5-1981

The political and legal framework for cable television franchising by Virginia local government

Clyde Edward Roettger

THE POLITICAL AND LEGAL FRAMEWORK FOR CABLE TELEVISION FRANCHISING BY VIRGINIA LOCAL GOVERMENT

BY
CLYDE EDWARD ROETTGER, JR.

A THESIS
SUBMITTED TO THE GRADUATE FACULTY
OF THE UNIVERSITY OF RICHMOND
IN CANDIDACY
FOR THE DEGREE OF
MASTER OF ARTS
IN POLITICAL SCIENCE

MAY, 1981

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Approved by

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Thesis Director

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Committee Member

PREFACE

Within the last decade state-of-the-art cable television has gone from an unsuccessful, premature proposal in Virginia, to operative franchises in several jurisdictions, including Richmond, Henrico, Chesterfield, Arlington, and Alexandria. There are also a number of franchises which have been in operation for many years and which are intended largely for reception improvement with some minimal extra services, such as those in Petersburg, Hopewell and Colonial Heights. It is proposed here to raise significant issues which could have been addressed by Virginia state and local government as to the regulation of this rapid growth of cable television in the Commonwealth, especially given the trend toward deregulation at the Federal level which might leave regulatory responsibility with the state and localities. Examples from the governmental response to that growth will be used to demonstrate the need for a comprehensive study of regulatory alternatives. They will also show that to a significant extent, Virginia has already committed itself to a regulatory scheme which apparently is to regulate in the public interest, but which, in fact, neither has the resources nor the authority to do so. Further, it will be apparent that this decision has been made largely by default. The Virginia General

Assembly has failed to act, either through ignorance of the potential of the medium, or a reluctance to regulate or delegate authority to localities to do so. Only the barest regulatory framework for local governmental initiative has been promulgated, and only a minimal commitment has been made to giving localities the resources necessary to exercise that responsibility. The Commonwealth consequently finds itself with a cable regulatory scheme which is neither fully relevant to the characteristics of the medium or capable of fostering the public interest.

This study will involve necessarily a description of some of the major aspects of the legal and political environment within which governments cooperated in, reacted to, or initiated this process. Further, the extent to which certain feasible and legal options were considered in an effort to create a sophisticated system reflective of community needs will be noted, as will the legal problems of the largely irrelevant process of local governmental franchising. It will be necessary to address briefly certain other points, such as the technical possibilities of cable television at this time and its likely future development, comparison of the systems offered and chosen in the recent Virginia experience with the state-of-the-art, the economic factors limiting the feasibility of particular systems attractive to multiple system operators (MSO's), and the social and political implications of choices made in the franchising and regulatory process.

Having addressed these subjects, it will be possible to assess the impact of the legal and political environment upon regulation of cable television by state and local government in Virginia, with the focus being on a comparison of the alternatives available with actual results. Here questions shall be raised as to the appropriate roles of state and local regulation; as to the rationale for authorizing local governmental regulation on the basis of the franchising process and the relevance of principles of franchise law to the cable television industry; and even as to the relevance of traditional Virginia local government law to the attainment of community cable television objectives. This shall require examination of the legal options, such as regional franchising and deregulation, taken by other jurisdictions, both nationally and in Virginia; of case law precedent, both for franchising generally (e.g., Cablecom-General of Virginia, Inc. v. City of Richmond, et al.), and for such related considerations as antitrust law (e.g., Community Communications Co. v. City of Boulder, Colorado), privacy protection, whether against private or public owners, First Amendment principles, and local government law (e.g., Virginia's Dillon Rule). It shall be necessary to analyze whether or not under Virginia law cable television is to be treated as a public utility or a luxury, a public improvement or a commercial enterprise, and the implications of such decisions for local governmental regulation. Based upon this foundation, the task then will be to point to the weaknesses

found in the legal tools available to Virginia local government in decisionmaking on such issues, and to suggest that this reflects a failure of the legal and political system itself to meet the challenge of a rapidly developing and potentially important new technology.

No effort will be made to describe a model regulatory scheme for Virginia and its localities. Rather, this study will explore the issues to be addressed in developing such a program, the possible benefit to the public interest in doing so, the lack of initiative on the issue, and limitations inherent in any such regulatory effort. The objective will be to raise important issues not yet addressed in a developing field. To respond to those issues would be premature. It is not premature, however, to demonstrate the necessity for a comprehensive analysis of this issue. In fact, in Virginia it may be too late, since a number of significant franchises have already been let. This study will demonstrate that no such decisionmaking process has as yet been carried out in the Commonwealth, and that significant long term commitments have been made without such guidance. Experiences from several jurisdictions with different cable television records, and located in three of the state's Standard Metropolitan Statistical Areas, Northern Virginia, the Tricities, and the Richmond area, will be discussed to illustrate the state and local response to such issues and the regulatory status of the medium at this point. The thesis of this study is that state government has defaulted in its regulatory responsibility

by leaving regulation to the efforts of local governments which have neither the legal authority, the technical expertise, nor the political inclination to do so effectively.

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CHAPTER 1

CABLE TELEVISION IN VIRGINIA

Cable television in Virginia represents a cross section of the medium nationally, consisting of both older reception improvement systems, such as that in Damascus, which was begun in 1949; and multiservice systems in excess of thirty channel capacity currently under construction or recently operational, as in Richmond and Arlington. As might be expected from a medium developing over thirty years of changing objectives and technology, system size varies significantly. Operational systems range from the very small, such as Rich Creek with fifty subscribers, to those of moderate sizes, as in Roanoke with eighteen thousand, five hundred subscribers. Systems under construction have even greater potential size, as in Arlington, with a franchise area population of over one hundred, seventy-five thousand. As of 1980, at least eighty-five systems were operational or in the advanced planning or construction phase in the Commonwealth. Of these, however, at least sixty-two use twelve channels or fewer. Such reception improvement systems are not the main subject of this study, since they no longer represent the state-of-the-art. Also, they were established primarily for television reception purposes, while to call the state-of-the-art systems television is almost a misnomer. Actually, the focus of this paper is the developing cable

information medium. Two such systems in the Tricities area will be noted, however, for comparative purposes. Of those sixty-two basic systems, five have gone into operation since 1977, and twelve have a capacity, which is not fully utilized, of more than twelve channels. Only two systems, however, Haysi with three and Jonesville with eight, have less than a twelve channel capacity. Only nine systems developed before the current stage of growth began in 1977 have and use a capacity beyond twelve channels, and these include the extraordinary situation presented by the Reston planned community system. Clearly, the nature of the medium's development in Virginia changed dramatically in the late 1970's.[1]

For the comparative purposes of this paper, the cable television experience in three markets: Tricities (the Cities of Petersburg, Hopewell, and Colonial Heights), Northern Virginia (the Counties of Arlington and Fairfax, and the Cities of Alexandria and Fairfax), and the Richmond Metropolitan area (the City of Richmond and the Counties of Henrico and Chesterfield) will be examined. The franchising process was conducted in these markets at different times, under different social, political and legal conditions, and at different stages in industry development. Emphasis will be placed on the City of Richmond, since the process there exemplied several of the shortcomings of the current Virginia experience with state-of-the-art systems. Northern Virginia will exhibit experiences

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[1]Broadcasting--Cable Yearbook 1980 (Washington, D.C.: Broadcasting Publishers, Inc., 1980), pp. G261-G267.

with similar systems, but with somewhat more sophisticated, if not much more successful, an approach. The older twelve channel systems of the Tricities area are examined primarily for demonstration of the challenge of the developing cable industry, which challenge demands both flexibility and resources apparently beyond many Virginia local governments, and for the consequences of these deficiencies.

The Northern Virginia Experience

Numerous inquiries from cable system operators to the Arlington County administration prior to 1970 led the county to request that the General Assembly authorize Virginia counties specifically, as well as other local jurisdictions, to franchise and regulate the cable television industry. The minimal response was the passage of Va. Code § 15.1-23.1, which shall be mentioned later. Upon completion of a study by the Arlington Public Utilities Commission, which had as one of its objectives an ordinance which was "flexible and would give the County the tools to protect the public interest in the face of changing technology," the Council passed its cable television ordinance on February 13, 1971.

Solicitation of bids from over sixty firms was issued on June 15, 1971, and five applications were received from Arlington Telecommunications Corporation (ARTEC), Arlington Community Television Co., Inc. (ARCOM), Northern Virginia Cable Centers (NVCC), TelePrompter (TPT) and the Corporation for Systems Research (ARSYSTEMS), four months later. Several public hearings

and work sessions were held by the Commission, which refused to meet in executive session with any of the applicants, and rankings and recommendations were presented to the Board of Supervisors on January 10, 1972. A public hearing in March resulted in referral to the PUC for additional information. This process, in which any applicant was permitted participation, resulted in a PUC recommendation in May that a "conditional certificate" be granted to ARTEC, which the Board granted on August 5. In September, Warren Braum was hired as negotiator to assist in development of a Certificate of Public Convenience and Necessity, consideration of numerous drafts of which followed. A Certificate was awarded to ARTEC on March 3, 1973, and an application in May filed with the Federal Communications Commission (FCC) for a Certificate of Compliance. Final authorization did not come until August 19, 1975, primarily because of issues raised by Washington broadcasting stations. ARTEC came into full compliance with the Cable Ordinance on December 16, 1975, by posting the required bond.[2]

Initial service by the three hundred, sixty mile, thirty-six channel system with six governmental educational channels and one for public access, was delayed until July, 1978, primarily because of financing difficulties.[3] At its opening, FCC

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[2]Interview with Jerry K. Emrich and Charles G. Flynn, Arlington County, Virginia, 21 November 1980; Washington Post, 16 July 1978, sec. C, p. 1; and Washington Post, 7 January 1979, sec. K, p. 5.

[3]Washington Post, 7 January 1979, sec. K, p. 5; and Washington Post, 9 February 1978, sec. Va., p. 1.

Commissioner Joseph Fogarty characterized ARTEC as a prototype for future systems nationally, with its services for county government and schools and community information, programming and shoppers guides and traffic signals.[4] Two years later, before completion of the system, the Board of Supervisors deregulated ARTEC rates, despite service complaints, despite the fact that access commitments had not been met, and despite the fact that rate regulation was perhaps the most effective regulatory power of the Board. ARTEC contended that lack of public access had resulted primarily from the fact that priority had been given to the completion of wiring. In support of deregulation, it was contended that cable television was not a monopoly, similar services being available from broadcast media in the Washington area; and that being the case, that philosophical considerations which the Board found persuasive should dictate a free market. Also of importance was the fact that, even given the availability of a public utilities commission that would make it one of the most capable of Virginia jurisdictions, complex rate regulation was probably beyond the county staff's resources. The Board did retain the authority to reinstitute regulation. It was interesting to note that at the same time, ARTEC was indicating an interest in renegotiation of terms requiring creative programming and public access.[5]

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[4]Washington Post, 19 July 1978, sec. D, p. 2; and Washington Post, 7 January 1979, sec. K, p. 5.

[5]Washington Post, 29 June 1980, sec. A, p. 13; and Washington Post, 10 July 1980, sec. Va., p. 6.

While the Arlington franchise awaited FCC approval, City of Alexandria officials considered initiating a cable franchise, but failed to do so when little interest developed. In 1978, however, solicitations were requested, and three companies, including an ARTEC subsidiary and the Alexandria Cablevision Company (ACC), submitted bids in 1979.[6]

Interestingly, the issue of rate regulation, as opposed to free market rates set in competition with other media, was involved in the Alexandria procedure from the beginning. That city's Council only retained the option for the Cable Administrator to regulate, upon request of Council. This was apparently in agreement with the position that rate regulation could increase the influence of politics on the franchising process, since only those with enough political power to get rate increases would bother to apply.[7]

Just as would be the case in Richmond, the primary factor considered in awarding the Alexandria franchise, aside from political pressure, was the financial ability of the bidders to perform, one difference being, however, that it was a local citizens group, the Consumer Affairs Commission, which advocated this position strongly in conjunction with the consultant. In doing so, it is interesting that one of the few economic advantages of regional systems was found to be true in the Alexandria

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[6]Washington Post, 15 April 1978, sec. B, p. 1; Alexandria, Virginia, Ordinance 2383, 26 June 1979; and Washington Post, 5 March 1979, sec. C, p. 1.

[7]Washington Post, 28 June 1978, sec. B, p. 7.

system, that being that the ARTEC subsidiary had no need to build an additional broadcasting tower in Alexandria, which the other bidders would.[8] In the end, this and other regional considerations did not succeed. Perhaps they were even a hindrance for ARTEC, or, as Council member Robert L. Calhoun stated, "I would like us to do something on our own in this city rather than be a part of an empire."[9] Interjurisdictional rivalries have often constituted the major obstacle to a regional system in Northern Virginia.[10]

ALTEC was given the highest rating by the city's cable television administrator and its financial consultant, based on financial strength, management experience, realistic projections, and public service advantages, including a two-way capability. Council, however, determined to award the franchise to ACC, but deferred the award until additional information could be obtained concerning what the city's consultant characterized as "serious deficiences" in its financial arrangements. Finally, on June 19, 1979, the franchise was awarded to ACC. In a due process complaint that was also heard in Richmond, ALTEC severely criticized Council for receiving additional information from one bidder after the deadline for bid submissions, but met only with an opinion of the City Attorney that Council was within the law in doing so. In an extraordinary action, the successful bidder ACC also complained

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[8]Washington Post, 8 March 1979, sec. B, p. 5.

[9]Washington Post, 20 June 1979, sec. B, p. 1.

[10]Interview, Emrich and Flynn; Interview, Maston T. Jacks and Michelle R. Evans, Alexandria, Virginia, 21 November 1980; and Interview, Phil Tyman, Washington, D.C., 13 November 1980.

about due process violations by the City's staff and consultant during the process.[11] Both complaints, however unfounded legally, point to the need for the type of franchising guidelines required later by Chesterfield and Falls Church.[12] Not only were such procedures absent in the Alexandria case, but a new Council took office in the middle of the award, leading to such problems as suggested additional terms in the performance contract concerning the City's right to purchase the system if its performance were found inadequate. The contract was signed, however, on July 26, 1979,[13] and the stringing of cable finally began in July, 1980, for a thirty-five channel "tiered" system which would allow flexibility in consumer choice of service, and which would eventually provide such two-way service as alarms as well as channels for leasing for business and personal use.[14] The fact that the system is two-way "active," as opposed to being susceptible to later conversion to two-way, constitutes a significant system advantage, despite the fact that this may have resulted from a bid error.[15] Service in some parts of Alexandria began in late October, 1980.[16]

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[11]Washington Post, 13 June 1979, sec. B, p. 8; Washington Post, 27 June 1979, sec. C, p. 1; and Washington Post, 4 July 1979, sec. C, p. 7.

[12]Interview, Stephen L. Micas, Chesterfield Courthouse, Virginia, 20 November 1980; and Falls Church, Virginia, "Cable Television Franchising Procedures Ordinance," 1980.

[13]Washington Post, 10 July 1979, sec. C, p. 3.

[14]Washington Post, 10 July 1980, sec. Va., p. 6.

[15]Interview, Jacks and Evans.

[16]Ibid.; and Municipal Highlights: City of Alexandria, Virginia, November 1980, p. 6.

On October 23, 1978, the Fairfax County Board of Supervisors voted unanimously to seek bids for a consulting firm to develop a cable television ordinance, and to authorize the hiring of a "special manager" to work as liaison between the staff and the consultant. It was anticipated that the ordinance would be drafted within six months.

