The original documents are located in Box L9, folder "Cable Television in 1979: An Industry Profile (3)" of the Gerald R. Ford Post-Presidential Office Files at the Gerald R. Ford Presidential Library.

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National
Cable Television
Association

Office of
The President

Cable Television and the Rewrite

of the Communications Act of 1934

For the first time in more than forty years, both Houses of Congress are actively engaged in efforts to update the nation's basic communications law, the Communications Act of 1934.

Last year, the House Communications Subcommittee, under the leadership of Congressman Lionel Van Deerlin (D-CA), held initial hearings on the first draft of a major rewrite proposal, H.R. 13015, sponsored by Van Deerlin and then-Ranking Minority Member Louis Frey (R-FL). The Chairman and his staff are currently redrafting that proposal for introduction late this month. Major cable television industry concerns in the original proposal are summarized in testimony included in this section.

Major developments have also taken place over the past six months on the Senate side. Earlier this month, Communications Subcommittee Chairman Ernest Hollings (D-SC) and Ranking Minority Member Barry Goldwater (R-AZ) each introduced a set of omnibus amendments to the 1934 law. NCTA is still analyzing the impact of the respective proposals on the cable television industry and has not yet taken public positions on either; intial bill summaries are included in this section.

NATIONAL CABLE TELEVISION ASSOCIATION • 918 SIXTEENTH STREET, N.W. • WASHINGTON, D.C. 20006 • (202) 457-6700

THE PROPOSED COMMUNICATIONS ACT OF 1978

H.R. 13015

The National Cable Television Association (NCTA) continues to support the goal of modernizing the nation's communications policy through a rewrite of the Communications Act of 1934. H.R. 13015, introduced by Reps. Van Deerlin and Frey, is a notable step in that direction. There is substantial public benefit in removing the regulatory bonds from cable TV to allow it to:

1) Offer consumers an in the home alternative video medium beyond the mass interest programming of the three TV networks.

2) Provide to consumers an alternative source of wire communications into the home to lessen the monopoly control and marketplace dominance of the telephone monopolies.

NCTA suggests, however, that these goals for the legislation are not fully met by the current draft. Specifically, NCTA suggests, that refinements in the proposed bill are necessary if the restrictive regulation of cable TV is to be significantly reduced rather than expanded. Furthermore, refinements are also necessary to assure a true competitive alternative to the dominance of the networks and telephone companies over video and non-video communications services.

IMPACT OF H.R. 13015 ON CABLE TELEVISION

Where and How Will Cable TV Be Regulated?

1. No Jurisdiction at the Federal Level
   Section 102(b) provides that, with the exception of the telephone companies, the new Communications Regulatory Commission (CRC) will not have jurisdiction over those entities which do not utilize the electromagnetic spectrum in the direct distribution of their service to consumers. Thus, cable television is singled out as devoid of federal jurisdiction. Consequently, cable TV is treated as an intra-state local communications medium while the communication entities with which it competes are dealt with on the federal level.

2. No Guidance for State and Local Governmental Regulation
   The bill establishes no restrictions or guidelines on the type of cable television regulation at the state and/or local level. Nor does it limit the number of tiers of regulation, the subject matter of such regulation or the manner of regulation that may exist at the non-federal level.

3. Common Carrier Regulation of Cable TV
   The proposed legislation is silent on the issue of common carrier regulation of cable or the "separation" of a cable system's ownership of hardware from its programming. There is no restriction in the bill on any state or local government establishing their own common carrier regulation or separate industry structure for cable systems.

CABLE INDUSTRY RESPONSE

1. Cable television is an interstate, national medium requiring a baseline of consistent, federal oversight and, in select areas, uniform federal regulation,

2. The proposed bill is not deregulation, it is multiplication. The bill will generate at the non-federal level the same kinds of restrictive regulations which it repudiates at the federal level,

3. Federal deregulation should not mean abdication of federal responsibilities. Congress can encourage federal deregulation yet establish that in many areas regulation is inappropriate at any level of government,

4. There must be a homogeneous national marketplace to stimulate the kinds of services cable is capable of offering. H.R. 13015 encourages the opposite -- purposeless diversity among governmental bodies. The FCC's preemptive approach in certain areas of current cable regulation recognizes that some of the innovative services offered by cable cannot be subject to a crazy quilt of inconsistent regulation.

5. Most non-federal governments do not have the financial resources nor the expertise to resolve the complex issues associated with the regulation of cable television. Congress should not encourage redundant public funding of inconsistent and duplicative regulation.

Telephone/Cable Relationship

1. Pole Attachment Law Repealed
   The recently enacted cable pole attachment legislation is repealed by H.R. 13015. Thus, cable operators and cable subscribers are returned to the position previously found unacceptable by the Congress whereby utilities restricted cable service and increased costs by unilaterally dictating "take it or leave it" terms for attachment to utility poles.

2. <u>One Wire Communications Monopoly Encouraged</u>
The bill permits telephone common carriers to provide cable TV service and other broadband telecommunications services (through a separate subsidiary). This potential for marketplace dominance over <u>all</u> communications gives the telephone companies additional incentive for the building of a single-wire system capable of precluding competition. These facilities would be constructed utilizing monopoly profits earmarked for improving lifeline telephone services, not expanding into riskier non-monopoly fields.

If cable systems desire to lease channels from the telephone company's "one wire" the CRC has jurisdiction over the rates for such channels. However, because the cable system could theoretically build its own plant, the bill would presume reasonable rates since telephone leased channels would be considered a "competitive service". Unless the cable system could meet the substantial burden of proving that the telephone company's channel rates were unreasonable, no rate restraints would exist at all on the telephone companies.

3. <u>Repeals Telephone/Cable Cross-Ownership Ban and AT&T Consent Decree</u>
Section 332 permits any telephone common carrier to create a separate subsidiary to operate any service which the CRC determines to be telecommunications. This includes cable TV. Thus the FCC's current ban on cable/telephone crossownership is abolished. In addition, the bill abolishes the restrictions on AT&T contained in the Justice Department Consent Decree of 1956 in which AT&T agreed not to engage in non-common carrier communications services. Thus, AT&T could provide cable services, through separate subsidiaries, without any oversight or control by the CRC at the federal level.

<u>CABLE INDUSTRY RESPONSE</u>

1. The currently existing cable/telephone restrictions were created to redress or eliminate demonstrated abuses:
   A. Pole attachment law - most local governments forbid the constriction of new utility poles for TV cable, realizing this the owners of the current poles engaged in abusive practices which hindered the growth of cable TV services.

   B. Crossownership Ban - prior to 1970 telephone companies could offer cable TV service. Their anticompetitive practices, designed to keep out independent cable operators, resulted in an FCC ban on co-located crossownership.

   C. AT&T Consent Decree - AT&T was using its monopoly position in voice communications as the basis for smothering competition in other non-common carrier services and thus expanding its monopoly. The Department of Justice brought suit which was finally resolved through a consent decree forbidding AT&T from offering non-common carrier communications services (such as cable TV programming).

D. Section 214 of the Current Communications Act - AT&T and the other telephone companies prior to 1970 were also able to force independent cable operators into leasing telephone plant under restrictive terms and conditions. The application of Section 214 of the Communications Act foreclosed these anti-competitive practices and the FCC's oversight on rates restricted the use of high rates to foreclose cable service by independent cable operators.

2. The "separate subsidiary" which the bill permits telephone companies to establish in order to provide cable TV programming and services is a transparent protection repudiated by other sections of the bill. If a separate subsidiary such as Western Electric must be split off from AT&T in order to assure fairness in the marketplace how will a separate subsidiary offering cable services be any more equitable?

3. There is no cost allocation or accounting practices which exist today that can detect AT&T and other telephone companies' cross-subsidies. Thus, both artifically high lease rates and predatorily low subscriber rates to thwart competition cannot be realistically prevented.

4. It is totally unrealistic to believe that an independent cable operator could begin service at fair and reasonable terms over a one-wire leaseback facility owned by the telephone company if the telephone company, through its subsidiary, wanted to maintain market dominance over the provision of those services.

5. If the goal of the proposed legislation is to give greater control to local governments, the telephone company provisions sabotage that goal. If telephone companies are permitted to offer cable TV service they will be able to avoid the local control of the franchising process since they arguably need no franchise for providing additional services over telephone plant.

6. There is a misconception that only the telephone company is capable of providing universal wire communications service. This ignores the fact that this "universal service" was only accomplished by after massive federal loan/subsidy program, by more profitable customers, subsidizing other customers or by consumers in less economical areas personally paying sometimes several thousand dollars in extra cash to bring service to their homes. Despite its huge profits and resources, AT&T, in many cases, has refused to serve these economically rural areas. Thus, "universal service" will not be accomplished through sheer size but will require either subsidy or consumers willing to pay the costs.

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NR/93/78
September 14, 1978

FOR IMMEDIATE RELEASE
Contact: Lucille Larkin
Phil Clapp
(202)457-6760

COMMUNICATIONS ACT PROPOSALS PERPETUATE PRO-BROADCASTING REGULATORY BIAS, CABLE TV INDUSTRY TELLS CONGRESS

Provisions of the proposed Communications Act of 1978 establishing a clear Congressional policy toward conventional broadcasting but omitting any mention of cable television would perpetuate government regulations which have restricted expanded viewing options for consumers for nearly 15 years, a cable TV industry representative told Congress in testimony today.

