

financial relationship between a listener and a broadcast licensee. The relationship is between a listener and the CATV operator, who charges the listener for the use of wire lines which he has constructed so as to bring the programming presented by the licensee to the public.⁵ But a licensed pay television system permits the licensee to directly charge for the use of public facilities (the airwaves) without any governmental regulation of those rates,⁶ while at the same time depriving the public of the free service it previously enjoyed over the air.

The Commission reasoned, in its First Report, that, although the Communications Act of 1934 makes no specific or direct delegation of power to authorize such a major change in the concept of American broadcasting and the regulatory scheme surrounding it, nevertheless, it found that power in the rather broad language of the Communications Act, particularly Sections 301 and 303 of the Act, which gives it broad powers over the uses of radio frequencies. And it is true, of course, that the Communications Act gives the Commission broad regulatory powers over the broadcast field. It is also true, however, and the Courts have so indicated, that these powers are not all encompassing and that matters regarding the manner in which stations derive their revenues as well as other internal business affairs were never conceived as being within the Commission's regulatory powers. See *F.C.C. v. Sanders Bros. Radio Station*, 309 U.S. 47. There is no provision in the Act which would authorize the Commission to permanently establish a system so radically different in nature from the present American free broadcasting system, and with such a potentially destructive effect on that system. Even the Commission, itself, has consistently recognized the destructive potential which the institution of a permanent pay television system could have for gutting the free system of its ability to fulfill its function of informing and entertaining the American public.

The need for additional legislation if pay television is to be authorized is made clear upon consideration of the regulatory scheme now included in the Communications Act. That scheme was established in the absence of a direct financial relationship between the individual listener and the broadcast station. This scheme is totally inadequate to cope with the introduction of a direct financial relationship. Thus, if rates are to be charged the public for the privilege of using public facilities (the airwaves), the question arises as to whether and how these rates must be regulated. We are unaware of any instance where the government has allowed a private entrepreneur to use public facilities, and make his profit by charging members of the public for the right to use such public facility without at the very least, regulating the rates to be charged. Yet the Commission would follow this course with respect to the public airwaves without ever resolving the question of whether the present Act provides it with the necessary rate regulation authority to protect the public against gouging. And, of course, it should be noted that the proponents of pay television have continually urged that the Commission does *not* have the power to regulate rates. The pay TV proponents desire a free and unregulated ride at public expense!

The need for additional legislation is made clear by the Report of the Commission's Subscription Television Committee. The Committee recognized that the free system must be protected, if for no other reason than to keep faith with the millions of the American public who have invested billions of dollars into the purchase of television sets on the implicit representation by the Commission and by the Congress that thereafter they could receive the benefits of the public airwaves on a free basis.

The Committee fully recognized in its Report the most obvious destructive effect which a pay television system would have upon the free service: that it would siphon popular programs and talent from the free service to the pay service, and render such programs unavailable except for the payment of a per program fee. In order to prevent this from happening, the Committee proposes a series of restrictions upon the age, type and content of the programs which the Commission will allow to be shown over the pay television service,

⁵ It should be noted, of course, that, as was pointed out above, the CATV operator may, himself, originate programming, charging the public for it. Under these circumstances, CATV becomes quite similar to pay television. It is significant, however, that the Commission has specifically refused to hold that origination of programming by CATV systems on a permanent basis is in the public interest and has sought guidance from Congress on this matter. See *Second Report* in Docket No. 14895 at Par. 153(ii), 2 F.C.C. 2d at 787.

⁶ The Supreme Court appears to have indicated in *F.C.C. v. Sanders Bros. Radio Station*, 309 U.S. 470, 474, that rate regulation of broadcasting is not encompassed within the present Act.