The FCC's Regulation of the New Video Technologies: Backing and Filling on the Level Playing Field

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I. INTRODUCTION

Like many other federal agencies, during the past few years the Federal Communications Commission[1] (FCC) has engaged in a spree of re-regulation, deregulation, and now unregulation. The basic assumption behind this exercise is that effective competition among rational profit-maximizing entrepreneurs inevitably will produce consumer satisfaction and make regulation unnecessary (Fowler 1982). This tenet produces the regulatory imperative of creating—or at least encouraging—as much competition as possible within an industry. The sole role of governmental intervention is to create a "level playing field" on which firms can compete.

Whether regulation can produce these market conditions is far from clear. As Representative Tim Wirth has quipped, "there's no such thing as a level playing field or airline food" (Wirth 1983). Part of the problem, of course, is that government traditionally has two distinct—and basically inconsistent—ways of promoting competition.

The first, a temptingly logical approach, is simply to impose identical restrictions upon all potential players. This rationale is eminently fair, assuming that all these players have reasonably comparable abilities. If they do not, however, this approach runs into both political and equitable problems. After all, the public and its representatives traditionally get a bit queasy at the sight of a 240-pound professional football player landing on the back of a 140-pound high school athlete. As a result, it is tempting to adjust any game's rules so that everyone can play.

Precisely because of this very human—and very inefficient—tendency, the second and time-honored method of creating a level playing field is to rein in the most effective players. Common examples are handicaps for golfers, weights for jockeys, and separation of professional from amateur athletes. Indeed, much of the New Deal's sometimes murky philosophy derived from this principle. This approach, naturally, is heresy to any ideologically pure deregulator, since it injects government into the marketplace. Nevertheless, it routinely creeps into administrative decision-making because of demands for equity. Classic examples in telecommunications policy include the now declassé antisiphoning rules, which prevented cable or subscription television from competing with broadcast television to buy motion pictures as well as sporting events (*Home Box Office v. FCC* 1977) and the still operational multipoint distribution service (MDS) rules, which prohibit an MDS operator from controlling more than half of its programming (FCC 1983v:47§21.900).

The current ideologically pure Commission purports to have used only the first approach in bulldozing a level playing field for the new video technologies. In most respects, this probably has been the case. Nevertheless, it is useful to test the Commission's premises by analyzing the consistency of its current regulatory scheme. This chapter thus reviews the FCC's policies toward the new video technologies in several different areas, including ease of entry, ownership restrictions, jurisdictional bases, degree of federal preemption, and content regulation.

These areas merit consideration because they have a heavy impact on each medium's ability to compete effectively. This classification scheme is suggestive rather than scientific, however, since there are no data available on the cost of regulatory burdens. Indeed, some of these media do not even exist, and the Commission's abolition of most reporting requirements will make it difficult to create accurate data bases in the future.

With these considerations in mind, it is appropriate to begin a perhaps pedestrian analysis of the Commission's regulatory approaches to the new video media. On many points, the most relevant observations focus not on what the FCC has stated, but rather on what it has failed to say. In these situations, of course, a certain amount of speculation as to the Commission's intent is necessary.

II. A COMPARATIVE ANALYSIS OF THE FCC'S REGULATORY POLICIES

The primary goal of deregulation is to encourage competition in previously regulated markets. Although perhaps desirable from a logical point of view, completely uniform regulation is often either politically or pragmatically infeasible; after all, most potential competitors are not even roughly comparable in terms of market performance. An operational regulatory goal in many cases is to equalize the effects of regulation on competitors. It is, therefore, less than surprising that the FCC's regulation of the new video technologies shows a notable lack of consistency.

A. Procedural Inhibitions on Entry

Since most of the new video technologies are infant industries, there are few absolute barriers to entry. In all the over-the-air services considered here, a substantial amount of spectrum has been available for initial licensing, even if there has not been enough for every potentially interested user. Moreover, only a few absolute legal bans—such as prohibitions on alien ownership or cross-ownership—currently exist, and the FCC is attempting to abolish most of these.

