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David M. Welborn, Major Professor

We have read this dissertation
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Vice Provost and Dean of Graduate Studies

THE DEVELOPMENT OF CABLE TELEVISION POLICY: REPRESENTATION OF INTERESTS IN DEREGULATION IN 1984 AND REREGULATION IN 1992

A Dissertation
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Doctor of Philosophy
Degree
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William Dennis Harris
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DEDICATION

This dissertation is dedicated to my mother, Angela B. Harris, for always believing in me, and my daughter Christina, for always being proud of me, and to Susan for standing beside me and encouraging me through the long haul.

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ABSTRACT

The purpose of this study is to understand and explain both the deregulation and subsequent reregulation policies for cable television as part of a national telecommunications regulatory system. The regulatory policies evolved incrementally with both national and local components. A case study methodology is used to analyze the participation of group interests in the political process, with primary attention on the role of organized interests. The focus of the analysis of group interest participation is undertaken in the framework of their influence on Congressional policy decision making.

Three central purposes guide the analysis. The first is to explain why cable television was freed from regulation in 1984, then returned to extensive regulation in 1992. The second is to fit insights and observations drawn from the particular cases studied with the literature on interest groups. One particular variable examined, which is not well treated in the literature, is that of the affect of technological change on policy decisions. The third purpose is to consider whether there are lessons to be drawn from the examination of cable deregulation and reregulation that can add to the general understanding of regulatory policy development and the role of groups in that process.

The conclusion of the study is that technological advances occur in the field of telecommunications in a very rapid fashion. However, the deliberative traditions of Congress as it contemplates policy decisions serve to both mitigate against policy decisions that favor short-lived technological developments and to provide broad ranging access for

various groups in the best traditions of pluralism. Establishing regulatory policy for telecommunications was found to be more of an iterative process than a terminal objective.

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LIST OF ABBREVIATIONS

ACLU	American Civil Liberties Union
ALA	American Libraries Association
APPA	American Public Power Association
AT&T	American Telephone and Telegraph
BLS	Bureau of Labor Statistics
CATVA	Community Antenna Television Association
CFA	Consumer Federation of America
CQWR	Congressional Quarterly Weekly Report
D	Democrat
DBS	Direct Broadcast Satellite
FCC	Federal Communications Commission
GAO	Government Accounting Office
LPTV	Low-Power Television
MSLF	Mountain States Legal Foundation
MSO	Multi-System Operators
MPAA	Motion Picture Association of America
NAB	National Association of Broadcasters
NAC	National Association of Counties
NARUC	National Association of Regulatory Utility Commissioners
NBMC	National Black Media Coalition
NCTA	National Cable Television Association
NFLCP	National Federation of Local Cable Programmers
NLC	National League of Cities
NRECA	National Rural Electric Cooperatives Association
NSCA	National Satellite Cable Association

NTIA	National Telecommunication and Information Association
OMB	Office of Management and Budget
PEG	Public, Educational, and Government access
R	Republican
SC	U.S. Supreme Court
SMATV	Satellite Master Antenna Television
STV	Subscription Television
UAW	United Auto Workers
USCM	United States Conference of Mayors
USTA	United States Telephone Association
WCA	Wireless Cable Association

CHAPTER I

INTRODUCTION

Cable television emerged as a telecommunications service in the 1940s. Over time, a regulatory regime developed incrementally with national and local components. From the 1950s through the 1980s and 1990s, technological and associated economic developments affecting an increasingly large proportion of the population related to cable drew the attention of national policy makers. In the 1970s and early 1980s, efforts to forge a coherent national policy for cable accelerated. The results were cable television's deregulation in 1984 and its subsequent reregulation less than a decade later, in 1992.

The purpose of this study is to understand and explain both deregulation and a policy turnabout just a few years later. The basic analytical perspective is of the representation of groups in the political process. In the study, the representation of groups is distinguished between both organized and unorganized interests. For purposes of this study, organized interests will be defined as: *Formally organized associations of individuals or organizations having shared attitudes which then attempt to influence decisions and actions of government in a particular policy area of their interest.* Unorganized interests are defined as: *Individuals or agents which attempt to influence decisions and actions of governments in a particular policy area of their interest without acting through associations, formally*

organized for that purpose. Examples include persons, individual companies or corporations, and community or industry leaders in issue networks, as well as policy entrepreneurs. Primary attention will be given to the role of organized interests, but the shadow of unorganized interests also will be acknowledged.

In this case, the presidency is involved to an extent and its role examined, but the major center of policy decision was the Congress. Thus, the prime focus is on the representation of interests in the legislative process in connection with the 1984 and 1992 acts.

Central Purposes

Three central purposes guide the analysis to follow. The first is to explain why cable television was freed from regulation to a substantial degree in 1984, then placed under more extensive regulation in 1992. Special attention in this is given to the role of interest groups in policy dynamics.

The second purpose, for which case studies are well suited, is to fit the insights and observations drawn from a particular case analysis with the literature reviewed here as something of a rough test. Several general observations about that literature are pertinent for defining the task within workable bounds. The first observation is that it is rich yet varied in its particulars and in the perspectives set forth. A second is that in the treatment of group interests and their influence, often a clear distinction is not made between emergent and mature policy regimes. A partial exception is to be found in the deregulation studies, although they concern mature regimes under attack. In the case of cable television, however,

there was no mature system in place. As will be seen in the following chapters, there existed a nascent and fragmented regulatory regime featuring, primarily, hundreds if not thousands of cities across the country. A third observation is that a critical variable at the heart of dispute over cable television policy is not well treated. That variable is technological change and its effects. In communications, there have been rapid and profound technological developments for two decades or more. New technologies such as cable, wireless, and satellite for example, compete among themselves and with older technologies, primarily wire and traditional broadcasting. In general, the question is, how does the cable case fit with the literature?

A final and related purpose is to consider whether there are lessons to be drawn from the examination of cable deregulation and reregulation that can add to general understanding of regulatory policy development and the role and influence of groups in that process.

To provide a foundation for addressing these matters, the following section reviews the relevant literature.

Relevant Literature

In order to set the stage for the analysis of the influence that group interests have on the shaping of regulatory policy, the literature regarding interests groups is reviewed in three contexts. At the most general level, the place of groups in American politics is discussed. Then, some perspectives on group activities as they relate to the policymaking process are presented, and lastly, and more specifically, interest group roles and influence on change in regulatory policies are reviewed. The assumption that guides this review of relevant

literature is that the importance of interests in the analysis of policymaking grows out of the pluralist perspective on American government and politics.

General Perspectives on the Role of Interest Groups in American Politics

Increases in citizen advocacy during the late 1960s and 1970s were perceived by some as an indication of a revival of participatory democracy.[1] As new groups formed to push for changes in areas such as civil rights, environmental regulation, and consumer protection, the voices of such constituencies spoke more loudly in the policymaking process. Government, in turn, responded with many new laws and regulatory programs. America seemed to be regaining the ideal of participatory democracy, a welcome development to many given the conflict and alienation of the times. Yet, for others, the increase in citizen advocacy was a cause for concern. One of the more prominent critics of this development is political scientist Samuel Huntington, who has warned against an "excess of democracy."[2] In Huntington's eyes, the wave of new citizen lobbies produced by the "democratic surge" of the 1960s "overloaded" the political system. The expansion of governmental activity could not possibly satisfy all competing demands, and, ultimately, the authority of government was undermined. Increased participation, for him, made the nation less governable.

Beginning with James Madison's writings in *Federalist 10*, the idea of people joined or associated to further their common interests was perceived as a potential threat to popular government in America. Madison also realized, however, that the suppression of groups

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[1] Harry C. Boyte, *The Backyard Revolution* (Philadelphia: Temple University Press, 1980).

[2] Samuel P. Huntington, "The Democratic Distemper,"*Public Interest* 41 (Fall, 1975): 9-38.

would effectively extinguish the flame of liberty. He therefore believed that with appropriate institutional arrangements, a proliferation of factions contending for power would check and balance diverse ambitions. This idea of the essential nature of factions or groups in the American political system has been important in the study of government and politics over the years. From Arthur Bentley to David Truman to Robert Dahl, political scientists have contended that the basic units for studying the American political system are interest groups. Interest groups are known variously as "pressure groups," "special interest groups," "public interest groups," "lobbies," and "citizens groups."[3] The traditional view of organized interest groups is that they lobby or attempt to influence government by pressing for action in accord with their policy interests. Depending on the type of group analyzed, this is viewed along a continuum from corruption of the process, to domination by upper-class interests, to merely educating decision makers on all aspects of a policy decision. In general, however, the conventional belief is that the broader public interest suffers whenever the narrow interests of particularistic groups prevail in government decision making.

The field of political science first saw the emergence of interest group studies at the turn of the century. Their development was shaped by the obvious importance of organized interests in politics and social and political theory that argued the basic societal significance of groups. Arthur Bentley's work in 1908 was a starting point. It represented a shift away from the nineteenth century study of jurisprudence and its focus on constitutional distributions of power among institutions. Bentley was an early advocate of a descriptive political science based on a group conception of political life. His work went beyond formal descriptions of politics.[4] He suggested a "social mechanistic" view of government that was

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[3] Robert H. Salisbury, *Interest Group Politics in America* (New York: Harper & Row, 1970).

[4] See Beard's review of Bentley for *Political Science Quarterly*, 1908, 739-741.

more realistic in empirical terms than formal normative views of how the institutions of government operated. In Bentley's view, the working class or elite groups were simply types of groups not more important than families, farm organizations, racial groups, political parties, interest associations and other groups in terms of their relationships with government. His image of government was the appeasement of many small groups, each with its own demands. Elitist theories held that business and organized economic interests were pre-eminent and to be considered in totally different categories than others not included among the economically powerful. Additionally, Bentley rejected the definitional differences between "interests" and "opinion" that prevailed in his time. Popular use of the terms contrasted "interests" as elite groups and "opinion" as popular will such as "public opinion." In his eyes, each was part of all the many and varied "interest groups" which the governmental process must accommodate.[5] Bentley believed there were no effective individual interests; that every group has its interest; that they always result in group action; and that there is no one group interest that includes everyone in society.[6]

G. David Garson writes that pluralism, in the early 20th century, became the rebuttal to the traditional political theory of the absolute sovereignty of the state.[7] The beginnings of this in practice were the nineteenth century struggles over matters such as independence of religious groups from state intervention.[8] This conception of the partial sovereignty of the state created a "framework for interpretation of the increasingly important economic pressure groups that appeared at this time." It also provided a rationale for protecting the

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[5] Arthur F. Bentley, *The Process of Government*, Peter Odgard ed. (Cambridge, Mass: Harvard University Press, 1967), 244.

[6] See Salisbury's *Interest Group Politics in America.*

[7] G. David Garson, *Group Theories of Politics* (Beverly Hills, Calf.: Sage Publications,1978).

[8] Ibid, 19.

growth of trade unionism from the intervention of a generally conservative and unsympathetic state. He states that, "At the core of the pluralistic critique was the argument that the state was not sovereign as jurisprudential theory held, but rather that the state was one of many associations in society".[9]

In the spirit of the pluralistic critique, the desirability of focusing empirically on groups grew among American political scientists. For example, Albert Hart noted that "more and more people tend to accept the theory that all government in America -- national, state, municipal or local -- springs from one source, the American people as a whole, who choose to exercise power through a variety of organizations."[10] John Dickinson used historical and anthropological evidence to argue that "conflict between interests is inevitable"[11] and that order is not suppression of conflict; order is the readjustment of human relations in the course of conflict, which is a never ending process. In this view, "Government, like the human will, is motivated by the very forces which it governs; its function is only to arrange them in a more orderly pattern."[12]

Other important studies of a descriptive nature focusing on groups were Peter Odegard's *Pressure Politics*, E. Pendleton Herring's *Group Representation Before Congress*, and S. A. Rice's *Farmers and Workers in American Politics*. Rice's was the most theoretically complex. Odegard's work was a descriptive study with little emphasis on

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[9] Ibid, 18.

[10] Albert Hart, "Growth of American Theories of Popular Government," *American Political Science Review* 1907 1: 558.

[11] John Dickinson, "Social Order and Political Authority,"*American Political Science Review,* 1929 (May), 23 2: 293-328, 299.

[12] John Dickinson, "Social Order and Political Authority,"*American Political Science Review,* 1929 August, 23 3: 593-632, 619.

theoretical problems as was Herring's book. "Thus with the rise of descriptive political science in the 1920's the study of politics came to be viewed as the study of influence and power, not the study of government and the state. The crucial distinction between the two lay in the abandonment of normative theory by the empirical students of group power."[13] For example, in his 1935 study of pressure groups and the tariff, E. E. Schattschneider concluded that groups achieved access to influence government through campaign contributions and inside connections when they were able to maintain lobbyists in Washington. He viewed this as a result of an upper-class bias that served to distort the public interest.[14]

Following Bentley, group theory for some held out the promise of serving as a general theoretical framework. From the 1950s to the 1960s, the group approach to the study of politics was believed by some to be the most influential general framework for analysis.[15] With the publication of Robert A. Dahl's *Who Governs?*, the pluralistic perspective and group theory became widely accepted bases for analysis in political science.[16] By the end of the decade, group theory changed from aspiring to be a research theory to now serving as an area of analysis, or research area.[17]

There is still today a general appreciation of the importance and influence of organized interests, despite disagreements at the normative level as to whether this influence

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[13] Garson, *Group Theories,* 37.

[14] E. E. Schattschneider, *Politics, Pressures, and the Tariff* (New York: Prentice-Hall, 1935).

[15] Garson, *Group Theories,* 120.

[16] Robert A. Dahl, *Who Governs? Democracy and Power in an American City,* (New Haven, Connecticut: Yale University Press, 1961) 1961.

[17] Garson, *Group Theories,* 119.

is good or bad. A general feeling of acceptance in empirical terms that influence by group interests matters in governance serves to justify a focus on organized interests in the study of policymaking.

Classic Pluralism and Its Critics

Assumptions about the importance of interest groups in the analysis of policymaking spring mainly from the pluralist perspective on American government and politics. Pluralism as a political theory is built on a recognition that groups are key actors in politics, that there are many sources of power and influence over government and that in a democracy, all members of a society can share in the exercise of power and influence through membership in groups and their interaction with political institutions within and outside of government. It is, in part, a theory of factions. It deals with the distribution of power in the political system. There is an assumption of equality in terms of opportunities to participate in the democratic process. In general, proponents of classic pluralism assume that all Americans belong to -- or can belong to -- groups, and that individual interests are thereby truly represented in political processes. Pluralism is viewed as an accurate empirical description of the basic nature of American political systems and is viewed normatively as the source of the system's strength. These views are best exemplified by the works of David B. Truman and Robert A. Dahl.

Although one can trace the roots of pluralist thinking about American politics back to James Madison and his efforts to promote the new constitution, the more explicit evolution of pluralist theory, as previously noted, probably begins around 1908 with Arthur Bentley in his book *The Process of Government*.[18] This work was extended by David B. Truman in 1951. Truman's normative thesis was that groups comprise in the deepest sense

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[18] Bentley, *The Process of Government.*

the "raw materials of politics and government." It was his belief that groups embody the basic instincts of men in pursuit of or in defense of their interests. For Truman, writing in *The Governmental Process*, politics can be understood entirely by looking at the interaction of groups.[19] To him, political man is a result of the influences that groups have on him. Truman argues that the existence and operation of groups of interests, identified with particular issues, is the appropriate unit of analysis for studying the governmental process. He believes that a characteristic feature of the governmental system in the United States is that it contains a multiplicity of access points. The federal system establishes decentralized and more or less independent centers of power and vantage points from which to secure access to the national government.[20] For Truman, the success of groups in gaining access to governmental institutions comes as a result of interactions among complex factors which he places into three categories: (1) factors related to the strategic position of the group in society; (2) factors related to internal characteristics of the group; and (3) factors that are particular to the governmental institution that is the target of access by the group.[21] It was in this manner that Truman aimed to conceptualize a structure of pluralist interactions that could be observed empirically.

Truman's defense of interest groups against critics who claim they are elitist and exclude the poor, ethnic minorities, and less powerful is found in the assertion that "the work of one political interest group, whether a business association or a group representing some other interest in the society -- labor unions, for instance -- results in wave-like development

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[19] David B. Truman, *The Governmental Process: Political Interests and Public Opinion,* 2nd ed. (New York: Knopf, 1951).

[20] Ibid, 507.

[21] Ibid, 506.

of interest group activity; other groups are created to present different claims and to push opposing policies, and, in turn, still other groups grow up in response to those, and so on."[22]

Robert Dahl's studies of pluralism evolved from the normative theory of the roles of interest groups in democracy to an empirical study of city politics to describe the roles actually played by particularistic interests, and finally to a synthesis of his writings as they relate to democratic politics. His book *A Preface to Democratic Theory* published in 1956 was theoretical and influenced a good deal of thought on how the American political system operates.[23] In 1961, he published *Who Governs?* as an empirical study to follow up on Floyd Hunter's study of elite power in urban government settings. Finally, he synthesized these perspectives in his book *Pluralist Democracy*.

In *A Preface to Democratic Theory*, Dahl argues that the definition of "normal" American political process is one in which "there is a high probability that an active and legitimate group" can be effectively taken into account at the important points in the decision making process.[24] American democracy, in Dahl's view, is not about majority politics. For him, "The numerical majority is incapable of undertaking any co-ordinated action; it is the various components of the numerical majority that have the means of action."[25]

Dahl's study of politics in New Haven, Connecticut, discovered that policymaking was a process which involved coalitions of groups and politicians whose levels of activity

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[22] Ibid, 79.

[23] Robert A. Dahl, *A Preface to Democratic Theory*, (Chicago: The University of Chicago Press, 1956).

[24] Ibid, 145.

[25] Ibid, 146.

varied by issues and their level of concern with the issues.[26] Fundamentally, he concluded that through bargaining and compromise among groups and politicians, public policy decisions were made without any single group always being dominant. To synthesize these studies, Dahl wrote that pluralism as a political system builds upon the legitimacy of group interests as they are used to avoid conflict and saw its value in avoiding single centers of sovereign power. For Dahl, "The existence of multiple centers of power, none of which is wholly sovereign, will help ...to tame power, to secure the consent of all, and to settle conflicts peacefully."[27] The strongest point made by Dahl in this context is that because of the necessity for continuous negotiations and bargaining among various centers of power in order to make decisions, group members learn and perfect the art of peacefully managing conflict. This does not merely benefit the groups directly involved, but ultimately benefits all in the society in the moderation of or avoidance of conflict. Pluralistic politics typically result in decisions that involve limited, acceptable degrees of change in small increments, or *incrementalism.*

Much of the criticism of pluralism is founded on an expectation of equity in political outcomes. Critics say that the world depicted by classic pluralism does not exist and special interest groups frustrate the development of American democracy. Elitist critiques attack the notion of equality of classes in the political process. They contend that rather than provide full representation in making public policy, some groups are advantaged over others.[28] The

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[26] Dahl, *Who Governs?* 1961.

[27] Robert A. Dahl, *Pluralist Democracy in the United States: Conflict and Consent,* (Chicago: Rand McNally and Company, 1967), 24.

[28] See Floyd Hunter, *Community Power Structure* (Chapel Hill, N.C.: The University of North Carolina Press, 1953); C. Wright Mills, *The Power Elite,* (New York: Oxford University Press, 1959); Mancur Olson, *The Logic of Collective Action,* (Cambridge: Harvard University Press, 1965); Peter Bachrach and Morton S. Baratz, "Two Faces of Power," *American Political Science Review,* v. 56, December, 1962; Grant McConnell, *Private Power & American*

wealthy and well organized are favored over those trying to find their voice. In the words of E. E. Schattschneider; "The flaw in the pluralist heaven is that the heavenly chorus sings with a strong upper-class accent."[29] Critics also contend that pluralist theory masks "cozy" relationships in collections of interests both inside and outside government that exclude other legitimate interests.[30]

A fundamental criticism of pluralism comes from sociologists and some political scientists who claim that the theory does not account for groups (or latent groups) that lack resources to organize for political or economic reasons. This perspective is presented mainly by writers and students of the elitist or stratification viewpoint. Floyd Hunter concluded from his study of Regional City (Atlanta, Georgia) that a power leadership existed which made policy decisions without the knowledge of the majority of citizens and to the advantage of the few in leadership positions.[31] He believed that a small number of individuals formulated and extended policy; that all policy makers have power but all who have power are not policy makers.[32] It was this study that so intrigued Robert Dahl that he undertook to test Hunter's hypothesis in New Haven, Connecticut.

Democracy, (New York: Alfred A. Knopf, 1966).

[29] E. E. Schattschneider, *The Semisovereign People,* (New York: Holt, Rinehart and Winston, 1960), 35.

[30] See Schattschneider, *The Semisovereign People*; Theodore J. Lowi, *The End of Liberalism: The Second Republic of the United States,* 2ed. (New York: W. W. Norton & Company, 1979); McConnell, *Private Power & American Democracy,*; Jeffrey M. Berry, *The Interest Group Society,* (Boston: Little, Brown and Company, 1984)

[31] Hunter, *Community Power,* 1

[32] Ibid, 7.

C. Wright Mills is one of the most notable critics of pluralism from the elitist perspective.[33] Mills uses the phrase "power elite," to distinguish those who wield power within the ruling institutions of society and act with common interest to preserve and enhance their power and the power of those institutions. For Mills, this elite includes the holders of the top positions in the military, the executive branch of the nation's government, the leaders of corporate industry, and members of fabulously rich families. An often cited manifestation of this power elite is referred to as the "military-industrial complex."[34]

For Peter Bachrach and Morton S. Baratz, elitists look to the *source* of political power while pluralists look at the *exercise* of that power or the processes involved.[35] Theodore J. Lowi argued that the ideology that interest group politics is good had transformed into interest group liberalism, in which government had lost its basic legitimacy and authority, thus inviting domination by select constellations of power in their own, private self interest.[36] This resulted in what Lowi saw as a systematic abdication by government to private groups of its power over the direction of public policies. These *de facto* delegations of government authority in turn lead to policy without law and legislation without accountability.

Grant McConnell described the emergence of the circumstances detailed by Lowi as beginning with the industrial mobilization in America in response to the First World War. He observed that some governmental agencies actually assumed the task of organizing

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[33] Mills, *The Power Elite.*

[34] The term "military-industrial complex" was used by Dwight D. Eisenhower in his farewell speech when he left the presidency and Washington, D. C. in 1961.

[35] Bachrach and Baratz, "Two Faces of Power."

[36] Lowi, *The End of Liberalism.*

economic groups in order to formulate a consensus in policy arenas to relieve the "government of much of its burden."[37] The danger of this was the possibility of eliminating public values from effective political consideration in making policy.[38] The process approximates in some situations to the "capture of government."[39] The major critique of pluralism functioning in small group constituencies is that not all groups are organized and not all interests are represented. This condition, McConnell believes, has serious consequences for democracy.

In 1965, Mancur Olson presented an evaluation of organized interest groups which served to undermine the arguments of group theorists in what some viewed as the most devastating critique of pluralism. Olson contended that interest groups could not operate as Truman and Dahl had theorized under pluralist thinking because of the difficulty in organizing and maintaining group memberships for benefits that were collective. This thinking tended to support the proposition that interest groups have bias toward monied interests and therefore tend to ignore the broader public interest.

In Jeffrey Berry's discussion of classic pluralism he described two principle lines of criticism. One was methodological in that important democratic issues are left out of the empirical analyses of interest groups because pluralist studies focus on too narrow a set of issues, for instance only those issues that reach the public agenda.[40] The other was a criticism on a normative basis which assumes that all citizens generally have equal resources for participating in interest group politics. While such criticisms attack pluralist thought on

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[37] McConnell, *Private Power,* 4.

[38] Ibid, 6.

[39] Ibid, 6.

[40] Jeffrey M. Berry, *The Interest Group Society,* 11.

various grounds, they do not deny the importance of organized interests in the ebb and flow of politics and policymaking.

Next we will look at several views on how organized interests participate in policymaking.

Perspectives on Organized Interests and Policymaking

As Schattschneider observed in his study of tariffs, interest groups can interact with government in various manners depending on the intensity of their interests.[41] In a somewhat passive mode, interest groups monitor government activity to determine what might affect their interests. Then, in a more active mode, an offensive mode, groups initiate or attempt to influence government action to favor their positions on a given issue, or, in a defensive mode, attempt to block action that would be a detriment to their interests. These activities in any particular policy area tend to establish long running and close relationships among the interest group representatives, the congressional sector (both members and staff), and the administrative or regulatory agencies involved. This leads to a discussion of views on the structure of the involvement of organized interests in policymaking.

In the context of regulation, the major manifestation of the critique of classic pluralism is what is known familiarly as capture theory. It claims to describe how regulatory behavior actually works. For many years social scientists' understanding of the regulatory process was based on a belief that agencies are captured by the interest groups that they

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[41] Schattschneider, *Politics, Pressures, and the Tariff,* 1935.

regulate. This belief was developed by Huntington [42] and refined by others.[43] The main argument is that agencies are created in response to the actions and wishes of those regulated. Once established, the agencies continue to operate in the interest of those organizations. In justification of the capture-at-origin view, proponents argue that such regulations are needed to protect selected industries from competition, to reduce risks and inefficiencies. Criticism of the capture theory centers on the claim that the theory is one-sided. That is, the theory ignores other constituencies that regulatory agencies have, not the least of which are public interest groups that monitor the regulatory activities of the agency.[44]

The more systematic conceptualization of subgovernments has supplemented highly simplistic capture theory to describe how interest groups act to influence policymaking. Leiper Freeman, in one of the first subgovernment studies, discovered that when looking at the public policymaking process with regard to the Bureau of Indian Affairs, bureaus, committees and interest groups enjoyed a good deal of autonomy that resulted in a policy subsystem involving mainly the leaders of the three entities.[45] He found that the relationship between the bureau and the congressional committee was institutionalized and depersonalized and that the bureau remained sensitized to the preferences of the committee. Emmette S. Redford found evidence of a more complex system in his study of civil aviation

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[42] Samuel P. Huntington, "The Marasmus of the ICC: The Commission, the Railroads, and the Public Interest," *The Yale Law Review* 1952 61: 467-509.

[43] See Marver H. Bernstein, *Regulating Business by Independent Commission,* (Princeton, N.J.: Princeton University Press, 1955); McConnell, *Private Power,* 1966; and Lowi, *End of Liberalism,* 1979.

[44] See Lawrence Rothenberg, *Regulation, Organizations, and Politics: Motor Freight Policy at the Interstate Commerce Commission* (Ann Arbor, Mich.: The University of Michigan Press, 1994), 10.

[45] J. Leiper Freeman, *The Political Process: Executive Bureau - Legislative Committee Relations,* Rev. Ed., (New York: Random House, 1955), 14-15.

policy than Freeman associated with Indian affairs. Even though he found a large divergence of interests, there existed a high concentration of decision making supported by a consensus involving the aviation industry, the administration, congressional leaders and trusted experts in the transportation area. This structure in turn delegated routine microdecisions to the administrative component of the system, reserving consideration of policy matters to be worked out by leaders in the industry, the agency, and the congressional leadership of the related committee.[46] According to Redford, subsystems serve to provide stability and equilibrium among interests, and they provide for interests access and opportunities to influence policymaking. As a corollary, subsystems also provide some access and representation for interests that are not dominant because of the inherent nature of multiple channels of access. Finally, subsystems prevent substantial changes in the equilibrium of interests without intervention of the next level. Subsystem actors are without authority to bring about radical change unless issues are raised to the highly visible arena of macropolitics.[47]

Jeffrey M. Berry defines subgovernments as consisting primarily of a limited number of interest group advocates, legislators and their aides and key agency administrators who all interact in a continuing and stable basis to dominate policymaking in a particular area. The subgovernment perspective differs from capture theory in that it recognizes that interests other than directly regulated groups play a role in influencing policymaking. For example, conservationist interest groups attempt to influence policies to protect the environment, or consumer advocate groups participate in auto safety policymaking. In a mature subgovernment, participating interest groups would be involved in a close, co-optive

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[46] Emmette S. Redford, *Democracy in the Administrative State,* (New York: Oxford University Press, 1969), 99-100.

[47] Ibid, p. 106.

relationship with government, seldom challenged by hostile interests from outside the relationship that might be opposed to their wishes. They are characterized as stable, long-standing relationships. These relationships breed from the circumstances that allow groups to offer both incentives and sanctions to gain access through politicians. In general, organized interests can provide the following political incentives for policy makers: (1) they can provide important information to help make or support policy decisions; (2) they can assist politicians with political strategy to pass or block bills or amendments; (3) they can provide politicians with ideas and innovative proposals that promote their political viewpoints; (4) because they may involve long standing friendships, many times they provide access to entertainment, dinners, recreation and travel; and (5) they can provide assistance in election campaigns in the form of volunteers for campaign staff and coordinators.[48]

For Berry, relationships in the subgovernment model may in some cases lead to development of policy in what is viewed as a closed system. Closed systems are popular within political science because they validate a belief that there exists an imbalance between the economically advantaged and the general public interest as a result of interest group politics. Various labels are used to refer to these closed relationships such as "whirlpools,"[49] "iron triangles," or "triple alliances."[50] The basic characteristics of these closed structures are: (1) that they involve a small group of actors who play a dominant role in developing policy in a particular field; (2) that the policymaking is consensual, with quiet bargaining

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[48] Jeffrey M.. Berry, "Subgovernments, Issue Networks, and Political Conflict," *Rulemaking in American Politics,* eds. Richard A. Harris and Sidney M. Milkis, (Boulder, Colo: Westview Press, 1988), 248-251.

[49] Ernest S.Griffith, *The Impasse of Democracy* (New York: Harrison-Hilton Books, Inc., 1939), 182.

[50] Freeman, *The Political Process,* 51.

that produces agreements among affected parties; and (3) that partisan politics do little to disrupt the autonomous and relatively stable arrangements. The negative implication is that the established relationships exclude other interests and do not therefore serve the "public interest" in the broad sense since such exclusion disallows representation by all important interests at the bargaining table.[51]

Another version of the subgovernment model of interest groups working with bureaucratic agencies is provided by Jonathan Bender and Terry Moe. Their "adaptive model" discusses indirect influence by interest groups on bureaucratic behavior. The model they present involves a three-way interaction among legislators, a bureaucratic agency, and at least two interest groups; one that prevails in the policy decision and another that loses.[52] In this model, agencies adapt their behavior depending on the indicators or cues they receive from legislators. These cues, or "feedback," come from congressional committees or when presidential administrations change.

Without denying the utility of the basic subgovernment concept, some scholars have taken the view that reality, including the role of organized interests, is more complex and variable. Redford, in *Democracy in the Administrative State*, identifies three levels of politics based on "scope of participation and involvement."[53] The first, and lowest level is *micropolitics*. At this level organized interests, individuals, firms, or even communities attempt to obtain beneficial decisions for themselves only. This level is characterized by direct interaction with the governmental entity -- usually the bureaucracy --that provides the

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[51] Berry, *Subgovernments,* 240-241.

[52] Jonathan Bendor and Terry Moe, "An Adaptive Model of Bureaucratic Politics," *American Political Science Review* 1985, 79: 755-774.

[53] Redford, *Democracy,* 83-85.

sought after benefit, such as a grant-in-aid, or a government contract. At this level, efforts to reduce differentiated microdecisions result in administrative procedures and bureaucratic rules and judgment of experts.

The next level is the *intermediate* level and deals with the politics of function, such as the main executive departments and agencies, for example, Agriculture, Energy, the Army Corps of Engineers, or the Bureau of Indian Affairs. At this level, activities will involve interrelationships among administrative agencies, congressional committee structures, organized interests, such as trade associations. Alternately known as subsystem politics, this model involves interrelationships between agencies charged with implementing public policy, congressional committees responsible for legislating and oversight of the policy area and the salient organized interests.

For Redford, the highest level is *macropolitics*. At this level, issues such as major changes in entitlements and the tax code are debated and resolved with the involvement of the president, congress as a whole, large-scale organized interests and mass public opinion. The questions raised to the macro level are broad in implication and normally involve matters of broader issue and involve much wider interests than at the subsystem level.

Another perspective on understanding the involvement of organized interests in policymaking was originally set forth in a book review in 1964 by Theodore Lowi. In it, he argued that: (1) the types of relationships to be found among people were determined by their expectations or what they intend to get from interacting from others; (2) in a political sense, these expectations were determined by governmental outputs in the form of policies;

(3) thus, political relationships were determined by the type of policy output at stake.[54] He extended his argument to state that for every type of policy there likely would be a distinctive type of relationship, or a different type of political process. These political relationships are power relationships, when power is defined as having a share in making policy or authoritative allocations.

Lowi's intent was to replace descriptive, subject matter categories used by pluralist scholars with a set of functional categories. He discusses three functional categories as types of governmental policies: distribution, regulation, and redistribution. The *distributive* policy area is characterized by policies that can easily be disaggregated and are individually dispensed unit by unit. Benefits are clearly identifiable, but the cost burden is not. In this arena, participants are numerous, and government tries to accommodate as many citizens as possible with as little of the unit benefit as possible distributed to each. Competition and conflict among interests are not typical, and power relations are stable. *Regulatory* policies are characterized by decisions that directly raise costs and reduce or expand alternatives of private individuals. These policies are distinguishable from the distributive in that they involve direct choices as to who will be a loser and who a winner. The policy area involves participation of a multitude of groups that interact in conflictual interplay so that policy tends to be a residue of the compromises formed to accommodate coalitions seeking preferred policy outcome. This arena is best described by the pluralistic model. The area of *redistributive* policies is characterized by broader social impacts approaching decisions along class lines. This policy arena is most closely associated with elitist political theory of power structures. It can be characterized as involving two sides on a given issue differentiated on ideological bases, but clear, stable and consistent on their stances. This area

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[54] Theodore J. Lowi, "American Businness, Public Policy, Case Studies, and Political Theory" in *World Politics,* Vol. 14, 1964; 671-715.

is therefore, given to negotiation of conflicts to maintain a balance in policies among dichotomous "peak associations," Congress, and executive agencies.[55] What may be most important from what Lowi develops is that while the relations among interests and between them and government vary, it is this variation by policy, policy type, and power structures that needs to be explained in political analyses.[56]

In *The Politics of Regulation,* James Q. Wilson uses his own notion of costs and benefits to distinguish or categorize regulations into types.[57] His premise is that the distributional effects of costs and benefits within the possible combinations of wide and narrow distributions result in four political categories: majoritarian, interest group, client, and entrepreneurial politics and are deterministic of actions by organized interests. First, *majoritarian* politics are expected when both costs and benefits are widely distributed. Interest groups or factions will not rise when no definable portion of society will pay or receive a disproportionate share or burden. This type closely approximates Lowi's *distributional* policy type. Second, *interest group* politics will mobilize in conflictual relationships involving particular organizations when both costs and benefits are narrowly concentrated. The general public (that is not involved) may be sympathetic but mostly indifferent. This type is similar to Ripley and Franklin's *competitive regulatory* policy type to be discussed later. Third, *client* politics arise when benefits are concentrated but costs are widely distributed. When a small group will benefit, organization of interest groups and lobbies will take place. Since the costs are widely distributed, and therefore relatively low per-capita, there will be little incentive to organize in opposition to the policy. This type

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[55] Ibid, 711-713.

[56] Ibid, 709.

[57] James Q. Wilson, ed., *The Politics of Regulation,* (New York: Basic Books Inc., 1980).

closely approximates Lowi's *redistributional* policy type. Fourth, *entrepreneurial* politics are expected when benefits are widely distributed (low benefit per-capita) but the costs are concentrated in a small segment of society. Examples are clean air, auto safety, and work place safety. This parallels Lowi's *regulatory* policy type and Ripley and Franklin's *protective regulatory* type.

The work of Lowi also has been extended by Randall B. Ripley and Grace A. Franklin.[58] They subdivide the regulatory arena into two distinct types: *competitive* regulatory and *protective* regulatory.[59] They define competitive regulatory policy as involving competition between prospective deliverers of goods or services for the right to deliver them by winning the competition for the right as it is held by a government regulatory agency. Agencies that operate in this policy area would be the old Interstate Commerce Commission, the Federal Communications Commission, and the Securities and Exchange Commission. Ripley and Franklin state that the policies in the competitive subarena are typically routine and very protective of well established interests represented therein. Protective regulatory politics involve more conflict in their relationships than do other subarenas. The authors believe this is because this policy subarea has the ability to both prevent certain types of private activity and also to mandate activities in quite explicit terms. The examples they provide include policies in the health, safety and environmental areas such as the Environmental Protection Agency, Occupational Safety and Health Administration, and the Federal Aviation Administration. Participants must at times fight

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[58] Randall B. Ripley and Grace A. Franklin, *Congress, The Bureaucracy, and Public Policy* (Homewood, Ill.: The Dorsey Press, 1986).

[59] Ripley and Franklin actually discuss a total of seven policy areas. In addition to the distributive and redistributive areas of Lowi, they also subdivide the regulatory area into subareas of competitive regulatory and protective regulatory. These four areas then fall under a general grouping of domestic policies. They also analyze structural, strategic and crisis as three additional areas and place them under the general grouping of foreign policy.

off views opposing their own, thus this subarena is characterized by controversy and volatility. If this argument is accepted, one concludes that individual organized interests have less relative policy influence, leverage, or power than more dominant interests operating in the competitive regulatory subarea. Therefore, the policies at issue in this subarea are without closed subsystems, "iron triangles" or established subsystems. Thus, the likelihood becomes greater that pluralistic expectations of countervailing actions by emergent organized interests (for example, those that believe they stand to suffer some decrement to the perceived quality of the environment, or the public's safety) will be more successful.

Ripley and Franklin contend that distinctive political relationships are generated and surround each of the different policy types. Even though they will differ by policy area, these relationships can be structured by the following elements: (1) identification of the primary actors involved; (2) the basic nature of the interactions among those actors; (3) the stability of their interactions; (4) visibility of the policy decisions to those not involved or concerned; and (5) the relative influence of individual actors.

The writings of Redford, Lowi, Wilson, and Ripley and Franklin represent thoughts about the influence of organized interests in fairly complex terms. Redford suggested three levels of politics, based on scope of participation and involvement. Lowi argued that the types of relationships to be found among people were determined by what they intend to get from government in the form of policies thus, political relationships were determined by the type of policy output at stake. He extended his argument to state that for every type of policy there likely would be a different type of political process. Wilson uses his own notion of costs and benefits to categorize regulations into types. His premise is that the distributional effects of costs and benefits within the possible combinations of wide and narrow

distributions result in four political categories. The characteristics of these distinct categories, in turn, predict how successful organized interests will be in their efforts to influence policies. Ripley and Franklin contend that distinctive political relationships are generated and surround each of the different policy types which are similar to Lowi's types. These relationships are structured by the primary actors involved, the basic nature of the interactions, stability of their political relationships, the visibility of the policy decisions, and the influence of individual actors.

The similarity of these approaches is that each posits that interest group involvement in policymaking is variable on some observable dimension. The differences are in the dimensions that each claims will cause involvement on the part of organized interests. In Redford's framework, organized interests will be most active and influential at the intermediate level in their efforts to maintain stability and equilibrium among interests. At the macrolevel, organized interests play more of a peripheral role. It is this level that provides access for more diffused interests that lack a voice at the intermediate level. Within Lowi's model, organized interests will be most involved and influential when dealing with the regulatory type of policy. It is in this policy arena that Lowi claims the particular organized interests stand to gain or lose the most. They would be least influential in the distributive type. Clearly, Wilson contends that within the two areas of interest group and client politics one would find the most influential actions on the part of organized interests. For Ripley and Franklin, the two strongest determinants for involvement and influence for interests are the visibility of policy decisions and the influence of individual actors. Collectively, they present a useful analytical perspective to view activities related to regulatory policymaking in the case of cable television.

Hugh Heclo provides another perspective on political structures, including organized interests, that produce policy. It concerns what he labels as issue networks. He criticized the notion of subgovernments as not so much wrong as incomplete.[60] He saw subgovernment politics as evolving into "issue network" politics. These networks are more open than clearly defined subsystems. He defines an issue network as "a shared knowledge group" that ties together large numbers of participants with common technical expertise. They are made up of technical specialists, journalists, administrators and political entrepreneurs working out of varied institutional settings. Issue networks are characterized by sloppy and ill defined organizational boundaries; participants move in and out easily. Issue areas overlap; as an issue develops, new coalitions form in response. Networks are distinctive in terms of their large size and accessibility to new participants. They tend to be shaped in two ways: (1) a central grouping involved in a wide range of issues such as when trade associations act as brokers of information or provide lines of communication on an issue; or (2) clusters of individual groups that share common interests and concerns and form coalitions. Issue networks can be highly conflictual when diverse viewpoints are represented. Another distinction is that they lack the stability of subgovernments. While Heclo viewed the simple notion of subgovernments made up of a limited number of key leadership individuals as incomplete, he recognized that they have a place in issue networks as a subcomponent on any given policy issue.

For Thomas A. Gais, Mark A. Peterson, and Jack L. Walker issue network systems are fluid, shifting, conflictual, and characterized by multiple access points for organized

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[60] Hugh Heclo, "Issue Networks and the Executive Establishment," *The New American Political System,* ed. Anthony King, (Washington, D.C.: American Enterprise Institute, 1978), 88.

interests.[61] Authority is fleeting. The "insiders" of legendary iron triangles would not be familiar with the rapid formation and mobilization of the new coalitions that are constantly emerging and dissolving. The authors believe that most important changes in the 1980s in public policy were fashioned within issue networks. They also contend that one of the most important causes of this change is the rapid expansion in the number and variety of interests that have achieved formal representation in the American system. In addition, as the range of issues have increased, single subgovernments have gradually lost the capability to manage the issues. Mass media gets involved with distributing information about the policy questions and who is involved. More citizens are motivated to make their preferences known to their elected representatives, and the widening of the pool of participants in the conflict brings in some who are new to the policy area.

Timothy J. Conlan, Margaret T. Wrightson, and David R. Beam, in their study of tax reform enacted in 1986, addressed the influence of recent political changes on the passage of tax laws, an area believed to be strongly steeped in the conventional model of special interest involvement in policy change.[62] The authors refer to their case study of changes in the tax laws as bearing on "nonincremental or breakthrough policy changes."[63] They believed that conventional interpretations of the policy process too often neglect the consequences of recent *institutional* changes in Congress, in party politics, and in the techniques of political communication and coalition building. Additionally, they noted the often surprising ability of *individual* congressional entrepreneurs to initiate and shape key

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[61] Thomas A. Gais, Mark A. Peterson, and Jack L. Walker, "Interest Groups, Iron Triangles, and Representative Institutions in American National Government" *British Journal of Political Science,* v14, 1984, 161-185.

[62] Timothy J. Conlan, Margaret T. Wrightson, and David R. Beam, *Taxing Choices: The Politics of Tax Reform,* (Washington, D.C. Congressional Quarterly Press, 1990).

[63] Ibid, 220.

policies. Finally, they recognized that *ideas* as well as *interests* can have a powerful independent influence on policymaking.

Conlan, *et al*, present three theories that structure conventional understanding of political behavior and policymaking: (1) the pluralist/incrementalist school; (2) the presidential/majoritarian model; and (3) the ideational/entrepreneurial perspective. The first model is characterized as "business as usual." It is the theory of incrementalism to which pluralism is usually linked and emphasizes outcomes as much as processes. Incrementalists recognize that most new policies, most of the time, involve only small departures from their predecessors. Incrementalism has a political explanation as well. Incremental decisions are normally the path of least resistance where there is a pluralistic distribution of power. The incrementalist model is also linked to subgovernment perspectives in that it allows bargaining to shape incremental changes in ways that foster acceptance by relative losers in particular interest groups.

The authors characterize the second model as "old-style reform." In the presidential-majoritarian form of policy change, a strong president sweeps into office along with large, unified party majorities in both chambers of Congress. This model somewhat resembles the responsible party government model for overcoming structural obstacles and political inertia. In this approach, the president mobilizes the substantial resources of his office to construct a coherent legislative program and rallies the public and his party followers behind it. Although effective in the short run (usually in the early weeks and months of an administration) in a matter of time, internal forces return the system to the circumstances that existed prior. The presidential-majoritarian model thus links great changes in policy to decisive shifts in the electorate. "It accords nicely with the progressive reforms secured by Woodrow Wilson in 1913 and 1914, with the outpouring of New Deal legislation under

Franklin Roosevelt in the 1930s, and with Johnson's Great Society program in the mid-1960s."[64]

The authors refer to the third model as the new politics of reform, one that places emphasis on the significance of ideas in politics. It differs from pluralism in that it treats ideas as an independent creative force in the political process.[65] The significant factors in this model include policy ideas and professionals or academics, political entrepreneurs, and the news media. Conlan, *et al*, argue that these same elements help to explain the enactment of other significant legislation that is difficult to account for in terms of interest-group politics and presidential-party leadership. They cite as examples many consumer and environmental laws, as well as the deregulation of air transportation that pitted the interests of broad, unorganized publics against narrow, highly organized interest group opponents.

Berry, in writing about subgovernments, issue networks, and political conflict, believes that the conventional view is still that policymaking takes place across institutional lines, (government agencies, Congress, courts, parties, and groups), and to understand policy decisions one must understand how key actors from different institutions and organizations interact.[66] He too contends that the recent growth in the number of interest groups militates against the operation of subgovernments. The expanded number of interest groups makes bargaining more complex and the control and coordination by key actors more difficult.[67]

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[64] James L. Sundquist, *Politics and Policy: The Eisenhower, Kennedy, and Johnson Years* (Washington, D.C.: Brookings Institution, 1968), 50.

[65] Conlan, et al., *Taxing Choices*, 240.

[66] Berry, *Subgovernments*, 239.

[67] Berry cites William Browne's identification of more than 200 lobbies concerned with farm, agribusiness, or rural interest as an example of proliferation of groups that has destabilized the agricultural subsystem. Also, Gais, Person and Walker's observation that the growth in liberal groups that took place as a result

This in turn leads to the likelihood of heightened conflict between coalitions. Both the Carter and Reagan administrations successfully broke down the autonomy of existing subgovernments, Carter by appointing citizen activists to important administrative positions and Reagan, in turn, by appointing administrators sympathetic to the then dominant political ideology of slashing the budgets of many programmatic scared cows and, in general, to the idea of limited government.

The basics of what can be viewed as five distinct perspectives on the study of organized interests in policymaking now have been discussed. The first is capture theory, which also can be considered the traditional model for viewing direct interest group involvement in shaping regulatory policy. The second is the subgovernment model, which expands the components to include relevant congressional committees and subcommittees, industry leaders, and policy experts at times. The third perspective involves studying the variability of organized interest participation in policymaking depending upon various factors. The first subvariety is presented by Redford, who argued that "intensity of interests" is the determinant of participation. The second is found in the writings of Lowi and Ripley and Franklin who argued that the type of policy being considered is the determining factor for understanding participation by organized interests. The last is Wilson's work that builds a model based on the distribution of costs and benefits as a determinant of participation. The third perspective is issue networks. This model is a dynamic variation of subgovernments but goes beyond them to analyze the ever changing coalitions and alliances that occur as policy changes are considered. The last model is one that involves the policymaking environment as it is influenced by institutions, ideas and interests. It includes analysis of

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of the dawn of social regulation in the 1960s and 1970s was followed by a reactive surge in conservative groups in the 1980s (Berry, 1988, p. 244).

institutional changes and ideas and how they influence policymaking in a manner that goes beyond the direct interactions between organized interests and decision making.

The Influence of Groups on Policy Change

Lastly, after consideration of John Kingdon's general point-of-view on policy change, we turn to several focused studies on interest groups and their influence on the enlargement and contraction of regulation.

Changes in policies, according to Kingdon, do not come about only through the involvement of group interests. In addition to the influence of organized groups on policy change, there are other factors that play a role. Two of these are ideas and policy entrepreneurs. Kingdon addresses both in broad terms in his analysis. Policy entrepreneurs are members of a community of specialists in a particular policy area. They are researchers, staffers, bureaucrats, academics, lobbyists, and legislators. Solution ideas for problems "float" in these communities, continually being refined and revised at conferences, through papers, hearings, published articles, and legislative proposals.[68] They do not control events, but they can anticipate them and bend events to their purposes to some degree. Finally, Kingdon also recognizes that more than just reelection incentives play a role. Interest group pressures and coordinating votes and political power affect agenda setting as well. He discusses the aspect of "ideas" as goals or motivations in the sense of rational-choice theory other than the classic, more narrowly focused self-interested quests. He argues that "argumentation, persuasion, the construction of effective appeals, and the evocation of

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[68] John W. Kingdon, "Agendas, Ideas, and Policy Change," in *New Perspectives on American Politics* ed. Lawrence C. Dodd and Calvin Jillson (Washington, D.C. Congressional Quarterly Press, 1994), 221.

values and ideology seem as important as interest group pressure, reelection, career advantage, and the pursuit of power" in the motivation of political behavior.[69]

For him, ideas are a strong underlying influence on governmental policy formulation. He contends that contrary to the prevalence in the academic literature that policy change is infrequent and difficult, there are conditions under which quite sudden and dramatic changes in public policy have been observed when entrepreneurs pushed their policy change ideas when opportunity presented itself. Kingdon cites the example of the early days of the Reagan administration when it seized the chance to reorder budgetary priorities in the first ten months of 1981. These changes had far reaching influences on the government, the economy and the political subsystems of the day. In other examples, when Kingdon finds it difficult to explain such movements as abolition, civil rights, environmental protection and consumerism strictly on the basis of the pursuit of traditional self-interests, he attributes the success of these movements to the power of ideas. He contends that the history of policy formulation in these areas is marked by powerful interests losing when confronting the ideas underpinning social movements. We will return to the influence of ideas on deregulatory policy when we discuss several case studies below.

Larry N. Gerston, Cynthia Fraleigh, and Robert Schwab study a number of factors other than organized interests that influence policy outcomes. One is agency structure, whether headed by a single administrator or by a commission. The occupational composition of a regulatory body may account for variations in the influence of interests. The classic comparison is between agencies dominated by lawyers and those made up of scientists, economists, engineers or technicians. The final environmental aspect mentioned by Gerston, *et al*, is the agency's mandate. Some are broad and wide while others involve

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[69] Ibid.

specific goals and timetables. They theorize that agencies with broad discretion are more open to industry capture while those with constrained latitude due to specific mandates produce inflexible and inefficient regulations.[70]

Richard A. Harris and Sidney M. Milkis define regulatory politics as the struggle for control over administrative levers of power and policy as it is established within governmental institutions. Their thesis is "that regulatory politics entails more than the free play of self-interest, that they reflect to a large degree a clash of ideas regarding how we ought to live."[71] Similar to Kingdon, these authors recognized the influence of purposive or goal-oriented perspectives found in rational choice theory on policy change. In support of this thesis, they argue that the regulatory reforms of the 1970s advocated social regulations based on the notion that government be opened up to provide new avenues for citizen participation. This in turn resulted in a new kind of participatory institution that has come to be known as the "public interest group." This development served to legitimize representation of diffuse interests in the policymaking process. As a result, there was heightened citizen participation, and the public interest lobbies took a "watchdog-like" role in following through on the implementation of social regulation policy. Another tactic used by public interest groups was to shift the regulatory "battleground" to the courts and call upon them to "oversee the implementation of policies and mediate disputes" in that process.[72]

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[70] Larry N. Gerston, Cynthia Fraleigh, and Robert Schwab, *The Deregulated Society* (Pacific Grove, California: Brooks/Cole Publishing Company, 1988), 78.

[71] Richard A. Harris and Sidney M. Milkis, *The Politics of Regulatory Change: A Tale of Two Agencies* (New York: Oxford University Press, 1989) ix.

[72] Ibid, ix.

The Influence of Groups on Regulatory Policy

Lawrence S. Rothenberg, writing about organizations and politics in regulation, discusses two main differences in the study of regulatory politics. One is the *economic* theory of politics associated with capture theory, and the other is referred to as the *new institutionalism* perspective which grows out of the political economy tradition. His basic premise is that a combination of the economic theory and the new institutionalism is needed to accurately specify the processes by which organized interests influence regulation and is of great importance if regulation is to be understood and explained.[73]

Rothenberg notes that from the 1950s to the late 1970s, the understanding of the regulatory process centered on agency capture by organized interests as theorized by Huntington, Bernstein, McConnell, and Lowi. This view was systematized by George Stigler as many saw his analysis as transforming the capture idea into scientific theory.[74] But further empirical studies of the CAB and the ICC suggested that group dominance alone, as in capture theory, could not explain all features of the regulatory process as observed. Many scholars believed that a more general theory was needed. From this developed a multivariate theory of group dominance that specified that the differences in the interests of organizations probably reflect differences in the society. Rothenberg contends that combining the multivariate theory of a "balanced of organized social forces" with the univariate group dominance (or capture theory) perspective will better explain public policy decisions. [75] Antecedents of this theory harken back to the work of early pluralists such as Bentley, Truman, and Latham.

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[73] Rothenberg, *Regulations, Organizations, and Politics*, 9.

[74] Ibid, 10.

[75] Ibid, 11.

In order to synthesize economic theory and new institutionalism theories, Rothenberg advocates treating organized interests as an institutionalized part of the regulatory environment by more precisely specifying the processes by which they influence agency performance. His ultimate theoretical objective is the development of a framework to determine if, when, and to what extent associations are influential and the identification in greater detail of the conditions governing group influence. In concrete terms, he attempts to better understand agency behavior by testing the economic theory on the role of groups; developing ideas of what conditions group influence and when, or if, groups are important players in the policy-making process; and devising improved perspectives on regulatory politics that include reasonable assumptions about institutions and specifies the processes of organizational influence.[76] Most importantly for Rothenberg, features of groups beyond those that are typically incorporated in studies of policy decisions need to be considered in understanding the role organized interests play in regulation and politics. Specifically, the features to be included are the degree of organization, the political goals pursued, and the capacity to achieve these goals.[77]

In summary, current thinking holds that changes in regulatory policies do not come about solely through the application of organized group influence. Additional factors play a role. Two of these are ideas and policy entrepreneurs. Ideas are a strong underlying influence on governmental policy formulation. Contrary to the belief that policy change is infrequent and difficult, there are conditions under which changes in public policy have been observed when entrepreneurs have pushed their ideas when opportunity has presented itself. The characteristics of regulatory agencies also influence policy change. One is agency structure, another is the occupational composition of a regulatory body, and the last is the

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[76] Ibid, 16.

[77] Ibid, 256.

agency's mandate. Furthermore, the reforms of the 1970s that opened up new avenues for citizen participation served to legitimize representation of diffuse interests in the policymaking process, adding an additional dimension. Moreover, a combination of traditional economic theory and new institutionalism is needed to describe the processes by which organized interests influence regulation. This view advocates treating organized interests as an institutionalized part of the regulatory environment by more precisely showing how they influence policy. Finally, consideration of the features of groups, such as the degree of organization, the political goals pursued, and the capacity to achieve these goals need to be included in understanding the role organized interests play in regulation and politics. The study of policy change in the area of cable communications is ripe for influence from any of these sources, and the research will be watchful for signs of their interplay.

Selected Case Studies of Deregulation

Several case studies were reviewed with particular attention paid to their findings on the role and influence of organized groups in deregulation. In all of these cases, while recognizing organized interests as important in regulatory policymaking and deregulation, it is concluded that their influence may be dilluted by other factors.

