Order in Docket No. 12443, *supra*, the Commission recommended that the Congress amend the Communications Act to require CATV systems to obtain the consent of the stations whose signals they transmit, and to carry the signal of the local station (without degradation) upon request. These proposals were embodied in S. 1801 and H.R. 6748, introduced in the 86th Congress, including S. 2653 (providing for the licensing of CATV systems) and S. 2303 (providing for the issuance of certificates of convenience and necessity). The Communications Subcommittee of the Senate Committee on Interstate and Foreign Commerce held hearings on these bills, and several other bills which involved CATV systems, including S. 1739, S. 1741 and S. 1886. On September 8, 1959, the Committee on Interstate and Foreign Commerce reported favorably on S. 2653. **S. Rept. 923, 86th Cong., 1st Sess.** In 1960, following two days of debate on the floor of the Senate (106 Cong. Rec. 10326, 10344, 10407, and 10520), S. 2653 was recommitted to the Committee on Interstate and Foreign Commerce by one vote, 106 Cong. Rec. 10547. As a result, no legislation relating to CATV systems was enacted in the 86th Congress. In the 87th Congress, the Commission proposed S. 1044 and H.R. 6840, which would have expressly authorized the Commission to issue rules for the protection of stations providing locally-originated television programs. These bills received no action. The Commission proposed no legislation to the 88th Congress, and no action was taken on any bills.

14. In initially reaching this conclusion, we have considered the various comments submitted in opposition to the ABC and other petitions.

15. Since there has been extensive examination of the matters in Docket Nos. 14895 and 15233, a shorter time for filing comments and reply comments on Part I will therefore be scheduled. We are unable to agree with Springfield's contention that immediate relief is procedural in nature or to conclude that summary procedures would be proper.

Commission from promulgating rules along the lines of those adopted in Docket Nos. 14895 and 15233; or (2) no legislation is forthcoming, and the comments in the rule making proceeding lead to the conclusion that the Commission does have present jurisdiction to extend the substantive provisions of the rules adopted in the above dockets to all CATV systems, whether or not they use microwave facilities. In the latter event, we would be remiss in our statutory duties if we had failed to exercise, without undue delay, our existing jurisdiction and authority to promote a public interest in this important area. The rule making proceeding instituted by this Notice will thus be conducted concurrently with legislative consideration, with final Commission decision withheld for an appropriate period to afford Congress an opportunity to act.

32. Third, in the event that it is ultimately determined that the Commission has jurisdiction over all CATV systems, we do not contemplate regulation of such matters as CATV rates to subscribers, the extent of the service to be provided, or the award of CATV franchises. Apart from the areas in which the Commission has specifically indicated concern and until such time as regulatory measures are proposed, no federal preemption is intended. Rather, we view our role as one of cooperating with local franchising authorities and state regulatory commissions to the maximum extent possible, such as by making information available to them, consulting with respect to technical standards for CATV operations, etc.

33. Fourth, in Docket Nos. 14895 and 15233 we decided that the public interest would be served by some accommodation which would permit a CATV system to duplicate the programs of a local station in color where the station transmits only in black and white (Report and Order in Docket Nos. 14895 and 15233, par. 143). However, we were unable to determine without further information whether this exception should apply across the board or whether the CATV system should be required to make a showing that a certain number or percentage of its subscribers possess color receiving sets before color duplication would be permitted. Accordingly, comments are requested as to whether the rules should require a threshold showing by the CATV and, if so, what kind of showing would be appropriate. Whether or not the Commission adopts rules going to all CATV systems, the comments received will, in any event, be applicable to microwave CATV systems.

34. We will consider in this proceeding the question of whether there should be some kind of transition period before the carriage provisions are made fully applicable to microwave and non-microwave CATV systems with limited channel capacity. It is contemplated that a questionnaire will be mailed to every known CATV operator in the near future seeking specific information to assist in making this determination (see FCC 65- , par. 161). In the event that any CATV operator is inadvertently omitted from such distribution, a copy of the questionnaire will be supplied upon request to the Commission.

35. The proceedings in Docket Nos. 14895 and 15233 were primarily concerned with commercial rather than educational television stations (ETV). While the carriage requirements were made applicable to educational stations, the non-duplication provisions were not, since many of the pertinent considerations are obviously not present in the case of ETV. We recognize, however, that the carriage requirements alone may not be sufficient to promote the sound growth of local educational stations. Accordingly, information is requested in this proceeding as to the nature of any further problems of ETV arising from CATV operations and what Commission action might be appropriate.

36. We are also interested in such questions as whether the carriage and non-duplication requirements should be extended to protect station-owned translators, which are located outside the station's predicted Grade B contour, so as to encourage these off-the-air facilities. If protection were to be accorded such translator facilities, should the rules be along the lines of those adopted for local stations or would different provisions be more appropriate? Conversely, some of the comments in Docket Nos. 14895 and 15233 suggested that station-owned translators should be precluded from duplicating the programs of local stations. Interested persons are invited to address themselves in this proceeding to the question of whether there is a problem warranting action.[16]

#### PART II

37. The petitions also raise broader questions of substance concerning CATV development, both microwave and non-microwave, which were not involved or settled in Docket Nos. 14895 and 15233. Thus, it is asserted (1) that the trend of CATV entry into large population centers like Philadelphia and Cleveland poses a threat to the development of independent stations and program sources, which will not be averted by the carriage and non-duplication requirements and which may frustrate the goal of the all-channel receiver legislation in the communities with the most immediate promise for new UHF facilities. It is also asserted (2) that generalized restrictions on the distance the signal of a television station may be extended beyond the stations contour are necessary in order to prevent the multiplicity of local stations contemplated by the Sixth Report and Order from being ultimately displaced by a CATV "network" distributing the New York, Chicago, and Los Angeles stations nationwide. And it is asserted (3) that CATV systems should be required to select the stations they carry in an order of priority determined by the distance of each station from the system, i.e., that the system should carry nearer stations in preference to more distant ones, so as to avoid "leap-frogging". Next, the petitions raise a question (4) as to whether CATV systems should be limited to receiving and simultaneously retransmitting television broadcast signals without addition or deletion, or should be subject to Sections 315, 317 and 310 of the Act and various Commission policies, e.g., the "fairness doctrine" and concentration of control policies). A related question is presented as to the possible develop-

ment of combined CATV-Pay TV to avoid adverse consequences to the operations and the need for regulation free television broadcast service. And (5), it appears to the Commission that there are other areas of concern.

38. For the reasons next set forth, we believe that inquiry to ascertain the facts in each of these areas is warranted in the public interest. The inquiry will develop information upon which we can determine whether rules or legislative proposals to the Congress are appropriate.

#### (1) Effect on Development of Independent (Non-Network) UHF Stations.

39. Of concern to the Commission is the mushrooming entry of CATV into major centers of population insofar as this affects the opportunities for new UHF stations. The developing pattern of CATV described by petitioners is confirmed by the CATV industry itself as an augury of coming events. The largest CATV group, H & B American Corporation, recently advised its stockholders that CATV activity in larger cities is of first importance among significant CATV developments, stating:

"First, and of overriding importance, is the shift of CATV strength to a new locus. The centers of the most intense CATV development now are the very large cities. In the past our attention was focused on the smaller markets and in these we reached about 2% of the nations' television population.

"But today we are in the throes of spirited competition for the development of cities such as New York, Philadelphia, Cleveland, Birmingham, Syracuse, Rochester, Wilmington, Norfolk, the entire State of Connecticut and entire counties such as the 37 cities of Camden County, New Jersey, all of Montgomery and Chester County, Pennsylvania, etc. Baltimore will be the next large U.S. city to receive multiple CATV franchise applications.

"The competition for CATV franchises is unparalleled in the history of American communications. It exceeds even the pell-mell scramble for television broadcasting permits that occurred throughout the U.S. in the first few months after the long television freeze in the late forties and fifties. We learn that new CATV systems are being sought or authorized at the rate of one a day. It is reported that at the end of 1964 700 cities throughout the nation were entertaining CATV proposals.

"In virtually every instance these authorizations are fought for in intensively competitive proceedings before local governing bodies. The applicants represent a cross section of the most prominent companies in the nation. For example, in Philadelphia they include the Philadelphia Bulletin, Storer Broadcasting the Philadelphia Inquirer-Triangle-Annenberg interests, a number of well financed influential local groups and a sprinkling of large CATV organizations."

40. The shift in the locus of CATV activities to the larger cities is cause for concern as to the effect on UHF and the stated goal of Congress in enacting the all-channel receiver legislation to make "provision for at least four commercial stations in all large centers of popula-

16. In this connection, comments are requested on the extent to which networks and other program suppliers, through contracts or otherwise, affirmatively restrict duplication by translators.

tion' (H.R. Rept. No. 1559, 87th Cong., 2d Sess., p. 3). The following are the underlying Congressional and Commission policy considerations as to development of the UHF:

41. (i) Congress has only recently reaffirmed the goal of "an effective national television' system through use of the UHF channels (*id.*, p.6; see also p. 3). As the first item in such an effective television system, Congress listed the need "for at least four commercial stations in all large centers of population" (*id.* at p. 3). Such a fourth station might make possible a fourth national network or the formation of FM-type "networks' in television, thus bringing added diversity to the field. Or, as both House and Senate reports stress, such a station might be "available particularly for local programming and self-expression. . . — an important need in many markets "because all of the available stations are network affiliates" (H. Report, p. 3; Sen. Report. No. 1526, 87th Cong., 2d Sess., p.4). In short, the fourth commercial station is important both to make our system "truly competitive on a national scale" (H. Rept. p. 3) and to further better local service.

42. (ii) Congress has also determined that the way to achieve the above goal is through effective use of UHF channels, since most large centers of population now have three full network stations and no unoccupied VHF frequencies. While Congress was generally aware of CATV (e.g., the same Senate Committee which considered the all-channel television receiver law in 1962 had held extensive hearings on CATV in 1959), it stated its view that all-channel receiver legislation, because it would develop UHF, "is not only the best but the only practicable way of achieving and adequate commercial and educational system in the United States" (H. Rept. at p.4; Sen. Rept. at p.7). It therefore enacted this "unique" all-channel set legislation, stating the increased price which the consumer will have to pay, at least initially, for all-channel sets "will be well worth the cost if this is the only way in which the American people can be assured of the benefits of television service to the fullest degree" (H. Rept. at pp. 8-9). Since the sale of television sets now exceeds 9,000,000 a year, the American people are now paying those costs, in the substantial amount of many millions each year.

43. (iii) There is every present indication that the all-channel set requirement is having its desired effect, and that the legislative goal is in the process of being realized. There has been greatly increased interest in UHF, with many applications filed — preponderantly for the larger cities. See attached chart (Appendix A) showing the markets with no commercial UHF station on the air but with com-

mercial UHF construction permit granted and/or commercial UHF channels applied for. But as Congress noted in 1962, the all-channel law will not smooth the road for the UHF broadcaster overnight; rather, "Substantial time will have to elapse. . . before a large majority of the public becomes equipped with all-channel receivers" (H.Rept. at p. 7; Sen. Rept., at p. 6).

44. (iv) The Commission also has noted that UHF stations face considerable obstacles during this crucial period. UHF must overcome the psychological factor of its previous failure in intermixed markets. Further, apart from intermixture and the initial limitation on audience pending set conversion or turnover, independent UHF stations in these cities will compete with three network affiliates for audience attention without having the advantage of the attraction of the popular network programming. The Commission therefore has stressed that it will not now take action which would be inconsistent with the Congressional goal and which might jeopardize the "investment in all-channel receivers' (H. Rept. at p.8) which has been asked of the American public.

45. The question before the Commission is what is the effect of CATV entry into the large markets upon the realization of the above goals for UHF. The problem is perhaps best pointed up by consideration of a specific case — Philadelphia. That city is a prime example of a potential UHF activity, with two UHF independent stations scheduled to go on the air in mid-1965. But Philadelphia is also a prime example of CATV activities, with the CATV applicants in Philadelphia proposing to carry the New York independents. The Philadelphia UHF stations, in competing with three network VHF stations, will be relying solely upon reaching an audience interested in independent (non-network) programming. Since the local competition is not only VHF but enjoys the advantage of popular network programming, unexpected factionalization of the audience interested in independent programming could be particularly harmful to these independent stations. [17] And, the CATV will be doing just that — bringing in three New York stations which also direct their efforts to the audience interested in independent programming. The crucial question is thus whether the result will be that New York independents will, in effect, be replacing Philadelphia UHF independents, with a concomitant loss of local service or the other advantages noted in par. 41.

46. The Commission needs further information with respect to that question before reaching a conclusion. On the one hand, it is urged that CATV systems in Philadelphia or similar large cities will remain relatively small and do not pose any significant threat to the legislative

goal noted in par. 41. See, e.g., Seiden Report, pp. 84-86. Indeed, it is urged that the CATV system will benefit the new UHF operation by bringing the UHF station's signal into homes which do not yet have all-channel receiver sets or where UHF reception might otherwise be difficult.[18] There are, however, indications running counter to the claim that CATV operations will have relatively little impact. Consider, for example, the extensive nature of the CATV operations proposed in some of the large cities (in Philadelphia, we are told that a 40 million dollar CATV investment is contemplated). And, generally, the spirited competition for CATV franchises in major cities by well-financed groups would appear to reflect the confidence of the CATV applicants in their success.[19]

47. It may be, after development and study of the facts and consideration of the arguments of interested persons, that the problem will appear less serious or take on new aspects. Or, it may be that CATV systems should not enter markets like Philadelphia for a period of four or five years — roughly the length of time remaining, which Congress specified as necessary in order to permit the substantial effects of the all-channel set law to be felt (i.e., to permit UHF independent stations to gain a proper foothold). We need further information before reaching a decision and, for that reason, are initiating this inquiry. For, we do know that we would be wholly remiss in our responsibilities if we ignored the problem — and simply permitted events to occur (indeed, often with the aid of our authorizations in the microwave services) which might jeopardize the Congressional goals just set, and the "investment in all-channel receivers" which the public is now making. If such goals are to be changed, that is a matter for Congress (with our task to collect the facts and make appropriate recommendations).

48. Accordingly, inquiry is warranted to determine the conditions under which CATV should be permitted to operate in areas with potential for independent stations. Such areas include not only communities with four or more commercial channel assignments but also those areas where any new station would rely very substantially upon independent programming sources because of overshadowing by three network services from nearby communities. Since we have no preconceived views as to the role of CATV in these areas or what conditions might be appropriate, comments furnishing full information as to pertinent factors and suggesting possible measures for achieving a reasonable accommodation are invited from all interested persons. As a starting point, comments are requested on the measures and proposals urged by petitioners in this respect.

49. While the proceeding is under

17. Moreover, the non-duplication time period prescribed in Docket Nos. 14895 and 15233 is geared largely to the schedule of network program distribution, on the premise that network affiliates will have a reasonable opportunity for viable operation if their popular network programming is not subject to CATV duplication. The prohibition against duplication 15 days before or after the local broadcast will provide only partial relief, at best, to independent stations, which rely on non-network programming that is not presented simultaneously, or nearly so, nationwide.

18. We note, however, in connection with the Philadelphia example which we have been pursuing above, that the franchise application of Jerrold Corp. in Philadelphia does not propose to carry the Philadelphia UHF stations on the CATV system, until such time as it might convert from a 12 channel to a 20 channel system.

19. We also note, in this regard, that the Seiden Report (pp. 85-6) does not consider the likelihood that the Philadelphia audience which would be attracted to the programming of the New York independent stations is the very heart of the audience at which any independent Philadelphia UHF station must aim. Instead, it is assumed that the potential Philadelphia audience for New York independent stations is like any other part of the Philadelphia audience, from the standpoint of Philadelphia independent stations. This assumption, we think, raises a question as to the correctness of the conclusion reached in the Report.

way, we shall carefully examine applications coming before us which involve the above problem. This means that pending the outcome of this proceeding, applications for microwave facilities to be used to relay the signal of any television station to a CATV system in a community with four or more commercial channel assignments and three or more stations in operation (or with at least two stations in operation and one or more stations authorized or applied for) must be accompanied by a clear and full showing that in the particular circumstances a grant would not pose a substantial threat to the development of independent UHF service in the area. A like showing must be made in applications for microwave facilities to serve a CATV system in a community where, because of its proximity to another community (or communities) having three or more existing commercial stations (e.g., within the Grade B contour of such three or more commercial stations), any new UHF television station would be independent in operation.

50. The foregoing takes up the Commission's concern and course of action as to microwave applications coming before it during the interim period while the proceeding is under way.[20] The same concern is applicable, whether or not the CATV proposes to employ microwave facilities, to situations where there is proposed large-scale CATV operations in major cities with burgeoning UHF independent development. Indeed, we note that the large-scale CATV operations proposed for Philadelphia do not make use of microwave facilities. We therefore request comments on what interim course of action, if any, may be appropriately followed by the Commission in this respect.[21] Since the matter is of such short-term nature (i.e., pending resolution of the proceedings), the shorter time period for comments and reply comments applicable to Part I of the Notice shall govern, and we will reach an early determination (see par. 30). In order to be in a position to take definitive action, if appropriate, we specifically invite comment on whether the foregoing course of action as to applications before the Commission should be extended to the non-microwave CATV system in the same type of situation (e.g., through a rule which would prohibit the extension of the signal of any television station beyond its Grade B contour into a community with the situation described above (par. 49), without there having been a clear and compelling showing that in the particular circumstances there is no threat to the development or maintenance of inde-

pendent UHF service in the community). This is also one of the matters which we shall bring to the attention of the Congress. Finally, we believe that franchising authorities will give due regard to the fact that the matter is thus under Commission consideration.

#### (2) Generalized Restrictions on CATV Extension of Station Signals.

51. Both the ABC and the AMST petitions urge that more general action is necessary to prevent fractionalization of audience and potential damage to the nationwide system of television broadcasting through a multiplicity of local stations contemplated by our allocations scheme. Accordingly, they propose general limitations upon a CATV's ability to extend the service area of any station—either in terms of distance from the station or of a specified signal contour or some combination of the two.[22] The issue is particularly raised whether the extension—perhaps for hundreds of miles—of the service of a powerful station operating in a very large market (and thus able to devote more resources to obtaining programming) may have an especially adverse impact upon the development or maintenance of the local stations contemplated by the allocations scheme.

52. We have reached no conclusion that broad scale restrictions along these lines are warranted.[23] Rather, as a part of our general inquiry, we invite comments directed to the proposals.

#### (3) "Leapfrogging."

53. Petitioners' assertions concerning the so-called "leapfrogging" issue (i.e., the distribution by the CATV system of distant signals in preference to signals of stations located much closer to the system) also raise a matter of future importance. Again we have reached no conclusion on this issue and would simply have the interested parties address themselves to it, both as to the facts and to pertinent policy considerations (and also the proposals which have been advanced by parties such as AMST in this respect). Thus, does it promote "the larger and more effective use of radio in the public interest" (Section 303(g)) if the closer signals are carried (on the ground that carriage of such signals would bring a programming service more likely to come closer to meeting the CATV community's interests than those from a distant state)? Is such carriage called for in the public interest in order to extend the service area of UHF stations or VHF stations serving sparsely populated areas—and thus enhance, to some extent, their chances of successful operation and their ability to serve fully the needs and interests of these areas? [24] If a policy along the foregoing

lines were to be adopted, should it be accompanied by a concomitant duty, on the part of the station carried, to provide some amount of programming of particular interest to the people in the CATV's community? Cf. **Petersburg Television Corp.**, 10 Pike & Fischer, R.R. 567, 584j - 584q; **NTA**, 22 Pike & Fischer, R.R. 273, 295. What kinds of disruption or other problems would such a requirement pose for CATV systems? If "leapfrogging" rules were adopted, is there a probability that the CATV, in order to meet the rules and still bring in desired distant signals, may distribute so many signals that the fractionalization of the audience aspect becomes much more serious (in the event there are local stations being carried pursuant to the requirements of the rules adopted in Docket Nos. 14895 and 15233)? These questions by no means exhaust the list of pertinent considerations to which we hope the interested parties will address themselves.[25]

#### (4) Program Origination or Alteration by CATV; Pay-TV or Combined CATV-Pay-TV Operations.

54. A fourth area of concern is the question of program origination or alteration by CATV. There was some indication in Docket Nos. 14895 and 15233 that CATV systems may be originating advertising material in some instances and deleting advertising from the station signals carried. We believe that inquiry is appropriate to determine whether CATV systems should be subject to the provisions of Sections 315 and 317 of the Communications Act and to a requirement that there be no deletion of the station identification announcement of any signals carried.

55. A related question is presented by the assertion of some of the petitioners that CATV might become a vehicle of Pay-TV or combined CATV-Pay-TV operations. They express a fear that the end result of such operations might be to siphon off top attractions from free television, if the fees obtained from large-scale CATV operations should enable CATV operators to outbid television broadcast stations in the program supply market, or that it might prove to be the means of a gradual transition from advertiser-supported free television to Pay-TV generally. It is further urged that CATV systems should not be permitted to use the distribution of free television signals as a base for engaging in Pay-TV operations. We have been advised of at least one instance where a CATV system has devoted a channel on the cable exclusively to the presentation of its own programming (both CATV originated local programs and films acquired from others).

20. We have also taken into account, in our decision to adopt this interim policy, the fact that the areas to which the policy will be applicable to do have a significant amount of television service, with additional new UHF service in the offing.

21. Such comments may discuss the jurisdictional as well as the policy considerations in any particular course of action.

22. We note in this connection that plans are on the drawing board for a CATV system capacity of 20 channels. Interested persons may wish to address themselves to the question of what effect CATV operations of this or a similar nature might have on local stations in terms of fractionalization of audience, and whether some limitation as to the number of signals carried should be considered.

23. Certainly, we have not concluded that there should be restrictions which might prevent areas now without the benefit of the basic services of the three national networks from ever obtaining those benefits. But here we note that AMST would appear to urge exceptions to the general restrictions it proposes where a CATV makes a showing of public need for its service.

24. In this connection, we note our discussion in the Report and Order in Docket Nos. 14895 and 15233, par. 69, as to increased awareness by rating services and advertisers of CATV penetration and CATV extension of a station's service.

25. We do not believe it necessary or appropriate, pending resolution of this issue, to hold up all applications for microwave facilities to relay television signals to CATV systems. Rather, parties may bring public interest considerations pertinent to this issue to our attention in connection with specific applications, and we ourselves shall examine such applications with this issue in mind.

56. The possible impact of subscription television on free television broadcast service has been a continuing subject of Commission and Congressional concern. See **Third Report on Subscription Television**, 26 F.C.C. 265; **Connecticut Committee Against Pay TV v. Federal Communications Commission**, 301 F. 2d 835 (C.A.D.C.), cert. den. 371 U.S. 816. In light of that concern, comments are requested on the feasibility or desirability of Pay-TV operations by CATV, whether any conditions would be required for the protection of the public interest in free television, and what conditions might be appropriate.[26]

57. In short, comments are requested as to whether CATV systems should be limited to simultaneous distribution of station signals without additions or deletions, or whether there should be no limitation on program origination by the CATV, or whether some intermediate position would be appropriate. The Commission has reached no conclusions in this area, and requests comments on all facets of the question. For example, in addition to the two basic issues posed above (i.e., complete restriction or complete freedom as to program origination), there are intermediate issues where comment might be helpful. Thus, comments are invited on the question of whether any such prohibition against CATV program and advertising origination should apply only where the CATV is operating in an area served by one or more television broadcast stations. In the absence of any local station, would the public interest be served if the CATV were not only permitted, but even encouraged, to serve the community by providing an outlet for local self-expression? Where there is but one local station, should the CATV be barred from carrying advertising but permitted and encouraged to present local programming, particularly in the news and public affairs field (on the ground that such local programming provides a needed diversity in a monopoly situation, and poses no threat to the viability of the local station)?

58. Some of the foregoing matters may be appropriate for Commission rule-making (e.g., the Section 315, Section 317, or station identification requirements), while others may call for Congressional consideration and resolution. Again, we think that as a matter of "first things first," we should garner the facts and pertinent considerations.

##### (5) Other Areas of Concern.

59. In view of the interest engendered concerning ownership and control of CATV systems, comments are requested on the proposals of petitioners with respect to the regular filing of information as to CATV ownership, control and management (see particularly the Boise and AMST petitions). Would it be appropriate to require the periodic filing of other information, such as the location of the CATV system, the number of subscribers, the signals carried, and the extent of program origination, if any? While much useful information was gathered in connection with Docket Nos. 14895 and 15233, the statistics will soon be out-of-date in a rapidly changing CATV field. Moreover, the questionnaire

discussed in paragraph 34 above is occasioned by a lack of specific information with respect to each CATV system. It appears to us that it might be more efficient and serve the convenience of interested persons, as well as the Commission, if pertinent information were regularly supplied by each CATV operator on a current basis.

60. The general matter of cross-ownership of CATV systems and broadcast facilities is being pursued separately in Docket No. 15415. Interested persons are nevertheless invited to address themselves in this proceeding to those aspects of the cross-ownership question which may be pertinent to the overall policy questions raised here. For example, there is the question of whether grants for translator facilities or local stations should be made to CATV systems in communities which have no off-the-air television service where there is no imminent likelihood of an independent applicant. In other words, would the public interest be served by permitting, or even encouraging, CATV systems to provide an off-the-air service to areas which would otherwise have none? Should a similar policy be followed to provide a second off-the-air service, or would cross-ownership afford the CATV licensee an unfair competitive advantage over the independent licensee? (See, FCC 65-, pars. 91, 134).

61. Another area of great interest to the Commission is the proposal in Dr. Seiden's Report that rulemaking action should be taken to afford potential and existing stations a sufficiently large service area to withstand CATV penetration. This proposal is set out in detail at pp. 7, 89-90 of the Report and will not, therefore, be repeated here. Comments are requested as to the feasibility and merits of the proposal and the most appropriate way of implementing it. More generally, we are of the opinion that all of our rules and policies should be re-examined to see if they are holding back or encouraging a variety of off-the-air services. In this connection, there is pending a proposal to facilitate the use of translators on allocated channels (FCC 65-129, Docket No. 15858).

62. Some of the petitioners have urged the Commission to establish appropriate technical standards to govern the operation of CATV systems, e.g., with respect to the technical quality of signals distributed by CATV. It appears to us that the matter of technical standards warrants inquiry. As a starting point, comments are requested on the proposals of petitioners (see RM-636 filed by Springfield, p. 6, fn. 6 above, and the proposal of AMST, p. 12, par. 25 (1) above).

63. The foregoing discussion has been directed toward CATV operations vis-a-vis television broadcast facilities. It has been brought to our attention that a standard broadcast or FM radio station might face serious audience fractionalization if a CATV system were to bring a number of competing aural signals to its subscribers. Accordingly, comments are requested as to whether any serious problem exists, or is likely to exist, in this area and, if so, the nature of any

regulatory measures which might be appropriate to govern the distribution of aural signals by CATV.

64. In sum, inquiry to ascertain the facts and appropriate policies in each of these areas is warranted in the public interest. Nor do we mean to restrict comments just to the above areas. Persons may, of course, point up other facets of this overall problem where remedial action may be appropriate (e.g., whether our policies with respect to other auxiliary services, such as translators or satellites, should be modified). The information developed might be useful to the legislative consideration of CATV and would assist the Commission in making recommendation to the Congress. Moreover, a sufficient basis has been shown to establish that additional rules may be required for adequate protection of the public interest and the regulatory scheme. In the absence of further information, we do not have a sound basis for specific rule proposals. However, in order to be in a position to take any rule making action found appropriate at the conclusion of this proceeding, without conducting new proceedings, comments are requested on the proposals of petitioners and the additional matters indicated above. Counterproposals as to possible alternative measures are also invited. We stress, however, that the main thrust of this proceeding is to gather the facts and to obtain the comments of the parties on the pertinent policy considerations. A further notice will in all likelihood be issued to afford an opportunity for comment on the specific rule proposals of the Commission.

65. The inquiry and proposed rule-making are directed toward all CATV systems. The questions raised by petitioners or indicated by the Commission are pertinent to our responsibilities in licensing microwave facilities for CATV use, whether or not rules governing all CATV systems are ultimately adopted. Consideration of non-microwave CATV systems is included in order to conserve time and to avoid the necessity for a second proceeding, particularly in the event that no legislation is forthcoming and the comments in this proceeding confirm our initial conclusion that the Commission has present jurisdiction over all CATV systems. Moreover, we believe it appropriate, as requested by one of petitioners, to put all persons who now operate or who propose to operate CATV systems on notice that CATV operations may be subject to Commission regulation of the nature indicated, whether microwave is used or not. All Commission actions taken during the pendency of this proceeding will, of course, be subject to the outcome of the proceeding and any rules adopted will be made appropriately applicable, such as at license renewal time.

66. Accordingly, there is instituted herewith, pursuant to the provisions of Section 403 of the Communications Act, an inquiry into the foregoing matters. Authority for the rule making proceeding instituted herein is contained in Sections 2, 3, 4(i), 303, 307, 308, 309, 310,

26. This proceeding is in no way intended to be concerned with, or to affect, the question of whether there is a property right in the broadcast signals carried by CATV systems (see FCC 65, par. 159).

315, and 317 of the Communications Act of 1934, as amended.

67. All interested persons are invited to file written comments on the rule amendments proposed in Part I, and on par. 50, on or before June 25, 1965, and reply comments on or before July 26, 1965. Comments on the inquiry and proposed rule making in Part II may be filed on or before August 27, 1965, with reply comments due on or before October 25, 1965. In reaching its decision in this matter, the Commission may also take into account any other relevant information before it, in addition to the comments invited by this Notice.

68. After study of the comments, the Commission may, by subsequent order, specify a number of days for the presentation of oral argument on these important matters. It is also contemplated that oral testimony may be solicited, and appropriate orders specifying the nature and time may be issued at a later date. After comments have been received, the Commission may well spin-off portions of the rule making for early decision, since other portions may require lengthy consideration.

69. In accordance with the provisions of Section 1.419 of the Commission's Rules and Regulations, an original and 15 copies of all comments, replies, pleadings, briefs, or other documents filed in this proceeding shall be furnished the Commission.

70. In light of the foregoing, IT IS ORDERED, That the various requests made in the pleadings filed by American Broadcasting Company, Springfield Television Broadcasting Corp., Boise Valley Broadcasters, Inc., Westinghouse Broadcasting Company, Inc., Association of

Maximum Service Telecasters, Inc., Capital Cities Broadcasting Corporation, Taft Broadcasting Company, and National Community Television Association, Inc., ARE GRANTED IN PART, to the extent

reflected in this Notice, and ARE OTHERWISE DENIED.

