TAXATION, REGIONALIZATION AND POLE ATTACHMENTS:

A COMPARISON OF STATE CABLE TELEVISION POLICIES

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Abstract

Policy outputs evolving from the day-to-day administration of state cable television statutes and laws are examined in three issue areas: the tax environment in both regulating and non-regulating states; regionalization through line extension, interconnection, districting and case-by-case adjudication; and the pole attachments issue, including a history of state and federal involvement, the 1978 California pole statute, and implications of the 1978 federal legislation. The three studies are assessed in relation to several cross-cutting questions: (1) the extent of administrative flexibility in implementing state statutes; (2) the degree of convergence or divergence in policy approaches among states; and (3) the changing nature of state involvement in cable.

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The state cable television regulation project addresses the political dynamics, legal options, regulatory issues and economic impacts of state government involvement in cable television. This 18-month project was conducted by the Harvard University Program on Information Resources Policy in conjunction with Kalba Bowen Associates, Inc., under a National Science Foundation grant.

The following is a complete list of this report series.

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1.0 INTRODUCTION

1.1 The Study's Objectives

In this paper we will examine several policy issues facing state governments in the field of cable television. The issues we have chosen are taxation, regionalization and pole attachments.[1] Our aim will be to describe and assess how different states have approached each issue in recent years, as well as to compare state approaches across issues and states.

It should be noted at the outset that the issues we will look at have been addressed by multiple branches of state government. Regionalization questions, for example, have up to this point been treated by state regulatory commissions within the context of their franchising, line extension or planning responsibilities. Taxation has primarily been of concern to legislatures -- which pass laws that either include or exclude cable businesses or services from certain taxes -- and state departments of taxation or revenue -- which interpret tax statutes to either include or exclude cable television businesses or services as well as assess cable property, etc. (In general, the agencies which tax cable television do not have jurisdictional authority over other aspects of cable services.) Finally, pole attachment issues have been addressed by both legislatures and regulatory agencies. Pole attachment questions have become prominent in states with broad regulatory authority over cable television; however, they have also

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[1] For an analysis of the majority of cable television issues which have been addressed by state level agencies, see Philip R. Hochberg, The States Regulate Cable: A Legislative Analysis of Substantive Provisions, Harvard University Program on Information Resources Policy, Publication P-78-4, July 1978.

been considered by legislatures and administrative agencies in states without such comprehensive authority.

Thus our report will cover several of the institutional mechanisms through which states have expressed jurisdictional interest in cable television. In addition, we will review how different approaches have been adopted in each of the three policy areas -- by different states or, at times, by a single state. In the taxation area we will show that cable television is taxed as a public utility in some cases, as a service in others, and through special tax statutes in still others. In the regionalization arena, cable regulatory agencies or public service commissions have used line extension, franchise districting and interconnection policies to further regional service objectives. Finally, with respect to pole attachments, some states have concentrated on resolving individual rate disputes, while others have sought to handle the issue in a broader, more generic fashion.

1.2 Cross-Cutting Issues in State Cable Regulation

In Sections 2.0 through 4.0 of this report, we will examine the policies and approaches taken in these three issue areas. In addition to this case study method, there are several cross-cutting questions which we will address in Section 5.0. Specifically, we will attempt to answer the following three questions, based on the case study materials:

(1) In a given policy area (i.e. taxation, regionalization, pole attachments), are state decisions severely constrained by statutory mandates, or is there room for administrative flexibility?

This question is of importance to many of the cable regulation stakeholders (e.g. system operators, state regulators, utilities, etc.). It should be considered a given that the cable television industry as well as other communication technologies are rapidly developing. It is therefore useful to determine whether statutes are flexible enough so that regulators can address emerging issues. Legislators are, of course, torn between writing a statute that is as specific as possible so the administrative agency will follow the legislators' instructions, and a statute that is broad enough to allow the agency to deal with new issues in a rapidly changing industry. Legislators, in general, do not wish to return to the cable issue on a year-to-year basis. This is one of the reasons they have allocated jurisdiction to an administrative agency.

