The Role of Future Regulation: Licensing, Spectrum Allocation, Content, Access, Common Carrier, and Rates

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I. INTRODUCTION

The regulatory scheme for broadcasting goes back over half a century, but since the early seventies, we have seen the emergence of a whole series of new video delivery systems. Some face the traditional regulatory pattern of television broadcasting; some come under a different or hybrid regulatory scheme; and some essentially escape all regulation. Yet all are engaged in essentially the same process—the delivery of entertainment/information to the home for commercial gain (e.g., advertiser-based; pay-TV; "pray-TV") (Channels 1983). As Stern et al. (1983) shows, the consequence of this turmoil in the video landscape has been regulatory confusion, cries of "foul" because of the absence of a "level playing field," and attempts to fashion a new regulatory pattern for video.

The discussion below treats several important aspects of the problem—governmental entry barriers such as licensing, spectrum allocation, and authorization; the basic regulatory mode such as public trustee; public or leased access; multiple ownership or similar restrictions; and the emerging trends. In view of the broad scope, the discussion is necessarily oversimplified.

II. GOVERNMENTAL ENTRY BARRIERS

A. Licensing

The largest barrier of entry to the new media is the need to obtain governmental authorization. There is no such barrier for cassette distribution. (Where the scheme weds the broadcast station to specially adapted VCRs, as had been the case for ABC's Telefirst project [*Broadcasting*, December 5, 1983, p. 40] FCC authorization is required.) A videotext entrepreneur also needs no license; however, transmission facilities into the home or business are required, for which the provider of these facilities—the telephone company or cable TV system—has obtained government authorization. Note, however, that there is no licensing barrier to the videotext operator: the telephone system exists, is ubiquitous (94 percent penetration), and is available on a common carrier (nondiscriminatory) basis.

Some other video operators face similar situations but perhaps more difficult practical problems. Thus, Satellite Master Antenna Television (SMATV) operators can obtain service from any common carrier satellite carrier to distribute its TV programming to the rooftops of the apartment building. With the FCC's "open skies" policies, there is no shortage of satellite capacity. But a substantial legal problem has arisen: cities more and more are seeking to license SMATV because they see it as a threat to the development of cable TV. Cable TV represents a "golden goose" to the cities in light of the promises made to obtain the franchise, as discussed below. But if SMATV "cream skims" the market by making quick deals with large apartment owners, cable's ability to deliver on its promises may be undermined. Hence the cities have made an effort to bring SMATV within their franchising ambit.

SMATV operators have sought to block this "protectionist" move by the cities and in late 1983 they succeeded in convincing the FCC to preempt local regulation of SMATV (FCC 1983i). So far, the courts have gone along with the FCC.

There are other video entities that escape licensing because they use common carrier facilities. Thus, a Multipoint Distribution Service (MDS) licensee—a common carrier—can provide an outlet for a pay service operator; and there are now multichannel video service proposals (MMDS) that use both MDS and Instructional Television Fixed-Frequency Service (ITFS) channels. Similarly, a Direct Broadcast Satellite (DBS) programmer can provide service directly to the public through facilities and frequencies licensed to a common carrier; the customers of common carriers are not licensed or regulated (FCC 1982a).

The Commission allowed DBS to proceed under a "pick 'em" concept: that is, the applicant can pick its niche by applying as a common carrier, broadcaster, private radio operator, or a combination of these. But if broadcaster status is chosen, in whole or in part, the applicant will be licensed and regulated to that extent as a broadcaster under Title III of the Communications Act. And of course broadcast licensing is required in the case of the commercial TV or STV (Subscription Television) applicant or the low power TV (LPTV) operator.

Finally, licensing is required in the case of cable TV, even though there is no use of the spectrum. Cable requires a franchise from a local (or state) governmental body in order to string its wires over the streets or in the ducts beneath the streets. Arguments have been advanced in several California suits that such franchising should be open-ended and largely ministerial in light of First Amendment and antitrust considerations, but these suits are unlikely to be successful. (*Century Federal, Inc. v. Palo Alto* 1983; *Pacific West Cable Co. v. Sacramento* 1983; *Preferred Communicators v. Los Angeles* 1983).

In sum, the states or localities will continue to license but in one area only—franchising for cable and telephone. They will most likely be precluded from playing "protectionist" games to hinder rivals like SMATV. All other video transmission will continue to require an FCC license under Title III of the Communications Act of 1934 (U.S. Congress (1976): 47§301 et seq.). If the programmer desires to own its own transmission facilities (e.g., a commercial TV or LPTV station or DBS), it will obtain a broadcast license or proceed on a private radio basis, e.g., private operational-fixed microwave service (OFS) (FCC 1981c; 1983l). The other important route is for the video programmer to obtain facilities from a licensed common carrier, e.g., in DBS or MDS, or to enter into a contract with the broadcaster (usually UHF), e.g., STV. Finally hybrid operations will increase; for example, a DBS licensee can be both broadcaster and common carrier, as can the regular TV operator, by using subcarriers for data transmission. While, as we will see, there are greatly different regulatory consequences, the programmer's choice is most often dictated by practical considerations (e.g., less need for start-up capital; reduced risk; earlier entry to obtain entrenchment against rivals). The FCC's laissez-faire, "pick 'em" policy of licensing will undoubtedly continue.

B. Spectrum Allocation, Assignment, and Authorization

1. Spectrum Allocation

The FCC needs to make spectrum available for licensing in all these fields. The FCC's recent record in this respect has been generally commendable and, in light of its trend and congressional prescription, will in all likelihood continue to reflect a "letting in" process. Thus, the

Commission acted promptly to implement the 1979 World Administrative Radio Conference allocation in 12 GHz for DBS. Further, it rejected arguments that Fixed Satellites (FS) could not be used for video programs seeking common carrier facilities for an early DBS start (FCC 1982b, 1983e). In its *DBS* decision (FCC 1982a), it permitted parties to go forward with high definition TV (HDTV) DBS operation, if they so chose. It reallocated frequency so that ITFS channels could also be used for the MDS service, thus facilitating multichannel MDS operation—a necessity if MDS is to compete effectively with cable (FCC 1983:119–20). It authorized LPTV operation on any unused TV channel and specified vertical blanking intervals for teletext service (FCC 1983c, 1982d).

There is controversy as to some facets of FCC spectrum policies. For VHF drop-ins (FCC 1980c), the agency will follow the same pattern as it did in the 9 KHz AM rulemaking (FCC 1981f)—namely, to reject the notion of widespread additional VHF "drop-in" assignments on engineering and service disruption grounds, but the VHF drop-in issue is a difficult one, with strong arguments on both sides.