In *The Politics of Deregulation*, Martha Derthick and Paul Quirk examine a number of deregulation cases (trucking, airlines, maritime shipping, and telecommunications) in which the regulatory agencies and Congress supported regulatory reform.[78] Their hypothesis is that when prominent regulatory problems exist, political conditions are ripe, and ideas for solutions backed by policy entrepreneurs and political leaders are available, the diffuse

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[78] Martha Derthick and Paul J. Quirk, *The Politics of Deregulation.* (Washington, D.C.: The Brookings Institution, 1985).

interests of the general public can overcome particularistic business interests in a given regulatory policy arena. The central question driving their study was why the affected industries and associated organized interests were ineffectual in stopping deregulatory reforms. They conclude that the combination of expert analysis, opportunistic political leaders, and mass public sentiment can combat particularistic organized interests effectively.

The authors identify the determining factor for policy change in the cases they present as the politics of ideas. Traditional notions such as capture theory, incrementalism, and "iron triangles" would predict that only slight adjustments in policies acceptable to regulated interests would have occurred. Derthick and Quirk describe a set of circumstances that involve perceived problems, the ready availability of solutions (ideas), and political conditions conducive to change that led to contrary results.

A central ingredient in their analysis is the role of policy reform leadership. They discuss issue leaders in the context of champions for an idea. They argue that participation by a potential leader is influenced by several conditions. One is timing of the issue. That is, is the time "ripe" for change? Another consideration is room on the agenda. If other issues in Congress are more pressing at the time, a reform may not get much attention (and therefore, neither will the leader). A third factor is the merits of the issue or the magnitude of the benefits to be derived from reform. The final factor influencing leaders' choices of issues to support is prior commitments which in most cases are fashioned in election campaigns. Essentially, Derthick and Quirk believe these cases show that the American political system has a greater capacity for transcending narrow interests than generally has been acknowledged.[79]

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[79] Ibid, viii.

Anthony Brown, in his study of airline deregulation, discusses how the Civil Aeronautics Board's support for deregulation was pursued over the objections of its regulated clientele, thus violating the presumption of regulator-regulated collaboration.[80] Similar to the work of Derthick and Quirk, Brown notes that early proponents of deregulation were professional economists who, in coalition with certain government agencies (the Antitrust Division at the Justice Department, the Federal Trade Commission, and the Department of Transportation) pushed for deregulation. Certain individual firms and segments of the airline industry that stood to gain from deregulation also joined this coalition. The major opponents were the larger air carriers and their employees, and they were joined by secondary interests such as state and local organizations representing airport operators and small communities that had benefitted from mandated service requirements in CAB regulations. Brown concludes that airline deregulation was brought about by policy entrepreneurs, advocacy by the affected agency itself, presidential support, changes in public opinion, and alterations in interest group structure.[81]

In *Regulation: The Politics of Policy*, Michael Reagan examines deregulation in communications, financial institutions, and transportation.[82] He uses Wilson's typology on the distribution of costs and benefits to categorize the politics that surround policymaking.[83] He offers Social Security as an example of majoritarian politics where most of society benefits and most expected to pay for the policy outcomes. For interest group politics, in which both costs and benefits are narrowly concentrated and the general public has a small

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[80] Anthony E. Brown, *The Politics of Airline Deregulation* (Knoxville, Tennessee: The University of Tennessee Press,1987), 18.

[81] Ibid, 127.

[82] Michael D. Reagan, *Regulation: The Politics of Policy* (Boston: Little, Brown and Company, 1987).

[83] Wilson, *The Politics of Regulation*, 366-372.

enough stake to stay out of policy fights, he cites the example of shipping regulation where a small population of steamship lines and major shippers are active in the policy arena. Next he characterizes client politics as benefits accruing to a small group but with the costs widely distributed. Examples given are CAB protection of airlines from competition while allowing them to overcharge the public prior to deregulation as well as agricultural price support polices. The last is entrepreneurial politics involving widely distributed benefits, while costs are narrowly assigned. Health and safety and environmental policies are examples of this category.[84]

Reagan observed that interest group and client politics categories seem most susceptible to capture theory, and his reasoning is simple. If a small industry group has much to gain or lose from a given pattern of regulation, strong incentives exist to convince the agency to adopt its demands. In the case of client politics, the fact that costs are so widely diffused works against the emergence of strong organized opposition to policies favorable to client industries.[85]

From an organized interest perspective, Reagan concluded that the present day situation is one of much greater variety and diversity of politically effective groups than was the case when capture doctrine was developed. A rise in the numbers, memberships, and economic resources of consumer, environmental, and other public interests groups[86] and the success of these groups in influencing regulatory agencies in directions other than those desired by regulated industries require a modification of the assumption that narrow,

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[84] Reagan, *Regulation,* 60.

[85] Ibid, 60.

[86] As observed by: Jack L. Walker, *Origins and Maintenance of Interest Groups in America*; Jeffrey M. Berry, *The Interest Group Society*; Andrew McFarland, *Common Cause*.

producer self-interested groups dominate public policy decisions.[87] However, such a rise in influence by public interest groups in the social regulation arena initiated a reactive rise in corporate political mobilization. The conclusion is that the political environment of the new social regulation is considerably more diverse and complex than that which existed until the 1970s in economic regulation.[88]

Richard A. Harris and Sidney M. Milkis write that, historically, the purpose behind attempts to streamline the federal regulatory apparatus have been to make it more accountable, more efficient, and more responsive. Changes in regulatory "regimes" were seen as being caused by new ideas, new institutions and new policies, with new ideas being the most crucial in the opinion of the authors.[89] The new public lobby regimes were seen as the driving forces behind public participation in reshaping the FTC into a consumer advocacy agency and the EPA into an environmental protector. The authors contend that the EPA was an agency where the public lobby regime and environmentalist had strong influence through involvement in public hearings and court appeals to ensure regulations were enforced. Each of these cases characterizes the supplanting of particularistic economic interests with diffused public interest organizations. They stated that new ideas indicate the leadership role played by intellectual and political elites in establishing new regulatory regimes. These elites included journalists, social critics, the professorate and political activists.

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[87] Reagan, 64.

[88] Ibid, 94-95.

[89] Richard A. Harris and Sidney M. Milkis, *The Politics of Regulatory Change*, 25.

The authors referred to Lowi's interest group liberalism as a model that saw organized interests as the only effective participants in the forming of public policies. In this model, it is only natural that organized interests will oppose major changes, because their influence is predicated on existing forms of regulatory institutions and processes.[90] This contributes to what Harris and Milkis viewed as regulatory inertia. But the authors also recognize how the new social regulation regimes were characterized more by issue network models of interest group involvement than the subgovernment models of Lowi and Ripley and Franklin. "The new social regulation was initiated and pursued by activist public lobbies, and those organizations continue to play an important role in the implementation of policy."[91]

Yet another perspective is provided by Dorothy Robyn in her case study of deregulation of the trucking industry in 1980.[92] It was a victory of diffused, public interest, political forces over concentrated interests. The conclusion that must be drawn, however, is that Robyn's perspective is one of a different set of interests in the form of a coalition of regulatory reformers prevailing over a previously entrenched subgovernment that benefited politically from maintaining the regulatory inertia that existed before deregulation.

Robyn's case study provides a theoretical context in which she shuns the traditional economic views of self-interest or utility maximization to explain the change in policy and builds an argument that the change was due to application of certain strategic elements on the part of reformers (examples include: farm groups that supported deregulation of trucking

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[90] Ibid, 36.

[91] Ibid, 37.

[92] Dorothy Robyn, *Braking the Special Interests: Trucking Deregulation and the Politics of Policy Reform,* (Chicago: University of Chicago Press, 1987).

services; corporate shippers that organized to support deregulation; the president's Council of Economic Advisors; and public interest groups such as the Committee Urging Regulatory Reform for Efficient National Transportation). The four elements were: (1) strategic use of economic evidence and analysis to prove the benefits of reform; (2) creation of and maintenance of ad hoc coalitions to support reform; (3) use of transition strategies to mitigate opposition to change, and (4) strategic bargaining by the president to gain positive leverage in passing legislation.

For Robyn, certain changes in economic, intellectual, and organizational climates were important contributors to deregulatory trends. The emergence of public interest groups and organized consumer concerns created changes in the *organizational climate* in a way that favored deregulation. Combined with these climatic changes was an increased tendency of business interests to lobby Congress more directly in efforts to counter the growing strength of consumer movements.

Lawrence Rothenberg's study of the Interstate Commerce Commission and deregulation of the trucking industry also concludes that group theory, narrowly defined, alone proved incomplete for understanding the agency (ICC) most closely identified with capture theory. He found that in many respects group influence proved conditional. For Rothenberg, it was evident that any ability for a group to dominate the political process would be dependent upon the preferences of and the resource allocation choices made by the leaders of organized interests.[93] He observed that the groups that dominated prior to deregulation did not have adequate levels of expendable resources at their disposal to use in regaining the dominance they enjoyed with the ICC before deregulation. They did not have the political capacity to gather assistance from the three principal entities that could

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[93] Rothenberg, *Regulations, Organizations, and Politics*, 255.

produce the desired change: i.e., the ICC, Congress, or the president. The leaders in the American Trucking Association (ATA) and the International Brotherhood of Teamsters (IBT) were forced to make decisions about allocating the level of resources needed to effect pre-reform conditions. The implication is that as institutional actors change, so will the ability of groups to dominate in the political process. For example, as presidential administrations, congressional committee assignments, leadership positions in agencies, even committee staff members change, so will the fortunes of particular organized interests. This takes place as new relationships and new institutional structures are formed that require political maintenance in ways that differ from prior arrangements.

Rothenberg -- as does Robyn -- assigns a good deal of credit for the increased saliency of regulatory reform to a response to inflationary economic conditions during the later part of the Ford administration and during the Carter administration.[94] However, he places much more emphasis on changes in the administration at the ICC as a result of presidential appointments, as well as the personal commitment that Carter made to deregulating the trucking industry to symbolize his fight against the inflationary aspects of regulation. He does not mention the power of ideas as in Robyn's changing intellectual climate, nor the successful strategies in the creation and maintenance of coalitions that she also emphasized. His observation is that, "Presidential administrations with different priorities and preferences come and go; leaders rise and fall at regulatory agencies; congressional membership on key committees constantly turns over," producing regulation in flux and evolving over time.[95]

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[94] Ibid, 217-218.

[95] Ibid, 255.

In sum, these empirical case studies clearly show that regulated interests, as typified by capture theory, do not dominate the policy process. They serve to picture regulatory policy as produced by the interactions of organized particularistic interests, organized interests that purport to speak for diffuse interests; government institutions; policy entrepreneurs; policy elites; and the role that ideas play in policymaking.

Research Procedures and Organization

The qualitative research process is used to investigate primary data that were collected from records of legislative hearings, reports and floor debates Federal Communications Commission (FCC) actions and court decisions. Interviews were conducted with key participants in forging legislation. Other data were taken from contemporaneous periodicals, including trade journals.

Given the nature of the research problem, the analytical procedure employed can be explained in very basic terms. For legislation, the first step was to identify major participants in the 1984 and 1992 enactments, such as organized interest groups and their representatives, and those in Congress and the executive branch. The next stage involved identifying the major issues in each period and the positions of major actors on the issues. Following this, policy preferences of major actors are tracked from hearings, through bill mark-ups, to floor debates, and ultimately to final versions of the bills as passed by Congress. The final stage of the analysis will be to examine the crafting of policy and the factors that appeared to influence major actions at each of these key stages.

For legislation, committee and subcommittee hearings are basic sources of data. Selected hearings were analyzed in terms of points of interest such as the central issues and the nature and range of interests represented and the weight of their representation based upon several indicators. Additionally, attention was paid to the position asserted by the various interests on major issues with particular sensitivity aimed toward differences within interest groupings, for example, within the cable industry organizations and organizations representing local governments. The usefulness of this perspective has been explained by T. Alexander Smith when he wrote, "The way people define issues is highly significant in determining the scope and intensity of issue conflicts."[96]

From hearings and other sources, the concerns and leanings of congressional members were ascertained as reflected in their questions and comments and their expressed or implied attitudes toward various interests, as were their expectations regarding how differences in policy preferences should be resolved.

After analyzing pertinent hearings, committee reports were examined to identify and describe the collective position taken by subcommittees and committees on major issues and to identify and discuss how the various interests fared in outcomes.

Finally, the analysis turns to floor debates. An important consideration in this phase is analysis of the amendments offered, their fate, and what they indicate about the relative winners and losers among participating interests.

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[96] T. Alexander Smith, *The Comparative Policy Process,* Studies in Comparative Politics, Series ed. Peter H. Merkl, (Santa Barbara, California: American Bibliographical Center – Clio Press, Inc., 1975), 169.

A continuing element throughout is a comparison of House and Senate processes in formulating regulatory policy. Another is similarities and differences between the 1984 and 1992 enactments regarding process, participation, winners and losers.

Organization

Chapter I has introduced the study with a statement of the research problem, a discussion of the relevant literature on pluralism and interest group participation in policymaking, with a special emphasis on regulatory policy. This chapter includes a description of how the analysis was conducted and closes by describing the organization of the chapters to follow.

Chapter II covers the history of cable television from its earliest beginnings and how it has been affected by the various regulatory frameworks applied over time. It contains a more detailed discussion of the initial policy response to the emerging technology and how the regulation of cable television came to the policy agenda.

Chapter III deals with the first stages in the development of the Cable Communications Policy Act of 1984. Chapter IV covers the enactment of the 1984 legislation and the aftermath of implementation of deregulation of cable TV. It also discusses activities of the FCC and the courts that took place from implementation as new calls for reregulation began. Chapter V tracks the passage of the Cable Television Consumer Protection and Competition Act of 1992. Chapter VI presents an analysis of the case study including any implications about regulatory or deregulatory policy theories that may emerge.

Finally, Chapter VII is an Epilogue that presents a brief summary of relevant policy developments affecting the cable industry since the 1992 Act became law.

CHAPTER II

THE EARLY YEARS

Cable television was developed in the 1940s, initially to provide television in communities where terrain or distance prevented reception of licensed television broadcast stations, as, for example, in Mahonoy City, Pennsylvania, in 1948.[97] At that time, antennas were placed in areas having good signal reception in order to pick up broadcasts which, for a fee, were distributed to subscribers over a cable network. Today, of course, most cable systems have advanced beyond their original purpose of simply retransmitting local television broadcast signals.

Emergence

Cable TV has experienced steady growth over the past decades. This growth and development was described in 1976 "as a direct result of consumer demand for clearer television reception and more viewing options than were made available under the frequency-allocation plan of 1952."[98] In 1950, cable systems were serving some 14,000

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[97]Paul W. MacAvoy ed., *Deregulation of Cable Television,* (Washington, D.C.: American Enterprise Institute, 1977), 5.

[98]Ibid, 4. Also see Congress, House, Subcommittee on Communications of the Committee on Interstate and Foreign Commerce, *Staff Report on Cable Television: Promise Versus Regulatory Performance,* 94th Cong,, 2nd sess., 1976.

subscribers in only 70 communities. By the beginning of 1982, approximately 4,700 systems were serving more than 21 million subscribers in some 13,000 communities in the United States. Throughout the 1980s the number of systems in major metropolitan areas increased, although most cable systems were still located in small communities. Between 1984 and 1992 the number of cable subscribers rose from 37 million to 57 million. The percentage of homes with cable wire available to them rose from 71 percent in 1984 to fully 97 percent in 1992, and the number of programming services grew exponentially. By 1995 it was estimated that about 60 million homes subscribed to cable television through more than 11,000 systems.[99]

The technology's most distinguishing feature is its capacity to provide many channels of service. Although in 1977 an average of 10 channels were programmed per system, most systems were capable of offering 12 or more. By 1995, systems commonly offered a capacity of at least 36 channels, and some provided 54 or more. Some systems in large metropolitan areas offered 100 or more channels.

"Cable television" is a deceptively uniform term which describes, without differentiation, three distinct forms of wired service encompassed during the period examined here. Cable could mean "community antenna," a four- to six-channel operation simply enhancing the clarity of existing television signals; or the typically twelve-channel "CATV," augmenting local transmissions with broadcast programming imported from other markets; or the more modern "cable TV," whose twenty-four to forty-eight [or more] channels and two-way circuitry provided a communications network for a broad spectrum

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[99]Associated Press, "Cable deregulation passes hurdle," *Knoxville (Tenn.) News-Sentinel*, Business. December 6, 1995.

of private information as well as general entertainment services. All cable operations share the characteristics of multichannel, audience-supported, closed-circuit technique of delivery.

The Initial Policy Response

In the 1950s, there existed many remote areas that could not receive strong, clear television broadcast signals. Two technologies were developed in the early stages to provide remedies for some regions. One was signal relay or "booster" systems and the other was the community antenna concept which was the precursor of cable television. Battles between cable and [signal] booster operators occurred predominately in small and moderate sized communities as these technologies emerged as the preferred means to bring television to remote mountainous areas. However, clashes of national significance occurred in the slightly larger cities of from 20,000 to 40,000 population range, such as Cheyenne, Wyoming, Helena, Montana, and Twin Falls, Idaho. Markets of this size in the west were too rare for service providers of either the booster or community antenna approach to surrender without a fight. These areas became the "staging grounds for the first congressional assault upon the cable challenge."[100]

Initial Congressional Involvement.

The legal authority of the FCC to regulate cable TV was, at best, murky. As cable television grew to become a competitor with broadcast television, regulatory policies regarding cable activities lagged behind and many times effectively constrained the progress of the medium. The FCC's jurisdiction over cable derived from the requirement of the

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[100]Don R. LeDuc, *Cable Television and the FCC: A Crisis in Media Control.* (Philadelphia, Pa.: Temple University Press, 1973), 88. (Much of the discussion of the initial policy efforts is taken from LeDuc, 1973).

Communications Act of 1934 to oversee interstate communications by wire or radio. What was complicated about this was that cable provided television programming to consumers, but did not do so by use of the frequency spectrum in the airwaves. The result was that the FCC attempted to fit a regulatory scheme based on a "spectrum scarcity rationale" to a medium that did not use the spectrum. Conversely, even though cable used "wire" to deliver its programming, it did not fit into the FCC's regulatory framework for common carriers as did telephone companies.

There were some early attempts to clarify the regulatory situation. For example, in 1954, the Senate Commerce Committee held the first of an eight part series of hearings titled the "Television Inquiry." There were four hearings held between 1954 and 1960 where testimony about small-market television problems was a focal point.[101] A significant development was the holding of a special session of the committee in 1958 by Chairman Warren G. Magnuson (D-Washington), a Westerner, on the problems of western small-market television stations. He appointed his former assistant Kenneth Cox as special counsel for the hearings. Cox would later become a FCC commissioner. The purpose of these hearings seemed to be to provide a forum for complaining small station owners to attack rival cable systems and the FCC for its indifference to their problems.[102]

In 1956, William Grove, station manager of Frontier Broadcasting's KFBC-TV, Cheyenne, Wyoming, along with twelve other western broadcasters, petitioned the FCC to declare 288 CATV systems to be interstate common carriers and subject to commission jurisdiction and regulation. The commission spent two years studying the case. In *Frontier*

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[101]Ibid.

[102]Ibid, 89.

Broadcasting v. Collier,[103] the commission concluded, "It is the opinion of the staff, that, under the provisions of the Act, and upon certain reasonable assumptions, CATV might be deemed to be common carriers for hire in interstate commerce." But it also stated that, "Assertion of jurisdiction would require the regulation of rates and services of several hundred CATV systems. It would entail an administrative burden which the Commission is not equipped to handle." The FCC essentially avoided attempts to regulate CATVs as common carriers because of the perceived administrative burden it would impose. Probably more significant was the question of whether the Commission had the authority under the Communications Act of 1934 to regulate the CATV industry as common carriers. As a consequence, in April, 1958, the FCC declared that CATV systems were not common carriers, because their customers did not select the particular messages they could receive. This development caused broadcasters to turn to Congress for relief.

One month after issuing the *Frontier* decision, FCC commissioners were called before Senator Magnuson's committee. Commission Chairman John Doerfer was the first witness and was subjected to contentious questioning by Special Counsel Cox. In summary, Doerfer rejected the suggestion by Cox that the commission had any obligation to protect local broadcasters from cable competition any more than it should protect them from drive-in movies or other attractions that might develop in their service areas.[104] This response drew a line between the role of the FCC in protecting the public's interest and the economic interest of those regulated, that is, broadcasters. When Senator Frank J. Lausche (D-Ohio), asked Doerfer what legislation might help the FCC carry out its responsibilities in the area of small local broadcast markets, he urged that Congress not take action until the

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[103]Federal Communications Commission, *Frontier Broadcasting v. Collier*, 16 RR 1005, 1958.

[104]LeDuc, *Cable Television and the FCC*, 90.

commission could complete an investigation it was conducting on small-market problems. In like fashion, Vincent T. Wasilewski, representing the National Association of Broadcasters (NAB), could not recommend specific legislation that would aid western members of the organization. He suggested instead that the FCC use its authority to regulate microwave relays to control cable growth.[105]

Ultimately, the hearings were a disappointment suffering low attendance by senators. On the second day, the hearings were adjourned when the last remaining senator left the hearing room. Reasons cited were other pressing business and limited general interest in a regional problem, and perhaps most accurately, that Senator Magnuson had already decided in advance that the FCC should control the growth of CATV and held the hearings to provide justification. In the end, the committee report written by Kenneth Cox contained every position advocated by the western broadcast witnesses.[106] The report, titled "The Problems of Television Service for Smaller Communities," recommended that the commission set up a system of priorities with the highest priority given to local television stations. It urged the commission to license all auxiliary services such as VHF boosters and CATV systems. It also advocated a prohibition on importation of network programming from other sources and a constant surveillance over the growth of auxiliary systems. Any service in a lesser priority level would have to show an absence of economic threat to the higher-ranking service before it would be allowed to begin or expand its services. The burden of proof would be on the newer technologies to show that such innovation was not an economic threat to existing services, thus eliminating the competitive-market nature of introducing new technological developments. In short, the report was a complete victory for

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[105]Ibid, 93.

[106]Ibid, 94.

small-market broadcasters, so much so that it did not provide any points useful for legislative negotiations.[107]

Other than the report that merely recommended actions by the FCC, it appeared that the hearings were successful only to the degree that they stimulated interest and support from other western senators who before were indifferent to the controversy. They could now articulate a single set of preferences for commission policy in the West.

Continued studies, findings and policies on the part of the FCC were contrary to the report's recommendation to give priority to local broadcasting in protecting economic health.[108] This prompted the Commerce Committee to request the Subcommittee on Communications to draft a workable bill on auxiliary television services. Chairman John O. Pastore (D-Rhode Island), opened hearings in the summer of 1959 with the stated purpose of drawing up an equitable regulatory proposal which would protect all interests, including the public's. Three types of bills were submitted: narrow and specific proposals of the FCC concerning boosters and retransmission consent; broad and comprehensive cable regulation from western Senators Frank E. Moss (D- Utah), and James E. Murray (D-Montana); and one that involved a limited set of controls on cable submitted by Senator A. S. "Mike" Monroney (D-Oklahoma), on behalf of the NCTA. Senator Pastore put together a compromise bill that was favorably reported by the Commerce Committee in September of 1959. But the skills in formulating a compromise demonstrated during the hearings did not protect the compromise from the cooling-off period between the drafting and the enactment

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[107]Ibid, 95.

[108]The FCC was wary of becoming involved in the business of ensuring the viability of any medium they regulated based on a 1940 Supreme Court ruling in *FCC v. Sanders Brothers Broadcasting* [309 US 470 (1940)] admonishing the commission to not consider economic impact when granting licenses.

of legislation. A month after the bill was reported, the National Cable Television Association (NCTA), issued a statement clarifying its position and reiterating objection to retransmission consent and mandatory local station carriage. It also renewed demands for preemption of state and local regulations and called for grandfathering existing systems. The cable industry then returned to the FCC and attempted to negotiate a private settlement with western broadcasters.

In November, 1959, A. J. Malin, president of NCTA, wrote to Chairman Doerfer proposing an ad hoc committee of station and cable owners to consider possible solutions to basic complaints that broadcasters had about CATV. Doerfer rejected the NCTA request, since Congress was struggling with the issue and he was reluctant to have the FCC back in the middle of the battle. It was interpreted by some that the initiative by the NCTA was really an attempt to slow or stop congressional deliberations on legislative remedies.

Pastore's Bill, S. 2653, came to the floor on May 17, 1960. Supporters were trying to push it through the Senate while opponents were trying to have it referred back to committee, killing it. By a roll-call vote, S. 2653 was defeated 18 to 37 and returned to committee where it died.

An analysis by LeDuc summarizes the outcome.[109] Addressing the question of how the NCTA faired so well over the far more powerful NAB, he concluded that the NAB did not lose and the NCTA did not win. The broadcast organization did not actively campaign for regulation of cable television. It was the small-market broadcasters from western states who had taken the initiative to approach Congress on the cable TV question. This is probably a result of the NAB not being a unified organization of broadcasters as much as a

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[109]LeDuc, *Cable Television and the FCC*, 110-111.

"federation" of narrow interests. The NAB was more focused on serving larger metropolitan markets where the big three broadcast networks held station licenses. There was no obvious cohesion between major-market broadcasters, not threatened by cable, and small-market community operators. Furthermore, western broadcasters had little influence in the association at all.

In a somewhat similar manner, the defeat of the legislation was not necessarily a victory for the leadership of NCTA. The association's board of directors had voted unanimously in 1958 to support federal regulation of CATV. Its motive was to centralize regulatory authority at the federal level and avoid the variations and complications of state and local regulations that were expanding in scope with each passing year. The concept was not, however, shared by its 300 members. The board of directors, made up of owners of large systems, was attempting to impose nationwide objectives on an industry that was basically local in nature. Most single system owners had reached accommodation with the regulatory bodies at the individual municipal or state levels. They had no interest in becoming involved with the FCC bureaucracy in Washington.

In the final analysis, the initial groups advocating federal intervention could not persuade their own organizations to support their positions. They represented only small but vocal portions of their respective industries. Likewise, the western senators were also a minority in the Senate and could not garner the necessary votes without support from at least one of the two national trade organizations. When the cable bill failed it was not so much from opposition as from lack of interest among senators whose constituents took no particular stand on the question. The rejection of S. 2653 was the collapse of a compromise among a minority of interests more than a victory or defeat of any particular faction. This

first effort to establish federal regulation of cable television failed because of apathy; an effect of the limited nature of its impact.

During the 1950s and 1960s, state and local governments attempted to fill the regulatory gap by establishing their own jurisdiction over cable TV. At the same time, broadcasters attacked the cable operations in various courts. In addition, advancements in cable communications technology allowed systems to carry up to twelve channels. Cable operators began to use the new technology to offer urban subscribers more than the three networks most had received, many times with additional programming imported from distant markets.[110]

The new direction that took cable TV into urban areas placed the industry in conflict with a more potent coalition of opponents. It included powerful broadcasters, programming syndicators, and networks that were concerned with controlling the flow of television programming into urban markets. Similarly, the importation of distant signals also threatened the independent UHF stations in urban markets.[111]

The FCC largely ignored the evolution of the cable television challenge until these systems began campaigns to enter major urban broadcast markets in late 1964. Because it was unprepared for this development, the commission could only react. It imposed an embargo on cable systems operating in metropolitan areas until the commission could establish policy to apply to the cable TV situation.

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[110]Ibid, 114.

[111]Ibid, 119.

State and Local Regulation

Until 1972, local and state governments were the dominant force in cable TV regulation.[112] The attempts by states to establish regulations over early cable operations proved difficult simply because, in general, their regulatory experience was with controlling large corporations providing electric power and common carrier communication services. Application of the traditional methods proved too cumbersome for the small business nature of CATV operators that prevailed at the time, and many states were not convinced that after expending the effort to establish such systems for regulating cable that the FCC would not preempt their authority in the future. As cable regulation developed in its early years, municipal involvement was generally found in authorizing the use of local streets and rights-of-way and to adopting regulations to protect the safety of life and property. The first cable television franchises or licenses generally were granted upon the application of a prospective operator.[113] These early regulatory arrangements were characterized by informal agreements that developed between small towns and the relatively small business operations of CATV operators.[114]

For cities, not only did they seek to require cable systems to provide a wide range of community services, but local officials sought to tax cable operators in the form of franchise fees, which in turn provided local governments with a significant new revenue source. In the view of cable operators, the urgency of prospective operators to serve the cities was used to extract valuable and costly considerations that they believed were unrelated to providing cable television services. It was partly this history of cable operators believing that excessive

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[112]Don R. LeDuc, *Beyond Broadcasting: Patterns in Policy and Law* (New York: Longman, 1987), 37.

[113]MacAvoy, *Deregulation of Cable Television,* i.

[114]LeDuc, *Cable Television and the FCC,* 127.

demands were being placed on them by local governments and the view of cities that cable operators were not always judicious in their willingness to agree to such terms that influenced Congress to consider the Cable Communications Policy Act of 1984. For operators, the franchising process had created a situation of over-regulation that exacted payments by them in terms of money, services, and facilities that they felt bore little relation to the marketplace or consumers' interests. Each franchising authority imposed a different set of rules and obligations on its cable system providers. Many times these terms reflected political considerations, not economic conditions or consumer demand. The situation had become one where the interests of municipal regulators, cable system owners, and potential cable operators differed sharply. Ultimately, Congress began to involve itself in the establishment of a national policy for cable communications.

Initiating Federal Regulation of Cable Television

By 1965 Congress had begun again to pressure the FCC to develop policy for CATV systems. The chairmen of both the Senate Communications Subcommittee and the House Interstate and Foreign Commerce Committee became interested in the issue. However, they differed in their approaches. While Senator Pastore wanted the FCC to make policy decisions, Representative Oren Harris (D-Arkansas), Chairman of the House Interstate and Foreign Commerce Committee, wanted only proposals from the Commission. He did not want the Commission to set standards without first having the legislative authority to do so. In March, the FCC staff prepared rules that simply reflected those applied to all cable systems that used microwave to import signals in the same manner that was already being applied on a case-by-case basis.[115] The FCC had been regulating cable systems using

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[115]Federal Communications Commission, *First Report and Order*, [38 FCC 683, 23 April 1965] "In the matter of Amendment of Subpart I, Part 21, to Adopt Rules and Regulations to Govern the Grant of Authorization in the Domestic

microwave broadcast band width to transmit signals because it fit into the Commission's scheme for regulating "broadcasting." The "First Report and Order" contained two fundamental regulatory elements. One required that cable TV operators obtain the consent of local broadcast stations to carry their signals and the other was a thirty day non-duplication of programming of local stations. The non-duplication element prevented cable TV systems from importing distant signals into a market that would show the same programming that local broadcast stations had exclusive rights to show. This thirty day period was intended to eliminate infringement on the exclusive programming rights of local stations. Although Senator Pastore was satisfied with the commission's actions, Representative Harris was upset by the refusal of the FCC to consult with his committee before enacting the regulations. He immediately introduced his own CATV bill, convened hearings and summoned the commissioners to explain their actions.[116] Based on his satisfaction with the initiatives taken by the commission, Senator Pastore stated that he would not entertain cable legislation unless the House took positive action. During the remainder of the decade, several bills were debated in the House but none made it to the floor for full House consideration and therefore died.

The FCC Prevails

Federal regulation of cable began in earnest in the late 1960s in response to urging from the broadcast industry that it needed protection from competition by cable television's capability to bring in, or import, broadcast programming from distant service areas into local television service areas. The FCC assumed authority to regulate programming carried by

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Point to Point Microwave Radio Service for Microwave Stations Used to Relay Television Signals to CATV," 700.

[116]LeDuc, *Cable Television and the FCC*, 145.

cable systems as a natural and necessary extension of its authority to regulate broadcast television (also known as the ancillary doctrine). This doctrine was based on the FCC's belief that if cable television could have a negative competitive impact on broadcast television, any such negative impact in turn would adversely effect the public interest, and thus the need for regulation. Indeed, in 1966 the initial cable TV rules were promulgated in the Second Report and Order in Docket 15971, based on an inquiry and rulemaking proceeding begun in 1965. The FCC found that importation of distant television signals could seriously degrade the service offered by broadcasters, causing a reduction in service to households not subscribing to cable systems. In order to protect local broadcasters, rules were established that required cable systems to carry the signals of all local stations in their areas, to refrain from duplicating programs of local television stations carried on the system during the same day that such programs were broadcast by local stations, and to limit importation of distant broadcast signals into the service areas of local television broadcasters in the top 100 markets.[117] In May, 1966, the U. S. District Court, Southern Division of New York ruled that CATV systems relaying broadcast television programs violated copyright laws. Before the end of 1966, the House of Representatives held hearings and a bill was produced to extend the FCC's statutory authority to cover CATV. The FCC also began to review and approve cable TV franchise agreements as they were granted or renewed by local governments. It attempted to extrapolate its authority over CATV from the 1934 Act in a piece-meal fashion as a reaction to the Commission's lack of explicit statutory authority to regulate cable television. This was the prevailing approach until a very important decision by the Supreme Court in 1968. In that case, the Commission's regulation of cable television was affirmed in *United States v. Southwestern Cable*, when it upheld the authority of the FCC to impose restrictions on the number of distant signals a cable television system could

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[117]Federal Communications Commission, CATV, 2 FCC 2d, 725 (1966).

import and make available to its subscribers.[118] The Court held that the Commission had jurisdiction under the Communications Act of 1934 to promulgate such regulations, but the Court warned that the Commission's authority was limited to areas reasonably ancillary to discharging responsibilities for regulating television broadcasting.

The Supreme Court based its decision on the finding that CATV performed one or both of two functions. One, it supplemented broadcasting by facilitating satisfactory reception of local stations in adjacent areas where the broadcast signal could not be received. Second, it provided subscribers with signals of distant stations entirely out of the range of local television antennae. As the number and size of CATV systems grew, their main function became the importation of distant television signals. Because the use of satellite technology had not yet developed at that time, cable television was yet to become a vigorous competitor with broadcasters through the use of made-for-cable programming. Thus, at that time, the Court's decision effectively relegated cable to second-class status in the television industry. After the Southwestern case, the FCC promulgated rules in nearly every aspect of the operation of cable systems. While the statutory authority of the FCC to do this was under some doubt, the commission used its authority over broadcast transmission to withhold permission to import broadcast signals from those cable operators who were party to local government franchise agreements that did not meet FCC specifications for such agreements. This denial of import permission would keep a cable system from being profitable enough to stay in business. This regulatory approach effectively allowed the FCC to preempt local control of cable TV franchises.[119]

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[118]United States et al, v. Southwestern Cable, 392 U.S. 157, (1968).

[119]LeDuc, *Beyond Broadcasting*, 37.

Later in 1972, FCC regulations requiring cable television systems to originate certain kinds of local public access programming were upheld by the Supreme Court as reasonably ancillary to the commissions's general obligation to promote diversity.[120] In a short period of time, based upon such interpretations, a regulatory regime was imposed upon the emergent cable television industry through a loose collection of separate rulings imposed by the FCC and upheld by the courts.

As time passed, the FCC, as part of its efforts to protect broadcasters from competition, went so far as to prohibit cable from purchasing the rights to display movies that were more than three or less than ten years old. Similarly, a cable operator could be fined if he telecast sporting events that had been broadcast in the same community within the previous two years. With regard to syndicated programming, a broadcaster's exclusivity contracts were used to forbid such program retransmissions by cable television.

Considering the question of whether the appropriate regulatory scheme had been in place or if another would be better suited, MacAvoy contends, "Cable television was one of those regulatory problem areas which official and unofficial Washington always found time to study but also found very difficult to do anything about. In fact, the industry had been intensively studied by the Congress, the Federal Communications Commission, various executive branch agencies, and prestigious private organizations including the Committee for Economic Development and the Sloan Commission."[121] Similarly, the question of whether regulation was even necessary had been raised as early as the mid-1970s when President Gerald Ford's Domestic Council Review Group on Regulatory Reform (DCRG)

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[120]United States v. Midwest Video Corp., 406 U.S. 649, 662-63, (1972).

[121]MacAvoy, *Deregulation of Cable Television,* i.

in March 1976 concluded that "rules on signal use over the cable should in good part be eliminated."[122]

In 1975, the FCC announced a program of structured dualism. Under this structure, state and local governments were given franchising authority and responsibility to select cable franchisees, establish franchise boundaries, regulate the construction of cable facilities, and maintain rights-of-way. Franchising authorities were allowed to regulate rates for basic service while the Commission reserved exclusive jurisdiction over all operational aspects of cable systems, including signal carriage and technical standards.[123] By 1979, the FCC had issued rules regulating cable operators in the top 100 markets requiring them to: (1) develop a minimum capacity of 20 channels; (2) develop the technical capability for accomplishing two-way, non-voice (data) communications; (3) allocate separate channels for use by public, educational, local government, and leased access users, with at least one channel for each; and (4) provide production equipment and facilities for public assess use. The Commission also regulated the rates that could be charged on access users, thereby treating cable television as a common carrier.

Cracks in Federal Regulations

Problems in the Courts and Congress

At the same time that the FCC seemed to be solidifying its position on regulating cable television, the Supreme Court was taking a different perspective. In December, 1968,

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[122]Ibid.

[123]Federal Communications Commission, *Cable Television Report and Order*, (Washington, D. C.: GPO, 1975). 36 FCC 2d 207.

a Supreme Court decision held that "cable television systems which pick up programs originated by others ...were free from any liability for royalty payments."[124] The Court on March 4, 1974[125] held that cable television systems were not infringing upon network copyrights by intercepting and retransmitting network programs to subscribers who could not otherwise receive them.[126] These decisions reversed lower court rulings in these matters and began to undermine the FCC's regulatory approach to cable TV.

By March, 1977 a U.S. appeals court threw out the FCC restrictions on program availability to cable TV operators.[127] The Court of Appeals, District of Columbia Circuit, held that neither the Communications Act nor the First Amendment authorized such regulating. The FCC, the NAB and ABC appealed this ruling. But the Supreme Court refused to hear their arguments and in October, 1977 left standing the appellate court decision that the FCC lacked the authority to restrict the programs offered by cable television stations. The Supreme Court struck down another FCC order that had restricted pay cable television's access to movies and sports events. Broadcasters, who opposed competition from cable television, had backed the FCC curbs.[128]

In 1979, the burden of these regulations again brought the issue before the U.S. Supreme Court in a second case involving Midwest Video. This time the Court ruled that

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[124]*Congressional Quarterly Weekly Report*, 1974, 1883. Hereafter cited as CQWR.

[125]Teleprompter Corporation, et al v. Columbia Broadcasting System, Inc. et al, 415 US 394 (1974).

[126]CQWR, 1974, 618.

[127]Home Boxoffice, Inc. v. FCC, 567 F.2d 9 (DC Cir. 1977).

[128]Erwin G. Krasnow, Lawrence D. Longley, and Herbert A. Terry. *The Politics of Broadcast Regulation.* (New York: St. Martin's Press, 1982) 249.

access requirements that could not be imposed on broadcasters could not be imposed on cable systems either. But most importantly was the statement by the Court that, "The Commission may not regulate cable systems as common carriers, just as it may not impose such obligation on television broadcasters. We think the authority to compel cable operators to provide common carriage of public-originated transmissions must come specifically from Congress."[129]

The Seeds of Deregulation Are Sewn

After adoption of the FCC's *Report and Order* in 1972, there was concern about the need for specific regulations, and also about the appropriate regulatory jurisdiction for those regulations. The cable television industry was particularly interested in eliminating regulations it believed were excessive or duplicative and expressed frustration about inconsistent or conflicting Federal, state, and local rules. For example, the force of the Commission's rate regulation requirement was doubted for states where local governments did not possess rate regulation authority .[130]

In a broader sense, the deregulation wave of the mid to late 1970s also touched the cable television issue. In late 1975 and early 1976 President Ford's Task Force on Regulatory Reform drafted legislation to deregulate the cable television industry. In addition, during January, 1976 the House Interstate and Foreign Commerce Subcommittee on Communications issued a report criticizing the FCC for over-regulating cable television and calling for legislation to promote the cable television industry.[131] On February 5, 1976 the

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[129]FCC v. Midwest Video, 440 U.S. 689, 709 (1979).

[130]U.S. Congress, Senate, Senate. Report. No. 97-170, 1981, 56.

[131]CQWR, 1976, 336.

Justice Department filed a brief in federal court challenging FCC restrictions on programs carried by pay cable television.[132]

In an effort to garner consensus on the question of appropriate regulation of cable television, if any, the House Subcommittee on Communications released a series of "options papers" in April 1977. The "options" addressed potential legislation that would establish a national policy on cable television. The result was that in February 1978 *The Communications Act Amendments of 1978*[133] was enacted. As it turned out, the only provision for cable TV was that it required the FCC to regulate the rates, terms and conditions for making cable TV pole attachments to ensure they were just and reasonable unless a state regulates such factors on its own.

The FCC Retreats

In July, 1980, the Commission adopted a proposal to delete its distant signal carriage restrictions and syndicated program exclusivity rules. This ended a rulemaking and study that began in 1976.[134] The basis for the action was the finding in the *Economic Inquiry Report* that the viability of broadcast stations would not be substantially harmed as a result of eliminating the rules and that the public benefit would be substantially increased by their deletion. In July, 1981, after the Reagan administration came to office, in another major deregulation action, the Commission deleted the syndicated program exclusivity rules for cable TV systems. This only applied to cable operators in the top 100 markets and was designed to protect contractual agreements between copyright holders and broadcasters for program rights.

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[132]Ibid.

[133]*The Communications Act Amendments of 1978,* PL 95-234.

[134]See FCC documents Dockets 20988 and 21284.

Coming to the National Policy Agenda

Viewing Cable TV regulation from a public policy perspective, it was governed by a chaotic piecemeal regulatory regime. Bernard J. Wunder, Jr., assistant secretary for communications and information at the Commerce Department, believed that cable's initial slow growth was due to regressive regulation by the FCC. However, the industry began to boom in the 1970s once the Commission relaxed its rules and cable operators were able to offer more to consumers. But the piecemeal regulatory regime had a local component as well. It was the contention of cable operators and their congressional supporters that as federal regulation decreased, local and state governments stepped up their regulation.[135] Indeed as the second *Midwest Video* ruling caused the FCC's presence in cable television regulation to diminish, local franchising authorities quickly increased their activities to fill the regulatory gap left by the FCC. The increase in activities came at a time when many major cities were deciding which cable companies should be awarded initial franchises to construct cable television systems and provide cable services. Local regulations were particularly troublesome because of their inconsistency across the nation.

When cable TV regulation is viewed from a political perspective, the industry had to struggle against the interests of broadcasters and cities that were regulating cable TV. Broadcasters certainly worked to curtail the growth of cable television as a serious competitor. They lobbied hard in Congress and at the FCC to restrict cable delivery of programs that originated with broadcasters.[136] In 1980, Erwin G. Krasnow, then general counsel for the NAB, said that the broadcast industry only wanted to assure that cable

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[135]CQWR, 1982, 2207.

[136] "Long Faced with Federal Regulation...Broadcasters Turned to Lobbying," *Congressional Quarterly Weekly Report*, (April 2, 1980), 2180-2181.

operators would pay a fair price for the programming they used, and that they not use it to compete unfairly with local broadcasters. However, Brenda Fox, who had been a deputy to Krasnow at NAB before becoming general counsel for the NCTA, stated that she believed the record was pretty clear about the attempts by NAB to stifle the development of cable.

On July 22, 1980, broadcasters suffered a setback when the FCC voted to lift nearly all limits on the programming of cable operators, giving as part of the rationale that broadcasters' fears of competitive damage from cable were groundless.[137] Cable television lobbyists had been trying to win similar concessions from Congress, but broadcasters had generated so much controversy that sponsors completely dropped broadcast-related provisions from House versions of an attempted rewrite of the Communications Act of 1934. One aspect of the effort that diminished NAB impact in fighting the growth of cable television was that about 30 percent of the cable systems were at that time owned by broadcasters.

Another contributing factor to the rise of cable TV to the national agenda, was changes in the industry itself. As large corporations began buying groups of cable systems throughout the United States, a major shift in the policy position of the NCTA occurred. The new owners supported federal regulation of cable to preempt state or local control and end pattern of varied and uncertain individualized franchise agreements which made in difficult to apply any uniform management from the headquarters of a corporation. Conversely, small sized cable operators favored dealing with state and local officials, with which they had established working relationships, over dealing with a federal bureaucracy in Washington.[138] Local franchising authorities, of course, felt that they were the most capable of determining

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[137]Ibid, 2181.

[138]LeDuc, *Beyond Broadcasting,* 84.

the aspects of franchise agreements that best suited local needs and desires and believed that such FCC involvement was not necessary. At this same time, cable television was becoming very aggressive in its lobbying strategies. A Senate aide described one tactic as, "when going into a community to organize a franchise, they get together a board of 20 to 30 leading citizens. All of them have immediate access to their representatives and senators. They are very aggressive and very, very effective."[139]

In these developments were the beginnings of the 1984 legislation to deregulate the cable TV industry. The effort began as a reaction to the dominant regime of local government regulation through application of franchise agreements and the efforts of Congress to curtail the federal role.

Deregulation and Cable Television

The debate over cable television that intensified in the 1980s appears at first to be an example somewhat different from other debates over deregulation that occurred starting in the mid-1970s. The conventional view of deregulation as a policy alternative had involved economic arenas that were marked by long standing relationships within "subgovernments" comprised of legislatures, regulating bodies and the regulated industry. Some notable areas include trucking, airlines and telephone services. The difference in the case of cable television was that until the Cable Act of 1984, there existed no true national policy on cable television. The FCC had established various regulations through rulemaking and courts had reviewed them. Cities were an immediate regulatory presence for increasingly larger cable

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[139] Ward White, personal interview by author, Washington, D.C., September 4, 1996.

enterprises who argued the need for policy that allowed the industry to grow effectively and efficiently without the kinds of regulations that prevented them from competing with the broadcast industry in a fair and equitable manner. Broadcasting took a different tack, and the cities were reluctant to be divested of their prerogatives. It was a complicated mix that confronted policy makers and those who sought to influence them, as the next two chapters will show.

CHAPTER III

MOVING TOWARD THE CABLE COMMUNICATIONS POLICY ACT OF 1984

Approximately two decades after the regulatory process began for cable television, Congress, for the first time, set formal national policy for this medium. Passed in 1984, the first cable telecommunications act was essentially deregulatory in nature. Most significantly, the final passage of the legislation resulted from extended negotiations among the National League of Cities, the National Cable Television Association, and some large cities. Cities and the industry long had held opposing views on cable policy. Indeed, according to one close observer, "One of the predominant themes in the history of cable television regulation has been the ongoing tension between cable operators and municipal franchising authorities based on mutual abuses of political and economic power."[140] The Cable Communications Policy Act of 1984 addressed some of these tensions by imposing uniform federal standards for specific components of cable regulation. But it focused primarily on limiting municipal power while imposing only a few federal restrictions on the ability of cable operators to exercise their market power. As one industry analyst observed,

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[140] Robert F. Copple, "State Coordination of Cable Communications Policy: An Idea Whose Time Has Come – Again." *Journal of Broadcasting and Electronic Media,* Vol. 36, No. 2, Spring 1992, 137.

"It reduced and reconfigured the scope of regulation of the cable television industry, but did not go further."[141].

More specifically, the act affirmed the authority of municipalities to award exclusive franchises to cable operators and made cable television the only mass medium required to provide access to any member of the public through channels reserved for public, educational, and government (PEG) use. It limited the franchise fees that municipalities could obtain to five percent of cable operators' gross annual revenues. It also mandated that local regulation of basic cable service rates end in 1987. An exception was made for situations in which the cable system was not subject to effective competition. In these, regulation of rates could continue. This became one of the more contentious aspects of the law to implement, since the FCC was directed by the act to define effective competition. In 1985 the commission ruled that any cable system would be considered subject to effective competition if three or more unduplicated broadcast signals were available in the service area. Because of this criterion, most cable systems qualified for rate deregulation by November of 1986. The act preempted regulation of other than basic services, such as premium channels and pay-per-view services, and reserved it for the FCC. The law banned cross-ownership of cable TV services and broadcast stations in the same community and prevented telephone companies from entering the cable business in their service areas except in areas that were predominately rural and not likely to be served by cable operators. Lastly, the law prohibited treatment of cable operators as common carriers, provided for consistent procedures for renewing cable franchises, but included no ban on newspaper cross-ownership.[142]

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[141] Robert Britt Horwitz, *The Irony of Regulatory Reform: The Deregulation of American Telecommunications.* (New York: Oxford Press, 1989), 244.

[142] Marvin R. Bensman, *Broadcast/Cable Regulation.* (Lanham, MD: University Press of America, 1990), 28.

This chapter examines the origins and development of the legislation through 1983. Its completion and immediate aftermath are the subject of the following chapter.

Overview

The central focus of the deregulation battle that emerged was over continuing the development of the cable industry and choosing the appropriate regulatory policy for that to occur. In the late 1970s and early 1980s, two basic issues divided cable system operators and municipal governments. The first issue was whether or not to continue regulating cable television. The second was, if regulation of the industry were to continue, how should authority be distributed among federal, state and local governments. Moreover, continuing the policy of cable operators paying franchise fees to local governments was of underlying concern to municipal government interests. These fees provided significant revenue sources in return for relatively low costs in city operations..

The National Cable Television Association, which represented cable system operators, preferred that Congress deregulate the cable television industry because cable operators believed they were in a competitive market. Absent total deregulation, the NCTA argued that any continued regulation should be at the federal level, similar to what existed for the broadcast industry. It believed that federal regulation was needed to preempt state or local control and thereby end a pattern of nonstandard and uncertain franchise agreements. Variegated local regulations made it difficult for the large cable corporations which owned many local operations to uniformly manage their subsidiaries. Also, local regulations were seen as unfair impediments to the development of the cable television industry as it attempted to compete with other video entertainment. However, not all cable operators

preferred federal regulation. Small, independent cable system operators favored dealing with state and local officials, with whom they had established successful working relationships, rather than dealing with a large federal bureaucracy. But, since the corporate cable operators dominated the leadership of the NCTA, the view that local regulations were burdensome prevailed as the industry's official position.[143]

On the other side of the question, the National League of Cities, representing local government interests, contended that regulation was vital to ensure that cable operators complied with franchise agreements. As an example, some franchise agreements included promises for expanded services that had not been fulfilled, such as data retrieval and open access to spare channels not used to transmit television programming. Additionally, some cable operators had poor performance records. Consequently, municipalities and other local governments took the position that rate regulation through franchise agreements was the only protection that consumers had against the effective monopoly of the cable operators. Therefore, the NLC felt that local governments were the appropriate regulating authorities, since they were best situated to represent each community's needs for cable services.

Serious efforts to enact major cable legislation began in 1981. In April of that year, S. 898, the Telecommunications Competition and Deregulation Act of 1981, was introduced by senators from four western states. The bill provided for far-reaching changes in basic communications policy, but focused mainly on the common carrier aspects of telephonic communications and not on cable communications. The Senate passed S. 898 in October by a vote of 90-4, but not before it was amended to eliminate contested provisions added in committee that would have removed the authority of states and municipalities to regulate

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[143] Don R. LeDuc, *Beyond Broadcasting: Patterns in Policy and Law.* (New York: Longman, 1987), 84.

cable television operators. It was the first bill to deregulate the telecommunications industry and restructure AT&T that would reach the floor of either chamber in five years of effort. Despite strong support in the Senate, it was not considered in the House. There, the only actions taken on cable television in 1981 were hearings on miscellaneous telecommunications matters by the Subcommittee on Telecommunications, Consumer Protection, and Finance of the House Energy and Commerce Committee (hereafter referred to as the Telecommunications Subcommittee).

Municipalities were angered language added to the bill limiting their regulatory power, since they had no opportunity to be heard. Consequently, on January 18, and February 16, 1982, the Senate Committee on Commerce, Science, and Transportation held hearings specifically on cable television regulation. As a result, on March 4, 1982, the Cable Telecommunications Act of 1982, S. 2172, was introduced. Comprehensive hearings on the bill were held in April. On August 10, the Senate Commerce Committee reported the bill that again included provisions to restrict local regulation of cable television. Despite interest in the Senate, there was little support in the House because of opposition from cities. It was evident that there would be no action on the legislation in the House so close to the end of the session. Nevertheless, the cable industry still wanted a vote in the full Senate to encourage completion of legislative action early in 1983 when a new Senate session would begin, but in this they were not successful and that vote did not take place.[144] In contrast, the only cable television activity in the House of Representatives in 1982 was a one-day hearing before the Telecommunications Subcommittee. The subject was whether local citizens interested in gaining access to cable television studios and transmission channels were allowed adequate participation in franchising decisions.

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[144] *Congressional Quarterly Weekly Report*, September 4, 1982, 2207. Hereafter cited as *CQWR*.

The following year, on January 26, 1983, Senator Barry M. Goldwater, (R-Arizona), introduced S. 66, the Cable Telecommunications Act of 1983 that was essentially identical to S. 2172. It contained severe limitations on state and local regulation of cable operations, and the NLC immediately went on record in opposition to the bill. In April, S. 66 was amended to reflect a compromise worked out by the NLC and the NCTA and was approved by the Senate Commerce Committee. After a short delay to accommodate opposition from some members and to avoid a threatened filibuster, the full Senate passed S. 66 by a 87-9 vote on June 14, 1983.

In the House, hearings were held before the Telecommunications Subcommittee on May 25, June 22, and November 3 "to consider proposals to revise and clarify FCC, State, and local regulatory jurisdictions."[145] These subcommittee hearings were also used to consider the March compromise agreement between NLC and NCTA concerning regulation of cable TV systems. H.R. 4103, the Cable Franchise Policy and Communications Act of 1983, was introduced in October of 1983. On November 17, the subcommittee approved a version of the bill that would have sharply reduced the power of cities to regulate the cable television business. The bill then moved to the full committee and was reported on October 1, 1984. It was passed by the House and added as an amendment to S. 66. A conference committee produced a compromise version. Within hours of that action, both houses approved the conference report and the Cable Communications Policy Act of 1984, S. 66 was passed on October 11. President Ronald Reagan signed it into law shortly thereafter.

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[145] Congress, House, Committee on Energy and Commerce, *Options for Cable Legislation: Hearing before the Committee on Energy and Commerce,* 98th Cong., 1st sess., May 25, June22, November 3, 1983. Washington, D.C.: Government Printing Office, 1984. (1984 CIS Microfiche H361-19).

Table 3.1 presents major congressional actions on cable legislation from 1981 through 1984 in chronological order.

Table 3.2 presents the major congressional hearings held between April of 1979 and June of 1983. The June 1983 hearings were the last held before the Cable Communications Policy Act of 1984 was passed. The hearings are listed by date, committee, and the major issues discussed at the hearings.