Valid concern that the process be cautiously conducted was expressed, despite some consternation that the county was not already further along towards cable service. There was even some sentiment for observing the experience in Arlington before proceeding too far, and perhaps for waiting until late 1979 to go out for bids. It was recognized by many, as Supervisor Martha V. Pennino stated, that the cable franchising issue presented "one of the most important decisions we will ever make;" or put more dramatically by one supervisor, that "this is either the greatest thing coming down the pike for Fairfax or a horrible monster." Unfortunately, county profit, in the nature of a business privilege tax, was a major motive from the beginning. ARTEC was one of the five firms initially interested.[17]

As late as May, 1979, one of the most respected national cable television consultants, Malarkey, Taylor and Associates of Washington, D. C., evaluated Fairfax County as a marginal risk for a franchise. Due to a low population density and local requirements for much underground work, it was anticipated that a system could expect approximately ten years of losses. Both Arlington

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[17]Washington Post, 26 October 1978, sec. Va., p. 18.

and Alexandria had population densities of more than twice that of Fairfax County. It was noted, however, that the County was a prestige area near the nation's capital, with a relatively high per capita income. As a means of mitigating capital expenditures, it was recommended that the county be divided into three service areas, ideally with a different franchise in each. The unincorporated, planned community of Reston, within which Warner-Annex Cable Corp. already operated a system without a franchise, would constitute one area, with the rest of the county being split into two areas. No plans involving subdistricting or networking were involved.

Rapid technological developments within the past year have made possible a substantial increase in available services to potential consumers which are unavailable from broadcast media. The resulting increases in the market for cable has made the population density question much less important.[18] The three franchise areas are being retained, but the two major franchises will probably now go to the same company. With one franchisee, there could be First Amendment problems with requiring different programming in subdistricts.

Any earlier misgivings about the feasibility of the system have not been evidenced by a lack of interest on the part of the potential operators. There are at least eighteen which have

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[18]Washington Post, 1 May 1979, sec. C, p. 2; Washington Post, 8 April 1980, sec. C, p. 1; Washington Post, 27 December 1979; and Interview, Richard A. Golden, Fairfax County, Virginia, 19 November 1980.

exhibited interest at some point. The Board of Supervisors approved, on April 7, 1980, the three district plan, and at the same time inexplicitably refused a proposal to give a citizen's committee a role in awarding the franchise.[19] Since that time, whether it was involved with the Board's decision on citizen input or not, that decision may have been indirectly vindicated. As a result of what at least appeared to the Board to be an especially unfortunate example of "rent-a-citizen" franchise practices, a controversy has developed over acceptance by the Fairfax County Arts Council, a private group also accepting county funds, of one percent interest in the subsidiary of Storer Communications. In terms of appearances, the problem was not mitigated to any significant degree by the fact that the company contended that no Arts Council lobbying was intended, and that the stock was only in return for programming advice.[20] The county has since adopted one of the strictest cable financial ownership disclosure ordinances in the nation.[21]

On a less hopeful note, however, the Board has come to the conclusion that they are incapable, even with one of the most sophisticated local staffs in the Commonwealth, of judging technological factors. Also, the originally set deadline of December 19, 1980, for the receiving of bids to the Board has apparently gone by the board as the governing body has called for a report on

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[19] Washington Post, 8 April 1980, sec. C, p. 1.

[20] Washington Post, 22 July 1980, sec. C, p. 1.

[21] Washington Post, 8 August 1980, sec. C, p. 1.

possible public ownership. Despite Dillon Rule, antitrust, and other legal problems with public local ownership, this should not be surprising, given the Fairfax reputation for liberal interpretation of Virginia local government authority.[22] This study could prove interesting though, since it could point to the fact that most of these problems could be mitigated by legislative action at the state level. For instance, if cable television could be classified as a public utility, regional construction and operation of all or part of a system could be pursued under authority granted in Va. Code §§ 15.1-304 through 15.1-307.

Elsewhere in Northern Virginia, the town of Leesburg granted a franchise to Storer Communications in August, 1980, after a process which involved an arrangement with the Loudoun Time-Mirror that could result in a virtual monopoly of local news on cable.[23] Storer did not consider Leesburg especially promising in profit terms, but instead saw it as a stepping stone to other franchises. The fact that a community of approximately ten thousand people, with two to three thousand households, could be expected to generate gross revenues of seven hundred, fifty thousand dollars per year says a great deal about the relative importance of system size for feasibility.[24] This "stepping stone" issue also raises significant networking questions in considering any future franchising action by Loudoun County.

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[22]Washington Post, 8 August 1980, sec. C, p. 1; and Interview, Emrich and Flynn.

[23]Washington Post, 27 August 1980, sec. C, p. 1.

[24]Washington Post, 28 August 1980, sec. B, pp. 1, 10.

Elsewhere in Northern Virginia, the City of Falls Church has begun consideration of a franchise, but to this point has only adopted ethical and other guidelines for the conduct of that process.[25] Prince William County has given some initial consideration to cable television, but the Board of Supervisors has decided to defer action.[26]

The Richmond Area Experience

The City of Richmond, in 1972, made its initial effort in the cable field by advertising for bids. Of seven submitted, four proposed some form of local input. The City Manager's recommendation, however, was in favor of a company making no such offer. Controversy over this issue ensued, and this, with confusion engendered by changing Federal Communications Commission regulations, led Council to abandon the effort. Also involved in this delay was concern that a Voting Rights controversy over the annexation of a portion of Chesterfield County might affect any franchise granted.[27] It is ironic that this indirect impact offers one of the few examples found in this entire study of a major effect of the law upon the Virginia cable franchising process.

In 1977, a member of City Council, most likely at the prompting of early industry lobbying, requested the City Attorney and Administration to draft a second bid package and ordinance.

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[25]Interview, William F. Roeder, Jr., Falls Church, 14 November 1980.

[26]Interview, Emrich and Flynn.

[27]Ibid.

The stated objective at that time was the three percent revenue to be generated for the City, revenue which under FCC guidelines was designated to cover the cost of "regulation." Despite the fact that the Administration felt that the City was incapable, especially from a technical standpoint, to proceed with a franchise award at that point, the new package was prepared. It was based primarily on that of Henrico County, which had passed a cable television ordinance on February 25, 1976, and Virginia Beach.[28] A Notice of Invitation for Bids was published on September 1, 1977,[29] after minor changes had been made by the consultant, Warren L. Braun, who had been hired at the suggestion of the Manager, and by Council.[30] The issue of local control over the system and access to it was addressed only once in the Notice, and this was merely to ask whether or not any local control of access would be offered. Apparently, this was done "out of an abundance of caution," based on the local control controversy in 1972.[31] This, and the indirect assistance of the Washington consulting firm which drafted the Henrico and Virginia Beach papers, was almost the extent of outside non-industry participation in the planning phase. Other input was apparently limited to minor suggestions by the Ford Foundation.

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[28]Interview, Daniel W. Allen, Richmond, Virginia, 2 December 1979.

[29]Warren L. Braun, City of Richmond: Cable Television Bids Response Analysis. Harrisonburg, Virginia: Warren L. Braun, Consulting Engineer, 1978.

[30]Interview, Allen.

[31]Ibid.

After the planning stage, and in fact after the submission of bids, Council was also presented with a Report on Cable Television in Richmond prepared by the Citizens' Research Committee on Cable, which reflected the views of a large number of community organizations.[32] This report is mentioned at this point since it reflects the major voice for local control, but even so, its ". . . primary concerns lay in the area of access to the system by public and non-profit institutions." The issue of overall control of the system and its resources was not of primary concern.

The Notice was sent to approximately fifty cable industry entities. Any effort to solicit potential local investments was apparently limited to the local newspaper advertisement required by law of all franchises for the use of public property, easements or rights of way, a requirement of little actual relevance of the cable process.[33] Six multiple system owners (MSO) submitted bids through their local corporations, as follows: Storer Broadcasting Company, Cablecom-General, Inc., American Television and Communications Corp., Continental Cablevision, Inc., Cox Cable Communications, Inc., and Century Communication Corp.[34]

The Citizens' Committee analysis of bids was presented to the Council and the Manager on March 28, 1978, and its following observations are interesting, particularly considering its emphasis on access provisions:

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[32]Citizens' Research Committee on Cable. Report on Cable Television in Richmond. Richmond, Virginia, 28 March 1978, pp. 1-2.

[33]Interview, Allen; and Va. Const., Art. VII, § 9; Va. Code § 15.1-308.

[34]Braun, City of Richmond, p. 1.

1. None of the applicants made commitments concerning reduced rates for community group or government use of leased channels. ATC and Continental did offer to consider the possibility, however;

2. From the group's viewpoint, the only importance of a local board was for citizen participation in local programming. It was noted that marketing alone would not create an audience for such offerings, which of their very nature are of relatively low quality, and that only content, volunteer energy, and community involvement would;

3. Continental and American offered greater local board control of public access channels. Continental proposed that a "Corporation for Community Access" be formed by the City for the purpose of establishing rules for the public access channel, for conducting training programs in its use, and for coordinating its use by City agencies and public institutions. The initial board membership was to be proposed by the Company, for Council approval;

4. Comments on two other proposals are interesting, in that even the Citizens' Committee felt that only national industry expertise could produce a viable operation. Cablecom, the company which eventually filed suit over its loss of the franchise, offered a board which was strictly advisory, and selected by the company. The Committee noted that this was ". . . not likely to be the kind of instrument necessary to achieve the full potential of community programming." At the other extreme, while the Century board was to be almost totally independent of company control, the

Committee objected on the ground that almost no company assistance in local programming was likely with this alternative;

5. Finally, in the strongest suggestion throughout the process for community involvement in the entire cable operation, the Committee recommended the formation of a Cable Television Commission to

> --Oversee compliance with all aspects of the franchise ordinance and bid;
>
> --Evaluate any proposed changes in rates, initiated either by the company, the Commission, or the public, and make recommendations to City Council;
>
> --Hear complaints from the public or others concerning the system and mediate or report to City Council;
>
> --Insure that the system is operated in the public interest . . . .[35]

It was also suggested that the three percent franchise fee be used to staff this Commission."[36]

The Manager's consultant issued his analysis of the six bids on April 10, 1978, and it was notable for the following recommendations:

1. That Council "consider the first principle of applicant qualification to be the relative financial strength of each bidder . . .," and that the strength of the parent MSO and financial commitments it had made elsewhere be given considerable weight in addition to the strength of the local company. Continental, which

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[35]Citizens' Research Committee on Cable, "Report," pp. 3, 8-11, 28.

[36]Ibid.

was eventually awarded the franchise, ranked only third in this category. ATC, which eventually received an interest in the award, was ranked first with Cox;

2. That "local ownership is only as important as the local board membership is empowered to act on behalf of the MSO. Most of the considerations, such as channel carriage, rules of fairness, EEOC, technical and other areas are under the direct control of the F.C.C. . . . ." Braun specifically left any determination on this matter to Council's discretion, and on only this issue and that of company "character" made no analysis or recommendation. Proposed percentages of local ownership, which were minimal and varied little, were reported, as follows:

Century, Cox, Storer and Cablecom	20% each
Continental	up to 20%
ATC	16 - 19%[37]

After intensive lobbying by local citizens with investment potential in the various local companies and by representatives of the MSO's, Council awarded the franchise to Continental. This came only after American withdrew in favor of Continental, having reached an agreement to purchase an interest in the local company.[38]

While extensive additional research would be necessary to confirm them, several preliminary conclusions can apparently be made concerning the Richmond procedure in this case, as follows:

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[37]Braun, City of Richmond, pp. II-1, X-1, X-1-3.

[38]Richmond Times-Dispatch, 28 May 1978, sec. B, p. 1; Interview, Allen; and Interview, Hall.

1. While much has been made about "political framework," the local ownership groups ffom which Council had to choose all represented the community with relative success. It may be true that the economic impact on various prominent local individuals did not escape members of Council, but it has not been established by substantial evidence to this point that this was a determinative factor;[39]

2. Apparently, the chief objectives of all parties involved in the process were limited to additional City revenue, local control of public access channels, the technological sophistication of services to be offered under the franchise, and the financial ability of the franchisee to perform according to its proposal;

3. Rather than establishing its own priorities and objectives through planning prior to an invitation for bids, on the issue of ownership or any other, Council for the most part reacted to the input of industry lobbying, the Manager's and Consultant's recommendations of a technical and financial nature, and perhaps some limited community pressure for involvement in control of local access. This is particularly relevant in light of the City Administration's position that even on technical subjects, the City was unprepared in 1977 to reinitiate the franchise process. This, and Council's willingness to participate in ex parte discussions and executive sessions,[40] at best should have been

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[39]Richmond Times-Dispatch, 28 May 1978, sec. B, p. 1.

[40]Richmond Times-Dispatch, 28 May 1978, sec. B, p. 1; Richmond Times-Dispatch, 16 May 1978, sec. B, p. 1.

expected to cause public confusion concerning their objectives and the extent to which the award met them, and at worst to raise questions of due process which, while not necessarily of legal significance, could bring into public question the essential fairness of the process and its conformity with the public interest;

4. Such confusion concerning the actual public objectives of the process is evident in the filing of Cablecom-General of Virginia, Inc. v. City of Richmond, et al. While a complex case, and one which may have turned more on legal procedural questions than questions of fact, the central issues were whether Council had complied with Virginia law by awarding the franchise to the "highest and best bidder," an issue of ownership; and that of due process and ex parte communications. As might have been expected, the Court refused to overturn Council's exercise of its discretion in the absence of evidence of arbitrary and capricious action. Actually, it is difficult to conjecture how such evidence could have been produced, since Council's criteria for judgment were less than evident. The plaintiffs based their contention primarily on the recommendations of the City consultant.[41] If, however, one assumes that the primary objective of Council was control of local access, then its choice of Continental seems not at all unreasonable. When this is coupled with the participation of financially strong American in the local company, thereby meeting one of the Consultant's major objections to Continental, the award is even more logical.

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[41]Cablecom v. Richmond, No. 790387 (Richmond Circuit Court, Div. II, December 11, 1978).

Had Virginia law required, as the literature suggests, that the Council publish its reasons for decisions on franchise issues,[42] an opportunity would have been available at least for the production of evidence. Perhaps the controversy could even have been avoided. That assumes, of course, a willingness for candor in such situations.

Chesterfield County became involved in cable television franchising primarily because it would have been politically untenable not to do so, since Richmond and Henrico citizens were to have soon the service available. The County administrator was of the opinion that the County had insufficient population density to support a system and that if any MSO could provide service, it would be Continental, which had received the other area franchises. Both analyses proved to be incorrect. Despite the latter, and despite the cultural diversity of the County, between its northern suburbs and southern and western rural communities, no regional networking approach was ever considered. Actually, the fact that Continental had franchises in adjoining jurisdictions probably was detrimental to its bid. It must be remembered in this regard that interjurisdictional dispute between Chesterfield and Richmond played a significant role in the demise of an earlier attempt to establish cable in Richmond, as well as the prevalent opinion in Chesterfield government that any cooperative effort with the two adjoining larger jurisdictions

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[42]Walter S. Baer, Cable Television: A Handbook for Decisionmaking (New York: Crane, Russak & Co., 1974), p. 82.

results in a lower level of service for Chesterfield citizens. More specifically, however, pointing to the importance of both careful planning and interjurisdictional cooperative effort, it was essentially too late for Chesterfield to be a part of such a network; Richmond and Henrico had already acted and planned their systems. Also, in another rare instance of the law indirectly affecting the cable franchising process, Richmond was once again in litigation (Cablecom), which would discourage interjurisdictional negotiations for changing the status quo. Also, cooperation was unlikely before the issue of annexation immunity for certain urban counties, including Chesterfield and Henrico, was settled by the 1979 and 1980 sessions of the General Assembly. On a more mundane level, the county administration also realized that there would be very little economy of scale even if Continental obtained all three franchises.