As is inevitably the case in regulation, however, a variety of procedural requirements may inhibit or delay entry. More important for purposes of this analysis, these potential procedural snares vary significantly from one medium to another. To a certain extent, of course, this situation results from differences in the underlying statutory and case law. For example, conventional broadcast television, LPTV, STV, and any other broadcast use are subject to a wide variety of statutory and judicial doctrines which evolved during the 1950s and 1960s, when the Commission focused most of its regulatory attention upon broadcasting (Krasnow et al. 1982). Moreover, the effect of this historical accident may be exaggerated somewhat by the vagaries of the Commission's current regulatory program. Because of both political and judicial opposition, the Commission has found it harder to repeal existing rules than to avoid adopting new ones. Three areas of the FCC's procedural rules seem particularly noteworthy.

First, the Commission's current application processes effectively require applicants for some services to undergo substantially more steps than applicants for other services. For example, the Commission has proposed eliminating the traditional requirement of a construction permit in processing applications for MMDS stations. Applicants for conventional broadcast, STV facilities, and LPTV stations, however, apparently still must secure a construction permit before applying for a covering license. Applicants for DBS facilities must obtain a construction permit, launch authority, and a covering license.

To be sure, legal and historical reasons explain many of these procedural differences. The Communications Act requires broadcasters to secure a construction permit before applying for a covering license (U.S. Code 47§319), and the Commission has done business in this fashion for fifty years. Moreover, implementation of DBS service requires coordination with other government authorities, which control the nation's publicly operated satellite launch facilities. The Commission's action might flow from an assumption that MMDS's impact on a national scale will be minimal, while DBS's might be substantial. Nevertheless, the requirement of construction permits for DBS but not for MMDS arguably might allow an MMDS station to go on the air substantially before a DBS operation.

A similar phenomenon may exist as to petitions to deny or competing applications. Under the doctrine of *Carroll Broadcasting v. FCC* (1958), the courts have required the Commission to allow an existing broadcaster to oppose a license application by showing that grant of another license would make operation of both the existing and the new stations economically infeasible and thus deprive the public of service. The *Carroll* doctrine's wisdom is questionable, because it eliminates potential competition solely on the basis of economic projections; but until the D.C. Circuit disavows the doctrine, it continues to apply to conventional broadcast television applications. At the same time, the Commission has indicated that it will not apply *Carroll* to LPTV (FCC 1982d:507) and DBS (FCC 1982e:1352–53) applications. The Commission's reasoning seems to be that neither LPTV nor DBS is likely to have any significant impact upon conventional television broadcasting. Still, it is not clear that the Commission can use a general policy statement to avoid case-by-case adjudication (*United States v. Storer* 1956; *FCC v. Texaco* 1964).

The Commission may have good reasons for not applying *Carroll* to the new video technologies. Along these lines, however, it should be noted that the Commission has cautioned LPTV operators against causing direct electrical interference to either MDS or cable operators (FCC 1982d:497–99). After all, *Carroll* may never have made much sense because of its clearly anticompetitive consequences, and it presumably makes even less sense in a video industry of abundance. The continued applicability of *Carroll* to broadcasting, but not to the new video technologies, seems a bit anomalous, however, unless the Commission implicitly is stating that it will not enforce the doctrine as to broadcasting either—a position also with questionable legal validity.

A third procedural difference arises from the Commission's procedure for resolving competing applications for the same frequency. Traditional case law required the Commission to hold comparative hearings (*Ashbacker Radio v. FCC* 1945), which are infamous for their Dickensian length and cost. Under a recent amendment to the Communications Act, however, the Commission may resolve comparative proceedings by means of lotteries (FCC 1983b). Although the Commission has proposed to use the lottery procedure for both conventional broadcast television and comparative MMDS licenses (FCC 1983f:145), it has applied the lottery procedure only to applications for LPTV licenses. As a result, an applicant for a conventional broadcast television station must wade through years of litigation and thousands of dollars in legal expenses, while a potential LPTV operator in the same community would receive comparatively speedy and certainly inexpensive processing.

Once again, there may be sound reasons for this situation. Regardless of its deregulatory philosophy, the Commission may find it difficult to depart from almost forty years of precedent—albeit rather unsatisfactory experience—with comparative hearings for broadcast stations. Moreover, there simply may be less need for concern about picking the "right" licensee for LPTV and MMDS, because of the initially limited public use of these services. (This rationale obviously will not apply if these services—particularly MMDS—become "wireless cable" systems.) In addition, the Commission may be the victim of the regulatory lag inherent in disposing of old rules.