Table 3.1. Major Congressional Actions on Cable Communications: 1981 through 1984

YEAR	SENATE	HOUSE
1981	**April** - S. 898 introduced. **June 2, 11, 15, 16, 19,** - Hearings held: "Telecommunications Competition and Deregulation Act of 1981" **July 16,** - bill reported by vote of 16 to 1. **October 5-6** -consideration of amendments and Senate Passage.	**June 9, & 16,** and **July 23, 28,** - hearings held: "Telecommunications Miscellaneous, Part I".
1982	**January 18, and February 16,** - hearings held: "Cable Television Regulation, Part 1." **March 4,** - S. 2172 introduced. **April 26-28,** - hearings held: "Cable Television Regulation, Part 2." **August 10,** - S. 2172 reported out of committee.	**March 8,** - hearings held: "Cable Franchise Investigation."
1983	**January 26,** - S. 66 introduced. **February 16, 17,** - hearings held: "Cable Telecommunications Act of 1983". **April 27,** - S. 66 reported out of committee. **June 14,** - S. 66 passed by Senate.	**May 25, June 22,** and **November 3,** - hearings held: "Options for Cable Legislation". **October 6,** - H.R. 4103 introduced.
1984	**October 11,** - Senate concurrence in House amendments to S. 66, passage with additional amendments.	**August 1,** - H.R. 4103 reported out of Committee. **October 1,** -passage of H.R. 4103; passage of S. 66 and tabling of H.R. 4103. **October 11,** - House concurrence in Senate amendments to S. 66.

Table 3.2. Hearings on Cable Communications Policy Act of 1984

Congress	Date	Committee	Issues
97th	June 2, 11, 15, 16, 19, 1981	Senate Commerce, Science, and Transportation Committee	Telecommunications Competition and Deregulation Act of 1981
	June 9, 16, July 23, 28, 1981	House Energy and Commerce Committee's Subcommittee on Telecommunication	Telecommunications Miscellaneous, Part 1.
	June 22, 1981 August 3, 1981	Senate Commerce, Science and Transportation Committee's Subcommittee on Communications	Rural Telecommunications
	January 18, February 16, 1982	Senate Commerce, Science, and Transportation Committee	Cable Television Regulation, Part 1
	March 8, 1982	House Energy and Commerce Committee's Subcommittee on Telecommunication	Cable Franchise Investigation: Local Participation.
	April 26-28, 1982	Senate Commerce, Science, and Transportation Committee	Cable Television Regulation, Part 2.
98th	February 16, 17, 1983	Senate Commerce, Science, and Transportation Committee's Subcommittee on Communications	Cable Telecommunications Act of 1983
	May 25, June 22, November 3, 1983	House Energy and Commerce Committee's Subcommittee on Telecommunications, Consumer Protection and Finance	Options for Cable Legislation
	June 6, 1983	House Energy and Commerce Committee's Subcommittee on Telecommunications, Consumer Protection, and Finance	Parity for Minorities in the Media

In the following sections, the activities and events which led to Cable Communications Act of 1984 will be examined in more detail.

Cable Deregulation Gets Underway

As the cable television industry began to prosper in the 1970s after the FCC relaxed its rules, the medium offered consumers more entertainment options. These included original programming in addition to simply providing programming from broadcast stations. Simultaneously, the FCC refrained from directly regulating cable television since it had no explicit mandate to do so. But as federal regulations decreased, local and state governments increased their roles in regulating cable TV. The result was a "patch-work quilt" of regulation that varied significantly by state and local jurisdictions. As each jurisdiction developed its own unique set of regulations, including franchise fee schedules and demands

for in-kind services, cable operators found it increasingly difficult to make consistent business decisions of a corporate nature on either a national or regional basis. Thus, they sought from Congress relief from inconsistent regulation or, alternatively, the creation of one consistent set of national regulations. To this end, organized interests for the cable industry found congressional allies, particularly from the Western states of Washington, Oregon, New Mexico, and Arizona, who were willing to include provisions for regulatory relief in broad based bills intended to rewrite telecommunications policy. The final deregulation policy was produced after several cycles of introducing bills, hearings, negotiations with stakeholders, and finally passing a law.

Key Players

As the 97th Congress began in 1981, the political tone in Washington was favorable for continuation of deregulation efforts begun in the 1970s. The Republican party held a majority in the Senate and the Democrats were in the majority in the House of Representatives. It was the first year of Ronald Reagan's two presidential terms, and one of his election mandates was to reduce government regulation. Several members of Congress were instrumental in enacting deregulation for cable television. Very early in the process, senators Robert Packwood (R-Oregon), and Barry Goldwater, were involved, Packwood as chairman of the Senate Committee on Commerce, Science and Transportation and Goldwater as chairman of the Communications Subcommittee. A favorable factor for deregulating telecommunications was that Senator Howard D. Cannon (D-Nevada) was the ranking minority member of the committee. He was noted for his efforts to deregulate the trucking and airline industries and was experienced in dealing with regulatory policy issues. He had cosponsored bills to amend the Communications Act of 1934 during the 96th Congress. Additionally, senators Harrison Schmitt (R-New Mexico), and Slade Gorton (R-

Washington), were also active in early hearings. In the House of Representatives, members who would play key roles in deregulating cable TV included Timothy E. Wirth (D-Colorado), Edward J. Markey (D-Massachusetts), and Alan Swift (D-Washington). Representative John D. Dingell (D-Michigan), who chaired the House Energy and Commerce Committee, actively sought a negotiated consensus.[146] Another significant participant was Representative Albert Gore, Jr. (D-Tennessee), who did not serve on the Communications Subcommittee until 1983, but stayed closely involved, especially in cable matters, after his election to the Senate in 1984.

In 1981 and 1982, the Senate Communications Subcommittee had four Republicans in the majority and three Democrats, with Senator Ernest F. (Fritz) Hollings (D-South Carolina), as the ranking member. The make-up of the subcommittee changed slightly in 1983 when Senator Gorton became a member and Schmitt left the subcommittee. In the House, Wirth chaired the Telecommunications Subcommittee. In 1981 and 1982, the subcommittee had nine Democrats in the majority and six Republicans in the minority. In 1983, the make up changed to ten Democrats and four Republicans. This is also the year that Al Gore joined the subcommittee, as well as Mickey Leland (D-Texas), who would become a key player the last hours before enactment of the deregulation law.

Initiation: 1981

As the 1st Session of the 97th Congress began, it was increasingly evident to both sides of the aisle that a new national policy was needed in the area of telecommunications. However, even though expectations were high that deregulation policy for

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[146] Thomas Wheeler, personal interview by author, Washington, D. C., July 18, 1997. Wheeler referred to Dingell's efforts as "holding a shotgun wedding."

telecommunications finally might be passed, it was noted by *Congressional Quarterly* that, "This is the fifth year of a concerted congressional effort to rewrite the 1934 Communication Act."[147] Immediately upon introduction of S. 898 in April 1981, it was referred to the Senate Committee on Commerce, Science, and Transportation chaired by Senator Packwood. The bill provided for far-reaching changes in basic communications policy, focusing mainly on telephonic communications by common carriers.

The partisan structure of the relevant congressional committees played a role in changing telecommunications policy. One result of the new Republican majority in the Senate was change in the make-up of the Communications Subcommittee, now chaired by Goldwater. During the Democrat-led 96th Congress in 1979 and 1980, it had 12 members. But in the 97th Congress, only four Republican senators chose to serve on the subcommittee. This effectively limited the Democratic positions to only three and thus reduced the total membership of the subcommittee to seven.[148] The reduced subcommittee size lessened the potential number of divergent viewpoints to reconcile when considering legislation.

There also existed in the House a high level of interest in deregulating telecommunications. This was evidenced by the efforts of some members of the House Committee on Energy and Commerce to change standing committee rules which prohibited subcommittee chairmen from serving on other subcommittees. Representative Wirth pushed this because he chaired the Telecommunications Subcommittee but also had interests in energy issues. The Democrats were successful in making the change and other members who served on the Telecommunications Subcommittee, as well as on subcommittees they chaired, were Markey and Swift. Even though Gore was interested in serving on the

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[147] *CQWR*, June, 1981, 999.

[148] *Broadcasting*, Vol. 100, No. 2, 26.

Telecommunications Subcommittee, he would not be appointed until 1983.[149] John Dingell was elected to chair the House Energy and Commerce Committee and Wirth was appointed to chair the Subcommittee on Telecommunications.[150] Both Dingell and Wirth became important actors in developing the final cable television policy.

Senate Begins Legislative Activities

The Senate began the legislative process in June when hearings on S. 898 were conducted by the full Senate Committee on Commerce, Science and Transportation. Consequently, Packwood chaired the hearings, rather than Goldwater. This was unusual because matters normally are considered first by the subcommittee of jurisdiction. According to Ward White, the senior counsel for the Communications Subcommittee at the time:

> In the Senate, the subcommittees in the Commerce Committee don't necessarily operate as subcommittees and particularly with Packwood, the way he operated. Packwood operated out of the full committee -- he did whatever he wanted. Goldwater sort of acquiesced to it -- he wasn't necessarily interested in doing all this. It was a personal matter. Goldwater wasn't particularly active at this time -- he wasn't in good health; that made it difficult.[151]

Packwood described his perspective:

> I was the chairman and I was very interested. And as a matter of routine, anything that I was really interested in and wanted to keep a strong hand in, I did at the full committee level rather than at the subcommittee level. That would keep a much better handle on it rather than have a subcommittee do it and come up with a recommendation.[152]

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[149] *Broadcasting*, Vol. 100, No. 3, 7.

[150] *Broadcasting*, Vol. 100, No. 5, 24.

[151] Ward White, personal interview by author, Washington, D. C., September 4, 1996.

[152] Robert Packwood, personal interview by author, Washington, D. C., July 17, 1997.

Senate Hearings

At the first hearings, the main focus of the testimony on S. 898, during five days in June, was AT&T. The objective was how to structure a policy that would establish enough competition in common carrier telecommunications to allow deregulation of the telephone giant. The spirit of deregulation led a desire to deregulate the telephone industry to avoid a court ordered divestiture. This tactic caused problems with the Judiciary Committee and its anti-trust interest in the pending law suit against AT&T. Ultimately, the huge telephone monopoly agreed in January 1982 to a court ordered divestiture which took effect in 1984.[153] The court order broke AT& T into a single long distance company and seven separate local telephone companies called Baby Bells. It also ordered a spin-off of the research and development division, Bell Laboratories, later to become Lucent Technologies, as an independent company. Competition in the long distance market flourished with the emergence of such companies as MCI and Sprint. However, the court order precluded the Baby Bells from entering into the long distance telephone market and the long distance carriers from operating in local markets.

Rather than a total divestiture as the court ordered, passage of S. 898 as drafted would establish a policy whereby AT&T would be designated as a dominant carrier under FCC regulation. It would require that AT&T establish fully separate subsidiaries to provide any other telecommunications services other than basic voice communications. It also limited state regulation to local exchange services, allowed interconnections between local telephone companies, and required carrier payments for exchange access charges to local phone companies.[154] The only witness listed for these hearings that could be identified with

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[153] CQWR, July 2, 1994, 1779.

[154] Congress, Senate, Committee on Commerce, Science, and Transportation, *Telecommunications Competition and Deregulation Act of 1981: Hearings before the Committee on Commerce, Science, and Transportation,* 97th Cong., 1st

the cable television industry was Gustave M. Hauser, chairman of Warner-Amex Cable Communications, Inc., who testified on June 19. Both his testimony and his submitted remarks included only cursory attention to regulation of cable television by state and local governments and then only in the context of how telephone companies were not subject to franchise fees, local rate regulations, and channel capacity set-asides as were cable operators. The NCTA later submitted a statement for the hearing record, but it merely addressed the industry's desire to cooperate with a proposed interagency task force that was intended to augment the establishment of fully separated subsidiaries for AT&T if it were eventually allowed to compete with other telecommunications carriers.

The Communications Subcommittee, however, did hold a three-hour hearing on June 22 on the subject of rural telecommunications that was separate from the full committee's hearings on S. 898.[155] Senator Larry Pressler (R- South Dakota), presided at the hearing which was also attended by senators Wendell Ford (D-Kentucky), Goldwater and Stevens. The topic of the hearing was how to ensure that rural areas would be included fully as the telecommunications industry underwent technological change. Witnesses testified on such telecommunication technologies as television translators, low-power television, direct broadcast satellite systems, community antenna television, and, of course, telephone systems. Witnesses who referred to cable television included Mark Fowler, the new chairman of the Federal Communications Commission; Steven Effros, the executive director of the Cable Antenna Television Association (CATVA); Bruce Jacobs, director of the Cooperative Communications Project of the National Citizens Committee for Broadcasting;

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sess., June 2, 11, 15, 16, 19, 1981. (Washington: Government Printing Office, 1981), CIS S261-79.

[155] Congress, Senate, Committee on Commerce, Science, and Transportation, *Rural Telecommunications: Hearings before the Subcommittee on Communications,* 97th Cong., 1st sess., June 22, and August 3, 1981. (Washington: Government Printing Office, 1981), CIS 81-S261-78.

and Thomas Wheeler, president of NCTA. However, the context of their testimony was not regulation of cable television at any government level, but rather as a communications technology in competition with telephone companies dependent upon utilities that owned the poles to which cable operators attached their wires. The staff of the Commerce Committee, nevertheless, did list this subcommittee hearing in the legislative history portion of the committee report on S. 898, since some of the witnesses mentioned their support or opposition to certain portions of the bill that dealt with deregulation of the telephone industry.[156] Interestingly, none of the hearing witnesses represented states or municipalities, either individually or as organized lobbies.

On July 16, nearly a month after hearings were completed, the Commerce Committee met in open markup session, and S. 898, with amendments, was reported out of committee.[157] As the committee report showed, the NCTA won the first round of the lobbying battle with the cities when it acquired enough votes in committee to place amendments in the bill that restrained local government cable regulatory authority. They were not on the agenda when the hearings took place, nor were they the topic of any testimony during the hearings in 1981. The controversial language was included by committee staff at the request of the NCTA in a manner considered a "time-honored lobbying tactic" of adding favorable language to a bill that did not deal directly, but only tangentially, with the industry's interest.[158] The NLC staff opposed the new language when

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[156] Congress, Senate, Committee on Commerce, Science and Transportation. *Telecommunications Competition and Deregulation Act of 1981,* Senate Report 97-170, (Washington: Government Printing Office, Y1.1/5:97-170, 1981), 5-6.

[157] Ibid, 6.

[158] Congress, Senate, Senate Consideration of Goldwater Amendment No. 541 and Cannon-Packwood Amendment No. 463 to S. 898, 97th Cong., 1st sess., *Congressional Record,* 127, (October 5, 1981): 23055.

it discovered it at a time when they too were attempting to have language favorable to the cities' interests included in the reported bill.

The specific language in the bill that the NLC found unacceptable essentially removed the regulatory authority local governments had over cable TV services. It stated that no government regulatory agency could "establish, fix, or otherwise restrict the rates charged any person either for the use or sale of cable channel capacity." This language was considered by the Commerce Committee to be consistent with "general deregulatory objectives of the bill to minimize unnecessary non-Federal involvement in the provision of competitive services."[159] The committee took the position that, "Such services were nonessential and possess none of the characteristics of utility type services" and therefore did not require economic regulation.[160] Furthermore, it believed that the cable industry was operating in a fully competitive environment where market conditions existed to the degree that prices would be controlled by consumer actions.

Understandably, when S. 898 was reported out of committee, it triggered a legislative battle between lawmakers who supported local governments and those who supported cable television operators. These circumstances eventually led to a heated debate when the bill was considered on the floor of the Senate on October 5 and 6. Some of the strongest debate was over the cable provisions which preempted the authority of cities and counties to regulate rates for cable while keeping the federal limits on what cable operators paid to local governments in franchise fees. The strongest objections came from Goldwater who said that they were inserted into a draft of the bill just two days prior to the mark-up session which was held when he was out of the country. He announced his intent to offer an amendment

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[159] Senate Report, S. Rpt. 97-170, 58.

[160] Ibid.

to strike the section that would remove local authority.[161] Goldwater, on a number of occasions, had publicly promised there would be no cable television legislation without hearings. He, therefore, considered it a matter of honor to introduce and fight for an amendment that would remove cable language from the bill, because no representatives of the interests of states or local governments had testified at hearings on the legislation. In debate on the floor of the Senate, he expressed his indignation and denounced the tactics used to insert the language in the bill. Meanwhile, in an attempt to retain some provisions on cable television in the telecommunications deregulation bill, Packwood and Cannon introduced an amendment with compromise language that basically codified the existing arrangement for regulation of cable television, leaving the role of cities unchanged.[162] This move was not acceptable to Goldwater. The Packwood-Cannon amendment was considered first, and it passed 52-40. Next, the Goldwater amendment to delete most of the language in the bill pertaining to cable television was accepted by a vote of 59-34, thus negating the Packwood-Cannon language.[163] Soon thereafter, S. 898 passed the Senate by a vote of 90-4.

There apparently were attempts on the part of the Communications Subcommittee staff to schedule hearings and draft new legislation on cable television soon after floor action. These activities were not sanctioned by Goldwater and he stated so in no uncertain terms in a memorandum to the staff counsel, Ward White.

> Maybe you have forgotten, but I am the Chairman of the Communications Subcommittee. Please keep that in mind. There will be no hearings or legislation on cable television until I return after the first of the year, my absence being caused by an operation. I repeat, no hearings, and please don't

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[161] *CQWR* (Washington, D.C.: September 19, 1981), 1795.

[162] *Congressional Record,* 127, (October 5, 1981): S11018-42.

[163] *CQWR* September 19, 1981, 1795.

> try to run around me on this because, if you do, there is going to be a loud noise.[164]

There were no hearings held until Goldwater's return in 1982.

Initial Activity in the House

In June and July of 1981, the House Telecommunications Subcommittee held hearings on miscellaneous domestic and international telecommunications issues.[165] Among them were relations between the United States and Japan on telecommunications equipment sales, FCC licensing of VHF broadcast stations in states lacking VHF broadcast TV stations, and municipal cable TV franchising processes.

Of particular interest, the July 28 hearing focused on cable franchising. Mark S. Fowler, chairman of the FCC, testified about the commission's policies, objectives and desires to revise and improve telecommunications competition. Among the witnesses were Ralph Smith, vice-president of policy and planning studies for the Bertman Group, who testified about the potential adverse effects of cable TV franchises on broadcasting. Harold Horn, President of the Cable TV Information Center and Jeff Forbes, a former cable TV official for the State of Massachusetts, testified about cable TV ownership and access to programming channels. They two supported stronger regulations to guarantee greater access to cable channels. Mayors Ernest Morial of New Orleans and Thomas Taylor of Wetland, Michigan, along with Councilman Bob Bolen of Ft. Worth and Morris Tarshis, the director

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[164] Senator Goldwater to Ward White, October 28, 1981, Special Collections, Howard H. Baker, Jr. Papers, University of Tennessee-Knoxville Hodges Library, box 17, folder 8, University of Tennessee, Knoxville, Tennessee.

[165] Congress, House Committee on Energy and Commerce, *Telecommunications Miscellaneous, Part 1: Hearings before Subcommittee on Telecommunications*, 97th Cong., 1st sess., June 9, 16, July 23, 28, 1981, Committee Serial No. 97-64; (CIS82:H361-33 v+684) il.

of franchises for New York City, represented the National League of Cities, the U. S. Conference of Mayors, and their respective cities. They collectively presented an overview of cable TV services, explained the cable TV franchising process, and argued the merits of maintaining municipal authority over cable franchising and local regulation. Representing the cable TV industry were Ben Campbell, president of CATA Systems, Inc, Thomas Wheeler of NCTA, Douglas Dittrick, president of Tribune Cable, and Lester Green, president of Community Communications Systems, Inc. They argued against excessive local cable TV regulation by presenting examples of problems in cable franchising practices and offered their remedies.[166]

Moving Forward: 1982

Many developments related to deregulation in the broadcast and cable television fields came in 1982.[167] In February, the Supreme Court announced it would include in its list of cases to hear that year one with direct bearing on the local regulation of cable television. In it, Community Communications Company claimed that Boulder, Colorado had violated antitrust laws when the city adopted an ordinance that restricted its plans to expand its geographic service area. The City Council of Boulder enacted an emergency ordinance prohibiting Community Communications from expanding its business for three months while the Council drafted a model cable television ordinance. Its intent was to attract new cable providers to enter the Boulder market under terms of the new ordinance. Later in the year it was held in *Community Communications Co. v. Boulder* that, indeed, Boulder was not

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[166] House. *Telecommunications Miscellaneous, Part 1;* hearings, 486-684.

[167] *Broadcasting,* "1982: Highs and Lows of the Fifth Estate." Vol. 104, No. 1, January 3, 1983, 50-59.

exempt from the Sherman Antitrust Act, because it was exercising a power that was not delegated by the State of Colorado.[168] This case triggered a renewed interest on the part of cities to obtain legislation to protect their authorities to regulate cable operators.

Among other regulatory developments that related to cable issues, the FCC deregulated AM radio. Then it adopted rules that gave birth to low-power television (LPTV).[169] In addition, it adopted interim rules for direct broadcast satellites (DBS), and it deregulated subscription television (STV).[170] These actions affected the prospects for legislation favorable to cable television since they showed the deregulatory bent of Reagan's FCC and underscored the existence of competing media, of which cable TV was only one.

Thus, in both Congress and the FCC during the second year of Reagan's presidency there was substantial support for the trend away from regulation by government and toward regulation by market forces. Opinions expressed by various committee staff members were that Congress was in agreement with such trends but had been unable to precisely formulate specific policies for cable. The belief was that what the FCC had in mind was congruent with congressional support, but some were concerned that the commission was moving too fast and, in some areas, perhaps, without appropriate authority. It was widely understood,

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[168] Community Communications Co. v. Boulder, 455 U.S. 40 (1982).

[169] It would be argued by cable television interests in congressional hearings that Low-Power Television (LPTV) constituted effective competition for cable programming, hence the need to deregulate cable television since LPTV was not regulated.

[170] LPTV was a proposal by the FCC in the 1980s to have local stations broadcasting to a limited geographical area, normally carrying local origination programming. DBS are program channels that can be received directly from satellites using an antenna, or dish, on the subscriber's property. STV uses signals that are scrambled when broadcast (not cablecast) and then decoded by a device attached to the television set that is available for a fee.

furthermore, that only Congress, and not the FCC, could provide truly meaningful deregulation of cable television.[171]

Second Round of Senate Hearings

In 1982, legislative efforts to set national policy for cable television became more focused. Exploratory hearings were held, followed by introduction of a bill on the specific topic of cable telecommunications.

Early in the year, Packwood authorized field hearings to address cable television matters. In the process, he provided some members of the committee a chance to participate in hearings in their home states.[172] Senator Gorton, a member of the Commerce Committee, but not a member of the subcommittee, participated in a field hearing on January 18 in Seattle, while Harrison Schmitt held a field hearing in Albuquerque on February 16. These were fact-finding in nature and intended to aid in drafting legislation. Because the debate between cities and organized cable interests had sharpened since the committee report on S. 898 was issued in July of 1981, the testimony of divergent interests in the field hearings provided a foundation for structuring new legislative language on the issues.[173]

At the Seattle hearing, Packwood presided, and his experience with S. 898 set the tone. He had seen the provisions in S. 898 to deregulate cable television, as well as his own

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[171] *Broadcasting*, January 3, 1983, 62.

[172] White interview, 1996.

[173] Congress, Senate, Committee on Commerce, Science and Transportation. *Cable Television Regulation, Part 1: Hearings before the Committee on Commerce, Science and Transportation,* 97th Cong., 2nd sess., January 18, February 16, 1982, (Washington: Government Printing Office, 1982, CIS microfiche S261-32).

compromise amendment, eliminated because state and local governments were not allowed an opportunity to testify on them. However, these interests were strongly represented at this hearing. Indeed, seven of the ten witnesses testifying represented state and local governments and provided most of the testimony.

The context of the hearings was the intensified attention of cities to cable television regulatory issues. Mayor Charles Royer of Seattle represented the NLC. He testified that the organization's task force on telecommunications and cable television had met in December of 1981 and instructed the "NLC staff to develop affirmative cable legislation" to counter the "cable industry's aggressive assertion of its interests in both Congress and the courts." The creation of a task force and specific direction given to the staff represented a heightened formality in the organization of lobbying efforts by the league on cable television issues. The NLC believed such action was necessary to insure a balanced debate on the issues. The position taken by local governments was that the cable industry's desires, as reflected in earlier legislation, failed to take into account both the public's interest and the legitimate concerns of state and local governments. For the NLC, it was important to emphasize that the public had First Amendment rights to receive information from a variety of sources, and also that state and local governments possessed rights under their police powers to set terms and conditions for the use of public rights-of-way.[174]

Conversely, the cable television industry still preferred deregulation. Alternatively, however, if regulation was to continue, the industry preference was for regulation at the federal level, preempting state and local regulations. Regulation at the federal level would place cable TV in a more predictable environment with nationwide consistency in regulatory standards and requirements. In addition, policy implementation would take place in a more

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[174] Ibid, 8.

familiar regulatory framework of a federal agency subject to congressional oversight and presidential influence. Larger cable operations, which dominated the NCTA board, felt more comfortable in operating within such a regulatory environment.[175]

Packwood made a determined effort to extract from state and local government witnesses what they thought was lacking in the failed Packwood-Cannon compromise amendment to S. 898, which would have codified the existing arrangements for municipal regulations.[176] In his questioning, he emphasized his understanding that the NLC had agreed to the compromise and expressed his frustration that the agreement seemed to vanish prior to the floor debate. He repeatedly listed the points in the compromise amendment and, with the exception of retaining FCC authority to limit franchise fees, suggested that they were equivalent to the provisions the witnesses were proposing. When he asked the witnesses representing local governments what else they thought should be included, they did not respond with any additional preferences. Frank Greif of Seattle and Rose Besserman of Vancouver said that they hesitated to answer as to general needs since each municipality was unique.[177] They urged that national policy include the authority for local jurisdictions to negotiate with cable operators through the franchise process to satisfy a particular community's needs as officials perceived them.

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[175] See recent writings on niches, regulatory communities, and selective lobbying; e.g., William P. Browne; "Organized Interests and Their Issue Niches," *Jounrnal of Politics*, 1990, 52: 477-509; M. R. Mahood, *Interest Groups in American National Politics: An Overview*, (Upper Saddle River, NJ: Prentice Hall, Inc., 2000); Ken Kollman, "Inviting Friends to Lobby: Interest Groups, Ideological Bias, and Congressional Committees," *American Journal of Political Science*, Vol. 41, No. 2. (April 1997) 519-544; also David M. Welborn and Anthony Brown, *Regulatory Policy and Processes: The Public Service Commissions in Tennessee, Kentucky, and Georgia* (Knoxville: Bureau of Public Administration, University of Tennessee, 1980).

[176] Senate hearings, *Cable Television Regulation* 33-37.

[177] Ibid, 31-32.

Senators Packwood and Gorton were the only members of the Senate Commerce Committee to attend the Seattle hearing. Various comments made by them seemed to establish Packwood as an advocate for cable TV operators. This was, perhaps, due to the defeat of his compromise amendment to S. 898 by the efforts of the NLC. Gorton, on the other hand, seemed most attentive to the interests of the NLC, perhaps because the incoming president of the NLC was the mayor of Seattle and one of his constituents. In addition, Seattle's director of the Office of Cable Communications, Frank V. Greif, another important witness, also served as the national chairman of the National Association of Telecommunications Officers and Advisors. This organization was clearly acting as an organized voice for the interests of state and local government regulators. [178]

At the second one-day field hearing, conducted alone by Schmitt in Albuquerque, New Mexico on February 16, ten witnesses were heard, five representing state and local governments and five the cable industry. Schmitt set the tone of the hearing by stating an intent to build a hearing record on "case studies of how local communities, local public utilities, cable entities, as well as states as a whole are dealing with [the] explosion of opportunity from broadband communications."[179] In his opening statement, he established a sense of neutrality when he stated, "I have no strong opinions one way or another, except on the nature of the problems. . . and I don't believe that the committee, as a whole, has strong opinions on the solutions to those problems." What he wanted to do was to "find the middle ground to make sure that all existing interests are able to compete in a free and open

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[178] See writings on trade organizations, interest group alliances and opposition by Robert H. Salisbury, John P. Heinz, Edward O. Laumann and Robert L. Nelson, "Who Works with Whom? Interest Group Alliances and Opposition," *The American Political Science Review*, Vol. 81, (December 1987) 4:1217-1234; and Browne, "Organized Interests and Niches".

[179] Senate hearings, *Cable Television Regulation*, 67.

environment . . . while at the same time new services at lower costs are provided to the consumer."[180]

As testimony was about to begin, Schmitt made an important point regarding the proposed consent decree that was being considered to settle the long-standing antitrust suit against AT&T. He wanted witnesses to think about the effects the decree would have on cable systems as potential competitors with local telephone operating systems. Schmitt believed that the issue of treating cable as a common carrier would be accelerated as a result of the decree if it were implemented. However, little was mentioned by the witnesses in the context of cable as a common carrier. Most testimony centered around how to create a environment of open competition within a structure of local government regulation.

The position of the cable industry at the time can be summarized from the testimony of Douglas Dittrick, president of the Tribune Company Cable system. He argued that the heart of the matter was the desire on the part of municipalities to establish total regulation over cable TV systems on the premise they were public utility monopolies.[181] Dittrick's view was that this premise was false. In his estimation, it set the climate in many cities that put cable at severe competitive disadvantages.[182] He believed that regulating cable operations as utility monopolies put cable companies at the mercy of uncertain local politics, limiting their ability to make timely business decisions regarding expansions and upgrades or attracting capital investments to finance growth.

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[180] Ibid, 68.

[181] Ibid, 70-72.

[182] Ibid, 73.

Speaking on behalf of local TV broadcast media, Mac Sklower, general manager of KOAT-TV in Albuquerque, described what he considered unfair competition between broadcast TV and cable TV. His point was that cable TV was not subject to the same kind of operating conditions as broadcast TV. These included equal time rules under FCC regulations, and having to bid for programming in an open marketplace. Cable did not pay for the programming as did broadcasters, yet it competed with local stations for advertising revenue.[183]

Presenting the viewpoint of cites was Steve Barshov, a staff attorney for the New Mexico Municipal League. Barshov addressed the issue of "open competition." From the perspective of the cities he was speaking for, "The only way of producing true competition is for the municipality to be able to impose a meaningful set of negotiating terms." If cable legislation would effectively "take away the city's power to in any way negotiate by making its franchise fees meaningless, or taking away any regulatory authority it may have, [was] the wrong way to go."[184] Barshov endeavored to claim the high ground for municipalities by describing the intent of cities to protect the interests of their citizens who were cable consumers. He claimed the "real basis for the regulation comes from the fact that the municipality has to be concerned with protecting the public's interest, and that public interest is getting the widest amount, the most highly diverse amount of cable programming and on the state of the art technology as is possible."[185] Schmitt delved into the way cities structured the use of public rights-of-way by cable operators and translated that into a right to regulate them. He then cautioned Barshov on using the rationale of regulating cable TV

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[183] Ibid, 75.

[184] Ibid, 82.

[185] Ibid, 96.

because it was a public service, suggesting that the municipalities themselves could be regulated.[186]

In all, eight issues were raised, and four of them dominated the two field hearings. Table 3.3 profiles them and illustrates the issue complexity that had emerged even as the debate was in its early stages. Not surprisingly, the most frequently raised issue was the authority of local governments to regulate rates charged for cable services. The second most frequently raised issue involved extending the pole attachment law so it would apply to cooperatively and publicly owned utilities and telephone companies. Cable system operators depended on existing power and telephone utility poles to carry their cables. In the early development of cable TV, there existed no regulation of fees for pole use charged to cable operators. Some utilities that had desires to provide cable service would charge inordinately high attachment fees, establish spacing specifications that effectively prevented use by cable systems, or flatly denied the space at all. Initial legislation to control and prevent such tactics exempted publicly owned or cooperatively owned utilities. Quite naturally, the cable industry sought to extend the pole attachment regulations to include all utilities. There were a large number of cooperative and publicly owned utilities and telephone systems in rural Washington and New Mexico. The third most frequently raised issue was whether municipalities should be allowed to own and operate cable systems. The fourth most frequently raised issue was whether the FCC should limit franchise fees.

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[186] Ibid.

Table 3.3. Issues Raised in 1982 Field Hearings

Issues Raised	Seattle		Albuquerque		Total
	Support	Oppose	Support	Oppose	
Local regulation of cable rates.	5	1	3	2	11
Extension of pole attachment law.	2	4	1	3	10
Municipal ownership of cable systems.	3	3	3	0	9
FCC limit of franchise fees.	3	3	0	1	7
Federal preemption of state and local regulatory authorities.	1	1	0	1	3
Required access to channel capacity.	2	0	1	0	3
Must-carry rules.	0	1	0	0	1
Anti-trust protection for cities.	1	0	0	0	1

Table 3.3 further shows that there was equal frequency of testimony on the topics of Federal preemption of state and local regulatory authority and requiring cable operators to provide access to commercial and PEG use of excess channel capacity. The former issue was the total replacement of local regulation with federal regulation by the FCC. The latter issue was related to allowing programmers and PEG access to channels on a cable systems that were not being used. Must carry rules and antitrust protection for cities were each the subject of only one witness. Neither of these two topics were discussed in Albuquerque.

On March 4, 1982, Goldwater introduced S. 2172, the Cable Telecommunications Act of 1982. The intent of his bill was to use the information gathered from the field

hearings in Seattle and Albuquerque and combine it with the subcommittee's staff research to formulate a viable policy for cable telecommunications. He wanted to revise and clarify the regulatory jurisdictions of the FCC, and of states and local governments over cable TV systems. Specific provisions in the bill included clarifying the FCC's authority in restricting foreign ownership of cable TV systems, yet it also had a provision that would permit municipal ownership of cable TV systems. The bill sought to authorize state and local governments to award cable TV franchises and regulate the rates charged under such franchise agreements. This provision was balanced by another that would require the FCC to establish a ceiling on cable TV franchise fees. Additionally, the bill required cable systems with twenty or more channels to set aside channels for PEG programmers.

The only action in the House in 1982 came just after Goldwater's bill was introduced. A one-day hearing was held on March 8 by the Telecommunications Subcommittee in Chicago. Wirth presided at the hearing and the only other member of the subcommittee present was Representative Cardiss Collins (D-Illinois). It was billed by the subcommittee as a "Cable Franchise Investigation."[187] The stated subject of the hearing was local participation in cable franchise matters, but the focus of the testimony was minority participation and ownership of cable systems. The subcommittee heard from eleven witnesses who represented interests in minority involvement in decisions on cable franchise agreements. No witnesses appeared from either the cable industry or other telecommunications industries competing with cable. The only information from the cable industry was a written submission from Turner Broadcasting System, Inc. Edward R. Vrdolyak, a member of the Chicago City Council, testified about Chicago's cable

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[187] Congress, House, Committee on Energy and Commerce. *Cable Franchise Investigation: Local Participation: Hearings before the Subcommittee on Telecommunications, Consumer Protection, and Finance.* Washington, D. C.: GPO, 1982. (CIS82:H361-99: 1-56).

franchising process. After that a panel of witnesses spoke about the need for minority participation in the franchising process and service availability from cable operators. The last panel of six witnesses spoke on the need for and importance of minority cable TV ownership as well as public participation in local cable TV franchising processes. Despite this hearing, minority participation in cable TV franchising processes did not become an issue in final versions of any cable regulation legislation. However, the issue became a pre-cursor for equal opportunity employment provisions in the final enactment.

On April 26, 27, and 28, the Communications Subcommittee held more extensive and comprehensive hearings on Capitol Hill. As subcommittee chairman, Goldwater presided. It was clear that the hearings were intended to honor a commitment on his part to correct the failure to include state and municipal interests in the 1981 hearings on S. 898. During his opening statement he commented about the number of communications bills that the Commerce Committee had considered. He spoke of his successful efforts to strike cable provisions from S. 898 because no hearings had been held on those sections.[188]

The hearings provided an opportunity for key interests to assert their basic positions. One of the first witnesses was the Assistant Secretary of Commerce for Communications and Information, Bernard Wunder. His message was that the Reagan administration, in general, supported S. 2172 with certain minor reservations. Also testifying was Mark Fowler, chairman of the FCC. He was generally in favor of the main intent of the bill with the exception of some specific aspects which he specified. One aspect that pleased him was the elimination of the fairness and equal time provisions of the Communications Act for both

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[188] Congress, Senate, Committee on Commerce, Science and Transportation. *Cable Television Regulation, (Part 2): Hearing Committee on Commerce, Science and Transportation.* Washington: Government Printing Office, 1982. (1982 CIS microfiche S261-59) : 161.

broadcasters and cable television. He was concerned that if these survived, they could be extended to newspapers. Then, in the event newspapers were transmitted over cable broadband circuits, it would be inconsistent regulation since the fairness and equal time doctrines did not apply to printed newspapers. His position was that any direct or indirect restraints on speech and the press should be eliminated, and he was adamant about protecting the First Amendment rights of cable. He also supported provisions requiring access to excess channel capacity by PEG organizations as well as commercial leasing to third parties. Interestingly, Fowler believed that the principal area of cable regulation was non-federal. He opposed the provisions calling for FCC preemption of state and local regulation of cable. In addition, the FCC opposed cross-ownership of cable systems by telephone companies or broadcast stations in the same community. It opposed limitation of foreign ownership of cable systems but supported reciprocity with neighboring countries if they would allow American cable companies to operate with status equal to cable operations in their own nation. At this time, no other countries, especially Canada, allowed American cable companies to operate in their jurisdictions.

Thomas Wheeler, speaking on behalf of the NCTA, made the case for deregulating cable TV, noting that it already faced effective market competition from alternative communications technologies. Wheeler also outlined the NCTA position on the dominant issues under consideration, particularly franchising. The NCTA believed that the concept of "renewal expectancy" should be established as national policy. Cable TV operators invest large amounts of capital in equipment and cable runs in developing their infrastructure. In order to borrow the monies needed, lenders need assurances operations will continue long enough to pay off the debt. What the cable industry wanted was a policy that as long as a cable operation lived up to the provision of its franchise agreement, it could expect the agreement to be renewed without having to enter a bidding contest to retain the operations.

The problem in cable industry–municipal relations, he asserted, "is not that cities and community groups have trouble gaining access to cable, rather that through the franchising process cities are demanding free of charge, channel capacity far beyond any showing of reasonable need or ability to utilize."[189] Regarding rate regulation, the NCTA position was that it should only be allowed in situations where a minimum complement of broadcast signals is not available off-the-air. Wheeler stated that the association was strongly in favor of the FCC having the authority to establish a ceiling for franchise fees that should " not ... exceed the costs of a reasonable level of city regulation of cable."[190] Regarding the pole attachment law, the NCTA strongly supported its extension, and also believed that publicly and cooperatively owned utilities should be included under the law. Such entities were monopolies that could charge whatever they wanted for such attachments, and indeed some had engaged in price-gouging.

Vincent Wasilewski, president of the National Association of Broadcasters (NAB) testified on behalf of television broadcasters. He outlined their position on cable legislation based on three principles: "First, fair and equitable access to programing; second, open entry with the ability to participate fully in ownership and development of cable television; and third; regulatory parity." He expressed the view that this latter principle be accomplished through further deregulation of broadcasting rather than establishing additional regulation of competing media.[191] A point made by Wasilewski would eventually present an interesting irony in future considerations of cable television regulation. In this hearing, one of the criticisms that he expressed was that "the Federal Government continues to grant cable systems a subsidy in the form of a compulsory license to use broadcast programing." In later

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[189] Ibid, 226-228.

[190] Ibid.

[191] Ibid, 453.

years, the NAB would argue that cable system owners should be both required to carry local broadcast signals and to pay for the use of them.

Stephen Effros, testifying for the CATVA, pleaded the case for cable TV systems that served small communities with subscriber bases of less than fifty percent of those offered the service. But the strongest portion of Effros' testimony came when he discussed the issue of municipal ownership of cable television systems.[192] Some municipalities were interested in taking over cable systems and running them as government operations. This was opposed on two fundamental points. The first was the idea that government ownership could control programing content and flow of information. For some this held First Amendment implications. The second was that others opposed it because they had built, equipped and developed the systems over many years and were afraid they would not receive adequate compensation if systems were taken over and operated like government utilities. Effros' testimony had a confrontational tone when he took Goldwater to task over language in the bill that provided support for municipal ownership. He cited comments made by the senator in television interviews expressing concerns about his perception of a "trend toward nationalism and socialism" in America. Effros went on to say, "Let us not mince words. Municipal ownership of cable television systems is socialism. . . . It is not only the government taking over a non-essential private enterprise, but the media as well."[193]

Challenged in a way that senators are not used to at hearings, Goldwater merely thanked Effros and called the next witness.

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[192] Ibid, 245-246.

[193] Ibid, 245.

For the cities, Helen Boosalis, mayor of Lincoln, Nebraska testified on behalf of the U.S. Conference of Mayors in support of maintaining the franchise process at the local government level. It was also the mayors' view that local government rate regulation was "the key ingredient to protecting the public interest."[194] Franchise fees, she argued, were business taxes and therefore compensation for the use of public rights-of-way. This point would become one of the most contentious issues in the consideration of cable legislation.

The NLC was represented by Cathy Reynolds, a city council member from Denver, Colorado. The main message she delivered was that the NLC believed that "S. 2172, by increasing the role of the Federal Government and preempting state and local authority in many areas, goes too far toward a national cable policy." Furthermore, "Since local interests predominate, states and local governments should have primary responsibility for the regulation of cable through the franchise process."[195]

For Goldwater, the key section in the bill was the provision that divided regulatory authority over cable television between the Federal government and the states. In general, the cable TV industry favored some form of standard national regulation which could only come from the FCC. Local governments, of course, believed the most appropriate place for obtaining effective regulation was at the state and local levels. Goldwater stated his "personal" preference, "We are not looking for an excuse to have more regulation. I am personally looking for an excuse to do away with regulation."[196]

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[194] Ibid.

[195] Ibid, 448.

[196] Ibid, 378.

On the second day of the hearings, Senator Pressler provided some insight into his deregulatory leanings on the issue of cable TV. In his opening statement on April 27, Pressler stated, "It seems to me any satisfactory cable legislation must cover two issues: The nature of the industry and the nature of government regulation. Cable service promises vast and far reaching new technologies. But this potential is uncertain at least partly because there is no coherent and consistent government policy."[197] This statement established, at least for Senator Pressler, that there needed to be a national policy for cable TV systems, formulated through the federal legislative process.

The Bill Clears Committee

On August 10, 1982, the Senate Commerce Committee, by a vote of 13-3, reported the bill, S. 2172. Its major provisions served to clarify the FCC's authority to restrict foreign ownership of cable TV systems. Provisions favorable to cities included authorizing state and local governments to award cable TV franchises and to regulate cable TV rates. It also permitted municipal ownership of cable TV systems and required cable TV systems with 20 or more channels to set aside access channels for public, educational, and government programming. The provisions favorable to the cable industry included establishing cable operator's presumptive rights for franchise renewals and allowing them to extend their areas of coverage. Lastly, it required the FCC to establish reasonable upper limits on cable TV franchise fees.[198] Franchise fees were, in many cases, a percentage of cable operation's gross revenues. Since there were no regulatory limits in place, fees were inconsistent across the nation and rising in bidding contests for franchise agreements and in renewal negotiations.

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[197] Ibid, 430.

[198] *Congressional Quarterly Weekly Report,* September 4, 1982, 2207.

This situation was one of the main drivers for the cable industry to seek a national policy on cable TV.

But before the bill was approved, three amendments were considered. Senator Gorton, in support of the cities, attempted to delete the provision that included presumptive rights for cable operators on franchise renewals and extensions of service areas. His amendment failed 4 to 7. Senator Cannon, a supporter of deregulation, offered an amendment to explicitly deregulate cable in cases where substantial competition existed. Cannon's amendment failed 4 to 11. The last amendment considered was offered by Senator Robert Kasten (R-Wisconsin). Kasten supported a sports blackout provision in the original bill, but it was deleted during revision. His amendment provided for an additional franchise fee of three percent that cable operators would pay for cable-casting distant programming such as professional sports events. It was defeated by a vote of 3 to 7.[199]

The reported bill received mixed reviews from organized interests. Cable operators said the bill would resolve their difficulties with overlapping and uncertain regulations that had impeded development and would help them compete with unregulated telecommunications companies. However, a coalition of mayors, state and county officials, consumer advocates and labor representatives opposed the measure. They contended that the bill was an unwarranted federal intrusion into local government affairs which unfairly restricted local regulation of rates that a cable customer would pay and that, in effect, required cities to renew an operator's franchise automatically.[200]

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[199] Ibid.

[200] Ibid.

The coalition of state and local governments, along with consumer and labor spokesmen, lobbied hard with some senators in support of amending the legislation to make it more acceptable to their interests and even to block a vote on the bill.[201] Senator Gorton was a strong supporter of these efforts. He opposed the bill because it preempted "the legitimate and traditional participation of States and local governments" in regulating cable television services.[202] He also believed it overly protected cable companies from vigorous and worthwhile competition. Moreover, he said he intended to amend the bill to eliminate the provision that would have required nearly automatic renewal of cable operators' franchises.[203] Furthermore, Gorton and Senator John C. Danforth (R-Missouri), who also opposed the bill in committee, and several other Republicans wrote Majority Leader Howard Baker (R-Tennessee), asking to be included in discussions about bringing the bill to the floor. They said they expected extended debate on the bill. Indeed, as a result of evidence of strong opposition, the bill was not considered by the Senate before the session adjourned.

After the bill was deferred and at the urging of Goldwater in the Senate and Wirth in the House, the staff of the NLC and the NCTA met to resolve differences on the legislation. The negotiations to arrive at agreement on legislative content began in September of 1982. The NCTA was willing to negotiate on the language in order to assure that its interests were protected and so it would not be seen as uncooperative in resolving cable issues.

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[201] Ibid.

[202] Congress, Senate, Committee on Commerce, Science and Transportation. *Cable Telecommunications Act of 1982.* Senate Report 97-518, 97th Cong., 2nd sess., 1982, (1982 CIS microfiche S263-24), 49.

[203] *CQWR*, September 4, 1982, 2207.

Meanwhile, cable copyright legislation passed the House (H.R. 5949) in September. It was concerned with issues regarding royalties paid on retransmission of movies and broadcast telecasts and was an example of how a negotiated approach to differences in legislative interests could be successful. Amendments to the bill were negotiated by the National Cable Television Association, the National Association of Broadcasters, the National Religious Broadcasters, the Motion Picture Association of America, and the National Association of Public Television Stations. This was an important bill to these interests, since it allowed copyright matters to be handled legislatively apart from the deregulation issues. Many of the interests supporting the copyright legislation testified in hearings on cable deregulation, urging that the issue not be included in regulatory bills. The concern was that enactment of the copyright compromise in H.R. 5949 might be jeopardized by the difficulties associated with passing a broader cable television bill.

Nearing Resolution – 1983: Movement Accelerates

In 1982, a new Congress was elected, and there were changes in the composition of both the Communications Subcommittee of the Senate and the Telecommunications Subcommittee of the House. For the Republicans, in addition to Goldwater, Pressler and Stevens, Slade Gorton was appointed to the Communications Subcommittee replacing Harrison Schmitt. The three Democrats on the subcommittee remained Hollings, Inouye and Ford. In the House, changes to the Telecommunications Subcommittee were more numerous. Tim Wirth remained chairman. However, Democratic representatives Al Gore, Mickey Leland, John Bryant (D-Texas), and James Bates (D-California) joined the subcommittee. On the Republican side, Michael Oakley (R-Ohio) joined Matthew J. Rinaldo (R-New Jersey), Carlos J. Moorehead (R-California) and Thomas J. Tauke (R-

Iowa). The subcommittee balance changed from nine Democrats and five Republicans to ten Democrats and only four Republicans.

The year began with the introduction by Senator Goldwater of another cable television deregulation bill. Cities continued to oppose the restrictions on their regulatory authority as contained in the bill. But as they began to realize that such provisions would ultimately be enacted, they continued negotiations with the cable industry to reach a compromise on national cable television policy. In March, a compromise was reached and incorporated in the bill that cleared the Communications Subcommittee on April 21. The Senate then passed the bill on June 14 and sent it to the House. The House, on the other hand, had its own version of cable television legislation drafted after holding subcommittee hearings in May, June and November. On November 17, the Telecommunications Subcommittee reported a bill, H.R. 4103, that differed somewhat from the Senate bill. The bill went no further than the subcommittee's approval. Meanwhile, the compromise agreement between the NLC and the NCTA unraveled, in part over the differences between the House and Senate bills. This generated another round of strong lobbying by both sides that prevented final passage of a bill in 1983.

The Senate Leads Again.

On January 26, 1983, with the NLC-NCTA negotiations at an impasse, Senator Goldwater introduced the Cable Telecommunications Act of 1983, S. 66, which was essentially identical to S. 2172 of the previous year. The new version still contained dramatic cutbacks on state and local government authorities over cable operations. Because of those aspects, the NLC immediately went on record in opposition to the bill. Alan Beals, executive director of the NLC said, "S. 66 represents a completely unwarranted usurpation

of fundamental state and local franchising powers and would abrogate freely negotiated contracts." Using a certain degree of hyperbole to establish local governments as the put-upon underdogs, Beals attacked the legislation stating, "There is no need for this special interest legislation which would destroy the franchising powers of cities."[204] Another controversial issue was the ability of franchising authorities to determine the annual fees paid for franchises. In the early stages of the bill's consideration, it was predicted by the NLC that the statutory ceiling on franchise fees would be less than the three or five percent in the FCC standard at that time. Municipalities viewed any reduction in the fee levels as a serious threat to the revenues they obtained from cable television franchises.

Compared to the amount of involvement by local governments and the cable industry interests, there was relatively little testimony presented at the hearings on behalf of the public or consumer interests. During February hearings on S. 66, held by Goldwater's subcommittee, Susan Buske, executive director of the National Federation of Local Cable Programmers, expressed concern that there was no testimony scheduled from the general public representing libraries, educators, or churches. She testified that, "These groups requested the opportunity to speak but were denied"[205]. It was her conclusion that the bill placed all resources and authority inherent in federal policy squarely on the side of the cable industry. This, she suggested, was contrary to the public interest standard that had been the basis of regulation of telecommunications for over 50 years.[206]

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[204] *Nation's Cities Weekly*, Vol. 6, No. 5, January 31, 1983, 1.

[205] Congress, Senate, Committee on Commerce, Science, and Transportation, *Cable Telecommunications Act of 1983, Hearings before the Committee on Commerce, Science, and Transportation.* Washington: Government Printing Office, 1983. (GPO microfiche Y4.C7/ S. Hrg. 98-26), 157.

[206] Ibid, 159.

The only arguments directly considered in favor of consumer interests were those included in statements from the NLC. Its position was that cities were the negotiators for consumers that could ensure they would get the best deal from cable operators. The cities viewed cable plant as infrastructure -- like bridges and roads -- requiring local government input, even in the planning stages.[207]

Speaking against any regulation of cable television, the Mountain States Legal Foundation (MSLF) submitted a statement at the invitation of Goldwater's staff. It was against the legislation on First Amendment grounds. The foundation took the position that cable was an important communications medium that should be free of government regulation at local, state or national levels. It felt that competition among providers in the marketplace would more properly control the medium and protect the interests of consumers. A key point in its testimony was the belief that cable monopolies are the creations of governmental entities rather than the marketplace. The MSLF's conclusion was, "Exclusive franchises in communications are incompatible with the First Amendment, as well as the pro-competitive national policies embodied in the Sherman Act and recited in this bill [i.e., S. 66]."[208]

Because of strong lobbying efforts on the part of both the industry and cities, Goldwater realized that his bill was as doomed as earlier attempts to set legislative policy unless a compromise could be reached. He said in his opening statement at the February hearing that after many city officials opposed S. 2172, he asked the two sides to meet and resolve their differences.[209] At the same time, he indicated his willingness to consider any

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[207] Ibid, 141.

[208] Ibid, 207-211.

[209] Ibid, 123.

agreement that could be reached between the NLC and the NCTA on compromise legislation if it could be done in time. He added:

> It is my firm belief that we need to establish a national policy for cable this year if that industry is to ever realize its full potential. If we do not get legislation soon, I mean this year, the current patchwork system of Federal, State and local regulation of cable will be too firmly entrenched to undo. Not only will the cable industry suffer, but the cities will lose, too. Ultimately, however, it is the consumer who will suffer the most, and I hope we can prevent that.[210]

Negotiating Compromises

As a result of negotiations between the NLC and the NCTA that began in September of 1982, the first compromise agreement was reached on March 4, 1983. The motivation for the NLC leadership to negotiate was its belief that congressional interest in deregulation, coupled with continuing court challenges to municipal franchising authority, would result in cities losing all regulatory authority over cable television. Therefore, it felt the need to capitalize on the stance taken by Goldwater during hearings by continuing to negotiate a compromise with cable operators that left cities with a role to play.

First Compromise Reached. In these negotiations, the cable industry was represented primarily by Tom Wheeler, president of the NCTA. During the first round, the NLC team included five local regulatory administrators from Boston; Atlanta; Scottsdale, Arizona; St. Paul, Minnesota; and Seattle, Washington.[211] Early negotiations did not involve the United States Conference of Mayors (USCM) because, historically, it had not shown much interest

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[210] Ibid, 124.

[211] Cynthia Pols, personal interview by author, Washington, D.C., March 14, 1997. Pols also remembers the first round of negotiations used no elected officials.

in cable issues.[212] Cable was more of a city council thing and not something that held much interest for mayors as an organized interest. However, the USCM did become involved when a second round of negotiations occurred because some NLC negotiators from larger cities became dissatisfied with language in the original compromise.

Tom Wheeler, recalled the impetus for negotiations that came from John Dingell:

> Let me tell you a story. John Dingell was Chairman of the Commerce Committee in the House. And, Chairman Dingell didn't want things to break out into open warfare between us and the cities in particular. So he held a shotgun wedding. It was a white shotgun so it was a formal wedding. He, in essence, sat us both down and he said to us: "Nothing's going to end up happening unless you reach an accord with the cities." And he said to the cities: "You folks run a real risk of building a negative record which will enable the cable folks to roll all over you at some point in time unless you sit down and negotiate. Why don't you folks sit down?"[213]

As one of the NLC negotiators, Cynthia Pols remembered this about the process. "It was just him (Wheeler), Jim Mooney, [executive vice-president of NCTA] and their lawyer -- just the three of them. And they [NCTA] knew exactly what they wanted; had a game plan." Ward White recalls the principal negotiators as Cynthia Pols, who was the Legislative Counsel for the NLC and Jim Mooney, and various members of the Commerce Committee staff. He also recalled there were "a lot of meetings and a lot of it was intense. A lot of frustration and it went on for a long time."[214] The early negotiations often were held in congressional staff offices because they were considered a neutral location. However, Tom Wheeler recalled the intensity of the negotiations near the end of reaching the first compromise, particularly the settings of the meetings:

> Considering that some of the sessions were in windowless, hotel meeting rooms at various places across the country – I remember one in some dark,

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[212] White interview.

[213] Thomas Wheeler interview.

[214] White interview.