The agency's overall thrust to allow each service its chance in the marketplace is clear and commendable, and it has received congressional ratification. In the FCC's 1985 authorization legislation (U.S. Congress 1983a), Congress included a provision stating:

> Sec. 7. (a) It shall be the policy of the United States to encourage the provision of new technologies and services to the public. Any person or party (other than the Commission) who opposes a new technology or service proposed to be permitted under this Act shall have the burden to demonstrate that such proposal is inconsistent with the public interest.
>
> (b) The Commission shall determine whether any new technology or service proposed in a petition or application is in the public interest within one year after such petition or application is filed or twelve months after the date of the enactment of this section, if later. If the Commission initiates its own proceeding for a new technology or service, such proceeding shall be completed within 12 months after it is initiated or twelve months after the date of the enactment of this section, if later.

2. *Spectrum Assignment*

In addition to the allocation of spectrum, the assignment rules can be of major importance, as was illustrated by the VHF "drop-in" example. It appears most unlikely that the Commission will make any changes in the near future in the height and power rules for over-the-air TV, LPTV, or MDS. Thus, LPTV will continue to be "beltway" in nature and, equally important, will not be required to be carried by local cable TV systems—carriage that would make the weak LPTV station the equivalent of the most powerful VHF station in cable homes. MDS will continue to be limited in power (100 watts). And of course the over-the-air TV service will continue under the various zone limitations as to antenna height and power, with increasing sharing between UHF and land mobile.

An interesting development in the field is the FCC's increasing tendency to allow a spectrum allocated for one purpose to be used for other purposes—for example, DBS for broadcasting, common carrier, or private radio; FS (fixed satellites) for broadcasting purposes as well as common carrier; television auxiliary stations to transmit over their excess capacity broadcast or nonbroadcast materials to other entities; or subsidiary communications authorization (SCA) for any purpose (FCC 1983a, 1983d, 1983n). The Commission is thus allowing licensees to determine the best or most efficient use of their channels.

There is one other assignment development that merits attention—the determination of the Fowler Commission to use the marketplace to establish the technical standards for new communications services. Thus, the Commission declined to adopt technical standards for DBS systems or teletext on the grounds that an open market approach will allow firms to tailor services to specific demands or situations and to respond to changes (FCC 1982a:716–17; 1983c:1327–28).

Again this is a close issue with substantial arguments on both sides. The market did sort out 33 1/3 versus 45 RPM in record players and seems to be working in determining the VCR standard among Beta and VHS. On the other hand, the Commission's handling of AM stereo (FCC 1982c) including its decision to let all five competing systems simply fight it out in the marketplace, has been, so far, a disaster: no service has been able to establish itself, and it is not clear that a reasonably priced, all-service receiver will be feasible. AM Stereo should have been available to AM stations years ago; it has long been fully developed and is much needed to combat FM's superior sound. Virtually *any* system adopted by the FCC would have served the industry and public better than what has in fact occurred. Now, there is a clear and well-warranted fear that teletext also will be held back and perhaps fail because the FCC abdicated responsibility for adopting technical standards. If that should be the case, future Commissions are likely to eschew the open market approach.

3.Spectrum Authorization

There is the final aspect of the spectrum process—authorization. In the commercial and STV full power service, the FCC continues its regular processing procedures, including the stultifying comparative hearing. As has been unanimously found by critics (e.g., Jones, 1962; Friendly, 1962; Leventhal 1969; Anthony, 1971), this comparative process is time-consuming, wasteful, and almost wholly without merit.

Because it has been inundated by thousands of applications in new fields like LPTV and multichannel MDS, the Commission has sought and obtained from Congress the right to use lotteries (U.S. Congress 1976:47§309i(3)(A)). And it is employing them now in LPTV and proposing to do so in specified markets in the common carrier cellular field (FCC 1983t). It seems clear that the Commission will turn more and more to the lottery as the way out of the authorization logjam it faces in the new services.

In my view, this is poor policy on several grounds. First, if it is desirable to take into account public interest factors like diversification or promotion of minority ownership—and the statute so requires by weighting the applicants in the mass media lottery accordingly (U.S. Congress 1976:47§309i(3)(A);1982:40–47)—a lottery is a poor way to accomplish this. A lottery attracts even the most disadvantaged applicants since, despite the adverse weighting, they may still win. More important, it does not take into account the public interest. Just to give one example, a nonprofit station seeking a low power permit to assist in educating a substantial minority population (e.g., Hispanics in Miami) would have the same chance as an absentee multiple owner. It would be better policy to let a board of experienced civil service employees examine the applications under standards set by Congress and the Commission, and then simply choose the best applicant, without a hearing or review by the Commission itself or the courts. Congress, however, seems unlikely to follow this United Kingdom-type process, so the use of the lottery will persist and increase.

Yet there is a fundamental objection to this process—the availability of a better alternative, the auction. In common carrier fields like MDS or cellular radio, the use of comparative criteria makes even less sense than in the broadcast area, so there is a natural desire to turn to other means like the lottery. An auction has marked advantages: the license goes to the user who will pay the most and for whom the license is most valuable. *It is thus the most direct way to encourage the most efficient and highly valued use of the license, and this in turn greatly benefits the consumer.* As Webbink (1980) demonstrates, an auction is the marketplace approach which produces the most efficient MDS or cellular service. The auction process does not mean that the wealthy will garner all the spectrum, any more than the existence of a marketplace means that the wealthy will purchase all the land or similar scarce "goods": the bidder willing to pay the most must justify the high bid in terms of value to its enterprise. Moreover, no matter how the license is given out (i.e., comparative hearing; lot) the wealthy can always purchase the license subsequently if they value it highly enough.

Meanwhile an auction would provide the agency with feedback on the value of the spectrum involved. For the first time, the FCC would begin to obtain "hard" data on the value of spectrum to users, and as Robinson (1979:389–90) states, they could make good use of this information in allocation proceedings. And, the auction accomplishes this goal while avoiding the lengthy comparative hearing process, with its delays of service to the public and high costs to applicants. Finally, the auction insures that at least a part of the value of the spectrum will be collected by the public, rather than the lottery winner upon the transfer or assignment of the license at a later time.

While noting the advantages of the auction (Robinson 1979:389–90) the Commission has declined to use it because it believes that it is lacking in legal authority (FCC 1980d). Although the matter is not free from doubt, I believe that the FCC can legally proceed with auction, and it should do so in light of the small chance that Congress will expressly authorize the use of auction (FCC 1983s:par. 30).