The analysis above conspicuously omits any consideration of cable television for the simple reason that cable systems need not obtain a license or other authorization from the FCC. Instead, a cable operator need only file a "registration statement" when it actually begins operations (FCC 1983v:47§76.12). Cable operators, however, must obtain licenses to operate microwave relay stations (FCC 1983v:47§78.11) which are essential for any large system. In theory, a cable operator can begin operations considerably more expeditiously than any of the over-the-air new video media. In reality, of course, most multiple systems operators have had to wage costly "franchise wars" in order to obtain choice franchises. For example, New York City granted franchises for Manhattan in 1970, but not for the other four boroughs until 1983. Depending upon the disposition of a city's governing authorities, a cable operator may face procedural delays as great as or even greater than those applicable to the other new video technologies.

Precisely because of these difficulties in the local cable franchising process, the Commission showed steadily increasing tendency to preempt local cable regulation. It first took local authorities out of rate regulation (FCC 1983h), and then prevented local authorities from regulating satellite master antenna systems (SMATV's)—i.e., private cable systems which serve only one apartment dwelling or complex (FCC 1983r). Moreover, the Commission informally threatened to preempt all state and local regulation of cable, if the Congress did not pass legislation limiting the regulatory powers of state and local governments—a strategy which apparently created pressure for passage of the Cable Communications Policies Act of 1984, as discussed in Subsection D.

To the extent that abuses in local cable regulation exist, preemption by the Commission may have been sound policy. But while the Commission has invoked preemption to relieve the cable industry from local regulation, it has failed to substitute any federal licensing or certificating requirements. The ultimate result of federal preemption could be that all of the new video media—except cable—would face sometimes convoluted and expensive authorization processes. Although this would be just a side effect of the Commission's and the Congress' attempt to prevent perceived local abuses, it could give cable a substantial procedural advantage over the other new video technologies.

Thus the new video media are subject to different procedural schemes for obtaining operating authorizations. These differences translate into time and money. For example, if a potential STV operator must go through a lengthy comparative hearing while a potential LPTV operator need not, the latter presumably will incur fewer expenses than, and be operational before, the former. Therefore, if a particular geographic market can support only one over-the-air pay television operation, a group of LPTV operators might foreclose future entry by a potential STV operator. There may be good reasons for these seemingly anomalous results, but so far the Commission has failed to articulate them very thoroughly.

B. Structural and Ownership Limitations

Not only may an ownership restriction bar a firm from a market, but it may also make it difficult for other firms to generate capital by means of joint ventures and the like. Thus when Congress abolished the prohibition on alien ownership of cable television systems in 1974 (FCC 1975d:160n.7) it brought a significant—and sorely needed—amount of Canadian capital into the U.S. cable industry. Ownership limitations have comparatively little impact on acquisition of programming, which is essentially a separate business. So even though an English firm cannot own more than twenty-five percent of a U.S. broadcast station, British programmers obviously have done a brisk trade in the United States.

In general, the Commission has imposed comparatively few ownership restrictions on the new video technologies and has attempted to eliminate most existing ones. Perhaps because of the inherent problems of history and regulatory lag, however, the Commission's present ownership policies are less than consistent.

The FCC has retained its traditional prospective ban on cross-ownership of a radio station, newspaper, or cable system by a broadcast television station in the same market (FCC 1983v:47§73.636), but it has not imposed similar cross-ownership requirements upon MMDS, DBS, or LPTV operators. When considering cross-ownership issues in the context of the new video technologies, the Commission merely has repeated its rhetoric that cross-ownership prohibitions are unnecessary in light of multiple video sources (FCC 1982d:486). The contrast between this approach and traditional cross-ownership prohibitions is anomalous. On the one hand, a broadcast television station may not acquire a radio station in its market without a waiver from the Commission (FCC 1982h). On the other hand, it is perfectly free to acquire one or more MMDS, DBS, and LPTV operations serving that same area—even though the latter three operations are likely to garner a larger share of the audience than is one radio station.

There may be an argument in favor of allowing local cross-ownership of MMDS, DBS, LPTV, and cable operations, on the theory that—at least in the very short run—aggregation of these media outlets creates countervailing power to local broadcast television stations and newspapers. However, the Commission obviously has not taken this approach; rather, it allows broadcast television stations to own MMDS and DBS, but not cable (FCC 1983v:47§76.51) operations in their markets. Similar arguments exist for allowing cable/telephone cross-ownership (FCC 1981a).