The Chesterfield process was indirectly an excellent example of the potential usefulness of standarized procedure. The ordinance was developed by the County Attorney, but was essentially a synthesis of the Richmond and Henrico ordinances; and the bid application was almost identical to that used by Henrico. It was felt that there were few technical problems with this, since the Henrico application had been so recently developed. The primary distinction of the Chesterfield ordinance was that it attempted to avoid excessive regulatory reporting, without diminishing the County's regulatory role.

One of its primary objectives was flexibility, both by the inclusion of an overly vague provision for maintenance of state-of-the-art service, and by requirements of a contract and performance bond.

The only consultant hired by the county was Telecom of Kansas City, Missouri, which was only to evaluate bids received; but the Board of Supervisors did adopt, and follow, strict guidelines for the award process, which avoided the type of ex parte contact problem which helped lead to the Richmond litigation and which is prevalent in the cable industry's relationship to government, including the FCC. Specifically, late submissions were prohibited, unlike in Alexandria.[43]

Following the analysis of bids, the County Administration was inclined to recommend acceptance of that of Continental. This was not primarily because of any substantial differences as to service, but instead largely because Continental, on the advice of its attorney, State Senator Frederick T. Gray, had avoided the practice, so typical in such procedures, of bringing local pressure to bear on the governing body.[44] Storer had not hesitated to take the "rent-a-citizen" route, using local ownership by prominent citizens. The County Administration feared that similar pressure could be used in thwarting regulatory efforts. In a decision which is excellent evidence of the primary importance of the political factor in determining the outcome of

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[43]Interview, Micas.

[44]Ibid.; and Interview, Hall.

cable franchising processes, Storer received the franchise on a vote of three to two.

A small area of the County has recently gone into service. Storer apparently is well financed and has evidenced a willingness to make significant front-end capital expenditures. The principle problem so far has involved only minor slippage in meeting installation deadlines. No evidence of use of the political clout of local owners to weaken regulatory efforts has been encountered. The consumer response to the system is indicated by a relatively high penetration rate and an average bill of approximately thirty dollars per month, as compared to the basic service charge of six dollars and ninety-five cents.[45]

The Tricities Experience

In the Tricities Area, two antiquated twelve channel systems in three jurisdictions, originally designed for reception improvement and minimal additional service, were granted new franchises with only those changed provisions absolutely required to be made by March 31, 1977, by the FCC's Cable Television Report and Order, 37 F.R. 3252 (1972). The changes were made on the initiative of the companies involved, in the same manner as earlier franchises had been granted in Petersburg and Colonial Heights. It is ironic that this was done at the same time as Arlington's "prototype for cable television nationally" was being developed.

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[45]Interview, Micas.

The Colonial Heights and Petersburg franchises do operate as a unified system. No serious consideration has ever been given, however, to joint operation of this system with that in Hopewell on a regional basis, which could make a wider range of programming and access services more feasible.[46] Nor has any plan been advanced for dividing such a regional system into subdistricts which could be more responsive to the diverse demographic characteristics of the area.

Several observations of relevance to this paper can be made about the cable franchising experience in all three areas. As to the historical setting, cable operations in Virginia can be divided into two basic categories, those being the limited capacity reception improvement systems, and the high capacity, multi-service systems. The former category contains, by far, the majority, but since 1977 the trend has been toward the latter. Prior to that date, the less sophisticated operation was the rule, with the exception of a small number of systems in some of the larger cities and in one planned community.

Secondly, the franchising processes exhibited several prevalent characteristics, as follows:

1. industry initiation of the process and of system specifications;

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[46]Interview, Michael R. Packer, Petersburg, Virginia, 12 November 1980; Interview, Carl R. Pigeon, Hopewell, Virginia, 12 November 1980; and Petersburg, Virginia, "Sammons Communications, Inc., Franchise Ordinance," 1977.

2. issuance of a franchise in any one jurisdiction in a region having an impact on all other jurisdictions in the region;

3. interjurisdictional rivalries, resulting in failure to consider regional networking possibilities even when raised;

4. frequent subordination of the public interest, in such issues as ownership options, to the political influence of potential local owners;

5. the need for strictly adhered to franchising due process standards, and for demanding standards for citizen input;

6. the high priority given to franchising as a source of local governmental revenue, with such revenue to be used for general purposes rather than regulation or public system development;

7. the minimal grant of authority to localities by the state, and almost no evidence of necessary guidance as to standardized procedure or review of technical and financial factors;

8. confusion over the proper extent of local regulation, for instance as to rates, and lack of sufficient local expertise, even in the most sophisticated jurisdictions;

9. the importance of the goal of flexibility in authority to meet the demands of technological developments during the franchise period;

10. the relative unimportance of population density or system size, when compared to demographics, in the analysis of system feasibility; and

11. the deficiencies of the estalished Virginia franchising process as applied to the licensing and regulation of a new technology.

CHAPTER 2

LOCAL AUTHORITY IN CABLE FRANCHISING IN VIRGINIA

Central to the question of effective local governmental action in Virginia in the cable television franchising process, in addition to the consideration of available resources and expertise raised above, is the legal authority required to make use of any such resources and expertise; and this raises the question of the role that Virginia law and its underlying political foundations allow for local government.

As is often the case, the lack of clear legislative mandate has created a confusing situation ripe for litigation. Dillon's Rule may aggravate this by engendering questions as to the validity of much local action.

> There can be no question that Virginia long has followed, and still adheres to, the Dillon Rule of strict construction concerning the powers of local governing bodies.[47]

In judging the extent to which adequate statutory direction has been given to Virginia local governments, it must be remembered that they are "creatures of the State which are entirely subordinate to it" and that they can exercise no greater powers

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[47]1978 Rep. Att'y Gen. 37; Commonwealth v. Arlington County Board, 217 Va. 558, 573, 232 S.E.2d 30 (1977); and Howard Gan, "An Introduction to Cable: Some Basic Technical Information and a Look at the Regulatory and Legal Framework," Charlottesville, Virginia, 18 August 1980.

than those conferred upon them.[48] The summarized statement of the often cited rule, is to the effect that Virginia local governments possess only those powers granted expressly, or "necessarily or fairly implied in or incidental to the powers granted expressly, or those powers "essential to the declared objects and purposes" of the local government, which is to say not only convenient, but indispensible.[49] While the rule has been interpreted in some jurisdictions to allow inference of powers "reasonably necessary to effectuate a power expressly granted," as opposed to those absolutely necessary, it is probably most accurate, and most realistic for the task here, to state the Virginia rule as holding that "[a]ny fair, reasonable doubt concerning the existence of the power is resolved by the courts against the corporation and the power is denied."[50] The rule has in most instances in Virginia been strictly construed. This has even been the case in its application to grants of the police power, and has especially been true in the interpretation of county authority.[51] It is true that in a related situation,

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[48]1978 Rep. Att'y Gen. 37; 207 Va. 827, 15 S.E.2d 270 (1967); 1979 Rep. Att'y Gen. 240; Board of Supervisors of Fairfax County v. Horne, 216 Va. 113, 215 S.E.2d 453 (1975); and 13 Michie's Jurisprudence Municipal Corporations §§ 26-16 (1974).

[49]City of Richmond v. Board of Supervisors of Henrico County, 199 Va. 679, 684 (958); 1976 Rep. Att'y Gen. 64.

[50]Connelly v. Clark County, 307 N.E.2d 128, 130 (Ill. App. 1973); City of Richmond v. Board of Supervisors of Henrico County, 199 Va. 679, 684 (1958); 1976 Rep. Att'y Gen. 64.

[51]A. E. Dick Howard, Commentaries on the Constitution of Virginia (Charlottesville, Va.: University Press of Virginia, 1974), p. 810.

concerning the authority of localities to set rates for telephone service, the Virginia Supreme Court has held that the legislature can "abandon" authority to localities by "clear intendment" without the use of express words. In light of precedent, however, it is probably wise for local governments to follow the presumption against doubtful authority, since, as the Court noted, ". . . the difference, if any, between 'power expressly conferred' and 'power conferred clearly and by express intendment' is so shadowy as to be indistinquishable."[52] It should be noted in passing that local governments have the express authority to regulate cable rates in Virginia.[53]

In accurately assessing that cable television franchising and regulatory authority, however, three factors must be considered. The first, and most apparent, is that Dillon's Rule itself stands in Virginia not only through judicial precedent, but through legislative unwillingness to abrogate it. The Commission on Constitutional Revision proposal in 1971 to abandon the rule, to treat county and city authority more uniformly, and to establish home rule in the amendment of charters by the local electorate, all in a new Section 3 of Article VII of the Virginia Constitution dealing with the authority of the General Assembly to provide for the powers of local governments, was not approved by the legislature. Those proposals, in fact,

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[52]City of Richmond v. Chesapeake and Potomac Telephone Co. of Va., 127 Va. 612, 105 S.E. 127 (195).

[53]Va. Code § 15.1-23.1.

met with more legislative opposition than any other. This could simply have been indicative of the traditional reluctance to take "too unsettling a departure from known patterns," or to open the door to too many uncertain effects. It most likely also indicates though a determination on the part of the legislature to maintain strict control over local governments, since one of the rationales expressed in debate for maintenance of the Dillon Rule was that any excessively narrow judicial interpretation of local authority could be reversed by the General Assembly by special act.[54] Such cohesive control of local level initiative has not only legal, but traditional political underpinnings as well. The unified control of local activities by the Byrd organization was for many years a distinctive characteristic of Virginia politics. Such aspects of the organization as the State Compensation Board, which plays a major role in the determination of local governmental salaries; and the selection by the legislature of Circuit Court judges, who at one time exercised significant political and governmental influence through their appointive powers, were designed specifically for the maintenance of such control. That authority was not only held, but exercised as well, as in the absolute stiffling by the organization through state government of any local initiative in opposition to massive resistance or in favor of liquor-by-the-drink.[55] One commentator has gone so far as to say that

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[54]1975 Rep. Att'y Gen. 132; and Howard, pp. 791, 811, 822.

[55]J. Harvie Wilkinson, III, Harry Byrd and the Changing Face of Virginia Politics, 1945-1966 (Charlottesville: University Press of Virginia, 1968), pp. 31-33, 35, 132-1333, 193, 222-223.

> [t]he history of the Byrd organization demonstrated the hypocrisy and sterility of the strict states' rights ethic. The machine's states' rights views conflicted with other conservative commandments. Under such practices and policies as the State Compensation Board, the circuit judge, massive resistance, and state bottle-only liquor laws, local powers and initiative were severely undermined.[56]

It cannot be expected that any such strict state control, long held and long exercised, would be quickly relinquished, or reversed by a conservative judicial system. This also points out, however, that the option of doing so does exist, if the public interest demands it.

A second consideration is that Virginia local governments do have Constitutional franchising authority which, while it may limit some of the flexibility necessary to an effective cable process, has been interpreted in many situations in favor of the localities. The Virginia Constitution, and statutory provisions pursuant to it, not only authorize, but specifically impose a procedure by which rights to use public property or easements in cities and towns are to be granted.[57]

The authority to grant permission to use public streets has been held in Virginia to infer the authority to attach conditions to that grant, despite the implications of the Dillon Rule.[58] Also, once a franchise is granted, its interpretation

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[56]Ibid., pp. 347-348.

[57]Va. Const., Art. VII, § 9; Va. Code §§ 15.1-307 to 316.

[58]Southern Bell Tel. & Tel. Co. v. City of Richmond, 98 F. 671; aff'd. 103 F. 31, 44 C.C.A. 147; appeal dismissed 22 S.Ct. 934, 46 L.Ed. 1264 (1900).

is frequently in favor of the locality. ". . . [A]n ambiguous or doubtful contract between a . . . company and a municipal corporation as to the rights of the public, will be construed in favor of the public rights."[59] In a field as rapidly changing as broadband communications, it is fortunate that no franchise holder can expand upon its rights under a franchise by inference from equivocal or doubtful provisions.[60] Interestingly, this results from a legal presumption that the terms of the franchise were written by the franchisee.[61] All too often in the past this has been the case. Also, it could be useful in some cable situations, especially several years into an excessively inflexible franchise, that even "exclusive" franchises cannot be held to bar the further exercise of the franchise authority.[62] Finally, Virginia counties, cities and towns have been given the authority to regulate cable television by express grant, as follows:

> § 15.1-23.1. Licensing, etc., and regulation of community antenna television systems.--. . .
>
> The governing body of any county, city or town may license, franchise or issue certificates of public convenience and necessity to one or more community antenna

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[59]City of Richmond v. C & P Telephone Co. of Va., 127 Va. 612, 105 S.E. 127 (1958).

[60]Atlantic Greyhound Corp. v. Commonwealth, 196 Va. 183, 83 S.E.2d 379 (1954).

[61]Richmond, Fredericksburg and Potomac Railroad Co. v. Richmond, Fredericksburg & Potomac and Richmond & Petersburg Railroad Connection Co., 145 Va. 266, 133 S.E. 888 (1926); City of Richmond v. Chesapeake & Potomac Telephone Co. of Va., 205 Va. 919, 140 S.E.2d 683 (1965).

[62]Snidow v. Board of Supervisors of Giles County, 123 Va. 919, 140 S.E.2d 683 (1965).

> television systems, and impose a tax thereon; may regulate such systems, including the establishment of fees and rates, and assignments of channels for public use and operate such channels assigned for public use, or provide for such regulation and operation by such agents as the governing body may direct. In exercising the powers granted in this section, the governing body shall conform to minimum standards with respect to the licensing, franchising or the granting of certificates of convenience and necessity for community antenna television systems and to the use of channels set aside for general and educational use which shall be adopted by the Virginia Public Telecommunications Board; such minimum standards being for the purpose of assuring the capability of developing a statewide general educational telecommunications network or networks; provided, however, that the owner or operator of any community antenna television system shall not be required to pay the cost of interconnecting such community antenna television systems between political subdivisions.

Also, Va. Code § 2.1-563.10.14 establishes as one of the seventeen duties of the Virginia Public Telecommunications Board that of ensuring ". . . the provision of assistance to the political subdivisions of the Commonwealth in matters relating to cable television and other public telecommunications facilities, services and entities . . . ." This remains, apparently, one of the Board's lowest priorities. For future reference, three points should be noted:

1. The authority granted is permissive, not mandatory;

2. Only minimal state standards, or assistance in limited situations, are provided for; and

3. Substantial limitation is placed upon the authority to require interconnection between systems in different jurisdictions.

In light of the unwillingness evidenced by these statutes to interject the state into the cable regulation arena to any significant degree, it is appropriate to address briefly the question of division of authority between the state and localities.

The State Corporation Commission is charged with the duty of "regulating the rates, charges, services, and facilities of all public service companies" in Virginia.[63] Given the general definition of the term "public utility," and the nature of the cable television industry and particularly its use of public rights-of-way, allowed by local governments for the provision of public service, it would be difficult to propose that cable television should not come within such regulation. McQuillin, for instance, defines a public utility in terms which describe state-of-the-art cable television services fairly well:

> [I]n order to constitute a public utility, the business or enterprise must be impressed with a public interest, and those engaged therein must hold themselves out as serving or ready to serve all members of the public to the extent of their capacity, and the nature of the service must be such that all members of the public have an enforceable right to demand it . . . .[64]

Just such requirements are typical of franchise ordinances, and use of public property would probably be unjustifiable if they were not.

