

1984

# A Review of Federal, State and Local Regulation of Cable Television in the United States

Adrian E. Herbst

Gary R. Matz

John F. Gibbs

Follow this and additional works at: <http://open.mitchellhamline.edu/wmlr>

## Recommended Citation

Herbst, Adrian E.; Matz, Gary R.; and Gibbs, John F. (1984) "A Review of Federal, State and Local Regulation of Cable Television in the United States," *William Mitchell Law Review*: Vol. 10: Iss. 3, Article 1.

Available at: <http://open.mitchellhamline.edu/wmlr/vol10/iss3/1>

This Article is brought to you for free and open access by the Law Reviews and Journals at Mitchell Hamline Open Access. It has been accepted for inclusion in William Mitchell Law Review by an authorized administrator of Mitchell Hamline Open Access. For more information, please contact [sean.felhofer@mitchellhamline.edu](mailto:sean.felhofer@mitchellhamline.edu).

© Mitchell Hamline School of Law

## A REVIEW OF FEDERAL, STATE AND LOCAL REGULATION OF CABLE TELEVISION IN THE UNITED STATES

ADRIAN E. HERBST,<sup>†</sup>  
GARY R. MATZ<sup>††</sup>  
& JOHN F. GIBBS<sup>†††</sup>

I.	INTRODUCTION .....	378
II.	FEDERAL REGULATION OF CATV .....	378
	A. 1952-1958 .....	378
	B. 1959-1964 .....	381
	C. 1965-1966 .....	384
	D. 1967-1972 .....	385
	E. 1972 .....	388
	F. 1972 to Present .....	392
III.	STATE REGULATION OF CABLE TELEVISION SYSTEMS	396
	A. <i>Introduction</i> .....	396
	B. <i>Topics of State Regulation</i> .....	397
	1. <i>Franchising</i> .....	397
	2. <i>Privacy</i> .....	398
	3. <i>Program Content</i> .....	399
	4. <i>Pole Attachments</i> .....	400
	5. <i>Theft of Service</i> .....	401

---

<sup>†</sup> Member, Minnesota Bar. Mr. Herbst received his B.S. degree from the University of Minnesota in 1961 and his J.D. from William Mitchell College of Law in 1965. For nineteen years, he has represented municipalities dealing with cable television. He is Vice President of the League of Minnesota Cities and Chairman of the Metropolitan Council Task Force on Cable Communications Interconnection. Mr. Herbst is presently a partner in the firm of Herbst & Thue, Ltd.

<sup>††</sup> Member, Minnesota Bar. Mr. Matz received his B.A. degree from St. Olaf College in 1977 and his J.D. from William Mitchell College of Law in 1981. He represents municipalities in matters relating to cable communications and is a member of the American Bar Association Forum Committee on Communications Law. He has served as a staff member for the Minnesota Cable Communications Board and is presently an associate in the firm of Herbst & Thue, Ltd.

<sup>†††</sup> Member, Minnesota Bar. Mr. Gibbs received his B.A. degree from the University of Minnesota in 1979 and his J.D. from William Mitchell College of Law in 1982. He is the Chairman of the City of Bloomington Cable Commission and serves as Treasurer and member of the Board of Directors of the National Association of Telecommunication Officers and Advisors, an affiliate of the National League of Cities. Mr. Gibbs is presently an associate in the firm of Herbst & Thue, Ltd.

6. <i>Interconnection</i> .....	401
C. <i>Federal Preemption and State Regulation</i> .....	401
1. <i>Minnesota Plan</i> .....	402
2. <i>Alaska Plan</i> .....	404
3. <i>Wyoming Plan</i> .....	405
IV. LOCAL REGULATION OF CABLE SYSTEMS .....	406
A. <i>Introduction</i> .....	406
B. <i>The FCC's Requirements and Guidelines for Local Franchises</i> .....	406
C. <i>The Local Franchise Contract</i> .....	407
V. CONCLUSION .....	410

## I. INTRODUCTION

Cable communications (CATV) systems are an integral part of the communications revolution which has rewritten the technical and legal conventions of our society in the past quarter century. As CATV systems have developed, various legal and regulatory issues have emerged. Many of these issues remain unresolved today.

This Article presents an overview of federal, state, and local regulation of CATV systems, highlighting the major issues. Through a listing and description of federal CATV regulation, this Article demonstrates the rise and fall of CATV regulation by the Federal Communications Commission (FCC). A general discussion of state regulation of CATV systems follows, including descriptions of three very different yet representative state regulatory plans. The final section is a discussion of regulation of CATV systems by municipalities and a general description of the typical provisions contained in local CATV franchise ordinances and contracts.

## II. FEDERAL REGULATION OF CATV

### A. 1952-1958

Cable television developed as a method for delivering television broadcast signals to rural communities. Thus, the early focus of the FCC was on CATV's impact on broadcast television. The FCC's first attempt to define the legal status of CATV came in early 1952.<sup>1</sup> The FCC's general counsel and chiefs of the Common

---

1. M. HAMBURG, ALL ABOUT CABLE § 1.03, at 1-8 (rev. ed. 1983); see also D. LE DUC, CABLE TELEVISION AND THE FCC: A CRISIS IN MEDIA CONTROL 60 (1973) (in 1952 FCC removed freeze on granting new licenses to broadcasters).

Carrier and Broadcast Bureaus joined in a memorandum setting out two alternative definitions of CATV operations:<sup>2</sup> "broadcasting" within the meaning of title 3 or interstate "common carrier" operations within the meaning of title 2 of the Communications Act of 1934<sup>3</sup> (the Act). Under the terms and conditions of the Act, the FCC had jurisdiction over common carriers and broadcasting.<sup>4</sup>

In 1952, the FCC declined to assert jurisdiction over CATV, effectively rejecting both alternatives. According to one source, the FCC's refusal to assert jurisdiction was based on the pragmatic view that such control would be of little benefit to complaining broadcasters.<sup>5</sup> Another commentator, however, suggested that the refusal to assert jurisdiction resulted from the FCC's limited staff.<sup>6</sup> As a result of the 1952 inaction, the question of CATV's legal status remained for future consideration.

CATV operations next came to the attention of the FCC in 1956. On April 6, 1956, the FCC received a complaint from thirteen licensees of standard or television broadcasting stations against 288 CATV system operators located in thirty-six states.<sup>7</sup> The complainants in *Frontier Broadcasting Company v. Collier*,<sup>8</sup> requested the FCC to exercise jurisdiction over CATV systems as common carriers under the Act.<sup>9</sup> The complainants further requested that the FCC institute a rulemaking proceeding for adoption of CATV rules and policies. These rules could be used as guides to determine when and how CATV systems could be authorized to operate as common carriers, and also to establish a basis upon which reasonable charges, practices, classifications, and regulations could be determined.<sup>10</sup>

The complainants' concerns were based upon the alleged adverse economic impact of such systems on local television broadcast stations.<sup>11</sup> The complainants argued that a CATV system, bringing service from a distant metropolitan station at no addi-

---

2. *Senate Comm. on Interstate and Foreign Commerce, Review of Allocation Problems of T.V. Service to Small Communities*, 85th Cong., 2d Sess. 3490 [hereinafter cited as *Review of Allocation*]; see also M. HAMBURG, *supra* note 1, § 1.03, at 1-8; D. LE DUC, *supra* note 1, at 7.

3. 47 U.S.C. §§ 151-609 (1976).

4. *Id.* § 152.

5. See D. LE DUC, *supra* note 1, at 72.

6. M. HAMBURG, *supra* note 1, at 1-8.

7. *Frontier Broadcasting Co. v. Collier*, 24 F.C.C. 251 (1958).

8. *Id.*

9. *Id.* at 251.

10. *Id.*

11. *Id.* at 253.

tional cost to its advertisers, diminished the revenues available to support the establishment of new local stations. Advertisers would be reluctant to support new local stations by paying extra for coverage already received from CATV. The physical limitations of CATV systems, making it uneconomical to serve rural areas, would also deprive rural areas of television service due to CATV's adverse economic impact on the establishment of local stations. In addition, the quality of programming of existing local stations would be adversely affected because of the reluctance of national advertisers to order the local station for network programs. Finally, the complainants argued that CATV systems would defeat the purpose of the FCC's multiple ownership rules by creating overlapping service areas under common control.<sup>12</sup>

The CATV industry argued that CATV systems were not common carriers within the meaning of the Act.<sup>13</sup> The CATV respondents maintained that they simply provided a physical facility for people to obtain better television reception. Contrary to traditional common carrier service, their customers had no control over the programming that they received. They claimed that CATV operators were not responsible for the economic plight of local television stations and that, in fact, CATV performed a valuable public service.<sup>14</sup>

The FCC agreed with the industry, finding that CATV systems were not a communications common carrier. In the absence of a statutory definition of "common carrier,"<sup>15</sup> the FCC focused on whether CATV systems conformed to the traditional concept of a common carrier. Common carriers traditionally provide programming that subscribers desire.<sup>16</sup> The FCC concluded that a CATV system is not a common carrier because the operator and not the individual subscriber has the ultimate control over the type of CATV programming broadcast.<sup>17</sup> The FCC also noted that even if a CATV system were a common carrier, all the physical facilities of most systems were in a single state and would not involve interstate common carriage.<sup>18</sup>

Shortly after the *Frontier* decision, the Senate Committee on In-

---

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* at 254.

