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John J. Copelan Jr.

A. Quinn Jones III

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# CABLE TELEVISION PUBLIC ACCESS AND LOCAL GOVERNMENT

JOHN J. COPELAN, JR.\*  
A. QUINN JONES, III\*\*

## I. INTRODUCTION

The cable television industry has been expanding at a phenomenal rate within the last twenty years. According to recent projections, it is estimated that as of August 1983, 34.5% of all households with televisions had cable television services. This figure is particularly impressive because according to the same statistical report, cable television is only accessible to 63% of all television households. This penetration of over fifty percent of these households is indicative of the rapid rate of expansion.<sup>1</sup>

Originally, cable television was designed to provide service to remote areas for signal pickup and enhancement. More recently, however, the cable industry has evolved into a multi-faceted source of both entertainment and services. Concurrent with the growth in the number of systems and market penetration, there has been an improvement in technology and the state of the art in the cable industry. Nowhere is this more apparent than in the increase in channel capacity available to subscribers. Many of the initial systems were built with an extremely limited channel capacity (some were capable of carrying only three channels).<sup>2</sup> On the other hand, the more recent cable systems are being built with a channel capacity of 104 channels or greater.<sup>3</sup> The increased technology, state of the art and cable capacity affords a community the opportunity for diversified programming which will address the public interest and concerns of the community which the cable system serves. Public access is the production and distribution of programming by the public, municipal agencies, institutions and similar organi-

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\* Deputy City Attorney, Miami, Florida. Mercer University (B.A., *magna cum laude*, 1973; J.D., 1976), Florida Atlantic University (M.P.A., 1976). Member of the State Bar of Florida and the District of Columbia Bar.

\*\* Deputy City Attorney, Miami, Florida. Howard University (B.A., *magna cum laude*, 1973; J.D., 1976), (Phi Beta Kappa). Member of the State Bar of Florida.

1. *Cable stats*, 9 CABLE VISION 134 (1983).

2. Winters, *Municipal Regulation of "CATV" - Community Antenna Television - Model Ordinance*, 151 NAT'L. INST. MUN. L. OFFICERS 2 (1967).

3. MIAMI, FLA., ORDINANCE 9332 (Oct. 19, 1981).

zations made available by the cable operator without charge. Public access is also an important aspect of the evolving area of law concerning cable television operation and regulation. As an alternative or supplement to traditional broadcasting, cable can provide an efficient and inexpensive forum for local groups covering local issues along with increasing the amount and diversity of programming available.<sup>4</sup>

Public access on cable television has been heralded by some as an effective vehicle for the expression of diverse opinions on public issues which allows for the unfettered flow of information central to the first amendment. Others, however, see public access as an infringement upon first amendment rights and a form of content regulation *vis-a-vis* government intervention.<sup>5</sup> For the purposes of this article, a lengthy and detailed examination of the constitutional underpinnings of the public access debate shall be avoided due to the overabundance of treatment of that area of law and, instead, concentration shall be placed upon the practical implementation of the provision of public access within the framework of local regulations. In an area with a paucity of focus on implementation, this article will address public access implementation from a local government perspective, taking into account the approaches for dealing with public access. Initially, however, an analysis of the regulatory framework for access at the federal and local government level will be developed and that will be followed by an examination of the issues and concerns in establishing a corporation for the administration of public access at the local level. Finally, the article will address the implications for public access as it relates to pending congressional legislative efforts.

## II. FEDERAL AND LOCAL REGULATION

Cable television regulation is shared between the Federal Communications Commission (FCC) and local authorities. The question of public access must, therefore, be examined in the context of both areas of regulatory authority.<sup>6</sup> Initially, municipal enforcement through franchises and licenses was the only means of regulating the developing cable industry.<sup>7</sup> Indeed, the history of

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4. Comment, *Public Access to Cable Television*, 33 HASTINGS L.J. 1009, 1011 (1982).

5. See generally, Botein, *Access to Cable Television*, 57 CORNELL L. REV. 419 (1972); Note, *Toward Community Ownership of Cable Television*, 83 YALE L.J. 1708 (1974).

