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CONTROL OF CABLE TELEVISION: THE SENSELESS ASSAULT ON STATES' RIGHTS

*Don R. LeDuc**

It has become fashionable to describe the diverse local, state, and federal supervisory interests in cable communication as constituting "tiers" of cable regulation. In a field in which words continue to speak far louder than actions, success in substituting the word "tiers" for what have traditionally been known as "levels of concurrent jurisdiction" provides a significant advantage to those opposing a state role in cable control.

A "tier" conveys the image of a baroque edifice, overly elaborate in design, and, since the states have been the slowest to claim their place in this hierarchy of control, it is their role that has generally been described as the needless or duplicitous third tier. Three-tier cable control also conveys a totally inaccurate sense of comprehensiveness, suggesting that these three levels of cable supervision extend across the entire field of operation.

Whatever its intention, such imagery does nothing to isolate those specific areas of concurrent cable jurisdiction which might impose unnecessary regulatory burdens upon the cable industry. As a result, it might be well to examine each general type of cable control to discover what benefits each might provide and where burdensome overlap could or could not occur. Although such a broad survey will of necessity be somewhat rough and basic, it may nevertheless serve as a valuable supplement to the diet of smooth-reading press agent puffery which presently seems to be constipating thought and analysis in this field.

I. THE REGULATORY TIERS

Only two fundamental types of cable television controls exist: those rules dictating the number and identity of television broadcast signals available for cable system carriage and those setting all other terms for individual system operation. Although recent studies and deliberations have tended to concentrate upon public access, program origination, or other nonbroadcast

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functions of cable, the industry itself is still most vitally concerned with those rules which affect the use of broadcast signals. The revenue potential of each cable system remains dependent upon one primary variable, the ability to augment the number of television program channels available to subscribers,¹ a variable controlled exclusively by the federal government.²

Ironically, it is in this most critical area of cable control that a substantial number of cable system owners would support the creation of at least a second tier of regulation, realizing that an additional authority could only operate to dilute the Federal Communications Commission's traditional preoccupation with the economic welfare of the broadcast industry. The FCC has made no attempt to conceal its overriding concern for broadcast interests when establishing cable television rules during the past decade, basing each new set of restraints upon the expressed desire to shield broadcasters from "unfair" cable competition.³ Unfortunately, this excessive concern has tended to make the Commission insensitive to other unfair elements in the controversy, including the inequity of preventing more than 10 percent of the public from using an alternative method to obtain one or more of the three national television network programming services which they cannot presently receive off-the-air.

If, for example, state cable agencies were granted even limited authority to equalize television service within their jurisdiction through expansion of the number of broadcast signals which could be imported to underserved communities, an entire new range of franchising opportunities would be created. At present, because such importation quotas are not established with reference to existing service but are instead hammered out by competing industry groups on the basis of compromise and trade-off, the relationship between available television signals and the right to import additional signals is in almost perfect inverse order, with the greatest number of additional imported signals authorized for the best served areas.⁴

1. See C. WOODARD, *CABLE TELEVISION: ACQUISITION AND OPERATION OF CATV SYSTEMS* 83 (1974).

2. Exclusive federal control was asserted in the FCC's Second Report and Order on CATV, 2 F.C.C.2d 725 (1966).

3. For a detailed analysis of federal restraints upon cable signal importation, see D. LE DUC, *CABLE TELEVISION AND THE FCC: A CRISIS IN MEDIA CONTROL* (1973).

4. For a description of how these rights were hammered out in the Office of Telecommunications Policy compromise of 1971, see Jassem, *The Selling of the Cable TV Compromise*, 17 J. OF BROADCASTING 427, 428-36 (1973). Only one exception to this fascinating inverse relationship between signals currently available and limitations upon imported signals exists. In communities located more than 35 miles from any television station, there are no quantity limitations imposed upon the number of broadcast signals which may be imported. Cable Television Report and Order, 36 F.C.C.2d 143, 178 (1972).

Whatever criticisms could or should be leveled at the regulatory policies now dictating cable's broadcast signal importation quotas, they do not include the charge of being multi-tiered. In this most vital area for cable system profitability, there is a single preemptive authority: the federal government.

A. *Nonbroadcast Service Beyond the Top 100 Markets:
One Tier or Two?*

As there is no state or local tier of control in areas relating to the importation of television broadcast signals, there is no federal tier defining or establishing minimum levels of nonbroadcast service for any community located more than 35 miles from a television station which operates in one of the largest 100 television advertising markets in the United States.⁵ For citizens located outside these geographical reference points, there are no federal standards which require either specific channel capacity,⁶ or any of the dedicated channel services⁷ (public access, leased, governmental, or educational) which have long been considered an inherent part of a modern broadband communication system.⁸ In these communities, generally inadequately served by local newspaper, radio, or television coverage, each community cable service must be chosen individually from a pool of industry applicants by city officials typically unsophisticated in mass media affairs. Only a few years ago, local entrepreneurs bargained with city officials over such mundane matters as subscriber fees and clarity of picture. Today, however, multiple system operators (MSOs)⁹ are negotiating with these same city officials for a broad range of complex and sophisticated services, including access for various purposes and specialized services and intercon-

5. Cable Television Report and Order, 36 F.C.C.2d 143, 178 (1972). Markets are determined on the basis of a private broadcast advertising research organization's division of the nation into 270 markets. The largest 100 contain 85-90 percent of the total population of the United States.

