

REGULATORY POLITICS:
STATE LEGISLATURES AND THE
CABLE TELEVISION INDUSTRY

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Abstract

Decisions by state governments on whether or not to regulate cable television, and if so, in what form, have emerged as political and legislative issues in several states. Five representative case studies illustrate the various factors which have influenced legislative decision-making processes, including the impact of strong personalities and bureaucratic politics; the role of media exposure of industry "misbehavior"; the involvement of governors and study groups in cable politics; intervention of competing industry groups; and the ability of the cable industry and municipalities to withstand or shape state regulation.

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The following is a complete list of this report series.

- P-78-2 Regulatory Politics: State Legislatures and the Cable Television Industry, Konrad K. Kalba, Larry S. Levine, and Anne E. Birinyi, August 1978.
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1.0 INTRODUCTION

During the late 1960's and early 1970's, regulation of cable television was considered by a growing number of state legislatures. In several cases, broad regulatory statutes were adopted; in others, more limited provisions (e.g. the extension of existing theft of service penalties to cable). As of March 1978, 11 states -- New York, New Jersey and Minnesota among them -- have initiated regulation of cable TV systems at the state level and at least 25 others have enacted laws affecting cable television.¹

However, several states, including California and Wisconsin, have to date declined the opportunity to assert broad regulatory powers over the cable industry. These divergent developments raise several instructive questions concerning both the past and future course of state involvement in cable television regulation.

First, why have some states chosen to regulate cable television? Is it because of the legal right to do so, given that cable television makes use of public roads and rights of way? Is it due to the economic judgment that cable TV companies operate as natural monopolies? Is it for the purpose of enlarging the number of appointments or budgets which they control? Or is it in response to the pressures of consumers, competing industries or cable operators themselves for a regulatory presence?

Second, why have other states, faced with the regulatory option, chosen not to exercise it; or have only exercised it in a limited manner by assigning

¹ For a review and analysis of these various laws, see Philip Hochberg, The States Regulate Cable: A Legislative Analysis of Substantive Provisions, Harvard University Program on Information Resources Policy, Publication P-78-4, July 1978. The eleven states with broad regulatory powers are Alaska, Connecticut, Delaware, Hawaii, Massachusetts, Minnesota, Nevada, New Jersey, New York, Rhode Island and Vermont.

certain regulatory functions to municipalities or passing legislation that does not call for elaborate regulatory overview?

And third, why have states which have initiated regulation selected one form of regulation over another (e.g. the creation of a new cable TV regulatory agency vs. assignment of regulatory responsibilities to an existing public utilities commission)?

These are the major questions that underlie the following five case studies of state cable TV regulation. In proposing answers to some of them, we hope the study will provide a useful source of information for future legislative and regulatory decisions.

1.1 Pressures for State Regulation

Answers to some of the questions posed above can be hypothesized. Traditionally, legislatures at all levels have undertaken regulation when there appeared to be a political demand for it and a legal basis for asserting jurisdiction. In the case of broadcasting, the demand stemmed from interfering signals which disturbed both radio operators and listeners, and the legal basis from public trusteeship over the spectrum. In the case of public utilities, pressure for regulation came initially from utility users, who complained of excessive rates, and the legal basis from Supreme Court decisions that industries imbued with the public interest could be regulated.

Similarly, the classical reason for establishing a regulatory agency is that neither legislatures nor the courts can develop the expertise or afford the time to address the detailed, case-by-case requirements of industry regulation.

Our aim in this study was both to check these traditional assumptions and to amplify on their application to the cable television context. For example, cable television differs from previous regulatory arenas in the sequence with which different levels of government have imposed regulation. Historically, the advent of state regulation (at least in the case of public utilities) followed municipal regulation and preceded federal regulation. In the cable television case, both federal and municipal regulation were present by the time that state legislatures were considering whether to establish comprehensive regulation. Moreover, cable television systems do not transmit over the spectrum as do broadcasting stations; nor have they been generally recognized as "public utilities", although they do make use of public streets. How have these factors influenced the decision to regulate or not to regulate?

An equally important question is whether regulation of cable television at the state level has been instigated by outcries concerning abusive industry practices? This has frequently been the spark that has given life to assertions of regulatory jurisdiction in the past. However, from our previous familiarity with cable TV, we know that legislators, and those calling on them to act, were often as concerned with the future possibilities and impacts of the cable medium as with specific past or ongoing abuses. Because of its particular technological potential and/or the political climate of the years during which the states scrutinized cable most intensively, the regulatory thrust in the cable TV case stemmed in some cases, at least, from a desire to prevent or insure certain future developments and not only from the desire to correct specific abuses. Yet, historically, state regulation in other industries has been motivated by "corrective" and not "preventive" pressures.

More specifically, we wanted to determine how the pressures for state regulation arose. While it is possible that legislators have analyzed the

desirability of state cable regulation on the basis of their individual political philosophies and staff resources, presumably they were influenced by external viewpoints as well. If so, to what views have legislators been most exposed and which ones have had the greatest effect? Has the decision to regulate or not to regulate been responsive to the pressures of consumer groups, the cable industry, competing industries, government officials, or academic experts?

Finally, we wanted to examine how these state legislatures which decided to regulate chose the form that this regulation would take. Why did some legislatures choose to place jurisdiction over cable television in existing Public Utilities Commissions (PUC's), while others created new agencies? In states where regulation seemed inevitable, the cable industry has generally fought for the establishment of a separate cable television commission. Was it this factor that influenced Massachusetts, Minnesota and New York? Similarly, why have some states preempted municipal jurisdiction over cable television, while others have chosen to exercise regulatory responsibilities jointly with the localities?

1.2 A Focus on Legislative Dynamics

Our primary focus in this report will be on how legislatures -- rather than executive agencies or the judiciary -- have responded to cable television. The reason for this particular perspective is that legislatures often reflect the dynamics of governmental decision-making more fully than other state bodies. Although governors can ratify or veto legislative decisions, and the courts can uphold or overturn them, it is in the legislatures that the political pressures for and against state regulation are, as a rule, experienced most intensely

and where proposals for the state's official response to these pressures are drafted, deliberated, amended, and voted on.

By the same token, we recognize the limitations of this perspective. State legislatures do not act in a vacuum vis-à-vis other branches of government in deciding whether or not to regulate cable television. Their options may be constrained by the previous or prospective decisions of the Courts, the Governor, the U.S. Congress, or the Federal Communications Commission. Consequently, where their role may have influenced legislative action or inaction, we will take into account these other government agents.

It should also be noted that conclusions arrived at on the basis of legislative behavior will not necessarily apply to how state regulatory agencies respond to cable television. Frequently, the constituencies to which legislators may be responsive do not monitor an issue such as cable television once it has been placed under regulatory supervision. The legislators involved in debates over statutory provisions themselves turn to other issues. And regulatory agencies can develop "a life of their own" in addressing subsequent issues.

At the same time, it is the legislative decision to regulate, and to regulate in a particular manner, that sets the stage for what will follow. A statute can define regulatory responsibilities in specific or vague terms. It can place requirements or restrictions (e.g. of expertise, political affiliation, etc.) on the composition of a regulatory commission; or fail to place such requirements or restrictions. It can endow the agency with ample or limited budgetary resources. In each of these ways, it can shape the relationship between cable regulators and the cable industry, which is presumably one of the reasons why so much political attention is placed on legislative decisions in the first place.

In the following case studies we will focus on the dynamics of this legislative decision process. This will include the internal dynamics of state legislatures (i.e. committee leadership, voting procedures, etc.) and the interaction between legislators and various external constituencies (i.e. industry representatives, municipal officials, etc.). It is only by describing these interactions as they occur within a particular legislature that the essentially creative nature of the process can be understood. The output of legislatures in the cable television field (as we suspect is true of other areas) depends on a blend of political resources, individual leadership, statutory precedents, procedural tactics, limited information, and compromise between diverse and often conflicting viewpoints.

We have tried, however, to go beyond the conclusion that "all factors matter" in our case studies. Where our evidence suggested the dominance of one factor over another, we have so indicated. However, we acknowledge the difficulties of arriving at indisputable conclusions when dealing with dynamic decision processes. Do personalities or underlying forces shape legislative policy? Given the legislative context, was the decision arrived at inevitable or simply one of numerous options? Were the consequences of a legislative decision consciously intended or are they unintentional? And to what extent are statements by stakeholders (e.g. at a hearing or in an interview) representative of their real perceptions or motivations?

Our conclusions have been developed with a healthy respect toward these research dilemmas. The assertions we make about the relative importance of decision-making factors and events have been confirmed by at least two sources from different constituencies. However, we have also carefully documented our evidence, so that readers of this report may formulate their own assessments.

1.3 Selection of the Cases

The case studies that follow do not represent a random sample of all states, nor of the states that have already decided to regulate. Given the primary purpose of our study, which is to examine how state regulation has evolved to date so as to better inform future decisions (at the state and other levels), we decided to focus on a more selective sample.

First, we wanted to look at cases where "comprehensive" state regulation was considered. By comprehensive, we mean the establishment of a multi-purpose regulatory authority in an existing or new agency, and not merely the passage of a law pertaining to a particular feature of rendering cable service (e.g. franchising, theft of service, taxation, etc.). Since we assumed that proposals for comprehensive regulation were likely to elicit a wider spectrum of inputs to the legislative process, we thought these cases would provide a fuller sense of the factors involved in state decision-making.

Second, we wanted to examine states that had instituted regulation as well as ones that had not. In other words, we have assumed that cases resulting in non-regulation are as important in assessing legislative dynamics as those where comprehensive regulation was adopted. Also, we were interested in examining at least one state where regulatory authority was placed in an existing agency (i.e. PUC) and one where a new commission was created.

And third, we decided to concentrate on the more populated states, although not exclusively so. As in the case of the first criterion, our reasoning was that the larger states are likely to have devoted more attention to the cable regulation issue and are likely to reflect a broader array of factors that influence the decision to regulate or not to regulate. In addition, their decisions are more likely to be imitated by other states than those of a random sample.

The states we selected were California, Connecticut, New Jersey, New York and Wisconsin. Of these, three (Connecticut, New Jersey and New York) have adopted state regulation, one by vesting regulatory authority in the PUC (Connecticut), another by creating a new office within the PUC (New Jersey), and the third by instituting an entirely new agency (New York). In the two remaining states, legislation for state regulation has been proposed but has not been adopted to date. In one case (Wisconsin), the decision to allocate regulatory responsibility to the PUC fell short by a single vote in the Assembly. In the other (California), bills calling for comprehensive state regulation have been introduced periodically in the legislature but none has come close to being adopted.

Taken together, these five states demonstrate how state regulation was first adopted (Connecticut), the influence of strong personalities and bureaucratic politics on legislative decision-making (New York, California), the role of media exposure (New Jersey), the involvement of governors and study groups in cable politics (Wisconsin, New Jersey, New York), the ability of the cable industry and municipalities to withstand state regulation (California, Wisconsin), and the intervention of competing industry groups (Connecticut, New York). In the aggregate, the cases also reflect the richness and complexity of political and legislative dynamics that are often associated with the regulatory issue at the state level.

Our conclusions about factors that appear to be most important in determining the course of state decision-making are presented in Section 7 of this report.

2.0 CONNECTICUT: THE UTILITY APPROACH

Connecticut was the first state to assert regulatory jurisdiction over cable television. Why it did so is not immediately apparent, for there was no cable television in Connecticut when the issue first arose in the 1950's, none when it was initially resolved in 1963, and only a handful of operating systems ten years later. Nonetheless, a legal technicality brought the cable issue to the foreground and resulted in the nation's first comprehensive regulatory statute at the state level.

The origins of governmental uncertainty over cable television regulation in Connecticut can be traced back to 1956 when the city of Torrington awarded a cable franchise to Litchfield County Television Company, which was already a local operator of master antenna television (MATV) systems. Although the city franchise provided for the use of air space over streets and highways, the Southern New England Telephone Company (SNET) subsequently refused access to the utility poles it shared with the electric companies. Since SNET acted as sole arbiter for pole rental purposes, Litchfield appealed to the PUC. This in turn resulted in a state Attorney General Opinion, to the effect that the PUC had no authority over entities not specifically designated as public utility companies, and that such entities could consequently not gain access to public utility facilities unless the request to the PUC originated with a public utility company.²

The fact that SNET never made such a request suggests it was not interested in facilitating cable development under these circumstances in the state. The telephone company was at that time concerned about the legal

² See David L. Nicoll, "Connecticut Cable and Public Utility" (Master's thesis, Annenberg School of Communications, Philadelphia, Pa., 1975), pp. 41-42.

liability that could result from providing pole space. Malcolm Andrews of SNET commented that "in those days, the company was very concerned with how they could control clearances and safety conditions if small 'fly-by-night' companies went into the CATV business."³

In addition, the telephone company itself was interested in becoming involved with cable TV at that time. Malcolm Andrews has said that "some consideration was given to our getting directly into the CATV business."⁴ Another avenue open to the telephone company was a leaseback arrangement,⁵ and in fact SNET offered in 1956 to provide leaseback service to Litchfield County TV, but didn't have a tariff on file for such a service until 1962.⁶ Litchfield TV declined the offer.

In the early 1960's, Matthew Jenetopulos, an MATV operator in New Haven, petitioned the city to construct poles for a cable TV system. About the same time, another MATV firm, Community TV Systems, Inc., headed by William Shlank, was tentatively awarded a franchise in Guilford, while authority to operate in Waterbury was given to still another applicant. These companies were, however, removing the matter from New Haven jurisdiction.

³ Letter to Konrad K. Kalba from Malcolm Andrews, Administrator of Environmental Affairs, Southern New England Telephone Company, dated January 3, 1978.

⁴ Ibid. AT&T had signed a consent agreement with the Justice Department prohibiting the telephone company from engaging in any activity which was not regulated by either state or federal common carrier tariff (United States v. Western Electric and American Telephone and Telegraph, Civil Action 17-49, District Court of New Jersey, 1956), but according to Mr. Andrews, it was not clear at that time from the wording whether or not CATV was included in the ban.

⁵ For a general discussion of the telephone company leaseback controversy, see Kas Kalba, et al, Separating Content from Conduit: Market Realities and Policy Options in Non-Broadcast Cable Communications (Cambridge, Ma.: Kalba Bowen Associates, Inc., September, 1977), pp. 98-105.

⁶ Telephone review by David Nicoll, Cable Television Specialist at the Cable Television Bureau, Federal Communications Commission, January 9, 1978.

As a result, Community TV and Jenetopulos' firm, TV Antenna Systems, Inc., joined together to request use of SNET poles. In a 1962 letter to Community TV, the General Commercial Manager of SNET stated that partial assignment of utility poles by the telephone company to cable operators was impossible because the use of public highways is granted by the state only to utilities whose presence is considered a public necessity. These specific statutory rights could not be transferred, wholly or in part, to any transferee which was not so classified. Furthermore, he stated that the use of a highway by a private party for gain impinged on the title of property owners concerned with lands adjoining public highways.⁷

The ensuing legal confusion over cable's ability to utilize utility poles led to two proposals being presented to the 1963 session of Connecticut's General Assembly. A.B. 3883 would have empowered Community TV to erect its own poles and run the required cables, or to rent poles from any individual or corporation. The bill also charged the PUC with maintaining safety standards.⁸ A.B. 3918, by contrast, would have authorized the PUC to permit any company owning poles on state-held rights of way to lease space to any "specially authorized entity".⁹

The bills were assigned to the Standing Committee on Public Utilities and a hearing was held March 7, 1963. Counsel to Community TV agreed with PUC supervision of safety factors, but argued against public utility regulation of cable companies on the grounds that cable TV was not a necessity and therefore should not be subject to PUC rules. He also assured the Committee that his client did not seek an exclusive franchise over any area in the

⁷ Nicoll, op. cit., p. 43.

⁸ A.B. 3883, January 1963.

⁹ A.B. 3918, January 1963.

state.¹⁰ However, Counsel to Televents Corporation, at that time the second largest multiple system operator (MSO) in the U.S., argued against any special authorization for Community TV. The attorney for Hartford Electric Light Company opposed the legislation on the grounds of complex service problems, threat to public safety, and inappropriateness of the legislative mandate to require a utility to rent its poles to specific entities.

Two substitutes for the original bills were presented when the Committee reconvened on April 25, 1963. The first was prepared by Counsel to Community TV and included a specific "non-exclusivity" provision. The second was offered by Counsel to New Haven Cable Co., another potential franchisee, and was endorsed by Televents as well as another prospective cable company. It authorized any municipality to rent space to cable companies on utility poles. The counsel to the PUC also appeared at this meeting, but asserted no position on the proposals. Nonetheless, he urged clarification of the role the legislature wished the PUC to take, noting the agency's total lack of experience with cable.

In executive sessions held in April and May of 1963, A.B. 3883 was dropped and A.B. 3918 was revised to specify total preemption of cable regulatory authority by the state.¹¹ The legislature adopted this amended bill without objection on May 27, 1963. However, the legislation that was passed as P.A. 425 was little more than an enabling act. For example, the act did not classify cable systems as public utilities, left rate regulatory authority unclear, and did not define what administrative authority the

¹⁰ But, as Nicoll has pointed out, the economic practicalities of cable system start-up costs, coupled with the biennial meeting of Connecticut's legislature, would probably give Community TV (or any other cable operator receiving a franchise) at least a seven-year head start over potential competitors for the same service area (Nicoll, op. cit., p. 45).

¹¹ Nicoll, op. cit., p. 47.

PUC would have over cable operators. It soon became evident that further legislation was needed to clarify the status of cable regulation.

At subsequent Committee hearings, amendment of Connecticut's General Statutes to include cable companies in the list of public utilities was supported by a representative of the Connecticut theatre owners and by the PUC's counsel. Both agreed that the primary motivation was to assure PUC control over rate regulation.¹² By contrast, opposition to public utility regulation was voiced by TelePrompter and the National Cable Television Association, who argued that cable was purely an entertainment medium and as such was not an essential utility. Counsels for both organizations also noted that cable was subject to direct competition from other media and therefore did not require public utility regulation.¹³

Despite these counter-arguments, the Legislature voted to include cable television systems among the state's public utilities on May 19, 1965. Six days later, the Senate confirmed the decision. In the process, cable systems were assured legal access to utility poles; they also became subject to PUC rate regulation and to the taxation requirements and exemptions accorded to other public utilities.¹⁴

¹² Another possible impetus to the adoption of public utility status for cable may have been taxation. Howard Hausman, former chairman of the PUC, has noted the value of bringing "CATV companies under Chapter 211 of the General Statutes, which imposes a gross receipts tax on public service companies. Such gross receipts taxes...are a major source of state revenues." Statement at the Hearing of Public Utilities Subcommittee of the Committee on Bank and Regulated Activities, June 6, 1973. However, no mention of taxation was found in the hearings.

¹³ Nicoll, op. cit., p. 54.

¹⁴ For an analysis of the tax implications of Connecticut's decision, see our treatment of this subject in a companion report: Konrad K. Kalba, Larry S. Levine and Philip R. Hochberg, Taxation, Regionalization and Pole Attachments: A Comparison of State Cable Television Policies, Harvard University Program on Information Resources Policy, Publication P-78-5, August 1978.

Connecticut's decision to establish state regulation is significant not only because it was the first, but also because it reflects how little attention was given to the details of cable regulation, compared to subsequent legislative deliberations in other states. The legislation enacted did not impose any special service or technical requirements on cable systems, nor any special franchising procedures. It simply assumed that the PUC would know what to do, based on its experience with telephone, electrical, water and other utility services. Just as municipalities often approached cable television during the 1960's as simply a licensing chore akin to the franchising of laundromats or drive-in theaters, Connecticut approached it as simply another utility. However, it took the PUC three years to process applications for cable franchises because of the massive paperwork generated by the hearing process. The awards finally decided upon were contested for three more years by disappointed applicants who claimed that the PUC had not made clear the criteria for awards with reference to geographical responsibility and broadcasting cross-ownership.¹⁵

In addition, the Connecticut case reflects how the outcome of legislative deliberations can be shaped by competing interests. Aspiring cable operators desperately needed the legislature to confirm their access to utility poles. But their failure to coalesce behind a single bill in 1963 was a sign of their limited strength and internal dissension in the face of at least three other forces (i.e. movie theaters, telephone company and PUC) who felt that if regulation was to come, it should be comprehensive. Cable

¹⁵ Another cause of the delay in beginning cable service in Connecticut was the FCC freeze on importation of distant signals in 1966, which tempted applicants to hold their franchises for possible future sale.

operators gained access to utility poles in Connecticut, but at the expense of rate regulation and the other trappings of public utility status.¹⁶

A third noteworthy implication of the Connecticut case is that municipalities took no significant part in the legislative deliberations. Most likely, this can be ascribed to the fact that Connecticut municipalities had had little, if anything, to do with cable, with a few scattered exceptions (e.g. Torrington, New Haven). As a result, Connecticut adopted a single-level form of regulation, an approach that would be later replicated in Alaska, Hawaii, Nevada, Rhode Island and Vermont (but not elsewhere as of 1978).

¹⁶ We are not here commenting on the overall advantages or disadvantages of rate regulation or public utility status for the cable TV industry, but simply reflecting the widespread conviction within the industry at the time legislation was passed that such regulation would be burdensome.

3.0 NEW YORK: A SEPARATE COMMISSION

New York State's decision to assert jurisdiction over CATV corporations is interesting in at least two respects. First, the state seriously considered two distinct forms of CATV regulation -- public utilities jurisdiction and regulation by a separate cable commission -- eventually settling on the latter. And second, the history of the state legislature's attention to CATV regulation is intertwined with the personality, career interests, and political acumen of one legislator, Robert F. Kelly, former Republican Assemblyman from Brooklyn and the first Chairman of the New York Cable Television Commission.