In determining whether or not SCC regulation would be appropriate, however, one must also consider the related issues of whether or not cable television constitutes, as utilities

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[63]Va. Code § 12.1-12; Va. Const., Art. IV, § 2.

[64]McQuillin, § 34.08; citing Dispatch v. Erie, 249 F. Supp. 267.

typically regulated by the SCC do, a common carrier or an industry necessarily involving a natural monopoly. That the common carrier status of the industry has been a major issue for some time is undeniable. Its current status, however, in that regard is tenuous, despite the fact that it practically can be so operated and despite the public policy benefits from such operation that have been noted. In a landmark case for the industry, the Supreme Court in 1979 struck down Federal Communication Commission public access regulations, which the Commission had claimed authority to impose as reasonably ancillary to achieving its legitimate objectives in the regulation of television broadcasting. The Court stated that

> With its access rules, . . . the Commission has transferred control of the content of access cable channels from cable operators to members of the public who wish to communicate by the cable medium. Effectively, the Commission has relegated cable systems, pro tanto, to common-carrier status. A common carrier service in the communications context is one that 'makes a public offering to provide [communications facilities] whereby all members of the public who choose to employ such facilities may communicate or transmit intelligence of their own design and choosing . . . .[65]

It was also held that this was violative of § 3 (h) of the Communications Act of 1934, to the effect that "a person engaged in . . . broadcasting shall not . . . be deemed a common carrier." It specifically was held that this not only precluded a presumption by the Commission that a broadcaster was a common carrier, an

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[65]Federal Communications Commission v. Midwest Video Corp., et al., 440 U.S. 689, 700-703; 99 S.Ct. 1435, 1441-1443; 59 L.Ed.2d 692, 702-704 (1979); and 47 U.S.C. § 153 (h).

interpretation which the language of the Act might reasonably allow, but also evidenced a Congressional intent to protect journalistic freedom by proscribing common carrier treatment in any event, even in the case of the cable television industry with its utility-like technology. The Court specifically declined to rule on potential Constitutional challenges which might arise from other access requirements which would allow greater editorial discretion, as in the case of the fairness doctrine.[66] What effect the various proposals for amendment of the Communications Act in the nature of deregulation would have on the current local practice in Virginia of requiring some public access is, of course, open to question.

Utility status would require, as has been seen, a public purpose or a purpose at least involved with the public interest, just as would also be the case in any effort at local public ownership. In the case of such ownership, or even considering only franchise fee revenue, the mere fact that the public sector profits financially in a proprietary manner from an enterprise is not sufficient to grant public purpose status, although the use of such profits to subsidize public purpose broadcasting might mitigate this limitation.[67] The fact that the service can only be provided by the use of easements, in some cases gained by eminent domain, and that the service in most cases, ignoring

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[66]Ibid.

[67]James W. Perkins, Tax-Exempt Financing of Community-Controlled Cable Television Facilities (Cambridge, Mass.: Center for Economic Development, 1976), pp. 6-7.

some of the recent developments in individual satellite reception, cannot be obtained by individuals alone except at very high cost, could in the first case be utility status by the facility's own bootstraps, or in the latter could be mitigated by its possible luxury characterization. The public purpose involved, however, does not consist simply of the use of public easements, as has been seen. The potential future use of broadband communications as a major social and cultural resource must also be considered. Ironically this could be established more clearly, given enhanced state or local governmental regulation, for reasons analogous to the Federal tax exemption situation.[68] If local governments were to aggressively address the social and political nature of the medium and the use of its profits, as opposed to the more commercially oriented objectives of the FCC, the public purpose question would be clearer. Utility status is also unclear due to the continuing contention of many that, due primarily to competition from other media, cable remains a luxury instead.[69]

The natural monopoly question is similarly unresolved. Because of the expenses involved in the duplication of trunkline, if nothing else, competition between companies is unlikely.[70]

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[68]Ibid., p. 9.

[69]Brenda Fox, "An Introduction to Cable: Some Basic Technical Information and a Look at the Regulatory and Legal Framework," Charlottesville, Virginia, 18 August 1980.

[70]Roger G. Noll, et al., Economic Aspects of Television Regulation (Washington, D.C.: Brookings Institution, 1973), p. 195.

There are a number of situations in which this might not be the case, however, as where the demand for channels is high,[71] or where an older system has become antiquated.[72] The monopoly question is also uncertain because of the fact that, while the plant may be a natural monopoly, programming rarely is; and to separately regulate or operate the two can cause problems, as in determining rate base allocations in rate regulation.[73] Legally, however, all of the Virginia ordinances examined were specifically nonexclusive, and there is substantial question whether any other alternative would be available under Virginia law.[74]

The question of monopoly is clouded on more practical legal grounds, however, by the fact that even where competition might economically be possible, its use as a tool by local government is limited, if for no other reason than by the threat of vexatious litigation. Admittedly, the situations in which competition would be feasible are few, since in most cases price cutting to achieve even a slightly lower cost per subscriber through increased penetration would likely result in an unstable system leading to only one operator. This, of course, would not be the case if any system had reached capacity without satisfying

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[71]Ibid., citing Richard A. Posner, "Cable Television: The Problem of Local Monopoly," RM-6309-FF (Santa Monica: Rand Corp., 1970).

[72]Interview, Micas.

[73]B. R. Allenby, "Deregulation Proposals and the Cable Television Industry" (M.A. thesis, University of Virginia, 1974). pp. 86-87.

[74]Interview, Emrich and Flynn; Interview, Jacks and Evans; and Interview, Golden.

demand,[75] as in the situation of older systems with few channels and services technologically incapable of expansion. Even so, the local governmental willingness to use competition through issuance of a second franchise would be diminished by the almost certain prospect of suit by the original grantee, whether well founded or not, if on no other grounds than contract. Negotiation for improvements, with use of competition as an implied threat, is probably as much as the locality can hope to obtain.[76] No better example of the practical limitations of cable franchises, and the concomitant need for careful planning for future flexibility, exists.

In any event, the Commonwealth of Virginia has chosen to limit its involvement in the process to that enunciated in § 15.1-23.1, and this substantially leaves out any role of the SCC, which regulates the activities of the following public service companies as provided by the Constitution and expanded by statute: railroads, telephone, gas, electric light, heat; power, and water supply, pipeline, sewers, telegraph; and common carrier transportation companies.[77] The decision has also been made by enactment of § 15.1-23.1 that cable television is an enterprise which, while not an essential utility in the strict

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[75]Robert E. Babe, Cable Television and Telecommunications in Canada: An Economic Analysis (East Lansing, Mich.: Michigan State University, Graduate School of Business Administration, Division of Research), 1975), pp. 56-57.

[76]Gan, "Introduction to Cable"; and Interview, Tyman.

[77]Va. Const., Art. IX, § 2.

sense, requires regulation beyond that involved with controlling the use of public property. Otherwise, franchising authority would not have been given to counties, in most of which the public roads are controlled by the State, and none of which have constitutional franchising authority.[78]

To point out the deficiencies of state initiative is not to say either that they are without cause or that localities should not be left with significant discretion. Perhaps the reason that government at both the state and local level in Virginia refuses to take a more aggressive approach is related to the readiness of private enterprise to treat the medium as a commercial enterprise, and the resulting reluctance of a conservative judicial system to find a public purpose for regulation or ownership, which one might expect to find under such circumstances.[79] Also, experience indicates that state utility commission regulation can lead to increased delay, confusion, and costs of reporting and compliance, to be passed on to the subscriber.[80] Be that as it may, there is justification, beyond just the regulation of the use of public streets, for significant local control.

Zoning, for instance, is a function jealously guarded by local governments in Virginia, and for technological reasons, site selection for cable facilities is intricately involved with

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[78]Howard, pp. 857-858.

[79]Perkins, p. 7.

[80]Allenby, p. 70.

the land use question. Frequently there are as few as three or four sites available in even a large community for the headend site, primarily for reasons of interference from existing or future land uses, and the role of local government in both selecting and protecting such sites is important. This is especially true of systems using midband and superband frequencies, since they are shared with military, police, business, weather radio, aircraft, navigation, and citizen band uses. Two way systems using frequencies below 30 MH_Z for upstream signals are also especially susceptible to interference from very high powered transmitters. This can create particular problems in converting one way systems, so it is apparent that any locality anticipating even the possibility of such a conversion must plan, and not only in its cable activities, from the beginning to make this as feasible as possible. Site selection by the franchisee and the locality can involve computer programming, aerial surveys, ground based measurements, and a review of both system and extrasystem signal strength and azimuth bearings. It must attempt to anticipate both private and public sector improvements, such as water tanks, which might appear at first to be unrelated, but which could constitute interference in the electromagnetic spectrum; as well as the availability of services to the system itself, such as an emergency power source in large communities not susceptible to total power blackout.[81] It would be difficult to overestimate the importance of this process, or

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[81]Cunningham, pp. 122-123, 172, 197, 326.

the cooperation of the localities in the exercise of zoning, planning and police power authority, in making adequate service possible, especially in rapidly developing communities.

> . . . At the present time the electromagnetic spectrum is becoming polluted by spurious signals from transmitters and incidental radiation from noncommunications devices. Undoubtedly, if a catastrophe in communications is to be avoided, the day will come when pollution of the spectrum is considered as serious as pollution of the atmosphere. Unfortunately, that day hasn't arrived, and until then the system operator must do his best to select a site as free as possible from interference. He must also keep a watchful eye on industrial developments in the area that might later lead to interference. Some types of interference require a great deal of imagination to anticipate . . .[82]

Perhaps one of the most important reasons for local regulation, and one of those issues least effectively addressed in the franchising process required of local governments by current Virginia law, has to do with adequate standards for dealing with citizen-subscriber complaints. Local government is uniquely capable of responding to this regulatory need, and it is important that objective standards be promulgated in the franchise itself for dealing with potential problems. Otherwise, there is no way to judge complaint validity, or seriousness of complaints, the public will itself have no objective way of judging the effectiveness of the local governmental effectiveness, and the city could be left open to a charge of favoritism to the MSO.[83] This is especially true of a situation so susceptible to the viscissitudes of local political pressure.

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[82]Ibid., pp. 122-123.

[83]Baer, p. 110.

Nonetheless, flexibility of local response is just as important as the enunciation of performance standards. The ultimate sanction of termination or nonrenewal is rarely credible,[84] and for this reason the provision for performance bonds and security funds found in some Virginia ordinances, but not in some of the older ones, are important.[85] In passing, it can be noted that an effective local response demands such flexibility in the franchise generally, and especially as regards future additional regulations as rapidly developing technology radically alters the meaning of "state-of-the-art" service.

Without adequate system specifications from the beginning the risk is run of inadequately planned growth causing serious technological problems which can actually make state-of-the-art performance impossible or at best make judgments concerning system performance uncertain. Prime examples are the addition of channels or the conversion from one to two-way service.[86] Many systems installed within the last decade, including those in the Tricities and especially those installed primarily for reception improvement, are for practical purposes limited to twelve channels; and with the smaller twelve channel system, it is often even difficult to predict whether additional channels are possible.[87]

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[84]Ibid.

[85]e.g., Richmond Ord. 77-168-157, § 1; Contracts §§ 11.D. and 12. Such provisions are not found in any of the Tricities ordinances.

[86]Cunningham, pp. 195-196.

[87]Cunningham, pp. 212-213; Micas; Cunningham, p. 196.

The most effective franchise will be that ordinance which establishes only the organic framework for operation regulation, leaving specifications to a subordinate contract or certificate of necessity (which infers a decision by the governing body both less apparently exclusive and involving broader community and economic considerations than the franchise alternative) subject to change as local conditions and technological developments require.[88] Thus, not only does generality of terms make construction of the ordinance more likely to be favorable to the locality and the public interest,[89] but it leaves a greater possibility of modification of agreements as changed circumstances require, in protecting that interest. Requirements concerning future modifications within the franchise term should not themselves be overly vague though, as in requiring only that the franchisor "keep up with the state-of-the-art." The flexibility this would allow would be more than outweighed by the extent to which this would leave the planning for such increased sophistication to the franchisee, according to its standards, and to which the authority of the locality to make specific requirements would be open to question which might lead to litigation.[90] Even such vague provisions for future modification are preferable to none at all, however, as is the case in several Virginia jurisdictions.

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[88]Interview, Micas; and Baer, p. 140.

[89]Atlantic Greyhound Corp. v. Comm., 196 Va. 183, 83 S.E.2d 379 (1954).

[90]Baer, pp. 206-207.

On a related point, it is also unwise to impose technical requirements by reference to those of the FCC, which have an uncertain future.[91] Performance by Virginia localities varies considerably on this point, from those provisions such as §§ 2(5), 4, 16, and 17 of the Colonial Heights ordinance, which impose only FCC requirements and anticipate no federal deregulation; to those like §§ 7.B. and 9.H. of the Richmond ordinance, which do anticipate local authority at least on some points in the event of deregulation permitting local action; to those exemplified by the Fairfax County ordinance in Article 7, §§ 4(a), 5(a), and 6(a), where the FCC is relied upon, but a concurrent local role is anticipated, as well as the possibility of deregulation.

An inspection of several local ordinances evidences a wide disparity of performance on the question of technical requirements.

Northern Virginia

The Arlington County Code, §§ 41-4 (h) and 41-9 (e), address this issue specifically, as follows:

> § 41-4 (h) The company shall undertake any construction and installation as may be necessary to keep pace with the latest developments in the state of the art, whether with respect to increasing channel capacity, furnishing improved converters, instituting two way services, or otherwise.
>
> § 41-9 (e)
>
> (e) After receiving recommendations from the agency and the county staff, giving due regard to technological limitations, the board may require that any part

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[91] Gan, "Introduction to Cable."

> or all of the system should be improved or upgraded (including, without limitation, the increasing of channel capacity, the furnishing of improved equipment, and the institution of two-way transmission), it may order such improvement or upgrading of the system, to be effected by the company within a reasonable time thereafter.

The Alexandria Code, §§ 7B-44 and 7B-66, offer even more specific standards:

> (e) The city council may require that any part or all of the cable television system should be improved or upgraded by the franchisee within a reasonable time thereafter (including, without limitation, the increasing of channel capacity, the furnishing of improved equipment, and the institution of two-way transmission); provided such improvement or upgrading of the system is found to be economically feasible. For the purpose of this subsection, a finding of economic feasibility shall mean a finding that the capital costs to the franchisee of such improvement or upgrading can reasonably be amortized over the then remaining life of the franchise.
>
> § 7B-66. Functions of administration. . . . The administrator's powers and responsibilities shall include, but not be limited to, the following functions . . .
>
> (k) To conduct evaluations of the system at least every three (3) years, with the franchisee, and pursuant thereto, make recommendations through the city manager to the council for amendments to this chapter or to the franchise agreement.

Alexandria Franchise Contract, paragraph 3

> 3. This contract shall not relieve ACC from the requirements of the applicable ordinances, and it is understood and agreed that the City reserves the right to impose such additional regulations or ordinances as it my [may] deem reasonable with respect to ACC in particular or cable television generally.

The Fairfax County Code, Chapter 9, Article 5, § 3, however, contains a provision which would probably be difficult to enforce, given its vagueness.

Section 3. Franchise review.

It shall be the policy of the County to amend a franchise, upon application to a Grantee, the recommendation of a Cable Television Administrator, or upon the Board's own motion, when necessary or advisable to enable the Grantee to take advantage of advancements in the state-of-the-art which will afford it an opportunity to more effectively, efficiently, or economically serve its subscribers or the County; provided, that this section shall not be construed to require the County to make any amendment for such purposes.

