THE END OF GOVERNMENT REGULATION OF THE RATES CABLE TELEVISION SERVICES CHARGE THEIR SUBSCRIBERS

I. INTRODUCTION

Government regulation of the rates cable television services[1] charge their subscribers was dramatically reduced by events in 1984. Following decisions by the Federal Communications Commission (FCC)[2] and the United States Supreme Court,[3] Congress enacted a comprehensive statute designed to reorganize the regulation structure for cable, including that for rate regulations.[4] A complicated and confusing regulatory situation[5] has now become one where the limits of government regulatory authority can be determined with some certainty. This deregulation of the cable industry, and in particular its rate structure, is welcome and long overdue.

Cable television merits deregulation for two reasons. First, the rationale for regulation does not exist as cable is a non-essential service offered under competitive conditions.[6] Government regulation thus serves no beneficial purpose. Second, local regulators lack the expertise needed for proper and efficient regulation. They have frequently demanded facilities and offerings far beyond what is needed for effective service.[7]

This Note analyzes the impact of the recent deregulatory events. To provide background, Part II describes the cable technology itself. Part III focuses on state and local regulation of the cable television industry. Regulation by the FCC is analyzed in Part IV. The role of the courts in the regulatory area is scrutinized in Part V. The negotiations and debate leading to the pas-

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[1] For a description of cable television services, see *infra* notes 8-28 and accompanying text.

[2] *In re* Community Cable TV, Inc., 95 F.C.C.2d 1204 (1983), *recons. denied*, 98 F.C.C.2d 1180 (1984); *see also infra* notes 76-84 and accompanying text.

[3] Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984); *see also infra* notes 106-10 and accompanying text.

[4] Cable Communications Policy Act of 1984 (Cable Act), Pub. L. No. 98-549, 1984 U.S. CODE CONG. & AD. NEWS 2779 (to be codified at 47 U.S.C. §§ 601-639); *see also infra* notes 184-203 and accompanying text.

[5] Senator Barry Goldwater of Arizona described the situation as a "patchwork of Federal, State, and local regulations and court decisions [producing] an unstable regulatory environment that has been bad for the cable industry, bad for the local and State franchising authorities, and bad for consumers." 130 CONG. REC. S14,283 (daily ed. Oct. 11, 1984).

[6] *See infra* notes 269-74 and accompanying text.

[7] *See infra* notes 275-76 and accompanying text.

sage of cable legislation in 1984 are considered in Part VI. Part VII focuses on the state of rate regulation following the events of 1984 and 1985. Part VIII reviews the cable statute in its entirety. Conclusions are offered in Part IX.

II. Cable Television Technology

A cable television system carries "television signals by wire rather than [by] transmitting them over the air."[8] This is the primary distinction between cable television and conventional broadcast television.[9] A cable television system employs an antenna that picks up local and distant broadcast signals and other signals unique to cable transmitted from communications satellites.[10] The signals are relayed by cable from the antenna to the "headend," or source point. From the headend, they are amplified, converted to cable channel frequencies, and distributed by trunk cables to feeder cables leading into the streets. The feeder cables then connect with drop cables running into subscribers' homes.[11] The cables are either buried underground or attached to utility poles.[12] Coaxial cable is generally used for distributing the signals.[13]

Most cable communications travel "downstream" from the headend to the subscribers, but a few channels are available for

[8] W. Baer, Cable Television: A Handbook for Decisionmaking 3 (1974). Cable signals can be seen by the viewer with the same clarity as at the point of origin. Broadcast signals travel over-the-air in straight paths and diminish with distance. S. Rep. No. 518, 97th Cong., 2d Sess. 3 (1982).

[9] Hamilton, *Implications for Economic Regulation of Cable Television*, 10 Wm. Mitchell L. Rev. 433, 434 n.1 (1984).

[10] 1 C. Ferris, F. Lloyd & T. Casey, Cable Television Law: A Video Communications Practice Guide ¶ 5.02 (1981 & Supp. 1986) [hereinafter cited as Cable Television Law].

[11] *Id.*; W. Baer, *supra* note 8, at 3.

[12] 1 Cable Television Law, *supra* note 10, at ¶ 5.02; W. Baer, *supra* note 8, at 3-5.

[13] Coaxial cable consists of copper wire encased in plastic and aluminum. When electrical impulses in the form of cable television signals reach the cable, the copper and aluminum react, creating a magnetic field that inhibits frequency loss, thus allowing for a large signal carrying capacity. 1 Cable Television Law, *supra* note 10, at ¶ 5.02; W. Baer, *supra* note 8, at 4 (diagram of the makeup of coaxial cable). In comparison, the wire used for telephone transmissions is unable to accommodate even one television channel over moderate distances. W. Baer, *supra* note 8, at 3.

Fiber-optic cable is sometimes employed for cable transmissions. It is made from glass fibers and uses light to transmit signals, rather than the electric currents used by coaxial cable. The advantages of fiber-optic cable are that it does not corrode, it is unaffected by electrical storms, and it has greater channel capacity. Nevertheless, it is not widely used because of its high cost and complex construction. Hamilton, *supra* note 9, at 434 n.1 (citing G.K. Webb, The Economics of Cable Television 2 (1983)); *see also* Rudell, *Distribution of Non-Standard Television Signals*, N.Y.L.J., Nov. 26, 1982, at 1, col. 1. "These tiny, lightweight, flexible glass wires . . . offer the capability of accommodating channels far in excess of even the 100 channels presently being used in the most sophisticated cable systems." Rudell, *supra* at 30, col. 5.

"upstream" transmissions.[14] Cable systems offering both can provide "two-way" or interactive services, allowing the subscriber to send his own signals and information.[15] This is another difference between cable and broadcast television, the latter of which cannot offer this "two-way" capability.[16]

All cable systems offer basic service packages or "tiers" available for a monthly rate, featuring local broadcast television programs and selected satellite-delivered programming.[17] Additionally, there are programs available upon payment of an extra charge above the basic monthly rate, the so-called "pay cable" programs. These offerings usually include feature films, sports events, and cultural programs.[18] The fact that cable is generally supported by subscriber fees differentiates it from broadcast television, which is primarily funded by advertisers.[19]

[14] 1 Cable Television Law, *supra* note 10, at ¶ 5.02.

[15] Among the services available to subscribers of interactive systems are home shopping and banking, home alarm systems, and videotex and teletext, which allow for the transmission of printed and graphic information. *Id.* For an analysis of the future prospects of videotex, see Stevenson, *Videotex Players Seek A Workable Formula*, N.Y. Times, Mar. 25, 1986, at D1, col. 4.

[16] Hamilton, *supra* note 9, at 434 n.2.

[17] 1 Cable Television Law, *supra* note 10, at ¶ 5.02. As examples of the type of programs customarily offered in the basic service tier, UA-Columbia Cable TV (UA-CC), serving northern New Jersey, offers services providing news and information (Cable News Network (CNN) and Financial News Network), sports (ESPN, Superstation WTBS, and Madison Square Garden Network), movies (USA Cable Network), the performing arts (Arts and Entertainment Network, Nashville Network, and Music Television (MTV)), health information (Lifetime), and programming of interest to children (Nickelodeon). Brochure from UA-Columbia Cable TV, The Skeptical Consumer's Guide to Cable Television (Jan. 1985) [hereinafter cited as UA-CC Guide]. The brochure did not mention UA-CC's retransmission of local broadcast signals, presumably because residents of northern New Jersey can receive them without difficulty.

The brochure also failed to mention any provision for access channels for public, educational, and governmental (PEG) use. Access channels provide the opportunity for programming different from that offered by private broadcasting companies such as ESPN or CNN. Public access channels are available for citizens and groups in the local community. Channels may also be reserved for educational programming and for use by local governments when needed. Cable companies making these access channels available may charge users or must offer them for free, depending upon local requirements. 2 Cable Television Law, *supra* note 10, at ¶ 15.03. The FCC was forced by judicial decree to eliminate all of its regulations that mandated the provision of access channels. *See infra* note 100 and accompanying text. Franchisors, however, may still require them. *See infra* note 37 and accompanying text.

The brochure most likely omitted mention of PEG channels because subscribers are not interested in them. *See Options for Cable Legislation: Hearings on H.R. 4103, H.R. 4229, and H.R. 4299 Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce*, 98th Cong., 2d Sess. 362 (1984) (report of Robert Entman, Duke Univ.) (subscribers will not drop cable service merely because access requirements are not met by an operator) [hereinafter cited as *H.R. 4103 Hearings*].

[18] 1 Cable Television Law, *supra* note 10, at ¶ 5.02. UA-CC's pay-cable offerings are Home Box Office (HBO), Cinemax, The Disney Channel, Showtime, The Movie Channel, and Sportschannel. Basic service and some of the pay-cable channels can be purchased for one price. UA-CC Guide, *supra* note 17.

[19] Hamilton, *supra* note 9, at 434 n.2 (citation omitted). This distinction is becoming

Cable television, including its basic service and pay cable components, is frequently confused with other video services that are not cable or broadcast television.[20]

The first cable system was installed in the late 1940's.[21] Cable's sole function in its early years was to provide broadcast television signals in areas where TV reception was hampered by

blurred as more advertisers use cable to publicize their products. *See infra* note 28 and accompanying text.

[20] These other services include subscription television (STV), multi-point distribution services (MDS), master antenna television (MATV), satellite master antenna television (SMATV), low-power television (LPTV), and direct broadcast satellites (DBS).

STV programs, like pay cable, are offered to subscribers for a fee, but are transmitted over-the-air to a subscriber's home as is broadcast television. The STV signal is scrambled; only subscribers with a decoder can receive the programs. Hamilton, *supra* note 9, at 438 n.30 (citation omitted). Since companies providing STV service transmit on only one channel, their offerings are limited. Rudell, *supra* note 13, at 30, col. 1.

MDS transmits over-the-air by means of a microwave signal. The range of transmission is quite limited, only about twenty-five miles. Microwaves, like broadcast television signals, require direct line of sight transmission. Rudell, *supra* note 13, at 30, col. 1. In contrast, cable transmissions are not so limited. *See infra* notes 22-23 and accompanying text. MDS is generally used to serve hotels, apartment buildings, and other multi-unit structures. Hamilton, *supra* note 9, at 439 n.31 (citation omitted).

With MATV or SMATV, a single large apartment unit or other privately-owned dwelling uses a microwave receiver (MATV) or a satellite earth station (SMATV), wired to subscribers, to receive signals. The public streets are not used since all wiring is within the building. *See* 1 CABLE TELEVISION LAW, *supra* note 10, at ¶ 13.10[2][c]. Instead of procuring a franchise from the local government, an operator obtains a contract from the property owner. Tauber & Costlow, *FCC Preemption Serves as Watershed for Private Cable*, Legal Times, Feb. 6, 1984, at 14, col. 1. MATV and SMATV systems offer all of the signals picked up by receivers, called "dishes," while MDS involves the transmission and receiving of programs unique to the MDS system.

LPTV delivers previously unassigned UHF and VHF channels over-the-air to a small geographic area. The start-up costs are lower than those for broadcast television. Hamilton, *supra* note 9, at 445-46.

DBS transmits directly to subscribers who have relatively inexpensive earth stations which "are significantly smaller than those required for a communications satellite." Rudell, *supra* note 13, at 30, col. 2. A clear path between the DBS satellite and the earth station is required. Rudell, *supra* note 13, at 30, col. 2. The high cost of starting a DBS system has led most companies to leave the field. Sanger, *Satellite TV Systems Seen in Doubt*, N.Y. Times, July 12, 1984, at D1, col. 3.

These video services compete with cable for consumer dollars. *See infra* notes 239-42 and accompanying text. Cable also competes with video cassette recorders (VCR's), which can record and play back material from television and other video sources and also play prerecorded cassettes. "In 1985, VCR's are currently used in one-third of American homes and are predicted to be in nearly sixty percent of them by the end of 1986, according to the Electronic Industries Association. Gittelsohn, *VCRs in 6 of 10 homes by year-end*, USA Today, Apr. 11, 1986, at 1A, col. 2. VCR's have also altered the viewing habits of program watchers. *See generally* Stevenson, *The Networks and Advertisers Try to Recapture Our Attention*, N.Y. Times, Oct. 20, 1985, § 4, at 8, col. 1. For details on the impact of VCR's on pay cable, see *infra* note 28.

