# TILLING THE VAST WASTELAND: THE CASE FOR REVIVING LOCALISM IN PUBLIC INTEREST OBLIGATIONS FOR CABLE TELEVISION

Through its passage of the Communications Act of 1934,[1] Congress established the Federal Communications Commission (FCC) and conferred upon it the authority to, among other things, issue broadcast licenses. In relevant part, section 309 of the Act requires the Commission to consider, in determining the eligible parties to whom licenses may be granted, whether "the public interest, convenience, and necessity will be served" by such grants.[2] The statutory language inscribed in section 309 has given rise to what have come to be commonly known as "public interest obligations," a bundle of community-minded conditions that represent a kind of "quid pro quo for the government's grant of spectrum use."[3] In practice, however, this intended regulatory bargain has turned out to be a raw deal for the viewing public: former FCC Chairman Newton Minow, in his inaugural address to the National Association of Broadcasters in 1961, drew popular attention to the dearth of television programming in service of the public interest, famously declaring that the medium had become a "vast wasteland" devoid of social import.[4]

Partially in reaction to this failure in broadcasting, Congress has over time reinterpreted the notion of public interest obligations and ex-

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[1] Pub. L. No. 73-416, 48 Stat. 1064 (codified as amended at 47 U.S.C. §§ 151–615b (2006)).

[2] *Id.* § 309(a), 48 Stat. at 1085 (codified as amended at 47 U.S.C. § 309(a)); *see also* Nat'l Broad. Co. v. United States, 319 U.S. 190, 215 (1943) (affirming that "[t]he criterion governing the exercise of the Commission's licensing power is the 'public interest, convenience, or necessity'" (quoting 47 U.S.C. §§ 307(a), (d), 309(a), 310, 312 (1940))).

[3] STEVEN WALDMAN ET AL., FED. COMMC'NS COMM'N, THE INFORMATION NEEDS OF COMMUNITIES 280 (2011) [hereinafter WALDMAN REPORT]; *see also id.* (maintaining that broadcast licensees "operate . . . as . . . trustee[s] for the public that own[s] [their] spectrum").

[4] Newton N. Minow, Chairman, Fed. Commc'ns Comm'n, Address at the National Association of Broadcasters Convention: Television and the Public Interest (May 9, 1961), *available at* http://www.americanrhetoric.com/speeches/newtonminow.htm ("When television is good, nothing — not the theater, not the magazines or newspapers — nothing is better. But when television is bad, nothing is worse. I invite each of you to sit down in front of your television set when your station goes on the air and stay there, for a day, without a book, without a magazine, without a newspaper, without a profit and loss sheet or a rating book to distract you. Keep your eyes glued to that set until the station signs off. I can assure you that what you will observe is a vast wasteland."). Much ink has been spilled on the gradual decline in both the compliance with and the enforcement of public interest obligations in broadcasting. *See generally* PUBLIC BROADCASTING AND THE PUBLIC INTEREST (Michael P. McCauley et al. eds., 2003); Byron L. Dorgan, Essay, *The FCC and Media Ownership: The Loss of the Public Interest Standard*, 19 NOTRE DAME J.L. ETHICS & PUB. POL'Y 443 (2005); Drew Simshaw, Note, *Survival of the Standard: Today's Public Interest Requirement in Television Broadcasting and the Return to Regulation*, 64 FED. COMM. L.J. 401 (2012).

tended them to cable companies.[5] There is good reason for the cable industry to assume the role of steward of the public interest: since its modest origins in the 1940s,[6] cable has evolved to become a dominant force in the nationwide media market. Today, the media marketing and research company Nielsen estimates that more than sixty percent of American households receive television programming via wired cable and more than half of America receives television programming via digital cable.[7] Compare those viewership figures to that for broadcast television, which Nielsen projected would be the sole source of television programming for a mere ten percent of Americans by the end of 2012.[8] These facts suggest that cable, more than broadcast television, ought to be well positioned to make effective Congress's commitment to further the public interest. Unfortunately, however, like its broadcast analogue, the regulatory regime for cable has failed to meet these lofty expectations and is in danger of being abandoned altogether.[9]

While some have heralded the death of television as an all-but-certain (and otherwise favorable) reality,[10] the decline in public interest obligations creates cause for concern because the content that flows over the air and underground still touches the lives of all Americans in profound ways. Television today stands as the predominant national pastime,[11] ranking among the most influential and pervasive features

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[5] The Communications Act, which predated cable television in the United States, did not expressly allow the FCC to impose any kind of public interest obligations on cable companies. When given the occasion to express an opinion on the matter in the late 1950s, the Commission concluded that because cable could not be construed as a "common carrier" of communications under the Act, the medium was outside the scope of its regulatory authority. Frontier Broad. Co. v. Collier, 24 F.C.C. 251, 253–54 (1958). However, when the Supreme Court was called upon to weigh in on the issue in the late 1960s, it ultimately found that "the Commission's authority over '*all* interstate . . . communication by wire or radio' permit[ted] the regulation of [cable] systems." United States v. Sw. Cable Co., 392 U.S. 157, 178 (1968) (first alteration in original) (emphasis added) (quoting 47 U.S.C. § 152(a) (1964)).

[6] *See History of Cable Television*, NAT'L CABLE & TELECOMM. ASS'N, http://www.ncta.com/About/About/HistoryofCableTelevision.aspx (last visited Dec. 1, 2012) (tracing the lineage of cable to media pioneers who erected community antennas to overcome poor over-the-air signal reception in rural areas across Arkansas, Oregon, and Pennsylvania).

[7] NIELSEN, TELEVISION AUDIENCE 2010 & 2011, at 4 (2011), *available at* http://nielsen.com/content/dam/corporate/us/en/reports-downloads/2011-Reports/2010-2011-nielsen-television-audience-report.pdf.

[8] *Id.*; *see also id.* app. at 31.

[9] Indeed, two recent pieces of legislation, introduced on the floors of the House and the Senate in the twilight of 2011, call for the wholesale repeal of cable television's already gutted public interest obligations. *See* Next Generation Television Marketplace Act of 2011, S. 2008, 112th Cong. (2011); Next Generation Television Marketplace Act, H.R. 3675, 112th Cong. (2011).

[10] *See, e.g.*, Derek Thompson, *The End of TV and the Death of the Cable Bundle*, ATLANTIC (July 12, 2012, 1:54 PM), http://www.theatlantic.com/business/archive/2012/07/the-end-of-tv-and-the-death-of-the-cable-bundle/259753.

[11] Brian Stelter, *Youths Are Watching, but Less Often on TV*, N.Y. TIMES, Feb. 9, 2012, at B1.

of modern society.[12] Every day, over 280 million Americans spend an average of nearly five hours sitting in front of their television sets.[13] The vast majority of these individuals — regardless of whether they reside in large urban centers, small townships, or rural communities — rely on television as their primary source for local news and information.[14] Public interest obligations ensure that informative and educational programming remains on our screens and accessible to the general populace. Put simply, without these regulations, television serves no better purpose than "a toaster with pictures."[15]

Much headway could be made by returning to one of the core tenets that initially undergirded the public interest–standard rationale for cable — namely, the advancement of localism.[16] "Despite the omnipresence of electronic networks, people still live in geographically defined clusters typically characterized by relative physical proximity to one another," and it is often within these bounded limits that citizens interact not only with one another but also with the institutions that govern them.[17] In recent years, though, the desertion of localism as a

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[12] *See* Heather Whipps, *Top 10 Life-Changing Inventions*, TECHNEWSDAILY (Mar. 4, 2011, 11:47 AM), http://www.technewsdaily.com/4900-ten-life-changing-inventions-.html.

[13] NIELSEN, THE CROSS-PLATFORM REPORT: QUARTER 4, 2011 — US, at 3, 4 (2012), *available at* http://nielsen.com/content/dam/corporate/us/en/reports-downloads/2012-Reports/nielsen-cross-platform-q4-2011.pdf. If one accounts for time- and space-shifted viewing in the home and on the go, the magnitude of television's impact on society is even more substantial. *See id.* at 4–5.

