State, Federal, and Local Regulation of Cable Television

Stephen R. Barnett
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The past year has seen the start of a movement toward state regulation of cable television; it has also seen a move by the Federal Communications Commission into the same area. The area is what may be called, without meaning to prejudge anything, the "local incidents" of cable television. These are the aspects and operations of a cable system that can be set apart from its function of carrying the signals of television broadcast stations, a function conceded to the preemptive regulation of the FCC. These are the incidents of cable that have heretofore been regulated, to the extent they have been regulated at all, through the franchising process at the local level—the process by which the cable system obtains from a city, town, or other unit of local government the franchise it needs in order to run its cables through the public streets to the homes of its subscribers.

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** A.B. 1957, L.L.B. 1962, Harvard University. Acting Professor of Law, University of California, Berkeley.

1 Descriptions of cable television (also known as CATV) and the issues of public policy it presents are now abundant. See, e.g., ON THE CABLE: THE TELEVISION OF ABUNDANCE, REPORT OF THE SLOAN COMMISSION ON CABLE COMMUNICATIONS (1971) [hereinafter cited as the SLOAN REPORT]; Smith, THE WIRING NATION, THE NATION, MAY 14, 1970; M. PRICE & J. WICKLEIN, CABLE TELEVISION: A GUIDE FOR CITIZEN ACTION (1972). I have provided one in CABLE TELEVISION AND MEDIA CONCENTRATION, Part I: Control of Cable Systems by Local Broadcasters, 22 STAN. L. REV. 221, 224-49 (1970) [hereinafter cited as Barnett].


3 The term "franchise" as used in this article, and as used generally in the context of cable television, is defined in state-and-local-government law as a grant of authority by a local or state government, to an existing corporation or an individual, to do certain things which a corporation or individual otherwise may not do; more specifically, it is a grant of authority to use the public streets, alleys, and ways, on a more than temporary basis, for the purpose of carrying on a business in the nature of a public utility, such as street railways, bus lines, electric, telephone, gas, or water service. See C. ANTEBAU, MUNICIPAL CORPORATION LAW 543 (1971) [hereinafter ANTEBAU]; 12 E. McQUILLIN, MUNICIPAL CORPORATIONS 16 (3rd ed. 1970 rev. vol.) [hereinafter McQUILLIN]. The legal principles applicable to the franchising of these other types of public-service businesses that make use of the streets have been carried over to cable television. The power of a local government to demand a franchise of a cable operator is based on its power, by virtue of express or implied delegation from the state, to control the use of its streets, alleys, and public ways. See 3 ANTEBAU, supra, at 543-44; 12 McQUILLIN, supra, at 21-22, 52-53. ("Whence came this power of Decatur's to enfranchise General? The power finds its source in the statutory grant permitting municipalities to regulate the use to be made of their streets, alleys and public ways. . . ." Illinois Broadcasting Co. v. City of Decatur, 96 Ill. App. 2d 454, 456, 238 N.E.2d 261, 264 (1968).) Having the power to require and grant the franchise, the municipality can attach conditions to its exercise and thereby impose obligations of a regulatory nature on the cable system. " . . . [A]ll courts are agreed that so long as the public utility has no right by statute or state commission order to use the streets, what conditions can be included in the franchise properly rest in the sound discretion of the municipal authorities." 3 ANTEBAU, supra, at 550; see 12 McQUILLIN, supra, at 95-98. Thus the municipality typically enacts an ordinance granting a franchise to use the streets for the purpose of providing cable-telephone service and, in the same ordinance or a simultaneous one, attaches conditions to the operation of the franchised
These incidents include, among many other things, determinations such as who gets the cable franchise, the area included in the franchise, the duration of the franchise, the timetable for constructing the system, the monthly rate charged to subscribers, the annual fee paid to the franchising authority, the channel capacity of the system (which can feasibly be 20, 40, or more channels), and the existence of a capability for other communications services such as return signals from the subscribers. They further include a host of decisions involving use of the channels that do not carry broadcast signals and are thus available for “program origination”: whether one or more channels must be dedicated to use by the local schools or local government, whether one or more channels must be made available without charge for “public access” programming by members of the public, whether one or more channels must be made available for leasing by other programmers, whether the cable operator should be allowed to use one or more channels for origination of his own programs (or should be restricted to carrying the programs of others), whether he should be required to originate certain types of local programs. Then, if there are to be “public access” and leased channels, there are questions as to what will be the rates, the priorities, the system for making reservations, the arrangements concerning studios and production facilities, and the numerous other terms and conditions governing these uses of the cable system.

These decisions have considerable public importance. They will shape the functions performed by cable systems in the areas they serve, and hence the uses of the new medium. The promise of cable television has been widely hailed. The FCC, for example, has stated:

> We believe... cable can make a significant contribution toward improving the nation’s communications system—providing additional diversity of programming, serving as a communications outlet for many who previously have had little or no chance of ownership or of access to the television broadcast system, and creating the potential for a host of new communications services.  

This promise depends on the local incidents of cable. The regulatory decisions that will shape those incidents go to the heart of the public’s interest in the new medium. It is these decisions that began in 1971 to attract substantial regulatory intervention by the states, and also by the FCC.
Before 1971 five states—Connecticut,\(^6\) Nevada,\(^7\) Rhode Island,\(^8\) Vermont,\(^9\) and Hawaii\(^10\)—had enacted legislation subjecting cable television to state regulation, in each case through the state’s existing public utilities commission. But these were small states, and the impact of their action had not been significant. The cable television industry, which strongly opposes state regulation,\(^11\) had generally been successful in resisting it. In 1971 the tide turned. Two states with substantial cable activity, New York\(^12\) and New Jersey,\(^13\) enacted legislation imposing a one-year moratorium on the franchising of cable systems while their legislatures sought to devise a state regulatory scheme, a task on which they are still engaged as this text is written in late January, 1972. In Illinois, the Illinois Commerce Commission in September 1971 asserted jurisdiction to regulate cable under the existing Public Utilities Act,\(^14\) thereby imposing its own moratorium on the franchising and initial construction of cable systems in that state;\(^15\) in January 1972 the Commission proposed a comprehensive set of rules to implement its asserted authority.\(^16\) Massachusetts, meanwhile, became in November 1971 the first state in the “new wave” actually to adopt legislation creating a regulatory scheme for cable, a scheme notably different from those adopted by the “original” five states.\(^17\) Inquiries looking toward legislation have been reported in a number of other states, such as Iowa and California.\(^18\)

The move to state regulation has a number of causes, but it draws intellectual support and documentation from several recent studies of cable. One of these is a report by Commissioner William K. Jones of the New York Public Service Commission, *Regulation of Cable Television by the State of New York,*\(^19\) which has provided the basis for a bill proposed by the governor to the New

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6 CONN. GEN. STATS. ch. 289, §§ 16-330—333 (1966 Rev.).
11 See, e.g., CABLE TELEVISION REPORT AND ORDER, infra note 26: “Cable interests were clearly opposed to state regulation...”; SLOAN REPORT, supra note 1, at 160-61.
14 ILLINOIS COMMERCE COMMISSION, INVESTIGATION OF CABLE TELEVISION AND OTHER FORMS OF BROADBAND CABLE COMMUNICATIONS IN THE STATE OF ILLINOIS, reprinted in 22 P & F RADIO REG. 2d 2192 (1971) [hereinafter cited as ILLINOIS REPORT].
15 Id. at 2204.
16 ILLINOIS COMMERCE COMMISSION, NOTICE OF INQUIRY AND OF PROPOSED RULE-MAKING—BROADBAND CABLE COMMUNICATIONS, Jan. 12, 1972 [hereinafter cited as ILLINOIS PROPOSED RULES]. The Commission’s assertion of jurisdiction is being challenged, however, and a preliminary injunction has been issued against it, in a suit brought by a number of cable operators. Cable Television Co. of Illinois v. Illinois Commerce Commission, Civil No. 71-2681, in the Circuit Court of the 19th Judicial Circuit, McHenry County, Illinois.
18 See SLOAN REPORT, supra note 1, at 153.
19 STATE OF NEW YORK, PUBLIC SERVICE COMMISSION, REGULATION OF CABLE TELEVISION BY THE STATE OF NEW YORK, REPORT TO THE COMMISSION BY COMMISSIONER WILLIAM K. JONES (Dec. 1970) [hereinafter cited as NEW YORK REPORT].
York legislature. Another is a *Report on Cable Television in New Jersey* prepared by the Center for Analysis of Public Issues, in Princeton. More recently, there is the long-awaited report of the prestigious Sloan Commission on Cable Communications. While all three reports recommend some form of state regulation of cable, each recommends a different form. The regulatory programs embodied in the new Massachusetts Act and the proposed rules of the Illinois Commerce Commission are different yet, as also is the legislation on the books in the five states that earlier regulated cable. Thus even if one decides that state regulation of cable is desirable, the content of that regulation presents a large problem.

Neither question can be considered without taking account of a document issued by the Federal Communications Commission on August 5, 1971. This was a "Letter of Intent," addressed to the communications subcommittees of the Congress, in which the Commission summarized the new federal rules it planned to adopt for the regulation of cable, rules directed in part, as will be seen, to many of the "local incidents" that are involved in considerations of state regulation. The FCC at the time intended to adopt the rules by the end of 1971, with an effective date of March 1, 1972. But the intervening period has seen delays, controversy, and an apparent alteration in one aspect of the FCC's intent, the last remarkable in terms of procedure, substance, and lawmaking theory.

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21 CROSSED WIRES: CABLE TELEVISION IN NEW JERSEY, A REPORT BY THE CENTER FOR ANALYSIS OF PUBLIC ISSUES, Princeton (1971) [hereinafter cited as NEW JERSEY REPORT].

22 SLOAN REPORT, supra note 1. The Sloan Commission on Cable Communications was established by the Alfred P. Sloan Foundation in June 1970 with a grant of $500,000; the Commission was chaired by Edward S. Mason, former dean of the Harvard Graduate School of Public Administration, and included fifteen other members, nine of whom were heads of universities or other nonprofit institutions devoted to education, research, or social improvement. The members of the commission, in addition to the chairman, were Ivan Allen, Jr., former mayor of Atlanta; John F. Collins, former mayor of Boston; Lloyd G. Elam, president of Meharry Medical College; Kermit Gordon, president of The Brookings Institution; William Gorham, president of The Urban Institute; Morton L. Janklow, New York attorney; Carl Kaysen, director of the Institute for Advanced Study; Edward H. Levi, president of the University of Chicago; Emanuel R. Piore, vice president and chief scientist of IBM; Henry S. Rowen, president of the Rand Corporation; Frederick Seitz, president of Rockefeller University; Franklin A. Thomas, president of Bedford-Stuyvesant Restoration Corp.; Patricia M. Wald, Washington, D.C., attorney; Jerome B. Wiesner, president of MIT; and James Q. Wilson, Professor of Government at Harvard. Ibid., back cover.

23 FCC LETTER OF INTENT, supra note 5.

24 Id. at 1761.

25 The central controversy over the intended rules, and over FCC cable regulation in general, has involved the extent to which cable systems will be allowed to import "distant" broadcast signals into the markets they serve. Since 1966, cable systems in the 100 largest television markets (comprising almost 90 percent of all television homes) have been subject to an FCC freeze prohibiting them, in general, from importing any distant signals. See United States v. Southwestern Cable Co., 392 U.S. 157, 166-67 (1968); Chazen & Ross, *Federal Regulation of Cable Television: The Visible Hand*, 83 HARV. L. REV. 1820, 1825 (1970). The result has been to block the development of cable in most of these markets. The rules announced in the August 5 *Letter of Intent* represented a compromise of the distant-signal issue; in brief, cable systems in the top 50 markets were permitted to carry at least three network affiliates and three independent stations, systems in markets 51-100 were permitted three network affiliates and two independents, and systems in smaller markets were permitted three network affiliates and one independent. FCC LETTER OF INTENT, supra note 5, at 1764-65. In the *Letter of Intent*, which was adopted by a vote of six to one, the FCC told Congress, "The policies put forward here result from an intensive study of the issues, balancing all
trovery and the alteration have not involved the parts of the rules relevant here—the argument has centered on the number of "distant signals" cable systems will be allowed to import from out-of-town television stations—but the rules will probably stand or fall in the policy-making arena as a single package. As of late January, 1972, the rules (in their altered form) are still expected to be adopted by the FCC in the near future.\textsuperscript{28} The result has become unpredictable, however, and even after the rules are adopted there will remain a significant possibility of legislative or judicial intervention, and thus of delay, if not obstruct-

the equities, and represent our best judgment on the regulatory course that should be followed." \textit{Ibid.} at 1760. The Commission also said, "We fully recognize that the continued economic health of those who create program material is crucial to both broadcasting and cable, but we have come to the conclusion that copyright policy is most appropriately left to the Congress and the courts." \textit{Ibid.} Responding to dissatisfaction with the \textit{Letter of Intent} in some quarters, the Office of Telecommunications Policy (OTP), an arm of the White House, set about constructing a new resolution more strict in its limitations on cable. The result was a so-called "consensus agreement" containing three such limitations not present in the \textit{Letter of Intent}. Most important, the agreement protects the interests of program copyright owners and their broadcast-station licensees by enabling them to enforce the "exclusivity" of their license contracts on syndicated programming against importation of the same programs by cable systems; in the top 50 markets (which produce over 80\% of the copyright revenues), the exclusivity protection is conferred for the length of the contract (which is subject to no legal limit), while in the second 50 markets it lasts for two years. \textit{See} \textit{Cable Television Report and Order}, infra note 26, at 1581-82 (Appendix D), 1530-31, \textit{¶} 63; for the objections to exclusivity, see Chazen & Ross, \textit{supra}, at 1828-35. The agreement was reached under the auspices of OTP, with the cooperation of the FCC chairman, by the three industry groups whom the director of OTP had invited to participate and whom he referred to as "the parties," and the broadcasters and the copyright owners. \textit{See, e.g., Broadcasting}, Nov. 15, 1971, at 16-18 ("We are very pleased that the parties have reached agreement . . . "). The process included no representation of the public interest, state or local governments, or other interested parties, and no adherence to the rulemaking procedures of the Administrative Procedure Act, 5 U.S.C. § 553 (1970). The agreement was then presented to the FCC on an all-or-nothing basis; the Commission considered inviting public comments on its terms, pursuant to the Administrative Procedure Act (5 U.S.C. § 553 (c)), but decided not to because it was not at liberty to vary any of the terms. \textit{See} \textit{Broadcasting}, Jan. 17, 1972, at 31; \textit{Cable Television Report and Order}, infra note 26, at 1532, \textit{¶} 67. In adopting its final cable rules on February 2, 1972 (\textit{see note 26 infra}), the Commission accordingly accepted the "consensus agreement" in its entirety, thereby repudiating to a significant extent the \textit{Letter of Intent} and substantially reducing the prospects for cable development in the 50 largest markets. \textit{Ibid.} at 1529-32, \textit{¶¶} 61-67. As noted by Commissioner Johnson in dissent, this time the Commission suggested a compact for at least the spirit of the Administrative Procedure Act, but also delegation of lawmaker authority to private interests, a delegation justified by the FCC in terms of avowed deference for the political power of those interests. \textit{Statement of Commissioner Nicholas Johnson Concurring in Part and Dissenting in Part, reprinted in Final Cable Television Decision, Television Digest} (1972), at 146-51. \textit{Compare} Concurring Statement of Chairman Dean Burch, \textit{id.}, supplement. It may also be suggested that the Commission's adoption of the exclusivity provisions of the "consensus agreement," an action avowedly based on copyright considerations, raises the question of the Commission's authority under the Communications Act to adopt rules primarily designed to protect an interest of copyright owners which the Supreme Court has held not to be protected by the present Copyright Act. \textit{Compare} \textit{Cable Television Report and Order, infra note 26, at 1529-34}, \textit{¶¶} 61-73, and Concurring Statement of Chairman Dean Burch, \textit{supra, with Fortnightly Corp. v. United Artists Television, Inc.}, 392 U.S. 390 (1968). \textit{Cf.} Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225 (1964). (It should be said in this connection that I was counsel for the defendants in the \textit{Fortnightly} case, an association begun when in private practice and terminated with the Supreme Court decision in 1968.)\textsuperscript{25} On February 2, 1972, after the text of this article was written, the FCC did adopt the new rules (in their altered form), with an effective date of March 31, 1972. \textit{Cable Television Report and Order, 37 Fed. Reg. 3252 (Feb. 12, 1972), reprinted in 24 P & F Radio Reg. 2d 1501 (1972) hereinafter cited as \textit{Cable Television Report and Order}; see note 25 supra}. The provisions relevant here do not differ substantially from those outlined in the August 5 \textit{Letter of Intent}, and they differ even less from the December 1971 draft of the rules by the FCC staff on which I have also relied in this article. \textit{See} note 134 \textit{infra} and accompanying text. Nonetheless, in footnotes throughout the article I shall refer to the \textit{Cable Television Report and Order} and to the rules as finally adopted whenever their provisions are pertinent.
tion, before they go into effect.\textsuperscript{27} It is therefore necessary not only to consider the FCC's intended rules on their merits, but to consider the desirability of state regulation and the form any such regulation should take on alternative premises: the existing framework of federal regulation, and the framework set forth in the intended rules.

In this article I shall first consider whether the states should regulate cable television; this discussion, in Part I, will focus mainly on the lessons to be learned from the existing system of local regulation and on the relative capabilities of local and state governments for the task, and will assume the existing framework of federal regulation. I shall then consider, in Part II, the local aspects of the FCC's intended rules; I shall examine the legal question (shortly to be decided by the Supreme Court) as to whether such regulation of the local incidents of cable is within the statutory authority of the FCC, then appraise the rules on their merits, and then weigh their impact on the case for state regulation. Finally, in Part III, I shall consider what the content of a state regulatory scheme should be, taking account of the alternative schemes advanced by the \textit{New York Report}, the Massachusetts Act, the \textit{Sloan Report}, the proposed rules of the Illinois Commerce Commission, and the \textit{New Jersey Report}. The discussion throughout will center on relatively broad policy issues, as is required by the expansive territory to be covered. I shall not attempt to consider every element of regulation involved or all the details of matters that are considered. My effort will be to grapple with the pivotal issues, the lynchpins of what is an extremely complex problem, a sort of three-tiered Chinese puzzle of regulatory policy.

\section*{I. The Decision on State Regulation}

The first question, putting to one side the impact of the FCC's intended rules, is whether the states should take a role in the regulation of cable television—whether the movement begun during the past year is a desirable one. The answer can only be yes. Although there are deeper considerations, that will be noted presently, the most conspicuous reason for a decision in favor of state regulation is that regulation through the franchising process at the local level, which thus far has been the only regulation in most states, has been a failure. This is the conclusion reached by the \textit{New York Report},\textsuperscript{28} the \textit{New Jersey Report},\textsuperscript{29} the \textit{Sloan Report},\textsuperscript{30} presumably by the Massachusetts legislature and the Illinois Commerce Commission, and by the FCC in its decision to adopt rules embodying substantial federal intervention in the local aspects of cable.\textsuperscript{31}

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\item See text at notes 178-88 infra. Adoption of the rules as reported in note 26 \textit{supra} has been followed by overall indications that they will stick, at least so far as Congress is concerned. Nonetheless, a suit was immediately filed challenging the rules for noncompliance with the Administrative Procedure Act: there were "rumbling sounds" of dissatisfaction by parties to the "consensus agreement" (see note 25 \textit{supra}); and it is predicted that petitions for reconsideration to the FCC will delay the effective date for at least a month. \textit{See} \textit{Television Digest}, Feb. 14, 1972, at 2-3; Feb. 21, 1972, at 3.
\item \textit{New York Report, supra} note 19, at 186.
\item \textit{New Jersey Report, supra} note 21, at 5.
\item "In the first two decades of cable growth, the federal government has been rudderless, the municipalities inept, and the states inactive." \textit{Sloan Report, supra} note 1, at 152.
\item \textit{FCC Letter of Intent, supra} note 5. "We are also persuaded that because of the
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reason the states have begun to act. As regulators of cable, the local governments, generally speaking, have failed in almost every respect to protect and promote the public interest in the new medium. My purpose in noting here some of the more significant shortcomings is not only to show the failure, but also to illustrate some of the leading issues with which a satisfactory regulatory scheme will have to deal.

A. Money, Politics, and Inadequate Procedures

The most visible evidence of a need for reform has been a spate of well-publicized scandals. The largest cable operator in the country and its chief executive officer have been convicted, and the mayor and a city councilman of Johnstown, Pennsylvania, have pleaded guilty (with another indicted councilman awaiting trial), on federal charges arising from the payment of $15,000 to get the franchise in Johnstown; the cable defendants admitted the payment but claimed it was extortion, not bribery.\footnote{32} Four former officials of Trenton, New Jersey, have been indicted for extortion in connection with the 1968 award of the cable franchise in that city.\footnote{33} Elsewhere in New Jersey, there have been charges of criminal conduct in connection with cable franchises in Hamilton Township and in Monmouth and Morris Counties.\footnote{34} Sparing further details, the story is told in a Wall Street Journal headline of April 1971: "Scandals and Allegations Intensify the Bid to Divest Towns of Authority Over CATVs."\footnote{35} Financial improprieties of a lesser order, such as conflicts of interest, have been reported in the franchising process elsewhere.\footnote{36} Then there is the common role of political favoritism as a dominant consideration in cable franchising. The New Jersey Report, based on what appears to be the most extensive empirical study to date, reported that one of the salient characteristics of local franchising was political influence, adding that "[i]t would be naive to expect anything else to be the case given the structure and nature of local government in New Jersey."\footnote{37} The structure and nature of local government elsewhere do not appear to differ in this respect. The importance of political influence in cable franchising has been noted by many other observers,\footnote{38} and outside New Jersey the phenome-
non has been reported specifically, for example, in Buffalo, Chicago, and Tacoma, Washington.41

The public interest in cable has been compromised on an even more widespread basis by the procedures—or lack of them—by which franchises have been awarded. The New Jersey Report found franchising in that state to be characterized by a lack of competition for the award and a lack of public notice about the process.42 Other characteristics were undue haste and lack of deliberation.43

1970) [hereinafter cited as Posner, LOCAL MONOPOLY]; TELEVISION DIGEST, June 8, 1970, at 1 ("CATV operators without other media holdings will be tickled to fight for franchises without facing local broadcasters & newspapers which often have overwhelming influence at city hall").


40 See Cable TV Comes to Clout City, CHICAGO JOURNALISM REVIEW, Aug. 1971, at 3.

41 While the franchise imbroglio in Tacoma involved on one hand charges of improper business ties between members of the city council and one franchise applicant, see note 36 supra, there was another applicant and another side to the story. The other applicant was the Tacoma News-Tribune, publisher of the city's only daily newspaper and licensee of one of the two VHF television stations assigned to Tacoma and an AM-FM combination there as well. As reported in a trade newsletter, the events surrounding the Tacoma franchise award were as follows:

In its attempt to get the local cable TV franchise, the paper reportedly agreed to hold down on criticism of incumbent officials as they went into last year's elections. A political reporter with a reputation for attacking the local administration was shifted to writing obituaries and innocent featurettes.

After the election, the city split its grant of the franchise between the Tribune and another group. Two days later the Tribune alleged in a front-page expose that the other grantee had improper business ties with a city councilman. Next, the new deputy mayor charged the paper with trying to discredit the other group, and the council withdrew the Tribune's cable franchise.

42 For the most part, the standing local rule for cable franchises is "first come, first served." Most franchises now in effect are not the product of competitive bidding; they were given to the first company to apply. . . . There was very little public notice of the fact that local governing bodies were considering CATV franchises and no advertising for bids as might have been done in a local sewerage or school construction project.

Not only were cable companies which might have offered a superior service denied the opportunity to bid, but the public's right to seek the best arrangement was ignored.

New Jersey Report, supra note 21, at 46.

43 In most communities, cable television franchises were given out with little deliberation. Many local governing bodies are unimpressed by the complexities of cable TV. They typically take only two or three sessions to study and bestow franchises. . . .

Local governing bodies move quickly on cable largely because they do not recognize the policy issues posed by this medium. . . .
Again, the problem is not unique to New Jersey.\textsuperscript{44} One leading example of an almost back-door franchise award, which happened to gain wide publicity through an article in the \textit{Wall Street Journal},\textsuperscript{45} occurred in Buffalo in early 1971, a case to which I shall have to return.\textsuperscript{46} Other examples have not attracted publicity, for reasons well indicated by a case study of the franchising process in San Jose, California, and two adjoining communities, Campbell and Santa Clara.\textsuperscript{47} All three cities granted their franchises—San Jose in 1965 (for a term of 25 years), Campbell in 1966 (20 years), Santa Clara in 1970 (25 years)\textsuperscript{48}—to a joint venture owned one-half by the licensee of the only VHF television station in the San Jose area and one-half by the publisher of the only two daily newspapers. So far as competition for the franchise was concerned, in San Jose only one other applicant made a proposal, while in Campbell there was no competition at all.\textsuperscript{49} The study discovered a possible explanation for this, and for other aspects of the franchise awards. Research through the back issues of the two San Jose dailies disclosed that while these papers commonly print news of matters due to come up at meetings of the city councils of both San Jose and Campbell, in the case of the franchise awards by both cities neither paper mentioned the matter in its news columns for a period of at least forty days prior to the award.\textsuperscript{50} (The

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\bibitem{note1} See, e.g., \textit{Sloan Report}, supra note 1, at 152-53 ("franchises are usually awarded, especially in smaller communities, after only cursory discussion; . . .").

\bibitem{note2} \textit{A Controversial CATV Ploy in Buffalo, N.Y., Could Hasten a Move to Federal Regulation}, Wall Street Journal, Feb. 2, 1971, at 32, cols. 1-3 (eastern ed.).

\bibitem{note3} See text at note 493 infra.


\bibitem{note5} \textit{Id.} at 34-35. \textit{The Santa Clara franchise, however, was eventually declined by the winning applicant. See note 492 infra.}

\bibitem{note6} Hemingway, supra note 47, at 26.

\bibitem{note7} \textit{Id.} at 26-27 & ns. 118, 121. The awards themselves were reported in the papers, though inconspicuously (e.g., the San Jose award under a headline, "City Eyes Curfew Change," in two paragraphs sandwiched between an item on curfew ordinance revisions and another on an issue concerning the change in a street name). \textit{Id.} at 37. In each case the stories did not mention that the company winning the franchise was controlled by the local daily newspapers and television station, referring only to the corporate names of the joint venturers. \textit{Ibid.} On the franchise award in Santa Clara, see text at notes 487-92 infra.

\textit{The San Jose and Campbell franchise awards have an interesting sequel. In December 1971 it was announced that the newspaper partner in the cable company, a wholly owned subsidiary of Ridder Publications, was selling its one-half interest to the other partner, the San Jose television licensee, which would thus become sole owner. \textit{Broadcasting}, Dec. 27, 1971/Jan. 3, 1972, at 24. Ridder said the sale was expected to produce an after-tax gain of 20 cents a share on Ridder's stock. \textit{Ibid.} Previously, in a 1969 prospectus, Ridder had valued its interest in the cable company at $154,000. Hemingway, supra note 47, at 43. That such a value in 1969, and such a sale price in 1971, were based mainly on the value of the franchises is indicated by the cable company's 1971 total of 1,900 subscribers in San Jose and Campbell combined. 1971 \textit{Broadcasting CATV Sourcebook} 39. The FCC was asked to approve the sale, inasmuch as it has a rule prohibiting cross-ownership between a cable system and a television station serving the same market; the rule requires divestiture by August 1973 of interests held prior to July 1970, and it prohibits acquisition of such interests after July 1970. \textit{47 C.F.R.} § 74.1191 (a) (2) & note 3 (d); see also \textit{City of Santa Clara, 20 P & F Radio Reg.}, 2d 456 (1970), discussed in the text at notes 487-92 infra. The FCC acknowledged applicability of the rule and declared also that it "should be read as prohibiting increases of ownership interests" as well as acquisition of entirely new interests. Yet, astonishingly, the Commission approved the transaction: "Nevertheless, in view of the pendency of petitions for reconsideration related to the matters raised herein [the cross-ownership rule], and the need for prompt action by the Commission on this request in order to avoid what might turn out to be an unnecessary divestiture of Gill Industries' [the TV licensee] current ownership interest in San Jose Cable under the pressures of a forced sale, we find that good
events surrounding the franchise award in Santa Clara, which were rather different but no less revealing, will be considered later.\footnote{51} Even in a city as large as Chicago, the franchising process under way until the Illinois Commerce Commission intervened had been described as leaving a great deal to be desired from the procedural point of view, notwithstanding conscientious efforts by some of the city officials involved.\footnote{52} Illustrative of the franchising process as it has occurred in a great many communities was a letter received by the television critic of a Chicago newspaper after he had written a series of articles on cable television:

Thank you for your series of articles on cable television. I only wish it had come earlier—say a year ago. That was about the time that a company named \text{———} (supposedly owned by local Democratic lawyers \text{———} and \text{———}) asked for and received \text{———}'s franchise at a city council meeting that was preceded by no prior notice to the public that I'm aware of. . . . Now that your articles have appeared, one of our city councilmen thinks the council may have acted too hastily.\footnote{53}

\section{B. Franchise Terms That Slight the Public Interest}

Slovenly procedures, political favoritism, and the other shortcomings of the franchising process would be expected to produce franchise provisions less than fully attuned to the public's interest in cable television. They generally have. As the \textit{New Jersey Report} states, "[m]any towns and cities, in fact, already have given away much—perhaps more out of ignorance than design—of the public's interest in this area."\footnote{54} Several of the common deficiencies of franchise terms arise from the fact that local franchising authorities, in the words of the \textit{Sloan Report}, "... more often than not have looked upon the entire process as one of assuring new revenues for the municipality."\footnote{55} The fault has been noted by virtually all observers, including the FCC,\footnote{56} the \textit{New York Report},\footnote{57} the governor of New York,\footnote{58} and the \textit{New Jersey Report}.\footnote{59} The point is, as stated by the

\begin{itemize}
  \item \textit{cause has been shown for a waiver of \ldots the Rules to permit Gill Industries' proposed increase in ownership interest in San Jose Cable.} Gill Industries, 23 P & F RADIO REG. 2d 447, 448 (1971). (The FCC has no rule requiring public notice of such a waiver request in the community affected, and the Commission's opinion does not indicate that any such notice was given to the public in San Jose or Campbell. One may wonder how the transaction and the FCC proceeding were reported, if at all, by the San Jose newspapers and television station.)
  \item \textit{See text accompanying notes 487-92 infra.}
  \item \textit{See M. Price, Cable Development and the Franchising Process, Sept. 1970, at 11-13 (unpublished paper for the Sloan Commission on Cable Communications) [hereinafter cited as Price, Cable Development]; CHICAGO JOURNALISM REVIEW, Aug. 1971, at 3-5, 8, 14.}
  \item \textit{Quoted in Price, Cable Development, supra note 52, at 6.}
  \item \textit{New Jersey Report, supra note 21, at 3.}
  \item \textit{Sloan Report, supra note 1, at 152.}
  \item \textit{First, many local authorities have — understandably but unfortunately — exacted high franchise fees for revenue-raising rather than regulatory purposes. Though most fees seem to run about five percent [of gross revenues annually], some have been known to run as high as 36 percent. The ultimate effect of any revenue-raising fee is to levy an indirect and regressive tax on cable subscribers, and our further concern is that the combination of high local franchise fees and cable's other financial responsibilities may so burden the industry that it will be unable to carry out its part of an integrated national communications program.}
  \item \textit{FCC LETTER OF INTENT, supra note 5, at 1782; accord, CABLE TELEVISION REPORT AND ORDER, supra note 26, at 1578, ¶ 185.}
  \item \textit{New York Report, supra note 19, at 202-03.}
  \item \textit{See N.Y. Times, May 4, 1971, at 94, col. 1.}
  \item \textit{New Jersey Report, supra note 21, at 52.}
\end{itemize}
**New Jersey Report**, that “CATV is too important a public resource to be viewed primarily as an additional (relatively minor) revenue source.”

The true promise of cable springs from the abundance of new channels made available, and its realization thus depends in the first instance on assuring an ample channel capacity. Yet the fundamental question of the number of channels on the system has been generally ignored by franchising authorities. Of the 66 franchises studied by the authors of the *New Jersey Report*, 32 did not specify a minimum of channels. In 19 of the other franchises, the number of channels specified was twelve or fewer, a number well below the present state of the art and not much greater than the number that may reasonably be required to accommodate over-the-air broadcast signals. There has been a similar failure of regulatory initiative with respect to the uses of any nonbroadcast channels that do find their way onto the system. Of the 66 New Jersey franchises, 45 “contain no requirement whatsoever that channel time be available to the community for public access [cablecasting].” Of 18 representative franchises examined in New York (which did not include those granted by New York City), only seven “provide for provision of a channel for community or educational use.” Only four of the New Jersey franchises required the cable operator “to produce and broadcast a certain amount of locally originated programming,” and there was apparently no such requirement in any of the New York franchises examined. The *New Jersey Report* concludes that with two notable exceptions, “local franchises in New Jersey . . . appear to be blind to the many broadband communications services made possible through cable television. Because many of these services are not profitable, we can expect few companies to introduce them voluntarily. Once again, ineffective regulation of CATV may

60 Id. at 70.
61 See FCC LETTER OF INTENT, supra note 5, at 1771-72; Sloan Report, supra note 1, at 64-65.
62 New Jersey Report, supra note 21, at 54-55. See also New York Report, supra note 19, at 136-37 (of 18 representative franchises examined, 8 required no minimum number of channels, and of the remaining 10, only 2 required more than 12, only one as many as 20). The number of channels devoted to over-the-air signals will depend in most markets on eventual resolution of the distant-signal issue. See note 25 supra. On the state of the art with respect to channel capacity, the Sloan Commission reports that lately “. . . the capacity of new installations is of the order of 20 to 25 channels . . .” and predicts, in what it deems a conservative estimate, that “by the end of the decade the majority of cable franchises will have a capacity of at least twenty channels, that forty-channel systems will be commonplace, or at least well within the state of the art, and that even greater capacity may be found in great metropolitan areas.” Sloan Report, supra note 1, at 37. Both the Sloan Commission and the FCC would require 20 channels as a minimum in new installations today. Id. at 65; FCC LETTER OF INTENT, supra note 5, at 1772; CABLE TELEVISION REPORT AND ORDER, supra note 26, at 1558, ¶ 120.
63 New Jersey Report, supra note 21, at 61. The number of over-the-air signals the system will actually carry depends, not on what the subscribers want, but on the number of local television stations (whose signals the FCC quite properly requires the system to carry) and on the number of “distant signals” the FCC allows the system to carry. See CABLE TELEVISION REPORT AND ORDER, supra note 26, at 1534-52, ¶¶ 74-108; note 25 supra.
64 New Jersey Report, supra note 21, at 62.
65 New York Report, supra note 19, at 133. With one arguable exception, “none of these franchises are clear on whether the channels will be furnished free of charge, although such is the probable intent.” Ibid.
66 New Jersey Report, supra note 21, at 63.
have seriously compromised the future of the medium in New Jersey.\textsuperscript{68}

Other deficiencies appear after the franchise has been awarded. There is a widespread problem of delay or inaction in getting the system constructed—the syndrome of the "no show" franchise. The New Jersey Report found that "[n]umerous franchises, in fact, seem to have been sought on a speculative basis, for possible later development or even re-sale."\textsuperscript{69} The problem has been noted by Commissioner Jones in New York\textsuperscript{70}—where "half the cable franchises . . . have yet to begin construction"\textsuperscript{71}—and by the Sloan Commission\textsuperscript{72} and other observers.\textsuperscript{73} It derives in part from the absence of clear franchise provisions setting construction and service deadlines, but also from the inability or unwillingness of franchising authorities to exact compliance with requirements that are in the franchise.\textsuperscript{74} Thus the New Jersey Report states that "most franchises require cable firms to complete their systems within two or three years of the franchise award," and most provide also that failure to do so is cause for revocation, but "[f]ewer towns . . . require the firm to post a performance bond to be forfeited for non-compliance."\textsuperscript{75} Of the 66 franchises examined in New Jersey, 30—including some that stipulated a performance deadline—did not include provisions for a bond.\textsuperscript{76} When the company fails to perform, local officials are confronted with a choice between two unhappy alternatives, overlook the violation or take action to revoke the franchise; in New Jersey, at least, they have generally done the former.\textsuperscript{77} Thus "[a] substantial number of communities have agreed to franchises which leave them powerless to deal with no-show firms."\textsuperscript{78} The problem has been especially acute in major cities, where uncertainties about FCC

\textsuperscript{68} New Jersey Report, supra note 21, at 63.
\textsuperscript{69} New Jersey Report, supra note 21, at 49; see id. at 48-50, reciting examples. The chairman of the Transportation and Public Utilities Committee of the New Jersey Assembly reportedly stated "he is disturbed to learn that many companies that have been awarded cable-TV franchises by local communities haven't gone into operation yet. 'A lot of these companies are coming in and getting a franchise from the municipalities and sitting on it and not doing anything with it.' . . ." Wall Street Journal, Apr. 20, 1971, at 38, cols. 1-2 (eastern ed.).
\textsuperscript{70} "In too many instances, applicants have sought franchises not with a view to building (a system) but with a view to selling the franchise to some other operator at some future date." Wall Street Journal, Apr. 20, 1971, at 38, col. 2 (eastern ed.).
\textsuperscript{71} "Half the cable franchises in New York have yet to begin construction, which emphasizes the need for franchising authorities—municipal and state—to reserve and exercise the power to revoke such franchises." M. Mitchell, State Regulation of Cable Television (1971) (RAND Memorandum No. R-783-MF, 1971) hereinafter cited as Mitchell (paraphrasing testimony of a cable operator at a legislative hearing in New York). In Illinois, the Commerce Commission in asserting its jurisdiction said that "there are now 48 cable systems in operation in Illinois landl that 66 others have been granted franchises but are not in operation . . . ." Illinois Report, supra note 14, at 2201.
\textsuperscript{72} Sloan Report, supra note 1, at 152-53. E.g., Mitchell, supra note 71, at 28; Price, Cable Development, supra note 52, at 21. See Cable Television Report and Order, supra note 26, at 1376, ¶ 181: "We are establishing . . . general timetables for construction and operation of systems to insure that franchises do not lie fallow or become the subject of trafficking."
\textsuperscript{73} See Sloan Report, supra note 1, at 152-53; New Jersey Report, supra note 21, at 58.
\textsuperscript{74} New Jersey Report, supra note 21, at 57.
\textsuperscript{75} Id. at 57-58, 48-50. However, in Newark, where the franchise (carrying a term of 25 years) was awarded in 1968 to a local political figure, with a requirement that the system be operable within two years, and where the franchisee sold his rights in 1970 and by mid-1971 the system was still under construction, the city has moved to terminate the franchise for non-performance. Id. at 57 n.23, 49.
\textsuperscript{76} Id. at 57.
distant-signal rules have provided franchise holders with a special incentive for delay, while at the same time the potentially great value of the franchise has tended to attract persons interested in holding it for purposes of speculation, resale, or competitive preemption.79

A final major vice in franchise terms, and one that enlarges most others, is overlong duration. The New Jersey Report found that “[m]ost franchises in New Jersey are awarded for terms exceeding twenty years and some extend far beyond that length of time.”80 The New York Report similarly found a majority of the franchises it examined running for twenty years or more.81 Fifty-year terms are not unknown,82 and a prominent franchise applicant in Chicago was proposing a city-wide franchise lasting sixty years.83 A great many existing franchises thus have durations that appear to outlast any reasonable justification, especially in such a fast-changing medium. The FCC in its Letter of Intent has taken the view that “generally speaking, a franchise should not exceed fifteen years, with a reasonable renewal period.”84 The authors of the New Jersey Report think ten years should suffice.85 The New York Report says “a limit of twenty years on any franchise term would not be unreasonable.”86 The Sloan Commission recommends “that no franchises for a term longer than ten years be awarded, but that franchise terms include provisions for purchase at a fair price of the assets of an unrenewed franchise.”87 Thus while views differ as to

79 See Mitchell, supra note 71, at 28. See the recent transaction involving the San Jose franchise discussed in note 50 supra. Another example is found in San Francisco, where one of the city’s two cable franchises was granted in 1966 to the company that publishes the city’s only morning newspaper (under a joint-operating agreement with the only afternoon newspaper) and that has the license for one of the city’s four commercial VHF television stations and an FM station as well. The company has done nothing to implement the franchise, and in 1971 an FCC hearing examiner, in a proceeding involving the television license, noted in passing that the company “has a franchise for San Francisco which it does not propose to employ.” Chronicle Broadcasting Co., 21 P & F Radio Reg. 2d 245, 250 (1971). The city has made no move to revoke the franchise for nonuse, or to prevent its speculative retention and eventual sale, or to grant additional franchises that would be implemented. The company’s intention not to employ the franchise has not been reported in its newspaper (or, so far as is known, in any other San Francisco news medium).

80 New Jersey Report, supra note 21, at 55. “In all, 39 towns, representing 59 percent of our sample, were found to have franchise terms of 20 years or longer.” Ibid. New Jersey Report, supra note 19, at 125-27.

81 In Ringwood, New Jersey, the holder of a 25-year franchise has the sole option to renew it for another 25 years. New Jersey Report, supra note 21, at 55. A franchise granted in 1965 by Salt Lake County, Utah, to a joint venture including the owners of Salt Lake City’s three VHF television stations and two daily newspapers runs for 50 years. See Hearings on the Failing Newspaper Act Before the Subcommittee on Antitrust and Monopoly of the Senate Judiciary Committee, 90th Cong., 1st Sess., at 539-41, 364-65 (1967) [hereinafter cited as Senate Failing Newspaper Hearings].

82 Chicago Journalism Review, Aug. 1971, at 3 (the company was described as one which “has never been in the cable TV business, but . . . does have a lot of friends in and around City Hall”); see also Price, Cable Development, supra note 52, at 12.

83 The economics of cable operation would appear to allow for amortization of initial investment over a 15-year period, and efficient operators can reasonably expect their franchises to be renewed. . . .” FCC Letter of Intent, supra note 3, at 1781-82. Accord, Cable Television Report and Order, supra note 26, at 1377, ¶ 182 & ns. 77-79 (“Long terms have generally been found unsatisfactory by state and local regulatory authorities, and are an invitation to obsolescence in light of the momentum of cable technology . . . . [W]e note that there is some support for franchise periods of less than 15 years” [footnotes omitted]).

84 New Jersey Report, supra note 21, at 56: “. . . There is ample evidence that a well-managed cable system can recoup its initial investment in four to seven years. . . .”

85 New York Report, supra note 19, at 190.

the most appropriate ceiling, most authorities would draw the line well short of some of the munificent lengths to which local governments have gone.\(^8\) Indeed, while the uncertainty of cable’s future leaves ground for debate about many of the elements of cable regulation now being proposed, the very uncertainty argues for keeping regulatory options as open and recurrent as possible. Since even a ten-year franchise granted today will reach well into the future of the medium, placing the lowest reasonable ceiling on franchise durations may be the most prudent and, in the long run, the most beneficial measure of all.

C. Institutional Considerations Favoring State Over Local Regulation

It is impossible not to agree, then, with the conclusion of the New Jersey Report that “[t]he performance of local government in regulating CATV can only be termed a failure.”\(^9\) Perhaps the regime created for cable by the local governments is more accurately described as an absence of regulation, a system of \textit{laissez-faire}. But, however the failure is characterized, it is important, especially in the rather lurid light of some of the past year’s headlines, to see that the root cause does not lie in the personal weaknesses of local-government officials. It lies, rather, in the institutional inadequacies of local government as the regulator, or at least as the exclusive regulator, of the local incidents of cable. These are inadequacies, moreover, which not only account for the failure of municipal regulation to date, but also render it unlikely that the defects can be remedied in the future by the local governments acting through their own devices. They thus have significant policy implications for the decision on state or federal intervention.

The local governments lack, in the first place, the expertise and resources needed for the regulation of a new communications medium such as cable. Even when local officials apply to the franchising task the utmost diligence and intelligence, they remain at a critical disadvantage in evaluating competing applications and designing, negotiating, and awarding the franchise. To be sure, this is now changing. As recognition of cable’s importance grows, local officials are becoming more knowledgeable about the medium, more alert to the issues and options of the franchising process, more willing to devote substantial effort and time to the process. Further, new sources of advice and information for franchising authorities are becoming available; a well-funded Cable Television Information Center has recently been established in Washington,\(^90\) proposals for advisory

\(^8\) The Illinois Commerce Commission, however, takes the view in its proposed rules that “the emphasis on franchise term may be somewhat misplaced,” on the theory that effective regulation of the cable system with respect to its technical capacity and quality of service would leave “little reason to change or to threaten to change cable operators.” ILLINOIS PROPOSED RULES, supra note 16, at 15; see text at note 452 infra. And the Connecticut Public Utilities Commission, perhaps out of deliberate decision, perhaps out of unthinking recourse to the normal practices of public utilities regulation, has granted cable licenses without limit of time. See Mitchell, supra note 71, at 12-13. Municipal franchises have also been known to run indefinitely. See New York Report, supra note 19, at 127. See generally text at notes 546-57 infra.

\(^9\) NEW JERSEY REPORT, supra note 21, at 65; see also Sloan Report, supra note 1, at 152.

\(^90\) N.Y. Times, Jan. 12, 1972, at 70, cols. 4-6 (city ed.). See text at notes 472-76 infra.
and promotional agencies at both the federal and state levels are proliferating, and the growing interest in cable on the part of the public is no doubt making it more difficult for franchise awards to be slipped through the city council without anyone noticing. But still, the local government remains a one-shot, part-time participant in the franchising game. The franchising of cable systems will not recur with sufficient frequency—even if the franchise terms are cut down to reasonable size—to support development within the local government of continuing expertise in the cable field. The municipality thus cannot hope to do as well in the franchising process, operating alone, as a state agency whose broader jurisdiction would enable it to develop and maintain a permanent cable staff. Nor does it seem sufficient to respond to this consideration, as some have, with the reassurance that the local governments can appropriately be left with full control of the franchising process now that they have access to the advice and assistance of state, federal, and privately funded cable information offices. As I shall point out later, there is reason to doubt that advice can count for more than institutional structure in shaping the franchising process and the decisions it entails.

