SUBSCRIPTION TELEVISION

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HEARINGS

BEFORE THE

SUBCOMMITTEE ON COMMUNICATIONS AND POWER

OF THE

COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE

HOUSE OF REPRESENTATIVES

NINETIETH CONGRESS

FIRST SESSION

ON

H.R. 12435

A BILL TO AMEND THE COMMUNICATIONS ACT OF 1934 SO AS TO PROHIBIT THE GRANTING OF AUTHORITY TO BROADCAST PAY TELEVISION PROGRAMS

OCTOBER 9, 10, 11, 12, 13, AND 16, 1967

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SUBSCRIPTION TELEVISION

MONDAY, OCTOBER 9, 1967

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COMMUNICATIONS AND POWER,
COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
Washington, D.C.

The subcommittee met at 10 a.m., pursuant to notice, in room 2123, Rayburn House Office Building, Hon. Torbert H. Macdonald (chairman of the subcommittee) presiding.

Mr. MACDONALD. The hearing will come to order.

The hearing this morning is on H.R. 12435 dealing with subscription television. I think that under the circumstances, because of some of the misapprehensions that I have heard circulated, perhaps at the outset I would like to briefly review the history of subscription television and our interest as a committee in it.

As all of us know, the Federal Communications Commission first authorized experimentation with over-the-air subscription television in 1950. Early experiments were conducted in New York City, Chicago, and Los Angeles.

Subsequently, a much broader experiment was undertaken beginning in 1962 in Hartford, Conn. I also know, although it is not here on the slip, that there was some experiment held in a suburb outside of Toronto, Canada, I believe.

The experiment in Hartford has recently been concluded. Since the conclusion of the Hartford experiment the Federal Communications Commission has proposed an order establishing certain rules to regulate the operation of subscription television throughout the country.

These hearings today are not concerned with the content of that proposed order and the regulations which the Commission now has under study. That proceeding involves the substance of the form that subscription pay regulations should take. We are not concerned with those in these hearings but what we are concerned with are more basic questions.

Namely, should Congress authorize subscription television? Should Congress prohibit subscription television? Will subscription television serve the public interest? These hearings, therefore, are held for two basic purposes.

First, Congress has delegated to this committee the responsibility to oversee the operations of certain independent regulatory agencies and to make certain that each is acting within the scope of its statutory authority.

As we on the committee so well know and most of you in the room are well aware, those agencies were created by Congress and Congress

delegated to them power within prescribed limits to regulate certain industries.

When it created these agencies Congress established certain criteria and standards which are to govern the activities of those agencies.

In addition, Congress has from time to time established policies which are to be executed by those agencies.

This committee regularly reviews the activities of the Federal Communications Commission to ascertain the manner in which this agency is carrying out its delegated responsibilities and whether its actions are within the scope of its statutory purview.

Second, these hearings are intended as an initial step to thoroughly explore all the ramifications of subscription television. We want to learn specifically what subscription television encompasses, what purposes it serves, what problems it can create, and whether it is indeed necessary.

Then we must thoroughly explore the effects that the existence or nonexistence of subscription television will have upon existing UHF and VHF television.

How is subscription television affected by and how will it affect community antenna television systems? As everyone in this room knows, only 2 weeks ago the House after passage by this committee, passed the Public Broadcasting Act of 1967. Therefore, we are now committed to the expenditure of significant sums of money for the promotion of high quality, locally oriented programs.

How will the educational broadcasting system be affected by subscription television. Several of the witnesses I hope will be members of the Federal Communications Commission. I want to assure them at the outset that this committee does not intend to interrogate them respecting the particulars of the rulemaking proceeding which is presently under consideration by the Commission.

We want among other things to inform ourselves of the basic reasons underlying the need, if any, for a subscription television system, and whether the statutory authority for Commission action in this field is adequate.

We should like to ascertain in these hearings the extent to which authorization of subscription television on a nonexperimental basis will diminish the amount of spectrum space now available for other uses.

We should also like to find out if any such diminution is necessary in the public interest.

Congressman Dingell, a distinguished member of our full committee, has introduced a bill, H.R. 12435, to amend the Communications Act by providing that nothing therein shall be held to empower the Commission to authorize any person to engage in the broadcasting of pay television programs.

(The bill, H.R. 12435, follows:)

[H.R. 12435, 90th Cong., first sess.]

A BILL To amend the Communications Act of 1934 so as to prohibit the granting of authority to broadcast pay television programs

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 3 of the Communications Act of

1934 (47 U.S.C. 153) is amended by adding at the end thereof the following new paragraph:

"(hh) 'Pay television program' means any television program intended to be received by members of the public only upon the payment by such members of a charge, fee, or other form of direct compensation."

SEC. 2. Section 303 of the Communications Act of 1934 (47 U.S.C. 303) is amended by adding at the end thereof the following: "Nothing in this Act shall be held to empower the Commission to authorize any person to engage in the broadcasting of pay television programs."

Mr. MACDONALD. With that in mind we certainly welcome the Chairman of the Federal Communications Commission, our first witness of the morning, Chairman Rosel H. Hyde.

Will you please come before us, Mr. Chairman? It is very nice to see you again.

STATEMENT OF HON. ROSEL H. HYDE, CHAIRMAN, FEDERAL COMMUNICATIONS COMMISSION

Mr. HYDE. Good morning. It is a pleasure to be here.

As Chairman of the Federal Communications Commission I appear today in response to the committee's invitation to discuss the background and current status of the Commission's subscription television proceeding, docket No. 11279.

Beginning in 1952, petitions were filed with the Commission requesting authorization to initiate subscription television. In February 1955, the Commission instituted a rulemaking proceeding inviting comments on whether the Commission should authorize television stations to transmit programs paid for directly on a subscription basis and related questions of law, fact, and public interest considerations associated with such a proposal.

Copies of the notice instituting that proceeding and all other documents mentioned in my statement which reflect action taken by the Commission are available for inclusion in the record at appropriate points should you so desire. I will ask members of the staff to show the various documents to committee counsel.

Among those filing comments were the three television networks; the National Association of Broadcasters; the Joint Committee on Toll TV (a group of motion picture theater interests opposed to subscription television); Jerrold Electronics Corp.; Zenith Radio Corp. and Teco, Inc.; Skiatron Electronics & Television Corp. and Skiatron TV, Inc.; and International Telemeter Corp.

Comments were also filed by UHF and VHF stations, educational institutions, and various organizations. Over 25,000 members of the public submitted letters pro and con.

After reviewing the comments filed, the Commission issued a notice of further proceedings in which it stated "that the Commission has the statutory authority to authorize the use of television broadcast frequencies for subscription television operations if it finds that it would be in the public interest to do so."

The notice also pointed out that although the comments were useful, they did not provide an adequate record upon which a decision could be reached as to whether the proposal to authorize subscription television should be either granted or denied.

The Commission found that trial operations would be indispensable in arriving at soundly based decisions and invited comments on a series of 11 questions designed to aid it in deciding the conditions under which trial operations should take place.

Appropriate congressional committees were kept fully apprised of all these developments. Congressman Harris, then chairman of the House Interstate and Foreign Commerce Committee, requested and we supplied him with a memorandum of law with respect to the Commission's jurisdiction to authorize subscription television operations.

In October 1957, the Commission issued its first report announcing the conditions under which it would consider applications for trial subscription television authorizations.

Among the conditions to be imposed on any trial operations authorized were:

(1) Any system could be tested in up to three markets.

(2) More than one system could be tried out in a single market.

(3) Trials were limited to stations in cities with at least four commercial television services (including the applicant's station).

(4) Trial authorizations were to be for 3 years with the possibility of renewal.

The first report also stated that, when sufficient data was available from the trials, the Commission would conduct a public hearing on such data and on the other outstanding issues. It indicated that because of the need for careful review of all aspects of the applications for trial operations, it would not be practicable to act on them before March 1958.

In January 1958, the House Interstate and Foreign Commerce Committee conducted 6 days of hearings on the subject. On February 6, 1958, that committee adopted a resolution expressing the sense of the committee that the FCC should not grant authorizations for subscription television operations as contemplated in the first report unless and until the Communications Act of 1934 is amended so as to specifically empower the Commission to grant such authorizations.

A number of bills were also introduced in both Houses of Congress which would restrict or prohibit authorization by the Commission of the broadcast of programs for which a direct charge is imposed on the viewers.

In these circumstances, and in order to give the Congress opportunity to act, the Commission announced in a second report of February 26, 1958, that action on applications for authorizations to conduct trial subscription television operations would be deferred until at least thirty days following the adjournment of the 85th Congress.

After further consultation with Chairman Harris, the Commission deferred the processing of such applications until the adjournment of the first session of the 86th Congress.

No congressional hearings were held on the bills then pending or on similar bills to prohibit subscription television which have been introduced in each Congress since 1958.

In a third report of March 23, 1959, the Commission made three changes in the conditions for trial operations:

(1) Instead of permitting the trial of a particular subscription television system in up to three markets, it permitted a system to be tried in only one market.

(2) Only one system could be tried in a single market.

(3) Whereas the first report had left open the question of whether any receiving equipment might be sold to participating members of the public, the third report announced that the public should not be called upon to buy equipment for trial operations that was not needed for the reception of "free" broadcasts.

The House Interstate and Foreign Commerce Committee then adopted another resolution, stating that its February 6, 1958, resolution should not preclude subscription television trial operations as contemplated by the third report.

On March 26, 1959, on the floor of the House, Chairman Harris summarized the reasons for the committee resolution. He stated that it would be unwise to prevent trial operations of subscription television as long as they were conducted so as to preclude the virtual establishment of a new service, and as long as they did not involve financial risk for subscribers.

He emphasized that promoters of subscription television were on notice that the Congress reserved the right to determine whether to enact legislation to amend the Communications Act to empower the Commission to grant, and to prescribe the conditions under which the Commission would have the power to grant, authorization for extended or permanent operations. He further emphasized that:

> Under no circumstances could the action of the Federal Communications Commission and the action of the Committee on Interstate and Foreign Commerce be construed as placing a stamp of approval on subscription television as a permanent service.

After 5 days of hearings before the Commission, the first application filed under he terms of the third report was granted. It authorized RKO General Phonevision Co. (a subsidiary of RKO General, Inc.), licensee of UHF station WHCT, Hartford, Conn., to engage in a 3-year trial operation of subscription television over WHCT.

The Commission's grant of this authorization was challenged in the U.S. Court of Appeals which upheld the Commission's jurisdiction and authority to order such trial operations (*Connecticut Committee Against Pay TV* v. *FCC*, 301 F. 2d 835 (C.A.D.C., 1958), *cert. denied*, 371 U.S. 816 (1962)).

The Hartford trial operation commenced on June 29, 1962. On May 21, 1965, the authorization was extended for a period of 3 years or until such earlier time as the Commission might terminate the rulemaking proceeding.

Only two other applications for authorization were filed. One was denied because it did not meet the conditions of the third report. The other was granted but the operation never commenced, and the authorization was relinquished on May 1, 1964.

In March 1965, Zenith and Teco, which supplied the equipment used in the Hartford trial operation, filed a joint petition requesting authorization of nationwide subscription television. The pleading

contained exhaustive information concerning the first 2 years of the Hartford trial.

In response to the Zenith-Teco petition, the Commission on March 24, 1966, issued a further notice of proposed rulemaking and notice of inquiry which included the following matters:

(1) A finding that the Commission has jurisdiction to authorize subscription television on a permanent basis.

(2) A recognition of the interest of Congress in the subject and provision of time for Congress to act if it so desired before the proceeding is terminated.

(3) A decision that subscription television is broadcasting.

(4) An expansion of its proceeding to include an inquiry into the appropriate role, if any, of the Federal Government with regard to the establishment and manner of operation of wire or cable subscription television, and how that role should be effected.

(5) Statements that "although we have reached no final conclusion thereon, it appears that it may well be in the public interest to authorize [subscription television] operations on a permanent nationwide basis" and "that subscription television on a nationwide scale can be effectively integrated into a total TV system, with advantages to the viewing audience, appears to be a reasonably sound conclusion at this point."

(6) An indication that the concern of the Commission was with the overall public interest, and that the competition between subscription and conventional television for audience and program material might result in improved and more varied fare for viewers of both services. However, the Commission emphasized that it regarded the preservation of conventional television service and the continued availability of good program material to the free service as vital considerations.

(7) A statement that commercials would not be allowed on subscription operations.

(8) An invitation to comment on the general issue of whether subscription television should be authorized on a permanent basis, and on 15 specific pertinent issues that would have to be decided if it is so authorized, and on specific proposed rules to govern subscription television if it is authorized on a permanent basis.

Comments were duly filed and, after a thorough study of the record, the Subscription Television Committee, which the Commission had established in 1963, submitted a written report on July 3, 1967, and a draft of a fourth report and order which the Committee recommended for adoption by the full Commission. These documents were made public on July 14, 1967.

The committee recommended the establishment of an over-the-air subscription service and the adoption of rules governing that service. The committee's report and the proposed fourth report are being submitted for the record. (See p. 8.)

Upon receipt of the fourth report, the full Commission determined that its study and resolution of the matter would be aided by oral argument, and that such argument would be most useful if addressed to the report. Oral argument was just heard on October 2 and 3.

In sum, this proceeding has been formally pending for more than 12 years. Each stage of it has been carefully considered and all actions taken by the Commission in this area have been announced in normal fashion and widely distributed and discussed within the communications industries.

The Commission, of course, welcomes any guidance the Congress may want to give in this important area. We have reached the stage where we apparently have before us sufficient data to make a determination, in the discharge of our statutory responsibilities, as to whether, and under what conditions, authorizing subscription television is in the public interest.

I want to stress that the Commission has reached no decision on this question. In fact, Commissioner Wadsworth, the chairman of our Subscription Television Committee, in signing the report to the Commission, appended a statement as follows:

> I agree that this matter should be brought to the attention of the full Commission at this time. However, I wish to make my position clear: In agreeing to submission of this document to the full Commission, I do not mean to imply that I endorse adoption of it. Nonetheless, in view of the history of this proceeding, I believe that the public and all parties to it are entitled to an early Commission decision on the basic question presented.

In reaching its determination, the Commission will, of course, fully consider the views presented in the docketed proceeding, and the oral arguments presented to the Commission during the past week, as well as the hearings now being held by this committee.

In conclusion, may I emphasize again that there has been no resolution of the issues which have just been argued so extensively before us. Since the entire matter is still under study, we are not in a position to express the Commission's conclusions on the substantive issues.

That concludes my written statement, Mr. Chairman.

(The Subscription Television Committee's report and proposed Fourth Report and Order, referred to above, follow:)

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

FCC 67-819
2819

In the Matter of	)	
	)	
Amendment of Part 73 of the	)	
Commission's Rules and Regulations	)	Docket No. 11279
(Radio Broadcast Services) to	)	
provide for Subscription Television	)	
Service	)	

O R D E R

Adopted July 12, 1967 ; Released July 14, 1967

By the Commission: Commissioners Bartley, Cox and Loevinger absent

The Commission has before it the report of its Subscription Television Committee, dated July 3, 1967, transmitting a proposed Fourth Report and Order and a Second Further Notice of Proposed Rule Making. The Commission believes that its study and resolution of this important matter would be aided by oral argument, and further that such argument would be most useful, if addressed to the report. Accordingly, it is releasing the report at this time, and will specify by subsequent order a date for oral argument to be held in early fall. Parties may also submit written comments or outlines of their arguments, not to exceed 50 pages, on or before September 15, 1967. An original and 14 copies should be filed. (See Section 1.419 of the Commission's rules.)

IT IS ORDERED, That, the interested parties may file written comments or outlines of oral arguments, not to exceed 50 pages, on or before September 15, 1967.

FEDERAL COMMUNICATIONS COMMISSION

Ben F. Waple
Secretary

Attachment

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 2793

REPORT TO THE FEDERAL COMMUNICATIONS COMMISSION

BY ITS

SUBSCRIPTION TELEVISION COMMITTEE
(July 3, 1967)

James J. Wadsworth, Chairman

Robert E. Lee

Kenneth A. Cox

1. The Subscription Television Committee of the Commission hereby reports to the Commission that, having carefully studied the record in the subscription television proceeding, Docket No. 11279, it has prepared two documents--a Fourth Report and Order (Attachment A), and a Second Further Notice of Proposed Rule Making (Attachment B)--for the consideration of the Commission.

2. The attached proposed Fourth Report and Order would establish an over-the-air subscription television (STV) service and adopt rules governing that service. The principal topics with which it deals appear in the table of contents. Using that table as a guide, this memorandum sketches the contents of that document.

3. The introduction contains a very brief history of this proceeding from the time of its inception in 1955 to the issuance of the Further Notice of Proposed Rule Making and Notice of Inquiry in March 1966--the last-issued document in this proceeding, and the one that elicited comments on which the Fourth Report and Order is largely based. (The Further Notice invited comments on whether over-the-air STV should be authorized on a permanent basis, on fifteen specific issues if it were so authorized, and on specific proposed rules.)

4. As to preliminary matters (pp. 2-5), the document reasserts the Commission's prior finding that it has jurisdiction to authorize an over-the-air STV service, and that such STV is broadcasting. It states that Congress has not acted on STV, that Congressional guidance in this area would be welcome, but that the Commission has a present duty to establish an over-the-air STV service if it finds this to be in the public interest, and that it so finds. Finally, it says that an oral hearing prior to establishing such an STV service would serve no useful purpose.

5. On the question of whether over-the-air STV should be authorized on a permanent basis, the document concludes that it should. It discusses in detail the four broad areas mentioned on page 1 of the table and finds the following:

a. STV could provide a beneficial supplement to conventional TV programming. This might consist mostly of current feature films, and of sports events not generally available on conventional TV. (pp. 7-20)

b. Absolute proof of viability need not precede the establishment of a new service, so that although there can presently only be speculation about whether the public will accept and support STV, and although the projections about STV service based on Hartford trial data are not without some uncertainties, there is enough of a basis on which to found the new service (pp. 20-26)

c. As to the impact of STV on conventional TV, diversion of audience (i.e., attracting those who would have been viewing free TV at a particular time to view STV instead) can be expected to be minimal. Pre-empting of time (i.e., broadcasting STV programs over a station that would otherwise have been broadcasting free TV programs) could occur to a degree contrary to the public interest. For example, in a one-station market, if the station commenced to broadcast STV programs during all of its prime time, the community would receive no free programs from it during those hours. Some program siphoning (i.e., diversion of programs from free TV to STV) that would be contrary to the public interest might occur. It is in the public interest to establish STV with regulatory safeguards directed at program siphoning and pre-empting of time. Although the preservation of conventional TV service and the continued availability of adequate quantities of free programs are important considerations, competition between STV and free TV could result in improved and more varied programming for both services. The safeguarding rules do not competely prevent siphoning, but strike a desirable balance between STV and free TV. (pp. 26-40)

d. Pages 40-47, "other information," set forth material which is discussed in connection with the fifteen regulatory issues listed on page 2 of the table.

6. The fifteen regulatory issues are discussed (pp. 47-99), and conclusions are reached thereon which lead to the adoption of specific rules (except for technical rules, discussed later herein) to govern the new service. A brief paraphrase of the main points of each rule, as related to the fifteen issues in the order in which they are listed on page 2 of the table, appears below. For convenience, each paraphrase is followed by the pages discussing it and by the section number of the pertinent rule which appears in Appendix D to the Fourth Report and Order.

a. STV authorizations will be granted only for a station the principal community of which is located within the Grade A contours of five or more commercial TV stations (including the station of the applicant). The five or more stations need not be licensed to serve the community in which the STV operation is proposed. At least four of the stations, not counting the station of the applicant, must be in operation. (pp. 47-52; §73.642(a))

b. Stations engaging in STV operations must, in addition to STV programs, broadcast at least the minimum hours of non-subscription programming required by Section 73.651. There are no requirements about a minimum or maximum number of hours of STV programming that a station may broadcast, or about the time of day that it may broadcast STV programs. (pp. 53-56; §73.643(c))

c. STV is permitted over both UHF and VHF stations. (pp. 56-57; §73.642(a))

d. Only one STV authorization will be granted in a community. (This rule, coupled with the rule mentioned in "a" above, is designed to protect against undue pre-empting of time from free TV.) (pp. 57-58; §73.642(a))

e. Any technical STV system (meeting general standards to be adopted later) may be used, i.e., STV will not be required to use one particular system. (pp. 58-63; §73.644)

f. No STV authorization will be granted to a party having any contract, arrangement, or understanding, express or implied, which prevents or hinders it from rejecting any STV program which it believes to be unsuitable or contrary to the public interest, or substituting an STV or conventional program which it believes to be of greater local or national importance; which delegates to another person the right to schedule hours of broadcast of STV programs; which prevents or hinders it from making a free choice of STV programs, whatever their source; or which deprives it of the right of ultimate decision concerning the maximum amount of any STV program charge or fee. In spite of the foregoing, however, subject to Commission approval, STV operators may enter into arrangements whereby they agree to schedule a specific STV program at a specific time, or to schedule

a specific number of hours of STV programs during the broadcast day or week; and whereby they agree to obtain all, or a specified part of, their STV programming from one or more sources. (pp. 63-72; §73.642(e))

g. Charges, terms, and conditions of service must be applied uniformly, but subscribers may be divided into reasonable classifications approved by the Commission. For good cause (e.g., for poor credit risks) deposits to assure payment may be required, and other steps may be taken. (Other than as specified in the rule, the Commission will not regulate the rates to be charged.) (pp. 73-76; §73.642(f)(2))

h. Unless a satisfactory signal is unavailable at the location where service is desired, STV service must be provided to all persons desiring it within the Grade A contour of the conventional TV service of the stations engaging in STV operations. For good cause, service may be terminated. (pp. 76-79; §73.642(f)(1))

i. STV decoders attached to sets of subscribers must be leased and not sold to subscribers. (pp. 79-81; §73.642(f)(3))

j. Concerning making STV available to all eligible stations, no rule is adopted on this specific matter since other rules subsume the issue. (pp. 81-82)

k. Feature films may not be broadcast which received first run showing on a non-reserved seat basis anywhere in the United States more than two years before proposed STV showing (pp. 86-87). However, a limited number (as many as 12) of feature films more than 10 years old may be shown each year (p. 87). Sports events may not be broadcast on STV which were regularly televised in the community within the two years preceding proposed STV broadcast (pp. 87-94). No series type of program with interconnected plot or substantially the same cast shall be broadcast over STV (p. 95). (The foregoing rules are designed to prevent siphoning. Since, generally, free TV cannot obtain current feature films, the films which STV shows will not be siphoned from free TV. Since it is expected that about 85% of the programming of STV will consist of current films, the rule does not harm STV. The rule on sports will clearly prevent siphoning, and the rule on series-type programs will prevent siphoning of a type of programming which constitutes a large part of free TV programming. Some siphoning, e.g., of programs that are not series, could occur.) In addition to the foregoing limitations, no commercials will be permitted on STV (p. 95). Also, not more than 90% of the programming of an STV station may consist of feature films and sports events combined (p. 94). (This is to assure that at least a minimum amount of cultural and educational programming will be presented, such as opera, ballet, etc.) (pp. 82-96; §73.643(a) and (b))

1. Except as otherwise waived by the Commission in STV authorizations which it issues, the rules and policies applicable to conventional TV stations are applicable to STV operations. (pp. 96-99; §73.643(d))

In addition to the foregoing, a few other rules appear in Appendix D of the Fourth Report and Order. Among these is a rule that an STV authorization may not be issued for a period longer than that of the regular license period of the TV station.

7. The rules also contain a NOTE (to Section 73.642(b)) stating that no applications for STV authorizations will be accepted for filing until rules concerning equipment and system performance capability have been adopted. Attached hereto is a Second Further Notice of Proposed Rule Making which invites comments on technical rules on this subject. It is quite brief and is not summarized here.

8. Concerning applications for STV authorizations, financial requirements (e.g., a requirement to make a showing of capacity to sustain STV operations for at least a year, similar to the requirement for applicants for CP's for conventional TV stations), fees, and reports, see paragraphs 288-289 on page 100 of the Fourth Report and Order.

9. The rules adopted concern only commercial television stations. As to the relationship between STV and educational television stations, see paragraphs 290-294 on pages 101-102 of the document.

10. The end of the document (pp. 102-108) deals with the inquiry into wire or cable STV which the Commission instituted in the Further Notice of Proposed Rule Making and Notice of Inquiry. The inquiry invited comments on what the role of the Federal Government should be, if any, with regard to this type of STV. Such STV falls into three categories: (1) STV systems, like the now defunct system that operated in Los Angeles and San Francisco, in which programs travel entirely by cable from studio to sets of subscribers. (2) CATV systems which, in addition to their traditional function of receiving and retransmitting conventional TV signals, also originate STV programs that travel by cable to sets of subscribers. (3) CATV systems which, in addition to traditional functions, transmit over-the-air STV programs which they have picked up either off the air or by microwave. To the best of our information, there are presently no STV operations in the United States in any of the three categories. The document says that with regard to the first two categories the Commission makes no decisions because it wishes to study the matter further. As to the third category, it states that the CATV carriage and non-duplication rules will apply to the conventional programming which the STV stations will be required to carry. CATVs will not be required to carry STV programming. An STV station, may, however, subject to Commission approval, make arrangements with CATV systems within its Grade B contour for the CATV to carry its STV programming. No such arrangements may be made with CATVs outside the Grade B

contour. The question of carriage of STV programs of an STV station by CATVs so situated is reserved for further study.

11. For the reasons stated therein, it is recommended that the attached Fourth Report and Order, and the Second Further Notice of Proposed Rule Making be adopted.

Subscription Television Committee

James J. Wadsworth, Chairman*

Robert E. Lee

Kenneth A. Cox

Attachments

*I agree that this matter should be brought to the attention of the full Commission at this time. However, I wish to make my position clear: In agreeing to submission of this document to the full Commission, I do not mean to imply that I endorse adoption of it. Nonetheless, in view of the history of this proceeding, I believe that the public and all parties to it are entitled to an early Commission decision on the basic question presented.

Attachment A

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Part 73 of the	)	
Commission's Rules and Regulations	)	Docket No. 11279
(Radio Broadcast Services) to	)	
provide for Subscription Television	)	
Service.	)	

FOURTH REPORT AND ORDER

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

B

In the Matter of	)	
	)	
Amendment of Part 73 of the Commission's Rules and Regulations (Radio Broadcast Services) to provide for Subscription Television Service.	)	Docket No. 11279

FOURTH REPORT AND ORDER

Adopted: ; Released:

By the Commission:

1. The Commission has before it for consideration the Further Notice of Proposed Rule Making and Notice of Inquiry released in this docket on March 24, 1966, 1/ and comments, reply comments, and technical submissions filed in response thereto.

2. Briefly, the course of events in this proceeding which led to the issuance of that document is as follows: In 1955 the Commission adopted a Notice of Proposed Rule Making 2/ inviting comments to help it decide whether it would be in the public interest to adopt rules authorizing television broadcast stations to transmit programs paid for on a subscription basis. A Notice of Further Proceedings, 3/ released in 1957, announced that although the comments responding to the 1955 Notice had been useful, they did not provide a fully adequate basis for arriving at final decisions on the matter, and that trial demonstrations would be necessary to aid in arriving at conclusions thereon. Later in 1957, the First Report 4/ announced the conditions under which applications for trial operations would be accepted. The Second Report (1958) 5/ gave notice that any such applications filed would not be processed until after the adjournment of the 85th Congress because of the interest and activity of that Congress with regard to subscription television (hereinafter called STV), the delay being for the purpose of affording the Congress an opportunity to consider public policy questions which the subject raised. The Third Report (1959) 6/ made some amendments to the First Report, otherwise readopted and affirmed it, and stated that the Commission was ready to give consideration to applications for trial operations.

1/ FCC 66-268; 31 F.R. 5136, March 30, 1966, 7 Pike & Fischer, R.R. 2d 1501.
2/ FCC 55-165; 20 F.R. 988, February 16, 1955.
3/ FCC 57-530; 22 F.R. 3758, May 29, 1957.
4/ 23 F.C.C. 532, 16 Pike & Fischer, R.R. 1509.
5/ FCC 58-182, 16 Pike & Fischer, R.R. 1539.
6/ 26 F.C.C. 265, 16 Pike & Fischer, R.R. 154a.

3. Three applications for trial authorizations were filed. One was denied, one was granted but operation never commenced and the authorization was later relinquished, and the third was granted and operation began in the summer of 1962 over UHF station WHCT, Hartford, Connecticut. 7/ The last-mentioned grant was affirmed by the U. S. Court of Appeals. 8/ The Hartford trial uses Phonevision equipment of which Zenith Radio Corporation is the manufacturer and patent holder. Teco, Inc. is the patent licensee of Zenith.

4. In 1965 Zenith and Teco jointly filed a petition for further rule making to authorize nation-wide STV on a permanent basis. The petition was based on data derived from the Hartford trial. The first part of the Further Notice of Proposed Rule Making and Notice of Inquiry (hereinafter called Further Notice) mentioned at the outset is responsive to the Zenith-Teco petition. It contains a discussion of over-the-air STV 9/ and invites comments on proposed rules for such a service. In the second part, the Commission, on its own motion, instituted an inquiry into what the appropriate Federal role, if any, should be with respect to the establishment and manner of operation of wire or cable STV. This type of STV was previously outside the scope of this proceeding, and was made a matter of inquiry because of the change of conditions since 1955 when the proceeding began. We shall first consider the over-the-air rule making, and then turn our attention to the inquiry.

OVER-THE-AIR SUBSCRIPTION TELEVISION

Preliminary Matters

5. The Commission is of the opinion that it is in the public interest to authorize over-the-air STV on a nation-wide basis to the extent described in the following discussion and crystallized in the rules adopted today (Appendix D).

Jurisdiction

6. The Notice of Further Proceedings announced the Commission's conclusion that it has statutory authority to authorize over-the-air STV operations. The First Report affirmed that conclusion and presented in detail (in

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7/ 30 F.C.C. 301, 20 Pike & Fischer, R.R. 754. The authorization was for a period of three years and was subsequently extended for a period of three years or (if it occurs sooner) until such time as the Commission terminates the present proceeding and enters an order with respect to the authorization.

8/ Connecticut Committee Against Pay TV v. FCC, 301 F. 2d 835 (C.A.D.C., 1958), 23 Pike & Fischer, R.R. 2001, cert. denied, 371 U.S. 816.

9/ In over-the-air subscription television, usually both the audio and video signals are transmitted over the air in "scrambled" form by television stations and may be viewed intelligibly only by those having "unscrambling" devices attached to their sets. Some systems scramble only the video and not the audio.

paras. 20-40) the reasons underlying it. The Third Report readopted and affirmed those paragraphs of the First Report. In the Further Notice (para. 19) we adverted to our views expressed in the First Report and also observed that the Circuit Court, in affirming our grant of the Hartford authorization, supported our jurisdictional conclusion. Some parties opposing STV now raise the jurisdictional issue once more. Since the arguments raised have previously been given thorough consideration, and since we are still of the opinion that statutory authority exists for the action which we take, it would serve no useful purpose to evaluate them here.

Congressional Guidance

7. Various opponents of STV urge that the Commission should not act in this area without Congressional guidance. In support thereof, many arguments are presented, some of which are: (1) STV is a basic modification of the American system of broadcasting--a modification which should originate with Congress and not the Commission. (2) The jurisdiction of the Commission to act is questionable, so guidance should be sought from Congress. (3) The Commerce Committees of both houses of Congress have expressed their views either questioning the jurisdiction of the Commission to license STV operations or stating that such operations should not be authorized by the Commission without specific authorization by law. 10/ (4) If STV is established, its rates should be regulated to protect the public, but, if it is broadcasting as the Commission has found, there is no authority in the Act to regulate rates thereof and the Commission should go to Congress for guidance.

8. The question of seeking Congressional guidance was raised in pleadings considered prior to issuance of the Further Notice. In that document, after having expressed our belief that we possess adequate statutory authority to authorize STV on a permanent basis, we said that we could not at that time determine whether amendments to the Act were needed to serve as guidelines for STV service. We also said that if STV service were ultimately established we would on the basis of information then before us in this proceeding decide whether amendments were needed and, if so, what recommendations should be made to Congress. We allowed a lengthy period for filing comments in this complex proceeding and announced in so doing that such a period would afford the Congress time to act with regard to STV before this proceeding is terminated if it so desired.

9. The Congress has not acted on the matter. We welcome any guidance it may wish to give, but believe that it is our present duty to establish an STV service if it is found to be in the public interest, for we have found that we have jurisdiction to do so, and Section 303(g) of the Act requires us "to encourage the larger and more effective use of radio in the public interest." At the present time, we do not believe that any amendments to the Act are necessary to serve as guidelines for the new service. In this connection,

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10/ These views appear in the Second Report, supra note 5.

we note that whether the Commission has statutory authority to regulate rates for the new service--a broadcast service--is open to question. Since we do not believe that such regulation is necessary (see paras. 220-222) the matter need not now be analyzed. However, we shall carefully observe all aspects of the new service in operation, and if amendments are indicated shall make appropriate recommendations concerning rate regulation or other matters.

STV is Broadcasting

10. In the Further Notice we concluded that STV is broadcasting within the meaning of Section 3(o) of the Act, and set forth in detail our views on the subject (paras. 22-29). As stated there, we regard intent to provide a radio or television program service without discrimination to as many members of the general public as can be interested in the programs as of primary importance in our determination. We further said that intent may be inferred from the circumstances under which the programs are transmitted and that the number of actual or potential viewers is not significant.

11. In our discussion we cited the Functional Music case 11/ and the Muzak case 12/. Both involved the use of special equipment attached to the receivers of subscribers in order to receive the service. ABC, urging that STV cannot be classified as broadcasting, cites early decisions of the Commission 13/ that certain activities over broadcast stations constituted point-to-point communications rather than broadcasting and argues that the interpretations in those decisions are worthy of more weight than the Muzak case. Motorola questions whether Functional Music is authority for the proposition that STV is broadcasting. We should note that we cited Muzak, as well as Functional Music, merely to illustrate that payment of a charge by subscribers for a special type of service is not in itself determinative of the question of intent that the programs be received by the public.

Oral Presentation

12. In the Further Notice (para. 21) we said that after a study of the written comments responsive thereto "we shall take whatever steps appear appropriate at that time, including an oral presentation if it is indicated, as may well be the case." Several parties suggest that if, in spite of their arguments to the contrary, the Commission should now decide to establish a permanent STV service, at the very least it should not do so without holding an oral evidentiary hearing first.

11/ Functional Music, Inc. v. FCC, 274 F. 2d 543 (C.A.D.C., 1958), cert. denied, 361 U.S. 813.

12/ Muzak Corporation, 8 F.C.C. 581 (1941).

13/ Scroggin & Co. Bank, 1 F.C.C. 194 (1935); Standard Cahill Co., Inc., 1 F.C.C. 227 (1935); Bremer Broadcasting Company, 2 F.C.C. 79 (1935); Adelaide Lillian Carrell, 7 F.C.C. 219 (1939).

13. A voluminous record has been established in this proceeding and has furnished information which we believe sufficient in arriving at a decision. However, as indicated below, it has failed to provide all that we could desire, and there are thus certain aspects of STV about which we continue to be concerned. Were there an oral presentation, it would be limited to those aspects. Because we are adopting rules which provide safeguards in the areas of concern, because we believe that STV operation under these rules will provide factual information about those areas that will serve as a guide for future Commission STV decisions, and because we believe that oral presentation at this time could only supply arguments devoid of such factual aid--elaborations of views already expressed in the written comments--we cannot find that an oral hearing would serve any useful purpose.

Parties Filing

14. Parties filing comments, reply comments, and technical discriptions of STV systems are listed in Appendix A. Those opposing permanent STV are the three networks (ABC, CBS, NBC), the National Association of Broadcasters (NAB), the Association of Maximum Service Telecasters, Inc. (AMST), the Joint Committee Against Toll TV (Joint Committee), Motorola, Inc. (Motorola), and the Colorado Translator Association. All other parties favor permanent STV (some with qualifications). These parties include proponents of various STV technical systems, licensees of television broadcast stations who contemplate entering into STV operations if nation-wide over-the-air STV is authorized, and other groups, such as the American Civil Liberties Union. All parties mentioned in this document hereinafter are referred to by short designations. Those of proponents, as well as those of opponents mentioned parenthetically above, appear in parentheses following the names of the parties in Appendix A.

Should STV be Authorized on a Permanent Basis?

15. Paragraph 45(a) of the Further Notice invited comments on whether STV should be authorized on a permanent basis. Paragraph 45(b) requested comments on fifteen specific matters of concern to the Commission in regulating STV if it is so authorized. We shall first deal with the fundamental problem of 45(a) and then treat the issues in 45(b).

16. In the First Report (paras. 47, 65, 56, 66) 14/ the Commission mentioned what sort of information it hoped to obtain from trial operations to help it make public interest determinations. This information included the following:

14/ These paragraphs were affirmed by the Third Report.

a. Whether STV would provide a beneficial supplement 15/ to the program choices now available to the public.

b. Whether STV would provide an increase in financial resources which would facilitate significant increases in the numbers of services available to the public under the present system.

c. The degree of acceptance and support which STV might be able to obtain from members of the public in a position to make a free choice.

d. Whether STV would seriously impair the capacity of the present system to continue to provide advertiser-financed programming of the present or foreseeable quantity and quality, free of direct charge to the public. This is closely related to the question of whether STV would result in significant audience diversion from conventional television and siphoning of programs and talent away from free television into STV service.

e. Other information, such as (1) modus operandi of the service; (2) the technical performance of the systems; (3) the nature of the programs offered; (4) the methods to be employed; (5) the role of participating broadcast station licensees; (6) possible monopolistic features of STV.

Comments on the question of whether STV should be authorized on a permanent basis generally fall into categories a, b, c, d and e above.

15/ The term "beneficial supplement" merely means STV programming that is not duplicative of the programming of free TV and that is desired or needed by at least a portion of the viewing public. It has no connotation of lack of impact upon free TV, which is a separate question.

Whether STV Would Provide a Beneficial Supplement to the Program Choices now Available to the Public.

17. Hartford Programming. In joint comments filed March 10, 1965, in support of their petition for further rule making (prior to the issuance of the Further Notice) Zenith and Teco set forth in detail the STV programming offered by WHCT during the first two years of the Hartford trial. Their comments 16/ filed in response to the Further Notice supply no additional data but incorporate by reference the March 10 material. As we pointed out in the Further Notice (para. 12), that information showed an average of about 1500 hours of STV programming, consisting of about 300 separate programs, were presented each year. 17/ The programs were not available on free television either in Hartford or elsewhere in the United States. The breakdown of the programs is as follows:

Category	Approx. Number of Programs	Approx. Number of Showings	Av. Number of Showings per Program	Percentage of Total Showings
Feature Films	216	768	3.55	86.5%
Sports	40	40	1.0	4.5%
Special Entertainment	18	49	2.7	5.5%
Educational	26	32	1.2	3.5%
Totals	300	889	2.96	100.0%

Of the 216 feature films shown during each year, one was a first run U.S. film, 58 (27%) were first subsequent run U. S. films which were shown several weeks after the first theater run (which corresponds to the time when pictures are released to neighborhood theaters), about 149 (69%) were U.S. films of over 6 months in theater release, and 9 (4%) were foreign language films with English titles or dialogue dubbed in. The sports programs were live broadcasts of events not carried on conventional television, such as championship boxing, high school, college, and professional basketball, college football, and professional hockey. The special entertainment included plays, opera and ballet, concerts and recitals, variety, and nightclub programs. Educational features included, among other programs, three for doctors only.

16/ To avoid needless repetition, RKO--which conducted the Hartford trial--filed brief comments stating that it fully agreed with the recommendations and conclusions of Zenith and Teco.

17/ During the same period WHCT averaged about 1812 hours of conventional programming per year.

18. Zenith and Teco state that when the Hartford trial was authorized various theater owner organizations tried to induce picture producers and distributors not to supply films for the trial, but that a number of independent and most major producers nevertheless did supply films. However, we are told, two major producers were unwilling to do so. In March 1964, RKO filed an antitrust action against them which was settled out of court in June 1964, and at the end of the second year of the trial those companies were supplying both first subsequent run and older films for the trial.

19. Although producers and distributors have been unwilling to supply films on a first run basis (only one such film has been broadcast since the trial began), Zenith and Teco state that this is mainly because the operation is on a trial basis. They express the opinion that if nationwide STV were authorized, first run films could be made available, if it were considered important, on the date of their release to first run theaters.

20. Concerning sports programs, Zenith and Teco mention that heavyweight championship boxing matches, which consisted of about 0.3% of the total STV programming during the first two years of the trial, were the most popular of all STV programs since, on the average, they had audience ratings of about 63% of all subscribers. They observe that before the Hartford trial there had been no such fights on television for more than ten years because promoters of such events found it much more profitable to show them by way of closed circuit theater outlets. They also point out the savings to the public that can accrue from viewing such events on STV. As an example, they cite the following figures for one of the Liston-Clay fights: An average of nine persons per tuned-in subscribing set watched the fight at a cost of $3.00 for all of them as compared to a cost of $5.00 a head (or a total of $45) at several local theaters which showed the fight on closed circuit.

21. As to college sports, they state that none of the football games shown on STV could have been broadcast over free TV under the restrictions of the National Collegiate Athletic Association (NCAA). These restrictions, they point out, were designed to protect college football teams from loss of gate receipts (similar rules prevail for college basketball). They limit the number of games that may be viewed in any part of the country to one game per week. As a result, viewers in the Midwest, for example, may be deprived of viewing a conference title game between two Big Ten teams because the game of the week is between teams from another part of the country. Zenith and Teco argue that STV would protect gate receipts and thereby make it possible to show local and regional games in which there might be great interest so that viewers would not be limited to the NCAA "game of the week."

22. They also mention that in both the American and National Football Leagues home games are blacked out and that home games of many major league baseball teams are either blacked out or their number is restricted in many cities. They state that the Chicago Bears and the Detroit Lions have permitted closed circuit theater operators to carry home games because the stadium seats are usually sold out. Zenith and Teco express the opinion that

theater television of home games of professional football teams will increase in the next few years and say that STV could provide a beneficial supplement to free TV by carrying such games to a larger audience than that of the theaters.

23. As to special entertainment, the programs shown during the two-year period are discussed. They claim that the economic limitations of the trial prohibited a steady supply of Broadway plays, but that with a broader economic base that nation-wide STV would provide these difficulties would not exist.

24. We are told that there were difficulties in obtaining programs of box-office caliber in the educational and instructional category, and that the audience ratings for such programs were low. It is stated that possibly the primary use of STV operations in the future in this programming area would be the use of commercial STV facilities by educational groups for the broadcast of educational programs for a fee. Especial reference is made to programs available only to doctors. Three such programs were shown in the two-year period and since then more have been shown. The programs were designed to aid doctors in keeping abreast of medical advances within the confines of their busy schedule, were supervised by a noted physician, and had considerable professional support.

25. Etobicoke Programming. Telemeter's comments incorporate by reference all material in previous submissions (June 5, 1955, May 25, 1965, and June 17, 1965) to the extent that it does not vary from its present comments. We note that in its May 1965 filing, in setting forth information about the five-year Etobicoke (a suburb of Toronto, Canada) cable STV experimental operation, it stated that "the prime pillars of programming were motion pictures and 'blacked out' sports," which is consistent with the experience of the over-the-air trial at Hartford. Special entertainment productions were also shown. Telemeter's experience in obtaining feature films for its experiment supplements the Hartford information. 18/ Telemeter states that "many--but not all--major film distributors as well as other leading companies were reasonably cooperative in supplying some of their current product for subscription TV use. However, except for three 'road-show attractions', which were exhibited on Telemeter during their general release to theatres, none of the other so-called 'road-shows' produced in the past five years or earlier were made available and, since not all major distributors permitted current feature pictures to be shown on the cable system, Telemeter subscribers had no access in their homes to a large number of desirable pictures released to theatres." (For meaning of "road-show" and "general release," see note 45, infra.)

26. The sports programming at Etobicoke constituted only a small portion of the total STV offerings, but was the most consistently favored. Among other things, it included away-from-home games of the Toronto Maple Leafs ice hockey team. Such games had not previously been available to

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18/ The May 1965 filing was a "Statement of International Telemeter Corporation in Support of /Zenith-Teco/ Rule Making Petition for Authorization of Nation-Wide Subscription Television." Although the Etobicoke operation was a 3-channel cable rather than an over-the-air operation and therefore dissimilar in many respects to the Hartford trial, in terms of programming experience it can shed light on STV operations generally.

Etobicoke. It also showed blacked-out home games of the Toronto Argonauts professional football team, as well as some professional championship boxing bouts not carried on free TV in Canada or the United States.

27. Conventional TV Programming. Opponents of STV devote many pages of their comments to the argument that the STV programming of the Hartford station did not provide a beneficial supplement since it was of the same general type as that shown on conventional television, i.e., motion pictures, sporting events, special entertainment, and educational presentations. Illustrative of the mass of data submitted to document the argument is the material in the immediately following paragraphs.

28. Feature Films. Of the 73½ hours of network programming between the hours of 7:30 and 11:00 p.m. each week over the three networks combined, 10 hours are feature films (CBS-2 films, NBC-2, ABC-1). Such films are available five nights per week. In addition, local stations also offer feature films in prime time. Viewers in some cities, e.g., Los Angeles, can see as many as 35 films per week during prime time. No figures are given for the number of films shown by free television stations in the Hartford market per week during the first two years of the Hartford trial, but it is said that the networks offered 160 films to their affiliates during that period. Moreover, we are told that although it is true that when this proceeding began motion picture producers were selling pictures of relatively minor caliber to free television, the number of major feature films released to free TV increased rapidly during the late 1950's and continues to increase today, so that presently there are over 1200 films available for conventional television. During the 1966-67 season, 120 films of high caliber were scheduled by the networks alone. Examples of such films include "The Bridge on the River Kwai" (1957) which is said to have been viewed by more than 60,000,000 people, "Lilies of the Field" (1963), and "Breakfast at Tiffany's" (1961).

29. As to recency of films shown on free TV, it is stated that the bulk of those shown by the networks five nights a week are "relatively" current and that not only have producers released more major pictures to free TV since the proceeding commenced, but also they have been releasing more recent films. Cited as evidence are purchases announced in September 1966 by ABC and CBS whereby the two networks acquired the right to show, over a period of five years, more than 112 feature films, including some that had enjoyed record box-office grosses. Of the films acquired by CBS, at least 14, we are informed, were films released to theaters in 1965 and 1966. It is stated that the trend toward showing more recent films on free TV will continue because the heavy demand is drying up the source of supply. Indeed, because of this, feature films are now being produced specifically for conventional television.

30. It is pointed out by STV opponents that of the 432 films shown during the first two years of the trial at Hartford, only 116 (27%) were first subsequent run, and the remaining 297 were over six months old, the average release date of those films having been 1960. We are told, moreover, that of the films shown during that period in the Hartford trial, over 60% have already been made available to free TV, some as soon as five months after their

showing on STV, the average being less than two years after STV showing. Of the remaining ones, many have already been purchased or are under option.

31. Sports. Opponents of STV state that there is virtually no major sports attraction that is not presently being broadcast on free TV. They list in overwhelming detail the kinds of sports and sports programs that free TV carries, and we shall not here repeat them. They state that the quantity and quality of sports programs exceeds all expectations of about ten years ago when this proceeding began. They concede what cannot be denied--that STV at Hartford carried heavyweight championship boxing matches, a type of program that in recent years has not generally been carried by free TV; and they would appear to admit that other sports events carried by WHCT were not otherwise available in the market.

32. Special Entertainment and Educational Programs. As with sports, opponents describe at length the great variety and quality of special entertainment programming carried by free TV to show that it is of the same type that STV offered at Hartford, and mention that since the issuance of the First Report such programs have expanded in number and quality. Mention is also made of the growth of educational television service in this country which provides educational and cultural programming, the programming of National Educational Television (NET), the fact that since this proceeding started the number of educational television stations has increased from 23 to over 100, 19/ and the fact that recent developments suggest that there may be new financing available in the near future for programming in the educational television service which would further improve its already excellent offerings. In addition, the Oxtoby-Smith "Study of Consumer Response to Pay Television" is quoted to the effect that "the ratings for educational and cultural programs and even for available stage plays have been low....The operation of a ready market for 'cultural' programming has not materialized." Along the same line, they advert to the very limited viewing of such programming by Hartford subscribers (average of only 22 subscribers viewing educational programs).

33. As mentioned above, STV opponents, in connection with the foregoing data submitted by them, make the argument that the Hartford trial did not provide a beneficial supplement because programming of the same general type appears on free TV. With regard to feature films, the only possible advantage of STV, we are told, is that of reducing the time lag between theater release and TV viewings. At least one party says that STV will not allow viewers to see films "at a significantly earlier time." Several admit that it is possible that STV can provide films "somewhat earlier" or that STV "can somewhat accelerate" their presentation to the public. However, it is argued, because conventional television is getting more and more recent films of high quality, the difference in time of presentation over STV and free TV would be less and less important. This time differential, it is said, does not justify the use of scarce channels for STV. Opponents say that representations were

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19/ Since the filing of the comments, the number has increased to 125.

originally made to the Commission that STV would show first run films, but that such films have not been made available to STV nor is there anything to indicate that if STV were authorized on a nation-wide basis they would be. As a matter of fact, they state, only first subsequent run films and films six months or more old have been made available, and only 27% of the Hartford films were first subsequent run.

