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CABLE TELEVISION IN ILLINOIS: THE PROBLEMS
OF CONCURRENT JURISDICTION*

I. CATV Is . . .

Cable television (CATV) is a method of transmitting electronic signals, such as television signals, over coaxial cable. CATV systems were developed in the late forties to allow isolated communities to receive television signals. At that time, there were so few broadcast stations that many communities were too far away to receive a strong clear signal. Other communities were in geographic areas with mountains or valleys which interfered with their reception. CATV systems solved these problems by placing an antenna in an area of clear TV reception from the air, and sending those TV signals to individual homes by wire. These early CATV systems were located primarily in small towns, operated by local television distributors. Until recently, CATV systems have not been extended beyond these isolated communities.

Interest in CATV has grown as the number of homes receiving CATV signals has increased. As an attorney's introduction to CATV, an ACLU pamphlet provides one of the most colloquial dissertations available.

A TV set hooked up to a cable is as different from the television you are used to as a telephone is from a tin can. There are three primary differences. First, cable TV signals are carried by cables instead of sent out over the air. This means the signals are sharper and do not interfere with one another. Second, cable TV signals can move in either direction on a cable. You can literally talk back to your television set. Third, there is no limit to the number of channels that a slightly modified television set can receive over a cable. Akron, Ohio, already has a 64-channel cable system.

* This Note was written while the Illinois Supreme Court considered a case, ICC v. Ill.-Ind. Cable Ass'n., No. 45274 (Ill., July 7, 1972), which raised the issue of the conflicting jurisdiction of state and local governments over CATV. A decision in this case is expected in September, 1973.

1. The coaxial cable provides a wholly self-contained path for transmitting electrical impulses from one point to another, offering significant improvements over both the wire pair used for local telephone distribution and carriage of television broadcasting over the radio spectrum. Only a limited number of television signals can be broadcast in any geographic area, since the spectrum is limited and shared by many users. By contrast, the current transmission range of coaxial cables potentially could permit simultaneous carriage of voice circuits, television channels, or mixes or variations of both types of signals. Use of multiple cables could expand such carriage, virtually without limitation, on a one or two-way basis.


The technical characteristics of CATV make it an extremely valuable communications instrument. When two-way communication through a CATV unit is in general use, many convenient services could be available in any home or office. These include library materials on microfilm; market information; shopping, currency, checking, and mail services, as well as central security protection against fire or burglary.4

Aside from its potential for advanced uses, the present importance of CATV can be measured in a concrete way. In 1971 there were about 2,800 CATV systems in the United States reaching 4.5 million homes. The annual revenue of the CATV industry exceeds $275 million, and should reach $3 billion by 1980.5 Even though the number of homes receiving CATV signals has grown enormously in the last few years, there has not been much penetration of the 100 major television markets. A major market can cover a large geographic area, and include many separate political units. For example, one market could be a major metropolitan area like Chicago, or a combination of medium-sized towns such as Champaign and Decatur, Illinois. As CATV enters the major television markets, it begins to compete with the major communications media.

The topic of this note is the extent of jurisdiction governmental agencies at various levels exercise or will exercise over CATV. Currently, federal, state and local government agencies are asserting jurisdiction over CATV. Each of these levels is moving quickly after asserting jurisdiction into rule-making to become as firmly entrenched as possible.6 The federal government, acting through the Federal Communications Commission (FCC), has a major advantage because it has the power of preemption, and can therefore dictate the areas of regulation left to the state and local levels.7 However, the FCC has a limited amount of manpower and resources it can commit to regulating CATV. The FCC has admitted that any detailed regulation of individual CATV franchises must be done at the state or local level.8 The CATV industry has been confronting a basic legal problem because it has the characteristics of two entirely distinct legal categories. CATV has had some difficulty fitting into the existing regulatory categories because it is a hybrid; it is a cross between a television broadcasting station and a

5. Oppenheim, supra note 3, at 5.
7. U.S. Const. art. VI, § 2.
telephone company. It can be considered a broadcast medium, and subjected to strict content limitations. Alternatively, it can be considered a public utility, where regulation is concentrated on the equipment and service available, and the content of the messages would not be regulated.

Physically, CATV resembles the public utilities which string wires on poles. This is important because many judges retain this wire-stringing image of traditional public utilities. Their reaction is supported by the fact that CATV shares many of the problems of traditional public utilities. For instance, the prohibitive cost of allowing a number of CATV companies to compete for customers in the same territory makes CATV a natural monopoly, like many public utilities. However, the operators of CATV systems are opposed to categorizing CATV as a public utility. They believe that the profits realizable under regulated rates would be so low that it would be impossible to raise the billions of dollars necessary to wire the United States with coaxial cable.

The FCC has recently begun to deal with CATV as a broadcast medium. This is not an airtight category because the same CATV operator can (1) carry the television signal broadcast by a major network, and be considered a public utility; (2) originate its own programs, and be a broadcaster; (3) make a studio and equipment available to the public on a rental basis, having no control over the content of programs produced, and thus be a common carrier. These multiple roles have caused governmental officials and courts to hesitate to assign CATV to any single legal category. The combination of the fear of the CATV operators and the lack of easily recognizable precedent to guide government officials has made CATV the subject of legal battles at every level of government in the last few years.