Similarly, the industry is likely to be concerned about the regulatory environment in which it operates. An agency with a broad legislative mandate may present an unstable environment. On the other hand, the industry might also be concerned about the ability of an agency to quickly respond to new issues, which may be important to the industry. In fact, in some cases the industry has approached regulators for assistance and regulators have claimed lack of jurisdiction. Therefore, the industry may in some instances support broader legislative mandates.[2]

The question then becomes one of determining how much regulatory or administrative flexibility is exhibited in the issue areas we have examined.

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[2] As examples of the industry approaching the regulatory agency for assistance in new developments, theft of service and pole attachments may be cited. In both cases, legislatures which enacted comprehensive cable regulation generally did not address these issues. Oftentimes the industry has found itself in a position where the regulatory agency has denied jurisdiction over these issues because of the lack of a clear statutory mandate. Therefore, the next step is for the industry to return to the legislature. This can sometimes be a long and arduous task, and one which the industry probably does not savor.

This is not to say that the existence of a greater or lesser degree of flexibility today is a prediction for the future. In addition, it is not even clear whether any general statements about the desirability of administrative adaptability can be made. One step towards a resolution of these policy issues, however, is to determine the extent of flexibility exhibited in our three issue areas.

(2) Can the policy approaches taken by the states be seen to be converging or diverging?

Are states becoming more or less alike in their approaches to various cable issues? If convergence is found, this can mean one of several things: agencies are learning from each other; agencies have simultaneously come to certain conclusions about the cable industry or about how to approach an issue; the industry has found an approach favorable to it in one state and has transplanted it to other states; or some combination of the above.

If divergence is found, several explanations are also possible: state agencies are not talking to and learning from each other; state agencies are aware of the approaches taken in other states, but feel that either the structure of the industry precludes that approach or that different approaches are not politically tenable in different states; or that legislative mandates and judicial precedents are sufficiently different from state to state so as to prevent extensive convergence. Again, we should not assume that convergence or divergence found today portends the future.[3] And it will not always be possible to discover which explanation of convergence is applicable in each case. Nonetheless, a first step in answering

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[3] However, given the length of time it takes for most regulatory agencies to implement new policies, it is likely that if convergence or divergence is found now, this will be the case at least in the immediate future.

this question is to determine the extent of convergence in each policy area.

(3) Has the nature of state regulation changed over time? Has it become more specific or more comprehensive?

Two of the issues we will examine in this paper are specific attempts by the states to address particular problems.[4] These areas are taxation and pole attachments. Regionalization, as applied to cable television, has generally been addressed as one issue within a more comprehensive program of cable regulation. Thus we can usefully inquire whether state involvement with cable television is tending towards the specific or the comprehensive approach. And if either tendency is found, what does this imply for the nature of state involvement in the future? Is the specific approach more or less "industry-oriented" than the comprehensive approach?

[4] When we say "specific attempts", we mean that legislatures have passed specific laws that address particular issues. This can be contrasted with a comprehensive approach, which addresses several cable issues at once, as well as delegating regulatory authority to a specific agency or agencies.

2.0 TAXATION OF CABLE TELEVISION CORPORATIONS

The assumption that only eleven states regulate cable television is only partly correct. While it is certainly true that cable systems in the regulated states are affected by state actions, there are several areas in which states have become involved which do not call for day-to-day supervision, but that do affect the fate of CATV.

One such area is taxation.[5] Many states have passed specific laws which apply existing taxes to cable television corporations. Others have passed new laws which specifically tax cable television. And finally, some states, through administrative decisions, have applied existing general tax statutes to cable television corporations. Although state involvement in the taxation of CATV does not constitute regulation (i.e. day-to-day supervision), some of the effects of taxation policies may be similar to the effects of overt state regulation.