FEDERAL COMMUNICATIONS COMMISSION  
Ben F. Waple, Secretary

#### APPENDIX A

Markets with no Commercial UHF Station on air but with Commercial UHF Channels applied for	Commercial VHF Stations on Air	Commercial UHF Construction Permits	Commercial UHF Channels Applied For	Vacant Commercial UHF Channels
Atlanta, Ga.	3	1	-	-
Austin, Tex.	1	2 [1]	-	-
Austin-Rochester, Minn.-Mason City, Ia.	3	-	1	2
Baltimore, Md.	3	1	1	-
Birmingham, Ala.	2	1	1	-
Charlotte, N. C.	2	1 [1]	-	-
Charleston-Huntington, W. Va.	3	1	1	-
Cincinnati, Ohio	3	1	-	-
Cleveland, Ohio	3	-	2	-
Columbus, Ohio	3	-	1	-
Dallas-Fort Worth, Tex.	4	-	2	1
Detroit, Mich.	3	2 [1]	1	-
Eugene, Ore.	2	-	-	1
Houston-Galveston, Tex.	3	1	3	2
Indianapolis-Bloomington, Ind.	4	-	1	2
Jacksonville, Fla.	2	1	1	-
Joplin, Mo.-Pittsburg, Kan.	2	-	1	2
Kansas City, Mo.	3	-	2	-
Lubbock, Tex.	2	-	2	-
Meridian, Miss.	1	-	-	-
Miami-Ft. Lauderdale, Fla.	3	2 [2]	1	-
Midland, Tex.	1	1	-	-
Minneapolis-St. Paul, Minn.	4	-	1	-
New Orleans, La.	3	1	1	2
Norfolk-Portsmouth-Newport News, Va.	3	1	-	-
Oklahoma City, Okla.	3	1	-	-
Philadelphia, Pa.	3	3	-	-
Pittsburgh, Pa.	3	2	-	-
Providence, R. I.	2	1	-	-
St. Louis, Mo.	4	1	-	1
San Diego, Calif.	2	1	1	-
San Francisco-Oakland, Calif.	4	3	1	1
San Jose-Salinas-Monterey, Calif.	2	2	-	1
Toledo, Ohio	2	1	-	-
Tulsa, Okla.	3	1	-	1
Ponce, Puerto Rico	2	1	1	1
Total:	96	34	25	17

[1] A permittee has gone on the air since January 1, 1965.  
[2] There is also a C.P. for a commercial VHF station.

#### APPENDIX B COMMISSION'S MEMORANDUM ON ITS JURISDICTION AND AUTHORITY

Section 1 of the Communications Act (47 U.S.C. 151) states that the purpose of the Act is the regulation of interstate and foreign commerce in communication by wire and radio, and that to efficiently achieve this purpose, authority over such commerce is centralized in the Commission. Section 2 (47 U.S.C. 152) states that the "provisions of this Act" shall apply to "all interstate communication by wire or radio . . . and to all persons engaged within the United States in such communication . . ." These terms are defined in Section 3 of the Act. Section 3(a) defines wire communication as the "transmission of . . . pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission." Section 3(b) defines communication by radio as the "transmission by radio of . . . pictures,

and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission."

From the plain language of these definitions, there would seem to be no question but that CATV systems are engaged in interstate communications by wire or radio. They transmit "pictures, and sounds . . . by aid of wire" and are "instrumentalities . . . [used for] . . . the receipt, forwarding, and delivery of communications . . . incidental to such transmission," and hence fall within the definition of wire communication under Section 3(a).[1] Moreover, CATV systems constitute interstate communication by wire, since they form a connecting link in the chain of communication between the point of origin (the transmitting station) and reception by the viewing public (the CATV subscriber)—a chain which "is now well established . . . as interstate communication." **Capital City Telephone Co.**, 3 FCC 189, 193 (citing **Federal Radio Commission v. Nelson Bros. Bond & Mortgage Co.**, 289 U.S. 266).[2] The law is clear that the mere location

of communication facilities wholly within one state does not establish that the communication service rendered over such facilities is an intrastate service, and that a communications service can be interstate or foreign in nature and subject to the Commission's jurisdiction even though all the facilities are located within the confines of one state. **California Interstate Telephone Company v. F.C.C.**, 328 F. 2d 556 (C.A.D.C.); **Ward v. Northern Ohio Telephone Co.**, 300 F. 2d 816 (C.A. 6), cert. den. 371 U.S. 820; **Pacific Telatronics, Inc.**, FCC 64-1180, 4 R.R. 2d 145 (1964). CATV systems are extensions of the interstate service of the television broadcast stations whose signals they carry, **Clarksburg Publishing Co., v. F.C.C.**, 225 F. 2d 511, 517 (C.A.D.C.), and hence constitute "interstate communication by wire" to which the provisions of the Act are applicable (Section 2(a), 3(a)). See **American Trucking Association v. United States**, 344 U.S. 298, 311.[3]

With respect to the Commission's authority to adopt the rules proposed in the Notice of Inquiry and Proposed Rule Making, i.e., the "provisions of [the] Act" that are to be applied to CATV

1. It can be argued that CATV systems, in receiving, forwarding, and delivering the station's signal to the viewing public, are the instrumentalities incidental to the transmission of the signal and hence fall within the definition of "communication by radio" in Section 3(b). However, it is unnecessary to consider this argument in view of the discussion above as to Section 3(a) and the scope of the Commission's proposals. Since CATV operations clearly fall within Section 3(a) and/or Section 3(b), a determination of their precise status is not essential to the question of the Commission's jurisdiction to proceed as proposed in the Notice of Inquiry and Proposed Rule Making.

2. Congressional approval of the **Capital City** doctrine was expressed in connection with the 1960 amendment to Section 202(b). See 105 Cong. Rec. at 6256.

3. It is, we believe, significant that in sustaining the jurisdiction of the Interstate Commerce Commission in **American Trucking** the Supreme Court relied solely upon provisions of the Motor Carrier Act that are, in the circumstances, analogous to Sections 2 and 3 of the Communications Act. Compare 49 U.S.C. 302(a) and 303(a)(19) with 47 U.S.C. 152 and 153(a) and (b).

systems, there are the following sections: Sections 1, 4(i), 303(f), (h), (p) and (r), 307(b), 315, 317, and 508. But the crucial sections would appear to be 1, 307(b), 4(i), and 303(f), (h) and (r). As the Notice and the Report and Order in Docket Nos. 14895 and 15233 make clear, the existence and growth of CATV systems threaten to impede realization of the Commission's television assignment plan and policies under Section 1 and 307(b) (i.e., the Sixth Report and Order).[4] See **Carter Mountain Transmission Corp., v. F.C.C.**, 321 F. 2d 359 (C.A.D.C.), cert. den. 375 U.S. 951 (1963). The Commission has authority under Sections 4(i), 303(f), 303(h) and 303(r) to:

"perform any and all acts, make such rules and regulations and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions (4(i));

"make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this Act . . . (303(f));

"establish areas or zones to be served by any station (303(h));

"make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act . . . (303(r)).[5]"

The foregoing provisions (4(i), 303(f), 303(h), and 303(r)) give the Commission broad rule making authority to carry out the provisions of this Act (e.g., Sections 1 and 307(b)) with respect to communications or persons coming within the Commission's jurisdiction (including CATV—Section 2(a)). Section 303(h), in particular, was affirmatively designed to assist the Commission in effectuating the fair and equitable distribution of broadcast service called for by Section 307(b). [6] The Commission's authority to issue rules establishing the area or zone to be served by any station for this purpose includes the power to prevent infringement of the rules by "any person" (Sections 312(b) and 502 of the Communications Act). Hence, it clearly encompasses, we believe, the authority to prescribe by rule the conditions under which the station's signal may be extended beyond the area or zone to be served by the originating station, by means of CATV—an "interstate communication by wire" to which the Act's provisions are applicable (Sections 2(a) and 3(a)).

Moreover, apart from Section 303(h), the general rule making power of the Commission (Sections 4(i) and 303(r)) includes authority to take necessary ac-

tion, not inconsistent with the Act or law, to prevent frustration of Section 307(b) by CATV. In **National Broadcasting Co. v. U.S.**, 319 U.S. 190, 215-220, the Supreme Court citing, *inter alia*, Sections 1, 303(f) and 303(r), stated that:

"The avowed aim of the Communications Act of 1934 was to secure the maximum benefits of radio to all people of the United States. To that end Congress endowed the Communications Commission with comprehensive powers to promote and realize the vast potentialities of radio. . . . In the context of the developing problems to which it was directed, the Act gave the Commission not niggardly but expansive powers."

Under such "expansive" and "comprehensive" powers,[7] the Commission has authority to take reasonable and appropriate action, including promulgation of rules, "as may be necessary" to carry out the provisions of Section 307 (b)—to ensure that the regulatory scheme embodied in that Section (the equitable distribution of service) and Section 303 is not frustrated by the operation of CATV, an "interstate communication by wire" to which the Act's provisions are applicable. This authority does not depend on a specific reference to CATV or CATV practices in the Act. **United States v. Storer Broadcasting Co.**, 351 U.S. 192, 203. See also, **National Broadcasting Co. v. United States**, 319 U.S. 190, 218-219, where the Supreme Court stated:

"True enough, the Act does not explicitly say that the Commission shall have power to deal with network practices found inimical to the public interest. But Congress was acting in a field of regulation which was both new and dynamic. . . . While Congress did not give the Commission unfettered discretion to regulate all phases of the radio industry, it did not frustrate the purpose for which the Communications Act of 1934 was brought into being by attempting an itemized catalogue of the specific manifestations of the general problems for the solution of which it was establishing a regulatory agency. That would have stereotyped the powers of the Commission to specific details in regulating a field of enterprise the dominant characteristic of which was the rapid pace of its unfolding. And so Congress did what experience had taught it in similar attempts at regulation, even in fields far less fluid and dynamic than radio. The essence of that experience was to define broad areas for regulation and to establish standards for judgment adequately related in their application to the problems to be solved.[8]"

To the same effect in other fields, see **Houston, East and West Texas Railway Co. v. U.S.**, 234 U.S. 342; **U.S. v. Wrightwood Dairy Co.**, 315 U.S. 110; **U.S. v. Pennsylvania R. Co.**, 323 U.S. 612; **American Trucking Assoc. v. U.S.**, 344 U.S. 298; **Public Service Commission of State of New York v. Federal Power Commission**, 327 F. 2d 893, 897 (C.A.D.C.).[9]

The **American Trucking** case is particularly pertinent. The Supreme Court there sustained ICC rules "aimed at conditions [trip-leasing] which may directly frustrate the success of the regulation undertaken by Congress." After citing sections analogous to Section 307(b) in our situation, the Court stated (344 U.S. at 311):

"Included in the Act as a duty of the Commission is that "to administer, execute, and enforce all provisions of this part, to make all necessary orders in connection therewith, and to prescribe rules, regulation, and procedure for such administration." And this necessary rule-making power, coterminous with the scope of agency regulation itself, must extend to the transportation of passengers or property by motor carriers engaged in interstate or foreign commerce and to the procurement of and the provision of facilities for such transportation regulation of which is vested in the Commission by 202(a). See also 203(a) (19)."

We point out that Section 204(a)(6) of the Motor Carrier Act is substantially similar to Sections 303(r) and 4(i) of the Communications Act; while in the circumstances, Sections 202(a) and 203(a) (19) of that Act are closely analogous to Sections 2(b) and 3(a) of the Act. Further, the Court reached its conclusion "despite the absence of specific reference to leasing practices in the Act," stating (at pp. 309-310):

"Our function, however, does not stop with a section-by-section search for the phrase "regulation of leasing practices" among the literal words of the statutory provisions. As a matter of principle, we might agree with appellants' contentions if we thought it a reasonable canon of interpretation that the draftsmen of acts delegating agency powers, as a practical and realistic matter, can or do include specific consideration of every evil sought to be corrected. But no great acquaintance with practical affairs is required to know that such prescience either in fact or in the minds of Congress, does not exist. **National Broadcasting Co., v. United States**, 319 U.S. 190, 219-220; . . . Its very absence, moreover, is precisely one of the reasons why regulatory agencies such as the Commission are created. . . ."

4. In addition, as noted in the Notice, there exists the potential to frustrate the purposes of the Act embodied in Sections 303(p), 310, 315, 317, and 508 (and certain Commission regulations).

5. Sections 303(f), (h) and (r) are preceded by the following clause: "Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires shall --"

6. Section 303(h) was copied from the Radio Act of 1927 and originated in preceding bills to amend the Radio Act of 1912. For the legislative intent, see Hearings on H.R. 5589 before the House Committee on Merchant Marine and Fisheries, 69th Cong., 1st Sess., pp. 40-41.

7. See also, **Stahlman v. F.C.C.**, 126 F. 2d 124, 128 (C.A.D.C.). For the intended comprehensive scope of Commission authority see, e.g., the following legislative history of the Radio Act of 1927, which was reenacted in all substantial respects in the Communications Act of 1934 (78 Cong. Rec. 8822-23, 10313-14, 10990); 66 Cong. Rec. 5479; S. Rep. 772, 69th Cong., 1st Sess., pp. 2, 3.

8. The Court, in referring to provisions of the Act such as Sections 303(g), and (r), stated (319 U.S. at 217-218): "These provisions, individually and in the aggregate, preclude the notion that the Commission is empowered to deal only with technical and engineering impediments to the larger and more effective use of radio in the public interest." We cannot find in the Act any such restriction of the Commission's authority. Suppose, for example, that a community can, because of physical limitations, be assigned only two stations. That community might be deprived of effective service in any one of several ways. More powerful stations in nearby cities might blanket out the signals of the local stations so that they could not be heard at all. One station might dominate the other with the power of its signal. But the community could be deprived of good radio service in ways less crude. One man, financially and technically qualified, might apply for and obtain the licenses of both stations and present a single service over the two stations, thus wasting a frequency otherwise available to the area. The language of the Act does not withdraw such a situation from the licensing and regulatory powers of the Commission, and there is no evidence that Congress did not mean its broad language to carry the authority it expresses."



See, also, **Public Service Comm. of N.Y. v. FPC**, 327 F. 2d 893, 896-97 (C.A.D.C.)

Of course, the rules must be "reasonably necessary and fairly appropriate" for the protection of the regulatory scheme. **Colorado Interstate Gas Co., v. Federal Power Commission**, 142 F. 2d 943, 952 (C.A. 10). See also, **American Trucking Assn., v. U.S.**, 344 U.S., at 314-315; **National Broadcasting Co., v. U.S.**, 319 U.S. at 219 ("Generalities unrelated to the living problems of radio communication cannot justify exercises of power by the Commission").[9] The Report and Order in Docket Nos. 14895 and 15233

demonstrates the appropriateness and necessity of rules requiring all CATVs to carry local stations without duplication for a reasonable period. Moreover, the **Carter Mountain** decision establishes the reasonableness of the requirements. In affirming the Commission, the Court stated that "this does not appear to us an unreasonable condition" but rather "a legitimate measure of protection for the local station and the public interest" (321 F. 2d 359, at 363-364). The Notice of Inquiry and Proposed Rule Making similarly demonstrates the validity of the Commission's concern as to the effect of CATV on independent sta-

tions and programming sources, as well as on the development of UHF in the larger markets.

In conclusion, it would appear that under the broad regulatory powers vested in it by the Communications Act, the Commission presently has jurisdiction over all CATV systems, whether microwave is used or not; that there are pertinent provisions of the Act applicable to the exercise of authority over such systems (in particular, Sections 1, 4(i), 303 (f), 303(h), 303(r), 307(b), and 403); and that the proposed rules and inquiry represent a reasonable exercise of that authority in the circumstances.

9. The **Public Service Commission** case sustained the power of the Federal Power Commission to issue temporary certificates to protect producers, although Section 7(c) of the Federal Power Act expressly authorized such action only to protect customers, on the basis of the broad provisions of Section 16 of that Act which are virtually the same as Section 303(r) of the Communications Act. The Court stated (327 F. 2d at 897): "All authority of the Commission need not be found in explicit language. Section 16 demonstrates a realization by Congress that the Commission would be confronted with unforeseen problems of administration in regulating this huge industry and should have a basis for coping with such confrontation."

10. The Commission clearly has no jurisdiction over bowling alleys or theatres, for example, as an administrative agency has no greater power than has been conferred by Congress, **Stark v. Wiegard**, 321 U.S. 288; **NLRB v. Atlantic Metallic Casket Co.**, 205 F. 2d 931 (C.A. 5). Cf. **Peters v. Hobby**, 349 U.S. 331. However, unlike bowling alleys and theatres, CATV systems intercept and extend the signals of television stations, and thus have a uniquely close relationship to the regulatory scheme. Moreover, CATV systems are engaged in teler-state communication by wire to which the Act's provisions are expressly applicable.

**STATEMENT OF  
COMMISSIONER ROBERT T. BARTLEY  
CONCURRING IN PART  
AND DISSENTING IN PART:**

"I concur in the Notices to the extent that they seek data for resolution of the matters here before us, but dissent to the indication of present authority over CATV."

**OPINION OF COMMISSIONER  
LOEVINGER CONCURRING IN  
PART AND DISSENTING IN PART**

"The Commission is issuing today a Report and Order, a Notice of Inquiry and of Proposed Rulemaking, a Memorandum on Jurisdiction and the text of new rules all of which relate to the problems posed by community antenna television systems, commonly referred to as CATVs. These documents aggregate over 120 pages and set forth such a mass of detail that the outlines of the problem, as well as the basic issues, are somewhat obscured, if not wholly submerged. Accordingly, it seems worthwhile to restate very briefly and simply what the problems and the issues are, in order to indicate my points of agreement and disagreement with the majority.

"A CATV is a system comprising an antenna for receiving television signals, and cables and auxiliary apparatus (such as amplifiers) for carrying the signals received into a number of receiving sets. CATVs are about as old as commercial television itself, the first systems having been started as early as 1950. CATVs have been developed in order to fill the wants of those who either because of distance or terrain were unable to get television signals off the air in satisfactory quality or numbers. (See articles in **TELEVISION MAGAZINE**, June 1962, September 1964 and April 1965.)

"For a variety of reasons, some of them related to actions of the FCC, the commercial CATV business has developed through independent companies which transmit or relay the signals and other companies which distribute the signals to subscribers. Typically there will be an antenna on some high point near a

community which receives the signals of a number of TV stations. These signals will be transmitted either by microwave relay or by coaxial cable to a point in the settled part of the community. At this point the relay company will deliver the signals to the CATV operating company. The latter will maintain and operate the system which distributes the signals over wires to the homes of subscribers within the community. In some cases the relay company will deliver signals to several CATV companies.

"CATVs were started in mountainous areas of Pennsylvania and Oregon where television reception was either poor or non-existent for many communities. As it appeared that CATVs were able to bring good reception and offer a variety of services to communities far outside the major metropolitan centers, the companies spread to more communities and got more subscribers. Over the years, as television has grown in both numbers of broadcasting stations and numbers of homes, CATV has also grown, although by no means in proportion. In rough figures there are now about 566 television stations in the United States covering some 266 markets. (**TELEVISION MAGAZINE**, April 1965, p. 85.) Over 52 million U.S. households have television receivers, which is 92% of all of the U.S. households. (Ibid.) The CATV industry today has about 13,000 operating systems serving about 1.2 million homes. (Seiden Report to the FCC, p. 1.) CATVs are concentrated largely in one or two station markets. Most systems are fairly small in size, about 90% having fewer than 3,000 subscribers and the average having about 655 subscribers. Most CATVs deliver five signals to their subscribers, although some deliver as few as three and some as many as seven or more. (Ibid.) However, the number and size of CATVs is growing and CATV systems are being offered to more communities, and to larger communities.

"The proliferation of CATVs is regarded by many in the television business as an economic threat. It is said that while the broadcaster has the burden and expense of providing programming which the audience gets without

payment and which must be supported by advertising, the CATV operator simply delivers the broadcasters' programming to subscribers and receives payment from them. This is said to constitute unfair competition. It is also alleged that the competition is not only unfair but destructive in some situations, because CATVs deliver the signals of far-distant stations and deliver a relatively large number of signals to relatively small communities in which the audience is not large enough to support a number of stations. CATVs create the anomaly that some relatively small towns are provided with a greater choice of television programming over the local CATV than many larger cities have in the absence of CATV.

"These circumstances have created a demand by many broadcasters for the FCC to take jurisdiction over CATVs and to institute measures to protect television broadcasters against competition of CATVs. As will be pointed out in some detail below, the FCC has instituted several proceedings and investigations relating to this matter. However, heretofore it has not taken any definitive action of general significance. While there has been some question as to the extent of the FCC jurisdiction, the Commission has had undisputed jurisdiction with respect to licensing microwave transmitting facilities for those relay companies that carry TV signals by microwave. The manner of exercising that jurisdiction is one of the matters that has been bitterly disputed and that is involved in the present proceedings.

"By the documents which the Commission is now promulgating it adopts a series of measures which represent the conclusion of the Commission majority as to the action that the Commission should take in this field. There are four significant measures involved.

"First, the Commission rules that CATVs must carry the signals of all local television stations without material degradation. The Commission exercises power over the CATV by requiring licensed microwave relay companies to require their customers to comply with the Commission conditions.

"Second, the Commission rules that

the relay companies must require the CATVs which they serve to avoid the delivery to their customers of the television signals of any program which duplicates the program of any local station. This rule of non-duplication does not refer merely to simultaneous duplication, but requires CATVs to avoid presenting any duplicate program either 15 days before or 15 days after the date of broadcast by a local station. Thus, this rule provides that the CATVs served by the relay companies subject to the rule must avoid duplication of any local TV program for a period of 30 days.

"Third the Commission asserts jurisdiction over all CATV relay companies and systems, including those that are wholly intra-state and that transmit signals entirely by wire. Although this conclusion is called "tentative," the background demonstrates that there is no practical possibility of dissuading the Commission from this conclusion. The Commission gives notice that the substantive measures already adopted will be extended to the full limits of this asserted jurisdiction as soon as the procedural amenities can be completed.

"Fourth, the Commission institutes an 'inquiry' seeking further comment on more than a dozen and a half questions, all of them relating to the possibility of imposing further restrictions upon the operations of CATVs.

"It seems to me that in its approach to the CATV problem the Commission is doing the wrong thing for the wrong reason in the wrong manner to deal with the wrong problem. It is thereby erecting only a gossamer barrier against the evils which it fears.

"The Commission is doing the wrong thing when it seeks to control, directly or indirectly, the specific programs which shall be presented to the audience. The Commission is acting for the wrong reason because it seeks only to limit competition. The Commission is proceeding in the wrong manner because it is acting to extend its jurisdiction beyond statutory language and contrary to precedent. The Commission is dealing with the wrong problem because it concentrates attention only on the single matter of competition for listener attention and substantially disregards more important and more basic problems. Finally, the Commission is erecting only a gossamer barrier against feared evils because the actions taken and proposed are not only wrong but must ultimately prove to be ineffective. Assuming that the Commission will assert jurisdiction over all CATV companies, and will impose non-duplication rules, and disregarding the risk that the action will be set aside for lack of jurisdiction, at best these rules will give slight and marginal protection against competition, and at worst they will be wholly overturned on the whim of some future Commissioner. This is not a sound basis on which to build an industry.

"Basically I concur in two of the four rulings made by the Commission today and dissent from two of the four. I agree that the Commission should, within the scope of its jurisdiction, require CATV carriage of local television stations without degradation, and that it should implement the rule so as to insure its

effectiveness. I have no disagreement with the substance of the rules regarding carriage of local stations. I also agree that the Commission should undertake an inquiry into the role and scope of CATVs, although I have some reservations as to the inquiry now initiated by the Commission. I disagree with the non-duplication rule which I believe is an improper attempt to limit competition by controlling programming; and I disagree with the Commission's attempt to extend its jurisdiction without Congressional authorization.

"While I heartily agree that the Commission should conduct a sweeping inquiry into the role and scope of CATVs in the field of mass communications, it seems to me that the present inquiry is too little and too late. It is too little because it does not deal with fundamentals. Many of the important issues in the field are mentioned in the Notice of Inquiry, but they are scattered through the somewhat diffuse discussion in random fashion, even occurring in footnotes. But the basic issues are not mentioned. These are what the function of CATVs should be, and what ultimate mode and system can be developed or encouraged to provide the greatest service to the greatest number. In various paragraphs of the instant orders and opinions CATVs are discussed as being ancillary or subsidiary facilities to broadcasting and as being a service competitive with broadcasting. These concepts seem inconsistent to me, and differing regulatory consequences flow from them. For example, if the services are truly competitive, then there is some reason to prohibit or discourage joint ownership of broadcasting facilities and CATVs. On the other hand, if the services are ancillary, then that reason does not exist, and broadcasters should be permitted, and perhaps encouraged, to own CATVs. At the present time the Commission is deferring action on a large number of broadcast license renewals because the licensees also own CATV facilities. This action seems inconsistent with some of the positions adopted in these proceedings.

"In any event, the present inquiry is too late because the Commission has already formed its opinion on this subject. I believe the Commission should make its investigation and conduct its inquiry before reaching its conclusions, rather than afterwards. The documents issued today plainly show that the Commission and its staff have strong and fixed views regarding the subordinate place of CATVs in the mass communications system, and these views are not likely to be much influenced by anything that can be presented to the Commission in the course of the inquiry. Even if some Commissioners hold such views, it would seem to me to be more courteous, more productive and more wise to refrain from officially promulgating them until the formal 'inquiry' has been completed.

"In any event, I cannot agree that it is proper for the FCC to determine, either directly or indirectly, which programs shall be carried by a CATV system. It seems to me that the basic issue is whether the Commission should employ economic and engineering rules in

order to achieve economic and engineering objectives, or should exert direct control over the substance of programming in an effort to achieve its objectives. The method of selective program control, which the majority adopts here, will beget future problems and more control. Problems will arise because of delay, changes in plans for broadcasting of particular programs, the requirements of Section 315 and 'fairness,' and Section 317, and other provisions, to pose only a few examples that can readily be foreseen of the numerous problems likely to arise under this rule. Suppose that a local station advises a CATV that the latter cannot carry some program because the station intends to carry it, and then the station, for whatever reason, does not carry the program? As a practical matter, the CATV will not have any other opportunity to carry the program once the date of its broadcast has passed. Will the FCC then require the local station to carry this program? Will that depend upon the Commission's determination of the value of the particular program? We know from experience that documentary and political programs are those most likely to be delayed or omitted. Will the Commission permit these programs to be taken off the CATV at the whim of the local station owner without insuring that he does carry them? It seems unlikely to me that the majority will be willing to do this. However, I doubt that those broadcasters who now clamor for a Commission rule on non-duplication will welcome this new grounds for Commission regulation of their programming.

"Even more provocative questions are posed with respect to political programming. Suppose a distant station, carried on a local CATV, is carrying a series of political programs on a presidential election which is balanced as between the major parties. A local station decides to carry those network programs presenting the views of one of the two major parties. It notifies the CATV which then blanks out these programs on its circuits. The local station will then have to balance out its own programming by presenting the views of the other major party over its broadcasting facilities. But the programs of the distant station carried on the local CATV will be unbalanced since they will present only the programs presenting the views of one party. Most important, the local public will then have an unbalanced presentation since it will have the programs favoring one party presented over two stations on the local system, whereas the programs favoring the other party will be presented over only one of the local channels and there will be only half as many of the latter. This is obviously a device that could easily be used to give the public a very biased political presentation during a campaign. Is the FCC then going to supervise CATV systems to see that their programs comply with all of the requirements of Section 315 and 'fairness'? How will this be accomplished? Will the FCC require program origination by CATVs? These and a host of other problems flow directly and inevitably from the approach adopted here. To say that any single situation is unlikely is not an adequate response. The records of the FCC and its own

attempts to influence programming are eloquent testimony that situations such as those suggested, and others more bizarre and unusual, do occur and re-occur.

"It should be noted that the rules now adopted by the Commission are based in significant part upon its concern for the preservation of local live' programming, and that the Notice of Inquiry suggests that the protection which the Commission is now bestowing upon broadcasting stations is likely to be 'ac-companied by a concomitant duty on the part of the station' to provide 'local live' programming. See Notice of Inquiry, par. 53. Thus, the non-duplication rule is not only a direct intrusion into the programming area through control of CATVs, but is also another argument to buttress the case for further Commission control of the programming of broadcasters. Believing, as I do, that the Commission should not seek to control program content in the field of broadcasting, I am opposed to this approach. See separate opinions in *Lee Roy McCourry*, 2 RR2d 895 (1964); *George E. Borst, et al.*, FCC 65-207 (1965); *The Role of Law in Broadcasting*, 7 J. of Bdcsting. 113 (1964); *Religious Liberty and Broadcasting*, 33 Geo. Wash. L. R. (March 1965).

"One practical factor that seems to be left out of consideration in the adoption of a non-duplication rule is that this is the approach which is most likely to provide incentive, if not virtual necessity, for CATVs to undertake the origination of their own programs. The operation of the non-duplication rule means that the CATV operators are required to delete material from the programs which they receive and deliver to subscribers and it also means that when such material is deleted the CATV is left with a vacant channel. While the economic pressures and motivations will undoubtedly vary from situation to situation, this kind of situation provides both the opportunity and incentive for program origination; and therefore, in the long run, is likely to engender more competition for the local television stations than it avoids. It seems to me to be far more simple and effective, not to mention wise and appropriate, to require that CATVs shall carry local stations, that they shall not alter or degrade the signals that they carry and that they shall meet such other engineering requirements as may be found appropriate, and to leave determination of programming to the broadcasters without forcing the CATV operators into the area of program selection and encouraging them to enter the area of program origination.

"The most impotrant and fundamental legal objection to the present Commission action is its lack of adequate jurisdictional basis. The rule promulgated by the Commission at this time undertakes to regulate the programs that may be carried by CATVs by requiring common carriers that serve the CATVs to impose upon their customers, as a condition of service, the limitations contained in the Commission rules. The Commission has repeatedly rejected this basis of jurisdiction in the past, as appears from the cases cited and quoted below. But regardless of lack of support in precedent or statutory language, the logical implications of this approach should warn of

its unsoundness. If the Commission can impose its will on a person or business entity that is the customer of a common carrier by the simple device of requiring the common carrier to act as the Commission's policeman in order to keep its license, then the Commission can regulate any business in the United States. Every business and most citizens are customers of the telephone and telegraph companies. It has never previously been suggested that this fact subjected them to regulation by the FCC. But if today's decision stands, then that is the law. The Commission need no longer be constrained by any technical limitations on its jurisdiction arising from statutes enacted by Congress, if this theory is sustained by the courts. The rule adopted by the Commission today applies to CATVs served by the telephone company as well as to those served by CATV relay companies. But there is nothing in the logic of the Commission's jurisdictional approach that limits this technique to CATVs. If this jurisdictional foundation is sound for CATVs, the Commission may, by precisely the same technique, impose its regulations on theaters or newspapers, on stock brokers or taxicabs, indeed on any business or person that needs and uses the services of a communications common carrier.

"The Commission's assertion of direct jurisdiction over companies that receive broadcast signals and transmit them wholly by wire within a single state, without any specific statutory foundation, is equally alarming in its implications. The principal argument urged in support of the Commission's jurisdiction over such companies is that it is desirable for the FCC to have such jurisdiction in order to attain the broad general objectives of the Communications Act. However, if this reasoning is sound, then the jurisdiction of the Commission is literally unlimited. There is scarcely any aspect of organized social living that is not in some way related to the complex ramifications of the communications system that is now under the jurisdiction of the Commission. If the Commission has authority to deal with any activities which threaten to impede realization of the Commission's . . . plan and policies (Memorandum on Jurisdiction) then it can control all amusements, the field of journalism, the scheduling of movements by trains, planes and ships, not to mention almost any other activity that is either competitive or ancillary to or an important user of communications. Such vague and broad reasoning simply will not sustain jurisdiction as to activities not plainly within the scope of some more specific statutory language. See *F.P.C. v. Panhandle Co.*, 337 US 498 (1949).

"When the Communications Act itself is examined it is found that not only is language lacking to give the Commission jurisdiction which it undertakes to assert here but the language of the statute expressly denies that jurisdiction.

"Section 1 of the Act, 47 USC 151, states the purpose of the Act in most general terms and states that the FCC is created pursuant to this purpose. However, it does not define or confer any jurisdiction.

"Section 2 of the Act, 47 USC 152, says in its first subdivision that 'the provisions of this chapter shall apply to

all interstate and foreign communication by wire or radio\*\*\*. It does not state that the Commission has jurisdiction over all such communication. Rather it describes in general terms the scope of the Act and the outermost limitations of its application. However, it says that within these outermost limits the Act applies pursuant to its provisions. In other words, in order to find jurisdiction within the scope described by the first subdivision of Section 2, it is necessary to find some specific provision of the Act conferring jurisdiction.