6. This term refers to a fixed minimum number of channels to be provided by a cable television system. A cable system can be designed to provide as many as 60 channels. In the top 100 markets, the FCC requires cable systems to be designed to carry a minimum of 20 channels. Cable Television Report and Order, 36 F.C.C.2d 143, 189-90 (1972).

7. A dedicated channel service is a specific purpose for which a channel is designated to serve, which determines who has access to program time. For example, the FCC requires each cable system to dedicate one channel for public use; this is described by the FCC as a "dedicated, noncommercial public access channel available without charge at all times on a first-come, first-served nondiscriminatory basis." *Id.* at 190.

8. This is a system that has 24 to 48 channels and two-way circuitry. It is one of three distinct forms of wired service encompassed by the term "cable television." See D. LE DUC, *supra* note 3, at 6.

9. A multiple system operator is an entity which owns and operates a number of cable facilities. See *id.* at 236.

nections. The disparity between their relative degree of expertise and skill has become, concomitantly, far more substantial. Recognizing that such well meaning but amateur negotiators may bargain away the rights of their community's citizens by agreeing to a franchise contract generally extending for more than a decade into the future, it does not seem unreasonable to suggest that each state government at least establish minimum cable communication standards by statute in order to protect the basic needs of all citizens of that state.¹⁰

Municipal governments seldom have the perspective to see the implications of their selection in terms of the resultant concentration of mass media ownership in their state or region of the country. Also, individual communities are vulnerable to "whip-sawing", *i.e.* threats of cable applicants that their applications will be withdrawn if the franchising authority does not accept lower standards of nonbroadcasting services approved by a neighboring community.¹¹

The cable industry has argued for more than a decade that the primary problem with local regulation is its lack of uniformity. State standards would certainly provide greater standardization than individual negotiation of each of the several thousand franchises now being sought in various communities throughout the United States. If the cable industry continues to oppose this second tier of regulation despite its promise of greater standardization, a cynic might be excused for considering the possibility that cable operators actually value uniformity far less than the benefits to be gained by dealing with isolated and inexperienced local governments in setting the terms of each cable franchise.

*B. Nonbroadcast Service in the Top 100 Markets:
Which is the Extraneous Tier?*

The federal government has established certain nonbroadcast requirements for all cable systems serving communities located within one of the largest 100 broadcast markets. Since the FCC continues to assert preemptive jurisdiction over the allocation of broadcast signal importation rights and has not asserted its authority over nonbroadcast functions outside these market

10. See Barnett, *State, Federal, and Local Regulation of Cable Television*, 47 NOTRE DAME LAW. 685 (1972). Professor Barnett's article describes how such citizens' rights might be established and also describes the role of the state in cable television in New York, New Jersey, and Massachusetts, where regulatory statutes have been enacted. See note 30 & accompanying text *infra*.

11. For an understanding of the tactics used by rival applicants in attempting to win franchises, see CENTER FOR ANALYSIS OF PUBLIC ISSUES, *CROSSED WIRES: CABLE TELEVISION IN NEW JERSEY* (1971).

boundaries, this is the one and only major area in which the cable industry does face some prospect of dual, if not tri-level, supervision. Yet all federal standards, including system channel capacity, two-way potential, and dedicated channel functions, are expressly dependent upon state or local agencies for their day to day administration; overlapping control is not likely to occur unless the FCC begins to expand its authority in the future.

The major flaw in the federal requirements as a mechanism for encouraging the growth of useful communication services at the community level is that the applicability of nonbroadcast regulations is based upon the cable system's proximity to a major television market, a reference point which bears no relation to the size of the community, its existing media services, or its own distinct needs. Rather, it is determined solely by the community's location, either within or without a 35 mile radius of a top 100 market television station. It may be proper to question, then, whether the primary motivation for these rules was to stimulate the development of broader communication services within the large broadcast advertising markets, or simply to force cable systems which attempt to invade rich broadcast domains to pay a sufficient price in construction and operation to blunt their competitive advantage over broadcasters.¹² Recent FCC staff interpretations of these requirements tend to reinforce the latter hypothesis.¹³

Yet while the FCC insists on playing an exclusive role in determining both the nature of these nonbroadcast rules and their area of application, it has no authority to perform the acts necessary for the growth of strong and vital regional cable systems within these major markets. The Rand Corporation's proposed grand design for an urban/suburban "regional" cable communication network in Dayton, Ohio and its surrounding area,¹⁴ to take just one

12. This argument is elaborated in Le Duc, *Cable Franchising in the United States: A Pattern in Emerging Problems*, EUROPEAN BROADCASTING UNION REVIEW, March 1974, at 47.

13. The FCC, for example, is currently considering a case involving Ft. Atkinson, Wisconsin, a community of less than 5,000 located 33 miles from Madison, Wisconsin, a market classified in 1971 as a top 100 market. (The same market service now classifies Madison in the second 100 markets, but to simplify administration the FCC has frozen these market classifications as they existed in 1971.) The city officials have petitioned the FCC to release them from the requirement of having a "leased" channel, which is unlikely to be used in a community of this size, and to open the only one of the 12 channels not otherwise committed to origination or additional broadcast service. The Commission, seemingly more concerned with uniform broadcast advertising protection of major markets, thus far has refused to modify its rule and allow a channel now dark to serve some useful purpose.