This is especially apparent in the entry area. One might assume that the decision by multiple system operators as to where or whether capital will be invested in CATV in a particular state is based, <u>in part</u>, upon the existence and extent of state regulation. Therefore, state regulation may have an effect upon cable development in that state. Analogously, the taxation environment within a particular state may impact upon the decision to commit capital for CATV development in that state. The taxation environment can have other effects as well. Because taxes are generally seen as

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[5] An example of another of these areas is theft of service. More than forty percent of the states without regulatory programs have enacted specific statutes or have applied existing statutes which call for the prosecution of individuals involved in the theft of cable television service. Similarly, as noted in Hochberg, <u>The States Regulate Cable: A Legislative Analysis of Substantive Provisions</u>, <u>op. cit.</u>, states can regulate the manner in which localities regulate cable.

an allowable operating expense, higher CATV taxes could, in some instances, yield higher subscriber rates. The state taxation policies might also affect the ability of the system to attract capital, as well as the cost of that capital. This in turn may affect the level and quality of cable service provided. The cost of capital also has an impact upon the level of subscriber rates. Therefore, consumers have a stake in knowing what the taxation policies are within their state because of these service and rate issues. In addition, there is a cross-subsidy issue involved. Whether or not subscriber rates are affected by the cost of capital, taxes are generally passed through to consumers. Since CATV taxes which are not earmarked for the establishment or support of a regulatory agency go into the state's general revenue accounts, the question can be asked: to what extent are cable subscribers subsidizing the general taxpayer? And finally, the taxation of cable television may upset the competitive balance between substitute services, which may be taxed at either a higher or lower rate.[6]

For these reasons, it is important to take a closer look at taxation policies at the state level. Section 2.1 will outline FCC involvement in the taxation issue, specifically through the interpretation of §76.31(b), which limits municipal (and in some instances state) franchise fees.[7] Section 2.2 will look at taxation policies in several of the states with comprehensive cable regulation, including special fees which must be paid to support the functioning of state CATV regulatory agencies. In Section

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[6] This is essentially an issue concerning the equity of the non-discriminatory nature of particular taxes, i.e. are businesses which are basically performing the same function being taxed differently? We will return to this issue in Section 2.4, below.

[7] The distinction between franchise fees and taxes will be discussed in Section 2.1, below.

2.3 we will look at a few "unregulated" states which we have found (through the use of a survey) to have interesting CATV taxation policies.

In Section 2.4, we will address some broad issues which emerge from the discussion of individual taxation environments. These issues are: the equity of taxing cable services without necessarily taxing other services; the ability of the federal government to limit state taxation of cable television corporations; and the potential incentives which are explicitly or implicitly contained within certain taxation policies.

2.1 FCC Involvement in State Cable Television Taxation

In 1972, the FCC issued its extensive Report and Order in Docket #18397, et al which, among other things, addressed Federal - State/Local Regulatory Relationships. Within the franchise standards section, the Commission promulgated §76.31 (b), which sets a "reasonable" municipal franchise fee level of no more than 3%. However, the Commission indicated that:

> If the franchise fee is in the range of 3 to 5 percent of such [gross subscriber] revenues, the fee shall be approved by the Commission if reasonable upon showings: (i) by the franchisee, that it will not interfere with the effectuation of federal regulatory goals in the field of cable television, and (ii) by the franchising authority, that it is appropriate in the light of the planned regulatory program. (FCC Rules and Regulations, Volume XI, 76.31 (b))

Thus the Commission indicated it would approve franchises that had provisions which called for less than 3% of gross subscriber revenues, would approve under certain conditions a franchise which exacted a 3 to 5% fee, and would not approve franchises with a greater than 5% franchise fee.[8] (Franchises which had been granted prior to 1972 were grandfathered and did not have to comply until the end of the franchise period or 1977, whichever came first.) This section was included essentially to prevent excessive fees which might result in the inability of cable to "...carry out its part in our national communications policy", and the desire to see franchises granted on other than monetary grounds. What the Commission did not consider (until much later) was the entrance of state regulatory bodies into the franchise fee area.[9]

