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

by Henry Geller

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by

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I. Introduction

The regulatory scheme for television broadcasting goes back over half a century. Since the early seventies, we have seen the emergence of a whole series of new video delivery systems. Some face the same regulatory pattern as 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").[1] 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 over-simplified.

II. Governmental Entry Barriers

A. Licensing

The largest entry barrier is the need to obtain governmental authorization to enter the video field. There is no such need as to cassette (VCR) players. (Where the scheme weds the broadcast station to specially adapted VCR's, as in the case of ABC's new operation,[2] FCC authorization is required). A videotext entrepreneur also needs no license. But this entrepreneur does need to use transmission facilities into the home or business, and 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% penetration), and is available on a common carrier (non-discriminatory) basis.

Some other video operators face similar situations but perhaps more difficult practical problems. Thus, the Satellite Master Antenna Television System (SMATV) 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 (see 14-15, *infra*). But if SMATV "cream skims" the market by quick deals with large apartment owners, this could undermine cable's ability to deliver on its promises. Hence the cities have made an effort to bring SMATV also within their franchising ambit.

The SMATVs have sought to block this "protectionist" move by the cities through FCC preemption. And in its 1983 ruling,[3] the FCC did rule for preemption. The matter is now pending before the courts. In my judgment, it will eventually be resolved in the FCC's favor.

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 (called 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.[4]

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 broadcasting 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 (Subcription 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 are now being advanced in several California suits that such franchising should be open-ended and largely ministerial in light of First Amendment and antitrust considerations.[5] These suits are unlikely to be sucessful.

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.[6] If the programmer desires to own its own transmission facilities (e.g., commercial TV, LPTV, DBS), it will obtain

a broadcast license or proceed on a private radio basis (e.g., private operational-fixed microwave service (OFS);[7] the other important route is for the video programmer to obtain faciilities from a licensed common carrier (e.g., in DBS or MDS) or to enter into a contract with the (usually UHF) broadcaster (e.g. STV). And finally, hybrid operations will increase, as the 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; lessened 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 must of course 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" processs. 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.[8] In its

DBS decision (see n.4 supra), it permitted parties to go forward with high definition TV (HDTV) DBS operation, if they so chose. It reallocated so that ITFS channels could also be used for the MDS service, thus facilitating multi-channel MDS operation -- a necessity if MDS is to compete effectively with cable.[9] It authorized LPTV operation on any unused TV channel and specified vertical blanking intervals for teletext service.[10]

There is controversy as to some facets of FCC spectrum policies. Thus, it seems clear that as to VHF drop-ins,[11] the agency will follow the same pattern as it did in the 9 KHz AM rulemaking[12]-- 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 substantial arguments on each side.

The agency's overall thrust to allow each service its chance in the marketplace is clear and commendable. And it has received Congressional ratification. Thus, in the FCC 1985 authorization legislation[13] there is the following provision:

> 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 appliction 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 shown by the above VHF "drop-in" example. It appears most unlikely that the Commission in the near future will change drastically or indeed at all the height and power rules as to 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 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 non-broadcast materials to other entities; or subsidiary communications

authorization (SCA) for any purpose.[14] The Commission is thus allowing licensees to determine the best or maximum use of their channels.

There is one other assignment development that merits attention -- the determination of the Fowler Commission to adopt a marketplace approach as to 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 freedom to tailor services to specific demands or situations and to respond to changes.[15]

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 as to VHS/Beta in VCRs. On the other hand, the Commission's handling of AM stereo,[16] including its decision to let all five competing systems simply fight it out in the marketplace, to date has been 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, since it was then fully developed and much needed to combat FM's superior sound. Virtually <u>any</u> system adopted by the FCC would have served the industry and public better than what has in fact occurred. And there is clear and well-warranted fear that teletext also will be held back and perhaps fail because of the FCC abdication there as to 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; Anthony, 1971),[17] 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.[18] And it is employing them now in LPTV and proposing to do so in specified markets in the common carrier cellular field.[19] 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 desired 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[20]-- the lottery does so poorly. Thus, the lottery attracts the most disadvantaged applicants since even with the adverse

weighting they may win. More important, it does not take into account the public interest: just to give one example, a non-profit station seeking a low power permit to assist in educating a substantial minority population (e.g., Hispanic in Miami) would have to take its chances, along with an absentee multiple owner. It would thus be better policy to let a board of experienced employees, after examining the applications under standards set by Congress and the Commission, 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.