34. It is also contended as follows: The promise of STV was that it would provide viewing for members of the public interested in the fine arts, opera, educational and informative programming, and similar programming, i.e., programming for minority tastes and not for mass appeal, but Hartford has not satisfied that promise: its programming was mostly of a mass appeal type, directed at those who watch free TV the most. Its own research firm reported that it should be directed at that audience, which is less demanding in its expectations than the minority who expect more from STV. The Oxtoby-Smith study shows that there is no ready market for cultural programming. Therefore, if STV became a national service, it would be unreasonable to assume that it would do other than show the mass appeal type of programming as Hartford did, for that is where the profits would be. Thus, Hartford (allegedly because of the limitations of a one-city trial) did not provide the diversity of programming that STV promised, and national STV would not either. Whatever the facts may have been in 1955, the broadcasting environment has since changed and today, conventional commercial television, the all-channel bill, syndication, and the networks all provide a great diversity and the trend is toward greater diversity so that STV would merely be duplicative of free TV.

35. Other arguments offered are that STV promised quality programs and that most of the films shown at Hartford were run-of-the-mill films; that STV would deter the formation of a fourth national TV network; that the game of the week and "black-out" restrictions imposed by college and professional sports are a reasonable accommodation of conflicting economic and social interests, and to the extent that STV would derogate from these policies it would undermine amateur and professional sports; and that Zenith and Teco should have given information about the more recent programming of the Hartford trial in their comments since the information of the first two years of the trial may be out of date.

36. In their reply comments, Zenith, Teco and Telemeter take issue with the contentions of the opponents of STV. Zenith and Teco say that the opponents have compared the programming of a single STV experimental operation with that of the combined networks with nearly 700 million dollars to spend for programming and that it would be more realistic to have compared the programming of the networks in 1948--the second year of their operation when the weekly schedule of all four networks during the hours of 7 to 11 p.m. consisted of about 40% unprogrammed hours and 23% boxing and wrestling, with only four one-hour dramatic productions, and a feature film library of about 50 titles. They aver that given twenty years, STV may also make strides. Telemeter offers a similar argument, stating that during the formative years of TV broadcasting

which parallel the start of STV broadcasting around 1960, broadcasters competing for channel assignments made a plethora of programming promises which were not fulfilled until many years later, because a large enough audience did not exist at the beginning. Before such audiences were obtained, Telemeter states, TV stations sustained great losses, losing millions of dollars according to published records of the Commission.

37. Also controverted is the argument that free TV supplies in quantity all the types of programs that STV would provide, so that the latter would not provide a beneficial supplement. Zenith and Teco observe that the "types" of which opponents speak are general categories such as "feature films," "sports," "opera," "mass entertainment," and the like. By using such broad categories, they state, it would even be possible to condemn the formation of a fourth free TV network on the grounds that the present networks provide ample amounts of all conceivable "types" of programming that a fourth network might offer. Telemeter says that when opponents speak of feature films as a "type" they ignore such differences as age of the film, quality, and the desires and habits of the public.

38. With regard to the age of the film, Zenith and Teco contend that the opponents belittle the matter of time delay that now exists between theater release and showing of films on conventional TV, implying that the public does not mind waiting three to ten years to see a film on TV after it has been shown in a theater. This, they state, is contrary to the economics of show business and human behavior, for "/f/reshness, immediacy and currency have long been essential ingredients in arousing the public's interest in entertainment."

39. In connection with the question of currency, Zenith and Teco say that although opponents mention the recent purchase by CBS and ABC of 112 feature films as examples of the kind of current pictures the networks are showing, they fail to state that many of those pictures will not be shown on free TV until 1970 or 1971, and that many of them have already been shown on STV during the past several years at Hartford. Similarly, Telemeter, in referring to the argument of opponents that the bulk of the films shown on free TV in prime time are "relatively current," mentions a compilation from a list of films in the July 27, 1966, Variety, presented by ABC, which suggests that (exclusive of two movies made originally for free TV) the films to be shown on the networks in prime time in the 1966-67 season had their theater releases anywhere from 1960 to 1965. However, Telemeter calls attention to the fact that the ABC compilation does not include the total list that appeared in Variety, an examination of which shows that more than 60% of the films to be shown are from 4 to 15 years old. Telemeter also states that 40 of the 116 films mentioned in the list were shown at Etobicoke. In addition, Telemeter names twenty-four pictures shown at Hartford since the start of the 1966-67 season (and prior to the date of filing of its reply comments on November 10, 1966) which, it says, probably will not be available to free TV until 1969 to 1971. It points out, too, that many of the films shown at Etobicoke have still not appeared on free TV.

40. Zenith and Teco, responding to the assertion that only 27% of the films shown at Hartford in the first two years of the trial were first subsequent run and that the remainder were 6 months old or more, advert to RKO's previous programming difficulties (see para. 18), characterizing them as water over the dam, and state that during the one-year period of October 1, 1965, to September 30, 1966, 70% of the 174 feature films shown were first subsequent run. The other 30% were shown within the first year of theater release, with a few exceptions which included "Bambi" and "Mary Poppins" which were "roadshowed" on a hard-ticket basis for over a year before they were given general release in theaters.

41. With respect to the argument that of the 432 films shown in the first two years of the Hartford trial 273 have since been released to free TV, Zenith and Teco point out that they never represented that such films would not some day reach that medium, but, rather, that they would be shown at an earlier date on STV.

42. They further state that the feature films which the opponents of STV seem to indicate are so important on network and local station programming could not be made available to free TV without support from box-office receipts. In the same vein, Telemeter says that current films--which are available on STV at the same time that they are being shown in local theaters--are not now and, under the economics of motion picture production and commercial TV broadcasting, never will be available on free TV while they are in current release in theaters. The reason given is that the films must first recoup their "negative cost" and at least some portion of their box-office potential prior to being made available to free TV. Numerous examples are cited. Thus, "The Bridge on the River Kwai," frequently referred to by the STV opponents as an example of free TV film fare, cost ABC $2,000,000 eight years after its release to theaters. Its negative cost was about $6,000,000 on top of which were able to pay for the film under the economics of commercial television would publicity, promotion, and distribution costs, so that the amount that ABC was not have paid a third of the total costs of the film, let alone absorb a part of its potential theater box-office gross of $17,000,000.

43. Telemeter goes on to say that, according to industry sources, the average motion picture is seen by only 5% of the population. A major picture is viewed by only 8% or, in rare cases, 10% of the population. Many who would like to see the current movie do not do so because of inconvenience or cost. A Broadway show in a 1200-seat theater that runs a year with every performance sold out is seen by 499,200 persons. Many of the nine and a half million residents of New York or the millions of persons in the rest of the country would like to see the show but cannot because of distance or cost. STV, Telemeter states, would aid the box-office potential of a motion picture or a Broadway play by showing it to an additional audience at a price, whereas free TV would impair the box-office potential. Thus, it is argued, STV may well stimulate additional quantity and quality of films, Broadway plays, operas, and the like. Additional programs so stimulated by STV would redound

to the ultimate benefit of free TV. 20/

44. Telemeter states that there are thus three levels of viewing films: (1) the theater, (2) STV, and (3) free TV. The public, it urges, should be entitled to choose at which level it wishes to view. It says that, after having been viewed in theaters or over STV, there will still be large audiences waiting to see them on free TV 3 to 5 years later and they will no doubt make for sizeable ratings for sponsoring advertisers just as they do now.

45. Telemeter, Zenith and Teco all make a further contention -- that films shown on free TV are cut and edited to fit appropriate time segments, and are often interrupted by commercials which, it is said, distort and destroy the artistic continuity of the films. 21/ In STV, the full feature is shown without cutting and without commercials. Moreover, another advantage of STV is said to be that the films may be shown more than once so that viewers may see them at their convenience.

46. Finally, concerning sports, special entertainment, and educational programming, Telemeter avers that STV will considerably expand the sports events available--events that are not now and in the foreseeable future will not appear on free TV. It is stated that although opponents belittle the fact that an average of only 17 doctors viewed each of the three medical programs at Hartford, it must be remembered that there were not more than 5,000 subscribers. If STV were nation-wide, Telemeter says, there would be millions of subscribers. As an example, it assumes 10,000,000 subscribers which is less than 20 percent of the total TV homes. With such penetration, 17 viewing doctors at Hartford would translate into 34,000 viewing doctors nationally. This is, Telemeter says, 12 percent of all doctors in the United States, who would be furnished a not inconsiderable and unique service by STV. Similarly, with regard to cultural programs, Telemeter states that opponents play down their import and play up the fact that these programs achieved very low ratings. Thus, NAB points out that The Consul had an average rating of only 3.5% at Hartford. However, if STV had millions of subscribers, even with such small ratings enough revenues would be generated to reward the producer of the opera. On the other hand, it is argued, such programs are viewed as "deadly" by commercial TV and get short shrift even in non-prime time, so that the minority audiences that would be interested in seeing them do not have the opportunity to do so.

20/ With regard to films, for example, Zenith and Teco mention that the increased use of films by the networks is making such product more scarce, and, citing figures, they say that except for second and third reruns free TV will not be able to show the quantity of first-commercial-TV run film that it has in the past. They state that if STV were to generate an increase in film production, this would not only aid STV, but would aid free TV as well.

21/ Telemeter cites two instances in which producers of films brought legal actions in efforts to prevent this sort of distortion on the part of free TV.

47. Conclusions. One of the most important single issues in this proceeding is whether STV would provide a beneficial supplement to the offerings of free TV. 22/ If it would, even its opponents agree that doubts about other public interest aspects of STV might possibly be resolved in its favor. However, if the programming of STV is merely duplicative of types of programs now appearing on free TV in quantity, opponents urge, and we would be inclined to agree, that it would not appear that other public interest considerations could justify the authorization of STV using broadcast channels. We believe, for the reasons given below, that STV will provide a beneficial supplement to free TV.

48. Of course, the programming of a single over-the-air trial operation at Hartford and an experimental cable operation at Etobicoke cannot form the basis for completely certain predictions about the programming that would be shown if nation-wide STV were authorized. However, programming different from free TV programming was available for the STV trials, and no arguments have been made that convince us that such programming would not continue to be available for STV if it becomes a nation-wide service. If anything, it seems that nation-wide activity would strengthen the position of STV in obtaining such programming, or even better programming. Proponents suggest that nation-wide STV would follow the pattern of the trials and that the major portion of its programming would consist of feature films and sports (91% of Hartford programming). This appears to be a reasonable forecast, and the rules which we adopt herein take cognizance of it. Should STV programming change as it develops, and should the change require amendments of our rules in the public interest, we, of course, stand ready to make them.

49. It may be useful first to analyze STV programming on the basis of the Hartford trial. We begin with sports. Opponents of STV urge that because a cascade of sports events is shown on free TV, sporting events shown on STV would be duplicative because they would be of the same type. This is unrealistic. It is elementary that if a man wishes to view a heavyweight championship fight he will not be satisfied with viewing a tennis match, a football game, or a motorcycle race instead. Such fights have generally not been carried on free TV in recent years. To let him see the fight on STV is clearly to supplement present sport-events programming on free TV. The same is true with respect to blacked-out home games of amateur or professional teams. If one wishes to view on TV the local teams in which he has a strong interest, it is at best a poor substitute to let him view teams in other parts of the country. It is a fact of life that just as heavyweight title fights are not now generally shown on free TV, homes games are blacked out. The promoters and team owners do not permit them to be shown on free TV for fear of

22/ The question of impact of STV on free TV, discussed hereinafter, is also of great importance.

harming box office revenues. Opponents speak of the present situation as "a reasonable accommodation of conflicting economic and social interests." This may be so, but it is not the only possible accommodation. If the teams which now protect their box office revenues by blacking out home games find that they can permit the games to be shown locally on STV and still benefit financially, perhaps a new balance of economic and social interests will be struck. It is argued that other factors than "protecting the gate" are involved. Thus, we are told that the Commissioner of the National Football League has said that he "does not want to follow the path of professional boxing--with teams playing in comparatively empty arenas with national television audiences." If the league believes that this would happen, there is nothing to force it to allow its football games to be shown on STV. They can only be shown if the league consents. The record suggests that at least in some cities where the pro football stadia are completely sold out and people cannot obtain tickets, STV might provide a beneficial supplement and the arenas would not be empty.

50. Another benefit to the public that should not be overlooked is the fact that many viewers may see a sports event over a single STV subscriber's set for a relatively modest per-capita cost. Thus, for example, a Hartford survey showed that during one heavyweight title fight an average of nine viewers was watching each STV set that was tuned in, and the cost for all nine was $3.00. The same fight on closed circuit TV at theaters in Hartford cost $5.00 per person.

51. Turning now to feature films, we observe that generally speaking, people like to see fresh, new films. That is one reason that theaters showing first run films can charge more than those with later showings. The fact that there are some exceptions to this observation, such as "blockbusters" that are not recent films, does not destroy its general validity. Although the opponents of STV attempt to minimize the importance of recency, at the same time they attempt to show that current films are being presented on free television. Just as a person wishing a heavyweight fight will not be satisfied with a tennis match, the chances are that generally a person wishing to see a widely-advertised, favorably-reviewed, new movie will not be satisfied with four-year-old film on free TV. They are both entertainment of the same type, i.e., "films," but there is a difference. And we agree with the proponents of STV who state that under the cost-per-thousand economics of conventional television, current films, such as first subsequent run films, cannot be shown on that service, because free TV cannot pay enough to cover production costs and potential box-office revenues that would be lost because of the free TV showing. On the other hand, Zenith and Teco report that after difficulties in program procurement were ironed out, 70% of the films exhibited in the Hartford trial in a recent year were first subsequent run. It may also be recalled that although only 27% of the films in the first two years of the trial were first subsequent run, the rest were, on the average, shown two years after theater release.

52. The opponents make an effort to show how recent the films on free TV are, but there can be no doubt from the data they submit, or from a perusal of TV program schedules, that the average age of the films on free TV is far above the Hartford average. As an example, we refer to the list of films to be shown by networks in prime time during the 1966-67 season which ABC compiled from the July 27, 1966, Variety. Except for two films made expressly for original run on free TV, it consists of 26 films that will, on the average, be shown 3½ years after theater release. Moreover, the complete Variety list of films to be shown by networks during the 1966-67 season from which the ABC list was selected, reveals that 60% of the films are from 4 to 15 years old. 23/

53. A final point should be mentioned with regard to feature films. Opponents suggest that, in pleadings filed about twelve years ago in this proceeding, the Commission was led to believe that STV would supply first run feature films, but that it has only furnished first subsequent run pictures. Zenith and Teco state that although first run films have generally not been made available for STV, if the service were authorized on a nation-wide basis they could no doubt be obtained if desired. We would point out that, as indicated in paragraphs 56-58 below, the Commission was of the opinion that claims of both proponents and opponents might not be free of exaggeration and the very purpose of trial operations was to aid in ascertaining where reality lay. The Hartford trial has shown that, at the least, first subsequent run films are available. Whether first run features would be similarly at hand if STV is authorized on a national scale is not controlling at this juncture, since we are convinced that even without their availability, the films to be shown on STV constitute a beneficial supplement. This supplement permits the public to have three methods of viewing motion pictures: (1) first or later runs in theaters, (2) first subsequent or later runs on STV, and (3) later runs on conventional television. If first run films should be made available to STV the same three methods of viewing would still prevail with STV being even more of a beneficial supplement.

54. Several opponents have stated that the Hartford trial has shown that STV has disproved the proponents' statements that STV would diversify television programming. They quote from paragraph 48 of the First Report to the effect that proponents "allege that subscriber financed broadcasts could and would provide a wider choice to members of the public interested in the fine arts, operas, educational and informative material and other similar kinds

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23/ What the situation on conventional TV will be in years to come is a matter of conjecture. Both opponents and proponents agree that the source of supply of films is drying up. ABC says that because of this, feature films are now being produced specifically for conventional TV exhibition and that such films may ultimately become a network staple. Others say that the viewing public is not satisfied with such films and prefers films made for theater release. Zenith and Teco question, in view of the diminishing supply, what free TV will do in the future other than resort to showing more and more reruns. (See note 20, supra.)

of programs." Instead of diversity, it is argued, Hartford has shown that most of the programming will be that which appeals to a mass audience--films and sports. Therefore, since it will not provide the diversity promised STV should not be authorized.

55. This argument overlooks the context in which the quoted statement was made. Therefore we quote in full paragraphs 48, 49, and 51 of the First Report:

> 48. Insofar as a judgment can be made on the present record the Commission believes that in some respects the claims of proponents and opponents alike are not free from exaggeration. Proponents, for example, have tended to stress the capacity of subscription television to bring to the public new kinds of programming hitherto unavailable or available on a very limited basis. In support of this argument proponents refer to the incentive to the advertiser to concentrate his support on programs of wide general interest. They allege that subscriber financed broadcasts could and would provide a wider choice to members of the public interested in the fine arts, operas, educational and informative material and other similar kinds of programs.
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> 49. As against this picture of greatly enhanced variety of programs, the opponents insist that the incentive to offer programs of the widest popular appeal would be if anything greater in subscription television. Time availabilities, it is claimed, which could yield substantially greater returns for programs of wider popular appeal would not be sacrificed to any appreciable extent for the transmission of programs which may be expected to attract such smaller audiences.
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> 51. It is not possible, however, without a demonstration of the service in operation, to determine reliably where the practical realities lie -- in the glowing prospects pictured by proponents, with the alarms raised by the opponents, or somewhere between these extremes.

Comments of proponents filed in 1955, and paragraph 50 of the First Report not quoted here, make it clear that proponents not only stated that STV would provide wider diversity, but that it might offer sports events not shown on free TV, as well as movies.

56. In view of the foregoing, it may be seen that we expressed an inability to determine where the realities of the matter lay without help from trial operations. We now have the results of the Hartford trial, as well as some information concerning Etobicoke. It would appear, at least at present, that the reality is that the major part of the programming, as opponents had

argued, will be of a kind that would appeal to a mass audience. To say this, however, is not to say that it would not be in the public interest to authorize STV for, as indicated above, we believe that such programming does provide a beneficial supplement to present television fare, albeit the diversity promised may not be fully achieved.

57. It is difficult at this stage to arrive at any definite conclusions about the cultural or educational type of programming that was to make for diversification. Hartford did offer some. So did Etobicoke. Audience response was not great, but there was a response. On a national scale, total audiences would be greater. Zenith and Teco state that the limitations of the trial prevented more such programming. Larger audiences might permit it. The Joint Committee says that RKO promised the Commission that it was prepared to lose up to $10,000,000 on the trial. It lost money, but not that much. The Joint Committee argues that had it spent and lost more, as it promised it was willing to do, it might have provided the Commission with more information about such programming. This is obviously an area where we know little. In any event, the rules we adopt today adjust to the reality of the situation--the expected predominance of films and sports--but provide assurance of programming for other tastes as well by establishing a maximum percentage of STV hours on the air that may be devoted to films and sports.

Whether STV Would Provide an Increase in Financial Resources Which Would Facilitiate Significant Increases in the Numbers of Services Available to the Public Under the Present System

The Degree of Acceptance and Support Which STV Might be Able to Obtain From Members of the Public in a Position to Make a Free Choice

58. These two categories are discussed together because they are so closely intertwined. Zenith and Teco give business projections based on the Hartford experience which indicate that an over-the-air STV operation would break even with 20,000 subscribers. They then assume what they characterize as a conservative estimate that 10% of the TV households in a community would subscribe to STV. Under these assumptions, the top 91 markets would have sufficient TV homes to support viable STV operations. From this they argue that STV has a reasonable potential of supporting 91 more stations in addition to those already in operation, and that, depending on the market place, it might do even more than that. Thus STV would facilitiate increases in the number of services to the public. Whether STV could provide an increase in financial resources depends, of course, not only on the validity of the assumptions that went into the preparation of the business projections that suggest a 20,000 subscriber break-even point, but also on whether public support would be such as to produce more than 20,000 subscribers in various communities. We turn first to the business projections.

59. Business Projections Based on Hartford Trial Information. Although the Hartford trial lost over three and a half million dollars in the first three years of operation, Zenith and Teco remind us that RKO mentioned at the hearing prior to the grant of the trial authorization that even under the best of conditions it expected to lose more than a million dollars. They aver that the objectives of the trial were to obtain operating experience and that in this respect it was a success. Thanks to the trial, they say, for the first time reliable data are at hand from which reasonable business projections may be made about the potential of STV to provide an increase in financial and program resources which would facilitate significant increases in the numbers of services available to the public.

60. The Zenith-Teco business projections were summarized in paragraphs 10 and 11 of Appendix A of the Further Notice. That appendix is attached hereto as Appendix B. The assumptions used in preparation of the projections are stated briefly in paragraph 11 and will not be repeated here.

61. Opponents variously criticize those assumptions. Thus, for example, it is said that the projections assume payments of $65 per year per subscriber for program charges, but that at Hartford the average for the first year was $67.47 and it fell to $56.84 the second year, so that the figure of $65 is not based on the trial data.

62. It is also argued that if STV pays only 35% of total subscriber program expenditures for payment to program suppliers (this is the figure assumed in the projections; the percentage was slightly higher at Hartford) it will obtain little more than the programming that was obtained for Hartford which produced less than 1% penetration rather than 10% or more. Quality films, we are informed, can command as much as 90% for a first-run showing in New York or Los Angeles, and often obtain as much as 50% or more for first subsequent run. Closed circuit television in theaters can expect to pay 50%-60% of the gross, it is said.

63. Other arguments are that in calculating the projections, the turnover rate (the number of subscriber homes disconnected as a percent of the average number of subscriber homes) is taken to be 20%, but it was higher at Hartford; and that the assumption of payments of $300,000-$400,000 per year for station time is too low.

64. Penetration. As to penetration of STV, opponents urge that the so-called conservative assumption of 10% has no basis in fact. At Hartford the penetration was less than 0.75% of the TV homes in the market. If the trial is to be used as the basis of projection then one should assume not more than roughly 1.0% penetratio . Using that figure, STV would be viable in only the top 4 markets and not in 91. 24/ .

24/ It is also urged that the high turnover rate at Hartford shows subscriber dissatisfaction and is significant in showing that STV lacks ability to attract sufficient subscribers.

65. In addition, it is argued that the revenues of the projection include not only program charges of $65 per year per subscriber, but weekly decoder rental charges of 75¢ that come to $39 per year, for a total of about $105 per year. According to the most recent Department of Labor statistics, the average family spends only $27.67 per year on all spectator admissions, yet Zenith and Teco expect them to quadruple that amount for box office admissions and spend the entire amount on STV. There is no empirical basis in fact, we are told, for expecting this to happen, and the trial results show that only 0.75% might do so, which is a far cry from 10%. Thus the revenues are overstated insofar as they purport to be based on the Hartford data.

66. Channel Allocations and Station Growth. Zenith and Teco present their projections and penetration material against a background of information concerning channel allocations and station growth in order to show that STV would provide an increase in financial and program resources for the nation's competitive television system. They briefly mention the activity of the Commission in allocating television channels throughout the country on the basis of priorities designed to provide the setting for a national competitive television system. But they emphasize that establishing stations using the allocated channels is the province of private enterprise. Figures are presented to show the number of television broadcast licensees and the number of permittees as of January 1, 1964 (shortly before they filed their joint petition for further rule making), and the number of idle channels. In addition, information is given about television stations that went off the air and construction permits for TV stations that were surrendered or cancelled between the lifting of the freeze in 1952 and January 1, 1964. Zenith and Teco also point to the Commission's sponsorship of the all-channel law as another example of what the Commission has done to develop the television system. They then conclude that the Commission has perhaps done all it can to achieve a nation-wide television system and foster UHF except for promoting economic support and program sources through the authorization of STV.

67. Responsive to the foregoing, the Joint Committee points out that the Zenith-Teco figures stop at January 1, 1964, but that between that date and September 29, 1966, the number of commercial UHF stations increased from 88 to 115 and the number of VHF stations, from 476 to 490. Also, during that period, the number of UHF construction permits increased from 61 to 139. This UHF growth, it is suggested, was brought about by the fact that the UHF problem was caused by the lack of set conversion, a situation that was corrected by the all-channel law without the aid of STV.

68. Necessary Showing for Establishment of New Service. In their reply comments, Zenith and Teco place principal stress on the question of what sort of showing is necessary in order for the Commission to establish a new service. They say that opponents hold that the Hartford trial did not supply enough information to permit valid projections of viability of STV, and that without absolute proof the Commission cannot establish a new service or otherwise encourage the larger and more effective use of radio because it would result in waste of spectrum space. Nothing in the Act, they state, indicates that establishment of a new service must be preceded by absolute proof

that it will be viable. Nor was such proof made when the Commission made allocations for UHF in 1952, when it reserved channels for educational TV in 1952, or in other situations. The Hartford trial, they state, provided useful information on which to make projections. Citing American Airlines, Inc. v. Civil Aeronautics Board, 192 F. 2d 417 (C.A.D.C. 1951), they argue that the Commission, in encouraging and developing new broadcast service in the public interest, should consider not only present facts but estimates of the future. Along the same line, in response to the argument that the 10% penetration figure is too optimistic, Telemeter states in its reply comments that one of the opponents of STV (NAB) misjudged the future of commercial television when it was beginning, but that service grew from 8500 TV homes to 94% of all homes in the nation.

69. Conclusions. We agree with the views of Zenith and Teco expressed in the preceding paragraph. We observe that the results of a single trial cannot be projected into the future to indicate with complete accuracy the nature of a new service. However, a trial can, and the Hartford trial did, supply us with information that does afford a projective basis with some attachment to reality as opposed to mere conjecture that existed before. We recognize that there are some weaknesses in the assumptions underlying the Hartford business projections, but do not consider them as overriding. For example, the estimated $65 figure for program revenue per year per subscriber is slightly higher than the Hartford experience. However, in making the projections Zenith and Teco stated that it only approximates the average program expenditure of the Hartford subscriber. They also pointed out that with nation-wide STV more, and in some respects better, program product might be available and it is not unreasonable to expect that subscribers might spend more on programs because of this. In any event, even if the $65 figure were shaved by a few dollars to make it correspond exactly to the average Hartford expenditure, it would only result in a relatively minor change in the projections.

70. Nor, for example, do we gainsay the validity of the fact that the projections assumed a revenue of about $105 per year per subscriber for STV alone, whereas the average family spends only $27.67 per year on all spectator admissions. However, the fact remains that the average subscriber at Hartford did spend close to $65 per year for programs and, with discounts, did pay a weekly decoder rental fee. To say that the average family spends $27.67 is not to say that no families spend more than that amount, for it is the nature of an average that many lie above it and many below. Unfortunately, we have not been told what percentage of American families spend far above the average. Nor do we have information about the possibility that expenditures for STV might come out of a non-recreational part of the budget as has apparently been the case with amounts paid for purchase of television sets.

71. Concerning the argument that the estimate of payments of $300,000 to $400,000 per year for use of station time for broadcasting of STV programs is too low, we would point out that even in the largest markets some TV stations charge rates comparable to those of the larger radio stations in the area. This indicates that the figure of $300,000 to $400,000 is not unreasonable.

72. As to the argument that the high turnover rate shows public dissatisfaction with STV and that the public will not support it, we conclude that not enough is now known about the causes of turnover to permit drawing valid conclusions. We agree that, based on the experience of telephone companies, Zenith and Teco assume too low a turnover rate. However, we have no reason at this time to believe that with STV authorized on a nation-wide basis this factor would be of such magnitude as to result in insufficient support of STV. In any event, the rule we adopt today provides for lease rather than purchase of decoders by subscribers, and thus provides protection to subscribers who may wish to withdraw.

73. As to the estimate that program costs would run about 35% of program revenues, it is said that unless STV spends more than that for quality product it will not achieve a better penetration than it did in Hartford and it will fail; and that quality product sometimes costs more. Yet we are not told how much quality product there is that costs more, or how much more it costs other than that "it will bring as high as 90% for first-run exhibition in New York or Los Angeles," or that it often obtains as much as 50% or more for first subsequent run and that closed circuit television in theaters can expect to pay 50%-60% of the gross. We believe that the question of what programs STV can obtain and how attractive they will be to how many people cannot be answered with any great degree of certainty. It is conceivable, for example, that a nation-wide STV system, even if only moderately successful, could provide an audience sufficiently large to make payments of 35% of program revenues very attractive to suppliers of quality product. In fact, with larger audiences, suppliers might be willing to charge lower percentages. Moreover, there is the possibility that if more than 35% had to be paid to obtain quality programs, STV operators could charge more for the better product. In any event, the question of STV penetration and what it might take to obtain great penetration is one about which there can only be speculation at this stage. At worst, using a 1% penetration, and accepting the other assumptions of the projections, presumably STV could be viable in the top four markets (New York, Los Angeles, Chicago, Philadelphia). At best, it would be successful in many more. Having decided that STV can provide a beneficial supplement to present TV programming, we are content to let this aspect work itself out in actual operations under our new rules and under a requirement (as a matter of policy) that applicants for STV authorizations make a showing that they have the financial capacity to operate for at least a year.

74. Although not previously mentioned, we here note with regard to the matter of potential penetration of STV that it has been argued that STV would be something which only the very wealthy could afford. Zenith and Teco provide the following table, based on the Hartford trial, controverting this:

Income Levels	Proportion of Total U.S. Families*	4633 Hartford Subscribers: Proportion of Total Subscribers	Average Weekly Program Expenditure
0-$3,999	29.1%	1.5%	$0.00
$4,000-$6,999	32.5%	40.8%	1.25
$7,000-$9,999	21.0%	43.3%	1.23
$10,000 and Over	17.7%	14.4%	1.18
Totals (rounded)	100.0%	100.0%	(avg.) $1.22

* Statistical Abstract of the United States 1964, Table No. 457, p. 338.

It would appear, if the trial is any indication, that STV would appeal especially to the more than 50% of the population in the middle-income groups, and not mainly to the upper income level which includes only about 18% of the population. As to the 30% of the population in the lowest income category, Zenith and Teco state that an annual income of $3,000 has been called a "poverty" income. Therefore many of those in the less than $4,000 bracket in the table might not be able to afford other than basic necessities, and some might not even be able to afford TV sets, let alone STV.

75. STV opponents contend that 30% of the nation would appear unable to afford STV and that therefore authorizing STV would not be in the public interest. We do not find their arguments convincing. Among other things, we would observe that under the rules which we adopt herein, all those in the lowest income group who own TV sets will be able to continue to see ample amounts of free TV programming, so that they will not be deprived of anything, while at the same time a substantial portion of the population will be given the opportunity to view STV if it so desires. The same economic difference presently exists with regard to color TV. Many in the country who desire color sets with large screens cannot afford them.

76. Finally, we are gratified that the all-channel law is apparently acting as a stimulus to UHF development, for this was our hope when we sponsored it. 25/ However, our commitment to aid UHF is not limited to that law, and it is well-known that our continuing policy is to foster UHF development. We are pursuing many paths toward that end, and to the extent that STV may act as a stimulus, we will pursue that path as well. One opponent has argued that the financial resources of STV would not be used to strengthen free TV on the same station that carried on STV operations, but that they would be used to strengthen STV since STV and free TV would compete with each other, and that this would impair rather than promote the capacity of

25/ U.S. Census reports that in August 1966, 93.4% of households had TV sets and 33.8% of households had sets equipped for UHF reception. (Current Housing Reports, Series H-121, No. 13, February 1967.)

such stations to yield an expanding service envisioned by the all-channel law. As with other aspects of this or any other new service, this cannot be known until the actual operations commence. However, we note that our new rules require that STV stations carry at least the minimum of conventional service specified by our present rules.

Whether STV Would Seriously Impair the Capacity of the Present System to Continue to Provide Advertiser-Financed Programming of the Present or Foreseeable Quantity, Free of Direct Charge to the Public. The Closely Related Question of Whether STV Would Result in Significant Audience Diversion from Conventional Television and Siphoning of Programs and Talent Away from Free Television Into STV Service.

77. With regard to the matter of impact of STV on free TV and the related subject of siphoning, we stated in the Further Notice (para. 16):

> "In our judgment, our consideration of subscription television should proceed with due regard both for its potential benefits and disadvantages and for the inherent strengths and advantages of the existing system. That subscription television on a nation-wide scale can be effectively integrated into a total TV system, with advantages to the viewing audience, appears to be a reasonably sound conclusion at this point. While...there may be some impact on free TV, we do not believe that this is in itself necessarily bad or that it need occur to a degree contrary to the public interest, particularly if safeguards such as those previously mentioned are adopted. Our concern, as it must be, is with the over-all public interest and not with protection of any existing service as such. It may well be that competition between conventional and subscription TV for viewing audience and program material may result in improved and more varied fare, both for subscription viewers and those who continue to rely on conventional television. But we also emphasize that we regard the preservation of conventional television service and the continued availability of good program material to the free service as extremely important considerations...."

78. We also stated in the Further Notice (paras. 13-14) that although no final conclusions could be drawn from the Hartford trial about the extent to which STV would divert audience from conventional TV, the trial data suggest that such diversion would not be destructive of the latter service. In connection with that statement we adverted to the fact that the average Hartford STV audience at any particular time was 5.5% of the subscribers, and that the number of subscribers was less than 1% of the net weekly circulation of the market. We stated that even with 10% penetration

and 10% average subscription audience (as compared with the 5.5% of the trial), the average STV audience in prime viewing time would only be 1% of all the TV homes in the United States. This diversion and whatever effect on revenues it might have we felt would not seriously impair the free TV service.

79. We went on to say that conceivably the audience diversion might be substantially greater if STV should result in "siphoning" 26/ of programs and talent from free TV to STV. And, aside from audience diversion, should siphoning occur, we stated, it could make free TV a less rich and varied medium for those continuing to view it. Because we found it difficult, on the basis of the Hartford or any other information, to arrive at conclusions about siphoning, we invited comments on the extent to which it might be likely to occur and on what rules or policies, if any, should be adopted to prevent it from occurring to a degree contrary to the public interest. Paragraph 14 mentioned and invited comments on possible regulative approaches to the problem--the safeguards mentioned in the quotation in paragraph 75 above.27/

26/ A matter of key importance in this area is the possibility of diversion of talent and programs from free TV to STV, a process often called "siphoning."

27/ The pertinent portion of paragraph 14 is as follows:

"It is difficult, on the basis of the Hartford trial or any other information which we have, to arrive at well-founded conclusions concerning siphoning of programs or talent. We invite comments on the extent to which such developments are likely to occur, and what rules or policies, if any, should be adopted to prevent them from occurring to a degree contrary to the public interest. For example, such regulations might include (1) rules preventing or limiting interconnection of pay TV operations by microwave or otherwise, (2) rules prohibiting a system manufacturer or franchise-holder (who might hold franchises in numerous markets) from engaging in subscription program procurement and supply, which could be made the responsibility of the individual licensee, or (3) rules to assure that subscription television entrepreneurs do not unreasonably contract with performers in such a way as to prevent or discourage their appearing on conventional television. Another possible approach to this question, urged by Zenith and Teco, is that subscription television be limited to kinds of programs not presently available in substantial amounts on conventional TV. This is discussed in paragraphs 41-42 below. We anticipate that, if subscription TV operations are authorized, the licensees thereof will be expected to furnish the Commission, on a continuing basis, with information as to number of subscribers, per-subscriber expenditures, and programs presented so that we may be periodically informed as to the factors bearing on their potential for siphoning programs or talent from conventional television."

80. Comments of Proponents of STV. Comments received are summarized in this and the succeeding paragraphs 28/ and are followed by our conclusions. Zenith and Teco, incorporating by reference previously submitted material, state that audience siphoning would be minimal because the average subscriber at Hartford had an STV viewing time of approximately 2 hours per week as compared to the average U.S. free TV viewing of about 38 hours per week. This is about 5% of the hours the public now views free TV. If every home were to become an STV home, which is unlikely, there would thus be a loss of 5% of viewing time to STV. But if 10% penetration of STV were achieved, the loss would be ½ of 1%. Moreover, since even in prime time between 35 and 50 percent of TV homes do not use their sets, some of those viewing STV might be those whose sets would otherwise have been dark so that their viewing would be additive rather than subtractive. They also demonstrate the minimal audience siphoning effect by stating that the average STV audience at any particular time was 5.5% of the subscribers. Thus even if there were 100% penetration by STV, only 5.5% of the subscribers would be diverted at any given time, leaving 94.5% of TV homes available to watch free TV.

81. Concerning pre-empting of time now used by free TV, it is stated that WHCT at Hartford broadcasts an average of 30 hours per week of subscription programming and that, because of the limitation on the number of box-office programs and the size of the recreational budget of families, that number is unlikely to vary in other STV operations. 29/ Since typical TV stations broadcast about 115 or 120 hours per week, in a multiple-station market of three or more stations STV could not absorb more than 10% to 15% of the total broadcast time available. Moreover, it is argued, because conventional TV stations affiliated with networks probably would not wish to desert profitable operations by giving up network programming for STV programming, it is likely that STV will have to support the establishment of new stations if it is to get off the ground. New stations would not siphon time that would otherwise be available to free TV. They would add to the total amount of time.

82. As to program siphoning, Zenith and Teco inform us that none of the programs shown at Hartford were available on free TV. With regard to talent siphoning, they remind us that stars, producers, directors, and writers often work for more than one medium and there is no more reason to assume that STV will siphon talent than there is to suppose that the motion picture industry would do so, since for much of its programming STV merely would substitute

28/ Many of the arguments made in the comments have been previously made in earlier stages of this proceeding.

29/ Zenith and Teco state that because of these limitations a total of about 30 hours of STV programming is all that can be absorbed in any market regardless of the number of STV stations therein.

for the motion picture theater. They contend that STV will not siphon programs or talent from free TV and that the two services will not bid for the same product. In any event, they aver, the economic resources of STV are dwarfed by those of the networks, so that STV could not outbid them. In support of these views they state the following:

"The fear that subscription television could outbid conventional television for programming also reflects a basic misconception concerning the fundamental economics of subscription television. Expensive box-office programs--such as ten-million dollar current feature-length motion pictures--can admittedly be shown on subscription television long before conventional television. But the reason is not that subscription will necessarily have more money available for program procurement than conventional television. The reason lies primarily in the distribution structure which results from the efforts of product owners to maximize their profits from each production.

"Thus, conventional television programming usually has only one source of economic support--the advertising sponsor. The extent of the sponsor's support is controlled by the cost-per-thousand economics of advertising. On the other hand, box-office attractions have several sources of economic support, which include revenue derived from theater release, both domestic and worldwide, in addition to revenue derived from later use on conventional television. Subscription exhibition can be combined with simultaneous theater release and add to the box-office revenue of program producers and distributors without reducing the further revenue ultimately obtainable from conventional television. The combined amount of these box-office revenues will ordinarily exceed what sponsors can pay for a single conventional television release. Yet the combined box-office releases exhaust the residual value of the film to a lesser extent than a single showing on conventional television. In short, subscription television and theater box-office release can profitably be permitted simultaneously, whereas release to conventional television must be deferred in the interest of maximizing profits over the life of the production.

"Aside from the erroneous presumption that subscription television and conventional television would often be simultaneously seeking the same product, it is a matter of simple business arithmetic that subscription television will not be in a position to outbid conventional television for program product. Thus, in Hartford the average subscriber has been willing to spend approximately $65 a year for subscription programming; and, on the basis of numerous market studies made by Zenith, Teco and others, this appears to be the approximate portion of the public's recreational budget that it is willing to spend on subscription programs. Of this $65 annual program income, approximately 35% (or $22.75) is available for program procurement, with the remaining 65% required to support the television station and the subscription system.

"For purposes of nation-wide projection, the Commission in its Further Notice has estimated, on the basis of the Hartford trial, that a 10% nation-wide penetration of television homes would be a relatively optimistic figure in the foreseeable future. A 10% nation-wide penetration would amount to approximately 5.5 million subscribers. Five-and-a-half-million subscribers spending $65 each per year, of which $22.75 would be available for program procurement, would make available $125,125,000 for subscription programs. This amount is dwarfed by current network expenditures for programming. Thus, in 1965 (latest figures available), the network and their O&O's spent $686,752,000 and the total broadcast industry spent $953,251,000 on conventional programming. In short, with a 10% nation-wide penetration, subscription would have available for program procurement less than one-fourth of the amount spent by the networks and their O&O's and less than one-seventh of the amount spent by the entire television industry for programming in 1964. Stated otherwise, subscription would have to achieve approximately a 70% nation-wide penetration of television homes to have an amount available for program procurement which would even approximate the amount already being spent by the television industry for conventional programming. Thus, the fear that subscription could win in a bidding contest with conventional television is simply not realistic."

83. To the often made argument that STV would siphon from free TV the programs that have high ratings and make the public pay for them, Zenith and Teco say that the Hartford experience shows that even for box office programs the public is selective. Thus the cumulative audience rating for first subsequent run films was about 27% but for older films it was 18%. Therefore, they argue, it is unreasonable to assume that the public would pay to see the type of program now available on free TV, especially when programs of that type could be seen on some other station free. Even with the 40 top-rated programs on free TV during the Fall season of 1964, according to the Nielsen rating, an average of 76% of the viewers did not watch them.

84. To the contention that STV would siphon all major sports, they state that even with an STV penetration of 20% in the top 175 markets, at an average yearly subscriber program expenditure of $65, there would be $650 million in program revenues. Assuming that 35% of this amount would be available for program procurement, there would be $227,500,000 for all STV programming. Citing figures for relative amounts of spending by the public for movies, plays, sports, and other entertainment, assuming that these figures will apply to STV spending, and allocating a proportionate amount for program purchases accordingly, about $32,000,000 would be available for sports programs. This figure they point out is about 60% of the sum of approximately $50,000,000 that free TV spends for some, but not all, of the sports programs seen on conventional TV. This reflects the relative abilities of STV and free TV to acquire sports programming. They state that with the money available, the major contribution of STV to sports programming would be that of carrying heavyweight championship fights and blacked-out games.

85. Finally, to the argument that STV would siphon all present network conventional programming from free TV, they state that there are just too many such programs to permit them to be absorbed by the public's recreational budget at a rate higher than sponsors will pay for their showing on free TV.

86. Other proponents of STV also present their positions in this area. Telemeter says that STV will not siphon but will show programs not now available to free TV. Teleglobe says that free TV is a giant and can't be hurt, its revenues having increased from 324 million dollars in 1952 to about 2 billion in 1965. With 10% penetration, STV revenues would only be about 500 million dollars a year. Jerrold says that phonograph records and tape recordings have not driven radio out of business or decreased quality of radio programming, nor have motion pictures become extinct because of TV. Actually, in Jerrold's view, pictures have improved because of the competition of television. Competition, it is said, should be assumed beneficial until a contrary showing is made and the government should not inhibit competition for the sake of preferring one kind of communications over another. Acorn says that if STV programming is good enough it is conceivable that free TV would try to siphon it away--a siphoning in reverse.

87. Comments of Opponents of STV. Concerning the matter of audience siphoning, the Joint Committee says that the trial gives no information because with an average of 5.5% of subscribers watching STV at any one time, only 267 persons (5.5% of 4,851) would be watching, and in a market with a net weekly circulation of 800,000 there would be little audience siphoning effect; and besides such an STV operation would not long survive. However, they argue, proponents foresee a 10% to a 50% penetration for STV. With such penetration in Hartford it would mean anywhere from 80,000 to 400,000 subscribers for that market. But if programming of a quantity and quality were available to attract that many subscribers, i.e., to establish a successful STV operation, what would the average viewing time be? Hartford provides no information about that. The Joint Committee points out that the Liston-Clay fight attracted 82.6% of the subscribers. With 80,000 to 400,000 subscribers, they state, this would have had a disastrous impact on free TV on the night of the fight. AMST says that although Zenith and Teco allege that audience siphoning would amount to only ½ of 1% of the audience available to free TV, by far the greatest part of STV programming would be shown at peak viewing hours and it would therefore have a critical impact at the very time that free TV generates its largest advertising revenues which sustain programming in less profitable periods of the day. Free TV relies on low cost-per-listener economics and would be vulnerable to audience losses. Moreover, AMST urges, the success of STV depends on its ability to penetrate the largest markets, as well as the smaller ones, and the destructive impact of STV through the larger markets would strike at the heart of free TV.

88. Pre-empting by STV of time now used by free TV is a matter toward which ABC, NAB and the Joint Committee direct remarks. The latter party states that the allegation of Zenith-Teco that there would be 30-40 hours of STV programming per week in any market and that this would still leave ample time for free TV overlooks the facts that the 30-40 hours are in prime time and that Zenith-Teco do not propose to limit STV to multiple station markets. The Joint Committee also questions the assumption of a 30-40 hour limitation of STV programming--a limitation based on the restricted amount of box-office programming and limitations in the family recreational budget. NAB points out that Zenith and Teco have said that stations would be predominantly STV or free TV because of such factors as prime time demands by both types of programming. If a station has STV programs on the air, the time is taken away from non-subscribers. In most markets, even the use of one station for STV would seriously restrict the public choice among programs. The concern of ABC about time pre-empting is expressed somewhat differently. It states that the Commission, recognizing the number of free TV hours would be reduced to some degree by STV, has proposed a limitation on the number of hours of STV broadcasting. In spite of this, it is stated, hours of free TV will be lost. There are relatively few markets with four or more stations where the loss would be less noticeable. To the extent that existing network affiliates use prime time for STV programs, network clearances could be severely compromised. This could be especially serious for ABC, which has the fewest number of primary affiliates and therefore has a greater problem in obtaining clearances for its programs. Failure of a significant number of stations to clear a program could badly hurt ABC's position in satisfying advertiser requirements, especially if the lack of clearances occurred in some of ABC's key markets. It could spell the difference between the retention or dropping of a program. Nor do delayed clearances help, because research has shown that programs cleared on a delayed basis frequently do not have sufficient audience to make them economically viable. Finally, ABC argues, the demand for station time of competing sources of entertainment which results in non-clearance of network programs frequently leads stations to drop network public affairs and other public service programs. Pre-empting of station time by STV programming would do this.

89. Several opponents state that the Hartford trial failed to give information about program siphoning. For example, ABC says this is because it was such a small operation that there wasn't even a remote possibility that it could compete for the most popular programs of network television that are sold nationally. CBS says that since the Hartford trial was limited to 5,000 subscribers, rather than 50,000 it originally contemplated as a maximum, meaningful conclusions on program diversion cannot be made. However, it is said, the trial established that STV and free TV rely on the same program sources, and if the Hartford business projections are correct, STV would have financial resources to siphon significant amounts of quality programming from free TV. Owners of box-office programs now on free TV would invite offers from both STV and free TV.

90. The latter point--that STV and free TV would compete for the same programs--is made by many opponents. It is variously argued that STV would cater to the same general audience tastes as free TV since the trial at Hartford showed that most of the programming would consist of mass circulation entertainment (movies and sports), that STV would siphon off most of the popular free TV programs with a devastating effect on the latter service, that siphoning of top shows would result in news and public service programming (which involve substantial losses) vanishing from free TV because of loss of financial earnings from the lost shows, that a showing of a program on STV dilutes the potential free TV audience and vice versa, that although talent, absent any contractual limitation, could work for STV and free TV, it cannot do so at the same time, that if the talent is a performer he might suffer the same problem of audience dilution as movies, that STV would bid away selective mass appeal programs such as the World Series and professional football games since those involved would have a choice of whether to use STV or free TV, and that in addition to siphoning the most popular free TV programming STV would siphon other programs as well as producers, writers, and directors of entire serials and specials.

91. Both ABC and CBS discuss selective program siphoning. ABC says that CBS is presently paying $19,000,000 for the right to show the NFL football games and that it appears that this is near the limit of what free TV can pay. It states that although it is difficult to estimate what STV penetration would be nationally, if only 15,000,000 sets were tuned in to professional football games at a cost of $1.00 for each game, over a 14-game season revenues of $210,000,000 would be obtained--an amount which dwarfs the $19,000,000 that CBS pays. Thus it is implied that STV could outbid free TV for such games.

92. Although questioning some of the reasoning of Zenith and Teco underlying the assumption that about $32,000,000 would be available to STV for procurement of sports events (if there were 20% penetration in the top 175 markets), CBS says that even assuming that figure, the Zenith-Teco statement that free TV spends about $50,000,000 for selected sports events so that STV could presumably not outbid free TV for them is not correct. CBS maintains that STV could concentrate its programming dollars on the lion's share of the major events and thereby siphon them from free TV.

93. Finally, ABC argues that there is no effective protection against siphoning. It states that if STV is authorized on a nation-wide basis and siphoning then develops, the immense capital investments and the establishment of viewing patterns will make it difficult, if not impossible, for the Commission to take effective regulatory action. ABC says that it was this sort of consideration that led it to urge the Commission to assert jurisdiction over CATV. As to taking action now to prevent siphoning by Commission rule, it is asserted that the limitation of STV programming to box-office attractions is impractical, and in any event would raise Section 326 and First Amendment problems.

94. Reply Comments of Proponents. Zenith and Teco reply to comments of STV opponents on siphoning as follows The Joint Committee argues that even though talent might continue to work for free TV and STV, it could not do so at the same time. This completely overlooks the fact that programs may be taped or filmed so that the artist need not perform the impossible task of being in two places at the same time. Recently, (citing an example) the same artist appeared on CBS and on NBC simultaneously. The argument that if talent appears on both STV and free TV it might dilute its conventional TV audience by self-competition (i.e., by siphoning part of its free TV audience to STV) is poppycock.