3.1 Assemblyman Kelly's Role

Robert Kelly became Chairman of the New York State Assembly Committee on Corporations, Authorities and Commissions in 1969 during reorganization of the Assembly's committee structure.¹⁷ This committee was responsible for overseeing the operations of a myriad of special corporations and commissions, including the Public Service Commission (PSC). Subsequent to his appointment, Kelly began an extensive study of ways in which the state

¹⁷ Neil Serafin, "The Growth of State-Wide Regulation of CATV by the State of New York", (Master's thesis, State University College of Arts and Sciences, Genesco, N.Y., 1974), p. 30.

could -- if it chose to -- assert jurisdiction over CATV corporations.¹⁸

Kelly attributes his own early interest in CATV to three factors. New York City legislators were receiving complaints from their constituents about not being able to receive CATV service. These complaints were being passed on to Kelly. A second factor was that:

legislators from many parts of the state raised questions on the competence and integrity of franchise applicants and the capacity of localities to cope with the sophisticated sales pitch of cable firms seeking what amounted to an option on "futures" of the infant industry.¹⁹

This lack of confidence in localities would eventually figure in the final report of the Kelly Committee as well as the legislation proposed by the

¹⁸ This was not, however, the first time the legislature had considered the issue. In the 1967 and 1968 legislative sessions, identical bills were introduced which would have vested jurisdiction in the N.Y. PSC (see Bills A.B. 5977 and A.B. 5850 in the Appendix). These were quite simple bills which, in the manner of the Connecticut legislation, merely defined CATV as a public service company, thereby applying all existing public service regulations to CATV. Both franchising and rates would have been set at the state level with little substantial local involvement. Both bills were submitted to the Committee on Public Service (the pre-1969 equivalent of the Committee on Corporations, Authorities and Commissions) where they remained without further action.

The exact fate of these bills is not clear, since prior to 1975 there were no "sunshine laws" in New York State. Committee meetings were not open to the public and there were no transcripts of Committee meetings. Hence, no records are available on the processing of bills which reached Committee but were never reported out. Bills do not have to be acted on by Committees, and therefore the two bills in question could have been voted on by the Committee (i.e. voted not to be reported out) or might never have reached the full Committee for a vote. Nonetheless, as will be outlined in sections below, the Chairman of each Committee had enormous power to determine what was on the Committee's voting agenda, and therefore what could be voted out by the Committee. Telephone interview with Frank Mauro, Deputy Director of Program Development in the N.Y. Assembly Program and Committee Staff, September 9, 1977.

¹⁹ The New York State Assembly Standing Committee on Corporations, Authorities and Commissions, Cable Television: A Public Service - A Public Concern, Final Report, April 15, 1972, Legislative Document #31, p. 1 (hereinafter cited as "Kelly Report").

report. Finally, a third factor was the Save Free TV Campaign, which was supported by the television industry and theatre owners. This late-sixties campaign was evident to most theatre-goers by the glaring marquees and theatre lobby displays that asked patrons to write their legislators to "Save Free Television". The campaign, organized by the National Association of Theatre Owners (NATO) in direct response to the FCC mandatory cablecasting requirements and broadcast subscription programming rules,²⁰ appears to have had an effect on the New York State legislature. Kelly asserts that pressure was brought to bear on legislators to "enact state control of the cable industry".²¹

This last consideration was reflected in the subsequent introduction of the "Stavisky Bills". Assemblyman Stavisky introduced bills in the 1969, 1970 and 1971 legislatures, which would have vested jurisdiction over CATV corporations in the PSC. In addition, all three bills would have effectively prohibited pay cable operations. Bills A.B. 4646 (1969) and A.B. 4202 (1971) would have limited cable program origination to public service programming, and Bill A4465 (1970) would have required that all CATV programming be provided to subscribers for a single fixed fee (see the Appendix: Bill History - New York State Cable Television Regulation). However, all three of these bills were referred to Kelly's Committee on Corporations, Authorities and Commissions, whence they never surfaced.

Following two committee hearings on CATV during 1969, Kelly himself had already determined that a state role was appropriate. But contrary to the direction previously adopted by other states which had vested cable regulatory authority in the PUC, Kelly had a separate commission in mind.

²⁰ See First Report and Order in Docket 18397, 20 FCC 2d (1969); and Fourth Report and Order in Docket 11279, 15 FCC 2d 466 (1968).

²¹ "Kelly Report", p.1.

This, in his view, was a compromise position, compared to the Stavisky approach, but also the only realistic one:

Faced on the one hand with testimony that the cable industry is not a public utility and would be stifled by regulation in the traditional utility pattern, and on the other hand with testimony that cable is vested with a substantial public interest that should be protected by a state level organization, my original proposal was a compromise approach -- neither the existing laissez-faire nor utility regulations.²²

Kelly indicated that during these hearings only one person ever testified that cable regulatory authority should be vested in the PSC.²³

As a formal confirmation of his philosophy, Kelly introduced a bill during the 1970 legislative session (see A.B. 6700-A in the Appendix), and a preliminary "Kelly Report" was issued. Hearings were held again by the Committee on Corporations, Authorities and Commissions, specifically directed at obtaining input on this concrete proposal. According to Michael R. Mitchell, after a review of these bill hearings:

the granting of franchises had received the bulk of attention at the hearings regarding the Kelly bill. It is evident that problems of municipal franchising were foremost in the minds of state legislators.²⁴

Kelly indicated that as a result of these hearings, the bill originally introduced in 1970 as A.B. 6700-A was subsequently revised and introduced as A.B. 6351-A in 1971. However, the revisions were not insignificant in some cases. But before examining them, another aspect of New York State's

²² Ibid.

²³ Interview with Robert F. Kelly, Chairman, New York State Commission on Cable Television, and C. Lynn Wickwire, formerly Executive Director, New York State Commission on Cable Television and at present Assistant to the President, Acton Corporation, April 18, 1977.

²⁴ Michael R. Mitchell, State Regulation of Cable Television, (Santa Monica: The Rand Corporation, 1971), p. 45.

original consideration of cable regulation will be reviewed. It touches on the PSC's role in the struggle over the proper regulatory form, and the role of Governor Nelson Rockefeller.

3.2 The "Jones Report"

In July of 1970, Governor Rockefeller requested the PSC to study the operations of CATV systems in New York, in order to recommend whether or not New York should regulate CATV and suggest what form this regulation should take. The report by the PSC was released six months later, in December, 1970.²⁵ The responsibility for undertaking the study and writing the report was assigned to one of the Commissioners, William K. Jones, but the final report was endorsed by the full PSC.

The "Jones Report" reviewed FCC policy in the television broadcasting and cable television areas, state CATV regulation in other states, the position of various parties concerning state regulation in New York, and the future potential of CATV in such areas as two-way transmission, and facsimile and electronic mail services. The report also included a survey of 18 New York CATV franchises, and recommendations and conclusions. Although Jones' franchise survey pointed out some of the differences among local CATV regulations, it did not really criticize municipal practices.²⁶ As Mitchell stated in 1971:

²⁵ William K. Jones, Regulation of Cable Television by the State of New York, Report to the State of New York Public Service Commission, 1970, p. 1, (hereinafter cited as the "Jones Report").

²⁶ Jones did note that several franchises had indefinite franchise duration provisions, that only seven of the eighteen had firm subscriber rate commitments by the operator, and only eight of the 18 required performance bonds. See "Jones Report", pp. 124-158.

Both the Kelly Bill and Commissioner Jones' recommendations adjudge this pattern of uncontrolled franchising unacceptable and each would impose statewide minimum or standard franchising procedures. However, Commissioner Jones does not see municipal franchise procedures as the primary problem for the state. He says [at page 183] that "the principal impediment to the development of CATV in New York State (outside New York City) is the FCC's distant signal importation policy."²⁷

The major recommendation of the "Jones Report" came as no surprise to those familiar with bureaucratic growth. The PSC recommended that jurisdiction over CATV systems in New York should be vested in the PSC. At the same time, the regulatory program suggested in the "Jones Report" differed significantly from those in states which had vested jurisdiction in PSC's.²⁸ The major responsibility for franchising was to remain at the local level with procedural and provisional guidelines set by the PSC. The PSC was also to be empowered to grant regional franchises if it was deemed necessary for areas which would otherwise not be able to support a cable system on an individual municipality basis. With respect to rate regulation, the PSC's authority was to be limited to assuring that subscriber rates were non-discriminatory, and it could set rates only where they were not stipulated in franchises.

Finally, one of the unique and more controversial characteristics of the "Jones Report" was a proposal to convert CATV systems to common carrier status:

It is proposed that when any single system, operated substantially as a coordinated whole, reaches a certain size (say 50,000 subscribers), the Public Service Commission shall have authority to direct that the system be converted into a "communications common carrier".²⁹

²⁷ Michael R. Mitchell, op. cit., p. 48.

²⁸ For a full description of the regulatory program, see the "Jones Report", pp. 186-220.

²⁹ "Jones Report", p. 199.

This meant that the system operator could no longer program any of its channels (although it could do so through affiliated corporations). Moreover, the rates charged by system operators for leasing channels would then be regulated by the PSC.

A question can be raised whether, once selected to perform the CATV regulatory study, the PSC was likely to call for the creation of a separate cable regulatory agency.³⁰ However, the "Jones Report" argued that creation of a new state agency would take time and money, both of which were in short supply, given the rapid development of the cable industry and the numerous demands on the state budget. What the report did not consider was whether the extensive and non-utility type of regulation it called for would not also require significant increases in personnel within the PSC.³¹

Moreover, the "Jones Report's" justifications for PSC jurisdiction were placed rather inconspicuously in the body of the report. In addition, although several specific recommendations were included in the report, a bill which made these recommendations explicit was not. It was not until the early part of the 1971 legislative session that a PSC-sponsored bill was introduced, a full five months after the "Jones Report" was released. This can be compared with the Kelly strategy of releasing a final report and a

³⁰ Economist Roger Noll and others have pointed to the expansionist tendency in federal regulatory agencies, which presumably is present at the state level as well. For discussion of this hypothesis, see Roger Noll, Reforming Regulation: An Evaluation of the Ash Council Proposals, (Washington, D.C.: The Brookings Institution, 1971), and Roger Noll, "The Behavior of Regulatory Agencies", Review of the Social Economy, 29 (March 1971): 15-19.

³¹ There are, however, several other arguments which could be made in defense of PSC regulation of cable television. These additional arguments were not really emphasized in the "Jones Report".

bill simultaneously. As will be pointed out below in the Wisconsin case study, legislators prefer discussion of specific statutory language to discussion of broad statements of philosophy. Kelly, as a legislator, used this knowledge to his advantage.

3.3 Indecision and Moratorium

As noted in Section 3.1, subsequent to the 1970 hearings on the first Kelly bill (A.B. 6700-A), changes were made and it was reintroduced as A.B. 6351-A. The proposed number of commissioners was reduced from seven to five, the Commission was charged with stimulating educational and public affairs programming and encouraging the development of non-profit organizations to seek franchises, and cable systems were required to maintain local offices for the handling of complaints and maintenance calls. But the most significant changes occurred in the areas of public service programming, municipal and state fees, and franchise revocation. The new version of the bill created a public programming services fund. The fund was to be primarily supported by fees paid to the state by CATV companies. The fee was set at 3% of gross annual receipts (changed from 2%, but with the same minimum fee schedule) and the Commission was authorized:

...to use the moneys held in the fund for the expenses of the Commission and to further the objectives of the Commission for development of educational, instructional, community interest and public affairs programming with full access thereto by cable television companies, educational broadcasters, and public and private institutions operating closed circuit television systems and instructional fixed services.³² (emphasis added)

³² A.B. 6351-A. Sec. 666.2.

Although the bill did not indicate how this money was to be disbursed, it appears that this section was included as a response to educational interests which surfaced at the hearings.

Municipalities were also represented at the 1970 hearings. Jones, in reviewing the various parties of interest indicated that:

Municipalities generally are opposed to state regulation of CATV. Arguments of "home rule" are advanced and there is some feeling that local regulation will be more responsive to the wishes of the community. Naturally, there is also great concern about possible loss or diminution of franchise fees if state regulation ensues.³³ (emphasis added)

Kelly, in an attempt to circumvent these concerns and build a coalition for his bill, included a section which expressly did not limit fees, taxes or charges which municipalities could impose on CATV systems already franchised. For systems franchised after the effective date of the bill, franchise fees were to be limited to 5% of gross annual receipts but no limit was placed on property taxes. Thus, municipalities who had already franchised CATV (and therefore had the most to lose monetarily) were not to be affected by the institution of state regulation. But what the bill gave to municipalities with one hand was taken away by the other. Section 669-c of the bill greatly increased the Commission's power to revoke, suspend or alter a system's certificate of approval for violation of Commission rules and regulations. No mention was made of the role of municipalities as a party in these proceedings.

During the 1971 legislative session, the Assembly was faced with four bills which would have instituted some type of state jurisdiction over CATV operations in New York. In addition to the Kelly bill, a bill based on the "Jones Report" and supported by the PSC was introduced late in the session.

³³ "Jones Report", p. 169.

As mentioned above, Assemblyman Stavisky introduced a bill (supported by NATO) which would have prohibited the provision of pay cable services, while placing jurisdiction in the PSC. This was referred to Kelly's Committee on Corporations, Authorities and Commissions, where it died. Assemblyman Van Cott also introduced a bill placing jurisdiction in the PSC, but allowing municipalities to retain initial franchising responsibilities. This was also referred to the Kelly Committee, where it fared no better than the Stavisky bill.

Neither of the remaining bills, the Kelly or Jones bills, passed the 1971 session. The Jones bill, introduced subsequent to the initial introduction period, was referred to the Committee on Rules, where it remained until the end of the session. The Kelly bill was referred to the Committee on Ways and Means because of its financial and budgetary implications. It was read twice, but did not reach the third (and final) reading. It remained in the Ways and Means Committee until the end of the session.

Kelly accounted for the inaction on his and Jones' bills in the following way:

The expectation that the FCC would clarify the regulatory picture was part of the reason that my 1971 bill was not passed.... Since the [Jones bill] would have placed jurisdiction for oversight of cable television in a traditional utility regulatory body, the legislature found that the necessary innovative approach to state involvement with the cable industry would not emerge.³⁴

More generally, the legislature appeared unwilling to pass a regulatory bill during the 1971 session. It also appeared that the FCC was about to lift its four-year distant signal importation freeze, thus potentially reducing the

³⁴ "Kelly Report", p. 2.

concern of legislators whose constituents were asking for CATV service, but increasing the fears of others about rapid, unregulated growth.³⁵

In response, the legislature took one avenue available to it: they passed a one-year moratorium on the granting of municipal franchises in the state of New York.³⁶ Franchises which were granted prior to the effective date of the law (June 17, 1971) were not affected. Any transfers, renewals or amendments of these franchises, however, would not take effect until April 1, 1973, and would then have to be approved "by such department or agency of the state as may hereafter be authorized to regulate the CATV industry and the awarding of CATV franchises, in accordance with the provisions of the act so authorizing such state department or agency to regulate."³⁷

The legislative intent section appended to the moratorium bill adequately reflected these concerns. After summarizing the various studies undertaken by the executive and legislative branches, the section noted that:

The intense competition for franchises has led to allegations of speculation in such franchises to the possible detriment of the public welfare.... These studies and reports have not developed sufficient agreement on the exact form which regulation of the CATV industry should take.... Unless there is an immediate and temporary cessation of the present precipitous pace of development of the CATV industry in this state, the necessary deliberations of the legislature will be rendered academic by the rapid march of practical events and the state will be entangled with an unregulated growth before an adequate system of regulation can be devised.³⁸ (emphasis added)

³⁵ See FCC Chairman Dean Burch's Letter of Intent, August 5, 1971, which outlined proposed rules for distant signal importation. These rules were eventually altered and included in Cable Television Report and Order in Docket #18397 et. al., 36 FCC 2d 143 (1972).

³⁶ §88, General Municipal Law, CLNYA.

³⁷ §88.4, General Municipal Law, CLNYA.

³⁸ Chapter 419, §1, of the Laws of 1971.

If one assumes that legislative intent sections at least moderately reflect the legislature's beliefs, two comments can be made. The legislature's desire to do something about the intense competition for franchises was stalemated by the equally intense competition over who was to regulate cable systems. In addition, the legislature had firmly committed itself to some form of state regulation and the 1972 session would have to yield a decision as to the form of this regulation in order for a program to be established by the expiration date of the moratorium.

3.4 A Separate Cable Commission

The 1972 session proved to be the crucial breakpoint. Kelly's standing Committee on Corporations, Authorities and Commissions released its final report entitled Cable Television: A Public Service - A State Concern. This set out, in great detail, Kelly's philosophy concerning regulation by a separate cable commission. In fact, Kelly's arguments for establishing a separate commission were the most prominent part of the report. Again, the argument that local authorities did not have the expertise, time or inclination to regulate cable was used to justify state regulation in the first instance.³⁹

Why this regulation should not be lodged in the PSC came down to three points. The FCC (which had already released its omnibus 1972 cable regulations) had determined that cable was a hybrid which needed a special form of regulation not available through traditional public utility regulatory bodies.⁴⁰ The second point concerned the fact that in certain very important respects,

³⁹ "Kelly Report", pp. 49-50.

⁴⁰ Ibid., p. 3.

cable was not a public utility, since it (a) operates in a competitive market; (b) is not essential to the general welfare; and (c) does not offer a uniform service based on established technology which would justify standardization of cost, universal access and limitation of earnings according to standard utility concepts of fair return on a reasonable estimate of investment.⁴¹ The third point could have caused the legislature to think twice about vesting jurisdiction in the PSC. The report launched an effective broadside against the Jones proposal to convert systems to common carrier status by claiming (although unsupported by actual financial figures) that this could seriously impede the growth of cable television in New York. While Jones and the PSC did not really have to justify their PSC approach to CATV regulation -- given the fact that nearly every state which had instituted a regulatory program thus far had done just that -- the common carrier proposal was both novel and unclear as to its effects. The burden of proof rested on Jones and the PSC, and Kelly's strategy of questioning the benefits of the common carrier concept was not only appropriate in light of the proposal's novelty, but undoubtedly secured him some cable industry support for his own measure.

Kelly's bill, including several major revisions, was re-introduced in the 1972 session (A.B. 12001-A). In this revised version, the definition of a cable system was rewritten to include all systems with 50 subscribers or more, in contrast to the 250-subscriber figure included in previous bills. MATV systems not subject to state regulation were also explicitly defined. The Commission was given the responsibility for developing a state-wide CATV plan, as well as developing system interconnection proposals when deemed appropriate by the Commission. In general, the bill was more specific as to

⁴¹ Ibid., p. 61.

the duties of the Commission, the minimum provisions which should be included in franchises, and the procedures by which franchises should be granted. The municipal fees and taxes section allowing localities to tax CATV systems was left in the bill, but revised so that any non-tax municipal fee, when combined with the state fee required, could not exceed federally-permissible limits. The state fee was now to be based on the actual costs of operating the Commission, but was not to exceed 1% of gross annual receipts (with a \$100 minimum for all systems). Simultaneously, the previously mentioned (section 3.3, page 24) provision concerning the Public Programming Service Fund was deleted (i.e. all state fees were to go for support of the Commission). The Commission was also given jurisdiction over subscriber rates, including the power to set rates in certain instances, and prohibited from any censorship of CATV programming.

The Jones PSC bill also underwent some modifications, though not as extensive as those of the Kelly version, before being introduced late in the 1972 session.⁴² It was referred to Kelly's Committee on Corporations, Authorities and Commissions, but it was not reported out by the Committee, and

⁴² The Jones bill introduced in 1972 (A.B. 11990) was quite similar to the Jones bill of 1971 (A.B. 7809). The major revisions, however, were most likely included to deflect criticisms that the PSC would not be responsive to the public when regulating an industry which was intricately bound to local and public interests. The new provision called for the creation of a Cable Television Council, which would have approval power over all PSC-promulgated CATV regulations. The Council would have been composed of 13 members, five from the PSC staff and eight citizens appointed by the Governor. The Chairman of the Council was to be chosen by the Governor from the eight non-PSC members and the Vice-Chairman would be the Chairman of the PSC. While this scheme did not necessarily insure that the PSC would be more responsive to the public and the unique qualities of the CATV industry, it did effectively increase the Governor's control over CATV regulation.

consequently was never voted on by the full Assembly.⁴³ The Kelly bill, also introduced late, was referred to the Committee on Rules, then referred to the Committee on Ways and Means (because of the \$350,000 appropriation required in the bill), which reported out the bill for an Assembly floor vote on May 4th. The bill passed the Assembly by a 100 to 35 margin. The Democratic/Republican vote breakdown appears below in Exhibit A.

EXHIBIT A

Assembly Vote on A.B. 12001-A, May 4, 1972*

	Yes	No	Not Voting	Total
Democrats	73.6% (53)	13.9% (10)	12.5% (9)	100% (72)
Republicans	60.2% (47)	32.0% (25)	7.8% (6)	100% (78)
Total	(100)	(35)	(15)	(150)

(*All percentages are row percents)

As Exhibit A demonstrates, Kelly (a Republican) was able to garner the support of a greater percentage of Assembly Democrats than of the Republicans. But nevertheless a substantial portion of the Republican majority went along with Kelly's proposal to create a separate commission, a feat which a Democrat might not have been able to perform, and an accomplishment when one considers that Republicans have traditionally been associated with fiscal conservatism and less government involvement in private enterprise. A.B. 12001-A was voted on by the Senate on May 8, 1972, and passed again by a substantial margin. The bill became Article 28 of the Executive Law and went into effect on January 1, 1973.

