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The Future of Municipal Regulation of Cable Television: Plugged In or Tuned Out?

Fredric D. Tannenbaum*

INTRODUCTION

The cable television industry is subject to a maze of concurrent federal, state and local regulation. The federal government, through the Federal Communications Commission ("FCC"), actively regulates the cable television industry and establishes guidelines for the regulation of cable television by state and local authorities. The State of Illinois, through the Illinois Commerce Commission ("ICC"), initially asserted direct jurisdiction over cable television franchises. A decision of the Illinois Supreme Court, however, has relegated the ICC to indirect regulation. Illinois municipalities have statutory authority to license, franchise and tax cable television companies. However, two recent

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1. The FCC defines a cable 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).
3. The FCC was created for the purpose of regulating communication by wire and radio in interstate and foreign commerce. 47 U.S.C. §§ 151-155 (1976).
4. See infra notes 54-64 and accompanying text.
decisions of the United States Supreme Court\textsuperscript{7} have raised serious questions concerning the continued viability of municipal regulation of cable television because of municipalities’ potential vulnerability to antitrust challenges.

This article will trace the history of the regulation of the cable television industry by the FCC. It will then discuss and analyze the Illinois Supreme Court decision which held that the ICC does not have the authority to regulate cable television directly. Next, this article will examine the municipalities’ role in regulating cable television. In particular, it will discuss the City of Chicago’s regulatory ordinance and analyze whether it exceeds the FCC’s mandatory franchise fee limitations. Finally, this article will analyze the vulnerability of Illinois municipalities to antitrust liability.

**FEDERAL REGULATION OF CABLE TELEVISION**

In the late 1950’s, cable television or community antenna television ("CATV") systems were built to strengthen the delivery of broadcast television signals to homes in predominantly rural and mountainous areas which were not serviced by network or local broadcasters. Essentially, the large antennas that CATV systems provided made reception clearer by enhancing the broadcasters’ signals. As the public demand for imported signals grew, CATV systems increased the number of available channels.\textsuperscript{8} Additionally, some system operators began to originate programming.

Broadcasters, both local and network, began to view cable television as an economic threat. Consequently, they turned to the FCC for protection.\textsuperscript{9} The Commission, however, determined that

\begin{itemize}
  \item See R.C. Smith, *The Wired Nation* 3-4 (1972). Local television dealers provided much of the impetus for increasing the number of CATV systems in order to boost their sales of television sets. Dealers would run cables from the community antennas to the homes of cable subscription purchasers. Note, *CATV Franchise Fee: Incentive for Regulation, Disincentive for Invention*, 30 Syracuse L. Rev. 741, 744 (1979). The signals typically were strengthened by an amplifier and then fed through a coaxial cable. A modern coaxial cable can carry 40 channels, FM radio, and computerized information. Dual coaxial cables, found in most large cities, can carry over 100 channels. See generally R. Steiner, *Visions of Cablevision* (2d ed. 1973).
  \item See R. Steiner, *supra* note 8, at 47. In 1976, some protection was given to broadcasters through the copyright laws. Congress revised the Copyright Act and imposed an
it had no authority under the Communications Act of 1934 ("Act")\(^\text{10}\) to regulate cable television\(^\text{11}\) because CATV did not qualify as a common carrier\(^\text{12}\) or as a broadcaster.\(^\text{13}\) Therefore, the Commission determined that there was no basis for FCC jurisdiction over cable television.


10. 47 U.S.C. §§ 151-609 (1976). The Act’s three relevant subchapters confer wide discretion on the FCC to accept jurisdiction over interstate communications. Subchapter I details the goals of the Act “to make available . . . a rapid, efficient, Nation-wide . . . wire and radio communications service with adequate facilities.” Id. § 151. Subchapter II gives the FCC plenary jurisdiction over common carriers. Id. §§ 201-222. A common carrier is defined in the Act as: “[A] common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy . . . but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.” Id. § 153(h). If cable television were classified as a “common carrier,” the Commission could require cable systems to allow full access to their facilities and to charge set rates for their services. Id. §§ 201, 203, 205. Subchapter III delineates the FCC’s authority over radio and broadcasting. Id. §§ 301-330. The FCC may license broadcast stations “if public convenience, interest, or necessity will be served thereby.” Id. § 307(a).

11. Report and Order, CATV and TV Repeater Services, 26 F.C.C. 403 (1959) [hereinafter cited as Repeater Services]. The FCC concluded:

In essence, the broadcasters’ position shakes down the fundamental proposition that they wish us to regulate in a manner favorable toward them vis-a-vis any nonbroadcast competitive enterprise. Thus, for example, we might logically be requested to invoke a prohibition against . . . all of the entities which compete with broadcasting for the time and attention of potential viewers and listeners.

The logical absurdity of such a position requires no elaboration.

Id. at 431-32.


14. FCC policies toward regulation of cable television have ranged from hands-off to pervasive to its present policy of regulation which is coexistent with state and local regulation. Initially, the FCC determined that the Communications Act of 1934 did not confer jurisdiction on the Commission to regulate cable television. Sixth Report and Order on Rules Governing Television Broadcast Stations, 17 Fed. Reg. 3905 (1952). For a thorough history of the FCC’s changing role in the regulation of cable television, see D. Le Duc, CABLE TELEVISION AND THE FCC (1973); R.C. Smith, supra note 8; Shoenerberger, The FCC, CABLE TV and Visions of Valhalla: Judicial Scrutiny of Complex Rulemaking and Institutional Competence, 14 U. Rich. L. Rev. 113 (1979); Note, Administrative Law - Communications Law - FCC Authority Over Cable Television, 1979 Wis. L. Rev. 962.
application for permission to construct a microwave radio communication system which would receive distant television signals and transmit them to cable television systems.\textsuperscript{15} Thus, the FCC asserted indirect jurisdiction over cable television operators.

