Chapter 11: The Regulation of Cable Antenna Television Systems

Howard M. Miller
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§11.1. Introduction. On November 16, 1971, the Massachusetts General Court enacted emergency legislation establishing a comprehensive plan for the licensing and regulation of cable antenna television (CATV) systems.1 The legislation defines a CATV system as:

... a facility which receives and amplifies the signals broadcasted by one or more television stations and redistributes such signals to subscribing members of the public for a fixed or periodic fee, employing wires or cables passing along, over, under, across, and upon ... public places...., and including facilities which in addition to providing such reception, amplification and redistribution, are also used to originate and distribute program or other material to such subscribers.2

Although not widely available in Massachusetts, CATV has been in existence for over 30 years, and there has been an operating system in Massachusetts for over 20 years.3 In its simplest form CATV receives existing television broadcast signals by means of a giant antenna and redistributes the signals through a cable, similar to a telephone wire, connected to the homes of subscribers.4 It thereby provides subscribers with a studio quality picture free from the usual interference that accompanies a picture received through a frequency broadcast. Additionally, the giant antenna of the CATV operator is able to receive many more channels than are otherwise available to the home viewer with his

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2 G.L., c. 166A, §1(b).
3 FOUNDERS ANNEX PUBLIC SERVICE PROJECT, INC., CABLE IN MASSACHUSETTS 2 at 13 (Oct. 1972).
4 Indeed most CATV systems will employ the facilities of the local telephone company. Operators will rent space on the poles or in the trenches of the telephone companies, and will string their coaxial cables along the same routes of telephone wires. The cables will connect the homes of subscribers with the broadcasting or control unit of the operator, called the “lead-end.”
limited size antenna.\(^5\) In the immediate future CATV offers the possibility of a far wider range of educational, instructional, cultural and recreational programming, catering to a multitude of special interests in a community. In the more distant future its capacity for a two-way communication service will offer facsimile reproduction in the home of newspapers and other documents, computer links for information storage and retrieval, the reading of utility meters, at-home shopping, and municipal surveillance for fire protection, traffic control and protection against crime.\(^6\)

Despite its potential for wide appeal and use, the absence of statutory authorization for CATV has often been a restraint on its growth.\(^7\) Without specific legislation the power of municipalities to regulate CATV was unclear.\(^8\) Yet states were often reluctant to enact such legislation because of the belief that the Federal Communications Commission (FCC) had preempted or might ultimately pre-empt the field.\(^9\) In February of 1972 the FCC, after more than three years of deliberation, ended speculation regarding the nature of the regulatory scheme by adopting extensive regulations governing the operation of CATV.\(^10\) These regulations...

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\(^5\) The FCC regulations governing CATV (see §11.3, infra) require CATV systems to provide a 20-channel capability. 47 C.F.R. §76.251(a)(1) (1972).

\(^6\) For a detailed enumeration of CATV uses, see Notice of Proposed Rulemaking and Notice of Inquiry, 15 F.C.C.2d 417, 420 (1968).

\(^7\) Even without legislation the growth of CATV has been significant. For example, in 1952 there were only 70 CATV systems servicing 14,000 subscribers; in 1969 there were 2,260 systems serving 3,600,000 subscribers. TELEVISION DIGEST, INC., 39 TELEVISION FACTBOOK 79a (1969). As of Feb. 1, 1973, there were 2,895 CATV systems in existence. TELEVISION DIGEST, INC., CATV ADDENDA TO TELEVISION FACTBOOK NO. 42 1 (Feb. 5, 1973).

\(^8\) The Massachusetts Attorney General determined in 1968 that municipalities had only a limited power to regulate CATV. 1968 Rep. Atty. Gen. 182. Such power was found in G.L., c. 166, §§21, 25, which gave the municipalities the power to regulate the erection and maintenance of transmission lines that pass over or under public ways. Such regulation could not extend, however, to the general operations of the CATV operator, or to the type of service furnished to the public. The Attorney General left open the question of whether the Home Rule Amendment (Mass. Const., amend. art 89) gave municipalities broader power to regulate CATV by ordinance or by-law. Id. at 184. Furthermore, the municipality could not share in the revenues from a CATV system, since to do so would be viewed as an attempt to exercise a taxing power, which in Massachusetts exists only in the state. Id. at 185. This ruling was a significant stumbling block, since the sharing of revenue was a primary inducement to a community to allow the establishment of a CATV system.

At least one court has held that Ohio municipalities have no inherent power to regulate CATV systems that use only existing facilities of a regulated telephone company. Greater Fremont, Inc. v. City of Fremont, 302 F. Supp. 652 (N.D. Ohio, 1968).


\(^10\) 47 C.F.R. §§76, 78 (1972). The regulations became effective on March 8,
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...grant to the states and municipalities the authority to license the systems, while they authorize the FCC to approve such licenses and to establish standards for operation. With the enactment of the regulations by the FCC and the Massachusetts statute most of the legal restraints to the growth of CATV have been removed, albeit some questions remain unanswered. It is the purpose of this chapter to review the Massachusetts legislation; particular emphasis will be put on the interrelationship among the Commonwealth, its municipalities and the FCC. Part I will present a general overview of the state statute and the FCC regulations; Part II will analyze in detail the licensing process. Finally, Part III will deal with enforcement proceedings.

I. OVERVIEW OF THE REGULATORY SYSTEM

§11.2. The Massachusetts statute. The Massachusetts CATV statute created a new state agency called the Community Antenna Television Commission (the Commission). That agency has broad regulatory authority over the operations of the CATV industry, while the power to license CATV systems is given to the municipalities. In shaping the statute, the legislature drew from the expertise of the FCC in certain areas. The statute contains an "equal time" provision, for example, the application of which is to be guided by the decisions of the FCC on the

1972. Their promulgation followed extensive litigation over the FCC's authority to regulate the CATV industry. In 1968 the Supreme Court ruled that the FCC has jurisdiction to prevent a CATV operator from redistributing a "distant" signal (i.e., a signal that is not otherwise available to the viewer because of the distance of the broadcaster). U.S. v. Southwestern Cable Co., 392 U.S. 157 (1968). This jurisdiction is based on the FCC's broad power to regulate the use of broadcast signals granted by the Communications Act of 1934 (47 U.S.C. §§151 et seq. (1970)). Id. at 167-169. During the same term the Court ruled that a CATV operator was not liable for copyright infringement to a broadcaster whose signals were redistributed. Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968). More recently the Court has also upheld the FCC's authority to require that CATV operators originate, as well as redistribute, programs. U.S. v. Midwest Video Corp., 406 U.S. 649 (1972). The Court considered such power to be "reasonably ancillary" to the regulation of television broadcasting, Id. at 662-663, and to be in the public interest. Id. at 671. For an excellent discussion of the Southwestern case and a court of appeals decision in Midwest Video, which had invalidated the origination regulation, see Note, Cable Television: A Regulatory Dilemma, 13 B.C. Ind. & Com. L. Rev. 326, 345-352 (1971).