Conversely, the Commission's policies do not consider possible future growth by the new video technologies. For example, cable and MMDS eventually may supply the vast majority of premium programming (Microband 1984). By permitting cross-ownership of MMDS, DBS, LPTV, and cable operations, the Commission may be creating the risk that it will need to unscramble this omelet at some point in the future—a job which it has found singularly distasteful in the past with cross-ownership of local newspapers and broadcast or cable operations (FCC 1975c, 1980a).

Along similar lines, the FCC traditionally has limited the number of broadcast stations which a multiple owner may acquire (FCC 1983v:47 §73.636). Yet the Commission has disavowed multiple ownership restrictions for MMDS, LPTV, DBS, or cable (FCC 1982g). In the absence of common and cross-ownership restrictions, one firm in theory could own all MMDS, DBS, and cable systems in the country. Still this scenario seems rather unlikely, if only because AT&T has not expressed any interest in it. Instead, ownership of the new video media presumably will follow the historical pattern of oligopoly. Nevertheless, the Commission's liberal postures on both common and cross-ownership have significant implications for the future, depending upon how the new video technologies develop.

Once again, the sharp contrast between the Commission's restrictions on conventional radio or television stations and its relaxed attitude toward the new video media seems to be largely a result of history. After all, the Commission currently is in the process of attempting to repeal its multiple ownership restrictions for radio and television, partially in response to arguments that the emergence of the new video media makes strict multiple ownership rules unnecessary (FCC 1983y).

In terms of alien ownership, the Commission faces a somewhat more complicated problem. Section 310(a) of the Communications Act prohibits a foreign firm from owning more than twenty-five percent of the stock in a U.S. broadcast station or common carrier (U.S. Code:47 §310(a)). Because of low-visibility technical amendments in 1974, however, Section 310(a) applies only to broadcasting and common carriage. Thus, by its terms, the statute does not govern MMDS, DBS, or cable. (To the extent that any of these media elected to operate as a broadcaster or carrier, Section 310(a) presumably would apply.)

If the purpose of Section 310(a) is to restrict foreign control of the U.S. mass media, the current exemption of cable, MMDS, and DBS seems anomalous. Moreover, the rather haphazard coverage of the present statute creates some strange situations. For example, alien ownership of an MMDS operation using leased educational microwave channels presumably would be acceptable, because these facilities are neither broadcasters nor carriers. On the other hand, the same foreign corporation could not acquire more than twenty-five percent of a traditional single-channel MDS operation—which might be folded into an MMDS operation—because the single-channel MDS operation is, technically, a common carrier. Since most MMDS systems probably will combine leased educational channels and existing single-channel MDS stations, the present situation has the potential for endless mischief. The Commission could resolve these anomolies merely by adopting alien ownership restrictions as a matter of discretion as it proposed to do for cable television (FCC 1975d) but has shown no inclination to act.

Finally, the Commission traditionally has reserved both radio and television frequencies for educational and noncommercial uses (FCC 1983v:47§73.606). It has declined to do so, however, for DBS (FCC 1982e:1347–48) or cable (FCC 1981e). MMDS operations presumably will lease educational microwave channels, thus building in an educational component; and since a number of television broadcast channels already are assigned to noncommercial uses, the present reservation of noncommercial frequencies effectively is built into the LPTV service (FCC 1982d:490). The Commission's reasoning seems to be that existing public television stations provide sufficient educational programming, even though many public stations have poor transmission facilities and small coverage areas. Although this rationale has a certain amount of abstract validity, it ignores the current decline in public television funding. The Commission's only response to this problem seems to be that MMDS will provide funding for local educational microwave stations, by leasing channels from them (FCC 1983g:383). The amount of such funds is likely to be quite insubstantial, however, unless and until the MMDS industry grows significantly.

Moreover, the Commission's refusal to reserve noncommercial allocations distributes the burden of providing noncommercial television channels somewhat unequally. The Commission's policy reduces the number of commercial channels available to conventional, LPTV, or STV broadcasters, and increases the number available to DBS and cable operators. Since this position does not change the status quo for broadcasters, there may be no advantages or disadvantages in relieving DBS and cable operators from offering noncommercial channels. But some potential broadcasters might suffer by not being able to use conventional, STV, or LPTV channels for advertiser-supported and pay programming.

Thus the FCC has not been terribly consistent in its ownership policies for the new video technologies. As would be expected, the reasons lie partially with statutory problems and partially with history. If the Commission were to make at least some major changes—e.g., as to alien ownership—it would need to seek amendments to the Act.