3.5 New York Revisited

Why did the New York legislature vest cable regulatory authority in a separate commission? A simple answer is that more legislators thought this was a better option (for whatever reasons) than the alternative. A more complex answer is that personality and political factors determined the outcome of the "battle of the forms".

Robert F. Kelly was elected to his Assembly seat in 1960, nine years prior to becoming Chairman of the Assembly Committee on Corporations, Authorities and Commissions. His legislative experience can certainly be construed as having had an effect on the probability that legislation which he supported would become law. This can be contrasted with a similar situation in Wisconsin, where responsibility for shepherding cable legislation through the Wisconsin House of Representatives was given to a recently elected Assemblyman. There seems to be little doubt that Kelly took on the task of creating a separate commission with fervor and intensity. Although his original purpose in making

CATV an issue were cited in Section 3.1, his interest may have been linked to another factor. It was assumed by several of the participants in the process that Kelly desired the chairmanship of the separate cable commission. Thus, the CATV issue may have had personal significance for Kelly.

Kelly's political expertise manifested itself in various contexts. He knew about the Committee system and therefore knew the proper time to introduce bills so that they would be referred to a Committee more favorable for his purposes. Moreover, he was the Chairman of the Committee to which all timely CATV regulatory bills would have had to be referred. Kelly was therefore in one of the most advantageous positions to seriously impede the progress of bills which were not congruent with his own position. This most likely accounts for the deaths of the Stavisky bills and the 1972 Jones bill.

There were other types of instances in which Kelly's political acumen was helpful. Sally Stout, who was the member of the Assembly Standing Committee Staff assigned to the Kelly Committee (and who also drafted most of the "Kelly Report"), indicated that Kelly was very adept at appeasing interest groups who were not originally siding with him.⁴⁴ This was evident in the inclusion of specific sections meant to soothe both the municipalities and educational interests. Although the cable television industry never supported Kelly's or the PSC's attempt to regulate at the state level, Stout pointed out that Kelly was receptive to their input. This appears to have been a much more productive tack to take than an openly aggressive relationship.

While Jones and the PSC chose to release a broad philosophical statement and then introduce a bill solidifying this philosophy, Kelly took a different approach. Although a preliminary "Kelly Report" was ready in 1970, the final report was not released until 1972. And, when the report was issued, a bill

⁴⁴ Telephone interview with Sally Stout, Assistant Commissioner, New York Department of Mental Hygiene, October 4, 1977.

was simultaneously introduced. This strategy scored several points. The report was impressive and therefore the Committee looked (and generally was) informed. In addition, the legislature could debate specific statutory language rather than philosophy, and use the report as background material. And, finally, because the report was issued subsequent to the PSC recommendations, Kelly could mount an effective counter-offensive against specific PSC points (for example, the common carrier proposal), while learning from the "Jones Report's" weaknesses how best to structure the recommendation. So, for example, instead of burying the rationale for the suggested form of regulation within the report (as Jones did), Kelly and the staff made the justification a major part of the text.

Conversely, the PSC was not effective in marshalling support for its proposal. In addition to not comprehending legislative dynamics as fully as Kelly, the PSC, whether it was merited or not, did not have a reputation for being a public advocate. This too may have influenced some legislators, in particular liberal Democrats, in supporting the Kelly proposal. However, some of the PSC's ineffectiveness in promoting its position may have been due to the agency's reluctance to devote all of its political expertise and clout to the cable issue. Specifically, the PSC was interested in obtaining jurisdiction over power plant siting in New York State at about the same time that the cable bills were being debated by the legislature.⁴⁵ Understandably, its primary emphasis was placed on securing authority over plant sitings. In addition, the possibility could have arisen for a trade-off given the

⁴⁵ Interview with Neil Swift, Director, Communications Division, New York Public Service Commission, April 1, 1977.

fact that any power plant siting legislation would have had to be acted on by Kelly's committee.⁴⁶

This brings us to the point of examining the role of the Governor's Office in the battle over regulatory forms. Sally Stout stated that the Governor's interest in CATV legislation was minimal at best.⁴⁷ This has been confirmed by other sources as well. But because of the intersection of the CATV and power plant siting issues, CATV legislation may have been of more than just peripheral concern. This concern could have stemmed from three sources: actual recognition that cable needed some form of regulation; the need to use the cable issue to get legislation on power plant siting; or the recognition that a separate cable commission might provide opportunities for appointments and political patronage.

Which one of these concerns was operative is hard to discern. What is known, however, is that a separate cable commission was created, the PSC was given power plant siting jurisdiction, and the Governor placed two of his advisors in important positions at the new cable commission.⁴⁸

⁴⁶ The power plant siting bill referred to in this paragraph was Senate Bill 9800, which became Chapter 385 of the law of 1972. This bill was signed into law by the Governor on May 24, 1972. The vote in the Senate was 33 - 22, and in the Assembly, 88 - 46.

⁴⁷ Telephone interview with Sally Stout, October 4, 1977.

⁴⁸ Jerry Danzig, Governor Rockefeller's media advisor, was appointed as a commissioner of the New York State Commission on Cable Television. C. Lynn Wickwire, who was Rockefeller's appointments officer, became the Commission's Executive Director. Of course, Robert Kelly became the Commission's Chairman.

4.0 CALIFORNIA: GROWTH WITHOUT REGULATION

One possible theory of how state regulation comes about is that it is a natural result of cable industry growth. As the number of local franchises increases, there are likely to be more instances of abuses, or alleged abuses, in securing or granting a franchise, in implementing the franchise (or refraining to do so) and/or in franchise "trafficking". As more systems are built and more subscribers are connected, there are likely to be additional complaints about the services offered, the rates, or the inability to obtain service due to limited system construction. And with this little bit of encouragement, the competitors of cable television, whether broadcasters, movie theater owners, telephone utilities, or antenna suppliers, will readily amplify these individual voices by pointing out that cable is more trouble to the public than it is worth. In turn, such complaints or allegations can provide the foothold for a responsive legislator to convince his peers that state regulation of cable television is a necessity -- that the localities cannot handle it on their own, that the industry is irresponsible, that "free television" may be harmed, or simply that enough consumers, whether directly or indirectly, are demanding regulation.

So the theory might be postulated, and to some extent, it is supported by the New York experience and that of other states (e.g. see the New Jersey case below). But in other states, this theory has not been matched by practice. California is an interesting case in point.

With 1,581,438 cable subscribers, California is the most heavily wired state in the nation. Still, California has not to date adopted any comprehensive form of cable regulation at the state level. The "natural"

regulatory conclusion has not been reached, despite the fact that bills calling for state regulation have been introduced in seven of the last ten legislative sessions.⁵⁰ To understand why none of these bills have passed requires a review of cable legislative developments in California, and an assessment of the parties at interest in these developments.

4.1 Early Legislative History

The history of the California legislature's attempts to regulate cable television begins not with a bill but with a court decision; more specifically, with a court decision reversing a prior decision of California's Public Utilities Commission. In 1954, in Couch v. Television Transmission, Inc. (54 Cal. PUC 623), the California PUC concluded that CATV companies were "telephone corporations", as defined in the Public Utilities Code, since the Code did not restrict the type of electronic communications that could be transmitted by such corporations.⁵¹ But two years later, the California Supreme Court in Television Transmission, Inc. v. Public Utilities Commission (47 C.2d 82) ruled that since the CATV petitioner was not by state law a public utility, the PUC did not have the authority to regulate CATV companies. The main point of this decision was that while telephone systems could carry television signals, it did not follow that all TV carriers were telephone corporations and thereby subject to the Public Utilities Code.

⁵⁰ The bills and several related ones are summarized in Exhibit B on p. 40.

⁵¹ The Code specifically enumerates telephone messages, telegraph messages, teletypewriter messages, telephotographs, program services (including radio and television broadcasts), and other communications services by means of the transmission of electrical impulses.

It was not until a decade later that attempts to reverse the practical effects of this Court decision (i.e. rendering cable TV immune from PUC regulation), surfaced in the California legislature, as outlined in Exhibit B. Three bills in 1967 and a fourth in 1968 were aimed at explicitly extending the definition of a public utility to include "any corporation or firm which transmits television programs by cable to subscribers for a 'fee'." ⁵² None of these passed, presumably on the grounds that cable was not a utility. However, two other bills, one explicitly exempting CATV from overall public utility regulation and another granting the PUC authority to set CATV safety and construction standards, were enacted during the 1968 session.

The defeated bills were followed in 1969 and 1970 by the most concerted attempt to date to place California cable TV systems under PUC jurisdiction. Both of these subsequent legislative efforts were led by Senator George E. Danielson, then Chairman of the Senate's Commission on Public Utilities and Corporations. In a report prepared with his aide, Robert J. Wheeler, and based on the Committee's 1969 CATV hearings, Senator Danielson concluded that:

...there is no requirement that a commodity or service be "essential to life" in order to declare the furnishing of that commodity or service to be a public utility; the future holds the potential of unlimited growth of CATV, aided by the eventual prohibition of rooftop TV antennas for "aesthetic" reasons, and the FCC's recent authorization permitting CATV to originate its own entertainment type and public service programming; the CATV owner has dedicated his property to a public use in that he holds his service out on equal terms to anyone desiring it, and makes channels available on a common carrier basis to anyone wishing to originate programming; and that under prevailing CATV practices in California, CATV is in fact treated as a public utility, subject to regulation by local government. For these reasons, among others, it is submitted that adequate justification exists for a

⁵² S.B. 456, 1968.

EXHIBIT B

CABLE REGULATORY BILLS IN CALIFORNIA, 1967-1976

<u>Year</u>	<u>Bill</u>	<u>Sponsor</u>	<u>Purpose</u>	<u>Adoption</u>
1967	SB 615	McCarthy	Defines CATV as public utility under PUC regulation	No
	SB 830	Petris	<u>Ibid.</u>	No
	AB 1310	Townsend	<u>Ibid.</u>	No
	AB 1704	Townsend	Explicitly exempts CATV from PUC regulation	No
1968	SB 456	Miller	See SB 615 (1967)	No
	AB 383	Townsend	Allocates CATV franchising and regulatory authority to local governments	Yes
	AB 384	Townsend	See AB 1704 (1967)	Yes
	AB 1062	Townsend	Allows PUC to prescribe CATV safety rules and construction standards; does not define CATV as public utility	Yes
1969	SB 1077	Danielson <u>et al.</u>	Defines CATV as public utility under PUC regulation; final amended form allows local franchising	No
1970	SB 758	Danielson	<u>Ibid.</u>	No
	SB 1117	Danielson	<u>Ibid.</u>	No
1972	SB 663	Beilenson	Establishes Cable Television Commission; retains local franchising role	No
	SB 1316	Alquist	<u>Ibid.</u>	No
1973	SB 754	Alquist	<u>Ibid.</u>	No
	SB 1330	Beilenson	<u>Ibid.</u>	No
1975	SB 423	Stiern	Defines CATV as public utility under PUC regulation	No

legislative determination that the services furnished by cable antenna television companies are of a public utility nature.⁵³

This key paragraph, along with references to the increasing consolidation of cable companies, the penchant of local governments to extract large franchise fees, consumer complaints about service quality, and Nevada's precedent in asserting PUC regulation, indicates the multi-faceted arguments that Senator Danielson used to justify state regulation and, specifically, PUC regulation.

But the amalgamation of arguments -- legal, aesthetic, political, consumerist, and others -- were insufficient to convince enough of the Senator's colleagues to pass any of the three versions of state regulation that he proposed during 1969 and 1971. His own report failed to document many of the problems with the existing regulatory framework on which Senator Danielson based his arguments. For example, the report itself describes most witnesses at the Committee hearings as opposed to defining CATV as a public utility.⁵⁴ Only the testimony of a representative of Marin County points to problems of service quality, construction delays and inadequate local franchising expertise.⁵⁵

How the arguments were countered by cable industry representatives and other interested parties, which also served to deflate the acceptability of Danielson's proposals, will be discussed further below. The point for

⁵³ Senator George E. Danielson and Robert J. Wheeler, CATV in California, December 28, 1970, p. 31; see also, by the same authors, "The Status of the Cable Antenna Television Industry in California and a Proposal for State Regulation", Pacific Law Journal, 2 (1971): 528-573.

⁵⁴ Ibid., pp. 23-24.

⁵⁵ Ibid., pp. 58-59.

now is that with the defeat of the Danielson bills, the concept of public utility regulation of cable TV was no longer given serious attention in California, although it continued to loom as a fallback option to the regulatory proposals that were to follow.⁵⁶

4.2 The Alquist and Beilenson Bills

The chief legislative figure in the cable television field since Senator Danielson (who was elected to the U.S. Congress in 1970) has been Senator Alfred E. Alquist, who succeeded Senator Danielson as Chairman of the Public Utilities and Corporations Committee. In addition, Senator Beilenson, Chairman of the Senate Finance Committee, played an important role in the next wave of legislative proposals calling for state regulation of the cable TV industry. Specifically, in March 1972, both senators submitted bills calling for the creation of a new regulatory entity, the Cable Television Commission. Apart from the decision to regulate cable outside of the PUC, both bills also differed from most previous ones in allowing localities to continue franchising cable TV systems. The state agency would set franchising guidelines, certify franchises, adjudicate rate conflicts, and generally monitor system operations, but the localities would choose the system operator.

Each of these bills was passed by the Senate's Public Utilities and Corporations Committee and the Fiscal Committee. However, both senators introduced more detailed measures in 1973. Even though the main thrust of

⁵⁶ A bill calling for PUC regulation was introduced by Senator Stiern in 1975 at the request of county officials in his San Bernardino district. However, the bill was never given a chance of passage, according to several of our interviewees.

the bills was the same, there were some differences. For example, the 1973 Beilenson bill limited the local franchise term to ten years, whereas the Alquist bill did not provide such a limit, presumably finding the 15-year FCC limit adequate. Similarly, the Beilenson proposal required that cable systems be certified by the state commission every five years, compared to the locally-determined franchise term in Alquist's version. The Beilenson bill also directed the Cable Television Commission to set cross-ownership restrictions and to require additional access channels beyond those mandated by the FCC.⁵⁷

In general, the Beilenson bill conformed to Senator Beilenson's reputation as a stronger consumer advocate than Senator Alquist. However, Senator Alquist was equally determined to place the cable industry under state regulation at the time and, given his key committee status, was probably in the better position to do so. The premises of both bills were that (1) local government could not by itself effectively regulate cable TV; (2) the future communications potential of cable was enormous and therefore required public interest scrutiny; and (3) such scrutiny should not, however, constrain the growth and development of the cable industry, which could provide important public benefits.⁵⁸

If ever there was a point in the past at which state regulation was to be adopted in California, it was in 1973. Several hearings were held by both

⁵⁷ With respect to cross-ownership, the Beilenson bill required "standards limiting concentrations of ownership of cable television systems, and interlocking ownership of cable television systems by print and broadcast news media and by persons engaged in sales, installation, or repair of terminals". The bill also directed the Commission to petition the FCC for an additional public access channel and an additional educational, local government, or leased access channel. (S.B. 1330. Secs. 19063 and 19061, respectively, May 7, 1973.)

⁵⁸ See the sections dealing with "Legislative Intent" in both bills (Chapter 2 in S.B. 754 and S.B. 1330).

the Alquist and Beilenson Senate committees, and it appeared that enactment of one of the bills was near at hand. But neither the Beilenson or Alquist measure was passed. Why this turned out to be the case will be addressed below in our treatment of the external interest groups that had a stake in the passage or non-passage of the legislation. In the meantime, it is worth noting that, with one minor exception, this was the last time to date that a formal legislative attempt to place the California cable TV industry under comprehensive state regulation was made.⁵⁹

4.3 Cable Industry Representation

Among the groups that intervened in, or otherwise affected, the legislative process in California were the cable industry, other industry groups (e.g. broadcasters, utilities, etc.), and state and local government. Of all these groups, it was the industry itself that played the largest role in determining legislative outcomes on the state regulatory issue.

According to our interviewees and a review of transcripts of CATV hearings before the Senate Committee on Public Utilities and Corporations, the opposition of California's system operators to state regulation has been strong, consistent, and virtually universal. Moreover, in the few instances where industry representatives have shown any acquiescence to the prospect of state regulation, they have suggested that the state might issue "guidelines" in certain regulatory areas, but saw no justification for a

⁵⁹ For the exception, see note 56, supra.

regulatory agency.⁶⁰ And only when asked what type of agency -- PUC or a separate commission -- they would prefer to see (i.e. if there was no other choice) did they indicate that PUC regulation would represent the worst of all possible options, on the grounds that this agency would favor the utilities in any cable-related conflicts and/or apply utility approaches (e.g. rate of return regulation) to the cable industry.⁶¹

⁶⁰ See, for example, the remarks of Edward M. Allen, President of Western Communications, Inc., in California State Senate Committee on Public Utilities and Corporations, CATV Hearing (transcript, San Francisco, November 1, 1972), pp. 139-45. Mr. Allen's concession on some state guidelines should, however, be interpreted in the context of his other statements concerning state regulation. A case in point was a letter he wrote to Senator Alquist on May 30, 1973, to voice his opposition to the two state regulation bills then pending. In it, he stated his position as follows:

Between the existing Federal and local regulation, the CATV industry has to be one of the most regulated industries in America. The establishment of a third (and intermediate) level of regulation does nothing but add to the paperwork burden of the cable television systems in California. Further, the areas of regulation outlined in S.B. 1330 and S.B. 754 are, for the most part, fully covered by existing Federal and local regulation. Still further, as a member of the Board of Directors of the National Cable Television Association, I have had a first-hand opportunity to see how regulation at the state level has operated in the limited number of states which have tried this "noble experiment" and, to date, it has been a disaster for the CATV industry in each of these affected states. While the CATV industry of the State of California can point with pride to its present record as a leader of the industry, it is safe to predict that the imposition of additional State regulation will dry up the financial market (as was done in other states). The California CATV industry (and the subscribers we serve) can only be the losers.

⁶¹ This profile of the industry position is based on personal or telephone interviews with Harold Farrow, Special Counsel to the California Cable Television Association; Ted W. Hughett, the Association's President; Walter Kaitz, General Counsel of the Association; Marc Nathanson, Senior Vice President of CATV for the Harris Cable Corporation; and Ralph Swett, President of TM Communications. It represents the industry's position during the 1968 to 1975 time period. In the past two years, we were told by Mr. Hughett, a growing but still small minority of the Association's members have come to see state regulation more positively, since a professional staff in a state agency might consider their rate increase applications more favorably than a more politicized local council. Also, it is possible that aversion to PUC involvement in cable regulation may be diminishing somewhat -- but this remains our speculation, based on the industry's support in 1977 of S.B. 177, which calls for a PUC role in settling pole attachment rate disputes.

In short, the industry position has been simple and straightforward: no state regulation if at all possible. Only as a very last resort would the industry consider regulation in the form of a separate commission that would not be beholden to other interests but would be a newcomer to government.

What is more interesting is how the industry has been able to avoid this "last resort" by converting its position into political force. The orchestration of the industry position has been based on the traditional lobbying techniques: familiarizing legislators with the industry and its problems; paying political and social attention to them; presenting the industry position forcefully but with sensitivity; building alliances with other groups; and knowing the times when lobbying would be most rewarding and at whom it should be directed (e.g. members of key committees).⁶² Above all, however, the strength of the industry position has come from two sources: (1) the cohesiveness of the industry, and (2) the effectiveness of Walter Kaitz, its Sacramento representative.

Both of these points are worth underscoring. First, the industry itself has not been divided or disorganized, as has been true at times in other states. For example, no apparent gap exists between the older, smaller, rural cable operators and the major MSO's operating in urban areas, as has been the case in New York. This is because most of the California cable

⁶² One industry representative pointed out that being a decentralized industry (i.e. with numerous local operations throughout the state), it has been relatively easy for California cable operators to develop good relations with a broad base of state legislators. In addition, the California Community Television Association (CCTA) has spent considerable amounts on state political campaigns. While we were not able to obtain data for the early 1970's, in 1975 the Association's campaign contributions totaled \$26,395. (This figure is from Lobbyist Employer Forms submitted by CCTA to the Secretary of State.)

operators are middle-size group owners, rather than falling into the two extremes. For example, two thirds of New York's operators are single-system independents (i.e. non-MSO's), compared to less than 30% in California.⁶³ The remaining-New York systems are dominated by three or four multi-system concerns (i.e. TelePrompter, Newchannels, UA-Columbia, etc.). By contrast, even though several of California's major operating companies are large out-of-state corporations (e.g. TelePrompter, Storer, Warner, Viacom and AT&C), there are about ten substantial California-based companies, most of them serving between 10,000 and 40,000 subscribers, which constitutes a relatively diversified industry dominated, if by anyone, a pluralistic configuration of middle-size MSO's rather than by either a few very large MSO's or the classical small town rural operators. But whatever the structural characteristics of the industry in California, the key point again is that the industry has been unified, loyal and consistent in its opposition to state regulation, and has spoken with one voice.