Although the Commission was primarily concerned with municipal fees, it was not long before the first two state fee cases came before the FCC; both dealt with Connecticut. In Valley Cable Vision, Inc., et al, the Commission decided that Connecticut franchises which were granted prior to 1972, subject to an 8% gross receipts tax, were substantially compliant with

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[8] The FCC, in a reconsideration of all the §76.31 franchise standards, has decided to retain the 3% (5% with justification) fee limitation. They did, however, alter the revenue base on which this percentage fee could be based. In Report and Order in Docket #21002, July 22, 1977, the Commission changed the revenue base from gross subscriber revenues (which only included revenues from basic service) to total revenues (which could include revenues from all services such as pay, in addition to basic service revenues). See Report and Order in Docket #21002, 41 RR 2d 885 at 906-910 (1977).

[9] It would be useful to distinguish between a tax and a fee. What the Commission terms a franchise fee is the money which a cable system must pay to gain the rights of way in a particular community. Such fees could be used to defer the cost of regulating the CATV operation (either on the the state or local level). On the other hand, a tax would be considered money which a CATV system must pay which would be earmarked for general revenue accounts. Unfortunately, this distinction is rather fuzzy. Many municipalities impose franchise fees which go into general revenue accounts and do not support a regulatory program. And in a state such as New York, a regulatory fee goes into the general state accounts, and the New York Commission on Cable Television's budget is based on need, rather than on how much money is raised from the CATV fee. Nonetheless, this distinction will be used.

Commission rules and would be approved.[10] In Coastal Cable TV Co., the Commission could not take this same strategy, given the fact that this franchise (essentially containing the same provisions as all other Connecticut franchises) had been granted by Connecticut subsequent to the 1972 rules.[11] Rather than becoming embroiled in a states' rights issue, the Commission side-stepped this problem by saying that although the 8% fee was well above the 5% limitation imposed by 76.31(b), the franchise concurrently exempted CATV systems from having to pay municipal personal property taxes, and claimed that the net effect of these policies would amount to less than 3% of subscriber revenues and was therefore within the limitation of 76.31(b).

New Jersey's regulatory fees were next to come under scrutiny. New Jersey regulation called for 2% of gross subscriber revenues to be paid to the municipality and an additional charge of up to 2% of gross subscriber fees to be paid to the state to support state regulatory efforts. The New Jersey Office of Cable Television intervened in Clearview Cable Corp.,[12] explaining the state regulatory program, and the Commission approved the franchise. The Commission acted similarly in a Minnesota case where state and local fees equalled 4% of gross subscriber fees, but the state fee was based on the actual costs of the state regulatory program.[13]

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10 Valley Cable Vision, Inc., et al, 38 FCC 2d 959, 26 RR 2d 320 (1973).

11 Coastal Cable TV Co., 47 FCC 2d 877, 30 RR 2d 1325 (1974).

12 See Clearview Cable Corp., 49 FCC 2d 485, 31 RR 2d 1318 (1974).

13 See Metro Cable, Inc., 49 FCC 2d 1133, 32 RR 2d 57 (1974). This seemed to be consistent with recently stated Commission policy. In Clarification of Rules and Notice of Proposed Rulemaking, 29 RR 2d 1621 (1974) at ¶103, the Commission stated that "...both local franchise fees and state fees, if any, will be added together to determine compliance with our fee limitations."

