

the Communications Act of 1934 which the Commission believes constitute authority for the authorization of subscription television service.

On February 6, 1958, the House Committee on Interstate and Foreign Commerce adopted a resolution expressing the sense of the Committee that the Commission could not authorize subscription television absent amendment of the Communications Act of 1934. A second resolution, of March 24, 1959, stated the Committee's view that the earlier resolution should not preclude the grant of an authorization for trial or experimental operations, under the terms of the Commission's *Third Report* in Docket No. 11279, 26 F.C.C. 265 (1959).

On February 23, 1961 the Commission granted an application of Hartford Phonevision Company for an authorization to conduct an experimental subscription television operation over station WHCT, Hartford, Connecticut. *Hartford Phonevision Co.*, 30 F.C.C. 301. This decision was made after hearing, and upon the basis of the earlier *Third Report* in Docket No. 11279. Upon appeal to the United States Court of Appeals for the District of Columbia Circuit, the Commission's action was challenged both with respect to its jurisdiction to permit any subscription television service and the particular terms of the Hartford trial. The first of these issues was defended by the Commission upon the basis of the considerations set forth in the Commission's Memorandum of Law of July 3, 1957. This authority was sustained by the Court of Appeals. *Connecticut Committee Against Pay TV v. F.C.C.*, 301 F.2d 835 (1962), *cert. denied*, 371 U.S. 816.

It has been suggested that the decision merely upheld authority to grant an experimental license, but I believe that analysis of the opinion demonstrates its approval of the general authority of the Commission to authorize subscription TV. The Court itself characterized the contentions as including a broad argument that the Commission lacked statutory power to authorize any television broadcast system which required the direct payment of fees by the public. Thus, it stated (301 F.2d at 837) that the first issue was whether "the Commission lacks statutory power to authorize a television broadcast system which requires the direct payment of fees to the public." On this issue, it stated (301 F.2d at 837):

"The Federal Communications Commission was established in 1934 under a typically broad grant of power by which the Commission was authorized by Congress, subject to limitations not pertinent here, to issue a broadcasting station license to any applicant 'if public convenience, interest and necessity will be served thereby.' 47 U.S.C.A. §307(a). Additionally, Congress specifically mandated the Commission by Sec. 303(g) of the Communications Act, to 'study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest.' (Emphasis added.) The plain language of the statute thus makes clear that Congress placed an affirmative duty on the Commission to experiment with and develop the most desirable deployment and utilization of the nation's communications facilities. The Supreme Court has said that 'where the language of an enactment is clear, and construction according to its terms does not lead to absurd or impractical consequences, the words employed are to be taken as the final expression of the meaning intended.' *United States v. Missouri Pac. R.R. Co.*, 278 U.S. 269, 278, 49 S. Ct. 133, 136, 73 L. Ed. 322 (1929)."

The opinion goes on to refer to "the distinguishing characteristic" of the authorization as the experimental nature of the grant, in response to the appellant's arguments that the grant was made with inadequate knowledge of the programming plans of WHCT and that it had not been shown that these plans would serve the public interest. And, noting its assumption that the Commission would carefully scrutinize the operation and oversee the form which programming would take under the subscription system, the Court added: "Surely its power to see that this area of the public domain is used in the public interest is not less for 'paid' television than for the existing system of so-called 'free' television." (301 F.2d at 838.) At no point in its opinion does the Court indicate that the authority found in the statute is limited to the grant of an experimental license. Thus, the Commission's position is, I believe, fully supported by the opinion of the Court of Appeals.

Furthermore, when certiorari by the Supreme Court was sought by the appellant, the Solicitor General, on behalf of the Federal Communications Commission, advised the Supreme Court that the Court of Appeals' decision was not limited to the question of authorization of an experimental operation, since basic jurisdiction must be present whether the authorization be for a trial or permanent operation. A copy of the opposition to certiorari is enclosed as attachment B. See footnote 8 therein.