

1975

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## Recommended Citation

24 Cath. U. L. Rev. 777 (1974-1975)

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## CITIZEN PARTICIPATION IN THE REGULATION OF CABLE TELEVISION

*Michael Botein\**

Cable television means different things to different people. To some, cable is a thin wire, often strung from tree to tree, which brings to them four or five otherwise unavailable television stations. To others, cable is the beginning of a national broadband communications system, with a host of novel and innovative uses ranging from two-way video communications, to pay television, to data transmission. Indeed, there is sharp disagreement over whether to call the medium "cable television" or "community antenna television" (CATV). Some members of the industry view the term "CATV" as a mark of the past, while others see it as the only accurate description.<sup>1</sup>

The truth about cable lies somewhere between these two extremes. On the one hand, most existing cable systems do little more than distribute the signals of from five to twelve television stations. While some entrepreneurs have invested in "blue sky" projects, such as data transmission and pay television, these highly sophisticated operations are not likely to develop in the near future because of the industry's present economic state.<sup>2</sup> Although cable television was a glamour stock only a few years ago, it now is suffering from want of capital.

Citizens groups, therefore, must not expect too much from cable in the near future. A modern cable system can deliver twelve or more channels of high quality television reception, offer one or two otherwise unavailable stations, and create a very limited amount of programming. Most cable systems today originate programs simply by maintaining an automatic time and weather channel which displays the time, weather and sometimes other

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1. One indication of the extent to which this controversy divides the cable industry is that two separate trade associations exist within the industry. The older National Cable Television Association (NCTA) represents comparatively large cable television systems. The newer Community Antenna Television Association (CATA) makes a very explicit point of speaking for "CATV" operators. *See, e.g.*, CATJ, March 1975.

2. For an excellent overview and estimate of the tremendous costs involved in such "blue sky" projects, see W. BAER, INTERACTIVE TELEVISION: PROSPECTS FOR TWO-WAY SERVICES ON CABLE (1971).

information. Because sophisticated large city cable systems will not develop in the near future, cable television will not soon have a massive effect on most people. Compared to conventional broadcast television, cable's impact is comparatively minor; indeed, cable systems are more analogous to local AM radio stations than to broadcast television stations.

This does not mean, however, that cable is unimportant in the life of a community. On the contrary, cable is the only communications medium which is still comparatively new and thus open to use by citizens. Citizens groups should take advantage of the opportunity to make cable responsive to their interests, since cable may represent their last and best chance to create a responsive medium.

Cable television is subject to combined federal, state, and local regulation. The type of regulation, of course, varies from one location to another. In Connecticut, for example, the state government has exclusive jurisdiction over cable.<sup>3</sup> In New York, both state and local regulatory authorities have jurisdiction,<sup>4</sup> and in California, only local bodies have jurisdiction.<sup>5</sup> Citizens groups, therefore, must not only study their area's regulatory pattern, but must also fight for their interests at each regulatory level. This fight becomes increasingly difficult as citizens groups address their interests at each successive level, since the decisionmaking process becomes less responsive to public input as it moves from the local to the state to the federal level. State agencies are loathe to overturn local decisions, and the FCC is even more reluctant to meddle with state or local action. Citizens groups thus must make their influence felt at the lowest possible regulatory level in order to ensure that they will be heard fully.

One great error made by citizens groups is to assume that they need the services of a professional communications attorney in order to make their ideas heard effectively. Because the whole area of cable television is new and open, citizens groups should not be deterred by lack of specialized counsel. Most cable work does not require a professional communications attorney. A local general practitioner who is familiar with state or local procedures in regulating cable television can be extremely useful. While

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3. CONN. GEN. STAT. ANN. §§ 16-330 to -333 (Supp. 1975).

4. N.Y. EXEC. LAW § 819 (McKinney Supp. 1974).

5. CAL. PUB. UTIL. CODE § 768.5 (West Supp. 1975), construed in *California Community Television Ass'n v. General Tel. Co.*, 73 Cal. P.U.C. 507 (1972). For more detailed discussion of state and local cable regulation, see Barnett, *State, Federal, and Local Regulation of Cable Television*, 47 NOTRE DAME LAW. 685 (1972); Botein, *CATV Regulation: A Jumble of Jurisdictions*, 45 N.Y.U.L. REV. 816 (1970). Although state courts usually are not an effective forum for citizen complaints, a few courts have invalidated local franchise grants because of technical deficiencies under state law. See Annot., 41 A.L.R.3d 384 (1972).

some "lay" attorneys will find local, state, and federal procedures confusing, many expert communications lawyers also find them difficult. The key to successful citizen input is thus concern, patience and a willingness to learn, rather than an extensive background in communications law.

### I. THE STRUCTURE OF CABLE REGULATION

The combination of an historical accident and the FCC's lack of exclusive regulatory power over CATV has created the present division of jurisdiction among federal, state and local authorities. The Commission calls this "dual jurisdiction" and "creative federalism."<sup>6</sup> Some observers call it a regulatory nightmare, however, and have urged federal authorities to "shed a tier for cable television."<sup>7</sup> It nevertheless appears that this present division of regulatory jurisdiction will not be altered in the near future. Thus, citizens groups must be prepared to take their cases to at least two—and possibly three—levels of government.