14. See L. JOHNSON, W. BAER, R. BRETZ, D. CAMPH, N. FELDMAN, R. PARK, & R. YIN, *CABLE COMMUNICATIONS IN THE DAYTON, MIAMI VALLEY: BASIC REPORT* (1972).

example, failed in large part because of the absence of legislation which only the states have power to provide.¹⁵ Since municipalities are not customarily granted the right to pool revenues or share expenses in joint ventures with other municipalities, any cable regulatory structure lacking a state tier will be unable to support the type of required broadband system social planners have advocated for the past few years.¹⁶

If there is an extraneous tier of cable control making the task of regulating nonbroadcast services in urban areas more difficult, it would seem that it is the federal tier, since it is least concerned with the needs of communities or citizens and least able to advance local interests.

II. STATE CONTROL OF CABLE

A. *Factors Discouraging the Development of State Cable Controls*

Although a substantial number of states have considered enacting some form of cable television controls during the past quarter of a century, three major factors have discouraged the passage of such legislation. The most significant factor has undoubtedly been the nature of the service provided by the typical cable television system itself, which only recently has evolved into something more than a passive reception device for existing broadcast signals.¹⁷

Until the middle of the 1960's, community antenna systems were confined almost exclusively to small markets or rural areas, with origination generally limited to a single automated time and weather channel. Under these circumstances, state legislatures had every reason to believe that the federal government would at any time preempt the field of community antenna

15. Although the plan collapsed for a number of reasons (urban/suburban jealousies and differing degrees of interest in cable among them), the author, as a communications consultant to the south of Dayton communities, as well as other participating attorneys, realized from the beginning that without state legislation the project was doomed. Unfortunately, the Rand proposal, while brilliant in its economic, technological, and sociological arguments, is devoid of the kind of legal analysis that would have indicated the probable unconstitutionality of the Dayton plan. *See generally* note 16 *infra*.

16. Municipalities are not permitted to act without an express grant of power from the state. *See* 1 C. ANTIEU, *MUNICIPAL CORPORATION LAW* §§ 5.01, 5.04, 5.11 (1973). Thus, while cities in a number of states have been vested with "home rule rights," these do not customarily include the right to form compacts with other communities lacking such home rule provisions to accomplish a joint venture. *See generally* T. Muth, *State Interest in Cable Communications* 255-57, June 1, 1973 (unpublished dissertation in Ohio State University Library).

17. *See* Le Duc, *Cable Television: Evolution or Revolution in Electronic Mass Communication?*, 400 *ANNALS* 127 (1972), which discusses the distinctions among the terms "community antenna", "CATV", and "cable television" in terms of economic impact, social function, and legal characteristics.

control, since the process of augmenting television reception was merely one aspect of interstate commerce in communication. Congress had in fact considered such preemptive legislation as early as 1959,¹⁸ and by enacting the All Channel Receiver Act in 1962,¹⁹ evinced the apparent intention of bringing all elements of television transmission and reception within the jurisdiction of the FCC. But despite the distinct possibility of having a substantial amount of state legislative time and effort rendered meaningless by subsequent federal action, more than half of all state legislatures or state regulatory bodies did consider cable regulation prior to 1965.²⁰

Central to every administrative, legislative, and judicial decision to prevent state community antenna regulation during this era was the presumption that the federal government could at any time assert preemptive jurisdiction over cable functions, a presumption supported by widespread congressional consideration of federal cable regulations from 1958 through 1960.²¹ After

18. See S. 2303, 86th Cong., 1st Sess. (1959).

19. 47 U.S.C. § 303(s) (1970) states that the Commission is to have: authority to require that apparatus designed to receive television pictures broadcast simultaneously with sound be capable of adequately receiving all frequencies allocated by the Commission to television broadcasting when such apparatus is shipped in interstate commerce, or is imported from any foreign country into the United States, for sale or resale to the public.

20. The most comprehensive survey of state cable regulatory history is included in T. Muth, *supra* note 16. For a less comprehensive, though useful, study, see Barnett, *supra* note 10.

Initially, a state attorney general's opinion that community antenna services were not within the purview of existing state regulatory agencies, *see, e.g.*, Arizona Corp. Comm'n, 12 P & F RADIO REG. 2094 (Op. Att'y Gen. No. 55-206, 1955); New Mexico Pub. Serv. Comm'n, 10 P & F RADIO REG. 2058 (Op. Att'y Gen. No. 5942, 1954); Utah Pub. Serv. Comm'n, 14 P & F RADIO REG. 2063 (Op. Att'y Gen. No. 56-129, 1956), was often enough to discourage further state activity. Nevertheless, a number of bills designed to empower existing state regulatory bodies to supervise community antenna functions were introduced during this period. *See, e.g.*, Arizona H.C.R. 12 (1957); Montana S.B. 184 (1957); Pennsylvania H.B. 1456, 835, 91 (1954); Washington S.B. 425 (1957); West Virginia H.B. 397 (1954). In both California and Wyoming, state public utility agencies asserted jurisdiction over domestic cable systems in 1956, although the courts later struck down this assertion of authority. *See, e.g.*, Television Transmission, Inc. v. Public Util. Comm'n, 47 Cal. 2d 82, 301 P.2d 862 (1956). *See also* D. LE DUC, *supra* note 3, at 124-25. The Montana legislature, in 1958, passed cable regulatory legislation only to have it vetoed by the Governor who declared, on the advice of his Attorney General, that the federal government seemed to have effectively preempted this field of regulation. *See* D. LE DUC, *supra* note 3, at 85.

