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AN ALTERNATIVE TO CABLE REGULATION: THE OFFICE OF
TELECOMMUNICATIONS POLICY PROPOSED CABLE BILL
AND AN ANALYSIS OF THE RESPONSES TO IT
JULY, 1971, TO JANUARY, 1976

DISSERTATION

Presented in Partial Fulfillment of the Requirements for
the Degree Doctor of Philosophy in the Graduate
School of The Ohio State University

By

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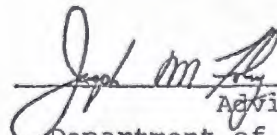
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1977

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Chapter 1

INTRODUCTION TO THE PROBLEM

The passage of laws governing the regulation of commerce for the benefit of the public began almost ninety years ago with the 1887 Act to Regulate Commerce. This act created the Interstate Commerce Commission with provisions which applied to railroads and water carriers under common management.⁵ The functions of the ICC include the following:

To require railroads to charge reasonable and just passenger fares and freight rates to guard against rates that discriminated against one town or group of customers in favor of another, to force carriers to post the fares and rates for public inspection, and to inquire into the management of railroad companies.⁶

Later, other federal agencies were created to prevent unfair methods of competition and other undesirable trade practices.⁷

Some of the agencies, date of creation, and regulatory jurisdiction include the following:

Federal Reserve System	1913	Credit control
Federal Power Commission	1920	Hydroelectric power, electric energy, natural gas
Federal Trade Commission	1914	Anti-trust trade practices
Federal Radio Commission	1927	Telephone, telegraph, radio, television ⁸

One of the characteristics of the regulated industries is that they are usually monopolies or highly competitive, lucrative businesses or a natural resource belonging to no particular individual--but to all the citizens.

In addition to federal regulation, the states individually have always been active in the passage of laws to protect health, morals, and

safety; and these have affected the operation of industries within their borders.⁹

In the states the industry that has been subjected to regulation for the longest period is banking. The history of regulation of this industry runs back to the early part of the nineteenth century. Railroads have been regulated by the states in some way from the beginning of the industry, and the present-day system of regulation dates from the 1870s. Public-utility regulation followed very quickly. In the first decade of the twentieth century, the attention of state governments was directed to the evils in the insurance industry, and regulation of a stringent nature was initiated. So-called "blue-sky laws," designed to prevent fraud in the sale of securities, were passed in the second decade. Economic regulation of trucks and busses began in the third decade. Though conservation measured for oil had been in effect for some years, proration of production was introduced in the late 1920s and became significant with its use in the East Texas field in 1931.¹⁰

During the past ninety years, both the federal government and the states individually have expanded the number of industries to be regulated and the variety of regulations imposed.¹¹

Essentially, the states and the federal government have passed legislation and created agencies to oversee the regulated industry with the objective of regulating the industry for the public good.

One of the industries to be federally regulated for the public interest, convenience, and necessity was the domestic broadcast industry.

The structure and regulation of the commercial broadcast industry in this country did not just happen. It has evolved over the past 50 years and is the product of particular American values and needs, as well as a unique democratic method of applying these values to fulfill these needs.¹²

In order to deal with a particular situation or crisis which arose regarding the regulation of broadcasting, the remedy frequently sought was the introduction of legislation which was usually passed

after considerable deliberation. Although each specific action taken at a time was to deal with a specific problem, one thread of continuity which has been observed by scholars of broadcast law is that the government has attempted to both regulate and promote private industry for the public good.¹³ When stringent regulation is victorious over the promotion of private industry and the scientific progress which accompanies it, advanced technology may be held back.

Examples taken from competing technologies such as the railroad and trucking transport reveal that regulation has slowed and distorted the pace and pattern of technological change.¹⁴ In this same vein, broadcasting and cable can be compared to other competing technologies. The older industry, broadcasting, has been protected by the government while the newer innovation, cable, has been constrained by the regulations the FCC has adopted and by the failure of the Commission to seek from Congress the statutory authority to regulate cable in the public interest. Although there is some variance in the regulation of railroad-trucking and broadcasting-cable, they are similar enough to draw the following comparisons. All of the four industries are regulated at the federal, state, and local levels of government. The regulators of the older technologies, railroad and broadcasting, have been accused of crawling into bed with the industry they regulate.¹⁵ This accusation has been made by those who see the new technology as a threat to the older more established industry. It can be speculated that widespread use of cable could eliminate broadcast station market dominance just as it can be argued that the trucking industry caused the decline of the railroads.

Further, since technology usually preceeds the regulation of its economic and social effects, the regulation of broadcasting-related research has never quite kept pace with technical developments in the field.¹⁶ The telegraph, telephone, radio, and television were each invented and then later regulated under laws which had to be written, passed, and enacted for the public good. Presently these communication mechanisms, under the law, are clothed with the public interest.¹⁷

The people through their government have the right to set the general standards for their operation, and that qualified persons may have the privilege of operating them providing they offer a worthwhile service.¹⁸

Each of the instrumentalities of communication--telephone, telegraph, radio, and television--is regulated under the provisions of the Communication Act of 1934.

A basic function of the Communication Act of 1934 is the establishment of a national policy regulating telecommunications in the United States and the administrative machinery to execute this policy. Certain sections of the Act are directed to the Federal Communications Commission while other sections pertain to the Executive Branch of government.

An impasse between the two agencies could lead to a conflict in spectrum usage. This has been avoided thus far by negotiations between the Executive Branch and the Commission, so that the two instrumentalities of government move in coordinated fashion in allocating frequencies for use by the federal government and denying them to others.¹⁹

Cooperation between the Commission and the Executive during the past 40 years has allowed each president to interpret his relationship to the Act in light of the historical framework of his term in office and the personal interests of the Chief Executive as it pertained to

telecommunications in this country. Of the six presidents in office since 1934, Richard Nixon took a more active part in telecommunication matters than did most of his predecessors. In February, 1970, Mr. Nixon submitted a letter to Congress requesting the creation of an Office of Telecommunications Policy within the Executive Branch. The work of the Rostow Report prepared under the auspices of the Johnson administration served as a model for what was eventually done in part by the Office of Telecommunications Policy.

1. It would serve as the President's principal adviser on telecommunications policy, helping to formulate government policies concerning a wide range of domestic and international telecommunications issues and helping to develop plans and programs which take full advantage of the nation's technological capabilities. The speed of the economic and technological advance in our time means that new questions concerning communications are constantly arising, questions on which the government must be well informed and well advised. The new office will enable the President and all government officials to share more fully in the experience, the insights, and the forecasts of government and non-government experts.

2. The Office of Telecommunications Policy would help formulate policies and coordinate operations for the Federal government's own vast communications systems. It would, for example, set guidelines for the various departments and agencies concerning their communications equipment and services. It would regularly review the ability of the government communications systems to meet security needs of the nation and to perform effectively in time of emergency. The office would direct the assignment of those portions of the radio spectrum which are reserved for government use, carry out responsibilities conferred on the President by the Communications Satellite Act, advise state and local governments, and provide policy direction for the National Communications System.

3. Finally, the new office would enable the Executive Branch to speak with a clearer voice and to act as a more effective partner in discussions of communications policy with both the Congress and the Federal Communications Commission. This action would take away none of the prerogatives or functions assigned to the Federal Communications Commission by the Congress. It is my hope, however, that the new office and the Federal Communications Commission would cooperate in achieving certain reforms

in telecommunications policy--especially in their procedures for allocating portions of the radio spectrum for government and civilian use. Our current procedures must be more flexible if they are to deal adequately with problems such as the worsening spectrum shortage.²⁰

Hearings held in the House of Representatives in March, 1970, produced little opposition to the plan and within one year the Office of Telecommunications Policy was created. Although other presidents had tried to establish exact guidelines to be followed when dealing with uses of the spectrum, their attempts were best described as procedural in nature. Nixon believed the Office of Telecommunications Policy should be located in the Executive Branch so the FCC would be able to look to one official in that Branch who would represent the President's viewpoint effectively when there was need for such representation before the FCC on broad policy matters.

One of the first issues attempted to be resolved by OTP was in 1971 when the Office brought together representatives of the government, broadcasting, cable, and copyright industries in getting them to accept a compromise agreement on cable rules. For almost a decade, the argument had been over the federal rules that would govern the CATV industry.

Broadcaster was pitted against cable operator--the one worried about invasion of his turf by a new communications technology; the other fighting for the kind of regulatory framework it feels will permit it to grow and prosper.²¹

Since OTP was originally established as the White House's principle adviser on broad policy matters, it was not considered unusual for its Director, Clay T. Whitehead, to take an active role in suggesting some of the guidelines he believed should be followed when regulating cable. Whitehead speaking at the National Cable Television

Association meeting in July, 1971, said:

We hope that we can develop a policy which will allow cable to offer people a wide variety of new services including, but not limited to, entertainment, while at the same time preserving or even augmenting, the quality and value of existing television service.²²

Although it may appear Mr. Whitehead was attempting the impossible, his suggestions and influence were felt in arriving at a settlement among the concerned parties in November, 1971. However, the agreement could best be described as a stop-gap measure since it left a key part of the dispute unresolved--the extent to which the FCC has the authority to regulate cable television under present law.

The Communication Act of 1934 provides for the regulation of both broadcasting and common carrier services; it does not specifically cover cable, which is understandable since cable was a medium of communication unknown at the time the Act was written.

However, the wording of Section 1 of the Communication Act is broad enough so that the phrase, communication by wire, has been interpreted to include the regulation of cable. Presently, cable is regulated as an adjunct to broadcast television. The Supreme Court in the Southwestern Case which was decided in 1968 declared that the FCC's rules were legally valid under the broad authority over interstate communication vested in the Commission by the Communication Act.²³

Although numerous studies have been made suggesting cable's capability and the increasing problem of the regulation of the medium, the Rostow Report, the report of the Sloan Foundation, Rand Corporation studies, and most recently, studies by the Committee for Research and Economic Development, the policy recommendations have not been acceptable to all those involved because of the variety of self-interest in so important a technology as cable. Essentially, the issue raised by all concerned parties is should cable be regulated primarily through the mode of statutory law or in the manner of an administrative agency with

statutory guidance. Aware of the increasing importance of the cable television industry, the Office of Telecommunications Policy has proposed a cable bill that would specifically outline the jurisdiction that local, state, and federal authorities have over cable. The 1975 Cable Bill is one of the first comprehensive legislative proposals written to grapple with how cable should be regulated. If the bill, the Cable Communication Act of 1975, were enacted by Congress, it would have become the first comprehensive statutory regulation of cable. This dissertation will attempt to determine how OTP resolved the issues of to what degree and who should regulate cable and analyze the response generated by the bill among the affected parties.

The compartmentalization of jurisdiction at various levels is applauded by the proponents of the bill and condemned by others. Essentially, those in favor of the bill believe it would finally clarify the role of local, state, and federal authorities as they pertain to cable--while opponents feel disputes over the regulation of cable can continue to be settled by litigation rather than legislation. This second group reasons that since the cable industry is relatively young, it should have additional time to develop during the next five years and that regulation at this time might hinder the growth of a vital communication medium. A third group not opposed to legislation per se is against the OTP bill because they feel the proposed legislation might create a static hierarchy of interests similar to those that already exist in the communication industry. Arbitration between the various factions seems to be the only logical method of arriving at a workable solution that would benefit those in dispute regarding the local, state,

and federal authority over cable. Individuals representing each of the three groups have admitted to the writer that they are willing to concede on certain issues written into the "Cable Bill of 1975." This dissertation will examine each of these viewpoints, the reasoning behind them, and then be able to suggest the future of cable legislation in this country.

SOURCES OF DATA

Most of the information for the dissertation came from primary source material which includes interviews with key figures in the drafting of the cable bill, letters from officials in government agencies commenting on the proposed bill, and Congressional hearings dealing with the reorganization of the Office of Telecommunications Policy. Secondary source material was relied upon in tracing the role of the Executive Office and the Federal Communication Commission as they pertained to the regulation and utilization of the spectrum by governmental agencies and private individuals. The scholarly publications included: Head's Broadcasting in America, Emery's Broadcasting and Government, Jones' Regulated Industries, Noll's Economic Aspects of Television Regulation, Capion's Technological Change in Regulated Industries, and Krasnow and Longley's The Politics of Broadcast Regulation.

Considering the generally high level of concern over the potential of cable, the possibility of its changing the current broadcast industry structure in this country and the lack of any Congressional enactment of legislation granting the FCC specific regulatory jurisdiction over cable television, it is not surprising to find a substantial

body of literature already existing which deals with the various aspects of the problems relating to the cable industry. This review will concentrate on that portion of the literature which is directly concerned with the current regulation of cable and how the proposed bill of the Office of Telecommunications Policy would alter the present regulatory structure. Works of a general nature dealing with the history of cable include: Le Duc's Cable Television and the FCC, S. Rivkin's Cable Television: A Guide to Federal Regulation, and Barnett's article "State, Federal, and Local Regulation of Cable Television" in Notre Dame Law Review.

Fredrick Charles Esplin's unpublished thesis--The Office of Telecommunications Policy: The Growing Role of the Executive Branch in Broadcasting--is a work which indicates that such an office can function in providing direction, policy, and information for a variety of information communication issues. Various other articles appearing in journals, including Sheila Mahoney's in The Catholic University Law Review and George Wellford Taylor, Jr.'s in Duke Law Journal, were used in studying the recommendations for the regulation of cable proposed by OTP. Press releases and speeches from OTP were used as part of the literature related to the topic. General press and trade press articles commenting on the proposed bill also served as literature that was surveyed.

RESEARCH QUESTIONS

This dissertation is limited in time from 1971--when the Office of Telecommunications Policy was able to bring together representatives

of the broadcasting, cable, and copyright industries in getting the parties to accept a compromise agreement on cable rules--to January, 1976, when comments on the proposed legislation had been received from the Congress, other governmental agencies, and non-governmental agencies involved in the legislative process, and how the proposed bill would amend the Communication Act of 1934 with respect to cable communications. Within this framework, the following questions are posed:

Background

1. What historically has been the role of the Executive Branch of government and the administrative agency governing telecommunications in this country and how have they changed to accommodate technology?

2. What did the creation of OTP do to change the role of the two agencies so far as the immediate and long-range planning of communication technology was concerned?

3. How did OTP first define and attempt to resolve the problem concerning the regulation of cable technology and other key issues related to it?

Analysis

4. How do the recommendations of the Cabinet Committee Report serve as a model for the proposed cable bill?

5. Does the OTP legislation favor a statutory law or does it suggest cable be governed by an administration agency with statutory guidance?

6. Does the proposed OTP legislation reflect the opinions of Congress, the FCC, the Executive Branch, and the effected industries?

Responses

7. What responses did the OTP proposed cable bill receive from governmental and non-governmental agencies commenting on the role of local, state, and federal regulation of the cable industry?
8. How do the responses compare to:
 - a. the definition of the problem?
 - b. the proposed legislation of OTP?

THE ORGANIZATION AND RESEARCH METHODOLOGY

The next chapter of the dissertation is devoted to background material. It traces the roles the Executive Office and the Federal Communication Commission have had in determining the usage of the spectrum by the government and private enterprise. This section follows the historical development of the recommendations of the presidents in office from 1934 to the establishment of the Office of Telecommunications Policy within the Executive Branch and how this Office was to serve in an advisory capacity on communication issues affecting this country.

After explaining what cable is and giving a brief summary of its regulatory history, Chapter Three will analyze the current structure of local, state, and federal regulation of CATV in the United States.

S. Rivkin's Cable Television: A Guide to Federal Regulation and Barnett's article "State, Federal, and Local Regulation of Cable Television" in Notre Dame Law Review will be especially helpful in tracing the development of cable legislation and outlining the present status of regulation. It will also be necessary in this chapter to trace OTP's involvement with cable regulation from 1971-1975 so that their

recommendations can be clearly understood by the reader. With this foundation established, it will be possible for the study to proceed to the next section.

Chapter Four will examine the recommendations of the Cabinet Committee on Cable Communications which served as a model for the proposed Cable Bill of 1975 and how each relates to the following topics:

1. Ownership of cable companies by private individuals, telephone common carriers, and other large communication corporations.
2. Programming and the development of new sources, the regulation of content, and the applicability of copyright laws to cable-originated programs.
3. The jurisdictional framework for cable regulation at the local, state, and federal levels. This area includes franchising, rate of return, privacy of the user, participation by minority groups, and the dedicated free channels. Each of the above three general categories is related to the present regulatory framework of cable so the reader can better understand the reasons for the recommended changes.

The fifth chapter will be a systematic analysis of governmental and non-governmental agencies which have commented on the proposed cable bill and which would be directly effected by the statutory obligation imposed by such legislation.

Much of the data for this portion of the study has been gathered in Washington, D. C., from the public files and personal interviews at the FCC, the Justice Department, and the Department of Commerce. Interviews were also conducted at National Cable Television Association

offices, the organization which represents the industry most effected by the proposed legislation, and Cable Information Center--a non-profit organization working for the welfare of its members. In essence, comments both in favor and against the proposed bill will be presented in this section of the dissertation.

The concluding chapter of the dissertation is devoted to a review of the conclusions generated from the analysis of the data with a view toward determining: (1) the extent of the role of governmental and non-governmental agencies in writing the proposed cable bill, (2) the usefulness of the comments of governmental and non-governmental agencies in writing legislation, and (3) the overall value the Office of Telecommunications Policy can serve in providing direction and information for an information communication issue like cable. Consideration is also given to future developments in the area of cable legislation.

Chapter 1

¹Sydney W. Head, Broadcasting in America (Boston: Houghton Mifflin Company, 1976), p. 319.

²John V. Lindsay, cited in Mayors' Action Report on Cable Television (Washington, D. C.: National Science Foundation, 1973), p. 25.

³Warren Burger, cited in Frank J. Kahn, Documents of American Broadcasting (New York: Appleton-Century-Crofts, 1973), p. 609.

⁴John Eger, speech before the Connecticut Broadcasters Association, Mystic, Connecticut, May 8, 1974.

⁵Herbert Hugo Liebhofsky, American Government and Business (New York: John Wiley & Sons, Inc., 1971), p. 440.

⁶Louis M. Kohlmeier, The Regulators (New York: Harper & Row, Publishers, 1969), p. 13.

⁷Emmette S. Redford, American Government and the Economy (New York: The Macmillan Company, 1965), p. 547.

⁸*Ibid.*, p. 549.

⁹*Ibid.*, p. 360.

¹⁰*Ibid.*

¹¹*Ibid.*, p. 361.

¹²Kahn, Documents of American Broadcasting, p. 1.

¹³Kohlmeier, The Regulators, p. IX.

¹⁴William M. Capron, ed., Technological Change in Regulated Industries (Washington, D. C.: The Brookings Institution, 1971), p. 11.

¹⁵*Ibid.*, p. 223.

¹⁶Kahn, Documents of American Broadcasting, p. 1.

¹⁷Walter B. Emery, Broadcasting and Government (East Lansing: Michigan State University Press, 1971), p. 7.

¹⁸*Ibid.*

¹⁹William K. Jones, Regulated Industries (New York: Foundation Press, 1967), pp. 1031-1032.

²⁰ Richard M. Nixon, Message from the President of the United States, U. S. Congress, House, Document No. 222, Reorganization Plan No. 1 of 1970, Office of Telecommunications Policy, 91st Congress, 2nd Session (Washington, D. C.: Government Printing Office, 1970), pp. 1-2.

²¹ Broadcasting, August 2, 1971, p. 22.

²² Ibid., July 12, 1971, p. 26.

²³ Kahn, Documents of American Broadcasting, p. 567.

Chapter 2

THE COMMUNICATION ACT OF 1934 AND THE POWER OF THE PRESIDENT

This chapter traces the roles the Executive Office and the Federal Communication Commission have had in determining the usage of the spectrum by the government and private enterprise. It also follows the historical development of the recommendations of the presidents in office from 1934 to the establishment of the Office of Telecommunications Policy within the Executive Branch and the ideas about the ways this Office was to serve in an advisory capacity on communication issues affecting this country. By tracing the background of the relationship between the Executive Office and the Federal Communication Commission, the following questions will be answered for the reader: (1) what historically has been the role of the Executive Branch of government and the administrative agency governing telecommunications in this country and how have they changed to accommodate technology, and (2) what did the reaction of OTP do to change the role of the two agencies so far as immediate and long-range planning of communication technology was concerned?

A basic function of the Communication Act of 1934 was the establishment of a national policy regulating telecommunications in the United States and the administrative machinery to execute the statutory powers and functions given to the Federal Communications Commission by Congress. However, this mandate was not always as clearly defined as it is now. Wire and wireless communication prior to 1934 were looked upon

as separate entities and, therefore, were not under one federal jurisdiction. Wire communication (telephone, telegraph, and cable) were regulated by the Interstate Commerce Commission under the provisions of the Mann Elkins Act of 1910.

This regulation proved largely negatory partly by reason of the lack of an effective statutory mandate but also because of a lack of appropriations sufficient to carry on an investigation.¹

Wireless communication, a later innovation, was regulated by the Federal Radio Commission. The body of five members had the authority under the Radio Act of 1927 to grant, renew, or revoke station licenses.² The Federal Radio Commission remained in office from year to year through various acts of the Congress until 1934 when it was replaced by the Federal Communication Commission.

Creation of the FCC gave Americans a single agency which regulated commercial communications by radio and wireless in this country.

Congress transferred to the FCC the authority that since 1910 had been vested in the Interstate Commerce Commission to regulate telegraph, telephone, and cable companies. The FCC also acquired the authority, which under the 1927 Act had been exercised by the Commerce Department, to license commercial radio broadcast stations.³

The FCC is charged with the following responsibility:

Regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, nationwide, and worldwide wire and radio communication service with adequate facilities at reasonable charges for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is hereby created a commission to be known as the "Federal Communication Commission," which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this Act.⁴

As prescribed by Section 4 of the Communication Act, the FCC is composed of seven commissioners chosen by the president with the advice and consent of the Senate--one of whom the president designates as chairman.⁵ The Act specifically limits the Commission's jurisdiction to non-governmental uses of radio⁶ and stipulates the president's authority to assign frequencies used by the federal government and executive control of all communication during a national emergency. Jones, in Regulated Industries, points out that an impasse between the two agencies could lead to a conflict in spectrum usage. However, this has been avoided thus far by negotiations between the Executive Branch and the Commission, so that the two instrumentalities of government move in coordinated fashion in allocating frequencies for use by denying them to others.⁷

Federal regulatory legislation has consistently exempted stations of the national government from the licensing requirements imposed on other operators. However, these stations except when beyond the limits of the United States or engaged in government business must conform to such rules and regulations designed to prevent interference with other radio stations and the rights of others as prescribed by the Commission.⁸ Although only Sections 305⁹ and 306¹⁰ are explicit in detailing the president's powers as they pertain to communications, each Chief Executive since the Act became law has interpreted the piece of legislation implicitly and has commissioned studies of telecommunications policy in this country in order to resolve conflicts between federal and non-federal uses of the spectrum.¹¹

Pressure for greater control and coordination of the government's frequency allocation during 1950 prompted the creation of the Board of

War Communications. The Board functioned as a planning and coordinating committee for the control of radio and wire communications during periods of national emergency until it was abolished early in 1947.¹² President Truman later established the Communications Policy Board to advise and assist in communication matters concerning the Executive Branch.¹³ In so doing, President Truman seemed to be trying to return to the presidential position that existed prior to the war.

President Eisenhower was later to abolish the Board established by his predecessor and in 1957 created the Office of Defense Mobilization with a Telecommunications Office to carry out communications management functions assigned by the president. The next year the Office of Defense Mobilization was merged with the Federal Civil Defense Administration to form the Office of Civil and Defense Mobilization (OCDM) within the Executive Office of the President (Reorganization Plan No. 1 of 1958). The telecommunications functions of ODM then became a responsibility of the new agency.¹⁴ However, the reorganization did little to establish permanent guidelines which could be followed by later administrations.

