

By the time the Federal Communications Act of 1934 was enacted, there had been no change in the universal practice of financing broadcast operations by selling time to advertisers, a fact which presumably explains the lack of attention to the question of subscription broadcasting during the debates on the new statute. Since 1934, a number of Bills have been introduced in Congress, including H.R. 586, introduced during the current session by Representative Celler of New York, which would operate to prohibit authorization of broadcast frequencies for subscription television. It is understood that none of these Bills have been reported out of Committee. Their introduction appears to reflect an assumption on the part of the sponsors that in the absence of some such specific prohibition, the Commission is not barred under the provisions of the present statute from authorizing subscription television operations, provided of course the basic requirement of a finding that subscription television service would be in the public interest, is met.

CLASSIFICATION OF SUBSCRIPTION TELEVISION

The Radio Act of 1927, contained no definition of broadcasting. The present Act, in Section 3(o) defines "Broadcasting" as "the dissemination of radio communications intended to be received by the public, directly or by the intermediary of relay stations." Section 3(h) of the Act defines "common carrier" or "carrier" as "any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this Act; *but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.*" (italics supplied) Thus, under the statute, broadcasting and common carrier services are mutually exclusive classifications.

A number of parties to the subscription television proceeding (Docket 11279) have submitted contradictory views concerning the question of whether subscription television is properly classifiable as a broadcast service, a common carrier service or some other kind of service not specifically defined in the Act. The various views on this question are not discussed in this Memorandum, the scope of which is limited to the question of whether the Commission has jurisdiction to authorize subscription television. It is well established that the Commission has the power to authorize the use of broadcast frequencies for non-broadcast radio services. Thus, the question of whether subscription television falls within or outside the scope of "broadcasting" as defined in Section 3(o) of the Act is not controlling on the question of Commission jurisdiction. An example is furnished by the Commission's action authorizing FM stations under stated conditions to render what is called a functional music service which is primarily non-broadcast in nature and which is furnished to subscribers under contracts with FM stations calling for the payment of a charge for the service.

The question of the possible classification of subscription television as "broadcasting" shall be examined not only in the light of the definition in section 3(o), but also in relation to the implications deriving from other sections of the Act relating to broadcasting, including section 315, 317, 325, 326 and 605. A brief statement of the contents of these sections, with the exception of section 605, is set out on page 2 of this memorandum. Section 605 excludes broadcast communications from the general prohibition of unauthorized publication of interstate or foreign communications by wire or radio.

In its Notice of Further Proceedings in the subscription television docket the Commission stated:

"We leave for future determination the related legal questions of whether subscription television would be properly classifiable as "broadcasting" within the meaning of Section 3(o) of the Communications Act or whether it may be classifiable as some other types of services. Nor, in view of the steps contemplated in this Further Notice, it is necessary or desirable that we endeavor to reach final conclusions at this stage concerning the proper classification of subscription television. While we recognize the importance of settling this question, we believe that it would be premature to attempt to decide it until we have additional information concerning the manner in which subscription television, if authorized, would operate in actual practice."

Adopted: July 3, 1957.