6. Copelan, *Cable Television: The Licensing and Franchising Authority of Municipal Governments*, 57 FLA. B.J. 492 (1983).

7. Hofbauer, "Cableporn" and the First Amendment: *Perspectives on Content Regu-*

federal regulation is relatively short and, until the early 1960's, the FCC did not exercise any jurisdiction over cable.<sup>8</sup> The history of federal regulation has been one of transitional flux, with the FCC shifting its jurisdictional position. This change in jurisdiction led one commentator to describe the regulatory system as "muddled interplay between federal, state and local authority."<sup>9</sup> The history of public access is perhaps not as "muddled" as other areas of cable law but the shared regulatory scheme which exists today is a variable in determining the parameters of providing public access in the local cable system.

### A. The FCC

The statutory foundation for the regulatory authority of the FCC over cable television is established in the Communications Act of 1934.<sup>10</sup> Even though the act preceded the advent of cable television and does not expressly provide for the regulation of the medium, section 2(a) does subject "all interstate and foreign communication by wire or radio" to regulation.<sup>11</sup> The FCC first took an interest in the activities of the common carriers that served cable systems, and then, in 1962, conducted a rule-making proceeding which evaluated the FCC's responsibility. This evaluation resulted in the First Report and Order.<sup>12</sup> The first FCC regulation of cable on a comprehensive scale occurred in 1966 with the *Second Report and Order on Grant of Authorizations into the Business Radio Services for Microwave Stations to Relay Television Signal to Community Antenna Systems*,<sup>13</sup> wherein the FCC prevented cable systems from expanding into the markets of existing television stations for purposes of competition, without the systems first showing that an expansion would serve the public interest.<sup>14</sup>

The authority of the FCC to regulate cable was challenged in the polestar case of *United States v. Southwestern Cable Co.*,<sup>15</sup> wherein the Court recognized that the commission may issue rules

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lation of Cable Television, 35 FED. COMM. L.J. 139, 145-46 (1983), citing Johnson, *Regulating CATV: Local Government and the Franchising Process*, 19 S.D.L. REV. 143 (1974).

8. *U.S. v. Southwestern Cable Co.*, 392 U.S. 157, 162 (1968).

9. Hofbauer, *supra* note 7, at 146.

10. 47 U.S.C. §151 (1934).

11. 47 U.S.C. §152(a) (1976).

12. *Southwestern Cable*, 392 U.S. at 165.

13. 2 F.C.C.2d 725 (1966).

14. *Public Access to Cable Television*, *supra* note 4, at 1013, citing La Pierre, *Cable Television and the Promise of Programming Diversity*, 42 FORDHAM L. REV. 25, 51-55.

15. *Southwestern Cable*, 392 U.S. at 157.

and regulations for cable as "reasonably ancillary" to the effective performance of its varied responsibility for the regulation of television broadcasting and may prescribe restrictions and conditions on cable as required by public convenience, interest or necessity.<sup>16</sup> Subsequent to the upholding of its jurisdiction to regulate the medium, the FCC proposed additional rules governing cable, therein changing its emphasis of regulation "from protecting broadcasting to promoting the public interest through full utilization of the technological potential of cable."<sup>17</sup>

In seeking to promulgate rules for cable with the furtherance of the public interest in mind (and not merely due to its ancillary effect on broadcast) the FCC promulgated local rules providing that cable systems with more than 3,500 subscribers must make available facilities for local production and the presentation of programs. Midwest Video Corporation, a cable operator, challenged the new cablecasting rules as going beyond being reasonably ancillary to the FCC's responsibilities in the broadcasting field and the Eighth Circuit set aside the rules.<sup>18</sup> Upon review of this decision, the Supreme Court reversed the Eighth Circuit in a split decision. Justice Brennan, in *United States v. Midwest Video Corp.*<sup>19</sup> (*Midwest Video I*), an opinion joined by three other Justices, expressed the position that the cablecasting rule was valid as reasonably ancillary to broadcasting. While Chief Justice Burger simply concurred in the result without adopting the position that the cablecasting rule was reasonably ancillary, he expressed the opinion that the FCC's position strained the outer limits of its jurisdiction and that the development of cable suggested the need for the legislative branch to reexamine the statutory scheme in the area of cable.<sup>20</sup>

Meanwhile, in 1972, the FCC promulgated regulations that dealt with new cable systems in the top 100 television markets. These new regulations became operational after March 31, 1972.<sup>21</sup> In its discussion of the new access rules, the FCC found that new rules were necessary as the time had come for cable television to realize some of its potential within a national communications

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16. The opinion in *Southwestern* was somewhat limited in scope regarding cable regulation and the Court specifically declined to detail the limits of the FCC's authority to regulate.