17. *Id.*

18. *Id.*

terstate and Foreign Commerce began a series of hearings regarding CATV.<sup>19</sup> The broadcasters' testimony emphasized the adverse effects of CATV systems on smaller television stations in the western United States.<sup>20</sup> In its report, the Committee recommended that the FCC establish a system of priorities for considering the merits of various competing systems of television signal delivery in any area.<sup>21</sup> The report emphasized that the FCC should always give priority to local television signals to achieve nationwide local service. The Committee concluded that the FCC should license cable systems to meet that objective.<sup>22</sup>

### B. 1959-1964

In 1959, the FCC issued its First Report and Order<sup>23</sup> examining the impact of CATV systems, television translators, television satellites, and television repeaters on the development of television broadcasting.<sup>24</sup> The FCC noted three legal questions involved in any proposed course of action: (1) What basis is there under present law for FCC assumption of licensing and regulatory powers over CATV systems?; (2) Would it be legally valid for the FCC to deny common carrier facilities for transmission of programs to CATV systems on the ground of adverse competitive impact on existing local television stations?; and (3) Whether economic injury to a television station can be a valid public interest justification for denial of authorizations to services which compete with such stations?<sup>25</sup>

The FCC reaffirmed the *Frontier* decision, concluding that CATV systems did not constitute common carrier service since subscribers were not given the choice of signals or programs to be presented.<sup>26</sup> It also determined that CATV systems are not engaged in broadcasting because they transmit programs by wire.<sup>27</sup> Furthermore, the FCC found that it could not regulate CATV sys-

19. *Review of Allocation*, *supra* note 2; M. HAMBURG, *supra* note 1, § 1.03, at 1-8; D. LE DUC, *supra* note 1, at 88.

20. M. HAMBURG, *supra* note 1, § 1.03, at 1-10; D. LE DUC, *supra* note 1, at 89.

21. *Review of Allocation*, *supra* note 2.

22. *Id.*

23. *In re Inquiry Into the Impact of Community Antenna Sys., TV Translators, TV "Satellite Stations," & TV "Repeaters" on the Ordinary Dev. of Telev. Broadcasting*, 26 F.C.C. 403 (1959) [hereinafter cited as *Inquiry Into Impact*].

24. *See* M. HAMBURG, *supra* note 1, § 1.04, at 1-11.

25. *Inquiry Into Impact*, *supra* note 23, at 426.

26. *Id.* at 427-28; *see supra* note 17.

27. *Inquiry Into Impact*, *supra* note 23, at 428-29.

tems because of the systems' effects on broadcasting, and that any attempt to do so would result in piecemeal regulation.<sup>28</sup> Perhaps most importantly, the FCC observed that CATV systems involve intrastate transmission of programming. Although Congress had the power to regulate CATV or to confer such jurisdiction on the FCC, Congress had not yet done so.<sup>29</sup> The FCC recommended legislation requiring CATV systems to carry the signal of a local station if the station so requested.<sup>30</sup>

Following the FCC's First Report and Order, there were extensive hearings before the Senate Subcommittee on Communications.<sup>31</sup> While several bills dealing with a wide range of subjects had been submitted, the bill ultimately submitted to the Senate was strongly opposed by the cable industry. On May 17, 1960, the bill was defeated by one vote and returned to committee where it died.<sup>32</sup>

During this period, the supplementation of local broadcast signals with additional microwave relayed signals presented a sensitive issue. The controversy involved the construction of microwave facilities designed to relay signals received from local independent television stations to CATV systems. The cable industry challenged the FCC's power to deny such applications, arguing that local stations had failed to demonstrate a legally protectible interest in network television programs. Three cases exemplify this controversy.

In the first case, *Carter Mountain Transmission Corporation*,<sup>33</sup> the plaintiff challenged the FCC's power to refuse a grant of facilities to a common carrier by radio, to be used by CATV systems. The FCC refused the grant because of the proposed grant's impact upon an existing television station. Carter Mountain Transmission Corporation, a common carrier, filed an application with the

28. *See id.* at 431.

29. *Id.* at 427. The FCC also stated that it did not have " 'plenary power' to regulate any and all enterprises which happen to be connected with one of the many aspects of communications." *Id.* at 429. Finally, the FCC found that CATV systems are not employed in "rebroadcasting" under section 325(a) of the Communications Act of 1934, 47 U.S.C. § 325(a) (1976). *Inquiry Into Impact*, *supra* note 23, at 429.

30. *Inquiry Into Impact*, *supra* note 23, at 430.

31. S. REP. NO. 923, 86th Cong., 1st Sess. (1959). Senator John O. Pastore of Rhode Island chaired the subcommittee. For a detailed discussion of Senator Pastore's role in the hearings, see D. LE DUC, *supra* note 1, at 101-11.

32. M. HAMBURG, *supra* note 1, § 1.04, at 1-11.

33. *In re Application of Carter Mountain Transmission Corp.*, 32 F.C.C. 459 (1962), *aff'd*, 321 F.2d 359 (D.C. Cir. 1963).

FCC for permission to construct a microwave radio communications system. The system would have transmitted signals received from television stations located in several distant cities to CATV systems established in the Wyoming towns of Riverton, Lander, and Thermopolis. A protest was filed by the licensee of television station KWRB-TV in Riverton. The FCC held a hearing in which the hearing examiner recommended denial of the protest. The FCC reversed, granting the protest and denying Carter Mountain's application.<sup>34</sup>

In reversing the hearing examiner, the FCC concluded that granting Carter Mountain's application would not serve the public interest, convenience, and necessity.<sup>35</sup> The FCC reasoned that permitting Carter Mountain to bring in outside programs for the CATV systems would financially destroy the local television station. Moreover, it would result in a loss of service to a substantial rural population not served by the CATV systems and to many other persons who did not choose to pay the cost of subscribing to the CATV systems. The FCC gave Carter Mountain leave to refile its application when it could show that the CATV systems would carry the signal of the local station without duplicating its programming.<sup>36</sup>

The District of Columbia Circuit Court of Appeals upheld the FCC's determination.<sup>37</sup> The court noted that the FCC, in determining whether a request would be in the public interest, could consider the proposed use of the requested facilities and weigh that use against other legally relevant factors, including the effect on existing local stations.<sup>38</sup>

Although the cable industry suffered a setback in *Carter Mountain*, two subsequent decisions worked in its favor. In the first, *Intermountain Broadcasting & Television Corporation v. Idaho Microwave, Inc.*,<sup>39</sup> three television broadcast stations sought injunctive and declaratory relief against operators of a CATV system in Twin Falls, Idaho. The issues presented included whether the CATV system could receive and convey the plaintiffs' signals through the CATV system to subscribers in Twin Falls and whether such conduct infringed on any interest, legal or equitable, which the plaintiffs had

---

34. 32 F.C.C. at 459-60.

35. *Id.* at 465.

36. *Id.*

37. *Carter Mountain Transmission Corp. v. FCC*, 321 F.2d 359 (D.C. Cir. 1963).

38. *Id.* at 361.

39. 196 F. Supp. 315 (S.D. Idaho 1961).



in their broadcasts.<sup>40</sup> The court ruled that operators of the CATV system were guilty of no "unfair competition" or "unjust enrichment" against the television stations and could, in fact, operate without the consent of such television stations.<sup>41</sup>

In the second action, *Cable Vision, Inc. v. KUTV*,<sup>42</sup> a CATV system operator brought an antitrust action against a television station which in turn counterclaimed, alleging tortious interference with contractual rights and unfair competition. The broadcast station argued that it had exclusive rights to the first run of affiliated network television programs. The station also argued that under Idaho law the activities of the CATV operator constituted tortious interference with those contractual rights and unfair competition in that the CATV operator received identical programming by other stations and distributed them for profit simultaneously with the defendant's broadcasts. The district court ruled for the defendant<sup>43</sup> and the plaintiff CATV operator appealed.<sup>44</sup> The Ninth Circuit Court of Appeals reversed, holding that unless the television station could demonstrate a protectible interest in network television programs, the broadcasters could not recover against the CATV operator.<sup>45</sup>

### C. 1965-1966

In April 1965, the FCC adopted a First Report and Order and issued a Notice of Inquiry and Notice of Proposed Rulemaking,<sup>46</sup> in which the FCC concluded that it had jurisdiction over all CATV systems. The FCC asserted jurisdiction because CATV systems were engaged in interstate communications by wire and thus governed by the Communications Act of 1934. The FCC proposed the extension of the rules governing CATV systems using microwave to all CATV systems. The FCC did not contemplate CATV rate regulation, the extent of the services to be provided, or

---

40. *Id.* at 316.

41. *Id.* at 325-28. The ruling was applicable even though the area in which subscribers lived was also served by a local television station that paid plaintiffs for the privilege of receiving and rebroadcasting their signals.

42. 211 F. Supp. 47 (S.D. Idaho 1962), *vacated and remanded*, 335 F.2d 348 (9th Cir. 1964).

43. 211 F. Supp. at 59.

44. 335 F.2d at 348.

45. *Id.* at 354.