Richmond Area

The Richmond Ordinance No. 77-168-157 (Contract Paragraph 16), is similarly vague, and has the added disadvantage of relying on FCC regulations which may cease to exist. It also apparently leaves the greater initiative for system improvement to the operator.

B. It shall be the policy of the City to amend this Franchise, upon application of the Grantee, when necessary to enable the Grantee to take advantage of advancements in the state-of-the-art which will afford it an opportunity to more effectively, efficiently, or economically serve its Subscribers; provided, however, that this section shall not be construed to require the City to make any amendment. Further, within the term of the Franchise, Council shall hold a public hearing, the purpose of which will be to consider System performance, System design modifications, and the possible need for reasonable and appropriate modifications in the Franchise of a nature that would not result in effectively terminating same under the then existing Federal Communications Commission Rules for Cable Television. This Franchise may be amended at any time in order to conform with the applicable Federal law and FCC rulings after notice and public hearing.

The Henrico Ordinance No. 458 (1976), Article III, § 3, is almost identical.

The Chesterfield Code § 7.1-29, offers a modification provision which is so extraordinarily vague as to be of questionable use; despite the fact that it is not atypical:

> The County hereby expressly reserved the following rights:
>
> (a) To adopt, in addition to the provisions contained herein and in the franchise and in any 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, shall be reasonable and not in conflict with the rights herein granted.
>
> (b) To revoke, amend or modify the franchise granted pursuant to this chapter should the Federal Communications Commission, as a result of its certification or registration process, require that substantial sections of the chapter, be altered or deleted.

Ironically, the same Chesterfield Franchise Agreement, § 6, offers an interesting example of response to inflexible system obsolescence, which should constitute a warning:

> § 6. Purchase of Sammons Broadcasting System.
>
> Franchisee agrees to negotiate in good faith to purchase from Sammons Broadcasting System the cable system already in existence in Ettrick serving 340 customers within Chesterfield County so as to permit the service of such area in a manner consistent with the rest of the County. The Franchisee shall offer Sammons a fair and reasonable price to purchase capital equipment of such system and upon purchase of the system shall upgrade the system so as to be consistent with the quality available in the entire County as soon as practicable. If by July 1, 1980 the Franchisee has bargained in good faith with Sammons and made a fair and reasonable offer for the system within the judgment of the County, but Sammons has refused to sell such system; the Franchisee shall be permitted to extend service to the area already served by Sammons consistent with the franchise agreement.

The Sammons facilities, operating as part of the Petersburg-Colonial Heights system in Chesterfield without a franchise, were

so outdated as to make it of little use to Storer. An offer was made, but, as might be expected, was low and was not accepted.[92]

Tricities Area

The three franchises neither require, by reference or otherwise, any technological standards beyond FCC regulations, and reserve no right to impose further state-of-the-art requirements.

There are, however, counterbalancing factors. The best franchise ordinance probably would specify technological matters to the point of requiring a modular design for the system, which, while being initially more expensive and requiring a conceptual design of the system and its expansion from the beginning, would allow the ordinance to state clear objective standards for future development without major retrofitting or obsolence problems.[93] None of the ordinances examined made such provision.

The lack of legislative direction as to the performance of local governments in cable franchising process creates a situation which begs for vexatious litigation, as Cablecom demonstrates. Probably no better example exists than the experience in Alexandria. Shortly after two Council members called, apparently with little legal justification, for an

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[92]Interview, Micas.

[93]Baer, pp. 195, 206-207.

investigation by the Attorney General of the bidding procedures used, one bidder called for the removal of certain Council members for threatening to cause difficulties in their future city business should that company file suit for any reason.[94] The number of questions left unanswered by Virginia law is, in fact, myriad. For instance, if the public utility status of broadband communications is questionable, there is question as to the extent a locality can resort to eminent domain to acquire easements in situations where to do otherwise would make service unfeasible. In the enforcement of a franchise, which is in the nature of a contract, to what extent can the locality proceed first in an action in contract, or is it necessary to go directly into a mandamus proceeding, which Va. Code § 15.1-315 would appear to allow, even if the remedy in contract was adequate.

To say this, however, is not to imply that state law is devoid of direction, or that it alone is responsible for confusion on the part of local officials as to their proper role. On the first point, general franchise law could be considered. Even if Federal law should deregulate franchise fees, state law would still impose general franchise fee standards.[95] The same can be said of factors to be taken into account in rate regulation, and enforcement guidelines.[96] But just as general franchise law

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[94]Washington Post, 18 July 1979, sec. C, p. 2; and Washington Post, 31 July 1979, sec. C, p. 3.

[95]C & P Telephone Co. of Va. v. City of Newport News, 196 Va. 627, 85 S.E.2d 345 (1955).

[96]City of Wheeling v. C & P Telephone Co., 82 W.Va. 208, 95 S.E. 653 (1918); and Appalachian Power Co. v. City of Huntington, 210 S.E.2d 471 (1974).

can answer some questions, it can raise others. For instance, one might ask to what extent a cable company operating a two way system would be liable for failure to operate properly to a subscriber's detriment, in a way analogous to the liability of a telegraph company. Perhaps the legislature should address this, and if not, perhaps the local franchising authority should, but the proper manner of doing so is less than clear.

On the second point, Federal law not directly related to cable franchising can cause equally difficult questions. Consider, for instance, the recent controversy involving the City of Boulder, Colorado, and Community Communications Company, Inc. (CCC),[97] concerning primarily the impact of the Sherman Antitrust Act on subdistricting. C.C.C. held a nonexclusive permit to use the rights of way of the City of Boulder for cable television facilities and to operate in one part of the city a reception improvement system, and the City had determined that it wished to receive bids for one or more state-of-the-art systems to cover the entire jurisdiction. In order to maintain the status quo, the City restricted C.C.C. from accepting new customers during a three month period during which other potential bidders could minimize C.C.C.'s competitive advantage. The company challenged the restraint as violative of Federal antitrust law.

Municipal corporations are no longer deemed to be immune from the Sherman Act, after the United States Supreme Court

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[97]See 485 F.Supp. 1035 (D. Colo. 1980); 630 F.2d 704 (10th Cirt. 1980); 496 F.Supp. 823 (1980); and Cable Television Reports, May 1980, pp. 1-3.

decision in City of Lafayette v. Louisiana Power and Light Co.[98] Instead, they, unlike sovereign states, enjoy such immunity only under the following circumstances:

1. the challenged restraint must be one clearly articulated and affirmatively expressed as state policy; and

2. the regulation must be actively supervised by the state itself.[99]

Also of importance is whether the local government has a proprietary, as opposed to governmental, interest in the regulation.[100] In determining the specific mandate by the sovereign state, a permissive statute may not be sufficient; a mandatory system of regulation may be required,[101] which brings into question the amount of actual authority granted by the limited, and permissive, § 15.1-23.1. This is especially true if any Virginia local government should take on the proprietary interest of public ownership, even ignoring any implications of the Dillon Rule. It also raises to a lesser degree, given lack of proprietary interest, the question of the authority of Virginia local government to deny additional franchises during the term of the original

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[98]U.S. Sup. Ct. City of Lafayette v. Louisiana Power & Light Co., 532 F.2d 431, 434, aff'd., 435 U.S. 389, 98 S.Ct. 1123 (1978).

[99]California Retail Liquor Dealers Assoc. v. Midcal Aluminum, Inc., 100 S.Ct. 937, 943, 63 L.Ed.2d 233 (1980).

[100]CCC v. Boulder, 630 F.2d 704, 708 (1980).

[101]Anthony F. Troy, "Exemption from Federal Antitrust Laws for Activities of Municipalalities: City of Lafayette and Beyond," Fredericksburg, Va., 8 April 1980 (Mimeographed).

grant in those few situations where competition might be economically feasible, even if such denial was based on the perhaps unjustifiable fear of an action in contract by the original franchisee.

A restraining order was granted by the U.S. District Court for Colorado, barring enforcement of the restriction, but this was overturned at the Circuit Court level. A permanent restriction of C.C.C. to one area of the City imposed afterwards, however, was also challenged, thereby bringing into serious question the authority of local government to set subdistrict franchise area boundaries, and the challenge was sustained by the District Court on July 22, 1980. In the second decision, the district court held that the degree of regulation required to give Boulder antitrust immunity in such a situation was so high as both to constitute an excessive infringement of First Amendment rights, and to cause the regulation to be lowered in status to a proprietary activity. The Court questioned whether, if diversity of programming was the objective, the regulatory scheme employed was the least restrictive means substantially capable of achieving it; assuming that diversity of programming was even a legitimate local governmental interest. The court also noted in analyzing this question, a fear of the control of the use of public rights of way to obtain control of program content.[102] Another issue which was not reached concerned the nature of any property right involved with a revocable permit (a question also of importance with franchises in the nature of

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[102] 496 F.Supp. 823, 828-829.

contract), which may be revoked without cause, but not for illegally anticompetitive cause without a showing of a valid governmental purpose; especially when the property right has been "enhanced by the First Amendment." Among other such questions were claims based on equal protection and inverse condemnation principles.[103]

Clearly, this case stands as a prime example of the need for clear and sophisticated state mandates for local governmental regulation of cable television; for realization of the validity of the Cable Television Information Center position that threatened competition against an operating system is highly likely to have a litigious result rarely worth the trouble; for the consequent realization that franchises once granted are for practical reasons often permanent; and for the great need for careful planning by local authorities, from the beginning of the cable experience, for clear and flexible authority to regulate into the distant future.

The need for such standards being apparent, it remains to suggest the type of response required of Virginia to meet such needs. In several ways, Virginia law hampers effective local regulation. Strict application of the Dillon Rule leaves authority at the state level, at which it is not used to any appreciable degree. Neither the legislature nor the Public Telecommunications Board has placed high priority on establishing

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[103]Ibid., p. 830.

general technical and financial standards, or model ordinance provisions for effective handling of such matters as citizen complaints or providing for flexible response to technological developments. This absence of standards continues despite potentially damaging uneven performance on the part of local governments. Additionally, a number of legal questions remain unanswered, creating an environment in which the threat of vexatious litigation can hamper local initiative. It remains, for instance, unclear in which situations the medium should be taken to be a monopoly and utility, and when State Corporation Commission regulation would therefore be appropriate. Also unclear is the related question of when the public interest in the medium, beyond the use of public property, is sufficient to justify substantial local regulation or public ownership. State policy, whether established by statute or otherwise, fails to offer clear direction as to what role local government is charged with performing, leaving that role vulnerable to such potential pitfalls as antitrust violations. This says nothing, of course, of the situations, such as interconnection, in which local authority is specifically limited, or the limitations imposed by reliance on general franchising authority. With the exception of more certain options offered, but not extensively used, by other types of authority such as zoning, the localities must rely on franchises or resort to certification or licensing. The latter process offers more flexibility, but as might be expected

as a result, less certainty of authority or direction. Generally, for these reasons, it must be concluded that the limited and questionable nature of local authority to regulate cable television in Virginia in the public interest is not conducive to effective local initiative.

CHAPTER 3

OWNERSHIP OPTIONS - THE EXPERIENCE IN RICHMOND

> A city must recognize the need for communications planning to be able to enter franchise hearings with its own clear requirements rather than merely respond to company proposals . . . Only when local governments charter studies, survey needs, and acquaint themselves with CATV sufficiently to allow reasoned decisions about what operation best meets both immediate and long-term community needs will the advantages of municipal ownership be illuminated . . . .[104]

As has already been seen the local control objectives of the Richmond City Council and Administration as evidenced during its franchise process, especially the planning stage, in granting a franchise to Continental Cablevision of Richmond, Inc., were minimal. The purpose here is two-fold: to delineate the alternatives open under current Virginia law or with General Assembly action which might reasonably be proposed; and to critically compare those objectives with those which the literature and general experience raise. To do so will be to point out the extent to which the process in Virginia, both on legal and political points, substantially fails to address the question of the public need. Fairfax County, as a matter of fact, offers the only clear example to the contrary in this study.

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[104]Thomas R. Leavens, "Community Antenna Television: The Case for Municipal Control," 22 Wayne Law Review 99-136, November 1975, p. 131.

Ownership Alternatives

Once the governing body has set its objectives, the observer might look for an examination of at least the following ownership alternatives: municipal ownership, public corporation or authority, common carrier status, and private ownership, either by the industry or local groups; with a number of potential policy decisions as to each alternative. The record indicates that only one alternative, from the last category, was ever seriously considered by the Richmond Council and Administration. An outline of the issues which might have been addressed in a more extensive planning phase, and some of the advantages and disadvantages inherent in the various alternatives, follows:

Municipal or Public Authority Ownership

Municipal ownership offers the advantages of increased public access opportunities, even if unprofitable or legally prohibited under private franchise operations, unilateral subsidy of public access, lower subscriber fees than a private system could justify, an increase in channel capacity for increased public access when demanded, or facility development to encourage public access as a public purpose.[105]

There is also less likelihood for censorship or the "chilling effect" of the profit motive mentioned earlier if the system is operated as a public service. Municipal ownership could conceivably even engender a constitutional right to access not present in the broadcast situation.

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[105]Ibid., pp. 116-117.

This alternative would require, however, protection against abuses of governmental authority which would diminish the effect of decreased censorship. For instance, statutory prohibitions against the use of municipal funds for official programming, or against use of officials' names or likenesses, might be advisable. The potential for enforcement of such restrictions would be somewhat diminished, since it most likely would be in the hands of local prosecutors, although traditionally such conflicts have not presented the problem in Virginia that they have in some other states.[106] There is also danger in the fact that direct municipal ownership would give access to information which could be collected through the cable system to those most able and likely to use it in a manner violative of individual privacy. Private ownership, however, would not necessarily solve this potential problem.

> . . . the potential for abuse is not ended by private ownership. Private owners may also be interested in collecting information either to use themselves or to pass on or sell to others; the operator might assent to public or private taps. The real problem is not ownership, but rather CATV's pervasive potential for invasion of privacy and unauthorized use of information.[107]

On both of these obstacles to municipal ownership, the "independent" public authority has been recommended by some as a remedy.[108]

Other factors which would affect the operation of a municipally owned system in a unique way, but about the impact of which there is considerable question, include

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[106]Ibid., p. 120.

[107]Ibid., pp. 134-135.

[108]Ibid.

--the economic impact of shopping by cable on both private and public investment in shopping centers and downtown areas;

--the effect of polling or voting by cable on the political system;

--the impact of availability of data and services by cable on the necessity for physical proximity to the central city; and

--the risk of public funds on a technological development which potentially could become obsolete.[109]

Beyond direct public funding, two financial advantages of municipal or authority ownership would be decreased operated expenses through tax exemptions, and the availability of development capital through general obligation or revenue bonds.[110]

There is considerable question under the Dillon Rule, as to whether or not the City of Richmond could have entered into such an enterprise without specific authorization by the General Assembly, since it would be difficult to make a necessary implication of ownership from express authority. Such authorization, of course, could have meant delay, but delay in the long term public interest might be a positive choice. Any request for authorization to operate a cable system as a proprietery function would also have been less than certain, however, since the "public purpose" question raised above remains unsettled, and since operation of information systems has not been a traditional

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[109]Ibid., p. 130.

[110]Ibid., p. 127.

function of limited local government in Virginia. This is, of course, especially true of enterprises so easily tied philosophically to the private sector by the potential for substantial profit.

