

EXECUTIVE OFFICE OF THE PRESIDENT  
OFFICE OF TELECOMMUNICATIONS POLICY  
WASHINGTON, D.C. 20504

*Mr. Scalia  
has a cy.*

**Date:** December 4, 1970

**Subject:** Cable Policy

**To:** Mr. Clay T. Whitehead

Here's a redraft of the document we discussed last week. The first three pages, "General Policy," serves as a summary of the rest.

Ralph Smith is coming down next week to discuss local government problems with cable. I have not included that point here. Michael McCrudden is working on the definitions of common carriers; in this draft I have tried to talk around that point.

A possible rationale for Congressional preemption of local, state authority in this area is the necessity to define a special class of public service corporation to fit the flexible context of wired distribution systems which engage in interstate commerce.



Bruce M. Owen

Attachment

cc: Walter Hinchman  
Michael McCrudden  
George Mansur

Cable Television

General Policy

There are certain broad policy goals which must underlie any particular policy position affecting the mass telecommunications media in the United States. These basic policy objectives are:

- (1) Freedom of access to the mass media of telecommunication by all citizens at reasonable cost, and consequent opportunity for widely increased diversity.
- (2) Minimization of the extent of detailed Federal regulation of the content of the mass telecommunications media.
- (3) Separation, to the maximum extent possible, of the functions of telecommunications message creation and message transmission, in order to avoid private concentration of control of content.
- (4) Efficient utilization of the radio spectrum.

There are many telecommunications technologies. The nature of each technology conditions the possibility of achieving these policy goals. In some technologies the goals are in conflict. The most promising single feature of wired distribution (of which cable television is only an incipient variety) is that the conflicts among these goals are largely eliminated.

Wired distribution technology offers an unprecedented opportunity to achieve desirable social and political goals. It therefore seems appropriate that the Federal government not impose barriers to the further exploitation of this technology by private industry.

Our view of the desirable long term structure of this industry follows in a straightforward manner from the policy objectives stated above. We recognize that there needs to be a transitional period between the present industry structure and the one which we find most desirable for the future. Such transitional periods are fraught with many difficult public policy issues. In commenting on the particular policy issues which are now at stake, we have been guided by the policy goals. We would certainly not object to other resolutions of the current policy issues which, while they differed from our recommendations, better achieved the basic goals above.

A subsidiary set of policy objectives associated with cable television is that the potential of cable to provide an alternative economic base for mass media programming not be constrained, and that the capacity of wired distribution systems to perform many non-broadcast functions be recognized. Broadcast media now depend principally on advertising as an economic base of support. Cable transmission provides an opportunity to supplement this source of support with the revenues from the

monthly fees of subscribers and per program or per channel subscription payments. We envision the ultimate structure of wired distribution programming to be not unlike that of the present-day print media, where there is a natural and healthy balance of local, regional and national "programming" and where there is a natural and healthy balance of support from advertising, subscriptions, and eleemosynary sources.

In the discussion of particular issues below, we look toward two related and important events. The first is recognition of the fact that wired distribution systems, by their nature, have certain public service obligations, the most significant of which is the responsibility to provide access at fair and nondiscriminatory rates to all persons who wish to originate programming. Freedom of access in the broadest sense would appear to imply that the cable operators have no control of content whatever; that listeners freely choose among the program sources which freely present material at the originating end; and that the cable operator merely transmit signals upon reasonable demand and perform other ancillary services.

The second and concomitant event is the elimination of all Federal and other government control, regulation, licensing and other involvement in the content or origination area.

The thrust of this policy is that cable transmission provides an opportunity for nearly complete freedom of speech and press and freedom to hear, and that this freedom should not be constrained by elements of concentration in the transmission function or by government control. The transmission function itself need be regulated only to the minimum extent necessary to achieve these objectives.

#### Current Policy Issues

The discussion which follows deals principally with the current policy issues identified with cable television. The discussion is related to the nature of the transitional arrangements in the context of our ultimate policy objectives.

