THE EVOLUTION OF CABLE TELEVISION REGULATION: A PROPOSAL FOR THE FUTURE

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Cable television[1] today reaches approximately twenty-two per cent of this country's television households.[2] Cable companies[3] engage in intense competition for approval to construct a municipality's cable system.[4] The cable industry originally developed to deliver television

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1. Cable television is the disbursement of high quality television signals through wires of cables directly to subscribers' homes for a fee. *See* K. ROBINSON, DEREGULATION OF CABLE TELEVISION 1, 4 (P. MacAvoy ed. 1977) [hereinafter cited as MacAvoy]; NATIONAL CABLE TELEVISION ASS'N, CABLE FACT SHEET (Dec. 22, 1978).

2. There were approximately 4,300 cable systems, 16.8 million cable subscribers, and 10,000 communities that received cable television services in the United States in 1980. NATIONAL CABLE TELEVISION ASS'N CABLE TELEVISION DEVELOPMENTS 1 (July 1980).

3. For a list of the top fifty cable system operators, see *id.* at 8.

4. To extend its cables through the public streets to subscribers' homes, a cable company must obtain a franchise from the local government. A municipal corporation, acting as an agent of the state, has the authority to issue a "franchise" or a grant to an individual or a corporation to use the public streets and ways. 12 E. MCQUILLAN, MUNICIPAL CORPORATIONS § 34.14 (3d ed. 1970). Public service businesses often obtain franchises from local governments in order to use bus lines, and supply cities with natural gas, electricity, water, and telephone services. *Id.* The authority states expressly or impliedly confer upon local governments to control the streets and ways allows municipalities to demand franchises from cable operators. *Id.* at §§ 22.23, 34.15. Within its authority to grant the franchise, a local government may impose conditions in the form of regulations upon its exercise. *Id.* at § 34.75. *See* Barnett, *State, Federal, and Local Regulation of Cable Television*, 47 NOTRE DAME LAW. 685 n.3 (1972); Davis, *Cable Television Franchising—The Role of Local Govern-*

service to areas unable to receive regular broadcast programming.[5] Recently, society has recognized the vast potential of cable television beyond its ability to supplement broadcast television.[6] Local com-

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ments, 51 FLA. B. J. 79 (1977); LaPierre, *Cable Television and the Promise of Programming Diversity*, 42 FORDHAM L. REV. 25, 68 (1973); Mahoney, *Cable Television's Jurisdictional Dispute*, 24 CATH. U. L. REV. 872, 883 (1975).

Municipalities cannot grant franchises to each cable operator that applies in a city. Rather, local governments must take offers and extend a non-exclusive franchise to the best bidder. Often as many as 10 or more companies compete for a franchise in a municipality. According to Harold Horn, executive director of the Cable Television Information Center, "The competition [for cable franchises] is cutthroat, no-holds barred." Crock, *Vying for Viewers: As Jousting for Cable-T.V. Franchises Gets Cutthroat, Tactics Upset Some Officials*, Wall St. J., Oct. 9, 1979, at 48, col. 1. For a discussion of the struggle for franchises around the country see Gelman, Henkoff, Howard, Kirsch & Waters, *T.V. Cables in a Tangle*, NEWSWEEK, Aug. 4, 1980, at 44-45 [hereinafter cited as *TV Cables in a Tangle*]; Schwartz, *Powerful Groups Clash in Battles to Acquire Cable TV Franchises*, N.Y. Times, July 27, 1980, at 1, 31, col. 2.

5. Cable companies constructed television reception antennas near areas with television reception problems. Regular broadcast signals travel in straight lines. Buildings, mountains, or other obstructions often block their delivery. Cable systems use microwave or satellites to pick up signals. Thus, they can easily pass these signals on to subscribers without the constraints suffered by the broadcast industry. NATIONAL CABLE TELEVISION ASS'N CABLE FACT SHEET 1 (Dec. 22, 1978). *See* LaPierre, *supra* note 4, at 29; Note, *Cable Television: The Practical Implications of Local Regulation and Control*, 27 DRAKE L. REV. 391 (1978).

6. Many cable systems still distribute television programming to smaller communities, but the number of systems serving large metropolitan areas is increasing. FCC, CABLE TELEVISION INFORMATION BULLETIN 1 (Apr. 3, 1979). Recent technological advances have allowed cable operators to offer as many as 100 channels. Entire cable networks providing recently released films and around-the-clock sports, news and children's programs are now available to cable subscribers. These advances have made cable television a valuable entertainment alternative. *See TV Cables in a Tangle*, *supra* note 4, at 44. Perhaps more important, cable's large channel capacity allows systems to provide a multitude of community services. In fact, cable franchise agreements may require cable operators to devote channels to local program origination and public access. Thus, communities can require cable companies to carry local broadcast stations. They can also require the cable operators to allow public interest groups to produce their own programming. For further discussion of the vast programming possibilities cable offers for community benefit, see W. BAER, CABLE TELEVISION: A HANDBOOK FOR DECISIONMAKING (1974); P. CARPENTER-HUFFMAN, R. KLETTER, & R. YIN, CABLE TELEVISION: DEVELOPING COMMUNITY SERVICES (1974); LaPierre, *supra* note 4, at 90-110.

In addition, cable systems can provide two-way services that allow subscriber participation in programming. The possible two-way services include digital subscriber response, voice and video return, subscriber initiation, and point-to-point services. The simplest of these service alternatives, digital subscriber response, would allow viewers to vote and answer yes and no questionnaires. Voice and video return would allow subscribers to answer any question posed. Subscriber initiation service would basically convert one's television into a computer terminal. It would allow the viewer munities can become the primary beneficiaries of cable's growth and development provided governmental bodies regulate the industry in the public interest, promoting the most efficient, technologically advanced, and community oriented systems.[7]

Following a brief discussion of cable television technology and the underlying rationale for the industry's regulation, this Note will examine the various tiers of control imposed upon cable systems.[8] It will examine the evolution of federal policies toward cable regulation from suppressive controls to the recent trend favoring deregulation of the industry. A discussion of the history of local regulation in relation to a proposal for a more efficient regional regulatory scheme for the future will follow.

I. CABLE TELEVISION TECHNOLOGY AND THE RATIONALE FOR THE MEDIUM'S REGULATION

A. *Cable Technology*

In contrast to traditional broadcast television which transmits signals over the air,[9] a cable television system[10] distributes television

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to select programming material from a library list. Finally, point-to-point services provide subscriber access to the television screen. Combined with "voice and video" return, this would allow viewers to see one another while they converse. They could use their televisions as receivers and transmitters. Note, *The FCC's Cable Television Jurisdiction: Deregulation by Judicial Fiat*, 30 U. FLA. L. REV. 718, 724 n.36-39 (1978). *See generally* R. VEITH, TALK-BACK TV: TWO WAY CABLE TELEVISION (1976); *see also* National Ass'n of Regulatory Util. Comm'rs v. FCC, 533 F.2d 601 (D.C. Cir. 1976) (denying FCC jurisdiction over two-way cable services).

7. Municipalities should request public input into the franchising process, demanding that cable systems provide programming tailored to community needs. Without careful regulation and control, cable television will become merely an alternative entertainment medium and primarily a source of profit for cable operators. *See* notes 180-254 and accompanying text *infra*.

8. In many jurisdictions cable systems must comply with federal, state, and local regulations. As a result, industry regulations are often duplicative and confusing. This three-level scheme is the outcome of the FCC's plan to issue federal standards while allowing local participation in the regulatory process. *See* Cable Television Report and Order on Rules and Regulations Relative to CATV Systems Third Report and Order, 36 FCC 2d 143, 207 (1972) [hereinafter cited as Third Report and Order]. The FCC has voiced concern over the problems of the duplicative, burdensome regulatory framework; as it stands, however, the cable industry is still subject to three different levels of governmental control. *See* Krasnow & Quale, *Developing Legal Issues in Cable Communications*, 24 CATH. U. L. REV. 677, 688-91 (1975).

9. Radiated or broadcast television transmits electromagnetic waves through space. The scarcity of space in the electromagnetic spectrum severely limits the capacity of broadcast television. Through its use of cables, cable television does not

signals via wire or coaxial cables[11] directly to subscribers' homes. A network of cables connects each receiver to the "head-end"[12] or source of the signal. A "trunk" line[13] conducts the signals from the head-end through major streets or thoroughfares. Those signals then travel through smaller "feeder" lines[14] into individual homes.[15] Ulti-

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suffer those limitations and can provide a much greater channel capacity. *See* SLOAN COMM'N ON CABLE COMMUNICATIONS ON THE CABLE: THE TELEVISION OF ABUNDANCE 16-22 (1971) [hereinafter cited as SLOAN]. In addition to limited channel capacity, conventional, over the air broadcasters can only provide one-way systems.

Broadcast services also perpetuate the danger of adjacent channel interference and poor quality program delivery. Atmospheric conditions cause distant signals to interfere with local ones. *See* Hadin & Smith, *Telecommunications, Technologies, A Basic Description*, in CABLE HANDBOOK 1975-1976 3, 11-12 (M. Hollowell ed. 1975). Cable is therefore a more attractive medium than broadcast television since it provides subscribers with a wider range of viewing choices and better quality services. Broadcast television, however, remains an efficient medium capable of delivering its programming to millions of viewers.

10. Since cable television began in smaller communities, the FCC and other authorities referred to cable distribution systems as 'community area television' or 'CATV' systems. Today, the Commission generally uses the term 'cable television systems' in place of the older term in recognition of the broader possibilities of cable. Third Report and Order, *supra* note 8, at 144 n.9 (1972). Since this Note deals with past regulations of the cable industry in relation to a more efficient regulatory proposal for the future, the newer more inclusive term for cable facilities will appear throughout.

According to the FCC, for the purpose of the federal regulations regarding the medium, a cable television system is

> A nonbroadcast facility consisting of a set of transmission paths and associated signal generation, reception, and control equipment, under common ownership and control, that distributes or is designed to distribute to subscribers the signals of one or more television broadcast stations, but such term shall not include (1) any such facility that serves fewer than 50 subscribers, or (2) any such facility that serves or will serve only subscribers in one or more multiple unit dwellings under common ownership, control, or management.

47 C.F.R. § 76.5(a) (1979). *See* LaPierre, *supra* note 4, at 26 n.1.

11. The "coaxial cable" lies at the heart of the cable system. Its parts include a small inner conductor, a larger diameter outer conductor, plastic foam to separate the respective magnetic fields, and an outer protective sheath. This cable carries signals from their point of origin or "head-end" of the system to subscriber's television sets. *See* SLOAN, *supra* note 9, at 12-14.

12. A cable system transmits signals from the "head-end" or studio. *See* SLOAN, *supra* note 9, at 13; Hadin & Smith, *supra* note 9, at 12.

13. The trunk line is the large cable that extends through the serviced area. *See* SLOAN, *supra* note 9, at 14 (diagram).

14. Feeder lines are smaller cables that stem from the trunk line. *Id.*

15. One authority draws an analogy between a coaxial cable system and a municipal water distribution system. The trunk line is the water main, while the feeder lines are the small pipes. Hadin & Smith, *supra* note 9, at 12. The Sloan Commission

mately, each subscriber has a separate line to the cable system.

