Minnesota's Approach to the Regulation of Cable Television

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I. INTRODUCTION

Minnesota has long been considered a leader in state regulation and development of cable television.1 Minnesota's cable regula-

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1. M. HAMBURG, ALL ABOUT CABLE 3-30 (1982). The term “cable television” generally refers to the use of coaxial cable to deliver high-clarity television-grade signals directly into subscribers' homes. Robinson, Introduction and General Background, DEREGULATION OF CABLE TELEVISION 4 (P. MacAvoy ed. 1977). The FCC defines a cable TV system as:

A non-broadcast facility consisting of a set of transmission paths and associated signal generation, reception, and control equipment, under common ownership and control, that distributes or is designed to distribute to subscribers the signals of one or more television broadcast stations, but such term shall not include (1) any such facility that serves fewer than 50 subscribers, or (2) any such facility that serves or will serve only subscribers in one or more multiple unit dwellings under common ownership, control, or management.

47 C.F.R. § 76.5(a) (1982). The Minnesota Cable Communications Board defines “cable communications system” as:

[a]ny system which operates for hire the service of receiving and amplifying programs broadcast by one or more television or radio stations and any other program originated by a cable communications company or by another party, and distributing such programs by wire, cable, microwave or other means, whether
tory program is distinctly multi-faceted. It encompasses planning, public service, consultation, and education.

The state began comprehensive regulation in 1973, during a period of considerable interest in cable. In the early 1970's, com-

such means are owned or leased to persons who subscribe to such service. Such definition does not include:
1. Any system which serves fewer than 50 subscribers;
2. Any master antenna television system;
3. Any specialized closed-circuit system which does not use the public rights-of-way for the construction of its physical plant; and
4. Any translator system which receives and rebroadcasts over-the-air signals.


Cable television was originally called community antenna television and is still widely known as CATV. R. SMITH, THE WIRED NATION: CABLE TV: THE ELECTRONIC COMMUNICATIONS HIGHWAY 1 (1972). "Broadband communications," a synonym now finding currency, refers to cable's capacity to provide a multiplicity of video channels and services. See id.; D. DELSON & E. MICHALOVE, DELSON'S DICTIONARY OF CABLE, VIDEO & SATELLITE TERMS 21 (1983).

A modern cable television system consists of several elements. A community antenna tower is constructed on a hill or other spot selected for good reception. At the foot of the tower is a small control station or "headend," which is the point at which the signals are received, brought up to maximum strength and clarity, and processed for transmission by the distribution network. The distribution system consists of a main coaxial cable leaving the headend on power or telephone company poles (or in some cases, via underground connections) and a system of amplifiers, feeder lines, "tap-offs," and "housedrops" which carry the signals into individual subscribers' homes. See T. BALDWIN & D. MCVOY, CABLE COMMUNICATION 12-14 (1983); R. SMITH, supra, at 4.


3. During this period, the Rand Corporation, sponsored by a generous grant from the Ford Foundation, examined cable TV. R. SMITH, supra note 1, at 85. The Sloan and Markle foundations also conducted major, nationally recognized inquiries into cable's role in society. See ALFRED P. SLOAN FOUNDATION, ON THE CABLE: THE TELEVISION OF ABUNDANCE: REPORT OF THE SLOAN COMMISSION ON CABLE COMMUNICATIONS (1971) (on file at Minnesota Cable Communications Board, Saint Paul, Minnesota) [hereinafter cited as SLOAN FOUNDATION]; W. MASON, F. ELDRIDGE, J. O'NEILL, C. PAQUETTE, S. POLK, F. SKINNER & R. SMITH, URBAN CABLE SYSTEMS: SUMMARY (1972) (prepared under a grant from the John and Mary R. Markle Foundation) (on file at Minnesota Cable Communications Board, Saint Paul, Minnesota); M. MITCHELL, STATE REGULATION OF CABLE TELEVISION (1971) (report prepared under a grant from the John and Mary Markle Foundation) (on file at Minnesota Cable Communications Board, Saint Paul, Minnesota); A. SINGER, ISSUES FOR STUDY IN CABLE COMMUNICATIONS (1970) (An Occasional Paper from the Alfred P. Sloan Foundation) (on file at Minnesota Cable Communications Board, Saint Paul, Minnesota).

The enthusiasm over cable in the early 1970's is illustrated by the following statement:

Cable technology, in concert with other allied technologies, seems to promise a communications revolution. There have been such revolutions before. Some 500 years ago the hand-written manuscript gave way to the printed book, and where earlier the store of man's knowledge and judgment and imagination had been available only to a few thousands of the wealthy or the learned it abruptly was laid bare to all who wished access to it. Some hundred years ago the first telephone wires were strung, and where earlier a man could readily make imme-
munications policymakers, community activists, scholars, and educators became aware of cable's potential uses. They looked to cable's greatly expanded channel capacity to provide a variety of communications services including news, political expression, direct contact with no more than those persons he chanced to find in his own neighborhood, quickly he began to find the whole city, the whole nation and ultimately the whole world within the sound of his voice. The revolution now in sight may be nothing less than either of those. It may conceivably be even more. Sloan Foundation, supra, at 2; see also R. Smith, supra note 1, at 83-99. Smith advocated development of a government plan for an "electronic highway system," a national broadband communications network to facilitate the exchange of information and ideas. See id. But see M. Hamburg, supra note 1, at 8-2, 8-3 (1982). Hamburg states:

It seems to me that what has occurred in this field is the normal overreaction indigenous to almost everything that is new in America. Great enthusiasm over the capability of ever-evolving technology has prevented many from seeing the essential need. We may have all of the hardware to permit distribution of vast numbers of television channels to all of our population, and to allow people to record the same (even while they are away or sleeping) for viewing at a determined time, but we have not thought through the question of what kind of software will be viewed. We may have the capability of displaying fifty-four or 108 channels at one time or of running a videotape or disc in anyone's home or office, hospital or school, but what can be programmed on those channels or on those tapes or discs that people will want or need to see and hear that will make them wish to pay (at least directly) for such material?

Id. 4. In 1968, the Federal Communications Commission listed the following potential uses for cable television:

- facsimile reproduction of newspapers, magazines, documents, etc.;
- electronic mail delivery; merchandising; business concern links to branch offices, primary customers or suppliers; access to computers; e.g., man to computer communications in the nature of inquiry and response (credit checks, airlines reservations, branch banking, etc.), information retrieval (library and other reference material, etc.), and computer to computer communications; the furtherance of various governmental programs on a Federal, State, and municipal level; e.g., employment services and manpower utilization, special communications systems to reach particular neighborhoods or ethnic groups within a community, and for municipal surveillance of public areas for protection against crime, fire detection, control of air pollution, and traffic; various educational and training programs; e.g., job and literacy training, preschool programs in the nature of "Project Headstart," and to enable professional groups such as doctors to keep abreast of developments in their fields; and the provision of a low cost outlet for political candidates, advertisers, amateur expression (e.g., community or university drama groups) and for other moderately funded organizations or persons desiring access to the community or a particular segment of the community.

In re Amendment of Part 74, Subpart K, of the Commission's Rules & Regulations Relative to Community Antenna Telev. Sys.; & Inquiry Into the Dev. of Communications Technology & Serv. to Formulate Regulatory Policy & Rulemaking &/or Legislative Proposals, 15 F.C.C.2d 417, 420 (1968).

5. State of the art cable television systems carry 54 to 60 channels. T. Baldwin & D. McVoy, supra note 1, at 30. In 1972, a Rand Corporation engineer predicted that in 10 to 20 years a form-cable system would be able to carry 400 channels of television. R. Smith, supra note 1, at 7.

6. See T. Baldwin & D. McVoy, supra note 1, at 6. Cable currently provides Cable News Network's 24-hour news programming and other in-depth news programs. See id.

7. See R. Smith, supra note 1, at 19-21.
nority and community access, education, interactive cable, and greater diversity in entertainment programming. It was hoped that cable would loosen the monopoly of the major broadcast networks and their affiliates and provide an outlet for new ideas and previously unrecognized creative talent.

Federal and state regulatory policies were developed to allow cable to fulfill its potential. In February 1972, the Federal Communications Commission (FCC) issued its Cable Television Report and Order. The purpose of the FCC's action was to obtain the full benefits of emerging cable technology consistent with the 1934 Communications Act's public convenience, interest, and necessity standards. The Report and Order represented the high point of federal intervention in cable television; since 1972, the federal government has substantially deregulated the area.

8. See id. at 16-17.
9. See T. BALDWIN & D. McVOY, supra note 1, at 7, 88-100. In Federal Communications Commission v. Midwest Video Corp. (Midwest Video II), 440 U.S. 689 (1979), the Supreme Court struck down the FCC's access channel requirement. See infra notes 59-60 and accompanying text. Nevertheless, many cable franchise agreements and city ordinances require access channels. Today, bidders in cable franchising contests routinely offer access channels, often substantially in excess of the original FCC requirements. T. BALDWIN & D. McVOY, supra note 1, at 89; see infra notes 58-63 and accompanying text.
10. See T. BALDWIN & D. McVOY, supra note 1, at 7, 89-91.
11. "Interactive cable" refers to the capability of a cable television system to allow subscribers to send as well as receive information. This technology makes possible such services as shopping, pay-per-view, viewer polling, home security, and medical emergency alarms. T. BALDWIN & E. MICHALOVE, supra note 1, at 40. See generally T. BALDWIN & D. McVOY, supra note 1, at 56-79 (discussion of two-way cable technology).
12. See SLOAN FOUNDATION, supra note 3, at 63-70.
13. See T. BALDWIN & D. McVOY, supra note 1, at 6; R. SMITH, supra note 1, at 17.
16. The Act provides that the FCC's policies must serve "the public convenience, interest or necessity." Id. § 303.
In Minnesota, the Citizens League, the Metropolitan Council, and several metropolitan suburbs began studying cable in 1972. By that time, there were a number of cable systems operating in several communities throughout the state.  

II. THE MINNESOTA CABLE COMMUNICATIONS ACT

The Minnesota Legislature passed the Cable Communications Act in 1973. The Act established the seven-member Minnesota Cable Communications Board to develop a state cable communications policy and to promote the development of a cable industry which would be "responsive to community and public interest." This mandate was to be implemented "as rapidly as economically and technically feasible." The Board was to provide state oversight without imposing "undue restraint and regulation."