"This is emphasized by the second subdivision of Section 2, which specifically says that nothing in the Act shall be construed to give the Commission jurisdiction with respect to 'intrastate communication service by wire or radio of any carrier' or 'any carrier engaged in interstate or foreign communication solely through connection by radio, . . . with facilities located in an adjoining state . . . of another carier . . .' It would seem that the latter clauses specifically exclude both CATV relay companies and CATVs from the jurisdiction of the Commission when they do not use microwave. However, it is argued that the intrastate relay companies using wire, rather than microwave, are connected by radio with **broadcasters** in another state rather than with **carriers** in another state. The obvious answer is that at the time of enactment of the Communications Act such things as CATVs were unheard of and that the intent of Congress expressed in the second subdivision of Section 2 is to deny the Commission jurisdiction over intrastate carriers which are not part of a single integrated system and which simply carry signals emanating from another state. The Congressional intent to exclude the Commission from regulation of intrastate facilities and operations is indicated in a number of provisions in the Communications Act. In addition to the restrictions of 47 USC sec. 152 (2), a statutory denial of Commission jurisdiction to regulate intrastate facilities or operations appears in 47 USC sec. 214 as to communications common carriers, in 47 USC 221(b) as to telephone companies, and even in 47 USC sec. 301(d) as to radio signals which do not have a direct effect on interstate communications.

"However, it is not necessary to rely upon inferential construction. Examination of the entire Communications Act for a specific provision applicable to companies engaged in transmitting signals intrastate by wire discloses that only Section 214, 47 USC 214, is applicable. This section provides that no carrier shall construct or operate a line without obtaining authority from the Commission provided, however, that no authority from the Commission is required for the construction or operation of 'a line within a single state unless such line constitutes part of an interstate line.' The section further provides that 'As used in this section the term 'line' means any channel of communication established by the use of appropriate equipment other than a channel of communication established by the interconnection of two or more existing channels. . . .' Thus, by specific statutory provision, the mere fact that a CATV system or relay company is connected by radio to some

other communications facility does not constitute its lines a part of a channel of communication comprising both the out-of-state facility and the intrastate facility. The company which operates by wire within a single state is, therefore, specifically excluded from Commission jurisdiction by Section 214. By familiar rules of statutory construction such a specific and explicit exclusion prevails over any inference that might otherwise be spun out of more general language that is claimed to imply jurisdiction.

"The Commission Memorandum on Jurisdiction argues from the definitions of 'wire communication' and 'radio communication' in 47 USC sec. 153 to the conclusion that the Commission has jurisdiction over CATVs because their activities may be said to come within the scope of these definitions. This argument is wholly beside the point. The section on definitions confers no jurisdiction at all. Many terms are defined in that same section, including the terms 'United States,' 'person' and 'State commission.' It is obvious that the FCC does not have jurisdiction over the United States, over State commissions or over all persons. The terms defined have legal significance only to the extent that they are used in other sections of the statutes. But one will search the Act in vain for any section which expressly confers jurisdiction upon the Commission in the broad terms mentioned in the Memorandum on Jurisdiction. Consequently, the definitions given those terms are not germane to the issue.

"If the argument in the Commission's memorandum is correct, then the Commission has jurisdiction not only over intrastate wire relay systems and CATV operating systems but also over television and radio receivers. The argument made in the Commission memorandum is that any instrumentality which is incidental to or used in the process of transmitting picture or sound or which forms a connecting link in the chain of communication between the transmitting station and the viewing public is subject to Commission jurisdiction. Television and radio receiving sets are just as much within this jurisdictional concept as CATVs and broadcasting stations. In that event the 'All Channel Law' (Public Law 87-529, 47 USC 303(s)) was unnecessary as the Commission had full authority to regulate and license receivers by the terms of the original Communications Act. Clearly, neither the Commission nor the Courts have ever previously thought this to be the case. Both have continuously acted on the contrary assumption.

"The Commission itself has explicitly denied its right to control and its jurisdiction over CATVs in several decisions which up to the present time have not been specifically reconsidered or overruled. The first reported decision is **Intermountain Microwave**, 24 FCC 54, adopted January 30, 1958. In this case, a television broadcaster, Hill County, objected to the grant of a microwave authority to a CATV relay company. The Commission opinion said:

'Hill County is seeking to have the Commission deny a radio authorization to a communications common carrier because the communication circuit to be derived under such authorization will be utilized by subscribers who are com-

petitors of Hill County in endeavoring to provide visual entertainment. . . . We are of the opinion that the request of Hill County must be denied. . . . In considering this problem, it must be remembered that it is possible and feasible for communications common carriers to provide program relay facilities to subscribers where no special authorization is required from this Commission, e.g. where the carrier already has in place properly authorized general cable, wire or radio facilities which may be put to such particular use in the ordinary course of business. Thus, to single out for special consideration and denial only those situations where new construction is involved, where such new construction is specifically for the purpose of providing a service to the public, when the initial or sole user availing himself of service is a community television distribution system, would be arbitrary, capricious and discriminatory. An alternative, of course, would be to adopt an overall policy, rule or condition with respect to every cable, wire, or radio authorization, issued by this Commission to carriers under its jurisdiction, under both title II and Title III of the Communications Act, prohibiting the rendition of the specific type of service here under attack by the objectors. Such a procedure would be equally arbitrary, capricious and discriminatory and unwarranted in view of our ultimate determination herein.'

"A few months later, in **Frontier Broadcasting Company**, 24 FCC 251, 16 RR 1005 (1958) the Commission specifically pointed out that even if it held CATV systems to be common carriers they would come within the scope of Section 214 of the Communications Act and, therefore, would not require Commission authority to construct or operate intrastate lines. The Commission further said that when CATV systems transmitting signals by wire do not emit excessive radiation they involve no radio transmission which requires any form of license from the Commission under the Act.

"Thereafter the Commission conducted an extensive inquiry and after plenary proceedings entered a Report and Order considering the whole subject of CATV and repeater service, 26 FCC 403, 18 RR 1573 (1959). The following are some of the conclusions then reached and stated by the Commission:

\*\*\*we find no present basis for asserting jurisdiction or authority over CATV's except as we already regulate them under part 15 of our rules with respect to their radiation of energy. (par. 71)

\*\*\*it would not constitute a legally valid exercise of regulatory jurisdiction over common carriers to deny authorization for common carrier microwave, wire, or cable transmission of television programs to CATV systems on the ground that such facilities would abet the creation of adverse competitive impact by the CATV on the construction or successful operation of local or nearby stations.' (par. 77)

'Certainly, with respect to anything more than the barring of simultaneous duplication, we believe this to be an unwarranted invasion of viewers' rights to get 'live' programming if they are willing to pay for it. The suggested rules

restricting presentation of the programs of the local station's network would appear to be cumbersome, if not completely unworkable, especially considering that many stations in small markets, including some of those covered in the record, present programs of two or even three networks.' (par. 96)

'We have considered herein the problem, the issues raised, and suggested methods of solution. Two of the broadcasters' suggestions, both relating to CATV's, we adopt. These are that CATV systems should be required to obtain the consent of the stations whose signals they transmit and that they should be required to carry the signal of the local station (without degrading it) if the local station so requests. **Since both of these steps require changes in the Communications Act**, we will shortly recommend to Congress appropriate legislation, as indicated above.' (par. 99) (Emphasis added)

"In 1962 the Commission, with one dissent and one abstention, issued the **Carter Mountain** decision, which is the principal reliance of those who now argue for FCC jurisdiction in this matter. **Carter Mountain Transmission Corp.**, 32 FCC 459 (1962). In this case a CATV relay company applied for authority to transmit television signals by microwave to a small community with one local television station. The television station protested the application and a hearing was held. On the basis of a complete evidentiary record the Commission found that a grant of the microwave authority to the relay company with the bringing of CATV service to the community would result in the demise of the local television station. It, therefore, found that a grant of the microwave authority would not be in the public interest. The Commission stated that the two basic issues in the case were whether the relay company was a bona fide common carrier and whether the economic impact of the grant was of legal significance or the public interest was inherent in the fact that applicant was a common carrier. The Commission held that economic impact of the proposed grant on the broadcasting station was of legal significance and was adequate ground for denying the authority sought. The holding was explicitly limited to this. The Commission said in its opinion: 'There is no attempt to examine, limit, or interfere with the actual material to be transmitted. We are merely considering the question of whether the use of the facility is in the public interest, a conclusion which must be reached prior to the issuance of the grant.' The Commission did not consider or discuss the decisions cited above and the only comment in **Carter Mountain** on the earlier decisions is this: 'To the extent that this decision departs from our views in the Report and Order in Docket No. 12443, 26 FCC 403 (released April 14, 1959), those views are modified.'

"The decision was appealed and affirmed by the Court of Appeals. In the Court of Appeals six issues were agreed upon between the parties and submitted to the Court by stipulation. These are set forth in the appellate opinion. **Carter Mountain Transmission Corp. v. FCC**, 321 F 2d 359 (CADC 1963), cert den 375 US 951 (1963). None of the issues re-

lated either to the imposition of conditions upon or control over the programs to be carried by the applicant or to the possibly of extending FCC jurisdiction to companies not utilizing radio transmission for the carriage of signals. In fact, the Commission in its brief to the Supreme Court in opposition to certiorari specifically stated that no question of Commission jurisdiction over CATVs operating by wire was involved in that case. The brief stated, ' . . . several bills have been introduced in Congress to give the Commission direct authority over CATV's, a question not involved here, . . . (FCC brief, p. 10.) (Emphasis added)

"A month after issuing its Carter Mountain decision, the Commission issued a unanimous order in **WSTV, Inc. v. Fortnightly Corp.**, 23 RR 184 (1962) in which it relied upon and reaffirmed the holding of the Frontier Broadcasting decision, and reiterated that 'this Commission [is] without Title II jurisdiction over the CATV systems.' Accordingly, the Commission ordered that the complaint by a broadcaster against a CATV system 'is dismissed for failure to state a cause of action within the jurisdiction of the Commission.'

"In the Report and Order adopting rules to be imposed on CATVs through the common carriers which serve them, the Commission merely mentions the matter of jurisdiction in a footnote. (Footnote 5) This cavalier reference relies entirely on the authority of the Carter Mountain case as the legal foundation for jurisdiction to issue the rules. But this reliance is wholly misplaced. The Carter Mountain decision held only that the Commission could wholly deny a common carrier application when the sole proposed use of the common carrier was to serve a CATV and such service would, on the facts of record in that case, result in the economic destruction of a local broadcasting station. The issue of Commission authority to impose conditions on or control the character of the signals carried by the relay company, not to mention the customer, was not raised or decided in that case, was not considered by the Commission (see par. 3, 32 FCC 460) and, in fact, was expressly disclaimed by the Commission. (par. 8, 32, FCC 462) The Commission did say that its denial of the application was without prejudice to the right of applicant to file a new application when conditions had changed so that the operation of the CATV would not have the impact on the local television station which the record there demonstrated was likely to follow in circumstance prevailing at the time of the decision. However, this is a far cry from a holding that the Commission can impose conditions as to the signals to be carried by the communications carrier or by its customer. As noted in the preceding discussion, the Commission told the Supreme Court in the Carter Mountain brief that the issue of FCC jurisdiction over CATVs was **not** involved, and shortly after the Carter Mountain decision a unanimous Commission reaffirmed that it did **not** have jurisdiction over the carriage of signals by CATVs. There is no reasoned Commission opinion that considers this issue and concludes that the Commission does have the jurisdiction actually exer-

cised in the instant Report and Order. Several Commission opinions hold to the contrary. In these circumstances, the casual disposition of the jurisdictional issue in a footnote seems inadequate at best and irresponsible at worst.

"The Commission memorandum cites cases like **American Trucking Assn. v. US**, 344 US 298, and **NBC v. US**, 319 US 190, to sustain jurisdiction. However, the point at issue in those cases, and others like them, was simply whether a regulatory agency having jurisdiction over a field of activity and an enterprise within that field could act with reference to a particular practice not specified in the basic statute. The Supreme Court held that, regardless of the absence of specific reference to a particular practice in the Act, the regulatory agency having jurisdiction of the field and the enterprise might promulgate regulations dealing with a practice which was considered to be an evil requiring correction. The Court points out that the necessity of formulating regulations to meet specific practices not foreseen by Congress is precisely one of the reasons regulatory agencies such as the Commission are created. However, this reasoning has nothing whatever to do with an issue as to the existence of jurisdiction over an economic or technical field or a particular enterprise.

"A case much closer to the present situation than any cited in the Commission's memorandum is **F.P.C. v. Panhandle Co.**, 337 US 498 (1949). In that case the Supreme Court held that the FPC could not extend its power by the kind of reasoning relied on by the FCC here, even though the FPC was seeking to regulate a company concededly within its general jurisdiction but as to an aspect of the company's business that was not within the terms of the statutory jurisdiction. The Court said, inter alia:

'Nothing in the sections indicates that the power given to the Commission over natural-gas companies by section 1(b) could have been intended to swallow all the exceptions of the same section and thus extend the power of the Commission to the constitutional limit of congressional authority over commerce.

'Failure to use such an important power for so long a time indicates to us that the Commission did not believe the power existed. In the light of that history we should not by an extravagant, even if abstractly possible, mode of interpretation push powers granted over transportation and rates so as to include production. . . . We cannot attribute to Congress the intent to grant such far-reaching powers as implied in the Act when that body has endeavored to be precise and explicit in defining the limits to the exercise of federal power.

"The Court stated that if the Commission were of the opinion that it should have the power sought, then it was authorized to call the attention of Congress to that fact. The reasoning adopted by the Court in the Panhandle Case applies with even greater force to the FCC in the instant situation. Here there is not merely an inference from earlier inaction that the Commission did not believe it had the power now asserted. Here there are clear and explicit declarations by this Commission that it does not have the power which the present

majority of the Commission now claims. The only thing that has changed since the Commission last disclaimed the jurisdiction it now asserts is the personnel of the Commission. That is not a proper basis for disregarding precedent and changing established legal principles. See my separate opinion in **Assignment of Additional VHF Channel to Johnstown, Pa., etc.**, 1 RR 2d 1572, 1580 (1963).

"Contrary to the apparent belief of the Commission majority, the fact that it might be thought desirable for the FCC to have control of CATVs or their practices does not indicate that the agency does possess such power. See **Youngstown Co. v. Sawyer**, 343 US 579 (1952). Despite some reservations as to the wisdom and objectivity of the Commission and its staff regarding CATVs, I would agree that, as a matter of principle, the FCC should have the authority to regulate CATVs as a service closely related to broadcasting. I favor and will support appropriate Congressional legislation to give the Commission jurisdiction in this field.

"This position differs from the assertion of jurisdiction made by the Commission in the instant proceedings in several important respects. First, it is founded on a deferential respect for the constitutional scheme by which Congress must specifically delegate power before it is exercised by an agency created by Congress. Second, the power that Congress delegates is almost certainly going to be specified and limited in extent, whereas the power derived by inference from broad general statutory terms is unlimited except by the self-restraint of the Commissioners and the vigilance of the courts. Finally, it is likely that Congressional hearings will illuminate this problem and that Congress will provide some guidance to the Commission that may suggest a better course than the one the Commission is now determined to follow.

"At least part of the problem that the Commission now foresees in the proliferations of CATVs is the result of the Commission's own past policies. In the past the Commission has adopted the same restrictive attitude towards translators and other auxiliary services that were within its jurisdiction that it now proposes to take toward CATVs. The popular demand which has been responsible for the recent rapid growth of CATVs has been largely the result of the denial of service to many areas because of the FCC strictness and reluctance in granting authority for the construction and operation of translators and boosters. Apparently the Commission has not yet learned that the expansion of service is not to be attained by the limitation of competition and the imposition of rigorous regulation but rather by stimulating competition and moderating regulation. The Commission can do many things to stimulate and encourage the extension and expansion of television service throughout the country, but regulating the programs that can be brought into homes by CATVs and extending the Commission's jurisdiction without specific Congressional authority are not likely to help.

"However, it seems to me that the most basic and important issue involved here is far more important than the interests

of the broadcasters, the CATVs, or even of the audience in securing broadcasting service. The basic issue involved here is whether a great government agency will show reasonable respect for its own precedents and reasonable restraint in seeking to extend the scope of its own power. Undoubtedly the independent regulatory agencies have been given great power and broad discretion in its exercise. But if democratic government is to survive, the corollary of great power and

broad discretion must be a strong impulse of self-restraint in the exercise of such power. In the face of statutory language, the Commission's own precedents, the prior statements of the Commission to the courts and its requests to Congress for legislation on this subject, it seems to me to be presumptuous for the Commission now to assert jurisdiction which it has previously explicitly disclaimed. If the laws are inadequate to cope with the problems of the moment, it is the func-

tion of Congress to remedy that lack. There is no reason to assume that Congress is any less responsive than the Commission to the public interest, or that it is unable or unwilling to act if action is needed in this field at this time. I am, accordingly, compelled to dissent from the Commission's efforts to extend its jurisdiction without specific Congressional authority."

(Note: Mr. Loevinger's comments are applicable to the Report and Order concerning Microwave served CATV.)

## MICROWAVE SERVICE TO COMMUNITY ANTENNA SYSTEMS

**EDITOR'S NOTE:** The Federal Communications Commission — with Commissioner Bartley dissenting and Commissioner Loevinger dissenting in part and concurring in part—has adopted a First Report and Order to govern microwave grants for community antenna systems. The Report and Order covers both authorizations in the Business Radio Service and authorizations in the Domestic Public Point-to-Point Microwave Radio Service (Dockets 14895 and 15233.)

The Commission is unable to provide complete copies of the text and dissenting statements by Commissioners Bartley and Loevinger. We believe this to be major landmark in the CATV industry's history and therefore are providing you with the entire proceedings.

By the Commission: Commissioner Bartley dissenting and issuing a statement; Commissioner Loevinger dissenting in part and concurring in part and issuing a statement.

1. These proceedings are directed to the policies we will follow in authorizing private and common carrier microwave stations for the purpose of relaying television signals to community antenna television (CATV) systems. [1.] The fundamental question we consider in these dockets is not whether to withhold such authorizations entirely, either generally or in specific situations. It is rather whether we should impose by rule certain conditions upon microwave grants designed to limit and regulate the manner in which CATV competes with the basic, off-the-air television broadcast service to which it is an adjunct.

2. The proceedings were instituted by a Notice of Proposed Rule Making in Docket No. 14895, issued on December

14, 1962, which proposed rules applicable to private CATV microwave stations in the Business Radio Service (27 F.R. 12586). In essence, we propose to condition grants to CATV systems located within a specific coverage contour of any television broadcast station to require that, upon the station's request, the system must (1) carry the station's signal without material degradation and (2) avoid duplication of the station's programming either simultaneously or within a reasonable time period. After receiving comments and reply comments on this proposal, and following the **Carter Mountain** decision, [2] we issued (on December 13, 1963) a Further Notice of Proposed Rule Making in Docket No. 14895 and a Notice of Proposed Rule Making in Docket No. 15233 (28 F.R. 13789). The 1963 Notices set forth more definitive proposals along the same lines and made them applicable also to grants in the Domestic Public Point-to-Point Microwave Radio Service for common carrier stations used to relay television signals to CATV systems. [3.]

3. Our various Notices have produced numerous and voluminous comments from interested persons, including extensive factual studies by the National Community Television Association (NCTA)—representing CATV interests—and by the National Association of Broadcasters (NAB)—representing broadcaster interests. During the proceedings, we have also conducted our own special study of issues related to CATV, utilizing the services of an economic consultant, Dr. Martin Seiden.[4] And we have engaged in a series of consultations with representatives of the NCTA, the NAB and other affected interests, with reference to the form and nature of legislation which might be proposed to the Congress on the subject of CATV systems generally, including systems which use microwave relay service and those which rely exclusively upon off-the-air signals.

4. In the roughly two-year period during which these proceedings have been pending, it has become apparent that the nationwide growth of CATV poses issues going beyond those with which we are concerned here—i.e., the carriage of local television signals and avoidance of program duplication by CATVs which rely upon microwave service. In response to these broader issues, we have today taken certain actions: (1) We have determined as an initial matter that the Communications Act vests in this agency appropriate rule making authority over all CATV systems, including those which do not use microwave relay service (the so-called "off-the-air" systems). We have issued a Notice of Proposed Rule Making calling for comments on the jurisdictional issue and proposing rules governing the carriage and non-duplication of local television signals by all such systems. (FCC 65-334, Part I) (2) Recognizing the need for more definitive information on a wide range of issues which go beyond the carriage and non-duplication of local signals by CATV systems, we have also issued a Notice of Inquiry and Proposed Rule Making looking toward the development of an appropriate record on these subjects. (FCC 65-334, Part II). In taking these actions, we have stressed our awareness that legislative action by the Congress in this area is both possible and desirable. We have moved to deal with the overall problem of CATV in a manner which we think will allow us to be most helpful to the Congress and at the same time give us the maximum flexibility to act where action is needed.

5. Notwithstanding these changes in the situation, we believe that it is appropriate now to resolve, insofar as we can, the issues posed in these proceedings. The questions of carriage and non-duplication by CATVs that rely upon microwave service—while not the whole of the problem—are nonetheless impor-

1. Generally speaking, a CATV system may be described as a facility which receives and amplifies the signals broadcast by one or more television stations and redistributes such signals by wire or cable to the homes or places of business of subscribing members of the public for a fee. The role of microwave facilities in the operation of such a system usually consists of the relay of television broadcast signals, normally picked up off-the-air at a point some distance from the transmitting broadcast antenna, through a series of one or more radio repeaters to a terminal point in or near the community served by the CATV, from which terminal point the signals are distributed by cable to the individual subscribers. In using microwave service, a CATV operator reaches out to obtain signals that cannot be received by means of an off-the-air antenna installation, or to obtain better reception of signals that can only be received marginally off-the-air.

2. **Carter Mountain Transmission Corp. v. Federal Communications Commission**, 321 F. 2d 359 (C.A.D.C.), cert. den., 375 U.S. 951 (1963).

3. During the pendency of the proceedings, applications for microwave facilities to serve CATVs have not been granted unless the applicant expressly accepted the conditions proposed in the relevant rule making Notice. In addition, of course, all such authorizations have been taken subject to the ultimate outcome of the proceedings.

4. Dr. Seiden's report to us has been published by the Government Printing Office under the title, *An Economic Analysis of Community Antenna Television Systems and the Television Broadcasting Industry* (1965). (Cited hereafter as "Seiden Report").

tant, if not central. We have considered these issues over a long period and have before us a substantial factual record pertaining to them. We have reached conclusions and it is appropriate to explain the reasons for those conclusions. In a period of explosive CATV growth, it is important to resolve, to the maximum extent feasible, uncertainties concerning our position. Moreover, establishment of general rules at the present time will have an additional benefit. During the pendency of these proceedings, as we have noted, we have granted microwave applications for facilities to serve CATV systems only on condition that the applicant would abide by the proposed rules. Since the procedure has been interim in nature, we have declined to consider requests for waiver of these conditions which are predicated on the assertion that the rules should not be applied in the particular circumstances of individual cases. (See our 1963 Notice, par. 13, fn. 7.) With the adoption of rules establishing general guidelines, it will be appropriate and feasible for us to consider such requests for waiver.

6. We recognize, of course, that our exploration of broader issues—and particularly the application of carriage and non-duplication requirements to “off-the-air” CATV systems—may bring to light factors which would cause us to reconsider the conclusions we have reached. We must also take into consideration the fact that if Congress legislates in this field any rules we now adopt may have to be adjusted. Moreover, in applying any rules now adopted, we must consider the possible need for a transition period before requiring full compliance. For all of these reasons, we have decided upon the following course of action:

(1) We shall, as an initial step, adopt rules implementing our conclusions on the subject of the carriage and non-duplication of local television signals by CATV systems that rely upon microwave service.

(2) The great majority of microwave-served CATV systems receive service pursuant to authorizations in the Domestic Public Point-to-Point Microwave Radio Service which were issued prior to the institution of these proceedings, are not subject to their outcome, and do not expire until February 1, 1966. By that date, we expect to be in position to take action on the general question of the carriage and non-duplication of television broadcast signals by all CATV systems—microwave-served and “off-the-air”—either pursuant to the existing provisions of the Communications Act or pursuant to new legislation. In the interim, we propose to explore intensively the question of whether, and in what circumstances, it would be appropriate to allow a transition period before requiring full compliance with the new rules.

In any event, we will apply the rules adopted today to the 1966 renewals only after we have had an opportunity to examine the overall subject of carriage and non-duplication in light of our further exploration and any Congressional action taken in the interim.

(3) Approximately 108 CATV systems are now authorized to receive microwave service under grants made in the Business Radio Service and the Domestic Public Point-to-Point Microwave Radio Service since the institution of these proceedings, subject to the interim procedures prescribed in our Notices and subject to the ultimate outcome of the proceedings. In view of the possible desirability of allowing a transition period before requiring full compliance with the new rules, we think it appropriate to defer application of the rules to such systems until we have had an opportunity to explore this question fully. Pending our further order, the microwave permittees and licensees involved will continue to be subject to the interim procedures prescribed in our Notices. Once again, we will apply the rules adopted today only after we have had an opportunity to examine the overall subject of carriage and non-duplication in light of our further exploration and any Congressional action taken in the interim.

(4) Applications are now pending for new or changed microwave facilities to serve approximately 180 CATV systems. There are also a relatively small number of renewal, transfer or assignment applications pending, which relate to facilities serving CATV systems. We will examine pending applications carefully to determine whether the new rules can be applied immediately or whether, in view of their effects in the individual case, it would be appropriate to defer their effectiveness until they are made applicable generally to all microwave-served CATV systems. In either event, we will afford the applicant an opportunity to make any showing it desires in this regard before taking action. Thereafter, assuming that a grant is otherwise appropriate, we will impose the new rules or grant on lesser conditions, such as those prescribed as interim procedures by our Notices in these proceedings. We cannot now predict the course we will take in each and every set of circumstances. However, in dealing with pending applications which have been designated for hearing, we think it appropriate normally to abide by the interim procedures already prescribed until we have had an opportunity to examine the overall subject of carriage and non-duplication in light of our further exploration and any Congressional action taken in the interim.

(5) We shall apply the new rules to all applications for new or changed microwave facilities to serve CATV systems,

or for transfers or assignments of authorizations for facilities serving CATV systems, which are filed on or after the effective date of this order. Our records indicate that no relevant renewal applications in the Business Radio Service and few, if any, in the Domestic Public Point-to-Point Microwave Radio Service are due to be filed before those called for by the expiration of licenses in February, 1966. The application of the new rules to any renewal applications filed in the interim will be considered on a case-by-case basis.

By this course of action, we will build up a body of experience with the practical operation of both new rules and the conditions prescribed as interim procedures by our Notices in these proceedings, before considering the extension of the rules to the CATV industry as a whole. Accordingly, we will not terminate these proceedings by this First Report and Order. We will instead hold them open for final action in conjunction with our action upon the overall subject of carriage and non-duplication.

7. Our conclusions on the substantive issues of these proceedings must be considered in light of our basic determination as to the overall course of action we shall follow. It is to those substantive issues that we now turn. The questions presented may be divided into two broad categories: (1) whether any rule making action on the subject of the carriage and non-duplication of local television signals by microwave-served CATV systems is necessary or desirable,<sup>5</sup> and (2) what the scope and nature of any such rule making action should be. In the first category, broadcaster interests urge that there is a need for action to prevent or ameliorate adverse impact of CATV competition upon the maintenance and healthy growth of television broadcast service. CATV interests generally urge that no showing has been made of any broad-scale adverse impact, and that the Commission is warranted in taking action to limit CATV competition with broadcasters only where, on a case-by-case basis, individual adjudicative records firmly establish an overriding need for such action. In the second category, broadcaster interests urge us to adopt and expand the limitations upon CATVs which we have proposed, while CATV interests argue that, if any action is deemed necessary, it should be restricted much more narrowly than the action we have proposed.

8. The broadcasters and those supporting their position (some 34 comments) urge that CATV systems have a substantial adverse impact on local stations, particularly UHF stations and stations in small markets, through loss or division of audience and resulting reduction in revenues. They point out that the existence of a multi-channel CATV is not

5. Some of those commenting (notably, the National Association of Microwave Common Carriers, Inc. and Western Microwave) assert that the proposed rules, if applied to common carrier stations serving CATVs (Docket No. 15233), would exceed the Commission's statutory authority, require an unlawful discrimination between customers and abridge free speech in violation of the First Amendment to the Constitution and Section 326 of the Communications Act. The arguments are substantially the same as those rejected in *Carter Mountain Transmission Corp. v. Federal Communications Commission*, 321 F. 2d 359 (C.A.D.C.), cert. den., 375 U.S. 951 (1963), supra, which we regard as dispositive. American Telephone and Telegraph Company urges that *Carter Mountain* does not control 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. However, in our view, application of the proposed rules to such a common carrier would be an appropriate extension of the Commission action approved in *Carter Mountain*. 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 (video and aural) to a user who in turn distributes those signals to members of the public. In such a situation, we think the law not only permits but requires us to consider the effects of such transmission upon the goals established in the Communications Act for the development and distribution of television broadcast service. Cf., *Federal Power Commission v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1 (1961). This situation is, in our view, entirely different from one in which a common carrier merely provides a general kind of communication service to a user who happens, because of the nature of his business, to be in competition with one or more broadcasting stations.

merely the equivalent of adding one additional signal in the community as would be the case with the establishment of another station, but involves adding whatever number of stations are presented by the CATV system.<sup>6</sup> Moreover, in addition to the CATV system located in the community of assignment of the local station, there may be CATV systems in most or all of the communities of any size within the station's service area. Taken together, these multiple systems may reach a sizable percentage of the total TV homes served by the local station, and "skim off the cream" of the population most likely to contain local advertisers as well as that which non-local advertisers are most interested in reaching.

9. Generally, when a television set is connected with a CATV system, the antenna capable of receiving a local station is disconnected. Thus, if the local station is not carried on the CATV system, it cannot be received by subscribers unless the antenna is physically reconnected or a switching device is installed. It is asserted that the switching devices are frequently defective and that either means of receiving the local station is inconvenient for the subscriber. Moreover, when reception of the local station entails the purchase and maintenance of an outside or rooftop antenna, CATV subscribers usually will not go to this trouble and expense in order to obtain programming not available on the CATV cable. As a result, CATV subscribers are effectively lost to the local station unless its signal is put on the cable.

10. When the local station is presented on the cable, and apart from the audience division caused by the presence of additional program choices on CATV, the ability of the local station to attract or claim audience through the appeal of its programs is substantially diluted when the same programming is duplicated on the CATV by one or more distant signals. The audience appeal of network and other programs received by the local station on film by mail is further greatly lessened if the same programming has previously been shown on CATV through the signals of stations broadcasting it at network times, or otherwise at an earlier time. Even when the CATV carries the local station, it is asserted that the quality of the signal is degraded and in many cases is of lower quality than the distant signals brought in by the CATV, causing subscribers to view other channels. Often the local signal is carried on different channels at different times, preventing audience identification with the local station.<sup>7</sup>

11. The broadcasters assert that audience losses caused by CATV operations have a corresponding effect on station revenues particularly where the total audience is, in any event, relatively small. It is claimed that the willingness of advertisers and sponsors to buy time, and the rates paid, are based on the size of the audience the station can command, and are adversely affected by audience reductions. The presence of additional signals via CATV, especially CATV oper-

ations which do not carry the local station or duplicate its programming, cuts down the number of sets which the station can claim to deliver.