[14] *See* CAROLYN MILLER ET AL., PEW RESEARCH CTR., HOW PEOPLE GET LOCAL NEWS AND INFORMATION IN DIFFERENT COMMUNITIES 20 (2012), *available at* http://www.pewinternet.org/~/media//Files/Reports/2012/PIP_Local_News_and_Community_Types.pdf.

[15] Peter J. Boyer, *Under Fowler, F.C.C. Treated TV as Commerce*, N.Y. TIMES, Jan. 19, 1987, at C15 (internal quotation marks omitted) (recounting a comment made by former FCC Chairman Mark Fowler, who pushed for a free-market approach to television regulation during the 1980s).

[16] Some scholars argue, however, that the "public interest" cannot be conscribed to localism alone; rather, they contend that the term is open to numerous, equally plausible interpretations and, as a result, implicates the conflicting concerns of various constituents. *See, e.g.*, Charles F. "Chuck" Harrison, *Programming in the Public Interest Means Many Things*, *in* PUBLIC INTEREST AND THE BUSINESS OF BROADCASTING 131, 131 (Jon T. Powell & Wally Gair eds., 1988) ("Any discussion of the activities arising from the broadcaster's 'public interest' obligation can follow a number of different paths. Does it mean 'Public Affairs,' 'Public Service,' 'Community Service,' or another of a dozen titles given this type of programming?"); Thomas C. Sawyer, *The Evolving Public Interest*, *in* PUBLIC INTEREST AND THE BUSINESS OF BROADCASTING, *supra*, at 77, 77 ("Ironically, while the 'public interest' continues to be the cornerstone of our unique system of broadcasting in this country, its definition has always proven elusive."). *See generally* Benjamin W. Cramer, *Unasked Questions and Unquestioned Answers: The Perils of Assuming Diversity in Modern Telecommunications Policy*, 17 COMM. L. & POL'Y 265, 268–69 (2012) (detailing the difficulty that the FCC and others have faced in providing coherent meaning to the phrase "public interest" in telecommunications law and policy).

[17] Peter M. Shane, *Democratic Information Communities*, 6 I/S: J.L. & POL'Y FOR INFO. SOC'Y 95, 97 (2010); *see also id.* at 98 (stressing that, although matters of national consequence such as presidential elections tend to garner the bulk of public attention, "the public officials *most* responsible for the impact of government on the quality of Americans' day-to-day lives are typi-

guiding principle in cable regulation has threatened to undermine the sustained maintenance of our democratic system. Traditional, area-specific journalistic enterprises such as regional newspapers and local radio stations have seen sharp dips in readership and listenership, respectively,[18] spurring widespread closures that have left some communities without any serious outlet for local news.[19] A lack of information flow to and from local communities has the potential to discourage civic engagement,[20] promote political corruption, waste government resources, and produce a generally uninformed electorate.[21] A 2011 report on the state of the media, produced on behalf of the FCC by a bipartisan assembly of policymakers, journalists, communications scholars, and legal practitioners, put it this way: "We face not a broad crisis of 'the news' or 'content' — but something much more specific: a shortage of local, professional accountability reporting."[22] Ultimately, policies that hew to a clearer conception of the public interest, centered on the representation of *local* interests, would better satisfy the information needs of communities.

This Note proceeds in three parts. Part I provides an overview of the history behind public interest obligations in broadcasting and cable and contrasts the Commission's bases for, ends in, and means of regulating each industry. Part II reviews the issues plaguing the cable industry's existing public interest–obligation regime. Specifically, this Part examines the issues pertaining to set-aside cable capacity for public, educational, and governmental channels and to must-carry and retransmission-consent election rights for broadcasters. This Part also offers a series of normative legal and policy recommendations and engages with counterarguments hinged upon the practicality and political feasibility of these proposals' implementation. Part III briefly explains why, despite their presumed availability, alternatives such as satellite television and the internet cannot satisfy local interests to the same extent that cable can.

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cally elected or appointed by the states, counties, and cities or towns in which we live" (emphasis added)).

[18] *See* WALDMAN REPORT, *supra* note 3, at 62; Rick Edmonds et al., *Newspapers: By the Numbers*, STATE OF THE NEWS MEDIA, http://stateofthemedia.org/2012/newspapers-building-digital-revenues-proves-painfully-slow/newspapers-by-the-numbers (last visited Dec. 1, 2012).

[19] *See* Rachel Smolkin, *Cities Without Newspapers*, AM. JOURNALISM REV., Apr.–May 2009, at 16, *available at* http://www.ajr.org/Article.asp?id=4755.

[20] *See, e.g.*, Sam Schulhofer-Wohl & Miguel Garrido, *Do Newspapers Matter? Short-Run and Long-Run Evidence from the Closure of the Cincinnati Post* 13–23 (Nat'l Bureau of Econ. Research, Working Paper No. 14817, 2009), *available at* http://www.nber.org/papers/w14817.pdf (detailing the negative impact that the closure of a small daily newspaper in Ohio had on voter turnout, the number of candidates running for local office, and campaign spending).

[21] WALDMAN REPORT, *supra* note 3, at 345.

[22] *Id.*

## I. A HISTORY OF PUBLIC INTEREST OBLIGATIONS

Although broadcast and cable both nominally fall under the umbrella of "television," the bases, ends, and means of FCC regulation of each of these media differ quite markedly. The government's basis for regulation of broadcasting stemmed from concerns regarding spectrum scarcity, and the primary end the government sought to achieve was the balanced presentation of political views. The particular means chosen to attain this end — known colloquially as the fairness doctrine — constituted one of the broadcast industry's earliest and most notable content-based regulations. In a 1949 report on the practice of editorializing by broadcast licensees, the Commission formally set out broadcasters' role in advancing the public interest by imposing upon them a standard duty comprised of two essential elements: (1) "the making of reasonable provision for the discussion of controversial issues of public importance in the community served" and (2) the presentation of "different attitudes and viewpoints concerning these vital and often controversial issues."[23] When the fairness doctrine came under constitutional attack in 1969, the Supreme Court affirmed its validity, holding that government regulation of the broadcast industry was justifiable given the scarcity of broadcast spectrum and the nature of such spectrum as public property.[24] Over time, however, the FCC's steadfast adherence to the fairness doctrine waned, as journalists and other members of the public complained of the chilling effects that attended compulsory ideological equity[25] and as once-commonly accepted notions of informational paucity receded from the political discourse.[26] The fairness doctrine was formally abandoned in 1985,[27] and in 2011, the Commission excised from its records all remaining references to the term.[28]

The government rationale for the regulation of cable, conversely, is derived from cable operators' access to public rights-of-way for the

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[23] Editorializing by Broad. Licensees, 13 F.C.C. 1246, 1249 (1949).

[24] *See* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 375, 390 (1969).

[25] *See* Val E. Limburg, *Fairness Doctrine*, MUSEUM OF BROADCAST COMM., http://www.museum.tv/eotvsection.php?entrycode=fairnessdoct (last visited Dec. 1, 2012).

[26] That said, spectrum scarcity still appears to present a bit of a political problem, as evidenced by the FCC's recent greenlighting of "incentive auctions," a process by which the Commission is empowered to reclaim excess broadcast airwaves and auction them off to cell phone companies seeking additional spectrum for data-intensive wireless broadband services. *See* Edward Wyatt, *F.C.C. Backs Proposal to Realign Airwaves*, N.Y. TIMES, Sept. 29, 2012, at B1.

[27] *See* Inquiry into Section 73.1910 of the Comm'n's Rules and Regulations Concerning the Gen. Fairness Doctrine Obligations of Broad. Licensees, 102 F.C.C.2d 145, 147 (1985).

