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Cable Television Option for Florida: Plan or Chaos?

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CABLE TELEVISION OPTION FOR FLORIDA: PLAN OR CHAOS?

Cable television[1] continues to demand media attention at both a national[2] and local[3] level as the struggle to identify the proper role of the cable continues. From a simplistic beginning during the late 1940's as a method of providing improved television reception in fringe areas, the cable quickly grew to threaten the revenues of over-the-air broadcasters.[4] With this growth came a controversy over cable control that eventually embroiled the United States Supreme Court,[5] the Federal Communications Commission,[6] and state[7] and local[8] governments in "a sort of three-tiered Chinese puzzle of regulatory policy" that remains unsolved today.[9]

Florida's experience with cable television began in 1955 as the City of Key West imported signals from Miami television stations. Presently over 100 Florida communities are served by the cable.[10] Despite this growth, Florida has not yet established a uniform policy of statewide regulation whereby federal requirements are implemented in light of the needs of local government. This note will outline the development and extent of federal jurisdiction over cable television and examine the legal status of the industry in Florida. From this vantage point the deficiencies of the ad hoc regulatory approach can be determined with a view toward recommending needed changes.

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1. Cable television, or simply the "cable" are terms currently used to replace the older term, CATV (Community Antenna Television), which is no longer accurate, since the cable no longer serves as only a "community antenna." The terms seek to convey the circumstance whereby a television set receives the desired signal via a coaxial cable rather than over the air. *See Cable Television Report and Order,* 24 P & F RADIO REG. 2d 1505, 1507 (1972).

2. *See, e.g.,* SLOAN COMM'N ON CABLE COMMUNICATIONS, ON THE CABLE: THE TELEVISION OF ABUNDANCE (1971) [hereinafter cited as SLOAN REPORT]; Smith, *The Wired Nation,* THE NATION, May 18, 1970, at 582.

3. *E.g.,* Detweiler, *Who Owns the Cable?,* Gainesville (Fla.) Sun, March 24, 1973, at 4A, col. 1; Gainesville (Fla.) Sun, March 30, 1973, at 5A, col. 1.

4. *See* Barnett, *Cable Television and Media Concentration, Part I: Control of Cable Systems by Local Broadcasters,* 22 STAN. L. REV. 221, 224-30 (1970).

5. *E.g.,* United States v. Midwest Video Corp., 406 U.S. 649 (1972); Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968); United States v. Southwestern Cable Co., 392 U.S. 157 (1968).

6. *E.g., Cable Television Report and Order,* 47 C.F.R. §76 (1972); *Second Report and Order,* 2 F.C.C.2d 725 (1966); *First Report and Order,* 38 F.C.C. 683 (1965).

7. CONN. GEN. STAT.. ANN. ch. 289, §§16-330 to -333 (Supp. 1973); HAWAII REV. STAT. §§4406-1 to -14 (Supp. 1972); MASS. ANN. LAWS ch. 166A, §§1-20 (Supp. 1972); NEV. REV. STAT. §§711.010-.180 (Supp. 1971); N.Y. GEN. MUNIC. LAWS §88 (McKinney Supp. 1972); R.I. GEN. LAWS ANN. §§39-19-1 to -19-8 (Supp. 1972); VT. STAT. ANN. tit. 30, §§401-08 (Supp. 1973).

8. CABLE TELEVISION INFORMATION CENTER, THE URBAN INSTITUTE, CABLE TELEVISION: OPTIONS FOR JACKSONVILLE (1972) [hereinafter cited as JACKSONVILLE REPORT].

9. Barnett, *State, Federal, and Local Regulation of Cable Television,* 47 NOTRE DAME LAW. 685, 690 (1972).

10. 42 TELEVISION DIGEST, INC., 1972-1973 TELEVISION FACTBOOK.

THE PROMISE OF THE CABLE

An understanding of the significance of the cable controversy requires an appreciation of recent advances and the current capability of cable technology. The promise of cable technology is derived from the electrical characteristics of the cable itself. In contrast to the early Key West cable system, which still carries only five channels, present technology currently provides twenty channel systems and offers a theoretical maximum of eighty channels.[11]

Early cable systems sought to attract customers by providing weather information or newswire services on unused channels.[12] The advent of increased channel capacity now demands proper planning in order to produce a more useful service. Proclaiming the necessity of a national cable policy, Ralph Lee Smith's classic article, *The Wired Nation*,[13] described cable television as a veritable "electronic highway"[14] capable of greatly facilitating the exchange of ideas and information. In addition, the rapid expansion of the cable was predicted in the Sloan Commission Report on Cable Communications, which foresaw a satellite interconnection of cable systems "capable of assimilation into a national network, or regional networks, on a scale substantially greater than that of conventional television at the present time."[15]

Although attention has thus far been focused on signals that the cable can bring into the home, technology now permits the subscriber to communicate via the same cable back to the source — a process commonly termed "interactive" or two-way cable, which has no broadcasting counterpart. While first generation two-way cable uses were limited to subscriber response services,[16] second generation two-way uses generally deal with subscriber initiated responses. Prospectively, at least, the two-way system could allow computer assisted instruction and give access to library materials that have been stored on a computer, although these services are as yet far off in time.[17]

While satellite interconnection and two-way cable remain futuristic, many of the promised benefits of cable systems are achievable today. Jacksonville,

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11. Barnett, *supra* note 4, at 226.
12. *See* SLOAN REPORT, *supra* note 2, at 27.
13. Smith, *supra* note 2.
14. *Id.* at 602.
15. SLOAN REPORT, *supra* note 2, at 42.
16. Under first generation technology, a viewer can return only a "Yes" or "No" response to the broadcaster from his home unit. For example, a local merchant may lease time on a cable channel to conduct a fashion show. A viewer can then place an order for a desired item by simply inserting a magnetically coded "credit" card into a home terminal device. The merchant subsequently receives and delivers the order to the home of the viewer. JACKSONVILLE REPORT, *supra* note 8, at 63.
17. Second generation technology contemplates full audio-video subscriber response. *See generally* JACKSONVILLE REPORT, *supra* note 8, at 63-67. A further application of two-way cable lies in its use as a tool of governmental surveillance upon the populace. The FCC has not formally considered the question of privacy on the cable, although existing cable technology renders the possibilities quite real. *See* Oppenheim, *The Coaxial Wiretap: Privacy and the Cable*, 2 YALE REV. OF L. & SOCIAL ACTION 282 (1972).