It was not until two later cases, one concerning Florida and the other New York, that the Commission found itself face to face with the potential limitations of its jurisdictional authority in the cable taxation area. In the Petition for Declaratory Ruling CSR-499, the Commission had before it a petition filed by the Florida Cable Television Association (FCTA).[14] The FCTA requested that the Commission rule on whether §166.231 of Chapter 73-129, Laws of Florida, violated §76.31(b) of the FCC's rules. This statute authorized municipalities to levy a tax of up to 10% of the sale of CATV services (among other services such as water, telephone, etc.). The Commission declined to rule on whether the tax violated 76.31(b), but did say that it was a regressive tax, undesirable because of its impact on CATV service. The FCC also indicated that it would look favorably on any judicial actions which the FCTA might take in having the constitutionality of such taxes tested, and absent this action, the Commission might seek judicial recourse on its own.

The Commission was faced with yet another state taxation issue in New York State Commission on Cable Television.[15] In this first case of a three-case lineage, the Commission made three decisions regarding a New York State-assessed fee based on the gross annual receipts of the cable system.[16] It should be noted that this state fee was based on gross annual receipts which included all revenues from basic and ancillary services, and that this fee was to be in addition to any franchise fees which the

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[14] See Petition for Declaratory Ruling CSR-499, 50 FCC 2d 540, 32 RR 2d 457 (1974).

[15] New York State Commission on Cable Television, 59 FCC 2d 1344 (1976).

[16] The New York State law calls for up to two percent of gross annual receipts to be paid to the state to defray regulatory costs. See New York Executive Law, Article 28, §817.

system was required to pay to the municipality. The three issues decided upon in this case were:

(1) The New York State Commission could base its state fee upon basic and pay service revenues, rather than simply on basic service revenues.

(2) If the state fee, when combined with the municipal fee, required the cable operator to pay more than 3% of the gross basic service revenues, then a §76.31(b) special showing was required. The FCC concluded that the New York State Commission had made such a special showing by outlining its state regulatory program and costs.

(3) The FCC concluded that in situations where the local fee was grandfathered (i.e. greater than 3% of gross basic service revenues), the state fee was inconsistent with §76.31(b) if the state fee combined with the grandfathered local fee exceeded 5% of gross basic subscriber revenues.[17]

The New York State Commission subsequently petitioned the FCC to reconsider decision (3).[18] In short, the New York State Commission argued that grandfathered systems were not subject to any franchise fee limitation regardless of whether new fees were imposed after 1972. In reconsideration, the FCC determined that for grandfathered systems, the grandfathered franchise fee limitation was to remain in effect until the system was refranchised or

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17 New York State Commission on Cable Television, 59 FCC 2d at 1350-51.

18 New York State Commission on Cable Television, Reconsideration, 39 RR 2d 1187 (1977).

required to come into compliance with FCC rules. So, for example, if the system was franchised prior to 1972 and the franchise called for a 6% of gross subscriber revenues fee, then state and local fee assessments combined could not exceed this 6% fee ceiling. But the FCC also stated that "the apportionment of the permissible fee between the state and local governments is a matter for New York Courts."[19] Therefore, fees for grandfathered systems could exceed the §76.31(b) 5% limitation, but could be no higher than the fee stated in the franchise.[20]

In short, the FCC's involvement in state franchise fees has been substantial, but not unlimited. In states that have had regulatory programs, the FCC has approved most of the state fees to defray the costs of these programs. In the New York case, the FCC stated that FCC fee limitations applied to state fees when combined with municipal fees, but that resolution of how state and local fees should be split would be left to state courts. The FCC was upheld by a Federal Appeals Court, but the case may eventually come before the United States Supreme Court. In a state which does not have a regulatory program (Florida), the Commission refused to determine whether a state-authorized municipal tax was inconsistent with §76.31(b), but encouraged judicial review. What emerges from these cases is that the Commission has most likely recognized that federal involvement in the states' right to tax is plagued with complex constitutional issues

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[19] New York State Commission on Cable Television, Reconsideration, 39 RR 2d at 1192-93.