46. *In re* Amendment of Parts 21, 74 (Proposed Subpart S), & 91 To Adopt Rules & Regulations Relating to the Distrib. of Telev. Broadcast Signals by Community Antenna Telev. Sys., & Related Matters, 1 F.C.C.2d 453 (1965).

the award of CATV franchises. Finally, the FCC ordered an inquiry to determine the conditions under which CATV should be permitted to operate in areas with potential for independent stations. Pending the outcome of the inquiry, applications for microwave facilities used to relay the signal of any television station to a CATV system in a community with four or more commercial channel assignments and three or more stations in operation were required to show that a grant would not pose a substantial threat to the development of independent UHF service in the area.

The FCC further ruled that before a license for cable-linked common carriers could be granted, each cable owner subscribing to the common carrier service must agree to carry, on request, the signal of every television station within approximately sixty miles of the cable system.<sup>47</sup> The ruling also required CATV operators to refrain from carrying, during the fifteen days prior or subsequent to local broadcast, any program duplicating the programs broadcast by any such station.

In 1966, the FCC adopted new rules reducing the period for nonduplication of local programs from fifteen days to the same day.<sup>48</sup> The FCC also required the CATV operator to carry the broadcast signals of all local television stations within whose Grade B contours<sup>49</sup> the CATV system was located. Finally, the new rules required an evidentiary hearing for any CATV operators seeking extension of any television signals beyond its Grade B contour and into one of the top one hundred television markets. Under this procedure, the CATV system was required to show that its operations were consistent with the public interest and the establishment and maintenance of UHF television broadcast service.

#### D. 1967-1972

In 1968, a United States Supreme Court decision dramatically affected the issue of federal jurisdiction over CATV systems. In

---

47. *Id.*

48. *In re* Amendment of Subpart L, Part 91, To Adopt Rules & Regulations To Govern the Grant of Authorizations in the Business Radio Serv. for Microwave Stations To Relay Telev. Signals to Community Antenna Sys., 2 F.C.C.2d 725 (1966).

49. "Grade B contour" is defined as "[t]he line surrounding the area within which local TV broadcast signals are able to be received satisfactorily by households 50% of the time at 70% of the locations." D. DELSON & E. MICHALOVE, *DELSON'S DICTIONARY OF CABLE, VIDEO AND SATELLITE TERMS* 37 (1983); *see also* 47 C.F.R. §§ 73.683(e), 76.65 (1982) (defining "grade B contour").

*United States v. Southwestern Cable Company*,<sup>50</sup> a television broadcast operator (Midwest) in San Diego, California applied to the FCC for special relief, alleging that Southwestern Cable's system transmitted signals from Los Angeles into the San Diego area, adversely affecting Midwest's San Diego station. The FCC restricted the expansion of Southwestern's service pending hearings on the merits of Midwest's complaint. On appeal, the Ninth Circuit Court of Appeals held that the FCC lacked authority to issue such an order.<sup>51</sup>

The case was appealed to the United States Supreme Court which noted that questions on the validity of the specific rules promulgated by the FCC for CATV regulation were not at issue.<sup>52</sup> Rather, the issues before the Court were whether the FCC had authority under the Communications Act to regulate CATV, and, if so, whether it had the authority to issue the prohibitory order in question.<sup>53</sup>

With respect to the first question, the Court concluded that the FCC's authority over "all interstate . . . communication by wire or radio" permitted the regulation of CATV systems.<sup>54</sup> The Court noted that this authority was restricted to that "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting."<sup>55</sup> Second, the Supreme Court held that the FCC's order limiting further expansion of service pending appropriate hearings did not exceed or abuse its authority under the Act.<sup>56</sup>

The restrictions on signal importation into major markets created a large backlog of cable proceedings, particularly for waivers in the top one hundred markets. This prompted the FCC to issue a Notice of Proposed Rulemaking and Notice of Inquiry on December 1, 1968.<sup>57</sup> The proposed rules prohibited all CATV operators within thirty-five miles of the downtown area of a city in the

---

50. *In re* Midwest Telev., Inc., 4 F.C.C.2d 612 (1966), *rev'd sub nom.* Southwestern Cable Co. v. United States, 378 F.2d 118 (9th Cir. 1967), *rev'd*, 392 U.S. 157 (1968).

51. *Southwestern Cable Co. v. United States*, 378 F.2d 118 (9th Cir. 1967).

52. *United States v. Southwestern Cable Co.*, 392 U.S. 157, 167 (1968).

53. *Id.*

54. *Id.* at 178.

55. *Id.*

56. *Id.* at 181.

57. *In re* Amendment of Part 74, Subpart K, of the Commission's Rules & Regulations Relative to Community Antenna Telev. Sys.; & Inquiry into the Dev. of Communications Technology & Serv. to Formulate Regulatory Policy & Rulemaking &/or Legislative Proposals, 15 F.C.C.2d 417 (1968).

top one hundred markets from importing broadcast signals without the permission of the station whose signal was to be imported.<sup>58</sup> CATV operators in the 101st through 200th markets were allowed to import without consent only those signals needed to provide three networks and one independent station.<sup>59</sup> CATV operators located outside the thirty-five mile zone of any station in a major or smaller market were permitted to carry such distant signals as they chose, so long as they did not carry a more distant station before carrying a closer station of the same type.<sup>60</sup> Finally, the Notice required full retransmission consent before the CATV operator could import a broadcast signal.<sup>61</sup> As a result, permission was required not only from the broadcast station itself, but also the network, the film syndicator, and any other source providing programming to that station.

In 1969, the FCC issued its First Report and Order in Docket Number 18397,<sup>62</sup> in which it introduced rules prohibiting all CATV systems with 3500 or more subscribers from carrying the signal of any television broadcast station after January 1, 1971. The rule excepted CATV systems that also provided one channel of cablecasting or program origination together with facilities for local production and presentation.<sup>63</sup> Under the rules, a CATV system engaged in cablecasting could present advertising material at the beginning and conclusion of each cablecast program and at natural intermissions or breaks within a cablecast.<sup>64</sup> The FCC observed that:

The use of broadcast signals has enabled CATV to finance the construction of high capacity facilities. In requiring in return for these uses of radio that CATV devote a portion of the facilities to providing needed origination service, we are furthering our statutory responsibility to 'encourage the larger and more effective use of radio in the public interest.' The requirement

---

58. *Id.* at 436.

59. *Id.* at 440.

60. *Id.*

61. *Id.* at 432.

62. *In re* Amendment of Part 74, Subpart K, of the Commission's Rules & Regulations Relative to Community Antenna Telev. Sys.; & Inquiry Into the Dev. of Communications Technology & Serv. To Formulate Regulatory Policy & Rulemaking &/or Legislative Proposals, 20 F.C.C. 2d 201 (1969).

63. *Id.* at 223 (section 74.1111 was added to Part 74, Subpart K, of the FCC's rules and regulations to restrict a CATV system from carrying the signal of a television broadcast station unless the cablecasting was done in accordance with sections 74.1113, 74.1115, 74.1117 and 74.1119).

64. *Id.* at 225 (referring to section 74.1117).

will also facilitate the more effective performance of the Commission's duty to provide a fair, efficient, and equitable distribution of television service to each of the several states and communities in areas where we have been unable to accomplish this through broadcast media.<sup>65</sup>

In 1970, the FCC promulgated a Second Report and Order in Docket Number 18397,<sup>66</sup> introducing a rule prohibiting CATV and television cross-ownership if the CATV system was wholly or partially within the predicted Grade B contour of the television station.<sup>67</sup> The rule also prohibited cross-ownership of a translator station and a CATV system serving the same community.<sup>68</sup> Finally, the rule prohibited the three national broadcast networks from holding an ownership interest in any CATV system.<sup>69</sup> A three year grace period was allowed for divestiture of locally cross-owned CATV systems.<sup>70</sup>

#### E. 1972

On February 3, 1972, the FCC released its Cable Television Rules (Rules), an amended version of which currently regulates CATV.<sup>71</sup> The rules contemplated a form of dual jurisdiction. On the one hand, the FCC noted that conventional licensing might place an unmanageable burden on the FCC, while, more importantly, local governments must be intimately involved since cable uses streets and public ways.<sup>72</sup>

The FCC required that cable systems obtain a certificate of compliance from the FCC before commencing operations.<sup>73</sup> The local franchise had to comply with the following criteria: (1) a statement showing that the franchising authority had considered in a public proceeding the operator's legal, character, financial,

---

65. *Id.* at 208-09 (citations omitted).

66. *In re* Amendment of Part 74, Subpart K, of the Commission's Rules & Regulations Relative to Community Antenna Telev. Sys.; & Inquiry Into the Dev. of Communications Technology & Serv. To Formulate Regulatory Policy & Rulemaking &/or Legislative Proposals, 23 F.C.C.2d 816 (1970).

67. *Id.* at 818.

68. *Id.* at 821.

69. *Id.*

70. *Id.* at 822 n.7.

71. 37 Fed. Reg. 3278 (1972) (codified at 47 C.F.R. §§ 76.1-.617 (1982)).

72. *In re* Amendment of Part 74, Subpart K, of the Commission's Rules & Regulations Relative to Community Antenna Telev. Sys.; & Inquiry Into the Dev. of Communications Technology & Serv. To Formulate Regulatory Policy & Rulemaking &/or Legislative Proposals, 36 F.C.C.2d 143, 207 (1972).

