CABLE TELEVISION: CITIZEN PARTICIPATION AFTER THE FRANCHISE

MONROE E. PRICE
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R-1136-NSF, *Citizen Participation in Planning*, by Robert K. Yin.

R-1137-NSF, *Technical Considerations in Franchising Major Market Systems*, by Carl Pilnick.

R-1138-NSF, *A Guide to Federal Regulations*, by Steven R. Rivkin.

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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,[1] 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 other people concerned with the development of cable television in their communities.

A series of companion reports to the Handbook treat specific issues in greater detail. This report discusses courses of action that remain open to community groups and individual citizens after a cable television franchise has been awarded. It emphasizes citizen participation in the FCC procedures for granting a certificate of

[1] Walter S. Baer, *Cable Television: A Handbook for Decisionmaking,* The Rand Corporation, R-1133-NSF, February 1973.

compliance, which the local cable system must have to carry broadcast television signals.

The authors of this report have conducted research and written extensively on the legal aspects of cable television. Monroe E. Price is Professor of Law at the University of California at Los Angeles, and served as Deputy Director of the Sloan Commission on Cable Communications. Michael Botein is Assistant Professor of Law at the University of Georgia. Both are consultants to The Rand Corporation.

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SUMMARY

Other reports in this series have dwelled on the importance of citizen participation in planning cable systems for their communities, deciding the question of ownership, and formulating franchise terms. Fortunately, the final issuance of a franchise to a cable operator—whether commercial, noncommercial, or municipal —does not spell an end to the rights and powers of citizens to intervene. This report discusses the remedies available to community groups and individual citizens to correct deficiencies in the cable franchising process and the administration of the franchise.

The Federal Communications Commission regulations governing cable television offer some interesting possibilities in this regard. Before a cable system can carry broadcast television signals, it must apply for and receive a certificate of compliance from the FCC; once the FCC gives notice that the application is before it, interested parties in the community have 30 days in which to file objections and petition for changes. The regulations also provide a limited opportunity for any interested person or group to go before the FCC at other times, to seek amendment of the rules or request special relief with respect to the cable system in their community.

Because the certificate of compliance procedure is new and largely untried, it is difficult to say how effective it will be in obtaining FCC pressure for improved performance by cable franchisees. The FCC is unlikely to exert such pressure unilaterally, if we are to judge by the early experience; so long as the application and the franchise comply with federal regulations, it appears that the FCC will not seriously question any application unless objections have been filed against it. Even when objections are filed, the FCC may give them very little weight.

Several sorts of objections can be envisioned. For example, community groups may petition the FCC to require that the application state, more clearly than does the franchise itself, how the applicant intends to comply with such important federal standards as the implementation of the reserved channels for public access, for education, for local government, or for local origination. During the certification process, community groups may wish to have more say about which distant television signals are imported into their community. The certification process is also an opportunity to contend that the mechanism for granting the franchise did not meet the FCC's standards for public participation. And when the franchise requires the operator to go beyond FCC requirements (through the payment of a high franchise

fee or the reservation of more than the maximum number of channels specified in the regulations), the support of community organizations interested in these franchise terms should accompany the application for an FCC certificate.

No intelligent action can be taken by community groups unless they have access to a certificate application and can decide whether they should support it or not. Since 30 days is short notice, they will be wise to ensure, by franchise provision, that the application will be readily available to them for review well before it is filed with the FCC.

In addition to the certification process, communities need to know more about Section 76.7 of the rules, allowing the softening or strengthening of the regulations in individual cases. In the past, many cable systems have obtained waivers of various requirements, such as the duty to originate local programming. In almost every case, the FCC has acted on such waiver applications without any comment from a community group or municipal authority. Community groups should be much more aware of the kinds of issues that will arise in waiver proceedings. They should also be sure, through the franchise or the certificate of compliance, that interested parties receive adequate notice when an application for waiver is filed. Waiver applications can be initiated by others than the cable franchisee. Where appropriate, for example, the FCC might be urged to remove "grandfathering" protection from a system and require earlier implementation of reserved channel rules. It will be very difficult for communities to use Section 76.7 as an offensive weapon, however.

Finally, the FCC is constantly considering new rules that will affect cable system operations and success. Many of these rules will be remote from the interests of a particular community; but since others may not, close attention will be necessary. The FCC's proposed actions should be closely followed to determine whether the community ought to make its voice heard.

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I. INTRODUCTION

As cable television systems grow across the country, most opportunities for creative contribution by local groups will be at the municipal level, when franchises are shaped and awarded. But it would be a great mistake to overlook the power of the Federal Communications Commission to assure that cable system operations will serve the public interest. In 1972, the FCC established rules for the growth of cable television, setting very specific federal standards.[1] These standards encourage experiments in the use of cable television for education, for local government uses, and for public access to the medium. The federal standards also assure minimum technical standards and require public hearings during the franchise award process.

Aside from the rules themselves, the FCC's main instrument of regulatory power is the *certificate of compliance.* Before a cable system can carry broadcast television signals, it must apply for and obtain such a certificate from the FCC. The process leading to the award of a certificate of compliance is still new, still being shaped. It is an important step in nurturing a responsive cable television system in the community, since it provides the principal opportunity for federal review of local decisions, and since it constitutes yet another forum in which interested parties can air their views.

Already, broadcasters have begun to use the certification process in attempts to influence FCC policy and cable practices. But community groups and local governments have largely neglected the same opportunity. As of this date, the FCC has approved roughly 600 certificate applications. According to an FCC staff member, in not one case has a community filed an opposition. This report explains the certification process and its relationship to the franchise. The intent is to help groups understand how they should examine an application for a certificate of compliance and what actions they should take before the FCC.

In addition to the certification process, local groups may apply to the FCC for special relief at any time during the franchise period, and may comment on applications for waivers and reliefs sought by others. The procedures for doing so are discussed in Sec. VII.

To understand the complexity of the certification process, some understanding of the FCC rules is important. Section II furnishes the necessary background.

[1] The FCC rules, embodied in the *Cable Television Report and Order,* FCC 72-108, appear in the *Federal Register,* 37 Fed. Reg. 3252 (1972); the *Reconsideration* appears in 37 Fed. Reg. 13848 (1972). Both documents are reproduced in a companion report in this series, Steven R. Rivkin, *Cable Television: A Guide to Federal Regulations,* The Rand Corporation, R-1138-NSF.

II. BACKGROUND OF THE FCC RULES

Citizen participation is essential not only in drafting a franchise and selecting a franchisee, but at every decisional stage in the franchising process. Adoption of a franchise does not mark the end of participation by local governments or citizen groups. A cable operator needs the FCC's permission to carry broadcast television signals, and his subsequent performance may require explicit FCC approval or may incur its disapproval. Both community groups and local governments must actively intervene in these processes.

The FCC adopted its new cable television rules by way of its February 12, 1972 *Cable Television Report and Order.* The rules are the product of a prolonged running battle among cable, broadcast, and copyright interests. As a result, they focus on these groups' main concern—cable's use of broadcast television signals. Local governments and citizen groups must also be familar with them, because some aspects of the rules will directly affect a cable system's service to its community. More important, they also restrict a franchising authority's power to regulate a cable system. Finally, the new rules create several difficult procedures for modifying their requirements. The following brief review may be helpful to local governments and citizen groups, but serious matters call for careful analysis of the rules or consultation with an expert communications lawyer. (See Rivkin's R-1138-NSF in this series for a detailed analysis and commentary on the FCC regulations.)

