OPINION 75

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Gentlemen:

This is in response to your respective inquiries concerning the many faceted legal questions created by the advent of community antenna television systems in Indiana. (These systems will hereinafter be referred to as CATV.) In addition to your questions we have received numerous inquiries from city attorneys, mayors of various Indiana cities, city councilmen and members of various municipal boards, groping for proper procedures in establishing CATV systems. It is, therefore, obvious that this robust offspring of the television industry has created considerable ferment in the governmental bodies which have, or claim to have, jurisdiction over this extremely interesting subject matter.

At the outset, I wish to say that this Opinion represents the views produced by considerable research but in which I readily state there can be no great clarity, because CATV is a "wild animal" which present laws were not designed to control or regulate. It is only logical, therefore, that legislative action will of necessity occur in this field. It is with this preface that I have attempted to collect the authorities and relate them to Indiana law and procedure to provide some guidelines in the interim before the enactment of specific legislation regulating CATV. Attention is not given to copyright law application. While implicitly raised by various

questions it is more of a private concern. See Note, 79 Harv. L. Rev. 366 (1965).

CATV involves the use of a master antenna to capture television signals, then relays those signals by cables to home television sets. The master antenna serves many private homes in a city in place of individual residence antennas. It is similar to a master antenna used by hotels and apartment houses to serve a number of rooms or units, except that it is vastly larger in size.

A CATV company usually goes into a community which has limited access to television and builds a tower for the purpose of capturing the signals from distant television transmitters. If the distance is too great between the transmitting station and the master antenna, the CATV company will build relay towers in between to receive and transmit by microwaves. "Community Antennas Enter the Big T.V. Picture," 72 *Fortune Magazine* 146 (Aug. 1965). Frequencies which begin at about 890 mega-cycles are microwave bands. They are at the upper reaches of usable radio spectrum bands. The microwave beam has been compared to a flashlight beam:

> ". . . it can be directed to any selected spot within range of the transmitter. This straight line directivity permits the same frequency channel to be used by parallel systems, each transmitting its own messages without interference from the other. Microwave radio systems are not affected in the same by weather or man-made interference as are radio services operating on lower frequencies, and are more economical than comparable wire line systems." Note, 70 Yale L.J. 954, 957 (1961).

The Federal Communications Commission presently permits use of three bands: 3700-4200 mc/s, 5925-6425 mc/s, and 10700-11700 mc/s. According to the Seiden Report (Seiden, *An Economic Analysis of Community Antenna Television Systems and the Television Broadcasting Industry: Report to the F.C.C.*, U.S. Govt. Printing Office, 1965), the first of these is nearly saturated with users and nearly all CATV microwaves are in the second band.

Once the signals are captured by the master antenna, they are transmitted over coaxial cables, usually strung on existing telephone and light poles to the individual television set. Coaxial cables consist of special wire capable of transporting television signals over long distances. Normal practice has been for the CATV company to obtain a franchise from the municipality to string these cables pursuant to a pole contract with the telephone or light company.

Most of the franchises are for 10-25-year periods. Seventy per cent of the cities with franchises exact some type of payment from the CATV system, usually a percentage of gross receipts.

The pole rental charged the CATV system in Indiana by the telephone companies is $3.25 per pole per year. Indiana Bell Telephone, Inc., Illinois Bell Telephone, Inc., and General Telephone Company of Indiana, have filed a tariff with the Public Service Commission of Indiana offering to provide facilities for transmission for CATV systems.

The CATV normally charges the individual subscriber an installation fee of $15.00 to $25.00 and a monthly service charge of $4.00 to $5.00. "Television's Lusty Offspring: the boom and brawls of CATV," 65 *Newsweek Magazine* 62 (Feb. 1, 1965); "Cable T.V. On the Move," Tepler, 71 *Electronics World Magazine* 87 (Jan. 1964); *Indpls. Times* (Mar. 1, 1965). Installation simply involves connecting the individual television set to the coaxial cable network. The distribution to subscribers is similar to that used in private telephone installation and service.

According to the Seiden Report, pp. 23-27, the cost of a CATV system, exclusive of tower and antenna, varies between $3,500 and $4,000 a mile depending upon the number of miles the cable must be strung to serve the community. The estimated capital cost of constructing a CATV system varies between $150,000 and $800,000.

The financing of a CATV system is similar to the financing of any corporate or business enterprise. The CATV company may borrow the necessary capital to finance initial equipment installation and operating expenses. It may meet such initial expenses through paid-in capital or assessment of stockholders. If already a going concern, it may finance

such expenses out of working capital. Another popular means used to meet these initial expenses is by capital raised from subscriptions from individual consumers of the service. In other words, the consumer pays the CATV company the installation charge, which is in excess of installation costs, and such additional revenue is used by the CATV company as initial operating capital.

CATV was originally developed about 1950 to make television reception possible in mountainous and remote regions too far away from stations to receive signals with conventional antennas. In recent years, however, diversity of programming has been its chief appeal. It is estimated that about 1,300 CATV operators currently service approximately 1.2 million of the 52 million U.S. households that have television sets. As recently as 1959, there were only 747,000 CATV customers served by 829 systems. Only about 250-300 of the CATV systems, however, employ micro-wave links.

CATV companies are currently operating in Indiana. Such systems are presently operating in the cities of Logansport, Peru, Wabash, Lafayette, Attica and Vincennes. Several others are competing for municipal franchises in other cities, including Indianapolis. The following is an example of its operation in Indiana:

> "Until the cable company moved in, residents of Lafayette had a choice of one local ultra-high frequency station, channel 18, which offers CBS programming, or erecting a maze of rooftop hardware in hope of attracting a signal from the Indianapolis stations.
>
> "The cable company now operating there has 6000 subscribers who'll pay a monthly charge of $4.90 for direct wired cable TV.
>
> "In return for the money, the cable company is offering to provide good reception on the Lafayette station, three Indianapolis stations, two Chicago stations, the South Bend station, the two airborne educational stations which operate overhead, one channel with weather information and five FM radio stations." *Indpls. Times,* pp. 1, 2 (Mar. 14, 1965).

This is similar to what happened in the Elmira, New York area which received one station clearly and two fuzzy before the CATV system, but now viewers can receive clear pictures on 13 channels. *Fortune, supra;* "Golden Antenna of CATV," Murray, 85 *Dunn's Review and Modern Industry Magazine* 99c (May, 1965).

CATV has had an enormous impact on the public. This is attributable to its ability to provide a more perfect picture, particularly with color programs, and a wider variety of programs from which to choose.[1]

In light of these facts, consideration will now be given to the following questions raised by your inquiries:

I. Whether CATV systems are subject to state regulation.

A. Whether state regulation would impose a burden upon interstate commerce thereby making state regulation invalid under the Commerce Clause of Art. 1, sec. 8, of the Constitution of the United States.