There is a more fundamental objection -- the availability of a better alternative, the auction. In common carrier fields like MDS or cellular, 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. But the auction has marked advantages: With the auction, 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 insure the most efficient -- the highest -- use of the license, and this in turn greatly benefits the consumer. Stated differently, as Webbink (1980) deomnstrates, it is the marketplace approach to achieve the most efficient MDS or cellular service to areas and populations, including expansion of service. The

auction process does not mean that the wealthy will garner all the spectrum, any more than they now own 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. In any event, however the license is given out (i.e., comparative hearing; lot) the wealthy can always purchase the license if it is valued highly enough.

The auction process 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) states, could, of course, make good use of this information in allocation proceedings. The auction avoids the lengthy comparative hearing process, with its delays of service to the public and high costs to applicants, and does so just as efficiently as the lottery. But unlike the lottery, the auction accomplishes this efficiency goal while at the same time obtaining the benefits noted above. Further, it has none of the drawbacks of the lottery. The lottery process can attract applicants who want the permit for later resale -- a difficult problem which the FCC has sought to deal with, but not in a wholly satisfactory manner. Finally, the auction recovers at least a part of the spectrum's value to the public, rather than letting the sums for this value go entirely to the transferor or assignor when it sells at a later time. <u>Ibid</u>.

While noting the advantages of the auction,[21] the Commission has declined its use because it believes that it lacks the legal authority.[22] 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.[23]

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 (1982)[24]-- an open market in spectrum -- is an even more remote possibility.

4. Cable Authorization

As noted, cable 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., 36% local live on the average), and then reneged (i.e., 11% on the average).[25] So also the motto in the cable field is: "Promise anything to get the franchise, renege later."[26] Both the cities and the cable companies are at fault.

The cable companies are seeking relief from Congress, and in S.66, passed by the Senate and now before the House roughly as H.R. 4103,[27] they obtained it: cable can renege on any service promised if, in the cable entrepreneur's judgment, there are "changed circumstances"; in the case of facility promises, compulsory arbitration is used if the city does not accept the cable system's demand for change. Such legislation simply reflects the lobbying strength of the cable industry: there is no reason for the Federal Government to intervene to save cable from its over-promising. Solutions will simply be worked out over time in deals and compromises between city and cable.

The present franchising situation is not only stultifying in that it results in awards based on phony public service promises, but it also often greatly delays institution of service. Thus, in cities like Baltimore, Washington, and Philadelphia, the franchising process seems interminable. All these new services face competition that, once entrenched, can cause serious provlems. Cable facing entrenched DBS or multi-channel MDS is a different animal from cable invading virgin territory. The window of opportunity may be narrowed or indeed closed if too much time elapses.

There was a ready solution to this problem of cable franchising: auction. Regulatory policy should follow a scheme that works for fulfillment of goals -- not against. 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. We shall see a "muddling through" of both the franchising and refranchising processes.

III. The Regulatory Scheme: Content and Access

Given the above entry process, the next issue is the applicable regulatory scheme. There follows first a brief discussion of the three main regulatory models, and then their applicability to the video services.

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

There are three main regulatory models to be 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 in order to obtain another five year renewal of license.[28] Under the Act, the broadcaster is thus a public trustee, with the obligation to render reasonable local and informational service to its service areas.[29] Not only must

it provide adequate coverage of public affairs, but it must do so fairly.[30] Other statutory provisions prohibit indecent or obscene programming, lottery information, rigged contests, and the failure to disclose consideration for material broadcast.[31] Further, the broadcaster must afford equal opportunities to all qualified candidates and reasonable access to those seeking Federal office.[32] 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.[33]

In contrast, the print model cannot constitutionally be brought under licensing, a fairness doctrine or access requirements. The only governmental interference as to content is quite limited: libel or obscenity, and even in these areas, the dice are loaded in favor of the publishers.[34] 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 with no editorial control over the intelligence transmitted.[35] Title II of the Communications Act[36] requires the filing of tariffs by the interstate communications common carriers and bestows on the FCC the power to determine whether they are just and reasonable.