After the franchise has been granted, the regulatory capability of the municipality is further diminished. Having lost its bargaining power, the local government must rely on whatever enforcement machinery it has provided for in the franchise, or on legal sanctions, as its weapons for securing compliance with the franchise terms, regulating the system’s operations, and bringing about any changes in the franchise or the system that it deems desirable. The machinery required for the ongoing supervision of a cable system is likely to exceed the cap-

91 This has become a standard, crutch-like recommendation. The Sloan Report proposes “a Federal Promotional Agency” (at 156-57) and also a special agency in each state that would not actually participate in the local franchising process but would supervise the process and amass experience to make available to the franchising authorities. See id. at 157-61. The New York Report would give to the state’s Public Service Commission “an advisory role in the franchising field.” New York Report, supra note 19, at 189. The New Jersey Report would establish an “Office of Cable Communications” within the state Public Utilities Commission to do the same. New Jersey Report, supra note 21, at 74-75. The Illinois Commerce Commission would rely on independent consultants instead. Illinois Proposed Rules, supra note 16, at 9. See text at note 440 infra.

92 See, e.g., New York Report, supra note 19, at 189. With respect to the technical capabilities of cable systems, for example, the New Jersey Report found that “[f]ew cable franchises require specific levels of technical performance,” and that of the franchises having such provisions, “most of these standards were suggested by cable firms, not municipal officials.... Without expert assistance, the average local official must accept on faith that these standards do, in fact, provide a fair measure of system performance....” New Jersey Report, supra note 21, at 59-60.

93 See, e.g., Sloan Report, supra note 1, at 158. The Connecticut Public Utilities Commission was the first agency to franchise an entire state for cable, from scratch. (It will probably also be the last, since it appears that no other state is virgin territory.) Although the commission began with no applicable experience, used only a small staff, and made some procedural missteps that substantially delayed its progress, it nonetheless succeeded, within three years, in entertaining applications filed by 25 separate applicants seeking to serve 70 of the state’s 168 towns, and in certifying 17 of them to serve 84 towns (including some assignments that had not been sought). See Mitchell, supra note 71, at 4-54; Connecticut Television, Inc. v. Public Utilities Commission, 159 Conn. 317, 19 P & F Radio Reg. 2d 2001 (Conn. Sup. Ct. 1970).

94 See New York Report, supra note 19, at 187-89, and other authorities cited in note 91 supra; see text at notes 455-501 infra.

95 See text at notes 479-501 infra.
ability of all but the largest cities. In addition, there are ways in which the interests of the municipal officials can be expected to conflict with the public's interest in effective regulation. It has been noted, for example, that local governments are often unwilling to take legal action against a nonperforming or malperforming franchisee; this is not surprising, for such action, among its other burdens, would reflect adversely on the judgment of the local officials who awarded the franchise (and who are likely to be still in office). The familiar symbiosis between a regulated company and the agency that regulates it can be expected to develop between the cable system and the city. To be sure, the same problem would exist if the cable system were franchised and regulated exclusively by the state. But assuming that the municipality will retain some role in the franchising or regulating process — that the ultimate choice is between exclusive local regulation, as at present, and a "mixed" system of local and state involvement — this threat to effective regulation seems more likely to be disarmed by the latter alternative, since the involvement of the state could be expected to deter or counteract the development of an undue mutuality of interest between the cable system and the local officials. Further, since the fees paid by the cable operator go to the local government, and can be expected to continue to do so, the local government is placed, in the words of the New Jersey Report, "in the dual role of regulator and business partner of the cable firm. Since the municipality has a stake in the financial success of the CATV company, officials are, to some extent, compromised as protectors of the public interest when it comes to regulating rates and the company's activities." Similarly, no matter how many prestigious reports and cable-information offices advise municipalities to renounce high franchise fees in favor of free channels and other noneconomic benefits, there will still be local governments whose financial needs lead them to ignore the ad-

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96 Even New York City's capability seems questionable. In 1968 a task force appointed by the city's mayor, under the chairmanship of Fred W. Friendly, recommended in an excellent report that "a new and separate office should be established to serve as the administrative arm of the Board of Estimate in cable television matters." The Mayor's Advisory Task Force on CATV and Telecommunications, A Report on Cable Television and Cable Telecommunications in New York City 71 (1968) [hereinafter cited as Mayor's Task Force]. The Report pointed out that while the existing administrative arm of the Board of Estimate was the Bureau of Franchises, the bureau's head, the Director of Franchises, "must at the same time deal with a host of other matters outside the field of cable television," and it took the position that the development of cable in New York demanded an official who could "give his full attention to the field of cable television." Id. at 71. The recommendation drew a dissent from one member of the nine-man task force, the city's Director of Franchises, who argued that the new office should be created within the Bureau of Franchises. Id. at 74-75 (separate views of Morris Tarshis). In March 1971 the Board of Estimate adopted a resolution representing a compromise between the two positions. It established an Office of Telecommunications within the Bureau of Franchises but left the authority somewhat divided; the Director of Franchises was still empowered to award the franchises, but it would be the chief of the new Telecommunications Office, reporting directly to the Board of Estimate, who, "once contracts are let, will regulate and enforce their terms." N.Y. Times, March 27, 1971, at 45, col. 4. A newspaper account began, "New York City will soon have a central authority to regulate the burgeoning CATV industry within the city." Ibid. Almost a year later, however, the new office has not yet been established or its chief appointed, and regulation of the operating cable systems in Manhattan has continued to be handled by the Director of Franchises. See, e.g., N.Y. Times, Oct. 26, 1971, at 71, cols. 1-4; text at notes 303-08 infra.

97 As a matter of practice, franchise violations are overlooked by municipalities." New Jersey Report, supra note 21, at 55; see text at notes 32-41 supra.

98 See text at notes 371-81 infra.

99 New Jersey Report, supra note 21, at 54.
Any regulatory decision that subordinates the potential of the cable system as a source of municipal revenue is more likely to be imposed through the participation of a governmental agency which is not the one that receives the revenue. Finally, it may be questioned whether the interest in assuring open and regular procedures and public input in the franchising process is likely to be adequately effectuated by the same local government officials who exercise the franchising power (assuming, again, that they will continue to do so). For example, the release by the local government of "a public report setting forth the basis for its action" in awarding the franchise, a procedure the FCC has "strongly suggest[ed]," seems unlikely to be undertaken voluntarily by many local governments, just as it has not been in the past. If the procedural defects in the franchising process are to be remedied, the cure seems unlikely to come from the franchising entities themselves.

Other institutional disabilities of local government arise from the fact that the decisions involved in franchising and regulating cable often transcend local political jurisdictions. There are cases where a single municipality is too small to support a cable system capable of providing ample channels and service. There are cases where municipal lines do not coincide with the boundaries of school districts the cable systems should serve. There is the need for some governmental entity with authority to order interconnection between cable systems so that subscribers of more than one system can receive, when desired, the same originated programs. And there is a need in the first place, a need generally neglected to date, for some authority able to identify and delimit comprehensively the various areas within a state for which cable franchises should be granted. Failing that, a franchising pattern based on the random scatter of political jurisdictions produces a patchwork without relation to the most economic and effective development of cable television.

In Connecticut, the one state franchised on a statewide basis, the ability of the state commission to respond to this need by "regionalizing" cable service has been called "perhaps the greatest single potential advantage of state rather than purely local control over franchising."

The New York Report appears to acquiesce: "... While the needs of some municipalities for revenues may lead to approaches like this [auctioning the franchise to the applicant willing to pay the highest percentage-of-gross franchise fee], and it is not recommended that such approaches be prohibited, the commission should seek to advise municipalities wherein their long-term interests lie. ..." New York Report, supra note 19, at 202; see text at notes 690-98 infra. See the report of a recent cable conference in Dayton, Ohio, stating: "Some municipal officials who attended the conference appeared to cling to the belief that cable would be an economic gold mine for their cities, according to some experienced observers... ."


FCC Letter of Intent, supra note 5, at 1780 n.*; see note 167 infra and accompanying text.

Consider, for example, local program origination on cable. For program origination of a given level of quality and quantity, the cost per subscriber is directly related to the number of subscribers. Or, expressed differently, the larger the subscriber base, the more extensive the local origination programming that can be maintained." Mitchell, supra note 71, at 19.

One resulting problem, though to some extent a compensating factor, has been "pressure on small towns" applied by cable operators who already have the franchise for a larger, neighboring community and who make the argument "that the firm offers the only service which will ever be available to such small communities. After all, it is contended, who will want the small franchise in the area without the big town contract... ." New Jersey Report, supra note 21, at 48.

Mitchell, supra note 71, at 17. The Connecticut Public Utilities Commission, in granting franchises for the entire state, took the position that franchises should generally cover
To be sure, the issue of "regional" franchise areas, including both a city and its surrounding suburbs, involves a policy decision that is already becoming controversial. On one hand, such a franchise area could help to bridge the gap between the central city and the suburbs. On the other hand, the proposal is already under attack as reducing the opportunity for ownership and control of cable systems by members of inner-city minority groups. It is to promote the latter cause, probably, that the Sloan Commission, while recommending that a state agency be empowered to "[i]dentify appropriate franchise areas within the state..." goes on to recommend that "the state must be prepared to let major cities... establish their own franchise boundaries where they are wholly within the city." I shall return to this question later. It is sufficient for the present to identify the issue as one of policy (and politics) that should be recognized and decided as such. The point here is that so long as the delineation of franchise areas and awarding of franchises takes place entirely at the local level, any options involving supralocal considerations are automatically precluded, or at least rendered dependent on the very difficult process of inter-municipal agreement.

There is a final, compelling consideration that disables local governments from dealing effectively with the local incidents of cable in the present circumstances. This is the fact that so many local governments have already granted their franchises, franchises whose contents have little in common, as has been seen, with the public interest in cable television. It is necessary not only to remedy the franchising process for the future, but to correct the outstanding franchises. These are much too numerous, and their durations frequently much too long, to be simply chalked up to experience, with the hope that franchising authorities will do a better job the next time around. According to the latest tabulation, there were in the country as of January 1972 a total of 2,659 operating cable systems, and there were 1,917 franchises outstanding for systems not yet in operation (with 2,752 franchise applications pending in another 1,586 communities). At issue, then, are nearly five thousand cable systems for which franchises have already been granted (with more being granted every month),

integrated areas cutting across local jurisdictions. Towns were assigned to franchise areas with the purpose of "regionalizing" cable service; the principle was that contiguous areas with a "community of interest" should be served by a single system, and the assigned franchise areas were thus generally composed of a major city and its adjacent towns. To achieve this result the Commission assigned to some applicants towns that had been requested by other applicants or that had not been requested by anyone. Its right to do this was subsequently upheld by the Connecticut Supreme Court. Connecticut Television, Inc. v. Public Utilities Commission, 159 Conn. 317, 19 P & F RADIO REG. 2d 2001 (Conn. Sup. Ct. 1970). See MITCHELL, supra note 71, at 16-22.

See text at notes 504-37 infra.

See text at notes 504-37 infra.
each of which is very likely to be the only cable system available to subscribers in its service area throughout its franchise term. The public interest in cable would seem to preclude a decision that all these systems must be written off for the duration of their existing franchises.

And if the shortcomings in the outstanding franchises are to be remedied, this result is less likely to be accomplished by the local governments that granted them than by some higher governmental authority. To see why this is so it is necessary to take account of a complex legal issue, one that appears not yet to have reached the courts in the cable context but that can be expected in the coming years to do so frequently, as it did in the context of other utility services more than a half-century ago. The issue, which can only be sketched briefly here, concerns the right of governmental entities, local, state, or federal, to adopt for the regulation of cable legislation or rules whose effect is to change the terms of existing local franchises. As a matter of policy, the need for such measures is clear. The public interest in cable would be largely frustrated if there were no legal way — or no legal way short of eminent domain — to modify the terms of outstanding franchises so as to bring into being services or provisions such as increased channel capacity, nonbroadcast channels for cable-originated programming, interconnection between cable systems, government supervision of service and technical standards, the raising or lowering of subscriber rates as appropriate, reduction of excessive franchise fees, reduction of excessive franchise durations, and so forth. Recognizing this need, the new schemes for state regulation of cable, such as the Massachusetts Act and the proposed rules of the Illinois Commerce Commission — and also the intended new rules of the FCC — are designed to apply, in general and for leasing, public access, and government and educational use in particular, production facilities for the users of these channels, two-way capability, interconnection between cable systems, government supervision of service and technical standards, the raising or lowering of subscriber rates as appropriate, reduction of excessive franchise fees, reduction of excessive franchise durations, and so forth. Recognizing this need, the new schemes for state regulation of cable, such as the Massachusetts Act and the proposed rules of the Illinois Commerce Commission — and also the intended new rules of the FCC — are designed to apply, in general, to existing systems and outstanding franchises as well as to franchises granted in the future. One question thus posed, how-

108 There is wide agreement that cable service, like water, electric, gas, or telephone service, has the attributes of a natural monopoly at the local level (since running parallel cables would involve unnecessary duplication), so that once a cable operator has wired a particular area it is unlikely that a second operator will try to serve it competitively, even if he can obtain the legal right to do so. As the FCC has said, "[Cable television's operations have developed on a noncompetitive, monopolistic basis in the particular areas served. . . ." First Report and Order, Docket No. 18397, 20 F.C.C.2d 201, 222 n.27 (1969). Accord, SLOAN REPORT, supra note 1, at 147 ("the inherent monopoly of a cable system in any locality . . ."); Posner, LOCAL MONOPOLY, supra note 36, at 1; authorities cited in Barnett, supra note 1, at 239 n.113. But cf. Better T.V., Inc. v. New York Tel. Co., 23 P & F Radio Reg. 2d 1, 10-13 (1971) (FCC bars unfranchised cable operator from offering competitive service in areas of Manhattan on ground of crowding in underground ducts).

109 The intended FCC rules, whose pertinent provisions are outlined in the text at notes 135-77 infra, will require that "[a]n existing cable system . . . certify that its franchise includes the above provisions within five years of adoption of our rules or upon renewal of its franchise, whichever occurs first." FCC LETTER OF INTENT, supra note 5, at 1783. The Massachusetts Act, whose provisions are outlined in the text at notes 413-37 infra, is applicable to all systems previously "authorized or constructed" in the state, with such applicability expressly including the 15-year ceiling which the Act places on all franchise terms. Massachusetts Act, supra note 17, at § 3(d). The proposed rules in Illinois would award grandfather certificates to systems which at the cut-off date were in possession of municipal franchises and either (a) were already serving at least fifty subscribers or (b) had engaged in a specified amount of construction. Cable operators who possessed franchises but met neither of the additional tests would thus be fully subject, for example, to the construction and capacity requirements to be applied by the state commission in granting the initial state certification. ILLINOIS PROPOSED
ever, is whether governmental entities at any level have power to make laws which alter the terms of existing franchises in ways that diminish the rights or increase the burdens of the franchise holder. Another question is whether the state or the local government is in the better position, legally and practically, to claim and exercise such power.

The questions arise because of the well-established legal doctrine that a municipal franchise, once granted and accepted — unless there is a reservation in the grant, as one would think there ought to be in cable franchises henceforth awarded — constitutes a binding contract, a "property right," which is protected by the federal and many state constitutions from state laws impairing the obligation of contracts.\footnote{\textsuperscript{110}} Of course, even if this rule were not "subject to variations and modifications, general and specific,"\footnote{\textsuperscript{111}} a local or state government would not be powerless to recapture or revise an outstanding cable franchise. If nothing else, all contracts are subject to the power of eminent domain.\footnote{\textsuperscript{112}} And there is a more attractive remedy that may be available in the many cases where franchises have been granted but not exercised, a remedy that local or state governments might well pursue: they could invoke the rule recognized in some states that a franchise, even though "accepted," does not give rise to a binding contract, and may be revoked, until the franchisee has performed some substantial part of the contemplated construction.\footnote{\textsuperscript{113}} Assuming, however, that the system has been constructed or the franchise is otherwise "binding," it still does not follow that the local, state, and federal governments are barred from making laws to regulate cable in ways that modify the franchise terms. The constitutional rule is indeed "subject to variations and modifications, general and specific," and while the extent of these qualifications at every level of government is not entirely clear,\footnote{\textsuperscript{114}} the outlines of the applicable law can be perceived. They indicate some

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\textsuperscript{110} "...[U]pon acquisition and exercise by a utility a franchise becomes a vested property right, in the nature of a contractual right protected by Federal and State constitutional guarantee." City of Detroit v. Michigan Bell Tel. Co., 374 Mich. 543, 547, 132 N.W.2d 660, 664 (1965). Accord, e.g., City of Minneapolis v. Minneapolis Street Ry., 215 U.S. 417, 427 (1910); Grand Trunk Western Ry. v. City of South Bend, 227 U.S. 544, 552 (1913); City of North Las Vegas v. Central Tel. Co., 460 P.2d 835 (Nev. 1969). See 3 Antieau, supra note 3, at 558-64; 12 McQuillin, supra note 3, at 116-17: "unless the power to do so is reserved, the municipality cannot modify or amend the franchise after it is granted, where thereby it lessens the rights and privileges of the company or imposes additional burdens on it." Id. at 116. Cf. Trustees of Dartmouth College v. Woodward, 4 Wheat. 518 (1819). On the municipality's power to regulate a franchised utility where it has reserved the right in the franchise grant, see Southern Pacific Co. v. City of Portland, 227 U.S. 559 (1912).

\textsuperscript{111} "...This rule, however, in this State and nationally, is subject to variations and modifications, general and specific, which render the broad statement as such incomplete. ..." City of Detroit v. Michigan Bell Tel. Co., 374 Mich. 543, 547, 132 N.W.2d 660, 664 (1965).

\textsuperscript{112} West River Bridge v. Dix, 47 U.S. (6 How.) 507 (1848); Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398, 435 (1934).

\textsuperscript{113} Capital City Light & Fuel Co. v. Tallahassee, 186 U.S. 401, 409-11 (1902); People v. Chicago City Ry., 324 Ill. 618, 155 N.E. 781 (1926); In re New York Electric Lines Co., 201 N.Y. 321, 94 N.E. 1056 (1911); see Owensboro v. Cumberland Tel. & Tel. Co., 230 U.S. 58, 66 (1913) ("...if the grant be accepted and the contemplated expenditure made ..."); City of Benton Harbor v. Michigan F. & L. Co., 250 Mich. 614, 231 N.W. 52 (1930) ("A franchise accepted by carrying out a contemplated undertaking, pursuant to which large sums of money are expended, must be held contractual in nature and to result in vested rights").

\textsuperscript{114} "There is ... some difficulty in determining just how far the state or municipality

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distinct differences in the power held at the federal, state, and local levels, differences that may bear upon the formulation of policy as to the most effective allocation of regulatory authority over cable.

The federal government's right to regulate cable without being hindered by existing franchise "contracts" is the least questionable. Assuming that the FCC's intended rules are within the Commission's authority under the Communications Act (a substantial question to be discussed shortly), and assuming they are within the constitutional power of Congress to regulate interstate commerce (which seems clear), it would appear to follow that if the rules are reasonable they are valid, even though their effect may be to impair or destroy contractual obligations. At the other extreme, the most questionable power is that of the local government, acting by ordinance, to regulate the cable system in ways altering the terms of the franchise it itself has granted. This is not only because of the many cases striking down such local legislation as in violation of the constitutional guarantee—cases holding, for instance, that the local government may not adopt an ordinance reducing the fares on the street railway below the amount fixed in the franchise. There are, indeed, cases that reach the opposite result, by reasoning that the municipality "cannot bargain away the police power of the state"; so far as local legislation is concerned, however, such cases tend to be limited to a relatively narrow definition of the police power, typically involving public safety or use of the streets. But the constitutional

may go in the exercise of its police power without passing beyond such power and impairing the obligation of a contract created by the granting of a franchise." 12 McQuillen, supra note 3, at 170.

115 See note 234 infra; see generally text at notes 202-68 infra.

116 "The Constitution, as it many times has been pointed out, does not in terms prohibit Congress from impairing the obligation of contracts as it does the states." Continental Illinois Nat'l Bank v. Chicago, R.I. & P. Ry., 294 U.S. 648, 680 (1935). Nevertheless, the same principle is applicable to Congress, to an extent which "has not been definitely fixed," through the due process clause of the fifth amendment. Ibid. "Speaking generally, it may be said that Congress, while without power to impair the obligation of contracts by laws acting directly and independently to that end, undeniably, has authority to pass legislation pertinent to any of the powers conferred by the Constitution, however it may operate collaterally or incidentally to impair or destroy the obligation of private contracts." Ibid. In upholding the FCC's rule prohibiting telephone companies from owning cable systems in their service areas (and requiring divestiture), the Fifth Circuit Court of Appeals recently said, "Petitioners argue additionally that the rules deprive them of the benefits of their local franchises. By this we do not understand them to mean that their franchise contracts have been unlawfully modified for it is well settled that contract rights in regulated industries are subject to reasonable modifications." General Tel. Co. of the Southwest v. United States, 22 P & F Radio Rsc. 2d 2171, 2187 n.14 (1971). See, e.g., Federal Radio Comm'n v. Nelson Bros. Co., 289 U.S. 266, 282 (1933); National Broadcasting Co. v. United States, 319 U.S. 190 (1943); United States v. Storer Broadcasting Co., 351 U.S. 192 (1956); American Airlines, Inc. v. CAB, 359 F.2d 624 (D.C. Cir. 1966), cert. denied, 385 U.S. 843 (1966); Air Lines Pilots Ass'n v. Quesada, 276 F.2d 892 (2d Cir. 1960).

117 Detroit v. Detroit Citizens' Street Ry., 184 U.S. 368, 395-98 (1902); see authorities cited in note 110 supra.

118 See, e.g., Atlantic Coast Line R.R. v. Goldsboro, 232 U.S. 548, 559 (1914) (ordinance affecting operation of railroad along "the main business street of the town," where it "tends to obstruct the crossings and is fraught with danger to life and property"); Grand Trunk Western Ry. v. City of South Bend, 227 U.S. 544, 553 (1913) ("the rights acquired were subject to the power of the municipality to pass reasonable regulations necessary to secure the public safety") (dictum); Clough v. North Central Gas Co., 150 Neb. 418, 34 N.W.2d 862, 869 (1948) (gas company required to install meters and keep pipelines in repair without cost to customers); 3 Antieau, supra note 3, at 561-62; 12 McQuillen, supra note 3, at 169-70. This is not to say the cases limiting the regulatory power of the local government on the basis of the constitutional guarantee are correct and should be followed by the courts
obstacle is not the only reason why the local government, after granting the franchise, may find itself unable to regulate the cable system in the ways now desirable; there is also the fact that state law often denies to local governments the authority to engage in public utility regulation, except by the contractual method of granting a franchise and attaching conditions to its exercise.\footnote{119}

The difficulties thus confronting the local entity are not equally applicable to the state. There is no question about the authority of the state to adopt legislation when the issue is presented in the context of cable. Where a municipality has the authority under state law to regulate cable as a public utility (see notes 119 and 123 infra and accompanying text), which authority must in any event be exercised in a reasonable and nonconscriptatory manner (see note 123 infra and accompanying text), the Constitution does not compel the conclusion that the municipality, by once awarding a franchise, has abdicated its regulatory power over the cable system and bound the local public to the terms of the franchise (and the absence of other terms) for whatever number of years the document specifies. It does not compel the conclusion that no matter how inadequate or harmful the franchise terms may be, no matter how thoughtless or slipshod the process by which the franchise was drafted and awarded, the municipality may not adopt legislation to regulate the system in ways inconsistent with the franchise terms. Given the crucial role the cable system may come to play in the community and given its monopoly status (see note 108 supra), regulation of this vital communications facility should fall within a modern concept of the police power, and hence should be beyond the capability of the local government to bargain or give away. Even in the 1914 \textit{Goldsboro} case, supra, while the ordinance in question was designed to protect the public safety with respect to the railroad's right of way down the main street of the town, the language of the Supreme Court was broad enough to encompass the interest of the public today (and in the future) in the services provided by the local cable system:

For it is settled that neither the "contract" clause nor the "due process" clause has the effect of overriding the power of the State to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property rights are held subject even to its fair exercise.

\textit{Atlantic Coast Line R.R. v. Goldsboro}, 232 U.S. 548, 558 (1914). \textit{See} 12 \textit{McQuillen}, supra note 3, at 170 (suggesting a governmental-proprietorial distinction as the test of the municipality's power); 3 \textit{Antieau}, supra note 3, at 561-62. As a matter of theory, moreover, since the constitutional guarantees are equally applicable to the state and local governments, it is difficult to see why the more expansive authority the courts have recognized in state governments with respect to public utility regulation overriding the terms of local franchises, \textit{see} note 125 infra and accompanying text, should not be accorded to local governments when the state has delegated to them the power to regulate public utilities. \textit{See} the discussion in note 125 infra.

119 "It is basic law that a municipal corporation must have the power before it can regulate public utilities. This is by no means an inherent power of municipalities. Municipal power to regulate utilities must be expressly granted or necessarily implied. . . ." 3 \textit{Antieau}, supra note 3, at 570. "Almost everywhere today control of services by public utilities has become the concern of state commissions. . . . Clearly the trend is away from municipal control of service to state supervision. . . ." \textit{Id.} at 576; \textit{see also id.} at 589. \textit{See} City of Detroit v. Public Utilities Commission, 288 Mich. 287, 296 N.W. 368, 375 (1939) ("Municipal corporations can establish rates by contract and franchise but they have no legislative power to fix charges to be made by public utility companies. The primary authority to fix such rates is in the legislature"); City of Chicago v. Chicago & N.W. Ry., 4 Ill. 2d 307, 122 N.E. 2d 553 (1954); In re Public Serv. Elec. and Gas Co., 35 N.J. 358, 173 A.2d 233 (1961); People v. Mountain States T. & T. Co., 125 Colo. 167, 243 P.2d 397 (1952); Ohmes v. General Tel. Co., 384 S.W.2d 796 (Tex. Civ. App. 1964); Noble v. Noblesville Gas Co., 157 Ind. 162, 60 N.E. 1032 (1901); 12 \textit{McQuillen}, supra note 3, at 209-10, 303. \textit{See} note 3 supra.

The Supreme Court of Kansas has recently held a local government without authority to regulate a cable-television system even through the franchise method. Community Antenna TV of Wichita, Inc. v. City of Wichita, 471 P.2d 360 (Kans. 1970). The court declared, "we find nothing in the business of a CATV system which would reflect on public health or morals" (\textit{Id.} at 364), and "[w]e do not believe that the requirements and provisions in the ordinance herebefore summarized have any rational relationship to the use and rightful regulation of the city streets." \textit{Id.} at 365. The case seems questionable, however, at least because the court assumed, on the basis of the parties' agreement, that cable television service "is a commercial enterprise of nonpublic utility character." \textit{Id.} at 364. \textit{Compare} note 371 infra.
regulating cable as a public utility.\textsuperscript{120} Not only would state regulation of cable be in accord with the prevailing allocation of regulatory control over public utilities, but the powers of the state agency selected or created for the task would be expected to include some form of authority over subscriber rates.\textsuperscript{121} Such authority, often denied to local governments by state law,\textsuperscript{122} would enable the agency to raise the rates, if necessary, to compensate for the cost of new obligations it imposed on the cable operator, thereby assuring that the obligations would not be confiscatory.\textsuperscript{123} The state's position is also less vulnerable than the municipality's to the constitutional objections based on the contract clause. While the state is of course subject to that inhibition,\textsuperscript{124} the cases in fact take a more expansive view of the police power when state legislation is at issue than they do when a municipal ordinance is being challenged, and they thus commonly uphold state public utility regulation which supersedes the terms of municipal franchises.\textsuperscript{125}

\textsuperscript{120} See TV Pix, Inc. v. Taylor, 304 F. Supp. 459 (D. Nev. 1968) (three-judge court), aff'd mem., 396 U.S. 556 (1970); Connecticut Television, Inc. v. Public Utilities Commission, 17 F.2d 601, 602-03 (2d 1926) (aff'd on reh'g en banc, 19 F.2d 561 (2d 1927)); State of Missouri v. Public Service Commission, 275 Mo. 201, 204 S.W. 497 (1918), the state commission ruling prevails over the municipal provision even when the franchise was entered into previous to the creation of the state commission,

\textsuperscript{121} See Chicago & A. R.R. v. Tranbarger, 238 U.S. 67, 77 (1915) (“it is settled that the police power embraces regulations designed to promote the public convenience or the general welfare and prosperity, as well as those in the interest of the public health, morals or safety”); Southern Utilities Co. v. City of Palatka, 268 U.S. 232 (1925) (“the unfettered power of the legislature to regulate the rates,” “... the fact that the contract might be overruled by a higher power”); Delony v. Rucker, 302 S.W.2d 287, 290 (Ark. 1957) (“an agreement fixing public utility rates to be charged in the future is subject to the sovereign's reserved power of rate regulation and must yield to the exercise of that power”); accord, City of New Haven v. New Haven W. Co., 132 Conn. 496, 45 A.2d (1946); Salt Lake City v. Utah L. & T. Co., 52 Utah 210, 173 P. 556, 559 (1918); 3 Anteau, supra note 3, at 562-63, 569-70. See id. at 569: “It has accordingly been held quite consistently that a state commission ruling prevails over the municipal provision even when the franchise was entered into previous to the creation of the state commission,”

\textsuperscript{122} See authorities cited in note 119 supra.

\textsuperscript{123} Compare Midwest Video Corp. v. United States, 441 F.2d 1322 (8th Cir. 1971), cert. granted, 40 U.S.L.W. 3314 (Jan. 11, 1972) (see text at notes 580-84 infra); New York REPORT, supra note 19, at 197 (see text at note 390 infra); State ex rel. Sedalia v. Public Service Commission, 275 Mo. 201, 204 S.W. 497 (1918) (see note 125 infra).


\textsuperscript{125} See Chicago & A. R.R. v. Tranbarger, 238 U.S. 67, 77 (1915) (“it is settled that the police power embraces regulations designed to promote the public convenience or the general welfare and prosperity, as well as those in the interest of the public health, morals or safety”); Southern Utilities Co. v. City of Palatka, 268 U.S. 232 (1925) (“the unfettered power of the legislature to regulate the rates,” “... the fact that the contract might be overruled by a higher power”); Delony v. Rucker, 302 S.W.2d 287, 290 (Ark. 1957) (“an agreement fixing public utility rates to be charged in the future is subject to the sovereign's reserved power of rate regulation and must yield to the exercise of that power”); accord, City of New Haven v. New Haven W. Co., 132 Conn. 496, 45 A.2d (1946); Salt Lake City v. Utah L. & T. Co., 52 Utah 210, 173 P. 556, 559 (1918); 3 Anteau, supra note 3, at 562-63, 569-70. See id. at 569: “It has accordingly been held quite consistently that a state commission ruling prevails over the municipal provision even when the franchise was entered into previous to the creation of the state commission,”

\textsuperscript{126} See authorities cited in note 119 supra.
Hence it appears that a state government does have legal power, the constitutional provision notwithstanding, to establish for cable a regulatory scheme unfettered by the terms of existing franchises, as Massachusetts has done. It also appears likely that a municipality's power in this respect will be held to be more limited. Apart from considerations of legal power, moreover, it would seem as a practical matter that local governments, having granted the outstanding franchises, are less likely to attempt remedial action to modify the franchise terms than an agency at another level of government would be. In sum, the public interest in establishing a scheme of cable regulation capable of correcting the deficiencies in existing franchises argues against retention of strictly local control over the local incidents of cable, and calls for intervention by the state or the federal government, or both.

D. State Versus Federal Intervention

Thus there are basic institutional reasons why the present system of local regulation has failed and why there is a need for intervention by another level of government. But it does not automatically follow that the state should intervene. The task could be assumed by the federal government. The FCC is involved in cable regulation anyway, since cable systems carry broadcast signals, and (assuming it has the legal power) it could license cable systems in plenary fashion just as it licenses radio and television stations. But there are strong reasons for preferring some role for the state. The decisions to be made in franchising a cable system and regulating its nonbroadcast operations are, after all, matters of primarily local impact. The cable system will be in many respects a peculiarly local facility; many of its most promising public benefits arise from its unique capacity to make the television medium available at the community and even the neighborhood level, to provide a vehicle for participation, communication, and interaction for the members of the community it serves. Accepting with it, by virtue of its statewide application, a warranty of broadly based public necessity that local regulation may be thought to lack. A legislative decision by the state to regulate a business as a public utility, when it impinges on the terms of a franchise contract, may well appear to have this effect only “collaterally and incidentally,” within the language of the Continental Illinois Nat'l Bank case quoted in note 116 supra (294 U.S. at 680); it may appear to operate in the manner of a force majeure, as suggested by the language of Justice Holmes in the City of Palatka case, supra (268 U.S. at 232). Regulatory legislation by the local government, on the other hand, is likely to apply only to a single company, and thus to appear more “direct and independent” in its impact on the contract. It emanates, moreover, from the very government that granted to the company the franchise that the legislation now purports to override. In these circumstances it seems natural for the courts to examine the local measure more rigorously than they would the same regulation emanating from the state. Nonetheless, it does not appear that any substantive difference in the applicable legal standards is justified. This is particularly so with respect to cable television, where the existing franchises were so commonly born of ignorance, inadvertence, and improvidence, where the medium changes so rapidly, and where the public interest in reforming the franchise terms is so compelling. When local governments adopt legislation to shape their outstanding cable franchises and regulate their cable systems in reasonable ways consistent with the public interest, such measures should not be held unconstitutional.

126 See note 2 supra and accompanying text.
127 “But cable television differs from radio in its heydey, and from present-day conventional television, in that much of it is an intensely local activity . . . . Much of its channel use (although not necessarily the same proportion of its audience) will be at the municipal and even the neighborhood level. If it is to be fully responsive to local needs, there must be a
the need for nonlocal intervention in cable regulation, the intervening agency should be as close to the local level, as familiar with the community served by the cable system, as possible. A state agency, for all its faults, seems likely to be more attuned to local considerations, more responsive to local needs, and more efficient in handling them, than the remote, overburdened, and slow-moving FCC. The FCC has recognized as much. Testifying before the Senate Communications Subcommittee in June 1971, for example, Chairman Dean Burch stated:

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

While the position thus taken leaves open the choice between “a state or municipal agency,” the inadequacies of the municipal agencies are established. Recognition of the FCC’s remoteness, unfamiliarity with local conditions, and inability to involve itself in regulation at the local level thus points to the conclusion that, as between the state and the federal government, the necessary close involvement should be by the state. Hence I would conclude that the states should take a role in regulating cable. The conclusion may be altered, however, and the need for a state role obviated, by the prospect that the FCC, through its intended new rules, will be taking a role in the local regulation of cable after all. I turn now to consider the local aspects of the new FCC rules.

II. The Intended New Rules of the FCC: Their Soundness as Regulatory Policy and Their Impact on the Need for State Regulation

The tentative conclusion in favor of state regulation requires reevaluation in the light of the new federal regulatory scheme for cable unveiled by the FCC.
in its August 5 Letter of Intent.\(^{130}\) As noted earlier, there are possibilities of congressional or judicial intervention, arising mainly from the distant-signal issue, that may prevent or delay the realization of the FCC's intended rules.\(^{131}\) But soon the distant-signal issue will be settled, either by the Commission or the Congress, and at that time the local aspects of the intended rules, which have not attracted substantial opposition, will presumably be adopted as well. To be sure, these provisions provide their own ground for judicial intervention, since there is a substantial question, to be discussed shortly, whether the FCC has authority to regulate the local incidents of cable as it proposes to do.\(^{132}\) But that question will apparently be settled by the Supreme Court in the very near future,\(^{133}\) and even if the Court decides against the FCC, Congress may then confer the needed authority. In sum, the Letter of Intent is something to reckon with so far as the future regulation of cable is concerned.

The program set forth in the intended rules embodies a substantial federal presence in cable at the local level. It goes well beyond the carriage of broadcast signals and well into the local incidents of the medium. It warrants evaluation on its merits as an exercise of regulatory policy with respect to the local incidents of cable. Beyond that, the intended rules are designed to remedy a number of the same failures of local franchising that have been deemed to establish the need for state regulation. The interposition of these rules might therefore render state regulation unnecessary or confusing, and in any event it might affect the form state regulation should take. In the following pages, accordingly, I shall first summarize the chief local provisions of the intended rules, using for the purpose not only the Letter of Intent, which is often opaque, but a December 1971 draft of the new rules prepared by the FCC's staff for circulation within the Commission (which I shall call the Staff Draft).\(^{134}\) I shall next examine the FCC's authority to adopt these provisions and then offer some analysis and comment on their substance, and then I shall consider where they leave the case for state regulation.

A. The Rules Summarized

1. Nonbroadcast Channels and “Access”

a. Providing channels. Two parts of the intended rules are relevant here, and the distinction between them is significant. The FCC deals first with “Nonbroadcast Channels (Access)” and then, separately, with “Federal-State/Local Relationships.”\(^{135}\) As the first rule in the “access” part, the Commission will re-

\(^{130}\) See notes 23 and 26 supra and accompanying text.
\(^{131}\) See notes 25-27 supra and accompanying text.
\(^{132}\) See text at notes 178-268 infra.
\(^{133}\) See text at notes 178-88 infra.
\(^{134}\) Hereinafter cited as Staff Draft; this Draft was not significantly different in its pertinent provisions from the eventual Cable Television Report and Order, supra note 26. The differences will be noted in footnotes as the discussion proceeds.
\(^{135}\) FCC Letter of Intent, supra note 5, at 1780; Cable Television Report and Order, supra note 26, at 1557-65, \(\|\) 117-48, 1572-79, \(\|\) 171-88.
quire all new cable systems constructed in the top 100 markets\textsuperscript{136} to have a minimum channel capacity, actual or potential, of twenty channels.\textsuperscript{137} It will require them to have the technical capacity for two-way communications, embodying a non-voice return.\textsuperscript{138} Next, there will be a rule that for each channel carrying a broadcast signal, the system must provide an equivalent channel for nonbroadcast uses.\textsuperscript{139} The amount of channel capacity available for nonbroadcast uses will also be affected by an expansion requirement, to be noted presently.

Further rules will govern the uses of the nonbroadcast channels thus mandated. The FCC "will require that there be one free, dedicated, non-commercial, public access channel available at all times on a non-discriminatory basis."\textsuperscript{140} A second channel must be set aside for use by local educational authorities and a third for use by local government, also on a free basis for at least five years.\textsuperscript{141} Because the Commission does "not want the free uses described above to constitute an unreasonable economic burden on cable system operators and subscribers," only the use of the three channels need be free, and "production costs . . . may be charged to users," except that on the public-access channel there shall be no production charge for "brief live studio presentations not exceeding five minutes in duration."\textsuperscript{142} After providing the three free channels, the cable operator, according to the Letter of Intent, "may make available for leased uses" any or all of the remaining nonbroadcast channels, and also the three dedicated channels when they are not in use for their dedicated purpose.\textsuperscript{143} The quoted language seemed critically deficient in that the cable operator would not be required to make any channel space available for leasing, but the Staff Draft remedies this, stating that " . . . such system shall offer other portions of its non-broadcast band-width, including unused portions of the specially designated channels, for leased access services."\textsuperscript{144} Expansion of the channel capacity for the various "access" uses (the three dedicated uses, plus leasing) will be governed by what the FCC calls its "N plus 1" formula. How this will work is un-

\textsuperscript{136} On the applicability of this and other requirements to existing cable systems, and to systems in markets below the top 100, see text accompanying notes 160-63 infra.

\textsuperscript{137} FCC Letter of Intent, supra note 5, at 1772; Cable Television Report and Order, supra note 26, at 1557, \textsuperscript{138} FCC Letter of Intent, supra note 5, at 1773-74; Cable Television Report and Order, supra note 26, at 1560, \textsuperscript{140} FCC Letter of Intent, supra note 5, at 1772; Cable Television Report and Order, supra note 26, at 1558, \textsuperscript{141} FCC Letter of Intent, supra note 5, at 1772; Cable Television Report and Order, supra note 26, at 1556, \textsuperscript{142} FCC Letter of Intent, supra note 5, at 1772; Cable Television Report and Order, supra note 26, at 1559, \textsuperscript{143} FCC Letter of Intent, supra note 5, at 1772; Cable Television Report and Order, supra note 26, at 1558, \textsuperscript{144} Staff Draft, note 134 supra. This is the language of the final rule, 47 C.F.R. \textsuperscript{76.251(a)}(1).
clear from the Letter of Intent, but the Staff Draft is again helpful. As there set forth, the rule will be that whenever all the channels assigned to the three dedicated purposes or used for leasing are in consistent use for 80 percent of the time over a sustained period, the system will be required, within a period of six months, to make an additional channel available "for any or all" of these purposes. The Staff Draft adds the significant qualification, however, that only a single public-access channel must be made available free — that on any additional public-access channels there may be a charge not only for production costs but for the use of the channel itself. Thus no matter how great the demand for free public access, only one such channel need be made available; and, as will be seen, the local or state government may not require more.

b. Regulating channel use. The FCC next turns to the question of regulating the use of the access channels, and it now becomes clear why these channels are considered separately from the subject of state or local regulation. Regulation of these channels, the FCC says, "is properly the concern of this Commission," and it continues:

Federal regulation is thus clearly called for. The issue is whether also to permit local regulation of these channels, if not inconsistent with federal purposes. We think that in this area this dual form of regulation would be confusing and impracticable.

... Thus, we believe that, except for the government channel, local regulation of access channels carrying programming is precluded, at least at this time. ...

In a further asserted preemption of local or state regulation, the FCC states: "Similarly, aside from channels for governmental uses, we do not believe that local entities should be permitted to require that other channels be assigned for particular uses." The FCC will, however, consider authorizing arrangements

145 See FCC Letter of Intent, supra note 5, at 1773. In particular, one cannot tell to which channels the formula will apply.

146 Specifically, during 80 percent of the weekdays for 80 percent of the time during any consecutive three-hour period for six consecutive weeks. Id. at 1773; Cable Television Report and Order, supra note 26, at 1560, ¶ 126; 47 C.F.R. § 76.251(a)(8).

147 Staff Draft, note 134 supra; 47 C.F.R. § 76.251(a)(8). It should be recalled that the cable operator will be required to make some channel space available for leasing, "including unused portions of the specially designated channels." See text accompanying note 143 supra. This presumably means that lessees will have second call on those channels, after the dedicated uses, and thus that the demand for leased channels will be capable, barring obstruction by the cable operator, of pushing the "occupancy rate" up to 80 percent for the entire pool of access channels and thus requiring the cable operator to add another channel to the pool.

148 One of the public access channels ... shall always be made available without charge, except that production costs may be assessed for live studio presentations exceeding five minutes. Such production costs and any fees for use of other public access channels shall be consistent with the goal of affording the public a low-cost means of television access.

Staff Draft, note 134 supra. This is also the language of the rule, 47 C.F.R. § 76.251(a)(10)(ii). The Report and Order conceals the point. It states, for example, that the expansion requirement "should encourage use of the system with the knowledge that channel space will always be available" (Cable Television Report and Order, supra note 26, at 1560, ¶ 126), but does not state that there will be no expansion of the free channel space.

149 FCC Letter of Intent, supra note 5, at 1774; Cable Television Report and Order, supra note 26, at 1561, ¶ 131; 47 C.F.R. § 76.251(a)(11)(iv).

150 FCC Letter of Intent, supra note 5, at 1774; Cable Television Report and Order, supra note 26, at 1561, ¶ 132; 47 C.F.R. § 76.251(a)(11)(iv).
providing for additional dedicated or access channels where both the cable operator and the franchising authority so request, and it will also "permit existing systems to continue operating under more 'generous' specifications than those described in this section."\footnote{152}

Having thus asserted exclusive regulatory authority over the access channels, the FCC finds that "[t]he question of what regulations we should impose at this time is a most difficult one."\footnote{153} It decides to leave the formulation of specific regulations to the cable operators themselves, subject to the principle of nondiscriminatory access on a first-come, first-served basis, and with a prohibition on censorship or program control by the cable operator.\footnote{154} The FCC does stipulate, however, that the public-access channels may not carry "any advertising material (including political advertising spots),"\footnote{155} and that "on at least one of the leased channels, priority shall be given part-time users."\footnote{156} So far as studios and production facilities are concerned, the FCC "... expect[s] that many cable systems will have facilities with which to originate [their own] programming, and such facilities should also be available to produce program material for public access"; in any event, the Commission "will require that the cable operator maintain at least minimal production facilities for public use within the franchise area."\footnote{157}

The foregoing "access rules" will apply to all new cable systems that become operational in the top 100 markets. Systems already operating in those markets will be required to comply with the rules within five years.\footnote{158} With re-

\footnote{151} Where the cable operator and the franchising authority seek to experiment by providing additional channel capacity for such purposes as public access, educational, and governmental — on a free basis or at reduced charges — we will entertain petitions and consider the appropriateness of authorizing such experiments, to gain further data and insight and to guide future courses of action.

\footnote{152} FFC LETTER OF INTENT, supra note 5, at 1774-75; CABLE TELEVISION REPORT AND ORDER, supra note 26, at 1561, \$ 132.

\footnote{153} FFC LETTER OF INTENT, supra note 5, at 1775. As the rule reads: Except on specific authorization, or with respect to the operation of the local government access channel, no local entity shall prescribe any other rules concerning the number or manner of operation of access channels; however, franchise specifications concerning the number of such channels for systems in operation prior to March 31, 1972, shall continue in effect.