B. Whether Congress has preempted regulation of CATV systems through the Federal Communications Act, 47 U.S.C., sec. 153.

II. Whether the Public Service Commission of Indiana has jurisdiction over CATV systems under Burns IND. STAT. ANN., § 54-105.

III. Whether an Indiana municipality may franchise a CATV company to service its inhabitants.

IV. Whether a municipal franchise granted a CATV company may be exclusive.

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[1]For further comments on CATV development see: "CATV Gets New Viewer," *Business Week,* p. 30 (May 1, 1965); "Is Pay T.V. Sneaking to Success? CATV Systems," *Business Week,* p. 32 (Apr. 25, 1964); "Harnessing the Antenna: CATV," Jones, 71 *Electronic World* 46 (April 1964); Frye, "Modern Broadband CATV System," 66 *Electronic World* 62 (Dec. 1961); Harris, "New Broadband T.V. Antenna," 66 *Electronic World* 62 (Dec. 1961); Report of the New York City Bureau of Franchises on CATV Systems. CATV was also given attention by the National Institute of Municipal Law Officers at their convention at Philadelphia in October, 1965.

V. Whether municipalities may own and operate CATV systems.

VI. Whether telephone and telegraph companies, as public utilities, may operate CATV systems.

VII. Whether telephone and telegraph companies may, as public utilities, enter into lease arrangements for their transmission equipment to CATV companies if such are not public utilities.

I

CATV SYSTEMS AND STATE REGULATION

A. The Commerce Clause

The first question for consideration under the federal aspects of the problem is whether state regulation of CATV would impose an undue burden upon interstate commerce, thereby making state regulation invalid under the Commerce Clause of Article 1, sec. 8, of the Constitution of the United States. This question must be answered in the negative.

The Supreme Court in *Pennsylvania Gas Co. v. Public Service Commission,* 252 U.S. 23 (1920), said that as a general rule the states could not directly regulate or burden interstate commerce if the subject involved had been committed by the Constitution to Congress. The Court, however, went on to note exceptions to this general rule, saying:

> "In dealing with interstate commerce it is not in some instances regarded as an infringement upon the authority delegated to Congress, to permit the States to pass laws indirectly affecting such commerce, when needed to protect or regulate matters of local interest. Such laws are operative until Congress acts under its superior authority by regulating the subject-matter for itself."

The Court restated this principle in *Head v. New Mexico Bd. of Examiners in Optometry,* 374 U.S. 424 (1963), saying:

> "A state law may not be struck down on the mere showing that its administration affects interstate commerce in some way. 'State regulation, based on the

> police power, which does not discriminate against interstate commerce or operate to disrupt its required uniformity, may constitutionally stand.'" (cite omitted). p. 448.

In applying the above criteria to state regulation of CATV, it is apparent that such regulation does not impose an undue burden upon interstate commerce. It must be conceded that CATV, by its very nature, has an interstate character and does affect interstate commerce. Television signals know no political boundaries. Further the content of these television signals is interstate in character. Yet CATV has definite local characteristics and its regulation by the states would not unduly burden interstate commerce.

The transmission by the CATV company is direct to the consumer without any intervention between seller and buyer. The service rendered is to local consumers who are reached by the use of streets of the cities. These facts are almost identical to those in *Pennsylvania Gas Co. v. Public Service Commission, supra,* where the Court held that the New York Public Service Commission could regulate rates of a Pennsylvania company transmitting gas from Pennsylvania to a town in New York. This case is strikingly analogous to the CATV system, assuming the CATV system is transmitting across state lines. The truth is, however, that there is no evidence of a CATV system transmitting across the Indiana border. Therefore, there would be even less basis for saying the CATV systems here are not subject to state regulation.

The Court in *Head v. New Mexico Board of Examiners in Optometry, supra,* likewise held that where a radio station and newspaper in New Mexico, close to the Texas border and serving part of Texas, were enjoined by state court of New Mexico, on the basis of New Mexico law, from accepting an advertisement by a Texas optometrist, there was not an undue burden of interstate commerce. In light of the court's decision in the *Pennsylvania Gas Co.* case and the *Head* case, the state of transmission may impose restrictions where there are sufficient activities of a local nature. Where, however, total consumption of the power of transmission is outside the state, the state of transmission is severally limited

in its regulation. *Public Utilities Commission v. Attleboro Steam and Electric Co.*, 273 U.S. 83 (1927).

In the *Attleboro* case a corporation in Rhode Island was supplying electricity to a corporation in Massachusetts for distribution to consumers in a Massachusetts town. The Court held that the Rhode Island Commission could not regulate or set rates for the electricity supplied to Massachusetts, with a strong dissent by Justice Brandeis.

The import of these Supreme Court decisions is that where the state attempting regulation has sufficient contacts of a local nature, it may properly regulate in the general welfare, an interstate activity in the absence of congressional regulation without infringing the commerce clause. Therefore, the states may properly regulate CATV systems without contravening the Commerce Clause of the United States Constitution.

B. Federal Preemption

The question has been raised as to whether Congress has preempted regulation of CATV systems through the Federal Communications Act, 47 U.S.C., §§ 151 to 609, thereby making state regulation invalid under the Supremacy Clause of Art. 6 of the Constitution of the United States. This question must also be answered in the negative.

Congress entered the radio and television field by enactment of the Federal Communications Act in 1934. (Hereafter referred to as FCA.) Prior thereto Congress had regulated radio alone with the Radio Act of 1927. 44 Stat. 1162. The preemption question raises two subsidiary questions: (1) Whether the FCA covers CATV systems, and (2) Whether Congress has so permeated the communications area as to preempt any type state regulation of the subject.

The Federal Communications Commission has not attempted regulation of CATV systems under the FCA with the exception of microwave facilities. A bill to give the FCC jurisdiction over CATV was defeated in the Senate in 1959 by one vote. (S. 2653, 86th Cong., 1st Sess.). A more limited bill was submitted to Congress by the FCC in 1961, but was never reported out of Committee. (S. 1044, H.R. 6840, 87th Cong., 1st Sess.).

The FCC has assumed jurisdiction over microwave facilities, *Carter Mountain Transmission Corp.,* 32 FCC 459 (1962). There the applicant sought a permit to construct a microwave system to transmit television signals to CATV systems in Wyoming. The television station in the town where the CATV system was operating protested. The hearing examiner recommended denial of the protest, but the Commission granted the protest and denied the application. The Commission's order was upheld on review. *Carter Mountain Transmission Corp. v. F.C.C.,* 321 F.2d 359 (D.C. Cir. 1963), cert. den. 375 U.S. 951 (1963).

