THE STATES REGULATE CABLE: A LEGISLATIVE ANALYSIS OF SUBSTANTIVE PROVISIONS

Philip R. Hochberg

July 1978

Publication P-78-4

This report was prepared for Kalba Bowen Associates, Inc., in fulfillment of a subcontract to the Harvard Program on Information Resources Policy under National Science Foundation Grant #APR76-04827 A01.

Abstract

At present, eleven states regulate cable television under comprehensive statutory programs which fall into three distinct patterns: regulation by the existing Public Utility Commission, a "hybrid" arrangement which consists of a Cable Television Office within a PUC, and separate Cable Television Commissions. Substantive portions of cable statutes under all of these schemes are analyzed including the definition of CATV systems, general and specific powers of the agency, franchising standards, technical provisions, rate oversight, ownership, channel usage, and other provisions of cable regulatory statutes. States without comprehensive jurisdiction are also examined.

Acknowledgments

The author is indebted to Professor Thomas Muth, of Michigan State University, whose 1974 study of state legislation provided a framework for the present analysis. See Cable Communications and the States: A Sourcebook for Legislative Decision Makers, (New York State Senate, 1975) at 116-49 (hereinafter "Muth"). An additional fundamental research source has been Muth, State Interest in Cable Communications, unpublished Ph.D. dissertation, Ohio State University, 1973 (hereinafter "Muth Dissertation").

The author is further indebted to Sharon Briley, of the Cable Television Bureau of the Federal Communications Commission, author of another, more recent -- and excellent -- study, State Regulation of Cable TV -- Progress and Problems in the Cable/Broadband Communications Book 1977-1978, (Hollowell, ed., 1978).

The report has also benefited from the comments of legal staff at state regulatory agencies and other reviewers who are listed below. However, they are not responsible for -- nor do they necessarily agree with -- the views expressed herein.

Robert S. Golden, Jr.	Robert R. Nardi
Michael Isaacs	Anthony G. Oettinger
Konrad K. Kalba	Steven R. Rivkin
Edwin K. S. Liu	C. H. Stanford
William Malone	Paul Tattersall
Thomas A. Muth	Michael M. Tischer

HARVARD UNIVERSITY - PROGRAM ON INFORMATION RESOURCES POLICY

Core Program Support

Abt Associates Inc.
Action for Children's Television
American Can Company
American District Telegraph Company
American Newspaper Publishers Assoc.
American Telephone and Telegraph
Arthur D. Little Foundation
Auerbach Publishers Inc.
Bell Canada
Beneficial Management Corporation

Boston Broadcasters Inc.
The Boston Globe
Burroughs Corporation
Canada Post
Central Telephone & Utilities Corp.
Codex Corporation
Common Cause
Communications Workers of America
Computer and Communications Industry Assoc.
Consolidated Edison Company of New York, Inc.

Des Moines Register and Tribune Company
Donaldson, Lufkin & Jenrette
Doubleday and Co., Inc.
Economics and Technology, Inc.
Encyclopaedia Britannica
L. M. Ericsson (Sweden)
Federal Communications Commission
Federal Reserve Bank of Boston
Field Enterprises, Inc.
First National Bank of Boston

First National Bank of Chicago
General Telephone & Electronics
Hallmark Cards, Inc.
Harte-Hanks Communications, Inc.
Honeywell, Inc.
Household Finance Corporation
IBM Corporation
Information Gatekeepers, Inc.
International Data Corporation
International Paper
International Resources Development, Inc.
International Telephone and Telegrapn Corp.

Iran Communications & Development Institute
Lee Enterprises, Inc.
Lockheed Missiles and Space Company, Inc.
John and Mary R. Markle Foundation
Marsteller Foundation
McGraw-Hill, Inc.
Mead Corporation
Meredith Corporation
Minneapolis Star and Tribune Company
National Aeronautics and Space Admin.

National Association of Letter Carriers
National Telephone Cooperative Assoc.
New York Times Company
Nippon Electric Company
Norfolk & Western Railway Company
Oppenheimer and Company, Inc.
Payment Systems, Inc.
J. C. Penney Company, Inc.
Pergamon Press Ltd.
Pitney Bowes, Inc.

Public Agenda Foundation
Reader's Digest Association, Inc.
Reuters, Ltd.
Salomon Brothers
Seiden & de Cuevas, Inc.
Siemens Aktiengesellschaft
Southern Pacific Communications Company
Stromberg-Carlson Corporation
Systems Applications, Inc.
Time Incorporated

Times Mirror
Transamerica Corporation
United Telecommunications
U. S. Department of Commerce:

National Technical Information Service
National Telecommunications & Information Administration

United States Postal Service
The Washington Post Company
Western Union International, Inc.
Xerox Corporation

The state cable television regulation project addresses the political dynamics, legal options, regulatory issues and economic impacts of state government involvement in cable television. This 18-month project was conducted by the Harvard University Program on Information Resources Policy in conjunction with Kalba Bowen Associates, Inc., under a National Science Foundation grant.

The following is a complete list of this report series.

P-78-2 Regulatory Politics: State Legislatures and the Cable Television Industry, Konrad K. Kalba, Larry S. Levine, and Anne E. Birinyi, August 1978.

P-78-4 The States Regulate Cable: A Legislative Analysis of Substantive Provisions, Philip R. Hochberg, July 1978.

P-78-5 Taxation, Regionalization and Pole Attachments: A Comparison of State Cable Television Policies, Larry S. Levine, Konrad K. Kalba, and Philip R. Hochberg, August 1978.

P-78-6 The Regulation of Cable Television Subscriber Rates by State Commissions, Larry S. Levine, July 1978.

P-78-7 The Economic Impact of State Cable TV Regulation, Yale M. Braunstein, Konrad K. Kalba, and Larry S. Levine, October 1978.

P-78-8 Federal Preemption of State Regulation in Cable Television, Philip R. Hochberg, November 1978.

P-78-9 States, Stakeholders and the Cable: The Evolution of Regulatory Policies, Konrad K. Kalba, December 1978.

P-78-10 Chronology of State Cable Television Regulation: 1947 - 1978, Anne E. Birinyi, November 1978.

P-78-11 Executive Summary of Findings of the State Cable Television Regulation Project, Konrad K. Kalba, Larry S. Levine, Yale M. Braunstein, and Philip R. Hochberg, December 1978.

TABLE OF CONTENTS

DEFINITIONS

Massachusetts, Minnesota, New York, Alaska, Connecticut, Delaware, Hawaii, Nevada, New Jersey, Rhode Island, and Vermont all regulate on a statewide basis. See text at notes 132-427, *infra*. Because of their form of regulation, the first three are to be referred to as "commission" states, while the latter eight are "PUC" states, although differences exist among the PUC states. See Muth at 129-31. Throughout this study, all regulating authorities in the "commission" states are referred to as "commissions" whether they are Commissions or Boards; likewise, all regulating authorities in the "PUC" states are "PUC's", whether they are Public Utility Commissions (i.e. Alaska, Connecticut, and Rhode Island), Public Service Commissions (i.e. Delaware, Nevada and Vermont), or the Director of Regulatory Activities, as in Hawaii. Moreover, all cities, towns and villages are "municipalities", while everything else is a "county".

Finally, for simplicity's sake, a shorthand statutory reference is used throughout the footnotes. Official citations are included in the Appendix.

I. INTRODUCTION

One of the most complex issues in the regulation of cable television is the involvement of states.[1/] It is generally recognized that Alaska, Connecticut, Delaware, Hawaii, Massachusetts, Minnesota, Nevada, New Jersey, New York, Rhode Island and Vermont are the regulating states.[2/]

1/ That the states may have a hand, albeit not necessarily a free hand, was sanctioned in _TV Pix, Inc._ _v._ _Taylor_, 304 F. Supp. 459 (D.Nev. 1968), _aff'd per curiam_, 396 U.S. 556 (1970).

2/ Some jurisdiction appears to exist statutorily in the California and Arkansas Public Utility Commissions.

> The commission may require every cable television corporation to construct, maintain, and operate its plant, system, equipment, apparatus, and premises in such a manner as to promote and safeguard the health and safety of its employees, customers, and the public, and may prescribe, among other things, the installation, use, maintenance, and operation of appropriate safety or other devices or appliances, establish uniform or other standards of construction and equipment, and require the performance of any other act which the health or safety of its employees, customers, or the public may demand.

California at § 768.5. This safety precaution was not designed to declare cable systems as public utilities. Danielson and Wheeler, _The Status of the Cable Antenna Television Industry in California and a Proposal for State Regulation_, 2 _Pac. L.J._ 528, 531 (1971). See also § 767.5 giving jurisdiction over pole attachments. See text accompanying notes 120-121, _infra_.

The Arkansas systems likewise come under the PUC, but there has been a very specific limitation on the jurisdiction.

> The Public Service Commission shall have no jurisdiction over or duties as regards cable television systems other than the duty to make original assessments of the property incorporated in or used by such systems as herein provided.

Arkansas at § 84-103.3.

A very useful pre-condition to an analysis of the roles of the states is an examination of the legislation passed in the various states. While aspects of state regulation can be multifold, the purpose of this paper is to examine only the substantive aspects of state cable legislation.[3/] There is no attempt, for example, to examine the structure of the regulating agency or its procedures. Nor is there any attempt herein to go beyond the legislation to, for instance, administrative regulations.

Any state considering cable legislation must consider initially the specific form of the legislation. Moreover, any agency or court interpreting the statute will first look at the language of the act. How states treat cable in statutory drafting therefore is the crucial first step.

All policy considerations will eventually manifest themselves in legislative action (or inaction). Numerous questions may arise: assuming that regulation is being considered on a state-wide level, what is the scope of the agency action? How far may agencies go in substantive regulation? What areas and what detail in those areas must recognized? How much leeway is allowed the agency in regulating?

3/ There has been no successful state assertion of jurisdiction without legislation. See Television Transmission, Inc. v. Pub. Util. Comm'n, 47 Cal.2d 83, 301 P.2d 862 (1956); "In the Matter of Community Television Systems of Wyoming", 17 R.R. 2135 (1958); Illinois-Indiana Cable Television Assoc. v. Illinois Commerce Commission, 302 N.E. 2d 334 (1973).

The examination becomes important not only for the substantive portions of the statutes, but for more general legal implications.

State courts in particular still often adhere to what has come to be known as the "non-delegation doctrine".[4/] For better or for worse, courts -- especially state courts -- distinguish between a permissible "authority and discretion to execute the law" and a "discretion as to what the law should be".[5/] On a federal level, the doctrine very well may have been laid to rest, coincidentally with a cable television case being a significant decision. In United States v. Southwestern Cable Co.,[6/] the Supreme Court upheld the FCC's jurisdiction over issues which were "reasonably ancillary" to the FCC's television jurisdiction. This had been called a delegation "without meaningful standards",[7/] but the Court discounted this argument.

A leading administrative law commentator, Kenneth Culp Davis -- while urging that states eschew the doctrine so as to look at the entire administrative setting, rather than just the statutory setting -- has indicated agreement nonetheless that some state judicial assertion of the non-delegation doctrine has been proper:

4/ "That the legislative power...cannot be delegated is, of course, clear." United States v. Shreveport Grain and Elevator Co., 287 U.S. 77, 85 (1932).

5/ Davis, Administrative Law, 77-78 (1958).

6/ 392 U.S. 157 (1968).

7/ Brief for Respondents at 36, cited in Davis, Administrative Law, 44 (1970 Supplement).

> Perhaps this should be so to the extent that legislative bodies behave irresponsibly in delegating without providing either adequate standards or adequate safeguards.8/

The numbers of state courts that have adopted the federal-type approach have been growing gradually, according to Davis, "but many state courts are two or three decades behind...."9/

Obviously, problems result from attempts to draw an adequate statute. A statute drawn strictly enough to avoid any non-delegation attack may place too much emphasis on certain subjects. On the other hand, a statute granting wide authority to an administrative agency may provide no statutory guidelines and subject itself to collateral attack as an improper delegation of authority.

At least one recent attempt at cable legislation was vetoed because it failed to establish standards to guide a state cable commission. A bill passed by the New York State Legislature was vetoed by Governor Carey, who criticized:

> as "vague" the definition of a small cable company, and the provision prohibiting the commission from requiring small companies to file "detailed" documents. 10/

Therefore, state courts well may strike down legislation that fails to define certain operative words in a statute, which must be administered by a state agency. In one recent case, an

---

8/ Davis, Administrative Law, 77 (1970 Supplement).

9/ Davis, Administrative Law of the Seventies, 31 (1976).

10/ See Variety, August 31, 1977, at 44.

attempt by the Illinois Human Rights Commission to preclude certain housing sales practices constituted too broad an assertion of jurisdiction. The court held that the statute failed to define the pertinent geographic area in which the Commission could preclude sales solicitation or to identify with particularity those to whom the statute would be applied. The legislature, said the court,

> cannot vest an administrative agency with the power in its absolute and unguided discretion to apply or withhold the application of the law or to say to whom a law shall or shall not be applied. 11/

Court decisions in 1967 and 1970 have likewise held that some precision must exist in the delegation to a state agency.[12/] Absent such guidelines, the statutes will be struck.[13/]

Indeed, in the cable television area itself (albeit on a federal level), jurisdictional questions have become paramount. Recognizing that the Communications Act of 1934 was drawn long before the advent of cable television, federal courts have been faced with challenges to the jurisdictional assertions of the

---

11/ People v. Tibbets, 56 Ill. 2d 56, ____ 305 N.E. 2d 152, 155 (1973).

12/ See, e.g., Kentucky State Board of Business Schools v. Electronic Computer Programming Institute, Inc., 453 S.W. 2d 534 (Ky. 1970); Zilm v. Zoning Board of Adjustment, Polk County, 150 N.W. 2d 606 (Iowa 1967).

13/ See, e.g., Lewis v. Bank of Pasco County. 346 So. 2d 53 (Fla. 1976); State v. Seligson, 106 N.J. Super. 329, 255 A.2d 795 (1969); Walden v. Hart, 243 Ark. 650, 420 S.W. 2d 868 (1967).

Federal Communications Commission. Although a broad jurisdictional assertion was upheld in the 1968 decision in United States v. Southwestern Cable Co., 14/ a number of decisions since then have had the effect of limiting the scope of the jurisdiction of the FCC. In the 1972 Midwest Video case, 15/ a plurality of the Supreme Court upheld rules of the Commission requiring origination by larger cable systems. Nevertheless, the deciding vote in Midwest Video was cast by Chief Justice Burger, who stated:

> Candor requires acknowledgement, for me at least, that the [Federal Communications] Commission's position strains the outer limits of even the open-ended and pervasive jurisdiction that has evolved by decisions of the Commission and the courts.... 16/

And subsequently, three decisions of the United States Court of Appeals have indicated that the statutory grant to the FCC simply was not broad enough to encompass actions taken by the FCC. In a case early in 1978, the FCC's requirements that larger cable systems must provide access channel space and facilities and that future public, education, local government and leased access channels and facilities must be planned were struck down by the Eighth Circuit. Noting Chief Justice

---

14/ Supra note 6.

15/ United States v. Midwest Video Corp., 406 U.S. 649 (1972).

16/ Id. at 676.

Burger's language in the earlier Midwest case, the court said:

> In our view, the present mandatory access, channel construction, and equipment availability rules burst through the outer limits of the [Federal Communications] Commission's delegated jurisdiction. 17/

The court said that the FCC had no "sweeping jurisdiction" and that its jurisdiction was "contingent upon its delegated powers." 18/

In National Association of Regulatory Utility Commissioners v. Federal Communications Commission, 19/ the court was faced with an order of the Commission which pre-empted state common carrier jurisdiction over leased access channels used for two-way, point-to-point, non-video intrastate communications. It held that the Communications Act did not grant blanket jurisdiction to the FCC. In the case of legislation dealing with cable television, said the Court of Appeals, the FCC had no

> license to construe statutory language in any manner whatever, to conjure up powers with no clear antecedents in statute or judicial construction, nor to ignore explicit statutory limitations on Commission authority. 20/

17/ Midwest Video Corp. v. F.C.C. and U.S., ___ F.2d ___, ___, 42 R.R.2d 659, 676 (8th Cir. 1978).

18/ Id. at _____, 42 R.R.2d at 677.

19/ 533 F.2d 601 (D.C.Cir. 1976).

20/ Id. at 618. See also id. at 612 and 613.

Moreover, the District of Columbia Circuit overturned the whole of the FCC's pay-cable regulations [21/] (in part, because the regulations as drafted did not conform to the statutory guidelines).

Certainly, if jurisdictional questions may be raised as to how far the Federal Communications Commission may go in its regulation of cable television under the Communications Act of 1934, so, too, much the same questions may be raised as to whether a state agency may regulate certain areas of cable television in the absence of explicit statutory language.

(The Commission's exercise of jurisdiction is not without its judicial support, however. In 1977, the Second Circuit Court of Appeals upheld the FCC's pre-emption of local rate regulation in the pay cable area, stating that the means chosen by the FCC to pre-empt were "adequate and effective" and that a policy of pre-emption of pay-cable subscriber rates is reasonably ancillary to the objective of increasing program diversity, and far less intrusive than the mandatory origination rules.) [22/]

21/ Home Box Office, Inc. v. FCC, ___ F.2d ___, 40 R.R.2d 283 (D.C. Cir. 1977), cert. denied, ___ U.S. ___, 98 S.Ct. 111 (1978).

22/ Brookhaven Cable TV, Inc. v. Kelly, ___ F.2d ___ (Case No. 77-6156, 6157) (2d Cir. 1978), affirming 428 F. Supp. 1216 (N.D.N.Y. 1977). See also dicta concerning the FCC's interpretation of its own regulations in New York State Commission on Cable Television v. FCC, ___ F.2d ___, 42 R.R.2d 265 (2d Cir. 1978).