\footnote{154} 47 C.F.R. \$ 76.251(a)(11)(iv).

\footnote{155} FFC LETTER OF INTENT, supra note 5, at 1775.

\footnote{156} Ibid.; CABLE TELEVISION REPORT AND ORDER, supra note 26, at 1562, \$\$ 134-38; 47 C.F.R. \$ 76.251(a)(11)(i).

\footnote{157} FFC LETTER OF INTENT, supra note 5, at 1775. The Staff Draft, no doubt concerned about the problem of defining a "spot," went further and proscribed "political advertisements" generally. The Report and Order, no doubt concerned about the problem of defining "political advertisements," has limited the political prohibition to "advertising by or on behalf of candidates for public office." CABLE TELEVISION REPORT AND ORDER, supra note 26, at 1562, \$\$ 135; 47 C.F.R. \$ 76.251(a)(11)(i). Also proscribed are lottery information and "obscene or indecent matter." Ibid.

\footnote{158} The language is from the Staff Draft. The Letter of Intent "contemplates" the same thing. Supra note 5, at 1775. The rules adopt the Draft's requirement. CABLE TELEVISION REPORT AND ORDER, supra note 26, at 1560, \$ 126; 47 C.F.R. \$ 76.251(a)(7).

\footnote{159} FFC LETTER OF INTENT, supra note 5, at 1777. The Staff Draft puts this requirement in terms of only a single public-access channel: "The system shall maintain and have available for public use at least the minimal equipment and facilities necessary for the production of programming for such a channel." The rule reads the same way, 47 C.F.R. \$ 76.251(a)(4), and the Report and Order similarly states, "we are requiring that the cable operator maintain within the franchise area production facilities for use on the public access channel." CABLE TELEVISION REPORT AND ORDER, supra note 26, at 1564, \$ 142. See note 148 supra and accompanying text.

\footnote{150} FFC LETTER OF INTENT, supra note 5, at 1778; CABLE TELEVISION REPORT AND ORDER, supra note 26, at 1565, \$ 147; 47 C.F.R. \$ 76.251(c).
spect to existing systems in markets below the top 100, the Letter of Intent says they will have to comply “when and as the system is substantially rebuilt,” while the Staff Draft suggests that they, too, will have to comply within five years. Neither the Letter of Intent nor the Draft says anything about the applicability of the rules to new systems in markets below the top 100, but it seems more than likely, given the coverage of existing systems in those markets after five years, that new ones will be covered from the time they start. Finally, going at least part way toward filling a large gap in the Letter of Intent, the Draft states that if existing cable systems (apparently in any market) begin to provide any of the “access services” required by the rules at a date prior to the end of the five-year grace period, they must immediately offer those services in compliance with the provisions requiring nondiscriminatory access, no program control by the cable operator, no regulation of the access channels by local or state governments, and the like.

2. FEDERAL-STATE/LOCAL RELATIONSHIPS

With questions involving the provision, use, and regulation of the nonbroadcast channels thus placed on a shelf marked “exclusively federal,” the FCC moves on to consider “Federal-State/Local Relationships.” Here the Commission “will leave a number of areas to local regulation”—with “local” meaning “state or municipal,” a choice on which the FCC stays neutral—but will seek “to insure efficient nationwide communications service with adequate facilities at

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159 FCC LETTER OF INTENT, supra note 5, at 1778.
160 “Systems which commenced operations prior to March 1, 1972 shall comply on or before March 1, 1977...” STAFF DRAFT, note 134 supra. In the final rules the FCC has retreated, disavowing any access requirements “at this time” for systems in markets below the top 100. The distinction is based, in part, on what seems a questionable assumption about a greater need for access to television in the larger markets:

[W]e focus here on the top 100 markets because we have selected these markets as the recipients of certain benefits in order to stimulate cable growth. But, correspondingly, that growth should be accompanied by access obligations if the public is to receive the full benefits of this program. Further, cities in the top 100 markets have, as a general rule, more diverse minority groups (ethnic, racial, economic, or age) who are most greatly in need of both an opportunity to express their views and a more efficient method by which they can be apprised of governmental actions and educational opportunities. . . .

... While we encourage systems in markets below the top 100 to provide access channels, we are not at this time requiring them to do so. We will permit local franchising authorities in such areas to require systems to provide access service, but to no greater extent than we have specified for systems in the top markets. In that event, our access rules would be applicable.

CABLE TELEVISION REPORT AND ORDER, supra note 26, at 1565, ¶¶ 147-48; 47 C.F.R. §§ 76.13(c)(4); 76.251(a).
161 See FCC LETTER OF INTENT, supra note 5, at 1772.
162 The final rules do not support this prediction. See note 160 supra.
163 The final rules are in accord. See note 160 supra; 47 C.F.R. § 76.251(b): “If a system carries any access programming, it shall comply with paragraphs (a)(9), (10), and (11) of this section.” (The cited paragraphs require free channels for public access and governmental and educational use, prohibit program content control by the cable operator, set forth the principle of nondiscriminatory access on a first-come, first-served basis, and prohibit regulation of the access channels by state or local governments; it is unclear whether the requirement of channel leasing will also be applicable to all cable systems once they carry any access programming. See 47 C.F.R. §§ 76.251(b), (a)(7), (a)(11)(3). The question ought to be answered in the affirmative, at least with respect to unused time on the channels that are provided for access uses.
reasonable charges . . . by specifying minimum requirements in the local franchising process.\textsuperscript{164} And these "minimum requirements" are designed to respond, with varying degrees of decisiveness, to the same deficiencies in the local franchising process that have been noted here as creating a need for state regulation.

At the start, the subject of franchising procedures calls forth one of the Commission's least aggressive proposals. Every new cable system will be required to file with the FCC a copy of its franchise "and a certificate showing that the franchising authority in a public proceeding has considered the system operator's legal and financial qualifications, and the adequacy and feasibility of his construction arrangements."\textsuperscript{6} (Among the things this does not say, of course, is that the "public proceeding" must have been open to competing applicants as well.)\textsuperscript{166} The Commission imposes no requirements on the franchise-selection process, but does make a "strong suggestion":

While we are not at this time instituting rules concerning the franchise selection process, we do strongly suggest that the local franchising authority require a public invitation to all who might want to compete for a local franchise, that all bids be placed on public file and reasonable public notice be given, that a public hearing be held to afford all interested persons an opportunity to testify on the merits or demerits of the various applicants, and finally that the franchising authority release a public report setting forth the basis for its action.\textsuperscript{167}

On the substantive elements of franchising the Commission is less reticent. In response to the problem of "no shows" and delays in construction, it "will require that the local franchising authority set reasonable deadlines for construction and operation of systems to ensure that franchises do not lie fallow or become the object of trafficking," and it specifies that the franchisee must undertake significant construction within one year and thereafter must extend the cable to a substantial percentage of the franchise area each year.\textsuperscript{168} On franchise dura-

\textsuperscript{164} FCC Letter of Intent, supra note 5, at 1780; Cable Television Report and Order, supra note 26, at 1575, ¶ 177.
\textsuperscript{165} FCC Letter of Intent, supra note 5, at 1780; Cable Television Report and Order, supra note 26, at 1575-76, ¶ 178; 47 C.F.R. § 76.31(a)(1).
\textsuperscript{166} Nor does it define "public proceeding"; the Staff Draft escalates the term to "full public proceeding" but still does not define it — as, for example, a proceeding at which any interested person may be heard. But cf. note 167 infra.
\textsuperscript{167} FCC Letter of Intent, supra note 5, at 1780 n.4. As befits a mere suggestion, no trace of this is included in the rules as drafted by the staff. The Report and Order escalates the suggestion to an expectation:

We expect that franchising authorities will publicly invite applications, that all applications will be placed on public file, that notice of such filings will be given, that where appropriate a public hearing will be held to afford all interested persons an opportunity to testify on the qualifications of the applicants, and that the franchising authority will issue a public report setting forth the basis for its action. Such public participation in the franchising process is necessary to assure that the needs and desires of all segments of the community are carefully considered.

\textsuperscript{168} FCC Letter of Intent, supra note 5, at 1781; Cable Television Report and Order, supra note 26, at 1576, ¶ 181; 47 C.F.R. § 76.31(a)(2). The percentage is left to be determined by the franchising authority, but the FCC advances as a guideline "at least 20
tion, the Commission "will require the franchising authority to place a reasonable limit on the duration of the franchise, and its renewal." The Commission adds:

... We think that, generally speaking, a franchise should not exceed 15 years, with a reasonable renewal period. The economics of cable operation would appear to allow for amortization of initial investment over a 15-year period, and efficient operators can reasonably expect their franchises to be renewed. In short, while we will set out the 15-year period as a general guide, we recognize that the local franchising authority may decide to vary the period based on particular circumstances. For example, an applicant proposing to wire inner-city areas free or at reduced rates might be given a longer franchise.

The rules as drafted by the staff say nothing about 15 years—only that "[t]he initial franchise period and any renewal franchise period shall be of reasonable duration." Turning to subscriber rates, the FCC "will require that the franchising or other governmental authority specify or approve initial subscriber rates for services furnished by the franchisee; that a program be instituted for the review and, as necessary, adjustment of such rates; and that reasonable notice be given to the public of all proposed rate changes with the right of affected members of the public to be heard." On service standards, "the franchising authority must have a program to ensure quality of service and to review service complaints." On franchise fees, the FCC notes that many local authorities have unfortunately exacted excessive fees and expresses the view that "generally franchise fees should run between three and five percent [of gross receipts annually] as a maximum ...." Rather than impose a specific ceiling for all cases, however, the Commission will require that when the fee is in excess of three percent, both the franchising authority and the franchisee will have to justify it.

percent of the franchise area per year" (CABLE TELEVISION REPORT AND ORDER, supra note 26, at 1576, ¶ 181); the rules, however, simply adopt the "substantial percentage" language. 47 C.F.R. § 76.31(a)(2).

169 FCC LETTER OF INTENT, supra note 5, at 1781.

170 Id. at 1781-82.

171 The Report and Order follows the Letter of Intent, see text at note 170 supra, in stating, "We believe that in most cases a franchise should not exceed 15 years and that renewal periods [should] be of reasonable duration," and notes also that "there is some support for franchise periods of less than 15 years." CABLE TELEVISION REPORT AND ORDER, supra note 26, at 1577, ¶ 182; see note 84 supra. The rules, however, simply incorporate the "reasonable duration" language of the Draft as quoted in the text. 47 C.F.R. § 76.31(a)(3). See text at notes 273-79 infra.

172 FCC LETTER OF INTENT, supra note 5, at 1782; CABLE TELEVISION REPORT AND ORDER, supra note 26, at 1577, ¶ 183; 47 C.F.R. § 76.31(a)(4) ("No changes in rates charged to subscribers shall be made except as authorized by the franchising authority after an appropriate public proceeding affording due process").

173 FCC LETTER OF INTENT, supra note 5, at 1789; CABLE TELEVISION REPORT AND ORDER, supra note 26, at 1577, ¶ 184; 47 C.F.R. § 76.31(a)(5).

174 FCC LETTER OF INTENT, supra note 5, at 1782; CABLE TELEVISION REPORT AND ORDER, supra note 26, at 1578, ¶ 185; see text at notes 55-60 supra.

175 FCC LETTER OF INTENT, supra note 5, at 1783; CABLE TELEVISION REPORT AND ORDER, supra note 26, at 1578, ¶ 186.

176 But when the fee is in excess of three percent (including all forms of consideration, such as initial lump sum payments), the franchising authority shall submit a showing of the appropriateness of the fee specified, particularly in light of the planned local
specifying minimum franchise requirements will be applicable, apparently, to all new cable systems, and existing systems will be required to certify that their franchises comply with the rules within five years after adoption of the rules or upon renewal of the franchise, whichever occurs first.177

B. The Rules Appraised

1. The Jurisdictional Question

Before weighing the FCC's intended rules on the scale of communications policy, there is a substantial legal question, a variant of which is now pending in the Supreme Court on grant of certiorari, respecting the Commission's authority to adopt such rules. In United States v. Southwestern Cable Co.,178 the Court upheld the first generation of FCC rules regulating cable television. These were rules requiring cable systems to carry the signals of local television stations, forbidding them from duplicating the programs of those stations for a specified period before and after the local broadcast, and forbidding them from importing distant signals into the top 100 markets until the Commission determined whether and on what conditions this should be allowed.179 The Commission justified all three rules as necessary to protect television broadcast service from the destructive threat of an unregulated cable industry.180 The Supreme Court, in upholding the Commission's authority to adopt the rules, limited its approval to rules "reasonably ancillary to . . . the regulation of television broadcasting," expressly leaving open the question whether the FCC's authority to regulate cable television goes further than that:

There is no need here to determine in detail the limits of the Commission's authority to regulate CATV. It is enough to emphasize that the authority which we recognize today under § 152 (a) is restricted to that reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting. . . . We express no views as to the Commission's authority, if any, to regulate CATV under any other circumstances or for any other purposes.181

The FCC subsequently adopted a rule requiring the largest cable systems—those

 regulatory program. The franchisee shall also set forth a showing that the fee specified does not interfere with achievement of his responsibilities as defined in relevant Commission rules and documents . . .

FCC LETTER OF INTENT, supra note 5, at 1783; CABLE TELEVISION REPORT AND ORDER, supra note 26, at 1578, § 186; 47 C.F.R. § 76.31(b); see note 276 infra.

177 FCC LETTER OF INTENT, supra note 5, at 1782. The Report and Order and the rules confirm this conclusion; they indicate that the franchise requirements, unlike the "access" requirements (see notes 160-62 supra), are applicable to cable systems in all markets. See CABLE TELEVISION REPORT AND ORDER, supra note 26, at 1575-78, ¶¶ 177-87; 47 C.F.R. § 76.31.


179 Id. at 165-67; see Second Report and Order on CATV, 2 F.C.C.2d 725 (1966);

Barnett, supra note 1, at 231-32; note 25 supra.


181 Id. at 178.
with 3500 or more subscribers—to engage in program origination. The rule was duly challenged, and in *Midwest Video Corp. v. United States* the Court of Appeals for the Eighth Circuit struck it down. The court said the rule went beyond the regulatory authority upheld in *Southwestern Cable*, might well be confiscatory, and was not supported by substantial evidence that it would further the public interest. In January 1972, the Supreme Court granted the Government’s petition for certiorari to review the Eighth Circuit’s decision; the case is expected to be argued and decided during the Court’s present Term.

While the rules announced in the Letter of Intent are not themselves involved in the *Midwest Video* case, they raise essentially the same questions with respect to the FCC’s authority to regulate the local incidents of cable, and it seems likely that the forthcoming decision will settle the question of the Commission’s power to adopt the intended rules. It is therefore appropriate to consider the jurisdictional question thus presented.

In doing so it will be useful to appraise the legal arguments as they apply not only to the compulsory-origination rule involved in *Midwest Video* but also to the intended new rules for nonbroadcast channels and other local incidents of cable. These rules, collectively, are a good deal more significant than the origination requirement. Further, that requirement would have the effect of compelling cable operators “to engage in the entirely new and different business of originating programs” and it thus raises an issue, at least in the view of the Eighth Circuit, of being confiscatory. The confiscation argument, a major pillar of

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182 Citing “the great potential of the cable technology to further the achievement of long-established regulatory goals in the field of television broadcasting by increasing the number of outlets for community self-expression and augmenting the public’s choice of programs and types of services . . . ,” the Commission declared that a cable system with 3500 or more subscribers would be prohibited from carrying broadcast signals unless it “also operates to a significant extent as a local outlet by cablecasting and has available facilities for local production and presentation of programs other than automated services.” First Report and Order, FCC Docket No. 18397, 20 F.C.C.2d 201, 202, 223 (1969).


184 21 P & F Radio Reg. 2d at 2133.

185 “There is a distinct possibility that such requirement may force CATV operators out of business thereby making unavailable the recognized useful service performed by CATVs in areas where distance and topography impair favorable reception of television signals.” Id. at 2134.

186 “The Commission report itself shows that upon the basis of the record made, it is highly speculative whether there is sufficient expertise or information available to support a finding that the origination rule will further the public interest.” *Ibid.*


188 As the Government said in its petition for certiorari, “Indeed, the cablecasting rule is part of a comprehensive regulatory program which the Commission is developing to integrate cable television into the nation’s communications system. . . . The restrictive view of the Commission’s jurisdiction reflected in the decision below casts serious doubt on this entire program.” Petition of the United States for Certiorari at 13, Midwest Video Corp. v. United States, 40 U.S.L.W. 3314 (U.S. Jan. 4, 1972) (No. 71-506). The FCC’s final rules, *see note 26 supra*, in fact re-adopt the origination requirement struck down in *Midwest Video*; the Commission adds that “Such origination cablecasting shall be limited to one or more designated channels which may be used for no other purposes.” 47 C.F.R. § 76.201 (a); *see Cable Television Report and Order, supra* note 26, at 1558, ¶ 121.

189 Midwest Video Corp. v. United States, 441 F.2d 1322, 21 P & F Radio Reg. 2d 2128, 2133 (8th Cir. 1971); *see id.* at 2131, 2133-34; note 185 *supra.*
the Eighth Circuit's decision, may be inapplicable or less forceful with respect to other elements of the FCC's intended rules. Even as applied to the compulsory-origination rule, moreover, the argument does not seem persuasive, and hence the Eighth Circuit's broader position, based on the Supreme Court's "ancillary to broadcasting" caveat in Southwestern Cable, assumes greater importance. It is a position equally applicable to other elements of the intended rules. During the following discussion it will accordingly be helpful to have in mind a few key elements of the intended rules. Appropriate for the purpose are the rules requiring cable systems to provide "public access" and leased channels, or the rule requiring a minimum channel capacity, or, as a sample of the "franchising" rules, the presumptive three-percent ceiling on annual franchise fees. In general, however, the discussion is believed to apply to the FCC's authority to adopt the entire sweep of the intended rules.

a. The case against the FCC's authority. The problem is not without difficulty, and the argument against the FCC's authority not insubstantial. This is indicated not only by the Eighth Circuit's decision in Midwest Video but also by the unusual stance of the Solicitor General in his successful petition for certiorari. While joining the FCC in urging the importance of the case and the need for Supreme Court review, the Solicitor General took no position on the merits, stating: "The United States has not... finally determined its position with respect to all aspects of the merits of the case. The views with respect to the merits expressed in this petition are those of the Commission." The core of the argument against the FCC's authority is that the Communications Act authorizes the Commission to regulate television broadcasting, that the Supreme Court in Southwestern Cable upheld the Commission's authority to regulate cable only to the extent such regulation was "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting," and that rules such as those requiring cable systems to originate pro-

190 While the majority relied heavily but not exclusively on the point, Judge Gibson, concurring in the result, placed his whole weight on it. He took the position that "the FCC has authority over CATV systems but that the order under review is confiscatory and hence arbitrary." Id. at 2135 (Gibson, J., concurring).

191 The Court of Appeals for the Fifth Circuit, in upholding the FCC's rule prohibiting telephone companies from owning cable television systems in their service areas, described Midwest Video as based "on the grounds that such a regulation would force CATV operators into an entirely different business from that in which they are now engaged" and added, "the rejection of such potentially confiscatory rules is not tantamount to a denial of the power to regulate." General Tel. Co. of the Southwest v. United States, 22 P & F Radio Reg. 2d 2171, 2177 n.2 (5th Cir. 1971).

192 The Eighth Circuit drew in highly selective fashion on the FCC's reports justifying the rule. For example, it ignored the detailed data presented by the Commission as to the costs of cablecasting operations of varying degrees of sophistication, and it ignored the fact that 70 percent of the cable systems already engaged in program origination had fewer than 3,500 subscribers (the minimum system-size to which the compulsory-origination rule would apply). See First Report and Order, FCC Docket No. 18397, 20 F.C.C.2d 201, 209-14, 17 P & F Radio Reg. 2d 1370 (1969); see also Memorandum Opinion and Order (on petitions for reconsideration), FCC Docket No. 18397, 19 P & F Radio Reg. 2d 1766 (1970). Compare the Midwest Video opinion, 21 P & F Radio Reg. 2d at 2128.

193 Midwest Video Corp. v. United States, 21 P & F Radio Reg. 2d 2130, 2131, 2133; see text at notes 181, 184 supra.


195 United States v. Southwestern Cable Co., 392 U.S. 157, 178 (1968); see text at note 181 supra.
grams, or to make nonbroadcast channels available for public access and leasing, have nothing to do with television broadcasting.\textsuperscript{196} To be sure, the Communications Act also authorizes the FCC to regulate “wire communication,” a term that readily includes a cable system.\textsuperscript{197} But—it can be argued—the Act authorizes such regulation only with respect to “interstate and foreign communication by wire . . . ,” and “[i]nterstate communication” excludes communication between points within a single state, which is where the wires belonging to all but a very few cable systems are.\textsuperscript{198}

The argument has been made by state authorities in support of the state interest in cable regulation. The state of Illinois is participating as amicus curiae in the \textit{Midwest Video} case in the Supreme Court,\textsuperscript{199} seeking affirmance of the Eighth Circuit's decision. An assault on the FCC's claim of regulatory authority over cable's nonbroadcast channels is also made by the \textit{New York Report}. Commissioner (and Professor) Jones there declares:

\textit{... Notwithstanding FCC determinations to the contrary, it is submitted that the FCC has no legitimate interest in CATV programming except insofar as (1) the local station's signal is being carried, or (2) the viability of the local station is threatened. Congressional concern about the equitable distribution of broadcast facilities was a concern that some areas might have too few facilities, not that some areas might receive a large number of signals under circumstances not prejudicial to other areas. Similarly, control of CATV originations seems to have nothing whatever to do with broadcast regulation, except insofar as injury to the local station might result or concentration of control with broadcast media might ensue. Compulsory CATV originations and restrictions relative to equal time, fairness doctrine, sponsor identification, and lotteries, would appear to have no relation to protecting the local station and should be left to state and local control. . . .} \textsuperscript{200}

There is room also, in opposing the FCC's authority, for emphasis on the local nature of the cable system.\textsuperscript{201} The plant, wires, and operations of the system will be within the local community, and the public-access channel, at least, would be expected to be largely local in the source of its programming, as well as the purpose of its existence. The franchising provisions of the intended rules—the

\textsuperscript{196} As the Eighth Circuit put it:

It is established that cablecasting involves no use of the spectrum. Cablecasting involves a new and distinct use of electronic communication which does not utilize in any way the radio frequency spectrum of the broadcast signals regulated by the Commission. The Commission's power to adopt rules requiring cablecasting to the extent that it exists must be based on the Commission's right to adopt rules that are reasonably ancillary to its responsibilities in the broadcasting field. . . . In our view, the Commission's origination requirement goes far beyond the regulation of the use made of signals captured by CATV as authorized in Southwestern Cable Co. . . .

\textsuperscript{197} See 47 U.S.C. § 153 (a); see note 214 infra.

\textsuperscript{198} See 47 U.S.C. §§ 152(a), 153(e). Section 2 (b) of the Act further contains a proviso, applicable to common carriers (cf. note 232 infra), that “[s]ubject to the provisions of section 301 of this title, nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier . . . .” 47 U.S.C. § 152 (b).

\textsuperscript{199} See \textit{ILLINOIS PROPOSED RULES}, supra note 16, at 19.

\textsuperscript{200} \textit{NEW YORK REPORT}, supra note 19, at 219.

\textsuperscript{201} See note 127 supra and accompanying text; text at notes 374-81 infra.
franchise-fee limitation, for example—likewise can be said to be primarily local in their impact.

b. *The Southwestern Cable opinion and Section 2 of the Act.* But the case for the FCC's authority to adopt the rules seems preponderant. The Supreme Court's opinion in *Southwestern Cable* provides an appropriate starting point. Although the Eighth Circuit Court of Appeals and other students of the opinion have focused on its concluding caveat, where Justice Harlan limited the holding to regulatory authority over cable which is "reasonably ancillary to . . . the regulation of television broadcasting,"202 analysis of the opinion puts the Court's views in a different light. The discussion of the FCC's authority to regulate cable breaks down into two parts; the latter is the "ancillary to broadcasting" rationale, on which the Court ultimately rested, but in the first part of the discussion the Court took a broader ground. Relying on Section 2 (a) of the Communications Act, which states that "[t]he provisions of this chapter shall apply to all interstate and foreign communication by wire or radio," the Court noted, "[r]espondents do not suggest that CATV systems are not within the term 'communication by wire or radio,' " and declared, "[t]hese very general terms amply suffice to reach respondents' activities."203 It was argued, however, that Section 2 (a) does not independently confer regulatory authority on the Commission, but only describes the forms of communications to which the Act's more specific provisions will apply; and that since cable systems were neither common carriers within Title II of the Act nor broadcasters within Title III, they were not subject to any operative regulatory authority.204 The Court squarely rejected the argument, concluding: "We have found no reason to believe that § 152 [Section 2 of the Act] does not, as its terms suggest, confer regulatory authority over 'all interstate . . . communication by wire or radio.' "205

Of course, the holding that cable systems are within the reach of Section 2 (a)206 might remain limited, as the Court limited it for purposes of the *Southwestern Cable* case, to activities of cable systems, notably the carriage of broadcast signals, whose regulation is "reasonably ancillary" to the regulation of television broadcasting. With respect to a public-access channel for cable-originated programming, for example, the conclusion might be that the operation of such

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203 Id. at 168.
204 Id. at 171-72.
205 We cannot construe the Act so restrictively. Nothing in the language of § 152 (a), in the surrounding language, or in the Act's history or purposes limits the Commission's authority to those activities and forms of communication that are specifically described by the Act's other provisions. . . . [T]he legislative history indicates that the Commission was given "regulatory power over all forms of electrical communication . . . . [citing Senate Report]. Certainly Congress could not in 1934 have foreseen the development of community antenna television systems, but it seems to us that it was precisely because Congress wished "to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission" . . . that it conferred upon the Commission a "unified jurisdiction" [citing Senate Report] and "broad authority" [citing House Report] . . . . We have found no reason to believe that § 152 does not, as its terms suggest, confer regulatory authority over "all interstate . . . communication by wire or radio."

Id. at 172-73.
206 " . . . [W]e therefore hold that the Commission's authority over 'all interstate . . . communication by wire or radio' permits the regulation of CATV systems." Id. at 178.
a channel was not "communication by . . . radio" or interstate "communication by wire." It will be necessary to return to this question, but note may be taken here of the pertinent decision of the D. C. Circuit Court of Appeals in General Telephone Co. of California v. FCC. The court there, in an opinion by then Judge Burger, upheld the FCC's jurisdiction under Section 214 of the Communications Act over the construction by telephone companies of channel-service distribution facilities for cable-television systems. It reached this conclusion against the claim that the systems, located as they are within the boundaries of a single state, constitute intrastate communications activities, and against the specific contentions that they fall within the proviso of Section 2 (b) (1) excepting from the FCC's common carrier jurisdiction "... intrastate communication service by wire or radio of any carrier" and the proviso of Section 214 (a) excepting from the FCC's certification authority "a line within a single State unless such line constitutes part of an interstate line." In so ruling the court relied exclusively, it is true, on the function of the cable systems in carrying broadcast signals and thus becoming, notwithstanding the local scope of their own operations, "an integral part of interstate broadcast transmission." It can be argued, of course, that this rationale does not apply to the strictly non-broadcast activities of a cable system, such as public-access and leased channels. But apart from the fact (to be noted shortly) that these activities themselves may involve interstate transmission to a significant and inseparable extent, the General Telephone case indicates that a cable system, by virtue of its carriage of broadcast signals, becomes in its entirety, with respect to all its channels, a "part of an interstate line" under Section 214 (a) (1) and a facility engaged in "interstate . . . communication by wire or radio" under Section 2 (a). Since the system as a unified entity constitutes "an integral part of interstate broadcast transmission," federal regulatory authority over the entire entity flows from the purpose stated in Section 301 of the Communications Act—"to maintain the control of the United States over all the channels of interstate and foreign radio transmission." This conclusion is fostered by the emphasis of the court in General Telephone, as of the Supreme Court in Southwestern Cable, on the propriety and even necessity of construing the FCC's regulatory authority over cable television as "comprehensive and pervasive," as representing a "unified jurisdic-

208 47 U.S.C. § 152 (b) (1); see note 198 supra; 413 F.2d at 397-401.
209 47 U.S.C. § 214 (a) (1); see 413 F.2d at 402.
210 General Telephone Co. of Calif. v. FCC, 413 F.2d 390, 401 (D.C. Cir. 1969).
211 "To characterize the interstate connections of a CATV channel distribution system as 'incidental' to any other function it may perform would be at best a myopic view of its true activities." Id. at 402 n.19. See also the Supreme Court's statement on the interstate nature of a cable system's operations:

Nor can we doubt that CATV systems are engaged in interstate communication, even where, as here, the intercepted signals emanate from stations located within the same State in which the CATV system operates. . . . To categorize respondents' activities as intrastate would disregard the character of the television industry, and serve merely to prevent the national regulation that is "not only appropriate but essential to the efficient use of radio facilities." . . .

212 General Tel. Co. of California v. FCC, 413 F.2d 390, 401 (D.C. Cir. 1969); accord, id. at 398, 402.
tion" and partaking of "a unified and comprehensive regulatory scheme . . . ." 213

c. Sections 3 (b) and 301 of the Act. Section 2 (a) is not the only provision of the Communications Act on which FCC authority to adopt the intended rules may be founded. Section 2 (a) covers communication "by wire or radio," and cable naturally tends to be thought of as "wire"; it readily meets the definition of "communication by wire" in Section 3 (a) of the Act. 214 But a cable system is also within the scope of "communication by radio" as defined in Section 3 (b) of the Act, inasmuch as it is "incidental to the transmission of radio communications." 215 On this basis it could be held that cable systems are subject to the "licensing" authority of the FCC under Section 301 of the Act, which provides that "[n]o person shall use or operate any apparatus for the transmission of energy or communications or signals by radio . . . except under and in accordance with this chapter and with a license in that behalf granted under the provisions of this chapter." The theory is not new. The FCC has increasingly invoked it as a basis for its claims of regulatory authority over cable. 216 In Southwestern Cable the Brief for the United States did not rely on the theory, resting on the proposition that cable systems are engaged in "communication by wire" and thus brought within the scope of Section 2 (a); 217 but nonetheless, despite the uncertainty now displayed by the Solicitor General in the petition for certiorari in Midwest Video, 218 the brief endorsed the theory in a footnote. 219 More important, the Supreme Court seems to have gone out of its way to indicate its receptivity to the claim. Instead of limiting its holding to the "communication by wire" approach, the Court invoked equally the definition of

213 United States v. Southwestern Cable Co., 392 U.S. 157, 168 (1968); accord, id. at 172-73.
214 "Wire communication" or "communication by wire" means the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission. 47 U.S.C. § 153 (a).
215 "Radio communication" or "communication by radio" means the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission." 47 U.S.C. § 153 (b). See also Section 3 (d), which states, "transmission of energy by radio" includes both such transmission and all instrumentalities, facilities, and services incidental to such transmission." 47 U.S.C. § 153 (d).
216 In promulgating the compulsory-origination requirement, for example, the Commission stated:

Moreover, in authorizing the receipt, forwarding, and delivery of broadcast signals, the Commission is in effect authorizing CATV to engage in radio communication, and may condition this authorization upon reasonable requirements governing activities which are closely related to such radio communication and facilities. Sections 2 (a), 3 (b), and 301 of the Communications Act.

217 Thus the "Statutes Involved" included Section 3 (a), the "wire" definition, but not Section 3 (b), the "radio" one. Brief for the United States and the Federal Communications Commission at 2, United States v. Southwestern Cable Co., 392 U.S. 157 (1968) [hereinafter cited as Brief for the United States]; see also id. at 29.
218 See text at note 194 supra.
219 "CATV systems are plainly 'incidental' to the transmission of radio communications, and could have been found subject to the regulatory authority of the Commission on this ground as well." Brief for the United States, supra note 217, at 30 n.23.
"communication by radio" in Section 3 (b). In sum, there seems little reason to doubt that cable systems are "incidental" to the transmission of radio communications within the meaning of Section 3 (b) and can be held subject on this ground to the FCC's regulatory authority over radio communications conferred by Section 301.

But this "radio" theory could prove too much. It could mean that cable systems, being engaged in "radio communication" under Section 3(b), may not operate, under Section 301, "except under and in accordance with this chapter and with a license in that behalf granted under the provisions of this chapter," and this in turn could mean the FCC must apply to cable systems the full structure of licensing procedures for radio stations found in Sections 307, 308, and 309 of the Act. It could mean the FCC was compelled to evaluate the qualifications and proposals of would-be cable operators, to license them every five years, and—most unpalatable—to conduct comparative "full hearings" when more than one applicant filed mutually exclusive applications to operate a cable system in the same locality. This could amount to the FCC's taking over the entire franchising process from local and state authorities, something the Commission has wisely said it would not do, at least for the present.

Such an untoward result does not have to follow, however, from recognition of the need for cable operators to obtain an FCC "license" under Section 301. A rulemaking approach such as the Commission has proposed in the Letter of Intent, whereby it would require a cable operator to file with the FCC a copy of its local franchise and a certificate showing that the franchising authority had considered the operator's qualifications and his construction arrangements for the system, might be upheld even under the licensing provisions of Section

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220 Respondents do not suggest that CATV systems are not within the term "communication by wire or radio." Indeed, such communications are defined by the Act so as to encompass "the transmission of . . . signals, pictures, and sounds of all kinds," whether by radio or cable, "including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission." 47 U.S.C. §§ 153 (a), (b). These very general terms amply suffice to reach respondents' activities.

322 U.S. at 168; see also id. at 172, 173, 178.

221 See 47 U.S.C. § 308(b).

222 See id. § 307 (d).

223 See id. § 309 (d).


225 "The Comments generally advanced persuasive arguments against federal licensing. We agree with the contention that federal licensing at this time would place an unmanageable burden on the Commission. Accordingly, we will not now take that step. Furthermore, local governments are markedly involved . . . ." FCC Letter of Intent, supra note 5, at 1780. In the Report and Order, the Commission has taken the same position but eliminated the words "at this time" and "[a]ccordingly, we will not now take that step." Cable Television Report and Order, supra note 26, at 1575, ¶ 177.

226 See FCC Letter of Intent, supra note 5, at 1780:

We will require that the cable system, before commencing operation with broadcast signals, file a copy of its franchise with us and a certificate showing that the franchising authority in a public proceeding has considered the system operator's legal and financial qualifications, and the adequacy and feasibility of his construction arrangements . . . .

Accord, Cable Television Report and Order, supra note 26, at 1575-76, ¶ 178; 47 C.F.R. §§ 76.13(a)(3), 76.31(a)(1).
309 as establishing a local or state franchise as a basic public-interest qualification for cable-system operators, with no comparative hearing required for unfranchised applicants unless they could show reasons why the rule should be waived or amended\(^\text{227}\) (or, of course, unless they could show that the rule had not been fully complied with in a particular case, as because the franchising process was defective). But it does not appear necessary for the Commission to go even that far toward invoking the “station license” procedures of Sections 307, 308, and 309 in its intended regulation of cable systems. Granting that Section 301 would require cable systems to have “a license ... granted under the provisions of this chapter,” a “license” is defined by the Act as “that instrument of authorization required by this chapter or the rules and regulations of the Commission made pursuant to this chapter, for the use or operation of apparatus for transmission of energy, or communications, or signals by radio, by whatever name the instrument may be designated by the Commission.”\(^\text{228}\)

The FCC has authority under Section 303 (r) to “[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter ...”; the use of this rulemaking power in regulating cable systems was upheld in Southwestern Cable,\(^\text{229}\) and it might thus be argued that the Commission in effect “licenses” cable systems already—or would if it simply gave out “instruments of authorization” certifying that the systems were in compliance with the existing cable rules. In any event, if the Commission has jurisdiction under the Act to adopt the rules here at issue respecting the nonbroadcast aspects of cable systems—jurisdiction grounded either on Section 2 (a) or on Sections 3 (b) and 301, or on both theories—it would seem that such rules, together with the certificates the Commission would presumably issue certifying compliance with them, would suffice to meet the “license” requirement of Section 301.\(^\text{230}\)

It seems reasonable enough, especially in the light of the Commission’s authority to “[c]lassify radio stations” and its other rulemaking powers,\(^\text{231}\) that cable systems as facilities “incidental” to radio transmission need not be locked into precisely the same licensing structure applicable to stations engaged fully in such transmission.\(^\text{232}\)

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\(^{228}\) 47 U.S.C. § 153 (cc), as amended. It is defined by the Administrative Procedure Act as “an agency permit, certificate, approval, . . . or other form of permission.” 5 U.S.C. § 551 (8).

\(^{229}\) 392 U.S. 157, 178 (1968).

\(^{230}\) The Commission in the final rules has indeed taken this approach: “We are requiring that before a cable system commences operation with broadcast signals, it must obtain a certificate of compliance with the Commission.” CABLE TELEVISION REPORT AND ORDER, supra note 26, at 1375, ¶ 178; accord, 47 C.F.R. § 76.11.

\(^{231}\) 41 U.S.C. § 303 (a); cf. 47 U.S.C. § 309 (b) (2) (G). See, e.g., 47 U.S.C. §§ 154 (i), 303 (g), (r), 307 (b).

\(^{232}\) Cf. Philadelphia Television Broadcasting Co. v. FCC, 359 F.2d 282, 284 (D.C. Cir. 1966): “In a statutory scheme in which Congress has given an agency various bases of jurisdiction and various tools with which to protect the public interest, the agency is entitled to some leeway in choosing which jurisdictional base and which regulatory tools will be most effective in advancing the Congressional objective.”
respect to the "radio" theory, it should be noted that recognition of this jurisdictional ground for the new rules does not necessitate abandonment of the ground that supported the *Southwestern Cable* decision. The applicability of Sections 3 (b) and 301, placing cable systems in the category of "radio" as well as "wire" communication, can be viewed as strengthening the jurisdiction based on Section 2 (a) which the Supreme Court there upheld.  

d. Policy reasons for upholding FCC jurisdiction. While there thus appear to be two grants of authority in the Act that could be found to sustain the FCC's power to regulate the nonbroadcast aspects of cable, that is not the end of the inquiry. The Supreme Court in *Southwestern Cable* interpreted Section 2(a) and appraised the operations of cable systems in the context of rules that regulated the carriage of broadcast signals and were justified in terms of cable's impact on broadcasting; the applicability of Sections 3 (b) and 301 also springs from the relationship between cable systems and broadcasting. The FCC's authority to regulate cable systems in their nonbroadcast aspects should not be held in wooden fashion to follow automatically from these jurisdictional grants. There ought to be some policy justification for the conclusion, some reasons or needs arising from the purposes of the Communications Act, some relationship—even if not the "ancillary" relationship specified in *Southwestern Cable*, though perhaps there is no difference—between the asserted regulation and the activity of cable systems in carrying broadcast signals, or the system of television broadcasting more generally, or the purposes of the Act. It is therefore necessary to consider ways in which the FCC's intended new regulation of cable may be related to television broadcasting or other forms of interstate communication by radio or wire, or may otherwise be within the legitimate concerns of the Commission under the Act.

once a cable system is operating with public-access and/or leased channels as required by the FCC's intended rules, to avoid recognizing it as a common carrier. It would also seem difficult, in the light of the *General Telephone* case (413 F.2d 390) and the arguments made here (see text at notes 207-13 *supra*), to argue that if a common carrier service is being provided to the channel users, the service is "intrastate" within Section 2 (b) (1) and/or Section 214 (a) (1). In view of the substantial regulatory scheme for cable that the FCC proposes to establish on a basis other than Title II common carrier regulation, however, it would seem reasonable and desirable for courts still to accord the Commission the "leeway" in this respect recognized in the *Philadelphia Television* case. See, e.g., 359 F.2d at 284 n.5: "Certainly the Commission's assertion of jurisdiction over CATV systems by its order of March 4, 1966, is substantial enough to serve as a basis for declining to regulate them as common carriers." The FCC in the final rules has espoused a jurisdictional theory similar to that suggested here: "We reaffirm our view that cable systems are neither broadcasters nor common carriers within the meaning of the Communications Act. Rather, cable is a hybrid that requires identification and regulation as a separate force in communications." *CABLE TELEVISION REPORT AND ORDER, supra* note 26, at 1579, ¶ 191.

233 392 U.S. 157, 167-73, 178 (1968). Cf. *General Tel. Co. of the Southwest v. United States*, 22 P & F Radio Reg. 2d 2171, 2178 (5th Cir. 1971), where the court held that Section 2 (a) together with Section 214 (and the general statement of purposes in Section 1) provided jurisdiction for the FCC to make rules respecting ownership of cable systems by telephone companies.

234 The need for such a nexus can be seen in a variety of lights. The jurisdictional base of Sections 3 (b) and 301, grounded as it is on the function of cable systems as "incidental" to radio communication, might be held to authorize only such regulation of cable systems as was itself incidental to radio communication. Under Section 2 (a), the conclusion that the nonbroadcast operations of a cable system constitute "interstate" communication by wire or communication by radio, may depend on a showing that those operations either themselves involve or affect interstate communications or are related to the other operations of the cable system that do. On either jurisdictional theory, the rules the FCC would be authorized to
(i) Interconnected programming over the nonbroadcast channels. Focusing on regulations directed exclusively to nonbroadcast operations of the cable system—such as the requirement that there be public-access channels and channels available for leasing—it is to be noted first that programming on the nonbroadcast channels, whether provided by the cable operator himself or by "access" users, and whether instituted by the cable operator voluntarily or in compliance with an FCC rule, will include "interconnected" programming distributed in interstate communications by wire or radio (including satellites). The FCC has declared its approval of "cable networking,"235 a policy that seems well within its mandate of Section 303(g) to "generally encourage the larger and more effective use of radio in the public interest." In distributing such programming over its nonbroadcast channels—or in its potential for distributing such programming, under an FCC rule requiring access channels or program origination by the operator himself236—the cable system would seem engaged in "interstate . . . communication by wire or radio" within the terms of Section 2(a), just as it is in distributing broadcast signals.237 With the nonbroadcast channels thus functioning—or capable of functioning and, under FCC policy, desired to function—as links in the chain of interstate communication, one policy of the Communications Act that becomes applicable, it would seem, is the purpose stated in Section 301: "to maintain the control of the United States over all the channels of interstate and foreign radio transmission." More specifically, the FCC has now reached the judgment that the owner of the cable system should not be permitted to monopolize all its channels and all the interstate communication they are able to carry, and that neither should he be permitted to shut off such potential communication by closing the system to nonbroadcast uses. Hence the Commission's intended requirements of channel leasing, a public-access channel, a minimum channel capacity, and so forth. Given the interstate component of

235 The Commission would feel compelled to oppose on behalf of the public, any proposal which would preclude CATV systems . . . from interconnecting on a regional or national basis for any purpose, including the distribution of entertainment type programming. . . . In the domestic satellite proceeding it has been suggested that CATV cable channel capacity might be utilized as a means for local distribution of satellite communications. . . .

236 The compulsory-origination rule struck down in Midwest Video was not limited to local-live programming. The FCC said that in requiring the cable system to "operate to a significant extent as a local outlet by originating," it did not mean to suggest that such originations "could not also include films and tapes produced by others, and CATV network programming." First Report and Order, FCC Docket No. 18397, 20 F.C.C.2d 201, 214, 17 P & F RADIO REG. 2d 1570, 1587 (1969).


The Petitioners [telephone companies operating cable-television systems] have,
the communications thus affected—both those of the cable operator himself and those of the leased channels once established—238 and also conceivably some of the programming on the public-access channel239—such requirements would seem within the FCC's rulemaking mandate under Section 303 (r) of the Act. They would also seem to promote the broad purpose for which the FCC was created, as set forth in Section 1 of the Act—"to make available . . . to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges." In particular, the rules requiring public-access and leased channels go directly to promote that vital component of the public interest, embodied in both the Communications Act and the first amendment, which was emphasized by the Supreme Court in Red Lion Broadcasting Co. v. FCC.240 Once the public-access and leased channels are in existence, the same reasoning supports FCC regulation of their use in order to assure "nondiscriminatory access on a first-come, first-served basis" and to prohibit program control by the cable operator.241 And similar policies, based on the public interest in promoting access and diversity and avoiding monopoly with respect to channels carrying interstate communications, support other elements of the intended regulatory scheme, such as the minimum channel capacity, the equivalence between nonbroadcast and broadcast channels, the "N plus 1" expansion factor. Nor would it seem feasible, or consistent with the policies involved, to divide the programming carried by the nonbroadcast channels into "interstate" and "intrastate" components and limit the FCC's authority to the former. It may be wondered, for example, whether this approach would authorize the FCC to require that the channels be provided in the first place.242 Although the Supreme Court in Southwestern Cable was focusing on the broadcast programming carried by cable systems—and although that programming surely has a greater "interstate content" than the nonbroadcast programming will have at the start—the Court's rejection of the attempt to characterize the activities of cable systems as intrastate, or to compartmentalize them into interstate and intrastate components,243 seems difficult to escape here.