[21] The installation was in 1948 or 1949. Those citing 1948 claim the installation was in Mahony City, Pa. *See, e.g.*, M. HAMBURG, ALL ABOUT CABLE: LEGAL AND BUSINESS ASPECTS OF CABLE AND PAY TELEVISION § 1.02 (rev. ed. 1981 & Supp. 1985). Those citing 1949 claim that it was in Astoria, Oregon. *See* 1 CABLE TELEVISION LAW, *supra* note 10, at ¶ 5.03; *see also* H.R. REP. No. 934, 98th Cong., 2d Sess. 20 (1984). The first commercial system was installed in Lansford, Pa. in 1950. *See* 1 CABLE TELEVISION LAW, *supra* note 10, at ¶ 5.03; *see also* H.R. REP. No. 934, 98th Cong., 2d Sess. 20 (1984).

topographical conditions or where the population was too small to support its own local station.[22] The cable system's antenna was placed at the top of a mountain, allowing it to pick up those signals that were otherwise obstructed from the households receiving television on the other side of the mountain.[23]

Cable developed slowly because it did not offer any programs other than those on broadcast television. There was little interest in cable in those areas where broadcast television reception was adequate.[24] But in 1975, Home Box Office, Inc. (HBO) installed a communications satellite for the purpose of originating programming that could be picked up by cable systems. The signals were relayed by microwaves to the cable antenna, where they proceeded to the headend.[25] Cable television then became a source of inexpensive programming different from that offered by the broadcast networks.[26] As a result, cable has grown quickly[27] and has become a lucrative business.[28]

[22] 1 CABLE TELEVISION LAW, *supra* note 10, at ¶ 5.03; *see also* H.R. REP. No. 934, 98th Cong., 2d Sess. 20 (1984). In recognition of its retransmission function, cable was originally referred to as Community Antenna Television (CATV). H.R. REP. No. 934, 98th Cong., 2d Sess. 20 (1984). The new name of "cable television" followed the development of services that went beyond the retransmission role. D. BRENNER & M. PRICE, CABLE TELEVISION AND OTHER NONBROADCAST VIDEO: LAW AND POLICY § 1.02[1] (to be published in 1986); *see infra* notes 25-26 and accompanying text.

[23] W. BAER, *supra* note 8, at 3, 5 (fig. 2).

[24] 1 CABLE TELEVISION LAW, *supra* note 10, at ¶ 5.03. As recently as 1970, there were 4.5 million basic service subscribers compared with the total of 60.1 million households with television, thus producing a penetration rate of only 7.5% (4.5 million as a percentage of 60.1 million). THE HOME VIDEO & CABLE YEARBOOK 1982-83 25 (table 3-1) (June 1982).

[25] *See* H.R. REP. No. 934, 98th Cong., 2d Sess. 21 (1984).

[26] HBO "revolutionized the cable industry by [making] it possible to economically deliver to local cable systems by satellite a vast array of national programming services." *Id.*; *see also* G. SHAPIRO, P. KURLAND & J. MERCURIO, CABLESPEECH: THE CASE FOR FIRST AMENDMENT PROTECTION 2 (1983).

[27] By June of 1982, there were 24.6 million subscribers of basic service, with a penetration rate of 30%, plus 16.9 million subscribers of pay cable service. THE HOME VIDEO & CABLE YEARBOOK 1982-83, *supra* note 24, at 4 (table 1-2). By 1985, 37 million households were wired for cable service, a penetration rate of 44%. Dougherty, *A New Agenda For Cable*, N.Y. Times, Mar. 28, 1985, at D27, col. 3. A study by CBS, however, foresees only minimal growth for cable until 1990. *See* Smith, *CBS Optimistic About Network TV*, N.Y. Times, Sept. 27, 1985, at C32, col. 1.

[28] Cable operators in 1981 garnered revenues from basic service and pay cable of $2.785 billion. THE HOME VIDEO & CABLE YEARBOOK 1982-83, *supra* note 24, at 28 (table 3-4). Pre-tax income in 1980 was $168 million. *Id.* Operators may expect increased profits now that subscriber rates will be deregulated and construction of most cable systems has been finished. Adams, *Cash-flow boom brightens profit picture*, USA Today, Sept. 4, 1985, at 3B, col. 2. Yet these profits are threatened by competition from alternative video technologies. In 1985, for the first time, the two largest pay cable services, HBO and Showtime, suffered a decline in the number of subscribers. This decline is partially the result of competition from VCR's. Smith, *Home Box Office and Showtime Lose Subscribers*, N.Y. Times, Aug. 3, 1985, at 46, col. 3.

Perhaps in response to this decline, Showtime is now experimenting with a pay-per-view (PPV) movie channel. Consumers are charged each time they watch the PPV movie

III. Regulation By State And Local Governments

The cable television industry is regulated by federal, state, and local governments. Regulation by the federal government is performed by the FCC.[29] Cable is within the jurisdiction of the federal government because of its impact on interstate commerce.[30] State and local governments may act only where not preempted by the federal government.[31]

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or program. Showtime claims the advantages of PPV are that first-run movies will be available on cable before they appear in stores offering videocassettes and that consumers will have "guaranteed access" to these movies, instead of hoping the stores have copies in stock. *Showtime Offers Pay-Per-View TV*, N.Y. Times, Nov. 27, 1985, at C22, col. 4. It remains to be seen whether this is sufficient incentive for consumers to reduce their use of VCR's, since users can view programs numerous times while paying only one price. Only addressable cable systems, which can control the programming seen in subscribers' homes "from a central office," are able to accommodate PPV services. Few cable systems are addressable. *Id.*

HBO has announced plans to combat the threat from VCR's by introducing a third cable entertainment service called Festival. The new service is designed to appeal to an older and more "traditional and conservative" audience than that for HBO's two other channels, HBO and Cinemax. Morgan, *HBO to Test a New Service, Festival*, N.Y. Times, Feb. 13, 1986, at C26, col. 4.

Advertisers have increasingly turned to cable. They spent approximately $220 million to advertise on cable in 1982, with an estimated increase to $1.6 billion in 1987. The Home Video & Cable Yearbook 1982-83, *supra* note 24, at 3. For evidence of the increasing interest of advertisers in cable, see Dougherty, *supra* note 27, and Dougherty, *Ad Clutter And Cable Television*, N.Y. Times, Mar. 27, 1985, at D21, col. 3.

29 *See infra* notes 40-84, 209-38 and accompanying text.

30 Federal jurisdiction over cable stems from the interstate commerce clause. U.S. Const. art. I, § 8, cl. 3. The clause may preempt state and local action by virtue of the supremacy clause. U.S. Const. art. VI, cl. 2; *see also* L. Tribe, American Constitutional Law §§ 5.4-.8 (1978 & Supp. 1984).

31 Preemption can occur in many different ways. As the Supreme Court noted in Fidelity Federal Savings & Loan Ass'n v. De La Cuesta, 458 U.S. 141 (1982):

> Pre-emption may be either express or implied, and "is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." . . . Absent explicit pre-emptive language, Congress' intent to supersede state law altogether may be inferred because "[t]he scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," because "the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject," or because "the object sought to be obtained by federal law and the character of obligations imposed by it may reveal the same purpose." . . .
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> Even where Congress has not completely displaced state regulation in a specific area, state law is nullified to the extent that it actually conflicts with federal law. Such a conflict arises when "compliance with both federal and state regulations is a physical impossibility," . . . or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress . . . ."

Id. at 152-53 (citations omitted); *see generally* L. Tribe, *supra* note 30, at ch. 6.

The interstate commerce clause, U.S. Const. art. I, § 8, cl. 3, has been interpreted as not removing all state power to regulate commerce. Where the federal government has not occupied the field or reserved all powers, states may regulate local commercial transactions that affect interstate commerce provided they do so in a rational and non-discriminatory manner and the benefits derived outweigh the burdens placed on the flow of interstate commerce. L. Tribe, *supra* note 30, at § 6.5; *compare* South Carolina St.

The states have chosen various approaches to regulate cable, most of which leave preeminent authority to regulate with the cities.[32] This authority stems chiefly from the power to grant cable system franchises.[33] A cable operator is generally required to obtain a franchise before offering service because public streets are used to lay the cable needed.[34] But an operator using only privately owned property[35] or contracting with an already-franchised public utility to use its wires, with no additional use of the streets, cannot be required to obtain a franchise.[36] Among the items usually covered in a franchise agreement are subscriber rates, franchise duration, the franchise fee to be paid by the system operator to the franchisor, the area of service, the makeup of the tiers of service, the construction schedule, and the provision of access channels for public, educational, and governmental

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Highway Dep't v. Barnwell Bros., Inc., 303 U.S. 177 (1938) (width and weight limitations on motor vehicles needed for safety reasons which outweigh inconvenience to interstate travel) *with* Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945) (restrictions on train lengths do not promote safety and increase the risk of accidents; the subject is one that needs to be regulated nationally, not state-by-state).

In the area of cable television, the federal government does not occupy the entire field, nor has it reserved all power to do so. Thus, the states may regulate various aspects of the cable medium, but they must follow the benefit-burden standard. The FCC is guided by the Communications Act of 1934, 47 U.S.C. §§ 151-757 (1982). For an example of state conflict with the Communications Act in the cable area, see TV Pix, Inc. v. Taylor, 304 F. Supp. 459 (D. Nev. 1968), *aff'd*, 396 U.S. 556 (1970) (Nevada may regulate cable TV as a public utility, in the absence of federal occupation of the field, so long as there is no evidence of a substantial adverse burden on interstate commerce).

32 As of 1985, Alaska, Connecticut, Hawaii, Nevada, Rhode Island, and Vermont expressly exercised all regulatory authority, thus totally preempting local regulation. 1 Cable Television Law, *supra* note 10, at ¶ 13.09[1]; *see, e.g.*, Conn. Gen. Stat. §§ 16-1,331 to -333j (Supp. 1986). In Delaware, Massachusetts, Minnesota, New Jersey, and New York, the state legislatures have expressly chosen to share their responsibility with local governments. A state agency implements the state's regulatory policy, while local governments grant cable franchises. 1 Cable Television Law, *supra* note 10, at ¶ 13.09[1]; *see, e.g.*, Mass. Gen. Laws Ann. ch. 166A (West 1976 & Supp. 1985); N.J. Stat. Ann. § 48:5A (West Supp. 1985). In the remaining thirty-nine states, most or all of the regulating is done by city authorities. In twenty of them, the states do not regulate at all. These states are Alabama, Arkansas, Colorado, Idaho, Indiana, Kentucky, Michigan, Mississippi, Missouri, Montana, New Mexico, North Dakota, Oklahoma, Oregon, Pennsylvania, Texas, Utah, Washington, Wisconsin, and Wyoming. 1 Cable Television Law, *supra* note 10, at ¶ 13.09[1] (see also ¶ 13.15 for information on the franchising process). For further details on state and local regulation, see D. Brenner & M. Price, *supra* note 22, at §§ 7.07[1], [2].

Since most non-federal regulating is performed by municipal, as opposed to state governments, this Note will refer to all non-federal regulators as "cities" or "municipal governments."

33 1 Cable Television Law, *supra* note 10, at ¶ 13.10[1]. Local governments do not have an inherent right to grant franchises, but must obtain the power from the states, either expressly, impliedly, or by default. *Id.*

34 *See id.* at ¶ 13.10[2][a].

35 The operator uses a MATV or SMATV system. *See supra* note 20.

36 *See generally* Greater Fremont, Inc. v. City of Fremont, 302 F. Supp. 652 (N.D. Ohio 1968), *aff'd sub nom.* Wonderland Ventures, Inc. v. City of Sandusky, 423 F.2d 548 (6th Cir. 1970) (applying Ohio law).

use.[37]

Subscriber rates are most commonly agreed upon during the franchising process. The franchise agreement usually includes provisions for rate increases and for amendment of the rate pact.[38] The negotiations that culminate in a franchise agreement force a cable operator and a franchisor to offer compromises in their positions. The regulation of subscriber rates is an area largely preempted by the federal government.[39]

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37 *See* D. Brenner & M. Price, *supra* note 22, at ch. 3; *see also* 1 Cable Television Law, *supra* note 10, at ¶ 13.11. "A franchise fee . . . is consideration . . . for the privilege of using the public streets or to compensate for [a franchisor's regulatory costs]." 1 Cable Television Law, *supra* note 10, at ¶ 13.15[2][a]. The FCC regulates franchise fees. *See* 47 C.F.R. § 76.31 (1985). The franchise contracts of New York and Los Angeles are presented in M. Hamburg, *supra* note 21, at app. G-1 to -2. For information on access channels, see *supra* note 17.

A major problem with the franchising process was overpromising by some operators trying to win franchises. Accordingly, shortly after beginning construction, they then sought to change the terms of their franchises, leading to delays and much contention. *See* H.R. Rep. No. 934, 98th Cong., 2d Sess. 21-22 (1984). In contrast, many operators claim local governments over-regulate the cable industry by demanding channel capacity and state of the art sophistication beyond what the market can bear. Friendly, *2 Decisions Cause Confusion on Cable-TV Rules*, N.Y. Times, July 19, 1984, at C19, col. 4; *see also infra* notes 275-76 and accompanying text. Operators also allege that franchisors abused the franchising process by making new demands after operators had spent money and begun construction. *See, e.g.*, *Hearings on S. 66 Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation*, 98th Cong., 1st Sess. 126 (1983) (statement of Thomas Wheeler, President, National Cable Television Association) [hereinafter cited as *S. 66 Hearings*].