73. *Id.* at 207.

technical and other qualifications, and the adequacy and feasibility of construction arrangements; (2) a provision allowing cable service to develop throughout the community; (3) a construction schedule including a completion date for a significant amount of the construction within one year after the issuance of the certificate, and a statement that thereafter energized trunk cable would be extended to a substantial percentage of the franchise area each year; (4) a provision limiting the initial franchise period and any renewal period to a reasonable duration; (5) a statement that the franchising authority specified or approved the initial rates which the operator would charge subscribers for installation of equipment and regular services and that no changes in subscribers' rates would be made unless authorized after an appropriate public proceeding affording due process; (6) a statement specifying procedures for the investigation and resolution of all complaints regarding quality of service, equipment malfunctions, and similar matters, and requiring the franchisee to maintain a local business office or agent for these purposes; and (7) a statement providing that any modifications of the provisions resulting from amendment by the FCC would be incorporated into the franchise agreement within one year of the adoption of the modification, or contemporaneously with franchise renewal, whichever occurred first.<sup>74</sup>

Other significant areas addressed by the 1972 Rules are discussed in more detail below:

*1. Franchise Fees.* In response to the need for reasonable franchise fees, the FCC suggested fees in the range of three to five percent of the franchisee's gross subscriber revenues per year from cable television operations in the community.<sup>75</sup> If the franchise fee exceeded three percent of such revenues, the cable television system could not receive FCC certification until the fee was approved by the FCC. Approval required a showing by the franchisee that it would not interfere with the federal regulatory goals for cable television, and, by the franchising authority, that it was appropriate in light of the planned local regulatory program.<sup>76</sup>

*2. Local Origination.* Any cable television system having 3500 or more subscribers was required to operate as a local outlet by originating its own programming and maintaining facilities for lo-

---

74. *Id.* at 208.

75. 37 Fed. Reg. 3278, 3281 (1972) (codified at 47 C.F.R. § 76.31 (1982)).

76. *Id.*

cal production and presentation of programs other than automated services. Local origination programming was limited to one or more designated channels which could be used for no other cablecasting purpose.<sup>77</sup> Finally, cable television systems located outside major television markets were prohibited from entering into any contract or lease for use of its cablecasting facilities that would prevent or inhibit the use of such facilities for a substantial period of time.<sup>78</sup>

3. *Access.* Cable television systems operating in a community located in or overlapping a major television market were further required to maintain certain specially designated channels: one noncommercial public access channel available on a first-come, nondiscriminatory basis; one channel for use by local educational authorities; one channel for local government uses; and other unused channels for leased access services.<sup>79</sup> The rules further specified that whenever all dedicated channels were in use during eighty percent of the weekdays for eighty percent of the time during any consecutive three hour period for six weeks, the system would have six months in which to make a new channel available for any or all of these purposes.<sup>80</sup> No cable television system could exercise control over the program content on any of the channels and, furthermore, no charge could be made for the use of these channels until five years after completion of the system's basic trunk line.<sup>81</sup> Finally, the rules required that a public access channel be made available without charge, except that production costs could be assessed for live studio presentations exceeding five minutes.<sup>82</sup>

4. *Channel Capacity.* Cable television systems operating within a major television market were required to have at least the equivalent of twenty television broadcast channels available for immediate or potential use.<sup>83</sup> Each such system was also required to maintain a plant having the technical capacity for nonvoice return communications.<sup>84</sup>

5. *Television Signal Broadcast Carriage.* The 1972 Rules required a

---

77. *Id.* at 3287 (repealed by 39 Fed. Reg. 43310 (1974)).

78. *Id.*

79. *Id.*

80. *Id.* at 3289 (repealed by 41 Fed. Reg. 20678 (1976)).

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

cable television system to carry the signals of television stations within their area.<sup>85</sup> Carriage requirements vary with market size. The significant factor is typically whether or not a community is located wholly or partially within a thirty-five mile radius of a commercial television station licensed to a major or smaller television market.

The rules contained lists of the top and second fifty major television markets and set out reference points by state, community, latitude, and longitude to determine the boundaries of major and smaller television markets. Under the rules, any market not listed as a major television market was defined as a smaller television market. Any cable television system that was not located in a major or smaller television market was considered a "community unit."<sup>86</sup>

Where a cable television system served a community in a major or smaller market, the rules required that system to carry, on request, the television signals of: (1) any television station licensed by the FCC to any community within a thirty-five mile radius of the community where the cable system is located; (2) any noncommercial educational television station within whose Grade B contour the cable system community is located; (3) certain television translator stations; (4) any Grade B signals from other smaller markets; and (5) any station whose signal is "significantly viewed" in the community.<sup>87</sup> Where the cable system was in a community not located in any major or smaller market, the system had to carry the following signals: any station within whose Grade B contour the system community is located;<sup>88</sup> translator stations with certain power; stations whose signals are significantly viewed in the community; and all of the educational stations licensed to communities within thirty-five miles of the system community.

The 1972 Rules also permitted cable television systems to carry other television signals depending upon the size of the market in which the system was located. In the top fifty television markets, a cable television system might carry three full network stations and three independent stations.<sup>89</sup> In the second fifty major television markets, a cable television system might carry three full network

---

85. *Id.*

86. *Id.* at 3281-85 (amended version at 47 C.F.R. §§ 76.51-.67 (1982)).

87. *Id.* at 3284 (amended version at 47 C.F.R. §§ 76.59, 76.61 (1982)).

88. *Id.* at 3283 (amended version at 47 C.F.R. § 76.54 (1982)).

89. *Id.* at 3284 (amended version at 47 C.F.R. § 76.57 (1982)).



stations and two independent stations.<sup>90</sup> In the smaller television markets, a cable television operation might carry three full network stations and one independent station. Finally, the rules imposed no restriction upon communities outside major and smaller television markets.<sup>91</sup>

#### F. 1972 to Present

Since the adoption of the 1972 Rules, there has been a gradual deregulation of cable television at the federal level. This deregulation has resulted from the FCC's initiatives and judicial invalidation of the rules.

The first challenge to the FCC came in 1972 when the local origination requirements were challenged in *United States v. Midwest Video Corporation*.<sup>92</sup> Midwest Video, an operator of cable television systems, challenged the authority of the FCC to impose local origination requirements. In a landmark decision, the United States Supreme Court ruled that the FCC's rules preserved and enhanced the integrity of broadcast signals and thus were reasonably ancillary to the effective performance of the FCC's responsibilities for regulating television broadcasting. Thus, the Supreme Court held that the FCC had authority to promulgate the 1972 Rules.<sup>93</sup>

Chief Justice Burger, while concurring in the result, stated, "[I am] not fully persuaded that the Commission has made the correct decision . . . [b]ut the scope of our review is limited and does not permit me to resolve this issue as perhaps I would were I member of the Federal Communications Commission."<sup>94</sup> The Chief Justice also suggested that given the "almost explosive development of CATV," the fundamental policies associated with CATV would be better addressed by Congress and not left entirely to the FCC and the courts.<sup>95</sup>

On December 22, 1975, the FCC issued a Notice of Proposed Rulemaking in Docket Number 20681,<sup>96</sup> eliciting comment on the proposed modification or deletion of the FCC's franchise standards. The standards set forth a procedure for changing subscriber rates prior to the granting of a certificate of compliance. In

90. *Id.* (amended version at 47 C.F.R. § 76.61 (1982)).

91. *Id.* (amended version at 47 C.F.R. § 76.57 (1982)).

92. 406 U.S. 649 (1972).

93. *Id.* at 670.

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

95. *Id.*

96. 41 Fed. Reg. 1606 (1976) (current version at 47 C.F.R. § 76.31 (1983)).

1976, the FCC deleted the section of the franchise standards pertaining to local rate regulation.<sup>97</sup> According to the FCC, the deletion of this franchise standard would enable local authorities to decide whether subscriber rates should be regulated and would best facilitate experimentation in implementing different types of rate controls.<sup>98</sup>

In 1977, the FCC completely reevaluated its certificate of compliance process and franchise standards. In Report and Order in Docket Number 21002,<sup>99</sup> it determined that applications for certificates of compliance would no longer be required to explain how carriage of all proposed television signals was consistent with the FCC's signal carriage rules. The applicant would only be requested to justify the carriage of signals that did not fall within the normal complement envisioned by the applicable rule. In addition, and more importantly, the five franchise standards<sup>100</sup> were deleted. Provisions dealing with franchise award proceedings, franchise duration, construction timetables, and complaint procedures were continued as non-mandatory guidelines. The franchise fee limitation was modified to allow all revenues derived from cable services to be included in the fee base. Consequently, franchising authorities are now permitted to assess a fee on all cable revenues.

In 1978, the FCC released Report and Order in Docket Number 78-206<sup>101</sup> which replaced the 1972 certificate of compliance with a simpler registration process. In general, operators of cable television systems commencing operation or adding signals to an existing system are now required to file with the FCC certain basic information relating to system identification, location, and signal carriage.<sup>102</sup> Immediately upon filing this information, operation may be commenced or new signals added. Cable television systems serving less than one thousand subscribers are generally exempt from the FCC rules. Nevertheless, before becoming

---

97. *In re* Amendment of Subpart C of Part 76 of the Commission's Rules & Regulations Regarding the Regulation of Cable Telev. Sys. Regular Subscriber Rates, 60 F.C.C.2d 672 (1976).

98. *Id.* at 682.