In an effort to call attention to the lack of long-range policy planning in the Executive Office, President-elect John Kennedy sought the help of James Landis, who in the 1930s had been chairman of the Securities and Exchange Commission and in the 1940s was the chairman of the Civil Aeronautics Board.¹⁵ Landis recommended the establishment of an Office of Communications Policy within the Executive Office and transfer to this Office all powers assigned to the Office of Civil Defense Mobilization. Instead Kennedy, as had been the case in past administrations, did not follow the recommendations.

By Executive order, the President did the following:

Delegated his authority over government stations to the Director of the Office of Emergency Planning, with authority to redelegate to the Director of Telecommunications Management, who is one of the Assistant Directors of the Office of Emergency Planning. The Director of Telecommunications Management is instructed to coordinate telecommunications activities in the Executive Branch of the government, formulate overall policies and standards after consultation with other agencies, develop data with respect to the United States government frequency requirements, and encourage research and development activities looking to better utilization of the radio spectrum.¹⁶

In summary, each of the previous studies commissioned by the various presidents tended to focus on one or two aspects of the total problem rather than searching for answers that might cut across the entire communications field. The proposals which resulted related to the day-to-day operating problems faced by the government and not the need for effective policy-making machinery for both national and government-wide problem solving.¹⁷

Seeking to finally remedy the situation, President Johnson in August, 1967, called for the review and formulation of a national communications policy. The Johnson effort was the most ambitious undertaking up to this time. In all, fifteen departments and agencies of the federal government cooperated and were addressed primarily to the legal and economic structure of our communications system and to the policy considerations which in our view should guide its evolution both at home and abroad.¹⁸

The report released by Undersecretary of State Eugene V. Rostow centered on the following topics:

The organization of our international telecommunications industry; policies to support and strengthen INTELSAT; telecommunications needs of less developed countries; uses of domestic satellites; structure

and regulation of the domestic carrier industry; future opportunities for television; spectrum use and management, and federal government roles in telecommunications.¹⁹

Conclusions and recommendations pertaining to the nine areas covered in the report were made with regard to the role played by the Executive Branch in determining the policy of the federal government in telecommunications. The Rostow Report concluded by making the following statement:

If the Executive Branch is to contribute effectively to sound systems planning in the communications industry, it should develop a competence which at present it lacks.

The new capability within the Executive Branch should include the capacity to engage in a variety of advisory and policy activities. It should have resources for communication systems analysis and for long-range economic and technological forecasting. Accordingly, the new entity could become a valuable partner of the FCC through many informal consultations on policy and operation problems and a valuable participant in regulatory proceedings, particularly if it is permitted to appear independently before the Commission in appropriate cases.²⁰

Some of the recommendations of the Rostow Report which helped lay foundation for proposals made by the Nixon administration will be covered in more detail later in the dissertation. However, it should be noted here that because of the difference of the political ideologies of the Johnson and Nixon administrations and the timing²¹ of the release of the Rostow Report that the study was generally ignored.

THE EXECUTIVE REQUEST TO CREATE THE OFFICE OF TELECOMMUNICATIONS POLICY

Within a year of taking office, Richard Nixon was to submit a letter to Congress requesting the creation of an Office of Telecommunications Policy within the Executive Office of the President. The new office would play three essential roles:

1. It would serve as the President's principal adviser on telecommunications policy, helping to formulate government policies concerning a wide range of domestic and international telecommunications issues and helping to develop plans and programs which take full advantage of the nation's technological capabilities. The speed of economic and technological advance in our time means that new questions concerning communications are constantly arising, questions on which the government must be well informed and well advised. The new Office will enable the President and all government officials to share more fully in the experience, the insights, and the forecasts of government and non-government experts.

2. The Office of Telecommunications Policy would help formulate policies and coordinate operations for the Federal government's own vast communications systems. It would, for example, set guidelines for the various departments and agencies concerning their communications equipment and services. It would regularly review the ability of government communications systems to meet the security needs of the nation and to perform effectively in time of emergency. The Office would direct the assignment of those portions of the radio spectrum which are reserved for government use, carry out responsibilities conferred on the President by the Communications Satellite Act, advise State and local governments, and provide policy direction for the National Communications System.

3. Finally, the new Office would enable the executive branch to speak with a clearer voice and to act as a more effective partner in discussions of communications policy with both the Congress and the Federal Communications Commission. This action would take away none of the prerogatives or functions assigned to the Federal Communications Commission by the Congress. It is my hope, however, that the new Office and the Federal Communications Commission would cooperate in achieving certain reforms in telecommunications policy, especially in their procedures for allocating portions of the radio spectrum for government and civilian use. Our current procedures must be more flexible if they are to deal adequately with problems such as the worsening spectrum shortage.²²

The reorganization plan for creating the Office of Telecommunications Policy was prepared by the President and was to adhere to the following guidelines pursuant to the provisions of Chapter 9 of Title 5 of the United States Code:

OFFICE OF TELECOMMUNICATIONS POLICY

Section 1. Transfer of functions. The functions relating to assigning frequencies to radio stations belonging to and operated by the United States, or to classes thereof, conferred upon the President by the provisions of section 305(a) of the Communications Act of 1934, 47 U.S.C. 305(a), are hereby transferred to the Director of the Office of Telecommunications Policy hereinafter provided for.

Section 2. Establishment of Office. There is hereby established in the Executive Office of the President the Office of Telecommunications Policy, hereinafter referred to as the Office.

Section 3. Director and deputy. (a) There shall be at the head of the Office the Director of the Office of Telecommunications policy, hereinafter referred to as the Director. The Director shall be appointed by the President by and with the advice and consent of the Senate and shall be compensated at the rate now or hereafter provided for Level III of the Executive Schedule Pay Rates (5 U.S.C. 5314).

(b) There shall be in the Office a Deputy Director of the Office of Telecommunications Policy who shall be appointed by the President by and with the advice and consent of the Senate and shall be compensated at the rate now or hereafter provided for Level IV of the Executive Schedule Pay Rates (5 U.S.C. 5315). The Deputy Director shall perform such functions as the Director may from time to time prescribe and, unless the President shall designate another person to so act, shall act as Director during the absence or disability of the Director or in the event of vacancy in the office of Director.

(c) No person shall while holding office as Director or Deputy Director engage in any other business, vocation, or employment.

Section 4. Performance of functions of Director. (a) The Director may appoint employees necessary for the work of the Office under the classified civil service and fix their compensation in accordance with the classification laws.

(b) The Director may from time to time make such provisions as he shall deem appropriate authorizing the performance of any function transferred to him hereunder by any other office, or by any organizational entity to employee, of the Office.

Section 5. Abolition of office. That office of Assistant Director of the Office of Emergency Preparedness held by the Director of Telecommunications Management under Executive Order No. 10995 of

February 16, 1962, as amended, is abolished. The Director of the Office of Emergency Preparedness shall make such provisions as he may deem to be necessary with respect to winding up any outstanding affairs of the office abolished by the foregoing provisions of this section.

Section 6. Incidental transfers. (a) So much of the personnel, property, records, and unexpended balances of appropriations, allocations, and other funds employed, held, or used by, or available or to be made available to, the Office of Emergency Preparedness in connection with functions affected by the provisions of this reorganization plan as the Director of the Bureau of the Budget shall determine shall be transferred to the Office of Telecommunications Policy at such time or times as he shall direct.

(b) Such further measures and dispositions as the Director of the Bureau of the Budget shall deem to be necessary in order to effectuate the transfers provided for in subsection (a) of this section shall be carried out in such manner as he shall direct and by such agencies as he shall designate.

Section 7. Interim Director. The President may authorize any person who immediately prior to the effective date of this reorganization plan holds a position in the Executive Office of the President to act as Director of the Office of Telecommunications Policy until the office of Director is for the first time filled pursuant to the provisions of section 3 of this reorganization plan or by recess appointment, as the case may be. The President may authorize any person who serves in an acting capacity under the foregoing provisions of this section to receive the compensation attached to the office of Director. Such compensation, if authorized, shall be in lieu of, but not in addition to, other compensation from the United States to which such person may be entitled.²³

Exactly one month after Nixon had requested the creation of the Office of Telecommunications Policy and the abolition of the Office of Emergency Preparedness, hearings on the matter were held before a Subcommittee of the Committee on Government Operations in the House of Representatives on March 9 and 10, 1970. Statements or testimony taken from approximately 20 witnesses was met with little opposition by those Congressmen in charge of conducting the hearings. Clarence J. Brown, a Representative from Ohio, seemed to question the procedure for establishing the Office.

Mr. Brown...It strikes me as unusual, perhaps not, but it seems unusual, to transfer a function to a nonexistent office and then establish the office. Section 1 transfers the functions. Section 2 of the reorganization plan establishes the office.²⁴

Later in the proceedings, Mr. Brown's fears about the precedent that this reorganization plan might set, appear to be dismissed.

Evidence presented to the committee clearly demonstrated that there had been at least a dozen precedents set for establishing an agency by a reorganization plan and then transferring functions to it.²⁵ Mr. Brown was also concerned whether or not the OTP was being established to speak for the President as a means of influencing directly policy-making decisions of the FCC.

Mr. Brown...If the Office of Telecommunications is being established to speak for the President as a means of influencing directly policy-making decisions of the FCC, I think that does affect the FCC and the relationship which the Congress, and especially the Interstate and Foreign Commerce Committee and the subcommittee that relates to that specialized area, have with the Federal Communication Commission.²⁶

The director of the Bureau of the Budget, Mr. Ink, assured the representative from Ohio that his fears were unwarranted.

Mr. Ink...Certainly, Mr. Brown. With respect to those things which affect government operations, for example, we would expect this Office to make effective recommendations to the FCC, but it would not be concerned with or deal with content or subject matter of TV or radio programs.²⁷

Dr. Clay T. Whitehead, Special Assistant to the President, who was to later become the Director of the Office of Telecommunications Policy, wrote the Chairman of the Subcommittee, William L. Dawson, a letter which assured him that the fears of any committee member were unfounded. Part of that letter reads as follows:

The independence and authority of the FCC is in no way to be impaired by the Reorganization Plan No. 1 now before the committee. No powers of the FCC are affected, and the authority of the Congress remain unchanged. It is, in fact, the administration's hope that the new office of the Telecommunications Policy will enable the Executive Branch to act as a more responsible and responsive partner to the Congress and the FCC in the telecommunications policy area.²⁸

The next witness called to testify was Dean Burch, Chairman of the FCC. Mr. Burch expressed little concern over the likelihood of the FCC being influenced by the proposed Office of Telecommunications Policy; and, in fact, he welcomed what he thought would be a strong, centralized entity to deal with telecommunications issues within the Executive Branch.

We believe that there should be a continuing close scrutiny as to the government's use of the spectrum, so as to insure optimum utilization of this precious resource in the national interest.

Finally, we believe that it will be helpful to receive the views of the Executive on significant matters of communications policy. We have found in the past that the submission of such views assists the Commission in rendering an informed decision.²⁹

Mr. Burch's testimony generally represents the attitude of the hearings and since no strong opposition was expressed either in the House or the Senate the Office of Telecommunications Policy came into existence on April 20, 1970, just two months after the plan for reorganization had been submitted to Congress by Richard Nixon.

Clay T. Whitehead was sworn in as the first director of the newly-created office in September, 1970. The office created little publicity during its first nine months of existence and was considered by the trade press to be "the new kid on the block."³⁰ As of June, 1971, most of the work that was being done by Whitehead involved organizing the agency and getting various of its projects underway.

THE PROPOSALS OF THE OFFICE OF TELECOMMUNICATIONS
POLICY AND REACTION TO THEM

One of OTP's earliest proposals was an administration bill providing long-term financing for the Corporation for Public Broadcasting. The bill proposed by the OTP would have provided \$35 million dollars each fiscal year for a five-year period. In addition, the fund would pay out \$1 for every \$3 raised from non-federal sources with half of the amount going to CPB; the remainder would go to educational stations and other non-broadcast sources, including CATV, engaged in educational programming. However, CPB was both dissatisfied with the amount allocated to them and the plan by which the funds would be distributed to them. The President of CPB, John Macy, Jr., felt that the number and character of entities engaged in educational programming would be impossible to identify when allocating grant monies. This opposition by Mr. Macy helped in causing OTP to withdraw the measure before it was submitted to the Office of Management and Budget for final clearance.³¹

The funding of public television in this country was an issue not to be forgotten by OTP or its director during the next three years. Other controversial telecommunications areas included: (1) new broadcast license renewal bill; (2) the deregulation of radio; (3) a national emergency telephone number; (4) a comprehensive plan for cable television. The last of these four issues, and regulation of the cable industry, will be detailed in greater length in Chapter Three and Chapter Four of the dissertation.

Whitehead's speech at the International Radio and Television Society luncheon in October, 1971, seemed to be his blueprint for

telecommunications in the United States for the foreseeable future.

Whitehead denounced the FCC's performance when handling cases related to the Fairness Doctrine. In his speech, Whitehead made the following comments.

However nice they sound in theory, the Fairness Doctrine and the new judicially-contrived access rights are simply more government control masquerading as an expansion of the public's right of free expression. Only the literary imagination can reflect such developments adequately--Kofa sits on the Court of Appeals and Orwell works in the FCC's Office of Opinions and Review. Has anyone pointed out that the fiftieth anniversary of the Communication Act is 1984? "Big Brother" himself could not have conceived a more disarming "newspeak" name for a system of government program control than the Fairness Doctrine.³²

Specifically, Whitehead advocated the following proposals.

One, eliminate the Fairness Doctrine and replace it with a statutory right of access. Two, change the license renewal process to get the government out of programming, and three, recognize commercial radio as a medium that is completely different from TV and begin to de-regulate it.³³

The ideas introduced by Whitehead could have possibly revolutionized the regulation of the broadcast industry. Since the proposals were to relax government supervision of broadcasting, Dr. Whitehead's efforts were applauded by the industry.

Broadcasting magazine included an article which read in part:

Broadcasters have suddenly acquired a formidable ally in their attempts to get relief from recent applications of the Communications Act....

The question is now whether broadcasters will take the cues Dr. Whitehead gave them in his remarkable appearance before the International Radio and Television Society in New York. To judge by the response of his audience, the significance of the speech may not immediately dawn on the people whose emancipation it proclaimed. There was only one interruption, and that for no more than scattered applause. An ovation would have been in order.

The President's chief expert in the field has now discovered that chaos induced by FCC actions and court decisions of recent years can only get worse until the law itself is radically changed.³⁴

Whitehead admitted that what he had said was only a proposal but that he would work for legislation if there was support for the proposals.³⁵

Although Broadcasting magazine had heralded the speech as a triumph for the industry, its editorial board seemed more reluctant to endorse any legislation which might be forthcoming.

In its totality, however, the package cannot be wrestled into legislation and regulation soon. It remains a major project to be shaped and advanced over the longer range.³⁶

An industry spokesman, Vincent Wesilewski, president of the National Association of Broadcasters, according to trade press sources made the following assertion.

NAB applauds Dr. Whitehead's creative and positive approach to these central issues. His speech certainly contains many suggestions which deserve implementation.³⁷

The speech of October 6, 1971, at the International Radio and Television Society luncheon was the kick-off of a campaign to revise the framework of the relationships between the government that regulated the industry and the way the industry was to better serve the public. The speech had brought the Office of Telecommunications Policy and its director from relative obscurity to the spotlight. Within a year, the Whitehead proposal to deregulate radio was put into effect by the FCC. The deregulation included the following procedures:

Meter readings of all broadcast transmitting systems may be made every three hours instead of every 30 minutes....

AM, FM, and noncommercial FM transmitting equipment is to be inspected once a week, at intervals of not less than five days, instead of once a day, five days a week.

All broadcast stations may keep operating and maintenance logs in a single log if they wish.

Station identification of broadcast stations will be made hourly, as close to the hour as feasible, at a natural break in programming offerings, instead of within two minutes of the hour for television and within two minutes of the hour and half hour for AM and FM stations.

Stations wishing to rebroadcast the programs of another station need obtain only the permission of the originating station, and not the authority of the Commission as presently required in some cases.

The mechanical reproduction rule has been simplified to assure only that a broadcast does not mislead the public.³⁸

Commissioner Richard Wiley said that the change was made so that the dynamic field of broadcasting would be better able to serve the public interest.³⁹

Before the dispute over the October 6, 1971, speech had settled, Whitehead was making another equally controversial and well publicized address to the National Association of Educational Broadcasters in Miami, Florida. In his speech, Whitehead was especially critical of the concentration of public affairs programming being done in Washington, D. C.

The Washington-based Public Broadcasting Service came into being in 1970 for the purpose of supervising the interconnection between the more than 200 public stations and to serve as the national programming authority. In effect, PBS became the network.⁴⁰

Whitehead felt that stations should be more independent and that this growing "central control" was in direct violation of the Carnegie Commission's recommendation calling for the autonomy of local stations.⁴¹ It was suggested in the speech that the Office of Telecommunications Policy might be more disposed to drafting a funding bill for public television if the system were built upon "localism" rather than one aspiring to be a "fourth network." Whitehead made the following statements in the speech.

Do any of you honestly know whether public broadcasting structured as it is today and moving in the direction it seems to be headed--can ever fulfill the promise envisioned for it or conform to the policy set for it? If it can't, then permanent financing will always be somewhere off in the distant future.

The legislative goals for public broadcasting--which I hope are our common goals--are:

1. To keep it from becoming a government-run system.
2. To preserve the autonomy of the local stations.
3. To achieve these objectives while assuring a diversity of program sources for the stations to draw on in addition to their own programs.⁴²

The stations within the next few months began to conform to the plan outlined for them by Whitehead. "Decentralization" operated in the following manner:

"Wall Street Week," for example, came to emanate not from New York City where Wall Street is an address, but from Baltimore. William F. Buckley, Jr.'s "Firing Line" began to be produced in South Carolina although Mr. Buckley resides in New York. The host as well as most of his guests, therefore, have to commute. A program based on MS. Magazine was set to be produced in Dallas until it was recognized as impractical--everyone connected with it was in New York.⁴³

The mandate handed down by the Office of Telecommunications Policy and followed by PBS did nothing to strengthen the service of non-commercial stations but was a tactic used to weaken the impact of what might otherwise be a threat to the Nixon administration.⁴⁴ However, the plan was not without criticism. Drs. Wilbur Schramm and Lyle Nelson assessed the financial predicament of public broadcasting and concluded:

Given the limited current PTV financial resources, the alternative is clear. CPB, through the PBS facilities, is providing approximately 14 hours a week of original programming and another six-eight hours of repeats, much (but not all) of it of high quality. Against this, the same funds spread out over 200 or so stations would produce only a few minutes per week of programming of comparable quality.⁴⁵

Unfortunately, "localism" has lowered the quality of programming of PBS and made it a kind of traffic manager rather than a national network system.⁴⁶ Brown, in the article "The Breakup of PBS," also assessed localism.

PBS does much of the paperwork for the newly-reorganized system, but it no longer produces programs nor commissions others to produce. Public television stations remain inter-connected, but they are without a nerve center, a decision-making authority comparable to Britain's BBC or Japan's NHK.

In place of a network, there is now a congress of 246 stations that vote on much of the national programming for public television through a new mechanism known as the Station Program Cooperative.⁴⁷

Although the decentralization of PBS may be looked upon as a triumph for Whitehead and the Nixon administration, it must be considered as a disaster for non-commercial television in this country. "Localness" helped to contribute to the breakup of a network which was an alternate to commercial programming.

Director Whitehead continued to make speeches regarding the status of telecommunications in this country, but none of them seemed to have the impact of the two previously discussed with the exception of the one given at the Sigma Delta Chi luncheon in Indianapolis, Indiana, on December 18, 1972. Local responsibility for programming was stressed, a five-year license renewal bill was promised, the need to eliminate the Fairness Doctrine was repeated, and network news and programming was condemned for "imbalance," "bias," and "ideological plugola." Elements of the Whitehead philosophy are contained within the following quotation from the speech.

There is no area where management responsibility is more important than news. The station owners and managers cannot abdicate responsibility for news judgments. When a reporter or disk jockey slips in or passes over information in order to line his pocket, that's plugola, and management would take quick corrective action. But men also stress or suppress information in accordance with their beliefs. Will station licensees or network executives also take action against this ideological plugola?⁴⁸

The editorial of Broadcasting magazine of January 1, 1973, was a reaction to the speech.

The way the speech was written and, therefore, interpreted, it appeared that the legislative proposals would somehow institutionalize affiliate pressure on network news....The Whitehead jawboning on network bias may be taken for what it is--another outburst of Nixon-administration outrage against that familiar ogre the Eastern liberal establishment. This time, of course, it was articulated in context with talk about affiliate responsibilities and license renewal. That put a hot new lead on Spiro T. Agnew's old scripts.⁴⁹

Reactions from network spokesmen were also included in the trade press.

While NBC and ABC issued brief statements asserting only that the speech appeared to be an effort to interfere with relations between the networks and their affiliates (CBS did not comment immediately.), NBC News President Frank called the Whitehead speech a "threat." Noting that affiliates already express themselves to the networks on programs they provide, he said that Mr. Whitehead is now saying, "We're holding the station accountable for what we don't like to see on each station, and the station's license is involved."⁵⁰

The industry was justified in its criticism of the speech since the references made by Whitehead regarding how the networks dominated over public affairs programming were largely unfounded.

Community by community, the reports received from DuPont correspondents indicated that the amount of time devoted to news was neither greater nor less than in the previous season. However, almost half of the cities reported on were seeing substantially more local documentaries and public affairs programming.⁵¹

Another issue, a national emergency telephone number which affects telecommunications in this country, came into existence in this country with the help of the Office of Telecommunications Policy. The three-digit number 911, which was recommended as early as 1967, did not have the notoriety that the other OTP proposals did. 911 was designated for public use throughout the United States.

The primary purpose of 911 emergency telephone service should be to enable citizens to obtain law enforcement, medical, fire, rescue, and other emergency services quickly and efficiently as possible by calling the same telephone number anywhere in the Nation. A secondary objective should be to enable public safety agencies to satisfy their operational and communication needs more efficiently.⁵²

In order that the objectives of 911 might be fulfilled, a Federal Information Center on the emergency telephone number 911 was established in the Department of Commerce. The procedure for using 911 was as follows:

Advice and assistance will be available through this Center to local governments wishing to initiate 911 services in their communities. The Center will also act as a clearing house for information concerning federal assistance programs that may be available for the establishment of basic 911 service.⁵³

Both the Bell System and other smaller companies have supported the implementation of 911 on a nationwide basis. Evaluating the results obtained from communities that already have the national emergency number indicate that customers use the service. A better indication of the effectiveness of 911 will come when the entire nation is able to use the service.

A tactic of Whitehead in each of the controversial speeches previously discussed was to promise corrective legislation which would be of benefit to those to whom he was speaking, only if they met certain

criteria. Non-commercial broadcasters did comply to the wishes of the Director of the Office of Telecommunications Policy and the Nixon Administration by decentralizing the network, hoping for permanent financing. However, as of this writing, PBS and its affiliates are still waiting for funding which would be of a longer duration than the present system of year-by-year financing. Since commercial broadcasting is not dependent upon government subsidy in order to operate, it was more reluctant to comply with the Whitehead doctrine. Longer license renewal periods and relief from the statutory obligation imposed by the Fairness Doctrine on broadcasters are yet to be realized. However, the least controversial of Whitehead's three-point proposal, the deregulation of commercial radio, was in operation within a year from the time it was proposed. Perhaps "deregulation" was used as bait to entice the broadcasters. Assuming that if broadcasters saw evidence of part of what was promised by Whitehead then they could hope for additional "deregulation" of their industry by adhering to the entire blueprint that would supposedly revolutionize the industry.

The issue of the national emergency telephone number received no criticism from the affected industry and, therefore, very little press coverage. Since the institution of 911 did not take away any of the authority of the telephone industry but served as a means of coordinating telecommunication service in this country, there was no opposition to the plan.