A brief description of the problems at the federal level will indicate why there is a need for state and local regulation of CATV to supplement the current federal regulation. A short history of the FCC's decision to assert jurisdiction over CATV will put the current state and local jurisdictional problems in a national perspective.

II. FCC Regulation of CATV

The FCC's authority to regulate television broadcasting and other forms of wired communications is derived from the Communications Act of 1934,
In this Act, the FCC received broad authority which has been interpreted by the courts to reach forms of communication not yet invented in 1934. The main consideration was, and is, that the frequency spectrum used to send communications signals can accommodate only a limited number of signals. The use of the air waves is so important to the general public that it must be regulated, and its character is such that it requires uniform national regulation. Even the availability of sixty channel CATV systems has not significantly affected this concern about scarcity of channels.

According to the Communications Act, the FCC was to "make available . . . to all the people of the United States a rapid, efficient, nationwide, and worldwide wire and radio communication service." The FCC was the "single Government agency [with] . . . unified jurisdiction . . . [and] . . . regulatory power over all forms of electrical communication, whether by telephone, telegraph, cable or radio." However, CATV does not fit neatly into any of the categories defined in the Communications Act. Despite frequent requests by the FCC, Congress did not specifically amend the Act to cover CATV. Therefore, in the 1950's the FCC officially disclaimed any jurisdiction over CATV. For example, in 1958 in *Frontier Broadcasting v. Collier*, licensees of television broadcast stations requested the FCC to exercise jurisdiction over 288 CATV systems in 36 states. The FCC stated that to qualify as communications common carriers, the CATV systems must hold themselves out to provide facilities by wire which all members of the public could use, with the CATV operator retaining no control over the contents of the signals transmitted. The FCC construed the Communications Act strictly, and concluded that CATV did not qualify because the CATV operator and not the public controlled the signal sent and received.

The FCC did not maintain this strict interpretation for very long. In 1962, the FCC indirectly regulated CATV systems in *Carter Mountain Transmission Corporation v. FCC*. In that case, a common carrier by radio was refused permission to construct a microwave communication system which would be used to transmit television signals from a number of cities to a CATV system in some small towns. The local television station

17. Id. at 137.
18. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 397 (1969). In this case the Court was certainly correct in considering the spectrum limited as long as the use of an unlimited number of channels is only a reality in the laboratory and not on the street.
22. 32 FCC 459 (1962).
in one of these towns protested, stating that this would be an economic threat which could bankrupt his station. The FCC denied construction permission to the common carrier, stating that its primary responsibility was to maintain the economic position of the local station, which served the greatest number of people. This action was upheld by the Court of Appeals, which stated that this sort of indirect effect on a CATV system was not regulation, but merely "considering appellant's application in its relevant setting."23

Gradually, the FCC found that CATV systems were affecting regulated broadcasters and common carriers. Therefore, in 1963, even though Congress had not amended the Communications Act, the FCC began a major study concerning CATV systems.24 In less than ten years, CATV had grown explosively and was beginning to affect the broadcast industry economically. This concerned the FCC, and in 1965, after two years of study, the FCC issued its First Report and Order25 asserting general jurisdiction over CATV. The United States Supreme Court upheld the FCC's authority to regulate certain aspects of CATV under the Communications Act in U.S. v. Southwestern Cable Co.26 Even though the individual CATV system in that case was located entirely within one state, the court took judicial notice of the fact that television broadcasting is largely programming produced for national audiences. Therefore, the CATV system was merely one link in an interstate communication system, and properly subject to the authority of the FCC. The court's basis for allowing CATV to be regulated was rather narrow, and was restricted to "that reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting."27 Here, the court was repeating the FCC's reasons for its early reactions to CATV. The FCC has, however, recently broadened its view.

Four years later, in U.S. v. Midwest Video Corp.28 the Supreme Court affirmed the FCC's authority to impose program origination on cable operators. The plurality opinion found that under the Communications Act,29 this FCC rule was within the FCC's mandate for the regulation of television broadcasting. As described in a recent law review article,30 mandating origination became just one part of a package of nonbroadcast standards. These standards were included in rules promulgated by the FCC in Febru-

24. Phillips, supra note 2, at 66. After two years of studying the cable industry, the FCC concluded that the Communications Act vested it with rule-making authority over all CATV systems, including both those that used microwave relay systems and the off-the-air systems.
27. Id. at 178.
29. 47 USC §§ 151,303(g), 307(b) (1970).
30. Rivkin, supra note 20, at 1500.
Apart from many technical requirements, the FCC has begun to deal with the burgeoning policy questions concerning broadcasting that have not been decided at the state or municipal level. The FCC has imposed equal time requirements for political candidates as well as the fairness doctrine on CATV. After it made CATV operators responsible for program origination, the FCC included rules on obscenity, advertising, sponsorship identification, and lotteries. The FCC has progressed from an indirect assertion of authority over CATV in *Carter Mountain Transmission Corp. v. FCC* to the recent policy decision to actively regulate the content of CATV television signals. However, the FCC has not begun to regulate CATV as a common carrier or a public utility. If the FCC evaluated economic data in detail for each CATV operator, it would be taking a giant step towards regulating CATV as a public utility as well as a broadcast medium. Currently, the FCC has left it to the state and local governments to perform these detailed evaluations. Moreover, to avoid political problems, the FCC has refused to take sides in the battle between state and local governments for jurisdiction over CATV.