While the Massachusetts statute refers to a "license," the FCC regulations refer to a "franchise." There is no technical difference. For purposes of simplification the term "license" will be used throughout this chapter.

12 The FCC views CATV as neither a broadcaster nor a common carrier within the Communications Act of 1934. Rather, it views CATV as a hybrid that requires identification and regulation as a separate force in communications. Cable Television Report and Order, 36 F.C.C.2d 141, 211 (1972). This writer concurs with that view.

subject. Further, the quality of signals is to be measured by technical standards set both by the Commission and the FCC. Although the statute predated enactment of the FCC regulations, the legislature recognized that CATV systems would have to be approved by the FCC. The statute thus authorizes the Commission to certify the performance of CATV operators to the "appropriate" federal authorities, and it authorizes the Commission to participate in proceedings before the FCC.

The Commission is composed of seven members appointed by the Governor and representing various segments of the public. Its powers include the power to determine the information to be included in applications for licenses; the power to investigate the business being done by licensees; the power to hear appeals from the denial of licenses by local authorities; the power to revoke licenses; and the power to mediate disputes between municipalities. The Commission is also directed to study the need for regulation of rates charged to subscribers. If, after three years, the Commission decides that such rate regulation is necessary, it may establish rates. Finally the Commission may insti-

2 Id. §5(j).
3 Id. §8.
4 Id. §16.
5 Id. §2. The first members of the Commission were appointed on June 21, 1972. According to Section 2, the members must have varied qualifications: "... one shall be a member of the Consumers' Council, one shall be an expert in the field of telecommunications, one shall be an attorney and a member of the Massachusetts bar, one shall be an educator with some experience in telecommunications and two shall be residents of the commonwealth, one of the two from a city having a population of more than . . . [150,000] persons and the other from a city or town of less than . . . [150,000] persons." The terms of the members are coterminous with the Governor's term.
6 Id. §4.
7 Id. §14.
8 Id. Section 14 also describes the administrative procedures to be followed upon such appeal.
9 Id. Section 10 outlines the procedure to be followed when either the Commission or the issuing authority receives a complaint about an operator.
10 Id. §16. This section also gives the Commission the power to "... issue such standards and regulations as it deems appropriate to carry out the purposes of this chapter." On September 20, 1972, the Commission requested the municipalities to impose a 6-month moratorium on the issuance of licenses. Letter from Community Antenna Television Commission to Municipal Issuing Authorities, Sept. 20, 1972. The Commission has recently proposed an application form and a set of regulations specifying procedures for the granting of new licenses [hereinafter cited as Proposed Regs.]. The form and regulations are expected to be enacted, after public hearings, before March 20, 1972, the expiration date of the moratorium.
11 G.L., c. 166A, §15.
12 Id. Until the Commission exerts this power, the maximum rate that can be charged is seven dollars per month. Acts of 1971, c. 1103, §2. Section 15 provides a procedure for judicial review of decisions in rate hearings. No provisions are made for judicial review of Commission decisions on the denial or revocation of a license; but see §11.8, infra.
tute legal action to compel compliance with the provisions of the statute.\textsuperscript{13}

The power to license CATV systems is given to the municipalities.\textsuperscript{14} Each municipality is authorized to own and operate its own CATV system.\textsuperscript{15} The “issuing authority” of each municipality\textsuperscript{16} may grant licenses for an initial term not to exceed 15 years,\textsuperscript{17} and may renew the same for a period not in excess of ten years.\textsuperscript{18} They have concurrent jurisdiction with the Commission to revoke licenses,\textsuperscript{19} and must approve all assignments of licenses and transfers of control.\textsuperscript{20} Until the Commission exerts its rate-setting powers, the issuing authority must approve the initial rate charged to subscribers, subject to the maximum rate of seven dollars per month.\textsuperscript{21}

An applicant for a license must disclose the true and beneficial ownership of the system,\textsuperscript{22} and a licensee must annually report its ownership and financial operations to the public and the issuing authority.\textsuperscript{23} An applicant must agree to indemnify the municipality from claims arising from the construction or maintenance of the system; he must also agree to terms and conditions designed to insure the provision of quality service to his subscribers.\textsuperscript{24} Holders of licenses issued prior to the effective date of Chapter 166A are allowed to continue operations, as long as they comply with the indemnification and information provisions of the statute.\textsuperscript{25}

\textbf{§11.3. The FCC regulations.} The general approach of the FCC regulations is to insure that licensing procedures meeting due process standards are followed by the state or local licensing authority, and to insure that minimum standards for quality operations will be met by CATV operators. Before commencing operations, a CATV operator must apply for a “certificate of compliance” from the FCC.\textsuperscript{1} In order to obtain this certificate the applicant must show that he holds a license that meets certain standards.\textsuperscript{2} The applicant must show that, after a public hearing

\textsuperscript{13} G.L., c. 166A, §12. Section 18 provides criminal penalties for willful violations of Chapter 166A. Section 21, added by Acts of 1972, c. 402, §2, provides criminal penalties for attaching foreign devices to the equipment of an operator.

\textsuperscript{14} G.L., c. 166A, §3.

\textsuperscript{15} Id. §20.

\textsuperscript{16} Section 1(d) defines “issuing authority” as “... the city manager of a city having a plan D or E charter, the Mayor of any other city, or the Board of Selectmen of a town.”

\textsuperscript{17} Id. §3(d).

\textsuperscript{18} Id. §13.

\textsuperscript{19} Id. §11.

\textsuperscript{20} Id. §§13, 7.

\textsuperscript{21} Acts of 1971, c. 1103, §2.

\textsuperscript{22} G.L., c. 166A, §4.

\textsuperscript{23} Id. §8.

\textsuperscript{24} Id. §5.


\textbf{§11.3.} 1 47 C.F.R. § 76.11 (1972).

\textsuperscript{2} Id. §76.31.
affording due process, the licensing authority has made determinations concerning the applicant's legal, financial, and technical qualifications, and the adequacy and feasibility of his construction plans.\(^3\) The license fee must be reasonable.\(^4\) Finally the applicant must have a procedure for the investigation and resolution of all complaints regarding the quality of service, and he must maintain a local office or agent for that purpose.\(^5\)

Once an operator has received a certificate of compliance, the operation of the system must be conducted pursuant to other FCC regulations. Of particular interest to the public are those regulations pertaining to programming. For example, every system with 3,500 or more subscribers must originate its own CATV programming on one or more designated channels.\(^6\) Such programming must comply with FCC rules governing political broadcasts,\(^7\) the fairness doctrine,\(^8\) lotteries,\(^9\) obscenity\(^10\) and advertising.\(^11\) Advertising may be presented only at the beginning and the end of an originated program, and at "natural intermissions or breaks" within a program.\(^12\)

CATV systems located within a "major television market"\(^13\) must comply with fairly specific "local access" provisions in their use of originated channels. Basically each such system must provide one channel for origination of new broadcasting for each channel used for the retransmission of existing broadcast signals.\(^14\) Origination channels must be made