Florida, has recently completed a comprehensive study[18] designed to utilize cable technology to meet the needs of that city. Jacksonville officials have identified a community need to disseminate information concerning eligibility requirements and application procedures for many available services including social security, welfare benefits, drug abuse programs, and child care services. As a local medium with a multiplicity of channels, the cable is uniquely qualified to provide such public service features at low cost.[19]

Cable television can also aid in efforts to create a better informed electorate. By televising city commission and school board meetings voters can acquire first-hand knowledge of community issues and their elected officials, a process that should help to restore the decisionmaking power to the people.

Two basic problems confront the expanded uses of cable television. First, since not all residents of a community will subscribe to the system the public service benefits of the cable will not reach many of those who need them most. Second, two-way cable requires expensive terminal equipment in the home. Its further development will thus remain inhibited until such equipment can be shown to be economically profitable.

To solve these problems and prevent further delay of desired services, Jacksonville is presently considering the establishment of "community information and service centers."[20] Each community center would provide full cable services free of charge, thereby assuring all residents the benefits of public service programming. For example, a center can contain a number of television receivers, each tuned to a different public service channel. Offerings may include adult education courses, home improvement programs, and information concerning available city services. It is in this climate that two-way service can also develop. For example, local government meetings, which many are unable to attend, can be opened to interactive discussion of current issues with groups gathered at the various community centers.[21]

The sophistication of the proposed Jacksonville system signifies a developing local cable policy that promises to collide in the near future with policies already emanating from the federal level.

FEDERAL JURISDICTION

Federal jurisdiction over the telecommunications field was lodged in the Federal Communications Commission (FCC) by the Communications Act of

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18. JACKSONVILLE REPORT, *supra* note 8.

19. City officials have also cited the cable as an effective tool for dealing with race relations. The Jacksonville public television station recently devoted extensive air time to an exploration of the busing issue as it affected that city. As a result of the telecasts, racial tensions were eased. Public television has but one channel, however, and must apportion its time among other interests. Thus, problems of this nature can be dealt with only at their crisis stage. Here again, cable television can serve as an information mechanism whereby social problems can be recognized, explained, and alleviated before the crisis stage is reached. *Id.* at 61.

20. *Id.* at 68.

21. *Id.* at 68-75.

1934.[22] Although granting the FCC specific authority to license broadcasters[23] and oversee the rates of common carriers,[24] the Act remained silent as to the precise limits of the group's authority in other areas of telecommunications.[25]

The Commission's primary purpose of regulating broadcasting in the "public interest"[26] was destined to frustration as a growing technology produced multiple demands upon a frequency spectrum acutely limited by the physical laws of electromagnetic field theory.[27] The FCC's solution to the regulatory problem was to allocate 12 television channels in the very high frequency (VHF) spectrum, giving each multiple use throughout the country at locations spaced to avoid destructive interference.[28] Additionally, the agency sought to alleviate the scarcity of broadcast frequencies by the licensing of television stations in the ultra high frequency (UHF) band.[29] Higher operating frequencies, however, generally dictate higher equipment costs and a concomitant degradation in the quality of reception. Accordingly, UHF stations are less profitable, which accounts for the fact that 54 per cent of the 584 construction permits issued remain inactive.[30] It is this environment into which the cable technology sought access.

Jurisdiction Over the Cable

The development of cable technology was seriously impeded for fifteen years by the uncertainty of federal jurisdiction. In 1958 the FCC rejected a broadcaster's request that it assert jurisdiction over cable television as a common carrier.[31] The Commission recognized the alleged economic injury to local stations by cable companies[32] but denied relief on these grounds. It likewise rejected the alternative of obtaining jurisdiction by treating cable companies as broadcasters.[33]

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22. 47 U.S.C. §§151-609 (1970).
23. *Id.* §§301-30.
24. *Id.* §§201-22.
25. The Communications Act of 1934 was enacted 15 years prior to the inception of cable television. Attempts to amend the act specifically to vest authority in the FCC over cable television have failed. *See, e.g.*, H.R. 13,286, 89th Cong., 2d Sess. (1966); S. 2653, 86th Cong., 1st Sess. (1959).
26. 47 U.S.C. §303 (1970).
27. The very high frequency (VHF) band includes from 50 MHz to 200 MHz. This spectrum is ideally suited for television signals, but other essential services including aircraft, maritime, amateur, government, and satellite communications also demand allocations.
28. *Sixth Report and Order*, 41 F.C.C. 148 (1952).
29. The UHF band lies above the VHF band on the frequency spectrum and is generally less suited for television broadcasting. *See Notice of Inquiry and Notice of Proposed Rulemaking*, 1 F.C.C.2d 453, 469 (1965).
30. SLOAN REPORT, *supra* note 2, at 20.
31. Frontier Broadcasting Co. v. Collier, 24 F.C.C. 251 (1958).
32. The economic injury theory as propagandized by broadcasters assumed that advertisers would patronize the distant metropolitan station and its larger audience at the expense of the local station to which the advertising revenues would normally accrue if there were no competing cable television service. *Id.* at 253.
33. *Id.* at 255.

One year later the Commission conducted an *Inquiry Into the Impact of Community Antenna Systems,*[34] which again addressed the problem of economic injury to broadcast stations. The Commission, however, still refused to act, finding it impossible to make an accurate determination of the extent of the injury.[35] This cautious approach toward jurisdictional powers was further emphasized by a resolution to seek congressional amendment of the Communications Act to provide the FCC with certain powers over cable television.[36]

Failure of Congress to amend the Communications Act[37] provided the impetus for the Commission to turn the corner in jurisdictional matters. In *Carter Mountain Transmission Co.*[38] a local television station objected to a permit to construct a microwave relay station feeding cable television systems on grounds of anticipated economic injury. Although the prior policy of the Commission concerning the exercise of its statutory authority over common carriers had been to avoid investigation of the specific use of equipment,[39] it now rejected that policy by saying:[40]

> [W]e do not agree that we are powerless to prevent the demise of the local television station and the eventual loss of service to a substantial population (those not served by the cable); nor do we agree that the Commission's expertise may not be invoked in this instance to predict this ultimate situation.