99. *In re* Amendment of Subparts B and C of Part 76 of the Commission's Rules Pertaining to Applications for Certificates of Compliance & Fed.-State/Local Regulatory Relationships, 66 F.C.C.2d 380 (1977).

100. *See* 47 C.F.R. § 76.31 (1983) (setting forth franchise requirements).

101. *In re* Amendment of Part 76 of the Commission's Rules & Regulations Concerning the Cable Telev. Certificate of Compliance Process, 69 F.C.C.2d 697 (1978).

102. *See* 47 C.F.R. §§ 76.12-.29 (1983).

operational or adding new signals, they too must comply with the registration rule.

In the mid 1970's, the FCC's rules requiring cable television systems having 3500 or more subscribers to develop at least a twenty channel capacity, and to make available certain channels for access by public, educational, local governmental, and leased-access users, came under attack. During the 1972 rulemaking proceedings, the FCC rejected a jurisdictional challenge, maintaining that the rules would promote the achievement of long-standing goals by increasing outlets for local self-expression and increasing the diversity of programming available to the public. The Eighth Circuit concluded that the regulations were not reasonably ancillary to the FCC's jurisdiction over broadcasting and, to the extent that the rules imposed common carrier obligations on cable operators, violated the Communications Act's prohibition against broadcasters being treated as common carriers.<sup>103</sup> The court also emphasized its belief that the rules presented grave first amendment problems.<sup>104</sup>

In 1979, the United States Supreme Court affirmed, holding that the FCC's rules were not "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting" and thus not within the FCC's authority.<sup>105</sup> The Court found that the access rules imposed common carrier obligations on cable operators to the extent such systems were: (1) required to make available dedicated channels on a non-discriminatory basis; (2) prohibited from determining or influencing the content of access programming; and (3) limited to the fees they may impose for access and equipment.<sup>106</sup> According to the Court, the authority to compel cable operators to provide common carriage of public originated transmissions must come specifically from Congress.<sup>107</sup>

In 1977, a similar review of the FCC's distant signal carriage rules was commenced.<sup>108</sup> The distant signal carriage rules re-

---

103. *Midwest Video Corp. v. FCC*, 571 F.2d 1025 (8th Cir. 1978), *aff'd*, 440 U.S. 689 (1979).

104. 571 F.2d at 1053-54.

105. *FCC v. Midwest Video Corp.*, 440 U.S. 689, 697 (1979) (*Midwest Video II*) (citing *United States v. Southwestern Cable Co.*, 392 U.S. 157, 161 (1968)).

106. *Id.* at 701-02.

107. *Id.* at 709.

108. *In re Cable Telev. Syndicated Program Exclusivity Rules*, 61 F.C.C.2d 746 (1976) (inquiry into petition to amend CATV Syndicated Program Exclusivity Rules, sections

stricted the number of signals of television stations outside of the franchise area that the system could transmit to subscribers. The number of distant signals varies with the size of the television market in which the cable television system is located. By restricting the number of distant signals that a cable television system could carry, the FCC attempted to lessen the economic impact of cable on local television stations.<sup>109</sup> The rules on syndicated program exclusivity allowed local television stations that purchased exclusive rights to certain programs to demand that the local cable television system delete those programs from a distant signal.

Both rules were predicated upon limiting the adverse economic impact of CATV on local television stations. Economic reports solicited by the FCC in 1979, however, concluded that television service would not be impaired if the two rules were repealed.<sup>110</sup> The FCC then released a Notice of Proposed Rule Making<sup>111</sup> which proposed elimination of the distant signal and syndicated program exclusivity rules. On July 22, 1980, the FCC finally adopted an order eliminating the two rules.<sup>112</sup> The Second Circuit Court of Appeals denied an appeal to set aside the order and found the action supported by a fair reading of the Copyright Act.<sup>113</sup>

The FCC's current rules govern the carriage of television broadcast signals,<sup>114</sup> network program nonduplication protection,<sup>115</sup> sports program blackouts,<sup>116</sup> equal employment opportunity,<sup>117</sup>

---

76.151 through 76.161, to extend current syndicated exclusivity protection to second fifty TV markets).

109. *In re Inquiry Into the Economic Relationships Between Telev. Broadcasting & Cable Telev.*, 65 F.C.C.2d 9 (1977).

110. *In re Cable Telev. Syndicated Program Exclusivity Rules*, 71 F.C.C.2d 951 (1979).

111. *In re Cable Telev. Syndicated Program Exclusivity Rules & Inquiry into the Economic Relationship Between Telev. Broadcasting & Cable Telev.*, 71 F.C.C.2d 1004 (1979).

112. *In re Cable Telev. Syndicated Program Exclusivity Rules*, 79 F.C.C.2d 663 (1980).

113. *Malrite T.V. v. FCC*, 652 F.2d 1140 (2d Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982). In response to the repeal of the distant signal limitations, the Copyright Royalty Tribunal recently set a new royalty rate at 3 3/4% of the gross receipts of the cable system for each "distant signal equivalent" carried on the system except: (1) any signal that was permitted or, in the case of new systems, that would have been permitted under the rules and regulations of the Commission in effect on June 24, 1981; (2) any signal of the same type that is substituted for such permitted signal; or (3) any signal that was carried pursuant to an individual waiver of the rules and regulations of the Commission in effect on June 24, 1981. *See* 37 C.F.R. § 308.2(c) (1982).

114. 47 C.F.R. §§ 76.51-67 (1982).

115. *Id.* § 76.92.

116. *Id.* § 76.67.

origination cablecasting,<sup>118</sup> technical standards,<sup>119</sup> record keeping,<sup>120</sup> and reporting.<sup>121</sup> Cable television systems serving less than one thousand subscribers are generally exempt from the FCC's rules. Nevertheless, even these systems must comply with the registration process, must-carry rules, technical standards, reports on operation, finances, and employment.<sup>122</sup>

### III. STATE REGULATION OF CABLE TELEVISION SYSTEMS

#### A. Introduction

With federal deregulation of cable television, state and local governments have developed their role as regulators of cable television. Federal regulation of cable television is nonexclusive and state authority to regulate cable is not in question. In *TV PIX, Inc. v. Taylor*,<sup>123</sup> the United States Supreme Court upheld a Nevada statute that regulated CATV systems as public utilities. The Court upheld the statute as constitutional, stating that cable television was essentially a "local business."<sup>124</sup> The Court determined that appropriate state regulation of primarily local facilities or services in intrastate commerce is not proscribed by the commerce clause of the Constitution. The FCC itself acknowledged that cable television is uniquely suited to "a deliberately structured dualism" and has adopted a regulatory plan which allows state and local authorities to regulate cable in any area not preempted by the FCC.<sup>125</sup>

The extent of regulation varies greatly from state to state. Subjects regulated by the states include: franchising, privacy, program content, pole attachments, theft of service, and interconnection.<sup>126</sup> State regulation of these subjects has developed through state statutes, agency rules, and court decisions. The following discussion is an overview of state regulation in several key topic areas.

---

117. *Id.* § 76.311.

118. *Id.* § 76.205.

119. *Id.* § 76.605.

120. *Id.* §§ 76.305, 76.403.

121. *Id.* § 76.400.

122. *Id.* § 76.300.

123. 396 U.S. 556 (1970), *aff'g*, 304 F. Supp. 459 (D. Nev. 1968).

124. 396 U.S. at 556.

125. FEDERAL COMMUNICATIONS COMMISSION, INFORMATION BULL. 18, CABLE TELEVISION (March 1982).

126. *See infra* notes 127-58.

## B. Topics of State Regulation

### 1. Franchising

In most states, a CATV system may not operate without a franchise granted by some governmental authority. Many states have delegated franchising authority to local governments. Typically, a state will establish a process that must be followed by local governments in granting a cable franchise.

Currently, Alaska, Connecticut, Hawaii, Rhode Island, and Vermont regulate cable television exclusively at the state level. In Alaska,<sup>127</sup> Connecticut,<sup>128</sup> Rhode Island,<sup>129</sup> and Vermont,<sup>130</sup> the public utility commissions act as the sole franchising and regulatory authorities. In Hawaii, the state's Division of Cable Television, under the Director of Regulated Agencies, regulates CATV systems.<sup>131</sup>

In Delaware, Massachusetts, Minnesota, Nevada, New Jersey, and New York, regulatory authority is divided between state and local agencies. Delaware,<sup>132</sup> Nevada,<sup>133</sup> and New Jersey<sup>134</sup> statutes authorize municipalities to grant franchises. The public service commission in each state, however, is empowered to preempt local franchising authority. In Massachusetts,<sup>135</sup> Minnesota,<sup>136</sup> and New York,<sup>137</sup> municipalities have authority to grant cable franchises but any state agency may establish franchise standards with which each municipality must comply.

The power of local governments to grant cable franchises is currently the subject of much litigation. The 1982 case of *Community Communications Co. v. City of Boulder*<sup>138</sup> established important principles of franchising and municipal antitrust liability. Boulder is a

127. ALASKA STAT. §§ 42.20.010-340 (1983).

128. CONN. GEN. STAT. ANN. §§ 16-330 to -333 (West Supp. 1983).

129. R.I. GEN. LAWS §§ 39-19-1 to -9 (1977 & Supp. 1983).

130. VT. STAT. ANN. tit. 30, §§ 501-508 (Supp. 1983).

131. HAWAII REV. STAT. §§ 440G-1 to -14 (1976).

132. DEL. CODE ANN. tit. 26, §§ 601-616 (Supp. 1982).

133. NEV. REV. STAT. §§ 711.020-260 (1983).

134. N.J. STAT. ANN. § 48:5A-22 (West Supp. 1983).

135. MASS. GEN. LAWS ANN. ch. 166A, §§ 1-22 (West 1976 & Supp. 1983) (the regulatory agency is the Massachusetts Cable Commission).