That voice has been Walter Kaitz, the California Community Television Association's General Counsel. Kaitz was generally described (i.e. by cable operators, government officials, and representatives of other industries) as one of the most educated, reasonable, persistent, likeable and successful industry representatives to have walked the halls of Sacramento's capitol. Supported by a cadre of unified and industrious Association members, by able associates -- Special Counsel Harold Farrow and Assistant Counsel Spencer Kaitz (his son) -- and by a long personal history of legal and legislative experience in California, Kaitz has, according to all reports, managed to befriend virtually every individual with a key public or private role in the

⁶³ The data for this comparison of industry structure in California and New York was gathered from Television Factbook (Services Volume) (Washington, D.C.: Television Digest, 1977).

debate over state cable regulation, including Senator Alfred Alquist. The fact that Alquist has not been pressing for comprehensive state regulation of the cable industry in recent years is due at least in part, in our opinion, to Kaitz's persistence.⁶⁴

4.4 Broadcasters and Utilities

Another reason why the California cable industry has been successful in conveying its position to the state legislature is that it has not had to contend with some of the industry's traditional opponents. In the early 1960's, both broadcasters and movie theater operators waged an intensive campaign against the introduction of pay TV into California communities. What had instigated the campaign was the prospective introduction of an over-the-air pay TV service in San Francisco and Los Angeles by Subscription Television, Inc., in 1973. The anti-pay campaign led to a state referendum in which pay TV was rejected by the voters.⁶⁵ A byproduct of this campaign was the inclusion in several local cable TV franchises of a clause preventing the carriage of pay TV services.⁶⁶

However, the role of the broadcasters in attempting to limit the spread of cable TV and pay cable has apparently dwindled during the 1970's. For example, the current president of the California Broadcasters Association

⁶⁴ For a discussion of other factors that may have influenced Senator Alquist's pursuit of cable legislation, see pp. 112-113, infra.

⁶⁵ In 1966 the referendum was repealed by the California Supreme Court in Weaver v. Jordan, 64 Cal. 2d 235, 411 PUR 2d 289, cert. denied 385 U.S. 844, but by this time Subscription Television, Inc. had gone out of business.

⁶⁶ This clause has subsequently been disregarded by several of the cable operators on the grounds that regulation of pay cable services has been preempted by the FCC, which overrides the local prohibitions.

(CBA) stated that like religion and politics, the subject of cable television is never brought up at Association meetings.⁶⁷ Some broadcasters own cable properties and others do not, he added, implying that no consensus on a cable television position could be reached if the subject were discussed. The CBA president added that the Broadcasters Association and the Cable Television Association did not meddle in each other's affairs with respect to state government.⁶⁸

This live-and-let-live philosophy, at least at the official Association level, may or may not be characteristic of other states.⁶⁹ But it does suggest that the frequently espoused image of broadcasters battling cable interests at every possible level may not be accurate. While the National Association of Broadcasters (NAB) continues to intervene in cable television regulatory issues at the FCC, in California at least, the state Association has not become involved in the legislative debate over cable television regulation.

The role of the utilities, particularly the California telephone companies, in state cable regulation has been harder to assess. During 1976 and early 1977, the telephone and power utilities and the cable industry were at odds over a bill introduced by Senator Alquist, which called for PUC regulation of pole attachment rates. However, the dispute was not irreconcilable,

⁶⁷ Telephone interview with Howard J. Smiley, President, California Broadcaster's Association, July 13, 1977.

⁶⁸ The broadcasters, after all, have their own state and local government problems to contend with, such as taxation decisions that affect broadcasters, state agency rulings restricting government advertising to newspapers, labor disputes involving government regulations, etc. Some of the ways in which their state association represents California broadcasters before government agencies are spelled out in a pamphlet, California Broadcasters Association Needs You as a Member (undated).

⁶⁹ We know of at least one instance where a regional broadcasting association is overtly opposing the growth of cable TV. See North East States Broadcasters Alliance, Legislative Conference, May 24-25, 1977.

and a compromise bill was passed in late 1977.⁷⁰ Similarly, during the 1960's the cable industry and the telephone companies in California were often at loggerheads over the right of telephone companies to own and/or operate cable systems (under a "leaseback" arrangement), with the cable companies claiming that the telephone companies engaged in a variety of unfair competitive practices. This conflict was resolved by an FCC decision in 1969, which prevented telephone companies from operating cable systems (including under the leaseback approach) in their service areas.⁷¹

However, what the role of the telephone utilities was during the late 1960's and early 1970's, which is when state regulation was given serious consideration by the legislature, is not entirely clear. Several of the cable industry representatives we interviewed suspected that California telephone companies have encouraged PUC regulation of the cable industry, but admitted they could not document this as a fact. On the other hand, representatives of the Pacific Telephone and Telegraph Company and General Telephone and Electronics of California stated that their companies had remained neutral on the question of whether the cable industry should be regulated at the state level. However, they added that if such regulation were to occur, they favored the PUC being vested with regulatory authority over the creation of a separate cable television commission. This made sense, in their judgment, from an administrative efficiency point of view, and, to the extent that the telephone and cable industries might provide similar services in the future,

⁷⁰ The question of pole attachment regulations, including the issues raised in California, is addressed in a companion report: Kalba, Levine and Hochberg, op. cit.

⁷¹ See footnote 5, supra, in reference to telephone company leaseback.

it seemed more reasonable to have both industries fall under a common regulatory framework that would assure fair competition.⁷²

4.5 The PUC and the Municipalities

Another set of potential interest groups we examined were those that fall under the rubric of state and local government. In particular, we looked at the roles of the California PUC and municipalities in supporting or opposing state cable regulation.

In the case of the PUC, we initially hypothesized that it was likely to favor such regulation. Our findings indicate, however, that the PUC's advocacy of this position was only indirect. In fact, the PUC's formal position on state regulation has been virtually identical to that of the telephone utilities: neutral on whether the state should regulate cable, but positive on the PUC assuming regulatory responsibility if the state were to regulate. For example, in 1973, the Executive Director of the PUC wrote nearly identical letters to Senators Alquist and Beilenson (see Exhibit C) to indicate PUC opposition to their respective bills.⁷³ As the letters illustrate, the PUC argued that to create a separate regulatory agency "would result in unnecessary duplication" and that repealing its existing authority to oversee CATV safety standards (which both bills stipulated) was "undesirable, as

⁷² Personal interviews with Harold Boel, Pacific Telephone & Telegraph, July 27, 1977, and Gabe Roberson, Executive Representative, General Telephone of California, July 28, 1977.

⁷³ This contrasts with the PUC's general approval two years later of Senator Stiern's proposal to place cable TV regulation under the PUC. The only point raised by the PUC against this later bill was that it provided no additional budget for the new regulatory responsibility the PUC would have to assume. The PUC projected that seven additional staff members, plus \$50,000 of monitoring equipment, would be required. (PUC memorandum on S.B. 423 from Paul Popenoe, of the Communications Branch, to Lawrence Q. Garcia, of the Legal Division, March 4, 1975)

EXHIBIT C

PUBLIC UTILITY COMMISSION LETTER ON CABLE REGULATORY BILL TO SENATOR ALQUIST,
MAY 24, 1973

Public Utilities Commission

STATE OF CALIFORNIA

May 24, 1973

FILE NO.

Honorable Alfred E. Alquist
The State Senate
State Capitol
Sacramento, CA 95814

Dear Senator Alquist:

Re: S.B. 754

The Public Utilities Commission has reviewed your S.B. 754 and has concluded that it must oppose said measure. This bill establishes a five member Cable Television Commission and specifies its membership, powers and salaries. It repeals Public Utilities Code Sections 215.5 which defines the term "cable television corporation", and 768.5 which provides for safety regulation of CATV systems. Regulation would be accomplished by the issuance of certificates of confirmation of CATV franchises issued by local governments. Rates would be established in the franchises by the local governments. The Cable Television Commission is required to establish rules and regulations for its approval of all pole attachment contracts, and shall require that all costs or charges shall be fair and equitable to both the owner of the pole facilities and the CATV company (§19065).

In the past the Commission has taken no position on similar bills, but has stated that if CATV is to be regulated on a statewide basis the Commission should do it since CATV companies use the facilities (poles, ducts, etc.) of the electric and telephone utilities. With respect to pole attachments, the bill may be in reaction to our Decision No. 80168 (June 20, 1972) which held that under existing law the Commission lacks jurisdiction over pole rental rates and practices. Review of that decision was denied by the California Supreme Court. The Commission believes that repeal of its safety jurisdiction is undesirable as utility operations could be affected. The bill appears to result in unnecessary duplication of regulatory agencies in that an entire new agency would be created to regulate this one industry.

Copies of this letter will be sent to the other members of the Senate Committee on Public Utilities and Corporations.

Very truly yours,

PUBLIC UTILITIES COMMISSION

By *William R. Johnson*
WILLIAM R. JOHNSON, Secretary

cc: Members of the Senate Committee on Public Utilities Corporations

utility operations could be affected". The implication of the letters was clear: since the PUC was already responsible in the safety area, any expanded cable jurisdiction should be assigned to it as well.⁷⁴

The other group, besides the cable industry, that has been heavily represented in the state regulation debate is local government. As Senator Danielson pointed out in an article written after the defeat of his bills for state regulation:

Unlike some of our smaller neighboring states, California government is strongly influenced by the home rule philosophy. Consequently, a substantial number of matters of government are delegated down to the county and city level for management.

⁷⁴ We also asked several interviewees whether any other state agency besides the PUC may have been interested in assuming regulatory authority over cable TV. The universal answer was no. The only other relevant information we have on this point is that in 1974 a special Panel on Telecommunications of California's Assembly Science and Technology Advisory Council recommended that a cable television bureau be created within the Department of Consumer Affairs. The main role of the bureau was not to be regulation (which would remain at the local government level), but the provision of "impartial assistance to local government to help it deal with the complex legal, financial and technical problems which they face in common in regulating cable television". See Panel on Telecommunications, Assembly Science and Technology Advisory Council, California 1980 Calling: What's Jamming the Message, a report to the Assembly General Research Committee, California Legislature, March 1, 1974, pp. 28-33, quotation from p. 32).

Another question we had concerning the state government role was whether the Governor or anyone in the Governor's Office played a role in the legislative debates over state regulation. Again, the answer from our interviewees was no. However, one respondent did suggest that Governor Ronald Reagan's (California Governor, 1967-1974) appointments to the PUC were pro-telephone industry, and that the specific composition of the Commission further increased the cable industry's fears of being placed under PUC authority. This opinion is supported in part at least by recent comments of the California PUC on the proposed federal "Consumer Communications Reform Act". Commissioners Sturgeon and Symons (appointed in 1967 and 1969) have generally supported this pro-telephone industry bill, whereas Commissioners Batinovich and Gravelle (appointed by Reagan's successor) have opposed some of its key provisions. These PUC comments were submitted to the Communications Subcommittee of the U.S. House Interstate and Foreign Commerce Committee. See Telecommunications Reports, 43 (August 1, 1977): 13-14.

And he added, possibly reflecting frustration at the demise of his own regulatory proposals:

...past consideration by the legislature concerning state regulation of the CATV industry has directed inordinate attention to the interests and attitudes of local governments.⁷⁵

Whether the attention directed to the interests and attitudes of local governments in legislative decision making over state regulation has been "inordinate" is a matter of judgment, but the fact that such attention has been given is indisputable. At most of the legislative hearings on cable regulation, the position of local government officials has been represented frequently and with a few exceptions this position has been that localities, and not the state, should regulate cable television. For example, at a hearing before Senator Alquist's committee on November 1, 1972, John P. Sheehan, Legislative Representative with the City of Los Angeles, offered the following reasons why cable regulation should remain at the local level:

One, at the very basis of this position, is that generally cable systems are local in nature.

Two, the granting of franchises for these systems, including the analysis of financial and technical qualifications of applicants and the analysis of the nature and extent of proposals, are basically local questions and as such can be best handled by a local agency.

Three, the cooperation of local government is essential in the construction of the CATV facility and related undergrounding, and because of its very nature, local government can provide what we feel is the best direct service to the operators.

Four, it is our view that the establishment, review, and enforcement of rates and changes can best be accomplished at the local level. We feel that this guarantees more expeditious handling and closer control, both from the public's and operator's interest.⁷⁶

⁷⁵ Danielson and Wheeler (1971), op. cit., p. 530.

⁷⁶ CATV Hearing (transcript), loc. cit., pp. 19-20.

These are not indestructible arguments. In fact, counter-arguments were at times made in the legislative hearings and debates, in a few cases even by representatives of local governments: e.g. that cable is not necessarily a local medium and will become less so as more nationally or regionally interconnected services become available; that localities, particularly smaller ones, do not have the financial and technical expertise to regulate a complex communications business; that uniformity in cable TV standards is required; and that local governments have abused the control they have over cable systems by granting excessively long franchise terms or enacting burdensome franchise fees.

But these counter-arguments only spawned more witnesses, more letters, and more rebuttals from the localities. They responded that the localities were regulating adequately; were responding to consumer complaints; were relying on the California League of Cities, the larger cities, or consultants where their own expertise was lacking; were coordinating their franchising efforts where interconnection was desirable; and that the FCC was already requiring a sufficient degree of regulatory uniformity. Most of all, the representatives of local government -- from Los Angeles, San Diego, Costa Mesa, Fountain Valley and elsewhere -- asserted their political muscle, which earned them the right to retain control over the use of city streets and rights of way. And according to California tradition, the legislators -- barring some indisputable revelation on how the cities and counties had misbehaved or on the dreadful consequences of unregulated (by the state) cable growth -- had to listen.

Yet such a fortuitous revelation never emerged. It did not come from any of the usual sources from which political bolts of lightning sometimes emanate. The local press, while occasionally covering cable franchising

maneuvers, never became fixated on any particularly dramatic breaking of the rules. There was no public interest research group to document and publicize the shortcomings of local regulation, as there would be in New Jersey. There were no minority or media access groups to link their interests with the cause of state cable regulation.⁷⁷ There were at best a few legislators who, for one reason or another, had gotten interested in the notion of state regulation; less than a handful of county officials, who had gotten tired of endless meetings over the rates that could be charged for cable services in one or another of their unincorporated areas; and only possibly, but never overtly, the telephone utilities. The votes that were there for state regulation were apparently not enough to secure passage of any of the proposed bill.

Due to an informal coalition between a cohesive and well-represented cable industry and powerful municipalities, and the absence of potentially divisive factors, California, the most wired state, decided not to follow the path of state regulation.

⁷⁷ For instance, one witness from the black community before the Senate Committee on Public Utilities and Corporations argued that cable regulation remain at the local level "essentially, because of the political powers that minorities have in the cities that we don't have on a state level"; CATV Hearing, loc. cit., p. 70. Allen Frederickson, of the Committee for Open Media, testifying at the same hearing, admitted that "we really haven't had an opportunity to think through fully the position of state regulation. We have some misgivings, but at the same time, we recognize the chaos that exists in this state...." He went on to suggest that the state not regulate cable but act "in an informational capacity". However, Frederickson's main energies were reserved for another proposal obviously more dear to his heart, namely, that one-third of a cable system's leased access channels be allocated to non-profit community organizations; ibid., pp. 52-56.

5.0 NEW JERSEY: THE ROLE OF PUBLIC EXPOSURE

The citizens of New Jersey have a special reason to be interested in cable television. The state is physically, politically and economically affected by its powerful neighbors, New York and Pennsylvania, and is subject to enormous influence by their information sources. In 1971, when public interest was focused on cable TV, New Jersey was the only state besides Delaware to have no commercial VHF television outlet (as remains the case in 1977).⁷⁸ The New York Daily News was the most widely read newspaper, and New Jersey news and public affairs information were aired on New York and Philadelphia radio and TV stations, where they occupied only a small fraction of broadcasting time.

In short, cable television as a programming medium could potentially begin to fill New Jersey's local information gap. Perhaps because of this, public attention to issues surrounding the development of cable systems has been higher in New Jersey than in most states. This attention, which was heightened by press coverage of questionable franchising practices, provided a dramatic context for legislative decision-making with respect to the need for state regulation. In this sense, New Jersey presents an instructive contrast to the California experience.

5.1 The "Crossed Wires" Report

In 1970, the Center for the Analysis of Public Issues undertook a study of cable television franchising in New Jersey, which resulted in a bleak

⁷⁸ WCMC-TV, Channel 40, a commercial UHF station, began operation in Wildwood, New Jersey, in 1966, and remains New Jersey's sole commercial station. Four educational stations also now operate in the state.

picture of both industry and municipal practices.⁷⁹ According to the Center's final report, issued in 1971 and titled Crossed Wires, franchising procedures in New Jersey were characterized by ignorance, lack of interest, and political maneuvering. Obtaining a franchise was fairly simple for the cable operator. He was apt to spend a minimal sum on promotional materials and legal assistance, negotiate for rarely more than a few weeks, and the franchise was his. Part-time local officials without the benefit of expert training or consultation were charged with deciding complex questions of communications technology and social policy, often surrendering control over cable service for long spans of time.⁸⁰

The Center's report pointed to several other franchising problems. For example, in small towns, it found that operators would often approach local councils, after having acquired the franchise rights to the largest municipality in the area, with the argument that no other firm would pick up their franchise, since the big city contract was held by another company. Moreover, since a cable franchise is a negotiable document of value, many franchises were sought by speculators who may not have intended immediate operation, but wanted them for resale, possible later development, or to extend existing area operations. Finally, political influence seemed to play a large role in New Jersey cable franchising. Principal members of cable companies have been visible political figures and, frequently, the local attorney chosen to handle negotiations was one with political connections.

Crossed Wires may not have had a substantial impact on New Jersey legislators, were it not for several concurrent developments. On January 29,

⁷⁹ Center for Analysis of Public Issues, Crossed Wires: Cable Television in New Jersey (Princeton, N.J., 1971), pp. 2-3.

⁸⁰ Richard C. Leone and Robert S. Powell, Jr. "CATV Franchising in New Jersey", in Kas Kalba and Bruce Heitler, eds., The Cable Fable. (Yale Review of Law and Social Action, 2 (Winter 1971): 254.)

1971, a federal grand jury indicted the president of TelePrompter, a cable company with several systems in New Jersey, on charges of paying \$15,000 to three officials in Johnstown, Pennsylvania, in order to obtain the cable franchise there. The officials, who were the mayor, a current councilman, and a former councilman, were all convicted on charges of bribery and conspiracy, as was Irving Kahn, president of TelePrompter at that time.⁸¹

TelePrompter's troubles in Johnstown, covered by the New Jersey press as well as Pennsylvania newspapers and television stations, were only the beginning. Reportedly because of Kahn's indictment in Johnstown, the Mercer County prosecutor's office began an investigation into the awarding of cable franchises in Trenton and Hamilton townships to TelePrompter in 1968 and 1969 (see Exhibit D). On March 24, 1971, grand jury indictments were handed down against the former Trenton City Council President, a Councilman, the Executive Director of the Trenton Housing Authority, and a former State Assemblyman. The four were accused of extorting around \$50,000 from TelePrompter during 1967 and 1968 to insure the awarding of the franchises.⁸² An official of TelePrompter told the press that it was his "understanding" that whoever won the franchise "would have had to pay money under the table".⁸³

Other cable operators also claimed that they were being subjected to pressure from town officials. A representative of Community Broadcasting of Red Bank, New Jersey, stated that officials in two Monmouth County municipalities had asked for money in return for awarding the cable company a

⁸¹ Ibid., p. 253.

⁸² The Trenton officials were, however, acquitted of the extortion charges on February 4, 1972; The Star-Ledger, Newark, N.J., February 5, 1972.

⁸³ The Evening Times, Trenton, N.J., April 2, 1971.

EXHIBIT D: ARTICLE PUBLISHED IN TRENTON, N.J., NEWSPAPER.

Cable TV Probe Underway Here

By HERB WOLFE
Staff Writer

The Mercer County prosecutor's office reportedly is probing possible irregularities in the awarding of cable television (CATV) franchises in Trenton and Hamilton Township.

A spokesman for the office today declined comment on the report.

However, it has been learned from reliable sources outside the court house that the

investigation into the Trenton and Hamilton Township CATV contracts with TelePrompter Corp. began last month.

The Trenton contract was awarded in 1968 and Hamilton's in 1969.

The probe reportedly got underway after TelePrompter's president, Irving B. Kahn, was indicted for allegedly paying \$15,000 to three Johnstown, Pa., officials who voted to award a CATV franchise to Kahn's firm.

The three officials, Mayor

Kenneth D. Tompkins, Councilman Robert McKee and J. Howard Deardorff, a former councilman, also were indicted by the federal grand jury in New York on bribery-conspiracy charges.

All four men have pleaded innocent to the charges.

◆ A New Look

The indictments caused Trenton City Council and the Hamilton Township Committee to take a new look at their contracts with TelePrompter.

A delegation from the firm

was to meet today with city council. TelePrompter cancelled a similar meeting with the Hamilton committee last night.

It could not be learned how far the prosecutor's investigation has gone, but it is not believed that it has reached the grand jury stage. A new grand jury empaneled this week will begin considering cases Thursday.

TelePrompter is the nation's largest cable television firm. It was awarded a

Trenton franchise in April, 1968 and one in Hamilton Township in May, 1969.

The firm has yet to begin operating in either community because it has not been able to get approval of its plans from the Federal Communications Commission (FCC).

The Hamilton and Trenton contracts with TelePrompter allow the municipalities to cancel their agreements if the firm did not begin construction of facilities within 120 days after the franchises were awarded.

The Hamilton committee on February 2 used the cancellation clause, and Trenton City Council has threatened similar action. TelePrompter, however, maintains that the 120-day period does not begin until after FCC approval is received.

Trenton City Council voted secretly in conference on December 13, 1967 to give TelePrompter the city's CATV franchise. Four councilmen voted for TelePrompter, one voted for a company owned by the Philadelphia Bulletin and one abstained. The breakdown of the voting by name was never revealed. Councilman David Schroth did not vote because at that time was a member of State Senator Sido L. Ridolfi's law firm. Ridolfi was a partner in one of the firms vying for the Trenton franchise.

When council formally awarded the franchise to TelePrompter the following April, the vote was 6 to 0. Only Schroth and Councilman Martin J. Hillman remain on city council. The other five either did not seek reelection last year or were defeated.