17. *Public Access to Cable Television*, *supra* note 4, at 1013.

18. *Midwest Video Corp. v. FCC*, 441 F.2d 1322 (1st Cir. 1971).

19. *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972).

20. *Id.* at 676 (Burger, C.J., concurring).

21. *Cable Television Report and Order*, 36 F.C.C.2d 141, 197 (1972).

structure to provide more outlets for community expression.<sup>22</sup>

These 1972 rules required that each system designate at least one noncommercial public access channel to be available on a first-come, nondiscriminatory basis. The system was also required to maintain and have available for the public use the minimal equipment and facilities necessary for the production of programming for the channel. In addition, designated channels for local government, education and leased access were required.<sup>23</sup>

In May 1976, the FCC modified the 1972 rules relating to access in two significant ways. First, the size of the systems to which the access rules applied was changed. The "top 100 markets" criteria was eliminated and the rules now applied to all systems with 3,500, or more, subscribers. Second, the 1970 change provided that only systems having sufficient capacity and demand for full time access were required to have four access channels and allowed other systems to conglomerate access on one or more channels.<sup>24</sup> Judicial review of the FCC's 1976 report was sought by both the cable industry and the American Civil Liberties Union (ACLU). Midwest Video challenged the regulations from the perspective that the regulations were inadequately supported by the record; beyond the jurisdiction of the FCC; violative of the free speech clause of the first amendment; and violative of the fifth amendment due process. The ACLU, on the other hand, objected to the fact that the FCC softened the 1972 access rules by its lack of a rational basis in failing to consider the interests of access program procedures; violating the FCC's mandate to regulate cable television as a common carrier; and not fully achieving general first amendment goals.<sup>25</sup> In its opinion, the Eighth Circuit traced the evolutionary process leading up to the 1976 report on access, which at the time provided:<sup>26</sup>

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22. *Id.* at 189 provides:

In its Notice of Proposed Rulemaking in Docket 18894, the Commission stated that: Cable television offers the technological and economic potential of an economy of abundance. On the basis of the record now assembled, we believe the time has come for cable television to realize some of that potential within a national communications structure. We recognize that in any matter involving future projections, there are necessarily certain imponderables. These access rules constitute not a complete body of detailed regulations but a basic framework within which we may measure cable's technological promise, assess its role in our nationwide scheme of communications, and learn how to adapt its potential for energetic growth to serve the public.

23. *Id.* at 240-41.

24. *Midwest Video Corp. v. FCC*, 571 F.2d 1025 (8th Cir. 1978).

25. *Id.* at 1029.

26. *Id.* at 1034.

- 1) that operators of cable systems having 3500 or more subscribers designate at least four channels for access users, one channel each for public access, education access, government access, and leased access;<sup>27</sup>
- 2) that, until demand exists for full time use of all four access channels, access programming may be combined on one or more channels;<sup>28</sup>
- 3) that at least one full channel for shared access be provided, but if a system had insufficient activated channel capacity on June 21, 1976, it could provide whatever portions of channels are available for such purposes;<sup>29</sup>
- 4) that at least one public access channel be forever supplied without charge;<sup>30</sup>
- 5) that a reasonable charge for production costs may be charged for live studio programs longer than five minutes;<sup>31</sup>
- 6) that operators establish rules providing for access on a first-come, nondiscriminatory basis and prohibiting the transmission of lottery information, obscene or indecent matter, and commercial and political advertising;<sup>32</sup>
- 7) that cable operators exercise no other control over content of access programs;<sup>33</sup>
- 8) that educational and local government access be offered without charge for the first five years;<sup>34</sup>
- 9) that operators establish rules for leased access channels on a first-come, nondiscriminatory basis, requiring sponsorship identification and an appropriate rate schedule, with no control over program content except to prohibit lottery information and obscene or indecent material;<sup>35</sup>
- 10) that each cable supply equipment and facilities for local production and presentation of access and lease programs;<sup>36</sup>
- 11) that equipment in new cable systems have a capacity of two-way nonvoice communication and a minimum of 20 channels;<sup>37</sup>
- 12) that cable systems in operation within a major television market before March 31, 1972, and other systems in operation