By promulgating rules and imposing standards, the FCC raises the question of federal preemption. The FCC has made a strong policy statement about the place of CATV in "a nationwide communications structure." However, the FCC has not said that CATV is the type of industry that requires uniform regulation and total preemption of state or local initiative. The FCC has indicated that all three levels of government can

31. 37 Fed. Reg. 3252 (1972), 37 Fed. Reg. 3287 (1972), combined at 47 C.F.R. § 76.1 (1972). The FCC rules would require CATV systems to have a minimum channel capacity, a minimum proportion of nonbroadcast channels, and free channels for public-access, government, and educational use. They also require channel leasing, and compel the expansion of the access-channel pool. They have also limited franchise fees and periods, and imposed a construction timetable. See Barnett, *supra* note 6, at 750.

33. Id.
34. Id. at § 76.215.
35. Id. at § 76.217.
36. Id. at § 76.221.
37. Id. at § 76.213.
38. In its Reconsideration of Report and Order, 37 Fed. Reg. 13848, 13862 (July, 1972), the FCC recognized the likelihood of "multiple franchising" in the CATV area. On Oct. 24, 1972, amending this report, *supra*, at § 117, the FCC noted that "when there is a dispute as to whether the appropriate franchising authority is on the state or local level notice of filing of an application for a certificate of compliance should be served on all authorities that are claiming jurisdiction. . . ." Amending §§ 76.13(a)(7), and (c)(5), the FCC stated that "where there are state and local authorities asserting jurisdiction over cable television, even where such jurisdiction is *pendent lite*, both are served with copies of the application for certificate of compliance."
39. Cable television, as it grows, must be integrated into a nationwide communications structure . . . we conceive it to be our obligation to consider the actual and potential services of cable television and create a federal policy which insures that these services can be distributed equitably, on a nationwide basis as merely one link in our communications system. We have attempted to construct only an initial framework within which cable may develop its potential for public service. 37 Fed. Reg. 13848, 13858 (1972).
regulate CATV simultaneously within a general framework of federal guidelines.

The FCC realizes that it cannot realistically provide detailed regulation of CATV. In testimony before the Senate Communications Subcommittee in June 1971, FCC Chairman Dean Burch said:

We simply do not have the staff and resources to hold comparative hearings in each community, decide who is the best applicant and what portion of a large community he should operate in, and so on. Clearly there must be a partnership here, with the Federal Government specifying national policies and, where appropriate, laying down guidelines to be applied by the local entity, be it a state or municipal agency. This approach would also carry the advantages of "grass roots" administration. Local officials with the most knowledge of local conditions would make the greater number of "nuts and bolts" decisions.40

Although the FCC increased its Cable Television Bureau 50% in 1972, this meant an addition of only twenty staff employees. These new employees will be primarily occupied in working on the 600 pending certification applications submitted pursuant to the new rules.41 This is certainly an inadequate staff to supervise even 50 state-level CATV agencies, much less hundreds of local and city CATV boards.

FCC regulation of an industry like CATV, with independent systems operating all over the country, raises the same types of administrative problems as other plans for comprehensive federal regulation. The FCC must consider the expense of holding long hearings on the detailed issues of public concern involving CATV. The FCC must also consider the cost of legal representation to the CATV operator, and the distance parties and witnesses in isolated communities must travel to attend a hearing. Finally, it is important to determine the amount of time the FCC would need to render a decision in any case filed. These administrative problems would be diminished by active state and local regulation of CATV.

The FCC rules leave major areas untouched, such as the criteria which should be used to rate CATV systems competing for franchises. Detailed procedures must be developed at the local level for the selection and regulation of CATV systems.42 Since the FCC rules are only the minimum criteria, the states may not only add details to these rules, they may also decide to set even more stringent requirements and procedures.

Although the FCC has been strongly inclined to regulate the broadcast-related functions performed by CATV systems, it will probably allow mini-

41. The Cable Television Bureau "had just been increased by 50 per cent. In terms of bodies, only 20—with 600 certification applications . . . . By the end of the year he'd probably have 600 more." Trib., supra note 4, at 40.
42. Barnett, supra note 6, at 751.
mal state or local regulation in this area. However, the FCC has indicated that state and local agencies should take an active role in regulating CATV functions which have been categorized as common carriers or public utilities. This trend is also likely to continue, and repercussions of this FCC policy will be examined in the following sections of this note.

