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be free to viewers who purchase an antenna; and Satellite Television Corporation (STC), a subsidiary of Comsat, whose proposal calls for three satellites to deliver three channels of commercial free programming to subscribers for a $25 monthly fee plus a $100 antenna installation.

The ultimate success of DBS is hard to predict. The two major business issues are cost and marketplace.

Because a DBS system needs a special satellite with a powerful downlink signal, relatively expensive receiving equipment (including a 2- to 4-foot antenna disk); and a nationwide sales and marketing force, putting together a national DBS service is a billion-dollar proposition. Since the receiving equipment presently can run between $500 and $1500, subscribers would have to receive superior programming in order to be induced to invest such sums.

Still being at least two years off, DBS will be entering a crowded and entrenched marketplace. It will offer more channels than does STV or MDS, but, on the other hand, will offer fewer channels than does cable, as well as requiring an outdoor antenna. Most experts agree that the largest market for DBS will be in rural and city areas that do not have access to cable television (or where it is too expensive to build cable), although here it may come into competition with the less expensive LPTV stations. DBS can also try to approach the consumer market as an additional pay tier on a cable system (whereby the cable operator would purchase the expensive receiver equipment for its head end). It is estimated that by 1990 20 million to 30 million households will not have access to the cable-STV-MDS market, and this is probably where DBS will make its home.

The prospect of several DBS systems operating raises several legal issues. The first and foremost is which spectrum space should be used for DBS, since the proposed spectrum (12-gegahertz band) is currently occupied by terrestrial services. The FCC faces a challenge in trying to accomodate existing users and future DBS users.

The second major issue is whether the FCC should regulate DBS services as a common carrier or as a broadcast service. Common carriers generally provide only the means of communication for their customers, while broadcasters are required to retain control over their transmissions. FCC regulations for each involve many pros and cons. For the moment, the FCC staff appears to be imposing as few regulations on DBS systems as possible, allowing the DBS services to operate unemcumbered while marketplace forces drive DBS to its most efficient form.

Cable Television Franchising

David K. Speaker
David Z. Wirtschafter

INTRODUCTION

The world, particularly the United States, is experiencing an information revolution. The entire fabric of modern society will be radically altered as increasing numbers of homes, offices, and factories are brought into a single communications system. The cable television systems being implemented in cities and towns across the country are becoming an integral part of this communications web. [1] Cable television has come of age.

Although the industry has existed quietly for a long time, [2] urban and suburban communities have been overwhelmed by the race for cable television franchises, [3] a contest that will continue until the coveted metropolitan market franchises are comsumed. [4] The surge in demand for cable television services, [5] the recent relaxation of FCC regulatory paternalism, [6] the removal of the regulatory forum to local governments, the increasing sophistication of cable technology, [7] and the proliferation of programming services and sources have all contributed to the development of a phenomenon best entitled a franchising frenzy. [8]

Between 1977 and 1982, the proportion of households with CATV grew from 16.7 percent to 34 percent. In the last three years, the cable audience has doubled, and it continues to grow at the rate of 6 million a year. By the end of the decade, cable hookups are expected in more than half of U.S. homes. The rapid pace at which local governments have jumped on the cable television bandwagon has fostered the development of intense competition among cable operators. In the opinion of one commentator, "[T]he outcome of the cable franchising wars will shape, to a great extent, the content and quality of television communication for the rest of the century." [9] Not surprisingly, this franchising frenzy has fostered a situation in major urban markets characterized by haphazard municipal procedures, conflicting interests, and controversial results. [10] This article will examine some of the problems associated with the franchising process as it currently exists [11] and will suggest reforms consistent with the likely reality of cable television's impact on the future of communications in this country.

THE PLAYERS

The players (the individuals and groups involved) and the peculiarities of their interaction are fundamental to the problems associated with cable television franchising. The primary adversaries are the local governmental authorities and the cable television system operators. [12] Their relationship exists from the moment a municipality decides that it would benefit from a cable system until the term of the franchise expires. The other participants, while important, are not as visible. They include the public, for whose benefit the franchise is purportedly going to be implemented, [13] locally influential persons who ally themselves with a particular cable system operator for economic or political purposes, the cable television consultants hired by the city, and, to a limited extent, the local tactical advisors hired by the competing bidders. These participants are active primarily during the period prior to the award of the franchise and are engaged in activities aimed exclusively at maximizing the benefits their groups seek to obtain from the award of the franchise.

THE BIG DEMAND, BIG PROMISE MENTALITY

The problems with cable franchising arise largely from the conflicting interests of the aforementioned participants and involve questionable practices of a national industry in its dealings with local governments. [14] The local politicians responsible for awarding cable television franchises have a great deal of control at their fingertips and, as of 1983, are making demands of the cable operators that just two years earlier would have been unthinkable. [15] This situation has been referred to as "state-of-the-art fever" [16] and has burdened the cable franchising process with what some view as "franchising hyperbole." [17] This excitement over the new capabilities that are emerging tends to overshadow the darker side of the marriage between local governments and cable television operators.

Local governing bodies have fallen into a "pay my price or leave town" syndrome. Since they have ultimate control over market entry, the process is more of a form of "sophisticated extortion and extraction" [18] than a negotiation: "City councils are not interested in whether equipment has been tested in the field or whether a company's projected revenues are inadequate; their concern is simply that they want the voters to know they got them a better deal than the community next door." [19]

The bid proposals typically contain every promise necessary to satisfy the demands of the local franchise authorities. [20] Since the technology is rapidly and concurrently developing, such promises tend to become self-fulfilling prophecies. But does the consumer really *want* all of these added niceties, or are they merely an undesirable product of the competitive bidding process? The point is that the cable industry may be forgetting the reality of business in its zeal to obtain franchises in urban communities, [21] that is, forgetting that there is an increased economic risk in inflated proposals.

Investment counselors, are warning that cable's speculative bubble may be dangerously overblown. They note that of the three-dozen cable services delivered by satellite, only Home Box Office is clearly showing a profit, and Ted Turner's Cable News Network is "gushing red ink at the rate of one million dollars a month. [22] Little attention is paid to what services consumers are willing to pay for; yet the cost of the system to the consumer is likely to become higher as the level of proposed services increases. [23] If the consumer's cost doesn't rise, it is equally likely that the operators are sacrificing their own financial and operating objectives in order to win the award of the franchise. The latter may lead to failed promises. As one commentator has said, "Low rates of below $8.00 for an urban 54-channel system are unrealistic and misleading. Companies trying to lowball rates should be looked upon with suspicion." [24]

The probable outcome may manifest the impact of the current price of market entry on the economic viability of the systems being proposed. John Malone, President of Telecommunications, Inc., a cable operator, stated, "In our judgement, there's virtually no major market in franchising today that is economic as bid. We think the bidders are depending upon changes in the franchise, the rates, or the development of services not yet surfaced. At this point it's a competitive process, and it has gone way beyond economic justification." [25]

In a speech to the American Society of Public Administration, Marc Nathanson, President of Falcon Communications, summed up his view of the high-capacity, low-fee system proposals being paraded before city councils with a single word: "ridiculous." [26] He added, "[T]hese unrealistic promises are a very negative trend and are getting out of hand. The industry is its own worst enemy. If we cannot straighten ourselves out, we are going to end up with broken promises and egg on our face." [27]

THE FRANCHISE FEES

A factor facilitating and reflecting the tendency of municipal decision makers to concentrate on factors other than what service is best of the community's cable consumers is the city's right to collect a franchise fee. Many local governmental units may initially be attracted to the idea of a cable operation in their community because of the potential boost it could provide for their revenue base. [28] This revenue is derived from a federally sanctioned [29] fee of between 3 percent and 5 percent of the cable operators' gross revenues [30] and is paid to the local governmental entity each year for the duration of the franchise. The fee is considered necessary to provide the local regulatory body with funds sufficient to cover the cost of its monitoring activities and to serve as a charge for the use of rights of way over public land.

There are, however, serious questions regarding the appropriateness of this fee, whether it is necessary, and whether there are any alternatives.