12. With respect to national advertisers, both spot and program, it is said that as these advertisers become increasingly aware that buying the larger metropolitan stations brought in by CATV includes substantial coverage of the community of the local station and other communities of any size within its service area, they will no longer see reason to buy the local small market station in addition. Moreover, even where advertisers continue to buy the local station, the rate may be reduced because of the decreased size of the audience. In addition, American Reserch Bureau (ARB) and Nielson ratings, upon which national advertisers rely in determining how best to reach the markets they are interested in covering, reflect audience losses through CATV impact. Also, these ratings purport to show total homes reached by a particular local station on a projection of a few surveyed and are distorted by homes subscribing to CATV. Thus, if a disproportionate number of CATV viewers who do not watch the local station is included in the sample, the projection may reflect a much larger number of persons not viewing the local station than is actually the fact.

13. It is further claimed that audience ratings are relied on not only by national advertisers, but also by regional and local advertisers. In rural, sparsely settled areas, advertising revenue comes largely from cooperative advertising, carried on behalf of all dealers in a particular area selling a particular product. This revenue is wholly dependent upon reaching the maximum number of viewers in the trade area of the cooperative group. Audience splitting by CATV operations cuts down revenue obtained from cooperative regional advertising.

14. As for local advertising, it is asserted that audience splitting causes the local station to become a less attractive medium in comparison to other media (such as newspapers and radio stations) in the area. Stations in sparsely populated areas find it difficult to obtain national advertising, and so local advertising from all towns in the service area is particularly important. CATV systems are located in precisely the places where local advertisers are most apt to reside, and CATV homes include a disproportionately large number of local businessmen. When they cannot receive the local station (or receive it with a poor signal, or see its programming duplicated on other channels), they assume that others in the community are also viewing distant station programming on CATV and that the local station's value as an advertising medium is small. Many local merchants allegedly ignore the fact that the local station serves a large but sparsely populated area outside the settled communities, which is not reached by CATV. Moreover, some CATV systems are beginning to originate local advertising and thus to compete directly for local advertising revenue.

15. The broadcasters claim that stations in smaller markets operate on a narrow profit margin or at a loss. Thus, it is stated, a reduction in revenues greatly inhibits the ability of the local station to meet its local programming responsibilities.

The studio facilities, equipment, personnel, etc., required for even a modest schedule of local programming entail great expense, and the revenue derived from such programming frequently does not cover the cost. Consequently, a curtailment of revenue is apt to result in curtailment of the more expensive and less remunerative local programming by those stations now attempting to meet their local responsibilities, and to prevent others from investing in facilities for local origination. It is further asserted by some of those commenting that reduction in revenues through CATV audience splitting will discourage licensees from expanding their service to underserved areas, or areas without adequate program choices, through satellites, semi-satellites and translators and will prevent such auxiliary facilities from developing into regular local outlets.

16. In addition, the broadcasters state that CATV is entering and preempting the very communities to which UHF looks for expansion as a result of the all-channel law (76 Stat. 150, 151 [1962]) i.e., communities with no local station or those with VHF stations and sufficient population to support additional UHF facilities. It is claimed that audience splintering through CATV is especially harmful to UHF stations, which for technical and set conversion reasons reach smaller audiences than VHF stations in any event. UHF reception is more dependent on outside antennas, which CATV subscribers may not bother to install or maintain, and may be more affected by leakage from the CATV cable or an improper reconnection of the outside antenna. Not only is UHF thus more adversely affected by not being carried on the cable, but it is also particularly vulnerable to audience fragmentation through duplication and the correlative effect on its ability to obtain advertising revenues. It is claimed that the presence and expansion of CATV operations in areas with potential for new UHF facilities will make many prospective UHF operators decide against undertaking the investment risk, especially where VHF competition is also present.

17. And, finally, it is urged (particularly by NAEB) that the survival and growth of local outlets and the development of UHF facilities is important to educational television (ETV). While CATV has provided ETV to areas where it might otherwise be unavailable, this should be as a complement to, not substitute for, ETV by local stations. Local educational stations are especially important to rural areas, providing services which cannot be supported by rural school systems and reaching many persons who cannot be reached by CATV. Where ETV is brought by CATV to a substantial number of homes and provided by cable to schools in the larger population centers,

6. As a consequence, they argue, the Table of Television Assignments is distorted, and a small community often has more signals available than the larger cities whose station signals are distributed on CATV.

7. This is claimed to be a particularly important factor when the CATV home is a participant in a rating sample and keeps a rating diary (see par. 12, below).



these communities are unlikely to provide financial support for local educational stations (which being non-commercial are dependent upon public contributions) in order to make possible ETV service to the surrounding rural area.

18. While supporting the Commission's proposal to take action with respect to those CATV systems using microwave, the broadcasters claim that similar action with respect to all CATV systems is essential to afford minimum protection to the public interest.

## 2. Broadcasters' Specific Evidence of Impact; The Fisher Report

19. The broadcasters support their assertions, in large part, by generalized statements referring to the obvious likelihood that the importation of competing signals via CATV, the duplication of local programming or the failure to carry a local signal will have some adverse effect upon the local telecaster's audience and revenues. Their comments are not devoid, however, of more specific evidence on the issue. For example, Frontier Broadcasting has submitted with its comments in response to our 1963 Notices an American Research Bureau survey indicating that Frontier's Station KSTF, Scottsbluff, Nebraska has a much higher audience for network and local programs in non-CATV homes than in CATV homes within its service area. And Frontier points out that the two communities served by CATV are the second and third largest communities within the KSTF Grade B coverage contour. Similarly, Springfield Television Broadcasting Corporation has submitted with its reply comments a comparison of the local revenues derived by its Station WRLP, Greenfield, Massachusetts from towns in its service area with CATVs that do not carry WRLP, towns with CATVs that carry WRLP but duplicate its network programming, and towns with no CATV. The comparison indicates that communities without CATVs returned substantially more local revenues than communities of comparable size with CATVs. And Channel Seven, Inc. submitted evidence, in its comments in response to our 1963 Notices, tending to show that the CBS Television Network's 1956 decision to cut sharply the network rate of Channel Seven's Station KLTU, Tyler, Texas was in part motivated by an on-site engineering survey indicating substantial penetration of the Tyler market and duplication of KLTU's network service by the signals of Dallas stations carried on the Tyler CATV system.

20. By far the most ambitious effort to demonstrate the effect of CATV competition upon the audience and revenues of television broadcasters, however, is contained in the Fisher Report, appended to the NAB's reply comments. This report describes statistical studies conducted by Dr. Franklin M. Fisher, Associate Professor of Economics at Massachusetts Institute of Technology, to provide actual measurements of the average

impact of CATVs on television broadcast stations. Studies were made of 487 television stations and nearly 1000 CATV systems, with intensive analysis of more than 800 CATV systems and their impact on 136 television stations in one and two station markets. These studies entailed thousands of hours of data collection, compilation, tabulation, computation and analysis. The studies used 1963 station revenue data furnished by the Commission on coded computer cards (Report, p. 23-24) and ARB audience estimates, both "able to receive" (ATR) and "net weekly circulation" (NWC). (Report, pp. 46-54.) The intensive 136 station study is based on three and a half prime time hours of each day during the ARB March 1964 Survey week (Report, p. 45).

21. The bulk of the Fisher Report (pp. 5-96) is devoted to a detailed explanation of the statistical procedures followed in the analyses, the factors or variables considered, the manner in which they were treated and why, the quantitative results obtained and the basis for each subsidiary conclusion drawn. Only the ultimate conclusions are indicated below.

22. The Report concluded that there is a direct correlation between increases in audience size and station revenues. It was found that an increase in a station's average hourly prime time audience of one TV home will, on the average, increase its annual revenue approximately \$27.00 (Report, pp. 28, 30). This finding was based on a survey of the 487 television stations for whom 1963 revenue data and 1964 ARB audience estimates were available (Report, pp. 23-29). A like survey conducted for 172 stations in one and two station markets reached substantially the same result (\$29.00). (Report, p. 30.)

23. The Fisher Report further concluded (pp. 31-37) that small stations, which are on the average less profitable than large stations, have operating expenses which are more sensitive to changes in revenue than those of large market stations and that when a small market station's revenue falls, it can be expected to cut expenditures relatively more than will a large market station. The entire group of 487 stations was divided into quartiles based on size of audience and analyzed on the basis of cost data furnished by the Commission (in the form of coded computer cards). It was found that for the 121 smallest audience stations, a change of \$1 in revenue will lead to a reduction in gross costs on the average of about 72 cents, whereas in the largest station quartile, the effect of a change in revenue is only about 52 cents (Report, p. 35)[8] The Report concludes (p. 37) that a loss of audience to a small market station magnifies the impact on programming and other expenditures.

24. With respect to CATV impact on stations in one and two station markets (analyzed in pp. 38-110), the Fisher Report summarized its conclusions as follows (Report, pp. 1-2):

"Through the use of standard statistical techniques we have measured the impact on station revenues of being duplicated and of not being carried by CATV systems with which they compete. The impact is substantial.

"While masses of data were gathered for nearly every commercial television station in the United States, our study focuses on the 136 one-and two-station market stations for which full current financial, broadcast competition and CATV competition data are available. Of these 136 stations, nine stations known to have non-duplication agreements were isolated out for special analysis. The following conclusions, therefore, represent the average effects of CATV competition on the remaining 127 stations:

"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. This is equal to more than 50 percent of the average net profits of all stations in the lower half of our study group ranked by size of audience, i.e., the smaller stations. 1000 TV homes is equal to about 2 percent of the average net weekly circulation for these smaller stations.

"2. For every additional 1000 TV homes, formerly able to view both the local station and another, which subscribes 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 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 or slightly less than two-fifths of average net profits for the small stations.

"4. For every additional 1000 TV homes, formerly able to view both the local station and another, which subscribes to a CATV carrying the local station with average duplication, the local station's annual revenue is reduced by a minimum of \$2,900 or some more than 10 percent of average net profits for the smaller stations.

"5. One additional half hour of prime time duplication per week above present average levels reduces average local station annual revenue by \$380 for every 1000 CATV subscribers."

25. The report concludes by considering these findings in the context of the average gross and net profits of the stations studied.[9] Using a variety of measures, Dr. Fisher shows that if his basic projections are correct, the impact of CATV non-carriage, duplication or simple fractionalization of station audience through additional program choices upon the profits of a large number of stations

8. Using net cost data, the average effect of a \$1 change in revenue remained the same (52 cents) for large market stations, but dropped from 72 cents to 62 cents for small market stations (Report, p. 36). This was attributed to the practice of small stations (not generally followed by large stations) of taking out some profits as salaries, including them in gross but not net costs (*ibid.*). It was also noted that in the case of smaller stations depreciation may depend more on the financial history of the station than on its current operations (Report, p. 34, fn. 31). While net and gross costs results may in fact be consistent when these factors are considered, the Report concludes that even leaving them aside "the strong indication remains that when a small station's revenue falls it can be expected to cut expenditures relatively more than will a large station market" (Report, p. 37).

9. As used by Dr. Fisher, the term "net profit" is the same as that reported by television stations on FCC Form 324, Schedule 3, line 3. "Gross profit" includes, in addition, depreciation and proprietary payments. (Report, p. 97, fn. 82)

can be serious and, in the case of stations already marginal, disastrous.[10]

### 3. The CATV Interests

26. The principal contention of the CATV interests, most fully stated by NCTA, is that the broadcasters have furnished no proof that CATV has had, or is likely to have, a substantial adverse impact on local television stations, and that this would be an unwarranted assumption on the part of the Commission. NCTA asserts that the Commission should not act on the basis of assumptions unsupported by demonstrated facts and that facts of this nature can only be established by evidentiary hearing as to the circumstances in individual situations (NCTA Further Comments, pp. 14, 19-23, 27-28, 137-138).[11]

27. According to NCTA, information as to adverse economic effect upon a television station "is more peculiarly within the knowledge of broadcasters" and "within the grasp of the Commission which receives annual financial data from these broadcasters" (NCTA Further Comments (FC), p. 8). Although not in a position to examine the financial returns of local television stations in order to disprove the existence of a substantial, adverse economic impact from CATV, NCTA has conducted extensive research to obtain what facts are available (NCTA Further Comments, pp. 8, 16). On the basis of this research NCTA points to several circumstances which, it states, affirmatively demonstrate that CATV has had little or no part in the demise of stations leaving the air and little, if any, adverse effect on existing stations.[12]

28. NCTA asserts that out of 129 stations (107 UHF and 22 VHF) leaving the air in the past twelve years, only three (ceasing operation in 1959) have cited CATV as one of the factors in their demise and only five have claimed that CATV had any impact at all on their operations (NCTA Further Comments, pp. 10-11), and that two of these stations have since resumed operation (NCTA, FC, p. 10). NCTA further states (FC, p. 12) that no station which has failed within the past five years has claimed CATV as a factor. It asserts that even in those three instances where the demise was partly attributed to CATV, the presence of other adverse factors, such as off-the-air VHF competition or an exceptionally

small market, was primarily responsible for the demise (NCTA, FC, p. 11).

29. Moreover, NCTA has made studies of the 19 stations which claimed a serious impact from CATV in 1959, both before the Commission in Docket No. 12443 and also before the Senate Interstate Commerce Committee.[13] It states that 18 of these stations are still on-the-air and only one has failed (NCTA p. 13). NCTA also asserts that several of these stations have not protested the advent of translators within their Grade A and B contours, even though they rebroadcast the programs of other competing stations and the Commission has no proposed or applicable non-duplication rules for translator operations (FC, p. 13). NCTA further claims that of the 12 stations in the 1959 "impact group" for whom statistics were available, nine have increased their network base hourly rate or their highest local hourly rate in the years between 1959 and 1963 (with increases ranging from 11 1/9 percent to 66 2/3 percent), and for three there has been no change (NCTA FC, pp. 16-18).

30. NCTA further asserts (FC, pp. 35-36, Reply C., p. 34) that its studies show that CATV has not hindered the development of UHF. It states that of the 92 UHF stations now on-the-air, 22 have CATV systems in the community of assignment and 14 of these began operation after the CATV system was in existence (*ibid.*). NCTA also claims that CATV systems affirmatively aid UHF stations by carrying their signals and providing a ready-built audience without need of UHF convertors or all-channel sets (NCTA, FC, pp. 2-3, 35). It is likewise asserted that CATV provides affirmative assistance to ETV by distributing the signals of ETV stations to schools which either cannot receive an ETV station off-the-air or cannot receive a good signal (NCTA, FC, Exh. 1 and 2). NCTA states that CATV gives schools access to high quality educational material far beyond local means and enables those school systems which may lack the technical knowledge or financial resources to establish a local ETV station, to obtain ETV at a price they can afford to pay (*ibid.*).

31. In addition, NCTA claims that CATV assists many local stations by ex-

tending their service areas (FC, p. 35), and that most CATV systems situated in the community of assignment of the local station have already put the station on the cable. According to NCTA (FC, pp. 42-43), there are 96 cities with both local stations and CATVs: 122 stations (100 VHF and 22 UHF) and 105 CATV systems. Of these 105 CATV systems, 85 carry the local station, 15 do not carry the local station, 2 carry one of two local stations, and 3 CATV systems in one city carry 7 of 9 stations (FC, p. 43, Exh. 12 and 13).

32. With respect to all the foregoing, NCTA states that it has not distinguished between CATV systems which use microwave and those which do not. However, apart from the matters relied on as showing that CATV in general has no adverse impact on local stations, NCTA points out that only a relatively small number of CATV systems receive microwave service—250 out of 1300 CATV systems (NCTA, FC, p. 9).[14] Of these 250, 79 are located outside the contour of any station, 71 are in the Grade B contour only, 28 are in the Grade A, 26 are in the city grade contour, and 46 are in the city to which the local station is assigned (*ibid.*). Only 20 of the systems within the Grade A contour of a local station do not carry the station on the cable. (FC, p. 45).[15] Thus, it is urged, Commission action in the microwave field would affect only a small number of CATV systems and would not fulfill the Commission's purpose even if, contrary to NCTA's belief, CATV systems in  *toto*  do have some adverse effect.

### 4. The CATV Interests: Response to the Fisher Report

33. After expiration of the time for filing reply comments, NCTA tendered additional reply comments directed toward the Fisher Report. Those comments will be accepted and considered.[16]

34. In order to evaluate the Fisher Report, NCTA retained Dr. Herbert Arkin, Professor and Head of the Business Statistics Division of the Baruch School of Business of the City College of New York. Dr. Arkin has provided an analysis of the Fisher Report, which is appended to NCTA's Additional Reply Comments (NCTA, ARC, Exhibit B). In Dr. Arkin's opinion, "the conclusions in the report, about the effect of CATV

10. E.g., "Thus, for example, an increase above the average of five half hours of duplication to the 5,500 CATV subscribers presently receiving the local station in an average 3rd and 4th quartile audience area would reduce net profits a minimum of 45%, or from \$23,500 to \$10,500, assuming no corresponding cut in expenditures." (Report, p. 104) Despite the general sensitivity of the expenditures of smaller stations to a drop in revenues, Dr. Fisher's data suggests that the very smallest ("fourth quartile") stations "may presently be at the expenditure margin (as well as the profit margin) with little leeway remaining for cost reduction." (Report, p. 99, and compare p. 36 fn. 33).

11. By way of example NCTA states that it would appear logical to assume that when an AM station receives competition from a second AM station it will incur a loss of advertising, whereas the Commission found that both develop their own advertising and, generally, a new broadcast station generates some new business (NCTA Further Comments, pp. 19-20).

12. NCTA asserts that most of the allegations of adverse impact come from a small group of stations and not from the broadcast industry at large (Further Comments, pp. 87-88).

13. See Report and Order in Docket No. 12443, *Inquiry into the Impact of Community Antenna Systems, TV Translators, TV "Satellite" Stations, and TV Repeaters' on the Orderly Development of Television Broadcasting*, 26 F.C.C. 400; Hearings before the Communications Subcommittee of the Senate Committee on Interstate and Foreign Commerce, 86 Cong., 1st Sess.

14. The NCTA included a statistical compilation concerning each of the 250 CATV systems employing microwave facilities to relay one or more of the signals carried by the system. The data included: the location of the system; the stations received by the system; whether or not microwave facilities were used to receive the station; whether or not the system is located within the A, B or City Grade contour of a station, and whether that station is carried on the system; the power and antenna height for each station; the time zone; the 1960 population, population rank and net weekly circulation, and market rank for the city of assignment of each station; the network affiliations of each station, and translators, if any assigned to the city where the system is located. (NCTA FC, p. 9, 137, Exh. 32.) NCTA has also furnished a series of maps of the United States showing three things: (1) the location of each city where a CATV system operates, employing microwave facilities; (2) the calculated Grade A contours of each TV station where the contour includes one or more cities having such a CATV system; (3) the location of each city where a TV station is operating or authorized. (NCTA, Appendix to Reply Comments, Exh. 3.)

15. NCTA states that 13 of these 20 stations are duplicated at the system's location off-the-air because of contour overlap with another station affiliated with the same network or by translator operations (FC, p. 46). It also states that 60 of the 250 CATV systems are located in areas where there is off-the-air duplication by two or more stations or translators (FC, p. 45).

16. Dr. Fisher has submitted a supplemental statement dated with respect to the reliability of his conclusions. This statement also will be accepted.

subscriptions on the financial position of local television stations, are at best of dubious validity and at worst a possible complete misstatement." (NCTA, ARC, Ex. B, p. 15.) He bases this opinion on a set of criticisms of the report's logic, its statistical techniques and the data which it utilizes.

35. Dr. Arkin argues that it cannot be assumed that all viewers who watch competing non-local signals on a CATV, rather than those of a local station, would watch the local station in the absence of a CATV system. Similarly, he urges, it cannot be assumed that all viewers of non-local programs on a CATV that does not carry the local station would watch the local station in the absence of CATV. In both cases, some people might not have used television at all in the absence of CATV.[17] Put more generally, the advent of CATV may stimulate viewing, resulting in more television homes and more hours of viewing. As a result, audience "lost" to the local station through non-carriage or competition and duplication may (1) be composed in part of audience which the station would never have had in the absence of CATV and (2) be compensated by new audience for the local station resulting from CATV's stimulating effect upon viewing generally.

36. Dr. Arkin also criticizes the Fisher Report for its asserted failure to "disclose in detail the actual data used in the analysis" (NCTA, ARC, Ex. B, pp. 6-8), and for various asserted faults in its statistical techniques. Particularly emphasized are (1) the "built-in" correlation between actual and potential station audience in Dr. Fisher's fundamental formula, which in Dr. Arkin's view vitiates any conclusions drawn from that formula as to the relationship between other variables (relating to CATV) and actual station audience, and (2) the assertion that Dr. Fisher's group of study stations is not a probability sample or a representative cross-section of stations, from which projections can be made as to all stations, but rather a conglomerate group of stations as to which various kinds of data were available. (NCTA, ARC, Ex. B, pp. 8-15.)

37. Apart from Dr. Arkin's analysis, NCTA makes a number of other critical comments on the Fisher Report. Most heavily emphasized is the claim that, using its own study group of 723 CATV systems and Dr. Fisher's 127 study stations, NCTA has been unable to find any actual situations in which Dr. Fisher's first two conclusions (as to the impact upon station revenues of 1000 subscriptions to a CATV not carrying the station) are applicable—much less borne out—in practice. (ARC, pp. 6-14) While making a number of other critical comments, NCTA states that it cannot respond to the remaining three basic Fisher con-

clusions, because it does not have available the data (particularly as to "average duplication") on which those conclusions were based or the time necessary to examine the data, were they available, and to prepare a response. (ARC, pp. 6-7)

38. Arguing that Dr. Arkin's analysis and its own comments demonstrate that the Fisher Report is entirely lacking in weight or meaning, NCTA petitions us to disregard that report totally as a basis for decision in these proceedings (ARC, p. 24). In the event we do propose to rely upon the report, NCTA requests an additional 134 days to "provide statistical evidence of the impact of the defects in the 'Fisher Report' and to insure that the basic technique was not faulty," as well as a Commission order that the basic data underlying the report be made available to NCTA (ARC, pp. 25-27)[18]

#### B. Evaluation

39. The comments of the parties center upon the effect which CATV competition has, or may be expected to have, upon television broadcast service. We must evaluate this effect, however, in light of our statutory responsibilities. We must also take into account the basic conditions under which CATV systems and television broadcasting stations compete as alternative means for the distribution of television programs. We discuss these matters before taking up the question of CATV impact upon broadcasting service.

#### 1. Statutory Responsibilities of the Commission

40. The fundamental statutory responsibilities of the Commission are clear. The Commission is charged with the duty of executing the policy the Communications Act to "make available, so far as possible, to all people of the United States, a rapid, efficient, Nationwide and world-wide wire and radio communication service" (47 U.S.C. 151) and "generally to encourage the larger and more effective use of radio in the public interest" (47 U.S.C. 303(g)). The Commission is also required to "make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same" (47 U.S.C. 307(b)).

41. In the television field the Commission has sought to fulfill these responsibilities on a nationwide basis through the Table of Assignments contained in Section 73.603 of the rules. When the basic assignment plan was promulgated in 1952, the Commission expected that the over-all assignments would substantially achieve the statutory objectives.[19] As was stated in the Sixth Report and Order (par. 67), by intermixing VHF and UHF assignments:

"\*\*\*the Commission was able to formulate an assignment plan that has the potentiality of fulfilling the objective of Section 1 of the Communications Act. If all the VHF and UHF channels are utilized, there should be few, if any, people of the United States residing beyond the areas of television service. (See priorities 1 and 3.) Moreover, the Table has gone far in fulfilling the need of individual communities to obtain local television outlets. It has provided at least one assignment to over 1250 communities (see priority 2). And it has attempted where possible to provide each community with at least two assignments."

42. While many areas now have local outlets and/or multiple reception services, the full potential of the assignment plan has not been realized in the intervening years. Three major factors have contributed to this. First, UHF assignments in areas with sufficient population to support additional stations have not been utilized because of the difficulties of competing with VHF stations on an intermixed basis and because television sets capable of receiving UHF signals are not yet generally prevalent. Second, in some sparsely settled areas of the country where unused VHF as well as UHF assignments are available (notably in the mountain and Western states), there has not been sufficient population to provide economic support for local outlets or multiple services. And, third, some persons residing within the computed service areas of existing stations have not in fact received their broadcast signals because of adverse terrain or other conditions.

43. The public demand for television service in areas too small in population to support a local station or too remote in distance or isolated by terrain to receive regular or good off-the-air reception has led to the development of CATV systems, "satellite" stations, translators and VHF repeaters or "boosters." [20] This development has not been limited to areas which, absent auxiliary means of distributing television programs, would have been totally devoid of service. It has proceeded in areas with one and two off-the-air signals of good technical quality, and—insofar as CATV is concerned—is proposed for communities with three full network services. The public in all areas has made clear its demand for good reception of multiple program choices. This desire and need must be recognized and fulfilled, to the extent practicable. It is one of the principal components of the public interest standard of the Communications Act. Indeed, it may be said that the development of CATV and other auxiliary means for distributing the signals of assigned stations to the public (something not envisioned at the time of the Sixth Re-

17. Dr. Arkin also criticizes the Fisher Report's assumption that subscribers to a CATV which does not carry the local station must necessarily be a total loss to the station. In some cases, he points out, the subscriber to such a system is equipped with a switch enabling him to choose—at any point in time—between cable and off-the-air reception.

18. We note here that the basic data underlying the Fisher Report were in fact submitted by NAB for inclusion in the record of these proceedings by letters of October 26 and November 9, 1964. They have been associated with that record, and have been available to all parties since a time shortly after those dates. NCTA's assumption, in additional reply comments tendered on December 14, 1964, that this information was not available to it, is evidently based upon a misunderstanding.

19. It was recognized, of course, that the allocation priorities could not be rigidly or mechanically applied in view of the limited number of available frequencies and varying geographic, economic, and population conditions from area to area (Sixth Report and Order, pars. 63, 65).

20. See the Report and Order in Docket No. 12443, *CATV and Repeater Services*, 26 F.C.C. 403, for a description of the nature and development of CATV systems, satellites, translators and boosters. See also, Report and Order in Docket No. 14184, *Television Broadcast Translator Stations*, FCC 62-710, 23 Pike & Fischer, R.R. 1565.

port and Order) now makes possible the realization of some of the most important goals which have governed our allocations planning. The provision of at least four commercial program choices and an educational service to most parts of the United States, using auxiliary means where necessary, may now be a feasible goal.[21]

44. However, while CATV systems are capable of making a valuable contribution toward the achievement of expanded television reception service, it is of the utmost importance to the over-all public interest that extensions of the Table of Assignments by auxiliary distribution means are accomplished on a fair and orderly basis, and that CATV systems and television broadcast facilities have complementary rather than conflicting roles. The distribution of multiple reception services through CATV cannot be permitted to curtail the viability of existing local service or to inhibit the growth of potential service by new broadcast facilities. Because of the prohibitive cost of extending the cables beyond heavily built-up areas, CATV systems cannot serve many persons reached by television broadcast signals. Persons unable to obtain CATV service, and those who cannot afford it or who are unwilling to pay, are entirely dependent upon local or nearby stations for their television service. The Commission's statutory obligation is to make television service available, so far as possible, to all people of the United States on a fair, efficient, and equitable basis (Sections 1 and 307(b) of the Communications Act). This obligation is not met by primary reliance on a service which, technically, cannot be made available to many people and which, practically, will not be available to many others. Nor would it be compatible with our responsibilities to permit persons willing and able to pay for additional service to obtain it at the expense of those dependent on the growth of television broadcast facilities for an adequate choice of services.

45. Moreover, local stations afford a means for community self-expression. They provide programming designed to meet the particular tastes and needs of the public in their service areas, such as local news and public affairs, and are accountable to the Commission for operations in the public interest. Very few CATV systems originate local programming. Even if they were to do so generally, and were to comply with the safeguards contained in Sections 315 and 317 of the Communications Act and other aspects of the public interest standard for broadcast operation, CATV-originated local programming would not be available to persons residing in rural areas and other non-subscribers.

46. In addition, the Table of Assign-

ments is predicated upon the social desirability of having a large number of social outlets with diversity of control over disseminating sources rather than a few stations serving vast areas and populations.[22] In the Sixth Report and Order the Commission rejected the "Dumont" allocation plan and its premise that channel assignments should be clustered in major cities with sufficient population to support extensive television facilities, while smaller communities within an appropriate range should obtain reception service from the major cities rather than attempt to support stations with their own less substantial economic resources. The Commission stated (Sixth Report and Order, par. 70):

"The Commission, on the other hand, believes that on the basis of the Communications Act it must recognize the importance of making it possible with any table of assignments for a large number of communities to obtain television assignments of their own. In the Commission's view as many communities as possible should have the opportunity of enjoying the advantages that derive from having local outlets that will be responsive to local needs."

47. Thus, our commercial television system is based upon the distribution of programs to the public through a multiplicity of local station outlets. In seeking to lift restrictions upon the growth of multiple services imposed by the UHF-VHF problem, we have not turned to an alternative system of signal and program distribution, based upon a handful of "super stations" and a nationwide network of wires, microwave relays and translators. Our fundamental program in this area stems from the all-channel receiver legislation, enacted in 1962 (76 Stat. 150, 151). And that legislation, recognizing the importance of local outlets and local service, seeks an expansion of the present system through the creation of new station outlets in the UHF bands. As the House Report states (H.R. Rep. No. 1559, 87th Cong., 2d Sess., p. 3):

"The goal is thus a commercial television system which will (1) be truly competitive on a national scale by making provision for at least four commercial stations in all large centers of population; (2) provide at least three competitive facilities in all medium-sized communities; and (3) permit all communities of appreciable size to have at least one television station as an outlet for local self-expression."

48. These considerations, all expressed or inherent in our **Carter Mountain** decision, lead to certain broad conclusions:

(1) If there is a significant risk that CATV competition will destroy or seriously degrade the service offered by a television broadcaster, our statutory du-

ties require us to seek means to prevent this result. The competition involved is not between basically similar entities, which offer similar benefits to the public. On the contrary, if CATV operations should drive out television broadcasting service, the public as a whole would lose far more—in free service, in service to outlying areas, and in local service with local control and selection of programs—than it would gain.

(2) It is therefore inappropriate to equate competition between broadcasting stations with competition between broadcasting and CATV. In dealing with competition between broadcasters, the courts have said: "Of course the public is not concerned with whether it gets service from A or from B or from both combined. The public interest is not disturbed if A is destroyed by B, so long as B renders the required service." **Carroll Broadcasting Co. v. Federal Communications Commission**, 258 F. 2d 440 (C.A.D.C.). But if CATV competition should destroy a broadcasting operation, the CATV would not thereafter "render the required service." 23/

(3) We cannot properly ignore this problem until and unless it is raised in the context of individual adjudicative cases. As the Supreme Court long ago pointed out, "The Communications Act is not designed primarily as a new code for the adjustment of conflicting private rights through adjudication. Rather it expresses a desire on the part of Congress to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission." **Federal Communications Commission v. Pottsville Broadcasting Co.**, 309 U.S. 134, 138 (1940). Our responsibilities are not discharged, therefore, by withholding action until indisputable proof of irreparable damage to the public interest in television broadcasting has been compiled — i.e., by waiting "until the bodies pile up" before conceding that a problem exists. Our duty is "to encourage the larger and more effective use of radio in the public interest"—to ensure that all the people of the United States have the maximum feasible opportunity to enjoy the benefits of broadcasting service. To accomplish this goal, we must plan in advance of foreseeable events, instead of waiting to react to them.

