CURRENT ISSUES IN CABLE TELEVISION: A RE-BALANCING TO PROTECT THE CONSUMER*

NORMAN M. SINEL
PATRICK J. GRANT
CAROLINE H. LITTLE
WILLIAM E. COOK

I. INTRODUCTION

The Cable Communications Policy Act of 1984[1] ("Cable Act") was signed into law by President Reagan on October 30, 1984. The Cable Act, which added a new title to the Communications Act of 1934[2] ("Communications Act"), constituted the first major change in the Communications Act in fifty years.

A principal purpose of the Cable Act was to establish "a national policy that clarifies the current system of local, state and Federal regulation of cable television."[3] In doing so, however, Congress intended to establish a policy that would continue to rely "on the local franchising process as the primary means of cable television regulation, while defining and limiting the authority that a franchising authority may exercise through the franchise process."[4] Specifically, Congress intended the Cable Act to "preserve the critical role of municipal governments in the franchise process."[5] Although Congress clearly anticipated that by loosening various limits on the power of local franchising authorities, it would loosen the regulatory reins on cable television, Congress never contemplated the creation of a virtually unregulated industry concentrated into a few large companies.

---

* Messrs. Sinel (B.A. 1963, Yale University; LL.B 1966, Stanford Law School) and Grant (A.B. 1973, J.D. 1977, Georgetown University) are partners with the law firm of Arnold & Porter, Washington, D.C. Ms. Little (B.A. 1981, Wesleyan University; J.D. 1986, New York University) and Mr. Cook (A.B. 1984, Duke University; J.D. 1987, Harvard Law School) are associates with Arnold & Porter. This Article was prepared to reflect the recommendations of The National League of Cities, the United States Conference of Mayors and the City of New York (collectively, the "Cities"). Where identified as such, the recommendations in this Article are those of the Cities, otherwise the views are those of the authors.

1 Pub. L. No. 98-549, §§ 601-639, 98 Stat. 2779 (1984) (codified at 47 U.S.C. §§ 521-559 (Supp. V 1987)).

2 47 U.S.C. §§ 152-559 (Supp. V 1987).

3 H.R. REP. No. 934, 98th Cong., 2d Sess. 19, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS, 4655, 4656 (1984) [hereinafter H.R. REP. No. 934].

4 *Id.*

5 *Id.*

The framework of the Cable Act, combined with changes in the nature of the cable industry and the actions of the courts and the Federal Communications Commission ("FCC" or the "Commission"), has led to a substantially deregulated cable industry dominated by large, vertically integrated companies. This lack of competition makes it possible for cable operators to take economic advantage of subscriber dependency on cable television. Congress is reexamining the key deregulatory provisions of the Cable Act. Bills pending in Congress would help to alleviate the problems caused by the Cable Act and to stimulate competition in the cable television industry. This Article describes those bills, as well as additional legislative action Congress should take to effectively balance the relationship between cable operators and local franchising authorities and to promote competition in the cable marketplace. Part II reviews the events precipitating the passage of the Cable Act. Part III catalogues the major areas of regulation which the legislative proposals seek to influence.

II. BACKGROUND

A. *Federal Communications Commission Regulation*

To appreciate current congressional efforts to rewrite the Cable Act to protect the public interest, one must consider the relatively complex regulatory scheme which preceded the Cable Act. The history of cable television regulation by the FCC before the Cable Act reflects first an expansion and then a contraction of federal regulatory activity. In 1963, in *United States v. Southwestern Cable Co.*,[6] the Supreme Court upheld FCC regulations that required cable systems to carry all local television stations, prohibited systems from importing a signal from another city to duplicate any program carried on the same day by a local station, and prohibited cable systems from importing distant signals into the 100 major television markets without a hearing on the probable impact of such activities on local broadcasting.[7] The Court held that, while not expressly contemplated by the Communications Act, the FCC's authority under section 152(a) of the Communications Act,[8] which renders the provisions of that Act applicable to "all interstate . . . communication by wire or radio," was sufficient to justify FCC regulation of cable in cases in which regulation was "*reasonably ancillary* to the effective performance of

[6] 392 U.S. 157 (1968).
[7] *Id.* at 178.
[8] 47 U.S.C. § 152(a) (Supp. V 1987).

the Commission's various responsibilities for the regulation of television broadcasting."[9]

While *Southwestern Cable* constituted a landmark affirmation of the FCC's jurisdiction to regulate aspects of cable television, shortly thereafter, the Supreme Court affirmed, *per curium*, a decision of a federal district court which clarified that cable would, nevertheless, remain subject to possible state and local regulation of considerable breadth.[10] In *TV Pix, Inc. v. Taylor*,[11] the court found that Congress, in enacting the Communications Act, "did not intend absolute preemption of the field to the exclusion of all state regulation."[12] The court determined that the limits of federal preemption of cable television should be defined by the extent to which the FCC actually issued regulations, not by the scope of the FCC's power to regulate.[13]

In 1972, the FCC adopted comprehensive cable rules.[14] They required cable television operators to obtain a certificate of compliance from the FCC prior to constructing or operating a cable television system.[15] The rules governing cable operators fell into several broad areas, including franchising standards, signal carriage, network program non-duplication and syndicated program exclusivity, cablecasting, cross-ownership, equal employment opportunity, and technical standards.[16] Cable operators who originated programming were subject to equal time, the Fairness Doctrine, sponsorship identification, and other provisions similar to rules applied to broadcasters.[17]

In *United States v. Midwest Video Corp.* ("*Midwest Video I*"),[18] the Supreme Court upheld the provisions in the FCC's 1972 regulations that required cable systems with 3,500 or more subscribers

---

9 *Southwestern Cable*, 392 U.S. at 178 (emphasis added).

10 TV Pix, Inc. v. Taylor, 304 F. Supp. 459, 465 (D. Nev. 1968) (state law controls except where the FCC has regulated), *aff'd per curiam*, 396 U.S. 566 (1970). In *TV Pix*, a three-judge court sustained the constitutionality of a Nevada statute which provided for the regulation of cable television systems as public utilities. The court stated that "there is no reason to conclude that community antenna service is not monopolistic in character and is not affected with the public interest. State supervision of it as a public utility does not conflict with the Fourteenth Amendment." *Id.* at 467.

11 *Id.*

12 *Id.* at 464.

13 *Id.* at 465.

14 *See* Cable Television Report and Order, 36 F.C.C.2d 143 (1972), *modified*, 571 F.2d 1025 (8th Cir. 1978).

15 *Id.* at 185-86, 217-19.

16 *Id.* at 219-47.

17 *Id.* Additionally, cable operators were required to maintain certain records and to file annual reports with the FCC concerning general statistics, employment, and finances. *Id.* at 242.

18 406 U.S. 649 (1972).

and carrying the signal of a television broadcast station to also operate as a local communications outlet by originating programs and making available facilities for the local production of programs.[19] The Court concluded that permissible regulation of cable television under the FCC's "ancillary to broadcasting" jurisdiction included regulation designed to further the general regulatory goals of the broadcast provisions of the Communications Act as well as to protect the broadcasting industry.[20] In a concurring opinion, Chief Justice Burger, however, characterized the FCC's 1972 cable regulations as straining the "outer limits" of the agency's jurisdiction.[21]

After the 1972 *Midwest Video I* decision, the FCC modified or eliminated many of its rules, including significantly relaxing its substantive regulations and replacing the certificate of compliance application process, originally instituted in 1972, with a simpler registration process for new cable systems.[22] Additionally, several successful court challenges to the authority of the FCC to regulate in certain areas resulted in the invalidation of still other cable regulations.[23] As a result of these developments, through the remainder of the 1970s, the FCC's role in the cable television field was significantly reduced. First, after the Court sustained its mandatory origination rule in *Midwest Video I*, the FCC deleted its program origination requirement and revised its access rules to effect the same objective.[24] Second, in *National Ass'n of Regulatory*

---

19 *Id.* at 653-54. In upholding the FCC regulations, the Court determined that the regulations were reasonably related to the FCC's responsibility for monitoring television broadcasting, *id.* at 653, and were in the public's best interest. *Id.* at 671.

20 *Id.* at 664-65.

> [T]o define the Commission's power in terms of the protection, as opposed to the advancement, of broadcasting objectives would artificially constrict the Commission in the achievement of its statutory purposes and be inconsistent with our recognition in *Southwestern* "that it was precisely because Congress wished 'to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission,' . . . that it conferred upon the Commission a 'unified jurisdiction' and 'broad authority.' "

Id. at 665 (citations omitted).

21 *Id.* at 676 (Burger, C.J., concurring in result) (stating that given its explosive rise Congress should reconsider the statutory scheme surrounding CATV so that basic policy is not left entirely in hands of courts and FCC).

22 *See* Report and Order in Docket No. 20508, 59 F.C.C.2d 594 (1976) (deleting program origination requirement and revising access rules); Report and Order in Docket No. 21002, 66 F.C.C.2d 380 (1977) (making franchise standards voluntary guidelines); Report and Order in Docket No. 78-206, 44 Rad. Reg. 2d (P & F) 513 (1978) (abandoning certificate of compliance application process); 47 C.F.R. § 576.12 (1984) (promulgating registration procedure).

23 *See, e.g.*, Home Box Office, Inc. v. FCC, 567 F.2d 9 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977) (invalidating FCC anti-siphoning regulations); FCC v. Midwest Video Corp., 440 U.S. 689 (1979) (invalidating FCC cable access rules).

24 Report and Order in Docket No. 20508, 59 F.C.C.2d 294 (1976). These revised

Util. Comm'rs v. FCC,[25] a federal appeals court held that the FCC did not have the authority to preempt state and local regulation of the use of cable television leased access channels for two-way, non-video communications.[26] In making this determination, the court relied heavily on section 152(b) of the Communications Act, which explicitly denies the FCC jurisdiction over *intrastate* common carrier operations.[27]

The FCC further limited its regulatory authority when, in November 1977, it amended its franchise standards, making such standards, which had previously been mandatory, only voluntary guidelines.[28] Additionally, in 1978, the FCC abandoned its process for review and certification of proposed cable television operations,[29] and replaced it with a simple registration procedure under which cable operators could commence operations in a community as soon as a registration statement containing certain basic information was filed with the FCC.[30]

The Supreme Court's decision in *FCC v. Midwest Video Corp.* ("*Midwest Video II*")[31] also resulted in a reduction of FCC regulation. In *Midwest Video II*, the Supreme Court invalidated the FCC's cable access rules.[32] The Court held that these rules were

access rules were later vacated by the Supreme Court in the second *Midwest Video* decision. FCC v. Midwest Video Corp., 440 U.S. 689 (1979).

25 533 F.2d 601 (D.C. Cir. 1976).

26 *Id.* at 617. The FCC's attempted pre-emption of state regulations for two-way, non-video cable communications "run[s] counter to the plain meaning of the 47 U.S.C. § 152(b) limitation . . . [and] is not within the 'ancillary to broadcasting' standard." *Id.* (quoting United States v. Midwest Video Corp., 406 U.S. 649 (1972)).

27 47 U.S.C. § 152(b) (Supp. V 1987). Another case which loosened FCC control over cable was Home Box Office, Inc. v. FCC, 567 F.2d 9 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977). The *HBO* court invalidated the FCC's "anti-siphoning" regulations, which were issued for the express purpose of preventing the shifting of popular program material from free broadcast television to pay cable services. "[T]he strategy the Commission has pursued in implementing its interest in preventing siphoning creates a restriction 'greater than is essential to the furtherance of that interest.'" *HBO*, 567 F.2d at 50 (quoting United States v. O'Brien, 391 U.S. 367, 377 (1968)). The court held that the FCC was authorized to regulate cable television only where the objectives were "long established" in the field of broadcast television or were "congressionally approved." *HBO*, 567 F.2d at 13.

28 Report and Order in Docket No. 21002, 66 F.C.C.2d 380 (1977) (continuing limitation on the size of the franchise fee imposed by local governments remained mandatory).

29 Report and Order in Docket No. 78-206, 44 Rad. Reg. 2d (P & F) 513 (1978).

30 *See* 47 C.F.R. § 76.12 (1984) (basic information included identity, location, signal carriage, and equal employment opportunity program).

31 440 U.S. 689 (1979).

