Mr. ERLICK. I don't think there is an inconsistency. One makes one assumption and one makes the other. We have taken a position from two different assumptions.

Mr. MACDONALD. I could not agree more with Mr. Brotzman who just picked up what I said. I don't see how you can argue out of both sides of your mouth.

Mr. ERLICK. Mr. Chairman, we are making two different assumptions. We are stating what we believe to be the consequences in both cases.

Mr. MACDONALD. Assuming it fails, how does it possibly harm you?

Mr. ERLICK. It does not, if it fails.

Mr. MACDONALD. If it succeeds, you feel it will harm you?

Mr. ERLICK. Very definitely.

Mr. MACDONALD. I am not trying to paraphrase Mr. Preminger the other day but isn't that the whole basis on which our system works, that the people of America have the right to choose whether they want to pay to see something or want to watch a movie with x number of commercials in it?

Mr. ERLICK. I think that perhaps is the crux of the argument here. Unless I misunderstand the issue, the choice the public would have would be whether to pay to see the event or not to see it at all if the event went to pay-TV. Now, that is not a very happy choice from the public standpoint.

Mr. MACDONALD. I don't know about ABC and I am not picking on your network, but I have seen movies on TV that are 15 to 20 years old. You can see John Wayne when he was an extra.

Mr. ERLICK. I suspect, Mr. Chairman, that some of those movies were local rather than network and that they were perhaps late night attractions that were not originated by the network but by the local stations.

Mr. MACDONALD. Do the networks have an agreement about how many commercials can be used during a movie that they purchase?

Mr. ERLICK. There is no agreement between the networks; no sir. There is a code which the networks adhere to, the Code of the National Association of Broadcasters, which does outline certain limits in the number of commercials.

Mr. MACDONALD. It depends on the movie I see.

Mr. ERLICK. In a 2-hour movie, there are normally 14 minutes of commercial time.

Mr. MACDONALD. Don't you think that is irritating to a lot of people?

Mr. ERLICK. Perhaps it is, Mr. Chairman, but I would just point out this in response. Were it not for those commercials, the program services which the free networks provide for the American public would be impossible.

To give you a rough idea of what we are talking about here and I have no figures from the other networks and only a rough figure from ours, but my guess is that the three program services of the three networks, including entertainment, sports, public affairs and news, runs somewhere in the area of $450 million a year in cost.

Mr. MACDONALD. You lose on the news programs?

Mr. ERLICK. Yes; I was about to get to that if I might take 1 more minute.

Mr. MACDONALD. Right.

Mr. ERLICK. That is the only way we can afford to present a program such as "Africa" which some of you gentlemen might have seen recently, a three and a half hour presentation which some individuals have said was probably the greatest program endeavor ever undertaken by the networks. We are also working with Jaques Cousteau on an underwater exhibition from which we expect to get some special programs on oceanography.

We are presenting a well-rounded news and public affairs program over the course of the year which cost the network in essence $18 million a year out-of-pocket loss. We spent $30 million, we recovered $12 million. We are losing $18 million a year on that service. The only way we can do that, Mr. Chairman, is to recover a sufficient amount from the commercial side of our operation to enable us to continue these efforts.

Mr. MACDONALD. You make it sound reasonable.

Mr. BROWN. Will the gentleman yield?

Mr. MACDONALD. I yield.

Mr. BROWN. Unless, of course, you go to subscription TV, which would provide some funds from people who want to see a specific item. Isn't this correct? Your only source of revenue is your advertising dollar; that is what you are saying?

Mr. ERLICK. Yes, sir.

Mr. BROWN. If you had another source of revenue, then you would be able to do something a little different because you would have a larger amount of revenue. Is that right?

Mr. ERLICK. I don't know that our source of revenue under those circumstances would be greater than our source of revenue under the present circumstances.

Mr. BROWN. This is a contradictory argument you are making here. You say, there is either too much or too little demand for pay-TV. We are faced with trying to find out which of these views is true. That is where the decision lies, frankly.

Mr. ERLICK. Of course, this is precisely where your decision lies. I think, without attempting to evaluate it, myself, because that is the job of you gentlemen, I think you have to evaluate the risks which are inherent and which so many have spelled out here in the establishment of a pay-TV system and in the gaining of a foothold by that system. Now, if those risks are of the magnitude which has been described, and we believe they are, then this is too great a risk to take, in our judgment, in terms of the destructive potential which obviously exists and which almost everyone admits, as far as the free system is concerned.

Mr. BROWN. If the gentleman will yield further, I would like to pursue this business point a moment.

It seems to me that if you are not selling an adequate amount of network time because you are a small network with fewer outlets than CBS or NBC, you would look for some way to get additional revenue—I find it difficult to phrase what I am thinking—well, you said you were losing money.

Mr. ERLICK. On the network; yes.

Mr. BROWN. If you are losing money on the network, I would think you would be coming in here and asking, "How about opening this thing up so that we can get in on subscription television and have

another source of revenue besides advertising?" If you are the Avis of the outfit, would you not like to find another source of revenue to be able to expand your business and perhaps compete more viably with the largest systems?

Mr. ERLICK. Not a source of revenue which would undermine the other half of our business which we are now in; no, sir.

Mr. BROWN. I don't know that it would undermine because I am not paying as an advertiser if I pay to watch something; I am paying as a box office fan. I am using my money rather than—as Mr. Preminger said, and I am being the devil's advocate for a minute here—having to absorb the dog food commercials which I don't find as offensive as he does because I like dogs. Rather than absorb that, I might want to put down 50 cents or a dollar or a dollar and a half to watch "My Fair Lady" which would go to ABC rather than going to CBS or NBC because they could finance it with the dog food commercials.

Mr. ERLICK. If I might answer it this way, I can make it clearer.

If there were an attraction on pay-TV on the market, say between the hours of 8 and 10 at night, the prime time, of great magnitude, then the audience is obviously going to be diverted to a substantial extent from the stations offering a free television service.

Mr. BROWN. You have all those poor people who can't afford to watch, according to what was said here.

Mr. ERLICK. There are a number of those; that is true. But a substantial portion of the audience, if the attraction is great enough, is going to be diverted. If today's game were on this afternoon, I don't think anybody in this room has any doubt that a substantial portion of the audience would be watching that game. If that is true, the audience remaining on the free station has got to be decreased and the price you would get from the advertiser is decreased. Consequently, the amount of money we can spend on public affairs and news programing and other public service efforts is bound to be decreased so that the service is bound to be harmed.

Mr. BROWN. That is only on one network, this game today.

Mr. ERLICK. Yes, sir.

Mr. BROWN. So they got the advertiser to pay the top dollar to get that game.

Mr. ERLICK. Yes, sir.

Mr. BROWN. If I want to watch it without commercials, I can't watch it, can I? If I can't watch it today, I may want to watch it tomorrow night sometime. It seems to me that if you got into this business, and I realize under the proposed FCC regulations you can't, you might wind up being Hertz rather than Avis.

Mr. MACDONALD. How about National?

Mr. ERLICK. We have said that, should pay TV be allowed to be established and should it look to us as if it is going to become a going enterprise, we certainly would get into it. We have never said we would not. We are saying now that we think it is in the public interest that it not be established. But should Congress decide that it should be authorized and the Commission so direct it, then I think we would take a very good look at it with the results I think I have just outlined in terms of the free service.

Mr. BROWN. Thank you, Mr. Chairman.

Mr. MACDONALD. To continue and not to sound like Johnny One Note, but ABC more or less controls Cassius Clay, don't they?

Mr. ERLICK. No, sir.

Mr. MACDONALD. Who is that sports announcer who has him on all the time, the rather obnoxious one?

Mr. ERLICK. I am not sure I know whom you mean.

Mr. MACDONALD. If you work for ABC, you know very well whom I mean.

Mr. ERLICK. Howard Cassell has interviewed Cassius Clay once or twice.

Mr. MACDONALD. Have you carried Clay's fights all the times he has fought over commercial TV?

Mr. ERLICK. We have on a number of occasions.

Mr. MACDONALD. Are you the network that blacked out Phoenix?

Mr. ERLICK. No, sir.

Mr. MACDONALD. Who did that?

Mr. ERLICK. I really could not say. We did not carry that fight. That question I knew came up and I did get some notes on it. I believe that fight originated in Madison Square Garden. I believe it was an RKO-owned event.

Mr. MACDONALD. They produced it but who carried it?

Mr. ERLICK. They bought the rights and I think they sold it to theater television and probably to certain local stations. I really don't know how it was disposed of. We did not carry it.

Mr. MACDONALD. No. 1, I would like to compliment ABC for doing the great job in sports it is doing; the Wide World of Sports is a great program. I am sure you lose a lot of money on that; you go to a lot of places and it costs a lot of money.

Mr. ERLICK. Fortunately, on Wide World, we do not; that is one of the events on which we manage to make a small profit.

Mr. MACDONALD. What is your viewpoint on this blackout system?

Mr. ERLICK. We are opposed to it. We would like to see it eliminated. We have no brief for blackout.

Mr. MACDONALD. I haven't talked to anyone who is for it. All I know, it happens.

Mr. ERLICK. It happens because it is a condition which is a part of the sale of the event. If you want the event, you must agree to that condition. The only alternative is not to buy the event. That is not a very happy choice.

Mr. MACDONALD. What if the three networks said they were not going to go on with this blackout?

Mr. ERLICK. If the three networks got together and made such an understanding, I think Mr. Ramsey Clark might have something to say about it.

Mr. MACDONALD. You just heard the chairman of the Judiciary Committee say just the opposite, in his judgment it would not happen. That also happens to be my judgment.

Mr. ERLICK. I would like very much to have some assurances from the Department of Justice that it would not happen.

Mr. MACDONALD. If it is a practice that the three networks don't like, have you asked for an advisory opinion about it?

Mr. ERLICK. No, sir; we have not.

Mr. MACDONALD. Because it seems to me more in restraint of trade, that being a word of art, I suppose, to black out an area for commercial reasons and sell it for theater TV than just letting it be seen on regular commercial TV.

Mr. ERLICK. Yes, sir.

Mr. MACDONALD. It is not my position to make any suggestions to all the brains of the three networks, but I would think it would be a simple matter to just ask the Attorney General for an advisory opinion about it, if it is that irritating to the three networks. I somehow have the feeling it is not that irritating.

Mr. ERLICK. Sir, as I say, it is something that we do not favor and do not want. There is no reason in the world why a network should want to black out any area of the country in terms of presenting any particular event. A college football game, there is no reason why we would want to black out the game in the hometown of the college involved.

There is a very good reason why a college wants to do that because it does not want to hurt its attendance on Saturday afternoon. That is understandable to us.

Mr. MACDONALD. Supposedly they are amateurs and therefore, you know, when they start talking dollars and cents and that sort of thing, I lose a good deal of sympathy for them about it although I can understand. But when something is sold out for months ahead of time—I use the example of here in Washington or in New York, where the stadium is sold out, fans support the team here; yet, you cannot see the game here. You have to watch some game, two teams playing whom you do not have any interest in. That does not seem to me to be a fair thing. Does it seem fair to you?

Mr. ERLICK. As I say, we would love not to have that condition.

Mr. VAN DEERLIN. Will the chairman yield?

Mr. MACDONALD. I yield.

Mr. VAN DEERLIN. Before my esteemed chairman digs too big a hole here——

Mr. MACDONALD. For whom? Myself?

Mr. VAN DEERLIN. Possibly to fall into.

Didn't Congress pass, about the 89th Congress, a bill which exempted from antitrust action any pro sport that did black out broadcasts?

Mr. MACDONALD. Yes; I think that is right. We also in our blind day that day said that only the Redskins and no other team—AFL, by law can't come in and use the Coliseum down here; believe it or not.

Mr. VAN DEERLIN. Thereby excluding the more glamorous circuit, the American Football League.

Mr. MACDONALD. I was one who voted against it. I am not sure that everyone who voted for it understood what was in the bill, frankly.

I will conclude by saying this. In your judgment, in addition to the inconsistencies that Mr. Brotzman and myself have pointed out, you know, your playing both sides of the fence, that pay-TV is a threat and yet it is a failure at the same time, also you are just absolutely wrong about attractions which you say would be lost to the public such as the world's series, because they can't be.

Mr. ERLICK. I believe they can be, Mr. Chairman.

Mr. MACDONALD. How?

Mr. ERLICK. Let me explain. Let us take the New York Giants, NFL football club.

Mr. MACDONALD. Let us talk about the world's series. That is the question I asked you about.

Mr. ERLICK. I have some specifics on that one; that is why I bring that up. Then we will talk about the world's series.

The restriction is 2 years, the FCC proposal. The Giants get $1,750,000 a year now from free television rights. Twenty-eight million dollars a year, roughly, is what the league has paid. It is divided among the clubs equally, as I understand it, and the Giants would receive $1¾ million from free television. If the Giants elected not to make available their away schedule——

Mr. MACDONALD. Let us get back to the world's series.

Mr. ERLICK. I can show you economically how this is possible.

Mr. MACDONALD. Let us talk about the world's series because specifically in that fourth order and report, the world's series and that type of specific event, to use the language they use, can't be lost to commercial TV.

Mr. ERLICK. I believe it can. There is nothing which says it has to remain on free television.

Mr. MACDONALD. Specific events such as, and they name the world's series.

Mr. ERLICK. Not the way we read it, Mr. Chairman.

Mr. MACDONALD. Well, read it again.

In conclusion, you said that rates should be regulated for pay-TV.

Mr. ERLICK. I didn't say they should be. I said under the proposal there was nothing to prevent rate gouging.

Mr. MACDONALD. What would your position be if the FCC told ABC what rates they can charge?

Mr. ERLICK. We are not charging the public, Mr. Chairman. There is a difference.

Mr. MACDONALD. I know you aren't. You are charging the sponsors.

Mr. ERLICK. That is correct.

Mr. MACDONALD. What if the FCC got into that act?

Mr. ERLICK. I think they would have to get specific authorization from Congress to do so in either case.

Mr. MACDONALD. I yield at this point.

Mr. BROYHILL. Thank you, Mr. Chairman.

I really don't have a question but a comment and part question.

It seems to me we have here, among others, at least two basic issues. One, of course, is the argument whether or not the Federal Communications Commission has authority over this. As I interpret it, this committee has over the years felt the FCC didn't have any authority over pay-TV. Of course, there are varying opinions about that.

Then we have another issue as to whether or not subscription TV is in the public interest. You are maintaining it is not in the public interest. At the same time, you are saying if it is approved you are going to get into the business.

Mr. ERLICK. We may.

Mr. BROYHILL. This seems to be inconsistent. If it is not in the public interest, why are you going to be running to get into it?

Mr. ERLICK. If the Congress and the Commission decide that this is a service which they want the public to be able to buy if they want to, then we are presented with a different set of facts than we are now and we would certainly take a look at it to determine whether it was in our interest to get into it or not. So far, that is not the case. The opposite is the case.

The resolutions that I am familiar with in the Congress and the bills which I believe have been introduced in the Congress would indicate to me that Congress does not believe pay-TV is in the public interest.

Mr. BROYHILL. In other words, it seems to me you are maintaining that if it is a profitable interest, you may want to get a part of it.

Mr. ERLICK. Yes, sir. If Congress directs the Commission, if Congress decides that pay-TV should be authorized in some form, because that is where I think the authority has to come from, and the Commission decides to follow through and pay-TV is established as a service, quite apart from how we might feel about it, what I am saying is that at that point and under those circumstances ABC will take a look at it as a business and decide whether we should be in it or not. I am not advocating that you do that. Do I make myself clear?

Mr. BROYHILL. I have no other questions, Mr. Chairman.

Mr. MACDONALD. Mr. Van Deerlin.

Mr. VAN DEERLIN. I am indebted to Mr. Lishman for documentation of that matter we were discussing a few moments ago. This occurred during the 87th Congress in which Mr. Brotzman, Mr. Broyhill and I were not serving.

Mr. MACDONALD. And I voted against it.

Mr. VAN DEERLIN. It permits professional football, baseball, basketball and hockey leagues to enter into package television arrangements without fear of antitrust prosecution.

I presume, Mr. Erlick, from your testimony in regard to the loss of prime sports entertainment or the fear of a loss, that you are not entirely reassured by Mr. Wright's promises on behalf of the Zenith Corp. yesterday that they had no interest whatever in getting the Rose Bowl and the world's series.

Mr. ERLICK. Let me say this, Congressman Van Deerlin. I have great respect for Mr. Wright and his company and I am sure he was very sincere in what he said. I would not doubt that at all. But Mr. Wright is not going to be president of Zenith forever and I do not believe he can commit his future management or his future board. Nor can he commit the hundreds of other pay TV entrepreneurs who might be interested in acquiring rights across the country.

The mere fact that Mr. Wright stated what his present intention was does not give us any great comfort as far as others are concerned or even his own company in the future.

Mr. VAN DEERLIN. Do you have any offhand estimate as to what would be required in the way of an investment to take one of those prime attractions off the air for 2 years?

Mr. ERLICK. I was about to give a rough idea in the case of the New York Giants, and this is my own crystal balling. I can't vouch 100 percent for these figures but I think they are reasonably accurate.

The NFL gets $28 million a year as a league from free television for the exhibition rights. This is divided, as I understand it, equally among the 16 teams, which would mean that each team gets $1¾ million per year for its television exhibition rights.

Now, if the New York Giants, for example, were to decide not to make available its away schedule to free TV, it could say, "I will sell my home schedule to pay TV, seven games." It could say that under these rules as we read them.

Now, there are 5,049,000 television homes in the New York metropolitan area. Let us assume that 10 percent of those homes subscribe to this event. That is 500,000 homes. Let us assume a dollar per home per game. That would be 500,000 times seven, or three and a half million dollars.

Let us assume further that half of that money goes to the team and half goes to the pay TV company. The Giants would receive then, net, the exact same amount of money under those circumstances and under the assumption I have just made that they would have received had they sold their entire schedule to free television. Therefore, there would be no loss to the Giants, moneywise, in keeping those games off free TV for 2 years. After that, as we read the rules, they would then be free to sell their entire schedule at the top price to the top pay TV bidder.

In other words, under those assumptions, if they are reasonably accurate, that is how a team could afford to stay off free TV for 2 years while they were getting themselves free of the FCC's proposed restrictions.

Mr. VAN DEERLIN. So that the restrictions that the FCC would impose in its rules would not provide a real protection at all, in your opinion?

Mr. ERLICK. Not in our judgment; no, sir.

Mr. VAN DEERLIN. Thank you, Mr. Chairman.

Mr. MACDONALD. I will recognize Mr. Brotzman in just a moment. Are you sure you are right about that?

Mr. ERLICK. This is the way we interpret it, Mr. Chairman.

Mr. MACDONALD. I don't have the language with me but the language says events that were usually shown.

Mr. ERLICK. Within 2 years on free television.

Mr. MACDONALD. Usually sold on commercial TV.

Mr. ERLICK. That is right. All you have to do is stay off 2 years.

Mr. MACDONALD. That would take the whole schedule, would it not?

Mr. ERLICK. No, sir; just that event, as we read it.

Now, to answer your question, the home games are not usually shown. So that, under both circumstances, they would be free of that restriction.

Mr. MACDONALD. They are not shown in New York; yes, but you can see them in Boston.

Mr. ERLICK. Right.

Mr. MACDONALD. If it is being shown—there are no geographical boundaries in the regulation—if it is sold commercially and I can watch it in Boston, then I would think any lawyer could easily argue that it had been shown.

Mr. ERLICK. I think you could argue that.

Mr. MACDONALD. Therefore, your argument about how it could be financed is specious. I don't think it is right.

Mr. ERLICK. I don't believe so, Mr. Chairman. All I believe the restriction provides is that the event must not have been shown. Whether it was local or not, let us leave that aside for a moment. Whether it was shown on television within a period of 2 years, free television, that is the question.

Mr. MACDONALD. If it is being shown in Boston and other places——

Mr. ERLICK. Under the circumstances I outlined to Congressman Van Deerlin, these events would not be shown on free television.

Mr. MACDONALD. On commercial television.

Mr. ERLICK. That is correct.

Mr. MACDONALD. But they would have to cancel their entire program.

Mr. ERLICK. That is right. They just won't make it available.

Mr. MACDONALD. Yes, but what you were saying to Mr. Van Deerlin, as I understand it, was that they just cut off their home games for 2 years.

Mr. ERLICK. I said assume they don't make their games available to free television at all, period, and they do sell their home games to pay TV.

Mr. MACDONALD. After 2 years?

Mr. ERLICK. No; for 2 years, during that 2-year period, after which time they would be free to sell their entire schedule to pay TV. The question was, How can a team afford to stay out for 2 years?

Mr. VAN DEERLIN. How can pay television make it worth their while?

Mr. ERLICK. Right. Another way would be if a man decides that the world series, for example, is a big enough attraction and he has a big enough pocketbook, he could say to the baseball leagues, "I will give you x dollars for this year here and x dollars for year 2 and in year 3 I will guarantee you x dollars."

Mr. MACDONALD. Sir, I don't want to dispute you about that but the regulation specifically, the fourth order and report regulation, specifically excluded the world series.

Mr. ERLICK. That was not the way we read it.

Mr. MACDONALD. Check it out.

Mr. ERLICK. All right, sir.

Mr. MACDONALD. Mr. Brotzman.

Mr. BROTZMAN. I have one question which relates to one statement you make here on page 5, Mr. Erlick. You say, "It is a virtual certainty that pay TV could afford to pay more for certain programing and could outbid free television for the most popular attractions."

I have heard discussions here about figures and I don't know what the percentage of profit is that you have, but we have talked about some pretty astronomical sums. I guess when we get down to talking about bidding for programs we get down to talking about dollars, is that correct?

Mr. ERLICK. Yes, sir.

Mr. BROTZMAN. What do you mean by that statement?

Mr. ERLICK. What I am saying is that for outstanding events such as the ones we have been talking about the price which a pay-TV business can pay for those events seems to us at least to be greater than the

price we can pay for those events. For the reasons stated in the preceeding sentence, that our ability to bid is limited by what we can reasonably expect to get back from advertisers. Their ability to bid is limited only by what the public can pay, what the traffic will bear as Congressman Celler said.

We think that what the traffic will bear from the public is greater than what we can get from this as an advertising medium. That is the assumption which is inherent here.

Mr. BROTZMAN. What you are really saying here is that there is a tremendous public demand for this because this is where their money would have to come from.

Mr. ERLICK. For these particular events; yes, sir. There is a great demand, no question about it, for these events.

Mr. BROTZMAN. When you say "these events", what are you alluding to?

Mr. ERLICK. Pro football, college football, world's series, outstanding movies, outstanding talent such as Sinatra, Bob Hope, and other people of this caliber. Yes; there is a great public demand for them. Now the public is getting it from free TV and they are not paying for it. The choice as I said a minute ago seems to be a rather illusory one as far as the public is concerned. The public would be faced with the choice of paying for the world's series or not seeing it at all and I don't think that is a very happy choice.

Mr. BROTZMAN. Thank you.

That is all I have, Mr. Chairman.

Mr. MACDONALD. Are there any further questions?

Thank you very much.

Mr. ERLICK. Thank you very much, Mr. Chairman and members of the committee.

Mr. MACDONALD. The next witness is from the National Association of Broadcasters.

STATEMENT OF DOUGLAS ANELLO, COUNSEL, NATIONAL ASSOCIATION OF BROADCASTERS

Mr. ANELLO. Mr. Chairman and members of the committee, my name is Douglas Anello, counsel of the National Association of Broadcasters.

Mr. Wasilewski, our president, had wanted to testify but, unfortunately, he is out of the city today and could not make it.

Before I start with Mr. Wasilewski's statement, I would like to clarify a point that was made between you and Mr. Erlick.

I refer to page 19 of the fourth report and order, paragraph 261. If I may, I would like to read the last sentence and I don't believe it is taken out of context:

"This means that if for a period of 2 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."

If it is true that way, Mr. Chairman, I would say the reverse would be equally true, that if the home games were not shown but the away games were shown, then STV could bring the home games but not the away games. That is from page 261.

Mr. BROTZMAN. Would you read that again rather slowly because I am trying to follow this and I am getting a little confused frankly.

Mr. ANELLO. Paragraph 261 of the Commission's proposed fourth Report and Order. It has two sentences. It is a long paragraph and I don't believe the last two sentences are taken out of context.

"This means that if for a period of 2 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"—meaning the away games—"but not the former. The same would be true for professional football."

I suggest that if it is true in that way, the reverse would be equally true, that if the away games were telecast and not the home games, then the home games would be available for subscription television.

STATEMENT OF VINCENT T. WASILEWSKI, PRESIDENT, NATIONAL ASSOCIATION OF BROADCASTERS, READ BY DOUGLAS ANELLO, COUNSEL

Mr. ANELLO (reading). Mr. Chairman, the National Association of Broadcasters is a nonprofit organization of radio and television broadcasters whose membership included as of October 4, 1967, 2,180 AM stations, 1116 FM broadcast stations, 514 television stations, and all of the national radio and television networks.

We very much appreciate your courtesy in inviting us here today to present the views of the association on subscription television.

The NAB stands firm in its belief that the public interest would not be served by permitting the use of the airwaves or exploitation of free programs by wired systems to bring pay television programs into the home. The American people receive free the best television in the world. Our television stations and networks offer the American people more programs and a wider choice of programing than is available anywhere.

This has been accomplished in the traditional American pattern of free and open competition. We have succeeded or failed, as in any other free enterprise, but never either in success or failure has our industry levied 1 cent on the American people to see or hear our broadcast performances. The only thing required of the American listener or viewer is that he have a receiving set.

Pay television would now take this investment in receivers by the people as its takeoff point. It would convert a free highway into a toll road. It would require the public to pay for what they now view for free.

If pay television proposed the use of sets other than those existing in the American home so that the public could truly have a freedom of choice, it would be new but pay television proposes to use the result of an investment by the public over the years of more than $30 billion. Its proponents realize that the roadway is already there—the receiver used for free reception by an audience created by free television. I submit this is not progress; rather, the antithesis of progress.

The use of the airwaves for pay-TV purposes is diametrically opposed in concept to the present system of broadcasting. Its basic premise is that if you want to see, put a coin in the box. Its justification is based on the fallacious promise that through the revenues

derived from this system the American public will receive a type of programing superior to that which it now receives free.

An examination of the record makes it clear that the promise of pay-TV is more myth than reality. Pay-TV systems do not provide new and diverse types of program services. The Subscription TV Committee of the FCC virtually admits this fact in its report and the Hartford experiment certainly demonstrates the same fact.

In 1961, the FCC authorized the Zenith Radio Corp. to provide a test of on-the-air pay television in Hartford. Zenith had stated that the "sole purpose of subscription TV" is to provide "programs of box office quality * * * which are not now available on free television."

Accordingly, the subscription programing provided by station WHCT in Hartford as a result of the experiment should throw light on the desirability of the whole idea of subscription television. Zenith and Teco have provided a detailed listing of all programs made available to Hartford subscribers during the first 2 years of the experiment.

During that 2-year period, station WHCT broadcasts a total of 599 different subscription programs; most were repeated, so that the station provided 1,776 separate presentations or "showings" during the 2 years.

As was the case in previous pay-TV experiments in Bartlesville, Okla., and Etobicoke, Canada, the Hartford service was essentially a "movies-in-the-home" operation: 86.5 percent of the total number of "showings" were motion picture films.

Sports broadcasts accounted for another 4.5 percent; educational features for 3.5 percent; and "special entertainment productions," including the operas, ballets, and Broadway plays promised by all of the major companies supporting pay television, for the remaining 5.5 percent of program offerings.

This hardly satisfied the criterion of "not being available on free television." Television stations have made extensive use of theatrical feature films almost since the beginning of commercial television in this country.

In the past several years there has been a notable increase in the programing of relatively recent films. The same is true in the increased coverage of sports events. This trend may be expected to continue unless these programs are siphoned away from free to pay.

That the FCC Committee is concerned with this possible siphoning process is apparent from its statement that "It is at least conceivable that a successful nationwide STV system * * * 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. We would not consider this to be in the public interest."

To assure a "wide variety" of programs not currently available on free TV the FCC Committee suggests "limiting" subscription TV to movies less than 2 years old and to sports events which have not been televised regularly in the community within the past 2 years.

To make certain that there would be at least a minimum amount of cultural and educational programing, movies and sports could not exceed 90 percent of the whole. The futility of these suggested restrictions is patent.

If pay television is capable of even moderate penetration of free television markets, sports teams and pay television promoters would

be fully able to make the necessary adjustment for the required period in order to capture the rewards of a "box office" return.

Professional football is an apt example. At present, the typical pattern is to broadcast "away" games of local teams, and when the local team is at home, to broadcast games of other teams. The rules would permit the pay television broadcast of "home" games not carried during the preceding 2 years.

It would be relatively simple for professional football teams immediately to substitute the broadcast of "home" games on pay television for the broadcast of "away" games on free television. This would provide professional football with substantial income during the interim 2-year period while leaving no professional football on free television.

Thereafter, pay television could carry all the games, both "home" and "away" of the local team. Professional football would disappear as a free broadcast service.

This could happen even though a small minority of the present viewing public chose to subscribe to a pay-TV service. For example, 5 percent of the 60 million TV homes in America today could by the simple expedient of paying $1 per game "outbid" the remaining 57 million.

This sport is but one example of the ultimate fate of virtually all of the most popular kinds of programs now available on free television. The argument that pay-TV would provide a beneficial supplement" to free TV is a sham. All evidence available and the imperative of logic leads to the conclusion that pay-TV would seek to appeal to the greatest number of viewers to reap the maximum number of subscriptions and this it could do largely with sports and motion pictures.

That many pay-TV advocates have been willing to accept what they consider to be very restrictive regulatory proposals should be cause for deep concern. Once the camel's nose is under the tent pay-TV would seek to circumvent, frustrate, or invalidate the restrictions.

Indeed, the suggested regulations over programing raise serious questions under the first amendment. Furthermore, they are so intricate as to be unworkable and would force the Commission into a morass of administrative detail thereby compounding its already substantial administrative burden.

In short, if the Commission cannot, consistent with the public interest, authorize pay TV without such regulations, then it should not authorize pay TV at all.

In this connection, the NAB respectfully suggests that the Federal Communications Commission lacks the jurisdiction to authorize over-the-air pay television on a permanent basis.

The only judicial consideration of the subject concerned itself with experimental operations. The court never addressed itself to the question currently under consideration by the Commission, that is, permanent authorization.

We suggest there is a much broader authority for the Commission to permit experimental operations than exists for actions that would alter permanently the regulatory scheme.

I shall not attempt to go into the legislative history which led to the present Communications Act other than to stress the fact that

we firmly believe it quite clear that Congress founded our present regulatory system in the clear context of free reception of programs by American listeners and viewers.

We suggest that the proceeding now pending before the FCC envisages such a basic modification of the American system of broadcasting that it should not be implemented withou the specific guidance of the Congress. We would take this position even if the act could be construed to grant general authority.

In its current proceeding, the Federal Communications Commission is considering the use of the frequencies for pay TV purposes. Of equal or even greater importance is the possible development of a nationwide system of wired pay television through the interconnection of CATV systems.

As you know, CATV picks up free broadcast signals and retransmits them to subscribers via cable for a fee. There are numerous applications presently pending before the Commission to interconnect many of these systems.

If there is a nationwide interconnected CATV network, it will be a simple matter to turn this into a nationwide system of wired pay TV. This is particularly true if there is no restriction upon program origination by CATV systems.

In its traditional form the community antenna, as a community antenna, can be beneficial to many people and should be encouraged. But if it is allowed to become a nationwide system of wire television, as it surely will if unchecked by the Congress and the FCC, it will be a thorn in the pocketbook of everybody.

Broadcasters are dedicated to service of the public—the whole public—in their communities. Their programing, whether it be news, entertainment, sports, or public service, and whether it be of local or network origin, is supported by advertisers.

Advertising, as we all know, is an essential element in the growth and health of our economy. It pays for itself many times over in the expansion of markets, the stimulation of employment, and the development and improvement of new products and services.

During the course of present consideration of pay television much has been said of the "public interest." Where does the interest of the public lie? What is best for all of the people, rural and urban, privileged and poor?

We believe the public interest lies in a system of diverse local broadcasting outlets, free of charge and equally available to all, urban and rural, rich and poor alike.

Mr. MACDONALD. Thank you very much, sir.

You know, those are ringing words and all that and, frankly, when I hear a witness testify for one side and then for the other it is a little confusing because all the witnesses have been persuasive.

You say, where does the interest of the public lie? That is not a bad question. That is what the Congress is here to look out for. What is wrong, to take a concrete example—and I don't want to sound just sportsminded, but it keeps coming to my mind—what is wrong if the stadium in Boston today, which hold 35,000, is sold out and I want to watch the game and I can't get a ticket—what is wrong with my right to pay $2 or $3, and I agree with you that charges will be that, not the 25 cents or 50 cents we have been hearing about, will be what

the market will bear, but what is wrong with my having the choice, if I want to, to stay home and watch it on pay TV and maybe have some friends in? What is wrong with my having the choice to pay $3 to watch it without getting pushed around by all the crowd?

Is there something inherently indecent about having a choice to watch it at home if you want to?

Mr. ANELLO. It is not inherently indecent, Mr. Chairman. If broadcasting had started out that way, there would be nothing wrong. But baseball is a national pastime. What makes the world series? It is the kid in San Francisco, in Tennessee, in Phoenix and in Chicago, being able to listen and view this series on a set which the only cost is the price of the set.

Mr. MACDONALD. That is him. That is somebody in Phoenix. I happen to come from Boston. I happen to dislike a lot of the commercials that come on, even though somebody said they were better than a lot of the programs. I don't happen to think so. Some of them are not dog food, either, but more basic things that they advertise—you know, it is fairly disgusting to have to listen to them and you hear them all the time. If I choose to pay $3 not to have to listen to those advertisements, what is wrong with my having the choice to do it?

Mr. ANELLO. Because you would be a minority then, imposing your tastes and your preferences upon the majority.

Mr. MACDONALD. Yes; that is right.

Mr. ANELLO. That is where the public interest comes in.

Mr. MACDONALD. What is wrong with that? Anytime I go to a movie, I am a minority of one. I go to the box office, I pay for the ticket, and I see it. Nobody makes me do it and they don't interrupt the program 42 times while you are watching the movie.

Mr. ANELLO. When you go to a movie, sir, you choose to leave your home to go downtown, pay your 50 cents or a dollar and everybody else has the same choice. You are depriving nobody of anything.

Mr. MACDONALD. How do I deprive the people in Phoenix, unless they have a blackout going in Phoenix, which we have been talking about? How, if I choose this pay TV thing, whatever system maybe is authorized, or whatever systems might be authorized, how do I deprive anybody of anything?

Mr. ANELLO. Because you are siphoning off a program that is already on television.

Mr. MACDONALD. How do I siphon it off?

Mr. ANELLO. Because once you pay for it you don't think somebody is going to put it on for free, do you?

Mr. MACDONALD. A lot of times they sell stuff, Dodge automobiles, the sponsor is trying to sell Dodge automobiles on this broadcast of the World Series. I don't smoke. They keep interrupting, telling you this cigarette is better and how long you make it, et cetera. You know, they are not selling me anything. How do I, by exercising my right, willing to pay to see a game, how do I deprive anybody of anything? Because this market does not go up; I am not going to buy a Dodge; I am not going to buy a cigarette. So, they don't lose anything by losing me.

Mr. ANELLO. Who doesn't, Mr. Chairman?

Mr. MACDONALD. The sponsors.

Mr. ANELLO. Maybe the sponsor doesn't but you don't think that game could be broadcast on pay television in Phoenix and for free in Los Angeles. It would have to be one or the other across the board.

Now, if the Red Sox or if the pay television entrepreneurs want to string a wire from Fenway Park into the local theater or into your home or into New York, that would be a horse of a different color. Even there you would still be siphoning off the game. But we are talking here about the use of broadcast frequencies, frequencies that are to be used by all the people to the greatest extent possible.

Mr. MACDONALD. That is right; in the public interest.

Mr. ANELLO. Precisely.

Mr. MACDONALD. And for free.

Mr. ANELLO. We feel that for free is in the public interest. That is our position.

Mr. MACDONALD. If I want to pay a station in Boston that is using a free airway, how much do you suppose it would cost me?

Mr. ANELLO. Depending on which one, maybe $12 or $15.

Mr. MACDONALD. How come the people who have been given these frequencies have the right to have that amount of money coming to them when it is something that they are doing allegedly in the public interest?

Mr. ANELLO. I do not think that the public interest and eleemosynary institutions are necessarily synonymous. I think you can serve the public interest by making money. The automobile manufacturers make money. They still serve the public in providing transportation. The telephone company makes money; it serves the public by providing telephone service.

Mr. MACDONALD. But they are regulated. They are a utility.

Mr. ANELLO. That is because they have a monopoly.

Mr. MACDONALD. How many networks are there?

Mr. ANELLO. There are only three networks today but there may be a fourth or there may be a fifth in the future as we get more UHF stations on the air.

If any monopoly exists, it is not because of the lack of frequencies, Mr. Chairman. There are plenty of frequencies there for an expansion of free television service. In Washington, look how many we have now. We have four VHF stations; we have three UHF stations. You can also receive Baltimore in a good many portions of the city. Why you get a high price for a station is a combination of circumstances:

One, many of these people were pioneers in the business. They started when all was not gold and glory in television. Up until around 1951, I think 1951 and 1952 was the last year when the industry showed a deficit, a lot of these people took it on the chin. Now, through their business ingenuity, through their programing, through their network affiliations, through their acceptance in the local community, they have built up a good business.

Mr. MACDONALD. Certainly I do not want to be argumentative with you, but, say, when TV was starting, what if the radio broadcasters created a great furor saying that if permitted, TV was going to ruin radio. Isn't that somewhat synonymous?

Mr. ANELLO. I don't think so, Mr. Chairman. There is one very substantial difference. When television came along the pike, there were no telvision sets. People had to start from scratch with a television

station and a set. Today the sets are already there. The pay television people are now coming and saying, "Despite the fact that you paid $300 or $400 for this set in the expectation of getting free channels, we now want to take a channel away from you."

Mr. MACDONALD. The whole point is that unless the public wanted programs that pay TV say they are going to put on, and I don't believe everything they say, either, but if the public doesn't want it, it is going to be a terrific waste of the money on their part, isn't it?

Mr. ANELLO. This is true, Mr. Chairman.

Mr. MACDONALD. Therefore, there has to be some public demand for it or else the companies that are involved will just go flat on their faces.

Mr. ANELLO. Mr. Chairman, I haven't the slightest doubt in the world but there is some public demand for pay television, like there is some public demand for anything that is not commonplace. But our fear is that this small public demand, and as I indicated by my figures, 5 percent of the public could then dictate what 95 percent of the public hear and see because their pocketbooks could clearly outbid all advertisers and all sponsors, and that is the fear. It is like the chicken and the egg, Mr. Chairman. What comes first?

Mr. MACDONALD. You know, it is a moot point, as they used to say in law school. It is a moot point that someone can outbid General Motors.

Mr. ANELLO. I don't say it is moot. I say we don't know the answer because we are speculating. That is what we are doing. If you take 5 million sets at $1 apiece, that is $5 million. I don't know what they paid for the world's series, Mr. Chairman, but I am sure it was not $20 million. I am assuming a four-game series. Thank God we had seven.

Mr. MACDONALD. It starts in 25 minutes, too.

Mr. ANELLO. I am well aware of it, too. Being a New Englander. I want to see your hometown win.

Mr. MACDONALD. I certainly appreciate that.

Mr. ANELLO. But it is this possibility, and I say we don't know for sure; of course not. If we were sure, our lives would be easier. Your task would be easier, so would mine, and so would all. But we believe firmly and sincerely and honestly that a small minority can start bidding for these programs. Once you get the program away from free, it will never go back there, and once you get one, then you get two and three and four and it is cumulative.

Mr. MACDONALD. Well, as a concrete example, and this is really a statement, the gentleman representing the ABC referred to a program called Africa. "Africa" was a fantastic program, I thought. Having been there, I was very much interested in the subject, but my children were not able to see it.

Now, I would personally pay to see a rerun of it just to have my children see it. I don't see really what is so terribly wrong with that concept. I am not saying whether I am for or against this thing. Actually, this is what the hearings are all about—to try to work out some middle ground or to find out whether it is good or bad.

But everyone who is opposed to this thing sounds so patriotic and, if you will forgive me, your ringing words sound so patriotic and if anyone should vote for it, you know, you are sort of a Benedict Arnold, taking from the underprivileged what they are entitled to.

I just don't happen to feel exactly that way.

Mr. ANELLO. You are a lawyer, Mr. Chairman. You must realize that lawyers are advocates. I am certain that Zenith Radio is as patriotic as NBC, ABC, or CBS. That does not enter into it. Perhaps we wax eloquently at times, but we are a little fearful of the possibility of these things happening.

I agree with you. Why should you not be able to pay for "Africa"? But I am certain that ABC will rerun it. I would hope so and I am confident they will. If you could limit it to that, it would be fine. In our judgment, it could not be limited to just that.

Mr. MACDONALD. Why don't the networks take hints from the people who are just sick to death of being subjected, in order to see a movie, and I use the phrase which somebody presented, to 220 commercials? Obviously that is not so, but it seems that way sometimes.

Mr. ANELLO. I just came from a Code Board meeting last week where we took the first step, and that is to limit the number of interruptions, two per half-hour. That does not mean that you can't have a cluster.

Mr. MACDONALD. Mr. Preminger said the smartest thing, why don't they do it at the beginning and at the end?

Mr. ANELLO. I was going to say we are meeting again next month to determine whether or not we cannot, not only in addition to putting a limit on the number of interruptions, but also look at the possibility of sequential announcements. That is not as easy as it might sound, apart from any finances, because you have substantial legal problems when you limit it to one interruption and two sequential announcements.

But we are not here to discuss that at this time. Some people find commercials quite amusing. Other people say it gives them the opportunity to do other things.

Thirdly, I guess the advertiser believes it sells his products, which is very important again, forgive me if I sound patriotic, but to help us to more prosperity and progress. Selling products is a part of advertising and it is a part of America.

Mr. MACDONALD. I said the other one would be my last question, but this is my last question.

It is funny that the Congress is now being asked to take down all billboards, to beautify America. I don't know how many millions of dollars is going into that. If billboards are abnoxious, how about billboards on your TV screen? I don't happen to think billboards are that obnoxious, but some highly placed people do. I suppose the program will go through

You know, it does not seem consistent to me. Anyway, thank you very much for your testimony.

Mr. ANELLO. Thank you, Mr. Chairman.

Mr. MACDONALD. The hearings are adjourned until tomorrow at 10 a.m., in this room.

(Whereupon, at 12:40 p.m. the hearing adjourned, to reconvene at 10 a.m., Friday, October 13, 1967.)

SUBSCRIPTION TV

FRIDAY, OCTOBER 13, 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 be in order.

The first witness is Mr. Martin J. Gaynes, appearing on behalf of the National Association of Treatre Owners and the Joint Committee Against Toll TV.

STATEMENT OF MARTIN J. GAYNES, COUNSEL, NATIONAL ASSOCIATION OF THEATRE OWNERS AND JOINT COMMITTEE AGAINST TOLL TV

Mr. GAYNES. Thank you, Mr. Chairman.

My name is Martin J. Gaynes, of the law offices of Marcus Cohn, Washington, D.C., and I appear before you on behalf of the National Association of Theatre Owners and the Joint Committee Against Toll TV.

The National Association of Theatre Owners is a nationwide trade organization consisting of the owners of motion picture theaters throughout the United States. The Joint Committee Against Toll TV is a voluntary association which came together in 1955 for the purpose of expressing its opposition to the institution of over-the-air pay television, and which has participated in the proceedings before the Federal Communications Commission during the past 12 years concerning pay television.

I thank the committee for the opportunity of appearing before it. I recognize that I come in at the end of a long and difficult week in which many of the arguments for or against pay TV have been put forth before the committee at great length.

I will not, therefore, read my prepared statement, but I beg leave to include it in the record and have it reproduced as if it were read.

Mr. MACDONALD. Without objection, it is so ordered.

(Mr. Gaynes' prepared statement follows:)

STATEMENT OF MARTIN J. GAYNES, COUNSEL, NATIONAL ASSOCIATION OF THEATRE OWNERS, AND THE JOINT COMMITTEE AGAINST TOLL TV

My name is Martin J. Gaynes, of the Law Offices of Marcus Cohn, Washington, D.C., and I appear before you on behalf of the National Association of Theatre Owners and the Joint Committee Against Toll TV. The National Association of

Theatre Owners is a nationwide trade organization consisting of the owners of motion picture theatres throughout the United States. The Joint Committee Against Toll TV is a voluntary association which came together in 1955 for the purpose of expressing its opposition to the institution of over-the-air pay television, and which has participated in the proceedings before the Federal Communications Commission during the past 12 years concerning pay television.