136. MINN. STAT. § 238.08 (1982) (the regulatory agency is the Minnesota Cable Communications Board). See generally Donaldson, *Minnesota's Approach to the Regulation of Cable Television*, 10 WM. MITCHELL L. REV. 413 (1984).

137. NEW YORK EXEC. LAW art. 28, §§ 811-831 (McKinney 1982) (the regulatory agency is the State Commission on Cable Television).

138. 485 F. Supp. 1035 (D. Colo.), *rev'd*, 630 F.2d 704 (10th Cir. 1980), *rev'd*, 455 U.S. 40 (1982).

"home-rule" charter municipality which awarded a twenty year nonexclusive franchise to Community Communications Company (CCC) in 1979. After years of inaction by CCC in certain neighborhoods, the city placed a moratorium on expansion of CCC enabling the city to consider a franchising process. CCC sued the city alleging antitrust violations and deprivation of property rights.

The case reached the United States Supreme Court in January 1982.<sup>139</sup> The Supreme Court decided that a city ordinance was not exempt from antitrust scrutiny under a "state action" exemption unless it implemented a "clearly articulated or affirmatively expressed state policy."<sup>140</sup> As a result of the *Boulder* decision, state legislators have considered enacting specific state regulation relating to cable franchising.

## 2. Privacy

Legislatures have focused on privacy issues in several states. Two-way cable television systems are capable of supplying banking and shopping services at home, educational instruction, home security, information retrieval, pay-per-view programs, message service, and public polling.<sup>141</sup> The personal information that cable systems can gather from subscribers poses new questions not previously raised by development of the United States mail, telephone lines, or access to governmental and financial records. Thus, many states are working to develop informational privacy legislation to create adequate safeguards.

The Illinois Communications Consumer Privacy Act,<sup>142</sup> became effective on January 1, 1982. The Act prohibits using equipment to observe or listen to individuals in their homes; providing lists of subscribers to any person or organization unless the company first notifies and obtains the consent of the subscriber; disclosing the television viewing habits of any subscriber without the subscriber's consent; and installing or maintaining a home-protection scanning device in a dwelling without the written consent of the occupant. These prohibitions apply to any company that provides informa-

---

139. *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982).

140. *Id.* at 52 (citations omitted).

141. Examples of two-way cable systems are: (1) QUBE operating in Columbus, Ohio, Cincinnati and Pittsburgh by Warner Amex Cable Communications, Inc. and (2) Interactive Data Exchange System (INDAX) operated by Cox Cable and Jerrold Communicom.

142. ILL. ANN. STAT. ch. 38, §§ 87-1 to -3 (Smith-Hurd Supp. 1983).

tion or entertainment to a subscriber through electronic equipment.

Wisconsin's privacy legislation<sup>143</sup> establishes penalties for monitoring subscribers' equipment, disclosing information describing any behavior of a household member, or conducting response research without first providing written notice.

### 3. Program Content

States have also addressed issues regarding the content of programming carried on cable television systems.<sup>144</sup> It remains unclear whether cable system operators will enjoy the maximum freedom from state control enjoyed by the press. CATV may be subject to many regulations, such as the "equal time" and the "fairness doctrine" provisions, which govern radio and television broadcasters. Nevertheless, it is clear that basic first amendment principles apply to cable. Accordingly, a state may not engage in content regulation of CATV programming that would violate the dictates of the first amendment.<sup>145</sup>

The United States Supreme Court has ruled that obscenity may be prohibited because it is not protected speech under the first amendment.<sup>146</sup> Defining obscenity, however, has proven difficult. In *Miller v. California*,<sup>147</sup> the Supreme Court ruled that the guidelines for determining whether material is obscene are: (1) whether the "average person, applying contemporary community standards," would find that the work taken as a whole appeals to the prurient interest; (2) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; (3) whether the work taken as a whole, lacks serious literary, artistic, political, or scientific value. Although a state can prohibit or regulate the distribution of material which fits the *Miller* definition, the definition is vague and difficult to apply.

---

143. WIS. STAT. ANN. § 134.43 (West Supp. 1983).

144. See, e.g., *Home Box Office v. Wilkinson*, 531 F. Supp. 987 (D. Utah 1982). The first amendment prohibits any governmental action that abridges freedom of speech. Although the first amendment states that "Congress shall make no laws . . . abridging the freedom of speech, or of the press," U.S. CONST. amend. 1, that prohibition has been extended beyond acts of Congress to include the actions of state and local governments. See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973).

145. *Paris Adult Theatre I*, 413 U.S. at 49.

146. See, e.g., *Miller v. California*, 413 U.S. 15 (1973).

147. *Id.*



Many state legislatures have enacted laws which prohibit the distribution of obscene material. For example, Minnesota Statutes section 617.241 provides in relevant part:

It is unlawful for any person knowingly to exhibit, sell, print, offer to sell, give away, circulate, publish, distribute, or attempt to distribute any obscene book, magazine, pamphlet, paper, writing, card, advertisement, circular, print, picture, photograph, motion picture film, play, image, instrument, statue, drawing, or other article which is obscene.<sup>148</sup>

The statute thus applies to a person who distributes or circulates obscene cable television programming.

Attempts have also been made to legislatively prohibit or regulate certain programming that does not meet the *Miller* case definition of obscenity but which may be indecent and objectionable to certain individuals or agencies. Courts have had difficulty dealing with this type of legislation. In *Federal Communications Commission v. Pacifica Foundation*,<sup>149</sup> a case involving a radio station that broadcast a "filthy words" monologue by comedian George Carlin, the United States Supreme Court upheld the FCC's right to restrict certain broadcasts of indecent speech.<sup>150</sup>

Any program content regulation by a state is constitutionally suspect.<sup>151</sup> Obscenity is not protected free speech and can definitely be prohibited. Many states expressly prohibit it.

#### 4. Pole Attachments

Each state has the authority to enact pole attachment rules and regulate pole attachment agreements. If a state chooses to do so, it must certify the regulation with the FCC.<sup>152</sup> Upon receipt of certi-

---

148. MINN. STAT. § 617.241 (1982).

149. 438 U.S. 726 (1978).

150. The Court was divided in *Pacifica*, and the precedential value of the case remains unclear. It does appear, however, that some restrictions on "indecent" programming are constitutionally permissible, at least when minors are likely to be viewing. The Court determined that speech not obscene but nonetheless objectionable or "profane" could not be aired at a time when children were in the audience. *Id.* at 749-50. The rationale of the Court was based largely on the "intrusive nature of broadcasting." *Id.* at 748-49.

151. In Utah, a state indecency statute was struck down as unconstitutionally overbroad. In *Home Box Office v. Wilkinson*, 531 F. Supp. 987 (D. Utah 1982), the court struck down the statute, stating that the *Miller* case established the analytical boundary of permissible state involvement in regulating pornography on cable. *Id.* at 994. Critics of this decision often claim that the district court overlooked the Supreme Court's opinion in the *Pacifica* case. Thus, the law remains unclear regarding the extent to which cable programming content may be deemed indecent and thus regulated or prohibited by a state.

152. 47 U.S.C. § 224(c)(2) (Supp. V 1981).

fication, state regulation preempts FCC regulation in this area.

### 5. *Theft of Service*

Theft of CATV system services has concerned cable system operators, and some states have enacted legislation as a result. One such example is the theft of service legislation recently enacted in Oklahoma.<sup>153</sup> The Oklahoma criminalizes procurement of cable service without proper payment to the licensed cable operator. The law also allows cable operators to sue individuals caught stealing cable signals. Furthermore, the law makes it a crime to sell, distribute, or import any device or equipment designed to aid in obtaining cable service without payment.<sup>154</sup>

### 6. *Interconnection*

States have also become involved in the interconnection of CATV systems. In Minnesota, the Minnesota Cable Communications Board (MCCB) ordered the cable communication systems operating in the Twin Cities Metropolitan Area<sup>155</sup> to either individually or cooperatively provide facilities for interconnection of cable systems in the region.<sup>156</sup> Minnesota defines an "interconnection system" as the "provision of broadband electronic linkage between cable communications systems . . . by means of coaxial cable, microwave or other means whereby the electrical impulses of television, radio, and other intelligences, either analog or digital, may be interchanged . . ." <sup>157</sup>

The MCCB rules also regulate the construction and operation of an interconnection system. The rules establish a number of procedural and technical requirements which an interconnection entity must meet before beginning operation.<sup>158</sup>

### C. *Federal Preemption and State Regulation*

The federal preemption doctrine applies to cable system regulation and has been the determinative issue in at least one case. In *Brookhaven Cable TV, Inc. v. Kelly*,<sup>159</sup> the New York Commission on

153. OKLA. STAT. ANN. § 1737 (Supp. 1983-1984).

154. *Id.* § 1737(B).

