CABLE TELEVISION: THE PROCESS OF FRANCHISING

PREPARED FOR THE NATIONAL SCIENCE FOUNDATION

LELAND L. JOHNSON
MICHAEL BOTEIN

R-1135-NSF
MARCH 1973

Rand
SANTA MONICA, CA. 90406
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CABLE TELEVISION RESEARCH AT RAND

The Rand Corporation began its research on cable television issues in 1969, under grants from the Ford Foundation and the John and Mary R. Markle Foundation. The central interest at that time was federal regulatory policy, still in its formative stages. Rand published more than a dozen reports related to that subject over the next three years. This phase of Rand's concern ended in February 1972 when the Federal Communications Commission issued its Cable Television Report and Order.

The Report and Order marked the end of a virtual freeze on cable development in the major metropolitan areas that had persisted since 1966. It asserted the FCC's authority to regulate cable development, laid down a number of firm requirements and restrictions, and at the same time permitted considerable latitude to communities in drawing up the terms of their franchises. It expressly encouraged communities to innovate, while reserving the authority to approve or disapprove many of their proposed actions.

The major decisions to be made next, and therefore the major focus of new cable research, will be on the local level. These decisions will be crucially important because cable television is no longer a modest technique for improving rural television reception. It is on the brink of turning into a genuine urban communication system, with profound implications for our entire society. Most important, cable systems in the major markets are yet to be built, and there is great pressure on the cities to start issuing franchises prematurely. The decisions shortly to be made will reverberate through the 1980's.

Aware of the importance of these events, the National Science Foundation asked Rand in December 1971 to compile a cable handbook for local decisionmaking. The Handbook, now completed, presents basic information about cable television and outlines the issues a community will face. It is addressed to citizen group members, local government officials, and others concerned with the development of cable television in their communities.

A series of companion reports to the Handbook treat specific issues in greater detail (see list inside the front cover). The present report deals with the most crucial issues a community and its franchising authority must face at the very outset, during the franchising process. The community must decide what cable-system configuration it wants, who is to own it, how it is to be operated, what the monthly subscription rate is to be, and a multitude of other matters both major and minor. Before proceeding into this heavily forested area, the reader is strongly advised to

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SUMMARY

Establishing the process by which cable television is to be designed, constructed, and operated is vitally important in determining how cable is to serve community needs. Detailed and careful consideration must be given to each step in the franchising process: assessing the needs and desires of the community, deciding on preferred forms of ownership, selecting among competing applicants, and meeting any requirements for waivers and special showings before the FCC.

The franchise itself demands careful attention to numerous important details. Minimum channel capacities, construction timetables, structure of subscriber rates, and cooperative agreements with neighboring jurisdictions are only a few of the major factors that must be taken into account.

Unfortunately, there are few clear-cut "right" answers to the many questions that arise in the franchising process, nor is there such a thing as a model franchise that communities can adopt with only minor adjustment. The more modest objective here is to delineate major policy issues, suggest guidelines, and discuss advantages and disadvantages of alternative approaches. Franchising is especially difficult because cable technology and the uses to which it can be put are in such a state of flux. On one hand it is of critical importance that flexibility be built into the franchising process and into the document itself, so that opportunities not now foreseen can be exploited in the future. At the same time, the community should avoid unduly burdening the cable operator with ambitious requirements that merely add to the costs to subscribers, in return for benefits of uncertain value. And it must pay careful attention to the issue of whether terms of the franchise unduly benefit one group of users, or potential users, at the expense of others. Along with these considerations, the community must be assured that it is amply protected, since the system will operate as a monopoly once the FCC has approved the franchise. Hence, the value of the competitive process that precedes franchising should be fully exploited through numerous hearings, specific evidence and disclosures required from competing applicants, and a well-conceived selection process, involving, among many things, inputs from citizens and community groups about their needs and preferences.

This report considers the franchising process in ten steps:

Step 1. Adoption of procedures for drafting and awarding the franchise. At the outset it is desirable to establish a procedural framework. In some cases this may involve enacting a procedure into local law through an ordinance, depending on
local circumstances, or an amendment to the city's charter. Or perhaps a uniform procedure might be established for all municipalities in accordance with state statute.

Step 2. An assessment of community needs, objectives, and alternatives. This would involve reviewing the abundant published information about cable; reviewing the experience of other communities; conducting surveys of community needs, desires, and present patterns of social communication; and considering the size and characteristics of the franchise districts, including the possibility of coordinated franchises with nearby jurisdictions to facilitate interconnection.

Step 3. Hearings and tentative decisions regarding major issues. Procedures for giving public notice must be adequate to permit all interested parties to be represented in the hearing regarding tentative decisions made on the basis of the preceding two steps. It should be understood that these decisions may be modified on the basis of evidence and circumstances that may come to light during the subsequent steps. It is particularly important that the franchising authority publish a written explanation of its decisions about these issues.

Step 4. Hearings on adoption of a draft franchise. Having decided upon the franchisee's geographic area in cooperation with neighboring jurisdictions, and having considered other major issues raised in Step 3, the franchising authority would consider the substantive terms of the franchise in this step. One of the major objectives would be to decide which provisions must be included in the final franchise and which are to be left open for competing offers from the applicants. At this stage the community may wish to consider franchising a noncommercial, or joint commercial and noncommercial, or municipal operator as an alternative to conventional private ownership.

Step 5. Preparation and dissemination of requests for proposal. Having drafted a tentative franchise document, the franchising authority would now transform it into a formal request for proposal (RFP). This would include not only the proposed terms of the final franchise, but also a request for detailed information from the applicant about his financial condition, ownership interest, and proposals concerning provisions left open in the tentative franchise document.

Step 6. Hearings on proposals. Here again, adequate public notice and publications of meeting times and places would be important to ensure that all interested parties are heard. Adequate time would be required for presentations and rebuttals by franchise applicants to provide a sound basis for Step 7.

Step 7. Decision on award of franchise. This is one of the most difficult steps because the franchising authority must choose one package of elements from the array of different packages that applicants have proposed, and comparisons among them necessarily involve subjective judgments. For example, one applicant may offer a lower subscriber monthly rate, but propose a cable system designed with little growth capacity beyond today's FCC minimum requirements. His offer may have to be balanced against that of another applicant who demands a higher subscriber rate but is willing to construct a more elaborate cable system, with larger channel capacities and flexibility to meet a wide range of both highly local and metropolitan-wide needs.

Step 8. FCC certificate of compliance. The FCC requires the cable operator to apply for and receive a certificate of compliance before he can carry broadcast signals. This certificate ensures that the cable system operates according to FCC
rules. In supporting the application, the franchising authority may need to cooperate in providing requests for waivers or information on special showings that may be required in specific areas discussed in this and companion reports.

Step 9. Monitoring system construction and certifying performance. After FCC certification, the franchising authority must be sure that the cable system is constructed in compliance with the terms of franchise. Monitoring the pace of construction, the hiring practices of the contractor, and the contractor's quality control procedures are major elements in this step. If performance tests are deferred until the system is ready to be turned on for subscribers, technical problems or variances from franchise terms may be difficult to correct.

Step 10. Continuing administration of the franchise. During the postfranchise period the cable operator, the franchising authority, and the community must live together on a day-to-day basis. Disputes are bound to arise from time to time. Some of them must be settled on the basis of ad hoc procedures; but a well-written franchise that sets down the procedures for settling disputes will also be of great value in informing all parties ahead of time of what their rights and responsibilities are.

The central question underlying this process is what terms and conditions the franchise ought to include and how best to frame them in light of all the conflicting considerations that necessarily arise. Section III of this report discusses, subject by subject, the many issues that should be addressed in the franchise. The Contents page provides a convenient listing. The report draws on language from existing franchises and existing model ordinances to demonstrate various ways of handling specific problems. It emphasizes the policy considerations the community must take into account in deciding upon specific franchise terms and conditions.
ACKNOWLEDGMENTS

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I. INTRODUCTION

OBJECTIVES

The purpose of this report is to assist local governments and citizen groups in working through the various stages of the franchising process, in terms of both the mechanics and the policy issues involved in writing and awarding a well-conceived franchise. The focus throughout is on those jurisdictions that have yet to go through the franchising process.

Section II describes the various steps of the process, including the early delineation of franchise boundaries, the request for proposals (RFP), the steps for public hearings, the final award of a franchise, and the application for a certificate of compliance from the Federal Communications Commission. Examples of actual franchise provisions illustrate the process of selection and award.

Section III concentrates on the many major and minor provisions that a franchise should include, taking into account the FCC's recent Cable Television Report and Order, as well as other recent rulings, which encompass rules and guidelines that have a far-ranging effect on choices open to local jurisdictions. Particular sections that should be included in a franchise are discussed roughly in the order they would take in the final document. In each section, major policy issues are discussed in light of the new FCC rules; provisions that have been included in actual franchises are quoted to provide examples of both solutions to follow and pitfalls to avoid, as well as to guide the detailed drafting of the franchise document.

For illustrative examples the following franchises or ordinances are drawn upon: New York City (the Borough of Manhattan); Chicago; Los Angeles; San Mateo, California; Beverly Hills, California; Akron, Ohio; Pomeroy, Ohio; Columbus, Ohio; and Louisville, Kentucky. Useful guidelines are also to be found in the model franchise drafted by the Franchise Committee of the Miami Valley Council of Governments of the Dayton, Ohio area (MVCOG); the model ordinance of the National Institute of Municipal Law Officials (NIMLO); and the model code of the American Civil Liberties Union (ACLU).

An appendix contains a checklist of major considerations drawn from the preceding portions of the report. This provides a capsule view of important items that local authorities should keep in mind as they work through the details of the franchising process.

For many audiences, this report will be most useful when read in conjunction with several other documents, in addition to the summary Handbook.


• A companion report in this series by Steven R. Rivkin, *Cable Television: A Guide to Federal Regulations*, R-1138-NSF, which also contains the full text of the *Cable Television Report and Order*.

• A second companion report, by Robert K. Yin, *Cable Television: Citizen Participation in Planning*, R-1136-NSF.

• Two reports by the Cable Television Information Center: *How to Plan an Ordinance* (1972), which draws on existing franchises to provide additional illustrative examples of alternative ways to draft provisions; and *A Suggested Procedure* (1972), which outlines suggested steps in the local authorization of cable television.

**A NOTE ON SOURCE MATERIALS**

Although this study centers on local regulation of cable television, the FCC's rules affect many aspects of local regulation. As a result, an understanding of the local regulatory role requires at least some familiarity with the requirements—and often the ambiguities—of the federal rules. Both layman and lawyer, however, may find the rules' source as elusive as their substance.

The FCC promulgates a rule by means of a *Report and Order*. Though usually printed as one document, it is actually two. The *Order* adopts the set of rules, while the *Report* contains the FCC's interpretation of the rules, and its reasoning in adopting them.

A number of sources for any FCC document exist. The most important is the *Federal Register*, an official daily publication that prints all major federal documents. Under the federal Administrative Procedure Act an FCC rule usually cannot become law until it has been published there. Moreover, the *Federal Register* usually is the easiest source for FCC documents, since most libraries carry it and since copies of individual issues are usually obtainable by writing to the Government Printing Office. Because of these factors, this study gives the *Federal Register* as the source for FCC policy statements and regulations. Two other sources also exist: the official *FCC Reports* and the privately published *Pike & Fischer Radio Regulation*. Though both of these sources are accurate, they usually are harder to obtain than the *Federal Register*.

After a rule has been published in the *Federal Register*, it receives a section number in the *Code of Federal Regulations*. The *Code* is reissued every year and contains a permanent and comprehensive collection of all regulations of federal agencies. Each regulation is classified according to a title and section number. All FCC regulations carry a title number of 47, since the FCC's regulatory power comes from title 47 of the United States Code. For example, since the FCC has assigned its rule on access to cable television a section number of 76.251, the rule can be found in 47 C.F.R. § 76.251 (1972). For convenience in referencing, this study gives only
the appropriate C.F.R. source, but also the Federal Register page on which the rule originally was printed, since revisions in FCC rules adopted in the last year will not have been codified.

More generally, FCC regulations and law review articles are referenced here in the standard legal format. All other literature is referenced in a conventional fashion consistent with that of other Rand reports.
II. DRAFTING AND AWARDING THE FRANCHISE

Franchising is a continuing and complex process, whose parameters are obviously less than exact. The process cannot be broken down into a neat "do it yourself" kit for franchising authorities and citizens groups to assemble one piece at a time. Nevertheless, it is possible to specify a generalized—albeit somewhat arbitrary—outline of alternative approaches and steps in the franchising process.

THE NEGOTIATION APPROACH VERSUS THE COMPETITIVE BID AND AWARD APPROACH

Two contrasting approaches exist in the franchising process with many variations between them. One is the "negotiation" approach, in which the city selects a prospective cable operator and negotiates the many terms and conditions that will go into the franchise. If the negotiations break down the city may, of course, elect to work with some other prospective grantee.

There are two major advantages to this approach: (a) it gives the franchising authority and the prospective grantee flexibility to agree tentatively on various provisions which can later be renegotiated depending on terms agreed elsewhere in the draft franchise, as an interactive trade-off process, so that an attractive overall package can finally be agreed upon, and (b) it expedites the franchising process insofar as relatively few participants are involved in the back-and-forth negotiations. Its major disadvantages are that (a) the early selection of a single prospective operator can give rise to complaints and even threats of lawsuits by other prospective candidates, (b) it does not permit the degree of community and citizen participation in the franchising process that such groups nowadays are demanding, and (c) however scrupulously the negotiations are conducted, the participants are vulnerable to suspicion by outsiders that under-the-table dealings are involved—all the more so since a number of illegal and questionable practices have come to light in the past.

Under the second approach, the "competitive bid and award" process, the franchising authority cooperates with community and citizen groups to decide in substantial detail the desirable elements of cable system design, ownership, and operation prior to dealing with prospective cable operators. The franchising authority
issues its package of requirements and negotiable options on a fully competitive basis including requests for proposals, extensive public hearings, and formal evaluations prior to franchise award.

The advantages of this approach lie in avoiding real or alleged favoritism toward a particular prospective grantee, and in permitting community and citizen participation throughout the process. Its disadvantages lie in being (a) potentially more time-consuming, with the large number of steps and participants involved, (b) more costly in terms of additional staff and consulting resources required by the franchising authority and additional burdens placed on franchise candidates, and (c) less flexible, insofar as the franchising authority has greater difficulty in modifying its earlier decisions about terms and conditions (based on new information and other factors) once its request for proposals is issued.

Bearing in mind the many possible mixes of these two approaches, we shall discuss the detailed steps required in the competitive bid and award approach. In cases where franchising authorities prefer stronger elements of negotiation, some of the steps discussed below would be eliminated or compressed in time and scope. These steps include:

1. Adoption of procedures for drafting and awarding the franchise.
2. Hearings and tentative decisions regarding geographic area of each franchise and interconnection of franchisees within separate local jurisdictions.
3. Hearings on and adoption of a draft franchise document describing the general terms and conditions of the final franchise.
4. Preparation and dissemination of a request for proposals from franchise applicants, based upon the tentative franchise document.
5. Hearings on proposals received from applicants for the franchise.
6. Decision on award of franchise.
7. Application for an FCC certificate of compliance, including whatever special showings the franchisor and franchisee must make, either jointly or separately.
8. Continuing administration of the franchise.

STEP 1: ADOPTION OF PROCEDURES FOR DRAFTING AND AWARDING THE FRANCHISE

Initial adoption of a detailed procedural framework for awarding a franchise can allay citizens groups' fears of being "railroaded," and also reduce protracted and bitter procedural infighting later in the franchising process. Though the Cable Television Report and Order represents the FCC's most concerted and sophisticated effort so far to create standards for the local franchising process, a wide range of responsibilities exists at this nonfederal level. In terms of franchising, the FCC's only important procedural provision is the requirement that the franchising authority hold a "public proceeding affording due process" before choosing a franchisee or authorizing rate changes. Under such a general requirement, the real responsi-
bility for formulating a franchising procedure remains in the hands of state and local authorities.

Accordingly, there seem to be three main methods for adopting a procedural framework. First, a local franchising authority—or perhaps a consortium of local franchising authorities—might enter into a nonbinding "gentlemen's agreement" to follow certain procedures. Second, a local franchising authority—or again a consortium—might enact a procedure into local law by way of an ordinance; depending on local circumstances, an amendment to the city's charter or other basic enabling document might be preferable. Finally, a state statute might specify a uniform procedure for all municipalities. In reality, all three approaches may function in the same way; since no written instrument can hope to cover all possible contingencies, the ultimate determinant may be the good faith of the parties.

The procedural framework outlined above and detailed later provides for strong citizen input. Citizen participation is not only proper in drafting a well-conceived franchise, but also necessary as a matter of sheer political reality. As another report in this series notes in more depth, it is true that public input may lead to political infighting and thus delay the franchising process, but today's citizen groups—particularly minority groups—demand that their voices be heard.

The procedural suggestions here would create three separate stages for citizen input: the initial planning, the drafting of a tentative franchise document, and the final choice of an applicant. These three separate steps actually should create a more efficient and speedy franchising process. If citizens are given a voice at each major juncture in policy decisions, it will not be necessary to backtrack at the final franchise award stage to consider basic policy matters.

In suggesting this procedural framework and outlining the subsequent activities, we do not set down appropriate time spans between steps. Aside from the fact that hard data on cities' actual experience are sparse, any attempt to generalize in this area would serve little purpose; the appropriate time frame for each municipality will vary with its size, demographic makeup, politics, and the like—as well as plain chance. Probably the only safe generalization is that a prolonged franchising process is ultimately preferable to an overly short one; hasty granting of "midnight franchises" has led some cities into ill-advised long-term commitments.

STEP 2: ASSESSMENT OF COMMUNITY NEEDS, OBJECTIVES, AND ALTERNATIVES

During step 2 the community would:

- Send for and review published information about cable;
- Review the experience of other communities;
- Conduct community surveys;
- Consider the size and characteristics of franchise districts, including possibilities of coordinated franchising with nearby jurisdictions;
- Investigate uses of the public access, education, and local government channels;

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- Study ownership alternatives, system design concepts, economic implications, and other issues.

Some would call this the study phase. It can be as limited or extensive as the community wants and can afford.

Review of Published Information

A vast amount of published information about cable is now available—so much, in fact, that we seem more bent on papering the cities than wiring them. Guides to the literature, such as those listed in the Handbook references, can be helpful.

Review of the Experience of Other Communities

Direct conversations with local officials and others involved with franchising in other communities also will prove useful. Although individual word-of-mouth contact is the most tried and true approach, organizations such as the Cable Television Information Center, the National League of Cities, the International City Management Association, and state cable television associations can help locate knowledgeable people. These organizations, some universities, professional societies, and research institutions such as the Stanford Research Institute, the MITRE Corporation, and The Rand Corporation also hold conferences to enable municipal officials and others to exchange views on cable issues.

Staff members from the FCC Cable Television Bureau and the Cable Television Information Center may come to the community on request and talk with the franchising authority about specific local problems. This can be a valuable service; franchising authorities would be well advised to confine their requests to this purpose, rather than ask for introductory briefings on the general subject of cable television.

Conduct of Community Surveys

Surveys can provide helpful information for planning a cable system, such as data on television viewing habits, programming of special interest to particular groups, and the likely appeal of basic cable television service to the community. Surveys may also measure the potential appeal of new programs and services—whether more people would pay to see a local basketball game than to see the Metropolitan Opera, for example—though such preferences should not be construed as hard market data. Finally, surveys can indicate the present pattern of communications among residents, both within their neighborhoods and with people in other parts of the city. This information can provide some guidelines for the physical layout of cable trunk lines and for determining interconnection requirements among cable districts.

Surveys also give the ordinary citizen some voice in the planning process, albeit a passive one. If not properly designed and conducted, however, surveys will be of little value and may even yield incorrect results. Communities therefore should seek professional advice before beginning a survey project.
Franchise Boundaries and Interconnection

Two of the early major questions that confront the franchising authority are the geographic coverage of proposed franchises and the coordination of its franchising efforts with neighboring authorities. The two subjects are closely related, since the type of systems surrounding a city should influence the city’s decisions about structuring its own franchises. For example, a small town’s governing body would be justified in attaching less importance to an applicant’s ability to originate programming if a large city’s cable system were within interconnection distance.

First, a local franchising authority must decide whether to grant the whole franchise area to one operator or to carve it up into separate sectors with different operators. Appendix B discusses in some detail the pros and cons of single and multiple ownership of cable systems within a given city. Because of the complexity of the issues, it should be studied carefully before reaching conclusions.

In weighing the considerations of single versus multiple ownership, local authorities must keep in mind that much depends on the population of the area to be franchised. For a small city—e.g., 20,000 to 50,000 people—the investment requirements would be low for either a single operator or a set of operators; the economies of a single integrated operation would be large, and the problem of local control for such a small city relatively minor. The reverse may be true for cities with populations of several hundred thousand.

In any event, tentative decisions need to be made early to establish the franchise boundaries at least roughly (if the overall area is to be subdivided) and to give competing franchise applicants indications of the size of the market, the investment, and other requirements likely to be forthcoming. As additional information comes to light on the basis of the succeeding steps, these decisions may have to be reevaluated and modified.

Second, a local franchising authority must consider not merely the location of its own franchise areas, but also their relation to other existing or proposed systems in adjacent jurisdictions. One of the most disconcerting aspects of cable growth to date has been its fragmented geographic coverage. Franchises have been let separately by thousands of cities and counties scattered about the country, with each jurisdiction concentrating on franchising its own area. With little or no coordination among jurisdictions, cable systems have grown up side by side without interconnection to permit communication across jurisdictional boundaries.

No less serious, scattered about the interstices of municipal boundaries are unincorporated areas usually franchised by the county. In many cases, it is not economic for a cable operator to serve scattered clusters of houses or housing tracts adjacent to but not part of a municipality. It might be quite feasible to serve them with cable lines extended from the municipality, but this would require a cooperative arrangement between county and municipality permitting the city franchisee to expand beyond municipal boundaries.

So long as cable serves only to retransmit broadcast signals from a master antenna and conventional headend, as it has done in the past, the geographic fragmentation of the industry is not of great concern. For this service, cable construction is so straightforward that small communities can be independently served by separate operators. Indeed, fewer than 100 of the nearly 3000 cable systems operating today have more than 10,000 subscribers.
However, in order to realize the great promise of broadband communications, in contrast to the mere retransmission of broadcast signals, the nature of the industry will have to change. The use of computers, other sophisticated equipment, and high-quality (but high-cost) programming will be feasible only for subscriber bases numbering in the many thousands. New services—such as instruction in the home, shopping by cable, and information storage and retrieval—will be feasible only if a large geographic area can be simultaneously served from central points. Metropolitan-wide or regional networks of cable systems will be necessary to make such developments a reality. This, in turn, will require cooperation among franchising authorities—cities and counties—to permit a single system to serve more than one jurisdiction, or to permit separate systems to interconnect and provide large-area coverage while continuing to serve their own jurisdictions.

There are several mechanisms through which neighboring jurisdictions can seek agreements regarding requirements to be written into franchises for interconnection, compatible technical standards, and franchise boundaries. A voluntarily created “Council of Governments” representing the separate authorities in a metropolitan area may provide a suitable mechanism. A special cable television committee of the COG could be set up to investigate the benefits of alternative cooperative arrangements. While working out these arrangements, a voluntary freeze on awarding franchises among members of the COG may be desirable. In this process independent outside consultants may be brought in, and a brief study made of the economics and technology of cable in the particular environment. This study could draw heavily from the many previous studies in order to reduce costs and to ensure the use of tested methodologies.

Another possibility is to work through a local regional planning commission, if one exists, whose breadth of membership, interest, and political visibility may be sufficient to assist in working out satisfactory cooperative arrangements. Yet another alternative is for city governments, along with county representatives, to agree to set up a special ad hoc committee to study the situation and to make recommendations to the participating governments.

At the same time, all of these methods of cooperation among local governments may be mooted to the extent that states enter the regulatory arena—and an increasing number of states are expressing interest in doing so. Only a handful of states currently regulate cable; only one of these, Connecticut, has had substantial experience in allocating franchise areas on a region-wide basis. This limited experience suggests that state designation of franchise areas may well lead to a better distribution of cable services—although perhaps at the cost of considerable delay and confusion.\(^a\)

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Investigation of Uses of the Public Access, Education, and Local Government Channels

In major market cable systems, local government and community groups will be directly involved in using the three access channels mandated by the FCC. Much

of the planning effort should therefore focus on these uses. Two chapters of the summary Handbook deal with public access and public services on cable in more detail.

Community groups and interested citizens can be especially helpful in assessing the community's need for various services. A variety of devices—including surveys, neighborhood meetings, thorough studies, and committee reports—can contribute to the planning process. Videotaping individuals and groups who might utilize time on an access channel may be a particularly valuable technique. Local theater productions, neighborhood council meetings, and programming prepared by high school groups or senior citizens can be shown at public hearings or to the franchising authority. Such tapes can present an effective case for emphasizing public access in the franchise. They may also demonstrate that the community contains far more talent than it may have thought.

The franchising authority should consider delegating panels of community leaders, teachers and school administrators, and other citizens to come up with ideas and workable plans for use of the public access and education channels. It may also want to begin planning how the police, fire, social service, and other city agencies will use the local government channel. The plans developed for the use and administration of the access channels could then be discussed at the public hearings in step 3.