95. They advert to the example of ABC which stated that if 15,000,000 STV sets were tuned in to NFL football games at cost of $1.00 per television household, then over a season of 14 games $210,000,000 would be generated so that STV could siphon the games from free TV because the latter medium can only afford to pay $19,000,000 for them. To this they reply: The ratings of AFL and NFL football games have averaged between 10 and 14. Therefore, if STV could achieve the same rating by levying a charge as was obtained when the programs were shown free, STV would need a penetration of 100 to 150 million subscribers in order to obtain revenues of $15,000,000 per week. But there are only about 55 million sets in the country. It is more reasonable to assume a 10% STV penetration which would result in about 5 ½ million subscribers. At $1.00 per game and with a rating of 10, STV would obtain $550,000 per week or $7,700,000 for the 14-week NFL season--an amount far less than that which CBS pays for the games.

96. As to the Joint Committee's questioning of limitations in the family budget that would serve as a brake on pre-empting of time, the Joint Committee had stated that this limitation was incapable of measurement. Zenith and Teco reply: It is measurable and was measured at Hartford. Thus, during the first two years of the trial only 27% of the feature films shown were first subsequent run. Between October 1, 1965, and September 30, 1966, 70% were first subsequent run. However, the average weekly expenditure of subscribers was about $1.20 in both situations. Therefore, even with improved programming the amount remains fairly constant and this is proof that there is a family budget limitation.

97. In response to arguments that the trial was too small to give information about siphoning they state that the sample of 5,000 subscribers at Hartford is about five times larger than the Nielsen sample for the whole country on which free TV so heavily relies. It is averred that it gave the data on which estimates of potential may reliably be drawn.

98. Zenith and Teco urge that contrary to hurting free TV by program siphoning, STV may well help free TV because of helping to increase the total box office returns (by adding to the theater returns) it will make for a larger total box-office revenue and this in turn will make for the production of more and better quality feature films. They state that this will help free TV because although that service is apparently placing more and more reliance on feature films, the fact is that the source is drying up. The stimulus that STV will give to motion picture production will, according to them, help to alleviate the situation.

99. Finally, they observe that the Commission stated that if nation-wide STV were authorized it would require STV licensees to furnish it with continuing information so that it might take steps to control siphoning if it should appear to be developing. (Supra note 27.)

100. Telemeter also voices the argument that STV will stimulate more and better motion pictures by increasing box office revenues. It points to the fact that only a small percentage of the population sees any particular film (see para. 43 above) in the theater, and home viewing of current films would add to this number. In addition, it states, millions will still wait for the film to be shown eventually on free TV. Hartford and Etobicoke, Telemeter urges, show that STV and free TV can exist side by side with the latter taking up the interest and attention of viewers 95% of the time. STV will be a supplement to the more extensive free programming.

101. Reply Comments of Opponents. The reply comments of opponents generally do not direct themselves to specific points concerning siphoning, but generally reiterate previous arguments. The most emphatic voice is perhaps that of ABC which emphasizes that it is erroneous to argue that the public will not pay for what it can see free. There are many programs--films, World Series, professional football games--that would command a price if not available on free TV. Thus, ABC argues, if such programs were siphoned to STV, it would be not a question of paying versus seeing the program free, it would be a question of paying or not seeing the program at all.

102. Conclusions. We have given careful consideration to the information supplied by commenting parties concerning the impact of STV on free TV and the related problems of audience diversion, pre-empting of time, and siphoning of programs and talent. As might have been expected, a considerable amount of the information is speculative. But this is not to say that it has not been helpful in illuminating various facets of the problems. As far as actual facts are concerned, we are left with those provided by the Hartford trial.

103. About audience diversion, we know that at any particular time the average subscription audience was 5.5% of the subscribers, although some programs, such as a heavyweight championship fight, generated viewing among 82.6% of the subscribers; that most of the programming was during prime time; that the average subscriber viewed STV about two hours per week, viewed one program per week, and spent $1.20 per week. In view of the fact that the total number of subscribers was about 5,000 and in view of the foregoing facts, audience diversion was minute.

104. About pre-empting of time we know that on the average there were about 30 hours of STV programming per week. 30/ We also know that the average subscriber paid $1.20 per week for programs whether 27% or 70% of the feature films shown on STV were first subsequent run.

105. About siphoning we know that all of the programs shown at Hartford were unavailable over free TV anywhere in the nation at the time that they were shown. Thus there was no program or talent siphoning.

106. The problem we face is that of whether and to what extent the foregoing facts form a reasonable basis for conclusions about the impact that nation-wide STV would have on conventional television service, and the related questions of audience diversion, pre-empting of time, and program and talent siphoning. Opponents state that they afford no basis for meaningful predictions. Proponents aver the contrary. We are of the opinion that the Hartford experience, limited though it may have been, was sufficient to supply information that can serve as an adequate foundation for reasonable estimates about the future. Nevertheless, as with any new and untried service, there are imponderables. 31/ Considering both the Hartford facts and the imponderables, we believe it is in the public interest to establish a nation-wide STV system with the regulatory safeguards which we adopt today--safeguards directed at program siphoning and pre-empting of time. 32/

30/ Thirty hours of programming per week is the fact that we shall have to use in our consideration of this topic with regard to authorization of nation-wide STV. Whether there was actually pre-empting of 30 hours per week in Hartford is open to question because at the hearing prior to the grant of the Hartford authorization RKO informed the Commission that WHCT had been operating at a loss and that if the grant were not made it would discontinue operation of the station (30 F.C.C. 301, 307). Had the station gone off the air, there would have been no free programming over it. Thus the trial not only provided STV programming, but, since WHCT was required to broadcast at least the minimal number of hours of free programming required by the rules for television stations, it added to the amount of free programming in the market instead of subtracting. The argument of STV proponents, of course, is that nation-wide STV would aid marginal or new stations to do just that.

31/ One imponderable, mentioned by the Joint Committee, is the recent development of CATV. That group urges that we should defer action on authorization of STV until the impact of CATV on the present system is known. We find this argument lacking in merit, especially in view of the actions which we have taken by the adoption of rules to govern integration of CATV into the present television structure of the nation.

32/ Topics such as whether interconnection of STV operations should be prevented or limited, whether STV should be limited to carrying certain kinds of programs, whether STV system manufacturers or franchise holders with franchises in more than one market should be allowed to engage in STV program procurement or supply, and similar problems relating to siphoning are discussed in the subsequent portion of this document which treats of the issues mentioned in paragraph 45(b) of the Further Notice (see para. 15 above).

107. As to audience diversion, no reasons have been presented to lead us to expect that substantially more than an average of 5.5% of subscribers will be viewing STV at any particular time. The constancy of the weekly program expenditure per subscriber even with substantially more first subsequent run films would indicate that this figure is likely to remain the same regardless of attractiveness of programs. If it be assumed that every TV home in the nation would become an STV home, this would mean that at any STV viewing time 5.5% of the television homes would be watching STV. It is certainly questionable whether such audience diversion and possible loss of revenues that might go along with it would impair the present service. 33/ However, in view of the fact that we believe it to be highly unlikely that there would be 100% penetration of STV throughout the country, it appears reasonable to assume that audience diversion would be considerably less. Even with as high as 50% penetration the audience diversion would only be 2 3/4%. In view of the foregoing, and in view of the fact that the rules we adopt limit STV for the present to communities receiving five or more Grade A commercial TV signals, and limit STV to one station in such communities (which would further reduce the nation-wide audience diversion), we see no cause for concern. This is especially true because we shall also require STV licensees to furnish the Commission on a continuing basis with information that will show trends with regard to audience siphoning, pre-empting of time, and program and talent siphoning (see para. 289). To the extent that some STV programs which would result in very high subscriber viewing (e.g., a Clay-Liston fight that produced over 82% subscriber viewing) might cause significant audience diversion, we would observe that STV penetration of, say, 20% would considerably reduce the magnitude of the diversion. Moreover, such diversion would probably be rare, for such highly attractive presentations are unusual. It could be mentioned, too, that when a "blockbuster" such as "The Bridge on the River Kwai," mentioned on many occasions in the comments, was presented on free TV, audience diversion from the other two networks and from independent stations was considerable. An answer to such diversion might be better competing programming, which would be in the public interest.

108. Concerning pre-empting of free TV time for the showing of STV programs, we are inclined to agree with those who state that if STV is not limited as to the communities in which it may operate, there might be considerable pre-empting of time, especially in peak viewing hours. Taking the figure of 30 hours per week as about the maximum number of hours which STV will show per week regardless of the number of STV stations in a market (as Zenith and Teco urge), and assuming, as Zenith and Teco mention, that the average TV station operates about 115 to 120 hours per week, if an operating station

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33/ Industry figures show that about 61% of TV homes are tuned in during prime time. If 100% of TV homes were STV subscribers and 5.5% were viewing STV in prime time this would mean audience diversion of about 9% of the viewers. However, it must be remembered that not all STV viewers would have been watching free TV had they not been watching STV.

in a one-station market turned to STV it could reduce the amount of free programming by a fourth, and in prime time could replace free TV entirely. In a two-station market, in prime time the free programming could be halved. Of course, if STV were carried by new stations, any free programming (as well as STV programming) would be additive unless one were to argue that without STV the new station would have carried all free TV programming. On the other hand, the argument could be made that without STV the new station might never have gone on the air.

109. In connection with the last point, Zenith and Teco state that the Hartford trial indicates that there is a likelihood that TV stations will be primarily STV or free TV in their programming because of the demands of prime time of either service, the need of free TV stations to maintain network clearances and continuity of audience, and because existing free TV stations, especially network affiliates, may deem it imprudent to forsake present substantial profits for the speculative profits of STV. For this reason, it is observed that, to develop, STV will probably have to turn to new stations. Such stations, they urge, will not pre-empt time but will add new STV time plus conventional programming time to the total available to the market.

110. Zenith and Teco say that the limited supply of box-office attractions and the limitations on the family recreational budget will serve as brakes so that the number of free TV hours presently available to the public that could be absorbed by STV could not be great. However, it is clear (see para. 108 above) that although the number might not be great the effect could be great in communities with a limited number of television stations. Moreover, Telemeter informs us that at Etobicoke, on its three-channel cable system, it carried 54½ hours per week per channel for a total of 163½ hours per week for all channels, and that viewing averaged a little under 4 hours per week. Although this Canadian experience might not be typical, it suggests the possibility that more than 30 hours of STV programming might be available to pre-empt free TV time, but not necessarily to divert audiences from free TV. In view of these considerations, and in view of our desire to assure an adequate number of hours of free TV service to the nation, the rule we adopt today limits STV operations to markets within the Grade A contours of five or more commercial television stations, and limits STV to only one station in such markets. This, we believe, will assure that those communities will continue to receive the full three network services plus that of an independent station. In such markets, the percentage of time pre-empted from free TV would be minimal, and the effect of loss of free television programming, even if all STV programming were in prime time, would not be great. Moreover, to the extent that a new fifth station broadcasting STV programs is built in a four-station market, as a consequence of the anticipated revenues from STV broadcasting, the effect would be to add new free TV programming that would otherwise have been unavailable, since our new rules will require STV stations to carry a minimum of conventional programming.

111. Program and talent siphoning, as we have stated, did not occur at Hartford. Whether it would occur if STV were authorized on a nation-wide

scale and were not limited by Commission regulation is one of the most hotly contested points in this proceeding. It is one of the imponderables to which we referred. Of the various arguments raised by STV opponents, we find that of so-called selective program siphoning most persuasive. It is at least conceivable that a successful nation-wide STV system, even though possibly not having as much money as free TV to spend for program product, could, by directing its purchases at select programs, e.g., the World Series or professional football games, take them from free TV and require the huge audiences of those programs to pay to see them or not seem them at all. We would not consider this to be in the public interest. Zenith and Teco, in discussing the charge that STV would siphon from free TV programs with high ratings, say that it is tortured reasoning to assume that people will pay to see siphoned programs on STV when there are programs of the same conventional type which could be seen on free TV. We disagree. In a different context, in refuting an argument of STV opponents, we said that a viewer wishing to see a heavyweight boxing match will not be satisfied with a tennis match. The same reasoning applies against the views of Zenith and Teco here. If a viewer wishes to see a particular program and that program appears on STV and not on free TV, he may not be satisfied by viewing other programs of the same general type on free TV.

112. Most other arguments on the topic of program siphoning we find too speculative to influence the action which we take here. The rule which we adopt, and which is discussed more fully in paragraphs 250-276. below, we believe will serve to prevent, or greatly limit, selective program siphoning. First, that rule requires that feature films shown on STV shall not have been given general release in theaters more than two years before STV showing. In other words, to the extent that STV shows feature films (and both Hartford and Etobicoke suggest that they will constitute much of STV programming) they must be current films. It appears that such motion pictures rarely find their way to free TV, and it does not appear that, in the light of box-office economics of motion picture production, they may do so in the foreseeable future. Thus the older films, which are generally the ones shown on free TV, cannot be shown on STV and there can be no competition between the two services with resulting siphoning to STV of that kind of programming--a kind, incidentally, which opponents seem to indicate is of growing importance to free TV. A single exception to the requirement that films shown on STV must be current is that STV stations may, under the rule, televise up to twelve feature films per year which had general release over ten years before STV showing. STV stations may not choose to show that many old films. In any event, even if they do, this could be expected to constitute a very small percentage of all feature films shown per year by an STV station (see para. 48).

113. The rule will also require that sports programs shown by STV in a community shall not have been shown on free television in that community on a regular basis within the last two years. Thus, for example, the World Series, having been on free TV in October 1964 could not be shown on STV

in October 1965. This rule, we believe, will serve effectively to prevent siphoning of key sporting events that might prove desirable to STV entrepreneurs, and assure the continued free viewing of programs of that kind now being seen free. It will, however, permit STV to show programs such as "blacked out" games that presently do not appear on conventional television. Details of this rule are discussed in paras. 253-270 below. Finally, the rule will not permit STV to show programs common in free TV in which continuing characters are presented from week to week in a series using a common setting or central program concept. This type of programming constitutes a not inconsiderable portion of free TV programming.

114. In view of the indications that STV programming will consist mainly of feature films and sports events, we believe that the new rules will assure that, with regard to the major part of STV programming, there will be no siphoning. The restriction on week-to-week series should further prevent such effects. Admittedly, it is conceivable that this still leaves some types of programs open to siphoning, e.g., spectacular "one-shot" programs, but we believe that these rules represent the extent to which we should regulate at this time. As we have stated (see para. 77), although we consider the preservation of conventional television service and the continued availability of free programs to be important, we also believe that the competition between STV and free TV could result in improved and more varied programming for both services. We believe that the rules we adopt, in the light of the information now before us, strike a desirable balance in this area. We shall, of course, as stated in paragraph 107, continue to watch closely the development of the infant STV industry to detect any trends with regard to siphoning.

Other Information, Such as (1) Modus Operandi of the Service; (2) the Technical Performance of the Systems; (3) the Nature of the Programs Offered; (4) the Methods to be Employed; (5) the Role of Participating Broadcast Station Licensees; (6) the Possible Monopolistic Features of STV.

115. (1) Modus Operandi of the service; (4) the methods to be employed; (5) the role of participating broadcast station licensees. 34/ Since these three items are closely interrelated, they will be discussed together. Zenith and Teco say that there are three functional organizations in the operation of STV service: (1) A local franchise organization to scramble programs for stations; to provide for the installation, servicing and maintenance of unscrambling devices attached to television sets of subscribers; to provide information to subscribers so that they will know how to adjust the unscrambling device to obtain desired programs; and to collect and disburse revenues obtained from subscribers. (2) A TV station licensee over whose facilities the STV programs are broadcast. (3) Program sources which supply programs directly to broadcasters.

34/ Additional information about these subjects appears in Appendix B attached hereto.

116. At the Hartford trial, they state, RKO General, Inc. was the franchise holder, and its subsidiary, RKO Phonevision Company, was the licensee of WHCT over the facilities of which the STV programs were transmitted. We are informed that programs were obtained by WHCT in a manner comparable to that now used by conventional TV stations in obtaining programs from networks, syndicators and other sources. Programs were obtained from many sources (more than 50 sources during the first two years of the trial), it is said, such as motion picture producers and distributors, sports promoters, producers of plays, and the like.

117. Zenith and Teco assert that there appears to be no business or public interest reason why there should not be a close ownership relationship between the franchise holder and the station licensee as was the case in Hartford. They also express the opinion that probably in some markets there will be instances in which the two have little or no ownership relationship. One possible reason for this, they say, is that it takes a substantial investment to operate an STV franchise system and some stations could not meet this burden alone. However, they urge that so long as the franchise holder is required to supply STV service to all stations in a market authorized to carry on STV operations, it would appear to make no difference whether the franchise holder is owned entirely by non-broadcasters, or by one or more TV stations in a market. 35/

118. During the trial, it is said, it became apparent that any of three possible methods of arranging for programs might be used: (1) The licensee, the franchise holder, and the program distributor might agree among themselves upon a division of fixed percentages of gross. (2) The licensee and franchise holder might join together in a cooperative effort to obtain programs from distributors, with revenues in excess of the program costs being divided on a basis agreed to by the licensee and franchise holder. (3) The franchise holder might supply the programs and buy time from the station at a so-called subscription card rate to broadcast them, in much the same manner as networks and affiliates now operate. This approach, they state, might be used particularly when nation-wide STV is getting under way in order to induce investors to build new TV stations for the showing of STV programs.

119. We are told that at Hartford the licensee of WHCT had control over the selection of STV programs, the times at which they were to be broadcast, and the charges to be made for them. (This, of course, was in accordance with the provisions of the Third Report under which the trial was authorized.) Zenith and Teco express the opinion that as a matter of business policy, as well as regulatory policy, these functions should always be the primary responsibility of the licensee.

35/ This argument was based on the assumption that more than one STV operation would be permitted in a market. It is irrelevant since the rules adopted herein permit only one STV operation in a community.

120. (2) The technical performance of the systems. The Hartford trial, Zenith and Teco state, established that the system could meet the technical requirements of the Third Report, namely: (a) The operation must not cause interference, either within or without the frequency employed, to any greater extent than is permissible under the present rules and standards of the Commission. (b) The operation must not cause perceptible degradation in the quality of video or audio signals on any receivers during either a subscription program or a non-subscription program.

121. In addition, it is related that the trial established that the Phonevision decoder (unscrambler) could be installed on all makes and models of TV sets if the sets were in good operating condition; that the system provides adequate protection against reception by non-subscribers; that it functions to permit an accurate allocation of per-program charges to the individual programs, the monthly billing reflecting not only the total amount due for programs but the amount for individual programs; that a credit system will work and is accepted by the public; and that Phonevision equipment will function satisfactorily with a minimum of service calls, home service calls having averaged 89¢ per subscriber per year.

122. Zenith and Teco mention that, as a result of the Hartford experience, a new model decoder is being production-engineered that will accommodate color as well as monochrome, that can be connected to the antenna terminals of the set instead of to the inside wiring, that simplifies the billing function of the new decoder so as to reduce cost and facilitate operations on the part of the subscriber, and that has circuitry changes designed to reduce cost and further improve reliability.

123. In connection with the foregoing statements, Motorola says that it has studied the Zenith and Telemeter proposals (presumably the descriptions of those systems submitted in response to the Further Notice) and that both vary widely from any system used in prior field tests. It is averred that the Hartford field test "involved a totally different concept and the field test results can have no meaningful bearing on the technical aspects of the proposed systems." A similar statement is made with regard to the system used by Telemeter in Canada (which was a cable system) and the proposal (for an over-the-air system) submitted by Telemeter in this proceeding. These statements are followed by a suggestion by Motorola that further field testing is therefore needed before STV can be authorized.

124. To this Zenith and Teco reply that the decoder used at Hartford operated in conjunction with certain parts of the subscribers's television set to unscramble the signal, whereas the new proposal uses the same unscrambling principle but does the unscrambling independently of the set, and sends the unscrambled signal directly to the antenna terminals of the subscriber's set.

They further state

> "(1) that the television broadcast signals and Zenith scrambling apparatus used in Hartford during the past four years were and are exactly the same as those to be used with the new Zenith decoder described in our July 25, 1966 technical submission in this proceeding; (2) that the decoding functions performed by the apparatus under test in Hartford are the same as those accomplished by the decoding apparatus described in Zenith's current technical submission; and (3) that the Hartford test of these signals and the effectiveness of Zenith's scrambling and decoding processes involved several thousands of hours of everyday transmission spread over more than four years in a field test operation involving thousands of homes. Thus the Hartford operation provided a greater quantity and quality of field testing of the proposed Zenith concept in actual commercial use than any comparable type of service has ever before had. Therefore, Motorola's conclusions with respect to field testing of the Zenith concepts are totally unfounded."

125. (3) The nature of the programs offered. This has been fully discussed in relation to the question of whether STV can offer a beneficial supplement of free TV programming and will not be treated here.

126. (6) The possible monopolistic features of STV. Zenith and Teco state that the Hartford trial has established that there are no inherent monopolistic features arising from STV operations. They do not urge that the Commission select Phonevision equipment as the only system to be used for nation-wide STV. On the contrary, they suggest that the Commission adopt general standards that will permit the use of multiple systems, and that will result in competition. They do, however, admit that it is unlikely that, as a practical matter, there will be more than one over-the-air STV system in any single community (were we to permit more than one such operation), although there may be competition within a community between cable and over-the-air STV. But within a community, Phonevision could be used with color or monochrome sets, UHF or VHF, and could serve more than one station authorized by the Commission to conduct STV operations. This, they point out, would be under the regulatory control of the Commission.

127. As to programming, they aver the following: There are already in existence numerous producers and distributors of programs of all kinds from which STV may draw. During the Hartford trial, there was no centralized distribution control over the programs chosen for STV broadcast. RKO was free to negotiate with any program supplier for whatever programs it desired on whatever terms it worked out. Ninety percent of the STV programs shown at the trial were obtained on the basis of RKO's paying the program supplier a fixed percentage of the program revenues obtained from subscribers. In a relatively small number of cases, e.g., a Broadway play, it was necessary to pay cash

acquisition costs. If requested by RKO, Teco usually provided such funds to RKO in return for receiving a certain percentage of the subscription fees received for the program. It is emphasized that this aid was not given until RKO had negotiated for the program and requested Teco aid. On occasion, and at the request of RKO, Zenith sometimes stepped in to facilitate negotiations for programs, but this was usually by way of using its personal contacts. Zenith also furnished some financial assistance to Teco to aid it in obtaining programming as mentioned above. Zenith states that it does not intend to continue supplying such assistance if STV is operating on a nation-wide basis, and it also does not intend to engage in the distribution or production of programs for STV.

128. It is claimed that comments filed in this proceeding in 1955 alleged that Zenith and Teco would exercise control over the distribution and selection of STV programs whereas such has not been the case. These two parties state that because of legal and business reasons they could not enter into any arrangement or tie-in with local franchise holders giving any program supplier the exclusive use of Phonevision facilities. If nation-wide STV is authorized, they say, Teco will serve two functions: (1) Granting local franchises and promoting the use of Phonevision equipment. (2) Possibly assisting in obtaining programs for STV, but such assistance will not tie in with its arrangements with local franchise holders, or with the arrangements that such franchise holders may have with station licensees, so as to give Teco an exclusive position with regard to any other program supplier.

129. The comments of Zenith and Teco on this subject end with a statement that monopolistic conditions in any business result from either the intent of parties involved or natural economic forces. These two parties aver that they have no intent to gain monopolistic control over STV in the United States. With regard to station owners, they say, there can be no monopoly because of the Commission's multiple ownership rules. While the natural economic forces that might make for monopoly are difficult to foresee, they state that under the operating proposals which they make there does not appear to be "any immediate or reasonable prospect of monopolistic evils which would require governmental regulatory action. If, after the full play of the natural forces of competition, a condition now unforeseen should arise at some time in the future which would indicate any trend toward monopoly detrimental to the public, the Commission can always exert its present regulatory power to eliminate any anti-trust problems that may possibly arise."

130. Combining its comments on the modus operandi, methods to be employed, and possible monopolistic features of STV, Telemeter takes issue with some of the views expressed by Zenith and Teco. The position of Telemeter follows, nearly all of it being best expressed in its own words.

131. There is only one STV operation in the United States today--that at Hartford which numbers but a small minority of the community as subscribers, and they only spend about 5% of their time viewing STV.

"The fact is that subscription television is not even an infant industry. Its opponents have attempted, by raising false issues, to stifle it before it can be born. Any regulations which the Commission makes at this time should recognize the essential truth of this statement.

"The elements of a subscription television industry have not yet emerged in any clear-cut form. There are no subscription television programming companies, syndicators, maintenance companies or other needed components. The elements of the existing structure which constitutes commercial broadcasting, or which constitutes the motion picture production, distribution and exhibition industry, do not yet exist. The Commission must therefore proceed with caution in adopting rules to regulate an industry whose essential character has not yet begun to emerge, lest its natural and successful growth be unduly restricted and inhibited.

"The subscription television business, regardless of the form which it will ultimately assume, will have at its core today the subscription television entrepreneur. He is the man, or the corporation, which must bring all of the elements required for successful subscription television into existence. At some time in the future, after the business has been started, there will be producers, maintenance firms, syndicators, broadcasters and others, but these elements do not exist today. It serves no useful purpose, therefore, to talk about separating the components and establishing regulations to govern their relationships. If a single firm is not allowed to start a total subscription television business including everything from the production of entertainment through its broadcasting, through its sale to the public, through installation of decoders, and through the collection of money, and every other aspect of the enterprise, subscription television is unlikely to come into existence.

"Subscription television, in its present stature, is analogous to the motion picture industry in its beginnings. A motion picture theatre, like any other theatre, is an enclosure containing means for exhibiting entertainment for which the patron must pay. The enclosure of a theatre may be analogized to the scrambling and unscrambling means of the broadcast subscription television system, and the box office to its credit or cash charging system. The projection equipment constitutes a means of communicating the entertainment on film to the public, and is analogous to the transmitting equipment of a broadcast. The theatre owner picks his programs and determines the timing and duration of their exhibition and their pricing, incidentally,

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on the basis of his knowledge of his market.

"In the early days of motion pictures, exhibitors would not go to the expense of building theatres because there was no entertainment available to be shown in them. Therefore, in order to get the industry under way, a natural identity developed between producers, distributors, and exhibitors. This identity was an absolute necessity if the industry was to come into existence.

"At this stage in the development of subscription television, no company (which is truly independent) is going to invest in decoders if it does not control broadcast facilities, and if it is not able to assure itself that it will be able to make its own efforts to obtain programming by every means physically available. . . The problem of the infant subscription television industry is that even where entertainment is available, it has been withheld, so that it is naive to assume that a subscription television operator, at this stage, can sit in his office and expect purveyors of entertainment of top quality to come to him.

"Furthermore, in view of the obvious and manifest hostility of existing media toward subscription television, it is equally naive to suppose that commercial broadcasters in significant numbers will approach a detached subscription television operator--without his own broadcast facilities--for the privilege of showing an occasional subscription television program. If subscription television is to develop, it is Telemeter's considered judgment that it will have to be started by those in full control of every aspect of the subscription television business with no, or exceedingly few, limitations upon their ability to solve the multifarious problems which experience has shown they cannot avoid." (Emphasis in original.)

132. The Joint Committee directs comments at another aspect of the question of monopoly in its reply comments. It states that STV proponents hold that the Commission cannot regulate STV rates to be charged subscribers. However, the Joint Committee says, it would be singular for the Congress to have intended that broadcast frequencies could be used for STV without at the same time having provided power to regulate rates to prevent rate gouging. It is for this reason, it is stated, that the Commission has no authority to authorize STV.

133. The Committee then goes on to say that if, as Zenith and Teco state, it is unlikely that there will be more than one STV system in any single market, then such an STV station would have a monopoly over STV in that community, and it would be unconscionable for the Commission to permit such a situation to exist without having the power to regulate charges. It would be an abdication of Commission responsibility, it is argued, to permit STV operators to use the frequencies and charge subscribers without clear Congressional

authority to regulate rates and without even considering or deciding whether the Commission already possesses such authority. The Joint Committee also refers to the comments of ADA, a group that favors STV, which indicate that STV should be regulated as a common carrier.

134. Conclusions. In paragraphs 15-16 above, we indicated that we would first consider comments concerning the question of whether an STV service should be established, and that we would then turn to consideration of fifteen issues of importance in determining what the pattern of regulation of such a service should be. We mentioned that comments concerning the broad question of whether to establish the service fell into five categories. The first four have been fully treated above. As to the fifth--concerning modus operandi, monopoly and other matters--the immediately preceding paragraphs contain pertinent information and views thereon supplied by the parties. Since the topics in the fifth category are closely related to some of the fifteen issues, in the interest of efficient presentation we shall evaluate the information and views about them and state our conclusions thereon in the course of treating the fifteen issues to which we now turn our attention.

Fifteen Regulatory Issues

135. In the following paragraphs, the issues are stated verbatim as they appeared in the Further Notice, and are followed by a discussion thereof. Appendix C of the Further Notice contained the rules proposed by the Commission on which comments were invited together with comments on the fifteen issues. For the sake of convenient reference, that appendix is also attached hereto as Appendix C.

(1) Whether subscription television should be limited to communities receiving a minimum number of television signals, e.g., whether it should be limited to stations the principal communities of which are within the Grade A contours of at least four commercial television stations (including that of party proposing to broadcast subscription programming), or whether it should not be so limited but should, in communities not lying within four commercial Grade A contours, be restricted to a more limited scope, especially as to hours of operation, than those in four-service communities. (See limitation proposed in Section 73.643(d) of Appendix C.)

136. This issue may be divided into two parts: (1) whether STV should be limited to communities receiving a minimum number of TV signals, and (2) whether, if there is no such limitation, there should be a limitation as to hours of operation of STV stations. Our discussion here will be restricted to the former. The latter may more properly be dealt with under Issue (2) below which has to do with the general topic of hours of operation of STV stations. Both parts of the issue, of course, underscore our concern over possible reduction of free TV hours and services available to the public in communities where STV operates.

137. Some proponents of STV urge that the service be permitted to operate in any community, regardless of the number of TV signals which it receives. Telemeter, for example, states that STV has a potential for usefulness under varying situations in different sizes and types of markets.

Thus, in marginal communities it might form the financial basis for building a station that would otherwise not be built. In large communities with three network services it might provide the basis for the development of a viable UHF competitor. Kaiser makes a similar point, stating that "/t/his is particularly true in markets such as Los Angeles, where the number of competing stations is large enough to strain the advertiser-supported system's ability to provide financial and programming support."

138. Zenith and Teco hold the view that Section 307(b) of the Act, which requires the Commission to make a fair, efficient and equitable distribution of broadcast service among the several "communities," dictates the conclusion that STV should be made available to all communities where there is a demand for it. In this connection, they mention that if STV could bring about the construction of a first TV station for a community, they would find it difficult to think of any public interest considerations that would justify not permitting the building of such a station. Along the same lines, Teleglobe says that it believes that among the principal objectives of STV is that of aiding UHF broadcasters in their struggle to survive, and a limitation of STV to, for example, markets with two or more stations would defeat that objective. Zenith, Teco, Telemeter, and Trigg-Vaughn suggest that questions of whether STV operations should be permitted in a particular community would best be handled on an ad hoc basis.

139. ACLU urges that STV operations should be permitted in any market. Its views are founded on its interest in advancing diversity of expression (which it regards as an application of the First Amendment) by way of over-the-air broadcasting. It believes that by providing new and different programming STV can increase diversity. If it is not limited to particular markets, there will be open competition that will also enhance diversity, ACLU states. ADA also believes that STV should be permitted in all markets. ACLU and ADA have additional views which are related to this belief, but they more properly belong with a discussion of hours of operation discussed under Issue (2) below and will be treated there.

140. ABC, as previously mentioned, opposes STV. However, in the event that the Commission should decide to authorize such a service, it offers its views on the various issues. It believes that this and the following three issues are related to the question of what rules are necessary to protect the existing structure of conventional commercial television. It states that

> "/u/ntil the impact of pay-TV operations upon the free television structure can be assessed, it would not appear meaningful to adopt restrictive rules which, at this juncture, are necessarily somewhat arbitrary. If the Commission elects to go forward with authorization for pay-TV, ABC urges that it adopt no rules at this time with respect to /this matter/. . .If, based upon meaningful experience with pay-TV, it appears that rules of some kind should be adopted, further rule making proceedings are available to the Commission."

ABC adds, however, that the Commission should make it clear that STV is not intended to disrupt the existing structure of free TV, including network service, and that it should place STV proponents on notice that the fact that no restrictive rules are adopted does not mean that they might not be at some future date if found to be necessary to preserve that structure.

141. As opposed to the aforementioned views that there be no limitation in regard to the communities in which STV may operate, both proponents and opponents suggest the contrary. Thus, Acorn, a proponent, believes that STV should not deprive anyone of free TV that he now has, and therefore thinks it inadvisable to allow STV operations over existing stations in one-station communities. The more stations in a community, the less the effect of STV over one of them would be, Acorn states. On the other hand, it sees no reason arbitrarily to restrict STV only to the larger markets since in some cases it would appear that STV would not undermine free TV service. Wherever possible, Acorn deems it best to conduct STV operations over new stations, for this could only add to the TV service of a community.

142. Munn and Chase, also proponents, are of the view that STV should be limited to communities that have three Grade A commercial signals in addition to that of the STV stations, so that there will be three network services available. Of the same view is the Joint Committee which urges that, if STV is to be permitted, it should be limited to communities within the Grade A contours of at least four commercial TV stations, for this would be consistent with the goal of the Commission to promote parity among the networks. It was this policy which underlay the conditions of the Third Report, it is said, and the Hartford trial provides no basis for changing that policy. However, the Joint Committee would superimpose on such a rule the additional requirement that, if a market is one of the top 100, there be a hearing to determine whether it is in the public interest, and, specifically, consistent with the establishment and healthy maintenance of free TV service in the area, to permit STV therein--a requirement not unlike that used in CATV proposals to extend the signals of TV stations beyond their Grade B contours into one of the top 100 markets. The Joint Committee argues that such a requirement exists for CATV in spite of the voluminous information available about CATV which was prepared by Drs. Seiden and Fisher, the National Community Television Association, CBS, and AMST, so that a fortiori there should be such a hearing requirement for STV about which much less is known.

143. AMST, in discussing this as well as other issues, says that the very fact that the issues have been posed recognizes rather than cures the incompatibility of STV and free TV. With regard to this issue it argues that to restrict STV to the largest markets will not prevent the pre-empting of free time from free TV and that in such markets more people would be deprived of this time. McClendon expresses the view that STV should not be permitted over VHF stations in multiple-station markets having at least one UHF or one independent VHF station if those VHF stations broadcast one or more hours of network programming during prime time. This, it is suggested, would correct the economic imbalance between UHF and VHF stations.

144. Conclusions. Because we believe that STV can furnish a beneficial supplement to the programming of free TV and that it might well provide a wholesome stimulation that would improve free TV and the overall programming available to the public, we believe that it should be authorized. However, as indicated in previous portions of this document, although the Hartford trial did furnish information that has proved helpful in making reasonable estimates of the future, its proscribed nature has left numerous areas about which we are legitimately concerned. Until we know more about how STV will develop on a nation-wide scale, we feel it best to proceed with caution. For this reason, the rules which we adopt are designed to strike a reasonable balance that will not hamstring the development of the new service and yet will provide safeguards against the occurrence of events that might be contrary to the public interest.

145. One area of concern is that of the pre-empting of time by STV from free TV. The Third Report provided that STV trial operations might be conducted only in communities lying within the Grade A contours of at least four commercial TV stations including the station of the STV applicant. It mentioned that one of the primary reasons for this provision was to assure the continued availability of substantial amounts of free TV programming to the public, i.e., to prevent undue pre-empting of free TV time. We stated in that report that it was our intent to suspend judgment on the question of whether there should be such a market limitation if permanent STV were authorized. The Further Notice, having referred to the foregoing in paragraphs 31 and 32, announced that, in the light of the Hartford information, we tentatively agreed with the view of Zenith and Teco that STV should not be so restricted. However, we specified this matter as Issue (1), the present issue, and invited comments thereon.

146. We have carefully weighed the comments, including those summarized in the immediately preceding paragraphs as well as those mentioned in paragraphs 80, 81, 88, and 104 above, and believe on further consideration that the tentative conclusion of the Further Notice should be rejected. For reasons stated below, we are now of the view that, at least for the present, STV should be restricted to communities lying within the Grade A contours of at least five commercial TV stations including that of the STV operator, and are adopting a rule to that effect. 36/ (It is thus more stringent than the requirement of the Third Report.) This conclusion has been anticipated in paragraphs 108-110. The following supplements those paragraphs.

36/ This rule appears in Section 73.642(a) of Appendix D. As may be noted, it also contains other provisions designed to restrict pre-empting of time. One is that, not counting the station of the applicant, at least four of the stations must be in operation. Another, discussed under Issue (4) below, provides that in the five-station markets where STV will be permitted, only one station in the market may engage in STV operations. It may also be noted that the rule requires that the entire community, not merely part of it, be located within the five Grade A contours.

147. Elsewhere (para. 77) we have indicated that we regard the continued availability of free programming as a most important consideration. This is so because we think that the tremendous investment of the public in television receivers based on the expectation of free service ought to be protected and the millions of viewers who rely on that service for free entertainment should be permitted to do so. Although we are aware of the merits of the arguments that STV should be permitted in all communities--the arguments maintaining that permitting STV in all communities might help marginal or new stations in small communities, might aid UHF in such communities, might promote diversity of programming; arguments that Section 307(b) of the Act requires that STV be allowed in all communities where a demand exists; arguments that we should not regulate in this area until the impact of STV on the free TV structure has been assessed--we are of the opinion that at this stage, where uncertainty about the new service exists with regard to this subject, considerations of protecting against pre-empting are overriding. In smaller markets, pre-empting could substantially reduce the amount of free programming available to the public, as some parties have mentioned. Since it appears likely, from the Hartford trial, that much of the STV programming might be in prime time, the effect would be even more marked, for although the loss in terms of hours is the same regardless of the time of day when the pre-empting occurs, the loss in prime time would generally speaking be a loss of more popular programs.

148. The rule protects against such loss in smaller markets. In the markets where it permits STV, it assures three network services and one independent service. To the extent that existing stations in those markets offer STV, there will be a relatively small amount of time pre-empted. To the extent that STV operations occur on new stations, there will be no pre-empting at all. It gives ample assurance against the dangers to networks, mentioned by ABC and the Joint Committee, which could conceivably result in an untoward weakening of the present broadcast structure. At the same time, the rule will permit a not inconsiderable portion of the nation's population to have the opportunity to use the new service if it so desires. 37/ Moreover, this will afford an opportunity to observe what factors evolve in the operation of a nation-wide STV service, such as, for example, the broadening of the base for the purchase of programs which Zenith and Teco tell us was lacking in a single-city trial, the possible development of an STV network, audience diversion, pre-empting of time, program siphoning, or others. With this additional information we should be in a position to take further steps to guide the development of this service in the public interest as seems appropriate.

149. At the present time there is no certain way of predicting what STV penetration will be after the service has been authorized on a nation-wide

37/ The Commission has allocated 5 or more channels to 80 markets which include 80% of the nation's TV homes. STV is potentially available to all of those markets. More immediately, of those markets, 63--including 78.8% of all TV homes--presently have activity on 4 or more channels, i.e., there are licenses, permits, or pending applications for 4 or more stations.

basis. If we were to hazard a guess, it would be that 10% to 20% would be optimistic for the near future. If this is correct, it would appear likely that the most interest in STV would be focused on the largest markets where the potential for more subscribers lies. Our rule, therefore, should not seriously impair the development of STV since it would permit it in those markets.

150. We do not adopt the suggestion that the point at issue be handled on an ad hoc basis. This would involve separate hearings, and the results, in our opinion, would not be commensurate with the cost, time, and effort expended thereon. A rule on this subject is clear and automatic in its application. It appears to be the better way to handle the matter.

151. Finally, we note the suggestion of the Joint Committee that hearings be held on applications requesting authorization to engage in STV operations in the top 100 markets. The Joint Committee maintains that the important factor common to both STV and to CATV proposing to extend television signals beyond the Grade B contours of stations to one of the top 100 markets is that of the introduction of programming not otherwise available to free TV in the market. The principal concern of the Commission in the CATV and the STV proceedings, it states, has been over the impact on free TV. Since hearings are required by rule in CATV for the top 100 markets, they should also be required when STV attempts to enter those markets. The point is lacking in merit.

152. In the Second Report and Order in Docket Nos. 14895, 15233, and 15971, we discussed in detail the reasons for the rule which requires hearings for the top 100 markets, 38/ and we shall not repeat that discussion here. Suffice it to say that STV and CATV involve different considerations--of which we shall mention only a few--that clearly indicate that the concern that led us to the conclusion that CATV hearings should be held does not exist here. Thus, (1) in the case of CATV systems entering the top 100 markets, we were concerned with the fact that CATV stands outside the program distribution process through which UHF stations have to obtain their programs. In the case of STV, there is no such element of unfairness since the STV operator would be in a program procurement position similar to that of the UHF free TV operator. (2) In the case of CATV, audience diversion from the UHF station could be large. In the case of STV, it would, as we have said, probably be small. In this connection, we note that CATV systems have multiple channels and thus a single CATV system is a source of multiple competition for local stations, whereas here we are permitting only one STV operation in a market. (3) STV can broadcast over a UHF station. If so, it is because the licensee thereof believes that it will help his station, not harm it. In fact, one of the principal arguments of proponents of STV is that it will aid UHF, not damage it. These few observations should make clear the reasons why we reject the Joint Committee's proposal.

38/ 2 F.C.C. 2d 725, 769-784.

(2) Whether stations engaged in subscription operations should be required to broadcast a minimum number of hours of conventional programming and, if so, what the minimum should be (see Section 73.643(c) of Appendix C). Whether subscription programming should be restricted to certain segments of the broadcast day and, if so, what segments; and whether a minimum or maximum number of hours of subscription programming per day or week should be specified, and, if so, what the number should be. (Concerning this issue, see Section 73.643(d) of Appendix C which has been drafted on the assumption that only one subscription operation would be permitted in any single community. Comments are invited on alternatives if the issue in paragraph 45(b)(4) is resolved to permit more than one such operation in a community.)

153. As with Issue (1), our concern is with making sure that adequate amounts of free programming remain available to the public in markets where STV operations exist. Requiring STV stations to broadcast a minimum number of hours of free TV would be directed toward that end, as would the establishing of limits on STV broadcasting both as to amount and time of day of such broadcasting. In paragraph 33 of the Further Notice, we mentioned that if free TV is to remain available, the amount of permissible STV broadcasting by a station should depend on the amount of free TV available from other stations in the market. As an example, we suggested that all STV be required to broadcast the minimum number of hours of free TV required by Section 73.651 of the Rules, and that the amount of STV broadcasting (assuming only one STV station in a market) should vary with the number of TV stations serving the community and with the time of day (prime time or non-prime time). The proposed rule to that effect appears in Section 73.643(c) and (d) of Appendix C. Comments were invited on the proposal, which assumes one STV station per market, and on what the rule might be if communities were permitted more than one STV station.

154. Many parties agree that STV stations should be required to carry the minimum number of hours of free TV required by Section 73.651 of the rules in the interest of helping to maintain a supply of free programming for the market. However, this view is not without its opponents. Munn and Chase, for example, say that the free programming of STV stations might be an unwarranted burden on STV stations and could turn out to be programming designed to fill the required number of hours, but of low quality. This could be especially true, they state, in major markets where STV stations would be competing with large, well-equipped and well-staffed stations. Moreover, in large markets, the free programming of STV stations might be purely redundant. For this reason, they urge that no such requirement be adopted, and that STV be allowed to pursue the development of good STV programming without having to present free programming.

155. Trigg-Vaughn also disagrees with the proposal to require a minimum number of hours of free TV over STV stations, and for the same reasons expressed by Munn and Chase. It states that the requirement could impose a severe operating disadvantage on STV licensees who are attempting to pioneer STV, by requiring them to do far more than their competitors simply for the right to engage in STV operations. It suggests that, since both STV and free

TV are broadcasting, the purpose of Section 73.651 would be met by permitting STV licensees to fulfill the requirements of that rule by all STV or any combination of STV and free TV broadcasting.

156. It goes on to say that if at a later time it should appear that such a rule is necessary, the Commission can take necessary action. In the meantime, it is said, absence of such a rule at the outset will permit STV to have greater freedom in the programming area and a better opportunity for development.

157. As to limiting STV to certain segments of the broadcast day, or limiting the number of hours of STV, proponents generally oppose such restrictions, stating that the record shows no need for them, that at this stage they would hamper the development of STV, and that the amount of time of broadcasting of STV programming should be determined in the market place.

158. On the other hand, one proponent--Zenith-Teco--states that because single-station markets present a unique problem, and because there is no problem of time availability for free TV in markets within the Grade A contours of five or more stations, the proposed rule with regard to such markets should be adopted. They believe, however, that markets receiving service from two to four Grade A signals, present different considerations. As a practical matter, it is said, network affiliates in such markets are not likely to give up assured profits to enter the speculative STV area. Moreover, the Hartford trial has shown that STV will have greater demands for STV programming in prime time than the proposed rule would permit. These two factors could operate to confine STV to only a few markets where five Grade A signals are received, and where therefore there would be no limit on STV broadcasting. They therefore suggest that the Commission exempt UHF stations in two to four station markets. This would, they urge, permit STV to have the same competitive access to UHF that free TV has always had, and would restrict the rule to VHF where most of the free TV is.

159. They also suggest that any time limitations be applied on the basis of an annual average and not a daily or weekly average, as is permitted with the AM-FM non-duplication rule (Section 73.242), so that programs will not be arbitrarily restricted. Finally, since the meaning of "prime time" is vague, they propose that the rule define the term as the hours between 6:00 p.m. and 11:00 p.m., which is also the period used in the programming portions of the Commission's application forms. Another clarifying suggestion is made by ABC, which points out that ambiguity exists in the proposed rule as to the meaning of "community," which may be cured by language making it clear that it is referring to the community to which the station is licensed.

160. AMST does not think that the proposed rules should be adopted because, among other reasons, in a five-station market it would be possible in peak viewing time to have no free TV available, in a four-station market, it would be possible that there would be no free programming available between 7:30 and 9:30 P.M., and so on with regard to markets of smaller sizes. The Joint Committee suggests restrictions more stringent than those in the proposed rule. Among others, it suggests that no STV station be permitted to devote more than 60% of its broadcast day to STV programming. Thus, whereas our proposal would have imposed no restrictions on STV stations operating in five-station markets, the Joint Committee would impose the 60% restriction on them because the lack of information about the possible impact of STV on free TV "does not warrant the risk of permitting any Pay-TV station to operate on unlimited time in any market."

161. ACLU believes that STV should not be viewed as a beneficial supplement to free TV, but as a different and independent system. Therefore, that group argues, both services will have the greatest chance of developing their potentials if stations are exclusively STV or free TV, and they accordingly propose that there be two classes of TV broadcast stations. This, they state, would best promote diversity (see para. 139) because an exclusively STV station would have the incentive to provide diversified programming for all hours of the day and evening. (In addition to working against diversity, they state that to permit STV and free TV over the same station could lead to various problems which they set forth.) ADA has similar views, but they contain additional ramifications which are discussed later in paragraphs 217-219.

162. Conclusions. In discussing Issue (1) we stated that we were adopting a rule limiting STV operations to markets within the Grade A contours of five commercial TV stations because we believed that assuring adequate amounts of free TV programming to the public was an overriding consideration. We shall not repeat the discussion of the subject which we presented there, but point out that the same considerations lead us to adopt a rule requiring STV stations to broadcast at least the minimum number of free TV hours required by Section 73.651 of the Rules. We believe that, at least at this point in the development of the new service, such a rule is a necessary safeguard.

163. We cannot agree with ACLU and ADA that there should be two classes of stations and that STV stations should not only not broadcast the minimum number of free TV hours, but should be prohibited from doing so. One of the principal arguments made by proponents of STV is that it will promote development of new or marginal stations and of UHF by supplying needed financial support. Clearly the development of which they speak is one that envisaged both STV and free TV on the same station. We are of the opinion that STV and free TV can exist side by side on the same station, each service supplementing the other to the ultimate benefit of the public, and that free programming will not be an undue burden on STV stations.

164. We are adopting a rule limiting STV to five (or more)-station markets, permitting only one STV operation in a market (see Issue (4)), and requiring that STV stations broadcast at least the minimum number of hours of

free programming, all in the interest of assuring adequate free programming for the public. We now face the question of whether STV programming should be limited as to segment of the broadcast day and to number of hours of programming. The answer to us is a clear "no." We have made adequate provisions to assure free programming. The new service cannot be completely surrounded with restrictions lest it smother. Some flexibility in operation is needed, and for various reasons we think that this is an area where that flexibility should be preserved. For example, to limit the number of hours of STV programming in prime time could, in the light of the Hartford trial, quite possibly prevent the new service from becoming financially viable. Prime time was the principal programming time at Hartford, and it would appear that it will be in new operations. STV should be permitted to program that or any other time with STV programming if it so wishes, with as many or as few hours as it wishes.