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27. 47 C.F.R. §76.254(a) (1976).

28. 47 C.F.R. §76.254(b) (1976).

29. 47 C.F.R. §76.254(c) (1976).

30. 47 C.F.R. §76.256(c)(2) (1976).

31. 47 C.F.R. §76.256(c)(3) (1976).

32. 47 C.F.R. §76.256(d)(1) (1976) (on public channel); 47 C.F.R. §76.256(d)(2) (1976) (on education channel).

33. 47 C.F.R. §76.256(b) (1976).

34. 47 C.F.R. §76.256(c)(1) (1976).

35. 47 C.F.R. §76.256(d)(3) (1976).

36. 47 C.F.R. §76.256(a) (1976).

37. 47 C.F.R. §76.252(a) (1976).

before March 31, 1977, shall have ten years from the effective date (June 21, 1976) of the 1976 Report to comply;<sup>38</sup>

The Eighth Circuit found the dispositive issue to be whether the mandatory access, channel capacity and equipment regulations set forth in the 1976 report exceeded the FCC's jurisdiction. In deciding that the requirements had exceeded the FCC's jurisdiction, the Eighth Circuit noted that the Communications Act of 1934 provided no jurisdiction over cable; that the subject regulations are not "reasonably ancillary" to the FCC's responsibilities for broadcast regulation; that the objectives do not confer jurisdiction; that the ends do not justify the means; and that the means are forbidden within the FCC's statutory jurisdiction.<sup>39</sup> The Eighth Circuit, while noting that it was not deciding the first amendment issue of whether the FCC had the authority to intrude upon the first amendment rights of cable operators, found that the governmental interference with the process, *vis-a-vis* the *Miami Herald Publishing Co. v. Tornillo*,<sup>40</sup> and newspaper compelled access, raised serious first amendment issues.

The Supreme Court granted certiorari,<sup>41</sup> and affirmed the Eighth Circuit decision in *FCC v. Midwest Video Corp. (Midwest Video II)*,<sup>42</sup> holding that:

The exercise of jurisdiction in *Midwest Video*, it has been said, 'strain[ed] the outer limits' of Commission authority. [Citation omitted]. In light of the hesitancy with which Congress approached the access issue in the broadcast area, and in view of its outright rejection of a broad right of public access on a common-carrier basis, we are constrained to hold that the Commission exceeded those limits in promulgating its access rules. The Commission may not regulate cable systems as common carriers, just as it may not impose such obligations on television broadcasters. We think authority to compel cable operators to provide common carriage of public-originated transmissions must come specifically from Congress.<sup>43</sup>

In a footnote, the Court declined to express a view on the question of whether the first amendment rights of cable operators were violated, but rather noted that the issue was not frivolous and

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38. 47 C.F.R. §76.252(b) (1976).

39. *Midwest Video Corp. v. FCC*, 571 F.2d at 1035.

40. 418 U.S. 241 (1974).

41. 439 U.S. 816 (1978).

42. 440 U.S. 689 (1979).