FCC RULES ON CABLE USE OF BROADCAST TELEVISION SIGNALS

Like the FCC's previous and proposed rules, the new regulations concerning cable use of broadcast television signals concentrate on two main provisions: first, that a cable system *must* carry some signals; second, and more important, that it *may* carry certain other signals. (In this context, broadcast signals are those picked off the air by antennas and retransmitted over cable; nonbroadcast signals are transmitted entirely by cable.)

Sections 76.61 and 76.63(a) require a cable system in the 100 largest television markets to carry the signal of (1) any television station within 35 miles of the cable system's community, (2) any educational station that places a grade B contour—that is, a moderately receivable signal—over the cable system's community, (3) any commercial "translator," i.e., relay station with 100 or more watts of power, (4) any

station licensed to the cable system's market, and (5) any "significantly viewed" station. Under Sec. 76.59(a), the standards for markets below the top 100 are essentially the same, except that a cable system there must carry any commercial as well as noncommercial station that places a grade B contour over its community. Finally, Sec. 76.57(a) requires a cable system outside of all markets to carry a station that meets any of these standards.

The regulations limit the *number* of distant signals a cable system may import. Thus, cable systems may import enough distant signals to offer "minimum service" —i.e., three network and three independent signals in the top 50 markets, and three network signals and one independent signal in the smaller markets. (See Secs. 76.61(a), 76.61(b), and 76.51(b).) In addition, Secs. 76.61(c) and 76.63(a) allow major market cable systems to import two additional "wild card" independent signals, unless these already have been used to provide "minimum service."

Second, a cable system must choose the geographic source of its distant signals in accordance with "leapfrogging" rules. If a system wants to carry signals of stations in the first 25 major markets, it must choose one or both of the nearest two such stations if they are available. And if a system can play a "wild card" for a third independent distant signal, under Sec. 76.61(b)(2), it must look first to any independent Ultra High Frequency (UHF) station within 200 miles or, if none is available, any independent VHF station within 200 miles or an independent UHF station anywhere.

Third, and most important, the regulations give local stations "exclusivity rights" that prevent a cable system from carrying a particular program. Thus, even though authorized to import a distant signal, a cable system may not carry programs that a local broadcaster has the exclusive right to show. Section 76.151(a) provides that a cable system in the top 50 markets may not show a syndicated (nonnetwork) program for "one year from the date that the program is first licensed or sold" to any station—even if not bought by a local station. In addition, under Sec. 76.151(b), a cable system may not import a program that any local station is showing if the contract between the broadcaster and the program supplier provides for exclusivity. In the 50 next largest markets, the exclusivity provisions are somewhat less stringent. Section 76.151(b) does not impose the one-year presale ban, although it allows very extensive contractual exclusivity rights. A station may contract with a program owner to bar syndicated reruns for up to a year and to prohibit new syndicated series programs, nonseries programs, and feature films for up to two years.

FCC RULES ON USE OF NONBROADCAST CABLE CHANNEL CAPACITY

The regulations contain a number of provisions requiring substantial channel capacity for uses other than carrying broadcast signals. First, and perhaps most important, Sec. 76.251(a)(1), (2) requires that all major market cable systems have as many channels for nonbroadcast as for broadcast use, with a *minimum* capacity of 20 channels. As a result, all major market systems must have at least 20 channels, and some systems in the larger markets—such as New York, Los Angeles, and Chicago—may need to provide 30 or more channels. Moreover, Sec. 76.251(a)(3)

requires all major market cable systems to build in at least some capability for two-way communication between subscribers and the system. The regulation is vague, however; for the time being, it will require operators to do no more than lay cable that can accommodate two-way communication at some undefined point in the future.

Second, Sec. 76.201 retains the Commission's previous requirement that cable systems with more than 3500 subscribers originate programming "to a significant extent as a local outlet"—a regulation the Supreme Court recently upheld in the landmark *Midwest Video* case (the decision is reprinted in full in Rivkin, op. cit.). As will be discussed later, the meanings of "local outlet" and "significant extent" are less than clear; however, the regulation appears to require a cable operator to operate somewhat like a local television broadcast station.

Third, the regulations specifically provide for both free and leased use of cable systems' channel capacity. Section 76.251(a)(4)-(6) requires major market cable systems to provide one "public access," one "education access," and one "local government access" channel for free. Section 76.251(a)(11) provides that major market cable systems must offer to lease all unused channel capacity. Finally, Sec. 76.251(a)(8) imposes the requirement—previously known as "N+1"—that a cable system add a new channel whenever all nonbroadcast channels "are in use during 80% of the weekdays (Monday-Friday) for 80% of the time during any consecutive three-hour period for six consecutive weeks."

Unfortunately, the access rules are filled with ambiguities and pitfalls. Because the FCC has not defined "public," "education," or "government" access, it is difficult to say who is entitled to use a particular channel. In addition, the FCC has left control of the access channels largely to the unfettered discretion of the cable operator. Thus Sec. 76.251(a)(11) requires simply that *systems* "shall establish rules requiring first-come nondiscriminatory access." And to compound the confusion, the FCC specifically prohibits local or state governments from stepping in to fill this regulatory void. Section 76.251(a)(11) explicitly states that a local government may not impose "any other rules concerning the number or manner of operation of access channels." Moreover, the FCC has offered virtually no help in drafting access rules; its standard of "first-come nondiscriminatory" access is almost meaningless. Finally, the access rules impose contradictory duties on cable systems. Section 76.251(a)(9) provides that cable systems "shall exercise no control over program content" on free or leased channels. But Sec. 76.251(a)(11) then requires cable systems to exclude some types of programming, such as obscenity, lotteries, and the like.

FCC RULES ON FEDERAL, STATE, AND LOCAL REGULATORY RELATIONSHIPS

The FCC's new regulations do not define regulatory roles for federal, state, and local entities, but rather restrict the powers of local governments. They lay down a set of fairly stringent—albeit also fairly vague—standards for local governments in granting and administering franchises.

The rules do not, however, directly impose any requirements on local governments. Instead, they require a cable system to state that its franchising authority

has followed the FCC's standards as a prerequisite to obtaining permission to carry broadcast television signals—the FCC "certificate of compliance," discussed in the next subsection. This approach presumably stems from the FCC's very legitimate doubts about its power to impose obligations directly on local governments. But since few franchising authorities will wish to prevent their cable systems from becoming operational, most governments will hew to the Commission's line.

First, Sec. 76.31(a)(1) requires a local franchising authority to consider a cable operator's "legal, character, financial, technical, and other qualifications" by way of a "full public proceeding affording due process." Similarly, under Sec. 76.31(a)(4) a franchising authority must "specify or approve" the "initial rates" charged *subscribers*, as opposed to users; moreover, a cable system may not change its *subscriber* rates without authorization from the franchising authority "after an appropriate public proceeding affording due process." As will be discussed later, the meaning of a "full" or "appropriate public proceeding affording due process" is obviously less than clear. In addition, Sec. 76.31(a)(5) requires the franchise to "specify procedures for the investigation and resolution of all [subscriber] complaints."

The rules also impose fairly lenient construction deadlines upon cable operators. Section 76.31(a)(2) requires a cable operator to "accomplish significant construction within one year" of receiving his certificate of compliance, and provides that he must wire "a substantial percentage of its franchise area each year" in an "equitable and reasonable" fashion. Under Sec. 76.31(a)(3), an initial franchise may not be longer than 15 years and a renewal franchise must be of "reasonable duration."

Finally, and in many cases most important, Sec. 76.31(b) limits a local government's franchise fee to 3 percent of a system's gross annual receipts from *subscriber* services. A local franchising authority may charge a higher fee only with the FCC's specific approval, and the FCC will approve a higher fee only upon a showing that it "will not interfere with the effectuation of the federal regulatory goals. . . [and] that it is appropriate in light of the planned local regulatory program." As will be discussed later, both the form and substance of the necessary special showing remain unclear.