Based in part on the 1972 New York cable legislation, Minnesota's statute has been praised for its balancing of regulatory, developmental, and public service interests. In this respect, Minnesota, along with New York, differs from most other states with comprehensive cable regulation. Many other states focus largely on centralized rate setting and control. Minnesota, on the other hand, leaves rate setting, franchise decisions, and system oversight to local government. The state role is concentrated on standard setting and policy development.

Minnesota was one of the last of eleven states to enact comprehensive cable legislation delegating the authority to regulate cable to a specific state agency. The scarcity of comprehensive state

18. Saint Paul, Minneapolis, and seven southwest Hennepin County suburban communities established commissions to consider cable franchising as early as 1972. Studies conducted by the Metropolitan Council and the Citizens League in that year played a role in the enactment of Minnesota's 1973 legislation.


20. MINN. STAT. § 238.04 (1982).

21. Id. § 238.01.

22. Id.

23. Id.


25. See infra note 28.

26. In Massachusetts, Minnesota, and New York, an independent cable television board or commission shares authority with local government. M. HAMBURG, supra note 1, at 3-21; see MASS. GEN. LAWS ANN. ch. 166A, §§ 1-22 (West 1976 & Supp. 1983-1984); MINN. STAT. §§ 238.01-.35 (1982 & SUPP. 1983); N.Y. EXEC. LAW §§ 811-831 (McKinney 1982). In Delaware, Nevada, and New Jersey, the state public utility commission or one
regulation is in part due to some state legislatures’ beliefs that the FCC’s assertion of authority over cable in the early 1970’s adequately protected the public interest. The primary reason, however, is stiffening cable industry opposition to any form of regulation. After the issuance of the FCC Report and Order 27 in 1972, cable companies undertook to discourage comprehensive state cable regulation. The industry has generally been successful in this regard.

Notwithstanding industry opposition, hundreds of cable bills have been introduced in state legislatures throughout the country. At least thirty-five states have specific statutes dealing with cable franchising, and almost every state has enacted some cable legislation. 28


27. Report and Order, supra note 14. See generally supra notes 14-17 and accompanying text.

28. See, e.g., ALA. CODE § 23-1-59 (1975) (empowers highway department to enter into contracts with owners or operators of community antenna television systems constructed along public highways and to prescribe reasonable rules for construction, repair, and maintenance of these systems); ALASKA STAT. §§ 44.21.300-330 (Supp. 1983) (comprehensive regulation, see supra note 26 and accompanying text); ARIZ. REV. STAT. ANN. §§ 9-509 to -510 (Supp. 1983-1984) (prohibits city or town from acquiring ownership interest in any commercial cable television system unless acquired at fair market value); ARK. STAT. ANN. § 84-103.3 (1980) (permits Public Service Commission access to property); CAL. GOV’T CODE §§ 53066-1, .4 (West Supp. 1984) (empowers cities and counties to grant franchises; permits franchisee to elect to be exempt from local rate regulation or to unilaterally adjust rates under certain conditions; franchising standards; lockboxes); CAL. PUB. UTIL. CODE §§ 215.5, 768.5 (West 1975) (§ 215.15 defines “cable television corporation” and § 768.5 authorizes commissioners of public utilities to require corporation to operate, maintain, and construct system in a manner promoting public safety); CONN. GEN. STAT. ANN. §§ 16-330 to -333g (West Supp. 1983-1984) (prohibits any person, association, or corporation from constructing or operating community antenna television system without obtaining certificate of franchise from department of public utility control; governs other orders and regulations, performance standards, compliance, and public access); DEL. CODE ANN. tit. 26 §§ 601-616 (Supp. 1982) (comprehensive regulation of cable television system; construction and operation of system without obtaining franchise from authorized municipalities or Public Service Commission prohibited); FLA. STAT. ANN. § 718-1232 (West Supp. 1983) (no resident shall be denied access to available franchise or licensed service; residents have right to these services without extra charge); GA. CODE ANN. § 23-3702 (Supp. 1982) (franchising); HAWAII REV. STAT. § 440G-1 to -14 (1976) (comprehensive regulation, see supra note 26 and accompanying text); IDAHO CODE
Since its creation in 1973, the Minnesota Cable Communic-
tions Board has survived repeated lobbying efforts by the cable industry to have it abolished. The Board has also been involved in several legal actions contesting its authority. The main efforts of the cable industry have been directed to the reduction of competitive franchising requirements, the elimination of minimum access program requirements for public, educational, governmental, and leased purposes, and the reduction of ratemaking and other municipal authority over cable systems. While the Board’s principal adversaries have been members of the cable industry, several cities have also resisted the Board’s franchising procedures and standards. Opposition has most often manifested itself in legislative initiatives intended to reduce the Board’s authority in franchising procedures and provisions for smaller communities.

In 1980, the Minnesota Supreme Court in *Minnesota Cable Communications Association v. Minnesota Cable Communications Board*\(^{29}\) struck down as discriminatory taxation the statute that provided funding for the Board by levying a fee on each franchise cable communications company within the state.\(^{30}\) The statute provided that the fee collected was not to exceed one percent of the gross annual receipts of the company,\(^{31}\) and was “in no case [to] diminish the amount collected by the municipality from the cable communications company.”\(^{32}\) A related federal regulation required that the combined franchise fee levied upon a cable company by both state and municipality was not to exceed five

\(^{29}\) 288 N.W.2d 721 (Minn. 1980).

