

issue can be resolved by requiring "a showing by the applicant of potential for sustained operation". (*Notice*, para. 17) While the "sustained operation" standard is now applied by the Commission to applicants for free television construction permits, the public, of course, is not there required to expend any money (other than in connection with television sets themselves) in reliance upon such "sustained operation". We assume it was the prospective inducement of additional consumer expenditures that led the Commission to request, in its First Report, data on the degree of acceptance and support by the public of a subscription service.

Petitioners state in their Comments that Hartford accomplished "what it was designed to do; namely, the gaining of empirical knowledge and the obtaining of significant and reliable data which would serve as a basis for appraising the potentials of subscription television in other types of circumstances. The experience so gained and the demonstrable facts so developed offer for the first time the parameters for reasonable business projections of the potentials of subscription television to provide additional economic and program resources which would facilitate significant increases in the number of television services available to the public." (Petitioners' Comments, p. 25)

Hartford demonstrated for whatever reasons an inability on the part of a subscription television system to obtain more than 1% of the net weekly circulation of the market. Even conceding that this figure can be improved upon in a nationwide subscription television operation, we doubt that there is any empirical data to support Petitioners' projections of a 10% or even 20% market penetration for subscription television.

In sum we can see no grounds for the Commission to conclude that economic viability of subscription television has been established by its proponents.

VI. WHAT, IF ANY, ROLE SHOULD THE FEDERAL GOVERNMENT PLAY WITH REGARD TO SUBSCRIPTION TELEVISION BY WIRE OR CABLE, NOT USING THE BROADCAST SPECTRUM?

By its Notice of Inquiry the Commission for the first time has enlarged this proceeding to include an inquiry into subscription television transmitted by wire or cable.

We do not believe that the Commission has jurisdiction over wired subscription television. An exercise by the Commission of purported regulatory authority in this area would in our view go beyond any previous assertion of its authority. We argued in our comments in the CATV proceeding, Docket No. 15971 that:

"The form of regulation which the Commission attempts to adopt over CATV systems is not based upon a licensing structure. The Commission would apply a regulatory scheme to non-licensees under a statutory structure designed for licensees. This is unique in Commission regulation. The Commission has never asserted that its jurisdiction can reach the networks, or other program producers, directly, and without reference to their status as station licensees. The hearings that resulted in the passage of Section 508 of the Communications Act, and in the all-channel receiver legislation, furnish persuasive legislative history establishing that, absent specific statutory grant of authority over the persons affected, only Commission licensees are subject to regulatory authority—under reasonable standards set by the Commission and derived from the Act."

While the Commission ultimately did assert jurisdiction over community antenna television systems, its Jurisdictional Memorandum made clear that in so doing an all important element was the fact that television stations' signals were extended by CATV systems beyond the area or zone to be served by the originating station, a factor not involved here.

Even if we believed that the Commission does have jurisdiction to regulate wired subscription television, we would oppose such regulation. This is not because we think wired subscription television would represent a beneficial supplement to free television. On the contrary, we believe that many of the adverse effects resulting from the authorization of an over-the-air subscription television service could also be presented by wired subscription television.

Yet, the fact that wired subscription television does not involve the utilization of scarce spectrum space should convince the Commission that, given our pluralistic society, it best not regulate wired subscription television. For again, as we stated in our CATV comments:

"Over the years, CBS has emphasized the basic nature of American broadcasting as a system operating in the context of free competitive enterprise. In general, historically CBS has urged that, except for such areas as technical interference or direct impingement on the exercise of licensee responsibility, the Commission