The FCC has passed on few certificate applications from new systems to date. Its actions with respect to older grandfathered systems, however, suggest that it will not enforce its franchise standards very stringently.

III. THE CERTIFICATE OF COMPLIANCE

Section 76.11 of the FCC's new rules provides that "No cable television system shall commence operations or add a television broadcast signal to existing operations unless it receives a certificate of compliance from the Commission."

To receive a certificate of compliance the franchisee must submit to the FCC a fairly elaborate document that contains, among other things, statements explaining:

1. How the system proposes to fulfill the goals of federal regulations establishing a channel for education uses and a channel for local government uses.
2. How the system's plans are consistent with federal regulations requiring the establishment of a special channel for public access—that is, the right of individuals and groups to reserve time for the distribution of their own television programming.
3. The system's plans for meeting federal requirements that systems in large markets[1] locally originate to a significant extent and that systems in small markets provide certain programming facilities.
4. How the franchise fulfills the federal expectation that cable systems will be built on time and that cable will be equitably spread throughout the franchise area.
5. How initial subscriber rates were set, and the procedure to be followed when subscriber rates are to be amended.
6. How the franchise process met standards requiring a "full public proceeding affording due process."

Thus, a cable system may not broadcast additional television signals unless the FCC has approved its franchise by way of a certificate of compliance. Of course, a cable system that did not carry the popular off-the-air television stations could operate without a certificate. But realistically, a cable system needs a certificate to be economically viable. Even though cable's future may depend more on new services rather than broadcast signals, no present system can afford to operate without broadcast signals and an FCC certificate.

There is no set form for an application for a certificate. Most applications filed since the rules went into effect on March 31, 1972 have been sketchy; nor is it yet

[1] The "top 100" or "major" television markets.

clear how thorough the FCC, through its Cable Television Bureau, can be in reviewing the applications. Thousands of applications will be filed, and the staff of the Bureau is small. The only penetrating analysis will come from community groups that monitor applications. And only as groups file before the FCC, listing inadequacies in application forms, will the FCC act directly and frequently to insure the integrity of the certification process.

The FCC developed this process as an alternative to direct federal licensing of cable television systems or complete reliance on local franchising authorities. Under the rules, the federal government establishes standards for performance—standards the local community is obliged to follow in awarding the franchise. The certification process is designed to assure that the franchised cable system actually meets federal standards.

The application process is also an opportunity to justify deviations from federal standards. In this report, specific attention will be paid to reviewing applications that seek to justify special terms, such as franchise fees higher than 3 percent, more than three reserved free channels for public use, and special controls over originated programming.

The application for a certificate of compliance should be ample, thorough, and descriptive. It is likely that even a precise and complete cable franchise will merely set norms without describing in detail how the norms are to be reached. The application for a certificate can be more generous. One example is the matter of access channels. The FCC rules require the cable operator to set aside one channel for education uses. The franchise will normally affirm this administrative prerequisite. The application for a certificate can go beyond reiterating the requirement, and tell in greater detail how the system hopes to implement the federal goal of instructional use of part of the cable capacity.

IV. GETTING ACCESS TO THE APPLICATION FOR A CERTIFICATE OF COMPLIANCE

Community groups that wish to comment on an application for a certificate have a threshold problem: obtaining the document in time to analyze it thoroughly and make useful comments. Though the rules specifically allow interested persons and groups to file objections to certification applications, community groups must move quickly to be heard. Section 76.13 requires a cable system to serve a copy of its certification application only upon the franchising authority, local television stations, the superintendent of schools, and a few others. Under Sec. 76.15, the Commission will "give public notice of the filing of applications"; but community groups that do not scrutinize the FCC's releases or the *Federal Register* will find themselves in an informational vacuum. The rules also require that the cable operator make a copy of the application publicly available if the franchising authority does not.

The time allotted for community comment on the certificate application is extremely short. Unless an extension is obtained, a group must file comments and objections within 30 days of public notice by the FCC. This means that interested groups and persons must be vigilant during the postfranchise period to make sure they receive a copy of the application.

Some definite steps can be taken to ensure that community groups have an opportunity to express their views on a certificate application. The franchise itself could require the cable operator to give more widespread notice, perhaps through local newspapers or cablecast announcements over the system.[1] Another solution would require the cable operator to submit his application for FCC certification to the franchising authority and publish it before the franchise is granted. Such early drafting would allow a reasonable time for discussion and revision—well in advance of the 30 days allowed by the FCC. In many cases it will be wise for community groups, the franchising authority, and the franchisee to draft the application together and thus reduce the likelihood of friction during the certification process.

[1] For a more detailed discussion of these and other methods, see L. L. Johnson and Michael Botein, *Cable Television: The Process of Franchising,* The Rand Corporation, R-1135-NSF.

V. ANALYZING AN APPLICATION

Now that the interested group has an opportunity to review the application, how should the document be analyzed? How thorough should an application be? How should a community group draft its comments and objections for submission to the FCC?

Community groups should ensure the accuracy and completeness of certification applications for a number of reasons. Section 76.13 requires a cable operator to state how he will comply with many of the FCC's regulations. Though statements in an application may not be as binding as promises in a broadcast license application, they can be a good yardstick for measuring the operator's later performance. What he promises will be important at renewal time and perhaps can be the basis for subsequent petitions for special relief.

His promises should be clearly stated. Community groups should ensure that they are spelled out fully and not hedged with cautious lawyers' language. For example, the cable operator's statements about planned program origination call for careful review. If his franchise application promised high-quality children's programming, his certification application should reiterate the promise and explain how he will fulfill it. The rules require a cable system to disclose a great deal about its ownership and financial structure. Community groups should review this information. They should check its accuracy against data the cable operator filed as part of his franchise application. They should examine it to determine his financial ability to carry out his promises. They should make sure it is complete and clear. Ownership disclosures may suggest possible conflicts of interest, concentration of control, or lack of minority participation. The certificate application provides an opportunity to explain how the local system intends to meet or surpass federal standards. If the cable operator and the franchising authority are seeking special authority to undertake an experimental approach, community groups have an interest in seeing that the argument in favor of authorizing the experiment is put forcefully and well. The community should ensure that the application carefully details how an experimental approach will be fulfilled. Some communities with a zeal for innovation have found themselves with systems that do not operate at all. In some cases, a prospective franchisee might have agreed to a community-imposed clause in the franchise in hopes that the FCC would strike the clause. Such hopes might take the form of a weak defense of the clause in the certificate application. This problem may arise where a franchise fee in excess of the federal standard has been established.

Even when the community has done an excellent job of drafting a cable franchise, the application for a certificate of compliance should be considered with care. A franchise document will usually be limited to the necessities, the formal terms of the franchisee's duties, but it will be surrounded by the community's tacit understandings and expectations. The certificate application is an opportunity to address those understandings specifically.

Once the group has analyzed the document, its comments to the FCC do not have to take any precise form. Of course, a certain formality of presentation and thoroughness of analysis is likely to dignify the group's views. If possible, the group should also document any claims it makes in its comments—for example, if it is claiming that the application fails to provide adequately for educational needs. And statements should be supported by appropriate affidavits where possible. The services of a lawyer are advisable, but not indispensable, in drafting comments on a certificate of compliance application.