**Study of Ownership Alternatives, System Design Concepts, Economic Implications, and Other Issues**

A wide range of issues can usefully be brought out and analyzed by community groups and local government officials during the study phase. They can explore basic system design concepts, including the number and location of headends, trunk lines, and studies. An economic analysis of cable feasibility in the community might be made as described in Chapter 3 of the summary Handbook. Individual experts and outside study teams can be brought in as needed. Again, the objective should be to outline alternatives and set community priorities that can be reflected in franchise provisions.

**Flexibility in Decisionmaking**

Decisions about franchise boundaries and intergovernmental cooperation and the other issues discussed above may need modification as information accumulates during the succeeding steps. Because franchising is a continuing process, however, decisions on franchise boundaries and intergovernmental cooperation must anticipate their potential effects on the later performance of the systems. For example, a decision to include sparsely populated areas within the franchise area will increase total wiring costs and thus require higher installation and service rates. A decision not to cooperate with an adjoining jurisdiction ultimately may deprive a government's constituents of programming originated by another system.

Here, as elsewhere, franchising is not an orderly sequence of easily defined decision points, but an iterative process with feedback, forward and backward. It should operate within a framework of decisionmaking flexible enough to adapt to new perceptions of problems, opportunities, and needs along the way.
This iterative process cannot take place in a vacuum; it requires thoughtful and
detailed citizen input. But in turn, citizen input cannot take place unless it has
formal and clear channels. The procedural framework called for in Step 1 must
enable citizens’ voices to be heard, even at this early stage.

STEP 3: HEARINGS AND TENTATIVE DECISIONS REGARDING
MAJOR ISSUES

Procedures for Giving Public Notice

Potentially interested citizens in the franchise area must be effectively notified.
Adequate notice is particularly important at this early stage, since a city’s mere
decision to grant a franchise is likely to attract little attention from the news media.
Traditional forms of “legal notices” are also inadequate, since they usually notify
only lawyers—and a rather small class of lawyers, at that.

Improvements along the following lines should be considered. First, the fran-
chising authority could be required to print a notice of a specified size and format
—e.g., three columns wide by four column inches long—on the television page of all
local newspapers. An even more effective approach would be to place advertisements
on all local television stations—a procedure somewhat akin to the FCC’s
requirement that stations broadcast notice of a pending renewal application. This
approach, however, might be unduly difficult in terms of both drafting and adminis-
tration. The intangible values of various program times on different stations would
complicate the creation of any written formula; and the cost of preparing an effective
advertisement, even if the time were donated as a public service announcement,
might be unduly high. If notice is intended to reach citizens interested in television,
this type of approach would nonetheless be the most effective—except for those
citizens whose tastes lead them to “tune out” contemporary television.

As a second alternative, the franchising authority might be required to print
notices in a specified format and post them in all areas it controls—city offices,
municipally owned bus lines, and the like.

Both these approaches would impose some cost on the franchising authority,
like other functions such as voter registration and tax collection. Although the cost
could probably be recouped from franchise applicants by an initial application fee,
the franchising authority will need to consider both the benefits and the costs
(however covered) in deciding how far to carry the process of notification.

Whatever form of notice is used, its timing is also highly important. First notice
should be given sufficiently in advance of any hearings—e.g., at least the traditional
thirty days—to enable citizens to prepare intelligent and useful comments. As the
deadline approaches, the notice should be repeated, but perhaps less extensively to
spare the franchising authority undue expense.

In addition, there should be special efforts in the community to notify organiza-
tions that have an interest in the shape of a franchise. The notice might be accom-
panied by a specific set of questions the organization might wish to consider, and a
list of suggested readings. The services of the city attorney or other informed officers
to help the organization prepare its position should also be offered.
Public Hearings

After notice has been given, the franchising authority should be required to hold hearings that encourage meaningful citizen participation. The procedural framework might provide for hearings in the evenings and on weekends in order to allow participation by working people. Moreover, the franchising authority should be required to hold hearings in all different neighborhoods of the franchise area. For example, each hearing might be held in a different state legislative district, chosen at random. It goes without saying that an insufficiently publicized hearing, or one held in too small a room, is hardly a “public proceeding.” If effective citizen participation is to be encouraged, the procedural framework should specify that all hearings must be held at locations with seating capacity for a given number of persons and facilities for accommodating the electronic and print media.

The hearings should be designed to provide a useful focus on particular issues. When the PCC held hearings on its rules, for example, it established panels on such issues as public access and forms of ownership. The panels were so constructed that competing views on the particular issue were sure to be represented.

The problem here—as with any type of hearing—is to insure that all voices are heard, but not to the point of unproductive repetition and wearisome tedium. Again, several approaches are possible. First, a time limit (e.g., five minutes) could be imposed on all interested parties. The obvious problem here is possible unfairness to groups that represent large numbers of citizens. Second, all parties could receive a minimum amount of time, subject to increases based upon the number of signatures they could solicit on a petition; a sliding scale might even be used—e.g., an extra five minutes for every hundred signatures. Third, the “one man, one vote” constitutional standard might be transformed into a “one man, one voice” requirement. Under this procedure, all parties desiring more than the minimum time might be required to submit petitions with signatures at some reasonable time before the hearing (e.g., twenty-four hours); each party’s time allocation then would depend on the proportion between his number of signatures and the total of all signatures. Rebuttal time also would be necessary to insure the ventilation of all views; it could be set, however, simply as a percentage of the initial presentation time to which a party was entitled.

Explanation of Decisions

The franchising authority should be required to publish a written explanation of its decision about franchise boundaries and interconnection with neighboring areas, and about other issues, within a reasonable time—perhaps thirty days—from the time that it is rendered. Though experience under other procedural frameworks has shown that the requirement to explain a decision does not guarantee better-reasoned decisionmaking, a written decision at least gives interested parties positions they can argue for or against. As with the notice requirement, defining adequate publication of the decision is difficult. Nevertheless, the franchising authority should be required to use any or all of the suggested forms of notice to inform the public that the decision exists, and a specified number of copies should be required to be made available at designated municipal offices during specified hours.
Other Possibilities for Citizen Input

Provision for citizen input through the formalist process of notice and hearings does not begin to exhaust the possible forms of citizen participation. Legal draftsmanship has severe limits, however, and cannot provide for many significant and perhaps ad hoc forms of input. As another report in this series points out, a whole range of other techniques—such as community surveys, conferences, committees, and quasi-official groups—can aid greatly in identifying and articulating citizens' desires.  

STEP 4: HEARINGS ON AND ADOPTION OF DRAFT FRANCHISE

Having decided upon the franchise's geographic area in cooperation with neighboring jurisdictions and in light of other major issues, the franchising authority should move on to consider the substantive terms of the franchise. Its objective is to decide which provisions must be included in the final franchise or franchises and which provisions are to be left open for consideration by the applicants. Again, citizen input would be useful. By this point, however, at least some citizens in the community will probably be aware of the franchise proceedings and their importance; moreover, the issue may have become important enough to draw some media attention. Consequently, notice and hearings should be provided for, but need not be as extensive as those in the preceding step.

In the process of drafting a franchise, the local government may wish to consider franchising a noncommercial, joint commercial and noncommercial, or municipal operator. Since only a handful of noncommercial and municipal systems currently exist, it is difficult to evaluate the advantages and disadvantages of each approach. Nevertheless, some preliminary comments can be made. A noncommercial system might have difficulty in raising venture capital unless it has an obviously attractive franchise area with little risk of failure, or unless it has good prospects of support from foundations interested in promoting the growth of cable. A joint venture composed of a noncommercial and a commercial corporation might be able to obtain funds more easily. Structuring the joint venture to avoid conflict would be difficult, however, and the combination of such diverse groups could create complex and possibly unfavorable tax consequences. A municipal system with a good credit rating would encounter no difficulty in raising capital, if the city had not reached its constitutional debt limit, or were not otherwise prevented from financing its system with a bond issue. In terms of public service, however, none of these three alternatives has a clear advantage over a purely commercial operation. Noncommercial programmers are as human, and can be as biased, as commercial ones; indeed, the prospect of turning over a broadband communications system to members of a local government creates possibilities of political abuse. Consideration of these points is an important area for citizen input.

On the basis of the preceding, the franchising authority should draft the major provisions of the franchise document as they will appear in final form. The basic

* Yin, op. cit.
analysis and drafting at this stage should consider the substantive issues discussed in Section III of this study. Some items must be left open since they will be determined by competition among prospective grantees. At the same time, the draft franchise should indicate at least the upper and lower bounds that the franchising authority would be willing to accept—e.g., a maximum monthly service rate of $6 or a requirement of particular program origination facilities—within which citizens can weigh their preferences. For example, strong preferences might be expressed for sacrificing a certain amount of program origination as a tradeoff for lower monthly subscriber rates. In any event, many of the legal considerations, definitions of terms, and other provisions should be included approximately as they will appear in the final document. As in Step 2, the franchising authority should be required to publish a written explanation of its decision.

STEP 5: PREPARATION AND DISSEMINATION OF REQUEST FOR PROPOSALS

Having drafted a tentative franchise document, the franchising authority should transform it into a formal request for proposals (RFP). This will include not only the proposed terms of the final franchise, but also a request for detailed information from the applicant about its financial condition, ownership interests, and proposals concerning provisions left open in the tentative franchise document.

Wide dissemination of the RFP is advisable to prevent limitations on a franchising authority's field of choice through either inadvertent omission or deliberate exclusion. The procedural framework should not simply designate a list of operators who should be invited to apply for the franchise; to achieve the widest possible dissemination, the franchising authority might be obliged to mail a copy of the RFP to any potential applicant designated by any citizen. As a less onerous alternative, the franchising authority might be required to furnish a copy of the RFP to any citizen and to accept for its consideration any properly completed proposal it receives from such a source.

Noncommercial groups, as discussed in Step 3, should be included in the distribution along with commercial organizations. If the city is interested in municipal ownership, it could apply for the franchise as one of a number of applicants.

The following example of some of the threshold requirements in a request for proposals is drawn from the Louisville ordinance:

A. No CATV Franchise or renewal thereof shall be issued except on a written application and upon a form approved by the Board of Aldermen as recommended by the CATV Special Committee of the Board. Such applications shall be accompanied by a nonrefundable cash fee of One Thousand Dollars ($1,000.00) which shall be paid to the Director of Finance.

B. The form shall set forth such facts in detail as the Board of Aldermen may deem appropriate including:

1. If the applicant is an individual, partnership, or unincorporated association, its statement shall contain the names and addresses of all persons (including corporations) having a proprie-

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The situation of the city competing with private parties obviously poses problems unless the franchising authority is in a position to deal at arm's length with all applicants. One of the most serious drawbacks to municipal ownership is the danger that it prematurely forecloses consideration of competing applications, once the city decides to own and operate the cable system.
tary or equitable interest in and to the prospective franchisee's business operation, and in and to the prospective franchise if awarded to the proposer. The term "equitable interest" shall include all assignment for value, as well as all contingent assignments of any right or privilege under the prospective franchise, and shall also include any benefit, payment, or enrollment whatsoever resulting from the grant of a franchise under this ordinance.

2. If the applicant is a non-public corporation, the statement shall furnish, additionally, the names and addresses of the officers, directors, and shareholders of the said corporation, together with the number of shares held by each shareholder.

3. If the applicant is a publicly held corporation, as defined by the rules and regulations of the Securities and Exchange Commission, the statement shall contain the states in which incorporated and/or qualified to do business, the names and addresses of the officers and directors of the corporation, the names and addresses and number of shares owned of all stockholders both nominal and beneficial, owning 3% or more of the outstanding stock of the applicant and the names and addresses of each shareholder who is a resident of Jefferson County, Kentucky, or Clark or Floyd Counties, Indiana, together with the number of shares owned by each.

4. A full disclosure of the ownership of the facilities to be used in rendering the service;

5. The source of funds for operation of the system respecting the installation and maintenance of all CATV facilities, and shall demonstrate the financial ability to provide and extend service to proposed subscribers at a reasonable cost;

6. A detailed schedule of the rates to be charged for the services offered, the facilities to be employed and the general routes of the cables used in redistributing signals, the service area or areas, the commencement and completion dates of construction of the CATV System and the proposed dates the service will be available to the area or areas named.

7. A detailed schedule of rates to be applied to residential, apartment, commercial and other users of service.

C. The Board may request such other information as it may deem appropriate.

D. All applications shall be open to public inspection, shall be kept on file a reasonable length of time at the discretion of the Board, and any intentional misrepresentation in an application shall be grounds for its rejection or for termination of the franchise.

E. All applications shall be considered firm offers to the City, shall be signed and verified by the applicants whose relationship to the applicant shall be set forth and shall bind the applicant to the provisions thereof.

These terms of the Louisville ordinance suggest yet other provisions a franchising authority should consider. First, the flat cash application fee required in Subsection A may short-change the franchising authority; actual franchising expenses may far exceed preliminary guesses. A better approach might be to require applicants to deposit a larger amount of money in an escrow account. After the final franchise award has been made, the franchising authority could compute its actual costs and charge each applicant its pro rata share.

Alternatively, the bulk of the cost burden might be imposed on the applicant who is awarded the franchise, with full or partial refunds to the other candidates. When there is an elaborate selection mechanism, a high per capita entrance charge may discourage good applicants. True, the operator who builds the system would be able to pay a high entrance charge. But many organizations may be unwilling to risk, say a $10,000 to $15,000 charge when there are many competitors. By placing much of the cost burden on the applicant selected, the franchising authority may encourage a wider range of choice.

Second, Subsection B(2)'s required disclosure of a corporation's "officers, directors, and shareholders" is wise, since it allows both the franchising authority and the public to inquire into an applicant's background. This logic might be extended a bit further, by requiring the applicant to list any managerial or ownership interests that its "officers, directors, and shareholders" have in any other business. Similarly, Subsection B(3) perhaps should require disclosure of any persons who own less than three percent—perhaps even one percent—in a publicly held corporation;
even one or two percent of a large corporation can give its owner significant control. By contrast, the FCC requires disclosure of one percent interests in many situations. In addition, Subsection B(4)'s disclosure provisions concerning the "ownership of the facilities to be used" might be made more severe; leasing or buying land from a local official is one of the classic methods of exercising undue influence. Thus enumeration of each piece of property involved, as well as of its owner and his interests in other businesses might be more appropriate.

Third, Subsection B(6)'s requirement for information on the system's proposed rates, services, routes, etc., might be more specific. The franchising authority might request information concerning rates for leased channels as well as for subscribers. A description of routes should designate major streets and other ways by name or plot location. And perhaps most important, the information on extending service throughout the franchise area should be required to be in specific terms—e.g., state legislative districts or other existing boundaries within the city.

Finally, Subsection D's requirement of "public inspection" for a "reasonable length of time" raises several issues. First, "public inspection" is obviously a term susceptible to differing interpretations; it should be defined more precisely. For example, the franchising authority might be required to post copies of all proposals at designated spots in municipal buildings scattered throughout enumerated areas of the city. Second, "reasonable length of time" could be made more specific simply by substituting for it a posting requirement from the time the proposal is received to the time the final franchise award is made. In addition, the franchising authority might be required to make reproductions of all proposals on request at a specific cost within a specified time.

STEP 6: HEARINGS ON PROPOSALS

An illustration of problems in delineating the hearing process is drawn here from the Chicago ordinance:

24 Hearings. The Commission shall hold public hearings on all bids received. There shall be public notice one month prior to these hearings.

25 Award. All franchises shall be awarded within three months of the last day of public hearings. However, the Commission may, if all bids are unacceptable, call for new bids under the provisions of this Article.

26 Publication. Any franchise that is granted shall be published.

27 Area Hearings. All public hearings relating to a specific franchise area, including those held to consider the initial franchise grant, shall be held within the geographic limits of the designated area. At least half of the hearings in each franchise area shall be held at night or on Saturdays.

Though other sections of the ordinance define "public notice" and "publication" in sufficiently concrete ways, the ordinance does not specify how the "public hearings" will be held—thus creating the possibility that some voices will be heard and others not. The franchising authority might better ensure effective public notice and meaningful hearings by following procedures akin to those discussed in Step 2. In fact, the necessity for notice may be less pressing at this point than at the earlier stages, since the actual award of the franchise should attract considerable attention from the news media. The hearings should be conducted along the same lines as the
previous hearings, with time allocated for presentations and rebuttals by franchise applicants.

STEP 7: DECISION ON AWARD OF FRANCHISE

This is one of the most difficult portions of the franchising process—particularly the selection of the applicant who proposes the package of elements, including a reasonable rate structure, that on the whole seems most attractive in light of the community's previously expressed desires.

In judging the reasonableness of proposed rates for services of the sort offered today (including charges for adding outlets, converters, and the like), the franchising authority will need to rely heavily on a close analysis of financial projections made by competing franchise applicants. These financial statements typically include annual profit and loss projections, a pro forma balance sheet, and other financial data, based on the estimated growth of the cable system over some period of time—typically ten years. Many examples of cable system cost inputs, financial statement format, and cost projections can be obtained from past cable studies. The franchising authority should be careful, however, not to put itself in the position of simply balancing one applicant's proposals off against another's. Instead, the authority should have developed its own financial and service analysis before it even receives proposals, either using its "in-house" staff or, as often will be the case in smaller cities, through contracts with independent consultants. The basic task, then, should be to measure each applicant's proposal against the authority's own analysis, in light of expressed public desires.

The following are some of the important questions the authority needs to ask:

- On what basis does the applicant estimate the annual growth and ultimate penetration of cable in this particular market?
- Do these estimates appear overly optimistic or pessimistic, considering the level of over-the-air broadcasting the cable operator will have to compete with in signing up viewers?
- Are revenues based on existing conventional services or do they include estimates of new services yet to be perfected? If the latter, does the applicant have a reasonable basis for estimating these revenues or are they pulled essentially out of the blue sky?
- Do the items of capital expenditures appear to be in the same ballpark as those estimated elsewhere? For example, is the cost per mile of cable plant low or high in comparison with experience in similar markets? If there is a substantial difference, is it justified in terms of the special conditions of the particular city or of the nature of the system being offered?


- How do the cost estimates of local program origination facilities (studios, cameras, lighting, and so forth) compare with estimates elsewhere?
- With respect to operating expenses, do payroll figures, pole rentals, property taxes (which, incidentally, are one of the largest single annual expense items), as well as selling and advertising expenses seem reasonable on the basis of experience elsewhere? Again, if not, do special circumstances of this franchise area explain the difference?
- Do the proposed debt-equity ratio and the rate of interest on debt seem appropriate, given the nature of the current capital market and the nature of the franchise applicant? Is the payback of debt and the flow of prospective dividends to stockholders estimated on grounds that would be regarded as financially prudent? If so, does this give a multiple system operator a preference that outweighs the desirability, if any, of local ownership and control?
- Is the estimated value of the system at the end of the period (a particularly important consideration in evaluating the viability of the system) reasonable in light of the market value of similar systems at the end of the same number of years? In the past, systems have typically been valued at from 7 to 10 times annual operating income. How does the estimate in this case compare with this range?

Of course, the applicant's financial qualifications are also important. General questions here include:

- Does the applicant have sufficient capital to build the system in accordance with his design and construction plan?
- If sufficient total funding is not available but some equity financing is in hand, is the borrowing requirement realistic in terms of the debt-equity ratio required for the plan?

These and other questions might best be appraised by a financial analyst engaged by the franchisor to undertake an across-the-board evaluation of the financial qualifications of all applicants. A major objective is to select the cable operator who will actually build the system, rather than one who merely hopes to obtain the franchise and sell it at a profit to some other, more responsible group. The franchisor must beware of a phenomenon that has occurred in the past, wherein groups of "leading citizens" join together to obtain a franchise but have no sound financial plan or real interest in exercising it—with the consequence that they sell the franchise (sometimes at a handsome profit) to another entity, which then proceeds to build the system.

Finally, in cases where the applicant has systems operating in other localities, the franchisor should check with authorities there to evaluate the applicant's track record. Here, a number of questions arise:

- How well did the applicant build and operate in accordance with the franchise?
- Did he have a solid financial base or was he obviously overextended?
- What was the level and nature of customer complaints? How well were they handled?
- Did the applicant pursue nondiscriminatory hiring and training practices?
- In general, was the franchisor satisfied with the performance of the operator? If not, what were the specific problems?
- How competent is the other franchising authority?

Answers to such questions will afford a better basis for comparing proposals. One applicant may offer a relatively low monthly rate—say $4—that is economic only if his visions of high advertising revenues come true. Another may propose a higher rate—say $6—but offer relatively elaborate local program origination facilities and a high quality signal. Yet another may offer a typical rate of $5—but with relatively high initial subscriber connection charges.

From these comparisons the franchise authority will have to make hard choices. Unfortunately, the complex tradeoffs involved preclude any neat formulas that supply ready answers. True, some proposals can be dismissed easily on grounds that the applicants' estimates of cable penetration are overly optimistic, or that their financial qualifications are weak. But this still will leave a "hard core" of proposals among which the final choice will be difficult. For example, is it better to have a $6 monthly subscription rate with relatively elaborate local origination facilities or a $5 rate with minimal ones? Is it better to have a "regular" $5.50 rate for every subscriber or to have a $6 rate that permits a special preferential $4 charge for the aged or poor?

Obviously, clear answers do not abound. Nevertheless, a few procedural guidelines at least can make the decisionmaking process more visible and perhaps more rational.

First, the franchising authority should designate and make highly visible the areas in which it will recognize competing bids. If it has decided to require local program origination facilities at several specified geographic locations but is flexible as to subscriber service rates, it should make clear that only the subscriber rates are subject to bidding. This approach not only will simplify the bidding for applicants, but also will make it easier for the franchising authority and the public to evaluate bids.

Second, the franchising authority should assign a definite weight and priority to each factor on which bids are taken. For example, it might give a weight of 10 percent to channel capacity, and 40 percent to subscriber service rates. It should then create priorities within each criterion—e.g., a $4 bid for the monthly subscriber service rate might be worth ten points, a $6 bid worth one. Though decisionmaking cannot be based solely on a mathematical formula, the franchising authority might find useful a chart, like that in Table 1, to help quantify and evaluate each applicant's proposal.

Table 1

<table>
<thead>
<tr>
<th>Applicant</th>
<th>Criterion</th>
<th>% of Decision</th>
<th>Score</th>
<th>Subtotal</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>Channel capacity</td>
<td>10</td>
<td>8</td>
<td>0.8</td>
</tr>
<tr>
<td>B</td>
<td>Channel capacity</td>
<td>10</td>
<td>6</td>
<td>0.6</td>
</tr>
<tr>
<td>A</td>
<td>Subscription rates</td>
<td>40</td>
<td>7</td>
<td>2.8</td>
</tr>
<tr>
<td>B</td>
<td>Subscription rates</td>
<td>40</td>
<td>5</td>
<td>2.0</td>
</tr>
</tbody>
</table>
Third, the procedural framework should require the franchising authority to write a reasoned opinion explaining its decision on the franchise award. As noted before in relation to previous steps, this requirement is difficult to enforce and easy to evade; nevertheless, the combination of citizen input, identification of bidding criteria, and evaluation of bids should all work toward more rational, or at least more candid decisionmaking.

These steps taken together are in marked contrast to past experience in the franchising process. Many cities have entered into long-term franchises without soliciting competitive bids, and many franchise proceedings have been conducted with little public notice that local governing bodies were considering cable franchises.

STEP 8: FCC CERTIFICATE OF COMPLIANCE

The FCC’s requirements for applications for certificates of compliance—without which a cable system may operate, but not carry any broadcast signals—are contained in 47 C.F.R. § 76.11. Though the rules appear complex at first glance, they actually require a straightforward listing of fairly general information. Nevertheless, several aspects of the rules are particularly important in the franchising process. Though the substantive as well as procedural requirements of the rules will be discussed in more detail in relation to the specific issues raised in Sec. III, some introductory observations are appropriate.

First, the rules specifically require the cable system to give formal notice to the franchising authority that it is seeking a certificate of compliance. As a result, the appropriate local official—usually the city attorney—should expect to receive a copy of the application for certification and should be prepared to take any action the local franchising authority deems necessary in supporting or opposing the application. This action must be taken without delay, however, since the rules give only 30 days from the FCC’s public notice of the application in which to file objections. The application for certification also gives local citizens the chance to object to the conduct of the franchising process. If a citizen group feels that the requirement of a “public proceeding affording due process” has not been met, it may complain to the FCC at this point. Once again, however, the 30-day time limitation applies. Moreover, since the rules do not require the cable system to serve notice on citizen groups, they must move even faster than local franchising authorities.

Sometimes the local franchising authority must join with the cable system in applying for a certificate. As will be discussed in more detail in Section III, the FCC will permit a franchising authority to impose certain franchise terms only if the FCC approves them after a joint “special showing” by both the franchisee and the franchisor. As a result, the franchising authority must be prepared to engage in often complex administrative proceedings in order to secure some franchise terms. Citizen groups, of course, may object to special showings as well as to ordinary applications for certification.

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8 A number of specific examples are cited by Leone and Powell, CATV Franchising in New Jersey, 2 Yale J. L. & Soc. Ac. 254 (1972).
The 30-day time limitation is very important for citizen action. Although a general provision of 47 C.F.R. § 76.7 allows interested persons to petition the FCC for relief at any time, citizen groups cannot depend on this provision for making a tardy appeal. The FCC has shown that it will entertain petitions after the 30-day period only under the most extenuating circumstances. It will not be enough for a citizen group to say that it was not aware of the earlier proceeding, or that more time was required to marshal its forces and to make a presentation. Citizen groups can expect to use this route successfully only under the most compelling circumstances.