\(^3\) Id. §76.31(a)(1).
\(^4\) Id. §76.31(b).
\(^5\) Id. §76.31(a)(5). These and other requirements for a certificate of compliance are considered in more detail at §11.7, infra.
\(^7\) 47 C.F.R. §76.205 (1972).
\(^8\) Id. §76.209.
\(^9\) Id. §76.213(a) prohibits any advertisement for or information on any game of chance. The Massachusetts Lottery Commission, on the other hand, is authorized by G.L., c. 10, §25 to promote the Massachusetts lottery through advertising. This certainly suggests that state policy would not prohibit the advertising of the lottery on CATV. The FCC's power to prohibit or control advertising originated by a CATV system that does not cross state lines has not been conclusively determined, and may very well be invalid, especially in light of a specific state policy to the contrary. See Midwest Video Corp. v. United States, 441 F.2d 1322 (8th Cir., 1971), rev'd, 406 U.S. 649 (1972).
\(^11\) Id. §76.217.
\(^12\) Id.
\(^13\) The 100 largest major television markets are listed at 47 C.F.R. §76.51 (1972). The major markets in Massachusetts are the Boston-Cambridge-Worcester market, ranked sixth, and the Providence, R.I.-New Bedford, Mass. market, ranked thirty-third.
\(^14\) Id. §76.251(a)(2).
available for use by the “public,” local educational authorities, and local units of government; any remaining origination channels must be available for lease. Although the operator may exert no control over the “content” of programs originated on its access or leased channels, he must adopt detailed rules governing the use of such channels.

II. THE LICENSING PROCESS

§11.4. Area to be served. Before accepting CATV license applications for hearing, it is recommended that municipal licensing authorities reach some tentative decisions concerning the “area to be served” by licensees, and where the municipality itself will operate the CATV system.

The area to be served may include “a municipality or a portion of a municipality.” It is possible for a municipality to grant multiple licenses to serve a single community. Given the economics involved, however, it can be expected that most towns will in fact be served by only one system. Smaller municipalities may consider regional CATV systems which, although not specifically mentioned, are not specifically barred by the statute. Under a regional system each community participating

15 Id. §76.251(a) (4).
16 Id. §76.251(a) (5).
17 Id. §76.251(a) (6).
18 Id. §76.251(a) (7).
19 Id. §76.251(a) (9).
20 Id. §76.251(a) (11). The FCC believes that these “local access” rules will foster local service by providing an opportunity for community expression. Cable Television Report and Order, 366 F.C.C.2d 141, 189-198 (1970). See also L. KESTENBAUM, COMMON CARRIER ACCESS TO CABLE COMMUNICATIONS: REGULATORY AND ECONOMIC ISSUES, March 19, 1971 (unpublished report prepared for the Sloan Commission on Cable Communications, Alfred P. Sloan Foundation, New York City).

Many other FCC regulations, too numerous to mention here, should be considered by a potential CATV operator. See 47 C.F.R. §§76.91 et seq. (1972).

§11.4. 1 If the Commission’s Proposed Regulations are adopted, defining the area to be served prior to hearing applications becomes mandatory. Under these regulations, the filing of one application requires the municipality to solicit other applications, and to set a filing deadline (see §11.5, note 9, infra). After that deadline, the issuing authority must create a Cable Advisory Committee to assist it in passing on the applications. Proposed Regs. §2.1. That Committee must file a report with the issuing authority in which recommendations are made concerning, inter alia, the areas to be served by licensees. Id. §2.4(a).

2 G.L., c. 166A, §1(f).
3 Indeed municipalities are barred from granting a monopoly, since any license issued must be “non-exclusive.” Id. §3.
4 It was presumably because of this possibility that the legislature gave the Commission the power to mediate disputes between municipalities. Id. §16. Also, under the Proposed Regulations the Cable Advisory Committee must make recommendations concerning the advisability of regionalization. Proposed Regs. §2.4(i).
would invite applications to serve the designated region; a joint hearing
would then be held on the applications received by each community.
The communities involved would then jointly decide to be served by
one applicant; each community, however, should issue its own license to
the chosen applicant, since, for purposes of certification, the FCC treats
each municipality as a separate licensing agent.\(^5\)

A larger city such as Boston could economically be served by more
than one CATV system. In order to best serve the divergent interests of
communities within such a city, the statute suggests that the division of
such a municipality reflect "the various economic, cultural, geographic
and community interests of the citizens residing therein."\(^6\)

\section*{§11.5. \textbf{The application process.}} Chapter 166A makes a limited at-
ttempt to determine who may qualify for a CATV license.\(^1\) No license
may be granted to television broadcasters or to owners and affiliates of
newspapers that are circulated in the area for which the application
is sought,\(^2\) nor may an operator have a direct or indirect interest "in the
business of selling or repairing television or radio sets."\(^3\) The statute
makes no attempt, however, to deal with the problems of "cross owner-
ship"—that is, where some persons have a financial interest in or are in
a position of control over both the applicant and a disqualified entity.\(^4\)

\(^5\) 47 C.F.R. §76.5(a) (1972).
\(^6\) G.L., c. 166A, §1(f). The Cable Advisory Committee formed under the
Proposed Regulations must also "... adequately reflect the social, political,
educational, cultural, and economic make-up of the community." Proposed Regs.
§2.1.

§11.5. 1 Unlike some regulatory statutes, Chapter 166A gives no preference
to Massachusetts citizens or resident corporations.
2 G.L., c. 166A, §1(e).
3 Id. §5(d).
4 The application form proposed by the Commission (see §11.2, note 10, \textit{supra})
seeks information relative to cross-ownership by requiring the applicant to fully
disclose any interests that its officers or shareholders have in any disqualified
entities. "Interests" that must be disclosed include the ownership of ten percent
or more of any class of stock or of any outstanding indebtedness, and status as a
director, officer, principal or partner of a disqualified entity.

The Commission has not proposed a regulation to the effect that such an
interest would be considered sufficient to disqualify the applicant. By including
the information in the application form, however, it can be assumed that the
Commission intends to do so. Furthermore G.L., c. 166A, §5(d) provides that
the operator "... shall not engage \textit{directly or indirectly} in the business of selling
or repairing television or radio sets." (Emphasis added). The Commission could
interpret "indirect" to include a ten percent common financial interest or a
similarity of control persons without a regulation. On the other hand, the pro-
hibition against television broadcasters and newspapers (Id. §1(e)) does not
contain language preventing an indirect interest. Therefore it is arguable that
the Commission cannot disqualify, by regulation or otherwise, an applicant that
has an indirect interest in a television station or a newspaper.