In 1966, the FCC issued its \textit{Second Report and Order} which further increased its regulatory scope.\textsuperscript{16} This report reflected the FCC’s concern for the potential economic threat which cable television posed to both VHF and UHF broadcasters. The FCC ruled that if an established broadcast station or a UHF station in the top 100 television markets\textsuperscript{17} objected to a cable television system’s importation of distant signals, the cable system would be barred from importing such signals, absent a showing that the importation would be consistent with the public interest.\textsuperscript{18}

In \textit{United States v. Southwestern Cable Co.},\textsuperscript{19} the Supreme Court upheld the FCC’s exercise of jurisdiction over cable television as enunciated in the Commission’s \textit{Second Report and Order}. The Court stated that the FCC was not restricted to regulating common carriers and broadcasters pursuant to the Act.\textsuperscript{20} Rather, the Court noted that the plain wording of section 152(a) of the Act “confer[red] regulatory authority over ‘all interstate . . . communications by wire or radio.’”\textsuperscript{21} Therefore, the Court found that section 152(a) of the Act conferred on the FCC a grant of authority broad enough to allow the FCC to regulate cable television.\textsuperscript{22} The Court, however, limited this broad grant of authority. The Court stated as follows:

There is no need here to determine in detail the limits of the Commission’s authority to regulate CATV. It is enough to emphasize that the authority which we recognize today under § 152(a) is restricted to that reasonably ancillary to

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  \item \textsuperscript{16} Second Report and Order, Cable Television, 2 F.C.C.2d 725 (1966) [hereinafter cited as Second Report].
  \item \textsuperscript{17} The top 100 television markets are listed in 47 C.F.R. § 76.51 (1982).
  \item \textsuperscript{18} Second Report, 2 F.C.C.2d at 746. Some commentators argue that the FCC’s rules actually stunted UHF’s growth. They reason that the availability of cable television would have enhanced UHF’s weak signals and increased the potential number of UHF recipients. \textit{E.g.}, R.C. Smith, supra note 8, at 49-51; Park, Cable Television, UHF Broadcasting and FCC Regulatory Policy, 15 J.L. & Econ. 207 (1972).
  \item \textsuperscript{19} 382 U.S. 157 (1965).
  \item \textsuperscript{20} \textit{Id}. at 172.
  \item \textsuperscript{21} \textit{Id}. at 173 (quoting 47 U.S.C. § 152(a) (1976)) (footnote omitted).
  \item \textsuperscript{22} \textit{Id}.
the effective performance of the Commission’s various responsibilities for the regulation of television broadcasting.\textsuperscript{23}

The FCC seized the Court’s affirmation of its jurisdiction over CATV and conducted hearings to determine how to regulate cable television in the public interest.\textsuperscript{24} As a result of these hearings, the Commission issued rules requiring CATV systems with 3,500 or more subscribers to originate programming and also to make facilities available for the local production of programming.\textsuperscript{25} These requirements, the FCC reasoned, would satisfy the congressional goals underlying the Communications Act of 1934, which were to establish a uniform, national mass media network that had local control and diversity.\textsuperscript{26}

The Court of Appeals for the Eighth Circuit in Midwest Video Corp. v. United States,\textsuperscript{27} held that the program origination rules promulgated by the FCC exceeded the Commission’s authority. The Supreme Court, in a closely divided opinion, reversed the Eighth Circuit’s decision.\textsuperscript{28} The Court stated that the central issue was whether the FCC’s program origination rules were reasonably ancillary to the effective performance of its responsibilities under the Act.\textsuperscript{29} The Court reiterated its holding in Southwestern Cable that the FCC is responsible for preventing CATV systems from adversely effecting the statutory policies of the Act.\textsuperscript{30}

The Court stated that in order to effectuate the goals of the Act, the FCC had the further responsibility of requiring CATV systems to affirmatively promote those goals.\textsuperscript{31} The Court con-
cluded that because the program origination rules promoted a media network which was diverse and locally controlled the rules were reasonably ancillary to the FCC's responsibilities, and therefore, did not exceed the FCC's authority.  

Four dissenting members of the Court challenged the FCC's authority to issue the program origination rules. The dissent distinguished the functions of CATV from the functions of broadcasting, and concluded that the FCC rules were actually "bludgeoning" cable systems into broadcasters. Furthermore, Chief Justice Burger in his concurring opinion admitted that "[c]lending requires acknowledgement, for me at least, that the Commission's position strains the outer limits of even the open-ended and pervasive jurisdiction that has evolved by decisions of the Commission and the courts." 

The FCC, despite the Court's affirmance of jurisdiction, chose to repeal the mandatory program origination rules. However,
the FCC permitted voluntary program origination by cable operators.\textsuperscript{37}

In 1972, the Commission conducted a study and issued a report and rules which required mandatory access to cable television systems.\textsuperscript{38} The rules required the cable television systems in the top 100 television markets to build twenty-channel capacity systems which contained at least four available access channels for use by the public, government officials, educators and paying lessors.\textsuperscript{39} Under the mandatory access rules, cable operators had no control over the content of the programs on the four access channels.\textsuperscript{40}

After receiving numerous complaints, the FCC in 1976 modified its mandatory access rules.\textsuperscript{41} The new rules applied to any system with 3,500 subscribers or more, rather than limiting the applicability of the rules to the top 100 television markets.\textsuperscript{42} In addition, the new rules required cable operators to write access rules for users and also to provide free access for five years to educators and local government officials.\textsuperscript{43}

In \textit{FCC v. Midwest Video Corp.},\textsuperscript{44} the Supreme Court held that the FCC's mandatory access rules were invalid. The Court accepted the Commission's argument that the FCC had broad authority to promulgate rules such as the mandatory program

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\textsuperscript{37} Id. at 1105-06.

\textsuperscript{38} Id.

\textsuperscript{39} Id. at 3289, 36 F.C.C.2d at 240-41.

\textsuperscript{40} Id.

\textsuperscript{41} Report and Order, Cable TV Capacity and Access Requirements, 59 F.C.C.2d 294, reconsideration denied, 62 F.C.C.2d 399 (1976) [hereinafter cited as Access Requirements].

\textsuperscript{42} Access Requirements, 59 F.C.C.2d at 302.

\textsuperscript{43} Id. at 314-16. These requirements ignored warnings given by cable system operators which indicated that the cost of providing free access would be prohibitive. In addition, the operators had contended that the cost of complying with these requirements would result in a 65% increase in subscriber rates. Notice of Proposed Rulemaking, Major Market Cable TV, 51 F.C.C.2d 519, 519-20 (1975).

\textsuperscript{44} 440 U.S. 689 (1979).
origination rules approved of by the Court in United States v. Midwest Video Corp. The Court, however, reasoned that the mandatory access rules exceeded the FCC's authority because they "plainly impose[d] common-carrier obligations on cable operators." The Court noted that Congress had forbade imposing common-carrier obligations on broadcasters because Congress did not want broadcasters' editorial control over their programs hindered. The Court reasoned that Congress's intent to assure journalistic freedom was equally applicable to the programming of CATV operators.

Although the Court in FCC v. Midwest Video Corp. limited the FCC's authority to regulate cable television, the Commission continues to possess the authority to promulgate rules for distant signal importation and to enforce the "fairness doctrine." Most importantly, it remains the FCC's responsibility to regulate cable television to promote the goals of broadcasting diversity and local origination.