The extent to which this alternative has been considered by the Virginia localities examined is questionable. The Richmond City Manager's Office apparently examined only one such system, which eventually went to private ownership.[111] In point of fact, as of 1977, there were approximately twenty cities in the United States with public owned cable television services.[112] While the Manager's objection that local control or ownership is meaningless due to the operational necessity for industry expertise is a potential problem, it is not necessarily an insurmountable one.[113]

Common Carrier Status

In this alternative, the cable system operator would be prohibited from any control of programming, but instead would lease channels on a non-discriminatory basis. Such an approach would have the advantage of ending any justification for government control of content based on concentration of program control,[114]

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[111]Interview, Allen, Richmond, Va., 12 December 1979.

[112]Robert E. Jacobson, Municipal Control of Cable Communications (New York: Praeger Publishers, 1977), p. 5; for validity of municipal ownership in Frankfort, Kentucky, see Consolidated TV Cable Service v. Frankfort, 465 F.2d 1190 (1972).

[113]Interview, Allen; and Leavens, p. 131.

[114]Bruce M. Owen, "Cable Television: The Framework of Regulation." in U.S. Congress, Senate Committee on Governmental Affairs, Study of Federal Regulation, Washington, D.C.: U.S. Govt. Printing Office, 1978, p. 359.

and would generally encourage diversity in the sense envisioned by traditional antitrust principles. Three recent major studies of cable television [the Cabinet Committee Report (1974), the Committee for Economic Development Report (1975), and the Staff Report of the House Subcommittee on Communications (1976)], have recommended this alternative to varying degrees.[115]

Among objections, primarily from industry, is the possibility that common carrier status would eliminate the only potential investors willing to develop local programming while penetration of a cable system in a particular market is growing, or that it could result in rate-of-return regulation in the manner of public utilities, which might be unnecessary for the foreseeable future due to competition from other media.[116]

Private Ownership-Community Organization Ownership

While the Richmond organizational arrangement is of this category, there are a number of variations which could have been, but apparently were not, seriously considered, as follows:

1) ownership by "enterprises which have come into being within neighborhoods that have special social or ethnic problems and constitute in some measure sub-cities with special requirements and special knowledge of their own;[117]

2) as implied by the public ownership alternative, state-mandated regional franchising authorities, perhaps at the SMSA level, which could grant several franchises in a market,

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[115]Ibid., p. 373.

[116]Ibid., pp. 377, 374.

[117]Sloan, Television of Abundance, p. 162.

with boundaries following demographic standards rather political boundaries. This could also allow for networking to meet sub-area needs;[118]

3) cross-ownership with local media; this could well have required delay of an award until after Federal deregulation, since the cross-ownership controversy is one of long-standing in the broadcast field, and since cross-ownership of cable systems could result in a disproportinate increase in the influence of one particular media voice in a community. It might also be profitable for a franchiser under such an arrangement to stifle cable growth. It would, however, offer skill and talent resources, interest in the local community, and a source of start-up capital, and could potentially encourage media diversity by enabling locally owned newspapers to remain economically viable through control of, and profit through, this new medium, which otherwise might be threatening.[119] The Leesburg situation may eventually to be illustrative of this.

4) financing, especially if the franchisee is an association or joint venture at the local level, gives rise to a number of possibilities, such as

--investment by local banks, church groups, insurance companies, savings and loan associations, private investors concerned with local development, or industrial concerns;

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[118]Ibid., pp. 149, 152, 159-160, 162, 177; and Jack Whitley, "Cable Television: The Practical Implications of Local Regulation and Control," 27 Drake Law Review (1977-78): 391-420, 403-404.

[119]Sloan, Television of Abundance, pp. 137-139.

--public investment by community development programs;

--"turn-key" construction of the system by the cable industry, with control gradually turned over to a local company or venture;

--municipal construction of the system, with bids being taken instead for operating and management.[120]

Financing is an especially important consideration in urban areas where reception is not an issue, so much as is full service from the beginning of the operation.[121]

Among the advantages often cited for private cable industry ownership are that the availability of local services is economically dependent upon the existence of a viable, profitable national marketplace.[122] Additionally, an argument for either municipal or industry control instead of community based ventures is the fact that community based systems are seen as economically impractical unless backed by political and financial entrepreneurs unreflective of the community,[123] and even this self-defeating financial backing might be unlikely considering the lack of effective recourse in the event of default.[124]

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[120]Leavens, p. 126; and Tate, pp. 31-32.

[121]Leavens, p. 125.

[122]Robert W. Hughes, statement before the Subcommittee on Communications, in U.S. Congress, House Committee on Interstate and Foreign Commerce, Volume I, The Communications Act of 1978, Washington, D.C.: U.S. Govt. Printing Office, 1979, p. 485.

[123]Jacobson, p. 101.

[124]Leavens, p. 125.

While the potential cost to the City of Richmond or the delay necessary in obtaining legislative authorization could have been reasons for giving little consideration to encouragement of a community venture as franchisee, delay in developing a system in which the public interest might have been more fully protected could have been a wiser course. In light of the potential social and political implications of a cable system, the issue of cost could have been more fully addressed from the standpoint of what one commentator has called "advocacy economics," by inquiring as to the public cost of not developing the system as a public or quasi-public one.[125]

As have been noted above, the Richmond City Council created public confusion as to its ownership objectives by allowing the agenda of the franchising process to be set solely by potential franchisees and an Administration concerned primarily with technical and financial considerations. In fact, this may also have evidenced confusion or lack of knowledge on the part of Council as to the potential issues to be addressed. Ironically, they reached a decision which was justifiable, not on the basis of that agenda, but for largely unstated and limited concerns over local control. Beyond this, however, Council allowed even its consideration of local control to be limited to response to industry proposals. As might have been expected, those proposals concerned only the control of public access, and the granting of relatively meaningless local ownership.

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[125]Jacobson, p. 103.

The latter proposal was, of course, for the purpose of affecting the franchise process by economic windfall for local community leaders more than for increasing local control. It has been the purpose here to raise from the literature a few of the ownership alternatives which could have been considered in a more fully developed planning process. Clearly, a sophisticated procedure for initiation of service by this new medium would include a more careful analysis of the ownership and control alternatives and their impact on the public interest of each particular community. To say this is not necessarily to indict Richmond's handling of the issue. Much remains to be done at the state level as well. Several of the alternatives suggested above are not available to localities under current law. Some, even if available, would be unattractive given other legislative lapses, as on the issue of privacy protection, which should in any event be addressed.

If the current prognostications concerning the impact of cable are accurate to any significant degree, the importance of these issues cannot be underestimated.

> The time for action is now: a radical change in the structure . . . of the city and its mode of operations may be possible for only a short while longer.[126]

Perhaps, on the other hand, interest in community involvement will diminsh after a short operation of basic cable service, thereby ending the demand or the need for public use which is now seen by the industry as merely "interference."[127] Perhaps,

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[126]Ibid., p. 9.

[127]Leavens, pp. 133-134.

given this uncertain future and legal and political framework, public interest considerations at this stage make Virginia local franchises unwise. This is especially true since a grant of a public franchise can bind the city to its choices for many years, particularly considering contract implications, and since resistance of renewal can be economically and politically difficult.[128]

The purpose here, however, is not only to raise these issues, but analyze their potential impact on the nature of cable in the Virginia environment. One of the above organizational alternatives with particular relevance to that point is that of regional networking.

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[128]Leavens, p. 136; and Whitley, p. 417.

CHAPTER 4

REGIONAL NETWORKING - A VIABLE ALTERNATIVE

Special purpose districts have been generally defined as ". . . that form of political corporation which has a continuing but indefinite existence, independent of other forms of local government, with limited geographical scope, and limited purposes."[129] Such districts offer an effective and efficient means of providing or regulating regional services with centralized planning, and without annexation or burdening any one jurisdiction.[130] Similarly, if that regional service is provided by a private proprietor, it is spared the effects of operating under several different local regulatory authorities. They are especially functional with those services, such as cable television, in which there is a potential for a high degree of participation by system users in decisions concerning service and for staff expertise. This is true since such situations offer inherent programming, ethical, and professional standards, and control against unfair limitation of services or bureaucratic stiffling of user participation in system decisionmaking. The possibility of the development of expertise on governing boards is also increased. Flexibility of service areas is provided when

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[129]John E. Juergensmeyer, "Special Purpose Taxation Districts: Coming or Going?" University of Richmond Law Review (Fall 1976): 87, 90, 98.

[130]Ibid.

jurisdictional boundaries themselves are irrelevant to service objectives. This is especially true when rural areas must also be served, since this is possible with a relatively lower overall cost to the taxpayer. Under certain technological limitations, this may, in fact, be the only feasible manner of serving rural areas. Generally, the effects of interjurisdictional disputes are diminished, and the coordination of services of divided or small communities, as well as their general unity, are encouraged.[131] Against that background, it is readily apparent that the approach to cable television franchising taken in Virginia has not been statewide or regional, either in policy or practice, but rather has been limited within jurisdictional boundaries unrelated and historically irrelevant to a twentieth century technology, or to the technological rquirements of, or the community resources made available by, the medium. In addition to any disadvantages of the special district mechanism that would be the vehicle for a regional approach, it is likely that the historical and political chauvinism of Virginia localities are also to blame.

Nonetheless, franchising within regions can result in several improvements in the quality of cable service. Interconnections between subdistricts within the franchise, or between small franchises within a region, can allow public access and community programming at the neighborhood level targeted for areas of similar ethnic, cultural, or economic characteristics, whether or not they are physically adjacent, or

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[131]Ibid., pp. 89, 90, 96.

related to jurisdictional boundaries.[132] Obviously, such an arrangement would increase the number of viewers for the entire network, as opposed to the audience of individual systems in each jurisdiction, thereby allowing the high costs of specialized programming to be spread over a larger number of subscribers. This is especially important since the proportion of homes actually reached by cable relative to the broadcast media must be expected to remain low for some time.[133] As mentioned above, a regional network of subsystems also could help to mitigate the problem of cross-subsidization for areas, such as rural communities, where the system would otherwise lack feasibility, a practice which worked well in the electrical and telephone industries with their relatively lower capital costs. The fact that such costs make this unlikely with cable at this time will also be lessened as technology develops and once the front end capital expenditures of particular systems have been covered.[134] For instance, it would have been much more efficient and economically feasible to plan and implement system growth in a regional arrangement in the Richmond area to rural areas as population density changes drastically over the next fifteen years. This is especially important when it is realized that a certain amount of rural subsidization is required to serve isolated communities which are demographically attractive, such as Brandermill

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[132]Baer, pp. 33-36.

[133]Leland L. Johnson, "The Social Effects of Cable Television," San Francisco, Cal., 1975 (Mimeographed), pp. 4, 7-8; and Baer, p. 186.

[134]Noll, p. 197.

in Chesterfield County. This is also true of areas that are of political necessity for governing body members from rural areas, and therefore must be served, but which are economically or technically unfeasible, such as Matoaca and Ettrick in the same county. There probably is no better example of the extent to which regional cooperation could increase system feasibility than the fact that the inclusion of the City of Colonial Heights could substantially improve the economic factors involved in this very expensive capital project of extending service to the Petersburg area from Richmond.[135] Also, there is within such a system no technological justification for concentrated ownership, thereby allowing fragmented ownership as a viable objective which addresses social and economic issues. This may be true, for instance, in those monopoly situations which can present antitrust problems, it being somewhat easier to avoid those problems when many subdistrict franchises are being granted than when there is only one for the entire service area. Such fragmentation would also allow more objective manipulation of system size and comparison of system performance.[136] The benefits of networking, however, should not be expected to be readily apparent. For instance, the large system which such a network would unite only could encourage local programming in a symbiotic manner. Local programming will only be attractive to operators when there is a large viewer coverage, which, except for a few large

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[135]Interview, Micas.

[136]Babe, p. 56.

cities, is unlikely to develop without networking. Networking of existing adjacent systems separately owned will be achieved, however, only upon proof of enough potential profit to warrant the difficult process of achieving cost sharing and technological agreements.[137] The profit situation, however, is clouded, since any economy of scale for local programming would be highly sensitive to fractionalization if reduced to the neighborhood level,[138] which is an opportunity networking would not only provide, but would for social and political reasons encourage.

Cable system feasibility is not a simple issue to analyze. System size is frequently a relatively unimportant consideration, as is evidenced by the operation of two separate systems under three franchises in the relatively underpopulated Tricities area. It must be kept in mind that cable television suffers from certain diseconomies of scale by its very nature. The optimal system would probably serve one hundred thousand subscribers with seventy miles of cable, which would only result from a highly unlikely density.[139] Small systems are actually

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[137]Johnson, p. 8.

[138]Noll, p. 200.

[139]Babe, p. 37; quoting Leonard Good, "An Econometric Model of the Canadian Cable Television Industry and the Effects of CRTC Regulation (Ph.D. thesis, University of Western Ontario, 1974), pp. 60-74.

> The age of these statistics might undermine their current accuracy. Technological advances, resulting in both lower capital costs, but also in higher system cost due to added services, could have affected somewhat the feasibility of small systems either way in the last six years.

more efficient in many circumstances than large, but a minimum size of one hundred, fifty to two hundred miles of plant, or given the typical situation, approximately forty thousand potential subscribers, is usually required.[140] Miles of plant is actually the best measure of system size, since it eliminates the population density variable, but there a number of other factors which must be considered. For instance:

1. fixed investment per mile increases as the number of miles increases;

2. fixed investment per household falls off sharply as systems grow to approximately thirty thousand subscribers, but then becomes constant;

3. fixed investment per potential subscriber declines rapidly as population density rises until around one hundred, fifty households per mile;

4. in order to obtain the lowest possible investment per subscriber, a pentetration rate of over fifty percent of households passed is required; and

5. operating costs, excluding depreciation, fall as system size approaches two hundred miles, but if depreciation is included, and uneconomically small plants (those under forty miles) are excluded, operating costs actually rise as system size increases.[141]

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[140]Babe, pp. 56, 27.

[141]Ibid., pp. 27, 36-37.

While such economic analysis for Virginia systems is beyond the scope of this paper, it can be said that, while the issue of system size cannot be used to justify large regional systems, it certainly cannot automatically be used to discount the viability of small subdistricts. This, of course, only addresses economic considerations. It says nothing of the social benefits to be gained.

While population density is not usually the best indicator of potential system or subsystem feasibility, there is evidence that, pending forseeable technological developments, minimum efficient size is approximately three hundred, fifty homes per square mile.[142] Interestingly, the Tricities area jurisdictions, which might be suspected of being potentially the least feasible, individually or as subsystems, have the following number of households per square mile:

Petersburg	645
Hopewell	782
Colonial Heights	741
Prince George	29
Dinwiddie	14

The three cities are considerably above the suggested minimal limit; and when it is considered that system expansion into the counties would be limited to suburban areas, as has been done by franchise in Prince George recently, it is apparent that this area theoretically could support several systems or

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[142]Allenby, pp. 43-44.

subsystems.[143] In a similar situation in Northern Virginia, the Cable Television Information Center has found Falls Church with a population of approximately twenty thousand to be suitable for a separate system.[144]

In technical terms, the regional approach is possible.[145] While service quality diminishes with distance from the headend, so does that of all competing broadcast media. Long distance cable transmission is possible either through microwave transmission, as in Chesterfield, or through "supertrunk" systems, which are specially designed for low frequency use to minimize signal loss over long distances which are impractical in main systems due to the need for expensive frequency conversion equipment for subscriber use, to "hubs" in distant communities.[146] Satellite connection of large regional or national networks is even possible.[147] Additionally, the use of cascades of fifty or more recently developed amplifiers can minimize noise and distortion over regional metropolitan distances. With such currently available technology, system runs of twenty to twenty-five miles are possible with enough remaining signal strength to feed a regular cable distribution system.[148]

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[143]Interview, Martha Burton, Petersburg, Va., 15 December 1980.