32 *Id.* at 691-93. These rules required cable television systems that had 3,500 or more subscribers and that carried broadcast signals to develop, at a minimum, a 20-channel capacity by 1986; to make available certain channels for public, educational, local governmental, and leased access users; and to furnish equipment and facilities for access purposes. The 1976 regulations had their genesis in rules promulgated by the FCC in 1972 requiring at least 4 channels for public, governmental, educational, and

not reasonably ancillary to the effective performance of the FCC's various responsibilities for the regulation of television broadcasting and that they imposed common carrier obligations on cable operators, thus violating section 3(h) of the Communications Act.[33] In April 1979, the FCC adopted a report on its syndicated program exclusivity rules and issued a notice of proposed rulemaking in which it proposed to delete the rules.[34] In July 1980, the Commission deleted entirely the syndicated program exclusivity rules.[35]

In April 1979, the FCC also denied reconsideration of its decision to relax its franchising standards and began a rulemaking to consider whether the federal limit on local franchise fees should be retained.[36] Finally, in July 1980, the FCC deleted the distant signal carriage restrictions, arguing elimination of such restrictions would benefit consumers without harming the ability of broadcast stations to meet their public interest responsibilities.[37]

B. *Uncertainty as to Jurisdiction*

This period of declining FCC involvement with cable created uncertainty as to the line between permissible and impermissible regulation at the local level. In 1975, the FCC referred to its approach as one of "subject matter preemption" and "creative federalism," explaining that the "ultimate dividing line"

> rests on the distinction between reasonable regulations regarding use of the streets and rights-of-way and the regulation of the operational aspects of cable communications. The former is clearly within the jurisdiction of the states and their political subdivisions. The latter, to the degree exercised, is within the jurisdiction of this Commission.[38]

---

leased-access use in the top 100 television markets. In imposing the 1976 requirements, the FCC reaffirmed its belief that preserving access channels benefitted society. *Id.* at 691-92.

[33] 47 U.S.C. § 153(h) (1982). *Midwest Video II*, 440 U.S. at 700-01, 708-09. The Court determined that imposition of the access rules abrogated cable operators' control over programming. Therefore, "the Commission has transferred control of the content of access cable channels from cable operators to members of the public who wish to communicate by the cable medium. Effectively, the Commission has relegated cable systems, *pro tanto*, to common-carrier status." *Id.* at 708.

[34] Report and Order in Docket Nos. 20988 and 21284, 79 F.C.C.2d 663 (1980).

[35] *Id.*

[36] Report and Order in Docket No. 21002, 66 F.C.C.2d 380 (1977).

[37] *Id.*

[38] Report and Order in Docket No. 20272, 54 F.C.C.2d 855, 861 (1975), *rev'd*, 467 U.S. 691 (1984).

The FCC further noted that it intended to preempt "areas of cable regulation [to ensure the] orderly development of this new technology into the national communications structure."[39]

The FCC purported to preempt certain areas of state and local regulation by adopting specific rules, thereby precluding state and local governments from promulgating regulations inconsistent with the FCC's or, in some instances, from promulgating any regulations in the area.[40] The principal areas of FCC regulation were those which: (i) specified the television and radio programming which cable operators were required to carry, could carry, or were prohibited from carrying; (ii) set limits on the fees which franchising authorities could impose upon cable operators; (iii) prohibited various forms of cross-ownership by broadcasters, television networks and telephone companies; and (iv) imposed various program content obligations upon cable systems which engaged in cablecasting (e.g., rules concerning the Fairness Doctrine, personal attack, political editorials, lotteries, obscenity, and sponsorship identification).[41]

The FCC also purported to preempt certain areas of cable regulation without adopting any rules, affirmatively declaring that state and local governments could not regulate in those areas. For example, in a series of rulings going back to the early 1970s, the FCC made it clear that state and local authorities could not regulate the rates, terms, conditions, or content of pay cable services.

On the other hand, the areas left to state and local regulation were defined in essentially three ways. First, there were several areas which the FCC specifically committed to state and local regulation: (i) the selection of the cable franchisee, including the determination of its qualifications; (ii) regulation of rates and terms for basic subscriber services; (iii) investigation and resolution of subscriber complaints; (iv) the length of the franchise and determination of renewal; and (v) the construction schedule and the geographic scope of the franchisee service area.[42] Second, state and local governments were free to regulate cable in any area not specifically preempted by the FCC.[43] For example, the FCC never addressed many matters relating to the protection of public health and safety, and thus these areas were open to state and local regulation. Finally, state and local authorities could regulate in those areas that

---

[39] *Id.* at 863.

[40] *Id.*

[41] Report and Order in Docket No. 20272, 54 F.C.C.2d 855.

[42] *Id.*

[43] This regulation was, of course, subject to applicable constitutional, statutory, or common law constraints, such as the antitrust laws, the first and fifth amendments to the United States Constitution, state enabling laws, and local ordinances.

were beyond the FCC's jurisdiction under the Communications Act.[44]

Beginning in 1983, however, several different developments suggested that the FCC was about to become increasingly active in its efforts to limit substantially the extent and nature of local regulation of cable.[45] In a series of decisions, the FCC appeared to expand the scope of its traditionally limited preemption of local cable regulation. In 1983, the FCC expanded its preemption of the regulation of "pay cable" rates to prohibit state or local regulation of the rates for any service other than "regular subscriber service," the basic service regularly provided to all subscribers, which the FCC narrowly defined as "must-carry" over-the-air signals.[46] The FCC declared that the rates for any other tier could not be regulated by state or local authorities because state and local jurisdictions were limited to regulating basic service.[47]

Of similar import was the FCC's decision in *Earth Satellite Communications, Inc.* ("*ESCOM*"),[48] dealing with state and local regulation of satellite master antenna television ("SMATV") or "private cable" system. In *ESCOM*, the FCC preempted one specific area of SMATV regulation, that is, "entry regulation."[49] It held that SMATV operators, unlike traditional cable operators, could not be required to obtain state approval prior to commencing operation.[50] The FCC broadly preëmpted any state and local regulation which "inhibits or interferes" with the development of SMATV.[51]

Also consistent with the change in regulatory emphasis was the

[44] For example, in National Ass'n of Regulatory Utility Comm'rs v. FCC, 533 F.2d 601 (D.C. Cir. 1976), a court held that the FCC lacked the authority to preempt state and local regulation of the use of leased access channels, two-way, point-to-point, non-video communication.

[45] Indeed, public statements to that effect were made by James McKinney, Chief of the FCC Mass Media Bureau, and other senior agency officials. In March 1984, Mr. McKinney was quoted as saying that he would present the FCC with a "cable preemption package" sometime after July 1984. 4 Communications Daily No. 45, at 1 (1984).

[46] Community Cable TV, Inc., 95 F.C.C.2d 1204 (1983), *aff'd*, 56 Rad. Reg. 2d (P & F) 735 (1984).

[47] *Community Cable TV*, 95 F.C.C.2d at 1217-18.

[48] 95 F.C.C.2d 1223, 55 Rad. Reg. 2d (P & F) 1427 (1983), *recon. denied*, FCC 84-206 (May 14, 1984), *aff'd sub nom.* New York State Comm'n on Cable Television v. FCC, 749 F.2d 804 (D.C. Cir. 1984).

[49] *ESCOM*, 95 F.C.C.2d at 1232, 55 Rad. Reg. 2d (P & F) at 1433 ("We believe that state or local government entry regulation of SMATV will 'chill development' of this service or impede its growth. We therefore conclude that our preemption today will ensure continued development and increased programming diversity to viewers of SMATV.").

[50] *Id.* at 1234, 55 Rad. Reg. 2d (P & F) at 1434.

[51] *Id.* at 1233, 55 Rad. Reg. 2d (P & F) at 1434. In City of Miami, Florida, 56 Rad. Reg. 2d (P & F) 458 (1984), *dismissed as moot*, CSR 2326 (Dec. 19, 1984), the FCC granted Miami's petition for a waiver of the FCC's franchise fee rules to allow the assessment of a 5% license fee, but it disallowed cash contributions by the cable operator that were

Supreme Court's decision in *Capital Cities Cable, Inc. v. Crisp*,[52] which, while of limited direct applicability, was widely read by the cable industry as strongly endorsing a broad standard of FCC jurisdiction over cable. The Court's description of FCC preemption of cable suggested that the FCC had established a clear division of responsibilities, with local governments responsible for franchising decisions and system construction issues and the FCC responsible for all operational issues; such a decision was not, in fact, the case.[53] Coming at a time when the FCC had been emphasizing deregulation and FCC staff members had been publicly advocating the preemption of additional areas of cable regulation, the Supreme Court's apparent endorsement of a broad standard of jurisdiction over cable was widely viewed as likely to encourage additional efforts in that direction.[54]

The Cable Act was enacted in the context of these legal developments, which, for the most part, favored the interests of the cable industry. The purpose of the Cable Act was to end the uncertainty concerning regulatory jurisdiction over cable and to establish a comprehensive statutory scheme for federal, state, and local regulation of cable television.[55] By enacting the Cable Act, Congress assumed that the public good required some regulation of the cable television industry. However, it has become apparent that, except for the setting of rates, the Cable Act has substantially deregulated the industry. Changes in the nature of the cable industry and the actions of courts and the FCC appear to have fostered the development of large, vertically integrated companies, whose cable television franchises are, for the most part, unregulated. As discussed further below, the abuses inherent in the current structure of the industry and its relationship to local franchising authorities have required Congress to reexamine the key deregulatory provisions of the Cable Act. If this second decade of cable development has been marked by deregulation, it appears that the third decade will be a time of re-balancing the regulatory framework.

III. Legislative Proposals to Stimulate Competition and to Provide for Effective Regulatory Oversight

The Cable Act represented Congress' initial effort to define

---

required by the city's ordinance to be used for the development of certain public access activities and similar purposes.

[52] 467 U.S. 691 (1984).

[53] *Id.* at 702.

[54] Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 697-711 (1984).

[55] H.R. Rep. No. 934, *supra* note 3, at 19.

the rights of federal, state, and local authorities to regulate cable television systems. Although Congress limited the control of cities over some aspects of the cable industry, Congress noted that the Cable Act "continues reliance on the local franchising process as the primary means of cable television regulation."[56] Congress recognized that "city officials have the best understanding of local communications needs and can require cable operators to tailor the cable system to meet those needs."[57] Congress intended the Cable Act to "preserve the critical role of municipal governments in the franchise process."[58] In short, the purpose of the Cable Act was not complete deregulation of the cable television industry, but a balanced approach to regulation.

Cities expected that the Cable Act would foster technological innovation and competition which, in turn, would result in improved cable services. They thought that the Cable Act would preserve the regulatory authority they needed to ensure that consumers receive quality, yet affordable, cable services. However, actions by the FCC and courts, and unforeseen developments in the cable industry itself, have upset the balance which Congress sought to establish in the Cable Act.[59] As a result, the cable industry has gained at the substantial expense of the consumer.

The FCC has seriously undermined the Cable Act's rate regulation provisions which were intended to protect consumers in communities where cable operators do not face "effective competition."[60] Further, the FCC has forbidden local franchising authorities from adopting signal quality technical guidelines that differ from the FCC's own 20 year old standards—standards which, prior to the Cable Act, even the Commission acknowledged were in need of upgrading. Thus, local franchising authorities are powerless to ensure that consumers receive adequate signal quality.

Federal courts have narrowly construed the power of franchising authorities under the Cable Act. Some decisions have held that a municipality's exercise of such authority is un-

---

56 *Id.*

57 *Id.* at 24.

58 *Id.* at 19.

59 *See infra* notes 60-64.

60 The FCC adopted an "effective competition" standard reflecting its own free market dogma, rather than the mandate of the Cable Act. This standard resulted in rate deregulation for 97% of the nation's cable operators, thereby paving the way to dramatic and unbridled rate increases. *United States General Accounting Office, National Survey of Cable Television Rates and Services: Report to the Chairman, Subcomm. on Telecommunications and Finance, House Comm. on Energy and Commerce*, GAO/RCED-89-193, at 4 (Aug. 1989) [hereinafter *GAO Survey*].

constitutional. Judicial decisions invalidating the FCC's "must-carry" rules upset a 20-year regulatory scheme that was an integral part of the foundation of the Cable Act and that ensured the availability of local programming.

The competition Congress hoped would flourish has not occurred. Instead, the market for cable services and video programming has become more concentrated. Multiple system operators ("MSOs") have earned an increasingly large share of the cable market.[61] Such concentration in the cable industry makes it difficult for independent cable companies, cable programmers, and alternative multichannel video programming distributors to compete with the established operators and their affiliated programmers. This lack of competition allows cable operators to take economic advantage of subscriber dependency on cable television. Cable operators now have the potential to control the programming received by about 80% of the nation's 90 million homes.[62] They already are controlling 47 million of these households.[63] Over 98% of the cable systems in this country do not face competition from another cable system.[64] Further, alternative multichannel video programming distributors do not provide viable competition to cable operators in most franchise areas. Thus, the local cable operator is often a citizen's only multichannel video source of news, information, and entertainment.

Congress must pass corrective legislative measures if the goals of the Cable Act are to be achieved. New statutory standards must provide stability in the regulatory relationship between cable operators and local franchising authorities, and promote competition in the cable marketplace. The steps that must be taken to re-balance the regulatory structure are identified in this Part in three sections: (i) the specific problem areas which warrant congressional attention; (ii) pending legislative measures, if any, which address those problems; and (iii) the recommendation of Cities for legislation that Congress should

---

61 The five largest MSOs now account for more than 40% of all cable subscribers. *See* BROADCASTING/CABLE YEARBOOK D-319 (1989) (Top 5 MSOs account for almost 19,000,000 subscribers); TELEVISION & CABLE FACTBOOK C-374 (1989) (47,500,000 total subscribers as of January 1, 1989). These MSOs have significant investments in a number of popular cable programming networks. *See* TELEVISION & CABLE FACTBOOK B-1447, 1448, 1454 (1989).