It is the position of the National Association and the Joint Committee that over-the-air pay television should not be adopted as a permanent medium and we respectfully request that this Subcommittee take whatever action it deems necessary to indicate to the Federal Communications Commission that: (a) the Federal Communications Commission does not have the statutory authority to inaugurate pay television as a nation-wide permanent medium and (b) that the institution of permanent pay television would not be in the public interest.

We have filed extensive comments with the Federal Communications Commission outlining in detail the detriments to the public interest which would ensue if pay elevision were to be authorized. We will not repeat all of the arguments made in these comments in the time which the Subcommittee has graciously extended to us today, although we respectfully seek leave to place these comments into the record of these proceedings so that they will be available for Committee study. We wish today merely to point up the more pressing reasons why we believe that the institution of over-the-air pay television as a permanent medium would be a disaster for the American public.

I. THE FEDERAL COMMUNICATIONS COMMISSION'S CONCLUSION THAT IT HAS THE STATUTORY AUTHORITY UNDER THE PRESENT COMMUNICATIONS ACT TO AUTHORIZE PAY TELEVISION IS ERRONEOUS

The Federal Communications Commission, in its First Report on pay television in 1957 (16 R.R. 1509, 15–14 at Pars. 20–44) concluded that it possessed the statutory power to authorize over-the-air pay television on a permanent basis. Although urged to do so many times, the Commission has never reevaluated that conclusion but has adhered to it in the Commission's March, 1959 Third Report,[1] and again in the Commission's March, 1966 Further Notice of Proposed Rule Making and Notice of Inquiry. Similarly, this conclusion was not reevaluated by the Commission's Subscription Television Committee in its July, 1967 Report; the Committee merely noted the conclusion and indicated the Committee's agreement therein.[2] We believe that the Commission's conclusion was erroneous.

It cannot be emphasized too strongly that a system which demands direct payment of fees by the public in order to receive programs broadcast on publicly controlled broadcast facilities represents a major and drastic change in the nature of American broadcasting. Prior to the advent of pay television, commercial broadcasting had been supported solely by advertisers. There was, and is, no direct financial relationship between a listener and a broadcast licensee. The absence of this relationship is more than just a matter of commercial choice. It represents an important feature distinguishing broadcasting from public utilities, and common carriers—a distinction which was explicitly recognized by Congress when it drafted and adopted the Communications Act.[3]

This single fact also sharply distinguishes pay television from other changes in broadcasting which have occurred over the years, such as color television, FM broadcasting, simplexing, multiplexing and functional music operations.[4] It also distinguishes pay television from CATV, since in CATV there is no direct

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[1] 16 R.R. 154(a).

[2] The Subscription Television Committee consists of Commissioners Wadsworth, Lee and Cox. On July 14, 1967, the Committee recommended to the full Commission that over-the-air pay television be authorized on a permanent basis. Commissioner Wadsworth, the Committee Chairman, however, stated that, while he agreed that the issues involved should be brought to the attention of the full Commission, nevertheless, this agreement should not be construed as an endorsement of the Committee's position, upon which question Commissioner Wadsworth withheld judgment.

[3] See, *e.g.*, the remarks of Senator Broussard who, during the debates on the Communications Act of 1927, stated "radio makes no direct charges, whereas the others (telephone and telegraph) are in the business of serving the public for direct pay." 67 Cong. Rec. 12504. See also *Pulitizer Publishing Co.* v. *F.C.C.*, 68 U.S. App. D.C. 124, 126, 94 F. 2d 249, 251.

[4] Although it is true that certain subscribers of functional music pay for the privilege of receiving material broadcast over the air, it is also clear that the *general* listening audience does not pay for this broadcasting. Stores, factories and buildings which desire such operations purchase them so as to provide the public in those stores and buildings with background music as an *additional* service. The public is not simultaneously *deprived* of the service.

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

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

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

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

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

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

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

including such restrictions as forbidding (with limited exceptions) the presentation on pay television of movies more than two years old in general release, forbidding the presentation of "series type" of programs with interconnected plots, and forbidding the presentation of sports programs which have been on television on a regular basis for two preceding years. These types of restrictions are unprecedented in broadcast history, and there is a most serious question as to whether they are legal under the present Section 326 of the Communications Act which forbids the Commission to "censor" program material. Indeed, such restrictions have already been attacked by numerous commentators as illegal. If these commentators are correct, then the Commission is powerless to enforce the very conditions which it deems necessary to protect the free service. Clearly, the present Act gives no guidelines on this point.

We believe that the conclusion reached by the Interstate and Foreign Commerce Committee in February 1958 is still valid and should be emphasized anew. On February 6, the Committee adopted the following resolution:

"Resolved, that it is the sense of this Committee that the public interest would not be served by the granting of authorizations for subscription television operations as contemplated by the Federal Communications Commission in its First Report, adopted October 17, 1957, in Docket Number 11279, because—

"(1) it has not been established to the complete satisfaction of this Committee that authority to license such operations comes within the power of the Commission under the provisions of the Communications Act of 1934; and

"(2) such operations might lead at least to a partial blacking-out of the present system of television operations, with possible injury to such present system in particular communities, if not throughout the United States.

"Sec. 2. For the reasons stated above, it is the sense of this Committee that the Federal Communications Commission should not grant authorizations for subscription television operations as contemplated in such First Report unless and until the Communications Act of 1934 is amended so as to specifically empower the Commission to grant such authorizations."

At the same time, the Senate Commerce Committee reached a similar conclusion and voted to recommend the adoption by the full Senate of the following resolution:

"Resolved, that it is the sense of the Senate that the Federal Communications Commission should not, without specific authorization by law, authorize or permit any television licensee or agent thereof to impose a toll, fee, subscription, or other charge on the general public or any portion thereof, for the privilege of viewing television programs received over television receivers located in the home, with the exception of both community antenna systems and those programs transmitted by cable or wire or both."

We believe that similar action should now be taken.

II. THERE IS NO DEMONSTRABLE PUBLIC DEMAND FOR THE SERVICE

The concerted drive by proponents of pay television for the institution of a pay television system has now been continuing for over 12 years; the proceeding before the Federal Communications Commission started in February 1955. Yet, throughout this entire period, there has clearly been no demonstration of public demand seeking the institution of pay television. On the contrary, the only outcry has come from the entrepreneurs who seek to profit from the medium.It can hardly be contended that the public has been besieging the Commission with demands that a permanent pay television system be established.

To the contrary, in California, as this Subcommittee is undoubtedly aware, the public voted down by a decisive margin the institution of a wired pay television system in the only public referendum ever held on this question. And it is significant that only one test of a pay television system, pursuant to the First and Third Reports, has been conducted. It is at least reasonable to assume that if a real demand for such service were evident, it would be reflected in requests by numerous prospective pay TV proponents for authority to conduct experimental operations. No such public reaction has been evident.

Indeed, the Hartford and the Canadian Etobicoke experiments clearly negate the existence of public demand. Although the Hartford pay TV proponents artificially limited the Hartford test to 5,000 subscribers and alleged that there

is a "back log" of demand, neither they nor any other proponents of pay television have demonstrated the existence of public clamor for such a system. In Hartford, less than 1% of the potential audience were subscribers and 42% cancelled subscriptions. The average number at any time of persons watching was 267, or only approximately 5% of the number of persons who subscribed. The Etobicoke test showed the same pattern, for during the Etobicoke experience, pay television subscribers actually declined more than 50% during the five-year test from an initial high of 5,500 down to 2,500 even at a time the pay TV operators were expanding their potential service area from 12,000 to 14,000.

In the face of such experience, how can it be contended that there is a pressing need or demand for the institution of pay television which as even its proponents on the Commission recognize, has such a potentially catastrophic effect upon the free service?

III. THE DETRIMENTS TO THE PUBLIC FROM A PERMANENT PAY TELEVISION SYSTEM CLEARLY OUTWEIGH ANY MINIMAL BENEFITS WHICH MAY BE DERIVED

The record, of course, has made it abundantly clear that the promises and siren songs of the pay television proponents have been demonstrably proven false. Pay television was first portrayed to the American public as a means by which television programming fare would be diversified and improved through the presentation of high quality minority-type programming which was allegedly unavailable over the free system. The pay TV proponents promised that, as the Commission noted in its First Report, "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."

It is now clear that pay television will *not*, in fact, yield the benefits which were its original *raison d'etre*. The Commission's own Subscription Television Committee recognized the validity of what opponents of pay television have continually pointed out—that pay television will not, in any way, offer additional cultural and high quality diversified minority-type programming, but would program for the mass audience, and would create no long-term improvement in either the quantity or the quality of television programming. The Committee itself has now recognized that whatever hopes might once have been held out for such programming by pay television, they can no longer be realistically entertained (see Report, Pars. 54–57).

Thus, programming which pay television will bring to the public will be mainly motion picture films and sports events, and the only benefits involved are that (1) the public may see some motion picture films somewhat more quickly than these films would be shown on free TV, and (2) pay television can present certain sports events as heavyweight championship bouts and other sports programs which are now, for one reason or another, "blacked out" on free TV.

With respect to films, however, it should be noted that pay television does not promise first-run features; the Commission's Subscription Television Committee held that even the presentation of films from *6 months to 2 years old* would be a sufficient justification to authorize a permanent pay television service. Yet the Committee never attempted to explain what the difference might be between a film, say, 18 months old and one 26 months old insofar as the public interest was concerned, nor did it attempt to explain why whatever small difference may exist was sufficient to authorize the permanent establishment of a system which could potentially destroy free television, and the billion dollar investment which the American public has in it.

Movies, indeed, are desired by the American public. Yet this Committee well knows that free television now presents a plethora of motion picture films, some of which are less than 2 years old. Moreover, the average age of movies presented on the free system has steadily been lowered during the past 5 years, and each year more current films are presented. There is no reason to suspect that this trend will not continue, although it certainly will not continue if pay television is authorized on a permanent basis. The best way of destroying any advance in free television movies is to allow pay television to be authorized.

And with respect to sports, it is well known that sports events on free television have been proliferating at a rapid rate. Virtually every sports event known has been presented on free television, and, indeed, many critics have chided the networks for overemphasis on sports programing. To contend that the airing of the occasional blacked-out heavyweight championship fight or other

sports programs is a "beneficial supplement" sufficient to authorize the institution of a pay television system, is to deprive these words of any realistic meaning.

The potentially destructive effect which pay television might have upon the free system is obvious. It has been recognized by many opponents of the system and even by the members of the Commission's Subscription Television Committee. The "benefits" to be derived from pay television are minimal at best, if they exist at all. The Hartford and Etobicoke tests were far too limited in scope to give any significant demonstration of the impact which pay television would have upon the public. There has been no public demand or clamor for the service. Under these circumstances, it cannot be seriously contended that the authorization of permanent over-the-air pay television at this juncture is in the public interest.

IV. THE AUTHORIZATION OF A PERMANENT PAY TELEVISION SYSTEM WOULD IMPROPERLY DISCRIMINATE AGAINST THE POOR

One final point should be emphasized for, in many respects, it is the most startling aspect of the institution of a permanent pay television system. The Hartford test yielded meaningful data in one respect: it made clear that the authorization of a pay television system would systematically deprive 30% of the nation (i.e., the persons in the income level $0–3999) of the free use of public frequencies, which would instead be turned over to the pay television proponents to be used for the benefit of wealthier citizens. In effect, pay television systematically discriminates against the lower income level families and deprives them of the ability to use what heretofore have been recognized as broadcast frequencies available free to all parts of the population, regardless of income. Pay television would, for the first time in American broadcasting history, divide the viewing public along economic lines according to ability and willingness to pay.

The Commission's Subscription Television Committee attempted to cope with this discriminatory pattern by contending that the lower income group "will be able to continue to see ample amounts of free TV programming, so that they will not be deprived of anything . . ." (Par. 75). Yet this reasoning is not impressive. It first assumes that the Commission will be effective in preventing the siphoning of free TV programming, a conclusion dubious, at best. But more importantly, it appears to set up a double standard of programming, one for the wealthy and a lesser standard for the poor. It urges, in effect, that the lowest income group has "ample" amounts of free TV programming, while, at the same time it is argued that the free service is not "ample" enough for wealthier citizens so that pay television must be authorized to fill the gap. Such a double standard is unprecedented in broadcast history. And it is strange indeed that the Committee is so satisfied with the quantity of free TV programming that it can conclude, even in cities with five or more stations allocated, that the loss of one station's potential programming is a desired or non-harmful result.

It needs no elaboration to demonstrate that television is perhaps the most successful and effective mass media which the world has even known. It has allowed the poorest citizen to obtain, in return for the mere purchase price of a television set, entertainment, information, and news of a quality and quantity unobtainable in the past by the richest prince or king. It is, in truth, the poor man's theatre; the benefits which it has brought redound most strongly to those persons and groups in the lowest income level. It is strange, indeed, that the Committee can so easily ignore this group, and seek to deprive them of some of the benefits of which television is capable.

It is even stranger when it is recalled that, at this point in our history, the country as a whole is making the most determined efforts to bring to the lowest economic levels of our nation the full benefits of the American society as they are enjoyed by the more fortunate majority of our citizens. Federal and state governments have instituted far-reaching programs in urban development, open housing, work training, education, and a myriad of poverty programs so as to enrich the lives of the poor. The country has recognized the disparity in income which exists in our society, and has moved to correct it through massive Federal and state aid. It is anomalous that the Committee would now have the Commission turn precisely in the opposite direction, and deprive the very portion of the nation which needs it most of the fullest opportunity to take advantage of the free service. The Committee, in essence, has created its own anti-poverty program—its program is directed *against* the poor.

CONCLUSION

We wish to conclude by citing the statement of Congressman Celler before the Federal Communications Commission in the oral argument upon pay television recently concluded by the Commission. Congressman Celler has summarized the situation in prophetic words:

"To summarize, careful study has convinced me that the conversion of any segment of the television spectrum to the service of toll television would increase viewers' costs and broadcasters' profits, and this without any substantial hope of producing any long-range improvement in programs. Free television, as we know it, may be downgraded to a secondary and economically untenable position. The best existing programs the public is accustomed to receiving without charge may be siphoned off. The trend, noted by the Antitrust Subcommittee, toward the monopolization of outstanding talent and program product will be accelerated. The television audience will be divided along economic lines. A method of broadcasting will be inaugurated that may drive free network television as we know it from the air-waves. The foreseeable result is a television system in which we will all be paying for much the same TV fare which now comes to us without cost."

We endorse Congressman Celler's statement and believe the points made therein should be adopted by this Subcommittee.

Mr. GAYNES. I would like to speak very briefly about some of the points made in the statement and first of all point out that we have filed with the Federal Communications Commission a number of comments on the pay TV rulemaking proceeding, two of them particularly responsive to the blue booklet which Zenith filed about the Hartford pay TV experiment.

Many of the arguments that we have made are contained within these comments. They also analyze the Hartford tests and indicate some of the weaknesses we find in it. I, therefore, beg leave to introduce these into the record as well.

I have given to the clerk whatever extra copies I had and wish them to be introduced in the record at this time.

Mr. MACDONALD. Without objection, it is so ordered.

(The documents referred to follow:)

BEFORE THE

Federal Communications Commission

WASHINGTON 25, D. C.

In the Matter of:	)	
	)	
Amendment of Part 3 of the Commission's Rules and Regulations (Radio Broadcast Services) to Provide for Subscription Television Service	)	Docket No. 11279
	)	
	)	

COMMENTS SUBMITTED BY JOINT COMMITTEE AGAINST TOLL TV

October 10, 1966

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BEFORE THE

Federal Communications Commission

WASHINGTON 25, D. C.

In the Matter of:	)	
	)	
Amendment of Part 3 of the Commission's Rules and Regulations (Radio Broadcast Services) to Provide for Subscription Television Service	)	Docket No. 11279

COMMENTS SUBMITTED BY JOINT COMMITTEE AGAINST TOLL TV

The Joint Committee Against Toll TV (hereinafter referred to as "Joint Committee") by its attorneys, hereby submits its Comments in the above-captioned rule making. The Commission has requested Comments on a number of matters concerning Pay-TV, including the question as to whether Pay-TV should be authorized on a permanent basis and, if so, the nature of the rules and regulations which should be adopted concerning Pay-TV. The Joint Committee respectfully submits that the Commission should *not* authorize Pay-TV on a permanent basis, and should not adopt the proposed rules and regulations promulgated by the Commission in its March 24, 1966, "Further Notice of Proposed Rule Making and Notice of Inquiry." In support, the Joint Committee states:

I. STATEMENT OF INTEREST

The Joint Committee Against Toll TV (sometimes also known as the "Committee Against Pay-as-you-see TV") is a voluntary association which has previously identified itself in the above-captioned proceeding and which has indicated its interest in the subject of pay television by filing Comments in the above docket on June 6, 1955, and by participating thereafter.

II. BACKGROUND

A. Procedural History

A review of the procedural background of the instant proceeding is necessary to place the instant Comments in proper perspective.

In 1955 the Commission, in response to Petitions by a number of pay television proponents, instituted the instant proceeding to seek Comments on a number of issues, including the question of whether the Commission had jurisdiction under the Communications Act to authorize pay television operations without further legislation and, even if such power existed, whether the Commission could find that such operations were in the public interest.[1] The Commission thereafter issued its First Report on pay television[2] which concluded (a) that the Commission had the power to authorize pay television operations under the present Act, and (b) that the Commission, however, could *not* make the determination that a permanent pay television system is in the public interest without having before it the results of a technical trial or trials of pay television. The First Report would have allowed trial operations of any pay television system in any of 20 major markets which received at least four television services. No one system, however, would have been permitted in

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[1] Matter of Subscription Television Service, FCC 55-165 (released Feb. 10, 1955).

[2] 16 R.R. 1509 (released Oct. 17, 1957).

more than three markets. It was hoped that trial operations would shed some light upon the important policy questions involved in the establishment of pay television as a permanent medium, particularly its effect upon the free system.

The issuance of the First Report stirred much critical comment. The House Committee on Interstate and Foreign Commerce held hearings on the First Report and adopted a resolution stating that until the Communications Act was specifically amended to grant the Commission power to authorize pay television operations, no such action should be undertaken. The Senate Interstate and Foreign Commerce Committee took similar action. The basis of Congressional apprehension was that so-called "trial operations," and the consequent investment of large sums of money in pay television systems by promoters and by the public, would virtually establish pay television as a *fait accompli* without specific Congressional approval.[3] In response to these fears the Commission issued its Second Report which withheld the processing of applications filed under the First Report until the expiration of the 85th Congress.[4] This policy was voluntarily continued by the Commission until the end of the 86th Congress.

Upon the expiration of the 86th Congress, the Commission re-evaluated the matter and issued its Third Report.[5] The Third Report readopted and reaffirmed virtually all the conditions for trial operations set out in the First Report, the only significant changes being that trials would be now limited only to any one of the 20 major markets which receive four television stations, and that authorizations would be further

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[3] See Remarks of Congressman Oren Harris, Chairman of the House Interstate and Foreign Commerce Committee, 105 Cong. Rec. 5362. In addition, numerous bills have been introduced in Congress which would have prohibited the Commission from authorizing pay television operations. See, e.g., H.R. 586, 85th Cong. 1st Sess. (1957); H.R. 166, 86th Cong. 1st Sess. (1959); H.R. 68, 86th Cong. 1st Sess. (1959); H.R. 3020, 86th Cong. 1st Sess. (1961); S. 2268, 86th Cong. 1st Sess. (1957); S. 591, 86th Cong. 1st Sess. (1959).

[4] Second Report, 16 R.R. 1539.

[5] 16 R.R. 1540a.

limited to one system per market and one market per system (Third Report, par. 8, 16 R.R. at 1540b). The Commission also reaffirmed its decision in the First Report that when "sufficient and meaningful" data became available, it would hold public hearings to decide whether pay television should be permanently authorized. (See First Report, par. 92, 16 R.R. 1533). The Commission, in limiting the nature and scope of the proposed test operations, was explicitly recognizing the obvious danger inherent in allowing extensive trial operations. The Commission clearly indicated that the limitations were imposed precisely to forestall the possibility that trials would be "so extensive as to constitute the virtual establishment of a service about which final decisions on a number of important points must be reserved until later." (First Report, par. 63, 16 R.R. at 1524). More particularly, the Commission in its First, Second and Third Reports has consistently stressed the need for sufficient and meaningful data on the many questions which it must decide.

B. The Instant Proceeding

On March 24, 1966, the Commission instituted the instant Further Notice of Proposed Rule Making in which, the Joint Committee submits, the Commission abandoned its heretofore careful approach to the questions at issue. Thus, the Commission in the instant Notice made a preliminary determination that "it appears that it may well be in the public interest to authorize such operations on a permanent nation-wide basis" (Further Notice, par. 10), and then shifted the emphasis of the proceeding away from what the Commission had previously indicated the next step in the procedure would be (*i.e.*, public hearings in which the results of the Hartford test could be analyzed).[6] The Further Notice, instead, placed the emphasis of the proceeding not upon *whether* a permanent nationwide Pay-TV system should be established, but upon the specific

[6] See First Report, 16 R.R. at 1533.

rules and regulations which the Commission should adopt in authorizing such a system.

The Joint Committee respectfully submits that the Commission gravely erred in making the preliminary determination that the authorization of a permanent Pay-TV system is in the public interest, convenience and necessity. On the contrary, the Joint Committee asserts (and will demonstrate in the instant pleading) that the Commission's determination in this regard was erroneous for the following reasons:

(a) The Commission's determination was based almost completely on the results of the Hartford test and those results do not warrant any such conclusions. Pay-TV was able to attract less than 5,000 people over a three-year period of time in one of the major television markets in the country. The limited number of subscribers precludes any valid conclusions concerning the effect of pay television as a nationwide, permanent medium. The inability to attract more subscribers denotes failure, and the statistics of failure provide no basis for evaluating the impact of Pay-TV on free television.

(b) The Commission does not have jurisdiction under the present Communications Act to authorize a permanent pay television system; assuming *arguendo*, that it did, the Commission should not do so without guidance from Congress in the form of statutory amendments to the Communications Act, particularly since pay television's proponents have not demonstrated any pressing public need or desire for the institution of a permanent pay television system.

(c) The Commission should defer authorization of a permanent Pay-TV system until the shape of CATV activity throughout the country has been established and the effect of such activity on the free local television service has been assessed. The impact of CATV activity, whether it involves the importation of large numbers of distant television signals or the carriage of programs which originate with the CATV system, may have a serious impact on the free local service. This type of CATV activity must be considered by the Commission before it can reach sound judgments with respect to the type of additional impact that a broadcast Pay-TV operation may have upon the free local television service.

(d) The most that is warranted at the present time is the continuation of the Hartford authorization in the hope that it will produce the data necessary for a valid public interest determination.

(e) If, for any reason, the Commission does permit a permanent nationwide pay television system, it must be under the most careful regulatory scheme embodying conditions and provisions calculated to protect the free broadcast system.

III. THE HARTFORD TEST DID NOT PROVIDE THE DATA THE COMMISSION MUST HAVE FOR A PUBLIC INTEREST DETERMINATION IN CONNECTION WITH A NATIONWIDE PERMANENT PAY-TV AUTHORIZATION

Stripped of excess verbiage, the public interest in the authorization of any Pay-TV test and, specifically, the Hartford authorization, was to determine essentially three factors:

1. To what extent would the public pay for programs?
2. Does the service represent a potential for programming which is not otherwise available on free television?
3. What would be the impact of the service on free television?

Stated otherwise: Will it work? What will it provide? And at what cost to the public?

In requesting a nationwide authorization, the Pay-TV proponents[7] have consciously interwoven what occurred in Hartford with excuses for what did not occur, relying upon the excuses to justify failures and the failures to justify speculation as to what would occur in the context of a nationwide authorization.

A test can lead to valid conclusions only to the extent that those conclusions reflect the facts developed during the course of the test. Conclusions as to what might have occurred if things had been different are essentially conjectures.

As will become evident hereinafter, the conclusions that flow from Hartford are not the conclusions suggested by the proponents. There were so few subscribers as to make the test virtually valueless. Pay-TV was a failure in Hartford in much the same way that it has failed wherever it has been tried. It did not provide programming which reasonably could be described as a supplement to free television. The programming that was presented did not attract an audience. The Commission, consequently, knows as little now concerning the effect of Pay-TV on free TV as it did in 1955, unless it assumes that Pay-TV will continue to present the same unsuccessful programming and attract the same size audience in the future.

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[7] Joint Comments of Zenith Radio Corporation and Teco, Inc. in Support of Petition for Nation-Wide Authorization of Subscription Television (dated March 10, 1965).

We turn first to the programming that was offered in Hartford, programming which the proponents have characterized as proving that Pay-TV will provide a "beneficial supplement" to the program choices now available to the public on free television, a characterization which the Commission (par. 12) appears to have accepted without regard to the facts.

A. Pay-TV Programming In Hartford Was Scarcely Competitive with, Let Alone a Beneficial Supplement to, the Program Choices Available to the Public on Free TV

The Hartford test was authorized by the Commission on the representation that:

> The subscription programs which the applicants propose to broadcast will be limited to box office attractions, *i.e.*, those programs which are not regularly available to the public without the payment of a fee. In this category are current releases of motion picture film, ligitimate [sic] theater plays, operatic performances, educational programs and sports events for which fees are being charged as a condition to witness a performance.[8]

If this was meant to suggest movies, then the proponents complied with their representations.

1. Movies

During the first two years of the test, proponents presented 432 motion picture films, 414 of which were domestic and 18 foreign. These films represented *86.5%* of the total pay television programming. During this entire two-year period, however, proponents presented only one

[8] Exhibits submitted by Hartford Phonevision Company, RKO General, Inc., Zenith Radio Corporation and Teco, Inc. in connection with the application of Hartford Phonevision for authority to conduct subscription television operations over Station WHCT, Hartford, Connecticut (hereinafter referred to as Application Exhibits), Exh. 8, p. 1.

first-run movie. Far from showing current film, moreover, the majority of the films, 304 of the 432 (70.41%) were six months old at the time of showing. At least 149 of these films were two years old or older at the time of showing. Some, in fact, were over five years in age.[9]

2. Sports

The sports programming consisted of six heavyweight championship fights (0.3% of the programming presented during the first two years), five college football games and two college basketball games (0.4%), 21 professional basketball games and 44 professional hockey games (3.7%).

3. Other Programs

The category "Special Entertainment" programs constituted 5.5% of the total programming and consisted of 4 concerts, 4 programs in the category "Opera and Ballet," 11 programs characterized as "Drama," 7 variety programs and 6 programs characterized as "Night Club and Cabaret." Programming characterized as "Educational and Instructional" accounted for 3.2% of the programming.

4. The Contrast With Free Television

To characterize such programming as a "beneficial supplement" to free television is to leave the phrase devoid of meaning. In essence, the people of Hartford were requested to pay for a diet of run-of-the-mill movies. If there was any benefit it was limited to the fact that some of the product was available earlier than it would have been on free television.

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[9] A schedule showing the release date of each film and the month and year the picture appeared on WHCT is attached to the Opposition of the Joint Committee.

Conversely, during the same period, free television exhibited films of equal or superior merit. On a regularly scheduled basis, moreover, it presented all types of sports including professional football, professional basketball, NCAA football and basketball and professional baseball.[10] During the same period the television audience saw, without charge, Barbra Streisand, Carol Burnett and a weekly Danny Kaye show.

Free television is, in fact, growing in scope. Contracts have been entered into for the regular presentation this fall of professional hockey as well as professional basketball.[11] CBS has contracted for the presentation of professional soccer for a period of 10 years at an estimated cost of one million dollars per year.[12] The fall schedule includes ballets, new and old, among them "Beauty and the Beast"; operas and musical comedies including Ethel Merman in "Annie Get Your Gun" and Robert Goulet in "Brigadoon."

And, if more were needed, the October 3, 1966, edition of *Broadcasting* magazine reports (p. 25) that the free television networks have or are about to acquire 93 million dollars worth of recent films. These purchases were motivated by the success of the three-hour presentation by ABC-TV of "Bridge on the River Kwai" which overwhelmed its program opposition.[13] Included in this total are an estimated 52.8 million

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[10] Championship fights were not then, but have since been, telecast by free TV. During the test period there were a total of six championship fights presented by Pay-TV in Hartford (0.3% of the total programming).

[11] These two sports constituted the great bulk of the Pay-TV sports programs and 3.7% of the total programming.

[12] Washington Post, Oct. 4, 1966, p. D-1.

[13] ABC paid 2 million dollars for two TV showings. Based on rating information, that was immediately available, ABC estimated that 60 million viewers across the country had watched the three-hour colorcast in whole or in part. According to Broadcasting, "Ratings on 'Kwai' proved to be more than 'Bonanza' and 'Moore' [the other two network programs during the 9-10 p.m. slot] combined."

dollar purchase by CBS-TV of 63 MGM films[14] (18 of which are new features that MGM is preparing for full theatrical distribution prior to TV showing) and ABC-TV's acquisition of 17 motion pictures from 20th Century-Fox for 19.5 million dollars (*e.g.*, "Cleopatra," The Longest Day," "The Magnificent Men in Their Flying Machines," and "The Agony and the Ecstasy") and 32 Paramount features for approximately 20 million dollars.[15]

The season has also witnessed a revival of interest in television drama inspired, perhaps, by the success of the CBS presentation of "Death of a Salesman" in May of 1966.[16] ABC's fall schedule includes "Stage 67."[17] Trade reports also indicate an ABC "Sunday Night Theater," a Sunday afternoon "Experimental Theater" by NBC and a CBS "Playhouse."

5. The Proponents Recognize That The Programming Left Much To Be Desired And Excuses Are The Order of the Day

The proponents excuse their failure to provide programming as follows (p. 12):

> Except for one film, the producers and distributors have refused to supply film on a "first run" basis. However, they have supplied product on a "first subsequent run" basis, *i.e.*, several weeks after first theater run, which corresponds to the time when

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[14] E.g., "The Sandpiper," "Cat on a Hot Tin Roof," "The Night of the Iguana," "The Glass Bottom Boat," "Yellow Rolls Royce," and "North by Northwest."

[15] E.g., "Casanova's Big Night," "A Breath of Scandal," and "Appointment with Danger."

[16] This fall the same sponsor will present "The Glass Menagerie."

[17] The opening program in this series was an original drama, Murray Schisgal's "The Love Song of Barney Kempinski," widely applauded by the critics.

> pictures are released to neighborhood theaters. In our opinion, any nation-wide subscription system could, if it were deemed important, obtain "first run" pictures day-and-date with their showing in first run theaters, since a principal cause of the lack of availability of first-run and certain outstanding film features was the fact that the Hartford operation was on a trial basis. In the absence of any assurance that the Commission would extend subscription television to a nation-wide basis, some film producers and distributors did not desire to release their best or newest product.

This excuse could be accepted more readily were it not for the fact that the same theme runs through the representations made to the Commission prior to the time Hartford was authorized:[18]

> Inasmuch as current motion picture releases for box-office exhibition have been considered by the applicant, and those in privity with it, to be a principal part of the program fare it would offer through subscription and inasmuch as the availability of such product has been an important consideration in determining the feasibility of the test, extended efforts for the last two years have been made to determine availability of feature motion picture films during the period of their distribution as box-office attractions. Major distributors and owners of such product were extensively consulted. We, in general, found great enthusiasm among producers and distributors for a test of Phonevision's feasibility. While, in no case, did a major distributor or producer state that current releases would not be made available, it was found impossible to obtain firm commitments. It was apparent to us that the wait-and-see attitude on the part of the major distributors and producers was motivated by some or all of the following considerations:

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[18] Applicant's Exhibit 8, pp. 1-3.

1. Our proposals have inherent irremovable uncertainties until the requisite governmental authorization is obtained.

2. In view of the uncertainties, and until they have been cured, an agreement to furnish specific product on specific dates under specific conditions cannot be made sufficiently definite and precise to constitute a firm commitment.

3. Arrangements between the distributors and producers and their respective independent contractors and joint venturers that may be prerequisites to commitments to the applicant are not feasible to undertake until the present uncertainties have been removed.

4. There seemed to be a natural unwillingness to upset or confuse existing business relationships so long as a public decision or position with respect to the tests could be postponed.

* * *

On the basis of its investigation of motion picture box-office product and the fact that motion picture product has been made available to every subscription experiment to date, the applicant has concluded that there is sufficient promise of a supply for the tests here proposed to justify proceeding to the point where the present disadvantageous uncertainties have been eliminated and where firm commitments can reasonably be expected or demanded.

The lack of Broadway plays and other special programs is excused as follows (pp. 15-16):

During the first year RKO experienced some difficulty in securing the cooperation of producers, writers and talent in connection with obtaining special entertainment productions primarily because of their ignorance of the purpose of the Hartford trial. However, during the second year, RKO was able to obtain better cooperation because of the steadily increasing subscription audience, the greater knowledge concerning subscription television brought about by the subscription operation in Hartford, and the realization by producers and talent that the type of subscription television programs produced for the Hartford trial could be of great value in the future.

> The economic limitations inherent in a single market test with a limited number of subscribers precluded a continuous supply of plays then showing on Broadway. The asking price, including the price of putting such shows on videotape, plus certain uneconomic demands of some local New York City unions, often made impractical the subscription broadcast of such shows beyond a limited number for test purposes. However, these economic problems, which flowed primarily from the limitations inherent in the trial, would be eliminated if there were a number of subscription stations bargaining from a broader economic base for such Broadway plays.

Prior to the commencement of the test, the proponents stated:[19]

> With respect to legitimate theater productions, the parties hereto have had numerous conferences with interests who participate in that field. The uncertainties heretofore mentioned and the multiple interests involved have made it impossible to obtain firm commitments at this juncture. The enthusiasm exhibited by most of those participating in this field has led us to conclude that, once we have removed the indefiniteness in our proposals, we will be able to broadcast legitimate plays in current exhibition over the Phonevision system proposed here.

We are less impressed by the actual loss of well over a million dollars in Hartford when we recall the prior representations of a willingness to invest between two and ten million dollars, the effectuation of which would have gone a long way toward eliminating "the economic limitations inherent in a single market test."

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[19] Applicant's Exhibit 8, p. 3. The paragraph concluded with the statement:

> We intend also to determine whether economic support for our proposed operations would support regular stock-company presentation of great plays over the medium.

We note that no such programs were, in fact, presented in Hartford.

The Commission knows little more now concerning the alleged program potential of Pay-TV than it did prior to Hartford. Hartford showed programming that was incapable of attracting an audience — programming which pales in comparison with the ever-expanding horizons of free television.

B. Market Penetration was Virtually Non-Existent. Pay-TV did not Attract Subscribers in Hartford.

After three years commencing June 29, 1962, the maximum number of subscribers in Hartford was 4,851. The breakdown as set forth in the Zenith-Teco Comments and in Appendix A of the Commission's Further Notice is 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

It is to be noted that the number of subscribers was in no way limited by the Commission, *Application of Hartford Phonevision Co.*, 20 R.R. 754, (1961). It verges on the ludicrous to suggest that the benefits of a nationwide pay television system and its overall impact on free television can be determined on the basis of such a chance, unscientific sampling of so small a magnitude.

The foregoing three-year pattern is now characterized by the proponents as "planned growth and experimentation consistent with the best use of manpower and facilities" (p. 48). That this is an afterthought is evident from the anticipations and representations made to the Commission prior to the authorization of the Hartford test:

> The number of decoders that applicants will install depends, in the first instance, upon the demand for the service, which cannot be established with any degree of certainty except through the actual experience of offering definite and specific service. Applicants intend, however, to commence operations after 2,000 decoders have been installed and to proceed to increase such installations if there is a demand for at least 10,000 decoders by the end of the first year. The restrictions upon supply of decoders and the rate at which they can be installed limit the number of decoders that would be installed during the first year of operation, in any event, to approximately 50,000 installations. The desirability of increasing the number of such installations after the end of the first year of operation is left for determination after a year of experience with the system.[20]

At another point, the proponents stated:

> Zenith Radio Corporation anticipates that it will be able to produce decoding units at the rate 1,000 per week; therefore, no more than 5,200 decoders could be supplied within the first year of operation. While the rate of installation equal to the rate of supply of decoders might be achieved, *the minimum goal of the applicants will be to install at least 10,000 decoders during the first year of operation.* They will commence operation after 2,000 decoders have been installed. The number of installations, therefore, that applicants anticipate during the first year of operation will vary between 10,000 and 50,000 depending upon demand, feasible rate of installation and experience with the system as operations proceed during the year.[21] (Emphasis supplied.)

The Commission itself was acutely aware of the failure to attract subscribers (Appendix A):

> 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 weekly circulation prior to its STV operation.

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[20] Applicant's Exhibits, Introduction, p. 1.

[21] Exhibit 5, pp. 4-5.

The ARB net weekly circulation figure may be pertinent for purposes of comparing subscription television service with penetration prior to the commencement of Pay-TV operations. For purposes of determining the penetration of Pay-TV, however, it is even more appropriate to note that the market in question contained 1,524,600 television households.[22] The actual penetration, consequently, was in the order of 0.3%.[23]

1. The Statistics Of Failure Are Not A Rational Basis For Estimating The Audience Of A Successful System And Its Impact On Free TV

The test, consequently, was conclusive evidence of public rejection and the Commission was sufficiently disturbed by this failure and the prior failures in Etobicoke and California to question the economic viability of Pay-TV (par. 17). Nevertheless, without identifying the failure as such or relating the limited penetration to the poor programming that was offered, the Commission conjectured concerning the overall impact of Pay-TV on free television. Thus, in paragraph 13 of the Further Notice, the Commission recited the facts developed in Hartford — the penetration of less than 1% (.6%) of the market and an average per program audience of 5.5% of the subscribers; it thereafter concluded that even if the penetration were 10% and the average per program audience 10% of the subscribers, this could have little or no effect on free TV since, at most, this would result in a penetration of 1% of the television homes in the United States.

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[22] Television Factbook, 1966 Edition, p. 38-a.

[23] Even if the base be limited to the City of Hartford alone, the 4,851 subscribers represent in the order of 2.2% of the 220,000 television homes in the city (Television Factbook, 1966 Edition, p. 108-b).

The tone of the paragraph suggests that the Commission regarded even a 10% penetration as being unrealizable and we agree, if one assumes the same quality of programming. This, however, is an essential assumption and in its absence the figure relating to penetration is pure speculation totally unrelated to the test situation. If speculation is in order, it was just as reasonable to assume 2% or 20%. The proponents, in fact, treat a 10% penetration as an absolute minimum and their conjectures include a 50% penetration as within reasonable expectation.

As noted, in order to conjecture as to the effect on television generally, in addition to suppositions as to penetration, the Commission indulges in suppositions concerning the average audience per subscription television program. A 10% penetration is more than 16 times greater than the .6% penetration (4,851 subscribers) actually achieved in Hartford. Notwithstanding this, the Commission assumes that only 10% of this 10% penetration would constitute the average audience for any particular program. The second figure clearly bears no relationship to any fact derived from the Hartford test. A 16-fold increase in subscribers could be achieved only in response to a substantial and significant improvement in programming. No assumptions can reasonably be drawn concerning the average number of viewers per improved program. The fact that when programming was so unattractive as to produce only a .6% penetration, the average audience was very small -- 5.5% -- is in no way related to what the audience would be for programming sufficiently attractive to result in a 16-time increase in the number of subscribers.

If Hartford proved anything, it was to the contrary. A review of the statistics contained in the Zenith-Teco Comments demonstrates that the 5.5% average resulted substantially from the lack of an audience for old movies. When attractive programming was presented, the audience changed drastically -- the Patterson-Liston fight showed an audience of 82.6% of the subscribers and all of the 6 boxing matches had an average audience of 63.3%.

The Hartford test was authorized in substantial part to determine the effect of a successful Pay-TV system on free TV. The test was unnecessary if the Commission were willing to determine the public interest in this regard solely on the basis of speculation. The test was, in fact, a failure and, as such, it provided no indication of what an economically viable Pay-TV system would do to free television. The conclusions drawn by the Commission purportedly from the Hartford experience bear no relation to the facts in question and are as much pure speculation today as they would have been if offered in 1955.

2. The Disconnect Rate Indicated Public Dissatisfaction

The Commission essentially ignores the number of disconnects although disconnects may be as significant in assessing the test as the failure to attract additional subscribers. Of a total of 8,329 subscribers during the three years, there were 3,478 disconnects. During the third year the disconnects (1,670) virtually equaled the new installations (1,752). In the overall, disconnects constituted 40% of the total installations.

There is no detailed explanation concerning the disconnects and it is never adverted to except in the context of explaining future projections. Thus, on page 29 of the Comments we are told that the proponents have allowed for a 20% disconnect rate in their projections and that this is comparable to the "15-20% 'disconnect-connect' annual turnover experienced by telephone companies in many markets." The fact remains, however, that the disconnect rate in Hartford over the three-year period was 40% and no clearer evidence of public disapproval is required.

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C. Pay-TV Excludes the Lowest Income Levels - 30% of the Population

We have been provided with the following information as to the income level of subscribers:[24]

		4633 HARTFORD SUBSCRIBERS	
Income Levels	Proportion of Total U. S. Families*	Proportion of Total Subscribers	Average Weekly Programs 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%	(avg.) $1.22

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

Unbelievable as it may seem, 4,633 subscribers are urged as establishing that Pay-TV is not limited to high income groups but primarily attracts middle income subscribers. If this is established by this data, then it also establishes an even more significant fact - that Pay-TV excludes the bottom 30% of the population. The proponents cavalierly dispose of this group with the comment that this segment "unfortunately does not provide a market for any goods and services beyond minimal shelter, food, clothing and medical care" (p. 22). This is the very group, however, that is dependent upon free television for its principal source of entertainment. To the extent that this group is incapable of providing a market for more than minimal needs, it is being subsidized by free television and it is least capable of absorbing any loss of this subsidy.

[24] Joint Comments of Zenith, et. al., p. 21.

The consequence to the lower income groups of a shift from free to pay television was considered in a recent study entitled "The Redistributional Effect of Television Advertising."[25] The authors, F. A. Lees and C. Y. Yang of St. John's University stated:

> Our study reveals that in 1963, under the present commercial television system, all income groups in the United States experience a redistribution of income slightly in excess of one-quarter of 1 billion dollars. Conversion of the commercial system to an alternative system of pay television would result in a complete or nearly complete elimination of the benefits of this redistribution currently enjoyed by families with a disposable personal income of less than $6,400. If a metered system of pay television were adopted the entire redistributional effect would be removed. If a flat-fee system were used a small amount of redistribution would continue to exist, but the size and direction of such redistribution would depend on the viewing pattern of subscribers. Conversion to a government-supported system could be expected to alter the redistributional effect, the extent of which would depend upon the relationship between viewing pattern and progressiveness of the tax structure.

IV. THE PROPONENTS MEASURE THE ALLEGED BENEFITS OF PAY-TV ON THE BASIS OF PROJECTIONS WHICH ASSUME A SUCCESSFUL SYSTEM. ITS IMPACT ON FREE TV, HOWEVER, IS MEASURED IN TERMS OF THE HARTFORD FAILURE

From the very outset the Joint Committee has believed that Pay-TV would fail. Its continuing concern had a two-fold motivation:

a) There would be a period of Pay-TV operation prior to its collapse during which the public interest — including the broadcast and theater industry — could be drastically affected.

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[25] The Economic Journal, Vol. LXXVI, June 1966, pp. 328-336. A copy of the article is attached hereto as Appendix A.

b) A successful Pay-TV system is essentially incompatible with free TV. In the competition for audience and product, Pay-TV would endanger free TV and would achieve its greatest success with the destruction of free TV. The public interest could not, consequently, and should not be determined solely on the basis of an assumption of failure. The public interest required a careful evaluation of the impact of a successful Pay-TV system on the economy and, specifically, on free television.

The inability of the proponents to attract subscribers in Hartford, we believe, demonstrated that Pay-TV was a failure. We are also of the opinion that the test itself was a failure in that the number of subscribers was too small to produce any probative evidence concerning the nationwide impact of Pay-TV on free TV. Certainly it produced no evidence concerning the nationwide impact of a successful Pay-TV system on free TV.

Nevertheless, the proponents urge upon the Commission that conclusions on this subject can be based on the test, and their contentions are made in such a manner as to intertwine success and failure beyond logical recognition. The benefits alleged to follow from Pay-TV are measured on the basis of "Business Projections," projections which assume a successful system. The impact of Pay-TV on free TV, however, is assessed in terms of what actually happened in Hartford.

23

A. There is No Evidence from Which to Conclude that Pay-TV would Facilitate the Growth of New Television Stations

1. The Recent Growth In The Number Of UHF Stations And Applications Suggests That The UHF Problem Was More A Lack Of Receivers Than Programming

Before attempting to sustain the assertion relative to the benefits that will flow from Pay-TV, Zenith stops to review the allocation data to establish the need for a further expansion of the number of television services. In this context it is appropriate to compare the allocation data supplied by the proponents as of January 1, 1964, with comparable current allocation data. Thus, the proponents stated (p. 23):

> The Commission, as of January 1, 1964, has allocated 1,942 commercial UHF and VHF television channels and 346 educational UHF and VHF channels to 1,206 communities. As of January 1, 1964, there were 564 commercial television stations in operation in 271 markets (476 VHF and 88 UHF). As of the same date there were 30 VHF and 61 UHF construction permits in the hands of permittees. There were also 85 educational stations on the air and an additional 28 education construction permits outstanding.