Although the FCC regulations do not preclude the ownership of a CATV
system by other media interests, they do prevent the carrying of any broadcast
signals if the CATV system "directly or indirectly owns, operates, controls, or
has an interest in" a national television network, or a broadcaster whose signals

\url{http://lawdigitalcommons.bc.edu/asml/vol1972/iss1/14}
Applications for a CATV license must be submitted to the issuing authority of the municipality in the area to be served. Prior to the appointment of the Commission the issuing authorities were authorized to prescribe the application form; they may continue to do so until the Commission prescribes the form. Once the Commission does so, all applications must be made on that form. The contents of such a form are prescribed to a great extent by the statute. For example, it must contain questions regarding the applicant’s character, his financial and technical qualifications to operate a CATV system, and the true identity of all owners. It must also disclose the source of the applicant’s funds, the quality and variety of expected programming, the number of channels, the hours of operation, provisions for local coverage, safety measures, installation and subscription fees, equipment to be employed, the area to be served, and the starting and completion dates for service.

§11.6. The issuance of licenses. Before granting a license the issuing authority must conduct a “public hearing” on the application, at least

are available in the area to be served. 47 C.F.R. §76.501(a) (1972). “Control” refers to actual working control, rather than to a majority stock ownership. In the case of corporate CATV operators, “interest” includes common officers, directors, or stockholders; if there are more than 50 stockholders, the only “interests” considered are those of stockholders either who are officers or directors, or who own more than one percent of the outstanding stock.

5 G.L., c. 166A, §4. An application fee of $100 is required. Id. §9.

6 Acts of 1971, c. 1103, §5. Any form so prescribed must contain the provisions of Sections 4 and 5 of Chapter 166A.

7 Although no specific language so states, Acts of 1971, c. 1103, §6 provides that “[n]othing in this act shall prevent any said issuing authority from issuing a license under said chapter one hundred and sixty-six A . . . before said commission prescribes an application form for such a license or authorizes terms and conditions therefor.” Incidental to the implementation of this section would be the issuing authority’s power to continue to prescribe the form after the Commission has been appointed but prior to its promulgation of a form.

8 G.L., c. 166A, §4.

9 Id. Under the Proposed Regulations, the filing of the first application has a triggering effect on the application process. Once the first application is received, the issuing authority must solicit further applications in local newspapers and trade journals. Proposed Regs. §1.2. (The issuing authority may also solicit applications on its own motion. Id.) An application deadline may be set, but it must be at least 60 days after the solicitations are published. Id. After the deadline, all applications must be made public, Id. §1.3, and a Cable Advisory Committee must be established. Id. §2.1. In order to assist the issuing authority in evaluating the applications, the Committee must prepare a report in which it assesses the general cable needs of the community, Id. §2.2(b), and makes policy recommendations on specific areas of public concern. Id. §§2.4(a)-(m).

The issuing authority must hold public hearings on the report submitted by the Cable Advisory Committee, Id. §3.1; after such hearings, the issuing authority must prepare its own report, setting guidelines in the areas in which the Committee report made recommendations. Id. This report must be sent to all applicants, who will then be given 30 days to amend their applications in response to the guidelines. Id. §3.2.
14 days after proper notice of the hearing has been published.\(^1\) The statute does not specify how soon after the application is filed the hearing must be held; it does, however, provide that the applicant may appeal the issuing authority's "failure to act within the period of sixty days."\(^2\) The hearing is exempted from the state Administrative Procedure Act.\(^3\)

Any license granted must be "non-exclusive."\(^4\) Nonetheless, the issuance of a license to one applicant would under most circumstances effectively preclude the issuance of a second license. Thus the issuing authority may constitutionally be required to conduct hearings that would allow a comparative analysis of the qualifications of competing applicants.\(^5\) While Chapter 166A contains no specific language on this issue, it does not suggest that the issuing authority will compare qualifications by providing that "[i]n the event more than one application is filed in any city or town, the issuing authority shall choose that applicant or those applicants which in its opinion will best serve the public interest."\(^6\) Also the FCC regulations condition the granting of a certificate of compliance on a "full public proceeding affording due process."\(^7\) "Due process" would under most circumstances require comparative proceedings.

After the hearing the issuing authority must, of course, decide whether

\[\text{§11.6.} \quad \text{1 G.L., c. 166A, §6.}\]
\[\text{2 Id. §14, as amended by Acts of 1972, c. 96, §3. Under the Proposed Regulations, public hearings on the qualifications of each applicant must be held within a reasonable time following the filing deadline for amended applications. Proposed Regs. §4.1. Additionally it is provided that decisions must be made on all pending applications within 18 months of the original application deadline. Id. §1.4.}\]
\[\text{3 G.L., c. 166A, §19; the state Administrative Procedure Act is applicable only to state agencies. G.L., c. 30A, §1(2). See also Dixie's Bar, Inc. v. Boston Licensing Bd., 357 Mass. 699, 259 N.E.2d 777 (1970).}\]
\[\text{4 G.L., c. 166A, §3.}\]
\[\text{5 See Bay State Harness Horse Racing and Breeding Ass'n., Inc. v. State Racing Commission, 342 Mass. 694, 702, 175 N.E.2d 244, 250 (1961), citing Ashbacker Radio Corp. v. F.C.C., 326 U.S. 327, 329-334 (1945). An argument against the requirement of such a "comparative" hearing is that the filing of one application requires a hearing under the statute, regardless of whether there are other applications to be compared. Also, the failure to grant a hearing gives the applicant the right of appeal to the Commission, regardless of whether other applications have been filed. It is suggested, however, that this right of appeal will not be exercised when delay is caused by questions of whether the area needs a CATV system, or by the consideration of other applications, since only the issuing authority can ultimately issue a license. See §11.8, infra. An applicant would therefore usually conclude that an appeal under such circumstances would be futile.}\]
\[\text{6 G.L., c. 166A, §6.}\]
\[\text{7 47 C.F.R. §76.31(a)(1) (1972). The FCC interprets this to mean that the licensing agent will publicly invite applications, make all such applications public, and hold a hearing in which all interested persons are given an opportunity to testify. Cable Television Report and Order, 36 F.C.C.2d 141, 207-208 (1972). This is basically the procedure adopted by the Commission in its Proposed Regulations; see §11.5, note 8, and §11.6, note 2, supra.}\]
or not to issue the license applied for. Again there are no time limitations placed upon this determination; and, except in the case where competing applicants are considered, the statute does not specifically mention any standards to be used by the issuing authority in making its decision. The issuing authority must, however, "issue a public statement in writing containing the reasons for its acceptance or rejections of any or all applications, which reasons shall relate to the information the applicant furnished pursuant to section four." Thus the statute by implication requires the decision to be based on the information contained in the application form.

Section 5 of Chapter 166A places many restrictions on the construction, maintenance and operation of a CATV system. For example, the licensee must avoid unnecessary damage to trees and structures in the construction and operation of the system, and indemnify the municipality from claims for injury or damage to property resulting from construction or operation. He must not engage in the business of selling or repairing television or radio sets, and he must provide CATV outlets free of charge to public schools, police and fire stations, public libraries and any other public buildings designated by the issuing authority. He must remove the system within six months of the termination of the license, restoring areas to which the system was affixed to their original condition. He must not remove a subscriber's television antenna, but must provide a switching device to allow the subscriber to choose between cable and broadcast television; he must also provide subscribers with a month's notice when he decides to switch a program source from one channel to another. He must abide by the equal time doctrine, submit a corporate surety bond, and grant a rebate to subscribers when services are in-

8 G.L., c. 166A, §6. In addition to the requirement of the Proposed Regulations that decisions be made within 18 months of the original application deadline, it is provided that decisions be made within a reasonable time following the close of the hearings. Proposed Regs. §4.3.