62 *See* BROADCASTING/CABLE YEARBOOK D-3 (1989); TELEVISION & CABLE FACTBOOK C-376 (1989).

63 *See* BROADCASTING/CABLE YEARBOOK D-3 (1989).

64 *See* Cable TV Franchising, Aug. 31, 1989, at 5 (stating that current overbuilds involve 700,000 subscribers).

adopt. The Cities' case for re-balancing the regulatory structure for cable television is compelling.

A. *Issues Affecting Municipal Regulatory Authority*

1. Rate Regulation

Prior to passage of the Cable Act, there were no federal statutory restrictions on the right of franchising authorities to regulate the rates for cable service. Beginning in the mid-1970s, the FCC prevented state and local jurisdictions from regulating rates charged for "pay cable" service. However, the FCC expressly authorized the regulation of "basic service" rates, i.e. the rates for local broadcast signals and Public, Educational, and Governmental ("PEG") access channels.[65]

In the Cable Act, Congress recognized the need for cities to continue to protect the consumer's interest in affordable cable service. Congress determined in section 623 that franchising authorities should continue to regulate the rates for "basic cable service" in those markets where the cable system does not face "effective competition."[66] Congress instructed the FCC to adopt an "effective competition" standard which would protect cable consumers from monopolistic prices charged by cable operators not subject to such competition.[67]

However, wedded to a hands-off marketplace approach to cable service, the FCC subverted congressional intent and failed to adopt a realistic "effective competition" standard. Under the FCC's "effective competition" standard, a cable system which typically provides more than 30-channels of programming is deemed subject to "effective competition" if as few as three over-the-air broadcast signals are theoretically available in 100% of a cable community.[68] This standard was vigorously opposed by the Antitrust Division of the Department of Justice, franchising authorities, and various public interest groups. Even the United

---

[65] *See* Brookhaven Cable TV, Inc. v. Kelly, 573 F.2d 765 (2d Cir.), *cert. denied*, 441 U.S. 904 (1979). During this period of rate regulation, the cable industry flourished. In 1976, for example, 3,681 cable systems reached approximately 11 million subscribers. TELEVISION & CABLE FACTBOOK C-374 (1989). By 1984, the number of cable systems had risen to 6,200 and the number of subscribers reached had almost tripled to a total of 29 million. Numerous satellite-delivered programming services were developed and prospered. By 1984, 43 satellite programming services were already in operation. At the same time, cities were able to protect the consumer interest in affordable cable service through rate regulation.

[66] Cable Act, § 623, 47 U.S.C. § 543 (Supp. V 1987).

[67] *Id.*

[68] Report and Order in Implementation of the Provisions of the Cable Communications Policy Act of 1984, 50 Fed. Reg. 18,637 (1985).

States Court of Appeals for the D.C. Circuit noted that it "might have defined 'effective competition' differently had [it] been presented in the first instance with the facts before the Commission."[69] However, the court said it was required to affirm the standard given the broad discretion the Cable Act granted the Commission in construing the definition of "effective competition."[70]

a. Current Regulatory Problems

Under the FCC's definition of "effective competition," more than 97% of the cable communities in the United States have not been subject to rate regulation.[71] The fear that cable operators in these communities would charge the consumer monopolistic prices for basic cable services was realized soon after the FCC's standard became effective. For example, a study conducted by the General Accounting Office ("GAO") shows that between December 1986, when rates were deregulated, and October 1988: (i) basic cable rates have increased an average of 29%; (ii) 45% of the cable operators had increased rates in excess of 30%; and (iii) almost one-fifth of the cable operators had increased rates by more than 50%.[72] These increases are far in excess of the approximately 10% increase in the Consumer Price Index during the same period.[73]

Although the reported increases are themselves dramatic, the GAO Survey does not sufficiently demonstrate the magnitude of the increases for some cities. For instance, in New York City, basic cable rates for some city residents have increased 74% since passage of the Cable Act.[74] Basic rates in Laredo, Texas have risen 258% since 1984 from $6.60 per month to $17.00 per month.[75] The increase has a significant impact on subscribers in Laredo, which has the second highest percentage of population living below the poverty line of the 275 largest Metropolitan Sta-

69 ACLU v. FCC, 823 F.2d 1554, 1564 (D.C. Cir. 1987).

70 *Id.*

71 *GAO Survey*, *supra* note 60, at 4.

72 *Id.* at 3, 28.

73 *See* S. 1880, 101st Cong., 1st Sess. § 2 (1989); H.R. 3826, 101st Cong., 1st Sess. § 2 (1989).

74 *See Media Ownership: Diversity and Concentration: Hearings Before the United States Subcomm. on Communications, Senate Comm. on Commerce, Science and Transportation*, 101st Cong., 1st Sess. 266 (June 21, 1989) (testimony of John L. Hanks, Director of the Bureau of Franchises for the City of New York).

75 *See Oversight of Cable TV: Hearings Before the United States Subcomm. on Communications, Senate Comm. on Commerce, Science and Transportation*, 101st Cong., 1st Sess. 276 (Nov. 16, 1989) [hereinafter *Oversight of Cable TV*] (testimony of Saul Ramirez, Mayor Pro-Tem and City Councilman, City of Laredo, Texas).

tistical Areas.[76] Numerous other examples of exorbitant rate increases have been presented to Congress.

The GAO Survey also fails to reflect various ways in which cable operators have been able to hide rate increases or manipulate consumers since passage of the Cable Act. For instance, cable operators have reaped monopoly profits from cable subscribers by unbundling or consolidating service tiers. It has been reported that one cable operator expects to increase significantly its revenues since unbundling its programming and offering it on an "a la carte" basis.[77]

In addition, cable operators have inflated the prices for equipment needed to receive cable services to discourage consumers from buying less expensive cable services. For example, it is reported that a cable operator imposed a $99.50 installation charge for basic service and a $350.00 installation charge for universal service.[78] It is possible that the cable operator imposed a higher installation charge for the universal service which has a lower monthly rate to encourage consumers to buy the more expensive basic tier of service.[79] When a senior vice president of the company was asked to explain the discrepancy in pricing, it is reported that he responded, "We're in the business to make money."[80]

The alleged actions by the cable operator demonstrate the power of cable operators to use pricing mechanisms to discourage cable subscribers from obtaining the services they may prefer. More importantly, the significant decrease in the installation charge for both services demonstrates the power of monopolistic cable operators to establish prices far in excess of the actual cost of such services. Finally, cable operators have maximized profits by increasing the types of equipment needed to receive cable programming.[81]

In those few communities that are not subject to "effective

---

76 *Id.*

77 Terranova, *Clustering Will Boost Cablevision Coffers*, Multichannel News, July 31, 1989, at 20, col. 1.

78 Universal service is a sub-basic service composed mostly of broadcast stations and PEG channels. *Prime Cable System Drops Hookup Fees*, Multichannel News, May 30, 1988, at 34, col. 1.

79 *See id.*

80 *Id.* It is reported that only after considerable pressure from the municipality did the cable operator lower the installation charge for universal service to $99.50, and the charge for basic service to $25.00. *Id.*

81 For instance, cable subscribers need converter boxes and remote controls to receive broadcast signals which have been repositioned to higher channel locations and programming signals which are now scrambled.

competition," cable operators continue to escape rate regulation for two main reasons. First, cities often must hire expense consultants and must engage in costly litigation to establish their right to regulate rates. The FCC, for instance, requires cities to submit engineering studies and other data to establish that three broadcast signals are not available in a cable community.[82]

The expense of establishing the absence of "effective competition" is prohibitive for many small towns. It is reported that one small municipality, which is in a depressed area where 35% of the residents live on fixed incomes, has found it difficult to prove it has the right to regulate rates.[83] The municipality believes that the local cable operator is subject to rate regulation.[84] It is reported that the municipality is taking steps to raise property taxes to finance what it believes will be a long battle with the cable operator over the issue.[85] The municipality spent almost all of its $10,000 yearly cable budget on a consultant, who determined that only one over-the-air broadcast signal is received in the municipality.

The second reason that cable operators escape rate regulation is that even if a city establishes its right to regulate rates under the FCC's restrictive standard, a cable operator can avoid rate regulation of its most popular basic service simply by creating a "sub-basic" tier of service. In the municipality attempting to estabish its right to regulate rates, for example, it is reported that the cable operator has already attempted to escape the impact of any future rate regulation by replacing its $13.95, 23-channel basic service package with a new 5-channel package for $11.95.[86] The $13.95 tier is now called "expanded basic," and may not be subject to rate regulation.[87]

Many cable subscribers choose not to subscribe to such "sub-basic" tiers since they do not include vital programming. In one municipality, for example, cable consumers received a 22-channel basic service package of programming for $7.00 in 1983.[88] After passage of the Cable Act, it is reported that the local cable operator created a new "basic" package of 5-channels

[82] 47 C.F.R. § 76.33(a)(3) (1989). A city also may be required to reimburse the cable operator for the costs of engineering studies undertaken to rebut the city's proof. *Id.*

[83] Thompson, *PA Town Raises Taxes To Fund Rate Regulation Battle*, Multichannel News, Nov. 27, 1989, at 51, col. 1.

[84] *Id.*

[85] *Id.*

[86] *Id.*

[87] *Id.*

[88] *Competition Level Decides City Control*, Victoria Advocate, July 2, 1989, at A1, col. 1.

for $7.00 per month, and began to charge $11.00 for the 22-channel basic package. Only about 3% of the 18,000 cable subscribers opted for the 5-channel package, whereas 97% continued to subscribe to the 22-channel package.

b. Pending Legislative Measures

Several legislators have proposed bills, currently pending, that would affect regulation of the rates of cable services. Senator Lieberman and Representative Shays have proposed bills, Senate Bill 905 and House Bill 2222, which would repeal the Cable Act limitations on the power of franchising authorities to regulate basic cable service rates and any other rates for communications services provided over a cable system to cable subscribers.[89] Senators Metzenbaum and Danforth and Representative Cooper have proposed measures, Senate Bills 833 and 1880, and House Bill 3826, under which a cable operator would not be considered subject to "effective competition" if: (i) non-affiliated competitive multichannel video programming service is available to less than 67% of the households subscribing to a cable television service or a competing multichannel video delivery system; or (ii) the number of households actually subscribing to such competing system or systems is, in the aggregate, less than 30% of all households subscribing to a multichannel video programming service.[90] Notwithstanding these provisions, a cable system would be presumed subject to effective competition if less than 30% of the households to which cable service is available subscribe to such service.[91]

Senator Gore and Representative Boucher have proposed bills, Senate Bill 1068 and House Bill 2437, which would allow a franchising authority to regulate the rates a cable operator charges for "lifeline" television services if the cable operator does not compete with another cable operator in its franchise area.[92] Representative Payne has proposed a bill, House Bill

[89] S. 905, 101st Cong., 1st Sess. (1989); H.R. 2222, 101st Cong., 1st Sess. (1989).

[90] S. 833, 101st Cong., 1st Sess. § 3(b)(3) (1989); S. 1880, 101st Cong., 1st Sess. § 4(a) (1989); H.R. 3826, 101st Cong., 1st Sess. § 4(a) (1989). The texts of Senate Bills 1880 and 833 and House Bill 3826 are almost identical. Senate Bill 1880 says "less than," as printed in the text accompanying this footnote, while Senate Bill 833 says "no more than." S. 833, 101st Cong., 1st Sess. § 3(b)(3) (1989).

[91] S. 833, 101st Cong., 1st Sess. § 3(b)(5) (1989); S. 1880, 101st Cong., 1st Sess. § 4(b) (1989); H.R. 3826, 101st Cong., 1st Sess. § 4(b) (1989).

[92] S. 1068, 101st Cong., 1st Sess. (1989); H.R. 2437, 101st Cong., 1st Sess. (1989). The bills define a "lifeline television services" tier as a service tier or tiers that provides at a minimum: (a) 3 channels carrying the broadcasts of affiliates of the 3 national television networks; (b) 1 channel carrying a public television station; and (c) 1 channel that

2128, which would grant franchising authorities the right to approve rate increases in basic cable service rates which exceed the higher of 5% or the percentage increase in the Consumer Price Index for the preceding year.[93] Representative Schumer has proposed a bill, House Bill 1375, which would require cable operators to furnish the FCC a report describing any changes in the services they provide or in the rates charged for such services, and would require the FCC to publish a monthly statistical summary of such reports.[94]

Cities support the provisions in Senate Bill 905 and House Bill 2222 which would grant franchising authorities the right to regulate rates for *all* cable services offered by cable operators.[95] Rate regulation should not be limited to basic cable rates for several reasons. Regulatory authority over all cable services is critical since the distinction between basic and non-basic service has blurred since passage of the Cable Act. Cable operators have unbundled programming formerly received as part of a basic cable service package and have consolidated basic cable tiers with other tiers of programming. A second reason to increase regulation is that, as discussed above, cable operators can create "sub-basic" tiers which are not popular among most subscribers. Consequently, cable operators are able to undermine the protection for subscribers intended by rate regulation by creating tiers of basic service to which few cable consumers actually subscribe. Finally, cable operators can currently discourage subscribers from subscribing to a regulated basic service tier by imposing outrageous equipment charges and by removing popular basic programming onto an expanded basic tier not subject to rate regulation.