155. MINN. STAT. § 473.121(2), (4) (1982).

156. *Id.* § 238.05(2)(c).

157. 4 MINN. CODE AGENCY R. § 4.221 (1982).

158. *Id.* §§ 4.220-221.

159. 428 F. Supp. 1216 (N.D.N.Y. 1977), *aff'd*, 573 F.2d 765 (2d Cir. 1978), *cert. denied*, 441 U.S. 904 (1979).

Cable Television sought to regulate pay cable rates by claiming that the FCC had not asserted full jurisdiction in the area. The court found that the state could not regulate in this area even if its actions were merely involved in the franchising process.

The nature of cable regulation varies greatly from state to state. The following overview of the state regulatory structures established in Minnesota, Alaska, and Wyoming are representative of the diversity, but provide only a small sampling of the many types of state cable regulations. Iowa, for example, adds another dimension to cable franchising regulation by granting municipalities the power to grant cable franchise ordinances.<sup>160</sup> Iowa law provides further, however, that no such ordinance may become effective unless approved by a majority of the voters at a local election.<sup>161</sup> The examples of Minnesota, Alaska and Wyoming serve as models of three typical approaches to state cable regulation.

### 1. *Minnesota Plan*

In 1973, the Minnesota Legislature enacted comprehensive cable legislation<sup>162</sup> reflecting the legislature's determination that cable television involves an extension of interstate broadcasting, public rights of way, municipal franchising, and a vital business and community service.<sup>163</sup> The legislature found that while cable operations "must be subject to state oversight, they also must be protected from undue restraint and regulation so as to assure development of cable systems with optimum technology and maximum penetration in this state as rapidly as economically and technically feasible."<sup>164</sup>

To guide the development of cable, the legislature created the MCCB to develop a state cable communications policy.<sup>165</sup> The MCCB consists of seven appointed members and is funded through legislative appropriations. The MCCB has generally maintained an Executive Director and a staff of three to eight. The legislature provided a list of nineteen general duties for the MCCB<sup>166</sup> and granted it rulemaking authority to carry out its

160. IOWA CODE § 364.2(4)(a) (1976).

161. *Id.* § 364.2(4)(b).

162. Act of May 23, 1973, ch. 578, 1973 Minn. Laws 1274 (current version at MINN. STAT. §§ 238.01-.35 (1982 & Supp. 1983)).

163. MINN. STAT. § 238.01 (1982 & Supp. 1983).

164. *Id.*

165. *Id.* § 238.04.

166. *Id.* § 238.05.

duties.<sup>167</sup>

The MCCB was given authority to oversee development of the cable industry in accordance with a statewide service plan. This authority included: setting standards for cable systems and cable franchising; assuring channel availability for municipal services, educational television, program diversity, and local expression; assuring communication services across metropolitan areas and neighborhoods; providing consultant services to community organizations and municipalities; and stimulating the development of diverse educational and community programming.<sup>168</sup> By exercising its authority, the MCCB was expected to promote the rapid development of an industry responsive to community and public interest; to assure that cable companies would provide economical and efficient services to their subscribers, municipalities, and the public; to encourage the development of public interest programming; and to provide minorities with the fullest opportunity to make use of cable.<sup>169</sup>

In addition to establishing the MCCB and granting rulemaking powers, the legislature enacted statutes which directly affected municipalities and cable companies. Minnesota Statutes section 238.08 mandates that a municipality require a franchise or extension permit for any cable system providing service within that municipality.<sup>170</sup> The statute also authorizes municipalities to create by agreement a joint powers commission which can franchise a cable system for several municipalities. Many suburban and rural communities have taken advantage of this statutory authority.<sup>171</sup>

In addition to the municipal franchise requirement, a "certificate of confirmation" must be obtained from the MCCB before a franchise can be exercised or become effective.<sup>172</sup> The franchisee cable company must obtain the certificate. Generally, no cable franchise will be certified by the Board until its staff has reviewed the franchising process and franchise ordinance, reported that all

---

167. *Id.* § 238.06.

168. *Id.* § 238.05, subd. 1.

169. *Id.* § 238.05.

170. *Id.* § 238.08, subd. 5.

171. Minnesota Joint Powers Commissions which have been formed to franchise and administer cable systems include: Southwest Suburbs Cable Communications Commission, Northern Dakota County Cable Communications Commission, Northwest Suburbs Cable Communications Commission, East Central Cable Commission, Ramsey/Washington Counties Cable Communications Commission, and North Suburban Cable Commission.

172. MINN. STAT. § 238.09 (1982 & Supp. 1983).

statutory and Board procedures have been followed, and determined that the franchise ordinance meets all of the minimum standards set forth in the MCCB rules.<sup>173</sup> Municipalities must also set forth the procedures for establishing rates in the franchise ordinance.<sup>174</sup>

The rules were promulgated by the MCCB to carry out its purposes and to regulate local franchising.<sup>175</sup> The rules regulate subscriber complaint procedures, agency procedures, cross-ownership of cable systems, equal employment opportunities, pole attachments, cable service territories, the franchising and refranchising process which municipalities must follow, franchise standards, certificates of confirmation, interconnection of cable systems, technical standards, and obscenity and defamation.<sup>176</sup>

The Minnesota cable legislation, the MCCB, and the MCCB rules work together to provide Minnesota cities with clear guidelines that govern local cable regulation. The state retains authority over the franchising process, but does not administer it. Through this division of regulatory responsibility, the local franchising authority is protected against significant antitrust liability, and the benefits of a cohesive state communication policy and a sharing of collective expertise are realized. This is accomplished without depriving the local authority of the opportunity to govern and franchise a cable system operating within its jurisdiction.

## 2. *Alaska Plan*

In 1970, the Alaska Legislature enacted legislation which conferred broad power over the regulation and franchising of cable systems to the Alaska Public Utilities Commission. The legislature empowered the Public Utilities Commission to issue "certificates of public convenience" which must be obtained by a cable system before commencing operation in a given area.<sup>177</sup>

Under Alaska law, a local franchise need not be granted prior to state certification. An application for certification is made directly to the Public Utilities Commission according to its regulations.<sup>178</sup> The Commission need not grant a certificate and can attach any

---

173. 4 MINN. CODE AGENCY R. § 4.202 (1982).

174. MINN. STAT. § 238.12 (1982 & Supp. 1983).

175. See 4 MINN. CODE AGENCY R. § 4.001 (1982).

176. *Id.* §§ 4.100-.231.

177. See ALASKA STAT. § 42.05.221 (1983).

178. See *id.* §§ 42.05.231-.241.

terms and conditions which it considers necessary to protect and promote the public interest. Such terms may include the condition that the applicant provide cable service to an area not proposed or contemplated by the applicant.<sup>179</sup> Through this legislation, the state established itself as the franchising authority.

Although the state reserved the power to issue certificates, local municipalities play a role in cable regulation through their permits and franchises. For example, the Alaska Statutes provide that cable systems have the right to a permit to use public streets upon payment of reasonable fees and compliance with reasonable terms required by the local municipality.<sup>180</sup>

One problem encountered by the Alaska plan was the effect of franchises granted before the plan became effective in 1970. In *B-C Cable v. City of Juneau*,<sup>181</sup> the Alaska Supreme Court held that franchises granted by municipalities prior to the enactment of the plan were not rendered void or necessarily preempted by the subsequent legislation.<sup>182</sup> The Alaska law does provide, however, that "[i]n the event of a conflict between a certificate, order, decision, or regulation of the commission and a charter, permit, franchise, ordinance, rule or regulation of such a local governmental entity, the certificate, order, decision or regulation of the Public Utilities Commission shall prevail."<sup>183</sup>

The Alaska plan also vests in the Public Utilities Commission the authority to approve or disapprove the transfer of cable certificates,<sup>184</sup> regulate rates for cable service,<sup>185</sup> require accounting and reports of cable system operators,<sup>186</sup> investigate the management practices of cable operators,<sup>187</sup> assess penalties, and enforce its rules and the cable statutes.<sup>188</sup>

### 3. Wyoming Plan

Local governments are the sole regulators of cable in Wyoming. By virtue of the general home rule powers of municipalities, Wyo-

---

179. *Id.* § 42.05.241.

180. *Id.* § 42.05.251.

181. 613 P.2d 616 (Alaska 1980).

182. *Id.* at 619.

183. ALASKA STAT. § 42.05.641 (1983).

184. *Id.* § 42.05.281.

185. *Id.* § 42.05.431.

186. *Id.* § 42.05.451.

187. *Id.* § 42.05.511.

188. *Id.* §§ 42.05.541-.621.

ming cities have the authority to grant franchises and to contract with cable companies.

The Wyoming Public Service Commission (PSC) currently does not exercise jurisdiction over cable systems. In light of recent FCC rulings affecting pole attachment rates, however, the PSC is now entering the field of pole attachment regulation. State statutory authority does not specify whether the PSC has jurisdiction over cable. When, in 1958, a Wyoming district court held that a cable system was not a public utility within the meaning of the Wyoming statute,<sup>189</sup> the PSC instituted rulemaking proceedings to exercise jurisdiction over pole attachment rates for cable operators.