As of January, 1966, the Commission had allocated 1,756 VHF and UHF channels to 792 cities. Of this total, 615 are reserved for educational use (107 VHF and 508 UHF channels) and 1,141 are unreserved (551 VHF and 590 UHF) channels.[26] There are now some 230 metropolitan markets.[27] As of September 29, 1966, there were 605 commercial television stations (490 VHF and 115 UHF) in operation; 28 VHF and 139 UHF construction permits (not on the air) outstanding; and 124 educational stations in operation and 34 educational construction permits outstanding.[28] As of July 31, 1966, there were applications pending for 95 channels (4 VHF and 91 UHF).

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[26] Fifth Report and Memorandum Opinion and Order, FCC 66-137, 2 FCC 2d 527, 551 (adopted February 9, 1966).

[27] 1966 Television Factbook, pp. 38-a-43-a.

[28] Television Digest, October 3, 1966, Addenda to Television Factbook.

Between January 1, 1964, and September 29, 1966, the number of UHF stations increased from 88 to 115 and the number of VHF stations from 476 to 490. During the same period of time the number of construction permits increased from 30 VHF and 61 UHF to 28 VHF and 139 UHF. This phenomenal growth occurred without benefit of Pay-TV. It suggests that the principal problem confronting UHF television in 1964 was conversion and that the basic solution was contained in the enactment of the All-Channel Bill. The mere enactment of the Bill did not place UHF receivers in the hands of the public. As the months pass, however, and old sets are replaced by sets capable of receiving UHF, the interest in the construction of new UHF stations increases and this is reflected in the foregoing statistics.

2. The Pay-TV System Which Proponents Allege Will Assist In The Development Of New Stations Is A Successful System, The System Of Their Projections, And Not The Failure That They Produced In Hartford

Zenith's review of television allocations was for the purposes of establishing a need for additional programs and revenue, a need which allegedly will be met by Pay-TV.

The Pay-TV which will meet this need is not the Pay-TV of the Hartford test — the Pay-TV which had less than 5,000 subscribers, a 0.6% penetration, in three years — but a successful system with a minimum of 20,000 subscribers and including 40,000, 75,000 and 100,000 subscribers (p. 27, 35) and a penetration characterized "conservatively" as a minimum of 10% (p. 35) and ranging up to 50%.

There is little point, consequently, in analyzing the projections in detail. They have no greater validity than similar calculations offered to the Commission in 1954. They cannot be tested or measured any more now than they were then.

One point is of academic interest -- the assertion (p. 27) that program producers and distributors will be paid 35% of the total subscriber program expenditure; that this is based on the Hartford experience; and that "It also conforms to the percentage which motion picture producers and distributors, with a few exceptions, have traditionally charged motion picture theaters." If this is the purchase price, it will guarantee little more than the programming that failed in Hartford and a consequent 0.6% rather than 10%-50% penetration.

Exhibitors compete with each other for the purchase of film. Quality product will bring as high as 90% for first-run exhibition in New York or Los Angeles. "Front" money or a guarantee to the producer is also a frequent prerequisite to securing top product. First quality films frequently pay 50% or more even for subsequent neighborhood runs ("Who's Afraid of Virginia Woolf?"). Theater television can anticipate paying 50%-60% of the gross.

The economics of theater distribution result in product being sold where it will produce the highest return. Pay-TV is competing for product not only with exhibitors but with free television. The proponents notwithstanding, free television has demonstrated that is is capable of paying two million dollars for the right to telecast "Bridge on the River Kwai" twice -- one million dollars per showing. The recent film acquisitions which were adverted to earlier demonstrate that this was not an isolated instance. The cost-per-listener economics of free television are not nearly as limited as the Pay-TV proponents have asserted.

Any exhibition of a film or a play before a large audience, whether in theaters, Pay-TV, or free TV, dilutes the market. With respect to film, theater exhibition is a known quantity and free-TV has demonstrated its capacity to pay. Pay-TV will secure the product only where it can demonstrate that Pay TV exhibition alone or in conjunction with a diluted theater market will produce revenues equal to or in excess of revenues that will be available from theater exhibition and free television. Particularly at the outset, Pay-TV will need current and quality films to attract subscribers and a substantial number of subscribers to obtain current and quality films. This circle was never broken in Hartford. If it can be broken, it will require the expenditure of large sums of money in the form of cash guarantees to producers or enlarged percentages, or both. The 35% figure isn't even close.

B. The Deleterious Effects of a Successful Pay-TV System on Free Television Cannot Be Measured By the Statistics of Failure

Although, as we have noted, the beneficial effects of Pay-TV are set forth in terms of a successful Pay-TV system, the ability of Pay-TV to impair free TV is measured in terms of the actual events in Hartford.

1. The Extent Of Audience Siphoning Is Dependent Upon The Number Of Subscribers And The Quality of Programs

There is little doubt that the loss of 267 people (5.5% of the 4,851 subscribers) would have little siphoning effect on a market with a net weekly circulation of about 800,000. This would be true whether the group watched two hours per week or ten hours per week. This is not what the test was intended to demonstrate; nor is it likely that a system which attracted an average audience of 267 people out of an 800,000 potential would remain in existence for long.

The proponents postulate a minimum penetration of ten percent to and including 50%. To determine the impact of Pay-TV on free TV in the Hartford market, the subscriber potential must be assumed to range between 80,000 and 400,000. If programming were available in a quality and quantity to attract a group of this size how many would watch a particular program? Would the average viewing time be two or ten hours per week? These are the questions which must be answered to determine the audience siphoning effect of a successful Pay-TV system and these are the questions that Hartford doesn't even purport to answer. The 82.6% that constituted the audience for the Liston-Clay fight would have had a disastrous impact on free television on the night in question if the subscriber group had been between 80,000 and 400,000 rather than less than 5,000.

2. The Time Pre-Empted By Pay-TV Is Prime Time

The next assertion is that Pay-TV would not pre-empt any significant amount of time now utilized by advertising sponsors. In this connection, it is urged that the average time utilized in Hartford was 30 hours per week, that assuming 30-40 hours a week of Pay-TV there would still be ample time in multiple station markets for advertising.

Conveniently overlooked is the fact that the 30 to 40 hours in question are the prime listening hours. Also overlooked is the fact that the proponents do not propose to be limited to multiple station markets.

The 30 to 40 hour limitation derives, we are told, from the limited amount of "box-office" programming available and limitations inherent in the family recreational budget. The latter is a convenient limitation since it is incapable of measurement. The former, the availability of programming, was a limitation in Hartford but not quite in the context suggested by the proponents. Good programming required money that the proponents were unwilling to spend. Moreover, they specifically committed themselves not to present programming to the exclusion of

free television that was available on free television — a commitment that is not now being made.

3. The Experience In Hartford Does Not Provide A Basis For Evaluating The Extent To Which A Successful Pay-TV System Would Siphon Talent And Programs From Free TV

Every program which is suitable for Pay-TV is suitable for free TV. The exhibition of a movie on Pay-TV dilutes the potential free television audience and vice versa. In this context any use by one affects the other. Talent useful to free television is also useful to pay television and vice versa. Although, absent contractual restriction or limitation, talent could work for free and Pay-TV, it cannot do so at the same time. If the talent in question is a performer rather than an author, he or she may be subject to the same problems of audience dilution as the movie.

Stated otherwise, the two techniques, free TV and Pay-TV, are directly and actively competitive for talent and programs as well as audience. Obviously people will not pay for what is available free, but this is axiomatic only as long as the program remains free.

The word "box-office" is not susceptible of any real meaning. It is used as a magical incantation to create an illusion of a difference that the proponents know does not exist. One episode of "The Man From UNCLE" constitutes a television program. Two episodes tied together constitute a movie for which people are now paying at neighborhood theaters throughout the country. The availability of the Yankees on free television did not deter Pay-TV, the Los Angeles Dodgers and the San Francisco Giants from contracting for the exclusive presentation of Dodger and Giant games on pay television to the exclusion of the home audiences.

The competition for product and talent is obvious. The purpose of a test was to determine whether a successful Pay-TV system would destroy free TV. In this context Hartford was of no value whatsoever.

C. Conclusion

The Further Notice cannot be reconciled with the Third Report. The Third Report postulated a test situation for purposes of determining the benefits and evils inherent in a different distribution technique -- Pay-TV. The essence of the test was that this new technique was so inherently competitive to and with the existing system of free television that it could not be authorized on a nationwide scale until the Commission had facts upon which it could determine the public interest -- the benefits to be derived and the effect of the system on existing television. Every use by Pay-TV precludes a simultaneous use of a scarce commodity -- broadcast frequency space -- at the same time, and such use could be authorized only if the benefits conferred were substantially superior to the detriment that could result.

The only conclusion the Commission can draw from the Hartford experience is that Pay-TV is a total failure. If the proponents, in fact, invested as much time and effort as they claimed and, in so doing, produced so few subscribers, then no further authorizations are warranted.

The Further Notice recognizes the failure -- it questions the economic viability of Pay-TV. Notwithstanding this, the Commission appears to be prepared to ignore the failure and undertake a permanent nationwide system on the basis of supposition rather than fact.

If the Commission can properly determine the public interest on the basis of conjecture and supposition, then the entire test procedure was a farce. The Commission had before it in 1955 evidence of a magnitude comparable to what it now purports to rely upon. The Hartford test does not, under any circumstances, justify a nationwide authorization. If the Commission is not persuaded of the fact that the system is a failure, the most that Hartford warrants is an extension of the existing test authorization.

V. JURISDICTIONAL AND RELATED QUESTIONS

A. The Commission Does Not Have Jurisdiction to Authorize a Permanent Pay-Television System

The Commission has stated in its First Report, and reiterated in the Further Notice of Proposed Rule Making here at issue, that it possesses the statutory authority to authorize nation-wide permanent pay television. Moreover, the Commission asserts in its Notice that the Court of Appeals, in *Connecticut Committee Against Pay Television* v. *Federal Communications Commission*, 391 F.2d 835 (D. C. Cir.), cert. denied, 371 U. S. 816 (1962), concluded that the Commission possessed such statutory authority. The Commission has asserted that if (as the Court held in *Connecticut Committee*) it possessed the statutory authority to authorize a *test*, then, of necessity, the Commission possesses the statutory authority to authorize pay television on a permanent basis (Notice of Further Rule Making, Par. 19).

The Joint Committee respectfully submits that the Commission's reading of the Court of Appeals' opinion is erroneous. Although the appellant in *Connecticut Committee* urged that the Commission did not have the power to authorize pay television on a permanent basis, nevertheless, the Court *refused* to decide this question in its decision in that case. The Court never addressed itself to whether the Commission possessed the power to authorize pay television *permanently*. The Court held merely that the Commission's power to provide for *experimental* uses of frequencies constituted a sufficient basis for the trial authorization there in issue. The Court's opinion was explained and justified exclusively by the experimental nature of the authorization, and the Court went to great lengths to emphasize the experimental nature of the operation as the basis for its decision, stating (301 F.2d at 837):

> The distinguishing characteristics of the Federal Communications Commission's authorization of subscription television in this case is the experimental or trial basis upon which the system is to operate for the duration of its three years authority.

The Commission's belief that the statutory authority to institute a test also carries with it the statutory authority to authorize pay television on a permanent basis, is a proposition which finds no support either in the Court's holding in *Connecticut Committee*, or any other court decision of which the Joint Committee is aware. It should be obvious that the statutory framework and guidelines which would be required to support a nation-wide permanent pay television system is far different from the type of legislation required to support a small experiment so limited in size as the Hartford test, and with such a necessarily inconclusive effect on the free broadcast system. The dangerous effect which pay television will have on the free television system does not arise from a limited system of tests. It arises precisely because such testing is fruitless and futile. The dangers of pay television will not be apparent until the system is extensive enough to accomplish the very things feared. At this point, the existence of an extensive and expensive pay television operation will present the Commission with a *fait accompli*. Section 303(g) of the present Communications Act, as the Court noted in *Connecticut Committee*, expressly confers jurisdiction on the Commission to authorize "experiments." There is no provision, however, in the Act which would authorize the Commission to permanently authorize a system so radically different in nature from the present American free broadcasting system, and with such a potentially destructive effect on that system.

Indeed, the precise difference between the power to authorize limited tests of pay television systems, and the power to authorize pay television on a permanent basis was clearly pointed out by Congressman Harris, the then Chairman of the House Interstate and Foreign Commerce

Committee. Congressman Harris indicated that the Committee allowed tests such as Hartford pursuant to the Third Report solely because of the experimental nature of the venture, and he stated that (105 Cong. Rec. 5362-63, emphasis added):

> * * * the Congress reserves to itself the right to determine whether or not to enact legislation to amend the Communications Act of 1934, as amended, to empower the Commission to grant, and to prescribe the conditions under which the Commission would have the power to grant, authorizations for extended or permanent operations.
>
> *Mr. Speaker, therefore, in conclusion, under no circumstances can the action of the Federal Communications Commission [in the First and Third Reports] 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.*

It seems clear, therefore, that the mere power to authorize experimental operations (which was the only power approved by the Court of Appeals in *Connecticut Committee, supra*) does not carry within it the power to authorize pay television on a permanent basis.

The Joint Committee is aware that the Commission in the First Report has concluded that the Commission has such permanent authority. The Joint Committee believes that the Commission's determination in the First Report was erroneous, and that it should be carefully reconsidered at this time.

It cannot be emphasized too strongly that a system which demands direct payment of fees by the public in order to receive programs broadcast on publicly controlled broadcast facilities represents a major and drastic change in the nature of American broadcasting. Prior to the advent of pay television, broadcasting had been solely supported by commercial advertisers. There was, and is, no direct financial relationship between a listener and a broadcast licensee. The absence of this relationship is more than just a matter of commercial choice; it represents an

important feature distinguishing broadcasting from public utilities, and common carriers — a distinction which was explicitly recognized by Congress when it drafted and adopted the Communications Act.[29]

This single fact also sharply distinguishes pay television from other changes in broadcasting which have occurred over the years, such as color television, FM broadcasting, simplexing, multiplexing and functional music operations.[30] It also distinguishes pay television from CATV since in CATV there, again, is no direct financial relationship between a listener and a *broadcast licensee*. The relationship is between a listener and the CATV operator who is, in effect, charging the listener for the use of wire lines which he has constructed so as to bring the programming presented by the licensee to the public.[31] On the other hand, a licensed pay television system permits the licensee to charge for the use of public facilities (the air waves) without any governmental regulation of those rates; the Supreme Court clearly indicated in the *Sanders* case[32] that rate regulation of broadcasting is not encompassed within the present Act.

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[29] See e.g., the remarks of Senator Broussard who, during the debates on the Communications Act of 1927, stated "radio makes no direct charges whereas the others (telephone and telegraph) are in the business of serving the public for direct pay." 67 Cong. Rec. 12504. See also Pulitzer Publishing Co. v. FCC, 68 U. S. App. D. C. 124, 126, 94 F.2d 249, 251.

[30] Although it is true that certain subscribers of functional music pay for the privilege of receiving material broadcast over the air, it is also clear that the general listening audience does not pay for this broadcasting. Stores, factories and buildings which desire such operations purchase them so as to provide the public in those stores and buildings with background music as an additional service. The public is not simultaneously deprived of the service.

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

[32] FCC v. Sanders Bros. Radio Station, 309 U. S. 470, 474.

In the First Report the Commission, although admitting that the Communications Act of 1934 makes no specific or direct delegation of power to authorize such a major change in the concept of American broadcasting and the regulatory scheme surrounding it, nevertheless found that power in the statute, and found support for its interpretation in its legislative history. The Commission reasoned that Sections 301 and 303 of the Act gave it broad powers over the use of radio frequencies, and it specifically cited Section 303(g) as giving it the power to study new and experimental use of frequencies and to generally encourage the larger and more effective use of radio in the public interest. It then cited what it considered to be certain specific statutory limitations on the Commission's licensing power (Sections 310(a), 313, 317, 325(a), 325(b) and 326) and concluded that if Congress wished to further limit that power in regard to pay television operations it would have specifically done so. Thus, by this strained interpretation the Commission concluded that it had been given the authority to regulate an industry never conceived of at the time of the drafting of the statute.

The statutory provisions relied upon by the Commission, however (Sections 301 and 303), do *not* support the Commission's interpretation of its power and authority. Section 301 of the Act merely states the general purposes which the Act was drafted to effectuate. This broad statement does not *grant* the Commission any power. It nowhere suggests or even hints that the use of the public channels can be permanently licensed to those who would withhold the benefits of those channels from persons who fail to pay a per-program fee.

The general powers of the Commission are stated in Section 303. Thus, Section 303(b) gives the Commission power to prescribe the nature of the service to be rendered by each station. Section 303(c) allows the Commission to assign frequencies to various classes of stations and to designate the power and the time which they may operate. Section 303(d) allows the Commission to determine the location of the different stations;

Section 303(e) allows regulation of the apparatus to be used; and 303(f) grants the Commission power to make such regulations as are necessary to prevent electrical interference between stations and to carry out the provisions of the Act. The balance of Section 303 covers miscellaneous rules to insure the proper technical operation of all stations. None of these provisions even remotely indicate that the Commission has authority to authorize a permanent pay television system.

The only part of Section 303 which gives any support to the interpretation adopted by the Commission in the First Report is Section 303(g) which empowers the Commission to study new uses for radio and to provide for experimental uses for frequencies and generally to encourage the larger and more effective use of radio in the public interest. Unquestionably, this section grants the Commission the power to run technical tests such as the ones carried out by Zenith in 1950. This section, as interpreted by the Court of Appeals in *Connecticut Committee Against Pay-TV* v. *FCC*, *supra*, also allows the Commission to authorize trial experiments such as the Hartford test. However, there is a vast difference between allowing the Commission to conduct experimental tests, and authorizing it to establish pay television on a permanent basis. The Communications Act, as now written, neither sets out nor attempts to set out the kind of regulatory scheme that would be necessary to encompass a permanent pay television system. The right to experiment included in Section 303(g) does not supply the statutory deficiency.

It is true, of course, that the Communications Act gives the Commission broad regulatory powers over the broadcast field. As the Commission correctly indicated, broadcasting is a rapid and dynamic field and Congress allowed the Commission great flexibility to enable it to cope with new problems as they developed. It is also true, and the Courts have already indicated, that these powers are not all encompassing and that matters regarding the manner in which stations derive their revenue, as well as other internal business affairs, were never conceived as being within the Commission's regulatory power. See *Sanders Brothers*, *supra*.

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The concept of a pay television operation and the introduction of a direct financial relationship between the individual listener and the station is more than a mere advance in the broadcasting art. It introduces a major change in the entire concept of broadcasting and must necessarily introduce a major change in the regulatory sheme which surrounds the broadcasting industry. If rates are to be charged the public for the privilege of using public facilities, the question arises as to whether and how these rates must be regulated. The present Act does not provide this guidance to the Commission. Moreover, if rates are to be regulated, it would mean that the Commission must assess such things as cost of operation, cost of equipment and cost of talent and then decide — as though the licensee were a public utility — what constitutes a reasonable return upon the licensee's investment. It is apparent that the Communications Act as now written neither sets out nor attempts to set out such a broad regulatory scheme. The absence of such a scheme is plain evidence that Congress did not grant the Commission power to authorize a permanent pay television system.

B. The Commission Should Not Act Without Guidance From Congress

Even assuming, however, that the Commission possesses the statutory "power" to authorize permanent pay television, nevertheless, it is clear that it should not do so without further guidance from Congress.

Indeed, the Commission, itself, in the instant Further Notice of Proposed Rule Making, has indicated that amendment of the Communications Act may indeed be necessary in order to properly protect the public from the detriments inherent in pay television. However, the Commission has indicated that it will apparently follow the procedure of first establishing pay television on a permanent basis and *then* seeking guidance from Congress through amendments of the Communications Act to correct the abuses which may occur precisely as a result of the Commission's authorization of permanent pay television (Notice, Par. 20).

This is indeed a strange view of the Commission's responsibilities: to allow the abuses first to occur and then to seek from Congress methods by which to correct them. It is even stranger yet to hear the Commission, on the one hand, earnestly urging that with regard to CATV it is seeking to fashion rules to protect the public *before* CATV becomes "entrenched,"[33] while, at the same time, virtually ignoring the vastly more serious dangers of pay television "entrenchment" by vaguely asserting that at some later time (after it has allowed pay television to be permanently authorized) it may seek some guidance from Congress on such a vital matter. One of the problems which the Commission has always faced is the fact that events move so quickly, and interests vest so rapidly, that the Commission is often swept ahead by technological and other changes, rather than controlling or regulating them properly or effectively. It is disheartening to see the Commission so forcefully pushed by the desire of pay television gadgeteers for profit as to allow permanent pay television to be foisted upon the American public without appropriate statutory amendments necessary to protect the public from gouging. It is particularly inappropriate for the Commission to do so in the face of the clear Congressional intent, as indicated by the House Interstate and Foreign Commerce Committee, that the ultimate decision to authorize extended or permanent pay television operations must rest with Congress and not with the Commission.

Congressional developments during the intervening years have clearly indicated Congressional concern with the possibility that the free television system would be supplanted by pay television. As noted above (footnote 3, *supra*), numerous bills have been introduced into the Congress which would prohibit pay television. Moreover, the House Interstate and Foreign Commerce Committee has made quite clear its belief that the Commission has no statutory authority under the present Act.

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[33] See particularly Second Report in Docket 14895 et. al., at Pars. 28-46, 2 FCC at 737-745.

Both the House and the Senate Interstate and Foreign Commerce Committees vigorously attacked the Commission's conclusion in the First Report that it had such authority.[34] The House Committee only acquiesced in the Hartford trial to be held pursuant to the First and Third Reports because of the limited and experimental nature of the proposed trials. Chairman Harris made it quite clear, however, that the Committee's acquiescence did *not* indicate a belief that the Commission should authorize pay television on a permanent basis without first obtaining Congressional guidance in the form of statutory amendments.

Moreover, public concern has always been evident. It might conceivably be argued that if a groundswell of public opinion or demand was present seeking the prompt institution of a pay television system, the Commission might be obligated to act even in the absence of a clear Congressional mandate, and despite the fact that the Communications Act gives no clear guidelines. Thus, for example, in the case of CATV systems, the Commission has been confronted with an industry which, as a result of public demand for increased television service in areas which cannot receive adequate signals, has been burgeoning at such a rapid rate that it threatened to distort or destroy the Commission's carefully considered nationwide television allocation plan. Under these circumstances the Commission recently indicated that it intended to take jurisdiction of off-the-air CATV systems even in the absence of a clear Congressional mandate, and even where the Commission once

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[34] See Second Report, 16 R.R. at 1539-1540. Thus, on February 28, 1958, the Senate Interstate and Foreign Commerce Committee voted to recommend the adoption by the Senate of the following resolution:

> Resolved, that it is the sense of the Senate that the Federal Communications Commission should not, without specific authorization by law, authorize or permit any television licensee or agent thereof to impose a toll, fee, subscription or other charge on the general public or any portion thereof, for the privilege of viewing television programs received over television receivers located in the home, with the exception of both community antenna systems and those programs transmitted by cable or wire or both.

refused to take such action without Congressional guidance.[35] It is clear, however, that there is no such public demand or pressure evident in the case of pay television. It can hardly be contended that the public has been besieging the Commission (or any other regulatory agency or public authority) with demands that a permanent pay television system is either necessary or appropriate. Indeed, in California, as the Commission is aware, the public voted down by a decisive margin the institution of a wired pay television system in the only statewide referendum ever held on this question. Similarly, it is significant that only *one* test of a pay television system pursuant to the First and Third Reports has been conducted. It is at least reasonable to assume that if a real demand for such a service were evident, it would be reflected in requests by prospective pay TV proponents for authority to conduct experimental operations. Nor has it been demonstrated that the public of Hartford has demanded the service. Although RKO artificially limited the Hartford test to 5,000 subscribers and alleged that there is a "backlog" of demand, nevertheless, neither they nor any other proponent of pay television has indicated the extent of such a demand or has demonstrated the existence of public clamor for a pay television system. The information supplied by Telemeter concerning its Canadian experiments corroborates the fact that, far from demanding a pay television service, the residents of Etobicoke and Mimico actually rejected it. In these communities, the number of wired, pay television subscribers actually declined more than 50% during the five-year test from an initial high of 5,500 to 2,500 *even after Telemeter expanded its potential service area from 12,000 to 14,000* (see Telemeter Comments, pp. 7-9). There were, no doubt, many reasons for the decline in demand for the Telemeter service. Whatever the reason, the Canadian experience

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[35] See, e.g., Notice of Inquiry and Proposed Rule-Making in Docket No. 15971, 30 Fed. Reg. 6078. Even here, however, the Commission requested Congressional guidance and Congressional clarification of its authority to act. Id. at 6082-83, par. 31

clearly indicates that a widespread public demand for the institution of a pay television system simply does not exist.[36]

Finally, and most importantly, the Commission should not attempt to authorize pay television on a permanent basis since it is plain that the Communications Act gives no guidelines to the Commission as to the manner in which pay television should be operated. One of the most pressing problems raised by a permanent pay television system is the question of rate regulation. There is serious doubt under the *Sanders Brothers* and *Pulitzer Publishing* cases[37] as to whether the Commission may regulate the rates which may be charged by a pay television licensee to its subscribers. Proponents of pay television vigorously assert that such regulation is not authorized by the present Act. The Commission, in the First Report, did not decide this question. Nevertheless, it would be a total abdication of responsibility for the Commission to allow the institution of charges to the public by Commission licensees for the use of the public airways in the face of the very real possibility that it has no statutory authority to regulate rates.

In short, subscription television represents a marked departure from the present pattern of broadcast operations. It raises, for the first time, fundamental policy questions which, heretofore, there has been little or no occasion to consider. Its introduction will cause dislocation, disruption and confusion in the industry. Clearly, the Congress is the proper body to legislate a change of this magnitude and consequence, even if it can be determined that the Commission has the requisite jurisdiction to authorize a permanent pay television system. The determination of whether or not pay television should be permanently authorized, and, if so, the circumstances which should surround its operation, are legislative functions. They should not be undertaken in the absence of a clear Congressional mandate.

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[36] It is also significant that after the cessation of the Etobicoke-Mimico test, less than 20 per cent of Telemeter's subscribers indicated regret that the system had stopped, despite the fact that Telemeter sought an expression of opinion from all of its subscribers. See Telemeter Comments, p. 7.

[37] Sanders Brothers v. FCC, 309 U. S. 470; Pulitzer Broadcasting Company v FCC, 68 U. S. App. D. C. 124, 94 F.2d 249.

VI. THE COMMISSION SHOULD DEFER ACTION UPON AUTHORIZATION OF A PAY-TV SYSTEM UNTIL THE IMPACT OF CATV UPON THE PRESENT SYSTEM IS KNOWN

Throughout all of its consideration of the possible authorization of Pay-TV, the Commission has adhered to one fundamental principle -- that any action authorizing Pay-TV would be taken only if it were clear that the result would be at least to preserve the traditional free television system in the United States, or, indeed, possibly even to strengthen it. The Commission's manifest position on this subject needs no reiteration. Its deliberations during the years preceding the present consideration of the subject have been devoted largely to efforts to ascertain whether a Pay-TV system could come into being without depriving the American public of the free television service on which it relies.

The Joint Committee respectfully urges that at the present moment in time the Commission is in a poorer position to make any determination with respect to that all important matter than it has been at any time since it first engaged in formal consideration of Pay-TV. The essential reason for the inability to determine at this time whether the authorization of Pay-TV would result in serious harm to the free television system is because the free television system faces a clear threat from the rapid growth of CATV. That threat, the result of which cannot be predicted at this time, may so effect free television that the additional impact of Pay-TV could constitute a mortal blow. At the very least, the Commission, the industry, and the public must acquire additional information from the operation and growth of CATV under recently adopted Commission regulation and possible Congressional action before any reasonable judgment can be made concerning the ultimate impact on the free television system or Pay-TV.

Underlying the issuance of the Further Notice of Proposed Rule Making in this docket is a fundamental two-fold assumption of the Commission that a basic decision with respect to pay television may be made at this time. The assumption is:

> (1) That the shape of the free television industry is sufficiently fixed so that the impact upon it from a pay television authorization may be measured with sufficient precision for regulatory purposes; and
>
> (2) That the form a nationwide pay television system will take is sufficiently known at this point so that Federal regulation may be intelligently applied.

As indicated elsewhere herein, the Joint Committee believes the Commission may not rely upon the Hartford test as a basis for authorizing a nationwide Pay-TV system, and is without sufficient data from that test to determine what the impact of nationwide Pay-TV will be on the traditional free television service. It is the further position of the Joint Committee, however, that the Commission is not able at this point to assess what form a pay television system is likely to take, nor is it in a position to assess the nature of the television system which may finally evolve in this country with or without pay television. Knowledge concerning both these factors is essential if the Commission's action with respect to Pay-TV will safeguard the oft-repeated concern for maintenance of healthy free television service.

The unsettling and unknown factor in the equation at this point is the burgeoning growth of the community antenna television industry, not only in small and isolated communities but in large cities, and the possibility that such CATV activity will itself become a vehicle for Pay-TV operations. In its current deliberations in the CATV field, the Commission has refused to make final decisions as to the role of CATV in the national television structure, and as we shall show, until basic decisions have been taken with regard to the CATV industry, and its role in the national television allocations structure is understood, no action should, or properly can, be taken to authorize a nationwide Pay-TV service.

A. The Extent of CATV Development

The rapid growth of CATV systems within the last several years must be considered a factor of prime significance to this proceeding. This growth appears to be concentrating in the large television markets of the country, the very areas which would be the first targets of Pay-TV operations. This activity formed much of the basis for the Commission's decision to assert jurisdiction over all CATV systems in the *Second Report and Order* in Dockets 14895, 15233, and 15971, 2 F.C.C.2d 725. Thus, at Paragraph 38 the Commission stated (2 F.C.C.2d at 741):

> 38. There is also widespread CATV activity within major cities. Our attention has been called to the asserted intent of CATV interests to wire up "almost all American cities — small and large" and 85 percent of all television sets — 40 million homes.[23] The December 1965 issue of Television Magazine (vol. 22, No. 12) states that franchise applications have been filed in San Francisco, Seattle, Pittsburgh, Baltimore, Fresno, Columbus, Tucson, Birmingham, Providence, and Sacramento. Two of the commenting parties in this proceeding are applicants for CATV franchises in Philadelphia. The comments of Columbia Broadcasting System (CBS) refer to applications for CATV franchises in Albany and Syracuse, N. Y.; Galveston, Tex.; and the grant of a CATV franchise in Wilmington, Del. D. H. Overmyer, permittee of new UHF station WDHO-TV in Toledo, Ohio, comments that local authorities have granted a CATV franchise for that city since the issuance of the joint notice herein. Toledo has two VHF stations, a UHF educational station, and — according to Storer Broadcasting Co., receives the signals of four Detroit-Windsor VHF stations, off the air and without reception difficulty. Telerama, Inc., an applicant for a CATV franchise in Cleveland, has filed comments describing its proposed cable operation for that city which has three VHF stations, a UHF educational station, and applications pending for two

> new UHF facilities.[24] Taft Broadcasting Co., in a June 1965 petition to deny a microwave application (file No. 6226-C1-P-65) to bring the three New York independent stations to CATV systems in the Wilkes-Barre-Scranton area of Pennsylvania, states that in the last 6 months 90 franchise applications have been filed in 54 communities in Lackawanna and Luzerne Counties. The Scranton-Wilkes-Barre area is served by three UHF stations, providing three full network services. [Footnotes omitted]

This current activity in the large cities by CATV interests is significant because it reflects the fact that CATV service no longer appears to be confined to its originally assumed purposes. Instead, despite the presence of numerous local signals, CATV systems now planned in the larger markets propose to provide an unusual number of additional broadcast programs.

Such activity in the large markets has the potential to threaten local free television service. This threat exists because CATV systems fragment the audience otherwise available to local stations by importing other broadcast signals. In addition they may be used as a vehicle for distributing programs which either originate with the CATV system or are made available to it on an exclusive basis. It is clear that substantial investments have been and are being made by CATV interests in the large markets of the country. There are currently on file with the Commission 112 requests for waiver of the Commission's new CATV rules requiring an evidentiary hearing before "distant" signals may be imported into the large markets. In addition, several significant CATV systems are in operation in the very largest cities of the country, such as New York, Cleveland, San Diego, etc. The economic pressure to utilize these systems in the maximum manner possible under the state of art, is likely to increase in the next few years. In addition, there is increasing interest in originating programming on CATV systems. These developments must be fully understood before a Pay-TV, off-the-air system should be authorized.

B. CATV As A Form of Pay-TV

A clear threat to the continued healthy existence and growth of free television is posed by the possibility that CATV systems may be converted into Pay-TV operations, or that they will originate programming on vacant video channels. In fact, there is now formal interest in utilizing CATV systems to carry programming which does not originate with broadcast stations. See applications of Dal-Worth Microwave, Inc., File No. 7661-C1-P-66. It is common knowledge that CATV systems have been utilized to distribute specialized programming, *e.g.*, heavyweight championship fights, that is not otherwise available to television broadcast stations, and substantial interest now exists among CATV groups for program origination on a broad scale.

The Dal-Worth applications apparently do not propose to charge subscribers on a per program basis for the nonbroadcast programming that would be provided. It is nevertheless clear that program origination undertaken by CATV systems can have as serious consequences for free local service as the most widespread pay television operation conducted on a broadcast frequency. Manifestly, such CATV operation would be in active competition with free television both for audience and for program material.

That no valid distinction between such CATV and Pay-TV may be based on the difference per program and monthly subscription payments has repeatedly been recognized. Indeed, the Commission uses the terms "pay television" and "subscription television" interchangeably. Moreover, one of the first pay television operations in the country involved a community antenna television system located in Bartlesville, Oklahoma, ("Telemovies") which did not charge subscribers on a per program basis but on a monthly basis. There was no doubt that this was pay television. (See *Broadcasting*, September 9, 1957, p. 31).

Former Chairman Oren Harris of the House Committee on Interstate and Foreign Commerce has stated:

> Now I think we are kidding ourselves when we try to say that Pay-TV is limited to dropping a coin in a box and getting a program out of the whirl. I think a lot of people in this country are going to wake up one of these days and find themselves in the midst of a new policy or program that they cannot get out of. (Hearings on H.R. 7715, *supra*, at 185.)
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> * * *
>
> Now what we are doing, I must say in all frankness and candor, in my judgment we are sitting around here and watching a nationwide Pay-TV operation develop (*Id* at 186.)
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> * * *
>
> [W]hether you talk about collecting on a monthly basis or per program basis, whatever method it is, it is still Pay-TV. (*Ibid.*)

It is true that the Commission has already expressed its concern over the possible impact on free television service from a hybrid CATV-Pay-TV operation. Thus, in the *Second Report and Order* in Docket 15971 at Paragraph 128, the Commission stated (2 F.C.C.2d at 777):

> Whether a form of Pay-TV operation will result from CATV is uncertain and would appear to depend again very largely upon the growth factor, particularly in the larger cities which would naturally be the backbone of any wire Pay-TV operation. But we would agree that in the circumstances its authorization should stem from the Commission (or the Congress) after appropriate proceedings. For, what is involved is not the strictly wire Pay-TV proposals such as recently attempted in California. A hybrid CATV-Pay-TV operation would be based, in an integral and substantial fashion, on use of broadcast signals (to provide the economic base for the Pay-TV "frosting"), and such use of broadcast signals should be allowed only if it is found to be in the public interest. We have petitions now under consideration, which seek the authorization of Pay-TV on a regular basis using broadcast

> facilities, perhaps only in the UHF portion of the spectrum. It is clear that until resolution of the very important policy issues, Pay-TV operations based in substantial part on use of broadcast signals is inappropriate.

The Commission further stated at Paragraph 153 that Congressional consideration of Pay-TV in conjunction with CATV was "particularly called for." The Commission stated (2 F.C.C.2d at 787):

> We believe that congressional consideration of Pay-TV aspects of CATV is particularly called for. For the reason stated in pars. 128-129, we shall urge that Congress prohibit the origination of program or other material by a CATV system, with such limitations or expectations as are deemed appropriate. A hybrid CATV-Pay-TV operation would be based, in an integral and substantial fashion, on use of broadcast signals, and such use of the broadcast industries signals would appear to be both inequitable and inconsistent with the public interest. It is inequitable because it is clearly unfair to use the broadcast industries product as a basis for wire Pay-TV operation which could adversely effect that industry or indeed supplant it. More important, were wire Pay-TV to supplant "free" television broadcast service, it would be inconsistent with the public interest, since it would mean that the public would receive, at least in part, the same service it now does, but for a fee. Finally, we are considering petition seeking the authorization of Pay-TV in the broadcast spectrum.

Despite the above statements reflecting the Commission's concern over joint CATV-Pay-TV operation, it may be that CATV systems will nonetheless enter into the Pay-TV field. For instance, if the Commission rigorously prohibits the importation of "distant" broadcast television signals by CATV systems into the larger markets, such systems may be required to look elsewhere for program sources in order to attract subscribers and compete with existing off-the-air television service. Much of the Commission's CATV regulation has been bottomed upon

the unfair competitive aspects of CATV service where no charges are paid for the program product by the CATV system and where television stations themselves must compete in the market place for such programming. However, if CATV systems are required to pay copyright fees and are not permitted to import distant signals, then much of the justification for prohibiting program origination operations by such systems will have been dissipated. The Senate Judiciary Committee has recently approved a new copyright statute which, it is reported, would not prohibit original programming by CATV systems so long as copyright liability to local broadcasting stations was acknowledged for the programs of such stations carried by the CATV system.

While the economics of the matter are not clear, it certainly cannot be denied that a large scale CATV system in the major markets would have the potential to compete for program originations. Even if CATV systems were required to pay reasonable license fees to local stations, adjustment of subscribers monthly fees to reflect copyright costs of the CATV system would not necessarily result in pricing of the CATV "product" beyond the reach of a substantial segment of the public. One of the factors which the Commission must investigate is the extent to which possible copyright liability may be an insufficient deterrent to the commencement of Pay-TV operation by CATV systems.

The relevance of this discussion to the instant proposal to establish a nationwide Pay-TV service utilizing broadcast frequencies is readily apparent. Insofar as the impact upon the free television service may be concerned, pay television originating on broadcast frequencies cannot be distinguished from pay television carried by wired systems. In fact, wired systems may have the physical potential to carry more than one original program at the same time. This is exactly the type of operation which was proposed by the subscription television service offered in Los Angeles and San Francisco. It is impossible to measure the impact of a Pay-TV service originating on broadcast frequencies upon the local free

television unless the Commission knows all of the other competitive threats to the local free television service extant at the same time. Unless the Commission is assured, either by an explicit prohibition on program origination through Congressional legislation, or by undisputed economic data demonstrating that such CATV-Pay-TV operations would never get off the ground, that there is no such threat to local television service, it cannot reasonably conclude that the additional authorization of nationwide off-the-air Pay-TV would not seriously harm the free television service.

C. CATV As An Adjunct to Free TV

The unsettled nature of the regulatory scheme and, indeed, the unsettled nature of the CATV industry, itself, dictates at this point that no definitive action can be taken with respect to the current proposal. This is so even if no hybrid CATV-Pay-TV operation is assumed. For insofar as CATV may import distant TV signals into a market, the impact upon the free television service may be precisely the same as the threat of program origination by CATV systems. Importation of New York independent broadcast stations into Philadelphia by a CATV system will have the similar effect upon the local free television service in Philadelphia as an off-the-air Pay-TV service. In both cases, the public would be receiving programming from a source not otherwise available to it, and the impact upon the local television stations in that respect is the same. Thus, if the CATV service does not develop into a Pay-TV form of operation, it may still represent a substantial threat to the local television service if signals not otherwise available locally are permitted to be shown in the particular market. While the Commission has established procedures for investigation of CATV operations in the larger markets, it is not entirely clear that the importation of distant signals will be rigorously prohibited by the Commission. In fact, the very decision of the Commission in the *Second Report and Order* to

"grandfather" existing systems, even though they are located in the large markets and importing distant signals, is fair indication that at least some cities will be subjected to the competition of a CATV system, with an effect upon the local television stations exactly as if an off-the-air Pay-TV service had been established. The extent of the CATV development at this point in time is not such that the Commission can dismiss the impact of distant signals upon local television stations before measuring that factor in determining whether off-the-air Pay-TV service should be established.

In addition, the same type of procedures should be adopted by the Commission with respect to the proposed broadcast Pay-TV service as have been adopted for new CATV activity in the larger markets. Whenever CATV systems bring to a particular community television programs which are not otherwise available off-the-air, they are affecting the competitive viability of the local television service in exactly the same manner that a Pay-TV system from a local broadcast station would do. Logical analysis requires the Commission to adopt procedures which would permit scrutinizing of the impact of broadcast Pay-TV operations upon the local television services in exactly the same manner that the Commission now requires CATV systems in the larger markets to prove in an evidentiary hearing that other stations will not be harmed by such operations. Since the threat is the same, the Commission's procedures to handle each should be the same.

It should be emphasized that the importation of distant signals is not merely a potential factor to be measured together with proposed off-the-air Pay-TV operations. According to a study of the National Communication Television Association, 92 percent of the CATV systems in this country carry at least one distant television signal and most systems carry more. See *Cable TV Review*, September 19, 1966, pp. 4-5. If the Commission is to treat the Pay-TV threat to local service in the same manner as it has treated the CATV threat, it must conclude at a

minimum, as in the CATV field, that evidentiary hearings in the particular markets on the proposal of the Pay-TV proponent must be conducted. Such hearings are an unsatisfactory alternative to deferral of action upon the instant proposal until the Commission's regulatory program in the CATV field has been developed. If, however, the Commission is determined to go forward with authorization of a nationwide Pay-TV service, then it must permit individual evidentiary hearings to be conducted so that the impact upon the local free television service may be assessed in a realistic manner. Such hearings would develop: (1) the nature of the Pay-TV service proposed, including its proposed penetration of the market; (2) the posture of the local free television service in existence and likely to come into existence; and (3) the extent of existing and proposed and CATV activity in the particular market.

D. Summary

The Commission has proposed here to authorize on a permanent basis and throughout the nation a broadcast service which has no substantial precedent. Whatever the merits of such a service in bringing additional programming to the public, it is clear that there are serious and substantial questions concerning the impact of the service upon existing free television operation. The Commission's proposal is put forward when the shape of the television industry has not been settled. All that is clear now is that the industry faces a five to ten year period of maximum instability. The burgeoning growth of CATV systems, particularly in the larger markets, must be assessed by the Commission before it can take definitive action in the Pay-TV field.

The Commission also must not lose sight of the fact that with an ever increasing need for frequency space, authorization of an unprecedented and largely unknown service such as Pay-TV on broadcast

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frequencies is not justified in light of the potential impact upon free television. The Commission may not also close its eyes to the potential impact of satellite communications upon the television industry and the public at large. While it is not clear how satellite communication might be used to bring service to the public, this kind of technical innovation no doubt will permit a greater number of television services to be brought to the public. In sum, the Commission is proposing at this time to permanently authorize a controversial and little needed auxiliary broadcast service in the face of widespread changes in the television industry which may become necessary or unavoidable within the near future. At a minimum, the Commission should defer further consideration of an off-the-air Pay-TV service.

VII. ASSUMING *ARGUENDO* THAT THE COMMISSION IS PREPARED TO AUTHORIZE A NATIONWIDE PERMANENT PAY-TV SYSTEM, ANY SUCH AUTHORIZATION MUST BE COUCHED IN TERMS OF A REGULATORY PATTERN DESIGNED TO INSURE THE SURVIVAL OF FREE TELEVISION

If Pay-TV is to be authorized on a nationwide basis, it must be in the context of a regulatory pattern designed to protect free television and the public. The Commission has never suggested that it would permit Pay-TV to supplant free TV. The grant of a permanent authorization rests upon the assumption that the two techniques can coexist. This assumption cannot be left to chance and must be incorporated as best as possible in an overall regulatory pattern.

We have attempted to set forth below the minimum restrictions which we believe appropriate if any authorization is to be made at the present time. Each proposed rule is set forth separate and apart from the others as well as part of a complete regulatory system.

As was indicated earlier, we do not believe the Commission has the data upon which to conclude that any nationwide authorization was warranted -- the data necessary to determine the economic viability of Pay-TV as well as the impact of a successful pay television system on free TV. Nevertheless, if Pay-TV is to be authorized, the rules set forth herein constitute the minimum necessary to protect the public interest.