III. STATE REGULATION OF CATV

Part of the difficulty the CATV systems face is that they have been regulated in a fragmented and piecemeal fashion for twenty years. Many governmental agencies have attempted to compensate for these years of inaction by suddenly imposing a confusing mass of regulations. State regulation of CATV is so recent that, before 1971, state governments were regulating CATV in only five of the smaller states: Connecticut, Nevada, Rhode Island, Vermont, and Hawaii. Today, in addition, Alaska, New York and New Jersey are regulating CATV. Massachusetts has established the Community Antenna Television Commission in its Executive Office of Consumer Affairs.

The municipality was the first level of government to regulate CATV. New Jersey cities made a large and most disastrous use of municipal franchising, as municipal officials often saw CATV as a gold mine of income for either the city or themselves. The nationwide publicity of bribery brought CATV to the attention of many state officials. They realized that the CATV industry usually took the municipality on as a business partner for a percentage of the profits. Since the fees paid by the cable operator go to the local government, the local government is placed in the dual role of regulator and business partner of the cable firm. Since the municipality has a stake in the financial success of the CATV company, officials are, to some extent, compromised as protectors of the public interest when it comes to regulating rates and the company's activities.

47. Hawaii Laws ch. 114 (1970). Each of these states uses it's existing public utilities commission to regulate CATV.
50. On the Cable: The Television of Abundance, Report of the Sloan Commission on Cable Communication (1971) at 152 (where unreasonably high franchise fees were noted in the FCC Report to Congress at 1782); cf. Crossed Wires: Cable Television in New Jersey, A Report by the Center for Analysis of Public Issues, Princeton (1971) at 52 (hereinafter New Jersey Report); Trib., supra note 4, at 39.
51. New Jersey Report, supra note 50, at 54.
State government in Illinois is also a new-comer to CATV regulation. The Illinois Commerce Commission (ICC), which regulates the state's public utilities, published a notice of Investigation of Cable Television on January 5, 1971. On the basis of extensive research and almost 3,000 pages of testimony taken in public hearings, and numerous exhibits, the ICC asserted jurisdiction over CATV in an Interim Opinion and Order, and four months later issued a Notice of Inquiry and of Proposed Rule Making. The Illinois-Indiana Cable Television Association (Illinois CATV Association) filed an application for re-hearing with the ICC, which was denied. The Illinois CATV Association then filed two suits in the Circuit Court of McHenry County: (1) an original action for an injunction and a declaratory judgment to set aside the ICC Cable Order and (2) a statutory appeal of the ICC Cable Order. These two cases were consolidated in the Circuit Court, and remained consolidated on appeal.

One of the reasons that the Illinois CATV Association filed these suits is that CATV operators generally would like to limit the number of governmental bodies which have jurisdiction to regulate CATV. Many operators have already developed a working relationship with the municipalities in their territory, and do not want any state interference. Moreover, some municipal governments in Illinois would like sole jurisdiction to regulate CATV.

Pursuant to Illinois Supreme Court Rule 302(b)

(b) Cases In Which the Public Interest Requires Expeditious Determination. After the filing of the notice of appeal to the Appellate Court in a case in which the public interest requires prompt adjudication by the Supreme Court, the Supreme Court or a justice thereof may order that the appeal be taken directly to it. Upon the entry of such an order, any documents already filed in the Appellate Court shall be transmitted by the clerk of that court to the clerk of the Supreme Court. From that point the case shall proceed in all respects as though the appeal had been taken directly to the Supreme Court, which provides for expeditious review where public interest requires prompt adjudication. Mr. Justice Davis granted a joint motion by the parties for direct appeal to the Illinois Supreme Court. Stay of judgment was entered pending appeal to the Illinois Supreme Court, which reinstated the ICC Cable Order.

54. No. 56191, issued January 5, 1972. These rules are available on request from the ICC. (hereinafter Illinois CATV Rules).
56. Illinois-Indiana Cable Television Association v. ICC, No. 71-2983 (Ill. Cir. Ct. April 17, 1972). In the first case, the Circuit Court granted an ICC motion to dismiss the Petition on the ground that an original action would not lie. In the second case the Circuit Court reversed the ICC Cable Order, holding that the scope of the ICC's regulatory jurisdiction is purely a question of law, and that the ICC lacks the jurisdiction to regulate CATV.
57. Phillips, supra note 2, at 49.
The ICC’s solution to these problems is a system of cooperative certification. The ICC proposes to reserve to itself the authority to certify all CATV operators, but under a procedure where municipalities could award CATV franchises which would be accorded presumptive validity. The municipalities would have to follow the detailed procedures established by the ICC. If the municipality fails to observe the procedures, the ICC could hear testimony and award a franchise directly.

The problem of federal preemption of state regulation of CATV was adjudicated in *TV Pix, Inc. v. Taylor,* where the U.S. Supreme Court held that CATV is a public utility which may be regulated by a state in the absence of federal legislative intervention. Even though CATV systems are engaged in interstate commerce, the court found that each system was essentially a local business. A CATV system was found to be analogous to a local express or parcel delivery service, which was appropriate for state regulation. Moreover, the areas the state intended to regulate (quality of service and rates) were held to be areas “which lend themselves naturally to local control and supervision.” Finally the Court found that there had been no federal preemption, which depends on actual federal regulation in a specific area, and not the mere power to regulate.

