

Cable TV: Omission by Commission

SIDNEY W. DEAN, Jr.

Mr. Dean is chairman of the Cable Subcommittee of the American Civil Liberties Union. An independent business consultant in marketing and communications, Mr. Dean has been a public interest spokesman for civic and business groups before Congress and the FCC.

The long awaited report of the Sloan Commission on Cable Communications is both a benediction and a body blow for the prospect that cable television might become an open carrier system for anyone who wishes to distribute and receive. The blue-ribbon, sixteen-member panel,

established in June 1970, has produced thirty-one recommendations for public policy, hammered out of the compromises and accommodations to which the commission process is so vulnerable.

The commission was established by the Alfred J. Sloan Foundation as its maiden venture into the assessment of technology. Dr. Edward S. Mason, economist and former dean of the Harvard Graduate School of Public Administration, is chairman of the \$500,000 study. Paradoxically, his commission decided that it could not assess the massive uses and revenues of cable in either business or education. Business uses now account for more than half of the \$20

billion revenues of the telephone systems. Educational communications are a \$30 billion activity. The omission of the two largest users of communications helps explain why the report is skeptical about major technical improvements in cable television or the sufficiency of investment capital over the next ten to fifteen years.

The commission gives its illustrious support to the unleashing of broad-band cable development in the public interest. It predicts that within ten years 40 to 60 per cent of U.S. families will have access to a cable. It calls for a minimum capacity of twenty TV channels. It warmly endorses the sale of programs and other services direct to the public. It spells out the extraordinary benefits that can be delivered by "The Television of Abundance."

The report attempts to untie the hobbles placed on the expansion of cable TV by the broadcasting industry's controls over copyright, and influence with the FCC, in the Congress and at the White House. The timing of its release could not have been improved: the FCC had just sent a letter of regulatory intentions to the Congress; the White House Office of Telecommunications Policy, under its director, Clay T. Whitehead, has now sponsored a three-headed hybrid fabricated by copyright holders, broadcasters and the sullen cable operators. The hybrid deal was designed to take the broadcasters' arm off the Congress and White House; to permit the Congress to go back to work on the 1909 Copyright Act, which has been stalled since 1966 by the cable impasse; to encourage cable entrepreneurs to find capital to start up in bigger cities; and, above all, to guarantee television stations in the largest 100 markets (with 85 per cent of the population) another long cycle of immunity from effective cable competition.

The Sloan Report boldly proposes to let cable into every city market by reasonable pickups of distant stations and thus to compete on fair terms with broadcasters for copyright programs. It advocates depriving broadcasters of their extortionate long-term program monopolies. But while the Sloan Report was still at the printer's, the hybrid deal was made. There was no public involvement or intent to secure public hearings or Congressional review. The Sloan Report will be a useful source of light and heat to combat the inter-industry collusion to restrain trade and competition in programming.

So far so good, but the report does not go far enough. In a letter to chairmen Pastore and McDonald of the Senate and House subcommittees on communications, the ACLU has denounced the omission from both the FCC letter and the industry compromise of "consideration to the First Amendment realization of the access and diversity inherent in cable television." In its summation, the ACLU urges the Congress "to promote the development of the broad-band communications carrier networks as open systems with unrestricted capacity to meet total demands at fair and reasonable rates and terms. Nothing less will satisfy the constitutional mandate against abridgment of speech and press in cable communications carriers which have no practical restrictions on their capacity and universality of connection and access."

The Sloan Commission has done a grave disservice to the public interest by compromising this paramount goal

of public policy for cable. The commission, in a long debated decision, accepted the cable promoters' argument: that they could not prosper as common carriers, that they required the revenue and profits from programming in order to secure capital. The commission's compromise proposal is that cable systems be given complete control over two television channels and the right to absorb all other cable capacity not used by others.

If this view should prevail in the FCC, it is inevitable that cable development will parallel the monopoly structure of broadcasting. The many devices available to cable operators—through rates, contracts, capacity and facilities (such as two-way, pay-TV, localized circuits)—to deny others use of the cable will become permanent blocks to independent access. As the economic studies of Prof. Bruce M. Owen and others attest, carriers who engage in program merchandising that is paid for either by advertising or directly by the public have irresistible profit-motives to restrict competitive access, to delay additional capacity and new facilities, and to siphon their earnings into program and hardware development.

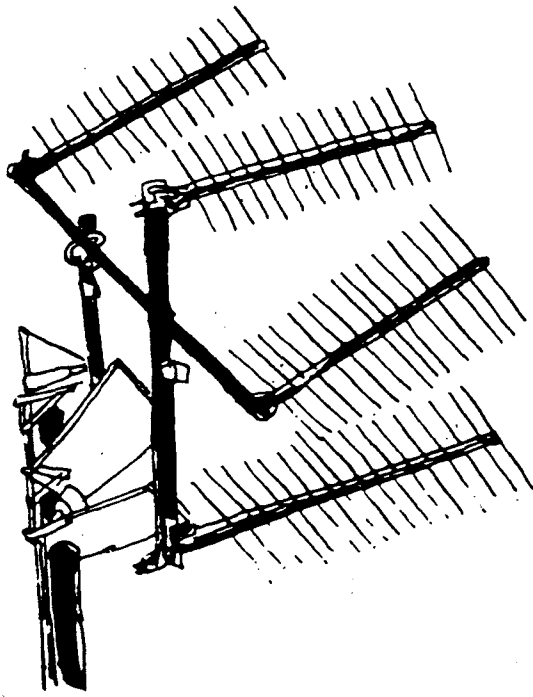
The commission recognized its compromise:

The arguments in favor of divorcing ownership from transmission derive additional strength from the inherent monopoly of a cable system in any locality as opposed to the competition of several over-the-air broadcasters in most places. Common carrier status may, indeed, be the way cable should and will go as it achieves maximum penetration and overtakes or supplants over-the-air broadcasting. At this point in time, however, the commission believes that imposition of common carrier status would be unrealistic and an impediment to the desirable growth of cable.