165. With the limitations which we are adopting, the fears of the Joint Committee about impact should be allayed; and the AMST argument that the proposed rule might allow all STV programming (and no free programming) during prime time in five-station markets vanishes. In the light of the position we take, it becomes unnecessary to discuss some of the other points made in the comments. As with other parts of our rules, should experience indicate the need for modification thereof, such changes can always be made.

(3) Whether subscription television should be permitted over any television station (subject to possible qualification as in par. 45(b)(4) concerning number of stations in the market), UHF stations only, or some other limitation.

166. Comments on this issue present a mixture of views. Several parties state that STV should be permitted over any station, for to adopt limitations, such as limiting it to UHF stations, is inherently anticompetitive, and no station should be precluded from rendering STV service if it wishes. They argue that there is no apparent reason for any limitation of this nature, and that if one were adopted it would foreclose VHF stations in some markets from STV operations and some markets might be deprived of STV, contrary to the public interest. Although Trigg-Vaughn is of the foregoing view, it states that as an interim policy the Commission might, in comparative hearings, favor UHF applicants proposing STV operations. Kaiser, believing that it is too early to decide whether to limit STV to particular types of stations, in effect says that there should be no limitation at the present time. AMST, although opposing STV, apparently would favor not limiting it to UHF stations because, among other reasons, it is irrelevant whether free TV is impaired by STV over UHF or over VHF stations, and because to limit it to UHF would do violence to the principle of an integrated UHF and VHF national television system on which the all-channel law is based. "In any event," AMST argues, "the Commission's plans for UHF development are long-range and short-term expedients like this would only divert UHF stations from providing the free television service contemplated for them by the Congress."

167. On the other hand, some parties would have us limit STV operations to UHF. The usual reason for this view is that STV can supply needed economic and program sources for marginal and new UHF stations. The views differ slightly: Skiatron, for example, would limit STV to UHF and marginal VHF stations. Springfield says to limit to UHF but to waive the rule on an adequate showing. Acorn would limit STV to UHF stations at the outset. It says that a UHF station is more likely to be a new station and that the public would be more likely to pay for programs over that station than to pay to stations from which they have been receiving programs free. In addition, Acorn observes, since UHF stations are more likely to be new, there is less chance of pre-empting of free TV time than there is if an established VHF station begins STV operation.

168. Conclusions. Although as a practical matter, STV may turn out to be limited mostly to UHF stations, we do not think that it should be so limited by rule. To do so could, as some parties argue, foreclose some VHF stations that wish to engage in STV operations from doing so. With the rules that we adopt today, sufficient restrictions are placed on STV to act as safeguards in areas of concern. We do not find any of the reasons given for restricting STV to UHF of sufficient weight to merit such a rule at this time.

(4) Whether more than one station in a community should be permitted to engage in subscription television operations, and, if so, whether such stations should be permitted to broadcast subscription programs simultaneously.

169. Telemeter states that this is a complex question which should be decided on a case-by-case basis, at least until some pattern emerges. It thus appears to oppose a rule restricting STV to a single station in a market. Zenith and Teco mention that as a practical matter it is likely that there will only be one STV station in a community, but to impose such a limitation by rule would apparently go contrary to the Commission's policy of encouraging competition. They suggest deferring this kind of decision until such time as a second station in a market applies for STV authorization, at which time the Commission will have information concerning the operation of the first station therein and could make a judgment on the basis of that information and other local public interest conditions. The opinion of Kaiser that it is too early to decide this issue is consistent with the foregoing.

170. Various parties, including ABC, Teleglobe, and ACLU take a position that STV should not be restricted to a single station because this is anticompetitive. Teleglobe adds that a limitation would also be unfair to another station in the community wishing STV.

171. Munn and Chase say that STV should be limited to one station per market because there is insufficient box-office programming for more than one station, and that allowing more than one to engage in STV operations would deteriorate the service. Trigg-Vaughn and AMST state that to limit STV to one station in a community would give the single station a monopoly. Moreover, according to AMST, "the combination of these market monopolies, deeply committed to pay television, would be particularly effective and energetic in efforts to 'siphon' free television audiences and programming." AMST admits, however, that such a restriction would reduce the pre-empting of free TV time by STV.

172. Conclusions. Our concern about pre-empting of time has been previously discussed. It has led us to the adoption of a rule restricting STV to certain markets, requiring STV stations to carry some free TV programming, and, finally, to restricting STV to one station in a community. If more than one station should broadcast STV programs in a single market more time could be pre-empted than we consider to be in the public interest at this juncture. We foresee no serious problems of monopoly in this connection. In relation thereto, it may be noted that there are numerous communities in the nation which have but a single free TV station, but monopoly problems sufficient to warrant action on our part have not arisen. In paragraph 133, we mentioned the views of the Joint Committee to the effect that it would be unconscionable for the Commission to permit such a monopoly without having clear-cut authority to regulate rates. We do not find it so. In balancing the conflicting considerations of dangers of pre-empting time against dangers of monopoly, the scale tips in favor of protecting against the former. As to the matter of rate regulation, it is discussed under Issue (9) below.

173. In view of the rule which we adopt it is unnecessary to consider the question of simultaneous STV broadcasting in the same community.

(5) Whether more than one subscription television technical system should be authorized, and, if so, whether more than one technical system should be authorized to operate in any one community (assuming that the answer to para. 45(b)(4) is such as to permit more than one station in a community to engage in subscription operation); and, if only a single technical system is permitted, what system should it be?

174. This issue was referred to briefly in paragraphs 36-39 of the Further Notice which mentioned that Zenith and Teco favor not limiting STV operations to a single technical system because the underlying policy of the Act encouraging competition points to the adoption of general technical standards within which more than one system might operate. We stated, however, that there might be advantages to the adoption of a single technical system--advantages similar to those accruing to the basic broadcast services, color TV, and FM stereo where we have required all broadcast stations in any band to use a single system so that receiving equipment in the hands of the public will be capable of using signals from any station.

175. Possible disadvantages in using multiple systems were mentioned in those paragraphs as well as in Appendix B of the Further Notice, which consisted of a memorandum from the Chief Engineer of the Commission for the information of commenting parties. These included the following: Viewers living within the service areas of more than one STV station would be put to unnecessary expense and inconvenience if they wished to see the programs of more than one of them. Persons purchasing decoders and later moving to other communities where other STV systems are used would be put to unnecessary expense and inconvenience. Even if decoders were rented rather than bought, there might still be inconvenience and expense in installing more than one kind of decoder in the home. Having multiple systems might restrict competition because viewers with one decoder attached to their sets could not, without additional inconvenience

and expense, receive STV programs of other stations. Thus, different systems in the same area might have different audiences. Competition between systems in the market place might become a popularity contest between competing systems which would be decided largely on the basis of promotional efforts rather than on their respective merits. The competition should occur before the Commission and be decided on the basis of technical merits before the STV service is regularized. With multiple systems, it will be necessary for the Commission to decide on a city-by-city basis what system should be used. This would necessitate detailed technical evaluation of the comparative merits of systems competing for the same market. If different kinds of decoders are used, their price would be greater than if only one kind were manufacturered in greater quantity for a single system. In addition to the foregoing, the Chief Engineer's memorandum contained considerable detail about patents, patent holders, and the Commission's revised patent procedures adopted December 6, 1961, which are designed to prevent the public benefits of systems which the Commission specifies shall be used from being derogated by unreasonable exercise of patent rights. That information will not be repeated here.

176. The comments in favor of having a single technical system are very brief. Thus, ABC states that it favors a single system because the public interest would be served, but does not say how. ACLU favors a single system because multiple systems would have a deleterious effect on diversity of expression for the reasons mentioned in paragraph 37 of the Further Notice. Motorola gives somewhat more on the matter. It states that authorization of multiple systems would be:

> "...a tragic regulatory mistake for which the public would pay a high price in years to come.
>
> "A single technical system provides the basic tools for growth of the service, as it has for television, both monochrome and color and for FM-Stereo. A single technical system permits better regulatory control by the commission. A single technical system allows equipment manufactureres a better opportunity to plan, to produce, to control inventory, to control national distribution and service, all of which reflect in higher quality, more reliable, lower priced units for the ultimate consumer."

Motorola urges thorough field testing of all systems before a single one is selected. It states that both the Zenith and the Telemeter systems have not been adequately tested (see paras. 123-124 above), and urges the Commission to institute a formal program of technical investigation and to request the industry to reconstitute the National Television Systems Committee as a vehicle for obtaining the field performance results for the Commission to evaluate.

177. The most lengthy arguments against limiting STV to a single technical system are presented by Teleglobe, Telemeter, and Zenith-Teco. Teleglobe offers the following: It presents a brief sketch of the history of STV systems including the development of the Teleglobe externally-connected decoder (as opposed to decoders that have to be connected to the inside of the TV set), and its centralized metering and billing system which permits immediate knowledge at a central office that a program is being viewed and which entails no coin or token insertion into the decoder or periodic sending in of tapes, code cards or the like for billing purposes. There were three STV systems in existence in 1957 when Teleglobe came on the scene. Had the Commission in 1957 decided to adopt a single technical system for STV, technical developments would have been frozen, progress stultified, and Teleglobe's novel concepts of external decoder connection and centralized metering and billing would not have emerged. Moreover,

> "[a]ll systems are workable. They are all ready for the market place. But only the actual operation of the individual systems--over a period of years--with tens of thousands of subscribers--in a number of markets--will be able to establish conclusively their comparative technical merits, efficiency of collection methods, ease of operation in the subscribers' homes, degree of servicing problems and general practicability. There is no other evidence that will justify the Commission to choose now one system in preference to the others. To make a choice of a single system for nationwide use, merely on the strength of circuit diagrams and written specifications is extremely unsound. . .A commitment by the Commission to a single system--in the present circumstances--will be a deterrent to progress and inventiveness.
>
> "A 'hands off' policy on the part of the Commission may or may not lead ultimately to the establishment of a single nationwide system. The public will not be hurt, however, since it is our proposal that television decoders should be installed by the Pay-TV operator and not sold to the subscriber."

In addition, not only would the adoption of a single system be unfair to the entrepreneurs who have pioneered STV at considerable expense and in the face of difficult opposition, but it would present a single company with a billion dollar monopoly, with profits not only from decoder sales, but from yearly royalties paid by franchise holders for use of the system. Finally, multiple systems should comply with general standards of good engineering practice, and should not be limited to one system per market since there is no technical difficulty in attaching more than one decoder to a set.

178. Telemeter presents arguments like those of Teleglobe with regard to stifling of invention and competition to improve systems if a single system is adopted. In addition, Telemeter says that because having a single system would eliminate competition, it would prematurely necessitate rate regulations, patent license regulations, and other burdens which would tend to stifle an industry which does not yet exist. It is premature, we are told, to fix upon a single system because this is not merely a technical question; it goes to the heart of the commercial organization of STV. In addition, as mentioned

earlier, (see para. 131), Telemeter believes that broadcasters, decoder owners and maintainers, and programmers will have to be one and the same in the early phases of STV, and it will probably be necessary at the start to grant franchises in order to induce investment in STV. Because of this, it is argued, having multiple systems would be the only way to have competition.

179. Zenith and Teco make the following presentation: Multiple systems are dictated by the underlying policy of the Act of encouraging competition. The Commission should adopt general technical standards under which the systems may operate. They could be as follows: (a) The system should be compatible with existing TV service (both UHF and VHF and monochrome and color) so that present TV sets can be used. (b) The STV system should not cause interference or have other undesirable effects within or without the assigned frequency. (3) It should result in no perceptible degradation of the quality of the video or audio signals received during either an STV program or a conventional program. There is no disagreement with the policy of single systems for basic broadcasting, color TV, and the like, but the same considerations do not apply here. There is no apparent reason why one method of secrecy to preclude non-subscribers from seeing STV programs need be used everywhere. Whether one or multiple systems are used, they would all be compatible with existing TV sets.

180. Like Teleglobe and Telemeter, Zenith and Teco are concerned about stifling inventiveness. They believe that establishing a single system would tend to make it impossible to incorporate future improvements--improvements which, among other things, could reduce ultimate costs to subscribers. We are told that based on the Hartford trial experience Zenith has made many new improvements in its equipment. The general technical standards that they have proposed would permit this sort of thing, they state. Moreover, they urge, decoder and encoder design involve other considerations than technical transmission of signal, such as billing, for example; and the Commission need not concern itself with what billing method is used as long as it is compatible with existing transmitter and receiver standards.

181. Zenith-Teco also argue that to have a single system would be contrary to the national policy against enlarging the monopoly of patent holders. To adopt a single system which would be inherently anti-competitive, there must be overriding social interests not presented here, they urge. Other arguments given are that there is an urgent need to increase the box-office support of feature films which are now so important to the free TV industry; that delay caused by the selection of a single system could cause TV channels to lie idle and open the door to reallocation of those channels to other services, as Motorola apparently would desire; and that there is no need for extensive field testing of systems as Motorola suggests.

182. Finally, they argue as follows: If multiple systems are used, it is unlikely, because of economic reasons, that there will be more than a single system in a community. This is so because an existing system in a community could also serve other stations subsequently authorized by the Commission to engage in STV operations therein. The later STV operators probably would not bring in new systems because it would be more economical and expeditious to use the existing system. Therefore, the inconvenience foreseen by the Chief Engineer if there were more than one system in a community is not likely to occur, and financial burden on the subscriber is minimized by renting of decoders. Although there will probably be only a single system used in a community, no reason why there should be a rule requiring this restriction is apparent.

183. As to the last-mentioned subject--limitation of STV to a single system in any one community--Acorn says that it favors STV broadcasting by more than one station in a community, and for that reason urges that only a single technical system be permitted in one community so that all subscribers may receive the programs of all STV stations there. Munn and Chase, on the other hand, believe that STV should be limited to one station per market (because of the limited number of box-office programs) and say that this view carries with it the requirement of having only one system to a community, although they see no reason for not having multiple systems nationally in non-overlapping markets. Trigg-Vaughn opposes limitation of one system to a community simply for the sake of confining all STV operation in the market to a single system, on the ground that this would be contrary to the public interest. However, it would apparently favor the adoption of appropriate limitations if having different kinds of STV service in a community would cause loss of the public's investment in receiving equipment or cause incompatibility with such equipment.

184. Conclusions. We have carefully considered the comments of filing parties and the views of the Chief Engineer of the Commission and here decide that it is in the public interest that multiple technical systems of STV be permitted. Many of the negative aspects of having multiple systems that are mentioned by the Chief Engineer are nullified by the fact that we are limiting STV to a single station within a community. Thus there is no problem of inconvenience and expense to the public caused by having two decoders attached to one receiving set for the purposes of receiving two STV operations in the community. While there may be viewers within the range of STV operations in more than one community, we do not believe these situations will be so numerous that, in the overall, significant inconvenience will be caused. Because of the foregoing, the argument that multiple systems might tend to restrict competition by dividing STV audiences between two STV stations falls. Our rule requiring that decoders be leased rather than sold (see Issue 11 below) protects those subscribers who move from one community with STV service to another STV community. To the argument that one system may be better than another and that with multiple systems use of one or another may be based on the efforts of salesmanship rather than technical quality, we reply that by establishing standards which multiple systems must meet, we assure that they will be able to transmit satisfactory pictures and sound. Moreover, as to the matter of decoders costing less with a single system as compared to manufacturing fewer of each kind with multiple systems, we believe that competition between systems may well serve to stimulate better methods of production that will tend toward lower costs. We agree that, under the rules which we adopt, if two or more applicants within a community apply for STV authorizations, a comparative consideration in a hearing may be necessary to determine the relative merits of the technical systems, but this fact does not deter us in view of the advantages to the public of the action which we here take.

185. Many of the arguments made by those favoring multiple systems we find to be of a makeshift nature and lacking in merit. Thus, for example, while we can sympathize with the argument that many entrepreneurs who have

invested time and money in STV systems will lose if a single system is selected, private interests would have to yield to public interest considerations, as they did in the case of color TV and FM stereo, if the public interest considerations in this case appeared to be in that direction. On the other hand, we believe that there is merit to the position that adoption of a single system at this time might well stifle inventiveness and the incentive to improve STV systems. At some future date, depending on the factors then existing, it might be in the public interest to adopt a single system, and STV operators are hereby put on notice to that effect. We believe that a broad trial of multiple systems over a period of years, possibly coupled with the reconstituting of the National Television Systems Committee to aid the Commission, might form the basis for subsequent decisions in this area. However, we do not believe that the testing should be made in the abstract. Standards which we adopt can assure the reception of satisfactory signals on all multiple systems used. In view of this, we see no reason why the market place should not be the proving ground. Finally, we agree with the argument that there is a paramount public interest in fostering competition and diversification of program sources as quickly as possible. We have already found that STV could provide a beneficial supplement to free TV. In view of this, in view of the paramount public interest just mentioned, and in view of the foregoing observations, the time to begin nation-wide STV--using multiple systems--is now.

(6) Whether a party manufacturing or selling equipment, or a holder of a subscription television franchise in more than one market should be permitted to engage in the procurement and supply of programs to television stations for subscription use.

(7) What requirements should be imposed upon station licensees engaged in subscription television operations to assure licensee control, i.e., whether the licensee should be required to retain sole control of all decisions as to program choice, charges to the public, etc., or whether the requirements should merely concern such matters as the licensee's retention of the right to reject programs, to make free choice of programs, to schedule the time of showing of programs, and to set the maximum price to be paid for a program by subscribers (see Section 73.642(e) of Appendix C).

(12) What restrictions should be adopted concerning the nature of arrangements among patent holders, patent licensees, franchise holders, and television station licensees, e.g., concerning such matters as whether, and under what terms and conditions, patents on any particular subscription television system will be required to be made available to franchise holders and station licensees, and whether stations engaged in subscription television operations should be permitted to enter into contracts that would give them exclusive rights to use a system in a particular community.

186. These three issues are dealt with together because of their close interrelation, bearing as they all do on questions relating to monopoly and competition and on the licensee's responsibility for the programming which is broadcast over his station. We have already set forth considerable information about them in paragraphs 115-119 and 126-133 which presented material

on the subjects of modus operandi of the STV service, the methods to be employed, the role of participating broadcast station licensees, and the possible monopolistic features of STV. In paragraph 134 we stated that we would evaluate that material in our discussion of the issues, and this will be done in stating our conclusions below. Reference is also made to footnote 32 in which we indicated that such topics as whether interconnection of STV operations should be prevented or limited, and whether STV system manufacturers or franchise holders with franchises in more than one market should be allowed to engage in STV program procurement or supply, and similar problems related to siphoning, would be discussed under the issues. (The question of whether STV should be limited to carrying certain kinds of programming, also mentioned in footnote 32, is treated under Issue (14).)

187. Issue (6). In paragraph 59 of the First Report we stated:

> "Opponents of subscription television have charged that the conduct of subscription television operations on the lines proposed in this proceeding would permit or foster monopolistic control of the medium. It is pointed out, for example, that a sole franchise holder in an individual community of a system employed exclusively in the local community for the encoding and decoding of subscription television programs might become the sole medium for the channeling of subscription programs into the community. This, it is argued, would enable the franchise holder, and through him the persons controlling patents on the equipment, to control the program availabilities, determine the terms of services to the subscribers and otherwise control the operation without competion from any other persons performing similar services locally. It is also argued that any system which by virtue of nation-wide standardization by the Commission, or otherwise, established a nation-wide network of local outlets, may gain monopolistic control over provision of subscription television service for the public in all the communities where that system was exclusively used for subscription television operations."

We then went on to say the following in paragraph 61:

> "It is superfluous to say that the Commission favors competition in the conduct of subscription television operations. The conditions set out herein for trial operations have been carefully determined with that objective in view. A trial conducted under these conditions would, we believe, provide useful indication of the extent to which it is possible to create and maintain competition in all phases of subscription television operations: among program producers and distributors, among manufacturers and distributors of equipment, and among stations, to name several. Should a trial disclose that competition among several systems is not feasible, or that the need for standardization of equipment precludes it, there would be ample opportunity, after trial data are available, for deciding whether the

continuation of such a service should be prohibited as contrary to the public interest, or whether its continuation and expansion should be governed by new regulatory controls furnished if need be by amendments to the present statute."

As events developed, however, trial operations were not conducted under the provisions of the First Report, but under those of the Third Report instead. Two fundamental differences exist between these reports: Under the former, more than one STV system could have operated within any one market, and any STV system could have been tried in up to three markets. Under the latter, only one STV system could operate within a single market (although more than one station in the market could engage in STV operations using that system), and any system could be tried in only one market. This fact may have resulted in our obtaining less information about the area of monopoly than might otherwise have been obtained. However, at the time, other considerations militated in the direction of adopting the revised provisions of the Third Report. In any event, it may be seen that our concern in the quoted paragraphs had to do with the matters specified in the present issue as well as with that of interconnection of STV stations by a nation-wide network--an item mentioned in footnote 32.

188. Proponents of STV commenting on these matters generally favor no restrictive rules thereon, at least at the outset. As an example, the views of Zenith and Teco are stated in their own words:

"Zenith does not contemplate engaging in program production or distribution if subscription television is authorized. However, we see no reason for a rule prohibiting Zenith from so doing. Other parties manufacturing or selling equipment in more than one market are presently permitted to engage in the procurement and supply of programs to conventional television for either their own or other television stations, or both, while making and selling equipment to those stations or to the public, or both.

"In our opinion, a holder of a subscription television franchise in either a single market or in several markets should not be prohibited from engaging in the procurement and supply of programs to television stations for subscription use, so long as the subscription television station is free to use the franchise holder's system, whether or not it uses the programs supplied by the franchise holder. Indeed, in many cases the subscription television station and the franchise holder may be the same party. This, as the Commission knows, is true of RKO in Hartford. This may also occur in the case of two Phonevision franchise options which have been granted to Field Communications in Chicago and Kaiser Broadcasting in Los Angeles.

"We believe that so long as any subscription television franchise holder stands willing to provide subscription service to all stations authorized by the Commission to carry subscription programs in a particular market, it should not make any difference whether the franchise holder on some occasions obtains programs which are in turn supplied to the stations. The stations will still have plenty of other sources from which they may obtain programs.

"It should be emphasized that because of legal and business considerations involved, Zenith and Teco would be effectively precluded from entering into any arrangement or tie-in with a local franchise holder giving any program supplier exclusive use of Phonevision facilities. Likewise, the same legal and business considerations would preclude a local franchise holder from entering into any tie-in arrangement which would require stations to use only programs supplied by the franchise holder.

"We, of course, recognize that the television station should have ultimate control over the final selection of all subscription programs broadcast . . . ."

They then refer to the three methods for arranging for programs which involve various degrees of cooperation between the licensee, the franchise holder, and program producers which were mentioned in paragraph 118, and conclude by saying:

"We do not believe that any sound regulatory purpose will be served at this point by putting unnecessary restrictions on a franchise holder's participation in program procurement. Nor do we believe that any useful purpose would be served by putting a program distribution restriction on any other group or classification. At the outset at least, subscription stations will require all the collateral help they can possibly obtain to acquire sufficient box-office product to make subscription television a success."

189. The views of Telemeter were set forth in detail in paragraph 131. On the basis of those views, Telemeter urges that, at least at the outset, there be no limitations placed on the system proponent, such as Telemeter, or on the franchise holder with regard to their ability to produce, acquire, obtain or supply STV programming. In one respect, Telemeter disagrees with Zenith-Teco. The position of the latter parties, we are told, would preclude exclusive franchise agreements between Telemeter and TV station licensees. Telemeter believes that an exclusive franchise may be the only method for commencing STV in the early days of the service.

190. Without mentioning them by name, we note that other proponents have views similar to those mentioned in portions of the foregoing. However, we specifically mention Kaiser because of its reference to networking of STV programs. It states that the key to the success of STV lies in its ability to obtain programming that will be supported by subscribers, and that to prevent interconnection of STV operations in different markets or to prevent equipment manufacturers from engaging in program procurement or supply would be to impose severe restrictions in this vital area with no real evidence that they are necessary either to protect free TV or to prevent anti-competitive practices. One proponent, ACLU, holds the view that there should be a complete divorce of programming from other facets of STV operation because diversity is limited by monopolizing programming in the hands of those who control distribution,and diversity is broadened by developing new entrepreneurs in programming.

191. Among opponents of STV, ABC believes that the Commission should not presently adopt rules limiting equipment manufacturers or sellers or franchisees with regard to engaging in program procurement and supply for STV. It observes, however, that

> "/a/lthough these combined functions may raise questions under the anti-trust laws, the questions are subtle and do not lend themselves to answers in the abstract. The sound course would be for the Commission to adopt no rule at this time and to await development of the subscription television industry."

AMST is of the view that although if such restrictions were adopted they would preclude certain groups from siphoning programming from free TV, they would not prevent siphoning itself. Finally, the Joint Committee, in order to minimize the risk to free TV, opposes any form of networking of STV programs or other types of multiple program purchase agreements.

192. Issue (7). Generally, comments favor traditional concepts of licensee responsibility, and most favor the requirements in proposed Section 73.642(e) for assuring licensee control. They are those required by the Third Report for trial operations, and suggested by Zenith-Teco for final rules, and it is stated that they would be adequate to insure licensee responsibility for STV station operations. Kaiser, however, believes that it is too early to decide on detailed restrictions because we do not yet know along what lines the program procurement process will develop. It might be along the lines of free TV with a network-station relationship, or it might be different and therefore call for more complete control by the licensee over operational details. Munn and Chase state that having rules on licensee control might protect licensees against outside pressures.

193. Telemeter supports the proposal providing it is made clear that exclusive franchise agreements are permitted and that stations may enter into contracts whereby the franchise holder undertakes to broadcast a minimum of STV programs within specified time segments. ABC favors the proposal but states that the Commission should recognize that in order to offer special and unusual attractions some kind of network-type distribution structure may be necessary. Because of this, it states,

> "/T/he Commission should not foreclose subscription television operators from contractual arrangements necessary to provide a nationwide audience for programming. In the free television and radio areas, a reasonable accommodation between the concepts of licensee responsibility with respect to program selection and national program distribution has been realized, and a comparable relationship would appear appropriate for subscription television."

194. Issue (12). Comments on this issue vary. Teleglobe believes that it would be premature to adopt rules on this subject at this early stage. Telemeter, expressing the same thought, says that if multiple systems are permitted, there may be some cross-licensing and pooling of patents. Some system proponents may manufacture and others not. Therefore, until the pattern of the industry emerges, it would be impractical to attempt to be specific about patent licensing terms and conditions. Trigg-Vaughn believes that the proposed rule in Section 73.642(e) concerning licensee control is sufficient to protect against abuses, should any develop, that might be imposed on licensees and ultimately the public by manufacturers of equipment. Zenith and Teco are of a similar view. ABC, on the other hand, believes in having appropriate restrictions to guard against anti-competitive practices. If the Commission should adopt a single technical system and permit more than one STV operation in a community, it then urges that rules be adopted that would permit sharing of rights and that would limit exclusivity arrangements.

195. Conclusions. We have carefully weighed the foregoing material and have arrived at the conclusions in the following paragraphs. Because of the limited scope of the Hartford trial, we lack information about conceivable problems of monopoly with regard to STV. As we said in paragraph 187, this may be partly the result of the more limited conditions which the Third Report imposed for trial operations. For example, had one system been tried in three markets, as would have been permitted by the First Report, we might now have trial information about interconnection of systems and the purchase of programs from a broader financial base by a franchise holder in more than one community. This lack of information, and other considerations mentioned below, lead us to the conclusion that, at least until such time as the infant STV industry grows to the point where patterns of organization and problems are discernable, we shall not adopt rigid regulations in respect to matters related to Issue (6) and (12), and the kindred matter of interconnection of STV operations. Instead, we are adopting rules in respect to Issue (7) which are of such breadth that each application may be treated on the basis of its specific fact pattern as to topics therein relating to Issues (6), (12), and interconnection.

196. Issue (6). Zenith and Teco have depicted for us the modus operandi and methods used at Hartford which include three functional organizations--the local franchise organization, the TV station, and program sources. At Hartford, the first two were under common ownership. We are told that there appears to be no reason why this should not be, although it often may not be the case. Three possible methods for making arrangements among these elements for obtaining programs (para. 118) are mentioned. We are informed that at Hartford programs were obtained from more than 50 sources during the first two years of the trial. These parties indicate that Zenith does not intend to engage in program production or distribution, that for business and legal reasons they would be precluded from entering into arrangements with local franchise holders giving any program supplier exclusive use of Phonevision facilities, and that the same considerations would preclude local franchise holders from entering into arrangements with station licensees that would require the latter to use only programs supplied by the franchise holder.

197. Telemeter, with considerable experience in Canada, stresses the importance of permitting a single firm to engage in all phases of STV operations including production of entertainment, broadcasting it to the public, installing decoders, and all other aspects of the business. Without this, they insist, STV may not get off the ground. They are therefore of the opinion, at this stage, that it serves no useful purpose to try to predict and separate the elements of STV and regulate them. Moreover, they strongly favor permitting exclusive franchises, contrary to the position of Zenith-Teco.

198. Thus, the two entitites that have the most actual experience in STV operations appear to have views that differ in some essential respects. This underscores the fact that we are in an uncharted area. There is no real evidence that restriction is necessary. In free TV some manufacturers and licensees have gone into programming to promote competitive free TV. Why should the same not be permitted in STV? We have only conjecture to argue against it.

199. We have, through limiting STV operations to five-station markets and to one station in those markets, and through limiting the kind of programming that STV stations may broadcast (see Issue (14)), taken sufficient steps at this time to protect the existing TV structure. We think it essential that some thought be given to what might be necessary to protect the growth of the new STV service. It appears that some sort of broader purchasing base for programs might be effective in making available to viewers programs of little mass appeal--operas, plays and the like--which may not be available on the basis of single-station purchasing. (It might also be helpful in obtaining more and better mass-appeal programs, thereby aiding STV to achieve greater market penetration--a matter about which doubts have been expressed.) As was mentioned in the comments, if a relatively small number of viewers in each of many communities were to view an opera, it might make producing and selling operas an attractive business venture. Lack of such programming on STV trials is one of the areas that STV opponents have chosen at which to aim their darts. It would appear unreasonable, then, to argue against interconnection of STV operations, or against procurement and supply of programs by

franchise holders with franchises in more than one city, or by equipment manufacturers, when there is no real evidence that such restrictions are essential to protect free TV or to provide safeguards against anti-competitive practices. AMST states that even if we had such restrictions they would only prevent some program siphoning but not all. To which we can only reply that it is not our intent to erect a complete fence about free TV. It may well benefit the public to leave at least a small opening in the enclosure. Finally, to the ACLU argument that diversity is best promoted by separating the functions of programming from other parts of STV operations, we can only reply that we give credence to the view that there may be a need for flexibility of approach to program procurement and supply in the early stages without which the service may not develop at all--a result that would make for even less diversity.

200. Issue (7). In view of the foregoing discussion about Issue (6) and the discussion of Issue (12) hereafter, we are of the view that proposed Section 73.642(e) concerning licensee control should be adopted with amendments befitting the situation as it appears to be. Before specifying what the amendments are, we shall refer briefly to a related topic--our chain broadcasting rules--to illustrate what we consider to be fundamental policy. That policy underlies the chain broadcasting regulations and the amendments to Section 73.642(e) which we adopt today. The chain broadcasting rules, adopted for radio in 1941, were later carried over to television stations when TV came into being, and the essentials of those rules are in effect today. The rules were designed to protect against two types of situation that the Commission deemed to be contrary to the public interest--so-called exclusivity of affiliation, and territorial exclusivity. The former consisted of an agreement between a station and a network whereby the station agreed to accept programs only from that network. The latter was the reciprocal undertaking on the part of the network whereby it agreed that it would not make its programs available to any other station within a given radius. The former was economically advantageous to the network because it gave assurance of an outlet in the community. The latter was of advantage to the station because it had a definite source of programs assured, and knew that no other station in the area could carry those programs.

201. In adopting the chain broadcasting rules, we found both types of exclusivity to be contrary to the public interest. Exclusivity of affiliation was proscribed because it hindered affiliates in the choice of their programs, since they could not broadcast those of another network even though the other network might offer some programs that were highly desirable and the broadcasting of which would be in the public interest. In addition, such exclusivity arrangements limited the chances of other networks to have their programs broadcast in that community, since the station having an exclusive affiliation with one network could not broadcast programs of another. In other words, network competition in the community was restricted, contrary to the public interest. Similarly, territorial exclusivity also restricted competition in that if an affiliate did not carry a program of its network, other stations in the market were prevented from competing to obtain and broadcast the program.

202. As explained above, and for the reasons mentioned, we are adopting rules providing that only one station in a community may engage in STV operations. In effect, then, we have decided that under the conditions of uncertainty about the future development of STV, and to protect the interest of the public in having sufficient amounts of free TV programs available, there should at least at the present time be something akin to territorial exclusivity for the STV operator in each community.

203. As to the matter which is analogous to the exclusivity of affiliation which was struck down by the chain broadcasting rules, we have, as the previously stated views of the parties indicate, a conflict of thought between two of the principal proponents of STV--Zenith-Teco, and Telemeter. Zenith and Teco relate that for business and legal reasons they would be precluded from entering into arrangements with local franchise holders that would give any program supplier exclusive use of Phonevision facilities. They state that the same considerations would prevent local franchise holders from arrangements with STV stations that would require the stations to broadcast only STV programs which the franchise holder supplied. On the other hand, if we understand the position of Telemeter correctly, it is of the view that it is essential that arrangements which limit an STV station to obtaining programs from a single source be permitted or the new service will not be able to develop in its early stages. It appears that Telemeter would agree that at a later stage of development such arrangements might conceivably not be in the public interest.

204. As a general principle, we believe that the philosophy underlying the chain broadcasting rules should apply to STV, for it is in the public interest to stimulate competition and diversity. However, general principles are subject to modification if the situation indicates a public benefit may result. Such was the case with our decision to limit STV operations to one station per community. As to the present problem, in our judgment, we do not know enough about STV at this time to adopt rules proscribing exclusive programming arrangements--which on their face would appear to be anti-competitive. For it may be that under the circumstances that prevail in the early phases of STV such arrangements, as Telemeter argues, will be necessary to nurture the new service into being--thereby once again modifying the general principle. Thus, on the one hand we believe, along with ABC, that there should not now be specific regulation. But on the other, we would be remiss in our duty, in setting up a new service, to write rules that are silent on a topic of great concern. For this reason, we have chosen a middle course. We adopt rules (see Section 73.642(e) of Appendix D, which with modifications is the proposed Section 73.642(e) of Appendix C) which provide that, generally speaking, parties will not be granted STV authorizations if they have entered into agreements that prevent or hinder them from making a free choice of programs. However, we provide that we shall examine each application on an ad hoc basis, and if it appears under the given fact situation that the rule should be waived, we shall do so.

205. Similarly, Telemeter has urged what in effect is a rule permitting optioning of a station's time for broadcasting a certain number of hours

of STV programs per day or segment thereof. We have, of course, abolished option time for free TV because we found it not essential to successful conduct of TV network operations, and a restraint contrary to public interest. For reasons stated in the preceding paragraph, it could be that in some cases it might be in the public interest to permit this type of arrangement in the early stages of STV. Therefore, we have also incorporated in the new Section 73.642(e) provisions to the effect that STV authorizations will not be granted to parties who have entered into such arrangements unless the Commission has approved them.

206. The rules which we adopt are broad enough to encompass not only equipment manufacturers, franchise holders, or others who may be engaged in program procurement and supply, but also any STV networks that may develop or other types of STV interconnections between communities. We do not foreclose STV interconnections or networks, but if arrangements related thereto restrict the freedom of choice of STV stations in procuring programs, the Commission must approve them or no STV authorization will be granted.

207. In periodic reports which we shall require those holding STV authorizations to submit, we shall obtain information in this area, and do not, of course, foreclose further rule making with regard to it.

208. Although, as stated in paragraph 288, we do not now decide what information will be required in applications for STV authorizations, we believe that the subject just discussed is of such importance that information on it will have to be contained in applications. For this reason, we are adopting a rule stating what material on the subject must appear in STV applications (see Section 73.642(g) of Appendix D).

209. Issue (12). As with Issue (6) we believe that we have insufficient information at present to know what, if any, regulations may be necessary. Much, if not all, of the issue is mooted by the new rules which we adopt. Thus, for example, restricting STV operations to one per community moots the question of whether stations should be permitted to enter into contracts giving them exclusive rights to use a system in a particular community. The adopting of rules permitting multiple systems greatly dilutes the other question posed in the issue.

210. As with other aspects of the new service, we shall keep the matters covered by this issue under surveillance and may from time to time require the submission of reports and other information to keep us abreast of developments, toward the end of having an informed basis on which to take any further regulatory action that may be required in the public interest.

(8) The nature of the technical rules that should be adopted.

211. Appendix C of the Further Notice contained a proposed Section 73.644 concerning equipment and technical operating requirements. That section indicated that STV equipment must be approved in advance by the Commission's established type approval and type acceptance procedures. It further stated

(as did paragraph 39 of the Further Notice) that additional rules concerning equipment and technical operating requirements would be announced at a later date. (This, of course, was contingent on the establishment of a nation-wide STV service.)

212. No comments were received on whether to adopt the proposed Section 73.644. After having considered that proposal, we are of the opinion that the type approval portion thereof should be deleted. Type acceptance is generally used throughout the radio services in the absence of an urgent need for type approval. No such urgent need appears evident here. Section 73.644 adopted herein is modified accordingly.

213. As stated previously, we have decided that multiple technical systems should be permitted (paras. 184-185). We are today, simultaneously with the adoption of the instant document, adopting a further notice of proposed rule making in this proceeding which invites comments on proposed rules for STV equipment and system performance capability. These proposed rules would establish standards with which any STV system proposed to be used by an STV applicant would have to comply. We do not presently foresee the need for special technical operating requirements for STV, and in the absence of such requirements the operating requirements for conventional television operation will apply. Should any parties believe that special rules on the subject are necessary for STV, their suggestions and comments will be welcome.

(9) Whether, and to what extent, the Commission should regulate the charges, terms and conditions pursuant to which subscription television service will be offered to the public.

214. Zenith and Teco support proposed Section 73.643(b) of Appendix C which would require that charges, terms, and conditions of STV service to subscribers be applied uniformly, although providing that subscribers may be divided into reasonable classifications, approved by the Commission, with different sets of terms and conditions applied to subscribers in different classifications. However, beyond that, they believe that the actual decoder installation, decoder rental, or per-program charges should not be regulated by the Commission. Trigg-Vaughn has a similar view. Among other reasons for this position, Zenith-Teco state that STV will be in competition with other forms of box-office entertainment, and prices would best be controlled by competition in the market place. Telemeter, along the same vein, holds that STV should have the same freedom in pricing as other box-office entrepreneurs enjoy.

215. Acorn states that there should be no rate regulation initially because the competition between free TV and STV should keep the STV charges reasonable. Kaiser says that it is too early to decide whether to regulate rates, and Teleglobe holds that it is premature to regulate charges, terms, and conditions because there should be as little regulation of STV as possible in the beginning. Trigg-Vaughn argues that no need for rate regulation has been shown and that regulation would place an artificial restriction in that area. If experience shows the existence of abuses, it is argued by Zenith-Teco and others, the Commission may take appropriate action.

216. As to actual jurisdiction to regulate rates, Telemeter holds that the Commission has no such authority because STV is a broadcast service, Section 3(h) of the Act states that broadcasting shall not be deemed common carriage, and rate regulation has traditionally and legally been limited to common carrier and public utility fields. ABC expresses doubts that the Commission can regulate rates because STV has been determined to be broadcasting so that it comes under Title III of the Act; thus it would not appear that the Act would sanction STV rate regulation. It suggests that the Commission seek Congressional guidance on the matter because STV is such a drastic step which changes traditional concepts of American broadcasting. Others, too, state that the Commission has no jurisdiction. For example, the views of the Joint Committee have been expressed in paragraphs 132-133 above; and, Trigg-Vaughn urges that the regulation of the economics of broadcasting is beyond the powers of the Commission. Although AMST states that it takes no position on the matter, it points out that rate and other regulation would be vast and complex, and that because of the doubtful benefits and substantial threats to the public, STV should not be authorized.

217. It is appropriate here to mention the proposal of ADA which forsees as a development of the future a system described by Dr. Joseph V. Charyk, president of the Communications Satellite Corporation. The system is based on the "telephone exchange" principle. It is briefly described as follows:

> ". . .The home or place of business would have a TV set and speaker with an auxiliary tape recorder for both picture and sound, connected to a central exchange by a single coaxial cable through a selector switch like a telephone dial or push-button.
>
> "The cable would come from a central exchange, like a telephone exchange, which would have literally thousands of feeder connections from television and radio station studios, film and tape libraries, newspaper offices, educational classrooms and laboratories, retail stores, banks and accounting services, movies and sports centers, theaters and concert halls. Each service and individual newspaper, lecture, film, game, etc. would be individually dialed.
>
> "Viewing and listening need not be 'live.' The receiver can be turned on and off to a specific channel by a clock-switch, so the subscriber can receive and tape record programs and services for later, more convenient viewing or study; newspapers, for example, would be recorded in the early morning hours for breakfast consumption - and continually updated around the clock."

ADA states that such a system would provide a choice of all available programs and services whether paid or sponsored. All programs would be carried by the system. The producer of programs would be separate from the television station and cable carriers, and would pay them on a cost-plus-fair-return basis.

218. This is not a complete description of the views of ADA, but it serves to give the central theme of their comments--that although ADA favors STV, the Commission should withdraw its proposed rules and propose new rules under which free TV and STV stations would be separately licensed, with the latter being regulated by common carrier principles under direct FCC supervision of carrier rates and terms. It expresses the fear that to adopt STV rules along the lines of those proposed in the Further Notice might thwart the development of the foregoing type of system, contrary to the public interest.39/

219. Conclusions. With regard to the ADA views, we admit that the future may well bring with it the sort of development which they describe, but it would appear to be years away. We do not believe that STV, which we think is in the public interest, should be required to await such a great passage of time, especially since there is nothing to lead to the conclusion that our action taken today would, as ADA fears, thwart the future. We see no reason to believe that STV, authorized as we propose, should impede the development of a "telephone dial" system any more than would the fact that retailing, banking, accounting, distribution of newspapers, and the like are presently cast in a mold that is highly different from that which ADA foresees. STV has already been postponed for a number of years and, with the information now before us, we believe that it should at last be given its chance to provide what lies within its power to the public. Should the situation envisaged by ADA occur, there will be time enough to switch to a common carrier type of regulation if that is then indicated.

220. It is stated that the nature of STV, like that of common carriers and public utilities, is such that rate regulation is necessary. Coupled with this are two additional arguments: That we must consider and decide whether we have such rate-regulatory authority before permitting STV operations; and that lacking clear-cut authority we should go to Congress for legislation amending the Act to give clear authority.

221. We cannot agree with these views. For reasons stated in the First Report, we have concluded that we have jurisdiction to authorize STV. Although we do not here decide whether we possess authority to regulate STV rates, we observe that the authority to authorize STV is not dependent on a concomitant one permitting such regulation. It is stated that television channels are in the public domain and that the STV operator will make a direct charge to the public for use of the public's property. Such a situation, we are told, requires rate regulation. The argument is without merit. Throughout this document we have used the term "free TV." However, "free TV" is not really free. The advertising costs which support free TV are eventually passed

39/ We also note here the suggestion of TVC of California, Inc. and Com-Sumers, Inc. that space satellites be used for STV. The suggestion is couched in the broadcast terms, contains no details, and is, in any event, outside the scope of this proceeding

on to the public, and a profit is made by the licensee or others from the use of the public's channels. Yet we do not regulate the rates charged by free TV stations for time over their stations which results in their profits, and it has been said that we cannot. 40/

222. The public is free to subscribe or not to subscribe to STV services. We believe that the market place will regulate the charges that are paid and that if they are excessive the operations will not succeed. There is nothing in the Hartford trial to indicate that rates will be exhorbitant. The highest price for a feature film during the first two years of the trial was $1.50. The lowest was 50¢. The most costly sports event was $3.00; the lowest, $1.00. The average prices for such programs during the second year were $1.03 and $1.37, respectively. Prices for other programming were comparably reasonable. We have already adverted to the fact that for a very popular heavyweight fight nine persons were viewing at each tuned-in set for a cost of $3.00 whereas the same fight was shown on closed circuit TV in local theaters for a price of $5.00 per head. Moreover, the rules which we adopt provide that the station licensee shall have ultimate control over the maximum charges to be made for programs, and the licensee is responsible to the Commission at renewal time for the stewardship of the station in the public interest and is expected to govern his activities during the license term accordingly. Regulation of charges, terms and conditions as prescribed in Section 73.642(f)(2) (Appendix D) which we adopt today is the extent of regulation that we deem necessary at the present time in this area. Should abuses arise, we are not barred from taking whatever steps appear to be necessary to correct them.

(10) Whether a station engaged in subscription television operations should be required to furnish subscription service to all persons within its service area who desire it.

223. Several parties are of the opinion that it would be premature to adopt rules on this subject in this stage of development of STV. In this, as in other areas, Kaiser believes that because of the uncertainty about how the new service will develop, overly narrow and detailed restrictions might both fail to achieve their desired ends and smother the infant industry. Kaiser states:

> ". . .[I]t is far too early to conclude that there is a need to impose full-blown public utility regulation upon subscription operations, with an obligation to serve everyone within some defined area and with detailed regulation of rates and earnings."

Trigg-Vaughn thinks it too early to impose a regulation requiring that everyone within the service area of a station be furnished STV service if he desires it. The reason given is that there might be a limitation on the ability of

40/ Pulitzer Publishing Co. v. Federal Communications Commission, 94 F. 2d 249, 251 (C.A.D.C., 1937).

a station to do this as a result of freak interference and reception conditions or other problems for which the station would have no remedy. ABC, Telemeter, and by implication, Munn and Chase, are of the view that, generally speaking, STV service should be provided to all persons in the service area on a non-discriminatory basis. However, the last two of those three parties qualify the position with provisos which include giving the STV operator the right to refuse or terminate service for non-payment of STV fees, for irresponsible or unauthorized damage to or use of decoder equipment leased to the subscriber, or for other reasons. Telemeter would also like the right to provide cash decoders rather than credit-type decoders to poor credit risks. Munn and Chase observe that the right to see free TV is limited by the ability to buy a set. If a person does not pay for his TV set, it is repossessed. They believe it would be an error to place on STV operators a requirement to serve all who wish to subscribe, and that the matter would best be left to the operator's business judgment and desire to expand.

224. As to the last-mentioned point, Trigg-Vaughn says that because of natural competitive motives the STV operator will make the broadest efforts to serve as many subscribers as possible. Zenith and Teco, of the same view, say that because of this there is no need for a rule. They also advert to the fact, like the Trigg-Vaughn view mentioned in the previous paragraph, that it is sometimes difficult to define a station's service area because there may be places of poor reception within the Grade A and B contours. They believe that although a rule might give protection in such situations, they can easily be handled on an ad hoc basis. Although apparently opposing the adoption of a rule, Zenith and Teco express a view like that of Telemeter, and Munn and Chase, that the STV operator should be permitted to withhold or withdraw STV service from those who are poor credit risks or who otherwise violate the terms of subscription agreements.

225. Finally, Zenith and Teco make the following statement:

> ". . .We might also note that in commencing new subscription operations in any community, it may be necessary, in order to efficiently and expeditiously handle decoder installations, to break down the so-called service area into geographic sections for purposes of orderly promotion and development. While this approach would be usually temporary, in most cases it will undoubtedly be utilized."

226. Conclusions. This issue is not without difficulties. We have classified STV as broadcasting on the ground that its transmissions are intended to be received by all members of the public who wish to subscribe. This would suggest that all who wish it should receive service, i.e., that all should be served, but for the reason that STV is broadcasting regardless of whether it is a public utility or not.

227. It is suggested that we not have rules on the subject, at least until more is known about the pattern of STV activities. However, although for that reason we have been willing to defer possible action in some of the areas discussed in the issues mentioned above, we believe that with regard to the instant issue the possible problems are rather clearly drawn, and that to defer action could lead to difficulties that by rule could be avoided. We know, for example, that within the normal service areas of television stations there may be poor reception at some places; that a small percentage of people are poor credit risks, that they may violate the terms of a contract with an STV operator, and that they may damage decoders installed in their homes; and that when an STV service is commencing operations in a community it may be more efficient and expeditious to install decoders on the basis of geographic sections.

228. The rule which we adopt (Section 73.642(f), Appendix D) takes such matters into consideration. We believe that it will avoid problems that might arise with regard to them, that it will not hinder STV operations, or, on the other hand, do a disservice to the public by unjustly preventing them from receiving STV programs which they desire to view. With regard to the relatively tiny percentage of the public who might not pay their bills, for example, we note that even in the public utility field precautions are taken on the matter. Thus, for example, it is common for a utility like a telephone company to include in its tariff rules a provision that the company may require potential customers to supply a surety bond or cash deposit satisfactory to the company, to assure payment for service. Moreover, they often provide that the company may terminate service for non-payment of bills. The fact that the tariffs state that the company "may" discontinue service, i.e., leaving the matter to the discretion of the company, instead of stating that the service "shall" be discontinued when certain conditions of non-payment prevail, raises certain questions about possible dissimilar treatment of customers by the utility which have not yet been solved. Be that as it may, we mention the tariffs to indicate that even in the utility field, of which the cornerstone is service to the public on demand, there are provisions of the type referred to. 41/ We do not find it unreasonable, therefore, to have similar provisions for STV service, for we think that they would do no more violence to the concept of broadcasting serving all of the general public than the telephone company provisions do to the concept of a public utility.