First, in franchise agreements that do not limit the rates an operator may charge, [31] the franchisee will pass the cost of the fee on to its subscribers, which, in effect, may amount to nothing more than the imposition of an indirect and regressive tax on cable subscribers. [32] Where the franchise agreement does restrict the franchisee's rate structure, the subscriber still bears the burden of its cost, either because a statute expressly permits such cost to be passed on by the franchisee [33] or because, in the absence of such statutory permission, the operator is likely to find some way of cutting costs that it would otherwise incur to the benefit of its cable subscribers (for example, a lower quality of service).

The FCC's imposition of a ceiling on the level of franchise fees was partially motivated by this consideration. In its view, excessive fees would thwart its goals of cable television proliferation and economic stability in the industry by undermining the operators' ability to keep their rates low and quality of service high. At the same time, the FCC wanted to prevent the localities from using the franchise fees as a supplement to the general fund.

It is possible that the costs to the community for which the franchise fee is theoretically imposed are significantly lower than 3 percent to 5 percent of the operator's total revenue. Assuming, for example, that the cables are to be strung on existing electric or telephone utility poles, the city incurs no *cost* at all, and, hence, is not engaging in a compensable activity, when the cables are placed along these existing land use easements. Not only had the easement already been granted to the electric or telephone utility, but those utilities can themselves charge the cable operators for the use of their poles. [34] The indirect effect, assuming this cost to the operator filters through to the subscriber in either higher rates or lower-quality service, is that the city council is imposing a tax on the subscribers for a cost that is at best theoretical.

Likewise, the cost of local regulation may be much lower than 3 percent of the operator's revenues. With a cable system, a city has the potential to reduce its own administrative communication costs through direct video networks between governmental departments and through services (such as sophisticated educational techniques for its school system). It is possible that such savings would offset whatever cost there is in regulating the operation of a cable system.

In sum, the validity of the local government's stake in the operator's gross revenues is subject to question because (1) the local government saves money administratively; (2) it spends very little on the system that it would not have been entitled to take from the general fund; (3) it does not incur any compensible detriment by granting rights of way; and (4) the fee is actually a tax on those who wish to subscribe in *addition* to their subscription charge.

There are other problems with the franchise fee. Although the FCC seeks the proliferation of cable television, its 3- to 5-percent franchise fee structure may actually be contributing to overregulation. [35] Because the additional 2 percent is permissible only if the regulatory scheme is sufficiently complex, local franchisors seeking to get as much dollar value out of the franchise as possible have an incentive to develop a complex regulatory scheme, even where one is not necessary, in order to secure FCC approval of the 5-percent fee. This unnecessary regulation can, in turn, have the effect of placing the operator in a straitjacket, thereby putting a cap on future technological innovation within the community's cable system as communication needs change and expand.

Additionally, as indicated by the discussion above, there is reason to be concerned that the franchise fee revenues will be used by the locality for purposes other than the administration of the cable television system. If funds obtained from the cable company are used by the municipality to benefit its public in matters unrelated to the cable system, the municipality is providing a benefit to nonsubscribers for which they have not been taxed. Subscribers, meanwhile, obtain the benefit too, but have paid for it indirectly in the form of higher subscription fees. Clearly, nonsubscribers could benefit at the expense of subscribers if franchise fee revenues are excessive and such excess is placed in the general treasury. Hence, it may be efficient additionally to regulate (through the FCC or, preferably, by a state public utilities commissions or state governments) the fees charged by the municipalities. This might involve monitoring the scope of local government regulation and, if necessary, placing limits on them in an attempt to eliminate unnecessary local regulatory functions.

An alternative possibility, assuming that the 3- to 5-percent franchise fee is unchangeable, is a legislative or regulatory mandate emanating from the federal or state level imposing a duty on the municipality to keep its regulatory cable expenditures to a minimum, retain any funds not used in a separate treasury account, perhaps in the form of a trust, and refund to the cable subscribers any portion of the franchise fee revenues remaining in the municipal treasury at the end of its fiscal year.

Another way to avoid these problems and to ensure efficient use of the funds may be to stipulate, by means of an agreement between the cable operator and the city council, that if any portion of the cash payment of the 3- or 5-percent fee exceeds the legitimate cost of regulation, either subscriber rates will be reduced by an amount equal to that portion of or an additional service will be provided at little or no cost. This would directly benefit the cable subscribers and avoid the inefficient and unnecessary governmental use step.

Local politics being what they are, however, it seems unlikely that such arrangements would ever come to pass in the absence of a great deal of direct and organized pressure from the constituents. This is particularly evident when one considers the importance of a balanced budget, the often arduous task of keeping within such a budget, the comparative difficulty of finding new sources of expendable municipal revenue, and the relative ease of exploiting such sources once found, especially such federally santioned ones as cable franchise fees.

In Alaska, an interesting controversy arose over whether a cable operator was still required to pay the franchise fee to the city following state legislation that removed the regulatory forum from the municipality to a state public utilities commission. *In B-C Cable Company, Inc. v. City and Borough of Juneau* [36] the cable franchisee argued that the 3-percent franchise fee could not be carried forward, subsequent to the state legislation, and continue to be considered a "reasonable fee" as contemplated by AS 42.05.251. [37]

The franchise fee authorized by AS 42.05.251 was originally designed to compensate the city for the use of municipal streets and for the cost of municipal supervision and regulation. The cable operator took the position that the reasonableness of the fee as required by AS 42.05.251 was subject to doubt since the newly created Alaska Public Utilities Commission [38] had relieved the municipalities of their regulatory burden.

In finding that the municipality remained entitled to the franchise fee, the Alaska Supreme Court pointed out that, despite the Commission's ultimate authority in regulatory matters, [39] "[W]hile the APUC Act preempts a large portion of the regulatory authority of municipalities . . ., it does not pre-empt all such authority." [40] In the court's view the municipality's regulatory capacity was limited only to the extent that it conflicted with those regulations promulgated by the Commission. Because its regulatory function was thus not totally abrogated, the franchise fee continued to support a legitimate local regulatory process.

The court in *B-C Cable* also noted that the franchise agreement, once granted, became a contract binding upon both parties, [41] and that, even though the franchise agreement originated in the form of a municipal ordinance, it was in fact a contract the validity of which should not be impaired by the subsequent enactment of legislation altering the regulatory forum. The courts in general, as indicated by the *B-C Cable* case, refrain from questioning the propriety of CATV franchise fees and when compelled to make a decision find the fee appropriate.

In *Affiliated Capital Corp. v. City of Houston,* [42] the court specifically recognized the blatant failure of the part of the city council to expend any of the city's resources in an effort to take control of the franchising process there. Despite the council's obvious lack of concern over the implementation of cable television in their city, the court failed to make any mention of the likelihood that such a passive local government would be disinclined to establish or engage in a regulatory procedure that would warrant or require expenditures amounting to 3 percent to 5 percent of the operating revenues of the city's five franchisees. The issue was never even raised by the litigant seeking to establish the impropriety of the franchising process in the city.

THE RENT-A-SOMETHING-POLITICAL SYNDROME AND RELATED PROBLEMS

Because franchises are awarded by local political bodies and because the competition is quite fierce, cable operators find that it is very helpful to become closely associated with individuals, groups, or institutions that have the capacity to exercise political influence among those awarding the franchise.

The differences between cable companies and their bid proposals are usually subtle to most city council members and may take weeks of research to discern. Political leverage thus becomes an effective and usually indispensable tool to a cable operator intent on winning the franchise. [43] Regardless of whether the responsibility for evaluating bids is in the hands of consultants or citizens' groups, the final decision rests with a group of politicians, whose actions are sometimes inexplicable and hardly ever predictable. [44] When there is little significant difference between the proposals and the character of the companies, politicians are left with little on which to base a decision except political advantage. [45] The presence of this element in franchising procedure fosters a procedural environment conducive to the use of tactical devices of questionable character.