Obviously, one way for the state legislature to avoid problems of delegations to state agencies is simply to make the policy judgment that state agencies shall not assert any control. This is not to say, though, that such a decision creates a total absence of any state role, since states that do not purport to regulate oftentimes do exactly that.

II. REGULATION IN NON-REGULATING STATES

While it is generally conceded that eleven states comprehensively regulate cable television, it has become readily apparent that many more states have affected the development of cable television through specific pieces of legislation.[23/]

Numerous areas in which the eleven regulating states have legislated are also treated by legislation in the non-regulating states: local franchising; term of franchise; construction requirements; service requirements; defamation, privacy, and censorship; rate oversight; transfers and renewals; relationships with other communications services, such as telephone companies in pole attachments arrangements; taxation; and theft of service.

23/ One may be tempted to analyze legislation not only in terms of that passed, but in terms of that not passed. Nevertheless, that temptation must be avoided, since any meaningful analysis would be precluded.

Definition of Cable Television System

Implicit in the problems faced by states granting authority to franchise on the local level is that of determining the appropriate definition of CATV. Obviously, to the extent that these non-regulating states control cable in one aspect or another -- through limiting the franchise term, through taxation, through service requirements, or through a myriad of other methods -- *what* is being controlled becomes crucial. For instance, a cable system may not consist of wires strung along highways or under streets; it is possible that apartment complexes may be large enough economically to support a system.[24/] By the same token, however, the other major definitional "peg" -- use of television signals -- ignores any system whose principal product may be an additional-charge movie package.[25/] Most systems appear to have adopted either the definition taken from the Rules of the Federal Communications Commission[26/] based on signal carriage,[27/] or that based on the use of the highways, as adopted

24/ See *New York v. Comtel, Inc.*, 57 Misc. 2d 585, 293 N.Y.S. 2d 599 (Sup. Ct. 1968), *aff'd without opinion*. 30 App. Div. 2d 1049, 294 N.Y.S. 2d 981 (App. Div.), *aff'd without opinion*, 25 N.Y. 2d 922, 252 N.E. 2d 285, 304 N.Y.S. 2d 853 (1969).

25/ As of December 31, 1977, it is estimated that some 71,000 apartments were being served nationwide by packagers. Kagan, *The Pay TV Newsletter*, March 8, 1978, Census at 15.

26/ 47 C.F.R. § 76.5.

27/ See Arizona at § 9-505 (2); Maine at § 1901-1-C; see also Virginia at § 15.1-23.1.

by PUC-regulating states.28/ Neither approach is without problems, but the interest of the state is obviously greater in the use of its facilities, i.e. highways and roads. Absent such a use -- for instance, in an apartment house complex -- it is possible that the general police powers to protect the citizens could provide a basis for jurisdiction.29/

One area in which no definitional uniformity is found is in the size of smaller systems which are exempted from any regulation at all. South Dakota and North Carolina, for instance, exempt no system of any size;30/ Virginia exempts those systems with less than twenty subscribers;31/ while other states simply adopt the FCC's exemptions of fifty-subscriber systems and Master Antenna Television Systems (MATV's).32/ To the extent that a

---

28/ See Illinois at §§11-42-11 and 429.24, with language almost identical to that of Nevada, *infra* note 137.

29/ Regulations undoubtedly would be more general. See Comment, *Federal and State Regulation of Cable Television: An Analysis of the New FCC Rules*, 1971 *Duke L.J.* 1151, 1184-5 (1971).

30/ South Dakota at § 9-35-16; North Carolina at § 153A-137 does not have a subscriber exemption, but does exempt MATV's.

31/ § 15.1-23.1.

32/ An MATV is commonly found in apartment houses where reception service is provided throughout the building at no charge additional to maintenance or rent. Not only is it financially pleasing (to the apartment dweller), but it is asthetically pleasing in removing the many antennas from the rooftop. See Arizona at § 9-505 (2); Illinois at § 429.24; Maine at § 1901-1-C.

New Hampshire has no subscriber exemption, but exempts MATV systems, which do not include any additional service. New Hampshire at § 53-C: 1. Wisconsin excludes MATV's from its definition, as long as no distant signals are carried on the MATV. § 77.51 (28).

cable system is subject to normal business regulation -- e.g. general taxation -- no policy argument is warranted exempting systems of any size; on the other hand, to the extent that special provisions are enacted -- e.g. service standards -- special treatment indeed may be justified. While the states' interest in exempting certain-sized systems is not the same as the federal government's,[33/] a valid argument may be made based on the uniqueness of the industry and its economics. Finally, the states may be forced into adopting the 1977 FCC revision, based on a system head-end subscriber count, rather than distinct community served.[34/]

Specific Grant to Non-State Entity

The most important area of legislation in the non-regulating states is the specific power granted to the local county or municipality to issue a cable television franchise or license to operate. The implications may be significant. First of all,

---

33/ Not only is the burden of regulation suggested to be onerous on small systems, but their impact on conventional broadcasting is slight. See Further Notice of Proposed Rulemaking in Docket No. 20561, 42 F.R. 19492, ___ F.C.C. 2d ___, R.R. Current Service at 85:201 (1977).

34/ First Report and Order in Docket No. 20561, 42 F.R. 19329, ___ F.C.C. 2d ___, 40 R.R. 2d 571 (1977). The Commission's new rules did away with the artificial (by cable standards) distinction of segregating systems by community. Now, under the definition of 47 C.F.R. § 76.5 (a), the Commission measures systems in the same fashion as most system operators -- i.e. by those served by a single, technically-integrated system, generally through the same head-end. This is especially relevant where a system extends service to a small area outside the principal franchise area.

it may remove any state-level authority from selection per se,[35/] or oversight of the selection of the franchisee[36/] which in itself might encourage certain applicants.[37/] So, for instance, an operator whose regional control might be offensive to a state body well may be able to convince a municipality that its selection will serve that community best.

(By the same token, however, a state may specify franchising conditions. California appears to be the only non-regulating state to specifically identify those aspects of franchisee selection. Its statute says:

> The award of the franchise or license may be made on the basis of quality of service, rates to the subscriber, income to the city, county, or city and county, experience and financial responsibility of the applicant plus any other consideration that will safeguard the local public interest, rather than a cash auction bid.) 38/

35/ See Russell v. Sebastian, 233 U.S. 195 (1914); City of Queensboro v. Cumberland Tel. & Tel. Co., 230 U.S. 58 (1913). See also Mahony, Cable Television's Jurisdictional Dispute, 24 Cath. U. L. Rev. 872, 884 (1975).

36/ While the franchisee selection at the municipal level removes a significant element of state-level control, it does not remove all elements of state control, as witnessed by the very fact that the three states with cable commissions -- Massachusetts, Minnesota, and New York -- have very specific legislation for franchisee selection at the municipal or county level.

37/ While franchising abuses are not unknown at the state level, at one point they seemed almost rampant at the local level. See Barnett, State, Federal, and Local Regulation of Cable Television, 47 Notre Dame Law. 685, 691-92 (1972).

38/ § 53066.

Additionally, local authority pre-empts any thought of PUC-type regulation, which might be considerably more comprehensive (and therefore generally feared by the industry); also, it may mean less oversight of system operations, since localities, often with limited staff capabilities and limited expertise, simply cannot monitor the system's performance. Also, as Barnett points out, giving municipalities the sole authority over cable may have subscriber rate implications, since any rate authority otherwise is often denied to local governments by state law.[39/] Moreover, it obviously may resolve any non-state-level jurisdictional questions, as where both the county and municipal governments claim franchising jurisdiction. Finally, it would tend to grandfather existing operations and franchises differently than where state control exists;[40/] i.e. in that state exercise of control invariably has subjected existing systems to some review, whereas complete municipal authority likely will retain the status quo.

The form of delegation varies. Statutes in various states have specifically given authority to the non-state-level jurisdictions to grant franchises,[41/] licenses,[42/] contracts,[43/]

39/ Barnett, supra note 37, at 707.

40/ Compare text at notes 171-78, infra.

41/ California at § 53066, allows franchise by city or county or city and county.

42/ Illinois at § 429.24.

43/ Maine at § 2151-2-H.

permits,[44/] or some other sort of authorizations to cable operators.[45/]

Of course, there may be a significant regulatory impact even where franchising authority has not been delegated to certain bodies. In Michigan, for instance, in addition to obtaining the consent of the municipality, an operator specifically must also obtain appropriate consents of the Board of the County Road Commissioners or State Highway Commissioners when the construction goes along a county or state road or

---

44/ South Dakota at § 9-35-23. See Johnson, Regulating CATV: Local Government and the Franchising Process, 195 S.D. L. Rev. 143 (1974).

45/ Obviously there can be the non-specific (i.e. general regulatory) grant. See, e.g., Tennessee at § 4302 (a). The statutory language of one state -- Indiana -- would appear to grant local licensing and regulatory powers -- and then take them right away. In Indiana,

> a city shall have power to: ... (b) regulate, inspect, license, and prohibit services ...furnished directly to the homes of the general public which shall include...television signals, excluding, however, such persons...as are subject to regulation by the Public Service Commission of Indiana; or any agency of the...federal government given regulatory powers over such activity. (Emphasis added)

§ 18-1-1.5-13. Arguably, as least, since the FCC regulates the activity of cable television, Indiana cities may not.

bridge.[46/] The question is therefore raised as to whether the particular board may be sitting as a super-franchising authority.

Finally, while some states specifically grant municipalities and counties identical franchising rights[47/] (and others specifically grant only municipalities such franchising rights[48/]), only Maryland grants county-wide authority alone, while not specifically granting it to the municipality.[49/]

The following chart illustrates the states granting specific statutory authority[50/] to counties and municipalities:

46/ § 9.263; § 9.264.

47/ See, e.g., Arizona at § 9-506; Nebraska at §§ 18-2201; 23-383.

48/ See, e.g., Delaware at §§ 607 and 608.

49/ Maryland at § 3C.

50/ See Briley, A Survey of Franchising and Other State Law and Regulation on Cable Television, (FCC 1976). The FCC contrasts specific statutory authority for franchising with "broad statutory authority for franchising; statute not specifically directed toward cable television." (Emphasis added) Id. at Summary Code.

For the discussion of a unique franchising situation, see Hochberg, A Step Into the Regulatory Vacuum: Cable Television in the District of Columbia, 21 Cath. U. L. Rev. 63 (1971).

State	County Authority	Municipal Authority
Alabama		X
Arizona	X	X
Delaware		X
Illinois	X	X
Indiana		X
Iowa		X
Kansas		X
Maine		X
Maryland	X	
Massachusetts		X
Minnesota	X	X
Nebraska	X	X
New Hampshire		X
New Jersey		X
New York	X	X
North Carolina	X	X
South Carolina	X	X
South Dakota		X
Tennessee	X	X
Virginia	X	X
West Virginia		X

Establishment of Standards

(a) Due process

In contrast to the concern of the Federal Communications Commission and a number of the regulating states in making certain that due process requirements are adhered to, few of the non-regulating states address the due process question with any specificity.

The due process consideration here is based on a concern, not so much guaranteeing the rights of the system operator, as protecting the public's interest. Too often in the past, the non-regulating states saw cable franchises granted on the basis of revenue promises or political favoritism.[51/] Much of the problem has been relieved since the 1972 Cable Television Report and Order,[52/] which required all applications for a Certificate of Compliance to have a recitation that the franchising process had included a public hearing affording due process.[53/] It may be concluded therefore that a specific statutory provision requiring a hearing was not necessary, since a new cable system could not begin operations without such assurances having been given in any case.

Nevertheless most states specifically have required a hearing locally. For example, Arizona requires an application to be filed[54/] and a public hearing be held within the proposed service area,[55/] as does Kansas.[56/] Moreover, considerable attention is paid by Arizona to the notice provisions.[57/] Maine has no specific hearing requirement, but may provide for some kind of hearing, since it allows the municipality to recover at

---

51/ See Barnett, supra note 37, at 694.

52/ 37 F.R. 3252, 36 F.C.C.2d 143, 24 R.R.2d 1501 (1972).

53/ See former 47 C.F.R. § 76.31(a)(1), deleted by Report and Order in Docket No. 21002, 42 F.R. 52404, 66 F.C.C.2d 380, 41 R.R.2d 885 (1977).

54/ § 9-507(a).

55/ § 9-507(b).

56/ § 12-2007.

57/ § 9-507(b).

least part of its hearing expenses.58/ Iowa, finally, requires that cable television franchises be granted only by ordinance, which may not become effective unless approved at an election.59/ The cost to the prospective cable operator of such a referendum could quickly grow into significant amounts through various public relations efforts. These costs could be passed along to subscribers in the form of higher rates.

Tennessee, on the other hand, seems to require only public notice and a "showing" of the franchise terms and fees.60/

Due process can also apply to situations other than franchise-granting. For example, the Kansas and Nebraska statutes specifically require an adherence to due process in forfeiture cases where a system faces a financial penalty for violations of its franchise.61/

(b) Term of franchise; grandfathering

Perhaps nothing is more important to the cable operator than the term of his franchise--given the effect this has on the ability to raise capital--yet few states indicate the length of a franchise term. This of course can be explained in part by the FCC's former asserted preemption of the franchise term and limitation to an initial fifteen-year period and a renewal

---

58/ See § 1901(H).

59/ § 364.2(4)(a), (b).

60/ § 4302(a); see also South Carolina at § 58-12-30.

61/ Kansas at § 12-2011; Nebraska at § 18-2205; § 23-387.

term of "reasonable duration."[62/] Maine requires that the franchise period may not exceed that fifteen-year period.[63/] Kansas has a twenty-year term,[64/] while Nebraska allows municipalities to grant twenty-five year terms.[65/] Obviously, these would have run afoul of FCC standards.

A number of the states treat the question of systems which came into existence prior to any legislation, commonly known as "grandfathered systems." Certainly, this can be of great significance, although it is more important where a new comprehensive regulatory scheme is devised.[66/] Nevertheless, even where a less-than-comprehensive plan is adopted, a grandfather clause is important. For example, the cable operator who received his franchise without benefit of a public hearing arguably should not *ipso facto* be deprived of that franchise because of a "defect" in the procedure; by the same token, he should not necessarily be allowed to keep it, by little more than an accident of time.

While systems in operation have the greatest equitable claim to continue, a major problem arises with non-operating systems. Justifiable concern may te expressed for the system which has been constructed--although service has not been

---

62/ See former 47 C.F.R. § 76.31(a)(3), *supra* note 53.

63/ § 1901 (H).

64/ § 12-2007.

65/ § 18-2202. Interestingly, counties have no specified term in the statute. § 23-384.

66/ See text at notes 171-78, *infra*.

commenced--under the terms of franchise granted prior to any state action; indeed, the lion's share of expenses may have been incurred by the construction of the head-end and the laying of strand. On the other hand, there is little concern for the operator who obtained a franchise, but failed to take any construction steps.

A distinction among the three postures is illustrated by Maine, New Hampshire, and Kansas. Maine grandfathers only those systems actually in operation on the grandfathering date.[67/] New Hampshire validates those systems in operation or whose construction was "substantially completed" on the grandfathering date.[68/] Kansas, finally, grandfathers all franchises without regard to construction or operation.[69/]

(c) Construction and service/operation

Little statutory attention is paid to any construction considerations. This is not necessarily surprising, since even in the regulatory states, few statutory provisions apply to construction.[70/]

67/ § 2151-2-H. Tennessee grandfathers such systems, but subjects them to the same local fees as new systems. § 4306.

68/ § 53-C: 5; see also South Carolina at § 58-12-30(b) and (d).

69/ § 12-2012.

70/ See text at notes 187-94, *infra*. In any case, it may have been statutorily-treated in a larger context--

(Footnote 70/ continued on page 22)

A Tennessee statute passed in May, 1977, appears to be the most comprehensive non-regulatory state legislation. Among other construction requirements, the statute prohibits construction along the state's freeway system and requires that it not interfere with the safe use of roads and waterways, that where utility lines are buried, so too must cable lines, and that the cable operator pay for any utility pole or line movement from state lands and repair any damage caused by such movement. 71/

The South Carolina statute likewise is fairly comprehensive in dealing with construction. It contains provisions dealing with "undergrounding" of cable lines, damage to highways and private property, easements and illegal construction. 72/

Kansas explicitly and Nebraska implicitly 73/ allow the franchising authority to set construction standards. Michigan and South Carolina statutes require that cable television

---

(Footnote 70/ continued from page 21)

e.g., "communications circuits"--prior to the advent of CATV or it simply may be accepted as a "standard of good practice" in the industry.

Moreover, technical standards -- integrally tied to construction -- have been pre-empted by the FCC. See 47 C.F.R. §§ 76.601-617.

71/ § 4303.

72/ §§ 58-12-10, 30, 40, 50, 60, 70.

73/ Kansas at § 12-2006 and Nebraska at § 18-2201; § 23-383.

lines not interfere with other public uses of roads, bridges, waters and other public places, and the former adds that trees and shrubs cannot be damaged.74/ South Dakota, Kansas and Nebraska require that a map of underground equipment be filed with the franchising authority.75/

On the other hand, at least one state attempts to protect cable operators. New Mexico protects cable systems from damage resulting from excavations, making the responsible party liable.76/

Likewise, very few of the non-regulating states ever address the need for general service regulations. The most comprehensive is that of Kansas, which calls on the local franchising authority to adopt and enforce regulations dealing with

> commencement of operation, territory of operation, the extension of service equitably to all parts of the franchise area, abandonment of facilities, elimination of unjust discrimination among subscribers, financial responsibility, insurance covering personal injury and property damage, safety of equipment, use of streets, alleys, dedicated easements and other public places, and reasonable grounds for forfeiture of franchise rights.77/

74/ South Carolina at § 58-12-10; Michigan at § 9.265.