From this conclusion the Commission proceeded to exert indirect control over cable television systems by predicating Carter Mountain Transmission Corporation's construction permit upon a showing that the local television station would be available on local cable systems and that distant stations would be deleted when broadcasting duplicate programming.[41]

First Report and Order

The protectionist policy toward broadcasters was soon extended to include all microwave-served cable systems in the *First Report and Order.*[42] By exercise of its rulemaking authority the Commission promulgated what are now

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34. 26 F.C.C. 403 (1959).

35. *Id.* at 431.

36. The FCC sought legislation empowering it to compel cable operators to seek consent from the stations whose signals they carry and to require that all local signals be carried on the cable. *Id.* at 441.

37. S. 2653, 86th Cong., 1st Sess. (1959) sought to place cable television jurisdiction in the FCC. *See also* H.R. 13,286, 89th Cong., 2d Sess. (1966), which would have authorized the FCC to issue regulations governing CATV. Both bills died in committee.

38. 32 F.C.C. 459 (1962), *aff'd sub nom.* Carter Mountain Transmission Co. v. FCC, 321 F.2d 369 (D.C. Cir.), *cert. denied,* 375 U.S. 951 (1963).

39. 32 F.C.C. at 466 (dissenting opinion).

40. *Id.* at 465.

41. *Id.*

42. 38 F.C.C. 683 (1965).

commonly referred to as the "carriage and non-duplication rules."[43] These new rules ensured preservation of local television markets for local broadcasters by requiring cable systems to carry local stations while blanking distant duplicate programming. This ruling completed the groundwork for more expansive control of cable systems by the FCC.

Second Report and Order

As might have been predicted, partial regulation of the cable television industry under the *First Report and Order* proved unworkable. Nevertheless, the precedential value was sufficient for the FCC to inquire subsequently into the propriety of asserting jurisdiction over all cable systems.[44]

In the *Second Report and Order*[45] the Commission cleared the final jurisdictional hurdle and imposed the earlier microwave regulations on all cable systems,[46] thus putting an end to the "unwarranted distinction between microwave and nonmicrowave systems."[47] Justification for this jurisdictional extension was available in the "economic impact" theory;[48] but the FCC went further. Citing the need to protect new UHF stations further in the major markets,[49] the Commission prohibited importation of distant signals into the 100 largest television markets except where demonstrably "consistent with the public interest."[50] The effect of placing the burden of proof on cable operators in markets containing 87 per cent of the viewing public was to place a virtual freeze on the growth of the industry.[51]

Jurisdiction Affirmed

Seeking to enforce the cable "freeze," a San Diego television station complained to the FCC that expansion of Los Angeles television signals by local cable operators into the San Diego market was adverse to the public interest.[52] The jurisdictional issue was raised by defendant Southwestern Cable Company but was rejected by the Commission, which restricted expansion of Southwestern's service pending hearings.

In the Supreme Court the landmark decision of *United States v. Southwestern Cable Co.*[53] held that the authority exercised by the FCC, on these

43. *Id.* at 713.
44. *Notice of Inquiry and Notice of Proposed Rulemaking*, 1 F.C.C.2d 453 (1965).
45. 2 F.C.C.2d 725 (1966).
46. *Id.* at 746.
47. *Id.* at 745.
48. *See* note 32, *supra* and accompanying text.
49. 2 F.C.C.2d 725, 776 (1966).
50. Proof of the "public interest," which was defined to be the "establishment and healthy maintenance of UHF television broadcast service," was made in an evidentiary hearing. *Id.* at 782.
51. SLOAN REPORT, *supra* note 2, at 29.
52. Midwest Television, Inc., 41 F.C.C.2d 612 (1966). Midwest alleged fragmentation and reduction of its viewing audience despite the nonduplication rules. It was further alleged that Midwest's cable signal was inferior to those of the Los Angeles stations. *Id.* at 614.
53. 392 U.S. 157 (1968).

facts, was "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting."[54] The larger jurisdiction question, which perhaps should have been resolved at this juncture, was specifically left open.[55] The failure of both the Congress and the courts to delineate clearly the Commission's jurisdictional limits was to continue to impede development of a national cable policy.

Bolstered by its qualified success in *Southwestern Cable* and by a general dissatisfaction over the evidentiary hearings of the *Second Report and Order,* the Commission launched a new *Notice of Inquiry and Notice of Proposed Rulemaking*[56] in a search for new approaches to the regulatory problem. The significance of the inquiry was underscored by an abandonment of the protectionist attitude toward broadcasters in favor of the formation of a national policy to foster the technological growth of cable television in the public interest. Noting the availability of 20 channel cable systems, the new rules proposed to condition the importation of distant signals upon a requirement that local cable systems originate programming.[57] It was also proposed that spare channels be leased for public use, thereby affording low cost access to the local community.[58]

The impact of the newly conceived "national policy" was explosive. In the *First Report and Order*[59] the FCC noted the uniform opposition by cable interests as well as by broadcasters who foresaw "potential fractionalization" of the audience and a "siphoning off of program material and advertising revenue."[60] The Commission nevertheless remained unpersuaded and subsequently ordered all cable systems having 3,500 or more subscribers to "cablecast"[61] as a condition precedent to the carriage of broadcast stations.[62]

Attempting to take advantage of the jurisdictional uncertainty that followed the *Southwestern Cable* decision, cable interests sought relief from the program origination order in *Midwest Video Corp. v. United States.*[63] There, the Eighth Circuit found that the origination requirement went "far beyond the regulation of the use made of signals captured by CATV as authorized in

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54. *Id.* at 178.

55. "We express no views as to the Commission's authority, if any, to regulate CATV under any other circumstances or for any other purpose." *Id.*

56. 15 F.C.C.2d 417 (1968).

57. *Id.* at 422.

58. *Id.* at 427. To replace the evidentiary hearing, the Commission proposed that importation of distant signals be conditioned upon "retransmission consent" to be obtained from the distant station whose signals the local system wished to import. *Id.* at 432. Further, the Commission proposed to require all systems to originate local programming. *Id.* at 422.

59. 20 F.C.C.2d 201 (1969). This was the *First Report and Order* of Docket No. 18,397. *See Notice* cited note 56 *supra.*

60. 20 F.C.C. at 202.