[28] *See* Broadcast Applications and Proceedings; Fairness Doctrine and Digital Broadcast Television Redistribution Control; Fairness Doctrine, Personal Attacks, Political Editorials and Complaints Regarding Cable Programming Service Rates, 76 Fed. Reg. 55,817 (Sept. 9, 2011); *FCC Drops "Fairness Doctrine,"* FOXNEWS.COM (Aug. 22, 2011), http://www.foxnews.com/politics/2011/08/22/fcc-to-drop-fairness-doctrine.

laying of cable lines, which, if left unmediated, would give such operators an inordinate amount of control in shaping the very "*content* to which their viewers have access."[29] Employing different means from those used in broadcasting, the FCC has engaged in predominantly structural regulation vis-à-vis the cable industry, focusing on the end of furthering local interests by (1) directing cable companies to set aside a portion of their channel capacity for public, educational, and governmental (PEG) use and (2) allowing broadcasters to obtain cable carriage via must-carry and retransmission consent rules.[30]

Unlike broadcasters, which are awarded licenses pursuant to regulatory procedures defined and managed by the FCC directly,[31] cable companies typically must petition municipal boards, commissions, city councils, or other governmental organs (known collectively as local franchising authorities or "LFAs") to obtain franchises allowing them to provide cable service to a particular area or neighborhood.[32] These franchising authorities enjoy a fair degree of autonomy in establishing the criteria under which prospective franchisees may be evaluated, and since the 1960s, many of them have made the provision of PEG channels a binding term in their franchise agreements.[33] Agency support for modern-day PEG channels dates back to the late 1960s and early 1970s, when the FCC first prescribed that cable companies reserve a certain number of channels for public, educational, and governmental access and furnish the facilities and equipment necessary for would-be community enterprisers to produce local original content.[34] However, in its 1979 decision in *FCC v. Midwest Video Corp.*,[35] the Supreme

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[29] Steve Mitra, Note, *The Death of Media Regulation in the Age of the Internet*, 4 N.Y.U. J. LEGIS. & PUB. POL'Y 415, 425 (2001) (emphasis added).

[30] Aside from PEG channels, must-carry, and retransmission consent, the FCC also moderates the business of cable television through leased-access regulations. Out of concern over the cable ownership market's increasing domination by a shrinking pool of large media conglomerates, Congress enacted the Cable Communications Policy Act of 1984 (1984 Cable Act), Pub. L. No. 98-549, 98 Stat. 2779 (codified as amended in scattered sections of 47 U.S.C.), an express purpose of which was to "promote competition in the delivery of diverse sources of video programming and to assure that the widest possible diversity of information sources are made available to the public." 47 U.S.C. § 532(a) (2006). To this end, Congress included within the Act a provision requiring most cable companies to give independent commercial programmers leased access to up to fifteen percent of their channel capacity. *See id.* § 532(b)(1)(A)–(C). However, because this purpose does not directly coincide with the localistic one at issue in this Note, neither the mechanics nor the implications of leased access will be considered henceforth.

[31] *See generally* KENNETH C. CREECH, ELECTRONIC MEDIA LAW AND REGULATION 130–45 (4th ed. 2003) (providing an extensive overview of the license and renewal process in broadcasting).

[32] *Id.* at 148.

[33] *See, e.g.*, 1 DANIEL L. BRENNER ET AL., CABLE TELEVISION AND OTHER NONBROADCAST VIDEO § 6:29, at 6–39 (2009).

[34] *See* KIMBERLY A. ZARKIN & MICHAEL J. ZARKIN, THE FEDERAL COMMUNICATIONS COMMISSION: FRONT LINE IN THE CULTURE AND REGULATION WARS 139 (2006).

[35] 440 U.S. 689 (1979).

Court pushed back against the Commission and struck down these requirements, declaring that PEG regulations were outside the ambit of the agency's statutory dominion[36] and that the "authority to compel cable operators to provide common carriage of public-originated transmissions must come specifically from Congress."[37] Congress, in passing the Cable Communications Policy Act of 1984[38] (1984 Cable Act) five years later, answered the Court's call with a measured response, assigning LFAs the right — though not the duty — to require cable operators to establish PEG channels.[39] The length of the franchise terms (oftentimes lasting between ten and fifteen years) and the necessity for cable operators to interface with LFAs made the renewal process "much more intimate than the federal government's postcard renewal used with broadcasters."[40] In addition, the Act generally prohibits these companies from moderating the content of PEG channels.[41]

The passage of the Cable Television Consumer Protection and Competition Act of 1992[42] (1992 Cable Act), which compels cable companies to apportion up to one-third of their channel capacity for the transmission of local broadcast signals to their customers,[43] marked another significant move by the FCC in the direction of structural, local regulation. The constitutionality of these so-called "must-carry" provisions was upheld by the Supreme Court in the mid-1990s in *Turner Broadcasting System v. FCC*.[44] After remanding the case upon first review for further evidentiary development,[45] the Court ultimately concluded by a narrow 5–4 margin that "must-carry serves the Government's interests [in preventing the collapse of local broadcast stations] 'in a direct and effective way'"[46] by "ensur[ing] that a number of local broadcasters retain cable carriage, with the concomitant audience access and advertising revenues needed to support a multiplicity of stations."[47]

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[36] *Id.* at 708.

[37] *Id.* at 709.

[38] Pub. L. No. 98-549, 98 Stat. 2779 (codified as amended in scattered sections of 47 U.S.C.).

[39] *See* 47 U.S.C. § 531(a) (2006).

[40] Constance Ledoux Book, *The People and the Cable Guy: Federally Empowered Public Interest Standards*, *in* COMMUNICATION AND LAW 333, 335 (Amy Reynolds & Brooke Barnett eds., 2006).

[41] *See* 47 U.S.C. § 531(e). Cable companies may exercise editorial control over PEG programming only when such programming features nudity or obscene or indecent content. *Id.*

[42] Pub. L. No. 102-385, 106 Stat. 1460 (codified as amended in scattered sections of 47 U.S.C.).

[43] *Id.* sec. 4, § 614(a), (b)(1), 106 Stat. at 1471; *see also* 47 U.S.C. § 534(a), (b)(1).

[44] 520 U.S. 180 (1997); *see id.* at 185.

[45] *See* Turner Broad. Sys. v. FCC, 512 U.S. 622, 668 (1994) (plurality opinion).

[46] *Turner*, 520 U.S. at 213 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 800 (1989)).

[47] *Id.*

Broadcasters' access to cable operators' channels and customers is not limited to that provided by must-carry rules alone. Pursuant to a triennial review process required by FCC regulations, local commercial broadcast stations are entitled either to elect carriage in accordance with the Commission's must-carry rules or to engage in "retransmission consent" negotiations.[48] Retransmission consent allows broadcasters — especially those with highly valuable programming — to deal directly with local cable stations to strike licensing agreements and obtain lucrative consent fees.[49] Those broadcasters would generally prefer not to use must-carry, which guarantees them cable carriage and preferred channel location but bars them from seeking compensation for their content.[50] Under the retransmission-consent regime, however, this local broadcast content cannot appear on cable stations unless and until a deal is reached between the parties.[51]

Certainly, the justificatory shift from spectrum scarcity to public access, as well as the evolution of structural regulation in the television industry, reflects a maturation in the FCC's regulatory scheme that, in theory, better suits the public's interest in localism. Yet the problems that have blighted the existing public interest–obligation regime in cable can be attributed not to the Commission's choice of regulatory approach but rather to the ways in which that approach operates (or, more accurately, does not operate) in actuality. Part II reviews these problems in detail.

## II. PROBLEMS WITH EXISTING PUBLIC INTEREST OBLIGATIONS FOR CABLE AND PROPOSALS FOR REFORM

### *A. PEG Channels*

*1. Funding.* — Funding for PEG channels comes primarily from franchise fees that are levied on cable companies and paid to municipalities.[52] By statute, these fees are capped at five percent of cable operators' gross revenues.[53] Media access centers — which house PEG

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[48] 47 C.F.R. § 76.64(f)(2) (2011).

[49] *See Cable Carriage of Broadcast Stations*, FED. COMM. COMMISSION, http://www.fcc.gov/guides/cable-carriage-broadcast-stations (last updated May 26, 2011); *see also* Philip M. Napoli, *Retransmission Consent and Broadcaster Commitment to Localism*, 20 COMMLAW CONSPECTUS 345, 347 (2012) (reporting that retransmission revenues have climbed from approximately $215 million in 2006 to a projected $1.46 billion in 2011).