\(^{30}\) *Id.* The court held that 1978 Minnesota Statutes section 238.07 violated article X, section 1 of the Minnesota Constitution, which provides that “[t]axes shall be uniform upon the same class of subjects.” *Id.*

\(^{31}\) MINN. STAT. § 238.07 (1982) (to date has not been modified or repealed by legislature).

\(^{32}\) *Id.*
percent of the company’s gross revenue. As a result of the combined effect of the state and federal statutes, six of the 112 cable systems in Minnesota were exempted from paying the one percent fee. The suit was brought by a trade association representing the 106 systems that paid the fee. The court held that it was “manifestly improper to relieve some taxing units of a burden imposed on others for services rendered both.”

The court thus struck down the state’s legislative plan for recovering the cost of the cable regulatory process. Since its inception in 1973, the Board's budget has been determined by regular legislative appropriations established independently of the fees collected under the statute. Nevertheless, the Cable Communications Association decision probably had some negative effect on the Board’s standing in the appropriation process. The decision may also have contributed in part to 1982 legislation extending the state sales tax to cable service and to an initiative to extend the personal property tax to equipment owned by cable companies in the state.

A. Cable Franchising Under the Act

The Cable Board does not grant franchises, but it sets standards for procedures in the franchising process and for franchise agreement terms. The Board’s procedural rules for cable franchising require municipalities to follow an open, competitive franchising process. Over the past five years, the Board has worked to ease, expedite, and clarify franchising procedures through the legislative and rulemaking processes. Minimum standards for cable franchises granted by the state’s municipalities include thirty provisions to be incorporated into the franchise agreement. In some instances, cities have expressed interest in simply granting cable

33. 47 C.F.R. § 76.31 (1978).
34. 288 N.W.2d at 721.
35. Id. at 722.
36. Id. (quoting Village of Burnsville v. Onischuk, 301 Minn. 137, 148, 222 N.W.2d 523, 530 (1974)).
37. MINN. STAT. § 297A.01 (3)(g) (Supp. 1983).
38. S.F. No. 646, 73d Minn. Leg., 1983 Sess.; H.F. No. 690, 73d Minn. Leg., 1983 Sess. As of March 16, 1984, these bills were in the Senate and House Tax Committees, respectively.
39. “Franchise” is defined in the rules as “any authorization granted by a municipality in the form of a franchise, privilege, permit, license or other municipal authorization to construct, operate, maintain, or manage a cable communications system in any municipality.” 4 MINN. CODE AGENCY R. § 4.00 D. (1982).
40. Id. §§ 4.140-143 (1982).
franchises to particular applicants without subjecting them to competitive bidding—a process obviously enabling favoritism.

In a 1978 lawsuit, Minnesota’s cable industry was successful in removing state authority to determine how rates for basic cable service would be established in Minnesota franchises. The Board chose not to appeal the decision, and now merely requires that franchises in the state contain a provision setting forth how rates will be established.

Some 245 cable systems, presently operational or franchised and in some stage of construction, are authorized to serve about 525 communities in Minnesota. Approximately one hundred of these communities are in the Minneapolis-Saint Paul seven-county metropolitan area, where most cable activity has commenced only in the last five years. The political and technical complexities of cable development in large cities, and in joint power configurations of up to fifteen jointly franchising suburban municipalities, are a far cry from the isolated small town franchising of ten years ago.

The complexities inherent in big city franchising are illustrated by the contested Minneapolis franchise. The Minneapolis case and other metropolitan area cable developments prompted the Board to establish policies concerning public ownership, joint powers franchising, and cable service territory establishment. In

45. Many early franchise agreements in Minnesota were one or two pages long and in the form of simple city-issued construction permits. In contrast, some recent franchise agreements in larger Minnesota cities occupy 80 or more pages.
46. The Board’s referral of the case to the Office of State Administrative Hearings resulted in 21 days of hearings in 1980. The hearings were followed by a mayoral veto of Board-recommended ordinance amendments. Eventually, the Board approved dual franchises for the city and initiation of system construction. In August 1983, the Board approved a transfer of one franchise to the other franchisee. As a result, Minneapolis will have one cable system and one franchise.
47. In 1980, the Ramsey County District Court affirmed the Board’s interpretation of the Cable Communications Act, MINN. STAT. ch. 238 (1978), ruling that the statute permits more than one franchise in a cable service territory. Kritzler v. Minnesota Cable Communications Bd., No. 437971, Memorandum and Order at 2-3 (Ramsey County Dist. Ct. Jan. 7, 1980). The Board’s interpretation of the Act and the rules promulgated under it have recently been applied to city cable ownership procedures. Recent legislation has clarified joint powers cable franchising. See MINN. STAT. § 238.17, subd. 4 (1982).
April 1983, pursuant to its legislative mandate, the Board ordered the interconnection of all cable systems in the seven-county metropolitan area to effectuate the simultaneous carriage of a uniform regional programming channel. Four months later, the Board issued its final request for applications for entities interested in becoming the programmer of the channel. The unique requirement of a public service-oriented regional channel is of considerable importance to cable companies, cities, the Metropolitan Council, and community and educational organizations in the area.