21. *See Hearings on S. 1739, S. 1801, S. 1886, & S. 2303, VHF Booster and Community Antenna Legislation, Before the Subcomm. on Communications of the Senate Comm. on Interstate and Foreign Commerce*, 86th Cong., 1st Sess. 1 (1959); *Hearings Pursuant to S. Res. 224 and on S. 376, Review of Allocations, Problems and Special Problems of T.V. Service to Small Communities Before the Senate Comm. on Interstate and Foreign Commerce*, 85th Cong., 2d Sess. (1958).

it became clear in 1960 that the federal government had no immediate intention of asserting such jurisdiction, a new flurry of state cable regulatory hearings began.²²

Although federal inaction encouraged a new wave of state deliberations, the fact that the federal government no longer seemed interested in preventing state supervision did not answer the basic question: could states justify imposing standards upon an industry which at that time was still little more than a master antenna service for national television programming? There was certainly justification for the argument that during this phase of their evolution, community antenna systems were simply passive conduits for national television signals, completely devoid of any characteristic requiring state supervision. In fact, in striking down a local ordinance which attempted to regulate cable functions, a federal judge had declared as late as 1968 that "the public has about as much real need for [community antenna services] as it does for hand carved ivory back-scratchers."²³ Moreover, it was difficult for state legislatures to justify extensive regulation when one considered the protections such laws might provide for state cable subscribers or potential cable subscribers. Since the concerns of these groups during this period extended only to the reasonableness of the monthly cable subscriber payment and the adequacy of the television service provided, it was natural to grant existing state public utility commissions similar community antenna supervisory responsibilities as the most logical and economical way of handling these rather minimal problems.

Unfortunately for the general image of state cable regulatory efforts, the first testing ground for this type of state control occurred in Connecticut. Connecticut became the first state to enact cable controls because of the cable industry's support for Public Utilities Commission (PUC) supervision;²⁴ this unusual industry stance was the result of clashes among cable applicants and the Southern New England Bell Telephone Company. The Bell System had consistently refused to grant to cable systems permission to lease its poles for system construction, insisting that the cable operators lease wires strung by the telephone company at a far higher yearly charge. Only two of the 42 franchises granted by Connecticut communities prior to assumption of control by the state agency were actually in operation, and both of these systems had been forced to install their own poles. The hope

22. See, e.g., Arkansas H.B. 309 (1963); California A. 2743 (1963); Maryland H.B. 186 (1960); New Hampshire H.B. 268 (1960); Oklahoma H.B. 914 (1963); Oregon H.B. 1546 (1960); Utah H. 914 (1963).

23. *Greater Fremont, Inc. v. City of Fremont*, 302 F. Supp. 652, 665 (N.D. Ohio 1968).

24. See D. LE DUC, *supra* note 3, at 126.

was that joint PUC jurisdiction over cable as well as telephone service might enhance the bargaining position of cable operators for pole rights. Instead, the state regulatory body was unable to take any positive action for a period of more than four years, thus suggesting an explanation for Southern New England Bell's previous success in obstructing independent cable operation in the state.²⁵ Yet despite the questionable applicability of this first state regulatory experiment to other jurisdictions, "Connecticut" became the rallying cry for those opposing a state role in cable regulation.

Nevada, a state with only limited television broadcast service, in 1967 became the second state to enact regulations, followed shortly by Hawaii, Rhode Island, and Vermont.²⁶ During the same era that these states were vesting their public utility regulatory agencies with the power to certify and regulate cable systems, several other states, including Illinois, Maine, Nebraska and South Dakota, were legislatively declaring that municipal or county government should have *exclusive* jurisdiction over all nonfederal elements of cable control.²⁷ Both the states which delegated cable control to an existing state agency by defining cable as a public utility, and those which delegated control to municipalities by declaring cable to be a matter of local concern, were attempting to avoid the arduous task of evaluating domestic cable services in terms of their own distinctive societal functions.²⁸

Those states which avoided general cable supervisory responsibility by defining cable to be of a purely local nature thereby lost the ability to guide cable development under uniform standards which could both aid rural communities in obtaining cable service and facilitate interconnection between urban and suburban cable systems. On the other hand, those states which defined cable systems as public utilities in order to avoid the necessity of creating a new agency with specific laws to supervise statewide cable functions artificially restrained these systems within a framework which would have little relevance to their future functions. As one observer has pointed out:

Utility regulation usually includes governmental control of rates of return on invested capital. Frequently where cost savings are

25. For further discussion of the Connecticut and Nevada regulatory experiences, see M. Mitchell, *State Regulation of Cable Television*, Oct. 1971 (a report prepared under a grant from the John and Mary R. Markle Foundation and published by the Rand Corporation).