Thus, as matters stand, the authorization process, while improved with the use of lotteries, remains quite flawed and is unlikely to improve in the near future without the adoption of the auction alternative in the circumstances where it is appropriate. The ultimate solution as proposed by Mueller (U.S. Congress 1982:53)—an open market in spectrum—is an even more remote possibility.

4. Cable Authorization

As noted, a cable television operator must obtain a franchise. The franchise is awarded upon the basis of public service promises—channel capacity, most services offered at lowest rates, a large number of public, governmental, and educational access channels with supporting studios, facilities, funding, etc. The process parallels that of the FCC in dealing with many applicants for prized VHF channels after its 1952 freeze: the applicant made extravagant promises (e.g., on average, 36 percent of programming would be local and live), and then reneged (i.e., 11 percent on the average) (FCC 1971). The motto in the cable field is: "Promise anything to get the franchise, renege later" (*New York Times,* March 4, 1984, F1) and both the cities and the cable companies are at fault.

The cable companies sought relief from Congress, and in the 1984 Cable Act (Congress 1984) they obtained guidelines dealing with revision of services in light of changed circumstances. There is, however, no reason for the federal government to intervene in this essentially local controversy. Solutions would simply be worked out over time in deals and compromises between city and cable.

The present franchising situation not only is stultifying in that it results in awards based on phony public service promises, but also it often greatly delays the institution of service. Thus, in cities like Baltimore, Washington, and Philadelphia, the franchising process has been near interminable. These new cable operators may face entrenched DBS or multichannel MDS, and will be in a very different position from a cable owner invading virgin territory. The window of opportunity may be narrowed or indeed closed if too much time elapses.

A ready solution to this problem of cable franchising is an auction system (Nadel 1983). Regulatory policy should follow a scheme that works for fulfillment of goals—not against them. If the goal of public service is accepted, the cities' scheme—public service bidding—is clearly a poor one for obtaining that goal; as both FCC and cable experience shows, it simply results in broken promises. If, on the other hand, an auction process were adopted, the franchise would be speedily awarded, and the sums obtained could then be used for public service (e.g., funding public, educational, and governmental use of cable).

It is too late now for this sensible resolution of cable entry problems;

auction is out of place in refranchising. Instead we shall see a "muddling through" of both the franchising and refranchising processes.

III. THE REGULATORY SCHEME: CONTENT AND ACCESS

Given the entry process discussed above, the next issue is the applicable regulatory scheme. There are three main regulatory models that may be applied to the video services.

A. The Three Main Regulatory Models—Broadcast, Print, Common Carrier

Three main regulatory models are considered in this analysis. The first, broadcasting, involves close governmental supervision. The TV broadcaster is a short-term (five-year) licensee which must demonstrate to the government (FCC) that it has served the public interest to insure a five-year renewal of its license (U.S. Code: 47§307(d)). Under the Act, the broadcaster is a public trustee, with the obligation to render reasonable local and informational service to its service areas (U.S. Code: 47§§307(b), 315(a); *Red Lion Broadcasting Co. v. FCC* 1969). Not only must it provide adequate coverage of public affairs, but it must do so fairly (U.S. Code: 47§315(a)). Other statutory provisions prohibit indecent or obscene programming, lottery information, rigged contests, and the failure to disclose consideration for material broadcast (U.S. Code: 18§§1304, 1464; 47§§317, 509). Further, the broadcaster must afford equal opportunities to all qualified candidates and reasonable access to those seeking federal office (U.S. Code: 47§§312(a)(7), 315(a)). In addition to these statutory requirements, the FCC has adopted rules and policies setting forth how the TV broadcaster is to ascertain the needs, problems, and interests of its area and minimal processing guidelines in the local and informational programming categories (FCC 1976, 1982i: 47§§73,4010).

In contrast, the print model cannot constitutionally be subjected to licensing, a fairness doctrine, and access requirements. The only governmental interference permitted for content is quite limited: libel or obscenity, and even in these areas, the dice are loaded in favor of the publishers (*New York Times v. Sullivan* 1964). The print model is often allied with the third model—common carrier (e.g., distribution of magazines by the Postal Service).

A common carrier serves the public indifferently, that is, on a first-come first-served basis, without discrimination, and without editorial control over the intelligence transmitted (*NARUC v. FCC*, 1976a:640–42). Title II of the Communications Act (U.S. Code: 47§201 et seq.) requires interstate communications common carriers to file tariffs and bestows on the FCC the power to determine whether they are just and reasonable. But it does not follow that every common carrier *must* be subject to rate regulation or other practices: this is simply a statutory choice. And the FCC is moving away from rate regulation as much as possible, asserting that it has the power to forbear from imposing the full panoply of Title II regulations where the carrier has no market dominance (i.e., virtually all carriers other than AT&T and its partners) (FCC 1982f:189).

B. Application to the Nonlicensee or Nonbroadcast Licensee

A video programmer that does not obtain a broadcast license escapes all of the public trustee obligations discussed above (e.g., the need for local/informational programming; fairness; equal time). Thus, the entrepreneur that utilizes common carrier facilities (MDS, FS, DBS), private radio (OFS), or, of course, cassettes, comes under the print model and is liable only for obscenity or libel. The same is true of the videotext operator employing the facilities of the telephone company and, in all likelihood, a cable system. Under the FCC policy, now under attack in court, customers do not face content regulation.[1]

This has raised the obvious argument: why should the STV operator come under public trustee regulation when it provides a pay service? Why does Satellite Television Corporation (STC) come under broadcast regulation when it provides its pay DBS service, because it also owns its broadcast satellite, when a rival, presenting exactly the same service over common carrier satellites, entirely escapes such regulation? The answer is that the statute imposes certain requirements on broadcasters, and the FCC cannot waive them; accordingly, it imposes on these new "broadcasters," like DBS or LPTV, only statutory requirements (i.e., equal time; fairness; reasonable access). Realistically, it makes little sense to impose these behavioral (content) requirements on an HBO-type operation, and there is a strong theoretical basis for not doing so—namely, the assurance of diversity through the availability of common carrier access. But clearly this area needs reexamination,[2] and the FCC has proposed an overall study (FCC 1983p:par. 32).