43. *Id.* at 708-09.



made clear that the asserted constitutional issue did not determine or sharply influence the Court's construction of the statute.<sup>44</sup>

The *Midwest Video II* decision has effectively removed the FCC from the regulation of public access pending congressional authorization (which has been very slow in coming). Indeed, as is discussed *infra*, the proposed legislation will have significant implications for federal jurisdiction in the area of public access.<sup>45</sup> The *Midwest Video II* decision has not, however, signaled the demise of public access, as the decision solely addressed federal agency jurisdiction and did not address the question of whether local governments had the authority to impose the same type of regulations. Indeed, there exist in many local cable franchises and licenses local public access requirements.<sup>46</sup>

### B. Local Governments

Local governments traditionally have possessed the authority to regulate the use of public streets, places and ways, and to pass legislation to protect the health, safety, welfare and property of their citizens.<sup>47</sup> It is well settled that franchising, licensing and regulating cable television serves a proper local government purpose, and numerous court decisions have stated that granting cable television rights and regulating cable television are proper exercised of local government powers.<sup>48</sup> Indeed, as indicated *supra*, local enforcement through franchises and licenses was initially the only restriction on the developing cable industry.<sup>49</sup> Currently, the FCC regulates specific areas of cable, such as broadcast television and radio carriage, program exclusivity, channel capacity, cablecasting and operational procedures and requirements, local governments, regulation of system design and capability, cable operator selections, systems performance and compliances, operation of municipal channels and public access.<sup>50</sup> Local governments, in the absence of federal regulation, are free for the most part to promulgate their own access requirements and to impose those terms and conditions which they perceive as necessary for serving their particular community. In this regard, as cable expands and

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44. *Id.* at 709, n.19.

45. *See infra* text accompanying notes 68-71.

46. M. HAMBURG, *ALL ABOUT CABLE*, 604 [3] (1981).

47. Copelan, *supra* note 6, at 493.

48. *See, e.g.*, *Capitol Cable, Inc. v. City of Topeka*, 495 P.2d 885, 893 (Kan. 1972); *Cablevision, Inc. v. Freeman*, 324 So.2d 149 (Fla. 3d DCA 1975).

49. *See* text accompanying note 7.

50. Hofbauer, *supra* note 7, at 146.

the demand for service increases, cable operators are placed in a highly competitive environment and often must compete for selection. This competition has led to an increase in the benefits offered, such as public access to channels, equipment and contribution to funding.<sup>51</sup>

The right of local authorities to promulgate access regulations was recently litigated in *Berkshire Cablevision v. Burke*.<sup>52</sup> In *Berkshire Cablevision*, an applicant for a certificate to provide cable television service to Newport County, Rhode Island, sought to have Rhode Island's access regulation declared unconstitutional on first and fourteenth amendment grounds.<sup>53</sup> The contested features of the content-neutral mandatory access regulations promulgated by the Rhode Island Division of Public Utilities and Carriers required the operator to provide at least one channel each for access by

51. *Public Access to Cable Television*, *supra* note 4, at 1028-29.

52. 9 MEDIA L. REP. 2321 (B.N.A.) (Sept. 15, 1983).

53. *Id.* at 2322, n.2.

Section 14.1 of the Rules Governing Community Antenna Television Systems, in part, provides:

Every CATV system operator shall make available to all of its residential subscribers who receive all or any part of the total services offered on the system at least one access channel in each of the categories in sub-paragraphs (1), (2), (3) herein. The remaining channels reserved for access purpose shall be apportioned and designated in response to demonstrated community need. Channels reserved for access purposes shall be designated as one of the following:

- (1) PUBLIC: Public access channels shall be made available for use by members of the general public on a first-come, first-served nondiscriminatory basis. The VHF spectrum shall be used for at least one of these channels;
- (2) EDUCATIONAL: Educational access channels shall be made available for use by local educational authorities and institutions (including, but not limited to, school departments, colleges and universities but excluding commercial educational enterprises);
- (3) GOVERNMENT: Government access channels shall be made available for use by municipal and state government;
- (4) "OTHER": Other designations for access channels may include (but need not be limited to) religious, cultural, ethnic heritage, and library access;
- (5) LEASED: Leased access channels shall be made available on a first-come, first-served nondiscriminatory basis.

The minimum number of specially designated access channels required by the above paragraph shall be made available immediately upon commencement of residential subscriber service.