Although cable operators initially may approach a community in an infinite variety of ways, some generalizations about methods of beginning the business are possible. The first step for most cable operators is to secure some form of operating authority from a local body such as a town, city, village or county. This authorization may come in any one of a variety of packages and labels. Although most commonly called a "franchise," the authorization may also be termed a "resolution," "license," "statute," "ordinance" or "law."<sup>8</sup>

In most states, local authorities do not have any direct power over cable television.<sup>9</sup> They usually can, however, regulate the means of physical access to the community, such as streets, which cable systems must use in order to function. Accordingly, local governments can assert regulatory jurisdiction over cable by conditioning the use of their property upon the cable operator's acceptance of their terms.<sup>10</sup> Of course, in a few rare situations local bodies

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6. Cable Television Report and Order, 36 F.C.C.2d 143, 207 (1972). This was the basic organic document by which the Commission lifted its six-year "freeze" on cable television and finally adopted a comprehensive regulatory scheme. See generally Botein, *The FCC's Cable Television Regulations—Round Four*, 1971-72 N.Y.U. ANN. SURVEY 577, 577-81 (1972).

7. Interview with Jacob W. Mayer, Chief, Special Relief and Enforcement Division, Cable Television Bureau, Federal Communications Commission, July 29, 1971.

8. For a description of these forms, see Annot., *supra* note 5.

9. See generally articles cited note 5 *supra*.

10. The limitation of local power to that of control of the streets rather than to some general police power can create some regulatory dilemmas for local governments. For example, in *City of New York v. Comtel, Inc.*, 25 N.Y.2d 922, 252 N.E.2d 285, 304 N.Y.S.2d 853 (1969), it was held that the city could not regulate a cable system which used leased telephone lines.

lack all power over cable. This is usually the result of either exclusive state jurisdiction<sup>11</sup> or the lack of any appropriate governing body, particularly in unincorporated areas of counties.

Action by citizens groups at the initial local stage may be the most important factor in determining whether a cable system will be responsive to the needs and interests of its community. As noted before, decisions become progressively more rigid as they move from the local to the state to the federal level. Accordingly, citizens groups must act knowledgeably and forcefully in the local franchising process.<sup>12</sup>

In the one dozen states which regulate cable,<sup>13</sup> the step after the local franchising process is approval by a state agency. State agencies vary greatly; some have exclusive jurisdiction over cable,<sup>14</sup> while others merely review local authorities' decisions for their consistency with state guidelines.<sup>15</sup> The latter system is most common. But even when a state has either mandatory or advisory guidelines for local franchising, the state agency's standards usually are lenient and require only cursory review. Citizens groups, therefore, have little chance of winning on the state level what they have lost on the local level.

The final step in the process is franchise authorization from the Federal Communications Commission (FCC). In this regard, it is important to note that a cable system may not operate without the FCC's approval, even though it has state and local authorizations.<sup>16</sup> The FCC exercises both a licensing and a policing function over cable systems; as a generalization, a cable television system needs the Commission's approval before its operation may begin and before its existing operations may be changed.<sup>17</sup> Such ap-

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11. For example, the Connecticut Public Utilities Commission has exclusive jurisdiction over cable television under its enabling statute, CONN. GEN. STAT. REV. § 16-331 (1966).

12. For a discussion of the means by which citizens make themselves heard at the initial franchising stage, see L. JOHNSON & M. BOTEIN, *CABLE TELEVISION: THE PROCESS OF FRANCHISING* (1973); R.K. YIN, *CABLE TELEVISION: CITIZEN PARTICIPATION IN PLANNING* (1973).

13. The twelve states are: Alaska, Connecticut, Delaware, Hawaii, Massachusetts, Minnesota, Nevada, New Jersey, New York, Rhode Island, Vermont and Virginia. See 40 Fed. Reg. 29337 (1975).

14. See, e.g., NEV. REV. STAT. §§ 711.010-.180 (1973).

15. See, e.g., N.Y. EXEC. LAW §§ 815-16 (McKinney Supp. 1974).

16. It should be noted, however, that FCC approval is required only for the operation of a cable system. A cable operator is perfectly free to build his or her plant without FCC approval. Thus the Commission has refused to act against a cable operator who was building, but not operating, a system. *Riverside Cable Corp.*, 42 F.C.C.2d 783 (1973).

17. See discussion at p. 785 *infra*.

proval takes the form of a certificate of compliance.<sup>18</sup>

In order to obtain a certificate, a cable system must be demonstrably in compliance with the Commission's rules. A cable system must, therefore, be providing its subscribers with the proper broadcast signals. The local franchising process must be reasonably fair, and the system must make appropriate provision for access channels.<sup>19</sup>

This federal certification process is very important for citizens groups. It may be their final, and sometimes their best, chance to make themselves heard. In addition, many of the Commission's rules—particularly its franchise and access rules—are of vital concern to local citizens. The Commission's rules require a local government to hold a "full public proceeding affording due process"<sup>20</sup> before it awards a franchise. The certification process, therefore, gives citizens groups an opportunity to show that a proper hearing never took place and that the franchising process must be reopened.