A major issue today is the question of copyright liability of cable operators for imported distant signals. Final responsibility in the matter clearly lies with the Congress. We believe, however, that the public interest requires that there always exist a mechanism by which creativity is rewarded and encouraged through adequate copyright payments. We also believe that ways must be found to reward this creativity and provide appropriate incentives without reducing either the degree of competition among transmission media or the exploitation of new technology. If it is true that initial diffusion of cable technology

If it is true that initial diffusion of cable technology is limited by the need to import distant signals, then we must recognize this fact as an interim expedient rather than a long term necessity. Importation of distant signals should thus be allowed as an interim measure designed to encourage cable penetration, with an accompanying mechanism for full copyright liability. This may well require that there be significant restrictions on exclusive agreements between broadcasters and copyright owners. It may, in addition, be necessary to require compulsory licensing.

We see no objection to a "common fund" plan for copyright payments which avoids the potentially high transaction costs of individual payments, provided that the plan is mutually satisfactory to the copyright owners and the cable operators. Special and involuntary taxes on cable systems for any purpose are unwarranted. The commercial substitution plan seems to us at best an awkward expedient.

In the longer term, carriage of distant broadcast signals should become a matter involving only the distant program source (as a potential lessor of channel time on a cable system) and its viewers or advertisers.

The nature of cable technology is such that channel capacity is not limited by the supply of Federal radio spectrum allocations. The

rationale of Federal regulation of broadcasting was dictated by the use of a public resource -- the radio spectrum -- and by its scarcity. Both the use of a public resource and the limitations on access to that resource deriving from its scarcity suggested Federal control. Neither consideration is present in cable transmission. Consequently, we look to the present adoption of an explicit schedule of events leading to the abandonment of Federal regulation and licensing of content when transmission is by cable. To the extent that cable transmission serves the public demand for mass communication better than over-the-air broadcasting, the public interest lies in cable as a substitute for the more limited over-the-air broadcast technology. The value of the spectrum in alternative uses suggests that over-the-air broadcasting of television signals be terminated when cable penetration reaches reasonably high proportions. At that time, a wide diversity of originators with relatively free access to cable capacity at reasonable cost would signal the end of all Federal licensing and regulation of program origination functions. The same philosophy should apply to control of content by other levels of government.

We would distinguish at this point between freedom to hear (select) a wide variety of programming sources, views and opinions, and the putative right to be informed in the passive sense. The latter "freedom"

seems to us both paternalistic and antithetical to the spirit of the First Amendment; it is the responsibility to inform which we have attempted to impose on broadcast licensees which has led to increasing Federal control of content. The natural development of wired distribution systems will, we expect, provide the public with the opportunity to hear what it wishes without Federal regulation or private barriers to access.

It is clear that this goal can be achieved only to the extent that there is real freedom of access by the public at both the receiving and origination ends of wired distribution systems. This is clearly a technical possibility. But it can take place in practice only if present doctrines concerning the responsibilities of transmission entities are reversed. Public policy formulated today should contain an explicit schedule by which certain public service obligations are imposed on wired distribution systems. We have some difficulty at this point with the definition of "common carriers." We mean to suggest that some of the conditions normally associated with the common carrier function be imposed on cable systems, but not all of these conditions. We do not, for instance, see any present necessity for regulation of entry, or of rates, or of investments in this industry. It is not yet clear that cable systems are natural monopolies, or if they are, that their geographical

extent is sufficiently great to require regulation in the classic public utility sense. We do, however, see it as essential that cable operators not have responsibility for the content of their transmission services, and that in fact they be required to grant access on a non-discriminatory basis to all programming sources upon reasonable demand, and similarly with respect to subscribers. Cable operators should not have any control whatever of content; responsibility for content should lie entirely with the originator. We thus may require redefinition of our concept of "common carrier," to include this special class of unregulated communication transmission corporation and its peculiar public service responsibilities. Such requirements as we have suggested may best be judicially enforced. More detailed and extensive regulation of the transmission function should come only in the future upon evidence of abuse of whatever monopoly power may develop, and then only after traditional antitrust remedies have failed.

Local origination by the cable operator himself may be a useful short-term source of diversity in smaller markets. But in larger markets and in all markets eventually cablecasting by the cable operator represents an unwarranted degree of vertical integration. Ultimately, the transmission entity should be excluded from any origination whatever.

Certainly origination should not now be required. The provision of local origination facilities for rent to others is, of course, unobjectionable.