Source: The Evening Times, Trenton, N.J., March 2, 1971.

franchise.⁸⁴ The representative claimed to have been subjected to telephoned bomb threats and concluded testimony with the refusal to divulge names and places for fear of being "found with my neck slit."⁸⁵ An official of National Cable TV Services of Dover, New Jersey, testified that he had been approached by a local official "on the take", who asked for "more than [he] cared to give."⁸⁶

These scandals were given front page coverage in local and national newspapers. A survey of the news media around the time of the indictments produced numerous articles with headlines such as "Graft Story Spurs Reform on CATV", "Four Indicted in Cable TV Plot", "Wider Corruption Probe - CATV Inductments Only a Start", "A Chain of Checks Link Trenton With New York Company", "Grand Jury to Quiz 7 in Probe of Cable TV", and "Off the Record Sessions Veiled Fierce Struggle for Franchise".⁸⁷ A Trenton paper, the Sunday Times Advertiser, ran a two-part serial entitled "Focusing on CATV -- Part 1: Promise and Problems of the Cable; Part 2: Rapid Growth Signals Need for Uniform Code",⁸⁸ which discussed the alleged franchising improprieties in Johnstown, Pennsylvania, and Mercer County, New Jersey. Newspapers including the New York Times and the Wall Street Journal, as well as the New Jersey papers, generally included accounts of the franchising scandals in their coverage of the legislative events leading to the state regulation of cable.

⁸⁴ Here again the improprieties were not proved, as a Monmouth County grand jury dismissed as unfounded the charges made by this cable operator. The Star-Ledger, Newark, N.J., July 31, 1971.

⁸⁵ The Evening Times, Trenton, N.J., April 21, 1971.

⁸⁶ Ibid.

⁸⁷ Ibid., March 3, 24 and 25, and April 21, 1971.

⁸⁸ The Sunday Times Advertiser, Trenton, N.J., March 2 and 8, 1971.

It is impossible to prove that New Jersey had an above average incidence of illegalities. However, the extensive press coverage of the scandals that did surface had a definite impact on the decision to regulate. In addition, as previously mentioned, there was the Center's report, which documented franchise improprieties and the general inability of localities to cope with complex franchising issues. Not surprisingly, the report's authors came out strongly in favor of state regulation and offered a three-part recommendation for its institution and development.⁸⁹

The first part of their proposal dealt with the role of municipal government in cable development. It called for statutory reform of the ground rules for municipal franchising, including regulation of franchise applications, notices and hearings, fees, channels, production facilities, local programming, non-exclusivity, renegotiation, and compliance.

The second part addressed new regulatory responsibilities for the PUC. The report recommended that all cable firms be required to have a permit from the PUC which specified criteria for technical standards, construction schedules, service provision, insurance, financial reporting, demonstration of community need, and proof of applicant fitness. This permit would be in effect for ten years and be renewable for successive ten-year periods. Cable television would be considered a public utility, subject to PUC powers and regulations, and the PUC would oversee rate regulation and coordination of cable growth.

The third section of the Center's recommendations concerned the establishment of an Office of Cable Communications within the PUC. Such an Office, the report suggested, should report to the President of the PUC and should be staffed with engineers, communications experts, and others experienced in

⁸⁹ Center for Analysis of Public Issues, op. cit., pp. 68-80.

cable matters. Its responsibilities would be to advise the PUC on cable policy, provide consulting service to localities, and undertake long-range cable planning in New Jersey.

5.2 A Legislative Study Commission

Historically, legislation attempting to place cable under the jurisdiction of the PUC in New Jersey has dated from 1965. In his message to the Legislature on January 12, 1965, then Governor Richard J. Hughes remarked,

CATV companies are currently operating with a minimum amount of governmental control, and because of their current expansion, conflicts will result between competing companies over franchise rights. Thus we are presented with a classic example of the birth of a public utility, with all of the attendant hazards to the consumer of unrestrained competition and service without prescribed standards. Legislation will soon be introduced to regulate this new industry by bringing such companies within the present statutory definition of the term "public utility".⁹⁰

Although this early bill was not adopted, the PUC did assert jurisdiction in 1965 over pole attachment agreements between New Jersey Bell and CATV operators, but only so far as to regulate in reference to questions of fair rates and non-discrimination on the part of the telephone company, claiming that its jurisdiction could not be extended without further legislation.⁹¹ It was not until 1971 that legislative momentum on the cable issue re-emerged.

Assembly Bill 2139 was introduced on February 11, 1971, by Assemblyman Crane for the purpose of amending N.J.R.S. 42:2-13, designating cable as a public utility and subject to PUC jurisdiction. The bill was referred to

⁹⁰ Third Annual Message, January 12, 1971, p. 69-70.

⁹¹ Center for Analysis of Public Issues, op. cit., p. 42.

the Committee on Transportation and Public Utilities, which held public hearings April 20 and May 18, 1971. The measure received support from the Chairman of the PUC, but was not acted upon by the legislature. However, the Center for Analysis of Public Issues, which was asked to testify on the bill, suggested that a one-year moratorium on the awarding of cable franchises be adopted in order to give the state time to develop a comprehensive policy.⁹²

On April 22, 1971, A.B. 2421 was introduced "temporarily forbidding the award of any franchise or privilege by a municipality to a person for the purpose of operating or maintaining a community antenna television system".⁹³ In order to effectively utilize this moratorium period, a resolution was adopted on June 14, 1971, to "study the regulation of community antenna television systems and related aspects".⁹⁴ The section of the bill dealing with legislative intent cited the "need for appropriate regulation to secure and foster the orderly development of the community antenna television industry because of the "intense competition for franchises from municipal governments" which has "led to allegations of speculation...and accusations of corruption",⁹⁵ thus illustrating a major concern of the legislature.

A.B. 2421 created a twelve-member Study Commission, four members of which were to be appointed from the membership of the Senate by the President thereof, with no more than two members of the same party; four members were to be appointed from the General Assembly by the Speaker thereof, with the same stipulation of party affiliations; and four members of the public, two of whom were to be appointed by the President of the Senate, and

⁹² Ibid., p. 43.

⁹³ A.B. 2421, April 22, 1971.

⁹⁴ Assembly Concurrent Resolution 2041, June 14, 1971.

⁹⁵ A.B. 2421 and 2041.

two by the Speaker of the Assembly. The Commission reported to the Governor and the Legislature.

The Commission was headed by Assemblyman Harold C. Hollenbeck (R-Bergen)⁹⁶ and in addition to the four Assemblymen and four Senators, the Commission included the Executive Director of the New Jersey Public Broadcasting Authority, the Director of Consumer Affairs, the Clerk of the Burlington County Board of Chosen Freeholders, and an advertising executive. The large proportion of legislators suggests that the political expertise of this group contributed to the prompt implementation of its recommendations.⁹⁷

The Study Commission held public hearings in September, October and November of 1971, and issued a 144-page report containing several key recommendations. First, it stressed that the need for a state-wide regulatory system in New Jersey was evident and generally agreed upon. The principal question was how large and how direct a role should be played by the state. CATV industry spokesmen, the Commission noted, envisioned a very limited role for the state because the few areas of substantive regulation not pre-empted by the FCC are those which they felt were appropriately controlled on the local level.⁹⁸ This did not prevent the Commission from presenting its second

⁹⁶ Harold Hollenbeck has been serving as a Congressman from New Jersey in the U.S. House of Representatives since November, 1976.

⁹⁷ New Jersey's small, politically-active Study Commission can be compared with the large, mainly academically-oriented Wisconsin Governor's Blue Ribbon Task Force (see Section 6, *infra.*) which, while it was set up on September 30, 1971, and issued conclusions in February of 1973, has not resulted in legislation as of November, 1977.

⁹⁸ New Jersey CATV Study Commission, Report to the Governor and Legislature (Pursuant to Assembly Concurrent Resolution No. 2041 of 1971), January 4, 1972, p. 26. However, in testimony before the Commission and the General Assembly Committee on Transportation and Public Utilities, representatives of the industry, such as the Counsel for the New Jersey Cable Television Association and the Executive Vice President of Coaxial Communications of Bergen County, Inc., announced their full support and cooperation in developing state-wide guidelines for cable regulation (transcripts of the New Jersey CATV Study Commission Hearing on October 7, 1971, and May 18, 1971).

conclusion, however, which was that total reliance upon municipal franchising arrangements for the non-federal component of CATV regulation had been unsatisfactory and was likely to become more so as the industry developed.⁹⁹ Specifically, the Commission recommended that a regulatory agency control the franchising process, investigate operator qualifications, oversee performance and complaints, regulate rates, delineate logical service areas, and choose major service installation sites.¹⁰⁰

The third conclusion of the Study Commission was that the most appropriate and effective way of regulating cable systems would be through a system modeled upon public utility regulation, modified in accordance with those characteristics peculiar to CATV which differentiate it from a typical "public utility".¹⁰² Again, the Commission noted the views of industry spokesmen that because cable was not an "essential" service and does not operate under an assured monopoly, it should not be classified as a public utility. And it recognized that in the five states then regulating cable by a public utility-type agency, development of the industry had been noticeably slow. Consequently, it recommended that:

- (1) cable regulation be allocated to the PUC, but that it be placed in a separate office having no other responsibility;
- (2) cable TV should not be legally classified as a public utility, and statutory provisions should be made for the CATV office to exercise regulatory functions over CATV systems, analogous to the PUC power over public utilities in general; and

⁹⁹ Ibid., p. 57.

¹⁰⁰ Ibid., p. 42.

¹⁰¹ Ibid., p. 43.

- (3) the general regulatory scheme for cable should allow for much greater regulation on the municipal level than is provided with respect to public utilities, particularly in rate regulation and provision of certain community services.¹⁰²

The fourth conclusion stated that in view of pending FCC action, it would be inappropriate to launch any elaborate scheme for the exploitation of cable potential for education and public-service potentials, but that New Jersey should adopt certain minimal standards in these areas.¹⁰³ Finally, the Commission recommended that the Legislature maintain surveillance over the development of the cable industry and of future State and Federal regulation in order to respond promptly and effectively to changing circumstances.¹⁰⁴

It did not take long for the Study Commission's views to be translated into a legislative proposal. On March 27, 1972, S.B. 840 was introduced by Senators Hollenbeck and Hagedorn. Article I of the bill declared the objectives of state policy to be provision of "fair regulation of cable television companies in the interest of the public", with regard to "just and reasonable rates", protection of the interest of municipalities relative to franchise procedures, and securing a "desirable degree of uniformity in the practices and operations of cable television companies".

The one significant departure from the Commission's recommendations was that the bill called for the Director of the Office of Cable Television to report directly to the Governor, under the "supervision of the Board of

¹⁰² Ibid., p. 57.

¹⁰³ Ibid., p. 58

¹⁰⁴ Ibid., p. 60.

Public Utility Commissioners". The bill further allowed local government to issue a municipal consent in the form of a local ordinance which would allow the municipality to collect fees from the cable operator of up to 2% of the operator's gross income. The state could, upon issuance of this consent, accept an applicant's request to operate and issue a "Certificate of Approval", which would valid for fifteen years.

S.B. 840 was later amended by the General Assembly. Most notably, full authority over the Office of Cable Television was given to the Board of Public Utility Commissioners.¹⁰⁵ With this politically significant amendment, the bill was approved by the Senate and signed into law by Governor William Cahill on December 16, 1972.

5.3 New Jersey Revisited

The New Jersey case presents a useful contrast to California's. Given the exposure to franchising irregularities that took place, legislative decision-making fell under a public spotlight. As a result, it became much less subject to influence by individual groups with a stake in its outcome. Since it was the very groups that were successful in preventing state regulation in California (i.e. the cable operators and the municipalities) who were being scrutinized by the press and the study groups (the Center and the Study Commission) in New Jersey, New Jersey's outcome was quite different.

The chronology of events is itself indicative of the more dramatic context in which state regulation was examined in New Jersey. Exposure of the TelePrompTer and other indictments by the media and publication of the

¹⁰⁵ Clifford Engle and James McCormick. State Regulation of Cable Television, Master's thesis, University of Colorado, 1975), p. 99.

influential Crossed Wires report were followed by swift imposition of the franchising moratorium. During this interim, the creation of a small, politically-knowledgeable task force to study cable regulation indicated the active concern of the legislature. Legislation followed quickly, the total time span between the initial public interest and enactment of the law being about 18 months.

Conversations with PUC officials, CATV industry spokesmen and attorneys involved with CATV initial regulatory procedures for the most part reflect the feeling that the widespread knowledge of existing franchise corruptions was instrumental in focusing public and political attention on CATV. Frank Scarpa, President of the New Jersey Cable Television Association at that time, has said that the wide publicizing of the scandals was "absolutely the sole reason" for legislation. He felt that coverage by the Trenton paper strongly influenced the legislators in the state capitol, and stated that the news media were vociferous in their criticism because of the potentially competitive aspects of cable. He also mentioned that the strong concern for consumerism at that time was a significant factor.¹⁰⁶

Ray Perkins, general counsel to the New Jersey Cable Television Association during this period, agreed that the revelation of franchising improprieties was a major impetus for legislation, although he felt that there were "other factors" involved as well.¹⁰⁷ Some of these "other factors" were mentioned by Richard Loftus, an attorney and a New Jersey system owner who worked on S.B. 840. It is his contention that, at the time, legislators were in the market for conspicuous issues and chose cable as a popular cause; therefore the precipitation of regulation was merely political

¹⁰⁶ Telephone interview with Frank Scarpa, President of the New Jersey Cable Television Association, September 26, 1977.

¹⁰⁷ Telephone interview with Ray Perkins, presently with law firm of Holzapfel and Perkins, Cranford, N.J., September 23, 1977.

maneuvering.¹⁰⁸ Presumably, however, the high visibility of the franchising scandals due to the heavy press coverage provided the necessary popular base for the political platform. In addition, concern over the increasing volume of franchising activity contributed to the regulatory momentum.¹⁰⁹

The basic structure of the bill itself was borrowed from the public utility statutes, apparently for expediency's sake, and in some areas is thought to be insensitive to the needs of cable.¹¹⁰ The industry, opposed to regulation in general, had very little clout compared to the broadcasters, public utility officials and legislators, and thus had very little input to the legislation.¹¹¹

In its original form, S.B. 840 called for the Office of Cable Television to report directly to the Governor. Some felt that placing cable regulation totally within the domain of the Governor's Office could create a highly volatile and political situation, open to the possibility of political patronage.¹¹² It has been intimated that the Governor was "having some political trouble then"¹¹³ and that his opponents had created a strong base within the PUC.¹¹⁴ A counter proposition was offered in which power was concentrated solely within the PUC. Attorneys and industry representatives attempted to find a compromise solution. Feeling that the PUC would provide several advan-

¹⁰⁸ Telephone interview with Richard Loftus, President, Amvideo Corp., Littleton, Ma., September 23, 1977.

¹⁰⁹ Telephone interview with Jim Bridgeman, legislative aide to Congressman Hollenbeck, October 3, 1977.

¹¹⁰ Common opinion gained from conversations with Perkins, Scarpa and Loftus.

¹¹¹ Telephone interview with Frank Scarpa, September 26, 1977.

¹¹² Telephone interview with Richard Loftus, September 23, 1977.

¹¹³ Telephone interview with Ray Perkins, September 23, 1977.

¹¹⁴ Telephone interview with Richard Loftus, September 23, 1977.

tages, such as the traditional PUC protections and the fact that PUC appointees must represent both political parties, it was decided that the PUC would provide a better vehicle for cable regulation. The attorneys, legislators and industry representatives compromised on the present Office of Cable Television within the PUC and built as much into the bill as possible in order to well-define its regulatory scope.¹¹⁵

An aide to Assemblyman Hollenbeck, the bill's author, agreed that the amended form of S.B. 840 was indeed a compromise. He called it a compromise to win the support of the Democratic faction,¹¹⁶ which presumably would have been reluctant to place the total authority over cable in the hands of Governor Cahill, a Republican, and preferred to rely on the bipartisan structure of the Board.¹¹⁷

The legislation was conceived, authored and passed with great haste. Richard Leone, who was at that time Director of the Center for Analysis of Public Issues and a strong agitator for regulation, has apparently had second thoughts and is presently wondering if New Jersey's entry into regulation was precipitous.¹¹⁸ The author of the legislation, Congressman Hollenbeck, has been quoted as feeling now that "in all probability cable didn't need to be regulated."¹¹⁹ On the whole, however, the consensus is that the present form of cable regulation in New Jersey is and has been reasonably successful, especially in the areas of rate regulation and fran-

¹¹⁵ Telephone interview with Richard Loftus, September 23, 1977.

¹¹⁶ Conversation with Jim Bridgeman, October 3, 1977.

¹¹⁷ The Board of PUC Commissioners is composed of three members, not more than two of which are to be of the same political party, who are appointed by the Governor to six-year terms. New Jersey Revised Statutes, 48:2-1.

¹¹⁸ Telephone interview with Frank Scarpa, September 26, 1977.

¹¹⁹ Telephone interview with Richard Loftus, September 23, 1977.

chising procedures -- the primary impetus towards a state-wide control.¹²⁰ The major objection to the present legislation seems to be its failure to recognize the two main divergences from public utility stakes, lack of a monopoly situation and the high risk factor.¹²¹

Nonetheless, periodic attempts in the legislature to change the status of cable regulation should be noted. Representative Salkind introduced A.B. 2309 on November 25, 1974, which would "establish a cable Television council as a separate agency in the PUC".¹²² It was referred to the Transportation and Communications Committee. A.B. 1263, introduced on January 26, 1976, by Mr. Van Wagner, would make the "Office of Cable Television an independent agency, rather than totally subordinate to the PUC".¹²³ That bill was also referred to the Transportation and Communications Committee. Paul Dezendorf, Coordinator of State and Local Planning for the New Jersey Department of Public Utilities, is against these movements because he feels that CATV would be placed under the auspices of an independent agency which could be inefficient and ill-informed. He feels that the New Jersey situation is the most effective of any of the regulatory schemes now in effect.¹²⁴ Ray Perkins agrees, stating that the regulation has evolved well from the operator's point of view.¹²⁵

¹²⁰ Conversations with Loftus, Perkins and Paul Dezendorf, Coordinator of State and Local Planning, New Jersey Department of Public Utilities.

¹²¹ Telephone interview with Frank Scarpa, September 26, 1977.

¹²² Sharon Briley. Cable Television - State Legislation - 1975. Cable Television Bureau, Federal Communications Commission, 1975.

¹²³ Sharon Briley. 1976 State Legislation. Cable Television Bureau, Federal Communications Commission, 1976.

¹²⁴ Telephone interview with Paul K. Dezendorf, September 21, 1977.

¹²⁵ Telephone interview with Ray Perkins, September 23, 1977.

Richard Loftus summed up the situation by stating that most operators in New Jersey are generally satisfied with the policies and principles of the New Jersey Office of Cable Television, and their objections are mostly to the usual bureaucratic red tape. He said that ideally he would like to see the Cable Office separated from the PUC at some point, but not as a political ploy -- it would have to wield real power and be an independent force. All in all, he feels a bureaucracy is preferable to patronage.¹²⁶

The forces which were in contention during the initial regulation of cable in New Jersey may be identified thus: the cable industry, which wanted to extend its territory, preferably without regulation of any sort; the newspaper and broadcast media, who opposed expansion of cable and came down hard on cable company irregularities; legislators who claimed to support regulation, either because of genuine concern for the issues or desire for political limelight; the Governor and the PUC, each favoring regulation and asserting that authority over cable would reside most advantageously within their respective offices; and the citizens of New Jersey, who were interested in cable as a means of augmenting the entertainment and information resources of their state and/or as a titillating headline story.

¹²⁶ Telephone interview with Richard Loftus, September 23, 1977.

6.0 WISCONSIN: THE ROLE OF PROCEDURAL DYNAMICS

On September 30, 1971, Governor Patrick J. Lucey called a joint session of the Wisconsin legislature and delivered "A Proposal for Cable TV Regulation in Wisconsin". In this speech, Governor Lucey called for a moratorium on "all cable TV franchise sales, transfers, construction and expansion".¹²⁸ In addition, Lucey indicated that he would appoint "a bipartisan, blue ribbon commission consisting of citizens and legislators to study cable for the next five months and to make recommendations to the legislature and the Executive Office".¹²⁸ On November 5, Governor Lucey appointed fifty-two individuals to the Blue Ribbon Commission on Cable TV, naming Dr. Lee Sherman Dreyfus, the Chancellor of the University of Wisconsin - Stevens Point, Chairman of the Commission.¹²⁹

This began the era of official state CATV interest in Wisconsin.¹³⁰ However, as of December, 1977, Wisconsin has not asserted state jurisdiction over CATV corporations. What the Wisconsin case reflects most of all is the role of procedural factors and legislative politics in the decision to regulate or not to regulate. Like the California case, it also shows the power of a coalition, informal as it may be, made up of the cable industry and

¹²⁷ Governor Patrick J. Lucey, Special Message to the Legislature: A Proposal for Cable TV Regulation in Wisconsin, September 30, 1971, p. 7.

¹²⁸ Ibid.

¹²⁹ Wisconsin Executive Order #28, November 5, 1971.

¹³⁰ In actuality, this statement is not wholly accurate. Don R. LeDuc cites the case of Edwin Bennett who, in 1971, sought Wisconsin PSC approval of a MATV system in Rice Lake, Wisconsin. The ultimate resolution of this case was that the Wisconsin PSC denied jurisdiction over the MATV system citing federal pre-emption. See Don R. LeDuc, "Community Antenna Television as a Challenger of Broadcast Regulatory Policy" (Ph.D. dissertation, University of Wisconsin, 1970), p. 117-20, and Application of Edwin Francis Bennett, 7 RR 2054 (1951).

municipalities. And it offers an important contrast to New Jersey's experience with a Cable Study Commission. Governor Lucey's Commission differed from Governor Cahill's in several important respects.

