

same cable system, Hollywood Home Theater and 20th Century-Fox's Prism claim to be racking up considerable numbers. Using multipoint distribution, Prism offers local sports events and six current motion pictures per month.

In the Audubon, N.J., system HBO is said to have 1,436 subscribers and Prism, 2,335. Mr. Levin speaks of Audubon as a "chaotic marketing situation," where Prism has its own sales staff working locally and HBO doesn't (and mentions that HBO may have to do something about that).

As Mr. Levin points out—and Robert Stice, Prism marketing director who worked at HBO early on seconds—the Prism concept was one that Time Inc. originally had thought it would go with. Prism has its deal with the Philadelphia Spectrum; HBO had its deal with Madison Square Garden. However, Mr. Levin says that when concentrating on local sports teams, a service "draws a narrower compass" regarding its potential subscriber universe. Nevertheless, Prism picked up where HBO left off. Still other services are vying for their share elsewhere.

As Mr. Levin told the CATV analysts two years ago, HBO has never expected to have a monopoly. He says that "there is room for a lot of program services." What HBO is banking on as its competitive edge is the foundation that's been laid and the lessons that have been learned in the past five years. But as to how the marketplace will develop, said Mr. Levin, "It's just too early to tell."

Fogarty says FCC has no right to ride herd on cable franchise fees

Commission action easing standards for local communities draws support of the commissioner, but he contends that the FCC lacks authority to set a limit on charges assessed systems

When it comes to cable television regulation, at least, FCC Commissioner Joseph Fogarty believes in a strict construction of commission authority, the kind of construction he says is required by court decisions.

Commissioner Fogarty made that clear in an opinion concurring in part and dissenting in part on the commission's action following a review of the standards it had required local communities to follow in granting cable franchises. The commission, in action taken on July 22 (BROADCASTING, July 25), but not reported in a published order until Sept. 30, repealed five standards but retained the 3%-to-5% limit on franchise fees that local authorities may impose.

Commissioner Fogarty, in the opinion released with the text, endorses the deletion of the five standards. The action, he said, indicates the commission is beginning to recognize the limits of its authority

to regulate a "dynamic" technology without the benefit of "a more specific congressional mandate."

But, he added, retention of the fee limitation—normally 3% of gross revenues, but 5% if the community can demonstrate that would be reasonable—"fails again to recognize the limited nature of the commission's jurisdiction over cable and fails, I believe, to meet judicially established standards for the valid assertion and exercise of our limited jurisdiction in this area."

The courts have held that the commission regulation of cable must be justified as "reasonably ancillary to the commission's power over broadcasting." And the commission supported its retention of the fee limitation with the argument that, "since the promise of cable's abundance and diversity of services is integrally linked to its financial viability... the fee limitation serves the goal of diversity and thus is within the scope of our authority."

Commissioner Fogarty, however, said that even assuming a reasonable connection between "the established objective of diversity in broadcasting and cable's financial viability," the commission has not presented any evidence to support the contention that the lack of a franchise-fee limit will frustrate the industry's development or "impair the ability of cable systems to provide a full panoply of services."

He noted that the commission's action suggests that local authorities are competent to assure due process in the award of franchises, set construction timetables, provide complaint procedures, and establish the duration of the franchises they award, and that they need not be required to state in their franchises that commission rules will be complied with when compliance is compulsory. But, he added, it also reflects the view that local authorities are "either incompetent or untrustworthy when it comes to the imposition of franchise fees."

Commissioner Fogarty was not the only commissioner not entirely satisfied with the commission's action. Commissioner Abbott Washburn dissented because of the deletion of the standard requiring the holding of proceedings in connection with franchise awards. "Events of the past several years have revealed, again and again, the danger of favoritism in proceedings involving public officials," Commissioner Washburn said, adding, "mere guidelines are not enough." The rule requiring "a full public proceeding affording due process was a good rule which served a useful purpose," he said.

A voice from the past was also heard last week on the franchise issue. Benjamin L. Hooks, who had been a member of the commission when it acted on the matter, concurred in part, dissented in part and issued a statement, which was released on Tuesday. Mr. Hooks, who resigned from the commission to become executive director of the National Association for the Advancement of Colored People, objected to the commission's deletion of the requirements for a public-hearing, due-

process proceeding, for construction timetables and for establishing procedures for handling subscriber complaints. Those deletions, he said, leave "unprotected" those persons the commission's rules are designed to protect.

Pole bills moving through Congress

Senate committee votes out one with forfeiture provision; House subcommittee approves one without that feature

Pole attachment legislation took a step closer to law in both the House and Senate last week, but not in the same form.

The Senate Commerce Committee made no changes in its bill, which had been introduced by Communications Subcommittee Chairman Ernest Hollings (D-S.C.). That bill contains two elements—one favored by broadcasters, the other by cable interests.

The pole attachment section supported by the National Cable Television Association and the National Association of Regulatory Utility Commissioners authorizes the FCC regulation of pole-attachment rates or allows state regulation within federally defined areas.

The National Association of Broadcasters is supporting the Senate version because it contains a section allowing FCC fines of cable systems that violate its rules. "The forfeiture provision is very important," said Donald Zeifang, NAB's senior vice president of government relations. "It was included in the version of the bill that passed the Senate last year," he added. NCTA is also supporting the Senate version, but only for the pole attachment provision. If it had its way, NCTA would prefer the House pole bill—that one is almost identical to the Senate's in terms of the pole area, but contains no mention of forfeitures.

The House Communications Subcommittee met last Wednesday and quickly approved that version with some amendments. One was introduced by Representative W. Henson Moore (R-La.) and stated that while the federal government may regulate pole attachment rates, "at any time the state may act and set rates," much the same language as contained in the Senate's version.

The House version will now be voted upon by the full Commerce Committee, possibly as soon as tomorrow (Oct. 18). The Senate bill will have to come before the full Senate, with no date scheduled yet.

At the state level, California Governor Jerry Brown signed a bill (it becomes effective Jan. 2) that gives the California Public Utilities Commission the authority to establish the terms and conditions of pole attachment agreements when the cable industry and pole owners are unable to agree on terms, conditions and price. The bill also specifies that cable firms only pay for that portion of usable space they occupy on the poles.