The opening of a whole new dimension of freedom of access in programming will have a beneficial effect upon the public interest, but it may threaten the economic base of existing broadcasters to the extent that these broadcasters derive revenue from the scarcity rent of their license rather than from their creativity in popular programming. If broadcasters were not now regulated they would be unprotected from the advent of new technology like all other participants in a free enterprise competitive economy. The regulated status of broadcasters is meant to serve the interest of the public, not the interest of the broadcasting industry; this status should not serve as the basis for protectionism. On the other hand, a long history of public service and expertise should not be lightly abandoned, and the public interest during the transition to cable transmission would not be served by a precipitous reduction in the ability of broadcasters to carry out the public trust they have been given. Broadcasters have exactly the skills and the experience needed to pioneer this new medium, and it would be unfortunate if these skills and experience were precluded from participation in the new technology.

Therefore, in order to provide an orderly transition, the Commission might immediately allow temporary relaxation of the "duopoly" rules to the extent of allowing each broadcaster to initiate programming and advertising on one or two channels of cable systems within his market. These channels (in addition to the one carrying the pre-existing over-the-air signal) would be leased from the cable operator under reasonable terms. Broadcasters could use these channels to initiate new or experimental programming or to provide other services, such as electronic newspapers. These channels should be freed from all present content regulations, such as the equal time, fairness, and personal attack doctrines, and should not be subject to Federal licensing or renewal. Such channels should also be freed from all restrictions on subscription television, provided that the broadcaster continues to provide free over the air service and a corresponding cable channel supported wholly by advertising during the transitional period. Broadcasters should be encouraged to own cable systems, provided these are not in their own markets.

Our rationale for this proposal follows. First, broadcast profits are eroded by an increase in the number of competing media channels. If each broadcaster is given several channels instead of one, this erosion is at least partially offset. Second, local broadcasters have the

experience and facilities to begin exploitation of the creative possibilities of the new medium. An increase in their ease of access will provide an opportunity for the public to benefit from that experience. Third, it is clear that the degree of program diversity will be greater in advertiser-supported systems if parallel programming is done by a single entity. This reduces the incentive to duplication. If each broadcaster programs on several channels, he will not maximize his profit by serving the same audience on each channel, but rather by programming for quite different audiences. Fourth, this proposal establishes the principle of leasing channels to non-cable-owning originators. Finally, this proposal provides an opportunity to observe the behavior of unregulated origination services, including subscription TV, with the broadcasters themselves among the beneficiaries of the increased freedom.

Local newspapers should be allowed to lease one or two cable channels for local origination purposes, but not to own cable systems in their own markets. The same arguments as above apply.

Interconnection of cable systems for the purpose of forming national or large regional networks should not be prohibited. In this way a national balance of local, regional, and national programming services will develop, as it has in the print media.

The thrust of this policy is to encourage freedom of access through multichannel capacity. To this end, no form of vertical integration of origination and transmission should be allowed. This necessarily implies the absence of control of content by the transmission entity. Just as the telephone company is not responsible for and cannot censor the content of telephone conversations, so the cable operator must act as a mere transmittor of mass media messages. Clearly, the cable operator must take reasonable precautions to ensure that the originator is a responsible party and that there is no presumption that a potential channel lessee intends to violate the law. Otherwise, the cable operator must be held safe from litigation arising from the content of any transmission; sole responsibility for the content of any transmission must lie with the originator.

We must emphasize again at this point that we envision a whole new industry of program originators, in structure much like the present print media (magazines and newspapers), but with the added flexibility of electronic techniques. There is no element of scarcity in the access of the public to the transmission medium, provided neither the government nor private concerns exercise monopoly power. There is, accordingly, no need for regulation or licensing or other control of content. The structure of this new electronic medium is different

from present-day broadcasting, and the same arguments do not apply. This is a whole new context; it requires a different way of thinking about traditional problems. The key to the new approach is flexibility -- minimization of the extent to which government can constrain the opportunities which may be present, and safeguards against private constraints on those opportunities.

Since we do not envision any special restrictions or requirements being put on cablecast programming (other than those applying to all media, such as libel law), we have some difficulty with the possibility that cable transmission may be used to broadcast obscene or pornographic materials into the home. This raises difficult issues, since access to cable receiving equipment by children may be quite easy. There does not appear to be any easy solution to this problem which avoids giving some power of censorship to the cable operator. We can think of two possible alternatives to the grant of such power and its concomitant dangers. The first is the requirement that all receivers be equipped with keys, so that parents can more easily control access to the receiver by their children. The other alternative is a recommendation to the Congress that the definition of obscenity and pornography, when transmitted directly into the home, be greatly strengthened by appropriate

legislation, and the penalties for originators who violate the more stringent definition be substantially increased. Both of these alternatives seem preferable to the grant of censorship power to the cable operator or to any level of government.