[50] *See Cable Carriage of Broadcast Stations*, *supra* note 49.

[51] *Id.*

[52] *See* CHARLES B. GOLDFARB, CONG. RESEARCH SERV., R42044, PUBLIC, EDUCATIONAL, AND GOVERNMENTAL (PEG) ACCESS CABLE TELEVISION CHANNELS: ISSUES FOR CONGRESS 1 (2011), *available at* http://www.natoa.org/CRS%20PEG%20Report%2010-7-11.pdf; *see also* 47 U.S.C. § 542 (2006) (setting out the rules governing franchise fees).

[53] 47 U.S.C. § 542(b).

stations and serve as sites for PEG programming production — were designed to function as community hubs, providing neighborhood groups with meeting space and digital literacy training, among other resources.[54] However, budget cuts pose perhaps the most significant and long-term threat to the sustainability of the PEG system. Existing law does not require any of the franchise fees generated for municipalities to be distributed to PEG channels,[55] and as a result, very little of the money in fact is.[56] State legislatures in Nevada, Kansas, Missouri, and South Carolina have absolved new cable operators of any obligation to provide funding and technical support to PEG channels, and many other states have implemented sunset provisions that allow for the gradual phaseout of these obligations for incumbent cable operators.[57] The veritable proof of such policies is in the pudding: in a survey of 165 PEG media access centers, nearly half of all respondents reported average funding losses of forty percent between 2005 and 2010, and since 2005 alone, over 100 of these centers have shuttered.[58]

Two potential solutions may mitigate these centers' recurrent resource shortfalls: (1) encouraging LFAs to exercise their statutory authority to compel franchisees to support PEG channels through the maintenance of franchise fees and (2) identifying and establishing alternative funding sources. The 1984 Cable Act initially granted LFAs prescriptive powers to enforce only the provision of "services, facilities, or equipment proposed by the cable operator which relate to public, educational, or governmental use of channel capacity."[59] However, the 1992 Cable Act took a considerable step toward the continued maintenance of PEG channels, bestowing upon franchising authorities the additional right to "require adequate assurance that the cable operator will provide adequate . . . financial support" to such channels.[60] This revision reflects an apparent acknowledgement on the part of Congress of the fundamental inequity in "treat[ing] commitments for the *financial support* of PEG channels differently from commitments for the

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[54] *See* Colin Rhinesmith, *How Public Access TV Evolved into Community Media Centers*, PBS (Nov. 20, 2010), http://www.pbs.org/mediashift/2010/11/how-public-access-tv-evolved-into-community-media-centers324.html.

[55] *See* 47 U.S.C. § 542(i) ("Any Federal agency may not regulate the amount of the franchise fees paid by a cable operator, or regulate the use of funds derived from such fees . . . .").

[56] *See* WALDMAN REPORT, *supra* note 3, at 170 (noting that "about a third of public access centers operat[e] on budgets of less than $100,000 per year" and that "many are staffed almost entirely by volunteers").

[57] *See* GOLDFARB, *supra* note 52, at 12 tbl.1.

[58] ALLIANCE FOR COMMC'NS DEMOCRACY, ANALYSIS OF RECENT PEG ACCESS CENTER CLOSURES, FUNDING CUTBACKS AND RELATED THREATS 2 (2011), *available at* http://www.theacd.org/uploaded_docs/2011_PEG_Access_study_1.pdf.

[59] 47 U.S.C. § 531(c).

[60] *Id.* § 541(a)(4)(B).

*setting aside* of the channels themselves."[61] LFAs should be prompted to remedy persistent budget challenges facing PEG channels by simply making PEG-channel funding a mandatory term in franchise agreements.[62]

Alternative sources of funding could also be secured by importing the funding model used for public broadcasting. The Corporation for Public Broadcasting (CPB), established by the Public Broadcasting Act of 1967[63] and sponsored entirely by the federal government, is a nonprofit corporation that serves as the nation's single largest source of funding for public media.[64] In order to eliminate the threat of undue political influence on CPB, Congress withheld from it any authority to produce, distribute, or moderate programming content. Instead, CPB's primary purpose — at least with regard to television — is to disburse funds to noncommercial educational stations (NCEs) like PBS, which also receives funding from a mix of sources, including member stations, private foundations, regulatory agencies, corporations, and "viewers like you."[65] Increased funding from a CPB-style organization, as well as from private individuals and others, could ensure that the doors to PEG media access centers are kept open.

However, it is perhaps worth noting that the foregoing recommendations may not be equally palatable from a pragmatic or political standpoint. Although nothing prevents LFAs from incorporating requirements for sustained funding of PEG channels as nonexcisable terms in cable franchise agreements, creating a CPB-like entity may prove far more difficult, as doing so would require congressional consensus on the issue (which may be challenging to build, particularly in divisive political times such as these[66]). That said, it may be easier simply to broaden the scope of the CPB's authority to allow it

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61 1 BRENNER ET AL., *supra* note 33, § 6:33, at 6-46.3 (emphases added).

62 How such payments should be considered in light of the five-percent franchise-fee cap is a matter of debate. *See, e.g.*, *id.* § 6:33, at 6-46.3 to -48.

63 Pub. L. 90-129, 81 Stat. 365 (codified at 47 U.S.C. §§ 390–399).

64 *About CPB*, CPB, http://www.cpb.org/aboutcpb (last visited Dec. 1, 2012).

65 *Producing for PBS: Funding*, PBS, http://www.pbs.org/producing/funding (last updated Jan. 2012). The quality of PBS programming has garnered near-universal acclaim, earning the network of independent television companies the title of "most-trusted institution in America" in 2012 for the ninth year in a row. *See* Press Release, PBS, PBS Is #1 in Public Trust (Feb. 27, 2012), *available at* http://www.pbs.org/about/news/archive/2012/pbs-most-trusted. However, most of this programming highlights issues of *national*, not *local*, significance. WALDMAN REPORT, *supra* note 3, at 157–58.

66 *See* Josh Stearns, *Not Again: House Subcommittee Moves to End Public Media Funding*, FREEPRESS (July 18, 2012), http://www.freepress.net/blog/2012/07/18/not-again-house-subcommittee-moves-end-public-media-funding (recounting congressional efforts to gradually eliminate federal funding for local PBS and NPR stations by 2015).

to fund entities that fall outside the traditional definition of public broadcasters.[67]

*2. Statewide Cable Franchises.* — As mentioned in Part I, cable franchising authority has typically resided with cities, counties, and other subdivisions of state government.[68] Since 2005, however, state legislatures have increasingly moved away from traditional models of local cable franchising and have enacted statutes that hand exclusive regulatory power to state agencies.[69] As a result, large incumbent cable companies can avoid the hassle of brokering city-by-city deals with LFAs[70] and often are given preference over potential entrants in the renewal of franchises.[71] In some ways, this default rule makes sense: Historically, cable television franchises, like local telephone companies, were thought of as natural monopolies whose privileged positions were justified by (1) the high capital costs that they would have to incur in order to establish a dominant presence in a new market, (2) the economies of scale that could ultimately be realized after gaining such a foothold,[72] and (3) a widely held belief that avoiding duplicative facilities and services promotes efficiency.[73] Furthermore, long-term relationships forged between incumbents and influential constituencies (namely, businesspeople, government bodies, and other relevant stakeholders) typically inure to the benefit of all parties involved.[74]

However, on balance, the lightening of public interest obligations has done a disservice to local communities. Statewide franchisees are often subject to PEG requirements that are less rigorous than those imposed by LFAs,[75] and their lack of local presence removes any mea-

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[67] *See* WALDMAN REPORT, *supra* note 3, at 356.

[68] *See supra* p.1039.

[69] *See* 1 BRENNER ET AL., *supra* note 33, §§ 3:10–3:11, at 3-17; *see also id.* § 3:11, at 3-17 to -22 (reviewing more than ten states' laws preempting local franchising).