48. Section 238.05 directs the Board to "prescribe standards for: franchises awarded in the twin cities metropolitan area which designate a uniform regional channel; [and for] the interconnection of all cable systems within this area." Id. § 238.05, subd. 2(c) (1982). The Board's rules require that all Twin Cities cable franchises designate a channel for uniform regional channel use. 4 MINN. CODE AGENCY R. § 4.223 (1982).

49. "Interconnection" refers to "[t]he joining together by cable or microwave of two or more CATV systems of relative proximity. This is done in order to present the same channels of programming to a larger number of subscribers and therefore to provide a bigger audience base for which to sell advertising." D. DELSON & E. MICHALOVE, supra note 1, at 40. The Board's rules define "interconnection" as:

- the provision of broadband electronic linkage between cable communications systems as defined in MINN. STAT. § 238.02, subd. 3, by means of coaxial cable, microwave or other means whereby the electrical impulses of television, radio and other intelligences, either analog or digital, may be interchanged, provided that the term 'interconnection' does not include the relaying by coaxial cable, microwave or other means of television broadcast signals intended for redistribution by the cable communications systems or systems receiving such signals.


50. In November 1983, the Board extended the deadline for this interconnection from July 1, 1984 to January 1, 1985.

"Regional channel" is defined in the Board's rules as "a segment of the electromagnetic spectrum provided by cable communications systems or an interconnection entity operating within the Twin Cities metropolitan area for programming on the standard VHF channel 6." 4 MINN. CODE AGENCY R. § 4.221 D. (1982).

51. Minnesota Statutes section 238.05, subdivision 2(d) directs the Board to "designate the (regional programming) entity . . . and prescribe rules for its operation and practice which rules shall insure that priority is given to public use of the uniform regional programming channel." MINN. STAT. § 238.05, subd. 2(d) (1982). Subsection 2(c) directs the Board to prescribe standards for "the designation of a single entity to schedule programs and facilitate use of this channel." Id. § 238.05, subd. 2(c). The Board's rules set forth procedures to be followed and criteria to be considered by the Board in designating the regional programming entity. 4 MINN. CODE AGENCY R. § 4.224 (1982).

52. Minnesota Statutes section 238.05, subdivision 2(d) requires that priority be given to public use of the uniform regional programming channel. MINN. STAT. § 238.05, subd. 2(d) (1982); see also 4 MINN. CODE AGENCY R. § 4.224 B. 3. c. (1982) (terms and considerations under which channel is made available to participants, insuring that priority is given to public use, listed as criterion in designation of regional channel entity). The Board's rules require that use of time on the regional channel or channels is to be made available without charge. Id. § 4.223.

53. A number of organizations have shown considerable interest in becoming the re-
The continued development of cable systems in smaller communities requires a great deal of Board attention because smaller communities often have greater need for advice and fewer local resources from which to draw. Smaller communities are often more prone to contested franchise decisions and to problems involving cable ownership by municipalities, telephone companies, and cooperatives. Although the United States Supreme Court held, in *Community Communications Company v. City of Boulder*, that a city cable ordinance is not immune from antitrust liability under the "state action" exemption unless the ordinance "constitutes municipal action in furtherance or implementation of clearly articulated and affirmatively expressed state policy," the 1982

54. In August 1983, the Board agreed to hear testimony from all parties involved in a competitive franchising dispute in Dodge Center with a view toward avoiding a protracted contested case hearing. Increasing numbers of small non-metropolitan cities are getting from two to five applicants for franchises, frequently under circumstances that invite conflict. Rural telephone companies and city-owned electric utilities are also aggressively seeking franchises in rural communities, in competition with traditional cable companies.

55. *Id.* at 40 (1982).

56. *Id.* at 52 (citations omitted). In *Boulder*, the petitioner, Community Communications Company, Inc. (CCC), had provided cable service to a poor reception area in Boulder, Colorado since 1966. *See id.* at 44. In 1979, CCC informed the Boulder City Council that it planned to expand its cable TV business in Boulder. *Id.* at 44-45. The City Council reacted by enacting an "emergency" ordinance which prohibited CCC from expanding its business into other areas of the city for three months. *Id.* at 45-46. During this moratorium, the City Council planned to draft a model cable ordinance and to invite new cable business to enter Boulder under its terms. *Id.* at 46. The council alleged that the moratorium was necessary because CCC's expansion during the drafting of the ordinance "would discourage other cable companies from entering the market." *Id.* (footnote omitted).

CCC filed suit, seeking a preliminary injunction to prevent the city from restricting its proposed expansion, alleging that such restrictions would violate section 1 of the Sherman Act, 15 U.S.C. § 1 (1982), which prohibits "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce." *See 455 U.S.* at 46-47.

The city responded that its moratorium ordinance was not violative of the antitrust laws, because the city was immune from antitrust liability under the "state action" exemption from Sherman Act liability enunciated in *Parker v. Brown*, 317 U.S. 341 (1943). *See 455 U.S.* at 46. The Court rejected the "state action" exemption, holding that "we are a Nation of States, a principle that makes no accommodation for sovereign subdivisions of States." *Id.* at 50 (emphasis in original). The Court emphasized that a state "might sanc-
Minnesota Legislature exempted systems with fewer than 1000 subscribers from the state cable statute at the option of the municipality. The antitrust consequences of this action are as yet undetermined.