26. HAWAII REV. STAT. §§ 440G-1 to -14 (Supp. 1974); NEV. REV. STAT. §§ 711.010-.180 (1973); R.I. GEN. LAWS ANN. §§ 39-19-1 to -8 (Supp. 1974); VT. STAT. ANN. tit. 30, §§ 501-08 (Supp. 1975).

27. ILL. REV. STAT. ch. 24, § 11-42-11 (1973); ME. REV. STAT. ANN. tit. 30, § 2151(H) (Supp. 1974); NEB. REV. STAT. §§ 18-2201 to -2205 (1970); S.D. COMPILED LAWS ANN. §§ 9-35-16 to -23 (Supp. 1974).

28. See T. Muth, *supra* note 16, at 1.

realized by utilities, invested capital is diminished by regulatory commission decision. Such measures to limit the rate of return of utilities produces little incentive to improve service and plant. It is apparent that rate regulation has not favored experimentation and innovation at levels currently needed in cable system development.²⁹

Although each new state statute vesting cable jurisdiction in a utility regulator offered more flexibility in terms of actual supervision and rulemaking powers than preceding statutes had granted, none of the pre-1972 state cable acts treated cable as a completely distinct type of service charged with a public interest which required its own unique set of regulatory standards.

There is certainly justification, then, for those who argue from pre-1972 experience that state cable regulation has proved to be unnecessarily rigid and burdensome. However, the FCC's *Cable Television Report and Order*,³⁰ which ushered in a broad new policy of cable television control in March 1972, so drastically altered each of the factors which had dictated previous state cable controls that any comparisons drawn from that past era no longer appear meaningful.

B. *The Modern Cable Era and State Control*

On March 31, 1972, when the FCC's *Cable Television Report And Order* became law, each of the three barriers which had limited a state role in cable communication control were swept aside. Federal preemption was no longer a danger in areas such as cable applicant selection and nonbroadcast channel supervision, now expressly set aside for state or local supervision. In addition, the major market service requirements for new systems clearly conferred upon states a broad legal base for the exercise of legitimate supervisory powers, and the importance of these services now seemed to justify extensive deliberations to protect public interests in such communication channels.

After declaring that "conventional licensing would place an unmanageable burden on the Commission,"³¹ the FCC made state and/or local governing bodies responsible for conducting the cable franchising process, selecting the cable applicant to provide the service, defining the franchise area, setting the rate of diffusion of service within each area, and determining the duration of the franchise, the rates to be charged subscribers, and the franchise fee to be imposed by the regulatory authority.³² The penalty set by the FCC for the

29. *Id.* at 22.

30. 36 F.C.C.2d 143 (1972).

31. *Id.* at 207.

32. *Id.* at 208-09.

failure of any state or local governing body to perform these functions was refusal to certify the franchise, thereby denying the cable operator and the host community the right to carry television broadcasts.³³

By compelling all major market cable systems to evolve into modern broadband communication networks offering 20 channels of communication service, including access, educational, governmental and lease channels, the FCC also offered a jurisdictional base for state regulatory bodies which extended beyond those traditional public utility controls suitable for systems which simply deliver existing broadcast signals.³⁴ Recognizing the broader role that a specialized state cable regulatory agency could now play, as well as the greater public need for specific legislation to protect new public interests in such communication services, states such as New York, Massachusetts, and New Jersey soon enacted more flexible types of legislation, providing for statewide licensing of systems, but relaxing state regulatory standards to allow significant local participation in the process.³⁵

The state cable regulatory structure emerging after the *Cable Television Report and Order* of 1972 requires emphasis at the state level on the formulation of policy and the setting of basic standards, leaving most elements of the franchising process at the community level. In New Jersey, for example, franchises (called "consents") are granted at the local level within specific guidelines established by the statute and by the state commission.³⁶ If the commission should reject the consent, an appeal process is available. In New York, municipal franchises granted under similar guidelines are submitted to the state's Commission on Cable Television for a "certificate of confirmation."³⁷ Confirmation is mandatory unless the franchise does not conform to the standards established by the commission or unless it would be in violation of the statute, a regulation, or a standard promulgated by the commission. Similarly, the Massachusetts commission is empowered to establish forms to identify the qualifications of applicants and the quality of service they propose to provide, with right of appeal to the commission granted to unsuccessful applicants, or a complaint relating to cable service subscribed to by more than 10 percent of the subscribers or voters in any franchise area.³⁸

In addition to this franchise review process, the New York Cable Televi-

33. *Id.* at 207-08.

34. *See id.* at 189-98.

35. *See* MASS. GEN. LAWS ANN. ch. 166A, §§ 1-21 (Supp. 1975); N.J. REV. STAT. §§ 48:5A-1 to -53 (Supp. 1975); N.Y. EXEC. LAW §§ 811-31 (McKinney Supp. 1974).