The *ICC Cable Order*

Given the *TV Pix v. Taylor* decision, the ICC was free to consider the statutory grounds for its jurisdiction over CATV. There were three major issues considered by the ICC in its Cable Order:

**Issue 1.** Whether the television signals and other information transmitted by CATV systems in Illinois are “telephone messages” within the meaning of Sec. 10-3(b). The ICC based its jurisdiction over CATV on Sec-

60. The general proposed procedure is as follows: 1) the municipality must conduct a study of its CATV requirement, publishing a report; 2) applicants would be invited to submit drafts of franchise bids; 3) the municipality must hold public hearings on these bids; 4) using standards set by the ICC, the municipality would issue a franchise document and applicants would be invited to submit their bids; 5) the criteria for judging the bids must be announced by the municipality; 6) bids must include a bond and a detailed statement signed by the Chief Executive Officer of the applicant; 7) technical details are necessary in the bid; 8) a financial statement must be included in the bid; 9) all documents described above must be available to the public; 10) 2nd round of municipal public hearings; and decision of municipality with reasons for decision.
62. *Id.* at 463. The rule invoked by the Court was that: in the absence of Congressional occupation of the field, state action in implementation of its concurrent jurisdiction over matters affecting interstate commerce, the subject not being one demanding uniformity of regulation, is presumptuously constitutional and the burden is on the public to prove the substantial adverse burden, obstruction or prejudice to commerce among the states resulting from the state statute or regulation under attack.
63. ICC Cable Order, supra note 53, at 2.
tion 10-3(b) of the Public Utilities Act, which authorizes the ICC to regulate any company that "operates any equipment for public use in Illinois which transmits telegraph or telephone messages." (Emphasis added).\(^{64}\) The ICC held that the legislative definition of a telegraph or telephone message included a CATV signal. This was one of the most difficult questions the ICC faced when it asserted jurisdiction over CATV. As argued in ICC v. Illinois-Indiana CATV Ass'n,\(^{65}\) it is partially a fact question whether a CATV signal fits the legislative definition of a telephone message.\(^{66}\) What is important here, however, is the standard of legislative interpretation that was applied in this case. A number of states with public utility statutes similar to Illinois' have indicated that they will use these statutes to assert jurisdiction over CATV if the Illinois attempt is successful.\(^{67}\)

The ICC has argued for a very broad definition of "telephone message" based on the holding in Public Utilities Commission v. Monarch Company.\(^{68}\) There the court held that a warehouseman furnishing refrigerated storage for fruits and dairy products was covered by the section of the 1913 Public Utilities Act which only mentioned grain elevators or storehouses. This classic case considered the legislative history of the Public Utilities Act and concluded that:

The regulation of so-called public utilities has kept pace with invention, the increase of population and the demands of civilization that have been brought about by the changing order of things. . . When the entire Act under consideration is read and its general purpose considered, it is very plain that the legislature intended to bring under the law every business which could be properly classed as a public utility.\(^{69}\)

The CATV Association has argued that "telephone message" should be read literally, giving it a narrow reading.\(^{70}\)

There is support for both positions. In his dissent in the ICC Cable Order, Commissioner Colter stated that he did not feel that either the ICC or the municipalities have been given the authority to regulate CATV. "This formidable jurisdictional hurdle . . . of a fundamentally new mode of

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\(^{65}\) Brief for Appellee, Ill. CATV Assoc. at 36; Brief for Appellant, ICC at 18, ICC v. Ill.-Ind. Cable Television Assoc., No. 45274 (Ill., July 7, 1972).

\(^{66}\) This issue was discussed at length in the ICC Cable Order, supra note 53, at 42, and in the transcript of the hearings before the ICC, and the briefs submitted to the Illinois Supreme Court.

\(^{67}\) Statement made by Roland Hornet on Jan. 17, 1973 in oral argument before the Illinois Supreme Court, when he appeared as Special Counsel for the ICC in ICC v. Ill.-Ind. Cable Assoc., No. 45274 (Ill., July 7, 1972).

\(^{68}\) 267 Ill. 528, 541, 108 N.E. 716, 729 (1915).

\(^{69}\) Id. at 537-541, 108 N.E. at 720-729, continuing, "Laws of this character should be given such a construction as will give effect to their true intent and meaning, without resorting to technical and arbitrary rules of construction to defeat their very objective and purpose." The nostalgic court also stated that "within the memory of man railroads and telegraphs have come into use in this state."

\(^{70}\) Appellee's brief, supra note 65, at 13.
communications, and all of the broad, vital public policy questions necessarily involved, can, in my view, be overcome only by clear legislative direction and delineation.\(^{71}\) This is a view which could be adopted by the Illinois Supreme Court in *ICC v. Illinois-Indiana CATV Ass'n*. However, as the ICC argued, a number of bills concerning CATV were introduced in the General Assembly in the last year. Since CATV is such a hotly disputed issue, no action was taken.\(^{72}\) The Court could read the statute broadly and pragmatically, and give the ICC jurisdiction. From a public policy point of view, CATV can be most easily directed in the public interest if state jurisdiction is asserted today rather than in a few years.