(4) This is not in any way to ignore or to denigrate the very real contribution which CATV service makes to the public interest. Our conclusion is rather that community antenna television serves the public interest when it acts as a supplement rather than a substitute for off-the-air television service. The question at the heart of these proceedings is whether and to what extent rule making action is necessary or appropriate to integrate CATV service into our existing television

21. We note that the University of Utah has extended the educational service of Station KUED in Salt Lake City to communities throughout the State by means of translators, and the Department of Health, Education and Welfare will grant matching funds for the construction of educational translator stations.

22. See **Associated Press v. United States**, 326 U.S. 1, 20 (1945); **The Goodwill Stations, Inc., v. Federal Communications Commission**, 325 F. 2d 637, 640 n.5 (C.A.D.C.); **United States v. Storer Broadcasting Co.**, 351 U.S. 192. As the court noted in the **Goodwill** case (325 F. 2d at 640, and n. 5), the Commission concluded in the clear channel proceeding that it was technically feasible for Class 1A standard broadcast stations to expand their skywave services by high power but was concerned as to whether the social and economic objections to high power had been sufficiently met, i.e., "whether (1) authorizing a few 'super-power' radio stations to serve a vast area and population would be compatible with the principle that the widest possible dissemination of information from diverse and antagonistic sources of local origin is in the public interest; (2) whether it is in the public interest to allow a few stations to achieve the competitive pre-eminence that would come with their use of higher power."

23. For this reason, while we are aware that off-the-air competition from another broadcaster can—in some situations—be more damaging to an individual station than competition via CATV (cf., Seiden Report, pp. 72-3), and while we do consider carefully any harm to the public interest which might result from this cause, in accordance with the doctrine of the **Carroll Broadcasting** decision, we do not normally regard this kind of competition as ground for the kind of concern with which we must view the potential effects of CATV competition upon broadcasting.

system—to ensure that CATV performs its valuable supplementary role without unduly damaging or impeding the growth of television broadcasting service.

## 2. Basic Conditions Under Which Competition Occurs

49. It is often asserted that CATV systems do not, in fact, compete with broadcasting stations, since they do not compete for the advertising dollar on which commercial broadcasting lives. While superficially appealing, we cannot accept this view. There are CATV systems, existing and proposed, which operate in areas of poor television reception and provide only the signals of local stations, which are prevented from reaching these reception "pockets" by special terrain or other factors. Such a system provides, in effect, a pure "reception" service to its subscribers. It "competes" with broadcasting service only in the sense that the reception difficulties it is designed to overcome might in some situations be resolved by a change in station facilities (antenna height or location, effective power, etc.) or by the erection of one or more translators re-broadcasting the signals of local stations. Much the same might be said of CATV systems which extend broadcast signals into areas that are simply beyond the range of any off-the-air broadcast signal.

50. In large part, however, the CATV industry brings to areas already served by one or more stations the signals of other stations which are well beyond the normal range of reception. Moreover, in providing additional television signals, it does more than supply subscribers with signals of their own choosing. As we have held on several occasions, the CATV operator—not the individual subscriber—determines which stations (and sometimes which programs) it will be available on the system.<sup>24/</sup> Systems that reach out for the signals of specific stations through the use of microwave relay service are obvious, but

not the only, examples of this kind of operation. When a cable system brings to a station's market additional signals which would not be readily available in the system's absence, it introduces competition for audience attention—and audience attention is the basic commodity that a station sells to advertisers.

51. The competition between CATV systems and stations may be marked by at least two features which are not present in the ordinary competition between broadcasting stations. **First**, the system—while carrying the signals of distant stations—may not carry the signals of a local station which the subscriber is otherwise able to receive. Upon installation of the cable, the CATV operator may not provide the subscriber with a switch enabling him to choose between off-the-air and cable reception. Outdoor antennas necessary for off-the-air reception may be dismantled at the time of cable installation, or may not thereafter be maintained.<sup>25/</sup> True, switching devices are sometimes installed (although the comments indicate considerable dispute as to the technical efficacy of such devices). But in any event the end result will often be a total loss of potential audience for the local station. For the sheer inconvenience of switching is an obvious deterrent to its use by the subscriber.<sup>26/</sup> In effect, the CATV operator who does not carry local stations offers potential subscribers a choice between available off-the-air service and the entire bundle of services from distant stations which his system provides. A gain of a subscriber to the system will in most cases mean the effective loss of a potential viewer for the local station. This kind of barrier to competitive access is not created in the course of competition between television broadcasting stations.

52. **Second**, in subjecting the local station to competition from additional program services, the cable system does not enter the market for programming, as would a competing broadcaster. Tele-

vision stations obtain their programs, for the most part, from various program suppliers. The most important of these, for most stations, are the national television networks. However, stations deal in addition with the distributors of feature film, cartoon, syndicated and sports programming.<sup>27/</sup> The station obtains the right to exhibit network programs by offering to the network a major portion of the compensation which the sponsor or participating advertiser pays for the use of the station's facilities in connection with that program. The station normally obtains the right to exhibit non-network programs by outright payments to non-network program suppliers.

53. In dealing with program suppliers, stations usually obtain the exclusive right to exhibit programs within a particular geographical area and for a particular length of time. This exclusivity reflects, among other things, the judgment that duplication of the program within the station's market—either simultaneously or within some period of time—reduces the audience and the value of the program to the station. The amount and kind of exclusivity that can be created is restricted by our rules (in the case of network programs) and, more generally, by the antitrust laws.<sup>28/</sup> However, our rules and the antitrust laws permit the creation of substantial exclusivity as a normal incident of the program distribution process.<sup>29/</sup> And this exclusivity is maintained, in large part, through the operation of Section 325 of the Communications Act, which forbids the re-broadcasting of any station's signal without the consent of the originating station. For network affiliation agreements and most station contracts with other program suppliers either explicitly or implicitly forbid the station to grant re-broadcasting consent for the programs involved without the approval of the supplier.<sup>30/</sup>

54. The CATV system that provides its subscribers with the signals of distant

24. See, e.g., *Frontier Broadcasting Co. v. Collier*, 16 Pike & Fischer, R.R. 1005 (1958); *CATV and TV Repeater Services*, 26 F.C.C. 403, 427-8 (1959). Were the facts otherwise, a serious question would arise whether CATV systems are subject to regulation under Title II of the Communications Act as interstate communications common carriers.

25. One of the standard selling points of CATV service is the subscriber's ability to dispense with expensive or unsightly outdoor antennas.

26. This is apparent if we consider the situation in terms of network programming (and the appropriateness of focusing upon the network situation is pointed up by (i) the fact that the principal basis for CATV growth thus far has been the provision of network service to areas where the programs of all three networks are not readily available, and (ii) the well-known importance of network programming to the financial support of local television service. If, for example, there is a local CBS affiliate competing for audience with a CATV which brings in a distant big-city CBS affiliate, there is no reason to believe that the subscriber will go to the trouble of using the switching device on the back of his set in order to get the CBS programs locally rather than from the big-city channel on the CATV. Common sense indicates that the subscriber will in most instances take the easiest, most convenient route and simply watch CBS programs on the CATV channel (thus avoiding the necessity of using the switch several times a night as he goes back and forth from CBS to those programs of other networks which are available only on the CATV channels).

27. The relatively few independent stations now on the air must, of course, rely primarily upon non-network sources of supply.

28. Section 73.685(b) of our rules prohibits arrangements between a network and its affiliate which prevent or hinder another station in the same community from broadcasting programs of the network not carried by the affiliate, or prevent a station in a different community from broadcasting any program of the network. The rules permit arrangements granting the affiliate a right of "first call" or "first refusal" in its community. The antitrust laws forbid exclusive "clearances" for the "runs" of a feature film in any area which (a) apply against a theatre not in "substantial competition" with the exhibitor to whom clearance is granted, or (b) are longer in time or wider in area than is reasonably necessary to protect the value of the license in the run granted. They permit reasonable clearances, creating reasonable exclusivity, within these limits. *United States v. Paramount Pictures*, 334 U.S. 131 (1948); *ABC-Paramount Merger Case*, 8 Pike & Fischer, R.R. 541, 561-71, 621-2 (1953). Similar restrictions would appear to apply to the distribution of television programs. Cf., *United States v. Loew's, Inc.*, 371 U.S. 40 (1962).

29. See note 28 above. We note that our rules restrict the kinds of exclusivity that can be created by agreement between a network and its affiliate. They do not presently control the kinds of exclusivity which the network can create as a matter of its own practice and for its own reasons. Networks do, in fact, have substantial incentives to avoid program duplication in selecting their affiliates and in deciding whether to make their program available to stations not affiliated with them. (The most important of these is probably the advertiser view that duplication is a waste for which no payment is warranted. As a result, most network affiliates enjoy substantially exclusive access to the programs of their network in an area going well beyond their own communities and, in many cases, well beyond their Grade A reception contours. Similarly, although the network is free to offer its programs to another station when its affiliate refuses to clear time except on a delayed basis, it rarely does so. As a result, the affiliate's network programs are almost never duplicated in advance of its own presentation and rarely thereafter, until the program leaves the network and enters the so-called syndication market. For a description of network practices in these respects, see *Network Broadcasting*, reprinted as H. Rep. No. 1297, 85th Cong., 2d Sess., pp. 208-47, 263-73 (1958).

30. We have examined, of course, the network affiliation agreements in our files and have obtained sample contracts for the sale of right to exhibit syndicated feature film and sports programming from stations and program suppliers. In addition, our general experience supports the statement made above. For an example of the way in which one network has exercised control over the distribution of its programs through the operation of Section 325, see *National Broadcasting Co.*, 20 Pike & Fischer, R.R. 1013 (1960).

stations presently stands outside of the program distribution process we have described. It has not been found subject to the requirements of Section 325.31. It does not compete for network affiliation, nor for access to syndicated programs, feature films or sports events. It is not concerned with bidding against competing broadcasters for the right to exhibit these programs nor with bargaining with program suppliers for time and territorial exclusivity. Moreover, because the distant station whose signal is carried has not control over the CATV's use of its signal, the question of whether a program should be exhibited through CATV facilities in any particular market cannot be the subject of bargaining or agreement between the distant station and the program supplier — although the question of whether the same program should be rebroadcast in that market by a television station or translator can be, and often is, the subject of such bargaining and agreement.

55. This is not the usual competitive situation. The CATV system and the local broadcaster provide the public with access to the same basic product — the programs created or sold for distribution through broadcasting stations. The broadcaster, however, must himself obtain access to the product in the program distribution market, with its various restrictions and conditions. The CATV operator need not enter this market at all.<sup>32/</sup>

56. The resulting situation is in many ways an anomalous one. From the point of view of an existing station, the CATV may—in providing its subscribers with the signals of distant stations — duplicate programs for which the station has bid and obtained exclusive exhibition rights. No other station in the same market could normally obtain access to those programs without effectively outbidding the local station in the program market. Nor could a translator carry them without the express or implied approval of the program supplier. The CATV, however, carries them without paying anyone or engaging in any bidding process.

From the point of view of an entrepreneur considering the establishment of another station in the same market, the situation is even more anomalous. Over and above his inability to obtain program exclusivity as against the CATV system, the very programs which he cannot obtain from program suppliers (because the existing station has been given exclusive exhibition rights in those programs) are made available in the market by the CATV without any payment or bidding process.

57. These considerations as to carriage of the local station's signal and duplication of its programming — like those stemming from our statutory responsibilities — lead to certain broad conclusions:

“(i) As a competitive practice, the failure or refusal by a CATV system to carry the signal of a local station is plainly inconsistent with our belief that CATV service should supplement, but not replace, off-the-air television service. The cable system that follows such a practice offers the subscriber the benefits of additional television service at the price of blocking of impeding his access to available off-the-air signals. Moreover, it gives the service of distant stations, offered to the subscriber as a group, an artificial advantage over the service of local stations in competing for the subscriber's attention. If the distant stations themselves were to establish a system carrying their signals, the anti-competitive character of their failure or refusal to carry the signals of local stations would be obvious. We think it no less obvious where the CATV system is independently owned.

“(ii) Because it is inconsistent with the concept of CATV as a supplementary service, because we consider it an unreasonable restriction upon the local stations ability to compete, and because it is patently destructive of the goals we seek in allocating television channels to different areas and communities, we believe that a CATV systems failure to carry the signal of a local station is inherently contrary to the public inter-

est.<sup>33/</sup> Only if we were persuaded that the overall impact of CATV competition upon broadcasting would be entirely negligible could we consider countenancing such a practice.<sup>34/</sup>

“(iii) In light of the unequal footing on which broadcasters and CATV systems now stand with respect to the market for program product, we cannot regard a CATV system's duplication of local programming via the signals of distant stations as a fair method of competition. We do not regard the patterns of exclusivity created in the existing system for the distribution of television programs as sacrosanct. We think it apparent, however, that the creation of a reasonable measure of exclusivity is an entirely appropriate and proper way for program suppliers to protect the value of their product and for stations to protect their investment in programs.<sup>35/</sup> We think the basic Congressional judgment underlying Section 325's limitation on rebroadcasting is the same.

“(iv) Nor do we consider the duplication of existing off-the-air service to be consistent with CATV's appropriate role as a supplementary service. Whatever the ultimate impact of CATV competition upon the revenues and operation of competing stations, duplication is highly likely to affect the audience for the specific programs involved.<sup>36/</sup> And it does so without generally offering the public a substantially different service. We believe that a service such as CATV, which lives on the product of the existing television system and finds its justification as a supplementary service, should at a minimum give some measure of recognition to the fundamental distribution practices that have developed in the parent industry's competitive program market—to exhibition rights for which others must bargain and pay but which it has thus far been able to use without any bargaining by itself or by the stations whose signals it carries.<sup>37/</sup> Once again, unless we were convinced that the impact of CATV competition upon broadcasting service would be negli-

31. See *CATV Systems and TV Repeater Services*, 26 F.C.C. 403, 429-30 (1959).

32. We are aware, of course, of the pending copyright litigation in which program suppliers are seeking to establish their right to control the use by CATV systems of signals carrying their programs. See *United Artists Associated, Inc. v. N.W.L. Corporation*, Civil Action No. 60-2583, U.S. District Court for the Southern District of New York, filed 1960; *Columbia Broadcasting System, Inc. et al. v. Teleprompter et al.*, Civil Action No. 64-3814, U.S. District Court for the Southern District of New York, filed 1964. We neither intimate nor express any view as to the merit of these suits, which fall beyond our jurisdiction. We cannot close our eyes, however, to the significance which the present inability of program suppliers to control the availability of their programs via CATV has for competition between CATV and broadcasting stations.

33. We note that in 1959 we expressed our willingness to recommend legislation requiring that all CATV systems carry the signals of local stations. *CATV Systems and TV Repeater Services*, 26 F.C.C. 403, 439 (1959). The major factors which prevented the imposition of such a consideration upon licenses for microwave relays serving CATVs in the common carrier and business radio services were (1) our determination—since reconsidered and reversed in the *Carter Mountain* decision — that it would be legally improper to consider the economic impact of a common carrier's provision of service to a CATV upon competing broadcasters in deciding whether to issue a common carrier authorization, and (2) the fact that at the time we had not yet opened microwave frequencies for the use of private business entities on a regular basis. See *Frequency Allocations Above 890 Mc/s*, 18 Pike & Fischer, R.R. 1767 (1959); 20 Pike & Fischer, R.R. 1602 (1960).

34. In the above discussion we have focussed upon commercial television broadcasting. We point out that any substantial roadblock to the reception of local noncommercial educational signals by CATV subscribers would also be contrary to established national policy which seeks to promote the widest reception of educational television service. See Public Law 87-477, 87th Cong., 2d Sess.; Sen. Rep. No. 1526, 87th Cong., 2d Sess., p. 3; H.R. Rep. No. 1559, 87th Cong 2d Sess., pp 3-4.

35. We note that our Network Study Staff rejected the idea that the right of “first call” for network programs should be abolished, on the ground that this right is essential to the working of the network system. See *Network Broadcasting*, supra, pp. 274-5 (1958).

36. This probability is clearest with regard to simultaneous duplication, where—a prior—it is reasonable to expect that the station's audience among subscribers might be reduced by as much as one-half, since there is no real basis for preference as between watching the same program on the local channel or that of the distant station. But a similar effect on audience is often likely in the case of duplication within a short time of presentation by the local station.

37. In 1959, while we rejected proposals that non-duplication requirements be imposed on CATV systems, we concluded that the restrictions on rebroadcasting embodied in Section 325 of the Communications Act should be extended to the distribution of broadcast signals by CATVs, both in order to clarify the situation with respect to property rights ( . . . we believe Congress intended to recognize and protect the property rights in programs) and in order to “place the CATV under the same conditions as the broadcaster with respect to access to programs originated by other stations.” *CATV Systems and TV Repeater Services*, 26 F.C.C. 403, 438-40 (1959). The Congress, however, has not seen fit to adopt this recommendation. Various parties to these proceedings now urge us to construe the microwave carriage and distribution of television signals by or for the benefit of CATVs as a single transaction which, in effect, constitutes “rebroadcasting” under the existing provisions of Section 325. We think the proposed construction is a strained one, which we are not at liberty to adopt. However, we believe that reasonable non-duplication requirements will serve, in part, to achieve the equalization of competitive conditions at which the “rebroadcasting consent” proposal is, in large part, aimed.

gible, we would favor some restrictions upon the ability of CATV systems to duplicate the programs of local broadcasting systems, as a partial equalization of the conditions under which CATV and broadcasting service compete."

### 3. Impact of CATV Competition on the Development of Television Broadcasting Service.

58. In light of what we have said about the basic conditions under which competition between CATV systems and broadcasting stations occurs, it is plain that these proceedings do not turn upon a showing that CATV competition is demonstrably certain to cause wide-spread and serious damage to the public interest in television broadcasting. We think the basic fact that CATV service, while entirely dependent upon television broadcasting, also offers substantial competition to television station outlets is enough to justify regulatory action designed to ensure that the competition involved is conducted under fair and reasonable conditions. But in any event, in light of our statutory responsibilities, we cannot view the issue before us as one which depends upon a showing that CATV competition is highly likely to cause the wholesale demise of television stations across the country in the immediate future.

59. There is another reason for taking this position. When we last considered the overall questions raised by the development of CATV, our approach to the "economic impact" issue was focused largely upon the question of whether the adverse impact of CATV competition on broadcasters "would justify us in taking action, or seeking authority under which we could act, to bar CATVs from coming into or continuing to operate in a particular market." **CATV and TV Repeater Services**, 26 F.C.C. 403, 424 (1959).<sup>38</sup> As we stressed at the beginning of this Report and Order, however, the issue in these proceedings is not whether to bar CATV entry into any particular market or markets. It is rather whether to permit the use of microwave facilities to serve CATVs, while imposing some restrictions upon the manner in which the relevant cable systems compete with local television stations. And, as our 1959 Report points out, "The amount and certainty of the impact which we would have to find in order to justify a particular course of restrictive action naturally varies with the character of the particular action to be considered." (26 F.C.C. at 424).

60. With these considerations in mind, we turn to an evaluation of the facts on the question of impact. We shall discuss this question first in terms of impact on existing operations and second in terms of the indications for new stations that may come on the air in the immediate future. 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 non-local television serv-

ice 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 (cf., Program Policy Statement, 20 Pike & Fischer, R.R. 1901 (1960)).

61. When we last reviewed the overall effect of CATV competition upon television stations, we concluded that "there is an impact upon television stations, regular and satellite, from the operation of auxiliary services of substantial size which bring competing signals into the stations' home communities (and perhaps, to a lesser extent, into other communities within their coverage areas)." We were unable to determine, however, "at what point, in terms of size of the market or auxiliary, the number of signals brought in, etc., this impact becomes serious enough to threaten the station's continued existence or serious degradation of the extent and quality of its service." **CATV Systems and TV Repeater Services**, 26 F.C.C. 403, 421-2 (1959). We reviewed three cases in which stations had gone off the air claiming that CATV competition was the cause of their demise (26 F.C.C. at 415-18) and concluded that it was impossible to isolate the effect of CATV competition from other factors which might — absent CATV — have presented successful operation (26 F.C.C. at 422-3). We also considered evidence of less extreme situations in which broadcasters had claimed that they had been forced to curtail their service to the public because of CATV competition (26 F.C.C. at 418-29, 423), but concluded that "the circumstances are essentially as unpredictable as the occurrences of the more drastic situations." (26 F.C.C. at 423).

62. As of the date of our 1959 Report, a number of other stations which were subject to some degree of CATV competition had gone off the air without citing CATV as a substantial factor in their situations. And, as NCTA notes, since 1959 yet other stations subject to some CATV competition have gone off the air, but non has publicly cited CATV as an important factor in their financial difficulties. Moreover, a number of the stations which in 1959 were complaining that CATV competition was placing them in a precarious condition having subsequently enjoyed sufficient financial health to increase the rates at which their facilities are sold to network and non-network advertisers.

63. We cannot regard these facts, however, as dispositive of the question of impact upon existing stations. Quite aside from the inherent weakness of an approach which makes conclusions turn upon whether or not a station owner or manager has publicly cited CATV as a causal factor in financial difficulties, the situation with which we are faced is not static but dynamic. Concentration upon the immediate results at a particular point in time in a few particular situations — without probing underlying factors and the longer range trends affecting them — can produce highly er-

atic conclusions.<sup>39</sup>

64. Looking, then, to the underlying factors, we note that in 1959 we concluded that "The amount of impact . . . depends not only on the number of people served by the auxiliary service and that number's relation to the size of the market, but also on the number and character of the signals brought in." (26 F.C.C. at 420). The record of the landmark **Carter Mountain** case illustrates the operation of these factors. It shows that the amount of local revenue received by Station KWRB-TV, Riverton, Wyoming from each of the major towns in its market area was inversely proportional to the ratio of CATV subscribers to total TV homes in each town. As shown in the table below, the towns with the lower proportion of CATV homes produced disproportionately greater revenue to the station than communities of comparable size but with substantial ratios of CATV penetration:

On the basis of these and other facts as to KWRB-TV's condition as a small market station, we found that the unconditional grant of an application for microwave service — which would result in substantially improved reception of distant signals — would probably also result in the station's demise. Upon review, the Court of Appeals held that the record "amply" supported our conclusion. **Carter Mountain Transmission Corp.**, 32 F.C.C. 459, affirmed, **Carter Mountain Transmission Corp. v. FCC**, 321 F. 2d 359 (C.A.D.C.), cert. den., 375 U.S. 951 (1963).

65. In seeking to determine whether it is probable that many other stations will be faced with circumstances like those of the **Carter Mountain** case, we must take account of nationwide trends affecting the nature of CATV service offerings, the character of the markets entered and the degree of penetration achieved. In this respect, we think, there is ground for real concern. In 1959, there were approximately 550 identified CATV systems, serving as estimated 1, 500,000 persons (26 F.C.C. at 408). Now approximately 1300 CATV systems serve 4,000,000 or more viewers (NCTA, FC p.8). In the late 1950's and early 1960's, franchises for cable systems were granted at an average rate of 50 a year. Between October 1963 and July 1964, the number of franchises granted was 158. (Seiden Report, p. 49). The average CATV system provided three signals to its subscribers in 1959 (26 F.C.C. at 407); now, the majority provides five or more signals (Seiden Report, pp. 53-4). It is not uncommon for a system to offer as many as 12 channels. In 1959 only 50 CATV systems made use of microwave facilities, and the maximum distance from which signals were brought in was some 300 miles (26 F.C.C. at 409). Since then, the number of systems using microwave has increased more than five-fold to 250 in 1964 (NCTA, FC, p. 9) and many more today. Microwave applications pending before us involve distances of 665 miles or more. And while the CATV industry originated in sparse-

38. See also 26 F.C.C. at 425 (par. 54) and 436-8.

39. For example, the station in Kalispell, Montana, heavily on this fact (26 F.C.C. at 416 and 422). the discussion in the Fisher Report on pp. 7-10.

which had been off the air, had returned to the air at the time of our 1959 Report, and we relied heavily on this fact (26 F.C.C. at 416 and 422). Shortly thereafter, the station once again ceased operation—this time permanently. Also see generally

ly settled areas and areas of adverse terrain, with little or no off-the-air television service, it is now spreading to metropolitan centers with as many as two local stations and is proposed for three-station cities such as Cleveland, Philadelphia, Pittsburgh and Baltimore.<sup>40/</sup>

66. CATV has already achieved significant penetration of the service areas of many stations, particularly small market stations, and the trend toward increasing penetration is apparent. In 1959, very few stations reported a heavy penetration of their overall service areas by CATVs. (See 26 F.C.C. at 447-52). Our current study, however, showed 32 stations whose Grade A contours contained CATV subscribers aggregating 10% or more of the station's net weekly circulation (as measured by the American Research Bureau surveys in standard use by stations and advertisers). Some 25 stations showed a similar penetration of their Grade B contours. Over 45% of the stations in one and two-station markets had some CATV penetration of their contours. Over 50% of the stations in markets ranking below 151 in size had some CATV penetration of their Grade A contour equalled over 11% of their net weekly circulation. (Seiden Report, pp. 75-80).

67. Particularly noteworthy is the experience of the seven stations with CATV subscribers exceeding 25% of their net weekly circulation within their Grade A contours. (The individual station penetration ratios were as follows: 27%, 29%, 34%, 46% and 55%.) All seven of these stations are effectively in one-or-two-station markets. Six are in markets ranking in size below 199. None of the stations reported gross revenues of more than \$224,000 in 1963, and five of the seven operated at a loss. (Seiden Report, pp. 767).

68. These figures do not, of course, establish that substantial CATV penetration always or even usually causes stations which might otherwise operate profitably to operate at a loss.<sup>41/</sup> Now, as in 1959, we think it impossible, with the data at hand, to isolate reliably the effects of CATV competition from all of the other factors which operate to produce particular financial results in differing settings. The Fisher Report, in our view, marks a substantial advance toward the goal of isolating and predicting the effects of CATV competition, and we think many of the criticisms leveled

at that report by other parties are misplaced.<sup>42/</sup> But there remain a number of questions. The Fisher Report assumes that a small decline in reported station circulation is followed by an equivalent decline in the prices advertisers are willing to pay. The Report furnishes no specific evidence of this fact, and our experience is that — particularly where national advertisers deal with smaller markets — there is much less tendency to react to small changes in station audience.<sup>43/</sup> There is also a question concerning the extent to which the various conditions described in Dr. Fisher's conclusions (as to non-carriage and duplication where the subscriber was previously able to receive one or more stations) are present in practice.<sup>44/</sup> Without further exploration of these and other questions,<sup>45/</sup> we would not and do not rely upon Dr. Fisher's conclusions as to the dollar effects of CATV competition and their significance in different settings.

69. To suggest that the likelihood of serious impact can therefore be dismissed, however, is to misconceive entirely the terms on which the problem comes to us. Now, as in 1959, it is plain that CATV competition can have a substantial negative effect upon station audience and revenues, although we lack the tools with which to measure precisely the degree of such impact. Now, as was not the case in 1959, the CATV industry is in a very rapidly expanding stage of its career. The long range trends are in the direction of deeper CATV penetration and greater impact. Countervailing factors may, in a number of cases, offset or mask these effects. If present trends should continue, however, there is good reason to believe that the negative effects will become dominant in more and more of these factors, there is an additional real more situations. Moreover, aside from son to believe that competitive impact will be more serious in the future than it has been in the past. As we have noted, and as NCTA itself has pointed out, the typical national advertiser (network or non-network) is barely aware of the effect of CATV upon station audience or its role in making the programs broadcast in one market available in others. It is highly probable that national advertisers will in the future take much greater account of CATV operations, and that estimates of adverse impact upon stations will become increasingly real. Rating services are beginning to supply the

relevant information and the data compiled in these proceedings will undoubtedly direct advertiser attention to the significance of CATV. Advertisers normally view duplication as a waste for which they will not pay, and network affiliations and rates are based on the amount of unduplicated coverage a station can provide.<sup>46/</sup> As advertisers become aware that the purchase of big city stations may include coverage of Secondary markets, it is likely that they will react.<sup>47/</sup>

70. Prediction of particular results in particular cases must, of course, remain hazardous. We think it clear, however, that the most serious effects will be felt by (1) stations in smaller one and two-station markets, where the public does not receive the full services of all three national networks off-the-air, (2) by marginal stations in larger markets, and (3) by new stations coming on the air. The latter point is particularly significant. In 1959, we said (26 F.C.C. at 425): "In the area of impact on the development of new stations . . . we can only conclude that there is probably an impact in some situations, so that in these situations a regular station will not be built with the auxiliary service in existence, whereas absent the auxiliary service it would be. But there is no way to define these situations, or tell when they exist or do not exist."

As a general matter, it remains true that there is no way to predict with reliability the results of individual cases. In light of the explosive growth of CATV, however, there is one overriding fact which we must take into consideration.

71. The remaining idle VHF channel assignments fall largely in sparsely settled regions west of the Mississippi River. Other potential new television stations must operate in the UHF frequency bands. The all-channel receiver legislation enacted in 1962 provides a basis for successful UHF operation in many areas which has hitherto been lacking. But the all-channel legislation, while a necessary first step toward more extensive use of UHF frequencies, affords no automatic guarantee of successful UHF operations—particularly where they are conducted in competition with established VHF stations. The full effects of the legislation will not be felt for several years. Moreover, the earlier history of UHF failures prior to the legislation, [48] and residual "psychological" preju-

40. We note that, for the most part, the move into three-station markets remains in the proposal stage. The heart of CATV development is still in areas which lack good reception of three full network services. (See Seiden Report, pp. 82-4.)

41. See Seiden Report, pp. 73-5, 80.

42. For a discussion of one of the major criticisms made by Dr. Arkin, see Seiden Report, pp. 67-9.

43. Cf., Seiden Report, pp. 64-6, 71-2; NCTA, ARC, p. 25.

44. See par. 37, p. 17, above. Although the comments do not make the point explicit, it is apparent that NCTA has used predicted coverage contours to determine whether CATV subscribers would otherwise be able to receive a station off-the-air. (ARC, pp. 9, 10, 14) Dr. Fisher, on the other hand, has utilized primarily American Research Bureau survey data (Fisher Report, pp. 17-20). Notwithstanding this fact—which may account in large part for any differences in their results—we think the NCTA comments point up an area which requires exploration in depth before serious reliance is placed upon Dr. Fisher's specific conclusions.

45. In particular, we are concerned with the degree to which the cost data used to establish the net and gross profits of different stations (cf. fn. 9, p. 13, above) and the audience data supplied by rating services, which in some cases may have unduly magnified the effects of CATV competition on station audience because of inadequate sampling techniques (cf. par. 12, p. 8, above), can be used to establish relatively precise dollar figures for the effects of CATV competition and its relation to station profitability.

46. See *Network Broadcasting*, *supra*, pp. 209-12, 216-20, 226-9, 233-6, 263-74 (1958).

47. "Should the marketplace become aware of these data the economic results could be disastrous for small market stations. The networks would cut back the station's hourly rate, and the spot market or the rating agencies would adjust the audience rating to effect a higher CFM," Seiden Report, p. 77; see also *id.* at pp. 72 and 75.

48. See, e.g., Second Report on Deintermixture (1956), 21 F.R. 4958, 13 Pike & Fischer, R.R. 1571; *Greylock Broadcasting Co. v. United States*, 231 F. 2d 748 (C.A.D.C.); *Fort Harrison Telecasting Corp. v. Federal Communications Commission*, 324 F. 2d 379 (C.A.D.C.); *Triangle Publications, Inc. v. Federal Communications Commission*, 291 F. 2d 342 (C.A.D.C.).



dices against UHF are interim factors to be overcome. Acceptance of UHF is also dependent upon technological advances in UHF receiving and transmitting equipment, which, in turn, are most likely to be stimulated by the advent of new UHF stations.