B. Community Program Access

The policy of the Minnesota Cable Communications Board has been to retain, in conjunction with reasonable municipal control of cable franchises, the community program access rights established by the 1973 Act. This Minnesota requirement is unique. In 1979, the United States Supreme Court in *Federal Communications Commission v. Midwest Video Corp.* (Midwest Video II) determined that anticompetitive activities by municipalities and thereby shield the municipalities from antitrust liability. \(^{59}\) *Id.* at 51. The state policy relied upon by the municipality, however, would have to be "'clearly articulated and affirmatively expressed.'" \(^{57}\)


\[^{57}\text{See Act of Mar. 22, 1982, ch. 514, §§ 11, 13, 1982 Minn. Laws 663, 668-69 (codified at MINN. STAT. §§ 238.02, subd. 3(a), 238.05, subd. 18 (1982). This legislative relief for small community cable systems was regarded as a palliative to the operators of those systems, who for four years had sought deregulation of their operations to parallel the partial federal deregulation of systems of similar size. See 47 C.F.R. §§ 76.30-31 (1982)).} \]

\[^{58}\text{The Act provides that "'t'aking into account the size of the cable communications system, the board shall also prescribe minimum standards . . . for access to, and facilities to make use of, channels for education, government, and the general public; and for construction and operation of the cable communications system." MINN. STAT. § 238.05, subd. 2(b) (1982). Pursuant to this statutory authority, the Board's rules provide that upon award of a franchise, a certificate of confirmation will be issued only if the franchise ordinance contains provisions establishing certain minimum access rights. The requirements vary according to the size and location of the system. 4 MINN. CODE AGENCY R. § 4.202 DD. (1982) (minimum access requirements for all cable systems); id. § 4.203 (additional requirements for Class B cable systems); id. § 4.204 (additional requirements for Class C cable systems).} \]

Class A cable systems are defined as: "All systems that are located outside of the Twin Cities metropolitan area; and are located in a franchise area having a population of 4000 or fewer persons and serving fewer than 1000 subscribers." \(^{4}\) MINN. CODE AGENCY R. § 4.200 A. (1982). Class B cable systems are defined as: "All systems except those systems meeting the criteria of the Class A system listed above, that are located outside of the Twin City metropolitan area; and located in a franchise area having a population of fewer than 15,000 persons and serving fewer than 3500 subscribers." \(^{59}\) Id. § 4.200 B. Class C cable systems are defined as: "All systems that are located in the Twin City metropolitan area; or are located in a franchise area having a population of 15,000 or more persons or serving 3500 or more subscribers." \(^{59}\) Id. § 4.200 C.

\[^{59}\text{440 U.S. 689 (1979). In *Midwest Video II*, the Court held that the FCC's rules regarding channel capacity and access requirements, 47 C.F.R. §§ 76.252, 76.254, 76.256 (1977) (repealed by 45 Fed. Reg. 76.179 (1980)), were not reasonably related to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting. The Court also held that the rules were not within the Commission's} \]
that the FCC lacked the statutory authority to require community access provisions in cable franchises.\textsuperscript{60} Minnesota, however, had already enacted access requirements and is now the only state with clearly mandated access requirements still intact.\textsuperscript{61} This is an object of some envy among states that desire such regulation but are unable to assert jurisdiction because of cable industry opposition.

Over the past few years, the accelerating growth of cable in the state and the Cable Board's limited staff and resources have combined to refocus the Board's attention on developing cable systems and less on encouraging cable's use by schools, the public, and local government. Nevertheless, there has been a small but steady growth in the number of systems regularly providing some type of community programming on the access channels provided for by Minnesota regulations. As large metropolitan systems commence operation over the next several years, it is expected that use of well-financed access channels will significantly increase in those systems and in smaller systems.\textsuperscript{62} Opposition to access channel use is expected to continue in smaller systems, which allocate limited channel capacity to more popular programming. In the future, the Cable Board may, absent judicial or legislative preemption, consider raising the minimum channel requirements to accommodate the legislative intent of the access channel requirement and the expanding programming capacities of cable systems.\textsuperscript{63}

\section*{C. Areas of Board/Industry Cooperation}

On several occasions the Cable Communications Board and the cable industry have agreed on proposed legislation. In each case, the Cable Board has acted in accordance with its statutory mandate to develop economical and efficient cable service for the bene-

\begin{footnotesize}
\begin{enumerate}
\item authority under section 3(h) of the Communications Act of 1934, 47 U.S.C. § 153(h) (1976), since they imposed common-carrier obligations on cable operators. 440 U.S. at 705, 708.
\item 440 U.S. at 708-09.
\item supra note 58.
\item Larger metropolitan franchise agreements often provide for direct financing of separate access program organizations by proceeds from franchise fees. In some cases, hundreds of thousands of dollars are available annually, making it possible to distribute access channel programming over a wide area.
\item In 1982, there were 69 older, smaller cable systems with only 12 channel capacity in Minnesota. This is the minimum channel capacity authorized by current Board rules for systems with fewer than 3500 subscribers. 4 MINN. CODE AGENCY R. § 4.202 O. (1982). Larger systems, including those in the Minneapolis/Saint Paul metropolitan area, are required to have at least 20 channel capacity by June 21, 1986. Id. § 4.204 C. 2.
\end{enumerate}
\end{footnotesize}
fit of educational, municipal, and general public interests. 64