[144]William F. Roeder, Jr., to C. Edward Roettger, Jr., 14 November 1980.

[145]Baer, p. 188.

[146]Cunningham, pp. 211, 227, 241; and Johnson, pp. 7-8.

[147]Johnson, p. 8.

[148]Cunningham, pp. 11, 242.

While density of population has been frequently cited as a determining factor in Virginia system feasibility, this is not, as has been seen, necessarily the case. Penetration is the key variable according to most analysts. Fixed costs and those related to the number of system miles account for approximately three-fourths of capital cost and more for operation. The cost of adding additional subscribers is relatively small. Use of penetration as a determinant changes the feasibility focus primarily to difficult market analysis of the impact of various services on consumer uses.[149]

The Chesterfield and Fairfax County experiences offer evidence of this point. At the beginning, administrators felt that the jurisdictions' population densities were too low to support state-of-the-art systems, but proceeded only because of the fear of political repercussions should other area localities offer a service which they could not. In the Fairfax situation, technological developments making additional services feasible have mitigated the problem, as is evidenced by a large number of very interested potential operators. In Chesterfield, a franchise area including approximately ninety-five percent of the county's households is expected to operate effectively, with a penetration rate to this point of over eighty percent, as compared to a national average of approximately fifty percent. In both cases, the demographic characteristics of these basically middle class

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[149]Noll, p. 153.

communities, with a population economically capable of using cable service and constituting an attractive market, but not having access to the broader range of entertainment services available in wealthier communities, were probably determative.[150]

It is interesting that subdistricting would enable more flexible manipulation of service to meet such demographic considerations. More importantly, however, it is apparent that the often stated concern about regional systems, that being that economically unjustifiable sparsely populated areas would have to be served, is also of questionable relevance.

Since localities in Virginia are "creatures of the state," it is incumbent on the State to provide the statutory authority for regional cooperation. Again, a situation exists in which the legal framework presents more of an opportunity then has been taken, but less than is necessary, apparently, to encourage, much less require, such an approach.

Article VII, §§ 2 and 3 of the Virginia Constitution provides:

> The General Assembly shall provide by general law for the organization, government, powers, change of boundaries, consolidation, and dissolution of counties, cities, towns, and regional governments. . . .
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> The General Assembly may also provide by special act for the organization, government, and powers of any county, city, town, or regional government, including such powers of legislation, taxation, and assessment as

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[150]Interview, Micas; Interview, Golden; and Washington Post, 27 December 1979, sec. Va., p. 3.

> the General Assembly may determine, but no such special act shall be adopted which provides for the extension or contraction of boundaries of any county, city, or town.
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> Every law providing for the organization of a regional government shall, in addition to any other requirements imposed by the General Assembly, require the approval of the organization of the regional government by a majority vote of the qualified voters voting thereon in each county and city which is to participate in the regional government and of the voters voting thereon in a part of a county or city where only the part is to participate.
>
> The General Assembly may provide by general law or special act that any county, city, town, or other unit of government may exercise any of its powers or perform any of its functions and may participate in the financing thereof jointly or in cooperation with the Commonwealth or any other unit of government within or without the Commonwealth. The General Assembly may provide by general law or special act for transfer to or sharing with a regional government of any services, functions, and related facilities of any county, city, town, or other unit or government within the boundaries of such regional government.

Thus, the General Assembly may provide for regional government subject to the referendum requirement, which has been among the many factors discouraging such action by localities to this point. It might be conjectured that cable television would present such an attractive service to the electorate that it would constitute one of the few situations in which use of the regional government approach might be politically realistic. This is unlikely for a number of reasons, among them the General Assembly's response to Article VII, § 2. Article 3, Chapter 34, Title 15.1 of the Code of Virginia, the Virginia Area Development Act, requires not only the concurrence of the majority of those voting within each jurisdiction,[151] but also limits

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[151]Va. Code § 15.1-1420.

participation unnecessarily, and inappropriately for cable purposes, within Planning Districts; and requires that a majority of the population in the District be included.[152] More damaging, however, is Va. Code § 15.1-1422 (b), which states:

> The plan shall assure that the services to be initially provided by the service district shall be of sufficient number and importance to produce a meaningful governmental unit and program and shall provide the framework of government for the eventual performance by the service district of all of the functions and services which are appropriate for performance on a district-wide basis.

This not only leaves open, but also encourages, consolidation of a wide range of local services once any one service, such as cable, has been established on a regional basis, thereby undermining the political viability of any such plan. Of course, this provision could be amended, and, since total consolidation of jurisdictions is provided for elsewhere in the Code, one must question the necessity for regional government provisions being so similar in ultimate result.[153] Fortunately, a much older approach, also provided for in the Constitution, is possible. Va. Code § 15.1-21 (a) provides that

> [a]ny power or powers, privileges or authority exercised or capable of exercise by any political subdivision of this State may be exercised . . . jointly with any political subdivision of this State and, with any political subdivision of another State.

This raises several possibilities. As an aside, the last provision of the subsection leaves to Northern Virginia the possibility of

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[152]Va. Code § 15.1-1421.

[153]See, for instance, Va. Code §§ 15.1-1071 to 1083, 15.1-1130 to 1148.

participating in a Washington area network about which there is currently some speculation.[154] More importantly though, perhaps localities could delegate their franchising authority in a regional mutual-exercise-of-powers agreement. Dillon's Rule does not prohibit the delegation of local authority.[155] The authority to do so is of some question, however, since there is specific Constitutional restriction on the exercise of the franchising authority by cities and towns, and Va. Code § 15.1-21 (b) would probably require each jurisdiction to take the "appropriate action." The doubt raised concerning joint franchising would probably be enough to prohibit such action under the Dillon Rule. This probably would not preclude, however, adjacent jurisdictions from reaching the same franchise decision and then providing for joint regulation pursuant to Va. Code § 15.1-21 (c)(2).

Thus, State law offers regional alternatives, but certainly does not offer any of such specific relevance to the cable situation as to encourage it. There are some legal situatons, however, which do offer such encouragement. Before any county, for instance, can reach a cable franchise agreement, it must come to some agreement with other franchising authorities within the County. For instance, the Town of Vienna claimed the authority to grant franchises within the town prior to county action at one point in the Fairfax process.[156] Were the situation as

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[154]Interview, Jacks and Evans.

[155]1974 Rep. Att'y. Gen. 103.

[156]Washington Post, 10 July 1979, sec. C, p. 3.

complex in any Virginia localities as in those in some other states, the state might be forced into more aggressively regulating franchising generally and service areas specifically.[157] Prince George's County, Maryland, with its twenty-eight municipalities, at least one of which has attempted to affect the course of county-wide cable television by granting a separate franchise of questionable feasibility, offers a good example. This situation could be reversed by the State and used to require that local franchises receive State approval, as to any number of requirements, but specifically as to service area, before such franchises become operative.

Legal and practical alternatives for regional organization do not guarantee, however, that such an approach is politically viable. The history of special districts in Virginia offers a subject area on which the General Assembly has been particularly reluctant to depart from "known patterns." As urban problems have grown beyond city boundaries in Virginia, especially since World War II, increased interest in regional approaches has developed. The General Assembly has provided by special act for the joint exercise of local authority by special districts, and local governments have also participated in such arrangements under general law.[158] The objectives and results have not always been encouraging, however. One of the primary purposes

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[157] Washington Post, 10 January 1980, sec. Md., p. 1.

[158] Howard, pp. 791, 823, 865.

has been to circumvent constitutional limitations on local debt, for instance, through local service contracts with authorities. The Virginia Supreme Court has held that such contracts do not constitute a present local debt in the full amount when they are for the performance of an essential public service, which cable at this point almost certainly is not; and when payment is in installments made as service is rendered.[159] It is also true that special districts were even authorized during the control of state government by the Byrd organization, but only as an effort to meet the demands of local governments for services for which the state was unwilling to incur debt or to have the localities do so directly. It can be seen then, that in creating special districts, the usual fiscal advantages have been offset by the fact that debts of the authorities have not been backed by the credit of the state, thereby subjecting bonds issued to higher interest rates.[160] In a capital intensive service such as cable, financing considerations such as this can be crucial to initial feasibility, as has been discussed above. It should also be noted that special districts in Virginia have been created for the most part for performance of functions traditionally recognized as having a legitimate public purpose, and with cable that status has not been obtained.

Of further mitigation, in the Virginia setting, of the advantages of special district cable franchising or operation is the lack of independence from general purpose local government

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[159]Ibid., pp. 865-866.

[160]Wilkinson, pp. 191-192; and Howard, p. 865.

that any district would enjoy. For instance, the General Assembly has specifically declined to authorize taxation by special districts, despite a Metropolitan Areas Study Commission recommendation in favor of such an approach. Instead, districts may only assess general purpose local governments.[161] In this way, one of the direct links of responsibility between cable system users and management is lost. A further potential roadblock to the use of special districts in the Virginia cable experience is the often stated claim that their creation leads to fragmentation of government.[162] It should be noted, however, that as this applies to cable regulation, and franchising generally, this criticism depends upon the perspective one takes. It could just as easily be maintained that the current constitutional delegation of the franchise authority to cities and towns fragments an important state governmental function. In fact, this important issue was debated at the 1901-1902 Constitutional convention, based upon a concern that this delegation of authority could weaken the power of the Commonwealth to control economic growth and encourage the development of statewide projects. This argument prevailed at least partially, in that counties were denied general franchising authority.[163] Nonetheless, for many reasons it remains questionable whether or

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[161]Juergensmeyer, p. 88; Howard, p. 820; and Va. Code § 15.1-1400.

[162]Howard, p. 865.

[163]Ibid., pp. 848-850.

not a regional organizational framework for the operation and regulation of cable television in Virginia, whether operation is by the private or the public sector, is politically realistic. This is true despite the fact that such districts would be more politically viable than regional government, which interferes to a greater extent with the functional and territorial integrity of traditional local jurisdictions.[164]

Virginia need not take an innovative approach in order to impose a statewide framework and policy on cable television franchising. Eleven states have imposed some regulatory authority over cable franchising. Eight do so through their public utility commission, which, as has been seen, Virginia does not. Most, however, do so only in limiting local decisionmaking, as with Hawaii, Connecticut, and New Jersey. At least three states have independent agencies for regulating the franchise process, for instance, Massachusetts, Minnesota, and New York.[165]

Such state regulations provide a number of alternatives for regional approaches. In Connecticut and Massachusetts, while state commissioners are given authority to establish technical stanadards and standard franchise provisions, to regulate rates, and to require certificates of compliance with those standards, little authority is given to regulate service

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[164]Juergensmeyer, pp. 97-98.

[165]David Owen Korte, "Cable Franchising in the Preferred Approach," Public Management, July 1980, p. 18.

areas, and the primary franchising authority remains with the localities.[166] Connecticut does provide for annual meetings of regional advisory councils with franchisees though,[167] and Massachusetts at least encourages subdistricting within jurisdictions by defining "area or areas to be served" as including "a municipality or a portion of a municipality in order to reflect within municipal boundaries, the various economic, cultural, geographic and community interests of the citizens residing therein.[168]

Other states, however, take an even more aggressive approach. In Hawaii, the Director of Regulatory Agencies has the authority to grant permits for cable television systems.[169] Applications for such permits must state the service area to be covered, and "[i]n determining the area which is to be serviced . . ., the director shall take into account the geography and topography of the proposed service area, and both the present operations and the planned and potential expansion of the applicant's and other CATV companies.[170] The director also has the duty to promulgate criteria for the designation of service

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[166]Connecticut Code §§ 16-38 et seq.; and Massachusetts Code §§ 166A:1 et seq.

[167]Conn. Code § 16-331.

[168]Mass. Code § 166A:1 (f).

[169]Hawaii Code § 440G-4.

[170]Ibid., §§ 440G-6 and 8 (a)(2).

areas.[171] The State Division of Public Utilities and Carriers in Rhode Island has similar authority to grant certificates of compliance and to impose standards as to territory of operation.[172]

In New Jersey, the State Board of Utility Commissioners may deny a state certificate of approval for either technical or financial reasons, and, most importantly for the purpose here, may direct more or less coverage of service area, if the impact of the application's approval would be to impede development of adequate service or create unreasonable duplication. Municipal consent is still required, but may not be arbitrarily withheld.[173]

New York's Commission on Cable Television is charged with the responsibility to "stimulate and encourage cooperative arrangements among organizations, institutions and municipalities in development of regional educational, instructional and public affairs programming," a mandate only somewhat broader than that of the Virginia statute, and also to "cooperate with municipalities to facilitate multiple community cable television systems."[174] Franchises must still be granted by municipalities, and, while they are not valid until a state certificate of confirmation is granted, apparently that certificate may not be denied on the grounds of service area.[175] The Commission may later, however, order the interconnection or coordination of operation of approved systems.[176]

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[171] Ibid., § 440G-12 (2).

[172] Rhode Island Code §§ 39-19 3 and 4.

[173] N.J. § 48:5A-17b; 48-5A-22.

[174] N.Y. § 815 (7) and (8).

[175] Ibid., §§ 819 and 821. [176] Ibid., § 823.

Minnesota takes one of the most affirmative regional approaches. That legislature has found that cable communications is in a state of rapid growth and corporate consolidation and that during that process it should conform to regional and statewide service objectives; that area-wide service should be encouraged, while concentration of ownership is discouraged; that many local governments lack the expertise and resources to plan for and secure the benefits of cable systems, or to protect subscribers and others in franchise negotiations; that there is a need for a statewide service plan and standard franchise practices; and that it must be assured that ". . . municipal franchising results in communication across metropolitan areas and in neighborhood communities in larger municipalities."[177] The Minnesota Cable Communications Board is charged with setting standards for establishing or altering service areas, is given the authority to approve special territories on application of municipalities or cable operators, and may order the interconnection of systems.[178] A regional system in the Twin Cities area is specifically required by state law.[179] A procedure is provided for extension of core service areas, including the joint exercise of powers of municipalities in accepting the earlier franchise of a core service unit in another municipality,[180] and allows joint franchising and regulation by

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[177]Minnesota Code § 238.01.

[178]Ibid., §§ 238.05 (6) and (7), 238.06 (5).

[179]Minn. Code § 238.05 (2)(c).

[180]Ibid., § 238.17.

municipalities, each of which would contribute a council member and a citizen member to a joint commission for that purpose.[181]

An interesting provision is the fact that

> [f]or the purposes of assisting in the implementation of sections 238.01 and 238.17, the metropolitan council and regional development commissions of the state may engage in a program of research and study concerning interconnections, cable territories, regional use of cable communications and all other aspects which may be of regional concern.[182]

Such a mandate could easily be given to planning district commissions in Virginia.

It should be noted that even in Minnesota, local prerogatives are not totally abrogated, as municipalities continue to have the franchising authority. Franchises must be approved by the Board before they become effective though.[183]

The question of service area and system fragmentation is not only recognized as fundamentally a part of the franchise procedure from its inception by other state statutes, but also in the literature. Walter S. Baer in Cable Television: A Handbook for Decisionmaking, recognizes three related questions of major importance which should be addressed early in the process:

1. geographic coverage;

2. coordination with neighboring jurisdictions for efficient service and interconnection; and

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[181]Ibid., § 238.08.

[182]Ibid., § 238.10.

[183]Ibid., § 238.09.