36. N.J. REV. STAT. §§ 48:5A-15 to -21 (Supp. 1975).

37. N.Y. EXEC. LAW §§ 819, 821(3) (McKinney Supp. 1974).

38. MASS. GEN. LAWS ANN. ch. 166A, §§ 4, 14 (Supp. 1975).

sion Commission has numerous other responsibilities generally similar in nature to those of the agencies in New Jersey. The New York commission is directed to develop a statewide plan for the evolution of cable television services; to establish rules to guide and direct municipal governments in granting franchises relating to such points as minimum channel capacity, access to channels, subscriber complaint procedures, and renewal provision, as well as standards for qualifications of applicants to be considered by the franchising authority; to provide technical assistance to communities requesting such aid; to encourage the development of regional cable communication systems; and to represent the people of the state before the FCC.³⁹ Based upon the apparent value of such expert support and guidance for each local community which faces the demanding process of cable franchising, it seems reasonable to ask at this point why only 10 states thus far have created comprehensive statewide cable controls.⁴⁰

C. *The Need for Statewide Cable Controls*

Opposition to a state role in cable control has not been confined exclusively to members of the cable industry. A number of communities with cable franchise already in operation oppose state involvement in their deliberations, contending that they can administer their own agreement quite effectively and do not want to share any portion of their franchise fee. Since more elaborate and comprehensive supervision at the state level will undoubtedly increase cable regulation costs, local governments are justified in their fears that such a program would reduce the funds now available for municipal cable administration. This concern, heightened by unfortunate early experiences with public utility controls exercised rather awkwardly at the state level, has produced a formidable coalition of municipal franchisors and franchisees opposing cable legislation in many states. Undoubtedly, this is a reasonable concern for communities which now have an effective cable communications system. Nevertheless, it also seems difficult to deny the validity of the argument that even those satisfactory franchise agreements

39. N.Y. EXEC. LAW § 815 (McKinney Supp. 1974).

40. The states which have enacted either laws vesting cable controls in existing public utility agencies or have created new cable agencies are Alaska, ALASKA STAT. § 42.05.701 (1975); Connecticut, CONN. GEN. STAT. ANN. § 16-331 (Supp. 1975); Delaware, DEL. CODE ANN. tit. 26, § 601 (Supp. 1975); Hawaii, HAWAII REV. STAT. § 440G-4 (Supp. 1974); Massachusetts, MASS. GEN. LAWS ch. 166A, § 2 (Supp. 1975); Minnesota, MINN. STAT. § 238.04 (Supp. 1975); Nevada, NEV. REV. STAT. § 711.050 (1973); New Jersey, N.J. REV. STAT. § 48:5A-4 (Supp. 1975); New York, N.Y. EXEC. LAW § 814 (Supp. 1975); Rhode Island, R.I. GEN. LAWS ANN. § 39-19-2 (Supp. 1975); and Vermont, VT. GEN. LAWS ANN. § 39-19-2 (Supp. 1975).

now in effect lack the scope or dimension to provide the broader communication functions which are projected for cable in the near future.⁴¹

Municipalities in most states have no authority to form combinations among themselves for common purposes, except as expressly authorized by state statute. Even those municipalities with broad home rule powers are usually not allowed to share tax revenues or general resources with neighboring communities.⁴² Thus, despite hopes for extensive program pooling among contiguous urban and suburban areas and interconnection for educational purposes among communities, absent state legislation any such efforts would appear to be *ultra vires*. Since the unique value of cable communication lies in its ability to merge audiences from surrounding communities and thereby provide a sufficiently large population to support informational, medical, governmental, and other similar communication services, the absence of a state level of authority would seem likely to doom cable systems to remain little more than isolated pockets or units for the delivery of national television programming. As one writer has pointed out:

Proposed cable uses (such as bank transfers, library information service, computer uses and home theatre) all depend on delivery of specified information to highly differentiated markets. Political boundaries should impede this flow no more than is experienced in interstate highway traffic. Information should be accessible and free to flow uninterrupted within and without regions, districts, cities, townships and counties. The principle of constitutional law that assures the free flow of interstate commerce might well be applied to intrastate communications by cable. Individual communities within naturally contiguous regions require interchange between government officials, businesses, and individual citizens. Regions within states require a comparable easy exchange of information. Communications demand systems designed to accommodate these requirements. Thus the potential for interconnection of cable communications is required in any system that expects to serve the convenience and necessity of citizens.⁴³

A second need for state cable legislation, closely related to the need for regional programming, arises from the fact that rural communities often have difficulty in bargaining at parity for cable service, since cable profitability is largely determined by the density of potential subscriber homes within a community.⁴⁴ A state agency could aid sparsely settled communities by

41. See generally L. JOHNSON, W. BEAR, R. BRETZ, D. CAMPH, N. FELDMAN, R. PARK & R. YIN, *supra* note 14.

42. See note 16 *supra*.

43. T. Muth, *supra* note 16, at 254.

44. See C. WOODARD, *supra* note 1, at 29.

requiring that a cable system serve all potential subscribers within a district rather than within a single political subdivision, thus avoiding "cream skimming" or applications for only the most densely settled communities. To encourage participation in such a program, the state might make available rural development funds or loans or provide similar inducements to encourage programming to rural areas with a specified minimum population base in order to make some type of cable communication service feasible.