> hotel meeting room at Dallas-Ft. Worth Airport on a Friday – I guess -- that then lapsed over into Saturday. I remember taking my morning jog around the D/FW Airport that morning and asking myself: What the hell am I doing here?[215]

Mooney specifically recalled "one guy from Scottsdale wouldn't agree to anything. The group was trying to work by consensus but he just held out and held out on critical issues. He jammed on everything to the point where Goldwater [when he heard about the stall] said, `You've got to agree now. I'm going to move the legislation forward if you don't agree.'"[216]

According to Mooney, Mayor Royer of Seattle and also president of NLC "had to step in and make a decision on the compromise because the Scottsdale representative had blocked the other local regulators from reaching consensus."[217] At the end of the first negotiations, he had to take the heat from other member cities for doing that, "and that's why things got so messy. Because Royer had to make the decision." In defending the original compromise, Royer wrote to the membership as NLC President expressing his view that it had become apparent in the fall of 1982 that the NLC was "winning battles" but that winning the war "was becoming less and less certain." In an effort to convince city officials critical of the accord, his letter described that they could only get three votes in the Senate Commerce Committee for their position, while 13 senators favored the industry's position. Furthermore, in the House, key members and staff of the Telecommunications Subcommittee indicated there was little support for the kind of regulation that was then in place. Moreover, Royer asserted that subcommittee contacts indicated there was a growing

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[215] Wheeler interview.

[216] James P. Mooney, telephone interview by author, Puget Sound, Washington, December 2, 1997.

[217] Mooney interview.

concern for what some congressional members viewed as regulatory abuses by cities along with a feeling that cable operators needed regulatory relief. [218]

On March 6, 1983, the NLC's board approved the first compromise agreement and the NCTA approved it on March 22. Both groups believed they had made significant concessions in the process. The NLC approved the agreement because of its expectation that some form of legislation was clearly going to pass the Senate and that the compromise was better than what they would have gotten from the Senate.[219] As it turned out, this was the first of ultimately three cable legislation compromises negotiated with the NCTA.

Two major areas of compromise were franchise fees and local regulation of rates charged to subscribers. The March 1983 compromise allowed a city to charge a franchise fee of up to five percent of the operator's gross annual revenues with no limitation set on how the fees could be used by the city. Cities had been concerned that the FCC would restrict the level of fees below the five percent mark and limit how the cities could use the funds. Cable operators were pleased that a limit was agreed to since fees in some cities were as high as 20 percent. Originally, cable operators wanted the fees to be used only for cable-related purposes. As for rates charged to customers, the compromise allowed local governments to regulate rates for basic service in only those instances where the system was located in an area receiving fewer than four broadcast television signals, therefore making cable TV the dominant medium for television programming.

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[218] *Nation's Cities Weekly*, March 21, 1983, Vol. 6, No. 12, 1.

[219] Cynthia Pols, legislative counsel to the National League of Cities quoted in *Congressional Quarterly Weekly Report*, March 26, 1983, 637.

With this compromise, Goldwater believed that he had finally succeeded in resolving the core disagreements between contending interests. He and the staff revised S.66 by including the compromise agreement between the cities and the cable industry. The agreement became the substitute language inserted as an amendment to the bill. He offered his amended version in an executive session of the Commerce Committee on March 22, 1983. However, the committee postponed voting on the bill after complaints were voiced by Democratic members that they received the amended version too late. To avoid a fight, Packwood and Goldwater agreed to postpone a vote. In addition, Senator Hollings, ranking minority member on the committee, found certain aspects of the revised bill unacceptable.

It soon became apparent that there were thorny issues that fell outside the agreement. For example, Hollings and some other members were primarily concerned with making the bill more pro-competitive. Hollings wanted to amend the definition of cable systems to permit common carriers to provide cable services and cable operators to provide telephone-like services. He was also interested in retaining FCC authority over ownership, whereas the bill barred the FCC from prohibiting persons to own cable systems by reason of their ownership of other media, including broadcast, cable, newspaper, programming services, or other printed or electronic information services except telephone companies. Senator James Exon (D-Nebraska), shared Hollings' concerns and said he feared a concentration of power would develop if the FCC had no authority to rule on cross-ownership matters.

Gorton, who in representing the concerns of the NLC had opposed legislation in 1982, praised the compromise and said he was satisfied with the bill's contents.[220] But not all cities represented by the NLC were satisfied with the agreement. When the first round of negotiations ended, the municipal regulator-types [staff employees] took strong exception

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[220] *Broadcasting* Vol. 104, No. 13, March 28, 1983, 86-87.

to the results that Royer engineered in response to Goldwater. According to Pols, "They then went to the US Conference of Mayors. The USCM became a repository for disgruntled regulators."[221]

On the industry's side, White felt there was also a split in the NCTA over objectives.

> Time-Warner was much more aggressive in trying to get things done -- they were always pushing. TCI [TeleCommunications, Inc.] wasn't big then; Time-Warner was more influential. . . But I just happened to remember that there was that split inside as to where they wanted to go. And Time-Warner was aggressive and they would hold independent discussions [lobbying] with people; pushing for things. [222]

Some examples of Time-Warner's focus were consistent franchise structures, assurances of franchise renewals to end bidding wars whenever a franchise agreement was nearing expiration, and limits on what cities could include as remuneration in franchise fees

The Compromise Begins to Unravel. After the committee postponed consideration of the bill, the NLC changed its position on the compromise legislation. Mayor Royer of Seattle wrote a detailed letter to Tom Wheeler, President of the NCTA on April 6 outlining major areas in the amended version of S. 66 that would have to be changed to obtain the NLC's continued support.[223] Basically, Royer's letter showed that there were difficulties in application of portions of the agreement, for example, in the calculation of franchise fees within the five percent limit, and on matters not covered in the agreement.

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[221] Pols interview.

[222] White interview.

[223] Congress, Senate, Committee on Commerce, Science, and Transportation, *Cable Telecommunications Act of 1983*, Senate Report 98-67 on S. 66, 98th Cong., 1st sess., 1983, (CIS83:S263-12): 13.

NLC had problems with several sections of the bill and wanted them eliminated. One section they wanted taken out would have prevented the FCC from applying cross-ownership restrictions. It wanted to eliminate the section that authorized the FCC rather than local authorities to establish rules and procedures for the use of access channels by the public, educational interests, or municipalities. A third provision it wanted removed prohibited the exclusion of financial instruments such as bonds, security funds, and letters of credit when calculating the five percent franchise fees. A fourth section to eliminate would prevent cable operators from obtaining personally identifiable information about cable subscribers. Additional problematic aspects included the voiding of existing franchise agreements, which would have required all franchise agreements to be reestablished under the new law. The section included restrictions on states and franchising authorities from exercising jurisdiction over matters of strict local concern as well as restrictions on the administration and enforcement of provisions in existing franchise agreements.

In response to these developments, the NLC and the NCTA promptly returned to negotiations with the added assistance of committee staff members from both the majority and minority. An amended version of the agreement was written and on April 20, 1983 it was fully endorsed by both the leadership of the NLC and the NCTA. Essentially, all of the changes wanted by the NLC were accepted by the NCTA and incorporated in the bill by committee staff. Those changes included: 1) eliminating a section that prevented the FCC from prohibiting ownership of certain cable systems so that the commission could continue to apply cross-ownership restrictions; 2) allowing franchising authorities and cable operators, rather than the FCC, to establish rules and procedures for the use of access channels; 3) permitting the collection of personally identifiable information about cable subscribers with prior written or electronic consent; 4) grandfathering franchise agreements in effect on the date of the bill's enactment which required a cable operator to provide

programming, services, facilities, equipment, or access channels; and 5) allowing states and franchising authorities to exercise jurisdiction over matters of strict local concern that were necessary for reasons of public health, safety, and welfare, including the terms and conditions for the granting of a franchise, as well as the construction and operation of a cable system. However, one section the NLC wanted eliminated, but was retained, was the inclusion of financial instruments such as bonds, security funds, and letters of credit in calculating franchise fee payments. This version of S. 66 was endorsed by Mayor Royer of the NLC and Tom Wheeler of the NCTA in a joint letter dated April 21, 1983.

On that same day, the Senate Commerce Committee approved the revised S. 66 by a vote of 15-2. Senator Hollings' concerns about the bill were satisfied by removing language that kept the FCC from prohibiting certain cross-ownerships of cable systems. Only one amendment was added to the bill during the markup, and it was a clause granting franchising authorities the power to censor pornography. [224]

Although the bill fully reflected the compromise reached by the NLC and the NCTA, it still had significant opposition. The two senators who voted against the bill in committee were Frank Lautenberg (D-New Jersey), and James Exon. They believed the bill failed to promote competition. Provisions in the bill, as it passed the committee, precluded franchising authorities from considering competing applicants when renewing cable service agreements. Additionally, Exon disliked the bill because it allowed cable operators to provide data transmission services without state or local regulation. He viewed this as an unfair advantage over telephone companies who were subject to state regulations when providing these same services. He concluded that, in time, telephone companies would lose

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[224] *Broadcasting*, Vol. 104, No. 17, April 25, 1983, 26.

this business to cable operators and would raise residential telephone rates as a consequence.[225]

Lautenberg and Exon were concerned about limiting the power of cities and local franchise authorities to consider competing applicants when renewing a franchise or removing an operator that had not lived up to a franchise agreement. Their concerns were shared by a dissident group of NLC member-cities. In particular, the larger cities of Cincinnati; Dallas; Denver; Fort Worth; Lexington, Kentucky; Miami; Nashville; New York City; the city and county of Sacramento; and Tucson all opposed the bill and lobbied, through the USCM, to have it amended on the Senate floor.

Opposition Coalition Formed. There were other organized interests that also were not satisfied with the committee's bill. The USCM convened a meeting of representatives of a number of cities and other critics of the bill which eventually led to the forming of a coalition opposing S. 66. The major members were the dissident cities, working through the USCM, AT&T, the National Association of Regulatory Utility Commissioners (NARUC), the Telecommunications Research and Action Center, the American Civil Liberties Union (ACLU), as well as educators, consumer advocates and the United Auto Workers (UAW).

Members of the coalition saw a number of problems. One was that USCM had not been included in the negotiations that produced the compromise. Tom James, coalition spokesman and cable franchise administrator for Dallas, said the limit on franchise fee levels was not a major consideration for the bill's opponents. More importantly, the objection was that S. 66 would limit the ability of communities to ensure that cable operators provided adequate service at a fair price. In addition, there was concern that the bill would allow for

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[225] Ibid.

automatic rate increases by cable companies for basic service by up to five percent a year. Furthermore, another provision in S. 66 mandated cities to renew franchises if operators had substantially met the requirements of their franchise. Moreover, the members of the coalition representing educators, consumer advocates, the UAW, and the ACLU argued that, as written, the bill would limit community access to cable television channels and would also restrict the authority of local officials to hold cable systems accountable.[226]

AT&T was a late comer to the cable debate, and its concerns, which were outside the scope of the NLC - NCTA compromise, proved to be the most difficult for advocates of the bill. It objected to the portion of S. 66 that allowed cable system operators to provide non-voice, non-entertainment, data transmission services without regulation. Since AT&T was subject to regulation by state public utility commissions when it provided such services, it believed the bill would give cable companies an unfair advantage in selling data-transmission services. Furthermore, AT&T, at that time, was allowed to cross-subsidize residential telephone service with the larger profits earned in providing long-distance and special services. Such cross-subsidization was used to universally provide residential telephone service at affordable rates. AT&T argued that if cable operators could offer data transmission services in an unregulated manner they would do so at cheaper rates and thereby "skim-off" the most lucrative of customers in this market. They contended that if cable "skimmed" the larger accounts, the cross-subsidies would be negatively impacted and residential telephone service rates would have to be increased, thereby threatening universal telephone service. In fact, soon after AT&T began lobbying against the bill, the National Association of Regulatory Utility Commissioners also expressed opposition to the bill. It wanted to maintain the authority of state regulatory commissioners to regulate data and voice transmission services regardless of who provided them.

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[226] CQWR, June 18, 1983, 1237.

In early May, the Senate began to take notice of controversies associated with the bill. Senator Strom Thurmond (R-South Carolina), chairman of the Senate Judiciary Committee, announced it would hold a hearing to review antitrust implications of the bill's requirements to renew franchises and prohibit consideration of competing applications by franchising authorities when renewing contracts. Certain factions within the NLC asserted that the renewal provisions might possibly violate antitrust laws. This matter was later resolved to the satisfaction of Senator Thurmond when Packwood agreed to eliminate language from the bill which prohibited accepting competing applications during renewal proceedings. The Judiciary Committee hearing was then cancelled.

At about the same time, AT&T launched a lobbying campaign against the data transmission provision, gaining the support of senators James Abdnor (R-South Dakota), Mark Andrews (R-North Dakota), and Rudy Boschwitz (R-Minnesota). They feared that local telephone rates would increase for rural areas if an erosion of telephone companies revenues occurred because of competition with cable operators. So they wrote a letter to Senate Majority Leader Howard Baker asking to be consulted before the bill was scheduled for floor debate. In response, Packwood and Hollings modified the draft bill in an attempt to address AT&T's concerns. AT&T objected to the changes as not going far enough, although its representatives participated in negotiations on language.[227]

Meanwhile, supporters were still confident the bill would reach the floor of the Senate. Chairman Packwood and Commerce Committee members Goldwater, Holllings, Daniel K. Inouye (D-Hawaii), and Gorton reiterated their support for the bill by distributing a "dear colleague" letter to other members of the Senate.[228] On May 21, the Commerce

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[227] *Broadcasting*, Vol. 104, No. 20, May 16, 1983, 66.

[228] Ibid, 66-67.

Committee agreed to the scheduling of the floor debate on S. 66 on June 13, with a vote on June 14. The postponement resulted partially from a threatened filibuster on the part of Democratic senators Daniel Patrick Moynihan (D-New York), Howard Metzenbaum, and Frank Lautenberg. Supporters of the bill believed that the delaying action was engineered by AT&T and the dissident cities.

Tom Wheeler of the NCTA was confident that amendments proposed by senators Packwood, Goldwater and Hollings adequately addressed the concerns of AT&T and the cities. Others, however, were not convinced. Abdnor was still worried about the impact that certain provisions would have on residential telephone rates as they were subsidized through universal telephone service policy. Therefore, he drafted two amendments that would counter the deregulation of cable-provided data transmission services by "insuring that all providers of telecommunications services share in the obligation of providing universal [telephone] service."[229] Lautenberg prepared an amendment to place the burden of proof on cable operators to show why a renewal should be granted rather than have a municipality prove why they should not be granted a renewal as the bill's language stated. Likewise, Senator Alan Dixon (D-Illinois), was prepared to offer an amendment to delete the automatic presumption of renewal and shift the burden of proof to cable operators as well as deleting the provision that would grant automatic rate increases to cable operators.[230] All senators opposing the bill were Democrats, although not all Democrats in the Senate opposed it.

Floor Debate on S. 66

When the bill finally came to the floor on June 13, Packwood was the floor manager and Goldwater assisted throughout the debate. The major action during floor consideration

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[229] *Broadcasting*, Vol. 104, No. 21 May 23, 1983, 35-36.

[230] Ibid, 35-36.

on June 14 was the Abdnor amendment to subject cable to the same state regulations as telephone companies. It represented the best hopes for the opposition coalition to defeat the bill. Although Abnor and Lautenberg ostensibly wanted to amend the bill to protect universal telephone service, the wording would have subjected cable TV operators to the rate regulations that telephone companies were under.[231] Had this amendment been accepted, it would have killed S. 66. Instead, the amendment was defeated 44-55. In its place, to address the stated concerns of Abnor and Lauthenburg, the Senate adopted a policy of promoting universal telephone service at reasonable rates to be subsidized by telecommunications companies. That amendment passed 97-0 and kept the bill alive.

In further floor actions, the Senate also turned back an amendment sponsored by Lloyd Bentsen that would have grandfathered all existing contract agreements about regulated rates for all services. Bentsen's amendment would cause any new requirements to apply only to franchise agreements created after passage of the bill, excluding, or grandfathering, agreements negotiated before the new law went into effect. It was defeated by a vote of 19-79. The bill, as reported from committee, allowed grandfathering of existing agreements that regulated rates for basic services for five years or half of the remaining term of the franchise agreement, whichever was longer. Additionally, the Senate voted 26-72 against an amendment by Dixon that would have removed the automatic rate increases provided in the bill. Finally, the Senate voted 82-16 to table, or kill, another Dixon amendment that placed the burden of proof on a cable company to show that it had conformed with applicable law before its franchise was renewed.[232] This was Dixon's

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[231] Congress, Senate, Floor consideration of the Cable Telecommunications Act of 1983, S. 66, 98th Cong. 1st sess., *Congressional Record* (June 13, 1983): 15451-70.

[232] CQWR, June 18, 1983, 1238.

attempt to undermine the renewal expectancy aspects of the bill which favored cable operators.

Senate Passes S. 66

On June 14, 1983, the full Senate voted 87-9 to pass S. 66. However, the wide margin of victory for the bill did not reflect the hard-fought efforts of AT&T to defeat it. Cable operators, on the other hand, lobbied strongly for passage of the bill to gain some relief from what they felt to be overly burdensome and uncertain local regulation which they believed had stymied the development of their industry. The NLC also lobbied for passage of the bill because of its belief that it was their last best hope to retain some authority over cable operations in their communities. However, as events would proceed, the faction of discontented cities within the NLC and USCM would continue to work against passage of the measure.

S. 66, as passed by the Senate, was essentially based on the compromise agreement negotiated between the NLC and the NCTA. The provisions that were favorable to the organized interests of cities authorized state and local governments to award cable franchises; allowed a local government to acquire a system at fair market value if a company defaulted; and allowed local governments to require access to channels for public, educational and governmental purposes. The provisions favorable to cable operators included barring any level of government from prohibiting ownership of systems because of owning other media; allowing cable operators to automatically raise rates by five percent a year; limiting to five percent of gross annual revenues the fees that cable firms would be required to pay; and requiring state or local governments to automatically renew a franchise except under limited circumstances. These favorable conditions for cable operators were

obtained in concert with the positions that they testified for, lobbied for, and negotiated with the NLC.

Even though the bill finally passed the Senate, it still had opposition to contend with. Several major cities still opposed the bill, and a day after it passed the Senate, the USCM unanimously adopted a resolution criticizing the bill at a meeting in Denver. When the matter of regulation of cable television was taken up by the House of Representatives, the organized interests began to struggle again for the inclusion of their preferences in legislation.

Support for the Compromise Fades

As the cable TV debate moved from the Senate to the House, support for the compromise among NLC member cities continued to wane. Even though at the annual meeting of the NLC in July, the board of directors reaffirmed its support for the compromise, it also noted the substantial concerns of a growing number of cities regarding various portions of the agreement. The NLC board then took the position that it would not oppose efforts on the part of some cities to alter the compromise, and that the NLC staff would provide technical assistance in those efforts.[233]

At that meeting, Sidney Stahl, who represented a number of cities on cable legislation, presented some of their views on the situation. He stated that:

> The League now finds itself in the uncomfortable position of having agreed to certain things in the compromise which a large part of its membership finds totally repugnant. The League neither wants, on the one hand, to renege on a deal, nor on the other hand, to embrace legislation which violates

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[233] *Nation's Cities Weekly* Vol. 6, No. 34, August 22, 1983 1 - 6.

> the fundamental and sacred principles of all local and state governments. It is indeed a dilemma for the League. In one case, the League risks losing credibility with Congress; and in the other, it risks losing credibility among its members. [234]

Stahl further stated that the foremost issue was the inherent right of local governments to retain jurisdiction over local matters. This issue was most significantly present in S. 66 regarding rate regulation at the local level. However, Stahl said, "Rates are not the issue. The issue is local control."[235]

Gradually, the position taken by the NLC began to change. At the time of the July meeting, over 150 cities had passed formal, official resolutions in opposition to S. 66. In addition, the U.S. Conference of Mayors and the National Association of County Officials had passed similar resolutions. A resolution was adopted subsequently by the NLC's Transportation and Communication Steering Committee at a meeting in Seattle on September 23 and 24, 1983 that appeared to reject the NLC-NCTA agreement. The committee recommended that the NLC should pursue cable legislation as long as three conditions were satisfied. First, legislation should not limit the options of local governments to regulate the rates charged by cable operators and that basic service should be defined by negotiations between cable operators and franchising authorities. Second, maximum competition should exist in franchise renewals with no expectation or presumption of renewal on the part of incumbent franchise holders. Third, all existing franchises and all franchises in the proposal stage should be "grandfathered." That is, existing franchise agreements would not be subject to the provisions of the law when it takes effect, but be

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[234] Ibid, 1.

[235] Ibid.

allowed to continued under provisions of agreements either in-place or being actively negotiated when the law is enacted.[236]

The House Considers Cable Television Legislation.

While the Senate was preparing for and completing floor action, in the House, the Energy and Commerce Committee's Subcommittee on Telecommunications prepared to hold hearings on its own cable television bill, H.R. 4103. The first two hearings took place on May 25, June 22, even while support for the compromise was fading. The last of three hearings took place on November 3, 1983. The first version of the House Telecommunications Subcommittee's bill had much the same language as S. 66. However, it did include a few additional provisions. The notable differences included provisions added by Wirth that required cable operators to set aside some of their channels for lease to commercial users (similar to common carrier use), a ban on cross-ownership by newspapers or broadcast television stations, and a guarantee to cable operators of access to potential subscribers in multiple-unit dwellings.[237]

Chairman Wirth stated that he believed the major issues in deregulating cable TV, in addition to such matters as franchising and rates, included mandatory access to commercial leased channels and common carrier status for data transmission channels.[238] Wirth felt that with access came diversity and that diversity of ideas is in keeping with the purposes of the First Amendment. Expressing his views on the concerns of AT&T, he stated, "Arguments by telephone companies that data transmission services offered by cable

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[236] *Nation's Cities Weekly*, Vol. 6, No. 40, October 3, 1983, 1.

[237] *Broadcasting*, Vol. 105, No. 14 October 3, 1983, 36.

[238] *Broadcasting*, Vol. 104, No. 25, June 20, 1983, 56.

operators should be regulated as common carriers do not belong in the debate about cable deregulation"[239]

Considering the S. 66 Compromise. The House subcommittee appeared to be less disposed toward the NLC-NCTA compromise than the Senate, although it figured prominently in the first two hearings. Early in the hearings, it became evident that the House intended to exercise independent judgment.[240] When testifying at the May 25 hearing, Mayor Royer of Seattle noted that, "At the urging of you, Mr. Chairman [Wirth], Senator Bob Packwood, chairman of the Senate Commerce Committee, Congressman Swift and others, the NLC and the NCTA decided to sit down to see if we could reach some agreement so that we could bring a skeletal compromise to you for legislation."[241] The response of Representative Al Swift was, "Our role is to examine this [compromise] and be sure it is in the public interest -- and we will do that -- and I am sure we won't agree with everything in it any more than anyone else does." He went on to say, "The time to compromise is when nobody can win clearly. If you wait to negotiate until it is clear you will lose you don't have much place from which to negotiate."[242] Finally, Wirth added, "As I have said before, it seems to me that the compromise is a very useful framework, but the Congress is not in the business of asking outsiders to go out and draft legislation and just rubber-stamping that deal."[243] He also stated that H.R. 4103 made a number of significant and substantial improvements over the compromise, especially with respect to leased access by program providers, or cable channels.

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[239] Ibid, 57.

[240] Congress, House, *Options for Cable Legislation: hearings,* 10.

[241] Ibid.

[242] Ibid, 170.

[243] Ibid, 989.

The concerns and leanings of members as reflected in their questions and comments began to reveal their attitudes toward the choices facing them. Wirth stated that the bill would have to embody two fundamental principles. First, it would have to provide an environment in which the cable industry could flourish so that the American public would benefit, and second, the legislation would have to incorporate the goal of assuring the American public of the widest possible diversity of programming and information sources.[244] On the second day of the hearings, Wirth addressed how to assure diversity through access to the electronic media by those other than the licensee or owner of the media. He believed this was one of the greatest challenges in establishing communications policy. Wirth stated, "Access itself is not the goal; diversity is the goal. Access provides an effective means of meeting the goal, guaranteeing that a diversity of viewpoints can be heard without relying on rules or regulations concerning cable program content."[245] In cable television there are two basic types of access provisions and thus two principal tools for assuring the public as wide a variety of information sources as possible. "The first category of access is public, educational, and governmental access -- known as PEG. The second form of access is known as leased or third party commercial access. Both forms of access are means of assuring information source diversity, which is clearly one of the key federal interests to be addressed by cable legislation. The legislative goal is to promote diversity, consistent with protecting the economic interests of the cable industry."[246]

On the issue of cable competition with telephone, Wirth stated:

> Should cable's provision of telecommunications services be regulated? If so, how? The telephone industry has argued that cable should be regulated as a common carrier by the States. The fact is, however, that telephone

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[244] Ibid, 292-293.

[245] Ibid.

[246] Ibid.

> companies are not regulated because they transmit voice and data, but because they offer universal service as an effective monopoly. The cable industry does not have that kind of market power -- and should not be regulated like the telephone industry. Historically, the subcommittee has been very much on record related to market power and market share, and it seems to me the issue is a very different situation where one firm has one-tenth or ten-tenths of 1 percent of the marketplace and another has 98 percent. That is one of the very fundamental purposes of regulation to protect consumers from the excess of monopolies in terms of prices and output. When there is competition in the marketplace, then we do not need to regulate to prevent monopoly. [247]

When Representative Ed Markey questioned Mayor Edward Koch of New York regarding the NLC-NCTA compromise agreement, he referred to, and seemed to support, federal legislation to promote localism. Koch opposed federal regulation of cable and preferred the *status quo* as it existed in New York City and New York State. [248] Representative Matthew Rinaldo, speaking on the issue of the cable industry competing with the telephone industry at local level said, "The cable system [potentially] provides a service of the same sort that is being provided by the local telephone company. Should the cable system service be regulated in the same manner as the phone company service? As I stated at the last cable TV hearing, it seems to me that equity requires that similar regulatory schemes be imposed on all entities to the extent that they provide similar or identical services."[249]

House Commerce Committee Chairman John Dingell, in a statement to the subcommittee, directed its members to consider the following questions: How to construct a regulatory system which would recognize the changes which had already occurred in the cable industry, yet would be forward-looking and not preclude the development of necessary

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[247] Ibid, 976.

[248] Ibid, 219-221.

[249] Ibid, 295.

regulation as the industry changes? How to assure fairness would exist for all participants? How to avoid the problem of the 1934 Communications Act which set up two categories into which every service had to fit, broadcast and common carrier, even though as the technology developed some services began to cross the line, such as cable? How to assure that cable TV would be as universally available to all citizens as the telephone had become?[250]

It began to appear as though the compromise between the NLC and the NCTA was going to collapse. Soon after Wirth introduced H.R. 4103, NLC president Charles Royer wrote a letter to him outlining in detail the League's opposition to numerous provisions in the bill. The letter also stated that the NLC position supporting the compromise worked out with the NCTA in the spring would be reassessed by the full membership at the annual meeting in November. Royer noted that Wirth's bill failed to provide municipal franchising authorities with adequate authority to ensure diversity of information or to protect other essential interests of consumers.[251]

When the last of the three hearings was held in November, conflicting views were quite evident. Wirth's bill was severely criticized by Representative John Bryant, (D-Texas) and a good number of the witnesses testifying before the subcommittee. Bryant characterized H.R. 4103 as a "bail-out" for the cable industry and said he did not believe the industry had demonstrated a compelling need for federal preemption of the existing contracts between cable operators and franchising authorities.[252] Instead, he introduced an alternative bill, H.R. 4299, that would have allowed municipalities to retain their existing power to negotiate and enforce cable contracts. Because of differences between the language in H.R.

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[250] Ibid, 298-300.

[251] *Nation's Cities Weekly* Vol. 6, No. 43, October 24, 1983, 1.

[252] Congress, House, *Options for Cable Legislation: hearings*, 980.

4103 and S. 66, the NLC opposed Wirth's bill.[253] Mayor Royer, speaking for the NLC, testified that H.R. 4103 had provisions that did not reflect the compromise that S. 66 was built upon. He said that language in Wirth's bill contained "adverse interpretations of ambiguous or incomplete provisions of the compromise."[254] Cities had become very concerned about three principal provisions of the bill. One freed most cable systems from rate regulation on all but the lowest tier of services. Another gave cable operators an expectation of renewal, and finally, still another allowed operators to renege on franchise promises in some cases when conditions changed substantially. Also Royer, following up on a letter he had earlier sent to Wirth, reminding him that support for the compromise among the NLC member cities was eroding and might disappear completely.[255]

The U.S. Conference of Mayors represented the cities that were dissenting from the compromise worked out with the NCTA, and this was its first testimony in that role. Mayor Gregory Sparrow of DeKalb, Illinois, testifying for the USCM, said that the conference shared the goals of the legislation. But it believed that the goals could "be achieved without erecting a structure which, regardless of initial intent, had the end result of protecting the industry from the marketplace, and from itself."[256]

The NCTA defended the bill, and while it testified that H.R. 4103 was not a "bail-out" for the industry, it did acknowledge that many cable operators had gotten into trouble because of promises made during franchise bidding wars. Also defending the bill, Stephen

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[253] *Broadcasting* Vol. 105, No. 19 November 7, 1983, 37-38.

[254] Congress, House, *Options for Cable Legislation: hearings*, 117.

[255] Ibid, 118-123.

[256] Ibid, 813..

Effros, of the CATVA, said he believed it was needed to bring order to the industry on behalf of all. He said, "The absence of legislation will be chaos."[257]

To further complicate passage of a bill, opposition by the telephone industry was presented by Robert Blanz, president of Mountain Telephone and Telegraph Co. He objected to the provisions that prohibited states from regulating cable as long as cable did not provide conventional or "switched voice" telephone services. Even though cable only intended to provide data transmission services and not voice transmission, he said since telephone companies are regulated by states, the exemption for cable operators would put the telephone industry at a competitive disadvantage. He believed the solution was to regulate all who provide the service or free all who contend in the market. To this end, Representative Swift introduced H.R. 4229 that would permit state regulators to have jurisdiction over cable systems when they provide data transmission services.[258]

Other organized interests also found fault with H.R. 4103. James MacNaughton, speaking on behalf of the National Satellite Cable Association (NSCA), representing satellite master antenna television (SMATV), testified against the provision that established a statutory right for cable companies to serve tenants in apartment buildings regardless of the landlord's wishes. This, he believed, would give cable a competitive advantage over SMATV service.[259] Additionally, Sue Miller Buske, speaking for the National Federation of Local Cable Programmers, testified against the way the bill treated access to cable channel capacity for use by public, educational and governmental entities. The bill allowed only a "reasonable" amount of channel capacity for PEG access. She complained that the

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[257] Ibid, 966.

[258] Ibid, 498-535.

[259] Ibid, 898-924.

bill did not define "reasonable," and that this would impede franchise negotiations and eventually end up in the courts.[260]

The only witness claiming to speak for the general public's interest was Jamie Love, representing Ralph Nader's consumer organization. Love testified that he believed that both H.R. 4103 and S. 66 would harm consumers. In his estimation, the bills were not truly deregulatory, but would create a world where entry was limited by a franchise award. Love testified, the House bill "is deregulatory in the sense that it relieves the cable operators of the obligation of increased services and lower rates, but it still retains the protection against competition."[261]

On November 16, 1983 the Telecommunications Subcommittee approved H.R. 4103 in a voice vote despite efforts by some committee members to delay consideration.[262] Representative John Bryant had moved to delay the vote until December 6, 1983 so that the NLC's full membership could take a formal policy position on the bill. This motion failed by a vote of 9-5, but it was supported by Representatives John Dingell and James Broyhill (R-North Carolina), who were two key members of the full committee.[263] Dingell was chairman and Broyhill was the ranking minority member, and as such, they were *ex officio* members of the subcommittee.

Just prior to the vote by the subcommittee, a key amendment was accepted that established equal employment opportunity quotas in the cable industry. The amendment

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[260] Ibid, 881-889.

[261] Ibid, 947.

[262] *Nation's Cities Weekly* Vol. 6, No. 47, November 21, 1983, 1.

[263] Ibid.

reflected an agreement reached between Representatives Leland, Cardiss Collins (D-Illinois), and the NCTA. This provision in the bill would become an issue later when the Senate ultimately considered passage of the Cable Communications Policy Act after conference committee meetings in 1984.

The subcommittee members who voted passage of the bill, such as Chairman Wirth, and representatives Leland, Swift, Jim Bates (D-California), Tom Tauke (R-Iowa), Michael Oxley (R-Ohio), Edward Markey, Al Gore, and Matthew Rinaldo, believed that subcommittee action was necessary to force the cities to take a reasonable and responsible position on cable legislation.[264] The vote was intended to "move on" with the legislation and the necessity for doing so was characterized by Tauke when he said, "If we wait around for the mayors to be happy, we are going to wait forever."[265]

Differences Erode Compromise. But HR 4103 contained restrictions that the cable operators opposed, including a requirement that a percentage of channels on large systems be set aside for third-party commercial programming leased access. It would also prohibit cable system owners from owning other media properties, including daily newspapers in their home communities, required landlords to allow cable into their buildings only if the cable firm offered compensation under an FCC approved formula, and allowed cities to require public, educational and government channels on a cable system.

After subcommittee passage of the bill, Alan Beals, executive director of the NLC, said that his organization was pleased to see that a number of improvements were made in the bill by the subcommittee. However, the NLC continued to have major problems with

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[264] Ibid, 16.

[265] *Broadcasting* Vol. 105, No. 21 November 21, 1983, 29.

the bill in the particular areas of the restrictive definition of basic service, the provisions allowing the cable operators to renege on services and facilities required in franchise agreements, and the franchise renewal provisions.[266] Meanwhile, those city officials aligned with the USCM were still dissatisfied with the bill and, along with the telephone industry, continued to oppose the legislation.[267] When the NLC convened for its annual meeting in late November, a formal vote was held on support for H.R. 4103. In that vote, the League formally withdrew its support for the legislation. It also adopted a formal resolution calling for significant revisions to the bill.[268]

Committee Members Urge Renewed Cooperation. Wirth began the task of renewing cooperative activities by the cities and the NCTA. He defended his bill during a luncheon speech at the NLC convention and chastised the League for abandoning the compromise[269]. Wirth said, "It is my own belief that the repudiation of your leadership's compromise is a result of enormous and often systematic lack of information about the bill, little awareness -- if any -- about the changes the subcommittee recently made, little if any response to requests for assistance in making further changes, and perhaps most disappointing, a failure to focus on the big picture, on what is really important in this legislation." [270] Wirth hit particularly hard on the lack of responsiveness by the cities. He said, "I have been asking city representatives since early this year to furnish the subcommittee with a specific legislative enforcement package. After months of asking we received a small package of enforcement

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[266] *Nation's Cities Weekly* Vol. 6, No. 47, November 21, 1983, 16.

[267] *Broadcasting* Vol. 105, No. 21, November 21, 1983, 30.

[268] *Broadcasting* Vol. 105, No. 23, December 5, 1983, 39.

[269] Ibid

[270] Ibid

ideas from the League staff only the night before the subcommittee markup."[271] He also stated that when he asked the cities' representatives to help resolve disagreements over the bill's contents, he was told "there was no interest in cleaning up the bill." Wirth reiterated that municipal authority over cable television was under serious challenge by recent FCC decisions that limited cable rate regulations and franchise fees, the massive lobbying campaign on the part of the telephone industry to treat all non-video cable services as common carrier activities subject to state regulations, and private lawsuits attacking the fundamental authority of cities to grant franchises.[272] He concluded by cautioning the cities that the best chance to resolve the matter was to improve legislative policy through congressional action, but that it would take participation and continued support by the cities themselves.

When the NLC rescinded its support for the compromise worked out in support of S. 66 and voiced opposition to H.R. 4103, the NLC and the USCM, became united, thus ending their differences and enlarging the coalition opposing the bill. Because of this united opposition and the cities claims that the terms of S. 66 were too favorable to the industry, no further progress was possible in 1983.

Conclusion

Regulation of the cable TV industry had evolved over many years. Since there existed no national policy on the regulation of the industry, and the FCC had at various times

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[271] Ibid

[272] *Nation's Cities Weekly* Vol. 6, No. 49, December 12, 1983, 3.

been deemed without authority over the medium, regulation developed at the local and state level. Within this framework, the regulation did not evolve consistently across states and municipalities resulting in many dissimilar aspects.

However, the technology associated with cable telecommunications became very sophisticated and the medium matured rapidly. The main example of this was the ability to transmit programming produced by cable owners and others over satellite signals. This development made cable TV systems a valuable commodity. Further development of the cable television industry was stymied due to difficulty in attracting the amounts of capital investment needed. This resulted from the uncertainty inherent in a collection of regulatory restrictions that varied from city to city. Cable TV system owners began to challenge some of the regulations in the courts and with increasing frequency, the courts reached decisions favorable to cable operators. This eliminated some by not all of the state and local restrictions. But still, a cohesive and comprehensive national policy was needed. At the suggestion of the courts and initiatives by cable TV industry interest, Congress sought to establish a national policy.

The time was ripe for the cable TV industry to approach Congress. Deregulation had become the dominant policy choice in the economic regulatory arena. The best the industry could hope for was to be deregulated entirely and operate in a free market for video communications, but they would settle for a national regulatory policy under the authority of the FCC similar to that applied to the broadcast industry. As could be expected, the parties that stood to lose the most in such a regulatory change activated their organized interests to counter such a campaign. Municipalities and state regulators began to lobby for a national policy that would maintain the *status quo* and solidify the authorities they had structured over several decades. Using the argument that they were best suited to serve as

public "watch dogs" for consumers, cities and municipalities strove to maintain the revenue sources that they derived from regulating cable TV operators through local franchise agreements.

As the issue became more contentious between the main antagonists of cable TV operators and local governments, congressional leaders pressed the two sides to negotiate. After several iterations of compromise agreements, S. 66 passed the Senate on June 13, 1983.

A vision of the movement toward deregulation begins to focus as the developing technology of cable TV intersects with institutionalized methods for dealing with telecommunications policy decisions. Before the maturing of cable television as a communications medium, the existing regulatory policy relied on a framework comprised of two main yet distinct approaches. One was telephone (and telegraph) which performed as common carrier services and were regulated as such. The other was broadcasting which used the air-waves, owned commonly by everyone, but regulated by the government. Both the regulators and the relevant industries were comfortable in this structure. The technology used for cable television is a hybrid of these two approaches and, therefore, fit into neither. So regulation became problematic because the existing policy approaches did not match well with the technology. Moreover, the dominant actors in the broadcast and telephone sectors of communications regulatory structures each wanted to share in the lucrative new sector.

This also led to issue conflicts over whether the medium should be regulated at all since it did not fit into the existing policy framework. Because some attempts had been made to regulate at local and state levels, due to the use of public rights-of-way, a vested interest in continuing that relationship was created by municipalities. They attempted to

define the issues as one of consumers being overwhelmed by a monopolistic industry. However, legislators choose to define the policy issue in terms of the need for protection and nurturing of a developing new technology, one that operated as an under-dog when competing with the larger more dominant and mature broadcast industry that thrived in the existing regulatory policy scheme.

CHAPTER IV

COMPLETION, AFTERMATH, AND REACTION

As the second session of the 98th Congress began in 1984, cable legislation faced a difficult road. Expectations were that there would be an intense debate on the Wirth deregulation bill centered around the policy differences among the cable industry, those cities opposed to the measure, and the telephone companies. The full House committee appeared to be divided on the bill, although 23 of the 42 members had co-sponsored the measure. Complicating matters further, Representative Dingell, the chairman of the full committee, opposed the bill as approved by the subcommittee.[273] And, if a bill passed the House, it was expected that there would be a difficult conference because of substantive differences between Senate and House versions.

The Legislative Struggle Continues

Late in the session, cable legislation became law. In the process, the various contending interests were central players in crafting the compromises that always are at the heart of legislative struggles, especially those that address complex and contentious matters.

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[273] *Broadcasting*, Vol. 106, No. 1, January 2, 1984, 71.

The measure's effects included some unexpected turns leading, very soon thereafter, to demands for a legislative adjustment.

The NLC Acts

The NLC considered its fight over H.R. 4103 to be one of its highest legislative priorities for 1984.[274] To that end, it promoted a grass-roots campaign by the cities in opposition to the bill as drafted. Its members were urged to make every effort to meet with their representatives in Congress as soon as possible to point out that the bill could potentially end all rate regulating authority for municipalities. Further, cities were encouraged to enlist the support of cable subscribers, church members, unions, and educational groups to express opposition to their representatives. City officials were urged to speak to organized service groups, fraternal organizations, and speak on radio talk shows as well as to generate support through local television appearances and press editorials. Through this approach of lobbying the general public, the cities hoped to capitalize on the fact that 1984 was an election year when congressional incumbents would be especially sensitive to concerns expressed at the local level. The driving force for this undertaking was NLC's belief that it was up against a powerful industry that was prepared to take every advantage of the deregulatory atmosphere that prevailed in Washington.[275]

Building a Coalition

In addition to the campaign within its member cities, the NLC also sought support from other organized interests. Some of the organizations that joined the cities in opposition

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[274] *Nation's Cities Weekly*, Vol. 7, No. 5, January 1984, 1.

[275] Ibid, 7.

to H.R. 4103 were: the National Association of Counties; the National Association of Regulatory Utility Commissioners; the American Public Power Association; the National Rural Electric Cooperative Association; the National Black Media Coalition; the American Library Association; the American Council on Education; the Consumer Federation of America; the Communications Workers of America; the AFL-CIO; and the National Federation of Local Cable Programmers. Also, organized representation of cities united when the USCM joined the coalition with the NLC after their collective opposition to S. 66 and H.R. 4103.

The opposition was encouraged when Chairman Dingell made an important speech at the January meeting of the USCM in Washington.[276] The chairman reiterated his dislike for the bill as written, describing it as "unabashedly bad." It did "not adequately address and protect the legitimate interests of municipalities and consumers."[277] This was followed by instructions to the mayors on how to lobby for their interests. Dingell believed they needed to strengthen their lobbying efforts and urged the USCM to present a united front with the NLC. He warned the mayors against speculating on whether or when the bill would be scheduled and if there would be a tremendous clash in the full committee. He also stated that ever since the NLC had reversed its position at its annual meeting in November 1983, it had been woefully ineffective in persuading Congress that the status quo was acceptable and that there was no need for cable television legislation. On the contrary, he reported that there existed substantial sentiment in his committee that there were very serious problems with regard to the granting, regulation, and renewal of cable franchises and that these problems were not being adequately addressed, because of a perceived lack of capability to address them at the local level. According to Dingell, it would be a very serious mistake to assume

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[276] *Broadcasting*, Vol. 106, No. 4, January 30, 1984, 44.

[277] Ibid.

that the bill would not be heard by the full Energy and Commerce Committee or that no cable legislation would be enacted in this Congress. He reiterated that the cable industry had demonstrated in the fight in the Senate that it was a "formidable adversary with a politically adroit trade association."[278] He then reminded the mayors that they and their allies had a fresh opportunity to present a unified case on Capitol Hill.

Toward Resuming Negotiations

While he was critical of the bill, Dingell did not take sides. He preferred a negotiated compromise between the major interests and proposed that the two primary parties -- the cities and the industry -- engage in good faith dialogue with the purpose of reconciling major differences. But he warned the mayors that any attempts to delay negotiations would be unacceptable and suggested that the House committee's staff be allowed to monitor the talks.[279] As he concluded his speech, he stated his desire that the process go forward in a fair and balanced way, with neither side having unfair leverage. "The industry," he said, "has a legitimate fear that the cities might use any [negotiations] as an opportunity for delay, hoping to run out the clock and thus kill any cable legislation" in this session. "On the other hand," he continued, "the message has been delivered to the mayors at various stages of the legislative process that you'd better make a deal and cut your losses because the train is pulling out of the station."[280]

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[278] These comments of Congressman John Dingell are paraphrased from the text of his speech before the Transportation and Communications Committee of the United States Conference of Mayors, January 6, 1984 as reprinted in *Nation's Cities Weekly,* Vol. 7, No. 7, February 13, 1984, 6.

[279] Ibid.

[280] Ibid.

The cable industry was beginning to sense that if the legislative effort failed, it could take its case to the FCC where the Mass Media Bureau was showing an eagerness to deregulate the industry. James McKinney, its chief, indicated that he would propose a rule making in the summer of 1984 to free cable operators from some municipal regulations. The NCTA also avowed that if the FCC didn't act, it would pursue the issue of local government regulation of the industry in the courts.[281]

On the other hand, the NLC took the position that if the FCC established rules on rate regulation, the courts would provide protection for them. The cities believed that the courts would conclude that the FCC lacked statutory authority under the Communications Act of 1934 to regulate cable television directly. The FCC's rule-making proposal, they believed, was merely a pressure tactic.

The cities received another push from Dingell in remarks to a congressional-city conference in early March. He again expressed his view that the Wirth bill was anti-consumer and inequitable and reiterated his commitment to opposing and voting against it as it was then written.[282] He also told delegates to the conference that there was "no constitutional precedent and no reason for Congress to want to tell local officials how they can regulate an industry with such an impact on their localities."[283] In urging the resumption of negotiations, Dingell said that the cities should not be forced to surrender to an agreement if they could not live with it. Furthermore, he said, "Cities should negotiate from a position

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[281] *Broadcasting*, Vol. 106 , No. 14, April 2, 1984, 38.

[282] *Nation's Cities Weekly*, Vol. 7, No. 11, March 12, 1984, 2.

[283] Ibid.

of strength knowing that they, as elected officials, have more power of influence on Congress than any other group" if they used it.[284]

It appears clear that Dingell intended to take the lead in passing cable legislation in the House. He showed that he preferred a negotiated compromise, but he also laid out the road map in such a way that the absence of such compromise would not stop Congress from formulating policy in this area on its own in a fashion that it saw fit. This last aspect surely established incentives for cities to participate in making the best deal they could. At that point, negotiations resumed.

Another Round of Negotiations

By the end of January, the NCTA, NLC, and USCM had agreed to another round of negotiations to resolve differences that were preventing consideration of legislation in the House. When negotiations commenced, the cities were interested in retaining regulatory authority over rate increases, service quality, equipment enhancement and the granting of franchises. They also opposed language in the House bill that allowed cities to escape from franchise agreements for unforeseen changes in conditions that would be determined on case-by-case basis. On the other side of the table, the cable industry wanted limitations on the amount of franchise fees that cities could charge and assurances of franchisee renewals. They opposed language that had been added to the House bill that required a percentage of channel capacity be made available for third-party commercial access.

One significant departure from previous negotiations when the new round began was the cities' use of elected officials as negotiators. A negotiating team was named comprised

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[284] Ibid.

of three members from USCM and three from NLC. The negotiators for the local government interests were: Dick Fulton, mayor of Nashville; Dick Callageri, mayor of Pittsburgh; Paul Zeltner, councilman and former mayor from Lakewood, California; Tom Volgy, vice-mayor of Tucson, Arizona, (he was the de facto chair for the group);Minette Trosh, councilwoman from Charlotte, North Carolina; and Carol Bellamy, council president from New York City.[285] For Tom Wheeler, one of the industry negotiators, three people stood-out in his mind as having an impact on the negotiations. The first was Charles Royer, the Mayor of Seattle and President of the NLC. Although not one of the negotiators, he was closely involved. The second was Tom Volgy the city councilman from Tucson. (Mooney remembered Volgy as a man of somewhat "mercurial" temperament. "He used to get quite excited during some of these meetings, when we made a second deal."[286]) The third was Susan Herman from New York City, who accompanied Carol Bellamy and provided staff support.[287]

Prior negotiations for the first compromise were conducted with regulatory staff from a few cities and staff of the NLC. Since some of the larger cities that were not directly represented balked at the first compromise, it was believed that representation by elected officials rather than staff would result in a more acceptable outcome. Therefore, the NLC Board wanted elected officials to negotiate this round. As Jim Mooney recalled,

> This thing went through a couple of iterations. We negotiated a deal with Cynthia [Pols] and George [Gross]. But between the Senate concluding consideration of that bill and the House initiating consideration of that bill, in the winter of 1983-84, there was a revolt inside the NLC in which a lot of the people who were principals of the NLC -- you know, mayors, and so forth -- said that they just weren't going to take the deal. They didn't care if the NLC had negotiated it or not. So, we basically had to do it again" This

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[285] Pols interview.

[286] Mooney interview.

[287] Wheeler interview.

> time while Cynthia and George were present, it was really with a group of four or five principles.[288]

In this arrangement, the elected officials were expected to negotiate highly technical issues regarding cable television deregulation.[289] Pols remembered the negotiations as a very difficult process. "I was the technical expert but also the generalist. I was the only one who knew the legal side, yet we had to bring in this gaggle of people -- to be political on our side -- who didn't know the law or the legislative process, but we had to face people who devoted their entire lives [to representing the cable industry interests]."[290] Unlike the first round of negotiations, the cities would have 10 to 15 people at each session. In comparison, "after Wheeler left the NCTA, it was only Mooney with just his attorney; and he knew exactly what he wanted."[291]

> We had this difficult process trying to get all those people to agree on stuff. All of these people were trying to deal with these nuanced [sic] issues of legislative language on the issue of regulation which wasn't something that was their natural bailiwick. We were very much at a disadvantage from a technical sense to be told you have to negotiate with these people and you got to use elected officials when they're [cable industry] going to use their specialists. It was always hard for us to get our people there, [on the Hill] and they had to be prepared to move on a dime to talk about cable. We were at an inherent disadvantage in the process and it was a process that was dictated by Congress.[292]

Cynthia Pols felt there were many intrinsic power inequities in the negotiating process.[293] She believed that was because "cities don't ever give campaign contributions.

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[288] Mooney interview.

[289] Pols interview.

[290] Ibid.

[291] Ibid.

[292] Ibid.

[293] Compare Pol's perspective with John Dingell's as quoted in *Nations and Cities Weekly*, Vol. 7; No. 11, March 12, 1984, 2.

Whatever relationship cities' officials have are a question of loyalties and political relationships, not a financial one like the NCTA where they have established access to legislators. Plus once we reached an agreement -- we had a pretty detailed agreement that was close to legislative language, but it wasn't quite legislative language, and obviously it wasn't legislative history."[294] At that point, it was all provided to committee staff people to turn into legislative language. They were on Wirth's staff and were

> "totally tight with the cable industry. They [staff] were going off and having fancy lunches while they were drafting the language -- getting clauses here and there -- that weren't supposed to be there and trying to change things and stuff that we hadn't talked about. Trying to get an advantage they weren't entitled to. We actually had to bring our negotiators in after the agreement was drafted to meet with Dingell to basically tattle on his staff people because they had been doing all these things for the NCTA and I couldn't get them to do the right thing." [295]

This round of negotiations was lengthy, taking place over a nine month period in 1984. At times the tone was strained. According to Jim Mooney, "There was very little lightness to those negotiations. There wasn't much camaraderie in those rooms. Frequently, in situations like that, the two sides can be pretty friendly with each other, on a personal basis. But that really wasn't the case in this instance. There was something about cable TV issues that leads . . . that causes emotions to run hot."[296] This temper of the negotiations lead to an impasse in late March. The major sticking points were the franchise renewal and rate regulation provisions in the legislation. At that point, Mooney said that the NCTA would push hard for a bill, but would not accept just any bill.

Eventually, a second compromise agreement was reached among USCM, NLC and NCTA on May 28. The compromise that resulted allowed cities to continue to regulate rates

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[294] Pols interview.

[295] Ibid.

[296] Mooney interview.

and service tiers for four years through franchises, rather than immediate preemption of local authority. But after four years from enactment, they would no longer regulate the rates charged to subscribers and the full deregulation of rates and tier structures would take effect. Other features of the compromise included an agreement on administrative due processes for cities to use in renewing existing franchise agreements and the continuation of existing franchise agreements regarding services, facilities and equipment. However, facility and equipment requirements for new agreements differed. Since the negotiators agreed to differentiate between franchise agreements either in-place, or in the final stages of negotiations, and ones that would be negotiated under any new legislation, the franchising authority would be entitled to establish minimum facility and equipment requirements for new agreements. It also allowed for negotiated contract modifications if circumstances beyond the control of the system operator warranted. Franchise fees would be limited to five percent of gross revenues from cable operations, and the federal government would be prohibited from restricting the use of franchise fee revenues by cities. For existing franchises, the franchising authority would be entitled to enforce customer service requirements. An important key provision of the proposed agreement was that all three parties, NCTA, NLC, and USCM, would support the compromise all the way through passage by the House and the House-Senate conference.[297] Pols said she thought the compromise was "a fair package overall." Len Simon, speaking for the USCM, said, "Given the political situation and dynamics, this is the best deal we believe" could be achieved at the time.[298] That accord was unanimously agreed to by all of the negotiators representing the cities, but since the NCTA had not granted its negotiator authority to approve, it was approved by the NCTA board.

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[297] *Nation's Cities Weekly*, Vol. 7, No. 23, June 4, 1984, 1.

[298] *Broadcasting*, Vol. 106, No. 23, June 4, 1984, 39.

The House Bill Clears Committee

John Dingell, was credited with bringing the parties back to the table and making it all happen.[299] Dingell said he would hold a markup on the bill in late June, but he also recognized that other issues could still impede the process. It was noted that several consumer groups had made it known that they were not entirely satisfied with the direction the legislation was taking, and it was expected that Bell operating companies would strongly oppose the bill and some of its provisions that allowed cable to transmit data without being subject to state regulations.[300]

On June 26, the House Energy and Commerce Committee reported H.R. 4103. The major change to the subcommittee bill was the inclusion of the compromise language created in negotiations between the NLC, USCM and the NCTA. No changes were made to the compromise and no language from other sources were inserted in the bill.

Compromise Breaks Down Again

Before the House bill could reach the floor, a significant event occurred that ultimately caused the collapse of the second agreement. Jim Mooney recalled that within a month of that deal being concluded, there was a decision by the Supreme Court, handed down on June 18, which tossed the deal into a "cocked hat," because it fundamentally undermined some of the legal assumptions about limits to the authority of the FCC which were the basis of the agreement. Although the bill as negotiated between the two sides was reported from the House Commerce Committee, that's as far as it went. Support for it had pretty much evaporated on both sides in light of the decision. In Mooney's words, "So there

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[299] Ibid.

[300] *Nation's Cities Weekly*, Vol. 7, No. 23, June 4, 1984, 6.

we were at the end of June with everybody pretty much convinced that this process had ended inconclusively and unsuccessfully."[301]

The decision, *Capital Cities Cable Inc. et al. v. Crisp,* struck down Oklahoma's ban on cable transmission of wine advertisements.[302] What was most damaging to the compromise was not the issue of advertising wine, but rather the aspect of the ruling that affirmed the authority of the FCC to preempt state and local regulation of cable television. Even though Oklahoma did not prohibit the sale and consumption of alcoholic beverages within the state, it did, in general, prohibit the advertising of such beverages. In 1980, the Oklahoma Attorney General (Crisp) determined that the state's advertising ban prohibited cable television systems operating in Oklahoma from retransmitting out-of-state signals containing such beverage commercials, particularly wine commercials.[303] Capital Cities Cable, Inc. and other cable operators sued in Federal District Court seeking declaratory and injunctive relief when they were threatened by the state with criminal prosecution. After winning relief in U.S. district court, it was reversed by the court of appeals. Capital Cities appealed to the Supreme Court. It held that application of Oklahoma's alcoholic beverages advertising ban of our-of-state signals carried by cable operators is preempted by Federal law.[304] The Court held that FCC rules permitted Oklahoma to regulate such local aspects as franchisee selection and oversight of system construction, but requiring cable operators to delete commercial advertising in signals carried in compliance with federal regulations clearly exceeded its limited jurisdiction and interfered with an area that the FCC explicitly

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[301] Mooney interview.