Electronic signals lose their power as they travel along the cable network.[16] Amplifiers placed at strategic points throughout the system strengthen these signals and assure sharp, clear program reception.[17] The capacity of the cable system depends upon the intricacy of the amplifiers used.[18]

Cable subscribers primarily receive programming through one of three different methods, depending upon the sophistication of the system.[19] The simplest cable system consists of an antenna that picks up local television signals from the air and transmits them through the cable network.[20] To receive signals beyond the normal antenna range, operators with more advanced systems construct additional antennas in the vicinity of the desired programming. The antenna picks up the distant signal and transmits it back to the cable system via long distance microwave or cable links.[21] Finally, the most elaborate systems allow program origination at the head-end or studio.[22] Modern technology permits the most advanced systems to provide a variety of nonbroadcast information and entertainment including two-way services.[23]

B. *The Rationale for Regulation of Cable Television*

Providing subscribers with the most advanced services through adoption of the most sophisticated system possible requires cable op-

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Report describes a cable system as a "tree network." SLOAN, *supra* note 9, at 14 (diagram).

16. SLOAN, *supra* note 9, at 14.

17. *Id.*

18. *Id.* at 15.

19. *Id.*

20. This was generally the format of the original cable systems constructed to provide television service to rural communities. The systems provided from three to five channels. *See* COMMITTEE FOR ECON. DEV., RESEARCH AND POLICY COMMITTEE, BROADCASTING AND CABLE TELEVISION: POLICIES FOR DIVERSITY AND CHANGE 60 (1975) [hereinafter cited as CED]; SLOAN, *supra* note 9, at 15.

21. *See* CED, *supra* note 20, at 60; SLOAN, *supra* note 9, at 15. For a discussion of the demand for increased cable television services and the subsequent development of microwave services, see notes 51-52 and accompanying text *infra*.

22. The FCC defines origination cablecasting as: "Programming (exclusive of broadcast signals) carried on a cable television system over one or more channels and subject to the exclusive control of the cable operator." 47 C.F.R. § 76.5(w) (1979).

23. For a discussion of the non-broadcast and two-way services cable television systems can provide, see note 6 *supra*.

erators to make a large initial capital investment.[24] Since cable is a capital intensive industry, the operator's financial stability greatly affects the development and growth of a cable system.[25] Although return on investment is substantial,[26] cable operators must wait several years to realize a profit.[27] These characteristics of the cable industry make it by nature a natural monopoly; subscribers will receive the most efficient service from one or a few operators.[28] This status as a natural monopoly requires governmental regulation of the industry as "public convenience and necessity" dictate.[29]

Unlike most beneficiaries of natural monopolies, the cable-operator cannot rely upon his or her monopoly position without consideration of other marketplace factors.[30] First, cable corporations compete intensely to obtain franchises to operate in municipalities.[31] Second, there is indirect competition between systems in close geographical

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24. St. Louis County, Missouri is currently considering proposals from several cable operators to establish a county-wide system. The average estimated capital investment necessary to set up such a cable system in St. Louis County is $34.7 million. Report on Cable Television Proposals from the Office of Thomas W. Wehrle, St. Louis County Counselor to St. Louis County Council 4 (Sept. 23, 1980) [hereinafter cited as Report on Cable Television Proposals].

25. Deputy Asst. Att'y Gen. Donald I. Baker testified before the Senate Antitrust and Monopoly Subcommittee in July 1975. In that testimony, Baker presented the Justice Department's views on possible cable television legislation, pointing out that since cable is a capital intensive industry, it requires profit incentives in order to develop. He indicated that extensive regulatory power delegated to the FCC would stifle cable's growth. *See* MacAvoy, *supra* note 1, at 12.

26. New York City offers a good example of the profit potential cable offers. Sixteen cable corporations are presently competing for the right to operate in four New York boroughs. Since each area has a high concentration of possible cable subscribers, it makes the award of a franchise a highly lucrative proposition. In Brooklyn, for example, there are an estimated 900,000 subscribers. Industry sources believe that the franchise holder could earn up to $100 million a year after a period of time. Thomas, *16 Cable TV Systems Vying for Rights in Four Boroughs*, N.Y. Times, Sept. 30, 1980, at B3, col. 3. *See* CED, *supra* note 20, at 61.

27. It may take 10 years before an investor in a cable operation realizes a profit. *See* CED, *supra* note 20, at 61.

28. *See* 2 A. KAHN, THE ECONOMICS OF REGULATION: PRINCIPLES AND INSTITUTIONS 2 (1971).

29. *See* Note, *The Wire Mire: The FCC and CATV*, 79 HARV. L. REV. 366, 373 (1965) [hereinafter cited as *The Wire Mire*]. For a general discussion of the rationale for regulation of natural monopolies, see 1 A. KAHN, THE ECONOMICS OF REGULATION: PRINCIPLES AND INSTITUTIONS 1 (1970).

30. *See The Wire Mire*, *supra* note 29, at 373.

31. *Id.* *See* note 4 and accompanying text *supra*.

proximity to one another.[32] Subscribers' realizations that the cable services they receive are inferior to those supplied by another operator in a neighboring community may lead to complaints to local government officials or termination of subscriptions. This factor may force cable operators to keep up with new developments in the field. Finally, cable television competes with other established entertainment and information services such as movie theatres and broadcast television.[33] These competetive influences upon cable operators should provoke less restrictive governmental controls over the industry.[34]

A stronger rationale for regulation of the cable industry is the need for establishment of franchises.[35] Cable operators cannot construct their systems without governmental permission to use local thoroughfares.[36] Governments often refuse to grant franchise privileges to all cable applicants[37] realizing that, consistent with natural monopoly theory,[38] allowing many companies to commence construction would be inefficient when one operator could satisfy public demand. Governmental regulation of francise rights thus encourages potential cable operators to enter the field.[39] Without assurances against overt competition and inadequate return on investment, corporations in this capital intensive industry may hesitate to make the initial expenditure.[40]

The foregoing reasons provide the traditional justification for careful regulation of cable television. The objective is to assure subscrib-

32. *See The Wire Mire*, *supra* note 29, at 373.

33. *Id.*

34. In his testimony to the Antitrust and Monopoly Subcommittee, in July 1975, Deputy Asst. Att'y Gen. Donald I. Baker stated, "The existence of monopoly power in the hands of a cable system in a limited number of areas does not justify applying detailed restrictions upon cable in all markets." Testimony of Donald I. Baker before the Antitrust and Monopoly Subcommittee of the Judiciary Committee, 94th Cong., 1st Sess. (1975) *cited in* MacAvoy, *supra* note 1, at 11-12.

35. 2 A. KAHN, *supra* note 28, at 3. For a discussion of the franchising process, see note 4 and accompanying text *supra*.

36. *See* note 4 and accompanying text *supra*.

37. Communities often take bids from several different cable companies before they grant a franchise. *See, e.g.*, Report on Cable Television Proposals, *supra* note 24 (summarizing bids proposed by applicants for cable franchise in St. Louis County, Missouri).

38. *See* note 29 and accompanying text *supra*.

39. *See* 2 A. KAHN, *supra* note 28, at 3-4.

40. *Id.*

ers adequate performance. Many levels of control, however, are duplicative, expensive, and a hindrance to growth of the cable industry.

II. FEDERAL POLICY CONCERNING CABLE TELEVISION

Often the obligation to protect established, regulated industries causes governments to issue controls over new technology.[41] Regulations are designed to preserve the financial integrity of the established industry and assure consumers continued reliable service.[42] The fear that a new industry will injure an existing public service business provokes strict restraints over the new entity.[43] Television broadcasters used this rationale to argue that the Federal Communications Commission (FCC) should protect them from the new, encroaching medium of cable television.[44] After some deliberation, the FCC issued restrictive controls over cable television to preserve the financial status of the broadcast industry.[45]

A. *The Early Years*

The first cable television systems emerged around 1950,[46] servicing areas where direct television reception was impossible or inade-

41. *Id.* at 12 n.20. The author makes a distinction valuable to this analysis: Marketplace forces may operate freely upon the automobile industry, without harm to consumers. If one automobile company goes out of business, another will replace it. On the other hand, if an interstate pipeline goes out of business, consumers will be without a source of supply. *Id.*

42. *Id.* at 43-46.

43. *Id.*

44. For a discussion of FCC policy concerning cable television, see notes 74-124 and accompanying text *infra*.

45. *Id.*

46. The earliest noncommercial cable television system began operation in Astoria, Oregon in 1949. One year later, in Lansford, Pennsylvania the first commercial system commenced service. Report and Order on Inquiry into the Impact of Community Antenna Systems, TV Translators, TV "Satellite" Stations and TV "Repeaters" on the Orderly Development of Television Broadcasting (CATV and TV Repeater Services), 26 FCC 403, 408 (1959). An agency report and order is the step before codification of final regulations in the Code of Federal Regulations (C.F.R.). A report is an analysis of a designated topic—cable television operators in this case. The order constitutes the basis for the regulations based upon the report. Note, *Cable Television: The Practical Implications of Local Regulation and Control*, 27 DRAKE L. REV. 391, at 394 n.16 (1978).

quate.[47] These early operations provided minimal local service and therefore prompted little concern from television broadcasters.[48] During this period of cable's infancy, broadcast television became the country's major source of entertainment and information.[49] In response to television's popularity and the demands of their subscribers,[50] cable operators began importing programs on microwave relays to expand their systems.[51] In addition to the cable subscribers in small towns, television viewers in larger cities began to request increased services. Cable operators answered these requests by offering additional programming and high quality signals to city dwellers.[52]

In order to regulate the cable industry and protect the design of the nation's television system, the FCC in 1952 established a national television system through allocation of limited broadcast space among local communities.[53] Through the implementation of both

47. CATV and TV Repeater Services, 26 FCC 403, 408 (1959). *See also* note 5 and accompanying text *infra*.

48. Television dealers who desired to sell more products in their area often constructed early cable systems. There were many of these small enterprises, 640 by 1960, largely supplying television service to those who could not otherwise receive it. *See* SLOAN, *supra* note 9, at 23-24. *See also* 2 A. KAHN, *supra* note 28, at 32; M. SEIDEN, CABLE TELEVISION U.S.A.: AN ANALYSIS OF GOVERNMENT POLICY 21 (1972) [hereinafter cited as SEIDEN].

49. SLOAN, *supra* note 9 at 24.

50. Cable subscribers in small towns issued requests for increased programming equivalent to that received by viewers in large cities. SEIDEN, *supra* note 48, at 21.

51. Cable operators use microwave relay systems in order to transmit distant signals. A microwave relay system consists of a series of microwave repeaters approximately 25 miles apart. The first repeater receives the signal from the antenna, amplifies it, and transmits it to the next repeater. This process continues until the original signal reaches the subscriber. Hadin & Smith, *supra* note 9, at 12.