75/ South Dakota at § 9-35-21; Kansas at § 12-2009; Nebraska at § 18-2203; § 23-385.

76/ Ch. 238, 1977 Laws, S. 311.

77/ § 12-2006. See also California at § 53066; Nebraska at § 18-2201; § 23-383.

The provision may place too great a burden on the local community. It is one thing to require such an extensive local regulatory pattern in Wichita, Kansas City, or Topeka; it is something entirely different to require the adoption and enforcement in Sharon Springs.78/

Very little statutory material is devoted to the easement question. Tennessee requires that the cable operator obtain the same easements as obtained by preexisting utilities, while South Carolina places a burden on utility companies to make certain that new easements consider cable.79/ California also treats it, but that very statutory section raises jurisdictional questions.80/

One existing section of the Nebraska municipality authorization (but not of the county authorization) is unique among state statutes, in its provision that all systems

> shall be required to carry all broadcast signals as prescribed by franchise and permitted to be carried by Federal Communications Commission regulations during the full period of the broadcast day of its stations.81/

78/ 1970 population 1,012.

79/ Tennessee at §§ 4303 and 4305; South Carolina at § 58-12-40.

80/ § 53066. See Danielson and Wheeler, supra note 2, at 568-70.

81/ § 18-2201. Compare with Nebraska at § 23.383.

Such a provision has been preempted by specific regulations of the FCC.[82/] A somewhat similar superfluous section is included in the Tennessee statute, requiring subscriber complaint procedures -- duplicating an FCC requirement.[83/]

(d) Privacy, defamation, censorship, and obscenity

This multitude of sins has received virtually no treatment in statutory terms. A cable system whose access channels carry a program invading someone's privacy or defaming a person or which might be obscene will not necessarily avoid liability as the carrier. But, by the same token, the operator cannot censor the program.

Maine appears to be the single non-regulating state to provide an exemption to the cable operator for the unwitting carriage of obscene or defamatory material or invasions of privacy. The exemption applies only to those programs not originated or produced by the system.[84/]

One state includes cable in its protection for newsmen, protecting a cable reporter from having to reveal his sources; Nebraska has put cable television specifically in its newly-enacted shield law.[85/]

82/ See, e.g., 47 C.F.R. § 76.61(b)(2).

83/ § 4307.

84/ § 2151-2-I. But see text at notes 228-237, infra.

85/ § 20-146.

(e) Transfer, renewal, amendment, termination and revocation of franchises

The non-regulating states generally have ignored the very major problem of control over the franchisee once operation is begun, leaving it to the sole discretion of the franchising authority. The FCC, however, has termed this general area as one "fraught with difficulties."[86/] Part of the problem with the first of these issues -- transfer -- is the lack of definition: What constitutes a transfer? For instance, what is effective control of a publicly-held corporation? At what point of stock acquisition has control been transferred? However, if the terms of the franchise are not violated, is there a valid local concern with any transfer?

The last two aspects -- termination and revocation -- are integrally involved with the powers that local authorities may exercise over the franchisee. While local communities would likely have some implicit rights of termination, other questions exist: what procedures are to be used; should compensation be paid (and how much); who should decide; must service cease or continue?

Yet, only the most general provisions in state statutes deal with franchise amendment or revocation. Arizona, for instance, allows the municipality or the county to amend the

---

86/ Clarification of Rules and Notice of Proposed Rule Making in Docket No. 20018-24, 39 F.R. 14288, 14296, 46 F.C.C.2d 175, ___, 29 R.R.2d 1621, 1647 (1974).

franchise to bring it into conformance with the regulations for the Federal Communications Commission.87/ The Arizona franchising authority is also specifically allowed to

> terminate a license according to its terms and conditions [if] a license holder is in default thereunder.88/

Similar provisions are included in the New Hampshire statute, which states

> Any franchising authority is hereby authorized to grant, renew, amend or rescind for cause franchises for the installation and operating of cable television systems in accordance with the provisions of this chapter within the geographical limits of its respective town or city. 89/

(f) Abandonment

Given the relative youth and the lure of economic viability of the cable industry, it is doubtful that any significant abandonment problem has existed to date. Therefore, the fact that only two non-regulating states -- Maine and Kansas -- deal with the problem is not surprising; the regulating states deal with it much more extensively.90/

The Maine statute does not allow abandonment without prior written notice to the franchising municipality, but this

---

87/ § 9-508(d).

88/ § 9-508(e).

89/ § 53-C: 3. See also Iowa at § 364.2(4)(b).

90/ See text at notes 268-270, *infra*.

is weakened since prior written consent is necessary only where it is required by the municipal franchise.91/ Kansas allows the municipality to fix regulations dealing with abandonment.92/

(g) Exclusivity and competition

Although the economics of the cable industry virtually preclude competition in traditional cable services, statutory provisions differ between the non-regulating states and the regulating states. While a non-exclusivity requirement is commonplace in the regulating states,93/ few non-regulating states specifically do not allow an exclusive franchise to be given.94/

Of all the states -- regulating and non-regulating -- Maine appears to be the only one which specifically allows the grant of an exclusive franchise.95/ Since Nebraska's county provision specifically precludes counties from granting exclusive franchises and an almost verbatim city provision is silent, Nebraska cities by implication may grant exclusive rights.96/

The South Carolina statute uniquely looks at a different aspect of competition: cable vs. conventional television.

91/ § 1901(I).

92/ § 12-2006.

93/ See text accompanying notes 271-274, infra.

94/ See, e.g., Iowa at § 364.2(4)(a); Nebraska at § 23-384.

95/ § 1901(H).

96/ Contrast Nebraska at § 23-384 with § 18-2201.

Section 58-12-110 prohibits any regulated cable system from obtaining an exclusive contract to originate athletic events of a state-funded "institution of higher learning"--anti-siphoning legislation on a state level.[97/]

Other Provisions

(a) Line extension

Only one state -- Tennessee -- appears to have treated any portion of the important line extension question. Tennessee specifically limits the authority of a county to require a franchise if no customers are served, if the construction is on public land, or through private easements.[98/]

(b) Rate oversight

The South Dakota, Kansas, Nebraska and Virginia statutes specifically allow the franchising authority to oversee rates.[99/] These provisions have an important function. During the term of the franchise, approval of rate is the key element of control of the franchisee. By conditioning rate approval, franchising authorities can exercise control over the performance of the system in all respects. Not only does inclusion in the statute indicate a

---

97/ § 58-12-110. But see Home Box Office, Inc. v. FCC, supra note 21.

98/ § 4302(d). See text at notes 317-320 infra.

99/ South Dakota at § 9-35-20; Kansas at § 12-2008; Nebraska at § 18-2201; § 23-383; Virginia at § 15.1-23.1.

policy decision by the state, it further removes any potential legal impediment to municipal control over the rates.

None of the four statutes speaks in terms of the form of rate regulation. Therefore, PUC-type rate-of-return regulation, for instance, might be imposed by the municipalities, subject, of course, to attack as being confiscatory.

(c) Local fee collection; taxation

The right of the franchising authority to collect a fee for allowing cable operation is recognized in Arizona,[100] California,[101] Kansas,[102] Maine,[103] New Hampshire,[104] and Virginia.[105] The collection of these fees could pay for the imposition of a local regulatory scheme, thereby relieving the cost of cable regulation to the community or even producing revenue for it. The FCC has placed a limit of three to five percent of gross revenues on the amount to be collected for the franchise.[106] This, however, can be only part of the burden of fees on the system.

100/ § 9-506(b).

101/ § 53066.

102/ § 12-2010.

103/ § 2151-2-H.

104/ § 53-C: 4.

105/ § 15.1-23.1.

106/ 47 C.F.R. § 76.31(b).

Obviously, another very distinct method of regulating cable in a non-regulatory atmosphere is through the tax laws.[107/] At least ten of the thirty-nine non-regulating states have specific provisions dealing with cable and taxation. One commentator has suggested that:

> thus far, taxing statutes seem to regularly classify cable with the telephone, gas, and electric utilities. 108/

Included are the imposition of a sales tax on service,[109/] or exclusion from sales tax.[110/] In addition, some states treat cable in terms of occupation,[111/] business or gross income,[112/] or property taxes.[113/]

107/ "[T]here does not appear to be any doubt that state and local taxes inhibit the growth of cable systems." Smith, Local Taxation of Cable Television Systems: The Constitutional Problems, 24 Cath. U. L. Rev. 755, 757 (1975).

See Levine, The Regulation of Cable Television Subscriber Rates by State Commissions, Harvard University Program on Information Resources Policy, Publication P-78-6, July 1978.

108/ Smith, id. at 763.

109/ See Indiana at § 6-2-1-38(n); Wisconsin at § 77.52(2)(a)(12). Florida recently amended its law to remove local sales tax authority, but allowed the levy to continue to meet bond obligations issued prior to May 4, 1977. Florida at § 166.231. In addition, a state sales tax at four percent continues. Florida at § 212.05(5).

110/ Louisiana at § 47:305.16; Mississippi at § 27-65-23.

111/ South Dakota at § 9-35-22; Nebraska at § 18-2204; § 23-386.

112/ Nebraska at § 77-2702(4)(b)(iv).

113/ Arkansas at § 84-103.1; Arizona at § 42-124.03; Kentucky at § 132.020.

A difference appears to exist in how the taxation is formulated. If a sales tax, for instance, is permitted to be passed through to the subscribers, it could have little effect on the system's ability to operate; it is simply seen as the state's effort to gain more revenue. On the other hand, an "occupation," "business" or "property" tax would probably be included in the basic cable rate (which may, of course, be subject to local approval); an attempt to pass it through would be perceived as an attempt to increase rates.

Absent this public perception, the net effect is the same. The FCC has indicated its concern that cable systems should not be unduly burdened by fees and taxes:

> Several jurisdictions are now attempting to impose a "use tax" as well as a fee for cable television service. It would appear that such a tax, particularly when its purpose is described as general revenue raising, results in the same potential harm we are attempting to avoid by imposing a franchise fee limitation....The burdens and obstructions to the growth of a viable nationwide communications grid remain the same whether imposed via a fee or a tax mechanism. 114/

(d) Public ownership

At least two non-regulating states have expressly allowed public ownership of cable systems. While public ownership remains small, official recognition and encouragement

114/ Supra note 86, at 14298, 46 F.C.C.2d at ___, 29 R.R.2d at 1654.

could prove a serious competitive threat to the industry. Obviously, municipal resources and the obviating of a profit motive are difficult challenges to meet.

North Carolina specifically recognizes that cable television is a "public enterprise". Cities have the authority to construct or own such systems and even to extend them outside the city limits.[115/] Public ownership is also allowed in Arizona.[116/] Interestingly, in neither of these states is there any municipally-owned system.[117/]

(e) Relationships with utilities and other communication entities

Some general concern is paid to the interrelationship with public utilities. For instance, Michigan states that rights given to public utilities are not to be expanded or impaired by cable legislation.[118/] Kansas and Texas specifically exclude public utilities from any provisions of the cable legislation -- and vice versa.[119/]

Of greater concern, however, is legislation dealing with pole attachments. Seven non-regulating states have enacted pole legislation, but only four have specifically mentioned cable

---

115/ § 160A-312.

116/ § 11-771.12(b)(10).

117/ The largest in the nation is in Frankfort, Kentucky.

118/ § 9.265.

119/ Kansas at § 12-2013 and Texas at § 3(C)(2)(a).

television. Given the passage into federal law of Public Law 95-234 -- now Section 224 of the Communications Act -- in February 1978, much activity can be expected on the state level. Section 224 gives the FCC authority to regulate the rates, terms, and conditions of pole attachments, except where a state certifies to the FCC that the state is regulating those areas.

The most significant of the state laws is the pole attachment bill passed in California in 1977.[120/] The legislation provides for a resolution of pole attachment disputes by the Public Utilities Commission. Where a public utility and a cable system are unable to agree upon rates, terms, or conditions for attachments, then the question is thrown into the PUC for resolution. Of particular importance, however, is that the PUC's ratemaking authority appears to be severely limited. It may set a rate anywhere between a low rate of the incremental costs ("all the additional costs of providing and maintaining pole attachments") or a high rate of the fully allocated costs

> (the actual capital and operating expenses, including just compensation, of the public utility attributable to that portion of the pole...used for the pole attachment...)

120/ S.B. 177 was signed into law on September 21, 1977. It adds § 767.5 to the Public Utilities Code.

The legislation was amended during the course of the debate to include a payment factor for support and clearance space. 121/

Tennessee, on the other hand, is not nearly as comprehensive. 122/ It places a burden on the cable franchisee to use existing utility facilities (and, by the same token, implicitly places a burden on the utility to allow its facilities to be used). No authority to regulate rates is included. In Utah, the Public Service Commission may prescribe conditions for joint use of right-of-way easements by utilities and cable TV companies. 123/ South Carolina requires cable companies to enter into pole attachment contracts "where possible and practicable" and makes the cable operator liable for costs of moving utility facilities which the cable is using. 124/

121/ "Support space" is that footage underground needed to support the weight of the pole; "clearance space" is footage above ground needed to provide safe passage beneath the lowest wire.

Soon after the effective date of the legislation, California operators were considering taking "appropriate" legal action. See *Variety*, Feb. 15, 1978, at 54; *Vue*, Feb. 20, 1978, at 5.

122/ § 4303.

123/ § 54-4-13(2).

124/ § 58-12-10 and § 58-12-20.

See generally, Briley, *Cable Television: Pole Attachment -- State Law and Court Cases*, (FCC, March 1977).

(f) Relationships with education

Virginia and South Carolina appear to be the sole non-regulating states which have expressed any concern for the educational impact of cable television. The Virginia statute states:

> In exercising the powers granted in this section, the governing body shall conform to minimum standards with respect...to the use of channels set aside for general and educational use which shall be adopted by the Virginia Public Telecommunications Council...; such minimum standards being for the purpose of assuring the capability of developing a state-wide general educational telecommunications network or networks; provided, however, that the owner-operator of any community antenna television system shall not be required to pay the cost of interconnecting such community antenna television systems between political subdivisions. 125/

The intent of the Virginia provision is to call statutorily for a state-wide plan taking advantage of cable to "fill in the gaps" of educational broadcasting. The purpose is two-fold: the use of educational access channels and a more comprehensive pattern of coverage.

South Carolina requires an annual payment by cable systems to be used for educational purposes and the dedication of a

---

125/ § 15.1-23.1.

channel to be used by the South Carolina Educational Television Commission.126/

(g) Theft of service

At least seventeen of the thirty-nine non-regulating states have enacted theft of service statutes specifically dealing with cable television.127/ Statutes dealing with theft have been the most commonly enacted legislation in the non-regulating states. Indeed, in some cases, existing theft statutes have been refined and amended.

Generally, theft laws deal with illegal taps, with Washington's being the most explicit, barring any tap connection "excepting from the wall outlet to the set."128/

126/ § 58-12-90.

Notwithstanding the absence of like statutes in other non-regulating states, ETV authorities often have worked closely with the cable industry. Moreover, the rules of the FCC virtually dictate that the cable operator cooperate with the local and state educational authorities. See, e.g., 47 C.F.R. §§ 76.11(a), 76.13(a)(6), 76.61(a)(2). But see Midwest Video Corp. v. F.C.C. and U.S., ___ F.2d ___, 42 R.R.2d 659 (8th Cir. 1978).

127/ Arizona at §§ 13-3707 and 13-3712; Arkansas at § 41-2204; Kansas at § 3752; Maine at § 2508; Georgia at § 9902; Missouri at § 569.010; New Mexico at ch. 95, 1977 Laws; California at § 593(d); Florida at § 812.14; Indiana at § 35-17-6; Montana at § 94-6-304.1; North Carolina at § 14-155; Washington at § 9.45.250; Tennessee at § 4308 (See Vue Magazine, June 30, 1977, at 11); Ohio at §§ 4933.42 and 4933.99, (See Variety, July 24, 1977, at 44); Virginia at § 18.2-165; Maryland at § 27-194(b).

128/ § 9.45.250.

The Indiana and Montana statutes also ban deceptive acts to obtain service.[129/] This more comprehensive form would make illegal, for instance, a false credit report, designed to induce the cable system to offer service.

Maine's former theft of service statute specifically mentioned CATV,[130/] but more general legislation was subsequently passed.[131/]

III. REGULATION IN REGULATING STATES

Definition of Cable Television Systems

From a technical standpoint, the statutes adopt various forms of definition, ranging from Vermont's simple definition[132/] to Alaska's twenty-first century definition.[133/]

129/ Indiana at § 35-43-5-3(b)(6); Montana at § 94-6-304.1(3).

130/ § 2508 (now repealed).

131/ §§ 805-06.

132/ § 501(2) states:

> "Cable television system" means a system by which television signals are received from one or more central locations and for consideration are transmitted to customers or subscribers by means of cables or wires.

133/ § 42.05.701(8) states:

(Footnote 133/ continued on page 39)

For system operators and regulators in regulating states, the definitional question is crucial -- more crucial than for the non-regulating states, since the very pervasiveness of the regulation will affect more systems in more ways. For example, a Wisconsin MATV system carrying distant signals and pay-cable may not be particularly concerned at coming under that state's rather limited regulation. 134/ But a New York MATV carrying distant signals and pay-cable would be seriously concerned about coming under the extensive jurisdiction of the New York State Cable Commission. 135/

They key factor from a definitional standpoint is the reception and transmission of television signals. In each of the eleven states -- except Alaska 136/ -- the statute specifi-

---

(Footnote 133/ continued from page 38)

> "Telecommunications" means the transmission and reception of messages, impressions, pictures and signals by means of electronic, electromagnetic waves and any other kind of energy, force variation or impulses whether conveyed by cable, wire, radiated through space or transmitted through other media within a specified area or between designated points.

134/ See note 32, *supra*.