But it does not at all follow that every common carrier must be regulated as to rate 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).[37]

B. Application to the Non-licensee or Non-broadcast Licensee

A video programmer that does not obtain a broadcast license should escape all the above noted public trustee regulation (e.g., the need for local/informational programming; fairness; equal time). Thus, the entrepreneur that utilizes common carrier facilities (MDS, FS, DBS), or 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.[38]

This has raised the obvious argument: Why should the STV operator come under public trustee regulation when it provides the 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 re-examination,[39] and the FCC has proposed an overall study.[40]

Significantly, the Commission has decided upon a deregulatory course as to 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).[44] The FCC was influenced by the consideration that STV directly competed with other pay services which did not come 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 -- in the long run seems clear.

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 of the public trustee concept falling 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.[42] Everything in the foregoing proposition is equally valid today.

Thus, there are no open TV channels in the top 25 markets, where over 50% of the U.S. population reside, and only a few vacant VHF 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 much better engineered to avoid much if not all of 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.

Corroboration of scarcity is further given by one source in which the FCC and its allies seem to place the most trust: the marketplace. Thus, in Broadcasting Magazine's wrap-up of 1983 station sales (January 9, 1984, at 74-82), there is the following: "...$342-million record-setting purchase of KHOU-TV Houston, and $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% the previous high set in 1980...; $136-million purchase of UHF WFLD-TV Chicago...." The physical assets of KHOU-TV probably do not even come to $42 millions: the $300 millions 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, Tornillo [43] and Red Lion are inconsistent. In Red Lion, the Court found no chilling effects from a broadcast personal attack rule; that the Commisssion could take remedial action if such effects were to develop; and that the rule promoted First Amendment values.[44] 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.[45]

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 fully 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 last opinion dealing with this general area,[46] the Court again stated that "[i]n 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 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 interests 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 whatever its public service record. And this botched agency performance has been accompanied by serious First Amendment problems.[47]

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 highest advertising dollar. It will thus serve children very largely as it does adults -- by garnering the maximum child audience for the toy manufacturers with the cheapest popular program, which translates to "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 militates for effecting the desired goals, as set by the legislature. While subject to periodic review, such goals could reasonably 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% 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 to directly 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,[48] 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 thus 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 (see 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 just described. But it is a marked improvement over the present flawed structure and thus a solid transitional step. Note, however, that only Congress can achieve the above step, 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 adopted a Report and Order deregulating radio (eliminating all processing and ascertainment guidelines and requiring only reasonable devotion of time to issues oriented to the community [49]) and is proposing a similar approach in television;[50] it has a simplified renewal process, ("postcard renewal"[51]), and is proposing to eliminate its own corollaries to the general fairness obligation -- the personal attack and political editorializing rules[52]. And, it is proposing to relax television multiple ownership policies,[53] 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 that 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 the 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 analagous to the "print medium," and therefore made broadcast requirements such as equal time and fairness inapplicable.[54] 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...."[55] 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"[56] is "...the transmission of writing, signs, signals, pictures and sounds of all kinds, including all...services...incidental to such transmissions." Thus it is established that a person engaged in teletext is broadcasting, and the broadcast regulatory provisions therefore come into play.