[20] This FCC interpretation of the FCC fee grandfathering clause was upheld in federal court in New York State Commission on Cable Television v. FCC, 42 RR 2d 265 (U.S. Court of Appeals, 2d Circuit, 1978). The New York Commission has petitioned the United States Supreme Court for review.

and the FCC has been cautious in becoming embroiled in lengthy and conspicuous legal battles.[21]

2.2 Taxation of CATV Systems in Regulating States

A myriad of fees and taxes are levied on cable television systems in states with formal regulation. Four states appear to give fair representation of the taxation situation confronting CATV systems in regulating states. Connecticut and Delaware both regulate cable as public utilities, but Delaware does not tax CATV corporations in the same way as they tax other utilities. Massachusetts and New York regulate through separate commissions, but whereas Massachusetts taxes CATV corporations no differently from other business entities, for tax purposes New York cable systems are considered public utilities. We will look at several of these taxation environments.

2.2.1 Connecticut

Connecticut defines cable television as a public service company regulated by the Public Utilities Control Authority.[22] For taxation purposes, CATV is treated similarly to other public service companies or public utilities such as gas, electric and telephone companies. This gives rise to some disadvantages as well as advantages for the Connecticut CATV system.

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[21] Some of the constitutional issues which could arise when the federal government becomes involved in limiting the states' right to tax businesses will be reviewed in Section 2.4, below.

[22] See Chapter 289, §16-1, of the Connecticut General Statutes (hereinafter "CGS").

A gross receipts tax is imposed on CATV systems as it is on railroad, telegraph and telephone companies.[23] The rate for this tax is 8% for both telephone and cable television companies. This proportion is considerably higher for these two classes of businesses than for express companies (2%), car companies (3%) or telegraph companies (4.5%).[24] According to Howard Slater, counsel for the Connecticut Cable Television Association, it is still unclear as to whether the tax will be assessed on pay cable receipts.[25]

All public utility companies must pay a corporate income tax of 10% of net income.[26] Connecticut also requires CATV companies to pay a use tax of 7% when purchasing equipment.[27] Telephone companies must also pay this tax, but all other public utilities are exempted. Slater indicated that:

> The CATV industry in Connecticut proposes to seek in the 1978 session of the Connecticut General Assembly an exemption for payment by CATV companies of a use tax....

A similar proposal by the Connecticut Cable Television Association died in committee in early 1977.[28]

Although CATV systems must pay a use tax, they are exempted (as are all other public service companies) from having to collect a 7% tax on sales.[29] CATV is treated exactly like all other public utilities in this respect.

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23 See Chapter 211, §12-256, CGS.

24 See Chapter 211, §12-258, CGS.

25 Response to taxation survey, Howard Slater.

26 Chapter 211, §12-269, CGS (if the business is unincorporated), and §12-213 (if the business is incorporated).

27 Chapter 211, §12-412 (R), CGS.

28 See note 25, supra; see also Connecticut Senate Bill, S.B. 1691.

29 Chapter 211, §12-412 (C), CGS.

The Public Utility Control Authority's administrative expenses are partially paid for by the companies which they regulate. Connecticut statutes call for all public service companies to pay a pro-rated amount (based on that company's gross receipts) equalling 70% of the estimated operating expenses of the PUCA.[30] This statute, however, exempts from payment of this fee all public service companies whose gross receipts are less than $100,000. This exemption, however, has no practical impact on existing Connecticut cable systems. No Connecticut CATV company falls below this $100,000 gross receipts figure.[31]

The most interesting aspect of the Connecticut CATV taxation context is the Real Estate/Property Tax laws. The Connecticut General Assembly authorizes municipalities to tax real and personal property.[32] Mill rates are fixed at the local level to meet budgetary needs, and property is assessed at between 50% and 100% of its actual value. The legislature, however, specifically prohibits municipalities from taxing the tangible personal property of public service companies (including CATV), but still authorizes the taxation of real property.[33]

Tangible personal property is construed to be any vehicles which the CATV system may own, as well as certain parts of office buildings which may be used in CATV service provision, while real property is the land on

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30 Chapter 289, §16-49, CGS.