"Anybody who thinks a franchise is awarded on the merits of the proposal is extremely naive. The awarding of a franchise is a political process, not a bid process." [46] The truth of this statement is the foundation of the practices known in the industry as rent-a-citizen or rent-an-institution. Usually, such individuals or institutions are highly visible and/or politically influential members of the community and are offered equity in the local venture or a position with the company in exchange for either token financial contributions or support. [47] The strategy on which the cable company relies assumes that once this individual or organization acquires the financial stake, there arises a vested interest in the outcome of a franchise-bidding process. With the politicians as their targets, the rent-a-citizens take over where the cable executives leave off, using their contacts, personal leverage, and powers of persuasion to influence the franchise-granting process. [48]

Many financial experts argue that the profits that these free-riding rented citizens will make from their percentage ownership in the cable operation will ultimately come out of the pockets of the cable subscribers, adding as much as 25 percent to monthly cable subscription fees in communities around the country. [49] The rationale is that if the cable companies are giving away 10 percent to 20 percent of their company to the local citizens in the form of bonuses and salaries, they could presumably have implemented their systems at a 10- to 20-percent lower cost had the local "investors" not been given the free shares.

In addition to the economic inefficiencies caused by the local rented citizens, this practice, while perfectly legal, can produce other undesirable side effects and ethical questions. For one thing, it creates an atmosphere that does not lend itself to citizen confidence in the integrity of the system. Also, many local politicians are angered by the practice, often feeling insulted by the overt attempts to influence their cronies, contributors, and constituencies. [50] Additionally, if left unchecked, the influence peddling may, and has, escalated into outright bribery or illegal collusion between local wheelers and dealers. As one cable executive aptly commented, "We are our own worst enemies engaged in an orgy of excesses." [51] The climate, in his view, was conducive to lying, cheating, and bribery.

Municipal politicians may be viewed as easy prey by those who wish to have certain objectives accomplished and possess the resources necessary to pull the appropriate strings. Despite legislative efforts to discourage such questionable deeds, decisions made for the wrong reasons are likely to persist and may or may not be construed after the fact as "illegal" or as an offense of such seriousness to warrant the invalidation of the benefit obtained thereby, namely the franchise. Whether it is labeled bribery, campaign contributions, extortion, or gratuity, its occurrence inevitably involves a public official's favorable exercise of discretion in his or her official capacity in exchange for money, services, or benefits contributed to that official privately. [52]

Any doubt that cable operators may go to great lengths in their quest for effective political alliance before the activity is likely to be perceived

as corrupt has been substantially laid to rest by the holding in *Metro Cable Co. v. CATV of Rockford, Inc.* [53] There, the mayor of the city and the chairman of the city council's Planning and Finance Committee agreed with two corporate officers of the successful applicant to use their best efforts to prevent plaintiff from being granted a franchise, and in exchange each official was given a substantial sum as a campaign contribution. In seeking injunctive relief and damages, the losing applicant alleged in its complaint that the presence of concerted efforts between plaintiff's competitor and the local officials to induce governmental action removed the immunity normally accorded legislative decisions under the Sherman Act and that the acts were in restraint of trade and thereby in violation of the Sherman Act.

The court held that the Sherman Act was not violated and made it clear that campaign contributions do not, in and of themselves, constitute inherently corrupt activity. Instead, the court concluded that such contributions, as long as they are genuine attempts to influence legislative action, will not be held to be anticompetitive even if the resulting legislative action has an anticompetitive effect.

The language of the *Metro* court recognizes the inevitability of the use of campaign contributions as a tool by cable operators in the franchise race as it proceeds through the political decision-making machinery. The only limitation on campaign contributions, as far as the Sherman Act is concerned, is that the concerted activity resulting from these payments not be a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor. Even if there is an overt intent to destroy competition, the Sherman Act does not apply if the means chosen to destroy competition is merely an honest attempt to influence politicians through campaign contributions. The *Metro* decision does nothing to discourage cable operators from engaging in practices that direct the attention of the decision makers away from the merits of the bid proposals toward the operator most persuasively engaged in the influence-peddling game.

The unfortunate product of the overwhelming presence and apparent judicial acceptance of fund-raising dinners, local partners, campaign contributions, etc., is quite clearly that the community frequently receives less in terms of quality, efficiency, production, and cost-effectiveness than it would have received had the franchise been awarded strictly on the basis of the merits of each bid proposal presented because the influence peddling has resulted in the franchise's going to a less qualified bidder. This, of course, does not always occur; the best qualified bidder may be chosen despite or because of the overwhelming presence of subjective factors. Rather, it is the *potential* for such abusive errors induced by the element of influence that makes a mockery of both the competitive bidding process and the use of cable consultants to analyze the comparative merits of the applications.

The lack of impartiality frequently is the origin of disparity between the ultimate award and the theoretically sound recommendations of a cable television consultant. Moreover, the operators competing for the cable franchise who are quite capable of succeeding on the merits of their proposal alone are required to expend time and resources to participate in the influence game in order to avoid losing the competitive edge they would otherwise have maintained had the bid and award process been conducted in a forum more capable of producing objective results. Ultimately, the cable subscriber bears the cost of this inefficient application of resources as the cable operator awarded the franchise attempts to recoup *its* losses from them.

In addition to the probability that the community will suffer by not obtaining the best service available and by having to bear the cost of the influence-related inefficiencies, the cable television needs of the region or state may also be frustrated because the element of influence removes any incentive local legislators might have to pay sufficient attention to those aspects of an operator's bid proposal bearing upon future growth as part of a regional cable network.

Perhaps the most troublesome consequence of the pervasiveness of local influence peddling in CATV franchising procedure is that, in the absence of statewide legislation establishing a larger, more sophisticated forum in which franchise award decisions can be made, franchise applicants who feel they have been the victims of conspiracy, denial of due process, arbitrariness, and other procedural defects have no alternative but to seek redress through the courts. The consumers, as a result, may have to bear the additional burden of waiting while the court decides whether the local decision was made consistently with the rights of those seeking the CATV franchise.

THE POSTFRANCHISE AWARD CONTEST

All the problematic effects of excessive political manipulation are compounded if the practice leads to costly and time-consuming litigation over the objective validity of the award, with the franchise loser(s) charging that politics, not an impartial bidding process, was behind the final vote. This intraindustry warfare has become commonplace as competition for franchises has intensified.

An underlying problem associated with postaward contests involves the potential for system implementation delay. The uncertainty facing the successful bidder (franchisee) is whether it should proceed with construction and other postaward steps required to implement the system while litigation regarding the validity of its cable contract with the city is pending or threatened.

Its course of conduct may be governed to a limited extent by a clause contained in some franchise ordinances [54] requiring that the presence of third party litigation will not suspend the cable operator's contractual obligation physically to implement the system in accordance with the prescribed timetable. [55] The presence of such a clause may enable the cable operator to proceed without risking financial loss or a judicial finding of bad faith, depending on the court's attitude and the extent of the operator's knowledge regarding the merits of both the procedural legitimacy of its award and the losing bidder's allegations. To proceed in the absence of such a clause may lead to a finding of bad faith.

It is possible that inefficiencies may result if the operator proceeds in accordance with the construction terms of the franchise ordinance. If the litigation results in a declaration that the franchise award procedure was in error and ought to be redone, the franchisee would have engaged in or completed construction and other system-related activities part or all of which may not be recoverable, assuming the award decision was changed by the outcome of such litigation. Presumably, the operator to whom the subsequent award is made will offer to purchase the facilities installed by the previous franchisee, but the purchase price offered may not adequately reflect the newly constructed system's actual investment value. For this reason, the franchisee's continuing construction efforts are likely to have an adverse impact on the losing bidder's likelihood of success on the merits: In such circumstances, the court may find it prudent to uphold the franchise award in order to avoid economic waste. This possibility may, in turn, provide the bidder who is challenging the award with a strong incentive to assure the court that it is willing to compensate the franchisee to the extent necessary to place that company in as good a position as it would have been in had it never obtained the franchise. Even so, the franchisee, while undertaking its installation efforts, may also be acquiring rights of way and exhausting limited governmental funds, which could make subsequent installation by the competing bidder more difficult should it eventually obtain the contract. [56] "The longer the resolution of the matter is delayed the greater the potential harm to both companies and the public." [57]

The lucrative potentialities of the operation of a cable television system often provide a disappointed bidder with a compelling inducement to challenge the justness of the franchise grant. Heated controversy provoking such litigation often arises when a consultant hired by the city or an administrative committee created by the city or state to study and make recommendations regarding the merits of the bid proposals had, in fact, made a recommendation or a ranking of the proposals that was subsequently ignored by the city council in reaching its award decision. The asserted purpose of these committees or consultants is to compensate for the awarding body's apparent lack of expertise in assessing the technical and economic qualifications of the individual bidders and the merits of their respective proposals. The typical scenario develops when a consultant or committee unequivocally advises the city council that one particular operator is superior to the others and provides a recommendation ranking the bidders and proposals on the basis of quality and ability to meet the city's needs—whereupon the city officials vote to award the franchise to one of the less-qualified cable companies.