[302] Capital Cities Cable Inc. et al. v. Crisp, 467 U.S. 691 (1984).

[303] Ibid, 1.

[304] Ibid, 698-711.

preempted.[305] It was also held that Oklahoma's advertising ban was in conflict with FCC regulations requiring cable operators to carry signals from local broadcast stations in full, and FCC rulings permitting and encouraging cable operators to import distant out-of-state broadcast signals.[306] The Court's decision limited the scope of the local government involvement in cable television to responsibility for "non-operational aspects of cable franchising, including bonding agreements, maintenance of rights-of-way, franchisee selection and conditions of occupancy and construction."[307] It held that the FCC had preemptive authority to assure the orderly development of new cable technology into the national communications structure.[308] With such a clear decision from the Court about their view of the limited authority of states and local governments while acknowledging the broad authority of the FCC, many in the cable industry wanted to abandon the legislative route in favor of pursuing their policy needs with the FCC.

Within five weeks of the *Crisp* decision, the FCC added to the confusion when it issued a final rule in the Community Cable TV, Inc., case, also known as the *Nevada* decision. The rule preempted vast numbers of state and local franchise agreements in ways that substantially deregulated cable TV operators. Bolstered by the *Crisp* decision, the FCC's final ruling, issued on July 25, 1984, included language that dismissed the NLC's petition for reconsideration on procedural grounds. This occurred despite the fact that the petition of the NCTA was accepted for consideration, even though it had not been filed in a timely fashion. That final ruling reiterated a November 8, 1983 ruling that limited state

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[305] Ibid, 700-705.

[306] Ibid, 705-709.

[307] FCC, *Excessive Over-Regulation - CATV,* 54 FCC 2d 855, 863 (1975).

[308] Ibid.

and local regulation of rates to the first tier of service.[309] It also expanded the ruling to nullify all franchise requirements which required the provision of particular services. [310] The final ruling included a statement that, "Allowing market give-and-take to occur without adding government as an additional participant is the better course in fostering development of program services for the public."[311]

The combination of these rulings seriously jeopardized the compromise formulated between cities and cable operators. Many in the cable television industry now felt that they did not need to compromise with local regulators in the cities. Since the FCC was known for its pro-deregulation stance during the early 1980s, some NCTA member companies wanted to vacate the legislative approach completely and cast their lot altogether with the FCC for full deregulation. However, the NCTA board recognized that while the FCC was sympathetic to the industry at that time, future commissions might have a different perspective. The board ultimately supported the legislative approach to create statutory protection for the industry through statute law; something that regulatory agency rulemaking alone could not do. However, it no longer supported the bill as written. It sought revisions to H.R. 4103 that were more closely aligned with the Supreme Court's *Crisp* ruling affirming the authority of the FCC to preempt state and local regulators.. Seeking these revisions effectively withdrew their support from the compromise. NCTA wanted less local authority over subscriber rates to reflect decisions by the Supreme Court and the FCC. It also wanted assurances of franchise renewal, restrictions on the use of franchise fees paid to local authorities and free access to multi-family dwellings and apartment buildings.[312] The NCTA

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[309] Ibid.

[310] *Nation's Cities Weekly*, Vol. 7, No. 31, July 30, 1984, 1.

[311] Ibid, 7.

[312] *Broadcasting*, Vol. 107, No. 4, July 23, 1984, 40.

believed the cable industry was in a "no-lose" situation. If the legislation with the changes it sought to reflect the *Crisp* decision became law, it would have a solid regulatory foundation for building the future. If the bill were defeated, the cable industry could go to the seemingly friendly courts and the FCC to solidify the recent deregulatory rulings by seeking additional ones.[313]

City officials remained committed to legislation to establish their authority over cable franchises in light of the rulings by the FCC and the Supreme Court. To this end, the NLC board reaffirmed its support for H.R. 4103 at a July 13 meeting and called for immediate action by the House to pass the bill.

The influence of the Supreme Court and the FCC as other institutional actors in the policy process had led to another breakdown in the legislative process. James Mooney summarized the situation succinctly when he said, "What happened, of course, was that the political and legal tidal wave set off by the Supreme Court's *Crisp* decision had swamped the legislative boat."[314]

Resurrecting the Compromise

Soon, however, caution overtook the cable industry. Concern developed within the NCTA that pressing hard for much more than was then in the bill would disrupt what had been a relatively smooth working relationship with Congress. Many were asking whether the NCTA could succeed with its new demands without alienating its key congressional

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[313] *Broadcasting*, Vol. 107, No. 7, August 13, 1984, 42.

[314] *Broadcasting*, Vol. 107, No. 8, August 20, 1984, 34.

allies, especially Wirth who had authored the original House version.[315] While some in the NCTA believed they were in a win-win situation from a business standpoint because of deregulatory leanings in the courts and the FCC, others worried about the political aspects. If they could not adequately justify reneging on key points in a signed agreement between the NCTA and the cities, the industry's reputation on Capitol Hill and its ability to move, block, or influence legislation in the future could be impaired.[316] Cable companies were concerned about relying on regulatory rules and court decisions that could be reversed by future commissioners or judges. Many still desired regulatory protection written into the statute books, but protection now informed by *Crisp*.

When the compromise nearly collapsed, Senator Goldwater attempted to revive the negotiations by repeatedly warning cities against abandoning the compromise process. In a speech before the NCTA in July, he had warned cities that if they reneged again on the compromise, he intended to use all of the resources at his command to ensure that the FCC deregulated the cable industry and preempted state and local regulations to the maximum extent allowed by its authority.[317] Seemingly ignoring Goldwater's threats, the NLC and the USCM told the NCTA in late July that they were not prepared to reopen negotiations on the bill on the industry's conditions. Further, they intended to push for passage of the legislation with or without NCTA's support. The NLC and USCM geared up to lobby Congress during the three-week recess from August 13 to September 5, 1984, and even cities that had opposed the bill prior to the compromise agreement were now pressing for its passage.

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[315] *Broadcasting*, Vol. 107, No. 4, July 23, 1984, 40.

[316] *Broadcasting*, Vol. 107, No. 7, August 13, 1984, 42.

[317] *CQWR*, July 14, 1984, 1707.

Wirth also continued to pressure both the cities and the NCTA to resume negotiations. He still felt there was time for both sides to bargain in their best interests.[318] So the door on renewed negotiations had not been completely shut. James Mooney of NCTA said, "This bill has been pronounced dead by the trade press at least six times within the previous eight months. Each time, lo and behold, it emerged from the ashes."[319] Additionally, Dingell issued a letter castigating the industry for "greed and arrogance" and threatened that the ultimate victim could be the cable industry itself.[320] Yet another tactic intended to break the impasse was used by Goldwater. Following through on a threat he made in July, he wrote a letter, dated August 10, to FCC Chairman Mark Fowler, in which he expressed his anger with the cities for their unwillingness to negotiate changes to the House cable bill that the industry wanted in order to reflect the conditions resulting from the Supreme Court and FCC rulings.. He told Fowler, "If we don't get legislation out of the House, I want you to throw the whole damn book at the cities and give cable everything you can under your power. I've never seen such double-crossing, double-talk and downright lying as I've heard from the cities. And, I think it's time we get the word across to them."[321]

The Third Negotiations

The board of directors of the NCTA voted in early September to authorize Jim Mooney to again negotiate with representatives of the cities for legislative language acceptable to both sides.[322] While the vote was not unanimous, it was a strong indicator of

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[318] *Broadcasting*, Vol. 107, No. 8, August 20, 1984, 34.

[319] *Broadcasting*, Vol. 107, No. 8, August 20, 1984, 42.

[320] *CQWR*, October 13, 1984, 2670.

[321] *Broadcasting*, Vol. 107, No. 9, August 27, 1984, 7.

[322] *Broadcasting*, Vol. 107, No. 11, September 10, 1984, 33.

the desire to reach a viable compromise so legislation could be passed. Two provisions in the House bill that were particularly difficult to accept by some in the NCTA were the grandfathering of rate regulation for tiers and the continued regulation of and the structrure of tiers for four years after the date of enactment. A group within the NCTA felt that since the Supreme Court had, in the *Crisp* decision, affirmed the FCC's preemptive authority, which was followed by the FCC's quick exercise of that authority with its *Nevada* decision, that to give in on these issues in a legislative compromise would be retrogressive, given the industry's regulatory position *vis-a-vis* these decisions. But even with the lukewarm prospects of new talks, the chances of passing legislation were still small, as only three weeks remained until Congress was scheduled to adjourn.

After the NCTA board indicated a willingness to modify some of its demands to entice the cities to resume negotiations, Packwood stepped up the pressure. He stated in a letter to the NLC that, "Next year may be too late. Our legislative schedule may prevent consideration of cable legislation, and in the meantime, the courts and the FCC may further define the limits of existing [municipal] regulations."[323] In addition, after the cable industry showed flexibility on the issues, Dingell, who had castigated the industry by letter and begun to favor the cities, strongly suggested to the USCM and the NLC that they resume talks with the NCTA. Yet another factor in the decision by the cities to renegotiate was the awareness of difficulties they would have in trying to pass the legislation without the support of the cable industry. Because the bill had to pass through the House Rules Committee before it could move to the House floor, and the NCTA had demonstrated that it had the political leverage to block actions in the Rules Committee, the NLC and USCM realized they would need to compromise.[324] It became a widely shared view that if a bill were to pass, it would

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[323] *Broadcasting*, Vol. 107, No. 12, September 17, 1984, 31.

[324] Ibid.

have to take place before the end of the legislative session. Next year would bring in a new Congress, and the process would have to begin anew, if there were interest in the committees. The courts and the FCC might not wait until the next Congress could enact legislation on cable telecommunications. Markey articulated this perspective when he stated on the floor of the House during final consideration of H.R. 4103 that, "One result of the deregulation mania is that unless Congress enacts a cable bill, the Supreme Court will do it for us."[325] In Markey's view, cities and consumers would not be included in the Supreme Court's or FCC's considerations of cable TV policy. Mooney's recollections agreed with that assessment of the policymaking environment at the time:

> That view was pretty much the prevailing wisdom through July and most of August. ***That's when people who are supposed to know their way around Washington earn their money, and I earned my money.*** We got together again, this time with Cynthia and George only and cut the deal that became the 1984 Cable Act; that was in early September. ***Everybody understood that not only did we have to move that bill fast, because the session was coming to an end, but you had to move it fast because the shelf life of these things had proved to be very short. Unless you got the damn thing enacted fast, a new group of dissidents would spring up on one side or the other and start picking it apart.***[326] [Emphasis mine.]

The renewed negotiations did not always run smoothly. Even though the NLC and the USCM had authorized their negotiators to approve any deals worked out, at least preliminarily, the NCTA required approval by its board of directors, meaning no final authority resided with Mooney as the negotiator. The negotiators reached an agreement on September 19, but it was rejected by the NCTA board because some of the larger cable system operators did not believe they really needed to compromise. They believed both the courts and the FCC were on their side. The board's action prompted Dingell to issue a strongly worded statement condemning the cable industry's "intransigence at the bargaining

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[325] *Congressional Record*, October 1, 1984, 27984.

[326] Mooney interview, (emphasis mine).

table" and expressing "only anger and disappointment at the greed and arrogance of those leaders of the industry who have tied the hands of the negotiators."[327] But on September 24, the NCTA board approved a new position which incorporated the key provisions of the NLC-USCM proposal.[328] Thus, by September 29, 1984, cities and cable TV operators had agreed to their third compromise on cable television legislation. The compromise focused mainly on H.R. 4103's provision to grandfather rate regulation of basic tiers of service and franchise aspects that prohibited cable operators from removing programming from the basic tier until four years after the law went into effect. The cities accepted the NCTA's offer for a more limited grandfathering provision to protect systems that had already repackaged and repriced as a result of the FCC's *Nevada* decision. In return, the NCTA accepted the cities' offer to reduce the period of continued municipal rate regulation from the four years contained in H.R. 4103 as it passed committee to two years.[329]

House Passage, Conference, and Enactment

The bill was scheduled for a House vote the first week in October. Then a procedural compromise was formulated that allowed the measure to be brought up under suspension of the House rules. This meant that debate would be limited to 40 minutes and amendments could be offered only by the chairman of the Energy and Commerce Committee, Dingell, or Wirth as the chairman of the Telecommunications Subcommittee. In return, a two-thirds vote was required for passage. Opposition to the bill was expected to come by way of attacks from the telephone industry over the issue of regulating data transmission services and from the real estate industry over language regarding access to apartment buildings and other

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[327] *Nation's Cities Weekly*, Vol. 7, No. 15, October 1, 1984, 6.

[328] Ibid.

[329] Ibid.

multi-family dwellings by cable operators.[330] However, the opposition was resolved through last minute negotiations with those interests.[331]

A compromise amendment negotiated by Swift resolved the telephone industries opposition. Wirth explained the change in summarizing the bill on the floor.

> Concerns expressed by the telephone industry with the original draft were addressed and resolved during full committee consideration. To resolve the concerns of the telephone industry, a compromise amendment by Swift narrowed the definition of cable service and was adopted by the full committee.[332]

Rinaldo further clarified the compromise, "The Swift amendment limited the definition of cable services to only include the type of video and other general programming that are available to subscribers."[333] Additional language favorable to the telephone industry was described by Dingell, language that addressed "protections for telephone companies regarding cross-ownership and pole attachment rules."[334] Dingell stated that there was no remaining formal objections from the telephone industry. The opposition from realtors stemmed from a provision that prohibited owners of multi-family dwellings from preventing of interfering with provision of cable service to residents. That opposition was eliminated when Wirth and his staff deleted the section from the bill.

Other changes to H.R. 4103 after it was reported by the committee were explained briefly by Wirth. "Under the most recent compromise agreement between the cities and

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[330] Ibid, 39-40.

[331] Congress, House, Representative Wirth of Colorado on H.R. 4103, 98th Cong., 2nd Sess., *Congressional Record*, (October 1, 1984): 27975.

[332] Ibid.

[333] Ibid, 27980.

[334] Ibid, 27982.

cable industry, municipal rate regulation for basic service is grandfathered for two years, but cable operators cannot be forced to retier, replace, or reprice services which have already been lawfully changed."[335] The version considered on the floor would deregulate the rates charged for basic cable service in two years in order to allow market conditions to dictate prices compared to the reported verison that had a four year transitional period for municipal rate regulation.[336]

Several other changes also were made. These included clarifying renewal provisions whereby franchising authorities and cable operators could agree to renew a franchise without implementing administrative procedures and protection for cable operators against "unfair denial of the franchise."[337] A provision was added to allow the FCC to grant waivers to telephone companies allowing them to own cable systems where cable service would otherwise be denied to local residents. A clarification was made in the equal employment opportunity provision providing that a finding of failure to employ members of minority groups and women at the prescribed parity levels did not by itself constitute a violation. Additional clarifications addressed provisions that authorized the receipt of satellite cable programming for private viewing by individuals, at Gore's behest, and a provision extending the time for appeals of state pole attachment rules to at most 360 days if authorized by state rules. In all, there were sixteen clarifying amendments that changed the bill from the version reported by the House Energy and Commerce Committee.[338]

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[335] Ibid, 27975.

[336] Ibid, 27976.

[337] Ibid.

[338] Ibid, 27976-27977.

The House passed H.R. 4103 by the required two-thirds margin on October 1, 1984.[339] Describing the major thrust, Wirth characterized the bill as setting "forth franchise procedures and standards to encourage the growth of cable and to ensure that cable systems are responsive to the needs and interests of the local communities they serve."[340]

The differences between H.R. 4103 were notable. S. 66, as passed by the Senate, included provisions on regulation of rates and services that allowed for franchising authorities to regulate rates for basic cable services for five years following enactment.[341] Others included provisions on renewals, unauthorized interception of [stealing] cable signals, protection of subscriber privacy, and finally, restrictions on the regulation of basic cable services, facilities, and equipment.[342]

Since the Senate had passed S. 66, the House was also considering that bill. Wirth moved to amend S. 66 by replacing all language after the enacting clause with the provisions of H.R. 4103 that had just passed the House by two-thirds vote.[343] In this action, the House approved S. 66 as amended by its bill H. R. 4103. Next, the House and Senate appointed conferees to resolve differences in the two versions of S. 66.

In the Senate, appointment of conferees was blocked by the opposition of several conservative senators led by Senators Orren Hatch (R-Utah), and Jesse Helms (R-North Carolina), who objected to equal employment provisions championed by Representative

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[339] Ibid, 27987.

[340] Ibid, 27975.

[341] Ibid, 27987-27991.

[342] Ibid.

[343] Ibid, 27989.

Mickey Leland, who negotiated them with cable lobbyists. The guidelines were similar to existing FCC regulations, but the Senate Republicans objected to what they viewed as quotas. They used a Senate tradition of putting a "hold" on the bill to delay action. On October 5, the bill's sponsors, Goldwater and Packwood agreed to strike the affirmative action section. That prompted Senator Metzenbaum, a supporter of the provision to place a counter-hold. On October 11, Representative Leland and other House backers agreed to drop all references to percentages of jobs to be filled by women and minorities. Instead, new language strengthened the FCC's power to enforce its then current regulations regarding affirmative action. According to a Wirth aide, the passage of the '84 Act was a "battle-royale;"

> At the last minute the conservative Republicans -- Jessie Helms-types -- suddenly discovered that this law contained the strongest affirmative action provisions anywhere in any federal law. They said: Oh my God! What are we doing here? Had you been there, you would have seen Tim Wirth, physically, getting the papers from the Senate and walking them to the House so that the bill could be passed. And had he not done that, and basically, bludgeon -- not committee staff, but official floor staff, people to hurry up and get the papers and stuff -- it wouldn't have passed! Just as an example, the bill passed because at 10 o'clock that morning, a deal on affirmative action was reached with Orren Hatch. It required Wirth to expend an enormous amount of political capital to gain the support needed.[344]

The law passed both houses on October 11, the last day of the session, after House Democrats and Senate Republicans resolved differences over an affirmative action provision.[345]

Observations and Reflections

Clearly, the enactment of a national policy for cable television was not a straightforward affair. There were many starts and stops. It seems evident, however, that

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[344] David Aylward, personal interview by author, Washington, D. C., April 28, 1998.

[345] *CQWR*, October 13, 1984, 2670.

the largest single factor that finally lead to passage was the strategy of focusing on cable telecommunications in a specific manner rather than to include efforts to establish cable televison policy within broader legislative actions intended to completely rewrite the Communications Act of 1934. When the broad, comprehensive method was attempted, there were too many other controversial issues to block enactment for reasons unrelated to cable telecommunications. The focused approach allowed the main antagonists to compromise on provisions in a fashion that gave neither all that they wanted but yet provided for the most favorable outcome that could be expected in the governmental policymaking environment of the time. It also allowed certain peripheral issues such as copyright payments and "must-carry" rules to be sorted out in separate legislative actions in a manner which avoided undermining the efforts to clarify and establish a national cable policy.

The new policy did involve other institutional changes that would soon come to the fore. As LeDuc was to observe later, the legislative language of the Cable Communications Policy Act of 1984 seemed to have established that Congress had reserved the right to preempt any state or local regulation it considered to be in conflict with federal mass communication policy.[346] By deregulating basic cable subscription fee controls and establishing a nationally uniform procedure for franchise renewal, the federal government seemed intent on expanding its jurisdictional base in an effort to free the cable industry from as many of the varied franchise requirements as it could. "To accomplish that objective, the federal government used an incremental process that would eventually deprive state and local governments of any meaningful role in the regulation of cable telecommunications."[347]

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[346] LeDuc, *Beyond Broadcasting*, 151-152.

[347] Ibid.

Moreover, the FCC's direct authority over cable TV as granted in the act strengthened the capacity of the commission to use preemptive federal authority to diminish the role of state and local governments in the field of cable regulation. There was reason to expect that it would be used not only by the FCC but also by countless cable and pay-TV operators and by satellite-dish retailers and owners, who would claim under the act the same rights in order to attack a broad range of state or local operating restraints in the federal courts.[348]

Who Won and Who Lost?

When a piece of legislation that is hard-fought by such polarized representation is finally enacted, the inevitable question is, "Which interests won and which ones lost?" Packwood addressed the question by saying "Clearly, cable TV was the winner on deregulation."[349] From the perspective of the cities, Pols thought it ended up a 50-50 situation. "Cable did well with rate deregulation. Cable was content. Cities were content initially, then the rates started to go up and up and up. In 1987 and 1988, cable rates started to re-emerge as a problem."[350]

Cable TV Industry

Speaking for the cable industry, Tom Wheeler reflected on the question saying, "I hope we were the winners. It was a landmark piece of legislation."[351] He believed the cable

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[348] Ibid, 173.

[349] Packwood interview.

[350] Pols interview.

[351] Wheeler interview.

industry was by far the winner because uniform policy was established. "The cable industry finally held its nose and lost on some issues because of the greater good being served by uniform policy being established. A couple of examples [where we lost] were the lease access provision, and Chairman Wirth wanted a provision for requiring access to a percentage of channel capacity based on system size."[352] More favorably, on the issue of franchising fees; there was a franchise fee cap put at three percent to five percent which, it was widely accepted to mean, *de facto*, five percent. This was virtually an increase in fees for all franchising authorities. "But it was clear that the cities would sign nothing that didn't have that kind of cap in it. When you're running a multi-billion dollar business, five percent of your gross is a LOT of money."[353] These were the kinds of things where the industry had to hold its nose and swallow hard. But, still the overriding necessity for the cable industry was to have some kind of uniform federal policy.

Jim Mooney, who followed Wheeler as President of the NCTA, said he thought the cable industry won in 1984 because "the cable industry was able to make a good case that it offered the promise of improved television service in the United States;" that it offered a greater diversity of programming choices to people at relatively modest costs. It successfully made the case that "its development was being hampered by the demands of local franchising jurisdictions, who traditionally had been the licensing authorities for cable systems, for all kinds of freebies and for gold-plated systems that were basically, uneconomical."[354] He believed that the industry convinced Congress that something had to be done to rein in the power of local franchising authorities because they had so complicated

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[352] Ibid.

[353] Ibid, emphasis Wheeler's.

[354] Mooney interview.

the business with uneconomic requirements and other difficulties. "If the technology and the medium was to be able to grow and develop and flower," relief was essential.[355]

Senator Packwood attributed the cable industry's success to their attitude. "Here's something they passionately wanted. And passion is underestimated."[356] He did not view the cable TV question as a truly large public issue. "It's not a major issue, it's not a Viet Nam. In a climate of deregulation -- and certainly on the Commerce Committee at the time -- they were pushing for deregulation."[357] And they were pushing at a time when it was harder and harder to defend the theory of scarcity. "Certainly on cable it was hard to defend the theory of scarcity. There was no scarcity of cable. Scarcity was disappearing as a rationale. So they [cable industry] wanted it badly, and there was less strong opposition."[358] In Packwood's recollection, the cities wanted the money and they wanted the power.

Cities

Ward White saw cities as the losing interests in the enactment of cable deregulation. "But, in the end, I don't think the cities lost that much. The cities might have lost some of their regulatory controls but they complained that consumers were still holding them responsible for rate increases. They couldn't do anything about it but they had to take the rap. I suppose they could thank themselves."[359] White remembered that the subcommittee

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[355] Ibid.

[356] Packwood interview.

[357] Ibid.

[358] Ibid.

[359] White interview.

staff didn't pay too much attention to the cities. He recalled that some of the subcommittee members did for personal reasons, but, it was not the staff's concern to look out for the cities.

> We were more concerned with the authority exercised by the cities and the idea that the cities and the cable industry were involved in a lot of very shady deals here in the franchise wars and people were not happy with that. There was a real effort at that point to take the authority away from the cities because of that and that's one of the things that helped originate this legislation in the first place. That was a different [time] back in the late 70s and early 80s.[360]

Broadcasters

Describing the National Association of Broadcasters perspective, Jack Goodman, NAB's Vice President for Public Policy, said, "In 1984, the cable industry was clearly the big winner, although they had to give up certain things to the cities." For the most part, they got the cities neutralized and made it much, much more difficult for the cities to impose onerous conditions on franchise renewal. "It made it much harder for them to even challenge a franchise renewal. And they [NCTA] got price deregulation -- a major, major victory in 1984."[361] Broadcasters also lost in their attempts to get "must carry" provisions in cable legislation. The Courts had too recently struck down such requirements as infringements on First Amendment rights of cable operators.

Telephone Industry

Regarding the telephone industry, Ward White believed,

> The telephone industry, to some extent, was a loser because they were permanently kept out of cable. Not that they would have gone into it, but that they were kept out probably delayed their serious consideration of getting into the video marketplace as a result. But they had a lot to do at the time with the divestiture and all the other changes that were taking place in

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[360] Ibid.

[361] Jack Goodman, personal interview by author, Washington, D.C., July 18, 1997.

> the industry. They probably were losers. They were always trying to get their pound of flesh out of everybody. They complained that they were left out but they didn't try to get in on it.[362]

The issue of most interest to the telephone industry was the potential for cable systems to carry non-voice data transmissions. They did not want so much to exclude cable from the market as much as they wanted to assure that the same regulations would apply to cable systems carrying data transmission as did the phone companies. They did not want cable to get what they viewed as an unfair advantage if cable were not subject to the same state fee regulations for common carrier services. They attempted to get language in the bills that would effectively subject data transmission services by cable operators to the same requirements as phone companies.

According to White, one strategy that did not work well for the telephone interests is that they set-up an organization called BellCore for joint marketing purposes, but also to lobby. "It had a legislative operation, supposedly, representing all the Bell Companies who owned BellCore."[363] The Bell Companies were attempting to get what they could out of this bill, even though this organization is not listed among hearing testimony. This strategy failed when Pacific [Bell] lobbied members on their own "which irritated the hell out of everybody else in the telephone industry."[364]

Consumers and Pole Attachments

Consumers were not mentioned by any interviewees as either winners or losers at the time of enactment of the law. However, it was a consensus that after full implementation

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[362] White interview.

[363] Ibid.

[364] Ibid.

of the bill took effect in 1987, that rates rose at a consistently steep rate. At that point, many consumers believed they had lost in the deregulation effort. Certainly, interest groups that claimed to represent consumers, such as the Consumer's Union and Ralph Nader's organization, believe from the onset that consumers were losers when deregulation was enacted.

Another issue that received attention early in the efforts to develop cable television policy was that of pole attachment regulations. When local governments and cable operators were first encouraged to participate directly in the legislative process, pole attachment rate abuse was an important issue to operators. This can be attributed in part to the pending expiration of laws that addressed pole attachment availablility and rates. However, as the development of legislation waxed and waned, the issue of regulating pole attachment agreements and rates evaporated from the agenda. The issue was dealt with by separate legislation that renewed existing pole attachment laws before the 1984 Act passed, thereby eliminating the question from consideration in cable deregulation efforts.

Other Views

Another slant on the question of "who won and who lost" was provided by David Aylward, a former chief counsel and staff director for the Telecommunications Subcommittee. For Aylward, the question was how the "prevailing political winds were blowing?"

> The biggest underlying theme for the politics [of the issue] and runs from '75 through the passage of the Act in '84, is cable [viewed] as the underdog. Cable as the new kid on the block; cable as the potential solution to the monopoly of the networks. Cable as the solution to the arrogance of the

> networks, and whether it's violence or politicians fearing three people controlling news or whatever.[365]

In Aylward's view, with the legitimation of cable as a competitive television medium, the broadcast networks lost some of the perceived power they were believed to have through their ability to control the presentation of political news.

Aftermath of Deregulation

Full implementation of deregulation under the 1984 Act was not in place until roughly 1987, but by that time pressure from the public for reregulation had already begun. That pressure came in the form of complaints to elected officials that the cable industry's rate increases, as well as service deficiencies, were unacceptable. Furthermore, in late 1989, the Congress began to consider reregulation of cable TV in response to growing complaints about the cable industry's excessive control of the market for programs. By then, the major foci of the legislative efforts were to both reregulate cable subscriber rates and bring control over monopolistic vertical and horizontal integration within the cable industry. Consequently, the Cable Communications Policy Act became more of a beginning than an end in itself.

Cable Advances

In the aftermath of legislative enactment, the cable industry's position was solidified by FCC decisions implementing the new law and by several judicial decisions advantageous to it.

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[365] Aylward interview.

The Federal Communications Commission. After enactment of the 1984 Cable TV Act, cable deregulation rules were implemented by the FCC on April 28, 1985, when rate regulation and other provisions of the Cable Communications Policy Act of 1984 began. In response to public complaints about the cable television industry after deregulation, the FCC modified the criteria for determining effective competition for cable operators. Their new criteria established effective competition as either: (1) the availability of six unduplicated broadcast television signals in the community or (2) an independently owned, competing multichannel video delivery system available to 50 percent of the homes passed by the incumbent system and subscribed to by at least 10 percent of the homes passed. However, this effort on the part of the FCC to redefine effective competition did not adequately diminish the complaints of excessive market control. Under the six-signal rule, the bulk of cable subscribers were still dependent on unregulated services.[366] One significant note is that when the 1992 act ultimately passed, it included a definition of effective competition that was more stringent than the six-signal test devised by the FCC.

In October, 1985, under authority of the 1984 Act, the Commission eliminated technical signal quality standards for cable TV systems. The FCC would retain authority so local authorities could not impose technical standards more rigid than federal.[367] This agency action was viewed as a win by the cable industry and a loss by local government interests.

Such steady advances by the cable industry attracted the attention of television broadcast interests. On March 24, 1988, a Notice of Inquiry was issued by the FCC

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[366] Leland J. Johnson, *Toward Competition in Cable Television* (Cambridge, Mass: The MIT Press, 1994), 6.

[367] FCC Docket, MM Docket 85-38.

requesting data, empirical studies, and other information concerning the availability of broadcast signals on cable television systems. The commission sought information on any specific harms that broadcast stations may have experienced as a result of not being carried on a cable system within its service area or of being carried by a cable system on a channel number other than which it broadcast over the air.[368] Apparently, this action resulted from broadcast interests attempting to bring the regulatory powers of the FCC to bear on the cable industry. Then, in August 1988, the commission requested further comments on a proposal to eliminate the rule which prohibited common ownership of cable TV systems and national television networks. This was viewed as a victory by broadcast networks over cable interests.

But the rapid growth and integration of cable operations under deregulation also brought negative regulatory action. The Time-Warner merger formed a cable television entity with both the capacity to create programming and the cable franchises to distribute it.[369] This caused executives from network affiliates and independent TV stations to fear an "increased blurring of the dividing line between cable TV and broadcast TV."[370] To them, the idea of cable operators setting up independent streams of programmng was a new and serious threat. The FCC reacted in 1988 by imposing a syndicated exclusivity rule to protect local broadcasters and the value of syndicated TV programs they purchase from cable carriage .[371] It guaranteed local stations exclusive showing, in their geographic areas, of reruns and other shows when purchased on an exclusive basis.

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[368] FCC *54th Report*, MM Docket 88-138, March 24, 1988.

[369] Peter Newcomb "Norman Lear, Meet Adam Smith" *Forbes*; Vol. 144, Issue 12, November 27, 1989, 206, 210.

[370] Ibid.

[371] Ibid.

Regarding telephone ownership of cable services, one of the things the FCC did when implementing the 1984 Act was take the cross-ownership language from it and apply it through a footnote to prevent any kind of telephone ownership. According to White, "Telephone cross-ownership hadn't necessarily been contemplated by the Congress -- they [FCC] went beyond what they should have." This tact by the FCC provided added incentive for telephone companies to seek TV reregulation in the late 1980s. "Early on I was one of the people that motivated, started agitating to change the FCC's rules which we got changed in a 1988 [FCC] decision."[372]

Judicial Actions. Following enactment of deregulation, the cable industry also benefitted from favorable rulings by the courts. One case involved Preferred Communications' denial of a franchise to expand cable service to a particular neighborhood in Los Angeles , California. Preferred challenged the exclusive franchise system, claiming it violated the company's First Amendment rights. Exclusive franchises were common nationwide, so the case was important to both cable TV and to cities. At first, a federal district judge dismissed the case, finding that the First Amendment did not apply as argued by Preferred. But in March, 1985, the 9th U.S. Circuit Court of Appeals disagreed and reinstated the lawsuit. To the cable industry, the appeals court decision was one more step toward recognition of cable TV as a form of "electronic publishing" meriting the same constitutional protections that newspapers enjoy.[373] On June 3, 1986 the Supreme Court issued its decision in *Los Angeles v. Preferred Communications*.[374] Ruling 9-0 in favor of cable, the Court found that cable TV operators have First Amendment rights but declined

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[372] White interview.

[373] Krasnow, "The Process of Broadcast Regulation."

[374] City of Los Angeles v. Preferred Communications 476 U. S. 488 (1986).

to define their scope until lower courts decided whether a city may grant an exclusive territorial franchise to a single cable company.

In another case, just a few months after the 9th Circuit ruled in *Preferred*, the U.S. Court of Appeals for the District of Columbia struck down federal rules requiring cable operators to retransmit the programming of all local television stations operating within their service area. In 1985, in *Quincy Cable TV v. FCC,*[375] the court concluded that the FCC's regulation requiring cable TV systems to carry certain local TV stations was unconstitutional. This court case was viewed as a win by the cable industry with respect to the broadcast industry. The court said, these "must carry" rules, in effect for more than 20 years, violate the First Amendment freedom of cable TV operators.[376] The FCC did not appeal that decision. But the NAB did ask the Supreme Court, without success to review and reverse. This, too, was a victory for the cable industry and a loss for broadcasters. However, White said, "Must carry developed later on as more of an issue. As the more cable improved, the more broadcasters were concerned about it."[377]

The FCC amended its rules in light of *Quincy*. These, too, were challenged. In December 1987, the Federal Appeals Court for the District of Columbia Circuit handed down its decision in a case involving the revisions. Century Communications Corporation and others sued the FCC claiming their First Amendment rights were violated by these scaled down must-carry rules. The appeals court decided:

> Although the FCC has eliminated the more extreme demands of its initial set of regulations, its arguments in the case leave us unconvinced that the new must-carry rules are necessary to advance any substantial government

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[375] Quincy Cable TV v. FCC, 768 F. dd 1434 (D.C. Cir. 1985)

[376] LeDuc, *Beyond Broadcasting.*

[377] White interview.

interest, so as to justify and incidental infringement of speech under the test set forth in *United States v. O'Brien.*[378]

On March 23, 1987, by a 7-2 vote, the Supreme Court affirmed a decision by the Tenth Circuit Court of Appeals which limited the power of states to ban or regulate 'indecent' programming on cable TV, striking down Utah's effort to confine such programming to the hours between midnight and 7 am. Without issuing an opinion, the justices upheld a lower court ruling that such restrictions violated the First Amendment.[379] This constituted a win by the cable industry over the states and over the concept of cable being regulated by any entity other than the FCC. As expected, cable industry victories in the courts ultimately led to the seeking of legislative relief by the aggrieved parties -- i.e., the losers.

Varied Assessments and Reactions to Deregulation: 1986-1987

There were a variety of events that precipitated the move to reregulate the cable television industry. These included the regulatory rulings by the FCC and the winning record that the cable industry enjoyed in the courts. Some believe that the winning record that the cable industry amassed led to a certain degree of overconfidence which in turn led to a steep and steady rise in rates charged to cable subscribers.

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[378] Century Communications Corp. v. FCC, 266 U.S. App. D.C. 228; 835 F. 2d 292 (1987).

[379] Wilkinson v. Jones, 480 U.S. 926 (1987), affirming Jones v. Wilkinson, 800 F. 2d. 989 (1986).

Close observers, including interests affected by cable operations, had varying views on the deregulated industry and its development. For one, Packwood's view was favorable. He summarized it this way, "Cable promised us in 1984 when they got deregulation there would be more channels and better quality: better quality technically, and better quality in programming. All of that I believe they delivered. They kept their end of the bargain, therefore I believe the consumers came out of it better."[380] He believed the services offered began to blossom under deregulation. He continued, "They were really starting to move, in that era, from just sort of re-broadcasting networks, or something like that, to do cable programming. Unfortunately, because local cable ownership was more disparately owned then, we had a few cable companies that would dramatically raise rates and that would irritate some significant member of Congress."[381]

In general, the more critical reactions were from two factions. One consisted of competitors in the communications marketplace, particularly networks, broadcasters, satellite service providers, and telephone companies. The other consisted of consumers concerned with rates and services.

Competitors' Reactions

The rapid success of cable systems under deregulation created tremendous economic power for the industry and became problematic for competitors. Clearly, one of the driving forces behind demands to revisit the deregulation of the cable television industry was the broadcast television industry. Giving the cable industry's perspective, Mooney listed the critics as broadcasters, the telephone companies, some of the self-styled consumer

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[380] Packwood interview.

[381] Ibid.

organizations, and others who had either an institutional or commercial interest in seeing cable reregulated.[382]

In the pioneering days of community antenna TV operations, the broadcast networks ignored the medium. But soon after the Cable Act of 1984 was fully implemented in 1987, the success of cable television had become apparent, and broadcasters wanted their share; the nation's "Big Three" television networks independently began to lash out at cable television. The financial success of cable TV was reported by Nielsen Media Research as 54.8 percent of US households receiving cable by 1989, compared with only 18.2 percent subscribing in 1979.[383] Moreover, cable television systems had become extremely valuable business assets. Indeed, cable systems had become among the most valuable media assets. *Fortune* magazine reported that one corporation, TCI, had the potential to become the richest media company in the US. In addition to generous operating margins, there was predictable income year after year because the cable systems business was noncyclical,. TCI had concentrated on building shareholder value by leveraging the business with debt in order to buy new cable systems.[384] However, a public relations problem resulted from their success and rough tactics had gained the company a reputation as a bully.[385]

Consumer Concerns

When asked what he believed initiated the movement to legislatively reregulate the cable industry, Mooney replied,

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[382] Mooney interveiw.

[383] Walley, "Cable TV: Wounded Networks Go for Jugular;" *Advertising Age*, Vol. 60 s1-s2.

[384] Knowlton, "Want This Stock? Its up 91,000%," *Fortune,* Vol. 20, Iss. 3, July 31, 1989, April 10, 1989, 97-104.

[385] Knowlton Ibid.

> It's a complicated subject. There was a great deal of resentment among the public about what people considered to be unreasonable rate increases and poor customer service. And I think that feeling -- to a very substantial degree -- provided the foundation, as it were, for elected officials in Washington to take seriously the possibility that cable might be reregulated.[386]

When asked if it was deregulation that caused consumers to be upset, Mooney continued, "It wasn't so much deregulation they were upset about, it was the consequences of deregulation; it was prices and customer service. They'd call their congressman, or write to their congressman or make their views known to their local officials who would be in touch with the relevant members of Congress."[387]

Supporting Mooney's assessment, Roy Neel, former staff aide to Senator Al Gore, Jr., was sure that Gore's staff got more than a couple thousand letters over a four year period.

> And they almost always related to some abuse by a cable company in the State of Tennessee or elsewhere. We had a notorious case in Tennessee. A company out of Connecticut bought a system of small cable companies in Tennessee. They came in and were arrogant and not only took cable customers for granted, but were impersonal about it. And they, basically, picked on the wrong state to do this, because that alone energized Gore. They turned Gore into a real enemy. They grossly mishandled their politics on this, frankly. Part of its easy [to say] in hindsight, but it was as "ham-handed" as it gets, by the industry and by individual companies.[388]

Jack Goodman, of the NAB, recalled the level of consumer response as, "If you talked to almost any congressman's office, they would have a stack of letters from subscribers saying -- complaining -- about the outrageous cable rate increases."[389]

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[386] Mooney interview.

[387] Mooney interview.

[388] Roy Neel, telephone interview by author, Washington, D. C., September 5, 1997.

[389] Goodman interview.

In addition to the letters received by members of Congress, the press also created pressure for reconsidering deregulation. Jim Mooney recalled that the local press also liked to "cable bash."

> Complaining about cable rates was a favorite story of many daily newspapers in the second part of the 1980's, and in the early 1990's. The Bureau of Labor Statistics even got into this a little bit, by highlighting the cable component of its monthly consumer price index when they made their reports. Presumably, because it thought there was popular interest in the subject. And so every month, or every couple months, you'd see a story on the wire services which would be reprinted by papers all over the country to the effect that cable rates went up so much last month or so much within the past few months. You know, two or three times what the increase had been in the consumer price index. Stories like that never ever failed to get some ink. There was also a lot written in the *New York Times*, the *Wall Street Journal* and nationally conservative press on the subject.[390]

If these sources of pressure weren't enough, Ward White admitted that the US Telephone Association (USTA) helped create the history of rate increases which dramatized this and made it clear to the Congress that there was a problem with rates.. According to Ward White, "We did it through studies that we paid for and gave them the results -- it just happened to be timing and knowing what motivates members."[391]

Packwood downplayed the issue of rate increases, recalling,

> Rates like this are like electric rates or telephone rates -- people pay attention to them then think nothing of paying $3 for a gin & tonic, *but if their bill goes up $3 a month on cable, they're outraged* [emphasis mine]. Most of the cable companies raised their rates -- for one -- they've had their rates held down for several years. And they raise their rates, but boy, they sure dig right in and provide better technical equipment and better programs.[392]

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[390] Mooney interview.

[391] White interview. White joined the U.S. Telephone Association upon leaving the Commerce Committee staff. He stated that he commissioned the survey that produced this information.

[392] Packwood interview, (emphasis mine).

Eventually, concerns expressed by cities over deregulation led to calls for considering several policy alternatives, including: 1) to let things continue as they were; 2) to follow National Telecommunications and Information Administration (NTIA) and FCC policy positions, which viewed the franchise process as an obstacle to competition and the expansion of viewer choices; or 3) to follow the NLC's proposal, which included greater protection from First Amendment damage claims, broader authority for local governments in franchise renewals, and restrictions on concentration of cable ownership."[393]

Pressure for Reregulation Mounts

Indeed, the financial success of the cable TV industry was clearly rooted in the rates charged for their services. The "bully" attitude was manifest in their rate policies. As a consequence, the rate at which fees for cable service increased under deregulation had become the "battle cry" of proponents of reregulation. However, another important cable oversight issue before the Senate Communications Subcommittee was how to eliminate discriminatory practices in the provision of programs produced by cable TV corporations. It was believed that major cable operators were preventing competition from other technologies by limiting their access to the programming needed to serve consumers.

Shirley Hobbs Scheibla described Congress' views on new regulation for cable in *Barron's* writing that, "The Cable Act of 1984, which took effect December 29, 1986, was supposed to spur the cable television industry's growth with the help of deregulation. As a

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[393] David J. Atkin, and Michael Starr, "The US Cable Communications Act Reconsidered," *Telecommunications Policy*, Vol. 14, Iss. 4, August, 1990, 315-323.

result, cable now has control of much of the information and entertainment available."[394] Congressional leaders began to predict a new cable law by the end of 1990. For example, one draft bill would have barred a cable company from controlling more than 10 percent to 15 percent of the national market and allow telephone companies to enter the market to create competition. The industry's view was summarized by TCI's Robert Thompson, who saw "vertical integration as the most critical regulatory issue."[395]

When Congress began considering legislation to impose new federal controls on the booming cable television industry, the measure was the most ambitious reregulation effort undertaken during the Reagan-Bush era.[396] The legislative battle over reregulation pitted the cable industry, its congressional defenders and the Bush administration against pro-regulation law makers, broadcasters, telephone companies, and consumer groups. Proponents of the measures said new controls were needed to protect consumers and competitors from price gouging, poor customer service, and discriminatory business practices. Opponents to reregulation said the federal government should not interfere in the cable market and warned that the legislation would increase cable rates, not lower them.[397]

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[394] Shirley Hobbs Scheibla, "Clear Signal: Congress Views New Regulation for Cable," *Barron's*, Vol. 70, Issue 8, February 19, 1990, 16-17.

[395] Ibid.

[396] Congressional Quarterly, *Congress and the Nation*, Volume VIII 1989-1992, (Washington, D.C.: Congressional Quarterly, 1993), 416.

[397] Ibid.

Congress Considers Reregulation: 1988-1989

The various congressional hearings held between 1987 and 1990 tended to focus on three general themes. One was the percentage increase in cable rates that occurred after the end of rate regulation took effect in 1987 in accordance with the 1984 Act. The second was the monopolistic characteristics of the cable television industry resulting from vertical integration of programming, distribution, and local service provision; in particular, the practice of volume discounting of programming to large multi-system owners (MSO) was viewed by Congress as generally unfair to small cable operators.[398] The third was the lack of programming availability to other media such as satellite dish systems and other wireless television service providers.

Because he had a sizable rural constituency, Senator Gore soon became zealously interested in how the satellite dish owners and the dish industry, as a whole, were treated by cable operators. At one point in 1988, he became so adamant about the cable TV industry's lock on satellite signals that he took an unorthodox approach when he proposed an amendment to a tax bill (S. 2238). His amendment required that satellite television programming available to cable companies also be offered at competitive prices to individual owners of satellite dish receivers, to ban discrimination against non-cable distributors, to dish owners and to require the FCC to promote availability of satellite network programming in rural areas. However, a motion by Sen. Inouye to table the motion effectively killed the amendment by the vote of 43-36.[399]

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[398] Congress, Senate, Committee on Commerce, Science, and Transportation, "*Oversight of Cable TV*" *Hearings before the Subcommittee on Communications,* 101st Cong., 1st sess., November 16, 1989, CIS No: *90-S261-27*; Y4.C73/7:S.hrg. 101-464. 167-189. (Hereafter referred to as the *Oversight of Cable TV* hearings.

[399] *CQ Almanac,* 1988, 58s.

A former assistant to Gore recalled that,

> While I don't remember substantively where Inouye was on that issue. I remember him as generally being supportive of the cable industry when they opposed that floor amendment. So as a substantive matter, he probably didn't like it. But probably more importantly, Inouye was the Communications Subcommittee chairman in the Senate and it's considered a real legislative insult to a committee chairman to use an appropriations bill as a vehicle to get Senate passage of something that hasn't been voted out of the relevant committee.[400]

It is not unusual for the chairman of the relevant committee to oppose a substantive amendment on an appropriations bill as being outside the normal course for enacting legislation.

In reaction to negative assessments of the 1984 Act, by 1989 Congress was actively considering reregulating the cable TV industry. Additionally, the FCC had opened a notice of inquiry into cable TV providers' service performance. Another source of pressure for change in the regulatory environment for the cable television industry came from the telephone industry. On September 22, 1989, the FCC proposed eliminating rules prohibiting telephone companies from providing video programming. The commission had previously adopted a cross-ownership rule in 1970 which prohibited telephone companies from entering the cable television market. That was because it was concerned that the monopoly position of telephone companies would likely hinder the development of an independent cable industry. However, by 1989, the FCC believed that the public might benefit from new services and technologies provided over broadband facilities.[401] The telephone industry was

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[400] Thomas Rogers, telephone interview by author, New York, N.Y., September 23, 1998.

[401] Denise M. Drialo, "Telephone-Cable Cross-ownership: Repealing Prohibition," *Rural Telecommunications* Vol. 8; Issue. 1; Winter 1989; 55-59.

anxious to capitalize on the perception of that opportunity. The troubles of the cable TV industry were seen as opportunities for telephone companies.[402]

Legislative Activities. In the early months of 1989 a flurry of bills were introduced to address perceived problems with the deregulation of cable television, indicating a substantial level of concern.

On January 25, 1989, S. 168 - *The Cable Television Programming Competition and Consumer Protection Act of 1989* was introduced by Senator Larry Pressler. It prohibited price discrimination and exclusive distribution for satellite-delivered programming.

On April 18, 1989 S. 833 -- *The Cable Television Subscriber Protection Act of 1989* was introduced by Senators Metzenbaum and Lieberman. It redefined the terms "effective competition" under the 1984 Cable Act to allow regulations of basic cable service unless the cable community was served by more than one multichannel, non-broadcast, video programming distributor. The bill was introduced after the Senate Antitrust Subcommittee earlier examined anticompetitive practices of the cable television industry.

On April 18, 1989 S. 834 -- *The Competition in Cable Television Act of 1989* was introduced by Senators Metzenbaum, Pressler and Lieberman. It prohibited unreasonable discrimination in the sale of programming to distributors, and prohibited any one cable company from owning systems that served more than 25 percent of the cable subscribers in the country. This was clearly intended to limit the

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[402] Michael Warr, "Pulling Cable TV and Telcos Together," *Telephony* Vol. 218, Issue. 3, January 15, 1990.

size of large MSOs. It also contained provisions to require fair access to programming.

On May 3, 1989 S. 905 -- *The Cable Consumer Protection Act of 1989* was introduced by Lieberman. It amended Section 623 of the 1984 Cable Act to allow regulation of cable rates and permit states or franchising authorities to regulate cable service. It also authorized a state to deny a cable franchise renewal or transfer of ownership or control of a cable system on the grounds of extensive media ownership, and placed conditions on licensing upon compulsory carriage of local broadcast signals. A companion version, H.R. 2222, was introduced in the House by Representative Christopher Shays (R-Connecticut).

On May 18, 1989 S. 1068, an untitled bill -- Offered by Gore, it provided a comprehensive multi-titled legislative solution to the problems that Gore he believed faced the television consumer. The bill allowed franchising authorities in areas without competition to regulate rates for the lowest-priced tier -- which Gore referred to as the "life line service." That tier also included the local broadcast stations. In addition to allowing telephone companies to provide cable services, it required cable operators to provide access to the system for all programming services and ensure that programming services affiliated with cable operators were available to all program distributors on a non-discriminatory basis.

In addition to Gore, co-sponsors included senators Slade Gorton and Wendell Ford. At the same time a companion bill, H.R. 2437, was introduced in the House by Representative Rick Boucher (D-Virginia) with fourteen co-sponsors. These bills would have reestablished local government regulation of cable rates in areas with only one cable

system. But more troubling to the cable industry was the provision in both bills to allow telephone companies to offer cable services as long as the funds were not provided by telephone ratepayers. [403]

Late in the year, two other major bills were introduced. On November 15, Senator John C. Danforth, and Representative Jim Cooper (D-Tennessee), introduced S 1880 and HR 3826, respectively. Similar to the Gore and Boucher bills, these allowed local rate regulation in areas with only one cable system and barred programmers with connections to cable systems from discriminating against other cable systems. The major difference was, they did not contain provisions to allow telephone companies to operate cable systems.[404] Provisions in the bills to restrain the cable industry's market strength included restoration of "must-carry" rules, which required cable operators to air most local television broadcasters. This provision was destined to be a problem since federal courts had struck down the must-carry rules in 1985 and again in 1987 after the FCC attempted to restore them under pressure from Congress.[405] Another provision in Danforth's bill proposed to limit the overall number of subscribers for any MSO to 15 percent of the national total.

Table 4.1 summarizes congressional actions from 1989 through 1992 when legislation passed..

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[403] *Congressional Quarterly Almanac,* Volume 46, 1990. (Washington, D.C,: Congressional Quarterly, Inc) 371.

[404] Ibid.

[405] Quincy Cable TV v. FCC and Century Communications v. FCC.

Table 4.1. Congressional Actions Related to the Cable Consumer Protection and Competition Act of 1992: 1989 - 1992

YEAR	SENATE	HOUSE
1989	January 25, 1989 - S. 168 introduced. Hearings in April, June, October and November. April 18, 1989 - S. 833 and 834 introduced. May 3, 1989 - S.905 introduced. May 18, 1989 - S-1068 introduced November 15, 1989 - S. 1880 is introduced.	Hearings held in June and August No Votes Taken May 18, 1989 - HR-2437 introduced November 15, 1989 - HR 3826 introduced
1990	Hearings held in March and April. July 19, 1990 - S. 1880 reported by Commerce, Science and Transportation Committee.	Hearings held in March, April, and May July 13, 1990 - HR. 5267 introduced. September 6, 1990 - HR 5267 reported by House Energy and Commerce Committee. September 10, 1990 - HR 5267 is passed by the House.
1991	Hearings held in March and June. January 14, 1991 - S. 12 Introduced. June 28, 1991 - S. 12 reported by Commerce, Science and Transportation Committee.	Hearings held in March and June. No Votes Taken
1992	January 31, 1992 - S. 12 passed by Senate. August 12,1992 - Senate disagrees with House Amendments. Agrees to a conference. September 21, 1992 - Senate agrees to Conference Report on S. 12. October 5, 1992 -	July 23, 1992 - S. 12 passed by House. Request for a conference. September 14, 1992 - Submission of Conference Report on S. 12. September 17, 1992 - House agrees to S. 12 Conference Report. October 5, 1992 - Presidential veto overridden.

When the 101st Congress began in 1989, Senate assignments hardly changed. However, changes in the House were "nearly impossible to keep track of."[406] One notable change on the House Committee on Energy and Commerce was the appointment of Representative Ed Towns (D-New York) to take the place of Mickey Leland who had died in a plane crash in Ethiopia while on a trip to visit refugee camps. Towns' appointment was backed by both Dingell and the Black Caucus.[407]

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[406] *Congressional Quarterly Almanac,* Vol. 45, (Washington, D.C., Congressional Quarterly) 1989, 16.

[407] Ibid.

With the Democrats now in control of the Senate, the Senate Commerce, Science and Transportation Committee had eleven Democrats and nine Republicans. Hollings was the chairman of the committee and Danforth was the ranking minority member. The Communications subcommittee was made up of seven Democrats and six Republicans. This was an increase over the 1988 subcommittee that had six Democrats and five Republicans. The chair was Inouye and Packwood was the Subcommittee's ranking minority member. Other Democratic members of the subcommittee that carried over from the 100th Congress included Ford, Exon, Gore, and John F. Kerry (D-Massachusetts). Senators Bentsen and John Breaux (D-Louisiana) were new to the subcommittee in 1989, and Hollings left the subcommittee when he became committee chair. The Republicans members, in addition to Packwood, that returned from 1988 were Pressler, Stevens, and John McCain (R-Arizona). Senator Pete Wilson (R-California) left the subcommittee and senators Conrad Burns (R-Montana) and Slade Gorton, who was returning to the Senate, were added to the subcommittee. Inouye, Packwood, and Gore remained highly active on the issue of cable television regulation.

The membership of the House Telecommunications Subcommittee continued with fourteen Democrats and nine Republicans. Markey remained chair of the subcommittee and Rinaldo was ranking minority member. Two Democratic positions changed when Wayne Dowdy (D-Mississippi) left and Leland died. They were replaced with Thomas J. Manton (D-New York) and Ron Wyden (D-Oregon). Two Republican positions changed also when Dan Coats (R-Indiana) and Howard Nielson (R-Ohio) left and were replaced with Edward R. Madigan (R-Illinois) and Dan Schaefer (R-Colorado).

Table 4.2, lists the congressional activities by committee and issues of major interest as they considered the need to reregulate the cable television industry.