Citizens groups can and should make themselves heard on all three levels of regulatory jurisdiction. Unfortunately, citizen participation has been almost nonexistent at all three levels. Indeed, citizens groups have filed in comparatively few FCC cable proceedings and have appealed only one FCC decision.<sup>21</sup> To a certain extent, this lack of participation is the fault of citizens groups themselves. Many groups harbor exaggerated and unfounded fears about the complexity of the regulatory process. Yet to a much greater extent, the blame rests with the FCC. The Commission not only has made it difficult for citizens groups to be heard, but also has been unresponsive to their concerns. The remainder of this article will explore some of these problems as well as possible solutions.

## II. NOTICE

The most basic problem facing citizens groups is finding a procedural

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18. The FCC draws a distinction between the certificate of compliance and a license. The Commission's unarticulated fear appears to be that if a certificate were deemed a license, the Commission would be required to hold hearings in many more cases, pursuant to the Communications Act of 1934 § 303, 47 U.S.C. § 303 (1970). See 47 C.F.R. § 76.11 (1974).

19. See 47 C.F.R. §§ 76.1-251 (1974).

20. *Id.* § 76.31(a)(1). See discussion at pp. 782-83 *infra*.

21. In *Comcast Corp.*, 42 F.C.C.2d 420 (1973), the Philadelphia Cable Coalition attempted to have the Commission deny several certificates of compliance on the ground that the city had failed to hold appropriate hearings under 47 C.F.R. § 76.31(a)(1) (1974). After several unsuccessful attempts to have the Commission reconsider its action, the Coalition unsuccessfully appealed the case to the United States Court of Appeals for the District of Columbia Circuit. *Philadelphia Cable Coalition v. FCC*, 509 F.2d 537 (D.C. Cir. 1975).

means to participate in the regulatory scheme. Accordingly, a group's first and most important step is to determine when the Commission or a local government is about to act on an issue of concern. Unfortunately, neither the Commission nor most local governments give adequate public notice of the matters before them.

#### A. Notice at the Local Level

Local authorities often act with very low visibility and therefore do not invite easy intervention by citizens groups.<sup>22</sup> The difficulty in discovering when a local authority is considering the grant of a franchise is compounded by the fact that most states do not require local authorities to give any public notice of a franchise grant.<sup>23</sup> Existing notice requirements usually are satisfied by "legal notices," which are, of course, virtually useless for informing citizens groups. These groups thus must make an affirmative effort to discover the status of a local franchising process. This often requires creating a liaison with the mayor's office or city council and constantly inquiring about new developments. A certain amount of sheer pestering can be useful.

The blame for inadequate notice, however, does not lie solely with local governments. The Commission itself is partly to blame. The FCC ostensibly polices the procedural practices of local governments in the grant or denial of a franchise. The FCC rules require a local governing body<sup>24</sup> to hold "a full public proceeding affording due process" in evaluating a potential franchisee's "legal, character, financial, technical, and other qualifications."<sup>25</sup> This language was designed to be broad in order to give the Commission discretion in dealing with widely varying local procedures. The Commission, however, has given the rule a somewhat less than strict construction and has

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22. In one example, an Alabama citizens group became interested in ascertaining the status of cable television in a fairly large city. When a member of the group visited the city attorney and asked for a copy of the local franchises, the attorney said that he had heard something about "the cable" but could not find a copy of the franchise. Comments of Selma Project, filed in Docket No. 19667. This proceeding culminated in the adoption of 47 C.F.R. § 76.305 (1974), which requires that certain records be maintained locally by CATV systems for public inspection. See note 30 & accompanying text *infra*.

23. New Jersey is comparatively rare in this regard; local governments are required to advertise fairly extensively any intent to consider granting a "consent." See N.J. Cable Television Act, N.J. STAT. ANN. 48:5A-23(c) (Supp. 1975).

24. Under 47 C.F.R. § 76.31(a) (1974), the Commission's minimum procedural safeguards apply to whatever body has the power to grant a franchise, whether it be state or local.

25. *Id.* § 76.31(a)(1).

taken little meaningful action. A "full public proceeding" thus is almost any procedure valid under local law.

The fundamental problem is the Commission's failure to develop any meaningful definition of adequate notice and hearing.<sup>26</sup> The Commission is usually satisfied if a franchise was on the agenda and discussed at a meeting of a local governing body. Moreover, in making a franchise decision, the Commission relies not on independent investigations, but generally on submissions by the applicant.<sup>27</sup> A letter from a town clerk or a copy of a newspaper article may satisfy the Commission.<sup>28</sup> And the "substantial compliance" test naturally makes these standards even more lenient for pre-1972 franchises.<sup>29</sup>

Local franchise proceedings obviously are of the utmost importance, since citizens groups may often determine the ultimate outcome at this level. At the federal level, by effectively demonstrating that a franchise was improperly granted, a citizens group may be able to reopen the whole proceeding, but, of course, the Commission is usually quite sympathetic to the applicant. Nevertheless, citizens groups constantly must be vigilant in obtaining notice of local franchise proceedings in order to have maximum impact on their outcome. Even when the outcome is unfavorable to citizens groups, the availability and quality of local notice may be potent weapons in further attempts by such groups to reopen the proceedings.