C. Jurisdictional Bases

Under the Act, the FCC has at least five different types of regulatory jurisdiction. First, under Title II of the Act, the Commission has jurisdiction over any "common carrier"—a term which is defined rather circularly as "a common carrier for hire in interstate or foreign communication" (U.S. Code: 47§153(h)). The basic notion of common carriage is comparatively simple, focusing on whether a firm either holds itself out by its business practices or is required by law to provide transmission services to any properly qualified customer. The most common types of communications common carriers, of course, are local and long-distance telephone companies.

Second, the Commission also has jurisdiction under Title III of the Act over use of "any apparatus for the transmission of energy or communications or signals by radio" (U.S. Code: 47§301). This jurisdiction in turn breaks down into three distinct subcategories. The most visible is regulation of broadcast stations, of course, and Title III contains special provisions applicable only to broadcasters—such as the fairness doctrine and sponsorship identification requirements. In addition, a license is necessary under Title III for any Title II common carrier spectrum use. Moreover, Title III gives the Commission jurisdiction over spectrum uses which are neither broadcasting nor common carriage. These usually fall under the general rubric of "private radio."

Finally, the FCC has a very vague type of implied or residual power over activities which are not squarely within either Title II or Title III. The most significant example of this type of jurisdiction is the Commission's "reasonably ancillary" jurisdiction over cable television. Although the extent of this jurisdiction is open to continuing question, it appears to be totally separate from—albeit implied by—the Commission's other jurisdiction (*United States v. Southwestern Cable* 1968). Its relationship to the FCC's limited jurisdiction under the new Cable Act is less than clear.

The D.C. Circuit recently seemed to limit the FCC's discretion in choosing jurisdictional bases for the new media, by holding that the Commission could not refuse to regulate either DBS operators or their customers as broadcasters—and thus subject them to the full panoply of fairness, equal opportunities and other traditional broadcast regulations (*National Ass'n of Broadcasters v. FCC* 1984.) The court reasoned that since "DBS systems transmit signals to homes with the intent that these signals be received by the public, such transmissions rather clearly fit the definition of broadcasting." At the same time, the court rejected analogies to regulation of MDS as a common carrier, suggesting that the

Commission's initial classification of MDS may have been incorrect. The case thus casts considerable doubt on the FCC's treatment not only of DBS, but also MMDS and the other new video media.

The FCC's choice of a jurisdictional basis has a significant impact upon the legal status of a medium. If a medium is classified as broadcasting, it becomes subject to a wide variety of statutory requirements, ranging from the fairness doctrine to "equal time" to sponsorship identification (U.S. Code: 47§§315, 317). On the other hand, classification as a common carrier requires an operator to file tariffs, and at least potentially to operate subject to rate-of-return regulation (U.S. Code: 47§214). As a result, regulation as a private radio service is attractive, since it effectively insulates a medium from both common carriage and broadcasting requirements.

The distinctions between common carriers, broadcasters, and private radio services traditionally were bright-line in nature. After all, both broadcasting (in the form of AM radio) and common carriage (in the form of telephone and telegraph) had existed for between one and five decades when the Act was drafted. When the Commission embarked upon regulation of cable television in the mid-1960s, it faced a somewhat more complicated problem. Cable obviously did not fit into either Title II or Title III, since it neither held itself out to the public nor used the electromagnetic spectrum. The Commission fudged the question by treating cable as a "hybrid."

Subject to the fall-out from recent litigation, the Commission has taken a hands-off position with the other new video media, by treating most of them simply as private radio services. To a very real extent, the Commission may have reacted to the problems which it had created for itself by hastily selecting regulatory classifications for MDS and STV, before their development was very clear. Although the courts basically have used a "form follows function" approach in classifying the electronic media (*NARUC v. FCC* 1976a) the Commission presumably can take a wait-and-see position. At the very least, the FCC probably has the discretion to defer the imposition of a regulatory mold until a medium develops (*NARUC v. FCC* 1976b).