The franchising procedure, which almost always led to the awarding of an exclusive franchise in each service area, has recently been attacked in the Ninth Circuit. In Preferred Communications, Inc. v. City of Los Angeles, 754 F.2d 1396 (9th Cir.), *cert. granted*, 106 S. Ct. 380 (1985), the court ruled, *inter alia*, that the goal of minimizing disruption of public streets does not justify the awarding of exclusive franchises. 754 F.2d at 1406. The court also hinted at the possible unconstitutionality of the Cable Act. In a reference to section 621(a)(1) of the Cable Act, which empowers "[a] franchising authority [to] award . . . 1 or more franchises within its jurisdiction[,]" the court stated that "we cannot agree with the suggestion in the legislative history that the provision 'grants to the franchising authority the discretion to determine the number of cable operators to be authorized to provide service in a particular geographic area.' . . . A construction of such breadth would be invalid." 754 F.2d at 1411 n.11 (citations omitted). *See* Cable Act, 1984 U.S. Code Cong. & Ad. News 2786 (to be codified at 47 U.S.C. § 621(a)(1)). The Supreme Court has accepted *Preferred* for review, and a decision is expected in 1986. Taylor, *Cable TV Licenses Will Get Hearing*, N.Y. Times, Nov. 13, 1985, at A21, col. 1.

38 *See* 1 Cable Television Law, *supra* note 10, at ¶ 13.15[1]; *see* D. Brenner & M. Price, *supra* note 22, at ch. 7. The regulation of basic service rates allows for "regular oversight of the cable operator's performance under the franchise agreement." *Cable Television Regulation: Hearings Before the Senate Comm. on Commerce, Science, and Transportation*, 97th Cong., 2d Sess. 15 (1982) (statement of Charles Royer, Mayor of Seattle, Washington) [hereinafter cited as *Cable Hearings*].

39 *See infra* notes 71-84 and accompanying text.

IV. Regulation Of Cable Television By The Federal Communications Commission

Cable television is regulated on the federal level by the FCC. The FCC was created by the Communications Act of 1934[40] and was empowered to regulate all interstate and foreign communications by wire and radio, including telephone and telegraph transmissions.[41] As cable television did not exist in 1934,[42] the Communications Act failed to specifically mention cable.[43] Thus, the FCC either had to imply its power to act in the cable area or wait for Congress to grant specific authority.[44]

At first, the FCC was reluctant to imply this power and to regulate cable television.[45] Apparently, the FCC considered cable to be a minor trend not warranting its attention. A 1959 FCC inquiry into the impact of new video services on the viability of broadcast television listed cable as merely one of many "auxiliary services" and found the evidence linking cable to any of the problems of broadcast television to be insubstantial.[46] The FCC's early reluctance is evidenced by its denial in 1958 of a request by thirteen broadcast station licensees that it regulate cable television as a common carrier under Title II of the Communications Act.[47]

Two developments persuaded the FCC to change direction

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40 47 U.S.C. §§ 151-757 (1982, Supp. I 1983, & Supp. II 1984).

41 *Id.* at §§ 151-152.

42 *See supra* note 21 and accompanying text.

43 The jurisdiction the Communications Act granted the FCC over wire and radio communications was divided into three parts. Title I, 47 U.S.C. § 152(a), granted the FCC authority over "all interstate and foreign communication by wire or radio . . . ." Title II, 47 U.S.C. § 201, covered communications common carriers. Title III, 47 U.S.C. § 301, concerned the FCC's jurisdiction over use of the radio spectrum. Cable does not expressly fall within any of the three classifications, but has been determined to fall within the FCC's "ancillary jurisdiction." 1 Cable Television Law, *supra* note 10, at ¶¶ 5.04[1], 6.02; *see infra* note 95 and accompanying text. The FCC decided in 1959 not to classify cable television as a common carrier. *See infra* note 47 and accompanying text.

44 1 Cable Television Law, *supra* note 10, at ¶ 5.04.

45 *Id.*

46 *See generally* Inquiry Into the Impact of Community Antenna Systems, TV Translators, TV "Satellite" Stations, and TV "Repeaters" on the Orderly Development of Television Broadcasting, 26 F.C.C. 403, para. 1 (1959). The FCC analyzed the possible connection between cable and the incidence of local broadcast stations going off the air. *Id.* at paras. 29-40. It found that only three of the ninety-six defunct television stations might have been affected by cable. *Id.* at para. 31.

47 Frontier Broadcasting Co. v. Collier, 24 F.C.C. 251, paras. 7-8 (1958). Although the Communications Act did not provide a specific test as to what constitutes a common carrier, the FCC interpreted the statute as referring to an entity that "provides the means . . . for the transmission of such [information] as the subscriber may choose to have transmitted." *Id.* para. 7, at 254. Such an entity gives the subscriber or user sole prerogative over what information shall be transmitted, as in the case of a telegram or telephone call. Cable television cannot be a common carrier because the cable system itself determines the content of the programs distributed. *Id.* at paras. 7-8.

in the 1960's. Acting without a congressional grant of power, the FCC determined that cable now merited regulation. The first development was the FCC's decision to encourage the growth of ultra high frequency (UHF) stations as the most efficient way to increase the number of television stations.[48] The FCC feared that cable systems in some of the larger markets would siphon off much of the audience for the fledgling UHF stations.[49] Second, broadcast station licensees and the FCC became alarmed by cable systems' increasing importation of distant broadcast signals into the listening areas of local television stations.[50] Cable threatened to dilute established television markets and to reduce the prices these stations could charge advertisers.[51] The FCC feared that cable was going to "destroy or seriously degrade the service offered by . . . television broadcaster[s] . . . ."[52]

The FCC's move into the field of cable television was a gradual one. In 1962, the FCC asserted jurisdiction over cable indirectly by regulating the common carrier microwave relay stations sometimes used to transmit the distant broadcast signals picked up by cable antennas.[53] Three years later, the FCC directly assumed authority over all microwave-fed cable systems.[54] Then in 1966, the FCC decided that its authority extended to all cable systems.[55] In an attempt to justify its ruling, the FCC cited the adverse impact of cable on broadcast television.[56] The FCC sought to keep cable in a position "supplementary" to that of broadcast television.[57] Having overcome these preliminary hurdles, the FCC proceeded to promulgate regulations for all areas of the cable industry, climaxing with the 1972 *Cable Television Report and Order*.[58] These rules covered practically everything from the required carriage of local broadcast signals, the so-called "must-carry" rules,[59] to limitations on cross-ownership[60] and technical standards.[61] The FCC did leave certain responsibilities, such as the granting of franchises, to local regulation, as part of a policy of "deliberately structured dualism."[62] State and local authorities would ideally handle those functions they could best regulate and the FCC would handle the rest.

Nevertheless, many of the FCC's regulations were so cumbersome to administer that confusion and inefficiency resulted in both the industry and the FCC.[63] The FCC's response was to once again change its direction. It began an inquiry in 1977 into

48 1 CABLE TELEVISION LAW, *supra* note 10, at ¶ 5.04.

49 *Id.*

50 Capital Cities Cable, Inc. v. Crisp, 104 S. Ct. 2694, 2701 (1984).

51 *Cf. In re* Carter Mountain Transmission Corp., 32 F.C.C. 459, para. 13 (1962), *aff'd sub nom.* Carter Mountain Transmission Corp. v. FCC, 321 F.2d 359 (D.C. Cir. 1963), *cert. denied*, 375 U.S. 951 (1963). The applicant's cable service would be "at the expense of destroying the local station and its rural coverage." 32 F.C.C. 459, para. 16, at 464.

52 Rules *re* Microwave-Served CATV, First Report and Order, 38 F.C.C. 683, para. 48, at 700 (1965), *aff'd sub nom.* Black Hills Video Corp. v. FCC, 399 F.2d 65 (8th Cir. 1968).

53 *In re* Carter Mountain Transmission Corp., 32 F.C.C. 459, para. 7 (1962) (subsequent history omitted).

54 Rules *re* Microwave-Served CATV, First Report and Order, 38 F.C.C. 683, paras. 4-6 (1965) (subsequent history omitted).

55 Second Report and Order, 2 F.C.C.2d 725, para. 19 (1966), *aff'd sub nom.* Black Hills Video Corp. v. FCC, 399 F.2d 65 (8th Cir. 1968).

56 Second Report and Order, 2 F.C.C.2d 725, paras. 28-46 (1966). The FCC could not pinpoint the negative impact of cable on broadcast television revenues. Nevertheless, it claimed a need to regulate from cable's "explosive . . . growth" and from the FCC's duty to protect "the public interest in the future." *Id.* at para. 28.

57 *Id.* para. 27, at 736.

58 36 F.C.C.2d 141, *recons.*, Memorandum Opinion and Order on Reconsideration of the Cable Television Report and Order, 36 F.C.C.2d 326 (1972), *aff'd in relevant part sub nom.* ACLU v. FCC, 523 F.2d 1344 (9th Cir. 1975); *see infra* notes 97-98 and accompanying text.

59 The "must-carry" rules require an operator to transmit the broadcast signals of any local broadcasting station located within a specified 35-mile zone of the operator or those signals that are "significantly viewed" in the area served by the operator. 47 C.F.R. §§ 76.59(a)(1), (6) (1985). The signals must be carried "in full, without deletion or alteration of any portion." 47 C.F.R. § 76.55(b) (1985).

However, the "must-carry" rules were recently overturned in Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434 (D.C. Cir. 1985). The FCC supported the decision, calling it "the first step toward a true marketplace for the distribution of programming." *F.C.C. Backs Ruling on Cable*, N.Y. Times, Aug. 3, 1985, at 46, cols. 5-6; *see also* Wolfe, *FCC won't appeal must-carry ruling*, CABLEVISION, Aug. 12, 1985, at 11. Supreme Court review of the decision is considered highly unlikely. Wolfe, *FCC's must-carry rules officially dead*, CABLEVISION, Sept. 16, 1985, at 13. The absence of "must-carry" channels presumably forces the FCC to create a new definition of "basic cable service." *See infra* notes 235-37 and accompanying text.

Although *Quincy Cable* eliminated all "must-carry" requirements, the trade associations representing both cable and broadcast television agreed on a plan to continue some of those requirements. Under the plan negotiated by the NCTA and the National Association of Broadcasters (NAB), cable systems offering 21 to 26 channels of service would be required to transmit 7 local stations; those with more than 26 channels would have to reserve 25% of their channels for local transmission. Only "qualified" stations, those that are "within a 50-mile radius of the cable station and receive a 2 percent share and 5 percent net weekly viewership in noncable homes[,] . . . ." are eligible for cable carriage. Stuart, *TV Groups Reach Pact On Must-Carry Rule*, N.Y. Times, Feb. 28, 1986, at C23, col. 1. The decision as to which local signals to transmit lies with the cable systems. NCTA President James P. Mooney said his organization compromised with the NAB in order to obtain leverage in Congress on other pending issues; he stated that broadcast television groups had dropped their opposition to several of the NCTA's legislative proposals. To become effective, the agreement must be accepted by the FCC. Stuart, *supra*, at C23, col. 1.

60 The cross-ownership rules restrict the simultaneous ownership of cable systems and broadcast stations. 47 C.F.R. § 76.501 (1985).

61 These FCC rules cover frequencies, measurements, and other technical performance standards; the FCC's entire set of regulations for cable television are in 47 C.F.R. §§ 76.1 to .617 (1985). *But see supra* note 59 ("must-carry" rules recently overturned).

62 36 F.C.C.2d 141, para. 177 (1972).

63 T. BALDWIN & D. MCVOY, CABLE COMMUNICATIONS 169 (1983). "The [1972] rules were so detailed and complex that cable operators, franchising authorities, the public, and the FCC itself had difficulty comprehending them." *Id.*

a basic rationale for regulation, the belief that cable posed a threat to broadcast television.[64] Two years later, the FCC eliminated its distant signal carriage rules,[65] and in the following year, its program exclusivity rules.[66] Much of the momentum for deregulation came from judicial decisions.[67] Most of the remaining regulations affect all broadcasters, not only cable systems.[68] The FCC can be expected to continue its deregulatory efforts, especially in light of the national trend toward deregulation.[69]

The FCC's rapid shift from non-regulation to extensive regulation and then to deregulation created instability in the industry and fueled congressional negotiations for the enactment of a comprehensive cable television statute. All parties to the negotiations, representing both system operators and local regulatory authorities, agreed that the most critical requirement in the industry was stability.[70]

Despite these erratic changes in its overall policy, the FCC acted consistently in the area of rate regulation. The FCC divided the authority to regulate subscriber rates between local governments and itself, and this division has not changed since 1972. As part of its 1972 *Report and Order*, the FCC created its policy of joint federal-local regulation of cable television.[71] The

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[64] Inquiry Into the Economic Relationship Between Television Broadcasting and Cable Television, 65 F.C.C.2d 9 (1977).

[65] Inquiry Into the Economic Relationship Between Television Broadcasting and Cable Television, 71 F.C.C.2d 632 (1979). The distant signal carriage rules limited the number of distant broadcast signals a cable operator was permitted to import to his service area. *Id.* at para. 60. The FCC determined that these distant signals had little impact on the audience for local broadcast television. *Id.* at paras. 99-100.

[66] Cable Television Syndicated Program Exclusivity Rules, 79 F.C.C.2d 663 (1980). These rules prohibited cable systems from duplicating the programming on local broadcast television through the importation of distant signals which contained the same programming. The rules applied with regard to a given time period before or after the local broadcast. *Id.* at paras. 14-16.

[67] *See infra* notes 99-101 and accompanying text.

[68] *See, e.g.*, 47 C.F.R. § 76.209 (1985) (Fairness Doctrine). The doctrine requires broadcasters to afford adequate opportunity for the presentation of opposing viewpoints on controversial issues of public importance. 47 C.F.R. § 76.209(a).