STATE REGULATION OF CABLE TELEVISION IN ILLINOIS

In Illinois, there is no direct statutory authority which permits state regulation of cable television. Furthermore, there is no statute which provides for regulation of broadcasters. Regulation of

45. Id. at 698-99.
46. Common carrier obligations require a company to deal with the public on a first-come first-serve basis. The Court described a common carrier in the context of communication service as "one that makes a public offering to provide [communications facilities] whereby all members of the public who choose to employ such facilities may communicate or transmit intelligence of their own design and choosing." Id. at 701 (quoting Report and Order, Industrial Radiolocation Service, Docket No. 16,106, 5 F.C.C.2d 197, 202 (1966)). The Court further stated that "[a] common carrier does not 'make individualized decisions, in particular cases, whether and on what terms to deal.'" Id. (quoting National Ass'n of Regulatory Util. Comm'rs v. FCC, 525 F.2d 630, 641 (D.C. Cir.), cert. denied, 425 U.S. 992 (1976)).
47. Id.
48. Id. The Court emphasized that § 3(h) of the Act requires that "a person engaged in . . . broadcasting shall not . . . be deemed a common carrier." Id. (quoting 47 U.S.C. § 153(h) (1976)).
49. Id. at 703-04. For an in-depth analysis of this decision, see Note, supra note 14.
51. 47 C.F.R. § 76.209 (1982). The fairness doctrine has been explained as follows: "Under the Fairness Doctrine broadcasters are responsible for providing the listening and viewing public with access to a balanced presentation of information on issues of public importance." Columbia Broadcasting Sys. v. Democratic Nat'l Comm., 412 U.S. 94, 112 (1973).
52. 440 U.S. at 700. The FCC's rules and regulations attempt to have cable television
common carriers and public utilities is exclusively vested in the Illinois Commerce Commission.\textsuperscript{53}

In Illinois-Indiana Cable Television Association v. Illinois Commerce Commission,\textsuperscript{54} the Illinois Supreme Court held that cable television was not a public utility under the Public Utilities Act. The ICC had asserted jurisdiction over cable television companies concluding that they were public utilities under the statute.\textsuperscript{55} The ICC, after considering the evidence, found that cable television, as a system of delivery signals, presented significant service overlap with the telephone and utilized financing techniques that paralleled the telephone industry.\textsuperscript{56} Because of the similarity between cable television companies and telephone companies which are public utilities under the Public Utilities Act, the ICC concluded that cable television was subject to its jurisdiction.\textsuperscript{57}

The Illinois Supreme Court refused to defer to the ICC’s extensive findings of fact that cable television fell within the statutory meaning of telephone communications.\textsuperscript{58} Instead, the court relied on the common meanings of television and telephone because “‘the statutory language . . . under consideration [was] not exceedingly technical in nature, such that only specialized agencies [might] be thought to understand it.’”\textsuperscript{59} The court concluded that the plain meaning of the term “television” was vastly dis-

\textsuperscript{53} Public Utilities Act, Ill. Rev. Stat. ch. 111 \(1/2\), § 9 (1981). Under the Act, a public utility is defined as follows: every corporation, company, association, joint stock company or association, firm, partnership or individual, their lessees, trustees, or receivers appointed by any court whatsoever that owns, controls, operates or manages, within this State, directly or indirectly, for public use, any plant, equipment or property used or to be used for . . . any franchise, license, permit or right to engage in . . . the transmission of telegraph or telephone messages between points within this State.

\textsuperscript{54} 55 Ill. 2d 205, 302 N.E.2d 334 (1973).
\textsuperscript{55} Id. at 205, 302 N.E.2d at 334.
\textsuperscript{56} Id. at 207-08, 302 N.E.2d at 335-36.
\textsuperscript{57} Id.
\textsuperscript{58} Id. at 221, 302 N.E.2d at 342.
\textsuperscript{59} Id. at 212, 302 N.E.2d at 338 (quoting Minnesota Microwave, Inc. v. Public Serv. Comm’n, 291 Minn. 241, 245, 190 N.W.2d 661, 665 (1971)).
tistinguishable from the term "telephone" and therefore rejected the ICC's assertion of jurisdiction.60

The court erroneously ignored the ICC's findings of fact regarding the similarities between telephone communications and cable television by summarily stating that the determination of the statutory term telephone messages was a legal issue. Although the interpretation of statutory words such as telephone messages is a legal question to be determined by the court, the court should have considered the ICC's findings of fact regarding the meaning of the term cable television when it made the legal determination of whether the term fell within the statutory meaning of telephone messages.61

In declining to include cable television within the statutory term telephone messages, the court set a precedent which is dangerous to the general principles of appellate review of administrative decisions. Traditional deference to administrative expertise and competence62 would quickly deteriorate if courts freely ignored the factual determinations an agency rendered by classifying such determinations as legal issues and ignoring the agency's factual findings when making its legal conclusions.

60. Id. at 221, 302 N.E.2d at 342. Other states have also recognized that a utility commission's jurisdiction over cable television requires clear constitutional and/or statutory authority. E.g., Television Transmission, Inc. v. Public Utils. Comm'n, 47 Cal. 2d 82, 301 P.2d 862 (1956). For states that have enacted legislation expressly conferring jurisdiction on their utility commissions to regulate cable television, see Annot., 61 A.L.R.3d 1150 (1975).

61. In the same year that Illinois-Indiana Cable Television was decided, the Illinois Supreme Court in Illinois Bell Telephone Co. v. Illinois Commerce Comm'n, 55 Ill. 2d 461, 303 N.E.2d 364 (1973), correctly deferred to the ICC's factual determinations when the court interpreted the meaning of certain statutory words.

62. In recognition of the ICC's expertise, a court's review of the findings of fact made by the Commission is statutorily limited. The Public Utilities Act provides in pertinent part:

The findings and conclusions of the [ICC] on questions of fact shall be held prima facie to be true and as found by the [ICC]; and a rule, regulation, order or decision of the [ICC] shall not be set aside unless it clearly appears that the finding of the Commission was against the manifest weight of the evidence. . . .

Perhaps, in light of the technological advancements made since the *Illinois-Indiana Cable Television* decision was rendered in 1973, the Illinois Supreme Court should reconsider whether cable television falls within the Public Utilities Act’s definition of telephone messages. For instance, cable television signals may now be transmitted over telephone lines. Furthermore, telephones can transmit messages from cable television stations to hook-ups inserted on television sets or even on personal computers. The Bell Operating Companies, the purveyors of local intra-exchange telephone service, are also considering whether to build and own cable television systems as a means of developing new sources of revenue.\(^{63}\) Additionally, teletext and videotext services, recently approved by the FCC, utilize telephone wires to link the home television screen to central data banks.\(^ {64}\)

Even though the *Illinois-Indiana Cable Television* decision established that the ICC cannot directly regulate cable television, the ICC can invoke jurisdiction indirectly. In *Cable Television Co. v. Illinois Commerce Commission*,\(^ {65}\) twenty-four cable television companies sought declaratory and injunctive relief asserting that the ICC had no authority to regulate pole attachment agreements entered into between public utilities and CATV operators. The Illinois Supreme Court rejected the argument of the cable television companies. The court noted that the Communications Act of 1934 authorized states to establish the rates, terms and conditions of pole attachments.\(^ {66}\) The court determined that the Illinois legislature had chosen to confer this power on the ICC by requiring public utilities to acquire ICC approval and consent before leasing any part of their equipment.\(^ {67}\)

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\(^{65}\) 82 Ill. App. 3d 814, 403 N.E.2d 287 (1980).