135/ See e.g., text at notes 145-46, *infra*.

136/ For the purposes of this study, Alaska may be virtually ignored. Cable regulation is melded totally into PUC regulation, with only two brief mentions of "telecommunications", in the instant definition section and at the text at note 316, *infra*.

cally incorporates a reference to the cable system's use of television signals. 137/

Some of the states, however, wisely have gone beyond limiting the definition to the reception and transmisison of television signals. While in the present relatively nascent stage of the cable industry, a reliance on television transmission for jurisdictional purposes may be sufficient, developments in the industry already have raised questions as to the sufficiency of a definition which is based solely on television signals. For instance, an otherwise-excluded MATV system in New York 138/ could still come under the New York Commission's jurisdiction, since that body has jurisdiction over systems carrying television (or radio) signals "or any other programs originated by a cable television company or by any other party...." [Emphasis added.] 139/ While Hawaii's jurisdictional attempt seems secure for the foreseeable future -- broadcast signal redistribution need only be

137/ New York at § 812(2); Minnesota at § 238.02(3); Massachusetts at § 1(b); Connecticut at § 16-330; Nevada at § 711.040(1); Vermont at § 501(2); Rhode Island at § 39-19-1; New Jersey at § 5A-3(d); Delaware at § 102(4); and Hawaii at § 440G-3(3).

138/ Supra note 32.

139/ § 812(2). Contrast this, however, with the almost identical Minnesota statute where the provision dealing with "other programs originated" does not stand as an independent basis for jurisdiction. Minnesota at § 238.02(3).

the "primary function" 140/ -- it is not inconceivable that at some point in the future the redistribution aspect could play less than the primary role of the system.

Generally, the statutes track either the Federal Communications Commission's definition or one relating to the use of the public roads. 141/

One attempt to broaden the scope of state regulation to prohibit the first of the "blue-sky" services -- pay-cable -- was legislatively approved in Connecticut but vetoed by the governor. 142/

Establishment of Standards

(a) Due process

The "catchall" due process requirement actually boils down to concern for the public (and potential competitors) as well as protection for the franchise itself. The former, however, is much more extensively treated than the latter in the statutes. The dual concern is complicated by these due

---

140/ § 440G-3(3).

141/ See text at notes 28-29, *supra*.

142/ Public Law 74-147; *vetoed*, May 9, 1974.

process requirements being necessary in both municipal actions and commission actions. Where the municipality awards the franchise, special provisions may exist dealing with that award; separate and distinct provisions deal with subsequent commission action. 143/

The sole FCC concern has dealt with due process to protect the public's interest in the award of the franchise. But even the FCC did not lay out strict guidelines. It merely required that there be a recitation by the franchising authority in the Certificate of Compliance application that

> the franchisee's legal, character, financial, technical, and other qualifications, and the adequacy and feasibility of its construction arrangements, have been approved by the franchising authority as part of a full public proceeding affording due process. 144/

Therefore, a statement reciting that the above was performed was sufficient and the FCC did not go beyond it. Indeed, it became virtually a self-fulfilling concept, since anything the

---

143/ Obviously, where the commission awards the franchise, the latter provisions merge. So, **Nevada at § 711.130** and **Rhode Island at § 39-19-8** have language requiring the granting of due process hearing rights where there is a revocation or alteration of the existing certificate.

144/ See former 47 C.F.R. § 76.31(a)(1). The FCC suggested certain procedures be followed in its Clarification of Rules and Notice of Proposed Rulemaking, 39 F.R. 14288, 14293-94, 46 F.C.C.2d 175, ___, 29 R.R.2d 1621, 1640-42 (1974).

local authority termed "due process" was "due process" by FCC standards. Therefore, a city council granting a franchise upon a single reading without any deliberation could easily suffice.

Given the rather cursory FCC treatment in the past and the non-existent treatment in the present, a regulating (or even non-regulating) state would do well to specifically address the problem. This has been done by the commission states; the PUC states have examined it in the context of the more general public utility statute.

Among the commission states, New York requires that its commission set standards for local communities in their issuance of franchises. These standards must include an invitation to compete for the franchise, the filing of applications, the holding of a hearing, a written report pursuant thereto, and other procedural standards.[145/] Minnesota merely states that the commission require local communities adopt certain procedures, including an invitation to compete for the franchise and a requirement that the invitation set forth the municipality's "criteria and priorities."[146/]

While the Massachusetts statute contains perhaps overly explicit notice requirements, it further provides one unusual aspect of due process whose benefit would run

---

145/ § 815(2)(a).

146/ § 238.05(2)(a).

primarily to disappointed applicants. The local authority must explain its decision, issuing a public statement, which must contain "the reasons for its acceptance or rejection of any or all applications." [Emphasis added.] 147/ It is quite possible that this requirement to explain not only why one party was selected but specifically why other parties were not selected could be burdensome on the local authority, especially if there are a large number of applicants.

New Jersey, alone among the PUC states, has specific provisions dealing with the award by a municipal governing body of a local consent, since it is the only PUC state that has dual functions, allowing a local entity to participate in the regulatory process. 148/ The only other PUC states recognizing any local jurisdiction -- Delaware, which allows incorporated municipalities to grant franchises completely apart from any PUC consideration -- sets no specific provisions for due process in the granting of those municipal franchises. 149/

Protection of the due process rights of the cable operator -- as opposed to the public -- is offered within the general context of the statute. Therefore, the cable operator is on

---

147/ § 6.

148/ See, e.g., § 5A-23.

149/ Where the franchise is granted by the Commission, due process procedures are in fact set out. See §§ 601(c), (d), 603(a), 606(a), (b).

notice as to what obligations he will incur and what penalties he may suffer.

(b) Franchises, consents, licenses and certificates

The FCC has imposed the specific duty on all prospective cable operators to obtain a franchise "or other appropriate authorization." 150/ In some cases involving systems which existed prior to legislation ("grandfathered" systems), operators neigher sought nor obtained local (or state) authorization; however, the FCC has warned that no Certificate of Compliance will be granted without the appropriate authorization. Moreover, the FCC has warned that where a franchising authority has the power to grant a franchise and refuses to do so, a Certificate will not be issued. 151/

This latter point incorporates the full federal power into the local or state authorization process. If a state establishes the right to grant a franchise in the municipality, there is no way the cable system will be able to legally commence operation without it. The same is true of subsequent state approval.

Perhaps because of the joint authorization concept embodied in the commission statutes, these three states -- New York, Minnesota, and Massachusetts -- play a secondary role in the franchising of cable operators: all require a local fran-

---

150/ *Supra* note 86, at 14293, 46 F.C.C.2d at ____, 29 R.R.2d at 1638.

151/ *Ibid*.

chise by the operator.[152/] As a general concept, cable operators are required to seek approval for their operations.[153/]

Traditionally, the PUC states have simply taken the entire franchising or certificating function away from the local community.[154/] However, recognizing perhaps the unique aspects of cable television within the PUC ambit -- most particularly, quality of communication and the potential future uses -- two of the more recent legislative attempts in the PUC states have developed a "hybrid" form of franchise-granting. While the New Jersey PUC still authorizes operation, the legislature required a more local consent:

152/ New York at § 819(1); Minnesota at § 238.08(1) and Massachusetts at § 3.

Barnett referred to the Massachusetts function as "appellate" rather than "coordinate" with the local grant. Barnett, State, Federal and Local Regulation of Cable Television, 47 Notre Dame Law. 685, 808 (1972).

153/ Minnesota's statute appears to impose an affirmative duty on the municipality, rather than on the cable operator. The statute says:

> A municipality shall require a franchise of any cable communication system providing service within the municipality.

§ 238.08(1). Therefore, with a grandfathered system, the burden well may be on the local community to obtain the consent of the already-existing operator as opposed to the operator having the burden of moving forward.

154/ See, e.g., Connecticut at § 16-331(a); Vermont at § 503(a); Rhode Island at § 39-19-3; Hawaii at § 440G-4. But see Nevada at §§ 244.185; 266.305; 268.085; and certain "franchising" rights (dealing with the use of property, such as streets) and § 711.090 which gives the PUC the right to grant a certificate of public convenience and necessity.

> In any case where a CATV company operates or proposes to operate in a municipality or municipalities where facilities are to be placed in, along, beneath or over highways and other public places, no certificate of approval for such operation shall be issued without a municipal consent being first granted therefor by resolution of the municipal governing body. 155/

In Delaware, an even more innovative approach has been developed. The state PUC is authorized to grant franchises in areas outside the incorporated municipalities.156/ In fact, the Delaware legislature appears to have taken pains to authorize incorporated municipalities to move forward with their own franchise grants. The PUC action is limited to areas outside the boundaries of incorporated municipalities

> which...have the power either express or <u>implied under their charters to grant franchises for a system</u>.... [Emphasis added.] 157/

The statute does not appear to grant any authority to the PUC to grant a franchise within the boundaries of an incorporated municipality where that municipality does <u>not</u> have the express or implied powers under its charter. And while one may assume that municipalities will attempt to assert jurisdiction, the question naturally is raised as to whether a vacuum exists

---

155/ § 5A-22. But, § 5A-17 provides for operation where municipal consent has not been granted.

156/ § 601(b).

157/ See § 601(a).

where neither the municipality nor the PUC can grant a franchise. It is possible that this question is answered by Section 608 which not only allows the PUC to modify a franchise granted by an incorporated municipality, but also allows the PUC to award a franchise if actions of the incorporated municipality are not in the public interest.

(c) Term of franchise; grandfathering

The Federal Communications Commission attempted to preempt substantive consideration for franchise duration by limiting the duration of the franchise to fifteen years with a non-automatic "reasonable" renewal period.[158/] The fifteen-year period apparently was reached through some sort of consensus, since no rationale was offered for it in the Cable Television Report and Order.[159/] Of the five states that in fact identify a term, Massachusetts,[160/] New Jersey[161/] and Delaware[162/] all specifically adopt the fifteen-year term identified by the FCC, although Delaware adds the caveat that it will allow "such other maximum as the Federal Communications Commission will allow."[163/]

158/ See former 47 C.F.R. § 76.31(a)(3).

159/ *Cable Television Report and Order*, 37 F.R. 3252, 3276, 36 F.C.C.2d 143, 208-09, 24 R.R.2d 1501, 1577. However, in the 1971 Letter of Intent, the FCC noted the reasons for selecting a fifteen-year period. In *Re Commission Proposals for Regulation of Cable Television*, 31 FCC 2d 115, 137-38, 22 R.R.2d 1755, ___ (1971).

160/ § 3(d).

161/ § 5A-19. The municipal consent is also limited to fifteen years. See § 5A-25.

162/ § 604(d).

163/ *Ibid*.

Such a consideration could become more important now that the FCC merely retains fifteen years as a non-mandatory guideline.[164/]

While Hawaii's statute indicates a twenty-year franchise term,[165/] this statute was enacted prior to the adoption of the Cable Television Report and Order.[166/] While its validity could have been questioned before, it would appear to be legal now.

Minnesota, on the other hand, has chosen to adopt a ten-year term for franchises granted in that state,[167/] notwithstanding the argument long made by the cable industry, that such a franchise term is simply too short for financial viability.

With PUC states (other than New Jersey, Delaware, and Hawaii), the term may cause a problem, since public utilities generally operate for an indefinite duration.[168/]

While the Rules of the Federal Communications Commission[169/] do not specify any renewal term -- guidelines stating that it

---

164/ See Report and Order in Docket No. 21002, 42 F.R. 52404, ___, 66 F.C.C.2d 381, ___, 41 R.R.2d 885, 900 (1977).

165/ § 440G-8(d).

166/ Supra note 159.

167/ § 238.09(6). In the Cable Television Report and Order, the FCC noted some support for franchise periods of less than fifteen years. Cable Television Report and Order, supra note 159.

168/ Muth Dissertation at 149.

169/ 47 C.F.R. § 76.31.

be of "reasonable duration" -- each of the states identifying a renewal term for new franchisees has selected a ten-year period.[170/] Delaware again has pegged its adoption of a term to the maximum allowed by the Federal Communications Commission's regulations[171/] -- although in this case, the regulations of the FCC are silent.

Any state proposing to engage in regulation in the future will have to struggle with the same grandfathering consideration of the states currently regulating. In the commission states, the legislatures recognize that there could be three potential grandfathering situations: in operation or under construction with a local franchise; in operation or under construction without a local franchise; or merely holding a local franchise.

To its credit, New York statutorily treated all three of these situations. Those in operation or under construction with a locally-granted franchise were given eighteen months in which to file and were granted state certificates with five-year initial and renewal terms.[172/] The Minnesota legislature set a grandfathering date of May 24, 1973; any system constructed but not in operation could receive a ten-year certificate from the

---

170/ Minnesota at § 238.09(7); Massachusetts at § 13; New Jersey at § 5A-25.

171/ § 604(d).

172/ § 821(6).

state, 173/ while any system constructed and in operation received a five-year Certificate of Confirmation.

For non-franchised operating systems, New York required a filing some seventeen months after the grandfathering date. If no filing was made by that time, the cable system was to be ordered to shut down (however, this provision could be waived by the New York Commission). 174/

Finally, in dealing with grandfathered, but unconstructed franchises, different problems occur. Since there is concern with this type of prior-issued license, New York declared them to be "contrary to the public interest and intent of such franchise," if not exercised by January 1, 1973. The New York statute appeared to create a presumption of invalidity, absent

> an adequate showing that substantial performance was precluded by circumstances beyond the reasonable control [of the franchise holder]. 175/

Minnesota, on the other hand, did not appear to be as antagonistic to franchise-setting as New York. In fact, a routine application for a Certificate of Confirmation would be allowed and a Certificate granted for a ten-year period; nothing in the

---

173/ § 238.09(4). Query why a system would not have waited to commence operation if its construction was completed sometime shortly before May 24, 1973.

174/ § 821(8).

175/ § 821(7).

statute appeared to preclude a franchise holder from continuing to "sit" on its franchise.

Massachusetts did not make any statutory distinction among the three different factual situations, but simply required an application within thirty days of the statute's effective date. 176/

All of the PUC states had grandfathering provisions written into their statutes, except Connecticut and Rhode Island. Since no systems existed in Connecticut or Rhode Island at the date of the statutory enactment, there probably was no need to treat any grandfathering question.

On the other hand, Delaware had to be concerned with non-franchised systems operating outside municipalities, since no authority for franchise-granting had existed for these non-municipal areas. These systems were required to file for a certificate within ninety days of the statute's enactment. 177/ For those systems operating inside incorporated municipalities, there was no need to establish grandfathering requirements, since the PUC was not taking jurisdiction over them in any case.

The remainder of the states merely required existing grandfathered systems file within a ninety-day period. 178/

176/ Massachusetts Statutes of 1971, Ch. 1103, § 4.

177/ § 607.

178/ Nevada at § 711.100; Vermont at § 503(a); New Jersey at § 5A-17(f); Hawaii at § 440G-5.

(d) Qualifications

In setting out the qualifications for the selection of the franchisee, no substantive differences appeared in the statutes whether the franchisee was being selected by the local community or by the state's PUC. With the exception of Minnesota -- which left the franchisee selection totally to the municipality 179/ -- each of the other states which identified the kinds of qualifications to be weighed 180/ specifically stated financial capability and character-suitability-citizenship. In addition, technical competence was also identified by half of those listing the kinds of qualifications sought.

Indeed, this area may be a perfect example of general statutory language which may not accurately reflect the law's application. To require, for instance, that the franchising authority consider the applicant's character and suitability would give little, if any, guidance in answering questions concerning the choice of the franchisee, but by the same token, the very absence of statutory criteria allows the municipalities, for example, to choose on the basis of what is best for their community.

(e) Technical provisions

Perhaps more than in any other area, state legislation has avoided technical provisions. Not only is the technical

---

179/ § 238.05(2)(b).

180/ The Vermont statute was silent on the matter.

area arguably beyond the competence of the legislators, but statutory provisions well might freeze the state of the art.

The sole regulating state dealing with technical provisions is Delaware, which requires that a system must be constructed in compliance with technical safety codes and be maintained in a safe condition. 181/

In addition, the New York statute requires that standards be set by the Commission for adoption by municipalities 182/ as to minimum specifications for equipment, among other things.

(f) Financial qualifications

Review of the financial integrity of a system can be extremely important. For example, a company may be too thinly capitalized and be forced to borrow at exorbitant rates -- thereby creating a financial burden, or be forced to give up an equity position -- thereby changing the ownership of the system. Notwithstanding this threshold consideration, little statutory concern is paid.

While each of the PUC states indicates that the financial responsibility of the applicant will be investigated or, alternatively, a statement submitted as to the proposed financing, only Delaware's regulatory structure indicates specific information sought. The Delaware statute requires a statement

---

181/ § 604(k). See also New Jersey at § 5A-10(a).

182/ § 815(4).

including a current balance sheet, total estimated cost of construction, and a construction and operation financial plan. In addition, the Delaware statute requires that where a financing plan will be used, "the actual availability of such sources of financial assistance" must be demonstrated.[183/]

In addition, the New York statute contains a provision similar to the PUC states, requiring the Commission to prescribe standards by which the franchising authority can determine the financial ability of the applicant,[184/] while the Massachusetts statute gives authority to the Commission to decide what information it needs to ascertain the applicant's financial qualifications.[185/]

The Minnesota statute contains no provisions dealing with financial qualifications. This, like other qualifications, is left up to the municipality.[186/]

(g) <u>Construction</u>

Pursuant to the FCC's former rules,[187/] a construction schedule had to be made known and an "equitable and reasonable"

<u>183/</u> § 602(g).

<u>184/</u> § 815(2)(c)(ii).

<u>185/</u> § 4.

<u>186/</u> <u>Supra</u> note 179.