Suppose a candidate contracts for a five-minute presentation, and runs a ribbon (or announces) that for more details as to the "facts" of the campaign or how to contribute, the viewer should use the keypad in the following way for a teletext presentation. The candidate's rival seeks equal opportunities to use the station's teletext facilities in connection with his or her presentation and is denied such use. Is the Commission really saying that an equal opportunities complaint would not lie? 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 on 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% penetration of U.S. TV homes with 50% 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.[57]

But cable today does not escape broadcast regulation. Becauses 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.[58] They now appear to have statutory backing. For in 1972, in connection with a reform making the lowest unit advertising rate available to cndidates, 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."[59] 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.[60] However, the Commission has never enforced the access requirement against cable operators and now appears to question whether it can be enforced.[61]

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."[62] 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 non-entertainment programming) for cable as there are for broadcast television. And today

there are no Federal access requirements for cable.[63] Cities, however, have imposed public and, less often, leased channel access 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 cable will lose this argument because, unlike the newspaper, it must obtain a government franchise to conduct its business,[64] 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 non-exclusive, only one award is given. But this monopoly aspect is not critical. What is crucial is that no franchising authority will give out 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 gleaned 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 on 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. I regard _Red Lion_ as uniquely limited and based now on long established tradition. See 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 80-100 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.'"[65]

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 accomplishing its independent purpose, should do so by the narrowest possible means, so far as impact on First Amendment freedoms.[66] Thus, 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 -- diversfying the <u>sources</u> 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 is then not keyed to the content of any cable programming. It is not triggered by <u>what</u> 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 here involved.

As stated, the legal issue is not yet settled, but there are cases now proceeding through the courts that could supply a definitive answer.[67]

Similarly, it is not yet clear whether cable will come within a lax or strict standard as to obscene or indecent programming material. In FCC v. Pacifica,[68] 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 so that it is inescapable, the Court found constitutional the Commission's interpretation of 18 U.S.C. Section 1464 (to prohibit the indecent -- as well as the obscene -- from being broadcast.)

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, requiring that all three elements of obscenity be established.[69]

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 multi-channel 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% 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% of TV homes in the community (with considerable "churn"), for that 55%, cable is the means of entry for video programming like pay. 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.[70]

The requirement of some reasonable provision of leased channels does not mean that rate of return regulation is automatically required. As Homet (1984) demonstrates, (and see also supra at 17-18) it is perfectly feasible to have a common carriage (non-discriminatory) requirement without rate of return regulation, the latter being appropriate for monopoly situations like the local telephone company. The critical consideration is non-discriminatory access -- not

limiting the return of the cable company. The terms and conditions of non-discriminatory 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 cannot afford to wait out a perhaps lengthy court proceeding, as 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.[71]

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 ever for regulation. And the 1972 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% 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 excellent position to fend it off. Cable is now at 40% penetration and is rapidly approaching 50% -- 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 any or even a few channels will be open for leasing. Thus, the present status is that 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 pending legislation in Congress is negative or ineffectual. The Senate bill, S.66, forbids the imposition of leasing, while the House bill, H.R. 4103, preempts the area and then imposes a leasing requirement that is ineffectual (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).[72]

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

result in cable. It may be that this will come about only with 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 anti-nuclear holocaust show, "The Day After," to the great embarrassment of the industry).[73] This might be termed "waiting for thalidomide" as a prescription for the passage of effective needed legislation.

In the meantime, the FCC has sought to "let go" in this area also. It has therefore proposed to end the application of fairness (and its specific rule corollaries) to cable systems with access channels, on the ground that such channels fulfill the purpose of fairness without the need for governmental intervention.[74] 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 practically 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. What the operator could not do is censor or drop 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 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, I believe that this shortsighted 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. The FCC has preempted all regulation of pay channels and has expanded this preemption to include tiers with pay or advertiser-based cable services.[75] Cable seeks freedom from all rate regulation, and has obtained such relief in states like Massachusetts where the system operates within the coverage of four or more broadcast signals. In the pending Federal legislation, S.66 and H.R. 4103, this policy would be extended nationwide.[76]

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 over-charging. But the question remains why this is not a matter left to resolution over time 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 the majority of the 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 issue is therefore before the courts, where cable previously lost but is trying again on the grounds of new circumstances,[77] and the Congress, where the broadcasters push for codification.

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 is 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 as to 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. And 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. And some local Public Utility Commisssions (PUCs) have sought to regulate cable.[78] The latter has in turn sought to block PUC regulation through preemptive FCC and Congressional action.[79] The two pending bills, S.66 and H.R. 4103, do preclude all

regulation of cable telecommunications sevices other than basic voice.[80]

Cable is surely right that there is a difference between it and the 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. And the divested Bell Operating Companies are caged: Under the Modified Final Judgment (MFJ) in the AT&T antitrust case, 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.[81] 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 oner 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 such publishing occurring to a substantial extent over common carrier facilities (telephone and

multi-channel cable), with rate regultion only of the former.