A final issue which seems likely to be of moment in the years ahead is access to the new medium by the poor -- at both the origination and reception ends. Access by the poor at the receiving end may be complicated by subscription broadcast services. It seems clear that no special problems are raised here which cannot be dealt with in the context of an overall income maintenance policy. Access by the poor at the origination end is already facilitated by the considerably cheaper costs of access to the cable medium, as compared with over-the-air broadcasting; again, we see no special problem here which cannot be satisfactorily resolved by general policies designed to support public broadcast program sources.

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December 31, 1970

MEMORANDUM TO MR. WHITEHEAD

Subject: Local Government and CATV

Attached is a draft of the statement which you requested regarding local government franchising of CATV.

B.

Bruce Owen

cc: Mr. Hinchman

1970

OTP Advice to Local Government  
in the Matter of  
Cable Television Franchises

Wired broadband communication service is a rapidly developing and changing industry. It began with Community Antenna Television (CATV). In its future may lie the sophisticated "wired city" technologies about which so much has been written.\*

National policy in this area has only begun to be formulated. The divisions between local, state, and Federal authority have not yet been drawn. Nevertheless, municipalities across the country have been forced to deal with the problem of franchise applications.

The Office of Telecommunications Policy makes no pretence that it has any final answers to the policy issues raised by cable television. We do think that local government should be aware of some of the policy problems and issues in this area, and we are issuing this statement to that end. Our principal recommendations are:

1. Both public policy and technology in this area are in a state of flux. It seems generally unwise for local franchise authorities to make long-term commitments which could be rapidly outdated by events.

\*See the bibliography attached.

2. It is by no means clear at this juncture whether cable television is a classic public utility with strong elements of natural monopoly. It therefore appears unwise to grant exclusive franchises which foreclose the possibility of competition.
3. Neither the demand for nor the supply of the many services which these systems can provide has yet been ascertained. It therefore seems unnecessarily restrictive to make large reservations of channels for specific purposes, or to otherwise make less flexible the ability of cable to serve new markets.
4. Most important of all, cable distribution systems are merely one technological means of transmitting public and private messages. As such, they fall squarely into that category of services with strong First Amendment implications. Local franchising authorities should take careful account of the extent to which freedom of the press, of speech, and of access to the medium is constrained either by private monopoly or by public regulation.

The thrust of these four recommendations is clearly cautionary. Already something like 50% of the population is covered by outstanding franchises. Some of these franchises may well have been granted too hastily and without full knowledge of the implications of the new technology. We would not have local authorities delay the development of cable, or place restraints on its potential. But we do think that the public interest

would be best served at this juncture by a flexible and temporizing approach. We are most concerned with the possibility that municipalities may foreclose for their citizens some of the greatest potential benefits of cable television technology. It seems apparent that this danger is most likely to arise in the context of franchises which are either exclusive or for long terms or both.

It has been suggested by many observers that municipalities should consider ownership of the cable distribution systems themselves. Municipal ownership of communication facilities seems to us to present two serious dangers. The first danger of municipal ownership is that growth of cable may be unduly hindered by the financial and capital problems facing all levels of government today. The second -- and greater -- danger is that government ownership of communications media, unless very carefully controlled, could lead to serious threats to our First Amendment freedoms. For these reasons, we believe local governments should exercise extreme caution in evaluating such proposals. We would emphasize again that there are not as yet any trustworthy data which would indicate that cable systems should fall into that special and very narrow category of enterprise requiring either full economic regulation or outright public ownership. It seems very premature to impose such status on cable systems without further experience.

There are of course a number of important pending public policy issues affecting cable television, before the FCC, the Congress, the courts, and various state legislatures. Among these are the questions of franchise fees, federal licensing, the division of federal from state authority, technical standards, and copyright liability. Resolution of all of these issues may take some time. We would urge local franchise authorities not to delay their decisions unduly or to otherwise foreclose the potentials of cable. At the same time, long-term commitments and exclusive franchises seem likely to lead to future difficulties.

Communities seeking guidance in these matters are urged to consult the brief bibliography we have prepared here, and to seek the advice of their local educational institutions. There are also a number of legal and technical consultants specializing in these issues.

## BIBLIOGRAPHY

(To be completed -- short, 2 page version)