For a sound technical reason, it is important to file comments or objections to a certificate of compliance application. Once an application is being processed, it can be amended. Groups that have filed objections and are therefore "parties" are entitled under Sec. 76.18 of the rule, as a matter of right, to notice of these amendments and the opportunity to comment on them. Moreover, it may not be possible, at a later date, to raise objections that were not presented at the initial certification stage.

VI. AN ANALYTIC APPROACH TO CERTIFICATE APPLICATIONS

There are several ways to analyze an application. Special interest groups, such as education users or public access advocates, will often be interested in specific aspects of the application that touch upon their concerns. A checklist approach can be used, comparing the application with the goals developed by the group in the franchising process. This section suggests the kind of questions to be asked in analyzing the application.

ARE THERE VIOLATIONS OF FEDERAL STANDARDS?

The clearest function of the reviewer is to determine whether the application reveals or disguises violations of federal standards. For example, the application must state that there was a "full public proceeding affording due process" before the franchise was granted, but a community group may argue there was not. The rule is vague, however; the legal concept of "due process" may mean anything from an informal conference to a trial-type adversary proceeding. But the certification process is a forum for clarifying the test on a case-by-case basis.

The Commission's recent actions, however, indicate that it will not require strict adherence to its franchise standards—at least for grandfathered systems. Its *Reconsideration Opinion and Order* amended the "grandfather" clause of Sec. 76.31(a), stating that cable systems that were franchised but nonoperational before March 31, 1972 need be only in "substantial compliance" with FCC franchise rules. Further, the FCC's first decision under the amended rule indicated that "substantial" can be rather minimal. In disposing of a combined certification and special relief application, the Commission approved a franchise that provided for a sliding fee scale of 5 to 12 percent, contained no construction requirements, ran for twenty years with automatic renewals, and had no subscriber complaint procedures—thus effectively violating every single provision of Sec. 76.31(a). If such actions are to become commonplace, the Commission was using understatement when it announced that "henceforth, the term 'substantial compliance' will be given liberal construction." Though the FCC attempted to confine its decision to grandfathered systems, its actions suggest that it will enforce the franchise standards loosely.

This attitude cuts both ways for citizen groups. On the one hand, the Commission's laxity may allow cities to push through franchises without public participation or consumer protection. On the other, the Commission's liberality may permit citizen groups to sustain franchises that embody generous commitments of fees and channels.

A community group may object to a franchise's definition of "significant construction" or "equitable and reasonable extension," pursuant to Sec. 76.31(a)(2). These terms, too are vague. Nevertheless, a franchise that allowed a cable operator more than a year after certification to complete his headend or allowed him to "cream skim" the more affluent areas of his franchise area presumably would violate the rule. This type of violation will be difficult to prove, however. No responsible city or cable attorney will allow such terms in the franchise; instead, they will result from informal understandings between the cable operator and the city government. The community may wish the certificate application to be far more detailed than the franchise itself with respect to the construction timetable, perhaps listing specific neighborhoods with target dates for cabling. Even so, a pattern of delaying tactics or selective wiring may become evident only after the system has been in operation for some time. As a result, a citizens group may need to file subsequent petitions under Sec. 76.7's general relief provisions.

A community organization may argue that the term of an initial franchise is in effect longer than fifteen years, or that a renewal franchise is not of "reasonable duration" under Sec. 76.31(a)(3). The proof of the first argument will depend on how automatic the right of renewal is. A community group might urge the FCC to impose conditions that will transform the renewal process into a meaningful opportunity for local review. And where a franchise sets a definite renewal period, of course, a local group may argue that the renewal duration is not "reasonable." Once again, only precedent will give the "reasonable" standard any real meaning; but the FCC appears to be taking a very lenient attitude in applying the term to grandfathered systems.

A citizen group may object under Sec. 76.31(a)(4) that a franchising authority has not "specified or approved" initial subscriber rates or that a franchise does not provide for "an appropriate public proceeding affording due process" before rates may be changed. Where the franchise and the application merely parrot the language of the regulations, the group may argue that the franchisee and the franchising authority must give a more detailed notion of the procedures and standards to be used when rate increases are to be considered.

A citizen group may argue that a franchise violates Sec. 76.31(a)(5) by failing to "specify procedures" for subscriber complaints or by not requiring the cable operator to "maintain a local business office or agent." Since the Commission obviously has not defined adequate "procedures," the group presumably must bear the burden of proof that a particular method is inadequate. Since the cable system often will not be in operation when the operator files his application, it may be difficult to measure the adequacy of the procedures. Nevertheless, some situations may create almost a presumption of inadequacy. For example, location of a cable system's main office far from a city's core certainly does not presage efficient treatment of central-city subscriber complaints. Here again, though, the FCC does not contemplate close scrutiny, at least for grandfathered systems.

Creative community participation in the certification process should go beyond

objections to violations of the rules. The process will enable the FCC to clarify and specify minimum standards for acceptable franchise performance. Citizen participation is essential in this case-by-case definition and amplification of FCC policy. A few examples will show possible directions.

First, the rules do not set a minimum channel capacity for cable systems in smaller markets—that is, those below the top 100. As a result, cable operators in rural areas and small towns may build systems with an inadequate number of channels. Federal standards now are lacking, and the FCC has noted the availability of certification proceedings for measuring the adequacy of a particular channel capacity. Community groups therefore may object to the channel capacity a cable operator promises in his application. Again, objections must be very well reasoned and documented if they are to be successful.

The present rules do not indicate how the transfer of a franchise affects a certificate of compliance. Cable franchises are attractive properties for which there is a brisk market. Transfer of a franchise is particularly important to communities that value local or minority ownership and are concerned with high-quality program origination. Community groups may argue that the certificate of compliance should specify the method of franchise transfer and its effect upon the certificate. For example, a community group might request that a franchise transfer invalidate the certificate, thus forcing the new cable operator to reapply.

A very important opportunity for citizen intervention relates to the access channels mandated by the FCC. The franchise may provide that the cable franchisee furnish three access channels (one each for government, education, and public access) as required by law (in the top 100 markets). The franchise may go on to provide that the franchisee will meet his obligation by providing only these three channels for the entire franchise area even though it may comprise many communities. Indeed, the FCC has indicated that it will approve, on an ad hoc basis, the sharing of access channels by several communities where there is a cooperative franchising process. But there is no set of standards to indicate when access channels should and should not be shared. In New York City, for example, should Manhattan's right to three or more public access channels of its own depend on the pattern by which the franchise is awarded? In many such cases, community groups will wish to argue that the FCC should disapprove sharing in the certification process. Again, the group will have to press its arguments carefully and with documentation. It may argue not only that providing all three channels will not burden the cable operator, but also that the community needs all three channels for itself.

SUPPORTING FRANCHISE PROVISIONS THAT EXCEED FEDERAL STANDARDS

Community groups should not feel that their only role in the certification procedure is to oppose and object. On the contrary, they should support franchise provisions that are more creative and expansive than the federal standards and that serve the community. The FCC has created a difficult balance, encouraging experimentation by franchise authorities but discouraging burdens on cable's growth. When a franchising authority has taken creative action, community groups should

underscore its importance before the FCC. Community groups not only must fight for an excellent franchise, but also must defend their product during certification proceedings. Although many franchise provisions may create difficulties with the FCC, two types probably will be the most troublesome: requirements for additional free community channels, and high franchise fees.

Additional Community Channels

The FCC's new rules require major market cable systems to make available one "education access channel," one "local government access channel," and one "public access channel" free of charge. Section 76.251(a)(iv) provides that "no local agency shall prescribe any other rules concerning the number or manner of operation of access channels" without the FCC's special approval. If community groups have been able to secure franchises that require additional channels for free or for preferential rates, they must defend those franchise provisions in the FCC's certification proceedings. This will require a showing that the channels are not only economically feasible for the cable operator, but also necessary for the community.