Section 14 further provides that in the event that the Service Area Citizens' Advisory Committee, a citizens' group appointed by the Administrator to advise cable operators about community needs and concerns, determines that any of the specially designated access channels are in use for eight hours a day for a three-month period, then the cable operator shall make an additional similarly designated channel available. On the other hand, if there is insufficient demand for seven public access channels, access programming can be combined on one or more channels. *Id.* at 2323.

members of the general public, educational institutions and governmental agencies. Further, the operator was required to construct an institutional industrial network which would permit, for a fee, origination and transmission of programming at institutions and public buildings, including schools and religious institutions within the area of service. The United States District Court denied an injunction and found that the access regulations did not violate the first amendment by stripping cable operators of the editorial control of their channels. In its opinion, the court took deference with the dicta of the Eight Circuit, in that it did not equate the medium of cable television with newspapers for first amendment analysis. Citing *Metromedia, Inc. v. City of San Diego*,<sup>54</sup> the court noted that each medium is not entitled to the same measure of first amendment protection. "[E]ach method of communicating ideas is a 'law unto itself' and the law must reflect the 'differing nature, values, abuses and dangers of each method.'"<sup>55</sup> The court found that cable operators' control over their channels is not immune from government regulation and determined that mandatory access requirements serve substantial government interests and were intended to assure community participation in cable television production and programming.<sup>56</sup> This analysis is sound and, in light of the diverse services afforded by the cable communications medium, local authority to implement public access is well founded.

### III. ADMINISTRATION OF PUBLIC ACCESS AT THE LOCAL LEVEL

In approaching public access, a municipality should determine what access services it needs now and will require in the future,

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54. 453 U.S. 490, 501 (1981).

55. 9 MEDIA L. REP. at 2327.

56. *Id.* at 2329;

As Senior Judge Pettine commented:

It has been noted that "[i]f cable is to become a constructive force in our national life, it must be open to all Americans. There must be relatively easy access . . . for those who wish to promote their ideas, state their views, or sell their goods and services . . . This unfettered flow of information is central to freedom of speech and freedom of the press which have been described correctly as the freedoms upon which all of our other rights depend." Cabinet Committee on Cable Communications, *supra*, at 19. See *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 756 (1 MEDIA L. REP. 1930) (1976). Cf. *Home Box Office, supra*, 567 F.2d at 48. See generally T. Emerson, *The Affirmative Side of the First Amendment*, 15 GEO. L. REV. 795, 805 (1981). Furthermore, enabling all segments of society to participate in cable television programming promotes the "First Amendment goal of producing an informed public capable of conducting its own affairs . . ." *Red Lion*, 395 U.S. at 392.

what management mechanism it will utilize and the source of funding for the access services it will require.<sup>57</sup> Through the use of access channels made available by the cable licensee, programming by the public, municipal departments and agencies and other institutions (i.e. educational, medical) can be transmitted over the cable system.<sup>58</sup> In addition, a municipality may require a category of access programming and services characterized as leased access. This concept entails making channels available to individuals or entities within the community for a fee. Leased access provides "an essential competitive safeguard in the overall development of sound cable television services in the city."<sup>59</sup> The leased access service may appeal to a large segment of the community.<sup>60</sup> The use of this communications medium will afford citizens and public entities the opportunity to air their concerns with respect to issues and interests confronting the community at large. After the municipality has conducted its access needs assessment in terms of services and facilities,<sup>61</sup> focus should then be directed toward a mechanism to manage the use of the system. The final prong of the access approach will be for the municipality to determine the source of funds it will need and require of the cable licensee for development and implementation of the access service.

As stated at the outset, a principal element in structuring community access is that of management. There are essentially two approaches that should be considered. The first is an advisory body which is by definition purely advisory; the second is an inde-

57. NEW YORK CITY CABLE ACTION PLAN, REPORT TO THE DEPARTMENT OF CITY PLANNING at 62 (Dec. 29, 1980).

58. MIAMI, FLA. ORDINANCE 9332 (Oct. 19, 1981). The ordinance requires that a minimum of 20 channels be supplied in the subscriber system without charge for public access purposes.