A. Pay-TV Applications in the Top 100 Markets will be Granted Only After a Hearing

The basic question permeating the Commission's Notice of Proposed Rule Making in both the CATV and Pay-TV matters pertain to the impact of those respective services on the national television structure. With respect to CATV, hundreds of systems were operated in all types of markets prior to the adoption by the Commission of rules intended to assure the orderly integration of CATV with free television. Extensive studies of CATV were conducted by Drs. Seiden and Fisher, the National Community Television Association (NCTA), CBS, and AMST (*Second Report and Order*, Docket Nos. 14895, 15233, and 15971, paragraph 44). Consequently, prior to the adoption of the CATV rules, exhaustive data was available to the Commission concerning the potential impact of this service on free television. Despite the voluminous information available to the Commission on CATV, despite the recognition by the Commission of significant contributions made by CATV (*Second Report and Order*, *supra*, paragraph 139), the Commission adopted rules which require an evidentiary hearing where a CATV system proposes to extend the signal of a television broadcast station beyond its Grade B contour into the top 100 markets. In contrast to this mass data on CATV, the Commission has very little material on Pay-TV -- one test in one market, and a test conducted under controlled

conditions promulgated by the Commission to assure minimal impact on free television.

The significant factor common to both Pay-TV and to CATV systems proposing to extend Grade B signals of broadcast stations beyond their contours into the top 100 markets is the introduction of programming into a given market not otherwise available on free television in the said market. The foremost concern to which the Commission has addressed itself in both the CATV and Pay-TV proceedings is the impact on free television. In attempting to assess the impact on free television from CATV systems operating in the top 100 markets, the Commission adopted rules which require a hearing. In attempting to assess the impact on free television from Pay-TV, the Commission can do no less. The method by which the pertinent issue (impact) is to be ascertained cannot justifiably vary because the sources of the impact are different. Indeed, the need for a hearing to determine impact prior to the grant of a Pay-TV authorization is more apparent in view of the dearth of information available to the Commission concerning Pay-TV in contrast to the abundance of information which was available to the Commission at the time it adopted the CATV rules.

PROPOSED RULES

No Pay-TV station shall be permitted to operate in the 100 largest markets except upon a showing, approved by the Commission, that such operation shall be consistent with the public interest, and specifically the establishment and healthy maintenance of free television broadcast service in the area. Commission approval of a request to operate a Pay-TV station in the foregoing circumstances will be granted where the Commission, after consideration of the request and all related material in a full evidentiary hearing, determines that the requisite showing has been made. The market size shall be determined by the rating of the American Research Bureau on the basis of net weekly circulation for the most recent year.

B. Subscribers Will Be Limited to A 10% Penetration

Any Pay-TV authorization is based upon the Commission's assumption, derived presumably from the Hartford experience, that Pay-TV would achieve, at best, a 10% penetration, and the average subscriber audience would be 10%. Consequently, Pay-TV would not affect more than 1% of the television homes in the United States. From this, the Commission deduced that there would be no noticeable impact on free TV.

Since the impact of Pay-TV on free TV is of paramount importance, the assumptions should be crystallized as rules. There is no way of precluding subscribers from watching any given program and, consequently, any limitation must be in terms of a limit on the number of subscribers. We believe that a 10% penetration — a limitation of the number of subscribers to 10% of the net circulation in the market — is, in fact, excessive in light of the actual experience in Hartford. Since the Commission, however, has utilized this figure in the Further Notice, we have assumed its validity for purposes of this discussion.

If the Commission adopts the hearing requirement for Pay-TV in the top 100 markets, no specific additional rules will be required in this context. It is assumed that during the course of such a hearing, the proponents would be required to demonstrate the number of anticipated subscribers, the penetration of the market, and the effect of such a penetration on free television. Any final decision by the Commission to grant any particular application would necessarily contain a determination as to the maximum number of subscribers proposed and the effect of such a penetration on free television. The Pay-TV system, thereafter, would be limited to its proposal and any growth beyond this point would require prior Commission approval and another hearing.

The problem also exists in markets other than the top 100.[38] The problem may be obiated by a rule which limits Pay-TV to four-station markets. In such event, Pay-TV will be, for all intents and purposes, precluded from the small markets. The proposed rule has been drafted to cover the maximum contingency and it can be adjusted in light of the discussion above.

PROPOSED RULE

1. No Pay-TV station shall be permitted to operate where more than 10% penetration is proposed or will be achieved except upon a showing, approved by the Commission, that such operation would be consistent with the public interest, and, specifically, the establishment and maintenance of a healthy free television broadcast service in the area. Commission approval of a request to operate a Pay-TV station in the foregoing circumstances will be granted where the Commission, after consideration of the request and all related material in a full evidentiary hearing, determines that the requisite showing has been made. Penetration shall be determined by the rating of the American Research Bureau on the basis of the net weekly circulation for the most recent year.

2. Pay-TV stations shall file with the Commission monthly subscriber lists. Pay-TV stations shall either (1) maintain subscribers at this 10% penetration level (or at such other level as the Commission may have approved in an evidentiary hearing) or (2) request Commission approval of additional subscribers. Commission approval of such a request will be granted where the Commission, after consideration of the request and all related material in a full evidentiary hearing, determines that the requisite showing described above has been made.

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[38] It is to be noted that the minimum number of subscribers deemed by the proponents to be economically feasible is 20,000 and the proponents indicate that operation below the top 100 markets, consequently, will require a penetration substantially greater than 10%.

C. No Pay-TV System Will Be Authorized Until it has A Minimum of 2,000 Subscribers

Every family or individual possessing a television receiver within technical range are potential viewers for free TV. Thus, considering television set saturation, there is no need to require applicants for television broadcast stations to demonstrate the existence of an audience. Pay-TV, however, absent the addition of a new element — subscribers, has no potential audience and the Commission cannot blightly assume that such an audience will materialize. In fact, based on the results of the Hartford test, there is an adequate basis to forecast that Pay-TV will not achieve a sufficient audience base necessary to survive. In short, whereas free TV has a potential audience recognizably available, Pay-TV does not — until subscribers are obtained. The proposed rule would translate this basic difference (the new element — subscribers) into a meaningful standard.

Based on the Hartford test, proponents state that a 20,000 subscriber system is the smallest system economically feasible (*Joint Comments*, p. 35). Accepting this as an accurate projection, the Commission should adopt a rule looking toward reasonable assurance of continued operation (*Ultravision Broadcasting Co.*, 1 FCC 2d 544). Such a rule would help protect against the type of public and private detriment suffered as a consequence of the early failures in UHF television. While it is not realistic to expect Pay-TV stations to commence operation with 20,000 subscribers, it is reasonable to require, as a part of the basic showing of need, that Pay-TV applicants demonstrate by firm, binding agreements at least 2,000 subscribers, prior to the grant of a Pay-TV authorization.

PROPOSED RULE

No pay TV authorization shall be granted except upon the affirmative showing that the applicant has obtained at least 2,000 subscriber contracts. Only contracts under which the subscriber has agreed to pay the regular prescribed charges will be considered in ascertaining compliance with this rule.

D. Pay-TV Must Be Limited to Preclude Siphoning of Programs and Talent

Underlying proponents' definition of "box-office" is the implication that Pay-TV programming will consist of programs not available to free television. For example, in the area of sport events proponents state:

> . . . subscription television's major contribution to sports fans will be the making available of those events such as heavyweight championship boxing matches, home professional football and baseball games and the vast number of college football games which are kept off conventional television by the owners thereof because of fear of the drastic effect conventional television may have upon box-office attendance. (*Joint Comments*, p. 46.)

As previously set forth, *supra*, the conditions under which the Hartford test was conducted, rendered impossible the formulation of meaningful conclusions pertaining to its impact on free TV. Nationwide Pay-TV, through the inducement of greater profits, may well siphon-off programs and talent now available on or to free television. Illustrative of this point is the disappearance from local free television of the games of certain major league baseball teams in California.

Sports are particularly vulnerable. The Kentucky Derby, the World Series and the weekly professional football games all attract mass audiences. That these events appear on free television today lends no assurance that they will continue to be available in the absence of regulation.

The rules proposed are calculated to restrict Pay-TV from siphoning program material which historically has been available on free television. Such purpose accords with both the Commission's goal and proponents' representations that Pay-TV first and foremost is a supplemental service to the existing television structure.

Sports events are reasonably identifiable and, consequently, a rule can be written which is capable of being enforced. With respect to sports events, Pay-TV licensees should be prohibited from charging a fee for events which were regularly televised into the market via free television within 5 years from the last date on free television. This 5-year period is intended both as a deterrent to the siphoning of sports programs from free TV and to afford free TV an opportunity to adjust to the demise of the program. 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.

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It is virtually impossible to proscribe entertainment programming as such. Any limitations written in terms of particular programs would involve the Commission in the type of detail that is considered in copyright litigation. At what point does a program change sufficiently so that it becomes a different program? The obvious instances are few — change in title does not create a new program. Does the addition of one new character or the change in character names create a new format? Is "Run For Your Life" the same program as "The Fugitive"?

We have also considered the possibility of a rule precluding programs or program series revolving around a main character. Television is not limited to such programs and, conversely, the problem of identification continues to exist.

The only approach which bears any hope from an administrative point of view is to preclude the siphoning of talent in such a way as to make that talent unavailable to free television and, accordingly, we have drafted a rule in this context.[39]

It is to be noted that the rule on talent cannot reasonably be applied to motion picture film exhibited on Pay-TV while, at the same time, every utilization by Pay-TV of motion picture film impedes the use of that film by free television. The Commission, consequently, should adopt a rule which limits the amount of time that a Pay-TV station can devote to films. The benefits inherent in such a rule extend beyond reducing the impact on free television. Movies occupied 86% of the Pay-TV programming in Hartford and, as such, the service provided by Pay-TV could be described charitably as analogous to the service provided by a neighborhood theater and the neighborhood theater does not utilize scarce broadcast frequencies. If the broadcast of motion picture film were limited, Pay-TV would be forced into the type of programming which heretofore has been limited to the speeches of company officials.

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[39] Comments looking toward a talent restriction were requested in Paragraph 14 of the Further Notice.

We have suggested a 50% limitation as an equitable balance designed, in conjunction with the sports that will be available, to afford the proponents sufficient programming to operate and yet requiring new programming resources.

PROPOSED RULE

1. 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.

   a. Notification of the sports events proposed to be carried by the Pay-TV station shall be provided to all other television broadcast stations located within 25 miles of the Pay-TV station at least 30 days prior to the designated broadcast date of said sports event.

   b. Petitions to prohibit the carriage of such sports events on a Pay-TV shall be filed with the Federal Communications Commission no later than 21 days prior to the designated broadcast date together with a copy of the contract (if available) upon which the petitioner relies.

2. No licensee shall broadcast any program for which a fee is charged, if the talent for such program is restricted, prohibited, or in any way induced or influenced from appearing at any time on free television.

3. No Pay-TV licensees shall devote more than 50% of its subscription hours in any week to the transmission of motion picture film.

E. Pay-TV Stations Should Be Limited to UHF Stations and to Communities within the Grade A Contours of at Least Four Commercial Television Stations

Historically, the Commission has striven to attain television dispersion throughout the United States. Incidental to this goal, the Commission has deemed it significant to provide conditions looking toward the establishment of parity among the national networks. Operation of a Pay-TV station in a market within the Grade A contour of less than four commercial television stations will subvert the progress heretofore accomplished. The displacement of network programming by a Pay-TV movie during the prime time in a major market would disrupt the competitive position of that network, *vis-a-vis*, the other two and it would also deprive the viewing public of the displaced network programming.

Presumptively, pay television is to be authorized as a supplemental service. No such justification exists if its authorization will result in the displacing of a major program source.

The available data from the Hartford test provides no basis for deviation from the policy considerations set forth in the *Third Report and Order*, limiting Pay-TV operation to markets within the Grade A contour of four commercial television stations.

PROPOSED RULE

No license shall be granted to a television broadcast station proposing to carry programming for which a fee is charged except upon a showing that the market which it serves or proposes to serve is within the Grade A contour of at least four commercial television stations (including the Grade A contour of the Pay-TV station). The market shall be the market as used by the American Research Bureau for the most recent year.

It is also to be noted that one of the principal claims advanced on behalf of Pay-TV is its alleged ability to promote the growth of new stations by providing additional economic and program resources. Since, as a practical matter, this relates almost exclusively to UHF stations, any authorization of Pay-TV should, we believe, be limited to such stations.

PROPOSED RULE

No license shall be granted to a television broadcast station proposing to carry Pay-TV programming except to a station operating on a UHF frequency.

F. Pay-TV Programming Should Be Limited In Total Hours of Operation and to Certain Segments of the Broadcast Day

The necessity of restricting Pay-TV authorizations to communities within the Grade A contour of four commercial television stations has been previously discussed and such arguments are equally applicable here. Bearing significantly on this question is the matter of restricting the broadcast hours of a Pay-TV station. While conditions imposed upon Pay-TV authorizations must not be so burdensome as to unreasonably fetter operation, the objective of preserving free television as it is recognized today, remains the paramount consideration.

The data available from the carefully controlled Hartford test simply does not provide any basis for assessing the impact on free television either as related to audience diversion or "siphoning-off" of programs. The matter of impact is prospective. Nevertheless, the Commission must be cognizant that a miscalculation on its part could wreck havoc on free television as it presently exists. In the absence of knowledge concerning the underlying factors affecting free television, in all types of markets, the Commission must proceed with caution and adopt rules which will avoid catastrophic results.

Assuming the adoption of a rule limiting Pay-TV authorizations to markets within the Grade A contour of four commercial television stations, the Joint Committee believes that the Commission's proposal set forth in Appendix C, Section 73.643 should be modified to the extent of restricting the Pay-TV station to devoting not more than 60 per cent of its prime broadcast time to Pay-TV programming. The Joint Committee urges, however, that this restriction should be applied to any Pay-TV station and not be limited solely to markets with a maximum of four stations. The lack of information respecting the impact on free television does not warrant the risk of permitting any Pay-TV station to operate on unlimited time in any market.

Should the Commission fail to adopt a rule limiting Pay-TV authorizations to markets within the Grade A contour of four commercial television stations, the Commission must apply a more strict limitation on the hours of operation available for Pay-TV programming in the smaller markets. The utilization of prime time hours for Pay-TV will upset the competitive positions of the networks and will deprive the public of the benefits of noteworthy network programming.

In its proposed Section 73.643, the Commission has recognized the need to reserve broadcast day segments for free TV in relation to the number of stations in the market. Thus, it is more imperative that a Pay-TV station in a market within the Grade A contour of only one station reserve significantly more time for free TV than a Pay-TV station in a community within the Grade A contour of four or more stations. While the Joint Committee agrees in principle with the proposal, it believes that a greater percentage of prime time must be reserved for free television. Accordingly, it is submitted that in single station markets, not more than 25 percent of the station's prime time broadcasting time, computed on a weekly basis, with a maximum of three hours in any one prime time segment, be permitted for Pay-TV use; that in two and three station markets, not more than 40 percent of a station's prime

time broadcasting time, computed on a weekly basis, with a maximum of three hours in any one prime time segment, be permitted for Pay-TV use. If the Commission adopts rules authorizing more than one Pay-TV station in a market, the time and percentage should continue to be calculated on the basis of only one authorization.

In addition to the reservation of broadcast day segments for free television, the Joint Committee further believes that it is necessary that the Commission impose a limitation on the number of hours per week which can be devoted to Pay-TV. Proponents state that on the basis of the Hartford test the feasibility of broadcasting more than 30 to 40 hours is unlikely. Since there is really no basis for knowing whether this condition would continue in the event of the authorization of nationwide Pay-TV, the Commission should affirmatively adopt a rule placing a weekly time limitation on the number of hours to be utilized for Pay-TV programming in a market.

PROPOSED RULE

If a television broadcast station supplies the only Grade A signal to a community, not more than 15 percent of its non-prime broadcast time (including subscription and non-subscription broadcast time during that period) and not more than 25 percent of its prime broadcasting time (including subscription and non-subscription broadcast time during that period) may be devoted to Pay-TV; if a television broadcast station supplies the second or third Grade A signal to a community, not more than 25 percent of its non-prime broadcast time, and 40 percent of its prime broadcast time may be devoted to Pay-TV; if a television broadcast station supplies the fourth or more Grade A signal to a community, not more than 50 percent of its non-prime broadcast time and 60 percent of its prime broadcast time may be devoted to pay television.

a. In no event shall a Pay-TV station or stations devote, individually or collectively, more than three hours to Pay-TV programming in any one broadcast day during prime broadcast time in markets within the Grade A contours of one, two or three television stations (including the pay television station).

b. In no event shall a Pay-TV station or stations devote more than four hours, individually or collectively, to Pay-TV programming in any one broadcast day during prime broadcast time in markets within the Grade A contour of four or more television stations (including the Pay-TV station).

c. Prime time broadcast hours are defined as those hours of the broadcast day between 6:00 p.m. and 11:00 p.m.

d. In no event shall a Pay-TV station or stations in a market exceed 35 hours, collectively, per week of Pay-TV programming.

e. In the event that more than one Pay-TV authorization is granted in the same market, the percentage of prime time authorized for Pay-TV programming will be calculated on the basis of a total of 35 hours and the percentage of non-prime time authorization for Pay-TV programming will be calculated on the basis of the station operating the fewest hours.

G. Pay-TV Licensees Shall Be Prohibited from Engaging in Network Operations or Other Types of Multiple Program Purchase Agreements

The Commission itself questioned the wisdom of interconnection and, in Paragraph 14, it requested Comments concerning rules preventing or limiting interconnection of Pay-TV operations by microwave or otherwise. This questioning relates to the limited nature of the information provided by the Hartford test. The Commission stated:

> 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.

Hartford provided no information concerning networking and it cannot be presumed that the Commission considered such a possibility in arriving at the 10% projected penetration. Moreover, proponents have never asserted that the benefits to be derived from Pay-TV required network type operations. Consequently, networking in any form should be prohibited to minimize the risk to free TV.

PROPOSED RULES

1. No license shall be granted to a television broadcast station having any contract, arrangement, or understanding, expressed or implied, with a network organization, providing for the furnishing of programs intended for Pay-TV use.

2. No license shall be granted to a television broadcast station having any contract, arrangement, or understanding, expressed or implied, with any other Pay-TV licensee, franchise holder, or agents thereof, for the purpose of purchasing Pay-TV programming.

3. No license shall be granted to a television broadcast station having any contract, arrangement, or understanding, expressed or implied, with any company, organization, etc., providing Pay-TV programming as a part of an interconnected system.

H. The Commission Should Regulate Charges, Terms and Conditions Concerning Pay-TV Operation

The Joint Committee does not believe that the Commission has the authority to regulate Pay-TV. In the event the Commission determines otherwise, however, the Commission should seek legislation from the Congress to regulate subscriber charges, terms and conditions.

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Both free TV and Pay-TV, as licensees, are recipients of a public trust and both utilize valuable public airways. Unlike free broadcasting, Pay-TV proposes to make a direct charge on the members of the public. It is this basic distinction, a direct charge on the public for services provided over the public's property, which requires government rate regulation. It is the nature of the Pay-TV operation, as in the case of common carriers and public utilities, which dictates rate regulation. If jurisdiction is to be asserted over Pay-TV, concomitantly the Commission must regulate rates. Lacking the express authority to regulate rates in the broadcast industry, it is incumbent upon the Commission to seek legislation in this field in order to validly carry out its assertion of jurisdiction.

I. CATV Systems Should Be Prohibited from Originating Programming or Carrying Pay-TV Programming

We have previously discussed the significance of CATV in the context of any Pay-TV authorization. Suffice it here to say that if the Commission determines that a nationwide off-the-air Pay-TV authorization is warranted at the present time, the very least that should be done is to prohibit CATV systems from originating programs or functioning or serving as an outlet for Pay-TV programming at least until such time as the Commission is prepared to evaluate the significance of CATV generally on free television.

PROPOSED RULE

No CATV system shall carry Pay-TV programs originating from a Pay-TV broadcast station or originate any programs for carriage to its subscribers.

Conversely, the Pay-TV licensee should be prohibited from entering into any arrangement, the purpose of which is to utilize CATV systems as direct outlets for Pay-TV programming.

PROPOSED RULE

No license shall be granted to a television broadcast station having any contract, arrangement, or understanding, expressed or implied, which provides for the distribution or furnishing of Pay-TV programming to or through CATV systems.

J. Pay-TV Licensees Should Be Required to Comply with All Commission Rules Imposed Upon Broadcast Licensees

Proponents have indicated, based on the Hartford test, that Pay-TV licensees can comply with the Commission's Rules otherwise applicable to a television licensee.[40] In the clear absence of any objection of hardship, such rules should be made applicable to Pay-TV licensees.

In addition, we believe that the Commission should adcpt rules in connection with the application to be submitted by Pay-TV applicants which solicit information comparable to that set forth in the Commission's *Third Report and Order*, Paragraph 32.

CONCLUSION

The Commission today has as little meaningful data from which to determine the impact of Pay-TV on the economy and on free television as it did when the subject first arose more than ten years ago. Hartford was virtually useless. The Hartford experience demonstrated nothing more than an inability to secure subscribers. Hartford provided

[40] As was done in Hartford, the minimum hours of operation required of television licensees should not include the hours devoted to Pay-TV.

no information as to the impact a successful pay television system would have on free television. The Commission, however, appears to have succumbed to a belief that, having authorized the test, it must now accord weight to its results. The experience in Hartford does not provide a basis for the conclusions which the Commission is attempting to draw and, at this stage, the Commission, in the public interest, should either terminate the test authorization or, at best, permit Pay-TV to continue in a limited test context in the hope that the ensuing years will produce the necessary data or that Pay-TV will recognize its own limitations and quietly fade away. Free television has not remained stagnant during the period and its value to the public is such that its continued growth should not be retarded.

The entire problem has now been complicated by the development of CATV. CATV has mushroomed to such an extent that the Commission is now attempting to assess its impact on free television. Certainly, the Commission cannot permit a new attack from a different source — Pay-TV — without first determining that free TV can survive under the existing conditions.

We are still of the opinion that the Commission does not have the necessary authority to grant Pay-TV on a permanent basis. Even more important, in light of the dangers inherent in a successful Pay-TV operation, the Commission should seek Congressional guidance before the problem becomes insurmountable.

The Commission has seen fit to request guidance from Congress concerning CATV. Pay-TV presents even greater regulatory problems and the Commission has the opportunity of securing guidance before the situation becomes catastrophic.

Finally, since the Commission's Further Order, as written, suggests the possibility of an immediate Pay-TV authorization on a nationwide basis, we have set forth a regulatory pattern which we believe to be the minimum necessary if free TV is to survive.

Respectfully submitted,

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October 10, 1966

APPENDIX A

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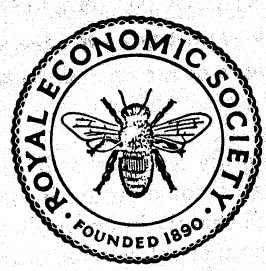
THE ECONOMIC JOURNAL



THE QUARTERLY JOURNAL OF THE ROYAL ECONOMIC SOCIETY

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THE REDISTRIBUTIONAL EFFECT OF TELEVISION ADVERTISING

THE economic merit of advertising must be judged on the basis of its ultimate contribution to consumer welfare, as well as by its immediate effects on production and distribution costs.[1] The purpose of this paper is to investigate the redistributional effect which results from television advertising.

Our study reveals that in 1963, under the present commercial television system, all income groups in the United States experienced a redistribution of income slightly in excess of one-quarter of 1 billion dollars. Conversion of the commercial system to an alternative system of pay television would result in a complete or nearly complete elimination of the benefits of this redistribution currently enjoyed by families with a disposable personal income of less than $6,400. If a metered system of pay television were adopted the entire redistributional effect would be removed. If a flat-fee system were used a small amount of redistribution would continue to exist, but the size and direction of such redistribution would depend on the viewing pattern of subscribers. Conversion to a government-supported system could be expected to alter the redistributional effect, the extent of which would depend upon the relationship between viewing pattern and progressiveness of the tax structure.

If the same redistributional pattern prevailed in Great Britain for the commercial portion of its system the magnitude of redistribution would have been approximately £15 million in 1963, or 11% of the total expenditures on television, as compared to 18% for the United States. The lower percentage for Great Britain is attributed to the existence of a government-operated system.

The Concept and Measures of Redistribution

In 1963 American advertisers spent $1·6 billion to support the existing commercial television system. In the same year this system provided viewers in all income groups with a total of 3·4 million station hours of entertainment and news programmes. The costs of this entertainment were shifted to consumers in the form of higher prices for advertised goods and services.

We may assume that approximately the same amount of expenditures

[1] Nicholas Kaldor points to the impossibility of evaluating advertising simply by reference to its direct effects. He considers at least six types of direct and indirect effects from advertising. They are: an increase in productive efficiency, an improved quality of product, a stimulus to business activity, reduced amplitude of cyclical fluctuations, greater shopping convenience and a subsidy to newspapers which promotes a free and independent press. "The Economic Aspects of Advertising," *Review of Economic Studies*, Vol. XVIII, 1950–51, pp. 7–8.

would be necessary to support the television system in the absence of advertising, if the same volume and types of programmes were to be supplied.[1] In this event direct payments for programmes would have to be made by consumers to television stations under a pay television system, or to the Government under a government-subsidised system. It then follows that the benefit received by any given consumer under the present system is equivalent to what he would have to pay for the programmes viewed in the absence of advertising; and the cost to the consumer would be what he pays for advertising, which is included in the prices of the advertised goods and services he purchases.

In so far as the purchases of advertised goods and services by families at different income levels are not proportional to the volume of their television viewing, discrepancies inevitably develop between benefits received and costs paid. This creates a redistribution of income between income groups. When the benefits received by a family exceed the costs paid a net positive subsidy arises, whereas when the costs exceed the benefits a net negative subsidy exists.[2]

Three sets of equations have been constructed to measure: (1) the net subsidy to a family with a given income for a given product group (equations (1.11) and (1.12)) and a total net subsidy for all product groups (equation (1.21)); (2) the level of income at which a net subsidy becomes zero (the break-even point) for a given product (equation (2.11)); and (3) an aggregate net subsidy to families in a given income bracket for a given product and also for all product groups (equations (3.11) and (3.21)).

A net annual subsidy received or paid (s_i) by a family with a given income (Y) for a given product is the difference between the value of television programmes viewed by the family that are sponsored by advertisers of the product and the amount of advertising expenditures included in the expenditures of the family on that product. Thus,

$$s_i = Ch_i - a_i E_i \quad (i = 1, 2, 3, \ldots n) \quad . \quad . \quad . \quad . \quad . \quad (1.11)$$

setting $h_i = \alpha_i (H)$, and $E_i = f_i (Y)$; where, $H = g(Y)$ and $\alpha_i = \dfrac{A_i}{\Sigma A_i}$

$$\text{Then, } s_i = C\{\alpha_i g(Y)\} - a_i f_i (Y) \quad . \quad . \quad . \quad . \quad . \quad . \quad . \quad . \quad (1.12)$$

[1] In the case of pay television, costs may vary somewhat, depending on the type of system adopted. If a wired system is used, there will be additional cable charges; and if an over-the-air system is used with a meter that enables the operator to charge differential rates for different programmes there will also be additional costs of providing and maintaining a black box. It is entirely possible, however, that a system can operate with a meter that is similar to that which is being used by electric power companies in measuring power consumption. Under such a system additional costs of meter reading and billing would be nominal. The costs of operating a totally government-sponsored system can be lowered by as much as 10% because of savings in selling costs.

[2] An advertising subsidy is sometimes regarded as the difference between the value of the benefits received and the actual costs paid by a consumer, such as subscription fees for magazines and newspapers. See, for example, W. B. Reddaway, "The Economics of Newspapers," ECONOMIC JOURNAL, June 1963, pp. 201–18.

TABLE I

Definition of Symbols and Sources of Data Used for Computation in Subsequent Tables

Definition.	Source.
s_i Net subsidy to a family for ith product group	
C Value per hour of television programme viewed as obtained from dividing the total advertising expenditures in television by the aggregate number of hours viewed by all families	Total television advertising expenditures, *Financial Report for Television, 1963*, Federal Communications Commission. The number of hours of viewing, *Nielsen Television Index*, January through December, 1963
α_i Percentage of programmes sponsored by ith product group, as estimated from television advertising expenditures of each product group	Television advertising expenditures of each product group were estimated from the network billings and spot billings published by Television Bureau of Advertising
H Total number of hours of viewing by a family per year. Estimated from Nielsen's viewing data as follows: $H = 1414{\cdot}7 + 0{\cdot}20045Y = -0{\cdot}0000Y^2$, where $H \geqq 1{,}400$ hours	*Nielsen Television Index*, January through December 1963. Since viewing data are not available for the upper income groups, a lower limit has been set at 1,400 hours which is the number of hours viewed by a family with a disposable income of $11,900
h_i Number of hours of viewing per family sponsored by the advertisers in ith product group. $h_i = \alpha_i(H)$	See α_i and H
A_i Amount of advertising expenditures of the advertisers in ith product group	See α_i
a_i Advertising expenditures per dollar of spending for ith product group, as obtained from dividing television advertising expenditures of ith product group by consumption expenditures on that product group	Television advertising expenditures of each product group, see α_i; consumption expenditures in each product group, *Consumer Expenditures and Income*, 1960–61, Bureau of Labor Statistics. Data for the urban families were projected to the total universe due to the unavailablity of data for rural families
Y Disposable personal income per family	Same as above
E_i Consumer expenditures of a family for ith product group. Computed as function of income.	Same as above. The following product-consumption functions have been computed:

1. Food	$E = 219{\cdot}1 + 0{\cdot}225Y - 0{\cdot}0000049Y^2$
2. Automobile	$E = 148{\cdot}1 + 0{\cdot}170Y - 0{\cdot}00000205Y^2 - 0{\cdot}000000000094Y^3$
3. Tobacco	$E = 17{\cdot}3 + 0{\cdot}017Y - 0{\cdot}00000052Y^2$
4. House furnishings and equipment	$E = -14{\cdot}7 + 0{\cdot}0575Y - 0{\cdot}00000096Y^2$
5. Alcoholic beverages	$E = 11{\cdot}0 + 0{\cdot}0129Y$
6. Clothing and related materials	$E = 422{\cdot}2 + 0{\cdot}0851Y$
7. Household operations	$E = 65{\cdot}8 + 0{\cdot}0356Y + 0{\cdot}00000086Y^2$
8. Medical care	$E = 82{\cdot}8 + 0{\cdot}051Y - 0{\cdot}00000059Y^2$
9. Personal care	$E = 58{\cdot}4 + 0{\cdot}049Y$
10. Recreation and Transport	$E = -4{\cdot}3 + 0{\cdot}0544Y$
11. Others	$E = 359{\cdot}2 + 0{\cdot}147Y$

And for all product groups combined the total subsidy is

$$s = C\,g(Y) - \Sigma a_i f_i Y \quad . \quad . \quad . \quad . \quad (1.21)$$

The level of income at which a net subsidy to a family becomes zero (the break-even point) for a given product group can be computed as follows:

$$C\{\alpha_i g(Y)\} = a_i f_i(Y) \quad . \quad . \quad . \quad . \quad . \quad (2.11)$$

Since C and $g(Y)$ are the same for all product groups, variations in the

break-even point among different product groups must come from differences in the values of the remaining terms. Hence, a higher value of either $f_i(Y)$ or a_i will lower the break-even point, while a higher value of α_i will raise it.

TABLE II

The Values of α_i and a_i for all Product Groups in 1963

	Percentage programmes sponsored by product group.	Television advertising expenditure per dollar of consumer spending.
	α_i.	a_i, cents.
Food	0·26	0·68
Automobile	0·06	0·29
Tobacco	0·08	2·88
House furnishings and equipment	0·04	0·49
Alcoholic beverages	0·05	1·90
Clothing and related materials	0·02	0·12
Household operations	0·12	1·29
Medical care	0·12	1·16
Personal care	0·16	3·53
Recreation and transport	0·02	0·22
Others	0·07	0·19

Source: See Table I.

That is, the relative size of the net subsidy to a family is significantly affected by the slope of $f_i(Y)$.

The aggregate net subsidy for all families in a given income bracket for a given product group can be obtained as follows:

$$S_{ij} = \int_a^b [C\{\alpha_i g(Y)\} - a_i f_i(Y)] \phi(Y)\, dY \quad . \quad . \quad (3.11)$$

where the jth income bracket covers all families with income of from a to b, and $\phi(Y)$ denotes the distribution of families as a function of income.

Similarly, the aggregate net subsidy for a given income group can be computed for all product groups combined,

$$\sum_{i=1}^{n} S_{ij} = \sum_{i=1}^{n} \int_a^b [C\{\alpha_i g(Y)\} - a_i f_i(Y)] \phi(Y)\, dY \quad . \quad (3.21)$$

The Estimation Results and Interpretations

Net subsidies have been computed for two hypothetical families, one with a disposable personal income of $3,000 and the other with $10,000. The results are presented in Table III.

In 1963 a family with an income of $3,000 viewed television programmes valued at $34·21, while paying an equivalent of only $21·20 in higher prices for advertised products. This leaves a net subsidy *received* on all product groups of $13·01, or 38% of the benefits received. The comparable figures

for a family with an income of $10,000 are $32·56, $51·73 and a net subsidy *paid* in the amount of $19·17. This represents 59% more than the benefits received from television viewing. When the subsidy is broken down into

TABLE III

Net Subsidies to Hypothetical Families with Disposable Incomes of $3,000 and $10,000 Respectively—1963

	(1) Benefits received, $.	(2) Payments made, $.	(3) Net Subsidy, $.	(4) Subsidy–benefit ratio, %.	(5) Income elasticity.
	A Family with Disposable Personal Income of $3,000				
Food	8·91	5·68	3·13	35	0·70
Automobile	2·06	0·99	1·07	52	1·36
Tobacco	2·74	1·87	0·87	32	0·65
House furnishings and equipment	1·36	0·73	0·63	46	1·04
Alcoholic beverages	1·71	0·95	0·76	44	0·77
Clothing and related materials	0·68	0·36	0·32	47	0·86
Household operations	4·10	2·33	1·77	43	0·68
Medical care	4·10	2·68	1·42	35	0·61
Personal care	5·48	3·64	1·84	34	0·43
Recreation and transport	0·68	0·35	0·33	49	1·03
Others	2·39	1·52	0·87	36	0·55
Total	34·21	21·20	13·01	38	
	A Family with Disposable Personal Income of $10,000				
Food	8·48	13·46	−4·98	−59	0·64
Automobile	1·95	3·63	−1·68	−86	0·80
Tobacco	2·61	3·92	−1·31	−50	0·49
House furnishings and equipment	1·31	2·27	−0·96	−73	0·83
Alcoholic beverages	1·64	2·66	−1·02	−62	0·92
Clothing and related materials	0·64	1·07	−0·43	−67	0·95
Household operations	3·90	6·55	−2·65	−68	1·04
Medical care	3·90	6·19	−2·29	−59	0·73
Personal care	5·23	7·31	−2·08	−40	0·72
Recreation and transport	0·64	1·19	−0·55	−86	1·01
Others	2·26	3·48	−1·22	−54	0·80
Total	32·56	51·73	−19·17	59	

Note: The values in each column were computed as follows: (1) $C\{\alpha_i g(Y)\}$; (2) $a_i f_i(Y)$; (3) column 1 minus column 2; (4) column 3 divided by column 1; (5) $\eta = \frac{dE}{dY}\frac{Y}{E}$.

Source: See Table I.

product groups considerable divergency emerges. Thus, a family with an income of $3,000 received a net subsidy as high as $3·13 from programmes sponsored by food advertisers and as low as $0·32 from clothing. The abso-

lute size of subsidy for each product group is roughly proportional to the size of its advertising expenditures. The relative size of subsidy, *i.e.*, the subsidy–benefit ratio, however, is significantly affected by the income elasticity of demand for the product. Thus, we observe a positive correlation between the subsidy–benefit ratios and the income elasticities for both a family with an income of $3,000 and a family with an income of $10,000. Hence, the higher the income elasticity of demand, the larger the relative size of net subsidy.

A break-even point is attained for each product group when the value of benefits received is equal to payments made, at which point the net subsidy becomes zero. This break-even point varies from product to product, depending upon the value of α and the level of E. A higher value of α tends to raise the break-even point, while a higher value of a and E lowers it. The break-even points for all product groups are presented in Table IV. For all groups with the exception of personal care, the break-even point falls within the relatively narrow range of $6,000–$6,800.

TABLE IV

The Levels of Disposable Personal Income at which a Net Subsidy Becomes Zero, 1963

	$
Food	6,250
Automobile	6,005
Tobacco	6,133
House furnishings and equipment	6,200
Alcoholic beverages	6,646
Clothing and related materials	6,710
Household operations	6,667
Medical care	6,340
Personal care	7,080
Recreation and transport	6,230
Others	6,765

Note: Equation (2.21) was used in computing the break-even points.
Source: See Table I.

For all families taken together, television advertising brought about a redistribution of income in the magnitude of $291·1 million in 1963. This represents 18% of the total sum spent on television advertising. The largest gainers were the families in the lowest income bracket. The size of net subsidy *received* declines as income increases until the break-even point is reached, thereafter the size of net subsidy *paid* rises as income increases.

The lowest income bracket (under $3,000) gained $151·4 million or approximately half of the net subsidy received. In contrast, the highest income bracket ($15,000 and over) experienced a negative net subsidy of $79·2 million. The largest negative net subsidy, however, fell upon the

TABLE V

Total Net Subsidies for All Income Groups 1963

($ million)

	Disposable personal income.								
	Under $3,000.	$3,000–$3,999.	$4,000–$4,999.	$5,000–$5,999.	$6,000–$7,499.	$7,500–$9,999.	$10,000–$14,999.	$15,000 and over.	Net redistribution.
Food	39·9	14·2	10·7	4·3	−5·2	−21·7	−28·5	−13·7	69·1
Automobile	12·0	4·9	3·9	1·0	−2·4	−7·8	−8·9	−3·0	22·1
Tobacco	11·6	4·1	3·0	1·1	−1·5	−5·9	−7·5	−4·9	19·8
House furnishings and equipment	9·2	3·4	2·4	0·9	−1·1	−4·2	−7·5	−3·1	15·9
Alcoholic beverages	8·2	3·3	3·0	1·7	−0·2	−4·0	−6·3	−5·7	16·2
Clothing	3·4	1·3	1·2	0·8	0·0	−1·6	−2·6	−2·5	6·7
Household operations	20·5	8·5	7·5	4·5	0·0	−9·9	−16·4	−14·7	41·0
Medical care	17·7	6·8	5·6	2·8	−1·5	−9·4	−13·6	−8·4	32·9
Personal care	15·3	9·1	8·4	5·9	2·4	−6·4	−19·3	−14·9	41·1
Recreation and transport	4·3	1·6	1·4	0·6	−0·4	−2·2	−3·1	−2·2	7·9
Others	9·0	3·8	3·2	2·2	0·2	−4·5	−7·8	−6·1	18·4
Net subsidy received:	151·4 (52·0%)	61·0 (21·0%)	50·3 (17·3%)	25·8 (8·8%)	2·6 (0·9%)				291·1 (100·0%)
Net subsidy paid:					−12·3 (4·2%)	−78·1 (26·8%)	−121·5 (41·8%)	−79·2 (27·2%)	−291·1 (100·0%)

Notes:

1. In computing a total subsidy for each product group, a net subsidy for the family with the median income, computed in the same manner as in Table III, is multiplied by the number of families in the group.
2. The figure of 46·8 million families was used.
3. A 100% saturation rate was assumed for television ownership. The actual saturation rate was 91% in 1963. A lower saturation rate, however, does not alter the results, in so far as the rate is the same for all income groups, which is considered to be a valid assumption.

Source: See Table I.

second highest income group ($10,000–$14,999). This amounted to $121·5 million, or 41·8% of total negative net subsidies.

The net redistributional effect varies widely among the various product groups, with the food group leading with a net shift of $69·1 million, followed by personal care, with $41·1 million, and household operations, with $41 million. A breakdown of the net subsidy by income bracket and redistributional effect by product is presented in Table V.

Comparisons with Other Systems

In the previous section we have shown how commercial television generates a substantial welfare effect in the United States through the redistribution of income. This *pure* commercial system, however, does not exist in other countries. In many cases the burden of expense connected with television programming is shared either by the Government or by viewing households which pay licence fees for the operation of television sets.

Potentially there are two additional types of *pure* television systems, namely pay television and a government-supported system. While pay television operates in the United States and in Canada on an experimental basis, the fully government-supported system rarely exists in non-Communist countries. A number of countries use a hybrid system.

The two most popular hybrid systems that exist in several of the more important television-viewing countries are: (1) the combination of commercial and licence fee system, and (2) the hybrid of a licence fee and government-supported system.

Great Britain operates a dual television system, consisting of the British Broadcasting Corporation (BBC) and the Independent Television Authority (ITA).[1] BBC is financed (1964) by a £4 ($11·20) annual licence fee paid by television-set owners, and ITA programme companies are financed by revenues from the sale of advertising time and programmes.[2]

Assuming no differences in viewing pattern for BBC programmes among families in different income groups, the flat fee charged by BBC minimises and possibly completely removes the redistributional effect for this portion of programmes viewed by consumers. On the other hand, the ITA network tends to generate a redistributional effect similar to that found in the United States. It cost £133 million to support both the BBC and ITA television systems in 1963, £50 million and £83 million, respectively.

As noted earlier, the net redistribution towards lower-income families in the United States in 1963 represented approximately 18% of aggregate

[1] In 1963 there were approximately 12·6 million television sets in operation almost all of which were licensed to receive BBC broadcasts. In that year 47·5% of the 14·4 hours of weekly viewing per family was tuned in on the BBC network, with the remainder receiving ITA programmes (*BBC Handbook, 1963*).

[2] For the fiscal year ended March 31, 1964, BBC received £32·6 million and expended £34·8 million, leaving a deficit of only £2·2 million.

television advertising expenditures. Assuming a similar redistributional effect in Britain for ITA programmes, we would expect a net redistribution of approximately £15 million ($42 million) in 1963, or 11% of total expenditures on television (advertising expenditures and licence fees combined). Thus, the larger the role of the government-licensed television sector (in this case BBC), the smaller the relative importance of the redistributional effect. If we relax our assumptions regarding viewing patterns for BBC and ITA programmes, and with respect to qualitative differences in programmes, the welfare results would be changed somewhat.

The other popular hybrid system is exemplified by the French system, which is supported by licence fees paid by set owners and by government subsidies. In places of expenditures by advertisers, the French Government provides financial support. In 1963 the 4·2 million set owners each paid 85 francs ($17). Although the precise amount of government subsidy is not known, it is estimated that the Government supported as much as half of the expenses of television incurred in 1963.

The extent of redistribution under this system depends upon the magnitude of government subsidies and upon the tax structure, from which the French Government derives revenues to subsidise the television system. The more progressive the tax structure, the greater the shift of income from higher-income brackets to lower-income brackets through television viewing. This assumes a viewing pattern similar to that found in the United States.

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APPENDIX B

PROPOSED RULES

No Pay-TV station shall be permitted to operate in the 100 largest television markets except upon a showing, approved by the Commission, that such operation shall be consistent with the public interest, and specifically the establishment and healthy maintenance of free television broadcast service in the area. Commission approval of a request to operate a Pay-TV station in the foregoing circumstances will be granted where the Commission, after consideration of the request and all related material in a full evidentiary hearing, determines that the requisite showing has been made. The market size shall be determined by the rating of the American Research Bureau on the basis of net weekly circulation for the most recent year.

No Pay-TV station shall be permitted to operate where more than 10% penetration is proposed or will be achieved except upon a showing, approved by the Commission, that such operation would be consistent with the public interest, and, specifically, the establishment and maintenance of a healthy free television broadcast service in the area. Commission approval of a request to operate a Pay-TV station in the foregoing circumstances will be granted where the Commission, after consideration of the request and all related material in a full evidentiary hearing, determines that the requisite showing has been made. Penetration shall be determined by the rating of the American Research Bureau on the basis of the net weekly circulation for the most recent year.

Pay-TV stations shall file with the Commission monthly subscriber lists. Pay-TV stations shall either (1) maintain subscribers at this 10% penetration level (or at such other level as the Commission may have approved in an evidentiary hearing) or (2) request Commission approval of additional subscribers. Commission approval of such a request will be granted where the Commission, after consideration of the request and all related material in a full evidentiary hearing, determines that the requisite showing described above has been made.

No Pay-TV authorization shall be granted except upon the affirmative showing that the applicant has obtained at least 2,000 subscriber contracts. Only contracts under which the subscriber has agreed to pay the regular prescribed charges will be considered in ascertaining compliance with this rule.

B-2

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.

a. Notification of the sports events proposed to be carried by the Pay-TV station shall be provided to all other television broadcast stations located within 25 miles of the Pay-TV station at least 30 days prior to the designated broadcast date of said sports event.

b. Petitions to prohibit the carriage of such sports events on a Pay-TV station shall be filed with the Federal Communications Commission no later than 21 days prior to the designated broadcast date together with a copy of the contract (if available) upon which the petitioner relies.

No licensee shall broadcast any program for which fee is charged, if the talent for such program is restricted, prohibited, or in any way induced or influenced from appearing at any time on free television.

No Pay-TV licensee shall devote more than 50% of its subscription hours in any week to the transmission of motion picture film.

