

In sum, I believe that the Commission's power to authorize subscription television operations under the broad provisions of the Communications Act of 1934 has been judicially confirmed. I hope that this letter satisfactorily explains the position of the Commission.

Sincerely yours,

ROSEL H. HYDE, *Chairman.*

ATTACHMENT A—MEMORANDUM OF LAW CONCERNING AUTHORITY OF THE FEDERAL COMMUNICATIONS COMMISSION TO AUTHORIZE SUBSCRIPTION TELEVISION OPERATIONS

The several proposals for subscription television on which the Federal Communications Commission is conducting a rule making proceeding (Docket No. 11279) raise the threshold question of whether the Commission has the authority under the Communications Act of 1934, as amended, to authorize the use of radio frequencies for a subscription television service.

For the purposes of this Memorandum of Law the term "subscription television" is used to describe the broadcast or aural and visual portions of television programs in scrambled or encoded form which cannot be received in intelligible form except by the use of decoding devices attached to the television receiver and the payment of a charge for the decoding process.

THE STATUTE

The Communications Act of 1934, as amended, like the Federal Radio Act of 1927, contains neither express authorization nor express prohibition of the licensing of radio frequencies by the regulatory body for a subscription service.

The Commission's general powers to authorize the use of the radio spectrum by broadcast station licensees are found principally in Sections 301, 303 and 307(a) of the Communications Act. The underscored portions of the following excerpts appear to be relevant to the jurisdictional question under consideration in this memorandum.

(Italic is supplied).

Section 301 states in relevant part: "It is the purpose of this Act, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmissions: and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority".

Section 303, in relevant part, empowers and directs the Commission "as public convenience, interest, or necessity requires" to:

- (a) *Classify radio stations;*
- (b) *Prescribe the nature of the service to be rendered by each class of licensed stations and each station within any class;*
- (c) *Assign bands of frequencies to the various classes of stations, and assign frequencies for each individual station and determine the power which each station shall use and the time during which it may operate;*
- (d) *Determine the location of classes of stations or individual stations;*
- (e) *Regulate the kind of apparatus to be used with respect to its external effects and the purity and sharpness of the emissions from each station and from the apparatus therein;*
- (f) *Make such regulations not inconsistent with law as may deem necessary to prevent interference between stations and to carry out the provisions of this Act . . .*
- (g) *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.*

Section 307(a) provides: *The Commission, if public convenience, interest, or necessity will be served thereby subject to the limitations of this Act, shall grant to any applicant therefor a station license provided for by this Act.*"

The broadcast licensing powers of the Commission deriving from the foregoing excerpts from the Communications Act are qualified in certain respects by specific limitations legislated in express provisions of the law. For example, Section 310(a) provides, in substance, that station licenses shall not be granted to or held by aliens, foreign governments, or corporations organized under the law of any foreign government. Section 311 prohibits the grant of a station license to any person whose license has been revoked by a Court under Section 303 relating to application of anti-trust laws to Commission licensees. Section 315 lays down