However, OTP's comprehensive plan for cable television was quite another story. The final issue discussed in this dissertation was attempted to be resolved by the Office as early as 1971 when OTP brought

together representatives of the broadcasting, cable, and copyright industries in getting the parties to accept a compromise agreement on cable rules. Whether or not this arbitration was a mandate to be followed by the President's guidelines established in 1970 is a question to be addressed in Chapter Three. Before answering the question, it will first be necessary to summarize the regulatory history of cable up to 1971 and determine why Clay T. Whitehead thought it was necessary to intervene in such a controversial area as cable.

Chapter 2

¹ Herbert H. Liebhofsky, American Government and Business (New York: John Wiley and Sons, Inc., 1971), p. 494.

² Walter B. Emery, Broadcasting and Government (East Lansing: Michigan State University Press, 1971), pp. 29-30.

³ Louis M. Kohlmeier, Jr., The Regulators (New York: Harper & Row, 1969), p. 203.

⁴ Frank J. Kahn, Documents of American Broadcasting (New York: Appleton-Century-Crofts, 1973), p. 54.

⁵ Emery, Broadcasting and Government, p. 54.

⁶ Sydney, W. Head, Broadcasting in America (Boston: Houghton Mifflin Company, 1972), p. 362.

⁷ William K. Jones, Regulated Industries (New York: Foundation Press, 1967), pp. 1031-1032.

⁸ U. S. Congress, House, Committee on Government Operations, Subcommittee on Government Operations, Reorganization Plan No. 1 of 1970 (Office of Telecommunications Policy), Hearings, 91st Congress, 2nd Session, March 9 and 10, 1970 (Washington, D. C.: Government Printing Office, 1970), pp. 91-92.

⁹ Kahn, Documents of American Broadcasting, pp. 68-69.

¹⁰ Ibid., pp. 109-111.

¹¹ Final Report: President's Task Force on Communication Policy (Washington, D. C.: Government Printing Office, 1968), Chapter 9, p. 5.

¹² Reorganization Plan No. 1 of 1970 (Office of Telecommunications Policy), p. 91.

¹³ Ibid., p. 93.

¹⁴ Ibid.

¹⁵ Kohlmeier, The Regulators, p. 49.

¹⁶ Jones, Regulated Industries, p. 1031.

- 17 Reorganization Plan No. 1 of 1970 (Office of Telecommunications Policy), pp. 91-92.
- 18 Final Report: President's Task Force on Communications Policy, Chapter 1, p. 9.
- 19 Ibid, Chapter 1, p. 10.
- 20 Ibid., Chapter 6, pp. 61-62.
- 21 The report was released December, 1968, and Nixon took office January, 1969.
- 22 Richard Nixon, Message from the President. Transmitting Reorganization Plan to 91st Congress, 2nd Session, House Document No. 22, February 9, 1970 (Washington, D. C.: Government Printing Office, 1970), pp. 1-2.
- 23 Ibid., pp. 3-4.
- 24 Reorganization Plan No. 1 of 1970 (Office of Telecommunications Policy), p. 22.
- 25 Ibid., p. 32.
- 26 Ibid., p. 27.
- 27 Ibid., pp. 27-28.
- 28 Ibid., p. 48.
- 29 Ibid., p. 50.
- 30 Broadcasting, June 14, 1971, p. 50.
- 31 Ibid., August 23, 1971, p. 38.
- 32 Clay T. Whitehead, Director of the Office of Telecommunications Policy, address before the International Newsmaker Luncheon, Waldorf-Astoria Hotel, New York City, New York, October 6, 1971, mimeographed copy.
- 33 Ibid.
- 34 Broadcasting, October 11, 1971, p. 72.
- 35 Whitehead address, October 6, 1971.
- 36 Broadcasting, October 18, 1971, p. 122.
- 37 Ibid., October 11, 1971, p. 16.
- 38 Ibid., November 6, 1972, p. 19.

³⁹Ibid., p. 19.

⁴⁰Les Brown, "The Breakup of PBS," Issues in Broadcasting, ed. Ted C. Smythe and George A. Mastroianni (Fullerton, California: Field Publishing Co., 1975), p. 349.

⁴¹Clay T. Whitehead, Director of the Office of Telecommunications Policy, address before the Forty-seventh Annual Convention of the National Association of Educational Broadcasters, Miami, Florida, October 20, 1971, mimeographed copy, p. 3.

⁴²Ibid., p. 5.

⁴³Brown, "The Breakup of PBS," Issues in Broadcasting, p. 349.

⁴⁴Programs of the public information category's "Washington Week in Review," "Bill Moyers' Journal," and the others previously mentioned in the text were generally critical of the Nixon administration.

⁴⁵Wilbur Schramm and Lyle Nelson, The Financing of Public Television (Palo Alto, California: Aspen Institute, 1972), p. 21.

⁴⁶Brown, "The Breakup of PBS," Issues in Broadcasting, p. 349.

⁴⁷Ibid.

⁴⁸Clay T. Whitehead, Director of the Office of Telecommunications Policy, address before the Sigma Delta Chi Luncheon, Indianapolis Chapter, December 18, 1972, mimeographed copy, pp. 5-6.

⁴⁹Broadcasting, January 1, 1973, p. 82.

⁵⁰Ibid., p. 18.

⁵¹Marvin Barrett ed., The Politics of Broadcasting (New York: Thomas Y. Crowell Company, 1973), p. 13.

⁵²OTP Brochure Nine-One-One: The Emergency Telephone Number (Washington, D. C.: Government Printing Office, 1973), p. 48.

⁵³Ibid., p. 49.

Chapter 3

THE HISTORY OF CABLE

This chapter will trace the regulatory history of cable. It also answer for the reader Question 3: How did OTP first define attempt to resolve the problem concerning the regulation of cable technology and other key issues related to it?

Cable television started modestly in 1949 as a seemingly harmless--one might say benignly parasitic--extension of normal television station coverage.¹ Community Antenna Television (CATV), also referred to as cable television, is a simple concept in principle.² It is a system of broadband communications in which signals reach a television set by direct connections with a coaxial cable rather than by captured airwaves, as is the case with commercial television. A sufficiently tall, well placed master antenna erected for the entire community can pick up distant television signals and transmit them to television sets of subscribers who pay a one-time fee for the cable connection³ and a monthly fee for continued use of the service.

Originally, CATV was to provide service to areas that had one or more of a combination of the following problems: (1) geographical isolation because of the terrain, (2) located great distances from a television station, (3) large metropolitan areas that had poor reception caused in part by tall buildings. As long as CATV merely acted as neutral relayer within a single market, filling in shadow areas, beefing up the fringes, overcoming local interference on behalf

local stations, it served to make the stations more effective.⁴ The operators were happy with the prospect of increasing the number of customers served, thereby receiving more revenue from their investment. Television stations had improved reception because of cable. Owners of television sets in small outlying areas who were not served for cable could now receive the same programs as their counterparts in the cities that had more than one television stations. Early demonstrations demonstrated that cable entrepreneurs, broadcasters, and customers were pleased with the performance and possibility of this technology. Subsequently, CATV systems began to seek program sources from more distant markets. Some stations found themselves being relayed to subscribers of as many as 30 or 40 small cable companies which substantially improved station coverage.⁵

At first, the FCC's control over cable television was considered to be quite limited. The Commission could regulate the systems to restrict any interference they might cause in the operations of their electronic equipment. But the retransmission of the signals received did not involve use of the spectrum, did not constitute rebroadcasting, and did not come within the scope of common carrier communications by statute.⁶

However, once the CATV systems began to rely on long-distance microwave relays they entered an area of obvious FCC regulatory authority.⁷ All microwave relays involve use of the radio spectrum and require prior FCC authorization, either as a common carrier service or as an industrial radio service.⁸

One of the earliest cases to challenge the FCC's authority over the involved a situation where the FCC refused to grant a common carrier, Carter Mountain Transmission Corporation, a permit to install microwave radio relay pickup television signals to community antenna systems in Riverton, Lander, and Thermopolis, Wyoming.⁹ The FCC made the following assumption:

To permit appellant to bring in outside programs for the community antenna systems on the basis proposed would result in the "demise" of the local television station (intervenor) KWRB-TV and the loss of service to a substantial rural population not served by the community antenna systems, and to many other persons who did not choose (or were unable) to pay the cost of subscribing to the community antenna systems; and that the need for the local outlet outweighed the improved service which appellant's proposed new facilities would bring to those who subscribed to the community antenna systems.¹⁰

However, the FCC gave Carter Mountain Transmission Corporation permission to refile its application when it could show that the system would carry the signal of the local outlet, KWRB-TV, and would not duplicate its programming.¹¹

The decision of the FCC was affirmed by the Court of Appeals and the Supreme Court refused to hear the case. In essence, this case established that the Commission could lawfully deny microwave relay communication that serve (CATV) systems if the existing television stations would be adversely affected by increased competition from such additional CATV facilities.¹²

Carter Mountain helped serve as a basis for the FCC's First Report and Order issued in 1965 and, subsequently, its Second Report and Order in 1966. The First Report and Order contained only two general regulatory provisions, applicable to all CATV-linked common

riers, whether local or interstate in operation.¹³ The rules
 as follows:

1. "The carriage rule" which enjoined cable operators from discriminating against a local station by refusing to put it on the cable.

2. "The nonduplication rule" which enjoined them from duplicating a program from a distant station, except with a reasonable time spread between the two performances of the program.¹⁴

Within 11 months, the FCC issued its Second Report and Order which was to clarify its earlier position on cable. The substantive provisions of the Second Report and Order, March, 1966, included modification of the carriage and nonduplication rules of the First Report and Order, plus the issuance of a new major market policy for CATV systems.¹⁵

The reason for the major market distance station policy was based upon the following assumptions:

1. An economic impact ground, based on the trends in the CATV and UHF fields.

2. A fair competition ground, based on the patently anomalous conditions under which the broadcasting and the CATV industries compete.¹⁶

In issuing its Second Report and Order, the Commission concluded that it was not committed to the status quo--of protecting existing investment against new technology.¹⁷ However, this observation was not made without certain reservations on the part of the Commission. The Commission made the following assumption.

It may be that CATV, if allowed full unfettered growth, would prove to be an excellent supplement, bringing additional service and diverse programming to millions of people in built-up areas who can afford it, without detriment to the provision of additional local broadcasting service to the entire nation. If so, the information obtained in the hearing process will provide that indication and will be the basis for authorizing such growth. But

we cannot make that judgment in the record now before us--and, instead of the above picture of wire television as an excellent supplement, there is the possibility that the nation might find itself with a system half wire, half free, which is destructive of the larger goals of additional networks, additional outlets for local expression, and which provides increased service to some in the city at the expense of those in the rural area or those who cannot afford to pay. It is, we think, time to get the facts, and in light of the service presently available, there is time to get the facts.¹⁸

It was as if the new technology to which the FCC referred would be satisfied with being second best, when compared to the means of broadcasting, for the foreseeable future. And so during the and one-half years (February, 1966, to December, 1968) in which the Second Report and Order was in force, the CATV industry continued to grow in spite of the FCC, although it did so outside of the top markets.¹⁹

A case, *United States et al vs. Southwestern Cable Company*, which upheld the Second Report and Order, was decided upon by the Supreme Court on June 10, 1968. The unanimous vote of the Court affirmed the FCC's rules legally valid under the broad authority over interstate communications vested in the Commission by the Communication Act of 1934.²⁰ The Court made the following observation.

There is no need here to determine in detail the limits of the Commission's authority which we recognize today under Section 152(a) is restricted to that reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting. The Commission may, for these purposes, issue "such rules and regulations not inconsistent with law" as "public convenience, interest, or necessity requires."²¹

This decision again made broadcasters victorious over the new technology that challenged their terrain.

However, the taste of success was brief for within a week the Court issued a second decision involving another disputed area, right liability, between broadcaster and cable operator. The 5-1 decision in the Fortnightly Corporation vs. United Artists Television holds CATV immune from copyright infringement action when cable systems merely relay TV station signals to subscribers' homes.²²

The function of CATV systems has little in common with the function of broadcasters. CATV systems do not, in fact, broadcast or rebroadcast. Broadcasters select the programs to be viewed; CATV systems simply carry, without editing, whatever programs they receive. Broadcasters procure programs and propagate them to the public. CATV systems receive programs that have been released to the public and carry them by private channels to additional viewers. We hold that CATV operators, like viewers and unlike broadcasters, do not perform the programs that they receive and carry.²³

The two cases, Southwestern and Fortnightly, did not determine which of the industries involved in the dispute would dominate the future; however, the cases ended an era of major challenges to the Commission's jurisdiction arising from the Second Report and Order.²⁴

The Supreme Court, in establishing the agency's regulatory authority over cable without allowing support for private copyright claims, had effectively determined the future course of action to be taken by the FCC.²⁵

Within six months of the decisions handed down by the Supreme Court, the FCC released its interim report. The rules were significant for these reasons:

The interim rules represented a reversal of the FCC's outlook in that required the inauguration of those services that the CATV industry had long been projecting as part of its potential and that the FCC had earlier viewed with considerable anxiety. On the other hand, to the extent that the interim rules tightened the effective exclusion of CATV from the top 100 markets, they

represented a continuation of earlier restrictive policies. The interim rules clearly indicated of earlier restrictive policies. The interim rules clearly indicated a growing state of ambivalence within the FCC--one that subsequently turned into a partial reversal of the Commission's basic approach.²⁶

The rules specifically covered the areas of program origination, right, and application of the 35-mile zone regulation.

1. Program origination. This rule required CATV systems with more than 3,500 subscribers to originate programming. This rule was later suspended and eventually rescinded by the Commission.²⁷

2. Copyright. The interim rules stated that CATV carriage of distant signals into the top 100 markets was permitted within a 35-mile radius from the main post office on the condition that the CATV obtain consent for retransmission from the originating station.

...The copyright considerations in this matter are, in fact, so complex that the "permission" clause of the interim rule all but foreclosed the importation of distant signals...

The basic difficulty was that the broadcaster did not have it in his power to grant permission. He had to refer the CATV operator to the owners of the copyrighted material. But there are so many such owners, some of whom are impossible to identify and find, that clearing copyrighted materials with their owners would obviously be a costly and almost limitless undertaking for a CATV.... In point of fact, the CATV was able to obtain very few clearances.²⁸

3. Application of the 35-mile zone regulation. ...All systems operating within 35 miles of the downtown area of a city in a top 100 market could not import signals without the consent of the station from which the signal was obtained. Systems operating within this proximity of cities in markets ranked from 101 to 200 could import only sufficient signals to carry the three networks and one independent channel without consent, and all systems were still subject to Second Report and Order restraints such as non-duplication protection, mandatory local carriage, leapfrogging prohibitions, and all other provisions not expressly superseded by the new rules.²⁹

During the time that the interim rules were in effect, from September, 1968, until March, 1972, behind-the-scene developments involving the FCC, the White House, local and state governments, broadcasters, cable and copyright industries were determining the course of cable.

THE INTERVENTION OF THE EXECUTIVE BRANCH

As pointed out in Chapter One of this dissertation, President Johnson on August 14, 1967, in a message to Congress, requested an examination of the telecommunications system in this country. The President did not want to create a new communications policy for our nation but hoped to propose the foundation for that policy.³⁰ The recommendations of the report which are applicable to the problem of this dissertation are: (1) an expressed need for a stronger Executive role to complement the work of the FCC³¹ (already discussed in detail in Chapter One) and (2) a design to ensure an adequate level of service over the air without unduly inhibiting the growth of cable television.³²

According to the authors of the President's Task Force on Communications Policy, cable could expand without hampering the broadcasting industry by offering services not yet widely available to the nation, such as:

...channels for local government needs, shopping information, local news, children's programs, the stock ticker, foreign movies, and other purposes.³³

Since the services that were mentioned were speculative in nature, the Commission was criticized by some authorities as not being realistic. For example, Martin Seiden in his book Cable Television U.S.A. is critical of the FCC since he believes that the Commission was day-dreaming³⁴ about the future of CATV services instead of dealing with the realities competing in a free enterprise system. This writer is in agreement with Seiden primarily because the means for the financing of cable services, such as facsimile for the reproduction of newspapers

and magazines, electronic mail delivery, access to computers, credit checks, airline reservations, etc., is left to conjecture rather than criteria based upon sound business principles. In dealing with the financing of cable, the Rostow Report concludes that revenues earned from the monthly fees incurred by subscribers are not the sole support of a cable system and that if alternatives to present offerings on the typical system are made available to the subscriber then additional monies must be secured by the cable operator from other sources. However, the report neglects to mention the prohibitive costs that would have to be incurred and exactly what the sources should be and to what degree the demand for such services existed.

It is as if the Rostow Report and the events which preceded it were analogous to an iceberg whose immense size could only be estimated instead of actually calculated by science. A series of events each happening in quick succession and over which the FCC had no control, reversal by an Appeals Court setting aside the order requiring CATV systems to originate programming,³⁵ challenges from both Congress and the White House to overhaul CATV rules were brought to a head in late June, 1971, when President Nixon himself established a special administration committee to develop a comprehensive policy with regard to cable television.³⁶ The Presidential committee, unlike the FCC, was not to be concerned with day-to-day activities regarding the regulation of cable but with such broad questions as whether cable should be regulated as a common carrier, the kinds of services that should be provided for by cable, and the social and economic implications of the new technology.³⁷

Mr. Nixon hoped that the committee would develop forward-looking policy proposals that would permit the full potential of cable to be realized and, at the same time, enhance the television service available to the American public.³⁸ The viewpoint of the President enjoyed the unusual distinction of being welcomed both by the National Association of Broadcasters and the National Cable Television Association, organizations that rarely agree on governmental initiatives dealing with cable policy.³⁹

Harmony among the concerned parties was short lived since within six weeks the broadcasting industry was apparently ready to fight what it thought would be a liberalization of the FCC's CATV rules.⁴⁰ What the broadcasting industry had suspected became reality on August 5, 1971, when Chairman Dean Burch released the FCC's letter of intent outlining the FCC future approach to regulating CATV. The letter of intent was to be a preamble to the rules which would eventually govern the CATV industry. In the letter the FCC rejected its long-established philosophy that CATV was a threat to UHF development and no longer had to be barred from the nation's major markets.⁴¹ Four inter-related issues covered in the letter of intent included:

...television broadcast signal carriage, nonbroadcast rules, technical standards, and federal-state-local relationships.⁴²

Within a week of the FCC's issuing its letter of intent, the Office of Telecommunications Policy was requesting statements from the National Association of Broadcasters, National Cable Television Association, Publicable--an organization set up for the purpose of protecting the public interest in cable--and the Communication Workers of America on such matters which would have a long-term effect on

able.⁴³ Of a more immediate nature was the role OTP would play as a broker in getting the trade associations to accept a compromise agreement regarding the regulation of cable. NCTA made it apparent in late August that it would not compromise on more restrictive rules than were issued by the FCC in its letter of intent. John Gwin, a spokesman for the industry, was quoted in the trade press as saying that NCTA could not negotiate downward from the FCC proposal of August.⁴⁴

Negotiation between the parties, affected by the regulation of cable, seemed to stagnate during the late summer and early fall of 1971. Both Burch and Whitehead tried unsuccessfully to have the NAB, NCTA, and copyright owners settle on a compromise amenable to all. In order to avoid a bitter confrontation during public hearings which would be held in the Senate and House Commerce Committees regarding the FCC's letter of intent of August 5, the contending parties reluctantly accepted the compromise agreement of the Office of Telecommunications Policy.

THE OTP CONSENSUS AGREEMENT

The agreement finally settled the dispute over such areas related to cable as carriage of local signals, distant signals, exclusivity, leapfrogging, copyright legislation, radio carriage, and grandfathering. Because of the complexity of the rules, the terms and explanation of their applicability are included in their entirety in appendix A of this dissertation. However, a brief summary of the agreement at this time might provide the reader with a better understanding of its importance. The plan, although it has been compared to an

intricate Chinese puzzle, offered sufficient broadcast signals to make for market cable operation possible. Proposals offered in the plan are not based upon benefit to any special group but to the public in general in the form of nonbroadcast services. The FCC envisioned these services as creating new outlets for local expression, promoting diversity in television programming, advancing educational and instructional uses of electronic media, and increasing the flow of information concerning local issues and local governments.⁴⁵

The parties affected by the consensus agreement of November 8, 1971, each issued separate statements summarizing their reasons for accepting the compromise.

The statement of the National Association of Broadcasters is as follows:

The board of directors of the National Association of Broadcasters reluctantly accepts the compromise plan put forth by the Office of Telecommunications Policy on a "package" basis as the best of any present alternative. The board petitions the Congress to adopt proper enabling copyright legislation at the earliest moment and it urges the FCC, in its regulatory capacity, to be vigilant and decisive in eliminating the practices that can damage free broadcasting service to the public. It is understood that nothing in this agreement prevents our vigorously seeking satisfactory resolution of such issues as siphoning of free programming to a pay system, ownership of CATV systems by broadcasters, and originations.⁴⁶

The National Cable Television Association countered the National Association of Broadcasters' position by adopting the following point of view:

The OTP compromise will provide a sorely needed opportunity for the immediate growth of the cable television industry. CATV manufacturers and operating companies alike have been severely retarded by the FCC freeze on cable, and it is the judgment of the NCTA board that this compromise will provide the impetus for cable's entry into major urban areas and the development of many of the new services only cable can offer....The compromise admittedly falls

short of what we had hoped would be the final accord. However, in the face of strong pressure from the OTP and the FCC, and the prospect of an indefinite extension of the freeze if the cable industry failed to accept the plan, the board believed the best interests of the public and the industry would be served by agreeing to an immediate end to the impasse.⁴⁷

Maximum Service Telecasters seems to arrive at a position where between the extremes of the NAB or NCTA when it issued the following statement:

Our acceptance necessarily assumes that all the above parties will work with and cooperate with the FCC and the OTP in effecting rules to embody the letter and spirit of the compromise, and with the FCC agree to support either separate copyright legislation or a CATV provision in the omnibus copyright revision....We note that some substantive provisions of the proposed compromise, in particular the number of distant signals which would be available to a compulsory license, are intended to subsidize the development of CATV at the expense of free over-the-air television service. We think this is a most unsound and unwise public policy....We are also deeply troubled by the discriminatory and plainly inadequate treatment accorded smaller television markets on the matter of exclusivity....Finally, we would be less than frank if we were not to say that our decision to accept the proposal was extremely difficult both in principle and because in numerous aspects we feel it is unfair and will be injurious to the public's interest in free broadcasting. However, we have attempted to approach your effort to avoid what could be a very bitter and destructive battle in a constructive fashion and in the hope that it will put to an end the process of erosion that has been occurring in the (FCC's) approach to the regulation of cable television.⁴⁸

Nicholas Johnson, the maverick of the FCC during the Johnson and Kennedy administrations, was critical of this compromise and said:

...in future years, when students of law or government wish to study the decision-making process at its worst, when they look for examples of industry domination of government, when they look for presidential interference in the operation of an agency responsible to Congress, they will look to the FCC handling of the never-ending saga of cable television as a classic case study.⁴⁹

However, on the other hand, Chairman Burch denied the charges of conspiracy, arm twisting, and secret deals.⁵⁰ According to Burch, the decision was the result of months of painstaking study and

insured deliberation culminating in regulatory craftsmanship of a high order.⁵¹

Roger B. Noll, in his book Economic Aspects of Television, does not entirely agree with the position of Chairman Burch nor does he go to the extreme of Nicholas Johnson but believes that the FCC rather than running the risk of adhering strictly to the August, 1971, position did the following:

...and then losing a subsequent political and legal battle, the agency chose to forecast, and then adopt, the position it felt to be the most likely compromise....In short, the industries able to represent their cases strongly before the commission, and to threaten to do battle with the commission in the courts or in the Congress should the decision be unfavorable, had their way. They participated in the writing of the final rules.⁵²

THE 1972 REPORT AND ORDER

Krasnow and Longley point out that the cable compromise is one of many examples of political maneuvering that exists within a political system. The various participants in this case involved the industry, the White House, and the Commission itself.⁵³ This comes as no surprise since it was pointed out earlier in this dissertation that historically the industry which is regulated usually participates in the political process. The railways, airways, and banking industries, to name a few, have strong lobbies whose principle purpose is to foster internal growth while protecting themselves from real external competition which would result in their obsolescence.

