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## Book Review of Cable Television and the FCC: A Crisis in Media Control

Jacob W. Mayer

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## BOOK REVIEWS

CABLE TELEVISION AND THE FCC: A CRISIS IN MEDIA CONTROL. By DON R. LE DUC. Philadelphia: Temple University Press, 1973. Pp. 289. \$10.00.

JACOB W. MAYER\*

No Homer has yet sung the Odyssey of the cable television industry's efforts to achieve full acceptance by the Federal Communications Commission (FCC), the broadcast industry, and the Congress. Perhaps because cable television is so recent a development that it defies final analysis, Professor Le Duc's attempt does not succeed; nevertheless, no future analyst will overlook this substantial contribution to the literature of the field.

As did many other components of the present television broadcast structure in the United States, cable television, formerly called community antenna television (CATV), evolved from the television freeze of 1948-1952.<sup>1</sup> Commercial television broadcast operation had begun in earnest after World War II and quickly had become extremely popular with the general public. Unfortunately, the engineering assumptions that had been the basis for selecting station locations soon proved too sanguine when operation began suffering from more interference between stations than had been anticipated. The Federal Communications Commission therefore imposed a freeze upon further station authorizations until additional experimentation could clarify the engineering problems, a process that ultimately consumed four years and led to adoption of the *Sixth Report and Order*<sup>2</sup> which is still the basis of television allocations.

During the prolonged freeze, the general public's interest in receiving television in unserved and underserved areas encouraged the development of a number of supplemental delivery systems, including boosters, translators, and CATV systems.<sup>3</sup> Early CATV's simply

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\* B.S., J.D., University of Kentucky; LL.M., George Washington University. Adjunct Professor of Law, Georgetown University Law Center, 1974-75.

1. See Botein, *Comparative Broadcast Licensing Procedures and the Rule of Law: A Fuller Investigation*, 6 GA. L. REV. 743, 750-52 (1972).

2. Amendment of Section 3.606 of the Commission's Rules and Regulations, Sixth Report and Order, 41 F.C.C. 148 (1952).

3. Boosters and translators are types of small rebroadcast stations. Cf. 47 C.F.R. pt. 74 (1974).

were antennas located at high elevations and connected by coaxial cable with the homes of subscribers willing to pay a fee for the service. CATV systems were welcomed by broadcasters who benefited from the expanded coverage of their signals and who expected that, with the expected lifting of the television freeze and consequent expansion of broadcast service, the CATV's gradually would be driven out of business.<sup>4</sup>

Following the freeze, however, CATV systems continued to prosper in outlying areas because of their ability to improve the quality of signals and, in some cases, to provide additional service. As the public demand for television service continued, CATV operators began to import additional signals from distant stations by using chains of microwave relay stations. This technological innovation had far-reaching implications for broadcasters; whereas CATV's previously had been little more than a superior form of antenna, they now threatened broadcast stations, which would have to compete with signals from distant stations.

The broadcasters perceived three different threats from the cable industry. Operators tended to allocate the then very limited number of channels to distant stations with the result that local stations were cut off from their local viewers.<sup>5</sup> Moreover, even if the local signal were carried on the cable, its audience might be diluted because its programs were duplicated by imported stations that viewers might prefer to watch. Finally, the public preference for imported signals might "fragment" the local market to the detriment of the local stations which otherwise would have a larger market share.<sup>6</sup>

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4. There was precedent for this expectation in that some antenna systems built in the 1920's to distribute radio signals had quickly gone bankrupt. Most of the exaggerated tales of CATV profitability stem from the period of the freeze when operators typically charged extremely high connection fees in order to recapture their capital investment as quickly as possible before new broadcast stations went on the air.

5. Early CATV systems had a capacity for only three to five television signals. Subsequent technical development allowing the carriage of additional signals has mooted the problems associated with preferential allocation by the CATV operators.