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26. In its recent Clarification of Rules and Notice of Proposed Rulemaking, 39 Fed. Reg. 14287 (1974), the Commission defined a "full public proceeding" for CATV systems in the following terms:

Our present requirement for public proceedings is administered on the basis of a "reasonable man" standard. So long as the public has been given a reasonable opportunity to participate in the franchising process, we currently consider our "public proceeding" requirement as having been met.

*Id.* at 14293.

27. Much of the information that the Commission requires to be submitted is information available only to the applicant, or information of a very subjective nature such as the franchise's "character" qualifications. See 47 C.F.R. § 76.31 (1974).

28. See, e.g., Lynchburg Cablevision, Inc., 32 P & F RADIO REG. 2d 854 (1975). The skiminess of the Commission's documentation is never apparent from the face of its opinions, for the simple reason that the Commission does not wish to base its decisions upon clearly flimsy bases. A perusal of the files in the Commission's Public Reference Room, however, quickly demonstrates the absolute dearth of documentation in some cases. For example, in Lake County Cable T.V., Inc., 42 F.C.C.2d 952 (1973), the Commission found that a local franchise fee was reasonable, based solely upon two unsworn letters from a city's mayor.

29. The "substantial compliance" doctrine applies to all franchises granted before the effective date of the rules (March 31, 1972). The doctrine essentially validates any such franchise until 1977, as long as it even vaguely resembles the Commission's minimum franchise standards. See, e.g., CATV of Rockford, Inc., 38 F.C.C.2d 10 (1972). Many cable operators are betting that in 1977 the Commission will simply "grandfather" all pre-1972 franchises.



### B. Notice from the FCC

In terms of conveying notice of its actions to citizens groups, the Commission is no more effective than state or local governments. In theory, the Commission gives "public notice" of all filings. In practice, the notice is virtually useless. It is merely a mimeographed list of filings and is available only at the Commission's headquarters. The best source for keeping up to date is thus the trade press, for trade magazines carry a fairly complete list of filings with the Commission.

In the near future, however, it should become somewhat easier to find Commission filings. The Commission recently adopted a rule requiring cable television systems to maintain a public inspection file—a collection of all documents filed with the Commission or relevant to the Commission's regulations.<sup>30</sup> The rule requires cable systems to maintain public inspection files containing all documents relating to their franchising process, applications for certification to the Commission, and any other proceedings before the Commission. The rule is currently in effect, but because it requires cable systems to maintain files of documents which may have been filed or thrown away years ago, many systems need a year or more to comply fully with its provisions.

A public inspection file is not very useful unless a cable system gives notice of the file's contents. Although the Commission is quite aware of this problem, it probably will not adopt any meaningful public notice requirements in the near future. Indeed, any public notice rule probably would follow the lead of the broadly stated franchise standards. A rather vague and possibly useless requirement of "reasonable notice" thus may be established in the distant future; although due process cannot be clearly defined, meaningful standards do exist.<sup>31</sup> The Commission already imposes a fairly detailed set of requirements on radio and television broadcasters.<sup>32</sup> The cable industry strongly opposes any public notice requirement, however, not only because of the possible expense, but also because of potentially increased citizen involvement.

Despite these problems, the current rules provide citizens groups with at least the basic tools for monitoring a system's legal status. By following public notices in the trade magazines and periodically perusing public

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30. 47 C.F.R. § 76.305 (1974).

31. Some suggestions are contained in M. PRICE & M. BOTEIN, *CABLE TELEVISION: CITIZEN PARTICIPATION AFTER THE FRANCHISE* (1973).

32. For example, the Commission requires broadcast licensees to advise the public of their upcoming license renewals not only by announcements over the licensees' own stations, but also by publication in local newspapers. 47 C.F.R. § 1.580(c) (1974).

inspection files, a citizens group can get a fairly good idea of a system's activities.

### III. THE RIGHT TO A HEARING

Even armed with the appropriate information, citizens groups face the higher hurdle of having their ideas received by the Commission. To be sure, the Commission is somewhat less than responsive to members of the public. Nevertheless, citizens groups have a number of procedures available to them by which they can make themselves heard at the Commission and at the same time obtain some leverage with local cable operators.

#### A. *Certificates of Compliance*

The certificate of compliance—known in the trade as a CAC—is the Commission's basic tool for regulating cable television. A cable system must secure a CAC if it began operations after March 31, 1972, or if it now modifies operations which were in existence before that date, by carrying a new television signal.<sup>33</sup> A number of cable television systems are thus effectively "grandfathered" from securing a CAC until 1977, since they were in operation before the effective date of the rules. Because of this, disputes often arise as to when a cable system actually began its operations.<sup>34</sup> Nevertheless, new systems are continually beginning operation and applying for CACs. In addition, many existing systems periodically wish to change their signal carriage and thus must secure CACs. Finally, all grandfathered systems must apply for a CAC and come into full compliance with the Commission's rules by March 31, 1977.<sup>35</sup>

The rules require a totally new cable television system to set forth a substantial amount of information in its CAC application. Not only must a cable system submit a copy of its franchise or other authorization, but it must also show that its franchise is consistent with the Commission's minimum franchise standards.<sup>36</sup> This requirement obviously is important for citizens groups. Aside from giving to them a copy of the system's franchise, the

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33. 47 C.F.R. § 76.13 (1974). The regulation thus effectively divides cable systems on the basis of the date of commencement of operations; moreover, the rule requires differing amounts of information, depending upon when a system commenced operations.