229. However, since the service is new, we do not know under exactly what circumstances precautions or other actions should be taken by STV operators or what the precautions or actions should be. This is an area as uncertain as the "may" vs. "shall" provision mentioned above. The rule which we adopt is broad enough to permit an STV operator, as Telemeter requests, to install a cash, rather than a credit decoder for poor credit risks, and to permit requirement of a reasonable deposit in advance for poor credit risks. However, we emphasize that we do not expect such cases to arise frequently, and that we regard as fundamental the concept that STV, like other broadcasting, is for the general public. We view actions like those just mentioned as reasonable under the circumstances, and as not precluding the

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41/ In other words, utilities must serve the public on demand--for a charge. They are not charities.

persons involved from becoming STV subscribers. We also regard it as reasonable to permit termination of service for non-payment of bills, damage to decoders, or the like. It is stressed that we expect STV operators to use good judgment in this area of business operations. We shall observe carefully the operation of STV under the leeway which we here provide, and shall take appropriate action to correct any abuses that may occur or any other situations which we deem contrary to the public interest. From time to time, as with other aspects of STV operations, reports on the subject may be required of STV operators.

230. As to geographic or other reasonable patterns of installation for new STV services, the rule is drafted to permit this. Such a provision seems reasonable and likely to make for a more rapid and efficient development of the new service in any community. 42/ Finally, our preliminary study of the technical systems for STV leads us to recognize that the service area of an STV operation may well be smaller than that of its free TV service that our rules will require it to provide. The rule adopted today in relation to the instant issue of whether STV service should be provided to all within the service area of a station is designed to strike what seems a reasonable requirement, namely, that STV service must be provided to all within the Grade A contour of the free TV service of the station, with the exceptions mentioned above concerning non-payment, poor reception pockets, and the like. This rule is consistent with our use of the Grade A contour in limiting STV to five-station markets. No doubt many subscribers will be obtained outside that service area, but service there will not be mandatory.

(11) Whether requirements should be imposed to insure that the public would not be adversely affected by obsolescence of subscription television equipment or cessation of service, e.g., should the Commission require that such equipment be leased rather than sold.

231. Kaiser states that because the industry is not yet developed, it is too early to decide whether a rule requiring STV equipment to be rented would protect subscribers from obsolescence or cessation of service, or whether it would serve primarily to prevent them from being able to obtain equipment from the sources they might prefer. Others, like Telemeter, Teleglobe, and Munn and Chase, believe that a requirement of renting would protect the viewers. Telemeter believes that it would not only protect from obsolescence and cessation of service, but that (assuming multiple systems were authorized) it would protect those who changed from the service of one STV company to another. Munn and Chase say that renting would help in the matter of maintaining equipment in proper operating condition. They analogize decoders to postal meters, saying that "the basic unit is sold to the customer but the meter, containing the postage printing element, is only leased, subject

42/ The rule also provides that STV service need not be furnished to those residing in pockets of poor reception within the service area of an STV station.

to regular service, with postage added only by postal authorities." ABC states that whether equipment is sold or leased, regulations should be adopted to protect against early obsolescence, or cessation of service. Trigg-Vaughn believes that, at this point, to protect the public, it would be wise as an interim measure to have a rule requiring that equipment be leased instead of sold, but with provisions for waiver thereof.

232. Zenith and Teco believe that STV operators will rent rather than sell decoders because of practical business considerations. This is because the decoder contains the elements of secrecy of the system and the billing apparatus which the operator would want to keep under his control. They do not object to a rule requiring rental instead of sale, at least during the early years of STV, to protect the public.

233. They also point out that in paragraph 17 of the Further Notice the Commission, because of its doubts about the viability of STV, suggested that if nation-wide STV service were authorized, it might require a showing on the part of STV applicants that they have the capacity for sustained operation just as is the policy with applications for proposed free TV stations. 43/ Zenith and Teco believe that such a requirement, a showing by the applicant that it could continue operation for at least one year, would not be unreasonable. They stress, however, that this showing should be limited to the station applicant, and not extended to others such as the franchise holder. As an analogy, it states that if a free TV applicant proposed to use General Electric transmitting equipment it need not show the financial capabilities of that company. They admit, however, that if the franchise holder and the applicant for the station STV authorization are the same party, it might be appropriate to require a showing that the financial situation of the franchisee is such that it will not impair the ability of the station to be constructed and to operate for a specified period.

234. Conclusions. At this stage of development of STV service, it appears that the best way to protect the public against obsolescence of equipment or cessation of service is to adopt a rule requiring that equipment be leased and not sold to subscribers. We recognize that at some later stage it may better serve the public interest to permit sale or lease. Should STV flourish and become a regular part of the television scene, a continued leasing requirement could mean that subscribers would pay in continued rental fees more than it would cost to buy the decoding equipment. However, for the present it would appear that a rental requirement is more in the public interest. 44/

43/ Ultravision Broadcasting Co., 1 F.C.C. 2d 544.

44/ In addition to protecting subscribers against obsolescence or cessation of service, requiring lease of decoders could conceivably stimulate the growth of STV since attempts to sell decoders might restrict the market for it.

235. In addition, although we do not adopt a rule on the subject, we shall, as with applications for new free TV stations, follow the policy of requiring STV applicants to demonstrate financial ability to continue operations for a period of one year. This will apply not only to applicants for new stations wishing to provide STV service, but also to applicants for STV operations over existing stations. In addition to the usual reasons for requiring such a financial showing in the case of applications for free TV stations, the requirement will here have the added function of protecting subscribers in the following way: It appears from the Hartford trial that in addition to weekly or monthly decoder rental fees, subscribers may be charged an installation fee (in the case of Hartford, $10.00). By assuring against early cessation of service, this investment of the subscriber is given some measure of protection. This requirement, as suggested, will run to the station applicant and not to franchise holders, although it may involve inquiry into financial status of the latter if station applicant and franchise holder are commonly owned.

(13) Whether means should be provided to insure that subscription television service will be available to all eligible stations on a non-discriminatory basis.

236. Telemeter suggests that, assuming that the Commission establishes a class of eligible stations, STV should be made available to all stations within that class, subject to the ability of the station to work out satisfactory terms with appropriate parties, such as the franchise holder. It further states, assuming that STV is permitted over more than one station in a community, that just as a network may make an exclusive affiliation arrangement with a station in a market, an STV operator should be permitted to negotiate with a station on an exclusive franchise basis if it wishes to do so.

237. ABC believes that STV should be made available to all eligible stations on a non-discriminatory basis, but thinks that at this time a policy statement on the matter is all that is required. If for any reason discriminatory practices should occur in the future, the Commission could regulate them. Zenith and Teco state that no problem could arise in this regard until more than one station is authorized to carry on STV operations in a community. Because they believe it unlikely that in the foreseeable future there would be more than one station applying for STV authorization in the same community, they think it the better course to defer action on the matter until an occasion arises in which a second station applies for STV authorization in a community. By that time, they say, there will be more experience with STV and thus a better basis for dealing with the problem which will exist.

238. Conclusions. We have already determined that all UHF and VHF television broadcast stations are eligible to conduct STV operations. However, since we today adopt rules limiting STV operations to one station in a community, possible discriminatory problems with regard to making technical equipment available to all stations in a community are moot. Of course, possible problems on a national scale are conceivable. For example, a party

may be a licensee in each of two five-station markets. He may be engaged in STV operations in one of them using technical system X, and might have an agreement that the supplier of that system will not make it available to any station in the other market until such time as the viability of STV in the former market has been determined. If viable in the former, then the licensee might use the same equipment in the second market. If not viable, and the licensee does not wish to engage in STV operations in the second market, then the supplier of the system could make it available to another station there. Although the example is conceivable, and such an arrangement might hinder the development of STV, we believe that the fact that multiple systems may be used for STV operations greatly reduces chances of adverse effect on the public interest that might occur and the possibility that this sort of arrangement might be made. Similarly, we foresee no difficulties nationally with regard to other equipment arrangements. As to the Telemeter suggestion that it be permitted to negotiate with a station on an exclusive franchise basis, insofar as this pertains to programming arrangements and not to the matter of technical equipment discussed above, it has been discussed in paragraphs 196-199.

(14) Whether a limitation should be placed on the type of programming which subscription television operations may broadcast, and if so, what that limitation should be and whether applicants for subscription authorizations should be required to make a showing of how their programming will differ from conventional programming or would otherwise serve the needs and interests of the community to be served, and what that showing should be [references to para. nos. omitted]. Whether placing a limitation on type of subscription programming is within the scope of the Commission's authority, taking into account Sections 303(b) and 326 of the Communications Act.

239. Briefly, the principal views of parties on this issue are the following: There should be no program restrictions on STV because this would be contrary to the First Amendment of the Constitution and Section 326 of the Act (ABC, ACLU, NBC, Telemeter). Only if there were an imperious need to limit STV programming might the Commission have authority to restrict (Kaiser). There is no such need because it is unlikely that there will be siphoning from free TV and thus there is no imminent threat of STV to free TV; and the very fact that there is no such threat raises serious questions about the censorship problems (Zenith-Teco).

240. Moreover, it is difficult, if not impossible, to draft a rule that would define the programs that STV could carry (ABC, Kaiser, NBC). For example, the Commission recognized the difficulty of defining "box office" in the Further Notice (ABC). Any attempted definition of a restrictive term appearing in a rule would lead to endless interpretations and

reinterpretations of the rule by the Commission that could have a paralyzing effect on large areas of program procurement for STV without there being any evidence that a need exists for such a restriction (Kaiser). In addition, a restrictive rule might inhibit, channel, or otherwise bind creative activity (Trigg-Vaughn) and prevent diversity of programming (ACLU). Even if one succeeded in drafting a restrictive rule, it might not be adequate to protect against siphoning. For example, if a rule were adopted like the one suggested in the Further Notice which would prohibit STV from carrying certain types of programs common to free TV such as those in which continuing characters are presented from week to week in a series using a common setting or central program concept, it would not protect against the siphoning of all of the other types of programs which free TV carries (AMST, NBC).

241. The Hartford trial and Etobicoke have demonstrated what the programming of STV will probably be (Telemeter, Zenith-Teco). That programming shows that serious siphoning of programs or talent from free TV is unlikely (Telemeter, Zenith-Teco). Thus, there is no need to have restrictive rules to protect against siphoning (Zenith-Teco). If there were such a rule, it would probably have little influence on the actual programming anyway (Telemeter).

242. However, and without conceding that the Commission has the authority to regulate programming, it might be desirable to have a broad regulation that could serve the purpose of casting STV into the mold in which it is most likely to develop, if for no other reason than to placate the alleged fears of the opponents of STV (Telemeter). This rule or policy might provide that STV stations are expected not to duplicate free TV programming, and are expected to provide programs of the type shown at Hartford, i.e., current movies, sports events not carried on free TV, and the like, with the content thereof to be determined by the licensee or STV entrepreneur (Telemeter).

243. A rule prohibiting commercials is acceptable (Teleglobe, Trigg-Vaughn). Yet, since the impact of commercials on program diversity of STV is unknown, any rule or policy used by the Commission should be viewed as in the nature of an experiment to see how programming diversity is affected (ACLU). Possibly, prohibiting commercials on STV would violate principles of free competition (ACLU).

244. As a yardstick for the future, a rule might be adopted limiting STV to programs not presently being shown on free TV (Acorn). A possible rule would be one prohibiting STV from showing "trade name" programs for a period of three years, with the Commission reviewing the matter at the end of that time (Angel). A rule is proposed that STV not be permitted to devote more than 50% of its STV broadcasting time to feature films in order, among other things, to promote, during the remaining portion of STV broadcasting time, a variety of programs over STV which proponents of STV have always promised that STV would furnish (Joint Committee). Still another rule is proposed that would prevent STV from carrying sports events which have been regularly carried locally on free TV within the past five years--for the purpose of restricting STV to the kind of sports programming which has not been available on free TV (Joint Committee).

245. Finally, as to requiring applicants for STV authorizations to make a showing that programming would be different from that of free TV, no such showing should be required because the programming of STV stations should be decided in the market place (Munn and Chase). Besides, since the Hartford trial has shown what programming is likely to be presented over STV, such a showing would be redundant (Zenith-Teco). Moreover, it would be impossible to give meaningful definition to the showing that would have to be made by STV applicants in order to distinguish their programming from that of free TV because the programming of the latter service is of unlimited variety (AMST).

246. Conclusions. We cannot agree with the arguments that the First Amendment and Section 326 of the Act preclude the Commission from restricting the programming on STV. Section 303(a) of the Act gives us the authority--using the public convenience, interest, or necessity standard--to classify radio stations. Section 303(b) provides that--using the same standard--we have the authority to /p/rescribe the nature of the service to be rendered by each class of licensed stations and each station within any class." We regard it as settled law that under these provisions we may decide what the programming of STV, or other stations, may be. On this matter, the Supreme Court of the United States, in affirming our chain broadcasting rules, has said in National Broadcasting Company v. U.S., 319 U.S. 190 (1943), at pages 215-216:

> "The Act itself establishes that the Commission's powers are not limited to the engineering and technical aspects of regulation of radio communication. Yet we are asked to regard the Commission as a kind of traffic officer, policing the wave lengths to prevent stations from interfering with each other. But the Act does not restrict the Commission merely to supervision of the traffic. It puts upon the Commission the burden of determining the composition of that traffic. The facilities of radio are not large enough to accommodate all who wish to use them. Methods must be devised for choosing from among the many who apply. And since Congress itself could not do this, it committed the task to the Commission." (Emphasis supplied.)

247. In addition, in dealing with a First Amendment argument in that case, the Court said at pages 226-227:

> "[It is argued that the] Regulations, even if valid in all other respects, must fall because they abridge, say the appellants, their right of free speech. If that be so, it would follow that every person whose application for a license to operate a station is denied by the Commission is thereby denied his constitutional right of free speech. Freedom of utterance is abridged to many who wish to use the limited facilities of radio. Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to government regulation. Because it cannot be used by all, some who wish to use it must be denied. . . The right of free speech does not include...the right to use the facilities of radio without a license. The licensing system established by Congress in the Communications Act of 1934 was a proper exercise of its power over commerce. The standard it provided for the licensing of stations was the 'public interest, convenience, or necessity.' Denial of a station license on that ground, if valid under the Act, is not a denial of free speech."

248. Just as, in the exercise of our regulatory function, we may--using the public interest standard--specify who will or will not be licensed to use a station, so too--using the public interest standard--we may specify what is or is not to constitute the service to be rendered by a class of licensed stations, or by stations within the class. As the Supreme Court indicated, inherent in radio communication is the fact that some restrictions in its use are necessary. Examples of cases in which the courts have sustained restrictions are Lafayette Radio Electronics Corp. v. U.S., 345 F. 2d 278 (C.A. 2, 1965), and Carter Mountain Transmission Co. v. FCC, 321 F 2d 359 (C.A.D.C., 1963). An example of a present rule restricting the programming of broadcast stations is Section 73.242 of our Rules which provides that licensees of FM broadcast stations in cities of over 100,000 population shall not devote more than 50 per cent of the average FM broadcast week to programs duplicated from a standard broadcast station owned by the same licensee in the same local area.

249. We have determined that STV can offer a beneficial supplement to free TV and that it is in the public interest that this supplement be provided. The action which we here take to prevent possible siphoning of programs from free TV is designed to protect the present television structure on which there is freedom of expression of all kinds. To weaken that structure could weaken the opportunities for freedom of expression over that thriving service. At the same time that we protect that structure, we add to the diversity of voices heard by authorizing a service with a type of programming generally not found in free television. We cannot agree with those who urge that the type of programming that STV will show is known, that it is clear that it will not

siphon from free TV, and that therefore no rule is necessary. The ultimate path that STV will follow is not clearly known. Although it may be that STV programming will follow the path of the Hartford and Etobicoke operations, and we think it well may, we would be remiss in our duties if we did not take regulatory steps to afford some assurance that free TV will continue to be available in ample quantity and quality.

250. The rules which we adopt will require that feature films shown on STV must not have been given general release in a theater 45/ anywhere in the nation more than two years before they are shown on STV. The purpose of this rule is to assure that the feature films shown on that service are generally of such recency that they are unlikely to appear on free TV. Thus the siphoning threat is minimized for this type of program, a type which we are told is becoming increasingly important in the programming of free TV. Since a major part of the STV programming apparently will be feature films, the importance of this rule is especially great.

251. Under prevailing practices of the motion picture industry, films are given general release for showing in some parts of the country sooner than in others. The question thus arose as to whether the two-year period should run from the date that the picture was first released anywhere in the nation, or from the date that it was released in the community where the STV station is located. We have chosen the former. This will give added

45/ As used herein, "general release" means the first run showing of a feature film in a theater or theaters in an area, on a non-reserved seat basis, with continuous performances. If a first run film is given general release at more than one theater in an area, the opening will usually be on the same date. "General release" is distinguished from "roadshowing" of a film which means the showing of a film on an exclusive first run basis by one theater in an area, on a reserved seat basis, with non-continuous performances, usually at prices greater than the theater's normal admission price. The tickets sold for roadshow performances are colloquially called "hard tickets," to describe the rectangular tickets sold for such performances as distinguished from the regular ticket torn from a roll for general release showings. "General release," as is used herein and in the rules which we adopt (Appendix D, Sec. 73.643(b)(1)), does not include special situations such as the first run showing of a picture at Radio City Music Hall in New York City on a non-reserved seat basis. We consider the general release date of such a picture for the New York City area to be the date on which the picture, after closing at Radio City, is first shown at other theaters in the immediate area on a non-reserved seat, continuous performance basis.

protection to free TV from siphoning of pictures, for with that date it is more likely that free TV would not be eligible to obtain the film. On the other hand, if the latter date had been chosen, it would mean that when an STV station might wish to negotiate for it, the film would be older and thus more likely to be the subject of negotiation on the part of free TV. Our decision, of course, could mean that in any particular community motion pictures shown on STV will, with regard to that community, be more current than in other communities, but we do not regard this as having any disadvantages. Attention is directed to the fact that the rule speaks of "general release." Some movies, of course, are "roadshowed" on a hard-ticket basis for a considerable period of time before general release. Usually, however, they are of the "blockbuster" variety, and although the two-year period for such films will still be measured from the date of general release rather than of roadshow release, we think that protection for free TV with regard to them is still adequate because such films generally take longer to exhaust their "box-office" possibilities before going to free TV than do ordinary films.

252. Although the two-year restriction will assure that generally feature films shown on STV will be of such recency as to protect against siphoning from free TV, we are of the opinion that it is in the public interest that STV also be allowed to show a limited number of older films of great public appeal that might or might not be available to free TV. Films that would fall into this category are, for example, "Gone With The Wind," and "All Quiet On The Western Front." Accordingly, the rule will permit STV stations to present, during one week of each calendar month, one feature film the general release of which occurred more than ten years previously. The film may, however, be shown more than one time during the week selected for it. 46/

253. We also believe that a rule giving a measure of protection against siphoning of sports events from free TV would be in the public interest. The Joint Committee (as mentioned in para. 244) suggests a rule the core of which is as follows:

> "No licensee shall broadcast any program involving sports events for which a fee is charged which was regularly televised into the market via a free television station within 5 years from the last date on which the event appeared on free television."

46/ As the table in paragraph 17 indicates, each feature film at Hartford was, on the average, shown 3.55 times. Sometimes all of the showings occurred in one week; sometimes, in two widely-separated weeks. It may be expected that STV operators will similarly have more than one showing of both current and older films. Older films can be expected to constitute only a small percentage of all feature films shown by STV stations (see paras. 48 and 112). We believe it generally to be in the public interest to spread throughout the year the showing of older films; hence the provision that only one such film may be shown during one week during each calendar month. However, if STV operators should desire to show more than one in a single month, e.g., to show a "festival of classics" during all or part of a month, we shall give consideration to waiver of the rule.

Its proposal also contains a requirement that STV stations notify other television stations in the area of intent to broadcast a sports event, and a provision under which such other stations could file with the Commission, within a specified time, petitions to prohibit the showing of such programs. We find the latter proposals cumbersome, unduly restrictive, and unnecessary. However, we are of the opinion that the part of the proposal quoted above contains a helpful concept for the prevention of siphoning of sports, and the rule which we adopt is basically like it.

254. Our new rule appears in Section 73.643(b)(2) of Appendix D. Generally speaking, it prohibits the STV broadcast of sports events regularly televised in the community via free TV during the previous two years. It differs from the proposal of the Joint Committee in that it uses a period of two years rather than five. The Joint Committee states that the five-year period would act as a deterrent to siphoning, and would give free TV stations an adequate time in which to adjust to the loss of sports programs. We believe a period of two years to be a more realistic and workable figure on which to base a rule that will provide the desired deterrent effect. As to giving stations an adequate time for adjusting, we regard this as a makeweight argument, and, in any event, two years appears to be an adequate time for such adjustment. In addition to the foregoing modification of the proposal of the Joint Committee, other modifications, consistent with the discussion in the following paragraphs, appear in our rule.

255. The Joint Committee, in discussing its proposal, states the following:

> "Such a rule, for example, in the Washington, D.C. area, would proscribe from Pay-TV the World Series, the Kentucky Derby, the National Football League and American Football League games of the week, Washington Senator baseball games, Washington Redskins regular season 'away' games, Atlantic Coast Conference basketball games, National Association basketball games, American League and National League baseball games of the week, specific golf and tennis tournaments, specific professional and college pre-season and post-season football games. Sports events which could be carried would include Washington Redskins 'home' football games, games of any professional or college team not formerly carried in Washington on a regular basis, and boxing bouts including championship boxing bouts since boxing has not been carried on a regular basis."

Although our views are essentially similar to those of the Joint Committee expressed in the foregoing statement, we believe that some refinement and elaboration is necessary as will become apparent below. Since to include in the rule all of the points covered in the following paragraphs would make it extremely cumbersome, we are, in NOTE 2 of Section 73.643(b)(2), calling attention to the fact that when questions arise with regard to administering the rule they will be resolved in the light of the following discussion--the "legislative history" of the rule.

256. The principal questions raised by the proposed rule quoted in paragraph 253 have to do with the meaning of the term "sports events," and the phrase "regularly televised into the market via a free television station." It is to these questions that we now direct our attention.

257. To begin with, some may raise the question of the meaning of "sport." One dictionary defines it as a pastime or diversion involving "activity requiring more or less vigorous bodily exertion and carried on according to some traditional form or set of rules, whether outdoors, as football, hunting, golf, racing, etc., or indoors, as basketball, bowling, squash, etc." It is our belief that the term must include an element of physical agility or skill--the bodily exertion mentioned in the foregoing definition. Thus, we would not view chess or bridge as sports. On the other hand, there are activities, ballet for example, that require physical agility and skill (and that are carried on according to some traditional form or set of rules) that we would view as an art form rather than a sport. Generally, we believe that there will be no difficulty in recognizing, for purposes of the rule, what the term means.

258. As to the meaning of "events," there would appear to be two types: (1) specific events, such as the baseball World Series, or the PGA Golf Tournament, and (2) games, or other contests, which are part of a regular series, such as football or baseball games played during a regular season (but, as indicated below, the games need not be played during a regular season).

259. The following are examples of what would be regarded as "specific events" within the meaning of the rule. The list is neither exhaustive of such specific events within any sports category (e.g., major league baseball, college football), nor does it include all sports categories in which such specific events might occur:

Major League Baseball
- World Series
- All-Star Game

Professional Football
- League Championship Game
- Division Championship Game
- Game Against College All Stars

College Football
- Rose Bowl, or other Bowl Game
- East-West Game
- North-South Game
- Blue-Grey Game

Professional Basketball
- NBA All-Star Game
- NBA Championship Game

College Basketball
National Invitational Tournament (NIT)
NCAA Semi-Final Games After Regular Season
NCAA Final Games After Regular Season

Horse Racing
Kentucky Derby
Preakness
Belmont Stakes

Golf
U.S. Open
PGA
Masters
Thunderbird
USGA Amateur

Tennis
National Singles Championship
National Indoor Championships

Other
Le Mans Grand Prix Auto Race
Olympic Games

260. It may be noted that some of the specific events mentioned above consist of more than one game or match. Thus, there are at least four games in the World Series, there are numerous games in the NIT, and matches in golf or tennis tournaments. If a substantial number of games or matches (or portions thereof) were shown by a free TV station, it would be considered to have broadcast the specific event within the meaning of the rules. With the World Series, there would likely be no problem, since stations usually carry all of the games and carry each game in its entirety. However, with a golf tournament, or the National Singles Tennis Championship, not all of the matches, and possibly not all of any particular match, may be carried. However, if a tournament runs for three days, and a station broadcasts it one to two hours per day for two or three days, it would be considered to have covered the event, although it is likely in such a case that only portions of play for all three days would have been broadcast. For example, in the case of a golf tournament, the broadcasts might have covered the last four holes of various matches on several days, but not the complete matches, and not all of the matches. Similarly, the broadcast of an auto race that takes twenty-four hours, like the Grand Prix at Le Mans, need not occupy twenty-four hours to be considered as having covered the event for protection within the rule. In this connection, we might also point out that, conceivably, some specific events might be regularly carried on television news programs. However, it is likely that such programs would only show very small portions of events, and we would not consider such broadcasts to merit protection against siphoning. Moreover, (as stated in paragraph 270) the rule will only provide protection for events that are televised live, and not for those broadcast on a delayed basis, and most news programs are broadcast on a delayed basis.

261. In addition to "specific events," we believe that certain other sports events should be protected against siphoning. We characterized these in paragraph 258 as games or other contests which are part of a regular series, such as football or baseball. For easy reference, we shall hereinafter refer to them as "non-specific events." For the purpose of the rule, we shall afford protection to non-specific events falling into well-defined categories, but shall not afford protection between categories. The following will serve to explain our meaning and intent. For some sports there is a regular season during which the sport is played, e.g., football, baseball, basketball. Games played during the regular season we view as non-specific events. In these sports, the networks broadcast "games of the week." Examples are the NCAA games of the week for college football, games of the week in the National Football League and the American Football League, or games of the week for the American League or National League in baseball. Such broadcasts, for each sport, will be considered to constitute a category for purposes of the rule so that if they have been regularly broadcast by free TV in a community for a period of two years immediately preceding proposed STV broadcast of such programs, STV may not carry them. On the other hand, in addition to network games of the week during a regular season, other games may be televised in a community. Thus, in the case of major league baseball or professional football, games of the week might be shown in a community, but "away" games of the home team might also be televised, though the latter might not be network games of the week. Such "away" games would be considered a separate category. This means that if, for a period of two years, baseball games of the week were regularly broadcast by free TV in a community during the regular season, and "away" games were not, STV could then show the latter but not the former. The same would be true for professional football.

262. Another category of non-specific events is that consisting of pre-season games which do not qualify as "specific events." Before the start of the regular football season, a championship professional team plays a game against college all-stars. This game we regard as a specific event. However, professional football teams play other pre-season games among themselves which we view as non-specific events. For purposes of the rule, such pre-season games will constitute a category separate from regular season games of the week or "away" games. Finally, some clarification should be given with regard to "playoff" games. It is customary in NBA professional basketball and NHL professional ice hockey to have playoffs at the end of the regular season. These games are a regular feature of the season and will be viewed as such -- i.e., as non-specific events. They may be broadcast either as games of the week or as "away" games, and dealt with accordingly under the rule. However, in professional football or major league baseball, occasionally two teams will be tied for the division or league title at the end of the regular season, and a playoff is necessary. Such playoffs are not regular features of the season, usually generate great public interest, and will be viewed as specific events rather than as non-specific events.

263. Having discussed the meaning of "sports" and "events," we now deal with the phrase "regularly televised into the market via a free television station." As stated elsewhere, the rules which we adopt permit STV operation in communities which lie within the Grade A contours of five or more operating

commercial TV stations, including the contour of the STV station. Hence, in deciding whether sports events have been regularly televised in a community via free TV, we shall only consider commercial stations which place a Grade A contour over the community. Moreover, stations placing such a contour over the community will be considered collectively, so that if one broadcasts major league baseball games of the week, and another major league baseball "away" games, both categories will be considered as having been furnished the community.

264. As stated previously, we shall prohibit STV from broadcasting sports events that have been regularly televised over free TV during the two years preceding the proposed STV broadcast. With regard to the meaning of "regularly televised," our standard will be somewhat different for specific events, and for non-specific events. Our standard for specific events is best illustrated by an example using the baseball World Series. If that Series were televised in a community on free TV in October 1965 and October 1966, it could not be shown on STV in October 1967 by a station licensed to the community. However, if the Series were on free TV in that community in either October 1965 or 1966, but not in both years, it would be viewed as not having been "regularly televised" there, and an STV station could show the Series in October 1967. Moreover, the period of two years need not be exact. Thus, if free TV showed the Series in a community starting Wednesday, October 6, 1965, and did not show it during 1966, an STV station in the same community could show it in 1967, even though (since it starts October 4) the full two-year period had not elapsed. In other words, for the purposes of the rule, if an event is held each year, the time between occurrences need not be exactly a year.

265. The rule also provides that if the last regular occurrence of a specific event, e.g., the Olympic Games, was more than two years before the proposed STV broadcast of the event, it may not be televised on STV in a community if the last occurrence was televised therein over free TV. Another point should also be mentioned. It is conceivable that, for some reason, an event normally occurring at regular intervals might not take place. For example, it might usually occur yearly, but skip a particular year or years. In such cases, we would prohibit the showing of such events by STV in a community if the event was carried there on free TV the last time that it occurred. Finally, as previously stated, we shall view professional division playoffs and major league baseball as specific events. Since such playoffs do not occur on a regular basis, we shall proscribe their broadcast on STV if they were televised in the community by free TV the last time that they occurred.

266. We have indicated in paragraph 260 that a specific event will be considered to have been broadcast by free TV even if the entire event is not televised. Although with regard to non-specific events the whole contest is usually televised, in those cases where this is not the case, the event will be considered televised on free TV if a substantial portion thereof was broadcast. As to the meaning of "regularly televising" non-specific events,

we shall view any category of such events as having been carried on a regular basis within the past two years before proposed STV broadcast if a substantial number of events in the category were televised over free TV in the community within each of the two years preceding the proposed STV broadcasting thereof. The standard will be applied on a category by category basis (e.g., major league baseball games of the week, major league baseball "away" games, professional football games of the week) as explained in paragraphs 261 and 262. If during one, but not both, of the two years preceding proposed STV broadcast a substantial number of events in a category were not televised in the community, the category will be considered not to have been regularly televised therein, and STV may show the contests in that category.

267. The rule would permit the showing on STV, during the regular season, of "home" games of a team that were not previously shown on free TV in the home community. Thus, to use the example of the Joint Committee, Washington Redskins professional football home games have not been broadcast on free TV in Washington, D.C., and could be shown on STV. The comments state that professional football home games of the Detroit and Chicago teams have been shown on closed circuit theater TV in those communities. This, however, would not prevent their being shown on STV since free TV did not carry them in those communities. The comments also suggest that all of the home games of the New York Yankees and of the New York Mets have hitherto been shown on free TV in New York City. Such games would therefore not be permitted on STV in that community. A problem exists in cities like Washington, D.C., where some, but not all, home baseball games of the Washington Senators have been shown on free TV. In communities where this sort of thing occurred, we would permit the showing of the home games on STV only to the extent that it would supplement what was previously shown. Thus, for example, if for a period of two years before STV proposed to show home games in Washington, D.C., five such games, on the average, had been shown for each of the two previous baseball seasons, STV could broadcast such games in that community, above and beyond five for a season. This means that five would be shown on free TV and any additional number could be shown on STV.

268. We would view a title boxing match--heavyweight or otherwise--as a "specific event." Other boxing matches probably would not be so viewed. As the Joint Committee suggests, it is likely that all boxing bouts including championship fights, would be available for STV since they have not been carried on a regular basis on free TV. Until recently, this would clearly have been true of heavyweight title fights which for many years were carried only on closed circuit theater TV. However, a few recent heavyweight championship bouts have been broadcast over free TV. Should a pattern of broadcasting all heavyweight title fights on free TV develop, and should all such fights within a two-year period be broadcast over free TV in a community, they would fall within the protection of the rule. However, if some such fights are on free TV and some on closed circuit theater TV during the two-year period, an STV station could show them.

269. With regard to developing situations, it may be necessary to construe the rule or modify it as specific problems arise. Soccer, for example, may be viewed as such a situation. It has been up to now a relatively unknown sport in the United States. This Spring, for the first time, professional games have been played here in each of two professional leagues--the United Soccer Association, and the National Professional Soccer League. The pattern of televising such games has not yet clearly emerged. It is not inconceivable, therefore,

that, as matters develop, soccer might be shown on STV. Should special problems in this or other areas occur, we shall face them as they arise.

270. Finally, it is our belief that only sports events that are broadcast live should be afforded protection, and the rule reflects this view. It appears unlikely that STV would wish, or be able, to sell taped sports programs. To the extent that they should do so, we believe that this sort of programming should be open to competition between the two TV services. This means, then, that the showing of such programs as ABC's Wide World of Sports, or the CBS Sports Spectacular which consist, generally, of taped sports events would not prevent the showing of similar programs on STV.

271. In addition to the foregoing, we are adopting a rule prohibiting STV stations from devoting more than 90% of their STV programming hours to feature films and sports combined, the percentage, generally speaking, to be applied on the basis of annual STV hours broadcast. Once again, this is similar to the proposal of the Joint Committee. That group suggests that not more than 50% of the STV time be devoted to films. This, coupled with sports events, they aver, would be an equitable balance that would give STV sufficient programming on which to operate, and yet require it to mine new program sources and give the sort of diversity of programming that it has promised. We believe that the Joint Committee's concept is a good one, but that its proposed restriction is of a harshness that could spell the death knell of STV before it even began. It would appear from the Hartford and Etobicoke experiences that feature films will be a staple part of the STV programming. To reduce the amount of this to 50% in an STV operation would be to raise serious doubts about whether it could be viable.

272. The figure of 90% which we select is, as with all lines of demarcation (voting age of 21, for example), arbitrary to some extent. However, it is roughly based on the information in the table of paragraph 17 above, and appears to be a reasonable one in terms of the Hartford operation. Using the figures of that table, it appears that the average length of a single program was about 1.7 hours, and that films and sports events occupied about 91% of the STV programming hours. 47/

273. This rule, of course, does not limit STV operators to showing for only 10% of their STV broadcast hours programs like opera, ballet, theater, and other programs of their choice exclusive of feature films and sports. They may show more if they wish. Calculating percentages on an annual basis, as we do with our AM-FM non-duplication rules, will provide flexibility. However, we wish to avoid the possibility that some STV operators might have an overload of opera, ballet, theater and similar programs during, say, the summer months when there might be less STV viewing, in order that they could devote more STV broadcast hours to mass-appeal feature films during other months when there might be more viewing. Therefore, in the absence of a showing of good reason for not doing so, we shall expect STV stations to devote at least 5% of their STV broadcast hours in any calendar month to programming other than sports and feature films.

47/ The table supplies us with the number of programs per year in each category, and the total number of showings for each category. Thus, in terms of number of separate programs, films constituted 72% of the offerings and sports, 13%, for a total of 85% for the combined categories. In terms of number of showings, films occupied 86.5% and sports, 4.5% for a combined total of 91%.

274. Still another rule adopted to prevent siphoning is that which proscribes the showing on STV of a series type of program with interconnected plots or substantially the same cast of principal characters, heretofore mentioned (para. 240). Since this sort of program is a staple of free TV it would appear essential to afford protection in this area, consistent with our desire to assure ample free programming to the viewing public.

275. Finally, we adopt a rule prohibiting commercial announcements of any kind during STV programming hours. However, it would permit promotional announcements about STV operations, at the beginning or the end of each separate program. Thus, for example, if the same feature film were shown twice in the same evening, such announcements could be broadcast between the two showings. We cannot agree with ACLU that principles of free competition should weigh in favor of permitting commercials on STV. Such operations are based on an entirely different economic concept from that of free TV--namely, that of financial support from paying subscribers rather than from advertisers. This fact works to permit the enhancement of the beneficial supplement which STV can offer by additional advantages mentioned elsewhere, namely, no interference with artistic continuity of a program by commercials or by cutting programs to make them fit a time schedule.

276. The advantage of the rule concerning feature films is that it is clear, definite, and easy of application. In addition, although some difficulties may occur in application of the rule on sports or on series-type programs, we do not anticipate that they will be serious. None of the rules is plagued with the indefiniteness mentioned by some commenting parties. We believe that they will serve to fulfill their functions of preventing undue siphoning, promoting program diversity, and preserving artistic continuity. Some may complain that in the areas of programming dealing with other than movies, sports, and series programs (e.g. programs like those of Andy Williams or Lawrence Welk) there is no siphoning protection. To this we say, as we have said before, that some competition (between STV and free TV in the programming area) may be beneficial to free TV and to STV as well, and we leave this type of program to competing factors in the market place and the performer's desire for exposure.

277. We believe the foregoing rules adequate to prevent siphoning of programs. It does not appear to us that rules to prevent siphoning of talent are necessary to achieve the end of assuring adequate quantity and quality of free TV to the public, at least at this time. However, we would view with a jaundiced eye unreasonably restrictive contracts on the part of either STV or free TV with talent that would prevent the latter from performing on or otherwise serving the other service. We shall watch this area closely, and shall entertain petitions by aggrieved parties for corrective action that may appear necessary in the public interest.

278. As to the subject of a required showing by STV applicants that their proposed programming will differ from conventional programming

or would otherwise serve the needs and interests of the community, we shall, or course, require such a showing, contrary to what some parties suggest, for without it we could not make a public interest finding that grant of the authorization would be in the public interest. We do not believe, as AMST suggests, that such a showing will be impossible to make. As to feature films, a vital item will be the length of time since general release. Meeting the two-year test, a major hurdle is passed. Similarly with sports. Other programming, which we expect to comprise by far the lesser portion of programming should present no insurmountable problems. As with free TV, we shall require that applicants provide us with narrative statements about what they have done to determine the needs of the community with regard to STV programming and the manner in which they propose to fulfill those needs.

279. Concerning the conventional programming which STV stations will be required to carry, we have already indicated our belief that such programming will provide a valuable service to the community. Applicants for STV authorizations must, in addition to a showing with regard to subscription programming, also make a showing with regard to the conventional programming, which they propose to broadcast in non-STV hours. This will have to be based on a survey of community needs with a showing of how the proposed programming is designed to meet those needs, just as with any application made by a non-STV television station. We shall not consider that the STV applicant has met the standard with regard to conventional programming if it carries entirely, or almost entirely, industrial and other available free film programming. We shall expect STV stations to develop a staff--for programming, sales, news, engineering, etc.--which will perform the same functions as the staffs of conventional TV stations.

(15) Whether various sections of the Act and of the Commission rules, and of Commission policies, e.g., the "fairness doctrine", pertaining to broadcasting (see par. 30 above) should be modified as they affect subscription television, and if so, what the modification should be.

280. Paragraph 30 of the Further Notice, referred to in the issue, reads as follows:

> "Since over-the-air subscription television is considered to be broadcasting, the question arises as to whether certain provisions of the Communications Act and our rules pertaining to broadcast stations should apply to subscription television operations in the same way they do to regular broadcasting. In the Act, Section 303(i) gives the Commission authority to make special regulations applicable to stations engaged in chain broadcasting; Section 307(d) limits the term of broadcast station licenses to three years, and of other stations to five years; Section 315 provides for equal use of broadcasting facilities by political candidates; Section 317 provides that announcement must be made ...[about matters] for which money or other consideration has been paid; Section 325 prohibits broadcast stations from rebroadcasting programs of other stations without

permission; Section 605 prohibits the unauthorized publication of communications, but expressly exempts 'the contents of any radio communication broadcast' from its application. Most of the foregoing are the subject of Commission rules. We invite comments on whether we should recommend legislation to the Congress, and if appropriate, make changes in our rules, to modify any of these sections insofar as they affect subscription television. In addition, comments are invited on how the 'fairness doctrine', which does not appear in our rules, but which is given recognition in Section 315(a) of the Act, should apply to subscription television."

281. Some comments favor applying present sections of the Act and of the broadcast rules and policies to STV, without amendments of any kind, since STV has been determined to be broadcasting. Others state that at least some of the foregoing should not apply, or that STV experience should be gained before deciding. Illustrative of these views are the following.

282. Telemeter states that it sees no reason for adopting new rules. It believes that to the extent to which STV programming would bring present rules and policies into play, they should apply, and mentions that at Etobicoke (although it was a cable STV operation, and in Canada), candidates for public office appeared over STV without charge to them or to the subscribers in accordance with Section 315 and the fairness doctrine principles. Zenith and Teco say that WHCT at Hartford reported that it experienced no dissimilarities in complying with the Commission's broadcasting rules when operating conventionally as compared to operating with STV. The station did not find it necessary to request a waiver of any of the rules except to the extent necessary to scramble its signals. These parties observe that should any problems arise in STV operations, they could be handled on an ad hoc basis. Teleglobe says that the only amendments necessary are those proposed in Appendix C of the Further Notice as modified by the comments in this proceeding.

283. AMST, mentioning the paragraph 30 material, says that since STV has been designated as broadcasting by the Commission, the fairness doctrine and the sections of the Act and of the Commission's rules which govern free TV should apply. As to Section 317 of the Act, it says that it should apply if sponsorship is allowed on STV, which it should not be. It stresses the fact that comments of proponents indicate that a system of one or more national organizations similar to free TV networks is contemplated. Therefore, the chain broadcasting rules (Section 73.658 of the Rules and Section 303(i) of the Act) should apply to STV. These rules, it is said, are intended to guard against dangers which the Commission assumes are inherent in network systems, and would be especially important if only one STV network were to emerge, in which case even more stringent protective measures might have to be adopted. Finally, it mentions that Section 315 and the fairness doctrine should be kept within the different confines of STV and free TV

operations over the same station so that a candidate appearing on STV may not be balanced against one appearing on free TV.

284. ABC states that STV, which has been designated to be broadcasting, should not be exempt from the rules and policies of the Commission such as the fairness doctrine. Although admitting that it is possible that some of these provisions may not have any real meaning with regard to the public interest insofar as they are related to STV, it would recommend no action on the matter at present. Specifically it says:

> "At this juncture, however, ABC suggests that the Commission should not attempt to carve out exceptions to its rules and policies. If subscription television is to be authorized, the burden should be upon the proponents and applicants to show in each instance where exemption from the requirements of a rule or policy is appropriate. At this juncture, the Commission should presume that all of its rules are applicable and reserve judgment on exemptions until particular matters are raised and probably until some meaningful experience with subscription television has been realized."

Trigg-Vaughn takes the following position:

> "We think that the Commission should gain actual experience with the day-to-day operations of pay television services before carrying over to pay television wholesale the limitations on program presentation which now apply to conventional broadcasting. The absolute statutory equal time obligation concerning political candidates would apply to pay television, of course, but there is a problem of significance in connection with the treatment of controversial issues. Applicants for pay television should be encouraged at the outset to set forth their plans for presenting in the course of pay television programs full opportunity for the expression of varying viewpoints on public issues. Whether the strict obligations of the Fairness Doctrine should apply exactly as they do in television broadcast operation is not clear at this point. If problems of significance are detected in the course of operation, it might later be appropriate to extend the Fairness Doctrine and similar regulations to pay television operations, but at this stage we think a less restrictive policy should apply to pay television than to television broadcasting as it presently operates.
>
> "We think that the distinguishing feature of pay television - its usefulness only if the public wishes to pay for it - calls

for more thought and observation before the many existing rules on regulation of programs are extended to it."

285. Munn and Chase state that since STV offers primarily box-office entertainment and does not involve problems of politics and personal attack found in editorial and advertising programs over free TV, the subject of "fairness" does not enter. ACLU, on the other hand, maintains that it regards the fairness doctrine and Section 315 of the Act as essential to assure that STV will operate in the public interest, because they "help to promote the concept of balance and fairness which undergird diversity, and we see no reason why they should not be vigorously enforced."

286. Conclusions. The purpose of this issue was to elicit information in recognition of the fact that STV might have different features from those of conventional TV and that therefore changes in the Act or the Commission's rules might be indicated. Those of the commenting parties who say that because STV has been judged to be broadcasting all broadcasting rules should apply to it are, in effect, saying that there are no differences between the two services. We are not sure that this is correct. However, neither do we know for certain at this point what the differences are that might require different regulation through the Act or our rules. We are of the view, therefore, that, for the present, the better course of action is to adopt Section 73.643(e) of Appendix C which proposed that, except as otherwise waived by the Commission in issuing STV authorizations, the rules applicable to free TV broadcast stations be applicable to STV operations. 48/ (In addition, of course, all of the other STV rules adopted today are new and in addition to present TV broadcasting rules.) We have no evidence on this matter other than that provided by Zenith and Teco (see para. 282). The path we pursue is consistent with that evidence and with the recommendation of those parties, and is not fundamentally at variance with the views of all parties. The rule will provide a necessary flexibility in a relatively unknown area. At a later stage, should we find that additions, deletions, or other changes are indicated, we shall act accordingly.

Rules

287. The rules which we adopt appear in Appendix D. They are based on careful consideration of all of the comments filed in this proceeding. Although parties did not comment on some portions of the rules which we proposed in the Further Notice, we believe that they are reasonable and in the public interest and adopt them. These include the requirement that holders of STV authorizations shall complete construction of STV transmitting facilities within a period of eight months after issuance of the authorization, and that

48/ The rule which we adopt is modified to say "the rules and policies applicable to" free TV stations so as to include the fairness doctrine for which we have no rule.

STV authorizations will not be issued or renewed for a period longer than the regular license period of the applicant's television broadcast station. Although in some cases the adopted rules add to or otherwise modify the rules proposed in Appendix C, in accordance with previous discussion in the document, in other cases the only modification is a change in paragraph number. In a few cases, amendments not discussed in the document have been made because they appear to be reasonable and in the public interest (e.g., compare proposed Section 73.642(c) of Appendix C with the same section in Appendix D; and see new Section 73.642(g) in Appendix D).

Applications, Financial Requirements, Reports

288. As indicated in the NOTE to Section 73.642(b) of the rules appearing in Appendix D, no applications will be accepted for filing until such time as we have adopted rules concerning equipment and system performance capability. At or before that time we shall announce the manner in which applications are to be filed and the content thereof with regard to equipment, technical operation, and other matters. We contemplate that applications will be required to contain, among other things, financial information sufficient to permit us to make a judgment about capacity for continued operation for a period of at least one year (see paras. 233, 235); a program showing (see paras. 278-279); information pertinent to Section 73.642(g) of the new rules; and some, but not all, of the information which was required of applicants for trial operations by paragraph 32 of the Third Report. Information already on file with the Commission in formal application forms or ownership reports may be incorporated by reference in these applications. We also contemplate that, at least in the early stages of the service, we shall not adopt an FCC Form to be used by those wishing to apply for STV authorizations. Section 1.531 49/ of the Rules will be amended to indicate that STV applications will be viewed as formal applications although no FCC Form will be used for them. Public notice of the acceptance for filing of such applications, or substantial amendments thereto, will be given by the Commission, and no grants will be made earlier than thirty days following the issuance of such public notice. We intend to charge filing fees for STV applications equal to those charged for applications for authorizations to operate TV stations. Thus, for example, if an applicant simultaneously files applications for a construction permit for a new TV station and for authorization to conduct STV operations over that station, the filing fee would be $150 for the former, and $150 for the latter, for a total of $300. Section 1.1111 of the Rules (Schedule of fees for Radio Broadcast Services) will be appropriately amended, prior to the time that applications are accepted, to reflect the filing fees for the new service.

289. We adopt no rule requiring applicants to make a showing as to their capacity to sustain operations for at least a year. This is, rather, a policy that will be followed. Similarly, although no specific rules are adopted thereon, as mentioned in various portions of the document we shall periodically require those possessing STV authorizations to submit reports and information to us for the purpose of keeping us informed about various aspects of STV operations.

49/ Section 1.531 of the Rules states (in part) the following:
"'Formal application' means any request for authorization where an FCC Form for such request is prescribed. 'Informal application' means all other requests for authorization."

Educational Television

290. Throughout this proceeding, our attention has been directed at commercial television, and the thrust of our entire discussion of beneficial supplementing of programming, siphoning, audience diversion, preempting of time, and other matters has been directed at commercial free TV only. The rules which we adopt today, likewise, are so oriented, and the proposals in the Further Notice have been clarified to indicate that only parties having or applying for authorizations to operate commercial television stations are eligible to apply for STV authorizations.

291. The matter of educational television as related to STV, except for the comments mentioned below, has not generally been commented on by the filing parties, and we therefore have no basis on which to found decisions pertaining thereto at the present time. Moreover, it is, of course, part of the larger problem of educational television in general, which has recently been the subject of careful consideration by the Ford Foundation, the Carnegie Commission on Educational Television, and others; which is presently under consideration by the Congress, various bills having been introduced on the subject (S. 1160 50/, H.R. 6736, and others); and which is under study by the Commission, e.g., in Docket No. 16495.