\(^{66}\) *Id.* at 818, 403 N.E.2d at 289.

\(^{67}\) *Id.*
The cable companies alternatively argued that even if the ICC could regulate the pole attachment agreements, the ICC, when determining whether to approve the agreements, could only consider the interests of the patrons of the utilities and not the economic impact of the agreements on cable subscribers. In rejecting this argument, the court noted that the Public Utilities Act requires the ICC to consider whether the public will be conve- nient in determining whether to approve the lease of property owned by a public utility. The court construed the term public to include not only the patrons of the utility, but the general public, which includes cable television subscribers. Therefore, the court concluded that when approving pole attachment agreements, the ICC should consider the interests of cable television subscribers as well as other interests at stake. Thus, although the ICC may not directly regulate cable television, it may do so indirectly because of its power to disapprove of pole attachment agreements entered into between public utilities and cable operators which the ICC finds would not be in the best interest of the public and the cable television subscribers.

MUNICIPAL REGULATION OF CABLE TELEVISION

FCC Franchising Guidelines

Until the FCC asserted jurisdiction over cable television in the mid-1960's, municipalities regulated the industry. A municipality would grant a cable television system an exclusive franchise by exercising its inherent power to control the city's streets, side-

68. Id.
69. Id. at 819, 403 N.E.2d at 289.
70. Id.
71. Id.
72. In the context of state and local government law, the term "franchise" is defined as follows:

[A] grant of authority by a local or state government... to do certain things which a corporation or individual otherwise may not do; more specifically, it is a grant of authority to use the public streets, alleys, and ways, on a more than temporary basis, for the purpose of carrying on a business in the nature of a public utility.... Having the power to require and grant the franchise, the municipality can attach conditions to its exercise and thereby impose obliga-

Barnett, State, Federal, and Local Regulation of Cable Television, 47 Notre Dame Law. 685, 685 n.3 (1972).
Franchises, however, were not always awarded in the public interest. Cable television franchises were often granted on the basis of bribes and kickbacks received by local governmental officials. Many cable franchises were awarded to the only bidder and in some cases cities awarded franchises without even holding public hearings. In addition, many cities failed to recognize the complexities of cable television regulations and therefore did not require franchises to add technological improvements.

In an attempt to correct the disarray present in exclusive municipality franchising, the FCC introduced minimum guidelines for local franchising. However, with the exception of the mandatory rules governing franchise fees, compliance with these

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73. See, e.g., Omega Satellite Prod. v. City of Indianapolis, 536 F. Supp. 371, 379 (S.D. Ind. 1982); Illinois Broadcasting Co. v. City of Decatur, 96 Ill. App. 2d 454, 238 N.E.2d 261 (1968) (a cable system, or any such business, needs city council authorization to lay wire). The first amendment of the United States Constitution does not preclude cities from regulating CATV. U.S. Const. amend. 1. “Reasonable time, place, and manner restrictions on the exercise of First Amendment rights have long been recognized.” United States Labor Party v. Oremus, 619 F.2d 683, 687 (7th Cir. 1980). The restrictions may not extend, however, to proscribe content if such content is constitutionally protected speech. E.g., Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982); Stanley v. Georgia, 394 U.S. 557 (1969). Moreover, the restrictions must be justified by a substantial governmental interest, and be narrowly, reasonably, and precisely tailored to meet such interest. E.g., Cox v. Louisiana, 379 U.S. 536 (1965).

74. In Johnstown, Pennsylvania, the mayor, a former councilperson, and a current councilperson were indicted for accepting bribes in exchange for their votes for a particular franchise. The mayor and former councilperson pled guilty to the charge of conspiracy to use an interstate facility to further illegal activity. United States v. Kahn, 472 F.2d 272, 276-77 (2d Cir.), cert. denied, 411 U.S. 982 (1973). The current councilperson was convicted of the same charge at trial. United States v. McKee, 462 F.2d 275 (2d Cir. 1972). See also Municipality of Anchorage v. Hitachi Cable, Ltd., 547 F. Supp. 633 (D. Alaska 1982) (The City of Anchorage brought a civil RICO action against the officers of a cable company who were convicted of bribing city officials to gain a franchise).

75. See, e.g., CROSSED WIRES: CABLE TELEVISION IN NEW JERSEY, A REPORT BY THE CENTER FOR ANALYSIS OF PUBLIC ISSUES 22, 46 (1971) (recounting two instances where cities awarded 25-year exclusive franchises without soliciting any other bids); Barnett, supra note 72, at 771-84 (recounting that Buffalo awarded an exclusive 15-year franchise without seeking competitive bids or conducting public hearings).

76. See Note, supra note 8, at 746. Of course, now that many franchises are expiring, cities may, within FCC rules, place heavy demands on franchises. However, the economic attractiveness of urban franchises is dwindling, at least temporarily, with low demand and high starting costs. See Landro, supra note 64, at 1, col. 6.

The guidelines are voluntary. The guidelines were designed to provide uniformity, competition and public participation in the local franchise process. The minimum standards include guidelines for public proceedings, construction timetables, franchise duration, installation and subscription rates, compliance procedures and franchise fees.

The FCC standards specify that the franchise fee charged by the grantor shall not exceed three percent of the grantee's gross revenues per year from the community. The FCC, however, will waive the three percent fee limitation and allow a franchise fee as high as five percent of gross revenues if two showings are made to the FCC. The grantee must first show that the fee will not interfere with federal regulatory goals. The franchising authority must then show the FCC that the fee is "appropriate in light of the planned local regulatory program."

The City of Chicago has enacted an ordinance to regulate cable television communications. The ordinance purports to adhere to the mandatory franchise fee standards. The ordinance levies on grantees a "franchise fee of not less than five percent (5%) of its annual gross revenues . . . and other forms of compensation including, but not limited to, a charge on certain sources of revenue and an interest in ownership or profits." Further, the ordinance provides that the City of Chicago "retains the right to fix rates for users, regular subscriber service, and all other services to the extent permitted by law or FCC rules and regulations that are just, reasonable and compensatory (assuming efficient and economical management)."

(1968)). The FCC guidelines were intended to remedy this situation.