238 As the FCC has pointed out, "... [T]he leased channels will undoubtedly involve interconnected programming, via satellite or interstate terrestrial facilities, matters that are within the Commission's jurisdiction." FCC LETTER OF INTENT, supra note 5, at 1774; CABLE TELEVISION REPORT AND ORDER, supra note 26, at 1561, ¶ 130.
239 In any event, under the FCC's intended rules the public-access channel, and the government and educational ones as well, would be available for leasing when not in use for their dedicated purposes. See text at note 143 supra.
240 "It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee." 395 U.S. 367, 390 (1969); see also id. at 375, 389.
241 See FCC LETTER OF INTENT, supra note 5, at 1775, 1776; see note 154 supra and accompanying text. It does not necessarily follow, however, that the FCC's regulation to this end must be exclusive of any state or local role, as the FCC has declared it will be. See text at notes 294-338 infra.
242 Cf. the provision in Section 214 recognizing the FCC's certification power over construction of "a line within a single State" when "such line constitutes part of an interstate line," a power held in the General Telephone case to apply to construction of channel facilities for a cable system. 47 U.S.C. § 214 (a); see 413 F.2d at 402; text at notes 208-13 supra.
243 See United States v. Southwestern Cable Co., 392 U.S. at 168-69, quoted in note 211.
(ii) Nonbroadcast programming and broadcast programming: pay TV on cable. The nonbroadcast programming is itself intertwined in pervasive respects with broadcast programming. For example, the use of "pay TV" arrangements with cablecast programming—programming that may be either local or interconnected—has the potential to "siphon off" program material now available on "free" broadcast television. The FCC has nevertheless authorized "pay cablecasting" operations, both by cable operators themselves and by channel lessees, and has asserted that such authorization overrides franchise restrictions to the contrary. At the same time, the Commission has expressed its concern about the "siphoning" danger, has promised to watch the matter closely, and has already imposed restrictions on pay cable that are designed to forestall the threat. Of course, such rules, if valid on their merits, could be sustained, under the limited rationale of Southwestern Cable, as designed to prevent an injurious impact on television broadcast service. They illustrate, however, a broader sense in which television broadcasting and television cablecasting are intertwined, constituting as they do two distribution systems capable of bringing the same programs to the public (more accurately, somewhat different publics) and likely, in the absence of government intervention, to be competing for some of the most popular programs. If the allocation of programs between "free" and "pay" television is a legitimate subject of the FCC's concern, as the FCC believes it is and as the court of appeals has agreed (at least with respect to broadcast pay TV), it would seem necessary to recognize the FCC's "unified jurisdiction" over both modes of program delivery. What is necessary is not only that the Commission have authority to protect broadcast television from the impact of pay cable. If there is a balance to be struck between the "free" and the "pay" services, it would seem no less necessary that the Commission, having struck such a balance through rules allowing but restricting pay cablecasting, have authority to preempt state or local rules which prohibit pay cablecasting of any kind. Such authority to permit pay cablecasting requires a unified jurisdiction over both services, not simply a jurisdiction to regulate cable in ways protective of broadcasting.

(iii) Nonbroadcast programming and broadcast programming: concurrent carriage on the same cable system. Cable-originated programming is intertwined more specifically with particular broadcast programming—that being supra. See also General Tel. Co. of California v. FCC, 413 F.2d 390, 401 (D.C. Cir.), cert. denied, 396 U.S. 888 (1969); General Telephone Co. of the Southwest v. United States, 22 P & F Radio Reg. 2d 2171, 2179-2180 (5th Cir. 1971).
244 Fiersen, Ball & Dowd, 22 P & F Radio Reg. 2d 949 (1971).
245 The Commission "has expressed its continuing concern that programming now presented on broadcast television might be siphoned off to cable, and it intends to keep a close watch on this question and to take whatever action is necessary to protect the public interest." Id. at 950.
carried concurrently by the same cable system. As the FCC has pointed out, "It is by no means clear that the viewing public will be able to distinguish between a broadcast program and an access program; rather, the subscriber will simply flick across the dial from broadcast channels to public access or leased channel programming, much as he now selects television fare." Thus, as the FCC further notes, rules applicable to broadcast programming, such as the "equal time" law, the fairness doctrine, and the requirement of sponsorship identification, could be "largely thwarted" if cable systems were free of any such obligations with respect to their own originated programming (programming that may even be inserted on "broadcast channels" to replace broadcast material deleted pursuant to the FCC's non-duplication rules). To be sure, a number of observers have questioned the need for application of equal-time or fairness rules to cable programming. Most who take this position, however, rely on the existence of public-access and leased channels on the cable system. As the Illinois Commerce Commission puts it, "This Commission does not believe that either the 'equal time' or 'fairness' provisions of FCC regulations are properly applicable to cablecast programming, so long as ample channel capacity is provided over public-access and leased channels to accommodate all points of view." But public-access and leased channels—and nondiscriminatory access to them—are themselves, of course, among the key provisions of the FCC's intended rules for the nonbroadcast channels. While some state and local authorities would impose such requirements on cable systems if the FCC did not, it is fair to assume that a great many cable systems would be subject to no such obligations, as is true of all but a very few of the systems cablecasting today. These "nonaccess" systems would consequently stand differently from the "access" systems in their need for equal-time and fairness regulations on their cablecast channels. In sum, the FCC's intended requirement of public-access and leased channels implicates the same policy considerations as the equal-time and fairness rules that are applicable to broadcast programming, in particular to the broadcast programming carried concurrently by the same cable system and indistinguishable to the audience, so that once again the need to recognize the FCC as the "single Government agency" with "unified jurisdiction" would seem inescapable.

(iv) Broadcast signals and nonbroadcast services. On a broader ground,

250 FCC Letter of Intent, supra note 5, at 1774; accord, First Report and Order, FCC Docket No. 18397, 20 F.C.C.2d at 219-21 (1969); Cable Television Report and Order, supra note 26, at 1561, \| 130.

251 Conceivably, the broadcaster might afford candidates A and B ½ hour each on one day on channel 2, and the CATV operator might present only candidate A for several hours for a number of days on channel 3. Or, following the ½ hour appearances of candidates A and B on broadcast channel 2, the CATV operator might present only candidate A for the next three hours on the same channel in place of broadcast program material deleted pursuant to the Commission's non-duplication rules.


252 See, e.g., Sloan Report, supra note 1, at 131 (except for right-of-reply rules); Illinois Proposed Rules, supra note 16, at 20; New York Report, supra note 19, at 219, quoted in text at note 200 supra ("should be left to state and local control").

253 Illinois Proposed Rules, supra note 16, at 20; see also Sloan Report, supra note 1, at 131.

the FCC avows that its intended regulatory scheme for cable's nonbroadcast channels is indissolubly linked to regulatory judgments it has made affecting cable's carriage of broadcast signals. In *Southwestern Cable* the FCC was upheld in adopting its temporary rule prohibiting cable systems from importing distant signals into the top 100 markets, on the ground (among others) that the Commission had reasonably concluded that such importation would unduly threaten television broadcasting. The FCC in its intended rules will now permit cable systems in those markets to import distant signals on a limited basis, but will simultaneously impose on those systems the various requirements for nonbroadcast services. The Commission says the two steps represent a balancing of public-interest considerations, a trade-off. It still sees risks in authorizing the distant signals, but considers that

... what makes the risks so clearly worth taking is the chance of obtaining great benefits to the public from cable's new services. ... In sum, we emphasize that the cable operator cannot accept the distant or overlapping signals that will be made available without also accepting the obligation to provide for substantial non-broadcast bandwidth. The two are integrally linked in the public interest judgment we have made.255

The substantial nonbroadcast bandwidth is being required, the Commission continues, so that "certain basic goals of the Communications Act [may] be furthered by cable's advent—the opening up of new outlets for local expression, the promotion of added diversity in television programming, the advancement of educational and instructional television, and the increased information services of local governments."256 To promote these goals, the Commission will require that portions of the bandwidth be devoted to public-access and leased channels, channels for government and educational use, and so forth. Also designed to further these purposes are the rules applicable to franchising; the three-percent franchise-fee limitation, for example, is designed to relieve cable operators of financial obligations that "may so burden the industry that it will be unable to carry out its part of an integrated national communications program."257

One may disagree with the Commission's view of the risks involved in authorizing the carriage of distant signals, but since the Commission's authority to "freeze" the growth of such carriage completely was upheld in *Southwestern Cable*, it seems likely that the distant-signal side of the present balance is within the Commission's authority. Further, the sincerity of the Commission's declaration that the two measures "are integrally linked in the public interest judgment we have made" cannot be seriously disputed. In the view of the FCC majority, the decision to allow the importation of broadcast signals into the top 100

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255 FCC Letter of Intent, supra note 5, at 1771; see also id. at 1772, 1774, 1780; accord, Cable Television Report and Order, supra note 26, at 1558, ¶¶ 120, 121; 1561, ¶ 130; 1575, ¶ 177.

256 FCC Letter of Intent, supra note 5, at 1772. In the Report and Order the Commission has changed the language, however, to eliminate reference to the Act: "... it is therefore appropriate that the fundamental goals of a national communications structure be furthered by cable..." Cable Television Report and Order, supra note 26, at 1558, ¶ 121.

257 FCC Letter of Intent, supra note 5, at 1782; Cable Television Report and Order, supra note 26, at 1576, ¶ 185.
markets is indeed “intelligently linked” to the hoped-for public-interest benefits from the requirements imposed with respect to the nonbroadcast services. 258 On this basis, the Commission’s authority to impose those requirements draws support from the “end use” doctrine of FPC v. Transcontinental Gas Corp. 259 The Supreme Court there held that in the case of a sale of natural gas that was not a “sale for resale” and hence not itself subject to the jurisdiction of the FPC, the Commission in determining whether to grant a certificate for the transportation of the gas pursuant to the sale could consider the “end use” to which the buyer would put the gas, and could deny the certificate on the basis that the end use (burning the gas under industrial boilers) was an “inferior” one which “would be wasteful of gas committed to the Commission’s jurisdiction . . . .” 260 Similarly here, it may be argued that the FCC, in authorizing cable systems to carry broadcast signals and in particular to import them into the top 100 markets, may consider the “end use” to which the signals will be put, and may seek to maximize the public benefits from that use by requiring the cable systems supported by those signals to have a minimum channel capacity, to provide public-access and leased channels, and to meet the other requirements of the intended rules. 261

The reply may well be made, however, that broadcast signals are quite unlike natural gas in that—the views of the copyright owners notwithstanding—they are not “wasted” by being brought to an additional public in another market. Applicability of the end use theory may therefore depend on a conclusion that the affirmative end use with which the FCC concerns itself, the “public benefits” it seeks to achieve through the nonbroadcast services of cable, are themselves at least colorably within the scope of the Commission’s legitimate concerns under the Communications Act. But surely they are. It would seem easy to defend the FCC’s characterization of “the opening up of new outlets for local expression,” or “the promotion of added diversity in television programming,” as among the “basic goals of the Communications Act . . . .” 262 Given those goals, it would seem a crimped and self-defeating interpretation of the Act—especially in view of Section 2’s declaration that the Act applies to “all interstate . . . communication by wire or radio” and the Supreme Court’s emphasis on the FCC’s

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258 See, e.g., the report in Broadcasting magazine on the FCC’s Letter of Intent, which begins:

When FCC Chairman Dean Burch addressed the National Cable Television Association convention last month, he issued a challenge to the industry: If you expect the right to import distant signals into major markets, be prepared to respond by providing the “supplemental, nonbroadcast benefits” that have been promised for so many years.

The chairman wasn’t kidding.

Broadcasting, Aug. 9, 1971, at 14; see also Broadcasting, July 12, 1971, at 18.


260 Id. at 6-7, 3-22. As the Court saw it, “the question in this case is whether the Commission, through its certification power, may prevent the waste of gas committed to its jurisdiction.” Id. at 8.


262 See text at note 256 supra; United States v. Southwestern Cable Co., 392 U.S. 157, 173-78 (1968); 47 U.S.C. §§ 151, 307 (b). Compare, however, the FCC’s apparent retreat from reference to the Act itself as the source of these goals. Cable Television Report and Order, supra note 26, at 1558, ¶ 121, quoted in note 256 supra. The retreat does not seem warranted; as the cited authorities indicate, these are indeed goals of the Act. In any event, the legal effect of the Commission’s position remains the same.
“unified jurisdiction” and “regulatory power over all forms of electrical communication”\textsuperscript{263}—to preclude the FCC from promoting those goals with respect to the cablecast as well as the broadcast television programs delivered by cable television systems.\textsuperscript{264} These considerations indicate that the benefits the FCC seeks to obtain through the intended rules are within its legitimate area of concern under the Act, at least to the extent that it may pursue them through the exercise of its regulatory authority over the carriage of broadcast signals. That carriage, of course, is the economic rock on which cable systems are presently founded, and it also establishes that they are engaged in incidental “communication by radio” and subject on that ground to the FCC’s jurisdiction.\textsuperscript{265}

The conclusion is reinforced, finally, by consideration of what the consequences would be if the FCC lacked authority to adopt its intended rules. There would then be no way—without Congressional action,\textsuperscript{266} which has proved difficult to obtain in the cable area\textsuperscript{267}—to assure the development and regulation of cable in the national interest. In addition, there would be a continuing problem for the FCC and the courts, one not readily amenable to rational solution, of drawing the line between those nonbroadcast activities of cable systems that sufficiently impinge on broadcasting to fall within a narrow view of the FCC’s jurisdiction, and those that do not. As will be seen in subsequent sections of this article, I take the view that the FCC’s regulation of the nonbroadcast operations of cable systems should not be exclusive of state or local regulation, and that the FCC in its intended rules has been misguided in preempts a state or local role with respect to the access channels. Yet if the FCC lacked regulatory authority in this area, as the Eighth Circuit Court of Appeals, the \textit{New York Report}, the Illinois Commerce Commission, and others apparently contend, the consequences for cable’s development could only be fragmenting and frustrating. For example, if the FCC lacks power to require cable systems to originate programs, as held \textit{in Midwest Video}, it would seem to follow—unless that decision is limited to the confiscation ground—that the Commission is also without power to authorize

\textsuperscript{263} United States v. Southwestern Cable Co., 392 U.S. 157, 168 (1968).

\textsuperscript{264} The Fifth Circuit Court of Appeals, citing the FCC’s responsibility under Section 1 “to make available, so far as possible, to all the people of the United States a rapid, efficient, \textit{Nation-wide} and world-wide wire and radio communication service with adequate facilities at reasonable charges, . . . . ,” has declared that “[t]he development of CATV services is a part of this broader purpose.” General Tel. Co. of the Southwest v. United States, 22 P & F. \textit{Radio Reg.} 2d 2171, 2179 (5th Cir. 1971). The Sloan Commission, quoting the same declaration of purpose, has expressed the view that “[c]able television was not anticipated in the statute, but its general intent applies as well to the new technology as to the old.” \textit{Sloan Report}, supra note 1, at 153-54.

\textsuperscript{265} See text at notes 214-33 supra. Cf. General Tel. Co. of California v. FCC, 413 F.2d 390, 401 (1969): “The Petitioners have, by choice, inserted themselves as links in this indivisible stream and have become an integral part of interstate broadcast transmission. They cannot have the economic benefits of such carriage as they perform and be free of the necessarily pervasive jurisdiction of the Commission.”

\textsuperscript{266} Over the years, the Commission has been required to meet new problems concerning CATV and as cases have reached the courts the scope of the Act has been defined, as Congress contemplated would be done, so as to avoid a continuing process of statutory revision. To do otherwise in regulating a dynamic public service function such as broadcasting would place an intolerable regulatory burden on the Congress—one which it sought to escape by delegating administrative functions to the Commission.

such origination as against local or state restrictions. It would thus presumably be within the power of state and local governments to prohibit advertising on cablecast channels and to prohibit pay-TV on cable, as many franchises have purported to do. More fundamentally, it would also be within the power of state or local authorities—unless the first amendment intervened—to prohibit cable systems from engaging in any program origination, either on their own behalf or on an access basis. Alternatively, it would be within state or local power to allow the cable operator to control the cablecast programming on all the channels on his system, free of any restrictions or access requirements. More generally, there would be no way to achieve the comprehensive, many-sided regulation necessary for the optimum development of cable on a nationwide basis, "the national regulation that 'is not only appropriate but essential to the efficient use of radio facilities.'"268 For all these reasons, the FCC's intended rules would appear to be within the Commission's regulatory authority under the Communications Act.

2. The Rules on Their Merits

It is necessary now to consider whether the rules are good policy. They represent a bold, comprehensive, and in some respects particularized intrusion of federal authority into the local incidents of cable. Yet on the whole, with exceptions to be noted, the dimensions of the federal presence they stake out would seem to be appropriate. The many-sided vacuum in cable regulation left by the failure of local governments throughout the country, the thousands of franchises already outstanding with inadequate or deleterious provisions and often excessive durations to boot, these maladies call for prompt and strong medicine, and the FCC will often be the first, if not the only, doctor on the scene. While the states have now begun to act, the promptness and efficacy of their action remain uncertain. Meanwhile, new franchises are being awarded every month, many of them in large cities. To provide some assurance that the public interest in cable will be protected throughout the country, the FCC is justified in taking steps to require minimum channel capacities, "access" channels, minimum specifications for the franchising process and the substance of both future and existing franchises, and in fact most of the requirements set forth in the intended rules. Nonetheless, several elements of the rules seem open to serious question.

a. Franchising. In the franchising area there are two respects in which the rules do not go far enough. These relate to franchising procedures and franchise duration. Both are properly regarded as essentially procedural concerns. Federal requirements in these areas would be designed not to impose any substantive content on the cable franchise, but to assure that the franchising authority will fully consider the available options, will responsibly choose among them, and will

268 Id. at 169. See General Tel. Co. of California v. FCC, 413 F.2d 390, 401 (1969): "... Any other determination would tend to fragment the regulation of a communications activity which cannot be regulated except by a central authority; fifty states and myriad local authorities cannot effectively deal with bits and pieces of what is really a unified system of communication."
not be bound to a single set of decisions for an unreasonably long period; they would seek also to assure that the public will have adequate opportunities to scrutinize the process and participate in it. This kind of federal "intervention," which has an enabling and enlarging effect rather than a restrictive impact on the substantive decisionmaking at the local or state level, may be the most readily defensible element of a federal presence in the local incidents of cable. It is also one of the most needed, in view of the widespread instances in which these characteristics have been absent from the franchising process.

Yet the FCC in its Letter of Intent only "strongly suggest[s]" that there be a public invitation to those who might want to compete for the franchise, public notice and disclosure of the applications, a public hearing, and a public report by the franchising authority explaining its action. And the rules as drafted by the staff omit any reference to such procedures. The matter of subscriber rates provides an interesting comparison. There, the FCC will require "that reasonable advance notice be given to the public of all proposed rate changes with the right of the affected members of the public to be heard." It will require no such notice or hearing with respect to the designing and awarding of the entire franchise. Subscriber rates to date have not been a substantial source of complaint (though they may be in the future), while an absence of competition, of public hearings, of due consideration, of respectable decisionmaking, and of open and regular procedures in the awarding of franchises has been an endemic problem. It is a problem, moreover, that franchising authorities are peculiarly unlikely to correct on their own initiative. One would have thought it called for treatment in the FCC rules, as through prescription of the procedures that the Commission has suggested.

On franchise duration the FCC is only slightly more assertive, and any...

269 See quotation in text at note 167 supra. In the Report and Order, the Commission has apparently sought to allay criticism on this score; it not only "strongly suggest[s]," but now "expect[s]," that there will be a public invitation for applications, public notice and disclosure of the filings, a public hearing "where appropriate," and a public report by the franchising authority setting forth the basis for its action. The Commission adds, "Such public participation in the franchising process is necessary to assure that the needs and desires of all segments of the community are carefully considered." Cable Television Report and Order, supra note 26, at 1576, ¶ 178, quoted in note 167 supra. But still, none of these expectations are set forth in the actual rules; see note 270 infra. It is also noteworthy that while the Letter of Intent unqualifiedly suggested "a public hearing . . . to afford all interested persons an opportunity to testify on the merits or demerits of the various applicants" (see quotation in text at note 167 supra), the Report and Order expects such a hearing only "where appropriate" (see quotation in note 167 supra).

270 See notes 166-67 supra. The same is true of the final rules; the FCC appears to have deliberately refrained from writing into the rules the procedural requirements that it "expect[s]" to be observed in the franchising process. See Cable Television Report and Order, supra note 26, at 1576; notes 167, 269 supra. The rules only require the franchisee to show that his qualifications and construction arrangements "have been approved by the franchising authority as part of a full public proceeding affording due process." 47 C.F.R. § 76.31(a) (1); see note 167 supra. This cryptic language might well be held, however, to require due process for a competing applicant in the form of a comparative proceeding. See Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945); Citizens Communications Center v. FCC, 22 P & F. Radio Reg. 2d 2001, 2015-17 (D.C. Cir. 1971) (describing the comparative-hearing requirement of the Ashbacker case as "a part of the due process owed to all mutually exclusive applications").

271 See quotation in text at note 172 supra; Cable Television Report and Order, supra note 26, at 1577, ¶ 183; 47 C.F.R. § 76.31(a) (4), quoted in note 172 supra.

272 See New York Report, supra note 19, at 192.
resulting gain appears likely to be more than counterbalanced by the uncertainty it brings with it. The FCC “will require the franchising authority to place a reasonable limit on the duration of the franchise, and its renewal,” and the Commission “think[s] that, generally speaking, a franchise should not exceed 15 years, with a reasonable renewal period”; but this is only “a general guide,” with the franchising authority allowed to “decide to vary the period based on particular circumstances.” And the Draft of the rules accordingly says only that “[t]he initial franchise period and any renewal franchise period shall be of reasonable duration.” This approach may be compared with that taken by the Commission with respect to franchise fees. There too, it adopts a standard of reasonableness and advances a specific guideline (“between three and five percent as a maximum”). But there it goes further and establishes an implementing mechanism, with fees in excess of three percent requiring justification and specific FCC approval. It would seem that the Commission should give at least this much effect to the 15-year guideline for franchise duration. Even if advancing the 15-year figure as “a general guide” could be expected to have some influence on future franchising, it would seem to leave unclear the status of the many existing franchises with terms in excess of 15 years. Can these now be justified, retroactively, by the franchising authority’s discovery of “particular circumstances” that it did not know were necessary when the franchise was originally granted? If the franchising authority is unwilling to attempt such justification, can the cable operator do so? What agency is going to decide the question? In sum, the indecisiveness of the intended rules on the matter of franchise duration seems doubly unwise; not only does the public interest call for stricter—indeed, one may think, absolute—enforcement of the 15-year guideline, but the FCC’s approach seems sure to produce uncertainty and con-

273 FCC LETTER OF INTENT, supra note 5, at 1781; see text at note 169 supra.

274 FCC LETTER OF INTENT, supra note 5, at 1781, quoted in text at note 170 supra.

275 This is also the language of the final rules, which likewise say nothing about the 15-year guideline. 47 C.F.R. § 76.31(a)(3). The Commission in the Report and Order, however, has reiterated its belief “that in most cases a franchise should not exceed 15 years . . . .” and has pointed out that “there is some support for franchise periods of less than 15 years.” CABLE TELEVISION REPORT AND ORDER, supra note 26, at 1577, ¶ 182; see notes 171, 84 supra.

276 If the franchise fee exceeds 3 percent of such revenues, the cable television system shall not receive Commission certification until the reasonableness of the fee is approved by the Commission on showings, by the franchisee, that it will not interfere with the effectuation of Federal regulatory goals in the field of cable television, and, by the franchising authority, that it is appropriate in light of the planned local regulatory program.

47 C.F.R. § 76.31 (b); see text at notes 174-76 supra.

277 As has been noted, existing cable systems will be required to certify within five years that their franchises include the provisions set forth in the intended rules, including, presumably, the provision that the franchise term be “reasonable.” See note 177 supra and accompanying text.

278 As noted earlier, see text at notes 84-87 supra, some authorities, such as the Sloan Commission and the New Jersey Report, have proposed that terms be limited to ten years. See SLOAN REPORT, supra note 1, at 149; NEW JERSEY REPORT, supra note 21, at 56; but see NEW YORK REPORT, supra note 19, at 190 (20 years).

The FCC’s opinion that 15 years should serve as “a general guide,” subject to the consideration “that the local franchising authority may decide to vary the period based on particular circumstances,” such as the applicant’s “proposing to wire inner-city areas free or at reduced rates,” would seem at least to call for a rule of prima facie invalidity for existing franchise terms greater than 15 years, since such terms were necessarily granted without recognition of the need for such special justification. The FCC could then stand ready—as in the
fus

2.79 b. Provision of access channels. If the FCC's intended rules are inadequate in the minimum requirements they impose on cable franchising, that deficiency can at least be cured through state regulation; as will be seen, a state's program of cable regulation may well include procedural requirements for the franchising process and a limit on franchise duration, and the FCC has no intention to preempt reasonable measures of this kind. The "access" provisions of the intended rules, however, do purport to preclude action in the same area by state or local authorities, and it is this fact that renders them questionable. The question applies both to the requirement that specified numbers of channels be provided on each system for the various "access" uses, and to the regulation of the use of these channels.

As has been stated, the "access rules" will require each cable system to provide one free channel for public access and two others for educational and governmental use; will require that some channel time (including unused time on the dedicated channels) be made available for leasing; and will establish the "N plus 1" formula for expansion of the pool of access channels. The rules will also embody the Commission's declaration that "aside from channels for government uses, we do not believe that local entities should be permitted to require that other channels be assigned for particular uses"; existing systems, however, will be permitted to continue to operate "under more 'generous' specifications," and the Commission, on the request of both the cable operator and the franchising authority, may authorize experiments involving additional free or reduced-rate channels for public-access, educational or governmental purposes.

Given the case of franchise fees exceeding 3 percent—to find the presumption overcome in specific cases where both the franchising authority and the franchisee made a showing that the greater-than-15-year term was in fact provided in exchange for some specific and unusual undertaking by the franchisee. Compare the rule quoted in note 276 supra.

279 Further uncertainty lies within the concept of franchise "renewal," as in the FCC's pronouncement that it "will require the franchising authority to place a reasonable limit on the duration of the franchise, and its renewal." FCC LETTER OF INTENT, supra note 5, at 1781. The FCC is not alone in using the unelucidated word "renewal" in this context; see, e.g., Massachusetts Act, supra note 17, at § 13, but the practice seems pregnant with confusion. The word may be thought to imply that the "renewal" applicant is entitled to a legal preference over any competing applicants upon termination of the franchise, and it leaves open the extent of that preference. The meaning of "renewal" could range—and does range under existing franchises, see New York REPORT, supra note 19, at 125-27—from a unilateral and unqualified option to renew on the part of the franchisee, through presumptions in favor of renewal and various kinds of first-refusal, good-faith negotiation, and arbitration provisions, to the position that the "renewal term" is simply a fresh franchise subject to all the procedures applicable to initial franchising. In view of the rendering controversy in the broadcast field over just this question—see Citizens Communications Center v. FCC, 22 P & F RADIO REG. 2d 2001 (D.C. Cir. 1971), invalidating FCC Policy Statement on Comparative Hearings Involving Regular Renewal Applicants, 18 P & F RADIO REG. 2d 1901 (1970)—it would seem wise in the cable medium to get the standards straight at the start, before claims of reliance set in. And it would seem that all the policies which favor placing a reasonable limit on the franchise term favor a limit that would truly end the term and give rise to a de novo franchising process. Such a process would embody all the procedures and the opportunity for competing applications of an initial franchising, but the incumbent franchisee would of course be allowed to compete, and if he had performed well he would still in practice have an important advantage.

280 See text at notes 538-57 infra; FCC LETTER OF INTENT, supra note 5, at 1780; CABLE TELEVISION REPORT AND ORDER, supra note 26, at 1575, ¶ 177.

281 See notes 140-47 supra and accompanying text.

282 See notes 150-52 supra and accompanying text. Also, "In communities outside the top 100 markets where access channels are not required by the Commission, we will permit local authorities to require access services, so long as they are not in excess of what we require for
public interest in access uses of cable and the widespread disregard for these possibilities in existing franchises, the FCC seems justified in imposing access requirements on all cable systems; further, to ensure effectuation of the concept it does seem appropriate for the Commission to formulate a set of specific channel requirements and other access provisions. It does not follow, however, that local or state authorities wishing to establish additional access requirements should be precluded from doing so (or precluded unless they obtain FCC dispensation). The interest in allowing them to exceed the requirements laid down by the Commission takes on special force in view of what appears to be the minimal nature of the keystone element in the Commission's access scheme. As noted earlier, while the Commission will require one public-access channel to be made available at all times "free," without charge either for the channel itself or for production costs of live studio presentations not exceeding five minutes, and while the "N plus 1" expansion factor would lead one to believe that additional public-access channels of the same type will be made available as the demand arises, the rules as drafted by the Commission's staff indicate that this will not be the case. They state that only one public-access channel need be made available free, and that on additional public-access channels the operator may charge both for production costs and for the use of the channel itself.

This cautious approach, probably motivated by fear that an expanding requirement of free channels would constitute an open-ended drain on the cable system's resources, may be appropriate as part of the FCC's access regime for cable systems generally. The FCC may also be justified, out of the same concern for the economic health of the medium, in precluding local or state authorities from imposing on cable systems requirements of free public-access channels that go beyond not only the requirements prescribed by the Commission, but also the provisions of the system's existing franchise (assuming that this is something the authorities otherwise could legally do). But it is difficult to see why the FCC should in any way restrict new franchises, voluntarily applied for and accepted by cable operators, from embodying access requirements additional to those prescribed by the FCC rules. In New York City, for example, the franchises granted in 1970 to the two cable systems operating in Manhattan require the systems to provide two "public channels" at present and two more by 1973; under regulations issued by the city's director of franchises (as authorized in the franchise), the two operators must make the public channels available free to noncommercial, nonprofit users, and the operators at latest report were providing the major markets." CABLE TELEVISION REPORT AND ORDER, supra note 26, at 1561, ¶ 132. Once local authorities have thus brought access services into being, however, they may not regulate them. See notes 294, 298 infra and accompanying text.

283 The Commission describes the expansion factor as requiring cable systems "to make an additional channel available for use as the demand arises," and as designed to "encourage use of the channels, with the knowledge that channel space will always be available . . . ." FCC LETTER OF INTENT, supra note 5, at 1773; accord, CABLE TELEVISION REPORT AND ORDER, supra note 26, at 1560, ¶ 126, quoted in note 148 supra.

284 See the Draft rules as quoted in note 148 supra; as there stated, the final rules are the same. 47 C.F.R. § 76.251 (a) (10) (ii).

285 See notes 117-25 supra and accompanying text.

286 See NEW YORK REPORT, supra note 19, at 151-53; Contract between the City of New York and Sterling Information Services, Ltd., 1970 at 12-13 (hereinafter cited as Sterling Franchise).
the basic production facilities to such users also without charge. While the intended FCC rules will presumably allow these two systems to continue operating under these "more 'generous' specifications," they will not permit the City of New York, except with the special approval of the FCC, to include such requirements in new franchises it may grant for other portions of the city. Such franchises could not require more than one public-access channel—having to wait, instead, for the "N plus 1" factor to trigger expansion—and they could not require that channel time or, perhaps, production facilities be made available free on more than one such channel. This seems unwarranted. A public demand for more than one free public-access channel may be expected to develop quickly, and if both the franchising authority and the franchisee agree to such a requirement, it is difficult to see why they should be required to obtain the FCC's special approval. The interest in protecting the economic health of the cable system from unduly burdensome access requirements—which would seem to be the FCC's only legitimate interest in prohibiting requirements that surpass its own—is satisfied in a case where the franchisee has applied for and accepted the franchise with such a provision in it.

It would thus seem to conduce both to sounder cable policy and a more efficient regulatory scheme, and also to further the interest in experimentation and development that the FCC has stressed, if the federal rules did not preclude, so far as new franchises are concerned, access requirements going further than those specified by the FCC. Indeed, even in the course of an existing franchise, if "the cable operator and the franchising authority seek to experiment by providing additional channel capacity for such purposes as public access, educational, and governmental—on a free basis or at reduced charges," it is difficult to see why the Commission should have to "entertain petitions and consider the appropriateness of authorizing such experiments, to gain further data and insight and to guide future courses of action." Unless the cable operator

288 See the final rule as quoted in note 152 supra. But query whether this language, while giving the two cable systems grandfather status with respect to "the number" of public-access channels specified in their franchises, would not deny such status with respect to "the manner of operation" of those channels—i.e., free to nonprofit users, with production costs free as well.
289 See text at notes 339-57 infra.
290 In New York, it is reported that "after the first several months, it appears that there will be demand sufficient to mean that the channels will be used most of the time. The cable companies are already worrying about the problem of choosing among applicants." Price & Morris, supra note 287, at 237. In Boston, where a UHF broadcast station has been making time available free to members of the public, the "waiting list is now two months long, on a strict first-come, first-served basis." Wall Street Journal, Dec. 16, 1971, at 1, col. 4; at 25, col. 3 (eastern ed.).
291 The FCC would not grant such approval unless both parties requested it. FCC LETTER OF INTENT, supra note 5, at 1774; see note 151 supra and accompanying text.
292 FCC LETTER OF INTENT, supra note 5, at 1774-75.
293 It might be suggested that such an arrangement would detract unduly from the channels available for leasing, but this seems unlikely. Not only would that be against the cable operator's interest, but the FCC in any event has not required any minimum channel capacity to be made available for leasing. The only such requirement is that the specially designated channels be available for leasing when not in use for their dedicated purpose, and an arrangement of this kind would simply put more channels into the available pool. See notes 143-47 supra and accompanying text.
complains to the FCC about a requirement imposed by state or local authority, there should be no need for the Commission's authorization.

c. Regulation of access channels. Even more questionable, and likely to be more significant in practice, is the FCC's asserted preemption of a role for state or local authorities in regulating the access channels. The Commission says, "except for the government channel, local regulation of access channels carrying programming is precluded, at least at this time." It continues,

The question of what regulations we should impose at this time is a most difficult one. We simply do not know how these services will evolve. . . . We believe that our best course is to facilitate use of these channels on a first-come, first-served nondiscriminatory basis with only the most minimal regulations, in order to obtain experience, and on the basis of that experience and the comments received in a new proceeding, to lay down more specific regulations. . . .

For the initial period, then, promulgation of specific regulations governing the access channels is left to the cable operator, with state or local governments excluded. With respect to the public-access channel, "the rules to be promulgated by the system must specify nondiscriminatory access on a first-come, first-served basis during this interim period," with no program control by the operator, but with proscriptions of "any advertising material (including political advertising spots), of lotteries, and, in terms identical to 18 U.S.C. § 1464, of obscene or indecent matter." With respect to the leased channels the regime is the same, except that the operator's rules shall also specify "the appropriate rate schedule," there are no restrictions on advertising material, and at least one of the leased channels must "give priority to part-time users." In both cases the approach applies not only to new cable systems and to existing ones within five years, but also, apparently, to existing ones as soon as they operate with access channels, thereby invalidating any local or state regulation of access channels that may already be in operation, as well as any such regulation that might otherwise have been instituted in the future.
The FCC offers two reasons for its decision to preempt local or state regulation of the access channels. First, given the overarching FCC regulation, a state or local role would create a "dual form of regulation" that would be "confusing and impracticable." Second, "detailed regulations at this time" would be inconsistent with the need for experimentation and varied experience during the initial period of access development. Neither reason seems valid. The question is not whether there will be a "dual form of regulation" or "detailed regulations at this time." In fact, neither can be avoided. The question is whether the detailed regulations will be promulgated and administered by the cable operator alone, or whether the local or state government may take a hand in the process. The FCC concedes the need for detailed regulations; it simply chooses to delegate the authority to promulgate and administer them to the cable operator alone:

In short, we recognize that the public access channel requirements may result in many problems for the cable operator, especially during the break-in period. Effective operational procedures can evolve only from trial and error, and it is probable that different systems will have diverse problems not presently capable of being solved by uniform regulation. We note, for example, the need to decide how applications for access time shall be made, who must make them, what overall time limitations might be desirable, how copyrighted material will be protected, how production facilities will be provided, how the public can get some advance notice of what is to be presented, and so on. All these questions will probably be answered by cable systems in a number of different ways. Again, we will require that the rules adopted by cable systems in these respects be filed with us and made available to the public. But experimentation appears to be the best way to determine what will be workable for the long run...

The decisions to be made in regulating use of the access channels are indeed numerous and difficult; in the words of the Sloan Report, "to assert merely that allotment will be non-discriminatory or on a first-come-first-served basis, is in practice to say nothing at all." In the first place, the matters to be decided (and supervised) will include, as the FCC recognizes, a variety of issues concerning the reservation of time: how much time can be booked at once, how far in advance the reservations may be made, how far in advance they must be made, what is the definition of the "part time users" who the FCC says must be given priority on one of the leased channels, how much "priority" they must be

299 FCC LETTER OF INTENT, supra note 5, at 1774; CABLE TELEVISION REPORT AND ORDER, supra note 26, at 1561, ¶ 151 ("We think that in this area a dual form of regulation would be confusing and impracticable").

300 "Further, we do not believe that the purposes we seek to advance would be served by detailed regulations at this time; rather, as set forth more fully below, we think it is important to allow a period of considerable experimentation..." FCC LETTER OF INTENT, supra note 5, at 1774; see also id. at 1775. In the Report and Order the Commission has dropped the "detailed regulations" argument, asserting instead: "Our objective of allowing a period for experimentation might be jeopardized if, for example, a local entity were to specify more restrictive regulations than we have prescribed." CABLE TELEVISION REPORT AND ORDER, supra note 26, at 1561, ¶ 131. This is scarcely responsive to "the issue of whether also to permit state or local regulation of these channels where not inconsistent with federal purposes" (ibid.), since those "more restrictive regulations" would be inconsistent with federal purposes.

301 FCC LETTER OF INTENT, supra note 5, at 1776; accord, CABLE TELEVISION REPORT AND ORDER, supra note 26, at 1562, ¶ 137.

302 SLOAN REPORT, supra note 1, at 129-30.
given, and so forth. For the two public-access channels now in operation on the franchised cable systems in New York City, these questions have been addressed by interim regulations promulgated by the city's director of franchises. The regulations provide that on one of the channels, users are limited to seven hours a week, two in prime time, with reservations permissible for only a 13-week period, while the other channel "is an access channel in the best soapbox sense: time cannot be reserved long in advance or for repeated regular use. It is primarily for users who have a one-time or last-minute message which they wish to cable-cast," and users are limited to reservations of the same time period once a month.303 There is also a rule that users who have reserved five hours or more on both channels are subject to preemption by less frequent users.304 Other provisions of the New York City regulations have attracted some criticism,305 as has the city's failure to hold a public hearing before promulgating the regulations.306 But the foregoing rules appear to have been generally successful as a first step,307 and the regulations in general have been said to "represent an important approach to public access channels."308 Yet these regulations, which have been the first of their kind, are also slated to be the last, for under the FCC's preemptive approach New York City will be barred from establishing or maintaining any such "local regulation of access channels carrying programming."309 The task will be put in the hands of the cable operators alone.310

It is not difficult to foresee a plethora of other issues that will arise in formulating and administering regulations for the access channels. Some, to be sure, would presumably be eliminated by the FCC rules, such as the difficulty in New York over the cable operators' insistence on prescreening the programs in order to avoid possible legal liability.311 But others would remain. These might include the dispute in New York over how old minors must be in order to use the channels without the company of an adult (although that could readily be settled by an FCC rule);312 they would certainly include questions, also raised in New York, over the provision of production facilities and the rates charged

303 Price & Morris, supra note 287, at 229-30; N.Y. Times, July 1, 1971, at 95, col. 2.
304 Price & Morris, supra note 287, at 230.
306 N.Y. Times, July 1, 1971, at 95, col. 3.
307 See Price & Morris, supra note 287, at 229-30.
308 Id. at 229.
309 FCC LETTER OF INTENT, supra note 5, at 1774; CABLE TELEVISION REPORT AND ORDER, supra note 26, at 1561, ¶ 131; 47 C.F.R. § 76.251 (a) (11) (iv).
310 The Sloan Commission takes the position that the "traffic director," as it denotes the role, "could be the cable owner himself, although most will shun this role; if cable ownership is sufficiently diverse, this in itself will be an experiment. Our own preferences lead in other directions: we would prefer some such instrument as a public-access commission with representation from civic institutions within a community which assume this task as an additional responsibility." Sloan REPORT, supra note 1, at 130.
311 See Price & Morris, supra note 287, at 235-36; N.Y. Times, Oct. 26, 1971, at 83, col. 4. See FCC LETTER OF INTENT, supra note 5, at 1775-76, 1777 ("we suggest that state law imposing liability on a system that has no control over these channels would frustrate federal purposes"); CABLE TELEVISION REPORT AND ORDER, supra note 26, at 1563-64, ¶ 141 ("state law imposing liability on a system that has no control over these channels may unconstitutionally frustrate federal purposes"). See Farmers Educational and Cooperative Union v. WDAY, 360 U.S. 525 (1959).
312 N.Y. Times, July 1, 1971, at 95, cols. 2-3 (city regulation setting age at 18 criticized).
There is a rich mine of disputes in the task of interpreting the FCC's pronouncement that the public-access channels may not carry "political advertising spots" (as stated in the Letter of Intent)\(^{314}\) or any "political advertisements" (as stated in the Draft rules).\(^{315}\) While the FCC has deferred consideration of "some possible modified fairness or personal attack requirements,"\(^{316}\) issues are sure to arise, whether or not such requirements are in effect, concerning the "equality" of the time slots provided to opposing political candidates, opposing points of view on controversial issues, or persons wishing to reply to personal attacks.\(^{317}\) Finally, whoever promulgates the regulations, and whatever they provide, administration of the access channels on a day-to-day basis is certain to involve a considerable amount of discretion, judgment, and arbitration of disputes. This follows from, among other things, the two conflicting policies that should both be served in the allocation of time: on the one hand, assurance of regular scheduling for the many programmers who will depend on it;\(^{318}\) on the other, sufficient flexibility to accommodate the "soapbox" sort of user and other kinds of last-minute or unusual needs.\(^{319}\) The cable operator, as manager of the system, must of course be involved in the task of administering the access channels, and also may be expected to have a good deal to contribute to the formulation of the regulations. The question posed by the FCC's intended rules, however, is whether both these regulatory functions at the local level should be left exclusively to the cable operator, with the local and state governments prohibited from participating.

There are several reasons why the FCC's affirmative answer seems wrong. If there is an overriding need to foster experimentation and gain experience with

\(^{313}\) The two cable operators were allowed by the city to set their own rates for the use of studio production facilities during the interim period (as the FCC, with the five-minute exception, would also allow them to do). N.Y. Times, July 1, 1971, at 95, col. 2. As a result one operator initially charged $10 for the use of its videotape playback deck, while the other had no such charge; this brought complaints, and the first operator announced that it was eliminating the fee in a revised schedule it was submitting to the city. N.Y. Times, Oct. 26, 1971, at 83, col. 3. It may be questioned whether this result would have been as likely under the FCC's intended rules, which would deprive the city of any authority over such rates and leave the cable operator with the final word.

\(^{314}\) FCC LETTER OF INTENT, supra note 5, at 1775.

\(^{315}\) STAFF DRAFT, quoted in note 155 supra. The problem would seem to have been substantially eliminated, however, by the new language in the final rules, limiting the prohibition to "advertising by or on behalf of candidates for public office." See note 155 supra.

\(^{316}\) FCC LETTER OF INTENT, supra note 5, at 1776. In the Report and Order, the Commission has dropped the idea, stating that "Such requirements are not being imposed on use of the access channels because these channels are free of operator control and access is guaranteed." CABLE TELEVISION REPORT AND ORDER, supra note 26, at 1564, \(\text{\S}\) 145; cf. text at notes 252-54 supra. The equal-time and fairness requirements remain in effect, however, with respect to the designated channels on which the cable operator presents his own originated programming. CABLE TELEVISION REPORT AND ORDER, supra note 26, at 1564, \(\text{\S}\) 145; 47 C.F.R. \(\text{\S}\) 76.205, 76.209.

\(^{317}\) The Sloan Commission reached the odd conclusion that, because there should be a free right of reply to personal attacks, there must be a "right of the cable operator, or his agent, to protect himself by cutting off, or by refusing to air, the original attack." SLOAN REPORT, supra note 1, at 131.

\(^{318}\) See Price & Morris, supra note 287, at 230: "Unless an organization or an individual can be assured of some regularity of appearance on the public channel, the opportunity to develop a viewing "constituency" (a more accurate characterization than 'audience') will be slight." See also SLOAN REPORT, supra note 1, at 131.

\(^{319}\) See text at note 303 supra; SLOAN REPORT, supra note 1, at 129: "there must be flexibility in the allotment of time by whoever it may be that makes that allotment."
the uses of access channels during the developmental period, as indeed there would seem to be, it is not clear why there should be experimentation with all aspects of the matter, all possible approaches to implementation of the broad standards laid down by the FCC, except a regulatory role for the state or local government. If it is conducive to the desired experience that "[a]ll these questions will probably be answered by cable systems in a number of different ways," it is difficult to see why it would not also be helpful to have some answers contributed by state or local governments, and by cable systems under the regulation of those governments. The FCC recognizes that a state or local role in regulating the access channels may prove after all to be desirable: "We stress that if experience and considerations brought forth in the further proceeding [which the Commission says it will institute concerning regulation of the access channels] indicate the need or desirability therefor, we can then delineate an appropriate local role." But the intended rules preclude the possibility of developing the experience with such a role that would help to determine, among other things, whether it is needed or desirable.

Excluding the participation of local and state governments in fact may defeat the purpose, wisely espoused by the FCC, of encouraging a maximum diversity of operational and regulatory approaches to the access channels. It may tend to solidify the regime—to freeze ways of doing things and close off options—too soon. For when the FCC notes approvingly that "[a]ll these questions will probably be answered by cable systems in a number of different ways," it overlooks the fact that the cable system's answer will not necessarily be final. Some party aggrieved by a rule promulgated by the cable operator (or one not promulgated), or by a particular decision made in administering the channels, may appeal. That there will be parties interested in the public-access channels and willing to pursue such a remedy is indicated by the several organizations that have sprung up to promote use of the channels in New York City. The legal standing of such an organization seems clear. In New York City these groups have been addressing their complaints to the city's regulating official, the director of franchises, apparently with some success. Under the FCC's preemptive approach, however, an appeal from action by the cable operator could go only to the FCC itself (or the courts). The Commission thus would be forced to make decisions whose authority would apply to cable operators generally. The involvement of state or local governments, as in New York City, would help to avoid such premature uniformity. It would not only enrich the making of policy by providing an additional input of regulatory experimentation and judgment, and would not only give those with access complaints against the cable system a more local and efficient remedy, but it would relieve the FCC of burden-

320 FCC Letter of Intent, supra note 5, at 1776.
321 Id. at 1774; accord, Cable Television Report and Order, supra note 26, at 1561, ¶ 131.
324 See N.Y. Times, July 1, 1971, at 95, cols. 1-4; N.Y. Times, Oct. 26, 1971, at 83, cols. 1-4. Criticized for failing to hold a hearing before promulgating the interim rules, for example, the official promised he would hold one before the rules expired and more permanent rules were adopted. N.Y. Times, July 1, 1971, at 95, col. 3. See also note 313 supra.
some ad hoc decisions and provide the Commission with a needed buffer, enabling it to keep its distance from the operational front of the access area while matters are still in flux.