6.1 A Gubernatorial Study

In instituting a Cable TV Commission, Governor Lucey, according to his press secretary at that time, Blake Kellogg, wanted to make sure it was broad-based.¹³¹ This concern was reflected in his appointments. Seventeen Commissioners (32%) were educators, ten Commissioners (18%) were leaders of state organizations, and six (11%) were legislators, the rest of the Commission being comprised of attorneys, cablecasters, business executives, journalists and broadcasters. It is interesting to note that the group with the largest representations on the Commission was educators. The influence of university-based individuals was also reflected in the selection of the Commission's staff director, Dr. Lawrence Lichty, who at that time was Associate Professor in the Communications Arts Department, University of Wisconsin-Madison.¹³²

On December 9, 1971, the full Commission met for the second time. It was at this meeting that each Commissioner was assigned to two of eight committees, and that committee Chairmen were appointed. Commissioners were asked to indicate their committee preferences, as well as any special expertise they had. Each Commissioner was on several committees, and Dreyfus attempted to give each Commissioner their first, second and third choice.

¹³¹ Interview with Blake Kellogg, presently Assistant Professor at the University of Wisconsin, July 25, 1977.

¹³² Blake Kellogg indicated that Lichty was Dreyfus' selection for Staff Director. But Kellogg also mentioned that it was Lichty and Kellogg himself who interested Lucey in CATV and also wrote Lucey's September 30, 1971, speech. Interview with Blake Kellogg, July 25, 1977.

What follows is a brief summary of the committees which were formed, the appointed Chairman, and the committees' missions.

(1) Federal Regulation: This committee was designed to analyze present and forthcoming federal regulations to determine the areas into which the State could enter. It was chaired by Milwaukee lawyer Marvin Klitsner.

(2) State Regulation: This committee was ultimately to make recommendations to the Commission as to what role the state should play in CATV regulation. It was chaired by David Walsh, a Madison attorney whose father owned part of the Madison, Wisconsin, cable franchise (not yet built at the time) and who also represented other cable interests in the state. Because this was to be an important committee of the Commission (and particularly important for this study), it is appropriate to examine what interests were represented on this committee. Representatives of the Wisconsin Cable Association, the Wisconsin Broadcasters Association, the Journalism Extension School of the University of Wisconsin, the Wisconsin Telephone Company, Sentry Insurance Company (on whose Board of Directors Lee Sherman Dreyfus sat and which was in the process of setting up Century Communications, a cable subsidiary), the Capitol Times newspaper, the Attorney General's office, and Blake Kellogg, the Governor's press secretary (who was also assigned as the Governor's Office - Cable Commission liaison). As can be seen, there were representatives of groups on this committee who had very strong concerns as to whether or not state regulation was recommended and in which form.

(3) Municipal Regulation: This committee was to make recommendations concerning the success and appropriate role of municipal governments in CATV franchising. It was headed by Dr. William Stroud, Professor in the Department of Communication, University of Wisconsin - Milwaukee.

(4) Education and Instruction: This committee was to investigate the needs of and the possibilities for use of CATV for educational purposes and was chaired by William Kraus of Sentry Insurance Company.

(5) Programming and Local Origination: This committee was chaired by Robert Burrull, owner of Madison area cable systems, who had been involved in numerous local origination experiments on his system.

(6) Citizens' Rights: This committee was charged with investigating privacy issues as well as franchising and other procedures which would insure citizen participation. It was chaired by Dr. Charles Sherman, then Associate Professor of Communications Arts, University of Wisconsin - Madison.

(7) Technical and Engineering: This committee was to make recommendations to the Commission concerning what role state government should play in technical and engineering standards. Ronald Bornstein, General Manager of WHA-TV (PBS) - Madison, was the Chairman.

(8) Common Carrier and Other Services: This committee was to investigate what policies might be advanced in the area of non-broadcast cable services. The Chairman was Dr. William Blankenburg, Associate Professor of Journalism, University of Wisconsin - Madison.

At the December 9, 1971, meeting the Commission authorized Dr. Dreyfus to send a letter to all Wisconsin municipalities requesting that they refrain from franchising activity during the duration of the study. This informal request replaced a formal moratorium which was voted down by the legislature. At the same meeting, the Commission also set a timetable for the public hearings mandated by Executive Order #28. Hearings were scheduled around the state in ten cities, with two days of hearings in both Madison and Milwaukee, and one day of hearings in each of the following cities: Oshkosh, Green Bay,

Eau Claire, Wausau, Platteville, La Crosse, Superior and Racine. All of the hearings except the one in La Crosse were held on the campus of the University of Wisconsin branch in that area. Lawrence Lichty, Tim Larson (a U.W.-Madison Communications Arts graduate student), Don R. LeDuc (the Commission's legal counsel), and several commissioners¹³³ travelled to the ten cities and heard or received 202 presentations.¹³⁴

Prior to, during and subsequent to the public hearings, the various committees were to meet and discuss information which the staff had collected as well as testimony received during the public hearings. The staff prepared more than 20 weekly newsletters (compiled from March through August). These newsletters contained articles about CATV collected from a number of different sources. In addition, several specific studies were undertaken by the staff, including an analysis of Wisconsin municipal ordinances (as well as in other states) and a survey of Wisconsin cable systems, which included a description of the services being provided by these systems, along with some financial data.¹³⁵ It is difficult to determine how many times each committee met because several committees met before and/or after hearings. Several of our interviewees noted that the meeting record of some of the committees was rather poor.

¹³³ Commissioner attendance at these public hearings was quite poor, averaging two hearings per Commissioner. This figure was cited by Dr. William Stroud in an interview on July 28, 1977. On the other hand, Lawrence Lichty indicated that there was no requirement or expectation that all of the Commissioners would attend all of the public hearings. Much of the material at the hearings was repetitive and they were scheduled around the state, not necessarily to facilitate maximum Commissioner attendance but to accommodate public participation. Letter from Lawrence Lichty to Konrad Kalba, January 16, 1978.

¹³⁴ Governor's Cable Commission. Cable Communications in Wisconsin: An Analysis of Recommendations, Document No. 3 (Madison, August 1972), p. 12.

¹³⁵ Governor's Cable Commission. Cable Communications in Wisconsin: Survey of Systems, Document No. 4 (Madison, November 1972), and Cable Communications in Wisconsin: Survey of Municipalities, Document No. 2 (Madison, August 1972).

6.2 The Commission's Recommendations

The hearings had ended in late March, 1972. In August, the staff sent out two documents: summaries of the testimony given at the public hearings and an analysis of recommendations. This action led to a decisive split within the Commission. Those Commissioners who were active in the process began to feel as if the staff were proceeding on its own by sending out recommendations to the Commission. On the other hand, Lichty and the staff, faced with a recalcitrant Commission and a limited amount of time, may have felt this was one way to spur the Commission to action. Unfortunately, this division within the Commission lasted throughout its life, and some say seriously hampered the chances for a regulatory bill being passed.

The recommendations for how the state should assert its interest in the CATV area were quite lengthy. There were recommendations to leave the major control of CATV with municipalities (1.1), to set up a special CATV office within the Wisconsin PSC (1.2, 2.1) and for a way to finance this special office (2.4). The special office was to have subscriber rate regulation jurisdiction, but would not be able to exercise this jurisdiction until after the completion of a rate regulation study (2.5 - 2.6). Recommendations 3.1 through 3.5 called for common carrier type regulation for cable systems allowing the cable operator to program a specified number of channels depending upon the size of the community. There were recommendations limiting certain kinds of cross- and multiple-ownership (17.1 - 17.5), encouraging regional franchising (22.1) and interconnection (29.1 - 29.2), and giving the Wisconsin PSC jurisdiction over pole and duct rentals. Recommendation 46.1 prohibited Wisconsin cable systems from providing pay or premium programming, requiring the municipality to franchise the pay operator separately from the basic cable service operator.

Some of these recommendations disturbed more than a few Commissioners. Several considered the recommendations a brief, advocating one point of view. For example, Mareli Rowe submitted a report to the Commissioners in September, in which she stated:

I would commend the work done by the staff as a momentous and very thorough document, supplied with plenty of painstaking documentation for every point. But it represents one point of view and one option only.

In response to the discontent expressed by some of the Commissioners, Chairman Dreyfus called a full Commission meeting at Stevens Point for November 20, 21 and 22, 1972, in a letter sent to all Commissioners on September 1, 1972.¹³⁶ The final vote on recommendations was not to take place at Stevens Point, but was to occur through mail balloting. The scheduled meetings were supposed to be used to work out the rationale behind each recommendation, but were basically used to structure the final ballot, which would be sent to Commissioners within the next few weeks. Commissioners were also allowed to add recommendations to the ballot.

The ballots were sent out in early December, 1972, and responses were received by the end of December. Several Commissioners, including William Stroud, indicated that they disliked the form of the ballot with several recommendations being contradictory. The way the ballot was structured, one could vote either yes or no on each of 169 separate recommendations. Within these 169 recommendations it was possible to contradict oneself by voting yes or no on both of two mutually exclusive statements.

¹³⁶ Lee Sherman Dreyfus indicated that the Stevens Point meetings had always been part of the procedure, and that discontent expressed by many Commissioners was directed towards the timing of the meeting (interview conducted July 27, 1977, and subsequent correspondence).

The results of the ballot were tabulated by Lichty and the staff (45 of the 51 voting members had responded). A preliminary draft of the final report was circulated and subsequently revised, edited, and approved by a majority of the Commission in a January 29, 1973, meeting. The final report was issued in February, 1973, and the Commission was discharged.

The final recommendations differed significantly from both the earlier staff recommendation and the subsequent bills introduced into the legislature. An important difference was that both the staff recommended and the bills proposed that a special Office of Cable Television be created within the PSC, while the Commissioners voted for regulation by a separate agency. Despite the qualifications written into the report, it cannot be refuted that 23 Commissioners voted for separate agency regulation and only 20 voted for PSC regulation.¹³⁷ All of the bills subsequently introduced as a result of the Commission-mandated PSC regulation. In addition, although the Commission did vote to allow access to cable systems without discrimination, this could not be construed as a vote for common carrier regulation, nor did the Commission vote to prohibit operator programming on all but a specified number of channels.

The Commission majority did not vote to have pay cable franchised separately. Seventy-one percent of the Commissioners felt that a study of rate regulation should be undertaken by an appropriate state agency, but 33% felt that there should be no state regulation of subscriber rates. Newspaper and broadcasting cross-ownership prohibition was not voted for by a majority of the Commission, but 58% of the Commissioners voted that "no firm shall own and/or operate a cable system(s) that has (have) the potential to serve more than 20% of the homes in the State of Wisconsin".

¹³⁷Governor's Cable Commission, Cable Communications in Wisconsin: Recommendations. * Final Report (Madison, February 1973); p.10.

6.3 The Legislative Process (1973 - 1974)

The task of the Commission was now supposedly complete. They had formulated recommendations and a body of knowledge which was to be passed along to the legislature and shaped into a bill. The Legislative Reference Bureau drafted a bill from the Commission's final report and recommendations by the Governor's staff. The first draft of the bill was then passed along to Edward Jackamonis, Chairman of the State Affairs Committee of the Wisconsin Assembly. The Governor's Office had chosen Jackamonis to introduce and shepherd the bill through the Assembly because he was the ranking Democrat of the committee to which any state regulation bill would be referred.

Representative Jackamonis, who at that time was a second-term legislator, used up valuable staff time drafting and redrafting the bill given to him by the legislative reference bureau. According to Jackamonis, the bill was in "poor shape" when he received it, and needed a lot of reworking. Among the problems cited by Representative Jackamonis were that the bill was overly complex with "unnecessary" hearing and paperwork requirements, and that the bill needlessly angered the cable industry by being one-sided and suspicious of the industry.¹³⁸ A revised version of the bill was introduced on March 15, 1973, sponsored by Jackamonis, five other representatives and two state senators, and officially titled as being requested by Governor Lucey.¹³⁹

¹³⁸ Interview with Wisconsin Representative Edward Jackamonis, July 26, 1977; and letter from Edward Jackamonis to Konrad K. Kalba, dated January 6, 1978.

¹³⁹ Despite placing his imprimatur on Assembly Bill 635, Governor Lucey never publicly endorsed this bill nor any other cable bill. According to Lichty, Lucey was quite interested in studying cable regulation possibilities, but was not necessarily in favor of state regulation (personal interview with Lawrence Lichty, July 26, 1977). However, see pp. 99-100, *infra*, concerning the unclear role that the Governor played in pursuing cable regulation.

At about the time A.B. 635 was introduced, the recently formed Wisconsin Cable Communications Association (WCCA, the industry trade group) became involved with lobbyists to stop the bill. The WCCA was concerned enough about A.B. 635 to hire at least one lobbyist to keep track of the progress of the bill and to testify against the bill at various public hearings.¹⁴⁰

Following its introduction and first reading, the bill was referred to the Committee on State Affairs, chaired by Representative Jackamonis. This committee held its first public hearing on A.B. 635 on March 27, 1973, to obtain input on the bill in its original form (i.e. the bill as introduced on March 15, 1973).¹⁴¹ The hearing lasted two days, with the first session being held in Madison and the second session in Milwaukee. A total of 28 persons spoke at these two sessions, with another 30 persons registering their support or non-support of the bill. Exhibit E illustrates the breakdown of those for and against the bill.

The top table in Exhibit E shows that of those who spoke at these early public hearings, 50% supported the bill. On the other hand, 63.3% of those who registered opposed the bill. This indicates a difference in strategies.

¹⁴⁰ Michael Vaughan was probably an appropriate choice for this position, given his background as former director of the Legislative Reference Bureau. Since he served in that capacity, he knew and understood the procedural complexities which a bill must go through to be passed by the Wisconsin legislature. He was also well known by the legislators and the staff assistants to the legislators, a very useful position to be in for a lobbyist. David Carley, a businessman involved in cable in the Madison area, also lobbied against state regulation, representing himself.

¹⁴¹ Unfortunately, Wisconsin neither makes transcripts of public hearings nor retains written statements presented at the hearings. The only record of this (and subsequent) hearings available is a list of individuals present at the hearings. This list is further broken down into those who spoke for or against the bill, those who spoke neither for nor against, and those who did not speak but registered either for or against the bill. Nevertheless, this sketchy bill history does provide some limited insights.

EXHIBIT E

SUPPORT AND OPPOSITION TO ASSEMBLY BILL 635 AT PUBLIC HEARINGS

(1) Hearings on Original A.B. 635 on March 27 and April 9, 1973

	SPOKE	REGISTERED	EITHER SPOKE OR REGISTERED
For A.B. 635	50.0% (14)	36.7% (11)	43.1% (25)
Against A.B. 635	14.3% (4)	63.3% (19)	39.7% (23)
Neither For nor Against	35.7% (10)	-- (0)	27.2% (10)
Total	100% (28)	100% (30)	100% (58)

(2) Hearings on Amended A.B.635 on July 30, September 14 and 19, 1973

	SPOKE	REGISTERED	EITHER SPOKE OR REGISTERED
For A.B. 635	61.9% (26)	76.4% (29)	68.7% (55)
Against A.B. 635	26.2% (11)	23.6% (9)	25.0% (20)
Neither For nor Against	11.9% (5)	-- (0)	6.3% (5)
Total	100% (42)	100% (38)	100% (80)

Within each cell is a column percentage indicating the percent of those in that column which fell within that row. In parentheses are the actual number of individuals.

The proponents of the bill chose to have many representatives of different groups speak at the hearings. This would show a broad-based coalition in support of the bill. For example, Dreyfus, as a representative of the Governor's Cable Commission, spoke at these hearings, as did Merry Sue Smoller of the Citizens' Cable Council (a Madison-based public interest group involved in passing a new Madison cable ordinance). In addition, representatives of the following groups spoke for A.B. 635: The Wisconsin Broadcasters Association, the Wisconsin State Telephone Association (which represented Wisconsin independent telephone companies), and the United Church of Christ Cable Committee. Among those groups who registered their support for the bill was the Wisconsin Federation of Cooperatives.

The opponents of the bill used a different strategy. Realizing that most of their support was derived from the cable industry, they chose to present fewer speakers and more registrants. Only two of their registrants against the bill did not represent the cable industry (both represented themselves). By having fewer but more eloquent, informed and prepared speakers, the industry would appear more united while the numbers would show through if anyone took the time to glance at the register. It was at these public hearings that Michael Vaughan, a former director of Wisconsin's Legislative Reference Bureau, made his first appearance for the WCCA.

As bills often do, this one became a cool issue for several months following this March-April flurry of activity. It was not until July 17, 1973, that Representative Jackamonis offered a revised bill entitled Assembly Substitute Amendment 1, A.B. 635. The major differences between this bill and the original A.B. 635 was that the regional planning function was taken away from the PSC CATV office (as it appeared in the original bill) and given to the regional planning commission. In addition, the PSC was restricted

from instituting rate regulation until 1977 in A.B. 635. But in A.B. 635, Substitute Amendment 1, this date was changed to 1975. The appropriation for the special CATV office within the PSC was increased from \$50,000 to \$140,000, and concurrently the percentage of gross revenue which each cable operator was to remit to the state was increased of one percent to one percent.

In July and September, three more public hearings were held to debate the merits of this newer version of the bill. These hearings were held in Madison, Milwaukee and Wausau, and also drew a large number of proponents and opponents. The bottom table in Exhibit E indicates the breakdown of support and non-support for the bill at these later hearings. Again, a similar strategy was adopted by proponents of the bill: show a broad-based coalition by bringing out the people both to speak for and now to register for the bill. Among those groups and individuals who came out in favor of state regulation at this time were: Lawrence Lichty, the former staff director of the Commission;¹⁴² William Stroud, a member of the Commission vocal in his criticism of Commission activities, but nonetheless an ardent regulation supporter; the Wisconsin Civil Liberties Union; Wisconsin Friends of Public Broadcasting; and the Wisconsin Electric Cooperative Association (an association of mostly rural electric cooperatives set up under the Rural Electrification Act) which had changed from being opposed to the bill at the earlier public hearings.

The opponents of the bill either did a poor job of getting out their supporters or continued with the strategy of fewer speakers which was evident earlier. In any event, the number of those who came to register their oppo-

¹⁴² According to Lichty, however, he was not expressing his own opinion concerning state regulation, but was merely asked to explain the process by which the Commission came to its conclusions in his capacity as former staff director. Letter from Lawrence Lichty to Konrad K. Kalba, dated January 16, 1978.

sition was small. However, the opponents did gain the support of a very vocal and influential representative -- Edward Johnson, the President of the League of Wisconsin Municipalities; this began the official involvement of municipalities against the adoption of state regulation. This appears to be a significant circumstance, which some have cited as being the reason for the lack of state regulation in Wisconsin.

Subsequent to these public hearings, Representative Jackamonis offered yet a third version of the bill, Substitute Amendment 2, A.B. 635. This differed only slightly from Substitute Amendment 1, but the several significant differences were obviously included to help garner support from the League of Wisconsin Municipalities. Municipalities were not only allowed to use franchise fees for regulation (which would help raise money and quiet cries for use of funds for public access), a specific section was added which stated that "nothing in this Chapter shall authorize the division to require the granting of any franchise by a franchise authority"; but most significantly, new sections were added which would have created a Wisconsin Citizens' Cable Advisory Commission (WCCAC) and required municipalities to create Citizens' Cable Advisory Commissions (CCAC's). The WCCAC was to be appointed by the Governor and was to advise the PSC in the development of a state plan. The CCAC's, which were to be appointed by the chief executive of each municipality, would assist in reviewing franchise applicants, review subscriber complaints and advise the PSC as to the proper way to enforce the public concerns in the CATV area. Both these bodies would significantly increase the municipalities' role in governing cable at the state level.

For municipalities which felt that state CATV regulation was another usurpation of their power, this could have been seen as a significant concession by the legislators to gain their support. But the Wisconsin League of

Municipalities continued its vocal opposition to state regulation, sensing perhaps a shift in momentum.

6.4 A Procedural Vote

On October 11, 1973, the Assembly Committee on State Affairs reported out the Assembly Substitute Amendment 2, A.B. 635, and recommended that the Assembly adopt this version of the bill. The Assembly proceeded to refer the bill to the Joint Committee on Finance because of the bill's fiscal effect (i.e. its budget requirements and its provision that cable operators must pay 1% of their in-state gross operating revenues to the State). The bill was favorably reported out on October 23 and placed on the Assembly calendar.

On February 20, the bill was read a second time before the Assembly (a bill must be read three times before it can be voted on) and several amendments were offered. One of the more important amendments adopted prohibited the ownership of CATV systems by any corporation which owned 50% of any newspaper or magazine. This was adopted following the failure of a more stringent amendment which would have substituted a 10% figure for the above 50% figure. This ownership prohibition was contrary to the Governor's Cable Commission, which did not recommend that any specific ownership restriction be immediately imposed, but rather called for the study of the ownership issue.

Following the amendment period, the bill needed to be read a third time. But Wisconsin legislative procedures required that the rules needed to be suspended so that the bill could be read a third time on the same day that amendments were taken up. Rule suspension needed to be confirmed by two-thirds of the Assembly. The bill proponents failed to receive this two-

thirds majority, which meant that the bill would have to go to a third Reading Committee and then be rescheduled to be taken up by the full Assembly. This stalling tactic worked to the advantage of the bill opponents, who realized that the end of the legislative session was nearing (April 1, 1974) and the longer the bill languished in the Assembly, the less time the Senate would have to consider the bill. This tactic would be used again by the opponents.