78. 47 C.F.R. § 76.31 (1982).
80. 47 C.F.R. § 76.31 (1982).
81. Id.
82. Id.
83. Id.
84. CHICAGO, ILL., MUNICIPAL CODE §§ 113.1-1 to -60 (1982). Significantly, no ordinance regulates television broadcasters utilizing microwave discs, scramblers and/or direct broadcast satellites. The cable television ordinance empowers the Chicago City Council and the Chicago Cable Commission to grant, revoke, and renew franchises; evaluate grantees' performances; and levy and assess franchise, subscriber and user fees. Id.
85. Id. § 113.1-21(A).
86. Id. § 113.1-21(E).
Chicago has also adopted many of the voluntary minimum guidelines recommended by the FCC to promote uniformity, competition and public participation in the local franchise process. These include holding public hearings on legal, financial, technical, construction and other franchising details. The ordinance also follows the FCC recommendation that both initial and renewed franchising periods shall not exceed fifteen years.

Chicago's regulation of cable television raises several problems. First, the City's statutory authority to regulate the industry extends only to "license, franchise and tax." The ordinance, however, attempts to vest the City with additional power to set subscriber and user rates. Such ratemaking authority exceeds traditional municipal functions, and may also extend beyond the City's regulatory competence. Moreover, because the Illinois Supreme Court has determined that cable television systems are not public utilities under the Public Utilities Act, rate regulation of cable television by any state or local governmental authority is anomalous.

A second deficiency of Chicago's regulatory scheme is its franchise fee which provides that the City will receive five percent of the gross revenues of a cable television system coupled with "other forms of compensation" from the cable television system, including a potential share of the profits. The FCC limited municipal franchise fees to three percent of gross revenues in response to potential and actual municipal abuses of cable television franchises. Prior to the adoption of the FCC rules, muni-

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87. Id. § 113.1-13.
88. Id. § 113.1-6.
92. Rate regulation under state authority is normally justified only when the body being regulated is a public utility. Moreover, the Chicago ordinance requires the ratemaking body to consider whether the franchise possesses "efficient and economical management." Chicago, Ill., Municipal Code. § 113.1-21(E) (1982). This standard is nebulous and subject to potential abuse.
93. The ordinance states that in addition to 5% of the franchise's gross revenues, the City is entitled to "other forms of compensation including but not limited to a charge on certain sources of revenue and an interest in ownership and profits." Id. § 113.1-21(A).
94. 47 C.F.R. § 76.31 (1982). Franchises which were granted prior to 1972 are exempt from the fee restrictions for a period of 15-years from the date of the grant of the original franchise or until the end of the franchise period, whichever occurs first. Id.
incipalities often extracted exorbitant fees from cable television companies, finding cable television franchises to be a new-found "urban oil well under . . . city streets." These excessive fees were passed on to subscribers or absorbed by the companies themselves. To justify a fee in excess of three percent, the FCC requires "both a full description of the special regulatory program contemplated and a full accounting of estimated costs." Failure to precisely specify the costs of municipal regulation raises a presumption that the fee in excess of three percent will be used for the municipality's general treasury. If this presumption is not rebutted, the extra fee will be stricken as null and void.

The FCC has approved fees in excess of three percent for several regulatory schemes. For example, the Commission has authorized fees higher than three percent when the regulatory jurisdiction established a separate commission to monitor franchisees' operations, resolve operator-customer disputes, or advise the city council. However, a municipality by merely claiming that its regulatory scheme requires additional personnel will not obtain FCC approval for fees higher than three percent. The three percent fee, the FCC reasons, should cover additional personnel and even consultants.

95. N.Y. Times, Feb. 6, 1973, at 73, col. 6 (quoting John Lindsey, then Mayor of New York).
96. The FCC noted that municipal abuse of the fee process was widespread. Some municipalities exacted fees of up to 36% of gross revenues. Cable Television Report and Order, 37 Fed. Reg. 3252, 3276, 36 F.C.C.2d 141, 209, aff'd on reconsideration, 37 Fed. Reg. 13,848, 36 F.C.C.2d 326 (1972). The FCC stated that such high fees amount to "an indirect and regressive tax on cable subscribers." Id. Such fees, moreover, hindered the FCC's goals of economic stability and competition.
98. See City of Mesa, Arizona, CSR-2068 (FCC, July 6, 1983).
99. If the FCC declares that a fee is excessive, the fee above 3% will be stricken. No new certification, however, is required. Clarification, 46 F.C.C.2d at 201.
100. See, e.g., T.C. Indus., Inc., 61 F.C.C.2d 462 (1976); General Television, 47 F.C.C.2d 60 (1974).
The FCC also closely scrutinizes requests for fees above three percent when the additional amount covers expenses other than those required to regulate the cable system. For example, the FCC will only approve an extra fee for public access programming if such programming adheres to strict first amendment safeguards and remains part of the larger, overall regulatory design. Also, the FCC will strike down any extra service package requirement unrelated to the regulation of cable television on the theory that it operates as a payment-in-kind if it causes the fee to exceed three percent.

Chicago can justify its five percent franchise fee. The City's intricate regulatory program, large market area, and the maintenance of the Cable Commission and the City Council Committee on Cable Regulation warrants the excess fee. However, the FCC will reject any attempt to enforce the provision of the City's ordinance which extracts "other forms of compensation" in addition to the five percent fee as an excessive payment-in-kind. Paradoxically, the FCC franchise fee rules actually encourage a city to seek a three percent fee. Any fee which is three percent or less may be appropriated to a city's general treasury and allocated to any project. A fee in excess of three percent, however,
requires a city to spend the entire amount, not just the amount in excess of three percent, on cable regulation.\textsuperscript{108}

\textit{Antitrust Liability}

Chicago's ordinance which governs its regulation of cable television also raises antitrust problems. In \textit{Metro Cable Co. v. CATV of Rockford, Inc.},\textsuperscript{109} an unsuccessful cable television franchise applicant sued the successful applicant, its owner and officers, the mayor, and an alderman under the Sherman Act, challenging the award of an exclusive franchise territory. The plaintiff conceded that the City of Rockford was immune from antitrust liability, and therefore never alleged a cause of action against the City.\textsuperscript{110} The plaintiff claimed that the defendants engaged in concerted activities to induce governmental actions that had an anticompetitive effect.\textsuperscript{111} The Court of Appeals for the Seventh Circuit affirmed the trial court's dismissal of the plaintiff's complaint. The court stated that the anticompetitive actions of the City were not subject to the Sherman Act, and therefore efforts aimed at inducing the City to act anticompetitively were likewise immune from the Sherman Act.\textsuperscript{112} The court reasoned that a municipality acting pursuant to legislative direction is cloaked with antitrust immunity under the doctrine enunciated by the Supreme Court in \textit{Parker v. Brown}.\textsuperscript{113}

In \textit{Parker v. Brown},\textsuperscript{114} the Supreme Court upheld a statewide regulatory system for the raisin industry stating that the regulatory system was not pre-empted by the Sherman Act. The Court

\textsuperscript{108} Clarification, 46 F.C.C.2d at 203. One might argue that excessive fees should be approved if they result from competitive bidding and the give-and-take of the negotiation process. Cities' greed, furthermore, is tempered by the fear of "killing the goose that lays the golden egg" — excessive fees could bankrupt grantees and deprive the cities of revenue in the long run. Despite arguments to the contrary, the FCC has steadfastly refused to approve any fee exceeding 5% for post-1972 franchises. One approach a city could consider in order to obtain the concomitant benefits of a low fee percentage and high fees would be to levy a low fee percentage and inflate anticipated revenues in some future time period. For example, Chicago is considering levying fees for the first year of the franchise, based on the projected revenues of the fifteenth year, fees for the second year based on the fourteenth year, etc. By simply inflating the anticipated revenues in year fifteen, a city can inflate the fees it is owed.