°New services requiring radio licensing will be allowed to pick their regulatory mode (broadcast, common carrier, private radio, hybrid), with only statutory requirements then applicable. The FCC will wait for mature development before itself considering rules (although then it may be politically infeasible to adopt rules for such an entrenched operation).

°In the broadcast field, maintenance of the public trustee concept will be fought out in the next decade in Congress, with progress in video only after deregulatory experience in radio. In the meantime, the FCC will continue to relax its own rules, consistent with the statute but with perennial litigation claiming inconsistent or arbitrary agency action.

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

°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."

Footnotes

[1] For an overview of the new video landscape, see 1984 Field Guide to the Electronic Media, Channels Magazine.

[2] See Broadcasting Magazine, Dec. 5, 1983, at 40.

[3] Memorandum Opinion and Order, Declaratory Ruling and Order, Earth Satellite Communication, Inc., FCC 83-526, Nov. 17, 1983, appeal pending, New York State Commisson on Cable TV v. FCC, Case Nos. 83-2190, 83-2196 (D.C. Cir.).

[4] See Direct Broadcast Satellite (DBS), 90 FCC 2d 676, 709 (1982), appeal pending sub nom. NAB v. FCC, Case No. 82-1926 (D.C. Cir.). See III, B infra.

[5] See Multichannel News, Sept. 19, 1983 at 3 (e.g., Century Federal, Inc. v. Palo Alto; Pacific West Cable Co. v. Sacramento; Preferred Communications v. Los Angeles).

[6] 47 U.S.C. 301, et seq.

[7] See Private Microwave Facilities, 86 FCC 2d 299 (1981); FCC 83-245 (1983).

[8] GTE Satellite Corp., 90 FCC 2d 1009 (1982), recon. denied, FCC 83-271 (1983); WARC Implementation, 54 Rad. Reg.

2d (P&F) 101 (1983), appeal pending, United States Satellite Broadcasting Co., Inc. v. FCC, Case No. 83-1692 (D.C. Cir.).

[9] Instructional Television Fixed Service (MDS Reallocation), 54 Rad. Reg. 2d (P&F) 107, 119-20 (1983).

[10] Teletext Transmission, 53 Rad. Reg. 2d (P&F) 1309 (1983); Low Power Television Service, 51 Rad. Reg. 2d (P&F) 476 (1982).

[11] Table of TV Channel Allotments, 83 FCC 2d 52 (1980).

[12] 9 KHz Channel Spacing, 46 Fed. Reg. 56214 (Nov. 16, 1981).

[13] Pub. L. 98-214, Dec 8, 1983.

[14] 53 Rad. Reg. 2d (P&F) 1101 (1983); FM Subsidiary Communications Authorizations, 53 Rad. Reg. 2d (P&F) 1519 (1983); FCC 83-364.

[15] See DBS, supra, 90 FCC 2d at 716-17; Teletext Transmission, 53 Rad. Reg. (P&F) 1309, 1327-28 (1983).

[16] AM Stereophonic Broadcasting, 51 Rad. Reg. 2d (P&F) 1 (1982).

[17] See Star Television, Inc. v. FCC, 416 2d 1086, 1089-95 (dissenting op. of J. Leventhal) (D.C. Cir. 1969).

[18] See Section 309(i) (3)(A), 47 U.S.C. 309(i) (3)(A).

[19] See Notice in CC Docket No. 83-1096.

[20] See Sec. 309(i)(3)(A), 47 U.S.C. 309 (i)(3)(A); H. Rept. 97-765, 97th Cong., 2d Sess., at 40-47 (1982).

[21] See John O. Robinson, Assignment of Radio Channels in the Multipoint Distribution Service by Auction, Proceedings of the Sixth Annual Telecommunications Policy Research Conference, Lexington Books, D.C. Heath, 1979, at 389-90.