52. The Sloan Commission Report cited two early examples of the demand for additional television service in urban areas already receiving three or more channels. As early as 1961, entrepreneurs erected elaborate antennas in order to pick up programming from stations in Los Angeles for delivery to their subscribers in San Diego. Similarly, cable operators met television viewers' demands for additional programming in New York by televising local sports games and special minority programs. These cable operators satisfied demand with a different service unavailable on broadcast television. They produced their own programs on an unused channel solely for cable subscribers. *See* Sloan, *supra* note 9, at 24-27. For a description of cable origination programming, see note 22 and accompanying text *supra*. *See also* 2 A. KAHN, *supra* note 28, at 32.

53. In 1952, after four years of deliberation, the FCC's engineers completed a Table of Assignments allocating limited spectrum space among the local communities. Sixth Report and Order on Rules Governing Television Broadcast Stations, 17 Fed. Reg. 3905 (1952) [hereinafter cited as Sixth Report and Order]. The FCC chose

VHF and UHF channels,[54] the FCC aimed to provide almost every community with at least one television channel.[55] The policy behind this allocation system was to strengthen local stations and serve community interests and desires.[56]

The Commission viewed the development of cable television as a threat to the success of local stations.[57] To "insure" its community

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a system of many local stations instead of a plan comprising a few regional markets. *See* SEIDEN, *supra* note 48, at 11.

54. Since space on the VHF broadcast spectrum was limited, the FCC allocated seventy UHF channels to television. Sixth Report and Order, *supra* note 53, at 3907 (1952). *See* Synchef, *Municipal Ownership of Cable Television Systems*, 12 U.S.F.V. L. REV. 205, 217 (1978).

Pursuant to the FCC's allocation plan, many broadcast stations operate in the UHF band. A UHF channel is inferior because the UHF band lies above the VHF band on the electromagnetic spectrum. Waves higher on the spectrum tend to move in straight lines, reflecting off obstacles rather than bending around them. These waves also lose energy as they move out, thus restricting their range. The natural laws of electromagnetic propagation therefore make higher range signals less desirable for television transmission. *See* SLOAN, *supra* note 9, at 17-20. Of the 60 UHF stations existing after the 1952 plan, most left the air due to lack of audience. Synchef, *supra*, at 207. These initial failures discouraged investment in UHF stations. In fact, most available UHF stations are not presently in use. SEIDEN, *supra* note 48, at 13.

55. *See* SEIDEN, *supra* note 48, at 11-12.

56. *Id. See* note 52 and accompanying text *supra*.

57. The Commission feared that communities would support cable systems that supplied distant programming rather than local stations. In fact, the FCC viewed cable as "UHF's most dangerous enemy." Synchef, *supra* note 54, at 219.

According to the Commission, cable's expansion threatened more than the substitution of cable for local services. The FCC was concerned that some areas would be left without any television service. Once local stations ceased operation in a community, cable would be its only television source. The Commission postulated that the high capital costs necessary to build cable systems would result in cable service in only wealthy, urban areas. Rural communities unable to finance cable construction would not receive any television service. Thus, the FCC feared that growth of the cable industry would render its local television service plan ineffective. *See* SEIDEN, *supra* note 48, at 4, 16. The Commission's belief that cable expansion would cause the demise of local stations was purely hypothetical. When the FCC decided to assert authority over the cable industry, no broadcaster had actually gone off the air because of competition with cable services. *Id.* at 5.

The FCC recently concluded that the public would incur only a negligible risk absent the Commission's rules stifling competition between television broadcasters and cable operators. The FCC held that it is "unlikely that any station or any viewer would be significantly harmed absent the regulations protecting the broadcasting industry." Inquiry Into the Economic Relationship Between Television Broadcasting and Cable Television, 71 FCC 2d 632, 713-14 (1979). Moreover, the Commission recently determined that a competitive climate would be in the public's best interest; accordingly, it removed its protective regulations. Fourth Report and Order in the Matter of Cable Television Syndicated Program Exclusivity Rules and Inquiry into service plan, the FCC finally decided to assert indirect control over the cable industry through its power over microwave relays.[58] This step instigated demands from both the broadcasting industry and Congress that the FCC create a set of rules governing the cable industry.[59]

Television broadcasters continued to oppose the expansion of cable operations and urged the FCC to assert jurisdiction over it.[60] In 1958, thirteen operators of standard broadcast stations filed a complaint against 283 cable system operators. In *Frontier Broadcasting* v. *Collier*,[61] the FCC held that it was without jurisdiction over the cable industry, and was therefore unable to promulgate regulations to protect television broadcasters from economic injury attributable to cable's expansion.[62] One year after its *Frontier* decision, the FCC

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the Economic Relationship Between Television Broadcasting and Cable Television, 45 Fed. Reg. 60186 (1980) [hereinafter cited as Fourth Report and Order]. For a complete discussion of the FCC's recent determinations, see notes 155-68 and accompanying text *infra*.

58. The FCC's jurisdiction over microwave relay systems is based upon the Communications Act's grant of authority over common carriers. 47 U.S.C. § 208 (1976). *See* note 62 *infra*.

In Carter Mountain Transmission Corp. v. FCC, 32 FCC 459 (1962), *aff'd*, 321 F.2d 359 (D.C. Cir. 1963), *cert. denied*, 375 U.S. 951 (1963), the FCC refused to grant a microwave license to a cable operator because it would result in the failure of the area's local TV station. The FCC acknowledged its decision was based upon a desire to protect television broadcasters from the economic injury that would result from competition with the cable industry. *Id.* at 465. The Supreme Court's refusal to review the *Carter Mountain* decision became the basis for the assertion of FCC authority over cable television. *See* G. Shapiro, *Federal Regulation of Cable TV—History and Outlook*, in THE CABLE/BROADBAND COMMUNICATIONS BOOK 3, 4 (M. Hollowell ed. 1977). For a discussion of *Carter Mountain*, see SEIDEN, *supra* note 48, at 146-48; LaPierre, *supra* note 4, at 41-42; Synchef, *supra* note 54, at 217-20.

59. Synchef, *supra* note 54, at 220 n.70. In addition to its other arguments, the broadcast industry objected to the unfair competition promoted by the existing set of rules. The cable industry operated unfettered by regulatory control while the FCC closely scrutinized the broadcasting industry. *See Note, Cable Television: The Practical Implications of Local Regulation and Control*, 27 DRAKE L. REV. 391, at 394 (1978).

60. Broadcasters issued a complaint against cable development with the FCC as early as 1956. LaPierre, *supra* note 4, at 39.

61. 24 FCC 251 (1958), *reconsideration denied in conjunction with* CATV and TV Repeater Services, 26 FCC 403 (1959).

62. The FCC's decision was based upon its interpretation of the Communications Act of 1934, 47 U.S.C. §§ 151-609 (1976). The Communications Act confers authority upon the FCC over communications common carriers. 47 U.S.C. § 208 (1976). According to the FCC's interpretation of the Act's legislative history, cable operators were not common carriers under the Act because they, rather than their subscribers,

initiated an inquiry into the impact of cable upon broadcast services.[63] In *CATV and TV Repeater Services*,[64] broadcasters claimed that the expansion of cable systems posed an economic threat to existing local television stations.[65] First, they argued that through importation of signals and provision of additional programming, cable operators fragmented and decreased the size of local television audiences.[66] Second, the broadcasters claimed that the diminished audience size resulting from cable's expansion would reduce broadcasters' revenue and ultimately cause inadequate television services.[67]

The FCC ruled that although the expansion of cable services had an adverse impact upon the broadcast television industry, the impact was insignificant.[68] It further concluded, consistent with its decision in *Frontier*, that the Communications Act of 1934[69] did not grant it jurisdiction over cable operations.[70] Finally, the Commission's inquiry contained a proposal for congressional legislation that would require cable systems to obtain consent from broadcast stations to

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transmitted the communication over the cable system. Since cable television, as it existed at the time the Commission decided *Frontier*, was not a common carrier, the FCC held it was powerless to issue regulations over the cable industry. 24 FCC at 255.

63. The Commission considered the overall impact of the developing cable medium in its inquiry. CATV and TV Repeater Services, 26 FCC 403 (1959).

64. *Id.*

65. *Id.* at 413.

66. *Id.*

67. *Id.* at 414.

68. *Id.* at 423-24. The Commission referred to the broadcasting industry as a "dynamic industry," where, if one station fell, another would soon replace it. *Id.*

New cable services posed direct economic threats to existing local stations that had previously enjoyed virtual monopolies in their receiving areas. Thus, any competition would certainly cause an economic impact upon established broadcasters. 2 A. KAHN, *supra* note 28, at 32-33. The FCC recognized this fact, but found the broadcasters' claims that cable's expansion caused the demise of broadcasting businesses groundless. 26 FCC at 415.

69. 47 U.S.C. §§ 201-609 (1976). For a discussion of the holding in *Frontier*, see note 61 and accompanying text *supra*.

70. CATV and TV Repeater Services, 26 FCC at 427-31. In addition, the FCC refused to exert authority over cable pursuant to a plenary power to regulate a new industry in order to protect an established one. *Id.* at 427-31. In fact, the Commission analogized that the broadcasters' request for protection against competition from cable was equivalent to a request to regulate any nonbroadcasters including motion picture operators and newspaper publishers. According to the Commission, "The logical absurdity of such a position requires no elaboration." *Id.* at 431-32. *See also* LaPierre, *supra* note 4, at 40.

carry distant signals.[71]

The *Frontier* and *CATV and TV Repeater Services* decisions left the cable industry unfettered by strict federal controls. This uncontrolled existence, however, was short lived. Shortly after these initial refusals to assert jurisdiction over cable television, the FCC abandoned its position through issuance of regulations over microwave relays.[72] Hesitating to overturn its previous decisions, however, the Commission awaited Congressional authority to directly regulate cable television.[73]

B. *The Decision to Regulate and Its Influence on Cable Television's Development*

In 1965, the FCC, responding to pressing demands, established operating standards for microwave-served cable systems.[74] These rules contained two provisions intended to diminish cable's adverse economic impact on television broadcasters.[75] First, to obtain a license for a microwave relay, cable operators had to carry certain local signals upon request of the local broadcast station.[76] Second, the Com-

71. 26 FCC at 433-34. The FCC believed that Congress intended to protect and recognize ownership and property rights in programs. Thus, it stated its intent to request Congress to amend § 325(a) of the Communications Act, 47 U.S.C. § 325(a) (1976) (dealing with rebroadcasting of programs), to require cable operators to obtain consent from the program originating station. 26 FCC at 438. *See* LaPierre, *supra* note 4, at 40 n.85.

72. The FCC issued a rule three months after its first inquiry concerning the provision of microwave facilities to the public. Order on Renewal of Station Licenses, 24 Fed. Reg. 6052 (1959). The rule affected cable operators because microwave relays were often a crucial part of their cable systems. *See* LaPierre, *supra* note 4, at 41.

73. Congress held hearings on cable television in 1959. *See* LaPierre, *supra* note 4, at 41 n.91.

The Senate defeated a bill that would have given the FCC direct licensing authority over cable systems by 2 votes. 106 Cong. Rec. 10,547 (1960).