3. the question of multiple or single ownership in the area. Such issues are most adequately addressed in conjunction with regional planning commissions.[184]

The experience in the three Virginia areas studied is quite the contrary. The provisions of the ordinances reflect little concern for regional issues. The record does not indicate that any consideration has been given to regional networking or subdistricting, except for speculation concerning the distant future, and, in point of fact, the possibility of operation on a regional basis by MSO's seeking additional franchises has more often than not had negative impact on their proposal's chances.[185]

Legislative response to the networking issue, to the extent it exists, is as follows:

Northern Virginia

Arlington Code § 41-4, offers perhaps the best example, as follows:

> (d) The company may be required to interconnect its system with any other broadband communications facility operating in an adjacent territory. Such interconnection shall be made within sixty (60) days of a request made by an appropriately designated county agency. The agency shall have the responsibility of coordinating such interconnections to insure technical compatibility between the systems to be interconnected. For good cause shown the company may request and the board may grant reasonable extensions of time to comply with the requirements.
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> (e) For the purpose of permitting the simultaneous transmission into any one or more subdistricts of isolated, discrete signals of county channels, public channels, and

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[184]Baer, pp. 78-79.

[185]Interview, Micas; Interview, Emrich; and Interview, Jacks and Evans.

> company channels, the company shall upon request of an appropriate designated official of the county, arrange the system so that it is capable of such transmission to subdistricts, the number and boundaries of such shall be as determined by the board upon recommendation of the agency. The company shall undertake the development of a plan to divide the county into the greatest number of subdistricts practicable, which subdistricts may be variously combined so as to constitute neighborhood communities, school districts, Congressional districts, State Senate and Assembly districts, and the like, for the simultaneous transmission into any one or more of such subdistricts of such isolated, discrete signals. Such plan shall be submitted to the county within a reasonble time after the request is made. The county shall approve or modify such plan giving due regard to economic, technological and engineering considerations. Such plan shall be implemented and the system be capable of simultaneous transmission of such isolated signals. . . .

There are problems with this, however. Va. Code § 15.1-23.1 raises the issue of cost allocation under (d); and more importantly, there are currently no plans for subdistricting and only speculation about interconnection.

The Alexandria Code, in § 7B-32, offers the following relatively good language, but again with no plans for implementation, which leads to the suspicion that it is simply boilerplate.

> Interconnection.
>
> A franchisee may interconnect the system with any or all other cable television systems in the area if otherwise lawful and provided such other system agrees to the interconnection. Interconnection of systems may be done by direct cable connection, microwave link, satellite or other appropriate method.
>
> (a) Upon receiving the directive of the city to interconnect, the franchisee shall immediately initiate negotiations with the other affected cable television system or systems in order that costs may be shared equally for both construction and operation of the interconnection link.

(b) The city council may grant reasonable extensions of time to interconnect or rescind its request to interconnect upon petition by the franchisee to the city council. The city council shall grant the request if it finds that the franchisee has negotiated in good faith and the cost of interconnection would cause an unreasonable increase in subscriber rates.

(c) No interconnection shall take place without prior approval of the administrator. A franchisee in seeking approval for interconnection shall demonstrate that all signals to be interconnected will comply with FCC technical standards for all classes of signals and will result in a low level of distortion.

(d) The franchisee shall cooperate with any interconnection corporation, regional interconnection authority, state or federal regulatory agency which may be hereafter established for the purpose of regulating, facilitating, financing or otherwise providing for the interconnection of cable television systems beyond the boundaries of the city.

The problem of cost allocation, which could thwart any plans which might later arise, is again raised here.

Sec. 7B-43, system design, is also relevant.

The cable television system shall be installed in a manner which will allow each area, if served by a separate head-end, to distribute and originate programs to not only the area served by the head-end but to interconnect with other head-ends, if any, within the system in order to send or receive originated programming from or to any one or more areas served by other head-ends within the city.

The Fairfax County Code, Chapter 9, Article 7, includes the following similar provision:

Section 3. Extension outside the primary service area.

(a) A Grantee shall extend its full service outside the PSA to any location within the franchise area in accordance with the line extension policy incorporated into the franchise.

(b) To the extent that may be allowed by law, the County, by resolution, may require a Grantee to interconnect its cable television system with other cable television

systems or other broadband communications facilities (e.g., a television communication network connecting public institutions or facilities) located within the County. Such interconnection shall be made within ninety (90) days of a request made by the County Board of Supervisors pursuant to such a resolution, or within a longer period of time as may be specified by the Board in its resolution.

(c) A Grantee shall make every reasonable effort to cooperate with cable television franchise holders in contiguous communities in order to provide cable service in areas within the County but outside the Granteee's Primary Service Area.

(d) The County shall make every reasonable effort to cooperate with the franchising authorities in contiguous communities, and with the Grantee, in order to provide cable television service in areas outside the County.

Richmond Area

The Richmond ordinance contains no provision for interconnection or subdistricting.

Henrico Ordinance No. 458 (1976), Article V, § 1, D., § 2, C and D, states that:

D. The Grantee may be required to interconnect its cable television system with other cable television systems or other broadband communications facilities located in contiguous communities. Such interconnection shall be made within ninety (90) days of a request made by the County Board of Supervisors.

C. Grantee shall make every reasonable effort to cooperate with cable television franchise holders in contiguous communities in order to provide cable service in areas within the County but outside the Grantee's Initial Franchise Area.

D. The County shall make every reasonable effort to cooperate with the franchising authorities in contiguous communities, and with the Grantee, in order to provide cable television service in areas outside the County.

A similar provision is included in the Chesterfield Ordinance in §§ 7.1-6 (c) and 7.1-(c).

Tricities Area

None of the ordinances address the issues of regional operation or networking of subdistricts.

In summary, two points can be made. Regional operation of a cable system, with networking within the system of subdistricts delineated according to demographic and technical standards, offers technological and programming advantages particularly useful in meeting the potential public service objectives of the medium. Secondly, however, while the legal mechanism exists in Virginia for such an organization, either of public or private system operation, that authority, in its current form, will not encourage this approach given political realities. Regional cable networking is not possible in Virginia without a departure at the state level from traditional approaches to local government. Consequently, this otherwise viable and useful organizational alternative remains unconsidered, despite examples of action in other states, despite the apparent advantages, and the potential dangers of inaction, and despite the failure of local governments to consider these issues on their own initiative.

CONCLUSION

As Brenda Fox of the NCTA told the Local Government Attorneys of Virginia in August, 1980, "technology is ahead of the law, and technology is beating the law" in the cable television field. This comparison of local regulation of cable television in Virginia to alternatives suggested by the literature and even the experience in other states, has demonstrated this to be the case in Virginia. For the most part, the General Assembly has failed to act. As has been seen, when it did so, it was only in response to the local initiative offered by Arlington County, and local initiative has itself been limited due to the legislature's failure to grant sufficient authority or support to local government. What has resulted is a regulatory scheme in which the legislature has determined that there should be regulation in the public interest, but in which the regulation has been left to localities which have neither the resources, the legal authority, nor the political inclination, to do so effectively and with flexibility.

In fairness, it can be noted that lack of legislative action, even given the potential implications of development of cable television, should not be surprising. The considerable changes in the technological, economic and legal aspects of the medium in the last five years, and the resulting rush for

franchises, could be expected to engender a cautious response, or no response at all, either on the basis of ignorance or uncertainty. Other aspects of the industry, evident in the Virginia experience, could also elicit a limited response. It has been observed, concerning national regulation, that

> [i]n a field such as communications where the interests of powerful industry forces frequently collide with one another as well as with the interests of the general public, nothing is more unsettling to many lawmakers . . . than the prospect of making a law.[186]

Instead, the Congress has chosen to rely on "a variety of informal techniques in directing and overseeing the activities of the F.C.C.," such as hearings, investigations and studies, despite the fact, noted by Chief Justice Burger in U.S. v. Midwest Video, that ". . . the almost explosive development of CATV suggests the need for a comprehensive reexamination of the statutory scheme . . . ."[187]

What is required in Virginia, however, is not reexamination, but comprehensive initial examination. Unfortunately, such has not been the experience described here. While it would be presumptuous to reach policy conclusions in a field in such rapid development and of such an uncertain nature, the Virginia experience definitely raises an agenda of issues to be addressed at the one level of government which as yet, for the most part, has remained out of the cable regulatory arena. If a decision is made that Virginia law should play a direct role in the

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[186]Erwin G. Krasnow and Lawrence D. Longley, The Politics of Broadcast Regulation, 2nd ed. (New York: St. Martin's Press, 1978), p. 90.

[187]Ibid.

future of cable television, then the following legal issues, among many others, would be addressed in the construction of a regulatory scheme:

1. The Virginia Freedom of Information Act could be amended to impose guidelines for the franchising process which would assure public awareness and impact upon the process, for example, by regulating ex parte communications between governing body members and bidders, and post-bid submissions of additional information and bid amendments. The experiences in Richmond and Alexandria were illustrative of such due process problems, and, on a more positive note, the standards imposed in Chesterfield and Falls Church offer examples of local initiative to fill the void;

2. The Virginia Conflict of Interests Act could, at the very least, address the issue of public official interest in cable firms;

3. Va. Code § 15.1-23.1 could be expanded into a more comprehensive state cable communications policy, imposing a mandatory duty upon the localities to regulate, with substantial state oversight, thereby removing the serious limitations placed on legal authority by the Lafayette and Boulder cases cited above. Beyond this, however, an expanded state regulatory mandate could be used to fill the vacuum in which local governments can consider factors irrelevant to community service by cable, such as "rent-a-citizen" political concerns, petty interjurisdictional rivalries, and increased local revenue.

Other vague standards for performance are offered by the franchising process itself, which is ripe for public confusion and litigation, since franchising for the use of public property was never intended for application to a rapidly developing communications technology. Many of the issues involved in Cablecom v. Richmond speak in favor of correcting this shortcoming. Also, flexibility to meet future technological developments could be built into the process, a reservation of authority rarely seen in the Virginia experience so far;

4. As a part of this policy, the state could eliminate some of the current limitations on local action, as in delineating cable communications service districts reasonably related to the social impact and technological characteristics of the medium. Given the Virginia political environment, it is probably most realistic to assume that local governments would continue to exercise franchising authority within such districts. Exercise of this authority, however, might be subject to state certification of compliance with service, networking, and subdistricting standards. Among the advantages of such an approach would be both the elimination of unrealistic bidding for marginal franchises, in order to establish a "stepping stone" in future bidding; and of unrealistic ownership diversity due primarily to local jurisdictional rivalries;

5. In light of the fact that federal technical standards may eventually be eliminated, and the fact that even Virginia localities with sophisticated staff capabilities are unable to

adequately impose such standards, a determination could be made as to the extent to which cable television is a utility, and to which such standards should be promulgated by the S.C.C. That is not to say that a new separate commission or the Public Telecommunications Board might not perform this function more appropriately, especially in the event of a legislative determination that cable services are not a utility, or that the issue of deregulation should not also be addressed. Also to be considered, if utility status is granted, could be rate regulation, on which the Arlington and Alexandria situations demonstrate the inability of even sophisticated localities to act, as well as the susceptibility of the process to political pressure. The financing issue, a consistently important one in this capital intensive field, and one with which Virginia localities have, almost without exception, had difficulty dealing could be examined. This last point is especially important, given the rapidly mounting commitments of several MSO's in Virginia in an enterprise where little short-term profit is available and where public purpose demands could legitimately be made on future significant profit; and

6. Various ownership alternatives for Virginia localities should be investigated, such as municipal or public authority ownership or operation, of either plant of programming or both. The alternatives offered in the experience studied here have, almost without exception, been those presented by the industry.

This is not to suggest the nature of effective regulation in Virginia, or that deregulation to the fullest possible extent might not offer the best alternative. On this point, the national experience in communications regulation is enlightening. The F.C.C. has tended to regulate in favor of those whom existing regulations have most benefited, the major entities in the media status quo as opposed to those requiring innovative approaches to technology or new standards for regulation. This has been the case largely because any regulator easily can be overwhelmed in a field of major technological development and rapidly expanding market demand. Such situations, as with citizens band radio for example, have lead historically to a reactive regulatory role, rather than a guiding one, as the regulator becomes dependent itself on the major industries for guidance. These situations have also lead in many cases, including the Federal regulation of cable television, to the stiffling of legislative and regulatory action by those industries with the most power to do so, those being the industries most heavily invested in maintaining the current legal and technical environment.[188] In this way it is possible, although not necessarily certain, that regulation can actually have results contrary to the public interest in increased media service. If experience is an accurate guide, it cannot be expected that more aggressive cable regulation in Virginia would be immune from this potential pitfall. The record described in this paper, in fact, is one replete with

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[188]Krasnow, pp. 21, 30, 80, 171.

acquiescence by local governments with limited resources to industry initiative, and MSO's willing to use that situation to their benefit to a significant degree. It cannot be guaranteed at this point that a more aggressive approach at the state level would have better support, or be any more independent of industrial influence in attempting to meet public objectives.

Perhaps relatively moderate regulation is the best that can be expected at either the state or local level. Perhaps such a limited approach even may be the most suited to the achievement of public objectives. It has been observed in the literature that

> the public interest may require in a highly complex, politically sensitive and rapidly changing industry at most a regulatory objective of modest change, flexibility and sensitivity to feedback, and a focus on short range goals.[189]

In such a situation, it may simply ask too much to expect specific long range goals or dramatic changes of direction. Perhaps such a limited process is the best possible, and certainly it is the most likely. Nonetheless, it should include at least one actor whose primary objective is the protection and fostering of the public interest. As has been seen above, even the possibility of a reactive regulatory role is increasingly threatened in Virginia, as local governments fail to retain the authority to meet technological developments with a flexible response. This study has discovered little action on the part

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[189]Krasnow, pp. 187-194.

of the Commonwealth to discourage this practice, either by enhancing the competence of the localities to regulate, or by increasing the awareness of this potential problem by imposing its consideration as a part of the franchising process. The current situation does not appear to be one designed to regulate in the public interest in a limited, practical manner. Rather, it appears to be one in which a decision has been made, largely by default, to regulate, but to do so hardly at all.

The future of cable television in Virginia for at least a decade has to a large extent been set within the last four years, as many major jurisdictions have awarded franchises. In the three major metropolitan areas studied here, Arlington, Alexandria, Henrico, Richmond and Chesterfield have issued franchises for state-of-the-art systems, and Petersburg, Hopewell, and Colonial Heights are bound for several years to antiquated systems. If the Commonwealth is to play any significant role in what little remains of the process, then General Assembly action, as opposed to minimal reaction, is imperative. Theoretically, the decision could justifiably be in favor of any number of regulatory alternatives, including even a temporary moratorium on cable system authorizations until basic policy decisions can be made and until the future of the medium becomes more certain. This could be justified on the grounds that the situation at present is too uncertain to allow the substantial bargaining away of public rights, or major investment of private or public capital. As to regulation itself, the extremes run from total

state preemption, to total deregulation except for the most minimal standards for the use of public rights of way. Realistically, the options are much more limited. Just as there is at the state level a legal void as to cable regulation, there is a related political one, also evident in this paper. Greater authority for the localities to regulate, or to take advantage of regional alternatives, is unlikely given Virginia's traditional approach to local governmental authority. Under the principles and experience which underlie the Dillon Rule, local iniative, even if not specifically prohibited, is certainly not encouraged, as any effort of Fairfax County to operate its own system will most likely demonstrate. This is also not to say that past experience indicates that authority given would be used, as with regional franchising, and given the traditional parochial outlook of Virginia localities.

That decision, however, is beyond the scope of this paper. What is apparent, based upon this study of the issues of regulatory authority, expertise, and organization alone, is the lack of any comprehensive analysis of the Virginia regulatory environment for cable television, and the inability of local government to regulate effectively in the field without such guidance.

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