[70] *See* GOLDFARB, *supra* note 52, at 2. For a defense of statewide franchising, see James G. Parker, Note, *Statewide Cable Franchising: Expand Nationwide or Cut the Cord?*, 64 FED. COMM. L.J. 199 (2011).

[71] *See* GOLDFARB, *supra* note 52, at 2.

[72] *See* Thomas W. Hazlett, *Cable TV Franchises as Barriers to Video Competition*, VA. J.L. & TECH., Winter 2007, at 1, 6, *available at* http://www.vjolt.net/vol12/issue1/v12i1_a2-Hazlett.pdf.

[73] *See* Jonathan E. Samon, Comment, *When "Yes" Means No: The Subjugation of Competition and Consumer Choice by Exclusive Municipal Cable Franchises*, 34 SETON HALL L. REV. 747, 761–62 (2004). The wisdom of these assumptions is disputable, however, as one could easily challenge the deep-seated notion that cable companies *must* be treated as natural monopolies. Indeed, if a cable company's outlay of capital expenses is disaggregated from the delivery of local content on the whole, then the argument in favor of such entrenched cable franchises becomes much more vulnerable to attack.

[74] *Cf.* Sanford C. Gordon & Dimitri Landa, *Do the Advantages of Incumbency Advantage Incumbents?*, 71 J. POL. 1481, 1482–83 (2009) (describing advantages of incumbency in the context of electoral political dynamics).

[75] *See* ALLIANCE FOR CMTY. MEDIA ET AL., STATE CABLE FRANCHISE LAWS AT A GLANCE 2–6 (2011), *available at* http://www.allcommunitymedia.org/wp-content/uploads/2011

ningful notion of community accountability or social investment. Statewide franchising also exacerbates an already troubling problem: de facto exclusive franchises. Before the 1990s, LFAs often pitted competing cable companies against one another in a bidding war to determine which of the companies would receive an exclusive franchise to provide cable service to the area at issue.[76] Congress, in the 1992 Cable Act, outlawed not only the practice of exclusive franchising but also the "unreasonabl[e] refus[al] to award an additional competitive franchise" if an eligible operator sought to enter a market with an existing cable franchise.[77] Despite this action, however, sufficient levels of competition have yet to be realized in cable markets. Today, about ninety-five percent of all households are served by only one cable provider,[78] and between 1996 and 2003, cable rates climbed by more than forty percent (nearly triple the national rate of inflation during the same period).[79] Overbuilds — cable systems that are built on top of those owned by existing franchisees in an effort to stir competition — are fairly rare and have proved largely ineffective at overcoming the challenges that inhere in incumbency,[80] so increasing cable companies' coverage areas statewide will only make the prospect of competition less likely. Accordingly, Congress should amend the 1984 Cable Act to ensure that franchising authority remains exclusively in the hands of local municipalities.

Of course, minimizing the damage of statewide incumbency poses its own set of political challenges. Theoretically, one straightforward fix would be to change the "may" in § 531(a) of the 1984 Cable Act[81] to "shall," thereby compelling LFAs to ensure the long-term viability of the PEG system. Unfortunately, though, the FCC is not empowered to

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/08/States-at-a-Glance-Franchise-Rules.pdf (reporting reductions in channel capacity and capital expenditures across numerous states); *see also* GOLDFARB, *supra* note 52, at 2.

[76] T. BARTON CARTER ET AL., MASS COMMUNICATION LAW IN A NUTSHELL 593 (6th ed. 2007).

[77] 47 U.S.C. § 541(a)(1) (2006).

[78] MARK COOPER, MEDIA OWNERSHIP AND DEMOCRACY IN THE DIGITAL INFORMATION AGE 140 (2003).

[79] *Id.* at 143 & fig.VI-3.

[80] *See* Steven A. Augustino, *The Cable Open Access Debate: The Case for a Wholesale Market*, 8 GEO. MASON L. REV. 653, 668 (2000) ("[H]igh entry barriers to the cable overbuild market — including prohibitive costs of installing cable facilities, onerous franchising requirements and building access problems — effectively insulate the market power of incumbent cable systems."); Kent D. Wakeford, Note, *Municipal Cable Franchising: An Unwarranted Intrusion into Competitive Markets*, 69 S. CAL. L. REV. 233, 236 n.12 (1995) ("In order for the competing overbuild company to be profitable it must penetrate enough households to cover the amortized costs of entry and costs of operating the cable system, including municipal fees and services. . . . As a result the economic viability of the competitive overbuild is questionable.").

[81] *See* 47 U.S.C. § 531(a) ("A franchising authority *may* establish requirements in a franchise with respect to the designation or use of channel capacity for public, educational, or governmental use . . . ." (emphasis added)).

force state or local governments to fund (or even create) PEG channels,[82] so this proposal remains a political nonstarter. Even the more limited proposal to prohibit the granting of statewide franchises would present a formidable political challenge, as such action would still require an amendment of the 1984 Cable Act. Moreover, under *Nixon v. Missouri Municipal League*,[83] "federal legislation threatening to trench on the States' arrangements for conducting their own governments should be treated with great skepticism," and courts are instructed to interpret such legislation "in a way that preserves a State's chosen disposition of its own power, in the absence of [a] plain statement" by Congress to the contrary.[84] Assuming Congress made a "clear statement" to the effect of eliminating statewide franchising, however, franchising power could be placed rightfully within the grasp of LFAs. Incumbency advantages would no doubt still persist, but a reemphasis on the relationship between existing cable companies and local municipalities would diminish their effects.[85]

*3. Use of Unclaimed PEG Channels.* — Another problem stems from the fact that channels that have been designated for PEG use but are not being utilized for such purposes may, with the blessing of the relevant franchising authority, be reclaimed by the cable operator and operated commercially.[86] The presumption in favor of use by existing cable operators in the event that PEG channels go underutilized gives cable companies an incentive to undermine PEG stations' viability and seek out programming that generates stronger returns.[87]

However, this presumption could be amended to favor local interests. Section 611 of the 1984 Cable Act grants LFAs the authority to design "(1) rules and procedures under which . . . cable operator[s] [are]

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[82] WALDMAN REPORT, *supra* note 3, at 301.

[83] 541 U.S. 125 (2004).

[84] *Id.* at 140.

[85] *Cf. generally* Mark A. Zupan, *Cable Franchise Renewals: Do Incumbent Firms Behave Opportunistically?*, 20 RAND J. ECON. 473 (1989) (arguing that "[t]he ability of operators to exploit the advantages of incumbency is constrained by the fact that an operator's nonsalvageable investments have value to only one buyer: the *city* in which the investments have been sunk," *id.* at 475 (emphasis added), and that "the counteracting monopsony power a city can exert may be substantial" relative to "the monopoly power opportunistic operators may exercise," *id.*, given the reputational consequences of acting opportunistically, *id.* at 476).

[86] *See Public, Educational, and Governmental Access Channels ("PEG Channels")*, FED. COMM. COMMISSION, http://www.fcc.gov/guides/public-educational-and-governmental-access-channels-peg-channels (last updated Dec. 20, 2011); *see also* 47 U.S.C. § 531(d).

[87] *See* Comments of the Alliance for Community Media et al., *In re* Implementation of Section 302 of the Telecommunications Act of 1996 (Fed. Commc'ns Comm'n) (No. 96-46), *available at* http://transition.fcc.gov/Bureaus/Cable/comments/csacmacd.txt ("Section 611 of the 1984 Act creates an incentive to undercut community support for PEG access by permitting unused PEG channels to be reclaimed by the operator."); *cf.* William E. Lee, *Manipulating Legislative Facts: The Supreme Court and the First Amendment*, 72 TUL. L. REV. 1261, 1302 (1998) (referencing an analogous problem in the context of commercial leased access).

permitted to use such channel capacity for the provision of other services if such channel capacity is not being used for the purposes designatod [sic], and (2) rules and procedures under which such permitted use shall cease."[88] The implementation of "good-faith" requirements would penalize passive cable service providers who simply sit on their excess channel capacity and would reward operators who develop a record of activity with regard to attracting PEG programming. Thus, LFAs should require cable franchisees to actively seek out PEG channel programming or else face a reclamation of their unused channel capacity. Once reclaimed, these excess channels could be assigned to other programmers, with preference given to local NCEs.