34. *Compare* Southern Illinois Cable TV Co., 44 F.C.C.2d 460 (1974), with Focus Cable of Oakland, Inc., 32 P & F RADIO REG. 2d 151 (1974). In the former case, the Commission refused to accept an operator's claim that its system had been operational before March 31, 1972; in the latter, the Commission refused to question the validity of the claim.

35. 47 C.F.R. § 76.11(b) (1974).

36. *Id.* § 76.31(a).

application procedure also forces the system to show that the franchise was granted as part of a "full public proceeding."<sup>37</sup> A citizens group thus may wish to show that the local franchising authority did not actually undertake a full public proceeding.<sup>38</sup> It is somewhat easier to make this type of showing than many citizens groups might think. The recitations in a CAC application generally are very broad and conclusory. In order to show that no adequate hearing was held, a citizens group may submit newspaper articles, affidavits from city officials or concerned citizens, and the like. It is worth noting that since citizens groups operate in a cable system's community, they actually can collect this information more easily than a Washington, D. C. communications law firm.

Citizens groups may also attack a system's maintenance of the requisite number of free-access channels. Cable operators often request, and are routinely granted, waivers of the now suspended requirement that they maintain three free-access channels.<sup>39</sup> The operators usually base their requests on the assertion that there is little local demand for all three channels and that maintenance of them would impose an undue hardship.<sup>40</sup> Cable operators usually give little or no support for their claim, however, that local citizens do not want all three access channels. Indeed, silence often is taken as a sign of consent.<sup>41</sup> Citizens groups obviously can challenge this type of assertion by showing that many local individuals and institutions wish to use the access channels. The best form of documentation is a number of affidavits from individuals and representatives of local institutions such as churches, schools, fraternal organizations and clubs. Although the future of

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37. See text accompanying notes 24-29 *supra* for a discussion of the "full public proceeding" requirement and its lax enforcement.

38. See p. 782 *supra*.

39. 47 C.F.R. § 76.251 (1974) requires all post-1972 cable systems in the major—the one hundred largest—television markets to maintain an "education," "local government" and "public access" channel. *Id.* §§ 76.251(a)(4)-(6). Unlike conventional broadcast television channels, these cable access channels must be made available to any qualified user on a "first-come, nondiscriminatory basis." *Id.* § 76.251(a)(11). The difference between the three types of channels is less than clear; for example, a local PTA presumably could qualify for use of any of them. The Commission has done little to ease this definitional problem. See, e.g., Clarification of Cable Television Rules, 39 Fed. Reg. 14287, 14291 (1974). The Commission now has partially suspended the operation of the regulations because of the financial woes of the industry and is looking for alternative measures. See Notice of Proposed Rule Making, 40 Fed. Reg. 27250 (1975).

40. As with the lack of documentation behind the Commission's finding of a "full public proceeding," FCC decisions rarely disclose the evidentiary bases on which these determinations are made.

41. For a rare instance in which the Commission actually refused to grant the normal rubber stamp waiver, see *Haystack Cable Vision, Inc.*, 50 F.C.C.2d 784 (1975).

access channels is very much up in the air, these guidelines should apply to any new standard which the commission adopts.

A cable system also must submit a Form 395 report on its equal employment opportunity practices and a statement of its equal employment opportunity program.<sup>42</sup> Minority employment is even more important in cable than in broadcast television, since cable has a poor equal employment opportunity record.<sup>43</sup> Citizens groups thus may wish to raise these issues, and the system's own submission may be useful in this regard. The Form 395 will show current employment figures and the EEOC statement will reflect current employment policies.

In order to have any real success, however, a citizens group must go beyond the applicant's own documents. In the past, the Commission consistently has held that a mere numerical disparity between minority employment and minority population—for example, 10 percent black employment in a 40 percent black community—is insufficient to raise the issue of discriminatory employment practices.<sup>44</sup> Indeed, in the three years that the regulations have been in effect, no citizens group has successfully challenged a cable system's employment practices.<sup>45</sup> In order to make a convincing case of discrimination, therefore, a citizens group must show extrinsic evidence of discrimination. Such evidence could include affidavits from unsuccessful job applicants, affidavits concerning statements by a system's employees, and Equal Employment Opportunity Commission complaints. In effect, the standards are the same for proving discrimination by cable systems as by television stations.<sup>46</sup>

These issues do not even begin to exhaust the grounds which a citizens group might wish to raise in opposition to a CAC application.<sup>47</sup> Nevertheless, these are the most common and perhaps the most important issues.

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42. The Form 395 is virtually identical to the Form 395 used for broadcast stations. It is required by 47 C.F.R. § 76.311(e) (1974).