The consensus agreement meant:

...network affiliates are to be protected against the creation by cable of more network-like options; copyright owners still have their "exclusives" which guarantee a future market for their movies and reruns that can be resyndicated numerous times at virtually no

cost; existing cable firms, located primarily in areas where cable does not have to offer much in the way of service in order to capture subscribers, lose little, and in fact are protected against unfavorable comparisons with new firms providing greatly expanded services in the nation's larger markets.⁵⁴

Against this background of continuous political maneuvering, the FCC in February, 1972, finally issued its 500-page Report and Order which generally followed the letter of intent issued August 5, 1971, modified by the compromise that the Office of Telecommunications Policy negotiated.⁵⁵ Generally, the scope of the FCC's rules encompass major areas:

1. Carriage of broadcast television signals.
2. Copyright and program exclusivity.
3. Cablecasting and channel capacity.
4. Technical standards.
5. Operating requirements and related matters.
6. The role of state and local authorities.⁵⁶

Since the compromise of November, 1971, which is detailed earlier in this chapter, served as the model of the February, 1972, Report and Order, it would be redundant to include the entire list of regulations covered in the rules for CATV. However, since the rules covering the status of local and state governments were not included in the consensus agreement, they will be summarized briefly at this point to give the reader a better understanding of the changes called for by the Office of Telecommunications Policy Cable Bill.

The appropriate relationship between federal and state/local jurisdiction in the cable area stems from the 1966 Report and Order

requesting legislative proposals requiring the immediate attention of Congress.

Finally, Congress will be asked to consider the appropriate relationship of federal to state/local jurisdiction in the CATV field, with particular reference to initial franchising, rate regulation, and extension service.⁵⁷

Since Congress did not act upon the recommendation, the agency was free to choose among one of three options:

1. To continue its present approach of federal regulation, enforced by a cease-and-desist proceeding.

2. To turn to federal licensing.

3. To have federal regulation of some aspects with local regulation of others under federal prescription of standards for local regulators. This last approach recognizes that, although practical considerations argue in favor of leaving important aspects of cable regulation to state and local government, cable is, nonetheless, an integral part of the interstate movement of electronic communications. The Commission chose the last course noting that:

- a. Conventional licensing would place an unmanageable burden on the Commission.

- b. Local governments are inescapably involved in the process because cable makes use of streets and ways.

- c. Local authorities are able to bring a special expertise to such matters; for example, as how best to parcel large urban areas into cable districts. Local authorities are also in a better position to follow up on service complaints.⁵⁸

This structured dualism is a conservative way of proceeding to cut controversy among the various levels of government participating in the regulatory process. The FCC stated that it must set minimum standards for franchises issued by local authorities because of the limited resources of states and municipalities and the FCC's obligation to ensure an efficient communications service with adequate facilities at reasonable charges.⁵⁹ The mechanism by which dual jurisdiction is

ieved is the granting or withholding of federal certification to the systems franchised under local law, whose franchises fall within the guidelines established by federal regulation.⁶⁰ In order to obtain a certificate of compliance from the FCC, the application must contain the following:

1. A copy of the franchise and a showing that the cable operator's legal, character, financial, and technical qualifications and construction arrangements have been approved by the franchising authority as part of a full public proceeding affording due process.
2. The franchise must require significant construction within one year of FCC's certification and that thereafter the cable operator will equitably and reasonably extend energized trunk cable.
3. The franchise cannot exceed 15 years.
4. The franchising authority must specify or approve the initial rates for regular subscription services: must approve any rate changes after an appropriate public proceeding affording due process and must have procedures for the investigation and resolution of service complaints.
5. The franchise fee shall not exceed three percent of the gross subscriber revenues per year unless a showing is made that the excess will not interfere with the effectuation of the federal regulatory goals and is appropriate in light of the planned local regulatory program.⁶¹

If the above requirements are met in an application for certification, the FCC will issue a certificate expeditiously.⁶²

If its requirements are not met, certification will be withheld or processed specially pursuant to a petition for waiver, wherein the party seeking to modify the Commission's rules has a burden of persuasion that its activities will serve the public interest. Thus the FCC offers the reward of speed and sureness for literal compliance with its rules, and the risks of delay and uncertainty when the applicant's views of the public deviate from its own.⁶³

Many authorities in the cable area applaud the dual system of regulation for CATV.

The dual approach puts many decisions into the hands of state and local authorities who have grass roots interests in and knowledge

of the needs of their community's citizens. Moreover, the approach will provide flexibility for experimentation in communities throughout the land from which everyone can profit unless the FCC meddles in favor of established industry structures.⁶⁴

From all indications, the 1972 rules, which as of this writing still in effect, permitted the cable industry an opportunity to expand more than had been the case prior to its release. However, the restrictions placed upon cable systems regarding the importation of over-the-air signals, exclusivity protection to local broadcasters, and television's right of first refusal in the exhibition of feature film, and the vagueness of some aspects of federal, state, and local jurisdiction need to be clarified for the benefit of the industries involved, and more importantly, for the public using the service. In theory at least, the telecommunications systems in this country was intended to be an efficient, nationwide, and worldwide wire and radio communication service with adequate facilities at reasonable charges.⁶⁴

The Office of Telecommunications Policy believed that a possible method of achieving what was suggested in the Communication Act of 1934 could be obtained by amending the document to allow for advanced technology. Their hypothesis, strategy, means of implementation, and changes that would result from the proposal will be examined in the following chapter.

Chapter 3

- ¹Sydney W. Head, Broadcasting in America (Boston: Houghton Mifflin Company, 1972), p. 235.
- ²Martin H. Seiden, Cable Television U.S.A. (New York: Praeger Publishers, 1972), p. 3.
- ³Stephen B. Borko, "Local Government Experience with Cable Television," Municipal Yearbook (Washington, D. C.: International City Management Association, 1974), p. 56.
- ⁴Head, Broadcasting in America, p. 235.
- ⁵*Ibid.*
- ⁶William K. Jones, Regulated Industries (New York: Foundation Press, 1967), pp. 1234-1235.
- ⁷*Ibid.*, p. 1235.
- ⁸*Ibid.*
- ⁹Frank J. Kahn, Documents of American Broadcasting (New York: Appleton-Century-Crofts, 1973), p. 520.
- ¹⁰Jones, Regulated Industries, p. 1236.
- ¹¹*Ibid.*
- ¹²Kahn, Documents of American Broadcasting, p. 520.
- ¹³Doc R. LeDuc, Cable Television and the FCC (Philadelphia: Temple University Press, 1973), p. 144.
- ¹⁴Head, Broadcasting in America, p. 238.
- ¹⁵Seiden, Cable Television U.S.A., p. 89.
- ¹⁶Jones, Regulated Industries, p. 1254.
- ¹⁷*Ibid.*, p. 1263.
- ¹⁸*Ibid.*, pp. 1263-1264.
- ¹⁹Seiden, Cable Television U.S.A., p. 92.
- ²⁰Kahn, Documents of American Broadcasting, p. 567.
- ²¹*Ibid.*, p. 579.
- ²²*Ibid.*, p. 582.

- ²³ Ibid., p. 588.
- ²⁴ LeDuc, Cable Television and the FCC, p. 173.
- ²⁵ Ibid.
- ²⁶ Seiden, Cable Television U.S.A., p. 107.
- ²⁷ Head, Broadcasting in America, 1976, p. 194.
- ²⁸ Seiden, Cable Television U.S.A., p. 110.
- ²⁹ LeDuc, Cable Television and the FCC, p. 175.
- ³⁰ Seiden, Cable Television U.S.A., p. 113.
- ³¹ Lyndon Johnson, Letter to Congress included in Final Report President's Task Force on Communication Policy (Washington, D. C.: Government Printing Office, December 7, 1968), Appendix p. 9.
- ³² Ibid., Chapter 9, pp. 27-29.
- ³³ Ibid., Chapter 7, p. 10.
- ³⁴ Seiden, Cable Television U.S.A., p. 108.
- ³⁵ Broadcasting, May 24, 1971, p. 20.
- ³⁶ Ibid., June 28, 1971, p. 16.
- ³⁷ Ibid., pp. 16-17.
- ³⁸ Ibid., p. 17.
- ³⁹ Ibid.
- ⁴⁰ Ibid., August 2, 1971, p. 22.
- ⁴¹ Seiden, Cable Television U.S.A., p. 115.
- ⁴² For a more detailed account of the four areas mentioned in letter of intent, it is suggested that the reader refer to Appendix A which is the consensus agreement reached by all parties concerning the rules which presently regulate cable.
- ⁴³ Broadcasting, August 16, 1971, p. 28.
- ⁴⁴ Ibid., August 30, 1971, p. 32.
- ⁴⁵ Le Duc, Cable Television and the FCC, pp. 193-194.

- ⁴⁶ Broadcasting, November 15, 1971, p. 16.
- ⁴⁷ Ibid., pp. 16-17.
- ⁴⁸ Ibid., pp. 17-18.
- ⁴⁹ Erwin G. Krasnow and Lawrence D. Longley, The Politics of Broadcast Regulation (New York: St. Martin's Press, 1973), p. 8.
- ⁵⁰ Ibid.
- ⁵¹ Ibid.
- ⁵² Roger G. Noll, Merton J. Peck, and John J. McGowan, Economic Aspects of Television Regulation (Washington, D. C.: The Brookings Institution, 1973), p. 207.
- ⁵³ Krasnow and Longley, The Politics of Broadcast Regulation, p. 8.
- ⁵⁴ Noll, Peck, and McGowan, Economic Aspects of Television Regulation, p. 207.
- ⁵⁵ Broadcasting, February 7, 1972, pp. 18-40.
- ⁵⁶ Ibid.
- ⁵⁷ Jones, Regulated Industries, p. 1263.
- ⁵⁸ Cable Television: Promise Versus Regulatory Performance, Committee on Interstate and Foreign Commerce, Subcommittee on Communications Report on CATV (Washington, D. C.: Government Printing Office, January 26, 1976), p. 78.
- ⁵⁹ Ibid.
- ⁶⁰ Steven R. Rivkin, Cable Television: A Guide to Federal Regulation (New York: Crane, Russak and Company, Inc., 1974), p. 8.
- ⁶¹ Subcommittee on Communications Report on CATV, p. 78.
- ⁶² Rivkin, Cable Television, p. 8.
- ⁶³ Ibid.
- ⁶⁴ Kahn, Documents of American Broadcasting, p. 54.

Chapter 4

A NATIONAL POLICY FOR CABLE

This chapter will answer research question four--How did the recommendations of the Cabinet Committee serve as a model for the proposed cable bill? It will also demonstrate how each of the recommendations of the Cabinet Committee relates to the following topics:

1. Ownership of cable companies by private individuals, telephone common carriers, and other large communications corporations.
2. Programming and the development of new sources, the regulation of content, and the applicability of copyright laws to cable originated programs.
3. The jurisdictional framework for cable regulation at the local, state, and federal levels. This area would include franchising, rate of return, privacy of the user, participation by minority groups, and the dedicated free channels.

Each of the above three general categories will be related to the present regulatory framework of cable so the reader can better understand the reasons for the recommended changes.

As already detailed in Chapter Three, the Executive Office as early as June, 1971, announced that a Cabinet Committee would be formulated in order to develop proposals for a comprehensive national policy on cable.¹ Members included Peter Peterson, Secretary of Commerce; Elliot Richardson, Secretary of Health, Education and Welfare; George Romney, Secretary of Housing and Urban Development, and

residential advisers Herbert Klein, Leonard Gormont, and Robert Finch. T. Whitehead served as the Chairman and the Office of Telecommunications Policy conducted the committee's staffwork.² In addition to departments and agencies represented on the committee, the working group coordinated its activities with other interested governmental organizations including the Department of Justice and the Federal Communications Commission.³ However, it should be pointed out that differences of opinion among individuals or government agencies do not appear in the report. Rather it is written as the expressed viewpoint of the majority of those working on the project. Twelve recommendations covering distributions, programming, jurisdictional framework, and consumer protection were made as a broad policy approach for integrating technology into this country's mass communication media.⁴ In recommending the policies and types of regulation to govern cable during the foreseeable future, the committee was concerned both literally and figuratively with "1984."⁵

Prediction is a perilous task in the rapidly changing communications field; and the chilling vision of "1984" can never be far from any group studying a new mass communications medium for an advanced technological society. We would rightly be held derelict in our duties if we took no steps to avoid the clear present and future dangers of government control of communications technology, which have been foreshadowed in the literary imagination.⁶

With this credo in mind, the following twelve recommendations were made:

First, that control of cable distribution facilities should be separated from control of programming and other services provided over channels on those distribution facilities.⁷ This recommendation is entirely different from the present structure of the cable industry.

cable owners are now allowed to program what they want on unused channels, provided the content adheres to the specific guidelines of the 1972 Report and Order⁸, and that operators make access, educational, and governmental channels available to those qualified to use them. This recommendation would put cable more into the classification of a common carrier, likened to the telephone industry of today, rather than a category similar to broadcasting. One disadvantage to this recommendation pointed out by Walter Baer of the Rand Corporation is the inclusion of Footnote 2 of Chapter Three of the Report which allows the cable operator control of one or two cable channels for his own programming.

Even if one or two channels is only a small percentage of the total capacity that we envisage for cable systems, still the operators control of those two channels does open up the same kinds of abuses and potential for monopoly profits that the separations policy is supposed to prevent. I think that it is an unnecessary addition that is in this Report probably to give some solace to the cable industry.⁹

Baer is correct in assuming what he does for David Foster of NTA is agreeing when he says that:

If it were not for Footnote 2 in the separations section of the document, the Report would have been met with a combination of wailing, gnashing of teeth, and hysterical laughter by the cable television industry.¹⁰

The most controversial of the twelve recommendations seems to strike a note of familiarity to the author of this dissertation in that once again compromise among competing industries was the surest method of achieving success.

The second recommendation, common ownership or control of cable systems, interconnection facilities, and program supply services, would be the only form of cable "network" operation prohibited.¹¹

Under these circumstances, the committee reasoned that retailers, who are considered to be the pivotal point in the competitive supply of services to the viewers, would be caught in such a cable network's vise that it would make realistic competition impossible.¹² Specifically, this recommendation would clarify and eliminate certain elements of Subpart J "Diversification of Control" of the 1972 Report and Order.¹³ If this recommendation were followed, the duplication of regulations pertaining to cable would be avoided by applying the anti-trust laws governing competition in this country. These laws would be sufficient to police possible abuses arising from other forms of joint ownership.¹⁴

Since the anti-trust and criminal divisions of the Department of Justice already enforce laws aimed to protect and restore competitive conditions of free enterprise¹⁵, there is little necessity to duplicate what is already being done.

Recommendation three stipulates there should be no restrictions on either cross-media ownership or multiple ownership of cable systems.¹⁶ However, the exception to this seems to be excessive concentrations of cross-media ownership prohibited by normal operation of the anti-trust laws which have been explained in conjunction with recommendation two. Prosecution of violations of Subpart J "Diversification of Control" of the 1972 Report and Order would be the responsibility of the Anti-Trust Division of the Department of Justice. Implementation of recommendation three calls for no real change in the present regulation of cable but only for a clarification that may have been missing prior to this time.

The fourth recommendation, telephone common carriers should not control or operate cable systems in the same areas in which they

provide common carrier services,¹⁷ is an already existing FCC rule.

It makes good sense to retain the rule for the following reason:

Widespread expansion by telephone companies into the cable business could stifle the development of competitive cable communications service. Moreover, the size, vertical integration, and long-distance interconnection role of the nationwide Bell System, if extended to cable communications, could make it very difficult to maintain any realistic competition in communications.¹⁸

At first reading, the fourth recommendation may appear to be suppressing the concept of free enterprise in this country. However, closer scrutiny of the committee's reasoning demonstrates that they were trying to avoid monopolistic practices which would be in direct opposition to the anti-trust laws of this country and, consequently, their assumption seems to be based upon sound ground.

Recommendations five, six, and seven are directed toward the structure of the cable industry and specifically its programming. The fifth recommendation stipulates the development of new programming and other information services that can be offered over cable should not be impeded by government-established barriers to the consumers' opportunity to purchase those services.¹⁹ The reasoning of the committee was based upon the following assumption:

The limited number of broadcast television outlets reduces television's utility to advertisers who wish to reach only a particular segment of the mass audience. The high cost of the relatively scarce TV broadcast advertising time makes it uneconomic for such advertisers to purchase commercial time.²⁰

Essentially, the committee is speculating on the future of cable and the programs and services it can provide including the following: selected dramas, sports events, direct responses from the electorate on political issues and candidates; and greater police and fire protection.²¹ The previously-mentioned services are only a partial

listing of the myriad of possibilities that other authorities have identified as being capable of being transmitted via cable.

The committee has been criticized for not making more concrete suggestions as to where the revenue should come from to provide the multitude of services that have become synonymous with cable.

A missing question on the agenda is: should investment in cable be made by public or private funds?...It may be a serious error in public judgment in not investing the initial capital in public funds and then permitting venture capital to experiment with the development of software. This is where the real opportunity for diversity lies.²³

Instead of encouraging this type of experimentation in software," the committee upholds part of the FCC rules protecting broadcasting interests.

With respect to sports events, the rule prohibits cablecasting of events that have been televised live on a nonsubscription, regular basis in the community during the two (2) years preceding their proposed cablecast....If a "specific event" such as the Olympic Games was last televised more than two years previously, it may also not be cablecast.²⁴

However, the committee deserves credit for eliminating the restrictions on feature films or television series programming when they concluded:

The anticipated competition and flexibility in cable programming will make unnecessary and inappropriate any sweeping government restrictions on the public's right to purchase a wide variety of information and entertainment services on the originator's right to sell such services.²⁵

Although recommendation five is a liberalizing of the status quo, recommendation six, that the programming, information, or other services provided over cable should not be subject to administrative regulation of content, nor should the prices of such services be regulated by any governmental authority,²⁶ could be considered a radical or extremist approach in updating the regulation of cable.

The implementation of the committee's sixth recommendation would eliminate each of the following:

1. The Fairness Doctrine. A requirement that origination of cablecasting "shall afford reasonable opportunity for the discussion of conflicting views on issues of public importance."

2. Personal attack rule. A requirement that when "an attack is made upon the honesty, character, integrity, or like personal qualities of an identified person or group," the cable system shall, within one week, notify the person or group so attacked, provide a tape or a script of the attack, and offer a reasonable opportunity to respond.

3. Political editorial rule. A requirement that when, in a political editorial, the cable system endorses or opposes a legally-qualified candidate, the system shall, within 24 hours, notify the other candidates, provide a tape or script of the editorial, and offer the other candidates or their spokesmen a reasonable opportunity to respond.²⁷

4. Equal time for political candidates. In this category (76.205) and in the related category of the "Fairness Doctrine" (76.209), the Commission is applying to origination programming by cable systems its standards applicable to broadcast licensees under Section 315 of the Communication Act of 1934. It establishes the following "general requirements."

RULE: If a cable television system shall permit any legally qualified candidate for public office to use its origination channel(s) and facilities, therefore, it shall afford equal opportunities to all other such candidates for that office: Provided, however, that such system shall have no power of

censorship over the material cablecast of any such candidate; And provided, further, that an appearance by a legally qualified candidate on any:

- a. Bona fide newscast,
- b. Bona fide interview,
- c. Bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or
- d. On-the-spot coverage of bona fide news events (including, but not limited to, political conventions and activities incidental thereto), shall not be deemed to be use of the facilities of the system within the meaning of this paragraph.²⁸

These provisions were included in broadcast law when the number of outlets over which a responsible individual could voice an opinion on a controversial issue was very limited, but cable with 20, or even more channels makes the inclusion of the Fairness Doctrine and Section 315 of the Communication Act of 1934 unnecessary. The sixth recommendation would not remove local and state sanctions on pornography, libel, and criminal incitement.²⁹ The committee, based on the research that it had done, concluded:

The government can and should vary its regulation of the communications media according to their particular interests. Cable systems are analogous to the mails and broadcasting in that they serve the consumer in his home where, without adequate safeguards, children may have easy access to the material distributed over cable channels. But the postal laws appear to provide a better example than the broadcast laws of the type of additional safeguards that may be needed.³⁰

Cable technology makes it possible for individuals to censor desired programs via the use of scramblers attached to the receiver at the head-end. Therefore, it is highly unlikely that certain wanted material would be viewed. Safeguards already inherent within

the industry make it unnecessary to add further restrictions which would hamper the development of cable.

Recommendation seven, incentives to create programming for cable should be fostered by full applicability of the copyright laws to cable channel users,³¹ is rather self-explanatory. However, it should be noted when the Copyright Act was originally authorized by Congress in 1909, the legislation was concerned with the written forms of reproduction and live performances. Although amended from time to time to extend protection to certain non-written and recorded forms, in 1975 the law retained essentially its outdated original conception.³²

Since the Copyright Act of 1909 does not make a provision for cable, local broadcasters view cable as threatening to make inroads on the national market for the significant amount of programming they distribute to individual broadcast markets.³³ Their reasoning is based upon the following argument.

Some programs are distributed through networks, which make payments to individual affiliated stations in proportion to the audiences those stations furnish for network-provided advertising. Other distribution, typically to independent stations, is provided by "syndication" of programming direct to individual broadcasters. These relationships are contracted for on an exclusive basis in each market. If cable systems are allowed to present the same programs that are sold in other markets, the audiences for local stations will drop. This in turn will reduce the revenues that program producers can earn nationwide, and at the same time deprive local stations of the protection of exclusivity for which they have bargained with program suppliers.

The potential disadvantage is especially great because the present state of copyright law does not require cable systems to make copyright payments for such programming.³⁴

Subcommittees in both the Senate and the House have been studying the problem of copyright legislation for 16 years; and until

they can agree on a bill and it is passed by the Congress, the seventh recommendation of the Cabinet Committee will not become reality.

Recommendation eight and recommendation nine deal specifically with the committee's proposals for the requisite federal-state-local governmental relationships regarding cable regulation. They are as follows:

Recommendation eight: The federal government's authority over cable should be exercised initially to implement a national policy; thereafter, detailed federal administrative supervision should be limited to setting certain technical standards for cable and applying anti-siphoning restrictions on professional sports programming.³⁵ This recommendation would mean the only continued supervision by a federal agency would be in the areas of technical transmission or distribution standards and the sports anti-siphoning restrictions³⁶ already explained in conjunction with recommendation five.

According to the committee recommendation nine, the franchising authorities would have the principle responsibility for the regulation of cable systems.³⁷ The 1972 Report and Order spells out no overall plan as to the federal/state/local relationship regulating cable.

This has resulted in a patchwork of disparate approaches effecting the development of cable television. While the Commission was pursuing a program to promote national cable policy, state and local governments were formulating policies to reflect local needs and desires. In many respects, this dual approach worked well. To a growing extent, however, the rapid expansion of the cable television industry has led to overlapping and sometimes incompatible regulations.³⁸

For the most part, cable franchising has been done by either municipalities or other local governments. However, within the past few years, individual states have either stepped into the legislative

picture or are considering the possibility of regulating cable systems as public utilities.³⁹ The committee does see this as a problem but believes that if their recommendations were followed the federal, state, and local relationships would already be predetermined.

According to the committee, cable systems could best serve the public if the procedure outlined by them were followed. States could provide overall guidance and assistance to local authorities in their franchising activities and establish minimum requirements regarding safety of cable system construction and operation. If ultimately required, states could also oversee the reasonableness of customer connection charges and of channel leasing rates imposed by the cable operator and could assure that cable systems and telephone companies compete fairly with each other and with other companies.