For example, many observers contend that several channels—not one—are necessary for a truly workable experiment in cable's educational uses. A community with a university or college may need an additional channel for providing higher education to the general public. Some Model Cities programs or community action agencies may want their own channels. A local law enforcement agency may wish to experiment with using a channel for surveillance, information retrieval, or other purposes. All these potential users, of course, presumably can buy time on the leased channels, but the cost may be beyond the means of many grass root community organizations.

If a franchising authority has been able to secure additional channels, it must prepare a persuasive case for the FCC. And the support of community groups can be important and helpful. The local government and citizen groups must present evidence that the additional free or preferentially priced channels are a necessity for the community and not the result of a bartering contest. As noted before, however, the FCC may apply its rule of "liberal construction" to franchise provisions. But since these issues have not yet come before the FCC, the type of evidence necessary is less than clear. Nevertheless, some general suggestions are in order. The local government and community group should attempt to document both present and potential uses of the additional channels. First, they should secure affidavits from any groups that have used the channels, if the system is already in operation. Second, a survey of the existing media's availability to community organizations might be helpful to show that a new medium is needed; affidavits from community organizations or spokesmen could supply the necessary documentation. Third, the local government and community group should analyze and list potential programming sources within the community—such as educational institutions with audiovisual departments, community action programs with videotape facilities, or independent production centers. They could distribute questionnaires to all local individuals or groups with a potential need for channels; these might include such organizations as local charities, hospitals, legal services programs, and welfare organizations. Finally, they must demonstrate why an experimental approach involv-

ing reserved channels is preferable to a scheme where channels are possibly available for leasing.

Both local governments and community groups may argue that currently grandfathered systems should provide more channels than the FCC requires. Under the present rules, any cable system in operation before March 31, 1972 must comply with the access requirements only to the extent that it carries additional broadcast signals. Moreover, the rules specifically state that for each additional broadcast signal the system must add only one channel and only "in the following order of priority: (1) public access, (2) educational access, (3) local government access, and (4) leased access."[1] Thus, a local government or community group may request that the FCC require a cable system to add all the channels or that they be added in a different priority. They might make the type of showing necessary to justify more channels than the rules require. Or they might argue that the cable system has constructed so little that it does not merit grandfathering. All of these requests and arguments face an uphill battle.

In a release from the FCC Cable Television Bureau, the Chief of the Bureau attempted to clarify some frequently raised issues concerning access channels. For example, as indicated in this report, many communities may wish to have more access channels than the cable rules permit (without FCC ratification). The Bureau letter states that such additional channels will not be permitted "unless during the certificating process the Commission is shown that such additional channels are necessary and capable of being used according to an existing, viable plan."

While this opinion is not binding, it should be heeded. It underscores the need for the franchising authority and community groups to have documented plans to submit with the application for a certificate. Of course it is hard to tell what is "necessary" and what is "viable." The plan should probably indicate why other channels of communication are inadequate; it should also stress that agencies that say they will use the cable access channels have the capability to do so.

The Bureau letter also states that a franchise will be disapproved if it requires all access services to be made available at no charge. This may mean, for example, that the requirement in the rules that 5 minutes of production time can be provided free of charge on the public access channel cannot be greatly exceeded. But the Bureau letter softens the impact of its statement by saying that free or reduced-rate services can be made available on an experimental basis.

Finally, the Bureau letter states that franchising authorities outside the 100 major television markets can require access services, but "to no greater extent then the Commission requires for systems in major markets." It is difficult to know what this Bureau ukase means. It may mean that smaller communities that require those access services which the FCC imposes on large systems can do so without special justification before the FCC in the certification process. Or it may mean that even if a justification is put forward, no small-market franchise will be certificated if it goes beyond the rules for major markets.

[1] Section 76.251(c). The FCC thus retreated from its previous position that a grandfathered system would have to add all the designated channels if it added any broadcast signals. See *Reconsideration of Report and Order* at 13867.

Excessive Franchise Fees

The FCC prohibits the franchising authority from imposing a higher fee than 3 percent of a system's gross annual subscriber revenues without special FCC approval. To justify a higher franchise fee, the franchising authority and cable operator must make a joint special showing that the fee "will not interfere with the effectuation of federal regulatory goals" (the burden is on the franchisee) and "is appropriate in light of the planned local regulatory program" (the burden is on the franchising authority). (Section 76.13(b).) Thus, the rules raise two separate issues: first, what amounts are included in the franchise fee, and second, what is a "local regulatory program?" The views of community groups on these issues will be important during the certification process, since the FCC appears to be taking a lenient view of its own standard.

First, a franchise fee obviously includes more than the mere annual payment specified in the franchise; indeed, Sec. 76.31(d) specifically includes "all forms of consideration, such as initial lump sum payments." As a result, the issue is whether a monetary or nonmonetary benefit to the community constitutes a "form of consideration." Since the Commission has yet to pass on these issues, the definition of "consideration" is unclear. Nevertheless, a few potential troublespots are evident. The FCC might hold that additional channels should be included in a franchise fee. Also, free or low-cost community production facilities might constitute a "form of consideration." And a cable operator's direct payment to either a local government or a community group for program production might be included in the franchise fee.

The FCC's Advisory Committee on Federal/State-Local Relations has highlighted ways in which the certification process can insure full disclosure of important financial details of the franchise process. The factors to be taken into account should include:

> Whether a successful franchise applicant was required in a public proceeding to enumerate in writing all of its franchising expenses, preferential equity arrangements, monetary and service grants to state/local institutions and organizations, and service commitments either volunteered in excess of commission maxima or required or agreed to where there are no such maxima.[2]

Second, the Commission has given little guidance in defining a "local regulatory program." Thus, a franchising authority may be unable to justify a higher franchise fee for monitoring the use of a public access channel, for financing an experimental use of channels, or for funding public access users. This restrictive view would cut local regulatory purposes to the quick—i.e., disposition of subscriber complaints, administration of the franchise, and approval of rate changes. The FCC has tentatively indicated a flexible approach on this issue, and its attitude toward franchise fees seems generally benevolent.

These problems may make a community group's support of a higher franchise fee very important. A petition to exceed the 3-percent figure must be supported by the franchising authority and the cable operator. Cable operators often agree grudg-

[2] Quoted in *Broadcasting*, November 27, 1972, p. 50.

ingly to high franchise fees, possibly in the hope that the FCC will invalidate them. As a result, a cable operator may not participate forcefully in certification proceedings. Community group support may become increasingly important.

Despite the FCC's apparent liberality, local governments and community groups should demonstrate the need for additional franchise revenue. The franchising authority should identify and emphasize all costs related to its regulation in any way. These could include expenses incurred during the franchising process in relation to contracts with independent consultants, conduct of public hearings, publication of notice, and the like. The franchising authority can either amortize these costs over the franchise period or collect them in a lump-sum payment. The franchising authority should attempt to characterize its actions as "regulatory." For example, it might use franchise receipts initially for programming to inform subscribers of the opportunities for access and rights to service. Community groups could argue that a "regulatory purpose" includes promoting public access and other nonbroadcast uses by furnishing funds for production uses. Finally, the franchise fee might be structured imaginatively. For example, the franchise might provide for an increase in the fee if the number of subscribers reached a particular level—e.g., 10,000—since the FCC recently spoke of such an arrangement with approval. Or the fee might be higher for nonsubscriber than subscriber services, such as subscription television, home safety monitoring services, and shopping by cable. Since the rule speaks in terms of "the franchisee's gross subscriber revenues per year," a higher fee for revenues derived from cable users—as opposed to cable subscribers—might be valid. The Cable Television Bureau has stated, however, that a franchising authority may not "impose a franchise fee based upon revenues derived from 'auxiliary' services such as advertising revenues, leased channel revenues, [or] pay cable revenues. . ." But this opinion has not been tested before the Commission itself. Undoubtedly some communities, wishing to divert the regulatory burden from subscriber revenues, will test this statement of the Cable Bureau's policy.