[22] See Notice of Inquiry and Proposed Rule Making in CC Docket No. 80-116, FCC 80-141, 45 Fed. Reg. 29335, May 2, 1980.

[23] Notice of Proposed Rule Making, CC Docket No. 83-1096, FCC 83-460, at par. 30 (October 28, 1983).

[24] See H. Rept. No. 97-765, 97th Cong. 2d Sess., at 53.

[25] Moline Television Corp., 31 FCC 2d 263, 272 (1971).

[26] See, e.g., The New York Times, March 4, 1984, at F1.

[27] 98th Cong., 1st Sess. (1983).

[28] See Section 307(d) of the Communications Act, 47 U.S.C. 307(d).

[29] See 307(b), 315(a); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

[30] See Section 315(a).

[31] See 18 U.S.C. 1304, 1464; 47 U.S.C. 317; 509.

[32] See Sections 312(a)(7); 315(a).

[33] See Ascertainment of Community Problems, 57 FCC 2d 418 (1976); 47 C.F.R. Sec. 73.4010 (1982).

[34] See The New York Times v. Sullivan, 376 U.S. 254 (1964).

[35] See NARUC v. FCC, 525 F.2d 630, 640-42 (D.C. Cir. 1976).

[36] 47 U.S.C. 201, et seq.

[37] See Competitive Common Carrier Service, 52 Rad. Reg. 2d (P&F) 187, 189 (1982), see n. 78, infra.

[38] 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...." (Brief for FCC in Case No. 83-1692, at 8; see n. 8, supra). The brief further states (ibid) 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 case should thus afford further guidance as to this important legal issue. One judge at the oral argument "rapped FCC's non-regulatory view of DBS," stating: "You have something that looks like broadcasting, smells like broadcasting and tastes like broadcasting, and has all the benefits of broadcasting, but we're not going to treat it as broadcasting because Congress didn't know about it [when it passed Communications Act]?" (TV Digest, March 5, 1984). See also Remarks of Commissioner Henry Rivera before the American Law Institute

(ABA), Communications Law: The New Regulatory and Technological Framework, March 29, 1984.

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, 321 F.2d 359 (D.C. Cir. 1963, cert. denied, 375 U.S. 951 (1963), imposing carriage and non-duplication 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.

[39] 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 text, at 27-28. For further treatment of the many anomalies, see Botein in this work.

40 See Fourth Report and Order in Docket No. 21502, FCC 83-485, Nov. 16, 1983, at par. 32.

[41] See Third Report and Order, in Docket 21502, 90 FCC 2d 341 (1980). cf. Enforcing Sec. 312(a)(7), 68 FCC 2d 1079, 1093 (1978).

[42] See Red Lion, supra; NBC v. U.S., 319 U.S. 190 (1943).

[43] Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974).

[44] 395 U.S. at 392-94.

[45] 418 U.S. 256-58.

[46] FCC v. National Citizens Committee for Broadcasting, 436 U.S.775, 799-800 (1978).

[47] Detailed support for the above assertions is set out in testimony of Assistant Secretary Geller on H.R. 13015, before the House Communications Subcommittee, Sept.11, 1978, at 2-23.

[48] Id. at 22-31.

[49] Deregulation of Radio, 84 FCC 2d 968 (1981), aff'd in part, remanded in part, Office of Commuinication of the

United Church Of Christ v. FCC, 707 F. 2d 1413 (D.C. Cir. 1983).

[50] Notice of Proposed Rule Making in MM Docket 83-670, 48 Fed.Reg. 37239 (1983).

[51] Radio Broadcast Services: Revision of Application for Renewal of Licenses, 49 Rad. Reg. 2d (P&F) 740 (1981), aff'd, Black Citizens for a Fair Media v. FCC, F. 2d (D.C. Cir. 1983), pet. for cert. pending, Case No. 83-1498, Oct. Term, 1983.

[52] Notice of Proposed Rule Making in Gen. Docket 83-484.

[53] Notice of Proposed Rule Making in Gen. Docket 83-1009, 48 Fed. Reg. 49438 (1983).