Table 4.2. Hearings Related to the Cable Consumer Protection and Competition Act of 1992

Congress	Date	Committee	Topic
101st	April 12, 1989	Senate Judiciary Committee's Subcommittee on Antitrust, Monopolies and Business Rights	Competitive Problems in the Cable Television Industry
	June 14, 21, 22, 1989	Senate Commerce, Science, and Transportation Committee's Subcommittee on Communications	Media Ownership: Diversity and Concentration
	June 15, 1989	House Energy and Commerce Committee's Subcommittee on Telecommunication and Finance	Cable Television Foreign Ownership
	August 3, 1989	House Energy and Commerce Committee's Subcommittee on Telecommunication and Finance	GAO Cable Rate Survey
	October 18, 1989	Senate Commerce, Science, and Transportation Committee's Subcommittee on Communications	Commercial Time on Children's Cable TV
	October 25, 1989	Senate Commerce, Science, and Transportation Committee's Subcommittee on Communications	MustCarry
	November 14, 1989	Senate Judiciary Committee's Subcommittee on Antitrust, Monopolies, and Business Rights	Sports Programming and Cable Television
	November 16, 17, 1989	Senate Commerce, Science, and Transportation Committee's Subcommittee on Communications	Oversight of Cable TV
	March 1 and April 19, 1990	House Energy and Commerce Committee's Subcommittee on Telecommunications and Finance	Cable Television Regulation (Part 1)
	March 21, 1990	Senate Commerce, Science, and Transportation Committee's Subcommittee on Communications	FCC Syndicated Exclusivity Rules
	March 29, and April 4, 1990	Senate Commerce, Science, and Transportation Committee's Subcommittee on Communications	Cable TV Consumer Protection Act of 1989
	May 9, & 16, 1990	House Energy and Commerce Committee's Subcommittee on Telecommunications	Cable Television Regulation (Part 2)
102nd	March 14, 1991	Senate Commerce, Science, and Transportation Committee's Subcommittee on Communications	Cable TV Consumer Protection Act of 1991
	June 18, 26, 27, 1991	House Energy and Commerce Committee's Subcommittee on Telecommunications and Finance	Cable Television Regulation
	June 20, 1991	Senate Commerce, Science, and Transportation Committee's Subcommittee on Communications	Broadcasters' Public Interest Obligations and S.217, the Fairness in Broadcasting Act of 1991

The Senate Antitrust Committee was also very interested in complaints against the cable industry. They were particularly interested in charges of local cable systems operating as natural monopolies raising prices because of the lack of competition. They were also interested whether there were any antitrust violations in their programming sales practices.

Senate Hearings

The first hearing in 1989 was a one-day session on April 12, when the Senate Judiciary Committee's Subcommittee on Antitrust, Monopolies, and Business Rights, explored "Competitive Problems in the Cable Television Industry." [408] There were three panels heard from: representatives of cities and consumers on one panel; organized cable industry interests on another panel; and broadcasters and competing video technologies on the final panel.

The Communications Subcommittee held hearings on three days in June. The subject of those hearings was diversity and concentration aspects of media ownership.[409]

Senate Subcommittee on Antitrust, Monopolies, and Business Rights Senator Howard Metzenbaum presided at the Judiciary hearing with subcommittee members Strom Thurmond (R-South Carolina), the ranking minority member of the committee, Dennis DeConcini, (D-Arizona), Paul Simon (D-Illinois), Herbert Kohl (D-Wisconsin), and Arlen

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[408] Congress, Senate, Committee on the Judiciary, *Competitive Problems in the Cable Television Industry: Hearing before the. Subcommittee on Antitrust, Monopolies, and Business Rights,* 101st Cong., 1st sess., April 12, 1989. (Y4.J89/2:S.hrg. 101-511).

[409] Congress, Senate, Committee on Commerce, Science, and Transportation, *Media Ownership: Diversity and Concentration: Hearing before the Subcommittee on Communications,* 101st Cong., 1st sess., June 14, 21, 22, 1989, (Y4.C73/7:S.hrg. 101-357).

Specter (R-Pennsylvania) present.[410] The hearings came almost exactly one year after similar hearings in 1988 on the same topic. In his opening statement, Senator Metzenbaum listed the points of interest. They included: 1) the rapid rise in cable rates nationwide -- 20 percent in the first year of deregulation; 2) vertical integration that discouraged large operators of multiple local cable systems from dealing on fair terms with competing delivery technologies; and 3) the exclusion of local broadcast stations in favor of programming owned and controlled by the cable industry. He viewed these trends as potentially monopolistic and possibly violations of antitrust laws.[411] Nationally, basic cable rates had risen 32 percent since deregulation. Metzenbaum contended that the price consumers were paying for cable service had increased at a greater rate than any other commodity or service in the entire United States. "Scores of local officials from communities around the country . . . have written to me asking that something be done to restore the cities' regulatory authority to restrain the rates charged by cable systems."[412] To Metzenbaum, the basic premise for the Antitrust Subcommittee's review was "the realization and acknowledgment that only with competition do you get the free enterprise system working well. The cable industry should not be permitted to thwart [Congress'] will by denying competing technologies the programming that is needed to compete."[413] He believed the mistake made by Congress was to let the FCC define effective competition.

> The Commission's definition does not comport with reality. The Commission's definition was irresponsible. They failed to meet their public responsibilities. Their definition provides that a cable system faces effective competition if three over-the-air television signals are present in a particular cable community. As a result, almost every city across the country is prevented from regulating rates. It is axiomatic that if competition is not able to restrain prices in a given product market, regulation may be the only

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[410] *Competitive Problems in the Cable Television Industry Hearing*: 1.

[411] Ibid, 1.

[412] Ibid, 2.

[413] Ibid, 11.

> alternative. I have not abandoned all hope that the market for cable television can be competitive. But I am convinced that the FCC's mistake must be corrected now.[414]

DeConcini described the issues as he understood them. "I am sure all of my colleagues receive, as I do, a lot of complaints from my constituents about the cable industry. The first problem is the concentration of ownership of cable television, a problem I think you are delving into today; and the second is the dwindling number of large companies and the integration of ownership of programming services and cable systems in a relatively small number of major cable system owners."[415] Furthermore, he continued, "I am also concerned about two other problems related to competition in the cable industry. The first is the problem of access to programming for non-cable providers, such as direct satellite broadcasters. The second is the right of broadcasters, particularly independent broadcasters, to be carried on cable systems."[416]

Similar to the approach taken by Congress in developing the 1984 act, there were negotiations between representatives of the main organized interests aimed at responding to the complaints so that new legislative actions could be avoided. DeConcini alluded to these efforts, saying "I understand that negotiations are taking place between the Cable Television Association and the broadcast industry today, and I hope that these negotiations are successful in solving these problems. I am not one that looks to the legislature, the Congress of the United States, to solve these problems. I prefer for the marketplace to do so. But I agree with Senator Metzenbaum. The public interest is here before us today."[417]

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[414] Ibid.

[415] Ibid, 23.

[416] Ibid, 24.

[417] Ibid.

Senate Subcommittee on Communications. On November 16 and 17, the Senate Communications Subcommittee held oversight hearings on the performance of the cable television industry. Of particular interest was the rapid increase in cable rates and the apparent restrictive access practices used by the industry regarding its programming. Broadcasters, wireless cable providers, and satellite dish manufacturers complained that the cable industry was "choking off" competition by keeping programming from competitors and shutting out other program suppliers. Broadcasters also complained that cable operators put them at a disadvantage by the placement of their channels on cable system line-ups at locations other than their normal broadcast channel number.[418] For example, a local station that broadcasts its signal on Channel 4 might be placed at position 44 on the cable system's channel selections. Another problem was exclusivity rights, where cable operators offered syndicated programs in areas where broadcasters had exclusive program rights, monopoly power (both vertical and horizontal MSOs), and access to satellite signals for competiting media. Other issues were raised by members. For example, Ford commented on the buying and selling of cable operations without making investments.[419] Senator Inouye indicated an interest in introducing "anti-trafficking provisions" that would prohibit a purchaser of a cable television operation from selling it within five years of the purchase date.[420] They also expressed larger concerns. Inouye stated, "At the beginning of the 101st Congress, it was apparent that many Americans were troubled about the market power of the cable television industry and were hopeful that the Subcommittee would make an examination of this issue a priority." [421] Ford, in his opening statement, said that, "I have had some problems with the philosophy of the big cable operators. I believe that their view of government relations is the

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[418] *CQ* Almanac, 1990, 370.

[419] Senate hearings, *Oversight of Cable TV,* 157.

[420] Ibid.

[421] Ibid, 1.

`scorched earth theory,' in that they beat back every single legislative initiative or suggestion."[422] He made reference to Danforth's bill, S. 1880, introduced the previous day, as evidence of general senatorial concern. "It had 15 co-sponsors, eight were from the Senate Commerce, Science, and Transportation Committee including members of both parties."[423]

Pressler, who co-sponsored S 1880, was concerned that between October 1986 and October 1988, basic cable rates had increased 29 percent nationally. "This increase is unwarranted and was made possible because of the lack of both competition and regulation . . .We created an unregulated monopoly and this is the result."[424] Speaking about the apparent monopoly on cable programming, he said, "The MSOs and the programmers are so corporately intertwined that `outsiders' in the business have found themselves paying much more for the same programming. In some cases they have found that they could not get the programming they wanted at any price."

Also concerned about the level of competition for cable television, Senator Gorton, who had been instrumental in the 1984 deregulation, stated that, "According to the Association of Independent Television stations, of the more than 7,000 cable systems in this country, only 36 have competition from other cable systems." On the subject of rising cable rates, Gorton believed that, "While each of the bills takes a slightly different tack, the central message remains the same -- consumers are demanding an end to an unregulated monopoly and Congress is listening and ready to respond."[425]

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[422] Ibid, 2.

[423] Ibid.

[424] Ibid, 6.

[425] Ibid, 7.

Table 4.3. Cable Rate Increases in Tennessee: 1986-1989[426]

City	Rise
Memphis	71%
Crossville	99%
Nashville	113%
Chattanooga	115%
Murfreesboro	117%
Knoxville	116%

One of the most adamant critics of rising cable rates was Senator Al Gore. During his opening statement, he charged that cable TV was distorting the marketplace. "[We] now have empirical evidence citing cable rate increases since the 1984 Act, which are vastly in excess of inflation." He referenced a Government Accounting Office report that showed increases of 24 to 29 percent over three years, based on a voluntary survey. He also cited the examples of rate increases in Tennessee as shown in Table 4.3.

Gore criticized the "huge MSOs that get bigger and bigger; that exercised anti-competitive muscle." In Gore's opinion, "The point of six bills ... is to give cable consumers and satellite dish owners some modest relief from skyrocketing rates and pervasive anti-competitive practices."[427]

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[426] Ibid, 4.

[427] Ibid, 5.

Senator Burns, called for an examination of several negative aspects of cable TV deregulation. First among his concerns was the lack of competition and the provision of a full complement of channels of news, information, entertainment, sports and other programming services. Second was the vast number of rural communities that remained unserved or under-served by cable. The third concern he listed was the slow deployment of fiber optics given the increased consumer services which fiber could provide. Lastly, he listed the prospect of telephone company entry into the provision of video programming services and whether telephone company entry might solve the problems that had arisen since the passage of the 1984 Cable Act.[428]

Senator Bentsen brought up a survey done by the U.S. Telephone Association.[429] It showed that "cable rates in Texas have increased an average of 80 percent in three years. e.g., Dallas $2.95 in 1986 to $14.95, a 407 percent; Laredo up 150 percent; Wichita Falls, $6.00 in 1986 to $18.69 in 1989, a 212 percent increase.[430] Breaux reported the average basic rate in Louisiana in 1986 was about $9.00; in 1989, the average was nearly $16.00, an increase of over 70 percent. In Shreveport, rates had increased $5.00 to $17.00; over 200 percent.[431]

Consumer interests were present at the hearing to echo the complaints registered by senators. Gene Kimmelman, legislative director for the Consumer Federation of America,

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[428] Ibid, 8.

[429] "We [USTA] did it through studies that we paid for and gave them the results -- it just happened to be timing and knowing what motivates members." Comment by Ward White regarding the USTA cable rate survey; White interview.

[430] Senate hearings, *Oversight of Cable TV*, 9.

[431] Ibid, 9.

testified on behalf of consumer interests. He stated, "I am here on behalf of the Consumer Federation to endorse Senator Danforth's legislation S. 1880, which has been co-sponsored by Senator Gore, because we believe it would address consumers' major problems with the cable television industry."[432] He reminded the panel that in the early 1980s, there was a lot of talk about competition.

> There was supposed to be direct broadcast satellite. There was supposed to be satellite transmission, pay-per-view, pay-per-channel. None has developed. Instead, we have seen cable industry's horizontal concentration and vertical integration into a complicated web of video ownership which controls a large portion of cable subscribers in this country and the most popular programming that the American people want to see.[433]

Furthering his case, Kimmelman said, "We have heard [at this hearing] discussion about comparisons to the consumer price index. It sounds reasonable, but when one looks at the cable industry, with the new technologies going into place, with expanding services and expanding subscribership, it is clear that cable is a declining cost industry; that the price per service and the price per subscriber is coming down."[434] Kimmelman continued,

> So the rate increases that the American people have experienced have really been a ripoff, Mr Chairman. Market analysis shows that with just half the revenue stream of the cable industry cable operators would be able to earn a reasonable profit. For consumers, this would mean that cable rates could be reduced by 50 percent, with appropriate regulatory tools in S. 1880, and

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[432] Ibid, 293.

[433] Ibid.

[434] Ibid, 294.

> the American consumer would save $6 billion in the video revenue that they are currently handing over to the cable industry.[435]

Kimmelman elaborated on the Consumer Federation's position in his submitted statement: "If vigorous competition had developed, as the Cable Act envisioned, or its surrogate in monopolistic markets -- effective rate regulation -- were imposed, consumers would be paying about half of what they are charged today for cable services."[436] Speaking of Sections 9 and 10 of Senator Danforth's bill, they

> would increase the diversity of programming available to consumers. By preventing discrimination against wireless cable and satellite dish service providers, Section 9 would increase the likelihood that consumers not wired by cable would have an opportunity to receive a broad package of video programming from non-wire technologies. Section 10 would then reduce the largest cable operator's incentive to maximize market power by limiting channel availability.[437]

Also speaking for consumer interests and against the perceived monopolistic position of cable TV, Sharon Ingraham, Chair of the National Federation of Local Cable Programmers, testified that, "Access [for Public, Education, and Government (PEG) organizations] remains unavailable to at least three-quarters of the communities with cable in this country."[438] She asked Congress to require PEG access in every franchise and that access programs be part of basic service tiers. Ingraham continued, "We ask you to amend the Cable Act to allow for facilities, equipment and funding sufficient to let access continue to thrive, and make it clear that this support should not be counted by cable operators as part

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[435] Ibid.

[436] Ibid, 306-307.

[437] Ibid, 309.

[438] Ibid, 312.

of the franchise fee."[439] Ingraham's group wanted Congress to limit the use of all franchise fees to paying expenses of managing franchise agreements and to require cable operators to fund production of local access programs with money other than franchise fees.

Continuing on the point of the cable industry's monopolistic behavior, Gore contended that the industry had an incentive to stifle the development of technological competitor such as satellite dish systems. For example, he stated that only after pressure from Congress did cable operators agreed to provide programming to satellite broadcast distributors or rural electric co-ops to reach customers having no chance of cable extended to their area "But the head of rural electric co-ops association came to testify and said it has been a failure because of one simple reason. The cable programmers have stone-walled us."[440] Rural electric co-ops charged that cable TV had given them a small trickle of programming, and the wholesale rates were 441 percent higher than the wholesale rates charged to cable systems for the same programming. Gore believed that because the cable industry held economic control over the source of programs, it created an artificial distortion in the price charged to the ultimate customer making it appear that it was more efficient to have the distributor of programming to deliver it to the viewer. Gore said that situation " is absurd and ridiculous on its face, but they come and seek to make that argument with a straight face. I do not think it is credible."[441]

In Gore's statement preceding his questioning of FCC Chairman Sikes, he recalled that the "single most powerful individual in the cable industry"[Mooney] surprised many by

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[439] Ibid, 313.

[440] Ibid, 360.

[441] Gore speaking to FCC Chairman Sikes about cable programmers' monopolies over their product, *Oversight of Cable TV* hearings, 360.

endorsing action by the Congress to place limits on the number of cable systems an individual company can own, and even contemplated divestiture in order to meet such limits. Gore was referring to Mooney who, during his testimony, endorsed congressional action to place limits on the trafficking in cable franchises; indicating that in his view the FCC had not been active enough in overseeing the activities of the cable industry. Finally, he contemplated more regulation, at least at the federal level, and identified market power and market concentration as legitimate issues for attention by the Congress, whether in the form of horizontal integration, or vertical integration.[442]

Then Gore asked Sikes for his reaction to Mooney's statement, and Sikes responded:

> I think that from what I understand of the testimony yesterday by the cable industry, you are seeing what is frequently played out with the commercial evolution of industries in America. An industry begins with certain benefits conferred upon it by the government, in order to help it develop. It reaches certain concentration levels, and then it rushes in seeking regulation, believing that the bargain will preclude new competition. My preference is for new competition.[443]

Sikes also addressed Mooney's comments about "trafficking," i.e., the quick sale of cable systems for a profit after owning them for just a short time. He said, "I know of municipalities that would have liked to have had current cable owners sell their systems, in order to facilitate, new cable providers."[444]

Sikes' testified that he was concerned about what seemed to be an effort to reestablish municipal empowerment. In diplomatic fashion, he said it is important to remember that the municipalities restrained the development of cable, "frequently extracting a variety of revenue promises." Senator McCain not so diplomatically interjected that he

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[442] Ibid, 329.

[443] Ibid, 359.

[444] Ibid.

believed it was "extorted" rather than extracted. Sikes agreed, continuing, "As we go through this, it is important, as some regulation is re-established that we think about what jurisdiction is perhaps best able to do that."[445]

Regarding the idea of telephone entry into cable service, Sikes said, "Turning to the rule book question, right now, in most states, cable cannot provide telephony. There are a few states, Illinois notably, where that is not true. So, as cable faces a legal block to getting into telephony, I think we have to be concerned about letting the telephone company being a fully vertical cable operator."[446] He continued, "It also strikes me that the legislative approach would be less likely successful, because of the concerns of various media that allowing that concentration of power through the local exchange, and through the extraordinary revenue streams of local telephone companies, might be just overwhelming."[447]

Senator Stevens was next to address Sikes. Stevens was concerned with the treatment of cable at the hands of municipalities. "

> The problem that I have with these proposals [to reregulate the cable industry] is I see more and more interference from the municipalities in creating fiefdoms that you have to pay dues in order to get through. Have you examined these to see what kind of roadblocks are going to be placed in the way of the development of national cable as we have had national telephone and nationalize other concepts? Or has the FCC taken a position on national cable?[448]

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[445] Ibid, 363.

[446] Ibid, 368.

[447] Ibid, 368.

[448] Ibid, 369.

Expressing perhaps indirect agreement with Stevens, Sikes' indicated that "the municipal history in the area of cable has not been such that I would recommend a significant re-empowerment of municipalities in the cable area."[449]

Several representatives of competing technologies participated in the hearing. Edward O. Fritts, head of the NAB, presented the concerns of TV broadcasters. For one, "When the Cable Act was passed back in 1984 must carry was in place at the FCC. The cable industry challenged those rules in court, and today local stations have no assurance of carriage. What's more, many stations have been displaced from prime channel positions by cable networks which are largely owned by the vertically integrated MSOs." More generally, he asserted, "Cable today stands as an unregulated monopoly. It is not regulated by the cities. It is not regulated by franchising authorities. It is not regulated by the Federal Communications Commission. It is not regulated by Congress, and it is not regulated by competition. Cable, in fact, is the regulator of today's marketplace. In short, in our [NAB] opinion, the 1984 Cable Act has failed abysmally."[450] Other competitors presented negative assessments of the cable industry, including the Satellite Dealer Coalition, the American Home Satellite Association, the Satellite Dealer Communication Association of America, the Wireless Cable Association, and GTE Telephone Operations.

Clearly, if this hearing was indicative, there was much unhappiness with the recent performance of the cable television industry. Most of the members of the Communications Subcommittee were critical of the cable industry. They based their criticism on constituency reactions to cable rate increases and a survey of cable rates conducted by the Government Accounting Office commissioned by House Telecommunications Subcommittee Chairman

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[449] Ibid.

[450] Ibid, 374.

Markey. Gore believed the "industry is severely distorting the marketplace."[451] Ford of Kentucky accused the cable industry of following a "scorched earth theory."[452] Senators Bentsen, Breaux, McCain, Pressler, Gorton, and Hollings all co-sponsored the Danforth bill aimed at reregulating the cable industry, as did Gore and Ford. Subcommittee members Inouye, Burns, and Kerry, while expressing concerns regarding complaints about rate increases, wanted to investigate the conditions more objectively and had not joined in co-sponsoring Danforth's S. 1880.[453] Stevens and Packwood were the only two members of the subcommittee at the hearing who could be considered defenders of the cable industry.

In more than six hours of testimony on November 16, cable interests offered a spirited defense against their critics. Mooney was first to offer testimony to defend the cable industry. "Basic service is only one component of most subscriber bills" he said.[454] The average monthly subscriber bill rose from $21.58 to $24.68 over the same two year period, an increase of fourteen percent or seven percent a year. From 1972 through 1986, when deregulation took effect, cable's basic rates ran 72 percentage points behind the consumer price index.[455] Cable deregulation has led to improved cable programming. "Cable operator's spending for basic programming has increased from about $300 million in 1984 to nearly $1 billion [in 1989]."[456] Moreover, the average subscriber in 1989 received 32 channels, as compared to 27 channels in 1986. The average cost per channel has remained

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[451] Congress, Senate, Committee on Commerce, Science, and Transportation, *Oversight of Cable TV: Hearings before the Subcommittee on Communications*, 101st Cong., 1st Sess., November 16 and 17, 1989, (S. Hrg. 101-464): 4.

[452] Ibid, 2.

[453] Ibid, 181.

[454] Ibid, 10.

[455] Ibid.

[456] Ibid, 11.

relatively flat: 46 cents in 1989 to 44 cents in 1986. Mooney believed the "spurt in basic rates which occurred in 1987 and 1988 were a post-regulatory adjustment."[457] Mooney testified that according to the BLS, the overall CPI figure for the first nine months of 1989 was up 3.7 percent while cable rates were up only 2.3 percent during that same period.. At the heart of cable's defense against the charges of unreasonable rate increases was the increase in numbers of channels offered to subscribers. Mooney pointed out that "basic rate increases have been matched by an increase in the average number of channels received by subscribers. [Even] the GAO found that the average cost per channel has remained at approximately 45 cents since rates were deregulated."[458] Mooney went on to list other benefits from the deregulation of the cable industry, including his claim that vertical integration in the industry led to increased amounts and qualities of programming available. He also emphasized that the franchise fees paid by cable operators amounted to significant general revenue sources for local authorities.

> In 1984, prior to enactment of the Cable Act, municipalities received $200 million in franchise fees and were required to devote the money to administering cable franchises. Since passage of the Cable Act, from 1985 through 1989, cable systems have paid an estimated $3.053 *billion* in franchise fees. That money is available for any municipal use.[459]

As for charges that the cable industry was monopolistic because of a lack of competition, Mooney's response was that since the 1984 Act cable now faced a growing number of competitors. "The number of independent television broadcasters had tripled to 417. Since cable had finished wiring most of the major metropolitan centers, there are [1989] 9,000 cable systems serving over 50 million households. VCRs are a major means of video distribution, increasing from 1.1 million units in 1979 to nearly 60 million in 1989.

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[457] Ibid.

[458] Ibid, 14.

[459] Ibid, 66.

VCR penetration grew to 65.8 percent . . . surpassing the growth of cable during the 1980's. Home satellite dishes, legalized by the 1984 Act, grew from less than 800,000 to nearly 2.6 million.[460]

Regarding charges of the monopolistic aspects of vertical integration, where MSOs invest in creating programming, Mooney pointed out that, "Three of the five largest networks (ESPN, USA Network, and CBN's [Christian Broadcast Network] Family Channel), have no operator investment yet have wide distribution."[461] Conversely, some of the most popular cable programming exists only due to cable's vertical integration. For example, Nickelodeon, Black Entertainment Television (BET), C-SPAN and C-SPAN II (funded by the cable industry), Bravo, Turner Network Television (TNT), the Discovery Channel, and Cable News Network (CNN), would not exist without the investment by cable operators to create the programming.[462]

John Malone, chairman of TCI, focused his testimony on the business aspects of the cable television industry and defended it against charges that it was reaping huge profits as a result of monopoly power. He stated that, "As further proof in our market economy that our product is successful, the penetration of CATV has actually been accelerating, rather than decelerating, as the industry matures."[463] He believed this was indicative of their product/price relationship being more appealing on the margin to consumers than before. Answering charges that cable's prices are too high, Malone retorted that "the cable TV industry has the lowest return on invested capital of any media or communications

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[460] Ibid, 70.

[461] Ibid, 73.

[462] Ibid, 75-76.

[463] Ibid, 108.

industry."[464] He described how five to six years before, large industrial companies such as General Electric, Westinghouse, American Express, and Capital Cities were in the cable TV business. They all exited "citing low return on investment."[465] Continuing, he cited statistics from an unnamed communications industry report "which indicated that regulated local telephone companies had a return on invested capital, . . .pretax profits divided by average assets, of 14.9 percent. The radio and broadcast industry had a return of 10.9 percent and the cable industry had a return of 7.3 percent."[466] Describing the specific circumstances of TCI,

> Our cumulative retained earnings over 20 years is zero. We have plowed everything back into growth and renewing our technology. Our technology is evolving so rapidly, that we cannot wait the fifteen year franchise cycle in order to provide good service. Most of our rate increases in TCI have reflected direct programming cost increases. We have typically added two or three cable networks each year.[467]

It seems, however, that the cable TV industry's defense was a shovel full of information thrown against a land-slide of charges about rate increases and monopolistic control of the market.

House Hearing

Earlier in the year, the House Telecommunications Subcommittee had used a GAO survey of cable TV rates to aim criticism at the industry's performance since deregulation. In April 1988, Representative Edward J. Markey, chairman of the House Subcommittee on Telecommunications requested the Government Accounting Office (GAO) "to conduct a

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[464] Ibid.

[465] Ibid, 108-109.

[466] Ibid, 109.

[467] Ibid.

nationwide survey of cable television rates and services."[468] The survey report was issued by the GAO on August 3, 1989, and Markey's subcommittee held a one-day hearing the same date. It would be the only hearing on the House side in that year.

Markey presided at the hearing and noted that the attendance by eighteen of the subcommittee's members was the largest number for any hearing that year, a gauge of interest in cable issues.[469] It was attended at various times by seven of the fourteen Democrats on the subcommittee and eight of the nine Republicans. The GAO's report was presented and testimony received from the agency officials who conducted the survey and authored the report. Additionally, cities, state regulators and the cable industry were represented in a second panel. The fundamental conclusion of the report was that "monthly rates for the lowest price basic cable service and the most popular cable service increased significantly by more the 25 percent or four times the rate of inflation from 1986 to October 1988."[470] The panel was questioned by Markey and several other members in obvious attempts to paint the rate of rate increases as abusive actions by an industry turned into a monopoly by the deregulation of 1984. Representative Swift and Don Ritter (R-Pennsylvania) were the only subcommittee member who questioned the GAO panel in a manner that revealed that the numbers could also have an interpretation that rates, when controlled for inflation, had increased in line with other consumer prices. Representatives from the cities, while sensitive of the complaints they were receiving from local citizens, did not believe reregulation was warranted. Rather, they expressed the view that actions to

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[468] Congress, House, Committee on Energy and Commerce, *GAO Cable Rate Survey: hearing before the Subcommittee on Telecommunications and Finance*, 101st Cong., 1st sess., August 3, 1989. (Washington D.C. GPO Y4.En 2/3:101-75). Hereafter referred to as the *GAO Rate Survey* hearing. 40

[469] Ibid, 248.

[470] Ibid, 2.

introduce competition were more likely to resolve the seemingly rapid rise in rates charged.[471] The industry witnesses testified that the conclusions of the GAO were erroneous interpretations of the survey. To support that position, Mooney submitted for the record a survey conducted by the NCTA to refute the governments findings.[472]

Conclusion

A strong reaction to the 1984 law emerged quickly and powerfully so that by the end of 1989, reregulation by Congress was a distinct possibility. This reaction was initiated by a number of interests with serious complaints. Primary among the concerns were increases in cable television rates. Additionally, many believed the issue of monopolistic behavior was equally important. This concern was articulated as the vertical and horizontal monopolization of cable television The charge that cable TV engaged in anti-competitive monopolistic practices included two subcategories. One was the negative impact from the horizontal concentration resulting from greater numbers of local cable operations being owned by a small number of large multi-system operators. The other was the negative impact of vertical concentration of programming by large corporations that owned both the programming and the distribution systems. Cable system owners in this latter category controled both the distribution and the pricing for their programming.

Regarding rate increases, consumers began complaining frequently and loudly to elected officials. Soon after the full implementation of rate deregulation took effect in early

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[471] Ibid, 247-248.

[472] Ibid, NCTA: "A Survey of Cable Service Pricing Changes Since Deregulation, 133.

1987, subscription rates increased steadily. A survey conducted by the GAO found that the rate increase was greater than the rate of increase for inflation. Consumers also accused cable operators of poor service and ignoring subscriber's complaints. This was believed to be a result of almost all of the nations's approximately 11,000 cable franchises operating without direct competition because of the definition of effective competition in the 1984 Act. Even though consumer interest organizations tried to establish themselves as representing subscribers, there existed no truly organized group for the expressed purpose of representing subscriber's interest The most effective representation of consumers was the NLC and USCM who also claimed to be the principal voice for subscriber interests.

Another set of interests that complained to policy makers were potential competitors using newly developed technologies such as the home satellite dish industry as well as microwave and wireless cable services. These interests defined the policy issue as a monopolistic industry using anti-competitive practices. They complained that cable programming companies charged them up to 500 percent more than cable operators paid for the same program, on terms that kept many programs out of the reach of competitors.

Additional complaints were heard from broadcasters, the main competition for cable television. The chief issue for broadcasters was requiring cable operators to carry local broadcasters' signals, also known as "must carry."[473] This question also had two subcategories. One was the adverse effects on local broadcast stations of cable TV retransmission from distant broadcast stations that negatively impacted exclusivity agreements local affiliates had with their parent networks. The other was the perceived

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[473] Congress, Senate, Committee on Commerce, Science, and Transportation, *Must Carry: Hearings before the Subcommittee on Communications,* 101st Cong., 1st sess., October 25, 1989. Washington: Government Printing Office, 1990. (Y4.C73/7S.hrg. 101-427).

unfair advantages for cable TV industry resulting from free access to broadcast signals. Broadcasters also felt that there was not a level playing field since cable TV was deregulated in 1984, yet they were subject to much more rigorous regulation at the hands of the FCC.

For cities and municipalities, the major issues were the provisions in the 1984 Cable Act which affected local franchise authorities, the fees they could charge, and how they could calculate them. The final, but by no means the least of the issues, was the question of allowing telephone companies to provide cable services using the emerging broadband communication technology.

CHAPTER V

CABLE TELEVISION CONSUMER PROTECTION AND COMPETITION ACT OF 1992

Less than a decade after cable television was deregulated in 1984, *The Cable Television Consumer Protection and Competition Act* was enacted in October 1992 over a presidential veto. The reregulation of cable television was driven by several factors, including those discussed in the last chapter. The new law, it should be emphasized, did not reregulate by restoring prerogatives to franchise authorities that the 1984 law took away. Basically, reregulation was national in character manifested in congressional mandates and enhanced FCC capability.

Specifically regarding the FCC's role, the act required nearly all of the nation's cable operators to follow rules of the FCC on pricing of basic program packages and equipment rental. Additionally, it allowed the FCC to delegate rate regulation to local and state franchising authorities upon written request with a subsequent finding by the commission that the state and local laws and regulations conformed to those of the FCC and that the franchising authority provided a level of consumer protection required by the commission.[474]

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[474] Public Law 102-385, *Cable Television Consumer Protection and Competition Act of 1992,* Section 623(a)(3), Qualification of Franchising Authority, 106 STAT. 1464.

The FCC would establish standards for cable system customer service and signal quality. In addition, it prohibited those who produced and sold cable TV programming from refusing to provide their products to other video distributors and prohibited cable TV operators from discriminating against unaffiliated cable TV program networks. On a stronger note, the act directed the FCC to issue regulations to limit children's access to indecent programming. Another provision in the act intended to "enhance effective competition"[475] by requiring the FCC to prescribe rules and regulations establishing reasonable limits on the number of subscribers and the number of channels carrying programming in which the system owner had a financial interest. Congress had in mind the public interest objectives of "ensuring no cable operator . . . can impede . . . the flow of video programming to the consumer."[476] It also required the FCC to report to Congress on migration of sports programming from broadcast TV to cable networks and pay-per-view systems. Lastly, it obligated the commission to establish equal employment opportunity standards for cable systems and and authorized it to establish rates and terms for leased access to cable channels, particularly for qualified minority or educational programming.

The act required cable TV systems to carry established local broadcast stations, including public TV stations, and limited the authority of cable operators to change channel positions of the local commercial stations. It also directed cable operators to obtain the consent of those broadcast TV stations to retransmit their signals. Another provision required cable operators to allow customers without charge to block channels which showed sexually explicit content as part of a premium package. The act established restrictions on cable operators that prevented them from selling cable systems for 36 months following acquisition or new construction, and there were restrictions on cable operator ownership or

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[475] Ibid, Section 613(f)(1), 106 STAT. 1487.

[476] Ibid, Section 613(f)(2)(A), 106 STAT. 1487.

control of other video programming services within a franchise area. The new law also authorized cable operators to prohibit indecent programming. Franchising authorities were enjoined against awarding exclusive franchises and unreasonably refusing to award additional competitive franchises. Limits were provided to the liability of cable franchising authorities in lawsuits arising from cable service franchising and regulation. This last provision was supported strongly by local governments who were vulnerable to charges of anti-competitive practices over granting exclusive franchises for cable TV operations.[477]

In the category of "public interest," the act mandated that providers of direct broadcast satellite video services reserve a portion of their channel capacity for noncommercial educational programming, and it established certain privacy-rights protection for cable service customers. An additional aspect of the legislation permitted broadcasters, who since 1965 had been required by the FCC to allow retransmission of their programs by local cable systems, to charge cable operators for use of such programming, known as "must carry." However, any station that feared it might be dropped by a local cable company could forfeit that right in return for having the cable operator transmit the station's signal for free.

Two years of intense politics were to move regulatory policy for cable television from the disaffection of 1989 to enactment in 1992.

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[477] The United States Supreme Court held in *Community Communications Co., v. Boulder*; 455 U.S. 40 (1982), that "Boulder's moratorium ordinance is not exempt from antitrust scrutiny under the Parker doctrine". 48-57.

Legislation Begins in Earnest: 1990

After full-implementation of the 1984 Act took effect, it became evident that the behavior of the cable TV industry under deregulation was in need of attention. By January, 1990, the FCC had issued a notice of proposed rulemaking intended to examine the "effective competition rules" regarding regulation of basic cable service in light of changed circumstances in the video marketplace since 1985. The notice sought comments on alternative definitions of effective competition.[478] This clearly constituted an attempt by the commission to interject some regulatory control over cable industry which was viewed by many as a non-competitive medium. But by July, the commission issued findings and recommendations on the state of the cable television industry, concluding there was no need to reregulate.[479] Certainly this outcome had to be seen as a victory for the cable industry.

The summer of 1990 was a very active period in the effort to reregulate the cable television industry, and legislation came close to passing in September. In July, H.R. 5267 was introduced in the House, the FCC's *Report on Cable TV* was released, and on July 19, the Senate Commerce, Science and Transportation Committee reported S. 1880 out of committee. On September 6, H.R. 5237 was reported by the House Energy and Commerce Committee,[480] and only four days later, the bill was passed by the House. However, after floor debate was blocked on September 28, S. 1880 died and the Senate took no further action on cable during the session.

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[478] FCC, *56th Annual Report,* Washington, D. C., Government Printing Office. 1991.

[479] Ibid, MM Docket 85-38; MM Docket 88-138; MM Docket 89-600, 27.

[480] Congress, House, Committee on Energy and Commerce, *Cable Television Consumer Protection and Competition Act of 1990,* House Report 101-682 on H.R. 5267, 101st Cong., 2nd sess., (CIS90:H363-33).

Issues, Bills and Positions

In the evolving debate over cable television, two central issues became the nearly exclusive foci for critics of the industry. Those were rates and alleged monopolistic or anti-competitive practices. Clearly, cable rates had risen dramatically since 1984, but there also had been expanded programming. Among the anti-competitive practices with which the industry was charged were denying access to, and discriminatory pricing for, programming, especially prices private satellite dish owners were charged for programming. Charges of anti-competitive practices grew as the industry had become highly concentrated. One anti-competitive aspect was the increasing vertical integration of the industry where cable operators and cable programmers have common ownership. Another was widespread horizontal integration where large cable companies owned many systems in numerous cities. Such vertical and horizontal integration created potential barriers to competing systems from entering the market, thus reducing the diversity of programming available.[481] Also contributing to anti-competitive practices was multichannel programming distribution. This involved distributors who broker multiple channels of video programming between producers and programming providers. This practice was also known as "third-party packaging" of programming. Such packaging was typically provided to subscribers as "premium tiers."

There were also issues of concern other than rates and anti-competitive practices. These included concerns about the constitutionality of must-carry policies. The industry questioned whether the imposition of such requirements violated their First Amendment rights to free speech. Members of the House Telecommunications Subcommittee had concerns about such broad issues as whether to allow foreign ownership of cable systems

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[481] Public Law 102-385, Section 2, Findings, Policy, Definitions. 106 STAT. 1460.

and whether cable television would "siphon" sports programming from over-the-air broadcast stations by outbidding broadcast networks for the rights to televise important sports events. Lastly, the issue of allowing telephone companies to enter the cable TV market was of significant concern. Having upgraded their systems using fiber-optics technology, telephone systems became capable of carrying video programming. They then pursued entry into the video programming market to help recoup their costs. Telephone industry interests as well as cities also supported allowing such entry as a means of introducing competition for cable operators.

The two major legislative vehicles for considering reregulation during 1990 were S. 1880, authored by John Danforth and H.R. 5267, authored by Ed Markey and Matthew Rinaldo.[482] Both contained provisions to control cable rates. In areas of providing programming to other video distributers and must-carry provisions, the two bills were nearly identical. Regarding controlling anti-competitive practices, language in both bills prohibited cable TV networks affiliated with cable TV operators from refusing to provide programming to other video distributors and prohibited discrimination against unaffiliated cable networks. Similarly, both bills required cable TV systems to carry local broadcast TV stations. The only notable difference on this specific issue was that H.R. 5267 included public TV stations in its must-carry provision.

Each bill required the FCC to ensure that rates were not unreasonable or abusive. However, they differed in the means for accomplishing this objective. S. 1880 would have the FCC apply such regulations only to systems not subject to effective competition. H. R. 5267 required standards and procedures applied to all systems to prohibit unreasonable or abusive rates. The Senate bill allowed for delegation of such regulation to local

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[482] *Congressional Quarterly Almanac*, 1990. 371.

governments where they petitioned to do so, but the House bill did not include such authority to delegate rate regulation.

As the legislative process progressed, various interest groups became involved. These included, in addition to the cable industry and broadcasters, wireless cable operators, the satellite dish industry, the telephone industry and cities. Consumer organizations that claimed to represent cable subscribers contended that the costs to operators for providing cable service was declining yet, because of the cable industry's monopoly position, charges were rising at a pace greater than the national consumer index of prices.

Broadcasters and the NAB supporting Danforth's S. 1880 with its must-carry provisions and limits on cable conglomerates, as did the cities. In addition, a newcomer group, the Wireless Cable Association, also supported such limits as did the Satellite Broadcasting and Communications Association. Such non-cable distributors of satellite and wireless cable programming complained that exclusive arrangements between cable operators and cable programmers such as HBO and Showtime, locked them out of programming.

The U.S. Telephone Association actively backed Gore's S.1068 and H.R. 2437 introduced by Boucher. Both allowed telephone companies to offer cable services to hasten competition and new services through fiber-optic technology. This view was also held by the National League of Cities and the U.S. Conference of Mayors.[483] [Ward White became active in the U.S. Telephone Association upon leaving the Commerce Committee staff.][484] However, the idea of allowing telephone companies to compete in offering cable services,

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[483] Ibid.

[484] Based on Ward White and Cynthia Pols interviews by author.

would ultimately take a back seat to other reregulation efforts. Dingell said House action on telephone's entry into cable markets would be considered only after work was completed on legislation to lift restrictions on Baby Bells entering new businesses.[485] One example of the cable industry's view on this issue was provided by NCTA President James P. Mooney when testifying at a hearing on November 16, 1989. He told senators that choosing between the two major legislative options -- reregulation or allowing telco competition -- was like choosing between "being boiled in oil or vinegar."[486]

The cable industry was neutral on H.R. 5467 since they viewed it as less aggressive on reregulation than S. 1880. Conversely, they actively opposed S. 1880. Their opposition was caused by language in the bill that prohibited cable operators from refusing to deal with other multi-channel video programming distributors. They objected to provisions prohibiting exclusive agreements between cable programmers and cable operators. In hearings, Mooney pointed out differences between the original version of S. 1880 and a staff-authored draft revision. "The two documents are different in that the staff draft tends to place major responsibility on the FCC for devising methods of handling [rate increases] whereas the original version effectively gives that authority back to city councils."[487] Desiring to avoid a retreat to local level regulation, cable TV interests supported the staff version of the bill.

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[485] In keeping with Dingell's prediction, by June 27, the House Energy and Commerce Committee withdrew an amendment to allow telephone companies into cable markets.

[486] Congress, Senate, Committee on Commerce, Science, and Transportation, *Oversight of Cable TV: Hearings before the Subcommittee on Communications* 101st Cong., 1st sess., (Washington, D.C.: United States Government Printing Office; November 16 and 17, 1989) 175.

[487] Congress, Senate, Committee on Commerce, Science, and Transportation *Cable TV Consumer Protection Act of 1989: Hearing before the Subcommittee on Telecommunications* 101st Cong., 2nd sess., (March 29, 1990) Y4.C73/7:S. Hrg.101-702; 134.

In an interesting combination of interests, the cable industry was joined by the newspaper industry in its opposition to allowing telephone companies to enter the cable TV service. The newspapers wanted to keep telephone companies out of information services because they were fearful that they could provide video text and become an alternate to printed news services.[488] Also in opposition was the Consumer Federation of America because of doubts about adequate assurances to prevent telephone ratepayers from subsidizing cable ventures by telephone companies.[489] It was indeed a rare situation to see organized consumer interests on the same side of a question with the cable industry.

The positions taken by both the Bush administration and the FCC were to oppose the efforts to re-establish regulation of cable rates. The administration wrote letters opposing the legislation prior to committee mark-up sessions. It argued that deregulation had resulted in substantial benefits and that reregulation would put those gains at risk. Additional letters from Commerce Secretary Robert A. Mosbacher and James Rill, head of the Justice Department's antitrust division, called instead for "emphasizing competitive principles such as promoting new entry" into the markets.[490] Possibilities included allowing telephone companies into the cable business. This was a clear indication that the battle lines were drawn.

The FCC's opposition to reregulation was based on a study of the effects of the 1984 act issued by the Commission in July.[491] It generally promoted competitive markets over

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[488] *Congressional Quarterly Almanac*, 371.

[489] Ibid.

[490] Ibid, 372.

[491] Federal Communications Commission, *1990 Cable Report*, MM Docket No. 89-600 FCC 90-272, (Washington, D.C.: GPO, 1990).

reregulating the cable industry. The report concluded that deregulation had fostered growth in cable service. It advocate legislative provisions that promoted easier entry for cable competitors, for example, removal of barriers that prevented other multichannel providers, such as satellite dish systems and wireless cable, from entering the market. It "supported legislative limits on anti-competitive practices" such as limiting vertical and horizontal integration. The FCC also believed some form of must-carry requirements were needed.[492] The report was issued the day before the House Commerce Committee mark-up of H.R. 5267.

Senate Hearings

In March and April of 1990, the Senate Subcommittee on Communications held hearings on S. 1880. Danforth's original bill was introduced in November, 1989. However, the hearings considered a staff draft bill, offered as a substitute for S. 1880. The March 29 hearing provides some indication of the temper and tone of the debate over reregulation.

One of the first witnesses at the March 29 hearing was Mooney. His testimony was clear regarding the industry's position on regulation, "Excepting matters such as `must carry,' we would prefer that the cable industry be allowed to continue to be deregulated."[493] Additionally, Mooney summarized the industry's opposition to reregulation of cable TV emphasizing three points:

> First, cable is a national as well as a local medium. To turn control of our industry back to city councils would, in our view, merely recreate the irrational and haphazard conditions which existed prior to 1984. Our experience is that city councils are political bodies with none of the quasi-judicial qualities normally found in regulatory agencies. Second, the programming side of our business is just now beginning to

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[492] *Congressional Quarterly Almanac*, 372.

[493] Hearing, *Cable TV Consumer Protection Act of 1989:* March 29, 1990, 45.

> flower and is still very fragile. Finally, we respectfully urge that as you consider proposals intended to stimulate new competition for cable, you also keep in mind that we bear unique regulatory burdens and costs under the Cable Act which are not shared by our competitors.[494]

The specific example given of "unique regulatory burdens" was the 14 percent of gross revenues paid to Montgomery County, Maryland for franchise fees, access fees and other taxes, none of which applied to cable TV's competitors such as broadcasters.

Testifying at the same hearing, Thomas Burchill, President and CEO, Hearst/ABC-Viacom Entertainment Services described the growth experienced by the industry under deregulation. According to Burchill, "The Cable Act has had a favorable effect on cable programming networks, allowing them to produce distinct and high quality television."[495] His testimony traced the history of his company as an example of how deregulation was working for the consumer. "We choose to operate as a niche business, becoming a targeted or vertical channel. Our mission is to be the first channel choice of women, providing programming dedicated to the special information and entertainment needs of American women." To that end, "LifeTime [a cable channel] was launched in February 1984 as a merger of two failing cable programming ventures called Cable Health Network and Daytime. After a fitful start in the days prior to deregulation, LifeTime grew and achieved its first full year in profitability in 1986, thanks to the addition of affiliate fees which supported the enhancement of our programming."[496] Burchell continued with his vision of the effects reregulation would bring:

> The prospect of rate reregulation will choke off those aggressive levels of programming investment. Rate reregulation forces downward pressure on affiliate fees. It discourages aggressive programming investments by cable

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[494] Ibid, 46.

[495] Ibid, 132.

[496] Ibid.

> networks such as [LifeTime]. In fact, the programming most likely to disappear first from the TV screen in [a reregulated] environment is the narrow appeal for public service product. Rate reregulation will also slow system rebuilds, limiting channel capacity for carriage of existing networks and with no channel capacity for news networks. The system begins to work against the interests of the consumer and the programmer if, as part of a rate reregulation tier, we stand to lose affiliate income for programming investment or if, as part of a higher tier, we lose the distribution we count on for advertiser income, it becomes a negative vicious cycle. The marketplace solution creates the best incentive for business arrangements that reflect our costs and the right kinds of distributor promotion and marketing plans for [LifeTime] network.[497]

The cable spokesmen were bombarded with questions about fees. Answering such charges about rate increases, Mooney testified, "While there occurred a spurt in cable prices in the two years immediately subsequent to deregulation, those prices have now leveled off. Cable consumer fees in 1989, increased at a rate less than the overall rate of inflation."[498] In follow-up questions to the panel of witnesses, Mooney addressed the history of rate increases and admitted that there was "no question but that basic cable rates went up significantly over all during the first two years subsequent to deregulation, and we think that was not altogether surprising since during the fourteen years prior to deregulation we had run 72 points behind the CPI as a consequence of the city councils holding our rates down. However, 1989 was the third year you saw those rates level off."[499]

Another defense for rising cable rates was offered by Amos Hostetter, Chairman and CEO of Continental Cablevision, Inc. His testimony was that "while our rates have gone up less than 5 percent a year, our operating expenses per subscriber have increased nearly 7 percent a year."[500] Hostetter also offered a somewhat longer-range view on rate increases.

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[497] Ibid, 133.

[498] Ibid, 45.

[499] Ibid, 149.

[500] Ibid, 118.

"The first systems we built in northwestern Ohio were turned on in 1964, and we charged $4.95 for a nine-channel service." He testified that if the industry had increased those rates to keep up with changes in the Consumer Price Index, by charging at a constant dollar amount, the rate would come out to be something in the range of $20. "Our actual basic rate companywide average is $16, so we have lowered our rates by about 25 percent, and our average system now delivers over 30 channels. So we have increased the service by threefold and in real dollars lowered the rates by 25 percent over a 25 year period."[501]

Danforth, author of the original version of S. 1880, addressed the question of monopolies to James Mooney, "The theory of the legislation is that unregulated monopolies are wrong, and that cable television does constitute a monopoly within each community and unless there is an alternative multi-channel provider, there should be regulation." Mooney was asked to explain his view. He responded, "I think I have really given up arguing whether or not cable is a monopoly because I think the relevant analysis has to do with whether there are things in the marketplace, things that are substitutes or near substitutes to cable, that act as a check on cable penetration and cable pricing."[502] Mooney continued,

> It is apparent to me – and I must say it is apparent to most of the people that I represent – that having argued this case for quite a while now, there is sufficient concern in the Congress, likely to result in legislation of such form. And we are not going to take the attitude that sometimes is taken by the business community to the effect that oh whatever you do to us, any little change is going to kill us, we are going to see what can be worked out, and we will try to the greatest degree we can to cooperate with you.[503]

Mooney believed that, "If you live and work in the television world, you find that these businesses are very hotly competitive. If it were not hotly competitive you would not

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[501] Ibid, 149.

[502] Ibid, 134.

[503] Ibid.

have the broadcasters up here involving themselves in the issues like rate regulation and the circumstances under which our franchises are to be renewed and whether we can have exclusive rights to our product because otherwise they would not care. But I think their vigorous presence in this is in itself a kind of negative testimony to the degree to which these businesses ...." Danforth cut Mooney off by saying; "I would doubt that. I mean it seems to be [the case] that one industry can affect the health of another industry and still constitute a monopoly, and I of course would argue that it is a monopoly."[504]

The tone of the hearing became sharper quickly when Mooney was questioned by Gore. The Tennessee senator asked if he thought it was "anticompetitive for a direct broadcast satellite [DBS] company to refuse to sell its signal except through local cable companies [disallowing private dish owners from receiving signals directly]?" Mooney replied not necessarily. It would depend on how they might use the technology. Gore then asked Hostetter if he was "aware that the cheapest rate [to purchase cable programming] that DBS had been able to get from the cable industry was 421 percent higher than the rate charged to cable franchises?" Hostetter responded that he was not privy to the rate packages from cable TV programmers that were distributed by satellite signals. Gore related the circumstances where the DBS industry said,

> Oh this is great, cable has negotiated with us and we are going to distribute this to satellite dish owners. But after one year's experience they came back and said these people are impossible to deal with. They are arrogant, they are monopolistic, they will not be fair with us and the cheapest deal they will give us is 421 percent higher than what they give their cable companies. They have asked us to pass legislation. It is just ridiculous that they will not be fair.[505]

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[504] Ibid, 135.

[505] Ibid, 142.

Gore tried to establish that cable operators were attempting to exclude competition from others who were developing new programming. He then spoke about NBC's effort to secure cable access for its CNBC venture. "Now NBC was told . . . by the cable industry we will not put you on our cable system if you plan to compete with CNN because that will cut into our share of the profits from CNN."[506] A major cable system, TCI, had an ownership interest in CNN.

> So if you plan competition you can just as well forget about being on cable television. So the mighty NBC was brought to its knees and forced to sign a formal agreement that they would not in any way compete with CNN. They launched the venture with a very ill-defined mission of providing business consumer news, and they will work up the courage to sort of nibble at the edges of their noncompete clause. But basically they agreed to a provision that deprives the public of the competition that would otherwise come if they had not been forced to agree not to compete.[507]

Mooney responded that he knew of no testimony before the committee to the effect of a noncompete clause. He tried to explain his view of the exchange with Gore, "What I recall is Bob Wright [of CNBC] sitting in front of a Congressional committee one day a while ago and being repeatedly and forcefully asked if he thought that anything untoward had happened in that matter. He kept saying, no, and finally he just stopped saying anything. I suppose people could have drawn an inference to the contrary."[508] Gore disagreed, saying he did not remember it that way, but he recalled that the message was, "Do not embarrass me by asking me to just spell it out A to Z, but essentially, Senator [Gore], that is exactly what happened."[509] Gore contended that no premium program that is not owned by the cable operators is allowed on cable anymore. No new ones have been allowed on in quite a while. "The problem with CNBC was that it was going to compete with a service that the MSOs

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[506] Ibid, 142.

[507] Ibid, 143.

[508] Ibid.

[509] Ibid.

owned and profited from. Now we can argue about the appearance of this thing all day long, but we both know what happened on this."[510]

Mooney continued to disagree with Gore's interpretation of the situation, but Gore insisted, "Well, everybody else knows what happened." At that, Hostetter responded that he was also in the group that does not know. "We have an investment in Turner, and we were approached by CNBC to carry their service. While some if not most, of your facts are right, I do not think the characterization is correct."[511] But Gore continued to pursue the point.

> You see, you did not have to participate in the dirty deed because there are some ringleaders who are the lead horses. TCI led the way on this. They said, CNBC, you are going to have to change and not compete or else you will not get on the cable. I mean, that is what happened. The larger issue which it represents is the one that troubles us. An unregulated monopoly is inherently against the public interest, because even if there are good guys in the business -- and there are lots of good guys in the business.
>
> Here is what Mr. Wright said, here is my question, Did you agree not to agree directly with CNN in making CNBC a full-scale news operation in direct competition with CNN because TCI owns part of CNN's parent company? Was this part of the arrangement that also guaranteed you access for CNBC? Mr. Wright said, "We have a provision in our affiliation agreement that was requested, required if you will, by most cable operators that we not enter into general competition with CNN. Is that not anti-competitive? Well, it is not exactly what we would have preferred. Can you understand that language, Mr. Mooney?[512]

Mooney responded that it appeared to him that Wright did not want to be tied up any more than he had to be in his response to Gore's question. Gore retorted sharply, "You really are going to earn your pay today if you can put a bright face on that statement."[513]

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[510] Ibid.

[511] Ibid, 144.

[512] Ibid, 144.

[513] Ibid, 143-144.

Gore summarized his views saying he believed that the temptation to come in and make a fast buck was overwhelming, that there was a temptation to shake down programmers who want access by demanding some of the ownership or else they will not be given access, and there was a temptation to shut down potential sources of competition like the satellite dish industry. Finally he said, "There is a temptation to shake down customers and to raise rates as swiftly as possible to whatever the traffic will bear."[514] After describing these temptations, Gore offered no evidence that these tactics actually were being employed.

Packwood seemed to come to the rescue of Mooney when Gore finished his questioning by asking him to explain what Gore meant about equity values in the past months.[515] Mooney responded that cable stocks had been off as much as 30 percent at the same time that money available for loans had become scarce. He believed it was partly, but not entirely, due to the uncertainty over regulation of the industry. Packwood asked if he believed that profits would fall "precipitously" and cable would not be as good a lending risk if it were regulated. Mooney responded that it was not if the industry were regulated but how far the regulation may go. "I think there is a fear the regulatory changes might go too far."[516]

Packwood then quizzed Mooney about the monopoly argument. "What am I missing . . . then, in the allegation that you have such a lock that there simply is no other competitive programming, no other competitive delivery system, and it is unfair to consumers?" Mooney responded that it was hard for him to make the argument from the other side.