59. NEW YORK CITY CABLE ACTION PLAN, *supra* note 57, at 69.

60. MIAMI, FLA. ORDINANCE 9332 (Oct. 19, 1981). Section 305(a) requires that a minimum of six video channels be available for lease, at least two of which shall be available for lease by audio and data services providers on an open, non-discriminatory basis in order to encourage competition.

61. *Id.* Section 403(a) has required its cable licensee to establish, equip and maintain at least three broadcast quality access programming and editing facilities (of which one is to be located in a predominantly Hispanic area and one to be located in a predominantly black area) including at least one electronic field production and news gathering mobile unit. The cable licensee is further required to hire staff to operate and assist in production of access programming, develop and implement an access training program for local community groups and provide direct assistance to community groups in the development of access programming. The cable licensee is required to commit at least two million dollars for the purpose of providing the facilities and equipment necessary for full utilization of the access channel capacity, in addition to one million dollars for an annual operating budget starting in the third year after the effective date of the license ordinance.

pendent management corporation whose function is operations.<sup>62</sup> The management corporation appears to be the most operable approach for community access management. Through this mechanism, a number of purposes are served because of the wide latitude afforded the management corporation's involvement with the daily operations. The community access corporation is generally responsible for:

- 1) Managing and allocating the use of non-municipal public access channels of the cable television system;
- 2) Supporting efforts by public and community groups to use the cable television system's access services;
- 3) Facilitating the development and production of local programming;
- 4) Raising funds to support the purposes and objectives of the community access corporation;
- 5) Developing a plan for the management, operation and use of the cable system's access services, including an assessment of the public, institutional and community needs the system's access services should serve; and
- 6) Imposing reasonable charges on classes of users, if appropriate.<sup>63</sup>

It is important to consider the funding source(s) in structuring a viable and successful community access corporation. It is also imperative that sufficient funding be provided and be made available to the community access corporation in order for it to function in accordance with its stated purposes and objectives. If funding is inadequate, the primary function and concept of making access programming available to serve the needs and interests of the community becomes useless and meaningless. The relative importance of the funding source with respect to the success of access programming has been identified and highlighted in the New York City Cable Action Plan:

By their very nature . . . access services cannot entirely support themselves in a free competitive marketplace. Therefore, an appropriate mix of funding for such activities must be developed to provide the necessary start-up funds, and a portion of the ongoing operating funds, in order to provide a meaningful test of the likely success of such services.<sup>64</sup>

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62. Rice Associates, Report on the Structure of the Miami Cable Access Corporation, at 4 (Feb. 27, 1983).

63. MIAMI, FLA. ORDINANCE 9332 (Oct. 19, 1981).

64. NEW YORK CITY CABLE ACTION PLAN, *supra* note 57, at 90.

The funding sources often, as in the City of Miami, require an initial start-up contribution by the cable licensee. In addition, a commitment to provide funds during the course of the license agreement is necessary to allow for an annual operating budget and for the full utilization of channel capacity in order for development of access programming and services. Additional funding sources may be comprised of annual contributions by the municipality, contributions from outside sources (such as grants from foundations or organizations) and fees charged for leased access. Contributions by the cable licensee specifically earmarked for access programming may also be required by the municipality.<sup>65</sup>

In conjunction with establishing a funding source, it is incumbent upon the municipality to determine what supervisory mechanism it will utilize to administer and manage the access services. The most optimal method for management, as stated earlier, can be found in the formation of an independent community access corporation. The corporation should have a board of directors which includes a diverse representation of the municipality's educational, cultural, ethnic, minority, community and business organizations.<sup>66</sup> This makeup will ensure a balanced representation reflective of the community.

It is advisable that a municipality desiring to form an independent community access corporation formulate a structure and time table for its development. This framework may include the following:

- 1) The appointment of an initial board of directors comprised of a small number of individuals with public service backgrounds. This board would be responsible for retaining independent counsel to draft articles of incorporation and by-laws;
- 2) As provided for by and consistent with the by-laws, the city commission or respective municipal body should appoint a number of individuals who would constitute the permanent board of directors. This number may range from fourteen to twenty persons and should include a diverse community representation as aforementioned;

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65. MIAMI, FLA. ORDINANCE 9332 (Oct. 19, 1981). Section 405(a) requires the cable licensee to make annual contributions of 3% of its gross revenues or \$600,000.00, whichever is greater, for access programming. Moreover, the city has committed to contributing 20% or \$200,000.00, whichever is greater, for the first five years after establishment of the community access corporation, and may make additional contributions as the city deems appropriate.