Following the court's decision the Commission in *Notice of Inquiry and Notice of Proposed Rule Making* and in *First Report and Order* in Docket Nos. 14895 and 15233, issued rules and regulations governing the issuance of authorization for microwave stations to relay television signals to CATV systems. F.C.C. Regs., Part 21, subpart 1, §§ 21.710, 21.712, 21.714 and 21.716. In the adopted rules, the FCC regulates those CATV systems which receive signals by microwave systems to obtain initial grants, modifications, assignments or transfers of control systems which they serve, have complied with the rules of the FCC concerning stations which must be carried, the manner of carriage, exclusivity of carriage, and program exclusivity. The microwave carriers were also required to perform certain services which amounted to policing the CATV applicants, or at least determining, before selling them services, that they met some of the requirements. This latter portion, the carriers were able to have amended. *Memorandum Opinion and Order,* Docket Nos. 14895 and 15233. F.C.C. Regs., Part 21, subpart 1, §§ 21.710, 21-712 and 21.714.

In light of the FCC proposals to Congress and the *Seiden Report,* the regulation of the microwave aspect of CATV will be the furthest the FCC will go in attempting regulation of CATV systems. The *Seiden Report* properly reasons that:

> "As a general principle the FCC approach has been proper. It would be unsound for the FCC to assert general jurisdiction over the CATV industry. Such sweeping authority would not improve the ability of the Commission to pursue its intended objectives of

allocating and regulating the use of the radio spectrum. Furthermore Federal preemption in CATV regulation would reduce the efficiency of existing CATV regulation at the local level. Time-lags in response to complaints would necessarily be introduced by distance, and the soundness of the adjudication of local disputes between subscribers, the township and the CATV would be limited by the relative inability of the Federal agency to make an on-the-spot evaluation in each case as can now be done by local authorities. Nor would the FCC be in a better position to judge among the applicants for franchises. Only the CATV industry would benefit from preemption by being freed of the need to pay a franchise tax to the local community and by the more relaxed surveillance from distant Washington.

"The local community is best able to decide the need, value, and quality of the CATV service it should have. At best, the FCC might develop a general information booklet to inform municipalities of the nature of CATV, the alternatives available, and provide a model franchise, and data to indicate the extent of profitability and the size of the capital investment involved—facts which could guide local governments in making their own decision." Pp. 47-48.

The FCC, in a letter to California Attorney General Thomas B. Lynch, dated August 18, 1965, indicated that it did not intend that the Federal government, by its proposed rule, preempt the field, and did not intend to enter the areas of rate regulation, service to be provided, or award of franchises.

The criteria for determining federal preemption was stated by the Supreme Court in *Florida Avocado Growers v. Paul*, 373 U.S. 132 (1963). The Court said:

". . . The test of whether both federal and state regulations may operate, or the state regulations must give way, is whether both regulations can be enforced without impairing the federal superintendence of the

field, not whether they are aimed at similar or different objectives.

"The principle to be derived from our decisions is that federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated matter permits no other conclusions or that the Congress has unmistakably so ordained." (cite omitted.) P. 142.

In the *Florida Avocado Growers* case, the Court upheld the validity of a California statute restricting the transportation and sale of avocados containing less than 8% of oil by weight despite the Federal Agricultural Marketing Agreement Act of 1937. The Court said that California regulation was not invalid under the Supremacy Clause. The facts in the *Florida Avocado Growers* case are analogous to those in CATV operations.

The only aspect of CATV that the FCC has or is attempting regulation of, is with respect to microwave facilities. Likewise, this is the area in which the states have not attempted regulation. Most state activity has been in the franchising area—an area of CATV of most vital local concern. Neither have the states attempted regulation of programming or frequency assignment which are two extremely important functions of the FCC under the FCA. State established rates for CATV systems certainly would not conflict with FCC functions. It is patently obvious that the states and the FCC can regulate CATV harmoniously. State regulation of CATV, in its present stage, meets the tests of the *Florida Avocado Growers* case. Further, the FCA, by its own force and subject area, does not oust the states of regulatory power.

The effort by the FCC to obtain congressional action to give it general jurisdiction over CATV systems manifests a recognition by the agency that it lacks such jurisdiction under the FCA. The refusal of Congress to enact such legislation further manifests an intent by it to leave state regulation undisturbed and from exercising its regulatory power. This virtually destroys any contention that Congress intends to completely occupy the communications field. *Cooley v.*

Board of Wardens, 12 How. 299, 13 L.Ed. 996 (1851). This was also the thrust of *Panhandle Eastern Pipeline Co. v. Public Service Commission,* 332 U.S. 507 (1947), where the Supreme Court upheld the order of the Indiana Public Service Commission regulating sales made by the gas company, operating in interstate commerce, where made directly to industrial consumers, despite the Natural Gas Act, 15 U.S.C., § 717. The Court's reasoning in that case that Indiana's interest was vital and obvious, is also applicable to the facts here:

> ". . . Not only would industrial consumers in most instances go without protection as to rates and service other than that supplied by competition from other fuels, but the state's regulatory system would be crippled and the efforts of the Indiana Commission seriously hampered in protecting the interests of other classes of users equally if not more important."

The Panhandle case clearly demonstrates the rule followed by the Supreme Court that where Congress has only partially occupied an area and has manifested an intent to only partially occupy, and the state has a vital interest in regulation, the Supremacy Clause will not preempt the state's regulation as long as it does not openly conflict with the federal scheme.

As was stated in Note, 73 Harv. L. Rev. 386, 389 (1959):

> ". . . These community-antenna systems were not in existence when the FCA was written, and, unlike radio, they are susceptible of state regulation with slight interstate effect. Further, state regulation may be the only alternative to a jurisdictional 'no-man's-land,' in which the state cannot act and the federal agency either cannot or, due to the relative significance of the areas involved, will not."

In addition state regulation of intra-state mobile radiotelephone units has been upheld even though using FCC assigned frequencies. *Commercial Communications, Inc. v. Public Utilities Commission,* 50 Cal.2d 512, 327 P.2d 513 (1958), cert. den. 359 U.S. 341 (1959).

Therefore, the FCA does not preempt state regulation of CATV systems and such regulation is valid under the Supremacy Clause of Art. 6, of the Constitution of the United States.[2]

II

PUBLIC SERVICE COMMISSION AND CATV SYSTEMS: THE QUESTION OF JURISDICTION

The question has also been raised as to whether the Public Service Commission of Indiana has jurisdiction over CATV systems. This question must also be answered in the negative.