No license shall be granted to a television broadcast station proposing to carry programming for which a fee is charged except upon a showing that the market which it serves or proposes to serve is within the Grade A contour of at least four commercial television stations (including the Grade A contour of the Pay-TV station). The market shall be the market as used by the American Research Bureau for the most recent year.

No license shall be granted to a television broadcast station proposing to carry Pay-TV programming except to a station operating on a UHF frequency.

If a television broadcast station supplies the only Grade A signal to a community, not more than 15 percent of its non-prime broadcast time (including subscription and non-subscription

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broadcast time during that period) and not more than 25 percent of its prime broadcasting time (including subscription and non-subscription broadcast time during that period) may be devoted to Pay-TV; if a television broadcast station supplies the second or third Grade A signal to a community, not more than 25 percent of its non-prime broadcast time, and 40 percent of its prime broadcast time may be devoted to Pay-TV; if a television broadcast station supplies the fourth or more Grade A signal to a community, not more than 50 percent of its non-prime broadcast time and 60 percent of its prime broadcast time may be devoted to pay television.

a. In no event shall a Pay-TV station or stations devote, individually or collectively, more than three hours to Pay-TV programming in any one broadcast day during prime broadcast time in markets within the Grade A contours of one, two or three television stations (including the pay television station).

b. In no event shall a Pay-TV station or stations devote more than four hours, individually or collectively, to Pay-TV programming in any one broadcast day during prime broadcast time in markets within the Grade A contour of four or more television stations (including the Pay-TV station).

c. Prime time broadcast hours are defined as those hours of the broadcast day between 6:00 p.m. and 11:00 p.m.

d. In no event shall a Pay-TV station or stations in a market exceed 35 hours, collectively, per week of Pay-TV programming.

e. In the event that more than one Pay-TV authorization is granted in the same market, the percentage of prime time authorized for Pay-TV programming will be calculated on the basis of a total of 35 hours and the percentage of non-prime time authorization for Pay-TV programming will be calculated on the basis of the station operating the fewest hours.

No license shall be granted to a television broadcast station having any contract, arrangement, or understanding, expressed or implied, with a network organization, providing for the furnishing of programs intended for Pay-TV use.

B-4

No license shall be granted to a television broadcast station having any contract, arrangement, or understanding, expressed or implied, with any other Pay-TV licensee, franchise holder, or agents thereof, for the purpose of purchasing Pay-TV programming.

No license shall be granted to a television broadcast station having any contract, arrangement, or understanding, expressed or implied, with any company, organization, etc., providing Pay-TV programming as a part of an interconnected system.

No CATV system shall carry Pay-TV programs originating from a Pay-TV broadcast station or originate any programs for carriage to its subscribers.

No license shall be granted to a television broadcast station having any contract, arrangement, or understanding, expressed or implied, which provides for the distribution or furnishing of Pay-TV programming to or through CATV systems.

BEFORE THE

Federal Communications Commission

WASHINGTON, D. C. 20554

In the Matter of:	)	
	)	
Amendment of Part 3 of the Commission's Rules and Regulations (Radio Broadcast Services) to Provide for Subscription Television Service	)	Docket No. 11279
	)	
	)	

FURTHER COMMENTS SUBMITTED BY JOINT COMMITTEE AGAINST TOLL TV AND NATIONAL ASSOCIATION OF THEATRE OWNERS

SEPTEMBER 15, 1967

The Joint Committee Against Toll TV, and the National Association of Theatre Owners (hereinafter referred to as "Petitioners"), by their attorneys, hereby submit Further Comments in the above-captioned rule making. The Commission has scheduled oral argument October 2, 1967, on matters relating to whether pay television should be authorized on a permanent basis and, if so, the nature of the rules and regulations which should be adopted concerning pay TV. The Commission has allowed parties to file written comments on the issues involved on or before September 15, 1967. The instant Further Comments are being filed pursuant thereto.

1. The October 2 argument concerns the Report submitted by the Commission's Subscription Television Committee (hereinafter "Committee") which recommended the institution of pay television on a permanent basis, and which suggested the rules, regulations, and conditions pursuant to which the pay television service should be authorized.[1] Petitioners respectfully submit that the Report should *not* be adopted, and that the Commission should not, and, indeed, cannot, authorize pay television on a permanent basis under its existing statutory authority.

2. Petitioners do not intend, in the instant document, to repeat all of the grounds which they believe require the Commission to decline to institute permanent pay television. Some of the arguments have already been made at length to the Commission in various papers filed by the opponents of pay television. They have also been covered in more detail in the papers previously filed by the Joint Committee Against Toll TV, to which the Commission is respectfully referred. The purpose of the instant document is to point out what Petitioners believe to be the errors in the Report of the Subscription Television Committee.

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[1] The Subscription Television Committee consists of Commissioners Wadsworth, Lee and Cox. Commissioner Wadsworth, the Committee Chairman, indicated that while he agreed that the issues should be brought to the attention of the full Commission, nevertheless, he stated that his agreement to the submission of the Report should not be construed as an endorsement of it.

I. Statement of Interest

3. The Joint Committee Against Toll TV (sometimes also known as the "Committee Against Pay-As-You-See TV") is a voluntary association which has previously identified itself in this proceeding, and which has indicated its interest in the subject of pay television by filing Comments thereon on June 6, 1955, and by participating thereafter. The National Association of Theatre Owners is a nationwide organization consisting of the owners of motion picture theatres.

II. Jurisdictional Considerations

4. The Subscription Television Committee did not reevaluate or reconsider the question of whether, under the Communications Act, the Commission has the statutory power to authorize pay television on a permanent basis. The Committee merely noted that the Commission, in its First Report,[2] had concluded that it possessed such authority, a conclusion which was reiterated in the Third Report,[3] and again in the Commission's March, 1966 Further Notice of Proposed Rule Making and Notice of Inquiry. Petitioners believe, however, that the Commission's determination in the First Report was erroneous and should be reevaluated and reconsidered by the Commission at this time.

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[2] 16 R.R. 1509, 1514-1520 at Pars. 20-44.

[3] 16 R.R. 154(a).

5. Although at times the Committee's Report overlooks or ignores the fact, it cannot be emphasized too strongly that a system which demands direct payment of fees by the public in order to receive programs broadcast on publicly controlled broadcast facilities represents a major and drastic change in the nature of American broadcasting. Prior to the advent of pay television, commercial broadcasting had been supported solely by advertisers. There was, and is, no direct financial relationship between a listener and a broadcast licensee. The absence of this relationship is more than just a matter of commercial choice. It represents an important feature distinguishing broadcasting from public utilities, and common carriers — a distinction which was explicitly recognized by Congress when it drafted and adopted the Communications Act.[4]

6. This single fact also sharply distinguishes pay television from other changes in broadcasting which have occurred over the years, such as color television, FM broadcasting, simplexing, multiplexing and functional music operations.[5] It also distinguishes pay television from CATV, since in CATV there is no direct financial relationship between a listener and a *broadcast licensee.* The relationship is between a listener and the CATV operator who

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[4] See, e.g., the remarks of Senator Broussard who, during the debates on the Communications Act of 1927, stated "radio makes no direct charges, whereas the others (telephone and telegraph) are in the business of serving the public for direct pay." 67 Cong. Rec. 12504. See also Pulitzer Publishing Co. v. F.C.C., 68 U. S. App. D. C. 124, 126, 94 F.2d 249, 251.

[5] Although it is true that certain subscribers of functional music pay for the privilege of receiving material broadcast over the air, it is also clear that the general listening audience does not pay for this broadcasting. Stores, factories and buildings which desire such operations purchase them so as to provide the public in those stores and buildings with background music as an additional service. The public is not simultaneously deprived of the service.

charges the listener for the use of wire lines which he has constructed so as to bring the programming presented by the licensee to the public.[6] But a licensed pay television system permits the licensee to directly charge for the use of public facilities (the air waves) without any governmental regulation of those rates,[7] while at the same time depriving the public of the free service it previously enjoyed over the air.

7. In the First Report, the Commission, although admitting that the Communications Act of 1934 makes no specific or direct delegation of power to authorize such a major change in the concept of American broadcasting and the regulatory scheme surrounding it, nevertheless found that power in the statute, and found support for its interpretation in its legislative history. The Commission reasoned that Sections 301 and 303 of the Act gave it broad powers over the use of radio frequencies, and it specifically cited Section 303(g) as giving it the power to study new and experimental use of frequencies and to generally encourage the larger and more effective use of radio in the public interest. It then cited what it considered to be certain specific statutory limitations on the Commission's licensing power (Sections 310(a), 313, 317, 325(a), 325(b) and 326) and concluded that if Congress wished to further

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

[7] The Supreme Court clearly indicated in F.C.C. v. Sanders Bros. Radio Station, 309 U. S. 470, 474, that rate regulation of broadcasting is not encompassed within the present Act.

limit that power in regard to pay television operations, it would have specifically done so. By this strained interpretation, the Commission concluded that it had been given the authority to regulate an industry never conceived of at the time of the drafting of the statute.

8. The statutory provisions relied upon by the Commission, however (Sections 301 and 303), do *not* support the Commission's interpretation of its power and authority. Section 301 of the Act merely states the general purposes which the Act was drafted to effectuate. This broad statement does not *grant* the Commission any power.

9. The general powers of the Commission are stated in Section 303. Thus, Section 303(b) gives the Commission power to prescribe the nature of the service to be rendered by each station. Section 303(c) allows the Commission to assign frequencies to various classes of stations and to designate the power and the time which they may operate. Section 303(d) allows the Commission to determine the location of the different stations; Section 303(e) allows regulation of the apparatus to be used; and 303(f) grants the Commission power to make such regulations as are necessary to prevent electrical interference between stations and to carry out the provisions of the Act. The balance of Section 303 covers miscellaneous rules to insure the proper technical operation of all stations. None of these provisions even remotely indicate that the Commission has authority to authorize a permanent pay television system.

10. The only part of Section 303 which gives any support to the interpretation adopted by the Commission in the First Report is Section 303(g) which empowers the Commission to study new uses for radio and to provide for experimental uses for frequencies, and generally to encourage the larger and more effective use of radio in the

public interest. Unquestionably, this Section grants the Commission the power to run technical tests such as the ones carried out by Zenith in 1950. This Section, as interpreted by the Court of Appeals in *Connecticut Committee Against Pay-TV v. F.C.C.*,[8] also allows the Commission to authorize trial experiments such as the Hartford test. However, there is a vast difference between allowing the Commission to conduct experimental tests, and authorizing it to establish pay television on a permanent basis. The Communications Act, as now written, neither sets out nor attempts to set out the kind of regulatory scheme that would be necessary to encompass a permanent pay television system. The right to experiment included in Section 303(g) does not supply the statutory deficiency.

11. It is true, of course, that the Communications Act gives the Commission broad regulatory powers over the broadcast field. It is also true, and the Courts have already indicated, that these powers are not all encompassing and that matters regarding the manner in which stations derive their revenue, as well as other internal business affairs, were never conceived as being within the Commission's regulatory power. See *Sanders Bros., supra.*

12. The Commission asserted in its Further Notice of Proposed Rule Making, and the Committee asserted in its Report, that the Commission's decision as to its jurisdictional power was supported by the Court of Appeals' decision in *Connecticut Committee Against Pay-TV v. F.C.C.* The Commission has asserted that if

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[8] 112 U. S. App. D. C. 248, 301 F.2d 835, cert. den. 371 U. S. 816 (1962).

(as the Court held in *Connecticut Committee*) it possessed the statutory authority to authorize a *test*, then, of necessity, the Commission possesses the statutory authority to authorize pay television on a permanent basis.

13. Petitioners respectfully submit that the Commission's reading of the Court of Appeals' opinion is erroneous. Although the appellant in *Connecticut Committee* urged that the Commission did not have the power to authorize pay television on a permanent basis, nevertheless, the Court *refused* to decide this question in its decision in that case. The Court never addressed itself to whether the Commission possessed the power to authorize pay television *permanently*. The Court held merely that the Commission's power to provide for *experimental* uses of frequencies constituted a sufficient basis for the trial authorization there in issue. The Court's opinion was explained and justified exclusively by the experimental nature of the authorization, and the Court went to great lengths to emphasize the experimental nature of the operation as the basis for its decision, stating (301 F.2d at 837):

> The distinguishing characteristics of the Federal Communications Commission's authorization of subscription television in this case is the experimental or trial basis upon which the system is to operate for the duration of its three years authority.

14. It should be obvious that the statutory framework and guidelines which would be required to support a nation-wide permanent pay television system is far different from the type of legislation required to support a small experiment so limited in size as the Hartford test, and with such a necessarily inconclusive effect on the free broadcast system. The dangerous effect which pay television will have on the

free television system does not arise from a limited system of tests. It arises precisely because such testing is fruitless and futile. The dangers of pay television will not be apparent until the system is extensive enough to accomplish the very things feared. At this point, the existence of an extensive and expensive pay television operation will present the Commission with a *fait accompli*. Section 303(g) of the present Communications Act, as the Court noted in *Connecticut Committee*, expressly confers jurisdiction on the Commission to authorize "experiments." There is no provision, however, in the Act which would authorize the Commission to permanently authorize a system so radically different in nature from the present American free broadcasting system, and with such a potentially destructive effect on that system.

15. The concept of a pay television operation and the introduction of a direct financial relationship between the individual listener and the station is more than a mere change in the broadcasting art. It introduces a major change in the entire concept of broadcasting and must necessarily introduce a major change in the regulatory scheme which surrounds the broadcasting industry. If rates are to be charged the public for the privilege of using public facilities, the question arises as to whether and how these rates must be regulated. Moreover, the Committee itself recognized that novel conditions, the like of which have never heretofore been imposed on any television station, must now be placed upon pay television stations if the free service is to be protected. Yet, the present Act does not provide the Commission with authority to regulate broadcasting rates. Moreover, if rates are to be regulated, it would mean that the Commission must assess such things as cost of operation, cost of equipment and cost of

talent. It must then decide — as though the licensee were a public utility — what constitutes a reasonable return upon the licensee's investment, for which no guidance is given in the Act. The pay television proponents, as well as certain of its opponents, strenuously urge that the Act as now written does not, in fact, allow the Commission to institute even the minimum controls recommended by the Committee, on the grounds that those conditions represent "censorship" forbidden by Section 326. If such assertions are correct, then the Commission will be deprived of the power to promulgate and enforce even the conditions which the Committee recognizes are vital to the protection of the public interest.

16. It is apparent that the Communications Act as now written neither sets out nor attempts to set out a broad regulatory scheme sufficient to promulgate and regulate a permanent pay television system. The absence of such a scheme is plain evidence that Congress did not grant the Commission power to authorize a permanent pay television system.[9]

III. The Commission Should Not Authorize Permanent Pay Television Without Further Congressional Guidance

17. Even assuming, however, that the Commission possessed the statutory authority to authorize pay television on a permanent basis, nevertheless, it must then face the question whether such authorization is appropriate in the absence of Congressional guidance.

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[9] Petitioners believe, and will discuss more fully below, that the conclusions in the Committee's Report concerning rate regulation of pay TV represent perhaps the most serious error contained in the Report.

Various parties in the instant proceeding have pointed to the many reasons why the Commission should not act without specific Congressional direction. Among these reasons are the following: (1) pay television represents 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 is, at the very least, questionable and should not be assumed without further Congressional action; (3) the Commerce Committees of both Houses of Congress have forcefully expressed their views either questioning the Commission's jurisdiction, or emphatically stating that such operations should not be authorized by the Commission without further specific authorization by law; (4) amendments to the Communications Act will unquestionably be required if pay television is to exist as a permanent medium; the Commission should not wait until after establishment to seek or obtain necessary changes in the law; proper control and regulation of pay television should be implemented before events and vesting interests render it difficult or impossible for proper regulations to take effect; (5) there has been no evidence of public demand or need for the implementation of permanent pay television which would warrant the establishment of permanent pay television in such haste as to preclude the necessity of awaiting Congressional implementation; and (6) it would be a total abdication of responsibility for the Commission to permit licensees to charge for the use of public airways in the face of the very real possibility that the Commission has no statutory authority to regulate rates. Petitioners submit that any one of these reasons is sufficient to withhold Commission authorization pending Congressional action.

18. The Committee noted some, though not all, of these objections in its Report (Par. 7), and attempted to answer a few of them. The points made by the Committee, however, are untenable.

19. The Committee rejects the need for awaiting Congressional clarification by stating (Report, Pars. 8-9) that Congress has not acted, although it was aware of the pendency of this proceeding for a number of years, and although the Commission specifically announced that it would allow a lengthy period for the filing of Comments so that Congress could act if it so desired. But this is no answer. Concededly, Congress as a body has not acted. Congressional inaction *per se*, however, obviously can mean either of two mutually contradictory things: either it believes that no guidance is necessary and that pay TV can be established and fully regulated under the present Act or, on the contrary, Congress may believe that no further statutory activity is required since the Commission cannot, under the present Act, authorize permanent pay television at all. If Congressional inaction is based upon the second of these propositions then, clearly, inaction cannot be used as an excuse by the Commission for authorizing the system on a permanent basis. And it appears that the weight of the evidence indicates that the second of these propositions is precisely the explanation for Congressional inaction for, as the Committee candidly noted (Par. 7), both Committees of Congress most intimately concerned with the Commission have indicated their judgment that the Commission does *not* have the requisite jurisdiction. Under these circumstances, it would appear that Congressional *action* (not inaction) affirmatively indicating that the Commission has such power is necessary before pay television should be permanently authorized. Such *action*, of course, has not been forthcoming.

20. The Committee urges that the Commission should not await Congressional guidance because it is the Commission's "present duty" to establish pay television if it can be found to be in the public interest, such action being required by Section 303(g) of the Act which requires the Commission to encourage "the larger and more effective use of radio in the public interest." (Report, Par. 9) Yet, the Committee's assertion merely begs the question, for it does not indicate *why* it believes that the institution of such a basic modification in the American broadcasting scheme (a modification which, it should be noted, the Committee itself recognizes has a potentially catastrophic effect upon the free service)[10] *must* be instituted before Congress has expressed its views legislatively on the question, and in the absence of a statutory scheme adequate to regulate a pay television system.

21. The Committee certainly does not, and could not, point to any demonstration of public demand seeking the prompt institution of a pay television system. Had such a ground swell of public opinion or demand been present, the Committee could conceivably urge that the Commission must act even in the absence of a clear Congressional mandate, and despite the fact that the Communications Act gives no clear guidelines. In the case of CATV systems, for example, the Commission was confronted with an industry which, as a result of public demand, had been growing at such a rapid rate that it threatened to distort or destroy the Commission's carefully considered television allocation plan. Under these extreme circumstances, the Commission

[10] The Committee's explicit recognition of this fact is demonstrated by the conditions which it imposed.

was required to take jurisdiction, even without Congressional guidance. It is clear, however, that there is absolutely no such public demand or pressure evident in the case of pay television.

22. It can hardly be contended that the public has been beseiging the Commission with demands that a permanent pay television system be established. To the contrary, in California, as the Commission is aware, the public voted *down* by a decisive margin the institution of a wired pay television system in the only public referendum ever held on this question. And, it is significant that only *one* test of a pay television system pursuant to the First and Third Reports has been conducted. It is at least reasonable to assume that if a real demand for such a service were evident, it would be reflected in requests by numerous prospective pay TV proponents for authority to conduct experimental operations.

23. Nor has it been demonstrated even that the public of Hartford has demanded the service. Although RKO artificially limited the Hartford test to 5,000 subscribers and alleged that there is a "backlog" of demand, nevertheless, neither RKO nor any other proponent of pay television has indicated the extent of such a demand, or has demonstrated the existence of public clamor for a pay television system. The information supplied by Telemeter concerning its Canadian experiments corroborates the fact that, far from demanding a pay television service, the residents of Etobicoke and Mimico actually rejected it. In these communities, the number of wired, pay television subscribers actually declined more than 50% during the five-year test from an initial high of 5,500 to 2,500, *even after Telemeter expanded its potential service area from 12,000 to 14,000* (see Telemeter Comments, pp. 7-9). There were, no doubt, many reasons for the decline in demand for the Telemeter service.

Whatever the reason, the Canadian experience clearly indicates that a widespread public demand for the institution of a pay television system simply does not exist.[11]

24. The Committee urges immediate action because it does not see the necessity of amendments to the Act at this time, and, in particular, it does not believe that rate regulation is necessary. Indeed, the Committee goes further: it contends that the authority to regulate rates is not even necessary to the Commission's authority to authorize the system on a permanent basis (Par. 221). In the Committee's view, it does not matter one whit that the Commission may not (and, under the present Act, does not) have the authority to protect the public against gouging.

25. In order to defend this type of "the public be damned" attitude, the Committee is forced to contend that the entire history of the present American system of broadcasting should be ignored and, in some magical fashion, pay TV should be considered in legal and practical effect *as if it were free TV*. Thus, the Committee asserts (Par. 221) that free TV is not really "free" because the cost is passed on to the consumer in the form of hidden additions to the price which the consumer pays for goods and services to cover advertising costs. The alleged indirect cost increase (which is never analyzed and the existence or amount of which is nowhere demonstrated by the Committee) is thereupon analogized to the *direct* per

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[11] It is also significant that after the cessation of the Etobicoke-Mimico test, less than 20 per cent of Telemeter's subscribers indicated regret that the system had stopped, despite the fact that Telemeter sought an expression of opinion from all of its subscribers. See Telemeter Comments, p. 7.

program cost which exists in pay television, and because the Commission cannot and does not regulate the rates charged by free television stations for time,[12] the Committee reasons by analogy that there is no need to regulate the direct costs to be charged to the public under a pay television system.

26. The difficulty, however, with the Committee's analogy is that it is both legally and historically unsound. The very difference which the Committee seeks to ignore is precisely the reason why rate regulation of broadcasting is not authorized by the present Act.[13] Ironically, this is made clear by the very case which the Committee cites in support of its novel theory.[14] In *Pulitzer*, the Court of Appeals pointed out that the absence of a direct charge by broadcasters to their listening audience is precisely the reason for the lack of rate regulation, and this fact was to be distinguished from the situation where such a charge would be present. It is inexplicable to Petitioners how *Pulitzer* can be read by the Committee as obliterating the clear historical distinction between free and pay TV when the rationale of the case is based precisely upon the existence of such a distinction.

27. The difficulties to which the Committee's position lead are demonstrated by the justifications which it offers in order to defend its abdication of responsibility. Thus, the Committee urges that rate

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[12] Which rate is then reflected in the hidden "indirect" cost.

[13] See, e.g., note 4, supra, where Senator Broussard pointed out the difference between radio, whose rates are not regulated, and public utilities, whose rates are regulated, as being that radio makes no direct charge to the public for service while the others do.

[14] Pulitzer Publishing Co. v. F.C.C., 94 F.2d 249 (D. C. Cir. 1937).

regulation is not necessary because: "The public is free to subscribe or not to subscribe to STV services." (Par. 222) The contention, however, is untenable. Obviously, the same could be said about any public utility: the public is free to subscribe or not to subscribe for phone service; it is free to obtain or not to obtain gas or electricity; it is perfectly free not to send a wire by telegraph or cable; it is free to refuse to travel by airplane, railroad or bus. Yet, these facts have not resulted in an absence of regulation over telephone costs, gas and electric services, telegraph and cable fees, and transportation rates. The fact that the public might ignore a service which is licensed by the government has never commended itself as a reason to refuse government regulation of the rates to be charged the public. Indeed, the Committee's argument sounds suspiciously like Anatole France's famous comment:

> The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the stores and to steal bread.

28. The Committee urges that rate regulation is unnecessary since: "We believe that the market place will regulate charges that are paid and that if they are excessive, the operations will not succeed." (Par. 222) Yet, it can fairly be asked: "What market place?" The conditions which the Committee, itself, recommends as governing permanent pay television for the immediate future limit pay television to *only one station* in each city with five television allocations. There is certainly no guarantee that this condition will be changed or liberalized to allow more than one in each city. The Committee has no right to *assume* that the limitation which it proposes will become unnecessary; in all probability such a condition will always be necessary so as to render the free service at least the minimal protection which even the Committee recognizes is necessary in the public interest.

29. Under these conditions, it is simply fallacious to argue that a "market place" exists, the operation of which would protect the public. There is no "market place" when there is a government-authorized monopoly. Petitioners are unaware of any instance in which a government-sanctioned monopoly has been established without clear indication that the rates charged the public are to be regulated.

30. The Committee asserts rate regulation to be unnecessary because there was "nothing in the Hartford trial to indicate that rates will be exorbitant." It asserts that the rates charged appeared "reasonable." (Par. 222) Yet, the Committee did not indicate the gauge by which it determined the rates to be "reasonable" or "non-exorbitant." The Committee did not indicate whether reasonableness was to be determined by return on investment, by capitalization of assets, by comparison to the price of similar events in non-television media such as legitimate stage, motion picture theatres, sports arenas or by a combination of these methods.[15] The Committee simply cannot make

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[15] The Committee cited with apparent approval the fact that at Hartford nine persons viewed a heavyweight fight at a cost of $3.00 while the same fight was shown on closed circuit television for a price of $5.00 per head. Yet, the fact that the per capita cost was less on pay television does not mean that the pay television cost to the subscriber was "fair" and "reasonable." Such a judgment could only be made after assessing RKO's cost in presenting the fight, and allocating that cost over the number of subscribers. Thus, it may be that RKO's cost per subscribing set was 25¢ for which it then charged $3.00. At the same time, the per capita cost to the theatre owner may have been $2.50 so that he may have made a $2.50 profit on a $2.50 investment. Under these circumstances, which of the two arrangements was "fairer"? And, more pertinent, should the pay TV station have been allowed to reap over a 1,000% profit when the only reason for him making any profit at all was that he was allowed to use publicly-owned spectrum space?

Of course, it should be noted that the operators of the Hartford test lost over three million dollars. As the Committee recognized, these business enterprises are not charities. In order to recoup their expenses, the prices which they would charge would logically have to be higher than those which they did charge at Hartford. Under the circumstances, the fact that they were willing to absorb a loss during the test period is hardly a sound basis upon which to postulate the costs to the public which would accrue under a permanent system.

judgments as to "reasonableness" in a vacuum without appropriate standards which have not yet begun to be formulated.

31. The simple fact which distinguishes pay television from other traditional entertainment media making direct charges to the public is that the other media do not use scarce public facilities (the airwaves) to make their profit, nor do they deprive the public of what the public could once enjoy free. It is only the pay TV proponents which desire a free and unregulated ride at public expense.

IV. The Detriments to the Public From a Permanent Pay Television System Clearly Outweigh Any Minimal Benefits Which May Be Derived

32. The Committee's recommendation to move upon the uncharted sea of permanent pay television is even more seriously impaired when the reasons for its recommendation are considered. For it is obvious that the Committee has lost sight of the nature of the judgment which the Commission must render before it can authorize pay television on a permanent basis. That judgment is whether there are any benefits to be gained by the public by the authorization of the service and, if so, whether the benefits clearly outweigh the detriments. And the record makes it painfully obvious that the benefits to the public are minimal at best, while the detriments are substantial and potentially catastrophic.

A. The Alleged Benefits.

33. It is clear, of course, that the promises and siren-songs of the pay television proponents have been demonstrably proven false. Pay television was first portrayed to the American public as a means

by which television programming fare would allegedly be diversified and improved through the presentation of high quality, minority-type programming which was allegedly unavailable over the free system. Thus, as the Commission noted in its First Report (Par. 48),[16] pay TV proponents promised that the system:

> . . . could and would provide a wider choice of members of the public interested in the fine arts, operas, educational and informational material and other similar kinds of programs.

The proponents of the Hartford test promised to present significant amounts of such high-quality minority-type programming[17] and the Court of Appeals, in approving the Commission's authorization of the test, noted that:[18]

> It seems to us imperative that the licensee be held to adhere faithfully to the *high standard of programming* which it has promised.

The Committee has candidly recognized, however, that pay television will not, in fact, yield these benefits which were its original *raison d'etre*. The Committee recognized what the opponents of pay television have continually pointed out — that pay television will not, in any way, offer additional cultural and high-quality diversified minority-type programming, but would program for the mass audience. The Committee has now recognized that whatever hopes may have been

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[16] 16 R.R. at 1521.

[17] See Exhibits submitted with the application of Hartford Phonovision, Exh. 8, p. 1.

[18] 301 F.2d at 838; emphasis added.

held out for such programming can no longer be realistically entertained (see Report, Pars 54-57). The Committee has rejected as the basis for its recommendation the requirement that such programming be forthcoming. It does not now even urge that any such benefits would accrue to the public.

34. The sole benefits which the Committee has been able to discern are that pay television (1) can bring to the public some motion picture films somewhat more quickly than these films would be shown on free TV, and (2) can present certain sports events such as heavyweight championship bouts and other sports programs which are now, for one reason or another, "blacked out" on free TV.

35. With respect to films, the Committee does not even urge that the films to be presented are first-run features. It holds that even the presentation of films from *six months to two years old* would be a sufficient justification to authorize a permanent pay television service (Report, Par. 53), despite the fact that free television now presents a plethora of motion picture films, some of which are less than two years old, and despite the fact that the average age of movies presented on the free system has steadily been lowered during the past five years. And with respect to sports, the Committee acknowledges that the occasional spectacular sports event such as championship boxing is rare and unusual (Par. 107).

B. The Substantial Detriments.

36. Having thus pared down the high touted "benefits" to a realistic bare minimum, the Committee was then required to assess these benefits against the detriments which its own Report revealed, and particularly to determine (a) whether the presentation of such

programming warranted the deprivation to the public of a scarce broadcast frequency and (b) even if so, the effect which it would have upon the free service. Perhaps the most revealing aspect of the Committee's Report, however, is that it never realistically assessed the first of these questions, and it attempted to solve the second of them upon a totally inadequate basis (*i.e.*, the Hartford failure), buttressed by the sheerest form of speculation and conjecture.

37. The first, and most obvious detriment is that, in order to give the public a few more current motion picture films, and some sports events, the public will thereby be deprived of the ability to receive a scarce broadcast frequency on a free basis. To state the obvious, if there are 5 channels allocated to a particular community, and one of them is being used as a pay television facility, there are no longer 5 free television allocations; there are 4. The public is simply deprived of the programming which it otherwise would have received, but for the pay television operation. Yet, nowhere in the Committee's Report is there any realistic recognition of the fact that the institution of a pay television system would rob the public of the benefits of a scarce frequency. Indeed, at one point, the Committee refused even to acknowledge that the public would be deprived of *anything*. Thus, at Paragraph 75, the Committee can blithely state that listeners "will not be deprived of anything" if pay television is authorized, apparently forgetting the plain and simple fact that authorization of a pay television station deprives the public of the use of that station on a free basis.

38. Moreover, the Committee failed to consider the importance of the fact (heavily stressed by the Committee in another context) that the audience to be reached by pay television is a minority, and one

which totally excludes all of the families in the lower one-third economic level of the United States. Thus, in attempting to demonstrate that a permanent pay television system will have no adverse impact upon the free system, the Committee heavily stresses (Par. 107) that, on the average, pay television could not expect to attract more than a small percentage of the total television listening audience. And (again, in another context) the Committee notes (without apparent concern) that this small percentage excludes the lowest economic third of the nation (Pars. 74-75). Yet, nowhere in the entire report does the Committee even face the question of whether the use of a scarce broadcast frequency, which would be totally denied to one-third of the families in the United States and, at best, would be limited to a fraction of the total listening audience, is justified merely for the purpose of presenting some additional movies and occasional sports events.[19] The Committee, instead, appeared to view its task as one of finding *any* benefit, no matter how slim, which would then be used as a justification for recommending pay television.

39. The Committee's casual attitude toward waste of frequency space is odd, indeed, when contrasted to the concern which the Commission manifested in its CATV proceedings. In the Commission's First and Second CATV Reports, it made it abundantly clear that the Commission's main concern was to protect the viability of the one or two new UHF facilities which might be instituted in communities throughout the country as a result of the passage of the all-channel

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[19] Petitioners do not wish to imply that they agree with the Committee's evaluation of the percent of penetration which pay TV could achieve, although it does agree that this penetration would not occur in the lower economic levels. Petitioners have here attempted merely to demonstrate that even on its own terms, the Committee failed to make the required assessment of benefits and detriments.

receiver legislation. The Commission there recognized that the potential programming to be offered by a single new UHF facility was so necessary to the public interest that it was to be protected from destructive competition by CATV systems which sought to import distant signals. The necessity of such protection led the Commission to take jurisdiction over CATV and to require a showing by any CATV system desiring to import distant signals that such importation would not adversely affect existing stations and, particularly, new UHF facilities.[20] It is obvious, of course, that instituting a pay television station over a UHF facility effectively deprives the public in that community (at least during the prime time listening hours) of the benefits of free UHF service, in the same way as if that UHF station had been driven off the air by a CATV system which imported distant signals. Yet, the concern with the protection of the viability of a scarce television frequency manifested by the Commission in the case of CATV systems is nowhere manifested or even recognized by the Committee in considering the effect of the authorization of pay television.

40. The Committee at least attempted to evaluate the second potential detriment of permanent pay TV, *i.e.*, the effect which it might have upon the free service. Its error in this regard, however, lay in accepting the results of the Hartford test as a responsible gauge upon which to measure future impact.

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[20] There are now pending before the Commission numerous hearings in which a CATV system is required to justify extension of signals into an area with only a single UHF facility in it. See, e.g., the hearing on the Dalton, Ga. CATV system (Docket No. 17066).

41. The folly of such an attempt is made clear by the fact that the Hartford test, despite the promises of RKO to install up to 50,000 units, was limited to a maximum of 4,851 persons who were asked to subscribe to a diet of run-of-the-mill movies, the great majority of which were more than six months old at the time of showing, and at least 149 of which were two years old or older at the time of presentation. The test represented a penetration of 0.6% of the net weekly circulation in the Hartford market, and only 0.3% of the television households in that market. Moreover, as the Committee recognizes (Par. 87), only an average of 267 families tuned in to the programs presented during the Hartford test. And it is not merely the small size of the sample which renders the data virtually meaningless. The Hartford operators did not even purport to obtain a valid scientific statistical sample such as is done, for example, by the rating services. It is simply naive to contend that such data is a meaningful basis upon which to make any predictions or projections of the actual effect of pay TV as a permanent media. Yet, the Committee attempted to do just that.

42. The impossibility of projecting the Hartford test on a national basis is made manifest by the Committee's own Report. The Committee pointed out that two of the most critical statistics in determining impact are (a) the amount of television homes which would adapt to pay TV (*i.e.*, the "penetration rate"), and (b) the average numbers of pay TV homes who would watch each attraction (*i.e.*, the "subscription rate"). Yet, as to the "penetration rate" the Committee recognized that it could not use the Hartford rate since it was simply impossible to do so. The Hartford penetration rate was, in fact, less than 1%, and the Committee realized that such a figure was totally unrealistic. Instead, the Committee noted that the penetration rate was a matter of sheer speculation, although it "guessed" (with no

explanation for the basis of the guess) that the rate might be somewhere between 10% and 20% (see Par. 149). And with regard to the critical question of program diversion, the Committee also recognized that the Hartford test could provide little meaningful explanation, and pointed out that the question "is one of the imponderables . . ." (see Par. 111).

43. At the same time that the Committee recognized the deficiencies in the Hartford experiment, it inexplicitly accepted as gospel truth the notion that only an average of 5.5% of the persons who subscribed to pay TV would tune in to the pay TV offerings. The Committee's entire conclusion as to the lack of substantial adverse impact upon the free service (Par. 107) is couched entirely upon an uncritical acceptance of the 5.5% figure which, it must be noted, is based upon the weekly average of only 267 Hartford subscribers.

44. But this is akin to creating an empire built upon quicksand. The Committee offered no persuasive explanation as to why it chose to accept so readily the 5.5% figure. Although the Committee indicated its reason to be that the 5.5% figure remained constant whether the station presented first subsequent-run, or whether it showed older movies, the Committee failed to recognize that the steadiness of the figure merely reflected the fact that, to the average viewer, *a first subsequent-run movie is no more attractive than a movie which may be three, four or five years old.* The run-of-the-mill movies shown at Hartford were simply not attractive enough, or different enough from material shown over the free service, to interest pay TV viewers. Rather than reflect a need for the programming offered, it indicated that the Hartford test, in fact, did not offer *any* meaningful "supplement" whatsoever to the material presented on the free service, much less a "beneficial" supplement.

45. At the same time, the test indicated that when a popular and unavailable item, such as a heavyweight championship fight, was presented, the viewing percentage rose to 83.6%, and it takes no great prophetical insight to discern that if similar popular productions are kept off the free service and placed only upon the pay service, the viewing percentage would rise far above 5.5%, and the Committee's conclusions would be revealed as erroneous.

46. There is yet another deficiency in the Committee's reasoning concerning impact, even if the 5.5% figure is accepted. The Committee, based upon this figure, has assumed the audience diversion to be 2-3/4% even if there were a 50% penetration, *i.e.*, if 50% of the television homes subscribed to the pay TV service. It then held that such a low percentage, combined with the rules which it adopted covering program and talent siphoning, gave it no cause for concern (Par. 107). In so doing, however, the Committee obviously treated all of the stations in the cities to be affected as if they were on an equal level. In other words, it failed to recognize the well-known fact that in cities with four stations, three of them network affiliated, the non-affiliated station can only count upon a small fraction of the total potential audience, the overwhelming majority of whom would normally be tuned to the three network affiliates. Thus, while the three network stations might have significant strength to resist the small diversions which the Committee prophesied as occurring, the independent station would be in a far worse position, and its financial viability may be destroyed even by a small further fractionalization of its audience.

47. Indeed, it was precisely the effect of fractionalization of the small potential audience of UHF stations which lay behind the adoption of the CATV rules and which made it necessary for a CATV system desiring to import distant signals to demonstrate that such

importation would not have the adverse impact which the Commission envisioned.[21] The Commission, in considering CATV, recognized that new UHF stations would be marginal, and that even small shifts in viewing might be sufficient to destroy them. No such recognition can be discerned in the Committee's Report. The obvious threat to non-pay TV UHF stations is virtually ignored.

48. Moreover, it is no answer to imply that UHF stations will be aided because they might apply for pay TV authority and therefore supplement their free TV revenue by pay TV revenue (see Par. 76). In a five-station market with more than one UHF station, in which only one station can become a pay TV outlet, obviously the UHF station which does not obtain the pay TV franchise could not possibly be helped by a fractionalization of its audience. And it is a contradiction in terms to argue that the *pay* TV UHF station will be helped so that UHF will be thereby fostered. The pay TV UHF station may be helped to survive financially, but it will survive *not* as the type of UHF station originally envisioned by the Commission, but as primarily a pay TV station which also happens to show some free television at non-prime time hours as the price it must pay for the privilege of reaping the pay TV bonanza. Petitioners submit that the Commission's strenuous attempts to aid UHF stations were not undertaken for the sole purpose of having stations broadcast free UHF programming during the daytime hours only.

49. The danger in the Committee's glib use of the Hartford figures as projections, and in its failure to realize that it simply does not have sufficient meaningful data upon which to base its conclusions, is made manifest by the catastrophic results which might occur if the Committee's speculations are erroneous.

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[21] See, e.g., CATV Second Report and Order, 6 R.R. 2d 1717, 1772-1781, and particularly Par. 123 at 1777-78.

50. The Committee, itself, recognizes explicitly in its Report the absolute necessity of protecting the free service. Thus, the Committee noted with approval (Par. 77) the Commission's statement in its Further Notice that:

> 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. . . .

And the Committee noted (Par. 147) that it would be a breach of faith with the public who have invested millions of dollars on television equipment on the expectation of receiving abundant free television programming to suddenly find such programming denied to them because it was shifted to a pay television system.

51. As a further indication of its concern, the Committee recommended the adoption of novel and unique conditions limiting the types of programs which could be shown on the pay TV service (*i.e.*, that pay TV movies cannot be more than two years old in general release), and further prohibiting the presentation of programs which, during the preceding two years, had been seen on the free service.

52. But if the Committee's speculations as to impact are erroneous, and if the conditions which it imposes are ineffective to protect the free service, then the free service would be rendered a blow from which it might never recover. In addition, with the investment of substantial funds by pay television proponents and the public, the Commission would be faced with a *fait accompli*, and it would be difficult, if not impossible, to unscramble the egg. Can the Commission truly believe that it has sufficient data upon which it can make reasonable judgments regarding future impact based upon the smidgins

of statistical data which it gleaned from the Hartford test, some of which the Committee itself recognizes is unreliable as a gauge for the future? Is it not more rational to conclude that until more probative and responsible data is collected, the Commission should not move into such a dangerous and potentially destructive area?

V. The Hartford Test Demonstrates That Authorization of Permanent Pay TV Would Improperly Discriminate Against the Poor

53. There is one area, Petitioners submit, in which the Hartford test yields some meaningful data. A breakdown of the subscribers demonstrates that virtually no persons in the income level 0 - $3,999 (an income level which represents almost one-third of all families in the United States) were able to subscribe to the test. Based upon these statistics, there can be no question that the authorization of a pay TV system would systematically deprive 30% of the nation of the free use of public frequencies, which would instead be turned over to the pay television proponents to be used for the benefit of wealthier American citizens. In effect, the Commission would be systematically discriminating against the lower income level families, and depriving them of the ability to use what heretofore have been recognized as broadcast frequencies available free to all parts of the population, regardless of income.

54. This systematic discrimination against one-third of a nation appears not to bother the Committee; the manner in which they treat this fact is one of the most startling aspects of their Report. Thus, the Committee blithely ignores the fact that the precise distinguishing feature of the American broadcasting system since its

inception was that it was free to *all* members of the public, and that the public's airways were not to be sold to any particular segment of a listening audience only if they would pay a direct fee. When the Commission allocated its scarce television frequencies, it plainly did so with the intention of *maximizing* the amount of free television spectrum space which could be equitably distributed throughout the country. Yet, the Committee would now have the Commission effectively deprive one-third of the nation of the ability to use certain of the allocated facilities. It would have the Commission say, in effect, that it has sufficient spectrum space to accommodate five stations in a city, but, nevertheless, it chooses to deny one-third of the public the right to free access to all five, but limit free access to four, with the fifth to be used only for that portion of the audience wealthy enough and willing to pay for the service. Thus, rather than meeting its statutory obligation of effectuating the "larger" use of broadcast facilities, the Commission would now *narrow* the use of such facilities by restricting a significant portion of them for use by the wealthy American citizens.

55. This creation of a type of second-class citizenry is treated most cavalierly by the Committee. Thus, the Committee rationalizes the discrimination against the lowest income level by asserting that, under the rules adopted, all those in the lowest income group "will be able to continue to see ample amounts of free TV programming, so that they will not be deprived of anything . . . ." (Par. 75) This reasoning is specious. It first assumes, with little justification, that the rules which the Committee proposes will be effective in preventing the siphoning of free TV programming. But what if the Committee is wrong, and the siphoning and destruction of the free service cannot be protected? How will the Committee then give back to this third of

a nation the programs of which it was deprived? And how will it protect them from further deprivations?

56. And by what standards can the Commission so patronizingly assume that the lowest income group has "ample" amounts of free TV programming, while at the same time urge that the free service is not "ample" enough for the wealthier citizens? Does the Commission assert one standard of programming for the wealthy and a lesser standard for the poor?[22] Is the Commission so satisfied with the quantity of free TV programming that it can conclude, even in cities with five or more stations, that the loss of one station's potential programming is a desired or non-harmful result? This patronizing attitude hardly commends itself as a standard which the Commission should follow.

57. And it is, of course, incredible for the Committee to assert that these persons "will not be deprived of anything." Of course they will be deprived of something — the free programming which the station would have presented had it not been given the opportunity of directly charging the public for the use of the public's own airways.

58. The Committee's final attempt to rationalize its disregard of a third of a nation is reflected in the Committee's attempted analogy to the color TV. The Committee argues that (Par. 75):

> 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.

The analogy is totally false. It is quite true that economic differences allow the wealthy to purchase color sets and deny the poor the same opportunity. But the ability of the wealthy to receive color sets can

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[22] Is the Commission urging in the Orwellian sense that: "All animals are equal, but some animals are more equal than others"?

be accomplished *without any deprivation whatsoever to the poor.* Color television is a true supplement — available to those who can afford it without cost to those who cannot. Over-the-air pay television is totally different, for it benefits those who could afford it *only* at the expense of those who cannot.

59. It needs no elaboration to demonstrate that television is perhaps the most successful and effective mass media which the world has ever known. It has allowed the poorest citizen to obtain, in return for the mere purchase price of a television set, entertainment, information and news of a quality and quantity unobtainable in the past by the richest prince or king. It is, in truth, the poor man's theatre; the benefits which it has brought redound most strongly to those persons and groups in the lowest income level. It is strange, indeed, that the Committee can so easily ignore this group, and seek to deprive them of some of the benefits of which television is capable.