43. Neither the Commission nor a private organization has done a study of employment practices in the cable industry. A random survey, conducted by the author, of Form 395 reports covering cable systems with a total of roughly 1,000 employees, however, disclosed minority employment of less than two percent and female employment of less than ten percent.

44. See *Central States Broadcasting, Inc.*, 37 F.C.C.2d 500 (1972).

45. See, e.g., *Athena Communications Corp.*, 47 F.C.C.2d 535 (1974).

46. For an example of the almost impossible standards currently applied in the broadcast area, see *Columbus Broadcasting Coalition v. FCC*, 505 F.2d 320 (D.C. Cir. 1974).

47. Another possible issue is whether the system carries sufficient foreign language stations. A cable system may carry as many foreign language stations as it wishes; this can be important in communities composed of minority groups. See 47 C.F.R. § 76.61 (e) (1974).

The filing of an "opposition" is the procedure by which a citizens group may object to a CAC application. An opposition must be filed within 30 days after the Commission gives public notice of receiving a CAC application.<sup>48</sup> This time limitation puts a heavy burden upon citizens groups. By comparison, citizens groups have 90 days to challenge the license renewal applications of radio and television stations.<sup>49</sup> Moreover, radio and television licenses have a duration of only three years, as opposed to a CAC's potential 15.<sup>50</sup> Absent a change in the rules, then, citizens group must be prepared to move very quickly after a CAC application has been filed.

One remedy for this time constraint is to secure an extension of time from the Cable Television Bureau, which has been delegated authority by the Commission to grant such requests.<sup>51</sup> In the past, the Bureau has been very liberal in granting extensions to the private communications bar. It presumably would be at least equally generous with citizens groups.

An opposition need not be extensive and complex. Instead, it should be short, to the point, and supplemented by a good deal of documentation. As noted above, a citizens group should support its position with as much hard documentation as possible—letters, affidavits, public documents and the like. If the documents speak for themselves, the text of the opposition need not be highly sophisticated.

A citizens group has not finished its job, however, by filing its opposition. The cable system will submit a reply to the opposition. This reply will set forth the alleged inaccuracies and mistakes in the group's opposition.<sup>52</sup> A reply is generally the last pleading which may be filed in a case. When a citizens group can produce new facts or show inaccuracies in a reply, however, it may file a response. This pleading is rather unusual and generally unpopular at the Commission, since many practitioners seem to use it simply as a means of getting in the last word.

When all the pleadings have been filed, the Commission generally has three alternatives. First, it may grant the CAC despite the opposition. In order to do so, however, it must write an opinion which sets out the reasons for its determination.<sup>53</sup> These reasons lay the groundwork for an appeal: an

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48. *Id.* § 76.27. Such notice is usually given by the Commission about 60 days after the application is actually received.

49. *Id.* § 1.580(h).

50. 47 U.S.C. § 307 (1970) limits the duration of broadcast licenses to three years. A CAC can last as long as its underlying franchise, however, and 47 C.F.R. § 76.31(a) (1974) sets this potential time period at 15 years.

51. 47 C.F.R. § 0.289 (1974).

52. *Id.* § 76.7(e).

53. 5 U.S.C. § 555(e) (1970) requires all agencies to give reasons for taking formal action.

unsuccessful opposition can thus have the side effect of allowing a citizens group to bring its grievances before a possibly sympathetic court.

Second, the Commission may deny the CAC on the basis of the opposition. In view of industry pressures, however, this type of action will be comparatively rare. The Commission will sometimes make a conditional grant of the CAC, contingent upon the system's taking remedial action in the near future.<sup>54</sup> This type of action is also appealable.

Finally, the Commission may find that the pleadings do not resolve key factual questions and may order a hearing. The Commission has seldom taken this course of action in the past, because it has wished to avoid lengthy and expensive hearings. Many cases have substantial factual issues, however, which can be resolved only by a hearing.<sup>55</sup> Confronted with strong opposition and a determined citizens group, the Commission may divert the matter to a hearing instead of making an appealable decision on the limited documentation before it.<sup>56</sup>

By filing an opposition, a citizens group therefore can make itself heard in a very forceful way. Aside from the possible legal consequences of the action, the mere act of filing gives a citizens group considerable bargaining power with a cable system because of the time constraints involved. If a CAC application is unopposed, the Commission normally will grant it within two to six months from the date of filing. If an application is opposed, however, the Commission may take from six months to two years to pass upon it.<sup>57</sup> Since a cable system loses money for every day during which it cannot operate, it has a very powerful incentive to have its application granted as quickly as possible. A cable operator may be willing to make significant concessions to a citizens group in order to have an opposition withdrawn.

### B. *Petition for Waiver and Related Forms of Special Relief*

A number of types of special relief are provided for in Commission

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54. See, e.g., Sun Valley Cable Communications, Inc. 39 F.C.C.2d 105 (1973). But cf. St. Landry Cable TV, Inc., 48 F.C.C.2d 1081 (1974).

55. The Commission seems to prefer to act on skimpy documentation. See notes 28 & 40 *supra*. Indeed, one of the problems with cable regulation is that the Commission is not required by statute to hold a hearing when there exists a "substantial and material question of fact," as in the broadcast field. 47 U.S.C. § 309(e) (1970).