74. *See* First Report and Order on Grant of Authorizations in the Business Radio Service for Microwave Stations to Relay Television Signals to Community Antenna Systems, 38 FCC 683 (1965), *modified*, 1 FCC 2d 524 (1965), *aff'd sub nom.* Black Hills Video Corp. v. FCC, 399 F.2d 65 (8th Cir. 1968). *See also* United States v. Midwest Video Corp., 406 U.S. 649, 659 n.17 (1972) (recognizing with approval the *Black Hills Video* Court's affirmance of the operating standards).

75. The FCC found these provisions necessary because of its belief that "CATV serves the public interest when it acts as a supplement rather than a substitute for off-the-air service." 38 FCC at 701. This statement evidences the Commission's failure to recognize the potential capabilities of cable television. As a result, it restricted cable's growth by granting it a subservient role.

76. 31 Fed. Reg. 4569 (1966) (codified in 47 C.F.R. § 21.712(c)-(f)); 37 Fed. Reg.

mission prohibited cable operators from carrying programs duplicative of those transmitted by local stations.[77] Most urban cable systems did not require microwave relay service,[78] and therefore were exempt from both FCC jurisdiction and regulations.[79]

The FCC adopted further rules in 1966, extending the mandatory carriage[80] and nonduplication rules[81] to all cable systems. These extensions were based upon the 1934 Act, which rests upon a policy of promoting a national telecommunications network.[82] The Act authorizes the FCC to promote that policy and prevent frustration of the regulatory scheme created pursuant to it.[83] The FCC ruled that since cable systems operated in interstate commerce by wire, they fell

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4573 (1966) (codified in 47 C.F.R. § 91.559(a)-(d)). *See* LaPierre, *supra* note 4, at 47. This is commonly referred to as the mandatory signal carriage requirement. Since the Commission believed that cable should remain a supplement to television broadcasting, it required cable systems to carry local stations as a quid pro quo for the right to provide additional services. Fourth Report and Order, *supra* note 57, at 60247.

77. 31 Fed. Reg. 4569 (1966) (codified in 47 C.F.R. § 21.712 (g)-(i)); 31 Fed. Reg. 4593 (1966) (codified in 47 C.F.R. § 91.559(c)-(g)). *See* LaPierre, *supra* note 4, at 47. The Commission recognized that cable systems were not subject to market competition for programming as were broadcast systems. The FCC believed that the nonduplication rules would equalize competitive conditions between broadcasters and cable operators. Fourth Report and Order, *supra* note 57, at 60247.

78. A cable operator generally uses microwave facilities to relay distant signals. Microwave services enable the cable system to obtain signals that cannot be received by antenna installation. They also allow the operator to obtain better reception of certain signals. Rules Regarding Microwave-Served CATV, First Report and Order, 38 FCC 683, 684 n.1 (1965) [hereinafter cited as First Report and Order]. Given this purpose for microwave use, urban cable systems may have few reasons to obtain distant signals through the use of microwave facilities. Chances are good that signals from other markets are attainable without much difficulty.

79. The FCC intended the *First Report and Order* to be an interim set of rules. The Commission wanted to "build up a body of experiences" before it promulgated regulations over the industry as a whole. First Report and Order, *supra* note 78, at 687.

80. The mandatory carriage requirements remained substantially similar to those issued in the earlier report. Rules and Regulations Governing CATV, Second Report and Order, 2 FCC 2d 725, 746 (1966) [hereinafter cited as Second Report and Order]. *See* note 76 and accompany text *supra*.

81. The nonduplication rules reduced the waiting period for cable broadcast of a local station's programming to a single day of the local broadcast. The Commission added an exemption for color programs not carried in color by the local broadcast. Second Report and Order, *supra* note 80, at 746-47.

82. 47 U.S.C. § 151 (1976).

83. *Id.* at §§ 303, 307.

under the Act.[84]

To prevent the alleged unfair competition with broadcasters, the Commission's 1966 ruling included a freeze upon cable's importation of distant signals in the top 100 markets.[85] A cable operator could obtain a waiver from the freeze only upon a showing that cable programming importation was in the public's best interest and would not injure UHF stations in the market.[86] Since proof was difficult, this distant signal provision prevented development of cable services in major urban markets and placed restraints on the entire industry's progress.[87]

The underlying purpose of the FCC's assertion of jurisdiction over the cable industry was promotion of its local television service policy. The Commission chose to expand UHF facilities and restrict cable development to achieve its goals. The inferior nature of UHF technology, however, frustrated the local service policy.[88] Thus, the Commission's proposal to stimulate local programming resulted in an empty promise. Its continued protection of television broadcasters' interests stifled expansion of local service through cable technology. In light of the quality and potential advantages cable offers,[89] promoting its development may have enabled the FCC to fulfill its promise.

Shortly after promulgation of the 1966 ruling, the Supreme Court approved the Commission's decision to regulate cable television in *United States v. Southwestern Cable Co.*[90] The Court found that the Commission's power over broadcast media pursuant to the 1934 Act[91] extended to cable services.[92] In adopting a broad jurisdictional

84. Second Report and Order, *supra* note 80, at 733-34.

85. *Id.* at 782. Synchef, *supra* note 54, at 222. Authorities call the FCC's policy a "freeze" upon cable development. Davis, *supra* note 4, at 79; LaPierre, *supra* note 4, at 53; Sloan, *supra* note 9, at 29.

86. Second Report and Order, *supra* note 80, at 782.

87. *See* note 85 *supra*.

88. For a discussion of UHF and its inefficiency see note 54 *supra*.

89. The FCC acknowledged that cable television has made a significant contribution to the public interest. The Commission admitted that cable had extended its service to areas unable to receive regular broadcasting and that it improved reception otherwise of poor quality. The protection of UHF programming, however, outweighed all other considerations. Second Report and Order, *supra* note 80, at 781.

90. 392 U.S. 157 (1968).

91. 47 U.S.C. § 152(a) (1976).

92. 392 U.S. at 167-69.

test for federal cable regulations, the Court established that FCC regulations "reasonably auxilliary to the effective performance of broadcast television" were valid.[93] Thus, the Court affirmed the Commission's protectionist policy and encouraged restraints upon the cable industry.

In 1972, the FCC exercised its broad jurisdictional powers by promulgating a complex set of rules governing the cable industry.[94] In an attempt to encourage cable's development, the Commission removed the freeze it had placed upon the importation of distant signals.[95] Most of the rules, however, remained protective of broadcast television.[96] These included syndicated exclusivity rules designed to protect program suppliers and local market broadcasters.[97] Syndicated programming is non-network programming sold in more than one television market.[98] The FCC rules prevented a cable system operating in the first fifty markets[99] from importing any syndicated series or feature film programming carried on a distant signal for one year from the date it was sold anywhere in the country.[100] The FCC

93. *Id* at 178.

94. Cable Television Report and Order on Rules and Regulations Relative to CATV Systems, 36 FCC 2d 143 (1972), *reconsideration denied*, 36 FCC 2d 326 (1972). The FCC based the regulations in the *Third Report and Order* upon the size rankings of the nation's cities; the determinations depended upon the number of the cities' television viewers during prime time. There are three categories of market rankings: 1 to 50, 51 to 100 and above 100. SEIDEN, *supra* note 48, at 117-18.

95. *See* note 82 *supra*.

96. The Commission stated that its objective was to promote the development of cable systems in the public interest with the caveat that it would do so without damaging broadcast television. Third Report and Order, *supra* note 8, at 164-65.

97. The FCC enacted the rules to protect independent local broadcasters because cable systems cannot import the programs they carry. Program suppliers are usually copyright owners who receive protection because these regulations allow them to sell programs to many different areas despite the fact that cable systems may import the programs. LaPierre, *supra* note 4, at 63.

98. The FCC defines syndicated programs as "[a]ny program sold, licensed, distributed, or offered to television station licensees in more than one market within the United States for non-interconnected (i.e., non-network) television broadcast exhibition, but not including live presentations." 47 C.F.R. § 76.5(p) (1979). *See* PRACTISING LAW INSTITUTE, CURRENT DEVELOPMENTS IN CATV, TV, AND PAY TELEVISION 285 (G. L. Christensen ed. 1978) [hereinafter cited as Christensen].

99. If a community is within 35 miles of the FCC's central reference point, it is within a particular market. 47 C.F.R. § 76.53 (1976); Synchef, *supra* note 54, at 226 n. 102. The 1972 rules established and fixed a market ranking system. 47 C.F.R. at § 76.51 (1976); Christensen, *supra* note 98, at 273.

100. 47 C.F.R. § 76.151 (1979).

provided this exclusivity for syndicated programs to protect independent stations and copyright owners.[101]

In addition to the syndicated exclusivity provisions, the 1972 rules contained mandatory carriage provisions and distant signal limitations.[102] The Commission directed cable systems to carry local television signals.[103] For those cable operators complying with the mandatory local carriage rules, the Commission allowed importation of distant signals.[104] It required, however, that all importation be in accordance with its distant signal regulations.[105] Those regulations permitted cable operators to import only two or three distant signals.[106] The combined effect of the local carriage and distant signal provisions, therefore, severely limited the amount and variety of programming available to cable subscribers.[107]

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101. *See* note 98 *supra*. Since most revenues received from syndicated programming comes from the top markets, the Commission made the restrictions governing the smaller markets less strict. *See* LaPierre, *supra* note 4, at 63. The author succinctly summarized the exclusivity rules in the smaller markets:

> In the second fifty markets, a cable system distant signal must be blacked out (1) for an old network series during its first non-network broadcast in the market, but for no more than one year, (2) for any non-network series during its first broadcast in the market, but for no more than two years, and (3) for any feature film during the first two years it is available for non-network broadcast in the market.

Id.

102. NATIONAL CABLE TELEVISION ASSOCIATION, SYNDICATED EXCLUSIVITY 1 (1970).

103. Upon request of a station licensee or permittee, the rules required cable operators to carry local signals. 47 C.F.R. §§ 76.57-.63 (1979). The local or "mandatory" carriage signals included educational stations within 35 miles of a community and stations significantly viewed in a community. Christensen, *supra* note 98, at 274-75.

104. The Commission in essence abandoned its absolute protectionist policy toward local UHF stations. *See* note 57 *supra* and accompanying text. Cable systems required to carry local stations would improve the quality of their reception and thus outweigh the fear of audience fragmentation due to the importation of distant signals. LaPierre, *supra* note 4, at 60-61.

105. 47 C.F.R. at §§ 76.51-.65 (1979). The Commission's rules on signal carriage varied according to the size of the market served. Synchef, *supra* note 54, at 226.

106. The Commission held that all systems in the top one hundred markets could carry at least two distant signals which would be sufficient to encourage cable development in a community. LaPierre, *supra* note 4, at 62.

107. Unfettered importation of distant signals would increase the attractiveness of the system to subscribers, cause more cable operators to enter the market and thus further the potential impact of the system. NATIONAL CABLE TELEVISION ASSOCIATION, DISTANT SIGNALS 1 (1979).