That the occurrence is not uncommon is shown by its presence in at least three recent major cable controversies. In both *In re Micro-Cable Communications Corp.* [58] and *Metro,* [59] each court specifically mentioned that the award decision of the respective city council, while made with full knowledge of an uncontroverted recommendation, failed to follow the guidance it had itself sought. While this was not a major issue in either case, its presence cast doubt over the extent to which objective factors were the basis for each city's decision. In *Affiliated Capital,* [60] the consultant hired by the city of Houston was fired after his recommendation that four of five applicants be rejected for lack of satisfactory evidence of ability was altered to indicate that he approved of each applicant.

The question is, At what point will a city's failure to abide by or at least take into consideration the factually based recommendations of its committee or consultant be construed as an actionable abuse of discretion, and to what extent does the failure to follow the recommendation infringe upon the recommended bidder's procedural rights?

The bidder selected by the advisory entity is usually, and understandably, upset at the prospect of being denied a multimillion-dollar contract by local politicians who have little or no practical expertise in the field and whose primary reason for ignoring the informed advice is likely to have been the successful influence-peddling activities of another, less qualified, applicant.

A cable consultant hired by a city is often one of the few nationally prominent cable consultants. All these consultants are experts in their field, but are nevertheless subject to pressures arising from the nature of their practice. For example, the well-known consultants interact regularly with the operators in their attempts to acquire the appropriate information bearing on the suitability of each operator's proposal. As a consultant is hired by an increasing number of cities, his or her recommendations may be affected by his or her previous decisions in other cities. For instance, if s/he has been responsible for several franchise awards going to one particular operator in a number of localities, s/he may later be inclined to

recommend another cable company to local governments to avoid the appearance of somehow conspiring with and to the advantage of one particular cable firm. Because of this problem, the consultant has an incentive *not* to recommend the best qualified applicant if he or she has frequently recommended that particular cable firm or its affiliates in the past. In other words, the consultant's advisory conclusions may become tainted by the distributional effects of his/her decisional history.

Committees as well as consultants may likewise be influenced by other factors, such as bribery, promises made by individuals interested in the outcome of the award process, or simple individual biases. The point here is that these recommendations are not invariably sound, and they may lead to postaward problems similar to those created by the failure to follow a recommendation, namely, litigation over the objective validity of the award.

Despite the risk that a consultant's or committee's analysis is subject to some elements of less than objective influence, this factor of uncertainty is of minor significance when contrasted with the benefit such advisors confer upon the process. Advisors reduce the likelihood of arbitrary results emanating from a municipal governing body that otherwise does *not* have the advantage of input from an informed and independent entity.

The localized nature of the forum virtually requires that the awarding body seek external expert advice to make up for its lack of familiarity with the technical and economic peculiarities of a cable television system. As long as the power to grant a cable television franchise remains vested entirely with the municipal entity, consultants will be used to create at least the impression that the decision was an informed one. When the advice is not reflected by the award, for no apparent reason, and without a satisfactory explanation, an inference of arbitrariness or impropriety may arise. Such questionable inconsistencies are likely to continue until the municipal decision-making forum is abandoned and replaced with a regional or statewide forum capable of making such award decisions on its own in the absence of reliable external expertise. By removing the *need* for consultants or other external advisors, the possibility of a contradiction between advice and outcome and the chance of the advisory entity's advice being somehow flawed are both removed, thereby reducing the likelihood of procedural impropriety.

FRANCHISING COORDINATION—BUILT-IN CONFLICTS, LONG-RANGE PROSPECTS

Another problem with present award decisions for CATV franchises is the apparent lack of concern, or perhaps lack of awareness, regarding the impact that a community's individual franchise operation will have on, and the role it will play in, the national cable communications network that will develop over the next twenty years.

Within the mid-eighties, virtually all the cities in the major metropolitan areas throughout the United States will grant franchises. Four to five years after that, they will all be built. [61]

Decisions on cable television often transcend the boundaries of local municipal governments. The franchising of cable television has created a disorganized pattern of systems without regard to either the best possible economic utilization or best possible overall development of cable television.

One element of the current franchising frenzy that is likely to deter the evolution of regional or statewide cable television systems is the recognition by local officials and local businesspeople that individual systems enable and encourage smaller and less developed entrepreneurial enterprises to participate in and exploit the growth of a new industry and its profit potential, whereas a regional system would permit only the larger and economically established firms to be participants in the cable network. [62] Moreover, a large number and variety of individual cable operators, while seemingly unwieldy and inefficient, may add an element of dynamics to the continued development of system technology through their natural ability to impose and maintain competitive tension. An overly large system operator may have little competitive incentive to exploit advancing technological innovations to its consumers' benefit, and may also be disinclined to maintain consistently high levels of customer service in the absence of competitive pressure.

Despite the existence of these internal, community-oriented economic and competitive advantages, the small, single-community cable television operation may eventually succumb to the pressures of economic and technological reality. Neighboring cable operators may find it advantageous to interact reciprocally on a technical level as it becomes apparent that efficiency dictates the sharing of strategically located signal-gathering hardware and the joint operation of local origination studios. Technical interaction, that is, joint use of cable facilities, will come to pass naturally as individual operators pursue alternative cost-reducing devices.

This interaction, while efficient and beneficial to cable subscribers, may lead to administrative problems as the network grows. A significant number of mergers and/or consolidations are a likely result as it becomes more feasible and efficient for the large operators to administer the growing cable network. The franchises granted to local operators may eventually become subsidiaries, divisions, or affiliates of much larger cable conglomerates, functioning in much the same way that the three major television broadcast networks function today.

The importance of these possibilities has been largely overlooked during the current phase of municipal franchising, as local authorities tend to focus their inquiries rather narrowly on the ability of *their* system to meet the needs of *their* community. However, as Frank Lloyd has perceived,

> [D]espite the significantly lower level of federal presence in the cable television area there will still remain several critical issues at the federal level, issues that will begin more and more to look like antitrust issues. The issues of the 80's will be, first, issues about who owns and controls cable distribution facilities, and, second, concerns about access by other than the owner of cable facilities to those facilities. [63]

Continuing, Lloyd pointed out that the FCC does not currently have any rules governing the specific number of cable systems one entity can own or the foreign ownership of cable. Yet these are issues that will develop as more and more of the nation becomes wired for video. A gray area is the extent to which current cable franchises can (and should) be amended and future franchises written to accomodate the probable demands that regional realities will impose on cable systems.

New Jersey [64] has acknowledged this problem of the likely failure of local governments fully to comprehend the scope of the franchises that they are awarding, and has responded by enacting legislation concerning the extent to which regional considerations will prevail over local considerations in the franchising of cable television companies. Most state legislatures have limited their involvement in the franchising process to the legislative delegation of complete cable franchising authority to the individual municipal entities. [65] New Jersey, however, in what may have been a farsighted effort, has created a statewide regulatory scheme, which, in addition to granting municipal cable-franchising authority, reserves certain coordinating powers to the State Board of Public Utility Commissioners. The New Jersey Cable Television Act [66] vests the Board [67] with the power to grant or deny the right to operate even where a local government has given a particular operator its consent. The Board's task is primarily one of examining the application/bid proposal in its regional, as well as merely local, context. [68] The purpose of this two-tiered approach is to protect the interests of all the municipalities within the state by securing a desirable degree of uniformity in the practices and operations of cable television companies in those various jurisdictions. [69] As explained by the Supreme Court of New Jersey in *Clear Television Cable Corp. v. Board of Public Utility Commissioners,* [70] "The Board's power to override municipal action, whether it be a denial or a consent, is greatest when regional considerations affecting the cable television needs of an area beyond the municipality are threatened by the municipal decision."[71]

The problem dealt with in *Clear Cable,* while not typical in today's franchising context, may become significantly more important as cable systems proliferate and the communication needs of consumers evolve to a point at which consumption demands exceed the boundaries of the municipality. The players primarily involved in this conflict were the state Board and the local governments, as contrasted with most cable franchise controversies, in which the opposing parties are typically the cable operators and the municipalities. [72]

In *Clear Cable* the court squarely faced the issues arising from the interrelationships of mutually exclusive municipal cable operations and was called upon to construe and apply the terms of the Act. The court's construction was liberal, allowing the legislatively created Board a relatively broad authoritative scope.