"The cable television industry is rapidly changing communications concepts in this country, offering services which were only gleams in our eyes years or even months ago," Viacom International President Ralph M. Baruch said. "A bill that sets a clear national policy toward conventional television broadcasting but offers no regulatory policy toward cable TV services would result in the suppression of the current achievements of the medium and the collapse of plans for additional services," he said.

Baruch, who heads one of the country's largest cable television firms and, as well, a major supplier of programming,

-more-

testified in House Communications Subcommittee hearings on H.R. 13015, a rewrite of the nation's basic communications law proposed by Subcommittee Chairman Lionel Van Deerlin (D-CA) and Ranking Minority Member Louis Frey, Jr. (R-FL). As now drafted the bill omits any mention of cable television, which would fall within the legislation's definition of a local communications service devoid of federal interest.

Baruch said the cable television industry strongly supports the subcommittee's efforts to rewrite the 44-year-old federal communications law and agrees with the draft's chief goal, "a communications marketplace where innovative consumer services are stimulated by competition, not restricted by regulation."

However, although the bill appears to eliminate restrictive federal cable TV regulations designed to protect broadcasters from competition, "it leaves the field open for state and local governments to impose a patchwork of similar regulations in 50 states and perhaps 9000 communities."

Baruch said federal regulation limiting the services cable television can offer to consumers "has hindered more rapid development of programming options. Are we to permit this history to repeat itself again in every village or town where broadcasters fear competition? Are we to take a giant step backward and once again deny consumers the benefits of competition while protecting the entrenched economic interests?" Baruch asked.

Cable television is a national medium serving between 30 and 40 million Americans, Baruch pointed out. "Such a large communi-

cations medium deserves a clearly stated Congressional policy permitting it to compete without state or local regulatory restrictions on the services it can offer," he said.

Baruch characterized the bill's disparate treatment of cable television and conventional broadcasting as "highly contradictory." "Both broadcast programming and cable programming are, in many cases, received from intrastate sources, yet broadcasting is treated as a national medium and cable is not," he said.

"The final argument put forward is that broadcasting uses the spectrum while cable does not. Therefore, the former is national, the latter is not," he said.

Baruch pointed out that cable television is making extensive use of national sources of programming and program distribution not widely used by broadcasters. "The rapidly-growing national cable/satellite network is creating a large new audience for programming across the country," he said. By the end of 1978, the satellite system will serve more than 5 million cable homes.

Baruch said that opening new fields of cable TV regulation to state and local governments would break up that audience and severely limit the continuing development of new cable TV services.

"We believe, have always believed and will continue to believe that diversity of programming options should be a paramount goal in any policy effort in the field of communications," he said. "That diversity should not be restricted by regulation at any level of government -- federal, state or local," Baruch said.

# # #

From Viacom

Testimony of Ralph M. Baruch
President and Chief Executive Officer
Viacom International Inc.

Before The

Subcommittee on Communications
U. S. House of Representatives
September 14, 1978

Thank you, Mr. Chairman. My name is Ralph M. Baruch. I am President and Chief Executive Officer of Viacom International Inc., a New York Stock Exchange Corporation with over 30,000 stockholders. We operate cable systems serving over 360,000 subscribers. Viacom also engages in television program distribution and production, in the supply of satellite pay cable service to the cable television industry and also owns a UHF television broadcasting facility in New York/Hartford, Connecticut.

I should like to draw the attention of this Subcommittee to several areas which should be of concern to the American public and are of concern to the cable television industry.

First, regulatory jurisdiction. It is essential that in any attempt to rewrite the Communications Act it be recognized that the cable television industry, now serving approximately 15,000,000 homes, comprising an estimated 30 to 40,000,000 American viewers, is a national communications medium. If all regulation, as outlined in the draft Bill, were left to regulatory forums other than the Federal government, the

result would be devastating suppression of the current achievements of cable television and the collapse of plans for new additional services. Many of the achievements of the cable industry have been attained despite a maze of Federal, State and local regulation. Despite these obstacles, the cable television industry's promises have become a reality and the momentum is gathering force as developments take place at an ever-increasing pace.

The cable television industry has radically changed communications concepts in this country. For the first time, services are being offered which were only gleams in our eyes years or even months ago. This is true on both a local, community basis and on the national scene.

On a local basis, Viacom's own systems, for example, have offered, for the first time, television programs covering city and county agencies; human services; college courses; programs for the elderly, women, minorities; sports; and countless other regular programs with an enormous impact on the people and communities we serve. I say this, Mr. Chairman, not because I want to stress our own accomplishments, but to try and establish, once and for all, that the cable television industry is, in fact, delivering what it said it would deliver to the American public.

But there is much more. For over 30 years, America has waited for a new competitive force in the television industry, a force which would begin to provide an influx of new creativity to home television screens. We waited for a force to provide the national television audience with alternatives to the present oligopoly.

Until the advent of cable television, this did not happen. In recent years, quietly and without much fanfare or notice, the cable television industry has not only developed the mechanism but also the services necessary for the long-sought development of many national networks for the distribution of new creative concepts, new

ideas and new programs. This has all been made possible by domestic communications satellite technology coupled with the competitive drive of cable operators. The cable television industry has seized upon this unique opportunity and is now transmitting signals to a satellite serving hundreds of cable systems, millions of homes and, certainly, tens of millions of viewers all over the nation with both general and specialized programming.

And the pace is accelerating. The number of ground stations to receive and distribute signals to the public is increasing as fast as the Federal Communications Commission can process applications. I have given you examples of some of the diverse programming which has taken place in our own systems on a local basis. Let me now give you an idea of the wide variety of the programming alternatives which have been created by the joining of satellite technology and the imagination of cable operators.

Cable television has made premium programming available to the public, enabling this public to view not only first-run feature films, but also an ever-increasing number of specially produced programs, documentaries, cultural events and other not-available-on-television fare. All of these attractions are seen in the privacy of the viewers' homes, at their convenience, unedited and uninterrupted by commercial announcements. I don't have to tell you, Mr. Chairman, that attractions we see on commercial television do not even approach the form of the original works as they were intended to be exhibited.

As the viability of the newly-emerging young premium cable audience has become established, the entertainment industry has already benefited on a national level by the influx of program development funding, by the actual production of newly-developed programming and by the development of new ideas and new concepts. The two best-known

satellite services of this type, Home Box Office and Viacom's subsidiary, Showtime, are involved in the development, funding and production of original programming aimed exclusively at this national audience. As a matter of fact, Viacom's Showtime has also encouraged the development by others of new, creative original program concepts for this newly-formed national audience and we have bought this product from others.

A second form of cable television service which is national in scope and nature consists of the supply of sports programming on a national or multi-state regional basis. Organizations such as Fanfare, Prism, Madison Square Garden and others are now providing regional and national audiences all over this country with exciting sporting events which formerly were only available, on rare occasions, on a local basis and almost never on a national scale. In most cases, these services are supplied to the cable viewer as part of his regular cable television service and are purchased and marketed by the local cable television service as part of an effort to obtain a larger subscriber universe.

But more was to come. Cable television's national character has now combined with its unique technology to create new networks of special interest programming. A new programming service supplied to cable systems all over the country and aimed exclusively at children will begin satellite distribution this very month. Three viewer-supported religious programming services, serving over 500 cable systems, are currently on the satellite. The popularity of such programming can best be illustrated by the fact that they are viewer supported. They supply television programs on practically a 24-hour basis, funded by the viewers themselves.

But even more was to come. Currently being made available to homes as part of regular cable television service is a 24-hour all news television channel transmitted via satellite. Late-breaking news reports accompanied by pictures of the events are now available on a continuous basis via cable television. In addition, cable television systems are providing the mechanism whereby independent television outlets not affiliated with one of the three networks have the opportunity, for the first time, to reach national audiences, providing additional television programming and obtaining truly national stature.

And more is still to come! Mr. Chairman, the cable television industry is looking forward to providing the public with the opportunity to follow, via satellite and via cable television, the gavel-to-gavel proceedings of the House of Representatives starting next January. We, as an industry, take this effort very seriously and will try to provide the schools of this nation, the citizens of our country, the elderly and many others with the opportunity of following the proceedings of our lawmakers.

And still more is to come! Experiments are taking place which years ago were referred to as "blue sky" and yet today have become reality. Qube, in Columbus, Ohio, is providing its viewers with attractions from all over this nation on a per-viewing basis in addition to providing many other services only dreamed of years ago. Our own cable system in Dayton, Ohio, is now engaged in providing fire, burglary and medical alarm systems to those who wish to avail themselves of this innovative service.

Mr. Chairman, I have given you a long recitation of the many general and specialized services the cable television industry is providing on a national basis. I think the cable television industry can be justly proud of these accomplishments, accomplishments which an industry hindered by unnecessary Federal, State and local regulations has nevertheless been able to achieve. And yet we hear it said, "Is that all you're doing?"

I only wish that certain elements of the television broadcasting industry would provide some of the many specialized programs we have made available. But broadcasters, despite their unfettered regulatory status, despite their unheard of prosperity and despite their vast circulation, have in fact ignored, in many cases, public service convenience and necessity. The cable television inudstry has not.