[69] This trend is exemplified by the deregulation of the airline industry. *See* Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (codified in scattered sections of 46 U.S.C.). For information on the impact of deregulation on the airline industry, see J. MILLER, THE AIRLINE DEREGULATION HANDBOOK (1981); Blumenthal, *Boom in Airline Travel Squeezes the Glamour Out*, N.Y. Times, Jan. 23, 1986, at A1, col. 1. The draft 1987 fiscal year budget of the Reagan Administration would abolish the oldest federal regulatory agency, the one hundred-year-old Interstate Commerce Commission (ICC). Pear, *Draft of Reagan Budget for 1987 Sees End to I.C.C. After 100 Years*, N.Y. Times, Dec. 18, 1985, at A1, col. 4. The ICC, which has authority to regulate railroads, trucking companies, and bus lines, is "counterproductive" and "inhibit[s] vigorous competition[,]" according to many economists and government officials. Pear, *supra*, at D23, col. 4; *see also* Tolchin, *Is the I.C.C. at the End of the Road?*, N.Y. Times, Jan. 12, 1986, § 4, at 4, col. 3.

[70] *See infra* notes 121-24 and accompanying text.

[71] *See supra* note 62 and accompanying text.

areas reserved for local regulation included authority to regulate rates for equipment installation as well as "regular subscriber services," those "regularly furnished to all subscribers."[72] These services are the basic cable programs; pay cable was federally preempted because it was available only to those subscribers who paid an additional fee above the monthly rate.

In 1974, the FCC elaborated on this federal-local division.[73] Local governments could continue to regulate "regular subscriber service," which included "all broadcast signal carriage and all . . . required access channels . . . ."[74] The FCC, however, expressly preempted "specialized programming for which a per-program or per-channel charge is made,"[75] the pay cable services.

The FCC reexamined this division of authority in 1983, in *In re Community Cable TV, Inc. (I)*.[76] Community Cable, an operator serving the Las Vegas area, requested the FCC to rule that federal preemption of rate regulation extended beyond pay cable services requiring a "per-program or per-channel" fee to pay cable programs "provided in tiers of services [and] offered to subscribers at a single package rate distinct from the rate charged for [basic] services."[77] The FCC agreed with Community Cable that preemption extended to all "non-basic program offerings," whether they were priced individually or grouped in tiers of services.[78] The FCC concluded that to draw the line between federal and non-federal authority based on the manner in which a service is sold would disrupt market continuity.[79] The FCC thus retained its basic (non-federal) versus non-basic (federal) distinction. The practical effect of the ruling, though, was to preempt many of the most attractive cable offerings. The city of Dallas asserted in opposition to Community Cable's petition that the right of a franchisor to regulate a majority of cable services now would be lost. This result seems contrary to the FCC's professed policy of dual regulation.[80]

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[72] 36 F.C.C.2d 141, para. 183 & app. A, at 219, § 76.31 (1972).

[73] Clarification of the Cable Television Rules, 46 F.C.C.2d 175 (1974).

[74] *Id.* at para. 84.

[75] *Id.*

[76] *In re* Community Cable TV, Inc., 95 F.C.C.2d 1204 (1983).

[77] *Id.* at para. 1. Community Cable wished to avoid state regulation of its "expanded tier," which included satellite-delivered services such as WTBS (Channel 17 in Atlanta), Cable News Network (CNN), and MTV, as well as a program guide and a New York Stock Exchange ticker. *Id.* at para. 3.

[78] *Id.* at paras. 16, 18.

[79] *Id.* at para. 21.

[80] *Id.* at para. 8.

The FCC reconsidered its decision in 1984, in *In re Community Cable TV, Inc. (II)*.[81] The FCC reiterated that preemption existed for all services, whether offered singly or in tiers, available only upon payment of an additional fee above the basic service rate.[82] Local governments retained the right to regulate the entire basic service tier, consisting of the "must-carry" signals, the locally-mandated access channels, and any other services stated in the franchise agreement as part of the basic tier.[83]

Both *Community Cable I* and *II* left the federal-local division unchanged. Yet the decisions were interpreted by the parties to the 1984 congressional negotiations as a boost to the interests of cable operators, who generally prefer minimal amounts of regulation. By specifically delineating the limits of local regulatory authority over subscriber rates, the FCC demonstrated how restricted that authority could be, depending upon the terms of the franchise agreement. Only those services offered in the basic service tier were subject to local regulation and the franchise could define the tier quite narrowly.[84] Following the enactment of the Cable Communications Policy Act of 1984,[85] the FCC was called on again to analyze the limits of local regulation of basic service.[86]

V. Judicial Scrutiny Of FCC Actions

The federal judiciary has frequently scrutinized the FCC's actions in the cable field. The Court of Appeals for the District of Columbia Circuit is empowered to review the rules adopted by the FCC,[87] and under the Administrative Procedure Act,[88] makes two separate inquiries. First it determines whether the FCC has acted within its delegated authority under the Communications Act.[89] Then beyond this threshold issue, the court decides whether the FCC's adopted rules and policies are the result of a

[81] *In re* Community Cable TV, Inc., 98 F.C.C.2d 1180 (1984).
[82] *Id.* at para. 13.
[83] *Id.* at 1186 n.6. Within the basic service tier, cities often include a wide variety of options. Wiley & Swanson, *New Cable Act Should Help Stabilize Industry*, Legal Times, Nov. 12, 1984, at 20, col. 1.
[84] *See supra* note 17 and accompanying text.
[85] Pub. L. No. 98-549, 1984 U.S. Code Cong. & Ad. News (98 Stat.) 2779 (to be codified at 47 U.S.C. §§ 601-639).
[86] *See infra* notes 209-38 and accompanying text.
[87] 47 U.S.C. § 402(b) (1982).
[88] 5 U.S.C. § 706 (1982).
[89] *See* Comment, *Radio Deregulation and the Public Interest: Office of Communication of the United Church of Christ v. Federal Communications Commission*, 4 Cardozo Arts & Ent. L.J. 169, 181 (1985); *see also infra* note 95 and accompanying text.

rational decisionmaking process.[90] Under this standard of review, the FCC usually receives only minimal scrutiny from the court.[91] In addition to this formal procedure for the review of FCC decisions, the FCC is subject to private suits brought in the federal courts under the judiciary's subject-matter jurisdiction.[92]

In 1968, in *United States v. Southwestern Cable Co.*, the Supreme Court upheld the FCC's authority to regulate cable television.[93] Although such power was not expressly authorized by the Communications Act,[94] the Court ruled that the FCC could act as long as it operated in a manner "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting."[95]

The federal courts have since ruled whether specific FCC actions fall within this "ancillary" authority. For example, the 1972 *Cable Television Report and Order*[96] was upheld in *American Civil Liberties Union v. FCC*.[97] The Ninth Circuit ruled that the FCC acted rationally and within the terms of its authority, even though the court admitted that it was possible to accept the ACLU's reasoning that the FCC should have acted differently.[98]

At other times, the federal courts have limited the FCC's jurisdiction, thus adding to the deregulatory trend in the industry. For instance, in *Home Box Office v. FCC*, the District of Columbia Circuit vacated all of the FCC's rules which sought to prevent operators of pay cable services from siphoning programs from broadcast television.[99] The Supreme Court, in *FCC v. Midwest Video Corp.*, overturned the FCC's requirements that cable opera-

[90] Comment, *supra* note 89, at 181.
[91] *Id. E.g.*, ACLU v. FCC, 523 F.2d 1344 (9th Cir. 1975); *see infra* notes 97-98 and accompanying text. For examples of stricter scrutiny by the courts, see *infra* notes 99-101 and accompanying text.
[92] J. Friedenthal, M. Kane, & A. Miller, Civil Procedure § 2.3 (1985). *E.g.*, Brookhaven Cable TV, Inc. v. Kelly, 428 F. Supp. 1216 (N.D.N.Y. 1977), *aff'd*, 573 F.2d 765 (2d Cir. 1978), *cert. denied*, 441 U.S. 904 (1979); *see infra* notes 102-04 and accompanying text.
[93] 392 U.S. 157, 168 (1968).
[94] *See supra* note 43.
[95] 392 U.S. at 178.
[96] *See supra* notes 58-62, 71-72 and accompanying text.
[97] 523 F.2d 1344 (9th Cir. 1975).
[98] *Id.* at 1350-51. The American Civil Liberties Union (ACLU) had attacked two FCC decisions, the refusal to treat access channels as subjecting cable operators to regulation as common carriers, and the decision to require programming on only one channel. *Id.* at 1349-50. The argument that access channels converted cable operators into common carriers was accepted by the Supreme Court in FCC v. Midwest Video Corp., 440 U.S. 689 (1979). *See infra* note 100. For information on access channels, see *supra* note 17.
[99] 567 F.2d 9, 36-43 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 829 (1977). The court struck down the rules because the FCC was unable to demonstrate the existence of any problem that would be remedied by the rules. The court doubted whether pay cable adversely impacted on the broadcast television audience. 567 F.2d at 25-28.

tors provide access channels.[100] The FCC's response to these limiting decisions was to proceed cautiously and to analyze the rationale for all of its cable rules.[101]

Preemption of pay cable by the FCC was approved in *Brookhaven Cable TV, Inc. v. Kelly*.[102] The plaintiff contested the law which created the New York State Commission on Cable Television because it gave the New York Commission authority to approve all rate changes without distinguishing between rates for basic and pay cable service.[103] The court found the New York law to be in violation of FCC policy. The Commission would be regulating pay cable despite its preemption and this preemption was consistent with the FCC's "ancillary" jurisdiction over cable.[104] The Second Circuit affirmed, noting that "[t]he policy to preempt has been shouted from the rooftops."[105]

The Supreme Court reexamined the FCC's authority to regulate cable television in 1984. In *Capital Cities Cable, Inc. v. Crisp*,[106] the Court ruled that FCC policy prevented the state of Oklahoma from requiring cable operators in that state to delete all advertisements for alcoholic beverages contained in the signals they retransmit to their subscribers.[107] According to the Court, the FCC had "unambiguously expressed its intent to preempt any state or local regulation of this entire array of signals carried by cable television systems."[108] The importance of *Capital Cities* lies in the Court's decision to omit language from *Southwestern Cable* which limited the FCC to doing only what is "reasonably ancillary" to its function as a regulator of television.[109]

Despite the sweeping language used in *Capital Cities*, it is unclear whether the court expanded the FCC's regulatory authority. The decision was, however, perceived as broadening the FCC's powers while concomitantly hindering the ability of state and local governments to regulate cable.[110] This view influenced the congressional negotiations which eventually resulted in the enactment of cable legislation.[111]

The impact of *Community Cable* was somewhat limited by *Cox Cable New Orleans, Inc. v. City of New Orleans*, in which a Louisiana district court affirmed local authority to regulate the rates for basic service.[112] Cox Cable claimed that it could remove from its basic service tier, arranged pursuant to the terms of its franchise, all programs but those carried on the "must-carry" channels. Cox Cable cited the FCC's *Community Cable II* decision[113] for the proposition that the FCC had preempted all decisions determining which programs would be offered in which tiers, regardless of whether basic service or pay cable was involved.[114] For the court to have agreed with Cox Cable would have been to sharply limit local power to regulate cable; an operator could have been able to ignore the terms of his franchise and remove all but the "must-carry" channels from local regulation.

The district court, however, disagreed with Cox Cable, ruling that *Community Cable II* only concerned tiering decisions for non-basic services.[115] The court cited *Capital Cities* as the test for determining whether an aspect of the cable industry had been preempted by the FCC. According to the district court, the test for preemption has three parts, all of which must be satisfied: the FCC must have authority to act, must have resolved to act, and must have acted reasonably.[116] The district court chose to first

[100] 440 U.S. 689, 700-09 (1979). The Court found the FCC's mandatory access rules to be outside of its "ancillary" authority. The rules required operators to allocate channels for various categories of users, who would then control the programming available on those channels. The operators would thus exhibit the characteristics of common carriers, according to the Supreme Court. This was outside of the FCC's authority to regulate cable because cable television is not a common carrier. For information on the connection between cable and common carriers, see *supra* note 47. For a discussion on access channels, see *supra* note 17.

[101] 1 CABLE TELEVISION LAW, *supra* note 10, at ¶ 5.05. The FCC was also responding to the increasingly strict scrutiny of the D.C. Circuit, the court with jurisdiction over the FCC's rules. That court, in *HBO*, criticized the FCC for indulging in "speculation and innuendo" in promulgating the anti-siphoning rules for pay cable. 567 F.2d at 50.

[102] 428 F. Supp. 1216 (N.D.N.Y. 1977) (subsequent history omitted).

[103] *Id.* at 1223.

[104] *Id.* at 1223-24; *see supra* note 95 and accompanying text.

[105] 573 F.2d 765, 768 (2d Cir. 1978) (citations and subsequent history omitted).

[106] 467 U.S. 691 (1984).

[107] *Id.* at 716.

[108] *Id.* at 701.

[109] The Court instead broadly suggested that *Southwestern Cable* "confirmed the FCC's general authority under the Communications Act to regulate cable television systems." *Id.* at 702; *see supra* note 95 and accompanying text.