This is one of the most perplexing problems facing the states in the regulation of CATV systems. The legislation creating the public service commission or public utilities commission and defining their powers was enacted long before the advent of CATV. Therefore, the fitting of CATV within the statutory definition of public utility has resulted in some rather clever mental gymnastics. There is a split among the states on this question.

The Supreme Court of California held in *Television Transmission Inc. v. Public Utilities Commission,* 47 Cal.2d 82, 301 P.2d 862 (1956), that the California Public Utilities Commission did not have jurisdiction over CATV companies under 57 *Wests Ann. Calif. Codes,* Public Utilities, §§ 216 and 233. Justice Traynor, in speaking for the court, said, "it does not follow, however, that because telephone corporations are not prevented by law from using their lines, which are unquestionably telephone lines, for the transmission of television broadcasts, any corporation that uses poles, wires, etc., to transmit such broadcasts is a telephone corporation."

A New York court has ruled similar to the California court in holding that a CATV company's attaching to a telephone company's poles was insufficient to make it subject to regulation by the New York Public Service Commission. *Ceracche Television Corp. v. Public Service Commission,* 28 P.U.R. 3d 410 (N.Y. Sup. Ct. 1960).

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[2]For cases and articles asserting or advocating federal preemptions see: *Re: Edwin Bennett,* 89 P.U.R. N.S. 149 (Wisc. P.S.C., 1951); Note, 52 Geo. L.J. 136 (1963); Note, 14 Fed. B.J. 4 (1955); Note, 40 N.D. Lawyer 311 (1965); Note, 11 Ark. L. Rev. 93 (1956-57).

The Ohio Public Utilities Commission has also held that it lacks jurisdiction over CATV systems under *Ohio Rev. Code,* §§ 4905.241 and 4905.03, and denied an application for a certificate of convenience to operate CATV facilities. *Re: Seneco Radio Corp.,* 57 P.U.R. 3d 67 (1964).

Several attorneys general have likewise ruled that their respective public service or utility commissions lack jurisdiction over CATV companies. *Op. Atty. Gen. Utah,* No. 56-129 (1956);[3] *Op. Atty. Gen. Ky.,* No. OAG-61-154 (1961);[4] *Op. Atty. Gen. Mo.,* No. 127 (1964).[5]

The Supreme Court of Arkansas, however, has held that under Ark. Stat. of 1947 Ann., § 73-1801, the Arkansas Public Service Commission has jurisdiction over CATV companies. *Independent Theatre Owners v. Public Service Commission,* 235 Ark. 668, 361 S.W.2d 642 (1962). The court said that, "television transmission is an integral part of the telephone and telegraph business as it has developed and now exists."

The Wyoming Public Service Commission has also assumed jurisdiction under Wyo. Stat., § 37-1(b), over companies operating CATV systems. *Re: Cokeville Radio & Electric Co.,* 6 P.U.R. 3d 129 (Wyo. P.S.C., 1954); *Re: Albert Carollo,* 13 P.U.R. 3d 581 (Wyo. P.S.C., 1956); *Re: Community Television Systems,* 23 P.U.R. 3d 444 (Wyo. P.S.C., 1958).

The Attorneys General of Nevada and Hawaii have similarly ruled that their respective public service commissions have jurisdiction over CATV systems. *Op. Atty. Gen. Nevada,* 197 (1964);[6] *Op. Atty. Gen. Hawaii,* No. 65-12 (1965).[7]

The conflict among the states on this point presents no difficulty in explanation. All the decisions turn on whether the statute prescribing the jurisdiction of the public service commission contains the language "transmission of intelligence by electricity." Where the statute contains this language, the public service commission has been held to have jurisdiction over CATV. Where such language is missing, it

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[3]Utah Code Ann. (1953), § 54-2-1 (28).
[4]Ky. Rev. Stat., ch. 278.
[5] Rev. Stat. Mo. (1959), § 386.020.
[6] Nev. Rev. Stat., § 704.020, Statutes 1963, Ch. 373.
[7]Rev. Laws Hawaii (1955), § 104.1.

has been held to lack jurisdiction. This is what distinguishes *Television Transmission Inc. v. Public Utilities Commission,* 47 Cal.2d 82, 301 P.2d 862 (1956) from *Independent Theatre Owners v. Public Service Commission,* 235 Ark. 668, 361 S.W.2d 642 (1962). The California statute makes no mention of the language "transmission of intelligence by electricity" or any reasonable facsimile thereto. 57 *Wests Ann. Calif. Codes,* §§ 216 and 233. In contrast *Ark. Statute of 1947 Ann.,* § 73-1801, does use the language "system of transmitting intelligence." The use of such language in the statute evidences an intent by the enacting legislature to give the state's public service commission jurisdiction over new industries as they come into existence. Likewise, where such language is absent from the statute defining public utilities, it evidences an intent by the enacting legislature to confine jurisdiction to those utilities clearly defined and functioning at the time of enactment.

The Shively-Spencer Act of 1913, as amended, Burns IND. STAT. ANN., §§ 54-102 to 54-725, created the Indiana Public Service Commission, which is patterned after the Wisconsin statute, *Todd v. Citizens Gas Co.,* 46 F.2d 855 (7th Cir. 1931), and prescribed its jurisdiction, duties and functions. The Indiana Supreme Court said in *General Telephone Co. v. Public Service Commission,* 238 Ind. 646, 150 N.E.2d 891, rehearing 154 N.E.2d 372 (1958): "In construing the act the law is well settled, as we noted in the original opinion, that the Public Service Commission derives its power and authority solely from the statute, and unless a grant of power and authority can be found in the statute it must be concluded that there is none."

The definition section of the Act, Burns IND. STAT. ANN., § 54-105, provides:

> "The term 'public utility' as used in this act shall mean and embrace every corporation, company, individual, association of individuals, their lessees, trustees, or receivers appointed by any court whatsoever, that now or hereafter may own, operate, manage or control any street railway or interurban railway or any plant or equipment within the state for the conveyance of telegraph or telephone messages, or for the

production, transmission, delivery or furnishing of heat, light, water or power, or for the furnishing of elevator or warehouse service either directly or indirectly to or for the public, but said term shall not include a municipality that may now or hereafter acquire, own, or operate any of the foregoing facilities.

* * *

"The term 'utility' as used in this act shall mean every street railway or interurban railway, and every plant or equipment within the state used for the conveyance of telegraph and telephone messages, or for the production, transmission, delivery, or furnishing of heat, light, water or power, or for the furnishing of elevator or warehouse service, either directly or indirectly to the public: Provided, however, That a warehouse owned or operated by any person, firm or corporation engaged in the business of operating a warehouse business for the storage of used household goods, shall not be a public utility within the meaning of this act.