66. Rice Associates, *supra* note 62, at 25 provides that the board of directors may be chosen by four methods: 1) total city appointed board; 2) total board elected by membership; 3) self-appointing board; or 4) combination of 1), 2) and 3).

- 3) A formal agreement between the municipality and the community access corporation in which the rights and obligations of the corporation are set forth in consideration of the city's funding of the corporation and the allocation of non-municipal channels under its umbrella;
- 4) Incorporation as a not-for-profit corporation;
- 5) Selection of an executive director by the permanent board of directors who shall have the primary administrative task of hiring the necessary technical and support staff;
- 6) Submission of an annual itemized fiscal budget by the community access corporation for approval by the city;
- 7) Establishment by the community access corporation of a financial accounting and record keeping system to safeguard its assets;
- 8) Submission by the community access corporation of an accounting, recording and bookkeeping system acceptable to the city prior to receipt of the initial start-up contribution from the city.<sup>67</sup>

#### IV. PENDING LEGISLATION

Presently, there is no federal regulatory scheme that would require cable licensees to mandatorily provide access channels to municipalities or access programming services. The imposition of access requirements has been of local concern and has been regulated by municipalities as requirements for franchise or license agreements. Because of the absence of federal legislation, a pervasive fervor has mounted on the part of cable operators in furtherance of establishing a national industry policy of local cable deregulation and for Congress to establish cable legislation that would greatly weaken the ability of municipalities to maintain local regulation.

As a result of Congressional and intense lobbying efforts, municipalities have the authority to require that cable operators provide access services as an integral part of a municipality's cable television system. It appears that once final legislation is adopted there may be some limitations imposed on the municipality with respect to the scope of its requirements for access service programming.

The Cable Telecommunication Act of 1983 (S. 66)<sup>68</sup> as passed

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67. Memorandum of the City Manager, Report on the Structure and Timetable for the Establishment of an Independent Nonprofit Community Access Corporation, at 1 (Mar. 17, 1982).

68. S. 66, 98th Cong. 1st Sess. (1983).

by the United States Senate affords the municipality a needed safeguard by requiring the cable licensee to provide access channels available for use by public, educational and governmental entities. However, S. 66 does not provide safeguards for third-party leased access in that there is no provision in the bill to require that the cable licensee provide channel capacity for commercial third-party users on a non-discriminatory basis.<sup>69</sup> The failure of the bill to provide this protection would severely limit competition because there would be no built-in measures designed to avoid discriminatory use.

Representative Timothy E. Wirth introduced a cable bill, (H.R. 4103)<sup>70</sup> in the House of Representatives. The Telecommunications Subcommittee of the House Energy and Commerce Committee approved H.R. 4103 on November 16, 1983. The House version would give municipalities the authority to establish public, educational and governmental access requirements without limitation through the franchising process. An amendment was adopted which would allow municipalities to establish public, educational and governmental requirements for interactive services and data transmission. Action by the full committee is anticipated in 1984 and until that time the future of the federal regulation is, at best, uncertain.<sup>71</sup>

## V. CONCLUSION

While the future of cable television regulation by the Federal Government is uncertain, public access as required by local governments is an important means for producing and distributing programming to the public and serves a substantial community interest. As has been developed in this article, public access, to be an effective community communications medium, must be fully developed within the realm of the community's needs, adequately funded and effectively managed. Experience has shown that the various approaches dealing with the provision of public access, the establishment of an independent access corporation is the most viable method of providing public access for cable. Only through the complete development of public access resources can a community achieve the optimal use of the expanding cable communications medium.

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69. U.S. Conference of Mayors, Cable Television and The Public Interest (Sept., 1983) (unpublished).

70. H.R. 4103, 98th Cong., 1st Sess. (1983).

71. Nation's Cities Weekly, November 21, 1983, at 1, col. 3.