Precisely because of its past decisions, however, the Commission faces somewhat of a hodge-podge of regulatory modes for the new video media. Cable television retains its hybrid status, although the Supreme Court has held that FCC common carrier regulations were improper. On the other hand, single-channel MDS is a loosely regulated common carrier; although it must file tariffs, it is not subject to rate-of-return regulation (FCC 1983v:47§21.900). The rationale behind the classification of MDS as a common carrier is a bit murky, but seems to have been based solely upon the fact that MDS frequencies previously had been designated for common carrier purposes (FCC 1974). In contradistinction to MDS, both STV and LPTV are broadcasters; but LPTV is subject to few conventional broadcasting rules, need not provide community service, and realistically may be exempt from the fairness and equal opportunities doctrines (FCC 1982d:518–20). Since all STV stations and many LPTV stations provide pay programming virtually identical to—and often from the same sources as—that offered by MDS, the basis for the distinction seems to be that STV and LPTV use frequencies previously allocated to conventional television broadcast stations.

In the context of totally new services such as DBS and MMDS, however, the Commission was not constrained to follow its own prior decisions, and has refrained from imposing any regulatory classifications. Depending upon the nature of their activities, DBS operators may therefore end up being regulated as broadcasters, common carriers, or private radio services (FCC 1982e:1366–67). Similarly, MMDS operators would be classified as private radio services, although they might be regulated as either broadcasters or carriers if they operated as such—for example, by providing data transmission capability (FCC 1983f:140). Although private radio status may be quite appropriate for MMDS in its formative years, it might subject MMDS operators to both private radio and common carrier regulation. Single-channel MDS retains its traditional common carrier status, and most MMDS operators are likely to combine existing single-channel MDS, newly authorized MMDS channels, and leased educational channels.

Finally, recent amendments to the Communications Act may require common carrier status for at least some of the new video technologies' activities. Section 331(c)(1) of the Act classifies any "service provided by specialized mobile radio, multiple licensed radio dispatch systems, and all other radio dispatch systems" as land mobile radio (U.S. Code: 47§331(c)(1)). A new definition of "mobile service" includes any "radio communications services carried on between mobile stations or receivers and land stations . . . and . . . both one-way and two-way radio services" (U.S. Code:47§153(n)). As the Commission recognizes (FCC

1983f:141–42), the statutory language would include a paging or other service offered on a subcarrier by a television, DBS, MMDS, LPTV, or STV station. (The new provision presumably is irrelevant to cable television, which cannot offer these services over a closed circuit system.)

The Commission's wait-and-see approach to classification of the new video media seems to make sense, but is hardly consistent. Some of the disparities may not be terribly significant in terms of their real world impacts. For example, the Commission is quite unlikely ever to apply the fairness doctrine rigorously to LPTV stations (FCC 1982d:519). Other factors may have far greater impacts, however, in terms of investment decisions. For example, even the potential threat of rate-of-return regulation might deter entry into a common carrier service.

The basic problems are historical and statutory in nature. If the Commission is to leave STV and LPTV as broadcasters and yet give them regulatory parity with DBS and MMDS, it presumably should seek repeal of several provisions in the Act—including the fairness and equal opportunities doctrines. Indeed, the Commission already has proposed eliminating the fairness doctrine, but has met with a rather chilly reception in the Congress (Stern and Krasnow 1984). Neither the fairness doctrine nor the equal opportunities doctrine seems vulnerable at present, because of their substantial backing from both public interest groups and elected officials—the latter of whom naturally have a strong incentive to preserve their right to free or inexpensive air time. Moreover, repeal of Section 331(c) of the Act presumably would be necessary in order to keep the new video media free from common carrier regulation, but would meet stiff opposition from existing land mobile radio operators. As a result, the Commission probably will be unable to reclassify existing media or secure major statutory changes in the near future. As its limited application of the fairness doctrine to LPTV indicates, however, the Commission probably will not apply these statutory provisions very stringently. Whether this type of administrative lawmaking is within the Commission's discretion, of course, remains to be seen.

D. Degree of Federal Preemption

Related to the issue of regulatory status is the question as to which level of government—i.e. federal, state, or local—should administer any regulatory scheme. The level of governmental regulation has a very substantial impact upon a firm in terms of inconsistent regulatory schemes and intensity of regulation. After all, six thousand cities and fifty states are considerably more likely to experiment with regulatory policies—and are much more difficult to control—than a single federal agency (Noam 1980). In a deregulatory federal environment, the absence of state or local regulation effectively translates into no regulation at all—a fact which hardly has escaped the attention of the cable industry.