9 G.L., c. 166A, §6. More specifically the Proposed Regulations require the written statement to evaluate each applicant in light of the policy guidelines in the issuing authority's report, Proposed Regs. §4.7(a), and to explain in detail the reasons for selecting each successful applicant and rejecting all other applicants. Id. §4.7(b).

10 According to Proposed Reg. §4.1, "[d]etermination of applicant qualification shall be expressly limited to the information provided in applications . . . , application responses . . . , the issuing authority report . . . , and oral testimony, if any, elicited during hearings."

11 A federal district court has found a similar provision contained in a municipality ordinance to be a denial of equal protection to the CATV industry. Greater Fremont, Inc. v. City of Fremont, 302 F. Supp. 652, 667 (N.D. Ohio, 1968).

12 It is unclear whether the language of Section 5 pertaining to the equal time doctrine also requires adherence to the fairness doctrine, as articulated in Red Lion Broadcasting Co., Inc. v. F.C.C., 395 U.S. 367 (1969). The FCC regulations, however, require operators to adhere to the fairness doctrine: "... a cable television system engaging in origination cablecasting shall afford reasonable opportunity for the discussion of conflicting views on issues of public importance." 47 C.F.R. §76.209(a) (1972).
terrupted for more than 24 hours. Before completion of construction, he must annually provide CATV service to at least 10 percent of the area to be served. Finally he must complete construction within six years, and maintain a local office or telephone in the community served.

An applicant must agree to all of the above conditions before a license can be granted. The Commission specifically has the power to authorize that the license contain other terms and conditions. Even though the issuing authority has the absolute discretion to deny an application, it probably cannot impose additional requirements if it chooses to grant a license. This is simply an application of the familiar principle that when an area has been fully regulated an administrative board cannot impose additional requirements. The specific authorization to the Commission and the lack of specific authorization to the issuing authority would also indicate that the legislature considered the problem and chose not to grant the power to the municipality. Finally, a municipality may revoke a license only for the violation of specifically enumerated

13 Under the Proposed Regulations, a somewhat more complex procedure is envisioned concerning the issuance of a final license. When the issuing authority grants an application after the public hearings, it must grant the applicant a provisional license, Proposed Regs. §4.3, and set a final date for the issuance of a final license. Id. §4.4. Prior to receiving a final license, the applicant must provide evidence to the issuing authority that it has complied with many specific requirements. Id. §5.1. For example, he must submit proof of a capacity to comply with the requirements of Section 5 (detailed supra), Id. §5.1(a). Proof must be made that the applicant's financial resources are adequate to construct and operate the system, Id. §5.1(c), and that all necessary construction contracts and leases have been entered into. Id. §5.1(d). Copies of all agreements relating to pole attachments, ducts, and rights of way, and copies of "strand maps," rate schedules, local access plans, and service extension policies must be filed with the issuing authority. Id. §§5.1(e)-(i). Proof must be made that the applicant's proposed engineering and technical standards comply with the National Electric Safety Code and the minimum standards of the National Cable Television Association, Id. §5.1(j), and that the applicant will implement an equal opportunity employment program. Id. §5.1(o). The applicant must show the availability of a "head-end" site, Id. §5.1(k), and a capacity to provide local origination facilities. Id. §5.1(l). Finally the applicant must show that he applied for an FCC certificate of compliance within 30 days of the grant of the provisional license. Id. §5.1(n).

If the applicant substantially complies with all of the above requirements within the time limits set by the issuing authority, the provisional license will expire and a final license will be issued. Id. §4.4. If the issuing authority finds that the requirements have not been met in the time allowed, the provisional license will then expire upon a written statement detailing the reasons for such finding. Id. The issuing authority may then either grant a provisional license to an applicant previously rejected, or re-commence the application process. Id. §4.6.

14 G.L., c. 166A, §3(e).

15 This is not to suggest that the issuing authority has no control over any of the terms of a license. Since the statute provides that the term of the license "shall not be more than fifteen years," Id. §3(d), the issuing authority may obviously grant a license for less than 15 years.

provisions. If the legislature had intended that a municipality could impose additional conditions, the legislature would probably have granted the correlative power to revoke a license if such additional conditions were not met.17

§11.7. Certification of the license by the FCC. Once a CATV system has been licensed by the local issuing authority, the operator must obtain a certificate of compliance from the FCC before commencing operation.1 No approval is needed from the state Commission, although the Commission may investigate the propriety of a license so issued and, after a hearing, revoke “for cause.”2

Chapter 166A was enacted before the promulgation of the FCC regulations. It is therefore not surprising that the statute’s requirements do not squarely meet many of the FCC requirements for obtaining certification. The FCC does, however, have the power to waive its requirements in any specific instance;3 moreover, systems in operation prior to March 31, 1972 have been given until March 31, 1977 to comply with the FCC requirements.4

To obtain a certificate of compliance from the FCC, a CATV operator must show that his license has been issued in compliance with six major requirements. The remainder of this section will compare these requirements with the appropriate provisions of the Massachusetts statute.

Approval by issuing authority. In order to be certified, the licensee must show that, after a public hearing meeting the requirements of due process, the issuing authority has approved his character, his financial and technical qualifications, and the feasibility of his construction arrangements.5 Since the application form devised under Section 4 must contain information relating to these areas, and since the issuing authority must refer to such information in its written decision on the application,6 it is reasonable to assume that the FCC will accept the granting of a


1 §11.7. 47 C.F.R. §76.11 (1972).
2 G.L., c. 66A, §14. For a more extensive discussion of this power, see §11.8, infra.
3 47 C.F.R. §76.31(a)(6) (1972).
4 Id. Such systems have more recently been given the opportunity to obtain a certificate of compliance upon a showing of “substantial compliance” with the FCC regulations. Reconsideration of Cable Television Report and Order, 36 F.C.C.2d 326, 366 (1972). In a certification proceeding after this Reconsideration, the FCC indicated that “substantial compliance” would be given a liberal interpretation, and that its provisions regarding licensing procedures, construction requirements and license fees (see infra, this section) would be found to be not substantially complied with only in extreme cases. CATV of Rockford, Inc., 38 F.C.C.2d 10 (1972). While the FCC has not so stated, presumably the same attitude will be adopted regarding licenses granted after March 31, 1972, at least in the absence of a challenge to certification.
5 47 C.F.R. §76.31(a)(1) (1972).
license under the Massachusetts statute as containing the required approval.