6. The offsetting consideration is that fragmentation also promotes the Commission's long-standing goal of program diversity. Protection of broadcasters from adverse economic impact is a delicate but important policy problem. Although the Commission has no obligation to protect broadcasters from loss *per se*, it cannot refuse to consider evidence of economic losses that might cause losses of program service to the public. *See, e.g., Carroll Broadcasting v. FCC*, 258 F.2d 440 (D.C. Cir. 1958). The problem is accentuated where CATV service might drive broadcast service out of an area since that service could not be replaced economically by CATV in areas of relatively low population density. Consequently, the ultimate nightmare

Professor Le Duc ably describes the resulting confrontations between the broadcast industry and CATV operators, and it is unlikely that future researchers will wish to expand upon his work. In brief, broadcast opposition to further CATV development included efforts to secure protective legislation, intervention by the Federal Communications Commission, and protection by the courts on various suggested theories such as copyright. By the end of the 1950's the CATV industry had rebuffed these challenges; Congress had not acted, the Federal Communications Commission had not intervened, and no judicial decisions favorable to the broadcasters had been obtained. The seemingly decisive victories of the CATV industry could not be sustained, however.

Instead, after legislative compromises had been rejected by the CATV industry, the Federal Communications Commission was persuaded to adopt an increasingly interventionist role. In 1959, the Commission had rejected the assertion of jurisdiction over CATV's.<sup>7</sup> This policy weakened, however, when the Commission was persuaded to use its regulatory power over microwave relay stations to protect television broadcast stations.<sup>8</sup> By the beginning of 1966 the Commission reacted to threatened CATV expansion in major television markets by adopting the *Second Report and Order*<sup>9</sup> in which it asserted the right to regulate all CATV systems. Broadly speaking, CATV systems were required to carry all local television signals and to delete imported duplicative programs broadcast on the same day. CATV expansion into smaller television markets was allowed on the reasoning that stations in such markets would be network affiliates and therefore largely protected by the nonduplication rules; expansion into the nation's 100 largest television markets, however, which contain approximately 90 percent of the population, was checked. CATV operators who wished to carry imported signals into the latter markets were required either to demonstrate in hearing that carriage of distant signals would not deter development of UHF television<sup>10</sup> or to obtain a waiver of the hearing requirement.<sup>11</sup> Although

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is the situation in which CATV has destroyed the broadcast structure but cannot replace it.

7. Inquiry into the Impact of Community Antenna Systems, TV Translators, TV "Satellite" Stations, and TV "Repeaters" on the Orderly Development of Television Broadcasting, 26 F.C.C. 403, 424 (1959).

8. See *Carter Mountain Transmission v. FCC*, 321 F.2d 359 (D.C. Cir. 1963).

9. Docket Nos. 14895, 15233, and 15971, *Second Report and Order*, 2 F.C.C.2d 725 (1966).

10. The UHF stations are considered more vulnerable to CATV competition since the fact that they typically are not affiliated with a network would reduce the benefit to them of the

implementation of the new rules initially bogged down in the Commission's Broadcast Bureau, a "CATV Task Force" was formed by the Commission and in operation by October.

Professor Le Duc completely discounts the significance of this group both on the basis of its size and on the ground that it was largely ineffective in disposing of requests for operation in the major markets. He asserts that "the FCC by 1968 was buried under a backlog of more than two hundred applications. Its entire list of top-100 approvals consisted of four systems . . . ."<sup>12</sup> Based on his perception that the Commission did nothing to deal with its CATV backlog, Professor Le Duc apparently accepts the thesis that the *Second Report and Order* was never more than a concealed freeze. He thus adopts the frequent charge of the CATV industry that there is a structural bias in the Commission against the CATV industry.<sup>13</sup>

Professor Le Duc's facts in this area are erroneous, however, and his conclusion therefore suspect. While the CATV Task Force's resources never matched those of the Broadcast Bureau, it was substantially more productive than Professor Le Duc acknowledges,<sup>14</sup> and it ultimately was accepted by the CATV industry on this basis.<sup>15</sup> Consequently, a more accurate appraisal of the Task Force, and of the Commission's motives in this area, would seem to be that it was intended to present the CATV industry's point of view before the Commission and that it took reasonable steps to control its

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nonduplication rule.