61. Cablecasting is defined as "programming distributed on a CATV system which has been originated by the CATV operator or by another entity, exclusive of broadcast signals carried on the system." *Id.* at 223.

62. 47 C.F.R. §74.1111 (1969).

63. 441 F.2d 1322 (8th Cir. 1971).

Southwestern Cable Co."[64] and invalidated the order on grounds that the additional economic burden of equipment and personnel could force cable companies out of business.

On appeal, the Supreme Court was squarely confronted with the need to define the "reasonably ancillary" test. In reversing the Eighth Circuit the Court adopted the Commission's goal of achieving "long-established regulatory goals in the field of television by increasing the number of outlets for community self-expression and augmenting the public's choice of programs and types of services."[65] To support the finding that the program origination rule was within the jurisdiction of the Commission, the Court relied upon *National Broadcasting Co. v. United States,*[66] where the FCC's power to regulate programming between networks and their affiliated stations was upheld as being within the public interest. By analogy, the Court reasoned that regulations promoting diversity of programming were no less "reasonably ancillary" to the Commission's jurisdiction than its rules governing the technological aspect of cable television carriage. More fundamentally, the Court found the origination rules to be properly premised upon section 303(g) of the Communications Act, which encourages radio usage in the public interest,[67] and by section 307(b), which requires fair, efficient, and equitable service to each of the several states.[68]

The result reached by the Supreme Court seems emminently correct. Had the FCC's authority to regulate cable been annulled in *Midwest Video,* the problem of defining the jurisdictional dividing line between broadcasting and cable interests would have remained unresolved. Further, the competing policies with which the Commission had struggled for fifteen years would have descended upon the several states, further fragmenting the development of a national cable policy. It is likely that this common sense approach to the problem was a key consideration in the *Midwest Video* decision.[69]

THE NEW RULES

Based upon the *Southwestern Cable Co.* victory, the Commission continued its expansive policy of cable regulation during litigation of *Midwest Video.*

64. *Id.* at 1327.

65. United States v. Midwest Video Corp., 406 U.S. 649, 664 (1972).

66. 319 U.S. 190 (1954). The Court specifically held that the Communications Act "does not restrict the Commission merely to supervision of [radio] traffic. It puts upon the Commission the burden of determining the composition of that traffic." *Id.* at 215-16.

67. *Id.* at 216. 47 U.S.C. §303(g) (1970) states: "[E]xcept as otherwise provided in this Chapter, the Commission from time to time, as public convenience, interest, or necessity requires shall . . . (g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest."

68. 47 U.S.C. §307(b) (1970) states: "[T]he Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same."

69. *See generally,* Barnett, *State, Federal and Local Regulation of Cable Television,* 47 NOTRE DAME LAW. 685, 726-34 (1972).

In the FCC report to Congress[70] the groundwork for the currently effective cable television rules was laid:[71]

> We believe . . . that cable can make a significant contribution toward improving the nation's communication system – providing additional diversity of programming, serving as a communications outlet for many who previously have had little or no chance of ownership or of access to the television broadcast system, and creating the potential for a host of new communications services.

Pursuant to this policy, the Commission proposed to establish rules governing (1) television broadcast signal carriage; (2) access to, and use of non-broadcast cable channels, including minimum channel capacity; (3) technical standards; and (4) appropriate division of regulatory responsibility between federal and state or local governments.[72] Final jurisdictional approval in *Midwest Video* opened the way for enforcement of the newly proposed rules contained in the *Cable Television Report and Order*.[73]

Consequently, the shape of any state-local regulatory relationship is now required to conform to federal preemption by the new rules. The extent of federal preemption must therefore be briefly considered prior to an analysis of the functions specifically left to state-local control.

The Rules Summarized

The *Cable Television Report and Order* continues the federal preemption of television broadcast signal carriage.[74] Of greater economic significance to cable operators, however, is the origination requirement upheld in *Midwest*

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70. 22 P & F RADIO REG. 2d 1755 (1971).

71. *Id.* at 1760.

72. *Id.* at 1761.

73. 37 Fed. Reg. 3252 (1972), *reprinted* in 24 P & F RADIO REG. 2d 1501 (1972).

74. Abandoning all prior approaches, the Commission developed a signal carriage policy tailored to the size of the television market in a given community and to the estimated ability of that market to withstand distant signal competition. Thus, in the nation's first fifty major markets (including Miami and Tampa, Florida) mandatory local service may be augmented by distant signals until the limit of three full network stations and three independent stations is reached. 47 C.F.R. §76.61 (1972). The second fifty major markets (including Orlando-Daytona Beach and Jacksonville, Florida) may likewise augment mandatory local services, but to the reduced ceiling of three full network stations and two independent stations. 47 C.F.R. §76.63 (1972). Smaller television markets are subject to mandatory local service up to the limit of three full network stations and one independent station. 47 C.F.R. §76.59 (1972).

The technique of tying the number of allowed distant signals to the television market size is sound policy for several reasons. First, importation of a greater number of distant signals into the top markets will enable cable operators to penetrate those markets. Second, the limitation placed on importation of signals into all markets will serve as an incentive to spur development of non-broadcast service. *See generally* Barrow, *The New CATV Rules: Proceed on Delayed Yellow*, 25 VAND. L. REV. 681, 705 (1972).

Video as a condition precedent to the retransmission of any television signal. Cable systems having 3,500 or more subscribers must now operate to a "significant extent" as a local outlet for program origination.[75]

New cable systems in the major markets are also subject to further rules designed to give public access to nonbroadcast channels.[76] To promote cable television the Commission now requires new systems to provide a minimum of twenty channels[77] and to include provisions for two-way communications.[78] Of the available channels, one is to be maintained as a "noncommercial public access channel available on a first-come, nondiscriminatory basis."[79] Another channel must be preserved for use by local educational authorities,[80] and a third allocated for local governmental use.[81] Other nonbroadcast channels are to be available for leased access services[82] subject to required expansion as a function of demonstrated need.[83]

Initial experiments with public access have not been without problems. The Commission has resolved, for example, that cable operators must not exercise program content control "of any kind"[84] over material presented on public access channels except to exclude that which they deem obscene.[85] Here, however, the New York City franchising authorities have increased the FCC's minimum standard and now prohibit franchisees from exerting *any* control over program content.[86] Consequently, New York operators are caught in the middle between FCC regulations and "public-access shows that seem deliberately aimed at arousing the public's private interests."[87]

The need for precise guidelines governing public access is clear. And during the experimental period of public access television, federal preemption of the regulatory process seems best suited to insure a uniform system of control.