SHOULD THE FCC ADD NEW REQUIREMENTS?

A franchising authority sometimes will adopt a franchise that is valid under federal requirements but unacceptable to community groups. This situation raises difficult questions for both community groups and the FCC. For example, community groups may develop an excellent experimental educational program with the full support of local educational authorities and a promise of financial aid from the federal Department of Health, Education and Welfare; but the franchise may not include the necessary provisions—sufficient channels, interconnection of schools and homes, and the like. Though not required by federal rules, these provisions may be extremely sensible for the community.

A community group certainly may oppose a certification application on the grounds that it lacks these provisions. The FCC will probably be ill disposed to demands that the franchising authority did not grant. Documentation of tangible local needs and grass roots political pressure may carry some weight with the Commission. If nothing else, this type of opposition may yield negotiated amendment of the franchise or of the certification application, so as to avoid a long and costly administrative hearing.

A SPECIAL CASE: THE CERTIFICATE APPLICATION AND BROADCAST SIGNALS

In the application for a certificate, the cable operator must designate which broadcast signals he plans to carry. Most of the sound and fury on the federal level has centered on cable's use of broadcast television signals. The conflict among cable, copyright, and broadcast interests has produced a number of arcane terms—e.g., "distant signals,"[3] "exclusivity,"[4] "leapfrogging,"[5]—whose legal complexities understandably may intimidate people; but community groups should press on fearlessly through the labyrinth. A cable system's choice of broadcast signals will significantly affect not only local television stations, but also the diversity of locally available programming.

The controls could be established in the franchise, but failing that, objections to the choice of signals can be made during the application process, or petitions for special relief can be filed. But regardless of the vehicle, the local government or community group should consider the substantive areas in which it may wish to intervene.

First, a local government or community group may disagree with the cable operator's choices among geographic sources of distant signals. As noted before, the new rules permit cable systems to import more distant signals than before; at the same time, importation is subject to the "exclusivity" and "leapfrogging" rules. Nevertheless, the cable operator still retains some freedom of choice. Conventional wisdom would allow the cable operator alone to select distant signals because theoretically he will choose the signals most likely to attract subscribers. In actuality, however, he sometimes may not. Importing distant signals usually requires microwave relay systems, whose cost depends on routes and distance. A cable operator therefore may have a very real financial disincentive against importing a signal that many viewers would find attractive. Moreover, he may select signals that do not meet local minority programming needs; and the community group may wish to encourage the importation of television stations that have good minority hiring policies or carry excellent children's programs.

Second, a franchising authority or community group may want some control over the number and type of foreign language stations the cable system carries. The new FCC rules allow unlimited importation of foreign language stations, but the operator may not import the quantity or quality of foreign language signals the community desires; the cost of microwave relays, as well as the potential income from channel leasing, may discourage extensive importation. Conversely, a com-

[3] A television station is considered "distant" if it is assigned to another community or city and cannot be generally received in the cable community without the assistance of the community antenna. The FCC's rules basically determine the quantity of distant signals that can be brought in and the conditions for their use.

[4] The station and copyright owners prevailed upon the FCC to protect existing contract rights. Thus, even if a cable company is entitled to bring in a distant station, it must blackout a motion picture, say, if a local station has exclusivity rights to televise it for a period of years. The exclusivity rules vary with the size of the market. See Rivkin, op. cit.

[5] To strengthen UHF stations and to prevent the growth of national independent stations, the FCC placed some limits on the distant television stations a cable operator could select. These rules, which favor stations nearby or in the same state, are called "leapfrogging" rules because they try to prevent excessive leapfrogging by cable systems. See Rivkin, op. cit.

munity might worry that importation would undermine the economic viability of a local foreign language station.

Third, a local government or community group has a similar interest in importation of educational television stations. As noted in Sec. III, the new rules allow a cable operator to import an unlimited number of educational signals, although local educational stations may object. The FCC has not yet indicated whether such an objection constitutes a veto. In any event, a local government or community group may find itself torn by conflicting desires. On the one hand, it may fear that importation will kill a budding local educational station. On the other hand, the cable operator may not import enough educational signals because of microwave costs and potential leased channel revenues.

Fourth, a local government or community group may object to the programming a cable operator substitutes for shows "blacked out" by the exclusivity rules. This may create several difficulties for the community. Since blacking out often will be necessary in prime time and on popular channels, the freed time slots will be valuable. Community groups may wish to use this time for local programming rather than for imported or "canned" shows. For example, a group might wish to use a time slot for a college extension course or for public access programming. In addition, the rules do not subject substituted programming to the "fairness doctrine." As a result, a substituted program might present only one side of an issue. Community groups and local governments therefore may wish to exercise some form of fairness control over substituted programming.

Finally, a local government or community group may be concerned with cable's economic impact on local television stations. Even the severest critics of broadcast television concede that it does some things well: it serves both the rich and poor, it carries events of national significance, and it entertains. As the Commission's six-year delay in lifting the cable television freeze amply indicates, it is unsure about cable's impact on broadcasting. This continuing uncertainty may force local groups to take seemingly contradictory positions. On the one hand, a local government or community group might join a television station in petitioning the FCC for special protection on the grounds that the cable system is decreasing the station's revenues and therefore its public service capability. On the other hand, a community organization might oppose a television station's petition for special relief on the grounds that its revenues are not low enough to justify neglect of public service programming. A local government or community group therefore can help to distinguish the valid from the invalid in a local station's claim of economic injury.

WHAT REMEDIES CAN THE COMMUNITY GROUP SEEK?

As noted in Sec. II, denial of a certificate may have no legal effect on the validity of a franchise; instead, it may only prevent a cable operator from carrying broadcast signals. Realistically, nevertheless, denial of a certificate will abort a system, since it still needs broadcast signals to be economically viable. The franchise should therefore state explicitly the effect of the FCC's refusal to grant a certificate. A number of options are open to the local franchising authority. First, the franchise might provide that it will remain in effect, except for terms invalidated by the FCC.

Second, the franchise might require that the selection process be reopened completely. Finally, and most realistically, it simply might empower the franchising authority to negotiate new terms acceptable to the FCC.

If a franchising authority adopts this last alternative, it should include a reservation of power clause in order to retain flexibility in negotiations. It might go even further, however, and include franchise provisions to replace those invalidated by the FCC. For example, a franchise might provide that if the fee is invalidated, the cable operator must complete construction of his trunk line more quickly. The very existence of alternative provisions, however, may function as a double-edged sword. On the one hand, the FCC's recent actions indicate that it probably will follow a clear manifestation of local desires in fashioning a remedy for denial of a certificate. On the other hand, the presence of an alternative may be an invitation to invalidation; it not only undercuts the franchising authority's argument that the term is essential, but also ensures that denial of a certificate will create only minimal disruption.

Where alternative franchise provisions do not exist, the local government and community group should suggest alternative remedies to the FCC. Denial of certification often will result in further negotiations among the cable operator, the franchising authority, the community group, and perhaps even the FCC's staff. The community group should have a list of alternative approaches it would find satisfactory where it appears that it has successfully objected to a franchise provision. Often these discussions with FCC staff members can take place before actual denial.