With the exception of cable television, the new video media are subject to virtually exclusive federal regulation. Since STV, MMDS, LPTV, and DBS use over-the-air transmissions and are interstate in nature, the Commission has ample statutory authority to preempt any state or local regulation. To be sure, the Commission presumably could allow local or state authorities to exercise specified forms of jurisdiction (Wilkie 1980). But it has failed to consider this approach so far—hardly surprising in light of these industries' inherent preferences for federal regulation.

The major exception to this trend was cable television. Local governments traditionally have used both their police power and their ownership of the streets to require cable operators to secure a franchise or other local authorization before constructing systems (New York 1977:§362). Roughly a dozen states have invoked their general police powers to regulate cable, sometimes by cooperating with cities and sometimes by preempting them (Cable Television Bureau 1982). The cable industry did not actively oppose state or local regulation until recently, apparently because it feared intensive federal regulation more than comparatively untutored efforts by local governments. But massive federal deregulation has provided an incentive for the industry to seek federal preemption—and thus effectively no regulation at all.

The Commission has traditionally restricted state and local governments' powers in two significant ways. First, an FCC rule prohibited local governments from charging franchise fees in excess of five percent of a cable operator's gross revenues (FCC 1983v:47§76.31). Although recent litigation has questioned the validity of the rule on both statutory and Tenth Amendment grounds (*GE Cablevision v. Peoria* 1982), it has not produced a definitive decision.

Perhaps more important, in 1983 the Commission preempted local regulation of customer rates except for "basic" service. The FCC's rationale was somewhat unclear, however, since its opinion merely reviewed its past preemption policies and then stated—in one paragraph—that it was preempting local rate regulation (FCC 1983h:1360). The Commission effectively has abolished virtually all rate regulation, since the ability to regulate rates for only basic service is largely meaningless. Under the Commission's decision, a cable operator can define basic service as just local signals, and offer all of its other—and more valuable—programming on a tiered, pay channel, or pay-per-view basis. Moreover, the Commission was threatening to preempt all local regulation of cable television, if the Congress had not passed the legislation discussed below. Whether the FCC had the statutory authority to undertake such broad-brush preemption is less than clear, but the mere threat may have been an effective way of promoting the legislation.

The 1984 Cable Act, which adds a new Title VI to the Communications Act, represents the culmination of a two-year battle by the cable industry for relief from local regulation. In the spring of 1983, the Senate passed S.66, which reflected a highly touted compromise between the National Cable Television Association and the National League of Cities. S.66 ran into serious opposition in the House Subcommittee on Telecommunications, which narrowed the bill's prohibitions and added a leased access channel requirement. The Act limits franchise fees to 5 percent of a system's gross revenues, phases in a prohibition against rate regulation except in areas with virtually no over-the-air television reception, over two years, and largely guarantees renewal of franchises.

The inevitable trend in cable regulation is toward exclusive federal regulation, however, either by statute or by FCC action. Regardless of whether federal, state, or local regulation intrinsically is most effective, cable operators have become national in scale and need uniformity as much as any other national medium. Although preemption of state and local regulation would give cable parity with the other new video media, it would leave one important difference: namely, all media except cable would be federally licensed. Even in a deregulatory environment, licensing serves an important function by allowing an agency to monitor an industry's performance and to police any abuses. It thus might be in order for the Commission to impose some type of licensing or certificating process for cable, in order to insure its parity with the other new video media. Questions may exist as to the Commission's power to license cable systems, however, since Title III's licensing requirements extend only to over-the-air transmissions—not those via cable (*U.S. vs. Midwest Video* 1972). The Commission thus would need to seek legislation in this area, in order to impose a licensing requirement on all of the new video media.

E. Program Content Control

Even aside from First Amendment considerations, regulation of any medium's programming has a number of practical consequences. On a purely noneconomic level, the existence of content control affects managers' self-perceptions and behavior. Thus it is not surprising that newspaper editors place more emphasis upon the message than the medium, while telephone operating company executives reverse these priorities. On an economic level, restraints on speech affect decisions as to whether or not to take a particular risk. The Playboy Channel presumably never would have come into existence if the FCC had prohibited frontal nudity on cable.