56. Designation of a hearing is expensive for the parties involved. On the other hand, the inherent delays in the Commission's internal appeals process almost guarantee that if a commissioner votes to designate a hearing, he or she will not be present to confront the ultimate decision.

57. Interviews with staff members, Cable Television Bureau, Federal Communications Bureau, in Washington, D.C., June 1975.

regulations. On the petition of "any interested person," the Commission may "waive any provision of the rules relating to cable television systems, impose additional or different requirements, or issue a ruling on a complaint or disputed question."<sup>58</sup>

The most common form of special relief is a request for waiver of the Commission's rules. The grant of such a request by the Commission allows a cable system to disregard an otherwise applicable rule. The very broad language of the special relief rule also includes other forms of relief, however, such as petitions for declaratory rulings. These petitions request the Commission to pass on the validity of a cable system's proposed conduct.

Cable system operators who desire immunity from the network exclusivity rules<sup>59</sup> must file requests known as CSRs. The exclusivity rules generally are limited to resolving conflicts between cable systems and television stations. Since these disputes affect a system's and thus a subscriber's program choices, however, they may be of interest to citizens groups.<sup>60</sup>

Moreover, waiver requests often deal with far more important issues. For example, as soon as the Commission adopted its ban on local cross-ownership of a television station and a cable television system,<sup>61</sup> the FCC was deluged with requests for waiver of the rule.<sup>62</sup> Obviously, a citizens group has a very real interest in whether a local television station may also control the only cable system in town.

If a citizens group wishes to oppose a requested waiver or declaratory ruling, it must move as quickly as possible in objecting to a CSR application. Once again, the appropriate document is an opposition. A citizens group must file its opposition within 30 days of the time that the request for special relief is *filed*<sup>63</sup>—as opposed to within 30 days of the time public notice is given. Since the issues in the processing of a CSR are likely to be

58. 47 C.F.R. § 76.7(a) (1974).

59. The exclusivity rules, *id.* §§ 76.91, 76.93, basically require a cable system to "black out" the signal of a more distant station in favor of the signal of closer stations.

60. The outcome of an exclusivity contest thus may determine how many signals a system must "black out."

61. *See* 47 C.F.R. § 76.501(a) (1974).

62. Indeed, the continued existence of the rule itself—let alone the exceptions which the Commission is anxious to create in it—appears to be very much in question. *See* BROADCASTING, February 3, 1975 at 23.

63. 47 C.F.R. § 76.7(d) (1974). It is important to remember that the time runs from filing rather than from public notice, as with CAC applications. Indeed, the rules do not require the Commission to give any public notice of CSR filings at all. As a matter of discretion, however, the FCC gives public notice of all CSR filings. Accordingly, it is less than clear whether the 30-day period runs from filing or from public notice. The latter interpretation seems more likely; otherwise, the Commission would deliberately be creating a boobytrap.

very similar to those of a CAC, an effective opposition to a CSR should follow basically the same rules as those necessary for an effective opposition to a CAC.

Finally, citizens groups sometimes may wish to support requests for waiver. Aside from the fact that a citizens group may simply agree with the request, this type of support obviously puts it in a better bargaining position with a cable operator. For example, in *New York State Commission on Cable Television*,<sup>64</sup> a New York state administrative agency supported a group of Albany, New York cable systems in requesting a waiver of the provisions for carriage of television broadcast signals for the first 50 major markets<sup>65</sup> in order to import New York City television signals. The FCC ultimately granted the requested waiver, thus indicating the importance of local support. As is the case with comments in support of a CAC application, comments in support of a waiver request may be very informal. They should simply make clear to the Commission that members of the community are highly concerned with the case.

### C. Requests for Orders to Show Cause

A request for an order to show cause—known as a CSC—is a citizens group's only real way of initiating any kind of enforcement proceeding against a cable system.<sup>66</sup> If the Commission finds reason to believe that a system has violated any rules, it issues a show cause order. This leads to a hearing, which can culminate in the issuance of a final cease and desist order against a system.

A CSC is a citizens group's most important tool for ensuring that a cable system's performance equals its promise. For example, a cable system may promise to provide three free-access channels, but actually supply only one. In such a situation, a CSC is the only procedure by which a citizens group can take affirmative action to remedy the violation.<sup>67</sup>

A request for a show cause order should follow the basic rules already outlined for other Commission pleadings. The text of the petition should state concisely and accurately the promise or rule which a cable system has violated. As with other pleadings, securing the appropriate documentation is very important. Within 30 days after the filing of a CSC, the cable system

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64. 43 F.C.C.2d 826 (1974).

65. See 47 C.F.R. § 76.61(b) (1974).

66. Petitions for orders to show cause also are filed under the broad "special relief" provisions of *id.* § 76.7.

67. A citizens group could petition the Commission to revoke the system's CAC. This tactic has very little chance of success, however, as indicated by the fact that the rules do not even provide a procedure for it.



against which it is directed may file an opposition.<sup>68</sup> The complaining citizens group then has 20 days in which to file a reply;<sup>69</sup> this procedure thus gives the complaining party a chance to get in the last word.