Within the regulatory structure, the committee suggested that the franchising authorities would be subject to certain uniform conditions, standards, and guidelines in order that national policy objectives for cable be implemented.⁴⁰

Achieving a goal similar to that expressed in the Communication Act of 1934 could be obtained if, as the committee hoped, federal, state, and local governments would cooperate by adhering to the mandate of Section 1 which declares:

To make available, so far as possible, to all the people of the United States a rapid, efficient, nationwide, and worldwide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of national defense, for the purpose of promoting safety of life and property through the use of wire communication.⁴¹

Recommendations ten, eleven, and twelve are more theoretical than the previous nine points discussed in that the committee wanted to

protect the consumer should problems arise. If no problems arise, then it might not be necessary to implement the last three recommendations.

Recommendation ten states there should be strong legal and technical safeguards to protect individual privacy in cable communications.⁴² This recommendation would also follow the lines of the first

ten amendments to the Constitution in that the individual would be protected from possible invasions of privacy posed by the further development of cable.⁴³ Since cable has the capability of providing a myriad of services for the consumer, it makes sense to protect individual rights that could otherwise be used by unauthorized persons for clandestine purposes.

Recommendation eleven, that governmental authorities should assure that basic cable or other broadband communications are available to residents of rural areas and to the poor, is acceptable; but according to Charles Tate, Executive Director, Cable Communications Resources Center, additional clarification in this area is still needed. Mr. Tate stated:

I like the fact that in the Report there was a statement on the issue of minority ownership and the issue that the choices of the poor should be preserved just as much as the choices for anyone else in society in terms of services, in terms of being able to go into the marketplace. But there are ambivalences, and I think that these are issues that have to be resolved in the framework of discussion, debate, and legislative proposals.⁴⁴

Certainly, Mr. Tate's comments are worthy of note since his attitude, like that of many other authorities, pointed out the necessity of resolving areas of dispute through arbitration.

Recommendation twelve, participation by minority groups in cable system ownership, operation, and programming should be

facilitated,⁴⁵ was likely included because of the federal government's commitment to the hiring and training of minority groups in broadcasting-related areas. Cases involving discrimination in programming and hiring practices have won for citizen groups the right to participate in license renewal proceedings before the FCC.⁴⁶ Ignoring the participation of minorities in the franchising process in a community would result in serious consequences for all concerned. Since local governments would hold public hearings prior to the granting of a franchise to a cable operator, it makes good sense to include recommendation twelve.

To implement the goals of the twelve recommendations, the committee suggested a period of transition whereby the federal, state, and local governments could cooperate in the legislation of cable. The first step in this evolutionary plan would be to divide the regulatory authority over cable between the federal and non-federal levels, as commented on in recommendations eight and nine of this chapter. This goal of a separation of jurisdiction, according to the committee, could only be obtained if Congress enacted legislation dividing the regulatory authority over cable.⁴⁷ The evolution of the legislative process began in 1974 when the Office of Telecommunications Policy wrote a draft of a bill, modeled after The Cabinet Committee Report, that would amend the Communication Act of 1934 creating a national policy that would serve as an alternative to the present regulation of cable. Because of the changes suggested by the Cable Communications Act, it is briefly summarized here to give the reader an overview of the provisions that are contained within it.

A SUMMARY OF THE PROPOSED ACT

The proposed Act is divided into five Titles: Title I consists of the short title of the bill and Congressional findings which conclude that cable is engaged in interstate commerce. This finding means that if the bill became law its source could be traced to the Constitution.

Article I, Section 8. The Congress shall have the Power... To regulate Commerce with Foreign Nations, and among the several States, and with the Indian Tribes;...To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.⁴⁸

Title I also declares the purpose of the Act and how it shall be applied to cable technology. The definitions of "cable system", "cable channel", "multi-channel capacity", "closed transmission media", "cable operator", "cable licensing authority", "interconnection facilities", "cable subscriber", "channel programmer", "program origination", "cable license", "commission", and "State"⁴⁹ are also defined.

Title II enumerates the authority, functions, and responsibilities of the FCC.

The OTP bill both modifies and adds to the ownership restrictions already imposed by FCC regulations. The opportunity for telephone companies to own cable systems will continue to be severely limited. However, it appears that the current restriction against national networks will be relaxed. Substantial use restrictions are also placed on ownership by newspaper or magazine publishers and broadcasters. Similar use restrictions are placed on the owners of multiple systems.

The bill would allow the Commission to set technical standards for cable systems as well as permitting FCC protection of equal employment opportunity and cable operators' access to rights of way.⁵⁰

Title III provides the standards and requirements for a non-federal cable licensing program.

Under the OTP bill, a cable system could not operate without both a license from a state or local licensing authority and a certificate from the FCC. The license may be granted only after fair and open proceedings by an entity having exclusive authority to regulate cable TV. The effect of this latter provision is to require that either the state or the local government assume full power over the nonfederal aspects of cable TV. Licenses issued by this authority may last from 5-20 years and must not be exclusive. Notable among the specific provisions is a requirement that cable operators make at least half of their channels available for lease; the licensing authority itself may require an even higher proportion. Once he has received a license, a cable operator may obtain the requisite FCC certificate upon compliance with the appropriate rules promulgated by the FCC.⁵¹

Title IV spells out the various limitations on the exercise of federal and non-federal jurisdiction over cable.

The bill would allow the Commission to set technical standards for cable systems, as well as permitting FCC protection of equal employment opportunity and cable operators access to rights of way. Unlike the current regulatory scheme, however, no authority would be allowed to control the content of programs originated on cable TV; in particular, the equal time, fairness, and balance rules are expressly rejected. Nor would the present "dedicated channels" requirement be preserved in the bill, which at most would permit a licensing authority to require cable operators to provide free time on one public access channel. There would be no regulation of the rates charged by operators to channel leasees (at least, not for a ten-year period) or of the rates charged by channel programmers for advertising and pay cable service, but the operator's charges to subscribers for regular service may be fixed by the licensing authority. Operators may be subjected to no taxes or fees other than those common to other businesses, with the exception of "reasonable fees" imposed upon issuance of the license and the FCC certificate.⁵²

Title V consists of miscellaneous provisions covering judicial review of causes of action arising under the bill. As an example, the bill would permit litigants to sue the operator and the licensing authority in state courts and would also authorize the federal district courts to hear cases without regard to diversity of citizenship or the amount in controversy.⁵³ Under Title V, the cable subscriber is

protected by the guarantee of the right to privacy in cable communications. The FCC would also be required to submit an annual report to Congress regarding the status of cable. Finally, a date is given as to when the bill, if passed, would become effective.

The preceding overview of the bill has been included to familiarize the reader with a basic outline of the provisions of the proposed Cable Act of 1975 and may be used for easy reference when reading the next chapter which contains comments on the feasibility of the bill by both governmental agencies and non-governmental organizations directly affected by its passage.

Chapter 4

¹ See Chapter 2 for a detailed explanation of the purpose and objectives of the committee.

² National Journal, July 15, 1972, p. 1167.

³ Report to the President: The Cabinet Committee on Cable Communications (Washington, D. C.: Government Printing Office, January 14, 1974), p. 3.

⁴ Ibid., p. 3.

⁵ Ibid.

⁶ Ibid., pp. 3-4

⁷ Ibid., p. 29.

⁸ Peter M. Sandman, David M. Rubin, and David B. Sachsman, Media: An Introductory Analysis of American Mass Communication (Englewood Cliffs: Prentice-Hall, Inc., 1976), p. 204.

⁹ Walter Baer, cited in Anatomy of a Government Document: The Cabinet Committee Report on Cable Communication, ed. Douglas Cater (Belo Alto, California: Aspen Institute, 1974), p. 5.

¹⁰ David Foster, Ibid.

¹¹ The Cabinet Committee Report on Cable Communications, p. 30.

¹² Ibid., p. 31.

¹³ Rules and Regulations: Part 76 Cable Television Service (Washington, D. C.: Government Printing Office, September, 1972), p. 41.

¹⁴ The Cabinet Committee Report on Cable Communications, p. 31.

¹⁵ Walter B. Emery, Broadcasting and Government (East Lansing: Michigan State University Press, 1971), p. 87.

¹⁶ The Cabinet Committee Report on Cable Communications, p. 31.

¹⁷ Ibid., p. 33.

¹⁸ Ibid.

¹⁹ Ibid., p. 34.

²⁰ Ibid., p. 35.

- ²¹ R. L. Barrow, "The New CATV Rules: Proceed on Delayed Yellow," Vanderbilt Law Review (May, 1972), p. 687.
- ²² Sandman, Rubin, and Sachsman, Media: An Introductory Analysis of American Mass Communication, p. 323.
- ²³ Ann Branscomb, Anatomy of a Government Document, op cit., p. 7.
- ²⁴ Steven R. Rivkin, Cable Television: A Guide to Federal Regulations (New York: Crane, Russak & Company, Inc., 1974), pp. 54-55.
- ²⁵ The Cabinet Committee Report on Cable Communications, p. 37.
- ²⁶ Ibid.
- ²⁷ Rivkin, Cable Television: A Guide to Federal Regulations, p. 50.
- ²⁸ Ibid., p. 47.
- ²⁹ The Cabinet Committee Report on Cable Communications, p. 38.
- ³⁰ Ibid.
- ³¹ Ibid., p. 39
- ³² Sydney W. Head, Broadcasting in America (Boston: Houghton Mifflin Company, 1976), p. 339.
- ³³ Rivkin, Cable Television: A Guide to Federal Regulations, p. 27.
- ³⁴ Ibid.
- ³⁵ The Cabinet Committee Report on Cable Communications, p. 39.
- ³⁶ Ibid., p. 40.
- ³⁷ Ibid., p. 41.
- ³⁸ Rivkin, Cable Television: A Guide to Federal Regulations, p. 61.
- ³⁹ Ibid., p. 63.
- ⁴⁰ The Cabinet Committee Report on Cable Communications, p. 42.
- ⁴¹ Frank J. Kahn, Documents of American Broadcasting (New York: Appleton-Century-Crofts, 1973), p. 54.
- ⁴² The Cabinet Committee Report on Cable Communications, p. 45.

⁴³Ibid.

⁴⁴Charles Tate, Anatomy of a Government Document, op cit., p. 8.

⁴⁵The Cabinet Committee Report on Cable Communications, p. 47.

⁴⁶Kahn, Documents of American Broadcasting, pp. 637-664.

⁴⁷The Cabinet Committee Report on Cable Communications, p. 55.

⁴⁸Kahn, Documents of American Broadcasting, p. 3.

⁴⁹Cable Communications Act of 1975, mimeographed copy, pp. 6-9.

⁵⁰George Wellford Taylor, Jr., "The Proposed Cable Communications Act of 1975," Duke Law Journal (March, 1975), p. 99.

⁵¹Ibid., pp. 98-99.

⁵²Ibid., pp. 99-100.

⁵³Ibid., p. 100.

Chapter 5

AN ANALYSIS OF THE OFFICE OF TELECOMMUNICATIONS POLICY PROPOSED CABLE BILL

This chapter will present a systematic analysis of the comments both governmental and non-governmental organizations directly affected by the possible statutory obligations imposed by the Office of Telecommunications Policy proposed bill. The comments of the Justice Department, Federal Communication Commission, and the Office of Telecommunications Policy itself because of their role in either the legislative process or their interest in the regulatory structure of telecommunications in this country will be included in the evaluation of the proposed bill. Comments by non-governmental organizations will include the Cable Information Center and the National Cable Television Association--two groups representative of the cable industry. The chapter should answer the following questions for the reader:

5. Does the OTP legislation favor a statutory law or does it suggest cable be governed by an administration agency with statutory guidance?

6. Does the proposed legislation reflect the opinions of Congress, the FCC, the Executive Branch, and the effected industries?

7. What responses did the OTP proposed cable bill receive from governmental and non-governmental agencies commenting on the role of local, state, and federal regulation of the industry?

In order to avoid redundancy and to better facilitate a clearer understanding of the comments made by both governmental and non-governmental organizations on the proposed bill, reproduced in its entirety in Appendix B, and summarized in Chapter Four, Chapter Five will examine the comments of the organizations already mentioned and how they relate to the following topics:

1. The jurisdictional framework for cable regulation at the local, state, and federal levels.
2. Ownership of cable companies by private individuals, telephone common carriers, and other large communication corporations.
3. The process of judicial review which allows aggrieved parties due legal process in a court of competent jurisdiction.

During the time that OTP was drafting a bill, it was able to keep what it proposed visible to the general public, by having such key figures in the Executive Branch as former Vice President Gerald Ford speak of cable regulation and exactly what the administration hoped it could do for the average citizen.

The Administration is considering draft legislation that would prohibit "snooping" and monitoring of communications entering and leaving a citizen's home via cable television. It would forbid disclosure of identifiable information about the viewing habits of subscribers to cable television systems without their consent. Such safeguards are essential to prevent the abuses of a "wired society" and to assure that advancing technology remains the servant of society's most cherished freedoms.¹

John Eger, former Deputy Director of OTP, was another of the people in the administration soliciting support for the bill from the cable industry when he said:

Under our tripartite system of government, Congress, the FCC, the Executive through OTP, and, yes, the courts have a responsibility. But it is important for you to realize that government is not any

font of all wisdom--that we depend upon the users, manufacturers, and others to make their input, their contribution.²

The timing of these speeches was not accidental, but part of the strategy developed by OTP in having their bill backed by the cable industry. OTP believed that if cable companies lobbied as a group then other effected communication industries would support the proposed legislation. As John Eger said:

In closing, let me emphasize one most important point. While this business of policymaking is in itself a difficult process--involving identifying objectives, analyzing alternatives, and establishing goals--it is far surpassed in complexity by the process of implementing it. This is true regardless of the subject and applies in particular to cable television. The most important ingredient, however, is you. A turn in direction, a switch in emphasis cannot be effected--without your endorsement, your support, and your sincere belief to paraphrase the Cabinet Committee Report that cable does offer countless Americans a chance to speak for themselves...and that cable can be a communications medium, free of both excessive concentrations of private power and undue government control. In short, that cable has much to offer; and that cable should at least be given an opportunity to prove its worth to the American people in the marketplace of goods and services and in the marketplace of ideas.³

By pointing up such fundamentally-held national principles such as allowing industry to operate in a free marketplace and the guarantee of First Amendment rights found in the Constitution, OTP was attempting to write legislation it surmised would represent public policy.

As a follow-up to the speeches made by those in the Administration, OTP attempted to solicit responses in what Broadcasting magazine called an unusual procedure.⁴ The first draft of the bill was circulated among industry and public interest groups before it was put into final form for clearance through the Office of Management and Budget. Robert Ross, legal counsel for the Office of Telecommunications Policy, told me in an interview that the OTP sent the proposed legislation to

over 200 individuals and interested groups for comments. These citizens were allowed to evaluate and constructively criticize the bill. These individuals and groups had been interested or involved informally in the writing of the Cabinet Committee Report on Cable. Such authorities included John Witt, Director of San Diego Municipal Cable Commission; Lynn Wickwire, Executive Director of New York State Cable Authority; Professor Larry Licthy at the University of Wisconsin at Madison; Jeff Forbes, Director of the Massachusetts State Cable Authority; owners of multiple cable systems, and other industry groups-- just to mention a few.⁵

According to Ross, these comments helped in writing the draft which was finally sent to the Office of Management and Budget in May, 1974. It should be noted here that as a matter of procedure all legislation is sent to the OMB which serves as a clearinghouse for the Executive Branch. The reason for this process is that OMB is responsible for the budget to the extent that any proposed legislation has a budgetary impact upon the economy, the Office of Management and Budget is supposed to see it. Additionally, if the bill would propose that the government should allocate federal dollars to the states in order to establish their regulatory commission, then it definitely would have an impact on the budget for the fiscal year that the bill was enacted. In essence, OMB must make sure there is enough money in the budget to support this type of federal revenue sharing with the states. Secondly, OMB has an interest in legislation since the administration must speak with one voice. A different bill from each of the various departments within the Executive Branch dealing with the same issue cannot all be sent to

the Congress for enactment. Essentially then, OMB serves as a clearinghouse and an amalgamator.⁶

Upon the approval of OMB, the Office of Telecommunications Policy sent the bill to 15 different governmental agencies and non-governmental organizations. Some of those did not respond or simply said they were not interested or qualified to comment on the bill. Of the federal agencies commenting on the drafted legislation, the most comprehensive were made by the Justice Department and the Federal Communication Commission which have the responsibility for preventing monopolistic practices in business⁷ and the regulation of telecommunications that should serve the public interest, convenience, and necessity.⁸

The Cable Information Center and the National Cable Television Association were the non-governmental organizations that contributed critical comments of the proposed bill being representative of the industry would be the most effected by the proposed legislation.

According to the Office of Telecommunications Policy, the draft legislation was to serve as the first step in implementing the Cabinet Committee Report on Cable. If enacted, the bill would amend the Communication Act of 1934. OTP believes that the bill would help establish cable as a viable alternative to the present telecommunications structure of this country and in so doing it would be able to compete more freely in the marketplace. The crux of the matter is that none of the major governmental or non-governmental organizations is in disagreement with the hypothesis of the bill. However, they disagree on the procedure of how cable should be regulated so that it can be used as

a viable alternative to the telecommunications system presently operating in this country. In order to help establish cable as a self-sustaining option for those that wish, OTP concluded in its proposed bill that system ownership be separated from control of content of cable transmitted material.⁹ This proposal would mean that if the legislation were enacted, cable would be placed in the category of a common carrier status. Simply stated, the use of cable would be based upon a first come, first served basis--preventing the operator from discriminating against the user or his message. Telephone and telegraph industries serve as examples of common carriers regulated by the FCC. However, the FCC's involvement with telephone and telegraph is not as involved as it is with broadcasting since public utility commissions regulate services which are entirely intrastate in nature. The regulation of common carriers is a two-tier structure--federal and state--unlike the present regulation of cable in certain areas of the country which have three-tier regulation--federal, state, and local municipalities governing some of the same aspects of the industry. Therefore, the difference between what now exists and the thrust of the OTP bill if enacted would divide jurisdiction over cable between the FCC and one level of non-federal government--state, local, or some other; the bill does not specify which would serve as the licensing authority.¹⁰ Separation of ownership from control of content and the two-tier structure of regulation proposed in the bill are the two most controversial suggestions made and the ones, among others, most fiercely objected to by those commenting on the draft.

COMMENTS ON THE BILL FROM GOVERNMENTAL AND
NON-GOVERNMENTAL ORGANIZATIONS

Following is a detailed analysis of the FCC, the Department of Justice, the Cable Information Center, the National Cable Television Association, and the response of the Office of Telecommunications Policy to those comments regarding the draft of the Cable Communications Act.

The severest criticism of the bill from all those commenting on it is with regard to Title I and Title III which spell out the limitations of federal and non-federal jurisdiction over cable. What is being questioned is that the Act itself may be contrary to the concept of federal/non-federal cooperation. It would, in fact, do the following:

...Create a regulatory framework, as the first step in such an evolutionary plan, which would apportion the authority to regulate cable systems between the federal government and a nonfederal level of government, and would provide federal standards and guidelines for the exercise of such regulatory authority by the several states or their political subdivisions.¹¹

Thus, the bill would explicitly delineate the functions which are of federal interest, and those which are non-federal, and allocate to each exclusive jurisdiction over its own sphere.¹²

It is also the explicit intent of the bill to confer power on a single local agency to perform what it enumerates as the nonfederal functions.

To the extent that the OTP bills purport to confer power on a nonfederal agency, the proposal is unique. There are numerous examples of federal-nonfederal regulatory cooperation, but they all rest upon the assumption that the nonfederal partner perform acts within its state-conferred authority. There are other examples of federal action which nullified obstructionist or inconsistent state or local actions. No precedent has been found in which Congress has declared that there is a national interest in having certain functions performed by a nonfederal agency and confer appropriate

powers to perform them. No such precedent has been found because, as the foregoing cases demonstrate, Congress has no Constitutional authority to confer power on any but a federal agency.¹³

The FCC in commenting on this "two-tier" regulatory approach thought that it might create more problems than it would solve for the following reasons:

1. That the FCC's investigation of the subject indicates that the strict two-tier approach or what could be better stated as a non-duplicative regulatory atmosphere might be more beneficial to cable.

That is, no more than two levels of government could involve themselves in any aspect of cable regulations and specific areas could be restricted to a uniform national standard.

This approach, it would seem, would give the measure of flexibility needed to allow all interested entities their appropriate role in the regulatory process. For instance, under the draft bill the licensing authority can regulate regular subscriber rates. This is identical to the existing FCC rules. However, there are now strong indications that there may be a need for some avenue of review of local decisions. The state of Massachusetts has already modified its rules after two years of experience to allow both operators and subscribers to appeal the rate decisions of local officials to a state agency. Such a structure would be consistent with our existing rules and with the concept of functional dualism. While the FCC would not be involved in rate regulation of regular subscriber services, two authorities--the local authority as the initial body considering rates and the state as a review authority, where needed--would assume the function. The OTP draft bill would appear to preclude such a structure.¹⁴

2. The creation of such a "licensing authority" may not be as simple as what OTP contemplates based upon the following assumption:

Clearly, if the state assumes total licensing authority, then there is no problem. However, only six states have done so to date. Further, the Cabinet Committee Report specifically states a preference for primarily local, as opposed to state control. It is possible that by creating a strict "two-tier" approach the bill would accomplish a result not preferred by the Cabinet Committee--state licensing. This is true because the draft offers no middle ground--either the state takes everything or it delegates all powers to designated "licensing authorities."¹⁵

3. The Justice Department also questions the legality of the procedure of adopting a system of licensing which follows the standards and requirements set forth in the bill.

As a matter of inherent Constitutional powers, a State may be regarded as "empowered by law" to issue cable franchises. Consequently, on one plausible interpretation of the draft definition of "cable licensing authority" a State would become a cable licensing authority which is required by Section 303 to adopt a system of licensing in conformity with Federal requirements regardless of whether it had enacted a system of cable regulation or had any desire to carry out such regulation. On that interpretation, the Federal Government would in effect be directing the State to choose between legislating or not and leaving them but ministerial agents of the Federal Government. Such a scheme certainly would do violence to the principles of federalism implicit in the Constitution.¹⁶

4. In addition to the complexities of establishing a non-implicative regulatory atmosphere, the FCC questioned whether the proposal would be theoretically feasible within the time table stipulated in Section 505 of the draft.

With an effective date 18 months after adoption, the proposed legislation would, in effect, require most, if not all, states to modify state laws within that period or the result would be a total freeze on cable development. Our research indicates that at least fourteen states schedule regular sessions of their legislatures only once every 24 months. Clearly, unless OTP expects the various effected states to call special sessions of their legislatures to adopt cable regulations, some of these states could be expected to find it impossible to comply with the timetable contained in the bill. Even in states where appropriate regulations or modifications could be adopted within the 18-month frame, there is certainly nothing to suggest from past state legislative experience in this area that such expedition is likely.¹⁷

OTP does not really respond to governmental and non-governmental criticism of the two-tier regulatory framework envisioned in the draft. Rather, OTP attacks the present concept of cable regulation at the local, state, and federal levels as one of unnecessary duplication at all levels of government. As a solution, Henry Goldberg offers a method that he believes would eliminate the problem of over-regulation. Goldberg said:

Leave the industry's future to the marketplace and hope that some genius comes along....A large scale exodus of government from the field of cable regulation offers a "rational regulatory framework" for cable's development. While the FCC should continue to govern cable's relationship with the broadcast media...regulation of nonbroadcast-oriented cable services can be minimal at a non-federal level. We just have to stop regulating so much and have a little more faith in the power of the marketplace.¹⁸

On the point of less regulation especially the multi-tiered structure which seems to be holding back the growth of the industry, W. Bowman Cutter, Executive Director of the Cable Information Center, agreed with Mr. Goldberg when he said:

Under existing FCC regulations, cable is being denied an attractive commodity to market. Entertainment of some sort is the basic vehicle of cable growth. But at present, cable just doesn't have a service to offer...with the present limitations on the number of television signals a system can bring into its market, the extent of cable penetration might not surpass 25 percent of the nation's television households.¹⁹

The possible solution to the problems of over-regulation and ownership of cable systems, as seen by Goldberg and Cutter, prevents cable from being a viable alternative to the present system. Comprehensive legislation would be a first step toward improving cable's future and at the same time would prevent the FCC from continuing to exercise derivative jurisdiction over the medium. It must be remembered that the FCC is critical of the proposed legislation because it would lessen their authority over cable and, conversely, the industry that is to be regulated by the bill supports its provisions because it believes that the draft would lessen the bureaucratic red tape involved in applying for a certificate of compliance from the various levels of local, state, and federal governments and in the day-to-day operation of a cable system. It seems that the reasoning of OTP and NCTA are based upon the assumption that the cable industry could be the nucleus

of a new broadband communication industry which is presently unavailable to the public but technically possible in the future. The claim made for the necessity of a new law seems to be best expressed by Mr. Goldberg:

You can recognize the dangers of leaving the development of a national policy of such an important medium of communications and new industry to the haphazard process of regulatory decisions and court review, so OTP's proposed legislation is really intended to create a policy and regulatory framework for a new broadband communications industry which might encompass entertainment services and a host of business and personal information services.²⁰

The philosophy contained in the previous statements of OTP are not generally disputed by those commenting on the bill. In fact, former Commissioner Glen O. Robinson approved of the principle that cable should be regarded as an important communication service in its own right and not merely as supplement or occasional surrogate for broadcast service.²¹ However, the objection raised to the bill is not necessarily the flaw of what would be made the subject of statutory guidelines, but in what would not be.²² Support for this statement is given by the Justice Department which questions the overall desirability of proposing legislation which leaves most of the restrictive existing regulation of cable in place as they believe the OTP bill does and fails to articulate clear Congressional guidance on certain issues. Such an example would be with respect to the ownership of cable companies by private individuals, telephone common carriers, and other large communication corporations--the second major criticism of the proposed bill.