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75. 47 C.F.R. §76.201(a) (1972).

76. 47 C.F.R. §76.251 (1972). In its *Letter of Intent* the Commission restricted the application of nonbroadcast regulations to the top 100 markets so as not to impose unreasonable economic burdens on smaller cable operators. The language implies, however, that this exemption may be temporary. *FCC Letter of Intent,* 22 P & F RADIO REG. 2d 1755, 1772 (1971).

77. 47 C.F.R. §76.251(a)(1) (1972).

78. 47 C.F.R. §76.251(a)(3) (1972). In its *Letter of Intent* the FCC recognized the requirement was rudimentary in nature but mandated the requirement, since the two-way communications are not available at a not inordinate cost. *FCC Letter of Intent,* 22 P & F RADIO REG. 2d 1755, 1774 (1971). This requirement now opens the way for the simpler forms of two-way communication including surveys, marketing activities, and educational uses.

79. 47 C.F.R. §76.251(a)(4) (1972).

80. 47 C.F.R. §76.251(a)(5) (1972).

81. 47 C.F.R. §76.251(a)(6) (1972).

82. 47 C.F.R. §76.251(a)(7) (1972).

83. 47 C.F.R. §76.251(a)(8) (1972).

84. *FCC Letter of Intent,* 22 P & F RADIO REG. 2d 1755, 1775 (1971). *See also* 47 C.F.R. §76.251(a)(9) (1972).

85. 47 C.F.R. §76.251(a)(11) (1972).

86. NEWSWEEK, April 9, 1973, at 83, col. 3.

87. *Id.* col. 2.

The impracticability of substantial dual regulation is amply demonstrated by the New York experience, where dual regulations have caused confusion.[88]

Nevertheless, there is also an argument to be made for permitting limited local control. The absence of local control places a heavier administrative burden on the Commission at a time when its concern should be policy formation. Thus, some form of local control should be available to police local operators and force compliance with the spirit as well as the letter of the regulations.[89] The ultimate resolution to public access problems will be found via experience with various approaches rather than by initial adherence to a particular philosophy.

Federal, State, and Local Relations

Although the areas of signal carriage, technical standards, and non-broadcast channel usage are preempted to federal control, the franchising of cable operators remains under local control subject to minimum requirements imposed by the Commission. The Commission professes the need for imposition of these minimum requirements to "insure efficient nationwide communications service with adequate facilities at reasonable charges,"[90] but the actual impetus for them may stem from general abuse of the franchising process on the local level.[91]

To prevent abuse, the Commission now requires a copy of the franchise granted by local authorities, together with the applicant's "legal, character, financial, technical and other qualifications,"[92] as determined in a public proceeding affording due process. To remedy instances where franchises have been acquired as speculative investments, "significant" construction is now required within one year after receipt of FCC certification and further extension of service in years thereafter as determined by local authorities.[93] To prevent

88. *Id.* col. 3.

89. For example, cable operators may be expected to encourage use of the revenue producing leased channels rather than the free access channel, which the public may find "unavailable" when use of it is desired.

90. *FCC Letter of Intent,* 22 P & F RADIO REG. 2d 1755, 1780 (1971).

91. *The Wall Street Journal* has recently concluded: "To land a [cable television] franchise, applicants figure they need much more than just technical know-how — lots of capital is essential. Timing can be crucial — tying up a town's best lawyers and most influential citizens quickly, perhaps by offering them a chance to buy stock. And it sometimes helps if some of the decision makers are good friends of members of the applying group." Wall Street J., May 2, 1973, at 22, col. 1 (Eastern ed.). Influence peddling recently escalated into criminal convictions of the president of Teleprompter, one of the country's largest cable operators, and three city officials of Johnstown, Pennsylvania, on bribery and conspiracy charges stemming from a cable franchise award. Wall Street J., Oct. 21, 1971, at 8, cols. 2-3 (Eastern ed.). Four former officials of Trenton, New Jersey have been indicted for extortion following the 1968 cable franchise award in that city. Leone & Powell, *CATV Franchising in New Jersey,* 2 YALE REV. OF L. & SOCIAL ACTION 252, 253 (1972).

92. 47 C.F.R. §76.31(a)(1) (1972).

93. 47 C.F.R. §76.31(a)(2) (1972). The *Letter of Intent* recommends that the trunk cable be extended throughout the franchise area by at least 20% per year during the first five years of operation. *FCC Letter of Intent,* 22 P & F RADIO REG. 2d 1755, 1773 (1971).

long-term franchises from hindering implementation of improved technology, the Commission recommends that franchise duration be limited to 15 years with reasonable renewal periods.[94]

Subscriber rates must now be set by the local franchising authority and no changes are permitted without authorization from such authority after a public hearing.[95] Franchise fees have also come under scrutiny, since many local authorities have "exacted high franchise fees for revenue-raising rather than regulatory purposes."[96] Thus, franchise fees in excess of three per cent now require Commission approval.[97]

LOCAL CONTROL PROBLEMS

The Commission's initial preoccupation with overriding policy and jurisdictional uncertainties tended to obscure similar problems on the state and local levels. Thus, in *TV Pix, Inc. v. Taylor*[98] a Nevada statute regulating the cable industry in that state as a public utility was attacked by local cable operators on grounds that *Southwestern Cable Co.* preempted state control. The court concluded that "whether preemption has in fact occurred . . . depends on whether the Federal Communications Commission has, in fact, regulated in this area and not upon whether it has the power to do so."[99] Nevertheless, the fact that states and municipalities *may* regulate certain areas of cable television leaves open the question as to which entity, if either, is better suited for the task.

The Commission has remained neutral by defining "Federal-State/Local Relationships"[100] without specifying the character or shape of the state-local relation.[101] The resulting uncertainties arising from the lack of guidance have led the Sloan Commission to describe the first two decades of cable growth as a time when "the federal government has been rudderless, the municipalities inept, and the states inactive."[102]

Since cable systems originated in small communities, having only restricted municipal powers, local officials were first to deal with the new technology. As municipalities moved to exercise their powers over the cable, state govern-

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94. The *FCC Letter of Intent* concludes that a 15-year franchise permits amortization of the initial investment. 22 P & F RADIO REG. 2d at 1781-82 (1971). Nevertheless, the *Cable Television Report and Order* permits local variation by prescribing that the initial franchise period be of "reasonable duration." 47 C.F.R. §76.31(a)(3) (1972).