Not only can a citizens group initiate its own show cause proceedings, but it can also intervene in show cause proceedings which affect its interests. For example, if a television station requests a show cause order on the ground that a cable system is not carrying its signal, a citizens group might wish to intervene on the side of either the station or the system. Accordingly, if another party begins a proceeding against a cable television system, a citizens group may become a full party to that proceeding with the right to file pleadings and participate in any hearing. A citizens group is only required to serve a request to intervene within 30 days after the Commission designates the CSC for hearing.<sup>70</sup>

The result of most show cause proceedings is a settlement among the parties, either before or after the Commission designates a hearing. A citizens group should never feel compelled, however, to join in a settlement. A cease and desist order gives a citizens group vast leverage in this regard, since the group can then obtain direct enforcement of the order.

A citizens group occasionally may wish to support a cable system in opposing a CSC. For example, the Commission has ordered cable systems to abolish dual rate structures, under which some subscribers pay more than others in order to receive more signals.<sup>71</sup> A citizens group might wish to oppose this type of decision, since it reduces subscribers' options and might deny service to the poor. Accordingly, a citizens group may intervene on the side of the cable system and argue against a show cause order, or litigate in a hearing against a cease and desist order.

Despite the fact that CSCs are their only affirmative tool, to date no citizens group has filed a request for a show cause order. Indeed, this important procedural vehicle has been used almost solely by television stations to attack cable systems' signal carriage practices. Citizens groups should familiarize themselves with, and utilize, this potentially forceful mechanism.

#### *D. Petitions to Deny CARS Licenses and License Transfers*

The cable television relay service—known as CARS—is a microwave service used for a variety of purposes in cable television. A CARS station is

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68. 47 C.F.R. § 76.7(d) (1974).

69. *Id.* § 76.7(e).

70. *Id.* § 1.223.

71. *Columbia Cable Television, Inc.*, 42 F.C.C.2d 674 (1973).

a low-power, high-frequency transmitter—generally five watts at most—used for relaying a signal to a cable television system.<sup>72</sup> The most common CARS uses are the importation of distant signals and the relaying of local origination programs.

Unlike a cable television system, a CARS station uses over-the-air radio frequencies. Accordingly, the Communications Act of 1934 requires a CARS station to hold a license, which must be renewed every five years.<sup>73</sup> More important, the Act specifically requires an applicant for a new or renewal CARS license to meet certain character qualifications.<sup>74</sup> The Commission's review of CARS applications, therefore, must be more detailed than its perusal of CAC applications. The statute requires the Commission to hold a hearing before granting or renewing a CARS license if a citizens group files a petition to deny the application which raises "substantial and material questions of fact."<sup>75</sup> These may take the form of character qualifications, financial capabilities, equal employment opportunity conduct, and the like.

Because of this, CARS licenses represent the Achilles heel of many cable systems. A petition to deny a CARS license can raise issues which would be irrelevant to a CAC application. Because of the lack of hard documentation, few citizens groups have filed petitions to deny and none have been successful. A petition to deny a CARS license application can be highly useful, however, in terms of both legal results and extralegal leverage. Citizens groups therefore should use this tool more often. The procedures for challenging a CARS license are very similar to those for challenging a broadcast license—a task in which citizens groups have proven highly effective in the past.

#### E. *Petitions for Reconsideration*

Even if it was not originally a party to a proceeding, a citizens group may request that the Commission reconsider an action, in either a case or a rulemaking, in which the group has any demonstrable interest. In order to do so, however, a group must file its petition for reconsideration within 30 days after the Commission releases its decision.<sup>76</sup>

A petition for reconsideration is an available procedural vehicle for citizens groups which are late in filing in a CAC, CSR, CSC or rulemaking.

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72. 47 C.F.R. § 78.5(a) (1974).

73. 47 U.S.C. § 307(d) (1970).

74. *Id.* § 309. Indeed, the difference between procedures for radio-frequency CARS stations and the cable systems which they service points up the double standard applied to cable and broadcast television.

75. 47 U.S.C. § 308(b) (1970).

76. 47 C.F.R. § 1.106(f) (1974).

In order to prevent undue delay or deliberate surprise, however, the Commission prohibits a party from raising on reconsideration any issue which it could have raised in the original proceeding. A petition for reconsideration thus is somewhat limited in scope. Nevertheless, it allows a citizens group to become a party to a proceeding and thus to take an appeal.

#### IV. CONCLUSION

Citizens groups have gone virtually unheard thus far in the course of the Commission's regulation of cable television. Though the fault is attributable in large part to the Commission's failure to make citizen input possible, to a very large extent citizens groups simply have not tried hard enough. If cable is to fulfill any of its promises, this situation must change. Whether cable remains merely a means of improving reception or becomes a responsive communications system will depend largely upon actions taken by citizens groups now, while the cable industry is still in its formative stages.

The status of cable thus is roughly similar to that of broadcasting in the 1920's. The medium is new and therefore malleable, but can take on undesirable aspects very quickly. Citizens groups failed to act in broadcasting's infancy, and consequently found it much more difficult to make the medium responsive in the 1960's. If citizens groups now take an active role in shaping cable television, they can institutionalize procedures for citizen input and thus obviate the need for a future breakthrough.