VII. SPECIAL WAIVER AND RULEMAKING PROCEDURES

After the system is in operation it may seek relief from various FCC or franchise requirements. There are two principal ways of obtaining relief. First, an organization may petition the FCC to waive a particular rule's application to it. As noted in Sec. II above, Sec. 76.7 of the FCC rules grants an explicit, albeit limited, right for any "interested person" to request waiver or modification of any cable television rule. Second, anyone may request the Commission to make a new rule or to change an existing rule, by way of a petition for proposed rule making. Cable operators, broadcasting stations, program producers, equipment manufacturers, and other interest groups besiege the Commission constantly with waiver or rulemaking petitions. Local governments and community groups, however, hardly ever use either procedural technique and usually are unprepared even to file comments on petitions that affect them.

REACTION OF LOCAL GOVERNMENTS AND COMMUNITY GROUPS TO PETITIONS FOR SPECIAL RELIEF

Cable operators and broadcasting stations often seek petitions for special relief. A few illustrations will show the scope of waiver applications and their relation to community interests.

A cable operator may seek a waiver from the requirement that:

- The system originate programming "to a significant extent as a local outlet" if it has more than 3500 subscribers. Section 76.201(A).
- A cable system located outside of all major television markets have facilities available for origination of local programs. Section 76.201(B).
- A major market cable system have a minimum 20-channel capacity and two-way capability. Section 76.251(a)(1)(2).
- The system provide additional channels when existing channels are in relatively high demand. Section 76.251(a)(8).

- The system adhere to the technical standards established in Subpart K of the rules.
- The system provide dedicated access, educational, and governmental channels. Section 76.251(a).
- The franchise contain a 15-year limitation on the initial duration or that it require significant construction equitably spread throughout the franchise area. Section 76.31(a).
- A television station not own a cable system within its service area. Section 76.501.
- Existing cable systems come into compliance with the rules within five years.

A local television station may also seek special relief:

- It may petition the FCC to decrease the number of distant signals which a local cable system may import, in order to diminish competition with the cable system.
- A local foreign language station may object to the importation of distant foreign language stations.
- A local educational station may object to the importation of distant educational signals.
- A commercial station may demand that a cable system not duplicate its programs with distant signals, even where the rules allow nonsimultaneous duplication.
- A station may petition for more stringent leapfrogging rules, in order to restrict the sources of a cable system's distant signals.

Many of these petitions will seem technical and irrelevant, but a local government or community group should examine every application in detail to determine its relevance to community interests. As noted in Sec. III, importation of distant signals may affect not only the programming available to subscribers, but also the public service capability of local television stations. And special interests in each community undoubtedly will want to be heard on some issues; for example, parent-teacher associations may have strong views on the education channel's uses.

Unfortunately, however, community groups now have no method of automatically receiving notice about petitions that affect them. Section 76.7(b) provides that a petition for special relief must be served upon the franchising authority or any "interested person who may be directly affected if the relief requested should be granted." But this may not necessarily include community groups that represent only a general public interest. A community group might send a formal letter to a cable operator stating that it is an "interested person" in relation to any petitions for special relief. It is not certain whether this tactic would create any legal right to notice. Nevertheless, it may have some impact on the cable operator—especially if copies are sent to the franchising authority and to the FCC.

What are the requirements to oppose a petition? Section 76.7(b) explicitly states that a "petition may be submitted informally, by letter." Accordingly, any comments or opposition presumably also may be informal. As a result, community groups should not be deterred from filing oppositions because they lack an attorney. As with an opposition to a certification application, the document should be as detailed as possible and present a well-documented case. As with an opposition to a certification application, local governments or community groups should point out inaccuracies or omissions in the cable operator's statements. For example, a cable operator may seek a waiver of the public access channel requirement on the grounds that the channel has generated little use or interest. A community group might oppose this by showing that the cable operator has not provided adequate studio facilities, that studio facilities have been located inconveniently, or that the cable operator has exercised censorship. Finally, Sec. 76.7(c)(2) provides that the cable operator's petition must state "all steps taken . . . to resolve the problem." A community group or local government might argue that the cable operator has failed to take readily available steps. For example, a cable operator may seek a waiver of the educational channel requirement, on the grounds that the local school district has not used the channel. A community group might file affidavits showing that other educational institutions—such as a state university or a parochial school—never have had an opportunity to use the channel.

Preparation of an effective opposition sometimes may require fairly sophisticated economic analysis—particularly where a local broadcast station argues that a cable system creates unfair competition, or where the cable operator argues that his subscriber base will not support required services. Though cost analyses seem difficult and mystifying at first, most community groups should seek enough expert advice to rebut or at least analyze the petition.

The presence of a local voice is highly important for several reasons. The FCC usually hears only from one side when it passes on a waiver application. Moreover, the Commission's staff is neither large nor expert enough to check out the accuracy of all statements. Finally, the FCC often grants certain categories of waivers automatically if there is no opposition. If no one speaks for the community, the FCC may act on the principle that silence gives consent.

PETITIONS FOR SPECIAL RELIEF BY LOCAL GOVERNMENTS AND COMMUNITY GROUPS

A local government and community groups can seek additional or different requirements for a cable system by opposing a certification application. They also have recourse to Sec. 76.7(a), which creates an avenue for special relief not solely for the cable operator but for any "interested person."

Community groups thus may come before the FCC on their own. Recent federal court and FCC rulings indicate that the term "interested person" includes local viewers and subscribers. The FCC may not actively encourage public intervention, but the rules undeniably permit it. In recent years many groups have intervened to challenge license renewals of broadcast stations.

Community groups might use Sec. 76.7 petitions in many ways. As discussed

above, a petition for special relief is a possible—albeit not probable—way of securing provisions that the franchise omits. Community groups also may use petitions to protest inadequate performance, just as they may use oppositions to certification applications to protest inadequate promises. For example, a community group might argue that a cable operator is not fulfilling his obligation under Section 76.201(a) to operate "to a significant extent as a local outlet by origination cablecasting." The meaning of the requirement is vague, and a community group could secure an interpretation through a petition. In short, petitions for special relief allow community groups to attack the actual—as well as the promised—performance of their cable systems.

This avenue may be partially closed off in the future, however. The FCC recently adopted an amendment that will limit recourse to Sec. 76.7 by barring claims for relief that could have been filed under Sec. 76.27 but were not. As noted before, objections to certificates of compliance have to be filed within 30 days. There is no such limit on 76.7 applications for relief. The FCC seemed worried that citizen groups and others would use Sec. 76.7 to obtain relief they could no longer obtain under the certification objection method. The new rule states:

> (i) If the relief requested could have been earlier filed pursuant to § 76.27, the petition will be dismissed unless the petitioner shows that:
>
> (a) The facts relied on relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters pursuant to § 76.27.
>
> (b) The facts relied on were unknown to petitioner until after his last opportunity to present such matters, and he could not through the exercise of ordinary diligence have learned of the facts in question prior to such opportunity.
>
> (c) Consideration of the facts relied on is required in the public interest.

While the motivation for the new rule is clear enough, its terminology is so vague that it seems a feeble mechanism for discouraging ill-grounded petitions. This is not to say that there is much hope for such petitions even if they receive the FCC's attention. The rule's reference to new facts or changed circumstances in Subsec. (a) probably will require a petitioner to prove there has been a massive transformation of the local situation, if the phrase is interpreted in the light of past judicial and administrative constructions of similar provisions. Only extreme changes may suffice, such as the discovery of fraud or corruption on the city's part. And while Subsec. (b) appears to be somewhat more generous, it may not include a community's general ignorance as to the stakes in cable franchising—precisely the situation, of course, that leads to most difficulties. Finally, Subsec. (c)'s reference to the "public interest" is so vague as to be effectively meaningless.