[110] Friendly, *supra* note 37, at cols. 1-3. "From cable's point of view it is as if a mild-mannered FCC stepped into a phone booth and suddenly emerged with super powers." Monterosso, *'Crisp' Spurs Commission*, CABLE T.V. LAW & FINANCE, Aug. 1984, at 1. For the view that *Capital Cities* dramatically expanded FCC authority at the expense of local control, see Comment, *Cable Television Update—Capital Cities Cable, Inc. v. Crisp: Federalism and Frustration of Powers*, 19 U. RICH. L. REV. 177 (1984); Witt, *Cable Television Content Regulation after Crisp: Is There Anything Left?*, 17 URB. LAW. 277 (1985). For a less expansive view of *Capital Cities'* impact, see Comment, *The Growing Pains of Cable Television*, 7 CAMPBELL L. REV. 175 (1984).

[111] *See infra* notes 184-203 and accompanying text.

[112] 594 F. Supp. 1452 (E.D. La. 1984).

[113] *See supra* notes 81-84 and accompanying text.

[114] 594 F. Supp. at 1461, 1465-67.

[115] *Id.* at 1465. The staff counsel for the FCC filed an amicus brief arguing that the FCC had preempted the entire area of retiering. *Id.* at 1461 n.8.

[116] *Id.* at 1461. This test is similar to the two-part review under the Administrative Procedure Act. *See supra* notes 88-91 and accompanying text.

consider whether the FCC had any desire to preempt local regulation of basic service. Once the court decided that the FCC had no such desire, it did not have to analyze the FCC's authority or the reasonableness of its actions.[117] The court reasoned that the FCC's desire to have local regulation of basic service continue was evident in FCC decisions dating back to 1972, including *Community Cable II*.[118] *Cox Cable* was decided as the cable statute reached the House floor in October of 1984.[119]

VI. Congressional Action

In recent years, there have been numerous attempts to amend the Communications Act by adding to it language specifically mentioning cable television.[120] Congress' goal was to create a system of regulatory certainty in the industry so that cable could enter a period of long-term growth.[121] Both the system operators and the local governments want stability because it permits them to make long-term decisions. Operators must spend a great deal on capital expenditures before they can sign up subscribers.[122] Cities, in contrast, want the ability to regulate for the entire franchise term, which is typically ten to fifteen years long.[123] The situation became urgent when the FCC changed direction so quickly after announcing its comprehensive regulatory scheme.[124]

Bills encompassing cable television passed the Senate Commerce, Science, and Transportation Committee in 1981 and 1982.[125] The cable provisions of the first proposed statute were removed on the Senate floor.[126] The second never reached the

[117] 594 F. Supp. at 1461.

[118] *Id.* at 1462-67; *see supra* notes 81-84 and accompanying text. The FCC responded to the district court decision by stating that "cable systems [are] 'free to add, delete, or realign [their] service as long as the basic service contains all the signals mandated by the [FCC's] rules.' " Cox Cable New Orleans, Inc. v. City of New Orleans, Louisiana, 100 F.C.C.2d 717, para. 3 (1985), *citing In re* Community Cable TV, Inc., 98 F.C.C.2d 1180, para. 18 (1984).

[119] *See infra* text accompanying notes 184-86.

[120] For a summary of the legislative history, see S. Rep. No. 67, 98th Cong., 1st Sess. 12-15 (1983).

[121] *See, e.g.*, Cable Act, U.S. Code Cong. & Ad. News 2780 (to be codified at 47 U.S.C. § 601); *H.R. 4103 Hearings, supra* note 17, at 6 (statement of Cong. Matthew Rinaldo).

[122] H.R. Rep. No. 934, 98th Cong., 2d Sess. 25-26 (1984).

[123] *Id.*; T. Baldwin & D. McVoy, *supra* note 63, at 199.

[124] *See supra* notes 63-70 and accompanying text.

[125] S. Rep. No. 67, 98th Cong., 1st Sess. 12-15 (1983).

[126] The Telecommunications Competition and Deregulation Act of 1981, S. 898, was introduced in the Senate on April 7, 1981 and was passed by the Commerce, Science, and Transportation Committee on July 16, 1981. All but one of the bill's cable provisions were deleted upon passage of an amendment on the Senate floor. *Id.* at 12. The deletion was for procedural reasons, at the request of Senator Barry Goldwater of Ari-

full Senate because it passed the committee too late in the 97th Congress.[127] The committee, before voting in 1982, held hearings on various cable regulation topics where the contrasting views of the operators and cities were presented.[128]

In the belief that they cannot otherwise supervise the performance of an operator under the franchise, local governments want as much power over rate regulation as possible. Mayor Charles Royer of Seattle, Washington, representing the National League of Cities (NLC), testified before the Senate Committee that municipal rate regulation allows for "regular oversight of the cable operator's performance . . . ."[129] Mayor Betty Edmundson of Yakima, Washington added that operators would take advantage of rate deregulation by raising rates excessively, because they faced little or no competition due to their franchise monopolies.[130]

Cable operators, on the contrary, desire reduced regulation in order to compete freely with other technologies in the video marketplace. For example, James Hirshfield, Director of the National Cable Television Association (NCTA), the industry's primary trade organization, testified before the Committee that cable faced competition from all directions, including broadcast television and videocassette recorders. These technologies have largely escaped FCC regulation.[131] Hirshfield asked why cable was deemed to have a monopoly in each franchise area when it had a relatively small number of subscribers.[132]

After receiving this testimony, the Senate Commerce, Science, and Transportation Committee considered a bill with several provisions relevant to rate regulation.[133] When compared

zona, Chairman of the committee's Subcommittee on Communications. Goldwater had objected "to the addition of the cable provisions to the bill . . . without the benefit of hearings or debate in either the relevant Committee or Subcommittee." National League of Cities, U.S. Conference of Mayors, and Arnold & Porter, Cable Franchising and Regulation: A Local Government Guide To The New Law I-18 & n.7 (Mar. 1985) (construing 127 Cong. Rec. S23,279-81 (Oct. 6, 1981)).

[127] The Cable Telecommunications Act of 1982, S. 2172, was introduced in the Senate on March 4, 1982 and was passed by the Commerce, Science, and Transportation Committee on July 22, 1982. S. Rep. No. 67, 98th Cong., 1st Sess. 13 (1983).

[128] *Cable Hearings, supra* note 38; *Cable Television Regulation: Hearings on S. 2172 Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation*, 97th Cong., 2d Sess. (1982) [hereinafter cited as *S. 2172 Hearings*].

[129] *Cable Hearings, supra* note 38, at 15.

[130] *Id.* at 40-41.

[131] *Id.* at 17-20.

[132] *Id.* at 21.

[133] *See* S. 2172, 97th Cong., 2d Sess. (1982), *cited in Cable Hearings, supra* note 38, at 163-82.

with the language of the statute finally enacted in 1984,[134] these provisions evidence Congress' steady retreat from regulation. The draft debated by the Committee left the power of cities to regulate basic service rates largely intact.

Under the committee draft, the cities were permitted to regulate rates for basic service and for the PEG channels[135] specified in the franchise agreement.[136] "[B]asic service" was defined as including the "retransmission of broadcast signals."[137] This draft would allow cities to regulate all retransmitted signals, whether imported from a distance or furnished locally under the FCC's "must-carry" rules.[138] The definition also did not distinguish between services provided "to all subscribers," which is how the FCC defines basic service,[139] and those broadcast television offerings provided to subscribers paying an extra fee, which are pay cable programs. The cities' authority to regulate basic service was thus potentially greater than that permitted under FCC rules. The Senate, however, never voted on this draft.[140]

Senator Barry Goldwater introduced S. 66 (S. 1) at the beginning of the 98th Congress in January 1983.[141] This latest legislative attempt followed the FCC's *Community Cable I* decision that restricted the number of programs cities could regulate.[142] The bill was also accompanied by a deregulatory trend in Washington.[143] S. 1 was the product of a compromise between the NCTA and the NLC, two organizations striving toward a common goal from opposite directions. Both sought the creation of a consistent and coherent regulatory framework.[144] The NCTA sought deregulation, yet recognized that an organized regulatory situation provided the stability needed for extensive investments.[145] The NLC tried to protect the cities' regulatory authority, yet realized that a statutory approach was better than the

[134] *See infra* text accompanying notes 204-08.
[135] *See supra* note 17 (information on PEG channels).
[136] S. 2172, 97th Cong., 2d Sess. § 607(a)-(b) (1982), *cited in Cable Hearings, supra* note 38, at 174-75.
[137] S. 2172, 97th Cong., 2d Sess. § 604(1), *cited in Cable Hearings, supra* note 38, at 166.
[138] *See supra* note 59.
[139] *See supra* note 72 and accompanying text.
[140] S. Rep. No. 67, 98th Cong., 1st Sess. 15 (1983).
[141] S. 66, 98th Cong., 1st Sess. (1983), *cited in S. 66 Hearings, supra* note 37, at 3-23.
[142] *See supra* notes 76-80 and accompanying text.
[143] *See supra* note 69.
[144] "[T]he industry would prefer to have its status affirmed by statute rather than depend on the whims of courts and the FCC." Harris, *Cable in No-Compromise Mood After Big Win in Supreme Court; Industry May Nix House Bill*, Variety, July 11, 1984, at 50, col. 1; *see also* Goodale, *Is the New Cable Act A Disappearing Act?*, N.Y.L.J., May 10, 1985, at 1, col. 1.
[145] *See supra* note 123.

erratic decisions of the FCC.[146]

S. 1 granted the FCC authority to preempt all local regulation of rates in certain situations. The FCC was directed to end local regulation of rates where it determined that "reasonably available alternatives to basic service programing [existed] in the particular geographic area or market."[147] The FCC was given a list of criteria for use in making that decision, including the number and size of other "basic service" providers and the characteristics of their program offerings.[148] These guidelines are so general that it is difficult to imagine a situation in which the deregulation-minded FCC could not have found "reasonably available alternatives."[149]

The version of S. 66 that reached the Senate floor in late 1983 (S. 2) limited cities still further.[150] The definition of "basic service" had become significantly narrower. The statute defined the term as "the lowest cost tier, other than a tier offered at a discounted fee, of service which is available to subscribers for a fee [including] the provision of retransmission of local broadcast signals [and] public, educational, and governmental programming . . . ."[151] This definition limited municipal authority in at least two ways.

First, only local broadcast signals are covered, not distant signals. Programs transmitted from afar, such as WTBS (Channel 17 in Atlanta), would be exempt from local regulation. Second, only "the lowest cost tier" is subject to regulation. If such a tier encompasses the programs offered for the basic monthly rate, then it falls within the FCC definition of "basic service" because all subscribers pay this monthly fee.[152] In a situation where basic service is broken down into separate tiers at different rates, "the lowest cost tier" constitutes less than "basic service." An

[146] Harris, *supra* note 144, at 50, col. 1. For information on FCC decisions, see *supra* notes 45-70 and accompanying text.
[147] S. 66, 98th Cong., 1st Sess. § 607(a)(2) (1983), *cited in S. 66 Hearings, supra* note 37, at 15.
[148] S. 66, 98th Cong., 1st Sess. § 607(a)(3), *cited in S. 66 Hearings, supra* note 37, at 15.
[149] The FCC was directed to examine "(A) the number and size of other providers of [basic] programing service; (B) the extent to which such programing service is available from other providers; (C) the ability of such other providers to make such programing readily available at comparable rates, terms, and conditions; and (D) other indicators of the extent of competition." S. 66, 98th Cong., 1st Sess. § 607(a)(3), *cited in S. 66 Hearings, supra* note 37, at 15.
[150] S. 66, 98th Cong., 1st Sess. (1983), *cited in* S. Rep. No. 67, 98th Cong., 1st Sess. 33-43 (1983).
[151] S. 66, 98th Cong., 1st Sess. § 603(1), *cited in* S. Rep. No. 67, 98th Cong., 1st Sess. 34 (1983). For information on access channels, see *supra* note 17.
[152] *See supra* note 72 and accompanying text.

equally vague term is "discounted fee."[153]

Furthermore, S. 2 permitted an operator under certain circumstances to institute automatic rate increases that did not require municipal approval. For up to three years, upon thirty days advance notice, the operator could raise rates by an amount not to exceed five percent annually.[154] Any additional rate request would go into effect if not acted upon within ninety days.[155] Increases were not permitted when the franchise provided for a fixed basic service rate over a specified period of time.[156] The Senate seemed to respond to the cable industry's complaints that franchisors were often negligent or vindictive in their response to rate requests.[157]

S. 2 omitted the provision which granted the FCC authority to end local regulation. This was little consolation for municipal governments, as it was replaced by a provision allowing for the automatic removal of regulation where a "cable system is located within the Grade B contour of not less than four television signals of which there shall be one affiliate of each of the three major television networks."[158] Under the FCC rules, a Grade B contour usually encompasses a radius of sixty to ninety miles,[159] a distance wide enough to cover most cities and cable systems. Thus, few cities would avoid losing their authority to regulate basic service rates.[160] The effect of this exemption from regulation would be delayed for a period equal to the greater of five years or one-half of the remaining franchise term.[161]

The Senate passed S. 66 toward the end of its 1983 session without any further changes.[162] The bill moved on to the House,

[153] S. 66, 98th Cong., 1st Sess. § 603(1) (1983), *cited in* S. Rep. No. 67, 98th Cong., 1st Sess. 34 (1983); *see* Botein, *Drafting, Other Problems Seen in Cable-TV Bill*, N.Y.L.J., June 10, 1983, at 1, col. 3.