The syndicated exclusivity and signal carriage provisions proved especially detrimental to the cable industry because they prevented cable operators from producing programming that induced viewers to subscribe.[108] The deletion of attractive programming resulted in fewer subscribers and a decreased revenue base. This deterred cable operators already in business from increasing local services and discouraged potential operators from entering the field. The signal carriage regulations thus protected television broadcasters from direct competention with cable operators.[109]

The comprehensive set of regulations set forth in 1972 also included regulations unrelated to the broadcast industry. The FCC found it necessary to regulate cable's non-broadcast services[110] rather than expose them to marketplace forces. The Commission required cable systems in the top 100 markets to maintain a minimum of twenty channels.[111]

The FCC further specified the uses of several of these channels. First, it mandated that each cable system maintain facilities for local production and presentation of programming exclusive of broadcast signals.[112] Second, the regulations required cable systems to make

108. *See* NATIONAL CABLE TELEVISION ASSOCIATION, SYNDICATED EXCLUSIVITY 1 (1970).

109. Congress has finally adopted a statute that specifies the copyright responsibilities of cable systems. This enactment would negate broadcasters' unfair competition argument and therefore should eliminate the signal limitation rules. Copyright Law of 1976, 17 U.S.C. § 111 (1978). *See* Note, *The FCC's Cable Television Jurisdiction: Deregulation By Judicial Fiat* 30 U. Fla. L. Rev. 718, 721 nn. 22-3 (1978). As additional support, the National Cable Television Association's Study on the relationship between broadcasting and cable television found that there is no support for the proposition that cable television restrictions are necessary to protect broadcast programming or the public interest. NATIONAL CABLE TELEVISION ASSOCIATION, ECONOMIC INQUIRY 1 (1979). The FCC has recently overturned the syndicated exclusivity and distant signal rules. *See* notes 159-72 and accompanying text *infra*.

110. The FCC finally recognized the cable industry's potential in Amendment of Part 74, Subpart K of the Commission's Rules and Regulations Relative to Community Antenna Television Systems; and Inquiry Into the Development of Communications Technology and Services to Formulate Regulatory Policy and Rulemaking and/or Legislative Proposals, 15 FCC 2d 417, 418 (1968). In fact, the Commission offered a non-exclusive list of some of the predicted cable services. *Id.* at 420.

111. 47 C.F.R. § 76.251 (1979).

112. The FCC required cable operators to originate their own programming under 47 C.F.R. § 76.201 (1972) (repealed, 39 Fed. Reg. 43302 (1974)). The Supreme Court upheld the Commission's jurisdiction in this matter, but the FCC later repealed the rule. Midwest Video Corp. v. FCC, 406 U.S. 649 (1972) (*Midwest I*). For a dis-

facilities available for public use on a nondiscriminatory basis.[113] To comply with these requirements, cable operators had to supply equipment and facilities for public access purposes.[114] The third nonbroadcast rule in the 1972 regulations provided that each cable system construct a device allowing for two-way communication.[115] These three provisions demonstrate the FCC's recognition of cable television's technological capabilities independent of broadcast television. The Commission acknowledged the vast potential of cable technology but found it proper to foster the industry's growth only in areas separate from broadcast television.

The FCC also recognized the local nature of cable services and therefore refrained from preempting the licensing process from community involvement.[116] Local officials, however, lacked expertise in the area of cable services and often issued confusing, duplicative regulations.[117] The Commission felt that some federal intervention was necessary and therefore issued mandatory rules governing the franchising process.[118]

One of the FCC rules required the franchising authority to guarantee a public proceeding for review and selection of cable operation applications.[119] Another provision predetermined construction timetables for future compliance by the cable operator.[120] A third rule mandated that franchise agreements provide local service complaint procedures.[121] Fourth, the FCC called for a reasonable duration of the franchise agreement.[122] Fifth, it granted franchisors full power

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cussion of *Midwest I*, see notes 126-29 and accompanying text *infra*. *See* amended cablecasting origination requirements, 47 C.F.R. § 76.205 (1979).

113. *Id.* § 76.251.

114. The Supreme Court in FCC v. Midwest Video Corp. (Midwest II), 440 U.S. 689 (1979), held that local officials and cable operators should determine the best use of access channels without federal restraints. For a discussion of *Midwest II* see notes 144-51 and accompanying text *infra*.

115. For a discussion of cable's two-way capacities see note 6 and accompanying text *supra*.

116. Third Report and Order, *supra* note 8, at 204-11. The FCC also noted that conventional licensing would present it with an unmanageable burden. *Id.* at 207.

117. *Id.* at 205-07.

118. 47 C.F.R. § 76.31 (1972), *amended*, 66 FCC 2d 380 (1977), *aff'd*, 71 FCC 2d 569 (1979).

119. 47 C.F.R. § 76.31(a)(1) (1972).

120. *Id.* § 76.31(a)(2).

121. *Id.* § 76.31(a)(5).

122. *Id.* § 76.31(a)(3).

over the rates charged subscribers.[123] Finally, the rules allowed the franchisor to charge a maximum of three to five percent of subscriber revenues as a franchise fee.[124] The Commission later removed many of these mandatory requirements governing the cable industry to allow local authorities and marketplace forces to determine its development.[125]

C. *Restriction of FCC Jurisdiction and Relaxation of Federal Control Over Cable Television*

The FCC received mixed reviews of its comprehensive regulatory scheme set forth in 1972. Soon after the regulations went into effect, courts began to erode the Commission's jurisdictional powers. In addition, the Commission abandoned many of its rules as they became obsolete and unnecessary.

A cable operator subject to the FCC's program origination requirement challenged the Commission's authority to promulgate that rule in *United States v. Midwest Video Corp*.[126] The Supreme Court reaffirmed the FCC's broad jurisdiction over cable television and upheld the requirement by applying the "reasonably ancillary" test.[127] In *Midwest*, the Court further entrenched the Commission's view that cable was a supplement to broadcast television. The Court held the origination rule valid because it "preserves and enhances the integrity of broadcast television."[128]

Although the origination requirement met approval in *Midwest*,[129]

123. *Id.* § 76.31(a)(4).

124. *Id.* § 76.31(b).

125. The FCC concluded, after five years of experience, that cities were the proper regulatory agents of cable television. Amendment of the Commission's Rules Pertaining to Applications for Certificates of Compliance and Federal-State/Local Regulatory Relationships, 66 FCC 2d 380, 391 (1977), *aff'd*, 71 FCC 2d 569, 571 (1979) [hereinafter cited as Amendment].

126. 406 U.S. 649 (1972).

127. 406 U.S. at 651. The Court applied the test it had established in *Southwestern*: regulations of cable television "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting" were valid. *Id.*

128. 406 U.S. at 670.

129. Chief Justice Burger in an ambiguous concurring opinion in *Midwest* voiced concern over Congressional inaction in regard to the cable and broadcasting industries. The Chief Justice, instead of narrowing the FCC's jurisdiction, concluded that until Congress acts, the Commission has broad authority over communication media. 406 U.S. at 675 (Burger, C. J., concurring). Although his opinion indicated concern

the FCC later abandoned it.[130] The Commission determined that mandatory regulations chilled the creativity and interest required for effective programming.[131]

Further erosion of the Commission's rules followed, especially in the area of non-broadcast service requirements. In *National Association of Regulatory Commissioners (NARC) v. FCC*,[132] the District of Columbia Circuit Court invalidated the Commission's preemption of state regulation of cable leased access channels for two-way, point to point, non-video communications.[133] In the court's view, the Communications Act did not confer "blanket jurisdiction" over cable activities upon the FCC; rather, the non-broadcast activities in question were within the proper scope of local regulatory authority and the FCC was without jurisdiction.[134]

In *Home Box Office, Inc. v. FCC*,[135] the District of Columbia Circuit further narrowed the FCC's broad jurisdiction over the cable industry. The court held that the Commission lacked the authority to issue its pay cable requirements and programming restrictions.[136] This case is significant in that the court held that the Commission had not "justified its position that cable television must be a supplement to, rather than an equal of, broadcast television."[137] Thus, the deci-

over the application of the outdated Communications Act to advanced communications media, Chief Justice Burger's solution did not benefit the cable industry.

130. *See* note 112 *supra*.

131. *Id.*

132. 533 F.2d 601 (D.C. Cir. 1976).

133. *Id.* at 615-17. The Commission first announced this policy concerning preemption of state regulation of cable system leased access channels for two-way, point-to-point, non-video communications in its First Report and Order, *supra* note 78, at 193, *further elaborated*, 46 FCC 2d 175, 185-86 (1974) and 49 FCC 2d 1078, 1081 (1974); 533 F.2d at 605 n.1. For a discussion of these cable services see note 6 *supra*.

134. The court held that the FCC's rules regarding cable's non-video, return communications were intrastate in nature and not within the Communications Act. Further, the court held that the FCC's rules did not meet the "ancillary test." The Commission's preemption of non-federal authority over the non-video communications in question would not have affected any broadcast purpose. 533 F.2d at 615.

135. 567 F.2d 9 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 829 (1977).

136. Pay cable television offers subscribers additional programming for a fee set on a per channel, per program basis. *Id.* at 13. The FCC restricted the amount and variety of programs a pay cable operator could supply. *See* 47 C.F.R. §§ 73.643, 76.225 (1975). The purpose of the rules was to protect broadcasters of free television from competition by those who supplied programming for a fee. 567 F.2d at 13.

137. 567 F.2d at 36. The *Home Box Office* court in effect foreshadowed the deregulatory climate of the future in its rejection of protective, anti-competitive regula-

sion granted cable television independent status. Further, the court limited the FCC's broad powers over cable by requiring it to substantiate its rules in the future with detailed inquiries.[138]

As support for federal intervention into the local franchising process waned, the Commission could no longer justify its comprehensive franchise standards set forth in 1972. It therefore revised the franchise regulations in 1977, allowing maximum flexibility at the local level provided new provisions issued did not interfere with federal interests.[139] The Commission reasoned that since local authorities must enforce the regulations imposed upon cable operators, they should create them.[140] Further, after six years of experience, local governments were "more sophisticated in regulatory matters."[141] Finally, the Commission noted that many organizations and individuals with special expertise in the cable field were available to local authorities for consultation.[142] Consistent with the overall federal deregulatory trend, the FCC aimed to ease the burden of mandatory rules imposed upon local governments and cable operators.[143]

The Supreme Court has followed the deregulatory trend advanced by lower courts and the FCC. In *FCC v. Midwest Video Corp. (Midwest II)*,[144] the Court invalidated the Commission's access rules that required cable operators to establish channels for public use.[145] The Court found that the rules conferred common carrier status upon cable operators by depriving them of the freedom to determine with whom and upon what terms to negotiate.[146] Consistent with the deci-

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tions. The court stated: "Finally, we do not perceive any *public* benefit to be achieved by hobbling cable television to correct the sort of unfair competition alleged by the Commission." *Id.* at 42. In fact, the court in a footnote observed that broadcasters had not proven that they had incurred or would suffer economic injury arising from cable's free use of broadcast signals. *Id.* at 42 n.71.

138. The court held that the Commission based the pay cable rules on speculations rather than on facts. The FCC, according to the court's decision, failed to create a record in support of its decision to regulate. *Id.* at 41.