[54] Teletext Transmission, supra, 53 Rad. Reg. 2d (P&F) at 1322-24.

[55] Section 3(o) of the Communications Act, 47 U.S.C. 153(o).

[56] Section 3(b) of the Act, 47 U.S.C. 153(b).

57 See, e.g., Midwest-Video Corp. v. FCC, 571 F.2d 1025, 1056 (8th Cir. 1978), aff'd on other grounds, 440 U.S. 689 (1979); Home Box Office,Inc. v. FCC, 567 F. 2d 9, 46 (D.C. Cir.) (per curiam), cert. denied, 434 U.S. 829 (1977). But see Community Communications Co. v. City of Boulder, 660 F.2d 1370 (10th Cir. 1981), cert. dismissed, 102 S. Ct. 2287 (1982); Omega Satellite Products Co. v. City of Indianapolis, 694 F.2d 119, 128 (7th Cir. 1982).

58 First Report and Order in Docket 18397, 20 FCC 2d 201,220 (1969).

59 Pub. L. No. 92-225, 86 Stat. 3 (1972); see Section 315(c), 47 U.S.C. 315(c).

60 Ibid.; Use of Broadcast and Cablecast Facilities by Candidates for Public Office, 34 FCC 2d 510, n. 2.

61 FCC Report to Sen. Goldwater, Cable Television and the Political Broadcasting Laws, Jan. 1981, at 24-26.

62 15 U.S.C. 1335 (1982).

63 See FCC v. Midwest Video Corp., supra.

64 See Boulder case, supra, 660 F. 2d at 1378.

[65] FCC v. National Citizens Committee for Broadcasting, supra, 436 U.S. at 795.

[66] Hymes v. Mayor of Oradell, 425 U.S. 610 (1976); NAACP v. Button, 371 U.S. 415 (1963); Boulder, supra, 660 F. 2d at 1379.

[67] See Berkshire Cablevision of Rhode Island, Inc. v. Burke, No. 82-0537 P (D.R.I., Sept. 15, 1983, upholding the constitutionality of access regulations promulgated by the Rhode Island Division of Public Utilites and Carriers); on appeal, state issues certified to Sup. Ct. of Rhode Island, Case No. 813-1800, 1st Cir., May 2, 1984. But see Shapiro et al. (1983).

[68] 438 U.S. 726 (1978).

[69] 413 U.S. 15 (1973). 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, 555 F. Supp. 1164 (D. Utah 1982).

[70] 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).

[71] See S.66, 98th Cong. 1st. Sess., at Sec. 613(d)(2).

[72] See H.R. 4103, Section 613(b)(1), (e).

[73] See Broadcasting Magazine, Nov. 21, 1983, at 88.

[74] See Notice of Proposed Rule Making, FCC MM Docket 83-331.

[75] First Report and Order in Docket Nos. 19554 and 18893, 52 FCC 2d 1 (1975); Brookhaven Cable TV, Inc. v. Kelley, 573 F.2d 765 (2d Cir. 1978), cert. denied, 441 U.S. 904 (1978); Memorandum Opinion and Order, FCC 83-525, November 15, 1983, ruling that state and local governments cannot regulate rates charged for tiered packages of advertiser-supported, satellite-delivered, cable programming.

[76] See Section 607(a), S.66; Section 633 of H.R. 4103.

[77] Quincy Cable TV, Inc. v. FCC, D.C. Cir., No. 83-1283; Black Hills Video Corp. v. FCC, 399 F.2d 65, 69 (8th Cir. 1968).

[78] Cox Cable Communications, Inc. v. Simpson, No. CV 83-L240 (D. Neb.).

[79] Pet. of Cox Cable Communications, Inc., FCC No. CCB DFD 83-1.

[80] See Section 607(g)(1), S.66; Sections 633, 634, H.R. 4103.

[81] See MFJ,II D; VIII C, U.S. v. Western Electric Co., Inc. and AT&T, August 24, 1982, 47 Fed. Reg. 7170, CCH Trade Reg. Rep. 1982-2 Trade Cases, 64,900.

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