<u>187/</u> See former 47 C.F.R. § 76.31(a)(1), (2).

amount of the franchise territory had to be wired annually. Perhaps because of the FCC's (albeit general) involvement, the states did not devote considerable statutory attention to construction questions. On the other hand, statewide statutory standards may not be the most appropriate way of dealing with problems so integrally tied up with local considerations. For example, in Massachusetts the problems of wiring Boston are much different than those of wiring rural Franklin County.

Nevertheless, the Massachusetts construction provision is the most specific. For instance, while the standards of construction simply are those of the FCC and the Massachusetts Commission,[188/] the Massachusetts legislature went so far as to include provisions whereby the licensee agrees to avoid "all unnecessary damage and injury to trees, structures, and improvements...."[189/] Moreover, the Massachusetts statute is the only legislation which imposes a specific term for completing construction -- six years after the license is granted.[190/] (At least a technical legal question raised by

---

188/ § 8.

189/ § 5(a). See also Hawaii at § 440G-6(b)(1).

190/ § 5(n). But at the same time, § 5(m) requires that not less than ten percent of the service area be wired annually. Other statutes merely require a reasonable construction period, e.g., New York at § 815(2)(d)(iii), or merely require that the construction plan be included in the terms of the franchise, e.g., Delaware at § 604(c).

this statutory provision may now be mooted. Notwithstanding the FCC's recommendation of twenty percent per year (or five years),191/ the Rules of the FCC specifically called on the franchising authority to set any standard.192/ In Massachusetts, however, it was the legislature which has set the standard -- not the Commission and not the local municipality.)

In the general oversight of the construction plans, a number of the PUC states have seen fit to regulate on the basis of facilities placed along public highways. New Jersey, for instance, states:

> Upon obtaining the prior approval of the board, a CATV company may construct and maintain the wires, cables, and conduits necessary to its business upon, under or over any highway, and may erect and maintain the necessary fixtures, including poles and posts, for sustaining such wires and cables. 193/

Delaware is the only statutory state which answers at least one of the major construction problems in the cable industry -- easements. In Section 613, the Delaware statute grants easements to a franchisee for the purpose of constructing or operating any facilities, but sets the pre-condition that the lands or waterways subjected to the easement already have on them other facilities owned or maintained by a public utility.

191/ *Supra* note 159, at 3276, 36 F.C.C.2d at 208, 24 R.R.2d at 1526.

192/ See former 47 C.F.R. § 76.31(a)(2).

193/ § 5A-20(a). See also Connecticut at § 16-331(a); Rhode Island at § 39-19-2; Delaware at § 612.

Finally, Connecticut uniquely has concerned itself with one CATV problem, creating authority within the Power Facilities Evaluation Council (PFEC), to regulate construction of cable facilities.[194/]

(h) Territory

Particular area grants will be no larger than co-extensive with jurisdictional boundaries. By definition, a city will not grant a franchise for an entire county. Therefore, the "issuing authority" in Pittsfield, Massachusetts is not about to franchise the whole of Berkshire County. Likewise, the City of New Haven will not attempt to grant a franchise, since the Connecticut PUC has franchising jurisdiction. Given this broad consideration, a lack of statutory attention to areas of service is not surprising.

Of the three commission states, only Minnesota appears to pay any significant degree of attention to the area being served by a franchisee. That state, recognizing the vast unpopulated areas on the one hand and the heavy concentration of population in the Twin City area on the other, has statutory provisions taking both of these circumstances into account.[195/] The New York and Massachusetts statutes do not appear to be considerably concerned with territories, perhaps given both

---

194/ § 16-50(g).

195/ § 238.05(6) and (7).

the award by the local communities and the relative density of populations.

On the other hand, it may be surprising that more attention to areas of service is not paid in the statutes of the PUC states. Only in Rhode Island,196/ New Jersey 197/ and Hawaii 198/ do the cable statutes specifically give authorization to the Public Utility Commission to amend the proposed service area. Obviously, however, the initial grant of authority to operate implicitly covers the question of service area.

(i) Service; operation

Statutory provisions dealing with service and operation of systems generally are so broad as to be nearly meaningless. It is not a taxing requirement to have the statutory duty of providing "adequate service." Nor is it of great statutory guidance to a commission or PUC to be instructed to adopt standards "to serve the public interest." (However, oftentimes, these are subsumed within subscriber complaint procedures.) 199/

Among the commission states, the New York Commission is statutorily empowered to

---

196/ § 39-19-6.

197/ § 5A-17.

198/ § 440G-8(c).

199/ See text accompanying notes 344-345, *infra*.

> prescribe standards...designed to promote...safe, adequate and reliable service to subscribers. 200/

An even less strict standard is set in Minnesota where the Commission is empowered to prescribe "minimum standards for operation" of the system, taking into account the size of the particular system. 201/

The statutory requirements in the PUC states are no less broad. In Connecticut, for instance,

> the [PUC]...may specify such terms and conditions as the public interest may require. 202/

There is, of course, the corresponding duty on the part of the cable system to offer good service. New York provides:

> every cable television company shall provide safe, adequate and reliable service in accordance with applicable laws, regulations and franchise requirements. 203/

Likewise, Nevada requires that

> every CATV company and every person and organization providing any service, equipment or facilities thereto shall provide save and adequate service, equipment and facilities for the operation of its CATV system. 204/

200/ § 815(2)(d)(i).

201/ § 238.05(2)(b).

202/ § 16-331(a).

203/ § 824(1).

204/ § 711.150(1).

This is not to say, however, that specific duties are never imposed in a cable statute. Nevada[205/] and New Jersey[206/] both have statutory provisions dealing with safety of operations; Delaware statutorily requires that the franchise application include a copy of the proposed subscriber contract[207/] and that the franchisee be allowed to interrupt service only for good cause.[208/]

Massachusetts appears to have gone as far as any state in its statutory statements of operation. Massachusetts's statute includes, among other obligations of the franchisee, provisions dealing with switchers,[209/] notices when a channel has been changed on the cable dial, and on equal opportunity uses by political candidates.[210/]

(j) Channel capacity

The 1972 Cable Television Report and Order of the FCC preempted the technical and channel aspects of cable regulation. Few of the regulating states therefore have paid any attention to channel capacity.

205/ *Ibid*.

206/ § 5A-44(d).

207/ § 602(f).

208/ § 604(f).

209/ Devices which allow the alternative use of the cable or a non-cable antenna.

210/ § 5(h), (i), (j).

In New York, the Commission is required to prescribe minimum channel capacity, as long as it is not contrary to federal law.[211/] The New York Commission is also called upon to develop standards for construction with the maximum capacity which is practicable, implicitly taking into account the size of the system and the community in which it is operating.[212/] The Minnesota statute is more explicit, calling on the Commission to take into account the size of the system in prescribing minimum standards for channel capacity.[213/]

(k) Access channels

Provisions of state statutes dealing with access channels seem to be directly related to whether the regulatory body is a commission or a PUC. Any provision of course is subjected to the FCC's asserted preemption.[214/] Considerable detail went into the FCC's access channel plans in 1972,[215/] but in the years since, the use of these channels in most communities

---

211/ § 815(2)(b).

212/ § 815(2)(d)(iv).

213/ § 238.05(2)(b).

214/ But see Midwest Video Corp. v. F.C.C. and U.S. ___ F.2d ___, 42 R.R.2d 659 (8th Cir. 1978).

215/ Supra note 159, at 3269-72, 36 F.C.C.2d at 189-98, 24 R.R.2d at 1557-65. See also former 47 C.F.R. §§ 76.251(a), now re-codified as 47 C.F.R. §§ 76.252, 76.254, and 76.256.

remained minimal and the FCC scaled down its requirements, 216/ even before the 1978 Midwest Video decision.

None of the traditional PUC regulation states deal with any access provision on a statutory basis. In fact, the only mention of access channels in the non-Commission states is the requirement of the Delaware statute that any franchise application include

> a description of facilities and services... which...the applicant desires to offer to the community, its governmental, educational or service agencies, including complete information concerning any applicable charges for such facilities and services. 217/

Indeed, the provisions of this section can be satisfied even outside the framework of access channels.

The New York and Minnesota statutes call on the commission to prescribe standards for inclusion in franchises specifically dealing with access channels. 218/ Minnesota's statute is somewhat broader in that it calls for uses by government entities, as well as educational bodies and the public, while the New York statute only refers to the latter two. 219/ Further, both states

---

216/ Report and Order in Docket No. 20508, 41 F.R. 20665, 59 F.C.C.2d 294, 37 R.R.2d 213 (1976).

217/ § 602(e).

218/ A much more comprehensive examination of access-related legislation can be found in Muth in 136-38.

219/ Compare Minnesota at § 238.05(2)(b) with New York at § 815(2)(b).

prohibit limitations being placed on the use of the access channels. 220/

Moreover, the Minnesota statute is broader in that it calls on the commission to encourage the establishment of non-profit corporations to facilitate production for the access channels. 221/

The Massachusetts statute is silent concerning access.

(l) Pay channels

In all of the regulatory states, the only apparent specific reference to pay-cable was the Connecticut passage and subsequent veto of Public Law 74-147, which would have barred pay-cable. 222/ In any case, the FCC has attempted to pre-empt all jurisdiction over pay channels. 223/

(m) Two-way capability

As with access requirements, 224/ the futuristic use of cable for two-way communication was addressed by the FCC in

---

220/ Minnesota at § 238.11(2); New York at § 829(c).

221/ § 238.05(16).

222/ Vetoed May 9, 1974. See *supra* note 142.

223/ See *Brookhaven Cable TV, Inc. v. Kelly*, ___ F.2d ___ (Case No. 76-6156) (2d Cir. 1978), *affirming*, 428 F. Supp. 1216 (N.D.N.Y. March 9, 1977).

224/ See text accompanying notes 214-221, *supra*.

1972. 225/ And again -- as with access -- there is very little state statutory attention. For present purposes, ignoring it may be appropriate, but any comprehensive statute would require (or at least allow) franchise provisions.

The "blue-sky" future of two way capability is addressed by only two states specifically -- New York and Minnesota. Of the two, New York appears to have the broader requirement. Whereas the Minnesota Commission is called upon to set standards for two-way capability (taking into account system size), 226/ the standards for New York systems are supposed to call for

> facilities capable of transmitting signals from subscribers to the cable television company or to other points. [Emphasis added.] 227/

The New York statutory provisions cover more than the Minnesota provisions in dealing with communication to "other points" as well as the more "traditional" two-way concept, which contemplates communication only between the system and the subscriber.

The Massachusetts statute is silent on the question of two-way communication.

225/ *Supra* note 159, at 3270, 36 F.C.C.2d at 192-93, 24 R.R.2d at 1560. See also 47 C.F.R. § 76.252(a)(2).

226/ § 238.05(2)(b).

227/ § 815(2)(d)(iv).

(n) Privacy, defamation, censorship, and obscenity

Where states have treated these aspects of programming, it is somewhat confusing and ambiguous. It can be, however, an area of importance for the cable operator.228/

A cable operator often will find himself between the Scylla of federal regulations and the Charybdis of private liability absent some state action. The problem could arise in at least three different ways: the system could carry a program as part of its signal complement, an individual could use the system's access facilities, or the system might originate programming. In the first two circumstances, it may be argued as patently unfair to hold liable the system operator, who has no control over program dissemination.

228/ In one important area -- invasion of privacy -- the statutes even fail to specifically identify the problem. There is no distinction between the private tortious act of publicly making known private facts about a person on the one hand, and the intrusion which may become a reality as cable advances in technology on the other. For instance, there is the "Big Brother" fear that government may use cable systems for monitoring purposes. See Possner, "The Impact of Communications Technology on the Right to Privacy; Memorandum to Members of the House Subcommittee on Communications", at 37 (1977). This monitoring can be just as offensive if carried out for commercial purposes. See Rivkin, Cable Television: A Guide to Federal Regulations, at 46 (1973). Finally, the integrity and security of private communications must be protected. See Ward, Present and Probable CATV/Broadband-Communication Technology, reprinted in On the Cable: The Television of Abundance, at 211 (1971).

The Minnesota statute merely prohibits "invasions of privacy" in two different sections.[229/] A question may be raised, however, as to the authority of the Commission to act competently, given the scope of the problem. While it might prohibit an invasion of privacy, could a commission also have the legal authority to exempt a system from private liability? This is more competently treated by statute.

On the other hand, the New York statute treats at least one aspect of the above question, absolving from liability the cable television company where an invasion of an individual's privacy occurs during a program not originated or produced by the cable company.[230/] This same type of immunity has been statutorily added in New Jersey[231/] and Connecticut.[232/] The Connecticut statute would grant broader immunity -- except upon a showing of willfulness -- to the owner of a cable system where a third party is defamed "by or on behalf of a candidate for public office <u>or by any other person</u>." [Emphasis added.][233/]

229/ § 238.05(2)(b); § 238.05(8). There is no identification as to what particular invasion of privacy is objectionable.

230/ § 830.

231/ § 5A-50.

232/ § 52-239.

233/ *Ibid.*

By these terms, therefore, the owner of the Connecticut cable system well may be immune from liability whether he is redistributing signals, allowing the use of access channels, or even originating programs. The New Jersey statute, on the other hand, merely exempts the system from liability where the use of the facilities is required by federal law to be made available to members of the public.

In Minnesota, the Commission is charged with the responsibility of establishing provisions dealing with defamation.[234/]

Both the New York and Minnesota statutes prohibit censorship. The statute prohibits censoring activities on the part of the New York State Commission, the local municipalities, and the system. But, having denied the system the authority to censor, the statute then reasonably exempts the system from liability for obscenity, defamation, or invasion of privacy.[235/]

The New York and Minnesota attitude toward free speech on cable television systems may be contrasted with one provision of the Rhode Island statute, which raises constitutional questions. The statute says:

> In the exercise of the police power of the state, the Commission may revoke or refuse to renew the license of any CATV company whose programs originating

---

234/ § 238.05(13). But the same question may be raised here as with the statutory provisions dealing with invasions of privacy. See text accompanying note 229, supra.

235/ § 830.

> within this state are offensive to commonly accepted standards of morality and decency of the community. 236/

Without question, any attempt to exercise this provision will raise an immediate First Amendment challenge since at appears to satisfy, at best, only one test currently used by the United States Supreme Court. 237/

(o) Equal employment opportunities

Notwithstanding one observer's statement that:

> all cable statutes now contain provisions relating to equal employment regardless of age, race, religion or sex, 238/

Minnesota appears to be the sole jurisdiction that has statutorily treated equal opportunities within the context of a cable television statute. Among the duties of the Minnesota Commission is the responsibility to

> insure that minorities and all other groups have the fullest access to cable communications at all levels.... 239/

The statute does not specify equal opportunities in employment, ownership, programming, or any other particular area.

Given federal equal employment requirements, 240/ the need for state legislative action may be questioned. On the other

---

236/ § 39-19-8.

237/ See Miller v. California, 413 U.S. 15 (1973).

238/ Muth at 138.

239/ § 238.05(9).

240/ 47 C.F.R. § 76.311.

hand, given the potential impact of cable systems, states may choose to address the problem specifically.

(p) Conflicts between cable and broadcast programming

The sole existing statutory statement dealing with conflicts between cable and broadcast programming is contained in the New York statute. There, the Commission is called upon to prescribe standards

> necessary or appropriate to protect the interests of viewers of free broadcast television and the public generally, which prohibit or limit cable television companies from prohibiting or entering into agreements prohibiting the sale or other transfer of rights for the simultaneous or subsequent transmission over free broadcast television of any program originated or transmitted over cable television. 241/

Such a provision raises serious constitutional, antitrust, and policy questions. The statutory provision appears to be designed to prevent the sale of exclusive rights to cable (or perhaps pay-cable).242/ Therefore, the demand by New York City cable systems for exclusive rights of distribution to home games of the New York Knickerbockers and New York Rangers might violate the standard called for in the statute. However, a unilateral decision by Madison Square Garden (1) not to televise

---

241/ § 815(2)(b).

242/ Muth appears to misinterpret the thrust of the statutory objective pegging it to retransmission questions, rather than pay-cable. Muth at 139.

for fear of impacting home attendance and (2) to sell certain rights to cable (and pay-cable) because of cable's willingness to purchase and limit circulation might not violate the statutory intent, since there need not be an exclusivity clause written into the contract.

(q) Ownership and concentration of control

While over half of the regulating states require in their cable provisions that ownership information be supplied, only one state -- New York -- appears to express statutory concern for ownership standards.243/ Obviously, providing information in itself may be critical in determining whether a particular company is awarded a franchise or a certificate. The amount of information sought can run from the skimpiest244/ to comprehensive ownership information.245/

The problems of ownership have been addressed by the FCC. It prohibits national network ownership totally246/ and television licensee247/ and telephone company248/ ownership in

---

243/ See, e.g., New York at § 815(2)(e); Vermont at § 503(c); and Delaware at § 602(j).

244/ Vermont at § 503(c), which merely requires "the names of the owners or incorporators of the company."

245/ Delaware at § 602(j).

246/ 47 C.F.R. § 76.501(a)(1).

247/ 47 C.F.R. § 76.501(a)(2).

248/ 47 C.F.R. § 64.601. See Report and Order in Docket No. 18509, 21 F.C.C.2d 307, 18 R.R.2d 1549 (1970), aff'd, General Telephone Co. v. FCC, 449 F.2d 846 (5th Cir. 1971).

their service areas. But these bars do not address cross-ownership by cable with newspapers, 249/ radio stations, television licensees and telephone companies outside their service areas, or entertainment conglomerates, any or all of whom the state or municipality may wish -- for policy reasons -- to deny ownership.