The growth of the kinds of services I have just described could be encouraged by this legislation. Likewise, the legislation could assure that they either never happen or else are delayed indefinitely. The cable television inudstry has given this Committee the reallife examples of what happened when the telephone company was permitted into the cable television business. That can happen again under H. R. 13015 and the new and innovative services I have outlined would cease. For, after all, the history of the telephone company in the cable business as well as the history of the telephone company in just about every other endeavor that they have touched is that the public receives services only when that service is consistent with the telephone company's profit plan. Let the telephone company into the cable business and say goodbye to the innovation and competition which have sparked consumer services by this industry.

Likewise, it seems to me that any attempt to confine the cable television industry to local or state boundaries seems ludicrous. To deliver the cable television industry into the hands of state regulatory agencies in a day and age of Proposition 13, when states will be seeking further sources of revenue, seems to me to be dangerous, not only to the industry but to the public which must ultimately bear such costs.

I firmly believe that the mix and overlaps of Federal, State and local cable television barriers have, in fact, hindered the more rapid development of our industry. If no other proof were needed, pay cable certainly is the best example. Pay cable, once onerous regulations were removed, developed at an amazing rate and all the dire predictions of program siphoning and all the theories and ghosts which threatened impending doom and

thus justified restrictive regulations have never come about. As a matter of fact, competing industries are thriving, we have injected new creativity into the field and the broadcasting business is better than ever. These services, however, were held back by regulations which responded to the unwarranted fears of broadcasters and theater owners. Are we to permit this history to repeat iteself again in every village and town? Are we to take a giant step backward and once again deny consumers the benefits of competition while protecting the entrenched economic interests? I hope not, but this is what H. R. 13015 would stimulate.

It isn't only the software but also the interstate aspects of cable television hardware which make it a national medium. There are currently over 30 states in which cable television systems, in the course of passing subscriber homes, also cross state boundaries.

One cannot ignore that a cable system or a television station network affiliate both receive interstate programming via common carrier facilities, be it via satellite or terrestrial microwave networks. Both television broadcast station programming and cable television system programming are, in many cases, received from totally intrastate sources, yet the draft Bill would grant only broadcasting a totally Federal character. Yet neither the intrastate facets of broadcasting nor cable television alter their national character. The facilities of both a broadcast station and a cable television system are in many cases located within a state, yet broadcasting, under the draft Bill, would be recognized as having a national nature; cable television would not.

Cable gets its permits to use city streets. Broadcasters get their permits to build towers and other facilities. Yet it is argued that cable television should be regulated at the non-federal level and broadcasting on a Federal basis. We do not oppose local government involvement in the selection of the cable system to serve the community

and use city facilities to provide service. Yet the contradiction between our permits and other industries' permits as a reason for total removal of cable from its national role seems to me to be inconsistent and illogical.

The final argument which is being put forward is that broadcasting uses the spectrum and cable does not. Therefore, the former is national; the latter is not. Yet the contradiction remains. Federal jurisdiction of broadcasting under this Bill is not only related to frequency spectrum management but to every facet of broadcasting's operations. Regardless of the necessity of local facilities and local service, nothing in broadcasting is left to the non-federal level regardless of how far removed from the spectrum management is the broadcast issue.

In addition, Mr. Chairman, your draft Bill establishes the provider of the other wire into the home as a totally national service. The telephone company, just like cable, utilizes streets and rights of way. The telephone company, just like cable, utilizes wire and not spectrum to serve its customers. The proposed legislation, however, grants the telephone company a Federal status and relegates cable to the non-federal level. It seems to me to be totally illogical to find a telephone receiver attached to the telephone wire in the customer's home to be under Federal jurisdiction, but the cable system and its terminals providing by wire service to the same customer from across the country to be completely outside Federal jurisdiction.

I believe that to submit an industry to regulations of 50 states and possibly 9000 localities would certainly realize the fondest dreams of our competitors and kill this industry, to the detriment of our own company, yes, but I believe also to the detriment of the American people.

To submit an industry such as ours to a regulatory scheme other than Federal guidelines would result in a patchwork of regulation designed, for the most part, to restrict cable services. Not only would the many and unique satellite services previously described be threatened by the burdens of complying with the vagaries of non-federal governments, but the growth of new forms of cable technology would be set back, if not smothered.

Would you leave the decision for signal carriage to the local politician, the same local politican who, to a great extent, is dependent for his reelection on exposure by the all-powerful television broadcaster? Should he make the signal carriage decision? This is not an academic question. It is a real one. Many existing cable television franchises contain a variety of signal carriage provisions. The proposed cable franchise for Kansas City, Missouri, precludes cable systems from carrying Kansas City sports events on any distant signal during times when games are blacked out. The proposed Kansas City franchise requires broadcast stations to be carried on channels which are technically unfeasible.

This is just one of many other examples of similar instances, be it East Lansing, Michigan; Effingham County, Illinois; Tyler, Texas; and many others. Under your draft Bill, all other non-broadcasting programming and services, such as pay cable, delivered by either common carrier microwave, multipoint distribution service or satellite, can be stopped by a state of local entity. This is not an academic question either. It is a real one, one which must be recognized in the rewrite of the Communications Act.

A substantial number of California cable television franchises prohibit, I presume at the instigation of broadcasters, pay cable service. New York State's Cable Television Commission, with its large staff and industry and consumer supported budget, time and again tried to inject itself into proceedings clearly preempted, all this to the detriment of the public. Let me just give you two specific examples: New York State tried to regulate, on a statewide level, charges made for pay cable service. I personally tried to show executives of this State Cable Commission the fallacy of trying to control present pay cable services but, much more important, how could such a Commission regulate the provision and charges for individual attractions, be they motion pictures, sporting events, special productions, concerts and ballets, when this is clearly a marketplace decision to be made by the consumer. That decision should be unfettered by State, Federal or local intervention. Do states regulate the price of admission at the stadium, at the theater, at the motion picture house, at the opera? They certainly do not, yet the same state cable commission involved the cable television industry in long, costly judicial proceedings and was not satisfied with the original decision but appealed it to the highest Courts in order to obtain this clearly unwarranted and unjustified jurisdiction over rates. In this case, to win its logical case the cable industry spent hundreds of thousands of dollars, and I assume the State did the same, except in the State's case it was with directly or indirectly tax-supported funds.

As a further example, I cite the following: Some time ago, one of our own cable systems in New York State tried to provide local sporting events originating in a more distant arena. The New York State Cable Commission decided that this service, called Season Ticket, was under its jurisdiction and both Town and State joined in trying to dictate terms and conditions under which we could provide the service to the consumer.

Rather than face long, drawn-out and costly proceedings, Viacom dropped this service to the consumer and refunded the entire fee to those who had already subscribed and seen parts of the games.

This is typical of what would happen if your Bill became law. Every state and every locality would think of itself as a cable television czar, would promulgate a patchwork of technical and practical applications vis-a-vis our industry and make the presently existing national medium a past tense.

Mr. Chairman, the cable television industry endorses deregulation if it is true deregulation and not a substitution of dozens, even hundreds, of other regulations. We submitted to this Committee position papers and a draft Bill which basically outlined, in what we believe to be a statesmanlike manner, those matters which are of Federal concern and those which are purely local. In short, we suggested that this regulatory responsibility should be assigned to the level of government most competent to make the decision. Thus, there are certain areas which are non-federal in jurisdiction, but there are likewise other areas concerning the national nature of cable television which are appropriately Federal concerns. Such Federal concerns should include, for instance, signal carriage, pay cable and program origination, technical standards and franchise fees.

Assuming a Federal deregulated approach as being possibly the proper one, the question remains as to the balance that should be achieved between cable television and the broadcast interests which for so long have feared competition from this new medium. Evidence developed as part of the economic inquiry conducted by the FCC clearly shows that a deregulated cable television industry is absolutely compatible with broadcast services in terms of the public interest. Indeed, the regulatory policies urged by broadcasters

would only result in a detriment to the consumer interests. We believe, have always believed and will continue to believe that diversity of programming options should remain a paramount goal in any public policy effort in the field of communications.

The diversity of programming options which I have referred to previously and which are being supplied on cable television are available now. They are not just promises; they are a reality. Yet it is the aim of some interests, it seems, to create a regulatory environment which would stifle cable's continued ability to provide consumers with these options.

Finally, in closing, I would like to discuss briefly the question of the cable industry's liability for copyright royalties. This Committee is aware that the Copyright Act of 1976 has imposed substantial liabilities on cable systems for the distant broadcast signals which they import. This legislative mandate acted to override two separate findings by the Supreme Court of the United States that cable systems were not liable for copyright payments. The new law, which took about 15 years to arrive at, was endorsed by the cable television industry in the interests of harmony and as a logical step in our move forward in the development of additional cable television services for the benefit of the American public. It represents a carefully-balanced compromise between Cable operators and Copyright owners.