The cable operator, moreover, seems a questionable repository for the exclusive regulatory authority the FCC would confer on him. His own economic interests conflict in important ways with the public interest in the regulation and administration of the access channels. For one thing, since the public-access channel must be provided free under the intended rules, with production costs free as well for studio presentations lasting five minutes or less, and since "to the extent that the public access, educational, and governmental channels are not being used, these channels may also be used for leased operation," the operator has an interest in discouraging use of the public-access channels so he can devote them to money-making leased operations. His control of the system, free of local or state supervision, would present a variety of ways by which to promote this result (e.g., by being stingy with production facilities). Then there is the fact that the cable operator may himself be engaged in programming on the system, indeed with no limit on the number of channels he can use for the purpose and with the right to employ "pay TV" arrangements involving extra charges to subscribers for special programs or special channels. The cable operator thus has an interest in maximizing the audience for his own programs as against those of competing programmers using leased channels; with the exclusive authority conferred by the FCC to promulgate and administer the regulations and rates governing the leased channels, the operator will have power to advance his interest through discouraging leasing generally (as through high rates) and through discriminating in time-allocation against the most competitive lessees. To be sure, such conflicts of interest are inherent in the cable operator's

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325 See note 142 *supra* and accompanying text.
326 FCC LETTER OF INTENT, *supra* note 5, at 1773; CABLE TELEVISION REPORT AND ORDER, *supra* note 26, at 1559, ¶ 125 ("But such operations may only be undertaken on the express condition that they are subject to immediate displacement if there is demand to use the channel for the dedicated purpose"); 47 C.F.R. § 76.251 (a) (7).
327 Compare the complaints by officials of "Amtrak" that railroads, notwithstanding their contractual obligations to "give priority to passenger trains," commonly favor freight service instead. Wall Street Journal, Jan. 24, 1972, at 1, col. 6 (eastern ed.).
328 The Sloan Commission would limit the operator (and any lessee) to two channels (SLOAN REPORT, *supra* note 1, at 143), which seems reasonable. The New York City franchises have a similar limitation. See Sterling Franchise, *supra* note 286, at 7, 12-13; New York REPORT, *supra* note 19, at 150-54. The FCC's intended rules impose no limit: "Such origination cablecasting shall be limited to one or more designated channels which may be used for no other purpose." 47 C.F.R. § 76.201 (a).
329 The FCC has authorized "pay TV" cablecasting operations by cable operators and lessees, notwithstanding franchise provisions that purport to forbid or restrict such activity. Pierson, Ball & Dowd, 22 P & F Radio Reg. 2d 949 (1971).
330 Of course, the latter conduct would violate the FCC's principle of "nondiscriminatory access on a first-come, first-served basis." That such discrimination is nonetheless likely to occur, and that it will be difficult to prove when it does, is suggested by, among other examples, the FCC's experience with the analogous situation of telephone companies who were required to provide nondiscriminatory service to cable-television operators seeking pole attachments or channel facilities for the purpose of providing cable service to the area, but who nonetheless favored cable operators affiliated with the telephone company itself, to the point where the FCC prohibited affiliation between telephone companies and cable systems serving the same area. CATV Channel Service by Telephone Companies, 18 P & F Radio Reg. 2d 1549 (1970), aff'd, General Telephone Co. of the Southwest v. United States, 22 P & F Radio Reg. 2d 2171 (5th Cir. 1971). See also note 327 *supra*.
dual role as a programmer in his own right and a common carrier of programs offered by others, a role that has elicited expressions of potential concern by the FCC331 and the flat opposition of many.332 But if the conflicts are not to be eliminated by foreclosing the dual role, as it appears they will not be in the foreseeable future, at least they require regulatory supervision, so that there will be some effort to prevent the proprietary interests of cable operators from undermining the access potentials of the new medium.

Apart from his affirmative interest in his own programming, the cable operator is a private businessman who has no institutional interest in the public policy that favors maximizing access to the system. So far as the public-access channel (or channels) is concerned, he has an economic incentive, as has been noted, to discourage public use so that he can lease the channel. More generally, his interests are opposed to the objective, embodied in the New York City franchises,333 for instance, and presumably in national policy,334 of encouraging the use of the public-access and leased channels by as many different users as possible. The greater the number and diversity of users, the greater will be the costs of producing the programs (due in part to the inexperience of the programmers), the more numerous will be the disputes that arise, and the greater will be the overall effort and expense involved in administering the channels. It will be in the cable operator’s interest to book the time to as few users as possible, in as large segments as possible, as far in advance as possible. It is also difficult to see how the FCC’s “N plus 1” expansion formula, dependent as it is on complex percentages of channel use over an extended period of time,335 could be effective when no local or state agency had authority to supervise and audit the use of the channels so as to protect against manipulation by the cable operator. Finally, the cable operator seems less likely than a governmental entity to seek or allow public participation in the regulatory decisions. Even public officials may have to be prodded in this respect—as was seen in New York City, where the director of franchises promulgated interim rules without a public hearing but, in response to criticism, said he would hold a hearing thereafter.336 Cable operators, as private businessmen, seem even less likely to invite or welcome public participation in their decisionmaking; they are also less vulnerable — though perhaps not immune337—to court decisions compelling them to do so. It is noteworthy that the FCC in both its Letter of Intent and its Draft rules, while re-

333 See Sterling Franchise, supra note 286, at 13: “... the Company shall endeavor to lease such channel time to as many different persons as is practical, it being the intent of the parties that such Public Channels serve as a significant source of diversified expression.”
334 See FCC Letter of Intent, supra note 5, at 1773; Sloan Report, supra note 1, at 123-30; Cable Television Report and Order, supra note 26, at 1558, ¶ 121-22.
335 See notes 146-47 supra and accompanying text.
336 N.Y. Times, July 1, 1971, at 95, col. 3.
quiring that the access regulations be promulgated by the cable operator and kept on public file at the system's headquarters and the FCC, says nothing about a public hearing or public notice in connection with the promulgation.\textsuperscript{338}

In sum, the FCC's preemptive approach to regulation of the access channels would seem ill-advised. Local or state regulation not inconsistent with federal purposes, and consistent with the first-come, first-served principle and other rules laid down by the FCC, should be permitted and, indeed, encouraged. Public filing of such regulations with the FCC, as well as locally, should be required, along with public notice and a public hearing before adoption of the regulations (a requirement which in any event should be imposed on cable operators under the present system). The FCC should further provide that when a unit of state or local government certifies that it is authorized by state law to regulate the access channels, and that it is prepared to do so in accordance with the rules set forth by the FCC, the Commission would not ordinarily consider a complaint or dispute involving the access uses of a cable system in that jurisdiction until the certifying entity had ruled on it. Cable operators would remain free to complain to the Commission against state or local regulation claimed to be unduly burdensome and hence inconsistent with the federal interest in cable's development.

d. Production facilities and compulsory origination. Two important elements of state or local regulatory power with respect to cable-originated programming are left in doubt by the FCC's intended rules. One concerns the provision of production facilities for access programming, the other a possible state or local requirement, such as that imposed by the FCC but struck down in the Midwest Video case,\textsuperscript{339} that the cable operator produce or assure the production of local-live programming. The Letter of Intent, while not clear on the point (the Draft rules do not help), seems to preclude any local or state requirements that go beyond the FCC's specification of "at least minimal production facilities for public use within the franchise area."\textsuperscript{340} Such additional requirements would seem to constitute the forbidden "local regulation of access channels carrying programming,"\textsuperscript{341} and they would also seem to necessitate the "dual form of regulation" and the "detailed regulations" that the Commission says it wants to prevent.\textsuperscript{342}

\textsuperscript{338} See FCC Letter of Intent, supra note 5, at 1775-76; Staff Draft, note 134 supra. The final rules are the same; they simply require that "[t]he operating rules governing public access, educational, and leased channels shall be filed with the Commission within 90 days after a system first activates any such channels, and shall be available for public inspection at the system's offices." 47 C.F.R. § 76.251 (a) (11) (iv); see Cable Television Report and Order, supra note 26, at 1562, ¶ 134.

\textsuperscript{339} Midwest Video Corp. v. United States, 441 F.2d 1322, 21 P & F Radio Reg. 2d 2128 (8th Cir. 1971), cert. granted, 40 U.S.L.W. 3314 (U.S. Jan. 4, 1972); see text at notes 182-87 supra.

\textsuperscript{340} FCC Letter of Intent, supra note 5, at 1777. The final rules phrase the requirement in terms of a single public-access channel: "The system shall maintain and have available for public use at least the minimal equipment and facilities necessary for the production of programming for such a channel." 47 C.F.R. § 76.251 (a) (4); accord, Cable Television Report and Order, supra note 26, at 1564, ¶ 142; see note 157 supra.

\textsuperscript{341} FCC Letter of Intent, supra note 5, at 1774; the final rules seem even stronger, prescribing local rules "concerning the number or manner of operation of access channels." 47 C.F.R. § 76.251 (a) (11) (iv); accord, Cable Television Report and Order, supra note 26, at 1561, ¶ 131.

\textsuperscript{342} See text at notes 299-300 supra. In a separate section on "production facilities," the FCC says, "It is obvious that our goal of creating a low-cost, nondiscriminatory means of channel access cannot be attained unless members of the public have available some reasonable produc-
So far as compulsory local origination is concerned, the textual implication of preemption is weaker, since this programming would not be carried on the “access channels”; the intent of the Letter of Intent is still not clear, however, since the FCC includes “program origination” among the areas where “federal regulation is clearly indicated” (though not saying, to be sure, that such regulation must be preemptive).

In any event, it would seem that in both cases, state or local requirements should be permitted. There is a wide gap to be bridged between the FCC’s requirement of “at least minimal production facilities for public use within the franchise area” and the realization of practical arrangements adequate to support the public’s access needs with respect to a particular cable system. What the Commission speaks of as “production facilities” entails an entire package of arrangements, including the number and location of studios in the community, the equipment made available at each studio (or, indeed, in mobile units), and the charges, if any, for use of the equipment (an issue already raised in New York City, where one cable operator had imposed, but withdrew under users’ protest, a $10 fee for use of a videotape playback deck). The contents of the package need to be adjusted, moreover, to the peculiar characteristics and needs of each community and each cable system. Since provision of adequate production facilities is indispensable, as the FCC has recognized, to “our goal of creating a low-cost, nondiscriminatory means of channel access . . . .”, it would seem that the particular arrangements to be made in each community should be subject to some regulation. This is especially so because these are arrangements as to which the economic interest of the cable operator—an interest, inevitably, in minimizing expenditures on production facilities for public-access users—conflicts squarely with the public interest in maximizing access. It thus seems peculiarly inappropriate to leave exclusively to the cable operator the decision whether to provide anything more than “minimal” production facilities for public use.

Compulsory origination has an important bearing on the availability of production facilities for access users. When the FCC issued its order, subsequently suspended by virtue of the Midwest Video decision, requiring program origination by the largest cable operators, it gave as one reason: “. . . the origination requirement will help ensure that origination facilities are available for use by others originating on any leased channels. . . . It is unlikely that many would-be

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343 FCC Letter of Intent, supra note 5, at 1777. It goes on to say, “Many elaborate suggestions have been made for comprehensive community control plans such as neighborhood origination centers, mobile communications vehicles, and neighborhood councils to oversee access channels. Here again the Commission will encourage experimentation rather than trying to enforce a more formal structure at this time.” Ibid.; accord, Cable Television Report and Order, supra note 26, at 1564, ¶¶ 142-44. Nothing is said directly with respect to state or local production-facility requirements, and ordinarily a federal design to “encourage experimentation” would welcome participation by state and local governments; in the FCC’s present scheme of things, however, “experimentation” seems to be a code word for preemption of state or local regulation of cable. See text at notes 299-301 supra.

344 See note 313 supra.

345 See FCC Letter of Intent, supra note 5, at 1777; Cable Television Report and Order, supra note 26, at 1564, ¶ 142. See note 342 supra.

lessees would possess their own origination equipment and studio, particularly those desiring only occasional use... Without such a requirement, the Commission is now reduced to saying in the Letter of Intent: "We expect that many cable systems will have facilities with which to originate programming, and such facilities should also be available to produce program material for public access." In addition to their interest in assuring production facilities for access programming, local or state governments may reasonably consider that requiring the cable operator to originate local programming — as is required by four local franchises in New Jersey, for example, and recommended by the New Jersey Report — is desirable in its own right. It assures that the cable system will provide the community with types of programs, such as local news coverage, that may well not be provided on the access channels; the local or state government may wish, in addition, to require coverage of specific local events, such as city council or school board meetings. To be sure, many cable operators will voluntarily become program originators. But this decision cannot be counted on, and it may not produce particular kinds of local-live coverage that the community wants. A state or local government may share the FCC's judgment that to require origination is "the most effective way to encourage origination. While such a requirement would make no difference for those systems who [sic] would voluntarily originate in any event, it should stimulate origination by systems which would otherwise not do so." The interest in allowing state or local origination requirements is especially forceful in the light of the decision of the court of appeals in the Midwest Video case, denying the FCC's authority to impose such a requirement. But even if the Supreme Court or Congress reverses that decision, the FCC's requirement was applicable only to the largest 10 percent of cable systems, leaving a great many systems whose origination would have to be required by the state or local government. No reason appears why the FCC should preclude such requirements.

With respect to both production facilities and required origination it may be argued, however, that local or state requirements could be unduly burdensome for the cable operator, thereby undermining the federal interest in the economic health of the medium and even raising the specter, discerned by the court.

348 FCC LETTER OF INTENT, supra note 5, at 1777; accord, CABLE TELEVISION REPORT AND ORDER, supra note 26, at 1564, ¶ 142.
349 See NEW JERSEY REPORT, supra note 21, at 62.
350 Id. at 72.
351 This is indicated, of course, by the action of one operator, a multiple owner, in bringing the Midwest Video case. See 441 F.2d 1322. See also the unenthusiastic attitude toward origination expressed by the local newspaper publisher who also owns the cable system in Longview-Kelso, Washington: "CATV does not want to get into local programming for two reasons: Lack of know-how, and cost ... [T]his will be one of the few times in history when a business has had to undertake a new service under government edict ... ." EDITOR & PUBLISHER, Oct. 10, 1970, at 13-14.
353 See text at notes 183-86 supra.
of appeals in *Midwest Video*, of confiscation. As noted earlier, such a concern would seem to have no valid basis with respect to requirements imposed on cable operators through the terms of franchises that the operators have accepted. Insofar as the question might be raised by local or state regulation imposing on an existing cable system requirements not contained in the franchise, it would seem sufficient to allow the cable operator to appeal to the FCC against any such requirement claimed to be unduly burdensome. Subject to that condition for requirements not contained in franchise agreements, the right of local and state authorities to impose requirements on cable systems with respect to production facilities and compulsory origination should be sustained.

C. The Case for State Regulation in the Light of the Intended Rules

Returning now to the vantage point of the states, the question remains whether the FCC's intended rules, their merits and possible improvements aside, obviate the need that otherwise exists for state intervention in the regulation of cable. The question is whether these rules cover enough ground and remedy enough of the deficiencies of local regulation to render a state role unnecessary, or whether they reduce the benefits of state entry to the point where these are outweighed by the burdens of subjecting cable to a third layer of regulation. The FCC rules do respond to a number of the most glaring failures of the franchising process. They would require cable systems to have a minimum channel capacity, a minimum proportion of nonbroadcast channels, and one free channel each for public-access, government, and educational use. They would require channel leasing, and would provide a formula to compel expansion of the access-channel pool to meet rising demand. They would place a reasonable limit on franchise fees and impose a construction timetable. They would at least require franchise durations to be "reasonable." Through these and other provisions, it is clear, the intended rules would reduce the need that now exists for state intervention. Nevertheless, the rules would not remove that need. There are two reasons for this conclusion.

First, it remains uncertain whether and when the rules will become effective. As noted earlier, it looks in late January 1972 as though the FCC will shortly adopt them, and in any event it must be assumed that the distant-signal issue on which they hinge will be settled sometime. But even so, there remain substantial possibilities for legislative or judicial roadblocks and at least considerable

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355 See notes 185, 190 *supra* and accompanying text.
356 See text at notes 285-91 *supra*.
357 This would be comparable to the procedure set forth in the *Letter of Intent* whereby franchise fees in excess of three percent shall not stand unless justified by both the franchising authority and the franchisee, with the latter having to show that the fee "does not interfere with achievement of his responsibilities as defined in relevant Commission rules and documents." FCC *LETTER OF INTENT, supra* note 5, at 1783. While the franchise-fee procedure would be applicable even to provisions of agreed-upon franchises, the economic burden of production-facility or required-origination provisions does not seem likely to be so substantial as to require protecting the cable operator against obligations he has voluntarily assumed. See also text at notes 285-93 *supra*.
358 See text at notes 26-27, 131-33 *supra*. 
There is the additional possibility that the local aspects of the rules will be struck down by the courts, as through a Supreme Court affirmance of the Midwest Video decision. Such a result would remove the rules entirely as a factor in the local incidents of cable, at least until Congress amended the Communications Act to supply the FCC with the needed authority. So while the intended rules will probably become a permanent part of the picture so far as regulation of cable television is concerned, they are not a sure thing, and in any event their establishment may be substantially delayed. During the period of delay, the existing system of local franchising will continue to operate, absent state intervention, much as it has to date. Many new franchises will be issued, a substantial number of them in large cities, and many new systems will be constructed pursuant to franchises already issued. The vacuum that calls for regulatory intervention will persist, and its harmful impact on the new medium will expand. The states, it would seem, should not stand by and let this happen — as New York and New Jersey have recognized by enacting moratoriums on cable franchising.

All things considered, until the intended rules actually go into effect, states would seem justified at least in suspending franchising activity. And in deciding whether to enact affirmative legislation, they should probably assume, to the extent it makes a difference, that the federal role with respect to the local incidents of cable will remain until further notice the same as it was at the end of 1971.

The second point, however, is that it would not seem to make a difference. Even under the FCC’s intended rules, while the need for state regulation would be reduced, it would still be substantial. The rules leave a large expanse of regulatory decisions, including the entire franchising process, to the local or state governments. They thus leave these decisions, absent state intervention, to the risk of continued performances such as those that have discredited the local role to date. For example, not only does the FCC decline “to set out comparative criteria to govern the selection process” (a decision that seems appropriate), but, as has been seen, its rules do not even require minimum procedures to be observed in conducting that process. The rules thus present no barrier to the political influence (or worse), the lack of due deliberation, the exclusion of public participation, that have so often characterized franchise awards. In addition to the question of who gets the franchise (which includes options of ownership by the local government itself, by nonprofit or community organizations, and by members of minority groups), almost all the important decisions as to what

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359 When the Letter of Intent was issued in August 1971, one FCC commissioner was quoted as telling a trade journal, “I think it will take about 3 years.” TELEVISION DIGEST, Aug. 9, 1971, at 3. See note 27 supra and accompanying text.

360 See text at notes 183-88 supra.

361 See the quotation in the text at note 476 infra, regarding “the decisions that hundreds of individual municipalities [will] make” with respect to cable in the “next several years.”

362 See notes 12-13 supra and accompanying text.

363 FCC LETTER OF INTENT, supra note 5, at 1781.

364 The Sloan Commission placed heavy emphasis on the options presented in the choice of different types of entities as the cable franchisee. It recommended “that Public Television stations be permitted to seek cable franchises without market area restrictions” (Sloan Report, supra note 1, at 162), and further declared:
goes into the franchise, while narrowed in range by FCC guidelines, would still entail substantial discretion on the part of the local or state government. Among other things, there is the question of the area to be served by the cable system, \textsuperscript{365} interconnection with other systems, channel capacity (above the FCC's minimum of 20), the construction timetable, the franchise fee (subject to the FCC's rebuttable ceiling of 3 percent), and the franchise duration (subject to the FCC's requirement that it be "reasonable"). There are, moreover, the affirmative regulatory obligations that the FCC purports to impose on state or local authorities with respect to supervising the service rendered by the cable system\textsuperscript{366} and regulating the rates.\textsuperscript{367} Then, with respect to the nonbroadcast channels, there are the decisions, plainly committed to the local or state government, concerning use of the governmental and educational channels the FCC will require. There are the two areas, production facilities and required origination, where the FCC rules may or may not permit a role for local or state authorities, but where it would seem that they should.\textsuperscript{368} Then, if the FCC should reconsider its unfortunate intention to preclude any local or state role in regulating use of the access channels or requiring the dedication of additional channels, the scope of decision-making left to local and state governments would be broader still; indeed, the FCC requirement of public-access and leased channels would itself create a substantial task — and a desirable one — of ongoing regulation by local or state governments rather than by cable operators alone.\textsuperscript{369}

In conclusion, the FCC's intended rules, even when they become effective, will leave a large and critical area of regulatory decisionmaking in the hands of

\textsuperscript{365} We have noted on several occasions that the community enterprise, profit-making or non-profit, is particularly appropriate to some of the broader purposes of cable television. We have especially in mind those enterprises which have come into being within neighborhoods that have special social or ethnic problems and constitute in some measure sub-cities with special requirements and special knowledge of their own.

We urge that wherever those circumstances are found, cities give preference to franchise applications from such enterprises. . . .

\textsuperscript{366} Id. at 162; see also id. at 126, 148-49. (Of course, this position may be attributable to the composition of the Sloan Commission, dominated as it was by heads of nonprofit institutions, see note 22 supra — including one, the Bedford-Stuyvesant Restoration Corporation, which seems the model for the "community enterprise" described in the quoted passage, and which has an application pending for a cable franchise in Brooklyn. Telephone interview with Morris Tarshis, Director of Franchises, City of New York. The commission included no representative of the commercial cable industry, who might have been expected to present a different point of view on this question. See also text at notes 522-28 infra.)

\textsuperscript{367} FCC Letter of Intent, supra note 5, at 1782 ("We emphasize . . . that . . . we do not intend to supervise the manner of dividing up political subdivisions. There are obviously a variety of reasonable ways to proceed here, and the matter is one uniquely for the judgment of the local entity." FCC Letter of Intent, supra note 5, at 1781; accord, Cable Television Report and Order, supra note 26, at 1576, ¶ 180.)

\textsuperscript{368} FCC Letter of Intent, supra note 5, at 1782 ("the franchising authority must have a program to ensure quality of service and to review service complaints"). The final rules say only that "[t]he franchise shall specify procedures . . . for this purpose," 47 C.F.R. § 76.31 (a) (5); see Cable Television Report and Order, supra note 26, at 1577, ¶ 184.

\textsuperscript{369} FCC Letter of Intent, supra note 5, at 1782 ("We will require that the franchising or other governmental authority specify or approve initial subscriber rates . . . .") The final rules in imposing this requirement speak only of "[t]he franchising authority" (a term they do not define), 47 C.F.R. § 76.31 (a) (4), but presumably do not mean to exclude rate regulation by the state where the franchise is granted by the municipality. See Cable Television Report and Order, supra note 26, at 1577, ¶ 183.

\textsuperscript{368} See text at notes 339-57 supra.

\textsuperscript{369} See text at notes 320-38 supra.
local and state governments. And the institutional considerations that account for the failure of local regulation to date would still largely obtain, disabling the local governments from effectively performing the regulatory task. These considerations would still militate in favor of state intervention. While the need for state intervention would be lessened by adoption of the FCC's intended rules, it would still be compelling.

III. The Shape of State Regulation

A. State Preemption Versus a "Mixed" State-Local Regime

The decision in favor of state regulation leaves the formidable task of fashioning the content of that regulation. One is met at the threshold by a broad choice between two forms of state involvement. In the first approach, the state — typically by declaring cable to be a public utility and hence subject to the jurisdiction of the state public utilities commission (however that agency may be named) — takes over the franchising of cable systems and the rest of the field not occupied by the federal government, ousting the local governments from any meaningful role in cable regulation. This path of "state preemption" has been the choice, basically, of the five states that enacted legislation to regulate cable prior to 1971. The alternative is what may be called a "mixed" approach, whereby the task of regulating cable is shared or apportioned in some way between the state and local governments. One variety of this approach has now been enacted in Massachusetts, and others are embodied in the proposed rules of the Illinois Commerce Commission, the recommendations of the New York, New Jersey, and Sloan Reports, and a number of bills pending before the legislatures of these and other states. It is characteristic of all these mixed proposals, as will be seen, that the franchising power is left essentially in local hands. Beyond that, however, the proposals vary considerably in the regulatory schemes they would create and, in particular, in the extent to which they would institute state controls and state involvement with respect to franchising.

Of the two approaches, state preemption seems the easier course. It is a 370 See text at notes 89-125 supra. 371 The power of a state to regulate cable television as a public utility has been settled by TVPix, Inc. v. Taylor, 304 F. Supp. 459 (D. Nev. 1968) (three-judge court), aff'd mem., 396 U.S. 556 (1970); accord, Opinion of Attorney General, State of Hawaii, Dec. 2, 1969, UTIL. L. REP., State Volume 1969 et seq., ¶ 21,206; Opinion of Attorney General, State of Indiana, Dec. 21, 1965, UTIL. L. REP., State Volume 1965 et seq., ¶ 20,276; ILLINOIS COMMERCE COMMISSION, ILLINOIS REPORT, supra note 14, at 2194. See also Aberdeen Cable TV Service, Inc. v. City of Aberdeen, 176 N.W.2d 738 (S.D. 1970). The conclusion seems clearly correct. Apart from what it may become in the future, cable today, in areas where it operates, would seem no less vital a service than, say, the telephone was in 1885. See State v. Nebraska Telephone Co., 17 Neb. 126, 22 N.W. 237 (1885). In addition, the cable system receives special privileges through the grant of a governmental franchise, and even if the franchise is not exclusive, cable service, by most informed opinions, constitutes a de facto monopoly within the area served. See authorities cited in note 108 supra; ILLINOIS REPORT, supra note 14, at 2194. These two characteristics have traditionally been recognized as of central importance in determining whether a privately owned business warrants public-service regulation. See Munn v. Illinois, 94 U.S. 113, 125-27 (1876); I. WYMAN, THE SPECIAL LAW GOVERNING PUBLIC CORPORATIONS AND ALL OTHERS ENGAGED IN PUBLIC EMPLOYMENT 40 (1911). 372 See notes 6-10 supra. 373 Massachusetts Act, supra note 17.
simple step, and follows a well-trodden path, to pass a law subjecting the new industry to the jurisdiction of the public utilities commission, which proceeds to certificate and regulate cable systems essentially as it does telephone, gas, and electric companies. The mixed approach, in comparison, is novel and complicated, requires an array of decisions as to the allocation of particular regulatory powers, and will doubtless be more cumbersome in operation. It has the overall disadvantage of subjecting the cable industry to three layers of regulation rather than two.

Nonetheless, the mixed approach seems the more desirable form for state regulation to take. Unfortunate, even disastrous, as the experience with exclusive local regulation has been, and compelling as the need for state intervention is, there are cogent values to be served by preserving a local role in the regulation of the local cable system. The cable system promises to become a central and vital institution in the community. “Whatever other capability it may possess . . . [cable television] is able, as conventional television is not, to serve its own community and that community alone.” Much of cable is an “intensely local activity,” and much of the channel use “will be at the municipal and even the neighborhood level.” The interest in local control of the cable system may be analogized to that which supports local control of the schools, or indeed it may be compared — especially in view of the role the system may come to play in local politics—to the interest in local control of the local government. Among privately owned facilities or services, it is difficult to think of any more intimately engaged in a vital, symbiotic relationship with the local community than the cable system may prove to be — except, of course, for the one that presents the closest analogy of all, but is not subject to government regulation, the local newspaper. Local dependence on the cable system begins with mundane considerations. It is the local citizens who not only will be paying the monthly charges to the cable operator (without a competitive alternative), but who, once they have subscribed to the system, will depend on the operator for the surpassingly indispensable service of keeping their television sets in operation. Then, it is the local citizens for whom it is hoped the cable system will function, in a host of possible ways, as a “community voice.” It is the local citizens whose schools

374 Sloan Report, supra note 1, at 98; see also id. at 160, 161-62, 115-24, 126; Barnett, supra note 1, at 296-97; New York Report, supra note 19, at 188; New Jersey Report, supra note 21, at 69-72.
375 Sloan Report, supra note 1, at 154.
376 Id. at 160.
377 Id. at 115-22; Barnett, supra note 1, at 305-10.
378 This, incidentally, is not to say the rapid disappearance of local control of newspapers presents no issue of public policy. Recently the head of the Gannett newspaper chain, announcing his company’s acquisition of its fifty-third daily in the United States, offered reassurance that the company would maintain its “longstanding policy of local autonomy.” N.Y. Times, Jan. 15, 1972, at 33, col. 3.
379 The Massachusetts Act, however, has an interesting requirement that the cable operator “shall not remove any television antenna of any subscriber but shall, at cost, offer to him and maintain an adequate switching device to allow the subscriber to choose between cable and noncable reception.” Section 5(h). The Illinois Proposed Rules have a similar provision but would go further and require that the switch be provided “without additional charge,” rather than at cost. Illinois Proposed Rules, supra note 16, at 30. (The Massachusetts approach seems preferable. There is something to be said, after all, for the esthetic interest in getting the antennas off the rooftops.)
380 E.g., Sloan Report, supra note 1, at 123-34.
and government will be served, under the FCC's intended rules, by dedicated channels on the system; whose communities will be defined, possibly in more than a geographical sense, by the prescribed service area of the cable system; who will get from the cable system their only nonbroadcast television programming, as well as other broadband communications services; and, finally, who will depend on the cable system for their only access to the television medium as communicators, and who will have to deal continually with the cable operator in seeking such access and the production facilities needed to effect it. In short, the cable system has a uniquely local genius; and it is the local citizens who will have to live with the system and its operator. From all these considerations, and others, the policy conclusion seems clear: While a state role in cable regulation is necessary, if there is a feasible way to preserve a local role as well, this is what should be done.

It is one thing to reject state preemption in favor of a mixed approach, however, and another to concoct the mix. At the heart of the problem is the franchising process. That process involves, broadly speaking, the determination of two questions: who gets the franchise, and what shall be required of him (or what shall be the elements of the franchise "package"). There is a sense, of course, in which franchising as so defined cannot be separated from the other methods involved in regulating cable, such as the promulgation of federal or state rules applicable to all cable systems. Any obligation imposed on cable systems by a statute or rule — the FCC's requirement that one channel be set aside for free public access, for example — could be included in the terms of a franchise; such a requirement has the effect, in fact, of dictating a term of new franchises and altering the terms of existing franchises to which it applies. Cable systems will indeed be subject, under the FCC's intended rules, to an assortment of such federal requirements and they will also be subject, under any scheme of state regulation, to some state requirements as well. But there is a substantial area of discretion with respect to the requirements imposed on the cable operator — not to mention the question of who the operator will be — that will necessarily remain the province of case-by-case decisionmaking through the franchising process. There are two basic reasons for this. First, every community and every potential franchise area is unique, with its own peculiar characteristics and needs so far as cable service is concerned. Second, cable operators after all are private parties, and the establishment of a cable system involves the making of a contract; a franchise package acceptable to applicants in one community might get

381 "If the local cable system serves to delimit neighborhoods, to give a sense of community to a section of a city or to a suburb now mainly dependent on the central city media, then politics could become more decentralized, with less attention to the national and state, and more to the local." Id. at 121.

382 Thus, the FCC's public-access requirement will be applicable to existing franchises after five years. See note 158 supra and accompanying text.

383 See text at notes 135-77 supra.

384 Of course, federal or state rules may affect this question as well. This is the effect, for example, of the existing FCC rule prohibiting ownership of a cable system by the licensee of a television station serving the same market. See 47 C.F.R. § 74.1131 (a) (2). The impact of both federal and state requirements in circumscribing the choice of the franchisee can be expected to remain, however, quite limited.
no takers in another. Thus, although the government does have power, through statutes or rules, to alter the terms not only of future franchises but of existing ones as well, so that there is no watertight bulkhead between franchising and noncontractual regulation, the distinction is necessary and important nonetheless. Separate consideration of the franchising process and the decisions it entails accordingly plays a central role in all programs of cable regulation. As has been indicated, moreover, the various proposals for "mixed" state regulatory schemes recently put forward, all of which are different, differ mainly in their treatment of the franchising process, and the crucial issue in this connection proves to be the extent to which that process, while conducted by the local government, should be subject to the control or participation of the state. Before offering my own views as to the elements to be included in a state regulatory scheme, it will be useful to summarize the main elements of the various proposals, particularly as they relate to franchising. The proposals may be aligned, roughly, in order of ascending state involvement in franchising—or of decreasing "local autonomy"—and I shall treat them in that order.

B. The Various "Mixed" Proposals


One school of thought, exemplified and justified by the New York Report, would preserve a maximum degree of local autonomy in the franchising process. To be sure, under the scheme proposed in the Report applicants for local franchises would have to meet minimum qualifications, prescribed by regulations issued by the state commission with respect to technical, financial, and character fitness, and the proposed cable system would likewise have to meet minimum state requirements with respect to construction and operation. The state commission would also have authority to order cable operators to make "major changes" during the term of their franchises, "where necessary either to conform to FCC requirements or to implement a Statewide objective of overriding concern." The franchise applicant would accordingly be required to file his appli-
cation papers with the state commission as well as the municipality, and—a standard provision in the mixed proposals—to obtain from that commission, after receiving the local franchise, a certificate of compliance with the state requirements. There is "one situation where the state commission could certificate a system directly"—"[w]here it appears that a viable CATV system requires a franchise from more than one community, and the communities involved are unable to coordinate their franchising functions and agree upon a common form of franchise for a single operator . . . ." But with these relatively minor qualifications, and others to be noted, the statutory scheme proposed in the New York Report would leave the selection of the franchisee and the formulation of the franchise terms in the power of the local government.

The Report justifies this approach at some length. Its arguments, which will be evaluated later, are, first, that "[a]s long as minimum criteria are satisfied, and no express Commission regulation or policy is contravened, it is extremely difficult to make a choice among qualified applicants—particularly from a distance." This was demonstrated, the Report notes, by the sorry performance of the FCC in awarding television broadcast licenses in comparative proceedings, a charge against which one would not want to defend the FCC. Further, "in an emerging industry, the terms of the franchise are likely to be a matter of bargaining between the municipality on the one hand, and the various applicants on the other," and, again assuming that minimum state criteria are met and no state rule or policy violated, "the local governing body would appear to be the most appropriate agency for determining which 'package' of arrangements is most beneficial to the particular community." Finally, recognizing that "local agencies may be corrupt or may show favoritism to an applicant based on extraneous considerations (e.g., political affiliations)," the Report responds:

But state agencies are not immune from these vices, and probably it is less damaging to the State if the officials of some town or city behave improperly in a single case than if a State agency does so in a whole series of cases (as the FCC did in the fifties in respect of television licenses). Moreover, assuming compliance with all Commission criteria, regulations and policies, it is very doubtful (a) that it will make much difference who obtains the franchise, or (b) if it does make a difference in a particular case, that the Commission will be able to predict the difference in advance. One possible

391 Id. at 187.
392 Id. at 189.
393 When the governor of New York offered legislation based on the Report, a newspaper account stated:

The Governor virtually acknowledged that he might be stepping on municipal toes as he repeatedly emphasized in a memorandum accompanying the bill that municipalities would still have the power to negotiate franchises and regulate the CATV fees for subscribers.

"The bill would not supplant local franchising; it would seek to correct the limitations in that system," the Governor said.

394 See text at notes 455-86 infra.
396 Id. at 188.
398 New York Report, supra note 19, at 188.
exception is where the contestants are a business firm on the one hand, and some form of nonprofit organization on the other. But this kind of choice—which goes directly to the "package" of benefits to be derived—seems like one the municipality should be able to make for itself.\textsuperscript{399}

The \textit{Report} does recommend that the state commission "have an advisory role in the franchising field," which would include preparing model franchises for use by municipalities and "providing consultation services for municipalities seeking guidance."\textsuperscript{400} The total state role thus recommended "is a limited one, but one that is considered necessary," since "[m]unicipalities are not experienced in this area, and franchising of CATV systems will not recur with sufficient frequency to permit the development of municipal expertise. Unguided municipal franchising of other utility services in the past generally has proved to be disastrous..."\textsuperscript{401} The \textit{Report} does not recommend requirements specifying procedures to be followed in awarding franchises, limiting the duration of franchises, or prohibiting the grant of exclusive franchises. It notes, however, that "[m]inimum requirements covering these points might well be added, although probably they would be superfluous [under New York law]."\textsuperscript{402}

2. \textbf{The Sloan Report}

The Sloan Commission, while its recommendations on the issue are not entirely clear, also appears to favor a maximum degree of autonomy in the franchising process for local governments, at least those of large cities. It would have the states create new regulatory agencies for cable whose principal activity would be "the general supervision of franchising procedures."\textsuperscript{403} The state agency would be empowered, mainly, "to identify appropriate franchise areas within the state" and designate a franchising authority for each such area, and to establish minimum standards for all franchises.\textsuperscript{404} The subjects of those minimum standards might include "system capacity, technical characteristics, performance and compliance, allocation of channels, non-discriminatory access, duration of franchises, and the like."\textsuperscript{405} (On the last point, franchise duration, the \textit{Report} elsewhere recommends "that municipalities limit the duration of franchises," with the limit being ten years,\textsuperscript{406} but it does not say what limit the state should impose.) The state agency would not involve itself in the regulation of subscriber rates,\textsuperscript{407} a task the commission would leave to the local authority,\textsuperscript{408}

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item Id. at 189.
\item Ibid.
\item Franchises are now required by State law to be non-exclusive. State law requires that the award of franchises be preceded by notice and public hearing (and State advisory services are recommended herein).
\item And . . . objectionable franchise provisions can be overridden by State regulatory measures. However, a limit of 20 years on any franchise term would not be unreasonable.
\item Id. at 190.
\item \textit{SLOAN REPORT, supra} note 1, at 159, 177.
\item Id. at 159-60, 177.
\item Id. at 177; \textit{see also} id. at 160.
\item Id. at 149.
\item Id. at 160.
\item Id. at 145.
\end{enumerate}
\end{footnotesize}
but would “receive and adjudicate appeals with respect to the performance of a cable operation.” 409 “The agency itself should not, except in extraordinary circumstances, issue franchises,” 410 and the Report conspicuously says nothing about state requirements concerning the procedures by which municipalities issue them. With respect to “major cities,” the Report goes further in the direction of local autonomy, although the difference is not clear. It recommends that the state agencies “be prepared to delegate major portions of their powers to major cities within the state,” 411 so that these cities might “set their own maximum rates and terms of performances; make their own channel allocations; establish their own appeal and adjudicatory mechanisms of first resort; and establish their own franchise boundaries where they are wholly within the city.” 412

3. The Massachusetts Act

Under the Massachusetts Act and the proposed rules of the Illinois Commerce Commission, the franchising process, while still placed essentially in the hands of the local governments, would be subject to minimum state requirements considerably more significant, especially in procedural terms, than any suggested by the New York and Sloan Reports; moreover, there would be a provision for the state’s own involvement in the franchising process by way of appeal. The Massachusetts law establishes a “Community Antenna Television Commission” in the state’s Executive Office of Consumer Affairs. 413 The commission is given authority to mediate and resolve conflicts between cities and towns over the exercise of franchising jurisdiction; 414 to regulate cable subscriber rates if, after studying the question for three years, it determines this to be desirable; 415 to issue standards and regulations; 416 and to carry out the adjudicatory functions to be described presently. Meanwhile, cable systems are required to have a franchise “from each city or town” in which they operate, 417 and the statute prescribes several provisions to be included in every franchise, with the state commission authorized to add others. 418 Among other things, the franchise must be

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409 Id. at 160, 177.
410 Id. at 160.
411 Id. at 177, 161.
412 Id. at 161-62. The only clear difference between the powers the commission would have specially delegated to “major cities” and those that would be available to all franchising municipalities under the commission’s recommendations appears to be the authority of the major cities to “establish their own franchise boundaries where they are wholly within the city,” which would override the authority otherwise given the state commission to “[i]dentify appropriate franchise areas within the state . . . .” Id. at 159. This would mean that in the case where a “natural franchise area crosses out of the city into a suburb,” which the commission cites as illustrating the need for state intervention (id. at 157), the state agency would be powerless to meet the need without the city’s concurrence. The commission’s desire to leave this question in local hands so far as large cities are concerned was related, it may be surmised, to its recommendation that “cities give preference” in awarding franchises to “community non-profit and profit-making institutions within neighborhoods which have special social or ethnic problems and needs.” Id. at 162, 176. See note 364 supra; text at notes 522-28 infra.
413 Massachusetts Act, supra note 17, at § 2.
414 Id. § 16.
415 Id. § 15.
416 Id. § 16.
417 Id. § 3.
418 Id.
nonexclusive and for a term of not more than 15 years, with renewal periods not to exceed ten years. These requirements, like all others imposed by the act on the content of franchising decisions, are declared to be applicable not only to new franchises, but to the existing ones to which grandfather status is accorded.

Of greatest interest here are the provisions affecting franchising procedure. Applications to the local franchising authority must be filed on a prescribed form setting forth, among other things, "complete information on the extent and quality of service, number of channels, hours of operation, variety of programs, local coverage, safety measures, installation and subscription fees" that the applicant proposes. There must then be a public hearing, on ample notice, before the franchise may be granted. (There is no requirement, however, of a public invitation for applications in the first place, or of public access to the applications on file; presumably such rules could be prescribed by the state commission, as one would think they should be.) "In the event more than one application is filed," the city or town is directed to "choose that applicant or those applicants which in its opinion will best serve the public interest." And it must "issue a public statement in writing containing the reasons for its acceptance or rejection of any or all applications, which reasons shall relate to the information the applicant furnished . . . [on the application form]." "Any applicant for a license who is aggrieved . . ." by the local authority's decision may then appeal to the state commission, "by a petition in writing, setting forth all the material facts in the case," and the commission "shall hold a hearing upon each such appeal," with due notice to all interested parties. The Act says nothing about the form of hearing, but it declares this hearing (unlike the one the municipality is required to hold) to be subject to the state administrative procedure act. That act sets forth requirements for "adjudicatory proceedings" which appear to be applicable and which include, among other things, the right of every party to call, examine, and cross-examine witnesses and to introduce exhibits. After the hearing, the Community Antenna Television Commission either "approves" or "disapproves of" the action of the local authority.

Id. § 11 (3) (1968).
Massachusetts Act, supra note 17, § 14.
cable Act says nothing about the standards of review to be applied in making this decision, but the administrative procedure act says the agency must determine, on the basis of reasons stated in writing, “each issue of fact or law necessary to the decision.” This would appear to call for unrestricted review of the entire franchising proceeding, including the ultimate question whether the franchise was granted to the applicant who “will best serve the public interest”—much as a federal administrative agency reviews an initial decision by its hearing examiner. In any event, if the commission approves the municipality’s action, it need only “issue notice to . . . [the parties] to that effect,” while if it disapproves it must “issue a decision in writing advising such issuing authority of the reasons for its decision and ordering the issuing authority to conform with such decision.” Judicial review of the commission’s decision is then provided for by the administrative procedure act. Pursuant to familiar concepts of judicial review of agency action, the review (jurisdiction for which is vested initially in the superior court) is confined, normally, to the record made below, and the court is authorized to set aside the agency’s decision if it is found to be prejudicially based on a constitutional violation, error of law, excess of authority, unlawful procedure, or absence of substantial evidence to support it, or if it is “arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law.” Finally, and significantly, although the commission or the court may thus reverse the municipality’s award of the cable franchise, the commission may not order the municipality to award the franchise to another applicant instead. Under the cable Act, the municipality, like the commission, retains a veto on the award, and if the two entities cannot agree, a new franchising proceeding must be instituted to try again.