Significantly, the Commission has decided upon a deregulatory course for STV, concluding that the service is really hybrid, having qualities of both broadcasting and point-to-point, and exempting it from broadcast requirements on this basis (e.g., ascertainment; reasonable access) (FCC 1982j, 1978a: 1093). The FCC was influenced by the consideration that STV competes directly with other pay services which are not within the broadcast regulatory ambit. The same consideration clearly should apply to an STV operator on LPTV or using "graveyard hour" transmissions to specially adapted VCRs.

It would seem that this trend will continue—that there will be increased focus on *function:* do these video operations carry out the same function—for example, distribution of pay programming—and therefore merit the same kind of regulation? Since important and growing media (e.g., cassettes, MMDS) escape behavioral regulation like equal time and fairness, there will be an increasing tendency to relieve others carrying out the same function (e.g., pay TV) with "broadcast" licensed facilities (e.g., DBS, STV, LPTV). There may be temporary obstacles in light of statutory prescriptions or court rulings, but the result—avoidance of behavioral regulation—seems clear in the long run.

C. Application to the Broadcast Licensee

1. Constitutionality of the Public Trustee Scheme

It has been argued by the present FCC and others (e.g., Stern et al. 1983) that the broadcast model of public trustee/fairness regulation is no longer constitutional since its basis, scarcity, has now eroded in light of the growth in the number of broadcast stations and the new video alternatives. There is no sound basis for this argument, and therefore little if any likelihood that the public trustee concept will fall under judicial assault.

First, the scarcity basis was never a *relative* one—to be compared to other media or even growing numbers in the broadcast medium. Rather, it is based simply on the fact that radio is inherently not open to all; that more people wish to broadcast than there are available frequencies; and that the government must therefore choose and, in choosing, may adopt a public trustee approach (*Red Lion v. FCC* 1969; *NBC v. U.S.* 1943). Everything in the foregoing proposition is equally valid today.

Thus, there are no open TV channels in the top 25 markets, where roughly 50 percent of the U.S. population reside, and only a few vacant

UHF channels in the top 100 markets. If a VHF channel opened in any of the large markets, the FCC would be swamped with applications. Nor is it any answer to say that the TV assignment system could have been better engineered to avoid the present scarcity. Whatever the merits of this proposition (and I believe it to have considerable substance), we are stuck with the existing system, and its constitutionality will accordingly be judged on that pragmatic basis—not some hypothetical one.

Further corroboration of scarcity is provided by the source in which the FCC and its allies seem to place the most trust: the marketplace. *Broadcasting Magazine*'s wrap-up of 1983 station sales (January 9, 1984, pp. 74–82), refers to the "$342-million record-setting purchase of KHOU-TV Houston, $245-million purchase of KTLA-TV Los Angeles: [excluding these two sales] the average price of the 37 VHF sales in 1983 was $24,024,714, bettering by 37 percent the previous high set in 1980 . . . " The physical assets of KHOU-TV probably do not even come to $42 million: the $300 million represent the "scarcity rents" for the license.

In any event, the issue is a legal one. The law has not changed significantly since the 1969 *Red Lion* case. Of course, *Miami Herald Publishing Co. v. Tornillo* (1974) and *Red Lion* are inconsistent. In *Red Lion,* the Court found no chilling effects from a broadcast personal attack rule; it found that the Commission could take remedial action if such effects were to develop, and that the rule promoted First Amendment values (*Red Lion v. FCC* 1969: 256–58). In *Tornillo,* the court found that a personal attack law applicable to print had chilling effects (with no more evidence than in *Red Lion*), and that in any event, the law contravened the First Amendment because it interfered with editorial autonomy (*Miami Herald v. Tornillo* 1974: 256–58).

But the FCC and others are being naive, indeed, if they think that this conflict calls into question the constitutionality of the *Red Lion* rules. The Court, which gave not the slightest indication in *Tornillo* that it was overruling *Red Lion,* knows full well what it is doing—and it clearly regards broadcasting as sui generis from a First Amendment point of view because of the licensing scheme based on engineering scarcity. Thus, in the latest opinion dealing with this general area (*FCC v. NCCB* 1978: 799–800), the Court again stated that "in light of this physical scarcity, government allocation and regulation of broadcast frequencies are essential, as we have often recognized," and further that, as Buckley [*Buckley v. Valeo,* 424 U.S. 1 (1976)] also recognized, however, "'the broadcast media pose unique and special problems not present in the traditional free speech case.'" *Id.,* at 50 n. 55, quoting *Columbia Broadcasting System v. Democratic National Committee, supra,* 412 U.S. at 101. Thus efforts to " 'enhanc[e] the volume and quality of coverage' of public issues" through regulation of broadcasting may be permissible where similar efforts to regulate the print media would not be. 424 U.S., at 50–51, and n. 55, quoting *Red Lion Broadcasting Co. v. FCC, supra,* 395 U.S. at 303; compare *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241 (1974). Requiring those who wish to obtain a broadcast license to demonstrate that such would serve the "public interest," does not restrict the interest of those who are denied licenses; rather, it preserves the speech of those who are the "people as a whole . . . in free speech." *Red Lion Broadcasting Co.,* at 390. . . .

The issue is therefore not one of law or constitutionality but rather of *policy.*

2. *The Public Trustee Scheme from a Policy Viewpoint*

In my view, the public trustee scheme has failed. It has not been effective in achieving its goals and has engendered serious First Amendment strains. The goals have been to promote reasonable local and informational service, serving the needs and interest of the station's areas. The record shows a dismal failure by the Commission over a half century. There has been no enforcement of these public service requirements, despite operations with little or no local/informational programming. The renewal process, whether regular or comparative, has been a joke, with the incumbent renewed irrespective of its public service record. And this botched agency performance has been accompanied by serious First Amendment problems (Geller 1978: 2–23).

The problem is again that the structure works *against* fulfillment of statutory goals. The statute calls the broadcaster a public trustee, but the broadcaster is a business entity in a very competitive milieu, motivated like any entrepreneur to be highly profitable; therefore, once the license is obtained, the broadcaster seeks to maximize its audience and thus collect the greatest amount of advertising revenues. It will thus serve children in the same manner as it does adults—by seeking to attract the maximum child audience (for toy manufacturers) with the cheapest popular program, that is "Sabrina the Witch" rather than a "Sesame Street"-type show. The same holds true for any and all public service programming that does not meet the critical "cost per thousand," advertiser-directed criterion.