STEP 9: MONITORING SYSTEM CONSTRUCTION AND CERTIFYING PERFORMANCE

After FCC certification, the franchising authority must ensure that the cable system is constructed in compliance with the terms of the franchise. It will want to monitor the pace of construction and the hiring practices of the contractors, as well as the contractors’ quality control procedures. In many cases this can be done by city inspectors, although engineering specialists will be needed for systems that are to deliver more than television services. As an example, expert monitoring will be necessary if the city expects to use the cable system for two-way communications among municipal agencies at an early date.

However simple or complex the system, its performance should be checked at several stages of construction. If performance tests are deferred until the system is ready to be “turned on” for subscribers, technical problems or variances from franchise terms may be difficult to correct. Instead, the franchising authority should make certain when the headend is completed that television signals delivered to the cable are of adequate quality. It might then check performance at the ends of the first feeder cables when they are installed. The franchise presumably will also include provisions for more formal “certification of performance” at the completion of each construction phase. The city may be able to certify performance on its own if it has the necessary equipment and technical staff. Most communities will hire a technical consultant for this task, however.

STEP 10: CONTINUING ADMINISTRATION OF THE FRANCHISE

Though the franchising and certificating processes are complex and difficult, their completion does not signal the end of local responsibilities. During the post-franchise period the cable operator, the franchising authority, and the community must live together on a day-to-day basis. The cable operator will have disputes with both citizens and the franchising authority; the franchising authority will have its own complaints against the cable system and will receive complaints from citizens; some citizens inevitably will be outraged at both the cable system and franchising authority. To compound matters, these conflicts may end up being resolved in any one of a number of forums. The courts will hear complaints from citizens and appeals from the franchising authority’s decisions. The franchising authority will be called
upon to resolve disputes between the community and the cable system. The FCC will receive objections to certification or petitions for special relief. Any major public endeavor generates conflict, but the stakes involved in the cable business virtually guarantee that it will generate more than its share. Section III will explore specific means of resolving particular types of conflicts.
III. TERMS AND CONDITIONS OF THE FRANCHISE

In writing the ordinance, drafting the tentative franchise document, and delineating terms of the final franchise, a number of provisions should be worded with particular care, to avoid the danger of subsequent disagreements, delays, and litigation. This section is organized around a number of topics, roughly in the order they would take in a completed franchise.

PREFATORY PROVISIONS

A franchise typically contains a set of “whereas and therefore” paragraphs setting down the process by which the franchise was granted and stating that the franchising authority and the grantee agree to all the conditions. An example is that of the New York City—i.e., The Borough of Manhattan—franchises held by TelePrompTer Manhattan CATV Corporation and Sterling-Manhattan CATV Company.

Whereas, by resolution adopted June 18, 1970 (Cal. No. 414), the Board of Estimate entered on its minutes an authorizing resolution and accompanying proposed contract and did fix July 23, 1970 as the date for a public hearing on said resolution and accompanying proposed contract; and

Whereas, on said date said Board duly held and closed such public hearing; now, therefore, be it

Resolved, that the Board of Estimate of The City of New York, hereby grants to Teleprompter Corporation and its subsidiary Teleprompter Manhattan CATV Corporation the franchise and right to install, operate and maintain a broadband communications facility, sometimes called a Community Antenna Television System, within a certain area in the Borough of Manhattan, upon and subject to all the terms and conditions contained in the accompanying contract, and that this resolution shall be duly certified and presented to the Mayor for his approval, and upon such approval, the Mayor of The City of New York be and he hereby is authorized to execute and deliver the accompanying contract in the name and on behalf of The City of New York, and that this resolution shall be null and void if Teleprompter Corporation and Teleprompter Manhattan CATV Corporation shall fail on their behalf to properly execute and deliver in duplicate and deliver the same to this Board within Forty-five (45) days after the approval of this resolution by the Mayor or within such further time as the Board may grant by resolution adopted on a date prior to the expiration of said Forty-five (45) days.

This is a contract, executed in duplicate this 18th day of August, 1970 between The City of New York (the "City") by the Mayor of the City (the "Mayor"), acting in accordance with the authority of the Board of Estimate of the City (the "Board"), party of the first part, and Teleprompter Corporation and its subsidiary, Teleprompter Manhattan CATV Corporation, both organized and existing under the Laws of the State of New York (both hereinafter referred to as the "Company"), parties of the second part.
WHEREAS, Teleprompter Corporation by petition dated October 19, 1964, applied to the Board for a franchise to install, operate and maintain a Community Antenna Television System; and

WHEREAS, said Board adopted a resolution on November 19, 1964 (Cal. No. 72), fixing the date for a public hearing on said petition as December 3, 1964, said petition and notice of public hearing thereon were duly published, and said hearing was held and continued to January 14, 1966 and closed on that date; and

WHEREAS, said Board adopted a resolution on December 2, 1965 (Cal. No. 128) authorizing Teleprompter Corporation to install, maintain and operate a Community Antenna Television System within a certain area comprising roughly the northern half of the Borough of Manhattan for an interim period terminating on December 31, 1967 (the "consent") and

WHEREAS, by a resolution adopted by said Board on June 10, 1966 (Cal. No. 44) consent was granted to the assignment of the consent to Teleprompter Manhattan CATV Corporation, a subsidiary of Teleprompter Corporation, and

WHEREAS, by modifying resolutions of November 22, 1967 (Cal. No. 130-A), December 19, 1968 (Cal. No. 41), December 18, 1968 (Cal. No. 243-A) and March 12, 1970 (Cal. No. 169-B) the consent was extended for periods expiring June 30, 1970 and the Company was granted permission to originate certain types of programs; and

WHEREAS, said Board has made inquiry as to the money value of the proposed franchise contract and the adequacy of the compensation proposed to be paid therefor; and

WHEREAS, said Board did embody the results of such inquiry in this contract and has caused this contract to be spread upon the minutes of the Board on June 18, 1970, together with the proposed resolution for the grant thereof and did fix the 23rd day of July, 1970, for a public hearing thereon, at which citizens should be entitled to appear and be heard; and

WHEREAS, prior to said hearing, notice thereof and the proposed contract and proposed resolution authorizing this contract were published in full for at least fifteen (15) days (except Sundays and Legal Holidays) immediately prior thereto in the City Record and notice of such hearing, together with the place where copies of the proposed contract and resolution of consent thereto might be obtained by all those interested therein, was published at least twice, at the expense of the Company, in the two newspapers designated by the Mayor and said hearing was duly held and closed on said date;

NOW, THEREFORE, the parties hereto do hereby mutually covenant and agree as follows:

Although such language may seem ceremonial, it does serve the important purposes of enumerating the procedural steps preceding the franchise grant and signifying that the franchise is in accordance with existing ordinances and rules. This helps to insure that the franchise stands up before the courts and the FCC, and to guide individuals and groups who are interested in examining the history of a particular franchise process.

DEFINITION OF TERMS

A list of clearly defined terms is important to avoid subsequent misunderstanding and disagreement. Deciding which terms to define will depend on the specific circumstances of the locality. A good example of definitions suited to local circumstances is contained in the ordinance of Louisville, Kentucky.

For purposes of this ordinance the following terms, phrases, words, abbreviations and their derivations shall have the same meaning given herein. When not inconsistent with the context, words used in the present tense include the future; words in the plural number include singular number; and words in the singular number include the plural. The word shall is always mandatory and not merely directory.

A. City — shall mean the City of Louisville, Kentucky, a municipal corporation in the Commonwealth of Kentucky.
B. Mayor — shall mean the existing or succeeding chief administrative officer of the City, or his designate.

C. Board — shall mean the present governing body of the City or any successor to the legislative powers of the present Board of Aldermen.

D. Director of Law — shall mean the chief legal officer of the City of Louisville presently known as the Director of Law.

E. Director of Finance — shall mean the chief financial officer of the City of Louisville presently known as the Director of Finance.

F. Director of Works — shall mean the Director of Public Works of the City of Louisville.

G. CATV — shall mean Community Antenna Television.

H. Community Antenna Television System (hereinafter called CATV System) — shall mean any facility in which (1) in whole or in part receives directly or indirectly over the air and amplifies or otherwise modifies the signals transmitting programs broadcast by one or more television and AM and FM radio stations and distributes such signals by wire or cable to subscribing members of the public who pay for such services; (2) distributes by cable or wire, news, weather and other information including Civil Defense type information as required by an incidental part of CATV service to all subscribers without additional charge; (3) distributes any and all other lawful communications of a specialized nature provided that it shall not mean or include any facility to which is transmitted any special television program or event for which a separate and distinct charge is made to the subscriber in a manner commonly known and referred to as pay television; except as may be permitted by the Federal, State, and/or local regulatory agencies.

I. Person — shall mean any person, firm, partnership, association, corporation, company or organization of any kind.

J. Applicant — shall mean any person submitting an application to the City of Louisville for a franchise to operate a CATV system under the terms and conditions set forth by the Board of Aldermen.

K. Grantee — shall mean the person to whom or to which a franchise as hereinbefore defined is granted by the Board of Aldermen under this ordinance or anyone who succeeds the person in accordance with the provisions of the franchise.

L. Gross Receipts — shall mean all revenue derived directly or indirectly by a Grantee, its affiliates, subsidiaries, parent, and any person in which a Grantee has a financial interest from or in connection with the operation of the CATV system in Louisville, Kentucky, with no deductions whatsoever.

M. Street — shall mean the surface of and the space above and below any public street, road, highway, freeway, lane, path, public way, or place, alley, court, boulevard, parkway, drive or other easement now or hereafter held by the City for the purpose of public travel and shall include other easements or rights of way as shall be now held or hereafter held by the City which shall, within their proper use and meaning entitle the City and its Grantee to the use thereof for the purposes of installing or transmitting CATV System transmissions over poles, wires, cables, conductors, ducts, conduits, vaults, manholes, amplifiers, appliances, attachments, and other property as may be ordinarily necessary and pertinent to a CATV System.

N. Residential Subscriber — shall mean a subscriber of any service delivered over the system to an individual dwelling unit where the service is not to be utilized in connection with a business, trade, or profession.

O. Commercial Subscriber — shall mean a subscriber of any service delivered over the system who or which is not a residential subscriber.

P. Basic Service — shall mean the simultaneous delivery by the company to television receivers (or any other suitable types of audio-visual communication receivers) of all subscribers in the City of all signals of over-the-air television broadcast required by the FCC to be carried by a CATV System as defined hereinabove. Basic service shall also include Grantee channels, City channels except as may be designated for special purposes by the Mayor, Public channels, and Additional channels at the option of the company; or as directed by the Board of Aldermen.

Q. Additional Service — shall mean any communications service other than basic service provided over its CATV System by a Grantee directly or as a carrier for its subsidiaries, affiliates,
or any other person engaged in communications services including, but not limited to, burglar alarm, data, or other electronic intelligence transmission, facsimile reproduction, meter reading, and home shopping.

R. **Channel** — shall mean a band of frequencies, six megahertz wide in the electro-magnetic spectrum which is capable of carrying either one audio-video television signal and a number of non-video signals or several thousand non-video signals.

S. **City Channels** — shall mean channels on the CATV System which are reserved by this ordinance for use by the City.

T. **Public Channels** — shall mean channels on the CATV System which are reserved for carriage of program material provided by persons who lease channel time and if necessary, studio facilities, from a Grantee for the presentation of programs.

U. **Grantee Channels** — shall mean the channels on the system which are reserved by this ordinance for the carriage of program material originated by a Grantee and the retransmission of broadcast signals in accordance with the FCC's cable casting rules and regulations.

V. **Federal Communication Commission or FCC** — shall mean that agency as presently constituted by the U.S. Congress or any successor agency.

W. **Certificate of Compliance** — shall mean that approval required by the FCC in order for a Grantee of a CATV franchise to begin operation within the City.

X. **Pay Television** — shall mean the delivery over the CATV system of video signals in intelligible form to Residential Subscribers at a fee or charge (over and above the charge for Basic Service) on a per program, per channel or other subscription basis.

To these might be added a definition of "system," as an alternative to CATV defined above, an alternative definition of "gross receipts," and a definition of a "converter," all drawn for illustrative purposes from the New York franchises:

"System" means the broadband communications facility which is to be constructed, operated and maintained by the Company pursuant to this contract.

"Gross Receipts" means all revenue derived directly or indirectly by the Company, its affiliates, subsidiaries, parents, and any person in which the Company has a financial interest, from or in connection with the operation of the System pursuant to this contract, excluding, however, revenues derived from provision of a separate service which uses the System for transmission but including an amount equivalent to what an outside party would have paid for such transmission.

"Converter" means an electronic device which converts signals to a frequency not susceptible to interference within the television receiver of a subscriber, and by an appropriate channel selector also permits a subscriber to view all signals delivered at designated dial locations.

Because subscriber rates and services are generally specified by "dwelling unit," it is also advisable to define this term. One illustration comes from a franchise noted by the Cable Television Information Service.¹

"Dwelling Unit" shall mean a room or suite of rooms in a building or portion thereof, used for living purposes by one family. A "dwelling unit" shall not mean a building used solely for commercial uses or a Guest House, Guest Room, Hotel or Lodging House.

As will be discussed later, a distinction between single and multiple dwellings for rate purposes often will be useful.

¹ Cable Television Information Center, *An Annotated Outline of an Ordinance for Use in Considering a Process for Local Regulation of Cable Television*, p. 19; hereafter cited as *Annotated Outline.*
DURATION OF FRANCHISE

The FCC has substantially restricted the freedom of local authorities to set the duration of the franchise. In its Report and Order it specified that:

We are requiring in § 76.31(a)(3) that franchising authorities place reasonable limits on the duration of franchises. Long terms have generally been found unsatisfactory by State and local regulatory authorities, and are an invitation to obsolescence in light of the momentum of cable technology. We believe that in most cases a franchise should not exceed 15 years and that renewal periods be of reasonable duration. We recognize that decisions of local franchising authorities may vary in particular circumstances. For instance, an applicant’s proposal to wire inner-city areas without charge or at reduced rates might call for a longer franchise. On the other hand, we note that there is some support for franchise periods of less than 15 years.\(^1\)

However, in its more recent Reconsideration it promulgated a stronger rule that “the initial franchise period shall not exceed [emphasis supplied] fifteen (15) years, and any renewal franchise period shall be of reasonable duration . . .”\(^2\)

Two questions remain with respect to this rule. First, would a longer franchise be permitted if reopen provisions were included after some period of time, e.g., ten years? This approach is employed in the twenty-year New York City franchises, which after ten years are subject to renegotiation of any condition except the duration of the franchise itself:

The franchise shall commence on the effective date of this contract and continue for a period of twenty (20) years, unless sooner terminated as herein provided. However, at any one time after ten (10) years from the effective date, the Board may, upon a review of all the circumstances then affecting broadband communications in the District, notify the Company of its determination that any of the terms and conditions contained herein (except the duration hereof) should be renegotiated, and the Company shall negotiate in good faith with the Board’s representatives as to all such terms and conditions. In the event that all such terms and conditions are not renegotiated to the satisfaction of the Board within six (6) months of its notification to renegotiate, the Board may submit any such unresolved matters to arbitration pursuant to Section 20 for a determination consistent with both the public interest and fairness to the Company. The Board’s right to initiate renegotiation pursuant to this subdivision shall be cumulative and shall be in addition to and not in derogation of all other rights reserved to the City, the Board and all agencies and officials of the City under other provisions of this contract.

For new franchises not covered by the FCC’s grandfathering provisions, this approach probably would not be consistent with the new FCC rules. First, the franchise explicitly makes renegotiation discretionary with the franchising authority, by providing that it “may” decide to reopen the franchise. Second, and more important, the franchise does not provide for modification of the duration, thus making any change—short of franchise revocation—impossible for twenty years.

If drafted somewhat differently, however, this type of approach might be acceptable to the FCC. Provisions for renegotiation of the whole franchise—including its duration—and requiring some form of “public proceeding” might well be considered a bona fide alternative to a shorter initial franchise. In this case, the renegotiation might reasonably be construed as the equivalent of a renewal.

A second question is whether a franchise of indefinite length would be acceptable if it provided for review at relatively short regular intervals. This approach has been recommended by the American Civil Liberties Union:

\(^1\) Cable Television Report and Order at 3276.
\(^2\) 47 C.F.R. § 76.31(a)(3) (1972); printed in Reconsideration Opinion and Order, 37 Fed. Reg. at 13866.
The franchise term shall be unspecified. The franchisor shall review the performance of each of its franchisees at public hearings held no less frequently than bi-annually. All those who wish to present evidence of any kind shall be heard at the hearings. At the conclusion of the hearings, the franchisor must do one of the following: extend the franchise until the next public hearing held under this section; fine the franchisee under the provisions of Section 3.28 [of this franchise] and at the same time set a date for a public hearing under this section, to commence within one year; revoke or cancel the franchise under the provisions of Sections 3.25 and 3.27.4

This approach presumably would have a better chance of surviving the FCC's rules, since it provides for total reviews at frequent and fixed intervals. Nevertheless, this approach may be unwise for other reasons. First, it may hamper the franchising process by reducing the ability of prospective applicants to raise venture capital, since neither operators nor investors may be willing to bear the increased risk. Second, even if enforced along lines that will not discourage investment, this approach may result in a de facto permanent franchise—like the virtually automatic renewal of broadcasting licenses.

In any event, the term of the franchise may be important not so much as a device for transferring ownership of the system or building a new one, but rather as a convenient point for reviewing the performance of the cable operator and for renegotiating on the basis of past experience. As an earlier Rand report noted:

... The franchise renewal process is [unlikely] to lead to a change in ownership. In a franchise proceeding, the existing holder has an advantage over challengers. In this respect, we should recall that although broadcast licenses are subject to renewal every 3 years, it is a rare occurrence when the existing owner loses his license. Even if the existing cable owner was forced out, he would be paid some “fair” market value determined perhaps by an arbitration board. If the cable operator had performed badly, this fair market value might not cover all debt claims with a reasonable return to equity. However, in the case of loss, the underlying difficulty is not that the franchise is written for, say, only 10 rather than 20 years, but that the cable operator has not done well in designing or operating the system or that the market is simply not sufficient to permit him to cover costs under any circumstances.

If it is true that a forced change of ownership is not likely, then why have a franchise renewal process at all? The renewal process is useful in at least two ways: (1) It provides a formal process for reviewing the performance of the operator, and (2) it facilitates renegotiating basic features of the franchise in accordance with the experience accumulated by the cable operator during the preceding period. The process of review assures that the level and nature of consumer complaints, growth of the system during the previous period, rates charged to subscribers and to other channel users, technical standards of service, and other elements can be examined in a more formal way than is likely to take place during the franchise period itself. Comparisons between the performance of the cable operator and that of operators in other cities would be useful. Although some review will (or should) be conducted continuously during the operation of the system, the renewal procedure provides a convenient formal review during which all interested parties can come together.

The renewal process also affords the possibility of substantially changing the conditions of franchise on the basis of past experience—for example, a new set of technical standards based on technological advances that took

place during the earlier franchise period, a modified or new set of fees to be paid to the city, revised procedures by which channels are to be made available to various classes of users, or modification in geographical boundaries of service. ⁵

The Illinois Commerce Commission recently observed that:

There is reason to believe that the emphasis on franchise term may be somewhat misplaced. If a cable system is required at the outset to install adequate capacity and to add to or improve that capacity as the state of the art and market demand develop, and if the quality of the service is subject to adequate supervision, there would seem to be little reason to change or to threaten to change cable operators. If on the other hand a system is under-engineered and under-financed, it may prove difficult to attract another operator to come in and redo the whole system.

A municipality might however regard a limited franchise term as a useful device to ensure appropriate attention to local needs and desires going beyond the minimum standards that will be imposed by the Commission. This is entirely justified, and the Commission is therefore disposed to regard franchise duration as a local matter to be settled by municipalities subject to FCC guidelines. ⁶

While the Illinois Commerce Commission’s approach has merit, it assumes a large "if"—namely, that the initial franchise will protect the public interest adequately. Moreover, a franchise renewal proceeding—like a broadcast license renewal proceeding—provides exactly the opportunity for the public input necessary to insure "adequate supervision."

Finally, franchising authorities should consider using a system of fines and forfeitures either in combination with or as an alternative to franchise renewal proceedings. Imposition of monetary penalties through simplified adjudicatory procedures may well be the most workable enforcement method, examples of which are described later. The threat of revoking or not renewing a franchise obviously is more severe, but its very severity probably insures that it will seldom if ever be used. Though the FCC has similar powers over broadcast licenses, it hardly ever has used them.

GEOGRAPHIC EXCLUSIVITY

Most franchises are nonexclusive in the sense that the city reserves the right to franchise more than one operator within the same geographic area. ⁷ For example, the New York City franchises specify that:

Nothing in this contract shall affect the right of the City to grant to any other person a franchise or right to occupy and use the streets or any part thereof for the construction, operation, and maintenance


⁷ In a survey of franchises in New Jersey, 8 out of 66 were found to be exclusive. Leone and Powell, op. cit., p. 26.
of a broadband communications facility within the District or elsewhere, and the Company shall not take a legal position contesting the Board's right to authorize such use of the streets or any part thereof; provided, however, that nothing contained in this subdivision shall prohibit the Company from appearing before the Board and being heard on any application for the grant of such right.

Though New York City adopted nonexclusive franchises partly because of policy considerations and partly because of public pressure, it actually had little choice; the State Constitution bars local governments from granting exclusive franchises—a factor that will vary from jurisdiction to jurisdiction.

Beverly Hills is one of the exceptions to the general practice. It has specified that:

Pursuant to the provisions of said Chapter 5 of Title 7 of the Beverly Hills Municipal Code, an exclusive franchise to construct, operate and maintain a CATV system within the entire boundaries of the City of Beverly Hills as it now exists or hereafter may be amended, as required by Section 7-521 of the Beverly Hills Municipal Code, for a term of fifteen (15) years from the date of acceptance, is hereby granted . . . .

The ACLU Model Code also recommends that "each franchise shall be geographically exclusive."

In general, the practice of granting only nonexclusive franchises has merit. In the words of an earlier Rand report:

As a practical matter, there is not a great deal of difference between the two types of franchises. In the former case [exclusive franchise], the operator has a de jure monopoly. In the latter case [nonexclusive franchise], once he builds a plant he will have a substantial advantage over potential competitors, which gives him a de facto monopoly. Our cost analysis does not suggest that it would be economical to have two or more operators with their own lines competing on a house-to-house basis. As in the case of telephone and other public utilities, the construction of duplicate facilities along public rights-of-way would seem wasteful, at least at this stage of cable development. Indeed, it remains an open question whether even a single operator can make a profit in large cities having extensively developed over-the-air broadcasting service.

All in all, there is nothing to lose and perhaps something to gain by writing only nonexclusive franchises. If the operator is doing a good job, the threat of additional competition would be inconsequential, and the two types of franchises would have the same effect; but the potential threat of competition under a nonexclusive franchise would provide additional stimulus for the existing operator to perform well. If worst comes to worst and he does a poor job, then competition would serve as a safety valve to protect the public interest.  

BROADCAST SIGNALS TO BE CARRIED

On the federal level, most of the sound and fury concerning cable's development has centered on its carriage of broadcast television signals—which broadcasters view as "unfair competition" and which copyright interests see as robbery of their rightful profits. As a result, the FCC has devoted most of its efforts for the last six
years to settling the signal carriage issue, and most of the rules adopted by its *Cable Television Report and Order* relate to signal carriage. In brief, the FCC’s new rules require cable systems to carry all “local” television stations and usually permit them to carry no more than a few “distant” television stations.\(^8\)

Despite the fact that the FCC has preempted practically all regulation of broadcast signal carriage, a few interstices remain that a local franchising authority may fill. First, where the FCC’s rules give a cable system some choice as to the stations from which it draws its “distant signal” complement, the franchising authority and the local community may wish to exercise some influence. Though under the FCC’s rules a franchising authority’s ability to specify the signals a cable system will carry is unclear, some mechanism for consultation between the system and the franchising authority appears to be permissible.

Second, the FCC’s rules allow a cable system to import an unlimited number of educational and foreign language distant signals as long as, with respect to the former, local educational authorities do not object. The franchising authority may wish to have some control over the cable operator’s choice and number of these signals.

Finally, all of the FCC’s restrictions and requirements are subject to waiver, as noted before in Sec. II. As a result, the franchising authority may encourage the cable system to apply for a waiver, support the cable system’s petition for a waiver, or oppose the cable system’s petition for a waiver. In all these cases, the FCC presumably will give considerable weight to the desires of the cable system’s community, if forcefully expressed. Though all these courses will involve the franchising authority in complex administrative procedures, they nevertheless should be considered. A companion study describes the problems and procedures in more depth.\(^9\)

**CONSTRUCTION TIMETABLE**

In response to concern that a franchisee may hold onto a franchise, hoping for a profitable resale and meanwhile dragging his feet on construction, the FCC has set down guidelines for construction and operation:

We are establishing in §76.31(a)(2) general timetables for construction and operation of systems to ensure that franchises do not lie fallow or become the subject of trafficking. Specifically, we are providing that the franchise require the cable system to accomplish significant construction within 1 year after the certificate of compliance is issued, and that thereafter energized trunk cable be extended to a substantial percentage of the franchise area each year, the percentage to be determined by the franchising authority. As a general proposition, we believe that energized trunk cable should be extended to at least 20 percent of the franchise area per year, with the extension to begin within 1 year after the Commission issues its certificate of compliance. But we have not established 20 percent as an inflexible figure, recognizing that local circumstances may vary.\(^10\)

The FCC’s rules do not require a cable system to wire any specified percentage of their franchise area in any specified amount of time. Though the FCC “believes” that

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\(^9\) Monroe Price and Michael Botein, *Cable Television: Citizen Participation After the Franchise*, The Rand Corporation, R-1139-NSF.