Cities also recommend that Congress not attempt to curtail rate increases with price caps on basic cable services for these

---

carries each local independent television station. *See* S. 1880, 101st Cong., 1st Sess., § 3(a)(2) (1989); H.R. 3826, 101st Cong., 1st Sess., § 3(a)(2) (1989) ("basic cable service"); S. 1068, 101st Cong., 1st Sess. at § 3(2) (1989); H.R. 2437, 101st Cong., 1st Sess., § 3(2) (1989) ("lifeline television services").

93 H.R. 2128, 101st Cong., 1st Sess. (1989).

94 H.R. 1375, 101st Cong., 1st Sess. (1989).

95 *See* H.R. 2222, 101st Cong., 1st Sess. at § 3(a)(i) (1989).

> "The limitations . . . of any State or franchising authority to regulate the rates for the provision of cable service . . . shall cease to be effective 180 days after the date of enactment of this subsection. Nothing in this title shall be construed to prevent any State or franchising authority from regulating such rates after such date."

Id. See also S. 905, 101st Cong., 1st Sess. § 3(a)(1) (1989); H.R. 2222, 101st Cong., 1st Sess. § 3(a)(1) (1989) (where the word "an" appearing before the "180," above, is the only difference between the bills.)

same reasons. An additional concern with price caps is that a cable operator can undermine their effectiveness and still maintain monopoly profits by eliminating basic programming and other cable services. Hence, although a rate increase may be capped, a cable subscriber would be receiving less while paying more.

Moreover, Congress should establish a clearly articulated statutory standard of "effective competition" which is not subject to revisions and manipulation by the FCC. Congress should deem a franchise area subject to "effective competition" only if it is served by at least two providers of comparable video programming and each of these offers cable service to at least 80% of the households in the franchise area and provides cable service to at least 30% of the households in the franchise area. A franchising authority should determine on an annual basis whether "effective competition" exists in the franchise area.

In addition, Cities support the concept of rate regulation for "lifeline service" in Senate Bill 1068 and House Bill 2437.[96] Franchising authorities should have the right to require and regulate the rates for such service, regardless of whether a cable operator is subject to "effective competition," since many cable subscribers depend on cable for essential video programming, especially in rural areas and other areas where geographical conditions preclude clear reception of broadcasting signals.

Further, franchising authorities should be permitted to regulate installation charges and charges for remote controls needed to receive "lifeline service." Lifeline service tiers should include local television broadcast stations, PEG access channels, and any other local programming, or programming of interest to a significant number of cable subscribers, that a franchising authority reasonably finds in the public interest, such as local professional sports programming. Such measures would alleviate municipalities' concern that low-income residents have access to essential local news, information, and entertainment at an affordable price.

2. Renewal

Prior to the Cable Act, there were no federal restrictions on the cable franchise renewal process. Municipalities rarely denied

---

[96] "[A] State or franchising authority may, in accordance with State law, regulate the rates that a cable operator may charge for the provision of lifeline television services." H.R. 2437, 101st Cong., 1st Sess. § 3(i)(1) (1989); S. 1068, 101st Cong., 1st Sess. § 3(i)(1) (1989).

renewal requests. However, the possibility of such denials gave cable operators a strong incentive to provide quality cable services at affordable prices. Also, cable operators and local franchising authorities viewed the renewal process as the appropriate time to negotiate improvements in the customer service, cable rate, and other public interest provisions in a renewal proposal. Franchise agreements were typically for ten or more years and provided cable companies ample time to recoup their investments and to make a profit. The pre-Cable Act renewal process thus represented an appropriate balance between the interests of cable consumers in quality cable services throughout the franchise term and the cable operator's interest in achieving a fair return on its investment.

The power of franchising authorities to regulate the renewal process was circumscribed by section 626 of the Cable Act.[97] Section 626 sets forth the procedures that franchising authorities must follow during renewals, and also standards that the franchising authority must consider in making its renewal decision.[98] A franchising authority must base denial of renewal on evidence that the operator failed to satisfy one or more of the specified standards.[99] Section 626 limits the discretion of the franchising authority in determining whether to grant a renewal.[100] Further, section 626(d) makes it difficult for a city to deny a renewal request based on franchise breaches if the cable operator allegedly "cures" the breaches or if the city "effectively acquiesced" to such breaches.[101] A franchising authority's deci-

---

97 Cable Act, § 626, 47 U.S.C. § 546 (Supp. V 1987).

98 Section 626 reads in pertinent part:

> whether . . . (A) the cable operator has substantially complied with the material terms of the existing franchise . . . ; (B) the quality of the operator's service . . . has been reasonable in light of community needs; (C) the operator as [sic] the financial, legal, and technical ability to provide the services, facilities, and equipment as set forth in the operator's proposal; and (D) the operator's proposal is reasonable to meet the future, cable-related community needs and interests . . . .

Cable Act § 626, 47 U.S.C. § 546 (Supp. V 1987).

99 "Any denial of a proposal for renewal shall be based on one or more adverse findings made with respect to the factors described in [the previous subsection] . . . ." Cable Act, § 626(d), 47 U.S.C. § 546(d) (Supp. V 1987). There are several stages in a section 626 renewal process, each of which appears to provide tactical advantages to the cable operator.

100 "A franchising authority may not base a denial on renewal or a failure to substantially comply with the material terms of the franchise . . . or on [the quality of the operator's service] . . . unless the franchising authority has provided the operator with notice and the opportunity to cure, or in any case in which it is documented that the fanchising authority has waived its right to object, or has effectively acquiesced." Cable Act, § 626(d), 47 U.S.C. § 546(d) (Supp. V 1987).

101 Cable Act, § 626, 47 U.S.C. § 546 (Supp. V 1987).

sion to deny a renewal may be overturned by a court if it is not supported by a "preponderance of the evidence."[102]

Recent court decisions interpreting the section have further circumscribed the renewal power of franchising authorities. For example, the Third Circuit held that the Cable Act requires franchising authorities to provide cable operators written notice of the filing deadline for a renewal proposal, even though such a requirement is not set forth in the Act.[103] In *Birmingham Cable Communications, Inc. v. City of Birmingham*,[104] a federal district court held that a cable operator could not be required to pay consultants' fees and other costs incurred by a franchising authority during a renewal proceeding if such costs would exceed the 5% franchise fee collected by the city.[105] The court's holding rested partly on its finding that, prior to enacting the ordinance requiring a cable operator to reimburse the city for its renewal expenses, the city had not ascertained its cable-related needs and interests as required by section 626(c)(1)(D).[106]

a. Current Regulatory Problems

Franchising authorities have found that the Cable Act's renewal provisions make it extremely difficult to deny renewal of a cable operator's franchise. From a practical standpoint, those provisions create a strong bias in favor of renewal. Most cable systems already enjoy a monopoly which section 626 helps to perpetuate. As a result, cable operators have little incentive to provide adequate service. They recognize that it is unlikely that their renewal request can be denied under section 626. Furthermore, this provision does not provide the franchising authorities a meaningful opportunity to consider competing bids for a franchise.

The renewal procedures and standards are complex and ambiguous, and may result in innocent violation of the provisions by franchising authorities, especially by smaller towns which are unaccustomed to hiring counsel to guide them through the Cable Act maze. Furthermore, these procedures have created an adver-

---

[102] "The court shall grant appropriate relief if the court finds that . . . the operator has demonstrated that the adverse finding of the franchising authority with respect to each of the factors . . . is not supported by a preponderance of the evidence . . . ." Cable Act, § 626(e)(2)(B), 47 U.S.C. § 546(e)(2)(B) (Supp. V 1987).

[103] Eastern Telecom Corp. v. Borough of East Conemaugh, 872 F.2d 30, 35 (3d Cir.), *cert. denied*, 110 S. Ct. 55 (1989).

[104] No. CV 87-L-0755-S (N.D. Ala., May 5, 1989) (LEXIS, Genfed library, Dist file).

[105] *Id.*

[106] Cable Act, § 626(c)(1)(D), 47 U.S.C. § 546(c)(1)(D) (Supp. V 1987).

sarial relationship between cities and cable operators. Franchising authorities must constantly scrutinize and audit cable operators to create a record which might support the denial of a renewal proposal at the end of the franchise term. This adversarial relationship militates against successful negotiations to improve cable service.

The administrative oversight required by section 626 is expensive. Smaller cities with scarce resources may find it difficult to review effectively a cable operator's proposal for renewal if they have to abide by the cumbersome renewal provisions. Further, their scrutiny is still subject to legal challenges by cable operators.

b. Pending Legislative Measures

Several bills addressing the renewal of cable franchises are currently pending. The Danforth and Cooper bills would broaden a city's authority in renewal proceedings and would streamline some procedures under section 626.[107] They would allow franchising authorities to solicit additional proposals for a franchise in addition to the incumbent cable operator's proposal, and to grant or deny any or all of the proposals.[108] However, the franchising authority must grant the incumbent's renewal proposal if it finds that the renewal proposal and incumbent's performance during the franchise term satisfy the standards under section 626.[109]

The measures would grant a franchising authority the right to consider, in addition to the current section 626 standards, the incumbent's ratemaking history and any other factors reasonably determined by the franchising authority as necessary to advance and protect the public interest in cable service.[110] The measures would not prohibit franchising authorities from considering the

107 S. 1880, 101st Cong., 1st Sess. § 6(b), (d) (1989); H.R. 3826, 101st Cong., 1st Sess. § 6(b), (d) (1989).

108 H.R. 3826, 101st Cong., 1st Sess. § 6(b), (d) (1989). The bills require the franchising authority to issue "written requests for . . . a renewal proposal from the incumbent cable operator; and . . . proposals for a new franchise from any other person." *Id.* at § 6(b)(1). Section (6)(d)(3) gives the franchising authority power to "grant or deny any or all of the proposals." *Id.*

109 *Id.* at § 6(d)(3). "[I]f the franchising authority finds that the performance of the incumbent cable operator under the franchise during the then current franchise term and the renewal proposal of the incumbent cable operator satisfy the standards specified . . . the franchising authority shall grant the incumbent cable operator's renewal proposals." *Id.*

110 *Id.* at § (6)(d). The franchising authority could consider the incumbent's "signal quality, rate making history, response to consumer complaints, and billing practices . . . ." H.R. 3826, 101st Cong., 1st Sess. § (6)(c)(A) (1989).

"mix, quality, or level of cable services" in deciding whether to renew a franchise.[111] The Lieberman and Shays bills would amend section 613(d) of the Cable Act and allow franchising authorities to deny renewal of a cable system because of a cable operator's ownership or control of other media.[112]

To re-balance the power between cable operators and consumers, Cities recommend that Congress repeal section 626 of the Cable Act. Franchising authorities should be allowed to structure their franchise renewal proceedings in any manner consistent with applicable state and local law, as they had the right to do prior to the Cable Act. Traditional concepts of administrative due process will afford cable operators sufficient protection. Furthermore, with average initial franchise terms in excess of ten years, cable operators will have adequate opportunity to make a reasonable return on their investments, even if their franchises are not renewed. In addition, section 627 of the Cable Act ensures that a cable operator will receive a fair price for its cable system if its renewal request is denied.[113] By the same token, the public would benefit from repeal of section 626 because cable operators would no longer possess a perpetual monopoly.

Although any action short of repeal of section 626 will not properly balance the interest of the public and of cable operators, several provisions in Senate Bill 1880 and House Bill 3826 would simplify the renewal process and broaden franchising authorities' rights. The bills allow cities to consider competitive proposals for a franchise subject to renewal.[114] The bills also increase the number of public interest factors that a franchising authority can consider as relevant to its renewal decision.[115] In addition, the "arbitrary and capricious" standard for judicial review proposed in the bills offers greater protection to franchising authorities denying renewal requests that are not in the public interest.[116] Finally, the bills would delete the "cure" provisions

---

[111] Cable Act, § 626(c)(1)(B), 47 U.S.C. § 546(c)(1)(B) (Supp. V 1987).

[112] S. 905, 101st Cong., 1st Sess. (1989); H.R. 2222, 101st Cong., 1st Sess. (1989).

[113] Cable Act, § 627, 47 U.S.C. § 547 (Supp. V 1987).

[114] S. 1880, 101st Cong., 1st Sess. § 6(b)(1) (1989). Section 6(b)(1) reads in pertinent part: "Upon completion of a proceeding under subsection (a), the franchising authority shall issue written requests for . . . proposals for a new franchise from any other person who shall have notified the franchising authority in writing of its interests in providing cable service over a cable system in the relevant area." *Id.*

[115] H.R. 3826, 101st Cong., 1st Sess. § 6(c)(1) (1989). Section 6(c)(1) reads in pertinent part: "the franchising authority shall . . . commence an administrative proceeding . . . to determine the dispositon of the proposals in light of community needs and interests." *Id.*

[116] (f) Subsection (d) of Section 626 . . . is amended—

(1) in paragraph (1)—

in section 626.