The *Clear Cable* controversy concerned the following question: If a municipality makes a cable television franchising decision that will adversely affect cable television service in neighboring communities, does the Board have the authority to grant a franchise, thereby imposing a certain CATV operator's service on a nonconsenting municipality that prefers another service from another company? The case involved two townships, Dover and Berkeley. Each granted a franchise to Clear for the mainland portions of their respective townships. After being rejected by both Dover and Berkeley, National Video Systems, Inc., petitioned the Board for certification to operate in the beach areas, arguing that its proposals had been arbitrarily denied and that, under Section 17(d) [73] of the Act, the Board should grant a certificate to National even though it had not obtained municipal consent. Both Berkeley and Dover argued that their beach areas should be serviced by Clear because a major portion of their citizens were already serviced by Clear; each township wished to have *all* its residents receive the *same* service from *one* company.

The Board found no arbitrariness, and it declined to grant National the franchise on the basis of its Section 17(d) powers, but it later held hearings on the regionalization issue of Section 17(b). [74] Pursuant to those hearings, the Board found that the beach areas would receive better overall service from National, since it already operated in the surrounding beach communities. The Board granted the beach area certificate to National. Clear appealed this decision and National appealed the finding of no arbitrariness to the Appellate Division, which reversed the Board on both issues, finding that National did not have the municipal consents required by Section 22 of the Act, [75] and that the grant was not within the Board's authority, since Section 17(c) [76] prohibits such a grant by denying the Board authority to "impair" existing municipal consents, which were possessed by Clear.

The Supreme Court of New Jersey reversed the Appellate Division, reinstating the decision of the Board, and in so doing found it necessary to clarify provisions of the Cable Television Act, emphasizing the importance of regional considerations.

Early in its discussion, the court acknowledged that intermunicipality cooperation is necessary as technical interaction becomes increasingly unavoidable, [77] pointing out, "[C]able television's dual local/regional nature is based on the purposes and *technology* of the industry itself." The court added that part of the nature of cable television is to serve as a "regional *network.*"[78] [Emphasis added.] The language used by the court in its interpretation of the legislature's intent and observation of the cable industry in general reveals an understanding that technological coordination and exchange is bound to evolve as increasing numbers of localities grant franchises.

The court's decisional task, however, did not require it to expound on technological reality. Rather, the court was called upon to elucidate the proper role of the state Board in preventing the development of a disorganized and incongruous patchwork of individual cable systems incapable of manifesting the legislature's vision of an effective statewide cable system. To that end the court concluded that Section 17(b) of the Act, which sets forth the regionalization power of the Board, must be construed broadly enough to enable the Board to foster a rational and productive regional system despite lack of municipal consent. [79]

The court reasoned that, although franchising under the Act was a two-step procedure requiring both municipal consent and Board certification, to require municipal consent as an absolute prerequisite to Board certification in all cases would enable the unilateral decisions of any locality to render the Board powerless in its role as regional coordinator. In view of the legislature's recognition that regional needs may not be met by the companies to whom municipalities choose to give consent and because local consent may be unlikely to be forthcoming even in the presence of significant regional advantages, the court emphasized that the legislature must have intended the Board to have the power to grant certification unilaterally under certain circumstances. [80]

With a tinge of sarcasm, the court's opinion discloses an element of criticism aimed at the municipalities for their failure, in general, to realize the extent to which their franchising decisions affect the functional economies of cable television in the surrounding region. Unfortunately, as recognized by both the court and the legislature, this is the reality of the local political arena. Local politicians are typically interested only in satisfying the needs of their constituents. Any effort to promote the interests of cable consumers outside the community represented is necessarily wasted, as no corresponding benefit at the polls or otherwise is likely to be forthcoming.

It is because of this reality that the New Jersey Legislature created and implemented the Act. Apparently for the same reason, the court construed the scope of the Board's regionalization function broadly. The Board is capable of scrutinizing each municipal franchise decision with an objective eye, free, to a great extent, from the political sensitivities and other potential blinkers affecting local councils. To constrain the Board's role by permitting it to act only after a body of local decision makers had granted consent to a cable operator would be tantamount to eliminating the very advantages that a state board brings to the process of cable television franchising, thereby defeating the goals of the Act.

The *Clear Cable* court tempered its permissive interpretation of the Act, however, in two ways. First, it cautioned cable companies against concluding that they are now able to sidestep the Act's municipal consent requirement, emphasizing that, before approaching the Board for certification, a good faith effort to obtain municipal consent should be made as required by Section 22 of the Act. [81]

This restriction on the Board's authority was generally supported by the Appellate Division in *In re Micro-Cable Communications Corp.*, [82] wherein the court noted, "[T]he very nature of the cable television business requires strict compliance with the regulations." [83]

The *Clear Cable* court also pointed out that the Board's power to issue certificates based on regional considerations without municipal consent does not extend to situations where to do so would impair an existing certificate previously granted by the Board. [84]

Despite these restrictions on the Board's power, the decision of the *Clear Cable* court unequivocally establishes a precedent supporting the appropriateness of significant regional and/or statewide efforts aimed at securing a regional network capable of responding adequately to the communication and consumption needs of a wide variety of cable subscribers. The dizzying pace of the current cable-franchising procedures across the country indicates that most states and, indeed, the entire nation could benefit substantially from the application of a procedure recognizing that cable television has an ever-increasing dual local/regional (or local/statewide) nature. The cable television industry requires intermunicipality cooperation, such as that mandated by the New Jersey Act, if the futuristic visions of the *"Wired Society"* [85] are ever to be realized, and if the nation is to avoid cable service incapable of the interaction and adaptability necessary to keep up with the continuous development of sophisticated cable technology and consumer demand.

NOTES

1 Cable television is a system of television reception in which signals from distant stations are picked up by a tall or elevated antenna and sent by cable to the individual receivers of paying subscribers. Cable TV is fairly simple from an operator's standpoint. He or she must build a "head end" facility—a dish antenna to pick up signals and transmitting equipment to push the signals out on the cable—and then run lines from it, along utility poles, into individual homes. Once such a system is installed, the operator's work is largely in maintaining it and selling it. Kuznik, *The War to Wire Your Living Room*, Cleveland Magazine, Dec. 1979, at 102. The FCC defines a CATV system as—

> A non-broadcast facility consisting of a set of transmission paths and associated signal generation, reception and control equipment, under common ownership and control, that distribute or is designed to distribute to subscribers the signal of one or more television broadcast stations, but such term shall not include (1) any such facility that serves fewer than 50 subscribers, or (2) any such facility that serves or will serve only subscribers in one or more multiple unit dwellings under common ownership, control, or management.

47 C.F.R. §76.5(a) (1978).

Cable television began as community antenna television (CATV) and was utilized in areas of the country where local reception of commercial broadcast stations was difficult or impossible. Because of their ability to present specialized nonbroadcast entertainment programming at low cost, the CATV systems began to operate in areas where their enhanced reception capability was of less value than their own closed circuit capabilities. In effect, CATV has evolved from a mere carrier of another medium's programming to a significant medium of ideas and information in its own right. Most recently, with FCC deregulation and the development of satellite technology, CATV has become capable of providing consumers in major urban markets with a wide variety of programming choices at low cost. Most important, CATV is now recognized as the communication device of the future: "After three decades of playing a country-cousin role in the communications world, cable television finally seems destined for stardom. The 1980's look promising for an industry which has fought, with little past success, to realize its potential." Temple, *AB699 and the Cable TV Revolution in California*, California Journal, Feb. 1980, at 77.