The Commission traditionally has regulated programming only on broadcast services, on the theory that by definition a common carrier cannot control—and thus be responsible for—the content of the messages which it transmits. In turn, regulation of broadcast program content has taken two primary forms: first, prohibitions on certain types of offensive material (such as obscenity, indecency, payola, plugola, and lotteries), and, second, affirmative requirements to provide time under the fairness and equal opportunities doctrines.
Commission has indicated that it does not plan rigorous enforcement of even statutory provisions such as the fairness doctrine (FCC 1980b:65; FCC 1982d:519). Finally, in addition to Title III's provisions, federal law provides criminal penalties for the transmission of specified types of material—most notably, obscenity, indecency, plugola, payola, and lotteries (U.S. Code: 18§1464). These provisions would apply to all of the new video media except for cable, since it does not use over-the-air transmissions. (The statute applies to any "means of radio communication," rather than just to broadcasting.) However, the only means for direct enforcement of the Criminal Code is by prosecutions, at the discretion of regional United States attorneys. Although the Commis-

sion has the authority to enforce the Criminal Code's policies through appropriate rules, it is not required to do so (*Illinois v. FCC* 1975).

The extent of program content control for each of the new media therefore depends largely upon whether it is a user of over-the-air transmissions or is a broadcaster. Although cable television is neither, the Commission long ago imposed the traditional array of negative and positive broadcast regulations to "origination" material (FCC 1983v:47§§76.205–76.221). While the meaning of this term is less than clear, it apparently refers only to programming produced directly by a cable operator, as opposed to programming received from satellite networks and the like. In any event, the question is probably moot; the Commission never has enforced the rules against a cable operator since their adoption more than a decade ago.

On the other hand, STV and LPTV presumably are subject to all of the Commission's broadcast regulations, since both are broadcast uses. As noted before, however, the Commission already has indicated that it will not enforce the fairness doctrine—and presumably other regulations also—against LPTV stations as rigorously as it enforces them against conventional broadcast stations (FCC 1980b:65; FCC 1982d: 519). DBS and MMDS apparently would be subject to no regulation beyond the Criminal Code's provisions, however, because of their status as private radio services. If a DBS operator were treated as a broadcaster, it would become subject to the full panoply of Title III regulations—including the fairness and equal opportunity doctrines.

Finally, the FCC apparently would subject none of the new video media to access requirements. A DBS operator would be subject to Title II's common carriage requirements if it chose to operate as a common carrier, of course, but Title II contemplates commercial as opposed to free public access. Along similar lines, single-channel MDS operators are theoretically common carriers and must sell time on a nondiscriminatory basis; realistically, however, most MDS operators take the bulk of their programming from established pay television networks. Finally, the FCC clearly lacks jurisdiction to impose access channel requirements on cable television systems (*FCC v. Midwest Video* 1979), but state and local governments are allowed to do so under the new Cable Act.

Except on the access front, the Commission's content regulation are less than a model of consistency. The problems appear to arise from much the same factors already considered in the context of regulatory status: that is, historical and statutory inhibitions. Rationalizing questions of regulatory status thus would solve a number of problems simultaneously.

III. CONCLUSION

Although the Commission is committed to creating a level playing field for the new video technologies, it has left a number of potholes. Indeed, on virtually all of the fronts examined above, significant disparities and inconsistencies exist among the new video media. Equally important, the FCC simply has failed or refused to consider a host of questions—e.g., MMDS's fairness and community programming obligations—without giving any reasoned basis for its positions.

At the present, it is difficult if not impossible to estimate these problems' impact on the new video media. Measuring the cost of a particular type of regulation is speculative at best and downright foolhardy at worst, when two of the industries in question—DBS and MMDS—do not even exist. Nevertheless, these inconsistencies may change the ways in which the new video media evolve.

The problem is not that the FCC deliberately has created this lack of consistency. In almost every instance the Commission has been hampered by historical accidents, legislative lacunae, and inherent regulatory lag. Nevertheless, it seems fair to criticize the Commission for not considering these problems in advance. The FCC's apparent lack of concern naturally complicates any resolution of these issues—particularly resolutions which inevitably must rely upon new legislation. As Judge Bazelon pointedly has noted, "a thorough rethinking of the legal treatment accorded telecommunications is in order. . . . It will not be easy to challenge the investment in the present system, but reform must be far-reaching and far-sighted if the law is ever to catch up with the reality of our times" (Bazelon 1981).

To date, the FCC has embraced the concept but not the details of the level playing field. Perhaps the Commission needs to spend less time on ideology and more time on methodology. But without internal rethinking and external debate, the Commission may find that it has created a host of inequities which ultimately will only stifle potential competition.