LOCAL GOVERNMENT AND COMMUNITY GROUP USE OF RULEMAKING PROCEEDINGS

Under federal law anyone may petition the FCC to make a new rule or to modify an existing one. Moreover, this right may be exercised in a remarkably easy way. The rules require only that a rulemaking petition be typed in any one of several simple formats and that it state the reasons for adoption or modification of the rule. Industry representatives file hundreds of rulemaking petitions each year; representatives of the "public interest" file virtually none.

Rulemaking petitions are only occasionally effective. A petition generally will not goad the Commission into adopting a rule, but at least may persuade it to consider a new policy issue, in which case new rules may follow later. For example, in 1967 the Office of Communication of the United Church of Christ filed a short petition requesting the Commission to ban racial discrimination by broadcasters. The Commission responded by first adopting a general policy against discrimination and then promulgating a comprehensive set of rules *(Nondiscrimination in Employment Practices,* 37 Fed. Reg. 6586, March 31, 1972).

SOURCES OF AID FOR LOCAL GOVERNMENTS AND COMMUNITY GROUPS IN SPECIAL RELIEF AND RULEMAKING PROCEDURES

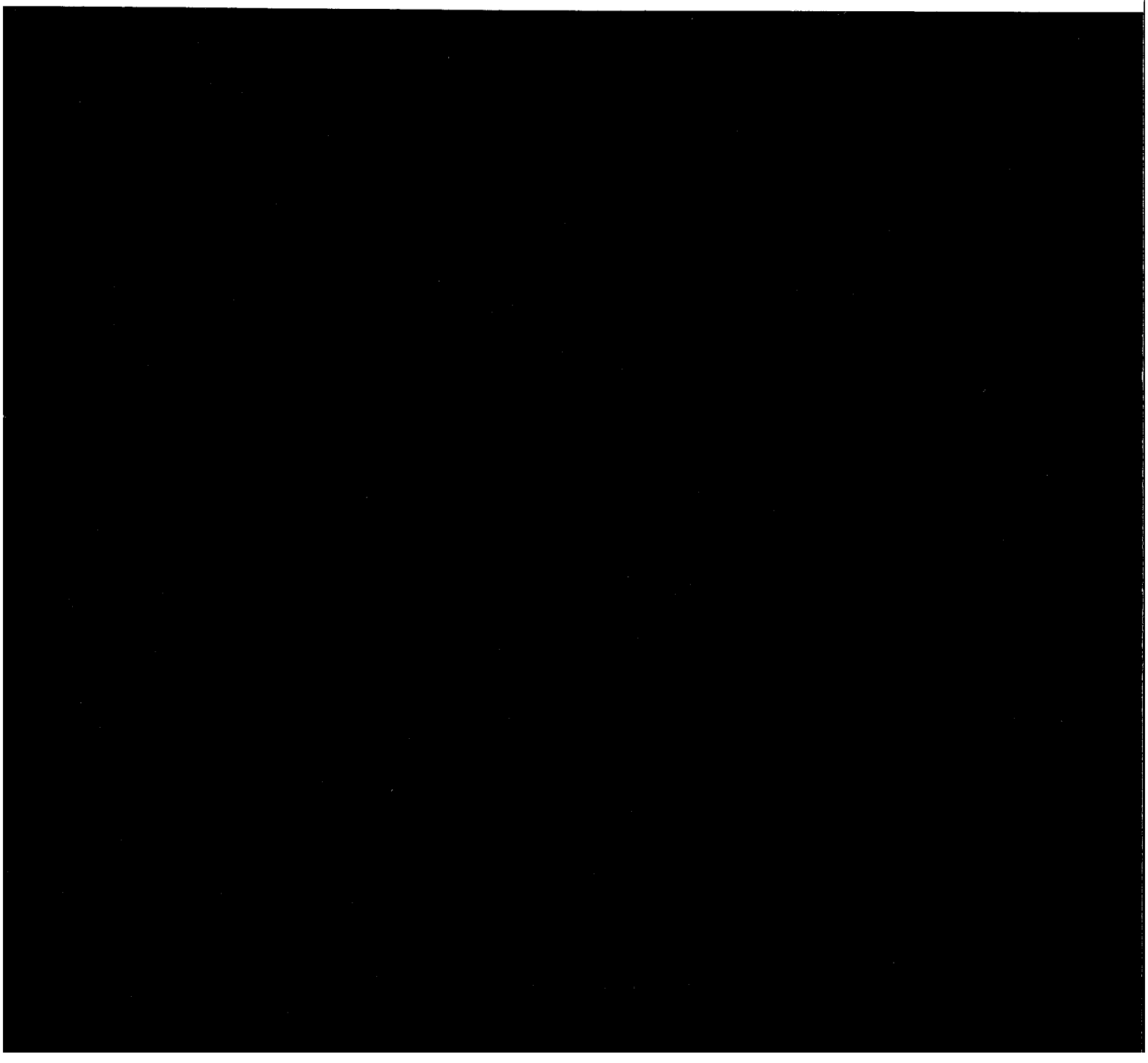
The rules thus give local governments and community groups at least an opportunity to participate in FCC proceedings. This participation need not be as difficult as the rules' mystifying language might indicate. Nevertheless, both local governments and community groups obviously can use help. A number of sources exist now, and others will become available.

The Office of Communication of the United Church of Christ works through its local affiliates to advise communities. The American Civil Liberties Union monitors FCC matters that touch on First Amendment interests. The new Cable Television Information Center will provide information to local groups and will contract to do studies for local governments. In some communities, publicly supported legal services offices or "public interest" law firms[1] will help groups file with the FCC; though most attorneys in these offices have little experience in communications law, they are often willing and able to contribute their time. In addition, regional and national organizations dealing solely with cable have developed and will become increasingly useful. Finally, some cities, such as New York, attempt to monitor issues which may affect local interests.

Before a local government or community group can take meaningful action, it must know that an issue will affect it. For example, another community's petition for special relief may be relevant, since the FCC's disposition will become a precedent. As a result, coalitions of community groups and local government should file *amicus curiae*— "friend of the court"—comments when a seemingly unrelated issue may ultimately affect them. Some communities and organizations have picked a person or committee to review relevant literature—such as magazines, newsletters, and trade publications.

Finally, a local government or community group always should attempt to settle a dispute. Negotiation is obviously much cheaper and easier than litigation for all parties. Nevertheless, community groups often will find that a cable operator is much more amenable to settlement if the group already has filed an intelligent and persuasive document with the FCC.

[1] A list of such firms can be obtained by writing to the Center for Law and Social Policy, 1600 20th Street, N.W., Washington, D.C. 20009. For an extensive list of information sources regarding cable, see Baer's compilation under the heading "For More Information" at the end of *Cable Television: A Handbook for Decisionmaking,* R-1133-NSF.

VIII. CONCLUSION

Local governments and community groups can participate in the FCC's certification, waiver, and rulemaking proceedings. Citizen participation inevitably will create conflicts among the FCC, local governments, community groups, and cable operators. This price, however, is well worth paying. First, the heat of battle may refine the FCC's policy decisions. Second, and more important, local governments and community groups must act immediately and affirmatively to prevent cable regulation from becoming an exclusively federal domain. Citizen participation may inspire a truly creative dual federalism. For it is clear that in many cases, effectuation of federal goals will be accomplished only if strong voices are heard from the local level.