2 The cable medium came into existence at least as early as 1954, since it was in that year that the FCC was first asked to assert jurisdiction over cable television, when a small West Virginia broadcast station complained that a CATV system intruded into its viewer market and refused to carry the local station's signal. Comment, *Regulating CATV: Local Government and the Franchising Process*. 19 South Dakota L. Rev. 143, 145 (1974). Although there appears to be some dispute as to precisely when the first community antenna television system was constructed, most sources agree that the one in Mahohoy City, Pennsylvania, began operating in 1948. House Subcomm. Communications. Cable Television: Promise Versus Regulatory Performance, 94th Cong., 2d Sess. 9 (1976).

3 Major cities that were expected to have awarded franchises by the end of 1980, for example, included the following inner cities: New York, Los Angeles, Philadelphia, San Francisco, Pittsburgh, Dallas, Fort Worth, Houston, Atlanta, Minneapolis-St. Paul, Indianapolis, Seattle, Cinncinati, Kansas City, Nashville, Portland, Buffalo, Columbus, Phoenix, New Orleans Charlotte, Memphis, San Diego, Oklahoma City, Orlando, San Antonio, Louisville, Birmingham, Dayton, Norfolk, Syracuse, Salt Lake City, Little Rock, Omaha, and Richmond. Of the major large inner cities, only the following had not awarded franchises by the end of 1980: Chicago, Boston, Detroit, Cleveland, Washington, D.C., St. Louis, Miami, Baltimore, Milwaukee, and Denver. Of these, Boston, St. Louis, Miami, Baltimore, Milwaukee, and Denver, had requests for proposals (RFPs) out in 1981.

As for the suburbs that are a part of the major markets, by the end of 1981, franchises had been awarded in nearly all of them. Dawson, *The Franchise Story*, Cable Vision, May 19, 1980, at 62.

[4] As used in this article, the term "franchise" refers to a grant of authority, by the local or state government, to a corporation or individual, to have the public streets, alleys, and ways, on more than a temporary basis, for the purpose of carrying on a business in the nature of a public utility. E. McQuillan, 12 Law of Municipal Corporations §34.04 (3d ed. 1970).

[5] Examples of developments expected to be operational by 1988 include home security alarm systems, home banking, shopping from the living room, purchasing airline tickets, etc., two-way communication, voting, institutional networks capable of interconnecting schools, hospitals, fire, and police services, libraries, etc., gavel-to-gavel coverage of the House of Representatives and other political activities, data channels, access to computer data banks, video games, off-track betting, and electronic mail delivery.

Basically, what will occur is a revolution in information access. There are, however, problems associated with this increase in communicative capacity, namely that the data stored in the cable company's computer may present a threat to the subscriber's security and privacy, with, for example, unscrupulous cable firms peddling such information to those willing to pay the right price. Though banks and credit bureaus fall under the federal privacy laws, cable operators may be free from such restrictions.

[6] Up until around 1981, the FCC exercised substantial jurisdiction over what was happening in the CATV business. *See* 47 C.F.R. §76 *et seq.* for its regulatory provisions. After 1977, however, the FCC began deleting many of the sections, until only the requirements regarding franchise fees remained. For a general discussion of this gradual removal of FCC restrictions, *see* Memorandum Opinion and Order and Further Notice of Proposed Rule Making, 71 FCC 2d 569 (April 12, 1979); Whitley, *Cable Television: The Practical Implications of Local Regulation and Control*, 27 Drake L. Rev. 391 (1978), at 393.

Some of the major changes in FCC policy, which were largely a result of court decisions, such as FCC v. Midwest Video Corp., 440 U.S. 689 (1979), leading to the franchising frenzy follow:

47 C.F.R. §§ 76.252-258 contained channel capacity, two-way capacity, and access requirements. These rules were deleted from the FCC rules on November 10, 1980. *See* 45 Fed. Reg. 76,178-79 (1980).

The FCC rules regarding restrictions on distant television signal carriage adopted in 1972 and codified in 47 C.F.R. §§ 76.59,61,63 and 151-61, were deleted by the Commission on October 18, 1980. *See* 45 Fed. Reg. 60,186-303 (1980).

The requirement that cable companies file an application for a certificate of compliance with the FCC was eliminated by the Commission in 1977. *See* Report and Order in Docket 21002, 66 FCC 2d 380 (1977).

[7] The technological breakthrough of satellite programming, which allows a single signal bounced off an RCA satellite 22,300 miles out in space to reach cable systems all over the country, changed the cable business almost overnight. Kuznik, *The War to Wire Your Living Room*, Cleveland Magazine, Dec. 1979, at 102.

Cable TV subscribers will have access to more programs with the advent of a satellite "shopping center" developed expressly to meet the needs of the cable TV industry. The satellite, called Galaxy I, will distribute twenty-four channels of programming service simultaneously on its twenty-four transponders. Programming companies will purchase the transponders and offer their services to cable system operators. Galaxy I is one of three satellites being built by Hughes Communications, Inc. It is scheduled to be launched in May 1983, followed by Galaxy II in September. Newsweek, Sept. 14, 1981, at 20.

Within the decade it will be possible to beam programs directly from the satellite to the TV set at home. A dozen companies including CBS, RCA, the Communications Satellite Corp,

and others, have applied to the FCC for permission to operate direct-broadcast satellite systems (DBS). The FCC has approved the concept in principle, but has made no move to issue licences and an international conference to divide up frequencies is not scheduled until 1983.

[8] This is a phrase commonly used in the industry to describe the hurried confusion characteristic of the CATV franchising process. *See* Winter, *Urge Cable Television Franchising Reforms*, 67 A.B.A.J. 275 (March 1981).

[9] Livingston, *The Big Stakes Game of the City Cable Franchises*, Adweek (Sept. 29, 1980), at page BR36.

[10] The resulting controversy often arises when the evidence and circumstances overwhelmingly indicate that the community would be best served by one particular cable operator, and yet the local government does not award the franchise to that operator.

[11] The franchising process as it currently exists across the country is almost completely dominated by municipal entities.

[12] The companies most active in pursuing the major markets are Warner Amex, ATC, Cox, Teleprompter, Storer, United, Cablecom, Viacom, TCI, Metrovision, and Cablevision System Development. Dawson, *supra*, note 3, at 63.

Many of the other companies that bid for a particular city's franchise are formed locally, for example, by a local group of businesspeople who have very little, if any, experience in running cable operations. Still other firms are regional in nature. However, because cable ventures are enormously expensive, the industry is becoming restricted to only the largest corporate players, just ten of whom serve nearly half the nation's cable subscribers. In Houston, for example, of five franchises awarded, four were given to locally formed companies. All four eventually sold out to larger cable operators capable of implementing the systems required.

[13] For example, citizens' groups, organized minorities, special interest groups, and the public in general.

[14] Firestone, at 369.

[15] One example of this is the prepayment of franchise fees. Teleprompter, in response to the known preferences of the city council that a prepayment be part of the bid, offered $2.51 million in its bid for the East San Fernando Valley, California, franchise. The payment was dismissed lightly as "one element of the bid." *L.A. Bidders Offer Big Prepayments*, Multi-Channel News, Jan. 19, 1981.

[16] To many in the industry, it is a phenomenon threatening the financial viability of cable; to others, it is merely the impetus for what will be the transformation of America into a twenty-first-century civilization. Dawson, *supra* note 3, at 61.

[17] *Id.*, at 64.

[18] Firestone, *supra* note 14, at 369-70.

[19] *Id.*

[20] *Id., at 385-86.*

[21] Nathanson, *Cable TV, Myth and Reality*, A Speech Before the Los Angeles Chapter of The American Society of Public Administrators (July 10, 1980), at 1.

[22] *Cable TV: Coming of Age*, Newsweek, Aug. 24, 1981, at 46.

[23] This effect may be offset to a certain extent by a common franchise "package" plan known as "tiering" whereby the consumer has the option of choosing a level of cable benefits, paying only for those s/he wishes to use. For more on tiering *see*, Dawson, *supra* note 3, at 67-68.

[24] Nathanson, *supra* note 21, at 9.

[25] Dawson, *supra* note 3, at 72.

[26] Nathanson, *supra* note 21, at 8. In that speech Nathanson stated:

Too often the large cable operators are indiscriminately putting out franchise applica-

> tions throughout the country. Several companies I know have over 100 applications pending, without the money to build them. The staff that pursues these franchises, I call them "franchise hustlers." Typically, they are not cable TV professionals. Most of them are new to our industry and could care less about it. They are solely goal-oriented and really know very little about the hard work of managing and successfully running a cable system. Why not ask them sometime if they've ever run a cable system.