[154] S. 66, 98th Cong., 1st Sess. §§ 607(b)(1), (2) (1983), *cited in* S. Rep. No. 67, 98th Cong., 1st Sess. 38 (1983).

[155] S. 66, 98th Cong., 1st Sess. § 607(c), *cited in* S. Rep. No. 67, 98th Cong., 1st Sess. 38 (1983).

[156] S. 66, 98th Cong., 1st Sess. §§ 607(b)(1), (2), *cited in* S. Rep. No. 67, 98th Cong., 1st Sess. 38 (1983).

[157] *See, e.g., S. 66 Hearings, supra* note 37, at 126-32 (statement of Thomas Wheeler, NCTA President).

[158] S. 66, 98th Cong., 1st Sess. § 607(d)(1) (1983), *cited in* S. Rep. No. 67, 98th Cong., 1st Sess. 38-39 (1983). "A Grade B contour is a line on a map connecting points of equal strength broadcast from a given television transmitter. Reception within this perimeter is expected to meet or exceed a specific standard." 1 Cable Television Law, *supra* note 10, at ¶ 5.05[5][a] n.21; *see* 47 C.F.R. § 73.683(a) (1985).

[159] Botein, *supra* note 153, at 2, col. 3.

[160] *Id.*

[161] S. 66, 98th Cong., 1st Sess. § 607(d)(2) (1983), *cited in* S. Rep. No. 67, 98th Cong., 1st Sess. 38-39 (1983).

[162] 1983-84-1 Cong. Index (CCH) 21,003.

which chose to concentrate on its own piece of cable legislation. Representative Timothy Wirth of Colorado had introduced H.R. 4103 (H.R. 1),[163] the result of another NCTA-NLC compromise.[164] Hearings were convened by the Subcommittee on Telecommunications, Consumer Protection, and Finance of the Energy and Commerce Committee.[165] Surprisingly, the testimony revealed dissension within the municipal ranks.

The United States Conference of Mayors, representing the largest cities, claimed that H.R. 1 would excessively hamper local regulation.[166] The Conference angrily claimed that the legislative debate was being manipulated by "threats and coercion" from the NCTA.[167] The Conference demanded a change in the definition of "basic service" so that all offerings not paid on a per-channel or per-program basis would be included. It also asked for the removal of the automatic rate increase provision.[168]

The United States Conference of Mayors had little impact on Congress, possibly because the NLC backed H.R. 1 as presented. The mayors of the NLC were prepared to settle for a diminished regulatory role. Some played down their loss by claiming that they could still exercise control over operators, even with limited influence over rate decisions.[169] For example, Mayor Bob Martinez of Tampa, Florida told the subcommittee that cities could "enforce service, system facility, and equipment requirements and [could] ensure the delivery of services."[170] Tampa, he said, retained its dominion over cable operators by using franchise provisions that allowed for, among other things, the periodic review of the franchise.[171]

H.R. 1, in the end, retained the definition of "basic service" used in S. 66, passed by the Senate, but added a reference to what was specified as "basic" in the franchise agreement.[172] The definition in H.R. 1 thus limited the cities' rate regulatory authority to "basic service," as defined by the FCC,[173] since local gov-

[163] H.R. 4103, 98th Cong., 2d Sess. (1984), *cited in H.R. 4103 Hearings, supra* note 17, at 669-702.

[164] *H.R. 4103 Hearings, supra* note 17, at 10-13 (statement of Charles Royer, NLC President).

[165] *See generally id.*

[166] *Id.* at 195-97 (statement of Mayor Bob Bolen of Fort Worth, Texas).

[167] *Id.* at 197 (statement of Mayor Bob Bolen of Fort Worth, Texas).

[168] *Id.* at 197-98 (statement of Mayor Bob Bolen of Fort Worth, Texas).

[169] *Id.* at 205-12 (statement of Mayor Bob Martinez of Tampa, Florida).

[170] *Id.* at 206 (capitals omitted).

[171] *Id.* at 206-07 (capitals omitted).

[172] H.R. 4103, 98th Cong., 2d Sess. § 602(2) (1984), *cited in H.R. 4103 Hearings, supra* note 17, at 671.

[173] *See supra* note 72 and accompanying text.

ernments may only regulate that which is not preempted by the FCC.[174] H.R. 1 included the large exemption from regulation in S. 66 allowing the FCC to end local regulation in a situation where a cable system was within ninety miles of four broadcast television stations, including at least one affiliate of the major networks.[175] The provision for automatic rate increases was retained in H.R. 1 as well.[176]

The House Energy and Commerce Committee passed the bill on August 1, 1984 in a version (H.R. 2) which reduced local authority over basic service still further.[177] "[B]asic cable service" was now restricted to only "the retransmission of local television broadcast signals[,]"[178] and all local rate regulation of existing franchises would cease after four years unless the FCC determined that "a cable system [was] not subject to effective competition."[179] For new or renewed franchises, this determination would be made immediately.[180] The standards and definitions under which this decision would be made were left for the FCC to create. Some suggestions were offered, but they were presented in the Committee report, not in the statute itself.[181]

The FCC determination of "effective competition" is critical to an analysis of local regulatory power. Presumably, the FCC would create a definition which would allow for the finding of a great deal of competition; the more competition found, the less the amount of local rate regulation.[182] Furthermore, the FCC was granted permission to redefine "basic cable service" for after the end of the four-year period of local regulation of existing franchises.[183] The prospect of a new definition runs counter to the goal of regulatory certainty sought by the respective parties to the legislative negotiations.

The version of H.R. 4103 that reached the House floor (H.R.

174 *See supra* notes 30-31 and accompanying text.
175 *See supra* notes 158-61 and accompanying text.
176 *See supra* notes 154-56 and accompanying text.
177 H.R. 4103, 98th Cong., 2d Sess., *cited in* H.R. REP. No. 934, 98th Cong., 2d Sess. 1-19 (1984).
178 H.R. 4103, 98th Cong., 2d Sess. § 602(2), *cited in* H.R. REP. No. 934, 98th Cong., 2d Sess. 2 (1984).
179 H.R. 4103, 98th Cong., 2d Sess. § 623(b)(1), *cited in* H.R. REP. No. 934, 98th Cong., 2d Sess. 8 (1984).
180 H.R. 4103, 98th Cong., 2d Sess. § 623(b)(1), *cited in* H.R. REP. No. 934, 98th Cong., 2d Sess. 8 (1984).
181 H.R. 4103, 98th Cong., 2d Sess. §§ 623(b)(1), (2), *cited in* H.R. REP. No. 934, 98th Cong., 2d Sess. 68 (1984) (see also H.R. REP. No. 934 at 66).
182 In fact, the FCC did create a definition allowing for the finding of much competition. *See infra* notes 212-36 and accompanying text.
183 H.R. REP. No. 934, 98th Cong., 2d Sess. 66 (1984). For information on the FCC's new definition of "basic cable service," see *infra* notes 235-38 and accompanying text.

3) contained further changes.[184] By this time, the regulatory climate had been altered by the FCC's decision in *Community Cable II*[185] and the Supreme Court's ruling in *Capital Cities*.[186] The result was a new attitude at the NCTA. The FCC's increased authority that resulted from these rulings convinced the NCTA that it might be in a better position without cable legislation. Although the NCTA was passing up the certainty a statutory approach would provide, it believed that the goal of deregulation could best be achieved by a deregulation-minded FCC able to expand its preemption of local regulation.[187]

NCTA President James Mooney declared that the FCC was now ready to "take [cities] out of the cable regulation business entirely."[188] Despite this attitude, the NCTA did resume negotiations with the NLC, although the decision to do so was not without opposition within the NCTA.[189] Most likely, the members of the NCTA thought that passage of the bill would ensure their ability to increase subscriber rates sooner than having to wait until all court reviews of FCC actions were completed.[190] Additionally, the organization may have been reluctant to abandon its laborious efforts so close to the passage of legislation.[191]

The United States Conference of Mayors contrarily advocated abandonment of H.R. 3. The Conference discounted the value of an enacted statute because it believed local governments had little regulatory authority left to lose. It also hoped the FCC might one day reverse its deregulatory course.[192]

H.R. 3 contained changes that benefited the NCTA. The provision allowing for the end of local regulation of basic service was amended so that this would occur in two rather than four years.[193] A new section promised operators that they would not be forced "to restore, retier, or reprice any cable service which was lawfully eliminated, retiered, or repriced as of September 26,

184 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 2779.
185 *See supra* notes 81-84 and accompanying text.
186 *See supra* notes 106-10 and accompanying text.
187 D. BRENNER & M. PRICE, *supra* note 22, at § 2.05[1]; Harris, *supra* note 144, at 50, col. 1. Following *Community Cable II* and *Capital Cities*, the compromise underlying H.R. 4103 was "no longer reflective of the present legal status of cable television." Effros, *H.R. 4103/S. 66 It's Now Law!—How It Happened and Why*, 11 C.A.T.J. 6 (Nov. 1984).
188 Harris, *Court, FCC Give Nod to Industry*, Variety, July 18, 1984, at 134, col. 4.
189 *Id.*
190 Goodale, *supra* note 144, at 1, col. 1.
191 Harris, *supra* note 144, at 50, col. 1.
192 Friendly, *supra* note 37, at col. 1.
193 H.R. 4103, 98th Cong., 2d Sess. § 623(c); 130 CONG. REC. H10,427, H10,430 (daily ed. Oct. 1, 1984).

1984."[194] This meant that those operators who repackaged their offerings in reliance on *Community Cable II*[195] and who did so before *Cox Cable*[196] could not be forced to return to their previous arrangements.[197] As a result, many operators were successfully able to avoid the service requirements of their franchise agreements.[198]

The political realities were evident in the remarks offered on the House and Senate floors. Members of Congress recognized that H.R. 3 represented the culmination of a labyrinthinian negotiating process between operators and franchisors. They were thus reluctant to stop the movement of the legislation when passage was near.[199] Others announced support in order to avoid further reductions in the cities' regulatory authority. Congressman Edward Markey of Massachusetts opposed most of the bill's provisions, yet supported the legislation because, without a statute on the books, "our cities will be robbed of their control over cable TV."[200] He described deregulation as a "crippling force" unleashed upon consumers by the FCC and the Supreme Court.[201]

At long last, comprehensive cable legislation cleared both houses of Congress on October 11, 1984.[202] The Cable Communications Policy Act of 1984 was signed into law on October 30 by President Reagan.[203] The long and tortuous move toward regulatory certainty had finally reached its end.

VII. The Outlook For Rate Regulation

Following the enactment of the Cable Communications Policy Act of 1984, the cities' remaining authority to regulate the rates cable operators charge their subscribers can be readily determined. The statute leaves one aspect of FCC policy unchanged—cities are preempted from regulating pay cable.[204] For a period of two years, they are permitted to regulate basic service rates for existing systems, those franchised on or before December 29, 1984. At the end of that period, regulation continues only if the cable system is not subject to "effective competition." For new cable systems, those franchised after December 29, 1984, deregulation except in the absence of "effective competition" begins immediately.[205]

The statute further limits local authority in three ways. First, only the retransmission of local broadcast signals is specifically included in the definition of "basic cable service." Omitted are other broadcast services that, because they are offered "to all subscribers," could have been construed as "basic" under the FCC definition.[206] Second, franchisors must accept retiering by operators who responded to *Community Cable II* by September 26, 1984.[207] Finally, operators may institute certain rate increases without municipal approval.[208] The cities' prime enforcement mechanism, the regulation of subscriber rates, has been eliminated almost entirely by the statute.

Furthermore, the FCC was directed by the statute to define "effective competition" by the end of April 1985.[209] Its ruling all but ends local regulation of basic service rates.[210] The FCC in December 1984 had expressed its desire to create a definition that would allow for "identification of those situations where a cable system may have sufficient market power to take undue advantage of its subscribers."[211] The FCC looked to the report accompanying H.R. 4103 (H.R. 2) for guidance.[212] The report directed the FCC to "consider the number and nature of services available from alternative sources."[213] The FCC was asked to

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[194] H.R. 4103, 98th Cong., 2d Sess. § 7(b); 130 Cong. Rec. H10,427, H10,435 (daily ed. Oct. 1, 1984). The word "lawfully" was included in the new section in order to permit court challenges to such "retiering." 130 Cong. Rec. H10,445 (daily ed. Oct. 1, 1984) (statement of Rep. Tauzin).

[195] *See supra* notes 81-84 and accompanying text.

[196] *See supra* notes 112-18 and accompanying text.

[197] H.R. Rep. No. 934, 98th Cong., 2d Sess. 24-25 (1984).

[198] *Id.; see also* Wiley & Swanson, *supra* note 83.

[199] Senator Packwood of Oregon referred to the "long and often bumpy road" the legislation had travelled. 130 Cong. Rec. S14,283 (daily ed. Oct. 11, 1984). Congressman Oxley of Ohio asked his colleagues to support the compromise legislation, even if they opposed some sections of it, in order not to waste the effort put into passing the statute. 130 Cong. Rec. H10,442 (daily ed. Oct. 1, 1984).