95. 47 C.F.R. §76.31(a)(4) (1972).

96. *FCC Letter of Intent,* 22 P & F RADIO REG. 2d 1755, 1782 (1971).

97. 47 C.F.R. §76.31(b) (1972).

98. 304 F. Supp. 459 (D. Nev. 1968), *aff'd,* 396 U.S. 556 (1970).

99. *Id.* at 465.

100. 47 C.F.R. §76.31 (1972).

101. The minimum requirements imposed by the *Cable Television Report and Order* are directed to correct a situation where "actions have been taken in the cable field without any overall plan as to the Federal-local relationship." 37 Fed. Reg. 3275 (1972). No preference is expressed by the Commission as to the relation between the state and local governments.

102. SLOAN REPORT, *supra* note 2, at 152.

ments were faced with no compelling need to legislate, and the cities thus assumed control of the cable by default.[103] The ensuing "ineptness" of municipal regulatory efforts can be attributed to several factors, one of which is the inadequate delegation of authority for municipal control.

Power To Regulate Use of Streets

A common ground upon which local governments have exercised control over cable systems is the statutory authority for municipal regulation of streets. Section 167.22 of the Florida statutes[104] creates the right in Florida municipalities to grant franchises for the use of city streets for periods not exceeding thirty years. The weakness in using this authority as a basis for exerting control lies in applying an 1899 statute to regulate 1973 technology. While Florida cities have relied upon the Florida statute,[105] an Illinois court[106] has conceded, in passing upon a similar statute in that state,[107] that cable television franchises generally contain additional requirements that "do constitute regulation unrelated to the use of the streets."[108] That court determined the city could attach, but not impose, collateral requirements, which the franchisee could choose to accept or reject. By this fiction the court found the additional requirements were imposed by the operator himself rather than the city; hence, the basic statute was held to constitute adequate legal authority for municipal regulation of cable systems.

Unfortunately, the fiction collapses when the facts vary. The Maine supreme court,[109] for example, held a city powerless to regulate cable companies using telephone company cables in lieu of constructing a separate transmission system. Fnding that state law vested all control over telephone companies in the state public utilities commission, the court concluded the city was powerless to regulate cable companies that did not in fact place their own equipment along the city streets.[110] Although the *Cable Television Report and*

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103. *Id.*

104. FLA. STAT. §167.22 (1971).

105. City of Cape Coral, Fla., Permit for Use of County Right of Way for Cable Television Distribution System, July 1, 1964; Gainesville, Fla., Ordinance 1136, March 19, 1963; City of Key West, Fla., Ordinance 065-7, March 10, 1965.

106. Illinois Broadcasting Co. v. City of Decatur, 96 Ill. App. 2d 454, 238 N.E.2d 261 (4th Dist. 1968).

107. ILL. ANN. STAT. ch. 24, §11-80-2 (Smith-Hurd 1971).

108. 96 Ill. App. 2d at 461, 238 N.E.2d at 265 (1968). The additional requirements that concerned the court included: free use of schools, minimum channel capacity, a channel dedicated for educational purposes, extension of service to new areas, hours of operation, and incorporation of technical improvements into the system on a continuing basis.

109. City of Waterville v. Bartell Tel. TV System, 233 A.2d 733 (Me. 1967).

110. The action arose upon complaint by the city and its exclusive cable television franchisee that a competing cable operator had commenced service without obtaining the requisite municipal franchise. The court held state law vested all control over telephone companies in the state public utilities commission; hence municipalities were without authority to exert control over cable companies that utilized telephone company lines to transmit television signals. *Id.* The New York courts have followed this reasoning in City

Order may now remedy this particular difficulty by requiring franchise approval by local authorities,[111] the propriety of basing municipal regulation upon the use of city streets remains in doubt. Certainly, it is clear that the power of a city to regulate its streets cannot provide the comprehensive authority needed to fulfill the promise of the cable on the local level.

Home Rule

A broader base from which municipalities may regulate local cable systems is available through home rule provisions of state constitutions. In *DiBella v. Village of Ontario*[112] an Ohio court rejected plaintiff's contention that the municipality could exercise only such powers as were specifically granted by the legislature. Upholding the power of the city to grant a twenty-year, nonexclusive cable television franchise, the court concluded the objective of home rule was to authorize each municipality to perform municipal functions without express statutory authorization.[113]

The broader powers of home rule were vested in Florida municipalities by the 1968 constitution, which in the absence of conflicting law yielded plenary power for municipal purposes to municipalities.[114] The legislative intent was further enunciated in an accompanying statute proclaiming that "the provision of this section shall be so construed as to secure for municipalities the broad exercise of home rule powers granted by the Constitution."[115]

Despite the broad grant of power by the legislature, the power of municipalities to regulate local cable systems remains questionable. The major source of doubt stems from the restrictive interpretation afforded the constitutional provision in *City of Miami Beach v. Fleetwood Hotel, Inc.*[116] The Florida supreme court held the city lacked authority to enact a rent control ordinance during a period of spiraling inflation. In so holding, the court acknowledged

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of New York v. Comtel, Inc., 57 Misc. 2d 585, 293 N.Y.S.2d 599 (Sup. Ct. 1968), *aff'd*, 25 N.Y.2d 922, 252 N.E.2d 285, 304 N.Y.S.2d 853 (1969).

111. 47 C.F.R. §76.31 (1972). Since the FCC now has jurisdiction over cable television, local cable companies can be compelled to comply with local franchising procedures regardless of the physical method of signal distribution.

112. 4 Ohio Misc. 120, 212 N.E.2d 679 (Ct. C.P. Richland County 1965).

113. Plaintiff argued the construction of the cable distribution system would divert the purpose for which the streets and highways were dedicated, and would increase the burden upon the easement for street and highway purposes. This contention could arguably have merit were it not for the home rule provisions, since municipalities previously held powers only as expressly granted by the state or as arose by necessary implication of such grants. *See* 1 J. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS 448 (5th ed. 1911).