72. In short, we are in a critical period with respect to UHF development. Most of the new UHF stations will face considerable financial obstacles. Many will be deprived of access to network affiliation. Many, in addition will lack access to popular syndicated and feature film or sports programs, which are under long-term contract to existing stations.

73. NCTA asserts that fears for the impact of CATV competition upon potential UHF stations are groundless. It points out that in the absence of all-channel or other UHF-equipped receivers a CATV may extend the circulation of a UHF station by carrying it to subscriber homes with VHF-only receivers. Its figures show that in 14 of the 22 cases where UHF stations are now subject to CATV competition in their home community, the station went on the air after the CATV system or systems were already in operation. Its figures also show that CATV competition was present in 10 out of 107 cases in which UHF stations have left the air. NCTA cites letters from 2 out of the 10 relevant UHF broadcasters complimenting their CATV competitors on the assistance received through CATV carriage of UHF signals. It argues further that the factors which caused the demise of 97 UHF stations without CATV competition must have been the primary cause of UHF failure in the 10 instances where CATV competition was present. In sum, it urges that UHF stations do go on the air in the presence of CATV and that few UHF stations with CATV in their home community go off the air.

74. We think this showing wholly inadequate to support the proposition which NCTA advances. With no specification of the degree to which any of the stations involved were subjected to CATV competition, or to which they benefited from CATV extension of their coverage, it is impossible to derive from this data any inference as to the effects of CATV on UHF development.

75. On the other hand, there is one general factor giving cause for serious concern. As NCTA points out, a CATV sells to the public what a broadcasting station provides free of charge. (FC, pp. 120-1). Inevitably, the primary attraction offered the public by the CATV operator must be service which is not available off-the-air. In some cases, this may take the form of a better picture than is receivable through normal means. In many cases, however, the primary economic justification for CATV entry into an area must be its ability to provide programming of distant stations which is not already available off-the-air from existing local stations. The ability to provide programming not available from existing stations, however, must also be the basic reason for the development of any new local station or stations. The competition between the two must necessarily be sharp and direct, and the likely impact correspondingly severe. We have noted the claim that CATV systems aid in the development of UHF stations by giving them a "built-in" potential audience on

the VHF sets in the homes of subscribers. To the extent this is so, it seems to us an additional reason to require carriage of a local station's signal by the CATV. In any event, the beneficial effect of such carriage is counterbalanced by the additional fractionalization of audience and duplication of programs to which CATV operation may subject a struggling new station.

#### C. Conclusion as to the Need for Rule Making Action

76. We conclude that rule making action is amply justified. First, we believe that requirements of carriage and reasonable nonduplication are appropriate as means designed to create reasonably fair and open conditions for competition between CATV and broadcasting stations as alternative ways of making television programs available to the public. These requirements stem also from our belief that, on the whole, the appropriate role for CATV systems is to make available television service which is not available off-the-air, rather than to duplicate or prevent reception of local signals. So long as CATV is not an insignificant factor in the competitive conditions facing the television broadcasting industry, we think every station affected is entitled to appropriate carriage and nonduplication benefits—irrespective of the specific damage which any individual CATV system may do to the financial health of the individual station. Commission action to achieve an accommodation of this nature between the two services is appropriate and in the public interest.

77. Secondly, we believe that the imposition of minimum carriage and non-duplication requirements by rule is required in order to ameliorate the adverse impact of CATV competition upon local stations, existing and potential. NCTA's argument that CATV has not yet caused any wide-spread demise of existing stations misses the point. As we have pointed out above, it would be clearly contrary to the public interest to defer action until a serious loss of existing and potential service had already occurred, or until existing service had been significantly impaired. Corrective action after the damage has already been done, if not too late, is certainly much more difficult. Further, it is difficult, if not impossible, to attempt to delineate with any precision a factor such as discouragement of entry of potential broadcasters because of CATV competition. In short, we must plan now for the healthy co-existence of CATV and local stations and safeguard the public from future injury. Circumstances have changed since our 1959 Report and Order, and the likelihood or probability of adverse impact upon potential and existing service has become too substantial to be dismissed. If studies are in conflict and present a close question as to the precise extent of the impact, it is not close as to how this uncertainty should be resolved. This is one of those situations in which the public interest requires that conditions conducive to the sound future of television "be assured rather than left uncertain." **United States v. Detroit Navigation Co.**, 326 U.S. 236, 241. This is particularly so, where we have two modes of service, one of which is almost completely dependent on the other for its product. In such circumstances, uncer-

tainties should be resolved in favor of ensuring the healthy growth and maintenance of the basic service.

78. Thirdly, we believe that rule-making action is best designed to meet the procedural problems inherent in the subject matter with which we are dealing. Although this proceeding involves only those CATV systems which make use of microwave relays, a fairly large number of stations are affected, and the volume of microwave applications continues to increase. An adjudication as to the effect of any particular microwave grant is not only cumbersome and time-consuming but will often lose its validity as new CATV facilities are subsequently added. Individual adjudicatory proceedings do not afford a satisfactory means for determining the cumulative effect of a number of grants, each perhaps having relatively small impact. Moreover, those stations operating marginally and most apt to be severely affected by CATV operations are the ones least in position to undergo the expense of evidentiary hearings, or repeated hearings to avoid "chipping," even assuming that interim action of some kind were to be taken during the hearings. Also, there would be little, if any, opportunity to consider on a case-by-case basis the effect of microwave grants upon the decisions of potential applicants or existing licensees whether to inaugurate or improve service. And rule making is the most appropriate method to accomplish an orderly extension of service by means of CATV. The establishment of minimum across-the-board requirements lets all parties—CATV operators, broadcasters, program suppliers and advertisers—know in advance what the basic operational conditions will be. All parties are thus given a reasonable chance to plan their activities with the foreknowledge of the basic requirements we will impose. We regard the introduction of as much stability as possible into the planning perspectives of those affected by our regulation as a highly desirable objective.

79. Finally, we note that reasonable carriage and non-duplication requirements need impose no substantial burden on the ordinary CATV operator or his subscribers. Most CATV operators already recognize the unfairness implicit in a refusal to carry the signal of a local station. Indeed, NCTA argues that a requirement of carriage is unnecessary, since in most instances cable systems carry local stations voluntarily. If this is true, however, there can be no objection to a rule recognizing the actual practices of CATV operators as desirable. Moreover, our investigation has disclosed a significant number of CATV systems that do not carry a station or stations that serve their communities off-the-air. Some 80 stations were found to have 151 CATV systems in their Grade A contours which do not carry their signals to approximately 220,000 subscribers. Some 123 stations have 261 CATV systems in their Grade B contours which do not carry their signals to about 324,000 subscribers. (Seiden Report, p. 54). It is apparent that there is a need for regulation to delineate the situations in which the principle of carriage is applicable. The form and scope of that regulation is a matter we discuss hereafter.

80. The situation as to non-duplication

is not greatly different. Our aim in this regard is not to take any programs away from any CATV subscriber, but to preserve to local stations the credit to which they are entitled—in the eyes of advertisers and the public—for presenting programs for which they had bargained and paid in the competitive program market. NCTA itself concedes that a requirement of simultaneous non-duplication would injure very few CATV systems (NCTA, FC, p. 121), but argues vigorously against any requirement that non-simultaneous duplication be avoided. This is a matter which, again, goes to the form of the specific rules adopted, and which we discuss hereafter.

81. Generally, we believe that our purposes in these proceedings can be accomplished without unduly burdening or obstructing the operations of CATV systems.[49] Our aim in adopting rules as to carriage and non-duplication is, we repeat, not to block or thwart but to seek an accommodation.

82. We realize that the rules we adopt will not solve all problems.[50] But this fact does not argue against their adoption. We act now where we can and as we can, to accomplish what we can. We hope that these rules, ensuring many stations' ability to maintain themselves as their areas' outlets for highly popular network and other programs, will permit more expeditious processing of applications for the use of microwave facilities to serve CATV systems. Should they be inadequate or unduly burdensome in individual cases, special action or waiver can be obtained upon an appropriate showing. **United States v. Storer Broadcasting Co.**, 351 U.S. 192 (1956).[51] If the rules should ultimately prove unnecessary or need modification in light of the passage of time, Congressional action or other factors, they can be modified or rescinded. Our best present judgment is that the public interest requires their adoption.

## II. SPECIFIC PROVISIONS OF THE RULES

83. We turn now to the specific substantive provisions of the proposed rules. After careful consideration of all the comments and for the reasons previously set forth, we have decided that the public interest would be served by adopting the rules substantially as proposed, but with some significant modifications. The substance of these comments and the resulting modifications in the rules are set forth below.

84. We shall discuss first the basic questions of (a) what stations are entitled to the benefit of required carriage, (b) what stations are entitled to the benefit of non-duplication and as against which

signals, and (c) what the time period for non-duplication should be. Thereafter, we shall discuss various miscellaneous issues relating to the three primary aspects of the rules and to the question of the kind of transitional period that should be allowed before requiring full compliance with the rules.

### A. Stations Entitled to be Carried

85. The rules proposed would require carriage of a station's signals by any CATV system receiving microwave service and located within its predicted Grade A contour. The comments of CATV interests generally indicate a preference that carriage requirements be limited to systems located in the station's city of assignment. Broadcaster interests, on the other hand, urge that limiting the carriage requirement to the Grade A contour is inappropriate, because many stations rely on an effective market area, extending to their Grade B contours and beyond. Small stations, operating in sparsely settled areas, are put forward as prime examples, since they must depend upon wide-area service to attain minimum financial success. In addition, it is pointed out that such stations are least able to afford the expense of case-by-case procedures to obtain Grade B carriage.

86. A related issue is the question of whether a CATV should be required to carry more than two local stations. NCTA urges that such a requirement would be burdensome, if not disastrous, for systems which have very limited channel capacity. The broadcasters argue, on the other hand, that the carriage requirement is appropriate for any and all stations which meet an across-the-board definition of "local station" and that discrimination between local signals should not be allowed.

87. In the view we take of both matters, carriage of a station's signal is desirable wherever the signals brought in by a CATV system compete effectively for the audience upon which the station relies. For, as we have already concluded, failure to carry the station's signal in such circumstances puts an unreasonable restriction upon the station's ability to compete. From the point of view of national advertisers and program suppliers, it makes little difference where a home in the station's normal audience is located. Signal contours, in this context, are merely useful rules of thumb for determining where a station's basic market area lies. Within that area, the station's right to be carried should not depend upon a showing of specific need in each instance.

88. On the other hand, we must consider the problems raised by the pres-

ently limited channel capacity of many CATV systems. The findings of our special study indicate that some 34% of all systems provide less than five channels and an additional 37% provide only five channels. (Seiden Report, p. 52).[52] Extension of the carriage requirement to the maximum limits conceivable could in some instances outrun the capacity of these systems (i.e., in cases where a system located between several markets is overlapped by six or more Grade B or better signals). Even in lesser situation, a blanket requirement that all Grade B or better signals be carried could easily result in the carriage of several substantially duplicating signals from network-affiliated stations in nearby markets and the consequent exclusion of signals from more distant independent and educational stations.[53] Indeed, informal investigation has revealed some instances in which primary affiliates of the same network place overlapping Grade A or better signals in the same area, although there are very few such cases in which the area now contains a CATV system.

89. Given these conflicting considerations, we think that a compromise approach is in order. Such a compromise has, in fact, been suggested in connection with the legislative discussions to which we referred at the beginning of this Report. In essence, its concept is as follows: A CATV system owes its primary duty to the stations that are closest and place the best signal over its community. It should, therefore, within the limits of its channel capacity, carry first all stations that place a signal of the highest intensity and technical quality over its community. Thereafter, it should carry the stations that place successively lower grades of signal over its community, with the lower limit being a Grade B contour. At any stage, the system need not carry a signal if (1) it substantially duplicates the network programming of a signal of a higher grade, and (2) carrying it would—because of limited channel capacity—prevent the system from carrying a non-network signal, which would contribute to the diversity of its service.

90. We shall adopt this concept. The modified rules will provide that, within the limits of its channel capacity, a CATV system using microwave service shall carry first the stations that place a "principal community" contour over it, second the stations that place a Grade A contour over it, and third those that place a Grade B contour over it. However, the system need not carry any station if its network programming is substantially duplicated by one or more stations of higher priority, and (b) carrying it would,

49. A spokesman for the largest CATV operator in the country (operating 29 systems in 12 states and 44 communities, with over 85,000 subscribers) has said, in a recent statement to the stockholders of that company:

"We foresee regulations which will require us to adopt certain conditions of operation that will foster the development of local stations. As for example:

a) We may be required to carry the local television station (or stations) on our cables and not degrade their picture quality.

b) We may be required to prevent the duplication of the local station's programs by a distant station carried on our cables. This can be accomplished by appropriate switching operations.

All of the foregoing conditions would be acceptable to your company and, in fact we have on occasions entered into such agreements on a voluntary basis with area stations . . ."

50. We refer here to the problems we are considering in the related Notice of Proposed Rule Making and Notice of Inquiry issued this day. (FCC 65- ). We note particularly that, although we will include non-commercial, educational stations in our requirements as to the carriage of local television signals by microwave-served CATV systems, we have taken no further action with regard to the issues raised by educational broadcasters. (See par. 17, above.) We have instead reserved consideration of those issues for the broader proceeding instituted today.

51. As required by the Act (e.g., Section 309), we will examine any question raised in connection with individual microwave applications which bears on the public interest in the particular applications involved.

52. For microwave-served systems, the comparable figures are 33% and 36%. *Ibid.*

53. See generally, NCTA, FC, Ex. No. 14.

because of limited channel capacity, prevent the system from carrying the signal of an independent, non-affiliated commercial station or the signal of a non-commercial, educational station. Thus, a Grade A signal that is substantially duplicated by one or more "principal community" signals need not be carried if, because of limited channel capacity, its carriage would prevent the carriage of an independent or an educational station. Similarly, a Grade B signal that is substantially duplicated by one or more Grade A or better signals need not be carried if, because of limited channel capacity, its carriage would prevent the carriage of an independent or an educational station.

91. We note the following subsidiary points in connection with this requirement:

"(a) For purpose of this rule, we define a 'substantially duplicated' signal to be one which regularly duplicated the network programming of one or more other stations, in a normal week during the hours of 6 to 11 p.m., local time, for a total of 14 or more hours. We concentrate upon the evening hours because, from the public's viewpoint, this is the period of maximum viewing and, from the station's viewpoint, this is the period of maximum revenue. With the three commercial networks offering evening schedules approximating 28 hours per week, we have chosen 14 hours as a rough mid-point defining 'substantial duplication.'

"(b) In cases where there are substantially duplicating signals of equal grade over the CATV community, and carriage of both would prevent the cable system from carrying the signal of an independent or an educational station, the system may in its discretion select one of the duplicating signals for carriage. We realize that this makes possible 'discrimination' between local signals in some cases. Upon complaint, we would examine closely any change of abuse, particularly where the CATV operator has an ownership or other interest in one of the two duplicating stations.

"(c) Moreover, we note another qualification. We have used the concepts of 'principal community,' 'Grade A' and 'Grade B' contours, already embodied in our rules,<sup>54</sup> as if they described uniform and sharply distinguishable grades of signal intensity. Actually, of course, signal intensity declines, not in sharp stages, but gradually as distance from a transmitter increases. It can be affected, also, by a number of factors such as terrain, directional antennae, etc. Once again, we stress that we are using signal contours as useful rules of thumb. If a station is able to show, for example, that its signal over a CATV community lying just beyond its Grade A contour is materially better than another, "substantially duplicating" Grade B signal, the CATV system will be obliged to select that signal in carrying out the responsibilities imposed under the rules. If a system is able to show that, notwithstanding an apparent difference in signal contours, the signals of two substantially duplicating stations are of equal grade, we will allow appropriate relief.

"(d) In cases where, because of limited

channel capacity, a system is not carrying the signals of all stations that place a Grade B or better contour over its community, we think it retains an obligation to disturb the off-the-air competitive relationships of the relevant stations as little as possible. Accordingly, we shall require such a system to offer and maintain, for each subscriber, a switch allowing the subscriber to choose at any time between cable and off-the-air reception, unless the subscriber affirmatively indicates in writing that he does not desire this service."

92. By these means, we hope to reconcile the objective of establishing broad, uniform requirements that each station be carried within its basic market area with the limitations imposed by the channel capacity of many CATV systems. We have noted a strong trend in the CATV industry toward the introduction of systems with wide channel capacity. Over a period of time, therefore, the problem of limited capacity should tend to disappear. As noted, we can and will re-evaluate our requirements in light of future experience.

#### **B. Stations Entitled to the Benefit of Non-Duplication and as against which Stations**

93. The proposed rule would entitle any station placing a Grade A or better contour over a CATV community to the benefit of non-duplication protection against any other signals carried by the system, except a signal which is itself required under the rule (i.e., a Grade A signal) or pursuant to an agreement "reached by the parties in lieu of the requirements of this section." See proposed Sections 11.556(a)(4) and 21.710(a)(4). Once again, CATV interests urge restriction of this provision to systems in a station's city of assignment; once again, broadcaster interests urge its extension to systems within a station's Grade B contour.

94. We take the same basic view of the non-duplication benefit that we do of the carriage requirement, i.e., that it is something to which a station is entitled, without a showing of special need, within its basic market area. However, we face here analogous problems of defining a station's basic market, of recognizing the limited channel capacity of many CATV systems, and of ensuring that our requirements do not work an undue disruption in CATV service.

95. In large part, CATV objections to any wide definition of the stations to be protected relate to the impact of protection of two or more stations against anything more than simultaneous duplication upon certain systems, viz., those with limited channel capacity that are located so far away from any independent, non-network station as to make access to the signals of such a station prohibitively expensive. The fear is that, in these circumstances, two stations could pre-empt for themselves most or all of the most popular network programs, sharply reducing if not destroying the usefulness and attractiveness of the service brought in on other channels by the cable system. Because of its limited capacity, and its practical inability to obtain the signals of independent, non-network stations, the system would then lose a large part

of its economic reason for being (cf., NCTA, FC, p. 123).

96. But CATV objections also stem from the fact that there is, in a number of instances, duplication of programming as a result of the overlap of off-the-air signals from stations located in different markets. (See, e.g., NCTA, FC, pp. 45-6, 134-5, Ex. No. 14). A certain amount of such duplication results from the overlap of the Grade A or better contours of two primary affiliates of the same network. A much greater amount results from the overlap of Grade B or better contours of two affiliates of the same network. (See NCTA, Reply Comments, Appendix, Ex. 2.) If duplication exists off-the-air, argues NCTA, the Commission should not seek to prevent it via CATV.

97. The question of the time period for which duplication protection should be afforded we discuss below. It has a bearing on the issue of what stations are entitled to protection, and we shall take both matters into consideration in our subsequent discussion. Here, we address our attention to the more general question of the area within which a station is entitled to exclusivity—whatever its scope in time. On this issue, we think that NCTA's basic point is a good one. As noted, our proposed rule would have exempted from the non-duplication requirement any overlapping Grade A signal required to be carried under the rule or a private agreement. Our purpose was and is to preserve the existing off-the-air situation, insofar as exclusivity is concerned, and not to give stations any greater exclusivity vis-a-vis CATV systems than they now enjoy as against each other. Stated otherwise, in the absence of a market in which the question of competitive access to programming by stations and CATVs can be resolved, our aim is to preserve for stations the competitive exclusivity they have been able to obtain as against other stations, but nothing more.

98. Taking these factors into consideration, we shall modify our proposed rules to provide the non-duplication benefit for all stations (1) within whose Grade B or better contour a microwave-served CATV system operates, and (2) which are carried on the system, **provided that** (a) as to network programming, the system will not be required to protect a station's exclusivity if one or more stations which substantially duplicate its network programming off-the-air place an equal or higher grade signal over the system; and (b) as to non-network programming, the system will not be required to protect a station's exclusivity if any stations operating in what is normally and usually considered another market for purposes of program distribution place an equal or higher grade signal over the system. In these situations, the CATV operator will be free to carry duplicating signals of other stations, wherever they may be located. Thus, a station that places only a Grade B contour over the CATV system would not be entitled to non-duplication of network programming if one or more affiliates of the same network (or networks) place a Grade B or better contour over the same system. The station would not be entitled to non-duplication of non-

54. See Sections 73.683-686 of our Rules, 47 C.F.R. 73.683-686.

network programming if any station located in what is normally and usually considered another market places a Grade B or better contour over the CATV system. Similar qualifications will apply to stations placing Grade A and principal city contours over the CATV system. We note, in this connection, the following subsidiary points:

"(i) We define a 'substantially duplicated' signal here as we have above—i.e., as one which is regularly duplicated by the network programming of one or more other stations in a normal week during the hours of 6 to 11 p.m., local time, for a total of 14 or more hours.

"(ii) A network's willingness to allow off-the-air duplication of its programs by two stations is rough index of its willingness to treat the stations as if they were located in essentially separate markets. No similar index is easily available with regard to non-network programming. However, the concept of a station's 'market' is one much used in the television industry. Only in a few instances is there likely to be much dispute concerning the application of the concept. In those instances, the practices of stations and program suppliers can be investigated, to determine whether the CATV community fails in an area in which the station normally obtains exclusivity as against other stations."

99. On the other hand, the rules will provide for non-duplication, even though a station's signal contour over the CATV system is overlapped by a lower priority signal contour from another station in a different market. (A station with a "principal community" contour will be protected even though overlapped by Grade A's, and a Grade A will be protected even though overlapped by Grade B's.) In such situations, the CATV system, which can effectively render the signals of all stations carried equal in technical quality, is in fact altering the existing off-the-air situation as to exclusivity.[55]

100. By these means, we hope to leave the cable system that operates "between" adjacent television markets relatively unaffected by the non-duplication requirements. At the same time, a station which—despite the overlap of lower-grade signals from an adjacent market—has been able to maintain itself as the exclusive outlet for network and other programming in its immediate area, will not find its position upset by the growth of CATV systems in its area of primary signal strength. And stations in sparsely populated areas, which rely upon wide-area coverage, will be able to maintain, within their Grade B contours, their fundamental position as against distant, large-market stations.

#### C. The Time Period within which Non-Duplication is Required

101. Perhaps the most seriously contested issue in this proceeding—apart from the basic question of whether rule making action is warranted—is whether restrictions on duplication of the pro-

gramming of local stations should extend beyond simultaneous duplication. As we have noted, NCTA is willing to concede that avoidance of simultaneous duplication would not injure many existing CATV systems. The reason for this is plain. With the exception of factors such as color transmissions, which we discuss later, prevention of simultaneous duplication takes nothing of any real significance away from the CATV system or its subscribers. All that is at stake is the availability of the same program on two different channels of the subscriber's set at the same time. However, controversy is sharp with reference to our proposal that duplication be avoided for a period of fifteen days before and after local broadcast by a station.

102. NCTA's Comments most fully present the CATV position. It urges that non-simultaneous duplication benefits the subscriber by making the same program available to him at different times, that the amount of non-simultaneous duplication varies drastically from case to case and station to station, with no perceptible general pattern, that no need for an across-the-board restriction of non-simultaneous duplication has been shown, and that the few broadcasters who have agreements with cable systems which limit non-simultaneous duplication have chosen not to exercise their full rights under such agreements. It argues further, as we have already noted, that non-simultaneous duplication protection—if afforded to two or more stations—can destroy systems which have limited channel capacity and are unable to obtain access to the signals of independent stations. Even where protection is afforded to only one station, NCTA claims, the "15-day before-and-after" period would permit an unscrupulous broadcaster—by arranging his schedule to "program against" the CATV—to maximize the hours of programming the system is prohibited from carrying, disrupting if not destroying the attractiveness of the CATV service and forcing the subscriber to wait until each protected program appears on the local station, often at an inconveniently early or late hour of the evening (NCTA, FC, pp. 51-109, 118-24).

103. Most of the broadcasters, on the other hand, urge that the full period of 15 days before and after the local station presents a program is necessary (1) to allow stations with multiple network affiliations to maintain their exclusive right to present—often on a delayed basis—programs of more than one network, and (2) to maintain minimum exclusivity with regard to non-network syndicated and feature film programming, which is not ordinarily presented simultaneously—or even nearly so—nationwide.

104. Our consideration of this issue must start with the facts of broadcaster practice in the scheduling of various programs. Most network programs are presented simultaneously throughout the Eastern and Central Time Zones, with a direct "feed" of the programs to differ-

ent stations through common carrier facilities, station-owned microwave relays or off-the-air pickup of one affiliate's signal by another affiliate. In the Pacific Time Zone, network programs are normally delayed for the three-hour period which covers the difference between that area and the Eastern Time Zone, but are presented simultaneously throughout the Pacific Time Zone itself. In the Mountain Time Zone, there are various practices. Some stations carry network programs simultaneously with their broadcast in the Eastern and Central Zones (carrying a program which originated at 8:00 p.m. in New York at 6:00 p.m. Mountain Time). Many others, however, delay their network schedules for varying periods, to meet the convenience of their viewers.

105. It is at once apparent that a CATV could—by bringing programs across either border of the Mountain Time Zone—duplicate a local station's network programs an hour or two before or after they are presented locally. Comments filed in a related proceeding by the operator of a CATV system in Yuma, Arizona, reveal that his system follows just such a practice.

106. The information at our disposal, however, does not indicate that this practice is at all wide-spread. Opportunities for non-simultaneous duplication of a local station's network programming by a CATV which carries the signals of a distant affiliate of the same network appear to arise primarily out of another set of circumstances.

107. When a network offers its affiliate a program, the affiliate may not wish to clear time for the program on a "live" basis, i.e., at the time when most of the stations in its time zone are carrying the program, using the common carrier or other facilities through which it is fed. The network typically then offers the program to the affiliate for broadcasting on a delayed basis, providing that the time slot provided is acceptable to the program sponsors or participating advertisers and to the network itself.[56] The affiliate's reluctance to clear time on a "live" basis stems from its desire to present either the program of another network or non-network program in the time period involved. Since the affiliate's independence vis-a-vis its own network and its opportunity to obtain the programs of other networks depends largely upon the relative number of station facilities in its market (i.e., whether there are fewer or more station outlets than national networks), one would expect, a priori, that the practice of carrying network programs on a delayed basis would appear primarily in one and two-station markets, but relatively less in the larger three-station markets.[57]

108. We have requested and obtained from the three national networks information concerning delayed broadcasts by their affiliates during a recent week. Analysis of this information for stations in the continental United States reveals the following: Twelve (12) markets with

55. We note here another qualification akin to one we have applied in relation to the requirement of carriage. If a station is able to show that its signal over the CATV system is materially better than another signal of "equal priority" or that, for whatever reason, it is in fact the dominant outlet in the CATV community for the network or non-network programming it carries—notwithstanding the presence of duplicating signals of "equal priority"—we would require the CATV system to afford it non-duplication protection. For instance, if a CATV system is just outside the Grade A contour of one station and barely within the Grade B contour of another, the system might well—on a proper showing—be required to protect the first. We would give similar treatment to a showing by a CATV operator that—notwithstanding an apparent difference in signal contours—two stations in fact put substantially "equal" signals over the CATV system.

56. In such instances, the network usually mails a film copy of the program to the affiliate.

four or more stations reported some delayed broadcasts; the number of hours of programming delayed in the median market, during the sample week, was two; the range was from one hour to 20 hours. Sixty-four (64) markets with three stations reported some delayed broadcasts; in the median market, all stations delayed a total of 2½ hours; the range was from ½ hour to 23½ hours. Fifty-seven (57) markets with two stations reported delayed broadcasts; the median was 11 hours and the range was from 1 to 42½. And with 84 one-station markets reporting some delayed broadcasts, the median fell between 5 and 5½ hours, with the range from ½ hour to 23½ hours.[58]

109. This information confirms generally our expectations. Stations in the one and two-station markets, where CATV systems have most often appeared, are likely to engage much more heavily in delayed broadcasting of network programs than their counterparts in the larger three and four-or-more-station markets, which typically appear in the role of the distant station carried on a CATV system. As a result, there is a substantial opportunity for CATV systems to duplicate the network programs of a local station in advance, since it carries the programs "live" from the large-market station, while the local station will often carry them on a delayed basis. Chances for duplication of a local station's network programs after the station has presented them are much less; for they depend upon the large-market station's delaying of a broadcast which the local station presents "live." The figures on advance and delayed duplication by existing CATV systems, supplied in this proceeding by NCTA, likewise confirm these statements (see NCTA, FC, pp. 68-84).

110. Non-network syndicated and feature film programming offers even more opportunities for non-simultaneous duplication. As the broadcasters point out, such programs—particularly feature films—are scheduled individually in each market, with relatively little nation-wide pattern and no tendency for scheduling to be simultaneous within a region or time zone. Our own research indicates that stations typically bargain for and obtain exclusive exhibition rights to these programs for substantial periods of time, with the median for syndicated series falling somewhere around two to three years and the median for feature films approximating five years. Within these periods, the scheduling of the episodes of a syndicated series may be affected by the need to "bicycle" film copies from

one market to another. There does not appear, however, to be any particular nationwide pattern in either the syndicated or the feature film area. As a result, syndicated or feature film programs may be scheduled on large market stations at widely varying times, both before and after the same programs appear on smaller market stations.

111. Assessing the contentions of the parties against the background of these facts, we think reasonable restriction of non-simultaneous duplication is warranted. We have found that restrictions upon CATV duplication generally are appropriate both to create fair conditions of competition and to safeguard against the potential impact of such duplication upon the ability of broadcasting stations to serve the public goals for which they have been licensed. If the amount of non-simultaneous duplication is large—as it may well be for many stations in one and two-station markets subject to CATV competition—our requirement must recognize this fact if it is to be effective. If, on the other hand, the amount of non-simultaneous duplication is small, its prevention will have correspondingly little effect on CATV operation. In neither case do we think that a station should be put to the test of establishing an overwhelming need for reasonable exclusivity within its basic market area.

112. This action does not take from the CATV system any program which is now available to it. No broadcast will be deleted from any channel on a system unless it is scheduled for earlier or later presentation on the channel of a local station. Nor is any significant "waiting" forced upon the subscriber because he cannot view a program before it is presented by his local station. Our 1963 Notice states that we would not regard the 15-day non-duplication requirement as applicable to programs of national importance, such as Presidential addresses or missile shots, which depend for their significance upon their timeliness. We made no proposal in this regard, as the Notice also states, because it was our understanding that such programs are not presented on a delayed basis by any station except in extraordinary circumstances. However, to make our intention absolutely clear, we have incorporated a provision in the rules exempting programs as to which timeliness of presentation is essential from the non-simultaneous duplication requirement.

113. Thus, our requirement of exclusivity for delayed broadcasts will apply only to the great mass of standard network and other programs, which are produced long in advance of their exhibi-

tion and are almost entirely independent of highly timely references.[59] It can hardly make much difference to the CATV subscriber whether viewers in another community are able to see a particular feature film or a particular episode of a network or syndicated program series a week or two before or after he is able to see it. The situation today, absent CATV, is that syndicated series and feature films are scheduled on widely varying dates in different communities, without noticeable discomfort on the part of the audience.