3. The Preferred Approach; Possible Transitional Steps

The preferred approach is again to adopt a structure that will facilitate the pursuit of desired goals, as set by the legislature. Subject to periodic review, they might include worthwhile instructional/informational fare for children, cultural programming, in-depth informational programs, programming for the deaf, support for minority-owned broadcast facilities, etc. It is no longer feasible to adopt an auction approach, in light of the private auctions that have already been conducted (e.g., KHOU-TV). But it would be practical to end the public trustee regulatory regime, thus bringing broadcast under the print model, and in its place take a modest spectrum usage fee—say 1–2 percent of gross revenues. After all, the broadcaster not only volunteered to be a public trustee, and is now freed of that obligation, but it retains the valuable privilege that motivated its volunteering: the government gives it the exclusive right to operate on a valuable frequency, and will enjoin all others from interfering with the right. It is really akin to grazing sheep exclusively on federal land.

The sums obtained from usage fees could then be used directly to accomplish the noted goals—through a Corporation for Public Telecommunications much better insulated from potential political interference than the present Corporation for Public Broadcasting. This approach has been advanced by the Executive Branch (Geller 1978: 22–31), one industry trade association, and Chairman Wirth of the House Subcommittee on Telecommunications, Consumer Protection, and Finance. However, it is opposed by the powerful National Association of Broadcasters (NAB) and the three networks. Its adoption in the near term is most unlikely.

This means that while the move to the print model will take place eventually, there will be a gradual transition (perhaps radio first, then television). An appropriate interim scenario might be along the following lines:

(i) The comparative renewal would be eliminated, and the process of the ordinary renewal would be made more objective and certain by adopting percentage guidelines in the two broad programming categories—local and informational (including children's TV)—with stations appropriately grouped (e.g., top 50, 51–100, 101-on, VHF or UHF, affiliate or independent). Under the public trustee scheme, the licensee is, in any event, to be judged on its overall programming effort; it makes no sense to leave the licensee or public uncertain and subject to unbridled administrative fiat in this most sensitive area.

(ii) Reduce the constraints now imposed by behavioral regulation: apply equal opportunities only to paid time; reasonable access only on an overall, not case-by-case basis (Geller and Yurow 1982); and replace fairness with an access (e.g., "op-ed") approach, reviewed only at renewal under a *New York Times v. Sullivan* standard (i.e., governmental intervention only if there is malice, bad faith, or a pattern of reckless disregard of the access request).

The above is clearly not a panacea and falls far short of the preferred approach described earlier, but it is a marked improvement over the flawed present structure and thus an affirmative transitional step. Note, however, that only Congress can activate this transition, and that congressional movement here is by no means certain, in light of the politicians' great interest in, and concern for, the impact of television. Television faces a slow, painful transition to its final goal—video publishing (the print model).

In the meantime, the FCC, along with its "letting in" process, is "letting go" as much as it can, consistent with the statute. Thus, it has acted to deregulate radio and television (eliminating all processing and ascertainment guidelines and requiring only reasonable devotion of time to issues oriented to the community [FCC 1981b; 1984b]); it has a simplified renewal process, "postcard renewal" (FCC 1981d), and is proposing to eliminate its own corollaries to the general fairness obligation—the personal attack and political editorializing rules (FCC 1983o). And, it has sought to relax television multiple ownership policies (FCC 1984c), a poorly conceived move in my view.

But these efforts cannot result in effective deregulation—in the print model. The broadcaster remains a public trustee who can be challenged at renewal, both by petitions to deny and competing applications. It remains subject to equal time, fairness, and reasonable access requirements. Only Congress can deal with these essential issues.

In this respect, one other regulatory effort by the FCC should be noted. In its Report and Order on teletext, the Commission referred to this new transmission as "ancillary" and analogous to the "print medium," and therefore made broadcast requirements such as equal time and fairness inapplicable (FCC 1983c: 1322–24). This is commendable policy but dubious law. The teletext VBI cannot exist without the rest of the signal; it is merely an increment of time which uses the same spectrum as the main part of the signal. Teletext is thus broadcasting, "the dissemination of radio communications intended to be received by the public." (U.S. Code: 47§153(o)). And it does not matter that the signal on the screen is textual: in regular TV there can be a textual scroll. In any event, the definition of "radio communication" (U.S. Code: 47§153(b)) is "the transmission of writing, signs, signals, pictures and sounds of all kinds, including all . . . services . . . incidental to such transmissions." Thus a person engaged in teletext is broadcasting, and the broadcast regulatory provisions come into play.

Suppose a candidate contracts for a five-minute presentation, and runs a ribbon (or announces) that for more "facts," or to make contributions, the viewer should use the keypad for a teletext presentation. The candidate's rivals seek equal opportunities to use the station's teletext facilities in connection with their presentations and are denied such use. Is the Commission really saying that an equal opportunities complaint would not be entertained? And it is quite probable that, to a significant degree, the teletext service will have a tie-in to the programming on the main channel and will enhance or expand upon that programming. In these circumstances, the reasonable access provision of Section 312(a)(7) can also come into play for candidates for federal office. While it is unlikely that any legal challenge will be brought unless or until teletext achieves significant penetration, this again appears to be an area warranting congressional action.

4. Application to Cable TV

a. The Present Status. Cable TV merits special attention in light of its growing importance—large channel capacity and 40 percent penetration of U.S. TV homes with 50 percent projected in the near future. From a regulatory standpoint, cable is particularly puzzling because of its hybrid nature. It closely resembles the broadcaster when it is carrying distant TV signals; when it presents its own programming it is a video publisher; and when it carries data, it resembles the telephone company. The cable operator claims that it is a video publisher, and that, since it makes no use of the spectrum, cable should come under the print model. Dictum in some cases supports this position (*Midwest*

Video v. FCC 1978; *Home Box Office v. FCC* 1977; *Community Communications Co. v. Boulder* 1981; *Omega Satellite Products v. Indianapolis* 1982).

But cable today does not escape broadcast regulation. Because of its close tie-in with the broadcast system, equal opportunities and fairness are applicable to cable. These requirements were adopted in 1969 under the FCC's general authority in the cable area (FCC 1969: 220). They now appear to have statutory backing. For in 1972, in connection with a reform making the lowest unit advertising rate available to candidates, Congress amended Section 315 of the Communications Act to provide that for the purposes of the Section, "the term 'broadcasting station' includes a community antenna system" (U.S. Congress 1972 U.S. Code: 47§315(c)). Since Section 315 specifies equal opportunities and fairness in subsection (a), these broadcast concepts are made applicable to cable. There is no explanation or reference to this in the legislative history.