139. Amendment, *supra* note 125.

140. 71 FCC 2d at 571.

141. *Id.*

142. *Id.*

143. *Id.* at 570.

144. 440 U.S. 689 (1979).

145. *See* notes 113-14 and accompanying text *supra*.

146. 440 U.S. at 708. For a discussion of the test the FCC uses to determine common carrier status, see note 62 and accompanying text *supra*.

sion in *Home Box Office*, the Court placed cable operators and broadcasters on equal footing.[147] It held that Section 3h of the Communications Act, which prohibited treatment of broadcasters as common carriers,[148] applied to "broadcasters and cable operators alike."[149]

In addition, the Court in *Midwest II* expressed concern over the regulatory burdens imposed upon cable operators. First, it noted that the FCC's requirement that operators devote resources to public access channels threatened the expansion of other cable services.[150] Second, the Court found the obligation to accept public access programming deprived cable operators of the option to determine their own programming scheme.[151] Therefore, the rules prevented cable operators from exercising discretion as to the operation of their systems. In essence, the Court recognized the interests of the cable industry as a separate developing industry in addition to restricting the scope of the FCC's authority.

The Supreme Court's decision in *Midwest II*, that the FCC cannot impose burdensome financial requirements on cable operators,[152] places the Commission's franchise fee limitation[153] in jeopardy.[154] Consistent with the federal deregulatory trend, the FCC has considered removal of the fee limitation.[155] It has not removed it for fear that, if unrestricted, local authorities would exact excessive fees.[156] Several states share the Commission's apprehension that local gov-

147. *See* note 137 and accompanying text *supra*.

148. *See* note 62 *supra*.

149. 440 U.S. at 705.

150. *Id*. at 707 n.17.

151. *Id*.

152. *See* notes 150-51 *supra*.

153. 47 C.F.R. § 76.31(b) (1972).

154. 71 FCC 2d at 581-82.

155. *Id*.

156. NATIONAL CABLE TELEVISION ASSOCIATION, RECENT DEVELOPMENTS IN CABLE TELEVISION REGULATIONS 2 (Feb. 1980) [hereinafter cited as CABLE REGULATION]. According to the National Cable Television Association, Chicago Mayor Byrne announced that the city was interested in cable because it could use the franchise fee revenues. *Id*. In addition the federal franchise fee limitation has proved beneficial. The franchise fee limitation has helped to keep subscriber rates low. Also, the federal limitation allows local governments to eliminate the fee consideration in their franchise application process. *Id*. at 1. The purpose of the rule is to allow solely for recovery of the cost in administering the cable television system. 47 C.F.R. § 76.31(b) (1972).

ernments will levy high fees on cable systems to derive revenue for the community unrelated to regulatory costs.[157] These states have enacted franchise fee ceilings to prevent that result in the event the FCC removes the federal requirement.[158]

The FCC's most recent ruling continuing the deregulation of cable has resulted in a major victory for the industry. The Commission removed the complex syndicated exclusivity[159] and distant signal[160] rules.[161] This decision will allow cable operators to provide additional programming and expand their systems.

In *Geller v. FCC*,[162] the District of Columbia Circuit considered the argument that since the FCC promulgated the syndicated exclusivity and distant signal rules to facilitate passage of copyright legislation,[163] the enactment of such legislation rendered the rules obsolete.[164] The court remanded the matter to the FCC, requiring it to justify the continued existence of the rules.[165]

After extensive re-evaluation,[166] the Commission found that their continued enforcement would disserve the public interest.[167] The elimination of program alternatives through enforcement of the rules allegedly protected the broadcast industry from competition,[168] but

157. CABLE REGULATION, *supra* note 156, at 2.

158. *Id.*

159. *See* notes 96-101 and accompanying text *supra*.

160. *See* notes 102-07 and accompanying text *supra*.

161. *See* Fourth Report and Order, *supra* note 57.

162. 610 F.2d 973 (D.C. Cir. 1979).

163. The Copyright Act of 1909, 35 Stat. 1705, as amended, 17 U.S.C. §§ 1 *et seq.* was inapplicable to cable television systems. The Supreme Court in Fortnightly Corp. v. United Artists, Inc., 392 U.S. 390 (1968), held that community area cable operators do not "perform" copyrighted works within Sections 1(c) and (d) of the Act. *Id.* at 390-400. Later, the Court held in Teleprompter Corp. v. CBS, Inc., 415 U.S. 394 (1973), that the 1909 Copyright Act was inapplicable to all cable operators. *Id.* at 402-05; 610 F.2d at 974 n.6.

164. For a discussion of the new Copyright Act see note 109 *supra*.

165. 610 F.2d at 974.

166. *See* Syndicated Exclusivity Report, 71 FCC 2d 951 (1979); Economic Inquiry Report, 71 FCC 2d 632 (1979).

167. The FCC based its final determination upon three factors, (1) consumer welfare or maximization of value public receives from the system, (2) distributional equity or whether all viewers will receive benefits, (3) external or spillover effects or obligation to inform the public. Fourth Report and Order, *supra* note 57, at 60189. Consideration of these factors caused the FCC to invalidate the rules. *Id.* at 60227.

168. The FCC found that cable does not pose a threat to the existence of local broadcast stations. *Id.* at 60217.

imposed a welfare cost upon consumers who could not receive programs for which they were willing to pay.[169] Further, the FCC held that cable's expansion without these restrictions would not diminish the supply of local programming since program broadcasters, creators, and owners receive protection under the 1976 Copyright Act.[170]

These considerations prompted the FCC to remove the debilitating syndicated exclusivity and distant signal regulations.[171] The Commission's abdication of its protectionist policy will allow cable to compete with broadcast television. The federal deregulatory trend encourages this competition to the benefit of local communities which will receive expanded cable services.[172]

D. *The Trend Toward Deregulation of the Cable Industry in Congress*

Congress has not significantly revised the Communications Act of 1934.[173] Courts and the FCC, therefore, have rendered their decisions concerning the cable industry without having prescribed standards to rely on. Authorities have stretched and strained the obsolete Communications Act to cover the many technological developments in the communications field.[174]

In response to the need for revision of federal communications policy, Congress has proposed telecommunications legislation to amend the 1934 Act.[175] The new legislation, if adopted, places primary em-

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169. *Id.* at 60219.

170. *Id.* at 60188.

171. *Id.* at 60227.

172. The additional programming that will be available once the signal carriage rules become ineffective will increase consumer demand for cable services. Cable systems will attract more subscribers and thus more revenue enabling them to expand services. Cable may spread more quickly to urban areas that have been unable to attract the capital necessary to build a cable system. *Id.* at 60195.

173. 47 U.S.C. § 151 *et seq.*

174. *See* 406 U.S. at 675 (Burger, C. J. concurring). *See* also note 129 *supra*.

175. *See* S. 622 & 611, 96th Cong., 1st Sess. (1979); H.R. 3333, 96th Cong., 1st Sess. (1979); *Proposed Amendments to the Communications Act of 1934: Hearings on S. 622 & 611 Before the Subcomm. on Interstate and Foreign Commerce, Science and Transportation*, 96th Cong., 1st Sess. (1979); *Proposed Amendments to the Communications Act of 1934: Hearings on H.R. 3333 Before the Subcomm. on Communications of the Comm. on Interstate and Foreign Commerce, Science and Transportation*, 96th Cong., 1st Sess. (1979).

phasis upon marketplace competition rather than upon stringent regulation.[176] Consistent with the trend toward relaxation of cable television regulation, this legislation substantially deregulates the industry. For example, the revised communications policy would preempt federal, state, or local authorities from imposing rules concerning the content or amount of cable programming or subscription rates.[177]

In its proposals, Congress would give cable a separate identity by statute. This independent identity has evolved slowly due to past restrictive controls. The cable industry, moreover, hopes to benefit further in the expected deregulatory climate of the future.[178] Congress has promised to step into the regulatory arena only where "marketplace forces are deficient."[179] Rather than restrictive federal control, the new federal policy encourages marketplace forces along with the local governments to guide cable's future development. Local and state governments should foster the growth and expansion of cable systems tailored to community needs and desires.

III. THE FRANCHISE PROCESS: REGULATION ON THE LOCAL LEVEL

A. *Early Problems*

Prior to federal intervention into the regulatory process, local governments exerted authority over cable television operations.[180] Towns and cities controlled the "local incidents" of cable through their power to grant franchises.[181] Local governments derived that power from their authority to regulate the use of the public streets

176. The goal of both the House and Senate bills to amend the 1934 Communications Act is to enhance competition. H.R. 6121, 96th Cong., 2d Sess. S.201(b) S.2827, 126 CONG. REC. S.7015 (June 13, 1980).

177. S.2827, 96th Cong., 2d Sess. § 238(a) (1980).

178. The trend is toward deregulation of industry. The new Congress has not yet drafted Communications Amendments. Authorities believe, however, that any new legislation will merely build upon the bills previously proposed. Interviews with Communications Subcommittee Staff Members of both the House and the Senate (Feb. 20, 1981).

179. H.R. 3333 at § 101(a), *reprinted in Hearings on H.R. 3333*, *supra* note 175, at 1.

180. Barnett, *supra* note 4 at 685; Davis, *supra* note 4, at 79; LaPierre, *supra* note 4, at 68.

181. For a discussion of the local authority to grant franchises *see* note 4 *supra*.

and ways.[182] The franchise granted by the municipality allowed the cable operator to construct a system and serve the local community. The local governments, however, designed the early regulatory schemes merely to assure compliance with local construction and safety codes without taking into account the services offered by the cable system.[183]

The early exercise of local control over cable television contributed to the retardation of the new media's growth. The local franchising process, the only method of control in many states, was unsuccessful for several reasons.[184] First, community officials were uninformed, and therefore did not realize the vast community services the communications medium could offer.[185] Often cable operators pressured officials to hastily adopt franchise ordinances.[186] As a result, many of the first agreements lacked specifics as to the design of the system. These franchises did not require innovation or expansion of services, but instead allowed maintenance of a minimum number of cable channels.[187]

In their haste, some local officials negotiated franchise agreements with cable operators without notice to the public.[188] Community participation in the choice of the franchise and in the regulatory process as a whole is necessary to promote the public interest. Public participation functions as a check upon local government processes. In addition, without community input into the franchising process, the cable system will not truly represent local needs and desires.

Other communities excluded the dates cable service was to commence. Those franchises allowed systems to lie dormant, without

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182. *Id.*

183. Davis, *supra* note 4, at 79.

184. Commentators agree that the early attempts by local authorities to regulate the new medium were unsuccessful. Barnett, *supra* note 4 at 691; LaPierre, *supra* note 4, at 69; SLOAN, *supra* note 9, at 152-53.

185. The franchising authorities in the early days of cable television had no experience in the communications industry. These authorities were more accustomed to regulating the transportation industry. *See* SLOAN *supra* note 9, at 152. For a discussion of the many services cable can offer *see* notes 6 and 110 *supra*.

186. *See* Barnett, *supra* note 4, at 694; SLOAN, *supra* note 9, at 152-53.