On the other hand, Senate Bill 1880 and House Bill 3826 fail to resolve a number of important concerns of franchising authorities about renewal. For example, the measures would continue to require a city to grant renewal to a cable operator whose renewal proposal meets certain statutory standards without regard to the existence of a second proposal.[117] Therefore, under the bills, a city would still be forced to grant the incumbent's renewal proposal, even though a competitor's proposal might offer more benefits to consumers. Further, potential competitors would have no incentive to submit competitive proposals, given the difficulty in denying the incumbent's renewal proposal.

In addition, Senate Bill 1880 and House Bill 3826 have several other shortcomings. For example, the bills do not allow a franchising authority to consider the performance of an incumbent cable operator's predecessors in reviewing a renewal proposal.[118] Such authority is necessary to protect the public interest,

---

(A) by striking "cable operator whose proposal for renewal has been denied" and inserting in lieu thereof "person submitting a proposal who is aggrieved";

(B) by inserting "who" immediately before "has been adversely"; and

(C) by striking "appeal" and inserting in lieu thereof "seek judicial review of"; and

(2) in paragraph (2), by amending subparagraph (B) to read as follows:

"(B) the final decision of the franchising authority is not arbitrary or capricious.".

S. 1880, 101st Cong., 1st Sess. § 6(f) (1989).

117 "[I]f the franchising authority finds that the performance of the incumbent cable operator under the franchise during the then current franchise term and the renewal proposal of the incumbent cable operator ratify the standards specified in paragraph (1), the franchising authority shall grant the incumbent cable operator's renewal proposals." S. 1880, 101st Cong., 1st Sess. § 6(d) (1989); H.R. 3826, 101st Cong., 1st Sess. § 6(d) (1989).

118 In determining the dispositions of the proposals, the franchising authority may consider—

"(A) whether the incumbent cable operator has substantially complied with the material terms of the existing franchise and with applicable law and regulations;

"(B) whether the quality of the incumbent cable operator's service, including signal quality, rate making history, response to consumer complaints, and billing practices, has been reasonable in light of community needs;

"(C) whether the parties submitting proposals pursuant to subsection (b), including the incumbent cable operator, have the financial, legal, and technical ability to provide the services, facilities, and equipment as set forth in their proposals;

"(D) whether the proposals submitted pursuant to subsection (b), including the incumbent's renewal proposal, are reasonable to meet the community's future cable-related needs and interests, taking into account the cost of meeting such needs and interest; and

"(E) any other factors reasonably determined by the franchising au-

given the fact that cable systems are constantly bought and sold by investors seeking a quick profit. Nor do the bills grant franchising authorities discretion in determining whether to solicit competitive bids.[119] A franchising authority should not be forced to solicit competitive bids if an incumbent's performance and its renewal proposal satisfies the expectations of cable subscribers.

Moreover, franchising authorities should have the right to consider any other factors "relevant" to the public interest in deciding whether to grant a renewal proposal or any other proposal. The "necessary to advance and protect" standard proposed in Senate Bill 1880 and House Bill 3826 unnecessarily restricts the right of franchising authorities to consider other important public interest factors.[120] Franchising authorities should also have the right to consider as relevant to their renewal decision an incumbent's employment practices and the character of any party submitting a renewal proposal. Franchising authorities should not be prohibited from denying any franchise proposal submitted by a cable operator of questionable character or whose employment practices are hostile to certain groups in a cable community.

Finally, franchising authorities should have the right to deny renewal if the franchising authority and cable operator are unable to reach agreement on the material terms of the renewal agreement. Otherwise, section 626 would circumvent a franchising authority's power to ensure that a renewal agreement protects the public interest. Senate Bill 1880 and House Bill 3826 are silent on the right of franchising authorities in this regard.

3. Franchise Fees

Prior to the Cable Act, the FCC prohibited cities from receiving franchise fees in excess of 3% of the cable operator's annual gross revenues, although a city could collect up to 5% if its regulatory expenses justified such an increase.[121] Notwithstand-

---

> thority to be necessary to advance and protect the public interest in the operation of a cable system.

S. 1880, 101st Cong., 1st Sess. § 6(d) (1989).

[119] Section 6(b)(1) reads in pertinent part: "Upon completion of a proceeding under subsection (a), the franchising authority shall issue written requests for . . . proposals for a new franchise from any other person who shall have notified the franchising authority in writing of its interests in providing cable service over a cable system in the relevant area." S. 1880, 101st Cong., 1st Sess. § 6(b)(1) (1989).

[120] *Id.* at § 6(c)(1)(e).

[121] *GAO Survey*, *supra* note 60, at 14.

ing the 3% limit, cities could require cable operators to provide operating funds for PEG access facilities, for example. Section 622 of the Cable Act allows franchising authorities to collect franchise fees of up to 5% of a cable operator's gross revenues per year.[122] However, the Cable Act does not fully clarify which assessments on a cable operator are franchise fees and which assessments and revenues are not included in calculating the 5% cap. Further, by subjecting ongoing non-capital support for PEG access activities to the 5% franchise fee cap, section 622 severely limits the ability of cities to ensure that the public receives the benefits of access channels contemplated by section 611 of the Cable Act.[123]

a. Current Regulatory Problems

Cities attribute several problems to the present definition of "franchise fee" contained in the Cable Act. First, since non-capital support for PEG facilities is subject to the 5% cap, many cable consumers are not receiving the quality of cable programming they deserve. Municipalities are often unable to provide adequate financial support to PEG activities. At the same time, cable operators are often unwilling to provide support voluntarily to PEG channels if such support would require them to spend more than the 5% franchise fee. The National Cable Television Association ("NCTA") has suggested that expenditures on PEG channels are not justified since there is little demand for PEG programming.[124] However, surveys of cable subscribers belie that claim.[125]

Another problem with the definition of "franchise fee" in section 622 is that it does not protect cities from suits by cable operators challenging the rights of franchising authorities to collect such fees. Cable operators have argued that, notwithstanding section 622, the first amendment precludes franchising

[122] Cable Act, § 622(b), 47 U.S.C. § 542(b) (Supp. V 1987).

[123] "For any twelve-month period, the franchise fees paid by a cable operator with respect to any cable system shall not exceed 5 percent of such cable operator's gross revenues derived derived in such period from the operation of the cable system." Cable Act § 622(b), 47 U.S.C. § 542(b) (Supp. V 1987).

[124] *See Oversight of Cable TV*, *supra* note 75, at 46 (statement of James P. Mooney, President and Chief Executive Officer of the National Cable Television Association).

[125] A survey of Minneapolis suburbs demonstrated that two-thirds of the respondents felt that local programming and public access are undervalued, and that 80% of those subscribers deemed local programming and public access as "very important" or "somewhat important." Swasey, *MN Subs Value Local Programming, Survey Shows*, Multichannel News, Sept. 19, 1988, at 24, col. 1. A similar survey of Boston cable subscribers found a "larger-than-expected audience for access programs." Brumback, *Boston Public Access Net Fares Well in Recent Survey*, Multichannel News, May 23, 1988, at 26, col. 1.

authorities from charging fees which exceed regulatory costs.[126] To date, one federal court has found unconstitutional a city's attempt to collect franchise fees to the full extent allowed under the Act.[127]

Even in cases where the constitutionality of franchise fees was not at issue, courts have constricted the authority of franchising authorities to collect fees which should not be subject to the 5% cap. In *Birmingham Cable Communications*,[128] for example, the judge's summary judgment order invalidated a city ordinance which would have required the cable company to pay the city's consulting fees accrued during the franchise renewal period.[129] The district court found that the cable company was entitled to seek renewal "without having to pay or agree to pay, above and beyond the Act['s] 5% franchise fee, the City's franchising expenses, consultant costs, or any other regulatory costs or fees."[130] The decision conflicts with section 622(g)(2)(D) of the Cable Act, which excludes from the franchise fee definition "requirements or charges incidental to the awarding or enforcing of the franchise."[131]

Moreover, section 622 does not clarify the extent to which states can prohibit local franchising authorities from collecting franchise fees allowed under the Cable Act. In *Schloss v. City of Indianapolis*,[132] the court found that the Cable Act preempted Indiana's effort to prevent cities from collecting a 5% franchise fee since the state statute was inconsistent with the Cable Act provision.[133] Although the court upheld the right of the franchising authority to collect franchise fees, this case demonstrates the need for Congress to clarify the rights of municipalities in section 622.

Congress also needs to clarify which sources of a cable operator's revenues are included in calculating franchise fees. Re-

---

126 For example, in Century Federal, Inc. v. City of Palo Alto, 710 F. Supp. 1559 (N.D. Cal. 1988), it was argued that a franchising authority " 'may not impose a charge for the enjoyment of a right granted by the Federal Constitution.' " *Id.* at 1561 (quoting Murdock v. Pennsylvania, 319 U.S. 105, 113 (1943)).

127 *See Century Federal*, 710 F. Supp. 1559 (N.D. Cal. 1988) (defendant cities violated the first and fourteenth amendments by requiring plaintiff cable operator to (1) pay a franchise fee of 5% of its gross receipts; (2) post construction and performance bonds; and (3) establish a security fund).

128 No. CV 87-L-0755-S (N.D. Ala., May 5, 1989) (LEXIS, Genfed library, Dist file).

129 *Id.*

130 *Id.*

131 Cable Act, § 622(g)(2)(D), 47 U.S.C. § 542(g)(2)(D) (Supp. V 1987).

132 528 N.E.2d 1143 (Ind. Ct. App. 1988), *aff'd*, No. 41504-9005-CV-351 (Ind. May 17, 1990).

133 *Id.* at 1149.

cently, cable operators have received revenues from nontraditional sources, such as advertising, shopping channels, and pay-per-view services.[134] Cities are concerned that cable operators might attempt to exclude such sources of income in calculating their gross revenues, on which franchise fees are calculated.

b. Pending Legislative Proposals

Despite the problems enumerated above, no pending bill addresses franchise fee issues. Nonetheless, section 622 should be modified in several respects. Congress should clarify that franchise fees are intended as rent or compensation for a cable operator's use of public rights-of-way, easements, and public property. This language should provide cities additional justification for the imposition of franchise fees in excess of regulatory costs, thereby precluding constitutional challenges. Moreover, non-capital support for PEG Access Channels should not be offset against franchise fees.

Further, in light of the *Birmingham* decision, Congress should add language to section 622(g)(2)(D) which clarifies that the term "franchise fee" does *not* include a city's expenses incurred in renewing, renegotiating, modifying, amending, or transferring a franchise, and does not include "charges incidental" to such proceedings, such as attorneys' fees and consultants' fees.[135]

To prevent cable operators from excluding new sources of revenues from the "franchise fee" definition, Congress should also clarify that the term "gross revenues" includes revenues in any form or kind attributable to, or derived from, the operation of the cable system. Franchising authorities should have broad discretion in determining which revenues satisfy this definition. In addition, Congress should add language to section 622 clarifying that states are prohibited from barring local franchising authorities from collecting franchise fees to the full extent allowed under the Cable Act. Such legislative language would codify only what the court in the *Indianapolis* case found implicit in the Cable Act.[136]

To limit any future ambiguity over which assessments are

---

134 *See generally* TELEVISION & CABLE FACTBOOK B-1447 to -76 (1989).

135 Section 622(g)(2)(D) of the Cable Act currently states that the franchise fee does not include "requirements or charges incidental to the awarding or enforcing of the franchise, including payments for bonds, security funds, letters of credit, insurance, indemnification, penalties, or liquidated damages . . . . " Cable Act, § 622(g)(2)(D), 47 U.S.C. § 542(g)(2)(D) (Supp. V 1987).

136 Congress intended to adopt a *federal* standard to govern franchise fees. "Neither

franchise fees, Cities recommend that Congress add a provision stating that no assessments, fees, charges, or in-kind payments assessed by a franchising authority should be considered franchise fees unless such assessments are clearly and unambiguously defined as franchise fees by a franchising authority.

4. Technical Standards

The FCC promulgated its existing cable technical standards for signal quality in 1970.[137] The FCC adopted only 5 technical parameters which directly affect signal quality on cable channels, despite the fact that there are more than 20 different parameters which determine the quality of the signal the consumer receives. Further, the rules were made applicable only to Class I channels, which are those carrying broadcast television signals. The FCC did not adopt standards for Class II-IV channels, which include the majority of services now offered by cable systems.[138]

In 1970, when it first proposed cable technical rules, the FCC noted that it intended "to revise the standards or add new requirements as the state of technology and our regulatory experience may indicate."[139] When the FCC adopted the standards in 1972, it again acknowledged that the rules were "minimal and should be augmented as soon as possible with standards covering other technical areas."[140] In 1976, based on the results of a study by the Cable Television Advisory Committee, a task force of experts formed to help develop additional standards, the FCC announced that it intended "to consider significant modifications of [its] technical rules" in the future.[141] As late as 1977, the FCC stated that it would address suggested revisions to its technical standards "in a future proceeding."[142] However, the FCC never initiated the promised "future proceeding." As a result, no significant changes have been made in the FCC's 1970 standards.