Construction within prescribed time limits. To be certified a licensee must also be required to "significantly" complete construction within a year after certification, and to thereafter extend service to a substantial percentage of the area to be served. The FCC has suggested that "significant construction" would be 20 percent in the first year. Chapter 166A allows a different construction schedule; construction must be completed in six years, and, until completion service must be extended to at least 10 percent of the area to be served each year. The differences involved, however, will probably not lead to the denial of FCC certification. First of all, the FCC has recognized that its standard is not inflexible, given variations in local building conditions. Secondly, Sections 5(m) and 5(n) could be viewed as establishing only minimum standards, which could be increased by either the Commission or the issuing authority to avoid a conflict with the FCC requirement. Finally, as a practical matter no conflict need result, since a licensee could begin construction before applying for certification, thus virtually assuring the construction of 20 percent of the system within one year of certification.

Duration of license. The FCC also requires that the initial license term be a maximum of 15 years, and that any renewal periods be of reasonable duration. Under Chapter 166A the initial license term may be no more than 15 years, and each renewal must be for a maximum of 10 years. There is therefore no conflict between the Massachusetts statute and the FCC regulations regarding the duration of the license.

Rate regulation. FCC certification is also predicated on an appropriate rate-setting procedure; basically, the issuing authority must have approved the rates to be charged by the licensee, and the issuing authority must also approve any changes in rates after a public hearing affording due process. Until the Commission acts to determine the initial rates under Section 15, the issuing authority has the power to determine rates to be charged by its licensees, with a maximum rate of seven dollars per

7 47 C.F.R. §76.31(a)(2) (1972).
8 Cable Television Report and Order, 36 F.C.C.2d 141, 208 (1972).
9 G.L., c. 166A, §5(n). The six-year completion requirement appears unnecessarily long. Construction of a CATV system is not that complex, and, depending on the size of the area to be served, could be completed in as little as two years. The New York City CATV contract, for example, requires completion in four years. Cable Television Report and Order, 36 F.C.C.2d 141, 208 n.77 (1972).
10 G.L., c. 166A, §5(m).
11 However, concerning the issuing authority's power to require "additional" terms and conditions for a license, see §11.6 supra.
12 47 C.F.R. §76.31(a)(3) (1972).
13 G.L., c. 166A, §3(d).
14 Id. §13.
15 47 C.F.R. §76.31(a)(4) (1972).
It is unclear, however, whether the issuing authority has the power to grant a rate increase if the initial rate set was below the maximum allowed. Once the Commission decides to set rates, Section 15 gives it the power to do so for each individual CATV system and to adjust rates so set after a hearing. Although the FCC regulations refer to rate-setting by the issuing authority, the exercise of rate-setting authority by the Commission in Massachusetts in all likelihood will not be considered such a substantial deviation so as to require the withholding of FCC certification.

**Complaint procedures.** The FCC also requires that the licensee have a procedure for the investigation and resolution of complaints, and that he maintain a local business office or agent for such purposes. The statute’s requirement that a licensee maintain a local office or telephone number would seem to satisfy the latter requirement. The statute does not, however, require a licensee to have a procedure for the investigation and resolution of complaints; it merely provides for the filing of subscriber complaints with either the Commission or the issuing authority, and for the reporting of complaints received by the licensee and the licensee’s resolution of such complaints. The Commission might consider requiring licensees to specify their complaint procedures, in order to promote a stricter compliance with this FCC requirement.

**Licensing fees.** Finally, FCC certification is dependent upon a showing that the licensing fee charged by the issuing authority is reasonable. In order to promote the growth of CATV and its ability to meet communication needs, the FCC has suggested that the fee should be no more than 5 percent of the licensee’s gross income. The fees established by Chapter 166A should be well within this limit. Each licensee must

17 Even if the issuing authority had no such power, however, the FCC regulations would arguably not be violated. The wording of 47 C.F.R. §76.31(a)(4) (1972) suggests that it is an attempt to prevent unsupervised increases in rates. Acts of 1971, c. 1103, §2, which gives the issuing authority the power to set initial rates, would be superfluous if a licensee could raise his rates without local approval after the issuing authority had initially set them. Therefore, if the issuing authority has no power to approve such rate increases, then rates simply cannot be increased (at least until the Commission decides to regulate rates). Such a situation certainly would not violate an FCC policy to prevent unsupervised rate increases.
18 The rate charged a CATV operator by a public utility for the use of its poles (see §11.1, note 4, *supra*) will affect the eventual rates charged the subscribers. The Commission, however, has no power to regulate these pole rates; presumably the power lies in the Department of Public Utilities. 1968 Rep. Atty. Gen. 186. Pole rental practices are currently the subject of inquiry by the FCC. *Cable Television Report and Order*, 36 F.C.C.2d 141, 209 n.81 (1972).
19 47 C.F.R. §76.31(a)(5) (1972).
20 G.L., c. 166A, §10.
21 47 C.F.R. §76.31(b) (1972).
22 Id.
annually pay both the issuing authority and the Commission fifty cents per subscriber, but not less than $250.23

§11.8. Appeals to the Commission; Judicial review. If a license application is denied by the issuing authority, or if the issuing authority fails to act upon an application within 60 days of its filing, the applicant has 30 days to file an appeal with the Commission.1 A hearing must be held on every appeal, subject to the Administrative Procedure Act.2 The hearing may be conducted by a single hearing examiner, but at least five Commission members must participate in all final decisions.3

On such an appeal the statute provides that:

If the commission approves the action of the issuing authority it shall issue notice to them to that effect, but if the commission disapproves of their action it shall issue a decision in writing advising said issuing authority of the reasons for its decision and ordering the issuing authority to conform with such decision.4

However the statute then modifies the word “order” by providing that “[t]he commission shall not, in any event, order a license to be issued until the application for said license has been granted by the issuing authority.”5 Thus it seems that the Commission cannot in fact order the issuance of an original license, but can only recommend that the issuing authority do so.6 Nor can the Commission itself issue an original license, since “no license shall be issued by the commission except in ratification of a prior issuance to the same party by the issuing authority.”7 Thus when an applicant takes an appeal to the Commission, the most the Commission can do is point out the error committed by the issuing authority, if any, and order the issuing authority to conduct a hearing on the application, if none has been held.8

23 G.L., c. 166A, §9. The minimal nature of these fees is surprising, since traditionally the primary inducement for a community to allow CATV has been a sharing of the revenue.

§11.8. 1 G.L., c. 166A, §14, as amended by Acts of 1972, c. 96, §3. Section 14 was taken almost verbatim from the appeal section of the Liquor Control Act, G.L., c. 138, §67.

Under the Commission's Proposed Regulations, the expiration of a provisional license based on an issuing authority's finding of non-compliance (see §11.6, note 10, supra) is also appealable to the Commission. Proposed Regs., §4.5.

2 G.L., c. 166A, §19. For the applicable sections of the Administrative Procedure Act, see G.L., c. 30A, §§10-12. The Consumers' Council has standing to represent the public as a party in any such hearing, and is treated as an “aggrieved party” in the event of any judicial appeal. G.L., c. 166A, §2A.