One of these areas of agreement is pole attachment rate-making. It is the general practice of cable companies to lease available space on existing utility poles, ducts, or conduits. 65 These poles, ducts, and conduits are typically owned by telephone and electric power utility companies. 66 Because cable operators frequently have no choice but to use whatever space is available, conflict has sometimes arisen over the charges that should be borne by cable companies for the use of these facilities. 67 In 1978, Congress passed legislation authorizing the FCC to regulate the terms, rates, and conditions for pole attachment agreements except where those matters are regulated by the states. 68 In Minnesota, pole attachment agreements are regulated by the Board pursuant to authority granted by the 1973 Act. 69

A bill introduced in the 1981 Minnesota legislative session would have removed the Cable Board's authority to regulate utility pole attachment rates. 70 The bill sought to transfer that authority to the state's Public Utility Commission (PUC), which presumably would allow substantially higher rates charged to cable companies, and hence passed on to subscribers, by the owners of the poles—the telephone and power utility companies regulated by the PUC. 71 The Cable Board argued that it had already determined, pursuant to the 1978 federal pole rental legislation, 72 that the federal guidelines would guarantee lower costs to cable

64. See supra notes 21-23 and accompanying text.
66. Id.
67. Id. at 3-4.
69. MINN. STAT. § 238.13 (1982); MINN. CODE AGENCY R. § 4.120-126 (1982).
70. S.F. No. 364, 72d Minn. Leg., 1981 Sess.; H.F. No. 167, 72d Minn. Leg., 1981 Sess. These bills were introduced and heard once in the Government Operations Committee before being tabled. Supporting testimony was given by the telephone company and the Public Utilities Commission representatives, and opposing testimony by the Cable Board's spokesman.
71. S.F. No. 364, supra note 70; H.F. No. 167, supra note 70.
companies, and thus to subscribers, and that the proposed legisla-
tion would add an unnecessary state regulatory procedure. The bill was laid by. The state’s cable industry association, while pri-
ately opposing the bill, took no action to assure its defeat.

Since 1980, the Board has supported legislation requiring own-
ers of multiple dwelling complexes to allow cable companies access to their buildings. In doing so, the Board has found itself allied with the major municipalities, a number of tenant organizations, and the cable industry—particularly those cable companies with franchises in the larger cities and suburbs—against the landlords. In 1983, the Minnesota Legislature enacted legislation requiring property owners to provide access to their buildings and providing compensation to the property owners.

D. The Board’s Consultative and Informational Role

Pursuant to its statutory mandate, the Cable Board helps guide Minnesota municipalities through difficult franchising deci-
sions by providing information and consultative services. Al-
though some other state regulatory agencies perform this service to a degree, the Minnesota and New York boards devote a substan-
tial proportion of their energies to this work. Cable Board staff consult with local officials, distribute written guidelines and informational materials, and loan agency library materials to munic-
ipalities. Staff members appear before city councils throughout the state during the franchising process, and long after the process has been completed, conduct formal and informal mediations between cable companies and local officials. Board members also partici-
pate in public events related to cable, and the agency functions

74. MINN. STAT. § 238.23, subd. 1 (Supp. 1983).
75. Id. § 238.24, subd. 8. In Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982), the Supreme Court held that the minor physical occupation of an apartment building by a cable installation, installed pursuant to a New York law requiring that building owners not interfere with the installation of cable facilities upon their property, constituted a “taking” for purposes of the fifth and fourteenth amendments. Id. at 441; see U.S. CONST. amends. V, XIV; N.Y. EXEC. LAW § 828 (McKinney 1982).
76. Minnesota Statutes section 238.05, subdivision 3 provides: “The board shall pro-
vide advice and assistance to the cable communications industry; federal, state and local governments; members of the citizenry not commercially involved in cable communica-
tions activities; community organizations; and other private and public agencies interested in matters relating to cable communications and services.” MINN. STAT. § 238.05, subd. 3 (1982).
informally as a locus of information about cable and related communication technologies.

III. A CRITICAL EVALUATION OF THE MINNESOTA CABLE COMMUNICATIONS ACT

Whether Minnesota's cable regulatory program has resulted in more or fewer cable systems within the state is unclear. Direct comparisons with other states or regions are difficult because of several variables.

Minnesota's regulatory program at least has had no negative effect on the development of cable in the state. Indeed, it is probable that Minnesota's competitive bidding requirements, which require both local and national published notice of intent to franchise,77 may actually have stimulated cable development. There is no way to accurately determine whether the state's regulatory program has resulted in more cable subscribership, but the evidence indicates achievement by cable systems of at least reasonably anticipated cable subscriber figures.

Because of the state's regulatory program, cable in Minnesota may also be better in terms of technology, services, and more satisfactory cable franchises which protect the interests of franchisor, franchisee, and subscriber. The competitive process itself, over and above the minimum standards imposed by the state, probably leads to more sophisticated systems and more services than might otherwise be available. The Cable Board staff has attempted on an informal basis to compare Minnesota cable systems with comparable systems in adjoining states and has concluded that Minnesota systems are superior in capacity and services.