In 1972, the FCC specifically authorized franchising authorities to adopt technical standards more stringent than its own.[143] Less than two years later, however, the FCC reversed its decision

---

explicitly nor implicitly does the Act permit the State to impose regulation of the amount of the franchise fee." *Indianapolis*, 528 N.E.2d at 1149.

[137] *See* Notice of Proposed Rulemaking in Docket No. 18894, 25 F.C.C.2d 38 (1970).

[138] Cable Television Report and Order, 36 F.C.C.2d 143, 198-99 (1972), *modified*, 571 F.2d 1025 (8th Cir. 1978).

[139] Notice of Proposed Rulemaking in Docket No. 18894, 25 F.C.C.2d 38, 42 (1970).

[140] *Report and Order*, 36 F.C.C.2d at 198, 204.

[141] Notice of Proposed Rulemaking in Docket No. 20765, 58 F.C.C.2d 1035 (1976).

[142] Report and Order in Docket No. 20765, 64 F.C.C.2d 743, 750 (1977).

[143] *Report and Order*, 36 F.C.C.2d at 198-99.

and preempted local standards different from its own standards.[144] The FCC justified the reversal by stating that it intended to adopt nationwide standards "more complete and refined than [its] present standards."[145] Because the FCC never did so, franchising authorities sought and received in the Cable Act the right to establish technical standards "not inconsistent" with the FCC's standards.[146] The FCC in 1985, however, reaffirmed its order preempting local standards which were different from its own.[147]

In *City of York v. FCC*, franchising authorities unsuccessfully challenged the FCC's preemption order.[148] The Supreme Court held that the FCC did not exceed its regulatory authority under the Cable Act by forbidding local authorities from imposing technical standards "different" from those set forth in the FCC's regulations for Class I cable channels.[149] The Court relied primarily on the fact that Congress did not expressly disapprove of the FCC's preemption policy in enacting the Cable Act.[150] The Court concluded that the Cable Act implicitly codified the FCC policy, despite the absence of any mention of such policy in the Cable Act or in its legislative history.[151]

Although the Court affirmed the FCC's preemption of local standards for Class I cable channels, it did not address the agency's preemption of standards for Classes II, III, and IV cable channels, for which the FCC had failed to establish any standards whatsoever. Thus, the Court left intact the court of appeals' decision that FCC preemption of state and local standards for those classes, without establishing some standards of its own, was "arbitrary and capricious."[152]

The court of appeals had found the FCC's preemption "arbitrary and capricious" because the FCC had failed to consider the propriety of its action in light of the Cable Act's franchise renewal requirements.[153] In determining whether to grant a renewal, section 626 directs franchising authorities to consider whether a cable operator's "signal quality" has been reasonable

144 Report and Order in Docket No. 20018, 49 F.C.C.2d 470 (1974).
145 *Id.* at 477.
146 H.R. REP. No. 934, *supra* note 3, at 70.
147 50 Fed. Reg. 52,462, 52,464-65 (1985).
148 486 U.S. 57 (1988).
149 *Id.* at 69.
150 *Id.* at 66-69.
151 *Id.* at 68.
152 *Id.* at 62-63 n.3, 69-70.
153 City of New York v. FCC, 814 F.2d 720, 726-27 (D.C. Cir. 1987), *aff'd*, 486 U.S. 57 (1988).

in light of community needs.[154] The court of appeals correctly recognized that franchising authorities should have an objective basis for assessing cable operators' signal quality.[155]

a. Current Regulatory Problems

Cities were hopeful that the court of appeals' decision would result in the FCC's adopting contemporary technical standards for all classes of cable service. Instead, the FCC, which appears determined to follow its own market-based approach to cable service despite contrary congressional and judicial directives, has proposed simply extending its antiquated 20 year old technical standards for Class I channels to the other signal classes.[156] Such action is tantamount to having no standards at all.

The current FCC technical standards are meaningless for purposes of assessing the numerous complaints from cable subscribers about signal quality. In the FCC's rulemaking on standards for Classes II-IV cable channels, franchising authorities submitted comprehensive engineering reports demonstrating that even if a cable operator complied with the FCC guidelines for Class I standards, the resulting signal quality could nevertheless be wholly unacceptable to a significant number of subscribers.[157] Despite such evidence, the FCC has refused to update its technical standards.[158]

b. Pending Legislative Measures

The Danforth and Cooper bills would require the FCC to "establish minimum technical standards . . . suitable to ensure adequate technical operation and signal quality, and periodically . . . update such standards to reflect improvements in technology."[159] A franchising authority would be allowed to enforce such standards or to adopt and enforce other standards "appropriate for the particular circumstances of the local cable system

---

[154] Cable Act, § 626(c)(1)(B), 47 U.S.C. § 546(c)(1)(B) (Supp. V 1987).

[155] *City of New York v. FCC*, 814 F.2d at 728.

[156] Further Notice of Proposed Rule Making, In the Matter of Review of the Technical and Operational Requirements of Part 76, 3 F.C.C. Rcd. 5966 (1988).

[157] *Id.*

[158] The FCC's outdated standards are also of concern during renewal proceedings. Since the FCC's standards are inadequate, cities have no meaningful basis for assessing a cable operator's signal quality during a renewal proceeding. Franchising authorities must rely on subjective evaluations of the cable operator's signal quality, which will make the renewal process even more ambiguous than it already is under the Cable Act's renewal provisions.

[159] S. 1880, 101st Cong., 1st Sess. (1989); H.R. 3826, 101st Cong., 1st Sess. § 8(c) (1989).

and cable community."[160] The measures would grant persons aggrieved by a cable operator's failure to meet the technical requirements in a franchise agreement the opportunity to petition the FCC for compliance.[161]

Cities support the technical standards provisions of Senate Bill 1880 and House Bill 3826 because the proposals contain two essential elements. First, they direct the FCC to adopt technical standards reflecting contemporary technology, and periodically to update such standards to reflect improvements in cable technology.[162] Second, they allow franchising authorities to adopt meaningful standards tailored to meet local needs.[163] Thus, the measures would allow franchising authorities to set standards which (1) reflect advances in cable technology; (2) define a signal quality consistent with reasonable subscriber expectation; and (3) provide a realistic, objective basis upon which to assess subscribers' complaints and to determine whether a cable operator's signal quality is satisfactory for renewal purposes.[164] Yet, by requiring the FCC to establish meaningful standards, the measures would ensure that cable subscribers in smaller communities which do not have the capacity to establish their own standards, receive adequate signal quality.

Cities believe that Congress should address the concern that cable consumers receive adequate signal quality in the near future. Thus, the FCC should be required to adopt contemporary technical standards within one year after enactment of the bills. Further, cable operators should be required to comply with the FCC standards, or standards adopted by franchising authorities, within one year after the standards are adopted.

5. Damages Immunity

a. Current Regulatory Problems

Increasingly, cities are finding their authority to regulate cable television systems challenged in court on various statutory

---

[160] S. 1880, 101st Cong., 1st Sess. § 8(c) (1989).

[161] "Any person, including but not limited to a cable subscriber or franchising authority, who is aggrieved by failure of a cable operator to meet the technical standards requirements of a franchise may petition the Commission for an order compelling compliance with the franchise." S. 1880, 101st Cong., 1st Sess. § 8(c) (1989); H.R. 3826, 101st Cong., 1st Sess. § 8(c) (1989).

[162] S. 1880, 101st Cong., 1st Sess. § 8(c) (1989); H.R. 3826, 101st Cong., 1st Sess. § 8(c) (1989).

[163] S. 1880, 101st Cong., 1st Sess. § 8(c) (1989); H.R. 3826, 101st Cong., 1st Sess. § 8(c) (1989).

[164] S. 1880, 101st Cong., 1st Sess. § 6(d) (1989); H.R. 3826, 101st Cong., 1st Sess. § 6(d) (1989).

and constitutional grounds. These lawsuits are expensive for cities to litigate and expose municipalities to the possibility of extraordinary monetary judgments.[165] As a result, the temptation is for cities to settle, rather than defend, their franchising authority in such suits. For instance, it is reported that Palo Alto and Atherton, California, recently agreed to pay a cable operator approximately $2 million to settle a lawsuit in which the court found that the two cities could not collect franchise fees in excess of those imposed on comparable users of the cities' rights-of-way, even though such fees did not exceed the Cable Act's 5% cap.[166] It is reported that the cities stated that they needed to settle the suit to protect their taxpayers from an estimated $1 million appeal and a possible $10-15 million damages assessment should they lose the appeal.[167] Similarly, the City of Dallas recently settled for $2.6 million an antitrust case remanded to federal district court, rather than face the possibility that the district court might award treble damages.[168] The appellate court had ruled that the Noerr-Pennington doctrine did not protect the city from denying a franchise application of a cable operator.[169]

b. Pending Legislative Measures

Only the Danforth/Cooper bills, affect the franchising authority's immunity from damages.[170] The measures would immunize franchising authorities from money damages arising from first amendment challenges to their regulation of cable systems or to decisions as to whether to grant a franchise under the Cable Act or other applicable federal, state, or local law.[171] Relief would be limited to injunctive relief, declaratory relief, and attor-

---

165 For example, cities and individual officers of cities may be held liable for money damages pursuant to 42 U.S.C. § 1983 (1982 & Supp. V 1987). Such damages could include compensatory damages, attorneys' fees, and in some cases, punitive damages.

166 Century Federal, Inc. v. City of Palo Alto, 710 F. Supp. 1559 (N.D. Cal. 1988). *See* Haugsted, *Century Fight Wasn't Worth Cost: Officials*, Multichannel News, Feb. 20, 1989, at 23, col. 1 [hereinafter Haugsted].

167 *See* Haugsted, *supra* note 166, at 23.

168 Video Int'l Prod., Inc. v. Warner Amex Cable Communications, 858 F.2d 1075 (5th Cir. 1988), *cert. denied*, 109 S. Ct. 1955 (1989). *See* Cable TV Law Reporter, Sept. 26, 1989, at 6.

169 *Video Int'l Prod.*, 858 F.2d at 1082, 1084-86. The City of Birmingham also settled a lawsuit involving franchise fee and renewal issues rather than appeal an adverse federal district court decision. *See* Cable TV Franchising, Sept. 27, 1989, at 5. In that decision, the court suggested that a city's renewal expenses would be subject to the 5% franchise fee cap. *Id.*

170 S. 1880, 101st Cong., 1st Sess. (1989); H.R. 3826, 101st Cong., 1st Sess. (1989).

171
> In any claim asserting constitutional rights under the First Amendment against a franchising authority . . . arising from the regulation of cable communications or a decision to grant or not grant a franchise or to otherwise regulate a cable operator in a manner permitted by this title or other

neys' fees.[172]

The Cities support the first amendment immunity provisions in Senate Bill 1880 and House Bill 3826. However, Congress should eliminate from these measures the right of cable operators to recover attorneys' fees if they prevail in a lawsuit against a city. As long as they may be liable for substantial attorneys' fees, cities may still be reluctant to defend against first amendment claims.

The immunity set forth in Senate Bill 1880 and House Bill 3826 should not be confined to first amendment lawsuits. Rather, it should be extended to all lawsuits, on any grounds, which challenge cable television regulation and franchising, except where an aggrieved party proves that a franchising authority discriminated against it on the basis of race, color, sex, age, religion, national origin, or handicap. Such immunity is needed to eliminate the "chilling effect" that possible multiple million dollar lawsuits may have on a franchising authority's exercise of its regulatory power under the Cable Act. If immunity is limited to first amendment claims, cable operators will simply style their claims as arising under the fourteenth amendment or other grounds.

B. *Issues Affecting Competition*

Broadcasters, cable programmers, cable operators, wireless cable operators, the home satellite dish industry, and others have raised various issues concerning the absence of competition in the cable industry. Cities believe these issues are important because the absence of meaningful competition to cable has contributed to the significant increases in cable rates and the decline in cable service. It is important for Congress to take action on many of these issues and to consider carefully the implications of others, namely, the provision of cable service by telephone companies and the suggestion that Congress require local franchising authorities to grant two cable franchises, neither of which will cause any significant shift in the power of the cable monopoly at the local level.

> Federal, state, or local law, any relief . . . shall be limited to injunctive relief, declaratory relief, and attorneys fees.

S. 1880, 101st Cong., 1st Sess. § 7 (1989).

[172] *Id.*

1. Must-Carry/Retiering

Local television broadcast stations have long provided free local news and information to television viewers. The continued viability of these stations was called into question by the judicial elimination of the FCC's must-carry rules.[173] The decisions reversed a 20 year practice that has been at the foundation of the relationship between the cable and broadcast industries. Recent negotiations between the cable industry and broadcast industry over the must-carry issue have failed as a result of disagreements by the two industries over channel positioning requirements for broadcast signals on cable systems.