60. It is even stranger when it is recalled that, at this point in our history, the country as a whole is making the most determined efforts to bring to the lowest economic levels of our nation the full benefits of the American society as they are enjoyed by the more fortunate majority of our citizens. Federal and state governments have instituted far-reaching programs in urban development, open housing, work training, education, and a myriad of poverty programs so as to enrich the lives of the poor. The country has recognized the disparity in income which exists in our society, and has moved to correct it through massive Federal and state aid. It is anomalous that the Committee would now have the Commission turn precisely in the opposite direction, and deprive the very portion of the nation which needs it most of the fullest opportunity to take advantage of the free service. The Committee, in essence, has created its own anti-poverty program — its program is directed *against* the poor.

VI. Conclusions

61. It is gratifying to note that the Committee has recognized the potentially disastrous effect which pay TV could have on the free service by at least attempting to impose conditions to protect free TV. Petitioners believe that the conditions which the Committee would impose, though laudable, are not stringent nor comprehensive enough to obtain the result which the Committee desires. The additional conditions which petitioners believe should have been imposed, and the reasons for their imposition, have been discussed at length at pp. 52-70 of the October, 1966 Comments submitted by the Joint Committee Against Toll TV, and will not be repeated here. Suffice it to say that the overwhelming weakness of the Committee's recommended conditions is that they are easily surmounted merely by withholding material from free TV for a two-year period, with the knowledge that thereafter such material can reap, unhampered, the profits of pay TV. Again, it takes no great insight to realize that proponents of pay TV systems could well decide to make good any loss which a program producer may suffer during the two-year hiatus. There is simply no way for the Commission to prevent circumvention of its conditions.

62. And it is particularly distressing that the Committee has rejected the suggestion that, if pay TV is permanently authorized, individual pay TV stations should not be licensed until after they demonstrate in an evidentiary hearing that operation of the station will not damage the free stations in the community, and will affirmatively serve the public interest. The Commission has required such hearings in the case of CATV systems desiring to import distant signals precisely because it was unable to determine without proper evidence

the impact of an individual system upon the existing local TV stations in its community. The determination to hold such hearings was made at a point when the Commission had before it far more statistical evidence of the effect of the CATV upon TV stations than the Commission now has with regard to the effect of pay TV on free TV. It is distressing that the Committee is so certain of the absence of adverse impact that it refuses to take this realistic and practical approach.

63. In sum, petitioners do not believe that the Commission has the authority to authorize permanent pay TV under the existing statutory scheme. But even if the Commission decides otherwise, and even if it attempts to enter the field without appropriate legislative guidance, nevertheless, the Commission today has as little meaningful data upon which to determine the impact of pay TV on the economy and on free TV as it did when the subject first arose more than ten years ago. The Hartford test did not yield such information. The experience in Hartford does not provide a basis for the conclusions which the Commission is attempting to draw. At this stage the Commission should, at most, permit pay TV to continue in a limited test context in the hope that the ensuing years will produce the necessary data.

Under all of these circumstances it is submitted that the Committee's recommended Report should not be adopted.

Respectfully submitted,

JOINT COMMITTEE AGAINST TOLL TV

NATIONAL ASSOCIATION OF THEATRE OWNERS

By _____
Marcus Cohn

By _____
Martin Gaynes

September 15, 1967

Mr. GAYNES. We believe first of all and perhaps primarily that this committee should make it very clear to the Federal Communications Commission, one, that the Commission does not have the statutory authority to institute pay television under the Communications Act of 1934 and, two, that even if it did it certainly should not do so because pay television is not in the public interest.

I do not think I have to speak too long about the fact that pay television is a tremendously drastic change in the television system we have in this country today.

I think the fact that this committee has been working so assiduously at it and the fact that so many people have appeared before them arguing pro and con demonstrate the novelty of pay television and the change it would make.

For the first time in the history of television broadcasting there would be a direct charge from the broadcasting licensee to the viewing public. In fact, it seeks to adopt a pay system which I think was rejected by the drafters of the Communications Act and certainly finds no support in it.

I find the lack of statutory authority in three aspects most particularly.

One, the present act has not a word about it which would indicate that the Commission has the power to institute a direct pay system. The legislative history of the act which is long and which we have analyzed in some of our comments make it quite clear this was never conceived as a real practical possibility at the time the act was passed. Two, this is demonstrated I think by the absence of rate regulation which I think is perhaps the most striking demonstration of the Commission's lack of authority.

The Communications Act is, of course, broad and gives the Commission many powers but it does not give them the power I believe to regulate the rates.

If the Congress wished to give the Commission the authority to institute pay television I cannot believe they would have done so without giving them the authority to regulate the rates.

This is a public utility. The airways belong to the people of the United States. They are given to broadcast licensees to use for limited periods and no property right is given therein. I just cannot conceive, it would be singular in the history of regulatory authority for this kind of power to be given without the regulation authority.

Yet the Commission does not have the power to regulate the rates. It won't even say it does have the power to regulate rates. It would launch this venture without the kind of protection that is necessary to protect the public.

I think there is a third reason. That can be found right in the fourth report. The Commission has recognized as we all have recognized the tremendously destructive potential which pay television has to destroy the free system. It tries to protect the free system by instituting program controls of a type which have never before been attempted.

It would limit movies on pay television only to those which are less than 2 years old in general release. It would prohibit the presentation of sporting events that appeared on free television in the past

2 years. It would go farther, it would prohibit the presentation of a series of programs with an interconnected plot.

This, I submit, is regulation of program content, the very one thing which the Commission has resisted throughout its entire career. The farthest the Commission has ever done insofar as regulating program content is indicating it might have some authority over broad categories of types of programs but never to my knowledge did it ever come out before the fourth report with a regulation which would depend upon the very nature and content of the program being presented.

Now obviously these are the only conditions under which even the Commission or the committee would allow pay television. Yet, both the proponents and the opponents of pay television have argued vociferously—not all proponents but some—that these are unconstitutional if not illegal under the censorship provisions of the Communications Act.

Commissioner Loevinger pointed out that under the committee's recommendation, pay television might not be able to present the plays of Shakespeare because there are a series of interconnected plots or they could be so defined. This kind of judgment would lead the Commission into a morass of programing judgments which they have heretofore, I think properly, eschewed.

But in any event, the present act, I believe, does not give them the power to do it or at least there is a very serious question that the act gives them the power to do it.

Under these circumstances, how can it seriously be contended that the present Communications Act gives them the authority to authorize pay television? The very conditions which they think are necessary may not be within their power to impose. This would start litigation that I think would be with us for years on definition of programs.

The chairman just touched one area of definition, whether the sports program to be prohibited must be within the community or throughout the country. That is just one of them, that is an easy one. I don't consider that one a particularly hard one. That is one of the easy ones.

I don't think the Commission really wants to do that in this way. Those are perhaps the main reasons why I don't think they have the power. Even if they did, I don't think they ought to do it before this committee at least would tell them to have the power.

I am a lawyer with no particular repute and if I don't know the answers to the question it does not mean very much. I don't think this committee knows the final answer to this question. It ought to be made very clear instead of leaving them in a morass of uncertainty.

Secondly, the history of the Hartford test has made it clear that there is no demonstrable demand for pay TV. The committee is undoubtedly aware that the only instance in which this question was put to the people in California. They voted it down by a sizable margin.

Later the courts struck down the legislation but I think the public reaction was at least indicative that there is no tremendous public demand for this service. There has been only one test.

Now the Commission envisioned a number of tests I think in the third report but there has been only one test run under the Third Report.

If there was a demonstrable public demand isn't it logical to assume there would have been more than one?

We should contrast this with CATV. The whole CATV industry developed in 3 or 4 years, burgeoning at a fantastic rate, almost unbelievable.

There was a demand and need. The people demanded it and they got it. I don't think there is this demand for pay TV, not in Hartford. The average audience in Hartford was 267. It was less than 1 percent.

Mr. Macdonald, you raised the question yesterday which I think is a very pertinent and excellent one. That is, aren't people like myself a little bit inconsistent saying on the one hand there is no demand, on the other hand it is such a tremendous demand that it will destroy free television? Certainly it does appear inconsistent.

I don't think upon reflection it is that inconsistent because demand is a strange thing. It can be created. Demand can be created by scarcity. Right now you don't have a tremendous demand for pay television because the people can get pretty much everything, virtually everything, that pay TV would offer, over free TV.

You take that away from free TV and you will create the demand.

That is the answer to the apparent inconsistency. It is the economics of scarcity which will create the demand that does not now exist. Let me use a simile.

If you banned automobiles today you would have the greatest demand for the horse and buggy that you ever saw in your life. If people don't have something then, of course, they will go to the vehicle from which they can get it.

I think it is clear beyond doubt that you will not get the sports programing that you have now.

Here I would like to speak for a moment to the question that was raised yesterday about whether the pay TV people could put on pro football sports if it appears anywhere in the United States. I think that they can because the conditions that the committee would impose in the fourth report speak not about absence from free television anywhere in the United States but absence from free television in the community.

The proposed rule is section 73.643(b)(2). It says:

> 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 the proposed subscription broadcast.

I agree with the representative from ABC and from the NAB that under the conditions of the fourth report the home games can immediately be sold to pay TV and they can withhold the away games for 2 years. They would not lose very much money.

At the end of the 2 years they would reap it all back. But I don't rely strictly on legal interpretation. I think events have proven that they will do this. The Los Angeles Dodgers and the San Francisco Giants kept their baseball games off free TV for years and they did it admittedly because they were looking forward to the pay TV bonanza which turned out did not result for many reasons but they certainly were willing to keep it off.

In the face of that experience I think it is at least reasonable to argue that the proponents of pay TV would do exactly the same thing.

Now what are the benefits to be gained? For years the proponents

of pay TV have contended that you are going to get high-level, minority cultural programing, operas, ballets, this type of material.

The rationale for pay TV was that you will get on pay TV the kind of minority programing you cannot get on free TV. The Hartford experiment did not prove a heck of a lot I think but it did prove this, you are not going to get this kind of programing on pay TV.

You just are not going to get it. They had virtually none of the things that they promised in this area. It was movies and sports. I think it is realistic to conclude that that is what you are going to have if you authorize this as a permanent medium.

I think the Commission was quite realistic in saying that we no longer would authorize it for this kind of programing, we will authorize it for movies and sports.

What about movies? Movies have been presented on free television in overwhelming proportions. The people demand it, the people like it. It has gotten the highest ratings. The average age of movies has been declining. Movies of less than 2 years old have been shown and will continue to be shown.

I think that what the imposition of pay television would have, the effect it would have would be to stop this development of better movies and would retard it.

It would make it impossible, I think, to present the kind of movies that we are now getting over free television. As far as sports are concerned we have such a plethora of sports now on free television that it has even come in for great criticism. There is a plethora of sports. Are we going to deprive the majority of the American people of the ability to utilize a scarce spectrum for the presentation of a few more occasional sports programs?

I don't think that is in the public interest. I don't think that this is what the Communications Act was set up to do. I don't think this is what this committee wants to do, to give entrepreneurs the use of a public facility to serve what would probably be a minority viewing audience in the higher economic class.

I do not think it is justified.

Now I think perhaps the most startling aspect of the Commission's fourth report was the institution for the first time of an economic discrimination in the use of broadcast facilities. Up until now the radio spectrum was available to all without regard to the income level, without regard to the ability to pay.

Yet, pay television would divide the country along economic lines and I think the Hartford test also proved that it would eliminate from that viewing audience the lower 30 percent of our Nation in the less than $4,000 class.

Now the committee said, we don't have to worry too much about these people because they still will be able to see plenty of free television. I find this argument very tenuous. In fact, the implications of it are kind of startling. What the Commission is saying is that for you people, the lower third of the Nation, you have ample television; but the wealthier, they don't. Because they don't, we are going to give them, in effect, the bonanza of pay television.

This is a kind of Orwellian argument, all animals are equal but some animals are more equal than others. The lower third, you have enough, the upper two-thirds, you don't. How can this Commission come to this kind of judgment? How can they say you who have less

than $4,000 have enough, when it is those people on whom television makes the greatest impact.

I can't think I have to argue now at this late date that television is the theater for the poor. Television gives to the poor the kind of entertainment that was never available to the richest prince years ago. They are the ones who get the greatest benefit not only from what they see—it was very interesting to me during the riots they would take pictures of people who were looting.

What were they taking? They were taking television sets. I remember a very vivid picture of them taking those television sets out. Why? Because this is their medium. This is the medium I think that you are going to deprive them of if you allow the authorization of a pay television system.

Now I was very struck with the words of Congressman Celler yesterday. He also gave some details before the Federal Communications Commission. I think his concluding statement was quite eloquent. I beg leave to say that I adopt it.

We should not authorize pay television. There is no benefit. It is going to increase the cost. It has such a potentially catastrophic effect on the free system that I don't think we ought to gamble on it because I think that effect will take place.

You will not see what you now see free.

I would like to conclude by perhaps speaking to a few of the points that were made by the other speakers. Mr. Wright, who was here, I respect, and he is very competent and his company makes the best television set on the market.

He assures the committee that Zenith would never siphon off sports that are now seen on free TV. I think Mr. Wright is more than serious. He believes it. There are two problems that I could point out. One, Zenith is not going to be the licensee of the pay TV stations so far as I know.

Zenith is the equipment manufacturer. The licensee will be the broadcast station. Flowing from that it is very clear that Zenith is not going to be the one who has the say about programing, not from choice but by law, because the fourth report has within it a condition which states and I would like to cite it for the record.

It is section 73.642(e). It says:

> No subscription television authorization or renewal thereof shall be granted to the party under any contract, arrangement or understanding, expressed or implied, which among other things—

And I skip—

> prevents or hinders it from or penalizes it for making a free choice of subscription programs, whatever their source.

Zenith under the fourth report does not have the legal power to impose any such condition that they told the committee here they would follow. It is kind of ironic, you see, because that condition was the condition that was placed in the fourth report at Zenith's instigation.

If you look at the bluebook that they gave to you, you will find on page 68 the Zenith proposal which says:

> No subscription television authorization shall be granted to a television station having any contract, arrangement or understanding, expressed or implied, which prevents the television station from making a free choice of subscription programs whatever their source.

Zenith can't impose the condition legally that it told the committee it wishes to follow.

Let me say again, I think Zenith is quite sincere in what they are doing. But Zenith is not the only one in this ball game aside from the fact it is not the only system; there are other systems, aside from the fact that they can't bind their future managements.

Now Mr. Brown raised a point I think, a very good one, to which I would like to address myself. The point was that we have so many UHF stations that are unallocated. How can you say that there is a demand for scarce spectrum space? Aren't you being foolish by using this argument when so many UHF stations lay fallow? That is an argument.

But I think there is an answer and the answer is this: First, the great number of those stations which lie fallow are allocated to the smaller communities, not to the large ones. They are in very small towns. They would not be put into operation even if pay TV existed, the audience is not there.

Some of them, over a hundred, are reserved for educational stations. Someone pointed out earlier that perhaps with one or two exceptions there are no unallocated UHF stations in the top 51 in the United States.

As a matter of fact, the last ones in Cleveland were just allocated after bitter fights. People are willing to spend thousands of dollars in legal battles to get the UHF stations in a big city. If anybody has an open UHF station in a large city and does not want it let him turn it in.

I will guarantee there are four people trying to get it. There is no real shortage of UHF in the major markets which is in the community where this would be issued.

There are some arguments made by Mr. Ottinger, by others, by Mr. Preminger, that we need this because it is going to force competition. Pay TV is going to put in their best efforts. This will force the networks to compete.

I don't think so. Why? There are two reasons. The networks have frankly said if this is authorized we have a responsibility to our stockholders, we are not going to sit by and let that bonanza flow to pay TV.

Second, we will get into it from the production end.

If this thing comes to fruition, they are going to produce programing. After all, that is their business. They are one of the greatest sources of program production. What makes anybody think they are not going to go into that business? They are in the business now.

You will have the networks on the one hand trying to protect their investment in the free system, on the other hand they are going to be producing things to put on the pay television. Thus, what they feel will go on pay television they will put on pay television.

What they feel will go on free television they will put on free television. It will be quite similar to the arrangement that used to be present in motion pictures before the Paramount decision.

I think this argument about competition is a little unrealistic.

Many members of this committee have rightly said, what is the Hartford experiment, what did they really do? Zenith gave you what they did in this blue book. One of the significant parts about the book is the date, it says March 10, 1965.

Now this is 1967, so this is 2½ years old. Do you know they have not given any more detailed showing than this yet? We don't know what happened in the last 3 years in Hartford.

The "Fourth Report" is based on the first 2 years of the 5 years' experiment. They have never given any more information than the program guide which I think they wish they had never given anyway.

I would like to find out what happened in the past 3 years. I would like to analyze what we analyzed before. But we have not seen it yet. We know virtually as little now as we did 3 years ago.

If anything, perhaps we should have some more experimentation.

I would like to conclude with one last point: There is a kind of assumption among the committee that free TV is not free, and I think some of the committee members have doubt whether it is free. I don't want to indulge in semantics, it is not important, but I would like to point out that the theory that advertising represents an indirect charge to the public because the advertising costs are passed on to them in the cost of the product is a theory that is held by many people. I think it underlies the skepticism which this committee has in the word "free."

I would like to point out to the committee that that theory is not universally accepted. There is a substantial body of economic opinion which holds that advertising reduces the unit cost of the product because it creates the demand. That theory was, I think, set forth most recently in a book published in 1967 by Dr. Jules Backman called "Advertising and Competition," in which he makes the point that the cost—price in volume relationships are very complex but that to the extent advertising is successful, total sales volume expands and may result in reductions in unit costs for production and overhead.

In such cases total unit costs could be lower with heavy advertising than without it.

I am quoting from page 143.

I commend the book to the study of the committee because I think it sheds some light on this very complex question of the relationship between prices and advertsing.

Incidentally, this theory was also put forth as far back as 1943 in other works, a book by Borden, called "Economic Effects of Advertising" and a book by Sandage, called "Advertising, Theory and Practice."

I would like to conclude by thanking the committee for giving me the privilege of appearing before it and expressing our views.

Thank you. I shall be happy to answer any questions you have.

Mr. MACDONALD. On behalf of the committee I certainly thank you for coming here. I just have two short questions.

We have many other witnesses who are scheduled to be heard. Also, aren't you talking very inconsistently because as I understand from the title, you represent the National Association of Theatre Owners?

Mr. GAYNES. Yes, sir.

Mr. MACDONALD. Aren't they in the business of pay TV on occasion?

Mr. GAYNES. If you are referring to the occasional broadcast of sports over the wire to that extent, yes. But that is not this business.

Mr. MACDONALD. Has it worked out for you? Have you made money on it?

Mr. GAYNES. I suppose some have, some haven't. Some have lost money on it.

As a matter of fact, we have had some problems as I recall with short fights and people demanding their money back and breakdowns, there have been problems. One of the interesting things is, there is this difference, we build our own theaters.

Mr. MACDONALD. You do what?

Mr. GAYNES. We put the money up to build our own theaters. The method by which we reach these people is by money we have expended. We don't ask the Government to build the theater for us.

Mr. MACDONALD. I haven't heard of any, except the new bill that we have, I haven't heard of any TV station asking the Government to put up their station either.

Mr. GAYNES. Because of the system we have they get the most important aspect of their business virtually free, that is the license, the right to use public facilities. That is a kind of subsidy. It is only given that right because we are going to use it, or the television stations are going to use it in the interest of public convenience and necessity which I think is all the people.

The theaters are different.

Mr. MACDONALD. You are talking about the poor people who are going to be robbed of their right to see things for free. I have never gotten into a theater free. Do you give away tickets to people?

Mr. GAYNES. No; we don't. We take our risks, we spend a lot of money on theaters. We spend a lot of money getting films in, we spend a lot of money on advertising. We hope enough people will come in on Saturday and Sunday to make up for the middle of the week when no one is in that theater.

Mr. MACDONALD. My only question is what is the relative between your taking a championship fight or something you think can be sold to the public and what pay TV would do? It just moves it from the home into a large amphitheater.

Mr. GAYNES. I think there are two basic differences. First, as I said we don't use public airways to do it.

Mr. MACDONALD. You do. How does it get in the theater?

Mr. GAYNES. By wire.

Mr. MACDONALD. Whom do you pay?

Mr. GAYNES. I don't know. I guess we pay A. T.&T.

Mr. MACDONALD. You know the thing we have kicked around, the Clay fight, in Phoenix that got blacked out because it was shown in the theater in Phoenix. Isn't that correct?

Mr. GAYNES. I am not familiar with the Phoenix situation but the people who blacked it out, I think, were the people who owned the rights to it. They felt they could get more money.

Mr. MACDONALD. They could not have done it unless the theater people had permitted it to be done.

Mr. GAYNES. That is true.

Mr. MACDONALD. Aren't you talking out of both sides of your mouth?

Mr. GAYNES. No, because I think the occasional theater TV presentation will not have the effect on the free TV system that this is going to have. I still say that we are not using the public airways. We were not given this theater on the representation we were going to serve everybody. Aside from that, the occasional theater presentation, how many times do we have it? It has not destroyed or even impaired free television yet. I don't think it ever will. It is a different kind of thing.

Mr. MACDONALD. You are not talking about free TV, you are talking about commercial TV, isn't that right?

Mr. GAYNES. I will accept that. I think it is a matter of impact. In certain respects they are similar. They are both in the entertainment business, but I think there are significant differences. I think the most significant differences for the purpose of this committee is the impact this will have on commercial TV. I think the impact of pay television over the air would be disastrous to it.

Mr. MACDONALD. I will yield to Mr. Brown in a minute but I have just one other question which bothered me yesterday and it bothers me again today.

You say that if the home games of professional football or baseball teams under the regulation are not used for 2 years, they would then become public property, shall we say, and could go on subscription TV.

Say the Redskins are going to play in Los Angeles. Although it is an away game for the Redskins, isn't it a home game for the Rams? So it still could be sold.

Mr. GAYNES. I am not sure I understand your question.

Mr. MACDONALD. I am not sure I understood any answers I got yesterday in which it was said that if they sold the away game, it would automatically free them to become the property of subscription TV.

In other words, somebody will broadcast that game whether it is at home or away. Isn't that right?

Mr. GAYNES. Yes, somebody will.

Mr. MACDONALD. If one-half of the contestants are from one city, why, isn't that the selling of their performance?

Mr. GAYNES. Yes.

Mr. MACDONALD. Then how can it become subject to becoming public property and therefore able to be put on subscription TV after a 2-year period?

Mr. GAYNES. Supposing they take it off entirely, supposing the Redskins decided they are not going to show any games——

Mr. MACDONALD. Somebody said yesterday that the league gets a certain amount of money and divides it into the number of teams that there are in the league.

Mr. GAYNES. That is right.

Mr. MACDONALD. Aren't they getting paid just as if they were on——

Mr. GAYNES. Yes, the individual team. The individual team could say, "Look, I am not going to give you rights to my game at all, I am giving up my share of the pot, I am going to sell the home games to pay TV, I am going to make as much money. I don't want my away games to be put on at all."

Mr. MACDONALD. Do you think they could make that stick?

Mr. GAYNES. I think they could, yes.

Mr. MACDONALD. The Redskins playing in Los Angeles against the Rams, they tell the Rams, "No broadcasting."

Mr. GAYNES. I think the Rams would do the same thing.

Mr. MACDONALD. Do you think the Redskins would tell the Rams not to sell their rights or vice versa?

Mr. GAYNES. I don't know. I certainly envision conflicts that may arise. Let me say about conflicts in professional football between teams,

they always manage to be resolved somehow. I think there would be agreements between them in order to do that.

Because the future promises such a fantastic bonanza for them I think they are willing to take the short-term loss.

Mr. MACDONALD. I don't want to sound like Johnny One Note and talk about sports all the time but that is the original question I asked the Zenith people. They said no, they would not do that.

Mr. GAYNES. I know they said it and they meant it.

Mr. MACDONALD. I am on your side in a way and yet I don't understand your answer.

Mr. GAYNES. My answer merely is that I think the Redskins could say that we are going to stay off because I think the Rams would say so, too. I think every other group would say so. They would say we are foregoing all the money we would get from the network and each one of us individually will then sell our games to the local pay television station because we can make as much money as we could by getting our share of the whole pot.

I am not saying this is going to happen tomorrow, obviously it won't because there won't be that many pay television stations but it will happen in 10 years.

The minute you get a pay television station in every home city, at that point the team I think would be more than willing because it is again a question of creating demand. They are creating a demand by their refusal to give it to the free television station.

I think from their point of view they are quite right. They are not charitable organizations, either. They have to maximize their profits. I think the longrun benefits to them would be enough to do it.

Let me say this, I would hate to be right.

Mr. MACDONALD. Which—you hate to be wrong or you hate to be right?

Mr. GAYNES. I hate to be wrong. I certainly have been that. But I would hate to be right which would be worse because you won't see pro football on television any more. It seems to me it is a terrible risk that you are running.

Certainly it is a terrible risk—you and I can disagree on what these rules mean and their effect. I don't know the answer. If you don't know the answer, who does?

Mr. MACDONALD. The FCC, I hope.

Mr. GAYNES. Oh, no.

Mr. MACDONALD. Mr. Brown.

Mr. BROWN. I would like to go through your written testimony here. I would like to ask for an expansion on a couple of points you raise.

You mentioned that "A licensed pay television system permits the licensee to directly charge for the use of public facilities (the airways) without any governmental regulation of those rates, while at the same time depriving the public of the free service it previously enjoyed over the air."

Now I am not sure I will accept the last part of that, but I would like to discuss the question of the use of public facility without regulation of those facilities.

What about the U.S. mail?

Mr. GAYNES. It is regulated. The rates are regulated.

Mr. BROWN. The rates charged by magazines, newspapers, and others for their product is regulated by the Federal Government?

Mr. GAYNES. No; but the amount I have to pay to use the U.S. mail is.

Mr. BROWN. Should we require the payment of the use charges by radio and television stations? Is that what you are suggesting? I understood your suggestion to mean that we should regulate the advertising rates.

Mr. GAYNES. No; I am sorry. Then I have been misunderstood and I apologize.

What I am saying is that right now you do not have the power to regulate the rates that will be charged by pay television stations to the user, to the individual consumer. The $1.50 or so that the pay television station will charge the public, under the present act the FCC does not have the power to say, "For this movie you can only charge no more than $1.50."

Mr. BROWN. It seems to me that is a little closer to telling Life or Esquire how much they must charge for their issue, for each edition which is sent through the mail rather than charging for the mail handling of that.

If you say that we are charging for the use of the mail a certain rate—we have been all through this in the last couple days in the House—then are you suggesting that we should charge for the use of the airways in some way?

Mr. GAYNES. No.

Mr. BROWN. But you are suggesting that we limit the charge which may be levied for the individual program?

Mr. GAYNES. Yes.

Mr. BROWN. Would you draw an analogy that we should be able to say to Esquire magazine, "You can only charge 25 cents a copy or 35 cents a copy since you use the mails"?

Mr. GAYNES. No, I would not. It would raise very serious constitutional questions.

Mr. BROWN. I wonder if there are not constitutional questions involved here.

Mr. GAYNES. Yes; there are very serious constitutional questions involved as to whether you could do that. The most serious question—I know Zenith would get up and go to the Supreme Court and say you certainly can draw the same analogy you draw and they might win.

If they won, there would be no regulation. I think that would be terrible because I think there is a difference between the use or the expenses which Life and Time have vis-a-vis the mailing rates, set against the total amount of their cost, and giving in effect a frequency to a station.

They are not exactly similar but they are enough similar to raise very serious constitutional questions. If the constitutional question is resolved against regulation, a private entrepreneur can use a scarce facility for the use of all people, he could charge what he wants for it and there is no one in the world who could tell him how much he could charge.

I don't think that is the desirable result. You may be right. It is conceivable that you don't have the power to do it either. I don't think that is an argument for it.

Mr. BROWN. You raise the question and I have some figures, Mr. Chairman, which I would like to put in the record. They relate to

the figures I presented yesterday although they are not exactly what those figures were.

There is a slight variation. The figures I had yesterday have been corrected by the FCC. I would like to have them inserted at this point in the record.

Mr. MACDONALD. Without objection, it may be done.

(The information referred to follows:)

UHF AND VHF CHANNELS ALLOCATED, AS OF MARCH 1966; OPERATING AND AUTHORIZED, AS OF SEPT. 30, 1967

TOTAL ALLOCATIONS AS OF MARCH 1966

	UHF	VHF	Total
Commercial	626	593	1,219
Educational	514	118	632
Total	1,140	711	1,851

STATIONS OPERATING AS OF SEPT. 30, 1967

Commercial	128	498	626
Educational	73	74	147
Total	201	572	773

CONSTRUCTION PERMITS AS OF SEPT. 30, 1967

Commercial	167	11	178
Educational	41	6	47
Total	208	17	225

Source: Research Office, Federal Communications Commission.

Mr. BROWN. These figures relate to the number of allocations of UHF and VHF licenses, the number of stations operating and the construction permits which have been granted. The total number of commercial stations only—we are not talking about educational television—as of March 1966 was 1,219.

The total number of stations operating is 626 as of September 30, 1967, which is just slightly over half of those which have been allocated. The construction permits granted as of September 30, 1967, are 178. That still leaves a rather sizable number of stations, in the area of 450 or so, for which allocations have been made but which are not on the air.

The question I would raise is this: You suggested that in the large markets everybody who has an allocation is actively pursuing that allocation. I don't have figures to verify or refute that. I, frankly, would doubt it because I recognize again that there are so many slots on my television dial here in Washington and it is a fair market, if it is not a fluent market, and they are not all utilized.

I don't know about New York but I presume from what has been said that the largest market in the United States, New York, would, under your argument, have all of its potential channels in use.

Now, is that correct?

Mr. GAYNES. Yes; there is no open channel in New York.

Mr. BROWN. Are they in use? Are they broadcasting?

Mr. GAYNES. Certainly all the VHF's are. There is an educational UHF that is on. I know that everyone in Washington is in operation except for the one which is still in hearing and will go in operation right away.

Mr. BROWN. They are broadcasting; is that right?

Mr. GAYNES. Yes; I think they are. The only one that is still available I think is channel 50 and that is in hearing status now. The Commission has not decided who is to get it.

Mr. BROWN. In other words, the potential number of stations that could be on the air in New York City and in Washington are all now operating on the air?

Mr. GAYNES. I can't say for sure but I think that is true; they are. If they are not on the air, in the case of Washington, it is because they have not decided who is to get the channel yet.

May I speak to this? Don't be misled by the number of spaces you have on the dials. That does not represent the number of stations you can have in the community. It is limited by physics and by mileage separations. You have 12 VHF stations. You can't have 12 channels. All you can have are the ones you have, four.

The potential number of channels, in fact, the realistic number for most communities, is four or five, including UHF. That is the total number which has been allocated.

Mr. BROWN. Let us look at CATV. Could I pick up on my set here in Washington, with the proper grid system of projection, a pay-TV station from, say, Asheville, N.C.?

Mr. GAYNES. You mean physically? Is it technically possible to do it?

Mr. BROWN. Yes.

Mr. GAYNES. Yes.

Mr. BROWN. Can I get all 12 of the VHF channels on my set utilized?

Mr. GAYNES. By CATV? Yes, you could. Not really because there are certain nonduplication rules that would make it impossible.

In other words, the way the Commission operates now, if you have a CATV system in Washington and you have the technical capability of bringing in the Asheville stations it could not duplicate what the local stations now present. It would have to block out those stations.

Mr. BROWN. Let us assume that Asheville, N.C., is not such a hot market for commercial advertising on television and somebody in Asheville, N.C., wants to put up a television station and support that station part of the time by subscription TV.

Mr. GAYNES. This is a television station?

Mr. BROWN. Yes.

I wonder if it is not possible for him to extend his subscription market—and perhaps I should ask this of Zenith or the people who developed the system—by means of a combination of the system we have had described to us on pay TV and CATV, or cable coverage to Washington so that in Washington I have a choice of three or four of these pay channels plus the channels you are allowed on the spectrum because of the physics you mentioned and so forth?

Mr. GAYNES. I think the answer would be no because the Commission would not allow it.

Mr. BROWN. Under the present ruling. I am just asking if it is physically possible.

Mr. GAYNES. I think it is technically feasible because almost anything is technically feasible.

Mr. BROWN. I go to this point because of the question you raised with reference to the fact that the small markets will not get pay TV and they will not get their channels utilized because of the limit of advertising support for stations in that area.

Now I am pursuing a philosophy which came out of this committee and the FCC and that is that there is something good about making as many television selections as possible available to the general public.

If we follow that idea, then maybe some entrepreneur in my small community will want to put up a pay TV station and offer certain things on that station which might, through the cable system or some other system, satellite or whatever, be available in Washington, D.C., so that here in Washington, D.C., by whatever system there is to be used for pay TV, I can have a choice of that channel out in my town which is not a big commercial market.

Mr. GAYNES. Yes; it is technically possible. I don't believe it is likely because the present Commission attitude is not exactly the attitude of "as many signals as you can possibly get." It really is as many signals as you can possibly get without destroying the health of the local stations.

I think that though certainly what you say could be done, I don't see that it is a likely probability under the present regulatory scheme.

Mr. BROWN. I don't want to destroy the health of the local stations. I want to give the local stations another source of revenue besides advertising.

Let me go to two other points. You mentioned on page 10 that in California a decisive margin voted against pay TV by wire. Now is it your assumption, legally or otherwise, that because there have been examples where over half the population decided that they did not want this system that therefore the system should be precluded?

Mr. GAYNES. No; I don't necessarily mean that, just because more than half the people don't want it does not necessarily mean you should have it.

I think it is indicative of a lack of demand for the service so great that it should not be instituted now by the Commission in the face of the figures.

Mr. BROWN. Do you have the vote?

Mr. GAYNES. The margin was 3 to 2. The exact numbers I don't have. It was a 3-to-2 margin.

Mr. BROWN. I find some conflict as I read your written testimony and listen to your oral views and I just happened to be in a place in your written testimony when you said something different that did not square.

You say in the written testimony that "pay television will not in any way, offer additional cultural and high quality diversified minority-type programing, but would program for the mass audience, and would create no long-term improvement in either the quantity or the quality of television programing."

And just about that same time you were saying that if pay TV is instituted, in addition to all the film makers we have in this country today you will have all the networks going into the movie business, too.

That seems to be a broadening of production of programing. I would agree with your oral comment and disagree with the written views.

Mr. GAYNES. I think that if you do decide to do this you will create the demand which now doesn't exist by the very fact that you are doing it. As of now, if you really protect the free system, I don't think there will be any beneficial supplement. But there will be a beneficial supplement if you take what we now have free off; yes.

Mr. BROWN. Finally, let me suggest to you two things.

I agree thoroughly with Dr. Backman that advertising does reduce the unit costs of products and I am all for it. That is part of the free enterprise system. I would like to know if there is an adverse effect on movie theaters from competition of free television because of the limitations in the size of the total available audience. You have not touched on this at all and I think it would be a very strong point in your argument against pay TV. But I don't know if it would be; I would like to have the facts.

What has happened to the number of theaters in the United States since the institution of free television and what has happened to the theater audience that goes out to see a movie?

Let me just make this one other point in that connection: Again it seems to me that if somebody put a buck in the set to watch it at home that it may be a little cheaper for all these poor folks everybody seems to be worrying about to be able to sit at home in their underwear if they want to without having to hop in an automobile and drive to the city to watch a first-run production and pay two bucks for the garage and three bucks for each theater ticket and so forth.

Can you give us some statistics on the numbers of theaters and the numbers of people who pay to watch presentations in the theater and also the numbers of dollars spent in theaters with reference to free television which certainly, I would think, is a competitive factor in the theater business?

Mr. GAYNES. I cannot off the top of my head give you figures. I will do so. I will say the number of theaters has declined but the number I don't know.

Mr. BROWN. The number of theaters, the audience in theaters and the dollars involved.

Mr. GAYNES. I certainly will do so.

(The information requested follows:)

MARCUS COHN, LAW OFFICES,
Washington, D.C., October 18, 1967.

Re hearings on pay television.

Hon. TORBERT H. MACDONALD,
Chairman, Subcommittee on Communications and Power, House Interstate and Foreign Commerce Committee, Rayburn House Office Building, Washington, D.C.

DEAR MR. CHAIRMAN: Last week I had the pleasure of appearing before the Subcommittee on behalf of the National Association of Theatre Owners and the Joint Committee Against Toll-TV on matters involving pay television. Members of the Subcommittee requested that, if possible, I furnish certain information concerning the effect of television upon motion picture exhibition houses. This letter is in response to that inquiry.

1. You inquired as to the relative number of motion picture theatres in the United States prior to and subsequent to the advent of free television. The information at our disposal indicates that in 1946 there were 18,760 motion picture theatres in the United States. In 1963 this number had declined to 12,652 motion picture theatres. While we do not have any definite figures available, it is esti-

mated that at least 1,500 additional motion picture theatres have ceased operation since 1963.

2. You inquired as to the relative number of persons attending theatres prior and subsequent to the advent of free television. Our information indicates that in 1946 82,400,000 persons per week attended motion picture theatres in the United States. In 1966 approximately 44,000,000 attended motion pictures theatres per week.

3. You inquired as to the effect of television upon gross receipts. In 1946 the gross receipts of motion picture theatres in the United States totaled $1,800,000,000. In 1963 the gross receipts totaled $1,062,732,000. It should be noted that this drop of over $700,000,000 occurred despite an increase in admission price of approximately 150% from 1946 to 1963.

4. You asked us to supply any information we might have about the effect of the Hartford pay television experiment upon the motion picture theatres at Hartford. We do not have at our disposal specific or definite data concerning the effect on Hartford motion picture houses which can be definitively ascribed to the Hartford pay television experiment. In general, some small theatres in the area closed, but at the same time new drive-in theatres were built around Hartford during the period of the experiment.

As I indicated in my testimony, it is our impression that the Hartford experiment had no measurable effect, and not too much impact, for two reasons:

a. In most cases during the Hartford test the pay television station carried subsequent run features.

b. More important, however, the test was simply too small to have any discernible effect. The pay television experiment never achieved anywhere near the 50,000 subscriber limit it envisioned in its application and, in fact, was able to attract a total of less than 5,000 subscribers. Average audience was 237 sets. Even if 2,000 persons would have tuned in at Hartford to listen to a pay television feature, this is still a small number compared to the total number of seats available in Hartford motion picture theatres.

For these reasons, we do not believe that the Hartford test was at all probative of the effect which the institution of pay television would have upon the motion picture exhibition industry.

I thank you once again for the pleasure of appearing before you.

Sincerely,

MARTIN J. GAYNES.

Mr. MACDONALD. Thank you, Mr. Brown.

I think also when you are getting those figures, I have been very curious as to what effect the subscription TV experiment in Hartford had on the theaters of Hartford. I am sure you can get those figures as well.

Mr. GAYNES. I can get those figures, but I can tell you now, it had none. It was just too small. (See letter above.)

Mr. MACDONALD. In other words, it had no effect on the theaters?

Mr. GAYNES. I don't think it had a perceptible effect on the theaters. That is only because it was too small to have any effect. You have average viewing of 237.

Mr. MACDONALD. Then what are you so afraid about?

Mr. GAYNES. I think it will have an effect. There is no question about it. If it comes it is going to come and it is not going to be 237 people.

Mr. BROWN. How do you square that, that there is not enough demand, vis-a-vis the California thing? You have to be on one side or the other.

Mr. GAYNES. The only problem is that I can't foretell the future. I have to take what appears to look like an inconsistent position but this demand, I again point out, will be a created demand. It will be a demand that is there because you can't get it anywhere else.

You are not going to get it on free television. You are going to create your own demand.

Mr. MACDONALD. I don't follow that.

Mr. GAYNES Right now I think you have a choice and, therefore, the demand is not present. If you deprive the people of the ability to have that choice you are going to get a demand. You take those movies off free television——

Mr. MACDONALD. As I said yesterday is it not wrong to deprive the American people of having a choice?

Mr. GAYNES. The American people are not deprived of having a choice because the producers of these programs, the ones who produce them, the manufacturers, are going to say we can by this device, the use of public facilities, desired by a minority of the audience, make more money than we could by doing it free.

We are going to have a minority dictating what the majority can see, the choice to black out made by the producers the same way they choose to black out sports now.

They are going to say, all right, supposing NBC makes a movie; they make a real blockbuster movie. They started to make that movie because they wanted to fill a time period 8 to 11 on the network. But they find out if they put it on pay television they will make five times as much.

What will they do?

Mr. MACDONALD. What is wrong with that?

Mr. GAYNES. That movie would have been seen free for the benefit of more people. What is wrong with it is that they are using, in effect, the roadway that was given to them by the Federal Government to do that.

Mr. MACDONALD. Thank you very much.

Mr. Lester W. Lindow, executive director of the Association of Maximum Service Telecasters, Inc.

STATEMENT OF LESTER W. LINDOW, EXECUTIVE DIRECTOR, ASSOCIATION OF MAXIMUM SERVICE TELECASTERS, INC.; ACCOMPANIED BY HENRY GOLDBERG, COUNSEL

Mr. LINDOW. Thank you, Mr. Chairman.

I am accompanied this morning at the witness table by Mr. Henry Goldberg, of Covington & Burling, who represents the association, and who will be here to be of assistance if required.

My name is Lester W. Lindow. I am executive director of the Association of Maximum Service Telecasters, Inc. (MST), an association of approximately 160 television broadcast stations, both UHF and VHF, commercial and noncommercial educational, serving urban and rural areas throughout the United States.

MST is dedicated to the development, improvement, and expansion of our nationwide system of free, competitive local and area television broadcasting. In keeping with this goal, MST is opposed to the authorization of pay TV by the FCC. MST believes that such authorization would be fundamentally incompatible with the public interest in free television broadcasting and that free television service would be seriously impaired by pay TV.

This position has been adopted by MST's membership and has been stated in pleadings filed with the FCC in the pay television docket. MST's further comments on pay TV was filed on September 15, 1967.

At this time I would like to incorporate this latest pleading into the record. These further comments set out the details of MST's position on pay TV. I will discuss only the highlights and submit a copy for the record of these hearings, if that is agreeable, Mr. Chairman.

Mr. MACDONALD. Without objection, it is so ordered.

(The document referred to follows:)

Before the Federal Communications Commission, Washington, D.C.

(Docket No. 11279)

IN THE MATTER OF AMENDMENT OF PART 73 OF THE COMMISSION'S RULES AND REGULATIONS (RADIO BROADCAST SERVICES) TO PROVIDE FOR SUBSCRIPTION TELEVISION SERVICE

Further Comments of the Association of Maximum Service Telecasters, Inc.

On July 14, 1967, the Commission released the proposed Fourth Report and Order in Docket No. 11279, prepared by its Subscription Television Committee (hereafter "STV Report"). Although the STV Report took into account information received during the entire period of this extensive proceeding, it was most directly based upon the data of the Hartford, Connecticut (WHCT, Channel 18) pay television experiment and the comments submitted to the Commission in response to its Further Notice of Proposed Rule Making and Notice of Inquiry in Docket No. 11279 (FCC 66–268, March 24, 1966). The Association of Maximum Service Telecasters, Inc. (hereafter "MST") filed Comments in this proceeding on October 10, 1966, and Reply Comments on November 10, 1966.

MST has opposed the authorization of over-the-air subscription television (hereafter "STV") because of its faith in the capacity of the present and potential system of free television to meet the public's needs, tastes and interests. STV would sharply impair the ability of free television broadcasting to serve effectively all segments of the American public, including those unable to pay for television. At the same time, STV would not produce the "benefits," claimed for it.

As we have previously pointed out, the basic public policy issue the Commission must decide is not whether STV should be given a chance to fail, but what would happen if it succeeds. Based upon the conservative estimates of the STV Committee's Report, even though the STV penetration were limited to as small a figure as 16 percent of the nation's television homes and to revenue per year of only $105 for each subscribing home, STV's annual revenues would be almost $1 billion. This is almost 50 percent of the total 1966 broadcast revenues of all three commercial television networks *and* their 15 owned and operated stations *and* all other commercial television stations in the United States! Revenues of these dimensions, which assume all of the "limitations" which the STV Committee's Report would place on STV operations, would have a devastating effect on the ability of the American public to continue to receive what it now receives for free. Even such "limited" success would provide STV with financial resources of such a magnitude as to enable it to siphon from free television many popular programs now provided without charge. The Commission must determine whether it is prepared to permit this to occur by licensing television stations to serve, for a fee, only those who can afford to pay and who live in communities where the economics justify the establishment of STV.

Further, many of the basic public interest issues, as well as the specific regulatory issues, raised by the Commission, which assume pay television on some permanent basis, reflect the fundamental incompatability of STV with the public interest in free television broadcasting and show further that free television would be seriously impaired by STV.[a] Discussion of some of these regulatory issues and of the likely effects of the STV Committee's conclusions on each of them is for the purpose of demonstrating that fundamental incompatibility and inevitable impairment.

Finally, MST continues to take no position, at this time, on subscription television by cable, except when it is combined with CATV. MST firmly opposes any such combination.

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[a] Since the Commission excluded the issues of whether it has statutory authority to authorize STV on a permanent basis and whether STV is broadcasting, MST will not comment on these issues at this time.