The bill went to the third reading committee and was deemed to be correct. It was then scheduled to be taken up by the full Assembly on March 20 (the bill was put at the end of a long list of legislation which was ready for a third reading). The proponents attempted three times to have the rules suspended so that the bill could be taken up prior to the scheduled March 20 date. They failed to gain a two-thirds majority each time.

On March 21, 1974, the amended A.B. 635 was read a third time and passed by the Assembly, 65 - 33. According to Michael Vaughan, the bill would have to wait in the Assembly for two days after its passage so that any Assemblyman could reconsider his vote.¹⁴³ Of course, the proponents of the bill wanted to see it received by the Senate as quickly as possible, but this again required a two-thirds vote to suspend the rules. The proponents failed twice to muster the necessary votes and the bill was not immediately sent to the Senate. The final vote on rules suspension was congruent with the vote on passage, 65 - 33. This was only one vote short of the necessary two-thirds, but effectively killed the chances of the bill being passed that session. It was virtually impossible to have the bill advance through the Senate in so short a time (given that it would not even be received by the Senate until March 26, 1974). According to Representative John Shabaz (R-New Berlin), the

¹⁴³ Interview with Michael Vaughan, July 25, 1977.

minority leader who actively worked against the bill, "We won it on a procedural."¹⁴⁴

Although the regular 1973 legislative session was over at the end of March, there was still a chance that a CATV state regulatory bill would be taken up by the legislature. In late April, 1974, the Governor called a special session of the legislature to take up several pending issues. One of the issues which the Governor put on the agenda was state CATV regulation. While this further indicated the Governor's interest in seeing state involvement, there were fears prior to the release of the agenda that cable regulation was no longer a priority of the Governor.

On April 23, 1974, an editorial in The Milwaukee Journal voiced these concerns. It intimated that the cable issue might not appear on the final agenda because the Governor was listening much too closely to Wisconsin businessman David Carley. David and his brother James were getting heavily into the cable television field at this time. Besides owning a 25% interest in the Madison franchise (which they bought in 1971), they were in the process of completing a deal with Robert Burrull for the purchase of Viking Media Corporation, a company which held franchises in surrounding Madison communities.

Nevertheless, a bill calling for state CATV regulation was introduced in the Senate during the special session. However, S.B. 6 was not introduced by request of Governor Lucey, but was offered by the Committee on Senate Organization. The bill essentially duplicated A.B. 635, but there were some differences. S.B. 6 eliminated any cross-ownership restriction whatsoever (e.g. the 50% rule amendment in A.B. 635) and would have also imposed a 4% sales tax on CATV sales to subscribers in an attempt to have the bill "pay for itself".

¹⁴⁴ Interview with Wisconsin Representative John Shabaz. July 28, 1977.

The bill was introduced in May 2, read the first time and referred to the Joint Committee on Finance (which was to study the fiscal impact of the bill, especially the 4% sales tax). The Joint Committee sat on the bill until the end of the special session, with one attempt to withdraw the bill from the Committee which failed by one vote. The bill eventually died in the Committee. The chance for state CATV regulation would now have to wait until the 1975 legislature, which was to begin meeting in January, 1975.

6.5 The Legislative Process (1975 - 1976)

The 1975 state legislature was a bit different from the 1974 one. For example, the Democrats controlled both houses (in the 1973 legislature, the Democrats controlled the Assembly but the Republicans controlled the Senate, probably accounting for the ability of the Senate to squash S.B. 6 in 1974). In addition, the Governor had been reelected in 1974 and was therefore no longer actively running for office. Representative Jackamonis had also been reelected, but he was no longer chairman of the State Affairs Committee (although he was still an influential member of that committee). In October, 1975, Jackamonis introduced a third bill, which called for PSC regulation of CATV systems, A.B. 1191. Again, it was by the request of Governor Lucey (again implying his public support for state regulation).

Assembly Bill 1191 was read the first time on October 8, 1975, and was then referred to the State Affairs Committee, which held a public hearing on the bill on October 21, 1975. Assembly Bill 1191 was similar to the earlier Assembly bills, except that it called for two rounds of franchise certification by the State: one for construction and one to begin operation. It also required a 1% of gross revenues fee to be remitted to the State. However,

there were no cross-ownership restrictions (similar to S.B. 6), and most significantly, the 4% sales tax included in S.B. 5 was now split off from the main cable regulation bill.

A public hearing on A.B. 1191 was held on October 21, 1975. This hearing had by far the best attendance of all the hearings. Exhibit F indicates the breakdown of opponents and proponents of the bill. As can be readily observed, the opponents of the bill now vastly outnumbered the proponents in both appearances and registrations. Speaking and registering for the bill were Lee Sherman Dreyfus, Blake Kellogg and Lawrence Lichty.¹⁴⁵ the old Cable Commission stalwarts. Several people and groups spoke or registered their opposition to the bill. Merry Sue Smoller, who had been a vocal proponent of state cable regulation, had since become the cable television officer of Madison and subsequently changed her position. In delivering her speech against the bill (which was approved by Madison's Broadband Telecommunications Regulatory Board and the Madison Common Council), she said:

I did support SB 6 last session because, although I felt the bill had serious problems, I felt it better than no bill at all. I cannot support such a bill today, based on what I have learned in almost a year and a half of being involved in regulation at a local level. The experiences I have had working in Madison and with a number of municipalities around the state have given me confidence in the ability of local people, in communities of varying size, to provide good regulation.... I can see now, as does our regulatory board, provisions in AB 1191 that overlap, dilute, contradict and override our local regulatory authority. (emphasis added)

Smoller's comments illustrated the crux of local opposition to PSC-type state regulation which pre-empted local authority. This opposition was again echoed

¹⁴⁵ Again, Lichty asserts that he was not expressing his own opinions, but merely explaining the Commission's recommendations. See footnote 142, supra.

EXHIBIT F

SUPPORT AND OPPOSITION TO ASSEMBLY BILL 1191
AT PUBLIC HEARING ON OCTOBER 21, 1975

	SPOKE	REGISTERED	EITHER SPOKE OR REGISTERED
For A.B. 1191	28.0% (7)	15.8% (3)	22.7% (10)
Against A.B. 1191	68.0% (17)	78.9% (15)	72.7% (32)
Neither For nor Against	4.0% (1)	5.3% (1)	4.6% (2)
Total	100% (25)	100% (19)	100% (44)

Within each cell is a column percentage indicating the percent of those in that column which fell within that row. In parenthesis are the actual number of individuals.

by Ed Johnson of the League of Wisconsin Municipalities; Harold Klubertanz, legislative analyst for the City of Madison; and William Beyer, of the Wisconsin Alliance of Cities.

The involvement of Stephen Effros (staff attorney for the FCC Cable Bureau) in this phase of the battle is worthy of note. In a memo written to Harold Klubertanz, dated October 16, 1975, Merry Sue Smoller wrote the following:

It [the FCC] does not favor three-tiered, duplicative regulatory structures. The Chief Attorney at the FCC Cable Bureau [referring to Stephen Effros] has called AB 1191 "the most duplicative state cable bill he has ever seen".

Smoller in writing this memo was attempting to convince Klubertanz that the Madison Common Council should come out against A.B.1191, and they did.¹⁴⁶

The bill was not taken up again by the State Affairs Committee until February 3, 1976. At that time, the Committee voted to report out the bill favorably and recommend it for passage by the full Assembly. The Assembly did not take up the bill until March 2, 1976, when it was read a second time and referred to the Joint Committee on Finance. Again, bill proponents were working against time, because the end of the 1975 legislative session was March 31, 1976. Proponents realized that the bill might get stalled in the Finance Committee, so their strategy was to attempt to withdraw the bill from the Committee on the same day it was referred to them. The only way a bill could be withdrawn from a Committee without having it debated by the Committee was for the full Assembly to vote to suspend the rules. Of course,

¹⁴⁶ It also appears that Smoller requested Effros to make written comment on A.B. 1191. Effros came to Madison to appear at the October 21, 1975, public hearing. Although he is officially listed as appearing neither for nor against the bill, both Lichty and Smoller indicated that his talk seemed more negative than positive concerning A.B. 1191.

this would take a two-thirds majority. The one attempt to have the bill withdrawn and placed on the March 4, 1976, Assembly agenda failed to get a two-thirds majority, 50 voting for withdrawal, 42 voting against withdrawal. This meant that the bill would have to be examined by the Finance Committee.

The Finance Committee did not get to the bill by the end of the legislative session. Michael Vaughan, the WCCA lobbyist, indicated in an interview that the Finance Committee was reluctant about the bill because it did not pay for itself. When asked about the 4% sales tax which had already been passed as a separate measure by the legislature, Vaughan said that the Committee did not view this as funds going towards CATV regulation, but instead saw the already passed tax as going into the general revenue coffers. By taking the 4% sales tax out of the regulatory bill, the proponents may have hurt its chances of passage. This, however, is only a theory raised by bill opponents; others doubted if this actually affected the voting.

6.6 The Cable Commission Revisited

Many of the individuals involved in the original Study Commission thought it did not work as well as was planned. Others such as Dreyfus and Lichty still remain convinced that it served a useful purpose in educating the public and legislators and served as a single gathering of information and ideas about these problems from citizens across the state. It is quite obvious that a task force was an approach extensively used by the Governor in his first term. In addition to the Cable Commission, Lucey appointed an Offender Reform Task Force, among others.

Edward Jackamonis was very critical of the Governor-appointed task force approach in general. He said that most of the time individuals with

publicly recognized names were appointed, and because of other commitments, were able to spend little time on their new project. In addition, Jackamonis stated that task forces are not bill-oriented, they don't attempt to hammer out coalition-type legislation. They generally drop a large amount of information in the lap of one legislator, who must then attempt to read the minds of the task force. Jackamonis recommended the legislative council approach, whereby a special joint legislative committee would have been appointed to investigate and come up with "practically" oriented legislation. As an alternative, a hybrid legislative council - task force approach could be taken where the task force simply gathers the information and the legislative committee drafts the bill.¹⁴⁷

These have all been criticisms of the study commission approach in general. The following are some comments about the CATV Commission in particular. The Commission may have been too large. Fifty-two members with other commitments are hard to deal with as a body. Because of this organizational problem, the Commission as a whole did not meet very often. In an attempt to make the groups more manageable, the individual committees were created, but their meeting records were not better. A smaller Commission might have been more manageable. On the other hand, a smaller Commission might not have achieved the broad-based interest representation which was one of Dreyfus' objectives. In addition, a small Commission might have been open to charges that the process was controlled by a small clique. As an alternative, a larger staff might have been able to organize a large Commission more effectively. This would have taken more money. In the final report of the Commission, the budget for their task was calculated at \$28,380, a small

¹⁴⁷ Interview with Wisconsin Representative Edward Jackamonis, July 26, 1977.

budget for a large Commission.¹⁴⁸ This budget might have been adequate, had the task they were given taken the six months originally estimated by the Governor. It is obvious now that the six-month time frame was overly optimistic.

The lack of organization and other factors led to another problem cited by those involved: a feeling on the part of some Commissioners that the staff was too autonomous. It is usually the rule and not the exception that the staffs of many Commissions do most of the work, while the Commissioners make final policy decisions. The staff of the CATV Commission did most of the work but, some felt, also tried to enter into the decision-making arena.

6.7 The Legislative Process Revisited

As mentioned in Section 6.6, Jackamonis indicated that there were several other approaches the Governor might have taken in studying and implementing state CATV regulation. According to Jackamonis, the track record of Lucey's task forces in getting legislation passed was not good. The legislative council approach passes more legislation. Dreyfus, on the other hand, felt that although more legislation is passed by a legislative council, the legislation is not as good as the bills which emerge from a Study Commission. The legislative council is not as responsive to the needs of the people, and it might increase the power of industry lobbyists. Nevertheless, it seems quite likely that had the legislature been more actively involved, they would have felt less hostility towards a bill resulting from a Study Commission appointed

¹⁴⁸ Final Report of the Governor's Blue Ribbon Task Force on Cable Communications, 1975, p. 48. Of this, \$18,343 was used for salaries. Lichty, Larson, a secretary, and LeDuc were all paid for their services. This lack of funding was cited by one Commissioner as the primary defect of the Wisconsin approach to studying state regulation. Letter from David Walsh to Konrad K. Kalba, dated January 11, 1978.

by the Governor. In addition, given the hostility between academics and legislators, it may not have been the best tactical move to have appointed the chancellor of a university as Chairman and chief spokesman for the Commission. On the other hand, some individuals have stated that Dreyfus himself was respected in the legislature.

What of the Governor's interest in seeing CATV legislation? It seems incongruent that a Governor interested enough in delivering a special message to the legislature and setting up a special task force could not -- if he wanted to -- push a bill through a legislature packed with members of his own party (as in 1975). Of course, Lichty indicated that Governor Lucey was quite interested in having a study done, but was not sure about regulating CATV at the state level. This is not, however, congruent with the fact that two of the three bills were introduced by request of Governor Lucey. Jackamonis claims that although the Governor introduced cable legislation, he did not push for its passage.

If, in fact, the Governor did lose interest in seeing CATV regulation and was merely lending his name to the bills, this too can be explained in several ways. Blake Kellogg, who was the prime impetus for the Governor's interest, left the Governor's staff in 1973. This could account for the Governor's loss of interest. The Governor's priorities certainly could have changed. In 1973-1975, Lucey was fighting for the legislation which came out of other task force studies, specifically offender reform legislation. The most cynical, and by no means the best substantiated, explanation is in the Carley connection. It may have been implicit that if the Governor cooled his efforts in getting state CATV regulation, David Carley, then heavily involved with cable in the state, could have been helpful in fund raising

efforts for Lucey in the 1974 gubernatorial race.¹⁴⁹

Even if the governor lost interest for whatever reason, this probably does not explain the whole story. Several other reasons emerge as well. Although some of the commissioners and staff remained involved in the battle to have the bills passed (Lee Sherman Dreyfus, Lawrence Lichty and William Stroud, to name a few), other commissioners worked actively against the bills (Mareli Rowe and Robert Burrull). Had the Commission been 100% behind the bill, the Assembly may have been more likely to accept their recommendations. But, as mentioned above, the bills were not exactly congruent with the Commission's recommendations, and therefore lost the support of some commissioners. In addition, the broad-based nature of the Commission meant that many interests were represented. Therefore it would have been difficult to achieve total consensus given this clash of interests. Blake Kellogg pointed out that had the bill not taken the industry head-on by putting everything in one piece of legislation, there might have been a better chance.

This leads to the role of Michael Vaughan, the lobbyist for the industry. As is evident from the foregoing analysis, there were many procedural fine points which bill opponents used in killing the various bills. Vaughan was versed in these procedures (from his job as director of the Legislative Reference Bureau) and he was being paid to make these procedures work for the industry. There was no evident pro-regulation lobbyist or any other individual who had both the expertise and time to spend making the procedures work for the bills. The fact that Jackamonis was a second-term legislator during the

¹⁴⁹ Dreyfus was the prime advocate of this position, but both Dreyfus and Carley are (as of late 1977) actively running for the Governorship in Wisconsin, which means that the statements may have more to do with partisan politics than reality.

fight over the first and most serious attempt at state regulation must also be considered a factor. Lichty mentioned that the Commission and the bills never really answered the question of why state regulation was needed.

Vaughan indicated that one of his best questions to legislators was "what ills would this bill cure?". Not having answered this question adequately was apparently a weakness on the part of the bill's proponents. However, the answer to this question is always difficult when legislation attempts to prevent something that has not as yet happened.

Another explanation for the failure of state cable legislation which was offered by several of our interviewees concerned the state of development of the cable industry and federal cable regulation. In 1971, the cable industry was, according to some, on the verge or in the middle of a rapid expansion. As was seen in the New York case, the fear of unchecked cable development (and the lack of agreement over the form state regulation should take) led the New York legislature to pass a cable franchising moratorium. In addition to this concern over rapid cable development, it was unclear in 1971 when and if the FCC would institute new cable rules and regulations, which would presumably address many of the franchising issues that concerned some state legislators. By 1974, the picture had significantly changed. The cable industry was not as financially healthy as some had predicted in the early 1970's. (In fact the economy as a whole was not very healthy.) The FCC had issued its omnibus cable regulations in 1972, and by 1974 many new franchises were awarded under these rules. Lichty also indicated that in Wisconsin in particular, several cities had awarded franchises that were similar to the proposed Wisconsin state regulation bills. Therefore, it could be argued that the perceptions of the extent and immediacy of the cable development "threat" had changed. The

perception that other levels of government (federal and local) were beginning to effectively handle the cable issue and that state involvement was no longer a necessity may have also played a role.¹⁵⁰

Finally, the role of municipalities looms large in this story. From the beginning, the Wisconsin League of Municipalities fought the regulation bills. It wasn't until the final bill A.B. 1191 that the City of Madison and the Wisconsin Alliance of Cities became involved. But it is quite obvious that some Wisconsin municipalities were adverse to what they thought of as state usurption of local control and "duplicative" state regulation. This may have been keyed to the fact that all of the bills called for PSC regulation of CATV, which seriously pre-empted local control. It is not clear, however, that if the bills called for some other form of regulation, municipalities would have been less adverse to state involvement.

Several other interests emerged in the state regulation battle. As pointed out above, Stephen Effros, an FCC Cable Bureau staff attorney, worked towards informing the legislature of the duplicative nature of part of A.B. 1191. The Wisconsin Independent Telephone Association was quite vocal in calling for PSC-type regulation of cable systems. Wisconsin Telephone (the AT&T affiliate), on the other hand, was virtually silent during the debate over state regulation. It is unclear what public position they would have taken in the debate. What effect their participation would have had is open to speculation.

¹⁵⁰ See pages 111 to 115 of this report on "Changing Perceptions of Cable", Section 7.3.

7.0 WHY STATES DO OR DO NOT REGULATE

In the preceding case studies, we have described the processes whereby five states, particularly their legislatures, arrived at decisions on cable regulation. This process view of state entry into regulation generally confirms the notion that states do not establish regulatory powers primarily on "technical" grounds (e.g. the presence or absence of natural monopoly). Instead, their decision to regulate or not to regulate is based on a confluence of factors, including the leadership aspirations of state legislators, the influence of industry and other groups, and prevailing concepts of the status and future of cable television as a communications medium.

Even the law does not serve as much of a guidepost in this process as long as it does not unambiguously prevent states from exercising a particular kind of regulatory authority. In fact, existing laws often contribute to the confusion, as in the Connecticut case, where the rights of cable operators to access utility poles were unclear.

The difficulty with a process view of legislative decision-making is that it undermines arriving at generalizations. Each case seems to exist in a unique setting, permeated with unique personalities, procedures and pressure groups. To some degree, this is as it should be. As every state legislator or industry representative knows, the peculiarities of the local situation (e.g. a legislature's committee structure, etc.) will influence the outcome of legislative decisions. Nonetheless, the more interesting questions from a comparative perspective are whether certain general factors can help explain why some states have chosen to regulate cable and others not, and why the form of regulation has differed across states. Based on the case studies, a general answer to these questions appears to be the following. For one reason or another (e.g. legal uncertainties, consumer complaints, competitive industry

pressures), cable television has emerged as a political and legislative issue in certain states. Once the issue has arisen, it has been dealt with in one of several ways by state legislatures: (1) waiting to see if it will go away, (2) assessing the importance of the issue(s) (i.e. through hearings, study groups, legislative research), and (3) considering a possible "solution". One of the solutions considered has been the institution of state regulation.

However, the decision to institute regulation and the form the regulation has taken have depended on a partially distinct set of factors. Among these can be listed (1) the appearance that industry abuses -- or regulatory incompetence at the local level -- are widespread and/or are likely to grow, (2) the effectiveness of various pro and con regulation interest groups, and (3) changing perceptions of cable television. In addition, general attitudes toward regulation, though not considered in the case studies, may have played an important role in determining the fate of cable regulation at the state level.

In the remaining part of this report, we will examine how these factors have been reflected in the five cases and in cable television regulation more generally.

7.1 Effectiveness of the Industry

Clearly, the political effectiveness of the cable industry has been a major determinant of legislative decisions on cable regulation, at least in the states we have studied. In Connecticut, the industry was only a handful of franchise applicants and in New York it was not very cohesive, given the mix of small rural operators and a few large MSO's at the time that state

regulation was being considered. In both cases, regulation ensued. By contrast, in California and Wisconsin, the industry was cohesive and generated well-organized campaigns against state regulation, succeeding in both instances.

As we pointed out in the California case, there are certain structural characteristics which may render the cable industry more or less effective in the political arena. An industry where most operators have common problems and yet sufficient resources to pursue political action may find it easiest to influence the course of events. Moreover, we suspect that the growth of the industry on a state-wide basis (i.e. as measured by the spread of systems as well as the number of subscribers) is likely to strengthen the industry's position vis-à-vis the legislature.¹⁵¹ Conversely, it is probably in states where state-wide growth is just emerging that the industry is likely to be most susceptible to (uninvited) regulatory action. The experience in New York and New Jersey (as well as Massachusetts and Minnesota) reinforces this conclusion.¹⁵²

Other factors that are likely to contribute to the industry's effectiveness in a given state are how its behavior is perceived by legislators, as mediated by the press, the other mass media, consumer groups, and cable users (e.g. media access groups, educational agencies, etc.); its own understanding of and involvement in the political and legislative dynamics of regulatory

¹⁵¹ This assessment is supported by the lack of regulation in heavily-cabled states such as Pennsylvania and Florida. In Pennsylvania, allegations of franchising irregularities have been plentiful, the Johnstown scandal transpired, study groups have been organized, and numerous bills calling for state regulation have been introduced, but still state regulation has not been adopted. In Florida, strong cable representation at the state capitol has so far precluded even the introduction of regulatory proposals in the legislature.