Concerns resulting from elimination of the FCC's must-carry rules have been compounded by limits on the ability of cities to require cable operators to carry programming of interest to local cable subscribers. Cable operators maintain that they have the unrestricted right to realign their service offerings and corresponding rates pursuant to section 625(d) of the Cable Act if they are not subject to the rate regulation provisions in section 623 of the Cable Act. Such retiering has resulted in numerous consumer complaints, especially from those consumers who have to rent a cable converter to continue receiving retiered programming.[174]

The continued carriage of broadcast and other programming on cable systems is subject to the whims of cable operators, which now block the availability of video programming. Many independent programmers, for example, have claimed that cable operators have denied them meaningful opportunities for access under the Cable Act's leased access provisions. In addition, cable operators have successfully challenged the Cable Act's PEG access provisions on first amendment grounds.[175]

Given the importance of local television broadcast stations and other local programming to communities, Congress should

---

[173] *See* Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986); Century Communications Corp. v. FCC, 835 F.2d 292 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988).

[174] It is reported that residents in one city have experienced numerous problems as a result of the retiering of programming and that problems resulting from the shift were aggravated because the cable operator did not have enough of the new converter boxes subscribers needed to receive channels 37 through 43. Cable TV Franchising, Apr. 26, 1989, at 3.

[175] *See, e.g.*, Preferred Communications, Inc. v. City of Los Angeles, No. CV 83-5846 (C.D. Cal. Jan. 5, 1990); Century Federal, Inc. v. City of Palo Alto, 648 F. Supp. 1465 (N.D. Cal. 1986), *appeal dismissed*, 108 S. Ct. 1002 (1988); Midwest Video Corp. v. FCC, 571 F.2d 1025 (8th Cir. 1978), *aff'd on other grounds*, 440 U.S. 689 (1979) (FCC's mandatory access, channel capacity, and facilities rules exceeded jurisdiction of FCC).

enact legislation which ensures the availability of such programming to cable subscribers. Cities support pending legislation tying the carriage of local broadcast signals to a cable operator's right to enjoy the benefits of compulsory licensing. To enable low income cable subscribers to have access to this vital source of local information and news, Cities also support provisions in pending measures that would require cable operators to carry local broadcast stations on the tier of cable service regularly provided to all subscribers at a minimum charge. Congress also should tie a cable operator's right to compulsory licensing to the carriage of programming pursuant to the leased and PEG access provisions in the Cable Act. Such requirements would facilitate a programmer's access to a cable system and would preclude constitutional challenges to PEG access requirements.

Finally, Cities recommend that Congress delete section 625(d) of the Cable Act, as recommended in House Bill 1304,[176] and add affirmative language to the Act stating that local franchising authorities have the right to approve retiering decisions by local cable systems, regardless of whether the systems are subject to rate regulation. Such legislation would eliminate complaints by cable subscribers and programmers over the constant retiering of cable programming.

2. Horizontal and Vertical Integration

There has been a significant increase in horizontal concentration and vertical integration in the cable industry since passage of the Cable Act. As a result, independent cable companies, cable programmers, and alternative multichannel programming distributors find it difficult to compete with MSOs and their affiliated programmers. Some MSOs allegedly use their monopolistic powers to force cable programmers to provide popular programming exclusively to them in areas where they have competition and to deny access to their cable systems to unaffiliated programming sources. Cable programmers affiliated with such MSOs allegedly refuse to sell, or sell only on unfavorable terms, programming to unaffiliated cable systems and other multichannel video programming distributors.

Monopoly control by MSOs and their affiliated programmers over access to programming is problematic not only for independent programmers and alternative multichannel video programming distributors, but also for consumers who desire

---

[176] H.R. 1304, 101st Cong., 1st Sess. (1989).

diverse programming.[177] The Cities believe that many horizontal concentration concerns would be resolved by the 15% cap on the number of cable subscribers nationwide a cable operator could serve, which is proposed in Senate Bill 1880 and House Bill 3826.[178] Further, the Cities support the provisions of Senate Bill 905 and House Bill 2222 which would alleviate the negative effects of horizontal concentration and vertical integration at the local level by allowing franchising authorities to consider a cable operator's ownership of other media in deciding whether to grant renewal or transfer requests.[179]

However, to protect the public interest further, cities should be granted additional authority to limit local horizontal concentration. Franchising authorities should have the right to consider a proposed cable operator's ownership of other media when initially granting a franchise. In addition, Congress should grant cities the right to require that a cable operator divest itself of other media interests as a condition of obtaining or maintaining a cable franchise. Finally, Congress should amend section 621 of the Cable Act to clarify that a franchising authority can reduce or divide a franchise area in granting, renewing or transferring a franchise.

Cities believe that Congress should take several actions to address the concerns over vertical integration. Congress should adopt the pending legislative measures that would: (i) prohibit a cable operator from discriminating against programmers unaffiliated with the cable operator with regard to the price, terms, and conditions of access to its cable system; (ii) prohibit cable programmers affiliated with cable operators from discriminating against unaffiliated cable operators and other multichannel video programming distributors with regard to the price, terms, conditions, and availability of programming; and (iii) prohibit cable

[177] In 1986, the New York Citizens Comm. on Cable Television (the "Committee") was compelled to file suit against Manhattan Cable Television, Inc. ("MCTV"). New York Citizens Committee on Cable Television v. Manhattan Cable Television, Inc., C.A. No. 86-CIV-859 (S.D.N.Y., filed Jan. 29, 1989) (raising both antitrust and Cable Act claims). The Committee argued that MCTV favored affiliated programming services such as HBO, and refused to carry competitive unaffiliated services such as Showtime, even though MCTV had channel capacity to carry such competitive programming.

[178] "[N]o cable operator shall control . . . any cable system or systems that individually or collectively provide service to more than 15 percent of all cable television subscribers in the United States." S. 1880, 101st Cong., 1st Sess. § 10(f)(i) (1989); H.R. 3826, 101st Cong., 1st Sess. § 10(f)(i) (1989).

[179] "[F]ranchising authorit[ies] may prohibit the ownership or control of a cable system . . . because of . . . ownership or control of media or mass communications or other media interest . . . . " S. 905, 101st Cong., 1st Sess. § 4 (1989); H.R. 2222, 101st Cong., 1st Sess. § 4 (1989).

operators and their affiliated programmers from establishing exclusive distributorships for programming in a franchise area or from entering into contracts which prevent other distributors of video programming services to the home from purchasing programming and other programmers from gaining access to a cable system. These prohibitions are set forth in bills introduced by Senators Metzenbaum, Pressler, Danforth, and Gore, and Representatives Boucher, Cooper, and Lent.[180]

Congress should also grant persons discriminated against by cable operators or their affiliated programmers the right to bring a civil action. After a party establishes that it has been discriminated against, Congress should place the burden of persuasion on the defendant cable operator or programmer to demonstrate a nondiscriminatory, pro-competitive reason for its actions. Such a shifting of the burden of persuasion is fair since the relevant evidence would be in the hands of the defendant cable operator or programmer.

In addition, Congress should require cable operators to publish a tariff specifying the rates, terms, and conditions of leased access. To ensure that such a tariff is fair and offers cable programmers a realistic opportunity of access to a cable system, franchising authorities should have the right to approve such tariffs prior to their effective date.

Finally, Congress should amend the judicial provisions in section 612 so that courts can compare the terms of access provided to affiliated programmers with the terms provided a plaintiff programmer in determining if a cable operator's terms of access are reasonable and in good faith, and Congress should shift the burden of proof to the cable operator to establish by "clear and convincing" evidence that it abided by the leased access provisions.[181]

3. Telephone Company Cross-Ownership

Section 613(b) of the Cable Act prohibits telephone companies ("telcos") from providing video programming to subscribers in their telephone service area, except in specified circumstances, and generally represents a codification of the FCC's cross-owner-

---

180 S. 834, 101st Cong., 1st Sess. (1989); S. 168, 101st Cong., 1st Sess. (1989); S. 1068, 101st Cong., 1st Sess. (1989); S. 1880, 101st Cong., 1st Sess. (1989); H.R. 2437, 101st Cong., 1st Sess. (1989); H.R. 2363, 101st Cong., 1st Sess. (1989); H.R. 3826, 101st Cong., 1st Sess. (1989).

181 Presently, section 612(f) provides a presumption of reasonableness and good faith in favor of the cable operator unless "shown by clear and convincing evidence to the contrary." 47 U.S.C. § 532(f) (Supp. V 1987).

ship rules existing prior to passage of the Cable Act.[182] One primary purpose of the prohibition was to prevent telcos from stifling the growth and development of the nascent cable industry. However, that purpose is no longer valid since the cable industry is now strong enough to withstand competition from telcos.[183] In fact, many advocates of telco entry argue that it would stimulate competition in a cable industry, which is now dominated by a few MSOs.[184]

In addition to providing competition in the provision of cable service, telco entry also may result in technological innovation, such as the introduction of fiber optics technology into the cable industry. Further, telco entry could result in service to areas which are not economically feasible for cable operators to serve.

Cities recommend that Congress allow telcos to provide cable service within their local service areas to stimulate competition and technological advances in the cable industry. However, Cities recommend that, to limit the anti-competitive effects of such entry, franchising authorities should have the right to: (a) define the parameters of telco entry in their local franchise areas; (b) require that telcos obtain cable franchises in order to provide cable services; and (c) subject telcos to the same franchising requirements imposed on other cable operators, including the imposition of franchise fees. Such requirements will prevent telcos from gaining an unfair competitive advantage over local cable operators subject to franchising requirements.

To prevent telcos from simply becoming new cable monopolists, Congress should prohibit telcos from acquiring existing cable systems unless authorized to do so by local franchising authorities. Moreover, to prevent telcos from subsidizing cable investments with revenues from their telephone services, Congress should require telcos to establish separate subsidiaries to operate their cable systems. Further, Congress should allow franchising authorities to determine how to allocate costs which benefit both

---

182 Cable Act, § 613(b), 47 U.S.C. § 533(b) (Supp. V 1987).

183 The FCC has tentatively proposed to eliminate its own cross-ownership ban and recommend that Congress lift the cross-ownership ban in the Act and liberalize the standards under which telcos can obtain waivers and affiliate with cable operators. Comments in that proceeding have been filed by numerous parties, including franchising authorities, which generally support the FCC's proposal. Further Notice of Inquiry and Notice of Proposed Rulemaking, In the Matter of Telephone Company-Cable Cross-Ownership Rules, 3 F.C.C. Rcd. 5849 (1988).

184 *See supra* note 61 and accompanying text.

a telco's telephone and cable operations, such as the cost of extending fiber optic technology into homes.

If a telco's cable service is integrated into its telephone service, a franchising authority should have the right to impose through the franchise process (i) consumer protection and customer service requirements; (ii) PEG access requirements; (iii) minimum requirements for cable systems facilities and equipment; (iv) franchise fees; and (v) any other franchising requirements deemed appropriate by a franchising authority. In addition, Congress should require telcos to (a) provide access to unaffiliated multichannel video service providers and programmers at nondiscriminatory tariffed rates; (b) offer switching and related service on a tariffed and unbundled basis; (c) not discriminate in favor of their own service offerings; and (d) expand and upgrade their facilities as demand increases. These requirements will ensure that telcos do not become the only provider of video programming.

4. Overbuilds

FCC Chairman Alfred Sikes has suggested that cable rates would become competitive and regulatory problems would be resolved if cities were forced to grant more than one franchise and could not prohibit non-franchised providers from distributing cable service.[185] The Chairman's statement assumes that cities prefer granting monopoly franchises. This is simply not the case.

Municipalities are willing to grant economically viable overbuild franchises. Many states, in fact, have enacted measures prohibiting cities from granting exclusive franchises.[186] However, the reality is that in most cities, overbuilds are not economically feasible. In a survey of 67 overbuilds, 37 operators had to combine with the competitive company to survive, only seven were able to maintain a profit, and the others went out of business.[187] New York City had the accounting firm of Price Waterhouse conduct a study to determine the feasibility of overbuilding its Manhattan cable systems.[188] The preliminary analysis conducted by the accounting firm showed that an overbuild of

[185] *Oversight of Cable TV*, *supra* note 75, at 15 (statement of Alfred C. Sikes, Federal Communications Commission Chairman).

[186] *See, e.g.*, LA. REV. STAT. ANN. § 33:4361(B) (West 1988); MONT. CODE. ANN. § 7-3-4451 (1989); NEV. REV. STAT. ANN. § 709.130(5) (Michie 1987); WASH. REV. CODE ANN. § 35.23.380 (1989).

[187] Seale, *Overbuild Threat Looms Large, Cable Lawyers Agree*, Multichannel News, Oct. 3, 1988, at 19, col. 5.

[188] Report of Arnold & Porter, *Overbuilding of Cable Systems: Experience and Implications*

a significant part of the Manhattan systems is unlikely to be economically viable.[189] Even if an overbuild is economically viable, cities face the prospect that an overbuilder may simply use the grant of a franchise to "greenmail" the established competitor.[190]

Municipalities would oppose measures *requiring* them to grant multiple franchises. Such a requirement would be disastrous for cable consumers and cable operators in cable communities where it is simply not economically viable to grant another franchise.

C. *Other Regulatory Issues*

There are a number of other cable regulatory issues which concern franchising authorities and which warrant congressional attention. A brief summary of the problems and of possible solutions follows.