292. Teleglobe, in its comments, has the following to say:

"'Subscription' is also in a position to alleviate the financial plight of Educational Television. It may take years before the ambitious plan of the Ford Foundation for the establishment of a 'Broadcasters' Non-Profit Service' is realized and in the meantime the financial position of many an ETV station may deteriorate even further. The part-time use of the principle of subscription for financing ETV 'Cultural'--as distinct from the 'Instructional'--activities, would make ETV self-supporting.

"Is it not rather sad that Channel 13, the New York Educational Station, which has on the whole succeeded in rising to a higher niveau of programming, is compelled for lack of finances to be off the air Saturdays and Sundays and thus leave waste a valuable natural resource? 'Subscription' could help Channel 13--and similarly placed ETV stations--to provide expanded services to their communities."

50/ This bill was reported by the Senate Committee on Commerce in Senate Report No. 222, 90th Cong., 1st Sess. (May 11, 1967); and was passed by the Senate on May 16, 1967.

293. On the same subject, ACLU states:

"Although the FCC notice is silent on this question, ACLU believes it to be in the public interest to permit educational, municipal, and non-profit stations to employ STV for portions of their broadcasting schedules. STV programming by such stations could be expected to add to the variety of services available to the public, as well as contribute to their financial self-support."

294. Because, as stated before, we have no adequate record on which to base decisions about STV operations by noncommercial educational stations and because the whole matter of educational television is under broad study on many fronts, decisions on the subject cannot and should not be made. 51/ However, if parties having STV authorizations wish, as part of their programming, to broadcast educational or cultural programs in conjuncation with non-profit educational organizations, such proposals will be given consideration in connection with their other proposed programming. In this regard, we point out that we are of the opinion that programming of an educational and cultural nature is certainly in the public interest. This is the main reason for our having adopted a rule requiring that at least ten percent of STV broadcast hours be devoted to other than feature films and sports.

WIRE OR CABLE SUBSCRIPTION TELEVISION

Preliminary Statement

295. As stated in paragraph 4 above, the scope of this proceeding was enlarged by the Further Notice to include not only over-the-air STV, its previous subject matter, but an inquiry into what the role of the Federal Government should be, if any, with regard to the establishment and manner of operation of wire or cable STV, and how that role should be effected. This was done, as the Further Notice mentioned, because of the change in conditions since this proceeding began in 1955. An important change has been the rapid growth of CATV systems.

296. Because of the necessity to avoid frustration of our television assignment plan and policies under Sections 1 and 307(b) of the Act by the existence and growth of CATV systems throughout the nation, on March 4, 1966, we asserted jurisdiction over all such systems--microwave-served and off-the-air--and adopted rules designed to fit such systems into the total television system. 52/ In connection

51/ In passing, we note that Section 73.621 of the Rules provides that educational stations may not broadcast programs for which consideration is received. This rule, of course, was adopted in a context devoid of STV possibilities. We also note that we have in the past authorized noncommercial educational television stations, on an experimental basis, to transmit "scrambled" signals which could be viewed "unscrambled" on specially adapted equipment. An example is that of four such stations in California which have been authorized to present, in that manner, programs designed to meet the educational needs of the medical profession and not deemed suitable for the general viewing public. The programs are broadcast to hospitals and educational institutions for viewing by physicians, hospital staffs, and others. We shall continue to authorize such operations on the same basis where application is made and it appears appropriate to do so.

52/ Second Report and Order, Docket Nos. 14895, 15233, 15971, 2 F.C.C. 2d 725.

with the proceeding in which the CATV rules were adopted, some parties had expressed the fear that CATV might become a vehicle for STV or combined CATV-STV operations which would siphon programs from free TV and possibly result in a transition from free TV to STV. Because of this, we invited and received comments therein on the question of whether it would be feasible or desirable to have STV operations over CATV, whether any conditions might be necessary to protect the interest of the public in free TV, and, if so, what conditions might be appropriate.

297. The Further Notice herein stated that, in addition to comments filed in the instant proceeding on the subject of wire or cable STV, we would take notice of the above-mentioned comments (in Docket No. 15971) on the matter of the CATV-STV relationship. In addition to comments on the general topic of wire or cable STV, the Further Notice requested comments on problems that might be encountered by parties proposing to bring over-the-air STV to communities in which there were established CATV systems. These included such questions as whether (if the subscribers do not have antennas because their only reception is by CATV) it would be necessary to have built-in antennas in decoders attached to sets of subscribers; whether a single decoder attached to the antenna of the CATV system which delivered an unscrambled signal along the cable would suffice, and, if so, how collection of charges could be made; and whether the CATV rules on carriage of signals of local stations would apply to carriage of STV stations. Having considered all of the comments, we set forth below the principal material therein and then our conclusions.

Jurisdiction

298. As to the question of jurisdiction of the Commission over wire or cable STV, several parties, without giving detailed legal arguments on the subject, state their views. Thus, Telemeter says:

> "Telemeter is aware, of course, of the Commission's assertion of jurisdiction over non-microwave served CATV's and of the pending legislation in Congress to support that jurisdiction. In the case of the closed-circuit subscription operation by wire, however, which involves no use of frequency space whatsoever, and in the case of the CATV system, which, itself, originates subscription television programs (as distinguished from the off-the-air pick-up or microwave-fed subscription programs), there should be no question that no federal regulatory authority exists."

299. CBS is of the opinion that the Commission does not have jurisdiction over cable STV. It states that although jurisdiction was asserted over CATV, "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." (It goes on to say that even if the Commission had such jurisdiction it should not regulate

cable STV because it does not involve scarce spectrum space.) On the other hand, Taft asserts, simply, that there is no jurisdictional problem with Commission action in this area because it has established such jurisdiction over all forms of CATV.

300. ABC expresses the following view:

> "ABC believes that the Commission should apply the same standards to pay-TV by wire as it applies to pay television by 'broadcasting.' The logic of the Commission's assertion of jurisdiction in CATV would support jurisdiction over pay-TV by wire. Although the Commission would appear to have no power to authorize pay television by wire, it should, in ABC's view, apply whatever regulatory policies it determines to be appropriate to wire television to the extent found necessary to protect the 'public interest in the larger and more effective use of radio.'"

Finally, Trigg-Vaughn states:

> "We think it premature to consider the question of the Commission's jurisdiction to regulate pay television systems conducted by wire. We believe that it is too early to tell how and in what way pay television by wire should be authorized. Experiments with off-the-air systems of pay television have been conducted and have produced meaningful operating data--the same cannot be said with respect to the relatively limited wire pay television systems."

How CATV Systems Can Pick Up Scrambled STV Signals

301. Concerning the specific questions raised in the Further Notice about how CATV systems might pick up signals of STV stations, we are informed by Zenith-Teco and Telemeter that it is technically feasible to attach a decoder at the CATV head-end that would unscramble signals of an STV station and transmit them to sets of subscribers. However, Zenith-Teco states that it is doubtful that any STV station would permit this since it would defeat the purpose of having single subscribers pay charges on a per-program basis, and Telemeter says that any flat rate arrangement with the CATV operator would be commercially impractical since program suppliers for box-office product prefer to participate in the gross receipts on the basis of percentage arrangements. Moreover, Telemeter states, such an arrangement implies a flat fee for CATV subscribers for STV service, and "the public has shown a reluctance to pay a flat fee for blocks of entertainment."

302. Both of these parties also indicate that it is technically possible to have CATV systems pick up scrambled signals, transmit them along the cables, and have them unscrambled by decoders attached to sets of STV subscribers just as if the signals had been picked up off the air. No built-in antennas would be necessary in the decoders.

Application of CATV Rules on Carriage of Local Stations

303. Telemeter states that since STV stations will probably be required to broadcast conventional commercial programming part of the time, it seems logical that the CATV rules on carriage of local stations should apply. ACLU expresses the opinion that it would be consistent with the present CATV carriage rules requiring carriage of local conventional television stations to require CATV systems to carry STV programming of local STV stations, for otherwise millions of families might be deprived of free TV programming without having the right to subscribe to STV services that replaced them. On the other hand, the Joint Committee argues that at least until such time as the Commission is prepared to evaluate the significance of CATV generally with regard to free TV, it should prohibit CATV systems from carrying STV programs broadcast by STV stations; and it should also prevent STV stations from entering into arrangements whereby STV stations would use CATV systems as outlets for STV programming.

Will CATV Turn Into STV?

304. The principal arguments in the instant proceeding as well as in Docket No. 15971 on the matter of CATV-STV relationship revolve about the question of whether CATV might develop into an STV or a combined CATV-STV operation which would siphon programs from free TV. It is urged that revenues obtained from large CATV operations, in major cities, for example, would permit the CATV operators to outbid free TV for programs, and that a transition from free TV to STV might thereby occur. It is argued that this is not only unfair because CATV operations would be using free TV, which makes CATV possible, as a stepping stone to STV operations that will harm free TV, but that such undermining of free TV is contrary to the public interest. Various parties point to cases where there is already program origination by CATV systems and imply that this shows the direction that will be followed. STV would thus enter by the back door, using the financial base created and made possible by free TV. If it is to enter, it is said, it should enter by the front door after appropriate proceedings. Some suggest that the appropriate proceedings should include trial STV operations over CATV systems similar to the Hartford trial in order to develop information helpful to arriving at decisions on the subject. It is also urged that if importation of distant signals by CATVs is prohibited, the systems may well have to turn to program origination to survive. Still another argument is that if copyright law is modified to require CATVs to pay fees for programs, the strength of the argument against program origination over CATV which derives its base from free TV is lessened.

305. On the other hand we are told that there can be no objection to program origination by CATV systems in areas where there is no television station; that in the few cases where there is presently program origination by CATVs it is programming of a public interest nature such as local news,

local sports, and the like; and that CATV alone or in combination with STV may well pose an economic threat to the present system of broadcasting, but that system is not central to the economic structure of this country, and what is central is whether or not the public is being served in the best possible way--CATV with multiple channel capacity can provide a wider diversity of programs to the public.

Conclusions

Carriage of Local STV Stations by CATVs.

306. As to views on jurisdiction (see paras. 298-300), it may be noted that Telemeter makes a three-fold distinction: (1) STV systems, like the now defunct system that operated in Los Angeles and San Francisco, in which the programs travel entirely by cable from studio to sets of subscribers, (2) CATV systems which, in addition to their traditional function of receiving and retransmitting conventional TV signals, also originate STV programs that travel by cable to sets of subscribers, and (3) CATV systems which, in addition to traditional functions, transmit over-the-air STV programs which they have picked up either off the air or by microwave. 53/ It denies jurisdiction in the first two categories and appears to concede it in the third. Although it is not clear, it seems that CBS limits its statement to the second category, but that it would, a fortiori, deny jurisdiction in the case of the first. Its position with regard to the third is not certain. Taft appears to suggest that we possess jurisdiction with regard to the second and third, and is silent on the first--a view similar to that of ABC.

307. We think it clear that we have jurisdiction in the third category. Appendix C of the aforementioned decision on CATV systems (supra note 51) sets forth in detail the basis on which we asserted our jurisdiction over such systems. We have concluded that STV is broadcasting and a beneficial supplement to present free TV, and have taken measures to assure its effective integration into the total TV system. If necessary to protect our television assignment plan and policies, it is entitled to the same protection as conventional television, and for the same reasons stated in the aforementioned Appendix C. However, since STV is different from ordinary broadcasting in that it involves the scrambling and unscrambling of signals, and since we anticipate that it generally will not broadcast programs normally available on free TV, different considerations apply.

308. To the extent that, under our new rules, STV stations will be required to broadcast at least the minimum number of hours of free TV programs required by Section 73.651 of our rules, such stations are conventional stations and, for their non-subscription programming, are entitled to the protection of our CATV rules, including the carriage and non-duplication provisions. As to the STV programming, we are informed that a decoder attached

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53/ To the best of the Commission's information, there are presently no STV operations in the United States in any of these three categories. There is, of course, some program origination by CATV systems, but as far as the Commission knows these programs are available to CATV subscribers at no additional charge.

to the head-end of a CATV system could unscramble an STV signal and transmit the decoded signal along the cable like any other TV signal. However, this is said to be commercially impractical, and we dismiss it from further consideration. It is also said that existing CATV systems could carry scrambled signals along a cable to decoders, attached to sets of subscribers, which could unscramble them just as if they had been picked up off the air. However, we shall not at this time require that CATV systems carry scrambled signals of local STV stations. The matter will be given consideration, if warranted, at a later date.

309. Should an STV station and CATV systems within the Grade B contour of the conventional service of that station wish privately to arrive at agreements whereby the CATVs will carry STV programming of the station, the public interest might be served (by having the STV signal of the station extended within its conventional TV service area). We shall therefore give consideration to proposals of STV stations wishing to make such arrangements. However, no party holding or applying for an STV authorization shall consummate such an arrangements without Commission approval thereof.

310. It should be noted that we here speak of permitting such carriage of STV signals by CATV systems within the Grade B contour of the STV station. We do not now intend to permit it outside of that contour. This will confine STV to the communities which we have selected for that service. Because of this, we see little merit to the Joint Committee argument that STV-CATV arrangements should be prohibited (see para. 303). As to the argument of ACLU that CATV systems should be required to carry STV signals so that those who have lost free TV service may have the opportunity to view the STV service which preempted the free TV time, we reply that the considerations that led to our limiting STV to five-station communities, with one STV station to a community, as a safeguard that would assure adequate free TV programming in such markets, apply to all viewers in the community, whether they use CATV or pick their signals off the air. The question of whether CATV systems outside the service area of an STV station should be permitted to carry its STV programming is one to which we shall devote further study.

311. A final matter should be mentioned which may require future action. Often the CATV operator, in installing the cable connection, disconnects the TV set from the outdoor antenna. This can make it impossible for the subscriber to receive a local TV station directly off the air. Under the provisions of Section 73.1033(c) of the Rules, we have provided that if a CATV system does not carry the conventional signals of a local TV station it must offer and maintain a switching device for each subscriber so that the subscriber may choose between viewing the local station off the air or viewing other stations on the cable. This need not be done if the subscriber indicates in writing that he does not desire the device. With regard to STV, it is possible that, if the CATV operator has disconnected the set from the outdoor antenna, is not required to carry the scrambled signal of the local STV station (see para. 308), and has not made arrangements with the local STV station to carry its scrambled STV signals (see para. 309), the CATV subscriber might not be able to pick up the scrambled STV signals off the air, and thus

might be precluded from becoming an STV subscriber. At a later date, we may need to consider whether to adopt a rule for STV similar to Section 74.1033(c), or to take other measures that would leave the TV set of the CATV subscriber accessible to STV service.

Program Origination by CATV systems, and Cable STV Not Related to CATV

312. As to the other two types of cable STV mentioned by Telemeter (see para. 306), we make no decision about the question of jurisdiction or other matters at this time. There are problems in this area which we wish to study further in the light of our decisions with regard to over-the-air STV, possible changes in the copyright law with regard to CATV, and kindred subjects.

313. Authority for the adoption of the rules herein is contained in Sections 3(o), 4(i), 301, 303(a), (b), (d), (e), (f), (g), (r), and 307(b) of the Communications Act of 1934, as amended.

314. Accordingly, IT IS ORDERED, That the rules contained in the attached Appendix D ARE ADOPTED, effective , 1967.

315. IT IS FURTHER ORDERED, That, in view of our having adopted today a Second Further Notice of Proposed Rule Making in this proceeding proposing technical standards for over-the-air subscription television systems, and in view of our intent to study further the subject of cable subscription television, the proceeding is not terminated.

FEDERAL COMMUNICATIONS COMMISSION

Ben F. Waple
Secretary

Attachments

APPENDIX A

Parties filing comments in response to Further Notice of Proposed Rule Making and Notice of Inquiry (* indicates reply comments also filed)

American Broadcasting Companies, Inc. * (ABC)
Acorn Television Corporation, et al. (Acorn)
American Civil Liberties Union (ACLU)
Americans for Democratic Action (ADA)
Angel Toll Vision (Angel)
Association of Maximum Service Telecasters, Inc.* (AMST)
Thomas A. Banning, Jr.
Colorado Translator Association
Columbia Broadcasting System, Inc. (CBS)
Communications Corporation of Indiana
Field Communications Corporation
International Telemeter Corporation* (Telemeter)
Jerrold Corporation (Jerrold)
Joint Committee Against Toll TV* (Joint Committee)
Kaiser Broadcasting Corporation (Kaiser)
John M. McLendon (McLendon)
Motorola, Inc. (Motorola)
E. Harold Munn, Jr. and James a Chase (Munn and Chase)
National Association of Broadcasters (NAB)
National Broadcasting Company, Inc. (NBC)
RKO General, Inc. and RKO Phonevision Company (RKO)
Screen Actors Guild
Skiatron Electronics and Television Corporation (Skiatron)
Springfield Television Broadcasting Corporation (Springfield)
Taft Broadcasting Company (Taft)
Teleglobe Pay-TV System, Inc.* (Teleglobe)
Trigg-Vaughn Stations, Inc. (Trigg-Vaughn)
TVC of California, Inc. and Com-Sumers, Inc.
WAIM-TV
WJRJ-TV
Zenith Radio Corporation and Teco, Inc.* (Zenith and Teco, or Zenith-Teco)

Parties filing technical descriptions of proposed STV systems in response to Further Notice of Proposed Rule Making and Notice of Inquiry.

Thomas A. Banning, Jr.
International Telemeter Corporation
Kahn Research Laboratories, Inc.
Skiatron Electronics and Television Corporation
Teleglobe Pay-TV System, Inc.
Zenith Radio Corporation

86-399 O - 67 - 9

APPENDIX B

SUMMARY OF HARTFORD SUBSCRIPTION TV TRIAL
AND ZENITH-TECO PROJECTIONS BASED THEREON

The information presented here, except where otherwise indicated, is based on material contained in the Zenith-Teco comments and the RKO General response to the Commission questionnaire. It is intended to provide a convenient summary of the facts and conclusions as reported by the petitioners.

Part 1

Facts About the Hartford Subscription Television (STV) Trial - 3 Year Experience

1. This service was introduced by RKO's station WHCT, Channel 18 in June 1962 in Hartford, Connecticut, which is part of the Hartford-New Haven television market. This market is served by other stations affiliated with all 3 networks. The net weekly circulation of this market is approximately 800,000 homes (ARB, 1965) which is the number of homes estimated to be tuned in at least once a week to the largest station WTIC, Channel 3. The net weekly circulation of WHCT Channel 18, prior to its STV experiment was 108,000 homes.

2. During the evening hours, and Saturday and Sunday afternoons, station WHCT, Channel 18, transmitted a scrambled signal which could be viewed intelligibly only by those having a decoder attached to their set. The decoder was installed for a $10 installation fee and a rental fee of $3.25 per month. All service calls were made free of charge.

3. By means of a weekly program schedule (supplemented by newspaper ads and listings), each subscriber was advised of the subscription features to be shown, the time and the price, and was given a code number for each feature. For example, the movie "What Ever Happened to Baby Jane" was listed for a price of $1 and was shown Monday, July 1, 1963 (Code Number 115E), and Thursday, July 4 (Code Number 111D), at 9 P.M. Subscribers wishing to see the movie simply set the code number in the decoder and the picture became unscrambled. The code number of each feature viewed and the price of the feature was automatically printed on a tape, which the subscriber removed each month and mailed to RKO with his check for the total amount for the programs viewed plus the monthly rental charge.

4. RKO intended to commence operations after 2,000 decoders had been installed, and "looked toward installation of 10,000 decoders by the end of the first year of trial. A maximum of 50,000 subscribers is contemplated . . . ." 1/ Actual operations started with fewer than

1/ FCC Report and Decision, February 23, 1961; Par. 8.

200 decoders on June 29, 1962, and progressed through three years of operation, as follows:

	Installed	Disconnected	Number of Subscribers at End of Year
First Year	3,183	422	2,761
Second Year	3,394	1,386	4,769
Third Year	1,752	1,670	4,851
Three Year Total	8,329	3,478	4,851

According to Zenith-Teco, "at the close of the second year of trial operations, RKO decided to limit the number of subscribers to 5,000 for the remaining third year of trial authorized because business prudence and fairness to subscribers did not warrant further substantial expansion without some assurances that the Commission would authorize the trial beyond the third year." The 4,851 STV subscribers at the end of the third year represented 0.6% of the net weekly circulation in the TV market or 4.5% of WHCT's net weekly circulation prior to its STV operation.

5. Zenith-Teco disputes the contention that STV is a service which only the wealthy can afford. The following table shows the income level and program expenditures of the Hartford subscribers:

Hartford Subscribers By Family Income Level

Income Levels	Proportion of Total U.S. Families 2/	Proportion of Total Subscribers	Average Weekly Program Expenditure
0 - $3,999	29.1%	1.5%	$0.99
$4,000 - 6,999	32.5	40.8	1.25
7,000 - 9,999	21.0	43.3	1.23
10,000 and Over	17.7	14.4	1.18
TOTALS (rounded)	100.0%	100.0%	$1.22 (avg.)

2/ Statistical Abstract of the U.S. 1964, p. 338.

6. To interest new subscribers RKO, from time to time, did extensive advertising, used door-to-door specialty salesmen, made offers of free decoder rentals, gave program discounts and used other promotions. During the first two years, RKO was able to obtain only a limited number of first subsequent run (neighborhood release) motion pictures and practically no first run (downtown release) movies. Most of the movies during this period were over six months old. In the third year, subsequent first run movies were available in greater number.

7. The turnover rate (the number of subscriber homes disconnected as a percent of the average number of subscriber homes) was 27% the first year, 36% the second year and 34% the third year. Turnover results from such factors as subscribers moving from the community, insufficient use to justify expenditure for decoder rental and credit delinquencies.

8. The following table summarizes the income and expense statements of the Hartford trial operation:

	($000)			
	First Year	Second Year	Third Year	Total 3 Years
Net Income - Totals	134	320	436	890
Installation	30	36	20	86
Decoder Rental	30	92	154	276
Program	74	192	262	528
Expenses - Total	1,487	1,687	1,254	4,428
Program Product	31	75	110	216
Other Program expenses	17	68	66	151
Time Charges paid to WHCT 3/	698	799	482	1,979
Technical	157	146	106	409
Sales, Advertising and Promotion	74	112	60	246
Depreciation 4/	375 5/	308	289	972
Other General and Administrative	135	179	141	455
Operating Loss	(1,353)	(1,367)	(818)	(3,538)

3/ Station was paid $300 per hour. Zenith-Teco comments suggest that payment of $400,000 per year would normally be made to station in market of this size. If such $400,000 were paid in this case, 3 year loss would be $2,759,000 instead of $3,538,000.

4/ Decoders cost $125.00 each and, for the test were completely depreciated during the three-year period.

5/ For this year cost of decoders purchased was reported rather than depreciation.

9. The following table shows the extent to which reductions were made in the charges for programs and decoder rentals.

Hartford Discounts

	First Year	Second Year	Third Year	Total 3 Years
Gross Program Income 6/	$82,028	$211,647	$285,821	$579,496
Net Program Income 7/	74,163	191,142	262,088	527,393
Difference	7,865	20,505	23,733	52,103
Difference as % of Gross Program Income	9.6%	9.7%	8.3%	9.0%
Gross Decoder Rental Income 8/	$60,479	$151,211	$189,878	$401,568
Net Decoder Rental Income 9/	30,394	92,284	153,708	276,386
Difference	30,085	58,284	36,170	124,539
Difference as % of Gross Decoder Rental Income	50%	39%	19%	31%

6/ Amount that would have been charged for programs if each subscriber were required to pay for each program viewed the listed price.

7/ Amount actually charged for programs.

8/ Amount that would have been charged for decoder rentals if each subscriber were required to pay $3.25 for each month.

9/ Amount actually charged for decoder rentals.

Part 2

ZENITH - TECO Projections

10. In its comments, Zenith-Teco has prepared business projections illustrating the viability of STV under various assumptions. These statements show that an STV franchise would break even with 20,000 subscribers spending an average of $65 per year for programs and $39 for decoder rental. If the number of subscribers is more, or the average program expenditure is higher, the business shows profits as indicated:

Summary of Business Projections by Zenith-Teco

Number of Subscribers and average Program Income	Sales ($000)	Cost of Equipment ($000)	PROFIT BEFORE FEDERAL TAXES $000	% of Sales	% of Cost of Equipment
20,000 subscribers:					
$ 65/yr.	2,120	2,711	1	0%	0%
75/yr.	2,320	2,711	119	5	4
40,000 subscribers:					
65/yr.	4,240	5,393	619	14	11
75/yr.	4,640	5,393	855	18	16
75,000 subscribers:					
65/yr.	7,950	10,087	1,780	22	18
75/yr.	8,700	10,087	2,223	26	22
100,000 subscribers:					
65/yr.	10,600	13,441	2,591	24	19
75/yr.	11,600	13,441	3,181	27	24

RESTATEMENT ON A "PER SUBSCRIBER" BASIS OF ZENITH-TECO'S BREAK-EVEN PROJECTION*

VARIABLE DATA	Per Subscriber	
INCOME:		
Programs	$65.00	
Decoder Rental	39.00	
Installation	2.00 11/	
Total Income		$106.00
EXPENSES:		
Program Product	$22.75	
Sales and Commissions	8.15	
Franchise Fee	5.20 (5% of Program and Rental Income)	
Technical	7.93	
Taxes (Other than Fed.)	2.22	
Supplies, Truck, Bad Debts, Other	3.10	
Depreciation	27.09 (almost all for decoders)	
Total Variable Expense		$76.44
Gross Margin Before Fixed Expense		$29.56

FIXED EXPENSES: 10/	
Station Time	$300,000
Administrative Salaries	94,000
Program Staff	23,000
Lines and Facilities	32,000
ASCAP and BMI Fees	18,000
IBM Equipment Rental	88,000
Rent	15,000
Legal, Audit, Insurance, Travel, Telephone, Utilities, Dues, Maintenance	20,000
Total Fixed Expenses	$591,100

Break-Even Point

$591,100 ÷ $29.56 20,000 Subscribers

10/ Some of these expenses listed as "fixed," actually do increase slightly with increased income.

11/ Zenith-Teco assumes 20% turnover, or 4,000 per year. This gives a total of $40,000 installation income, or $2.00 per subscriber (20,000).

* Prepared by Commission staff.

11. The projections were made on the basis of the following assumptions:

Assumption 1. An STV system operating in a number of markets. Zenith-Teco state that STV franchise agreements have been entered into for the following cities with RKO: New York, Philadelphia, Washington, D.C., San Francisco, Hartford, and New Haven; with Marshall Field in Chicago and with Kaiser in Los Angeles. It is their opinion that a number of additional agreements, now in negotiation, will be concluded upon approval of nationwide STV by the Commission.

Assumption 2. STV will obtain a 10% market penetration. Based on this it is concluded that STV will be viable in the top 91 TV markets. At different levels of penetration (assuming the 20,000 subscriber break-even point) the number of viable markets is as follows:

50% penetration - Top 200 markets
20% penetration - Top 170 markets
10% penetration - Top 91 markets
5% penetration - Top 46 markets
3% penetration - Top 20 markets

(10% penetration of the Hartford market would result in 74,000 subscribers)

Assumption 3. Program product cost will average 35% of program income. Based on the figures shown in paragraph 8, program product cost in Hartford was 38% of program income during the first year, 35% during the second and 38% during the third year. Motion pictures, which are exhibited in theaters for 33 1/3% to 35% of the gross, were made available to STV in Hartford at the same prices.

Assumption 4. Station time will cost $300,000 for small STV systems and $400,000 for larger ones. Zenith-Teco anticipates paying $300,000 for its STV time to a TV licensee in markets which can support up to 40,000 subscribers (assuming 10% penetration) and paying $400,000 in markets which can support 75,000 (or more) subscribers.

Assumption 5. Decoder cost of $131.38[13/] and 5 years depreciation. This was the actual decoder cost in Hartford. On a 20,000 subscriber system (the break-even point) the annual depreciation of decoders would amount to $525,520.

Assumption 6. A turnover rate of 20%. Based on the Hartford experience "and anticipated changes in operating methods and practices." Also 15-20 % turnover experienced by telephone companies. (Turnover rate in Hartford trial averaged 32%, see paragraph 7.)

Assumption 7. Program income will average a minimum of $65 a year and decoder rental income $39 a year per subscriber. Based on the Hartford experience adjusted to eliminate discounts and the assumption of a multi-market system resulting in more and better program product. This is also the basis for projections of program income of $70 and $75. (See paragraph 9 for Hartford discount experience and Conclusion 3 on inherent limit on spending. According to the Bureau of Labor Statistics [12/] in 1960 and 1961 urban families with incomes between $4,000 and $10,000 spent an average of $30 a year and those with incomes of over $10,000 an average of $59 a year for movies, sporting events, concerts, plays, etc.)

12/ "Consumer Expenditures and Income", Bureau of Labor Statistics. July 1964 p. 237.

13/ Decoder price of $125 plus $6.38 for freight and use tax.

PART 3: Zenith-Teco Conclusions

Conclusion 1. STV will make available additional program choices to the viewing public. Box-office type television entertainment is not now available nor can it be available in the future on conventional TV.

Conclusion 2. STV will have minimal impact on audience for conventional TV. In Hartford, an average of 5.5% of all subscribers viewed STV programs. There seems to be an inherent limit on the amount of STV viewing the public will support. The loss of audience by conventional TV would be less than 5.5% of TV homes because the loss is limited to those homes which subscribe to STV and which otherwise would normally have been watching conventional TV had STV not been available.

Conclusion 3. Only one STV station in a market. WHCT in Hartford devoted an average of 30 hours per week to STV. This is expected to be typical of future STV operations due to the limited number of "box office" attractions and the size of the recreational budget. On this basis, in markets with 3 or more stations, STV could not absorb more than 10% to 15% of the total broadcast time. This limited time would probably result in but one STV station in the market.

Conclusion 4. STV will not siphon talent or existing programs from Conventional TV. None of the Hartford programs were available on conventional TV anywhere in the country. No one can expect the public to pay for what someone else provides free. There are too many programs of the conventional entertainment type and the public's recreational budget is too limited to permit STV to pay more than sponsors are willing to pay for such programs. Talent and writers now often work for both the motion picture industry and conventional TV. Since subscription television merely substitutes the home TV receiver for the motion picture theatre, there is no reason to believe that motion picture talent and writers would not still continue to work for conventional TV as they now do.

APPENDIX C

1. It is proposed that the following new sections be added to Part 73 of Commission Rules and Regulations:

OVER-THE-AIR SUBSCRIPTION TELEVISION OPERATIONS

§73.641 Definitions

(a) Subscription Television. A system whereby subscription television broadcast programs are transmitted and received.

(b) Subscription television broadcast program. A television broadcast program intended to be received in intelligible form by members of the public only for a fee or charge.

§73.642 Licensing Policies.

(a) Subscription television service may be provided only upon specific authorization therefor by the Commission. Such authorization will be issued only to:

(1) The licensee of a television broadcast station;

(2) The holder of a construction permit for a new television broadcast station; or

(3) An applicant for a construction permit for a new television broadcast station.

(b) Application for such authorizations shall be made in the manner and form prescribed by the Commission. If the Commission, upon consideration of such application finds that the public interest, convenience and necessity would be served by the granting thereof, it will grant such application. In the event it is unable to make such a finding, the Commission will then formally designate the application for subscription television authorization for hearing and proceed pursuant to the provisions of Section 309(e) of the Communications Act and the Commission's Rules and Regulations applicable thereto. The Commission may impose such conditions upon the grant as may be appropriate.

(c) Holders of subscription television authorizations shall complete construction of subscription television transmitting facilities within a period of eight months after issuance of the authorization unless otherwise determined by the Commission upon proper showing in any particular case.

(d) A subscription television authorization will not be issued or renewed for a period longer than the regular license period of the applicant's television broadcast authorization.

(e) No subscription television authorization shall be granted to a television broadcast station licensee or permittee, or to an applicant for a construction permit for such a station, having any contract, arrangement or understanding, express or implied, which:

(1) Prevents it from rejecting or refusing any subscription television broadcast program which it reasonably believes to be unsatisfactory or unsuitable or contrary to the public interest; or substituting a subscription or conventional program which in its opinion is of greater local or national importance; or

(2) Delegates to any other person the right to schedule the hours of transmission of subscription programs: provided, however, that this rule shall not prevent a licensee, permittee, or applicant from entering into an agreement or arrangement whereby it agrees to schedule a specific subscription television broadcast program at a specific time; or

(3) Prevents it from making a free choice of subscription programs, whatever their source; or

(4) Deprives it of the right of ultimate decision concerning the maximum amount of any subscription program charge or fee.

§73.643 General operating Requirements.

(a) No commercial advertising announcements shall be carried during subscription television operations except for promotion of subscription television broadcast programs before and after such programs.

(b) Charges, terms and conditions of service to subscribers shall be applied uniformly: provided, however, that subscribers may be divided int reasonable classifications approved by the Commission, and the imposition of different sets of terms and conditions may be applied to subscribers in different classifications.

(c) Any television broadcast station licensee or permittee authorized to broadcast subscription programs shall broadcast, in addition to its subscription broadcasts, at least the minimum hours of programs required by Section 73.651 of the Rules.

(d) If a television broadcast station supplies the only Grade A signal to a community, not more than 15% of its non-prime broadcast time (including subscription and non-subscription broadcast time during that period), and not more than 50% of its prime broadcasting time (including subscription and non-subscription broadcast time during that period) may be devoted to subscription broadcasting; if it supplies the second or third Grade A signal, not more than 25% of its non-prime broadcast time, and 60% of its prime broadcast time; if it supplies the fourth Grade A signal, not more than 50% of its non-prime broadcast time, and 75% of its prime broadcast time; and if it is one of five or more stations supplying a Grade A signal to the community, there is no limitation on the amount of broadcast time that may be devoted to subscription broadcasting.

(e) Except as they may be otherwise waived by the Commission in authorizations issued hereunder, the rules applicable to regular television broadcast stations will be applicable to subscription television operations

§73.644 Equipment and Technical Operating Requirements.

(a) Subscription television equipment must be approved in advance by the Commission pursuant to the "type approval" and "type acceptance" procedures now established by Part 2, Subpart F--Equipment Type Approval and Type Acceptance--of the Commission's Rules and Regulations.

Additional proposed rules concerning equipment and technical operating requirements will be announced at a later date.

APPENDIX D

1. Part 73 of the Commission Rules and Regulations is amended by adding the following new sections thereto:

OVER-THE-AIR SUBSCRIPTION TELEVISION OPERATIONS

§73.641 Definitions.

(a) Subscription television. A system whereby subscription television broadcast programs are transmitted and received.

(b) Subscription television broadcast program. A television broadcast program intended to be received in intelligible form by members of the public only for a fee or charge.

§73.642 Licensing policies.

(a) Subscription television service may be provided only upon specific authorization therefore by the Commission. Such authorization will be issued only to:

(1) The licensee of a commercial television broadcast station;

(2) The holder of a construction permit for a new commercial television broadcast station; or

(3) An applicant for a construction permit for a new commercial television broadcast station: Provided, however, That such authorization will not be issued prior to issuance of the construction permit for the new station.

Moreover, such an authorization will be issued only for a station the principal community of which is located entirely within the Grade A contours of five or more commercial television broadcast stations (including the station of the applicant), whether the principal community each station is authorized to serve is the same as that of the applicant, or is a nearby community. Only one such authorization will be granted in any community. No such authorization will be granted unless, not counting the station of the applicant, at least four of the stations which include the community of the applicant within their Grade A contours are operating stations.

(b) Application for such authorizations shall be made in the manner and form prescribed by the Commission. If the Commission, upon consideration of such application finds that the public interest, convenience and necessity would be served by the granting thereof, it will grant such application. In the event it is unable to make such a finding, the Commission will then formally designate the application for subscription television authorization for hearing and proceed pursuant to the provisions of Section 309(e) of the Communications Act and the Commission's Rules and Regulations applicable thereto. The Commission may impose such conditions upon the grant as may be appropriate.

NOTE: No applications will be accepted for filing until such time as rules concerning equipment and system performance capability have been adopted in Section 73.644. At that time, the manner of filing such applications, the form, and the content thereof with regard to equipment, technical, and all other matters will be announced.

(c) Holders of subscription television authorizations shall complete construction of subscription television transmitting facilities within a period of eight months after issuance of the authorization unless otherwise determined by the Commission upon proper showing in any particular case. During the process of construction of the subscription television facilities, the holder of the authorization, after notifying the Commission and the Engineer in Charge of the radio district in which the station is located, may, without further authority of the Commission, conduct equipment tests for the purpose of such adjustments and measurements as may be necessary to assure compliance with the terms of the authorization, the technical provisions of the application therefor, and the rules and regulations. The Commission may notify the holder of the authorization not to conduct tests if such tests appear to be contrary to the public interest, convenience, and necessity. Upon completion of the construction, the holder of the authorization shall submit a detailed showing that compliance with the terms of the authorization, the technical provisions of the application therefor, and the rules and regulations has been achieved. No subscription television operation shall commence until requirements of this paragraph have been fulfilled and operation has been specifically authorized by the Commission.

(d) A subscription television authorization will not be issued or renewed for a period longer than the regular license period of the applicant's television broadcast authorization. Renewals of such authorizations will usually be considered together with renewals of the regular station authorizations.

(e) No subscription television authorization or renewal thereof shall be granted to a party having any contract, arrangement, or understanding, express or implied, which:

(1) Prevents or hinders it from rejecting or refusing any subscription television broadcast program which it reasonably believes to be unsatisfactory or unsuitable or contrary to the public interest; or substituting a subscription or conventional program which in its opinion is of greater local or national importance; or

(2) Delegates to any other person the right to schedule the hours of transmission of subscription programs: Provided, however, That this rule shall not prevent a licensee, permittee, or applicant from entering into an agreement or arrangement whereby it agrees to schedule a specific subscription television broadcast program at a specific time or to schedule a specific number of hours of subscription programs during the broadcast day (or segments thereof) or week subject to Commission approval; or

(3) Prevents or hinders it from, or penalizes it for, making a free choice of subscription programs, whatever their source: Provided, however, That upon making a satisfactory showing to the Commission that the public interest would be served by permitting the licensee, permittee, or applicant to enter into an agreement or arrangement whereby it agrees to obtain all or a specified portion of its programming from one or more sources, this rule may be waived; or

(4) Deprives it of the right of ultimate decision concerning the maximum amount of any subscription program charge or fee.

(f) No subscription television authorization or renewal thereof shall be granted to a party having any contract, arrangement, or understanding, express or implied, with other parties the provisions of which do not comply with the following policies of the Commission:

(1) Unless a satisfactory signal is unavailable at the location where service is desired, subscription television service shall be provided to all persons desiring it within the Grade A contour of the non-subscription television service provided by the station broadcasting subscription programs: Provided, however, That geographic or other reasonable patterns of installation for new subscription services shall be permitted: And provided further, That, for good cause, service may be terminated.

(2) Charges, terms and conditions of service to subscribers shall be applied uniformly: Provided, however, That subscribers may be divided into reasonable classifications approved by the Commission, and the imposition of different sets of terms and conditions may be applied to subscribers in different classifications: And provided further, That with-in such classifications deposits to assure payment may, for good cause, be required of some subscribers and not of others; and, also for good cause, if a subscription system generally uses a credit-type decoder cash operated decoders may be installed for some subscribers.

(3) Subscription television decoders shall be leased, and not sold, to subscribers.

(g) All applications for subscription television authorization or renewal shall set forth, in such detail as the Commission may require, the terms of agreements and arrangements the applicant has or intends to have with other parties concerning the supplying of subscription television programs, including specifically any provision that such programs shall be presented at a particular time or during a certain number of hours during the day (or segments thereof) or week, any arrangement or understanding which might hinder or prevent the presentation of programs from different sources, or penalize the applicant for so doing, and, as to any arrangement or understanding with a party other than the producer of the program, any other arrangement or understanding of which the applicant has knowledge, between such other party and third parties, which prevents or hinders such other party from obtaining programs from different sources. The applicant shall use due diligence to ascertain the existence and nature of arrangements to which it is not a party.

§73.643 General operating requirements.

(a) No commercial advertising announcements shall be carried during subscription television operations except for promotion of subscription television broadcast programs before and after such programs.

(b) Subscription television broadcast programs shall comply with the following requirements:

(1) Feature films shall not be broadcast which have had general release in theaters anywhere in the United States more than two years prior to their subscription broadcast: Provided, however, That during one week of each calendar month one feature film the general release of which occurred more than ten years previously may be broadcast, and more than a single showing of such a film may be made during that week.

NOTE: As used in this subparagraph, "general release" means the first run showing of a feature film in a theater or theaters in an area, on a non-reserved seat basis, with continuous performances. For first run showings of feature films on a non-reserved seat basis which are not considered to be "general release" for purposes of this subparagraph, see note 45 in Fourth Report and Order in Docket No. 11279, 8 F.C.C. 2d).

(2) Sports events shall not be broadcast which have been televised live on a non-subscription, regular basis in the community during the two years preceding their proposed subscription broadcast: Provided, however, That if the last regular occurrence of a specific event (e.g., summer Olympic games) was more than two years before proposed showing on subscription television in a community, and the event was at that time televised on conventional television in that community, it shall not be broadcast on a subscription basis.

NOTE 1: In determining whether a sports event has been televised in a community on a non-subscription basis, only commercial television broadcast stations which place a Grade A contour over the entire community will be considered. Such stations need not necessarily be licensed to serve that community.

NOTE 2: The manner in which this subparagraph will be administered and in which "sports", "sports events", and "televised live on a non-subscription regular basis" will be construed is explained in paragraphs 253-270 of the Fourth Report and Order in Docket No. 11279, 8 F.C.C. 2d).

(3) No series type of program with interconnected plot or substantially the same cast of principal characters shall be broadcast.

(4) Not more than 90% of the total subscription programming hours shall consist of feature films and sports events combined. The percentage calculations may be made on a yearly basis, but, absent a showing of good cause, the percentage of such programming hours may not exceed 95% of the total subscription programming hours in any calendar month.

(c) Any television broadcast station licensee or permittee authorized to broadcast subscription programs shall broadcast, in addition to its subscription broadcasts, at least the minimum hours of non-subscription programming required by Section 73.651.

(d) Except as they may be otherwise waived by the Commission in authorizations issued hereunder, the rules and policies applicable to regular television broadcast stations are applicable to subscription television operations.

§73.644 Equipment and system performance requirements.

(a) No subscription television authorization will be granted unless the system to be used has been type accepted in advance by the Commission pursuant to the type acceptance procedures established by Part 2, Subpart F--Equipment Type Approval and Type Acceptance--of this chapter.

NOTE: Additional rules concerning equipment and system performance capability for subscription television systems will be adopted after a rule making proceeding in Docket No. 11279.

Attachment B

B

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
Amendment of Part 73 of the) Docket No. 11279
Commission's Rules and Regulations)
(Radio Broadcast Services) to)
provide for Subscription Television)
Service.)

SECOND FURTHER NOTICE OF PROPOSED RULE MAKING

Adopted: ; Released:

By the Commission:

1. Further notice of rule making is hereby given in the above-entitled matter.

2. The Commission on this date has adopted a Fourth Report and Order in this proceeding which establishes a nation-wide, over-the-air subscription television (STV) service and promulgates rules governing that service (FCC 67-). Those rules which the Commission has adopted do not include any that govern the performance capability of STV systems except for Section 73.644, which states that STV systems must be type accepted in advance by the Commission pursuant to the type acceptance procedures established by Part 2, Subpart F, of the Commission's Rules--Equipment Type Approval and Type Acceptance. The standards to be used in type accepting STV systems, however, have not been established. Instead, a NOTE to Section 73.644 states that additional rules concerning system performance capability will be adopted after a further rule making proceeding in this docket.

3. Accordingly, the Commission is adopting the instant document inviting comments on proposed rules governing STV system performance capability. It is the hope of the Commission that such rules can be adopted without undue delay since, as a NOTE to Section 73.642(b) of the Rules states, no applications for STV authorizations will be accepted for filing until such time as they have been adopted. Having found that an over-the-air STV service is in the public interest, it should be given a chance to provide benefits to the public as soon as possible.

4. In the Fourth Report and Order (paras. 174-185), the Commission decided that it would not limit STV operations to the use of a single technical system. Instead, it chose to permit the use of any system so long as it could meet the system performance capability standards established by the Commission. The Commission has studied detailed specifications of present or proposed STV systems submitted by parties to this proceeding. This has helped it in the formulation of the proposed rules contained in the Appendix attached hereto, on which comments are invited. These rules would require

adequate performance of STV systems in serving their subscribers and in avoiding any increase of interference to conventional TV services.

5. As stated in paragraph 213 of the Fourth Report and Order, we do not presently foresee the need for special technical operating requirements for STV, and in the absence of such requirements the operating requirements for conventional television station operation will apply. Should any parties believe that special rules on the subject are necessary for STV, their suggestions and comments would be welcome.

6. Pursuant to the procedures set forth in Section 1.415 of the Commission's Rules and Regulations, interested parties may file comments on or before 1967, and reply comments on or before 1967. All relevant and timely comments and reply comments will be considered by the Commission before final action is taken in this proceeding. In reaching its decision in this proceeding, the Commission may also take into account other relevant information before it in addition to the specific comments invited by this Notice.

7. Authority for the amendments proposed herein is contained in Sections 4(i), 301 and 303 (e), (f), and (r) of the Communications Act of 1934, as amended.

8. In accordance with the provisions of Section 1.419 of the Rules and Regulations, an original and 14 copies of all comments, replies, pleadings, briefs, and other documents filed in the proceeding shall be furnished the Commission.

FEDERAL COMMUNICATIONS COMMISSION

Ben F. Waple
Secretary

Attachment

APPENDIX

1. It is proposed that Section 73.644 of the Commission's Rules and Regulations be amended by the addition thereto of a new paragraph (b) as follows:

§73.644 Equipment and system performance requirements.

* * * * * * *

(b) The criteria for type acceptance of subscription television systems are as follows:

(1) The system shall be capable of operating by delivering a suitable signal to the antenna input terminals of receivers designed for reception of a signal meeting technical standards for color or monochrome television transmission and accompanying aural signal as set forth in Subpart E of Part 73 of the Commission's Rules. For the purpose of this requirement, a "suitable signal" shall be one which, except for distortion or changes caused by the transmitting antenna, receiving antenna or entering in the propagation medium, complies with all technical standards for color or monochrome transmission and accompanying aural signal set forth in Part 73 of the Commission's Rules.

(2) Spectral energy in transmission shall not exceed limitations set forth in §73.687(i).

(3) No increase in width of the television broadcast channel (6 Mc/s) shall be required.

(4) Visual power (peak or average) and aural power shall not be necessary in excess of that now authorized, to provide coverage equal to that obtained by normal transmission standards.

(5) The encoded visual and aural programs shall be recoverable without perceptible degradation as compared to the same programs transmitted in accordance with Commission monochrome and color standards.

(6) Internal modifications to subscribers' receivers shall not be required.

(7) Interference to conventional television and subscription television, co-channel and adjacent channel, monochrome and color, shall not exceed that occurring from conventional television broadcasting conducted in compliance with the standards of Subpart E of Part 73 of the Commission's Rules.

(8) Susceptibility to interference of any kind shall not be greater than with conventional television broadcasting conducted in compliance with the standards of Subpart E of Part 73 of the Commission's Rules.

Mr. MACDONALD. Thank you very much.

Actually you touched on what I think is a very basic feature of these hearings, the concern of some members of the subcommittee and the full committee, about the right of the FCC jurisdiction to put out licenses for subscription TV. While doing homework during the week on this matter, I couldn't find except one case in which the court agreed with you that you did have jurisdiction. I know it will be very helpful for the committee if you can outline why you believe you do have jurisdiction because I think that is the bedrock of this entire hearing.

Mr. HYDE. Mr. Chairman, I believe it might be well to bring up to date the memorandum of law that was submitted by the General Counsel. I think the only case in point would be the appeal from the Commission's decision authorizing the trial in Hartford.

We recognize, of course, that this was——

Mr. MACDONALD. Yes, but I have the language here. I would be interested. The court affirmed the Commission's decision but it noted that "distinguishing characteristic of the Federal Communications Commission authorization of subscription TV in this case is the experimental or trial basis upon which it is to operate for the duration of its 3-year authority."

This was page 873 of that decision. It would seem to me that although you buttressed the fact that fundamentally you do have jurisdiction, I would think if I were a lawyer on the other side, and I am not, that you could use that very case against the fact that the court felt that you had jurisdiction for an experiment but not on a full-time basis.

I wish that you would explain your position about this. This is not going into the merits of the thing that is pending before you but it is just the basic question that we are concerned with here.

Mr. HYDE. Mr. Chairman, you are quite right in pointing out that the decision we have just now cited was an appeal from a grant for experimental authorization and to sustain the Commission's power to grant the authority for an experiment would not necessarily imply that we had authority to grant authority for a regular service.

But we do not base our assertion of authority and responsibility on this case alone.

I think I should refer you to the memorandum of law. It does discuss the general powers of the Commission and we would not by any means limit our assertion of responsibility in this area to this particular case.

The Communications Act of 1934, as amended, grants very extensive powers and responsibilities to the Commission to allocate frequencies to various kinds of services under conditions that such grants will serve the public interest.

It includes a provision, section 303(g) requiring the Commission to encourage the larger, more effective use of radio. These and other provisions seem to require the Commission to recognize new services as technology develops and to provide allocations and rules appropriate to the use of radio in the public interest as the new technology permits.