I. Basic Public Interest Issues

A. STV WOULD NOT CONSTITUTE A "BENEFICIAL SUPPLEMENT" TO FREE TELEVISION BROADCASTING

The Commission has long recognized that one central issue relating to permanent authorization of STV is "whether subscription television would provide a beneficial supplement to the program choices now available to the public . . . [on free television]." [1] Indeed, the STV Report states that, "if the programming of STV is merely duplicative of types of programs now appearing on free TV in quantity . . . 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." [2]

Since this is the determinative issue, it is ironic that, to the extent the Hartford experiment has proven anything, it has proven that STV must provide essentially the same type of programming as free television if it is to be at all acceptable to the public, and, therefore, an economically viable service. STV had always promised previously that it would give those willing and able to pay the opportunity to enjoy programming essentially different from that generally available on free television. In Hartford, movies and sports—which are provided in quantity by free television—accounted for 93.7 percent of the programming, with only 5.5 percent devoted to so-called "special entertainment programs." [3] Movies and sports found the greatest public acceptability and this, rather than diversity, has become the *sine qua non* of STV financial viability. The STV Report recognized that STV programs would be largely duplicative of free television programs, since "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." [4]

Aside from films and sports, under the STV Committee's proposed rules, STV would be able to carry all the entertainment programming now available on free television with the exception of series with "interconnected plot or substantially the same cast of principal characters. . . ." [5] Such programming, which has attracted millions of families to television, could and would be diverted to STV.

What then would STV offer as a "beneficial supplement," if it cannot offer the diversity and nonduplicative programming originally promised? With respect to feature films, which are expected to be *85 percent* of STV programming, the STV Report states that STV would offer "recency"; not better films, not different types of films, just recent ones.[6] STV would allow those people who could afford it the opportunity to sell films in their home sooner than they could see them on free television. For this "beneficial supplement," the STV Report justifies diversion of scarce spectrum space and broadcast facilities to STV! "Recency" of films on television is a function of the feature film distribution system. The elements of this system are not immutable, although the Report treats them as if they were. Film distribtuion practices *have* changed and continue to change and the trend has steadily been toward making better and more recent films available to free television. This trend is bound to be reversed if STV is authorized. Film distributors would doubtless delay the sale of such films to free television until they had a "run" on STV.

Moreover, "recency" as such is not determinative as to whether STV films would in fact be a "beneficial supplement." "The Bridge on the River Kwai" was successful on free television not because it was recent, but because it was an outstanding, Academy Award winning film. On the Committee's own data derived from the Hartford experiment, it can be seen that "recency" is virtually irrelevant; "the average subscriber paid $1.20 per week for programs whether 27 percent or 70 percent of the feature films shown on STV were first subsequent

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[1] First Report on Subscription Television, 16 R.R. 1501, 1520–21 (1957).

[2] STV Report, ¶ 47.

[3] Moreover, most of the "special entertainment programs" (for example, drama, variety, and "night club" programs) are either already available regularly on free television or are essentially the same kinds of programs that are now available on free television. Insofar as concerts and opera and ballet are concerned—the types of programs that used to be promised by STV—it will be noted that a total of only four concerts and four opera and ballet programs were presented in Hartford over the period of two years.

[4] STV Report, ¶ 56, at 19–20. It is important to note that even the proposed STV program rules implicitly assume that STV programming would duplicate free television programming substantially. Granting this, the proposed rules attempt to prevent siphoning of programs from free television by STV.

[5] STV Report, App. D, § 73.643(b)(3).

[6] *See* STV Report, ¶¶ 51–53.

run." [7] Yet an illusory standard of "recency" is the only way in which the STV Committee expects 85 percent of STV programming would be a "beneficial supplement" to free television.

As for sports programming, the other major component of projected STV program formats, STV proponents stated that they would be able to offer heavyweight championship fights and blacked out games.[8]

The STV Report treats this as rendering STV a "beneficial supplement" by offering sports events not regularly available on free television. Again the Report sees what free television programming is (or was) and concludes that this pattern must be present in the future and proposes rules to assure that it will. But while these proceedings have been going on, an increasing number of heavyweight championships and home games, which STV proponents said they alone would present, have become available on free television.

The Commission must compare what the STV Report expects to be STV's "beneficial supplement" with the programming that free television is offering now and can be expected to offer in the foreseeable future, and not what free television programming was when this proceeding began. Local free television stations and the national networks have responded to the changing tastes and needs of the public with flexible program formats, which include feature films; regularly-scheduled variety and dramatic programs and entertainment, news and public affairs specials; and many different types of sports events.[9] With respect to sports events, free television has moved from the days when boxing, wrestling and baseball were the staples to coverage of many diverse types of sports.[10] The STV Report recognized that changing sports programming patterns with respect to broadcast of home games, title boxing matches and soccer will create problems to which solutions are presently unknown.[11] It would be much simpler for the proponents of STV if free television programming would remain static. But, free, commercial television has consistently demonstrated its capacity, when demand is sufficient, to pay for very expensive sports,[12] film features [13] and other programming.

The All-Channel Receiver Act has greatly facilitated the growth of UHF broadcasting by increasing the percentage of homes that have television receivers capable of receiving UHF transmissions and, thus, encouraging the establishment of new UHF stations.[14] Most of these new UHF stations are likely to be unaffiliated with the three major commercial television networks and will have to rely on diverse program sources. To be financially viable, these new UHF

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[7] STV Report, ¶ 104.

[8] STV Report, ¶ 84.

[9] *See* discussion of proposed STV program rules, *infra*.

[10] When the Hartford experiment began, none of the networks presented professional hockey or basketball (over two-thirds of the Hartford sports presentations), whereas both are now presented on free television. One of the proponents of pay television said in 1955: "Nevertheless television today is not portraying certain outstanding sports events and is likely to do so less in the future." Comments of Skiatron Electronics and Television Corporation, June 8, 1955, p. 42. Free television has proven this prediction to be inaccurate. Some professional sports rely on free television to build up an audience for the sport. For example, professional soccer was on free television for the first time last season and promoters expect free television to help establish soccer as a popular spectator sport in the United States.

[11] *See* STV Report, ¶¶ 267–69.

[12] *E.g.*, CBS Television Network purchased the rights to broadcast certain National Football League contests, not including the championship, the Pro Bowl and the Playoff Bowl, for $37.6 million for two years. *Broadcasting*, January 3, 1966, p. 124. The NBC Television Network has purchased television and radio rights to the World Series, All-Star Games and weekly "Game of the Week" telecasts for the 1969, 1970 and 1971 seasons for $50 million. The Washington Post, August 5, 1967, p. D1.

[13] For example, recent trends show that some commercial advertisers are willing to provide support to enable free television to show recent "blockbuster" films. The Ford Motor Company is paying $2.5 million to sponsor and promote the telecast of "Mutiny on the Bounty" on ABC in September 1967. New York Times, August 2, 1967, p. 59, col. 4.

[14] Under the stimulus of the All-Channel Receiver Act, commercial, UHF broadcasting has grown significantly. As of July 21, 1966, there were 122 commercial UHF stations on the air (90 licensed and 32 with CP's) and 96 stations with CP's, but not on the air. As of July 27, 1967, there were 126 commercial UHF stations on the air (101 licensed and 25 with CP's), 3 stations licensed, but not on the air, and *135 stations with CP's*, but not on the air. *Compare Broadcasting*, August 1, 1966, p. 92, *with Broadcasting*, July 31, 1967, p. 106. UHF penetration figures show a rise of over 10 percent in 12 months; 22.8 percent of all television sets in the United States were equipped for UHF in August, 1965, while 33.8 percent of all sets were so equipped in August, 1966. *See* U.S. Bureau of the Census, *Current Housing Reports—Housing Characteristics—Households With Television Sets in the United States*, August, 1966, p. 2 (February 1967). Moreover, based upon data compiled by the American Research Bureau in February and March, 1967, out of 62 metropolitan areas in the United States in which UHF is a "significantf actor," 19 have UHF penetration rates of 90 percent or more. *See* 7 *Television Digest* 29 (July 17, 1967).

stations must "counter-program" against the affiliated stations and established independents in their markets by offering programs that appeal to public needs and interests presently unserved by those stations. This means that the new UHF stations do and increasingly will present feature films and sports events not otherwise available over the existing stations in their markets. The total effect of increased UHF penetration in all television markets will be to offer the public more diverse, free program services.

It now appears likely that the role of noncommercial educational television broadcasting in terms of diversity of program content will be greatly strengthened. The Report of the Carnegie Commission on Educational Television placed great stress on free, noncommercial television ("public television") providing the American public with programming of high quality, catering to diverse interests and tastes and not tied to the economics of satisfying a mass audience.[15] Proposed legislation incorporating this concept of programming has been passed by the Senate.[16] Chairman Hyde predicted that passage of the legislation would add 20 noncommercial educational television broadcast stations a year.[17] Ultimately, almost all of the American people will be able to receive this new programming service free of charge.

It can be seen, therefore, that free television broadcasting, both commercial and noncommercial, will continue to expand its programming to meet developing needs and interests. This development offers a much better prospect for beneficial supplementary program services than STV. By diverting stations that would otherwise be providing such services to pay operations, Commission authorization of STV would hinder realization of a beneficial supplementary free television service. STV would not supplement this expanded programming, but would, if allowed to develop as outlined in the STV Report, begin merely by duplicating free television programming and ultimately would siphon off the cream of present programming.[18]

B. STV COULD GENERATE ENOUGH REVENUES TO HAVE AN ADVERSE IMPACT ON FREE TELEVISION

Some parties have concluded from the rather disappointing results of the Hartford experiment that STV would not find sufficient public acceptance and support to make it economically viable, and, that, it should not be authorized for this reason. The STV Report recognized that STV might have financial problems but recommended authorization of STV to give it a chance to succeed or fail. However, as we observed at the outset—the real issue before the Commission is not whether STV should be given a chance to fail but what would happen if it succeeds.

Even though there is no public need or demand for STV because it would not offer beneficial supplementary program services, STV could use its economic leverage to procure the free television programming that is most successful in attracting the mass audience and siphon off the cream of this programming. The end result would be that, while there is no significant present public interest in or demand for STV, once established it would create and generate its own demand by siphoning programs that were available free of charge and "snowball" until it destroys free television.

Would STV have the success it needs to give it the economic leverage to begin this "snowballing?" As MST has pointed out, STV does not have to be very successful to impair free television. Even at its inception, with relatively little

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[15] "Public television" itself is defined in terms of program content of wide ranging diversity. It "includes all that is of human interest and importance which is not at the moment appropriate or available for support by advertising, and which is not arranged for formal instruction." Carnegie Commission on Educational Television, *Public Television: A Program for Action*, Introductory Note (Bantam ed. 1967).

[16] S. 1160, passed May 16, 1967.

[17] *See* Testimony of Chairman Hyde before the House Committee on Interstate and Foreign Commerce, July 13, 1967.

[18] Recent developments in the field of low-cost video recording and playback systems, whereby television viewers will be able to purchase television programs and play them back on equipment connected to their home receivers, much like a long playing phonograph record, may perform the limited function contemplated by the STV Report without using broadcast frequencies. *See Broadcasting*, August 28, 1967, pp. 67–68. As one commentator has stated, with such equipment widely available, "the entertainment world presumably would have a means of leapfrogging over such complex systems as pay-as-you-see TV . . ., and directly tap the box-office potential of the individual viewing family . . ." Jack Gould, "Soon You'll Collect TV Reels, Like LP's," New York Times, September 3, 1967, p. D13.

penetration, it could gain sufficient revenue to start the "snowball" rolling. For example, a local free television station is tied to cost-per-thousand economics. Based upon information available to MST, the national average station rate for prime time is $3 per minute per 1000 homes. Therefore, an hour long program delivering 100,000 homes and containing 10 commercial minutes is, on the average, worth $3,000 to a commercial advertiser. On the other hand, any STV operation, even at its inception, enjoys "box office" economics, it "sells" programs to an audience and not time to an advertiser. Even if the STV station has only 5000 or 6000 subscribers tuning in a program that sells for $1, it could outbid free television for that program.

Once begun, the potential revenues of STV are almost unlimited. The STV Report has very conservatively estimated that STV penetration would be approximately 10 percent to 20 percent.[19] On the STV Report's figures, there is a potential for STV being authorized in markets constiuting 80 percent of the nation's television homes or 45,100,000 television homes.[20] At the 20 percent penetration rate, this would give nationwide STV a conservative total potential of approximately 9,000,000 subscribers, or 16 percent of the total television homes. Assuming only this level of penetration and the Report's low projected revenue of $105 a year for each subscribing home, this would give STV at least potential annual revenues of $945,000,000.[21] Of this, between $545 million and $630 million would be merely annual *program* revenue. ($65–$70 per year from each subscribing home.)

The STV proponents estimate that 35 percent of annual program revenue must go to pay program acquisition costs; no reason is given why this should not be 35 percent of all revenue. However, even using this conservative estimate, STV would have a potential of between $190,750,000 and $220,500,000 available each year with which to purchase programs. It must be pointed out that all of these figures are low. Once STV began to snowball, the penetration rate could rise to 50 percent or more. Moreover, the 35 percent estimate is largely meaningless. As the STV Report appreciates, if more than the 35 percent expenditure is required to purchase programming that would attract a large number of viewers as some parties believe, STV operators would pay more for the program and "could charge more for the better product."[22] In practice, once STV began to snowball, the amount available to STV operators for the acquisition of programming is limited only by what their subscribers would be willing to pay.

Throughout the STV Report, great reliance is placed on what is described as the "healthy competition" between STV and free television that would result to the benefit of all concerned. But, the benefits of this competition are illusory because free television would not be in a position to compete effectively with STV. In the first place the "box office" economics of STV, when matched with the cost-per-thousand economics of free television, would give STV enormous financial leverage with which to dominate program procurement both locally and nationally. In the second place, under the proposed rules, STV operations are not required to telecast the costly news, public affairs and other public service programs that are expected of free television and which free television provides in the public interest. Competition between free television and STV could have seriously deleterious effects if free television had to reduce its costly public service programming.

In its initial Comments, MST showed that the financial resources derived from STV operations would not be used to aid marginal, free broadcast stations, largely UHF, because STV would be competing with free television for station time (even on the same station), audience, programming and talent. Even if we were to accept the somewhat dubious proposition that the revenues derived from STV operations would be used to strengthen free operations on the station, there would be only one healthy UHF station in the market; the STV–UHF station. The stations that did not have the STV authorization would be severely injured by the one station with STV.

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[19] STV Report, ¶ 149, at 52.

[20] STV Report, n. 37, at 51. ARB estimates that there will be approximately 56,375,000 television homes by December 31, 1967. *Broadcasting*, August 7, 1967, p. 57.

[21] This is close to half of the $2.2 billion figure which represents the total 1966 broadcast revenues of all three national commercial television networks, *and* their 15 owned and operated stations *and* all 593 other commercial television stations in the United States. *See* FCC's TV Broadcast Financial Data—1966, August 25, 1967.

[22] STV Report, ¶ 73.

C. STV'S ADVERSE IMPACT ON FREE TELEVISION WOULD BE LARGELY FELT IN TERMS OF PREEMPTION OF TIME, AUDIENCE DIVERSION, AND SIPHONING OF PROGRAMMING AND PROGRAM TALENT

The STV Report correctly analyzes the potential adverse impact of STV upon free television largely in terms of preemption of time, audience diversion, and, especially, siphoning of programming and program talent. However, these aspects of impact are distinct only for purposes of analysis and evaluating the possible effects of STV. In reality, these effects overlap and, in some instances, are cumulative; this is what creates the "snowball" effect.

1. Preemption of time

The STV Report defines this possible adverse effect as the broadcasting of STV programs over a station that would otherwise have been broadcasting free television programs. The Hartford experiment, operating with less than 5000 subscribers and incuring a loss of over $3 million, preempted approximately 30 hours of free television time each week. The STV Report assumes that this amount of preemption by an isolated STV trial operation would be the "maximum number of hours which STV will show per week. . . ." [23] The Report concedes that even 30 hours per week could cause dangerous preemption of time in certain communities. The preemption is likely to occur in peak viewing hours [24] and, thus, is likely to have a disproportionately adverse effect, since, such hours comprise segments of the broadcast day in which free television generates its largest advertising revenues and the revenue necessary to sustain public affairs programs. Rules are proposed that are intended to minimize the adverse effects of preemption of time, but MST will show that the proposed rules would not do so.

2. Audience diversion

The Hartford experiment indicated that an average of 5.5 percent of the 5000 subscribers watched a single STV program. The Report generalizes this 5.5 percent "average rating" achieved by an isolated, fledgling STV station, into *the* "average" for an established, nationwide STV system and finds that even at a nationwide STV penetration of 50 percent of all television households, audience diversion would be minimal and dismisses the problem.[25] The Report acknowledges that some STV programs might produce *very* high subscriber viewing (*e.g.*, 82 percent in Hartford for a Clay-Liston championship boxing match) but equates this to "blockbuster" presentations on free television (*e.g.*, "The Bridge on the River Kwai"). It states that "such highly attractive presentations are unusual," and concludes that the answer to such great audience diversion "might be better competing programming. . . ." [26] But the Report is both inconsistent and unrealistic. In the first place, the STV Report justifies STV as a "beneficial supplement" for the very reason that it could offer programs of mass audience appeal both regularly and often. Certainly STV would make every effort to maximize its audience and revenues. Those revenues would be used to divert programs and hence further audience from free television. By skimming off the cream of free television programs (including movies like "The Bridge on the River Kwai"), STV would make usual the "unusual" occurrence of large audience diversion. The suggested answer of "better competing programming" on the part of free television is no answer if, through the feedback effects of program siphoning and audience diversion, the amounts of such programming available to free television are diminished.

Finally, the potential STV audience would probably be the same audience that has been the most devoted to free television programming. STV programming of 90 percent films and sports and 10 percent other light entertainment is not going to attract as STV subscribers those who have not been viewing free television. When STV siphons free television programming, the new subscribers would be those who comprised the audience for such programming on free television and are willing and able to pay for it when it moves to STV.

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[23] STV Report, ¶ 108. The STV Report does not recognize that the 54½ hours per week per channel (*i.e.*, total of 163½ per week) presented on the Etobicoke pay television system might be more typical, though it does concede that "more than 30 hours of STV programming might be available to preempt free TV time. . . ." STV Report, ¶ 1110.

[24] *Id.* at ¶ 108.

[25] *See* STV Report, ¶ 107.

[26] *Ibid.*

At the same time, families that could *not* afford to subscribe to STV, *would be deprived of programs they may now view free of charge.*[27] In this connection, it must be noted that Zenith-Teco submitted a table showing the breakdown of Hartford STV subscribers by family income level relative to the proportion of income for all families in the United States to support the argument that STV is not solely for the wealthy.[28] The STV Report accepts this argument and even suggests that to the extent low income level families did not subscribe, they could not afford television sets, let alone STV.[29] However, it is unrealistic to take the results of the Hartford experiment, with its 4,633 subscribers and its limited amount of programs, and generalize to a STV operation-situation in which there is an established, nationwide operation.

But even accepting the validity of this generalization, the Zenith-Teco statistics indicate that approximately 30 percent of all families in the United States could not afford to subscribe to STV and the STV Report so concedes.[30] The suggestion that such low income families could not even afford television sets is incorrect, when applied to the Hartford situation. The statistics for Hartford County show that 96 percent of total households are television households.[31] Moreover, the percentage of low income families who did not subscribe in Hartford is probably greater than 30 percent, since Zenith-Teco did not break down the $4,000–$6,999 income level category. It may be that most of the 40.8 percent of the Hartford subscribing families fall into the upper reaches of this category. It must also be noted that, while 30 percent or more of Hartford low income families did not subscribe to STV, STV at Hartford was not as expensive as it could be nationwide, since, to attract subscribers, program and decoder rental discounts were given.[32] Moreover, an average weekly program expenditure of approximately $1.25 appears to be much lower than subscribing families would have to spend to view a substantial pattern of programming provided by a regular STV operation, rather than the experimental Hartford STV operation.

3. Siphoning of free television programming and program talent

The STV Report defines the program-siphoning effect as the diversion of programs from free television to STV and concludes that some program siphoning, which would be contrary to the public interest, might occur. But the problem is much more severe than the STV Report indicates. It is well recognized that one of television broadcasting's greatest challenges is to secure an adequate amount of program material worth broadcasting.[33] Therefore, free television is highly vulnerable to selective program and talent siphoning by STV. Program siphoning by STV would be inevitable when one takes into account that STV programming would be largely duplicative of free television programming. STV and free television would be competing for the same type of programming, with STV having great leverage because it could use its large financial resources for "selective" program siphoning and because it would need only a fraction of the audience needed to support free television programming to make it financially viable.

Because of the very real danger of selective program siphoning by STV, the proposed rules are designed to minimize the adverse effects of that danger upon free television. MST will analyze some of these proposed rules below.

It is somewhat simplistics to view the siphoning problem solely in terms of program siphoning.

The danger is also one of STV's siphoning performers, producers, directors, writers and other program talent from free television. The primary danger of talent siphoning is not that of restrictive contracts, which the STV Committee has said it will "view with a jaundiced eye." [34] The more subtle, but real, danger is that STV would have the financial resources to tie a performer to STV without resorting to restrictive agreements. If STV can contract with such stars as Ed

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[27] The STV Report states that families in the low income groups, who can afford television sets, but not STV, "will be able to continue to see ample amounts of free programming, so they will not be deprived of anything. . . ." (STV Report, ¶ 75.) However, this assumes that STV would not have the adverse impact on free television, in terms of siphoning free television programs, that MST submits it would.

[28] *See* STV Report, App. B, p. 2.

[29] STV Report, ¶ 74, at 25.

[30] *Id.* at 25.

[31] See 1967 Television Factbook, Services Volume, p. 56–a.

[32] See STV Report, App. B, p. 3.

[33] *See, e.g.,* Speech of Commissioner Lee Loevinger before Geneva World Conference on World Peace Through Law, p. 19 (July 11, 1967).

[34] STV Report, ¶ 277.

Sullivan, the Smothers Brothers, Carol Burnett, Johnny Carson, or Dean Martin for a season's variety series, the stars would not have time for regular free television variety shows and appearances, which are presently available regardless of whether the viewer is in the largest markets or can afford to pay a fee. No Commission rule could prevent against the danger of program talent siphoning by STV.

II. The Commission Should Await an Explicit Congressional Mandate Supporting Authorization of STV

On the basis of the public interest issues discussed above, MST urges that the Commission refuse to authorize a nationwide system of STV. However, at the very least, the Commission should take no action with respect to such authorization without an explicit, affirmative Congressional mandate.[35]

When the Congress determined that an 82-channel television system is essential to the public interest and, accordingly, passed the All-Channel Receiver Act, its determination assumed use of these channels for programming available to all of the American people. Use of some or all of these channels during some or all of the time for STV would cut into the effective number of channels found by the Congress to be required for free television. Moreover, the radical change in the structure of television broadcasting that would be caused by authorization of nationwide STV should not be undertaken without explicit Congressional approval. It is not sufficient to say that it is proper for the Commission to go ahead because the Congress did not act during the lengthy period that has elapsed while his proceeding has been in progress. The type of regulation proposed by the STV Committee raises issues of a kind that are more properly resolved by the Congress—an ambiguous Congressional silence is not sufficient justification for the Commission to proceed.

III. Specific Regulatory Issues Raised by the Commission

When MST first filed Comments in this proceeding, it stated that, since it is opposed to STV under any conditions, it took no substantive postion on most of the issues and proposed rules specified in the Further Notice of Proposed Rule Making. This is still MST's position.

The regulatory issues themselves, the STV Report conclusions on these issues, and the rules it proposes all demonstrate the fundamental incompatibility of STV with free television. Not even the complex regulation of STV proposed in the STV Report would prevent the adverse impact of STV. Over and above the question of whether the proposed rules offer the intended protection of the public's interest in a sound free television service, it is clear that undue government intervention into broadcasting would reach intolerable levels if nationwide STV is authorized by the Commission.

There follows a discussion of the STV Report's conclusions with respect to some of the fifteen specific regulatory issues posed by the Commission in its Further Notice of Proposed Rule Making.

A. PROTECTION AGAINST PREEMPTION OF FREE TELEVISION TIME AND DIVERSION OF FREE TELEVISION'S AUDIENCE

1. Five grade A signals—STV Report, paragraphs 144–52 and proposed section 73.642(a)

Proposed Section 73.642(a) provides that an STV authorization would be issued only for a station "the principal community" [36] of which is located entirely within the Grade A contours of five or more commercial television stations. The Report states that the proposed rule is primarily intended to minimize the

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[35] The question of whether the Commission should authorize STV without explicit Congressional guidance is not the same as the question of whether the Commission should regulate CATV without detailed Congressional guidance. Like unlimited CATV, STV poses a substantial threat to free television system, now serving the American public. But, whereas Commission inaction would have allowed unregulated CATV to disrupt established national policy, such disruption would be caused in the case of STV only by affirmative act of the Commission. Thus, the same consideration—protection of existing national television policy—which justified prompt Commission action with respect to CATV—dictates at least awaiting Congressional judgment on STV.

[36] While the proposed rules use the term "community," the STV Report constantly speaks of five station markets. *See, e.g.*, STV Report, n. 36, at 50; and ¶¶ 148, 162, 164, 172, 199 and 230. The precise intention is not clear.

danger of preemption of free television time by STV, and also to reduce possible audience diversion. The Committee believes that:

"The rule protects against such loss [time preemption] 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 preempted. To the extent that STV operations occur on new stations, there will be no preempting at all." [37]

These assumptions are incorrect; therefore the proposed rule would not accomplish its intended purpose.

The proposed rule does not restrict STV to only the largest communities. Given the configuration of Grade A contour overlaps in many areas, there could be many smaller communities in which STV could be authorized contrary to the intent of the STV Report. Taking the southeast coast of Florida as an example of such an overlap area, it can be seen that Channel 51 in Fort Lauderdale could be authorized as an STV station. Its principal community is served by the Grade A signals of five operating commercial television stations.[38] The *only* channel allocated to Fort Lauderdale to provide local service would thus be preempted for STV.

As a result of overlapping Grade A contours between different communities and television markets, STV would not be confined within the seeming limitations of the proposed rules, and certainly would not be restricted to the communities which have been selected for STV service. In addition, the mandatory service requirement within the Grade A contour of the free television service of the STV station,[39] when combined with the Grade A overlap situation, would permit STV penetration into smaller communities. In sum, what appears to be a restriction of STV to the largest communities and television markets, is no restriction at all.[40]

To the extent that the Commission could devise a rule that would restrict STV authorizations to large cities and guarantee that people in those cities would receive at least three network services and one independent service, the rule would still not prevent preemption of free television time in those cities, where more people would be deprived of the time and more audience would be diverted to STV. It would also not protect the public from being deprived of the free service of a second independent or a fourth specialized, national or regional network affiliate. Moreover, if free television is impaired in the larger cities, the effect of program siphoning would be felt in the smaller communities whose residents could not even pay to see the siphoned programs on STV.

2. Minimum free broadcast hours—STV Report, Paragraphs 162–65 and Proposed Section 73.643(c)

The limitation intended by proposed Section 73.643(c) is also illusory. The STV Report asserts that requiring STV stations to broadcast at least the minimum number of free television hours required by Section 73.651 of the Commission's Rules, would assure adequate free programming for the public. At most, after three years of operation, Section 73.651 would require the STV authorized station to broadcast only 28 hours of free television a week! The STV Report rejected limiting STV programming to certain segments of the broadcast day; [41] therefore, there is nothing to prevent the STV station from scheduling its minimum free television hours in off-viewing hours and preempting prime time for wholly-STV operations.[42]

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[37] STV Report, ¶ 148.

[38] Three Miami stations, WCKT (Channel 7, NBC), WLBW–TV (Channel 10, ABC) and WTVJ (Channel 4, CBS), and two West Palm Beach stations, WPTV (Channel 5, NBC) and WEAT–TV (Channel 12, ABC). Data are compiled from the 1967 Television Factbook, Stations Volume, pp. 143–b—145–b, 149–b—150–b.

[39] STV Report, ¶ 230.

[40] The seepage of STV beyond the seeming limitations proposed in the STV Report may be further accentuated when one takes into account the Report's conclusion that STV stations may make the arrangements with CATV systems operating in the Grade B contour of the station's free television service to carry the scrambled STV signal of the station, with the prior approval of the Commission. STV Report, ¶ 309. The most likely effect of such arrangements would be that communities not eligible for direct authorization of STV would receive it indirectly by CATV. There would be a corresponding diversion of audience from free television in those communities.

[41] STV Report, ¶ 164, at 56.

[42] The Report recognizes that this would be a serious loss, since: "the effect [preemption of time] would be even more marked, for although the loss in terms of hours is the same regardless of the time of day when the preempting occurs, the loss in prime time would generally speaking be a loss of more popular programs." STV Report, ¶ 147.

3. One STV station in a community—STV Report, Paragraph 172 and Proposed 73.642(a)

Proposed Section 73.642(a) states that, "only one such authorization will be granted in any community." The rationale of the STV Report is, *"if more than one station should broadcast STV programs in a single market more time could be preempted than we consider to be in the public interest at this juncture."* [43] However, there are many communities (and even markets) in which STV programs from more than one station will be available.

This restriction breaks down because of the interaction of the overlapping Grade A contour situation with the Grade A mandatory service requirement described above. As an example of the breakdown of this apparent restriction, it is possible that the Springfield-Holyoke, Massachusetts, television market would be required to receive the STV programs of three STV stations. Under the proposed "five Grade A" rule, STV stations could be authorized in Worcester, Massachusetts,[44] and Springfield-Holyoke,[45] and WHCT in Hartford, Connecticut, could receive a permanent STV authorization. Therefore, there could be service *required* from *three* STV stations in the 78th television market.

Under the STV Report's own rationale, the preemption of free television time caused in multi-STV signal communities would not be in the public interest.

To the extent that a rule could be devised, or the present proposed rule administered, to limit STV authorizations to only one per community or market, problems caused by the creation of STV monopolies in those communities would arise.[46] Moreover, an entity representing a combination of these monopolies would be in a strong position to siphon free television time and divert free television audiences.[47] The strong "group monopoly" leverage would pose a serious threat to the nationwide free television system, and not merely jeopardize the service provided the public by free television stations in the communities in which STV is authorized. It is not merely a question of what individual STV stations can do to free television, but what the combined efforts of all STV stations could do to free television with selected siphoning of programming and even at selected prime time hours.

B. GUARANTEE OF LICENSEE RESPONSIBILITY—STV REPORT, PARAGRAPHS 195–208 AND PROPOSED SECTION 73.642(e)(1)–(4)

In Issue (7) of the Further Proposed Notice of Rule Making, the Commission posed two alternative means of assuring licensee responsibility for the STV operations carried on over his station, but the STV Committee chose neither in its proposed rules.[48]

The proposed rules basically apply the philosophy underlying the chain broadcasting rules to STV operations and prohibits the STV stations from entering into agreements that hinder their free choice in procuring or scheduling programs and prohibits them from optioning station time. However, the proposed rules would allow for restrictive "networking" arrangements and option time agreements, in violation of this basic philosophy, upon Commission approval. The STV Report states that this is the "middle course" between regulation and no regulation.[49] However, it is either no regulation at all or, if it is a meaningful restriction, it would involve the Commission in the day to day program acquisition efforts of STV stations and would result in an intolerable substitution of Commission responsiblity for the licensee responsbility, which is essential for a mature and independent medium of communications.

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[43] STV Report, ¶ 172 (emphasis added).

[44] Worcester is covered by the Grade A's of the three Boston commercial VHF stations and by the Grade A of the Worcester station. 1967 Television Factbook, Stations Volume, pp. 329–b–332–b, 339–b.

[45] Springfield and Holyoke are covered by the Grade A's of at last two Hartford, Connecticut, commercial stations (WTIC–TV and WHNB–TV) and the Grade A's of two Springfield-Holyoke stations (WHYN–TV and WWLP). 1967 Television Factbook Stations Volume, pp. 123–b–124–b, 337–b–338–b.

[46] The divisiveness in television broadcasting that would be caused by such rigid segregation is inconsistent with the premise of this proceeding, which the Commission has stated as being: "that subscription television on a nation-wide scale can be effectively integrated into a total TV system, with advantages to the viewing audience. . . ." Further Notice of Proposed Rule Making and Notice of Inquiry, FCC 62–268, ¶ 16 (March 24, 1966).

[47] The proposed rules would in no way prevent the establishment of such an entity.

[48] To the extent that the proposed rules allow for the separation of STV franchisees from station licensees, they are inconsistent with the Commission's policy of strengthening licensee programming responsibility.

[49] STV Report, ¶ 204.

In addition, one expected effect of allowing equipment manufacturers and STV franchisees to procure programs for STV stations would be to create a "broader purchasing base" for STV programs, which might "be helpful in obtaining more and better mass-appeal programs, thereby aiding STV to achieve greater market penetration. . . ." [50] This would lead inevitably to program siphoning and result in audience diversion.

C. REASONABLE CHARGES AND NONDISCRIMINATORY SERVICES BY STV OPERATORS—STV REPORT, PARAGRAPHS 219–22, 226–30, 234–35, 238 AND PROPOSED SECTION 73.642(f)(1)–(3)

The Further Notice of Proposed Rule Making reflected the deep concern of the Commission that STV operations would lead to the abuses of rate gouging, and discriminatory and unfair treatment of subscribers. Because of these potential abuses, the Commission considered a public utility type of regulation. However, the STV Report declined to propose rules regulating STV rates, leaving the protection of subscribers to the market place. The STV operator in each community would have the advantages derived from monopoly status, but would not be subject to regulation to assure that reasonable rates would be charged to subscribers. On the other hand, the extent of government involvement in television broadcasting, if the Commission adopted regulations such as those suggested in its 1966 Further Notice of Proposed Rule Making, would be enormous and would constitute an unacceptable degree of governmental intervention in broadcasting, which would be contrary to the public's interest in a strongly independent television service. As a matter of principle, television broadcasting, like the other media of communication and information, should be left as untrammeled of government regulation as possible.

The STV Report did, however, incorporate some of the principles of public utility regulation, when it proposed rules to guarantee nondiscriminatory service to the public by STV stations. Although this proposal is obviously a compromise, it is a halfway measure which does not solve the Commission's basic delimma of having to decide whether to take no action at all to deal with the range of possible STV abuses that concerned it, leaving the public unprotected, or to develop, adopt and administer an extensive and far-reaching type of public utility regulation. This Hobson's choice, which still faces the Commission, is but another compelling reason for the Commission not authorizing STV at all.

D. PROTECTION AGAINST SIPHONING OF FREE TELEVISION PROGRAMS BY STV

It is MST's position that, if STV is authorized, it should not be allowed to present the same kind of programming that free television presents, otherwise there would be no limitation on the destructive impact of program siphoning from free television. However, MST recognizes that it would be most difficult to regulate the programming of STV, in order to prevent siphoning, without raising serious questions of law and policy. At the very least, the rules proposed in the STV Report, and the conclusions found in the "legislative history" of those rules, would involve the Commission in detailed regulation of programming transmitted over broadcast facilities. The Commission would be making decisions which it has consistently avoided in order to promote licensee responsibility and independent judgment.[51] This further Hobson's choice between no STV program regulation, which would allow STV to have a severe adverse impact on free television, and complex STV program regulation, which would involve governmental interference with licensee programming responsibility, again leads MST to oppose *any* authorization of STV.

Moreover, the rules proposed in the STV Report to prevent program siphoning by restrictive STV to certain types of programming are unrealistic and impractical and essentially do *not* prevent siphoning of free television programming or program talent.

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[50] STV Report, ¶ 199.

[51] *See* Report and Statement of Policy Re: Commission *En Banc* Program Inquiry (FCC 60–970), 20 R.R. 1902 (1960). For example, under the proposed rules the Commission would become involved in scheduling programs for broadcast! An STV operator would be required to get prior Commission approval before he can show more than one film over 10 years old per week per month. *See* STV Report, n. 46, at 87.

1. Feature films and entertainment programs—STV Report, Paragraphs 246–52 and Proposed Section 73.643(b)(1) and (3)

As MST has shown above, STV programming would be substantially duplicative of free television programming. This becomes all the more apparent when one considers the proposed rule restricting STV to the broadcast of feature films within two years of the date on which they have been given general release to any theater in the United States. Feature films would be the major type of program on STV; they have long been a major program category on free television. In the 1967–68 television season, the three networks alone will be presenting feature films six nights a week, in prime time, or 12 hours of prime time each week.[52] Contrary to what the STV Report indicates, a "recency" rule is no protection against such films being siphoned from free television. Of 130 films scheduled by the networks to be shown in prime time during the 1967–68 season, it appears that approximately 20 percent would be eligible for presentation on STV.[53] As MST has shown above, given the potential revenues of STV, STV could consistently outbid free television in the competition for recent films.

Moreover, the proposed rules allow older films (more than 10 years from the date of general release), "which might or might not be available to free TV," [54] to be presented on STV. Approximately 12 percent of the public listing of 130 feature films to be shown by the three networks during the 1967–68 season appear to fall within this category.[55] Therefore, comparison of the proposed rules, which are intended to prevent siphoning of films from free television, with the films to be presented by the three networks in one season, shows that approximately *one-third* of those films could be siphoned from free television by STV.[56] Films in the category of older films eligible for STV comprise a significant part of the film acquisitions of local stations and are the mainstay of many independent UHF stations, which are most vulnerable to the adverse impact caused by STV.[57]

Moreover, the STV Report's basic conclusion about the ability of free television to obtain recent films, "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," is doubtful.[58] For example, CBS "plans to televise four or five feature-length films it will produce for TV and *subsequent* theatrical release." [59]

The only type of free television programming for which the proposed rule offers complete protection is television series with interconnected plots or substantially the same cast of principal characters. However, recent data show that this type of program is becoming less and less important, in prime time, to free television.[60] One cause of the decline is that the series cannot compete successfully for audience with feature films and specials.[61] The former will comprise the great majority of STV programming and the latter will be open to STV.

The entertainment programs that *are* becoming more important to free television would *not* be protected from STV siphoning by the proposed rules! The STV Report states that "it is conceivable that this [the proposed rule] still leaves some types of programs open to siphoning. . . ." [62] A review of the 1967–68 free television season proves this to be an understatement. The three networks

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[52] *Variety*, July 26, 1967, p. 27, col. 2.

[53] *Variety*, July 26, 1967, p. 39, cols. 4–5. Since the networks will broadcast some 180 films during the regular season, this listing is incomplete by 50 films. These 50 films may well be the more recent ones, which, for competitive reasons, the networks are not willing to publicize so far in advance of their presentation.

[54] STV Report, ¶ 252.

[55] *See Variety*, July 26, 1967, p. 39, cols. 4–5.

[56] Moreover, a review of every feature film that has been televised on any network from September 1961 through December 1966 shows that, using January 1, 1967 as a base date, approximately 41 percent of those films fall into categories that are not protected from siphoning by STV. *See Television*, September 1967, pp. 76–86.

[57] There are indications that many of the older films, even pre-1948 films, are still very popular with the viewing public. *See Broadcasting*, September 4, 1967, p. 5. The ratings of many of these films further show that, contrary to the conclusions of the STV Report "recency" is not the most attractive characteristic of feature films.

[58] STV Report, ¶ 51.

[59] New York Times, August 2, 1967, p. 59, col. 4 (emphasis added). The comment has been made that the viewers do not like films produced for television and prefer films made for theater release. STV Report, n. 23, at 18. However, of the seven films telecast during the 1966–67 season which received the highest audience rating, three were produced especially for free television. *See Variety*, July 26, 1967, p. 43.

[60] *See Variety*, July 26, 1967, p. 27, col. 2; New York Times, August 2, 1967, p. 59, cols. 1–4; The Washington Post, August 4, 1967, p. D11, cols. 1–2.

[61] *Ibid.*

[62] STV Report, ¶ 114.

are planning more than 150 dramatic and entertainment specials.[63] There will be at least five or six specials every week during the 1967–68 regular season.[64] In addition to "special" programs, which could be siphoned by STV, there are many regular free television programs that do not fall within the protected series category. Such popular variety shows as "The Ed Sullivan Show," "Hollywood Palace," "The Dean Martin Show," etc.; dramatic shows appearing on "The Bob Hope Theatre," ABC's "Stage 67," NBC's "Experiment in Television," etc.; and various musical programs all may be siphoned by STV.[65] This is not the kind of problem that can be brushed aside by praising competition and leaving it to the market place.[66] As MST has shown, the "box-office" economics of STV would consistently allow it to outcompete free television for these programs, and, more important, for the talent that makes such programs possible. Programs in these nonprotected categories of "specials" and variety shows are often the only types of programs with which networks can counter the feature films appearing on rival networks.[67] Therefore, the proposed rules would offer no protection to the programs which may be free television's only defense against the feature films presented on STV.

2. *Sports events—STV report, paragraphs 256–70 and proposed section 73.643(b)(2)*

The proposed rule on feature films available for presentation on STV would not protect against siphoning, but it at least has the advantage of being relatively clear. The proposed rule on sports programs does not even have this advantage.[68] If these highly complex proposed rules are adopted, the Commission would find itself involved in endless disputes as to whether certain sports events are protected from siphoning by STV and would still not accomplish the intended purpose of protecting against siphoning of sports events which the public now can, or in the near future would, see free of charge.

In essence, the proposed rule provides that, "sports events shall not be broadcast [on STV] which have been televised live on a nonsubscription, regular basis in the community during the two years preceding their subscription broadcast. . . ."[69]

Under this rule, *any sports events could be siphoned from free television by STV.* All that a STV entrepreneur would have to do would be to arrange to black out a sports event in a certain community. The next year, and for every year thereafter, the event could be presented by STV in that community. Such situations would be likely to develop, since the STV operator would have the financial resources with which to persuade those holding the television rights to sports events to withhold the event from free television for one year to cash in on the STV revenues. Moreover, this siphoning would not have to be undertaken by STV on a large scale to be successful. Selective siphoning of a few of the most popular sports events could be undertaken community by community until the event is withdrawn, from a large number of people across the nation who could not afford STV or who are not served by STV.[70] In some communities, popular, specific sports events have already been blacked out in the communities in which they are played, and STV would only have to outbid free television for the right to broadcast that event in that community next season when it would not be blacked out! For example, under the proposed rules, the NFL–AFL "Super Bowl" could be carried by an STV station in Los Angeles in January 1968 or January 1969, since Los Angeles was blacked out for the "Super Bowl" in January of 1967.

The whole category of taped sports programs is not protected from STV siphoning. Sports events originating in foreign countries, such as the European Grand Prix automobile races, that may be taped for rebroadcast in the United States because of the time differential, would thus be available for STV.

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[63] 150 additional specials will deal with news and public affairs. New York Times, August 2, 1967, p. 59, col. 1.

[64] *Ibid.*

[65] It must be noted that many of the fine dramatic and entertainment programs appearing on noncommercial television would also not be protected from siphoning by STV.

[66] *See* STV Report, ¶ 276.

[67] New York Times, August 2, 1967, p. 59, cols. 3–4.

[68] The STV Report seems to concede this. *See* STV Report, ¶ 276.

[69] STV Report, App. D, Section 73.643(b)(2).

[70] The fact that the Commission might expect that the hue and cry that would arise if popular specific sports events were siphoned from free television would move the Congress to prevent this from happening is no reason for the Commission to abdicate its responsibility to protect the public interest.

In addition, the whole category of sports events that are *not* now regularly broadcast on free television could be shown for a fee on STV. If STV were authorized five years ago, professional golf would probably be on STV and millions of viewers would not be able to see it free of charge. Under the proposed rules and absent contractual restrictions, professional soccer could be siphoned to STV next season, since last season was its first on STV. The point is that free television, in its sports and other programming, has shown great flexibility in seeking out new attractions to present to the public. The proposed rules as to sports events would tend to cast free television in a rigid mold of certain types of sports programming and deprive viewers, who would not be served by STV, of viewing different types of sports attractions.

Sports that are not presently regularly shown on free television could also provide a program source for marginal UHF stations and could lead to the establishment of specialized sports networks with those stations as the affiliates. A specialized network, perhaps one that could offer a baseball game every week night during the baseball season, could develop if there were an "extra" UHF station in the major markets and an independent UHF station in the other markets.[71] If the sports events that such a network could offer are already committed to STV, no such supplementary free television services could develop.

Aside from the substantive provisions, the lack of clarity in the proposed rules raise other siphoning problems. For example, it is not clear how many games or matches of a specific event must be broadcast by free television to constitute a "substantial number," so as to protect that sports event from STV siphoning.