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[514] Ibid, 144-145.

[515] Ibid, 147.

[516] Ibid.

> I think that people somehow sometimes instinctively mistake subscription television for a distinct market of its own, but that is not how people treat TV. People hooked up to a cable system sit there with that remote, and they dial through the broadcast channels and the cable channels and the pay channels as if they were all just TV. That is how the public treats television. To say that cable is without competitors and has a unique hold on video in the home I think just does not comport with reality.[517]

Senate Committee Action

After the hearings were completed, committee chairman Ernest F. Hollings, subcommittee chairman Inouye, and Danforth drafted another substitute version of S. 1880. The Senate Commerce Committee approved this substitute version on June 7 by a vote of 18-1. Packwood cast the only dissenting vote.[518] One thing in the substitute version that the cable industry preferred over Danforth's original bill was that it shifted rate regulation from local governments to the FCC. The NCTA came close to agreeing not to oppose the measure, but held back because of its objection to language barring cable operators from "unreasonably" refusing to deal with other multichannel video programming distributors such as DBS, satellite broadcasters, and independent cable operators.[519] Its objection was based on the lack of any definition or examples of "unreasonable." The failure to obtain agreement with cable "at the very last minute" on this anti-competitive provision angered Gore. In return, he offered an amendment to delete the introductory "finding" that would have sanctioned exclusive agreements between producers of cable programming and cable operators, which limited the availability of the programming to competing system operators, as a "legitimate competitive strategy." His amendment also included another anti-

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[517] Ibid, 148.

[518] *Congressional Quarterly Almanac*, 1990, 371.

[519] Ibid.

competitive provision that required the sale of cable TV programming, transmitted by satellite, directly to home satellite dish users. It was adopted by voice vote.[520]

However, another potentially explosive amendment was diverted. It was authored by Burns and allowed telephone companies to provide cable services. Hollings and Inouye persuaded him to withdraw it because it would impede passage of the bill.[521]

House Hearings

Hearings were also held in the House in March and April 1990 by the Telecommunications Subcommittee.[522] Most of the subcommittee members favored some degree of reregulation. As in the Senate, the major issues discussed were rate increases and anti-competitive practices. There was also an interest on the part of the members to discuss whether the cable industry had delivered on its promises under deregulation.

Chairman Markey presided at the hearings and listed the issues he was concerned about in his opening comments. They were, primarily, cable rates and anti-competitive practices. [523] He recounted that competition between cable companies was an expectation of deregulation in 1984. " Yet today [1990], in 99 percent of the communities served by cable, there is only one cable operator."[524] He took the position that "until there is a truly

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[520] Ibid.

[521] Ibid, 371.

[522] Congress, House, Committee on Energy and Commerce, *Cable Television Regulation (Part I): Hearings before the Subcommittee on Telecommunications and Finance*; 101st Cong., 2nd sess., March 1, April 19, 1990, (CIS91:H361-9).

[523] Ibid, 1.

[524] Ibid, 2.

competitive market place, some form of reregulation is necessary to protect consumers."[525] On this latter point, Markey supported allowing telephone company entry into the cable TV market place to promote competition. He also supported must carry of local broadcast programming.

Statements by other subcommittee members regarding rates included that from Representative Jim Cooper, who agreed with the Consumer Federation of America in their belief that reregulation of rates would lower charges to American consumers enough to save $6 billion a year. He believed it was possible to cut cable rates in half if Congress could find a way to inject competition through reregulation into the situation.[526] Contrasting Coopers view on rates was Representative Bill Richardson (D-New Mexico). Richardson took the stance that competition, not reregulation, was needed, with some rate regulation. He did not want to change the act. He believed that cable operators were victims of a vicious public relations campaign.[527]

Various subcommittee members believed that the cable industry could practice anti-competitive tactics because of the lack of regulation under the 1984 Act. Representative Rick Boucher emphasized the lack of competitiveness in the cable service industry when he charged that "Cable today is an unregulated monopoly."[528] Boucher had introduced H.R. 2437 to provide for rate regulation in the short term so that local govenments could set rates

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[525] Ibid.

[526] Ibid, 12-13.

[527] Ibid, 14-15.

[528] Ibid, 6.

until competition could emerge. It would also introduce such competition by allowing telephone companies to enter the cable service market.[529]

Representative Christopher Shays (R- Connecticut), who was not on the subcommittee, spoke as a guest at the hearing. He portrayed the development of cable TV as being at the expense of franchising authorities. In his view, state governments gave away cable franchises without obtaining anything significant in return. Then cable operators became the beneficiaries of 1984 deregulation when Congress deregulated regional monopolies allowing them to change services and increases prices at will. As a result of anti-competitive practices, cable operators became multi-millionaires when franchises that were purchased for $600 per subscriber were sold for $2,500 per subscriber. "Cable operators can't have it and shouldn't have it both ways: no competition and no regulation."[530]

Representative Thomas J. Bliley, Jr. (R-Virginia), spoke of subscriber fees for cable television services from a more cable-friendly perspective. He wanted to temper the criticism directed at cable rates by comparing what the industry had done to enhance the product they offered. Referring to the 1989 GAO study on cable rates, he acknowledged that the costs of basic services purchased by most customers rose 26 percent. That same study, he continued, "found that when you take into account the number of channels provided in those basic packages, the cost remained constant at approximately 45 cents per channel per month."[531] Bliley argued that as a result of deregulation, cable operators were able to attract the capital investment necessary to expand their program offerings, and that while rates increased, services were also increasing.

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[529] Ibid.

[530] Ibid, 21-22.

[531] Ibid, 3.

House Committee Action

On June 25 the Telecommunications Subcommittee approved an unnumbered substitute measure introduced by Chairman Markey and ranking Republican Rinaldo. It was so new, members still did not have a final draft in front of them when the subcommittee markup started.[532] Ultimately, the bill, H.R. 5267, granted certain concessions to the cable industry. For example, the bill now contained the explicit protection of exclusive programming agreements that were denied to the cable industry in the Senate bill. It allowed cable companies to continue to enter exclusive agreements with video programmers, such as Home Box Office, as long as the cable market was deemed competitive.[533] Such language had been struck from S. 1880 by the Senate Communications Subcommittee, causing the cable industry to oppose the measure. Also the bill's approach to limiting monopolistic practices was less aggressive than that in S.1880.[534] The House bill differed from the Senate bill by directing study on how to limit horizontal and vertical integration. S. 1880 required the FCC to develop rules to restrict the number of channels a cable operator could provide to an affiliated programmer.[535] The House favored a market solution rather than regulations to address charges the cable industry acted as a monopoly through vertical and horizontal integration. Regarding rates, the House bill, as in S. 1880, required cable systems to offer a basic service tier of programming which was to include local broadcasters and public-access channels and for the FCC to regulate the rates of the basic service tier.[536] The bill also

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[532] CQWR, June 28, 1990:2053

[533] Ibid.

[534] Ibid.

[535] Ibid.

[536] House Committee on Energy and Commerce, Subcommittee on Telecommunications and Finance, *Cable Television Consumer Protection and Competition Act of 1990,"* report prepared by the Committee, 101st Cong. 2nd sess., September 6, 1990 (CIS90:H363-33).

included a compromise reached among cable, broadcasters and public television only days before on must-carry that provided for cable operators to devote about 25 percent of their channels for local broadcasts and to carry those broadcasts on the same channel number that the TV stations used.[537]

Similar to the Senate experience, the question of allowing telephone companies to enter cable was deferred when Boucher admitted he did not have the votes to support an amendment to that effect.[538] On June 27, just two days after, the full Commerce Committee approved the subcommittee's bill by a voice vote with little change.

Floor Actions

House leaders brought H.R. 5267 to the floor on September 10 under suspension of the rules to limit debate and prohibit amendments. Despite Bush's opposition and a veto threat, the bill passed by voice vote.[539]

The legislative process did not run as smoothly in the Senate. When Majority Leader George Mitchell (D-Maine) sought to bring S. 1880 to the floor under a procedure requiring unanimous consent, he was unable to do so when Wirth, Packwood and Malcolm Wallop (R-Wyoming) gave notice that they would object. Wirth acknowledged the importance of the cable industry to his state saying he supported a bill to deal with complaints about rate rises and service deficiencies, but criticized the provisions that would have denied the right to enter into agreements to provide exclusive programming to certain cable operators and

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[537] CQWR, June 30, 1990: 2053.

[538] Ibid.

[539] CQWR, September 15, 1990, 2910.

charge discounts to larger cable systems that purchased programming in volume even though smaller systems not buying in volume were charged more. According to Tom Rogers, who was at the time a Telecommunications Subcommittee staff member, Wirth opposed the bill in part because as an author of the 1984 deregulation legislation, S. 1880 would, in large part, have eradicated his work. "Wirth was of a view that cable was something that would -- that deregulation would benefit competition in the telecommunications industry, and its reregulation would thwart the development of new programming sources in the cable industry. So it was in keeping with his authorship of previous legislation."[540] In his objections, Packwood referred to the bill as an overreaction, and Wallop shared this view.[541]

On October 11, in an effort to salvage some legislation that session, Wirth and Gore reached a compromise over preserving some forms of exclusive agreements between cable operators and cable programmers. Gore was an advocate of emerging technologies, particularly those that served rural areas such as satellite and wireless cable systems. Wirth was interested in a compromise because his state of Colorado was home to large cable companies. But 24 amendments on file from Democrats to further tighten regulation effectively bogged down floor consideration and their compromise and S 1880 died in the process. After the measure died, supporters said they planned to push their proposals in the 102nd Congress. Moreover, cable opponents promised hearings on the issue of allowing telephone companies to operate cable systems.[542]

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[540] Rogers interview.

[541] CQWR, October 20, 1990, 3506.

[542] Ibid.

Summary

The momentum for legislation to reregulate the cable industry was fueled by the activities of several organized interests. With the upgrading of telephone lines with fiber-optic cables, the telephone industry initiated attempts to allow them to compete in the lucrative cable service market. Additionally, because of the perception that rates charged to cable subscribers were out of control, cities received the brunt of subscriber's complaints. For that reason, interests representing cities were among the strongest advocates for reregulation. Organizations claiming to represent consumers remained active through their testimony at hearings. The main thrust of their argument was that rates could be slashed in half. However, they also opposed efforts to allow entry into the cable market by telephone companies for fear of the emergence of an even more powerful monopoly. Broadcasters, for their part, wanted assurances that their programming would be carried on cable to prevent a decline in advertising sales in local viewing areas. Lastly, other competing technologies pushed for provisions that would require the cable industry to share programming at fair and competitive prices.

Regarding the regulation of rates, both S. 1880 and H.R. 5267 contained provisions requiring the FCC to ensure that rates were neither unreasonable nor abusive when cable operators did not have effective competition. They also addressed competition in a similar manner by both prohibiting cable TV program networks from refusing to provide programming to other video distributors and from discriminating against unaffiliated program networks. Both would require cable TV systems to carry local broadcast TV stations with H.R. 5267 explicitly adding public TV stations in that requirement.

There were differences in ways to eliminate regulating anti-competitive practices. S. 1880 contained a provision to limit the size of operations by restricting the number of

subscribers a single operator could reach nationwide and the number of channels that could be used by affiliated cable programmers. It also prohibited cable TV operators from owning satellite or wireless cable TV systems servicing their franchise area. H.R. 5267 did not contain either of these two provisions. In contrast to S. 1880, H.R. 5267 contained several provisions not addressed in the Senate bill. For example, the House bill required the FCC to establish standards for customer service, signal quality, and assess the needs for requiring equipment compatibility among cable systems. It required regulation of rates for use of cable systems by nonaffiliated cable networks and to set aside channels for commercial leasing. It also prohibited cable operators from selling systems for 36 months after construction or acquisition and restricted foreign ownership. It addressed equal employment opportunity standards and required cable networks to make programming available at reasonable rates to satellite dish owners. Probably the most significant difference was that H.R. 5267 would require cable systems to offer a basic service tier to include broadcast TV and local PEG programming and require the FCC to regulate the rates charged for this basic tier.

The two bills considered in 1990 had received some support from the cable industry early on as the NCTA tried to calm the concerns of investors by reducing the regulatory bite of any new legislation through compromise on provisions. However, after H.R. 5267 bill passed the House by voice vote, the cable industry withdrew its support of continued legislation because of language in S. 1880 assuring competitors open access to cable programming by prohibiting exclusive agreements and a deal that would have forced cable operators to carry broadcast channels. The industry then began to oppose any reregulation

efforts. As one observer reported, "Feeling burned, [by this change in attitude] Senate sponsors promised the 1991 bill would include even weightier regulatory language."[543]

The Battle Lines Are Drawn: 1991

Maintaining their opposition as the 102nd Congress began, the cable industry was not expected to cooperate in any reregulation efforts. Furthermore, the Bush administration's continuing support for measures to stimulate competition rather than reregulation lent support to cable's resistance. There was considerable continuity in the new Congress in the identity of the major congressional players in cable legislation. New cable reregulation bills in the form of S. 12 and its companion H.R. 1303 were introduced. These bills essentially reflected the bills that failed in 1990 except that S. 12 was a little tougher on cable.[544]

In March, the Senate Communications Subcommittee held hearings on S. 12, but members of the subcommittee were responding in a more partisan fashion on this round of attempts at reregulation. Danforth, as the bill's chief sponsor, had only two other Republicans siding with him. In 1990, he had six that supported his efforts. Most Republicans on the Telecommunications Subcommittee opposed the bill in the March 21 hearing. This took place after they met on March 6 with senior White House officials who encouraged them to fight the bill.[545]

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[543] Mike Mills, "Foes of Reregulation Effort Turn-up the Heat This Year," *CQ Weekly Report*, March 23,1991, 742.

[544] Ibid.

[545] Ibid.

On May 14, the Senate Commerce, Science and Transportation Committee reported S. 12 by a vote of 16 to 3.

The House Telecommunication Subcommittee held hearings in March and June to consider H.R. 1303 and H.R. 2546. These two bills would be replaced by H. R. 4850, introduced by Ed Markey and reported in June. However, after subcommittee passage, House supporters of the measure decided to wait for the Senate to act first because of the late-session collapse of cable reregulation efforts at the end of the previous Congress.[546] However, the Senate did not act in 1991 when in November of 1991 a banking deregulation bill was taken up, leaving no time on the schedule for cable.[547]

Recurring Issues

As new rounds of legislative effort began, local governments continued to seek reregulation of cable and restoration of local "control over cable television operations."[548] A record had now been developed adding weight to the claims of the cable industry. The 1991 report by the Senate Committee on Commerce, Science and Transportation on S. 12 said, "While deregulation fueled explosive growth, it has led to abuses and problems"[549] and the stakes were large. Since Congress deregulated cable, it had grown into a $20 billion

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[546] Ibid.

[547] Congress, Senate, Committee on Commerce, Science, and Transportation, *Cable Television Consumer Protection Act of 1991,* Senate Report 102-92 on S-12, 102 Cong., 1st sess., (CIS91:S263-14).

[548] Jean Dimeo, "Local Governments Want Their MTV," *American City & County*; Vol. 106, (December, 1991), 13: 54-58.

[549] S. Rpt. 102-92 on S. 12.

industry. It was available to 90 percent of all homes in 1991, and 61 percent of those households subscribed.[550]

Sensing how the political winds were blowing and to counter claims of economic abuse, the NCTA had adopted voluntary service standards in 1990, which were accepted by 85 percent of cable operators. However, the Senate report said local governments had adopted standards that were more sensitive to consumers' needs than the NCTA's and that strong mandatory requirements were necessary.[551] Similarly, The FCC acted in June of 1991 to tighten the standard which cable companies had to meet to avoid regulation to six stations. Still, only 18 percent to 34 percent of the nation's 11,000 cable systems were subject to regulation under the existing commission standards.[552]

Congressional Actions in 1991

By early 1991, the debate became more partisan and heated. The Bush administration still strongly opposed any reregulation as both houses of Congress remained under Democratic control. Furthermore, the cable industry refused to cooperate as it had through most of 1990, adding to the intensity of conflict.[553] David Alyward explained one cause of the resistance as an arrogant attitude on the part of the cable industry.

> By 1990, the cable industry had gone from a zero bank account [of political support] to a huge deficit in its bank account on Capitol Hill. They had a whole lot of people really really upset. And merely, I think, over the issue of rate increases. But also because they couldn't wear that "we're the little guys" [label] anymore. They had passed that point on the development

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[550] *Congressional Quarterly Almanac,* 1991, 158.

[551] S. Rpt. 102-92 on S. 12.

[552] CQWR, 1991, 742.

[553] Ibid.

> curve. Will McGowan, who had founded MCI, use to come in and lobby. He was the start up guy. I mean, MCI can't walk around now and say: "Yeah, I'm the little start-up guy, help me out." They've got office buildings all over the place. That's [also] what happened to cable.[554]

Even though realizing that they had not adequately cultivated the necessary support on Capitol Hill, James Mooney offered further explanation of why the cable industry continued to be uncooperative in the legislative process.

> The industry's unwillingness to compromise on any form of reregulation proved fatal to its interests; I mean my board just didn't want to compromise. They just said "No." And they thought that George Bush was going to save them with a veto because George Bush's guys had promised that he would.[555]

Regarding the new bills, in the Senate, S. 12 was introduced by John Danforth. It was cosponsored by Hollings and Inouye.[556] In the House, H.R. 4850 was introduced by Markey, but Rinaldo, who had co-authored the 1990 bill, did not co-sponsor the 1991 version. The sole co-sponsor was Dingell, chair of the Energy and Commerce Committee.

Legislative Proposals

Senate Bill. Senate bill S. 12 sought to strengthen FCC regulations for basic cable service. The bill was similar to S. 1880 in its provisions for FCC regulation of the basic tier of service when not subject to effective competition, including allowing the FCC to delegate such regulation to local and state franchising authorities. It retained S. 1880's prohibition on denying cable programming to other video distributors and discriminating against unaffiliated cable networks. To control horizontal integration, it also required the FCC to limit the number of subscribers a single operator could reach nationwide and restricted cross-

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[554] Aylward interview.

[555] Mooney interview.

[556] CQWR, March 23, 1991, 742.

ownership of satellite or wireless systems in their franchising area. One difference between S. 12 and S. 1880 was the approach to "must-carry." As a result of the must-carry compromise that collapsed at the end of 1990, a provision in S. 12 did not require carrying local TV stations, but did require cable operators to obtain the consent of local broadcast stations and limited cable operator's in changing channel positions of broadcast stations. The additional provisions in S. 12 included authorizing the FCC to establish rates and terms for leased access to cable channels and limiting the liability of cable franchising authorities in lawsuits that might be brought by cable operators charging violations of their First Amendment rights. This latter provision was one desired by cities. The bill also added to the definition of effective competition the presence of another video programming distributor, such as satellite or wireless cable that served at least 15 percent of area households and was available to more than half of them.[557]

House Bill. H.R. 1303, was essentially the same as H.R. 5267 from 1990. One different provision was that H.R. 1303 required the FCC to regulate basic rates for all cable operators regardless of how competitive their markets were. However, this bill would eventually be replaced with H.R. 4850 as a subcommittee substitute amendment in April 1992. That version would contain several changes from H.R. 1303 that will be discussed later.

Senate Hearings. On March 14, the Communications Subcommittee held hearings on S. 12, the *Cable TV Consumer Protection Act of 1991.*[558] Senator Inouye presided at the hearing, with Exon and Breaux present. As the hearing progressed, Packwood, Danforth,

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[557] S. Rpt. 102-92.

[558] Congress, Senate, Committee on Commerce, Science, and Transportation, *Cable TV Consumer Protection Act of 1991: Hearing before the Subcommittee on Communications,* 102nd Cong., 1st sess., March 14, 1991, (CIS91:S261-56) 538.

and Pressler also participated. The subcommittee heard testimony from a balanced set of organized interests. First were witnesses who represented the views of municipal and local governments. Senator Joseph I. Lieberman (D-Connecticutt), then testified on why he supported S. 12 and why reregulation was needed. The next panel represented the cable TV industry and another represented the broadcast industry. A mixed panel presented views of consumers, community broadcasters, and the telephone industry. The final panel consisted of representatives of competitors to cable operators.

David C. Adkisson, the Mayor of Owensboro, Kentucky, and Sharpe James, the Mayor of Newark, N.J. representing the NLC and the USCM, gave the initial testimony. They testified about the problems posed by lack of competition and excessive subscription rates in community cable TV systems. They supported the importance of S. 12's provisions to promote competition and the need for regulation to offset the economic power of cable TV systems. Adkisson shared the frustrations he and his constituents faced regarding the cable television industry, including stating, "During the past year we have had two rate increases in our community" amounting to a forty percent increase over the past twelve months."[559] The second problem he described was the lack of authority that cites had over cable TV since passage of the 1984 Act. "We are held responsible. We are expected to control rates. But cities are absolutely helpless when it comes to controlling rates of cable television."[560] The other problem Adkisson discussed was franchise renewals. With no competition available to existing cable operators, the cities have no negotiating strength when renewing franchise agreements. He concluded by saying, "The 1984 Cable Act was just that. It was a cable act. In 1991 this bill is a cable television consumer act. The

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[559] Ibid, 59.

[560] Ibid, 60.

difference is highly significant."[561] Mayor James described the 46 percent rate increase the Newark had experienced since 1986. But he focused more on the anti-competitive aspects of the cable industry. He testified that, "Local governments believe the renewal amendments in S. 12 are essential to any cable legislation."[562] By supporting S.12 and its "comprehensive approach to resolving concerns resulting from horizontal and vertical integration" cities believed that stimulating competition would help with the franchise renewal problems.[563]

In Lieberman's view, Congress should act rather than await FCC action, because "cable companies offered a truly monopoly product in their multi-channel programming packages."[564] He described the problem as,

> Under the 1984 Act, no one can legally regulate that full package. The FCC is actually prohibited by the 1984 Cable Act from reviewing the rates charged for services other than those that consumers can already get free with an antenna. That is, local broadcast television. Under the 1984 Act, cable companies can deregulate some of their most popular offerings, such as MTV, CNN, Nickelodeon, or ESPN simply by placing that program in a separtate teir from local broadcast services. The FCC has no power to alter this restriction on its own powers through [rule making] alone, and that is why regulation must be adopted by Congress.[565]

During Lieberman's testimony, Senators Danforth, Packwood, Pressler and Burns arrived at the hearing. Danforth had actually taken the chair while Lieberman was testifying. A very interesting development occurred next. Danforth, the sponsor of the bill, recognizing that the minority had assumed control of the committee, attempted to report the bill.[566] But

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[561] Ibid, 61.

[562] Ibid, 78.

[563] Ibid.

[564] Ibid, 100.

[565] Ibid, 100-101.

[566] Ibid, 103.

Packwood, as the ranking minority member, corrected Danforth by stating that he would take the chair. He next stated that, "As I do not like this bill, the hearing is adjourned, and we will have no further hearing."[567] Burns seconded his motion. Packwood preceded to make an opening statement in which he said that he could "see no justification for this bill or any step backward into reregulation."[568] Subsequently, while he was making an opening statement, the majority returned and the chair reverted to Exon. When Packwood attempted to adjourn the committee at that point, he recognized, "Oh, there is a majority here. I cannot do that."[569] The hearing continued with Exon presiding. Packwood and Burns took the side of the cable industry by linking the increase in channels provided by operators to what they saw as reasonable price increases. They tried to bring out this point in their questioning of city witnesses. In similar fashion, Danforth, Exon and other supporters tried to use testimony by the cable industry to establish they were participating in anti-competitive practices.

Next to testify was a panel representing the cable TV industry consisting of James Mooney, President of NCTA, James C. Kennedy, Chairman and CEO of Cox [cable] Enterprises, and, R. E. (Ted) Turner, III, President and Board Chairman of the Turner Broadcasting System. They provided their review of improvements made in cable TV programming and consumer value because of deregulation and expressed their collective opposition to S. 12. This panel anticipated adverse effects on cable TV industry investments in programming and technological improvements if Congress passed S. 12. They were critical of provisions that mandated competitor access to cable programming. Mooney emphasized the enhanced product that cable subscribers receive over that of six years ago.

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[567] Ibid.

[568] Ibid, 104.

[569] Ibid.

He also pointed out that the industry was on the threshold of another technological upgrade through the use of fiber-optic cable to carry even more programming to its customers.[570] He also mentioned that provisions in S. 12 on "must-carry" did not reflect agreements reached on S. 1880 with cities in the waning hours of the 101st Congress.[571] Kennedy emphasized increased channel capacities that would not have materialized without the investment available to a deregulated cable industry. His fear was that reregulation would stem further technological growth for cable TV.[572] In closing, they emphasized that competition for the cable TV industry did indeed exist. Specifically, Turner pointed out that "basic cable receives strong competition from broadcasting."[573] He testified that "In 1990, broadcast stations had a 70 percent share of all television viewing in the United States, and basic cable, including super stations, had a 24 percent share."[574]

Representatives of the broadcast industry testified next. Edward O. Fritts, President of the NAB and James B. Hedlund, President, Association of Independent TV Stations represented these interests. As expected, they expressed their support for S. 12 and the need for legislation requiring cable TV operators to carry local programming. A detailed analysis of anticompetitive trends in the cable TV industry was presented, including the practice of repositioning of channels for local stations.[575] Broadcasters believed this was an anticompetitive practice, charging that it confused viewers. The panel also described what they believed were adverse economic effects of cable TV practices on non-cable TV stations

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[570] Ibid, 118.

[571] Ibid, 139.

[572] Ibid, 154-165.

[573] Ibid, 171.

[574] Ibid.

[575] Ibid, 221.

and networks. They presented their views on the impact and importance of S. 12's provisions for the future of free TV.[576]

The fourth panel of witnesses represented a mix of interests. The three witnesses were, Gene Kimmelman, Legislative Director for the CFA; D. J. Everett, III, President, Community Broadcasters Association; and John Sodolski, President, U.S. Telephone Association. This panel collectively supported S. 12 because of its perceived benefits to consumers. They also supported its proposed controls on rate increases and on anticompetitive practices.

The final panel included Robert L. Schmidt, President, Wireless Cable Association International and Bob R. Phillips III, CEO, National Rural Telecommunications Cooperative. The basis of their support for S. 12 was the status given to the satellite-TV industry as an alternative to cable television. They believed it important for S. 12 to ensure access to programming for alternative distributors on reasonable terms. To make their point, they told of problems with obtaining satellite TV programming for distribution in rural areas.

S. 12 Clears Committee. On May 14, the Senate Commerce Committee approved S. 12, by a vote of 16-3 after a mark-up of the bill. Among the more interesting aspects of the politics involved in marking up the bill between the subcommittee hearings and full committee consideration concerned the "must carry" issue. Support from broadcasters for the bill was enhanced when Inouye inserted a "retransmission consent" provision into the bill. It was a new approach to the "must carry" requirement that had generated so much conflict over the years. Inouye's measure gave broadcasters the choice of either forcing cable operators to carry their signals free or forfeiting that option and asking cable operators

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[576] Ibid, 205.

to compensate them for their programs. The measure attempted to heal a rift within the broadcast industry over whether to force cable systems to carry local broadcast stations. On the one hand, powerful broadcast stations wanted to sell their signals to cable operators. Conversely, smaller, independent stations perceived the so-called `must-carry' option as more beneficial and wanted retransmission of their signals to be compulsory.[577] They feared that cable operators would drop them rather than negotiate to buy their signals. Inouye's amendment, approved by voice vote, was an effort to please the two factions in the broadcast industry by including both options in the bill.

Inouye's move gained support from among broadcasters, but there was an unexpected backlash from the film industry. It opposed the measure because studios would not receive any of the new revenues from retransmission payments. Ironically, this cast the powerful lobby for the movie industry as an ally of cable television in opposing passage of the bill.[578] The retransmission approach also provided organized cable industry interests with an historical basis for opposing the bill. It was able to emphasize that "must carry" had been tried before, but was struck down by the courts. As early as 1965, the FCC had required cable systems to carry local stations. However, two federal courts rejected those rules in 1985 and again in 1987, saying they violated First Amendment rights of cable programmers.[579] The NCTA strongly objected to the new provision. Moony characterrized the "supposed `consumer bill' as a boondoggle for cable's main rivals."[580]

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[577] *Congressional Quarterly Almanac*, 1991, 159-160.

[578] *Congressional Quarterly Almanac*, 1992, 173.

[579] Quincy Cable TV, Inc. v. FCC, 768 F. dd 1434 (D.C. Cir. 1985); and Century Communications Corp. v. FCC, 835 F. 2d 292, 304 (D.C. Cir. 1987) clarified 837 F. 2d 517 (D.C. Cir. 1988).

[580] CQWR, May 18, 1272.

Thus, much of the concern over the bill in the Senate Commerce Committee markup focused on the legal effects of the Inouye provision.[581] A number of variations on the "must-carry" concept were offered as amendments. In one particular case, the power of the subcommittee chair was demonstrated when Inouye denied a request by John B. Breaux to offer an amendment that excluded home-shopping stations from the benefits of the must-carry provision. Breaux had singled out the Home Shopping Network, a Florida-based broadcaster that sold merchandise over its own television stations. Breaux said it should not be accorded the same status as other over-the-air stations. Another variation involved Senator Ford when he offered a must-carry amendment that included low-power television stations. He wanted stations that had locally generated programming to be included under the definition of the over-the-air broadcasts signals that cable operators would be forced to carry. His amendment was adopted by voice vote.[582]

S.12 set its own new standard for effective competition. It would consider competition adequate when at least half of an area's households are served by other competitors such as satellite systems or other cable operators with at least fifteen percent of the market share in the area. This standard was expected to bring a larger percent of cable operators under rate regulations. The bill also increased local authority to regulate rates and service and encouraged cities to seek second cable franchises to increase competition. The bill also included a new provision that would limit the ability of cable operators to avert regulation by shifting their most popular programming to another package. In addition, it would prohibit cable programmers from `unreasonably' refusing to sell programming to competitors. It also prohibited cable programmers from discriminating against competitors

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[581] Ibid.

[582] Ibid.

in pricing and terms on programming and ensuring that satellite networks did not favor cable operators over distributors for home satellite dishes in prices and programming access.[583]

Although Commerce Chairman Hollings expected changes to the essential provisions of the bill before it went to the floor, he still opted to report it, but not without complaints that the action was premature. In responding to this criticism, proponents asked to delay Senate floor action to see what steps the FCC would take to toughen regulatory guidelines for cable operators. While proponents waited, opposition to the bill became more intense.[584]

House Hearings. As the House awaited Senate action, members of the Telecommunications Subcommittee held hearings on March 20, and June 18, 26, and 27. Markey introduced H.R. 1303 as a starting place for considering reregulation .[585] The bill as introduced was nearly identical to H. R. 5267 that passed the House in 1990.[586] However, most Republicans who spoke at the March 20 subcommittee hearing opposed Markey's bill. Matthew J. Rinaldo, ranking member of the subcommittee, was not a cosponsor of the House bill, as he was in 1990. The sole co-sponsor was Chairman John Dingell. The partisanship that was developing around this bill was similar to that evident in the Senate.[587]

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[583] Ibid.

[584] Ibid.

[585] Mike Mills, "Cable Reregulation Backers Seek Broader Support," *CQ Weekly Report*, June 27, 1991, 1751.

[586] Congress, House, Committee on Energy and Commerce, *Cable Television Regulation: Hearing before the Subcommittee on Telecommunications and Finance*, 102nd Cong. 1st Sess., March 20, 1991, 1.

[587] CQWR, 742.

On March 20 the subcommittee heard from cities who mainly listed again the problems they had with cable operators. Collectively, they tried to paint a picture of the FCC as ineffective in regulating rates for cable service.[588] The only other witness to testify was FCC Chairman Alfred Sikes. In his testimony, he urged the committee to allow the new FCC rules raising the criteria for effecitive competition to six other video sources to take full effect before legislating again.[589]

In the 1990 House bill H.R. 5267, a balance was achieved when a fragile agreement was reached between broadcasters and the cable industry that required cable operators to carry local broadcast stations.[590] However, the willingness of cable interest to cooperate on any provisions was squashed when, on June 27, Markey added provisions to H.R. 1303 requiring the FCC to regulate basic rates for all cable operators regardless of how competitive their markets. The NCTA urged the subcommittee to not adopt a must carry proposal that was similar to the one Inouye placed in S. 12. James Mooney, speaking for the association, likened the provision as "imposing a surcharge on the community antenna function of cable systems."[591] Conversely, Laurence Tish, chairman of CBS defended the retransmission consent plan as important to the future viability of free broadcast television.

The hearing on June 26 considered H.R. 2546, a bill introduced by Representatives Boucher and Oxley. Their bill intended to allow independent telephone companies, and in some cases, Bell companies to carry video programming, own up to 25 percent share of the programming they carried and set up franchises to compete with cable operators. In return

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[588] Cable Television Regulation Hearing, 101-186.

[589] Ibid, 186-201.

[590] CQWR, June 27, 1991, 1751.

[591] Ibid.

the telephone companies would build a nationwide broadband communications system. Gore and Burns had offered a companion bill in the Senate.[592]

The remaining hearing sessions focused on the demands made by broadcasters and phone companies to allow them to compete with cable operators.

The Administration's Role

The White House. In 1991, the administration opposed bills more actively and at an earlier stage in the process.[593] Senior White House officials met the week of March 6 with some Republicans on the House Telecommunications Subcommittee to encourage them to fight the cable reregulation. On March 13, the administration wrote to Congress on its position that "more competition rather than more regulation, was needed." In addition, the administration expressed its preference for removing restrictions prohibiting telephone companies from entering the cable programming industry.[594]

Federal Communications Commission Action. On June 13, 1991, the Commission adopted new rules that redefined effective competition, established guidelines for the regulation of basic service rates in the absence of effective competition and revised the procedural requirements for franchising authorities regulating such rates.[595] Supporters of reregulation claimed the FCC ruling would improve, not diminish, support for new regulations. The agency tightened the standard that cable companies must meet to avoid

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[592] Ibid.

[593] Ibid, 159.

[594] Ibid.

[595] FCC, *57th Annual Report.*

regulation. Under the 1984 Act, the FCC did not regulate rates for cable television service. After the effective date in 1987, rates for basic cable service were regulated by local franchising authorities, but only if the cable franchise area was served by fewer than three unduplicated broadcast signals. In 1991, the FCC increased the threshold to six signals, boosting the percentage of cable systems subject to local rate regulation from only 3 percent to an estimated 34 percent.[596] However, what may appear as a loss for the cable industry might actually have been an attempt to stem the flood of legislative actions by acquiescing to a tighter set of agency regulations that could be open to negotiation at a later time. However, the Senate gave serious consideration to the GAO report which demonstrated that the FCC's June (1991) effective competition decision did not address the problem of runaway cable rates. According to the GAO report, under this definition, 80 percent of cable subscriber rates would not be subject to rate regulation.[597] Convinced that the FCC actions were too little too late, S. 12 included its own more rigorous criteria for effective competition.

Summary

During 1991, the debate over cable TV reregulation became more partisan. The Bush administration strongly opposed reregulation of the industry. Ironically, the basis for the Bush administrations opposition was its preference for introducing competition into the cable area rather than more regulation. This included allowing telephone companies to compete with cable operators. The administrations strong stance against reregulation encouraged the cable industry such that they refused to cooperate in any way in preparing

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[596] CQWR, 1991, 160.

[597] Ibid.

new legislation. If no legislation could be passed, neither could telephone companies enter the cable service market.

Senate bill S. 12 was introduced primarily to strengthen FCC regulations for basic cable service. It established more rigorous criteria for effective competition. The provisions in the 1984 Act that allowed cable operators to be considered subject to effective competition when as little as three broadcast stations were operating in the area had resulted in regulation of rates to apply to only a very few cable systems. There was a lack of confidence in the ability of the FCC's new rule to raise the number of stations constituting competition to six to produce the necessary regulation of rates. Although it was introduced early, S. 12 never reached the Senate floor because of other pending business at the end of the session and because of the threat of many amendments to weaken the regulatory provisions. Additionally, many Republican opponents wanted the Senate to wait to vote on the bill until after the FCC had the opportunity to issue new regulations of their own. While one bill was introduced in the House of Representatives, the only actions taken was to hold hearings. Many members of that chamber wanted to wait to see what action the Senate would take.

Reregulation is Passed: 1992

Enactment of *The Cable Television Consumer Protection and Competition Act* occurred after the following key congressional actions in 1992. On January 31, the Senate overwhelmingly passed S. 12 by a vote of 73 to 18. This vote occurred after the Senate rejected a weaker substitute measure offered by Packwood. On July 23, the House passed H.R. 4850 by a vote of 340 to 73. The Senate failed to pass the House version of S. 12 (as

amended by passage of H.R. 4850) on August 12, thus establishing disagreement between the House and Senate versions of the bill. The Senate did, however, agree to a conference on the legislation. On September 14, the Conference Report on S. 12 was submitted to the House and three days later, on September 17, it was adopted by a vote of 280 to 128. The Senate adopted the report on September 22 by a vote of 74 to 25 and sent S. 12 to President Bush for signature. However, as he had threatened, Bush vetoed the bill.

President Bush's veto came on October 3, very close to the end of the congressional session when many members were anxious to leave in time to tend to election business. But on October 5, just before Congress adjourned, both houses voted to override the President's veto, the Senate by 74 to 25 and the House by 308 to 114.[598] The heat of the battle to override the veto overshadowed the fact that the enactment was the "only large scale reregulation of any industry in the Reagan-Bush era."[599] It was also the first and only override of a veto by President Bush. Thirty-two days later, on November 7, 1992, George H. W. Bush lost the presidential election to William Jefferson Clinton.

Senate Action

On January 31, the Senate overwhelmingly passed S. 12 by 73-18 with Senator Inouye serving as the floor manager.[600] Consideration of the bill began on January 27 and ended on January 31 after twenty-one amendments were offered. Seventeen of the

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[598] *Congressional Quarterly Almanac*, 1992, 171.

[599] Ibid.

[600] Congress, Senate, 102nd Cong. 1st Sess. 138, *Congressional Record,* (January 31, 1992): S 711.

amendments were adopted, two were withdrawn, and two were rejected. The most notable of the rejected amendments was a motion to consider a substitute version of the bill.

Senate Floor Debate. Senator Inouye, Chairman of the Communications Subcommittee served as the floor manager for the bill. Senator John Danforth, was the sponsor of the bill, and senators Inouye, Hollings, Gore, Gorton, Lieberman, and Metzenbaum, were the original co-sponsors of the bill. Six other co-sponsors were added in the year after introduction. However, of those six, only Gorton and Hatch were Republicans. S. 12 was very similar to S. 1880 which was approved by the Commerce Committee in June 1990 by a vote of 18 to 1. The focus of the bill, like S. 1880, was to address consumer's problems with rates and services while at the same time promoting competition.[601]

As the floor manager for the bill, Inouye was clear about his position.

> I believe that the cable industry has begun to take advantage ofits popularity. In certain instances, ... rate increases have been excessive and, for many systems, customer service has been abominable. Programmers argued that they could not get carried on cable systems without relinquishing control of their product. Competing video distributors alleged that the programmers refused to deal with them. In general, it appeared that the cable industry possessed undue market power. Over three years, the Communications Subcommittee held 13 hearings on cable related issues. They listened to over 50 hours of testimony from 113 different witnesses. At last, the bill passed the committee by a vote of 16 to 3.[602]

The amendment offered as a substitute to S. 12, was proposed January 30 by Packwood, Wirth, Stevens, Burns, Dole, Shelby, Rudman, Simpson, Breaux, senators Wyche Fowler Jr. (D-Georgia), Jake Garn (R-Utah), and John Kerry (D-Massachusetts). It

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[601] Congress, Senate, Senator Inouye of Hawaii speaking in favor of adoption of S. 12 during floor debate, 102nd Cong., 2nd sess., *Congressional Record*, January 29, 1992: S561.

[602] Ibid.

attempted to weaken the regulatory provisions of the bill. It eliminated language aimed at giving cable competitors better access to cable programs and contained no limits on cable system ownership. It contained favorable language on franchise reform that fundamentally favored cable's renewal rights. It also contained extremely liberal language in defining effective competition as at least "one or more independently owned multichannel video programming distributors."[603] On January 31, The amendment was soundly rejected by 35-54.[604] Though the substitute was rejected, sponsors agreed to add two of its provisions to the main bill to encourage the administration's support. One would prohibit local governments from awarding exclusive cable franchises. A second would broaden an exemption to a 1984 ban on telephone company entry into the cable business by allowing rural phone companies in areas with populations of 10,000 or less to offer cable services.[605]

With the exception of the Packwood substitute amendment and another amendment by Jessie Helms, all amendments were disposed of by voice votes. Six of the adopted amendments dealt with prohibiting violence, indecency or unsolicited pornography in cable programming. The Helms amendment was approved 95-0 and allowed cable operators to ban pornographic programs and require operators to place such shows on one channel available only upon subscriber request.[606] Another amendment, offered by Fowler and approved by a voice vote, allowed cable operators to ban the use of any public educational channels for programs containing "obscene" material. Of the two amendments rejected, one was the Packwood substitute and the other was offered by Brown and intended to modify provisions related to the "must-carry" provisions in S. 12. It was rejected by voice vote.

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[603] Congressional Record, January 30, 1992: S 689.

[604] Congressional Record, January 31, 1992: S 711.

[605] Congressional Record, January 30, 1992: S 689.

[606] Ibid, S 645.

During his urging for floor passage, Inouye promoted his provision addressing retransmission consent for broadcasters. "I want to respond once again to the cable industry's campaign of misinformation about its effect on consumers' cable rates. One fallacy they promote is that S. 12 will allow the TV networks to add a `20 percent surcharge to cable subscribers' bills."'[607] He believed the cable industry had misinterpreted the provisions and encouraged the NCTA to study the measure carefully. In defending the retransmission provision, he stated,

> Gone are the days when the broadcasters received their revenues from advertisers and cable received there revenues solely from subscribers. [Today] as we all know, cable competes with broadcasters for local and national advertising. The retransmission provisions of S. 12 will permit local stations, not national networks, as I have indicated, to control the use of their signals[608]

To eliminate any doubt about this issue, Inouye offered a manager's amendment to the bill to make certain that retransmission consent did not result in rate increases. In addition, the FCC would be required to regulate the rates for the basic tier -- this is the tier that contains the broadcast signals -- to make certain that those rates remain reasonable. Thus, the FCC had a clear mandate to ensure that retransmission did not result in harmful rate increases.[609]

S. 12 was then sent to the House with a request for concurrence.

House Action

The House waited until mid-1992 to weigh in on the increasingly controversial cable debate. On March 25, Markey introduced an unnumbered bill, later to become H. R. 4850.

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[607] Ibid, S562.

[608] Ibid, S563.

[609] Ibid.

It was adopted by the subcommittee in the form of a substitute amendment for H.R. 1303 to reregulate cable TV. He vowed to "rein in the renegades" who charged "exorbitant rates, provided poor service and hoarded programming." He believed the bill was "pro-consumer, pro-competition legislation."[610]

Markey's bill was the product of subcommittee "Democrats, backed by the lobbying support of consumer groups, labor unions, and -- most importantly -- the National Association of Broadcasters."[611] This pitted a coalition of powerful lobbying organizations against the cable industry and its allies.

Subcommittee Republicans were cool to the bill and had not been involved in its preparation. In fact, no Republican attended a March 25 briefing on the bill. And indeed, key Republicans on the subcommittee met with White House Chief of Staff Samuel K. Skinner on March 25 to discuss strategies to defeat the bill. In the end, the bill did move from subcommittee to committee, then to the floor and passage.

At the Committee Level. An early complication concerned the struggle among broadcasters, Hollywood studios and cable operators for use of over-the-air signals. Similar to the Inouye retransmission consent provision in S. 12, Representatives Markey and Dennis E. Eckart (D-Ohio) sought to give broadcasters the option of negotiating with cable operators for permission to retransmit their local signals for a fee, or simply allowing the cable operator to carry the signal for free.[612] The movie studios had tried to revise the provision

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[610] Mike Mills, "House Panel's Reregulation Bill Targets Cable TV `Renegades'," *CQ Weekly Report,* March 28, 1992, 797.

[611] Ibid.

[612] Ibid.

in the Senate bill that allowed broadcasters to negotiate fees when their signals are carried by cable operators. The studio interests contended that the bill, as written, diminished their control over copyrighted programming. Jack Valenti, the major lobbyist for the motion picture industry, sought help from the House Judiciary Committee, which had jurisdiction over copyright issues.[613] This produced a jurisdictional conflict. Jack Brooks (D-Texas) chairman of the Judiciary Committee, and Intellectual Property Subcommittee Chairman William J. Hughes (D-New Jersey) opposed the retransmission consent provision on the grounds that the copyright claims of film producers were ignored, and copyright matters were within the jurisdiction of the Judiciary Committee. They wanted language that would produce revenue for local broadcasters and for Hollywood.[614] In the end, Markey prevailed when he insisted that retransmission consent fell fully within the jurisdiction of Telecommunications Subcommittee and was unrelated to copyright questions.[615]

A markup on the bill was scheduled for March 30, but was delayed for a week because it became apparent that several Democrats were siding with Republicans to push for a weaker bill.[616] On April 8, Markey had to struggle to muster the votes to get his bill out of his subcommittee. The panel approved the draft by a vote of 17-7, after rejecting a weaker alternative by Representative Norman F. Lent (R-New York) by a 12 -14 vote. Markey's bill prevailed despite the defections of Democrats Thomas J. Manton and James

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[613] "Inside Washington: Down but Still Wired," *The National Journal*, (The National Journal, Inc.), February 15, 1992, Vol. 24, 7: 373.

[614] CQWR, March 28, 1992, 797.

[615] Ibid.

[616] Mike Mills, "Protests From Panel Democrats Snag Cable Reregulation Bill," *CQ Weekly Report*, April 4, 1992, 872.

H. Scheuer of New York and Bill Richardson of New Mexico. The three Democrats voted "present" on the final bill, while three Republicans switched to support the measure.[617]

The divisive actions of the subcommittee centered on two of the bill's key provisions: One would require the FCC to set rates for broadly defined basic cable service that would include local and distant over-the-air signals and possibly even the most popular cable channels such as CNN and MTV. Lent's alternative, backed by the cable industry, accepted the notion of basic rate regulation but proposed limiting the definition of a basic program tier to only broadcast and public, educational and government channels.[618] The other provision most objectionable to opponents would ban cable affiliated programmers from unreasonably refusing to sell programming to cable competitors such as satellites and so called wireless microwave cable systems.[619]

Questions were raised about why Richardson, Manton and Scheuer so strongly supported the cable position for weaker regulation, particularly because none of them had overtly sided with cable in the past. In reaction, consumer groups launched a media campaign to criticize the Democrats, with whom they had largely been allied on other issues. For New Yorkers Manton and Scheuer, the hometown influence of Time-Warner Inc. played a role. The nation's second-largest cable operator controlled systems in Manhattan, Brooklyn, and Queens. "Like all congressmen, we take into account the hometown industry," Manton said, adding that "Time-Warner employed about 2,000 people in his district, while complaints about cable rates had been few. But there wasn't any pressure. I

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[617] Mike Mills, "Markey's Cable Reregulation Bill Survives Democrats' Defections," *CQ Weekly Report*, April 11, 1992, 943.

[618] Ibid.

[619] Ibid, 944.

keep my own counsel."[620] A Scheuer spokesman said any implications that his vote was tied to campaign contributions was "stretching it. His only motivating factor was to get a bill that could pass."[621] Richardson said he wanted to "ensure that cable operators would not be banned from negotiating exclusive deals with program providers."[622]

Markey's only defeat came with the rejection, by voice vote, of a provision that established local citizens' groups to monitor local cable operators and franchising authorities. The groups would have no authority to lodge complaints about cable abuses. The provision was pushed by consumer organizations, including Ralph Nader's Public Citizen Group.[623] A similar provision was proposed to the Senate Commerce Committee staff by the CFA, according to Ward White. "There were some things that people tried to get in [the bill] that would have killed it if they had gotten in. For example, the consumer federation wanted a CUB [Citizens Utility Board] put in. Well, I told them that if they wanted that, the bill would never go anywhere."[624]

H.R. 4850 went next to the full Energy and Commerce Committee for consideration. On June 17, it approved a scaled-down version of the bill. Two controversial provisions were eliminated which Chairman Dingell said would cause the bill to get bogged down by opponents on the Judiciary Committee. One was the broadcast retransmission consent proposal. The other provision was to bolster competition by giving satellite distributors and other potential competitors lower-priced access to cable programming.

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[620] Ibid, 945.

[621] Ibid.

[622] Ibid.

[623] Ibid, 946.

[624] White interview.

On the other side, the bill was amended to make it tougher on the industry.[625] An amendment by Jim Cooper authorized the FCC to order refunds to consumers for any rate increases collected by a cable company after a complaint was lodged until it determined whether price-gouging had occurred. It passed by voice vote with little debate. Another by Ralph M. Hall (D-Texas), allowed local broadcasters to expand the number of cable systems that would be forced to carry their signals under the so-called must-carry requirements if they transmitted between two large metropolitan areas. It also was approved by voice vote.[626]

Other amendments adopted by the Energy and Commerce Committee included requiring the FCC to study the migration of sports programming from free broadcast television to subscription cable and pay-per-view television; allowing cable franchise authorities to set local rates for pay-per-view events that involved any professional sports championship featuring their hometown team, and requiring broadcasters to comply with equal employment opportunity guidelines.[627]

An attempt by Cooper to set up consumer watch dog groups were defeated by voice vote.

The full committee approved the bill 31-12. A substitute was offered by Lent that was similar to that offered in the subcommittee, but it was rejected by a party-line vote of 15-27. Four Republicans crossed party lines to support the final bill: Matthew J. Rinaldo, Carlos J. Moorhead (R-California), Michael Bilirakis (R-Florida), and Fred Upton (R-

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[625] CQWR, June 20, 1992, 1787.

[626] Ibid.

[627] Ibid, 176.

Michigan). Democrats Manson and Scheuer of New York, and Richardson of New Mexico, who had supported Republicans wanting a weaker bill in the April 8 action of the subcommittee, switched back to vote with their party.[628]

House Floor Action. On July 23, the House passed the cable bill by a vote that was viewed as a solid victory for cable TV's opponents, broadcasters and consumers. Markey was the floor manager for the bill. Ten amendments were offered. Three, offered by Dingell, Slattery (R-Kansas), and Billy Tauzin (D-Louisiana) were adopted. Four offered by Oxley, Shays, Manton, and Lent were rejected. And three amendments were withdrawn.[629]

The first real sign that President Bush was on the losing side of the cable issue came on a crucial amendment by Tauzin to replace the program access provision dropped from the bill by the Energy and Commerce Committee. Tauzin's amendment received overwhelming backing 238-68.[630]

Before consideration of Tauzin's amendment, Manton had offered an amendment to weaken an anti-vertical integration provision in the bill regarding programming access. He called the Tauzin amendment "far-reaching and radical," saying it would set a government mandated price for programming and cause program creators to lose control over their product. Manton stated that the satellite industry wanted "more than a jump start, they wanted a free ride."[631] His amendment was less restrictive than Tauzin's. It would bar any

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[628] Ibid, 175.

[629] Congressional Record, July 23, 1992: H 6520-6545.

[630] Congressional Record, July 23, 1992: H 6531.

[631] Ibid.

programming vendor "controlled" by a cable operator, rather than "affiliated," from refusing to deal with cable competitors to restrain competition. It also did not address discrimination in the prices, terms or conditions of program contracts. It also allowed programmers and operators to enter into exclusive contracts. Manton's amendment was backed by Dingell, members of the House Democratic leadership and the cable lobby. Yet, after impassioned speeches by both Tauzin and Manton, the Manton amendment failed by a vote of 162-247.[632]

In comparison, Tauzin's amendment would bar cable affiliated programmers from refusing to sell programs at fair prices and terms to home satellite dish and wireless cable industries. It would also allow exclusive contracts between programmers and operators only if the FCC determined they were in the public interest.[633] The Administration opposed the Tauzin amendment because it restricted the discretion of cable programmers in distributing their product. Requiring programming networks that are commonly owned with cable systems to make their product available to competing distributors could undermine the incentives of cable operators to invest in developing new programming.[634] Nevertheless, the amendment passed overwhelmingly, 238-68[635]

After adoption of the Tauzin amendment, the House considered an amendment offered by Lent.[636] Supported by the Bush Administration, it eliminated or significantly modified many of the excessively regulatory provisions of H.R. 4850. It reduced the use of

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[632] Congressional Record, July 23, 1992: H 6532.

[633] Ibid, H 6531.

[634] Ibid.

[635] Ibid.

[636] Ibid, H 6545.

exclusive local franchising which the White House saw as one impediment to competition in the cable industry. It was still defeated by a vote of 144-266.[637]

The bill, as amended, then passed the House by a wide margin of 340-73.[638] Ninety-eight Republicans joined with 241 Democrats in voting aye. Many of these defectors were from rural areas where broadcast signals could not reach and viewers had to rely on cable and satellite television for reception[639] Coupled with a voting margin of 73-18 for the Senate's companion bill, a confrontation was set up between Congress and President Bush.[640] The Bush administration continued to voice its opposition to reregulating cable TV until competition was established. In that regard, the White House pointed to a July 16 ruling by the FCC that allowed telephone companies to carry video programs over a "video dial tone."[641]

Easy passage was attributable to the fact that sponsors had succeeded in keeping some controversial issues out of the debate, the telephone-cable issue, for one. They also avoided a fight with the Judiciary Committee over how to compensate broadcasters who provided programs to cable operators. Furthermore, the Rules Committee declined to allow two competing amendments to the bill: One was the Eckart retransmission consent provision dropped in the committee markup. The other was Hughes' that would overhaul the entire

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[637] Ibid.

[638] Ibid H 6560.

[639] Mike Mills, "House Overwhelmingly Passes Sweeping Reregulation Bill," *Congressional Quarterly Weekly Report,* July 25,1992, 2163.

[640] Ibid.

[641] Ibid, 2164.

copyright royalty payment system while requiring the cable industry to pay broadcasters, program creators and sports leagues for use of broadcast programs.[642]

Sponsors were confident that the broadcaster retransmission consent provision that was in the Senate bill would be retained in the final conference version. Even though Judiciary Committee Chairman Brooks promised to continue to fight against the provision in the conference committee stage, he ultimately declined to attend the conference meetings after he concluded he did not have the votes to prevail on the issue.[643]

Final Action

As the two bills headed for conference, the differences in the bills were, as expected, concentrated in the areas of rate regulation and competition.

Differences. Regarding regulating rates charged for cable service, the House version authorized the FCC to set maximum prices and to ensure that rates for basic packages offered by cable systems were reasonable. H. R. 4850 defined basic packages to include all broadcast signals carried by a cable operator, and all public, educational and government access channels. Local franchise authorities would enforce the basic service prices by using FCC guidelines. To monitor prices of other program packages, a franchising authority or a state or a local government could protest unreasonable cable prices. Subscribers would be eligible for a refund for the undefined "unreasonable" portion of any rate deemed unfair by

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[642] Ibid.