Id., at 6.

Citing a rather ludicrous example of the big promise situation, Nathanson continued:

> One of the two bidders was telling the commission why they should give the franchise award to their company. The pitch went something like this:
>
> "Mr. Chairman, we should get this franchise because we are the only company proposing a special 'B' cable (for institutional service) in addition to the regular 'A' cable with forty or fifty channels."
>
> Chairman Chick then logically asked, "Where are 'B' or secondary cables being used economically?" The franchise advocate said, "Nowhere yet, but there are hundreds of potential uses for the 'B' cable that might be developed in the future," and went on to describe these for the next fifteen minutes.
>
> When he was finished, the second applicant got up and said, "As you know, we did not provide a 'B' cable in our proposal, but if that's what the city of Los Angeles wants . . . we'll also put up a 'B' cable."
>
> Bob Chick turned to the applicant and said, "And I bet if we ask for a 'C' cable, we would get that also."
>
> Shortly thereafter, the Los Angeles City Council threw out all bidders for the East Valley and are starting all over again.

Id., at 7-8.

27 *Id.*, at 8.

28 If the firm's revenues are $20 million per year, as they were expected to be for the Cincinnati franchise, the city could get up to 5 percent of that for merely being the franchisor. The charging of a franchise fee is a legitimate exercise of a municipality's police power as long as the power to impose franchise fees has been delegated by the state to the municipality. The fee must also be reasonable and nondiscriminatory. E. McQuillin, *supra* note 4, at §34.80 at 195-96.

29 This is the last area of regulation in which the FCC remains active. *See* 71 C.C.C. 2d 569, *supra* note 6, at 570. Frank Lloyd, however, suggested that the FCC may even remove the lid on local franchise fees eventually. Lloyd, *The FCC's Future Program for Cable Television*, Remarks Before the Western Cable Television Convention (Dec. 12, 1980). Frank Lloyd is an Administrative Assistant to the Chairman of the Federal Communications Commission.

30 Gross revenues formerly meant only revenues from subscriber fees; however, the revenues on which the fee is now permitted to be calculated include revenues from all the franchisee's operations. *See generally* 71 FCC 2d 569, *supra* note 6.

31 In California, a cable operator is not required to charge subscriber rates as set by the municipality, but is free to pursue its own rate structure after the first year of operation, provided it operates more than twenty channels at least one which is a community services channel. Certain other conditions must be met as well. *See* Cal. Government Code §53066.1 (West).

32 Cable Television Report and Order, 36 FCC 2d 141, at 209.

33 For example, the Alaska Public Utilities Commission Act, AS 42:05.251, provides that the commission may require a utility (cable television is within the Act's definition of utility) to add the amount of any permit fee as a pro rata surcharge to its bills for services rendered at locations within the boundaries of any city which requires payment of a permit fee.

34 Cal. Public Utilities Code §767.5 (c)(2)(A) (West).

35 *See* Levin, *CATV Franchise Fee: Incentive for Regulation, Disincentive for Innovation*, 30 Syracuse L.R. 741 (1979).

36 613 P.2d 616 (1980).

37 Section 42.05.251 of the APUC Act provides:

> Public utilities have the right to permit to use public streets, alleys and other public ways of a city or borough, whether home rule or otherwise, upon payment of a reasonable permit fee and on reasonable terms and conditions and with reasonable exceptions the city or borough requires. A dispute as to whether fees, terms, conditions or exceptions are reasonable shall be decided by the commission.

The type of state commission established by the APUC Act is the type of entity suitable to perform the function of ensuring that local franchise fee revenues are used only to pay for local regulatory endeavors that are reasonable and necessary, as proposed on page 17 of the accompanying text.

38 The APUC Act was adopted in 1970, and created the Commission.

39 Section 42.05.641 of the APUC Act provides:

> The commission's jurisdiction and authority extend to public utilities operating within a city or borough, whether home rule or otherwise. In the event of a conflict between a certificate, order, decision or regulation of such a local governmental entity, the certificate, order, decision or regulation of the commission shall prevail.

40 B-C Cable Company, Inc. v. City and Borough of Juneau, *supra* note 36, at 618.

41 *Id.*, at 619.

That the municipal cable franchise is a contract binding upon both parties is supported by courts in other states. The Supreme Court of Pennsylvania, for example, in Borough of Scottdale v. National Cable Television, 381 A.2d. 859, 863, another controversy over cable franchise fees, held:

> When such an ordinance is accepted and acted on by the grantee of the privilege the corporation becomes contractually bound to pay the consideration and perform the terms and conditions specified in the ordinance, and the contract thereby formed has the same legal status as any other contract.
>
> The acceptance of the terms of the ordinance created a contractual relationship.

Likewise, the Supreme Court of Washington, in City of Issaquah v. Teleprompter Corp., 611 p.2d 741, 747, has observed, "Municipal franchise ordinances are contracts and are binding upon the municipality and the franchisee according to the terms therein. . . . While the franchise is municipal legislation, it is also a contract freely entered into by [the operator]."

The United States Court of Appeals for the Tenth Circuit has also recognized the contractual nature of municipal franchises: "It should be remembered that we deal here also with *contractual* rights. All of the involved 'ordinances' are, in fact, and by their terms, contracts." That case, Community Communications Company, Inc. v. City of Boulder, 630 F.2d 704, 714-15 (1980), was a controversy over the rights of the City of Boulder, Colorado, under the terms of its cable television franchise.

Finally, while recognizing the contractual principle as applied to formally adopted CATV franchise-granting ordinances, the Supreme Court of Minnesota noted that prior to the final adoption of any proposed cable ordinance, "[N]o valid contract for a franchise was entered into by the City of Minneapolis." Minneapolis Cablesystems v. City of Minneapolis, 299 N.W.2d 121,122 (1980).

That the ordinance granting a franchise is recognized as a binding contractual agreement underscores the proposition that such right to collect franchise fees can as easily be contracted away, contractually reduced, or contractually tied to reasonable levels of contractually prescribed local regulatory activity.

42 519 F.Supp. 991 (1981).

43 *See*, Kuznik, *The War to Wire Your Living Room*, Cleveland Magazine, Dec. 1979, at 103.

44 *Prospecting for Cable Franchises: The Gold Rush of 1980*, Broadcasting, March 31, 1980.

45 *Id.*

46 *Id.*

47 These people are former councilmen, prominent local attorneys, other civic leaders, or anybody able to influence local decision makers or improve the local image of the cable operator. Studying the rental of leading citizens in the Minneapolis contest late in 1979, a writer for *Forbes* magazine found that selected civic leaders were offered 20 percent of equity in ATC's local bidding affiliate in exchange for 2 percent of the equity capital. In Pittsburgh, ATC's affiliate there offered 20 percent of the equity to civic leaders for a 5 percent contribution, while a joint venture by Teleprompter-Comcast offered 13 percent to selected local leaders for 3 percent of the capital. Sloan, *Bring Plenty of Money*, Forbes, Dec. 10, 1979, at 52.

One of Storer's subsidiaries in the Washington, D.C., area sought out eleven prominent local citizens, and two organizations, and gave them 20 percent of the company's equity and 50 percent of its local management control. All the "investors" shared one trait: They got their stock without paying *any* cash. The "investors" said that they were making an "in kind" contribution of time and effort toward preparing the proposal instead of helping to underwrite the estimated $30 million to $60 million in capital expenditures necessary to build a working cable system in that area. Bauer, *Free Shares of Cable TV Cost Its Users*, Washington Post, Sept. 14, 1980, at A10 col. 1.