There is also ambiguity with respect to the effect of the proposed rules as to limitations on STV presenting categories of nonspecific sports events. It appears that the STV Report proposed limitations on STV's ability to present entire categories of nonspecific sports events. In this way the proposed rules would distinguish between specific events, as to which there would be limitations for each event, and nonspecific events, as to which there would be limitations for each category of such events. If "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*."[72] Assuming that the converse is true, if a substantial number of contests in a category *were* broadcast on free television in the community, STV would not be permitted to broadcast *any* of the contests in that category over and above those broadcast on free television. However, the examples set out in Paragraph 267 of the STV Report would seem to indicate that free television would have to broadcast *all* of the nonspecific events in a category in order to preclude STV from siphoning the games that had been broadcast on free television. In one example used, "some, but not all" home baseball games of the Washington Senators were regularly shown on free television. The STV Report indicated that STV could present the balance of the games in that category "above and beyond" the average number of games broadcast on free television for the preceding two years. This appears to be inconsistent, since "some, but not all" may be a "substantial number."

If the latter interpretation of the proposed rules is correct, there would appear to be no distinction between the STV limitations upon presenting specific sports events and nonspecific sports events. If such were the case, there would be no limitations on program spihoning by STV. A STV promoter would be able to use his economic leverage to purchase the balance of the games in a category and present them without delay. For example, a baseball team may play 80 home games and an average of ten to twenty each year may be regularly broadcast on free television in the home community. STV could purchse the television rights to the other 60 to 70 games the very next season, while the games previously broadcast by free television could be withdrawn by the ball club during that season so that they, too, could be made available to STV the following year, thereby immediately depriving the public of *any* home games broadcast on free television.

E. APPLICATION OF COMMISSION'S BROADCASTING RULES TO STV—STV REPORT, PARAGRAPH 286 AND PROPOSED SECTION 73.643 (d)

If STV is authorized, MST sees no reason why the provisions of the Communications Act and of the Commission's Rules which govern free television

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[71] Of course, if the "extra" UHF station is engaging in STV operations, it would most likely be lost to a free television specialized network.

[72] STV Report, ¶ 266, at 93 (emphasis added).

should not also govern STV. For example, these areas include the three-year license period (Section 307(d)), political broadcasts (Section 315),[73] rebroadcasts (Section 325), exemption from the prohibition of unauthorized publication of communications of radio broadcasts (Section 605) and the fairness doctrine (as to the legality of which MST takes no position).

F. OTHER SPECIFIC REGULATORY ISSUES

1. Commercial announcements—STV Report, Paragraph 275 and Proposed Section 73.643(a)

The STV Report recommended that commercial announcements of any kind be prohibited during STV programming hours. MST supports this recommendation but, as MST pointed out in its initial Comments, advertising on STV would be likely only after free television had lost the battle for broadcast time, audiences and programming. At that time, retaining the prohibition against commercial announcements on STV might not be in the public interest; the demand for STV to fill the advertising void left by the impairment of free television might be irresistible.[74] Instead of waiting until it is too late, the Commission should face the fact that STV threatens ultimately to impair free television to the point of destroying its essential advertising role in the economy of the nation.

2. CATV and STV—STV Report, paragraphs 306–12

The STV Report made a threefold distinction concerning the relationship of CATV and STV: (1) STV systems in which the programs travel entirely by cable from the studio to the sets of subscribers, (2) CATV systems which, in addition to their traditional function of receiving and retransmitting free television signals, also originate STV programs that are distributed by cable to subscribers, and (3) CATV systems which, in addition to their traditional functions, transmit over-the-air STV programs which they have picked up off the air or by microwave.

MST takes no position on the first category, which is purely closed-circuit STV.

Although there was no recommendation in the STV Report concerning Commission jurisdiction over the second category, it is incorrect to state that there are presently no STV operations in the Unied States in this category merely because the program originations of some CATV systems are made available to subscribers at no additional charge. The program origination by some CATV systems at present,[75] and the much greater program origination that CATV systems plan for the future, *is* wired STV and it is totally irrelevant whether payment for those programs is made by the program, by the day or by the month. Nothing compels STV operators to charge by the program. Indeed, STV promoters have indicated that there might be STV stations that sell "magazines" of programs.[76] As MST has stated in the past, program origination over CATV systems is a form of pay television and MST is strongly opposed to such operations. The Commission recognized in its Second Report and Order on CATV, that CATV should not be allowed to use free television programs as the financial base for STV operations, which would impair free television. If wired STV is to be authorized, it must succeed or fail upon its own merits and not use revenues derived from exploitation of free television programs as a stepping stone.

With regard to the third category of combined CATV–STV operations, the rules proposed in the STV Report would allow STV stations to make arrangements, upon prior Commission approval, with CATV systems operating in the station's Grade B contour to carry the STV programs of the station. As discussed above, such arrangements would have been the effect of broadening the adverse impact of STV on free television beyond the apparent limits proposed in the STV Report.

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[73] However, a licensee's Section 315 and fairness doctrine responsibilities for pay programming should apply independently of its responsibilities for free programming, so that, for example, a station should not be able to balance a candidate appearance on STV against a candidate appearance on free television.

[74] The fact that STV proponents have not proposed commercials is irrelevant. CATV proponents disclaimed any such intent, but some are now selling commercial time. *See Broadcasting*, July 4, 1967, p. 30; Hornberger, "Your Friendly Neighborhood Video Channel," 23 *Television* 45, 71, 74 (December 1966).

[75] For example, International Artists, Inc. is selling films for program origination on CATV. Agreements have been signed with 27 CATV systems, with 125,000 subscribers. *CATV Magazine*, August 7, 1967, p. 10.

[76] *Broadcasting*, July 24, 1967, p. 42.

Wherefore, the Commission should not authorize over-the-air subscription television on any basis, unless the Congress explicitly directs such authorization.

Respectfully submitted.

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SEPTEMBER 15, 1967.

Mr. LINDOW. If you review the history of the pay television proceeding at the FCC and the results of the Hartford pay television experiment, it is clear that a nationwide system pay TV would represent a drastic, fundamental change in the system of American broadcasting as we know it. The most apparent change is that viewers would have to pay, whether by the program, day, week, or month, for the opportunity to see television programs they now see free of charge.

The imposition of program charges would mean that pay TV would be available only to those who could afford to pay such charges and who live in communities where the economics justify the establishment of pay TV. The FCC has concluded that such pay TV "narrowcasting" constitutes "broadcasting" under the Communications Act and is, therefore, within the Commission's jurisdiction. But this assertion of jurisdiction is of doubtful validity.

In any event, by asserting jurisdiction over pay TV upon such grounds, the Commission is faced with a very serious dilemma. On the one hand, it is trapped by its conclusion that pay TV is "broadcasting" and thus its rates and related practices cannot be regulated. On the other hand, the Commission is aware that authorizing pay TV on a permanent basis without the type of control imposed upon public utilities would create dangers of rate gouging and other serious abuses to pay TV customers. And the dilemma becomes even greater because the imposition of such controls would result in an intolerable degree of governmental involvement in television.

Furthermore, under the rules proposed for pay TV authorizations, pay TV would be regulated primarily in terms of its programing content, even to the extent of regulating the scheduling of certain types of programs. This would involve the Government in an area in which, as a matter of law and policy, it clearly should not be.

On the other hand, without adequate regulation of program content, pay TV poses the danger of severe adverse impact on the service the public receives from our present system of free television broadcasting. Many segments of the American public would be deprived of the free television broadcast service that they now receive free of charge. This is another regulatory dilemma which merely points up the drastic change in our television system that authorization of pay TV would involve.

Given these radical changes in television broadcasting that pay TV would involve, MST believes that, even if it has jurisdiction to authorize pay TV, the Commission should not act without an explicit and affirmative mandate from the Congress. When it enacted the All-Channel Receiver Act, the Congress determined that an 82-channel television system is essential to the public interest.

This was a determination that these channels would be used for all the American people, not just those able to pay. Use of some or all of these channels during some or all of the time for pay TV would

reduce the effective number of channels found by the Congress to be required for free television. The FCC should not proceed with a course of action that represents a fundamental modification of the structure of television broadcasting without explicit congressional approval.

The report of the FCC's Pay TV Committee justified proceeding without such approval on the ground that the Congress was allowed a sufficient amount of time in which to make its views on pay TV known to the Commission. Even if the Commission were faced with an ambiguous congressional silence, this would not be sufficient justification for it to proceed on issues of a kind that are more properly resolved by the Congress.

However, the congressional reaction to pay television since the FCC first began consideration of it in 1955 can hardly be characterized as "silence." The resolutions of this committee and these hearings are indications of the vital interest that the Congress has taken in pay television.

Of course, the question of whether the FCC should authorize pay TV without explicit congressional guidance is not the same as the question of whether the Commission should regulate CATV without such guidance. Like unlimited CATV, pay TV poses a substantial threat to existing free television service. In the CATV situation, however, Commission inaction would have allowed unregulated CATV to disrupt established national policy. With respect to pay television, such disruption would result from the affirmative action of the Commission.

Thus, the same consideration which justified prompt Commission action with respect to CATV should require deference to the judgment of Congress with respect to pay TV. It is significant to note that, in its second report and order on CATV, as to the CATV operator who originates programing, the Commission specifically refused to hold that this type of pay television is in the public interest and stated that it would seek guidance from the Congress.

One obvious question that must be answered is what advantages of pay TV could be expected to outweigh its adverse effects on our present system of free television broadcasting. When pay TV was first proposed, and indeed before the committee earlier this week at least one of its supporters promised that it would serve the unique and diverse programing tastes and interests of minority audiences, audiences which the pay TV proponents said were unserved by free television. This was to be a "beneficial supplement" to free television.

However, to the extent that the Hartford pay television experiment can be relied upon for anything, it has completely ended this myth. The pay TV report repeatedly recognizes that pay TV must provide the sames types of programing as free television if it is to be at all acceptable to the public and, therefore, a financial success.

Under the proposed rules, feature films and sporting events, which are provided in quantity by free television, may comprise 90 percent of pay TV programing. Furthermore, the Hartford experiment shows that the balance of pay TV programing would not be made up of the so-called cultural programs that were promised, but would be made up of drama—not necessarily Shakespearean drama—variety shows and entertainment programs appealing to mass audiences.

I might mention that, of the so-called cultural programs that were to be the staples of pay TV, a total of only four concerts and only four opera and ballet programs were presented in Hartford over a 2-year period. There is little doubt on this point.

The report of the FCC's Pay TV Committee recognizes that pay TV programs would be largely duplicative of free television programs. It states that "the reality is that the major part of the programing, as opponents had argued, will be of a kind that would appeal to a mass audience." (STV Report, para. 56, at 19–20.)

The other day, Mr. Wright, of Zenith, when he was before you, did not even mention diverse cultural program offerings. You hear this from other proponents of the pay TV who have not operated a system over a period of 3 or 4 years as Zenith has but you don't hear the promises of culture from the experienced people who have seen the balance sheets. Previously, Zenith talked culture but they sold movies and sports. Now they talk "free enterprise" and "competition," but they still sell movies and sports. It is somewhat ironic to hear this kind of argument from a business entity that would be a legal monopoly under the proposed Commission rules and is said to be a natural monopoly even without the proposed rules.

As a practical matter, the promises for pay TV's beneficial supplementary programing have proven to be lacking in substance. Yet, the pay TV report says to go ahead with permanent authorization of pay TV without regard to the realities of the situation. We must face up to the question of whether the public need for pay TV programing, which would be duplicative of free television programing, justifies the use of scarce broadcast frequencies and the likely, if not probable, impairment of free television service for all the people.

One need only look at the recent action of both Houses of Congress in passing the Public Broadcasting Act of 1967 and the revitalization of UHF broadcasting under the stimulation of the All-Channel Receiver Act to know that free television broadcasting is well on the way to bringing into being what pay TV has promised and cannot deliver. These positive developments with respect to increased program diversity for free television service could be impeded by establishment of pay TV.

Much of the argument has revolved around pay TV's chances for financial success. There are those who minimize its threat merely because it would not be a "beneficial supplement" to free television. They suggest, therefore, that pay TV would not create sufficient public demand to allow it to succeed financially.

The question, however, is not whether pay TV should be given a chance to fail, but what will happen if it were to succeed. It is precisely because we know that pay TV would not be a beneficial supplement that MST believes that it would have to attract free television's audiences by siphoning programs and talent now available free of charge in order to survive.

Pay TV does not have to be very successful to impair free television. It operates with box office economies which, when compared with the cost-per-thousand economics of free television, would allow pay TV to outbid free television for programing and dominate it at the local and national level. Even based upon the revenue figures derived from the Hartford failure, nationwide pay TV could easily have annual

revenues of $1 billion, and this at only 16-percent penetration of U.S. television homes. This is almost half the total of 1966 broadcast revenues of all three national commercial networks and their 15 owned and operated stations and all 593 other commercial television stations in the United States. That is at a 16-percent penetration.

Of this $1 billion, pay TV program revenues alone of at least between $550 and $630 million would almost equal the total program expenditures for the three commercial networks in 1966.

By adjusting the figures for family program expenditures to only $1.25 more than the weekly figure for Hartford's 2 hours of run-of-the-mill programs a day, or raising the cost per program slightly, one can project program revenues alone for a moderately successful nationwide pay TV system of at least $1.1 billion, which is greater than the total program expenditures of all commercial broadcasting in 1966. This is still at a 16-percent penetration.

Increase the penetration rate, as pay TV can do once it begins to "snowball," and the program and other revenues climb that much higher.

You can buy a lot of feature films, sports events, and other entertainment for the kind of money that pay TV would make. Pay TV program siphoning would seriously impair the ability of free television to serve all segments of the American public, including the approximate one-third of American families who would be unable to afford pay TV, plus those who could afford pay TV but live in areas where the economics do not justify its establishment.

As may be seen from the detailed analysis in MST's "Further Comments," which we have just put into the record, the complex proposals of the pay TV report, which are intended to minimize this harmful siphoning, would simply not do the job. For example, the rule proposed to limit siphoning of feature films from free television would not cover at least one-third the feature films to be shown by the three commercial networks in the 1967–68 season, as they have been announced thus far.

Moreover, any sports event now shown on free television could be siphoned to pay TV. This siphoning would not take 2 years, as this committee has been told, but could be done with only a 1-year wait or blackout on free television and, in many cases, not even a 1-year wait.

There has been considerable discussion this week about the proposed FCC rules for pay TV as they would affect sports events. Quite understandably, there has been a certain amount of confusion. Let me say, first of all, that the proposed rules regarding sports are quite complex. It is certainly understandable that confusion has been created. I do not blame you one bit for having problems with these things.

However, the proposed FCC Fourth Report and Order does set forth the proposed rules although, as I say, they are somewhat complicated. First of all, it is important to understand that there are two kinds of sports events established by the proposed rules. The first type is what are called specific sports events. These include such features as the world's series, the all-star game, the various bowl games, league championships, and, of course, they extend not only two baseball but other kinds of sports, as well.

The second type is what is described as nonspecific sports events. Generally speaking, these include those games played as a part of a

regular season, in other words, all the regular games of the Washington Redskins or the Washington Senators.

Within the nonspecific type there is a further breakdown of categories, again applying to all types of sports having a regular season. It includes home games, games away from home, preseason games or exhibition games, or the so-called games of the week. These matters are set forth in detail on page 91, paragraph 261 of the proposed FCC report, as well as in paragraph 262 which immediately follows that.

Let us refer back to the type described as specific sports events; the world's series, the all-star game. The proposed Commission rules would provide that if such an event had been broadcast on free television for 2 consecutive years in the community, and I emphasize "in the community," where the pay television station is located, not nationwide but in the community, pay television cannot broadcast it. I refer now to page 92 of the proposed report at paragraph 264.

Let us take the world's series as an example. If the series were on free TV in that community in October 1965 as well as in October 1966, both years, pay television could not show it in October 1967 on the pay TV station licensed to that community. Here I quote from the report, "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."

This is the rule. Would it prevent siphoning? I don't think that it would. Let us see how this could conceivably work. It could work in several ways. Assume that the series was broadcast on free television in 1966 and again this year, in 1967. The pay television station operator in Washington, D.C., could go to the baseball people, offer them a sufficient amount of money if they would refuse to sell the world's series right for Washington for free television in 1968—they only have to do it in Washington—and agree to make up the difference in income. The following year it could be placed on pay TV and every year thereafter.

Another method to get around this might well be to keep it off free television in 1968 but, through mutually agreeable arrangements, put the series in 1968 into theater pay television in Washington, in near-by Maryland, Virginia, all through our whole area, with the idea of bringing it on pay TV the following year. Under this method, the baseball people would not stand to lose any revenue and the public could see that series provided they were able to go to the theater and pay for it for 1 year.

Now, we do not say that this would necessily happen on a national basis overnight but it could happen on a selected basis in market A and B this year, in C and D next year, and, incidentally, Zenith said that they did not expect to go into operation all over the country; they are just talking about a couple of markets at a time; Mr. Wright made that point the other day—they could do this progressively and so on until in a relatively short time, for all practical purposes, the world's series would be taken out of the realm of free television and into a completely pay TV setup.

Certainly there would be outcries from the public. There were outcries from the public when championship fights were put into the theaters on a pay basis and taken off free television. You have re-

minded us on several occasions, again this week, that there were very serious outcries from Arizona this spring on this very matter, in the case of the Clay-Foley championship fight. But the situation still exists. That is part of what we are up here talking about today.

Now let us turn to the second type of sports event set up by the proposed Commission rules, that of the nonspecific sports event; the game which is played as a part of a regular season. The proposed Commision rules cover this as well. I refer you now to paragraphs 266 and 267, commencing at the bottom of page 92 of the proposed FCC report.

If a substantial number of nonspecific events, such as home games or away from home games, or the so-called games of the week, were televised over free television in the pay TV community and were, and and I quote from the proposed FCC report, "within each of the 2 years preceding the proposed STV broadcasting thereof," then no games in that category may be presented by pay television in that community.

As the proposed FCC report states, the standard is to be applied on a category-by-category basis, and, here I quote again from the report, "If during one but not both of the 2 years preceding proposed STV broadcast, a substantial number of events in a category were not televised in a community, the category will be considered not to have been regularly televised therein and STV may show the contests in that category." That means all such contests.

Now, that is the rule that is proposed. Does it prevent siphoning? A pay TV promoter could use his economic leverage to purchase the games in a category of nonspecific sport events, such as regular season home baseball games which may not have been broadcast in the community over free television, and present them without any delay. For example, assume that a baseball team plays 80 home games and no games in this category are broadcast on free television in the home community. Pay TV could purchase the television rights to all of the home games in this category the very next season, while the away from home games previously broadcast by television could be withdrawn from free television by the ball club during that season so that they, too, could be made available to pay TV the following year. The same situation could exist if some but not all of the home games were broadcast on free television.

Now, I hope this may help clear up the so-called 2-year provision which I think is a snare and a delusion.

Whole categories of regularly scheduled variety shows, such as the "Ed Sullivan Show" or the "Dean Martin Show," and free television drama, such as the "Bob Hope Theater" or last season's ABC "Stage 67," and entertainment and dramatic specials, such as "Death of a Salesman" or the "Barbra Streisand Special," are not even offered protection from pay TV siphoning.

What is also important is that the proposed rules do not and could not stop pay TV from pirating free television program talent. Thus, the rules that are intended to limit siphoning are ineffectual, despite the fact that they would involve the FCC in detailed, day-to-day regulation of every aspect of the programing transmitted over broadcast facilities by pay TV.

The impossible choice between no pay TV program regulation at all, which would have a severe adverse impact on free television service,

and complex pay TV program regulation, which would involve governmental interference with licensee programing responsibility is another reason that leads MST to oppose pay TV and should lead the Congress to act now to forbid the establishment of pay television. The Congress should reaffirm the principle that the future of broadcasting in this country belongs to all the people, not merely to those who are able to pay and who live in communities in which STV operators would find financial gain.

Thank you very much, Mr. Chairman.

Mr. MACDONALD. Thank you, sir.

Mr. Lindow, I just have two questions.

On page 3 you say that "the dilemma becomes even greater because the imposition of such controls will result in an intolerable degree of Government involvement in television."

Don't you think that the Government is already quite involved?

Mr. LINDOW. Yes, sir; I certainly do.

Mr. MACDONALD. What would change?

Mr. LINDOW. As I tried to point out in the statement, sir, faced with this dilemma the Federal Communications Commission would set up complicated rules such as the sports rule that I went into in detail and this, of necessity, would involve the FCC in the type of programing regulations which they so far have not practiced.

As I think the preceding witness so aptly put it, if we are having problems here when we have been studying this thing and trying to understand it, it is very easy to appreciate that these problems would become more and more severe as a Government agency is trying to regulate the entire pay television industry. It would be intolerable.

Mr. MACDONALD. I have read the Fourth Report. Everyone hints around but I don't see anything in there that further regulates TV than it is already regulated.

Mr. LINDOW. Yes, sir; they are saying under what conditions programing can be presented by pay TV.

Mr. MACDONALD. The programing of 10 percent cultural programs which I think is a mistake, frankly, but outside of that.

Mr. LINDOW. I think you find in here a considerable number of things that they are suggesting they will look into from time to time, that they will have to regulate and provide for in a degree that they just don't do at this time, sir. I have been a licensee in one way or another of the FCC for 33 years.

Mr. MACDONALD. All broadcasters are subject to review to see whether they should have their licenses renewed. The witnesses yesterday pointed out there has not been any revoking of licenses for quite some time and certainly no major broadcasters. I don't see how the Government could get more involved by allowing pay TV to happen.

If you have some specific illustrations, I am sure the committee would like to hear them.

Mr. LINDOW. Counsel reminds me that one of the places the Commission provides for increased governmental involvement in the proposed Fourth Report is in connection with where pay TV can operate and where it cannot, where it must provide nondiscriminatory service. Do you have the citation on that, Mr. Goldberg?

We might give you that for the record.

Mr. MACDONALD. Indeed, it would be helpful.

Mr. LINDOW. It is in paragraph 230 on page 79. That is an example of the sort of thing we are talking about.

Mr. MACDONALD. What does it cite?

Mr. LINDOW. This is the citation; yes, sir. It is very brief, if I may read it to you.

Mr. MACDONALD. Please do.

Mr. LINDOW (reading):

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.

There is also a footnote:

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 were required to provide. The rule adopted today in the instant issue of whether STV service should be provided within all the service area of the 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 nonpayment, poor reception pockets and the like. This rule is consistent with our use of the grade A contour limiting STV to five station markets. No doubt many subscribers will be obtained outside that service area but service there will not be mandatory.

Mr. MACDONALD. Does that not overlook the fact that CATV will be in operation, as well?

Mr. LINDOW. CATV is another operation.

Mr. MACDONALD. CATV could interlock with pay TV.

Mr. LINDOW. I think CATV is bound to interlock itself into the pay TV.

Mr. MACDONALD. As I understand, I hope one of the counsel will correct me if I am wrong, but, as I understand the grade A contour, it just means a radius of 58 miles. Am I correct?

Mr. LISHMAN (committee counsel). Depending on whether it is UHF or VHF.

Mr. LINDOW. It depends, but that is approximate.

Mr. MACDONALD. The use of CATV just throws that out of the window, does it not?

Mr. LINDOW. I am not sure that I understand, but CATV can conceivably bring in signals from quite a distance away.

Mr. MACDONALD. Therefore, what is now in this year of our Lord 1967, grade A does not necessarily mean that it will be grade A contour if CATV is successfully used in, say, a year or 2 years?

Mr. LINDOW. Grade A is the measurement of a signal of an individual station. So, grade A for a station is a particular thing. CATV does not have anything to do with changing where that signal goes.

Mr. MACDONALD. No, but the use of that station, if I have CATV I can pick up a station that is farther away than 58 miles, can't I?

Mr. LINDOW. Yes; in some cases, you can.

Mr. MACDONALD. Therefore, the use of the words "Grade A" does not mean very much any more.

Mr. LINDOW. It depends on what you are using it for, sir. It is a term of the art, so to speak, describing the signal strength of a specific station, without assistance of CATV. It is the measurement of an off-the-air signal.

Mr. MACDONALD. As Mr. Brown indicated to me, it presumes the nonexistence of CATV with STV. It seems to me the whole ball game is changed.

Mr. LINDOW. I agree that CATV coupled with pay television, which is bound to happen unless something is done about this, poses some tremendous problems for this committee and the Congress and the Federal Communications Commission, to say nothing of the broadcast industry. I think the two do have a direct relationship to each other.

Mr. MACDONALD. I do not mean to get into the technical aspects of the thing.

You have made a fine statement.

Mr. LINDOW. Thank you, sir.

Mr. MACDONALD. On page 9, you, like all the other opponents, and I am not saying that I am for this pay TV, but you keep calling it a failure. You say based on the revenue they derived from the Hartford experiment. If it was such a failure, why are the commercial networks fearing it so much?

Mr. LINDOW. I didn't think the concern is that of the commercial networks alone. The commercial networks, incidentally, sir, are not members of our association. We represent individual stations. I think the concern of the networks is shared by the individual broadcasters, as well.

Mr. MACDONALD. If it were a fialure and the public does not want it, then they are not going to use it; is that right? If they are not going to use it, Zenith and the other four or five stations are going to fall flat on their face and lose a lot of money. Is that right?

Mr. LINDOW. That is right.

Mr. MACDONALD. Therefore, are you not putting the cart before the horse in saying that this has proven to be a failure and yet you are so fearful of it? I cannot connect up the two thoughts.

Mr. LINDOW. Sir, as I said in my statement, I think the problem before us is not what happens if pay TV fails. If you and the members of this committee and other Members of the Congress, the Commission, everybody else, agree that this thing is a complete failure, then we all have been wasting an awful lot of time and money because in that case why establish pay TV and utilize scarce broadcast frequencies for this purpose? We have to address our question only to the question of what happens if it succeeds.

Mr. MACDONALD. It is not the substance of this hearing so I have not made a point of it. Mr. Dingell made a point of it, but the U.S. Government, itself, uses over half of the spectrum or reserves it. All this talk about spectrum or lack of space, to use somebody's words yesterday, is hogwash; it does not mean anything because the spectrum is there and it is not being utilized.

Mr. LINDOW. May I speak to that point, sir?

Mr. MACDONALD. Of course.

Mr. LINDOW. The spectrum is being utilized to a considerable degree and the degree of utilization has been growing at a fantastic rate—I am speaking now of the television broadcast spectrum—at a fantastic rate in these past years. Originally, when Zenith and others were trying to start the pay TV argument some years ago, Zenith made a big hue and cry on this point; we were not using the spectrum so what difference does it make?

Mr. MACDONALD. The land mobile people are the ones who were really pushing that part and I think they are right.

Mr. LINDOW. Mr. Brown referred to the 400-and-some unused television channels that are not in operation, 450, I believe is what the gentleman from Ohio said. Let us look at those 450 for just a minute.

As I understood it, you qualified it further by saying this excluded all the educational, these were all commercial stations. Now, a substantial number of those are located in remote, sparsely populated parts of the United States where they may very well never come to life as a full-fledged television broadcast station.

We have a pet expression in our business and I do not mean to cast any aspersions on the great State of Nevada, but Broken Jaw, Nev., meaning a small crossroads community far away from everybody else. A good part of the channels not presently in use you will find distributed among such communities.

Mr. MACDONALD. May I interrupt you?

Mr. LINDOW. Yes.

Mr. MACDONALD. I have a house in a place called Cape Neddick, Maine, which I don't get to use as often as I like. I can get double the channels at Cape Neddick, which is a rural area, that I can in Boston because I can draw from Manchester, N.H.; Portland, Maine; Portsmouth, N.H.; educational station in Durham, N.H. Then I can get the Boston stations, too. All this without CATV.

So, your argument about the rural areas being harmed by this thing is specious.

Mr. LINDOW. The rural areas will be harmed in this sense, that if the programing that is now on free television which provides a big part of our income, revenue, and enables us to do all the things that you and the Commission tell us we have to do and we want to do, if that income is jeopardized then our programing will be reduced. The type of programs we are now carrying will be siphoned off to pay TV.

Mr. MACDONALD. Would the opposite happen? Would you up your type of programing? Would you be afraid of competition and therefore put on better programing? Instead of having 17 commercials in a movie, you might cut them down to seven?

Mr. LINDOW. I don't think the number of commercials is causing any problem.

Mr. MACDONALD. I guarantee you they are.

Mr. LINDOW. I meant in the sense of limiting the amount of acceptance that television is having in most cities.

Let me try to answer your question. The fact that there would be some problem of competition is not a matter of our being afraid to go out and fight. We have competition now. You talk to any station operator in any market, particularly this year when things are a little bit rough, he will tell you he has plenty of competition.

But, as I pointed out in my statement, it takes not only a desire to compete but it takes money to go out and buy the raw material, if you will, of our business, which is talent and programs, and you have to have the resources in order to do that.

These pay TV people, on the very, very unoptimistic projection that I gave you, would have $1,100 million to spend on programs when they would have only a small degree of penetration and this is the equivalent of a great part of what free television broadcasting has to spend

now, you can see they are going to outbid us, and there are just so many features, there are just so many world series.

Mr. MACDONALD. Would not the public end up getting better programs than they now have available? Do you not have to go to the least common denominator of intelligence and taste to sell the stuff that you try to sell over your stations? Would not the public benefit from a change from that?

Mr. LINDOW. I don't know.

Mr. MACDONALD. I don't, either. You are in the business. I have a million things to do. I am just the lowest kind of worker in the vineyard. I just watch TV. I have not made up my mind one way or the other. I am not sure a little competition would not do you some good.

Mr. LINDOW. I listened the other day, and I will try to answer your question, sir. I listened the other day when Mr. Wright was on with the station manager, I guess it is not his station, it was the station's general manager from Hartford. Members of the committee were talking about the programs offered there. Your questions related to the quality of programing. He said they had to take the kind of film they could get from the film companies and they could not alter it or change it, because there had been some questions about whether this was of a standard that was acceptable or not, they could not alter or change it or cut it.

Mr. Preminger made a big point about the fact that there would not be any changes on some of these programs.

That does not sound to me like they are looking toward any great big improvements in programs. They are suggesting taking the same kind of program material now offered on free television, except they are not going to exercise the kind of control over it apparently that we do regularly. Ninety percent of this is going to come from films and sports. How is this going to improve the programing? I can't see it.

Mr. MACDONALD. You said that that formula was a failure. It is, in your judgment. You said that the Hartford experiment was a failure.

Mr. LINDOW. I said Hartford was a failure as a test.

Mr. MACDONALD. You also said that that was the breakdown, that it was; namely, movies and sports. I read in the paper yesterday, I believe, or the day before, that the Nielsen ratings buttressed the fact that movies were the biggest draw on TV.

Mr. LINDOW. Yes, sir; they sure are.

Mr. MACDONALD. I don't know how accurate the Nielsen ratings are but at least it is an expression of opinion and has some authority in it. So maybe what they are experimenting with in Hartford was wrong because if you say it was a failure, maybe the programing was the reason it was a failure. I, personally, would not stay at home to watch movies and sports events all the time. I certainly like a more diverse type of entertainment than that.

Mr. LINDOW. I think they pointed out that it was their intention, they certainly did not disagree with the Commission's findings that 90 percent of the programing of pay television would be in feature films and sports. So, if the feature films and sports which they had been programing up in Hartford was wrong, maybe they should change to something else. At least, they don't believe it is wrong.

As I indicated in my statement, I have heard very little said, by the Zenith people at least, on the subject of new and different types of programing, different sorts of programing in the future. They used to talk about that but right now they are talking films and sports and that is what they are selling. The films they are selling up there, as Mr. Wright so correctly pointed out are the ones that are currently shown.

Mr. MACDONALD. Yes, but you said the experiment was a failure.

Mr. LINDOW. I said the test was a failure, sir.

Mr. MACDONALD. If you did an experiment and showed that a certain formula was wrong, as a businessman wouldn't you change it?

Mr. LINDOW. I certainly would.

Mr. MACDONALD. Maybe they will.

Mr. LINDOW. I didn't say their formula was wrong. I said as a test of the extent of the success of subscription television it was a failure.

Mr. MACDONALD. Mr. Brown.

Mr. BROWN. I do not follow what you are saying to Mr. Macdonald with reference to your comments on page 9. You talk about the 16 percent penetration. Was that the Hartford penetration?

Mr. LINDOW. This is based on the Pay TV Committee's figures of what pay TV could reasonably expect to do. Again this is based on the proposed FCC "Fourth Report" and what the FCC and Zenith and everybody else said.

Mr. BROWN. What was the Hartford penetration?

Mr. LINDOW. That was much smaller than that.

Mr. BROWN. What was it?

Mr. LINDOW. 0.75 or thereabouts.

Mr. BROWN. Was that a controlled percentage or was that as much as they could get?

Mr. LINDOW. I think Zenith set forth certain limits, the total size of their test.

Mr. BROWN. Here again, if there was a forced limitation, then we have another question, have we not? Because we don't know how far Hartford might have gone if it had been left free and everybody who wanted to could have joined.

Mr. LINDOW. It was not a forced limitation. I think they just decided they wanted to spend just so much on the test.

Mr. BROWN. If they had been able to make available as many control units to as many people in Hartford that wanted it, it might have been different.

Mr. LINDOW. I think if this was spread all over the country I think it would be considerably different. If pay television was instituted as a nationwide system, it would be considerably different; yes.

Mr. BROWN. You don't think it would have been a failure?

Mr. LINDOW. This is the point I have been trying to make, sir. Again a pay TV system with this type of programing and the opportunity to get it that they will have under the rules proposed by the Commission, I don't think it will be a failure. I think it will be a howling success. As a financial operation, it would be a howling success. It might be disastrous as far as the public in concerned who would wind up paying for something they have been getting for nothing up to now.

Mr. BROWN. Wait a minute.

If people are willing to pay for a service even though somebody else is offering that service free, what is wrong with that?

Mr. LINDOW. We have set up, the Congress has set up, a system of free broadcasting in this country.

Mr. MACDONALD. Commercial; not free.

Mr. LINDOW. Commercial and educational, different categories of stations; yes, sir. It is one where the viewer does not have to pay a specific amount to view the program.

Mr. BROWN. Wherein the advertiser determines, along with the station or the network, what is going to go on the air and what selection that the public has. This Congress just got through passing public broadcasting legislation in order to provide with public funds an alternative to that choice because the Congress apparently felt that the existing "free" choice was not adequate. I happened not to support that piece of legislation.

But I think it is highly inconsistent for the Congress to take the taxpayers' money willingly and put it into public broadcasting, really free broadcasting except the taxpayer pays, and say that the public cannot, given the possibility of a system to do this, put some money in the meter and see what they would like to see themselves and cannot have a choice between the commercial broadcast and the public free taxpayer-supported Government broadcast.

Mr. LINDOW. Of course, Congress can and it has the power to change our system. This is well within the authority of Congress to do this if they want to.

Mr. BROWN. I am trying to figure out where the morality is in the other two systems and the immorality is in this system.

Mr. LINDOW. I think it is a basic policy question, the philosophy under which our system of broadcasting has operated. It is quite unique and distinctive and was the first in the world to operate on this basis. It has done extremely well for the public and for those who laid their money on the line.

Mr. BROWN. Let us get into a policy question here. Do you feel that any control should be exercised by the FCC over the program content of television?

Mr. LINDOW. No; I do not.

Mr. BROWN. I share that view and am concerned that we may get to the point where, because of what is involved, people are going to say we have to have some control over it.

It seems to me that one of the controls might be exercisable directly by the citizens rather than through their Government.

Mr. LINDOW. That has been the way it has been operating. Somebody said the other day, I guess it was Mr. Van Deerlin, about how he has to run for office every 2 years. I can sympathize with his problem. We have a vote taken as a television broadcaster every second because the viewer can either switch it on or turn it off. It is a big problem to do the job. People do exercise control over us, considerable control over us, believe me, by that device.

Mr. BROWN. Where do I vote to see the National Symphony Orchestra on television?

Mr. LINDOW. Channel 9 has been over a period of years carrying concerts of the National Symphony Orchestra, I believe.

Mr. BROWN. How about sponsors?

Mr. LINDOW. They have been sponsored.

Mr. BROWN. At what price?

Mr. LINDOW. I don't know what the figures for the sponsors were. I suspect that probably WTOP may have dug into its own pocket to make up the difference between what it got from the sponsor and what it paid for the symphony but I don't know. I am not familiar with that. That is frequently the case with cultural events.

Mr. MACDONALD. I must be voting wrong all the time because some of the programs I like run about 8 weeks or a month.

Mr. LINDOW. You and I have the same problem.

Mr. MACDONALD. I don't know who does the voting, but it certainly is not the public.

Mr. BROWN. Let me ask this question: I happen to be in the newspaper business in real life. I think that there is an analogy here, if every station were allowed to be a combination of pay and subscription TV wherein you would probably sell your prime time, that is, the station would sell its prime time to the audience and not to the advertiser in much the same way that the newspaper sells its front page to the reader and not to the advertiser on the theory, which you developed so effectively on page 9 of your testimony, that you can make more money from the audience for that time than you can from the advertiser with that time. Does that make sense?

Mr. LINDOW. I don't think there is any question but what you can make more money out of pay television than you can out of what we call free television or commercial television. I think there is no doubt about that. The potential is much greater. You have more people to draw on. If you charge everybody to see everything that you are giving to them for free now, of course, you are going to produce a lot more money.

But with it come a great many penalties that we are not prepared to accept, that we don't believe are right; and this is why we feel the way we do.

Mr. BROWN. You see, I think we have an issue here, not an argument; I don't see it as an argument between Zenith and RCA or anybody else or an argument between two or three networks or an argument between a number of different stations.

If the Congress acts in an area, it can say to the FCC the jurisdiction is ours; we will permit or not permit pay television. It can also act and say further, your regulations as proposed should be limited or changed in this way or that way. This is what we have come to in this hearing—I don't know whether we intended to get into it this far or not, but of necessity we have.

It occurs to me one of the rules that may be wrong is the five-stations market rule. Maybe we ought to permit everybody, who wants to, to go pay TV.

Mr. LINDOW. Then you are changing our whole system over to a pay system from a free system.

Mr. BROWN. Perhaps because it may just be that there would be a station in that market that would say to themselves, I think we can make more money as a free TV system in our particular market and offer good programing between 8 and 10 o'clock at night which would be available to a high-bid advertiser in such a way that we would counter the pay TV. Let us be frank about the system under which we operate. Watching free TV is not the only choice I have at night. I can go out, if I have the money, I can go out to the Shoreham and

have a meal and watch topnotch entertainers, live. I can go to a movie and see something that I will later be able to see on either pay TV or free TV. I can watch the ETV channel which I help support by my contribution or which the University of Maryland or somebody else sponsors with Federal, State, and local funds. Or I can go to the symphony and hear Iturbi or to the boxing matches.

Mr. LINDOW. You are a fortunate man, sir. There are a good many people who are not in that position, right here in the District of Columbia.

Mr. BROWN. Precisely. Those people also buy things, don't they?

Mr. LINDOW. Yes.

Mr. BROWN. As a matter of fact, if you take the number of people and the number of dollars that move with these people a lot of them buy more than the people who go out and watch live entertainment at the Shoreham because those people drive out in their Cadillacs and Lincolns and there are not very many Cadillacs and Lincolns sold versus the number of Fords that are sold.

What I am getting at is that we are in a position in free TV now where the number of things which are most common in our society, and I don't use the word "common" in a deprecatory way, are the things that the advertiser wants to sell to people he cannot get to through free television. If you want to sell something to people who have money, you sell it through the Wall Street Journal because the people who have money buy the Wall Street Journal.

Now my question is: Does not pay TV offer the possibility of aiming for audience selection that would provide for the selection of an economic strata market and intellectual strata market, and with pay TV in combination with free TV you would be offering to the advertisers of this country, for instance, a broader possibility of making the economic system work?

Mr. LINDOW. The proposed FCC pay TV report recognizes, as I indicated, that pay TV programs would largely be duplicative of the free TV program. Let me quote this again. They state: "The reality is that the major part of the program, as the proponents argue, will be of a kind that would appeal to a mass audience" and not this select group that you are just talking about, sir.

Mr. GOLDBERG. The economic pressures are the same in commercial television as they are in pay television, to maximize the profit. You don't have this in public television because you don't worry about the profit. But where you are worrying about the profits you want to maximize them. The economic pressure, whether they are using the cost per thousand of free television or the box office economics of pay television, is the same. It would lead to the same kind of programing. The Hartford test was not a failure in terms of what could be financially successful on pay television.

At Etobicoke, the experiment showed the same thing. This is in the proposed FCC report, that the programing which seemed to satisfy most of the people most of the time was the readymade audience packages of films and sports.

The Hartford experiment was a failure in terms of its concept of programing to minority audiences. This failed. As a result, they are still sticking with movies and sports, as you saw in their program guide.

Mr. BROWN. You know, if your analogy were followed all the way through, we would not have an ballet or symphony in this country. We would be watching the same thing. This seems to me unfortunately the direction in which free TV may be headed. If the only criteria you use is the sale of your time that is available because you have this franchise from the Federal Communications Commission, to make money, the most money from the guy who wants to get the broadest audience, you wind up with the least common denominator.

I should not say the least common denominator, the broadest common denominator, because the least common denominator infers some very low taste which will offend enough people that they will not watch it and you will lose it at the other end.

Mr. LINDOW. This is not the case in free television. We have been putting on ballet. We have been putting on opera. We have been putting on concerts. We have been putting on programs of the highest standards. These are done in proportion. We try to have a balanced program schedule which is what the Federal Communications Commission has urged. We quite readily accept that as good business.

We have done this to the extent that we have gone far overboard. We have spent millions and millions of dollars on providing the type of programs which, if you measure it by the pure standards of their commercial attractiveness, would never get on. But they are done because we have this obligation which we freely accept and try to honor.

The record is full of this sort of thing, to say nothing of the public service activities that free television takes part in, to say nothing of the news and special events programs that we do. Believe me, sir, I can't sit quietly here and accept the suggestion that free television is not doing a job in that area. I believe, sir, that it is. I think we can do better and we would like to do better and we are going to try but we have to have money to do it.

Mr. BROWN. If you infer this as a flat statement, you are wrong. What I am concerned about is that we are trending in that direction in free radio and television because of the commercial problems involved. Now, my only suggestion in this area, my only question really to you is, why can't we have a combination of audience interest and commercial interest?

In any event, it is not free unless we go to a Government system and it is not free that way, either. There is a political interest.

Mr. LINDOW. If the Congress wants us to have that kind of system, you can have it.

Mr. BROWN. I understand. I am asking you as a representative of the group in whose behalf you are testifying what your feeling about it is. I know Congress can do it if it wants to.

Mr. LINDOW. Because I think you would be depriving a great many people of the opportunity that they now have. I don't think that that is right in terms of the system that we operate under.

Mr. BROWN. The assumption being that everybody, all commercial broadcasters, would go to the pay TV system.

Mr. LINDOW. I think that would be a very unfortunate decision for the American people.

Mr. BROWN. And also broadcast 100 percent of the time on pay TV. Is that your assumption?

Mr. LINDOW. I don't know whether they could all sustain themselves but maybe they could. Broadcasters have a lot of ingenuity. I see some small radio stations sustaining themselves in areas where I did not think they could possibly exist, but I don't know.

Mr. BROWN. I don't think we know, either. To say that it is a failure and therefore we should not go into it or that it is such a howling success that it is going to completely disrupt the present system of free TV seems to me to be an assumption so broad that I have to have a better rationale for why one or the other is true. I think you will find the true place is right down the middle.

Mr. LINDOW. Once you start this thing snowballing, it does not happen overnight, but the siphoning effect we have been talking about starts to come into play and increases and increases and develops further and further and I think this is what the witness that preceded me tried to point out, as well.

Mr. BROWN. Will the chairman be patient for one more statement? It seems to me the station in Broken Jaw, Nev., will have to wind up using a combination of pay and commercial television in order to supply the people in Broken Jaw, Nev., full usage of the spectrum that the Government makes available to them.

Up in Torbert's area, in that cabin, he may get it all free or all pay; I don't know. But why could not all stations use a combination of the two systems?

Mr. GOLDBERG. We don't believe that pay TV and free television service could exist side by side because of the siphoning effect. They are both going to be competing for the same kind of programs.

There is only a certain kind of program that apppeals to a great many people in the context of their home viewing. One of the greatest problems in broadcasting is that there is not an adequate supply of programs worth broadcasting. That is the problem that the network have each season. They will be competing for the same general type of program to present in the context of the home.

It becomes then a question of who can compete better or who has more revenue with which to compete. We feel that pay TV, given its potential of unlimited penetration nationwide, would dominate the program acquisition races.

Mr. BROWN. You had on channel 18 in Hartford a combination of pay and free TV because that station was only pay TV a few hours a day. This was a controlled experiment in such a way that it loses some of its impact. But, in a market like New York City where you have a wide number of stations available, if all stations were pay and free both, you would have free TV available on some stations some of the time, and pay TV on some stations some of the time. I think you would have a spectrum of selections that would serve the public interest better. I would submit this is something that we have to prove is or is not going to be the case. I don't think it has been well proved. If we can, prove it some bettetr way.

Mr. GOLDBERG. On your example, if you have that situation existing in New York City you would find that this would be true but what you would have is a free system during the day, the off viewing hours, and a pay system in the prime evening time and the 20 or 25 to 50 percent of the people who could afford that service would have the service on pay TV in the evening and the people who could not afford it would be totally deprived of any service in prime time.