[643] Ibid.

the FCC. The automatic annual rate hike of 5 percent allowed under the 1984 Act was repealed.[644]

In S. 12, the FCC would ensure that basic cable rates were reasonable, and at a level that would be left up to the agency to define. Basic cable service simply included at least all local broadcast signals. Local government franchise authorities would be able to regulate basic rates as long as such authorities followed FCC regulations. To monitor prices for packages other than the basic tier, excluding premium movie channels and pay-per-view events, cable subscribers and franchising authorities could protest to the FCC about unreasonable rates, and the FCC could lower rates it found excessive.[645]

An issue related to rates was the topic of basic packages. In the House bill, cable operators were required to offer all local and distant broadcast signals as part of their basic package, including so-called superstations. Also, within five years, or where technically feasible, cable operators were banned from forcing customers to subscribe to a higher-priced package in order to receive a premium movie channel, such as HBO or Cinemax, or a pay-per-view event. The Senate version limited cable operators from avoiding rate regulation by turning their basic program packages into stripped- down, unpopular packages, by applying rate regulation to the lowest-priced cable package subscribed to by at least 30 percent of all customers.[646]

The provisions to control of competition provided the most significant differences in the bills. The House bill contained a provision intended to give cable competitors, such

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[644] CQWR, July 25, 1992, 2164.

[645] Ibid.

[646] Ibid.

as home satellite dish program packages and microwave "wireless" cable systems, better access to cable programming at fair terms. It barred cable-affiliated programmers from unreasonably refusing to deal with cable competitors in the price, terms and conditions of programs. But cable-affiliated programmers would be able to set different prices, account for differences in the cost of creating, selling, delivering or transmitting programs, and offer volume discounts. They also could enter into exclusive contracts when the FCC finds such contracts to be in the public interest.[647] The Senate bill included a similar program-access provision, but it had fewer allowances for price differences and would offer no explicit permission to enter into exclusive contracts. In a key difference with the House bill, the Senate bill also would give broadcasters the power to extract fees from cable operators. The so-called retransmission consent provision, authored by Inouye, would allow broadcasters to either force a cable operator to carry their signals free of charge or to forfeit that option and negotiate with the cable operator to receive compensation for the retransmission of its signal. This provision did not make it into the House bill because of an effort to avoid a jurisdictional dispute with the Judiciary Committee.[648]

In the House bill, franchising authorities would be prohibited from granting exclusive franchises to cable operators. Cities and towns would be allowed to establish and operate competing cable systems. However, in S. 12, franchise authorities would be barred from unreasonably refusing to award additional franchises. Cities would also be allowed to establish and operate competing cable systems.[649]

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[647] Ibid.

[648] CQWR, July 25, 1992, 2164.

[649] CQWR, July 25, 1992, 2164.

H.R. 4850 included a provision for the FCC to study the impact of cable operators owning programming, or vertical integration, and limit their control over large shares of the nation's subscribers, or horizontal integration. In the Senate bill, the FCC would limit vertical and horizontal integration within the cable industry.[650]

Conference. On September 9, House and Senate negotiators approved the conference report for S. 12 by voice vote. In a rapid two and a half hour meeting, conferees settled the few substantial differences between the two bills that had not been resolved by the respective staffs over the August recess.[651] Issues settled before the conferees met included the provisions for rate-setting and granting cable competitors better access to cable-originated programming.[652]

Regarding the regulation of rates, the conferees adopted the language from the House bill with two changes. One was to state specifically in Section 623(b) that the FCC shall regulate rates for basic service tiers to ensure they are reasonable. The other was to add a provision that directed the FCC to seek to reduce the administrative burdens on subscribers, cable operators, franchising authorities, and the Commission.[653] The conferees agreed to

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[650] Ibid.

[651] Ibid.

[652] Ibid.

[653] Congress, House, *Conference Report on S. 12, The Cable Television Consumer Protection and Competition Act of 1992,* H. Rpt. 102-862,102nd Cong., 2nd Sess., (CIS92:H363-32) September 14, 1992, 72.

permit subscribers, as well as franchising authorities or other relevant state or local government entities to file complaints with the FCC.[654]

Regarding anti-competitive measures, the conference agreement adopted the Senate provision that bars national and regional cable programmers affiliated with cable operators from unreasonably refusing to deal with any multichannel video programming distributor and in discriminating in the price, terms, and conditions in the sale of their programming to multichannel video distributors to avoid impeding retail competition.[655]

The House version required that any television broadcast station signal carried by the cable operator be provided in the basic tier, including superstations. The conferees agreed to delete the requirement that superstations be carried on the basic tier. The conference agreement allowed cable operators to decide whether to carry superstations in the basic tier or on other tiers in their own discretion.[656]

Two controversial provisions were dropped from the final bill by the conferees. One in the House version dealt with the migration of sports events from free television to pay-per-view charges. It was dropped from the final version by the conferees agreeing to rely on the Senate's provision on uniform rate structure.[657] Another dealt with a House provision to bar foreign ownership of cable systems. The conferees adopted the Senate position, which was silence on the issue.[658]

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[654] Ibid, 74.

[655] Ibid, 100-101.

[656] Ibid, 73.

[657] Ibid, 74.

[658] Ibid, 112.

The home satellite-dish and wireless cable industries enjoyed an advantage in their effort to gain cheaper access to cable programming. The conferees accepted House language, similar to the Senate bill, that would bar cable operators who owned a financial interest in programming from improperly influencing decisions regarding the price, terms and conditions of program sales to non-cable competitors.[659] Also a House provision that would have allowed local governments to set the price for pay-per-view championship professional sporting events was rejected because of opposition from the Senate conferees and House Republicans. However, conferees did agree to allow the FCC to study the issue.[660]

The provision from S. 12 to broaden an exemption to a 1984 ban on telephone company entry into the cable market by allowing rural phone companies in areas with population of 10,000 or less to offer cable service was dropped from the bill in conference committee.

On September 17, the House adopted the final version of the conference committee's cable bill.[661] Even though continuing intense opposition from the cable industry and the movie producers, causing 58 House members who had voted for passage to vote against the conference report, the House passed it by 280-128.[662] The strength of this vote indicated that the House could still manage the two-thirds votes necessary to override a threatened veto by President Bush.[663] Bush sent a letter to Republican leaders that same day saying, "My vision

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[659] Ibid.

[660] Ibid.

[661] *Congressional Quarterly Almanac,* 1992, 178.

[662] Ibid, "Vote 398," 98-H.

[663] Ibid, 178.

for the future of the communications industry is based on the principles of greater entrepreneurship and less economic regulation. This legislation fails each of these tests and is illustrative of the congressional mandates and excessive regulations that drag our economy down."[664]

On September 22, the Senate passed the final version of S. 12 by a vote of 74-25. The vote for passage represented more than the two-thirds majority that would be needed to override a veto by the President and included many Republicans.[665] The Bush administration, however, did not back away from its threat to veto the bill.

Veto Override

On October 3, President Bush vetoed the bill stating that the burdens of reregulation would cause cable television rates to rise, and not decrease as proponents claimed.[666] Bush, his Chief of Staff James A. Baker III and Senate Minority Leader Bob Dole (R-Kansas), worked hard to persuade enough senators to abandon their support for the legislation. In doing so, the White House cast the showdown vote on the cable bill as a critical test of presidential loyalty. But on October 5, the Congress resoundingly rejected the argument in overriding the veto.[667] Both chambers surpassed the two-thirds majorities needed for the first override of 36 vetoes, despite intense pressure on Republican senators to side with the president just weeks ahead of the November 3 national election.[668] Minority Whip Al Simpson, who supported the bill, but offered to switch his vote in behalf of Bush, said the

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[664] Ibid.

[665] Ibid, 179.

[666] "Veto message," *Congressional Quarterly Almanac*, 1992, 179.

[667] Ibid, 182.

[668] Ibid.

White House came close to winning the 34 senators needed to sustain the veto. "We never could bump up past 33 votes, said Simpson, who ended up voting for the final bill. But if we had two or three more votes, we'd have made it."[669] In the end, only 25 senators took the President's side.

The House followed by voting to override by 308-114. That was a greater margin than the 280-128 vote in the House when it adopted the conference report on September 17. No members switched their votes to the President's side, but 14 went from `nay' to override the veto.[670]

Conclusion

During this round of legislation, the cable industry lost on nearly every policy position they supported. The results were directly opposite to the outcome of the 1984 Act when the cable industry received a real boost from Congress. This outcome was rooted in a number of the cable industry's actions. One was the rapid manner in which operators raised rates while failing to pay attention to the need to educate the subscribing public to the increases in programming and channel capacities that drove those increases. In fact, the industry was often accused of being arrogant in dealing with customers. Similarly, it did not cultivate the support of elected officials until too late in the reregulation effort, depending too heavily on the anti-regulatory, pro-market philosophy of the Bush Administration. This

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[669] Ibid.

[670] Ibid, "Vote 477," 116-H.

false sense of security extended to the belief that the FCC and courts would strike down regulations that could be found to violate First Amendment rights of cable operators.

On the other hand, consumers and broadcasters were winners on issues important to them. They were successful in defining the policy issue as the need to control a powerful monopolistic industry. Here it is clear that the cable industry failed to realize the importance of the majority party change in Congress and what that meant in terms of a preference for regulatory policies. The rapid economic success for the cable industry did not provide the necessary political savvy to assure a continuation of that success. As a result, the new policy was a boon for broadcasters.

It is easy to view these outcomes as a "war" between large competing industry interest groups. However, it was more of a struggle between advocates of regulation and advocates of competitive market approaches to eliminating or avoiding potentially monopolistic industries. The policy struggle was fought over defining the issue. Advocates for regulatory policies were successful in defining the issue as a consumer protection function and were willing to support the policy needs of cable's main competition in exchange for their support in framing the issue as protecting American consumers. Conversely, interests that supported policies directed at creating more competition were unsuccessful in making their case to allow free-market approaches to control any long-standing dominance by any individual industry or technology. Advocates of this approach envisioned free competition that would allow new technologies to develop, flourish, and replace older technologies. These in turn would be replaced by even newer technologies.

Thus the winners were those who defined the policy issue in terms best understood by the masses. However, this did not deter the inevitable continued development of new telecommunications technologies.

CHAPTER VI

CONCLUSION

This chapter presents an analysis of the case studies conducted. It will examine the cases in terms of general aspects of cable television regulation issues and some of the problems Congress faced in establishing a national regulatory policy. It discusses the essential features of the politics of cable television regulation in relation to the literature on group interests. Observations about the deregulation and reregulation experience are compared with some of the primary theoretical models of interest group activities. Finally, the relationship between politics and policies are discussed in terms of outcomes of the two cases.

In the general realm of studying regulatory policy development, focus is on the actions of Congress in deciding whether or not the cable TV industry should be regulated, and if it so, how regulatory policy should be structured.

Regulatory Policy for Cable Television as a Case Study

This study is essentially the story of the difficulties regarding formulating a national policy for a relatively new industry that relied on a rapidly developing technology and that

lacked a mature regulatory structure. These two aspects serve as crucial influences throughout the quest to resolve the policy issue and caused the development of regulatory policy to follow a jagged path. Regulation of the industry wandered from little or no regulation, to a hodge-podge of regulation at the state and local levels, to a national policy of deregulation enacted after contentious legislative battles. After becoming deregulated in the first phase of national policy, the industry soon faced political charges of operating as an unbridled monopoly, gouging consumers and systematically excluding competitors. Congress then reregulated the industry less than ten years after deregulation occurred. The path proceeds from early rule making by the FCC to rulings by federal courts through campaigns by organized interests to stymie the growth of the industry, on to negotiated compromises with the major opposition interests, to finally surviving attacks by rival communications competitors.

As one former staff aide described the progression of communications policy, "The key to understanding communications problems in politics is not to focus on one institution. It's to focus on the interplay of Congress, the FCC, and the courts."[671] This study begins with the time when several federal institutions were struggling with the need to change the regulatory scheme for the communications sector. The FCC, the courts, and the Department of Justice were trying to modify the manner in which the dominant telecommunications monopoly, AT&T, would be regulated as a result of unprecedented challenges from newly developed technologies. In response to those changes, certain policy entrepreneurs in Congress, who believed that starting over was the only way to create an effective national communications policy, attempted to completely re-write the Communications Act of 1934. These entrepreneurs also tried to include cable television in their revision of the act. The time in which these efforts took place coincided with a wave of deregulation in the late

[671] Aylward interview.

1970s and early 1980s. Deregulation had already taken place in other economic regulatory arenas such as motor carriers and airlines.

The journey took place amidst rapid technological changes in the industry and uncertainty as to how best to regulate the medium. Similar to the telephone industry, the issue of regulating cable TV became problematic as rapid changes occurred in the technology used. The initial methods were simple. Community antenna television used tall towers to receive signals and used cables to extend television programs into areas that could not receive broadcast signals. They usually provided four to six local channels through connections to a community distribution system. Then, the development and use of satellite broadcasting to transmit programming enabled cable operators to import additional signals from distant markets and to provide twelve or more channels of entertainment to any who wanted to subscribe. Finally, when broad-band transmission capabilities were developed, twenty-four to forty-eight or more channels were offered along with the possibility of two-way communications. The first of these technologies had been in place since the early 1950s. The second phase in the technology development occurred in the late 1970s and early 1980s when Congress sought to establish a deregulatory policy for cable TV. The latter phase occurred during the time the industry was considered deregulated between 1987 and 1992. These rapid technological advances in cable capacity had a severe impact on, among others, local broadcast stations. The FCC found that importation of distant television signals could seriously degrade the programming product offered by broadcasters, causing a reduction in advertising revenues for service to households not subscribing to cable systems. Cable TV was in serious conflict with broadcasters for local video entertainment markets.

In the context of rapid technological changes that were taking place, there existed a great deal of uncertainty regarding regulation of cable TV. Since there existed no national

policy on regulation of the industry, and the courts had at various times ruled the FCC lacked authority over the medium, the existing regulatory vacuum was filled by local and state governments. However, lacking any cohesive national policy, the regulation of cable TV evolved inconsistently across states and municipalities, resulting in many dissimilar schemes. Generally, local governments regulated cable TV through provisions in franchise agreements negotiated with individual cable operators. Each franchising authority imposed a different set of rules and obligations on its cable system providers. Many times these terms reflected political considerations more than economic factors or consumer demand. This variation from city to city produced uncertainty in regulatory restrictions which, in turn, inhibited development of the cable television industry because of the difficulty in attracting capital investment. The situation became one where the interests of municipal regulators and cable system owners differed sharply on how cable TV should be regulated. These two groups became the main protagonists in the battle to deregulate or, more accurately, relieve the industry of the burden of local regulations in 1984.

At the heart of the regulatory uncertainty for cable television was how its technology differed from others in the communications sector. Early interpretations of the FCC's jurisdiction over cable derived from the requirement of the Communications Act of 1934 to oversee interstate communications by wire or radio. What was complicated about this was that cable operators provided television programming to consumers, but not by use of the frequency spectrum. The result was an FCC attempt to apply a regulatory scheme based on a "spectrum scarcity rationale" to a medium that did not use the spectrum. Conversely, even though cable used "wire" to deliver its programming, it did not fit into the FCC's regulatory framework for common carriers as did telephone companies. Probably more significant was the question of whether the Commission even had the authority under the Communications Act of 1934 to regulate the CATV industry as common carriers. As a consequence, in April,

1958, the FCC declared that CATV systems were not common carriers, because their customers did not select the particular messages they could receive. Also, since they were not regulated as broadcasters, because they did not use the frequency spectrum, cable TV was essentially allowed to compete with broadcasters without having to satisfy the same regulatory requirements. Consequently, broadcasters turned to Congress for relief.

Eventually, the characteristics of a rapidly emerging and developing technology and the lack of an existing regulatory structure steered the parties with interests on both sides of the issue to seek a national policy. As is typical for cases where the regulatory bodies are inconsistent and the courts fail to establish precedent, interests turned to Congress for a resolution. But the lack of an existing policy structure proved problematic for Congress in dealing with the issue. As we have seen, the operations of the cable television medium did not fit at all well into the two existing regulatory structures for common carriers and broadcasters. The earliest attempt to legislate a national policy for cable TV was in 1958, when a few members of the Senate from western states tried to establish a regulatory framework but were defeated. The leadership of the NCTA at that time willingly supported federal regulation of CATV. Its motive was to centralize regulatory authority at the federal level and avoid the variations and complications of state and local regulations that were expanding with each passing year. However, the supporters from the broadcast and cable industry groups who advocated federal intervention could not persuade the rest of the members from their own organizations to accept their positions. They represented only small but vocal portions of their respective industries. The western senators who developed the legislation to address a problem unique to rural western areas were a minority in the Senate and could not garner the necessary votes without the full support of either the NAB or the NCTA. When the first cable bill failed it was not so much from opposition as from lack of interest among senators whose constituents had no interest in the question. The

rejection of that first legislative attempt was because of the collapse of a compromise among a minority of interests rather than a victory for, or defeat of, any particular faction. It should be noted that it was the larger cable companies and the broadcast networks that formulated the first legislation. Both would be considered "powerful industry interest" groups in the view of elitist group interest theory.

The next notable attempt at formulating a policy occurred almost a decade later, in 1966. The House of Representatives held hearings that resulted in a bill to extend the FCC's statutory authority to include CATV. During that time, the FCC also began to review and approve cable TV franchise agreements as they were granted or renewed by local governments. The Commission attempted to extrapolate its authority over CATV from the 1934 Act in a piece-meal fashion as a reaction to its lack of explicit statutory authority to regulate cable television. This was the prevailing approach until a very important decision by the Supreme Court in 1968. In that case, the Commission's regulation of cable television was affirmed in *United States v. Southwestern Cable*, when it upheld the authority of the FCC to impose restrictions on the number of distant signals a cable television system could import and make available to its subscribers.[672] The Court held that the Commission had jurisdiction under the Communications Act of 1934 to promulgate such regulations, but the Court warned that the Commission's authority was limited to areas reasonably ancillary to discharging responsibilities for regulating television broadcasting.

Another decade passed before the U.S. Court of Appeals, District of Columbia Circuit, in March 1977, held that neither the Communications Act nor the First Amendment authorized the FCC to promulgate restrictions on program availability to Cable TV

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[672]United States et al, v. Southwestern Cable, 392 U.S. 157, (1968).

operators.[673] The FCC, the NAB and ABC appealed this ruling. But the Supreme Court refused to hear their arguments and in October, 1977 left standing the appellate court decision that the FCC lacked the authority to restrict the programs offered by cable television stations. The industry was again without any national policy.

In 1979, requirements for cable operators to provide access to their channel capacity by other programming entities again brought the issue of the FCC's authority regarding cable before the U.S. Supreme Court in a second case involving Midwest Video. This time the Court ruled that access requirements that could not be imposed on broadcasters could not be imposed on cable systems either. But most importantly was the statement by the Court that, "The Commission may not regulate cable systems as common carriers, just as it may not impose such obligation on television broadcasters. We think the authority to compel cable operators to provide common carriage of public-originated transmissions must come specifically from Congress."[674]

Some of the basic problems that faced congressional policy makers included: Should the industry be regulated at all at a time when the trend in national policies was toward deregulation of industries so they could compete in open markets. Another problem was how to generate a policy structure for an industry where none existed before? If the industry is to be regulated, what should that look like? Should it be applied at the federal level, the state or local government levels?

The question of whether regulation was even necessary had been raised as early as the mid-1970s when President Gerald Ford's Domestic Council Review Group on

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[673]Home Boxoffice, Inc. v. FCC, 567 F.2d 9 (DC Cir. 1977).

[674]FCC v. Midwest Video, 440 U.S. 689, 709 (1979).

Regulatory Reform (DCRG) in March 1976 concluded that "rules on signal use over the cable should in good part be eliminated."[675] This conclusion was part of the general deregulatory trend during the late 1970s. Historically, however, when important industries are involved and when their development and operations are seen to be impeded by state and local regulations or no regulation at all, the answer to the question about the need for national policy usually has been yes. Examples of this include industries such as railroads, motor carriers, airlines, banking, securities and broadcasting. In the case of cable TV, early regulatory attempts by states proved difficult and were by their nature inconsistent across the nation. It was difficult simply because in general, their regulatory experience was in controlling large corporations providing electric power and common carrier communication services. On the other hand, local government control over cable TV was based on the authority to grant franchises for the use of local streets and rights-of-way as well as access to poles to attach the cables. As cable regulation developed in its early years, franchise agreements became very creative. Cable companies tended to bid for exclusive franchises by offering increasingly greater services and in-kind perquisites to communities. These offers in many cases failed to materialize. This in turn raised complaints about unfulfilled promises by cable operators. Simultaneously, members of Congress were sensitive to the desires of their constituents in the form of local elected officials who had become somewhat dependent on the revenue generated by local franchise agreements with cable operators. Most wanted no change, or at best, to preserve the franchise arrangements as part of any newly developed policy. Clearly, a cohesive and comprehensive national policy was needed. At the suggestion of the courts and initiatives by cable TV industry interest seeking consistency, Congress sought to establish that national policy.

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[675] MacAvoy, *Deregulation of Cable Television*, i.

Once it was clear that a national policy was needed, the next question to address was the form it should take. The answer was influenced by prior deregulation efforts by Congress. However, the debate over cable television that occurred in the 1980s differed from other debates over deregulation that started in the mid-1970s. The conventional view of deregulation as a policy alternative had involved economic arenas that were marked by long standing relationships within "subgovernments" comprised of legislators, regulating bodies and the regulated industry. Some notable areas include trucking, airlines and banking services. Many differences existed in the case of cable television. One was that the deregulation of the 1970s occurred for industries that were seen as affecting the general economy through non-competitive pricing structures and exclusionary practices sanctioned by the agencies charged with regulating them. The result, in the eyes of critics, was that customers and interstate commerce were burdened by long-standing relationships between the involved industries and the agencies responsible for regulating them. The prevalence of these kinds of arrangements in economic regulations were generally believed in the 1970s to produce negative impacts on the national economy. Cable TV differed in two ways. One, there was no "cozy" relationship with a regulatory agency. The other was that the initiative to regulate cable TV did not come as a result of its pricing structures or any exclusionary practices. It came from the industry itself to gain relief from the widely varied application of franchise agreements.

Until the Cable Act of 1984, there existed no true national policy on cable television. The FCC had established various regulations through rulemaking and courts had reviewed them, supporting some and rejecting others. Cities were an immediate regulatory presence for increasingly larger cable enterprises who argued the need for policy that allowed the industry to grow effectively and efficiently without the kinds of regulations that prevented them from competing with the broadcast industry in a fair and equitable manner.

So, in 1984 Congress determined that a national policy was required. The policy established was, in essence, a policy to reduce what was seen to be burdensome local regulation. While it was called deregulation, it established a regulatory framework at the national level that allowed greater growth and technological development for the industry and severely restricted the force of regulation by local governments. Conversely, in the 1992 policy revision, this approach was changed to a system of tighter regulatory authority to be exercised nationally by the FCC.

The distinguishing features of a rapid and continually developing technology in combination with unique regulatory aspects clearly justify the study of cable television deregulation and regulation as worthwhile cases to examine. Now we will discuss how the essential features of the politics of cable regulation fit into the existing literature on interest groups.

Essential Features of the Politics of Cable Regulation

Another purpose of this study has been to compare the insights and observations drawn from these case analyses with the literature reviewed. This is accomplished by comparing the activities of interests against the framework of a number of interest group theories. The first observation is that the cases discussed are varied in their particulars and in the perspectives set against the interest group literature. A second is that the literature on group interests does not distinguish between emergent and mature policy regimes. In the case of cable television, there was no mature system in place. The situation of interest groups -- in many ways, powerful interests -- competing to establish policy regimes is fundamental to this study. A third observation is that a critical variable at the heart of

dispute over cable television policy is not well treated in the literature. That variable is technological change and its effects. In general, the question then is, how does the cable case fit with the literature?

Starting with basic areas of interest group literature, one would ask, do the efforts to deregulate and then reregulate the cable TV industry fit better into the pluralist, or the closed elitist model of interest group politics? David B. Truman believed pluralism was a characteristic feature of the governmental system in the United States in that its decentralized nature contains a multiplicity of independent centers of power and vantage points to secure access to the national government.[676] For Truman, the success of groups in gaining access to governmental institutions comes as a result of interactions among complex factors which he places into three categories: (1) factors related to the strategic position of the group in society; (2) factors related to internal characteristics of the group; and (3) factors that are particular to the governmental institution that is the target of access by the group.[677] This view of pluralism is furthered by the writings of Robert A. Dahl in his conclusions that through bargaining and compromise among groups and politicians, public policy decisions are made without any single group always being dominant. Pluralistic politics typically result in decisions that involve limited, acceptable degrees of change in small increments, or incrementalism.[678] What we have seen in this study is the presence of multiple access points and multiple interest groups bargaining to reach compromises in the fashion of an open system, without any one group interest dominating the agenda. In the cases of the cable industry and cities in 1984 and again with the cable industry versus broadcasters in 1992, this framework served to limited the policy debates to those that

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[676] Truman, 507.

[677] Ibid, 506.

[678] Dahl, *Who Governs.*

multiple factions could accept rather than result in wholesale loss of policy positions by main interest groups or one of the competing interests gaining all advantages sought. A dominant interest would not have to negotiate multiple times to continually reach consensus agreements.

In the cases addressed in this study, pluralistic characteristics were manifest in the propensity to negotiate compromises on legislative issues. In the 1980s, as the issues became more contentious between the main antagonists of cable TV operators and local governments, congressional leaders encouraged the two sides to negotiate. The objective was to establish legislative language that they could both live with through a consensus compromise. After several iterations of compromise agreements, S. 66 passed the Senate on June 13, 1983.

Antithetical to pluralism is the elitist model of group interest theory. This model is based on powerful interest groups interacting with government institutions in a manner similar to the "capture of government."[679] The cable TV industry's experience in the regulatory struggles reveal anything but a "capture of government," especially during the reregulation efforts of the early 1990s. Indeed, none of the interests involved in the deregulation of 1984 nor reregulation of 1992 could be found guilty of capturing the policymaking process.

Another variation on capture theory is Emmette Redford's "subsystems" discussed in Chapter I. His three defining aspects of regulatory subsystems are first, they serve to provide stability and equilibrium in a particular policy area. Second, they provide access and representation for non-dominant interests, but third, they also prevent substantial changes

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[679] McConnell, *Private Power*, 6.

in the equilibrium of interests. Jeffrey Berry extends this definition of subsystems to include interest other than those directly regulated. His subgovernment models lead to or give the appearance of closed systems which limit access to participate in policymaking efforts. This was not the case in considering policy for the cable TV industry. The experience seems quite open to participation for any who were interested. Additional interests that participated other than the cable industry, cities and broadcasters included consumer interest groups, newly developing competing technologies, and interests supporting public, educational, and government access to cable systems for local PEG programming.

Let us now examine how the cable TV cases fit with regulatory politics schemes of Theodore Lowi, Randal Ripley and Grace Franklin. As presented in Chapter I, Lowi's category of "regulatory policies" are characterized by decisions that directly raise costs and reduce or expand alternatives of private individuals. These policies are distinguishable from the "distributive types" in that they involve direct choices as to who will be a loser and who a winner. Lowi's regulatory policy area involves participation of a multitude of groups that interact in conflictual interplay so that policy tends to be a residue of the compromises formed to accommodate coalitions seeking preferred policy outcome. This arena is best described by the pluralistic model. Similarly, Ripley and Franklin define "competitive" regulatory policy as involving competition between prospective deliverers of goods or services for the right to deliver them by winning the competition for the right as it is held by a government regulatory agency. Ripley and Franklin state that the policies in the competitive subarena are typically routine and very protective of well established interests represented therein.

These categorical policy areas described by Lowi and Ripley and Franklin, also fit reasonably well with the cable television cases which concerned competitive subarenas of

the telecommunications arena. Multiple interests were involved in an open process, and the outcome was the result of negotiations between the main interests. In the context of choices made in legislation, on the major points of dispute there were winners and losers but, as noted previously there was no winner take all.

Another perspective to consider is issue networks. Hugh Heclo defines an issue network as "a shared knowledge group" that ties together large numbers of participants with common technical expertise. They are made up of technical specialists, journalists, administrators and political entrepreneurs working out of varied institutional settings. Issue networks are characterized by sloppy and ill defined organizational boundaries; participants move in and out easily. Issue areas overlap; as an issue develops, new coalitions form in response. Networks are distinctive in terms of their large size and accessibility to new participants. They tend to be shaped in two ways: (1) a central grouping involved in a wide range of issues such as when trade associations act as brokers of information or provide lines of communication on an issue; or (2) clusters of individual groups that share common interests and concerns and form coalitions. Issue networks can be highly conflictual when diverse viewpoints are represented. Another distinction is that they lack the stability of subgovernments.

For Thomas A. Gais, Mark A. Peterson, and Jack L. Walker issue network systems are fluid, shifting, conflictual, and characterized by multiple access points for organized interests.[680] Authority is fleeting. The "insiders" of legendary iron triangles would not be familiar with the rapid formation and mobilization of the new coalitions that are constantly emerging and dissolving. The authors believe most important changes in the 1980s in public

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[680] Gais, Peterson, and Walker, "Interest Groups, Iron Triangles, and Representative Institutions," 1984, 161-185.

policy were fashioned within issue networks. They also contend that one of the most important causes of this change is the rapid expansion in the number and variety of interests that have achieved formal representation in the American system. In addition, as the range of issues have increased, single subgovernments have gradually lost the capability to manage the issues. Mass media gets involved with distributing information about the policy questions and who is involved. More citizens are motivated to make their preferences known to their elected representatives and the widening of the participation in the conflict includes outsiders of the policy area.

Many but not all characteristics of an issue network were evident in the cases presented in this study. The issues involved in cable regulation were highly conflictual, which in turn enticed Congress to consider negotiated resolutions among the major factions within a telecommunications issue network. As described by Jim Mooney of the NCTA, "If there is going to be a bill, and both sides are willing to sit down at the table, most frequently Congress will allow -- within reasonable limits -- the rival commercial interests to work out a solution. That was something that was pretty much done between the two industries"[681] in 1992. The tendency for Congress to take this approach was a strong one, "especially in matters which are basically regulatory statutes. And which involve highly technical areas of the law. Which are to a very significant degree, battles between rival commercial interests."[682]

In the case of deregulation in 1984, there was a shared knowledge group, with large numbers of participants having common technical expertise. When the reregulation effort began, it can be argued, that there existed a more visible network of technical specialists,

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[681] Mooney, Interview.

[682] Ibid.

journalists, administrators and political entrepreneurs working out of varied institutional settings. In the deregulation case, the issue network involved murky organizational boundaries; with participants moving in and out easily. With reregulation, there seemed to be more structured stability. Related to this, the congressional component appeared to be stronger as a result of several years of experience with cable issues.

In this connection and among those involved, policy ideas also played an important role in the development of national policy for the cable TV regulation. John Kingdon characterizes ideas as tools of policy entrepreneurs who are members of a community or network of specialists in a particular policy area. They are researchers, staffers, bureaucrats, academics, lobbyists, and legislators. Ideas as solutions to policy problems emerge in such communities. He discusses the aspect of "ideas" as goals or motivations in the sense of rational-choice theory other than the classic, more narrowly focused self-interested quests. He argues that "argumentation, persuasion, the construction of effective appeals, and the evocation of values and ideology seem as important as interest group pressure, reelection, career advantage, and the pursuit of power" in the motivation of political behavior.[683]

Senator Tim Wirth is an example of a policy entrepreneur who cultivated a particular idea to solve a policy problem. He clearly supported the cable industry throughout the process. His former aide, David Aylward, recalled that he had a public interest goal in promoting the idea of diversity of programming. "Wirth had in his head that the goal was not to regulate networks; it was to create alternatives to networks."[684] In the mass media area, he focused on the issue of television violence. He was concerned about what violence on TV was doing to children. It became apparent to Wirth that attempts to regulate content

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[683] Kingdon, "Agendas, Ideas, and Policy Change," 1994, 221.

[684] Alyward interview.

were a waste of energy. Eventually his idea about the amount of violence on TV was matched with the idea of developing an alternative new industry in cable television. Wirth's strategy was to get as many channels as he possibly could. It was not to defend the NAB; nor to develop new revenue sources for the cities; it was to remove barriers to the commercial entity investing in the capacity, which then will create the opportunity for programming and then somebody will fill the programming and if they can charge money for that, that will create more programming.

Another prominent example of a member of Congress as a policy entrepreneur was Senator Al Gore. After election to the Senate, he decided to become a champion for satellite dish users who were predominately rural residents, a major part of his Tennessee constituency. Satellite dish manufacturers as well as distributors wanted legislation to force favorable distribution agreements with the cable programmers. Mooney characterized Gore as an astute politician who realized that the "degree that other groups of people who had a bone to pick with cable could be united under one broad measure to punish the cable industry for its various sins, that there would be a greater chance of something happening to relieve the particular interest group he was concerned about which was the backyard dish people."[685] This was a populist position which meshed well with partisan Democratic politics.

The Part Played by Partisan Politics

Partisanship joined with ideas was important in Congress' actions in setting cable policy. Generally, the partisan dimension of cable issues was shown in the political

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[685] Mooney interview.

philosophies of many Democrats who were in favor of regulation and Republicans who generally favored deregulation. More specifically, it is noteworthy that in 1984, Republicans controlled the Senate, and in 1992, the Democrats were in the majority. However, at the end of the process in both 1984 and 1992, partisan lines were not sharply drawn. Votes in 1984 were divided more along regional lines and perceptions of constituency interests. In 1992, the bipartisan outcome was the result of proponents of reregulation successfully characterizing the bill as a consumer protection measure at a time very close to a national election. Actually, most partisan phases in the evolution of policy were at times when bills were introduced to either deregulate or reregulate the industry. Over time, as differences were worked out, extreme positions were moderated.

Opinions on the influence or degree of partisanship overall, varied. Former Senator Packwood recalled little partisanship. To his recollection it only existed to the extent that Democrats are generally for regulation and Republicans are against it. As an example of bipartisan acts, he recounted that, "Tim Wirth and I in 1990 filibustered against legislation that year. And he was a Democrat. In 1992, I found a bunch more partisan things although, in the end, McCain and I were the only ones who voted against it."[686]

From a staff perspective, Ward White described communications legislation as generally not partisan. Similarly, Tom Wheeler, from a cable perspective, agreed that telecommunications legislation is, traditionally, not a partisan issue. From the perspective of the cities, Cynthia Pols believed it was non-partisan. "Many times we got lots of help from Republicans as well as Democrats. Senators Gorton and Goldwater, were very helpful. Often times Democrats were very unhelpful."[687]

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[686] Packwood interview.

[687] Pols interview.

Jim Mooney, a representative of cable interests, viewed the reregulation process as partisan during the formulation stage, particularly in the House Energy and Commerce Committee where the Republicans were taking a strong ideological stand against regulation, *per se*. But in the end, considering how the votes were actually cast on the floor in both bodies, as well as in the Senate Commerce committee, this issue wasn't all that partisan. If it was all that partisan, Bush's veto would have been upheld. However, Roy Neel, a Gore aide at the time, recalled reregulation as being partisan. Democrats were generally for it and Republicans were generally against it. But there were anomalies in that. "You had Democrats, such as Tim Wirth, who opposed this and worked hard to kill it. He represented major cable interests in Colorado."[688] Conversely, there were Republicans on the other side, like Representative Chris Shays of Connecticut who was a supporter of reregulation. The outcome, however, was obviously bipartisan because Congress overrode the veto.

But for Neel, reregulation was really more a matter of constituencies. If you represented Denver where TCI, a major cable firm, was headquartered, as did Wirth, you were going to be pretty violently opposed to it. He also recalled that another member who was a strong advocate for reregulation was Senator Danforth from Missouri, who was the ranking Republican on the Senate Commerce Committee. "We probably worked as closely with Danforth as we did with Hollings. He and his staff helped write the bill."[689]

The NAB's Jack Goodman's recollections of Senate Commerce Committee policymaking reinforce Neel's view. The leadership there acted in a very bipartisan fashion.

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[688] Neel interview.

[689] Ibid.

Democratic senators Inouye and Hollings and Danforth, who was the ranking member of the subcommittee, all worked together very closely.[690]

As noted previously, another important political aspect was the significance of changes in the control of the House and Senate between deregulation and reregulation. The Republican control of the Senate beginning in 1981 helped bring deregulation to the policy agenda and eventually enactment. However, when control changed to Democrats in 1989, a high degree of interest developed in reregulating the cable industry. Arguably, the cable industry failed to cope with the importance of this majority party change in the Senate and what that meant in terms of regulatory policy preferences.

In the end, policy was produced out of the interaction of group interests, ideas about policy, and the activities of policy makers, especially the key congressional actors, responding to the partisan aspects of the issue and their own political interests in ways that are extraordinarily difficult to sort out. The policy struggle culminating in the 1992 Act, was fought over defining the core issue. Advocates for stronger regulatory policies were successful in defining the issue as a consumer protection function and were willing to support the policy needs of cable's main competition in exchange for their support in framing the issue as protecting American consumers. Conversely, interests that supported policies directed at creating more competition were unsuccessful in making their case to allow free-market approaches to control any long-standing dominance by any individual industry or technology. Advocates of this approach envisioned free competition that would allow new technologies to develop, flourish, and replace older technologies. These in turn would be replaced by even newer technologies.

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[690] Goodman interview.

Summing Up

What can be said about the relative success of the various interests involved in the struggle over cable policy? One point is that all of the interests, except perhaps for the cities, although they eventually came around, won in the advocacy of a national regulatory system, a set of rules founded in national authority and administered by a national agency.

Overall, despite the 1992 set back, the cable industry was advantaged. A central factor was congressional appreciation of the power and potential of the technology and preference for dealing with the negative effects on other interests without impairing its future development.

Cable's prevalence over the cities in 1984 was key and not to be undone. The industry flourished under this policy. That policy was created because they had many sympathetic ears in Congress that viewed its technology in favorable light, though previously restricted by cumbersome and awkward restraints.

In 1992, to be sure, there were set backs. Those who wished to compete with the cable industry, such as the satellite broadcast industry, for one, and the wireless cable industry, for another, benefitted from the program access provisions of the 1992 law. Broadcasters won the ability to charge for their programming that was retransmitted over cable systems, which became a financial boon for them. While many of the restrictions consumer interests wanted placed on cable TV were enacted, many other provisions they lobbied for were ignored.

On the other side, municipal interests were no more successful in 1992 than they were in 1984. Just as important, what cable won in the overall struggle, including 1992, was to not have to compete with the powerful telephone companies. Perhaps most important of all, despite increased regulation, including more restrictive criteria for effective competition to be free of rate regulations, it retained the ability to attract the investment needed to continue to develop the technology and grow as a business. A decade after 1992, our own viewing habits attest to the viability of a developing technology that was moderately restrained, but not impeded in any fundamental sense by the legislation enacted in 1984 and, especially, in 1992.

Because technological advances in the telecommunications field occur so rapidly, it could, in theory, be totally deregulated to allow free-market competition to sort-out survivors. However, because of the pervasiveness of the communications sector and the level of dependence on telecommunications in today's society, this would play havoc with the nation's economy. The strongest survivors would become monopolies, even if only temporarily. However, this outcome is mitigated by the deliberative policymaking process in Congress and the influence of pluralist politics with its associated incrementalist characteristics. In a balancing act, these two influences mitigate against both the rise of monopolies and the undermining of the telecommunications sector of the economy by protecting emerging companies, their employees, equipment suppliers, and investors.

The conclusion of this study is that establishing regulatory policy for telecommunications in America is more of a process than a terminal objective. It is fluid and must always remain flexible to accommodate enhancements of the technology which occur so rapidly that demands for new policy create almost constant pressure for new decisions. In the telecommunications arena, the policy-making question is how to prevent dominant

levels of economic power from accumulating in monopolies or oligopolies while still allowing adequate access for emerging new technologies to develop, compete, and ultimately supplant "older" technologies. The pluralist model of interest participation appears the best suited to answer this question. To accomplish this, the institutional components of the American policy-making structure, including the legislative process and administrative rule-making, tend to navigate toward a neutral course. Along the way, course corrections are provided by the review of laws and rules in the courts as demands by interests raise new policy issues. Singularly important course corrections or some threshold number of lesser corrections bring the policy-making process to a new decision point.

Thus, the policy-making process for cable television becomes analogous to a journey. In this analogy, legislative policy decisions are more like crossroads than destinations. If, in turn, one views policy itself as a vehicle, it can be examined as it arrives at a crossroad, chooses the path for the next leg of the journey, and then passes through the crossroads (policy decision) to move in a new direction. As the policy-vehicle pauses at the decision crossroad, it takes on new passengers in the form of competitors and emerging interests as these opportunities occur. The journey then proceeds anew through administrative rule-making, court challenges, business mergers, and then new demands for correcting the policy course. Each new demand for course corrections represent yet another crossroad in the continuing policymaking journey.

That the journey continues for telecommunications policymaking will be evident in the Epilogue to follow.

CHAPTER VII

EPILOGUE

After the *Cable Television Consumer Protection and Competition Act of 1992* became law, it met immediate resistance in its implementation. Suits were filed that challenged the constitutionality of some provisions. Some of the new regulations promulgated by the FCC were also challenged in the courts, and others caused unintended economic harm to the ability of the industry to expand and develop its operations. Just four years after the 1992 Act became law, Congress completely rewrote policy for telecommunications when it replaced the obsolete *Communications Act of 1934* with the *Telecommunications Act of 1996.* Since then, emerging new technologies continue to develop and challenge the nation's regulatory policy on telecommunications .

Implementation of the 1992 Act

After enactment, implementation of the policy changes in the 1992 Act proved problematic. Language in the 1992 Act mandated that the FCC set rates for cable TV based on what would have been produced by competition. The ambiguity of that language made the FCC's job difficult which lead to prolonged rule making. As the FCC approached deadlines on setting rates it implemented a price freeze for cable operations subject to

regulation under the 1992 Act.[691] These initial rules on cable prices had two effects: one, no cable company lost revenue, and two, one-third of the country's cable consumers had their prices raised. [692]

In late 1993, the FCC developed a complex formula to set prices equitably. When the FCC issued new rules based on the formula, it reduced rates that cable operators charged subscribers, which in turn caused an investment crisis for the cable industry. Such rate control frightened away investments needed to expand and upgrade operations. Thus, rate regulation reduced the cable industry's cash flow, lowering its attractiveness for investors.[693] This in turn effected cable TV programmers who could not get their programs carried on cable systems because rate cuts caused operators to cut back on their plans to expand the number of channels provided. Thus market values of cable operations were lowered at a time when the businesses needed to raise money to compete with telephone companies. Cable operators challenged the rate rules in the courts. Then a year after the price freezes were instituted, the FCC approved conditional price increases for those cable operators who were willing to add six or more new channels to their service. This conditional arrangement was not satisfactory to anyone. Subscribers viewed the changes as cable operators simply raising their prices once again. Cable operators, on the other hand, were concerned about the uncertainty for revenues under arrangements of conditional rate increases. In addition, telephone companies continued to pursue the authority to enter cable markets through FCC rule making rather than legislation.[694]

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[691] Dick W. Olufs, III, *The Making of Telecommunications Policy,* (Boulder, CO: Lynne Rienner Publishers, Inc., 1999), 67.

[692] Reed E. Hundt, *You Say You Want a Revolution: A Story of Information Age Politics,* (New Haven: Yale University Press; 2000) 21.

[693] Ibid, 31.

[694] Olufs, 67.

When William J. Clinton became President in January 1993, he brought a new perspective to telecommunications issues. To encourage the industries to rebuild their networks and compete with each other, his administration sought to permit the cable companies to compete in the telephone business, and the telephone companies to sell video. The Clinton administration also brought with it an interest in an "information revolution" soon to be known by the catch phrase "information superhighway." The rapid development of new technologies to support the revolution carried consequences for the established major telecommunications companies. In order to compete in a rapidly changing technological environment, cable companies wanted to offer local telephone service, but they wanted protection from direct competition with the economically powerful regional bell operating companies (RBOC). They sought FCC rules to control the degree of competition that would have to exist before telephone companies could compete.[695] They also wanted an end to regulation of their rates. What worried the cable industry most was concerns about the possibility of being treated as "common carriers" and having to provide access to competitors if they were allowed to compete with telephone companies. These circumstances produced pressures for new regulatory legislation from Congress. During the 103rd Congress, bills were introduced in both the Senate and the House that were aimed at allowing telephone companies to compete in the cable market. H.R. 3636 enabled telephone companies to provide cable service as long as they allowed competing telephone and video services to use their lines. S. 1822 allowed regional bell companies to compete in long distance markets as soon as they could demonstrate they had actual and demonstrated competition. However, no new telecommunications legislation was enacted in the 103rd Congress.

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[695] Olufs, 71.

Another development which eroded the policy established by the 1992 Act was the court decision on the suit filed immediately after enactment. As soon as the 1992 law went into effect, Turner Broadcasting System and Daniels Cablevision Inc., two of the most prominent cable programmers and large system operators, filed suit against the new law. They claimed that the law's requirements to carry broadcast programs infringed upon their First Amendment rights.[696] On June 27, 1994 the Supreme Court agreed with the cable operators. In *Turner Broadcasting System, Inc. v. Federal Communications Commission,* the Court decided 5-4 to remand the case to the federal District Court for the District of Columbia, finding that federal regulators needed to do a better job justifying their requirements on which programs cable operators must carry. Cable operators argued that the law's mandate to carry local stations infringed on their free speech since they had to displace their own programming to make room for local stations. In its remand, the majority expressed the need for effected local broadcasters to provide more direct evidence of their harm if their programs were not carried on cable systems instead of just a presumption that not being carried would cause irreparable harm. It's interesting that the minority opinion was to strike the must-carry provision entirely as unconstitutional rather than to remand. Evidently, none of the justices believed the provisions in the law should be supported as written. Clearly, the Court felt that cable operators deserved more constitutional protections. In allowing cable operators more protection against government intrusion on First Amendment freedoms than broadcasters enjoyed, the Court made an important distinction between the two technologies.[697] Once again, a cycle of court challenges, passing laws, and writing rules was initiated.

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[696] *Congress and the Nation,* Volume VIII, 451.

[697] CQWR, July 2, 1994, 1778.

In the election of November 1994, Republicans were elected to a majority in both houses of Congress. Two new Republican chairmen for both the House and Senate Commerce Committees wasted little time in announcing they would consider new legislation to deregulate telecommunications, including cable television. On March 30, 1995, Senator Larry Pressler, as chairman of the Commerce Committee, introduced S. 652 to deregulate cable television so it could raise the necessary capital to compete with telephone companies in the new service arenas. A similar bill, H.R. 1555 was introduced on May 3, 1995. The Senate bill passed on June 15, 81-18. The House bill passed their version on July 14, by voice vote, but amended the bill to replace it with H.R. 1515. This caused a long and protracted conference to take place with both sides finally reaching agreement on December 12, 1995. This was also during the time when the Republican Congress had a face off with the Democratic White House over the budget and the government was actually shut down for a time. Finally, the conference bill was passed by the House on February 1, 1996, 414-16. The Senate passed the bill 91-5 that same day.

The Telecommunications Act of 1996

On February 8, 1996, the Telecommunications Act of 1996 (P.L. 104-104) was signed into law by President Clinton. The intent of the act was to again "promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."[698] In that bill, existing rules restricting concentration of ownership by media companies were essentially eliminated. Among other deregulatory

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[698] *Legislative History of P.L. 104-104, Telecommunications Act of 1996.* (Washington, D. C., Congressional Information Service, Inc.) 1996. 1.

provisions, cable television regulations were relaxed three years after enactment. It also allowed telephone companies to enter the cable TV business.[699] The act contained provisions to establish numerous procedures to promote competition in telecommunications markets.

Title III of the Telecommunications Act of 1996 dealt with cable television services. State and local governments could not act in a way that limits the ability of a company to enter any market. Rate regulations were to disappear in three years, except for the basic services, which means airwave broadcasts and educational and public-access channels. Telephone companies were allowed to enter cable television businesses, but their video transmissions were subject to telecommunications regulation, and their video programming was to be subject to the same regulation as cable companies. Companies could offer "open" video programming (the notion of a video dial tone, where customers can dial what they want and not just flip through the package offered by one company). Small cable companies were freed from many regulations, as were companies that face real competition.[700]

After telephone and cable industries were subjected to open competition by the 1996 Act, FCC Chairman William Kennard predicted a boom for consumers. Telephone companies would carry TV shows and cable would provide voice services. The result would be more channels and lower prices.[701]

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[699] Olufs, 2.

[700] Ibid, 91.

[701] Deborah Soloman and Robert Frank, "Comcast Deal Cements Rise of an Oligopoly in the Cable Business," *Wall Street Journal*, December 21, 2001,

New Technologies, New Interest Representation

One result of the deregulation of cable television and the telephone industry was the AT&T acquisition of TCI. In this merger, the largest long-distance telephone company acquired the nation's largest cable company.[702] AT&T had found a way to bypass regional and local telephone companies in its quest to provide direct long distance service through the potential for using existing broad band cable connections. But by the beginning of 1999, the growth of the internet and the development of higher capacity computer hardware also brought new pressures from group interests on the issue of access to the high-speed capabilities of cable's broad-band system. As a result, the cable TV industry found itself targeted also by companies who provided internet services principally over phone lines and manufacturers of computer chips that were capable of ever faster data transmission speeds. Because of the explosive development of digital technology, the traditional use of copper telephone circuits to homes and business locations (known as the last mile) were too slow to capitalize on the potential for speedy transmission of data. However, cable's broad-band circuits were capable of carrying the amounts of information that matched the speeds of the new computer hardware.

Group interests representing internet service providers began to campaign for changes to telecommunications policy to allow their access to cable's network. In January 1999, America Online (AOL), began a lobbying campaign to gain access to the broadband network that was under the control of the cable TV industry. They wanted Congress and regulators to "require that cable TV lines to be opened to all competitors seeking to provide

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[702] Hundt, 219.

high-speed Internet service via their broad-band technology"[703] The lobbyists for AOL and a coalition of other internet providers and long-distance telephone companies also approached municipal regulators to impose open access requirements on cable providers. They were only successful in Portland, Oregon in getting such requirements adopted. They targeted AT&T as it pursued its acquisition of TCI. In turn, AT&T sued in federal court to have the requirements ruled illegal.[704] The NCTA opposed the approach because it would create a dangerous policy. It believed "Either your have a view that the online marketplace is competitive and emerging, and that the government should stay out, or you have a view that government should come in."[705]

On this issue, Congress was reluctant to interfere with the internet, but was also concerned about the tendencies of cable operators to operate as monopolies. The Chairman of the FCC was empathic to the idea of open access to cable broad-band circuits, but some commissioners questioned the authority of the FCC in this area. On the other hand, the pent up anger of cities was evident by the growing interest of municipal regulators in supporting the open-access approach to promote effective competition.

In 2000, another approach was undertaken by an internet provider to gain access to cable TV broad-band systems. Internet Ventures Inc. petitioned the FCC to allow it access to a cable system in Washington state. Internet Ventures used provisions in the 1996 Act that required cable operators with 36 or more channels to set aside space for commercial use by third parties. The FCC ruled that the section of the law did not pertain to varieties of

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[703] Brian Gruley, "AOL Leads Lobbying Campaign to Gain Access to `Broad-Band' Cable TV lines for the Internet," *Wall Street Journal*, January 26, 1999.

[704] Ibid.

[705] Ibid.

services but was limited to video programming.[706] This ruling was favorable to the cable industry as the FCC avoided forcing cable companies to share their high-speed lines with competitors, believing it was premature for government to regulate the industry.

By 2001, rulings in federal courts generally favored the cable TV industry. On March 2, the Court of Appeals for the District of Columbia ruled to invalidate limits on how many channels cable operators can fill with programming in which they have a financial interest (vertical integration). They also threw out government rules restricting the number of subscribers a cable operator could serve.[707] The court concluded the FCC could not support its reasoning for the restrictions. Cable operators argued the restrictions infringed on their First Amendment rights by restricting them from speaking to as large an audience as possible. This ruling was also favorable for AT&T, already the largest cable operator due to its acquisition of TCI, as it pursued a merger with MediaOne. Without the court's ruling, AT&T would have been in violation of the rules.[708]

Internet Access as the Dominant Issue

At the turn of the century, "access" became the dominant issue in telecommunications policy. Rules created as a result of the 1996 Act required companies to share their systems with others. "The goal was to stop monopolies, but what regulation

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[706] Kalpana Srinivasan, "FCC refuses to force cable TV company to lease cable space to internet provider," *Knoxville News-Sentinel,* February 20, 2000, D4.

[707] Kalpana Srinivasan, "Customer limits on cable firms rejected by court." *Knoxville News-Sentinel,* March 4, 2001, D8.

[708] Ibid.

did was to bar. . . investment by privatizing the risk and socializing the rewards."[709] These open access rules were used first to restrict telephone companies, but had been extended to cable operators. One solution to the gaining access to local broad band capacity was to buy existing cable operations. One example occurred at the end of 2001 when AT&T announced a merger with the Comcast Corporation cable company. If successful, it would become the largest cable operator in the nation. As a result, the three companies of AT&T Comcast, AOL Time-Warner, and Charter Communications would control sixty-five percent of the nation's cable market. The cable industry that was "once a hodge-podge of family-owned companies has become one of the nation's most visible and profitable oligopolies, as smaller operators are unable to cope with the rising costs of the business."[710]

Also in 2001, the RBOCs again tried the legislative route to change regulatory policy. At mid-year, the House Energy and Commerce Committee passed a bill, supported by representatives Tauzin and Dingell, to allow the Bell companies to carry internet traffic without having to first meet strict government requirements that they open their local phone markets to competition.[711] The requirement for allowing competitors to compete in their markets by using their equipment. The Bells argue this was a disincentive for them to invest the capital necessary to upgrade their systems if their competitors would immediately gain benefit from the upgrades before the Bell companies could recoup their investments. The new bill provided a way around those requirements and eliminated the disincentive for capital investment. However, Senate Commerce Committee Chairman John McCain did not support any loosening of regulations for regional and local telephone companies.

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[709] George Gilder, "Tumbling Into the Telechasm," *Wall Street Journal*, August 6, 2001.

[710] Soloman and Frank, *WSJ*, December 21, 2001.

[711] Kalpana Srinivasan, "McCain wary of looser rules on phone firms," *Knoxville News-Sentinel*, May 11, 2001.

The most recent technological advance in the telecommunications area involves satellite based television and digital services. In February 2002, the nations two largest satellite dish companies proposed a merger to offer their services across the nation. The services offered would provide a viable nation-wide competitor to the cable industry. It would also further a technology that could provide both television programming and wireless internet access to the nations most remote rural areas. In their effort to generate approval of the merger, the two companies have promised uniformed pricing of their services as a solution to uncertain and varying cable rates in different local jurisdictions.[712]

In summation, since enactment of the 1996 Act, intended to regulate cable rates and protect consumers, cable prices have risen 31.9 percent, with most Americans still having a single cable provider to choose from. Local phone rates, still regulated under the act, have risen 12.1 percent. On the other hand, long-distance prices have fallen 13.1 percent since 1996.[713] The emergence of new technologies is promising in its potential for offering effective competition, but also in its activation of the policymaking cycle once again.

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[712] Andy Pasztor and Yochi J. Dreazen, "Hughes, EchoStar Offer to Span the U.S.." *The Wall Street Journal*, February 27, 2002.

[713] Soloman and Frank, *WSJ*, December 21, 2001.

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