#### IV. LOCAL REGULATION OF CABLE SYSTEMS

##### *A. Introduction*

In most states, the primary regulation of cable systems is securely vested in local government. Local regulation typically takes the form of a franchise ordinance or contract granted by the local municipality. This local regulation was facilitated by the FCC's 1977 decision to delete the franchise standards which had previously been imposed upon municipalities.<sup>190</sup> The extent of local regulation is limited by the FCC's retention of certain discretionary guidelines regarding the content of cable franchises and the choice by some states to retain minimum franchise ordinance or contract requirements.

The following discussion outlines current requirements and guidelines established by the FCC regarding local franchises, followed by the typical provisions found in local franchise agreements.

##### *B. The FCC's Requirements and Guidelines for Local Franchises*

In 1977, the FCC promulgated rules limiting franchise fees to "no more than three percent of the franchisee's gross revenues per year from all cable services in the community."<sup>191</sup> A local government may only receive approval from the FCC for a franchise fee in the range of three to five percent upon a showing "1) by the

189. *In re* Community Telev. Sys. of Wyoming, No. 46-31 (1st Judicial Dist., Oct. 6, 1958).

190. *In re* Amendment of Subparts B & C of Part 76 of the Commission's Rules Pertaining to Applications for Certificates of Compliance & Fed.-State/Local Regulatory Relationships, 66 F.C.C.2d 380 (1977).

191. 47 C.F.R. § 76.31 (1977) (current version at 47 C.F.R. § 76.31 (1983)).

franchisee, that it will not interfere with the effectuation of federal regulatory goals in the field of cable television, and 2) by the franchising authority, that it is appropriate in light of the planned local regulatory program."<sup>192</sup>

In addition to the franchise fee requirements set forth above, the FCC adopted the following recommendations regarding the local franchising process: (1) the franchisee's legal, character, financial, technical, and other qualifications and the adequacy and feasibility of its construction arrangements should be approved by the franchising authority as part of a full public proceeding which conforms with due process requirements; (2) the initial franchise should not exceed fifteen years, any renewal period should be of a reasonable duration not to exceed fifteen years and should only be granted after a public proceeding affording due process; (3) the franchise should specify that the franchisee shall accomplish significant construction within one year after receiving FCC certification, and shall thereafter reasonably make cable service available to a substantial percentage of its franchise area residents each year; (4) where a franchise contains a construction policy requiring less than complete wiring of the franchise area, the policy should be adopted only after a full public proceeding which includes specific notice of the consideration of the policy; and (5) the franchise should: (a) specify that procedures have been adopted by the franchisee and franchisor for the investigation and resolution of all complaints regarding cable television operation; (b) require that the franchisee maintain a local business office or agent for these purposes; (c) designate, by title, the office or official of the franchising authority having primary responsibility for administering the franchise and implementing complaint procedures; and (d) specify that notice of the procedures for reporting and resolving complaints shall be given to each subscriber when initially subscribing to the cable system.<sup>193</sup>

### *C. The Local Franchise Contract*

Local franchise ordinances and contracts generally contain a wide variety of terms. In some states, certain minimum standards and provisions are required. In others, municipalities are free to franchise as they wish. The following provisions are common elements of local franchise ordinances and contracts and supplement

---

192. *Id.*

193. *Id.*



those recommended by the FCC. These provisions are general in character and do not contemplate the specific nature of a franchise in any given state. Some states require that cable franchises be granted by ordinance. Other states have no such requirement, and municipalities have chosen to contract with the cable company rather than rely upon a municipal ordinance when franchising a cable system. In still other municipalities, both a franchise ordinance and a franchise contract are utilized. This combination can work to increase the municipality's administration and enforcement alternatives.

Once a franchise is granted to the cable operator, that franchise becomes the basic operating document used by the cable company and municipality when determining their respective rights and obligations. Thus, the process of negotiating the terms of the local cable franchise establishes most of the parameters of cable regulation. Most regulatory constraints upon the cable system operator are set forth in the local franchise. Accordingly, local governments must refer to the franchise to determine their enforcement and administrative rights over the cable system.

*1. Authority of a City to Grant a Franchise.* A city's authority to grant a franchise is most often established by state statutory authority, home rule authority, or the state's constitution. Any authorization or limitation unique to franchises is usually contained in the franchise ordinance or contract. Municipalities sometimes delegate their franchising authority to a consortium of cities. This is often done through the use of joint powers agreements or other delegation documents. The authority to delegate is generally set forth in the franchise ordinance or contract.

*2. Franchise Processing Award Fee.* Typically, municipalities are reimbursed for the costs incurred in granting a cable franchise. The requirement and amount of such reimbursement is often set forth in the franchise.

*3. Grant of Franchise.* A provision setting forth the actual grant of a franchise is contained in the franchise. This provision sets forth the relationship of the franchise to state and federal laws, rules, and regulations. The duration of the franchise and its nonexclusivity will also be set forth in the grant provision.

*4. Authority For Use of Streets.* The extent of the authority granted to the cable company to use streets and other public property is set forth in the franchise. Such a provision usually contains an all-inclusive description of cable facilities which may be constructed on public property. The authority to use streets is generally condi-

tioned upon applying for and receiving all applicable municipal permits, paying all fees, and complying with all other applicable municipal codes and ordinances.

5. *Cable System Operator's Agreement to be Bound by the Franchise.* Most franchise agreements contain a general statement of agreement and acceptance by the cable operator. The cable operator thereby acknowledges the franchise and agrees to provide all services set forth in its proposal and to abide by the terms of the franchise.

6. *Recitation of Police Powers.* A municipality may appropriately provide that nothing in the franchise will be construed to prohibit the municipality from exercising its police power to adopt and enforce ordinances necessary to the health, safety, and welfare of the public.

7. *System Design Provisions.* The design provisions of the cable system, as proposed, are generally set forth in the franchise. The entire proposal may be incorporated by reference in the franchise. Except for practical enforcement considerations, the salient features of the proposed system design are set forth in the franchise.

8. *Access Requirements.* The cable operator's support of access programming on the cable system is often delineated in the franchise. Such a provision may include a description of the cable system's channel allocation, equipment, and staff which will be dedicated to the support of access programming.

9. *Technical and Performance Standards.* The technical standards established by the FCC govern all cable systems. The standards are often incorporated by reference in local franchises. All additional technical requirements of the city are typically set forth in the franchise as well.

10. *Initial Services and Programming.* The program lineup, proposed services, levels of service, and other salient features of the cable service proposal are set forth in the franchise. Often included is a provision allowing a variance from the original proposal, or service substitutions should certain services become unavailable to the cable operator.

11. *Construction Timetable.* The timetable proposed for completing construction of the cable system is typically included in the franchise. A map setting forth the various neighborhoods, construction goals, and deadlines often is attached to delineate more clearly the obligations.

12. *Extension Policy.* If the entire cable service territory is not to be wired initially, a policy setting forth how and when subscribers outside of the initial service area will obtain cable service is often

included in the franchise. The cost, or formula for determining the cost, of such an extension generally accompanies the policy.

*13. Construction Codes.* Any construction codes or requirements unique to a cable system are often included in the franchise. In addition, requirements related to the repair of streets, restrictions on the erection of poles, regulation of undergrounding of cable, reservations of street rights, restrictions on trimming of trees, and regulation of street vacation or abandonment are typical franchise requirements.

*14. Service Contracts.* If the cable operator utilizes service contracts with subscribers for monthly service, restrictions relative to those contracts must be set forth in the franchise. Such restrictions include clarity of language, certain type and size requirements, and content approval power by the municipality.

*15. Rates.* All rates which will be charged for various cable services as well as rate change procedures and rate guarantees are generally contained in the franchise.

*16. General Financial and Insurance Provisions.* Typically, a franchise will require that the cable operator maintain liability insurance for bodily injury, death, property damage, and all other types of liability.

*17. Bonds.* Any requirements for construction or performance bonds are typically included in the franchise.

*18. Penalties and Security Fund Requirements.* Security funds upon which the municipality may draw to impose penalties or assess liquidated damages for failure to comply with the franchise are common. The amount of any security fund and procedure for withdrawal from the fund is generally established in the franchise.

*19. Franchise Revocation.* A franchise generally provides the grounds and procedures for revoking the cable franchise. Due process and purchase upon revocation procedures should accompany the general revocation provisions.

*20. Franchise Renewal Provisions.* Procedures for renegotiating or renewing the franchise at the end of the franchise term are often included in the original franchise. The franchise renewal sections generally require the procedures to begin approximately two years before the franchise expires.

## V. CONCLUSION

This Article has provided a general overview of federal, state, and local regulation of CATV systems in the United States. It has

described a regulatory structure that has been referred to by the FCC as a “deliberately structured dualism” between the federal government through the FCC and the states through various state and local agencies.

The current regulatory structure has evolved over the past quarter century. As CATV systems enter the areas of communications traditionally dominated by telephone services, as the economics of providing cable service change, and as the potential of breakthroughs in CATV technology are realized, the regulation necessary to protect the public’s interest in communications systems will continue to evolve.

The regulatory framework is currently being studied by the United States Congress and attacked by those it regulates. Two comprehensive cable bills are currently before the United States Congress.<sup>194</sup> Although the regulation of CATV systems is still in flux, one thing seems certain: as the communications revolution escorts this nation into the twenty-first century, the application and direction of regulation will have a significant impact on the development of communications systems and the public interest.

---

194. S. 66, 98th Cong., 1st Sess. (1983); H.R. 4103, 98th Cong., 1st Sess. (1983).