187. *See* Snychef, *supra* note 54, at 209. Most cable systems in operation today have capacities for under twelve channels; 2,947 have capacities for twelve or less channels while only 489 have capacities for thirteen through twenty channels. NATIONAL CABLE TELEVISION ASSOCIATION, CABLE TELEVISION DEVELOPMENTS (1980).

188. *See* Barnett, *supra* note, 4 at 694; Synchef, *supra* note 54, at 209.

service. Operators obtained the right to construct cable systems without mandatory requirements to do so. Thus, many cable companies purchased franchises for speculation purposes without any intention to commence operation.[189] Further, many agreements omitted a duration requirement. Cities and towns often found themselves bound to a franchise agreement for inordinately long periods of time.[190] Public scandal connected with the local franchising process also hindered its success. Prospective franchisees often bribed local officials in order to obtain a franchise.[191]

B. *The Evolution of the Franchise Process*

Failure to promote the public interest in the past should not preclude local government participation in the regulatory process today. Over the years, local authorities have gained experience in franchising.[192] They are thus less likely to fall prey to unscrupulous cable operators. Moreover, increased awareness of cable's many benefits has increased demand for the service.[193] The industry, in response to the increased demand, has reacted with fierce competition.[194] The future should bring further expansion of cable services in light of the recent removal of federal restraints over the industry. This increased interest in the growth and development of cable television services should provide a check upon the dishonest practices of either government authorities or cable operators. With increased concern and proper procedures, the public interest should prevail.

Community officials have requested technologically advanced systems for their citizens, and cable operators have presented more elaborate proposals to comply with those requests.[195] Political pressure,

189. Synchef, *supra* note 54, at 210 n.20.

190. Some franchise agreements had durations of fifty or sixty years. *See* Barnett, *supra* note 4, at 697.

191. For an extensive discussion of "money politics and inadequate procedures" involved in cable franchising, *see* Barnett, *supra* note 4, at 691-94.

192. The FCC acknowledged that after six years of experience, local officials are "more sophisticated in the regulatory process." This factor caused the Commission to remove its mandatory franchising requirements. 71 FCC 2d at 571.

193. *See* note 4 and accompanying text *supra*.

194. *Id.*

195. Eleven cable corporations submitted elaborate proposals to the St. Louis County Council in their attempts to gain the County's franchise. Report on Cable Television Proposals, *supra* note 24.

however, still plays a major role in franchise success.[196] In response to the call for local ownership of cable systems, bidders for franchises across the nation have recruited the most influential citizens as stockholders.[197] In some cases these stockholders have made campaign contributions to the officials voting on the franchise grant.[198] Many cable companies use this "rent-a-citizen" tactic to help them win a community franchise.[199] Communities can avoid the strong implication of political influence, however, by requesting experienced outside consultants to evaluate proposals and give recommendations.[200] Local citizens should participate in the entire franchising process and require community officials to announce their rationale for heeding or ignoring outside advice.[201]

Since local governments are the most attuned governmental bodies to community needs and desires, their input into the franchising process is crucial.[202] It is difficult to eliminate completely the possibility of corruption in an institutional setting.[203] A well-drafted local franchise ordinance, however, can promote the public interest and

196. Robert Schmidt, former president of the National Cable Television Association, voiced his apprehension over the increased expansion of cable. His fear is that "companies, in the heat of competition could resort to some of the tactics of the 1960's," Schwartz, *supra* note 4, at 31.

197. This tactic is known as the "rent-a-citizen ploy." Cable companies enlist such influential local figures as investors, lobbyists and advisors. Cable companies compete for political backers rather than for the services their cable systems offer. The rent-a-citizen tactic is not illegal but has concerned authorities about the potential for unethical conduct from bribes to illegal campaign contributions. *See TV Cables in a Tangle*, *supra* note 4, at 45. Crock, *supra* note 4, at 48 col. 2; Schwartz, *supra* note 4, at 31 col. 2.

198. *See TV Cables in a Tangle*, *supra* note 4, at 45. *See also* Gelles, *Cable TV Firm Would Move Here For Franchise*, St. Louis Post Dispatch, Sept. 27, 1980 at 1E.

199. *TV Cables in a Tangle*, *supra* note 4, at 45.

200. The staff of the nonprofit Cable Television Information Center in Washington evaluates proposals in a wide range of cities. *See* Schwartz, *supra* note 4, at 31 col. 2-3.

201. The city of Houston hired an outside consultant to evaluate cable television proposals. He felt that the city had made their choice prior to his employment, behind closed doors. In fact, the company he suggested lost the franchise bid. The franchising process in Houston is under investigation by a Federal Grand Jury. *Id.* Clearly, the city's decision would have been less suspect had government officials announced the rationale for their choice.

202. The most important aspect of cable television on the local level is the potential community services cable offers. *See Cable Television: The Practical Implications of Local Regulation and Control*, *supra* note 5, at 418.

203. The best defense to corruptible public institutions is an aware, active citi-

eliminate many of the problems that occurred in the past.[204]

The first consideration in the franchising process is selection of the franchisee. Since the industry is highly competetive, local authorities will have a wide range of choices. They should choose the most financially stable system best suited to the political and social needs of their communities.[205] A municipality can steer clear of fraud and other questionable practices by providing a full public proceeding to review the credentials of cable television applicants.[206] This hearing must take place on a local level to allow full public participation.

Second, franchisors must specifically limit the duration of the franchise agreement to encourage innovation and development.[207] A substantial amount of time is necessary, however, to realize a profit in this capital intensive industry.[208] Thus, cable operators desire long franchise agreement periods.[209] The FCC recommends a compromise of fifteen years.[210] This period is short enough to give the community bargaining power over the cable operator. He or she will know that unless all promises of community service are fulfilled, the local government may terminate the agreement at the end of the specified duration.[211] Most cable systems will provide the promised facilities since failure to do so will endanger the operator's large financial investment and lucrative position.

Third, local governments should determine a specific construction

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zenry unwilling to tolerate abuse. Comment, *Community Antenna Television—The Case for Municipal Control*, 22 *Wayne L. Rev.* 99, 135 (1975).

204. Most of the solutions to the problems exposed in the previous section come from the St. Louis County Cable Franchising Agreement, St. Louis County, Mo. § 817 (Jan. 2, 1980) [hereinafter cited as Cable Franchising Agreement]. The FCC replaced its mandatory local franchise regulations with optional guidelines. 47 C.F.R. § 76.31 (1980). Many of these optional guidelines appear in the Cable Franchise Agreement and the discussion below.

205. *See* Davis, *supra* note 4, at 80.

206. *Id.*

207. *See Cable Television: The Practical Implications of Local Regulations and Control*, *supra* note 5, at 399.

208. *See* note 27 and accompanying text *supra*.

209. *See Cable Television: The Practical Implications of Local Regulations and Control*, *supra* note 5, at 399.

210. *See* 47 C.F.R. § 76.31(2) (1980); The Cable Franchising Agreement, *supra* note 204, at § 817.060 provides a duration requirement of not less than 15 or more than 20 years.

211. *See* The Cable Franchising Agreement, *supra* note 204, at § 817.060.

timetable.[212] This provision should include enforcement procedures to insure against speculation. The close proximity of local authorities to the operation provides assurance that they can adequately enforce the construction requirements.

Fourth, since they are the authorities who will implement the enforcement provisions, local officials should create them.[213] An ordinance should include a provision governing liability, security, and indemnification.[214] Local authorities should require franchisees to maintain comprehensive liability insurance to cover any personal injuries or litigation related to operation of the system.[215] As an additional precaution, an ordinance could require the franchisee to post a security bond proportionate to the size of the area served.[216] The bond would cover any of the cable operator's defaults on payments.

The ordinance could further provide for inclusion in the franchise agreement of an indemnification requirement stipulating that nonperformance of any of its provisions will result in a monetary penalty.[217] This negotiated provision for automatic penalties upon nonperformance prevents franchisors from invoking burdensome inconsistent penalties against franchisees. Also, without such indemnification provisions, franchisors in the past hesitated to enforce franchise agreements against cable operators.[218] Local officials feared that any action taken against a franchisee would reflect a poor decision on their part.[219] This provision alleviates that concern and allows close scrutiny of the cable system's operation.

Fifth, local governments should require cable operators to maintain a local business office for receipt of consumer requests and complaints.[220] Local governments should monitor and review the consumer feedback to ascertain the success and reliability of the system.[221] This procedure would help local officials keep abreast of any problems the franchised cable operation may have. Again, since lo-

212. *See* Cable Franchising Agreement, *supra* note 204, at § 817.050.

213. 71 FCC 2d at 571.

214. *See* Cable Franchising Agreement, *supra* note 204, at § 817.390.

215. *Id.*

216. *Id.*

217. *Id.*

218. *See* Synchef, *supra* note 54, at 210.

219. *See* Barnett, *supra* note 4, at 703.

220. 47 C.F.R. § 76.31(5) (1979).

221. Davis, *supra* note 4, at 85.

cal governments will use and enforce this provision, they should set the standards.

Sixth, although communities cannot regulate programming content,[222] they can insert provisions for origination and access channels into the franchise agreement.[223] This provision would enable the cable operation to truly reflect the needs and desires of the municipality. Local interest groups could propose plans for access channels at public proceedings. Ordinances should reflect those suggestions with provisions for local education, local and regional government, and public affairs channels.[224] Other governmental agencies, such as state departments of transportation, may request channels for their own use in the public interest.[225] The plentitude of cable channels available makes it possible for authorities to seriously consider each request.[226]

Seventh, franchise agreements should require cable operators to keep their systems current with developments in the field.[227] An ordinance should specifically allow the franchisor to mandate improvements in the system consistent with innovations in technology.[228] This provision would force both local authorities and cable operators to maintain a progressive system responsive to the public interest. It would prevent franchisees from enjoying the protection of a long contract without performing to their maximum potential.[229]

Eighth, although the FCC preempts non-federal regulation of

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222. The Fairness Doctrine applies to the production of programs on the cable system. Thus, cable operators must allow "reasonable opportunity for the discussion of conflicting views on issues of public importance." 47 C.F.R. § 76.209 (1979).

223. Cable Franchising Agreement, *supra* note 204, at § 817.230. The FCC removed the rules that required cable origination. The Supreme Court invalidated the FCC imposed access requirements in *Midwest II*. In light of that decision franchise provisions that mandate access channels may be in jeopardy. For a discussion of *Midwest II* see notes 144-52 and accompanying text *supra*.

224. For a general discussion of access programming see SLOAN, *supra* note 9, at 124.

225. Letter from Thomas W. Wehrle, County Counselor, County of St. Louis to the Chairman and Members of the County Council (Jan. 2, 1980). The letter discusses the request of the Department of Highways for use of access channels to monitor and control traffic.

226. The Cable Franchising Agreement, *supra* note 204, at § 817.040 requires a cable operator to maintain a minimum of 35 channels.