One commentator made the following comments:

> What would be blatantly illegal if only two parties were involved—the grantor and grantee—apparently can be legalized if not deodorized by the presence of three parties —grantor, freeriding party of influence and grantee.
>
> Under this arrangement, the wealth transferees usually are a few prominent and well-connected locals. Sometimes a popular or powerful institution, such as a university, or a minority organization is substituted. In Omaha, Warner-Amex "gifted" a 20% interest in the potential award to Creighton University, probably on the theory that an "if-somebody-is-going-to-get-a-windfall-why-not-the-good-guys" sentiment might sweep the council at decision time.
>
> But Warner-Amex, of course, wasn't the party making the gift. The transferors of the wealth grant (estimated conservatively by the Warner-Amex representative in the case of Creighton to be worth $10 million in 10 years) would not be the national cable operator, but rather the future cable users of Omaha. For there is no particular magic possessed by cable companies enabling them to turn lead into gold for a few selected local citizens. The gold must come from the user of the service—but only if he is overcharged relative to capital employed in the service. And under current regulatory thinking, the national cable operator can factor "grant-influencing" costs into a rate structure just as easily as the more tangible costs.

Buffett, *When Cable TV Comes to Town*, Washington Post, Sept. 7, 1980, editorial page.

48 Livingstone, *supra* note 9 at BR35.

49 Bauer, *Free Shares of Cable TV Cost Its Users*, Washington Post, Sept. 14, 1980, at A10 col. 4.

50 Livingstone, *supra* note 9 at BR35.

51 *Id.*, at BR36.

52 Kahn v. United States, 472 F.2d 272 (2d Cir. 1973), *affirming* 340 F.Supp. 485 (S.D.N.Y. 1973), *cert. den.*, 411 U.S. 982.

53 516 F.2d 220 (1975).

54 For example, the cable franchise awarded by the city of Pittsburgh specified at §8.1(f), "[A]ny litigation instituted by a third party shall not suspend franchisee's obligation to construct and install the system in accordance with the [prescribed] time schedule."

55 An example of timetables prescribed in municipal CATV ordinances provides that the operator shall apply for all necessary permits and authorizations for implementation and operation within thirty days of franchise acceptance. Within ninety days thereafter, construction and installation shall commence. Within ninety days of commencement of construction, the operator shall proceed to render service as households become connected. All households shall be connected not later than five years after commencement of construction. These types of provisions vary from city to city, depending on the city's size and the nature of the system being implemented. Most cities do provide that failure to meet the terms of such a timetable will be grounds for termination of the franchise. *See* Huntington Park Municipal Code § 5-26.10 (1979).

56 Three Rivers Cablevision, Inc. v. City of Pittsburgh, 502 F.Supp. 1118,1126 n.7 (W.D.Pa. 1980).

57 *Id.*, at 1126.

58 422 A. 2d. 780 (1980).

59 Metro, *supra* note 53, at 223. The problem occurred in Pittsburgh; Three Rivers, *supra* note 56, at 1121.

60 Affiliated Capital, *supra* note 42, at 1002-03.

61 Nathanson, *supra* note 21, at 6.

62 Livingstone, *supra* note 9 at BR35.

63 Lloyd, *supra* note 29.

64 Much litigation in the cable field has originated in New Jersey because of its legislature's comparatively active role in the regulation of CATV franchising. At this point most states have only legislated to an extent similar to that in California. In this respect, New Jersey may be considered more farsighted than other states.

65 Like California, Texas is representative of the norm. In Texas there are no legislative limitations proscribing the power of home rule cities to franchise cable television. In fact, the Texas State Legislature has codified this power with an express grant of full franchising authority to home rule cities. Tex. Rev. Civ. Stat. Art. 1175 §12 and Art. 1181. The only proscription on cable television franchising is set forth by the Texas Constitution, which provides that franchises must be nonexclusive and nonperpetual. Texas Constitution, Art. 1 §17.

66 N.J. Stat. Ann. §48:5A-1 *et seq.* [hereinafter cited as Act].

67 The Board of Public Utility Commissioners [hereinafter cited as Board]. Under the New Jersey Act, this board has to give its approval of a proposed franchisee in much the same way that the FCC formerly granted certificates of compliance.

Under the Act, the franchising and regulatory power over cable television is divided between the Board and the municipalities. The goal of the statute is, among other things, to—

> assure that local considerations—and perhaps local inadequacies—in any one municipality should not be allowed to affect other municipalities adversely or to inflict upon subscribers a service of lower quality than might reasonably be expected.

State of New Jersey CATV Study Comm'n, Report to the Governor and Legislature (pursuant to Assembly Concurr. Resolution No. 2041 of 1971) (1972), at 42.

In addition to setting certain minimum technical standards, which the municipalities must be sure each applicant meets, the Board makes the final determination regarding the appropriatness of a municipality's consent to a particular cable franchise applicant, that is, once an operator has been awarded the franchise by the municipality, the operator must obtain a certificate of approval from the Board before commencing operations. Although the Board has this broad discretion to grant or deny operating certificates, the Board does not dictate to the municipalities what company or type of service they may choose.

68 N.J. Stat. Ann. §48:5A-17 subd. b.

69 *Id.*, §48:5A-2 subd. c.

70 424 A.2d 1151 (1981) [hereinafter cited as Clear Cable].
71 *Id.*, at 1153.
72 *See infra* for additional discussion of postaward controversy.
73 Section 48:5A-17, subd. d, of the Act provides in pertinent part:
If a municipality shall arbitrarily refuse to grant the municipal consent required under the terms of this act prerequisite to issuance of a certificate, or to act upon an application for such municipal consent within 90 days after such application is filed, then the applicant CATV company may avoid the necessity of first obtaining such municipal consent by showing to the satisfaction of the board that the municipal consent is being arbitrarily withheld.
74 Section 48:5A-17, subd. b, of the Act provides in pertinent part:
In considering any such application, the board shall take into consideration the probable effects upon both the area for which certification is sought and neighboring areas not covered in the municipal consents; and if it finds that the probable effects, for technical and financial reasons, would be to impede the development of adequate cable television service, or create an unreasonable duplication of services likely to be detrimental to the development of adequate cable television service in any area either within or without the area for which certification is sought, it may deny the certificate or it may amend the certificate in issuing it so as to (1) direct that areas covered in the application be excluded from the area certified, or (2) direct that areas not covered in the application be included in the area certified.
75 Section 48:5A-22 of the Act provides in pertinent part:
In any case where a CATV company operates or porposes 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.
76 Section 48:5A-17, subd. c, of the Act provides in pertinent part:
No such certificate amended pursuant to subsection b. of this section shall be issued except after hearing of which each affected municipality shall be given notice and afforded opportunity to be heard. No such amended certificate shall be issued which would impair the terms of any existing certificate or of any municipal consent upon which such existing certificate is based, except with the consent of the holder of such existing certificate and of any municipality having issued such municipal consent.
77 Clear Cable, *supra* note 70, at 1155.
78 *Id.*
79 *Id.*, at 1159-60.
80 *Id.*, at 1161.
81 *Id.*, at 1160.
82 *Supra* note 58.
83 *Id.*, at 785.
84 Clear Cable, *supra* note 70, at 1161-62.
85 James Martin's best-selling book; *see* Dawson, *supra* note 3, at 63.

The Demise of the Airwave Pirates *

Dave Viera

This article will focus on the piracy problems arising from two new technological areas—subscription television (STV) and home satellite reception. Two types of interceptions may be distinguished: commercial pirate interceptions (another commercial entity intercepts STV or satellite signals and then sells them to another source) and home pirates (individuals in the privacy of their own homes who utilize either black boxes to capture STV signals or home dishes to receive satellite signals). There is little doubt that unauthorized commercial interceptions will be enjoined. Current case law confirms this. But, given the recent trend towards deregulation and the political clout of the public, home pirates (under the banner of "fair use" and "privacy") are more difficult to deal with. [1]

Communication signals are authorized by the FCC and protected by the Communications Act. Remedies are available to the sender of the signals thereunder, usually in the form of an injunction prohibiting unauthorized interceptions. Two problems have arisen: (1) the Communications act does not protect any signal broadcast or transmitted for the "use of the general public," [2] and (2) enjoining unauthorized interceptions by an individual in his home raises constitutional problems centered around the sanctity of the home and the right to privacy. For example, how would a prohibition be enforced against an individual without spying on him and a lot of others? This same problem arises in the *Betamax* area as well.

PART I: SUBSCRIPTION TELEVISION (STV)

The Technological Background

Pay TV currently has two forms: over-the-air STV and cable. The two are rivals. [3] In this article we are concerned with the over-the-air variety.

The STV industry currently includes 24 stations in 18 markets with over

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