Mr. MACDONALD. Right.

I agree with that. That is obviously true.

But what is the new technology basically about this? It is just a way of getting money, is it not?

Mr. HYDE. It is a combination of technology and service concepts. This is characteristic of developments in communications. New concepts are introduced from time to time in telephone message service for one thing. The after 9 plan was an entirely new concept.

There are new categories of mobile services that have come on from time to time. It will be remembered that we started first with use of radio for safety of life at sea. Then we got into such obvious safety services as police. Then we progressed to where we used radio for dispatching of trucks.

We have a whole host of new services that were never thought of at the time that the Communications Act was first framed. I think it was very wise on the part of Congress that they did give the licensing agency the flexibility necessary to provide for these new uses as they were developed.

Mr. MACDONALD. We are operating under the 5-minute rule. I am going to hold myself to it. I just have one other question which has been bothering me and it is a very small question perhaps.

On page 4 of the report by your Subscription Television Committee—again I am not going into the merits of it, I just want your observation on it—you talk about feature films and according to what I read the main thing that went well in Hartford were old films and sports.

I suppose that would be true on a nationwide basis as well.

Mr. HYDE. The Committee report—I am referring to the FCC's Committee on Subscription Television—pointed out that perhaps the staple and backbone of the Hartford experiment were feature films which had not been made available to conventional TV.

Mr. MACDONALD. And also sports.

Mr. HYDE. And sports.

Mr. MACDONALD. I repeat, I am under the 5-minute rule and I want to adhere to it.

Since I follow sports I could not quite figure out the attitude about the sports feature in pay TV when it says sports events may not be broadcast on STV which were regularly televised within the community within the 2 years preceding the proposed STV broadcast.

My question is this: Is that sort of like the option that professional football players have, say the Redskins, although they have broadcast on so-called commercial TV, not so-called commercial TV but commercial TV, if they wanted to they could play out their option and not broadcast on commercial TV for 2 years and then be locked up completely by pay TV?

Mr. HYDE. I believe it was the Committee's thought that the rule they have suggested here would prevent what is called in the trade "siphoning" of spectacles now shown on free TV over to pay TV.

Mr. MACDONALD. Right.

Mr. HYDE. This 2-year period was a test to determine whether or not the spectacle about to be shown was one that would have been free except for subscription TV use.

Mr. MACDONALD. The answer to my question then is "Yes."

If the Redskins or the Forty-Niners or anybody, the Chicago Bears, the Boston Patriots, don't want to go along with commercial TV for a

2-year period, then to all intents and purposes they can refuse to be shown on commercial TV and can only be seen on pay TV.

Is that right?

Mr. HYDE. For 2 years that would seem to be the result, yes.

Mr. MACDONALD. No, the 2-year period is just the period they play out their option.

Mr. HYDE. That is right.

Mr. MACDONALD. They penalize themselves for losing commercial revenue for 2 years. But then they go completely pay TV, is that right?

Mr. HYDE. Yes.

Mr. MACDONALD. In other words, it is conceivable that if all the major league teams and baseball and football decide to play out their option, there would be no sports on TV commercial, so-called free TV, at all after a period of 2 years.

Is that correct?

Mr. HYDE. May I say this point has been made in the discussion before us and we will have to examine that.

I think we are getting into the issues of the hearing before us and you will excuse me if I say that we have to study that.

Mr. MACDONALD. Thank you very much.

Mr. Kornegay.

Mr. KORNEGAY. Thank you, Mr. Chairman.

Mr. Chairman, it is nice to see you here this morning.

Pursuing the question of jurisdiction raised by the subcommittee chairman, I want to build as much a record on this point as I can.

As I gather from what you said to the chairman, Mr. Chairman, there is no question in your mind or the mind of the Commission about the fact that the present law gives you the authority to authorize the establishment of subscription television throughout the country?

Mr. HYDE. The Commission does take the position that it has the authority and it has the responsibility to act upon the various petitions that have been addressed to the Commission.

Mr. KORNEGAY. How do you reconcile that position with the legislative history or with the history of events relating to this matter that are enumerated and well set forth in this statement?

It was in 1958 when the House Committee on Interstate and Foreign Commerce, February 6, adopted a resolution expressing the sense of the committee that FCC should not grant authorizations for subscription television operations contemplated in the first report unless and until the Communications Act of 1934 is amended so as to specifically empower the Commission to grant such authorization.

I was not here at that time but I gather from your statement that this resolution passed by this committee expressing the sense of the committee and was not in fact passed by the Congress.

Is that right?

Mr. HYDE. Congressman Kornegay, that would be correct.

I do not want to indicate by this any lack of respect for the views of the committee at all. The committee did authorize the experiment.

Mr. KORNEGAY. I am not raising the point to put you on the spot. I just want to get in the record as to where we are. I don't know.

Mr. HYDE. As a matter of law I would assert that the resolution of the committee did not amend or modify the statutory responsibility already vested in the Commission.

Mr. KORNEGAY. Before you could get underway with the experiment that was carried out in Hartford some time later, apparently somebody thought it was necessary to have some legislation on the matter.

Mr. HYDE. We would always wish to cooperate with the Congress. We endeavor to maintain a liaison with the committee. The matter was discussed with the chairman at the time, with a view of working in cooperation and that is still our attitude.

We would now welcome congressional guidance.

Mr. KORNEGAY. Going back to 1959, prior to the adoption of the resolution which you referred to on page 5 of your statement, did the Commission request the committee to take action on this resolution?

Mr. HYDE. I do not believe we did.

I think the idea originated with the committee. I think the committee became concerned about the development. A number of bills, I am told, had been introduced regarding the concept of pay TV. I am sure these matters brought it to the attention of the committee.

Mr. KORNEGAY. Was that resolution of March 26, 1959, actually passed by the House?

Mr. HYDE. To the best of my knowledge there has been no resolution by the House.

Mr. KORNEGAY. I thought I would go into this because it was not spelled out in your statement.

Mr. HYDE. We undertook to recite the entire legislative record here. If I omitted anything it was an oversight.

Mr. KORNEGAY. Now you do have for the record copies of the fourth report?

Mr. HYDE. Yes, we do. We will be pleased to supply them for the record of this proceeding. (See p. 15.)

Mr. KORNEGAY. That is all, Mr. Chairman.

Mr. MACDONALD. Mr. Broyhill.

Mr. BROYHILL. Thank you, Mr. Chairman.

Mr. Chairman, it is good to see you here today.

It is true that throughout the years this committee has consistently, as I view the record and my study, held to the position that the Federal Communications Commission did not have the full authority to implement a nationwide STV system.

Would you agree with this conclusion?

Mr. HYDE. I would agree that the committee has tended to take the view that the FCC did not have the authority. This is the force of the resolution that was adopted.

The new resolution only went so far as to consent to an experiment.

Mr. BROYHILL. That is the point I was getting to.

In the past you have abided by the apparent feeling of the chairman of the committee on STV and when the committee in the late 1950's adopted a resolution calling for experiments, the FCC abided by this mandate.

Is that correct?

Mr. HYDE. I feel that we have cooperated fully with the committee, that is right.

Mr. BROYHILL. Like the chairman, I have studied this situation and all the information available to me, in recent weeks. In my mind I question whether the Federal Communications Commission has full authority.

As I understand, you are basing your present rulemaking decision on certain portions of the Communications Act and you are stating that STV is broadcasting.

Mr. HYDE. We do state that STV is broadcasting.

Mr. BROYHILL. Yet, it seems that the Commission is recommending rules under which the FCC would go far beyond what you require the broadcasters to do.

Mr. HYDE. The rules do go beyond what is required in conventional broadcasting.

Mr. BROYHILL. Does this mean you have concluded you have authority to do this in STV broadcasting?

Mr. HYDE. Yes, it does, because we believe the authority granted to the Commission by Congress does give the authority to make rules appropriate to a particular type of service. We believe that there can be classifications of broadcast service, indeed there are. We have rules appropriate to FM. We have rules for stereo and FM. We have rules for television broadcasting and, of course, we have rules for AM broadcasting.

The act makes not distinction as between any of these classes of broadcasting.

Mr. BROYHILL. In the proposed rules as I read them the Commission is proposing to lay down certain stringent rules on programing. You have never done this in implementing the first necessary doctrine to broadcasting as a group.

Mr. HYDE. I agree with you that the type of regulation that the committee has recommended here is unique, it is different, it goes beyond anything that the Commission has provided in other cases.

Mr. BROYHILL. It is also not true that in the court case on your experimental system in Hartford, Conn., the court case really went to the question of whether or not you had the authority to authorize a trial test, it did not go to the question of whether or not you had full authority?

Mr. HYDE. The case litigated was for application for experimental authority.

Actually, I am not personally familiar with the briefs and the issues as they were raised before the court. I would prefer to have our general counsel discuss that further. For that purpose I would suggest that if it would meet the pleasure of the committee that we bring our legal memorandums down to date. We will submit a supplement to our legal memorandums which will discuss this case further.

Mr. MACDONALD. Without objection it is so ordered.

(The following information was subsequently submitted:)

FEDERAL COMMUNICATIONS COMMISSION,
Washington, D.C., October 26, 1967.

Hon. TORBERT H. MACDONALD,
House of Representatives, Washington, D.C.

DEAR CONGRESSMAN MACDONALD: When I testified before the Subcommittee on Communications and Power of the House Committee on Interstate and Foreign Commerce on October 9, 1967, questions were raised concerning the authority of the Federal Communications Commission to authorize subscription television operations. At that time I agreed to supply supplemental material to bring up to date the Memorandum of Law (FCC 57–730) on this subject furnished to the Committee on July 3, 1957. That Memorandum, a copy of which is enclosed herewith as attachment A, discusses in detail the provisions of

the Communications Act of 1934 which the Commission believes constitute authority for the authorization of subscription television service.

On February 6, 1958, the House Committee on Interstate and Foreign Commerce adopted a resolution expressing the sense of the Committee that the Commission could not authorize subscription television absent amendment of the Communications Act of 1934. A second resolution, of March 24, 1959, stated the Committee's view that the earlier resolution should not preclude the grant of an authorization for trial or experimental operations, under the terms of the Commission's *Third Report* in Docket No. 11279, 26 F.C.C. 265 (1959).

On February 23, 1961 the Commission granted an application of Hartford Phonevision Company for an authorization to conduct an experimental subscription television operation over station WHCT, Hartford, Connecticut. *Hartford Phonevision Co.*, 30 F.C.C. 301. This decision was made after hearing, and upon the basis of the earlier *Third Report* in Docket No. 11279. Upon appeal to the United States Court of Appeals for the District of Columbia Circuit, the Commission's action was challenged both with respect to its jurisdiction to permit any subscription television service and the particular terms of the Hartford trial. The first of these issues was defended by the Commission upon the basis of the considerations set forth in the Commission's Memorandum of Law of July 3, 1957. This authority was sustained by the Court of Appeals. *Connecticut Committee Against Pay TV* v. *F.C.C.*, 301 F.2d 835 (1962), *cert. denied*, 371 U.S. 816.

It has been suggested that the decision merely upheld authority to grant an experimental license, but I believe that analysis of the opinion demonstrates its approval of the general authority of the Commission to authorize subscription TV. The Court itself characterized the contentions as including a broad argument that the Commission lacked statutory power to authorize any television broadcast system which required the direct payment of fees by the public. Thus, it stated (301 F.2d at 837) that the first issue was whether "the Commission lacks statutory power to authorize a television broadcast system which requires the direct payment of fees to the public." On this issue, it stated (301 F.2d at 837):

"The Federal Communications Commission was established in 1934 under a typically broad grant of power by which the Commission was authorized by Congress, subject to limitations not pertinent here, to issue a broadcasting station license to any applicant 'if public convenience, interest and necessity will be served thereby.' 47 U.S.C.A. §307(a). Additionally, Congress specifically commanded the Commission by Sec. 303(g) of the Communications Act, to '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.' (Emphasis added.) The plain language of the statute thus makes clear that Congress placed an affirmative duty on the Commission to experiment with and develop the most desirable deployment and utilization of the nation's communications facilities. The Supreme Court has said that 'where the language of an enactment is clear, and construction according to its terms does not lead to absurd or impractical consequences, the words employed are to be taken as the final expression of the meaning intended.' United States v. Missouri Pac. R.R. Co., 278 U.S. 269, 278, 49 S. Ct. 133, 136, 73 L. Ed. 322 (1929)."

The opinion goes on to refer to "the distinguishing characteristic" of the authorization as the experimental nature of the grant, in response to the appellant's arguments that the grant was made with inadequate knowledge of the programming plans of WHCT and that it had not been shown that these plans would serve the public interest. And, noting its assumption that the Commission would carefully scrutinize the operation and oversee the form which programming would take under the subscription system, the Court added: "Surely its power to see that this area of the public domain is used in the public interest is not less for 'paid' television than for the existing system of so-called 'free' television." (301 F.2d at 838.) At no point in its opinion does the Court indicate that the authority found in the statute is limited to the grant of an experimental license. Thus, the Commission's position is, I believe, fully supported by the opinion of the Court of Appeals.

Furthermore, when certiorari by the Supreme Court was sought by the appellant, the Solicitor General, on behalf of the Federal Communications Commission, advised the Supreme Court that the Court of Appeals' decision was not limited to the question of authorization of an experimental operation, since basic jurisdiction must be present whether the authorization be for a trial or permanent operation. A copy of the opposition to certiorari is enclosed as attachment B. See footnote 8 therein.

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 televsiion 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

the familiar requirements of equal opportunities in the use of broadcast facilities by candidates for public office. Section 317 requires that all matter broadcast by any radio station for which service money, or any other valuable consideration is directly or indirectly paid, or promised to or charged or accepted by, the station so broadcasting, from any person, shall, at the time the same is so broadcast, be announced as paid for or furnished, as the case may be, by such person. Section 325(a) prohibits broadcasting stations from rebroadcasting programs of other broadcasting stations without express authority from the originating station. Section 325(b) requires that prior authorization be obtained from the Commission for transmission of programs from a broadcast studio located in the United States to a station located in a foreign country for broadcasting from such foreign station if broadcasts from the foreign station may be consistently received in the United States. Section 326 prohibits censorship by the Commission of any radio communications, including broadcasts.

The foregoing examples illustrate the Congressional practice of legislating in specific terms the limitations Congress desired to impose on the Commission's general power to license the use of radio frequencies. Apart from such specific limitations as the foregoing, Congress has laid down the general requirement that as a condition to the issuance of licenses authorizing the use of radio frequencies, the Commission determine that the public interest, convenience or necessity would be served thereby. Thus, the authorization of subscription television would be subject to the requirement of such a finding. There appears to be no other language in the statute suggesting Congressional intent to limit further or to prohibit authorization by the Commission of subscription radio or television operations.

The bare language of the statute must be read, however, in the context of the history of broadcasting and the circumstances of the industry at the time the relevant portions of the statute were enacted.

LEGISLATIVE HISTORY

There is little in the legislative history of the Communications Act of 1934, or any of the amendments thereto which casts light on Congressional intent relating to the powers of the Federal Communications Commission to authorize the use of radio frequencies for subscription programming involving the encoding of broadcast signals and the payment of a charge incidental to the reception of subscription programs in intelligible form. Congressional debates and actions relating to the predecessor Radio Act of 1927 do, however, make some direct reference to the question. Since the relevant portions of the Communications Act of 1934, constituted virtual re-enactment of provisions of the earlier law it is appropriate to consider the legislative history of the earlier Act in this respect, particularly since there had been no change between 1927 and 1934 in the universal practice of transmitting broadcast programs in the clear and their reception by the radio audience without the payment of any fee or charge.

In these circumstances the legislative history of the Radio Act of 1927 may be usefully studied with a view to determining whether Congress intended that the established universal practice of the broadcast industry of relying on advertising revenues and of broadcasting programs which could be received free of charge to the viewer, theretofore a voluntary practice, become mandatory under the 1927 statute.

It seems clear that so-called "free" broadcasting was not mandatory prior to 1927. The limited powers of the Secretary of Commerce under prior laws were inadequate even for the enforcement of the terms of licenses issued by him designating the frequencies on which licensees were to operate. A careful review of the legislative history of the Radio Act of 1927, however inconclusive it may be in some respects, gives little support to the theory, put forward by some parties to the Commission's subscription television proceeding, that Congress intended to prohibit authorization by the Federal Radio Commission of subscription radio. In light of the legislative history, which is briefly summarized in this Memorandum, it appears unlikely that if such had been the intent of Congress, it would have relied upon merely inferential limitations on the otherwise broad powers conferred on the Commission. As will be seen, the question of subscription radio was debated and was the subject of certain Congressional actions. Yet, the legislation as finally enacted contained no language specifically prohibiting subscription radio, while express limitations were laid down in relation to other matters, already mentioned in which Congress intended to limit the otherwise broad licensing powers conferred on the Commission.

The record of public utterances on this subject by interested Senators and Representatives does not reflect a unanimously held view that under the pending legislation which subsequently became the Radio Act of 1927 the Commission would have the power to authorize subscription radio. The record does however, indicate that most of the legislators who commented on the question believed that it would. Senator Dill, sponsor of the Senate Bill and Chairman of the Conference Committee which reported the legislation, made several statements which clearly indicated that he understood the legislation as not prohibiting the authorizing of subscription broadcasting. During a debate on the Bill on the Senate Floor in response to a question by Senator Walsh of Massachusetts as to whether anything in the Bill would permit "the charging of a fee to listeners-in when messages are broadcasted," Senator Dill stated:

"Mr. President, in the first place, this bill provides that the Commission shall have authority to regulate the type of transmitting apparatus as to its external effect, so that *the Commission would have the power to permit or prohibit the use of such apparatus if it so desired*, but I want to say to the Senator that, in my judgment, *Congress should not pass a law that would prevent a broadcasting station from so equipping itself that people could not listen to its programs unless they had a certain kind of receiving set.* In other words, if a broadcasting station wants to select its clients by selling a certain kind of receiving set or attachments for sets, I do not know any reason why the Congress of the United States should prevent it from engaging a telephone company or movie house from preparing something and not allowing anybody to enjoy it or hear it except by their paying a fee." (Italic supplied.) (68 Cong. R. 2880–2881).

In reply to another question by Senator Walsh, Senator Dill stated:

"Why, if no one presents a program should he not be paid for it?

"Let me say to the Senator that in most countries people are not permitted to have radio free . . . But here in the United States we have built up a free system of broadcasting and reception and it has thrived . . . I do not believe with the condition existing that any broadcasting station can hope to prosper if it attempts to set up a method by which it would charge the listener-in; *but I know of no reason why Congress should interfere with that kind of private business any more than it should interfere with any other kind of private business.*"

Senator Dill made a similar statement in reply to queries by Senator Copeland of New York.

Senator Pittman of Nevada criticized the bill because: "It admits that, under the bill, broadcasters have the authority and power to charge for listening in" (68 Cong. R. 4109). The bill was similarly interpreted by Representatives Davis of Tennessee and Representative Nelson.

The Record indicates, on the other hand, that at least one legislator did not understand the pending legislation as conferring authority upon the Commission to authorize subscription broadcasting. In a reply to a question by Representative Nelson of Wisconsin, then Representative White of Maine stated "The legislation gives no such authority . . ." (68 Cong. R. 2580).

A Bill (H.R. 1687, 69th Cong., 2nd Sess.) introduced by Representative Bloom of New York, which would have prohibited a charge to radio listeners, appears to reflect an assumption on Congressman Bloom's part that the legislation as it stood did not bar Commission authorization of subscription broadcasting. This Bill, however, died in Committee.

During the pendency of the Senate Bill which was subsequently enacted as the Radio Act of 1927, an amendment was introduced which would have authorized the Commission to control charges to listeners. This amendment was stricken in conference. It would seem quite clear that the amendment was predicated on an assumption that the legislation permitted the authorization of broadcast operations involving a charge to listeners. The fact that the amendment was stricken in conference evidently reflected an intention to leave to the discretion of licensees the amount of any charge to listeners for the reception of radio programs.

In examining the legislative history of the Radio Act of 1927 it is relevant to note that the attention of Congress was directed primarily to the problem of regulating the radio industry in terms of its customary mode of operation, and that at that time, as now, advertising revenues constituted the established source of financial support for the industry. This is not to say, however, that Congress intended to make the current financial practice of the industry mandatory. Such an interpretation receives no support in the express language of the statute, and seems hardly tenable in view of the fact that some attention, although limited, was given the question of possible charges for the reception of radio programs.

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 Represenative 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 endeaver 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.

ATTACHMENT B

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 161

CONNECTICUT COMMITTEE AGAINST PAY TV, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1–7) is reported at 301 F. 2d 835. The First and Third Reports on Subscription Television of the Federal Communications Commission, prescribing the conditions under which the Commission would authorize a trial of subscription television operations, are reported at 23 F.C.C. 531 and 26 F.C.C. 265. The Commission's Second Report on Subscription Television has not been officially reported, but is reported unofficially at 16 Pike & Fischer, Radio Regu-

lation 1539. The Commission's Report and Decision granting the application of Hartford Phonevision Co. (now RKO General Phonevision Co.) for authority to conduct a trial subscription television operation is reported at 30 F.C.C. 301.

JURISDICTION

The judgment of the court of appeals affirming the decision of the Commission was entered on March 8, 1962 (Pet. App. 8). The petition for a writ of certiorari was filed on June 6, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 47 U.S.C. 402(j).

QUESTION PRESENTED

Whether the Federal Communications Commission is empowered to license on a trial basis a subscription television service which requires the payment of a fee by the public to receive programs.

STATUTE INVOLVED

The pertinent provisions of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. 151 *et seq.*, are set forth at pages 2–6 of the petition.

STATEMENT

In 1955 the Commission instituted a rule making proceeding to determine whether television broadcast stations should be authorized to transmit programs whose reception by the public in intelligible form would require the payment of a charge (Notice of Proposed Rule Making in Docket No. 11279, 20 F.R. 988). In the Notice of Rule Making the Commission requested comments on the questions whether it had

statutory power to authorize subscription television operations and, if so, whether such operations would be in the public interest (20 F.R. at 989). By a Notice of Further Proceedings of May 23, 1957, the Commission requested further comments on the conditions under which it might be desirable to authorize subscription television on a trial basis (22 F.R. 3758).

Thereafter, in its First Report on Subscription Television (23 F.C.C. 531), issued October 17, 1957, the Commission determined, after a review of the pertinent statutory provisions and their legislative history, that it had statutory authority to authorize subscription television (*id.* at 535–540). It stated, however, that in the absence of a demonstration of the service in operation, it could not determine whether authorization of a subscription system on a permanent basis would be in the public interest (*id.* at 542–543). It concluded that a trial of subscription television under conditions established in advance by the Commission would serve the public interest by enabling the public to register its judgment and by providing operational data on competitive impact, technical standards and the possible need for new legislation to support additional administrative supervision (*id.* at 555–556). The Commission then prescribed the conditions under which applications for trial subscription television operations would be considered (*id.* at 546–555).

On February 26, 1958, the Commission issued a Second Report on Subscription Television, 16 Pike & Fischer, Radio Regulation 1539, announcing that it would not process applications for trial authoriza-

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tion until 30 days after the adjournment of the 85th Congress. This Report followed the introduction in Congress of a number of bills which would have either prohibited subscription television or restricted the Commission's authority to authorize it,[1] as well as adoption of resolutions by the House and Senate Interstate Commerce Committees proposing that the Commission withhold action until specifically authorized by Congress (*id.* at 1539–1540).

When none of these pending bills were acted upon by Congress, the Commission on March 23, 1959, adopted a Third Report in Docket No. 11279, 26 F.C.C. 265, in which it decided to process applications filed in conformity with revised requirements set forth therein. These requirements provided, *inter alia*, that trials would be authorized only in cities with four or more commercial television services; that trial authorizations would be limited to a three-year period, not renewable as of right; and that the licensee would be required to retain control of programs and subscription rates and to furnish periodic and other special reports to the Commission concerning all aspects of the subscription television operation, including the fixing and collection of fees (26 F.C.C. 267–272). In order to insure against a premature establishment of subscription service, the Commission added further requirements (1) limiting the trial of any one system to one city and permitting only one trial operation in any particular community, and (2)

[1] See, *e.g.*, H.R. 586, 85th Cong., 1st Sess.; S. 3201, 85th Cong., 2d Sess.; H.R. 9629, 85th Cong., 2d Sess.; S. 2934, 85th Cong., 2d Sess.

prohibiting the sale to the public of the special receiving devices required for subscription television (*id.* at 266).

At the same time the Commission reaffirmed (26 F.C.C. 266) its intention, announced in the First Report, to hold full public hearings before reaching a decision on the permanent authorization of subscription television (23 F.C.C. 556):

> The Commission will, when it finds that sufficient, meaningful data are available from trial subscription television operations, conduct a public hearing at which all interested parties will have full opportunity to submit information, data and views concerning the foregoing [specified public interest questions] and any other questions which remain to be answered in reaching a decision as to whether the authorization of a subscription television service on some extended or continuing basis would serve the public interest.

On March 26, 1959, the House Interstate Commerce Committee adopted a resolution stating that it had no objection to the authorization of trial subscription television operations as contemplated in the Third Report (105 Cong. Rec. 5362–5363).

On June 22, 1960, Hartford Phonevision Company (RKO) [2] filed an application for authority to conduct trial subscription television operations over its television station WHCT in Hartford, Connecticut, dur-

[2] The name of the applicant was subsequently changed to RKO Phonevision Company, and is now RKO General Phonevision Company. See motion of RKO General Phonevision Company for leave to be named a party-respondent in this Court.

ing 40 hours of the station's 70-hour broadcast week (J.A. 5).[3] The so-called "Phonevision" system proposed by RKO involves the use of an encoder which "scrambles" (renders unintelligible) the video and audio signals of a standard television transmitter and a decoder, placed on the receiver of a subscriber, which restores intelligibility (30 F.C.C. 302–303). The subscriber will be required to pay an installation charge estimated at between $7.50 and $10; a rental charge, not to exceed 75 cents a week, to cover repairs and maintenance service; and a per program charge of from 25 cents to $3.50, with most programs expected to fall within the price range of 75 cents to $1.50 (*id.* at 304). The operation is to be financed solely by these charges; there is to be no commercial advertising (*id.* at 308). RKO's programming plans consist mainly of "box-office attractions" (i.e., programming for which the public would ordinarily pay an admission charge), including first-run motion pictures, legitimate theatre, opera, ballet, concerts, educational features, art and children's films and sports features (*id.* at 307–308).

Following a public hearing before the Commission *en banc,* in which petitioners participated as parties in interest, the Commission, in a Report and Decision issued February 23, 1961, found that a grant of the RKO application for a trial subscription television operation would be in the public interest (*id.* at 301, 321). The Commission concluded that the proposed

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[3] The citation is to the joint appendix filed by the parties in the court of appeals which is presently on file with the Clerk of this Court.

trial would fulfill the objectives of the First and Third Reports on Subscription Television and provide useful information which would assist the Commission in its ultimate determination whether some form of subscription television service on a permanent basis would be in the public interest (*id.* at 310, 321).

In reaching this conclusion, the Commission determined that the arrangements proposed by RKO adequately protected subscribers against the purchase of equipment which might later become worthless (*id.* at 311);[4] that the station licensee would retain adequate control over programs and maximum charges (*id.* at 312–313); that, while some conventional programming in Hartford would be displaced and some program sources diverted to subscription television, the effects would not be substantial, and could, in any event, only be determined by the trial itself (*id.* at 313–315); and that severe adverse effects on the other television stations in the Hartford area could not be expected (*id.* at 315–316). The Commission granted the requested authorization for a period of three years, subject to the conditions of the Third Report and to the further express conditions that the authorization was not renewable as of right and could be revoked

[4] The Commission rejected a contention that installation and rental charges on the decoders should not be permitted, stating (30 F.C.C. 311): "it would appear that such proscription could rob the trial of at least some of its value, for if the decoders were literally given away, we would receive no indication of the public's true capacity and desire to pay some amount toward amortization or depreciation of decoders." The Commission also rejected, as without record support, a claim that the proposed charges were unreasonable (30 F.C.C. 311, fn. 6).

or modified at any time upon notice and hearing (*id.* at 321–322).

The court of appeals affirmed the Commission's decision on March 8, 1962 (Pet. App. 1–7). It did not accept the contention of petitioners that the Commission lacks statutory power to authorize a system which requires the direct payment of fees from the public. The court found that the Commission was given a "broad grant of power" by Congress, subject to limitations not pertinent here, to issue a license to any applicant if the public interest would be served (47 U.S.C. 307(a)), and that Congress had specifically commanded the Commission in Section 303(g) of the Communications Act to "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" (Pet. App. 5–6). The court held that the plain language of the statute "thus makes clear that Congress placed an affirmative duty on the Commission to experiment with and develop the most desirable deployment and utilization of the nation's communications facilities" (Pet. App. 6).

Finding that the distinguishing characteristic of the authorization in this case was its trial nature, the court of appeals also rejected the contention that the predicted dangers of a trial of subscription television rendered such a trial contrary to the public interest (Pet. App. 6–7). It noted that every license for future operation necessarily involves some predictions as to an uncertain future, and found reasonable the Commission's determination that "the public benefits anticipated by the Commission warrant the risks of

the experiment" (Pet. App. 6). The court also pointed out, in this connection, the power retained by the Commission to terminate the trial upon notice and hearing at any time prior to the expiration of the 3-year period, and the Commission's expressed determination to oversee carefully the conduct of the trial.

ARGUMENT

1. The only issue properly before the Court is whether the Federal Communications Commission is empowered to authorize on a trial basis a subscription television system which requires the payment of direct fees by the public.[5] The decision below, upholding this power, was correct and no further review by this Court is warranted.

Petitioners' contend (Pet. 17–20) that, because of the novel nature of subscription television, the Commission is without power to license it, in the absence of a specific affirmative grant of such power in the Communications Act. This contention rests on a misreading of the Act which, as found by the court

[5] "The dangers inherent in a pay-TV operation" set forth at pages 15–17 of the petition represent petitioners' predictions of the effects of permanent authorization of subscription television and do not provide a reason for the grant of certiorari in this case. It is for the precise purpose of providing operational data which will enable the Commission to evaluate the impact and benefits of subscription television before deciding whether to authorize it on an extended basis, that this trial was authorized. A determination of the public interest objections to permanent operation asserted here by petitioners will be made at a further hearing to be held by the Commission at the conclusion of the trial operation (23 F.C.C. 556).

of appeals, confers a "broad grant of power" upon the Commission (Pet. App. 5). Thus, Section 307(a) authorizes the Commission, subject to limitations not pertinent here, to grant a station license to any applicant "if public convenience, interest, or necessity will be served" (47 U.S.C. 307(a); Pet. 6). Sections 303(a) and (b), 47 U.S.C. 303 (a), (b), Pet. 4), empower the Commission to classify stations and to prescribe the nature of the service rendered by each class of station and each station within any class. Congress, in Section 303(g), also directed the Commission, "Except as otherwise provided in this Act," to "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" (47 U.S.C. 303(g); Pet. 5). Since there is no provision in the Communications Act either prohibiting a service requiring the direct payment of a fee by the public or limiting the use of radio frequencies to those services which were common when the law was enacted, these provisions, without more, afford ample basis for the Commission's action and a full answer to petitioner's attack upon it.

The Communications Act does not itemize the types of radio service which the Commission is authorized to license and neither the statute nor the cases interpreting it provide a ground for petitioners' assertion that such specific authorization should be required in the case of subscription television.[6] For,

[6] The authorization of a subscription service is not without precedent. See *In the Matter of Muzak Corporation*, 8 F.C.C.

as this Court has declared, "Congress was acting in a field of regulation which was both new and dynamic." Its "dominant characteristic . . . was the rapid pace of its unfolding." *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 219. Congress "did not frustrate the purposes for which the Communications Act of 1934 was brought into being by attempting an itemized catalogue of the specific manifestations of the general problems for the solution of which it was establishing a regulatory agency." Instead, it defined broad areas for regulation under governing standards (*id.* at 219–220) and, recognizing that the Commission's "authority covers new and rapidly developing fields" (*United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, 203), affirmatively directed the Commission to encourage new uses for radio (47 U.S.C. 303(g)),[7] and clothed it with wide discretion in choosing among the competing demands for frequencies.

As the court of appeals held upon a careful examination of petitioners' contention, the plain language of the statute places upon the Commission "an af-

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581; *Functional Music, Inc.* v. *Federal Communications Commission*, 274 F. 2d 543 (C.A.D.C.), certiorari denied, 361 U.S. 813.

[7] Petitioners' reliance (Pet. 20) upon *Interstate Commerce Comission* v. *United States ex rel. Los Angeles*, 280 U.S. 52, is misplaced. In that case, the statute authorized the Interstate Commerce Commission to require a carrier to permit another carrier to use its terminal facilities. This Court refused to extend that power to permit the Commission to compel carriers "to build a union passenger station in a city of the size and extent and the great business requirements of Los Angeles" (280 U.S. at 68).

firmative duty . . . to experiment with and develo
the most desirable deployment and utilization of th
nation's communications facilities" (Pet. App. 6
The license challenged here falls squarely within th
scope of that duty.[8]

2. Petitioners' contention (Pet. 22–25) that th
Commission erred in authorizing a trial subscriptio
television operation without first determining whethe
it can or should regulate rates, is raised for the firs
time in the petition and is therefore not properl
before the Court. This allegation of error was nc
included in the notice of appeal or in the stipulate
issues filed with the court of appeals (J.A. 1–4)
Contrary to petitioners' present contention (Pet. 2
fn. 27), it was not presented to the court of appeal
in the briefs below.[9]

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[8] Petitioners also urge (Pet. 20–21, 22) that, while the Com
mission found it had statutory power to authorize subscriptio
television on a regular, permanent basis, the court of appeal
did not reach this question and found such authority only t
authorize a trial test. We do not believe this to be a correc
evaluation of the opinion below, so far as the issue of basi
authority raised by petitioners is concerned. Statutory suppor
for the Commission's jurisdiction to authorize a system requir
ing the payment of fees by the public is equally necessar
whether that authorization be for a trial or a permanent opera
tion. Neither the Commission nor the court below (nor, indeed
petitioners) made the alleged distinction. As petitioners recog
nize (Pet. 21, fn. 23), the court below correctly stated petition
ers' contention as a broad attack on the Commission's statutor
power to authorize any system requiring the direct payment o
fees from the public.

[9] In their briefs before the court of appeals (copies of whicl
are being lodged with this Court), petitioners assumed that th
Commission had no power to regulate rates in arguing that it
had no power to authorize subscription operations, but did no

In any event, the contention is without merit. This is a trial authorization. The information obtained will assist the Commission in determining whether rates should be regulated, and, if so, what kind of regulation would be required and whether additional legislation might be desirable (see First Report, 23 F.C.C. 531, 533). Petitioners' assertion, made for the first time here, that the Commission was required to answer these questions in advance of the trial authorization would put the cart before the horse. Moreover, the absence of such a determination in no way threatens the public interest. Should the rates charged for the trial service prove objectionable at any time, the Commission, which has required the licensee to retain control over maximum charges (30 F.C.C. 311–312) and has itself retained the power to revoke or modify the authorization upon notice and hearing (*id.* at 321–322), is amply prepared to act.

The short answer to petitioners' contention that the Commission erred in failing to determine its power to regulate the rates charged when and if permanent operations are authorized, is that the trial authorization being contested in this case nowhere presents that question. It will be time enough to consider this issue when the information to be obtained by the trial operation is available and when the question whether to authorize a permanent operation is before the Commission.

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urge that the Commission had erred by failing to consider whether it could or should regulate rates (Brief for Appellants, pp. 20–21, 22–23; Reply Brief for Appellants, pp. 2–6).

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted.

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Federal Communications Commission.

JULY 1962.

Mr. BROYHILL. I have no other questions at this time, Mr. Chairman.

Mr. MACDONALD. Mr. Van Deerlin.

Mr. VAN DEERLIN. Good morning, Mr. Chairman.

In the event that the decision were to go forward with this subscription television system, has the Commission given any thought, Mr. Chairman, to the guidelines it would impose in awarding licenses? I have visions, in every market area, of all current licensees applying to provide the subscription signal.

Mr. HYDE. Nothing beyond what has been suggested in the committee's recommendations, Congressman Van Deerlin. We have not, as a matter of fact, had an opportunity to discuss the committee's report since the oral argument. Attachment B to the committee's report, a suggestion for further rulemaking going to technical standards, very general ones, was released by the Commission for comments on July 26.

(The document referred to follows:)

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION, WASHINGTON, D.C.

FCC 67-891-3085

In the matter of Amendment of Part 73 of the Commission's Rules and Regulations (Radio Broadcast Services) to provide for Subscription Television Service

(Docket No. 11279)

ORDER SETTING ORAL ARGUMENT AND SECOND FURTHER NOTICE OF PROPOSED RULE MAKING

(Adopted July 26, 1967; released July 31, 1967)

By the Commission: Commissioners Bartley, Lee and Loevinger absent.

1. The Commission has before it for consideration its Order released in this proceeding on July 14, 1967 (FCC 67-819; 32 F.R. 10606, July 19, 1967), and the Attachment thereto which consisted of a Report of the Commission's Subscription Television Committee dated July 3, 1967. The Order stated that, as an aid in studying and resolving this matter, the Commission intended to hold oral argument in the early fall in this proceeding and would specify a date for the argument by a subsequent order. It also stated that interested parties could file written comments or outlines of oral arguments, not to exceed 50 pages, on or before September 15, 1967.

2. The Order further said that the oral argument would be most useful if addressed to the report of the Subscription Television Committee. That report consisted primarily of a proposed Fourth Report and Order and a Second Further Notice of Proposed Rule Making herein, which the Committee transmitted to the Commission and recommended for adoption. The Fourth Report and Order would, if adopted, establish a nation-wide over-the-air subscription television (STV) service and, with the exception of rules governing STV system performance capability, would promulgate rules governing that service. The Committee recommended that the Second Further Notice of Proposed Rule Making, which invites comments on proposed rules governing STV system performance capability (and assumes that STV would not be limited to the use of a single technical system), be adopted simultaneously with the Fourth Report and Order.

3. After further consideration, the Commission has today determined the date on which oral argument will be held, and has also decided that it would be in the public interest to issue at this time the Second Further Notice of Proposed Rule Making inviting comments on proposed rules concerning STV system performance capability, instead of waiting until final decisions which might favor adoption of the Fourth Report and Order are made.

4. The reason for the decision to issue the Second Further Notice of Proposed Rule Making at the present time is that this will permit the Commission to give consideration to the technical matters concerning system performance capability sooner so that if, after oral argument, it should be decided to establish an STV

service and not limit it to the use of a single technical system, the technical and other matters can be considered concurrently and the new service could get under way with a minimum of delay.

5. It is emphasized that the decision to issue the Second Further Notice of Proposed Rule Making at this time is not to be construed as a prejudgment of the basic issue of whether a nation-wide STV service should be established, or if the issue of whether, if authorized, STV should be restricted to the use of a single technical system or permitted on any system which meets general system performance capability standards established by the Commission. The decision, it is repeated, is solely for the purpose of expediting an earlier commencement of the service should it be decided that such a service is in the public interest and that use of multiple systems should be permitted.

6. The Commission has studied detailed specifications of present or proposed STV systems submitted by parties to this proceeding. This has helped in the formulation of the proposed rules contained in the Appendix attached hereto which would permit the use of any STV technical system which meets the standards set therein. These rules would require adequate performance of STV systems in serving subscribers and in avoiding any increase of interference to conventional TV services.

7. The Commission does not presently foresee the need for special technical operating requirements for STV, and in the absence of such requirements the operating requirements for conventional television station operation will apply. Should any parties believe that special rules on the subject are necessary for STV, their suggestions and comments would be welcome.

8. Authority for the rule amendments proposed herein is contained in Sections 4(i), 301 and 303(e), (f), and (r) of the Communications Act of 1934, as amended.

9. Accordingly, it is ordered, That pursuant to the procedures set forth in Section 1.415 of the Commission's Rules and Regulations, interested parties may, in response to the Second Further Notice of Proposed Rule Making, file comments on or before September 29, 1967, and reply comments on or before October 20, 1967. All relevant and timely comments and reply comments will be considered by the Commission before final action is taken in this proceeding. In reaching its decision in this proceeding, the Commission may also take into account other relevant information before it in addition to the specific comments invited by this Notice.

10. It is further ordered, That, in accordance with the provisions of Section 1.419 of the Rules and Regulations of the Commission, an original and 14 copies of all comments, replies, pleadings, briefs, and other documents filed in the proceeding shall be furnished the Commission.

11. It is further ordered, That oral argument will be held in this proceeding at the Commission's offices in Washington, D.C., on October 2, 1967.

12. It is further ordered, That parties interested in participating in said oral argument shall notify the Secretary of the Commission in writing on or before September 15, 1967, briefly setting forth their intention to appear at the argument, their position in this matter, and the approximate amount of time they wish to use in argument: *Provided*, That interested parties may, in addition to the aforementioned brief submission, submit (in a separate filing) written comments or outlines of their arguments, not to exceed 50 pages, on or before September 15, 1967, pursuant to our Order released on July 14, 1967, in this docket: *And provided further*, That the aforementioned brief submissions, comments, and outlines of arguments shall not be addressed to that portion of the report of the Subscription Television Committee dated July 3, 1967, which consisted of the Second Further Notice of Proposed Rule Making pertaining to system performance capability standards.

13. It is further ordered, That after the various requests filed pursuant hereto are received, the amount of time allowed to various parties will be specified by further Order, which will also set forth the order of presentation.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

APPENDIX

1. It is proposed that Section 73.644 of the Commissions Rules and Regulations be amended by the addition thereto of a new paragraph (b) as follows:

§ 73.644 Equipment and system performance requirements.

* * * * * * *

(b) The criteria for type acceptable of subscription television systems are as follows:

(1) The system shall be capable of operating by delivering a suitable signal to the antenna input terminals of receivers designed for reception of a signal meeting technical standards for color or monochrome television transmission and accompanying aural signal as set forth in Subpart E of Part 73 of the Commission's Rules. For the purpose of this requirement, a "suitable signal" shall be one which, except for distortion or changes caused by the transmitting antenna, receiving antenna or entering in the propagation medium, complies with all technical standards for color or monochrome transmission and accompanying aural signal set forth in Part 73 of the Commission's Rules.

(2) Spectral energy in transmission shall not exceed limitations set forth in §73.687 (i).

(3) No increase in width of the television broadcast channel (6 Mc/s) shall be required.

(4) Visual power (peak or average) and aural power shall not be necessary in excess of that now authorized, to provide coverage equal to that obtained by normal transmission standards.

(5) The encoded visual and aural programs shall be recoverable without perceptable degradation as compared to the same programs transmitted in accordance with Commission monochrome and color standards.

(6) Internal modifications to subscribers receivers shall not be required.

(7) Interference to conventional television and subscription television, cochannel and adjacent channel, monochrome and color, shall not exceed that occurring from conventional television broadcasting conducted in compliance with the standards of Subpart E of Part 73 of the Commission's Rules.

(8) Susceptability to interference of any kind shall not be greater than with conventional television broadcasting conducted in compliance with the standards as Subpart E of Part 73 of the Commission's Rules.

Mr. HYDE. I would expect that if the Commission did move ahead after due deliberation on the record we have, that there would have to be some further consideration as to how we went about it.

Mr. VAN DEERLIN. What consideration has been given to the impact of CATV?

Mr. HYDE. It is discussed to some extent in the committee's report here. I may say the community antenna activity has all developed since subscription TV was first suggested and has largely become a factor in broadcasting while this case has been under consideration.

The committee notes it and indicates that in its judgment the Commission should not wait for the further development of community antenna business.

Mr. VAN DEERLIN. From an engineering standpoint isn't the signal on CATV an improvement over the airborne signal?

Mr. HYDE. In many instances it is.

As a matter of fact, the interest in community antenna systems was based in the first instance on the inability of consumers in certain situations to get an adequate signal. Of course, it has now been expanded to become a service which brings new signals into an area through microwave and various relays.

But the original justification for it was to provide a more adequate signal.

Mr. VAN DEERLIN. Now, of course, the desire of CATV is to get into program originations. This would make CATV a form of subscription television, would it not?

Mr. HYDE. It would be very hard to make a distinction between a subscription service by cable and a subscription service over the air when the only difference would be the manner in which it is delivered to the house.

Mr. VAN DEERLIN. I presume that may have been a factor in the Commission's desire to go slow in the matter of adjudicating the dispute that has arisen over CATV?

Mr. HYDE. There have been arguments that CATV looks toward the pay TV system. There have been arguments against the expansion of it on that ground. But actually the Commission's rulemaking in CATV was to find an accommodation between conventional broadcasting and CATV, taking into consideration the fact that the CATV operators use the product of the broadcasting industry in the main and their distribution of it would sometimes interfere with the market distribution of conventional TV.

What we have actually done is try to reconcile the two or to find accommodation such that free TV would not be impaired but such that the people whow ould have need for additional signals or improved signals could get them under conditions that would not jeopardize free TV.

I may say it has been a most difficult challenge for us. We are watching with considerable interest the development of copyright law in this field, hoping that it will help in the resolution of the problems that have arisen.

Mr. VAN DEERLIN. Your mail has been somewhat augmented, has it not, by the dispute over CATV?

Mr. HYDE. It has. Mass communications has a way of generating mail. A dispute or an issue as to a broadcast matter or a CATV matter can become the subject of a lot of correspondence.

Mr. VAN DEERLIN. Thank you, Mr. Chairman.

Mr. MACDONALD. Mr. Harvey.

Mr. HARVEY. Mr. Chairman, you have been with the FCC for a good many years.

Mr. HYDE. Yes, sir.

Mr. HARVEY. I wonder if you can straighten out some of us on the committee who have not been on the committee such a long time regarding the various resolutions.

In your statement on page 3 you refer to the 1958 House committee resolution.

Was that adopted by the committee first and then by the House?

Mr. HYDE. Only by the committee.

Mr. HARVEY. The gist of that resolution was that it was a sense of Congress resolution against subscription TV?

Mr. HYDE. That is correct.

Mr. HARVEY. Is that right?

Mr. HYDE. Yes, sir.

Mr. HARVEY. In other words, that reflected the sense of the committee?

Mr. HYDE. That is right.

Mr. HARVEY. Now you refer then in your history here to another resolution in 1959 which somewhat amended the earlier resolution.

Mr. HYDE. Yes.

The restrictions of the earlier one were eased so as not to preclude a trial operation.

Mr. HARVEY. Was that a sense of the committee resolution?

Mr. HYDE. Yes.

Mr. HARVEY. Was that passed by the House?
Mr. HYDE. Only by the committee.
Mr. HARVEY. Neither of these resolutions was passed by the full House or by the Senate; is that correct?
Mr. HYDE. That is correct.
The latter one was discussed, Congressman Harvey. The latter resolution was discussed on the floor of the House by the chairman of the House committee.
Mr. HARVEY. But to the best of your knowledge neither one was approved by the House?
Mr. HYDE. To the best of my knowledge neither one was approved by the House.
Mr. HARVEY. So that we are in a position here where the committee, itself, has expressed to the FCC what its thinking is with regard to subscription TV; is that correct?
Mr. HYDE. That is correct.
Mr. HARVEY. Although it has been discussed on the floor of the House and not repudiated by the House, nevertheless the full House has never expressed its thinking to the FCC?
Mr. HYDE. That is correct.
Mr. HARVEY. As far as what Congress has said, however, I gather that its thinking has always been clear, that is that it thus far has been opposed to subscription TV with the exception of the permission granted for the experiment in the later resolution.
Mr. HYDE. That would be a correct summary of the House committee's views on the matter.
Mr. HARVEY. Has there been any other act by Congress to make the FCC think that they supported subscription TV?
Mr. HYDE. No. I do not know of any.
Mr. HARVEY. So that we are in the position here further where the FCC at the present time, basing its authority for its present hearings not on anything that the Congress has authorized it to do specifically but rather upon the authority that it feels is granted by the courts in the earlier law; is that the fact?
Mr. HYDE. Congressman Harvey, I would rather put it this way. The Commission relies upon the delegation of authority and power granted by Congress in the basic act which the Commission administers as construed, of course, by decisions of the court.
Mr. HARVEY. We frequently hear with regard to subscription TV, and throughout the report of the subcommittee that I read, some sort of indication or a wish that Congress would give a certain amount of guidance.
Has the FCC ever come before the committee here and requested Congress to give guidance?
Mr. HYDE. We have made statements from time to time such as those I offered today indicating that we would welcome the guidance of Congress.
Mr. HARVEY. Does the FCC feel that the silence of Congress in this regard is a consent to what the FCC is presently doing?
Mr. HYDE. No. Our concern with the question is not based upon silence of Congress at all. It rather has been based upon the Commission's feeling that it must proceed with its duties under the Act,

granted always that Congress may, if it sees fit, modify the act which we administer.

Unless they see fit to do that we must continue to administer the act that we already are charged with administering.

Mr. HARVEY. I just have a couple other questions here.

Is the case presently before the FCC considered to be one within its rulemaking authority?

Mr. HYDE. Yes, the Commission has so stated in its last notice on this matter.

Mr. HARVEY. Is it presently in what we would call and adjudicatory posture?

Mr. HYDE. Yes, it is.