Mr. Chariman, I have read testimony which I find difficult to believe. I have read testimony which makes me believe that the copyright interests are not being adequately compensated. I can only say I find this preposterous. Indeed, in many respects, I believe that the new law is plainly too generous to these interests. The law does provide a minimum royalty fee whereby a cable system pays a percentage of its subscriber revenues, whether it carries distant signals or not. This means that regardless of whether a cable system uses compensible property, it must pay for it. It

should also be understood that according to the latest surveys the broadcasting industry spends the equivalent of approximately 26% of profits on copyright royalties. Please understand, Mr. Chairman, that these programs form the backbone of a television station's status and profitability. It is advertising within these programs or their adjacencies which determine the financial success of a television station. Nothing else can be sold. In cable television, a specific program or channel is just one of the many elements which contribute to a cable television system's financial success, not through advertising, but selling subscribers in the largest possible number. Yet the cable industry also spends the equivalent of 26% of profits for copyright payments.

In addition, I am constrained to call your attention to the regulations promulgated by the Copyright Office regarding accounting and reporting procedures for cable television systems. To say they are burdensome is an understatement. Not only has the Copyright Office required that payment by cable television systems be made by certified check, something not even the IRS requires, but the many, many hours required to just comply with the reporting requirements impose a very severe financial and administrative burden on cable operators. Let me just cite one example: I would like to direct the Committee's attention to Viacom's cable system serving Shaker Heights, Ohio. The system has approximately 7800 subscribers. Here are two copies of the semi-annual statements which must be filled out by this cable system with 7800 subscribers. In addition to paying over $4000 in copyright royalties for the first half of 1978, we estimate that in order to comply with reporting requirements this small system expended between 250 and 350 manhours. This clearly is not a burden either the copyright owners or the broadcasters must bear. It is a semi-annual submission of programming logs, as you will see, of several hundred pages. Multiply this example of one system by the thousands of cable systems in the country and you can see that when we talk of the burden of copyright, we mean much more than just the dollars involved.

To summarize, I believe that cable television is a national industry which extends in both the software and hardware areas beyond any state boundaries. Legislatively limiting regulation to non-federal bodies can only serve to further, once again, stifle growth and development of new services to the American public. The focus of the free marketplace can and should be the keystone of any legislative effort, but this keystone will be capable of supporting the industry only as long as it operates in an environment unaffected by the restrictive and protective sort of regulatory approach that has been documented time and time again in the absence of Federal pre-emption. Deregulation and Federal guidelines are the components required of a workable Communications Act of 1978 as it will impact upon the cable television industry.

Thank you.

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NR/83/78
August 1, 1978

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9:30 AM EDT AUGUST 2, 1978
Contact: Lucille Larkin
Phil Clapp
(202) 457-6760

TELEPHONE COMPANY MONOPOLY SHOULD NOT BE EXTENDED

TO TELEVISION PROGRAMMING,

CABLE TV INDUSTRY TELLS CONGRESS

Congress should not permit telephone companies to expand into the field of television programming if its goal is to stimulate competition and new communications services to consumers, a cable television industry spokesman told the House Communications Subcommittee today.

"Telephone companies were banned from offering broadband communications services after they had used their huge financial resources and monopoly powers to eliminate all competition," William J. Bresnan told the subcommittee.

Bresnan, who is president of the Cable Television Division of Teleprompter Corporation, New York, testified as the cable TV industry's second witness in hearings on H.R. 13015, "The

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Communications Act of 1978," introduced last month by Subcommittee Chairman Lionel Van Deerlin (D-Calif.) and Ranking Minority Member Louis Frey, Jr. (R-Fla.).

Bresnan told the subcommittee that the cable television industry strongly supports the bill's chief goal, "a free communications marketplace in which innovative consumer services are stimulated by competition."

"But the competitive marketplace H.R. 13015 envisions for television services would be destroyed if the door were opened for the country's most powerful monopoly companies to control the communications services available to consumers," Bresnan said.

The Van Deerlin-Frey bill would permit telephone companies to own and operate cable television systems in their own markets, a practice outlawed by the Federal Communications Commission in 1970.

"The FCC ban was imposed after telephone companies in market after market used their political and financial power -- along with their control over the telephone poles to which cable TV systems attach their wire -- to prevent anyone but their subsidiaries from offering cable television services," Bresnan said.

Bresnan cited numerous cases where the FCC and the courts found that telephone companies indulged in blatantly anticompetitive practices to bar independent cable television companies from their markets.

In 1965, he said, General Telephone and Electronics Corporation created a cable TV subsidiary and instructed its operating telephone companies to assist in developing markets for it.

"How the system worked was revealed in Bloomington, Illinois," Bresnan said. "General Telephone of Illinois offered to lease channels on its own wire to cable TV companies, but at a prohibitive price only the GT&E subsidiary could afford, and announced that it would not lease space on its poles for any cable TV company to build its own wire system," he said.

"Independent cable companies couldn't construct a system without a pole attachment agreement from the telephone company, so the City Council of Bloomington awarded its franchise to GT&E's CATV subsidiary," he said. (The FCC ultimately ordered GT&E to relinquish the franchise.)

"The telephone companies have also shown that they have no desire to offer cable television service to consumers when they must compete without monopoly advantages," Bresnan said. "The FCC ban only prohibits telephone company cable TV operations in their own telephone service areas, but shortly after it was imposed telephone companies sold off their cable TV subsidiaries and chose not to compete anywhere else."

Bresnan said the cable television industry is not seeking protection from new technologies like fiber optics which can make "one-

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wire" distribution of communications services possible. "But it is essential that a telephone monopoly not be given control over all communications services carried on a one-wire system," he said.

Bresnan urged the subcommittee to retain the ban on telephone company provision of cable television services in any new federal Communications Act.

"If telephone companies are permitted to use their enormous financial power to cross-subsidize cable TV programming, they will ultimately be able to establish a monopoly by pricing services below market cost until they have driven out competitors," he said, "Once a monopoly is established, there is no incentive for the monopolist to provide new, innovative services."

"Cable television systems in major urban areas are now offering 36 channels of programming, and a wide variety of new services is expanding rapidly. Increasing viewing options for consumers have been stimulated by competition, which could be squashed under the heel of the country's most powerful monopoly," Bresnan said.

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Testimony Of
William J. Bresnan
Subcommittee On Communications
United States House Of Representatives
On
H.R. 13015
August 2, 1978

Good morning Mr. Chairman and members of the Subcommittee. I am William J. Bresnan, President of the Cable Television Division of Teleprompter Corporation.

Earlier in this series of hearings a representative of the cable television industry appeared before you and indicated support for the goal of revising national communications policy. He also urged the Committee to guard the structure of the marketplace against those who would thwart a national communications system by dividing the marketplace into small regulatory pieces. Today I appear before you as another representative of the cable industry to reiterate our support for your policy review. In addition I am here to urge this Committee to preserve the functioning of the marketplace against those economic forces which have demonstrated a desire and an ability to destroy its competitive fabric.

The avowed purpose of this new act is to rely on competition both to stimulate consumer service and to protect consumer interests. If this goal is to be met with regard to broadband communications services, it will be necessary to make certain that competition is not squashed under the heavy heel of the monopolist.

To avoid any possible misunderstanding or mischaracterization of our views regarding the common carrier provisions of H.R. 13015, I wish to state at the outset that the cable television industry neither fears competition nor seeks protection from it. We have lived every day of our existence in a highly competitive marketplace. Cable television competes actively with old and new technologies such as movie theaters, translators, television stations, multi-point distribution service and even outdoor television antennas. We have never sought a regulatory advantage in competing with these other forms of technology and we seek none now. We subscribe entirely to the intent of H.R. 13015: regulation is appropriate only where marketplace forces are distorted and competition therefore deficient.

It has been demonstrated in a number of administrative and legislative proceedings that marketplace forces cannot function where one industry (telephone) has a total monopoly over the gateway to which another industry (cable television) must gain entry in order to do business. In view of this unique relationship, the FCC, Congress and the courts have adopted and approved a few basic rules of the game to assure fair play and healthy competition. We frankly are concerned that H.R. 13015 would repeal those rules.

Permitting telephone common carriers to own and operate cable television systems, as this bill does, may appear on the surface to be injecting a new competitive force into the marketplace. This appearance, however, could not be farther from reality; what may be intended to be encouragement of competition actually foretells the destruction of competition through monopoly expansion. The adoption of Section 332 permitting telephone companies to enter into the cable television business will lead to monopolistic market control whereby all wired telecommunications services would be provided by existing telephone carriers.

We do not raise these concerns as supposition or as imaginary horribles which could only perhaps become reality. The cable television industry has empirical evidence demonstrating that entry of the telephone companies into the cable business means the end of competition and the inequitable and inefficient expansion of a new monopoly service.

This evidence, which is documented in a number of FCC decisions, reveals a consistent pattern of conduct by telephone carriers to use their entrenched monopoly to acquire control of cable television. Under the same type of "competitive" conditions which are created in H.R. 13015, the telephone companies aborted the proper functioning of the marketplace by:

- Abusing their entrenched monopoly position to preclude the awarding of cable television

franchises to any entity not affiliated with the telephone company,

- ° Refusing to grant the cable franchise holder access to the telephone poles for the purpose of stringing cable, while at the same time granting access to telephone-affiliated companies,
- ° Delaying the construction of an independent cable system while at the same time expediting the construction of a telephone lease-back system to parallel the independent system,
- ° Requiring as a condition to pole attachment or lease-back contracts that the cable operator agree to offer only one-way transmission of off-the-air television signals; thus preserving all potentially competitive markets for the telephone company, and
- ° Leasing channel capacity to the cable TV operator on the condition that the telephone company could reclaim the bandwidth whenever it so desired even if it meant eliminating cable TV service to subscribing households.