Only two states express specific concern in their statutes with the ultimate make-up of cable ownership. Massachusetts adopted statutory prohibitions against television cross-ownership in service areas 250/ or newspaper cross-ownership in areas of general circulation. 251/ New York's Commission is required to set standards to prohibit or limit concentration of control over "mass media and communications companies and facilities...." 252/ Nevertheless, even the New York concern with concentration of control is mitigated by the statutory proviso that

> nothing herein contained shall be construed to authorize the impairment of any existing rights of any mass media and communication company....253/

249/ See Barnett, State Federal, and Local Regulation of Cable Television, 47 Notre Dame Law, 685, 770-74 (1972).

250/ § 1(e). But while the Massachusetts statute tracks the television ownership preclusion specifically, supra note 246, it does not preclude telephone company ownership statutorily. Supra note 248.

251/ § 1(e).

252/ § 815(2)(e).

253/ Ibid.

(r) Transfer, renewal, amendment, termination and revocation of franchises, consents, licenses and certificates

Policy considerations which are applicable to an original grant are applicable to further disposition of the authority to operate. Muth points out some of the advantages to control of transfers of ownership, calling it

> one of the more all-embracing regulatory controls imposed upon cable system operation by state government. 254/

He says the state can control mergers, acquisitions, distribution of ownership, and even the value of systems. 255/ Much the same considerations apply to renewals. 256/ From the standpoint of continuing control over the franchisee, amendment approval could be most significant, especially if rate increases during the term of the franchise require an amendment to it. Finally, termination and revocation do not necessarily indicate effective controls, since the sanction is so severe for the operator and the public that it is seldom exercised, with penalties more often used. 257/

254/ Muth Dissertation at 145.

255/ *Ibid*.

256/ See text at notes 263-64, *infra*.

257/ See Muth Dissertation at 152.

With the exception of Vermont, every regulating state has cable statutory provisions relating to transfers. 258/ Virtually every one of these states specifically conditions the effectiveness of a transfer on prior approval, either by the local community or by the state agency. While standards may be very specific 259/ or very general, 260/ the statutes rarely go beyond procedural aspects. Where stated, the statutes apply the same standards as if the proposed transferee were an original applicant. Delaware appears to be the only state which attempts to articulate a standard beyond "public interest", in that it states:

> Approval of applications for transfers and assignments shall be granted, unless after hearing, which shall not otherwise be required, the Commission shall find that service to subscribers of the franchise would be adversely affected. [Emphasis added.] 261/

258/ The term "transfer" herein is used to mean a divesting of control. Obviously, not every transfer of license constitutes a transfer of control -- e.g. subsidiary operations could be set up -- and transfers of control could occur without transfers of license -- e.g. the voting stock of the controlling company could be acquired, rather than acquiring the assets.

259/ See New York at § 822(1)-(5).

260/ See Minnesota at § 238.05(10), which simply states

> The Board shall establish standards pertaining to transfer, renewal, termination or amendment of franchises.

261/ § 609(d).

The New Jersey statute is probably the most comprehensive since it specifically requires PUC approval should a cable company "lease, mortgage, or otherwise...encumber its property...." 262/

In the renewal area, four states -- Connecticut, Nevada, Vermont, and Rhode Island -- do not treat the question at all. On the other hand, the three Commission states specifically deal with renewals. 263/ The only difference between an original applicant (either for initial authority or as a transferee) and the renewal applicant is the record of service which may be reviewed, but no indication is given, for instance, as to what preference might be given a renewal applicant who has performed satisfactorily.

The renewal question could raise problems in PUC states where systems operate ostensibly for an indefinite duration, like other public utilities. As Muth says:

> The certificate to operate a public utility terminates when the utility ceases to serve in the interest of public convenience and necessity. Thus, where public utility agency regulation is imposed, the cable system will operate indefinitely unless its service falters. 264/

262/ § 5A-40.

263/ See, e.g., Massachusetts at § 13.

264/ Muth Dissertation at 149.

As in the transfer area, every state -- except Vermont -- empowers its Commission or PUC to terminate or revoke service. Massachusetts [265/] and Hawaii [266/] have the most comprehensive revocation sections, which are almost identical. Both states allow revocation for false and misleading statements, failure to maintain a construction bond, repeated failure to maintain signal quality, any transfer or assignment of a license, and failure to comply with the terms of its authorization. In addition, uniquely, Massachusetts allows its Commission to revoke a license for failure to complete construction in the required six-year period. [267/]

(s) Abandonment of systems and plant

The regulation of abandonment arises from a fear that facilities will fall into disrepair after a franchise has been terminated or the operator simply has decided not to continue in business. Sometimes this has been the case with public utilities.

Approval before abandonment, or at least notice of the intention to abandon, often must take place. [268/] The New York

---

265/ § 11.

266/ § 440G-9.

267/ § 11(g).

268/ See Vermont at § 505; New Jersey at § 5A-37; New York at § 826(1).

statute even goes so far as to pre-empt local franchising patterns by stating:

> no cable television company, notwithstanding any provision in a franchise, may abandon any service or portion thereof without having given six month's prior written notice to the Committee.... [Emphasis added.] 269/

The statutory need to require advance permission to abandon might be obviated by performance bond requirements. Certainly such a bond could cover the cost of tearing down the facilities, although there would be a delay in tearing down the facilities that would not occur with the statutory abandonment provision. Massachusetts specifically requires that the bond cover such action. 270/ However, absent a statutory requirement that the performance bond cover such an eventuality, the cable system could benefit by paying less to acquire the performance bond and perhaps simply abandon the facilities thereafter. One of the two statutory requirements would therefore seem necessary.

269/ § 826(1). The New York statute, however, appears to draw a distinction between franchises which prohibit abandonment and those which are silent on the subject or permit abandonment. In the former case only -- where abandonment is prohibited by a franchise -- is prior written consent of the franchisor and the commission needed. Compare Maine at text accompanying notes 91-92, supra.

270/ § 5(k)(3).

(t) Exclusivity and competition

The commission states appear to be much more concerned with precluding exclusive cable operations than the PUC states. Muth, for one, suggests:

> the net effect is the obviation of a claim of monopoly which could result in a dedication of the cable systems' private property as a public utility. 271/

Given the obvious fact that the PUC-regulating states already consider cable either to be a public utility or "of a kind", it is not surprising that the principal concern in this particular area comes from the commission states.

But for the rationale suggested by Muth, there would not appear to be the specific need in each of the commission states for the particular non-exclusive legislative language.272/ The economics of the cable television industry seem to almost universally dictate that there is no overbuilding;273/ in fact, exclusivity therefore exists no matter whether it is granted or denied, and whether this is statutory, regulatory or pursuant to a franchise.

271/ Muth at 139.

272/ New York at § 815(2)(b); Minnesota at § 238.05(2)(b); Massachusetts at § 3.

273/ The principal exception to this statement would appear to be in the Allentown, Pennsylvania area, where two giant systems -- Twin-County Cable Corp. and Service Electric Company -- compete directly in a lucrative cable market.

One other area of competition is addressed. In Connecticut, to prevent unfair competition by cable operators, CATV systems may not sell, lease, or repair any televisions, radios, stereos, etc. 274/

(u) Insurance

More than half of the regulating states statutorily require that insurance be carried. Although normal business practices would dictate that liability insurance, for instance, be carried, strong policy arguments can be made for requiring it by statute; for instance, the fact that a potentially dangerous instrumentality is being installed, that some sort of immunity must attach to the quasi-government action, or that the needed entity might be required to shut down if faced with a potentially disastrous law suit.

Only four of the cable statutes require that the cable operator carry liability insurance of a specified amount. 275/ Likewise, only four states require a performance bond statutorily. 276/ While the general purpose of such a bond is for construction, Massachusetts requires that the bond run through termination or abandonment. 277/ Only two states require that

---

274/ § 20-342.

275/ Massachusetts at § 5(b), (c); Rhode Island at § 39-19-6; New Jersey at § 5A-28(f); Delaware at § 604(c).

276/ Minnesota at § 238.05(2)(b); Massachusetts at § 5(k); Hawaii at § 440G-6(b)(5); New Jersey at § 5A-28(d).

277/ § 5(k)(1)-(4).

there be indemnification for losses suffered by the franchising authority.[278/]

(v) Greater local requirements

Two of the three commission states specifically allow local franchises to exceed any standards set on a state-wide basis.[279/] This begs the question as to which, if any, standards of the Federal Communications Commission can be exceeded by the local franchise. A municipal franchise which requires, for instance, a thirty-channel system is inconsistent with the FCC's rules.[280/] Moreover, from a general policy standpoint, allowing stricter standards may encourage excessive demands on the franchisee.

General Duties of Agency

(a) Investigate, analyze and develop cable or telecommunications plan for the state

One broad area appearing to be more common to the commission states than to the PUC states is the requirement to investigate and analyze cable television. One commentator identifies this requirement as

> the most innovative feature contained in recent cable legislation creating specialized agencies. 281/

278/ Massachusetts at § 5(b); Hawaii at § 440G-6.

279/ New York at § 819(3); Minnesota at § 238.08(2).

280/ 47 C.F.R. § 76.252.

281/ Muth at 133.

The requirement (or the desire) to formulate such long-range plans indeed can be a significant statutory contribution. The only comparable state communications function is in the non-commercial broadcasting area.282/ In terms of public policy, many problems can be remedied by the state's early integration into the planning of cable service. The state, for instance, can require service to specific underpopulated areas or can participate in the use of access channels or encourage (or retard) cable development through various administrative or legislative actions. In any case, an attempt to effectively develop cable's uses -- rather than allowing it to grow in a haphazard fashion -- may best be served by requiring any state-wide regulatory body to assess the future of cable in the particular state.283/

The New York Commission, for instance, is charged with developing a state-wide plan for the provision of cable services.284/ As part of this duty, the Commission may undertake studies of the industry.285/ Notwithstanding no specific

---

282/ But state involvement in non-commercial broadcasting has suffered from its integration into the FCC's allocation policies, significant start-up and operational costs, and an inability to justify service to extremely small communities. See 47 C.F.R. § 73.606.

283/ The various actions taken as a result of the state-wide plan are discussed at text accompanying notes 388-391, *infra*.

284/ § 815(1).

285/ § 815(11).

charge to perform the same function, the Minnesota Commission apparently does perform it and has recently issued a plan for statewide development.286/

Only two of the non-Commission states have any similar statutory provision -- New Jersey and Vermont.287/ Vermont's, however, may be limited to an expenditure of $15,000 for "special planning functions."

Among the duties of the New York and Minnesota Commissions are the development of statewide communications plans. Muth feels this function is "among the most important considerations for the state government."288/ Indeed, given the haphazard growth of public utilities generally and the virtually total lack of opportunity to affect broadcast or broadcast-related services to date,289/ as well as the tabula rasa of cable television, it perhaps is surprising that more states have not dealt specifically with this kind of provision.290/ Of course, many of the benefits expected to flow from this might well

---

286/ "Statewide Development Plan" (Minnesota Cable Communications Board, April 1977).

287/ New Jersey at §§ 5A-12 - 5A-14, and § 5A-2(c); Vermont at § 22(a)(7).

288/ Muth at 140.

289/ Except, of course, for state-wide educational television development.

290/ Muth at 140 states that this function is "implied" in Massachusetts and "suggested" in New Jersey.

be negated if the state agency fails to perform the function in a timely fashion. State regulation notwithstanding, the industry could be on its way to significant development before a plan is laid out.

Both New York and Minnesota call for their respective Commissions to

> develop and maintain a statewide plan for development of cable...services, setting forth the objectives which the Commission deems to be of regional and state concern. 291/

None of the regulatory bodies in the PUC states nor Massachusetts is either authorized or required to attempt to develop such a plan. Obviously, however, a state that sets up special districts or territories may indirectly "plan."

(b) Maintain standards

States have the obligation to establish standards, and obviously this may be done statutorily.292/ Just as obviously, however, it may be delegated--and usually is. The states will identify specifically (or generally) those areas for commission or PUC standard-setting. This is one of the more important general duties of the regulatory body.

291/ New York at § 815(1); Minnesota at § 238.05(1). The statutes, however, may be somewhat ambiguous in their use of the term "regional." Is this designed to be a region within the particular state or within a region of the United States?

292/ See text commencing at note 143, *supra*.

Each of the three commission states is required by statute to have the commission set forth those standards which must be met in various subject-areas; the commissions thereafter must also enforce the standards set forth. The Massachusetts statutory charge, however, merely requires that the commission issue such standards and regulations as it "deems appropriate to carry out the purpose of this chapter...."[293/] On the other hand, the New York and Minnesota statutes identify very specific areas for the commission to set standards. For instance, New York requires that standards be set in the following areas: franchise procedures; operational standards; applicant selection; construction and operation; concentration of control; equipment and safety; and that the commission look to these standards in acting upon certificate applications.[294/]

Minnesota requires that specific standards be set out in franchise procedures; operational standards; a channel for the Twin Cities; cable territory; renewals; ownership; interconnection; construction and operation; and line extension.[295/]

While it would appear that New York and Minnesota are no less willing to allow standards to be set by their Commissions,

---

293/ § 16. See also § 3(e).

294/ See § 815(2)(a); § 815(2)(b); § 815(2)(c); § 815(2)(d); § 815(2)(e); § 815(4); and § 815(5), respectively.

295/ See § 238.05(2)(a); § 238.05(2)(b); § 238.05(2)(c), (d); § 238.05(6), (7); § 238.05(10); § 238.05(11); § 238.05(12); § 238.05(16); and § 238.05(17), respectively.

the state legislatures simply have decided that certain areas _must_ have standards set by the Commission.296/

(c) Provide consultation, advice and technical assistance to local communities

Where the sole authority to operate is granted on a state level, the states generally have no policy requirement, much less a statutory requirement, of consulting with local communities. Nevada, however, appears to have a policy which calls for cooperation between the PUC and local jurisdictions.297/

In non-PUC states, however, a requirement of local consultation seems salutary. Small local communities -- and possibly large ones, too -- may not be sophisticated enough to deal with the complexities of cable.

New York's Commission is statutorily required to provide assistance and advice to municipalities involved in franchising.298/ The Minnesota Commission, meanwhile, is required to provide assistance to other government bodies, which obviously can include state agencies as well as municipalities.299/

296/ In the PUC states, the standard-setting power statutorily granted is very general and does not specifically identify cable television. See Nevada at § 711.080(2)(e); Vermont at § 505; Rhode Island at § 39-19-6; Hawaii at § 440G-4.

297/ § 711.095 requires special notice to county commissioners in counties of less than 100,000 population. While in most states, this would constitute a small county, in Nevada only two of sixteen counties have _more_ than 100,000 population. 1970 Census. See also §§ 244.185; 266.305; 268.085; and 269.125.

298/ § 815(3).

299/ § 238.05(3).

The Massachusetts statute does not appear to require consultation or advice to local communities, but it seems unlikely that such consultation or advice would be refused; if a statutory "peg" is needed, it conceivably could come under the Commission's duty to certify performances of cable operations to local authorities. 300/

(d) Represent interests of the state before federal agencies

All three commission states and two PUC states (Nevada and New Jersey) require representation by the regulatory body, where necessary, before the federal government. Requiring this input can be beneficial to the federal government, as well as the state, in making known local conditions and attitudes.

The three commission states specifically require representation of the interests of the citizens of the state before the Federal Communications Commission. 301/ The most obvious method of commission representation is participation in any rulemaking proceedings which affect the industry as a whole. 302/

In addition to representing the interests of the people before the Federal Communications Commission, the Massachusetts Commission is required to

---

300/ § 16.

301/ New York at § 815(6); Minnesota at § 238.05(5); Massachusetts at § 16.

302/ One proceeding in which all of the state commissions would have been expected to participate was Docket No. 20272, the net effect of which would have been to cut back on the jurisdiction of the very state commissions themselves. See 40 F.R. 34608, 54 F.C.C.2d 855, 34 R.R.2d 1229 (1975). In fact, all three of the state commissions have filed comments.

> certify the performance of the CATV operators under its jurisdiction to appropriate federal...authorities. 303/

In virtually identical language, the PUC's of Nevada and New Jersey are required to cooperate with the federal government in its efforts to regulate cable television. 304/

(e) Stimulate, encourage, and assist in developing public services and novel uses of cable

Little statutory demand is made for the regulatory body's encouragement of public services and novel developments in the cable television area. Both Minnesota and New Jersey have provisions calling for developing the full potential of cable. In Minnesota, the Commission is charged with the duty to

> encourage experimental, innovative approaches to the building and operation of cable communications systems. 305/

New York requires that its Commission encourage the creation of public and community groups to become franchisees. 306/ Minnesota, on the other hand, merely encourages non-profit entities to become involved in production for access channels. 307/

303/ § 16. It is possible to argue that the certification of performance could include requiring the Massachusetts Commission to perform the technical tests required by the FCC of the individual systems. See 47 C.F.R. §§ 76.601-17.

304/ Nevada at § 711.080(2)(d); New Jersey at § 5A-2(c)(5).

305/ § 238.05(14). See also New Jersey at § 5A-2(c)(2).

306/ § 815(9).

307/ § 238.05(15).

What might be the most novel use to be promoted by state agencies are the regional uses proposed in New York and Minnesota.[308/] For cable, which has grown on a community-by-community basis for three decades, a requirement of regional development indeed could be revolutionary.

(f) Investigate and organize interconnection and regionalization; line extension

For the short- and mid-term, the agency's authority and the duty to organize interconnection and/or regionalization well could be the single most significant function for a state regulatory body to handle. What other function is uniquely capable of being handled on a state level and not on the local level? It is believed that this general duty is more important in the commission states than in the PUC states, since the operator in the PUC states is probably on notice that the power of the PUC in franchise areas is pervasive. In the commission states, however, the operator has bargained and dealt with the local municipality. It may indeed be a sudden shock for him to learn that he must serve additional areas which he did not contemplate serving or interconnect with another system which might be technically incompatible. While due process arguments are always

---

308/ See § 815(1) and § 238.05(1) respectively. See text at notes 281-291, supra.

left open to the operator in either type of state, he obviously is not desirous of litigating. By the same token, too harsh and arbitrary an attitude by the regulatory body may significantly impede cable industry interest in the state.