OTP's proposed act would place some conditional restrictions on the ownership of cable systems by those organizations which are

already disseminating information to the public or which might want to impede the growth of cable TV because it would provide possible competition.²³ Section 303 (d) of the draft states that it shall be the responsibility of the licensing authority to:

...assure that a licensee is qualified to construct and operate a cable system; provided, that a licensing authority shall not grant a license to any person, including entities under common control, who either directly or indirectly owns or controls access to interconnection facilities serving cable systems, and also supplies programming to channel programmers; unless such person certifies that either interconnection services or programming supply services will not be provided to the cable system for which such person seeks a license.²⁴

Essentially then, this section would mean that newspaper, magazine companies, owners of TV networks or broadcast stations, and owners of multiple stations would be prevented from owning cable systems in an area that they already provided with another communication service. However, an exception to the rule which might create some problems was enumerated upon by George Welford Taylor in his criticism of the bill.

Ownership by any of these groups will be approved if the cable operator limits his use to providing only the minimum service of retransmitting required stations, a public access channel, and one or two channels of programs originated by the operator. To make sure that independent programmers are not foreclosed from the market, all channels not used in providing this minimum service are to be available for lease.²⁵

George Welford Taylor, in commenting on the proposed bill, believes that the free competition conditions cited in the act are laudable in theory. However, in practice, since the cable operator is only permitted to use one or two channels, the excess number of channels may go unused.²⁶ Thus, the public would be deprived of

additional programming because of the restrictions on these particular types of owners.²⁷

The FCC takes the argument against vertical integration a step further by pointing out the fact that in Section 303 (d) a certificate of compliance will not be granted under the following conditions:

To any person, including entities under common control, who either directly or indirectly owns or controls access to interconnection facilities serving cable systems.²⁸

Forbidding interconnection facilities as all inclusively as the draft does would, according to the FCC, produce unreasonable results.

At least one effect would be to prohibit a cable operator with a private microwave radio license (a practical necessity for the operation of many cable television systems) from originating programming in his own community. In its analysis, OTP notes that it is aware of the problems posed by the Commission but believes its approach to be justified in order to preserve the Cabinet Committee goal of prohibiting "vertical integration" of ownership of a cable system, interconnection facilities serving the system, and program supply services serving the system.²⁹

The Commission admits to being concerned about the possible anti-competitive effects of vertical integration. However, the FCC feels that cable must be permitted to grow and provide the public with diverse communication services in what is already becoming a highly-competitive market.³⁰ The FCC concludes:

OTP's approach would not only frustrate many of cable's present services but might prevent it from acquiring the economic strength to provide other services in the future. The real issue is the extent to which the Federal Government will allow vertical integration to proceed. Unlike OTP, we believe that this matter can be dealt with by appropriate application of the anti-trust laws and administrative regulations.³¹

The Justice Department seems to vacillate between the FCC and the present rules governing crossownership and in part with OTP's approach which advocates that any form of legislation must endeavor to

deal with existing as well as any future competitive regulatory scheme that is designed. The Justice Department, in making its opinion known on crossownership rules, made the following statement.

It would not be responsible for any proposed legislation to show a blind eye towards these significant problems on the basis that possible future development--should they ever occur--will make these present day difficulties seem insignificant. Unless the existing restrictions upon the potential of cable are ameliorated, the industry may never attract the capital necessary for it to provide consumers with additional choice. Should cable eventually develop into the dominant media, the FCC could be given adequate regulatory powers limited to the public interest problems actually experienced.³²

Justice argues that since there are already FCC rules which make it possible for broadcasters to invest in cable systems in every market in the country except for the maximum of seven in which they are allowed to own television stations, they find little reason to additionally constrain an infant industry with chains which were designed to handle a giant like broadcasting.³³ Therefore, Justice reasons that:

When considering cable television, moreover, it is important not only to focus upon the loss of actual competition which such media crossownership can entail, but also to bear in mind the loss of economic incentives fully to exploit the potential of cable. Put simply, firms having vested interests in existing media technologies may not press, or press as hard, for the emergence of cable services that may be competitive with their commonly owned, established press or broadcast business.³⁴

The middle ground taken by the Justice Department stresses a compromise between the extremes of either the FCC or OTP. A possible solution arrived at by the Justice Department would allow the maximum entrepreneurial incentive in the cable industry without hampering other local media. What Justice describes is an alternative to the FCC or OTP. It is what might best be described as a compromise and one that the cable industry might be willing to accept. By adhering to the

formula for compromise, it seems that neither the cable or broadcasting industry would be deprived from capital investments which are necessary for successful operation and for returning a profit to investors.

The final major argument, which is voiced by both governmental and non-governmental organizations commenting on the OTP bill, is with regard to the procedure of judicial review by the courts. Section 502 addresses itself to Federal Court Jurisdiction;³⁵ and although it is titled "Privacy of Communications,"³⁶ would, in fact, empower the federal district courts jurisdiction without regard to "citizenship or amount in controversy"³⁷ in a case of litigation. The Justice Department questions whether or not Sections 502 and 503 are Constitutional since they would, in effect, grant the federal courts a power that might be in violation of Article III of the Constitution.

That Article in part is as follows:

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and the Treaties made, or which shall be made, under their Authority;...to Controversies to which the United States shall be a Party; to Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States; between Citizens of the Same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens, or Subjects.³⁸

An observation made by Justice is that unless the jurisdiction granted a federal court by statute can be found to be within Article III, that statute would be unconstitutional.³⁹ Sections 502 and 503 must be reviewed practically in the context of the day-to-day operation of a cable company rather than in abstract theorizing of a state law by itself being questioned in a federal court.

Almost all cases challenging acts or omissions under State cable law or regulations would presumably claim, at least among other things, either that the State laws or regulations were not consistent with the Federal law or that the State licensing authority or cable operator had acted in a manner inconsistent with Federal law. That is, even claims challenging acts pursuant to State regulations will most likely raise in the pleadings questions of interpretation of the Federal law.⁴⁰

The FCC is also concerned about Sections 502 and 503 inasmuch as that they do not confer exclusive jurisdiction on Federal District Courts.

Inasmuch as Section 501 defines standing to file suit for any court of competent jurisdiction, it must be concluded that OTP envisions like actions being brought to either Federal or local and/or state courts. This combined with the FCC review function, creates what we believe to be a potentially chaotic situation....

It is our opinion that even restricting jurisdiction to federal courts alone is hardly a path to uniformity. To distribute pieces of the jurisdictional pie to all courts cannot conceivably promote uniformity.

We may assume that among the matters to be entertained in state courts, pursuant to Section 502 of the proposed bill, will be suits by citizens of a state against that state.⁴¹

This sort of judicial action is seen as controversial not only by the FCC but by George Welford Taylor, Jr., as well, since both interpret such procedure in the courts as running counter to the XI Amendment which specifies:

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign state.⁴²

The FCC said at issue is the general concept of sovereign immunity.

Cases have made clear that if a state can decline to be sued by its own citizens in its own courts it may also decline to be sued by its own citizens in federal courts. We are not attempting here to make a general pronouncement on the constitutionality of this matter, but only to raise the question for consideration....Thus,

while cable was found to be a part of interstate commerce, it is certainly questionable whether a state's regulation of cable automatically strips the state of its immunity to be sued by its own citizens.⁴³

Even if this hypothetical situation of judicial review were not a problem, Sections 502 and 503 are significantly weakened by the lack of a damage remedy; the limitation of suits to challenges of acts, practices, and omissions seems to be in terms of injunctive relief.⁴⁴

In order to eliminate possible abuses which may arise: (1) disclosing private information about a subscriber, (2) suits against a subscriber for an overdue bill, (3) enforcement of leasing channels on a first-come, first-serve basis, demonstrate three of the more common disputes arising that the bill needs to clarify in authorizing both state and federal courts to provide whatever relief is appropriate.⁴⁵

However in the revised draft of the bill, Sections 501, 502, and 503 remain virtually the same. OTP reasons that it was not necessary to alter the Sections in question. It bases its reasons on the following argument:

This Section does not confer jurisdiction directly on state courts, it merely confers a right in aggrieved parties to bring an action for violation of a provision of this bill, or a law or regulation implementing a requirement of this bill. It assumes that the court in which such action is brought will be competent to hear the case.⁴⁶

In making this statement, the argument of OTP seems to be deliberately circular thereby hoping to avoid the attacks of governmental and non-governmental personnel commenting on the bill. The strategy is ill conceived since until the questions involving the constitutionality of judicial review contained in the draft are resolved, the bill will not have the support of those questioning its validity. In order to give

their stand on the issue of judicial review credence, OTP quotes the Cabinet Committee Report which served as a model for the proposed bill:

Do not require the day-to-day supervision of a federal regulatory agency, but rather the uniform and consistent treatment that generally can be derived from enforcement in the federal courts.⁴⁷

OTP believes that the court review of cases involving any action commenced pursuant to Section 501 without regard to the citizenship of the parties or the amount in controversy,⁴⁸ would not lead to a plethora of actions all across the country. Court litigation, according to OTP, can be expected to diminish once the new regulatory framework is firmly established.⁴⁹

The reasoning of OTP, if not falacious, is at best left to conjecture. Experience gained from over the past 33 years, the time that the Communication Act has been in effect, has not seen a lessening of cases; but contrarily, the courts have been inundated with the rise of countless citizen groups who seek, and in many instances have, the right to legal redress for their grievances.

As a result of OTP's refusing to negotiate on such controversial areas as judicial review, regulatory structure, and ownership of cable systems, the possibility that the bill proposed by them would be passed was very unlikely. The reason for this is that although each of the governmental and non-governmental organizations commenting on the draft agrees in principle that regulatory reform in the area of cable is needed, they cannot agree upon the final structure the legislation should take.

Chapter 5

¹ Gerald Ford, former Vice President, news release from the files of the Office of Telecommunications Policy, June 13, 1974, mimeographed copy.

² John Eger, former Deputy Director of Office of Telecommunications Policy, address given before the Telecommunication Committee of the National Association of Manufacturers, Washington, D. C., June 5, 1974, mimeographed copy, p. 5.

³ John Eger, former Deputy Director of Office of Telecommunications Policy, address given before the Western Cable Show, Anaheim, California, December 6, 1974, mimeographed copy, p. 8.

⁴ Broadcasting, April 22, 1974, p. 5.

⁵ Statement by Robert Ross, former Legal Counsel for Office of Telecommunications Policy, in a personal interview, Washington, D. C., June 26, 1975. Permission to quote secured.

⁶ Ibid.

⁷ Frank J. Kahn, Documents of American Broadcasting (New York: Appleton-Century-Crofts, 1973), p. 79.

⁸ Ibid., p. 71.

⁹ Broadcasting, May 6, 1974, p. 42.

¹⁰ Ibid.

¹¹ See Appendix B Section 103B of the proposed cable bill.

¹² Sheila Mahoney. (Examination of the legality and constitutionality of proposals dealing with the problem of three-tier regulation. Mimeographed copy of unpublished paper given to the writer in June, 1975), p. 23. Permission to quote secured.

¹³ Ibid., pp. 23-24.

¹⁴ Based on personal correspondence between Richard E. Wiley, Chairman, Federal Communication Commission, and James T. Lynn, former Director, Office of Management and Budget, March 10, 1975, p. 3. Permission to quote secured.

¹⁵ Ibid., p. 4.

¹⁶Based on personal correspondence between A. Mitchell McConnell, Jr., former Acting Assistant Attorney General, and James T. Lynn, former Director, Office of Management and Budget, June 17, 1975, p. 10. Permission to quote secured.

¹⁷Wiley and Lynn, op. cit., p. 6.

¹⁸Henry Goldberg, former Legal Counsel, address given at First Annual International Communication Conference, Madison, Wisconsin, June 5, 1975. Permission to quote secured.

¹⁹Broadcasting, April 29, 1974, p. 21.

²⁰Goldberg, op. cit.

²¹Based on personal correspondence between Glen O. Robinson, former Federal Communication Commissioner, and James T. Lynn, former Director, Office of Management and Budget, March 10, 1975, p. 1. Permission to quote secured.

²²Ibid., p. 2.

²³George Wellford Taylor, Jr., "The Proposed Cable Communication Act of 1975," Duke Law Journal (March, 1975), p. 107.

²⁴See Appendix B Section 303d of the proposed cable bill.

²⁵Taylor, op. cit., p. 107.

²⁶Ibid., p. 107.

²⁷Ibid.

²⁸See Appendix B Section 303d of the proposed cable bill.

²⁹Wiley, op. cit., p. 8.

³⁰Ibid., p. 8.

³¹Ibid.

³²U. S. Congress, Senate, Committee on the Judiciary, Subcommittee on Anti-trust and Monopoly, Anti-competitive Practices Potentially Inhibiting the Growth of Pay Cable Television Hearing, 94th Congress, 1st Session, July 15, 1975 (Washington, D. C.: Government Printing Office, 1975), p. 14.

³³Ibid., p. 14

³⁴McConnell, op. cit., p. 4.

³⁵See Appendix B Sections 502 and 503 of the proposed cable bill.

³⁶ Ibid.

³⁷ Ibid.

³⁸ U. S. Constitution Article III, §2.

³⁹ McConnell, op. cit., p. 11.

⁴⁰ Ibid., p. 12.

⁴¹ Wiley, op. cit., p. 10.

⁴² U. S. Constitution Amendment XI.

⁴³ Wiley, op. cit., p. 10.

⁴⁴ Taylor, op. cit., p. 119.

⁴⁵ Ibid.

⁴⁶ Based on personal correspondence between Henry Goldberg, former Legal Counsel for the Office of Telecommunications Policy, and William V. Skidmore, former General Legal Counsel for the Office of Management and Budget, January 10, 1975, p. 20.

⁴⁷ Report to the President: The Cabinet Committee on Cable Communications (Washington, D. C.: Government Printing Office, 1974), p. 41.

⁴⁸ See Appendix B Section 502 of the proposed cable bill.

⁴⁹ Goldberg and Skidmore, op. cit., p. 10.

Chapter 6

SUMMARY AND CONCLUSIONS

This final chapter will give the reader an overview of the process initiated by OTP with respect to cable legislation. By separating the various research questions posed in the introduction to this dissertation into three areas: (1) background, (2) analysis, and (3) response, the writer hoped that the reader would be able to follow historically the roles that the Executive Office and the Federal Communication Commission have had in determining the usage of the spectrum by the government and private enterprise. Furthermore, by organizing the research questions into three areas, it was the intention of the writer to give the reader a better understanding of the attitude of the Executive Branch and the FCC toward changing technology. By analyzing the responses in favor of and against the proposed bill, the reader should be able to conclude on the merits of the arguments presented by both sides why the Cable Act of 1975 was not introduced to the Congress. Although the bill was not enacted into law, the process analyzed in the dissertation demonstrates the regulatory process as it applies to cable technology. More importantly, it may be possible to predict the influence of such a process in writing future legislation which will eventually govern the telecommunications industry in this country.

To summarize, the final chapter will give the reader a clearer understanding of the problem, what issues are related to it, the

solution proposed, how well OTP did in encouraging comments from others, why the bill was not introduced, and what the implications of the proposal were so far as they affected the future of cable.

RESEARCH QUESTIONS AND THE ISSUES

The reader may recall the eight questions in the introduction were:

Background

1. What historically has been the role of the Executive Branch of government and the administrative agency governing telecommunications in this country and how have they changed to accommodate technology?
2. What did the creation of OTP do to change the role of the two agencies so far as the immediate and long-range planning of communication technology was concerned?
3. How did OTP first define and attempt to resolve the problem concerning the regulation of cable technology and other key issues related to it?

Analysis

4. Does the OTP legislation favor a statutory law or does it suggest cable be governed by an administration agency with statutory guidance?
5. Does the proposed OTP legislation reflect the opinions of Congress, the FCC, the Executive Branch, and the effected industries?
6. How has the scope of the problem been altered during the past three and one-half years and how has OTP readjusted its attitude toward the subject of cable legislation?

Responses

7. What responses did the OTP proposed cable bill receive from governmental and non-governmental agencies commenting on the role of local, state, and federal regulation of the cable industry?

8. How do the responses compare to

- a. The definition of the problem?
- b. The proposed legislation of OTP?

Background

In the background area it was shown that the regulation of commerce for the benefit of the public began almost 90 years ago with the 1887 Act to Regulate Commerce. Later, other federal agencies were created and acts passed by Congress to prevent unfair methods of competition and other undesirable trade practices such as those detailed in the introduction to this study. Some of the agencies, their date of creation, their regulatory jurisdiction, and their responsibilities toward the public were also included in the introduction of this dissertation.

The traits that all regulated industries have in common is that they are usually monopolies or highly competitive, lucrative businesses or a natural resource belonging to no particular individual--but to all the citizens. The telecommunications industry in this country does conform to some of the characteristics just described and, therefore, has been regulated for almost 50 years by an agency created by Congress to prevent the misuse of a national resource--the radio spectrum.¹ Each of the instrumentalities of communication--telephone, telegraph, radio, and television--is regulated under the provisions of the Communication

Act of 1934. Although the Communication Act of 1934 has been modified periodically to accommodate change, it has remained, for the most part, intact as it was then written.

The reluctance on the part of the federal agency to accommodate technological development has frequently been referred to as a conservative bias on the part of the regulatory agency.

The best example of the conservative bias is provided by the ICC, which is responsible for regulating competing modes of transport. The Commission has not developed policies and procedures to compensate a railroad that loses profitable traffic to a motor carrier offering a new and better service. As a consequence, the Commission has been slow to approve new service made possible by new and improved equipment. For example, the whole history of the ICC's actions in overseeing the introduction of piggybacking in freight transport supports the view that an innovation-retarding bias has had a significant effect on technological development in the industry. The Commission is understandably loath to approve changes that threaten existing operators, especially since the railroads generally have been earning below-average profits.²

This tendency is usually reinforced by the regulatory process itself, because the firms that would be hurt by a change have, in the regulatory agency, a forum in which to plead their cause.³ An example of pleading a cause would be the lobbying done by the National Association of Broadcasters at the Broadcast and Common Carrier Bureaus of the FCC. The broadcasting industry has been successful in having the FCC shield them from competition and to maintain the status quo. However, government regulators see things differently.

To them, protecting the broadcasters should be only a by-product of protecting the public interest....

The conclusion arrived at by the government's regulators is that CATV must be regulated--ostensibly to protect the public, and only residually, the television broadcasters, in the nation's small towns and rural areas.

Only a naive observer would be surprised to learn that the government in fact never has protected the small broadcasters.

This is because the government, once it had obtained the necessary authority, headed in an entirely different direction--based on an entirely different set of principles--principles that had not been articulated when the government first considered extending its authority to regulate CATV.

Such convolutions in public policy are not uncommon. They make this CATV affair, now over ten years old, a case study in the evolution of public policy in general.⁴

This dissertation has endeavored to show that the problems of the CATV industry and the attempt to regulate it in the public interest demonstrate the on-going political process that has been applied during the past 90 years to such other industries as transportation, the utilities, and banking. Furthermore, it was demonstrated in the introduction to this dissertation that both the federal government and the states individually have expanded the number of industries to be regulated and the variety of regulations imposed. Although a plethora of studies have been conducted, it is generally conceded that no assessment that applies to all of the regulated sectors seems possible on the basis of evidence so far available. This is due partly because of differences in the basic characteristics of the various industries and partly because of differences in approach of the various regulatory bodies.⁵ However, perhaps the FCC could learn from the examples of conservative bias elaborated upon on the previous page. This is not to say that cable, the challenger, will continue its struggle while broadcasting, the older form, will be subsidized by the government even if it earns below average profits. Although broadcasting still dominates over cable, this writer concludes that the regulatory structure now governing the cable industry is worthy of re-examination.

The FCC's jurisdiction over cable, through the years since its invention, has been derived from various court cases. Both the Carter

Mountain and Southwestern cases detailed in Chapter Two declared that the FCC did have authority over cable since it already had jurisdiction over all "wire communication" as stipulated in Section 3 of the Act. Since Congress failed to provide enabling legislation, the FCC found it necessary to proceed under the Communication Act as it stood.⁶

In 1970 the Commission began trying to develop some of the potential of cable, while still protecting the interests of over-the-air broadcasters, especially the economically weak UHF stations. Cable companies with more than 3,500 subscribers were required to originate some of their own programming. The networks were banned from cable ownership, and owners of TV stations were forbidden to own cable systems in the same community. Pay-cable systems were prohibited from carrying programs (like the Super Bowl) that were not allowed on over-the-air pay TV. Other rules were proposed that would permit cable companies to import distant signals under certain conditions, while requiring them to provide extra channels for local government, education, and public access.⁷

However, a series of events each happening in quick succession and over which the FCC had no control, reversal by an Appeals Court setting aside the order requiring CATV systems to originate programming, challenges from both Congress and the White House to overhaul CATV rules were brought to a head in late June, 1971, when President Nixon himself established a special administration committee to develop a comprehensive policy with regard to cable television.

Unlike what had been done in the past and what the FCC was doing at the time, the Presidential committee headed by Clay T. Whitehead, Director of OTP, was to study such questions as whether cable should be regulated as a common carrier, the kinds of services that should be provided for by cable, and the social and economic implications of the new technology. In addition to doing what it was charged with by the Chief Executive, the Office of Telecommunications Policy was able to play the role of a broker in getting the trade associations involved

in the stalemate over cable to accept a compromise agreement regarding the regulation of the new technology. The agreement reached by the parties became the basis of the 1972 Report and Order which, as of this writing, is still in effect.

Under the direction of Clay T. Whitehead, the Office of Telecommunications Policy went to work on the long-range policy for cable. The Office of Telecommunications Policy involvement in the issue of cable was not considered at all unusual since one of the broad reasons in creating the Office was to allow the Executive Branch to act more effectively as a partner in discussing communication policies with both the Congress and the FCC. The conciliatory approach alluded to in President Nixon's letter of February, 1970, to Congress permitted OTP to investigate and recommend what was considered to be the route that would be best for cable.