* * *

"The term 'indeterminate permit' as used in this act shall mean and include every grant, directly or indirectly, from the state to any corporation, company, individual, association of individuals, their lessees, trustees or receivers appointed by any court whatsoever, of power, right, or privilege to own, operate, manage or control any plant or equipment, or any part of a plant or equipment, within this state, for the production, transmission, delivery or furnishing of heat, light, water or power, either directly or indirectly, to or for the public, or for the transportation by a street railway or interurban railway of passengers or property between points within this state, or for the furnishing of facilities for the transmission of intelligence by electricity between points within this state, which shall continue in force until such time as the municipality shall exercise its right to purchase, condemn, or otherwise acquire the property of such public utility, as provided in this act, or until it shall be otherwise terminated according to law. This act

> shall be commonly known and referred to as the 'Public Service Commission Act.'"

The statute specifically enumerates the type companies subject to regulation by the Public Service Commission. Needless to say, it makes no mention of CATV systems or companies operating such systems. Neither did the Legislature use the language, "transmission of intelligence by electricity" in its definition of a "public utility" or "utility."

While it must be conceded that the provisions of Section 54-105 defining "indeterminate permit" employs the language "transmission of intelligence by electricity between points within this state," it does not change the clear import of legislative intent in defining a "public utility."

The purpose of the provision defining indeterminate permit is merely to define the functions of those companies defined as public utilities for which permits will be granted. The language "transmission of intelligence by electricity between points within this state" directly relates to the language in the "public utility" definition "equipment within the state for the conveyance of telegraph or telephone messages." When the Legislature used the "transmission of intelligence" language regarding indeterminate permits they were obviously referring to telephonic or telegraphic messages or impulses and not television or radio impulses. The "transmission of intelligence" language obviously refers to voice communication or telegraphic communication. This is further evidenced by the language in Burns IND. STAT. ANN., § 54-601b(a):

> "(a) When used in this section, unless the context otherwise requires
>
> "(1) The term 'telephone service' means any public utility service whereby voice communication between two or more persons within a single territorial area through the use of electricity is the principal intended use thereof and includes all telephone lines, facilities or systems used in the rendition of such service.
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> "(2) The term 'telephone company' means any natural person, firm, association, corporation or part-

> nership owning, leasing or operating any lines, facilities or systems, used in the furnishing of telephone service within this state."

This receives even greater clarity when viewed in the perspective in which indeterminate permits are used. Burns IND. STAT. ANN., § 54-604, provides:

> "Every license, permit or franchise hereafter granted to any public utility shall have the effect of an indeterminate permit subject to the provisions of this act. . . ."

Burns IND. STAT. ANN., § 54-605, provides:

> "Any public utility operating under an existing license, permit or franchise from any county, city or town within the state of Indiana shall, upon filing, at any time prior to July 1, 1923, with the auditor or clerk of any such county, city or town which granted such license, permit or franchise, and with the public service commission of Indiana, a written declaration, legally executed, that it surrenders such license, permit or franchise, receive by operation of law, in lieu thereof, an indeterminate permit as provided in the act creating the public service commission of Indiana, entitled 'An act concerning public utilities, creating a public service commission, abolishing the railroad commission of Indiana, and conferring the powers of the railroad commission on the public service commission,' approved March 4, 1913, and such public utility shall hold such permit under all the terms, conditions and limitations of said act as fully and completely as if the same had been done prior to July 1, 1915."

Burns IND. STAT. ANN., § 54-606, provides:

> "Any public utility accepting or operating under any indeterminate license, permit or franchise hereafter granted shall by acceptance of any such indeterminate license, permit or franchise be deemed to have consented to a future purchase of its property including property located in the contiguous territory

> within six [6] miles of the corporate limits of such municipality by the municipality in which such utility is located. . . ."

The language of these statutes clearly reflects the dependency of indeterminate permit application on public utilities as defined by § 54-105. Further, the Public Service Commission may only grant indeterminate permits to public utilities as they are defined in § 54-105. It is, therefore, obvious that the indeterminate permit definition was not meant to broaden the definition of a public utility to include any and every system or company transmitting intelligence by electrical impulses that would arise in the future. This would unduly extend the jurisdiction of the Public Service Commission beyond that ever envisioned by the Legislature. The Commission was unknown to the common law and has only such authority as clearly conferred by the statute. *State ex rel. Public Service Commission v. Vandalia R. Co.,* 183 Ind. 49, 108 N.E. 77 (1915). The act is, therefore, to be given a strict construction. *General Telephone Co. v. Public Service Commission,* 238 Ind. 646, 150 N.E.2d 891, rehearing 154 N.E.2d 372 (1958).

The Supreme Court of California in *Television Transmission Inc. v. Public Utilities Commission,* 47 Cal.2d 82, 301 P.2d 862 (1956), properly reasoned that CATV systems could not properly fit within the telephonic function. To say that the "transmission of intelligence" language of Burns, § 54-105, *supra,* defining indeterminate permits includes CATV systems and, therefore, gives the Commission jurisdiction over such systems, would simply be saying such systems fit within the telephonic function. Such a construction would be a perversion of legislative intent.

Therefore, in the absence of specific statutory authority granting jurisdiction over CATV systems, the Public Service Commission may not subject it to regulation. The Indiana Public Service Commission does not have jurisdiction over CATV systems.

III

MUNICIPAL FRANCHISES

The question has been raised as to whether municipalities may grant franchises to CATV companies to service their inhabitants.

In *Folz v. City of Indianapolis,* 234 Ind. 656, 130 N.E.2d 650 (1955), the Supreme Court defined "public utility," "public calling," and "business affected with a public interest" to have the same meaning, and also stated that whether a business is a public utility depends upon the situation of the business at the time the question is raised.

> "The court decision, through the centuries, recognize that changing economic conditions create new uses and businesses that were not in existence or contemplated in earlier times, and that certain kinds of businesses are affected with a public interest to the extent that they may be regulated." 130 N.E.2d 654.

The court thus contemplates that the list of those businesses which are public utilities will be augmented from time to time, and that the result of a business being denominated a public utility is that it may be regulated to one extent or another.

The court restates two historical tests which have been used to determine whether a business is a public utility. The first is economic necessity. Besides the leading federal case upholding state regulation of utilities, *Munn v. Illinois,* 94 U.S. 113, 24 L. ed. 77 (1876), the court cited *Hockett v. State,* 105 Ind. 250, 5 N.E. 178 (1886), which first held telephone service and equipment subject to statutory regulation in Indiana. Many analogies may be drawn between this case and the present situation of CATV. The court stated that the telephone had already become as much a matter of public convenience and of public necessity as were the stage coach and sailing vessel a hundred years before, or as the steamboat, the railroad and the telegraph became in years later. Since no other known device could supply the "extraordinary facilities" which the telephone affords, it had become an "indispensable instrument of commerce." It had assumed relations with the

public which made it a common carrier of news, and imposed upon it the well defined obligations of a public corporation. (The court's definitions of telephone and telegraph are also extremely interesting and would appear to exclude CATV from the definition, 105 Ind. at 261-263.) Whether CATV has reached the status of becoming an "indispensable instrument of commerce" may be open to question.