114. FLA. CONST. art. VIII, §2(b) provides in part: "Municipalities shall have governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services, and *may exercise any power for municipal purposes except as otherwise provided by law.*" (Emphasis added.)

115. FLA. STAT. §167.005(2) (1971).

116. 261 So. 2d 801 (Fla. 1972). *See also* Admiral Dev. Corp. v. City of Maitland, 267 So. 2d 860 (4th D.C.A. Fla. 1972).

the new constitutional language but relied on prior case law[117] to conclude that the municipal charter "gives the municipality all the powers it possesses"[118] and that reasonable doubts shall be resolved against the city. The holding has been justly criticized,[119] for it again requires a municipality to seek legislative approval via special law prior to exercise of any power not expressly conferred by its charter.[120]

It is nevertheless improper to conclude that *Fleetwood* represents the only obstacle to the exercise of broad local powers over Florida cable television systems. Even courts accepting the concept of broad home rule powers have had difficulty in applying those powers to the regulation of cable television. For example, in *Nugent* ex rel. *Hurd v. City of East Providence*[121] an exclusive cable television franchise was invalidated on grounds the franchise attempted to regulate and control the conduct of business; this, the court concluded "[partook] of statewide character rather than of the character of local legislation"[122] and was, therefore, beyond the purview of the home rule charter. Similarly, the defendant city in *Community Antenna Television of Wichita, Inc. v. City of Wichita*[123] attempted comprehensive regulation of the franchise under authority of the home rule amendment to the state constitution.[124] The court acknowledged the broadened powers of municipalities under home rule, but determined the scope of the regulation was tantamount to that of a public utility, thereby rendering the ordinance unreasonable and void.[125]

The ramifications of uncertain municipal powers have led Jacksonville officials to conclude:[126]

> Special legislation seems to be the safest way to clear the municipality's legal path to ownership and operation of the system, even though a strong case can be made for the inherent authority of the City to own and operate the system under present law. Both investors and the government should be spared the delays and uncertainties of possible attacks by litigation. But the probability of litigation, already recognized

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117. Clark v. North Bay Village, 54 So. 2d 240 (Fla. 1951); Liberis v. Harper, 89 Fla. 477, 104 So. 853 (1925).

118. 261 So. 2d at 803.

119. Sparkman, *The History and Status of Local Government Powers in Florida,* 25 U. FLA. L. REV. 271, 305 (1973); Comment, *Municipal Powers in Florida: By Constitutional Right or Legislative Grace?,* 25 U. FLA. L. REV. 597 (1973).

120. See Sparkman, *supra* note 119, at 279; Comment, *supra* note 119, at 602.

121. 103 R.I. 518, 238 A.2d 758 (1968).

122. *Id.* at 522, 238 A.2d at 762.

123. 205 Kan. 537, 471 P.2d 360 (1970).

124. The contested ordinance controlled rates, set technical standards, established carriage rules, required system expansion to accommodate new customers, and established city audit of the franchisee's internal books and records. *Id.*

125. The court also considered the validity of the ordinance under the police power of the city to regulate its streets; however, it rejected this ground on a failing to find "any rational relationship to the use and rightful regulation of the city streets." *Id.* at 543, 471 P.2d at 365.

126. JACKSONVILLE REPORT, *supra* note 8, at 185.

as a delaying device by competing applicants, is increased where any uncertainty exists in the City's legal authority. And whatever the opinion of the City with regard to its legal powers in cable ownership, the financial community must be satisfied that in this venture in cable there are sufficient protections for its investment.

Special Legislation

The decision by Jacksonville officials to seek special legislation to cure uncertainties in municipal authority is a remedy that has been sought by other Florida cities.[127] Special legislation is, however, one of the least efficient methods of providing comprehensive and uniform treatment of the growing cable television industry.[128]

Similarly, population acts that potentially afford specialized treatment for counties of varying size have proved unworkable.[129] The 1965 legislature delegated to all counties with population in excess of 450,000 the power to grant cable television franchises. This authorization has since been repealed and reenacted as county ordinances of the affected counties.[130] Notwithstanding this result, the delegation of raw legal authority to grant franchises sidesteps the central problem by failing to provide a statewide policy promoting the development of cable television. In addition, the piecemeal legislative approach, which has produced occasional special legislation, has also provided general laws designed only to tap the cable as a revenue source.[131]

THE NEED FOR REFORM

The insufficiency of the legal base from which municipalities have at-

127. Fla. Laws 1972, ch. 699, §1, at 1072 (City of Tampa authorized to grant cable television system franchises). Gainesville has joined with Alachua County in seeking plenary power over cable television via a special legislative act. Notice of Intention To Apply for Special Legislation, Feb. 21, 1973.

128. Local bills introduced in the 1965 Legislature numbered 2,107 while population acts numbered over 2,100 by 1970. It was this multiplicity of special acts that prompted the 1968 constitutional revision that sought to eliminate legislative congestion by granting broader powers of home rule. *See* Sparkman, *supra* note 119, at 286-88. The plethora of local bills has produced unusual results. For example, the 1965 Legislature granted a 30-year cable television franchise to Cable-Vision, Inc. in Monroe County. Fla. Laws 1965, ch. 1927. This act was repealed by Fla. Laws 1969, ch. 1316 but was subsequently reinstated in Cable-Vision, Inc. v. State, 35 Fla. Supp. 17 (1970), which declared the 1969 act an unconstitutional abridgment of contractual rights.

129. Population acts quickly lose their intended effect in areas experiencing high growth rates. Thus, constant awareness is required to determine which population acts are no longer effective and those that become applicable to a growing county. Aware of the unworkability of this procedure, the 1971 legislature repealed almost all existing population acts. Fla. Laws 1971, ch. 29. The repealed population acts were then reenacted as ordinances of affected counties subject to repeal or modification. *See* Sparkman, *supra* note 119, at 300.

130. Fla. Laws 1971, ch. 71-29, at 96.

131. Fla. Stat. §205.323 (1971) (license tax applied to CATV), *repealed and superseded by* Fla. Laws 1972, ch. 72-306, at 1142; FLA. STAT. §212.05(5) (1971) (sales tax applied to CATV).

tempted to regulate the cable is clear. Further, emerging national cable policy as promulgated in the *Cable Television Report and Order* and affirmed in *Midwest Video* suggests that the states should now act to define appropriate state responsibilities and those duties that local governments can optimally perform.