Unincorporated areas of a state seem particularly in need of state legislation to establish some minimum standards for cable service. The FCC, while issuing a certificate of compliance to such areas upon the submission of a satisfactory franchise agreement, has strongly urged that some mechanism be created to formalize and allow public participation in such franchising, a mechanism only the state can provide.⁴⁵ In addition, a state regulatory agency could provide minimum standards for nonbroadcast service and applicant selection in these and other areas of the state more than 35 miles from a top 100 broadcast market, and therefore beyond the protection of federal nonbroadcast rules.⁴⁶ It could also provide information of particular value to various citizens groups interested in community cable service, including guidance for educators, church officials, art councils, librarians, and others concerned with developing particular communication services on a local or regional basis.

State cable regulation would also seem to offer a number of substantial benefits to the cable industry. State bodies, for example, could support state cable operators who attempt to alter FCC policy in a manner which would be of value to citizens of that state, and could use their eminent domain power to facilitate the construction of cable systems in the state.⁴⁷ Perhaps even more important for the growth of a nationally based MSO cable industry is the fact that statewide cable franchise standards would not only formalize and regularize each community franchise but would also avoid needless squabbles over basic provisions in each new proceeding.

If all of these benefits could attend the enacting of state cable legislation, why has there been such a sluggish response in the 40 states which at present

45. See, e.g., *Coastal Cable, Inc.*, 41 F.C.C.2d 857 (1973); *Mahoning Valley Cablevision, Inc.*, 39 F.C.C.2d 939 (1973).

46. See note 5 *supra*.

47. Without specifically stating that the New York Commission on Cable Television has an eminent domain power or that it should use such power, the New York law speaks of the Commission receiving "from any agency of the state . . . such assistance . . . as may be necessary" for the Commission to carry out its duties, which suggests the possible exercise of eminent domain power for cable purposes. N.Y. EXEC. LAW § 816(4) (McKinney Supp. 1974).

have no statewide regulatory plan? The answer appears to be that there is neither broad guidance nor substantial incentive for such state legislative efforts at present. While the National Association of Railroad and Utility Commissioners (NARUC) and the League of Municipalities have circulated model statutes and ordinances outlining traditional state public utility and local franchising provisions, and the Cable Television Information Office has provided a similar service for various communities, no national organization is now providing extensive information for states seeking a more flexible system of cable controls.

While there is no apparent justification for the failure of states to accept this vital regulatory responsibility, there would seem to be even less justification for the failure of the federal government to encourage such a response. The FCC is admittedly dependent upon the states or their municipalities for the supervision of a substantial share of federal cable policy, yet there has been no effort to defray the expenses such administration demands. In fact, the only federal activity in this field has been to set a rigid ceiling upon the franchise fee that might be imposed in order to underwrite the costs of supervision.⁴⁸

D. *Reasons for the Attack Upon State Cable Controls*

The FCC has never declared an intention to drive states from the field of cable regulation, but a number of factors have come together to erode the confidence of state regulators concerning their future role in this field.⁴⁹ The creation of a separate and autonomous Cable Bureau within the FCC, linked with the industry-dominated Cable Advisory Steering Committee, probably accelerated the trend toward a broader federal role at the expense of state regulation.⁵⁰ The apparent rationale for investing the cable office with the

48. After issuance of its *Cable Television Report and Order* in 1972, the FCC amended 47 C.F.R. § 76.31(b) to limit the state and local franchising authorities to a franchise fee of three percent of subscriber gross annual revenues to defray the expenses of administration. An additional two percent may be imposed to recoup the expenses of all services furnished by the system upon a showing of proper need by the authority. The FCC has strictly adhered to these limitations. See *Teleprompter Florida CATV Corp.*, 45 F.C.C.2d 1020 (1974).

49. Compare *Burch Says FCC Doesn't Want to Regulate Cable by Itself*, BROADCASTING, Feb. 12, 1973, at 68 with *Some Cable Regulatory Leftovers for the States*, BROADCASTING, June 17, 1974, at 41. See also FCC Cable Television Advisory Committee on Federal/State Local Regulatory Relationships, Final Report (1973).

50. See, e.g., BROADCASTING, Dec. 17, 1973, at 36. For a useful description of the influence the Cable Bureau asserts upon information sent to the FCC Commissioners, see R. Berner, *Constraints on the Regulatory Process: A Case Study of the Regulation of Cable Television 72-99*, Aug. 1975 (Harvard University Program on Information Technologies and Public Policy Publication P-75-5).

same degree of prestige as the Broadcast Bureau within the FCC was to reduce the disparity between the amount of influence each could exert upon Commission broadcast-cable policy. Unfortunately, this seems to be creating a regulator-*cable* affinity to rival the existing regulator-*broadcast* affinity, balancing biases but continuing to relegate audiences to the role of either unintended beneficiaries or helpless victims of these internal struggles.⁵¹

Whatever the validity of this observation, there is little question that the Commission's Cable Bureau has been aggressively asserting a federal role in all aspects of cable regulation since its inception, supported almost unanimously by the industry members of the Cable Advisory Committee.⁵² One factor which might explain this solidarity is the present economic climate of the nation, one which argues for the most expeditious type of cable franchising procedures to encourage cable growth. Another less charitable explanation is that neither the Cable Bureau nor the industry is particularly interested in the nonbroadcast services which state governments have been empowered to supervise; both envision an enlarged federal role in a nationwide mass communication distribution system as the most effective means of eventually bypassing these interim requirements.⁵³ While the FCC is now requesting further instruction on how to revise the ultimate jurisdictional rules of cable supervision, a trend toward a reduction of state participation in the process seems destined to occur.⁵⁴

III. CABLE CONTROL: IMAGERY WITHOUT POLICY

In a field noted for promise without performance, the cry of three-tier regulation seems to have persuasive force even though, as this study suggests,

51. A discussion of how such biases seem to emerge is contained in Le Duc, *The FCC v. CATV et al.: A Theory of Regulatory Reflex Action*, 23 FED. COM. B.J. 93 (1969).