The second test is a "holding out" to the public in a particular trade, which distinguishes the businessman who offers service to the public from the one who engages in the same act only casually or on special agreement or contract. Under this test, CATV is a "public calling or business."

The court further indicated that the question of whether a public utility is regulated by the state is one of legislative discretion, and indicates that when the state does not regulate the rates and charges or service, the public retains its common law rights, including service without discrimination, and reasonable prices, and may bring private actions to enforce the duties owed. It may be pointed out here that even in the Public Service Commission Act, the Legislature has excluded certain public utilities from the operation of the act by reason of their ownership (municipally owned utilities) or nature of their business (warehouses for used household goods), thus reinforcing the court's interpretation. The court in discussing the eminent domain cases, points out that even a public corporation cannot take property by eminent domain for a private use, which implies that public corporations may have property which is not "dedicated to a public use," although the corporations are in the group which historically is classified as a public calling or one affected with a public interest.

CATV systems, therefore, are in essence common law public utilities, but are not statutory public utilities under the Public Service Commission Act, *supra*.

Burns IND. STAT. ANN., § 48-7301 provides:

> "Any city or town may by contract, first entered into by the board of public works of any city of the first, second, third or fourth class, or the proper committee of the common council of any city of the fifth class, or of the board of trustees of any town, as the case may

> be, such contract to be duly approved by ordinance, as in other cases, grant to any person or corporation the right to lay down pipes, wires or conduits; . . . or to erect poles, wires, posts, masts, skeleton towers, and other necessary appliances and structures, in the streets, alleys and other public places of such city or town, and to maintain them there, for the purpose of supplying such city or town and its inhabitants with . . . light or intelligence, for the convenience and welfare of the people. . . ."

Sections 48-7303, 48-7305, require notice, hearing and the enactment of an ordinance.

Since CATV companies are common law public utilities, not statutory public utilities under the Public Service Commission Act, the holding in *City of Huntington v. Northern Ind. Power Co.*, 211 Ind. 502, 5 N.E.2d 889 (1937), "that the Public Service Commission became and is the sole authority operating in the state to grant franchises and to control the manner of operation" of utilities in the state, is inapplicable.

Several Attorneys General have passed on the franchise question.[8] In approving of municipal franchises in *Op. Atty. Gen. Ky.*, No. OAG 61154 (1961), the Attorney General of Kentucky said:

> "A franchise is a privilege of a public nature which cannot be legally exercised without specific grant. It is, in other words, a privilege of doing that which does not belong to the citizens of the city generally by common right. As for example, when a rightofway over public streets is granted with leave to construct and operate a street railway thereon, the privilege is a franchise or the right to do something on the public highway which, except for the grant, would be a trespass. See 23 Am. Jur., Franchises, Sections 2 and 3. Also See Peoples Transit Company v. Louisville, 220 Ky. 728, 295 S.W. 1055."

[8]For states approving municipal granted franchises, see: Op. Atty. Gen. Calif., No. 64/323 (1965); Informal Op. Atty. Gen. La. (1965); Op. Atty. Gen. Ky., No. OAG 64902 (1964); Op. Atty. Gen. Ky. No. OAG 6566 (1965). For states disapproving the granting of municipal franchises see: Op. Atty. Gen. Miss. (1962); Op. Atty. Gen. Miss. (1959); Informal Op. Atty. Gen. Va. (1965).

In *Op. Atty. Gen. Ore.*, No. 3198 (1955), the Oregon franchise statute was given a strict construction in light of *Ohio Telephone & Telegraph Co. v. Steen,* 85 N.E.2d 579 (C. P. Ct. O. 1949), and *Knoxville Water Co. v. Knoxville,* 200 U.S. 22 (1905), in determining that a county court in that state has no right or duty to grant a franchise to a CATV company for use of county right-of-ways.

We must, however, agree with the Attorney General of Kentucky that such statutes should be liberally construed in favor of the municipality and the public it represents. To rule otherwise would negate the clear import of the statute involved. Burns IND. STAT. ANN., § 48-7301. Indiana municipalities may grant franchises to CATV companies.

Other questions naturally flow from such a determination. Who may enter into such contract or grant such franchise for the municipality? What shall be the content or duration of such franchises and may the municipality exact a percentage of the gross income of the CATV company for the granting of the franchise?

Section 48-7301 is explicit as to who has the power to enter into the franchise agreement for the municipality. The board of public works is the municipal department given such power, subject to approval by ordinance, in first, second, third and fourth class cities. The statute designates the "proper committee of the common council of any city of the fifth class," which would mean the committee of council normally dealing with utility problems. The proper agent for towns would be the towns' board of trustees. The board of county commissioners would have this contracting power in respect to use of county property. Burns IND. STAT. ANN., § 36-718 despite the provisions of Burns IND. STAT. ANN., § 26-620(5).

The statutes lack specificity as to content of such contracts between municipalities and CATV companies. Section 48-7301 merely says that such contract "shall provide all necessary regulations and restrictions for the proper placing of such poles, pipes, wires and other structures and appliances, so as to cause the least inconvenience to the public and the least injury to the use of private property, and shall provide for the safe and convenient supply and distribution of such water, gas,

electricity or other elements. . . ." The maximum term for such contracts is twenty-five years under Burns IND. STAT. ANN., § 48-7302. Consideration for the contract may be in the form of a percentage of gross revenues from the CATV company under Section 48-7301.

It must also be pointed out that the municipal-CATV contract or franchise granting use of the streets may constitute the imposition of additional burdens of a prior grantee. *City of Indianapolis v. Consumers Gas Trust Co.,* 140 Ind. 107, 39 N.E. 433 (1895).

While these agreements or arrangements between the municipality and the CATV company have been referred to as franchises, they are essentially contracts between the public body and the private business. Their content is also discussed in *The Seiden Report,* pp. 44-47.

It must be concluded that municipalities may enter into contracts with CATV companies for the use of the municipalities' streets and thoroughfares and service to its inhabitants.

IV

EXCLUSIVE FRANCHISES

The question has also been raised as to whether the franchise or contract entered into between the municipality and the CATV company may be exclusive. This question must be answered in the negative.