There is also a substantial issue whether the reasonable access provision of Section 312 (a) (7) of the Communications Act applies to cable. In this 1972 reform, Congress also amended the Communications Act to require that broadcasting stations give candidates for federal elective office reasonable access to their stations. This law also stated (in Section 102) that the term "broadcasting station" has the same meaning as in Section 315 of the Communications Act. This cross-reference would appear to make the reasonable access provision, which was a part of the 1971 Federal Election Campaign Act, applicable to cable, and the Commission so held in its 1972 primer (FCC 1972). However, the Commission has never enforced the access requirement against cable operators and now appears to question whether it can be enforced (FCC 1981g: 24–26).

This tendency to lump cable with broadcasting is further illustrated by the ban on cigarette advertising. That ban would seem to apply to cable as well as to broadcasting since cable is a "medium of electronic communication" (U.S. Code: 15§1335). Again there is no consideration or discussion of this facet in the legislative history.

There are no ascertainment requirements or percentage guidelines (as to local or nonentertainment programming) for cable as there are for broadcast television. And today there are no federal access requirements for cable (*FCC v. Midwest Video* 1979). Cities, however, have imposed public and, less often, leased access channel requirements. The latter is a common carrier requirement of nondiscriminatory service for hire, while the former is also made available without discrimination but on a free basis.

b. Constitutionality of These Regulatory Schemes for Cable TV. It is necessary to consider first the constitutional issues, because unlike the broadcast field, they are not settled and may well be controlling as to the regulatory approach to be adopted. Is the cable industry correct in its assertion that since it does not use the spectrum, it is a video publisher on its channels and comes within the print model?

I believe that the cable television industry will lose this argument because, unlike the newspaper, it must obtain a government franchise to conduct its business (*Community Communications Co. v. Boulder* 1981: 1378), and this franchise is given out only to a few. Actually, like telephone, it is bestowed as a de facto monopoly—that is, while usually specified as nonexclusive, only one award is given. But this monopoly aspect is not critical. What is crucial is that no franchising authority will give out an unlimited number of permits to string wires through or under the streets; it is simply too disruptive and, in any event, space on poles or in ducts is limited.

The problem with cable's position can be understood by considering the analogy to the telephone company. Suppose a telephone company applied for a franchise to use the streets for its wires, but insisted that it had a First Amendment right to pass on the content of intelligence carried on these wires. The city would obviously demur, stating that it was its policy to bestow telephone franchises only when there was a separation of content and conduit (and note that this would be true even if there were several local phone companies); if the applicant did not want to comply with this sound policy, it should step aside and allow others willing to accede to it to come forward. Clearly the city would be sustained in this position. Why then can the city not insist on some reasonable separation of content and conduit in the case of the similarly placed cable applicant?

Could governmental authority go further and apply a public trustee/fairness concept to cable, based on its licensing aspect (as akin to licensing in broadcasting)? While the matter is not settled, in my view the answer is no. *Red Lion* is uniquely limited and based now on long established tradition (Geller and Lampert 1983). The government does have a substantial purpose or interest in regulating the new cable in the major markets—namely, to deal with the unhealthy First Amendment situation that exists where one entity has the ability to control the content of 80 to 100 or more TV channels into homes because of a limited governmental franchise. The public interest standard in the communications field "necessarily invites reference to First Amendment principles . . . and, in particular, to the First Amendment goal of achieving 'the widest possible dissemination of information from diverse and antagonistic sources'" (*FCC v. NCCB* 1978: 795).

Yet, it does not follow that regulation as a public trustee (with all it embodies, such as fairness, equal time, etc.) is permissible. It is well settled that such regulation, even when in support of a compelling government purpose, must intrude on First Amendment freedoms in the narrowest possible way. (*Hymes v. Mayor of Oradell* 1976; *NAACP v. Button* 1963; *CCC v. Boulder* 1981: 1379). If public trustee regulation were relied upon to further this important governmental purpose, we would be repeating the same mistake that was made without forethought in 1927 as to broadcasting, going down the same slippery slope.

Regulation here should be structural rather than behavioral. There is an alternative that accomplishes the government purpose—diversifying the *sources* of information—and does so in a structural, content-neutral manner. The alternative is to require that some significant number of cable channels be available on a public or leased channel basis—that is, the common carrier model of nondiscriminatory service. Government intervention then is not keyed to the content of any cable programming. It is not triggered by *what* the speaker (cable operator or other user) is saying. Because this alternative is much less likely to lead to undue governmental interference with editorial decisions, it—and not the public trustee approach—must be used to deal with the substantial legitimate problem involved here. As stated, the legal issue is not yet settled, but there are cases now proceeding through the courts that could supply a definitive answer.[3]

Similarly, it is not yet clear whether cable will come within a lax or strict standard on obscene or indecent programming material. In *FCC v. Pacifica* (1978) the Supreme Court upheld the FCC's power to regulate "indecent" speech in broadcasting—to bar the use of "seven dirty words." Such speech is clearly protected by the First Amendment in other contexts. The plurality relied on two factors, both of which relate to the special impact of broadcasting: broadcasting is pervasive and it is uniquely accessible to children. Because of the fact that broadcasting intrudes upon the privacy of the home, the Court found the Commission's interpretation of 18 U.S.C. Section 1464 (to prohibit the indecent—as well as the obscene—from being broadcast) to be constitutional.

In my view (Geller and Lampert 1983), this is a most flawed holding, and appears to reflect a determination by a majority of the Court to "protect" the broadcast audience, whatever the constitutional costs. The issue is whether it will be confined to broadcasting or extended to cablecasts of "offensive" material. So far the attempts to do so have been wisely struck down on the grounds that cable is different from broadcasting and comes within *Miller v. California* (1973), requiring that all three elements of obscenity be established.[4]

c. Policy Considerations. If the foregoing legal analysis is correct, the policy issue left is whether or not government shall impose public and/or leased access requirements on cable. The cable industry does not oppose public access: the new multichannel cable systems in the large markets have ample capacity, and thus dedicating some channels to public (or educational and governmental) access, while it can have nuisance consequences in terms of possibly obscene programming, does not greatly trouble the cable industry as a practical matter. But the industry strongly opposes the leased channel requirement. Its policy arguments can be stated in the following terms:

Cable is not a monopoly in the delivery of video services, since it has several competitors (e.g., commercial TV; STV; MDS; etc); in the circumstances, it is not a necessity, as shown by its tendency to level off at a 50–55 percent penetration rate even though the homes-passed figure is much higher; and finally, it is conceded to be a high-risk business in the major markets. To achieve penetration and success in these markets, the cable entrepreneur carefully puts together its package of tiers combining various services. All this careful planning can be set at naught if it must lease channels to cable programmers who can put together their own tier or combinations. Further, this constitutes an "unfair ride" on the risk-taking and heavy investment of the cable operator.