114. NCTA urges that the local broadcaster may present a program (which was scheduled "live" in prime evening time by a network) on a delayed basis at highly inconvenient viewing times, such as after midnight or in mid-afternoon. No showing has been made that as a general practice networks or sponsors would permit prime time programs to be shifted to less desirable periods, that non-network advertisers would be very interested in purchasing announcements adjacent to such programs, or that broadcasters have engaged, or are likely to engage, in such a practice. Once again, however, in order to make our intentions clear, we have incorporated a provision in the rules that programs which are scheduled by a network between 6 and 11 p.m., Eastern Time, but broadcast by a local station, in whole or in part, outside of what would normally be considered prime time for network programs in the time zone involved, are exempt from the non-duplication requirement. [60]

115. The one thing our action does withdraw from the CATV subscriber is the opportunity to view the same program twice (or, in some cases, three or more times)—once on the local station's channel and once or more times, at a different hour or date, on the channels of incoming distant stations. Repeat presentations of this kind can undoubtedly be a service to the subscriber, giving him more than one chance to view a program he desires and perhaps avoiding the conflict between two attractive programs normally scheduled at the same time. Once again, however, we note that if the amount of non-simultaneous duplication is small, our requirement withdraws very little from the subscriber. If the amount of non-simultaneous duplication is large, we think the desirability of preventing it must normally outweigh its benefit to the subscriber. There are, in this connection, two important additional considerations: (1) In the larger communities served by the distant stations whose signals are imported by the

57. There is another reason to expect more delayed broadcasts in smaller one and two-station markets. Some smaller stations are forced to obtain all of their programs by mail because the business they generate does not, in the network's view, justify the expense of ordering common carrier facilities and the station cannot afford its own microwave relay or arrange for an off-the-air pick-up of another affiliate's signal. In situations of this kind, the station's entire network schedule may be run on a delayed basis. This accounts, we think, for many of the cases discussed in the NCTA comments (FC pp. 69, 85-6) in which a CATV carrying the signals of a large market station did not duplicate any programs of the local station simultaneously but duplicated a large number non-simultaneously.

58. Several comments on this analysis are appropriate: (1) Some 217 out of approximately 260 television markets reported some delayed broadcasts; if the markets with no delayed broadcasts are taken into consideration, the median figures are reduced as follows: four-or-more station markets—1¼ hours, three-station markets—2 hours, two-station markets—10½ hours, and one-station markets—4.5 hours. We do not regard these differences as significant. (2) The upper end of the range for four and three-station markets may appear to be high. However, the average number of hours per station is much lower. Moreover, the total number of hours per market falls off sharply from the peak. For example, only 7.8% of the reporting three-station markets showed 10 or more hours during the sample week. Only 20.3% reported 5 or more hours. And in each case a number of markets reported no delayed broadcasts. (3) While the median for one-station markets was less than for two-station markets, the average number of hours per station in the median market was approximately the same (5½ hours) in both. Moreover, there was a considerable tendency for one-station markets to cluster near the upper end of the range.

59—On the basis of these considerations, our Network Study Staff came to the conclusion that "the fact that a network program may be carried on a delayed rather than a live basis is not per se contrary to the public interest." *Network Broadcasting*, supra, p. 276 (1958).

60. We point out that nothing said above is intended to suggest that the non-duplication requirement will be inapplicable where a station has shifted a program normally scheduled at one hour during the daytime to another daytime hour.

cable system, the competitive program market does operate as between stations. As a result, this service—the presentation of the same program within a two-week period on different channels—is normally unavailable to the residents of those larger communities. Our requirement does not discriminate against the residents of the smaller communities typically served by CATV systems. It withdraws from them a service not available to anyone else at present. We cannot regard this as an undue hardship. (2) When a local station delays the broadcast of a program from one network, in order to present the program of another network scheduled in the same time period, it provides for all its audience—both CATV subscribers and off-the-air viewers—the chance to avoid a conflict between two attractive programs normally scheduled at the same time. If duplication via CATV should cause a network or sponsor to object to such scheduling, or if it should so reduce the station's incentive that it avoids such scheduling, the entire audience—CATV and off-the-air—would lose this opportunity.

116. On the whole, we are convinced that our action, properly understood, will cause very little inconvenience for the CATV subscriber. Nor are we persuaded that it will have any undue impact upon the financial health of CATV systems. At the outset, we note NCTA's showing that in a few instances where broadcasters have had the right to demand protection against non-simultaneous duplication under private agreements with CATV systems, they have chosen not to request all, or even the major portion, of the relief to which they were legally entitled. Without going into the underlying details, whatever this showing suggests as to those broadcasters' varying judgments of their needs for exclusivity in differing circumstances, it hardly squares with NCTA's claim that broadcasters will use the non-simultaneous duplication provisions of our rules to cause maximum damage to competing cable systems.

117. In this respect, we do not regard the station practice of presenting network programs on a delayed basis, in order to present highly popular programs of another network, as inherently contrary to the public interest. For the reasons described previously, this practice — referred to as "cherry-picking" in various comments — is characteristic only of stations in one and two-station markets. Given the availability of more network schedules than station outlets, the station wishes to bring its viewers what it judges to be the most entertaining or more networks; by doing so, it makes those programs available to those who are not on the cable in the community, or who live beyond the physical or economic reach of the cable in the area

around the community. Absent a showing that the programs are being presented at inconvenient viewing hours, or that the practice is being deliberately used in an attempt to undermine a CATV operation — both of which matters we would consider seriously upon complaint — we can give no weight to the claim that this practice contravenes the public interest. [61]

118. Generally, we point out, it is the growth of CATV on a "simultaneous non-duplication only" basis which could change the scheduling of network programs. Our action, which tends to maintain the existing situation in relation to program exclusivity, leaves stations to make their choices on the basis of program availability and their judgment as to how best to serve their communities. Only if delaying a network broadcast would incur the penalty of duplication would there be an incentive to change. By and large, the question thus comes down to the effect of present scheduling practices upon the viability of competing CATV systems, assuming some restriction on non-simultaneous duplication.

119. We consider this question, first, as it relates to situations in which a CATV system is obliged to protect only one station. NCTA has provided figures which suggest — but do not prove — that in a few instances where a broadcaster has successfully obtained protection against non-simultaneous duplication the effect has been to slow — but by no means halt — the expansion of the CATV's subscriber list. In one of the three instances supplied, involving a cable system in Hattiesburg, Mississippi, "cable company officials do not attribute the losses to any significant degree to dissatisfaction with non-duplication" and NCTA itself concedes that "the dissatisfaction isn't strong enough to have harmed the Company's business." (NCTA, FC, p. 109). We cannot regard this as evidence of undue disruption.

120. More generally, there are stringent limitations upon a single station's ability to carry network programming on a delayed basis — thus creating the possibility of substantial non-simultaneous duplication. The amount of prime time available to the station per week is limited, and so is the station's ability to persuade networks to make additional programs available. NCTA has submitted a study of the damage which a broadcaster might do to a competing three-channel CATV system, given 15-day non-duplication protection. The study was conducted by "the former general manager of a network television station with a net weekly ARB circulation in excess of 500,000 TV homes." It suggests that the station could raise the hours between 6:00 and 11:00 p.m. during which it is duplicated on one or both of the competing channels of the system from 4-1/2 in a week to 13. The total "black-

out" during the week would be 1 hour on one competing channel and 13 hours on the other, out of a total of 35 hours of programming presented on each channel between 6:00 and 11:00 p.m. during the week. (NCTA, FC, pp. 51-6, Ex. 15). The system would still offer 34 hours of non-duplicating programming on one competing channel and 22 hours on the other, between the hours of 6:00 and 11:00 p.m. Without further information, these figures do not suggest a ruinous impact, even on an extra-ordinarily limited system.[62]

121. There are, of course, the situations we have noted in which a station in a small market is carrying its entire network schedule on a delayed basis, because a "live" pickup is not available to it. There are also the situations in which, due to time zone differences, the CATV system is duplicating the entire network line-up of a single station an hour or two before or after. However, the stations involved — which fall largely in the sparsely settled regions of the Mountain and Pacific Time Zones — are the ones most likely to need the protection which a "simultaneous only" rule would take from them. And the total amount of programming effectively "pre-empted" by one station is no greater in these situations than it is in others.

122. Turning to the effects of our action in situations where more than one station is protected, we must distinguish between two different cases. The first is where a cable system is located effectively within a market served by two or more stations. The second is where the system falls "between" markets. In the first situation, problem areas are largely confined to two-station markets. CATV has not yet made a substantial entry into markets containing three or more stations.[63] The stations in such markets do not engage in a large amount of delayed network broadcasting and the CATV systems proposed rely almost exclusively upon improving the reception of local stations or importing independent, non-network signals.

123. Concentrating upon the two-station market situation, it is possible that prevention of non-simultaneous duplication could have a serious effect upon a CATV system which offers the public nothing over and above the available off-the-air service except the signals of network affiliated stations. For two stations can, in fact, pre-empt a significant proportion of the most popular programs of the three networks. We note, however, the following considerations: (1) What is involved is a claim by a supplementary service that it cannot survive in competition with off-the-air broadcast service unless it is allowed to duplicate some of the product of its competitors, rather than provide new product. (2) Over and above duplicating programming, the CATV operator retains his ability to provide a number of services to

61. It has been suggested that the practice results in an expansion in the amount of network programming carried by the station in prime time, to the exclusion of non-network and particularly local programming. Along these lines, it is argued that we should restrict duplication protection to simultaneous duplication, so as to give the station an incentive to carry local programming—which could not by its nature be duplicated. Without going into the question of whether such action would be appropriate or effective, we think it sufficient to note that the same action would also penalize the broadcaster who delays a network program in order to present a non-network, local program.

62. Further, we note that the proposed rules afford protection against undue effects arising out of the prevention of non-simultaneous duplication, by providing that in single-station situations duplication need not be prevented if it results in reducing the CATV system, at any particular time, to presenting the program of only one network.

63. There is a question of whether CATV can ever become a significant fact or in such market. See, e.g., Seiden Report, pp. 82-6.

his subscribers. Our investigation of network programming available to UHF stations seeking to enter two-station markets indicates that a significant number of popular programs are not being presented by the existing stations in such markets.[64] The 15-day rule, which is truly minimal in relation to the extended periods for which stations now receive the exclusive right to present syndicated and feature film programming, will allow the CATV to present the great bulk of the non-network programming broadcast by distant affiliates. Moreover, the system may be able to offer better reception of local signals. (3) Our provision allowing duplication where necessary to allow a CATV system to present—at any particular time—the programs of two networks was originally limited to situations in which the system is “affording protection to a single television broadcast station.” See proposed Sections 11.556(a)(3) and 21.719(a)(3). We have decided to extend that provision to all situations. Thus, the situations in which delayed network broadcasting by one or both local stations in a two-station market would leave the competing cable system with only one or no network programs will be avoided [65] (4) Most CATV operators who enter the heart of a two-station market must be expected to equip themselves with the capacity to offer the public the signals of non-network stations, if at all possible. Only two cases (Rapid City, South Dakota and Great Falls, Montana) are put forward in NCTA’s comments as instances in which this is asserted to be impossible, because of limited channel capacity, distance from independent stations or both. (NCTA, FC, pp. 121-3). Without specifying further, NCTA claims that there are numbers of others in similar situations. On the present record, however, we believe that the problem is sufficiently confined that it can be given appropriate treatment upon application for waiver of the rules. Moreover, the overall course of action we have adopted will give us an opportunity to examine a number of situations in which a CATV system is required to afford 15-day non-duplication protection to two or more stations before deciding whether to extend this requirement to the great majority of microwave-served systems.

124. Finally, considering the case of a system which falls effectively “between” television markets, our conclusions are similar. We have relieved such systems of the non-duplication requirement in many instances. Thus, a system operating within the overlapping Grade B contours of a multiplicity of stations from different markets could often carry all such stations without affording them program exclusivity against each other or against

more distant stations. There will be some instances in which a “between market” CATV system will be required to afford non-duplication protection to more than one station. In many such situations, however, the stations protected will be located in markets containing three or more stations — thus reducing the incidence of any non-simultaneous duplication. In most such situations, the CATV system will have a highly significant function to perform in improving the reception of the available off-the-air signals, which would be unaffected by any non-duplication requirement. On the whole, we are convinced that our restriction of non-simultaneous duplication would create no insuperable problems for such systems. Once again, however, the overall course of action we have adopted will give us an opportunity to examine these situations again, before extending the rules to the great majority of systems.

125. There remains the question of the precise extent of the restrictions to be imposed upon non-simultaneous duplication. After examining this question carefully, we believe that the 15-day before and after period proposed in our last Notice should be adopted. In dealing with network programs, our sample week study shows that, of all the hours of delayed network broadcasts, 10.2% were delayed less than 1 day, 48.9% were delayed from 1-7 days, 30.2% were delayed 8-15 days, and 10.7% were delayed over 15 days. A more detailed distribution shows that the number of hours of delayed network broadcasts fell off sharply at the end of a 7-day period of delay and once again at the end of a 15-day period.

126. These figures reflect the practices of stations of which only a miniscule proportion are now in position to “program against” a CATV in an effort to cause a “black-out” of programs on competing channels. They fully justify the advance period of 15-days specified in our rule-making proposal, without even taking into consideration any requirement for the prevention of duplication of non-network programs in advance of their presentation by local stations.

127. With respect to the “after” non-duplication period, we think that a similar 15-day period is called for. Our judgment in this respect is not based on the situation with regard to network programs, since — as we have pointed out — the likelihood of duplication after a local station has presented a network program is relatively small. But a 15-day “after” period is clearly a minimal measure of protection against the duplication of syndicated or feature film programs, considering the extended periods — up to and exceeding 5 years — for

which stations now bargain and obtain exclusivity in relation to such programs.

#### D. Miscellaneous Matters The Question of a Transition Period

There are a number of subsidiary issues relating to the basic requirements of the rules which we have not treated thus far. Without attempting to summarize them in advance, we discuss them here.

128. **Use of Predicted Contours:** In dealing with both the carriage and the non-duplication requirements, we have made liberal use of the signal contour concepts embodied in our rules. As proposed in our Notices, these references were entirely to predicted contours. As we have stated several times, however, signal contours are, in the present context, useful rules of thumb. And, as we have repeatedly recognized, the methods of prediction specified in our rules are based on various assumptions as to terrain and other factors, which may not necessarily hold true in an individual instance. In the absence of other information, predictions based on our rules will be regarded as creating a **prima facie** presumption as to the location of signal contours. With one exception to be noted later, however, any party, however, will be free to make a showing that, because of terrain or other factors, the contours lie elsewhere. If the parties are unable to agree, the matter may be brought to us for resolution.

129. **Material Degradation:** One of the matters covered by the proposed rules on which dispute has long been endemic is the requirement that CATV systems carry the signals of local stations “without material degradation.” [66] Broadcaster interests — fearing intentional degradation of their signals by CATVs—seek a more specific definition of “material degradation in quality” and ask that some criteria be set forth. It is suggested that the CATV system should use a good quality antenna at an optimum site chosen after consultation with the station’s engineer and with his approval. CATV interests point out that many problems in the reception of a stations signal may stem from deficiencies that may occur anywhere in a transmission path that can extend — in the case of network programs — from network studios in New York across the country, through a station transmitter and thence to the point of pick-up by the cable system. They deny that any instances of deliberate degradation have occurred, and urge us to leave such matters to the parties to work out, resolving disputes on a case-by-case basis.

130. We will not attempt to prescribe specific quality standards for the reception and carriage of television signals by CATV systems in this proceeding. Such action may be desirable.[67] How-

64. Cf., FCC, Public Notice, Mimeo. No. 3627, Report No. 4664, Issued May 31, 1963.

65. Under the provision originally proposed—now applicable to systems served via microwave grants made under the interim procedures—the system is free to select which two network programs (both of which are scheduled for delayed broadcast by the local station) it will duplicate. In extending this provision to cases in which protection is afforded to two or more stations, we recognize that we create the possibility of “discrimination”—i.e., that a system could theoretically decide always to duplicate the programs of one station, instead of basing its judgment upon the needs of its subscribers. Upon complaint, we would consider carefully any charge of abuse, particularly where the cable system has an ownership or other interest in one of the two stations concerned.

66. We take this opportunity to comment on the argument of TAME, an association representing manufacturers of receiving antenna equipment, that CATV systems should be required to ensure that television sets of subscribers are capable of receiving local signals off-the-air, instead of requiring that the system receive and carry the signals of local stations. For the reasons we have given, and because the installation and maintenance of roof-top antennas may entail substantial expense for the subscriber—or may not otherwise accord with the subscriber’s desires, we think it preferable to require that CATV systems carry the signals of local stations. As noted above, however, in those cases where the system does not carry all Grade B or better signals, we have required the system to provide and maintain a switch enabling the subscriber to receive off-the-air service, if he should desire this service.

67. We note the pendency of a petition for rule making to prescribe technical standards for the reception and carriage of television signals by all CATV systems, filed on July 28, 1964 by Springfield Television Broadcasting Corporation (RM-636). We will consider that petition in the general proceeding concerning CATV regulation instituted today (FCC 65, Part II).

ever, with the large number of variables involved, it would take some time to develop appropriate technical criteria. Moreover, any prescribed minimum standard would fall short of what can be achieved by cooperative, good faith efforts on the part of CATV operators and broadcast licensees. With the adoption of general carriage and non-duplication requirements, it will be in the best of interest of both parties to provide a good signal on the cable in order to retain the good will of the subscribing public.

131. We shall, however, retain a general requirement that local signals be carried "without material degradation." We stress that this requirement imposes a duty to do more than avoid deliberate damage to reception of the station's signal. CATV systems have demonstrated an ability to provide a good signal, received off-the-air, beyond the Grade B contours of stations they have themselves desired to carry. Our carriage requirement, on the other hand, applies only where at least a Grade B contour is in fact placed over the CATV community. And the system's obligation to the local signal is at least as great as its obligation to the signals of more distant stations. Accordingly, the requirement of "no material degradation" implies an obligation, on the part of the CATV operator, to provide appropriate means for the best reception of the local station's signal that is reasonably possible. In this regard, he should consult with the station's engineer as to the optimum site and manner in which to receive the station.

132. On the other hand, the cable system's obligation is not unlimited. The station has an obligation to provide a transmission that meets the technical standards laid down in our rules. It cannot expect a cable system to make good deficiencies in its signal that result from its failure to meet these minimum requirements. Nor can it demand more than a reasonable effort on the part of the CATV operator to provide the best reception of its signal possible in all the circumstances. If both parties operate in good faith, we believe that most problems can be resolved. Any disputes may be brought to us for ruling on a case-by-case basis.

133. **Selection of a Channel for Carriage Purposes:** Closely related to the question of "material degradation" is the issue of the channel on which the local station is carried. NCTA has submitted a showing indicating that carriage of signals on a cable system on the same channel as that on which they are transmitted can cause degradation due to interference from (1) the off-the-air signal (picked up by the subscriber's set "from the receiver chassis, from power lines, or from other sources") where that signal is strong or (2) radiation from the cable (even within the limits permitted by Section 15.161 of our rules) where the CATV is attempting to receive a weak off-the-air signal. (See NCTA, Appendix

to Reply Comments, Ex. 4) On the other hand, broadcasters prefer to be carried on their own channel, if this is possible without material degradation. Moreover, they contend that the only way for a station to build and maintain program cable always on the same channel.[68] identification with the CATV audience is for their signal to be received on the local station can be carried "on-channel" And there are some who assert that a without degradation (e.g., through various means of amplifying that signal)—particularly where the off-the-air signal is of less than principal city grade.

134. There is no way to prescribe a specific rule covering all of the various situations possible. Where practicable without material degradation, however, we will require that the local station be carried on its own channel. Moreover, once a channel position on the cable is selected, we do not believe it should ordinarily be changed without the station's consent, except to accommodate the signal of a station having higher claims, because it places a higher grade signal over the CATV community. Without incorporating an express provision in the rules, we would examine any charges of abuse upon complaint.

135. We note one additional matter in this connection. There may be situations in which the presence of a strong off-the-air signal or other factors render one or more channel positions on the cable inferior to others — no matter what signal is placed in those positions. In such situations, the cable system may have a choice between placing a local signal (i.e., one required to be carried) or a non-local signal (i.e., one not required to be carried) in the inferior position. We expect the local station to be given preference in such choices, and construe the requirement of carriage without material degradation to impose this obligation.

136. **Duplication; The Means of Prevention:** There are basically three ways in which duplication — simultaneous or non-simultaneous — can be avoided. (a) The duplicating signal may be "blacked out" and a slide substituted, informing the subscriber of the channel on which and time at which he may view the deleted program. (b) The signal of the protected station may be switched so out" period — on both its own channel that it appears — during the "blacked and on the channel of the duplicating station. (c) The "blacked out" period other, non-duplicating station carried on may be filled with the signal of some the system (which would then appear simultaneously both on its own channel and on the duplicating channel) or by other material of the cable operator's choosing. In any of these cases, the switching required may be performed manually or by means of various automatic devices.[69]

137. Some broadcasters urge that the use of a slide is the only effective way scribbling public and the advertiser, the

to establish, in the eyes of the sub-exclusivity that the rule is designed to protect. Other broadcasters, while not insisting upon the use of a slide, contend that carriage of their signal on more than one channel tends to destroy their program identification in the eyes of the audience and the advertiser. CATV interests, on the other hand, generally prefer to retain the ability to fill a "blacked out" period with program material, either from another broadcast signal or of their own choosing, so as to avoid subscriber dissatisfaction.

138. We will not require the use of a slide. While it may be of some benefit to the broadcaster — particularly in dealing with local advertisers — the benefit is a marginal one compared with the major benefit of non-duplication. The interests of the CATV system outweigh, we think, this consideration. We will, however, require that, upon the station's request, the cable system refrain from carrying its signal on more than one channel.<sup>70</sup> The CATV operator has no stake in whether a "black out" period is filled by the protected station's signal or the signal of another station. Neither has the subscriber. Moreover, by filling "blacked out" periods with material other than the signal of the protected station, the parties would largely avoid another problem discussed in the comments — the "clipping" or other disruption that may occur when switching is not properly coordinated with the local station's programming.<sup>71</sup> Whether the fault in such situations lies with the broadcaster (in failing to keep to standard time schedules) or with the CATV (in failing to perform switching operations or set time clocks accurately), the problem can be alleviated by the use of a slide or a signal other than that of the protected station. The local programs and advertisements will then be received in their entirety on the channel of the local station and the CATV operator will retain full control over the switching that occurs on the duplicating channel.

139. **Duplication; Nature and Timing of Notice from Local Station:** The rule originally proposed in Docket No. 14895 would have required a station entitled to non-duplication protection to give the competing CATV system at least 30 days advance notice of the date on which the **protected** broadcast would occur. In our 1963 Notice, we modified this requirement to provide for "notification as soon as possible and in any event, at least seven days in advance of the date of the program's scheduled presentation over the CATV system." See proposed Rules 11.556(a)(1) and 21.710(a)(1).

140. CATV interests make various objections to this provision, and we have in any event reconsidered the entire matter. Given a requirement for 15-day non-duplication, the searching out of duplicating programs in the schedules of competing stations can impose some burden on the CATV operator — espe-

68. The importance of this matter in situations where the CATV viewer is a participant in a rating sample is particularly stressed.

69. The mechanisms now in use for this purpose depend upon a pre-set time clock.

70. We know of no reason why CATV operators should want to carry the signal of a local station on more than one channel, except to accomplish non-duplication. The loss of program identification for the local station would be the same whenever such duplicate carriage occurred. Accordingly, we have made this requirement apply generally.

71. By "clipping" the parties are referring to situations in which CATV subscribers miss the beginning or last few minutes of a program, including local advertisements, because of a failure of coordination between switching operations and the protected station's programming.



cially with regard to syndicated and feature film programs, which may be scheduled in different markets on widely varying dates with little regular pattern, and particularly where he is required to protect more than one station. We think this task should properly be undertaken by the broadcaster requesting protection, i.e., that he should specify both the program to be protected and the program against which he desires protection. For the most part, this burden will be minimal — particularly in relation to regularly scheduled network programs. Where it is more than minimal, we think the broadcaster should bear it unless the CATV operator would prefer to do so himself. The proposed rules will be modified accordingly.

141. On the other hand, with the broadcaster notifying the system of the programs as to which he desires protection, the remaining reasons for specifying a period for advance notification are (1) to give the cable operator an opportunity to arrange for the appropriate switching operations, and (2) to give him an opportunity to keep subscribers informed of the differences between the program schedules for the duplicating distant stations which are printed in area newspapers or other publications and their schedules as they will appear on the cable system. Any broadcaster desiring to retain the good will of subscribers will naturally seek to provide the required information to the cable system as early as possible. Last minute changes in the scheduling of both network and non-network programs do occur, however. Considering all factors, we have decided to require notification as soon as possible and, in any event, no later than 48 hours preceding the broadcast of the program to be deleted. However, we also expect the CATV system to afford reasonable cooperation in case of shorter notice.

**142. Duplication; Color Transmission:** CATV interests urge vigorously that they should not be required to delete reception of programs transmitted in color in order to avoid duplication of the same programs in black and white. They urge that a significant number of subscribers possess color receivers and that a significant number of local stations carrying network broadcasts available in black and white or color do not themselves possess color transmission equipment. Non-duplication of these stations, they contend, can destroy the usefulness of the subscriber's color receiver.

143. We are not convinced that the problem is as wide-spread as NCTA claims it to be.<sup>72</sup> However, we also would not wish to withdraw from a significant proportion of subscribers the opportunity to view programs in color unless there are weighty considerations justifying such action. With the market for color receivers showing substantial expansion, and with all networks commencing a significant amount of color-transmission, we believe that almost all stations will have equipped themselves

for color transmission in the relatively near future. In the interim, we believe that some relief from non-duplication requirements may be warranted. However, present levels of color receiver saturation are relatively low. We are not now in position to specify any particular level of color set saturation among a systems subscribers which would always justify removal of the non-duplication requirements. We are therefore adopting rules without a specific provision on this subject, but are calling for comments on it in the related Notice of Proposed Rule Making issued today. (FCC 65-334, Part 1). Before imposing non-duplication requirements on the bulk of microwave-served CATV systems or the industry at large, we will address ourselves to this subject again. In the interim, we will consider individual cases on application for waiver of the rules.

**144. Stations Entitled to Carriage and Non-Duplication: Satellites and Translators:** As proposed, the rules would not require cable systems to carry or non-duplicate boosters, repeaters, translator television stations or satellites (which do not originate at least seven hours per week of local programming) unless such facilities present the programming of a station which is otherwise entitled to carriage and/or non-duplication. Both CATV and broadcaster interests have expressed dissatisfaction with this provision. The CATVs urge that a satellite originating only seven hours per week is still primarily a repeater facility, which does not stand on the same footing as a local station. Beyond this, they contend that our failure to impose restrictions upon the duplication of local station programming by translators is discriminatory. The broadcasters — with the support of various independent translator groups — urge that satellites and translators should have the same carriage and non-duplication benefits as regular local stations, with no prerequisite for a minimum amount of local program origination. Pointing out that such auxiliary facilities are normally located in under-served areas with a corresponding need for free reception service, the broadcasters claim that a lack of relief from CATV competition will discourage licensees from continuing, or undertaking new, translator or satellite ventures to meet that need. Further, they point out that unless a satellite obtains protection akin to that afforded a full-fledged local station, it may never have the opportunity to develop into such a full-fledged station.

145. We think the broadcasters' basic point with regard to satellite stations is sound. Both as means for extending off-the-air service and as potential local stations, we think satellites are entitled to the basic benefits of the rules. However, a satellite cannot be treated precisely as we would treat any other television station. A satellite's coverage contours may overlap the "equal priority" contours of the parent station, thus creating off-the-air duplication of programming. But this

has nothing to do with the geographical scope of the market in which satellite and parent operate as a unit, and should not result in a loss of non-duplication protection for both. On the other hand, if the CATV system involved has wide channel capacity, treatment of a satellite as a full-fledged station might in some instances require the system to carry both satellite and parent, with only a very marginal amount of non-duplicating programming added for the benefit of subscribers. We believe that a satellite and its parent should generally be treated as a unit. Carriage of one will relieve a CATV system of any obligation to carry the other. Affording non-duplication protection to one will relieve the system of any obligation to afford protection to the other. However, off-the-air duplication of a satellite's programming by a parent station, or *vice versa*, will not result in a loss of exclusivity for both.

146. The question as to translators, whether station-owned or independently owned, is a more difficult one. For it involves broad issues as to the appropriate role of these auxiliary broadcast facilities. We are urged by Dr. Seiben to consider a wide expansion in their use, to extend the service areas of small market stations and bring three full network services to the entire country off-the-air.<sup>73</sup> And we are considering an expanded use of translators in certain limited circumstances.<sup>74</sup> The issues raised, however, are entirely too broad for resolution here. For the present, we have decided to treat translators and other repeaters in the manner proposed in our Notices in these proceedings. Where they operate within the Grade B or better contour of the station whose programming they rebroadcast, they will be treated as extensions of that station's facilities, adding to its rights under the rules only to the extent they bring its service to an area which would otherwise not have it because of terrain or other factors. Nor will any off-the-air duplication due to translators and other repeaters be regarded as ground for withholding non-duplication protection from the originating station. However, in the related Notice of Proposed Rule Making issued today (FCC 65-334), we have called for comments on the appropriate role of translators and the manner in which they should be treated for purposes of carriage and non-duplication by CATV systems. We will therefore have opportunity for further consideration of this subject in the relatively near future.

147. Finally, we point out that translators and satellites — unlike CATV systems — operate under the provisions of Section 325 of the Act and that our rules now impose restrictions on the use of station-owned VHF translators to invade the service areas of other stations whose programs would be duplicated. (See Section 74.732(3) of the Rules.) The question of whether further restrictions should be imposed on duplication of the programming of local stations by translators repeating the signals of distant stations

72. NCTA shows that one out of every four stations whose signals were carried by microwave-served cable systems as of the date of its comments was not equipped for color transmission. Casual inspection of the list of 72 stations it submits, however, reveals that a large number are non-network, independent stations or affiliates of networks that have not, until recently, engaged in a significant amount of color transmission. At least one of the stations is a non-commercial, educational station. (See NCTA, FC, Ex. No. 31).

73. See Seiden Report, pp. 7, 22, 89-90.

74. See Notice of Proposed Rule Making in Docket No. 15858, issued February 19, 1965.

is also too broad for resolution here. We will evaluate it in light of further experience or, where raised, in the context of individual grants.<sup>75/</sup>

**148. Agreements between Broadcasters and CATV Systems as to Carriage and Non-Duplication:** We have emphasized throughout these proceedings that any rules adapted are not intended to preclude parties from arriving at agreements tailored to the specific circumstances in which they find themselves. The carriage and non-duplication requirements operate only at the request of the station, and the non-duplication requirement specifically depends upon notification by the station. The rules establish the minimum to which the station is entitled — not the minimum it must demand. Similarly, they establish the maximum we will require of the cable system as a normal matter, not the maximum to which it may agree in particular circumstances.

149. NCTA points to language in our 1963 Notice indicating that it is not our intention to upset or replace existing agreements between broadcasters and CATV systems "which both parties still believe suited to their particular situation." This language, it claims, "literally invites the broadcaster to repudiate existing agreements." Some of these agreements, it notes, have been written for definite periods of time; all of them were entered into after our **Carter Mountain** decision gave notice that we were prepared to impose some carriage and non-duplication requirements in connection with the licensing of common carrier microwave facilities. In NCTA's view, these agreements were forced upon cable operators by our action and — where narrower than the rules adopted—should not now be repudiated. (NCTA, FC, pp. 112-13).

150. The question of whether a broadcaster or a CATV operator should be bound by an agreement entered into on the basis of varying calculations as to our probable action is not one we can resolve by rule. Insofar as it may turn on considerations of "good faith and fair dealing" by our licensees,<sup>[76]</sup> the facts of each case must be controlling. We will therefore consider it on a case-by-case basis, where raised, taking into account the equities of the parties in the specific circumstances involved and the other pertinent public interest considerations.