The reclamation of unused channel capacity designated for PEG channels faces few practical or political hurdles. Indeed, a version of the aforementioned good-faith requirement is already on the books in Ohio,[89] and some municipal franchise agreements contain provisions allowing LFAs to reclaim channel capacity.[90] Of course, this recommendation may not ultimately guarantee fair *treatment* for such stations. In recent years, cable companies have exhibited favoritism toward commercial programming by migrating PEG channels to lower-quality, hard-to-find tiers in their channel lineup[91] and making such channels accessible only through complicated interfaces that fall below industry standards.[92] Therefore, LFAs could go one step further by incorporating nondiscrimination provisions into franchise agreements to act as a backstop against the practices of wily franchisees.[93]

*4. Disclosure of PEG Ratings Information.* — One question that has yet to be answered by this Note is whether PEG channels are even effective in meeting the public's needs for local and community programming. Cable companies are not obligated to collect information

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[88] 1984 Cable Act § 611(d)(1)–(2) (internal quotation marks omitted).

[89] *See* OHIO REV. CODE ANN. § 1332.30(A)(1)(a) (West 2012) ("Any [PEG] channel may be reclaimed if it is not substantially utilized. . . . [A] PEG channel is 'not substantially utilized' when fewer than forty hours of noncharacter-generated content are programmed on that channel each week and less than sixty per cent of the programming is nonrepeat and locally produced.").

[90] *See, e.g.*, Columbia Heights, Minn., Ordinance 1583 § 11.106(A)(3) (Aug. 9, 2010), *available at* http://www.ci.columbia-heights.mn.us/DocumentCenter/Home/View/373.

[91] Brian T. Grogan, *Meeting New Challenges for Cities Negotiating with Telecommunications Providers*, *in* NAVIGATING MUNICIPAL TELECOMMUNICATIONS ISSUES 49, 52 (Jo Alice Darden ed., 2010).

[92] *See, e.g.*, Comments of Free Press at 10–15, Petition for Declaratory Ruling of the Alliance for Community Media et al. (Fed. Commc'ns Comm'n 2009) (No. 09-13), *available at* http://www.freepress.net/files/FP_Initial_Comments_PEG.pdf.

[93] *See, e.g.*, Columbia Heights, Minn., Ordinance 1583 § 11.106(A)(4) ("Any PEG Access Channel reassignment must be to a Channel that meets or exceeds the service and technical standards required by this Franchise.").

relating to PEG ratings or viewer demographics,[94] so it remains difficult for operators of these stations to measure the degree to which PEG channels actually succeed in fulfilling their statutory purpose. For example, during a field visit to Cambridge Community Television (CCTV), the flagship public access station for Cambridge, Massachusetts, CCTV's executive director noted that although the city's resident cable franchisee voluntarily records PEG data, it withholds most television metrics from its PEG-channel partners.[95] Certain cities, however, have made the mandatory provision of this data a contractual term in cable franchise agreements. For example, the Seattle City Council passed an ordinance in 2006 requiring its cable franchisees to share viewership composition, demographic, and ratings information with PEG channels.[96] Cities nationwide should pass similar ordinances. Relying on this information, LFAs could seek to persuade cable companies to invest in PEG programming that appeals to primary- and secondary-school children, immigrants and members of non-English-speaking communities, and other audiences that would likely appreciate more targeted PEG offerings.

Forcing franchisees to provide PEG channels with ratings information via franchise agreements seems simple enough (and politically feasible). However, practically speaking, it would likely be difficult to compel cable companies to furnish such information, given that they hold the PEG-funding purse strings. Nevertheless, even if this recommendation proved unworkable, LFAs could use informal procedures in the franchise renewal process to meet the same goals. Before a new franchise may be issued to a prospective cable service applicant, the 1984 Cable Act requires LFAs to engage in "ascertainment proceedings," which involve notifying city residents about the pending consideration and soliciting public feedback on the proposal.[97] Mandating that cable companies successfully complete a more rigorous version of this process would help ensure that the interests of the public are aired and addressed and that issues of local moment are reflected in the franchise.[98]

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[94] *See* GOLDFARB, *supra* note 52, at 2 n.7 ("Audience measurement (ratings) data do not exist for PEG stations, in part because the audiences are small and in part because there is no commercial interest willing to bear the costs associated with audience measurement.").

[95] Interview with Susan Fleischmann, Exec. Dir., Cambridge Cmty. Television, in Cambridge, Mass. (Apr. 3, 2012).

[96] *See* Seattle, Wash., Ordinance 122089 § 6.10 (May 3, 2006), *available at* http://clerk.seattle.gov/~scripts/nph-brs.exe?s1=&s3=&s4=122089&s2=&s5=&Sect4=AND&l=20&Sect2=THESON&Sect3=PLURON&Sect5=CBORY&Sect6=HITOFF&d=ORDF&p=1&u=%2F~public%2Fcbory.htm&r=1&f=G.

[97] Book, *supra* note 40, at 336.

[98] *See id.* at 336–38. These proceedings are the spiritual successors to the Commission's ascertainment requirements for broadcast stations. *See id.* at 339. A 1971 FCC primer directed

### B. *Must-Carry and Retransmission Consent*

1. *Supporting Local News Media.* — The *Turner* Court's inference regarding the public utility of must-carry has not been borne out by actual practice. The findings of a number of empirical studies directly challenge *Turner*'s assumptions: residents in small- and medium-sized media markets tend to receive significantly less local news than do those in larger metropolitan areas, and more than one-third of commercial broadcast stations nationwide air little to no local news whatsoever.[99] Admittedly, recent data collected by the Pew Research Center confirm that, despite the changing media landscape, local television remains the most popular source of news for the majority of Americans.[100] This hopeful factoid, however, is belied by two important details: (1) among the outlets that citizens identify most frequently as their primary source for *civic* information, local television ranks relatively low;[101] and (2) the stories that are most heavily covered often touch on crime, accidents and disasters, and business news, with proportionately less attention paid to public, educational, and community affairs (especially when compared to coverage of these topics in newspapers and on the radio).[102] These data suggest that must-carry, as currently constituted, in fact does little to further local interests.

Unfortunately, the FCC can do little to formally require local broadcast stations to offer more robust local news and community-centric programming, as its authority to regulate the content of such

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broadcasters to canvass neighborhoods and to meet regularly with area citizens to discover the kinds of programming that the viewing public wished to have featured on television. Simshaw, *supra* note 4, at 406–07. Eventually, ascertainment requirements gave way in the face of pressure from broadcasters, who argued that ratings provided an accurate measure of whether the public interest was in fact being satisfied. *See* Arthur C. Nielsen, Jr., *Television Ratings and the Public Interest*, *in* PUBLIC INTEREST AND THE BUSINESS OF BROADCASTING, *supra* note 16, at 61, 63 ("With the help of ratings, broadcasters know what we find most appealing and desire to view. Broadcasters have every incentive to please the public. Each of us votes every day by the simple process of turning our dials. What could be more democratic?"). Of course, the broadcasters' response begs a chicken-and-egg-type question: how can the public know what it wants — let alone what it truly *needs* — if it is never given the opportunity to voice its opinion and if broadcasters air only programming that yields high viewership and generates high advertising revenue? *Cf.* Jon T. Powell & Wally Gair, *Introduction* to PUBLIC INTEREST AND THE BUSINESS OF BROADCASTING, *supra* note 16, at 1, 10 ("Broadcasting can either lead and form public taste and opinion, or follow public taste, depending on your outlook. Chances are, it does both . . . .").

99 *See* WALDMAN REPORT, *supra* note 3, at 100–02.

100 *The Role of Local TV News*, JOURNALISM.ORG (Sept. 26, 2011), http://www.journalism.org/analysis_report/role_local_tv_news.