¹⁵² In states with only a few systems, the issue is not likely to be deemed important enough even to be debated.

decision-making; and the extent of other forces that may be aligned against the cable industry.

Perceptions of industry "misbehavior" in the local franchising process played a major role in New Jersey's consideration of state regulation and a significant one in New York. Conversely, in California and Wisconsin, where regulation was not passed, the documentation and/or press coverage of such misbehavior was relatively limited.¹⁵³ In this respect, the cable television experience reflects the traditional association between perception of industry abuses and the call for regulation. And it suggests that relationships between an industry and the news media may be as important in determining legislative outcomes as the relationship between the industry and the legislature.

The role of consumers and consumer groups, on the other hand, has been negligible in the states we examined, with the exception of New York, where New York City legislators were being asked why cable services were not available outside of Manhattan.¹⁵⁴ We assume that individual consumer complaints about existing cable services could have played a dramatic role in legislative debates, if enough consumers thought about venting their complaints to legislators or if municipal officials (who probably receive the most complaints after the cable companies themselves) had forwarded these complaints to the legislature. However, as we have seen, municipalities were not usually interested in stimulating legislative concern over

¹⁵³ We are not asserting here that industry misbehavior did occur in these states. The key point is simply that allegations of misbehavior did not play a significant role in the legislative decision process.

¹⁵⁴ Subsequent to the period covered in this report, the New York Public Interest Research Group (NYPIRG) has become involved in monitoring state cable regulation in New York, and periodic interest in state cable issues by consumer and user groups has been apparent elsewhere.

cable regulation. Whether consumers will organize to affect cable regulation as cable services become more widespread remains to be seen.

In those cases where the industry has withstood the imposition of regulation, its representation in the state capitol has obviously also been a key factor. In both Wisconsin and California, the cable industry had able representatives with considerable experience in the procedural dynamics of legislative decision-making and a close relationship with relevant legislators. And in at least one of the two cases (i.e. California), the industry regularly supported a number of candidates for political office, a fact that was not likely to be overlooked by the beneficiaries of this support in the legislature when it came to key committee or house votes. While the understanding of legislative dynamics and the ability to take advantage of them may in turn be related to the industry's overall cohesiveness and organization, the impact of the individual capabilities, timing and leadership of lobbyists cannot be discounted.

A final factor that influences the effectiveness of the industry in legislative decision-making, and one over which it may have relatively little control, is the array of forces lined up against it. Most notably, these can include government interests (which will be discussed below) and competing industries. Connecticut is the most obvious example of how other industries, in particular the telephone company, contributed to the advent of state regulation. New York provides another example of this kind, since both broadcasters and movie theater operators exerted pressure to regulate cable television, which in their view was a predatory competitor.¹⁵⁵

¹⁵⁵ Even in the New Jersey case, a question can be raised as to the ultimate motivations of the local press in dramatizing franchising improprieties, since cable systems could threaten the press's monopoly on local news in the state.

As the newcomer, the cable industry is at a relative disadvantage when faced with political pressure from competing groups such as the telephone and broadcasting industries, both of which are likely to have solidified strong ties with local legislators and other political decision-makers.¹⁵⁶ In some cases, these groups may also be receiving support -- as in the "Save Free TV" campaigns -- from national trade organizations. However, the California case serves as a counterpoint. Again, because of effective representation by its lobbyist and growing industry influence, the California cable association has achieved a state of peaceful coexistence with its broadcasting counterpart.

7.2 The "Divisibility" of Government

Because the cable industry is often perceived as a competitor by other industries, it has not managed to secure the backing of general business organizations, such as the Chamber of Commerce, whose influence in state politics can be considerable. But in several instances, the industry has managed to achieve a coalition, informal as it may be, of equal significance in its attempts to prevent state regulation from occurring. In several states, municipalities and their associations have fought against state regulation as vehemently as the industry itself.

The point is not that municipalities support the industry's desire to avoid more regulation; rather, local governments want to make sure that their own regulatory powers over cable television will remain substantial.

¹⁵⁶ There are some contrasting examples of influential political figures who have been involved in cable system ownership, for example, in Connecticut and Pennsylvania.

Municipalities do not want to divide franchise fee revenues with state agencies; often want to tax pay cable revenues, which states (not to mention the FCC) can prevent them from doing; and generally want to retain regulatory controls over the services, rates and performance of cable systems so that responsiveness to their residents' and voters' needs -- as municipal officers perceive them -- can be ensured.¹⁵⁷

Legislators who are interested in establishing regulatory authority at the state level must inevitably confront the municipal viewpoint on cable television. They can do so by pointing to the inadequacies of municipal franchising and regulation (whether documented or not) or by proposing compromises in the allocation of regulatory powers (e.g. by allowing localities to continue franchising, limiting state fees, etc.). The first approach was pursued in at least four of the states we examined (i.e. California, New Jersey, New York and Wisconsin; the second, in New York, California, and New Jersey. The fact that full regulatory pre-emption was only achieved in one state (i.e. Connecticut), that New Jersey and New York have dual levels of regulation, and that regulation was not legislated in California and Wisconsin is a reflection of the power of the municipalities in cable politics.

The fact that legislators and municipalities have often disagreed on the most appropriate framework for regulating cable is also a reflection of a more general point. Government is not a unified interest group.

¹⁵⁷ While this statement applies to the period covered in this report (i.e. late 1960's and early 1970's), it may need to be qualified with respect to more recent developments. In the area of rate regulation, municipalities have started to allow cable operators to set their own subscription fees. In other cases, municipalities have not resisted rate regulation by state agencies, since this allows municipal officials to deny rate increases at the local level with the knowledge that, if reasonable, the rates are likely to be approved at the state level. See Larry S. Levine, The Regulation of Cable Television Subscriber Rates by State Commissions, Harvard University Program on Information Resources Policy, Publication P-78-6, July 1978.

Not only must state legislators agree with each other (i.e. in sufficient numbers to create a majority) before state regulation can be instituted, they must also contend with the often divergent viewpoints and pressures of other arms of the state government, including municipalities and counties, the Governor's office, and the PUC. Just as private interest groups have often been divided on the desirability of state regulation, so has the state government.

Part of the differences within state governments can be ascribed to party politics. In New Jersey, for instance, last minute jockeying to remove the proposed Office of Cable Television from under the control of the Governor reflected suspicion of a Republican Governor by a Democratic legislature (as well as the concern of the cable industry not to be subject to gubernatorial whims, regardless of party). Similarly, in Connecticut, when a Republican governor appointed the members of a Commission on the Educational and Informational Uses of Cable Telecommunications in 1974, a Democrat-controlled committee in the General Assembly declined to approve the Commission's budget.¹⁵⁸

But an equal, and possibly larger, number of intra-government conflicts over cable regulation can be associated with the divergent bureaucratic interests of different parts of the government. For example, in most of the case studies, we found the PUC interested in encompassing cable television under its jurisdiction; although in New York this interest, strong as it was, was apparently overshadowed by an even stronger PSC

¹⁵⁸ See Nicoll, *op. cit.*, p. 92. We have also been told that in Michigan the Democratic legislature has refrained from allocating cable regulatory responsibility to the PUC, since it would then come under the indirect control of a Republican Governor.

concern to have nuclear power plant regulation placed within the PSC.¹⁵⁹ Similarly, the role of the Governor in using cable regulation as a political issue or as a vehicle for expanding authority over appointments or budgets could be inferred from the Wisconsin, New York and New Jersey cases.¹⁶⁰

In sum, not only does the frequent "divisibility" of government interests consume a considerable amount of legislative energy in the process of developing a regulatory proposal that will receive sufficient support to be enacted, it can also foster the interests of the cable industry. A divided government is no match for a unified industry. In New York, for example, a form of regulation less favorable to the industry would likely have resulted, had conflicts among Representative Kelly, the PSC and the Governor's office (all predominantly Republicans) over the allocation and structure of regulatory responsibility not emerged. Conversely, in California and Wisconsin, state regulatory bills would probably have been passed, had they received the support of the municipalities.

7.3 Changing Perceptions of Cable

The factors discussed above have played a role in the decision-making dynamics presented in our five case studies. However, when placed in a

¹⁵⁹ However, the agency's initial trade-off between these two areas of regulation has not stopped it from further intervention in the cable arena. In 1976, the PSC announced that it was planning to regulate intra-state data communications services on cable systems. See also the discussion of conflicts between the PSC and New York's Cable Television Commission over regulation of cable pole attachments in our companion report: Kalba, Hochberg and Levine, op. cit.

¹⁶⁰ Such bureaucratic conflicts are, of course, not unique to the cable television context. See, for example, Melvin R. Levin and Norman A. Abend, Bureaucrats in Collision: Case Studies in Area Transportation Planning (Cambridge, Ma.: The MIT Press, 1971).

broader context, the case studies raise some other considerations. More specifically, it can be argued that decisions on whether to institute cable regulation at the state level have been influenced by legislators' perceptions of the cable industry and of regulation as a means of guiding industry growth. These approaches have, in turn, reflected broader societal perceptions of both cable and regulation.

In California, for instance, Senator Alquist opened a committee hearing on cable that was held in 1972 by pointing to the medium's vast social potential. In his own words:

Rapidly developing technology has produced a system that can come into your homes and into your businesses with audio, video and facsimile transmissions that will provide newspapers, mail service, banking and shopping facilities, data from libraries and other storage centers, school curricula, and other forms of information too numerous to specify. In short, every home and office can contain a communications center of a breadth and flexibility that will drastically influence every aspect of private and community life.... We can expect that within the next ten years, the opportunity for benefits from a cable system will be extended to nearly every Californian. How these opportunities can be maximized through the most appropriate regulatory pattern is the subject of this hearing.¹⁶¹

A short two years later, Senator Alquist was introducing another cable hearing, using quite different language:

We are here today in recognition of reality. Cable television's potential is real enough, but so are the many difficulties it has faced during its development.... In addition to federal controls, the industry faces local regulations which may vary from county to county and from city to city. This situation may hinder the growth and proper development of cable television.¹⁶²

¹⁶¹ California State Senate Committee on Public Utilities and Corporations, CATV Hearing (transcript), San Francisco, November 1, 1972, pp. 1-2.

¹⁶² California State Senate Committee on Public Utilities and Corporations, Hearing on State Regulation of Cable Television (transcript), Santa Ana, December 9, 1974, pp. 1-2.

While Senator Alquist continued to be a proponent of regulation in 1974, it is clear that his perspective had shifted considerably (i.e. from regulating service opportunities into existence to regulating barriers to cable development, such as conflicting local requirements, out of existence). Undoubtedly, this shift reflects in part the success of the California cable industry in convincing the Senator about some of its woes. But it also reflects a national change of mood about cable television's promise and how fast it could be realized.

When the cable television industry represented a minor adjunct to the over-the-air broadcasting system, state legislatures were as a rule more than willing to allow municipalities the responsibility (and the nuisance) of franchising local systems. Alternatively, they concluded that cable television was akin to public utilities and should be regulated along traditional PUC lines. As cable television became a more publicized issue, either because of claims of franchise trafficking or visions of the multiple communications functions that it could perform in the future, legislators in an increasing number of states considered the need for comprehensive state regulation. On this new perception were based most of the legislative proposals examined in this study. They were aimed at correcting existing abuses and preventing foreseeable ones, through comprehensive regulation and even in some instances (e.g. Minnesota, New York) a measure of planning.¹⁶³

As the multi-service vision of cable's future faded, however, so did the political interest in regulating the cable, in being identified as a proponent of its public services, and in overseeing its destiny. Not surprisingly, most of the large states that chose to regulate cable television did

¹⁶³ For an assessment of some of the planning responsibilities that were legislated during this phase, see the section on "regionalization", in Kalba, Hochberg and Levine, op. cit.

so within a very short span of years: Massachusetts in 1971, and Minnesota, New York and New Jersey in 1972. By 1977, only one state (Delaware in 1975) had followed their course.

In addition, soon after the cable perspective changed, questions started to be raised about the value of regulation generally and of instituting new regulatory agencies in particular. As an aide to Senator Alquist recently stated:

...at that time, as little as four years ago, we [the California legislature] were creating commissions and boards to take care of everything.... The pressure today, if you did want to have state regulation, would be to consider seriously the PUC as the regulatory agency.¹⁶⁴

In short, the regulatory mood, at least in one state (i.e. California) shifted somewhere between 1973 and 1975. It has probably done so in other states as well, given the greater emphasis in recent years on cost consciousness in state government and heightened criticism of regulated markets. In addition, other issues, notably in the energy and environmental fields, started pre-empting the attention of legislators concerned with public utility matters by 1973 or thereabouts. As the Alquist aide also noted, "1972 was probably the climax of the national discussion of cable television and all the great things it can do in the future."¹⁶⁵

¹⁶⁴ Personal interview with Tim Davis, Legislative Assistant to California Senator Alfred Alquist, July 27, 1977.

¹⁶⁵ Ibid.

7.4 Some Policy Implications

A consequence of these second thoughts about the future of cable television and about regulatory efficacy more broadly is that states have followed a regulatory pattern not dissimilar to that of the federal government and municipalities. In those states that instituted regulation in the early 1970's, the general thrust of state legislation was to recognize cable's potential but also subject its growth to more detailed regulatory controls. This paralleled the thrust of the FCC's new cable rules issued in 1972 and of the more complex franchising contracts that began to appear at the municipal level around this time.¹⁶⁶ An increasing number of other states began studying the complexities of cable development but were unable to arrive at a legislative conclusion as to how to proceed; this again parallels the outcome of study efforts in the major cities. The problem of agreeing on the best form of regulation stood in the way of adopting any regulation.

By the mid-1970's, the pattern began to change, however, again at all three levels of government. States that appeared on the verge of establishing regulatory jurisdiction were deciding not to; the FCC rescinded some of the regulations imposed on the industry in 1972 and delayed the implementation of others; and municipalities began to deregulate cable subscriber rates.¹⁶⁷

¹⁶⁶ See, for example, Kas Kalba, City Meets the Cable: Technological Innovation and Community Decision-Making, Harvard University Program on Information Resources Policy Publication P-75-7, September 1975; also Larry S. Levine, "Scrambled Signals" (Masters thesis, University of Wisconsin, 1976).

¹⁶⁷ Among the large states considering regulation at the state level during this period but deciding against it were Illinois, Michigan, Texas, Pennsylvania, and Wisconsin.

The irony in all of this is that states have often rationalized their regulatory role (actual or potential) as complementing that of the federal and municipal levels. The FCC, while capable of setting national guidelines, is too distant from individual cable systems to administer detailed regulations, the states have often argued. Similarly, they have argued that localities, while capable of understanding the needs of their citizens, are not expert enough in the technical and economic facets of cable television to provide adequate regulation. This suggests that as the FCC and localities have moved toward less regulation, the states would regulate more, if only to fill the regulatory vacuum. But this has apparently not happened. As the FCC and municipalities regulate less, fewer states seem to be entering the regulatory fold.

Assuming that this is not a temporary phenomenon (e.g. that the reason more states have not filled the regulatory gap is not that they have failed to recognize its emergence), it raises two interesting questions. First, how will an integrated framework of cable regulation be developed, if the regulatory behavior of the three levels of government is imitative rather than complementary? And second, how will state legislatures react should the cable industry itself seek regulatory guidance and/or protection at the state level?

While industry-based calls for comprehensive state regulation remain rare, the cable industry has recently gone to state legislatures to pass more specialized legislation to protect itself from the abuses of certain consumers (i.e. theft of service) and certain utilities (i.e. pole attachments). In the former case, at least 40 states have already passed industry-initiated bills. In the latter, as of 1977 California has passed

an industry-supported measure that allows the PUC to regulate pole attachments rates.¹⁶⁸ Several other states are considering similar bills.

Increasingly, legislatures appear to be adopting an image of cable television as an industry that provides a useful service to a growing number of citizens. As such, it deserves to be serviced legislatively like any other growing industry. Consequently, if in the future, the industry should find other forms of regulation desirable -- whether rate-of-return regulation or protection against a new competitor -- it is not inconceivable that legislatures will comply. In the process, this would alter the character of state regulation (i.e. from correcting industry abuses to supporting its growth). And it could shift the balance of regulatory authority over cable television from the federal to the state level.

¹⁶⁸ See Section 4.4, supra.

APPENDIX

BILL HISTORY — NEW YORK STATE CABLE TELEVISION REGULATION

- A.B. 5997 -- Introduced February, 1967 -- Referred to Committee on Public Service. Major emphasis -- defined cable television for purposes of the law, and then merely denoted that CATV was subject to public service law.
- A.B. 5850 -- Introduced February, 1968, by Assemblyman Harris -- Referred to Committee on Public Service. Major emphasis -- same as A.B. 5977, above.
- A.B. 4646 -- Introduced February, 1969, by Assemblyman Stavisky -- Referred to Committee on Corporations, Authorities and Commissions. Major emphasis -- This bill was fashioned after the 1969 NARUC model legislation and conferred jurisdiction on the Public Service Commission; totally pre-empted any local authority, limited CATV systems to originating "public service programs" only, thereby excluding sports, motion pictures, etc.
- A.B. 4465 -- Introduced February 3, 1970, by Assemblyman Stavisky -- Referred to the Committee on Corporations, Authorities and Commissions. Major emphasis -- similar to A.B. 4646, above, in that it vested jurisdiction in the PSC but included additional provisions such as: franchises were exclusive for geographical areas, all services furnished by the CATV system would have to be provided to all subscribers for one fixed fee (thereby eliminating possibility for per program or per channel charges), limited profit returns to 10% and the cost of the provision of incidental (origination) services would have to be defrayed solely from advertising revenues, limited fees paid to state to 6% of gross revenues plus all other applicable taxes (80% of which was to be distributed back to the local communities).
- A.B. 6700-A -- Introduced April, 1970, by the Committee on Rules (at the request of Robert F. Kelly) -- Referred to Committee on Rules, amended and then rereferred to Committee on Rules. Major emphasis -- the first surfacing of the Kelly bill vesting jurisdiction in an independent Commission. Franchising responsibility remained with localities, but franchising procedures were set at state level. Also specific provisions to be included in franchises were to be set by Commission. Two per cent of gross fees to state with minimum amounts set.
- A.B. 6798 -- Introduced April, 1970, by the Committee on Rules -- Referred to the Committee on Rules. Major emphasis -- variation on A.B. 6225 and A.B. 4465 placing jurisdiction in PSC, origination costs must be paid for out of advertising revenues, franchising would be on the state level.

A.B. 4202 -- Introduced February 10, 1971, by Assemblyman Stavisky -- Referred to Committee on Corporations, Authorities and Commissions. Major emphasis -- provided for PSC jurisdiction, state franchising; limited origination to public services programming.

A.B. 5052 -- Introduced February 16, 1971, by Assemblyman Van Cott -- Referred to Committee on Corporations, Authorities and Commissions. Major emphasis -- lodged jurisdiction in PSC, franchising remained at local level except in cases where municipalities refused to grant franchises.

S.B. 4105 -- Introduced February 18, 1971, by Senator Marchi -- Referred to Committee on Public Utilities. Major emphasis -- vested authority in PSC -- identical bill as A.B. 5052, above.

A.B. 6351-A -- Introduced March 2, 1971, by Assemblyman Kelly -- Referred to the Committee on Ways and Means. Major emphasis -- the "Kelly bill" of the 1970 session; A.B. 6700-A, reintroduced with few changes, that appropriation to commence the separate Commission was increased from \$50,000 to \$250,000.

A.B. 7809 -- Introduced May 5, 1971, by the Committee on Rules -- Referred to the Committee on Rules. Major emphasis -- vested jurisdiction in the PSC and in fact the first PSC-sponsored legislation based on the 1970 "Jones Report". Franchising remained at the local level with confirmation by the PSC, franchising on state level where municipalities refused to grant franchises, conversion to common carrier status after a CATV system reached 50,000 subscribers, cross-ownership restriction, and limitation of ten years on new franchises, five years on renewals.

A.B. 11990 -- Introduced April 3, 1972, by the Committee on Rules -- Referred to the Committee on Corporations, Authorities and Commissions. Major emphasis -- carries over many of the provisions of the Jones bill (A.B. 7809) from 1971 session, but includes some changes. Essentially this was a Governor-sponsored bill which called for the creation of a Cable Television Council which would approve or disapprove all PSC promulgated CATV regulations. The Council was to have been composed of 13 members, five from the PSC, and eight appointed by the Governor. The Chairman of the Council was to be chosen by the Governor from the eight non-PSC members, while the Vice-Chairman of the Council was to be the Chairman of the PSC.

A.B. 12001-A -- Introduced April 5, 1972, by the Committee on Rules -- Referred to the Committee on Ways and Means, amended and rereferred to the same Committee. Major emphasis -- Kelly bill calling for separate CATV commission. This bill was eventually passed and became Article 28 of the Executive Law. The fees collected by the state were set at not more than 1% of gross annual receipts; first appropriation to create the Commission was not set at \$350,000. Franchising remained at local level with Commission confirmation. Rates charged subscribers were to be those in the franchise and no rate changes were allowed unless the franchise was amended.

S.B. 9823 -- Introduced March 7, 1972, by Senator Rolison -- Referred to the Committee on Finance. Major emphasis -- identical bill as A.B. 12001-A.

A.B. 12378 -- Introduced May 5, 1972, by the Committee on Rules (at request of Assemblyman Kelly) -- Referred to the Committee on Rules. Major emphasis -- this bill also passed the 1972 legislature and it made some significant changes in the A.B. 12001-A bill passed by the Assembly on May 4, 1972. Some of the changes were: cable television companies were prohibited from entering into agreements for programming which would prohibit sale of the programming to over-the-air broadcasters, and existing cross-ownership operations were to grandfathered.