These examples are only representative samples of how the telephone companies acted to strangle competition through predatory

practices. Attached to my testimony are specific and more detailed case histories of telephone company abuses.

For the purpose of illustration, let me share with you highlights of a few of those cases. In 1965, General Telephone & Electronics Corporation created a subsidiary, G.T.&E. Communications, Inc. (GTEC), for the purpose of entering the cable television business as an operator. Simultaneously, General Telephone advised all of its operating telephone companies to assist GTEC in finding potential cable markets within each company's operating area. The case of Telecable Corp., 19 F.C.C.2d 574 (1969), revealed how the coordination between GTEC and the local General Telephone Company (General Telephone of Illinois) functioned to exclude competition from independent cable television operators in Bloomington, Illinois. General Telephone Company of Illinois filed a tariff providing for the lease of channels for cable television services. General Telephone of Illinois also announced that it would not lease space on its poles to any cable television operator. The tariff did not offer an adequate return to the independent cable operators who were seeking a franchise in Bloomington, but GTEC did order the channel service from its sister corporation. Since the independent operators were unable to show how they could construct a cable system without a pole attachment agreement from General

Telephone of Illinois, the City Council of Bloomington awarded the franchise to GTEC.

The FCC found that General Telephone & Electronics Corp., General Telephone of Illinois and GTEC had engaged in anticompetitive conduct and ordered them to cease providing cable television service in Bloomington.

Another FCC case, Manatee Cablevision, Inc., 22 F.C.C. 2d 841 (1970), demonstrated similar activities of General Telephone Company of Florida (GTF) to extend its telephone monopoly into cable television. The Commission stated:

> We conclude that GTF and GTEC took advantage of GTF's monopoly position as a communications common carrier in the area and engaged in anticompetitive conduct, which was designed to eliminate Manatee Cablevision as a competitor in the unincorporated areas of Manatee County and which resulted in substantial detriment to Manatee Cablevision. 22 F.C.C.2d at 862.

United Telephone Company, the second largest independent telephone company, paralleled the strategies of General Telephone. It formed a subsidiary, United Transmission, to enter the cable television business in the late 1960s and immediately thereafter, all United Telephone companies adopted a policy of refusing to lease pole space to cable television systems. Instead, the United Telephone companies offered to provide a cable TV channel service under tariff. However, as the FCC explained in United Telephone of Penn., 40 F.C.C.2d 359 (1973),

United's tariff did not offer an adequate return to independent cable operators and thus United Transmission was the only company practically able to provide cable television service in areas served by United Telephone.

The FCC found that United Telephone had engaged in anticompetitive conduct.

Because of the 1956 Consent Decree which precludes AT&T from offering non-common carrier services, the Bell System was unable to engage directly in the cable television business as did General Telephone and United Telephone. AT&T, however, was no less aggressive in seeking to extend its telephone monopoly into the cable television business. The Bell System companies filed tariffs in the 1960s offering to provide a cable TV channel service--although the tariff offerings limited the cable operators to the most rudimentary forms of cable television service. While not refusing pole attachments outright, the Bell System companies adopted various policies, including unsupported increases in pole attachment rates, which made it exceedingly difficult for an independent cable operator to compete in the marketplace with an operator who had leased channels from a Bell Telephone Company. After reviewing these policies and practices in Better T.V. of Dutchess County New York v. New York Telephone Co., 31 F.C.C.2d 939 (1969), the FCC concluded:

> The course of conduct followed by N.Y. Teleco employees in the communities under consideration such as the express or implied threats of delay if the cable operators persisted in their request for pole attachment agreements, the interminable delays between each step of the processing from request to the attachment of the cable to the poles, the priority given to construction for the channel service customer and the other conduct detailed herein, establish to our satisfaction that <u>the objective of such conduct was improperly to discourage attachment applications and to encourage the acceptance of common carrier channel distribution service.</u> 31 F.C.C.2d at 966. [Emphasis Added.]

It was this sordid record of anticompetitive conduct which persuaded the FCC in 1970 to ban telephone companies from providing cable television service in areas where they maintained telephone operations. The FCC also adopted rules requiring telephone companies to offer cable operators the alternative of pole attachment rights at reasonable rates whenever the telephone company sought to provide a channel distribution service.

As a court noted, however, the FCC "did not ban the telephone companies from the cable television business altogether for the prohibition extends only to the telephone companies' service areas. Outside of these areas the companies are free to compete with independent operators." 1/ But the telephone carriers which had entered the cable television business directly

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1/ General Tel. of Southwest v. United States, 449 F.2d at 860.

did not choose to compete in this free market. Both General and United sold their cable television assets shortly after the FCC's ban on cross-ownership and neither has sought to compete in areas where they do not have the advantage of a co-located telephone company.

Similarly, the FCC's rule preserving a free market choice for the selection of telephone or non-telephone distribution facilities apparently caused AT&T to abandon its tariff offerings. AT&T has sold the cable television facilities previously offered under such tariffs and, although free to do so, has constructed no new cable TV facilities.

But the telephone carriers did not abandon their objective; they merely revised their strategy. Having been prevented from achieving a major ownership interest in cable's distribution plant by the FCC's 1970 actions, the telephone carriers next sought to participate in the profits of the cable television industry by the simple device of immediately raising pole attachment rates. This stratagem almost succeeded when the FCC held in July, 1977 that it had no jurisdiction to regulate the reasonableness of pole attachment rates. This Committee, however, reviewed the evidence and properly determined that free marketplace forces cannot function where one entity possesses a total monopoly over an essential resource (here pole space) which

another entity must acquire in order to provide a communications service. Congress therefore passed Public Law 95-234, which provides a federal or state forum for the resolution of pole attachment disputes, as a means of preserving competition in telecommunications services.

H.R. 13015 would repeal the pole attachment law, the FCC rules noted above and the 1956 Consent Decree against AT&T's provision of non-common carrier services. Given the extensive records of proven anti-competitive conduct which demonstrated the deficiency of marketplace forces and supported these governmental actions, we have grave concerns over Section 332 in the proposed legislation.

We must emphasize again that the cable television industry is not seeking protection from any technology. If telephone carriers can provide a "one-wire" communications capability with fiber optics, coaxial cable or any other facility that is more technically efficient for delivering video services than cable television, there is nothing in current law to prevent them from doing so, nor do we seek limitations on their right to do so. But it is absolutely essential to test this technical efficiency in the marketplace by assuring that independent providers of television services have a choice of leasing channel capacity from telephone carriers or of building their own distribution

plant. There would be no such choice, however, if a telephone carrier with its immense resources and ability to cross-subsidize cable operations indefinitely could say, in effect, "either lease my wire distribution system at my price or I will offer a programming service directly to your customers (at below market costs)."

There are, we submit, two obvious social costs of the monopoly that inevitably would result from the entry of the telephone industry into the business of providing television programming to the public. First, the new and rapidly expanding medium of cable television would be absorbed by AT&T, the largest corporation in the world. History teaches that once AT&T achieves a monopoly in a telecommunications service economies of scale become an illusory concept. Second, telephone carriers, which already are bombarding the public with institutional advertising designed to equate their monopoly services with the public interest, would be given an opportunity to select and control programming delivered to the public by wire. Such a development, we submit, would raise grave First Amendment concerns over the free flow of opposing viewpoints to the public.

A fundamental oversight in H.R. 13015 is that it seems to ignore the fact that telephone carriers by virtue of their monopoly ownership of poles control the "gateway" to cable

television and have used that control to seek to destroy an independent cable television industry and the consumer benefits which competition from that industry would bring. As the U.S. Court of Appeals for the Fifth Circuit stated in affirming the FCC's telephone-cable cross-ownership rules:

> . . . CATV is one important gateway to entering the broadband market and it is the Commission's obligation to eliminate any arbitrary blockage of this gateway. There is no reason to deny independent operators the opportunity to participate in broadband cable developments, yet the power to deny entry would reside in telephone companies. 2/
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> * * * *
>
> The Commission described an existing realistic danger of competitive restraint and in its rule-making capacity it took steps to eliminate such anti-competitive potential. 3/

While we recognize that H.R. 13015 would seem to give the new federal agency, the CRC, the authority to consider whether the provision of cable television service by a telephone carrier would be consistent with the purposes of the Act, we do not find solace in such authority. This is so because nowhere does H.R. 13015 recognize as a national communications purpose the existence of a competitive independent cable television

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2/ General Telephone Co. of Southwest v. United States, 449 F.2d 846, 857 (5th Cir. 1971) cert. denied, ___ U.S. ___.

3/ Id. at 859-60.

industry. Indeed, H.R. 13015 places cable television outside of the CRC's jurisdiction. As a court stated in holding that the FCC should regulate telephone involvement in cable television: "the Commission's regulatory and enforcement powers should not be artificially fragmented or compartmentalized when the result would be to frustrate a comprehensive regulatory scheme." 4/ H.R. 13015 unfortunately would do just that, i.e., remove federal authority over one form of telecommunications (cable television) which is exceedingly vulnerable to another form of telecommunications (telephone). Such a result clearly is undesirable from the point of view of a national communications policy. Even assuming that the CRC would consider the adverse impact on an independent cable operator as a consequence of the provision of cable service by a telephone carrier, H.R. 13015 contains no standard to measure whether such impact is consistent with the purposes of the Act. Moreover, the process of measuring impact and of balancing the competing interests undoubtedly would involve the type of time consuming and expensive litigation that telephone companies can use to exhaust their adversaries.

