

present system of broadcasting, the Commission proposes to create a new form of broadcasting. This act of the Commission is an admission of its own inadequacy. Rather than face up to the issues, once again in its characteristic fashion it has avoided them. Instead of improving free television it is merely creating an alternative medium without any considered forethought, without any direction, and without the faintest guarantee or assurance that this new gimmick will serve the public interest. This is regulatory bankruptcy.

What basis has the Commission established for its latest panacea to right the wrongs of commercial broadcasting? What thorough studies has it made during all these years which clearly point to the direction it now proposes to take? I have reviewed the Commission's recently proposed fourth order and report and its accompanying proposed regulations for subscription TV, and can see no logical or compelling reasons for the Commission's action. From the time it asserted its dubious authority, the Commission's reasoning has been fraught with contradictions, vagaries, and inaccuracies which cannot go unchallenged.

By what specific statutory authority does the Commission find that it has the power to license non-experimental subscription television stations to use a portion of the public domain? In my opinion and in the opinion of many legal authorities in this field it has no such right. It is true that from time to time the Commission has written to Members of Congress with regard to its statutory authority to permit subscription television. It has not received that authority. In fact, resolutions were adopted by the House Interstate and Foreign Commerce Committee in 1958 and 1959 requesting the Commission not to authorize subscription TV on a permanent basis without appropriate legislative action. The Congress has not amended the Federal Communications Act to permit subscription television. Nevertheless, the Commission has attempted to invent a jurisdictional basis and thereby to thwart the will of Congress.

The Commission hangs its hat on Sections 301 and 303 of the Communications Act for authority. A careful examination of Section 301 reveals that it is merely a general purposes provision. It does not give any authority whatsoever to the Commission to act. That authority must be found in the appropriate provisions of the Communications Act which specifically delegate to the Commission its rights and its power.

These are enumerated in Section 303. If the Commission relies upon Section 303(g) which provides "for the experimental use of frequencies and generally encourages the larger and more effective use of radio in the public interest," then it is clearly erroneous to build upon that provision by permitting *non-experimental*, permanent type licenses for pay TV. The rest of the jurisdictional argument which the Commission has proffered concerns itself, curiously enough, with the express prohibitions relating to broadcast licensees, namely Sections 315, 317, 325 (a) and (b) and 326. Simply stated, the Commission cannot claim statutory authority to grant these licenses on other than an experimental basis because the statute does not give the Commission that authority.

Does the Commission now rely upon the decision in *Connecticut Committee Against Pay Television v. Federal Communications Commission* as authority to license a subscription television station on a non-experimental, permanent type basis? Nothing in that decision grants the Commission such authority. The decision is specifically based on the obvious power of the Commission to grant an experimental license.

Let us make for the moment the unjustified assumption that the Commission does have the jurisdictional authority to grant a non-experimental subscription television station a broadcast license. Has the Commission forgotten that all its license grants must be "in the public interest"? How can the Hartford experiment justify subscription television as an activity "in the public interest"?

If the Hartford experiment proved anything, it was that there is no extensive public demand for subscription TV as presently conceived. To begin with, the Commission decided that the best kind of an experiment for subscription TV would be one taking place in many markets so that the findings would enable the Commission to make valid projections based upon a broad sampling. In 1957 in its first order and report on subscription television, the Commission made 20 market areas available for the operation of experimental subscription television stations. However, so little interest was generated that the experiment was made in only a single market area—an area, incidentally, which is not in the top 10 major TV markets of the country.

The Hartford trial actually was supposed to begin operations after 2,000 subscribers had been obtained. Its proponents, including the Commission, looked forward to installation of some 10,000 decoders the first year and eventually 50,000