3 G.L., c. 166A, §2A.

4 Id. §14.

5 Id.

6 See Largess v. Nore's, Inc., 341 Mass. 438, 170 N.E.2d 361 (1960), in which the Supreme Judicial Court reached the same result regarding the Liquor Commission's powers under the analogous section of Chapter 138.

7 G.L., c. 166A, §14.

8 In a multiple application situation, it is arguable that language in Section
Decisions of the Commission relating to the issuance of licenses will be subject to judicial review under Section 14 of the Administrative Procedure Act\(^9\) which provides, in part:

Except so far as any provision of law expressly precludes judicial review, any person or appointing authority aggrieved by a final decision of any agency in an adjudicatory proceeding, whether such decision is affirmative or negative in form, shall be entitled to a judicial review thereof, as follows: . . .

Where no statutory form of judicial review or appeal is provided, or where the only statutory form of review is by extraordinary writ, judicial review shall be obtained by means of a petition for review.

Since Chapter 166A does not set forth a specific procedure for judicial review, and since the hearings conducted by the Commission on appeals are themselves subject to the Administrative Procedure Act,\(^10\) Section 14 should clearly apply. However, the courts may also hesitate to order local authorities to issue licenses; the statute vests a wide range of discretion in the issuing authorities, and a court order to issue a license would probably be viewed as a usurpation of local licensing power.\(^11\)

Once a license has "finally" been denied, the applicant may not reapply within a year of the date of his last application.\(^12\)

6 to the effect that "... the issuing authority shall choose the applicant or those applicants which in its opinion will best serve the public interest" (emphasis supplied) could be interpreted as requiring the issuing authority to issue at least one license. The implication is countered, however, by specific language in Section 14, which provides that "... if in case the issuing authority is unwilling to issue a license to any of the applicants before it, then such issuance shall be withheld pending further applications."

\(^9\) G.L., c. 30A.

\(^10\) G.L., c. 166A, §19.

\(^11\) Such was the approach taken by the Court in Johnson Products, Inc. v. City Council of Medford, 353 Mass. 540, 233 N.E.2d 316 (1968), app. dismissed and cert. denied, 392 U.S. 296 (1970), and in Scudder v. Selectmen of Sandwich, 309 Mass. 373, 34 N.E.2d 708 (1941). But see Pendergast v. Board of App. of Barnstable, 331 Mass. 555, 559-560, 120 N.E.2d 916, 919 (1954), where the Court in dictum raised the question of whether it would order a variance to be granted where the Board's decision was based solely on a legally untenable position, or was completely whimsical or capricious. See also Cohen v. Board of Registration in Pharmacy, 350 Mass. 246, 214 N.E.2d 63 (1966), where the Court affirmed an order of a superior court ordering the issuance of a pharmacy license that had been denied without substantial evidence after a four-year delay. These latter two cases suggest that the Court's traditional reluctance to order the issuance of licenses is based on an exercise of discretion rather than a lack of power.

\(^12\) G.L., c. 166A, §14. This same provision was included in Section 67 of the Liquor Control Act. However, Acts of 1971, c. 477 deleted that part of Section 67 and amended G.L., c. 138, §15A to provide that the licensing authority may in its discretion reject an application filed within one year of the last application by the same operator. Such a provision is far more satisfactory, since a complete bar could easily defeat an application otherwise worthy of consideration.
§11.9. Assignment and transfer of licenses. A licensee may not assign his license without the prior written approval of the issuing authority.1 An application for such approval must be filed by both the licensee and the proposed assignee on a form prescribed by the Commission. The form must contain information, similar to that required of an original applicant, regarding the assignee's character, his technical and financial qualifications, the names of all persons who will have a financial interest in the license, and the source of the funds to be used in operating the system.2

Chapter 166A does not specifically require that there be a hearing on an application for an assignment. Section 13 does, however, contain some standards to be used by the issuing authority in making its decision. First of all, permission to assign "shall not be arbitrarily or unreasonably withheld." Secondly, permission may be withheld if it appears that "the consideration being paid in the proposed transaction includes a substantial payment for the license."3 If permission for the assignment is withheld, the decision may be appealed to the Commission.4 While the statute is silent on the point, presumably the Commission's powers with regard to such an appeal would be the same as regarding the issuance of a license under Section 14.5 If this is so, then the Commission would have no power to order a licensing authority to consent to an assignment.6

Chapter 166A also requires that any proposed "transfer of control" of a license be approved by the issuing authority.7 The statute is silent

§11.9. 1 G.L., c. 166A, §13. Section 4.8 of the Proposed Regulations has been reserved for the incorporation of regulations governing the transfer or assignment of a provisional license.
3 This provision is intended to prevent "trafficking," or the buying and selling of licenses primarily for profit. The intent is desirable, since it would prevent persons from applying for licenses where there is no intent to operate; the means employed to reach this goal, however, are questionable. When a going business is sold, the price paid is usually more than the value of the assets; the difference, which can be justifiably substantial, is usually attributable to "good will." There is no assurance under Section 13 that the issuing authority will not treat the price of such "good will" as a payment for the license. This fear will lead the licensee and assignee to deceptively overvalue the assets, thus avoiding the need to attribute part of the price to "good will," in turn this possibility will cause the issuing agency to engage in its own valuation of the assets, which could be a complicated and expensive inquiry. The legislature could have avoided this problem by adopting the approach used by the FCC. In effect, the FCC requires its licensees to operate under a license for at least three years before a profit can be made on assignment. 47 C.F.R. §1.597 (1972).
4 G.L., 166A, §7.
5 See §§11.8, supra.
6 This result only follows, of course, if the "issuance" of a license is interpreted to include an "assignment" of a license.
7 G.L., c. 166A, §7. "Control" is not defined in the statute; however, the FCC defines "control" as actual working control, regardless of the percentage of ownership involved. 47 C.F.R. §76.501 (1972). For a discussion of the definition

http://lawdigitalcommons.bc.edu/asml/vol1972/iss1/14
on how this approval is to be obtained; the Commission could, however, require the filing of an application under its regulatory powers. Nor are standards for the decision specified; the decision is, however, appealable under section 14. If a transfer of control of a corporate licensee is involved, then on such an appeal there technically would be no question of the Commission's power to order that consent be given by the issuing authority, since there would be no question of the "issuance" of a license to a new licensee. However such a technical application of Section 14 seems to conflict with the general philosophy of the statute, which otherwise delegates to the issuing authority the sole power to choose the operator of the CATV system.

III. Enforcement Proceedings

§11.10. Administrative action: Revocation and suspension. The appropriate licensing authority and the Commission have concurrent jurisdiction to revoke a license after a hearing. The grounds for revocation are numerous and specific; they include: false or misleading statements in or material omissions from an application or annual statement; failure to file and maintain a bond or required insurance; repeated violations of the equal time doctrine; repeated failure to maintain signal quality; unauthorized assignment; repeated violations of the other terms and conditions required by Section 5; and failure to complete construction within six years. Section 14 provides that revocation may be considered by the Commission "[u]pon the petition of ten per cent of the subscribers who are taxpayers ... or who are registered voters ... , or [upon the petition of] the consumers council, or upon its own initiative." Upon such request, the Commission "may investigate the granting, renewal or assignment of such a license or the conduct of the business being done thereunder." Section 14 provides that the Commission may revoke a license "for cause;" given the specificity of the grounds enumerated in Section 11, however, it is doubtful whether Section 14 expands the available grounds for revocation by the Commission. Rather, the phrase "for cause" as used


8 Of course, if a "transfer of control" involves the assignment of a license, Section 13 provides the procedures to be followed and the standards to be used.