Having accepted that there will be a scarcity of carrier capacity and that the carriers will themselves dominate programming, the commission felt compelled to adopt compensating recommendations on cable carrier privileges in other policy areas. For example, the report favors allocating capacity by types of uses; it places arbitrary ceilings on the number of cables under one ownership, on local and U.S. coverage; it sets a ceiling of two television channels per user. All of these contrivances would be unnecessary if cables were regulated, like the telephone, telegraph, postal and satellite systems, as common carriers.

The only argument advanced in the report for carrier control of programming is the alleged necessity to secure capital. The commission offers no supporting financial testimony nor evidence by analogy—such as from the telephone industry's unparalleled success in attracting loan and equity capital into new technology. Indeed, the two commissioned papers in the report which deal with access policies call for common carrier status. One is by Lionel Kestenbaum, the leader in the successful fight to block the merger of IT&T with the ABC network; the other is by John de J. Pemberton, an authority on civil liberties.

Strangely enough, after endorsing a dominant role for cable operators in programming, the Sloan Commission also gave its support to a media monopoly position that has been challenged even by key Congressmen and the FCC—namely, by endorsing a limited ownership of cable systems by local television stations and newspapers. Since about half of all local cable companies are already owned



by television or newspaper interests and since there are only twenty-four cities in the United States that still enjoy competitive newspaper publishers, this invitation to further monopolization of the major media in local areas seems irresponsible. Once again, the commission bases its position on the need for capital and would even remove the restraints on cross-ownership of cable with other local media "if there were no other cable applicants." The commission has apparently ignored the scandals of municipal inside deals in franchises like the Buffalo *Courier-Express* newspaper-radio-TV-cable sweepstake.

Having sanctioned degrees of cross-ownership and restrictive concentrations, the Sloan Report proposes giving cable carriers further editorial power by recommending that cable systems be relieved of Fairness Doctrine obligations to present balanced viewpoints on public issues and political contests. Since it may be twenty years or more (the duration of many franchises, including those in New York City) before open access at fair, uniform terms is available to all, this exemption is inexplicable. Coupled with it is a puzzling recommendation that cable operators (or an engineer) may cut what they judge to be personal attacks off the air.

Yet on the free-speech issue, the Sloan Commission wisely adds its weight to the FCC recommendation that cable carriers be relieved of responsibility for illegal speech or acts, since under federal and state laws the originator or spokesman takes full legal responsibility. This provision is important, since content liability which has been imposed on operators by their franchises has been used to impose on independent producers delays, expenses for recording, pre-censorship of content, or even denial of access.

"Monopoly" must have been ruled a taboo concept in the commission's proceedings. Nowhere does the report examine the real consequences of the fact that all 2,800 cable companies now reaching 6 million families are

monopolies in their own areas. Such questions as the assurance of nondiscriminatory access, prompt subscriber connections in the entire area, undercapitalization and risks of early obsolescence are not raised. The commission's assertions that the enforcement of reasonable rates to program and service producers will be "self-regulating" and "governed by the market" are irresponsible—especially since independent producers may discover that the carrier has decided to produce competitive programs.

Nor does the report recognize the peril to the public interest in common ownership and vertical control between carriers and manufacturers of cable and terminal equipment. These relations, once established and legalized, are almost impossible to correct or regulate. As the telephone industry has shown, practically all of the great promises of cable will be realized by the receiving, transmitting, switching, storage, retrieving, printing and computing terminal systems. By its *Carterfone* decision, the Supreme Court forbade carriers to require the use of their own terminal hardware. Before it is too late, the rush of cable carriers, terminal equipment and program producers to form conglomerates must be halted and reversed. Sloan does not recognize the issue. Of course, the Congress itself has as yet passed no cable legislation!

A final critical question needs to be asked: "How did a commission of such qualifications arrive at so many questionable conclusions, and fail to confront so many determinants of public policy?" These and other defects in the commission's report, as printed, appear to stem from its professional methods. Procedurally, the commission did not adopt a basic statement of the public's interest in the development of broad-band communications. Nor did it refer to goals previously proposed by the President's Task Force on Communications Policy, by the National Academy of Engineering study, or by the Electronic Industries Association filings with the FCC.

Lacking goals, the commission lacked criteria whereby to evaluate its staffs' and editors' recommendations, and indeed its own conclusions. Lacking goals and standards, it had recourse to a body of assumptions and premises, usually unsupported and often unwritten. For example, the commission was directed to explore the future of *cable* communications. It chose to exclude hard evaluations of carrier and terminal technology, the massive business and education markets, the vital financial issues; it focused instead on "The Television of Abundance." The loaded image "television" made plausible the sanctioning of carrier involvement in programming, the protecting of broadcasters from the "threatened" [*sic*] challenge of cable. It permitted the commission to remain silent on the perils of concentration and monopoly.

Therefore, the conclusions of the Sloan Report must be considered as unreliable compromises on selected aspects of profound, long-term social and national issues. The Sloan Report is an ideal case study of the methodological pitfalls in public policy studies by commissions. If a camel is a horse designed by a committee, a public policy study may be a compromise constructed by a commission. The pioneer survey of the future of cable television, "The Wired Nation" (*The Nation*, May 14, 1970), better identifies the fundamental policy issues with which citizens and government must now deal. □