We respectfully submit that at least in this particular area H.R. 13015 would result in less, not more, competition.

4/ General Tel. of Cal. v. FCC, 413 F.2d 390, 402 (D.C. Cir. 1969).

After having gone through this detail, let me summarize the industry's position as it relates to the goal of assuring the availability of innovative broadband service to as many people as desire it at reasonable costs.

First, the telephone carriers today are not restricted from building coaxial cable or fiber optics or any other technological advancement in cable plant. If indeed their facilities prove to be the most efficient and economic transmission medium for carrying cable television and other broadband services, then it will be this "one-wire" and not the cable operators' own cable which is utilized. We have no problem with the telephone company supplying the highway, provided, of course, that the provision of facilities is fairly open to all.

Second, it is the repeal of the present restrictions on a telephone company's provision of cable services in its monopoly market area which is of grave concern to the cable industry. We can hardly support the prospect of having to return to anticompetitive practices such as (1) denial of pole attachments, (2) unreasonable lease channel rates, (3) telephone- inspired franchise denials, and most importantly (4) cross- subsidization of competitive services with monopoly profits from non-competitive telephone service. Thus, we oppose the repeal of the cross-ownership rules.

While the drafters of H.R. 13015 seem to recognize the dangers of cross-subsidization between monopoly telephone services and other telecommunications services, they apparently believe that requiring telephone carriers to provide such services through subsidiaries will mitigate the dangers. We disagree. The initial telephone entry into cable television was through subsidiary corporations and the FCC found that rate regulation would not prevent the elimination of the independent cable television industry. But most significantly, regulation of a telephone company's channel service rates is unnecessary if independent operators have the option of constructing their own distribution systems. So long as this option is fairly available, the marketplace will assure a benchmark for measuring the efficiency of the telephone company's channels.

We therefore, urge the Committee to recognize in this legislation the wisdom of the basic rules that have been adopted over the past eight years to preserve competition in broadband communications. In conclusion, I wish to summarize the benefits to the public which have resulted from the existing scheme of regulation:

- the economy and efficiency of broadband communications facilities are determined in the marketplace

because providers of broadband services can freely elect to lease capacity from telephone carriers or to construct separate facilities.

- There is no need for government regulation to determine whether a common carrier is subsidizing video transmission facilities to be used by a related program service with revenues from basic telephone service.
- There is a reduced probability that video services will be available only from a sole source supplier.
- There is vigorous competition between the various technologies which deliver television services and through this competition the public is being offered many new and innovative services.

CASE HISTORY SUMMARIES OF TELEPHONE COMPANY ABUSES

Prior to adoption of the cross-ownership rules in 1970, which prohibited telephone companies from owning or being in any way affiliated with cable television systems within their service areas, the telephone companies engaged in a systematic program of anti-competitive practices designed to preclude independent cable television systems and to preserve an absolute monopoly on broadband telecommunications services.

The following brief case histories outline specific examples of various anti-competitive practices employed by the telephone monopolies in order to preclude the operation of competitive cable systems.

1) Telephone companies abused their entrenched monopoly position and their long established political relationships to convince local officials to award cable television franchises only to the local telephone company subsidiary.

For example, in 1965, United Utilities, a separate subsidiary of United Telephone Co., adopted a policy designed to prevent CATV franchises from being granted to an unaffiliated company in any community served by United. To implement this policy, United's managers were encouraged to actively seek franchises for their respective areas. At a 1965 Board of Directors meeting, United Managers were instructed as follows:

> ... to insure that no other franchises in United towns are issued to foreign companies, each operating head has been requested to formally introduce a franchise for United Transmission, Inc.

United's President urged managers to take "an aggressive approach" to the provision of cable services.

One such manager applied for a franchise in Warrensburg, Missouri, where he had served on the city council. Several letters were sent by United to local officials "reminding" them of all the favors the telephone company had done for the community. Even after a franchise had been granted to an independent operator, United pressed its application. In a public franchise hearing, the telephone company manager stated that the unaffiliated cable operator would be allowed to attach to United's poles. Later, in a private call to the Mayor, this promise was revoked. United was ultimately awarded a second franchise. See, Warrensburg Cable, Inc., 48 FCC 2d 910 (1973).

Similarly, in Telecable Corporation, 19 FCC 2d 574 (1969), the Commission found that the General Telephone affiliated companies used their monopoly position to convince the city council not to award the franchise to an independent cable company. Furthermore, Pacific Northwest Bell intervened with the governing authority of the city of Portland, Oregon in 1974 to deter the award of a CATV franchise which might offer competitive services. Pacific Northwest Bell argued that the cable system would be superfluous and would violate the telephone company's charter as the sole provider of communications services. In addition, Pacific Northwest Bell threatened that implementation of the planned system would increase telephone rates and jeopardize the re-election of council members who supported the plan.

2) Telephone companies advised local franchising officials that independent cable operators would not be granted access to utility poles even if a franchise was not awarded to the telephone company subsidiary.

This is another effective way of pressuring a local community into awarding a franchise to a telephone company-subsidiary cable operator. If the city wants cable service, it has no choice but to award the franchise to the telephone company. Illustrative of this practice is the November 19, 1965 letter from Mr. George J. Wickard, CATV Coordinator, United Telephone Company of Pennsylvania, to the President of the Borough Council, Borough of Hanover, Pennsylvania:

> The United Telephone Company of Pennsylvania is preparing tariffs to provide and lease signal distribution facilities for community antenna television systems. Pole attachment agreements permitting CATV operators to attach to United Company poles will not be available to any CATV operator who should become successful in a bid for CATV franchise.
>
> United Utilities Incorporated, our system parent company, has formed a subsidiary company, United Transmission, Incorporated, which will provide and operate CATV systems. United Transmission has completed signal strength surveys and other feasibility studies for Hanover Borough. I have been authorized by United Transmission, Incorporated to request time on the Borough Council meeting agenda in order for United Transmission to present its proposal to provide Hanover Borough residents with community antenna television service.

3) <u>Telephone companies often commenced service in communities without local franchises on the theory that their certificates from the state PUC were sufficient.</u>

This tactic allowed the telephone company to disregard any local determination as to the appropriate cable franchisee and simply commence operations in competition with established operators without complying with established local procedures. Under the proposed legislation, the CRC would have no authority to review the adequacy of any local franchise or other authorization nor could it set aside franchises awarded through fraud, bribery or coercion. <u>See</u>, <u>Teleprompter</u>

Cable Systems, Inc. v. FCC (Johnstown, PA), 543 F. 2d 1379 (D.C. Cir. 1976).

4) To advance their own cable effort, company-wide policies were adopted by the telephone company refusing to grant pole attachments to independent cable systems while granting such access to the telephone company's separate subsidiary.

For example, at a management meeting on December 15 and 16, 1964, United Utilities adopted a "CATV Policy Statement" which concluded, in part:

> We believe it is in the public interest that pole and duct line space be utilized as efficiently as possible, that each service carry its full share of cost, and that the control of this property be exercised by the public utilities (telephone and power) which own it and which have long-term responsibility, under regulation, for its use. For these reasons, we will not ordinarily grant contact rights for the use of poles or lease duct space to others for any purpose.

5) Telephone companies employed various tactics to give their channel lessees advantages over independent cable operators seeking attachments to telephone company poles.

Leasebacks were preferred by telephone companies to pole attachments because the telephone company owned the facilities, could control their use and could add their cost to the rate base to justify telephone rate increases. These advantages are not available when cable operators own potentially competitive facilities attached to telephone company poles.

AT&T, which was barred from the cable television business by the 1956 Consent Decree, typically priced its channel distribution leasebacks at less than cost to induce cable operators to lease facilities under AT&T control rather than construct their own facilities attached to AT&T poles.

However, the independent telephone companies actively involved in cable television through separate subsidiaries, such as United and General, did not offer sweetheart leasebacks to independent operators. Rather, these telephone companies filed tariffs which were only attractive to their subsidiaries, thus precluding competition. For example, "barrier to entry" rates could be set unreasonably high so that only the telephone subsidiary could afford service. Similarly, the telephone subsidiary would agree to restrictions upon use in a leaseback agreement since the parent could always provide all other services. Understandably, independent cable operators were unwilling to accept these restrictions.

In response to interrogatories filed by the Department of Justice in the on-going AT&T anti-trust suit, the Department concluded that "...cable communications represents an alternative local distribution system which threatened [AT&T's] local exchange monopoly, the development of which [AT&T] attempted to limit." 1/ Under the proposed legislation, AT&T's incentive for anti-competitive conduct would be even greater, because an independent cable system would not only threaten AT&T's local exchange monopoly but the plethora of competitive services opened up to AT&T under H.R. 13015 as well.