101 *Id.* fig.7 (comparing the percentage of adults relying on local television for breaking news coverage and weather reports (55% and 58%, respectively) with that of adults relying on local television for political news (28%)). Interestingly, more than one-third of African Americans and Hispanics identified local television as their preferred source of political news, whereas only a quarter of whites voiced the same preference. *Id.* fig.10.

102 *See* WALDMAN REPORT, *supra* note 3, at 85.

stations' offerings is narrowly delineated.[103] However, the federal government could instead put its resources into advertising for local news media. A 2007 Government Accountability Office report found that, although government advertising contract obligations reached nearly $5 billion between 2001 and 2005, more than eighty-five percent of these dollars went to the Departments of Defense, Treasury, and Health and Human Services.[104] The money that *is* spent on television tends to flow to national entertainment outlets (mainly because of the outsize reach that such programming has).[105] In 2011, FCC affiliates put forth a policy recommendation calling for the redistribution of government advertising expenditures to "help local news media models . . . gain traction and help create local jobs, while potentially making taxpayer spending more cost-effective."[106] The adoption of such a proposal would likely carry with it the additional benefit of stimulating greater local news coverage as well.

*2. Retransmission Consent Breakdown.* — Although it is often described as one of the media industry's most promising methods for meeting local communities' information needs,[107] retransmission consent is just as problematic as must-carry. Due to its guarantee of financial reward, this form of carriage has become increasingly popular: the proportion of broadcast stations electing retransmission consent has risen steadily since at least 2003, with less than forty percent of stations opting for must-carry in 2009.[108] Because retransmission con-

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[103] *See* MEDIA BUREAU, FED. COMMC'NS COMM'N, THE PUBLIC AND BROADCASTING: HOW TO GET THE MOST SERVICE FROM YOUR LOCAL STATION 12 (rev. 2008), *available at* http://fjallfoss.fcc.gov/edocs_public/attachmatch/DA-08-940A2.pdf ("Because the Commission cannot dictate to licensees what programming they may air, each individual . . . TV station licensee generally has discretion to select what its station broadcasts and to otherwise determine how it can best serve its community . . . .").

[104] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-877, FEDERAL ADVERTISING 13, 14 fig.1 (2007).

[105] *See* WALDMAN REPORT, *supra* note 3, at 334.

[106] *Id.* at 352.

[107] Indeed, during floor debates on the then-proposed retransmission consent provisions in the 1992 Cable Act, members of Congress repeatedly cited the advancement of local news and local interests as the principal rationales in favor of enactment. *See, e.g.*, 138 CONG. REC. H6493 (daily ed. July 23, 1992) (statement of Rep. Rodney Chandler) ("[I]f the retransmission consent option is not considered, we may find that local networks are unable to survive the increasing revenue losses. Who then would be left to cover the story on a local high school football team winning a State championship, or the heroics of a little girl whose 911 emergency call saved her mother's life?"); 138 CONG. REC. S643 (daily ed. Jan. 30, 1992) (statement of Sen. Daniel Inouye) ("[P]roviding local stations with the ability to negotiate with cable systems . . . is a necessary step . . . to ensure that local stations remain viable well into the future to continue to provide local service to cable subscribers and nonsubscribers alike.").

[108] *See* FED. COMMC'NS COMM'N, OBI TECHNICAL PAPER NO. 3, SPECTRUM ANALYSIS: OPTIONS FOR BROADCAST SPECTRUM 8 exhibit C (2010), *available at* http://download.broadband.gov/plan/fcc-omnibus-broadband-initiative-(obi)-technical-paper-spectrum-analysis-options-for-broadband-spectrum.pdf.

sent privileges large network affiliates who are already flush with cash, however, independent broadcast stations must often make the Hobson's choice to forgo this mode of carriage, reflecting "the natural advantage that nationally distributed programming enjoys over locally distributed programming."[109] In addition, frequent breakdowns in retransmission consent talks have in recent years led to widespread channel outages, since cable companies cannot afford to offer service sans deep-pocketed players like ABC, CBS, NBC, and Fox without risking widespread customer defections.[110] Making matters worse, the FCC's stance on the issue is one of express noninvolvement, as the Commission regularly declines to intervene in retransmission consent negotiations.[111] Admittedly, in March 2011, the FCC initiated notice-and-comment proceedings on proposals that, if adopted, would clarify the Commission's good-faith negotiation requirements and provide customers with earlier and more effective notifications regarding service disruptions.[112] Still, neither of these proposals will likely do much in the way of substantially mitigating the threat of deadlock.

Despite its statements to the contrary, the FCC *does* in fact have some authority to intervene in retransmission consent talks that have reached an impasse. Section 325 of the Communications Act grants the Commission the power to adopt regulations governing retransmission consent so long as they do not interfere with "the Commission's obligation . . . to ensure that the rates for the basic service tier are reasonable."[113] One of the more promising proposals in recent years calls on the FCC to exercise its statutory authority under § 325 to resolve deadlocked negotiations by designing binding dispute-resolution mechanisms that would activate automatically upon negotiation breakdown and by mandating that interim carriage be instituted during the pendency of a retransmission consent dispute.[114] Mandatory mediation and arbitration have proved effective in a variety of contexts in lower-

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[109] Christopher S. Yoo, *Rethinking the Commitment to Free, Local Television*, 52 EMORY L.J. 1579, 1659 (2003).

[110] *See, e.g.*, Brian Stelter & Bill Carter, *In Cable TV Fights, Consumers Wait to See Who Blinks*, N.Y. TIMES, Oct. 17, 2010, at A27.

[111] *See Cable Carriage of Broadcast Stations*, *supra* note 49 ("Generally, the FCC is not authorized to participate in discussions between television stations and cable systems regarding retransmission consent agreements.").

[112] *See* Amendment of the Commission's Rules Related to Retransmission Consent, 76 Fed. Reg. 17,071, 17,072 (proposed Mar. 28, 2011).

[113] 47 U.S.C. § 325(b)(3)(A) (2006).

[114] *See* Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent 32–33, 35–37 (Fed. Commc'ns Comm'n 2010) (No. 10-71), *available at* http://www.wileyrein.com/resources/documents/Retransmission%20Pet%20%20for%20Rulemaking.pdf; *see also* Matthew Lasar, *Time Warner Cable's Cure for the TV/Cable Wars*, ARS TECHNICA (May 6, 2010, 9:15 AM), http://arstechnica.com/tech-policy/2010/05/time-warner-cables-cure-for-the-tvcable-wars (summarizing proposals).

ing unnecessary and expensive negotiation costs, expediting parties' efforts to reach equitable settlements, and maintaining and repairing critical business relationships.[115]

This particular proposal, however, faces significant practical challenges. Because both sides of the table in retransmission consent negotiations are often profit-driven, implementing mandatory dispute resolution and interim carriage would do little to remove power from the hands of commercial interests. In addition, the content over which retransmission consent battles are fought tends to have negligible local or social value, as parties in recent years have typically taken to disputing who should get the largest slice of the pie for ratings mega-hits like the Academy Awards and the World Series.[116] One could argue further that interim carriage may actually *heighten* the threat of holdup by broadcasters — at least for some period of time — because cable companies would be likely to fold in the face of protracted blackouts that interrupt service for their customers. That said, the implementation of mandatory mediation and arbitration would function as a counterweight to broadcasters' power, as their incentive to remain recalcitrant would not be as great as it is in the existing regime.

*3. NCE Election of Retransmission Consent.* — Retransmission consent is currently limited to commercial broadcast stations, as the Communications Act restricts the carriage options of NCEs to must-carry alone.[117] Without a doubt, mandatory carriage is critical to the existence of NCEs, as there is "no free market for the carriage" of such stations.[118] Congress, in debates preceding passage of the 1992 Cable Act, acknowledged the value that a must-carry regime for NCEs has for cable operators, as it "relieves cable operators of the burden of canvassing the noncommercial stations in their communities to determine which ones are qualified for carriage."[119] Nevertheless, local interests could be further served if NCEs were accorded the same choice as their commercial counterparts to elect retransmission consent as well as must-carry. The key word here is *choice*: those NCEs that are

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[115] *See, e.g.*, Samuel Estreicher, *Predispute Agreements to Arbitrate Statutory Employment Claims*, 72 N.Y.U. L. REV. 1344, 1349 (1997) (referencing binding predispute agreements in the employment context); Erin Butcher-Lyden, Note, *The Need for Mandatory Mediation and Arbitration in Election Disputes*, 25 OHIO ST. J. ON DISP. RESOL. 531, 533 (2010) (advocating for federal legislation mandating dispute resolution in elections). Some scholars, however, find these virtuous assumptions dubious. *See, e.g.*, JOHN W. COOLEY, THE MEDIATOR'S HANDBOOK 21 (2d ed. 2006) (acknowledging the potentially coercive nature of mandatory mediation).