431 See Administrative Procedure Act, 5 U.S.C. § 557 (b) (“On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule”); 47 C.F.R. § 1.282(b)(1).
432 Massachusetts Act, supra note 17, § 14. Under the state administrative procedure act, however, it seems that the commission will be required, upon a timely request, to provide a written opinion stating its reasons. Mass. Gen. Laws Ann. ch. 30A, § 11 (8) (1968).
433 Massachusetts Act, supra note 17, § 14.
435 See id. §§ 14 (4), (6) (7). The statute speaks of “the record of the proceeding under review” (id. § 14 (4) ), which would presumably include the record made by the franchising municipality to the extent there is one.
436 Id. § 14 (8). The statute provides, however, that “if the court shall give due weight to the experience, technical competence, and specialized knowledge of the agency, as well as to the discretionary authority conferred upon it.” Ibid.
437 . . . . The commission shall not, in any event, order a license to be issued until the application for said license has been granted by the issuing authority. . . . In case the issuing authority is unwilling to issue a license to any of the applicants before
4. THE PROPOSED RULES OF THE ILLINOIS COMMERCE COMMISSION

The Illinois Commerce Commission in its proposed rules has addressed itself to "[t]he possibility of developing cooperative certification procedures with Illinois municipalities, so as to give them a suitable voice in planning for and meeting the communications needs of their local residents." The commission advances a proposal whereby it would "reserve final certification authority to itself," but "under a procedure which would accord presumptive validity to municipal franchise awards that meet specified minimum procedural and substantive standards." Under the proposal, the municipality, before acting on any franchise applications, "would retain a recognized independent consultant" to make a survey of its needs in the field of cable communications. The consultant's report would be published, and "applicants would be invited to engage in a 'design competition' by submitting drafts of a franchise . . . ." showing how they would meet the indicated needs. The municipality would also determine, presumably at this stage, "how many systems should be franchised and for what areas, taking into account economies of scale and the existence and location of distinct communities of interest . . . ." The municipality "would then announce and hold a public hearing at which applicants could explain and defend their proposals and any interested person could be heard," and thereafter it "would draw together the best and most realistic aspects of the various proposals and incorporate them, together with minimal standards . . . [set by the state commission and the FCC], into a franchise document which would be published and on which the applicants who had theretofore participated would be invited to bid." The municipality would announce the criteria on which the bids would
be judged, which might include "the most capacious or sophisticated plant installation, the greatest number of described services beyond stated minima, or any combination of such factors, together with the local authorities' judgment about the relative character, financial, and technical qualifications of the applicants." It is expressly stated that the criteria might not include "the level of franchise fees payable to the community," and another possibility pointedly omitted from the list, and at least discouraged by the commission, is the (lowest) level of monthly subscriber charges. The bids would then be received—supported by bonds "sufficient to ensure acceptance of the franchise if awarded" and by filings showing that the applicant met minimum character, technical, and financial requirements, with all application records "freely available to the public at all times"—and then "the municipality would hold a second round of public hearings at which the merits and demerits of the various applications could be fully explored." Within a specified time after the close of these hearings, "the municipality would—unless it rejected all bids—announce the award of one or more franchises. The announcement would include a written statement of the reasons for the decisions. The state commission

... would then accept an application for certification from the successful franchisee(s) and would, without taking new evidence, accord presumptive validity to the municipal proceedings unless it were shown that there was a "vital flaw" in the sense of prejudicial failure by the municipality to observe the foregoing procedural guidelines; in which case the Commission could treat the proceedings as a whole or in relevant part as open to de novo consideration, or could invite the municipality to reopen its proceedings to cure the "vital flaw."

With respect to franchise duration, the commission reports that "[f]ranches in Illinois have been granted for varying periods, many of them for 25 years or more and often with a unilateral option in the cable operator to obtain extensions," but finds "reason to believe that the emphasis on franchise term may be somewhat misplaced":

If a cable system is required at the outset to install adequate capacity and to add to or improve that capacity as the state of the art and market demand develop, and if the quality of the service is subject to adequate supervision, there would seem to be little reason to change or to threaten to change cable operators. . . .

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444 Id. at 10.
445 Ibid.
446 In a unique position, the commission takes the view that "one of the present impedi-ments to industry development may well be the restriction on rate levels and rate increases typically found in municipal franchises," and proposes to invalidate franchise provisions setting maximum rate levels. Id. at 5. Compare SLOAN REPORT, supra note 1, at 145-56; see text at notes 580-84, 592-99 infra.
447 ILLINOIS PROPOSED RULES, supra note 16, at 10.
448 Id. at 11-12.
449 Id. at 12.
450 Id.
451 Id.
452 Id. at 13-14.
Accordingly the commission regards franchise duration "as a local matter to be settled by municipalities subject to FCC guidelines." It does propose, however, "that the terms under which cable systems operate be 'renegotiated' 10 years after initial issuance of a franchise and every 10 years thereafter," the parties being the cable operator, the municipality, and the commission, and the "principal issue" being "whether the operator was keeping its system current with the state of the art . . . ."  

C. The Extent of Local Autonomy in Franchising

From the variety of approaches thus sketched, a central issue that emerges is the extent of autonomy to be retained by the local governments in making the franchising decisions. It is the issue posed between the stance of the New York Report on the one hand, and the direction indicated on the other hand by the proposed Illinois rules, with their specification of complex franchising procedures for the municipalities to follow, or by the Massachusetts Act, with its appeal process that involves both the local government and the state commission and gives each of them a veto on the franchise award. The difference between the New York and the Illinois-Massachusetts approaches may not seem large or sharply drawn at present, but it appears to represent a crucial fork in the regulatory road. In appraising the policy choice, let us return now to the arguments advanced in the New York Report, and quoted earlier, in support of the position favoring maximum local autonomy. Analyzed and restated, these arguments would seem to have three main strands. The first, a relatively minor theme, is that once there are state rules and minimum requirements applicable to cable

453 Id. at 14.
454 Id. at 14-15.

The recommendations of the New Jersey Report may be rather briefly stated. Cable systems would be subjected to the authority of the state Public Utilities Commission, which would apply the normal elements of public utility regulation, including "general rate regulation." New Jersey Report, supra note 21, at 73-74. Much as the New York Report recommends, cable operators would have to obtain a permit from the PUC in addition to a local franchise, and the permit (but, apparently, not the franchise) would require renewal every ten years. Id. at 72-73. As in the New York Report, the PUC would have power to franchise a cable system directly where neighboring communities needed a single system but could not agree (id. at 74), and, again as in New York, there would be created within the PUC an "Office of Cable Communications" to provide consulting services to local franchising authorities. Id. at 74-75. Beyond that, "[m]unicipalities would retain the right to select the firm with the most attractive package of benefits." Id. at 76. The remaining recommendations are phrased as admonitions to municipalities, in which case the program would have a strong local-autonomy flavor, much like the New York Report's, but they turn out in the end to be intended, apparently, as recommendations for state restrictions on what municipalities can do. Thus, "[p]ermission to install a system should be granted in the form of an ordinance enacted by the local governing body after public notice and public hearings" (id. at 70); "[m]unicipalities should not require payment of fees on a percentage of gross receipts" (ibid.); they should require a minimum number of channels, "at least one channel for public access programming," production facilities, and the right to renegotiate the franchise every five years, with binding arbitration before an arbitrator appointed by the president of the state PUC. Id. at 70-72. (Apart from this renegotiation, no limitations on franchise duration are suggested. See id. at 72.) In addition, "[m]unicipalities should not award exclusive franchises," and they should require franchisees to "produce a minimum number of hours per week of locally originated programming." Id. at 72. Finally comes the surprise ending: "All existing franchises ought to be modified to comply with these provisions within three years of their enactment by the legislature." Id. at 72.

455 See text at notes 395-99 supra.
systems generally, the decisions made in the franchising process will not make much difference anyway. This view is also expressed, it may be noted, by the Illinois Commerce Commission when it takes the position that franchise duration should not be a state concern because, so long as there is adequate state supervision of the systems' technical capacity and service quality, "there would seem to be little reason to change or to threaten to change cable operators." The second and much more important argument is that the franchising decisions will indeed make a difference, but the difference goes peculiarly to the local impact of the system and should therefore be left to the local government. The third is that the state government probably could not do a better job of making the decisions anyway.

The first argument can readily be rejected. Both of the decisions involved in the franchising process—the selection of the franchisee and the design of the "package"—are and will remain important. As the New York Report suggests and the Sloan Report emphasizes, the possibilities of awarding the franchise to "some form of nonprofit organization," or to "community non-profit and profit-making institutions within neighborhoods which have special social or ethnic problems and needs," or quite simply to members of minority groups (in part on the ground that they have been "locked out" of any share in the control of the existing mass media), or to the municipal ownership of the franchising entity itself, or to the local newspaper if its ownership of the cable system is not prohibited by federal or state rules—these alternatives are anything but interchangeable, and they can be expected, in fact, to become increasingly controversial. Even in choosing among a group of commercial cable operators applying for the franchise, the decision would not seem a matter of indifference to the local public. As suggested earlier, the cable operator in his relationship to the community is more than a custodian of technical apparatus. He is the recipient of a unique prize within the gift of the municipality, one that provides a rare entree to mass media control; his ability to originate programming can make him a leading media voice in the community (or, if he declines the opportunity, can deprive the community of such a voice); and his control of the cable facility will make local residents dependent on him in vital and continuing

456 See, e.g.: "Moreover, assuming compliance with all Commission criteria, regulations and policies, it is very doubtful (a) that it will make much difference who obtains the franchise . . . ." New York Report, supra note 19, at 188.


458 See, e.g.: " . . . [t]he local governing body would appear to be the most appropriate agency for determining which 'package' of arrangements is most beneficial to the particular community." New York Report, supra note 19, at 188.

459 See, e.g.: " . . . [i]t is extremely difficult to make a choice among qualified applicants—particularly from a distance." Id. at 187-88. "But state agencies are not immune from these vices . . . ." Id. at 188.

460 Ibid., quoted in text at note 399 supra; see Sloan Report, supra note 1, at 191 (public television).

461 Id. at 176; see note 364 supra.

462 The Massachusetts Act provides that "Any city or town may construct, purchase and operate a CATV system, but such operation shall be subject to this chapter as if the system were privately owned and operated." Supra note 17, at § 20.

463 See text at notes 636-85 infra.

464 See, e.g., text at notes 522-23 infra. The view of the Illinois Commerce Commission quoted in the text at note 452 supra, to the effect that if the technology and the service are regulated the identity of the operator does not matter, therefore seems quite unrealistic.
The decisions involved in designing the franchise "package" are even more important. As has been noted, state and federal requirements will necessarily leave a large role for franchise decisionmaking. Most of these requirements will be of a minimum nature, leaving it open to the franchising authority to go further in a wide variety of respects. Moreover, every community and franchise area is unique (as emphasized by the Illinois proposal for a survey of local needs in each municipality), and the franchising process is in any event not unilateral, but a matter of bidding and bargaining with private applicants in each community.

Of course, to recognize the significance of the decisions involved in the franchising process is not to say they should be made at the state rather than the local level. On the contrary, as was pointed out earlier, these are decisions of primarily local impact. It is on this ground, indeed, that the New York Report, in its second argument, contends they should be subject to local decision-making autonomy. This is the crucial question, but it will be convenient, before addressing it, to deal with the third argument for local autonomy—the claim that a state agency is no less likely than a local government to be corrupt or show political favoritism, that the choice of the franchisee is no easier from the state capital than from city hall, that a state agency, in general, could not be expected to do a better job of franchise decisionmaking than the local government. Assuming its factual accuracy, the argument seems beside the point. The issue as posed here, in the context of a mixed regulatory scheme, is not one of state preemption of the franchising power. It does not pose a choice of local or state franchising. It is a question, rather, of state regulation of the franchising process and possible state involvement in that process. It poses issues such as whether the state should specify procedures for local franchising, should impose a limit on franchise duration, and, most significant, should devise a way to participate in the franchising process along with the local government.

The central issue, then, is whether state regulatory schemes for cable should preserve a maximum degree of local autonomy in franchising, along the lines proposed by the New York and Sloan Reports, or whether, without preempting the franchising process, they should seek ways to regulate and channel it, as the Illinois rules propose, and ways also to participate in it, as Massachusetts has begun to do. The issue is not black-or-white. The New York Report, after all, assumed that state law already required notice and public hearing before the award of a franchise, and if that was not the case the powers given the New York Public Service Commission under the Report's proposal might well enable it to impose those and other requirements on the franchising process. Still, the New York Report breathes a spirit of preserving and defending local autonomy in franchising—a theme stressed by the governor of New York in proposing the ensuing bill—which seems basically at odds with the thrust toward a system of state-local checks and balances in the franchising process found in both the Massachusetts Act and the proposed Illinois rules. If the difference is largely a

465 See text at notes 374-81 supra.
466 See text at notes 374-81 supra.
467 See note 402 supra and accompanying text.
468 See note 393 supra.
matter of emphasis and degree, it is there nonetheless, and it can be expected to widen and harden as state regulation develops. In practice, moreover, there may well be a crucial difference between a regime in which municipalities have power to make the franchising decisions in their own way and by their own lights, and one in which they are compelled to make them in some sort of conjunction with the state.

In evaluating the case for maximum local autonomy, it is necessary to take account of the prospect that local franchising authorities will have available to them, from a variety of sources, expert advice and assistance in the cable field that were not available in the past. Those who make the case rely rather heavily on this consideration. Thus the New York Report would give the state commission "an advisory role in the franchising field," which would include "preparing model franchises for use by municipalities of different sizes" and "providing consultation services for municipalities seeking guidance."\(^{469}\) The role is "considered necessary" because "[m]unicipalities are not experienced in this area, and franchising of CATV systems will not recur with sufficient frequency to permit the development of municipal expertise. Unguided municipal franchising of other utility services in the past generally has proved to be disastrous. . . .\(^{470}\)

The Sloan Commission invokes two sources of advice. It recommends creation by Congress of "a federal promotional agency for cable," designed among other things "to advise state and local governments on the development and uses of cable" and "[t]o stimulate the creation of corresponding state agencies,"\(^{471}\) and it points out, with a nod to sister foundations, that state and local authorities "will shortly be in a position to benefit from assistance made available by the Cable Information Service, now being established with support from the Ford Foundation and the John and Mary R. Markle Foundation . . . .\(^{472}\) The "Cable Television Information Center," as this entity proved to be called when its formation was announced in January 1972,\(^{473}\) may indeed have an important bearing on the capabilities of many local governments henceforth faced with franchising decisions. Funded by $3,000,000 from the two foundations,\(^{474}\) the center is designed to perform a service squarely relevant here: It "will coach local agencies in their complex dealings with franchise-hunting cable entrepreneurs," and "will aim . . . at steering cities and towns away from the common mistakes of the early cable franchises: First, the long-term license awards that imposed virtually no service requirements on operators; and second, the heavy burden of taxation in other cable franchises that has dampened profits and

\(^{469}\) New York Report, supra note 19, at 189.
\(^{470}\) Id. at 189. See also id. at 190, pointing out, as a reason for not recommending regulatory restrictions on franchise duration or franchising procedures, that "State advisory services are recommended herein."
\(^{471}\) Sloan Report, supra note 1, at 156-57.
\(^{472}\) Id. at 161. Thus "major cities," exercising the apparently plenary authority over cable that the Sloan Commission would have delegated to them by the state, would be given the opportunity to meet their own cable needs "through their own resources and those that the Cable Information Service can bring to bear." Ibid.
\(^{473}\) See N.Y. Times, Jan. 12, 1972, at 70, cols. 4-6.
\(^{474}\) Ford contributed $2,500,000, Markle $500,000. The center will operate as a unit of the Urban Institute in Washington. Ibid.
In announcing the center’s formation, the president of the Markle Foundation stated, as reported in a trade journal,

... that capital investment in cable during the next several years will far outdistance that made at a comparable stage of conventional television’s development. “The quality of that investment will guide the course of the industry” ... And the decisions that hundreds of individual municipalities make to guide the investment will determine whether cable enjoys orderly growth or becomes a “patchwork, incompatible” system. “That’s the real reason for the formation of this center” ...  

The statement well describes the stakes, and it also well indicates the issue here. The issue is whether these critical, long-term decisions should be left to be made by “hundreds of municipalities” as an exercise of institutional autonomy, albeit with access to advice, or whether the states, as the only entities in a position to do so, should try to create arrangements which, without shutting off any of the advice, render the exercise of the franchising power by the local governments subject to a system of checks and balances involving another level of government.

The state advisory office that the New York Report would create (and the New Jersey Report as well), the federal advisory office that the Sloan Report would create, the Cable Television Information Center that the Ford and Markle foundations have created, the independent consultants on whom the Illinois Commerce Commission would rely, all such steps to make advice and expertise in cable available to municipalities faced with franchising decisions are to be applauded. They will contribute, in fact, to filling what in the past has often been a gaping need, a lack of information and of anywhere to turn to get it, for local officials being pressed to grant a franchise. In addition, as has been noted, local officials themselves—at least the full-time professional ones, as distinguished from the elected city councilmen who actually vote the franchises—are likely to be better informed about cable in the future than they have been in the past. The local public, too, is more likely to be aware of cable’s importance and to make itself heard with respect to the franchising process—assuming, however, that it gets notice and an opportunity to do so. For all these reasons, there is ground for hope that many local governments that henceforth engage in the franchising process will do so in a manner more consistent with the public interest than has generally been true of municipal action in this field to date.

Yet it would seem naive to rely on voluntary improvement to reverse the record of the past, a record that adherents of maximum local autonomy seem too quickly to forget. The institutional inadequacies of the local role479 will persist, and it cannot be assumed that they will generally be overcome by the availability of advice and assistance. For one thing, it cannot be assumed that local govern-

475 Ibid. See also Broadcasting, Jan. 17, 1972, at 39 (principal aim is “to provide policymakers in local and state governments with the information and analytical tools required to make franchising decisions for cable television”).


477 See note 454 supra.

478 Public interest and involvement are being stimulated by efforts such as the recent book Cable Television: A Guide For Citizen Action, by Monroe Price and John Wicklein (1972).

479 See text at notes 89-125 supra.
ments generally will seek and follow the advice made available. The reliance placed by the New York Report and the Sloan Commission on advice and consultation to be provided to municipalities by a state agency seems especially unrealistic. Not only do institutional and political rivalries often exist between the municipal and state governments, but they have been noted recently, in the states of New York and Illinois, as involving specifically a struggle for power over the franchising of cable television. Even apart from political antagonisms, local officials who take the view, as reported in New York, "that they are fully competent to regulate cable television and that the state should not interfere," seem unlikely to be much more receptive to state advice than to state regulation. The Cable Television Information Service, as a privately funded entity without governmental ties, will have an important advantage from this point of view. But still, without deprecating its value, an office with a staff of 25 to 30, including 18 to 20 professionals, cannot be expected to service intensively each of the "hundreds of individual communities" that will be granting franchises in the next few years, even if they were all to request its services. It is noteworthy, too, that the center plans to charge communities for its more intensive, customized services, such as "studies of a particular city's franchise options"—which might well be the only services specific and forceful enough to carry a community in a particular direction, especially in the face of political pressure. When one of the faults of local franchising to date has been that municipalities "...more often than not have looked upon the entire process as one of assuring new revenues for the municipality," it may be too much to expect that many communities will be so decisively steered away from this approach as to be willing to spend money in connection with their franchising needs.

But the record of the past has a broader impact. One is compelled to review the catalog of derelictions in local franchising, to recall the endemic political favoritism (not to mention the occasional corruption), and the many cases in which local officials have had no interest in soliciting competition for the franchise, in giving public notice, in holding a hearing, or in otherwise making themselves aware of the options available to them. With those kinds of currents running, it seems unlikely that the availability of advice from Washington or the state

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480 See N.Y. Times, Jan. 19, 1972, at 1, cols. 5-8.
482 The New York hearings are replete with protests from local officials that they are fully competent to regulate cable television and that the state should not interfere. For example, representatives of one small city claimed that their community was capable of regulating cable television without "unnecessary and burdensome" additional state regulation. They testified that they had reviewed ordinances and franchises of numerous other New York towns before granting their own franchise. As a result, the city now has a system with only 12 channels, whereas larger capacity systems were readily available... .

MITCHELL, supra note 71, at 46.
484 See text at note 476 supra.
485 Among the services the center might provide are model ordinances and case studies for governments that request them; studies of a particular city's franchise options (with the city picking up part of the tab), and alternative courses of action in specific areas, such as the kinds of free public services a system might reasonably be asked to provide.

BROADCASTING, Jan. 17, 1972, at 40.
486 SLOAN REPORT, supra note 1, at 152.
capital will customarily prevail. The municipalities that need it the most will be the least likely to ask for it. The availability of expert franchising information will probably be of great benefit in many cases, but there will be many others in which for one reason or another the advice is not solicited or not accepted. The weaknesses of local franchising as revealed thus far seem too ingrained and widespread to be dissipated by mere assistance and advice. And every "bad" franchising decision, it must be recognized, will be a long-term, indelible one so far as cable television in that community is concerned. There is a need for institutional mechanisms that will help to assure the integrity and quality of all franchising decisions within their reach; not the least value of such mechanisms may be, indeed, their effect in increasing the receptivity of franchising authorities to the advice that will be available.

D. Two Case Studies of Local Franchising Behavior as Affected by Outside Enlightenment

While the foregoing conclusion would seem to follow from a realistic view of the entire story of local franchising to date, there are two instances, both of recent vintage, that point up sharply the kinds of attitudes on the part of local officials that must be reckoned with. The cases involve Santa Clara, California, and Buffalo, New York. The Santa Clara case goes directly to the question whether local officials can be counted on to follow advice from Washington, even when it is specifically requested by the city and when it is advice of a peculiarly authoritative nature. The Buffalo case also involves the reactions of elected local officials to applicable policies, or even laws, that run counter to the political influence favoring a particular franchise award. The Buffalo case, since it involves New York, is especially relevant to the stance in favor of maximum local autonomy taken by the New York Report.

1. SANTA CLARA

A city council's reaction to word from Washington concerning a pending franchise award is illustrated by an exchange that occurred in the fall of 1970 with respect to the cable franchise in the city of Santa Clara, a community of 85,504 located in the San Jose metropolitan market. The city council of Santa Clara voted tentatively in early October, 1970, to grant the city's cable franchise to the joint venture, mentioned earlier,8 consisting of the area's only VHF television licensee and only daily-newspaper publisher.488 The council was

487 See notes 47-50 supra and accompanying text.
488 This applicant was chosen over seven others, by a four-to-three vote of the council, despite the fact that the city manager, in a report to the council evaluating the proposals of five of the applicants, had ranked it fifth. Report to Santa Clara City Council from City Manager, Subject: CATV Applicants, Sept. 21, 1970, in Hemingway, supra note 47, at 32. The applicant's proposal, as embodied in the granting ordinance, provided for a 25-year term, a monthly subscriber fee of $5.95 (stated to be for a 24-channel system), a franchise fee of 2 percent of gross receipts (with no minimum amount payable until "the first full year service is provided"), a local origination studio for use by local residents at such time as the grantee should begin originating programs, and virtually no other requirements relating to the construction of the system or the services to be provided. City of Santa Clara, Ordinance No. 1232,
told, however, that the FCC had a rule prohibiting cross-ownership between a television station and a cable system serving the same area. Consequently on October 8, 1970, after the tentative vote (which would not become effective for 30 days), the city attorney and the "communications coordinator" of Santa Clara wrote the FCC a letter, stating that the city wished to grant the franchise to the joint venture, noting the FCC's rule and the applicant's expressed intent to seek to have it waived or amended, and asking the Commission's advice. The Commission replied a week later, October 14, with an officially adopted letter to the city. Santa Clara was informed that the franchise applicant as presently constituted would be prohibited from operating the cable system, that the franchise award would therefore be contrary to FCC policy, and that it could result in depriving Santa Clara residents of cable service for an extended period of time. With the benefit of this advice, Santa Clara proceeded to make the franchise award final.

2. Buffalo

It would be difficult to imagine a better demonstration of the sway of political favoritism in the franchising process, or of the inadequacy of outside enlightenment as a corrective—and hence the inadequacy of the laissez-faire approach to local franchising recommended by the New York and Sloan Reports—than the story of the franchise award in February 1971 by the city of Buffalo. Buffalo is presumably one of the "major cities" to which the Sloan Commission would have the state delegate most if not all of the limited powers over franchising it would otherwise possess under the Sloan recommendations. Also, it is the law in New York, according to the New York Report itself, that cable franchises "are now required by State law to be non-exclusive" and that "State law requires that the award of franchises be preceded by notice and public hearing." Yet on February 2, 1971, as reported in the Wall Street Journal, the
Common Council of Buffalo awarded an “exclusive” 15-year franchise, “without public hearings,” to a company owned by the publisher of Buffalo’s only morning and only Sunday newspapers (and licensee as well of AM and FM radio stations in the city). According to the Journal’s report, the award was made on a “hurry-up” basis by “the Democratic political organization that dominates the Buffalo Common Council”; the leader of the council majority was quoted as saying, “We have the votes . . . and we have the legislative prerogative to do what we want. If it’s illegal I’m sure we’ll be notified.” The course of events in Buffalo, as related in detail in the margin, indicates that in this large city, in 1971, the awarding of an “exclusive” franchise for the


497 The Wall Street Journal’s February 2nd account is substantially confirmed, and elaborated, by testimony given on behalf of a Buffalo civic organization, “CAUSE,” at a subsequent hearing. “CATV in Buffalo, New York,” Observations Presented by Dr. Claude E. Welch, Vice-President, CAUSE, at hearing before Committee on Authorities, New York Senate, Buffalo, October 28, 1971 (hereinafter cited as Welch). Consolidating the two accounts, it appears that by October 1970, Buffalo had received five franchise applications, which were referred for study to the Common Council’s Committee on Legislation. Welch, at 1. On November 5 the council held a session which defenders of the franchise award apparently have since described as a public hearing. As the Wall Street Journal describes it, “The applicants—but not spokesmen for religious, labor, business or other community groups—were invited to argue their case at a one-day hearing.” Wall Street Journal, Feb. 2, 1971, at 32, col. 3. Welch substantially agrees, stating that it “. . . was called a ‘session’; notices were sent to Council members, the Corporation council [sic], the press, and applicants for the franchise; apparently the only individuals who appeared were representatives of the five firms.” Welch, at 1. Subsequently three additional applications were received and filed with the same committee. Ibid. Of the eight applications, Welch notes, “flew . . . were detailed in their specifications regarding fees, channel capacity, and the like; these were, in effect, ‘feelers.”” Ibid. The Wall Street Journal reports “a source close” to one of the applicants, Teleprompter Corp., saying the company “didn’t press its bid because the newspaper subsidiary appeared to enjoy an inside track.” Wall Street Journal, supra, at col. 1.

On January 13, a newly elected member of the council, George Arthur, filed a resolution which the Wall Street Journal describes as “calling for an ‘in depth’ analysis by an outside consultant” (id. at col. 3) and which Welch describes as “calling for a public hearing on the CATV proposals.” Welch, at 1. In any event, by the next hearing, the two councilmen were asked what was to be done. In quick order on Jan. 19 the disciplined Democratic majority voted down the Arthur resolution, plucked the eight applications from the committee, then ‘received and filed’—that is, killed—all those except the newspaper subsidiary’s.” Wall Street Journal, supra, at col. 3. Welch adds that this was done through “the unusual expedient of a discharge petition,” and that “rather than engaging in public examination of the merits of several proposals, the Common Council clearly intimated it would consider only one proposal.” Welch, at 1. Further, according to the Journal story, “the city attorney determined that a majority vote would suffice to approve the one remaining application . . . He had said, before the Jan. 19 voting, that a two-thirds vote would be required. But after Mr. Mitchell (the leader of the majority party on the council couldn’t command two-thirds to kill the seven competing applications, the attorney changed his mind.” Wall Street Journal, supra, at col. 3.

The majority leader of the council, who presented the arguments that the franchise would be illegal because of its exclusive nature and because of the lack of a public hearing, was quoted by the Journal as responding: “We have the votes . . . and we have the legislative prerogative to do what we want. If it’s illegal I’m sure we’ll be notified.” Wall Street Journal, supra, at col. 1. Councilman Arthur was quoted: “Those guys don’t want to battle the newspapers.” Id. at col. 3.

On February 2 the council awarded the franchise to the newspaper-owned applicant. Wall Street Journal, Feb. 3, 1971, at 23, col. 3 (eastern ed.). As reported by Welch, “Two members of the Common Council filed a motion for a public hearing. However, with extraordinary disregard for the Council’s own By-Laws, the Majority Leader moved to remove the Courier franchise from the table at the Common Council meeting of February 2 prior to considering the public hearing motion . . . .” Welch, at 2. In response to the Wall Street Journal article and other criticism, the mayor of Buffalo, a week later, did invite comments and hold his own hearing on the franchise award before approving it. Welch, at 2.
entire city was accomplished through a process that included no real public hearing, little if any serious evaluation of the competing applications, a dominance of narrow political considerations, a rush to award the franchise to the politically favored applicant, an apparent absence of official explanation for the action taken (which may have been all too clear)—in sum, apparently a deliberate rejection of all the enlightened steps that the *New York Report* and the *Sloan Report* would trust municipal governments to follow if only shown the way.498

The Buffalo story is not unique; it may not even be atypical. As indicated earlier,499 many of the phenomena that occurred in Buffalo have been observed as common characteristics of the franchising process. These include the dominance of political favoritism, the avoidance of public notice or public hearings,500 the failure to evaluate competing applications on their merits, the disinclination to seek or accept outside advice, the undue haste in awarding the franchise to a favored applicant, the unduly favorable terms embodied in the franchise, the lack of local newspaper coverage (especially, but not only, when the local newspaper is itself an applicant),501 and, of course (although neither of these conditions was apparent in Buffalo), the conflicts of interest and outright corruption that have appeared in a number of cases. As the Buffalo story indicates, it is difficult to see why such practices would not persist under a scheme of state regulation which, like the *New York Report* and the *Sloan Report*, would basically keep the state out of the franchising process. It seems necessary to reject an approach whereby the local governments would be left essentially with the discretion, even though tempered by the availability of expert advice, to make whatever deal they like, through whatever procedure they like, with whatever franchise applicant they like.

To be sure, these considerations do not call for state preemption of cable franchising; the local interests remain compelling, and it is also true, as argued by the *New York Report*, that “state agencies are not immune from these

498 Apart from what the Buffalo story shows about the unwisdom of leaving the franchising power in the unregulated hands of the local government, it casts light, as have other instances noted in this article, on the question whether daily newspapers should be allowed to own or compete for cable systems in the cities they serve, a question discussed in the text at notes 636-85 infra. It may be wondered, and the point is of more than incidental pertinence (see text at notes 655-57 infra), how the events leading up to the award of the Buffalo franchise were reported in the Buffalo newspapers. According to one account, “Buffalo's press ignored the issue.” CHICAGO JOURNALISM REVIEW, Aug. 1971, at 14; see also id. at 5.

500 Mitchell reports that “[a] large city in New York [evidently not Buffalo] has had its franchise grant challenged in the courts. The county attorney and local school officials testified that a ‘lame duck’ city council granted the franchise to a private operator, without public hearings. The franchise, of 20 years’ duration with a 20-year renewal option, is for constructing a 20-channel system....” MITCHELL, supra note 71, at 46.

501 In a city such as Buffalo, where there is another daily newspaper, which itself owns a TV-AM-FM combination in the city (1971 BROADCASTING YEARBOOK, at A-39), that newspaper’s reticence to “expose” the cable story may be explained by a sort of mutual-protection pact. Ben H. Bagdikian, a former press critic who is now an editor of the *Washington Post*, has noted the existence of “a Geneva Convention of Newspaper Warfare which provides that whatever else the parties may do, they shall not escalate their competition to the point where they shall, first, expose each other’s errors and omissions; second, write about the other’s front office problems even if these affect the public welfare....” Senate Failing Newspaper Hearings, supra note 62, at 310-11. On the frequent lack of local newspaper coverage of cable franchising proceedings, see NEW JERSEY REPORT, supra note 21, at 45-47; Wall Street Journal, April 20, 1971, at 38, col. 2 (eastern ed.).
But the question does not have to be reduced, as the New York Report suggests, to a choice between governmental improprieties at the local or the state level. It is possible for the state, even while leaving the franchising power entirely in local hands (apart from minimum state and federal requirements applicable to the substance of the franchise), to impose procedural requirements governing the way the power is exercised. Beyond that, it may be possible, by following the path opened by the Massachusetts Act, to construct a system of checks and balances, a system of local and state participation in the franchising process, best designed to prevent the abuses of unfettered local autonomy while preserving the values of a local role in franchise decisionmaking.

To these ends I propose, drawing on the components of the various proposals summarized earlier, to outline two approaches to state regulation of cable. In their impact on the local franchising process, these can be described as a “basic” and a “dual” approach. The basic approach would leave the franchising power entirely in local hands and focus on creating state controls, both procedural and substantive, designed to reduce the likelihood of abuses and improve the quality of decisionmaking at the local level. In outlining this approach I shall also include brief discussions of a number of the issues not directly related to “franchising” which arise in constructing a scheme of state regulation. I shall then describe some possibilities for a dual approach whereby both the state and the local government would have necessary roles to play in the franchising process.

E. Recommendations for a “Basic” State Approach to Cable Regulation

1. Identification of Franchise Areas and Franchising Authorities

Assuming that the state will establish a mixed scheme of cable regulation and will authorize a state commission to assume the state’s portion of the regulatory function, the first question posed with respect to the franchising process is whether the franchise areas and franchising authorities throughout the state must be designated as such by the state commission prior to institution of the process. As has been noted, the Sloan Commission makes such a recommendation, although not with respect to large cities. The Massachusetts Act, the New York Report, and the proposed Illinois rules take a more limited approach. Basically, they defer to the franchising power of the established local governments. Intervention by the state commission is authorized only where, as stated in the Illinois proposal, the most broadly worded of the three, “it is made

502 New York Report, supra note 19, at 188, quoted in text at note 399 supra.
503 "... [T]he state must be prepared to let major cities establish their own franchise boundaries where they are wholly within the city." Sloan Report, supra note 1, at 161-62.
to appear that a group of communities would be more effectively served by a single cable system and the communities cannot agree on the project. 507 It should be noted, however, that the intervention contemplated by the New York Report and the proposed Illinois rules would take the relatively extreme form of direct franchising by the state commission, preempting what would otherwise be a local function, 508 rather than simply the designation of local franchising authorities, as under the Sloan proposal.

The question is quite difficult. On one hand, a unique and significant advantage of state regulation, as noted earlier, 509 lies in the ability of a state commission to rationalize for purposes of the cable medium the patchwork of local-government jurisdictions that will otherwise become a patchwork of franchise areas and cable systems. 510 At issue is not only the situation, addressed in the New York Report, where “a viable CATV system requires a franchise from more than one community . . . .” 511 There are the cases, perhaps not reached by that language, of small communities that will attract no franchise applicants at all unless the applicant for a large neighboring community can be compelled to serve them as well 512 and similar situations in which the holder of the franchise for a large community (or a group of communities in the same area) is willing to take the franchise of the neighboring small community but only on his own terms. 513 More broadly, the judgment may be reached that the most effective franchise area, either in a particular case or as a general rule, is a “metropolitan” or “regional” one encompassing a city and its suburbs, as a Rand Corporation study is said to be recommending with respect to Dayton, Ohio. 514 At the same

507 The Illinois Commerce Commission will “leave it to local authorities to determine at least in the first instance how many systems should be franchised and for what areas . . . .” ILLINOIS PROPOSED RULES, supra note 16, at 17. But “[t]he Commission could itself follow the foregoing procedures and certificate a cable system directly, whenever upon application or on its own motion it is made to appear that a group of communities would be more effectively served by a single cable system, and the communities involved are unable to coordinate their franchising functions.” Id. at 12.

510 The New York Report would authorize the state commission “to certificate a CATV system directly” where “it appears that a viable CATV system requires a franchise from more than one community” and the communities cannot agree. NEW YORK REPORT, supra note 19, at 189, quoted more fully in text at note 392 supra. The Massachusetts Act seems the most narrow of the three, authorizing the state commission to “mediate between cities and towns and . . . make a final decision, in the event of conflict in the exercise of jurisdiction to authorize or regulate CATV systems.” Massachusetts Act, supra note 17, at § 16.

508 See note 507 supra.
509 See text at notes 102-06 supra.
510 See MITCHELL, supra note 71, at 16-20.
511 See note 507 supra.
512 “Certain outlying areas may be uneconomic to wire either by themselves or in combination with other areas. “In Connecticut, this was an important practical problem. . . .” MITCHELL, supra note 71, at 20 (italics in original).
513 See NEW JERSEY REPORT, supra note 21 at 48, speaking of “pressure on small towns” and noting, “without some regional or state guidance, a local governing body can find that an important local decision has been taken out of its hands by the government of another municipality.”
514 See N. Y. Times, Jan. 12, 1972, at 70, col. 5, quoted in note 105 supra. See also the Sloan Report’s reference to the situation where a “natural franchise area crosses out of the city into a suburb.” SLOAN REPORT, supra note 1, at 157. The Rand study recommended “an interconnected network of six systems for metropolitan Dayton,” which could be owned either by a single entity or by several. It pointed out that “[a]n interconnected system would allow different groups in the area to communicate with one another,” whereas “[s]eparate cable systems might accentuate those barriers and . . . build an electronic wall around the center city.”
time, while there are interests to be served through assuring that cable systems will not be too small. There is also an interest in preventing individual systems from becoming larger than they need to provide optimum services at minimum costs. This objective could be attained by the state commission's issuance of a general rule imposing a ceiling on system size, but it seems likely to be disregarded by many large cities if those cities are allowed, as the Sloan Commission would allow them, to "establish their own franchise boundaries where they are wholly within the city." The ability of a state commission to respond to all these considerations through predesignation of franchise areas has been demonstrated in Connecticut, where the Public Utilities Commission not only drew the franchise areas but, under the state's preemptive statute, granted the franchises as well. The commission decided, for one thing, "that better service to the public will be assured through a series of relatively small independently owned systems." But it also took the approach of seeking to "regionalize" cable service by seeing that contiguous areas with a "community of interest" would be served by a single system, and the franchise areas it assigned were thus generally composed of a major city and its adjacent towns. Most strikingly, the commission, "in order to best serve the public interest and to establish more viable systems," modified the applicants' proposals and "assigned some towns to applicants that had either been requested by another or for which no application has been made."

While the Connecticut Commission was operating under a preemptive approach, it would of course be possible to seek the same advantages under a mixed approach by authorizing the state commission, as recommended by the Sloan Report, to "identify appropriate franchise areas within the state" and "to identify or bring into being officially constituted franchising authorities for each such area," whereupon these authorities would conduct the franchising process. There are, however, arguments against such an approach. One is the fear, expressed by "a predominantly black coalition of inner-city organizations" in Dayton and a factor, perhaps, in the Sloan Commission's recommendation that major cities be exempted from the state commission's authority to designate
franchise areas,\textsuperscript{528} that to give such authority to the state commission would produce "metropolitan" franchise areas and thereby diminish the possibility of control of cable systems by inner-city community and minority groups. It might be argued that the fear is insubstantial. For one thing, the advantages of integrated cable service throughout a metropolitan area may be attainable through interconnection of separately owned systems as well as through service by one system, owned by a single entity, to the entire area.\textsuperscript{524} Also, a state commission that drew franchise areas "with due regard for existing governmental boundaries on the one hand, and for natural neighborhoods and communities on the other," as the Sloan Commission recommends,\textsuperscript{625} might be no less likely to respect the interests of community and minority groups than a city council would be—than the Common Council of Buffalo, for example, which awarded an exclusive franchise for the entire city without, apparently, considering alternative franchise areas that might have been more tailored to the interests of inner-city groups.\textsuperscript{626} Still, there is a substantial interest in keeping open the possibility of cable-system ownership by members of these groups (however difficult it may be for them to obtain the needed capital),\textsuperscript{527} and the argument that state pre-designation of franchise areas would tend to close the door—having in mind, for example, the franchises given to single operators for "regional" areas in Connecticut\textsuperscript{528}—cannot be dismissed.

In any event, there are other arguments against the proposal. One is delay. It took the Connecticut Public Utilities Commission nearly three years—not including the subsequent judicial review, which consumed another three—to divide up the state for cable purposes.\textsuperscript{529} While much of that time was of course attributable to the commission's responsibility for not only drawing franchise areas but awarding franchises, it nonetheless seems that to hold up all franchising activities within a state until a newly authorized commission re-maps the state for cable purposes would produce unacceptable delay, in effect a state "freeze" on cable development to replace the one soon to be lifted by the FCC. This is particularly so because, to the extent the commission drew franchise areas that deviated significantly from existing political boundaries, a court challenge (likely to be stronger under a mixed approach than it was in Connecticut), and hence further delay, could be expected. (If the commission is not to do that, on the other hand, there is little point in giving it the authority to draw new lines.) Further, whereas the Connecticut Commission could draw

\textsuperscript{523} See Sloan Report, supra note 1, at 161-62.
\textsuperscript{524} See the Rand study on Dayton as reported in note 514 supra.
\textsuperscript{525} Sloan Report, supra note 1, at 159.
\textsuperscript{526} See notes 496-98 supra and accompanying text.
\textsuperscript{527} See Broadcasting, Jan. 31, 1972, at 25 ("Some black delegates focused on the need for minority ownership of cable systems, but the wider sentiment was that ownership would be dominated by existing private entrepreneurs, probably in some kind of cooperation with nonprofit local groups"); Broadcasting, March 6, 1972, at 32 (Theodore S. Ledbetter, Jr., a black communications consultant, quoted as saying: "the ownership of cable by minority people is as important, if not more important, than access to the medium," and pointing out that of some 2,700 cable systems currently in operation, only two have as much as 50 percent ownership by black people).
\textsuperscript{528} See Mitchell, supra note 71, at 7-8; text at note 519 supra.
its lines on a clean slate and treat the problem of designating cable territories throughout the state as a “unified whole,” there being no cable systems (and apparently no franchises) in the state when the law was passed in 1963, this would be far from the case in other states enacting legislation now. The commission in such a state would have to perform its predesignation task in piecemeal fashion around and between the numerous cable systems and franchises already in existence, and would have to deal, as the Connecticut Commission did not, with the contentions of other municipalities that had made franchising plans or that wanted to be heard as to the identity of the franchise areas and franchising authorities affecting them. A pattern of regional franchise areas such as the Connecticut Commission adopted would create under a mixed regime, moreover, a substantial task of establishing new governmental entities as franchising authorities. So while there is a good deal to be said for a requirement that franchise areas and franchising authorities be designated by the state commission prior to the institution of the franchising process, it seems, on balance, that such an approach should be rejected. The units of local government presently authorized to issue franchises should be recognized as the franchising authorities, subject to specific action to the contrary on a case-by-case basis.

There is much the state commission can and should do by way of such specific action, however, to forestall and diminish the disadvantages of “patchwork” cable development. It is important that the commission, either during the franchising process in each municipality or as a condition of granting its own certificate to the winning applicant (and as a requirement to be imposed on existing cable systems as well), require that the cable system be interconnected with others that serve adjoining areas. Such interconnection, to enable the carrying of cable-originated programming and other communications services on a multi-system basis, can produce a number of the advantages sought to be gained from metropolitan-size systems. Conversely, the commission should require, if the franchising authority does not, that the cable system be capable of subdivision, or “filtration,” so as to provide originated programming (and production facilities) for distinct communities within its franchise area. More broadly, the commission might well consider a rule placing a maximum size limit on the population to be included within the franchise area of a single cable system. In addition, the commission should address itself on an ad hoc basis to the problems that arise from the discrepancy between political boundaries and optimal franchise areas. For this purpose it should not have to wait for a “conflict in the exercise of jurisdiction” between municipalities, as under the Massachusetts Act, nor should its authority be limited to the situation where “a viable CATV system requires a franchise from more than one community,” as under the New York Report, or even the broader situation described in the proposed Illinois rules, where “a group of communities would be more effectively served by a single

530 Id.
531 See MITCHELL, supra note 71, at 10, 27.
532 If such an approach is attempted, the statute should require the state commission to make this its first business, and might well specify a deadline for its completion.
533 See note 514 supra.
534 Massachusetts Act, supra note 17, at § 16.
535 NEW YORK REPORT, supra note 19, at 189.
cable system, and the communities involved are unable to coordinate their franchising functions.\footnote{536} Nor does it seem necessary, on the other hand, that the commission's authority in such circumstances be escalated to that of preempting the franchising process. The statute might direct the commission, in the situation described in the proposed Illinois rules, to designate or bring into being a joint franchising authority for the communities in question. The commission might further be directed to focus specifically, on its own motion or that of any community, on the problem of smaller communities which by themselves either could not attract any cable operator or would have to accept the one franchised by a larger neighboring community, and to designate or create joint franchising authorities in which the communities involved would have appropriate, proportional voices. Finally, the commission might be authorized to consider, on a case-by-case basis, the possible desirability of metropolitan or regional franchise areas, and to designate such areas and create appropriate franchising authorities when, after full public hearings with respect to a particular proposed franchise area and full consideration of the views of the communities involved, it determined this to be desirable.\footnote{537}

2. Franchising Procedures

Probably the most obvious and pervasive need demonstrated by local franchising to date, and one to which almost all the programs for mixed state regulation would respond in some fashion,\footnote{538} is the need for requirements specifying the procedures to be followed by local governments in awarding cable franchises. Especially since the FCC only "strongly suggest[s]" what local governments should do in this respect,\footnote{539} it seems essential that the state regulatory scheme embody such requirements. These might be as complex as the procedure suggested by the proposed Illinois rules, which would require the municipality to retain an independent consultant to survey its cable needs in the first instance, and then conduct a "design competition," in either two stages or one, wherein applicants would vie to meet those needs.\footnote{540} But while that proposal is attractive, it seems unduly detailed and constricting to impose on municipalities throughout the state. A municipality might reasonably decide, for example, to bypass the

\footnotesize{\footnote{536} Illinois Proposed Rules, supra note 16, at 12.  
\footnote{537} Thus the Rand report on Dayton pointed out that "[a]lthough no single authority exists that could franchise a regional system, . . . the council of governments can coordinate cable franchises 'and may, in fact, be able to draft a common franchise that can be adopted by its member municipalities.'" But while "the concept of a regional system has apparently won important support, . . . the issue of control remains wide open," and "James McGee, the mayor of Dayton, says that city has to control who will get the regional franchise, since it is not only the largest city in the area but also the one with the most acute minority problem." Broadcasting, Jan. 31, 1972, at 25.  
\footnote{538} The exceptions are the New York and Sloan Reports, and the former assumes that state law already "requires that the award of franchises be preceded by notice and public hearing . . . ." New York Report, supra note 19, at 190. Only the Sloan Report ignores the subject.  
\footnote{539} FCC Letter of Intent, supra note 5, at 1780 n.*, quoted in text at note 167 supra. The Commission has now stated that it "expects[s]" franchising authorities to comply with the suggested procedures, but still has not incorporated them into its rules. See notes 167, 269-70 supra.  
\footnote{540} See text at notes 441-52 supra; note 443 supra.}
initial stage of the Illinois procedure and begin the "design competition" immediately by entertaining franchise applications as the first step; then, on the basis of the proposals received in the applications and with the aid of its consultant (who one assumes need not be an independent practitioner, but might come from an entity such as the Cable Television Information Center), the municipality would prepare the franchise specifications, of greater or lesser particularity, to be employed in a second round of bidding and public hearings. If a consultant is to be retained in every case, incidentally, it might be appropriate, and more to the point, to require him to prepare a report to the municipality evaluating the final applications at the stage immediately prior to the decision. In general, it would seem best for the procedural requirements embodied in the state regulatory scheme to be of a more rudimentary, adaptable nature, capable of being applied to a process like the one suggested in Illinois but also to other approaches that local governments might wish to try.