227. Cable Franchising Agreement, *supra* note 204, at § 817.150.

228. *Id.*

229. *See* note 189 and accompanying text *supra*.

franchise fees,[230] local governments in most states may control subscriber rates. Local authorities may, through a fair proceeding, approve or disapprove those rates.[231] Inclusion of such a provision in the ordinance would give the local authority bargaining power over the cable operator. In addition, it would enable franchisors to remain involved with cable operation after the franchise grant. Rate regulation, moreover, is essential in those communities where the cable system provides the only television service.[232]

Rate regulation often causes conflicts of interest, however, at the local level. Franchisors should grant rate increases to cable operators who desire to improve their systems in the public interest. On the other hand, authorities must keep the rates low enough to encourage a maximum number of subscribers. Local governments often face the impossible task of presenting a highly developed system to their constituents for unreasonably low rates.

A solution to the rate regulation problem is to allow market forces to determine subscriber rates. Regulation of rates is proper in utility industries where competition is non-existent and the service provided a necessity.[233] In light of the competitive alternatives to cable, the industry cannot rely upon a monopoly position. Nor is cable television a required service.[234] The methods used to determine utility rates, therefore, are inappropriate to establish cable subscriber rates.[235]

Many communities allow cable operators to determine the price consumers must pay for cable service.[236] Several states have enacted legislation to deregulate cable subscriber rates.[237] For example, the

230. 47 C.F.R. § 76.31(a) (1979). Removal of franchise fee limitation is currently under FCC consideration. *See* notes 152-58 and accompanying text *supra*.

231. Cable Franchising Agreement, *supra* note 204, at § 817.270.

232. For a discussion of the rationale for regulation of cable television *see* notes 24-45 and accompanying text *supra*.

233. *Id.*

234. *See* notes 30-34 and accompanying text *supra*.

235. NATIONAL CABLE TELEVISION ASSOCIATION, SYSTEM OPERATING SERIES, STRATEGIES FOR RATE DEREGULATION, app. x (1979).

236. NATIONAL CABLE TELEVISION ASSOCIATION, CABLE TELEVISION SUBSCRIBER RATE DEREGULATION (1980). This is a detailed list of the communities that (1) de-regulated rates; (2) do not have rate regulation; (3) seek de-regulation; (4) have partially deregulated rates.

237. Alaska passed a rate deregulation bill on June 30, 1980. Regulation of rates will remain in effect for only two of the state's fourteen systems. NATIONAL CABLE TELEVISION ASSOCIATION, INTERACTION (Aug. 1980). Massachusetts recently issued

California legislature recently passed a bill allowing cable operators to designate subscriber fees, provided they supply community service programming and upgrade their systems.[238] The legislature enacted the bill to encourage modernization and expansion of the cable industry in the public interest. It serves as an example of state and local cooperation in the cable regulatory process, since local authorities still create the franchise agreement.

A well organized franchise ordinance, complete with the aforementioned provisions, can help cure the problems which caused the failure of the early local regulatory schemes. Further, an informed, participating populace, hungry for efficient cable service, will provide a check upon unscrupulous local activities. Today, local authorities can consult organizations and individuals with expertise in the field for guidance. State supervision of the franchise process would provide another check upon community problems and political bias.[239] A dual, state-local regulatory scheme would inject uniformity into the system, fostering widespread expansion of cable services in the public interest.[240]

C. *A Regional Approach to Cable Regulation*

1. State Control

Some states entered the cable regulatory arena in response to local

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a *Report and Order in Docket R-4* that suspended rate regulation in 3/4 of the cable systems in the state. The state deregulated the subscriber rates only in those areas where other television service is available. *Id.* The Governor of Florida vetoed a rate deregulation bill, however, that would have allowed cable operators to raise their rates according to the rise in the Consumer Price Index. The Governor reasoned that rate deregulation should occur on the local rather than the state level. NATIONAL CABLE TELEVISION ASSOCIATION, INTERACTION 6 (July 1980).

238. CAL. GOV'T. CODE § 53066.1 (Deering Supp. 1980).

239. Although authorities disapprove of duplicative regulation of the cable industry, they encourage the dual, state/local approach. *See* Barnett, *supra* note 4, at 805-07: "In sum, a dual franchising process might achieve the respective advantages of local and state participation while at the same time, through the checks and balances it would involve, minimizing the abuses that have been so common in the past." *Id.* at 807. *See* LeDuc, *Control of Cable Television: The Senseless Assault on States' Rights*, 24 CATH. U. L. REV. 795, 806-09 (1975).

240. Often, municipalities lack the power, unless expressly conferred by statute, to join together for common purposes. A regional regulatory scheme would enable communities to pool their resources and their audiences. Larger audiences would provide cable systems with a broader financial base which would allow them to increase their services. A regional scheme could also foster cable development in smaller rural areas. LeDuc, *supra* note 239, at 807.

government failure in the franchising process.[241] Several enacted statutes governing the operation of cable systems pursuant to their powers to regulate public utilities.[242] This approach often preempted local participation in the franchising process.[243] States placing cable regulation within the authority of their public utilities commissions (PUC's) took the easy route. State PUC's controlled cable as they did any other utility. This approach was inappropriate in that cable systems possess qualities different from other utilities and thus require special treatment.[244] The regulation was similar to the FCC's early approach to cable, as both the states and the commissions refused to recognize cable's independent identity.

Several states, approaching cable television as an independent entity, have devised more modern cable statutes.[245] These states have created separate commissions to oversee cable operation on the state

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241. *See* Barnett, *supra* note 4, at 698.

242. The Nevada District Court upheld a state statute that granted the Nevada Public Service Commission authority over cable operations. The U.S. Supreme Court affirmed the court's decision in T.V. Pix, Inc. v. Taylor, 304 F. Supp. 459 (D. Nev. 1968), *aff'd per curiam*, 396 U.S. 556 (1970). Statutes confer the power to regulate public utilities upon states. States that regulate cable television pursuant to these statutes define cable as a public utility. *See e.g.*, White v. Ann Arbor, 406 Mich. 554, 281 N.W.2d 283 (1979), The Michigan Subdivision Control Act of 1967 defined a public utility as: ". . . all persons, firms, corporations, copartnerships or municipal or other public authority providing gas, electricity, water, steam, telephone, sewer or other services of a similar nature". MICH. COMP. LAWS ANN. § 560.102(1) (1980). The Michigan court held that the state had authority over cable television because it was similar to television service and thus a public utility under the Act. *Id.* at 572, 281 N.W.2d 288. One judge went further: "Since cable television is truly a public utility, state wide regulation would certainly enhance the likelihood that the benefits of cable television would adhere to all the public." 406 Mich. at 578, 281 N.W.2d at 291 (Moody, J. concurring). *Cf.* The Washington Supreme Court recently held that cable television is not a public utility within the meaning of a state statute that confers regulatory powers over utilities to cities in City of Issaquah v. Teleprompter Corp. 93 Wash. 2d 567, 611 P.2d 741 (1980).

Of the eleven states with comprehensive cable statutes, seven currently regulate through their public utility commissions. NATIONAL CABLE TELEVISION ASSOCIATION, INTERACTION 4 (Jul. 1980). For a complete discussion of state regulation of cable television as of 1977, see S. BRILEY, *State Regulation of Cable Television—Progress and Problems*, THE CABLE BROADBAND COMMUNICATIONS BOOK, 31 (M. Hollowell ed. 1977).

243. *See* Barnett, *supra* note 4, at 753.

244. *See* SLOAN, *supra* note 9, at 158-59.

245. Briley, *supra* note 242, at 32. *See* Barnett, *supra* note 4, at 753-59. The author encourages a mixed approach of state and local regulation of cable television rather than state preemption.

level. Their cable statutes allow local participation in the franchising process.[246]

2. A Proposal for the Future

There are few comprehensive state cable statutes. More states should enact them in the future to meet the industry's expected expansion.[247] The removal of the restrictive federal controls will allow cable systems to provide more and better services and stimulate consumer demand. Many competitive cable operators will approach local officials anxious to obtain permission to construct cable systems.[248] Although the franchise process has matured over the years, many communities nonetheless remain ill-equipped to handle cable's explosive expansion.

Cable operators in competition for an area franchise must often educate local officials about cable services.[249] State cable commissions, created to guide local authorities in their decisionmaking,[250] can best inform those authorities about the advantages of cable without profit considerations. These commissions can use state funds and consult authorities in the field in order to develop expertise. In addition, they can develop experience through repeated participation in the franchise process. This input into the local regulatory process should diminish the opportunities for corruption on the local level.

The most convincing argument in favor of state cable regulation is the desire for regional programming. Easy interconnection[251] of cable systems provides larger viewing audiences and a wider variety

246. *See, e.g.*, N.J. STAT. ANN. § 48:5A(4) (West Supp. 1980).

247. Although few states have enacted comprehensive State Cable Statutes, many have introduced bills affecting cable in their state legislatures. In 1979, for example, 135 bills affecting cable received attention from state legislatures across the country. Of these, 36 did propose some kind of state regulation. *See* NATIONAL CABLE TELEVISION ASSOCIATION, INTERACTION, 5 (Jul. 1980).

248. Already cable operators are intensely competing for cable franchises. *See* note 4 *supra*.

249. Many local officials lack the technological expertise to comprehend the franchise proposals. One official recalled a hearing where "the technical discussion was so far above my head I couldn't believe it. I wanted someone to sit down and explain it in baby talk." *T.V. Cables in a Tangle*, *supra* note 4, at 45.

250. *See* notes 245-46 *supra*.

251. Interconnection is the link of cables in contiguous communities to one headend or studio to enable the interchange of programming. *See* SLOAN, *supra* note 9, at 41.

of programming.[252] In addition, larger viewing audiences provide support and funding for creation of increased services such as channels providing educational, governmental, medical, and informational programming. A regional cable operation would enable audiences and systems to merge.[253]

IV. Conclusion

Regulations governing cable television have prevented the medium from conferring its potential benefits upon local communities. Although authorities have recognized the need for local television service, they have failed to permit cable systems to fulfill those needs. Instead, the industry has faced burdensome, ineffective regulations by three levels of government.

The absence of federal controls will encourage cable expansion. States should help local authorities meet the onslaught of cable operators anxious to win the prize of the local franchise. Guiding local officials through the franchise process should be a state priority. Cable systems can provide a vast array of community services. Thus, states should require maximum participation in the regulatory process on the local level to assure cable programming truly reflects community needs and desires. This state and local regulatory approach should[254] curb abuses at the local level and foster growth of cable systems in the public interest.

252. Mahoney, *supra* note 4, at 808.

253. In several areas throughout the nation, cable districts united to form consortiums. Communities may take this approach in order to obtain cable if they are too small to do so on their own. Alternatively, suburbs may unit to achieve greater bargaining power or to obtain cable service at a better rate. These clusters of municipalities would provide the audience density necessary to support varied programming. Clustered communities provide a large revenue base to enable cable operators to develop more services including facilities for two-way cable and advanced origination devices. Cable Television Information Center, *Suburbs Cooperate to Form Joint Franchises*, 1 Cable Reports 5 (Nov. 1979).

254. *See* Barnett, *supra* note 4, at 805-07. The author approved of a "dual" approach 10 years ago to diminish the improprieties on the local level. Although authorities in the past have suggested this dual approach, the federal deregulation and subsequent expansion of cable television have made state action an even more compelling alternative today. *See* note 239 *supra*.