On the other hand, the state's minimum standards and competitive franchising procedures may make establishment of cable systems slightly more expensive with correspondingly higher subscriber rates. There is no clear evidence of this, however. It is arguable that the state's franchise requirements, by permitting municipalities to assert some restrictive oversight over basic cable rates,78 may in fact keep subscriber rates down.

77. Under the Cable Board's rules, larger communities must publish their requests for franchise proposals in a local newspaper and in two national publications approved by the Board. 4 MINN. CODE AGENCY R. § 4.140 D. 4. (1982). Smaller cities must at least publish in a local newspaper. Id. § 4.141 B. 3. Cable Board staff aggressively encourage national industry awareness of Minnesota cable opportunities.

78. See MINN. STAT. § 238.12, subd. 1a (1982).
The state's access channel requirement\textsuperscript{79} has unquestionably resulted in more local program services. The most dramatic effects of these policies will soon be felt as large and well-financed metropolitan area access channels become active. Eventually, these services are expected to include a broad range of community, governmental, and educational services in communities of all sizes.

It can be assumed that orderly and standardized franchising and franchise performance are desirable qualities. The state's shared regulatory program, in which the city or franchising authority conducts the franchising procedure using guidelines established by the state, has resulted in positive values to municipalities. It has also been an advantage to most cable companies, many of which have commented on the advantages of an orderly and understandable, albeit competitive, procedure. The advantages also extend to the clear procedure by which franchises may be sold, transferred, and renewed, and it is probable that avoidance of potential legal and court costs for cable companies, cities, and subscribers are the result. In the ongoing administration of cable communications franchise ordinances, there is obvious advantage, to both multiple franchisees and cities, in having relatively standardized franchise provisions to facilitate administration.

The Minnesota cable regulatory program set up the Cable Board to serve as a locus of information, interpret federal and state cable regulations, and provide guidance in cable matters. Its usefulness to municipalities, cable companies, community organizations, and consumers has been amply demonstrated. The Board also functions as an open and participative forum for policy development, problem solving, and conflict resolution concerning cable. The fact that it functions in all these capacities with some success cannot be denied. Clearly, the presence of a specialized agency permits policymaking to take place quickly and effectively.

The Cable Board's policies have remained consistent with its statutory directive over the years, changing in emphasis only as the legislature has responded to changing circumstances. To stay abreast of changing circumstances affecting cable, the Cable Act directs the Board to maintain a statewide development plan.\textsuperscript{80}

\textsuperscript{79} MINN. STAT. § 238.05, subd. 2(b) (1982) (directing board to prescribe minimum access standards); 4 MINN. CODE AGENCY R. §§ 4.202 DD. 1-2., 4.203-.204 (1982) (minimum access requirements for different size classes of cable systems); see supra notes 58-63 and accompanying text.

\textsuperscript{80} See MINN. STAT. § 238.05, subd. 1 (1982).
Updated from time to time as warranted by changing conditions, the plan was completely rewritten in 1983 and continues to form the Board’s long-range planning and policy guide. The plan enables the Board to adapt relatively easily to the need for new rules and, where necessary, legislation.

IV. CONCLUSION

Throughout its existence cable has been a transitional medium. It has been transformed from its origin as a single community antenna television service to a far broader and more pervasive communications medium. Many believe that even the present sophisticated form of cable communications is transitional, and that the future will see a widely interconnected system of broadband communications using wire cable, optical fiber, laser, infrared transmission, and communications satellites to provide a sophisticated system of audio, video, and data transmission and interchange. These systems will not be exclusive; competing media will offer at least some mutual services.

The entire field of telecommunications is undergoing rapid transition as new technologies are adapted to expanding public needs and interests. Resulting shifts in public policy will affect and possibly dislocate some traditional communications enterprises. More state and local involvement in telecommunications issues is likely.

No one really knows just how or when these transformations will take place. Nor is it clear at what level or levels of regulation—federal, state, or local—the major policy issues involving cable will be resolved. Indeed, the role of the state in cable regulation may itself be transitory, depending upon changing technology and the possibility of federal preemption of communications policy.

States that already have regulatory and support programs in cable may be in a better position to adapt to these changes. In Minnesota, consideration is now being given to legislation that may result in a more comprehensive state communications policy that would seek to relate expanding communications resources to state and local needs. Should that or similar legislation be en-

81. See H.F. No. 867, 73d Minn. Leg., 1983 Sess.; H.F. No. 1671, Minn. Leg., 1984 Sess. House File 867 proposed to create a State Information Systems and Communications Council as a state agency to study state agency telecommunications and data processing; make recommendations and plans; develop device specifications; evaluate computer processing; review data processing acquisitions; and develop plans for cable communications services. The bill also proposed to place the Cable Communications Board under the administrative control of the Council and require that it follow the serv-
acted, the state's present cable regulatory program may be incorporated into an expanded program of communications regulation, development, and application.

See id. The bill died in the Government Operations Committee. House File 1671, a substitute measure introduced in 1984, proposes to create a Minnesota telecommunications council. As of March 23, 1984, House File 1671 appeared likely to pass.