1. Enforcement Provisions

The right of franchising authorities to enforce the penalty provisions in franchising agreements has been called into question by the decision in *Tribune-United Cable v. Montgomery County*.[191] In that case, the court ruled that a cable operator could prevent a franchising authority from imposing penalties for breach of a franchise agreement by requesting modification of the breached provision pursuant to section 625 of the Cable Act.[192] The ruling apparently allows cable companies to stay liability for *past* breaches of their franchises simply by filing a section 625 request for a *prospective* modification.[193] Hence, cable operators will have an incentive to ignore franchise obligations since the decision limits the ability of franchising authorities to enforce such obligations. Cities do not believe that Congress intended such a broad interpretation of section 625.

Congress should prohibit cable operators from misusing section 625 to avoid sanctions for breaches of their franchise agreements. It should clarify in section 625 that a franchising authority has the right to enforce the penalty provisions in a

App. D (Apr. 21, 1989) (copy on file with the Cardozo Arts and Entertainment Law Journal).
[189] *Id.* at Exhibit 1.
[190] *See, e.g.*, Cable TV Franchising, Jan. 31, 1989, at 8.
[191] 784 F.2d 1227 (4th Cir. 1986).
[192] *Id.* at 1231.
[193] *Id.* at 1230-31.

franchise agreement if a cable operator breaches the terms of the agreement, regardless of whether the cable operator institutes a proceeding to modify the breached provision prior to or subsequent to such a breach. This recommended revision would not have a substantive impact on a cable operator's right to obtain a modification of its franchise under section 625. However, the suggested amendment would nullify the holding in the *Montgomery County* decision.

To prevent a *Montgomery County*-type interpretation of section 626, the Cities also recommend that Congress add similar restrictive language to section 626, if Congress does not eliminate the cure provisions currently in the section. Cable operators should not be able to escape enforcement actions by invoking renewal proceedings and promising to cure breaches of their franchise agreements.

2. Local Programming

In view of the increasing vertical integration in the cable industry and the tendency of cable operators to favor affiliated programming over nonaffiliated programming, cities are concerned that cable systems will drop programming of interest to a local cable community in favor of affiliated programming. Senate Bill 1880 and House Bill 3826 would allow franchising authorities to require cable operators to provide broad categories of programming of interest to local cable consumers, *e.g.*, broadcast programming and other programming that is in a particular foreign language or is of particular interest to a minority group comprising a significant portion of a cable community.[194]

Cities support these provisions of Senate Bill 1880 and House Bill 3826. However, Congress should clarify that cities also may require news and public affairs programming, sports programming, programming of particular interest to the handicapped, children, the elderly, and other identifiable categories of programming. Further, Congress should make discretionary a city's authority to enforce such requirements. Currently, the bills state that a franchising authority "shall" establish such requirements.[195]

194 "The required broad categories of video programming may include, but are not limited to, broadcast or other programming that is in a particular foreign language or is of particular interest to a minority group comprising a significant portion in the cable community." S. 1880, 101st Cong., 1st Sess. § 8(b)(3) (1989); H.R. 3826, 101st Cong., 1st Sess. § 8(b)(3) (1989).

195 S. 1880, 101st Cong., 1st Sess. § 8(b)(3) (1989); H.R. 3826, 101st Cong., 1st Sess. § 8(b)(3) (1989) ("a franchising authority shall, in its discretion . . . .").

3. General Franchising Requirements

Local franchising authorities have encountered problems regarding the extent of their right to grant franchises. Some cable companies have challenged the right of local franchising authorities to deny them cable franchises.[196] Several recent cases, all of them involving local governments in California, have held that a municipality generally may not limit the number of franchises within its jurisdiction.[197] However, other courts have found that cities have the right to limit the number of cable franchises.[198]

Given the conflicting court decisions, Congress should amend section 621 of the Cable Act, which governs a franchising authority's power to grant cable franchises. Congress should make clear that franchising authorities have the right *not* to grant franchises. Such authority is needed so that cities, without fear of litigation, can deny franchises to applicants when it is not economically feasible to grant additional franchises.

Another problem confronting franchising authorities is the fact that some cable operators have challenged their right to require that cable service be offered to all residents in a franchise area. Section 621(a)(3) attempts to resolve the issue by prohibiting denial of cable service to a group of potential subscribers in a residential area because of the income level of the group.[199] However, the Cable Act does not require that cable operators provide service throughout a franchise area, regardless of the income of possible subscribers. Franchising authorities should have the right to impose such a requirement.

---

[196] *See* Preferred Communications, Inc. v. City of Los Angeles, No. CV 83-5846 (C.D. Cal. Jan. 5, 1990); Pacific West Cable Co. v. City of Sacramento, 672 F. Supp. 1322 (E.D. Cal. 1987); Group W Cable, Inc. v. City of Santa Cruz, 669 F. Supp. 954 (N.D. Cal. 1987), *appeal dismissed per stipulation*, No. 88-1832 (9th Cir. June 20, 1989); Century Federal, Inc. v. City of Palo Alto, 648 F. Supp. 1465 (N.D. Cal. 1986), *appeal dismissed*, 484 U.S. 1053 (1988).

[197] *See, e.g.*, *Century Federal*, 648 F. Supp. 1465 (N.D. Cal. 1986) (summary judgment for cable operator holding that city's exclusive franchising scheme violated the first amendment since it did not further a substantial government interest in minimizing disruption to the public domain).

[198] *See, e.g.*, Central Telecommunications, Inc. v. TCI Cablevision, Inc., 800 F.2d 711 (8th Cir. 1986), *cert. denied*, 480 U.S. 910 (1987) (rejecting cable operator's claim that City's grant of exclusive franchise violated its first amendment rights, given the natural monopoly conditions present in the market); Community Communications Co. v. City of Boulder, 660 F.2d 1370 (10th Cir. 1981), *cert. dismissed*, 456 U.S. 1001 (1982) (franchising authority may conduct a competitive bidding process and award a franchise to a single bidder where a natural monopoly exists); Omega Satellite Products v. City of Indianapolis, 694 F.2d 119 (7th Cir. 1982) (city may limit the entry of cable television companies and may remove cables of non-franchised cable operator).

[199] Cable Act, § 621(a)(3), 47 U.S.C. § 541(a)(3) (Supp. V 1987).

4. Trafficking in Cable Systems

The deregulation of the cable industry has contributed to trafficking in cable systems. Investors recognize that they can charge monopolistic prices for cable services since most cable systems are not subject to competition and since cities are prohibited from regulating cable rates in virtually all franchise areas. Further, these investors recognize that it is difficult for cities to deny them renewal of their cable franchises. As a result of this deregulatory environment, cable operators have been able to obtain substantial cash flow margins, while subscribers have experienced price hikes, poor service, and less-than-acceptable signal quality. Not surprisingly, investors are willing to pay substantial prices for cable systems. Systems have been sold in excess of $3,000.00 per subscriber,[200] despite the fact that cable systems can be built for approximately $800.00 per subscriber.[201] Buyers are able to finance such purchases through unreasonable rate hikes and cutbacks in service.

To alleviate the negative effects of cable system trafficking, Congress should enact legislation prohibiting transfers of cable systems owned less than 5 years. A franchising authority, however, should retain the right to consent to transfers for systems held for less than 5 years if it determines that the transfer protects and advances the public interest in the operation of the cable system.

5. Modifications

The provisions in section 625 of the Cable Act make it extremely difficult for franchising authorities to deny modifications which are not in the best interest of a cable community.[202] The Cities recommend that Congress repeal section 625. Section 625 was enacted primarily to protect cable operators from "franchising wars" in which cable operators allege that they made unrealistic promises to secure a franchise. Since virtually all cities where a cable system is economically viable have already granted franchises, the ban is no longer justified.

6. Revocation of Franchises

Section 627 establishes the standard franchising authorities must follow in determining the price for a cable system revoked

---

200 Cable TV Franchising, Mar. 31, 1989, at 9.
201 Cable TV Franchising, Nov. 30, 1988, at 3.
202 Cable Act, § 625, 47 U.S.C. § 545 (Supp. V 1987).

for cause or for a cable system in the event of the denial of its renewal request.[203] However, section 627 does not provide sufficient guidance as to the right of franchising authorities to act once a franchise is revoked, especially when a franchise is revoked for cause. Nor does it provide adequate guidance as to the price that an incumbent cable operator has the right to receive for its cable system.

Congress should amend section 627 to clarify that, where a franchise is revoked for cause, a franchising authority has the right to: (i) acquire ownership or transfer the system to a new franchisee at a price determined in the franchise agreement or at an equitable price, taking into consideration such matters as the harm to the community resulting from the cable operator's breach or failure to perform; (ii) require a cable operator, at its own cost, to remove its cable from a city's rights-of-way and easements; (iii) grant the franchisee, a trustee, or a new cable operator a nonrenewable interim franchise until the cable system is transferred or a new one is built; and (iv) require that the profits from such an interim franchise be held in escrow to prevent the incumbent operator from profiting from poor performance during the interim period.

7. Subscriber Privacy

The subscriber privacy provisions in section 631 do not adequately protect subscribers from disclosure of information for non-cable purposes.[204] To strengthen the protections offered to cable subscribers, Congress should amend section 631 to prohibit cable operators from disclosing subscriber information (i) without having explained to subscribers the ramifications of disclosure and having provided subscribers, in writing, the opportunity to prohibit or limit disclosure; and (ii) without having obtained written authorization for disclosure from subscribers. Section 631 also should include a provision granting franchising authorities access to subscriber lists, addresses, and other information needed to administer the franchise agreement and to determine if a cable operator is in compliance with such an agreement.

8. Consumer Protection

Subscribers are not satisfied with the service provided by

---

[203] Cable Act, § 627, 47 U.S.C. § 547 (Supp. V 1987).
[204] Cable Act, § 631, 47 U.S.C. § 551 (Supp. V 1987).

cable operators and are irritated by the recent price increases imposed on them. A major consumer complaint concerns the slow response of cable operators to service calls. A survey by New York of its Manhattan cable subscribers conducted in December 1989, indicated a dismal picture of customer service in the areas of signal quality, telephone service, appointment problems, repair problems, and billing problems. Approximately 60% of the respondents from the franchise areas served by Manhattan Cable Television and Paragon supplemented their survey responses with additional comments, the vast bulk of which reflected negatively on the cable companies operating in Manhattan.[205]

Congress should amend section 632 to clarify that state and local consumer protection laws are not preempted by the Cable Act provisions. Such authority is needed to protect cable consumers from inadequate cable service and slow response to consumer complaints.

IV. CONCLUSION

The 1980s have seen almost a full pendulum swing in the regulation of cable television, *a swing to non-regulation*. Congress now appears to be most concerned with the power and the behavior of the cable industry. Consumers currently suffer at the hands of the cable monopoly with respect to the quality of service and the rates paid for services. The vertical integration of the industry restricts the diversity of programming available to the public. Congress and the FCC do not appear to favor regulation at the local level, nor, in fact, are they enamored with ongoing regulation at the federal level. They seem to hope for the development of a "competitive" market. Since direct cable-to-cable competition seems doubtful, given the economics of cable, it is important to restructure the Cable Act to account for these developments. There are numerous barriers to the effective local regulatory oversight of cable systems and to increasing competition in the provision of cable services. Such barriers have resulted from judicial and administrative actions since passage of the Cable Act, and from the anti-competitive and monopolistic effects of vertical integration and horizontal concentration in the cable industry. Bills pending in Congress would help to alleviate current regulatory problems and to stimulate competition in the

---

205 Report of Price Waterhouse, Report on MCTV Subscriber Satisfaction Survey 9 (Mar. 13, 1990); Report of The Gallup Organization, Inc., Paragon Subscriber Satisfaction Survey 8 (March 13, 1990).

provision of multichannel video programming. However, the Cities believe that Congress could improve the effectiveness of the bills in addressing cable regulatory concerns if Congress also passed legislation incorporating the Cities' recommendations.

The balance must be reestablished. There must be meaningful regulation of the cable television industry to protect the consumer and ultimately to protect the communications structure of the country.

V. Postscript

The staff of the Senate Communications Subcommittee and the staff of the House Energy and Commerce Committee have drafted cable television bills since the initial text of this article was written. The drafts have not been introduced in either the House or the Senate, but it is believed that the drafts may serve as the mark-up vehicles of any cable legislation considered in the Senate and House. Many topics of concern addressed in this article, including, among other things, rate regulation, technical standards, renewals, must-carry, and consumer protection standards are addressed in either or both of the drafts.

The drafts offer less protection to consumers compared to the protection offered in most of the pending bills. The drafts, for example, would grant the FCC greater authority to regulate cable rates, despite the fact that actions by the FCC have exacerbated current rate problems and other problems. Moreover, the drafts would narrowly define the cable services subject to rate regulation—thus retaining the cable industry's ability to impose monopolistic rate increases on unregulated services.

As with the 1984 Cable Act legislation, the drafts probably will be revised to reflect the concerns of competing interests and will probably not resolve existing problems—despite the intentions of the drafters to resolve such problems. The Cities, the cable industry, other key interested players, and members of Congress, have been discussing with the staffs possible changes in the House and Senate drafts. It is unclear at this point what the result of these discussions will be. However, indications are that the bills may not radically alter the status quo, which will be to the detriment of cable subscribers and to the benefit of the cable industry.