**151. Procedural Matters: Notification by Applicant:** The proposed rules would impose upon the applicant for microwave facilities in either the common carrier or private business radio service the duty of notifying any television stations within those predicted Grade A or Grade B contours the CATV systems it seeks to serve may fall. (See proposed Sections 11.556(b) and 21.710(b).) NCTA objects generally, arguing that stations normally retain attorneys to keep them advised of the filing of applications that may affect their interests. American Telephone and Telegraph Company and others argue that burdens of this nature should not be imposed upon the carrier bringing video service to CATV systems.

152. The purpose of the proposed provision is to ensure that actual notice of the filing and basic content of applications reaches those most concerned — in this instance, affected broadcasters. As we have recognized throughout, there may well be cases in which one or more parties wish to seek more or less than the rules provide. The Congress has required that broadcasters give public notice of the filing of their applications "in the principal area which is served or is to be served by the station." Communications Act, Section 311(a), 47 U.S.C. 311(a). We think an analogous requirement is appropriate here.

153. On the other hand, we agree that a common carrier providing service to CATV systems should not itself be required to carry out the notification involved. However, the obligation is one which the carrier can easily impose upon the customer ordering service. Accordingly, we have modified proposed Section 21.710(b) to provide that the carrier's application shall contain a statement that the appropriate television stations have been notified by the CATV systems involved.

154. Finally, in this one instance, we think it appropriate to require all parties to use predicted contours based on the computations prescribed in our rules. (See Section 73.684 of the Rules.) The "notice" stage of an application is not one at which it is appropriate to consider disputes between parties as to the location of coverage contours. Moreover, it is reasonable to require notice somewhat broader in its scope than the action which may, in some instances, be taken ultimately.

**155. Procedural Matters; Special Procedures and Interim Relief:** The proposed rules set out the specific procedures to be followed in the event that a party believes that one or more provisions should not apply in the particular circumstances of its case. (See proposed Sections 11.557 and 21.711.) On further consideration, we have deleted these provisions. The Communications Act and our normal rules prescribe the procedures to be followed in considering applications for permits, licenses and other authorizations.<sup>[77]</sup> Further, we have provided generally for the consideration of requests for waiver of any rule. (See Section 1.3 of the Rules.) And our concern with special procedures stemmed largely from our initial decision to restrict the carriage and non-duplication requirements to the Grade A contour, notwithstanding the strong indication that many stations would request protection out to their Grade B contours. (See **pars.** 5-7, 10-12 of our 1963 Notice in these proceedings.) As we have now extended the geographical scope of the carriage and non-duplication requirements, while providing for relief from their impact in cases where there is "off-the-air" duplication, the need for special procedures is substantially lessened. On the whole, we are not now persuaded that special procedures will be necessary. We will evaluate this question, however, in light of further experience and particu-

larly in light of the general proceeding on CATV matters instituted today.

**156. Procedural Matters; Enforcement and Sanctions:** The proposed rules are designed to operate as conditions upon the access of CATV systems to microwave authorizations and service. A system that accepts a license in the Business Radio Service but refuses to abide by the rules is subject to a cease and desist order or to revocation of license, pursuant to Section 312 of the Communications Act. A broadcaster who abuses the benefits granted him under the rules subjects himself both to a loss of those benefits through a waiver of the rules, and, in sufficiently serious cases, to action against his broadcast authorization. In the Domestic Public Point-to-Point Microwave Radio Service, the proposed rule would require the relevant carrier to include the appropriate requirements in its tariffs or in any contracts for service to any CATV system. If a system receiving service under these provisions refuses to abide by them, it is subject to withdrawal of service by the carrier. If the carrier does not carry out its obligation, it is subject to a cease and desist order or revocation of license. If a broadcaster abuses his position, he is once again subject to a loss of benefits under the rules or to action against his broadcast authorization.

157. There are two major questions raised by this procedural scheme. The American Telephone and Telegraph Company argues that a common carrier should not be required to undertake the interpretation, application and enforcement of rules which may be subject to considerable dispute between its CATV customers and affected broadcasters. We think there is merit in this argument. Accordingly, we have modified proposed Section 21.711 to provide that where there is a dispute between a broadcaster and a CATV customer on the question of whether the customer is complying with the applicable tariff or contract conditions, the carrier may refer the matter to us for a ruling. However, we will require the carrier to obtain from any customer a statement of willingness to comply with the applicable conditions prior to providing the relevant service.

158. NCTA argues that we should impose severe sanctions on any broadcaster who, after giving notice of his intention to carry a program and requiring a cable system to delete a duplicating presentation of the same program, thereafter fails to broadcast the program at all. We have made it clear that we will examine charges of abuse. We take this opportunity, however, to stress one general proposition that we consider of overriding importance: The proposed rules will not work at all without a reasonable amount of good faith cooperation between the affected parties. Particularly in the early stages of their operation, we expect a certain number of errors to be made — a certain number of programs to be duplicated through inadvertence on the part of the cable operator or to be needlessly "blacked out" through an error by the broadcaster

75. We consider this subject explicitly in the related Notice of Proposed Rule Making and Notice of Inquiry issued today (FCC 65-334).

76. **Cf., Granik v. Federal Communications Commission**, 234 F. 2d 682 (C.A.D.C.)

77. See, e.g., Communications Act, Sections 308, 309, 310(b), 319, 47 U.S.C. Section 308, 309, 310(b), 319.

in transmitting scheduling information—even with the utmost good faith on all sides. An occasional such error may occur even after the parties have worked out the practical operating details and have become accustomed to operation under the rules. Parties would not regard errors of this kind as an abuse of our rules. Parties must make a showing that substantial efforts have been made to resolve outstanding problems before requesting action on our part.

159. **Copyright Matters:** A number of participants in these proceedings urge us to incorporate in our rules an express declaration that nothing in them is intended to affect in any way the copyright or other rights that broadcasters or others may have in television program material. We think incorporation of such a declaration in the rules is unnecessary. We have noted (par. 55, fn. 32, above) the pendency of suits in which program suppliers are seeking to establish their rights to control the use by CATV systems of signals carrying their programs. We have also noted that such suits fall entirely beyond our jurisdiction. Our decision to require non-duplication takes account — as it must — of the existing practices of CATV system operators and the present inability of program suppliers to control the availability of their program in any evaluation of the nature and effects of competition between CATV and 78. See Communications Act, Sections 1, 303, 307,

television broadcasting. Our determination does not rest, however, on any theory concerning the requirements of copyright or any federal or state law other than the provision of the Communications Act we have discussed. [78] Nor is anything we have said or done intended to affect the determinations of other federal or state tribunals as to matters within their jurisdiction.

160. **Possible Creation of a New Microwave Service for CATV Systems:** In Docket No. 15586 (Notice of Proposed Rule Making issued August 3, 1964) we are considering a number of matters with relation to the appropriate frequency allocations for microwave facilities serving CATV systems. One of the proposals under consideration is the creation of a new service for all non-common carrier Community Antenna Relay Stations (CARS Service), in which the licensing of stations would be administered by the Commissions Broadcast Bureau. If such a proposal is adopted, we will apply the rules here adopted to the new CARS Service without further rule making proceedings.

161. **The Question of a Transition Period:** We have tailored our requirements, both as to carriage and non-duplication, to the channel capacity of individual CATV systems. Notwithstanding this, however, the rules may well operate in some instances to require CATV operators to choose between substituting a local for a more distant signal on their

systems and expanding their systems channel capacity. For this and other reasons, as we have stressed in paragraph 6, above, it may well be desirable to allow a transition period for some systems before requiring full compliance with the rules. The overall course of action we have adopted will allow us to examine this question thoroughly before applying the rules we adopt to the great majority of CATV systems. The rules will therefore be made effective in the manner we have described.

#### CONCLUSION

162. Authority for the rules adopted herein is contained in Sections 4(i), 303, 307(b), 308, 309, 310 and 319 of the Communications Act of 1934, as amended.

Accordingly, IT IS ORDERED, this 22nd day of April, 1965, that the rules contained in the attached appendix ARE ADOPTED, effective June 1, 1965, as to applications for new or changed microwave facilities, assignments of license or transfers of control filed on or after June 1, 1965; and

IT IS FURTHER ORDERED, that the rules shall be made effective as to other applications, permits or licenses by further order of the Commission.

FEDERAL COMMUNICATIONS  
COMMISSION  
Ben F. Waple  
Secretary

308, 309, 310 and 319; 47 U.S.C. Sections 151, 303, 307, 308, 309, 310 and 319.

#### APPENDIX

##### PART 21—Domestic Public Radio Services (Other than Maritime Mobile).

I. Part 21 is amended by adding new Pars. 21.710, 21.712, 21.714, 21.716 to read as follows:

##### §21.710 Definitions

As used in §§21.712, 21.714, and 21.716,

(a) **Community antenna television system.** The term "community antenna television system" ("CATV system") means any facility which receives and amplifies the signals transmitting programs broadcast by one or more television stations and redistributes such signals by wire or cable to subscribing members of the public, but such terms shall not include (1) any such facility which serves fewer than fifty subscribers, or (2) any such facility which serves only the residents of one or more apartment dwellings under common ownership, control, or management, and commercial establishments located on the premises of such an apartment house.

(b) **Television station; television broadcast station.** The terms "television station" and "television broadcast station" mean any television broadcasting station operating on a channel regularly assigned to its community by §73.606 of this chapter, but shall not include boosters, repeaters or translator television stations, unless such facilities carry the programming of a station within whose Grade B contour a relevant CATV system operates or proposes to operate, in whole or in part, in which event such facilities shall be deemed extensions of the originating station.

(c) **Principal community contour.** The

term "principal community contour" means the signal contour which a television station is required to place over its entire principal community by §73.683(a) of this chapter.

(d) **Grade A and Grade B contours.** The terms "Grade A contour" and "Grade B contour" mean the field intensity contours defined in §73.683(a) of this chapter.

(e) **Network programming.** The term "network programming" means the programming supplied by a national television network organization.

(f) **Substantially duplicated.** The term "substantially duplicated" means regularly duplicated by the network programming of one or more other stations, singly or collectively, in a normal week during the hours of 6 to 11 p.m., local time, for a total of 14 or more hours.

(g) **Priority.** The term "priority" means the priority among stations established in §21.712(a).

(h) **Independent station.** The term "independent station" means a television station which is not affiliated with any national television network organization. §21.712 Authorizations for fixed stations to relay television signals to CATV systems.

Authorizations (including initial grants, modifications, assignments or transfers of control, and renewals) in this service to establish or operate fixed stations used to relay television signals to community antenna television systems (CATV systems) will contain the condition that the licensee carrier shall include the following requirements in its tariffs or in any contracts for service to any CATV system:

(a) **Stations required to be carried.** Within the limits of its channel capacity,

any such CATV system shall carry the signals of operating or subsequently authorized and operating television broadcast stations in the following order of priority, upon the request of the licensee or permittee of the relevant station:

(1) First, all commercial and non-commercial, educational stations within whose principal community contours the system operates, in whole or in part;

(2) Second, all commercial and non-commercial, educational stations within whose Grade A contours the system operates, in whole or in part; and

(3) Third, all commercial and non-commercial, educational stations within whose Grade B contour the system operates, in whole or in part.

(b) **Exceptions.** Notwithstanding the requirements of paragraph (a) of this section,

(1) The system need not carry the signal of any station, if (i) that station's network programming is substantially duplicated by one or more stations of higher priority and (ii) carrying it would, because of limited channel capacity, prevent the system from carrying the signal of an independent commercial station or a non-commercial, educational station.

(2) In cases where (i) there are two or more signals of equal priority which substantially duplicate each other, and (ii) carrying all such signals would, because of limited channel capacity, prevent the system from carrying the signal of an independent commercial station or a non-commercial, educational station, the system need not carry all such substantially duplicating signals, but may select among them to the extent necessary to preserve its ability to carry the signals of independent commercial or non-commercial, educational stations.

(3) In cases where the system operates within the Grade B or higher priority contour of both a satellite station and its parent station, carriage of the signal of one of these stations will relieve the system of any obligation to carry the signal of the other.

(c) **Special requirements in the event of non-carriage.** Where the system does not carry the signals of one or more stations within whose Grade B or higher priority contour it operates, the system shall offer and maintain, for each subscriber, an adequate switching device to allow the subscriber to choose between cable and non-cable reception, unless the subscriber affirmatively indicates in writing that he does not desire this device.

(d) **Manner of carriage.** Where the signal of any station is required to be carried under this section.

(1) The signal shall be carried without material degradation in quality (within the limitations imposed by the technical state of the art);

(2) The signal shall, upon request of the station licensee or permittee, be carried on the system on the channel on which the station is transmitting (where practicable without material degradation); and

(3) The signal shall, upon the request of the station licensee or permittee, be carried on the system on no more than one channel.

(e) **Stations entitled to program exclusivity.** Any such CATV system which operates, in whole or in part, within the Grade B or higher priority contour of any commercial television broadcast station and which carries the signal of such station shall, upon request of the station licensee or permittee, maintain the station's exclusivity as a program outlet in the manner and to the extent specified in paragraph (f) of this section: **Provided,** That:

(1) The system is not required to maintain the exclusivity of the network programming of any such station if the system carries the signal(s) of one or more equal or higher priority stations (other than a satellite or parent of the station requesting exclusivity) which substantially duplicate the network programming of the station requesting exclusivity; and

(2) The system is not required to maintain the exclusivity of the non-network programming of any such station if the system carries the signal(s) of one or more equal or higher priority stations (other than a satellite or parent of the station requesting exclusivity) which operate in what are normally and usually considered other markets for purposes of television program distribution.

(3) In cases where the system operates within the Grade B or higher priority contour of both a satellite station and its parent station, protection of the program exclusivity of one of these stations will relieve the system of any obligation to protect the program exclusivity of the other.

(f) **Program exclusivity; extent of protection.** Where a station is entitled to program exclusivity, the CATV system shall, upon the request of the station licensee or permittee, refrain from duplicating any program broadcast by such

station, simultaneously or within a period commencing 15 days prior to its broadcast by the station and ending 15 days after such broadcast, if the CATV operator has received notification from the requesting station of the date and time of its broadcast of the program and the date and time of any broadcast to be deleted, as soon as possible and in any event no later than 48 hours prior to the broadcast to be deleted.

(g) **Exceptions.** Notwithstanding the requirements of paragraph (f) of this section,

(1) The CATV system need not delete reception of a network program if, in so doing, it would leave available for reception by subscribers, at any time, less than two network programs (including those broadcast by any stations whose signals are being carried and whose program exclusivity is being protected pursuant to the requirements of this section);

(2) The system need not delete reception of a network program which is scheduled by the network between the hours of 6 and 11 p.m., Eastern Time, but is broadcast by the station requesting deletion, in whole or in part, outside of the period which would normally be considered prime time for network programming in the time zone involved; and

(3) The system need not delete reception of any program consisting of the broadcast coverage of a speech or other event as to which the time of presentation is of special significance, except where the program is being simultaneously broadcast by a station entitled to program exclusivity.

**Note:** Whether or not a particular station which does not present a significant amount of locally originated programming is a "satellite," as that term is used in §21.712, will be determined on the facts of the particular case.  
§21.714 Notification of the filing of the application.

An application for any authorization subject to §21.712 shall contain a statement that (1) each CATV system served or to be served has notified the licensee or permittee of any television broadcast station, within whose predicted Grade B contour the CATV system operates or will operate, of the filing of the application and (2) the CATV system has indicated willingness to comply with the provisions of §21.712. Such statement shall be supported by copies of the letters of notification directed to such television broadcast licensees or permittees and by a statement of such CATV system(s) indicating willingness to comply with §21.712. The notice shall include the fact of intended filing by the applicant, identification of each CATV system served or to be served under the authorization sought, identification of the community served or to be served by each such CATV system, and the television station(s) whose programs will be distributed by each such CATV system.

**Note:** As used in §21.714, the term "predicted Grade B contour" means the field intensity contour defined §73.683 (a) of this chapter, the location of which is determined exclusively by means of the calculations prescribed in §73.684 of this chapter.

§21.716 Disputes between television

broadcast stations and CATV systems as to requirements under §21.712.

In the event that a dispute should arise, at any time, between a television broadcast station and a CATV system served under an authorization subject to §21.712, on the question of whether the CATV system is complying with the applicable tariff or contract requirements, the licensee carrier may refer the matter to the Commission for a ruling.

**PART 91—Industrial Radio Services**  
**II. Part 91 is amended by adding new §§91.557, 91.559 and 91.561 to read as follows:**

§91.557 Definitions.

As used in §§91.559 and 91.561,

(a) **Community antenna television system.** The term "community antenna television system" ("CATV system" means any facility which receives and amplifies the signals transmitting programs broadcast by one or more television stations and redistributes such signals by wire or cable to subscribing members of the public, but such terms shall not include (1) any such facility which serves fewer than fifty subscribers, or (2) any such facility which serves only the residents of one or more apartment dwellings under common ownership, control, or management, and commercial establishments located on the premises of such an apartment house.

(b) **Television station; television broadcast station.** The terms "television station" and "television broadcast station" mean any television broadcasting station operating on a channel regularly assigned to its community by §73.606 of this chapter, but shall not include boosters, repeaters or translator television stations, unless such facilities carry the programming of a station within whose Grade B contour a relevant CATV system operates or proposes to operate, in whole or in part, in which event such facilities shall be deemed extensions of the originating station.

(c) **Principal community contour.** The term "principal community contour" means the signal contour which a television station is required to place over its entire principal community by §73.683(a) of this chapter.

(d) **Grade A and Grade B contours.** The terms "Grade A contour" and "Grade B contour" mean the field intensity contours defined in §73.683(a) of this chapter.

(e) **Network programming.** The term "network programming" means the programming supplied by a national television network organization.

(f) **Substantially duplicated.** The term "substantially duplicated" means regularly duplicated by the network programming of one or more other stations, singly or collectively, in a normal week during the hours of 6 to 11 p.m., local time, for a total of 14 or more hours.

(g) **Priority.** The term "priority" means the priority among stations established in §91.559(a).

(h) **Independent station.** The term "independent station" means a television station which is not affiliated with any national television network organization. §91.559 Authorizations for operational fixed stations to relay television signals to CATV systems.

Authorizations (including initial grants,

modifications, assignments or transfers of control, and renewals) in the Business Radio Service to construct or operate point-to-point operational fixed stations to relay television signals to community antenna television systems (CATV systems) will contain the following conditions:

(a) **Stations required to be carried.** Within the limits of its channel capacity, any such CATV system shall carry the signals of operating or subsequently authorized and operating television broadcast stations in the following order of priority, upon the request of the licensee or permittee of the relevant station:

(1) First, all commercial and non-commercial, educational stations within whose principal community contours the system operates, in whole or in part;

(2) Second, all commercial and non-commercial, educational stations within whose Grade A contours the system operates, in whole or in part; and

(3) Third, all commercial and non-commercial, educational stations within whose Grade B contour the system operates, in whole or in part.

(b) **Exceptions.** Notwithstanding the requirements of paragraph (a) of this section,

(1) The system need not carry the signal of any station, if (i) that station's network programming is substantially duplicated by one or more stations of higher priority and (ii) carrying it would, because of limited channel capacity, prevent the system from carrying the signal of an independent commercial station or a non-commercial, educational station.

(2) In cases where (i) there are two or more signals of equal priority which substantially duplicate each other, and (ii) carrying all such signals would, because of limited channel capacity, prevent the system from carrying the signal of an independent commercial station or a non-commercial, educational station, the system need not carry all such substantially duplicating signals, but may select among them to the extent necessary to preserve its ability to carry the signals of independent commercial or non-commercial, educational stations.

(3) In cases where the system operates within the Grade B or higher priority contour of both a satellite station and its parent station, carriage of the signal of one of these stations will relieve the system of any obligation to carry the signal of the other.

(c) **Special requirements in the event of non-carriage.** Where the system does not carry the signals of one or more stations within whose Grade B or higher priority contour it operates, the system shall offer and maintain, for each subscriber, an adequate switching device to allow the subscriber to choose between cable and non-cable reception, unless the subscriber affirmatively indicates in writing that he does not desire this device.

(d) **Manner of carriage.** Where the signal of any station is required to be carried under this section,

(1) The signal shall be carried without material degradation in quality (within the limitations imposed by the technical state of the art);

(2) The signal shall, upon request of the station licensee or permittee, be carried on the system on the channel on which the station is transmitting (where

practicable without material degradation); and

(3) The signal shall, upon the request of the station licensee or permittee, be carried on the system on no more than one channel.

(e) **Stations entitled to program exclusivity.** Any such CATV system which operates, in whole or in part, within the Grade B or higher priority contour of any commercial television broadcast station and which carries the signal of such station shall, upon request of the station licensee or permittee, maintain the station's exclusivity as a program outlet in the manner and to the extent specified in paragraph (f) of this section, **Provided**, That:

(1) The system is not required to maintain the exclusivity of the network programming of any such station if the system carries the signal(s) of one or more equal or higher priority stations (other than a satellite or parent of the station requesting exclusivity) which substantially duplicates the network programming of the station requesting exclusivity; and

(2) The system is not required to maintain the exclusivity of the non-network programming of any such station if the system carries the signal(s) of one or more equal or higher priority stations (other than a satellite or parent of the station requesting exclusivity) which operates in what are normally and usually considered other markets for purposes of television program distribution.

(3) In cases where the system operates within the Grade B or higher priority contour of both a satellite station and its parent station, protection of the program exclusivity of one of these stations will relieve the system of any obligation to protect the program exclusivity of the other.

(f) **Program exclusivity; extent of protection.** Where a station is entitled to program exclusivity, the CATV system shall, upon the request of the station licensee or permittee, refrain from duplicating any program broadcast by such station, simultaneously or within a period commencing 15 days prior to its broadcast by the station and ending 15 days after such broadcast, if the CATV operator has received notification from the requesting station of the date and time of its broadcast of the program and the date and time of any broadcast to be deleted, as soon as possible and in any event no later than 48 hours prior to the broadcast to be deleted.

(g) **Exceptions.** Notwithstanding the requirements of paragraph (f) of this section,

(1) The CATV system need not delete reception of a network program if, in so doing, it would leave available for reception by subscribers, at any time, less than two network programs (including those broadcast by any stations whose signals are being carried and whose program exclusivity is being protected pursuant to the requirements of this section);

(2) The system need not delete reception of a network program which is scheduled by the network between the hours of 6 and 11 p.m., Eastern Time, but is broadcast by the station requesting deletion, in whole or in part, outside of the period which would normally be

considered prime time for network programming in the time zone involved; and

(3) The system need not delete reception of any program consisting of the broadcast coverage of a speech or other event as to which the time of presentation is of special significance, except where the program is being simultaneously broadcast by a station entitled to program exclusivity.

**Note:** Whether or not a particular station which does not present a significant amount of locally originated programming is a "satellite," as that term is used in §91.559, will be determined on the facts of the particular case. §91.961 Notification by applicant.

An application for any authorization subject to §91.557 shall contain a statement that the applicant has notified the licensee or permittee of any television broadcast station, within whose predicted Grade B contour the CATV system(s) served or to be served operate or will operate, of the filing of the application. Such statement shall be supported by copies of the letters of notification directed to such television broadcast licensees or permittees. The notice shall include the fact of filing by the applicant, identification of each CATV system served or to be served under the authorization sought, identification of the community served or to be served by each such CATV system, and the television station(s) whose programs will be distributed by each such CATV system.

**Note:** As used in §91.561, the term "predicted Grade B contour" means the field intensity contour defined in §73.683(a) of this chapter, the location of which is determined exclusively by means of the calculations prescribed in §73.684 of this chapter.

#### **Dissenting Statement of Commissioner Robert T. Bartley**

"I dissent to the conclusion that we have, presently, the necessary authority to adopt these rules pertaining to CATV.

"A majority of the Commission, however, having reached such a conclusion, I would concur in the promulgation of a rule requiring the CATV customer of a microwave licensee to carry without material degradation the programs of TV stations in whose predicted Grade A contour the CATV system is located. As indicated in the Report and Order, hardship cases may arise with respect to CATV systems located between the Grade A and B contours of TV stations. I would handle those on a case-to-case basis, thus relieving the Commission of what I anticipate will otherwise be a substantial administrative burden.

"I cannot agree to the requirement that any programs carried by a CATV system from a local TV station may not be carried again on the system from other TV stations within a specified number of days.

"If a program is scheduled to be carried on a delayed basis by the local station, I would afford 24 hour protection only.

"I oppose the imposition of interim conditions before the rules become effective or applicable."

(Note: Proposed CATV Rules for Commissioner Loevinger's comments.)



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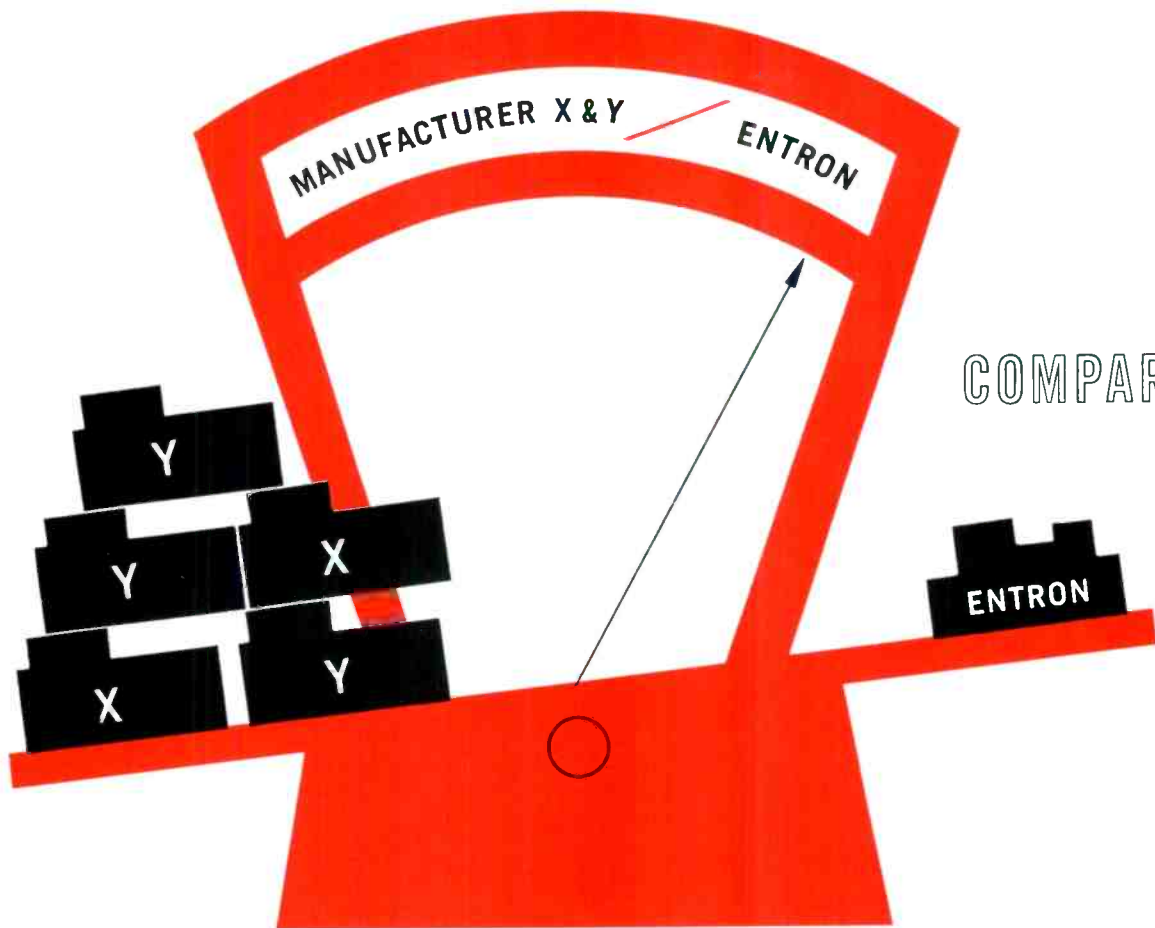
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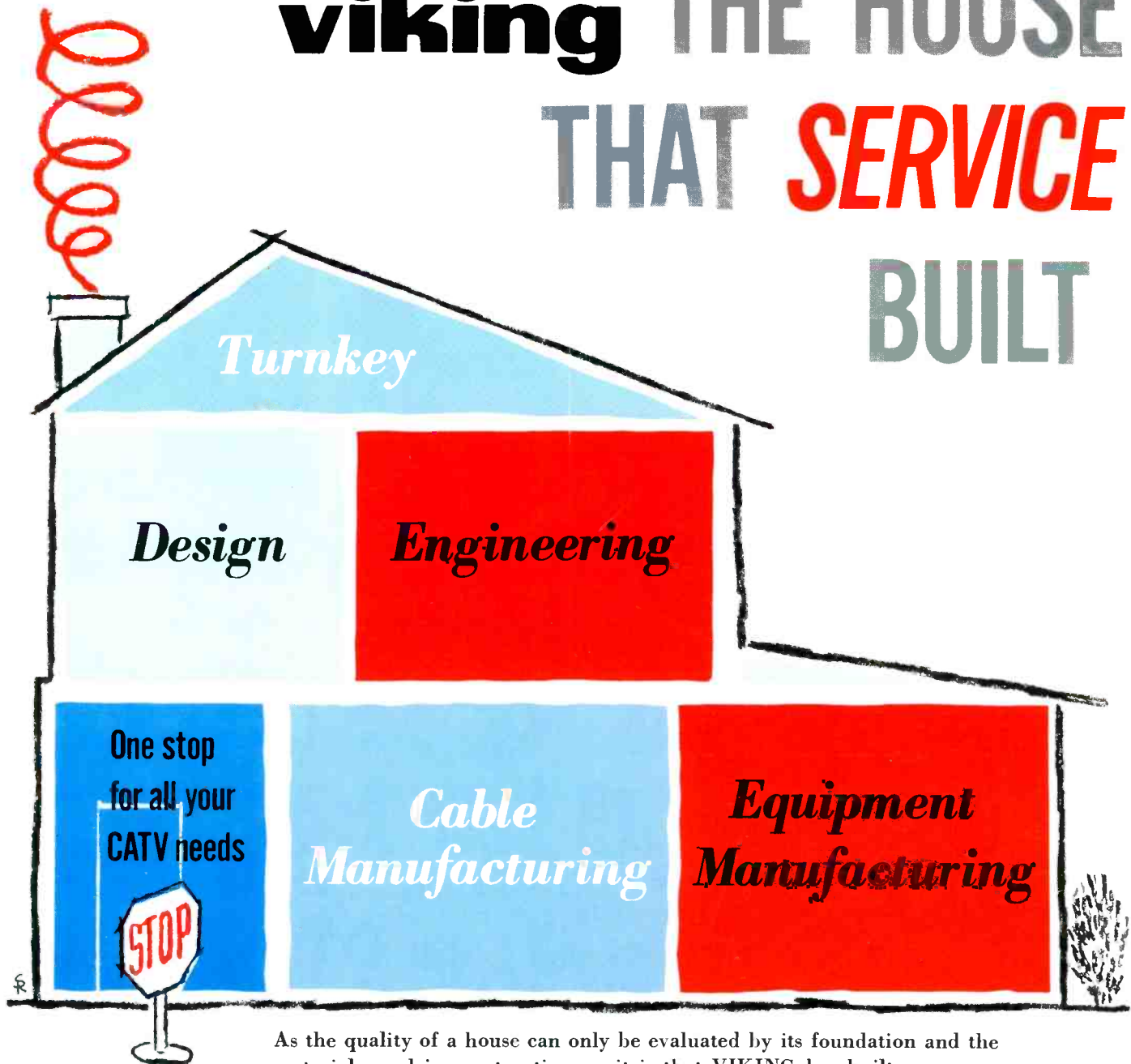
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