52. As a member of the original Citizens Cable Advisory Committee to the FCC, the author is aware that nonindustry members seldom were able to participate in meetings which were held in Washington, D.C. at short notice, and for which no personal expenses were reimbursed. For comments on the composition and general attitude of the final steering committee, see *Untangling the Tangle in Cable Gripes*, BROADCASTING, July 8, 1974, at 30. The Federal/State-Local Advisory Committee (FSLAC) was primarily responsible for considering this aspect of the cable control issue. See FCC Cable Television Advisory Committee, *supra* note 49.

53. The tendency of regulation to result in national distribution patterns with limited local participation is described in PRESIDENT'S TASK FORCE ON COMMUNICATIONS POLICY, FINAL REPORT, ch. 9 (1968).

54. See BROADCASTING, Dec. 16, 1974, at 26, 27. This pessimistic appraisal appears reasonable in view of the fact that no organization of national dimension will be pressing for modern state regulatory control, and that the FCC appears to require countervailing pressures in order to formulate intelligent policy. See D. LE DUC, *supra* note 3, at 35-36.

it is only applicable to the federal role in the supervision of nonbroadcast services within the top 100 markets. If states are discouraged or ultimately prevented from acting in this field, municipalities will then be virtually isolated from outside support, while being asked to supervise a complex series of communication services which the FCC has admitted are beyond its ability to control. Considering the competitive impact of television upon media such as radio and film, any hope that amateur local regulators can successfully compete with the broadcast industry seems incredibly naive.

The ultimate irony is that cable seems to be the medium which the Commission and its predecessor, the Federal Radio Commission, have been seeking for the past half century. As the Commission has often observed, cable, through its abundance of channels, offers the opportunity for truly local or community services without limiting the ability of the system to carry nationwide communication services.⁵⁵ Yet it seems that in order to encourage cable growth at this time, these nonbroadcast attributes which give cable its unique potential are to be sacrificed simply to encourage immediate expansion. While it may be that no system of regulation could achieve the promise once held for this American dream machine, it would seem that a regulatory policy accentuating a national tendency toward economic gain at the expense of social benefit is superfluous, since this would be the natural tendency of the industry absent such regulation.

The FCC recently terminated proceedings to consider rulemaking which would relieve the massive if mythical three tiers of regulation which face a beleaguered cable industry.⁵⁶ Although the Commission said that it would eschew "a strict, inflexible, 'two tier' approach" which would broadly limit state regulatory options, it expressed an intention to reduce burdensome, superfluous nonfederal regulation by continued federal preemption on a subject matter basis.⁵⁷ In pursuit of this objective, the Commission announced that it would continue investigation and in the near future would propose rulemaking "on an issue by issue basis while also considering a legislative proposal to Congress that would provide adequate regulatory structure to guarantee against burdensome duplicative regulation."⁵⁸ Based

55. See, e.g., Notice of Proposed Rulemaking and Notice of Inquiry, 15 F.C.C.2d 417 (1968).

56. Report and Order Terminating Proceeding Relative to an Inquiry on the Need for Additional Rules, 40 Fed. Reg. 34608 (1975). See also Memorandum Opinion and Order of Rules and Regulations Relative to Federal-State or Local Relationships, 34 F.C.C.2d 165 (1970).

57. Report and Order Terminating Proceeding in the Area of Duplicative and Excessive Over-regulation of Cable TV, 40 Fed. Reg. 34608, 34611 (1975).

58. *Id.*

upon the Commission's past performance, the regulations and proposed legislation which eventually emerge will reduce any barrier that states might place in the path of a wired nation. Yet, if any tier of cable regulation could be said to be superfluous, it would be the federal tier, which seems at the moment bent upon betraying the promises it made to the public in its *Cable Report and Order* issued only three years ago.⁵⁹

59. In its *Cable Television Report and Order*, 36 F.C.C.2d 143 (1972), the Commission declared:

"[I]t is therefore appropriate that the fundamental goals of a national communications structure be furthered by cable—the opening of new outlets for local expression, the promotion of diversity in television, and increased informational services of local governments."

Id. at 190.

Yet one element of its local cable communication design, local origination, has already been abandoned as a requirement of the FCC, *see Report and Order on Program Origination by Cable Television Systems*, 49 F.C.C.2d 1090 (1974), and therefore is no longer mandatory in those franchise areas which did not insert a similar provision in their cable agreement. It is difficult to believe that any of the above described services can develop without merging audience bases in a manner possible only at the state jurisdictional level.