[200] 130 Cong. Rec. H10,444 (daily ed. Oct. 1, 1984).

[201] *Id.* Congressman Markey was presumably referring to the *Community Cable II* and *Capital Cities* decisions. *See supra* notes 81-84 & 106-10 and accompanying text.

[202] N.Y. Times, Oct. 12, 1984, at A15, col. 1.

[203] N.Y. Times, Oct. 31, 1984, at A1, B8, cols. 1, 1. The statute has been called "the most significant piece of communications legislation in over fifty years." Goodale, *supra* note 144, at 1, col. 1.

[204] *See supra* notes 72-75 and accompanying text.

[205] *See supra* notes 178-81 and accompanying text.

[206] *See supra* note 72 and accompanying text.

[207] *See supra* note 194 and accompanying text.

[208] *See supra* notes 154-56 and accompanying text.

[209] *See supra* notes 178-81 and accompanying text.

[210] *See infra* notes 232-34 and accompanying text.

[211] Amendment of Parts 1, 63 and 76 of the Commission's Rules to Implement the Provisions of the Cable Communications Policy Act of 1984, Notice of Proposed Rule Making, December 11, 1984, MM Docket No. 84-1296, FCC 84-612, 49 Fed. Reg. 48,765, para. 41 (1984).

[212] *Id.* (citing H.R. Rep. No. 934, 98th Cong., 2d Sess. 66 (1984)).

[213] H.R. Rep. No. 934, 98th Cong., 2d Sess. 66 (1984). The House wanted the FCC to make a traditional antitrust analysis, focusing on the cross-elasticity of demand be-

create objective criteria that could be employed "on a community-by-community basis."[214]

The FCC decided in December to base its standard only on the availability of broadcast signals in a franchise area.[215] The FCC ruled that competition for basic service would exist if a subscriber could disconnect his service and satisfactorily receive local signals over-the-air on broadcast television.[216] The FCC was then left with a decision as to how many local signals in a franchise area constituted sufficient competition.[217] The FCC chose not to include alternative video technologies[218] in its analysis because it did not believe they offered enough local broadcast signals to compete with cable.[219]

The NLC, however, urged the FCC to consider these other technologies because they offered many of the programs presented on cable.[220] This position represented a switch for the NLC. While the cable statute was being negotiated, the NLC claimed that operators enjoyed a monopoly and faced little competition.[221] Now the organization accepted the NCTA's argument that cable and the alternative technologies competed for consumer dollars.[222] The NLC decided that regulation should end only when three conditions exist in a franchise area: (1) the cable system is located within thirty-five miles of five or more broadcast

tween cable television and all other video services. The FCC was directed to consider the interchangeability of use, in each separate market area, between cable and the other services. Rice & Botein, *The Ambivalent Nature of the Cable Communications Policy Act of 1984: An Analysis*, N.Y.L.J., March 22, 1985, at 5, cols. 1, 3. The FCC ignored these suggestions, choosing instead to consider only the availability of broadcast television signals in each market area. *See infra* notes 215-19 and accompanying text.

214 H.R. Rep. No. 934, 98th Cong., 2d Sess. 66 (1984).

215 49 Fed. Reg. 48,765, paras. 43-44 (1984).

216 *Id.*

217 *Id.*

218 *See supra* note 20.

219 49 Fed. Reg. 48,765, para. 45 (1984). Access channels were also omitted from the standard because of what the FCC described as consumer disinterest in them. *See supra* note 17. This decision, however, ignores the basic purpose of PEG channels, which provide otherwise-silent groups and individuals in society with access to the "marketplace of ideas." Meyerson, *The Cable Communications Policy Act of 1984: A Balancing Act on the Coaxial Wires*, 19 Ga. L. Rev. 543, 570 (1985) (interpreting H.R. Rep. No. 934, 98th Cong., 2d Sess. 30 (1984)). To guarantee an adequate supply of access channels in a franchise area, the FCC might have considered a two-tiered approach. Irrespective of the availability of broadcast television signals, local regulation of the tiers containing PEG channels would occur where meaningful opportunity for these groups and individuals did not exist. Meyerson, *supra*, at 570.

220 Amendment of Parts 1, 63 and 76 of the Commission's Rules to Implement the Provisions of the Cable Communications Policy Act of 1984, Comments of the National League of Cities, January 28, 1985, MM Docket No. 84-1296, FCC 84-612, para. 23 [hereinafter cited as Comments of the National League of Cities].

221 *See supra* notes 129-30 and accompanying text.

222 *See supra* notes 131-32 and accompanying text.

signals, including affiliates of all three major networks and an educational or PBS (Public Broadcasting Service) station; (2) twenty percent of the households subscribe to a MDS or DBS system[223] with five or more channels; and (3) the cable system has a penetration rate[224] of under seventy percent.[225] The existence of these three conditions in a franchise area would constitute "effective competition," according to the NLC.[226]

The organization further stated that Congress did not intend for the FCC to look solely at broadcast signals. It claimed that Congress contemplated such a standard only to omit the relevant language in the final version of H.R. 4103 (H.R. 3).[227] S. 66, passed by the Senate in 1983 (S. 2), directed the FCC to end regulation if a cable system is near "four television signals of which there shall be one affiliate of the three major television networks."[228] The statute enacted in 1984, however, did not include such a provision. Finally, the NLC told the FCC that if it insisted on scrutinizing only broadcast television and not the other video technologies, the minimum number of channels providing "effective competition" would be ten.[229]

The cable operators, in seeking deregulation, agreed with the FCC that only broadcast television must be considered.[230] The NCTA stated that the presence of only two signals provided sufficient competition.[231] The FCC ruled on April 11, 1985 that "a cable system will be considered to face effective competition whenever the franchise market receives three or more . . . broadcast signals."[232] Most cable systems will now escape regulation. The NCTA estimated that seventy-five percent of all systems

223 *See supra* note 20.

224 *See supra* note 24.

225 Comments of the National League of Cities, *supra* note 220, at para. 82.

226 *Id.*

227 Comments of the National League of Cities, *supra* note 220, at para. 23; *see supra* notes 179, 193, & 212-14 and accompanying text.

228 *See supra* notes 158-61 and accompanying text.

229 *Controls easing on cable TV rates*, Record (Hackensack, N.J.), April 12, 1985, at A1, A16, cols. 3, 3 [hereinafter cited as *Controls*].

230 Amendment of Parts 1, 63 and 76 of the Commission's Rules to Implement the Provisions of the Cable Communications Policy Act of 1984, Reply Comments of the National League of Cities, February 11, 1985, MM Docket No. 84-1296, FCC 84-612, paras. 37-42 [hereinafter cited as Reply Comments of the National League of Cities].

231 *Id.* at para. 37.

232 Amendment of Parts 1, 63 and 76 of the Commission's Rules to Implement the Provisions of the Cable Communications Policy Act of 1984, Report and Order, 58 Rad. Reg.2d (P & F) para. 100 (1985). Furthermore, cities have the burden of demonstrating that the broadcast signals are neither "significantly viewed" nor located within a Grade B contour. Effros, *Commission Rules on "Effective Competition"—Three Signals is* [sic] *Enough*, 12 C.A.T.J. 24 (June 1985). For a discussion on "significantly viewed" signals, see *supra* note 47. For a discussion on Grade B contours, see *supra* note 158.

serving more than ninety percent of cable subscribers will become deregulated.[233] One city official stated that the FCC's ruling leaves "[l]arge parts of the country . . . at the mercy of cable operators."[234]

In the same April 1985 ruling, the FCC announced a new definition of "basic cable service" which differs from the one in the cable statute[235] and that would apply to cable systems franchised after December 29, 1984. Such service was now defined as "the tier . . . regularly provided to all subscribers that includes the retransmission of all must-carry broadcast television signals . . . and the [PEG] channels, if required by a franchising authority."[236] The FCC claimed that section 623(b) of the statute, which directed the FCC to create the standards under which franchisors could regulate rates, gave the FCC discretion to change the definition.[237] The significance of the new definition is that a franchising authority may now regulate only the one tier of service offered to all subscribers which includes all of the retransmitted local broadcast signals and the PEG channels. Since the statute treated as "basic cable service" any tier including local signals, an operator offering such signals on several of his tiers of service would be subject under the statutory definition to regulation on all of those tiers.[238]

Now that cities have lost practically all control over subscriber rates, only market forces can restrain rate increases. The cable industry maintains that competition from the various entertainment media and from the many communications technolo-

[233] *Controls, supra* note 229, at A1, col. 6.

[234] *Id.* at A16, col. 4 (statement of Michael Stover, an assistant city administrator in Lakewood, Cal.). Another estimate is that the FCC standard will subject only "two or three percent of the nation's population" to regulation. Rice & Botein, *supra* note 213, at 5, col. 3.

[235] *See supra* note 178 and accompanying text.

[236] 58 RAD. REG.2d (P & F) para. 118, at 33.

[237] *Id.* at paras. 116-17. The Cable Act itself is silent on the issue of altering the statutory definition. *See* Cable Act, U.S. CODE CONG. & AD. NEWS 2788-89 (to be codified at 47 U.S.C. §§ 623(b)(1), (2)). The legislative history, however, permitted the FCC to "fashion a definition of basic cable services most appropriate to achieve the purpose of the regulations, consistent with the provisions of [the Cable Act]." H.R. REP. No. 934, 98th Cong., 2d Sess. 66 (1984). Whether the FCC's new definition is consistent with the provisions of the Cable Act is unclear. According to the same House report, the intention of the Energy and Commerce Committee is "that all service tiers that meet the [statutory] definition be considered as basic cable service. In some franchises this will mean that basic cable service includes multiple service tiers." H.R. REP. No. 934, 98th Cong., 2d Sess. 40 (1984).

[238] *See supra* note 178 and accompanying text. The new definition sharply limits local regulatory authority. Under the statute, rate regulation was allowed for any tier that contained "basic service" components, such as the "must-carry" signals, even if the tier was predominantly composed of pay cable offerings. Now local regulation is permitted only for the one tier that includes nothing but the "basic service" components.

gies will prevent unreasonable escalations.[239] For example, a 1982 study commissioned by the NCTA suggested that a four or five channel program service could meet much of the demand for cable's non-broadcast television offerings.[240] The authors of the study reasoned that consumers desire only a few such programs and ignore most cable channels. These technologies, therefore, need offer only a few channels in order to be competitive with cable.[241] The NCTA also argues that if subscribers reject so many cable offerings presently, cable cannot risk further opposition by drastically raising rates.[242]

Supporters of cable regulation claim to the contrary that operators have little to fear by raising rates because they operate monopolies immune to competitive pressures.[243] Within a franchise area, operators almost always do not compete with other cable companies.[244] After a franchise expires, renewal is usually granted.[245] Despite this, the NCTA claims that local governments sometimes threaten to reject renewal requests in order to force changes in the language of franchise agreements.[246]

Proponents of regulation also see little prospect of competition from other video technologies. A 1983 report on the prospect for competition concluded that "cable's significant technological and economic advantages will probably make it the dominant medium of the future, barring unforeseen technological or regulatory developments."[247] The study emphasized the number and variety of programs on cable. Broadcast television and alternative technologies cannot possibly compete when cable offers something for everybody.[248] The report cited MDS and

[239] *See generally S. 2172 Hearings, supra* note 128, at 209-37 (statement of Thomas Wheeler, NCTA President).

[240] J. POTTLE & P. BORTZ, THE IMPACT OF COMPETITIVE TECHNOLOGIES ON CABLE TELEVISION xi (Mar. 1982) (available from the NCTA).

[241] *Id.* at xi-xii.

[242] *S. 2172 Hearings, supra* note 128, at 209-37 (statement of Thomas Wheeler, NCTA President).

[243] *See generally H.R. 4103 Hearings, supra* note 17, at 195-201 (statement of Mayor Bob Bolen of Fort Worth, Texas); *id.* at 311-29 (statement of Samuel Simon, Executive Director, Telecommunications Research and Action Center).

[244] D. BRENNER & M. PRICE, *supra* note 22, at § 7.06[2][a]. According to a study conducted at Princeton University for Ralph Nader's Center for the Study of Responsive Law, the operator "will operate as a natural monopoly in each discrete geographic market." Effron, *Cable Regulation Warning*, L.A. Daily J., Sept. 20, 1983, at 5, col. 1.

[245] *Id.*

[246] *H.R. 4103 Hearings, supra* note 17, at 55-56 (statement of Thomas Wheeler, NCTA President).

[247] Noam, *Local Distribution Monopolies in Cable Television and Telephone Service: The Scope For Competition*, in TELECOMMUNICATIONS REGULATION TODAY AND TOMORROW 351, 359 (E. Noam ed. 1983).

[248] *Id.* at 359-65.