To this end, both New York and Minnesota may order interconnection among systems.[309/] In dealing with the related question of regionalization, the New York Commission is required to cooperate with municipalities to facilitate the "undertaking of multiple community cable television systems."[310/] One of Minnesota's principal concerns is with the Twin Cities;[311/] however, other concerns are manifested in the Minnesota statute in its development of cable television territories and cooperation with Regional Development Commissions.[312/]

Massachusetts approaches the problem by indirection. Each applicant must indicate the "area or areas to be served" in its application.[313/] However, the "area or areas to be served" may include a

---

309/ New York at § 823; § 815(2)(d)(iv); Minnesota at § 238.05 (12); § 238.05(6).

310/ § 815(8). See also § 815(7).

311/ § 238.05(2)(c), (d).

312/ § 238.05(6), (7); § 238.10.

313/ § 4.

> municipality or a portion of a municipality in order to reflect within municipal boundaries, the various economic, cultural, geographic and community interests of the citizens residing therein. 314/

Since § 4 of the Massachusetts statute provides that additional "areas"

> to be served may be added by amendment to the license from time to time pursuant to regulations promulgated by the Commission. 315/

it may be argued that it is possible for the Commission to "force" an applicant for one area into taking a contiguous (or even non-contiguous) geographic area.

Given the broad powers over areas in the PUC states, there is a virtual absence of any statutory treatment dealing with interconnection. Nevertheless, this is the one area in which the state of Alaska has statutorily treated any aspect of the cable television industry. 316/

A related area of concern is that of line extension. In the typical case, the operator with authority to operate in a municipality stops at the city line. A small pocket of non-service exists just over that line, not large enough to justify

---

314/ § 1(f).

315/ § 4.

316/ § 42.05.311(b). See text at note 136, supra.

construction of its own system and not close enough to any other wired portion of the county.[317/] A second problem is the requirement to serve all areas of the franchise territory, regardless of density.

Some of the statutes contain specific line extension authorization to the governing body. For instance, New York can require a cable system to extend its lines only after a hearing and only if the extension has been unreasonably withheld.[318/] Massachusetts, on the other hand, has a much broader line extension policy, depending on the public need.[319/]

New Jersey's line extension policy relates to the second problem, since it appears to demand that the entire franchise territory be wired rather than going outside the franchise territory.[320/]

(g) Regulatory programs -- rates

The agency's function of maintaining a regulatory program dealing with rates breaks down into at least four major areas: oversight of rates; rate setting; procedures; and particular rates affected.

317/ See Byrum, Channeling the Energies of Cable Television: A Case for Positive State Involvement, 5 Urban Law, 376, 391 (1973).

318/ § 824(2).

319/ § 1(f) taken in conjunction with § 4.

320/ New Jersey at § 5A-48; Nevada at § 711.110. See also New Jersey at § 5A-23(e).

(1) Oversight

The "oversight" function requires that rates be identified. Any deviation from the stated rates will undoubtedly bring agency involvement.

The New York statute is the most comprehensive, specifically dealing with cable television and rates. While under certain stated circumstances the New York Commission can set rates, it generally merely maintains oversight of rates approved by the local franchising authority.[321/] The Minnesota statute has language largely identical to that of New York.[322/] The Massachusetts Commission, on the other hand, was effectively precluded from any rate oversight at all for the three-year period from 1971 to 1974;[323/] thereafter, the Commission was given statutory oversight functions -- indeed, complete rate-setting ability.

In the PUC states, with residual rate regulation power within the PUC statutes, an oversight function was granted in

---

321/ § 825(1), (4).

322/ § 238.10.

323/ § 15 states:

> For a period of three years from the effective date of this chapter, the Commission shall study the necessity and desirability of rate regulation....

but four states: Nevada,[324/] New Jersey,[325/] Delaware,[326/] and Hawaii.[327/]

(2) Rate setting

The New York Commission's rate-setting power is triggered only by discrimination or preferential treatment of subscribers[328/] or by inadequate service.[329/] The apparent failure in the latter statutory provision is that the term "inadequate service" connotes a failure of signals, quality, etc., rather than the local community having agreed to an unpopular or inappropriate rate (i.e. having "made a bad deal"). However, the New York Commission has what might be termed a "remedial rate-setting" function in that it may change rates under the following circumstances: if there has been no change in what are discriminatory rates; if service is inadequate; if there is no stating of rates in a particular franchise; or if there is a joint request by the franchisee and the franchisor.[330/]

324/ § 704.040; § 711.150(2), (3).

325/ § 5A-2(c)(3).

326/ § 604(n).

327/ § 440G-8(b); § 440G-11.

328/ § 825(3).

329/ § 825(4).

330/ § 825(5)(a)-(e).

The Minnesota legislature specifically denied to the Minnesota Commission the power to set rates; rather, the question was to be studied.331/

The Massachusetts Commission is entitled to set rates based on a "fair and reasonable rate of return." The rates, according to the statute, must be "adequate, just, reasonable and non-discriminatory."332/

(3) Procedures

The most important rate area statutory distinction between the New York and Minnesota Commissions deals with the method of obtaining a rate increase. Whereas in New York there must be a franchise amendment,333/ any amendment itself must be approved by the Commission.334/ Therefore, any cable system seeking a rate increase, by definition, must have it approved by the Commission in one context or another. In Minnesota, however, the statute specifically incorporates whatever provisions are made in the local franchise.335/ Therefore, if the Minnesota franchise were to provide for an automatic increase in rates, the increase could go into effect without Commission approval, a situation statutorily barred in New York.

331/ § 238.12(3).

332/ § 15.

333/ § 825(2).

334/ § 822(1).

335/ § 238.12(2).

In Massachusetts, the Commission apparently has plenary power. The Commission is authorized to take up rate increase questions on its own motion, upon the motion of the franchising authority, or upon the motion of the licensee. The statute furthermore subjects rate increase decisions by the Commission to detailed review by the Superior Court for Suffolk County, Massachusetts. 336/

Perhaps as a result of their long-standing experience in the rate area in dealing with other regulated entities, the PUC states generally have developed procedures for dealing with rate increases. 337/

(4) <u>Types of rates regulated</u>

Only three of the states specify which rates are to be covered by their rate regulation. Massachusetts states "subscription rates" 338/ New Jersey states "reception services"; 339/ while Delaware states "all services and facilities." 340/ An attempt by Delaware to control pay-cable rates may have run

---

336/ § 15.

337/ See Nevada at § 704.070; § 704.100; § 704.110; Rhode Island at § 39-19-6; New Jersey at § 5A-28(g); Delaware at § 602(d); § 604(m); Hawaii at § 440G-6(a); § 440G-11.

See also Taylor, <u>The Case for State Regulation of CATV Distribution Systems</u>, 23 <u>Fed. Comm. B.J.</u> 110 (1969).

338/ § 15.

339/ § 5A-28(g).

340/ § 604(m).

afoul of the previously-asserted jurisdiction of the Federal Communications Commission, but the FCC recently gave authority to tax pay services. 341/

(h) Regulatory program -- discrimination in rates and services

Whereas the New York and Minnesota statutes allow cable systems to set up reasonable classifications and categories, 342/ some PUC states flatly prohibit a service's allowing discriminatory rates and services, without providing for the designation of any reasonable classifications and categories in the cable statutes. 343/

(i) Regulatory program -- adequacy of service

As might be expected, cable systems are generally required to offer adequate service. While specifically mandated in some states, 344/ the statutory provision to require adequate service is at least implicit in all statutes. Whereas a statutory provision requiring adequate service might be surplusage, 345/

341/ Report and Order in Docket No. 21002, 42 F.R. 52404, 66 F.C.C.2d 380, 41 R.R.2d 885 (1977). See also Brookhaven Cable TV, Inc. v. Kelly, ___ F.2d ___ (Case No. 77-6156, 6157) (2d Cir. 1978).

342/ New York at § 825(1); Minnesota at § 238.10(1). In addition, the New York statute specifically states that reduced rates to schools and other public buildings, for instance, shall not be held to be discriminatory. § 825(3).

343/ Rates: Rhode Island § 39-19-6; New Jersey § 5A-36(b); Delaware § 604(m). Services: New Jersey § 5A-39(b), (d). But see Nevada at § 711.080(2) and § 711.150.

344/ See New York at § 824(1); New Jersey at § 5A-39(b).

345/ See text accompanying notes 199-202, *supra*.

such a provision requiring a regulatory program to assure such adequate service is entirely different. Under that statutory charge, an agency might set up a monitoring program, establish complaint procedures, set technical standards, mandate billing procedures, etc.

(j) Oversight of local fees for cable system operation

Obviously, where no local consent is needed, no local franchise fees will be paid; on the other hand, in each of the states where local consent is required, in one form or another, some local fee is paid and recognition of these fees is required to be maintained on the state level by a regulatory body.

In at least one case -- Minnesota -- the agency statutorily cannot interfere with the local franchise "fee, tax, or charge;" no restriction is placed on the power of a municipality to impose a local franchise fee.[346/] In New York, however, the same provision is subjected to the condition that, when added to the fee paid to the Commission,[347/] the total cannot exceed the maximum amount permitted by federal law.[348/] Obviously, therefore, if both the state of Minnesota and the local Minnesota franchising authority impose fees, the total could exceed the amount set by the Federal Communications Commission as being non-burdensome.

346/ § 238.08(4).

347/ See text accompanying note 374, *infra*.

348/ § 818. See also New York State Commission on Cable Television v. FCC, ___ F.2d ___, 42 F.R.2d 265 (2d Cir. 1978).

Massachusetts has a stated fee to the local municipality of fifty cents per subscriber per year, but no fee for those systems with less than two hundred fifty subscribers. 349/

New Jersey limits the local franchise fee to no more than two percent of gross revenues, 350/ although the municipality may petition to charge in excess of two percent. 351/ Moreover, for grandfathered systems which may be paying in excess of two percent, a rollback of the local franchise fee, according to the statute, shall trigger a reduction in the subscriber rates or an improvement in service. 352/

Delaware maintains jurisdiction over local franchise fees charged by incorporated municipalities within the Commission's general oversight of municipal franchises. 353/

Two states -- Massachusetts and New Jersey -- specify in their statutes the application fees to be paid to the local authorities. 354/

349/ § 9. See text accompanying note 376, infra.

350/ § 5A-30(a).

351/ § 5A-30(c).

352/ § 5A-30(b).

353/ § 608.

354/ Massachusetts at § 9; New Jersey at § 5A-23(a), (f), (g).

General Powers

In order for any regulatory body to function adequately, it must have certain powers.

(a) Issuance and rescission of rules and regulations

Obviously, a statute vesting authority in a commission to regulate an industry would be of no value if the regulatory body had no power to issue or rescind rules and regulations. To that end, in the three commission states, specific authority is granted not only to implement the statutorily-required standards and duties, but also those standards and duties granted to the commission in a more general sense. 355/ The Massachusetts requirement may be a burdensome one, however, calling on the Commission to hold hearings prior to the issuance of any regulations. The statute says:

> The Commission may after hearing issue such standards and regulations as it deems appropriate to carry out the purpose of this chapter.... 356/

If this is to be taken literally, the apparent necessity to hold a hearing upon every rule change is easily criticized. Obviously, for instance, some issues are best decided on written comments, rather than hearings.

355/ See New York at § 816(1); Minnesota at § 238.06(1); Massachusetts at § 16.

356/ Massachusetts at § 16.

It would appear that Rhode Island is the only traditional PUC state where the general authority to issue regulations is specifically stated in the cable television statute.[357/] In New Jersey and Hawaii -- both of which adopted non-traditional PUC regulation -- the statutes grant specific power to issue regulations.[358/]

(b) Require reports and information

A necessary correlative to regulation is obtaining information through reports filed by cable systems. But as anyone who has filled out an income tax return knows, the filing of government forms can be a burdensome chore indeed. Among the types of reports which must be filed are those dealing with ownership,[359/] gross revenues,[360/] balance sheet,[361/] and engineering.[362/]

357/ § 39-16-6.

358/ New Jersey § 5A-36(c); Hawaii § 440G-12(a).

359/ See, e.g., New York at § 816(2).

360/ See, e.g., New Jersey at § 5A-34(a).

361/ See, e.g., Massachusetts at § 8.

362/ See, e.g., New York at § 816(2).

Some provisions are made for keeping certain filings closed and confidential, while others are open to public inspection. 363/

(c) Subpoena and examination power

State regulatory bodies have the right to make inspections, 364/ make official inquiries, 365/ and, in at least one circumstance:

> examine, upon reasonable written notice and during regular business hours, subscriber lists, repair records, service complaints, rates charged, and facilities and interview management personnel of all franchisees or applicants for franchises for the purpose of verifying applications or compliance with the terms of a franchise.... 367/

Examination power would appear necessary to any enforcement procedures of the regulatory body; as such the power exists in general form in PUC states. Nevertheless, Nevada has amended its public utility statute to allow the PUC to order an examin-

---

363/ See Massachusetts at § 8. See also text accompanying notes 413-414, *infra*.

364/ See, e.g., New York at § 816(2).

365/ See, e.g., Minnesota at § 238.06(3).

366/ See, e.g., Nevada at § 711.120.

367/ Delaware at § 605(c).

ation of the condition and management of any public utility -- including cable systems -- under its jurisdiction.368/

(d) Institute or intervene in legal actions

The cable statutes grant to the commission states authority which probably already exists in the PUC states. New York can institute legal actions through its broad enforcement powers369/ and specific enforcement authority for use in the forfeiture area.370/ This power obviously must be included in the statute for the commissions, since they have no residual authority as do the PUC's.

Delaware and Hawaii appear to be the only non-commission states which grant specific authority in the cable statutes to institute legal actions or to intervene.371/ Obviously, however, the rights exist elsewhere in the general PUC authority.

(e) Requirement of payment to the state regulatory body; taxation

All three state commissions are designed to be financially self-supporting. From the standpoint of the community at large, this is probably appropriate. First of all, it is the

---

368/ § 704.

369/ § 816(5).

370/ § 827-A(3). See also, Minnesota at § 238.16 and § 238.06(3) and Massachusetts at § 12.

371/ Delaware at § 615; § 605(d); Hawaii at § 440G-12(f).

cable operator who derives the benefit of the statute.372/ And if not the operator, then it is the subscribers to the system who benefit. But in any case, it is not the public at large which benefits or which should fund the regulatory body.

In the case of New York and Minnesota, cable systems are to pay pro-rata shares of the costs and expenses of the Commission.373/ This, of course, presents the interesting potential conflict that if the industry does not flourish, neither will the agency. Originally limited to a payment of no more than one percent of the gross annual receipts of each cable system, New York's Section 817 was amended in 1975 to two percent (with a $100 minimum).374/ Minnesota continues to limit the pro-rata share of each system to not more than one percent of the system's gross annual receipts; however, it is subordinated to the collection of any local fee (and limitations of the Federal Communications Commission).375/ In other words, a cable system paying more than four percent to the local community pays less than its pro-rata share to the Minnesota Commission.

372/ As with charges by the FCC--struck down by the Court of Appeals in National Cable Television Association v. FCC, 554 F.2d 1094, 39 R.R.2d 355 (D.C.Cir. 1976)--the benefit to cable operators of a system of regulation may be questioned.

373/ New York at § 817(2); Minnesota at § 238.07.

374/ See New York L.1975, C.486, § 1. As to New York's unique situation with grandfathered systems, see New York State Commission on Cable Television v. FCC, supra note 348.

375/ See 47 C.F.R. § 76.31.

The Massachusetts statute provides for a flat amount payment, but the provisions of the statute conceivably could make a profit for the state. Each licensee is required to pay a license fee of eighty cents per subscriber served, but there is no fee for those systems with less than two hundred fifty subscribers.[376/] Given this potentially open-ended collection, it is possible that the expenses of the Massachusetts Commission could be exceeded by the payments.

Both New Jersey and Delaware likewise have adopted a statutory plan whereby cable systems pay no more than two percent of gross operating revenues[377/] or gross subscription receipts[378/] as the costs of the regulatory body are divided on a pro-rata basis among cable systems in those states. Hawaii also provides for the payment of an annual fee, the purpose of which is used to offset the costs of administering the cable statute. However, the fee is to be "determined by" the Director of Regulatory Agencies.[379/] Vermont requires that the costs of operating the PUC be offset by the regulated parties,

---

376/ Massachusetts Statutes of 1977, Ch. 552, § 1, amending former § 9. A payment also is due to the local community served. See text accompanying note 349, *supra*.

377/ New Jersey at § 5A-33.

378/ Delaware at § 610.

379/ § 440G-14.

including cable, which pays .005 percent of gross operating revenues (or a minimum of twenty-five dollars). 380/

Rhode Island is the sole state which requires a specific sum as an annual fee -- fifty dollars. 381/

Among the regulatory states, Connecticut appears to be the lone state which has specifically included cable television in its taxation statutes. Connecticut has decided that the use tax does not apply to cable television, but a special eight percent gross receipts tax does apply. 382/ The amount of taxation on cable systems in Connecticut has been subjected to criticism as being unduly high for an infant industry. 383/

380/ § 22(a)(7). Five thousand dollars of this amount is to be set aside for "special planning functions" relating to cable.

381/ § 39-19-4. But see Vermont at § 22.

382/ § 12-412(c) and § 12-258. A New York bill specifically to exclude CATV from a gross receipt tax on transmission of boxing and wrestling matches was vetoed in 1977. See Variety, Aug. 31, 1977, at 44. In addition, the collection of sales tax on CATV service was overruled in a state court and some six hundred thousand dollars collected was refunded. See Variety, Feb. 8, 1978, at 46.