\textsuperscript{109} 516 F.2d 220 (7th Cir. 1975).
\textsuperscript{110} \textit{Id.} at 228-29 (footnote omitted).
\textsuperscript{111} \textit{Id.} at 224.
\textsuperscript{112} \textit{Id.} at 229.
\textsuperscript{113} \textit{Id.} at 227-29.
\textsuperscript{114} 317 U.S. 341 (1943).
reasoned that principles of federalism, absent a contrary expression of congressional intent, permit a state to regulate commercial activity within its borders. The Court stated: "In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress."115 The Court concluded that "[t]he Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action."116 However, two subsequent decisions of the Supreme Court limit the extent of the Parker doctrine's applicability to municipalities.117

The Court restricted municipal antitrust immunity in City of Lafayette v. Louisiana Power & Light Co.118 The Supreme Court held that city-owned public utilities were not exempt from the antitrust laws unless a state had authorized the city to act anticompetitively. The Court stated that the Parker doctrine "exempts only anticompetitive conduct engaged in as an act of government by the State as sovereign, or, by its subdivisions, pursuant to state policy to displace competition with regulation or monopolistic public service."119 According to the Court, if a legislature authorizes the municipalities of its state to regulate a particular area, it can be inferred that the legislature contemplated that the municipalities might regulate anticompetitively.120 The Court affirmed the Court of Appeals for the Tenth Circuit's decision to

115. Id. at 350-51.
116. Id. at 351. Since the passage of the Sherman Act, the Supreme Court has continually affirmed states' inherent powers to regulate the health and safety of their citizens through clearly articulated and directly supervised statutory systems. In New Motor Vehicle Bd. v. Orrin W. Fox Co., 439 U.S. 96 (1978), the Supreme Court reversed a decision which held that a state statute regulating retail motor vehicle dealerships was pre-empted by the Sherman Act. The Court held: "The dispositive answer is that the [state's] regulatory scheme is a system of regulation, clearly articulated and affirmatively expressed, designed to replace unfettered business freedom. . . . The regulation is therefore outside the reach of the antitrust laws under the 'state action' exemption." Id. at 109. Cf. California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105-06 (1980) (The Court held that the State regulatory statute was pre-empted by the Sherman Act, reasoning that although the intent to displace competition was clearly expressed, the State did not directly supervise the regulation and thus "failed to meet the second requirement for Parker immunity." Id. at 105.).
117. See infra notes 118-21, 123-39 and accompanying text.
119. Id. at 413 (Brennan, J., plurality opinion).
120. Id. at 415 (Brennan, J., plurality opinion).
remand the case to the trial court for a determination of whether the state legislature contemplated that Louisiana municipalities would regulate public utilities anticompetitively.121

The Court in City of Lafayette did not resolve whether municipal activities need to receive state legislative direction or mere authorization to enjoy antitrust immunity. The Court also did not consider whether a municipality should receive antitrust immunity for activities such as cable television that the municipality franchises and regulates, but in which it has no proprietary interest. Subsequent to the decision in City of Lafayette, courts determined that municipalities were immune from antitrust violations based on a finding of general or implied authority from their state legislatures. Courts also exempted municipalities from Sherman Act liability for their non-proprietary activities as well as their activities based on home rule amendments.122

The Supreme Court further narrowed the scope of municipal immunity from antitrust violations in Community Communications Co. v. City of Boulder.123 In this case, a municipality pursuant to its extensive home rule authority enacted an ordinance which precluded a cable franchise grantee from expanding its service territory. The grantee sought to enjoin the City from enforcing its restrictive ordinance by alleging that it violated section 1 of the Sherman Act.124 The trial court held that the Parker doctrine did not shield the municipality from antitrust liability and therefore granted the injunction.125

On review, the Court of Appeals for the Tenth Circuit reversed, holding that a municipality could only be subject to antitrust violations if it had a proprietary interest in the activity regulated.126 The court distinguished City of Lafayette, noting that

121. Id. at 417 (Brennan, J., plurality opinion).
122. See generally Areeda, Antitrust Immunity for “State Action” After Lafayette, 95 Harv. L. Rev. 435 (1981). Typically, proprietary activities include city-owned businesses, e.g., bus companies, while non-proprietary functions include activities dedicated solely to public service, e.g., police protection. However, determining the difference between proprietary and non-proprietary functions has raised difficulties. See 2 E. McQuillen, The Law of Municipal Corporations § 10.05 (3d ed. 1979).
123. 455 U.S. 40 (1982).
124. 15 U.S.C. § 1 (1982). Section 1 of the Sherman Act provides, in pertinent part: “Every contract, combination...or conspiracy, in restraint of trade or commerce among the several states...is declared to be illegal.”
City of Lafayette involved municipally operated revenue-producing utility companies, while in the instant case the municipality had no proprietary interest in cable television franchising.\(^{127}\) The court stated that even if a municipality could be held liable for anticompetitively regulating an activity in which it had no proprietary interest, the City of Boulder remained immune from antitrust liability. The court reasoned that Colorado's home rule amendment satisfied the requirement enunciated in City of Lafayette that a municipality must receive sufficient authorization from the state to act anticompetitively.\(^{128}\)

The Supreme Court reversed the Tenth Circuit's decision and remanded the case.\(^{129}\) The Court implicitly rejected the Tenth Circuit's holding that a municipality could only violate the antitrust laws by anticompetitively regulating activities in which a municipality had a proprietary interest. The Court stated that the Parker doctrine was specifically limited to official action directed or authorized by the state.\(^{130}\) In the Court's view, exempting a municipality from antitrust liability for anticompetitive regulation of any activity without authorization from the state would violate the principle that "we are a Nation of States, a principle that makes no accommodation for sovereign subdivisions of States."\(^{131}\) Therefore, the distinction between proprietary and non-proprietary activities would not bear on whether an activity violated the antitrust laws.

The Supreme Court also rejected the Tenth Circuit's alternative holding that Colorado's home rule amendment was sufficient authority by the State for municipalities to act anticompetitively in regulating CATV.\(^{132}\) The Court stated that for a municipality to be cloaked with antitrust immunity its actions must constitute either "the action of the [state] itself in its sovereign capacity" or "municipal action in furtherance or implementation of clearly articulated and affirmatively expressed state policy."\(^{133}\) The Court held that the City of Boulder failed to meet either requirement.

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127. Id. at 708.
128. Id. at 707.
129. 455 U.S. at 57.
130. Id. at 52.
131. Id. at 50 (emphasis in original).
132. Id. at 52-56.
133. Id. at 52.
First, contrary to the City’s contention, the State’s home rule amendment which vested Colorado municipalities with “every power theretofore possessed by the legislature,” did not empower the City to act as the State in its sovereign capacity. The Court stated that because “[w]e are a nation not of ‘city-states’ but of States,” a state must give specific direction to act in a particular manner for municipalities to act as a state in its sovereign capacity. Second, the Supreme Court stated that Colorado’s home rule amendment did not clearly articulate and affirmatively express that the legislature contemplated anticompetitive regulation of cable television by Colorado municipalities. The Court reasoned that the State’s grant of local autonomy in its home rule amendment reflected “precise neutrality.” In this regard, the Court stated:

A State that allows its municipalities to do as they please can hardly be said to have “contemplated” the specific anticompetitive actions for which municipal liability is sought. Nor can those actions be truly described as “comprehended within the powers granted,” since the term, “granted,” necessarily implies an affirmative addressing of the subject by the State. The State did not do so here: The relationship of the State of Colorado to Boulder’s moratorium ordinance is one of precise neutrality. The Court concluded that because the City of Boulder’s act of prohibiting a cable operator from expanding its franchise was not specifically contemplated by Colorado’s home rule amendment, the City could not avoid antitrust liability by claiming immunity under the Parker doctrine.

Whether the City of Chicago would be subject to antitrust liability for granting exclusive cable television franchises depends on the source of the City’s authority to regulate CATV. Chicago, unlike the City of Boulder, derives its authority to regulate cable television from more than constitutional home rule powers. The Illinois legislature, unlike Colorado’s legislature, specifically

134. Id. (quoting Denver Urban Renewal Authority v. Byrne, Colo., 618 P.2d 1374, 1381 (1980)).
135. 455 U.S. at 54 (quoting Community Communications Co. v. City of Boulder, 630 F.2d 704, 717 (10th Cir. 1980) (dissenting opinion), rev’d, 455 U.S. 40 (1982)).
136. Id. at 55.
137. Id.
138. Id. (emphasis in original).
139. Id. at 48.
granted municipalities the authority to license, franchise and tax cable television companies.\textsuperscript{140} However, the Illinois legislature did not empower municipalities to act as the State in regulating cable television. The statute does not require municipalities to regulate cable television at all, let alone in any particular manner. The statute which uses the word "may" vests municipalities with discretion whether to regulate.\textsuperscript{141} Thus, the actions of Illinois municipalities in regulating cable television cannot be considered the actions of the State in its sovereign capacity.

Although Illinois municipalities cannot argue that they are acting as the State when regulating CATV, they may assert that they are immune from antitrust liability because the statute contemplates that municipalities will act anticompetitively in awarding franchises. To avoid antitrust liability based on the awarding of an exclusive cable television franchise, an Illinois municipality could argue that the legislature's failure to forbid municipalities from granting exclusive franchises while allowing them to license, franchise and tax cable television indicates that the legislature contemplated that municipalities would act anticompetitively. Certainly, the Illinois legislature must have been aware that many municipalities grant exclusive franchises to cable operators, and thus, it could be inferred that the legislature approved of municipalities granting exclusive cable television franchises.

However, courts cannot lightly infer that the legislature intended that the municipalities should act anticompetitively by granting exclusive franchises. Indeed, if the Illinois legislature intended to authorize anticompetitive actions by municipalities and thereby immunize them from antitrust liability, it could have so

\textsuperscript{140} The statute provides in pertinent part:

The corporate authorities of each municipality may license, franchise and tax the business of operating a community antenna television as hereinafter defined.

The authority hereby granted does not include authority to license, franchise or tax telephone companies subject to the jurisdiction of the Illinois Commerce Commission or the Federal Communications Commission in connection with the furnishing of circuits, wires, cables, and other facilities to the operator of a community antenna television system.


\textsuperscript{141} \textit{ILL. REV. STAT.} ch. 24, § 11-42-11 (1981).
worded the statute. The regulatory powers granted municipalities to “license, franchise and tax” are not necessarily concomitants of monopoly regulation. Furthermore, the Supreme Court in City of Boulder stated that there must be a “clear articulation and affirmative expression” of the state’s position regarding the anticompetitive acts of a municipality to exempt it from antitrust liability. In contrast, any approval by the Illinois legislature regarding the granting of exclusive cable television franchises by municipalities can only be shown by implication because the statute does not address the awarding of exclusive franchises.

Although the City of Chicago might not be immunized from antitrust liability, it may be able to raise a defense against antitrust claims. In City of Boulder, the Court held that the City was not exempt under the Parker doctrine from antitrust liability. The Court, however, stated that its decision did not reach the issue of possible defenses a municipality could assert against the claim that it acted anticompetitively. Nevertheless, the Court reiterated a statement it made in City of Lafayette that “[i]t may be that certain activities, which might appear anticompetitive when engaged in by private parties take on a different complexion when adopted by a local government.” This statement by the Court may indicate that it believes a municipality should be allowed to offer a rational justification as a defense for its allegedly anticompetitive restraints which might be considered per se illegal if they were engaged in by private parties. Such a defense would recognize that municipalities, as legitimate guardians of the public interests of their communities, may justifiably regulate activities anticompetitively for the orderly functioning of society. Municipalities should only be required to show, as states show in challenges under the commerce clause, that an anticompetitive municipal regulation bears a rational

142. 455 U.S. at 52.
143. Id. at 48.
144. Id. at 56 n.20.
145. Id. (quoting City of Lafayette, 435 U.S. at 417).
146. The per se rule of antitrust liability contemplates a commercial, competitive arena, with the violator’s conduct containing no possible “redeeming virtue.” Broadcast Music, Inc. v. Columbia Broadcasting Sys., 441 U.S. 1, 9 (1979). Municipal conduct, however, differs in intent and scope. Municipal conduct might be rationalized and tolerated where private parties’ behavior clearly would not be acceptable. Thus, in determining whether municipal conduct violates the antitrust laws, competitive considerations should be but one factor. The reasonableness of the anticompetitive restriction in light of a city’s goals and its political and economic situation should be the focus.
relationship to a legitimate local purpose. The regulation would then be upheld if its local benefits outweighed its anticompetitive effects.