\(^10\) *Cable Television Report and Order* at 3276.
20 percent per year would be a reasonable figure, its requirement of only a "substantial percentage" and its recent actions suggest that it will take a liberal attitude. Moreover, even strict enforcement of a specified percentage requirement would not by itself insure equitable wiring of a franchise area, since it would allow a cable operator to wire more affluent neighborhoods first in order to meet his percentage quota. As a result, a franchise authority should specify not only the amount of the franchise which must be wired each year, but also the geographic distribution of it.

For appropriate wording of provisions consistent with the FCC regulations, the New York City franchises may provide a useful guide:

The Company shall extend the installation of cables, amplifiers and related equipment throughout the District as rapidly as is practicable. Within four (4) years from the effective date of this contract, the Company's trunk line installations of cable, amplifiers and related equipment shall be capable of providing Basic Service to every block within the District. Thereafter, the Board may impose such further construction obligations as are necessary to bring Basic Service to any building within the District.

Alternative wording is provided by a draft model franchise of the Miami Valley Council of Governments (MVOG):

The grantee shall construct one head-end and the necessary antenna and studio facility to permit the reception of broadcast signals and the origination of programming within one year after the effective date of this franchise. The grantee further shall complete construction of at least twenty percent (20%) of the cable distribution plant during the first year after the effective date of this franchise and shall during such year commence construction of a separate trunk cable from a head-end facility for each Separate Service Area as provided in subsection 3(a) hereof. Thereafter, the grantee shall complete construction annually of at least twenty percent (20%) of the distribution plant and any remaining uncompleted portion of the cable television system necessary to fulfill the obligations of this franchise or of the F.C.C. regulations.

Construction of the system shall proceed in a non-discriminatory manner that provides relatively equivalent service to each Separate Service Area and that meets with the approval of the franchisor.14

EXTENT OF WIRING IN THE FRANCHISE AREA

Closely related to the question of construction timetables is the issue of what amount of the franchise area is to be wired. FCC regulations clearly prohibit the cable operator from skimming the cream off the most profitable portions of the geographic area:

We emphasize that provision must be made for cable service to develop equitably and reasonably in all parts of the community. A plan that would bring cable only to the more affluent parts of a city, ignoring the poorer areas, simply could not stand. No broadcast signals would be authorized under such circumstances. While it is obvious that a franchisee cannot build everywhere at once within a designated franchise area, provision must be made that he develop service reasonably and equitably. There are a variety of ways to divide up communities; the matter is one for local judgment.15

Aside from the question of cream-skimming, there is the important issue of what percentage of homes in the franchise area are able to have access to the cable system. Must the cable plant pass within the normal distance of every home, regardless of expense? As noted in an earlier Rand report:

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14 Miami Valley Council of Governments, CATV Subcommittee, Proposed Model CATV Franchise, July 1972; hereafter cited as the MVCOG Model Franchise.
15 Cable Television Report and Order at 3276.
The major problem with insisting on literally 100-percent coverage is that in nearly any large franchise area a few homes will be extraordinarily expensive to wire because of geographical locations that require additional expensive trunk and feeder lines to maintain good signal quality. Other expenses are incurred where there is a sudden fall-off in population density in a small subarea; this generates a very high cost for those few additional homes passed by the cable. Our financial projections for the Dayton area suggest that the average cost of cable plant per home passed is about $120. For a few homes, however, this cost could run to two or three times as much (the precise figure cannot be determined until a detailed street-by-street engineering blueprint is drawn—a task normally done by the cable operator shortly before he commences installing cable in a given subarea of his franchise.) A major policy question is whether other subscribers should bear the cost burden of the abnormal difficulty of wiring these few homes. This problem is especially worrisome since it is likely that the homes that are the least difficult to wire will be located in the densely populated low-income areas, while the few homes with geographical wiring problems are likely to be in the high-income suburbs.14

One possibility in coping with this issue is to follow New York City’s lead and require that all blocks of the city have access, leaving for subsequent determination the extent to which service will be offered to each separate building or residence in the block.

Another possibility is a provision not requiring every block to be wired, but instead enabling a special charge to be levied for homes in particularly difficult blocks. The provision for cable extension charges in the Beverly Hills franchise may prove a useful guide:

In the event that a potential subscriber’s premises are located at such a distance from the feeder cable that it is not economically feasible for the Grantee to provide service at the foregoing rates and charges, the City Council shall determine, upon request from the potential subscriber or the Grantee, the amount, terms, conditions and refund provisions of the line extension charge which, in addition to the foregoing rates and charges, would be fair and reasonable under the particular conditions and circumstances.

One major problem here, however, is that the provision begs the question posed earlier; the “distance from the feeder cable” itself depends on how much cable plant the operator builds in the first instance. If he is expected to pass closely only 70 percent of the homes, then many homes will be subject to special charges under this provision. If he is expected to pass 100 percent, then by definition the provision would never apply. A second problem with this approach is that it does not provide any standards for determining the “amount, terms, conditions and refund provisions of the line extension charge . . .” Similarly, requiring an administrative proceeding in order to settle the issue might generate excessive and unnecessary transactional costs.

The franchise should require the cable operator to build plant passing within 150 feet (or some other “normal” distance) of perhaps 90 or 95 percent of the homes and in addition include a provision (perhaps along the lines of the Beverly Hills approach) to take care of the remaining 5 or 10 percent, but with well-defined conditions under which service is to be extended.

CONSTRUCTION REQUIREMENTS

Underground Versus Aboveground Construction

Several provisions are advisable with respect to underground versus aboveground construction, standards for conduit construction, condition of streets, and other factors. A cable operator generally is expected to rely on aboveground construction by using existing telephone and power poles whenever available, and is expected to use underground construction where existing utilities are already underground. One example of useful language is a franchise provision noted by the Cable Television Information Service:

In areas of the city having telephone lines and electric utility lines underground, whether required by ordinance or not, all or any CATV permittees' lines, cables and wires shall be underground. It shall be the policy of the city that existing poles for electric and communication purposes be utilized wherever possible, and that underground installation even when not required is preferable to the placing of additional poles.14

Although the city’s "policy" here may be satisfactory, a more practical and detailed enforcement mechanism is desirable. The Beverly Hills franchise provides a good example:

Poles shall not be installed for the sole purpose of supporting CATV cable without written justification and approval by the City Engineer... The City Engineer shall require street crossings to be placed underground if there are no other overhead wires at the crossing.

This type of condition seems reasonable on two counts. First, for aesthetic reasons, most observers would agree that the landscape should not be cluttered with poles for the sole purpose of stringing coaxial cable, when so much effort already has been devoted to placing other utilities underground. In some cases existing underground duct space is sufficient to carry cable also; but even if this is not true, the cable operator generally would be expected to go underground and bear the full cost of retrenching. In this latter case occasional exceptions might be made by adding language such as, "Poles shall not be installed for the sole purpose of supporting CATV cable without written justification and approval by the City Engineer," as in the Beverly Hills franchise.

Second, to insist on underground cable when existing utilities are aboveground would place a very severe cost burden on the cable operator with questionable benefits to the public. Cable strung on existing poles would add little to the aboveground jungle of wires; hence, the aesthetic benefits in this case would be small. Moreover, the costs of underground construction can be two, three, or many times as high as the cost of aboveground construction, depending on soil and other conditions. Aboveground construction, including cable and amplifiers, generally costs from $4000 to $8500 per mile, depending on the kind of cable plant to be built; underground construction can vary from $10,000 per mile in favorably located areas to as much as $100,000 per mile or even more in New York City.15 Overhead housedrops also are obviously less expensive than underground connections.

14 Cable Television Information Center, How to Plan an Ordinance, p. 23.
Yet some franchises require underground construction irrespective of the nature of existing utilities. The San Mateo franchise flatly states that “all construction shall be underground.” The Sunnyvale franchise also originally included such a provision. The cable operator there ran into such high costs in attempting to comply, however, that he eventually succeeded in getting permission to use existing utility poles in areas yet to be wired.

Standards for Underground and Aboveground Construction

Typically, franchises also include provisions regarding construction standards and practices for both aboveground and underground construction. For aboveground construction, an example of useful language is drawn from a franchise noted by the Cable Television Information Center:

Each CATV permitte’s distribution system in the public streets shall comply with all applicable laws, regulations, and ordinances, and all its wires and cables suspended from poles in the streets shall comply with the minimum clearances above ground required for telephone lines, cables, wires and conduits.17

Though this provision seems deceptively simple on its face, it covers a multitude of situations and at the same time maintains the community’s aesthetic balance merely through incorporating existing standards by reference.

A good example of underground standards is included in the relatively elaborate franchise of the city of Beverly Hills, which has paid special attention to underground construction standards because other utilities are underground in large portions of the city.

All underground cable on public rights-of-way and service laterals on private property shall be placed in conduits. Property owners requesting exception from this requirement must do so in written form to the City Engineer.

Conduit material shall be in accordance with recognized industry-wide standards as approved by the City Engineer. Any material authorized must have been in widespread use for a minimum period of three years.

CONDUIT INSTALLATION—All conduits shall be placed by approved boring or jack methods with a minimum cover of 24 inches, except for such separate specific authorization by the City Engineer due to unusual circumstances. Permission will not be granted to cut sidewalks, driveways, streets, alleys and parkways for continuous trench to lay conduit with the following exceptions:

1. Permission will be granted to trench around obstructions and substructures when necessary and for trench pits incident to jacking and boring operations.

2. In the event it can be proved conclusively that conduit cannot be installed by jacking or boring operation, permission will be granted to install conduit by trenching methods.

Safety and Damage Requirements

Many franchises contain provisions to protect the public from harm and undue inconvenience, to ensure that any physical damage is properly repaired by the cable operator, and to put him on notice that he may have to modify his plant as a consequence of physical changes in the community. The Akron franchise states that:

17 An Annotated Outline, p. 41.
The Company's transmission and distribution system, poles, wires, and appurtenances shall be located, erected and maintained so as not to endanger or interfere with the lives of persons, or to interfere with improvements the City may deem proper to make, or to hinder or obstruct the free use of the streets, alleys, bridges, or other public property. Removal of poles or equipment when necessary to avoid such interference will be at the Company's expense.

In the maintenance and operation of its television transmission and distribution system in the streets, alleys, and other public places, and in the course of any new construction or addition to its facilities, the Company shall proceed so as to cause the least possible inconvenience to the general public, and any opening or obstruction in the streets or other public places made by the Company in the course of its operations shall be in accordance with the Rules and Regulations Governing the Making of Openings in Streets, Sidewalks, Public Ways or Places of the City of Akron, Ohio, as established by the Department of Public Service of said City, and which are in effect at that time.

The model ordinance of the National Institute of Municipal Law Officers (NIMLO) states that:

In case of disturbance of any street, sidewalk, alley, public way, or paved area, the grantee shall, at its own cost and expense and in a manner approved by the [Director of Public Works or other appropriate official], replace and restore such street, sidewalk, alley, public way, or paved area in as good a condition as before the work involving such disturbance was done.

If at any time during the period of this Franchise the City shall lawfully elect to alter or change the grade of any street, sidewalk, alley, or other public way, the grantee, upon reasonable notice by the City, shall remove, relay, and relocate its poles, wires, cables, underground conduits, manholes, and other fixtures at its own expense.

Any poles or other fixture placed in any public way by the licensee shall be placed in such manner as not to interfere with the usual travel on such public way.

The grantee shall, on the request of any person holding a building moving permit issued by the City, temporarily raise or lower its wires to permit the moving of buildings. The expense of such temporary removal or raising or lowering of wires shall be paid by the person requesting the same, and the grantee shall have the authority to require such payment in advance. The grantee shall be given not less than forty-eight (48) hours' advance notice to arrange for such temporary wire changes.

The grantee shall have the authority to trim trees upon and overhanging streets, alleys, sidewalks, and public ways and places of the City so as to prevent the branches of such trees from coming in contact with the wires and cables of the grantee, except that at the option of the City, such trimming may be done by it or under its supervision and direction at the expense of the grantee.²⁹

One interesting aspect of this provision is that by authorizing the cable operator to use private and public property, the city actually is giving him a de facto right of eminent domain—a practice that may be questionable under some states' laws. This approach is similar to authorizing cable operators to wire apartment houses without their owners' consent, as will be discussed later.

As another example of similar provisions, the New York franchises specify that:

No construction, reconstruction or relocation of the System, or any part thereof, within the streets shall be commenced until written permits have been obtained from the proper City officials. In any permit so issued, such officials may impose such conditions and regulations as a condition of the granting of the same as are necessary for the purpose of protecting any structures in the streets and for the proper restoration of such streets and structures, and for the protection of the public and the continuity of pedestrian and vehicular traffic.

Should the grades or lines of the streets which the Company is hereby authorized to use and occupy be changed at any time during the term of this contract, the Company shall, if necessary, at its own cost and expense, relocate or change its System so as to conform with such new grades or lines.

Any alteration to the water mains, sewerage or drainage system or to any other municipal structures in the streets required on account of the presence of the System in the streets shall be made at the sole cost and expense of the Company. During any work of constructing, operating or maintaining of the System, the Company shall also, at its own cost and expense, protect any and all existing structures belonging to the City. All work performed by the Company pursuant to this subdivision shall be done in the manner prescribed by the City officials having jurisdiction therein.

Although the New York City and the NIMLO provisions require the cable operator to protect individuals' rights, question arises as to how individuals are to seek remedy. An outraged resident can complain to the appropriate official, who may then take the necessary action. In addition, individuals could exercise a private legal right, which they could enforce either in an existing small claims court or, perhaps even better, in a specially constituted tribunal established under terms of the franchise.

EMPLOYMENT PRACTICES AND TRAINING

Franchising authorities will need to include adequate provisions to ensure that the cable operator's personnel practices are nondiscriminatory. One example of employment provisions, drawn from the New York City franchises, is noteworthy:

The Company will not refuse to hire or employ, nor bar or discharge from employment, nor discriminate against any person in compensation or in terms, conditions or privileges of employment because of age, race, creed, color, national origin or sex.

The ACLU Model Code goes further in requiring that the cable operator actively seek out and train minority-group employees at a level reflecting their percentage of the franchise area's total population:

No franchise shall discriminate on the basis of sex, race, national origin, religion, creed, or arrest or conviction records in hiring and promoting employees. Each franchisee shall seek out and train employees so that minority groups are represented in its employee work force in the same relative proportion as they are represented in the population of the franchise area. Each grantee shall file an affirmative action plan with the Commission. This plan shall include a report of persons employed, together with their positions and salaries, by categories listed in the first sentence of this section.18

However, no matter how well intentioned this type of provision, it creates problems of which the franchising authority may not be initially aware. First, hiring requirements must mesh with existing bans on discrimination; these may include local or state laws and definitely will include the FCC's antidiscrimination rules, the Civil Rights Act of 1964, and the equal protection clause of the federal Constitution. Second, the experience with bans on age and sex discrimination has been extremely frustrating; the line between a legitimate classification and an invalid discrimination is highly tenuous. Third, attempts to define that action which is affirmative often end up in either tokenism or quotas, the former of which is inadequate and the latter of which promotes backlash. The courts have had the bitter experience

18 Here and elsewhere the ACLU distinguishes between the "Commission" and the "franchisor." The franchisor, such as a city council, grants the franchise, while some other agency such as a new city commission or a state commerce body is responsible for continuing regulation.
of finding that attempts to remedy past violations of the equal protection clause often become present violations of the equal protection clause. The franchising authority should move carefully in drafting these provisions in a manner that is both practical in enforcement and consistent with applicable laws.

**TECHNICAL STANDARDS**

The many questions relating to technical standards that concern local officials are treated in a separate Rand study. This report deals with some of the more general language relating to operating standards and to those modifications necessary to reflect technical advances.

One of the most serious shortcomings of many franchises is their vague language regarding technical and operational standards; this flaw can lead to serious disagreement and debate. In some cases, a literal interpretation of the language would impose exorbitant costs on the cable operator that one way or another would have to be passed on to the public. For example, one franchise quoted by the Cable Television Information Center states:

> The CATV system shall be installed and maintained in accordance with the highest and best accepted standards of the CATV industry, to the effect that subscribers shall receive the highest quality service technically possible.  

One obvious problem here is how to interpret the phrase “highest and best accepted standards.” The standards of the cable television industry have many dimensions; what is well accepted by some areas or experts is disputed by others. Cable is still an infant industry and much disagreement remains about how cable plant should be built (because of the many design and construction alternatives as well as different areas’ requirements) and how the many tradeoffs in design and cost should be taken into account.

No less troublesome is the above franchise’s requirement that the “ subscribers shall receive the highest quality service technically possible.” A chasm divides the *technically possible* from the *economically feasible*. Without question, cable technology could extend superbative service to every subscriber by spending money freely—on oversize cable, more than the usual number of headends, closely spaced amplifiers, cable plant able to withstand the severest wind storms, large maintenance crews to keep the system in excellent repair (including adjustment of amplifiers for day-to-day temperature variations), and a large office force to handle customer complaints and queries. But such lavishment could easily double or triple construction and operation costs—costs that one way or another must be borne by the user.

The same franchise goes on to state:

> The System, in addition to meeting the standards herein set forth, shall continue to conform to the highest state of the art in the field of Community Antenna Television and shall continue to be designed, redesigned, installed, operated and equipment replaced and maintained in accordance with the best engineering practices in the industry.

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80 *An Annotated Outline*, p. 46.
Again, experts disagree sharply about what constitutes the best engineering practice in particular circumstances. Also, continuing to upgrade the system in accordance with the "best" practices again could lead to extraordinarily high costs. In redesigning an existing system, the franchising authority clearly must consider the usefulness of the existing system to the public as well as the cost/benefit relation of redesigning and reconstructing the plant immediately or gradually. As an example, it hardly would be in the public interest to require the telephone industry to switch overnight to the newest and most modern telephone instruments. Nor would it have been in the public interest to force the airline industry to abandon propeller aircraft immediately upon the advent of jets.

In view of the preceding examples, why then do cable operators willingly agree to such franchise language? The answer is simply that the language is not interpreted literally; as a practical matter, the cable operator has leeway in designing and maintaining a system with inevitable variations in service quality.

Nonetheless, it makes little sense for a franchise to embody language that is unenforceable and that could create serious mischief in interpretation. A better approach is to specify technical and operational standards (including adequate margins to recognize that perfection costs money) and to establish a schedule of well-defined penalties and arbitration procedures for failure to perform adequately. Combined with such specific provisions, a general "state of the art" clause may have residual value by reserving power for the franchising authority to cope with new technological developments—which always are much clearer by hindsight than by foresight.

OPERATIONAL STANDARDS

Merely insuring that a system's design is relatively up-to-date, however, does not guarantee subscribers adequate service; a well-designed but poorly maintained system obviously leaves much to be desired. A franchising authority must therefore insure that the cable operator delivers the promised service. Indeed, the FCC’s new regulations explicitly provide that franchising authorities must be receptive to subscriber complaints, by requiring that:

The franchise shall specify procedures for the investigation and resolution of all complaints regarding the quality of service, equipment malfunctions, and similar matters, and shall require that the franchisee maintain a local business office or agent for these purposes.²¹

Thus, the franchisor must determine what enforcement mechanisms or penalties it will invoke when citizens register valid complaints against the cable system. Two principal approaches have been used. One is to define operating standards in a general way in the franchise and negotiate with the cable system for corrective measures when necessary. For example, the New York City franchises for Manhattan state:

²¹ 47 C.F.R. § 76.31(a)(5) (1972), printed in Cable Television Report and Order at 3281.
The Company shall furnish to its subscribers and customers for all services the best possible signals available under the circumstances existing at the time, to the satisfaction of the Director of Communications.

Other cities have used similar language.

In principle, the advantages of this approach are that a city retains great flexibility in handling complaints and can negotiate with the operator from a position of strength, since it has final authority to terminate or not renew his franchise. However, several problems may arise with this approach:

- There are no objective standards for determining the validity of subscriber complaints;
- A city must decide in each instance how many complaints are needed before it should act;
- Citizens have no objective way of measuring the performance of the enforcement agency;
- The city is vulnerable to charges, however unfounded, that it selectively enforces complaints or otherwise deals under the table with the operator;
- The "ultimate sanction" of franchise termination or nonrenewal simply may not be credible in dealing with minor, day-to-day problems.

The second approach would attempt to set specific operating standards and appropriate penalties for noncompliance in the franchise. The franchise might specify a maximum time for the operator to respond to subscriber complaints (for example, same-day response if the complaint is received before noon). It might set standards for system reliability in terms of the number of service interruptions per year, or establish picture quality standards over and above those contained in the FCC rules. For each of these examples, the penalty for noncompliance might be a rebate of part of the monthly fee to each affected subscriber.

An example of such a system of procedures and penalties is drawn from the Illinois Commerce Commission:

System operators will have to provide same-day service response seven days a week for all complaints and requests for adjustments received before 2:00 p.m. each day. Calls received after 2:00 p.m. must be responded to within 24 hours.

If the operator fails to remedy a loss of service attributable to the cable system within 24 hours after a complaint, he will be required to rebate one-thirtieth (1/30) of the regular monthly charge to each subscriber for each 24 hours or fraction thereof following the first 24 hours after a report of loss of service, except to the extent that restoration of service is prevented by strike, injunction, or other cause beyond the operator's control.

The operator will have to keep a log, and file a copy thereof with the Commission at the close of each calendar quarter, listing by category all complaints and trouble calls received, the number of second or subsequent calls on the same complaint, the remedial action taken, the period of time required to satisfy each reported complaint, and the rebate (if any) to subscribers.

The MVCOC model franchise also contains reasonably clear language about required performance and penalties for nonperformance:

Whenever it is necessary to interrupt service for the purpose of making repairs, adjustments, or installations, the grantee shall do so at such time as will cause the least amount of inconvenience to the

\[22\] Notice of Inquiry, p. 29.
subscribers; and, unless such interruption is unforeseen and immediately necessary, it shall give reasonable notice thereof to its subscribers.

Whenever the grantee's system shall be out of service so that the subscribers may not receive more than half of the available channels for a period of 48 hours, then the grantee shall automatically refund to the subscribers a proportionate amount of his subscription fee.

The requirements for maintenance of equipment contained in this provision shall not apply to the subscriber's television receiver.

It is relatively easy to enforce specific standards in an open and straightforward manner. The disadvantages of the approach are that the franchising authority and the operator may be unable to agree on operational standards, and that the city has less flexibility to take special factors into account in enforcement. In essence, this approach is like handing out tickets for minor traffic offenses, rather than negotiating with the violator to improve his behavior under threat of revoking his driver's license. And while states do revoke drivers' licenses, there is no evidence to date that municipalities will revoke or refuse to renew franchises.

Perhaps the best solution is a combination of the two approaches. Operational performance standards might be included in the franchise where they can be reasonably determined, with appropriate penalties for noncompliance. Where setting operational standards is difficult—as, for example, the picture quality of locally originated programming from remote sites—the city must rely on negotiating any needed improvements.

Finally, any effective complaints system must include workable remedies as well as rights. One possible alternative is arbitration, which the New York City franchises provide for:

Matters which are expressly made arbitrable under provisions of this contract shall be determined by a panel of three arbitrators appointed by the Presiding Justice of the Appellate Division of the Supreme Court of the State of New York for the First Judicial Department. The fees of the arbitrators shall be fixed by the said Presiding Justice. The expenses of the arbitration, including the fees of the arbitrators, shall be borne by the parties in such manner as the arbitrators provide in their award, but in no event will the City be obligated for more than half the expenses. The determination of a majority of the arbitrators shall be binding on the parties. In the event that an arbitrable matter arises contemporaneously under another franchise, involving the same issue as that to be arbitrated under this franchise, the Company will not claim or assert that it is prejudiced by, or otherwise seek to prevent or hinder, the presentation of the arbitrable matter under such other franchise for determination by a single panel.

As an alternative to relying on the courts in selection of arbitrators, franchising authorities should consider following the standard American Arbitration Association practice of allowing each party to designate one arbitrator and then having the two arbitrators pick a third.

ACCESS TO PREMISES BY CABLE OPERATOR

One of the major difficulties in some large urban areas is that many landlords of apartment buildings refuse to allow the cable operator to wire individual apartments at the tenant's request. Some landlords charge tenants for using their own master antenna systems and do not want the cable operator to compete with this service. Others are apprehensive about physical disruption and possible damage to the building resulting from installation of cable in cramped or difficult quarters. And
many landlords are simply out to get what they can; in New York City some have been known to demand payments from the cable operator for permission to wire the building.