DBS systems as examples of technologies that are unable to compete because of their limited offerings.[249] At the same time, cable's ability to segment the television market easily and efficiently, by a process called "narrowcasting," makes it an increasingly popular medium for advertisers. Broadcast television does not have this capability because it is available to anyone with a television set.[250]

VIII. Local Regulatory Authority Under Other Sections Of The Cable Communications Policy Act Of 1984

Having lost their authority to regulate rates, local governments may wish to rely on other provisions in the Cable Communications Policy Act. The statute, the result of a compromise between the NCTA and the NLC, left open the possibility that other sections of the statute would provide the cities with sufficient authority to control cable operators. But those additional provisions do not increase franchisors' regulatory powers and may actually reduce them.

Perhaps the most important regulatory provision not involving subscriber rates is section 624(c), which permits a franchising authority to enforce all existing franchise requirements concerning programming, service, and equipment for the life of the franchise.[251] A major exception to this is the provision allowing for retiering of services in the wake of *Community Cable II*.[252] With regard to new franchises, an operator cannot be required to provide specific programming services,[253] but an offer to furnish "broad categories of video programming" is enforceable.[254] Requirements for facilities and equipment are likewise binding.[255] In general, requirements for current franchises remain in force, but regulatory authority is limited with respect to the program offerings of new franchises.

Operators, according to section 625, may easily modify their franchise obligations.[256] Programming may be discontinued or

[249] *Id.* For a description of MDS and DBS systems, see *supra* note 20.
[250] Cable's audience is easily broken down into the subscribers for each program or channel. In contrast, broadcast television has only one audience less susceptible to division. Noam, *supra* note 247, at 363-64.
[251] Cable Act, 1984 U.S. Code Cong. & Ad. News 2790 (to be codified at 47 U.S.C. § 624(c)).
[252] *See supra* notes 194-98 and accompanying text.
[253] Cable Act, 1984 U.S. Code Cong. & Ad. News 2789-90 (to be codified at 47 U.S.C. § 624(b)(1)).
[254] *Id.* at 2790 (to be codified at 47 U.S.C. § 624(b)(2)(B)).
[255] *Id.* (to be codified at 47 U.S.C. § 624(b)(2)(A)).
[256] *Id.* at 2790-91 (to be codified at 47 U.S.C. § 625).

replaced as long as "the mix, quality, and level of services required by the franchise . . . will be maintained."[257] This vague phrase is not defined elsewhere in the statute or in the report accompanying H.R. 4103 (H.R. 2).[258] Presumably the discontinuation of unique offerings such as MTV or WTBS (Channel 17 in Atlanta) would affect the "quality" of service. Requirements for facilities and equipment may be modified if an operator demonstrates the commercial impracticability of compliance and the "appropriateness" of his modification.[259] The statute defines "commercial impracticability" as "a change in conditions . . . beyond the control of the operator" and contrary to the basic assumptions of the franchising parties.[260] Section 625 thus creates a strong possibility that a cable operator may avoid franchise requirements, although the provision's ultimate impact turns on the judicial interpretation of "mix, quality, and level of services" and of "commercial impracticability" in a cable context.

In an attempt to avoid one of the major points of contention between operators and cities,[261] Congress provided for a franchise renewal procedure in section 626.[262] Each step of the complicated procedure, from the filing of a renewal application to the possibility of judicial action, is described in detail.[263] There is apparently no presumption of renewal,[264] but an operator who meets the standards of section 626 would have a strong legal claim if his request for renewal was rejected.

The cities' primary increase in regulatory authority arises from the statute's specific allowance for access channels. Section 611 permits a franchisor to require an operator to provide such channels for PEG use.[265] These channels are exempt from the

[257] *Id.* (to be codified at 47 U.S.C. § 625(a)(1)(B)).
[258] *See id. generally* and H.R. Rep. No. 934, 98th Cong., 2d Sess. 26 (1984).
[259] Cable Act, 1984 U.S. Code Cong. & Ad. News 2791 (to be codified at 47 U.S.C. § 625(b)(2)(A), (B)).
[260] *Id.* (to be codified at 47 U.S.C. § 625(f)). The Uniform Commercial Code has a similar standard for excusing performance by a seller. *See* U.C.C. § 2-615 (1978). A seller is excused "from timely delivery of goods contracted for [when] performance has become commercially impracticable because of unforeseen supervening circumstances not within the contemplation of the parties at the time of contracting." *Id.* at § 2-615 comment 1.
[261] *See* H.R. Rep. No. 934, 98th Cong., 2d Sess. 25-26 (1984). Congress' goal was to "give some stability and certainty to the renewal process." *Id.* at 25.
[262] Cable Act, 1984 U.S. Code Cong. & Ad. News 2791-93 (to be codified at 47 U.S.C. § 626).
[263] *Id.*
[264] *See* National League of Cities Memorandum on Cable Communications Policy Act of 1984 at 7 (November 7, 1984).
[265] Cable Act, 1984 U.S. Code Cong. & Ad. News 2782 (to be codified at 47 U.S.C. § 611).

modification provision, section 625.[266] Section 612 governs leased access channels set aside for commercial use.[267]

The above-discussed statutory provisions affect the way in which a franchisor can exercise his authority to regulate the performance of a cable operator. In particular, the provisions involve a city's ability to supervise how an operator satisfies franchise requirements, such as those relating to program content and level of service. These provisions do not permit local governments to regulate more than they could previously as part of the franchising process, although they do specifically encompass access channels. A cable operator, depending upon the interpretation of the modification provision, might even be less restricted by local control and regulation.

IX. Conclusion

Events in 1984 presented a three-front assault on the authority of cities to regulate the rates for cable service. Decisions by the FCC and the Supreme Court left intact the rule that local authorities may regulate basic service. Nevertheless, these decisions did restrict the regulatory powers of franchisors and, most significantly, added fire to the deregulatory trend in Congress. This trend is demonstrated by the various drafts of proposed legislation leading to the enactment of a statute which dramatically shrinks a franchisor's ability to regulate rates.

Cities previously could regulate the rates for basic service. The FCC definition of basic service encompassed those programs offered "to all subscribers." Local governments were thus able to regulate a great many cable offerings. Now they can regulate basic service only under rare circumstances. Franchisors may regulate only if a cable system is not subject to "effective competition." The effect of the FCC's April 1985 ruling is that such regulation will rarely occur. Regulation of existing franchises continues uninterrupted for two years, but the basic tier of service subject to local regulation may have been modified by the response of cable operators to *Community Cable II*.

Deregulation of cable television is an idea whose time has come. The rates cable operators charge their subscribers should be determined by market forces, not by government intervention.[268] The rationale for regulation does not exist in the cable

266 *Id.* at 2791 (to be codified at 47 U.S.C. § 625(e)).
267 *Id.* at 2782-85 (to be codified at 47 U.S.C. § 612).
268 Increases in rates charged for the "long . . . undervalued" basic service programs

area and franchisors frequently have demonstrated their inability to properly regulate cable.

The rationale for government regulation exists when a product or service considered essential to society, for which there is no substitute, is offered in an anti-competitive environment. The government intervenes to insure that the product or service is available in sufficient quantities and at reasonable prices.[269] The classic situation mandating regulation is that of a public utility, which usually enjoys a monopoly in its service area.[270]

Cable television is not an essential service. It merely provides entertainment and can not be compared to essential items such as housing and electricity. Cable's non-essential character is demonstrated by the decisions of many potential subscribers in a franchise area to decline service.[271]

Furthermore, cable does not have any monopolistic advantages in the communications marketplace. Although cable operators rarely compete with each other in the franchise area, they face competition from countless numbers of video offerings.[272] For instance, the growth of pay cable services has recently slowed due to the increasing interest of consumers in videocassette recorders, which offer for private showing many of the same movies and entertainment specials presented by pay cable.[273] Additionally, alternative video technologies inexpensively provide the four or five channels which are apparently what consumers want

can be expected. Corresponding decreases in pay cable rates may also occur. Kerver, *The Revenue Picture Improves*, Cable Television Bus., June 1, 1985, at 31, 32. In the first six months after the Cable Act became effective, about ten percent of cable system operators raised rates by the five percent permitted under the automatic increase provision. *Id.* at 32; *see supra* note 154 and accompanying text. Rate deregulation offers the prospect of a potentially "dramatic" increase in operators' cash flow, in the opinion of Richard MacDonald, Assistant Vice President for Equity Research, First Boston Corp. MacDonald predicts "aggressive price increases" for basic service. Russell, *Cable bill impact: Financier says money will flow like wine*, CableVision, Dec. 3, 1984, at 9. For further discussion on operators' revenues, see *supra* note 28.

269 *See* A. Priest, Principles of Public Utility Regulation 1-4 (1969); *see also S. 2172 Hearings*, *supra* note 128, at 216 (statement of Thomas Wheeler, NCTA President); Arnebergh, *Public Utilities Regulation and the Community Interest*, 30 S. Cal. L. Rev. 191, 191 (1957).

270 "It is of course elementary that the prevailing philosophy in this country is to have public utility services rendered by monopolies . . . . But all must recognize that where a necessary of life is provided by a monopoly, effective regulation of that monopoly is necessary to protect the public interest." Arnebergh, *supra* note 269, at 191.

271 "Cable is not, in any event, a necessity service (nationally, only about 55 percent of potential subscribers actually take the service), and the comparison of cable to 'public utilities' is for that reason alone intellectually indefensible." Letter from James P. Mooney, NCTA President and Chief Executive Officer, in *Cities Have Failed as Cable Regulators*, N.Y. Times, Dec. 4, 1984, at A24, col. 4.

272 *See supra* notes 131-32 & 239-42 and accompanying text.

273 *See supra* notes 20 & 28.

from non-broadcast television.[274] Thus, cable by its very nature does not merit regulation.

Moreover, many franchisors do not know how to regulate cable television. Cities frequently sought the maximum service possible, even if the demand for it did not exist. They demanded channel capacity that proved excessive or expensive equipment and facilities that ultimately went unused.[275] These governments demanded such state of the art offerings out of apparent ignorance; they did not realize that over-regulation could increase the costs of operation and threaten the viability of some cable companies.[276] If the charges of the NCTA are legitimate, a small number of franchisors have vindictively refused or delayed action on requests for rate increases and modification of franchise requirements.[277] Such accusations are not applicable to the majority of local regulators. Nevertheless, even for those franchisors who acted in accordance with their mandates, no rationale for regulation exists. The move to deregulate subscriber rates is to be commended. Let market forces dictate the rates charged subscribers. Regulation of cable television is both unnecessary and harmful.

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[274] *See supra* notes 240-41 and accompanying text.

[275] "City councils and assorted cable 'experts' have tried to force the technology to deliver a wide variety of nonvideo services, for which only speculative markets exist." Mooney, *supra* note 271, at col. 5; *see also H.R. 4103 Hearings, supra* note 17, at 760-61 (statement of William J. Bresnan, Group W Cable Chairman and Chief Executive Officer, on behalf of the NCTA).

[276] *See* D. BRENNER & M. PRICE, *supra* note 22, at § 7.06[2][b]. "The result has been to create economically untenable requirements, to siphon off resources that might have been used to support programming services people are genuinely interested in, and seriously to retard the wiring of our larger cities." Mooney, *supra* note 271, at col. 5. Franchise demands are often decided by "politics and whimsy." Driscoll, *Cable TV Should Be Deregulated*, L.A. Daily J., Sept. 27, 1983, at 4, col. 3. Cities, however, claimed that state of the art offerings protected a "community from being stuck with a system that [was] hopelessly out of date." T. BALDWIN & D. MCVOY, *supra* note 63, at 199-200. For information on cities' ignorance of the adverse impact of over-regulation, see H.R. REP. No. 934, 98th Cong., 2d Sess. 21 (1984).

[277] *H.R. 4103 Hearings, supra* note 17, at 772 (statement of William J. Bresnan, Group W Cable Chairman and Chief Executive Officer, on behalf of the NCTA). The NCTA has offered accounts of other abuses. The Association's President, Thomas Wheeler, testified in 1982 that the government of Dearborn, Michigan used the franchise fee it collected from the operator, not to cover the costs of regulation, but to build a reflecting pool at City Hall. He also stated that after the operator serving Spencer, Iowa started construction on an expensive upgrade of his system that would bring capacity to thirty-five channels, the local government insisted he sell out to a local group for fifty cents on the dollar. When he refused, the city council revised its cable ordinance to require fifty-four channels as the price of a franchise renewal, even though the operator was eighty-percent complete with the upgrade. *S. 66 Hearings, supra* note 37, at 128, 132 (statement of Thomas Wheeler, NCTA President). For a discussion on franchise fees, see *supra* note 37.

Additionally, "corporations set up by the Borough Presidents of Queens, Staten Island and the Bronx have spent more than "$700,000 [of cable systems' money] since 1983 to prepare for the production of [PEG] programming on cable systems[,]" even though large-scale cable service in those boroughs remains, at best, a distant possibility. Finder & Connelly, *Another Cost of New York City's Cable Delays*, N.Y. Times, Mar. 2, 1986, § 4, at 6, col. 1. These corporations hired staffs and spent money on rents, salaries, and convention trips, but did not build studios or create any programs. In contrast to these unnecessary expenditures, the Borough President of Brooklyn placed the money collected in his borough in escrow accounts. *Id.* This wasteful spending appears to be related to growing allegations of deception and inefficiency associated with Cablevision of New York City's franchise to provide cable service to those three boroughs. *See* Brewin, *Cablevision The $10 Million Question*, Village Voice, April 1, 1986, at col. 4.