The rule in Indiana is well established that municipal corporations may not grant exclusive franchises for the use of their streets. Such contracts or franchises are void. *Citizens Gas and Mining Co. v. Town of Elwood,* 114 Ind. 332, 16 N.E. 624 (1887) ; *Crowder v. Town of Sullivan,* 128 Ind. 486, 28 N.E. 94 (1891) ; *City of Rushville v. Rushville Natural Gas Co.,* 132 Ind. 575, 28 N.E. 853 (1892).

In *Informal Op. Atty. Gen. N. Y.* (1964), the Attorney General of New York determined that under *Fox v. Mohawk & Hudson River Humane Society,* 165 N.Y. 517, that a town board could not grant an exclusive franchise for the use of its streets. Reliance was also placed upon McQuillan, *Municipal Corporations,* 34.23. This problem has received further

attention in Note, 29 Albany L. Rev. 321 (1965). The New York problem revolves around Art. 3, § 17 of the Constitution of New York. *Dictum* in the *Citizens Gas and Mining Co.* case indicates legislative power to municipal corporations in Indiana to grant exclusive franchises or contracts might also contravene the Indiana Constitution.

Therefore, franchises or contracts entered into between municipalities and CATV companies may not be exclusive.

V

MUNICIPAL CATV SYSTEMS

The next question presented is whether municipalities may own and operate CATV systems. This question must be answered in the affirmative.

12 McQuillan, *Municipal Corporations,* § 36.02 states:

> "The object of the creation of a municipal corporation is that it may perform certain local public functions as a subordinate branch of the state government; and, while it is invested with full power to do everything necessarily incident to a proper discharge thereof, no right to do more can ever be implied. In the absence of express legislative sanction, it has no authority to engage in any independent business enterprise or occupation such as is usually pursued by private individuals."

Courts have upheld the expenditure of public funds for municipally owned and operated radio and television stations where statutory or charter authority permitted. *Lewis v. LaGuardia,* 14 N.Y.S.2d 463 (1939); *State v. City of Jacksonville,* 50 So.2d 532 (Sup. Ct. Fla. 1951).

There is a split among the attorneys general on this question. Where the statutes were silent on the question it has been determined that municipalities could not operate CATV systems. *Op. Atty. Gen. Ky.,* No. OAG 61483 (1961); *Op. Atty. Gen. Tex.,* No. C-465 (1965). Where such power could be inferred from the statutes, municipally owned and operated CATV systems have been upheld. *Op. Atty. Gen. Minn.,*

No. 469C-12 (1965); *Op. Atty. Gen. Minn.*, 469C-12 (1962); *Op. Atty. Gen. Calif.*, No. 62/100 (1962); *Op. Atty. Gen. Ariz.*, No. 65-39-L (1965); *Op. Atty. Gen. Ariz.*, No. 57-112 (1957).

Burns IND. STAT. ANN., § 48-7301, states:

> ". . . In granting such franchises such city or town shall also provide for the terms on which such water, gas, steam, electricity or other elements, and such drainage and sewerage connections, shall be supplied to the city or town and to its inhabitants, as well as for reasonable license fees or other compensation to be paid to such city or town for any such franchise and privilege; and such city or town shall also have the power to lease or purchase from any such corporation or person any such water-works, gas-works, electric light works, drainage or sewerage system, heating or power plants, constructed or to be constructed by such corporation or person in accordance with the provisions of this act upon such terms as may be agreed upon by such city or town and such corporation or person, and such city or town shall also have the power at the time it grants to any such person or corporation the right to supply such city or town and its inhabitants with water, gas, electric light, heating power, sewerage or drainage, or other public convenience, or at the time such city or town leases from such corporation or person any such water-works, gas-works, electric light works, heating or power plant, drainage or sewerage system, or other public convenience, to require such person or corporation to give and grant to such city or town an option or right to purchase such water-works, gas-works, electric light works, heating or power plants, sewerage or drainage systems or other public convenience, upon such terms and conditions as may be agreed upon between such city or town and such corporation or person, and such corporation or persons so constructing or owning any of said public utilities above named shall have power to enter into any of said contracts above named with said municipal corporation: Provided, however, That before any such purchase is made, the common council of any such city

> or the board of trustees of any such town shall first submit such question to the qualified voters of such city or town in accordance with the provisions of section 249 [§ 48-7201] of this act, but such submission shall not be necessary in case a lease only is made: . . ."

It naturally must be conceded that a CATV system is none of the works or plants specified, however, such list is not exclusive, particularly in light of the preceding phrase. It does fit within the group, "water, gas, steam, electricity or other elements." All could be termed common law public utilities. The subsequent phrase enumerating "water-works, gas-works, electric light works, drainage or sewerage systems, heating or power plants" does not modify or limit the preceding phrase. It is exemplary rather than conclusive. Section 48-7301, read as a whole gives to municipalities the power to contract for utilities or services to their inhabitants, the power to lease or purchase such utilities or conveniences, and generally their regulation. To restrict the application of the statute, insofar as purchase and operation are concerned, would be contrary to the intent of the legislature where CATV systems fit within the prior general language of the Section. There is an inference in favor of municipally owned CATV systems.

Therefore, municipalities may own and operate CATV systems.

VI

TELEPHONE COMPANY OPERATION OF CATV

The next question is whether telephone and telegraph companies may operate a CATV system.

There is no valid reason why a telephone or telegraph company may not also operate a CATV system. Nothing in Indiana law prohibits such a function. The Legislature seems to have contemplated such, in light of Burns IND. STAT. ANN., § 54-208, which provides:

> "Every public utility engaged, directly or indirectly in any other or subsidiary business shall, if ordered by the commission, keep and render separately to the

> commission, in like manner and form, the accounts of all such business, in which case, all the provisions of this act shall apply with like force and effect to the books, accounts, papers and records of such other business; Provided, Every public utility may, with the consent of the commission and the proper local authorities, furnish to all patrons or persons applying therefor any service, product or commodity which it creates as a necessary incident and subsidiary to its main or primary business. No such consent shall be granted except as provided in section ninety-seven [§ 54-601] of this act, and every such subsidiary business shall be subject to all the provisions of this act."

Such an additional operation would be subject to P.S.C. approval and regulation but would not oust the municipalities of their regulatory power over CATV systems.

In California, where the P.U.C. lacks jurisdiction over CATV companies, it was held, nonetheless, that where a telephone company engaged in a CATV operation, it was subject to P.U.C. regulation, for it was still a telephone company regardless of subsidiary operation. *Re: Pacific Telephone & Telegraph Co.*, 54 P.U.R.3d 535 (Calif. P.U.C., 1964).

The New York Public Service Commission has similarly held that a CATV companies attaching to telephone companies' poles was insufficient to subject it to P.S.C. regulation. *Ceracche Television Corp. v. New York Telephone Co.*, 28 P.U.R.3d 410 (1960). The New York Commission had previously held it had jurisdiction to set tariff rates for the use of telephone facilities for CATV transmission. *Re: New York Telephone Co.*, 34 P.U.R.3d 115 (1960).