Franchise authorities therefore should consider provisions that both assure access by the cable operator and protect the landlord from property damage. The provisions of the ACLU Model Code may serve as an appropriate guide:

Each franchisor shall have the right and obligation to provide cable television service to any member of the public in any publicly or privately owned buildings that are in the franchisor’s franchise area without paying a charge to the building owner. Any disputes between the franchisor and any building owner shall be heard at and resolved by a public hearing by the franchisor. Each franchisor shall report to the franchisor any building owner who requests a payment from the franchisor before allowing the franchisor to install cable system service in the building or who otherwise refuses it free access. The franchisor after public hearing, may fine such building owners up to $——— per offense and order the building owner to allow the franchisor access. If a building owner is for any reason not available to appear before the franchisor, the franchisor may proceed against any agent of the building owner.

Any damage caused to the property of building owners or users or any other person by the franchisee shall be repaired fully by the franchisee.

This type of franchise provision is by no means self-executing. Terms such as “free access” and “repaired fully” are vague and may create disputes. Moreover, some local governments may lack the power to impose such requirements on landlords and therefore must seek it from the state legislature. As an alternative, a franchising authority might require the cable operator to pay landlords a flat fee for each apartment passed, in order to avoid the delays and costs of litigation. Or the franchising authority might specify a flat fee but allow dissatisfied landlords to commence proceedings for a higher fee; in these proceedings the landlord would have the burden of proof or even the burden of rebutting a presumption that the flat fee is reasonable.

RATES AND OTHER CHARGES TO THE SUBSCRIBER: GENERAL CONSIDERATIONS

Within the new FCC rules, one area that remains open for local determination is the matter of subscriber rates and other charges. In the opinion accompanying its rules, the FCC specifies:

We are permitting local authorities to regulate rates for services regularly furnished to all subscribers. The appropriate standard here is the maintenance of rates that are fair to the system and to the subscribing public—a matter that will turn on the facts of each particular case (after appropriate public proceedings affording due process) and the accumulated experience of other cable communities.23

Here the Commission apparently attempted to require rate regulation but not specify the type. (Its subsequent actions indicate that it will accept almost any form of rate control.) On the one hand, the FCC apparently felt that some rate control was necessary. On the other, it presumably wanted to avoid traditional public utility rate-of-return regulation, which would inhibit the flow of venture capital into cable television. Moreover, the rule specifically stipulates regulation only of rates "for

23 Cable Television Report and Order at 3276.
installation of equipment and regular subscriber services." The question of regulating leased-channel rates for new services—e.g., pay television and information retrieval—is left open.

Thus local authorities have full jurisdiction (subject to possible state preemption) to review and approve fees for cable installations, monthly services, outlet relocations, and so forth. In setting rates, the local franchising authority should consider several points:

- First, it must decide what standards, if any, to use. A number of alternatives are available. First, it might adopt traditional public utility rate-of-return regulation. The problems of estimating the investment on which the rate of return is regulated make this approach difficult. Second, it might use rate surveillance—that is, policing a system's profits only to insure they do not become exorbitant. This approach not only is administratively easy for the franchising authority, but also allows cable systems to earn enough profit to attract venture capital. Finally, the franchising authority might assume a totally "hands-off" attitude and simply approve whatever rates the cable system proposes. Though this might satisfy the letter of the FCC's rules, it obviously would present difficulties in terms of both policy and politics.

- Differences in rates for various services or components of services generally should reflect differences in underlying costs, if the franchising authority seeks to prevent one group of users from heavily subsidizing another. To be sure, the cost of service for any two subscribers is not identical, and rates cannot reflect individual cost-differences. Some rate averaging is inevitable. In most franchises the basic monthly charge is constant over the whole franchise area, despite cost-differences among locations because of factors such as population density, construction conditions, and topography. At the same time, other cost-differences should be taken into account. The subscriber who requires an underground connection should pay more than the one who requires only a conventional overhead dropline. The subscriber who lives more than some "reasonable" distance from the nearest feeder line should pay a surcharge. Conversely, subscribers in densely packed multiple dwelling units should pay less than those in single-family residences.

- As noted above, the FCC's rules presently may bar, without special justification, rate regulation of leased channels for new services. Ample leeway should be built into the franchise, however, to encompass regulation of subscriber rates for new services that today are only on the horizon. The long experience with cable retransmission of broadcast signals and small-scale local program origination provides a reasonably sound basis for establishing basic subscriber rates and connection charges for these conventional uses. But what about services that may be added in the future? These may include: two-way leased lines for data transmission; special channels for pay movies; connection and maintenance of new kinds of terminals that may work in conjunction with or independently of the conventional home television set. No satisfactory basis exists today for setting specific rates for such services—a factor that probably influenced the FCC in not specifying the regulation of these services' rates. The best approach is to make the franchise flexible by reserving the

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47 C.F.R. § 76.31(a)(4) (1972), printed in *Cable Television Report and Order* at 3281.

right of the local or state agency to establish, review, or modify rates for these services as they arise and as the FCC permits.

- Mechanisms should be built into the franchise to allow necessary rate changes as circumstances warrant. General inflationary pressure is beyond the control of the cable operator and may require periodic rate increases during the franchise term—especially if it is as long as 15 or 20 years. Experience may show that some services are not paying their way and need to be repriced. On the other hand, extraordinary profits would merit rate reduction. As noted at the beginning, the standard that the franchising authority adopts for rate control will influence all of these judgments.

- As a corollary, the franchising authority must take care that in competing for the franchise the winner not be forced into proposing nonremunerative rates. The FCC is concerned about similar problems in other areas of franchising, such as with respect to franchise fees. Since competitors for a franchise tend to offer overly generous franchise fees at the expense of services to the public, the Commission has taken a strong stand against franchise fees it regards as excessive, as will be discussed later. Because competitors also tend to offer large numbers of free channels for various public uses—again constituting a potential burden on other users—the Commission has banned the wholesale giveaway of channels, as will be discussed later. Yet the possibility of excessive rate competition remains. If franchise applicants cannot compete on the basis of free channels and franchise fees, they may be under much more pressure to compete in terms of rates. Although some rate competition is clearly in the public interest, it creates the danger of a candidate’s offering uneconomically low rates. Correctly or incorrectly, he may reason that once he obtains the franchise he can obtain an increase; or he may be overly optimistic about his level of expected costs and the expected growth in number of subscribers. In either case, saving partially built plant from bankruptcy will require increasing subscriber rates, perhaps after long renegotiation, during which time service to the public is disrupted or poor.

In light of the preceding points, we shall now discuss the separate detailed elements of different subscriber rates. The wording of existing franchises will illustrate approaches to be considered and pitfalls to be avoided.

**CABLE CONNECTION FEES**

In addition to monthly service fees and other charges, cable operators generally set a one-time fee for connecting the subscriber to the nearest feeder line. Where the feeder line is on telephone or electric power poles, the cable connection is a drop line from the nearest pole. If the feeder line is underground (as in many downtown areas and some new residential areas) a trench is dug from the feeder to the home, as with other underground utilities.

As mentioned earlier, the cost of connection depends heavily on whether underground construction is involved—a factor that should be considered in the franchise, as previously discussed. The subscriber’s distance from the feeder line is also an important consideration. An interesting approach to both these points is contained in the Beverly Hills franchise:
I. RATES AND CHARGES FOR INSTALLATION SERVICES IN SINGLE FAMILY AND DUPLEX RESIDENCES.

(a) First Outlet

1.1 Overhead Service

a. The charge shall be $19.50 for normal installation.
b. In the event that the distance from the center line of the street, alley, or easement occupied by the feeder cable to any outlet at the subscriber's set exceeds 150 feet, the Grantee may make an additional charge not to exceed the actual direct cost to the Grantee attributable to such distance in excess of 150 feet.

1.2 Underground Service From Underground Feeder Cable

a. In the event that the subscriber independently provides for his own trenching (including backfilling, repaving and/or replanting), the charge shall be as stated above for Overhead Service—1.1 a. and 1.1 b.
b. In the event that the subscriber contracts with the Grantee to provide the trenching and related work, the charge for the trenching, et cetera, shall be the variable cost incurred by the Grantee and the charge for the duct, cable and installation shall be as stated above for Overhead Service—1.1 a. and 1.1 b.

c. In either event, Grantee shall bear the full cost of providing the trenching and all other facilities from the feeder cable to the subscriber's property line.

1.3 Underground Service From Overhead Feeder Cable

The charge shall be as stated above for Overhead Service—1.1 a. and 1.1 b., and in addition thereto, the difference between the Grantee's incurred variable cost of providing the underground facilities and the estimated cost of constructing equivalent aerial facilities.

In this case, the subscriber pays a flat fee of $19.50 for normal connections and the cable operator's actual cost for underground service. This approach has merit. The variation among subscribers for overhead drops is small enough to make the ease of administering a flat rate system the dominant consideration, as with telephone installations. But underground construction can vary enormously, depending on the necessity of tunnels under sidewalks or streets, the extent of disruption to lawns and shrubbery, the nature of the soil, and other factors.

Charging an amount equal to actual cost may be a good practical solution—all the more so since the subscriber is given the option (in 1.2a above) to do his own trenching or to have some other contractor do it, in which case the charge by the cable operator is to be the same as for overhead service. These options may protect the subscriber against possibly excessive charges by the cable operator for trenching operations.

At the same time, an "actual cost" standard is not free of difficulty. "Actual cost" is an elusive measure, subject to disagreements between the subscriber and the cable operator and hard to define because of complexities in allocating the system's expenses among various functions. Moreover, subsection 1.2(a)'s provision for trenching by the subscriber may furnish only a limited alternative, because (a) subscribers may not know of the option or of a competent outside contractor, and (b) the cable operator might use petty defects in a job as an excuse for not laying cable in the subscriber's trench.

In view of these problems, the franchising authority might consider an approach similar to the one suggested in relation to wiring apartment houses: setting a flat per-foot charge and allowing the cable operator to petition the appropriate tribunal for an increase.

The above franchise language also provides for an extra fee, equal to "actual
direct cost," for extending a dropline more than 150 feet from the feeder. Any such limit is arbitrary, of course. But whether the number is set at 100, 150, or 200 feet, clearly some such provision should be included in the franchise so that subscribers who are extraordinarily expensive to serve bear their additional cost.

The Beverly Hills franchise is notable also in specifying that the installation charge for additional outlets on the same premises be lower than that for the first, to reflect the cost savings that accrue from installing multiple outlets from a common dropline into the home:

(b) Each Additional Outlet

1.1 The charge shall be $5.00 per additional outlet if the subscriber's order for same is made not later than the time the first outlet is installed or reconnected or any other outlet is relocated.

1.2 When the subscriber's order is made subsequent to the time specified in b. 1.1 above, the charge shall be $10.00 for the additional outlet and $5.00 for each further additional outlet, if any, ordered installed concurrently.

This stands in contrast to the provisions in the New York City franchises, which specify a flat maximum fee for each outlet:

Rates for Basic Service to Residential Subscribers shall not exceed the following amounts... For installation of each outlet, $9.95...

In New York, then, the subscriber may pay $9.95 for each outlet he orders, whether one or five. However, since this figure is specified as a maximum, the cable operator could lower his rates for both the first and additional outlets, as long as he complies with the further provision that "All rates, charges, and terms or conditions relating thereto shall be non-discriminatory." In fact, cable operators in New York City follow the practice, widespread in the industry, of sometimes offering low "promotional" installation fees. This practice is permitted in New York City as long as during the period of time of the promotion the same low fees are offered on a non-discriminatory basis to all potential new subscribers.

MONTHLY SERVICE RATES, DISCONNECTION AND RECONNECTION CHARGES

In establishing a structure of monthly subscriber rates, it is important to distinguish between single and multiple dwellings and between TV service and FM radio service, as well as to specify charges for disconnection and reconnection. On a per-unit cost basis, serving a four- or five-unit dwelling is generally cheaper than serving a single-unit dwelling. These differences should be reflected in rates. Moreover, the fact that serving a second TV outlet or an FM outlet is cheaper than serving the first also should be reflected in rates, as noted above. An example of an interesting approach to a rate structure is drawn from the Beverly Hills franchise:

(a) Single family and duplex residential for TV and/or FM service:

<table>
<thead>
<tr>
<th>Service</th>
<th>Price</th>
</tr>
</thead>
<tbody>
<tr>
<td>First outlet</td>
<td>$5.00 per month</td>
</tr>
<tr>
<td>Additional outlets—each</td>
<td>1.00 per month</td>
</tr>
<tr>
<td>Disconnection of existing service</td>
<td>No charge</td>
</tr>
</tbody>
</table>
Multiple apartments, hotels, motels, and non-residence for TV and/or FM service:

<table>
<thead>
<tr>
<th>1.1 Number of outlets</th>
<th>Rate per month per outlet</th>
</tr>
</thead>
<tbody>
<tr>
<td>a. 1</td>
<td>$5.00</td>
</tr>
<tr>
<td>b. Next 9</td>
<td>3.75</td>
</tr>
<tr>
<td>c. Next 10</td>
<td>2.50</td>
</tr>
<tr>
<td>d. All over 20</td>
<td>2.00</td>
</tr>
</tbody>
</table>

1.2 Disconnection of existing service

1.3 The above rates shall apply only where all outlets are on the same premises, under one ownership and with billing to one customer.

These provisions of the Beverly Hills franchise are interesting on several counts:

- The franchise specifies a monthly charge for each additional outlet substantially below the first, to reflect the difference in cost. (On this point the New York City franchises are in agreement; they also recognize the cost differences by specifying a lower monthly figure for each additional outlet ($1) than that for the first ($5)).

- In regard to the outlet charge, the franchise puts TV and FM service on the same footing, to reflect the fact that the cost of supplying them is the same; the cost of supplying only FM presumably is no different from the cost of supplying only TV, since both are carried on the same cable, which must be brought into the home and into an outlet. Although installation costs for FM and TV outlets are identical, a franchising authority might set a lower rate for an FM outlet, on the theory that an FM subscriber should not bear the costs of TV carriage and TV program origination on cable for which he does not receive the benefits.

- The franchise contains a sliding scale within which the monthly rate falls as the number of dwelling units on a single premise rises—again a reflection of the cost savings in serving points with high population density. Such a provision is especially important in encouraging the use of cable in low-income areas where multiple dwelling units prevail. This sliding scale applies, however, only when the premises are “under one ownership and with billing to one customer.” Subscribers who live in condominiums or who are billed separately presumably would pay the full $5 per month, despite the fact that serving them would be substantially cheaper than serving single or duplex residences. In future franchises it would seem sensible to add additional rate categories. First, condominium owners should receive a sliding scale monthly charge below $5 but sufficiently above the monthly charges for “single billing to one customer” to offset the additional cost of billing each subscriber separately. Second, condominium owners or other residents who establish their own central billing system should receive the same sliding scale as multiple dwelling residents. Finally, the franchising authority might consider a separate set of rates for buildings which can be wired inexpensively—e.g., modern apartment houses with built-in cable or specially prepared ducts.

In contrast to the terms of the Beverly Hills franchise, the New York City franchises make no explicit distinction between single and multiple dwellings or between multiple dwellings of various sizes with respect to either the connection charge or the monthly service fee. Nor do they take into account length of connection line or underground versus aboveground construction. Such a flat-rate approach may be justified on grounds that the Borough of Manhattan is more homogeneous than is typical elsewhere: Virtually all dwellings are multiple units; once
the feeder line is installed along the block, each dropline is relatively short; and practically all construction is underground. Moreover, although not required under terms of their franchises, the New York City cable operators on their own volition have offered quantity discounts (as filed with the Bureau of Franchises) to large multiple dwelling units where central billing is available.

- The Beverly Hills franchise requires no charge for disconnection of service. This also is a reasonable recognition of the practical problems in collecting disconnection payments, since the cable operator can do little to enforce payment. In any event, the small amount of money involved hardly would justify the operator’s going to a small claims court or turning the bill over to a collection agency. The situation is all the more complex if the former subscriber moves out of town. In the absence of a disconnection charge, however, the franchise should include a reconnection fee—which can be enforced more easily than a disconnection charge. If neither a disconnection or reconnection charge is imposed, the cable operator may incur very high costs in maintaining subscriber hookups, particularly in areas with high population turnover.

A striking example of the disconnection problem is that faced by the Kern Cable Company, which serves the unincorporated areas of Bakersfield, California pursuant to a franchise issued by Kern County. The following is taken from a letter from the cable operator to the Kern County Board of Supervisors:

Kern Cable’s records indicate that 25% of its customers moved during the year 1969. This is nearly double the turnover experienced by most other CATV systems.

Kern is forced to set aside a minimum of one week a month during which as many as 16 servicemen do nothing but disconnect subscribers who have either moved or refused to pay their bills. A man must go to the door of the home and attempt to make a collection. If unsuccessful, he must then climb a utility pole and physically disconnect the dropline leading from the pole to the house. The entire process, including driving time, averages 20 to 30 minutes.

Ironically, a disconnected subscriber can call a half-hour later and demand to be reconnected. He pays no reconnection charge; he has lost no deposit; all he has to do is pay his bill. Our installer must now go back out, climb the pole, reconnect the cable and go into the home to verify that service to the set has been restored. Kern’s present franchise makes no provision for recovery of the costs involved in either the disconnect or reconnect procedure. [Emphasis added.]

The Beverly Hills franchise copes with the disconnection problem by specifying a reconnection charge:

(a) The charge shall be $5.00 per subscriber.
(b) The charge shall apply where the Grantee had previously served the premises, and facilities are substantially in place, but service was cancelled, suspended, or terminated for any good cause.
(c) The charge shall not be made in addition to the installation charge set forth in 1. (a) 1.1 a, or II. above.

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26 One possible solution would be to require that the subscriber make an initial deposit in an interest-bearing escrow account, from which the cable operator could draw to satisfy any debts for disconnection of service.

27 Letter, Kern Cable Company to Kern County Board of Supervisors, February 18, 1970.
(d) The Grantee shall not remove, rearrange or otherwise disturb any of its existing facilities for the purpose of making a greater charge than would otherwise be applicable.

Thus, the Beverly Hills franchise does not permit a reconnection charge where the operator cancelled service without "good cause." This approach seems fair since it does not penalize the subscriber for the operator's mistake or misfeasance. At the same time, it could generate disputes in determining whether the operator had "good cause."

RELOCATION CHARGES

In addition to the preceding provisions, the franchise should specify charges for relocating outlets within the same premises. The Beverly Hills franchise is notable in providing that relocation of a second and additional outlet is to be priced lower ($5) if related to other services or performed at the same time:

IV. RELOCATION CHARGE

(a) The charge shall be $7.50 per relocated outlet, except that where the subscriber's order for same is made not later than the time an additional outlet is installed, the subscriber's service is reconnected, or the first outlet installation is made, the charge shall be $5.00 per relocated outlet.

(b) In the event that more than one outlet is ordered relocated concurrently, the charge for the first such outlet shall be as set forth in IV. (a) above, and the charge for each additional relocated outlet shall be $5.00.

This also stands in contrast to the New York franchises, which specify as a maximum "... for moving and reconnecting an outlet, $9.95," regardless of the number of relocations and regardless of the fact that relocating an outlet is less costly than installing a new one. Again, the cable operator on his own volition may make nondiscriminatory downward adjustments in his rates to reflect these differences in cost.

BILLING AND PAYMENT PROCEDURES

Franchises typically specify procedures by which payment is to be made, including payment for a portion of a month's service. As one example, the Beverly Hills franchise specifies:

Prorating for Less than One Month's Service

The monthly rate shall be prorated on the basis of the number of days in the period for which service was rendered to the number of days in the billing period.

Billing and Payment

1.1 The bill for the monthly rate may be rendered in advance. Such bill is due and payable not more than five (5) days in advance of the period during which service is to be furnished.

1.2 The billing period shall not exceed two (2) calendar months.

Though billing a customer for service in advance obviously guarantees payment and is practiced by many utilities, it vests more power in an already quasi-monopolistic entity. Moreover, a system of advance payments makes rebates for poor service
all the more difficult; it transforms them from rate reductions to refunds, and problems may arise in assuring prompt issue of refund checks.

PROVISION FOR TEMPORARILY REDUCED CHARGES

Occasionally, a cable operator will offer special reduced rates for promotional purposes. During a subscriber sign-up drive, for example, he may waive the cable connection fee temporarily. In some cases he even will offer a free 30-day trial hookup in the area of the promotional drive. Some cities, such as Beverly Hills, specifically provide for such possibilities.

At the option of the Grantee, any of the foregoing charges may be reduced by any amount, but only under the following conditions:

a. The subscriber makes a bona fide application for service not later than 30 days after the Grantee's local feeder cable is initially placed in service and such cable is reasonably accessible to the subscriber's premises; or
b. The Grantee applies for and receives from the City Council specific time limited authority to make reduced charges.

c. Reduced charges, if offered, shall be on a non-discriminatory, non-preferential basis.

The franchise thus strikes a reasonable balance by allowing the cable operator to run a promotional campaign while preventing him from using an alleged promotional campaign as a cover for discriminatory rates.

REDUCED RATES FOR SPECIAL CLASSES OF USERS

The requirement of "nondiscriminatory" rates appears in most franchises. There has been much debate, however, about whether the availability of cable should be promoted among low-income groups by means of special preferential rates. A leading problem is defining in a clear and workable fashion who does and does not qualify. A threshold assumption must be that no formula ever can be truly fair. As the courts have found through long and bitter experience in administering the equal protection clause of the federal Constitution, any draftsmanship inevitably will be overinclusive in some respects and underinclusive in others. Thus a preferential rate for welfare recipients inevitably will include some people who can afford to pay and exclude other people who cannot. This simple fact of life does not rule out preferential rates; it must be accepted, however, before any realistic analysis can begin.

If welfare recipients do receive special rates, the constant turnover in the welfare rolls may create some difficulties. Whenever a person went on or off the rolls, the welfare agency would have to notify the cable operator—who in turn would need to adjust his billing. On the one hand, this might generate substantial costs for the cable operator and resentment among subscribers. On the other, welfare eligibility has been used as a criterion for other services in the past, and may not create substantial transactional costs.

*Tusman and Tenbrook, The Equal Protection of the Laws, 37 Calif. L. Rev. 341 (1949).*
Another approach, included in the Pomeroy, Ohio franchise, is to give a special rate to the head of any household who is either more than 65 years old or permanently disabled. In contrast to the regular monthly fee of $5.50, the Pomeroy franchise provides:

"Senior Citizens Service": Homes in which the head of the household is 65 years old or older ("Head of household" being determined by definitions of the U.S. Bureau of the Census and U.S. Internal Revenue Service) — $3.50 per month.

"Disability Special Service": Homes in which the head of the household, as defined above, is certified as permanently and totally disabled, under definitions of the U.S. Department of Health, Education and Welfare, or is suffering from a service-connected disability exceeding 60 percent, as defined by the U.S. Veterans Administration — $4.00 per month.

One danger of this approach is that if sufficiently large numbers of subscribers qualify for the reduced rate, the cable operator's receipts may not cover his total costs. In recognition of this danger, the Pomeroy franchise includes an additional provision:

It is further understood that in the event the total families in the "Senior Citizens Service" and "Disability Special Service" categories shall exceed 40 percent of the total of paying subscribers, the Company shall have the right to increase rates for these categories, by filing an amended schedule of such rates with Council.

Another question with preferential rates is the extent to which monthly fees within a franchise area should be adjusted to reflect underlying cost differences that result from variations in population density. All else being equal, the cost of cabling a densely populated area is less per dwelling unit than that of cabling a sparsely populated area. As a social issue the problem is all the more pressing, since at least in cities low-income groups tend to live in relatively densely populated areas. A single uniform rate creates the danger that the densely populated low-income central portion of the city would subsidize the higher-income fringes. The bulk rates for multiple dwelling units, as in the Beverly Hills franchise noted above, help to alleviate this problem.

Most franchises specify a single rate within the entire franchise area for any given class of users, such as single-family or two-family residences. If the franchise area is large, encompasses a wide variety of housing densities, and hence has large variations in underlying costs, the franchising authority should consider the feasibility and desirability of a differential rate structure. As in the preferential rate discussion above, however, great care would be required to establish definitions of classes of users that are unambiguous and do not generate resentment and misunderstanding. One possibility would be to establish a preferential rate for people living in census tracts with more than a specified number of people per street-mile. For a medium-size city, 150 to 170 people per street-mile is typical in the most densely populated portions, and 100 or so in the periphery. In such a case the franchise authority might consider lowering rates at a break-point of 130 to 140 persons per street-mile within census tracts, as defined by most recent census data.

This approach demands careful scrutiny of the area's actual composition, however, since density alone does not determine overall cost per subscriber. Among considerations bearing upon overall costs of wiring and providing service are the placement and age of buildings; the extent of turnover among subscribers due to
differences in mobility among groups; and the extent to which collection costs and
the level of market penetration, including the sign-up for special services, varies
among areas as a consequence of differences in family income and other factors.

ESTABLISHING AND ADJUSTING THE RATE STRUCTURE

A critical task facing franchising authorities is the determination of a rate
structure and of mechanisms for modifying it. Until recently, the rate for "basic
service"—standard one-way television service over cable—has fallen within narrow
bounds. Virtually all franchises have specified a rate in the range of $4 to $6 per
month. Likewise, the rate for set-top converters to increase the number of cable
channels also has fallen in a narrow range, with a typical rate of $1 per month.

But as new services are added, the problem of rate setting and adjusting will
become increasingly complex. If movies, education, data information storage and
retrieval, alarm services and other applications occupy special channels, they will
create problems not only as to their pricing, but also of assessing their impact on
revenue requirements for the basic and other services. For example, if the cable
operator collects substantial revenues from a special pay-movie channel, he may be
able to reduce the rate for basic service substantially below the traditional $4 to $6
per month. Indeed, if a host of new services become lucrative it eventually may
become possible to reduce the basic monthly service rate to zero—in effect, giving
the cable subscriber free conventional one-way television service and using revenues
from special add-on services to cover the total cost.

SETTING RATES AND CONNECTION CHARGES FOR BASIC
AND ANCILLARY SERVICES

Establishment of equitable initial rates and fees depends on the conduct of the
franchising process itself, as described in Sec. II of this report. Once the franchising
authority decides which applicant is to be awarded the franchise, it simply might
incorporate its proposed schedule into the final franchise document—assuming that
it has opened rates up to bidding in the first place. Though the temptation is great
to negotiate further rate adjustments after the franchise award, the franchising
authority should refrain from doing so; this type of ex post negotiation would deny
other applicants a fair chance to make further bids. This difficulty of negotiating
with the successful bidder is one of the areas of inflexibility accompanying the
"competitive bid and award" approach, as distinguished from the "negotiation"
approach dismissed in Sec. II of this report.

REVIEW AND REVISION OF RATES

In addition to setting initial rates, the franchising authority must devote seri-
ous attention to periodic rate modifications. On the one hand, general inflationary

29 A random sample of 25 systems listed in the Television Factbook (1971-72 edition) discloses that
two have a monthly subscriber charge of less than $4 and that one has a charge exceeding $6.
pressures may require periodic rate increases if the cable operator is to maintain a viable business. On the other, continued technological advance, new economies in operating procedures, and development as well as expansion of programming markets may permit rate reductions. Given these possibilities, the franchising authority should adopt language that will make necessary rate adjustments relatively easy. The language should be specific enough to avoid misunderstandings and the uncertainty of long and frustrating hearings, rehearings, and reviews. At the same time, the franchise should not simply ignore the issue by omitting all language with regard to mechanisms for change. Unfortunately, many franchises are deficient in these respects.

One example is the Los Angeles franchise, which leaves open the criteria by which the franchising authority is to regulate rates:

**Regulation of Rates and Service.** The Board shall have the power to regulate rates and service to the extent and in the manner as provided in the City Charter and ordinances, and the Grantee by its acceptance of this franchise agrees to comply with every such order and regulation.

The nature of "every such order and regulation" remains to be seen. If little disagreement arises between the city and the cable operator, the absence of specific criteria for judging rates will pose no serious problem. Yet one easily can imagine circumstances under which the cable operator's agreement to "comply with every such order and regulation" could give rise to serious problems.

As another example, the Akron franchise states that:

When this Franchise takes effect, the rates herein contained shall be subject to revision by Council after a period of ten (10) years elapses as provided in Section 46 of the Akron City Charter.

The Company from time to time may make changes in or additions to the rate schedule, provided, however, that the change or additions shall become effective sixty (60) days after the filing of notice of such change with the City, unless disapproved within such period for good cause shown by the Council of the City.

In this case it is not clear what criteria the Council would use in revising rates after the ten-year period; and while the cable operator is free to change the rate schedule after filing due notice, the basis for approving or disapproving the changes remains unclear.

Moreover, "approval by acquiescence" may be dangerous, since under some states' law the franchising authority's failure to take action may not be subject to judicial review. Accordingly, the franchise should provide that any rate change accepted by the franchising authority is a final order—and thus reviewable by the courts.

Another example is the language in the Columbus, Ohio City Code:

No action shall be taken by the Council with respect to rate reduction and/or modifications in rate structures unless the operator has been given a written notice at least ninety (90) days in advance of the effective date contemplated by Council and not until the operator has been given every opportunity to be heard by Council will final action be taken (Emphasis added).

Here serious problems can arise in defining "every opportunity." One easily can imagine months of debate, delay, and frustration in case of serious disagreement, while the cable operator and the city attempt to explore "every opportunity" to reach some kind of agreement.
Other franchises take what might be called an "asymmetrical approach" to the issue of review and revision, by in effect making rate reductions easier than rate increases. The New York City franchisees are a leading example:

The Board may reduce rates for Basic Service at any time after five (5) years from the effective date of this contract and rates for Additional Service after eight (8) years from the effective date of this contract upon a determination, made after a public hearing following notice to the Company, that such rates or a particular rate can be reduced without impairing the ability of the Company to render service and derive a reasonable profit therefrom.

This provision is sensible in cases where the cable operator is able to enjoy operating economies, take advantage of cost-cutting new technologies, and develop new services to provide additional revenues and a broader base for his overhead costs. In early years he can retain the full benefit of whatever cost savings and additional revenues he is able to achieve; and this would have the beneficial effect of giving him an incentive to operate as efficiently as possible.

But the New York City franchise has no comparable provision for cases where rate increases might be necessary. If faced with clear and obvious financial difficulty, the cable operator presumably could petition the franchising authority for a rate increase under the provision quoted below; but the absence of specific language delineating the criteria for rate increases could be a source of difficulty:

The Board may at any time increase or decrease any rate, require discontinuance of any scheduled service, or revise or delete any term or condition applicable thereto upon a determination, made after a public hearing following notice to the Company, that a particular rate, service or term or condition (1) explicitly or implicitly violates this contract or (2) has the effect of unreasonably restricting the use of Public Channels.

As noted previously, the franchising authority can choose among many rate-control strategies; but whatever standard it ultimately adopts should be as clear as possible in the franchise, for the benefit of both the cable operator and the public.

The process of public hearings is an important input in achieving this goal. Giving effective notice to the public is considerably easier at the rate-modification stage than at the initial franchising stage, since the cable system usually will be in operation. The franchise authority might rely heavily on the system's own facilities to give notice, by requiring the operator to cablecast frequent announcements of any pending rate hearing. In addition, the franchising authority might require at least some other notice, to cover citizens who do not subscribe to the cable system but who are concerned with its rates.

Public hearings on rate changes should be conducted like those in the initial franchising process. Obviously, the franchising authority must provide time not only for citizens to be heard, but also for the cable operator to present his position and rebut others' presentations. In this proceeding, the city attorney or other local legal officer may take an affirmative, quasi-prosecutorial role—much as the Broadcast Bureau of the FOC sometimes does in license renewal hearings.

RATES FOR NEW SERVICES

The final question is pricing wholly new services as they arise. How and to what extent should the franchising authority—and can the franchising authority, under
the FCC's rules—control the rates for special pay movies, alarm services, information storage or retrieval, and other services? In some of these cases, such as pay movies, the strong competitive pressure from theaters and commercial television may obviate the need for explicit public control. Other services may be highly monopolistic, however, and also vital to the needs of the changing American society. For now, a relatively simple statement in the franchise may be sufficient to leave the door open for necessary ratemaking. The Beverly Hills franchise provides a good example:

Any service not covered by scheduled charges and deemed desirable may be offered and a rate may be initially established by the Grantee. Such rates may be reviewed and thereafter established by the City Council.

The FCC may provide some future guidance in setting rates for new services. The Commission has indicated that it plans:

... at a later date to institute a proceeding with a view to assuring that our requirement of capacity expansion is not frustrated through rate manipulation or by other means. This proceeding will also deal with such open questions as rates charged for leased channel operations.30

ALLOCATION OF CHANNELS

The FCC has been concerned greatly about pressure on cable operators to offer large numbers of free channels for educational and other public uses. Although the cost of one channel may be small, it is not zero. The more free channels offered, the greater is the cable operator's cost burden—which usually will be passed on to subscribers in terms of less service or higher fees. At the same time, the FCC has concluded that some free channel capacity should be made available for development purposes and for assured public access. Hence it has specified that, in addition to leased channels, three channels—and only three channels—be set aside free of charge for special purposes:

... cable television systems will have to provide one dedicated, noncommercial public access channel available without charge at all times on a first-come, first-served nondiscriminatory basis and, without charge during a developmental period, one channel for educational use and another channel for local government use.31

The grandfathered New York City franchises provide an example of provisions that generally would be invalid under the new FCC policy. Of the initial 17 channels, two were set aside for the city and two for public access. Moreover, according to these franchises:

As the channel capacity of the System is increased beyond seventeen (17) channels new channels shall be allocated in the following sequence: one (1) City Channel, two (2) Public Channels and three (3) Additional Channels. The Director of Communications shall designate dial locations as he deems appropriate for all new channels.

30 Cable Television Report and Order at 3276. The FCC's present rules require a cable system to publish a rate schedule for its leased channels, however, which will make overt rate discrimination more difficult. 47 C.F.R. § 76.251(a)(11)(ii) (1979), printed in Cable Television Report and Order at 3289.
31 Ibid. at 3269.
Under the FCC rules a new franchise presumably could require free of charge only one city channel, one public access channel, and one educational channel.

The only exception the FCC recognizes is a possible waiver if a community and cable operator jointly make a special showing relating to experimental uses of the cable system:

Because of the federal concern, local entities will not be permitted, absent a special showing, to require that channels be assigned for purposes other than those specified above. We stress again that we are entering into an experimental or developmental period. Thus, where the cable operator and franchising authority wish to experiment by providing additional channel capacity for such purposes as public, educational, and government access—on a free basis or at reduced charges—we will entertain petitions and consider the appropriateness of authorizing such experiments, to gain further insight and to guide further courses of action. [Emphasis supplied.]\(^{32}\)

Any special showing presumably would be made by way of a petition for special relief, as previously discussed. The necessary facts and documentation still are not clear, since the Commission has not yet passed on any such petitions. The petition presumably should show that the franchise area has a tangible need for additional channels, however, and should be documented by affidavits testifying to either an inability to get time or to a desire to use time. Another study in this series explores the requirements for waivers in more depth.\(^{33}\)

Moreover, these provisions leave open several other questions. First, to what extent may the local franchising authority require the cable operator to make available channels on a preferential basis—i.e., for a charge that covers at least the incremental or out-of-pocket cost of supplying the channels but not a proportionate share of the system’s overhead. For example, may the franchising authority authorize additional educational channels at rates high enough not to impose an additional cost burden on other users, but below those for pay movies and sports? A pricing practice in which some services bear much more overhead than others is common to virtually all industries, including the telephone industry. As a case in point, nighttime telephone calls are priced at rates lower than daytime calls, yet at rates sufficient to cover the additional costs of using otherwise largely idle facilities. To the extent that nighttime telephone revenues cover some portion of overhead, daytime users actually benefit from nighttime service, even at lower rates. According to the language in the Cable Television Report and Order, however, these special reduced rates apparently would be authorized only on the basis of a special showing of experimental, rather than routine use. This conclusion is strengthened by the FCC’s more recent pronouncement on reconsideration of the rules:

The NABE [National Association of Educational Broadcasters] urges us to amend our rules to enable leased channels to be used for educational purposes at lower rates and to provide that, at the termination of the five-year developmental period for educational access channels, rates be kept at a minimum. As stated, we are entering into a period of experiment. The access rules will, without question, require further study and future deliberations. The question of access channel rates is but one of the many matters which we will have to confront again. Our initial feeling in this matter is to avoid any form of preferential policy with regard to who may use and what must be paid for access channels. For the present, we deem it desirable to allow the experiment to proceed.\(^{34}\)

\(^{32}\) Ibid. at 3271.

\(^{33}\) Price and Botein, op. cit.

\(^{34}\) Reconsideration Opinion and Order, at 13659.
Second, if the city does not have additional free channels, is it entitled to other forms of preferential treatment, such as in service rates? For example, the New York franchises specify that:

The charge for Basic Service [relay of broadcast signals, origination programming, and access channels] to any board, bureau or department of the City, or other governmental body, or any public benefit corporation for Basic Service in addition to any such service provided free of charge shall be seventy-five percent (75%) of the charge for Basic Service to Residential Subscribers.

The Company shall provide the City with Additional Service [new services] at a charge to the City not to exceed sixty-six and two-thirds percent (66-2/3%) of the tariff charge for similar service offered by the appropriate communications common carrier operating within the District.

Nothing in the rules directly seems to prohibit preferential treatment in terms of monthly subscriber rates. On the one hand, the FCC might invalidate these types of preferences also, on the theory that they are inconsistent with its general position against preferences. On the other hand, the FCC’s previously discussed broad grant of rate-control power to local governments might allow preferences in subscription rates to both government and nongovernment users.

Third, may the franchisor require the cable operator to wire public facilities free of charge or under preferential conditions? In the absence of FCC language to the contrary, franchising authorities presumably will continue to have leeway in requiring the operator to wire specified facilities. One example is an extensive list drawn from the Beverly Hills franchise:

The undersigned agrees to provide complete CATV service anywhere within the city limits to any public facility now owned or acquired in the future by the City of Beverly Hills or now owned or acquired in the future by the Beverly Hills Unified School District subject to the following conditions:

(a) All underground conduit or conduit within any public building will be installed without expense to the undersigned.

(b) The cost of material and labor for cable installation in excess of 1,500 feet in length, measured from the closest point of each service, will be installed without expense to the undersigned.

(c) No material or labor charge, installation charge, monthly charge or other charge (except as otherwise provided in Paragraphs (a) and (b) of this paragraph) shall be made to the city or the school district for such CATV service.

(d) Right of way will be provided at no expense to the Grantee.

(e) Authority for requirement of such service shall be by resolution of the Council.

(f) The locations of facilities now owned by the City which may be designated for service under requirements of this section are shown on Map Number 2.

(g) The locations of facilities now owned by the Beverly Hills Unified School District which may be designated for service under requirements of this section are shown on Map Number 3.

This type of provision could constitute a substantial cost burden on the cable operator. In view of the FCC’s concern about such burdens, the Commission should determine whether this is a loophole that should be plugged.

Fourth, an ambiguity arises with respect to the cable operator’s obligations to supply three channels where one headend serves more than one community. The FCC requires that “cable television systems will have to provide one... public access channel, one channel for educational use and another channel for local government use.” Does this mean that the cable operator must supply three separate channels for each of the communities he serves from a single headend, or would the communities share the use of each channel? Indeed, how is a “community” defined? Is each

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22 Cable Television Report and Order at 3299 (emphasis supplied).
legally separate governmental unit a "community," or can several be combined for purposes of interpreting these rules? How are unincorporated areas (in some cases heavily populated) treated? These are questions of more than academic importance. In many situations communities will find it mutually advantageous to franchise a cable operator jointly in order to exploit economies of scale.\footnote{For example, one recent study has shown that a number of suburbs ranging in population size from 3,000 to 50,000 each would find it in their interest to share the headend and studio facilities in order to reduce per-subscriber cost. Johnson et al., Cable Communications in the Dayton Miami Valley, Paper 1, pp. 9-13.}

Realizing these possibilities, the FCC observes:

...we are not unmindful of the existence of multiple systems served by a single headend. In most of these situations, each system has the same channel capacity, and carries the same broadcast programming. The "system" as a whole is not designed to carry program material selectively to each component system. The ability of an existing conglomerate of systems to comply with the access channel requirements will necessarily vary with the proximity of the component systems, the basic design of the system, and, of course, the channel capacity. Clearly, we cannot establish a rule of general applicability in this area. To the extent possible, however, within the technical and geographic parameters of the systems involved we intend to safeguard the integrity of our access requirements. This can best be done if, during the certificating process we are provided with sufficient detailed information concerning the systems' ability to comply. Again, we will require compliance to the greatest possible extent. In some cases it may be possible for individual systems to share channel time. If this is the case we may be persuaded for instance that at least 2 shared public access channels will suffice for some conglomerate systems. Where boards of education are under the same jurisdiction, the problems may be alleviated. Local governments may agree to share time on one or two channels. We must, however, be given as much information in these respects, as possible, together with specific proposals on the part of the systems.\footnote{Reconsideration Opinion and Order at 13860.}

Until we receive such material certificates will not be issued.\footnote{FCC, Notice of Proposed Rulemaking, 37 Fed. Reg. 3192 (1972).}

Supplying each community with an educational, governmental, and public access channel could constitute a substantial burden on a cable operator who serves three, four, or five communities. Moreover, small communities—in the range of 5,000 to 10,000—may not use these channels very effectively. At the other extreme, where a single system serves a city of a million people, the three channels would be grossly inadequate. In short, communities that contemplate sharing headends must submit a specific proposal to the FCC as indicated above.

**PAY PROGRAMMING**

In response to pressure from local broadcasters and motion picture exhibitors, many franchising authorities have taken a hostile position toward pay programming on cable systems. For example, the New York City franchises provide that "[T]he Company shall not engage in Pay Television, nor shall it deliver signals of any person engaged in Pay Television, unless and until affirmatively authorized by the F.C.C." Although opposition has been expressed within the FCC to any form of pay programming—whether broadcast or cablecast—its recent rules specifically authorize pay programming, subject to some restrictions on program sources.\footnote{For example, one recent study has shown that a number of suburbs ranging in population size from 3,000 to 50,000 each would find it in their interest to share the headend and studio facilities in order to reduce per-subscriber cost. Johnson et al., Cable Communications in the Dayton Miami Valley, Paper 1, pp. 9-13.}

This codifies an earlier ruling in which the Commission responded to the situation in New York City and "affirmatively authorized" pay programming.
FACILITIES FOR PUBLIC ACCESS TO SYSTEM

Since 1969 the FCC has required systems with more than 3,500 subscribers to originate programming "to a significant extent as a local outlet." In addition, the FCC's new rules require one channel for public access, one for government, and one for education. With respect to the latter two, the cable operator's obligation clearly extends only to supplying a channel, as opposed to studio equipment or other facilities on the premises of educational and government institutions. It is not clear how much leeway franchising authorities will have, however, in requiring the operator to wire specific public facilities free of charge, as noted below.

The public access channel poses a different problem, since it involves studio facilities that are under the control of the cable operator. As the FCC noted:

We believe there is increasing need for channels for community expression, and the steps we are taking are designed to serve that need. The public access channel will offer a practical opportunity to participate in community dialogue through a mass medium. A system operator will be obliged to provide only use of the channel without charge, but production cost (aside from live studio presentations not exceeding 5 minutes in length) may be charged to users.

The franchise should state the general specifications for program origination equipment, such as:

- Should the equipment be color or monochrome?
- What quality of equipment should be used—e.g., half-inch tape, one-inch tape, etc.?
- Should the equipment be compatible? If so, what standard should be adopted?
- How many cameras, recorders, and playback units should be required?
- What type of technical assistance should be required?

Obviously enough, no written document can specify how to run a television studio, especially in light of a constantly changing technology. Nevertheless, a fairly detailed set of initial provisions will minimize later conflicts; a reservation of power clause will enable the franchising authority to impose additional and more specific requirements as necessary.

In doing so, one would expect that the larger the subscriber base, the more elaborate the facilities to be specified. Here as elsewhere, franchise officials should not saddle the cable operator with costly obligations in the absence of clear public benefits.

Requiring production equipment may violate the FCC's ban on a franchise fee of more than three percent, absent a waiver. The FCC might consider the cost of the

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40 47 C.F.R. § 76.201 (1972), printed in Cable Television Report and Order at 2887. The requirement first was imposed by the First Report and Order, 20 F.C.C. 3d 201 (1969) and was reaffirmed in the Memorandum Opinion and Order, 35 Fed. Reg. 10601 (1970). When the new rules were promulgated, the existing origination requirement was taken over virtually verbatim.

41 Alternative equipment lists required for particular levels of local program origination are contained in several previous studies, including Charles Tate (ed.), Television in the Cities: Community Control, Public Access, and Minority Ownership, The Urban Institute, Washington, D.C., 1971, pp. 42-51.
production equipment and of the studio maintenance as part of the consideration for the franchise and thus add it to any other franchise fee expressly exacted. As a result, the franchising authority may need to petition the FCC for a waiver. To be successful, the franchising authority presumably would need to show that the production equipment is related to a bona fide regulatory or experimental program, as will be discussed later.

MINIMUM CHANNEL CAPACITY

Most franchises specify the capacity of the system, and some franchises specifically provide for expanding capacity in accordance with the demand for channels. One example is drawn from the model franchise of the MCOG:

The grantee has in its proposal agreed that the cable television system shall have forty (40) channels initially. The grantee shall provide additional channel capacity in accordance with F.C.C. regulations. Failure to comply with this provision shall be a material breach of this franchise and shall be a sufficient cause for revocation of this franchise.

The FCC states that:

We wish to proceed conservatively, however, to avoid imposing unreasonable economic burdens on cable operators. Accordingly, we will not require minimum channel capacity in any except the top 100 markets. In these markets, we believe that 20 channel capacity (actual or potential) is the minimum consistent with the public interest. We also require that for each broadcast signal carried, cable systems in these markets provide an additional channel 6 MHz in width suitable for transmission of class II or class III signals.\footnote{Cable Television Report and Order at 3269. For additional commentary see Rivkin, op. cit., Sec. 3.332.}

Thus, the design of the system, including trunk lines, feeders, droplines, and amplifiers must accommodate a minimum 20-channel capacity, though the actual number of operating channels will depend on the number of broadcast signals, leased uses, and other factors. If the cable system carries more than 10 broadcast channels, its capacity must be increased beyond 20 to provide an equal number of nonbroadcast channels.\footnote{Cable Television Report and Order at 3270.}

Thus franchising authorities in major markets clearly now may not allow a system to have less than 20 channels. A question arises as to whether a franchising authority may require more than 20 channels—e.g., 30 or 40. Although the FCC's rules explicitly prohibit regulation of "the number or manner of operation of access channels," [emphasis supplied] the rules relate only to these channels and not to the system's total channel capacity. As a result, a franchising authority probably is free to require a channel capacity greater than the FCC's minimum, if it can demonstrate any rational basis for the requirement. In reconsidering the rules, the FCC commented that:

\footnote{47 C.F.R. § 76.251(a)(11)(iv) (1972), printed in Cable Television Report and Order at 3289.}
The question has arisen whether we have preempted the area of channel capacity so that local governmental entities could not require more than twenty channel capacity or more than required under the equal bandwidth rule, Section 76.251(a)(2). We believe that our requirement for expansion of channel capacity will insure that cable systems will be constructed with sufficient capacity. However, if a local governmental entity considers that greater channel capacity is needed than is required under the rules, we would not foreclose a system from meeting local requirements upon a demonstration of need for such channel capacity and the system's ability to provide it.42

INTERCONNECTION OF SYSTEMS

A question also arises about whether local franchising authorities can require interconnection of systems. In its Cable Television Report and Order the FCC is silent about this issue. But the previously discussed ban on local "rules concerning the number or manner of operation of access channels" (emphasis supplied) could be interpreted as restricting the power to require interconnection, since interconnection could affect the manner of operation. Interconnection is certainly important in supporting new services that need a large subscriber base. Though the FCC has not yet passed on the issue, its comments on reconsideration of the rules indicate that the issue is at least still open:

The National Association of Educational Broadcasters is concerned with how cable is to develop and assure the interconnection of franchise areas (regionally or statewide) and the adequate planning of equitable service expansion from urban to rural areas. Petitioner argues that local officials may not be able to meet such a challenge for compatible development and interconnection across political boundaries. Again, we feel that it would be premature to codify such rules as the petitioner suggests. However, we do agree with the NAEB that such guidelines should be identified as a priority problem for the Cable Television Advisory Committee on federal-state/local relationships.46

If local authorities ultimately are permitted to require interconnection, they should keep in mind a caveat: though very important for services requiring a large subscriber base, interconnection involves a cost that could get out of hand if the franchise language is written too broadly. An example of this risk can be seen in the language of the American Civil Liberties Union's Model Code:

Each franchisee must interconnect its cable system with all other contiguous cable systems, and may interconnect with any other system or service,

42 Reconsideration Opinion and Order at 13848, n. 25. The FCC continues in the same footnote: "A similar question has been raised with respect to two-way capability. We find no reason why a cable operator wishing to experiment with a more sophisticated two-way capability than that which we have required should be precluded from doing so. However, we do not believe that franchising authorities should require more than we have provided for in our rule because it is possible that any such requirement will exceed the state of the art or place undue burdens on cable operators in this stage of cable development in the major markets. Where a franchising authority has a plan for actual use of a more sophisticated two-way capability and the cable operator can demonstrate its feasibility both practically and economically we will consider, in the certificating process, allowing such a requirement."

46 Ibid. at 13862.
in such a way that subscribers can receive all channels of all interconnected systems at any time. [Emphasis supplied.]

The cost of interconnecting systems to provide all channels of all contiguous systems could be very great. For example, if each system has 20 channels, the interconnection network would require a 20-channel capacity in each direction between contiguous systems—an endeavor that could be extraordinarily expensive and also require perhaps more radio spectrum space (if microwave links are employed) than is available. 47

As one example of past kinds of interconnection provisions, the New York City franchises specify:

For the purpose of permitting the transmission of signals throughout the City the Company shall interconnect its System with any other broadband communications facility authorized by the Board to operate in an adjacent district. Such interconnection shall be made within sixty (60) days from the effective date of this contract with the System presently operated in the southern portion of Manhattan by Sterling Information Services Ltd. Within four (4) years the Company’s System shall be capable of interconnection with any broadband communications facility authorized by the Board in an adjacent district and with any adjacent community antenna television system (as defined by the F.C.C.) outside the City; actual interconnection may be ordered by the Director of Franchises upon reasonable terms and conditions.