It is in the adjudicatory posture in the sense of a rulemaking proceeding where you have various parties presenting conflicting points of views.

We did, as a matter of fact, hold hearings on the record on Monday and Tuesday of last week. The report issued by our committee was the subject of the discussion.

Mr. HARVEY. I have no further questions at this time, Mr. Chairman.

Mr. MACDONALD. Just to clear that point up—we all seem to get back to the jurisdiction question—earlier you indicated to me that the memorandum of law which was sent to Mr. Harris in 1957 indicated that in the judgment of the Commission they did have jurisdiction.

Mr. HYDE. That is correct.

Mr. MACDONALD. Since you gave me that answer, Mr. Chairman—I am not being forceful but I have just read it and it does not say that at all.

If you will pardon me I will read it to you and you can judge for yourself what it says.

It says—

The question of the adequacy of the Commission's regulatory powers presents different problems with respect to full-scale nationwide subscription television operations. We cannot determine until after a reasonable trial period whether the authorization of subscription TV on some general scale would be in the public interest.

This is the important part I am coming to now.

"Nor can we determine at this time"—this is the letter by which you asserted jurisdiction—"nor can we determine at this time the conditions which it may be necessary to impose ultimately on subscription television operations if their authorization on some general basis should be found to be in the public interest. Thus it would be in our view premature to attempt to ascertain whether amendments to the Communications Act would be required."

So, obviously he was saying that you did not have jurisdiction. If that is the basis under which you are asserting jurisdiction it seems a little flimsy one to me.

Mr. HYDE. May I discuss the matter a little fully.

Mr. MACDONALD. Of course.

Mr. HYDE. I believe the language you are referring to has some reference to what the powers of the Commission might be to regulate the fees. Under the committee's suggestion here there would be no effort at regulations of that kind. I also would like to qualify my earlier answer about the Commission's power.

The Commission's authority under the act to authorize this service would be based upon a finding that the operation of such a service would be in the public interest.

What I should have said is that we are confident of both our authority and our responsibility in the matter conditioned on a finding that the operation would serve the public interest, convenience, and necessity.

Mr. MACDONALD. Then what you are talking to me about, this memorandum of law——

Mr. HYDE. With your permission we will bring this memorandum of law down to date. (See p. 149.)

Mr. MACDONALD. Fine. Thank you.

Mr. Brotzman.

Mr. BROTZMAN. I would like to recap, Mr. Hyde.

It seems to me that we can only talk to you at this particular point relative to something we call a legal conclusion without going into the substance of this particular matter.

What we are talking about now is jurisdiction.

I would understand and I understand clearly, and I think the subcommittee does, that you have arrived at a legal conclusion that you do have jurisdiction over this particular matter predicated by a case which I don't think is exactly in point, and I think you will admit that, because it relates to experimental TV, bolstered by the basic power in the Federal Communications Act of 1934.

Now there is a conflict in conclusions, obviously, that although Congress, according to your testimony, has not spoken in its entirety on the question, yet the only expression you find of record comes from this particular committee at the time Mr. Harris was chairman when they said in essence they were reserving jurisdiction or that they withheld jurisdiction.

As of this particular moment, I think the chairman of the subcommittee stated correctly, that if we do not act, the law is quite clear that we have by inaction assented to the legal proposition that you are correct.

I think the law is rather clear in this regard, at least from what I have read and from what I understand. These are just a few conclusions I have drawn from listening to the testimony as of this moment.

Getting down to the last official pronouncement of the Commission on March 24, 1966—that is the last pronouncement, is it not, that relates to the Zenith-Teco petition?

Mr. HYDE. Right.

Mr. BROTZMAN. You restate your proposition there.

First of all that you do have jurisdiction. I understand that. Now the second paragraph is one that kind of points up what I have been talking about.

First of all, was this passed unanimously by the full Commission?

Mr. HYDE. Yes, it was.

Mr. BROTZMAN. You do recognize the interest of Congress in this subject and in providing time for Congress to act if it so desires before the proceeding is terminated?

Mr. HYDE. That is correct.

Mr. BROTZMAN. What do you mean by that? The words are clear but I want to be sure I understand.

Mr. HYDE. We want to make it clear that we did not want to be seemingly acting in disregard of Congress. We recognize that this is a field of great interest and in the event Congress wished to resolve the issues here or come before the Commission we think it only appropriate to provide time for that attention.

May I correct an answer I made previously.

You asked me if the last expression of the Commission was unanimous. It was as to the members present but Commissioner Loevinger was not present at the meeting.

Mr. BROTZMAN. So what you are really saying there and once again directing our attention to the very fine point of jurisdiction, you say that under the existing law and the one decision, court of appeals decision, you say it is your conclusion that you have jurisdiction.

However, recognizing the right of the Congress to act in this regard if we desire to assert our authority.

Is that a fair statement?

Mr. HYDE. Right.

Mr. BROTZMAN. I have just one more question and this relates to paragraph 5 of your 1966 pronouncement.

In the last sentence you say that, "Subscription television on a nationwide scale can be effectively integrated into a total TV system with advantages to the viewing audience. That appears to be a reasonably sound conclusion at this point."

While I know that you have not finally determined, it would indicate to me that you feel that there is merit in this particular use of the medium.

Mr. HYDE. I would say that what you have read is the view of the committee that made a rather intensive study of this. We will all be looking at it again in the light of the hearing just concluded.

Mr. BROTZMAN. As of this particular moment all I am trying to do is to nail down the FCC's position.

Mr. HYDE. That is the latest document on the subject.

Mr. BROTZMAN. Thank you.

Mr. MACDONALD. On that point, in the document they have indicated that for the first time FCC would be going into the program requirements.

Isn't that correct?

Mr. HYDE. Mr. Chairman, these rules suggested by the committee are a new concept. It is the first time that this approach has been mentioned according to my recollection.

Mr. MACDONALD. I have been on the committee for quite a while now and I have never heard it suggested by anybody, and I mean anybody, that FCC should get in the business of programing and telling the stations that they have to reserve 10 percent of their time for the ballet and drama of substance, because frankly we just passed a bill that is going to cost quite a good deal of money where we authorize money to educational types of stations for just the things that you say the pay TV people will have to use up to 10 percent of their time doing.

Mr. HYDE. Mr. Chairman, without involving myself in an expression of opinion about the substance of the provisions here, may I just make this observation.

The committee is apparently in its recommendations to the full Commission trying to devise regulations that would permit the opera-

tion of a subscription TV service in a manner that would prevent it from having untoward effects on free TV.

I think those regulations were directed to that. Now whether they are good or bad I have no views today.

Mr. MACDONALD. Could I ask you this?

If I had enough money and I was running for an office and I wanted to go on pay TV and they were willing to sell me the time, could I go on it and campaign for myself or for somebody else for an office? Does the fairness doctrine operate? Who would put up the money for my opponent?

Mr. HYDE. That would be his problem I do believe.

Mr. MACDONALD. I think it is your problem.

Mr. HYDE. I did not mean to be facetious about the matter. I guess we would all have a problem on the matter. The committee's report says that section 315, fairness doctrine and other policies that have been developed in the licensing regulation of broadcasting would apply to subscription TV. It looks toward the application of the same policies and principles that pay TV as apply in the conventional TV.

Mr. MACDONALD. It might look forward to it but the practicality of the matter might not lend itself to what is being looked forward to.

Mr. HYDE. I must agree there might be some problems requiring some new procedures for resolving them.

Mr. MACDONALD. Mr. Brown.

Mr. BROWN. Apparently we have two basic problems here for the committee to render some decision on.

First, does the FCC have the right to regulate or to authorize the institution of pay TV and, secondly, do you have the right beyond that to go beyond the regulations you have just been discussing with the Chairman?

Mr. HYDE. That was challenged in the hearing before the Commission. There was a good deal of argument about the right of the Commission to make the type of regulation which has been suggested by the committee. We will have to consider those arguments very carefully.

Mr. BROWN. If the committee sits silent and therefore assents to the Commission's right to license pay TV, would our silence also be considered as assent to the regulations of program content and other material which have been recommended?

Mr. HYDE. I would not give any such silence that construction.

Mr. BROWN. What action would you suggest that the committee take in case it would approve your licensing pay TV or subscription TV but not approve the idea that the FCC would proscribe program content?

Mr. HYDE. I would not have any suggestions on that at this time. I note that when the committee amended its earlier resolution, adopted an amendment to its earlier resolution removing the restrictions against the test, insofar as the resolution is concerned I think the committee indicated an interest in studying this subject further. I am pleased that you are doing that. I really do have difficulties here in avoiding getting into a discussion of the substantive issues of our hearing.

Mr. BROWN. Let me go back to these resolutions. I presume it is your feeling that the committee's adoption of the resolutions would

serve as a guide as to what the sense of Congress may be in this area of pay TV?

Mr. HYDE. The resolutions certainly indicated an interest. We certainly have every respect for the interest of Congress.

Mr. BROWN. They represent an interest by the committee and not a formal action by the entire Congress.

Mr. HYDE. We are not disposed to treat the interests of the committee lightly at all, as you can tell by the procedures that we have followed.

Mr. BROWN. May I ask if you consider the expression of the committee as equivalent to an expression by the Congress?

Mr. HYDE. No, I do not. As a lawyer I could not. I do not believe you would expect me to.

Mr. BROWN. What relationship do they have? They are a guide, but not a legal proscription.

Mr. HYDE. That is right. They are an advice, let me put it that way.

Mr. BROWN. Let me ask about a couple of resolutions. In the first place, I note that there has been a change in the language we are using in broadcast legislation from the language used 8 or 9 years ago in these resolutions, or at least I presume that is the case because of the use of the term "radio and wire transmission." But in that language used I find difficulty reading anything but CATV as it is now operating, to wire transmission of pay TV.

Mr. HYDE. There is no doubt but what this development of cable television has brought about this new interest in the term "wire" or the broader look at the whole subject.

Mr. BROWN. There has been a specific limitation by the FCC, however, to experimenting in subscription television and its use of the spectrum but not much control of the commercial usage of CATV.

Mr. HYDE. This is true. Our regulations in the community antenna field are just regulations. We have not asserted licensing authority. We do consider petitions for waivers of regulations. It sort of looks like granting a permit in some circumstances. But our overall posture there is one of administering some rather broad regulations which have nothing to do with original franchising, these are normally granted by the communities. What we have endeavored to do is bring a bit of order into the distribution of broadcast programs, which absent Commission regulation tended to disregard the rights of local stations.

Mr. BROWN. You say it has nothing to do with original franchising but in certain instances original franchisers have gotten into the CATV business. My question is, Why would you consider a resolution by the committee which speaks to subscription TV by radio as a more serious proscription than the use in that same resolution of subscription TV by wire and not have moved more quickly to control CATV development by certain licensees versus the interest expressed in subscription pay TV?

Mr. HYDE. Congressman, I do not believe that we have made such a distinction. Up to now there have been some program originations but by and large CATV handles programs originated by the networks and stations. Local origination is incidental to a larger interest in handling the programs originated by the networks and stations.

Mr. BROWN. I have another question but first I have to check some language, Mr. Chairman.

Mr. MACDONALD. While Mr. Brown is checking this I would like to ask you a question which I don't think is unfair and you don't have to answer if you don't want to.

I quite agree this thing has been kicking around for an awful long time. You say you look for congressional guidance. Every time the Congress has done anything about this subject, including under our former chairman, Mr. Harris, they have just stood up on the floor, this committee, and have been opposed to subscription TV. So my question is a small one, but would you not think that is a little bit of guidance?

Mr. HYDE. Mr. Chairman, I would suggest that the last expression from the committee was to acquiesce in the carrying on of an experiment. We are now looking at it in the light of the information developed in the experiment.

Mr. MACDONALD. Let me ask you this question: Does the Commission contemplate taking any action before this committee or the Congress has a chance to vote Mr. Dingell's bill up or down?

Mr. HYDE. We have not met to discuss this matter since our hearing last week. But I will give you my personal view that I would not expect precipitate action.

Mr. MACDONALD. In other words, you would wait for the Congress to act on the bill before us or perhaps another resolution, if that is the sense of the committee, such as Mr. Harris put out?

Mr. HYDE. I would assure you of this, that the Commission is certainly not going to take hasty action while the committee has this matter under consideration.

Mr. MACDONALD. That is one of the reasons these hearings were called, despite of what you have read in the trade press and other places, was actually merely to avert a head-on collision between one of the branches of Congress and the Congress. Certainly they were called for October 2 before it was realized that that was a religious period of time and it was not to try to exercise any heat on the Commission. I want all the Commissioners to understand that.

The Congress has felt strongly about this. Several members of this very committee have. Therefore, we felt it was necessary that we hold hearings at a time convenient to you, but close enough so that we would not run into any difficulties between each other.

Mr. BROWN. Will the Chairman yield?

Mr. MACDONALD. Surely.

Mr. BROWN. The language to which I referred is on page 2 of Committee Chairman Harris' House Resolution 130, January 20, 1959. I want to be sure I understand what your view of this is. This language, if I may impose on the Commission's time, reads: "*Resolved*, That the Senate and House of Representatives in Congress assembled except as provide in section 2, until new legislation has been enacted setting forth the terms under which pay television programs may be broadcast or transmitted"—Congress gave a clear indication by radio or wire—"(1) the Federal Communications Commission may not authorize any person to broadcast or to render a communication service by radio or wire which would aid in the broadcast or transmission of any pay television program; and (2)," and it goes on and I presume your feeling is that the key word is "programing," pay television programing, rather than pay to receive an improvement of existing programing?

Mr. HYDE. I think that is a valid distinction.

Mr. BROWN. I am trying to get the separation now in my mind the same as in yours between CATV and subscription television. Is that the distinction where a person pays to watch a program versus where a person pays to have the quality of programing improved or the availability of programing broadened?

Mr. HYDE. There was this distinction with the original CATV. But as they have explained it they have tended, as you have put it, to broaden the number of channels that would be available and actually became distributors as well as improvers of the signal.

Mr. BROWN. Right now CATV does two things; does it not? It improves the quality of the signal or it increases the selection of signals that the viewer may receive?

Mr. HYDE. Right.

Mr. BROWN. And that is all.

Mr. HYDE. They increase the number of broadcast signals that are available but to some extent they are beginning to do program originations. That is a new service.

Mr. BROWN. Are these FCC licensees?

Mr. HYDE. They are not licensees, except to this extent. We have issued permits for microwave systems to provide carriage in situations where a signal could not be found over the air.

Mr. BROWN. Let us say a CATV operator has one of these scanning devices which scans the weather report or the news headlines or whatever it may be that he originates in his operation and he is not an FCC licensee but people are paying to receive the signal which he sends out and this is the program which he originates in his studio.

Now, that is not subscription or pay TV; that is CATV?

Mr. HYDE. By usage in the trade that is CATV. Is it not also the same function that subscription TV performs?

Mr. BROWN. I am asking you. The committee has to know what the FCC's view of the distinctions may be.

Mr. HYDE. Subscription TV undertakes in the context of that term as used in the committee's report to bring some programs to the public that were available only through box office arrangements. They propose to bring in new movies, sports attractions not available by conventional TV. But when you do have a program service of any kind originated by someone, delivered to your house for a fee, how do you distinguish it from subscription TV by function? They begin to look very much alike, don't they?

Mr. BROWN. It seems to me if Mr. Macdonald wishes to use subscription TV to go on the air and campaign and his constituents who subscribe to his viewpoints want to pay money to hear him on subscription TV, it may not be a lot different from his being interviewed in the studio or having his presentation made on CATV where people also pay to have that channel selection. I don't know whether Mr. Macdonald is box office or not.

Mr. HYDE. We may have solved this problem of the television appearances for candidates.

Mr. KORNEGAY. Will the gentleman yield for a question?

Mr. BROWN. I yield.

Mr. KORNEGAY. With reference to CATV, Mr. Chairman, to what extent, if any, have any of the CATV systems gone beyond weather and news in their program originations?

Mr. HYDE. I have been informed that in some instances they are carrying local advertising. I do not have exact information as to other programs beyond weather and news. I am sorry, it has come to my attention that in some communities they have presented the city council, that there have been some efforts to put on what in broadcast field is called public interest programing, local civic activities.

Mr. KORNEGAY. In other words, beyond the scope of news and weather?

Mr. HYDE. Yes.

Mr. KORNEGAY. Do you promulgate rules and regulations with reference to that situation?

Mr. HYDE. We have no rules on that.

Mr. KORNEGAY. You have no rules on program originations so far as CATV is concerned?

Mr. HYDE. I believe we have an outstanding notice. You are asking me do we have any present rules?

Mr. KORNEGAY. Right.

Mr. HYDE. I think not.

Mr. BROWN. If I may make a final observation, broadcasting the city council was one of the things claimed as a good reason we should not finance by the taxpayers and approve by the Congress the so-called recent Public Broadcasting Act.

It seems to me that we have a very definite blurring of the lines, perhaps the result of the technical developments, the state of the art, between instructional television, educational television, cable television, subscription television, and whatever that old form of television we used to have was.

Mr. MACDONALD. Mr. Kornegay.

Mr. KORNEGAY. Your rules and regulations you have under consideration in connection with subscription television, Mr. Chairman, I rather run to the licensee and not to the promoter or sponsors of the programs to be seen on STV; is that right?

Mr. HYDE. They would run to the licensee.

Mr. KORNEGAY. He is the only one you have any jurisdiction over?

Mr. HYDE. That is right. This would be similar to the situation with respect to the network regulations. We call them network regulations, but they are directed to stations.

Mr. KORNEGAY. You have no direct authority over the networks?

Mr. HYDE. That is right.

Mr. KORNEGAY. The promoters of STV would be situated with the networks?

Mr. HYDE. I think the Commission would have a considerable amount of power in this respect; that it could preclude a licensee from making contractual arrangements with a supplier that would, for instance, limit the licensee's choice of programs, matters like that.

Mr. KORNEGAY. You do not allow subscription TV under your rules and regulations?

Mr. HYDE. The committee's recommendation would allow it in only those communities where there are as many as five television stations and would permit it on only one station.

Mr. KORNEGAY. That is five stations which have grade A contours.

Mr. HYDE. That is right.

Mr. KORNEGAY. How many different communities in the country would be eligible under that rule?

Mr. HYDE. Eighty-three, I am told, is the number.

Mr. BROWN. Would the gentleman yield at that point?

Mr. KORNEGAY. Yes.

Mr. BROWN. As I understand, the community under FCC consideration is a municipality wherein television or radio stations are located?

Mr. HYDE. There must be what we call five grade A signals at the location.

Mr. BROWN. That is what I wanted to clarify. At the location of reception or at the location of origination?

Mr. HYDE. Location of origination.

Mr. BROWN. You talk about municipality.

Mr. HYDE. Well, a principal community. A municipality has a certain limited meaning. We are talking about a principal community. I think that word is used in census figures.

Mr. BROWN. If the gentleman from North Carolina will permit me to ask another question to refine this, let us say there are two sizable communities a distance apart wherein one community has two stations and another community has two stations and in neither of these communities can you receive a grade A signal of the other, but in between there is an area of overlap where there are four signals received.

Mr. HYDE. The committee did not seem to anticipate that exact situation. It does talk about communities rather than places in between them. Under the suggested rule the principal community would have to be entirely within the grade A signal.

Mr. BROWN. I am talking about an overlap situation where there is no originator but four signals received. Let us suggest that those two separate communities produce signals and that in each of the two communities there are four signals received. How does that apply?

Mr. HYDE. I suggest if there were five grade A signals over both communities that there might be two eligible communities. I think it would be a most unusual circumstance.

Mr. MACDONALD. Mr. Broyhill.

Mr. BROYHILL. I just want to pursue for a moment my question of a few minutes ago. Could the Federal Communications Commission require no commercials to be shown on free or commercial TV?

Mr. HYDE. The committee report recommends that the Commission should prohibit commercials on subscription TV. I think that that indicates the feeling that the Commission has toward making such a regulation.

Mr. BROYHILL. What is the statutory basis, then, for treating these two forms of television broadcasting differently?

Mr. HYDE. Section 303(b) of the act which authorizes the Commission to make rules and regulations with respect to different classes of stations.

Congressman, the Commission did have under consideration the rule to prescribe limits on the number of commercials carried on conventional, commercial broadcasting stations. It determined that it would not be in the public interest to adopt such a rule, but did not find it lacked power to do so.

Mr. BROYHILL. This committee frequently disagrees with you?

Mr. HYDE. Yes, the committee does. It disagreed with us on that, too. Let me review that. No, I think the final action that the Commission took was in agreement with the committee.

Mr. BROYHILL. That you did not have?

Mr. HYDE. No. I think the committee took the view that the Commission should not adopt such a regulation. The Commission, in fact, did determine not to adopt such a regulation but it did not do this on a question of law.

Mr. BROYHILL. The same question, of course, comes up in the limitation on programing. I see in the rules, for example, the proposed rule would prohibit the series type of programs; it would also prohibit showing movies over a certain age. I am inquiring what is the statutory basis for this difference in treatment of program content, so-called free TV on the one hand and STV on the other, when you are using the same language of the act to justify your actions. Conversely, you could do the same with free TV. As in years past we will have changes in the Commission and whatnot.

Mr. HYDE. I think you must have observed that the committee was concerning itself with ways and means of authorizing subscription TV under conditions that would not lead to a conventional TV subscription system. I suppose they would argue that the Commission has authority to make regulations appropriate to this class of service.

Mr. BROYHILL. That brings up an interesting point, Mr. Chairman. I read somewhere that one of the networks, I believe, or some company—I have forgotten now which it was—was considering a cartridge type of program where the individual could actually play his program over his own television set. Would the FCC want to exercise jurisdiction over this? Would this not be a siphoning off of audience?

Mr. HYDE. Neither this committee nor the FCC—well, so far as the FCC is concerned it would seem not to worry about this. True, this replay device would use your TV set but it would be like playing a program on your TV set in the same way you would play a record on your high-fidelity set.

Mr. MACDONALD. Mr. Harvey.

Mr. HARVEY. Mr. Chairman, I want to go back for a minute again to what has motivated the FCC in going ahead with its hearings and getting back to the question that Chairman Macdonald asked you a few minutes earlier.

In answer to Mr. Macdonald, did I gather that you thought that because our committee of the House amended its earlier resolution to permit the experiment in Hartford, that this was congressional intent that the FCC go ahead and decide this question?

Mr. HYDE. No, I did not intend to say that. But I did intend to say that this would seem to be an indication of interest on the part of the committee in taking an additional look in the light of what was developed as a result of the experimental operation.

Mr. HARVEY. The reason I bring that up is that I think we would both be in agreement that the remarks by Chairman Harris would indicate clearly that the committee reserved its jurisdiction in this particular area and they had no intent to turn over to the FCC jurisdiction in this new field. Isn't that correct?

Mr. HYDE. I think he made it very clear that they were giving approval only to an experimental operation.

Mr. HARVEY. So that the only guidance that the committee or the Congress has given the FCC has clearly been that we reserve the deci-

sion whether to go ahead in this field or not and you do not have that jurisdiction?

Mr. HYDE. Chairman Harris' statement indicated that he did not wish to be understood as conceding anything in the matter of granting a regular authorization, that the committee's action was only to acquiesce in the experiment and any views they had about regular operation were reserved.

Mr. HARVEY. In your opinion, Mr. Chairman, what sort of additional congressional guidance would be necessary for Congress to assert its jurisdiction in this particular field and to restrain the FCC from proceeding further with the hearings that they have? Would a sense of the committee resolution make clear the congressional intent or would you insist on the matter going to the floor finally?

Mr. HYDE. May I give a lawyer's answer to the question? I think that if Congress wished to preclude the Commission from—or let me put it this way—if the Congress wished to deny the Commission authority to grant an authorization like this, they should do so by amendment of the statute.

Mr. HARVEY. Otherwise the Commission is going to proceed on the assumption that they have this authority?

Mr. HYDE. Otherwise the Commission will, consistent with the views that we have heretofore expressed, feel that it does have authority to grant such authorization, it appearing that if they do so it would serve the public interest, convenience, and necessity.

Mr. HARVEY. Although contrary to previously stated congressional views.

Mr. HYDE. I did not say that.

Mr. MACDONALD. One last question, Mr. Chairman. You have been very patient. You would like to have the Congress amend the Communications Act?

Mr. HYDE. What I had intended to say was that the Commission must administer the act as it now stands absent some action by the Congress to amend that act.

Mr. MACDONALD. Even though you can't prove that you have any jurisdiction to do what you are doing? If you have I would like to hear what the basis of the jurisdiction is. We have been going around the mulberry bush all the time.

Mr. HYDE. Mr. Chairman, we will give a full discussion of this question of jurisdiction in the Commission. I would want to say again that any time that the Commission would act here it would have to be based on a finding that the action it took would serve public interest, convenience, and necessity and that decision, whether to deny or grant, would be subject to judicial review.

Mr. MACDONALD. Thank you very much, Mr. Chairman.

You have been very cooperative and very helpful.

Mr. HYDE. Thank you.

Mr. MACDONALD. The next witness is Mr. Julian Goodman, president of the National Broadcasting Co.

Mr. MONDERER. My name is Howard Monderer. I am Washington attorney for NBC. Mr. Goodman, who is president of NBC, is scheduled to be the next witness. Unfortunately, the plane on which he was due to arrive this morning had engine trouble. We do not expect him

until 1 o'clock. For tomorrow he has an appointment in Cincinnati, so he will be unable to be here then.

What we would respectfully request, the schedule of this committee and the House permitting, would be to permit him to appear sometime this afternoon.

Mr. MACDONALD. As I understand the schedule of the House, we have six District bills up. I do not think we can get permission to sit because there will be general debate and votes, et cetera. I think it might be just as well if you have a statement from Mr. Goodman, to insert it in the record and, obviously, it will be given every consideration as if he did read it.

Mr. MONDERER. If you wish we can do that or else I can read it and answer questions on the legal issues. Mr. David Adams, who is our senior executive vice president, is here and could answer questions on policy matters if you would prefer.

Mr. MACDONALD. Fine. Let us do that.

STATEMENT OF JULIAN GOODMAN, PRESIDENT, NATIONAL BROADCASTING CO., PRESENTED BY HOWARD MONDERER, WASHINGTON COUNSEL, NBC; ACCOMPANIED BY DAVID ADAMS, SENIOR EXECUTIVE VICE PRESIDENT, NBC

Mr. MONDERER. As I mentioned before, Mr. Chairman, my name is Howard Monderer. I am the Washington attorney for the National Broadcasting Co.

There have been distributed to you, and I will proceed to read, the statement which Mr. Goodman was to present this morning. Mr. Goodman, as you know, is president of the National Broadcasting Co. We appreciate this opportunity to present our views.

NBC opposes the use of broadcast frequencies for pay television. This has been our position throughout the 12-year period in which this issue has been before the Congress and the Federal Communications Commission. Our opposition does not stem from concern over additional competition. NBC has consistently supported measures that would broaden the base of free broadcasting and thus tend to increase competition in the industry.

For example, NBC supported the all-channel legislation which fostered the growth of UHF. We also support pending legislation that would expand the resources of noncommercial broadcasting and help it compete, at least in part, for audience with our own service.

However, we think a system using broadcast frequencies to charge viewers for programs would narrow the base of broadcasting and violate the public interest in two respects: It would require set owners to pay for programs of the type they now enjoy free; in the process it would threaten the ability of free television to continue and expand its present services. These considerations have become increasingly clear as experience with pay television and free television has developed. A brief review of the background may help put the matter in perspective.

In 1957, in its first report on pay television, the FCC noted that the key issue was whether it would provide a "beneficial supplement" to free television programing. The Commission pointed out that there

were sharply differing views on this matter, the proponents arguing that pay television "would provide a wider choice * * * in the fine arts, operas, education, and informative material," while the opponents claimed that it would "offer programs of the widest popular appeal."

To develop experience that would settle this question, the Commission authorized limited pay television test operations in its third report of March 1959. The House Interstate and Foreign Commerce Committee then adopted a resolution approving the concept of these limited tests, with the specific understanding that Congress would make the ultimate decision on whether pay television should be authorized on a permanent basis.

Only one organization took advantage of the test opportunity and conducted a 3-year test in Hartford, Conn. When the test was concluded, the records showed that 91 percent of the pay television programing consisted of feature films and sports. These are clearly mass appeal programs types widely shown on free television.

Thus, the Hartford test completely failed to show that pay TV would provide a distinctive program service that would broaden the television base. If anything, it tended to demolish the proponents' argument, since the pay TV operation offered a much smaller proportion of cultural and informative programing than is provided by free television.

Following the test, the FCC appointed a committee of Commissioners to prepare an analysis which was submitted in the form of a proposed fourth report. It acknowledged that if pay television programing—

> * * * is merely duplicative of types of programs now appearing on free TV in quantity * * * it would not appear that other public interest considerations could justify the authorization of STV using broadcast channels.

The report also found that—

> * * * the major part of the programing, as opponents had argued, will be of a kind that would appeal to a mass audience.

This should have settled the issue. But despite the acknowledged evidence, the report concluded that pay television will provide a "beneficial supplement" because the "types" of programs it will present will be "different." The difference used to justify this broad conclusion is that pay TV movies would be limited to those less than 2 years old or more than 10 years old; and live sports coverage would be limited to games not televised in the community within the past 2 years, with complex exceptions and qualifications.

We believe these are technical distinctions, not meaningful differences that would justify a radical change in communications policy. Moreover, even if they were distinctions several years ago, they are no longer, because each year, free television has been showing more recent movies and has broadened its sports coverage.

Apart from whether pay television would duplicate program types already available, the FCC recognized another important question: whether pay television would siphon away selected program attractions from free television. The report acknowledged that danger, stating that pay television "could, by directing its purchases at select programs * * * take them from free TV and require the huge audiences of those programs to pay to see them or not see them at all."

After recognizing this as a threat to the public interest, the report proposed a detailed regulation of pay television programs to prevent "selective program siphoning."

Basically, these proposed regulations would prohibit entertainment "series programing on pay television and would control the kinds and amounts of movies and sports programs pay television could show. This includes a stipulation that movies and sports may not exceed 90 percent of pay television programing annually, or 95 percent in any month. Of course, this concedes that the concept of program diversity—which was supposed to be pay televisions special contribution—has been abandoned.

Instead, the dangerous principle of program regulation is adopted to legislate a far lower standard of diversity than is now typical on free television.

We believe that these detailed program controls raise the most serious questions of constitutional validity and FCC authority. We oppose such regulatory control of programing whether it is directed to pay or free television. We also feel the program regulations would be ineffective, because they could easily be manipulated to permit large-scale diversion of programing from free to pay television.

Before discussing these points, we believe that some additional public policy questions should be considered.

One of these centers on the claim that pay television should be given the chance to rise or fall on the basis of public choice. This concept of public choice is a camouflage. To take a specific example, if the world's series should move from free to pay television, the public's only choice would be either paying or not seeing the games.

It is also claimed that the market is broad enough to permit the coexistence of free and pay television, since the pay service is likely to attract only a minority of the public. This disregards the enormous economic leverage pay television could exert, with relatively few subscribers. For example, if pay television could achieve a 20-percent penetration rate, as assumed in the fourth report, and operated under the limitations outlined in that report, it could accumulate annual revenues approaching $1 billion, enabling it to outbid free television for key program attractions. As a result, by having to pay for programs, 20 percent of the public could foreclose free television from making those programs available to all of the public.

Thus, the advertiser-supported medium would lose the economic base for its own costly and less popular—but extremely important—news and public affairs programing. There is nothing to indicate that the loss or reduction of this type of programing would be made up by pay television. Currently such programing represents approximately 25 percent of the NBC television network schedule. By comparison, the "educational and instructional" features offered during the first 2 years of the Hartford test represented about 3.2 percent of the total.

The fourth report mistakenly assumes that free television cannot grow beyond the types of movies and sports it offered in its earlier years. When the Hartford test started, there were no movies on television that had been released within 2 years. But during the last broadcast season, over 10 percent of the network movies were less than 2 years old, and we estimate that the proportion will more than double during the current season. Similarly, free television now presents on

a nationwide basis many sports events formerly carried only in a few markets or not at all.

It is naive to believe that the proposed regulations could prevent pay TV siphoning of free television programs. If pay television is to be assigned feature films under 2 years old, film suppliers would have every reason to withhold such films from free television during the 2 years following their release—and after—to realize maximum revenue from box office television. The owners of sports rights need only keep the games from free television for 2 years—nationally or in any given market—to qualify them for pay television; and in the case of specific sports events like the world's series, the real effect of the complicated regulations is to reduce the waiting period to 1 year.

If these movie and sports features are to be preemptible by pay television, the free service would tend to be limited to older movies and to sports already carried, and would be fenced off from natural development in these fields.

Finally, the free television programs most vulnerable to siphoning—like major entertainment specials and taped sports coverage—would be wholly available to pay television, endangering the continuation of free television in these distinctive fields.

Another public interest consideration relates to the portion of the public that could not afford pay television—estimated in the fourth report at 30 percent of the total population. These are the people who have the fewest privileges and opportunities and are most in need of the full entertainment and information services free television can offer. The diversion of programs to a service from which they are economically barred would be a denial of their justified expectations.

All the considerations indicate that an issue of basic national communications policy is presented on which the Commission should not act without specific congressional authorization. This has been recognized in resolutions previously adopted by this committee and by the Senate Commerce Committee. And as I mentioned before, in 1959, Chairman Harris emphasized this committee's understanding that pay television would not be authorized on a permanent basis without further action by the Congress. The fact that Congress has not acted does not justify Commission authorization of pay television, especially when there is no public demand for the service.

To summarize, the record of pay television's test operation demonstrates that it will not provide a service distinctive from free television service in any significant way. Accordingly, there is no affirmative public interest reason that would justify diversion of broadcast frequencies from free to pay television. On the contrary, there is a danger that pay television could siphon popular attractions from the free service and thus diminish the scope of service to the total public. The fourth report recognizes this danger and seeks to guard against it by a system of detailed program regulation that is bad in principle and would not be effective in practice.

While the events of the past years demonstrate that there is no public demand for broadcast pay television and it would not affirmatively serve the public interest, free television has progressively broadened its service, in programing; in the UHF expansion; and in the growth of noncommercial broadcasting. These positive developments can be impeded by broadcast pay television.

On the basis of all these factors, we respectfully recommend that the Congress make it clear to the Commission that broadcast pay television should not be authorized on a permanent basis.

Thank you, Mr. Chairman.

Mr. Adams and I are prepared to answer questions if we can.

Mr. MACDONALD. The statement is a very succinct statement of the NBC position. I just have a couple of questions about it I would like to ask.

You say there is no public demand for pay TV. I am not sure whether you are right or not, I am certainly no expert in the field, but the one in Hartford seemed to go pretty well, at least in that one instance.

Do you think that the networks are not—I am not just saying NBC—helping feed the flames of people who are willing to pay to see a movie without having it interrupted about 220 times—an exaggeration to be sure. But with these constant interruptions or commercials sometimes you are not able to follow the plot of the movie because the program is so chopped up. With the obnoxious repetition of commercials, don't you think that perhaps the networks themselves tend to help the public wanting something like pay TV?

Mr. ADAMS. Chairman Macdonald, on the direct question you first asked, the results of the Hartford experiment which was carried on over a prolonged period of time, 3 years, indicated that about less than 1 percent of the television homes in the coverage area of the Hartford station subscribed. I don't have at hand the statistics on the actual level of subscription but I think the average program attracted something like 200 home subscriptions.

Now, you would have assumed that there is a turning away from advertiser supported programs because of the interruptions of commercials and particularly in the movies. And taking into account the fact that the primary programing on the Hartford pay television station was movies and attracted so little subscription, I think that experience tends to answer your question—that viewers prefer television movies with commercials to television movies for which they must pay.

Certainly commercial interruptions are not pleasing to all people.

Mr. MACDONALD. All people? Whom do they please?

Mr. ADAMS. They are pleasing to some people.

Mr. MACDONALD. Let me, because time is short, just ask you this and I do not know if you are the proper person to ask, but in repetition of my saying that perhaps the networks fan the flames toward pay TV don't you think the practices of networks in blacking out good sports events in a certain area—a concrete example I can recall very well when the New York Giants were very good a few years ago and you could not see the New York Giants if you lived in New York City. Even though the Polo Grounds or Yankee Stadium—they switched between the two at the time—even though the Polo Grounds or the Yankee Stadium was sold out still the network blacked out New York City. People used to get in their cars and go to Connecticut, take a motel, bring some food and other things and have a TV watching of the Giants.

Don't you think that this practice on the part of the networks is disturbing to the public?

Mr. ADAMS. I think it is a very undesirable practice, Mr. Chairman, but it is not the networks' or broadcasters' choice. Any broadcaster

wants to get as much circulation and as much audience in every community in the United States as he can. But the ball teams that own the rights to television exhibition condition their contracting those rights on such conditions as this. It is a condition that is imposed on us, none that we either wish or initiate.

Mr. MACDONALD. Could you not refuse, if they blacked out a certain area, and you have said this is a bad practice—and I could not agree with you more—could you not refuse to let the rest of your network carry that game? You are not entirely helpless in this.

Mr. ADAMS. We are not entirely helpless but there is competition in the business. I don't think Mr. Monderer would let us agree with the other two networks that the only basis on which we would negotiate for sports rights is a three-network agreement not to accept blackout provisions.

Mr. MACDONALD. The worst example I can think of did not affect me directly, although I did get mail about it. When Mohammed Ali was fighting some guy from Arizona—Folley, I believe. They allowed the programing every place except where it was being fought, which I think was Madison Square Garden, in New York City. Then they blacked it out in Phoenix, Ariz. Do you think this was a good practice?

Mr. ADAMS. I don't know the circumstances. On the basis you describe it does not sound to me like a good practice, but I do not know the conditions that prompted it nor do I know under what conditions the blackout was imposed.

Mr. MACDONALD. They blacked it out because Folley was from Phoenix. I guess they had theater TV and therefore they did not want it to go on free TV to knock out the hometown boys' theater revenues in Phoenix. So they blacked it out in Phoenix and the people in Phoenix who wanted to see him fight in this heavyweight match had to go to a theater and pay money to see it.

Mr. MONDERER. I seem to recall, I believe it was the RKO people who had the rights and they apparently chose to do it on that basis in their hometowns.

Mr. MACDONALD. Don't you think that continuation of this type of thing would make people willing to pay to see some programs?

Mr. ADAMS. I think the example you used of the fight, Mr. Chairman——

Mr. MACDONALD. I am talking about blackouts really.

Mr. ADAMS (continuing). Is the same sort of example we use when we are concerned with pay television over the air. We think that also would result in blacking out home screens for free viewing. We do not like the blackout principle. Until we have the ability to negotiate our way out of it we have to accede to demands on the part of the rights holders for it. Their interest is an economic interest.

Mr. MACDONALD. Do you see any chance in the future that the blackout question will stop?

Mr. ADAMS. I would hope so, but I don't see the basis on which rights holders would agree to let us broadcast in the very places where they are inviting an audience into a stadium.

Mr. MACDONALD. Mr. Kornegay.

Mr. KORNEGAY. Mr. Adams, would you have any basis for your statement other than the fact that Hartford had 1 percent of the subscribers, the statement that it was not interested in or, whatever it was, there was no public interest in pay TV?

Mr. ADAMS. I think the Hartford experiment is a pretty good indication of that. Pay television has been tried in several other places. It was tried in Palm Springs on a different basis. It was tried in a suburb of Toronto. In each case the public reception was at a low level. The context of my statement, I believe, is this: that if you give the benefit of doubt to pay television, at best it is a dubious enterprise as far as Commission authorization is concerned. It certainly is a radical departure from past communication policy.

Our position at least is that to justify the exercise of authority in a cloudy situation and to depart basically, taking a new direction in communication policy, there ought to be some very active, very strong, very articulate, and clearly visible public demand. There is no evidence of any such public demand.

It seems to us that the burden of demonstrating that public demand is on the proponents, not the opponents. After all, that was the reason for the Hartford experiment. I think we should remember the context where the Commission, after considering this issue for a number of years and being faced with two conflicting arguments, said let us settle this on the basis of experience instead of listening to self-interested groups who argue on opposite sides of the fence. They laid down certain criteria and objectives. The experiment was held and it seemed to us to prove the opposite of what the claimants for pay television were arguing, including public demand.

Mr. KORNEGAY. Is there any public demand for CATV? Frankly, in my neck of the woods I don't understand why there is any need for that, but apparently there is.

Mr. ADAMS. I think there is in those places where people can't get good signals.

Mr. KORNEGAY. I understand that, but in a community where you get three grade A signals and three networks, why should there be demand for CATV? But everybody is fighting to get into the business and spending millions of dollars to go into it, so there must be a demand for it.

Mr. ADAMS. In the case you cite, I would not see where there would be a demand. Let me make this distinction as compared to pay television. Nobody has to subscribe to a CATV system if he does not want to. If he does not subscribe there is no penalty; he will see whatever is available over the air without paying a cent for it.

Mr. KORNEGAY. He does not have to subscribe to STV.

Mr. ADAMS. What if subscription TV buys away a major sports event because it has a bigger box office potential and it is removed from free television, then he cannot see it on his set unless he pays for it. That is one of the differences between CATV and pay TV.

Mr. KORNEGAY. Wasn't that same fear expressed by the opponents to CATV?

Mr. ADAMS. I don't believe so, sir.

Mr. KORNEGAY. That is by bringing in distant stations.

Mr. ADAMS. I think there was concern over more competition than the people in the marketplace were accustomed to. I don't think an argument has ever been made, nor do I see how it could be made, that CATV would displace free television because you can still get whatever you can get on your set without becoming a CATV subscriber. Also, I might add that has not been NBC's position.

Mr. KORNEGAY. Do you feel it would be possible for over-the-air STV and free TV to exist side by side without either system causing the economic ruin of the other?

Mr. ADAMS. We do not think so, sir. If over-the-air pay television is authorized and fails then, of course, there is no issue.

Mr. KORNEGAY. That is what I was going to say. You may have answered it. If there is no demand for it you should not be worried about the competition.

Mr. ADAMS. That may well be true. But as has been said before, the concern is what if it does not fail?

Mr. HARVEY. Will you yield at this point?

Mr. KORNEGAY. I will yield because I have to go on the floor.

Mr. HARVEY. The demand might possibly be created by the decision of the artists themselves. If Elizabeth Taylor and Richard Burton decide only to appear on subscription TV they have the right to make that decision and not the FCC; is that correct?

Mr. ADAMS. That is true. There is one other consideration I believe. If 10 percent of the public or even 5 percent of the public felt that what pay television promised was worth subscribing to, pay television could on the basis of a rather small minority of the public build up a kitty large enough to outbid advertiser supported television for the very attractions that are on the air now. It is a case where a small number of people can exercise a lot of leverage that affects the total service to the total public.

Mr. BROYHILL. Is that the reason you say there is a danger that pay television will siphon off these attractions from the free service?

Mr. ADAMS. Yes, sir. That is not true of any other types of competing service, that I can think of anyway. It is a peculiarity of pay television.

Mr. KORNEGAY. Where have you ever seen Elizabeth Taylor and Richard Burton on free TV.

Mr. HARVEY. I did see them on free TV. It was not very good, as a matter of fact.

Mr. MACDONALD. The House is in session. Are there any further questions?

Mr. BROYHILL. I don't have any questions, Mr. Chairman. I appreciate your coming here. I regret that Mr. Goodman was not able to be here but I can understand that it was a matter beyond his control.

Mr. ADAMS. I think he is on a plane right now trying to get here.

Mr. BROWN. NBC appeared in favor of the establishment of public television. Was there a great public demand for that?

Mr. ADAMS. No, I don't think there was a great public demand on the part of the large masses of people, but for many, many years the educational enterprises of this country and a good deal of the leadership of the country have felt that public television, so-called public television, noncommercial broadcasting, could supply a specialized service that by its very structure and its function commercial television cannot supply as extensively as some people would like.

Mr. BROWN. What is that service?

Mr. ADAMS. That service includes more detailed discussion of public affairs and analysis than a mass audience can take and cultural programs of specialized interest.

Mr. BROWN. You mean as differentiated from the superficial news coverage that we get on commercial TV?

Mr. ADAMS. That would not be my characterization, Mr. Congressman.

Mr. BROWN. Between detailed and superficial is what we are discussing.

Mr. ADAMS. Well, superficial is a sort of vituperative epithet. Let me give you an example.

Mr. BROWN. Limited?

Mr. ADAMS. More limited in quantity. What a commercial television network does a minority of its time a noncommercial broadcasting enterprise can do all the time because it is not dependent on large audiences.

Mr. BROWN. You are spending 25 percent of your time on public affairs broadcasting?

Mr. ADAMS. Approximately that. Those are the programs produced by NBC News. In addition to that percent, there is some programing in the cultural field. The "Bell Telephone Hour" is an example.

Mr. BROWN. You said something about the disadvantage of pay TV being that if the public could not pay for a program they would not see it, or if an artist chose not to be on the subscription TV the public would not be able to see him. Now, if the artist chose or the movie owner or rights holder chose not to sell it on commercial TV there is nothing on commercial TV, is there?

Mr. ADAMS. That is true, but the experience has been that commercial television programing has broadened its program scope very broadly over the past 5 years. Let us take movies as an example. Motion picture films of fairly recent vintage, that is 2 or 3 years old, and major productions are now regularly on commercial television.

Mr. BROWN. Why?

Mr. ADAMS. Because there is a substantial audience for them when shown on television.

Mr. BROWN. That is not the reason you put them on. You put them on because somebody pays for them.

Mr. ADAMS. Somebody pays for them only because there is a substantial audience watching them.

Mr. BROWN. Should not that substantial audience have an opportunity to watch without commercial interruption?

Mr. ADAMS. That is a question for your judgment. If that substantial audience that now watches them with commercials should have them available without commercials and would be charged $1 or $2 per day television broadcast there would be an awful lot of people who now watch a motion picture on free television who would be economically precluded from watching it on pay television and free television could not get it.

Mr. BROWN. The thing I am trying to work out in my own mind is that if somebody pays for it commercially and puts it on commercial television that is good for them. If the Federal Government finances it, puts it on public broadcasting, that is good for people. But if somebody wants to put it on subscription TV and people want to pay to watch it, that is not good for them. Now, I don't understand that. What is the logic behind this?

Mr. ADAMS. The difference we make is that to the degree it is put on and people have to pay for the individual program, the program is removed from the public airwaves where everybody can watch it.

Mr. BROWN. Necessarily?

Mr. ADAMS. I think necessarily. Let us take the Commission's fourth report——

Mr. BROWN. After they put "My Fair Lady" on pay TV, why cannot NBC outbid them and put it on commercial TV or put it on public TV for that matter?

Mr. ADAMS. It is a possibility but I doubt whether the commercial value to advertisers would be as great on that basis and whether the payments we could make would therefore be as large as the program suppliers are now getting.

I think pay television would tend to skim off the cream of popular appeal and exhaust their appeal before free showing.

Mr. BROWN. Let us relate this to something that has been on present commercial television.

I see reruns all the time, the series of only a couple of years ago are making the rounds again in the middle of the afternoon or in the early morning, whenever it is.

Somebody has bought those things and put them on and got them sponsored. Would there not be a commercial possibility of selling "My Fair Lady" or the world series games again next week at night so that I could see it so that I would not have to stop what I am doing during the day to see it?

Mr. ADAMS. I think that is a possibility, sir, but at a much lower economic level than the original broadcast. The example you use indicates that. The network fare that you see in the middle of the afternoon 2 or 3 years after it has gone off the network is in syndication. The owner of the rights has licensed the material for television exhibition on a station-by-station basis at a small fraction of what the networks originally paid for a national network exhibition fee. I don't think that small fraction as applied to a network rerun of what was formerly a pay television attraction would be enough to sustain the whole network program enterprise.

Mr. BROWN. One of the motives of the Public Broadcasting Act, according to some of those people who testified before us, was to raise the cultural level of Americans.

If somebody wants to put a cultural event on pay TV and has paid heavily for it out of money that people put in the slot, or mail in, or however they are going to do it, doesn't that broaden the cultural reward, the financial reward, that people who undertake cultural activities get, and encourages the opportunity for expansion of culture?

Mr. ADAMS. If that happened I think what you said would be true. One of the purposes of the Hartford experiment was to see whether it would happen. As the figures in the statement indicated, it did not happen at all. The "cultural" material——

Mr. BROWN. It will happen if we let the FCC say 10 percent of the effort must be in the cultural line, or 20 percent or 30 or 50. I would presume they can do this if they say that 90 percent of it is the limit which can be in the sports and otherwise.

Mr. ADAMS. To begin with, we disagree very strongly that the Commission has authority to lay down that sort of program regulation and to quota the amount or types of programing that can be shown on the air.

Mr. BROWN. If this committee does not speak, the Commission, I would take from the testimony of Mr. Hyde this morning, will take that authority unto itself.

Mr. ADAMS. I guess that is a reason for the committee to speak.

Mr. BROWN. By the acquiescence of the committee we would permit that to happen if that is the sequence of events.

Mr. ADAMS. Then I guess the only recourse the public interest would have would be the courts.

Mr. BROWN. Thank you.

Mr. MACDONALD. Thank you very much, gentlemen.

The hearings will be adjourned until tomorrow morning in room 2322, at 10 o'clock.

(Whereupon, at 12:25 p.m., the subcommittee adjourned, to reconvene at 10 a.m., Tuesday, October 10, 1967.)