9 G.L., 166A, §16.

10 Id. §7.

§11.10. 1 G.L., c. 166A, §11.

2 "Repeated" in another context has been interpreted to mean two or more times. Kneeland v. Emerton, 280 Mass. 371, 389, 183 N.E. 155, 163 (1932).

3 G.L., c. 166A, §11.

4 No such provision describes who may seek revocation from the issuing authority.

5 G.L., c. 166A, §14.
in Section 14 should be read merely as incorporating the specific grounds in Section 11.6

The provisions of Section 14 dealing with revocation also provide that the Commission may suspend a license, after a hearing, "for cause." There is no specific grant of power to the licensing authority to suspend a license. Section 14, however, seems to recognize such a right, since it provides a right of appeal to "any applicant who is aggrieved by the action of any [issuing] authority in modifying, suspending, cancelling, revoking, declaring forfeited or assigning" a license. (Emphasis added). It is doubtful that the legislature considered this problem. Rather, it is probable that the appeals section was lifted blindly from the Liquor Control Act, without any thought being given to whether, as is the case here, a phrase would become ambiguous or meaningless in the context of Chapter 166A.7

§11.11. Judicial action: Injunctive relief, Suit on the bond, and Criminal proceedings. Both the Commission and the Consumers' Council may seek affirmative or negative injunctive relief to compel compliance with Chapter 166A or any Commission regulations.1 Ordinarily the Commission's power to suspend or revoke a license would obviate the need for such judicial proceedings. The Commission, however, has no power to issue cease and desist orders; therefore injunctive relief may be necessary to stop conduct that might cause irreparable harm to the public, thereby giving the Commission enough time to consider suspension or revocation.

The terms and conditions of the issuance of a license require that the licensee submit to the issuing authority a bond.2 The bond assures compliance with four specific requirements: the satisfactory installation and operation of the system; the indemnification of the municipality from claims arising from the construction maintenance or operation of the system; the removal of the system from public ways within six months of termination; and the restoration of pavements, sidewalks and other

7 The Commission is also considering a regulation that would impose a fine on operators for certain violations of the statute. Compared with the enforcement techniques of revocation and suspension, which would harm the subscribers as well as the operators, the imposition of fines by the Commission would be a welcomed alternative. Unfortunately such a regulation is not permissible without a specific delegation of power from the legislature. Davis, Administrative Law §2.13 (1958).

§11.11. 1 G.L., c. 166A, §12.
2 Id. §5(k). Unlike some statutes, such as G.L., c. 138, §21, Section 5(k) does not specify to whom the bond is to run. It seems clear that it would run only to the municipality, since the conditions on the bond relate only to potential harm to the municipality. This might have been made clearer, however, to avoid any argument that the Commission, which has substantial enforcement powers under Chapter 166A, has the power to proceed on the bond.
improvements to their original condition upon termination. For violations of these requirements, the issuing authority could bring a suit on the bond for damages.

Finally, the statute provides criminal penalties for willful violations of any of its provisions or of any Commission regulations. The punishment includes a fine of between $100 and $1,000, and for imprisonment for not more than six months.

§11.12. Conclusion. There are presently 49 CATV systems operating in Massachusetts. In addition, licenses or permits have been issued in approximately 32 communities. Many of these licenses may be void or voidable because of illegal issuance procedures prior to the enactment of Chapter 166A, or because of a failure to construct within a designated period, which has been a usual condition of most licenses. The 6 month voluntary moratorium imposed by the Commission expires on March 20, 1973, by which time it can be anticipated that licensing and operating procedures will be fully developed. The real race for licenses will then begin, restricted only by the limited number of companies presently able to meet the financial and technical qualifications.

The enactment of the Massachusetts statute and FCC regulations pave the way for the orderly development of the CATV industry in Massachusetts. That path, however, may be as stormy in the future as it has been in the last thirty years. Along the way disputes will arise between competing applicants for licenses, and sometimes among the competing interests of the state, municipal and federal governments. All of this may result in extensive litigation and the development of a new body of law. Hopefully it will also result in the satisfaction of the ever-increasing

3 G.L., c. 166A §5(k).
4 Only actual damages would be recoverable. City of Lowell v. Massachusetts Bonding and Ins Co., 313 Mass. 257, 47 N.E.2d 265 (1943). Thus the suit on the bond may sometimes be a meaningless remedy. For example, if an operator failed to provide service to 10% of his area in the first year of service, the municipality would be hard-pressed to prove actual damages. On the other hand the municipality could not revoke the license, since a “repeated” violation would not be involved.
5 G.L., c. 166A, §18. This provision could also prove to be meaningless, since violations of Chapter 166A will rarely result in criminal proceedings. Moreover, it could prove to be harmful; for example, an operator could resist inquiries by the Commission not otherwise specifically required by the statute on the ground that he would incriminate himself under the Fifth Amendment. See Davis, Administrative Law §§ 3.07-3.09, and Leary v. United States, 395 U.S. 6 (1969), where the Supreme Court ruled that compliance with the marijuana tax act would have violated the defendant's Fifth Amendment rights, since compliance would have subjected him to prosecution under state narcotics laws.

2 Id.
3 See §11.2, note 10, supra.
need of the public for information, and in the provision of a low-cost vehicle for community expression.*

*On March 8, 1973 the Court of Appeals for the Second Circuit ruled that the importation of distant signals by a cable system from locations hundreds of miles from the community the cable system was intended to serve is subject to copyright liability. *Columbia Broadcasting System, Inc. v. Teleprompter Corporation,* — F.2d — (Docket No. 72-1800, 2d Cir. March 8, 1973). In so doing the court distinguished the United States Supreme Court decision of *Fortnightly Corp. v. United Artists Television, Inc.* on the ground that the cable system in *Fortnightly* did not import signals that were not otherwise available in the community where the cable system was located. See §11.1, note 10, supra.

On March 21, 1973 the Cable Commission enacted final regulations. In most respects they are identical to the proposed regulations. The only significant difference is the requirement that the issuing authority conduct public hearings to consider the desirability of a community being serviced by a cable television system and therefore whether to commence the licensing procedure. Regulation 1.2. This procedure is initiated by the issuing authority, by the petition of a certain percentage of registered voters, or by the filing of an application pursuant to G.L., c. 166A. Regulation 1.1. In the event the issuing authority concludes that it will not commence the licensing process, its decision is appealable by an applicant pursuant to G.L., c. 166A, §14.