New York City’s approach thus is somewhat more selective than the ACLU’s, since it requires interconnection only with the City’s other systems and does not specify carriage of an inflexible number of channels.

FRANCHISE FEES

Because of today’s prevalent financial pressures, many cities view cable television as merely another convenient source of revenue. Competing franchise applicants often find themselves offering higher and higher fees to sweeten their bids.

Yet the FCC and many other groups have expressed great concern about franchise competitions’ tendency to be based on fees. The operator can be squeezed so badly that his ability to serve the public is curtailed severely. The FCC notes that:

... we believe some provision is necessary to insure reasonableness in this respect. First, many local authorities appear to have exacted high franchise fees more for revenue-raising than for regulatory purposes. Most fees are about 5 or 6 percent, but some have been known to run as high as 36 percent.

The ultimate effect of any revenue-raising fee is to levy an indirect and regressive tax on cable subscribers. Second, and of great importance to the Commission, high local franchise fees may burden cable television to the extent that it will be unable to carry out its part in our national communications policy. Finally, cable systems are subject to substantial obligations under our new rules and may soon be subject to congressionally-imposed copyright payments. We are seeking to strike a balance that permits the achievement of Federal goals and at the same time allows adequate revenues to defray the costs of local regulation.

... It is our judgment that maximum franchise fees should be between 3 and 5 percent of gross subscriber revenues. But we believe it more appro-

** For a discussion of interconnection costs, see Johnson et al., op. cit., Paper 1, pp. 29-31.
appropriate to specify this percentage range as a general standard, for specific local application. When the fee is in excess of 3 percent (including all forms of consideration, such as initial lump sum payments), the franchising authority is required to submit a showing that the specified fee is appropriate in light of the planned local regulatory program, and the franchisee must demonstrate that the fee will not interfere with its ability to meet the obligations imposed by our rules.48

The FCC places this limitation only on subscriber revenues. In its rules it says nothing about limitations on fees from leased channels, advertising, and other sources of revenue. More recently, however, the Chief of the Cable Television Bureau has stated in answer to a question from a cable operator that franchise fees are to be computed only on the basis of regular subscriber revenues:

Q. May a franchising authority impose a franchise fee based upon revenues derived from "auxiliary" services such as advertising revenues, leased channel revenues, pay cable revenues, etc.?

A. No---Subscriber revenues are considered to be those revenues derived from regular subscriber services---i.e., the carriage of broadcast signals and required non-broadcast services.49

Unless modified as circumstances warrant, this policy could create problems in the future. If new services thrive, it may be possible for cable operators to reduce regular subscriber rates, perhaps eventually to zero, with most or all revenues generated by special services. Unless franchisee fee ceilings take into account the development of new services, there could be a forced reduction in fees through time. For the moment, franchising authorities will need to keep this restriction carefully in mind. The state of uncertainty they are left with will be clarified through time as the FCC issues, or refuses to issue, certificates of compliance.

An example of the problem posed by the new FCC rules is the language of the grandfathered New York City franchises:

As compensation for this franchise the Company shall pay the City amounts equal to the following:

(i) Five percent (5%) of its Gross Receipts from provision of Basic Service to Residential Subscribers, starting on the effective date of this contract, but not less than the following minimums for the calendar years specified:

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<thead>
<tr>
<th>Year</th>
<th>Minimum</th>
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<tr>
<td>1971</td>
<td>$75,000</td>
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<td>1972</td>
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<td>1973</td>
<td>125,000</td>
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<td>1978</td>
<td>300,000</td>
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<tr>
<td>1979-1989</td>
<td>350,000</td>
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</tbody>
</table>

In 1990, $350,000 pro-rated from January 1 to the twentieth anniversary of this contract; and

(ii) Ten percent (10%) of all its other Gross Receipts; and

(iii) When and if Pay Television is authorized, the percentage of the Gross Receipts therefrom, or other compensation, determined pursuant to Section 4(1).

48 Cable Television Report and Order at 3276-77.
49 Letter No. 4000U from Chief, Cable Television Bureau, to Edward M. Allen, August 11, 1972.
When and if so authorized, the Company shall not engage in, nor deliver the signals of any person engaged in, Pay Television until the amount of compensation payable to the City by the Company or other person engaged in Pay Television has been fixed by the Board. Such compensation shall not exceed twenty-five (25) percent of the Gross Receipts attributable to such Pay Television.

If this approach were followed in drafting new franchises, it would raise several questions for local authorities:

- The 5 percent of gross receipts from basic service exceeds 3 percent and thus would require a special showing that the fee "is appropriate in light of the planned local regulatory program" and "that the fee will not interfere with its [the system's] ability to meet the obligations imposed by our rules." New York City's relatively elaborate cable regulatory framework—including a new Office of Telecommunications—may provide a sufficient basis for justifying the 5-percent fee. It remains to be seen whether other cities, particularly smaller communities, will have regulatory programs justifying an additional fee.

- The inclusion of fees on gross receipts from new services (10 percent in New York City's case) would run afoul of the policy discussed above.

- Similarly, fees on pay television (a maximum of 25 percent in the case of New York City) would be contrary to FCC policy.

- To follow New York City's approach in specifying flat minimum fees for the duration of the franchise conceivably might run afoul of the FCC rules, under which the franchise fee includes "all forms of consideration, such as initial lump sum payments." (Since the New York City minimums fall below the 3-percent mark for the present, however, no problem exists in this particular case.)

- With respect to the franchise fee ceilings of 3 to 5 percent, and the possibilities of extending fees to include special services, the requirements for a waiver are unclear. Nevertheless, some generalizations are possible. A petition should emphasize heavily any activities that the franchising authority undertakes in relation to cable—e.g., public hearings, publication of notice, conferences with concerned citizens, disposition of subscriber complaints, etc.—in addition to the normal processes of drafting the franchise and monitoring the system's performance. Though the FCC has not addressed the issue, presumably any expenses incurred in the prefranchise process could be included in the franchise fee either as a flat payment or on an amortized basis. In addition, the franchising authority may need to justify requirements of production facilities as "regulatory," as previously discussed. To do so, the franchising authority should keep records as to the facilities' use and perhaps at least initially use them to inform subscribers and nonsubscribers about cable and its regulation.

In light of these uncertainties, what should local franchise authorities do? One recourse is to play it safe and adopt provisions similar to those of the Beverly Hills franchise—but to make clear that annual gross receipts include only those for "regular" subscriber services as discussed above.

Grantee shall pay to the City of Beverly Hills for each calendar year or fraction thereof during the term of this franchise, three (3%) percent of the gross annual receipts from operation of the proposed service; provided, that every such annual payment shall not be less than One Thousand Five Hundred Dollars ($1,500.00)."
In such a case no special showing would be required for the FCC.

Another approach is to waive an annual fee in favor of a relatively small fixed sum plus expenses incurred for granting the franchise—an approach illustrated by the San Mateo franchise.

Fees and Payments. Peninsula [Cable Company] shall pay City the sum of thirty thousand dollars ($30,000) for the rights vested by this franchise. Said payment will be made prior to the exercise of any rights hereby granted and is separate and distinct and will not relieve Peninsula from any payment due City under the terms of this franchise or Article 121 of the San Mateo Ordinance Code, 1959 Edition. Further, Peninsula will reimburse City for all expenses incurred by it in connection with the granting of this franchise, including but not limited to costs incurred by members of the City staff and its consultant, Donald R. Atwell & Associates, Inc. Such payment to be made upon billing and prior to exercising any rights hereunder.

As noted above, a lump-sum payment for a franchising authority’s prefranchise expenses presumably would be included in the franchise-fee ceiling.

Another approach is to provide for higher annual fees, in the neighborhood of 5 percent, and to establish a regulatory program that would justify the excess in the eyes of the FCC. This could include the same or higher fee schedules for new services, such as advertising and pay movies. At worst, if the FCC rejects the application, the local franchising authority could set lower, more acceptable fees.

Yet another possibility is to specify a fee of perhaps 5 percent, some or all of which will go into a fund to finance local television programming by community groups. The FCC has expressed its concern about high franchise fees in terms of funds that simply go into the city’s general coffer. Its reaction is unclear as to proposals for relatively high fees that are channeled into public service programming or other activities that directly benefit cable subscribers.

Finally, the franchise should include provisions to cover the consequences of the FCC’s refusal to authorize a fee. These might take the form of a simple reservation of power clause, which would allow the franchising authority to set a new fee. Or they might specify a particular fee in the event of FCC disapproval. However, the latter approach might undermine the franchising authority’s plea for a higher fee and thus invite the FCC to disapprove it. 51

PROVISIONS FOR TRANSFER OF FRANCHISE

A major issue is the question of sale and of ownership transfer of the cable system. Cable franchises are attractive properties and there is a strong market in them. Nothing in the federal rules speaks directly to what happens when the cable operator sells the franchise. How does the sale affect the certificate of compliance? The issue is particularly important where a community values local ownership or minority ownership or is placing great faith in the cable operator to perform in the field of local programming. Community groups with these interests should make sure that the certificate of compliance places strict conditions on transferability that meet community needs. At the least, the application for the certificate should spell out and the certificate should confirm what procedures will be followed and what

51 For additional discussion of the limitation on franchising fees, see Rivkin, op. cit., Sec. 4.217.
standards applied on the transfer of a certificate. In this respect, the NIMLO Model Ordinance contains useful language:

The grantee shall not transfer this Franchise to another person without prior approval of the City by ordinance.

In order that the City may exercise its option to take over the facilities and property of the CATV system authorized herein upon expiration or forfeiture of the rights and privileges of the grantee under this Franchise, as is provided for herein, the grantee shall not make, execute, or enter into any deed, deed of trust, mortgage, conditional sales contract, or any loan, lease, pledge, sale, gift or similar agreement concerning any of the facilities and property, real or personal, of the CATV business within prior approval of the City Council upon its determination that the transaction proposed by the grantee will not be injurious to the rights of the City under this Franchise. Provided, however, that this section shall not apply to the disposition of worn out or obsolete facilities or personal property in the normal course of carrying on the CATV business.

Except as provided for in subsection (a) immediately above, the grantee shall at all times be the full and complete owner of all facilities and property, real and personal, of the CATV business.

Prior approval of the City Council shall be required where ownership or control of more than 30% of the right of control of grantee is acquired by a person or group of persons acting in concert, none of whom already own or control 30 percent or more of such right of control, singularly or collectively. By its acceptance of this Franchise the grantee specifically grants and agrees that any such acquisition occurring without prior approval of the City Council shall constitute a violation of this Franchise by the grantee.

Thus, the franchise requires the franchising authority's approval for three separate types of transfers: of the franchise, of ownership of tangible property, and of control of the franchisee's corporate entity. Although the franchise touches all major bases, its language might be more specific. First, the prohibition on any "transfer" of the franchise is unclear; it should include any arrangement relating to transfer, such as an agreement to transfer the franchise in the future or a covenant not to seek renewal. Second, and more important, the 30 percent of "control" figure is both too high and too ambiguous. In many public corporations, far less than 30 percent of the stock constitutes effective control; moreover, the franchise does not make clear whether "control" includes devices such as stock options, shareholder agreements, etc. As a result, the franchise should speak in both broad and narrow terms, in order to give the franchising authority maximum flexibility.

The New York City franchises provide an example of more detailed transfer provisions:

This franchise shall not be assigned or transferred, either in whole or in part, or leased, sublet, or mortgaged in any manner, nor shall title thereto, either legal or equitable, or any right, interest or property therein, pass to or vest in any person, either by the act of the Company or by operation of law, without the consent of the Board. The granting, giving or waiving of any one or more of such consents shall not render unnecessary any subsequent consent or consents.

The consent or approval of the Board to any assignment, lease, transfer, sublease, or mortgage of this franchise shall not constitute a waiver or release of the rights of the City in and to the streets.

The Company shall promptly notify the Board of any actual or proposed change in, or transfer of, or acquisition by any other party of, control of the Company. The word "control" as used herein is not limited to majority stock ownership, but includes actual working control in whatever manner exercised. Every change, transfer or acquisition of control of the Company shall make this franchise subject to cancellation unless and until the Board shall have consented thereto. For the purpose of determining whether it shall consent to such change, transfer or acquisition of control, the Board may inquire into the qualifications of the prospective controlling party, and the Company shall assist the Board in any such inquiry. If the Board does not schedule a hearing on the matter within sixty (60) days after notice of the change or proposed change and the filing of a petition requesting its consent, it shall be deemed to have consented. In the event that the Board adopts a resolution denying its consent and such change, transfer
or acquisition of control has been effected, the Board may cancel this franchise unless control of the
Company is restored to its status prior to the change, or to a status acceptable to the Board.

Nothing in this Section shall be deemed to prohibit a mortgage or pledge of the System, or any part
thereof, or the leasing by the Company from another person of said System, or part thereof, for financing
purposes or otherwise. Any such mortgage, pledge or lease shall be subject and subordinate to the rights
of the City under this contract or applicable law.

By considering “actual working control,” rather than a set percentage of stock,
the New York franchises give the franchising authority considerable flexibility in
dealing with corporate changes that have a de facto effect on the system’s control.
The combination of this broad standard and the NIMLO franchise’s specific stand-
ard therefore may be advisable.

The Akron franchise includes a much briefer provision for transfer but with the
interesting feature that, in no event, shall a transfer take place within 5 years:

The Company shall not assign or in any manner transfer the rights granted by this franchise
whether by stock assignment or otherwise in such a manner as to effectively transfer control of such
rights except by future consent ordinance of The City of Akron at any time and in no event for a period
of five (5) years from the effective date of this ordinance; nor shall these rights be assignable or transfer-
able in any bankruptcy proceedings, trusteedship, receivership, but same shall not be intended to prevent
transfer by operation of law by merger or consolidation, and said franchise shall terminate forthwith
upon such assignment or transfer.

PERFORMANCE BONDS

To help ensure that the cable operator performs in accordance with the fran-
chise, most franchises include a performance bonding arrangement. In drafting
these provisions, the franchisor must realize that performance bonding is not a
cure-all. Serious disagreements can arise between the franchisor and the cable
operator about the meaning of “adequate performance.” The operator may fall
behind his construction schedule for reasons that he alleges are beyond his control,
but that the franchisor thinks could have been avoided had the operator used better
judgment. If the system does not meet technical standards, the cable operator may
argue that the fault lies not with him, but with equipment manufacturers; the
franchising authority’s technical consultants may counter by arguing that the fault
lies with improper system design, of which the cable operator should have been
aware early in construction. These are but a few examples of the many disagree-
ments that the performance bonding approach cannot resolve.

An example of existing provisions comes from the San Mateo franchise:

Pursuant to Section 121.14 of the San Mateo Ordinance Code, Peninsula will, at the time this
franchise is accepted, file its bond in the amount of $200,000. Upon final completion of the system, said
bond may be reduced to $20,000.

Besides not specifying standards or procedures for measuring performance, this
provision raises a question of what constitutes “final completion” of a system. Sys-
tems constantly are being upgraded; a few miles of plant are strung as new housing
developments are built or as new sections are added to the franchise area. If the
amount of the performance bond is to be reduced after system completion, specific
numbers must define completion. For example, a franchise might require that 95
percent of the *existing* homes within the existing franchise area be passed by cable within a period of four years after the franchise is signed.

The NIMLO formulation may be useful in drafting the franchise:

The grantee shall maintain, and by its acceptance of this Franchise specifically agrees that it will maintain throughout the term of this Franchise a faithful performance bond running to the City, with at least two good and sufficient sureties approved by the City, in the penal sum of $— conditioned that the grantee shall well and truly observe, fulfill, and perform each term and condition of this Franchise and that in case of any breach of condition of the bond, the amount thereof shall be recoverable from the principal and sureties thereof by the City for all damages proximately resulting from the failure of the grantee to well and faithfully observe and perform any provision of this Franchise.

Again, the NIMLO wording raises the problem of determining what constitutes a breach of the bond's conditions. Moreover, its talk of "damages proximately resulting" from the cable operator's default may create difficulties by importing the notion of proximate cause from an unrelated area of the law; though a cable operator's poor performance may run against the public interest, it may not damage identifiable people or institutions.

Although performance bonds are one useful tool in insuring high-quality service by a cable operator, their administrative difficulties and overkill potential make them an enforcement mechanism that franchising authorities will be slow to use—much like franchise renewals. As a result, a system of easily administered monetary penalties for specific violations may be a useful supplement, along with arbitration procedures as discussed previously.

LIABILITY FOR DAMAGES BY THE CABLE OPERATOR

In addition to performance bonding, cable operators typically must carry liability insurance and agree to indemnify the franchising authority for any legal liability on its part. In this regard the NIMLO Model Ordinance is a useful guide:

1. (a) The grantee shall pay and by its acceptance of this Franchise the grantee specifically agrees that it will pay all damages and penalties which the City may legally be required to pay as a result of granting this Franchise. These damages or penalties shall include, but shall not be limited to, damages arising out of copyright infringements and all other damages arising out of the installation, operation, or maintenance of the CATV system authorized herein, whether or not any act or omission complained of is authorized, allowed, or prohibited by this Franchise.

   (b) The grantee shall pay and by its acceptance of this franchise specifically agrees that it will pay all expenses incurred by the City in defending itself with regard to all damages and penalties mentioned in subsection (a) above. These expenses shall include all out-of-pocket expenses, such as attorney fees, and shall also include the reasonable value of any services rendered by any employees of the City.

   (c) The grantee shall maintain, and by its acceptance of this franchise specifically agrees that it will maintain throughout the term of this Franchise liability insurance insuring the City and the grantee with regard to all damages mentioned in subparagraph (a) above in the minimum amounts of (1) $— for bodily injury or death to any one person, within the limit, however, of $— for bodily injury or death resulting from any one accident; (2) $— for property damage resulting from any one accident; (3) $—- for the infringement of copyrights; and (4) $—- for all other types of liability.

The Akron franchise provides an example of actual amounts of insurance required:
The amounts of such insurance against liability due to physical damages to property shall not be less than One Hundred Thousand Dollars ($100,000) as to any one accident, and not less than Two Hundred Thousand Dollars ($200,000) aggregate in any single policy year, and against liability due to bodily injury or to death of persons not less than Two Hundred Thousand Dollars ($200,000) as to any one accident, and not less than Five Hundred Thousand Dollars ($500,000) as to any one accident. The Company shall also carry such insurance as it deems necessary to protect it from all claims under the Workmen's Compensation Laws in effect that may be applicable to the Company. All insurance required by this Agreement shall be in full force and effect for the entire life of this ordinance. Said policy or policies of insurance or a certified copy or copies thereof shall be approved by the Director of Law of said City and be deposited with and kept on file in the office of said Director.

REPORTING REQUIREMENTS

A franchise clearly should specify the kinds of data the cable operator must make available to local authorities. The new FCC rules will make available much important information since they require cable operators not only to file detailed statements with their applications for certificates or compliance, but also to file annual reports about their ownership and programming. Nevertheless, the local franchising authority should reserve the power to require its own reports, since it may need more detailed or more frequent information than the FCC.

The NIMLO Model Ordinance provides guidance, but deals almost exclusively with the filing of financial accounts:

The grantee shall file with the City Clerk true and accurate maps or plots of all existing and proposed installations.

The grantee shall file annually with the City not later than sixty days after the end of the grantee's fiscal year, a copy of its report to its stockholders (if it prepares such a report), an income statement applicable to its operations during the preceding 12 months period, a balance sheet, and a statement of its properties devoted to CATV operations by categories, giving its investment in such properties on the basis of original cost less applicable depreciation. These reports shall be prepared or approved by a certified public accountant and there shall be submitted along with them such other reasonable information as the City Council shall request with respect to the grantee's properties and expenses related to its CATV operations within the City.

The grantee shall keep on file with the City a current list of its shareholders and bondholders.

The ACLU Model Code goes further in requiring extensive financial disclosure and reporting of action taken regarding customer complaints:

Each franchisee shall file with the Commission quarterly reports signed by a Certified Public Accountant, on gross revenues. Each franchisee shall also allow its franchisor and the Commission to audit all of its accounting and financial records upon reasonable notice; it shall also make available all of its plans, contracts, and engineering, statistical, customer and service records relating to its system and all other records required to be kept hereunder. Each franchisee shall at all times maintain complete and accurate books of account records of its business and operations, and all other records required by this Code. In addition, each franchisee shall file annually with the Commission and its franchisor an Ownership report, indicating all persons who at any time during the preceding year did conduct or benefit from an interest in the franchise of more than 1%, and all creditors, secured and unsecured, in excess of $1,000. The report shall also include all creditors whose accounts were at any time paid in full for a period of greater than two months, together with the reasons therefor. Each franchisee shall also file annually with the Commission and its franchisor copies of such rules, regulations, terms and conditions which it has adopted for the conduct of its business.

All user and other complaints sent to the franchisee, including those forwarded by government agencies, shall be turned over to the Commission and to the franchisor within ten days of mailing, together with the franchisee's response thereto. All complaints to the Commission or franchisor shall be forwarded to the appropriate grantee and answered by each within 10 days of original mailing.
Each grantee shall file with the Commission a quarterly report of all complaints and trouble calls received, and shall include in that report a breakdown of the calls by category, the number of second or subsequent calls on the same complaint, and an average of the period of time required to satisfy each complaint reported.

FRANCHISOR'S RIGHTS

The franchise should include explicit statements of the franchisor's right to inspect the cable system, review the operator's books, and adopt additional provisions. The MVCOCG model franchise provides a number of interesting provisions in these areas:

The franchisor hereby reserves the right to adopt, in addition to the provisions contained herein and existing applicable ordinances, such additional regulations as it shall find necessary in the exercise of its police power; provided, however, that such regulations, by ordinance or otherwise as provided by law, shall be reasonable and not in conflict with the rights herein granted.

The franchisor shall have the right to inspect the books, records, maps, plans, income tax returns, and other like material of the grantee at any time during normal business hours.

The franchisor shall have the right during the life of this franchise to install and maintain, free of charge, upon the poles of the grantee any wire and pole fixtures necessary for a police alarm system, fire alarm system, traffic control system, or other similar system or systems for other governmental functions, on the condition that such wire and pole fixtures do not interfere with the cable television operations of the grantee.

The franchisor shall have the right to supervise all construction or installation work performed under the provisions of this franchise and to make such inspections as it shall find necessary to ensure compliance with the terms of this franchise and other pertinent provisions of law.

At the expiration of the term for which this franchise is granted, or upon its termination and cancellation as provided herein, the franchisor shall have the right to require the grantee to remove at its own expense all portions of the cable television system from all public ways within the franchise area.

CONCENTRATION OF CONTROL

Some franchises prohibit cable operators from leasing, selling, or maintaining television sets. To an extent this reflects pressures from local retailers and repairmen, who fear that cable operators will pose a competitive threat. It also reflects the view that the cable operator's special access to subscribers creates an unfair and quasi-monopolistic competitive element. The Akron franchise illustrates such provisions:

The Company agrees to restrict its operation within the City so as not to compete with the television sales, service and repair industry; that is, it shall not offer nor accept employment directly or indirectly in the repair or servicing of a customer's television set or sets other than the technical servicing that may be needed in the cable installation within the home and its connection to the customer's television set. Nor will the Company engage directly or indirectly in the referral of such repair or servicing to any particular repair or service agency.

The Illinois Commerce Commission emphasizes the alleged unfair competitive aspects of permitting the cable operator to be involved in set sales and leasing:
Most franchises now prohibit cable systems and their affiliates, shareholders, officers and directors from engaging within their franchise areas in the sale, rental or repair of television receivers. This is designed to prevent unfair competitive access to the home, is eminently reasonable, and would appear suitable for adoption by the Commission as its own rule.\(^{53}\)

An earlier Rand study, however, suggests that permitting cable operators to lease sets may reduce their maintenance cost and also stimulate the production of sets specially designed for cable.\(^{54}\)

Recognizing this possibility, the MVCOG franchise prohibits cable operators from engaging in television set leasing, sales, and repair in the short term, but leaves the door open for developing integrated services in the long term:

(a) The grantee shall not engage in the business of selling, repairing, or installing television receivers, radio receivers, or accessories for such receivers within the franchise area.

(b) Failure of the grantee to honor its obligation under subsection (a) shall be a material breach of this franchise.

(c) The provision in subsection (a) above may be renegotiated after five years at the option of the franchisor to allow the grantee the non-exclusive right to sell, lease, and service television receivers.

Some local franchising authorities also may be concerned with preventing a cable system from becoming a minor cog in the wheels of a giant conglomerate communications corporation. These fears appear to be justified, since the trend toward cross-ownership and common ownership of cable systems is strong. At least fifty percent of existing cable systems are owned by broadcasting or publishing interests. This tendency probably stems from the existing media's desire not only to neutralize possible competition, but also to share cable's potential profits. As a result, a local franchising authority may wish to prohibit cross- or common ownership of a local cable system. The New York City franchises provide a good example:

Neither the Company nor any officer or director of the Company shall hold, directly or indirectly, any stock or other beneficial ownership interest in any other company owning or operating a System within the City; any radio or television broadcast station whose signals are carried on the System on a regular basis; any television broadcast network other than a network consisting entirely or substantially of community antenna television systems; or any newspaper or magazine whose principal circulation market is New York City, except that ownership by an officer or director of less than one percent (1%) of the outstanding stock of any company whose securities are listed or admitted to trading on a national securities exchange shall not be deemed a violation of this Section. No officer or director of the Company shall be an officer or director of any company owning or operating businesses of the types hereinafter mentioned.

So far, the FCC has taken relatively little action to prevent concentration of control, by imposing bans on cable ownership only by networks, local television stations, and telephone companies. It is unclear whether the FCC's rules preempt local governments in adopting more extensive cross-ownership restrictions. As a result, provisions like the above may require FCC approval.

**MAINTENANCE OF HOME ANTENNAS**

Some franchises require cable operators to give subscribers the option of easily switching back to their own antennas. This puts the cable operator under additional

\(^{53}\) *Notice of Inquiry*, p. 41.

\(^{54}\) See Johnson et al., op. cit., Paper 9, pp. 51-61.
pressures to give good service. The Illinois Commerce Commission provides useful guidelines in this respect:

The Commission believes that subscribers who wish to retain their own antennas for television broadcasts should be free to do so. Operators will therefore be required to provide, on request and without additional charge, a switching device allowing a subscriber to use his own television antenna as he chooses. Operators will not be permitted to require the removal, nor offer to remove, any existing antenna as a condition of providing cable service.**

EMERGENCY USE

Language drawn from the New York City franchises and from the NIMLO Model Ordinance, respectively, provides useful guides covering the use of cable systems in emergencies:

In the event of an emergency situation, as determined by the Director of Communications, the City may interrupt signals otherwise being distributed by the Company for the delivery of signals necessitated by such emergency.

In the case of any emergency or disaster, the grantee shall, upon request of the franchisor make available its facilities for emergency use during the emergency or disaster period.

SEPARABILITY OF CLAUSES, COMPLIANCE WITH APPLICABLE LAWS

As noted before in relation to several particular issues, the franchising authority should reserve rulemaking power to cope with new developments. The MVCOC model franchise provides good examples of miscellaneous legal provisions and of methods for modifying the franchise in accordance with future FCC regulations.

If any section, subsection, sentence, clause, phrase, or portion of this franchise is for any reason held invalid or unconstitutional by any court of competent jurisdiction, such section shall be deemed a separate, distinct, and independent provision and such holdings shall not affect the continued effectiveness or validity of the remaining portions hereof.

At all times during the life of this franchise, the grantee shall be subject to all lawful exercise of the police power by the franchisor and to such reasonable regulation as the franchisor shall hereafter provide.

In addition to any provision of this franchise, and notwithstanding any provision thereof, the grantee shall comply with all applicable state and federal laws and with all applicable regulations of the Federal Communications Commission.

This franchise shall incorporate any modifications made by the Federal Communications Commission in its regulations concerning franchise standards. If such incorporation is required by said regulations, should such modification require a substantive provision not delineated in the regulations, the grantee and the franchisor shall negotiate such additional term. If agreement is not reached, the provision shall be determined in accordance with the procedure in Section 25(f).

** Notice of Inquiry, p. 30.
RECEIVERSHIP

Although many franchises do not cover this area, the franchising authority should take into account the contingencies of receivership, reorganization, and bankruptcy. The language of the New York City franchises may provide a useful guide:

The Board shall have the right to cancel this franchise one hundred and twenty (120) days after the appointment of a receiver, or trustee, to take over and conduct the business of the Company, whether in receivership, reorganization, bankruptcy, or other action or proceeding, unless such receivership or trusteeship shall have been vacated prior to the expiration of said one hundred and twenty (120) days, or unless:

1. within one hundred and twenty (120) days after his election or appointment, such receiver or trustee shall have fully complied with all the provisions of this contract and remedied all defaults thereunder; and,
2. such receiver or trustee, within said one hundred and twenty (120) days shall have executed an agreement, duly approved by the court having jurisdiction in the premises, whereby such receiver or trustee assumes and agrees to be bound by each and every provision of this contract.

Though giving the receiver a chance to remedy the system's defaults seems fair, this provision's lack of standards may create conflict as to whether or not the receiver has succeeded; moreover, 120 days may be too short a time in which to cure an already ailing system.

CANCELLATION AND EXPIRATION

The franchise clearly should provide for cancellation and expiration of the franchise, including terms under which the system is to be purchased by the city or by another grantee. The New York City franchises go into particularly great detail:

(a) The Board shall have the right to cancel this franchise if the Company fails to comply with any material and substantial provision of this contract, or any reasonable order, direction or permit issued by any City agency pursuant to such material and substantial provision, or any rule or regulation promulgated by the Director of Franchises which is reasonable in light of, and consistent with, any provision of this contract; or if the Company persistently fails to comply with any provision of this contract, or any reasonable order, direction or permit issued by any City agency pursuant to any provision of this contract. Such cancellation shall be by resolution of the Board duly adopted in accordance with the following procedures:

1. The Director of Franchises shall notify the Company of the alleged failure or persistent failure of compliance and give the Company a reasonable opportunity to correct such failure or persistent failure or to present facts and argument in refutation of the alleged failure or persistent failure.
2. If the Director of Franchises then concludes that there is a basis for cancellation of the franchise pursuant to this subdivision (a), he shall notify the Company thereof.
3. If within a reasonable time the Company does not remedy and/or put an end to the alleged failure or persistent failure the Board, after a public hearing on notice, may cancel the franchise if it determines that such action is warranted under this subdivision (a).

(b) If for ten (10) consecutive days the System, or any part thereof, is inoperative, or if the same is inoperative for thirty (30) days out of any consecutive twelve (12) months, the Board may cancel this franchise.
(c) The Company shall not be declared in default or be subject to any sanction, under any provision of this contract in any case in which the performance of any such provision is prevented for reasons beyond its control.

(d) If all or any part of the streets within the District are closed or discontinued as provided by statute, then this franchise, and all rights and privileges hereunder with respect to said streets or any part thereof so closed or discontinued, shall cease and determine upon the date of the adoption of the map closing and discontinuing such streets, and the Company shall not be entitled to damages from the City due to the closing or discontinuance of such streets or for injury to any part of the System in the streets or for the removal or relocation of the same.

(e) If the System is taken or condemned pursuant to law, this franchise shall, at the option of the Board, cease and determine on the date of the vesting title pursuant to such taking or condemnation, and any award to the Company in connection with such taking or condemnation shall not include any valuation based on this franchise.

(f) Upon cancellation or expiration of this franchise, the City shall have the right to purchase the System in accordance with subdivision (g) of this Section, and the Board may direct the Company to cease operation of the System. If the City elects to purchase the System, the Company shall promptly execute all appropriate documents to transfer title to the City, and shall assign all other contracts, leases, licenses, permits and any other rights necessary to maintain continuity of service to the public. The Company shall cooperate with the City, or with another person authorized or directed by the Board to operate the System for a temporary period, in maintaining continuity of service. Nothing herein is intended as a waiver of any other rights the City may have.

(g) If this franchise;

1. is cancelled by the Board by reason of the Company's default, that part of the System located in the streets shall, at the election of the City, become the property of the City without any charge therefor; that part of the System not located in the streets shall, at the election of the City become the property of the City at a cost not to exceed its then book value (i.e., cost less accumulated depreciation) according to generally accepted accounting principles, with a reduction for any damages incurred by the City in connection with such cancellation. Such book value if not agreed upon, shall be determined by arbitration pursuant to Section 20 of this contract, but shall not include any valuation based upon this franchise. Damages incurred by the City shall include without limitation, any payments made by the City pursuant to a resolution of the Board authorizing or directing another person to operate the System for a temporary period until a franchise therefor is granted.

2. terminates by expiration of its term, the purchase price to the City for the System shall be its then fair value as determined by arbitration held pursuant to Section 20 of this contract. Beginning within two years prior to expiration and whether or not the City has then elected to purchase the System, either the City or the Company may demand an arbitration pursuant to Section 20 of this contract, for the purpose of determining fair value of the System on the date arbitration was demanded which determination shall be subject to correction or adjustment by the arbitrator to reflect the fair value on date of expiration, to be paid by the City if it elects to purchase the System. Such fair value shall be the fair value of all tangible and intangible property forming part of the System but shall not include any valuation based upon this franchise. If the City does not purchase the System, the Company shall remove that part of the System located in the streets and restore the streets to a condition satisfactory to the Commissioner of Highways.

(h) Upon the cancellation by the Board, or upon the expiration, of any other franchise to construct, maintain and operate a broadband communications facility, the Board may, by resolution, direct the Company to operate the same for the account of the City for a period of six (6) months and the Company agrees to comply with such direction. The City shall pay the Company all reasonable and necessary costs incurred by it in operating such broadband communication facility.

Though comprehensive in their scope, the New York City provisions illustrate difficulties as to both the procedures and terms of franchise termination. First, the standards for franchise termination (such as what does and does not constitute "default") are necessarily a matter of interpretation. They cannot be made significantly more specific by any reach of the draftsman's pen. As a result, the fairness of any franchise termination will depend largely on the good faith of the franchising authority and of the cable operator.
Second, Subsection g’s provisions for compensation of the operator upon franchise termination are severe. If the franchising authority “cancels” the franchise “by reason of the Company’s default,” the cable operator forfeits his trunk, feeder lines, and droplines “in the streets” and receives no more than “book value” for his other equipment. A cable system’s largest investment is in its lines, and the book value of other equipment probably will be quite low, since most cable operators use accelerated depreciation practices. As a result, cancellation may amount to virtual confiscation—a remedy so severe that a franchising authority would be most reluctant to invoke it. Similarly, the system’s book value—as opposed to fair market value—also is likely to be low, once again putting the franchising authority under pressure not to cancel the franchise.

One alternative approach would be to adopt a “fair market value” standard. A second would be to set a purchase price at the very beginning in the franchise itself, such as a given percentage of the purchase price of the system’s equipment and with the percentage adjusted in accordance with the equipment’s age. A third would be to offer the system to the highest bidder acceptable to the franchising authority, with all proceeds going to the original franchisee. These approaches would not only give the cable operator more security, but also provide the franchising authority with a pragmatically usable enforcement mechanism.
IV. CONCLUDING REMARKS

As even the most cursory reading of this report indicates, the franchising process is complex, difficult, and frustrating. Nevertheless, local governments and community groups must plunge into it deeply and immediately. Well-conceived decision-making is important at this early stage of the industry’s development. Since hindsight is clearer than foresight, this report does not begin to cover the myriad problems yet to be discovered, let alone resolved. Nevertheless, local franchising authorities must wield a better-informed and more sophisticated hand now than they did in the past.

In pursuing this process, franchising authorities must keep carefully in mind that in certain areas the FCC has constrained the range of local decisionmaking. In particular, the FCC has imposed strong requirements with respect to maximum franchise fees, duration of franchise, broadcast signals to be carried, minimum channel capacities, and allocation of free channels. At the same time, local franchising authorities have wide latitude in setting rates for services, specifying the facilities for local program origination, and defining geographic boundaries within which one or more cable systems are to operate. Within the range of choice open to franchising authorities, many hard decisions remain.

Moreover, local authorities will need to pay attention to activities at the state level. An increasing number of states are expressing interest in regulating cable to one degree or another. Some states have preempted functions that otherwise would be undertaken at the local level. Regardless of how these activities are split between state and local jurisdictions, the basic considerations discussed in this report will be of paramount concern to whoever is to bear the responsibilities, at either the local or state level, for discharging these tasks.
Appendix A

CHECKLIST OF MAJOR ELEMENTS IN THE FRANCHISING PROCESS

This checklist serves not only as a short summary of this report, but also as an easy means for local governments and citizen groups to evaluate their franchising process. Two caveats are in order, however. First, by its very nature this checklist is highly abbreviated. Any real analysis of an issue requires reading the relevant portion of this report as well as other materials. Second, not all the steps and standards noted here will be appropriate for all localities. This report is intended not as a master plan for all communities, but rather an exposition of major considerations and alternatives. Each community must choose its own steps and standards.

I. The Process of Franchising

- To select a cable operator, has the franchising authority decided to use:
  - the "negotiation" approach?
  - the "competitive bid and award" approach?
  - a variant of the two?

- Has the franchising authority adopted a detailed procedural framework to govern the drafting and award of the franchise?

- Does this procedural framework require that at all major decisional points the franchising authority:
  - hold meaningful public hearings?
  - give effective public notice?
  - publish a written opinion explaining any decision it reaches?

- Has the franchising authority considered multiple versus single system ownership?

- Has the franchising authority used some means—e.g., Council of Governments, regional authority, state agency—to communicate with neighboring jurisdictions concerning their franchising policies?
• Has the franchising authority considered the advantages and disadvantages of commercial, noncommercial, mixed commercial and noncommercial, and municipal system ownership?

• Has the franchising authority held hearings on and adopted a draft franchise that indicates which provisions are open to bids?

• Has the franchising authority drafted and disseminated a request for proposals (RFP) as widely as possible?

• Does the RFP require full disclosure of the applicant’s financial, ownership, character, technical, and other qualifications?

• Has the franchising authority independently analyzed the area’s economic potential for cable and compared all proposals with its findings?

• Has the franchising authority analyzed each applicant’s financial ability to deliver its proposed service?

• Has the franchising authority given effective public notice, held meaningful public hearings, and published a written opinion in selecting an applicant for the final franchise award?

• Is the franchising authority prepared to:
  — join the cable operator in making any necessary special showings to the FCC?
  — oppose the cable operator’s application for a certificate of compliance from the FCC?

II. Contents of the Franchise

• Do the prefatory statements state compliance with federal and state law?

• Are the definitions sufficiently precise and comprehensive?

• Does the franchise comply with the FCC’s fifteen-year maximum duration for initial franchises and a “reasonable” period for renewal franchises?

• Is the franchise nonexclusive in terms of geographic coverage?

• Does the franchise give the franchising authority some control over the cable system’s choice of broadcast television signals?

• Does the franchise require the cable operator to construct the system speedily and equitably?

• Does the franchise specify how closely a trunk line must pass each dwelling?
• Does the franchise specify standards as to:
  — underground versus aboveground wiring?
  — quality of underground and aboveground construction?
  — protection of property owners' rights?

• Does the franchise include forceful but workable prohibitions against discrimination in employment practices?

• Does the franchise include technical standards that are specific enough to be enforceable?

• Does the franchise require the cable operator to resolve subscribers' service complaints efficiently and expeditiously?

• Does the franchise include a provision that insures access to apartment houses by the cable operator and protects landlords from property damage?

• Does the franchise provide for:
  — rate-of-return regulation?
  — rate surveillance?
  — no rate control at all?

• Do the franchise's rates or rate control mechanism take into account:
  — differences in underlying costs?
  — power to set rates for new services?
  — periodic rate modifications?

• Do initial installation rates reasonably reflect the cable operator's cost for different subscribers?

• Does the franchise provide for disconnection and reconnection charges?

• Do monthly subscriber service rates reflect:
  — rate differences in serving different subscribers?
  — rate differences for additional outlets in the same home?
  — rate differences in providing TV and FM reception?

• Does the franchise set charges for relocation of outlets within the same dwelling unit?

• Does the franchise specify subscriber billing procedures?

• Does the franchise limit the cable operator's ability to offer reduced rates?

• Does the franchise require more free or preferentially priced channels than the FCC's rules allow?

• Does the franchise prohibit or unduly restrict pay television?

• Does the franchise set a minimum channel capacity?
• Does the franchise provide for interconnection of the cable system with other neighboring systems?

• Does the franchise provide for a fee in excess of the FCC's limitations?

• Does the franchise restrict transfer of the franchise or the cable system?

• Does the franchise include a clear and workable performance bond?

• Does the franchise require the cable operator to disclose necessary information to the franchising authority?

• Does the franchise restrict cross- or common ownership of the cable system?

• Does the franchise require the cable operator to allow a subscriber to switch back to his own antenna easily?

• Does the franchise provide that:
  -- its provisions are severable?
  -- the cable operator will comply with all laws?

• Does the franchise make provision for receivership of the cable system?

• Does the franchise specify fair and realistic standards and procedures for cancellation of the franchise?
Appendix B

SINGLE VERSUS MULTIPLE OWNERSHIP

Does it make much difference whether one or several operators serve the franchise area? This question will be treated with respect to the following major factors:

- Technical capability and interconnection;
- Division of geographic coverage;
- Sharing of program origination facilities;
- Economies of scale;
- Local control;
- Yardsticks for comparing performance;
- Investment requirements and construction schedules;
- Satisfying rival claimants.

TECHNICAL COMPATIBILITY AND INTERCONNECTION

One potential problem of multiple ownership is the difficulty of maintaining adequate compatibility and interconnection among the districts. With separate owners—including private, municipal, or community nonprofit organizations—attaining these goals will not be easy. Some cable operators may install only one cable and put a converter in each home in order to provide 20 to 24 channels. Others may opt for a dual-cable system with a converter in order to provide 40 or so channels. Yet the extent to which a community benefits from a large number of channels in one district will depend on the offerings in other districts. One district's 40-channel capacity will be of limited value if other systems have only 20. For example, colleges and universities may need 5 channels for home instruction, but may have enough capacity only in the 40-channel districts. The benefits of televised instruction would be reduced to the extent that students in 20-channel districts could not be reached. A special continuing medical education channel may be economically feasible only if it covers the entire metropolitan area, but sufficient capacity may exist only in the 40-channel districts.

If this interrelation exists, the separate owners might not necessarily enter a
voluntary agreement to ensure capability and interconnection. First, cable operators may have honest disagreements about how much capacity is needed and what technology is most effective. One operator may conclude that the 20 channels are enough, since this quantity would meet the FCC’s minimum channel requirements. Others may be more optimistic about services and favor 40 channels. These disagreements are apt to be particularly severe if the type of ownership—e.g., public versus private—varies from one district to another. This is not to say that the United States cable industry should be limited to one technology and channel capacity. Diverse technologies (single cable versus dual cable, use of converters, and experiments with switched systems) clearly need to be pursued. Yet within any one jurisdiction, common technical characteristics are essential for the development of services where broad coverage is required. Diversity is best achieved among, not within, separate franchising jurisdictions.

Obtaining voluntary agreement will be troublesome to the extent that cable operators are interested primarily in retransmitting broadcasting signals—as most of the industry is today. For this use 20 channels are more than adequate. Moreover, the cable operator may reason that he can lease additional channels at little or no more than their incremental cost, thus making additional profits zero or very low. He therefore may opt for 20 channels rather than 40. Other operators may be concerned about the longer-term value of additional channel capacity and thus may disagree. Their attempts to provide large capacities may lead to frustration, however, because their additional channels cannot provide services to other districts.

Moreover, unless each operator is bound by a carefully devised and enforced plan for interconnection, he may design his system suboptimally to cover only his district. For example, he may locate his headend at a point that is convenient for his own district, but that has no line-of-sight path for microwave interconnection to other headends. This possibility becomes all the more probable if separately operated systems follow different construction schedules. One operator may complete his headend and much of his plant before a neighboring operator has even decided where to locate his headend. Again, cable operators theoretically could arrive at a voluntary agreement to coordinate construction schedules and interconnection, but this is a difficult task. Cable operators primarily interested in broadcast signals may decide to get these signals off the air by microwave links and hence conclude that they do not need interconnection. They may reason that interconnection would be important only for educational, governmental, and other uses and that these uses would generate little or no additional profits.

To be sure, these problems are difficult, but not insurmountable. If all districts’ franchises require common technical standards, construction schedules, and other conditions essential for coordination, the outcome could be the same as that under common ownership. In addition, state cable regulation is increasingly common and may create uniformity as well as coordination. As a result, single and multiple ownership of cable systems within a franchise area can have similar results, depending upon the regulatory effort invested.

1 For a fuller discussion, see Rivkin, op. cit.
DIVISION OF GEOGRAPHIC COVERAGE

Another problem of divided ownership is determining the geographic boundaries of each district. One easily can visualize disputes among cable operators over serving particular subareas in the franchise area. In seeking to enlarge their potential subscriber base, some operators may encroach on others' territories. Thus, separate ownership may create serious difficulties in dividing up the separate districts.2

One potential solution is not defining boundaries at all: that is, franchising several cable operators to serve any areas they choose. Each would serve the area where he could build a plant more quickly than the other operators. This would have the added advantage of encouraging speedy coverage of as large an area as possible. It would be an attractive approach if the retransmission of broadcast signals characteristic of today's cable industry were the only concern. More advanced services, however, may require that cable systems follow boundaries of school districts or particular communities of interest—such as ethnic, industrial, governmental, or commercial lines.

Geographic division is not an insuperable problem, but will entail extended debate and disagreement to reach final decisions—a process that could be avoided through single ownership.

ECONOMIES OF SCALE

Substantial economies of scale are possible for cable systems that offer advanced services requiring central computers, local origination facilities, and microwave interconnection. Unless each district encompasses enough dwellings to exploit most of the economies of scale, however, the separate owners must agree to share the cost of central computers and other facilities serving the entire area. So far as maintenance and other operating costs are concerned, there would be little difference between separate and single ownership for districts of 20,000 subscribers or more; crossing of boundaries by maintenance crews might be marginally easier under common ownership than under separate ownership.

SHARING OF FACILITIES FOR LOCAL PROGRAM ORIGINATION

Whether they have single or multiple ownership, larger cities—those with populations of half a million or more—probably will need several separate local program origination facilities scattered about the city to serve local community needs. It would also be advisable to have one central facility with relatively elaborate studios and equipment, however, to distribute higher-quality programming for

2 An example of this problem arose in the franchising of Las Vegas, where the division of the city between two franchise holders was accomplished by voluntary bargaining between the two. After a long period of argument and debate they finally agreed simply to split the city along the Strip. See Mitchell, op. cit., p. 41.
the entire area. Splitting the metropolitan area into separate districts might create problems of sharing the cost of a common facility. Some cable operators might argue that the cost simply should be split equal ways. Others might argue that their share of the cost should depend on the extent to which they carry programming originating at the central facility. Yet others might maintain that costs should be divided in proportion to the number of subscribers served by each district.

Again, this problem is not insuperable, but it could seriously delay design and construction of the cable system. Multiple franchises, then, will require special attention from the franchising authority.

LOCAL CONTROL

One frequently mentioned potential advantage of separate ownership is a greater degree of local participation in controlling channel use and in setting monthly subscriber rates. If each district is designed to be economically self-sufficient, rates would vary from district to district in accordance with underlying service costs. These costs depend on each district's capital investment and operating expenditures relative to the number of users. Generally, the greater the population density, the lower the cost per home passed by cable; the higher the level of cable penetration, the lower the cost per subscriber. Rates reflecting these costs would prevent cross-subsidization among districts. Thus some subscribers would be better off and others worse off with separate rates for the separate districts.

At the same time, single ownership for the entire area does not foreclose rate variation among districts. The franchise could specify separate rates for each geographic area, depending on which cable headend serves it.

The single-ownership approach has flexibility because it leaves open the option of having either a single rate for the whole area or different rates for separate districts and subdistricts. The separate-ownership approach might lock the system into separate rates to the extent that subscriber costs vary among the districts and each district must be economically self-sufficient. On the other hand, under single ownership a franchising authority would be free to set uniform rates for all districts, regardless of differences in underlying costs, so long as total revenues do not fall below total costs.

If the franchisor set a uniform rate structure for the whole area, some districts might not be economically self-sufficient and would require subsidization. Transferring funds from one district to another would be more difficult with separate ownership than with single ownership. Conversely, a uniform rate structure which made even the least profitable districts viable would result in windfalls for operators in more profitable districts.

Another aspect of local control is access to local cable channels. Some groups feel that local ownership will give them access to channels under more favorable terms than will metropolitan-wide system ownership—i.e., that they can influence a local operator more easily than they can a city-wide operator. They may be right. A powerful community organization indeed may have greater leverage in gaining access to a relatively small locally owned system than to a larger system "run" by a large organization in another part of town. Yet, a serious question arises as to
whether access to cable channels ought to depend on community groups' power and influence. It may be more important to require enough channel capacity to provide all groups with equal and nondiscriminatory access regardless of the pressure—political and otherwise—that they are able to exert.

YARDSTICKS FOR COMPARING PERFORMANCE

One clear advantage of the separate-ownership approach is that it enables comparisons of performance among cable operators. If one cable operator is doing poorly, his shortcomings will stand out more clearly if there is a neighboring cable operator who is doing well. These performance comparisons may be especially useful in deleting, modifying, and adding provisions to franchise renewals.

INVESTMENT REQUIREMENTS AND CONSTRUCTION SCHEDULES

Another advantage of separate ownership is that it substantially reduces the investment requirement for individual operators. For example, the overall metropolitan system in the Dayton, Ohio area is estimated to involve an investment of about $22.5 million. For today's cable industry, this is a large amount of money for a single operator to raise. The cable industry's increasing trend toward merger, however, will make funding of this magnitude progressively easier.

More important than the total investment is the question of whether an area's market for cable services is large enough to make the enterprise economically viable. If it is, then funding probably would be available under either single or multiple ownership.

Related to the question of capital requirements is the issue of construction timetables. Construction probably could be completed sooner in separately franchised districts than in a single-ownership system. Again, much depends on whether the single owner could obtain funding as easily as the separate operators in each of the districts. To the extent that individual operators could obtain funds more quickly, they also could complete the detailed engineering planning, purchase materials, and hire construction crews more quickly than could a single operator.

SATISFYING RIVAL APPLICANTS

One advantage of multiple franchises is simply that they permit more applicants to be satisfied. On strictly political grounds, a franchising authority may prefer approving 3 out of 10 applicants to selecting only one. While each would have a smaller portion of the pie than would a single approved applicant, the franchising authority may face less political pressure.