The California Attorney General, however, has ruled that telephone companies operating CATV systems are still subject to local franchising authorization, saying, "in this posture a telephone company is no different than any other 'CATV' operator subject to local franchising." *Op. Atty. Gen. Calif.*, No. 64/323 (1965).

Operation of CATV systems by telephone companies, or any other statutory public utility, in Indiana results in concurrent regulation by the P.S.C. and the municipality. The Shively-

Spencer Act, as amended, gives the P.S.C. jurisdiction over particular companies whereas the municipal franchise statute, Burns IND. STAT. ANN., § 48-7301, gives municipalities subject-matter jurisdiction over CATV systems. Where the regulations imposed by the two are in conflict, those of the municipality must prevail. P.S.C. regulation of these activities by the telephone company could only be directed to internal operations of the telephone company for the purpose of preventing deterioration of telephone service. Telephone service is, after all, the primary function of a telephone company. P.S.C. duties, in regard to subsidiary operations such as CATV, are to insure against the peril of these secondary functions undermining the telephone companies primary functions.

The municipalities, by contrast, with subject-matter jurisdiction, are obligated to consumer protection through rate and service regulation.

Both the P.S.C. and the municipality are obligated to protect consumers, but these obligations are, theoretically, to different consumers. The primary objective of the P.S.C. is to protect the telephone consumer, whereas the municipalities will be to the CATV consumer.

Therefore, where a CATV system is operated as a subsidiary by a telephone or telegraph company, it is subject to P.S.C. approval and regulation and municipal franchising authorization.

The tariffs filed by Indiana Bell Telephone, Illinois Bell Telephone and General Telephone Company of Indiana, Inc., which became effective in the absence of opposition, are valid only within the confines of P.S.C. jurisdiction over telephone companies as previously discussed.

VII

TELEPHONE AND CATV LEASE ARRANGEMENTS

Telephone and telegraph companies may, subject to P.S.C. approval, enter into lease agreements for their transmission equipment to CATV companies. Burns IND. STAT. ANN., § 54-202(a) (1935), as amended, provides:

> "Every public utility, and every municipality, and every person, association or corporation having tracks, conduits, subways, poles or other equipment on, over or under any street or highway shall for a reasonable compensation, permit the use of the same by any other public utility or by a municipality owning or operating a utility, whenever public convenience and necessity require such use, and such use will not result in irreparable injury to the owner or other users of such equipment, nor in any substantial detriment to the service to be rendered by such owners or other users. Every public utility for the conveyance of telephone messages shall permit a physical connection or connections to be made, and telephone service to be furnished, between any telephone system operated by it, and the telephone toll line operated by another such public utility or between its toll line and the telephone system of another such public utility, or between its toll line and the toll line of another such public utility, or between its telephone system and the telephone system of another such public utility, whenever public convenience and necessity require such physical connection or connections and such physical connection or connections will not result in irreparable injury to the owner or other users of the facilities of such public utilities, nor in any substantial detriment to the service to be rendered by such public utilities. . . ."

Burns IND. STAT. ANN., § 54-202(b), as amended, provides:

> "In case of failure to agree upon such use or the conditions or compensation for such use, or in case of failure to agree upon such physical connection or connections, or the terms and conditions upon which the same shall be made, any public utility or any person, association or corporation interested may apply to the commission and if after investigation the commission shall ascertain that public convenience and necessity require such use or such physical connections, and that such use or such physical connection or connections would not result in irreparable injury to the

> owner or other users of such equipment or of the facilities of such public utilities, nor in any substantial detriment to the service to be rendered by such owner or other public utilities or other users of such equipment or facilities, it shall by order direct that such use be permitted and prescribe reasonable conditions and compensations for such joint use and that such physical connection or connections be made and determine how and within what time such connection or connections shall be made, and by whom the expense of making and maintaining such connection or connections shall be paid."

Burns IND. STAT. ANN., § 54-509 (1925), as amended, provides:

> "No public utility, as defined in section one [sec. 54-105] of this act, shall sell, assign, transfer, lease, or encumber its franchise, works or system to any other person, partnership or corporation, or contract for the operation of any part of its works or system by any other person, partnership or corporation, without the approval of the commission after hearing. . . ."

In accordance with the foregoing statutes, telephone or telegraph companies may lease their transmission equipment to CATV companies subject to approval by the Indiana P.S.C. Telephone companies may not, however, discriminate in these leasing arrangements. The reasoning in *Antenna Systems Corp. v. N. Y. Telephone Co.*, 25 P.U.R.3d 316 (N.Y. P.S.C. 1958) is highly persuasive on this point.

Where a telephone company engages in the operation of a CATV system or leases any of its equipment to CATV companies, it may not arbitrarily refuse such use to other CATV companies.

CONCLUSION

As previously pointed out, state regulation of CATV has been primarily by municipal contract or franchise with the few exceptions where the state public service commission has taken jurisdiction. It is obvious, however, that present regulation of CATV is haphazard and inadequate at best. It opens

a new area of the law, and, therefore, is difficult to characterize. As a result there has been some movement to bring supervision of CATV under direct authority of state public service commissions. For example in Connecticut the Legislature conferred jurisdiction in the Public Utilities Commission of Connecticut and gave a specific definition to "community antenna television companies." Conn. G. S. ch. 289, §§ 16-330—16-333. A similar bill was introduced in the New Jersey Legislature but failed to pass. N.J. Senate Bill No. 206.

The most comprehensive legislation proposed was a bill submitted in the 1965 session of the Oklahoma Legislature. (Okla. Senate Bill No. 353). Its defect was an attempt to also cover television translators and the Legislature was therefore, advised by the Attorney General of Oklahoma that it violated the Commerce Clause. *Op. Atty. Gen. Okla.,* No. 65-224 (1965). See also Note, 79 Harv. L. Rev. 366 (1965).

It is therefore, clear that precise treatment and regulation of CATV must await legislative action where a clear policy can by statute, be enunciated. In the meantime, since economic interests cannot await this pronouncement and are, therefore, generating questions which must be answered, I have arrived at these stated conclusions. Admittedly it is the application of statutes designed for regulation and control of similar activities but not exactly in the nature of CATV. They will, nevertheless, have to suffice until more precise legislation can be enacted.

OFFICIAL OPINION NO. 76

December 31, 1965

Mr. Robert E. Martin
Interim Director, Indiana Vocational Technical College
Old Trails Building
309 West Washington Street
Indianapolis, Indiana

Dear Mr. Martin:

Recently you requested an Official Opinion on the following question: