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Cable Television Franchising and the Antitrust Laws: A Preliminary Analysis of Substantive Standards

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INTRODUCTION

The last few years have seen an explosive growth in the use of the federal antitrust laws[1] by cable television operators to challenge cities' grants of new or renewal franchises.[2] To a certain extent, of course, this development is simply a reaction to the increasingly deregulatory postures of the Federal Communications Commission (FCC)[3] and many state regulatory agencies.[4] Cable operators apparently have come to the very logical conclusion that in the absence of either federal or state regulation, the elimination of the franchising process would leave the cable industry largely immune to regulation.

Moreover, the cable television industry recently has passed from an era of intense instability into one of comparative financial security—as shown by the industry's ability, for

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1. 15 U.S.C. §§ 1-40 (1976).

2. As used in this piece and generally in the industry, new or initial franchising refers to a situation in which there is no incumbent franchisee, while renewal franchising refers to a situation in which there are negotiations or other dealings between a city and an incumbent cable operator involving grant of an additional term of a franchise.

3. *E.g.*, 47 C.F.R. § 76.57 et. seq. (1982).

4. *E.g.*, CAL. PUB. UTIL. CODE § 53066.1 (West 1979); MASS. GEN. LAWS ANN., ch. 164, § 34 (West 1973). *See also* CABLE TELEVISION BUREAU, FEDERAL COMMUNICATIONS COMMISSION, CABLE TELEVISION: STATE LEGISLATION vii-viii (1982).

the first time in history, to obtain large amounts of debt and other financing at interest rates fairly close to prime.[5] This new-found stability—as well as the magnitude of capital investment needed to build high-technology cable systems in major markets—has led the industry to look for ways to guarantee future profits. Most recently, of course, the industry has lobbied for a variety of means to secure franchise renewals, through automatic renewals, "renewal expectancies," or similar devices.[6] The industry's efforts have taken several forms. Its most visible strategy has been recent federal legislation which decreases state and local powers.[7]

Another approach has involved litigation to challenge regulation of programming, establishment of rates, or the payment of franchise fees to state and local governments on first amendment grounds.[8] Although this article does not attempt to deal with the industry's constitutional claims in any comprehensive fashion, these arguments affect antitrust analysis in a tangential way. As will be discussed later,[9] many observers seem to condemn in antitrust terms practices which they find offensive in First Amendment terms.

Finally, and perhaps most dramatically, cable operators have brought a wide array of antitrust cases to challenge a city's decision not to grant or renew a franchise.[10] (In many cases, of course, the successful bidder for a franchise also may be a defendant—thus making the antitrust laws potentially a double-edged sword for cable operators.) The arguments in most of these cases are vague at best. Generally, however, they seem to center around theories of a monopolist's refusal to deal or vertical restraints. This piece will deal primarily with these antitrust theories.

On the antitrust front, little real thought has been given to

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5. CABLE TV LAW & FINANCE, March, 1983, at 1.

6. COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION, S. REP. NO. 67, 98th Cong., Sess. 1, 26-27 (1983).

7. 47 U.S.C. § 601 *et. seq.* (Supp. 1985). The new law limits local powers as to franchise fees, rates and renewals. §§ 621, 622, 623.

8. *E.g.*, Complaint in Cape Cod Cablevision Corp. v. Massachusetts, (filed September 8, 1980), Civ. No. 44121 (Super. Ct., Suffolk Cnty., Mass.).

9. *See infra* discussion in text notes 95-144.

10. *E.g.*, Multichannel News, April 25, 1983, at 4, col. 1; Multichannel News, August 30, 1982, at 6, col. 1.

the substantive legal standards applicable to the cable television franchising process. As discussed in Section I,[11] the Supreme Court's recent decision in *Community Communications Co. v. City of Boulder*[12] seems to have created substantial confusion among cable operators and local officials. Although the *Boulder* case did not even purport to define the circumstances under which a franchising process would violate the antitrust laws, many observers have interpreted it as opening the door to injunctive relief against municipalities.[13]

It thus seems appropriate to begin thinking about the application of the antitrust laws to local franchising decisions. This article will look first at the procedural background of the *Boulder* case, then at the process of market definition in a cable television franchising case,[14] and finally at the traditional antitrust doctrines of a monopolist's refusal to deal, creation of "bottleneck" situations, and imposition of vertical restraints.[15]

I. *BOULDER* AND BEYOND

In the *Boulder* case, the City enacted an "emergency" ordinance, which prohibited the expansion of Community Communications Company's existing and franchised cable system for a period of three months. The City's action followed Community's decade-long failure to wire more than a small part of the community. During the moratorium, the City was to draft a model cable television ordinance, and then invite other cable operators to bid on new franchises. The City's action was in response to its conclusion that competition for one or more new franchises within the City—perhaps resulting in Community's elimination—would secure the best possible cable services for its citizens.[16] In effect, the City concluded that cable was a type of natural monopoly—an issue still hotly debated.[17]

11. *See infra* discussion in text notes 16-46.
12. 455 U.S. 40 (1982).
13. Under recent federal legislation, private parties may secure only equitable relief—rather than treble damages—in antitrust cases against local governments. H.R. 6027, 98th Cong., 2d Sess. (1984).
14. *See infra* discussion in text notes 46-93.
15. *See infra* discussion in text notes 94-143.
16. Community Communications Co. v. City of Boulder, 485 F. Supp. 1035, 1039-40 (D. Colo. 1980).
17. *E.g.*, National Cable Television Association, *infra* note 61.

The ensuing confrontation between the City and Community soon reached rather substantial proportions. Community defied the moratorium, and began stringing cable beyond the small area in which it had operated for years; the City pulled cable down as fast as Community could string it up. The controversy soon ended up in federal district court.[18]

The District Court held not only that the City lacked antitrust immunity under the traditional "state action" doctrine, but also that the City had violated the Sherman Act by its involvement in a rather vaguely defined conspiracy not to deal with Community.[19] (Perhaps the depth of the Court's analysis is indicated by the fact that it found the existence of a conspiracy, despite the fact that it did not identify the City's co-conspirators.)[20] The Court of Appeals reversed the District Court rather summarily; it held only that the City did have "state action" immunity, and did not reach the merits of the case.[21]

The Supreme Court, in turn, reversed the Court of Appeals, holding that Boulder's moratorium was not exempt from antitrust scrutiny under the state action doctrine. The majority opinion basically just clarified the state action doctrine's applicability to municipalities with "home rule" powers under state constitutions like that of Colorado. The Supreme Court thus offered only a discussion of the threshold issue of antitrust immunity—not any analysis of the substantive antitrust issues.[22]

The *Boulder* decision probably is significant in terms of its impact upon the state action doctrine, rather than on the legality of local cable franchising. The state action doctrine first was read into the federal antitrust laws by *Parker v. Brown*[23] in 1943, which rejected an antitrust challenge to California's establishment of an administrative agency to allocate the amount of production of raisins by the State's farmers. Coming in a mid-Depression era of tremendous oversupply, *Parker* may have been anomalous from the very beginning, and probably

18. Community Communications Co. v. City of Boulder, 485 F. Supp. 1035 (D. Colo. 1980).

19. *Id.* at 1038-39.

20. *Id.* at 1039-40.

21. Community Communications Co. v. City of Boulder, 630 F.2d 704 (10th Cir. 1980).

22. *Boulder*, 455 U.S. at 56, n.20.

23. 317 U.S. 341 (1943).

should have been consigned to a post-Depression graveyard for antitrust precedents based upon social rather than economic policy.[24] Nevertheless, the decision's influence increased over the ensuing years.[25]

Thus, *Boulder* merely was one more step in a series of recent attempts by the Court to cut back on the underbrush which grew up after *Parker*. Since 1975, a number of Supreme Court cases have hacked away at the scope of the *Parker* doctrine.[26] Despite some commentators' strong arguments for retention of the *Parker* doctrine in order to allow experimentation with local regulatory systems,[27] the Court seems to believe that the doctrine has outlived most of its usefulness—at least as applied to governmental entities with delegated rather than direct state powers. This approach is perfectly consistent with the current ascendancy of deregulatory economic philosophy.[28] Indeed, the Court recently held that a county hospital lacked state action immunity against a Robinson-Patman Act price discrimination claim, when it obtained greater discounts on drugs for resale in its pharmaceutical department than competing private drug stores.[29] The Court once again emphasized that "there is a heavy presumption against 'implicit exemptions' from the antitrust laws. . . ."[30]

The basic theory behind *Boulder* and other recent state action cases seems to be that the courts should recognize state action antitrust immunity only in the presence of a "clearly articulated and affirmatively expressed" state policy.[31] In effect,

24. *E.g.*, R. POSNER & F. EASTERBROOK, ANTITRUST 125 (2d ed. 1982).

25. For discussion of the expansion and contraction of the state action doctrine, *see* Susman & Wawro, *State Action Immunity and Antitrust Issues in Cable Television Franchising*, 3 COMM/ENT 645 (1982); Note, 32 CATH. U.L. REV. 413, 416-19 (1983); Sullivan, *infra* note 45, at 15-16.

26. *E.g.*, Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975); Cantor v. Detroit Edison Co., 428 U.S. 579 (1976); Bates v. State Bar of Arizona, 433 U.S. 350 (1977).

27. Handler, *The Current Attack on the Parker v. Brown State Action Doctrine*, 76 COLUM. L. REV. 1 (1976).

28. *E.g.*, Geller, *Talk vs. Action at the FCC*, REGULATION, March/April, 1983, at 15.

29. Jefferson County Pharmaceutical Ass'n, Inc. v. Abbott Laboratories, 103 S. Ct. 1011 (1983).

30. *Id.* at 1016.

31. 455 U.S. 40 at 52.

the Court has placed a heavy burden on states to show that a delegation of power to a local government merits antitrust immunity for a state police power purpose. This apparently would require the existence of a detailed state statute, showing a very specific legislative intent to accomplish an allegedly anti-competitive purpose. Since Boulder's ordinance was not based upon such a statute, the City naturally could not make such a showing.

Indeed, the meaning of *Boulder* is complicated substantially by the fact that the City rested its claim of state action immunity on the Colorado Constitution's very sweeping grant of home rule powers to cities. The relevant constitutional provision stated only that "[it] is the intention of this article to grant to the people of all municipalities . . . the full right of self-government in both local and municipal matters. . . ."[32]

A different situation might exist if a state imposed a "clearly articulated and affirmatively expressed" policy. For example, New York State long ago created a separate administrative agency, the Commission on Cable Television, as a part of a complex regulatory scheme for cable television.[33] The Commission has—and has exercised in a reasonably aggressive fashion—authority to prescribe minimum operating standards for cable systems[34] and minimum procedural safeguards for franchising processes.[35] This type of active state involvement arguably might pass the *Boulder* test.

On the other hand, some states' recent attempts to immunize cities against antitrust liability by giving them broad powers in cable franchising[36] are far more questionable. Indeed, there is a real question as to whether a state's affirmative deci-

32. *See id.* at 43, n.1.

33. N.Y. EXEC. LAW § 813 (McKinney Supp. 1980). *See* letter from Mr. Robert Perry, Assistant Attorney General, State of New York, to Mr. Gordon A. Howe, II, Assistant Counsel to the Majority Leader, The Senate, State of New York, June 2, 1982 at 2-4.

34. *E.g.*, NEW YORK STATE COMMISSION ON CABLE TELEVISION, CABLE COMMUNICATIONS IN NEW YORK STATE: AN AGENDA FOR GOVERNMENT INVOLVEMENT (1981).

35. N.Y. Admin. Code tit. 9 §§ 594, 595 (1982).

36. CABLE TELEVISION BUREAU, FEDERAL COMMUNICATIONS COMMISSION, *supra* note 4 at iii. *E.g.*, CABLEVISION, January 17, 1983, at 65. *See* Stitt, *An Experience in Obtaining Immunizing Legislation*, ANTITRUST AND LOCAL GOVERNMENT, *infra* note 45 at 90-92; Civiletti, *The Fallout from Community Communications Co. v.*

sion *not* to regulate cable franchising would create state action immunity.[37] The trend of the Court's recent decisions appears not to immunize displacement of competition by deregulation; in such a situation, exemption from the antitrust laws would promote no state police power goal.

Moreover, no antitrust immunity at all may exist for a city's proprietary rather than governmental activities, as the Chief Justice hinted in a prior decision,[38] and as the Court did nothing to negate in *Boulder.* In the cable franchising context, characterization of a city's activities as proprietary or governmental is difficult. On the one hand, cities seem to use the franchising process as a means of raising revenues. On the other hand, cities have some traditional police power interests—i.e., security services, emergency alerts, community education—in regulating cable systems. Even if a proprietary/governmental distinction exists, it is far from clear which side of the line the franchising process would fall on.

In the two years since *Boulder*, there has been no guidance as to the substantive antitrust analysis which might apply to the cable television franchising process, in the absence of any state action antitrust immunity. A number of cable operators have brought *Boulder*-style cases; but most of these cases have been settled fairly quickly.[39]

The new federal legislation fails to address the antitrust liability of cities in the franchising process. Almost simultaneously with its passage of cable deregulation legislation, however, the Congress enacted a statute immunizing local government from treble damages awards—as opposed to injunctive relief—in private antitrust actions.[40] Since the new statute applies only to "official conduct of a local govern-

City of Boulder: Prospects for a Legislative Solution, 32 CATH. U.L. REV. 379, 389-90 (1983).

37. *E.g.*, Vanderstar, *Liability of Municipalities Under the Antitrust Laws: Litigation Strategies*, 32 CATH. U.L. REV. 395, 396-97 (1983).

38. City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 419 (1978) (Burger, C.J., concurring).

39. *E.g.*, CABLEVISION, November 22, 1982, at 20; Multichannel News, May 9, 1983, at 5, col. 1. *See also* Howard, *The Perspective of a Defendant's Lawyer*, ANTITRUST AND LOCAL GOVERNMENT, *infra* note 45 at 38-39.

40. H.R. 6027, 98th Cong., 2d Sess. (1984).

ment"[41] its scope is less than clear. Both municipal and cable representatives seem to have given little thought to the antitrust implications of franchising decisions.[42] Indeed, prior drafts of the cable deregulation legislation did not touch on the topic at all,[43] and the courts traditionally have disfavored implied repeals of the antitrust laws.[44]

Despite all of the *sturm and drang* in *Boulder's* aftermath, the standards of illegality are no clearer than they were before *Boulder*. First, little or no thought has been given to defining the product and geographic markets relevant in a franchising case. Second, and potentially more troublesome, cities arguably may be subject to a relatively lenient "rule of reason" type of antitrust liability, because of the fact that they at least presumably represent the interests of their citizens and carry out some police power functions through the franchising process. Indeed, as Justice Rehnquist noted in his dissenting opinion in *Boulder*, the majority opinion invites judicial creation of a special rule of liability for cities:

> If the Rule of Reason were "modified" to permit a municipality to defend its regulation on the basis that its benefits to the community outweigh its anticompetitive effects, the courts will be called upon to review social legislation in a manner reminiscent of the *Lochner* era. Once again, the federal courts will be called upon to engage in the same wide-ranging, essentially standardless inquiry into the reasonableness of local regulation that this Court has properly rejected.[45]

Although all aspects of cable television regulation naturally do not implicate the police power, many have at least some arguable connection—for example, providing emergency, health, or consumer information on local origination or access channels. It thus would be desirable to define the antitrust liability of cities—even if only for purposes of injunctive relief—without

41. H.R. 6027, 98th Cong., 2d Sess., § 3(a)(1) (1984).

42. Interview with representative of National League of Cities in Washington, D.C., March 4, 1983; interview with representative of National Cable Television Association, in Washington, D.C., March 4, 1983. For a discussion of federal antitrust immunity in franchising, *see* Civiletti, *supra* note 36 at 390-92.

43. *E.g.*, S.66, 98th Cong., 1st Sess., § 604 (1983).

44. Walden, *Antitrust in the Positive State*, 41 TEXAS L. REV. 741, 767-88 (1963) (catalogues scores of explicit statutory exemptions from the antitrust laws).

45. *Boulder*, 455 U.S. 40 at 67. *See also*, SULLIVAN, *The Antitrust Regime and Federalism*, ANTITRUST AND LOCAL GOVERNMENT, 14-15 (J. Siena ed. 1982).

creating special, and inherently vague, rule of reason standards. As suggested in the following two sections, it very well may be possible to apply traditional antitrust principles to local governments without interfering with *bona fide* local policies.

II. Market Definition

Since the antitrust laws are concerned primarily with preventing market foreclosure, the first step in any analysis is to define a relevant market.[46] This task basically involves consideration of two types of markets—a product market and a geographic market. The definition of a product market, however, very often has a significant influence upon the establishment of a geographic market.[47]

As the Supreme Court consistently has maintained, there is no simple test for deciding what products to include within a single product market.[48] The basic criterion is functional interchangeability of products, as viewed by potential buyers; theoretical or technical interchangeability is generally irrelevant, if buyers do not actually view products as acceptable substitutes for each other.[49] Since definition of a product market depends upon buyers' perceptions, it naturally is quite subjective in nature.

In turn, a geographic market generally is the area within which a firm sells a product in active competition with other firms.[50] As with product markets, the Court has engaged in a high degree of gerrymandering, in order to reach particular results. For example, it has held that the relevant market for a beer manufacturer might be alternatively one state, three states, or the whole country.[51] The Court did not attempt to

46. *E.g.*, United States v. Aluminum Company of America, Inc., 377 U.S. 271 (1964).

47. *E.g.*, Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320 (1961). Since the Court there held that the relevant product market was all coal available at competitive prices in Florida, it inexorably expanded the geographic market to a substantial portion of the country.

48. *E.g.*, United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377 (1956). For further comment on the case, *see infra* discussion in text at notes 55-56.

49. *Merger Guidelines of the Department of Justice*, Trade Reg. Rep. (CCH) ¶ 4500 (1982).

50. *E.g.*, United States v. Pabst Brewing Co., 384 U.S. 546, 549-50 (1966).

51. *Id.* at 552.

pick a particular geographic market, but instead held rather sweepingly that the merger was illegal under any formulation of the geographic market.[52]

To date, the courts have given little consideration to market definition in the cable industry. Although there have been a variety of antitrust cases against operators and/or cities, very few actually have gone to trial.[53] Moreover, in the few reported opinions, the courts generally have been quite vague in defining either product or geographic markets; in most cases, the courts seemed to assume that there was a relevant market, but did not bother to define it.[54]

One of the basic problems in defining product and geographic markets, of course, is that every firm acts as a buyer and/or seller simultaneously in a number of different markets. As a result, market definition usually implies that competition of a certain type is at issue. For example, in *United States v. du Pont de Nemours Corporation* ("Cellophane"),[55] the Court focused on consumer preferences, in considering whether du Pont had acquired a monopoly on food wraps through its control of cellophane.[56] The Court did not—and had no reason to—consider du Pont's role in buying and selling literally thousands of other products, since there was no claim in the case as to market foreclosure in any other lines. One year later, *United States v. E.I. du Pont de Nemours & Co.*[57] involved du Pont's control of the market for automotive finishes; the Court naturally was not concerned with du Pont's share of the market for food wraps.

In analyzing the antitrust consequences of dealings between a cable operator and city during a franchising process, the initial question in defining the relevant product market centers on establishing the type of market foreclosure at issue.

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52. *Id.* at 550-51.

53. *See supra* notes 10, 39.

54. *E.g.*, Charlotte Telecasters, Inc. v. Jefferson-Pilot Corp., 546 F.2d 570 (4th Cir. 1976); Metro Cable Co. v. CATV of Rockford, Inc., 516 F.2d 220 (7th Cir. 1975); Lamb Enterprises, Inc. v. Toledo Blade Co., 461 F.2d 506 (6th Cir. 1972), *cert. denied*, 409 U.S. 1001 (1972).

55. United States v. E.I. du Pont de Nemours Corporation, 351 U.S. 377 (1956).

56. *Id.* at 397-404.

57. 353 U.S. 586 (1957).

Many observers, including this one,[58] have blithely assumed that the relevant product market was the distribution of video and other electronic material to retail consumers.[59]

The result of this tacit assumption is to skew attempts at product market definition away from market foreclosure in cable franchising, and instead to direct it solely at the consumer video market. Under this type of approach, the relevant product market thus becomes some mix of conventional broadcast television, "premium" or "pay" television, and data services. Although there obviously is room for substantial disagreement among observers, the relevant market might be any or all of the following: all types of entertainment; all methods of transmitting pay programming; all broadcast or non-broadcast television programming; all methods of data transmission; or a particular method for distributing programming or data.[60]

Under this type of product market definition, a cable operator would be in active competition with a wide variety of other media—such as conventional broadcast television, subscription television, the multipoint distribution service, direct broadcast satellites, videocassette recorders, videodisc units, and computers.[61] This would indicate that cable systems lack monopoly characteristics, need not be regulated as to their rates or services, and should not be subject to exclusive franchising. The cable industry has been making this argument in Congress for quite a while, asserting that cable operators are "electronic publishers" and thus should be free from any substantial amount of regulation.[62]

The problem with the cable industry's approach is simply that it proves too much. If cable operators really exist in the

58. Botein, *New Communications Technology: The Emerging Antitrust Agenda*, 3 COMM/ENT 685, 691 (1982). *See also* Susman & White, *The Perspective of a Plaintiff's Lawyer*, ANTITRUST AND LOCAL GOVERNMENT, *supra* note 45, at 21.

59. For a brief description of the relevant media, *see* Note, *The Development of Video Technology*, DEVELOPMENT AND REGULATION OF NEW COMMUNICATIONS TECHNOLOGIES 5-28 (D. Rice & E. Samuels eds. 1980).

60. Botein, *supra* note 58, at 691-92.

61. NATIONAL CABLE TELEVISION ASSOCIATION, CABLE TELEVISION, GOVERNMENT REGULATION AND THE FIRST AMENDMENT (April, 1981). This later was published in substantially the same form as Goldberg, Ross & Spector, *Cable Television, Government, and the First Amendment*, 3 COMM/ENT 577 (1981).

62. *Id.* at 590.

highly competitive environment which the industry posits, they presumably are not monopolists in any real sense, and thus should not be subject to public utility regulation. At the same time, however, there would be no logical reason to guarantee a reasonable rate of return or an automatic renewal to a firm which exhibits no public utility characteristics; economic guarantees for utilities usually are based upon a public policy determination that no firm would enter into a business with large sunk costs without receiving substantial legal rights to stay in business.[63] The industry cannot have a competitive cake and eat it in a public utility fashion.

The industry's mode of analysis may have some validity for determining some types of antitrust issues—for example, a dispute between a cable system and a broadcaster over acquisition of program rights.[64] But this approach provides little help in analyzing disputes between cable operators and cities in the context of franchising. For this purpose, the relevant antitrust analysis must inquire into market foreclosure not of programming, but rather of franchises—i.e., the ability to sell programming and other services within a particular community.[65] By analogy, market foreclosure on a retail level has no implications as to the amount of competition on a wholesale level.[66] The amount of competition in the consumer programming market is no more relevant to the franchising process than was du Pont's control of the market for automotive finishes in the "Cellophane" case.[67] If the focus of an antitrust inquiry is market foreclosure in the grant of franchises, a more useful starting point would be the nature of franchises and of the franchising process.

Although the legal status of a cable—or, for that matter, any other—franchise differs from one state to another depend-

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63. *E.g.*, Stigler & Friedland, *What Can Regulators Regulate? The Case of Electricity*, THE CRISIS OF THE REGULATORY COMMISSIONS, 39, 41-43 (P. W. MacAvoy ed. 1970).

64. *E.g.*, United States v. Columbia Picture Industries, 507 F. Supp. 412 (S.D.N.Y. 1980).

65. For a somewhat analogous situation in terms of distinctions between wholesalers and retailers in the video media, *see* Board of Regents of University of Oklahoma v. National Collegiate Athletic Ass'n, 707 F.2d 1147 (10th Cir. 1983).

66. *E.g.*, Interstate Circuit, Inc. v. United States, 306 U.S. 208 (1939).

67. *See supra* discussion in text at note 55.

ing upon the relevant statutory scheme,[68] a franchise basically is an intangible property right, which a local government conveys to a cable operator in return for some form of compensation—usually, of course, in the form of franchise fees, local origination programming, access channels, production facilities and the like. A franchise is closely related to some very tangible rights in real property, since it essentially is just permission to use the streets, rights-of-way, and sometimes poles[69] which a city owns. Indeed, a traditional Common Law property lawyer presumably would classify a cable franchise along with various rights to use real property, such as easements, licenses, profits-a-prendre, etc.[70] Just like these traditional property rights, a franchise may be exclusive or non-exclusive, depending upon state law;[71] as will be discussed later,[72] the extent of exclusivity probably makes little pragmatic difference for antitrust purposes.

If a cable franchise is nothing more than a type of intangible property right, the next question in defining a proper product market is the extent to which these particular types of property rights are perceived by buyers to be functionally and economically interchangeable. In the context of cable franchising, the designation of each party as a buyer or seller is not self-evident. To the extent that it is appropriate to focus upon the nature of the item sold, presumably the relevant item would be the right to wire a community. Viewed this way, a franchising process involves a city's conveying of intangible property rights to a cable operator, in return for compensation in the form of both cash and barter. For all intents and purposes, a city is a seller, and a cable operator a buyer of franchises.

At one extreme, every cable franchise arguably might be so unique as not to be interchangeable with any other. At the other extreme, all cable franchises might be deemed to be interchangeable with all others. As in most other commercial

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68. *See* P.R. HOCHBERG, *infra* at note 113.

69. Some cities, particularly in the Midwest, operate their own electric utilities.

70. *See* 2 A.J. CASNER, AMERICAN LAW OF PROPERTY §§ 8.8-8.11 (1952).

71. *E.g.*, N.Y. EXEC. LAW § 815(2)(b) (McKinney 1982) (prohibition on exclusive franchises).

72. *See infra* discussion in text at notes 112-113.

transactions, the truth probably lies somewhere in between. For example, most pieces of vacant land within a metropolitan area probably are not completely interchangeable because of size, proximity to customers, aesthetic appeal and the like. On the other hand, very few pieces of land are so unique as to be truly "one of a kind." If a real estate developer were interested in leasing an appropriate piece of land, it generally would consider properties located in a variety of areas.

Using the traditional buyers' perspective test, the relevant question then becomes the extent to which cable operators view franchises as fungible. As is usually the case with product market definition, there unfortunately are no data. Nevertheless, just as the Supreme Court could speculate as to buyers' perceptions of cellophane and other food wraps,[73] one can venture a few guesses as to how cable operators view potential franchises.

All potential cable franchises are not created equal. Their desirability obviously varies in such terms as the population's demographics, the density of homes, and the amount of underground as opposed to aerial wiring.[74] Moreover, some franchises may be especially attractive to particular cable operators, because of their proximity to regional or headquarters offices, integration into existing operations, and the like.[75] Nevertheless, most large cable operators apparently are willing to bid on a wide range of franchises.

Indeed, the actual practice of most multiple systems operators (MSOs) has been to bid for and to build cable franchises throughout the country. Although no firm body of empirical evidence exists on this point, a brief survey of five of the nation's largest MSOs—which account for roughly sixteen percent of the country's cable subscribers[76]—indicates that their holdings are geographically diverse. The results are set out in Table A. For example, Storer's headquarters is in Miami, and

73. *See supra* discussion in text at note 55.

74. *E.g.*, M. SEIDEN, CABLE TELEVISION U.S.A.: AN ANALYSIS OF GOVERNMENT POLICY 36-46 (1972).

75. Table A seems to indicate that this is particularly true of small, rather than large MSOs.

76. At present, there are approximately 30,000,000 cable subscribers in the United States, of which the five companies listed in Table A have roughtly 5,000,000.

Storer has more subscribers in Florida than in any other state; at the same time, however, it has almost as many subscribers in California, New Jersey, and Texas. Similarly, Times Mirror's main office is in Los Angeles, and Times Mirror has more subscribers in California than in any other state; but it also has very large numbers of subscribers in Connecticut, Kentucky, Ohio, Pennsylvania, and Texas. But ATC's headquarters is in Denver, and ATC has far more subscribers in California, North Carolina, North Dakota, Pennsylvania, Texas, and Wisconsin.

TABLE A

GEOGRAPHIC DISTRIBUTION OF CABLE SUBSCRIBERS (IN PERCENT)

	American Television & Communications Co.	Storer Cable Communications	Times Mirror	Continental Cable	New-channels
ALA	2.0	5.0			12.5
ALK					
AZ		3.0	8.0		
AK	0.6	3.0	1.8		
CA	6.0	13.5	15.2	6.0	
CO	2.0	6.0			
CT	0.7	7.0	10.7		
DEL		2.0			
FL	11.0	18.0			
GA	1.3	4.0			
HA	4.0				
ID					
IL	1.0	2.0	4.7	14.0	
IN	2.6		3.7		
IO	1.6			1.0	
KA	1.0				
KY	0.9	7.0	9.4		
LO	3.2				
ME	1.6			1.0	
MD		4.0			
MA			4.6	13.0	
MI	0.3			15.0	
MN	0.9	3.0			
MS	2.2	1.5			
MO	3.8			5.0	
MT					
NB	0.3				
NE	0.1	2.4			
NH				5.0	
NJ	0.1	10.0	2.7		

TABLE A (CONTINUED)

	American Television & Communications Co.	Storer Cable Communications	Times Mirror	Continental Cable	New-channels
NM					
NY	12.7		3.1		80.0
NC	10.4				
ND					
OH	1.6		9.6	29.0	
OK	2.0				
OR	0.4	8.0			
PA	6.6	0.1	10.6		7.5
RI			2.9		
SC		4.0			
SD					
TN	4.4				
TX	5.3	11.0	9.6		
UT					
VA	2.2	2.0		11.0	
VM					
WA					
WV	1.2		0.9		
WI	4.8				
WY					
Subscriber Totals	2,198,200	1,163,000	817,946	673,000	274,000

Source: data supplied by each cable operator in June, 1983.

Moreover, a quick analysis of the current building commitments of three other large MSOs shows a high amount of geographic diversity. Group W Cable is headquartered in New York City, but is building or rebuilding systems in states including Alabama, California, Florida, Michigan, Minnesota, Ohio, Oregon, Texas, and Washington.[77] Cox Cable's national headquarters is in Atlanta, but the company is building or rebuilding systems in, among other places, Illinois, Indiana, Oklahoma, Ohio, Michigan, Nebraska, and New York.[78] Warner Amex Cable has its principal place of business in New York City, but is building or rebuilding cable systems in states such as Arizona, Arkansas, Illinois, Indiana, Kansas, Minne-

77. Application of Teleprompter, Inc., to the City of Southfield, Michigan, Section V, Exhibit III-E, May 2, 1981. Teleprompter is now, of course, owned by Group W Cable.

78. Application of Cox Cable Communications, Inc., to the City of Southfield, Michigan, Exhibit III-E, May 2, 1981.

sota, Mississippi, Missouri, and Ohio.[79]

This does not mean to suggest that a franchise in a wealthy, densely populated suburb with aerial wiring is fungible with a franchise in a depressed inner city with underground wiring. The two obviously are not comparable to a cable operator in economic terms. The difference between the two situations is reflected, as such economic realities usually are, in the price which a buyer is willing to pay for a particular benefit—in this case, a cable franchise. In the cable franchising process, the cost of a franchise to an operator generally comprises both direct payments to a city or a city's designated agent—such as franchise fees, access production fees, and even college scholarships[80]—as well as a host of intangibles, such as channel capacity, interactive capability, production facilities, and the like. Indeed, one of the most common complaints from consumer groups and local governments today is that cable operators provide a panoply of channels and services on new systems, but offer only low-technology systems to older communities.[81] As a further indication that an active and well-understood pricing system exists, some large cities recently have made highly optimistic demands from cable operators—and found themselves with few bidders.[82]

The fact that cable operators pay different prices for different franchises, however, does not suggest that the cable operators perceive franchises as non-interchangeable. Indeed, even the preliminary empirical data discussed above seem to militate towards precisely the opposite conclusion. Using the analogy to real estate once again, cable operators are intelligent consumers of franchises, and shop around among various municipal sellers for the most profit-maximizing deal. It thus seems fair to conclude that large cable operators view most potential franchises as functionally interchangeable in economic terms. The relevant product market in cable franchises therefore would include all potential franchises in communities with

79. Application of Warner Amex Cable, Inc., to the City of New York, New York, Vol. 3, Section B, Part VI-B, June 26, 1981.

80. *E.g.*, Application of Continental Cablevision, Inc., to the City of Hazel Park, Michigan, Section 7, July 13, 1981.

81. CABLE TV LAW & FINANCE, July, 1983, at 2.

82. *E.g.*, Multichannel News, July 18, 1983, at 1, col. 1.

minimum demographic profiles, densities, amounts of aerial wiring, etc.

To be sure, no cable operator may be willing to bid for franchises which do not meet certain minimum requirements or for which a local government has made unduly optimistic demands. Indeed, some rural areas must rely upon cooperative associations to receive cable service, because their low density renders service unprofitable at normal commercial rates.[83] And other marginal areas attract franchise bids, but not from established MSOs.[84] This does not argue against designating franchises as the relevant product market, but rather in favor of establishing a submarket[85] for franchises on which no MSO—or perhaps no cable operator at all—will bid. The situation resembles local governments' problems in disposing of real property in economically depressed areas.

Subject to the existence of one or more possible submarkets, the product market in cable franchises thus appears to be all franchises. This in turn makes definition of the geographic market comparatively simple, working once again from the proposition that a geographic market is the territory within which a firm competes on a reasonably equal basis with other firms as to the same product.[86]

At first glance, the relevant geographic market might seem to be the boundaries of the particular local government involved in a franchising proceeding. After all, cable television is inherently a rather localized medium; its capital-intensive nature prevents even a large firm from wiring more than a few urban areas at a time.[87] Moreover, a cable system is somewhat less than portable. As discussed before,[88] if a product market definition focuses on the services offered by cable and other arguably competitive media, presumably the appropriate geo-

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83. *E.g.*, TELECOMMUNICATIONS RESEARCH & ACTION CENTER, CABLE COOPERATIVES (1982).

84. *E.g.*, Multichannel News, April 4, 1983, at 23, col. 5.

85. *E.g.*, United States v. Aluminum Company of America, Inc., 377 U.S. 271 (1964).

86. *See supra* note 51.

87. For example, current estimates are that it will cost more than one billion dollars to wire the outer four boroughs of New York City. Wall Street Journal, July 20, 1983, § B, at 5, col. 1.

88. *See supra* discussion in text at note 58 et. seq.

graphic market would be comparatively small; the competing media—particularly cable and the multipoint distribution service—are physically confined by franchise or license to an area no more than twenty or thirty miles in radius.[89]

Whether or not this definition makes any sense in terms of other antitrust problems facing cable (i.e., the competitive relations of different media) it certainly has no application to cable franchising. Since most cable franchises seem to be reasonably interchangeable in the eyes of large cable operators, most MSOs are willing to bid on franchises in virtually any part of the country—and occasionally outside the United States.[90] As a result, the relevant geographic market for most cable operators would be the whole country. As with the definition of the relevant product market before, this conclusion naturally is subject to some exceptions. Some cable operators—particularly smaller ones—tend to be highly regional in the scope of their operations. For example, the smallest MSO on Table A—Newchannels—is considerably less geographically diverse than any of the larger MSOs. Just as with the product market, creation of some regional geographic submarkets may be in order.[91]

In the context of cable franchising, the relevant market thus appears to be all cable franchises in the United States, subject to potential submarkets. Under this analysis, there would be a comparatively large number of franchise sellers (i.e., cities) and franchise buyers (i.e., cable operators) involved in the market. The number of sellers presumably runs into the hundreds or thousands. At least theoretically, most cable franchises today are non-exclusive; even if they already have granted franchises, most local governments are free to grant additional franchises.[92] The number of franchise buyers presumably is somewhat more limited; although no real empirical data exist at the present, only the fifteen or twenty largest MSOs in the country appear to bid routinely on any type of nationwide basis. Nevertheless, the present Herfindahl index

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89. *See supra* note 59, at 9-22.

90. *E.g.*, Wall Street Journal, June 23, 1983, § A, p. 4, col. 1; New York Times, June 25, 1983, § D, p. 29, cols. 3-5.

91. *See supra* discussion in text at note 85.

92. *See* note 72, *supra*; P.R. Hochberg, note 113, *infra*.

for the cable industry seems to be rather low,[93] indicating a comparatively low level of concentration among cable operators. It thus would seem fair to conclude at least tentatively that the market for cable franchises is atomistic as to both sellers and buyers.

III. SUBSTANTIVE ANALYSIS

If the relevant market is all franchises in all parts of the country (subject to possible submarkets), evaluation of potential substantive theories of antitrust liability becomes more feasible. As indicated above, under this market definition an antitrust analysis starts with a relatively atomistic—and thus perhaps competitive—market.

At the outset, it should be noted that some observers of the cable franchising process tend to confuse antitrust and First Amendment goals. As shown by the debate in Congress over federal limitations on franchising, cable operators and others view as particularly obnoxious franchise provisions relating to speech—for example, requirements of access channels, minimum local origination programming, services to be carried, etc.[94] Although the First Amendment aspects of cable franchising are beyond the scope of this article,[95] these arguments are "not frivolous,"[96] and the issues are presented squarely in pending litigation.[97]

In economic and antitrust terms, however, the particular form of a franchise buyer's payment to a city is totally irrelevant. A franchise's requirement of access channels, local origination programming, or the like constitutes nothing more or less than substitution of a barter for a cash transaction. As

93. For example, in terms of the market or submarket for subscribers in communities served by MSOs with more than 500,000 subscribers—about half of the nation's subscribers—the Herfindahl index for all MSOs with more than 500,000 subscribers is 979. A merger between the two largest MSOs would increase this to only 1314. (Statistics are based on data in CABLEVISION, June 20, 1983, at 342.)

94. 47 U.S.C. §§ 611, 612 (Supp. 1985).

95. For an excellent analysis of pornography on cable, see Krattenmaker & Esterow, *Censoring Indecent Cable Programs: The New Morality Meets the New Media*, 51 FORDHAM L. REV. 606 (1983).

96. FCC v. Midwest Video Corp., 440 U.S. 689, 709, n.19 (1979).

97. *E.g.*, Mountain States Legal Foundation v. City of Denver, — F. Supp. — (D. Colo. 1983). *See also*, Goldberg, Ross & Spector, *supra* note 61, at 590-594 for the cable industry's argument that it is an "electronic publisher."

cable operators know quite well from their internal budgeting, every service requirement has a corresponding monetary value.[98] Indeed, precisely for this reason, cable operators commonly offer cash payments to cities in lieu of assuming a particular service obligation, such as provision of a local origination channel. Using the real estate analogy once again, it is not at all uncommon for a city to lease property in consideration of both monetary payments and bartered services—for example, establishment of a public park.

Any substantive antitrust analysis of the cable franchising process thus must disregard the self-evident fact that transactions between cities and cable operators may have substantial First Amendment implications. In terms of the antitrust laws, it is irrelevant whether a cable operator buys a a franchise with monetary payments (i.e., franchise fees) as opposed to access channels, local origination programming, satellite services, or—as is usually the case—a mixture thereof. The First Amendment questions can and should be litigated under a totally different set of principles than the antitrust questions. It thus may be useful to consider a cable operator's monetary and service obligations to a city as one financial commitment.

Putting aside First Amendment issues, in terms of power offenses as opposed to vertical restraints, the most significant antitrust provision in the context of cable franchising is Section 2 of the Sherman Act, which makes it illegal to "monopolize or attempt to monopolize or conspire . . . to monopolize. . . ."[99] In evaluating cable franchising, the most important Section 2 doctrine is the prohibition of a monopolist's unjustified refusal to deal with a particular buyer or seller.[100]

In general, of course, proof of a Section 2 violation requires a showing that a defendant not only possesses enough market control to constitute a monopoly, but also has used overtly anti-competitive, "bad" acts.[101] The courts naturally have been less than clear as to how much market control is too much; the minimum figure, however, appears to be about fifty

98. A. PEARCE, THE COST OF CABLE TELEVISION REGULATORY & FRANCHISE REQUIREMENTS: A PRELIMINARY ANALYSIS, 25-29 (1982).

99. 15 U.S.C. § 2 (1976); *see* L. SULLIVAN, ANTITRUST 94-105 (1977).

100. L. SULLIVAN, *supra* note 100, at 92-103.

101. *E.g.*, Standard Oil Co. of New Jersey v. United States, 221 U.S. 1 (1911).

percent of the relevant market.[102]

It is certainly not clear that cities possess this type of market power. To be sure, any local government is the sole owner of the right to tear up its streets, except in the few states which have pre-empted all local control over cable systems.[103] Viewed in this light, a city arguably might have monopoly power over the sale of a franchise to wire its streets. (Or, since cities also could be deemed to buy some services—i.e., local origination, access, emergency alert announcements, etc.—from cable systems,[104] they alternatively might have monopsony power.[105] The mode of characterization has no impact on antitrust liability in this context.)

Under the product and geographic markets developed before, however, no one city would seem to have substantial market power. After all, each MSO presumably would be willing to take any one of a number of different cities' franchises at any given point in time. Any city's share of the national market for cable franchises thus would be quite small,[106] and certainly less than the market shares which the courts traditionally have used as tests of monopoly power.

At least in theory, of course, some franchises might be so attractive as to be deemed unique. Or, put another way, some cities might be deemed to control franchises which provided the only feasible means of reaching a particular and non-interchangeable audience. In this situation, a city might be deemed to be an "essential facility" or "bottleneck" in traditional antitrust terms.[107] The few "bottleneck" cases to date have involved facilities for which there arguably was no substitute—such as the only means of shipping railroad traffic over a particular route[108] or the only source of news.[109] At least cur-

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102. L. SULLIVAN, *supra* note 100, at 92 et seq.

103. CONN. GEN. STAT. ANN. § 16-330-333 (West Supp. 1984); NEV. REV. STAT. § 711.010-.260 (1967).

104. *See supra* discussion in text at note 98.

105. *See* National Macaroni Mfrs. Ass'n v. FTC, 345 F.2d 421 (7th Cir. 1965) for a rare instance of monopsony power.

106. For example, the nation's largest cable system, in San Diego, California, has 221,585 subscribers. CABLEVISION, June 20, 1983, at 343. This is less than one percent of all subscribers in the United States.

107. L. SULLIVAN, *supra* note 99, at 125.

108. United States v. Terminal R.R. Ass'n, 224 U.S. 383 (1912).

109. Associated Press v. United States, 326 U.S. 1 (1945).

rently, however, cable subscribers are relatively fungible, thus making it rather unlikely that any city has this type of market position. The bottleneck scenario might be more plausible in the future, as cable operators increasingly enter the market for data transmission[110] and seek to supply customers in business centers which exist in only one city—for example, the New York Stock Exchange or the Chicago Board of Trade.

Moreover, even if a city were deemed to be a monopolist, its market power might be justifiable on the ground that it was inevitable. After all, only one local government can have jurisdiction over a geographical area at one time; municipal corporations do not compete in any marketplace for the right to govern a particular area. In the private sector, the courts have begun to recognize the inability of more than one firm to supply a market as a justification for monopoly power.[111]

Cities thus appear to lack any form of monopoly power in the granting of cable franchises. As a result, a local government's refusal to deal with a particular cable operator would not seem to have any Section 2 consequences. Indeed, under this mode of analysis, cities presumably would be free to grant *de jure* as well as *de facto* exclusive franchises. Indeed, grant of an exclusive franchise would seem somewhat analogous to restrictive covenants in the leasing of stores in shopping centers and other commercial real estate; most courts have upheld such provisions to the extent that they were necessary for a landlord to maximize its profits in a lease.[112] Similarly, a cable operator might pay more for an exclusive than a non-exclusive franchise. As a practical matter, of course, the issue is relatively moot, since most states do not allow the grant of exclusive franchises.[113] If the market for cable franchises is as highly competitive as suggested in Section II above,[114] the offer

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110. CABLE TV LAW & FINANCE, Aug. 1983, at 2.

111. Official Airline Guides, Inc. v. FTC 630 F.2d 920 (2d Cir. 1980), *cert. den.* 450 U.S. 917 (1981).

112. Blechman, *The Restraint of Trade Doctrine*, 57 N.Y.U. L. REV. 669, 695 et. seq. (1982).

113. P.R. HOCHBERG, THE STATES REGULATE CABLE: A LEGISLATIVE ANALYSIS OF SUBSTANTIVE PROVISIONS 28 (1978); *see also* S.66, 98th Cong., 1st Sess., § 604(2) (1983).

114. *See supra* discussion in text at notes 20-21.

of an exclusive franchise arguably might be a city's only means of securing the highest possible competitive price.

Moreover, as Justice Rehnquist suggested in his dissenting opinion in *Boulder*,[115] cities may be subject to a highly lenient rule of reason analysis, because of their police power responsibilities in the grant and supervision of cable franchises. For example, a city might be able to argue that only the designation of an exclusive service provider would insure safe, secure, and private transmission of data, alarm, or financial services.

For antitrust purposes, a second way of viewing the cable franchising process might be in terms of a vertical restraint.[116] Most important for analytical purposes, monopoly power is not a necessary element of an illegal vertical restraint,[117] as opposed to a Section 2 violation. A vertical restraint usually involves a seller's attempt to impose anti-competitive terms on a buyer—usually limitations on a buyer's options as to the source or price of a product or service. A conventional cable franchise would not seem to involve the most common types of vertical restraint, i.e., tying agreements and resale price maintenance. Cities generally neither require cable operators to buy a "tied" product in order to obtain a franchise,[118] nor set minimum consumer prices.[119] Nevertheless, to the extent that a city and a cable operator are deemed to be a seller and a buyer respectively of a franchise, some franchise provisions might raise vertical restraint issues.

For example, most franchises impose some type of rate regulation, at least to the extent allowed by the rather confused current state of the law.[120] Although most resale price mainte-

115. *See supra* discussion in text at note 45.

116. *E.g.*, Vanderstar, *supra* note 37, at 399-400.

117. *E.g.*, Standard Oil of California v. United States, 337 U.S. 293 (1949).

118. Some cities have been known, however, to have informal requirements that cable operators use or buy a piece of real property—usually an unused school building—for head-end or studio purposes. More commonly, cities require cable operators to maintain an office within their territorial limits, which presumably has some effect on a city's tax base.

119. Regulation of subscriber rates, of course, focuses on maximum prices. Even this, however, arguably may present some problems. *See infra* discussion in text at note 121.

120. Brookhaven Cable TV, Inc. v. Kelly, 573 F.2d 765 (2d Cir. 1978), *cert. denied* 441 U.S. 904 (1979), seems to hold that the FCC has pre-empted local regulation of rates for "pay" or "premium" services. Since the court relied on an FCC

nance cases naturally involve a seller's setting of minimum prices, a requirement of maximum prices also may be illegal, to the extent that it decreases non-price competition in areas such as service.[121] Similarly, to the extent that a franchise restricts a cable operator to a particular part of a city—as franchises in large cities today typically do[122]—an element of territorial exclusivity might be present.[123] And franchises commonly impose requirements similar to traditional "location clauses,"[124] of course, by providing that a cable operator will build a business office, head-end, or studio at a particular place.[125]

Although franchises may contain a variety of arguable vertical restraints, most of them presumably are valid. Unlike Section 2 power offenses—in which a seller by definition has monopoly power of some kind—vertical restraints are explicitly subject to a rule of reason analysis.[126] In the usual private sector business context, of course, a seller can satisfy the rule of reason simply by showing that its conduct was commercially reasonable—i.e., that its behavior increased its ability to compete with other firms ("interbrand competition") while decreasing its buyers' ability to compete among each other for sales of the seller's product ("intrabrand competition") only to a limited extent.[127]

To be sure, the relevant "brand" for purposes of this type of analysis is less than clear. If it is cable television service, however, presumably cities would have very broad latitude in imposing vertical restraints. After all, most cable television operations are *de facto* exclusive, since "overbuilding" by competing cable operators in the same geographic area simply has not proven to be economically feasible in most cases; at pres-

rule which had been repealed before its decision, however, the weight of the holding is less than clear.

121. Albrecht v. Herald Co., 390 U.S. 145 (1961).

122. *See* Multichannel News, April 25, 1983, at 1, col. 3; CABLEVISION, Jan. 10, 1983, at 20, for a review of the New York City cable franchising situation, which has involved division of the City into a number of different service areas.

123. *E.g.*, Continental TV, Inc. v. G.T.E. Sylvania, Inc., 433 U.S. 36 (1977).

124. *Id.* at 45-46.

125. *See* M. BOTEIN & B. PARK, WHAT TO DO WHEN CABLE COMES TO TOWN, 3-64 (1980), for a sample franchise provision along these lines.

126. 433 U.S. 36 at 51-57.

127. *Id.* at 57-59.

ent, there are less then thirty overbuild situations in the whole country, generally involving older systems in small communities.[128] If intrabrand competition—i.e., competition for the sale of cable services within the same geographic area—does not exist in the first place, then by definition a franchise's vertical restraint would not decrease intrabrand competition.[129] At the same time, a city could argue that a vertical restraint—including even territorial exclusivity—was the only means by which it effectively could compete with other cities (presumably the relevant interbrand competition in this situation) in attempting to sell its product (i.e., its franchise) for the highest possible price.[130] Again, the arguable adoption of a special rule of reason by the *Boulder* majority may give added support to the use of a particularly generous analysis in the context of cable television franchising. Under a proper analysis, however, creation of such a rule may be unnecessary.

So far, this discussion has considered substantive antitrust law only in the context of new, rather than renewal franchising. As a matter of contract law, of course, the two processes may be identical; after all, unless a franchise provides for an unconditionally automatic renewal, at the expiration of the initial term a city would be free to treat an incumbent cable operator in the same fashion as a totally new applicant. (Precisely because of this possibility, of course, the cable industry has pressed for automatic renewals or at least renewal expectancies.)[131] Nevertheless, there may be some special antitrust problems regarding renewal franchising.

To begin with, it is less than clear that a city is free to negotiate solely with an incumbent cable operator, as opposed to opening up a totally new bidding process. Both cable operators and cities obviously recognize some type of preferred status for an incumbent with satisfactory past performance, as indicated by the infrequency with which franchises are not renewed. By analogy to other dealings between cities and busi-

128. A. PEARCE, THE FEASIBILITY OF COMPETITIVE CABLE SYSTEMS (1982).

129. *E.g.*, Twin City Sportservice, Inc., v. Charles O. Finley & Co., 676 F.2d 1291 (9th Cir. 1982).

130. *See* 433 U.S. 36 at 54-55.

131. S.66, 98th Cong., 1st Sess. § 609 (1983). See *Cable TV Law & Finance*, Aug. 1983, at 1 et. seq.

ness entities, no sound reason for such an obligation seems to exist. After all, cities routinely choose new firms as lessees of real property with no antitrust repercussions.

Nevertheless, if a city were deemed to be a monopolist—or, more significantly, an essential facility—it might have some type of duty to entertain new proposals. Indeed, it arguably might be required to grant franchises to any financially and otherwise qualified firm at any time in the duration of an incumbent firm's franchise. The Supreme Court has held that long-term exclusive dealing arrangements between buyers and sellers do not necessarily violate the antitrust laws, as long as the agreements serve the interests of both parties.[132] It is not clear, however, whether this general endorsement of arms-length dealings would apply to franchise renewals. One problem naturally would be perpetual options to renew, which some older franchises contain.[133] Another issue would be the validity of renewal expectancies and the like.[134]

In both cases, a city could argue that the extremely long-range or even perpetual nature of a franchise had not been contemplated by the parties at the beginning and thus was not for the mutual convenience of both parties. To a certain extent, this situation is somewhat analogous to well established prohibitions on tying agreements[135] and reciprocal buying arrangements;[136] like those agreements, a perpetual or almost automatic renewal clause may result in substantial, long-term market foreclosure of an incumbent's competitors. (This type of approach obviously would be inconsistent with legislation currently being pushed in Congress by the cable industry;[137] as noted before, an explicit repeal of the antitrust laws would be a useful part of any such statute, in order to avoid lengthy future litigation over the existence of an implicit exemption.)[138] Fi-

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132. Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320 (1961).

133. *See* Agreement Between the City of Salisbury, Maryland, and General Television of Maryland, Inc., Aug. 27, 1971, which purports to grant perpetual renewals.

134. D. RICE, *Legal Considerations in the Franchising Process* in CABLE TV RENEWALS & REFRANCHISING 31-32 (J. Rice ed. 1982).

135. *E.g.*, United States v. Jerrold Electronics Corp., 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961).

136. *E.g.*, FTC v. Consolidated Food Corp., 380 U.S. 592 (1965).

137. S.66, 98th Cong., 1st Sess. § 609 (1983).

138. *See supra* discussion in text at note 42.

nally, it is not clear whether even a mere renewal expectancy would pass antitrust muster; after all, the Supreme Court has used the tying doctrine to invalidate arrangements which gave a seller merely a right of first refusal to meet another seller's price.[139]

Finally, of course, this analysis does not apply to a number of other potential antitrust problems in the franchising process. First, the above discussion has dealt only with demands made unilaterally by one city. Obviously enough, if a group of cable operators colluded in rigging their bids, a classic *per se* price fixing arrangement would be involved;[140] even if a city or a city official were involved in the conspiracy, no immunity might be present.[141] Conversely, a group of cities might be liable on a monopsony price fixing theory if they formed a joint bargaining agency to deal with cable operators;[142] the key question, of course, would be whether they had market control and attempted to control prices. And Section 7 questions as to undue concentration of control obviously would be raised by any one cable operator's acquisition of a large percentage of all available cable franchises.[143]

Except for these obviously rather unlikely situations, most actions by cities in the context of cable television franchising thus would not run afoul of either Section 1 or Section 2 of the Sherman Act. Under properly defined product and geographic markets, dealings between cities and cable operators seem to go forward on a reasonably arms-length, competitive basis.

CONCLUSION

In recent years, antitrust litigation in the cable industry has produced little or nothing in the way of substantive anti-

139. International Salt Co. v. United States, 332 U.S. 392 (1947).

140. Affiliated Capital Corp. v. City of Houston, 519 F. Supp 991 (S.D. Tex. 1981), *rev'd on other grounds*, — F.2d — (11th Cir. 1983).

141. California Motor Transport Co. v. Trucking Unlimited, Inc., 404 U.S. 508, 513 (1972).

142. *E.g.*, Appalachian Coals, Inc. v. United States, 288 U.S. 344 (1933). Fairly commonly, groups of small cities form consortia in order to bargain with a cable operator, on the theory that aggregating a large number of subscribers increases their bargaining power.

143. At present, however, no MSO seems to have a particularly large share of a relatively unconcentrated market. *See supra* note 93.

trust analysis. The reason for this lack of substantive development seems to lie in the use of antitrust litigation not only as a means of doing business between cities and cable operators, but also as a ideological position for some elements of the cable industry.[144] Any definitive answers probably must be delayed until the current hoopla is over.

As indicated by the discussion above, the proper product and geographic markets for analysis of the cable franchising process appear to be all arguably profitable franchises in the country. In their dealings with cities, cable operators compete among themselves not for services, but rather for franchises—and thus ultimately for the ability to serve a particular number and type of subscribers. In turn, the number of sellers and buyers of franchises—i.e., cities and cable operators—seems to be rather substantial, thus indicating the presence of an atomistic and probably competitive market.[145]

There thus appears to be little cause for antitrust concern over the normal functioning of the cable franchise market. Cities do not appear to have enough market control to be monopolists or essential facilities. And in terms of vertical restraints, all or most franchise provisions apparently would be valid under the usual rule of reason approach.[146]

Ironically enough, the cable franchise market seems to be quite competitive precisely at the time that the cable industry has persuaded the Congress to pre-empt local governments from negotiating with cable operators on most of the key elements in the relationship between cities and cable systems—i.e., rates, franchise fees, and renewals.[147] The industry certainly would have an excellent case if there were any evidence either of market failure or of abuses by cities. To date, however, neither phenomenon seems to have been present in the cable franchising process. Since the industry argues that government intervention in its operations is unnecessary or even unconstitutional because of an active marketplace,[148] there was

144. *See* Civiletti, *The Boulder and Lafayette Decisions: Antitrust or Anti-Cities?*, *supra* n.45, at 184-185.

145. *See supra* discussion in text at note 76.

146. *See supra* discussion in text at note 107.

147. *See supra* note 7.

148. NATIONAL CABLE TELEVISION ASSOCIATION, *supra* note 61.

little reason for the Congress' recent intervention in the franchising process; after all, that too seems to operate subject to an active marketplace. In the event that real abuses—such as big-rigging or other horizontal arrangements—developed, the antitrust laws would have been more than capable of dealing with them.