Initially, OTP defined the problem of cable regulation as lacking a broad policy approach for integrating the new technology into our country's mass communications media. In order to alleviate the problem, OTP followed the twelve specific recommendations of the Cabinet Committee Report detailed in Chapter Four of this dissertation. The reader may recall that the twelve recommendations were:

1. Control of cable distribution facilities should be separated from control of programming and other services provided over the channels on those distribution facilities.
2. Common ownership or control of cable systems, inter-connection facilities, and program supply services should be the only form of cable "network" operation that is prohibited.
3. There should be no restriction on either cross-media ownership or multiple ownership of cable systems.

4. Telephone common carriers should not control or operate cable systems in the same areas in which they provide common carrier services.

5. The development of new programming and other information services that can be offered over cable should not be impeded by government-established barriers to consumers' opportunity to purchase those services.

6. The programming, information, or other services provided over cable should not be subject to administrative regulation of content, nor should the prices of such services be regulated by any governmental authority.

7. Incentives to create programming for cable should be fostered by full applicability of the copyright laws to cable channel users.

8. The federal government's authority over cable should be exercised initially to implement a national policy; thereafter, detailed federal administrative supervision should be limited to setting certain technical standards for cable and applying anti-siphoning restrictions on professional sports programming.

9. Franchising authorities should have the principal responsibility for the regulation of cable systems.

10. There should be strong legal and technical safeguards to protect individual privacy in cable communications.

11. Governmental authorities should assure that basic cable or other broadband communications are available to residents of rural areas and to the poor.

12. Participation by minority groups in cable system ownership, operation, and programming should be facilitated.⁸

The twelve points just enumerated became the substance of the first draft of the bill prepared by the Office of Telecommunications Policy. The bill took the twelve recommendations and formed them into specific sections and subsections of what was to be called the Cable Act. This bill would have amended the Communication Act of 1934 which, only in the remotest sense, refers to CATV indirectly in Section 3 where it defines "wire communication." The following definition is given:

The transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to transmission.⁹

As is shown, cable television is not explicitly mentioned in any section of the Communication Act. However, the paragraph just quoted is broad enough so as to encompass all wire communication. Based upon the assumption that since the FCC does have authority over interstate communication, the agency derived its jurisdiction over the new technology from a law written almost 20 years before cable was marketed.

In order to eliminate the statutory ambiguity which surrounded cable, the OTP bill under Congressional approval was to limit FCC regulation to broadcast signal transmission, some technical standards necessary to insure cable's inter-operability and networking capabilities, equal opportunity employment, and certain crossownership restrictions.¹⁰

As mentioned previously, other studies made by private endowments and governmental agencies had offered recommendations for bringing cable into its own right in the marketplace and letting it stand or fall on its own merits. However, up to the time of the circulation of the OTP draft, no provisions were made for long-range policy and the statutory legislation envisioned in the bill. The bill was circulated among industry and public interest groups before it was put into final clearance through the Office of Management and Budget. Over 200 individuals and interested groups were asked to comment on the proposed legislation. Authorities included John Witt, Director of San Diego Municipal Cable Commission; Lynn Wickwire, Executive Director

of New York State Cable Authority; Professor Larry Licthy at the University of Wisconsin at Madison; Jeff Forbes, Director of the Massachusetts State Cable Authority; owners of multiple cable systems, and other industry groups--just to mention a few.

In soliciting opinions from individuals, citizen groups, and governmental agencies, OTP was hoping to write legislation that would meet with the approval of the majority affected by the bill if it were passed. OTP seemed to be making the regulatory process more open. Much of what was done earlier by various branches of government in considering the future of cable was literally done behind closed doors. OTP's approach demonstrated how the regulatory process operates within a system involving various participants, including the industry, the public, the White House, and the Commission itself.¹¹ By asking for comments from those affected by the passage of the OTP bill, the Office left itself open for both praise and criticism from those involved in the regulatory process. Although the bill was rejected, the process OTP used demonstrates in the analysis of the draft and the response to it that the bill raises interesting issues which should have been addressed to the Congress.

For example, the Congress could examine the feasibility of whether or not cable should be subject to the regulation of its content by a governmental agency. Since the Communication Act already strictly forbids censorship of content by the FCC, it would be hard to imagine that Congress would not sanction a recommendation that upholds the principle of free speech enumerated in the Constitution. However, the retention of the Fairness Doctrine with its personal attack rules and Section 315 of the Communication Act may not be necessary since these

provisions were included in broadcast law when there was a limited number of outlets for the individual to voice an opinion. Cable technology with the number of channels that are available to all makes the inclusion of the Fairness Doctrine and Section 315 unnecessary.

Another issue to which Congress could address itself is to whether or not it would be beneficial to give a federal agency less authority in granting a franchise to the cable operator. Since the federal government has long been criticized for the perpetuation of bureaucratic red tape, the elimination of the duplication of granting a franchise at various levels of government would make the process more local in character. Consequently, it should be more appealing to the constituency. Since one of the stipulations of the bill makes it necessary for the FCC to report to Congress on an annual basis as to the status of cable, it would have provided a means of checks and balances on the system. Certainly Congress and the citizenry they represent could have no quarrel with this point. However, since Congress did not address itself to the draft, the issues just mentioned by this writer, although valid to my way of thinking, remain debatable. The reason Congress did not address itself to the OTP draft will be taken up in the next section of this chapter.

ANALYSIS AND RESPONSE

In analyzing the bill and the comments regarding its contents, the reasons the bill met defeat become evident. The first area of contention, the two-tier regulatory structure envisioned in the bill seems to be contrary to the concept of federal/non-federal cooperation.

Neither the FCC nor Congress has the authority to specify how a power inherent to the state is to be exercised nor the authority to designate the locus of such power, that neither the FCC nor Congress has the power to confer such power upon a non-federal level of government, and that the cooperative regulatory programs Congress has enacted in other areas afford no precedent for such a program for cable television and, indeed, are demonstrably ill-suited to cable television at this time.¹²

Each of the governmental and non-governmental agencies commenting on the proposed bill voiced strong opposition to the two-tier regulatory framework because they believed the bill placed unnecessary restrictions upon the states.¹³ The bill offered no middle ground. Either the states would have the option of participating or not participating in the licensing and regulation of cable.

A possible alternative to OTP's approach could have been to follow one of the suggestions of the Federal/State/Local Advisory Committee which was formed specifically to deal with, among other things, duplicative regulation of cable. The majority position of the FSLAC was that the FCC should permit no more than one non-federal regulatory partner by redelegating certain local functions of cable to the most local level of government (i.e., two-tier regulatory approach.) This method would allow the non-federal partner which has a better understanding of matters that are local in character to have a voice in administering the law. In effect, the federal government would not be telling the states that if they did not participate in the licensing and regulation of cable then the federal authority having jurisdiction over cable would be able to mandate what the licensing process was to be and what services should be provided for within state boundaries. The point is well made since it makes little sense to delegate to all states the same criteria to be used in regulating cable. States differ

from each other in physical size and population. What is good for the state of Rhode Island is not necessarily good for California. The pattern that has emerged during the past five years can be compared to a patchwork quilt with separate and distinct regulations that applied to individual areas. However, it was felt by those commenting on the draft that OTP's bill would not have eliminated the problem but would have introduced another problem of inflexibility.

In essence then, until the time that the bill was altered as to clarify the two-tier regulatory structure it envisioned, it could not have been enacted. This author believes the best solution would have been to opt for the suggestion of the FSLAC regarding the two-tier regulation of cable. This approach would have permitted a two-tier framework that most likely would have been acceptable to the majority of those involved in the political process of regulating cable. However, instead of responding to the charges that were made against the two-tier regulatory framework envisioned in the draft, OTP simply attacked the present concept of cable regulation at the local, state, and federal levels as one of unnecessary duplication. To this writer's thinking, this approach taken by OTP regarding the feasibility of the two-tier regulatory framework was ill conceived since those commenting on the bill did raise legitimate questions which were left unanswered.

Also, from the interviews that this writer had with Henry Goldberg and Bob Ross, the authors of the bill, it is reasonable to conclude that they would have been willing to concede on one or more of the points of contention if the other governmental agencies commenting on the bill would have relinquished something in return.

Ross believed that OTP did not have as much leverage in dealing with the aspects of cable regulation as the other governmental agencies did since other agencies had experience in writing legislation and OTP did not. Furthermore, the Executive Office, of which OTP is a part, was dealing with other matters which it felt were of top priority at the time.¹⁴

The second area of contention between what OTP proposed and the opinions of those commenting on the bill dealt with the subject of the ownership of cable companies and specifically that of vertical integration. In addition to the rules which the FCC already has in effect regarding the ownership of cable companies by private individuals, telephone common carriers, and other large communication corporations, OTP proposed some additional restrictions on the ownership of cable systems. Specifically, Section 303 (d) of the bill would assure the following:

Assure that a licensee is qualified to construct and operate a cable system; provided, that a licensing authority shall not grant a license to any person, including entities under common control, who either directly or indirectly owns or controls access to interconnection facilities serving cable systems, and also supplies programming to channel programmers; unless such person certifies that either interconnection services or programming supply services will not be provided to the cable system for which such person seeks a license.¹⁵

Forbidding interconnection facilities as all inclusively as the draft does would, according to the FCC, produce unreasonable results (see Chapter Five.) More than likely, the critics of the bill felt that additional restrictions at that time would prevent entrepreneurs from investing the capital necessary for the growth of cable. When commenting on vertical integration, the Justice Department believed

that regulations designed to preserve competition should be distinguished from regulation designed or having the effect of restricting competition.¹⁶ The Justice Department concluded that the additional restrictions imposed by Section 303 would, unfortunately, have the reverse effect of what the proposed statute intended to do. The writer is in agreement with those commenting on the bill who believe that since there are already FCC rules which make it possible for broadcasters to invest in cable systems in every market in the country except for the maximum seven in which they are allowed to own television stations, there is little reason to restrain competition with additional rules.

Finally, the third criticism of the bill as it was written argues against the procedure of judicial review enumerated in it. Those commenting on the bill believe that Sections 501, 502, and 503 may be running counter to the XI Amendment of the Constitution. The reasons supporting this argument were detailed in Chapter Four. However, OTP reasoned that it was not necessary to alter the sections in question since:

This Section does not confer jurisdiction directly on state courts, it merely confers a right in aggrieved parties to bring an action for violation of a provision of this bill, or a law or regulation implementing a requirement of this bill. It assumes that the court in which such action is brought will be competent to hear the case.¹⁷

OTP's statement does not really refute the argument of the charge made by those commenting on the bill but simply skirts the issue in question.

Since as a matter of procedure, the Office of Management and Budget, which serves as a clearinghouse, received the criticisms of

those governmental agencies commenting on the bill, it is logical to conclude that the reason the bill was not introduced to the Congress is that OMB felt the arguments against it were stronger than those of OTP. OMB may have thought it advisable to combine the best points of the bills that were in the process of being written by other governmental and non-governmental agencies and, thereby, create a cable act which would be acceptable to the majority affected by such legislation. OMB may have thought that a combination of the best points, taken from the bills that were being written, would certainly avoid the pitfalls of the OTP draft. It could also be assumed that since OMB took this wait and see attitude that they thought no legislation was needed at the time. However, whatever the reason that OMB did not give final approval to the OTP final draft remains a matter of speculation.

Since the OTP bill would have altered the existing ideological and legal consensus now pervading the regulation of cable with a long-range policy substitute, governmental agencies whose authority would have been replaced strenuously objected to the implementation of the bill. Case studies have demonstrated that the FCC has tended in the past to be reactive rather than innovative and to adopt short-term measures rather than long-range solutions.¹⁸ The demise of the OTP cable bill would, to a large measure, be one further example of the conservative thinking of the FCC toward legislation. Although the Commission's jurisdiction was supported by the courts in the Southwestern and Fortnightly cases, as detailed in Chapter Three, cable is still considered to be an adjunct to broadcast television and is regulated in that manner. However, the exercise of derivative

jurisdiction has been without the benefit of any comprehensive Congressional guidance. The proposed bill would have clarified the vagueness which surrounds the regulation of cable by amending the Communication Act of 1934 so that cable would no longer be a surrogate to over-the-air broadcasting, but would be regulated as one part of the integral mass telecommunications system in this country.

Generally speaking, both governmental and non-governmental agencies alike agree that Congress should address the question of how cable should be regulated to best serve the public interest. As has been demonstrated in this dissertation, disagreement among the various agencies has arisen as to the particular provisions of how the proposed bill would have enforced such aspects of cable regulation as a two-tier framework, ownership of cable companies, and judicial review by the courts.

It should also be pointed out that the analysis of the OTP proposed bill presented in this dissertation further exemplifies the political process that has, in the past, been applied to other private industries which the government has attempted to both regulate and promote for the public good. The participants involved in the discussion, the FCC, Justice Department, Cable Information Center, National Cable Television Association, and OTP itself have, for the reasons detailed in Chapter Five, supported or opposed the OTP bill.

It should be noted that the proposed OTP bill stimulated discussion among the participants engaged in the regulatory process and to that extent it has succeeded. More importantly, the Subcommittee on Communication of the Committee on Interstate and Foreign Commerce

made recommendations similar to those proposed by OTP. The three main points made by the Subcommittee were:

1. To resolve the difficult jurisdictional issue. The Subcommittee like OTP believed that the federal government could assist state and local governments by providing information and being accessible to answer questions. But the regulatory function of the federal government should have remained within the purview of federal concern--such as the carriage of broadcast signals, pay cable, networking, and technical standards to insure interconnection.¹⁹ The Subcommittee was reiterating the revised section of the cable bill dealing with the jurisdiction and responsibilities of the FCC. Where the Subcommittee differed from the OTP bill is in the application of the two-tier regulatory approach to cable. Instead of endorsing legislation, the Subcommittee recommended that:

The Commission should continue to study the state/local process, to be as helpful as possible to state/local authorities, and to issue periodic reports dealing with illustrative problems. If such reports pinpoint duplicative, burdensome regulation, we believe that this sunlight will be sufficient to obtain relief on the state/local level and be of assistance to these authorities. If it is not, an extensive problem is demonstrated, then and only then--should there be legislation.²⁰

2. Secondly, the Subcommittee recommended setting forth basic policy guidelines for the development of cable television rather than continuing with the present "ancillary to regulation of broadcasting" pattern. The Subcommittee points out that:

The Commission, under present law, appears required to bring any cable regulatory effort within the ancillary doctrine of Southwestern and Midwest Video supra--that is, the regulation must be "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting." If the Midwest Video plurality prevails,

Chief Justice Burger's critical fifth vote would indicate that the cablecasting requirements are as far as the FCC can go in imposing affirmative regulations without Congressional authorization.²¹

It should be remembered by the reader that in the introduction to this study the words of Chief Justice Burger were quoted and have been referred to in the dissertation because of their importance. The Subcommittee's conclusion regarding the granting of franchise standards, although they are not as detailed as those in the bill, are totally in line with those of OTP. In fact, the Subcommittee points out that several of the franchising requirements have a dubious relation to the FCC's responsibilities for regulating broadcast television (see Chapter Three.)

3. Finally, the Subcommittee recommended that cable should be brought within the Copyright law. The reader will remember that these points are closely aligned with the recommendations made in the Cabinet Committee Report and specific sections of the proposed bill detailed in Chapter Four. Of the three recommendations of the Subcommittee, only the third point has been resolved. As of January 1, 1978, copyright liability will be extended to cable operators under a compulsory licensing system.²² However, cable legislation will not occur until the jurisdictional issues and the basic policy guidelines which have been enumerated in this study are resolved. Essentially then, a reconsideration of the basic policy guidelines would permit the existing regulatory scheme to be replaced with a statutory law more aligned to today's telecommunication system.

Future Research

This study has repeatedly noted the need for additional research in resolving the problems related to cable legislation; particularly, (1) the crossownership of cable companies by individuals, telephone common carriers, and other large communication corporations, and (2) the jurisdictional framework which now governs cable at the local, state, and federal levels of government.

The Report and Order of 1972 which is presently in effect may not necessarily be the best policy to be followed regarding the prohibitions of crossownership by other media. Presently, cable systems cannot be owned by national networks, television broadcast stations whose grade B contour overlaps the cable system, and by television translator stations serving the same community as a cable system. In addition, the divestiture of existing crossowned systems was also ordered in an effort to insure compliance across the board.

In going to great lengths to explain the rule, the Commission cited empirical data as support for its position and made clear its statutory policy to favor diversity of control over local mass communications media.²³

One important point should be made. The rule did not prohibit crossownership of television stations and cable systems. It only prohibited crossownership in the same community. Such a posture, it argued, would enhance local diversity of ownership and would also enable broadcasters to continue to own cable.

The affected industries immediately attacked the rule. After two and one-half years of reconsideration, however, the Commission upheld its rule. It then turned and invited petitions for waivers and

received some 70, which, if granted, would totally obliterate the rule as previously shaped through the public process.²⁴

Whether or not the waivers would be granted is a hypothesis which can be argued. However, the point of petitioning the FCC for waivers is well made since, if the agency relinquished its position on crossownership to all those who requested it, the waiver policy would circumvent the concept of maximum competition, which was originally intended, with a shallow administrative process.²⁵ True diversification of ownership can only be achieved by allowing all those who wish enter the marketplace the opportunity to compete freely.

In determining the direction that cable legislation should take, researchers in the area could determine if communities which are presently served by a co-owned company are receiving as many services as those of a cable company that is privately owned. What is necessarily good for one community is not necessarily good for all communities because of the needs of the population and the size of the community itself.

Further research could investigate the advantages of a community-owned station vs. those communities that are served by a large company owning many cable companies. It should also be pointed out that the economic stability of the service area is an important factor to consider when doing comparative studies. Since the current policy which governs the crossownership of cable companies was instituted to allow for the greatest amount of competition possible, the comparative studies that have been mentioned might help legislators determine the best course of action to be followed in regulating cable in the public interest, convenience, and necessity.

Future research should also look at (point two) the jurisdictional framework which now governs cable at the local, state, and federal levels of government. The multiple structure of regulation may represent the most fundamental and far reaching regulatory dilemma that the cable industry faces.

In addition to the FCC's regulation, eleven states now regulate CATV, each in its own way. Of course, nearly every community which has cable--well over 7,000--regulates it as well. Much of this non-federal regulation duplicates the FCC's rules. Much of it conflicts with federal rules. For example, states and localities continue to attempt to regulate pay cable even though this area has been pre-empted by the FCC. Multi-tier regulation means massive reporting requirements for many cable operators, it continues to cause delays in the awarding of rate adjustments and franchises, and it has been a constant source of litigation which could often be avoided.

Despite the recommendations of its own Federal/State/Local Advisory Committee on Regulation, the FCC has declined to act decisively to bring order out of the developing chaos. Indeed, the Commission has as much said "we don't know what to do, let the Congress decide."²⁶

Earlier studies such as those by LeDuc, Cable Television and the FCC, and Noll's Economic Aspects of Television Regulation have demonstrated the FCC's inability to act decisively on telecommunication matters. As a followup to what has been previously done, additional research in the area of multi-tier structure of cable regulation at federal, state, and local levels could attempt to seek why the FCC and Congress as well have been reluctant to accept the findings of government-supported studies and those of private endowments which were detailed in Chapter Three.

With assistance from the Justice Department, the Office of Management and Budget and other governmental and non-governmental agencies involved in the political process, future research might be able to determine the appropriate role of the affected industries in

determining regulatory policy. Another area of future research might consider the impact that lobbyists and citizen groups have had upon cable legislation. Although lobbyists have been around for a considerably longer period of time than citizen groups, nevertheless, their impact has been felt in the regulation of other areas related to the legislation of telecommunications and perhaps cable is no exception to the rule. In the future, it might also be possible to compare and contrast trends relating to cable television which took place during defined periods of time. A study of this sort would make it possible to assess the effectiveness of regulation as well as its impact upon the affected industries. This last study just described by the writer would be a logical one to follow the work that has been done up to this point.

Conclusion

Although the OTP bill was not passed, it served as an investigation into the legislative process as it applies to the regulation of the telecommunications industry. If the past is to serve as a guide, then the policies proposed by OTP will not unfold automatically according to a precise schedule but will be shaped by the push and pull of political decision making. Consequently, policy making for cable will not be an orderly process.²⁷

The goal of cable regulation should be a way to cope with the uncertainty and disorder that now exists.²⁸ Proposing an alternative plan that is acceptable to the majority of those affected by cable legislation is ultimately the goal of those involved in the decision-making process. However, a consensus of opinion cannot be agreed upon

until some basic philosophical principles regarding the regulation of cable are resolved. For example, the FCC was unwilling to accept the proposal of OTP because of a basic philosophical difference. The FCC believed the bill was just too specific and would not allow for necessary waivers. On the other hand, OTP felt just the opposite.

The OTP bill is a major effort to achieve regulatory reform,...that it would give the regulatory agency less to do and place more reliance on the business decisions of cable system operators and the people who are programming on cable channels. The OTP bill would strike at the heart of the economic problems of over regulation by substantially reducing the scope of the FCC's authority over cable. Instead, there would be an increased reliance on the competitive marketplace and on non-federal authorities to make up for any deficiencies that may arise in the marketplace. There would also be increased reliance on federal and state courts to interpret and enforce the legislative policy for cable development as expressed in the OTP bill.²⁹

The foregoing demonstrates a means of looking at a particular aspect of cable regulation from two different perspectives. Neither argument is completely correct or is either totally in error. Which point of view will finally be adopted or modified will depend upon the amount of pushing and pulling that is involved in the process of political decision making.

The problem which arises in analyzing the process described in this study is the difficulty in separating material based upon fact from that which relies solely upon opinion. The author attempted to present arguments both in favor and against the OTP proposal and to weigh their merits when arriving at a conclusion. However, certain factors such as cooperation received from some agencies or the lack of it, the availability of both public and private correspondence, or the refusal on the part of some agencies, all contributed to the author's bias. Generally, the individuals questioned attempted to

answer as best they could the research questions posed by the author. However, there were times that individuals would speak only for themselves and not as a spokesman for the organization which they represented. This was at times frustrating for although the individual disagreed with the policy of the agency for which he worked, he did so unofficially saying that his opinion was not necessarily that of the administration. Although these drawbacks were frustrating at the time, they now seem minor by comparison when the matter is viewed as a whole.

The Office of Telecommunications Policy deserves recognition for the manner in which it prepared its first piece of legislation. In retrospect, OTP might have been more successful in the political process of decision making if it had previous experience in writing legislation. It should be pointed out that the OTP Cable Act legitimately questioned the present structure of how cable is regulated and in so doing proposed a long-range alternative plan. As was suggested in the study, certain concepts contained within the bill deserve consideration. Examples included alternatives to the multi-tier regulatory framework presently existing and the system of judicial review now operating in our courts. Hopefully, the study has shown that OTP has made the most extensive effort to date in suggesting the critical need for both cable legislation and a national communications policy governing cable. How well OTP succeeded in its efforts to bring about change will be evidenced when a cable bill is written.

No one can plot with certainty the pace of change from the present cable policies to those that have been proposed by OTP and others. What is important, however, is the direction that these changes will take.³⁰ If cable is going to compete with changing technology,

then this author believes a national policy should move toward the relaxation of federal controls and a more important regulatory role for state governments. Less duplication of regulation and an opportunity to compete in the marketplace will truly test cable's potential and salability.

Chapter 6

¹Frank J. Kahn, Documents of American Broadcasting (New York: Appleton-Century-Crofts, 1973), p. 1.

²William M. Capron, ed., Technological Change in Regulated Industries (Washington, D. C.: Brookings Institution, 1971), p. 10.

³Ibid., p. 10.

⁴Martin H. Seiden, Cable Television U.S.A. (New York: Praeger Publishers, 1972), p. 4.

⁵Capron, op. cit., p. 10.

⁶Report to the President: The Cabinet Committee on Cable Communications (Washington, D. C.: Government Printing Office, January 14, 1974), Introduction.

⁷Peter M. Sandman, David M. Rubin, and David B. Sachsman, Media: An Introductory Analysis of American Mass Communication (Englewood Cliffs: Prentice-Hall, Inc., 1976), p. 204.

⁸Report to the President: The Cabinet Committee on Cable Communications, pp. 29-47.

⁹Kahn, op. cit., p. 56.