[116] *See* Will Richmond, *Will Cable TV Networks Kill Their Golden Goose?*, BUS. INSIDER (Mar. 22, 2011), http://articles.businessinsider.com/2011-03-22/entertainment/30011830_1_time-warner-cable-cable-networks-twc.

[117] *See* 47 U.S.C. § 535(a), (i)(1); *Cable Carriage of Broadcast Stations*, *supra* note 49.

[118] *See* Andrew D. Cotlar, *The Road Not Yet Traveled: Why the FCC Should Issue Digital Must-Carry Rules for Public Television "First,"* 57 FED. COMM. L.J. 49, 62 (2004).

[119] S. REP. NO. 102-92, at 88 (1991).

uncomfortable gambling with retransmission consent or that perhaps cannot offer commercially attractive programming can always take the conservative tack and require mandatory carriage, whereas more enterprising NCEs could pursue retransmission fees in order to recoup the costs of innovative productions. This proposal could have the effect of enhancing the quality of NCE programming because NCEs would be motivated to develop offerings that would be appealing to suitors from the cable industry.

From a practical perspective, however, allowing NCEs to elect retransmission consent would carry with it some potential drawbacks. First, "strong" NCEs that offer a vast library of high-quality programming (like PBS, for instance) would likely be better served by retransmission consent than the typical "weak" NCE (which does not have as large of a nationwide footprint or generate a significant revenue stream), so the benefits of such a strategy would most certainly be smaller than desired. Second, if an NCE opted for retransmission consent at the beginning of a three-year cycle but failed to reach an agreement with its relevant cable service provider, it could demand that its programming be pulled from cable immediately, a result that would entirely undermine the long-term stability of the NCE-cable relationship and negatively affect the viewing public. That said, if retransmission consent negotiations were governed by arbitration clauses and subject to interim carriage, then cable companies would have at least some recourse in the event of a retransmission consent impasse.

## III. CONSIDERATION OF OTHER MEDIA

Rather than imposing more stringent public interest obligations for cable, the government could take the alternative tack of applying such obligations to satellite television providers. Existing noncommercial carriage provisions require satellite companies to set aside at least four percent of their channel capacity for educational or informational use,[120] and these companies are constrained in the degree to which they can exercise editorial control over educational and informational content.[121] In addition, the recently enacted Satellite Television Extension and Localism Act of 2010[122] extended statutory licenses to secondary transmissions of local broadcast signals,[123] making it easier for satellite stations to retransmit local content to their national customer base. However, as evidenced above, the regulatory framework is much more robust for cable television than for satellite. Moreover, satellite

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120 47 C.F.R. § 25.701(f)(1) (2011).

121 *See id.* § 25.701(f)(3)(ii)–(iii).

122 Pub. L. No. 111-175, 124 Stat. 1218 (codified as amended in scattered sections of 17 U.S.C.).

123 *Id.* § 103, 124 Stat. at 1227.

penetration in the United States is much smaller than that of cable (reaching a mere thirty percent of American households in 2012[124]), and because satellite remains a "high-cost, niche distribution system,"[125] it has failed to counteract supracompetitive pricing by cable companies.[126] Therefore, cable television would seem to be the better candidate for the imposition of tighter public interest obligations.

Of course, the proverbial elephant in the room — that is to say, the internet — cannot be ignored. Given the sheer breadth of informational choice that new media offers consumers, the low cost at which content can be created on the web, and the degree to which everyday citizens may engage in the production and distribution of such content, why should cable companies alone bear such a great regulatory burden? Although the advent of the digital age has no doubt upended the traditional media landscape, the internet has not meaningfully enhanced the extent to which critical issues of local concern are being covered,[127] and it has made it more difficult for those focusing on such issues to sustain themselves financially.[128] Moreover, among all forms of media, the internet is the least regulated,[129] and there is still a sizable gap across numerous demographic groups in the degree of access to online technologies (deemed in communications policy parlance the

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124 *See* NIELSEN, *supra* note 7, at 4.

125 COOPER, *supra* note 78, at 139.

126 *See id.* at 140.

127 To be sure, blogs, social-networking sites, video-sharing platforms, and other new media have opened up innovative avenues for citizen journalism. *See, e.g.*, *About CNN iReport*, CNN IREPORT, http://ireport.cnn.com/about.jspa (last visited Dec. 1, 2012) (describing CNN's initiative to utilize user-generated content to complement local beat reporting). However, these media lack much of the aggregative and analytical value offered by traditional news sources. *See* Shane, *supra* note 17, at 98 ("The most highly trafficked news and information sites on the Web remain those affiliated with *national* media brands . . . ." (emphasis added) (citation omitted)). Moreover, the prevalence of free and widely available sources of information decreases the incentives for media outlets to invest in local news staff and resources, which has a direct impact on the quality of investigative reporting.

128 *See* WALDMAN REPORT, *supra* note 3, at 124–25.

129 This result is by no means accidental: the interjurisdictional and exceedingly complex nature of the internet makes it particularly challenging for a single U.S.-based agency to moderate alone. *But see generally* Jack Goldsmith, *Unilateral Regulation of the Internet: A Modest Defence*, 11 EUR. J. INT'L L. 135 (2000) ("[U]nilateral regulation of Internet transactions can be both effective and (from the perspective of jurisdiction) legitimate." *Id.* at 135–36.). That said, the FCC took its most notable step toward sweeping unilateral regulation of the internet in December 2010, when it promulgated network-neutrality rules prohibiting internet service providers from decelerating internet service speed on prejudicial grounds. *See In re* Preserving the Open Internet Broadband Industry Practices (Fed. Comm'cns Comm'n 2010) (No. 10-201), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-10-201A1.pdf. Still, the D.C. Circuit's opinion in *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010), holding that the FCC lacked the authority to regulate network management practices, *id.* at 644, casts serious doubt on the Commission's ability to implement these rules effectively. *See* Cecilia Kang, *FCC Approves Net-Neutrality Rules; Criticism Is Immediate*, WASH. POST (Dec. 22, 2010, 12:47 AM), http://www.washingtonpost.com/wp-dyn/content/article/2010/12/21/AR2010122106110.html.

"digital divide").[130] In addition, advertising revenues in cable topped $25 billion in 2011 and have moved steadily upward since at least 1999,[131] indicating that the internet's effect on the medium, thus far, has not been fatal.

## CONCLUSION

The goal of fostering localism should remain at the heart of public interest regulatory efforts with respect to the cable industry. No other medium is superior to cable in its ability to satisfy the needs of local information communities, and the most successful and practicable ways it can do so are through reforms in the PEG-channel system. Regardless of which of the aforementioned policy proposals are ultimately adopted, a renewed emphasis on localism will enhance the long-term viability of public interest obligations overall and, in so doing, will prevent television from regressing back to the "vast wasteland" of yesteryear.

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130 *See generally* KATHRYN ZICKUHR & AARON SMITH, PEW RESEARCH CTR.'S INTERNET & AM. LIFE PROJECT, DIGITAL DIFFERENCES (2012), *available at* http://pewinternet.org/~/media/Files/Reports/2012/PIP_Digital_differences_041312.pdf.

131 *See Cable Advertising Revenue: 1999–2011*, NAT'L CABLE & TELECOMM. ASS'N, http://www.ncta.com/Stats/AdvertisingRevenue.aspx (last visited Nov. 5, 2012).