The minimum procedures required by the state law thus might include (with suitable elaborations) the following: (a) issuance of a public invitation to all who might want to compete for the franchise; (b) a requirement that the applications be submitted on a specified form, as under the Massachusetts Act, and that the applications and all connected and subsequent filings be continuously available to the public, with reasonable notice of their availability; (c) the conducting of at least one public hearing, upon reasonable notice, at which members of the public and all other interested persons would have an opportunity to testify on the applications filed and on the franchise in general; (d) public issuance by the franchising authority of a proposed report stating the action it proposes to take on the franchise award and its reasons for that action, including the reasons for its proposed acceptance or rejection of each of the applications before it; (e) not less than a specified interval (e.g., three weeks) after issuance of the proposed report, a public hearing thereon; and (f) not less than a specified interval (e.g., two weeks) after the hearing, final action by the franchising authority accompanied by a final report meeting the same requirements as the proposed report.

3. Franchise Duration

As suggested earlier, the interest in imposing a limit on franchise duration, so as to preserve for municipalities the ability to exercise their franchising power at reasonable intervals and to free municipalities, the public, and the cable medium from the prodigal and ignorant decisions of the past, seems a compelling need
for cable regulation to fill.\textsuperscript{547} And the intended rules of the FCC, with their 15-year guideline that reduces to a requirement of "reasonableness that may vary with the "particular circumstances,"\textsuperscript{548} promise a good deal of confusion on the subject and questionable impact on existing franchise terms.\textsuperscript{549} To avoid the confusion and achieve such impact, a state limitation on franchise terms is needed. The period of 15 years, suggested by the FCC and adopted by the Massachusetts Act,\textsuperscript{550} seems an ample and reasonable compromise.\textsuperscript{551} In imposing such a limit the state law should make clear, as the Massachusetts Act does, that the limit applies to existing as well as future franchises.\textsuperscript{552} The "renewal" term might well be limited to ten years, as in Massachusetts,\textsuperscript{553} or to another 15. In any event, it should be established that when the franchise comes up for renewal, the proceeding is governed by the same procedures and standards as are applicable to an original franchise award (including an invitation for competing applications)—except of course that the performance of the incumbent franchisee is to be taken importantly into account. There might also be, as suggested by the Sloan Report, "provisions for purchase at a fair price of the assets of an unrenewed franchise."\textsuperscript{554} Finally, there might well be a provision, as suggested by the Illinois Commerce Commission,\textsuperscript{555} the New Jersey Report,\textsuperscript{556} and the

\textsuperscript{547} The position of the Illinois Commerce Commission on this issue is difficult to understand. The commission reports that Illinois has "many" franchises granted "for 25 years or more and often with a unilateral option in the cable operator to obtain extensions," but finds "reason to believe that the emphasis on franchise term may be somewhat misplaced," since if the system is required to maintain an adequate, up-to-date capacity and if "the quality of the service is subject to adequate supervision," then "there would seem to be little reason to change or to threaten to change cable operators." Illinois Proposed Rules, supra note 16, at 13-14; see text at note 452 supra. As has been noted, there are a number of reasons why the identity or nature of the franchise operator may be considered significant by the local community. See text at notes 460-85 supra. It may also be suggested that regulatory supervision, which the commission assumes will assure adequate plant and satisfactory service, has not been notably successful in that objective in the case of other industries, including the closely analogous telephone industry. There is reason to believe, as the broadcast experience suggests, that the need to face a license-renewal proceeding at periodic intervals can do more than the customary sort of regulatory supervision to maintain and improve the service rendered by a regulated company. Beyond that, the appropriate policy question with respect to cable franchises running 25 years or longer might be thought to be, not whether there was "reason to change or to threaten to change cable operators," but whether there was any public-interest reason to accept the entrenchment of a single cable operator (or his transferees) for so long a period. Finally, the commission's conclusion that duration should be left as a local matter to be settled by municipalities subject to FCC guidelines" (Illinois Proposed Rules, supra note 16, at 14) seems inadequate in view of the excessive franchise terms already granted by so many municipalities and the apparent toothlessness of the FCC's "guidelines." See text at notes 80-88, 273-79 supra.

\textsuperscript{548} FCC Letter of Intent, supra note 5, at 1781-82; Cable Television Report and Order, supra note 26, at 1577, ¶ 182; 47 C.F.R. § 76.21(a)(3).

\textsuperscript{549} See notes 273-79 supra and accompanying text.

\textsuperscript{550} FCC Letter of Intent, supra note 5, at 1781; Massachusetts Act, supra note 17, at § 3(d).

\textsuperscript{551} As noted, the Sloan Commission and the New Jersey Report suggest 10 years; the New York Report suggests 20. See text at notes 85-87 supra.

\textsuperscript{552} See Massachusetts Act, supra note 17, at § 4. Existing franchises would expire either at their specified date or 15 years after passage of the law, whichever occurred first. See ibid.

\textsuperscript{553} Id. § 13.

\textsuperscript{554} Sloan Report, supra note 1, at 149. See also Illinois Proposed Rules, supra note 16, at 16.

\textsuperscript{555} Illinois Proposed Rules, supra note 16, at 15 (complete renegotiation every 10 years).

\textsuperscript{556} New Jersey Report, supra note 21, at 72 (every five years).
New York Report,\textsuperscript{557} for "renegotiation" of the franchise terms between the franchising authority and the cable operator, with "arbitration" by the state commission or some other third party, every five or ten years during the term of the franchise.

4. Transfers of Control

For a variety of reasons, including a brisk merger movement in the industry, transfers of control over cable systems and cable franchises occur frequently today and can be expected to remain common for the indefinite future.\textsuperscript{558} Any procedures, public participation, outside consultation, or other input brought to bear on the franchising process can be rendered nugatory, so far as the choice of the franchisee is concerned, if the franchise holder is allowed to sell the system, or even the bare franchise, to anyone he chooses. It seems basic, therefore, that the state regulatory scheme should provide that all transfers of control over cable franchises—whatever the form of the transfer—must be approved by both the local franchising authority and the state commission.\textsuperscript{559}

The more difficult question then arises as to the standards and requirements to be applied to a request for such approval. On one hand, perfunctory standards can have the effect of washing out almost completely the "public interest" judgment that went into the selection of the original franchisee, as has been the case with respect to broadcast licenses.\textsuperscript{560} On the other hand, there is a public interest in the transferability of cable systems, as of other businesses; if government regulation made it difficult to sell cable systems, moreover, the result could be to hobble the new industry in its ability to attract capital and form the ownership patterns most suitable to the development of its technical, economic, and service potential. Varying approaches to the approval of transfer applications have been suggested. The New York Report, pointing out that state-commission control over transfers "is essential to protect the same interests involved in initial franchising," would require the transferee to comply with the commission's minimum financial, character, and technical qualifications and its rules and regulations,

\textsuperscript{557} New York Report, supra note 19, at 191 (no rate provision binding on municipality for initial period longer than 10 years, subsequent period longer than 5).

\textsuperscript{558} The FCC noted in 1970, "In view of the present volume of voluntary CATV transfers, it appears that systems are readily transferable." Second Report and Order, FCC Docket No. 18397, 19 P & F Radio Reg. 2d 1775, 1781 (1970); see Mitchell, supra note 71, at 30. Compare the still substantial traffic in broadcast licenses, and the recent report that 1971 was the biggest year in history in the dollar volume of broadcast-station sales approved by the FCC. Broadcasting, Jan. 17, 1972, at 26.

\textsuperscript{559} Mitchell reports that under Connecticut law, PUC approval is required before a certificate can be "sold or transferred." "But apparently operators do not have to obtain PUC approval to sell all or a portion of their ownership interest in the franchised corporations . . . ." Mitchell, supra note 71, at 29. The New York Report notes, "In the case of transfers, it should be made clear—in contrast to most franchise provisions—that any transfer of control of either the franchise or the system property, requires Commission approval." New York Report, supra note 19, at 210.

\textsuperscript{560} The amended Section 310 (b) of the Communications Act provides, for example, that in order to approve a license-transfer application the FCC must find that the public interest would be served thereby, "but . . . the Commission may not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee." 47 U.S.C. § 310 (b).
and points out that transfer applications "also afford particularly suitable occasions to bring obsolete minimum criteria pertaining to system construction and operation into line with developments since the issuance of the initial franchise." The Illinois proposed rules take a tougher approach. Grandfathered cable systems would have to be brought into "substantial compliance" with all the commission's requirements upon being "transferred to other ownership," and it appears that the proposed transferee would also have to submit at that time to the "renegotiation process" that would otherwise occur at ten-year intervals. The Massachusetts Act seems more lenient. It provides that a franchise may not be assigned "without the prior written consent of the issuing authority," but adds that such consent "shall not be arbitrarily or unreasonably withheld." Moreover, the information required from the would-be transferee is limited to matters of financial, character, and technical fitness; it does not include, as does the application for an original franchise, undertakings with respect to the facilities and services to be provided by the system. This may mean that it would be considered "arbitrary or unreasonable" for the franchising authority to withhold its consent to a transfer on the ground that the proposed transferee would not agree to significant changes in the technical capacity or operations of the system, even changes necessary to bring a grandfathered system into compliance with current state or federal requirements.

There is one element omitted from all the proposals which, it seems, should be the first to be included. This would be a requirement for public notice and a public hearing in the local community on the transfer application. Since the local public have a substantial interest in the identity of the franchisee, an interest that will presumably be protected by notice and hearing requirements with respect to the original franchising, the public should have an opportunity to be heard on the proposed transfer—and to hear about the proposed transferee, including his record in the cable business and his plans for the local system—before the local authority makes its decision. The state law should therefore require the local authority to hold a public hearing, upon ample notice, before approving the transfer, and it might also require an appearance at the hearing by representatives of both the transferor and transferee.

So far as the substantive standards for approval of the transfer are concerned, the Illinois proposal may be too inhibiting—assuming that franchise durations are limited to 15 years or less, as they apparently would not be in Illinois—in requiring complete renegotiation of the franchise as a condition to ap-

563 "... A successor in interest to the franchisee will have to submit to a 'renegotiation process' allowing the Commission and the municipality to examine both its fitness and the terms under which it will operate, before it receives a Commission certificate." Id. at 16.
564 Massachusetts Act, supra note 17, at § 13.
565 Compare Section 13 with Section 4. Omitted from the information to be included on the transfer application is: "... complete information on the extent and quality of service, number of channels, hours of operation, variety of programs, local coverage, safety measures, installation and subscription fees; and such other information as the commission may deem appropriate or necessary." Id. § 4.
566 Of course, the Massachusetts Act is "strict" on transfers insofar as it would prohibit ones involving "a substantial payment" for the franchise itself. Id. § 13, see note 437 supra.
567 See text at note 452 supra.
proval of the transfer. But the apparent approach of the Massachusetts Act, ruling out any consideration of changes in the system’s plant or operations under the new owner, seems too acquiescent. Transfer applications may well provide the best occasion for undoing franchise errors of the past and asserting the wishes of the local public and local government with respect to the franchise, and this opportunity should not be closed off. At the least, the local authority and the state commission should each be authorized to require as a condition of transfer approval that the cable system be brought into compliance with existing federal and state requirements. A wider process of franchise renegotiation—subject to arbitration, perhaps, by the state commission or some other party—would not seem inappropriate.

Somewhat different considerations should apply, it seems, with respect to the proposed transfer of a bare franchise, prior to construction of the system. Speculation in franchises has been widespread, and is apparently a leading cause of the delays and “no shows” that have often followed the franchise award. The public interest in transferability would seem considerably lessened when the would-be transferor has not constructed or developed the system; there is, in fact, an interest in discouraging the delay and speculation involved. Thus, while the particular circumstances may provide a justification for the transfer, they may also justify the franchising authority in seizing on the proposed transfer as cause for vacating the franchise and instituting a new franchising process. At least, there should be no presumption in favor of the transfer of a bare franchise. Perhaps the law should provide that the proponents of such a transaction shall have the burden of persuasion to demonstrate that its approval would serve the public interest. There is merit also in the Massachusetts approach which would prohibit transfers that include a substantial payment for the franchise itself.

5. Regulation of Rates

Regulation of the subscriber rates charged by cable systems is a sensitive issue; fear of public-utility ratemaking on the classic rate-of-return model has been a principal reason for the cable industry’s opposition to any regulatory role for the states. The FCC says it will “require” local and state authorities to maintain programs for the approval, review, “and, as necessary, adjustment” of subscriber rates; the Commission leaves open the standard to be applied, beyond saying that the rates should be “... fair to the system and to the subscribing public — a matter that once again will turn on the facts of each particular case and, in the next years, the accumulated experience of other communities with cable.” While the five states adopting preemptive regulatory schemes for cable have all provided for rate regulation on what appears to be the traditional approach, the major mixed schemes embody a variety of approaches; each pro-

568 See note 563 supra and accompanying text.
569 See text at notes 69-79 supra.
570 See note 437 supra.
571 FCC LETTER OF INTENT, supra note 5, at 1782; CABLE TELEVISION REPORT AND ORDER, supra note 26, at 1577, ¶ 183; 47 C.F.R. § 76.31(a) (4).
572 See statutes cited notes 6-10 supra.
vides for some supervision of rates, and each would probably fit beneath the umbrella of the FCC's requirement, but the plans vary considerably, and especially in the stance they take toward rate-of-return ratemaking.

On one hand, the New Jersey Report appears to embrace the concept without hesitation. It recommends that “[t]he PUC should provide general rate regulation of CATV franchises. The necessity to protect consumers in an industry which surely will develop on a monopoly basis mandates this recommendation."573 The Massachusetts Act directs the state cable commission to study the problem for three years and authorizes it then, if it so decides, to "fix and establish individually, for each community antenna television system in the commonwealth, a fair and reasonable rate of return from subscription rates charged to subscribers, said rates to be adequate, just, reasonable and non-discriminatory."574 Until the state commission so acts, the local franchising authority is authorized "to determine rates and charges to subscribers . . . provided that the monthly charge to subscribers shall not exceed seven dollars."575 The New York Report similarly takes a position that would at least defer rate-of-return regulation. It recommends “that the Commission not undertake general rate regulation of CATV systems at this time,"576 but that it take these principal actions in the rate area: (1) Where a franchise stipulates the rate to be charged, the commission would assist the municipality in enforcing the stipulation. (2) Where the franchise does not stipulate a rate, the commission would fix one, "equal to the rate generally being stipulated in similar franchises issued at about the same time in the same area." (3) The cable operator would be required to renegotiate rates with the municipality after an initial period of ten years and subsequent periods of five years, and if the two parties could not agree, “the Commission, on petition of the municipality, shall determine the CATV operator's rates, to meet the operator's reasonable revenue requirements, in accordance with normal public utility ratemaking standards."577 The third point, it may be noted, seems somewhat tricky; a "renegotiation" process in which the municipality (and only the municipality) could run to the commission and have ratemaking imposed may involve more duress than negotiation, and may provide a rather certain entree for ratemaking. If ratemaking is to be imposed in the future it ought to be done, one would think, on the basis of a direct and generally applicable public-interest finding, as the Massachusetts Act provides, rather than through the back door of negotiating tactics. Another recommendation of the New York Report, which would authorize the conversion of the cable system to common-carrier status as soon as it reaches the level of 50,000 subscribers, in which event "the Commission shall have authority to regulate the CATV operator's rates in the

573 New Jersey Report, supra note 21, at 74. The Report adds, however, that "the state regulation should consider the growth and prosperity of the cable industry as a desirable public goal . . . ." Ibid.
574 Massachusetts Act, supra note 17, at § 15.
575 Id. § 2. With respect to new franchises, "installation and subscription fees" are among the items that must be stated in the application form upon which the franchise is granted (Section 4), so presumably an initial subscription charge will be embodied in each franchise agreement.
577 Id. at 191.
same manner as any other common carrier," could also have the effect of installing rate-of-return regulation relatively soon on the basis of considerations other than a perceived need for it.

The proposed rules of the Illinois Commerce Commission represent a new and uniquely permissive approach to rate regulation. The commission first rejects for the near future the rate-of-return concept. It recognizes that cable systems "tend to have monopoly power in their franchised areas, and this power can be expected to have significance for rate levels as the scope of cable communications offerings expands," but notes that "[t]o date . . . rate abuses have not been a problem and they are unlikely to become a problem while cable continues to strive for market acceptance." Moreover, "[i]t seems clear that the necessary groundwork has not yet been laid, nor sufficient experience accumulated, for the uncritical imposition on the cable industry of traditional rate-of-return regulation." Then, in its new departure, the commission expresses the view that "the current industry level of monthly subscriber rates may be entirely too low to permit high-quality systems to become established and to survive in larger metropolitan areas," and that the rates should be encouraged "to move upwards and find their 'true level.'" Declaring that "one of the present impediments to industry development may well be the restriction on rate levels and rate increases typically found in municipal franchises," the commission "therefore proposes to allow a wide measure of ratesetting latitude to cable systems over the coming years," and proposes further — the crucial point — "to preclude the application of municipal rate restrictions to those systems." The commission would require cable systems to file with it a schedule of all their rates (to channel users as well as subscribers), and it would review them initially, when an increase was sought, or at any other time. "Its inquiry will be limited, however, to determining that all classifications are reasonable and nondiscriminatory, that initial rates are 'just' in relation to the specified capital requirements of the cable system in question, and that increases (for new or established services) are reasonably justified or required by increased costs in providing such services."

As far as rate-of-return ratemaking is concerned, it seems that any decision

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578 Id. at 192.
579 The Sloan Commission, sensitive to the fears of cable operators (see SLOAN REPORT, supra note 1, at 160-61), gave no support to a rate-of-return approach but otherwise took a fence-sitting position on the rate issue, and a confused one at that. Stating that "the marketplace cannot regulate the price of the basic subscription fee, since in this respect the monopoly position of the cable operator means that there will be no direct market," the commission took the view that maximum rates should be specified in the franchise: "Franchising procedures generally include the imposition of maximum rate regulations; we believe they should continue to do so." Id. at 143. It further declared that "the state must be prepared to let major cities set their own maximum rates . . . ." Id. at 161. But since the state commission in any event "would not involve itself in rate regulation" (id. at 160), it is unclear who would set the maximum rate when it was not specified in the franchise and when the city, whether "major" or not, declined to do so.
580 ILLINOIS PROPOSED RULES, supra note 16, at 3.
581 Id. at 4.
582 The Commission considers that time and experimentation will be needed for cable rates to move upwards and find their 'true level,' and that this process should be encouraged. The industry cannot be expected to provide tomorrow's services at yesterday's rates." Id. at 4-5.
583 Id. at 5.
584 Id. at 6.
to impose such a regime on cable at this time would be, at best, premature. There is virtually unanimous agreement that, as stated in the *New York Report*, "at the moment, there appears to be no pressing consumer demand for rate regulation..." There is also wide agreement, though not without dissent, that imposition of rate-of-return regulation on cable at this time could seriously impair the industry's ability to attract the large amounts of capital it needs for development. Further, public utility ratemaking in other industries has not been so successful as to encourage its extension to a new industry, at least until a need appears. This is especially so because financial and other characteristics of cable would replicate, and in some respects exacerbate, problems that have hindered effective regulation in other fields. Rate-of-return ratemaking for cable should thus be rejected at this time. Nor should a state adopt procedures, such as those pointed out in the *New York Report*, that would tend inevitably or very probably to carry the traditional form of rate regulation in their train. It would seem adequate for the present to take the course proposed in part by the *New York Report* and suggested by the FCC's Letter of Intent, whereby rates for each cable system would be set and periodically reviewed by the municipality or the state commission, but the standard would be that of the "going rate" — "the rate generally being stipulated in similar franchises issued at about the same time in the same area."

The approach proposed by the Illinois Commerce Commission presents different questions. The commission assumes that cable subscriber rates, if allowed to float, will "move upwards and find their 'true level';" it believes "that this process should be encouraged," and it therefore "proposes to allow a wide measure of rate-setting latitude to cable systems over the coming years, and to preclude the application of municipal rate restrictions to those systems." The assumption about the upward trend of unregulated rates, it should be noted, is not necessarily sound; for one thing, the commission appears to ignore the possi-


586 See *New York Report, supra* note 19, at 192; *Sloan Report, supra* note 1, at 160-61; *Illinois Proposed Rules, supra* note 16, at 4-5; *New Jersey Report, supra* note 21, at 74. It has been argued, however, that the fears are unconvincing, in view of "the telephone industry's unparalleled success in attracting loan and equity capital into new technology." *Dean, Cable TV: Omission by Commission, The Nation*, Dec. 27, 1971, at 692. The argument draws support from the Connecticut experience, where, despite "a current mythology... that public utility regulation tends to retard the growth of cable," a total of 25 applicants, including the industry's leading company, "competed vigorously" before the PUC for the franchises issued pursuant to a statute providing for full public-utility regulation, including ratemaking. *Mitchell, supra* note 71, at 27, 7. It draws further support from the solicitous attitude toward the industry's revenue needs that has now been expressed by the Illinois Commerce Commission. See text at notes 580-84 supra. Still, on the question of wherein lie the industry's best prospects for growth, profits, and attractiveness to capital, the perceptions of the industry itself (assuming they have not been changed by the proposed rules in Illinois) may be thought to carry their own validity.


589 See text at notes 577-79 supra.

590 See text at notes 571, 576 supra.

591 See *New York Report, supra* note 19, at 191.

bility that higher rates will attract fewer subscribers.\textsuperscript{593} The Sloan Commission, in contrast, has suggested that cable operators may find it to their economic advantage to reduce or even eliminate the monthly subscription fee.\textsuperscript{594} In any event, it may be conceded that maximum rates set by municipal franchises may prove inadequate to the legitimate needs of the cable operator for revenue, profits, and ability to attract capital.\textsuperscript{595} But it does not follow that the state commission in reviewing rates should consider whether they are “reasonable and just” only in relation to “the specified capital requirements of the cable system” and the “increased costs in providing such services,”\textsuperscript{596} and not in relation to their impact on the subscribers. The subscribers will be subject to the cable system’s monopoly power, after all, and they may be unable or unwilling to pay for some of the additional capacity or services that the cable operator may wish to provide. There is, indeed, a suggestion of cable technology as an end in itself, without regard for whether people want it and will pay for it, in the Illinois Commission’s statement that rate limitations in municipal franchises “serve to ‘protect’ the consumer at the expense of denying or delaying the evolution of broadband services.”\textsuperscript{597} Nor does it follow that the rate decisions, including decisions to over-ride municipal franchise limitations, should be consigned to the cable operators themselves with “a wide measure of rate-setting latitude,” and without coequal participation by the local franchising authority, the state commission, and the local public through notice and hearings.\textsuperscript{598}

Most significantly, it does not follow that all municipal rate restrictions should be invalidated \textit{ab initio}, as the Illinois Commission apparently proposes. The result would be to free existing cable systems from their franchise bargains.

\textsuperscript{593} The rates being charged by the industry today—to the extent that they may be considered “unjust” or “unreasonable”—may be so because they are too low to finance the installation of plant capacity and development of service offerings adequate to gain a high percentage of subscriber penetration in the unwired areas of Illinois. [Id. at 4.]

\textsuperscript{594} As the income increases that a cable operator derives from his rented channels and from the channels he programs himself, he may find it to his economic advantage to eliminate the basic monthly subscription fee. That is, he may decide that his revenues would be greater if he removed the disincentive represented by the monthly fee, and thereby built his subscriber list faster than he otherwise could.

\textsuperscript{595} It therefore seems peculiarly inadvisable to write a maximum rate limit into the state statute, as Massachusetts has done with its seven-dollar figure, which is binding on all communities and cable systems in the state until such time as the state commission decides to impose ratemaking. Massachusetts Act, supra note 17, at § 2; see text at note 575 supra. Such an approach may, in fact, compel the cable operators to press for ratemaking (especially if they can anticipate the kind of solicitude displayed by the Illinois commission).

\textsuperscript{596} See text at note 584 supra.

\textsuperscript{597} ILLINOIS PROPOSED RULES, supra note 16, at 5. In point here, and illustrative of a more balanced approach, is the suggestion of the \textit{New York Report} that in the case of proposed changes in the cable system that are not considered necessary “to implement a Statewide objective of overriding concern,” the state commission may order the cable operator “to canvass its subscribers as to their wishes, indicating the changes proposed and the additional rates required (if any) to implement the changes,” with the wishes of the majority controlling. \textit{New York Report}, supra note 19, at 197-98.

\textsuperscript{598} The FCC will require notice and a right to be heard for affected members of the public on all proposed rate changes (FCC \textit{LETTER OF INTENT}, supra note 5, at 1782), but the substantive standards proposed by the Illinois Commission would not accord much if any weight to the public’s possible desire to keep the rates low.
without the need for any showing that the bargained-for rate ceiling has become unreasonable, and to eliminate subscriber rates as an element to be considered in future franchising proceedings. The level of monthly subscriber rates is in practice a major point of concern for municipalities and members of the local public in designing a franchise package; given the fact that cable has to compete with innumerable other demands on the family budget, and with other activities to which members of the family may wish to devote their leisure time, it seems strange to declare that the public's desire to minimize its monthly cable bill is not a legitimate interest in the franchising process. Under the Illinois proposal, the only way the municipality could seek to keep the subscriber fees low would be by minimizing the plant and services demanded from the cable operator, hoping thereby to minimize his costs and hence the rates he chose to charge within the "wide latitude" given him by the state commission. Such an approach, of course, would run directly counter to the result the commission seeks. It would also undercut a number of the reasons for leaving the franchising process at the local level. If, as the Illinois Commission recognizes, "communities have a legitimate interest in determining and providing for the varying communications needs of their localities," it is not apparent why they should be allowed to consider only the benefits they wish from the cable system and not the costs they will have to pay, any more than they should be precluded from bargaining over the price when they deal with any other municipal contractor.

It therefore seems that automatic invalidation of rate stipulations in municipal franchises should be rejected. As recognized by the other regulatory programs, such stipulations should in fact be required — with the state commission supplying them, as suggested by the New York Report and the FCC, when the municipality has not. This does not mean that the interest in freeing cable operators from unreasonable rate limitations, which properly concerns the Illinois commission, need be disregarded. It may well be appropriate for the state regulatory scheme to include, as part of the program for review and adjustment of rates that the FCC will require, a provision allowing cable operators to apply to the state commission for a rate increase, notwithstanding any limitation in their franchise, and authorizing the commission to grant such an increase if it finds it justified, but only after hearing the views of the municipality and the local public.

6. **Nonbroadcast Channels (Access)**

A regulatory role for the state with respect to cable's nonbroadcast channels might include a number of concerns: requiring that there be more channels for public access, leasing, educational, or governmental use than will be required by the FCC; regulating the rates, terms, and conditions for use of the access channels and adjudicating disputes that arise; specifying the production facilities to be provided; and requiring local-live originations by the cable operator. The authority of the state (or the local government) to assume any of these functions depends on the absence of federal preemption, and federal preemption, as

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discussed earlier, is what the FCC has in mind.\textsuperscript{600} It is my view, as has been indicated, that the FCC should recede from this position and that a role for the local and state governments should be allowed and encouraged.\textsuperscript{601} Assuming that the FCC, for one reason or another, will not preemptively occupy these fields, the question is reached as to the extent to which the regulatory roles in question should be assumed by the state as part of its regulatory scheme for cable.

The \textit{New York Report} here again takes the position that the matter should be left in local hands, that considerations such as “free channels for public purposes” are “best left to the various municipalities to obtain as part of the ‘package’ of benefits in bargaining with franchise applicants.”\textsuperscript{602} Here again, it is difficult to agree. As the review of local franchising at the outset of this article pointed out, bargaining for free channels is one of the things that municipalities in dealing with franchise applicants have most notably and regrettably failed to do.\textsuperscript{603} For just that reason, it would be desirable in the absence of FCC action

\textsuperscript{600} See text at notes 149-57 \textit{supra}.

\textsuperscript{601} See text at notes 281-357 \textit{supra}.

The local or state measures of which I speak would be designed to multiply and enhance the nonbroadcast uses of the system, and would thus be “not inconsistent with federal purposes,” FCC \textit{LETTER OF INTENT}, \textit{supra} note 5, at 1774. A different issue is posed by the proposal of the Illinois Commerce Commission to limit the cable operator, apparently, to a single channel for his own local origination (“the cable operator \textit{may} offer its own local programming, over the same or one different channel . . .”), and to require that he offer such programming “only on a nonprofit basis; that is, the sum total of any advertising revenues it earns in connection with such programming must recover no more than its direct costs.” ILLINOIS PROPOSED RULES, \textit{supra} note 16, at 20. The commission’s concern is “to avoid giving the cable operator a proprietary interest in its own programming that could conflict with the public interest in promoting widely diverse programming opportunities on the other cable channels.” \textit{Ibid.} (It is unclear how this concern is furthered by limiting the cable operator to a single channel for his own local programming but allowing him to use other channels for “news and entertainment programming acquired commercially by the operator” (\textit{id. at 22}), in which programming he would presumably have “a proprietary interest” by virtue of advertising or pay-TV arrangements.) As a matter of policy the concern is not without merit, see text at notes 325-38 \textit{supra}, and it may be that the FCC should have barred cable operators from any programming role on their systems, as it was urged to do by a number of observers. See Dean, \textit{Cable TV: Omission by Commission}, \textit{The Nation}, Dec. 27, 1971, at 692; but see Sloan \textit{Report, supra} note 1, at 146-48. But the FCC has not done that. Nor has it limited the number of channels the cable operator may devote to his own origination, local or otherwise — a limitation that would seem desirable, see note 328 \textit{supra} — or the extent of the “proprietary interest” the operator may have in his own programming. It has ruled, in fact, that local authorities may not restrict federally authorized program origination or advertising by the cable operator, Clarification of CATV First Report, 20 F.C.C.2d 741, 17 P & F \textit{Radio Reg.} 2d 1676 (1969), and also that they may not restrict pay-TV operations by the cable operator. Pierson, Ball & Dowd, 22 P & F Radio \textit{Reg.} 2d 949 (1971).

The Illinois proposal, purporting as it does to restrict programming authorized by the FCC, thus seems legally untenable (assuming the validity of the FCC’s regulation of cable-originated programming, see text at notes 178-268 \textit{supra}). Indeed, apart from the preemption issue, for a state to tell a cable operator he may originate his own local programming only over a single channel, and then “only on a non-profit basis” — with a governmental inquiry thus authorized into the revenues and costs of news and public-issue programming — might well be thought to raise first amendment problems. \textit{Cf.} Weaver v. Jordan, 49 Cal. Rptr. 537, 411 P.2d 289 (1966), \textit{cert. denied}, 385 U.S. 844 (1966). Legal issues aside, the Illinois proposal, its good intentions notwithstanding, would seem to represent poor policy for the development of the cable medium. If the Illinois Commerce Commission can restrict the cable operator’s program origination on the basis of “the public interest in promoting widely diverse programming opportunities on the other cable channels,” then other state and local authorities, citing other “public interests” — including ones more congenial to broadcasters, theater owners, local newspapers, and others with whom cable will compete — can restrict the program-origination function of the new medium in other ways, and indeed can simply prohibit origination. \textit{Cf.} text at notes 266-68 \textit{supra}.

\textsuperscript{602} \textit{New York Report, supra} note 19, at 201.

\textsuperscript{603} See text at notes 61-68 \textit{supra}. 
for the state to impose free-channel requirements on cable systems operating under existing franchises, and even under the FCC's new regime it would be useful for the state to be in a position to go beyond the federal requirements, not only as to existing franchises but as to new ones as well. On the whole, however, the need for state requirements as to the provision of access channels does not seem critical, inasmuch as the FCC's rules will establish a minimum access regime for all cable systems.

Regulation of the access channels is a different story. It is a function the FCC would leave to the cable operators but which in fact calls strongly, as I have argued, for a state or local role. To repeat just one example, there is a need to oversee the rates charged for access uses to assure that they are not set so high as to discourage those uses (a result likely to promote the economic interests of the cable operator, especially if he is himself engaged in programming). Astonishing on this score is the assertion of the Sloan Commission that "the marketplace" will regulate the rates for leased channels to keep them reasonably low. More appropriate is the position of the Illinois Commerce Commission, which proposes "to adopt the FCC proposals provisionally, and to deal with additional access needs through its own regulation of leased channel operations." This regulation would include requirements that the rates for at least one of the leased channels not be "so high as to discourage any member of the public from applying to use them; that this channel would have adequate studio and production equipment; and that the cable system would adopt rules and practices designed to prevent preemption of excessive time by any user or class of users during specified time periods," with the "rules and rates" for the channels requiring the approval of the state commission. For all the reasons noted earlier, such a regulatory role for the state or local government with respect to the access channels seems greatly desirable. And since there can be no assurance that the local government will assume the task, the state regulatory scheme should include such authority for the state commission. The commission should be authorized and prepared — again assuming an absence of federal preemption — to require cable systems to exceed the FCC requirements for access and dedicated

604 See text at notes 107-25 supra. This is particularly so with respect to cable systems in markets below the top 100, in view of the FCC's decision to impose no access requirements on those systems at this time but to permit local or state authorities to do so. CABLE TELEVISION REPORT AND ORDER, supra note 26, at 1565, ¶ 148, quoted in note 160 supra.

605 See text at notes 281-93 supra.

606 See text at notes 294-338 supra.

607 See text at notes 325-35 supra.

608 Id. at 145. The commission does not explain why the monopoly position of the cable system is decisive with respect to programmers.


610 Ibid.

611 See text at notes 294-338 supra.
channels when this seems desirable. More important, it should be authorized and prepared to regulate the use of the access channels, and thus to assume responsibility for promulgation of regulations, approval of rates, supervision of the cable operator's administration of the channels, adjudication of disputes, and other things. The commission should also specify the production facilities to be provided and the terms and rates involved, and it should have authority to require local-live origination by the cable operator when this seems appropriate. In all these areas, however, when a local government establishes an apparatus and demonstrates a capability to perform these regulatory tasks on a continuing basis—as may be true of New York City, for example—it would seem that the state commission should delegate them to the local government in the first instance.

7. "GRANDFATHERING"

Questions arise as to the extent to which existing interests in cable systems or cable franchises should be accorded "grandfather" status under a state regulatory scheme. Three classes of interests require consideration: (a) franchised cable systems already in operation when the act is adopted; (b) franchises outstanding but not yet implemented to the point of system operation; (c) applications filed in franchise proceedings begun but not yet consummated.

(a) As all agree, the franchises of systems already in operation should be confirmed, which can be done through the award of grandfather certificates by the state commission. Such confirmation should be subject, of course, to any existing legal infirmities in the franchise. Further, the grandfathered cable systems should not be excused from immediate compliance with what may be called the "nonstructural" requirements of the state regulatory scheme — filing of information with the state commission, rate regulation (or supervision) of rates and service, franchise fee limitations, procedures applicable to transfers of control, etc. Compliance with "structural" requirements — e.g., minimum channel capacity, two-way capability — should also be required of grandfathered systems at some time, but not immediately. It might be desirable for the law to authorize rulings by the state commission as to the time for compliance with particular requirements difficult to place in one category or the other (e.g., interconnection, production facilities), and possibly the rulings would have to deal on an ad hoc basis with particular cable systems. As a general rule, however, state adoption of the FCC's "generous" position requiring full compliance within five years or at the time of franchise renewal, whichever occurs first, would seem appropriate. In addition, as has been recognized by the New York Report and the Illinois proposed rules, an application to transfer control over the franchise pro-

612 The Illinois Commerce Commission makes useful, specific proposals in this regard, stating, for example, that "[a]s a starting point, it seems necessary to provide separate studios for each of the dedicated channels, and one for all other cablecasting purposes . . . ." Illinois Proposed Rules, supra note 16, at 26.

613 See text at notes 303-08; but cf. note 96 supra.


615 FCC Letter of Intent, supra note 5, at 1783; Cable Television Report and Order, supra note 26, at 1578, ¶ 187.
vides an apt occasion for bringing the system into compliance,616 and it would seem appropriate, as has been noted, to require full compliance with existing rules as a condition for approving the transfer.617 The state ceiling on franchise duration should of course apply to grandfathered systems,618 as should any requirement for periodic renegotiation.

(b) The applicability of the new state law to outstanding franchises for systems not yet in operation is a matter of large importance. Such franchises may even outnumber operating systems;619 a great many of them are likely to be deficient, as is true of existing franchises generally; and in these cases remedial action may be possible before the system is constructed. It is necessary to identify the point in construction at which the system becomes entitled to grandfather status on the same basis as completed systems.620 It seems reasonable to accord such status when the franchise holder has engaged in "substantial construction" of the system.621 But since this standard leaves much room for argument, and since there is a strong public interest in "catching" these systems before they are constructed, it would seem desirable to adopt a more specific test as well. A fair-seeming one is advanced by the Illinois Proposed Rules, which would accord grandfather status to franchised cable operators who at the cut-off date "had erected their antenna tower and 'head end' and had strung no less than five miles of feeder and/or distribution cable."622 Wherever the line is drawn, it would seem important to provide, as the Illinois proposal does, that even a system that meets the test for grandfather status will be fully subject to the new rules with respect to "all of its unconsummated operations."623 For similar reasons, states which enter the cable picture by way of moratorium legislation, as New York and New Jersey have done,624 would seem well-advised to apply the moratorium not only to the franchising of cable systems, but also, like the Illinois Commerce Commission, to the initial construction of systems already under franchise.625

When the franchise holder has not engaged in sufficient construction to qualify for grandfather status, the franchise and the system should be required

616 NEW YORK REPORT, supra note 19, at 210; ILLINOIS PROPOSED RULES, supra note 16, at 28; see text at notes 561-63 supra.
617 See text at notes 568-69 supra.
618 The Massachusetts Act expressly so provides. Supra note 17, at § 4. The Massachusetts Act includes no provision for delayed application of state requirements to grandfathered systems. It simply provides that such systems "shall within ninety days furnish said issuing authority all other information required by [the Act] ... and shall comply with all other applicable sections of [the Act] ... and shall receive from the issuing authority a license ..." Id. § 4. If this means compliance within 90 days even with structural requirements that may be adopted by the state commission— or with the Act's ban on newspaper-cable cross-ownership, see text at note 678 infra—it would seem unduly harsh. The language seems flexible enough, however, to allow the commission to clarify the matter by regulation.
619 See note 71 supra and accompanying text; but cf. text at note 107 supra.
620 The requirements immediately applicable to such a system, notwithstanding its grandfathered status, should include, of course, a timetable for completion of construction. See text at note 688 infra.
621 This is the test proposed by the New York Report, supra note 19, at 186.
623 Id. at 3.
624 See notes 12-13 supra and accompanying text.
625 ILLINOIS REPORT, supra note 14, at 2202 ("This means that no construction of authorized but unbuilt cable systems may be undertaken ... ").
to meet all the substantive requirements of the state (and federal) regulatory schemes. It might be argued that the procedural requirements for the franchising process should be applied as well, with the result of vacating franchises that were not granted in conformity with those requirements, that were granted without public notice and a public hearing, for example. The municipality would then initiate a new franchising proceeding which met the new requirements, and in which the present franchise holder could of course compete. Such an approach seems especially attractive when one thinks of franchising processes such as the one in Buffalo, or of the many "no show" franchises that have been held for extended periods without any effort, or even any intention, to construct a system.\footnote{See notes 69-79, 493-501 supra and accompanying text.} It would seem that franchising authorities should, indeed, assert any legal rights they may have to recover such franchises;\footnote{See note 113 supra and accompanying text.} the state legislation might, in fact, authorize the state commission, or a state legal officer, to bring this issue to court on behalf of municipalities that may decline to do so themselves. But a legislative attempt to vacate existing franchises across the board, without regard for the length of time they have been held or the possible justifications for delay, simply on the basis that the procedures by which they were granted are now considered inadequate, would seem unwise. Such a measure would upset reliance interests to an unjustified extent, might well succumb to legal challenge,\footnote{See note 110 supra and accompanying text.} and would certainly spawn confusion and delay. On the whole, it would seem more appropriate—apart from attempts to recover specific franchises for nonperformance or other legal deficiencies, and apart from specific new rules affecting the qualifications of the franchisee\footnote{This would include ownership restrictions. The FCC in adopting its ban on ownership of cable systems by television stations serving the same area has required divestiture within three years, for example. Any other ownership restrictions adopted should likewise be "retroactive." See Second Report and Order, FCC Docket No. 18397, 19 P & F Radio Reg. 2d 1775, 1781 (1970); text at notes 677-85 infra.}—to acquiesce in the selection of the existing franchise holders and concentrate regulatory efforts on improving the "contents" of the franchise before the system is constructed.

(c) With respect to persons who have merely filed applications in franchise proceedings that have not resulted in a franchise award, any claims of reliance seem clearly outweighed by the public interest in subjecting the franchising process to the new requirements, both procedural and substantive. This is especially so in view of the fact that the applicants will not be deprived of the opportunity to compete for the franchise. New York, New Jersey, and the Illinois Commerce Commission have all recognized as much by their moratoriums, and Massachusetts has done so by its statute.\footnote{Massachusetts Act, supra note 17, at §§ 3-6.}

8. Concentration of Control

Another question is whether a state regulatory scheme for cable should include, or may include, restrictions on cable-system ownership designed to avoid undue concentration of control over the mass media. One aspect of the problem,
involving control over the cable medium itself, was touched on earlier in suggesting that the state impose a ceiling on the size of individual cable systems. Such a ceiling should be accompanied by rules limiting the number of cable systems (in terms of the number of subscribers) that a single owner may control within a metropolitan area, and perhaps within the state as well. Chiefly at issue, however, are rules that would prohibit "cross-ownership" between a cable system and a television station, a daily newspaper, or a radio station serving the same community. The FCC has been active in this area. It has adopted a rule prohibiting cross-ownership between the cable system and the television station, so that this is a question which—barring a change of heart by the Commission, by no means impossible—need not concern state and local authorities. The FCC has also been considering the issue of radio-cable cross-ownership. But the crucial question, which the FCC at this writing has not yet resolved, and which will face state and local governments if an FCC rule is not adopted, is cross-ownership between the cable system and the local daily newspaper. The FCC has proposed a rule prohibiting such affiliation; the proposal is the target of strenuous opposition by newspaper publishers, expressed in a variety of ways; and as this is written in late January of 1972, the FCC is still pondering the matter. I have addressed all of these questions elsewhere and do not propose to treat them fully here. I shall only summarize the policy considerations applicable to the critical newspaper-cable question, and shall then consider whether an FCC decision not to adopt a ban on newspaper-cable cross-ownership should preclude state and local governments from doing so.

Various considerations support adoption of a rule prohibiting control of a cable system by the owner of a daily newspaper published in the same market.

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631 See text at notes 516, 533-34 supra.
632 New York City has begun doing this. Its Manhattan franchises provide that the franchisee may not have an ownership affiliation with another cable system in the city. Sterling Franchise, supra note 286 at 30 (Sec. 18). This is in accord with the report of the Mayor's Task Force which recommended that the city be divided into some 10 or 12 franchise areas, id. at 42-43, and that "no company should be prohibited from owning more than one cable television system in New York City, either directly or through the establishment of a separate corporate entity, unless a second system is either the small system on Staten Island or that in Riverdale." Id. at 48. Mayor's Task Force, supra note 96.
633 47 C.F.R. § 74.1131 (a) (2); see Second Report and Order, FCC Docket No. 18397, 19 P & F RADIO REG. 2d 1775 (1970); Barnett, supra note 1, at 221-319.
636 Id.; see also Memorandum Opinion and Order, FCC Docket No. 18891, Dec. 8, 1970 (as corrected).
638 The issues of local cross-ownership of cable systems and television stations, and cable systems and radio stations, are discussed in Barnett, supra note 1, at 292-319 and 319-29, respectively. I have dealt with the newspaper-cable issue in two sets of comments filed with the FCC. Reply Comments in FCC Docket Nos. 18110 and 18891, August 16, 1971, at 103-46; Comments in FCC Docket No. 18397, April 1, 1969, at 100-193.
In the first place, there is the growing concern in recent years over the existing concentrations of control among the major media outlets in American cities, a situation many find inconsistent with, among other things, the Supreme Court's well-known statement that the first amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public . . . ." 639 I have collected elsewhere a number of samples of this concern, indeed this consensus, 640 and shall not repeat them here. Suffice it to recall the statement of the Vice President of the United States, "the American people should be made aware of the trend toward monopolization of the great public information vehicles and the concentration of more and more power over public opinion in fewer and fewer hands," 641 and to quote the more recent words of a judge of the Court of Appeals for the District of Columbia Circuit. In a case involving the media cross-ownership in Salt Lake City (which includes a joint venture in cable television, constituting the dominant cable operator and franchise-holder in the market, 642 whose ownership combines all the daily newspapers and all the VHF television licensees in the market), 643 Judge Tamm pointed to "disheartening statistics describing the marked trend toward concentration of media ownership," declared that "[t]he risk inherent in allowing these accretions of power to persist unchecked is clear . . . ." and expressed the hope that the FCC in a pending rule-making proceeding "will finally come to grips with the grave problems inherent in the rising concentration of ownership in the mass media. . . ." 644 In the rule-making proceeding to which the judge referred, which is still pending at this writing, the FCC has proposed a rule that would break up the existing combinations between daily newspapers and television broadcast stations serving the same market. 645 As the Commission recognized in issuing that proposal, the increased concern over local-media concentration springs largely from two developments: the rise of television as the preeminent mass medium, to the point where television and daily newspapers are by far the leading sources on which the public relies for news, and the simultaneous development of daily-newspaper monopoly in almost every American city. 646 In fact, of the more than 1,500 cities that have daily newspapers, all but approximately 40, or some 97.5 percent, have a daily-newspaper monop-

640 See Barnett, supra note 1, at 221-22, 279-85.
641 N. Y. Times, Nov. 21, 1969, at 22, cols. 1-5, quoted in Barnett, supra note 1, at 222.
642 See Barnett, supra note 1, at 288-89; 1971 BROADCASTING CATV SOURCEBOOK 162-63.
643 It is noteworthy that this cable system, serving Salt Lake City, Salt Lake county, Provo, Utah county, Ogden City, and Weber county, and apparently in operation since 1970, reportedly has only 8 channels. Id. at 162. See text at note 651 infra.
646 See id. at 53:184f - 184i. The point was made succinctly by Chairman Burch of the FCC: " . . . There are only a few daily newspapers in each large city and their numbers are declining. There are only a few powerful VHF stations in these cities, and their numbers cannot be increased. Equally important, the evidence shows that the very large majority of people get their news information from these two limited sources. Here then are the guts of the matter. . . ." Id. at 53:184m (Chairman Burch concurring and dissenting).
It is against this background that the question of newspaper-cable cross-ownership must be considered. When a new medium, cable, suddenly appears in local markets where concentration of control among the existing media is a source of rising concern, and when that concern focuses particularly on the monopoly position of the daily newspaper, to allow the newspaper to control the cable system may well seem inimical to the various policy considerations, bottomed on the first amendment, the Communications Act, and the antitrust laws,\(^\text{648}\) that favor diversity of media voices and media control. At a time when the FCC has felt compelled to propose “deconcentration” through breaking up the long-existing combinations between daily newspapers and television broadcast stations at the local level, it may seem peculiarly poor policy to let the advent of cable television increase the existing level of concentration through annexation of the cable system by the newspaper.