11. The Commission always retains the right to waive its rules. 47 C.F.R. § 1.3 (1974).

12. D. LE DUC, *CABLE TELEVISION AND THE FCC* 158 (1973).

13. *Id.* at 21.

14. Regretably, several years after the fact, it is impossible to generate accurate figures in this area. An indication that Professor Le Duc has understated the Task Force's production is apparent from the first two FCC reporter volumes that would reflect the Task Force's work. Just a cursory scanning reveals a number of actions, including several affecting major markets: Mission Cable TV, Inc., 5 F.C.C.2d 575 (1966) (waiver granted to add signal on existing system); Athens TV Cable Co., Inc., 5 F.C.C.2d 577 (1966) (waiver granted to add signal on new system); Greater Television, 5 F.C.C.2d 699 (1966) (waiver granted for changes on existing system); Stephen Vaughan & Assoc., 6 F.C.C.2d 291 (1966) (partial waiver to allow interim operation); Gateway Cable TV, Inc., 6 F.C.C.2d 412 (1967) (waiver to add signal on new system); Long Island Cablevision Corp., 6 F.C.C.2d 653 (1967) (waivers granted for one new system and two existing systems); Unicable, Inc., 6 F.C.C.2d 771 (1967) (hearing order which includes waiver for one new system and one existing system); American Television Relay, Inc., 6 F.C.C.2d 837 (1967) (waiver for new system). Inasmuch as the most recent of these actions was taken in February 1967, Professor Le Duc's estimate of major market production for the 1966-1968 period appears substantially short of reality.

15. *Sol Schildhouse and His CATV Task Force*, TV COMMUNICATIONS, February 1967, at 32.

backlog. The very existence of the Task Force also exerted some pressure on the broadcast industry to negotiate.

Further expansion of the Commission's involvement in the cable industry was delayed until the Supreme Court affirmed the Commission's jurisdiction in June 1968.<sup>16</sup> Shortly thereafter, the Supreme Court also held that CATV signal carriage did not constitute a "performance" within the meaning of the Copyright Act.<sup>17</sup> The effect of these decisions was to recognize the Commission's regulatory jurisdiction just as the broadcast industry lost its most likely source of leverage, copyright protection, for future negotiations. The Commission's response, late in 1968, was largely to defer further action in the cable field, pending resolution of some extremely wide-ranging rulemaking inquiries.<sup>18</sup> Eventually, a compromise between the cable and the broadcast industries was embodied in the *Cable Television Report and Order* of February 1972.<sup>19</sup> Professor Le Duc provides an interesting case study of negotiations between industries by fully describing the various stages of the rulemaking. It is difficult to tell whether the broadcast-cable controversy has been resolved finally, since the inflation of 1973-74 has largely inhibited the development of new cable facilities designed for operation under the new rules.

The strong points of Professor Le Duc's work lie in its wide-ranging collection of reference sources and an attractive narrative style which well describes a frequently chaotic situation. Its great weakness, however, is its effort to document a thesis, that structural bias in the Federal Communications Commission prevented quick response to the regulatory demands of new technology, which does not seem supported by the record.

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16. *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968).

17. *Fortnightly Corp. v. United Artists*, 392 U.S. 390 (1968).

18. Notice of Proposed Rule Making and Notice of Inquiry in Docket No. 18397, 5 F.C.C.2d 417 (1968).

19. Docket Nos. 18397, 18397-A, 18373, 18416, 18892, and 18894, *Cable Television Report and Order*, 36 F.C.C.2d 143 (1972).