The Justice Department referred to AT&T market studies which "...concluded that the most effective means of precluding cable companies from eroding AT&T's market position was to prevent cable companies from owning distribution facilities, and restricting the use to be made of such facilities..." 2/

1/ Plaintiff's Answer to Interrogatory 51, United States v. AT&T, et al., Case No. 74-6098 (D.C. Cir.), p. 277.

2/ Id. at 282.

AT&T, which has been precluded from the cable television business by the 1956 Consent Decree, wanted to at least maintain ownership and control over the distribution facilities. AT&T attempted to achieve this position by arbitrarily raising pole attachment rates, by imposing use restrictions on independently owned facilities and by employing its ability to cross-subsidize through marketing "..their own 'channel services' at remarkably low prices to encourage existing and potential cable communications companies to lease channels from Bell rather than construct their own."[3/] AT&T admitted that its leaseback rates did not even cover costs.[4/]

6) Telephone companies engaged in protracted delays in arranging for pole attachments in order to force the independent cable company into accepting leaseback arrangements.

The Bell System's companies filed tariffs in the late 1960's offering to provide leased channel distribution service. While not refusing pole attachments outright, as did General and United, the Bell System companies adopted various policies, including unsupported increases in pole rates and delays in make-ready, "changeouts" and engineering inspections, which made it exceedingly difficult for an independent cable operator to compete in the marketplace with an operator who had leased channels from a Bell Telephone Company. After reviewing these policies and practices in Better T.V. of Dutchess County, N.Y. v. New York Telephone Co., 31 FCC 2d 939 (1969), the FCC concluded:

3/ Id. at 283.

4/ Id. at 294.

> The course of conduct followed by N.Y. Telco employees in the communities under consideration such as the express or implied threats of delay if the cable operators persisted in their request for pole attachment agreements, the interminable delays between each step of the processing from request to the attachment of the cable to the poles, the priority given to construction for the channel service customer and the other conduct detailed herein, establish to our satisfaction that the objective of such conduct was improperly to discourage attachment applications and to encourage the acceptance of common carrier channel distribution service. 31 FCC 2d at 966.

7) Telephone companies built duplicative facilities to those provided by the existing franchised independent cable entrepreneurs for the benefit of the telephone company's cable subsidiary or for favored cable operators which leased channel distribution facilities from the telephone company.

For example, in Warrensburg, Missouri, in spite of the intense pressures brought to bear by United Telephone against local officials, a franchise was granted to an independent cable operator. The independent operator met with persistent opposition and delays from United with regard to pole attachments and essential procedures for the construction of a cable system.

Subsequently, United succeeded in obtaining a second "non-exclusive" franchise from the city for its subsidiary. United marshalled crews and equipment from its telephone subsidiary and was able to complete construction to the entire city long before the independent operator who had started first. This advantage is crucial in an overbuild situation because customers typically stay with the first company that offers them service. See, Warrensburg Cable, Inc., 48 FCC 2d 910 (1973).

8) Telephone companies, with the only available poles, have required pole attachment agreements to be terminable at will.

Abuses by the telephone companies as to their pole attachments have been thoroughly detailed in the last two sessions of Congress. Incredibly, H.R. 13015 would repeal the recently passed remedial pole attachment legislation.

Telephone companies have rarely had to exercise this terminability at will because its mere existence gives the telephone monopoly total leverage, especially with regard to pole rate increases. Furthermore, many lenders have avoided the cable industry in the past because they are unwilling to see such a tremendous investment in plant and electronic equipment be capable of destruction at the whim of the telephone company.

Telephone companies do not hesitate to use this monopoly power when force is necessary. For example, in 1976, North Carolina cable operators failed to pay a unilateral pole rate increase when Carolina Tel. and Tel., a United Company, refused to offer any cost justification and would not even negotiate. The telephone company disconnected the cable from the poles, disrupting service in three communities. The same disruption of service was threatened within a week to 23,000 subscribers in Fayetteville, N.C.

9) Pole attachment and leaseback agreements typically restricted the independent cable operator to one-way transmission of off-the-air television signals, thus preserving all other telecommunications markets for the telephone company or its cable subsidiary.

As mentioned before, telephone companies want to retain control over broadband facilities to preclude independent cable operators from offering services which do or might in the future compete with the telephone company.

In a Report on CATV Activity to its directors, United Utilities candidly admitted its intention to thwart competition:

> The United System went into the CATV business primarily to protect the interests of its operating telephone companies, in anticipation of future developments in communications which would require a broadband transmission facility. We wished to avoid having a potential business competitor build such a facility on United pole lines in towns served by United Telephone Companies. See, Warrensburg Cable, Inc., 48 FCC 2d 910, 919 (1973).

The following examples of attempts to invoke these restrictions upon use of a cable operator's facilities are indicative of the potential for restraining competition.

On September 26, 1967, Michigan Bell notified Iron River CATV that its pole attachment agreement would be terminated if Iron River continued transmission of a radio signal when the pole attachment agreement only allowed one-way transmission of television signals.[5/]

New York Telephone denied the request of Ceracche TV Cable Company to transmit educational programs via cable to Ithaca College since this would be a two-way service.[6/] On May 27, 1968, Pacific Telephone denied a request for pole attachment privileges to a California cable operator desiring to install security surveillance cameras at customers' locations. Pacific Telephone admitted that the attachments were being denied because it offered similar services.[7/]

5/ Plaintiff's Answer to Interrogatory 51, United States v. AT&T, et al., Case No. 74-6098 (D.C. Cir.), p. 284.

6/ Id. at 285.

7/ Id.

The typical United Telephone leaseback agreement for the "joint use" of facilities built by United included the following terms:

1) the inhibition against the CATV operator providing common carrier services;

2) the grant of an option to the telephone company to construct and maintain the CATV system;

3) the grant of an option to the telephone company to control radio spectrum space, both within and outside of the "VHF" and FM broadcast bands; and

4) the provision that the telephone company will perform installation and maintenance work for the CATV operator on a no-priority basis, while at the same time prohibiting the CATV operator from holding out that the telephone company has responsibility for the service provided.

10) Channel lease (leaseback) agreements also typically allowed the telephone company to reclaim bandwidth upon demand.

This situation is analogous to the terminable at-will pole attachments. Under such an arrangement, a cable operator could be put out of business simply because the telephone company wanted excess capacity or because the facilities were being used to compete with the telephone company. United even insisted that this right to reclaim bandwidth on the systems be included in the sale agreement when it was forced to divest pursuant to the FCC cross-ownership restrictions.

11) Telephone companies have the ability to use monopoly profits and telephone revenues to cross-subsidize cable operations.

State and Federal regulatory bodies have granted telephone companies a monopoly on local exchange switched voice service and allowed rates adequate to provide a "fair rate of return". This is done, at least in part, to assure universal telephone service and to provide accumulated capital for innovation, research and development, and modernization of the expensive telephone plant. Telephone companies, however, have used these accumulated monopoly profits to enter new fields and expand their monopolies.

In order to foreclose the independent cable operator from the market, cable television service could be initially offered at less than cost by the telephone company's cable subsidiary. These losses could be subsidized from accumulated monopoly profits or from other rate payers such as telephone subscribers. As the Supreme Court has held, "...the use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor is unlawful." United States v. Griffith, 334 U.S. 100 (1948). While the Congress may hope that the proposed legislation produces competition in all facets of telecommunications, including local telephone exchange service, the present monopoly in local service is not likely to be eliminated in the foreseeable future as a source of monopolistic cross-subsidies.

AT&T has been found to have used this predatory pricing practice in other areas where competition was permitted.[8/] But it has been extremely difficult to prove.

8/ The anti-trust suit brought by the Justice Department alleges countless examples of this predatory pricing by AT&T. AT&T has been found to have engaged in this activity in "competing" with the independent equipment suppliers and, indeed, section 333(a) of the proposed legislation recognizes such likelihood by requiring that AT&T divest itself of its separate subsidiary, Western Electric. Furthermore, in the "specialized carrier" area, predatory pricing has been found by FCC administrative law judges in digital data service. American Telephone and Telegraph Co., 62 FCC 2d 774 (1977).

The pending franchise applications for cable service in Verona, Wisconsin provide an example of this potential for anti-competitive abuse even from the smaller telephone companies. The small telephone company, a REA borrower, has proposed to offer cable services at substantially less than cost in an effort to underbid the existing independent cable operator. These predatory prices can be proposed only because of the telephone company's ability to cross-subsidize from its monopoly services.

As a further unfair competitive advantage, the telephone company plans a consolidated financial statement, thus gaining a significant tax break by offsetting the projected cable losses against telephone company profits. H.R. 13015, while requiring separate subsidiaries for the provision of competitive non-common carrier telecommunications services, does not appear to prevent this kind of unfair tax incentive to the parent telephone holding company.

S. 611 (HOLLINGS) AND CABLE TELEVISION

Overview

S. 611 is an amendment to the Communications Act of 1934 which significantly changes the regulatory concepts developed under the '34 Act. Two crucial policy determinations are made in S. 611 which have a profound impact on cable television:

1. The regulation is based on services not on facilities as is presently the situation.
2. The regulatory concept of common carriers is abolished as is the concept of cable television carriers. These are replaced by the regulatory concept of "telecommunications carriers."