¹⁰Henry Goldberg, former Legal Counsel for Office of Telecommunications Policy, opinion expressed in a panel discussion ("Territorial Imperative or Territorial Imperialism in Cable,"), June 4, 1975 (taped by this writer.) Permission to quote secured.

¹¹Erwin G. Krasnow and Lawrence D. Longley, Politics of Broadcast Regulation (New York: St. Martin's Press, 1973), p. 8.

¹²Sheila Mahoney, (Examination of the legality and constitutionality of proposals dealing with the problem of three-tier regulation. Mimeographed copy of unpublished paper given to the writer in June, 1975.)

¹³Letter of Transmittal from A. Mitchell McConnell, Jr., former Acting Assistant Attorney General, to James T. Lynn, former Director of Management and Budget, June 17, 1975, p. 6. Permission to quote secured.

¹⁴Statement by Robert Ross, former Legal Counsel for Office of Telecommunications Policy, in a personal interview, Washington, D. C., June 26, 1975.

¹⁵See Appendix B Section 303d of the proposed cable bill.

¹⁶Mahoney, op. cit., p. 6.

¹⁷Letter of Transmittal from Henry Goldberg, former Legal Counsel of Office of Telecommunications Policy, to William V. Skidmore, former General Legal Counsel of Office of Management and Budget, January 10, 1975, p. 20. Permission to quote secured.

¹⁸Krasnow and Longley, op. cit., p. 137.

¹⁹U. S., Congress, House, Committee on Interstate and Foreign Commerce, Subcommittee on Communications, A Staff Study, Cable Television: Promise Versus Regulatory Performance (Washington, D. C.: Government Printing Office, January 26, 1976), p. 84.

²⁰Ibid., p. 85.

²¹Ibid., p. 80.

²²Freedom of Information Digest, September-October, 1976, p. 1.

²³U. S., Congress, House, Committee on Interstate and Foreign Commerce, Subcommittee on Communications, Cable Television Regulation Oversight, Hearing 94th Congress, 2nd Session, May 17, 18, 19, 20, 24, 25, 26; July 20, 22, 27, 28, 29; August 3, 5; and September 22, 1976 (Washington, D. C.: Government Printing Office, 1976), p. 1103.

²⁴Ibid., p. 1104.

²⁵Ibid., p. 1104.

²⁶Ibid., p. 1192.

²⁷Broadcasting and Cable Television: Policies for Diversity and Change (New York: Georgian Press, Inc., 1975), p. 69.

²⁸Ibid.

²⁹Goldberg, op. cit., June 4, 1975.

³⁰Broadcasting and Cable Television: Policies for Diversity and Change, op. cit., p. 69.

APPENDIX A

OTP CONSENSUS AGREEMENT*

Local Signals

Local signals defined as proposed by the FCC, except that the significant viewing standard to be applied to "out-of-market" independent stations in overlapping market situations would be a viewing hour share of at least 2 percent and a net weekly circulation of at least 5 percent.

Distant Signals

No change from what the FCC has proposed.

Exclusivity for Nonnetwork Programming
(against distant signals only)

A series shall be treated as a unit for all exclusivity purposes.

The burden will be upon the copyright owner or upon the broadcaster to notify cable systems of the right to protection in these circumstances.

A. Markets 1-50. A 12-month pre-sale period running from the date when a program in syndication is first sold any place in the U. S., plus run-of-contract exclusivity where exclusivity is written into the contract between the station and the program supplier (existing contracts will be presumed to be exclusive).

B. Markets 51-100. For syndicated programing which has had no previous nonnetwork broadcast showing in the market, the following contractual exclusivity will be allowed: (1) For off-network series, commencing with first showing until first run completed, but no longer than one year. (2) For first-run syndicated series, commencing with first showing and for two years thereafter. (3) For feature films and first-run, non-series syndicated programs, commencing with availability date and for two years thereafter. (4) For other programing, commencing with purchase and until day after first run, but no longer than one year. Provided, however, that no exclusivity protection would be afforded against a program imported by a cable system during prime time unless the local station is running or will run that program during prime time. Existing contracts will be presumed to be exclusive. No pre-clearance in these markets.

*Broadcasting, November 8, 1971, pp. 16-17.

C. Smaller markets. No change in the FCC proposals.

Exclusivity for Network Programing

The same-day exclusivity now provided for network programing would be reduced to simultaneous exclusivity (with special relief for time-zone problems) to be provided in all markets.

Leapfrogging

A. For each of the first two signals imported, no restriction on point of origin, except that if it is taken from the top-25 markets it must be from one of the two closest such markets. Whenever a CATV system must black out programing from a distant top-25 market station whose signal it normally carries, it may substitute any distant signal without restriction.

B. For the third signal, the UHF priority, as set forth in the FCC's letter of August 5, 1971, p. 16.

Copyright Legislation

A. All parties would agree to support separate CATV copyright legislation as described below, and to seek its early passage.

B. Liability to copyright, including the obligation to respect valid exclusivity agreements, will be established for all CATV carriage of all radio and television broadcast signals except carriage by independently owned systems now in existence with fewer than 3,500 subscribers. As against distant signals importable under the FCC's initial package, no greater exclusivity may be contracted for than the commission may allow.

C. Compulsory licenses would be granted for all local signals as defined by the FCC, and additionally for those distant signals defined and authorized under the FCC's initial package and those signals grandfathered when the initial package goes into effect. The FCC would retain the power to authorize additional distant signals for CATV carriage; there would, however, be no compulsory license granted with respect to such signals, nor would the FCC be able to limit the scope of exclusivity agreements as applied to such signals beyond the limits applicable to over-the-air showings.

D. Unless a schedule of fees covering the compulsory licenses or some other payment mechanism can be agreed upon between the copyright owners and the CATV owners in time for inclusion in the new copyright statute, the legislation would simply provide for compulsory arbitration failing private agreement on copyright fees.

E. Broadcasters, as well as copyright owners, would have the right to enforce exclusivity rules through court actions for injunction and monetary relief.

Radio Carriage

When a CATV systems carries a signal from an AM or FM radio station licensed to a community beyond a 35-mile radius of the system, it must, on request, carry the signals of all local AM or FM stations, respectively.

Grandfathering

The new requirements as to signals which may be carried are applicable only to new systems. Existing CATV systems are "grandfathered." They can thus freely expand currently offered service throughout their presently franchised areas with one exception: In the top-100 markets, if the system expands beyond discrete areas specified in FCC orders (e.g., the San Diego situation), operations in the new portions must comply with the new requirements.

Grandfathering exempts from future obligation to respect copyright exclusivity agreements, but does not exempt from future liability for copyright payments.

APPENDIX B

A BILL

to amend the Communications Act of 1934 to create a
national policy respecting cable communications

Be it enacted by the Senate and House of Representatives
of the United States of America in Congress assembled:

TITLE I. SHORT TITLE, FINDINGS, DECLARATION
AND APPLICATION OF POLICY, AND DEFINITIONS

Short Title

Section 101. This Act may be cited as the "Cable
Communications Act of 1975."

Findings

Section 102. The Congress hereby finds:

- (a) that cable systems are engaged in interstate commerce through the origination, transmission, distribution, and dissemination of television, radio, and other electromagnetic signals, and have the technological capacity to provide a multiplicity of various communications services;
- (b) that the expansion, development, and regulation of cable communications, while a matter of importance to non-Federal governments, is also of appropriate and important concern to the Federal Government;

- (c) that the application of policies intended for broadcast communications is inappropriate for cable communications in that cable technology eliminates the channel scarcity found in television broadcasting, and thus facilitates the provision of programming and other communications services not otherwise available over broadcast facilities;
- (d) that, given technical and economic considerations, cable systems are likely to evolve as natural monopolies within their service areas;
- (e) that it is necessary and appropriate for the Federal Government to establish and support a national cable policy to assure the evolution of cable as a medium in its own right, open to all and free from both excessive concentrations of private power and government restrictions that would deny the public the full potential of cable services; and,
- (f) that a national and uniform policy is needed for cable to prevent the emergence of conflicting or duplicatory regulation by various governmental authorities.

Declaration of Purposes and Policy

Section 103. The Congress accordingly declares that the purposes of this Act are to:

- (a) initiate an evolutionary plan, pursuant to its powers to regulate interstate commerce, that will result in the adoption of a comprehensive national policy to allow the growth and development of cable communications, which will be responsive to, and serve the needs and interests of the public;
- (b) create a regulatory framework, as the first step in such an evolutionary plan, which would apportion the authority to regulate cable systems between the Federal Government and a non-Federal level of government, and would provide Federal standards and guidelines for the exercise of such regulatory authority be the several states or their political subdivisions;
- (c) assure that cable develops as a communications medium open to all, free of both excessive concentrations of private power and undue government regulation and control that would inhibit the communication of information and ideas, or otherwise deny the public the full benefit of the services to be provided or offered over cable systems;

- (d) assure that cable develops as a medium of communication in its own right, allowed to compete in the marketplace with other communications media, and is not, in relation to such other media, limited by regulation to an auxiliary or supplementary role in the provision of communications services to the public;
- (e) establish as the goal of the evolutionary plan initiated by this Act a policy that separates control of cable systems from control of the content of cable channels, so that such content is insulated from the local monopoly power of each cable system, as well as from the government regulatory power that otherwise would be necessary to prevent abuses of that monopoly power;
- (f) assure that cable is regulated at the Federal and the non-Federal levels of government in a manner designed to achieve the national policy goal of separating control of cable systems from control of the content of cable channels.

Application of Policy

Section 104. The provisions of this Act shall apply as follows:

- (a) Any cable system licensed by a cable licensing authority on or after the effective date of this Act shall be subject to its provisions and such orders, rules, or regulations as may be adopted pursuant thereto.
- (b) Any cable system licensed prior to the effective date of this Act shall be subject to its provisions, unless otherwise provided, and such orders, rules, or regulations as may be adopted pursuant thereto when its license period ends, or two years from the effective date of this Act, whichever occurs first.
- (c) A state, or any political subdivision or agency, board, commission or authority thereof, may adopt or continue in force any law, rule, regulation, order, or standard affecting cable systems, provided, that such law, rule, regulation or order or standard is consistent with the exclusive grants of authority under Title II and Title III of this Act, is not forbidden to any governmental authority under Title IV of this Act, and does not otherwise create an undue burden on the interstate commerce in cable communications.

Definitions

Section 105. For the purposes of this Act,

- (a) "Cable system" means a facility or combination of facilities under the ownership or control of a single person or entity and authorized to serve a particular geographic area or location, which consists of a primary control center used to receive and retransmit, store, process, and forward, or, to originate radio, television, or other electromagnetic signals; and transmission facilities, with multi-channel capacity, used to distribute or otherwise disseminate such signals over one or more coaxial cable or other closed or shielded transmission media from the primary control center to a point of reception at the premises of a cable subscriber; provided, that such term shall not be understood or construed to include such a facility or combination of facilities that:
 - (1) serves fewer than 500 subscribers; or
 - (2) serves only to retransmit the signals of radio and television broadcast stations, defined as local stations by the Commission.
- (b) "Cable channel" or "channel" means that portion of the electromagnetic frequency spectrum used in a cable system for the propagation of a radio, television or other electromagnetic signals.
- (c) "Multi-channel capacity" means the capacity of a cable system to transmit simultaneously the equivalent of five or more television signals.
- (d) "Closed transmission media" mean media having the capacity to transmit simultaneously electromagnetic signals over a common transmission path such as a coaxial cable, optical fiber, wire, waveguide or other such signal conductor or device.
- (e) "Cable operator" or "cable system operator" means any person or entity, or an agent or employee thereof, that operates a cable system, or that directly or indirectly owns an interest in any cable system; or that otherwise controls or is responsible for, through any arrangement, the management and operation of such cable system.
- (f) "Cable licensing authority" means any state, county, municipality, or any political subdivision thereof, or any agency, commission, board, or authority thereof, that is empowered by law to authorize by license, franchise,

permit or other instrument of authority, the construction and operation of a cable system within the jurisdiction of such agency.

- (g) "Person" means an individual, partnership, association, joint stock company, trust, or corporation.
- (h) "Interconnection facilities" means microwave equipment, boosters, translators, repeaters, communications space satellites or other apparatus or equipment used for the relay or transmission and distribution of television, radio, or other electromagnetic signals to a cable system.
- (i) "Cable subscriber" means any person who, for payment of a consideration, receives radio, television, or other electromagnetic signals distributed or disseminated by a cable operator or a channel programmer over a cable system.
- (j) "Channel programmer" means any person who leases, rents, or is otherwise authorized to use the facilities of a cable system for the origination of programming or other communications services over a cable channel, except the use of a channel by a cable subscriber to transmit an electromagnetic signal. Such term shall include a cable system operator to the extent that such operator, or person or entity under common ownership or control with such operator, is engaged in program origination.
- (k) "Origination" or "program origination" means the use of a cable channel by a channel programmer to distribute or disseminate any program or other communications service, except retransmission of the signals of a radio or television broadcast station by the cable operator or any person or entity under common ownership or control with such operator.
- (l) "Cable license" means the license, franchise, permit or other authorization issued to a cable system by a licensing authority.
- (m) The term "Commission" means the Federal Communications Commission.
- (n) The term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and territories and possessions of the United States.

TITLE II. AUTHORITY, RESPONSIBILITIES, AND FUNCTIONS
OF THE FEDERAL COMMUNICATIONS COMMISSION

Authority

Section 201. The Federal Communications Commission shall have exclusive authority to execute and enforce the provisions of this Title, and shall have exclusive authority to adopt appropriate rules, regulations, or orders respecting cable systems excluded from the provisions of this Act pursuant to subsections 105(a) (1) and (2).

Certificate of Compliance

Section 202. No person shall operate a cable system licensed after the effective date of this Act unless such person is issued a certificate of compliance by the Commission.

Responsibilities

Section 203. In order to carry out the purposes of this Act, the Federal Communications Commission shall--

- (a) grant certificates of compliance upon its determination that the applicant for such certificate is in compliance with the rules and regulations of the Commission, and holds a license to construct and operate a cable system issued by a cable licensing authority pursuant to Titles III and IV of this Act;
- (b) adopt or continue in force such appropriate rules, regulations and orders as:
 - (1) assure that cable system operators conform to technical standards necessary to promote the compatibility and interoperability of cable systems, the compatibility of the receivers or other terminal equipment connected to such systems by cable subscribers, and to prevent harmful interference to radio communications;
 - (2) assure that cable subscribers may determine in advance of reception, the nature of programming originations and may, at their request, be provided at reasonable cost appropriate means to preclude, avoid, or control intelligible reception of program originations such subscribers do not wish to receive;

- (3) limit the ownership or control of cable systems, including such systems excluded from the provisions of this Act pursuant to subsections 105(a) (1) and (2), by telephone common carriers providing telephone exchange or telephone toll services within the meaning of subsections 3(r) and (s) or the Communications Act of 1934, in the area to be served by such cable systems; provided, however, that such telephone common carriers may provide to cable system operators, pursuant to a tariff or other lawful schedule of charges and conditions, transmission facilities used to distribute or disseminate electromagnetic signals from the primary control center of a cable system to cable subscribers.

Functions

Section 204. The Federal Communications Commission may--

- (a) establish by rule or regulation the terms and conditions respecting the retransmission of radio and television broadcast signals by cable system operators or channel programmers; provided, however, that the Commission shall have no authority to determine or enforce property rights in broadcast programming under Federal or state copyright laws;
- (b) adopt rules or regulations necessary to assure cable system operators reasonable access at equitable rates to poles, ducts, conduits, and other such rights-of-way owned or controlled by common carriers, public utilities, or other persons, for the purpose of constructing, operating, or maintaining the transmission facilities of a cable system;
- (c) adopt rules or regulations respecting the equal employment opportunities to be afforded by cable system operators;
- (d) adopt rules or regulations limiting the common ownership or control of cable systems and television broadcast stations or networks in the areas served by such stations or networks, provided, however, such ownership or control shall not be prohibited when the operators of such systems provide only the number of radio and television broadcast signals required for carriage by the Commission, one public access channel, as specified in section 401(b),

and program originations on one channel, and make the balance of the channel capacity of such systems available for lease to channel programmers having no ownership affiliation with the cable operator;

- (e) adopt rules or regulations respecting the submission of reports to the Commission by cable operators.

TITLE III. CABLE LICENSING PROGRAM: AUTHORITY, STANDARDS AND REQUIREMENTS

Authority

Section 301. A cable licensing authority shall have exclusive authority under state law to execute and enforce the provisions of Section 303 and adopt all other rules, regulations, and procedures respecting those activities characteristic of cable system construction and operation as are consistent with the provisions of this Act, and are not exclusively reserved to the Commission by Title II, or forbidden to an executive agency of the United States, a State, or any agency thereof by Title IV of this Act.

Cable License

Section 302. No person shall construct or operate a cable system unless such person is issued a license by a cable licensing authority pursuant to the standards and requirements of this Title.

Licensing Standards and Requirements

Section 303. The licensing authority shall--

- (a) adopt procedures for the issuance, revocation, or denial of cable system licenses, and for all proceedings incidental thereto, including but not limited to, procedures providing for adequate public notice of any such proceeding, and providing for public hearing, including the opportunity to submit written comments, prior to disposition of any such proceeding;
- (b) adopt procedures providing for the imposition of sanctions upon a finding that the terms and conditions of the cable license have been violated;

- (c) grant or renew licenses that are non-exclusive and issued for limited periods of time of no less than five years and no more than twenty years;
- (d) assure that a licensee is qualified to construct and operate a cable system; provided, that a licensing authority shall not grant a license to any person, including entities under common control, who either directly or indirectly owns or controls access to interconnection facilities serving cable systems, and also supplies programming to channel programmers; unless such person certifies that either interconnection services or programming supply services will not be provided to the cable system for which such person seeks a license;
- (e) assure that cable systems constructed or substantially modified after the effective date of this Act are constructed with channel capacity of at least one equivalent channel for every channel intended to be used by the cable operator for retransmission of the signals of television broadcast stations or for program originations by such operator.
- (f) assure that each cable operator with channel capacity in excess of the capacity specified in subsection (g) (2) of this section makes such capacity available for lease to channel programmers;
- (g) require that channel capacity available for lease to channel programmers having no ownership affiliation with the cable operator be increased in proportion to the total channel capacity of the cable system; provided, that:
 - (1) the formula, or other terms and conditions, for increasing such leased channel capacity shall be set out in the cable system license and shall be reasonably related to the use of, and unfulfilled demand for, such capacity; and
 - (2) the cable operator shall have available, at all times, sufficient channel capacity to retransmit the number of radio and television broadcast signals required for carriage by the Commission, and provide a public access channel, as specified in Section 401(b), and shall be permitted to have no less than two channels available for program originations by the cable operator.
- (h) assure that each cable operator publishes a schedule of rates, and all changes thereto, setting out the charges, terms, and conditions for the use of channels or time on

those channels for program originations, and the access to and use of all instrumentalities, facilities, apparatus and services incidental to such use of channels or time, which do not unreasonably discriminate among comparable uses or classes of channel programmers, provided, however, that nothing herein shall be construed to prevent a cable operator from establishing, as separate classes of channel programmers, persons engaged in educational, eleemosynary, non-profit, governmental, or similar non-commercial activities, and offering lower rates to such classes of channel programmers;

- (i) require the operator of a cable system, who also functions as a channel programmer on such cable system, to establish a separate corporation or entity to perform such function, which corporation or entity shall be accorded no more favorable terms and conditions respecting program originations than are accorded a channel programmer having no ownership affiliation with the cable operator;
- (j) assure that the cable system operator does not prohibit the cable subscriber from attaching or connecting to the cable system receiving or terminal equipment of any type, except upon a showing by the operator that the Commission has determined such equipment to be technically incompatible with the operation of a cable system.

TITLE IV. LIMITATIONS ON GOVERNMENT AUTHORITY

Section 401. No executive agency of the United States, including the Commission, and no State or political subdivision or agency thereof, including a cable licensing authority, shall:

- (a) require or prohibit program originations by a cable operator or channel programmer, or impose upon such operator or programmer any restrictions or obligations affecting the content of such program originations, including rights of response by any person, opportunities for appearances by candidates for public office, or requirements for balance and objectivity; provided, that nothing herein shall be deemed to affect the criminal or civil liability of channel programmers pursuant to the laws of libel, slander, obscenity, incitement, invasions of privacy, false or misleading advertising, or other similar laws, except that the cable operator shall not incur such liability for any program originated by a channel programmer having no ownership affiliation with the cable operator;

- (b) require the reservation or dedication of cable channels or time on such channels, to particular persons or uses, except that a cable licensing authority may require the reservation of one standard television channel and require a cable system operator to make time available free of charge on that channel upon the request of any person for any noncommercial or nonprofit purpose, pursuant to such terms and conditions, consistent with subsection (a) of this Section, as the cable licensing authority shall by regulation adopt;
- (c) impose a special tax or other revenue raising measure upon cable operators, channel programmers, or cable subscribers solely by reason of the operation or use of a cable system, provided, however, that reasonable fees may be imposed on cable operators upon issuance of certificates of compliance by the Commission or issuance of licenses by cable licensing authorities;
- (d) adopt any rule, regulation or policy prohibiting or limiting the ownership or control of cable systems by persons having an ownership interest in a newspaper or magazine publishing activity, or by persons having an ownership interest in other cable systems, when the operators of such systems provide only the communications services specified in section 303(g) (2), and make the balance of the channel capacity of such systems available for lease to channel programmers having no ownership affiliation with the cable operator;
- (e) establish or adopt specifications respecting the technical characteristics or channel capacity of cable systems, or the technical characteristics of electromagnetic signals disseminated over such systems, except as otherwise provided by section 203(b) (1) or 303(3), or as may be incidental to any rule or regulation adopted by the Commission pursuant to section 204(a);
- (f) establish, fix, or otherwise restrict the rates charged channel programmers by cable operators for the use of channels or time on such channels for a period of ten years after the effective date of this Act, or the rates charged advertisers or cable subscribers by any channel programmer for the sale of time or for any program origination; provided, however, that the licensing authority may establish reasonable fees, rates, or other charges to be imposed upon cable subscribers by the cable

operator for providing services other than program originations to subscribers or for cable system installation, connection, or maintenance at the premises of the subscriber.

TITLE V. MISCELLANEOUS

Right of Action

Section 501. Any person adversely affected or aggrieved by any act, practice, or omission of a cable licensing authority or cable operator may bring an action in a court of competent jurisdiction to challenge such act, practice, or omission, on the ground that it does not comply with the provisions of this Act or the provisions of a statute, ordinance or law of a State, or political subdivision thereof, intended to implement or apply the provisions of this Act.

Federal Court Jurisdiction

Section 502. The district courts of the United States shall have jurisdiction of any action commenced pursuant to section 501, without regard to the citizenship of the parties or the amount in controversy, provided that judicial review of actions of the Federal Communications Commission pursuant to this Act shall be in accord with section 402 of the Communications Act of 1934, as amended.

Privacy of Communications

Section 503. In order to protect the privacy and security of cable communications, no person shall intercept or receive program originations or other communications provided by means of a cable system unless authorized by the cable operator, the program originator or other sender of the communication; and no cable operator, or channel programmer, shall disclose personally identifiable information with respect to a cable subscriber or the programming or other communications service provided to or received by a subscriber by means of the cable system except with the consent of the subscriber, or except pursuant to a court order authorizing such disclosure. If a court shall order disclosure, the cable subscriber shall be notified of such order by the cable operator or other person to whom such order may be directed, within a reasonable time before the disclosure is to be made.

Report to the Congress

Section 504. The Commission shall submit annually to the Congress a full and comprehensive report on the status of cable communications in the United States, including information pertinent to the achievement of the national policy goals of separating control of cable systems from control of the content of cable channels, together with any recommendations which the Commission may consider appropriate; provided, that the report required by this section may be made a part of the report required to be submitted by section 4(k) of the Communications Act of 1934, as amended.

Effective Date

Section 505. This Act shall be effective eighteen months following its enactment.

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