It is then necessary to consider that the cable system, like the newspaper, will be a monopoly in the area it serves. Whereas members of the public can typically receive at least three local television stations, in all likelihood they will be able to subscribe to only a single cable system wherever they live.\(^\text{649}\) The nature of the monopolized media, moreover, increases the impact of their combination. Much of the promise of cable lies in its ability to provide a new media voice for the local community, a source of local news and opinion, community expression, and local advertising. These are fields in which the local newspaper at present has a substantial monopoly, but in which the cable system, given the power of television and the ability of cable “to serve its own community and that community alone,”\(^\text{650}\) may well emerge as a formidable competitor. Ownership of the cable system by the newspaper whose monopoly it challenges would seem unlikely to promote development of the system in these respects that are so critical to the public interest in cable.\(^\text{651}\) The publisher’s conflict of interest would have a specially forceful impact on development of the “access” uses of the cable system. As proprietor of what is by far the dominant outlet in local news, local advertising, and other local media functions, the publisher not only has a disincentive to develop the cable system for his own use, but his economic interests are even more strongly opposed to maximizing the system’s channel capacity and its provision of leased channels for use by other programmers and local adver-

\(^647\) Of 1,511 cities with daily newspapers, 1,304 have only one daily; another 141 have two dailies but only one owner; and another 21 have two separately owned dailies published under a joint-operating agreement that eliminates economic competition between them. Figures compiled by Professor Raymond B. Nixon in Editor & Publisher, July 17, 1971, at 7. The American Newspaper Publishers Association agrees that “in 97% of the markets there is no local daily newspaper competition” and states, “[t]he one-daily-newspaper city is the unique and distinguishing characteristic of the newspaper business.” Reply Comments of the American Newspaper Publishers Association in Opposition, FCC Docket No. 18110, August 18, 1971, at 30-31.

\(^648\) See, e.g., Barnett, supra note 1, at 254-60.

\(^649\) See note 108 supra.

\(^650\) Sloan Report, supra note 1, at 98.

\(^651\) See, e.g., Publishers Look at CATV’s Effect on Local News Service, Editor & Publisher, Oct. 10, 1970, where a publisher-cable owner in Longview-Kelso, Washington, is reported as telling fellow publishers, for example: “... Suddenly a new hometown competitor appears. This occurs in the face of the fact that local news is the only commodity that newspapers have left to them exclusively. ... Do newspapers want readers to become more dependent on their TV screen for news and information, or do they want to hold them as long as possible to the printed page?”
tisers. This consideration is sharpened by the FCC's intended rules inasmuch
as they leave it essentially in the hands of the cable owner to determine, among
other things, how many channels to make available for leasing and at what
rates. But under any regulatory scheme the cable owner will retain a critical
degree of control—de facto if not de jure—over the availability of the system
for access uses and the development of its access potential. The owner of the
local newspaper, with his frontal conflict of interest, would seem the least likely
of all possible cable owners to maximize the development of the cable system's
potential for providing media diversity and media access to the local community.
There is also the economic impact from blockage of the competition that would
otherwise exist between the newspaper and the cable system in the market for
local advertising. The point has been urged by the Justice Department, which
has told the FCC that "common control of a newspaper and CATV in the
same community represents substantial foreclosure in the market for local adver-
tising and eliminates development of potential independent alternative advertising
media."

Another set of considerations has been suggested at several points in this
article. It involves the unsavory effect on the franchising process—and indeed
on the entire future of the cable system, insofar as it may be affected by the pro-
cesses of local government and the attitudes and activities of the local public
that is likely to result when the local newspaper competes for the cable franchise
or owns the system. It is no coincidence that so many of the abuses in cable
franchising—illustrated by the cases of Buffalo and San Jose-Campbell-Santa
Clara—involve the local newspaper as a franchise applicant. Such a situation
presents a singular potential for political favoritism in the franchising process,
for franchise provisions unduly favorable to the franchisee, and for delay in con-
struction of the system (since the newspaper is in no hurry to establish a com-
peting medium). It also has the effect of disabling the newspaper, the leading
if not the sole source of substantial local news coverage, from vigorously and dis-
interestedly informing the public about the vital local news story that the fran-
chising of the cable system represents. Nor can this effect be expected to termi-
nate after the franchise has been granted. The construction and then the opera-
tion of the cable system, and its regulation, will be permanent subjects of public
importance and public interest in the community, a continuing major news
"beat," and if the newspaper owner is the cable operator, there will be a perma-
nent blanket over the public's knowledge about the cable facility and the issues
of public concern it presents. It is also noteworthy that, under any program of
cable regulation other than state preemption, an important role in regulating
the cable system will remain in the hands of the local government. Casting a
newspaper in the role of a regulated industry (at least in part a public utility)
may be cause for discomfort in any event, but there are special dangers in a rela-

652 See text at notes 144, 301-37 supra.
653 See text at notes 312-32 supra.
654 Comments of the United States Department of Justice, FCC Docket No. 18397, April
655 See text at notes 493-501 supra.
656 See text at notes 47-51, 487-92 supra.
tionship where the local newspaper, as owner of the local cable system, would be subject to the continuing regulation, supervision, and franchising power of the local government and its elected officials.

While the considerations thus summarized appear compelling, the contrary arguments do not. The Sloan Commission, which proposed a compromise on the issue, listed seven "arguments in favor of cross-ownership." Two of them are that "capital will be needed to make cable grow," and that "there are arguments of equity in favor of permitting those interests most threatened by the growth of cable television to balance the threat of economic loss with an opportunity for economic gain," so that it would not be "equitable to prohibit broadcasters from trying their fortunes in cable." Both points are unexceptionable, but the Sloan Commission does not explain why both are not met by the opportunity broadcasters and newspaper publishers would have to "try their fortunes in cable" in markets other than those in which they hold broadcast licenses or publish newspapers. A third argument, that "the association of a local newspaper with a cable system may be the most efficient means of assuring that the cable system will assume responsibility for local news coverage," over-looks several things: the possibility of achieving the same assurance by requiring the cable system to originate local programming; the benefit the community would derive from local news coverage that emanated from a second, different source, rather than from the existing newspaper through a different medium; the disincentive the newspaper owner would in fact have with respect to developing the capability of the cable system as a vehicle for local news (and adverti-

657 As "the best and most workable compromise between opposing positions," the commission recommended that within any metropolitan area, "any commercial television station or newspaper of general circulation be permitted to seek a cable franchise or group of franchises capable of reaching no more than 10 percent of the households within that area," and further that in no metropolitan area should ownership of cable systems by local television stations or newspapers "be permitted to exceed, in the aggregate, 40 percent of all households." Sloan Report, supra note 1, at 139-40. The commission thus demonstrated that private commissions can outdo governmental ones in their resort to unreasoned, political compromise. With a single exception, Washington attorney, Patricia Wald, who noted her dissenting position on two issues (id. at 132, 140), none of the 16 members of the Sloan Commission publicly avowed an individual point of view. Thus, on the issue of network ownership of cable systems, the Report states that the commission's recommendation against permitting such ownership "reflects the view of the majority of the Commission; a minority believes network ownership should be permitted." Id. at 140. The commissioners holding the respective views are not identified and there is no disclosure of the vote, much less majority and dissenting opinions. Compare the procedures of the FCC. See 47 U.S.C. § 154(j); 5 U.S.C. § 553(c).

658 Sloan Report, supra note 1, at 137.

659 Id. at 138-39.

660 That pursuit of a business interest in another city does not pose unwonted management problems for newspaper publishers is suggested by the fact that more than half the daily newspapers in the country are now under chain ownership. See Editor & Publisher, July 17, 1971, at 7.

661 Sloan Report, supra note 1, at 138.

662 See text at notes 346-54 supra.

663 See the reported remarks of one publisher-cable owner at a publishers' meeting: "McClelland admitted that the news staff question presents a dilemma. Does a newspaper share locally gathered news with the cable system? Does it hire another news staff to duplicate what is already being done by the newspaper staff?" Editor & Publisher, Oct. 10, 1970, at 18. Cf. the reported statement of another such owner: "He opted for cable tv as a means of promoting the newspaper, noting 'the more minutes we can have people thinking about our paper the better off we are.' " Editor & Publisher, March 6, 1971, at 32.
ing); and the fact that the local newspaper can provide news coverage on the cable system over a leased channel or comparable arrangement without owning the system. A fourth argument, that "ownership of a cable system may enable a newspaper to remain in operation that otherwise might fail," which "has sometimes been one of the consequences of cross-ownership of newspapers and conventional television," ignores the fact that such ownership would be at least as likely to damage as to preserve newspaper competition. The short answer, however, is that a rule against cross-ownership would naturally be subject to waiver, as the FCC has made clear with respect to the TV-cable rule, in a case of economic hardship such as the one suggested. A fifth point is that "many of the arguments against cross-ownership equate ownership of cable franchises with control over cable channels," and that when the owner's channel control is limited through access devices such as required leasing, "[m]uch of the monopolistic threat of cross-ownership is thereby diminished sharply." It is true that access requirements reduce the harm from cross-ownership, but harm remains—owing to the cable owner's power to program his own channels and control the development and uses of the system, and his power in particular to inhibit, manipulate, and discriminate against the access uses themselves, together with his self-interest in doing so. A sixth argument is that there may be a number of cable franchise areas within a single market, with the various systems under different ownership, "and hence diverse voices." This ignores what the Sloan Commission recognizes elsewhere but does not mention in the cross-ownership context: "the inherent monopoly of a cable system in any locality . . . ." The result is that for any given segment of the public there would not be "diverse voices," but only one cable voice, owned by what will ordinarily be the only newspaper voice.

664 See the statements by a publisher-cable owner quoted in note 651 supra, and the additional negative attitude by the same speaker to the idea of cable-originated programming in the first place (e.g., referring to the FCC's then-extant compulsory origination rule: "it will be interesting to watch how well CATV can perform 'under the painful lash of federal compulsion'"). Editor & Publisher, Oct. 10, 1970, at 13-14.

665 Elsewhere in its Report the Sloan Commission recommended that Congress or the FCC "should assert limitations on ownership and on leasing . . . that would deny ownership or channel control to those for whom it would pose a conflict of interest." Sloan Report, supra note 1, at 155. The commission did not advert to the subject of conflict of interest in its discussion of the newspaper-cable question. See id. at 135-41.

666 For a report of such an arrangement in Pompton Lakes, New Jersey, see Editor & Publisher, April 24, 1971, at 40: "For the past five months, the editorial staff of Today . . . has written and presented a weekly news program telecast to CATV subscribers within the seven town area served by both media. . . ."


669 Sloan Report, supra note 1, at 139.

670 See text at notes 325-32, 651-54 supra.

671 Some of the threat of a monopoly effected by cross-ownership rests on the unstated assumption that only a single cable franchise will be issued in a given marketing area. In practice, there are likely to be several franchises in large cities, and even more when entire metropolitan areas are considered; regulations or franchising provisions could readily be devised that would assure diverse ownership of the several franchises, and hence diverse voices.

Sloan Report, supra note 1, at 138.

672 Id. at 147; see also id. at 145.

673 This is why the commission's proposed compromise, see note 657 supra, is pointless.
The first amendment principle which "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection . . . "\(^{674}\) assumes a multitude of tongues heard by the same audience, not a multitude of audiences hearing one tongue each. The seventh and final consideration listed by the Sloan Commission under the heading "merits of cross-ownership" is that:

As a practical matter any steps to bar television stations and newspapers from ownership of cable franchises would have the effect of calling into being powerful opposition to cable television in general. The effect of that opposition and the support it could muster both nationally and locally, might be a greater threat to the healthy growth of cable television than the fact of cross-ownership itself.\(^{675}\)

In thus deferring to the political power of the media, the Sloan Commission ignores the impact that same power could be expected to have, if cross-ownership was allowed, on the local franchising decisions and the future of the cable medium in the community. But apart from that, such deference is a reproach to a commission made up of eminent private citizens who might have been expected to appraise public policy considerations on their merits.\(^{676}\)

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\(^{675}\) SLOAN REPORT, supra note 1, at 138.

\(^{676}\) Compare the similar obeisance recently performed by the FCC in adopting the "consensus agreement" on cable policy; see note 25 supra.

Another argument advanced in favor of newspaper-cable cross-ownership, though not by the Sloan Commission, is based on the possibility that the cable system will serve in the future, through facsimile transmission, as a means of delivering the newspaper to the home. One would have thought this argued against such cross-ownership, since control of the cable system would thus enable the publisher to foreclose access to the system, and hence to the homes of the public, to his existing or potential competitors. See Comments of the United States Department of Justice, FCC Docket Nos. 18110 and 18891, May 18, 1971, at 39. The danger draws substance from observations that the existing monopoly position of daily newspapers is based in part on their maintenance of exclusive systems of home distributorships which "seriously impede new entry, since they require each new paper to build its own system." Roberts, Antitrust Problems in the Newspaper Industry, 82 HARV. L. REV. 319, 326 (1968). Whatever their true motives, newspaper publishers claim they must be allowed to own the cable system precisely so they may be assured of control of the potential new delivery mode. The FCC has made it clear that newspapers would be assured of nondiscriminatory access to the cable system for the purpose of home delivery without the need to own the system. Notice of Proposed Rule Making and of Inquiry, FCC Docket No. 18891, July 1, 1970, at 3 n.3. In arguing that this is not enough, that they must be able to own the system, the publishers contend, for example:

Even if the FCC were to require CATV systems to accord newspapers priority status, disputes will inevitably arise over such matters as the number of channels to be allocated to press use, reasonableness of rates and the like. Government agencies will then be called upon to intervene in order to safeguard press activities. The right to publish should, under our constitutional system, be as near absolute as possible. The press should not be forced to depend on the enforcement mechanisms of government where other alternatives (i.e., system ownership) exist.
While a rule prohibiting ownership of a cable system by a daily newspaper published in the same market thus seems not only desirable but necessary,\textsuperscript{677} the question remains whether state and local authorities may adopt such a rule if the FCC does not. Several such authorities have adopted rules or policies prohibiting cross-ownership between cable systems and other major local media outlets. The Massachusetts Act contains such a prohibition against ownership of cable systems by "television broadcast stations . . . and newspaper media and their affiliates in their major circulation areas."\textsuperscript{678} The franchises awarded in New York City prohibit common interests between the franchisees and, among other entities, "any radio or television broadcast station whose signals are carried on the System on a regular basis" and "any newspaper or magazine whose principal circulation market is New York City . . . ."\textsuperscript{679} The Connecticut Public Utilities Commission, prior to the FCC's adoption of the TV-cable rule, adopted a policy whereby, "other things being equal," owners or operators of television stations would be disfavored in applying for cable franchises within the service areas of their stations; the commission accordingly denied all the applications it received from such broadcasters, in favor of competing applicants without such affiliation,\textsuperscript{680} and its action was upheld by the state supreme court against the claim of federal preemption.\textsuperscript{681} The \textit{New York Report} takes the view that the state commission should be empowered to make rules respecting concentration of control, including newspaper and radio cross-ownership, and that the position ultimately taken by the FCC should not preempt additional requirements imposed by state and local authorities; the \textit{Report} takes no position, however, as to

\textsuperscript{677} As I have argued elsewhere, a rule prohibiting ownership of the cable system by the licensee of a local radio station should also be adopted for communities having only a few such stations — for example, less than five AM stations. See Barnett, \textit{supra} note 1, at 319-29. While large cities have a plenitude of radio stations, there are some 1500 communities in the country, located outside of metropolitan areas, that have only a single radio station or a single AM-FM combination. \textit{Id.} at 325. In such communities, and in others where the radio outlets are few, the ability of the cable system to provide a new media voice to supplement the very limited number of existing voices should not be undermined by common ownership with the radio station.

\textsuperscript{678} Massachusetts Act, \textit{supra} note 17, at § 1(e).

\textsuperscript{679} Sterling Franchise, \textit{supra} note 286, at § 18.


In Nevada, on the other hand, the Public Service Commission expressly rejected the Connecticut view, concluding that "absent a specific statutory directive, there are no circumstances under which concentration of control should be afforded consideration by a commission such as ours in a proceeding of this kind." \textit{Quoted in Mitchell, \textit{supra} note 71, at 40.} The commission thereupon awarded two franchises for Las Vegas, one to the owner of a VHF television station and a daily newspaper in Las Vegas (as well as a VHF in Reno), and the other to the owner of the other daily newspaper in Las Vegas. \textit{Id.} at 38-41; \textit{see} 1970-1971 \textit{Television Factbook}, No. 40, services vol., at 471-a; 1971 \textit{Broadcasting Yearbook} A-37; 1971 \textit{Editor \\& Publisher Yearbook} 152.
what rules the state commission should adopt.\textsuperscript{682} The Illinois Commerce Commission discusses the matter but concludes: "In the absence of specific and demonstrated abuses of the regulatory system it is proposing, the Commission believes that issues of this sort are best left to legislative judgment."\textsuperscript{683}

While an FCC decision not to adopt the newspaper-cable rule would be ill-advised, no reason appears why it should preclude the adoption of such a rule or policy on the part of state or local entities, as New York City and Massachusetts have done. If the FCC is not going to "set out comparative criteria to govern the selection process,"\textsuperscript{684} but is going to leave that choice to the state or local government, it should not attempt to prohibit their use of this one particular comparative criterion, a consideration that has peculiar local impact and is not contrary to any significant federal policy on which the FCC's negative decision could be based. If a state or local government is to be free to choose, for example, between awarding its franchise to a private cable operator, a nonprofit institution, a central-city minority group, or the local government itself, it should likewise be able to decide that it will not award the franchise to the owner of a newspaper published in the same city.\textsuperscript{685} The state likewise should be able to make that decision as part of its regulatory scheme. Regardless of what the FCC does on the issue, the state should in fact adopt such a rule.

9. Other Elements of State Regulation

Many other elements that should be included in a basic state regulatory scheme for cable will not be discussed here, largely because they do not seem particularly difficult or controversial. But to help fill out the picture—yet still without any attempt at inclusiveness—some of the more important additional elements may be briefly noted.

\textit{a. Interconnection.} As was indicated in the discussion of franchise areas,\textsuperscript{686} one of the unique and crucial advantages of state regulation lies in the ability of the state commission to order the interconnection of cable systems serving different areas. The state commission should be authorized to do this and should vigorously exercise the authority. It should consider the question with respect to each newly franchised cable system before it grants the state certificate\textsuperscript{687} (even though some interconnection requirements may be included in the franchise itself), and should also maintain a continuing program directed toward ordering interconnection between systems already in operation, upon adequate findings of need and with consideration of the financial impact on the systems.

\textit{b. Construction timetable.} The state statute or the rules promulgated by the state commission should require that each franchise contain a detailed construc-

\textsuperscript{682} \textit{New York Report, supra} note 19, at 208-09.

\textsuperscript{683} \textit{Illinois Proposed Rules, supra} note 16, at 43.

\textsuperscript{684} \textit{FCC Letter of Intent, supra} note 5, at 1781.

\textsuperscript{685} Any attempt to enforce a preemption rule might raise difficult problems, indeed, in determining whether or not a franchising authority had taken the fact of newspaper ownership into account.

\textsuperscript{686} \textit{See} text at notes 509-20 \textit{supra}.

\textsuperscript{687} An appropriate procedure for state certification is set forth in the \textit{New York Report} at 187.
tion timetable, a faster one than the FCC’s guideline calling for wiring 20 percent of the franchise area per year. The obligation should be guaranteed by an adequate performance bond, and the operator should be held to it unless he can show to the satisfaction of the state commission (not just the municipality) adequate justification for the delay.

c. Channel capacity. The state should require cable systems to have minimum channel capacities above the FCC’s intended minimum of twenty. This could be done through rules geared to city size. Thus the Illinois Commerce Commission proposes to require a minimum of two cables (providing 16 to 20 channels at the start, depending on location, but expandable in the future to 50 or 70 channels) in communities below 50,000 in population, and a minimum of three cables (assuring at least 24 channels at the start, expandable to 75 or more over time) in larger cities.

d. Franchise fees. The question of a ceiling on the franchise fees or other taxes imposed on cable systems by municipalities would be largely settled by the FCC’s intended rules, with their rebuttable maximum of three percent (of gross revenues), a figure that could be exceeded only through specific FCC approval of justifications offered by both the municipality and the cable operator. In the absence or in the interstices of the FCC rules, however, the question of franchise-fee limitations will remain significant, and it should not be ignored in constructing a state regulatory scheme. This is another issue on which one view, represented by the *New York Report*, would defer to local autonomy. The *Report* recognizes that “one of the worst methods of selecting the CATV operator for a particular municipality is to auction off the privilege to the system willing to pay the highest percentage of gross revenues to the municipality,” but it nonetheless would not empower the state commission to regulate the level of franchise fees, nor would it prohibit the high-bid auction method. Such a view seems to combine undue respect for municipal judgment on an issue where that judgment is demonstrably and inherently weak, with unwarranted reliance on powers of persuasion. The Massachusetts Act, on the other hand, sets its own franchise fees—which appear to preempt additional charges by municipalities—and makes them payable to both the state and local governments by cable systems throughout the state.

Since high franchise fees are indeed ill-advised, as all authorities agree, and since the status of the FCC rules remains uncertain, it would seem desirable...

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688 *FCC Letter of Intent*, supra note 5, at 1781. See the Illinois Commerce Commission’s proposal to require that full service be offered to 90 percent of the population in the service area within two years of the franchise award. *Illinois Proposed Rules*, supra note 16, at 19.
690 *FCC Letter of Intent*, supra note 5, at 1782-83, see text at notes 174-76 supra.
692 Id. at 201.
693 “While the needs of some municipalities for revenues may lead to approaches like this, and it is not recommended that such approaches be prohibited, the Commission should seek to advise municipalities wherein their long-term interests lie. . . .” Id. at 202.
694 See text at notes 479-86 supra.
695 The Act provides for an annual fee of 50 cents per subscriber to both the state and the municipality. It is not clear, however, that higher fees to the municipality are proscribed. See *Massachusetts Act*, supra note 17, at § 9. The one-dollar total comes to less than 2 percent on a subscriber charge of $5 per month, ignoring other income to the cable operator.
696 See text at notes 55-60 supra.
for the state to adopt its own ceiling, of three percent or less. When the FCC rules become effective, the state could then assume the role, as proposed by the Illinois Commerce Commission, of administering the FCC guideline—deciding in the first instance whether to endorse applications to the FCC by municipalities and cable systems seeking to justify fees above three percent. The state might well go further than the FCC, at least with respect to new franchises, and flatly prohibit fees in excess of that or a lesser amount. This approach would have the advantage, among others, of eliminating the need for the state to prohibit the awarding of franchises through the high-bid action method, as the Illinois Commerce Commission proposes to do. Such a prohibition could pose difficult problems of interpretation where the high bid was claimed to be an element in the municipality’s decision but the municipality denied it was determinative.

e. Service and technical standards. The FCC’s intended rules provide that “the franchising authority must have a program to ensure quality of service and to review service complaints.” The state should have a program to exercise this responsibility jointly with the municipality, leaving the task of day-to-day surveillance to the local government but backstopping that government when it needs help or fails to do the job, as recommended in the New York Report.

f. Exclusive franchises. There is little if any public interest to be served by awarding cable franchises which, in addition to the cable system’s likely status as a natural monopoly in its service area, are legally exclusive as well. And the possibility of competitive service, slight though it be, may provide a healthy spur to the cable operator’s performance. State law accordingly should prohibit the awarding of exclusive franchises, and should relieve franchising authorities of such provisions in existing franchises.

F. Recommendations for a “Dual” Approach Involving the State in the Franchising Process

1. Advantages of a Dual Approach

Under the proposals just outlined, the state would prescribe minimum procedures for the franchising process and an array of other requirements affecting the content of the franchise, the operation of the system, and, in one limited respect (concentration of control), the choice of the franchisee. Adoption of such proposals as part of a state regulatory scheme would avoid or diminish, it may be hoped, many of the deficiencies and improprieties that have characterized local franchising to date. But such proposals would still leave the franchising

697 This Commission will be relieving municipalities of the major burdens of regulation . . . , so that it will have to decide in the first instance whether the justification is adequate or whether the franchise fee might be so high as to impair a cable system’s ability to meet the service objectives set by the Commission. In cases where a showing of justification and non-impairment can be made, the Commission will endorse applications for approval to the FCC; in other cases, not.

698 Id. at 13.

699 FGC LETTER OF INTENT, supra note 5, at 1782.

700 NEW YORK REPORT, supra note 19, at 193-96.

701 See, e.g., Massachusetts Act, supra note 17, at § 3; note 494 supra.
process and the decisions it entails—the selection of the franchisee, the design of the franchise package beyond the federal and state minimums, the planning and administration of the process itself—in the hands of the local government alone, aided by whatever advice it might seek and accept. As was argued earlier, these areas of franchise decisionmaking will remain expansive and important, and the local officials entrusted with the decisions will remain lacking in cable expertise, subject to political and other pressures, and not necessarily receptive to advice and input from outside experts or the local public. The attitude in Buffalo—"We have the votes... and we have the legislative prerogative to do what we want"—or the reaction to the FCC’s advice displayed by the city council in Santa Clara might well survive requirements of public notice, public hearings, and a written opinion explaining the decision. The institutional disabilities of local franchising, and many of the unhappy results, may not be eliminated so long as the local government retains exclusive control over the actual process of awarding the franchise.

The best approach might therefore be one in which the state, besides hedging-about the franchising process with procedural and substantive requirements, and besides offering advice and consultation which the municipality might or might not accept, was itself a necessary participant in the decisionmaking process along with the municipality. Such a dual approach could afford a number of institutional advantages. It would ensure the utilization of the staff and expertise in the cable area that the state commission, unlike the municipality, could develop and maintain. It would involve in the decisionmaking process persons who, besides being more expert and professional in the cable area than the local officials, were more detached from the pressures and limited viewpoints of the local scene. It is true, as the New York Report argues, that "state agencies are not immune" from the vices of corruption and political favoritism that may be displayed (and often have been) by local officials. Yet a state commission, especially its staff personnel in cable, might tend to be less subject to the political vice, at least, than the elected local officials who usually make the franchising decisions. It may be, for example, that the recommendations of a city manager as to the relative merits of the franchise applicants would be less readily rejected by the city council, as occurred in Santa Clara, if an outside agency such as the state commission were also a party to the process. Further, even assuming that the state personnel involved in the process were as politically oriented as the local ones, their political predilections would be likely to differ from those prevailing at the local level, and the result of a dual approach might thus be to diffuse and balance out the extraneous considerations. Municipal officials themselves might often welcome the ability to fend off local pressures by pointing out that the franchising decision was not exclusively in their power—that they did not have "the legislative prerogative to do what we want"—and might themselves perform better in the franchising process as a result. A process involving both

702 See text at notes 479-86 supra.
703 See text at note 486 supra.
704 See text at notes 489-92 supra.
705 See note 488 supra.
706 See note 488 supra.
the local government and the state agency would also tend to be more public, more open, more deliberate than the exclusively local process has characteristically been. Even if the story was inadequately reported in the local newspaper, for example, it might be expected to attract coverage at the state level. 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.

2. THE ILLINOIS AND MASSACHUSETTS PROPOSALS

Of the major mixed programs for state cable regulation so far put forth, the Massachusetts Act, and arguably the Illinois Proposed Rules, may be said to embody forms of a dual approach to franchising—that is, an approach involving more than perfunctory state participation in the otherwise-local process of awarding the franchise. The Illinois Commerce Commission in its Interim Order of September 1971 specifically posed for further inquiry “[t]he possibility of developing cooperative certification procedures with Illinois municipalities, so as to give them a suitable voice in planning for and meeting the communications needs of their local residents.” In its proposed rules of January 1972 the commission has pursued the matter with a specific proposal, outlined earlier. The proposal, however, is mainly a set of state-imposed procedural requirements for local franchising, and only marginally a plan for state involvement in the franchising process. As noted, the state would prescribe rather complex procedures for the municipality to follow in awarding the franchise, including retention of an independent consultant and one or two rounds of competing proposals, and the state commission would then

... accord presumptive validity to the municipal proceedings unless it were shown that there was a “vital flaw” in the sense of prejudicial failure by the municipality to observe the foregoing procedural guidelines; in which case the Commission could treat the proceedings in whole or in relevant part as open to de novo consideration, or could invite the municipality to reopen its proceedings to cure the “vital flaw.”

That the local franchise award could be set aside for prejudicial noncompliance with state procedural requirements would be the case, one would think, under any system of mixed state regulation, upon petition to the state commission or a state court. To be sure, the refined nature of the procedures included in the Illinois

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707 Most of the mixed proposals — that of the New York Report, for example — require state certification of the franchisee, but the certificate is granted to whichever applicant the local government has chosen, dependent only on his compliance with minimum state requirements and qualifications of a general nature. See New York Report, supra note 19, at 187. This is to be distinguished from state involvement in the franchising decisions made in the individual case as between particular applicants and particular proposals.


709 See text at notes 438-51 supra.

710 Illinois Proposed Rules, supra note 16, at 12; see id. at 8-12; text at notes 438-51 supra.

proposal would promote integrity in the process at the local level. Yet the criteria for the municipality's ultimate decision could include the applicant's proposed plant or services "or any combination of such factors, together with the local authorities' judgment about the relative character, financial, and technical qualifications of the applicants."\textsuperscript{712}—criteria leaving ample scope for colorable justifications of results based in fact on improper considerations. (Nor is it clear that the independent consultant would dispel this risk, especially if he had no necessary role to play in choosing among the competing applicants.\textsuperscript{713}) Thus the Illinois proposal would still leave the franchising municipality with almost unfettered discretion and would fail to achieve the benefits of a dual approach.

The Massachusetts Act goes a large step further in the direction of state involvement. It does this through its unique procedure whereby an applicant aggrieved by the municipality's franchising decision can appeal to the state commission, which will hold a hearing and—exercising what appears to be an unrestricted scope of review—either "approve" or "disapprove" the municipality's decision, whereupon the aggrieved party can obtain judicial review, but with the municipality protected from having to accept any franchisee it does not choose itself.\textsuperscript{714} This is an impressive scheme, and probably a workable one, for giving both the municipality and the state commission a role in the franchising process and a veto on the other's selection. But it still does not involve truly joint participation in making the award. The municipality is left completely to its own devices in entertaining the applications and making the decision, and the state commission is then limited to approving or disapproving the municipality's choice. The approach has the "negative virtue," which is significant, of enabling the state commission to reject a bad decision by the municipality, but it lacks the positive advantage of involving the state agency in the basic process at the local level. This is particularly true with respect to the composition of the franchise package and the structuring of the process for making the award; the state agency would not participate, for example, in any decisions with respect to the possible conducting of a two-stage bidding process among the applicants designed to combine the most attractive features of various of their proposals (as in the Illinois plan),\textsuperscript{715} nor would it participate at any stage in the drafting of specifications for the franchise, nor would it participate in any way in the selection of the franchisee at the local level. In a word, the role of the state commission under the Massachusetts plan is appellate and not coordinate. While the plan has much to recommend it, it does not achieve the advantages that might be gained through involvement of the state agency at the local level.

3. Recommendations for a Dual Approach

A scheme for state participation at the local level can be constructed. It would have as its key element the participation of the staff of the state commission in the franchising proceeding conducted by the local government. The staff

\textsuperscript{712} Illinois Proposed Rules, supra note 16, at 10.
\textsuperscript{713} See text at note 542 supra.
\textsuperscript{714} See text at note 437 supra.
\textsuperscript{715} See text at notes 443-50 supra.
of the state commission would be a party to the local proceeding much as a staff bureau of a federal administrative agency—the Broadcast Bureau of the FCC, for example—participates in proceedings before that agency, or as one federal agency participates in proceedings before another federal agency. The state statute, thus, would authorize and direct the state agency given authority with respect to cable—or, specifically, a separate office within that agency, an Office of Cable Franchising—to participate in every proceeding for the award of a cable franchise conducted in the state. (In addition, the office could be authorized to participate, at its discretion, in other types of proceedings involving cable franchises, such as hearings on transfer applications and rate changes.) The procedures to be followed by the local government in awarding the franchise would be set out in the statute as outlined earlier; they could be fairly complex procedures as under the Illinois proposal, or more basic ones leaving room for flexibility and adaptation by the local authority. Whatever procedures were employed, the state cable office would be a party to them. It would participate—always on the record—in all hearings and other stages of the process and would have the right, among other things, to submit proposed specifications for the franchise and to file comments on the proposals submitted by the applicants. Prior to issuance of the proposed decision by the franchising authority (assuming the procedure recommended earlier), or prior to issuance of the final decision if the authority is not required to issue a proposed decision, the state cable office would issue and make public a recommended decision and report. This would state the office’s conclusion as to the appropriate resolution of the franchising process—which applicant or applicants should be awarded franchises, and why, or perhaps a conclusion that there should be no award at the present time. At a specified period after issuance of the recommended decision by the state office, the franchising authority would conduct a hearing based upon it; the authority would accord full rights to the franchise applicants and the public to challenge the recommended decision both orally and in writing. The franchising authority could not issue its own proposed (or final) decision until a specified period thereafter. The decision of the local authority, whether it followed or rejected the recommendations of the state office, would be supported by a written report and would comply with all the other procedural requirements recommended earlier.

After the local authority had made its decision, there are two ways in which
the process could be constructed. That decision could be the final administrative step, with direct appeal available to a state court vested with jurisdiction for the purpose; the court would review the decision pursuant to standard principles governing the scope of judicial review of administrative adjudications, just as a state court would review the franchising decision of a state commission under a preemptive scheme of cable regulation. It would seem preferable, however, to provide for an initial appeal from the local authority to the state commission, as under the Massachusetts Act. This would require, or at least render desirable, a "separation of functions" within the state commission, whereby the staff personnel who had participated in the local proceeding were prohibited from off-the-record contacts concerning the case with the commissioners and staff members who would decide the appeal—a principle and practice well established within the federal administrative agencies. Given such separation, the state cable office should be authorized, further, to participate in the appeal just as it did in the local proceeding. The local authority whose decision was being appealed would also have the right to be made a party to the appeal, as would the aggrieved franchise applicants and appropriate representatives of the public. There should be a provision, similar to the one in the Massachusetts Act but not dependent on the discretion of the state commission, conferring a right to appeal upon persons representing specified percentages of the local public (and on the state cable office as well). The scope of review on the part of the state commission should be broad, as it apparently is under the Massachusetts Act and as it is when a federal agency reviews the decision of its hearing examiner. But there should also be a provision, as in the Massachusetts Act, preventing the installation of any cable operator not voluntarily franchised by the local authority. Finally, judicial review of the state commission's decision should be available, pursuant to the familiar standards. The state legislation should specifically vest a state

725 Thus the Administrative Procedure Act provides that "[a]n employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review . . . , except as witness or counsel in public proceedings." 5 U.S.C. § 554(d); see 2 Davis, Administrative Law Treatise 213-16 (1958), see generally id. at 171-249; id. at 442-65 (Supp. 1970). Although this provision of the APA does not apply "in determining applications for initial licenses," 5 U.S.C. § 554(d)(A), the Communications Act, as amended in 1961, declares that the restriction does apply to applications for initial licenses before the FCC. 47 U.S.C. § 409(c)(2), (d). The Communications Act further provides that "[i]n any case of adjudication" designated for hearing by the FCC, "no person who has participated in the presentation or preparation for presentation of such case at the hearing or upon review shall . . . directly or indirectly make any additional presentation respecting such case to the hearing officer or officers or to the Commission, . . . unless upon notice and opportunity for all parties to participate." 47 U.S.C. § 409(c)(1).
726 See Massachusetts Act, supra note 17, § 14; note 433 supra.
727 See Massachusetts Act; supra note 17, § 14; Administrative Procedure Act, 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule"); 47 C.F.R. § 1.282(b)(1); notes 429-31 supra and accompanying text.
728 See note 437 supra and accompanying text.
729 See note 723 supra.
court with jurisdiction to entertain petitions for review of franchising decisions where it is not clear that such jurisdiction already exists.

G. Selection of a State Agency

If a state is to regulate cable television in any manner, the question arises whether the task should be conferred on the existing public utilities commission (however named) or on a new agency specially created for the regulation of cable. The five states that “originally” regulated cable have all done it through their public utilities commissions. The New York Report, not surprisingly, recommends the New York Public Service Commission for the job. The Report argues that the PSC already has some applicable expertise (e.g., in communications engineering, accounting, the legal and administrative sides of regulation), that the time to create and staff a new agency may not be available, and that cable and telephone operations are likely in the future to intermesh.

The Illinois Commerce Commission, necessarily, would assume the job for itself. An unbiased authority, the New Jersey Report, would similarly give the task to that state’s Public Utilities Commission. The Massachusetts Act, on the other hand, creates a new Community Antenna Television Commission within the state’s Executive Office of Consumer Affairs; the commission, consisting of seven members appointed by the governor, will have an executive director and may hire “expert assistants” and other employees, but is apparently expected in the main to “call on the staff of the department of public utilities . . . for administrative and investigatory services and technical advice.” The Sloan Report comes out strongly against the public utilities commission and in favor of a special cable agency. It argues that public utilities commissions are concerned with “rate regulation, return on investment, and the provision of uniform service,” and that while these matters are pertinent to the regulation of cable, cable has different concerns as well:

. . . concerns that have to do with the differing nature of the service rather than its uniformity; with the problems of a great many small-sized or medium-sized monopolies existing side-by-side rather than one or a few large monopolies dominating an entire region. The problems are not at all the same, and it is inappropriate that an agency whose major attention is directed to one kind of regulation should be empowered as well to deal with another which may, in important respects, be profoundly different.

The explanation for this ipse dixit becomes clear on the following page, where the commission lets fall the real reason for its preference: “We believe that state agencies of this sort will diminish, if they will not eliminate, the objections of cable operators to the notion of state intervention. . . .”

730 See statutes cited in notes 6-10 supra.
732 Ibid.
734 New Jersey Report, supra note 21, at 72-74.
735 Massachusetts Act, supra note 17, at §§ 2, 16.
736 Sloan Report, supra note 1, at 159.
737 Id. at 160.
The question seems a close one, with neither decision unacceptable. The cable industry's fear that public utility commissions will treat them unfavorably does not seem a valid policy consideration, even if it were well-founded; and the benevolent attitude of the Illinois Commerce Commission toward increases in cable subscriber rates suggests that the industry may quickly warm to the embrace it now fears. The cost of creating and staffing a new agency with expertise in cable need not significantly exceed the cost of doing the same for a cable office within the PUC. On balance, I prefer a new agency. This is chiefly because of the value of a new and fresh regulatory approach, instead of the instinctive application of the time-encrusted modes of public utility regulation.

The Illinois Commerce Commission notwithstanding, a public utility commission is likely to be too ready, for one thing, to apply rate-of-return ratemaking to cable's subscriber rates. In Connecticut, the PUC's application of its normal public utility practices to cable has led to the franchising of all cable systems in the state for indefinite periods of time, and on an exclusive basis, apparently without any consideration of whether cable called for different practices.

The Connecticut Commission also overlooked, much as municipalities have done, the unique attributes of cable that make it something more than a delivery service for television broadcast signals. In brief, cable calls for a fresh regulatory approach, which a fresh agency is more likely to essay.

IV. Conclusion

The recent movement toward state regulation of cable television, and the converging move by the FCC in its new cable rules to impose federal requirements on the local operations of cable systems, both bespeak a widespread perception that the existing approach, which relies on local governments and the franchising process, has been a failure. The perception is warranted. The failure of local regulation, which infects cable franchises and threatens the public's interest in cable in a variety of ways, springs mainly from fundamental institutional considerations, inherent weaknesses in the capability of local governments to carry the burden as exclusive regulators of the local incidents of cable. These weaknesses can be expected to persist, notwithstanding the increased information and

738 See text at notes 520-38 supra.
740 This is suggested by some of the recommendations of the New York Report. See, for example, the proposal that if the cable operator and the municipality cannot agree on re-negotiation of the rates, then the PSC, on petition of the municipality, will fix them "in accordance with normal public utility ratemaking standards." New York Report, supra note 19, at 191. See also the listing among the PSC's experts whose expertise is transferable to cable of "accountants familiar with the problems of securing the accurate and complete financial statements needed for effective regulation." Id. at 213.
741 Thus, the successful applicants are under no threat that their franchises might not be renewed after a specific length of time or that other cable operators may be franchised to serve the same towns covered in their own certificates. Although it may seem strange to the cable television industry for a franchise to be granted for an indefinite length of time, this is common practice in public utility regulation.
742 "The PUC apparently saw no 'public need' for educational and local public service programming, two-way capability, minimum channel requirements, or minimum technical standards of the sort now being proposed by the FCC." Id. at 12.
advice on cable franchising now becoming available to local governments. For one thing, local governments left to their own devices cannot be expected on a widespread basis to take steps to remedy the cable franchises they have already granted. These franchises, numbering nearly five thousand, are typically inadequate if not positively harmful in their provisions, and they can and should be reformed by governmental action rather than allowed to stand in their present form for whatever period of years they may specify. One thus concludes, subject to consideration of the FCC rules, that there is a need for state intervention in the regulation of cable at the local level.

The new cable rules of the FCC, with their "access" requirements and their minimum standards for cable franchises, stake out a substantial federal presence in cable at the local level. The FCC's authority to adopt such rules, presently under challenge in the Supreme Court, should be upheld. In the overall scope of their local impact, the rules are well conceived. But they do have significant faults. They are unduly weak in their requirements for franchising procedures and their limits on franchise duration, and they are misguided in their asserted pre-emption of any role for local or state authorities in requiring cable systems to provide access services or in regulating the use of the access channels the systems do provide. Instead of prohibiting local and state authorities from regulating these functions and leaving the task to the cable operators themselves, the FCC should be encouraging local and state governments to assume such responsibilities, at least on an experimental basis. The new FCC rules do, however, leave large areas in the shaping, awarding, and revising of cable franchises, and in the regulating of cable operations, to local or state decisionmaking. Hence, even assuming that the rules will shortly become effective, they will not obviate the need for state regulation of cable.

The question is thus presented as to the shape of state regulation. Because the cable system is, after all, a peculiarly local facility, there is a compelling interest in preserving a voice for the local community in the designing and regulating of the system and the awarding of the franchise—an interest that should be respected, if possible, notwithstanding the failures of exclusive local regulation. The state regulatory scheme therefore should not be one of state franchising and state preemption; it should rather be a "mixed" scheme, embodying roles for both the state and the local governments. This implies a significant role for the local government in the franchising process, the process of deciding who gets the franchise and what its provisions shall include; but still, proposals to leave that process almost entirely in local hands, to maximize the degree of local autonomy involved, should be rejected, since the institutional inadequacies of local governments would still hold sway. At the least, the state should specify procedures to be followed in the franchising process, should limit the duration of cable franchises, and should set forth a number of other requirements applicable to new and existing cable franchises. These should include minimum standards for system capacity, requirements for interconnection between cable systems, creation of franchise areas spanning local-government boundaries in particular circumstances, procedures and standards applicable to transfers of control, supervision of subscriber rates (but not rate-of-return rate-
Beyond such a "basic" approach, centering on state controls and state standards for local franchising, it would be desirable to construct a statutory scheme involving "dual" participation by both the state and the local government in the franchising process itself. The pathbreaking step in this direction taken by Massachusetts in its new cable act, based on a right to appeal the local franchising decision to the state commission, has much to recommend it. The approach lacks, however, the advantages of state participation in the initial process of shaping and awarding the franchise at the local level. Those advantages could be attained through an approach such as the one recommended here. The staff of the state commission would participate in the local franchising process as an independent party and would make a public recommendation to the local authority; the authority's decision would be appealable to the state commission—with internal separation between the staff that participated in the proceedings below and the decisionmakers on appeal—and then to the state courts. Such a dual system would seem the most likely way to preserve the advantages, while minimizing the deficiencies, of local decisionmaking in the franchising of cable systems.