**Issue 2.** Whether the ICC's jurisdiction over CATV is based on the nature of the service provided or the nature of the company providing the service. There are a number of older cases which hold that a state agency did not have jurisdiction to regulate CATV under the existing public utilities statute. However, in each case the state's statutes referred to "telephone companies or corporations" (Emphasis added).\(^{73}\) The case used most often is *Television Transmission, Inc. v. Public Utilities Commission*,\(^{74}\) where Judge Traynor had to determine whether a cable company could be classified as a telephone corporation under the California statute. The ICC distinguished that case, since the Illinois Public Utilities Act grants authority in terms of the type of messages and not the type of corporation. Moreover, Traynor wrote his decision in 1956 before many of the data transmission and two-way communication capabilities of CATV were considered near at hand. It is arguable that in a quickly-changing technical field, this California decision is based on an outdated fact situation.

**Issue 3.** Whether CATV is sufficiently affected with the public interest to warrant state regulation as a public utility. On the basis of the holding in *TV Pix v. Taylor*, opinions of Attorneys General in various states, and its own detailed record, the ICC concluded that cable television and other forms of broadband cable communications are public utilities because they are offered "for public use" within the meaning of Section 10-3 of the Public Utilities Act.\(^{75}\)

Given the problems discussed above, the ICC has proposed an extremely liberal approach to regulation of CATV.\(^{76}\) While its rules must be within the federal guidelines, it is interesting to note that the ICC does not

71. ICC Cable Order, *supra* note 53 (Colter's dissent) at 2, 91 P.U.R.3rd at 51.
72. See notes 84 and 85, *infra*.
propose to treat CATV like any other public utility.\textsuperscript{77} From its hearings, the ICC concluded that rate abuses have not been a problem. Moreover, while the monthly subscriber rates are low, high-quality CATV systems are not likely to be established. The ICC policy is to encourage the realization of service potential, recognizing that potential services may not fit easily into uniform rate formulae. It therefore rejected the imposition of the traditional public utility rate-of-return standard, and proposed that CATV rates should be allowed to find their own “true level”.\textsuperscript{78}

The ICC has proposed detailed rules to regulate a municipality’s award of a CATV franchise. Ten years after a franchise is awarded, it must be renegotiated with the municipality and the ICC. The ICC proposes to apply §§29 and 49a of the Public Utilities Act, requiring ICC approval before service can be discontinued or a franchise transferred to CATV operators.\textsuperscript{79} The municipality can use the ICC as a watchdog to assure that the CATV operator performs according to the franchise terms. This means that each operator must file an annual certificate of compliance with performance standards which will be reviewed by the ICC. Finally, the ICC recognizes its unique position to arbitrate the continuing disputes between CATV operators and other utilities in Illinois.\textsuperscript{80} The key to the ICC rules for CATV may be their generous view towards CATV rates. This may be a result of criticism by the cable industry that public utility commissions are not sensitive to the needs of CATV. In the ICC hearings, at least one witness\textsuperscript{81} strongly advocated the creation of a separate state agency to regulate CATV. Others feel that the state should not be involved in the regulation of CATV. They advocate a strong rule-making role for the FCC with local municipality and county governments implementing these rules.\textsuperscript{82}

In the final analysis, the Illinois Supreme Court must weigh the practical and public policy effects of finding that the ICC has jurisdiction over CATV when it considers the legal basis for that jurisdiction. The policy arguments for state regulation of CATV are that there must be

\textsuperscript{77} A liberal attitude by the ICC toward the CATV industry’s rates \textit{might} tend to make the industry much more amenable to acceptance or even lobbying for state regulation.

\textsuperscript{78} Illinois CATV Rules at 3-5.

\textsuperscript{79} \textit{Id.} at 15.

\textsuperscript{80} \textit{Id.} at 44.


\textsuperscript{82} Rivkin, \textit{supra} note 20, at 1475.
some government agency at the local level to complement the FCC. The state has jurisdiction over every individual geographic area within its boundaries, and there would be no unregulated areas if it had jurisdiction over CATV. If only cities and counties had jurisdiction over CATV, they must all regulate CATV or there would be gaps and places where no local agency had any jurisdiction. Since the ICC is currently regulating public utilities, it has professional engineers and accountants on its staff who are always available if there is a problem with any CATV system in the state. Even if a municipality hired consultants or experts when it first let bids on a CATV franchise, it is unlikely that a municipality could afford to pay such experts indefinitely. This would mean that there was no technical staff to investigate complaints after the system was in operation. There are many advantages inherent in having a state-level agency regulating CATV in Illinois. Governmental units, such as municipalities and counties, naturally prefer to direct activities within their boundaries without being subject to review from a state agency. When it decides the question of jurisdiction presented in ICC v. Illinois-Indiana CATV Ass'n., the Illinois Supreme Court must consider the conflicts raised by concurrent state and municipal jurisdiction over CATV.