These arguments have considerable substance. Nevertheless, it seems to me that there is a stronger policy argument in favor of the requirement of some leased channels. First and foremost, there is the *Associated Press* principle discussed earlier: it is simply wrong for one entity to control the content of so many channels (50–100, or more) on an important medium based on a governmental grant. We do not allow one entity to own all, or indeed even more than one, of the TV stations in a community. Further, while cable's penetration does seem to end up at about 55 percent of TV homes in the community (with considerable "churn"), for that 55 percent, cable is the means of entry for video programming such as pay-TV. Failure to gain access to the cable simply cuts off the programmer from the substantial cable audience. And vertical integration here can exacerbate this problem, as shown by some prior incidents.[5]

The requirement of some reasonable provision of leased channels does not mean that rate of return regulation is automatically required. As Homet (1984) argues, it is perfectly feasible to have a common carriage (nondiscriminatory) requirement without rate of return regulation, the latter being appropriate for monopoly situations like the local telephone company. The critical consideration is nondiscriminatory access—not limiting the return of the cable company. The terms and conditions of nondiscriminatory access would be fixed by the cable systems, and if controversy developed, as might be the case in light of cable's aversion to leased access, this could be handled in a number of ways. Homet (1984) suggests that the courts resolve the issue, as they have done in the past. The drawbacks here may be delay: the programmer rarely can afford to wait out a perhaps lengthy court proceeding; it must usually gain quick access for its service; compulsory arbitration may therefore be a better solution. The programmer is immediately given access, and any dispute on terms is then resolved through the arbitration process, perhaps using the "last offer" variation (i.e., the arbitrator must select from the last offers made by each side). Significantly, the cable industry has endorsed the concept of arbitration when it works in its favor (U.S. Congress 1983b: §613(d) (2)).

One suggestion to meet the arguments of the cable industry is to delay the introduction of this regulatory scheme until cable has "turned the corner" in the major markets. This approach parallels the FCC's present trend of not adopting regulatory restraints, such as multiple ownership rules for DBS, unless and until the service blossoms; if it never succeeds, there is no need for regulation. The 1974 Cabinet Committee Report on Cable Television in effect adopted this approach: it called for the separation of content and conduit on cable (with the exception of two channels) when cable penetration reached 50 percent of U.S. TV homes.

The difficulty with the approach is that the industry becomes entrenched after years of operation without the regulatory scheme and is thus in an excellent position to fend it off. Cable is now at 40 percent penetration and is rapidly approaching 50 percent—yet the industry is so entrenched and powerful that the issue is not separation of virtually all channels from the operator's control but rather whether even a few channels will be open for leasing. At present the FCC has no access provisions; cities usually require public access but not leasing (or if the latter, it is on a phony basis left to the cable system's full discretion and therefore not really utilized); and the federal legislation recently enacted (U.S. Congress 1984) appears ineffectual. For the new law preempts the area and then imposes a leasing requirement for video programming that is not likely to be of much use to a cable programmer in need of prompt access (e.g., the cable system can set terms assuring that the lease "will not adversely affect the operation, financial condition, or market development of the cable system"; the system's terms are to be considered reasonable, and a complaint must make a "clear and convincing" case to the contrary to the court) (U.S. Congress 1984: §612 (c)(1), (d), (f)).

In these circumstances, there is little likelihood of real progress in the near future. I continue to believe that eventually some separation of content and conduit will be imposed in cable. It may be that this will only arise after flagrant abuses, such as the system operator's exercise of its own prejudice to rule off some programming or issues (e.g., an operator stated its intention not to carry the antinuclear holocaust show, "The Day After," to the great embarrassment of the industry, *Broadcasting*, November 21, 1983, p. 88). This might be termed "waiting for thalidomide" as a prescription for the passage of needed effective legislation.

In the meantime, the FCC has sought to "let go" in this area also. It is therefore considering ending the application of the fairness doctrine (and its corollary rules) to cable systems with access channels, on the ground that such channels serve the purpose of the doctrine without the need for governmental intervention (FCC 1983m). That is a commendable step, but once again there is a much better solution ignored by the Commission: that is to proscribe any censorship by cable of the individual programs carried on the system (other than on local origination channels). This would not interfere with the system's operation, since the cable operator would still select the signals to be carried; how they are presented (e.g., tiers, charges); and when they are to be dropped or shifted. The operator would only be prohibited from censoring or dropping an individual program on CNN or HBO or USA and, realistically speaking, the operator usually does not know what is being presented over the many channels on the modern system.

By proceeding in this fashion, the operator would be freed not just of fairness but of all content regulation: equal opportunities, reasonable access, libel or slander, obscenity or indecency. The remedy would be to proceed against the programmer, as in the case of messages carried by the telephone company or the postal service. This is an obvious step to be taken; it is again resisted by the cable industry, which insists that it is a "telepublisher" on all 50 to 100 channels. Over time, this short-sighted opposition will be overcome.

d. The "Level Playing Field." The problems with the stultifying bidding process in the major markets has been noted. There is one other aspect that merits some discussion: cable's basic service package (access, local and distant signals, and usually some cablecasting signals like Christian Broadcasting Network or USA or CNN) is often subject to rate regulation by the local franchising entity. While the FCC preempted all regulation of pay channels and expanded this preemption to include tiers with pay or advertiser-based cable services (FCC 1975b, 1983q; *Brookhaven v. Kelley* 1978), the 1984 Cable Act will free basic rates from regulation in those markets where cable systems are subject to effective competition over a two-year transition period (U.S. Congress 1984: §623).

The policy seems to have worked well in the several states where it has been employed. Further, the cities appear to use rate regulation of basic service more as leverage to get cable to carry out promises than as a serious effort to prevent overcharging. But the question remains why this is not a matter left to resolution at the local level.

There is another "level playing field" issue that will disappear over time: the problems associated with the FCC's "must carry" regulations (i.e., the cable system must carry all local TV stations, as defined in the FCC regulations). This poses no issue in the case of the new systems with large capacity. But a large proportion of systems still have 12 or less channels and, until rebuilt, cannot present the new cable services like CNN because of the need to carry many local signals. Broadcasters strongly oppose elimination of the "must carry" rules, and the FCC is unlikely to act in these circumstances (although it is conceivable that some relief could be afforded by not requiring full carriage of all duplicating network affiliates). The cable industry previously lost on this issue in the courts (*Black Hills v. FCC* 1968), but is trying again on the grounds of new circumstances (*Quincy Cable TV v. FCC* 1983; *Turner Broadcasting Co. v. FCC* 1984). The broadcasters meanwhile, are pushing for codification of the rule in Congress.