The 1971 Florida Legislature acknowledged the need for a state cable policy by proposing the creation of an advisory council to "study the long range potentialities of cable television."[132] The council was to have prepared a report for the 1972 session to include: (1) recommended franchising procedures, (2) anticipated technological developments, (3) a study of the relation between the cable and other broadcast sources, (4) financial aspects of television services in the public interest, (5) problems of access to the cable, (6) distribution of powers between state and local governments, (7) methods to achieve statewide coverage, (8) a study of the availability of future programming, and (9) proposals for future methods of cable regulation in the public interest.[133]

Perhaps the bill preceded its time, but its death in committee now requires that Florida follow the lead of other states. Nevertheless, Florida can perhaps benefit by patient critical observation of the experience of others. The Sloan Commission, however, discourages undue delay:[134]

> Cable television is today at a stage where the general exercise of choice is still possible. . . . [I]t remains possible by government action to prohibit it, to permit it, or to promote it almost by fiat. . . . It is not as yet encumbered by massive vested interests, although that day may no longer be remote. . . . There is, in short, still time.

Regulatory Alternatives

The several states that have acted to regulate cable television have demonstrated diverse approaches. New York[135] and New Jersey[136] have wisely imposed a one-year moratorium on cable franchising while their respective legislatures study the regulatory alternatives. The prudence of the moratorium lies in its preservation of the status quo. Thus, municipalities are prevented from entering into long term contracts that would later frustrate the developing state regulatory plan.

Others have taken more substantial action by declaring cable television to be a public utility under the jurisdiction of the state public utilities commission.[137] This approach deprives local governments of meaningful powers by

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132. Fla. H.R. 1443 (Reg. Sess. 1971, introduced by Rep. D'Alemberte); Fla. S. 1057 (Reg. Sess. 1971).

133. Fla. H.R. 1443 (Reg. Sess. 1971).

134. SLOAN REPORT, *supra* note 2, at 3.

135. N.Y. GEN. MUNIC. LAWS §88 (McKinney Supp. 1972).

136. New Jersey Laws 1971, ch. 221, *repealed and superseded by* N.J. STAT. ANN. §§48: 5A-1 to -53 (Supp. 1973).

137. CONN. GEN. STAT. ANN. ch. 289, §§16-330 to -333 (Supp. 1973); HAWAII REV. STAT. §§440G-1 to -14 (Supp. 1972); NEV. REV. STAT. §§711.010-.180 (Supp. 1971); R.I. GEN. LAWS ANN. §§39-19-1 to -8 (Supp. 1972); VT. STAT. ANN. tit. 30, §§401-08 (Supp. 1973).

giving the state control of all functions not preempted by the federal government. The wisdom of this approach has been subject to question because state public utility commissions deal with the regulation of a few large monopolies where the concern is rate regulation, provision of services, and return on investment. Although the cable shares several public utility characteristics, the dissimilarities are far more significant. Many problems facing cable development require varying solutions for different localities, and these determinations are best made at the local level. For example, since much of the channel usage will be at the community and even the neighborhood level, local residents will be required to deal continually with the local operator who also is the recipient of the monthly fees charged each user. For the cable to be responsive to changing community needs, an element of local control should therefore remain in any final regulatory plan.

State preemption is clearly a simple means of avoiding the complexities concomitant with a dual state-local structure, for the enactment of one law can relegate cable to public utility jurisdiction. The Sloan Commission soundly rejects the "public utility" concept in favor of the creation of special state agencies "empowered to direct and regulate the growth of cable television, in conformity with the standards established by the federal government but with freedom at all times to exceed those standards where they are expressed as minimal."[138] As a supervisory body, the proposed state agency would identify appropriate franchise areas within a state while local governments would engage in the franchising process per se. Rate determination would also remain in local control, subject only to the necessity of reporting to the state agency concerning rate schedules, franchise terms, and operator qualifications. Appeals from disputes at the local level would be resolved at the state level.

The most significant function to be performed by the state agency, however, involves the establishment of minimum requirements that must be present in all franchises. These would include franchise duration, technical standards, non-discriminatory access, allocation of channels, and performance standards. By allocating the franchise negotiation process to local governments, the state agency assumes a unique position from which it can evaluate and select among competing policy considerations yet to confront the developing technology.[139]

CONCLUSION

Despite its added complexity, the dual state-local concept of regulation has been successfully implemented by the Massachusetts Legislature[140] and is being

138. SLOAN REPORT, *supra* note 2, at 159.
139. *Id.*
140. MASS. ANN. LAWS ch. 166A, §§1-20 (Supp. 1972).

considered in New York,[141] New Jersey,[142] and Illinois.[143] Clearly, Florida must also act to deal with the new technology. The regulatory format can still be structured by legislative action, but time is short. Although Jacksonville has carefully weighed its options, the question remains whether all Florida communities would be inclined to incur the expense of a similar study prior to entry into a long-term franchise. At present there can be no assurances, for there is no over-all plan of regulated cable growth in Florida. The absence of a state cable policy coupled with an inadequate legal base is presently handicapping those communities that are attempting to promote the new technology. The task confronting the state of Florida will not be resolved by borrowing a statute from another state at a later time, for each state is unique and must provide its own solutions to the regulatory problem. The Florida Legislature should now establish the advisory council on cable television that it failed to establish in 1971. The task of the council should be defined to encompass questions of policy and of implementation, both of which remain unresolved in Florida. The Sloan Commission, the FCC, and other state governments have provided useful guidelines for Florida, but the ultimate responsibility must lie with the state legislature, and the time to act is now.

DALE A. DETTMER

141. STATE OF NEW YORK, PUBLIC SERVICE COMM'N, REGULATION OF CABLE TELEVISION BY THE STATE OF NEW YORK (Dec. 1970).

142. CROSSED WIRES: CABLE TELEVISION IN NEW JERSEY, A REPORT BY THE CENTER FOR ANALYSIS OF PUBLIC ISSUES (Princeton, 1971).

143. ILLINOIS COMMERCE COMM'N, INVESTIGATION OF CABLE TELEVISION AND OTHER FORMS OF BROADBAND CABLE COMMUNICATIONS IN THE STATE OF ILLINOIS, *reprinted in* 22 P & F RADIO REG. 2d 2192 (1971).