IV. ILLINOIS MUNICIPALITIES AND CATV

Some municipalities in Illinois are opposed to state regulation of CATV. The strongest opposition has come from Chicago, which filed an amicus brief in the case of ICC v. Illinois-Indiana CATV Ass'n. In that brief the City argued that when the Illinois legislature amended the Municipal Code in 1967, giving municipalities the power to “license, franchise and tax the business of operating a community antenna television system...”, municipalities received the power to regulate CATV. In Ill. Broadcasting Co. v. City of Decatur, decided in 1968, the Illinois Appellate Court held that municipalities had the authority to impose conditions on franchise grants which may be voluntarily accepted by CATV systems. Municipalities had this authority even before the Municipal Code was amended. How-

85. Illinois Broadcasting Co. v. City of Decatur, 96 Ill. App. 2d 454, 459, 238 N.E.2d 261, 266 (1968), where an ordinance imposing conditions on a CATV franchise was passed before § 11-42-11, “the power to enact (the franchise ordinance) must be carefully distinguished from some of the conditions here imposed, as to which municipalities have no power to exact unless such exaction is agreed to,” by the CATV system accepting the franchise. The authority to impose franchise conditions on a CATV system is derived from Ill. Mun. Code, Ill. Rev. Stat. ch. 24, § 11-80-2 (1965), which gives the cities the right to regulate the use of their streets and other municipal property.
ever, the City, elaborating on that holding, stated that in Section 11-42-11 the Illinois legislature gave municipalities sole authority to regulate CATV in Illinois. This argument was refuted by the ICC, which pointed out that in Division 42 of the Municipal Code, every section except Section 11-42-11 includes the authority to regulate. The ICC argued that this omission meant that the legislature did not intend to give Illinois municipalities the authority to regulate CATV.

There has been some doubt that current state legislation clearly delineates jurisdiction over CATV, judging from some of the bills introduced in the 77th General Assembly. S.B.169 and H.B.620, both tabled, contained language repealing municipal authority to regulate CATV. H.B.4582 carefully adds the word "regulate" to Section 11-42-11, and states that "the Illinois Commerce Commission shall have no jurisdiction with respect to community antenna television systems." Proposing a new act, H.B.4581 authorizes counties to franchise and regulate CATV. H.B.4581 and H.B.4582 were also tabled. With no recent legislative guidance, the courts must depend on other sources of authority.

The City contends that the Public Utilities Act governs home rule units only until city ordinances to the contrary are enacted, relying on Kanellos v. County of Cook. Citing various FCC regulations, the City discussed the public policy basis for giving the municipality sole local jurisdiction over CATV. The City called the new FCC cable regulations comprehensive, and saw few statewide implications in CATV, which it styled as basically local in nature. The City of Chicago stressed its unique knowledge of the diverse neighborhoods to be served by CATV within the city boundaries. The key question overlooked in the City of Chicago's argument is whether CATV pertains only to the government and affairs of one home rule unit, or whether there is a more general, perhaps state-wide interest involved.

Since the basis of Chicago's home rule authority is the 1970 Illinois Constitution, the intent of the 1970 Constitutional Convention is relevant for the Illinois Supreme Court to consider when interpreting the extent of authority granted by the home rule provision. The Convention's Committee of Local Government expressed some concern about the possible fragmenting of governmental power in metropolitan areas caused by the assertion of home rule powers. In its report, the Committee stated:

86. Chicago Amicus Brief, supra note 58, at 18.
87. ICC Brief, in reply to Chicago Amicus Brief, supra note 58, at 2; ICC Appellee Brief, 32-39.
89. Tabled April 25, 1972, id. at 866.
91. Chicago Amicus Brief, supra note 58, at 20.
92. "As to the problem of fragmenting governmental power in metropolitan
when a state statute actually exercises a governmental power or authorizes a state agency to do so... the state interest is much more significant than where the statute merely denies the power to local governments. For example, extensive conflict and confusion could result if each home rule unit of government could regulate public utilities independently and the state was powerless to vest exclusive jurisdiction in a utilities commission. This statement clearly shows that the Convention considered public utility regulation an area where the state and municipality must have concurrent jurisdiction. This statement is somewhat at odds with the proposal in the City of Chicago's brief. The City argued that even if Section 10.3(b) of the Illinois Public Utility Act gives the ICC jurisdiction over CATV, home rule units have the authority to enact franchising ordinances which take precedence over ICC regulations within municipal boundaries.94 This statement not only conflicts with the intent of the 1970 Illinois Constitutional Convention, but it also conflicts with the authorities outside Illinois.

The Supreme Court of Kansas95 invalidated local franchises to regulate CATV which were enacted under a home rule amendment to the Kansas constitution.96 The Supreme Court of Alaska made a strong statement in a recent decision,97 where it held that the City of Anchorage could not use its home rule powers to dictate the service areas to be wired for electrical power.

Although the powers of home rule cites vary depending upon the basis for the grants of such powers, conflicts between the state statutes and municipal ordinances generally have been modulated by ruling in favor of the statutes. Many state courts, while not clearly enunciating the basis for their holdings, have in fact followed a rule which for the sake of convenience can be referred to as the 'local activity rule.'

areas,” the solution lies in “... permitting the state to take over or directly control those aspects of government in metropolitan areas which do not lend themselves well to governance by a large number of local units.” VII Record of Proceedings, Sixth Illinois Constitutional Convention, Committee Proposals 1615 (1972).