383/ At least one observer has said that the net effect has been to retard industry growth significantly, although the availability of adequate over-the-air service and the FCC's regulatory policies hardly are to be ignored. Nelson, Cable Television in Connecticut: Realizing the Promise at 32-36 (1976).

Special Duties and Powers

(a) Duty to establish statewide commissions and councils

While Muth, for one, feels that the development of public input especially would be of aid to smaller, non-specialized utility agencies, his principal proposal -- that of a citizens' commission which

> would possibly shift ultimate authority to broadly based representation from local communities rather than at the state level in a small, possibly insulated commission appointed by the executive. [Emphasis added.] 384/

-- has not been enacted. Instead, only two states have developed advisory commissions: New Jersey, 385/ and Hawaii. 386/

Muth suggests that such public commissions can not only deflect criticism of state commissions and PUC's, but can be of "special value" to the regulatory commissions which are faced with wide jurisdictional problems beyond the cable field. 387/

(b) Duty to organize and assist in developing cable systems in interstate metropolitan areas

Minnesota apparently has taken the lead in metropolitan area cable development (albeit intrastate), in significant part

---

384/ Muth at 143.

385/ §§ 5A-12 - 5A-14.

386/ § 440G-13.

387/ Muth at 143.

because of its desires to serve the entire Twin City market[388/] and its proposal to serve "cable territories" larger than a single community.[389/]

Moreover, it would appear that the duties of the cable commission to work on regional development in New York[390/] and Minnesota[391/] well may be of some significance in developing interstate cable service. It is likely that some state regulatory agency, rather than a local community, may be better able to cope with interstate problems.

Miscellaneous Substantive Provisions

(a) Public ownership of systems

The three commission states each address the question of public ownership. New York, for instance, encourages the creation of non-profit franchise-seeking groups.[392/] While hardly a ready affirmation of the concept of public ownership, the New York statute appears to be more positive than that of Minnesota. In the latter, the statute gives tacit recognition to potential public ownership by stating that any publicly-owned cable system

---

388/ § 238.05(2)(c). See text accompanying notes 309-312, *supra*.

389/ § 238.05(6), (7).

390/ § 811 and § 815(1).

391/ § 238.01 and § 238.05(1).

392/ § 815(9).

will be treated as if it was privately-owned.[393/] In Massachusetts, however, ownership by a city or town is recognized specifically.[394/] As in Minnesota, any publicly-owned system will be treated as if privately-owned.[395/]

(b) Governmental works and uses of cable

Delaware appears to be the only state which recognizes a specific governmental use. In emergency situations, says the Delaware statute,[396/] facilities of the cable system shall be turned over for "governmental use."

The Delaware statute also recognizes that service drops to government buildings may be considered in the same manner as service to schools.[397/] In much the same light, the New York and Massachusetts statutes deal with service drops. Massachusetts requires a drop at public facilities;[398/] New York indicates that drops at government institutions (as well as schools) are not to be considered discriminatory service in its oversight of regulatory programs.[399/] Finally, both New York and Minnesota

---

393/ Minnesota at § 238.08(3).

394/ § 20(1).

395/ Ibid.

396/ § 604(j).

397/ § 604(i).

398/ § 5(e).

399/ § 825(3).

have statutory provisions requiring their Commissions to "stimulate...arrangements among interested parties so as to develop "public affairs programming", which could well be a governmental use.[400/]

(c) Elections and campaigns

The sole statutory provision dealing with elections and campaigns is that section of the Massachusetts statute which requires equal opportunities (and a Fairness Doctrine) on origination and access channels.[401/]

The need (and the wisdom) of such a provision may be called into question. First of all, the underlying basis of the similar provisions in the Communications Act of 1934 is control of the limited modes of access. But the limitation does not exist with cable's multiple-channel capacity. Secondly, it is questionable as to whether small cable operators are capable of becoming program regulators, especially on the access channels. Thirdly, the advent of cable offers at least the opportunity for experimentation with a system not under Section 315 ("equal time"-type) controls.

400/ New York at § 815(7); Minnesota at § 238.05(2)(b).

401/ § 5(j).

(d) Corrupt practices

It is forbidden by Minnesota statutes for Commission members to hold financial interests in cable, broadcast or related companies.[402/] Rhode Island PUC members are also forbidden this conflict of interest situation.[403/]

Focusing on corrupt practices at the local level, the New Jersey cable statute declares it unlawful for a member of a municipal governing body or an employee of the municipality to acquire any interest in the franchisee or take part in any selection of the franchisee for the particular community.[404/] However, it does not bar any conflicts of interest or financial interest by members of the state regulatory body.

(e) Relationships with utilities

Not surprisingly, more attention is paid to utility relations in the PUC states than in the commission states. At least four different areas of relationships with utilities are taken up in the PUC states, but given the attention paid to pole attachments by the cable industry, for example, the lack of legislation is surprising.[405/]

402/ § 238.15.

403/ § 39-1-35.

404/ § 5A-31.

405/ See text accompanying notes 118-124, *supra*.

(1) Pole attachments

In Nevada, a cable system may use the right of eminent domain to get on utility poles (where no injury is shown).[406/] Questions of rates for pole attachments will be submitted to the PUC in New Jersey and Hawaii.[407/] While not identifying poles as such, other statutory provisions talk in terms of "leasing facilities" -- which indeed may be the very same pole attachment issue. This leasing of utility facilities for cable purposes has been specifically approved in Connecticut, Nevada, and New Jersey.[408/]

A difference of opinion exists as to which state statutes currently satisfy the newly-enacted Section 224 of the Communications Act which allows states to pre-empt FCC pole attachment jurisdiction only when the state statute takes into account the interests of cable consumers as well as utility users. On the one hand, NCTA says only California, Connecticut and New Jersey qualify,[409/] while the FCC's Cable Television Bureau takes the position that California, Connecticut and Hawaii qualify.[410/] However, it would appear that either New Jersey and Hawaii both

---

406/ § 37.010.

407/ New Jersey at § 5A-20 and Hawaii at § 440G-12.

408/ Connecticut at § 16-332; Nevada at § 711.160; New Jersey at § 5A-21.

409/ See Vue Magazine, Feb. 20, 1978, at 8.

410/ Briley, Summary of Pole Attachment Regulation in the States (March 1978). This would appear to be the more persuasive argument, since Hawaii in fact regulates rates. See, Levine, op. cit.

satisfy the provision -- or neither does -- since the same general public interest seems to apply.

(2) Relocation matters

Two states -- Hawaii [411/] and Rhode Island [412/] -- deal with relocation or construction of public utility facilities. In the former, the statute applies the same formula for allocating expenses in relocating cable as it does in relocating the more conventional utilities; in the latter, the statute requires that public utility use of highways, among other things, not be inconvenienced by cable construction.

(3) Utility payments

Hawaii specifically exempts identification as to the source of funds when a cable system is purchasing facilities from a public utility. [413/] This provision appears, however, to be in sharp contrast with the general tenor of disclosure:

> Each applicant shall make full disclosure as to the true ownership of the facilities to be employed in rendering service, as to the source of funds for the purchase, lease, rental, and installation of such facilities, except as to the source of funds for the purchase and installation of facilities to be provided by public utility. 414/

411/ § 440G-8(a)(4).

412/ See generally, § 39-19-7.

413/ § 440G-6(a). See text accompanying notes 359-363, *supra*.

414/ *Ibid*.

(4) Jurisdiction

In establishing its special Office of Cable Television, the legislature of New Jersey took special pains to state that

> Nothing in this act shall be construed as declaring or defining cable television to be a public utility or subjecting it to the application of any of the provisions of [the public utility statutes]... except as otherwise specifically provided in this act. 415/

Meanwhile, the sole provision in the three commission states dealing with utility relationships is the statutory grant to the Minnesota Commission to adopt pole attachment regulations. 416/

(f) Relationships with educational interests

The sole provisions dealing with education relate to service drops at schools 417/ and the New Jersey provision encouraging "optimum educational potential." 418/

(g) Landlord-tenant relationships

Perhaps because of the abundance of apartment dwellings in portions of New York state, that state has adopted the most comprehensive landlord-tenant statute. It states, among other provisions, that there shall be no discrimination by the

---

415/ § 5A-4.

416/ § 238.13.

417/ See, e.g., New York at § 825(3).

418/ § 5A-2(c)(2).

landlord against tenants who seek installation of cable (although reasonable installation requirements may be set), that there shall be no payment demand made by landlords in exchange for permitting service, that existing leases are grandfathered, and that there shall be no interference with master or individual antenna equipment.[419/] In addition, Massachusetts,[420/] New Jersey[421/] and Connecticut[422/] also have adopted landlord-tenant/CATV legislation, designed to facilitate the cable operator's entrance into apartment dwellings.

It is not unusual, however, for these statutes to contain provisions designed to protect the landlord as well. New York and New Jersey,[423/] for instance, require that the installation protect the appearance of the premises.

(h) Theft of service

As with landlord-tenant/CATV legislation, state legislatures have adopted the new or amended theft of service legislation subsequent to the passage of cable legislation to fill in

419/ § 828(1)-(3).

420/ § 22.

421/ § 5A-49.

422/ § 16-333A.

423/ New York at § 828(1)(a)(i); New Jersey at § 5A-49.

a regulatory gap.[424/] All eleven of the regulatory states have legislated against obtaining service without payment by virtue of an illegal tap.[425/]

It is often a further violation of the theft of service statutes for a subscriber to obtain service by some misrepresentation in subscribing.[426/]

It remains to be seen whether the Vermont statutory attempt actually achieves its purpose. The statute states:

> A person who...tampers with or connects any wire or device to the equipment of the cable television company that would degrade the service rendered without authorization...may be fined no more than $100.00 and shall be liable in a civil action for three times the actual amount of the damages.... 427/

It would therefore appear necessary to show that the illegal tap or the misrepresentation degraded service. While any tap obviously draws down power and any misrepresentation to obtain service makes the cable company less able to serve its other customers, this provision of the statute seems to have some natural infirmities.

424/ The first regulatory state CATV theft of service statute was enacted by New York in 1975.

425/ New York at § 165.15(4)(a); see also, § 165.15(5); Massachusetts at § 21; Connecticut at § 53A-119(7)(5); Nevada at § 205.470(2); Rhode Island at § 11-35-16; New Jersey § 5A-52; Delaware at § 614(b); Vermont at Title 13, § 3786; Hawaii §§ 275-9 and 708-830; Minnesota §§ 238.90(1) and 609.52(2). Alaska has a more general telecommunications theft statute at § 11.20.495.

426/ New York at § 165.15(4)(b); see Rhode Island at § 11-35-16; New Jersey at § 5A-52.

427/ § 3786.

IV. CONCLUSIONS

State-level regulation -- be it by a utility commission, cable commission or some hybrid form -- is certainly no panacea for the problems generated by cable television. However, eleven states have established regulatory programs, and with the Federal Communications Commission's movement away from establishing franchise standards and the recent federal pole attachment legislation, further movements by states into cable regulation would not be surprising.

At least one statutory area -- theft of service legislation -- does not seem to vary in relation to the regulatory approach. But that legislation is penal in nature and is not a regulatory-type statute. This may tend to explain the more uniform treatment.

The most common state involvement -- i.e. isolated specific statutes -- obviously requires threshold policy decisions. While it might be best to leave cable regulation at the municipal level, are the municipalities capable of handling problems of greater magnitude than the local community's concerns? For example, do the communities have the ability (legal and otherwise) to grapple with the urban and suburban cable system? What about the need for long-range planning that goes beyond the local community? Now that the Federal Communications Commission has virtually removed itself from franchising oversight, will there be a return to the abuses which took place on a local level in the past?

But by the same token, are state-wide entities close enough to handle what has been traditionally thought of as the local role? Is a state-level authority the best to plan for the development of cable within a community? Is that authority the one which should decide as to the franchisee? Are state agencies any more immune from the vices of corruption and political favoritism that have existed on the local level?

These types of policy decisions, in the final analysis, obviously must precede any decision on statutory language. The initial questions must be asked: Is the creation of a state-level agency worth the problems that it engenders? Are the municipalities so incapable of handling certain issues as to make it imperative that there be state intervention? If the answers to these questions are "no", then the problem, in reality, does not exist; there would be no need for state-level regulation. At most, the state may wish to consider legislating certain guidelines within which municipalities would continue to regulate.

But assuming that a threshold policy decision is made to implement a useful and significant role, the question that remains is how. The first choice is whether to regulate cable systems in only certain specialized ways or to regulate comprehensively (i.e. within the limits of state authority). For example, a state can "regulate" cable development through taxation statutes or theft of service laws. In fact, in the tax area, many of the taxation statutes are in non-regulating states, which could lead one to the conclusion that taxation indirectly replaces formal regulation. However, these kinds of legislative attempts are likely to be haphazard, accomplishing regulation in "fits and starts" and, theoretically at least, can be even more damaging to the cable operators -- to say nothing of cable subscribers -- than a comprehensive plan of regulation.

By contrast, a decision to regulate comprehensively opens up the question of which agency should be vested with regulatory powers and responsibilities. For those states which have regulated, the options have been essentially (1) within the existing PUC framework, (2) setting up a completely new state commission, or (3) establishing some hybrid form of regulation.

From a strict statutory standpoint, state-wide jurisdiction is most easily accomplished by placing all jurisdiction in in the PUC. Obviously, there is considerable logic to this approach. Where services offered by telephone common carriers and cable operators are similar -- such as data transmission -- the logic for so doing is strengthened. The State of Alaska saw fit to give its Public Utility Commission complete cable jurisdiction merely by changing the definition of what constitutes a public utility -- and virtually saying nothing else. And indeed, the Alaska decision may have been a well-conceived legislative choice. At the very least, it was the easiest legislative choice.

On the other hand, the establishment of a commission is a more difficult approach. Not only does it involve the conceiving of cable in an entirely new way and the setting up of a new institutional framework, but the cable commission might find itself at odds on certain issues with the already-established PUC, as has happened in New York. Of course, there are other considerations. For example, a state choosing state-wide jurisdiction may seek to avoid the setting up of another bureaucracy by placing all the functions within the utility commission. By so doing, however, the actual creation of another agency may be avoided, but an already over-burdened PUC may find itself with additional duties.

Some commentators have urged that cable, while having some indicia of a public utility, is truly so separate and distinct that traditional approaches of PUC regulation should be avoided. For example, the Sloan Commission Report said:

> The Public Utility Commission deals primarily with the consequences of monopoly in the provision of public services. Their [sic] concern is rate regulation, return or investment, and the provision of uniform service. 428/

But while cable is concerned with these aspects, it really goes much beyond the traditional approach, introducing new elements of service and monopoly.

Some states, notably New Jersey and Delaware, have attempted to strike a middle-ground between traditional PUC regulation and revolutionary commission regulation. Just as the attempt may be to achieve the best of both worlds, it is also possible that the worst of both will be the result.

Nevertheless, some general observations can be made. It would appear that anything the cable commission can do can be done by the utility commission. The question would therefore boil down to how broad is the jurisdiction of the cable commis-

---

428/ Sloan Commission, *op. cit.*, at 159.

sion, or alternatively, how much assertion of jurisdiction does the PUC want to make. Generally a PUC will have much broader inherent authority than a commission. So, for example, a PUC probably has inherent jurisdiction within the traditional PUC statute to require the regionalizing of franchises (i.e. serving an area larger than a particular community). Absent specific statutory authority, a state cable commission might not be able to require regionalization or line extension. Likewise, in matters dealing with rates charged, the utility commission has much greater inherent power in areas of rate-setting, procedures, and those rates which are to be covered. And in another area -- relationships with utilities, which include pole attachments -- the Public Utility Commission will have much broader inherent authority, but by the same token, a much more likely utility bias.

It is in the newer areas of cable service, such as access requirements, provisions dealing with two-way communications, stimulating public services, or developing broad telecommunications plans, that the statutory distinctions become much more evident. This of course does not necessarily mean that the PUC legally cannot move into those areas; rather, what it means is that the PUC will be left to its own devices, without any statutory guidance as to new forms of communication. Given an absence of a statutory charge and a generally conservative PUC approach, it is likely that the PUC would choose not to deal with the newer cable questions.

It is theoretically possible to create a new regulatory atmosphere dealing with cable within the framework of the existing utility commission. Indeed, that would appear to be the approach of the hybrid states -- Delaware, New Jersey and, to a smaller extent, Hawaii. It is therefore possible to accommodate even the more novel aspects of cable within the traditional PUC framework. In other words, it is possible to have the utility commission treat access requirements or the potential of two-way communication. As pointed out in the statement concerning Alaska's legislative attempt, this hybrid approach is -- for the legislature, at least -- an easier (though not necessarily better) approach.

However, the potential advantages of the commission format should not be discounted. It represents an attempt to meld the peculiar local aspects of cable (e.g. franchisee selection) with those better handled at the state level (e.g. regionalization). At the same time, it is an attempt to avoid the weaknesses at the local level (e.g. due process abuse), and at the state level (e.g. attempts at rate of return regulation).

While statutory considerations obviously are crucial in the decision as to whether to adopt the commission approach, the PUC approach or the "hybrid" approach, it is just as likely that this particular choice also may well depend on the budgetary constraints facing state legislators and technological developments. 429/

429/ See the companion report, Regulatory Politics: State Legislatures and the Cable Television Industry, by Konrad K. Kalba, Larry S. Levine and Anne E. Birinyi, Harvard University Program on Information Resources Policy, Publication P-78-2, August 1978, for a discussion of how these broader factors have influenced the form of regulatory involvement by the states.

APPENDIX

Page

MASSACHUSETTS

MICHIGAN

Page

MINNESOTA

Page

NEW YORK (Continued)

Page

NEW YORK (Continued)

Page