The essence of the telecommunications carriers portion of the bill is that the degree of regulation will be determined by the extent to which the individual services are competitive. Two categories of carrier services are established:

1. Category I: Carrier services which are unregulated because they are subject to effective competition (as defined by the FCC) and do not dominate a particular market.
2. Category II: Carrier services which are regulated because they are not subject to effective competition.

In addition, there is created the concept of "exchange areas" within individual states. These exchange areas are to be established by the states and can be no larger than One Standard Metropolitan Area. The states shall have jurisdiction over intra-exchange services which are not essential to inter-exchange telecommunications. All inter-exchange and interstate telecommunications are preempted by the federal government.

Specific Cable Issues

1. Crossownership

The FCC is given the authority to promulgate rules pertaining to cable/telco and cable/broadcast crossownership. In addition, Section 227 of the bill provides no Category II (noncompetitive) carrier may provide cable television service without permission of the Commission. This has the same impact as the current cable/telco crossownership rule only it would now be in a statute. In addition, as a precondition to any waiver under this policy, the Commission shall require conditions adequate to achieve separation of cable television services from non competitive services such as the establishment of a fully-separated entity to provide cable TV service.

The Subcommittee summary of S. 611 states, "In its case-by-case (waiver) review in larger communities, the telephone companies must show program service would not be provided without their involvement." This is similar to the position NCTA is advocating in the ongoing rural crossownership rulemaking at the FCC.

For the purpose of the bill, "Cable Television Services" is defined as "the retransmission by any closed transmission medium of any broadcast signal or any one-way video entertainment program on a per-caller, per-program, or other subscription basis."

2. Federal-State Jurisdiction

States shall have jurisdiction (which may be delegated to the local level) of all intra-exchange matters not essential to inter-exchange telecommunications. Included in this would be franchise fees, basic subscriber fees, and local access and service requirements.

Retransmission of broadcast signals and other subscription video entertainment (pay cable) is federally preempted.

3. Signal Carriage Regulation

Cable carriage of broadcast signals is preempted as a federal matter. Broadcast retransmission is not a telecommunications service subject to the Category I and Category II determination but instead is regulated under its own set of rules. These rules provide that the FCC may impose signal restrictions if the local broadcaster can demonstrate harm to his local service obligation. The burden of proof in any such proceeding would be on the broadcaster.

4. Subscription Video Entertainment (Pay Cable)

Pay Cable is preempted as a federal matter. As an "information service", pay cable is deregulated insofar as the program supplier and the content of the programming is concerned.

5. Separations

There is no prohibition on cable operators engaging in programming. Instead, there is a requirement that a cable operator wishing to engage in programming must do it through an arms-length subsidiary. Such a subsidiary, called "fully separated entity",

means an entity or carrier "owned or controlled by or under common ownership or control with another entity carrier which does not have common directors, officers, employees, facilities, or financial structure with such other entity or carrier, and which deals with such other entity or carrier in the same manner (according to the same arms-length arrangements) as it deals with any unaffiliated entity or carrier."

6. Pole Attachments

The bill amends the pole attachment law by requiring mandatory access to poles, ducts, and conduits at just and reasonable rates, terms and conditions. In addition the bill eliminates the pole law's exemption for cooperative utilities.

7. Rural

The Bill directs the FCC to reexamine its crossownership provisions in regard to rural areas in order to allow telephone companies to provide cable service where there is no other means of obtaining such service. Provisions are also included to authorize REA, in conjunction with NTIA, to provide funding for rural broadband planning and facilities. Then funds would be available to all qualified parties, including cable.

S. 622 (GOLDWATER) AND CABLE TELEVISION

Overview

The Bill amends the Communication Act of 1934 "to encourage marketplace competition"...and to provide deregulation of certain services. The Bill provides a regulatory philosophy and guidelines for FCC action in the areas of common carriers, international communications, broadcast licensing, radio deregulation and cable deregulation. Cable is defined as an interstate communications medium, thus placing the primary focus of cable regulation exclusively at the federal level.

Specific Cable Issues

1. Crossownership

The FCC is directed to maintain its current restriction on telco provision of cable services, ensuring that "no common carrier becomes a cable system operator or channel programmer." As is currently the case, common carriers may lease channels to cable systems or channel programmers.

The FCC may waive telco/cable crossownership restrictions in rural areas where services would otherwise not be provided.

Restrictions on broadcast ownership of cable systems (including network ownership) are lifted.

2. Federal-State Jurisdiciton

Cable is defined as an interstate communications media and regulation thus almost completely restricted to the federal level. Non-federal regulation is specifically prohibited as regards:

a. signal carriage
b. crossownership
c. access
d. origination, including pay cable
e. subscriber rates
f. technical standards
g. carriage of sporting events

3. Signal Carriage Regulations

The FCC is directed to establish terms and conditions regarding cable carriage of broadcast signals. Directions to the FCC are vague, the bill noting that "any restrictive terms that the

Commission may impose may be waived on a case-by-case basis. The cable system requesting the waiver would bear the burden of showing that such restrictions are not necessary to prevent harm to the public.

4. Program Origination (including Pay)

Pay Cable appears to be defined as an origination service and as such is unrestricted in the Bill. State, Local or Federal limitations on originated programming or program content are prohibited, as is rate regulation.

The FCC is directed to establish restrictions on cable carriage of sporting events which were previously available "live and in their entirety on nationwide broadcast television."

5. Separations

There is no cable separations in the Bill.

There is a requirement that the FCC establish regulations that would ensure, whenever a cable system was the only source of video programming in a market, the availability of access channels for lease on a first come, first serve basis. The number of mandated access channels would be determined as a proportion of total channel capacity. The FCC is also directed to ensure that the cable operator does not prohibit cable subscribers from attaching terminal equipment, as long as such equipment is compatible.

6. Pole Attachments

The Bill maintains the current Pole Attachment Law and eliminates the exemption for cooperative utilities.

7. Miscellaneous

a. State, federal, and local regulation of leased channel rates is prohibited.
b. Candidates for federal office must be ensured reasonable access.
c. No agency (state, federal, local) may mandate origination or control program content.
d. The FCC will establish technical standards to ensure compatibility and prevent interference.
e. Protection of individual privacy must be ensured.

NEW COMPETITION FOR CABLE TV

Cable television has always had competition for the consumer's entertainment dollar — movie theaters and local broadcasting. Now there are other new technologies offering the American consumer a non-cable television alternative to commercial television. This new competition assures that cable will not become a monopoly and must remain responsive to consumer needs.

STV

Subscription Television is an entertainment programming service provided by specially-equipped UHF television stations. A UHF scrambled TV signal is transmitted over-the-air and the subscriber receives the signal via his rooftop antenna. A device to descramble the signal is attached between the antenna and the television set in the home. Programming is provided over one channel.

There are already 100,000 STV subscribers in Los Angeles, and other major markets — Philadelphia, Chicago, Miami, Detroit, Dallas-Fort Worth, and San Francisco, among others, are all being considered for STV development. STV has been authorized in nine markets already, and there are 26 pending applications at the FCC. 1979 is expected to be a tremendous growth period for this industry. Predictions have been made that within 6 years, STV will equal the size of pay cable in subscribers, and match its program buying size within 4 years.

MDS

Multipoint Distribution Service is a common carrier service that transmits private TV programming (or data and facsimile), via microwave.

Hotels and apartment buildings in metropolitan areas, with rooftop receivers, are the largest users of MDS entertainment channel service. However, MDS is also now considered viable in medium and smaller markets where there is little pay cable. Past technical problems with this service have been overcome, and market penetration is expected to increase.

VIDEODISC/CASSETTE

The Videodisc and Videocassette industries predict a 30% penetration into the American home by 1985. RCA has earmarked $2 million for advertising early in 1979 for its SelectaVision line of video cassette recorders.

Because of the technological advances within this industry that make the video equipment available at reasonable consumer-market prices, families will have the capability of forming their own "video libraries", with programming ranging from movies and special entertainment programs to instructional series and "talking books".

And within the cable industry itself, competition is at an all-time high. For example,

PAY COMPETITION

The number of pay cable programmers continues to expand, bringing with it new competition. This competition has stimulated pay cable programmers to differentiate their services by adding new productions and products, thus helping them in the marketplace while benefitting consumers through greater service.

Recently, the second-largest pay cable programmer, Showtime, closed the gap on the largest programmer when the largest cable system, Teleprompter, bought half interest in Showtime and switched its systems to this service. This new influx of subscribers put real competitive vitality into the race between the number one and number two programmer, vitality from which the consumer will benefit.

COMPETITION FOR NEW CABLE FRANCHISES

As the number of services that cable television offers increases, so, too, does the number of communities that want to receive these services. At the end of 1978, there were:

- 4,000 communities being served by cable television
- 1,200 communities with franchise applications pending, and
- 640 communities that are asking cable companies to submit applications

The industry projects that in 1979 alone, it will build 25,000 miles of new cable plant. In comparison, it constructed just over 12,000 miles in 1976.

There are hundreds of cable television companies competing for these franchises, and those offering the most varied, marketable, and dependable services will be awarded the franchises.

According to a study done recently by Factbook Research, Inc., of the 384 cable franchises awarded in 1978, only 42 went to the largest 25 cable companies. The remaining 342 franchises were awarded to smaller cable operators, thus demonstrating the strong competitive vitality in the cable industry.