93. Id. at 1642.
94. Chicago Amicus Brief, supra note 58, at 21: Should § 10.3(b) of the Utilities Act vest jurisdiction over cable television in the Commission, home rule units, under the authority of Art. VII, § 6 of the 1970 Constitution, will be empowered to enact franchising ordinances and to the extent they conflict with the Commission's regulations, such ordinances would take precedence within the municipal boundaries. (Emphasis added).
96. Under the Kansas Constitution, art. 12, § 5, cities could conduct “municipal functions without statutory authorization where that function is not restricted by the statutes of the State of Kansas.” The Kansas Supreme Court stated that “the home rule amendment may have broadened the powers of municipalities but it did not extend to them the power to enact unreasonable ordinances under the guise of police power.” 205 Kan. at 541, 471 P.2d at 364.
This rule was not born of a need to preclude municipal legislation when the state has preempted an entire area of law. Instead, it is merely an expedient method for resolving an impasse between state statutes which seek to further a specific policy and municipal ordinances which either directly or collaterally impede this implementation.

In considering the case before us, we feel that this rule will adequately serve to eliminate the existing friction between our state statutes vesting power in the PSC and the city's ordinance. Here, the activity sought to be regulated is unquestionably of a state-wide concern—the denomination of service areas wherein a public utility may operate.98

This case is of great significance because the 1970 Illinois Constitutional Convention explicitly stated that the language in the home rule section was derived from the Model State Constitution and from the Alaska Constitution. This case clearly indicates that public utility regulation is of state-wide rather than local concern, and supports the ICC argument for concurrent state and city jurisdiction over CATV.

The City of Chicago has argued that even if the ICC has the power to regulate CATV, home rule units may nevertheless enact CATV regulations effective within their boundaries.99 As stated in the 1970 Illinois Constitution:

Except as limited by this Section, a home rule unit may exercise any power or function pertaining to its government and affairs including, but not limited to, the power to regulate. . .100

The City of Chicago reads this Article with §9 of the 1970 Illinois Constitution Transition Schedule, which provides that the rights and duties of public bodies remain as if the 1970 Constitution had not been adopted, with the exception of the changes contained in the 1970 Constitution. The issue here is whether the regulation of CATV is a function pertaining to the municipality's government and affairs.

The fact that CATV relates to municipal government and affairs should not nullify the conclusion that public utilities require state-wide regulation. The home rule powers granted to a municipality such as Chicago should not imply that Chicago has the authority to exclude the ICC from regulating CATV within Chicago's boundaries. Even under home rule, the status quo could be easily maintained, since the state and municipalities have historically had concurrent authority to regulate public utilities providing telephones, electricity, and gas. Chicago and a few other municipalities in Illinois have the resources to maintain a staff to oversee CATV problems within their boundaries. However, since concurrent authority is the essence of the franchising procedure proposed by the ICC, Chicago and other municipalities do have an

98. Id. at 120.
99. Chicago Amicus Brief, supra note 58, at 18-22.
opportunity to regulate CATV quite actively, as long as the ICC guidelines are followed. Chicago and other municipalities could conceivably achieve a great deal of autonomy within the ambit of the ICC's proposed rules and procedure. Moreover, the details of this procedure will be scrutinized by the FCC and various courts. The parameters of jurisdiction of the state and municipalities under the Illinois Constitution can be fully adjudicated in the future.

V. CONCLUSION

Before any problems of concurrent jurisdiction can arise, the Illinois Supreme Court must decide whether the ICC currently has the statutory authority to regulate CATV. In oral argument, the court was told of the importance of regulating a growing industry like CATV as early as possible. This is one of many policy considerations which must be weighed with a statutory interpretation when the court decides whether the ICC has jurisdiction. However, there has been a stalemate at the legislative level precisely because CATV is such a "hot issue", and there are strong interests both in favor of and opposing the expansion of CATV. If the court finds that the ICC does not have the authority to regulate CATV, it could be a long time before enough members of the Illinois legislature are able to agree on a CATV bill to pass it, and clarify the current jurisdiction problems. The home rule units may have a chance to regulate CATV without state guidelines or state aid.

The Illinois Supreme Court has sufficient legal precedent to support either a finding that the ICC has jurisdiction over CATV, or a finding of no jurisdiction. No level of government in Illinois has the clear and exclusive right to regulate CATV. Therefore, the Illinois Supreme Court has the opportunity to weigh public policy considerations much more heavily than in situations where the law is clear. The downstate justices asked about the effects of the current local regulation of CATV, which is limited to municipalities. These justices have been close to the problems of downstate CATV systems. They were concerned about the families living outside of municipal boundaries who have no local government agency to represent their interest in receiving quality CATV service. No matter what the legal basis of the final decision, the practical effects of a finding of jurisdiction will be a major concern in this case. Moreover, each justice will make the subjective determination that either the state or the municipality can do a better job regulating CATV at the local level. These considerations will color the facts, and will probably be the key factors in determining whether the ICC has the jurisdiction to regulate CATV in Illinois.

LESLIE RECHT