By raising a public interest defense, a municipality should be able to avoid any antitrust liability for regulation of activities that are traditional municipal functions. A city could easily show that anticompetitive regulation of traditional activities is essential to promote public health, safety and welfare. Of course, it would be more difficult for a municipality to justify its anticompetitive regulation of an activity which it has not traditionally believed it was compelled to regulate. Therefore, whether such a defense would aid municipalities which are haled into court on claims of antitrust violations for granting exclusive CATV franchises is unclear. Regulation of cable television franchises has not been considered a traditional municipal function. A municipality would have the burden of proving that its arguably anticompetitive franchises were reasonable and served a legitimate local purpose. A municipality would have to show why the public interest would be better served with only one CATV system serving an area, instead of allowing two or more CATV systems to operate in the same territory. Thus, the municipality would have to demonstrate that economies of scale, construction oversight, subscriber and citizen convenience, and other considerations of public welfare outweigh any evils inherent in the municipality's anticompetitive exclusive franchises.

147. See Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970). For example, municipalities often fix the number of taxicabs and the rates charged. Cities often grant exclusive franchises for transportation, sanitation and other services. However, these activities bear a rational relationship to the municipalities' traditional and inherent functions. But see Edgar v. MITE Corp., 457 U.S. 624 (1982) (scrutinizing and invalidating the putative relation between the challenged corporate takeover statute and local interests).


149. See, e.g., City of Boulder, 455 U.S. at 40 (cable television regulation is not a traditional municipal function); City of Lafayette, 435 U.S. at 389 (public utility regulation is not a traditional municipal function).

Although a municipality might be able to persuade a court that anticompetitive regulation was justified, the major problem this defense presents is the uncertainty of its success. The Supreme Court has not provided any clear guidelines which lower courts can utilize in evaluating when municipal conduct will violate the antitrust laws. As a result, municipalities are uncertain whether their anticompetitive regulation of an activity will be considered justified in light of its purpose, or instead, will leave the municipality exposed to potential treble damages.

Even if standards were developed to evaluate the legitimacy of municipal anticompetitive conduct, the public interest defense is inadequate because it exposes a municipality to a lawsuit each time it decides to regulate an activity anticompetitively.

150. 15 U.S.C. § 15 (1982) authorizes awarding treble damages to successful plaintiffs in cases brought under the Sherman and Clayton Acts. However, declaratory and injunctive relief, rather than treble damages might be the sole remedies available to compensate victims of anticompetitive municipal ordinances. The Supreme Court has recognized that the punitive and deterrent purposes of the treble damages remedy against private parties might not "be equally appropriate for municipalities." City of Lafayette, 435 U.S. at 401-02; City of Boulder, 455 U.S. at 56-57 n.20. Although the Supreme Court has left the treble damage issue unsettled, the Court has held that punitive damages are not available against public entities in the absence of clear congressional intent. City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 258-71 (1981) (but a city is liable for damages under 42 U.S.C. § 1983 (1976)). The eleventh amendment, however, permits suits for monetary relief against cities. See, e.g., Monell v. New York Dep't of Social Servs., 436 U.S. 658 (1978).

151. Justice Rehnquist in his dissenting opinion in City of Boulder recognized that the consequence of the Court's decision was that cities could be constantly "haled into federal court in order to justify [their] decision that competition be replaced with regulation." 455 U.S. at 70 (Rehnquist, J., dissenting). He argued that a city's decision to regulate an industry rather than allow competition should be given the same deference as a state's decision to regulate an industry. Id. (Rehnquist, J., dissenting). Justice Rehnquist stated that the pre-emption doctrine was an adequate safeguard against municipal abuse of its power to replace competition with regulation. Id. at 68 (Rehnquist, J., dissenting). Therefore, he concluded that absent pre-emption a municipality could regulate activities anticompetitively.

The pre-emption doctrine is based on the supremacy clause. Federal statutory law will pre-empt or override state law if Congress has specifically evinced an intent to displace state law or if the state law directly conflicts with federal law and compliance with both is impossible. Courts are reluctant to infer pre-emption, and will not pre-empt state law unless "the repugnance or conflict [is] direct and positive, so that the two acts could not be reconciled or consistently stand together." Kelly v. Washington, 302 U.S. 1, 11 (1937) (quoting Reid v. Colorado, 187 U.S. 137, 142 (1902)). See also Merrill, Lynch, Pierce, Fenner & Smith v. Ware, 414 U.S. 117 (1973). "Federal regulation ... should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that Congress has unmistakably so ordained." DeCanas v. Bica, 424 U.S. 351, 356 (1976) (quoting Florida Lime & Avocado Growers v. Paul, 373 U.S. 132, 142 (1963)). See also City of Philadelphia
municipality could be involved in costly litigation for each decision it makes to grant an exclusive CATV franchise. The threat of such litigation and the potential liability may persuade city councils not to grant exclusive CATV franchises even though the councils believe that exclusive franchises are in the public’s interest.

Clearly, the Supreme Court’s decision in City of Boulder exposes Illinois municipalities to potential antitrust liability for granting exclusive cable television franchises. The Illinois statute provides that a municipality may license, regulate and tax municipalities. However, the statute does not provide specific authorization for municipalities to regulate anticompetitively. The Illinois legislature must take affirmative steps if it wants to prevent Illinois municipalities from being subject to antitrust liability. The legislature could amend the statute and specifically authorize the State’s municipalities to grant exclusive cable television franchises. In the alternative, the Illinois legislature could empower the ICC to regulate the granting of cable television franchises by municipalities.

CONCLUSION

The complex and interwoven maze of federal, state and local schemes regulating the cable television industry have changed dramatically over the last twenty-five years. The federal role has grown considerably. Yet, the FCC has recognized the importance of state and local input and control. Although the Illinois Supreme Court has determined that the ICC has no authority to directly regulate the cable television industry, rapidly developing technology may demand a role for the ICC. Moreover, in light of the Supreme Court's decisions in City of Lafayette and in City of Boulder, Illinois municipalities must now seriously re-examine


152. The federal role in regulating cable television may soon grow dramatically. The Senate recently passed a bill which if enacted into law would significantly decrease municipalities’ regulatory authority over cable television and expand the authority of the FCC. S.66, 98th Cong., 1st Sess., 129 Cong. Rec. S8324-25 (1983). For example, the bill sharply limits the franchisee’s obligation to provide public access channels for local public service programs. The bill further restricts the state and local authorities from regulating rates and assessing franchise fees.
their extensive regulation of cable television franchises. Municipalities may be forced to divert their resources from promoting a viable, healthy regulatory scheme to protecting themselves from antitrust litigation.