There is a sound solution: the FCC should eliminate all authorization of distant signals for new cable systems or those in the top 100 markets, and at the same time end the "must carry" and other requirements. Cable today is a parasite on the broadcast system: it carries distant broadcast signals under government fiat and at rates fixed by the government; the government therefore also requires cable to observe the bedrock concept of the broadcast system—local service. If a cable system came fully within the competitive TV programming market place, there would be no reason why it should be called upon to give a "special break" to broadcasters. And the government would also then not be skewing the market towards cable: all cable's carriage would be determined in the marketplace (except for smaller systems "grandfathered" to prevent great disruption).

One can expect progress along the above lines, but it will be slow and painful: these are powerful industries, and they will not lightly give up long established advantages. Congress detests clashes of such industries and usually admonishes them to work out a compromise or forget about legislation.

There is still another "level playing field" issue between cable and telephone. Cable in large cities is now entering the data market. The telephone company argues that such entry is unfair in that cable's services are unregulated, while its operations receive the full panoply of local regulation. It contends that either both should be deregulated or both regulated. In response to the telephone industry, some local Public Utility Commissions (PUCs) have sought to regulate cable (*Cox Cable Communications v. Simpson* 1983). The cable industry, in turn, has sought to block PUC regulation through preemptive FCC and congressional action (*Cox Cable Communications* 1983). The 1984 Cable Act does preclude all regulation of cable telecommunications services defined as the one-way transmission of video or other programming, including videotext (U.S. Congress 1984; H.R. 4103, §§602(16); 621(c); 624(f)).

Cable is surely right that there is a difference between a cable system and a *monopoly* telephone company, and that one does not build the same cage for the canary and the gorilla. The canary should go free. But the gorilla, while it needs a keeper (FCC/PUC) and "bells and whistles" (rate regulation; fully separated subsidiaries for competitive endeavors), ought not be caged. Under the Modified Final Judgment (MFJ) in the AT&T antitrust case, the divested Bell Operating companies are, however, caged. They cannot engage in any information services unless they show the district court that there is no substantial possibility that they can use their monopoly power to impede competition in the particular field they seek to enter (*U.S. v. Western Electric* 1982). This issue—the total suppression of BOC competition in the enhanced (data) fields—certainly warrants further consideration, and will be the subject of great controversy over the next decade.

IV. CONCLUSION

Based on the foregoing analysis, I would predict the following patterns of future regulation in this important area:

— The "letting in, letting go" process will continue. The overall trend will be to video publishing—to the print model, with a substantial portion of such publishing occurring over common carrier facilities (telephone and multichannel cable), with rate regulation only of the former.

— New services requiring radio licensing will be allowed to pick their regulatory mode (broadcast, common carrier, private radio, hybrid), subject only to the statutory requirements imposed by Congress. The FCC will wait for the service to mature before considering rules (although it may be politically infeasible to adopt rules once an industry is entrenched).

— In the broadcast field, the public trustee concept will be fought about in Congress, with progress in video only after radio deregulation is tested. In the meantime, the FCC will continue to relax its own rules, consistent with the statute, but will be faced with perennial litigation from those who will charge them with inconsistent or arbitrary agency action.

— In cable, behavioral regulation will fade, as the video publishing (print model) takes firm hold, but the festering issues of access, particularly of a leased (common carrier) nature, will remain.

— As to the many facets of the "level playing field" issue, great difficulties will be encountered in eliminating skewed governmental policies. As Senator Magnusson observed, "all each industry seeks is a fair advantage over its rivals."

In short, we are proceeding in the right direction, but the transition will be difficult. Goethe once observed, "the Devil is in the details." I would amend that to: "the Devil is in the transition."

Notes

1. A caveat should be noted here. While the Commission stresses that the regulatory scheme does not call for regulation of the customers, it nonetheless kept a possible "string" here. Thus, the FCC couched its DBS order in terms of declining to assert jurisdiction, "because the Communications Act does not expressly require that customer-programmers of common carriers be regulated, and because unwarranted regulation would stifle desirable experimentation and development" (FCC 1983e: FCC brief on appeal, p. 8). The brief further states that the Commission "emphasized, however, that it would respond appropriately if circumstances arise to suggest a need for regulation. *Id.* at 77 *Reconsideration*, FCC 83-271 at 2 n.2." The Court reversed, holding that whenever radio facilities are used to disseminate programming directly to the public, this use must come under broadcast regulation (e.g., sec. 315 requiring equal opportunities), either by regulating the common carrier licensee or its customer

(*United States Satellite Broadcasting Co. Inc. v. FCC*, 1984). The FCC may seek further review so the matter remains in doubt. In my view, the key consideration is that the common carrier affords *access* to users, and this negates any resort to broadcast regimen.

It is possible to impose a regulatory scheme upon the customer—by attaching reasonable conditions to the license of the common carrier (see *Carter Mountain Transmission Corp. v. FCC* 1963), imposing carriage and nonduplication requirements on cable systems that are customers of common carriers)—but this indirect method has never been used to impose behavioral content regulation (fairness, equal time) and would be of most dubious validity, if attempted.

2. There are other anomalies. Thus, unlike the MDS operator who is treated as a common carrier, the ITFS licensee can sell its excess capacity to pay TV entrepreneurs without incurring common carrier status. Also, a teletext operation on MDS would not raise the equal time or fairness problems that can be encountered in the broadcast mode (see above). For further treatment of the many anomalies, see Botein, chapter 10 herein.

3. See *Berkshire Cablevision of Rhode Island, Inc. v. Burke* (1983), upholding the constitutionality of access regulations promulgated by the Rhode Island Division of Public Utilities and Carriers. But see Shapiro et al. (1983).

4. These elements are that the material is patently offensive by contemporary standards, is prurient in nature, and lacks serious redeeming social value. See *Community Television of Utah, Inc. v. Roy City* (1982).

5. When *Times-Mirror* began its new pay service, Spotlight, it removed HBO from most of its own systems; HBO did not enlist an STV or MDS to compete; it was simply foreclosed. Similarly, Cable News Network was precluded from access to Westinghouse's Manhattan system and filed an antitrust suit based on Westinghouse's preference for its own cable news service (now defunct).