31 This statement is based on figures from Television Factbook (Services Volume), (Washington, D.C.: Television Digest, 1977). By multiplying the number of reported subscribers (reported as of early 1976) by the monthly fee and then again by 12, a rough estimate of gross receipts can be computed.

32 Chapter 211, §12-64, CGS.

33 Chapter 211, §12-268 (J), CGS.

which buildings or headends are built on as well as other parts of buildings not construed to be tangible personal property.

In summary, the 8% gross receipts tax is considerably higher than the fees which are authorized by the FCC in §76.31 (b), but it is no higher than the tax paid by telephone companies in Connecticut. While this is no solace for the CATV operator, other benefits accrue to the CATV corporation. The exemption of a sizable portion of property for municipal taxation purposes is of course one of these benefits. A hefty 7% sales tax is also not assessed on CATV consumers, and therefore a possible subscriber backlash to higher cable service prices has been avoided. But on the other hand, cable systems and telephone companies must pay a sizable 7% use tax which other public service companies do not have to pay (although all other businesses are assessed).

Several clues as to the effect of this 8% gross receipts/personal property exemption environment are available. As mentioned above in Section 2.1, the FCC, after analysis of the tax situation in Connecticut, indicated that the total taxation environment's net result, i.e. 8% fee but property tax exemption, was demonstrably less than 3% of expected subscriber revenues.[34] Vince King, former manager of Greater Hartford Cable Television, echoed this conclusion. He indicated that Cox Cable's (80% owner of Greater Hartford) calculations suggested that their Connecticut system comes out 2% of gross receipts ahead of Cox operations in other states which do not have Connecticut's tax package. Greater Hartford has about $3,000,000 of cable plant, which would be taxed at $96,000 if they were taxed as any other business entity. Due to their public utility status, this tax was only

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[34] See Coastal Cable TV Co., 47 FCC 2d 877, 30 RR 2d 1325 (1974).

$68,00 in 1976, according to King.[35] The general effect of this tax package can be stated thusly: for systems with the same number of subscribers and the same monthly fee (i.e. the same gross revenues), a system with a large amount of tangible personal property is in a favored position; a system with a large amount of real property is in an unfavorable position. Therefore, the ratio of tangible personal property to real property (for systems with the same gross revenues) becomes important in determining the actual effect of this taxation scheme.

Municipalities have also felt the effect of this tax package. While prohibited from taxing much of the lucrative cable property, they also receive none of the 8% of gross revenues remitted to the state. During the 1977 legislative session, several bills were introduced which, if passed, would have transferred some of this revenue back to the local communities.[36] However, these bills did not pass the legislature. All of these clues point to the possibility that CATV systems in Connecticut may benefit (when compared to CATV systems in other states) from the tax structure despite the high 8% fee and the non-exemption from use tax payments.[37]

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[35] Interview with Vince King, April 6, 1977.

[36] See Connecticut Legislature bills H.B. 6935, H.B. 7790, and H.B. 7802.

[37] It is interesting to note that Thomas Nelson, then Professor of Law at the University of Connecticut, in a consultant report to the PUCA, focused on the 8% fee as being "...a severe imposition which prevents the franchise holder from serving extensive segments of his sparsely populated franchise area." Nelson does not even mention the personal property tax exemption as a possible factor. He does, however, recommend a partial remission of this 8% fee when CATV operators extend services to outlying areas. See Thomas Nelson, Cable Television in Connecticut: Realizing the Promise, Connecticut PUCA report, 1976, pp. 32-37.

2.2.2 Delaware

Although the state of Delaware has lodged limited authority over CATV systems with the Public Service Commission, the total regulatory program could not be designated akin to public utility regulation.[38] For taxation purposes, cable is not considered a public utility.[39] Therefore, several taxes which apply to other businesses (including public utilities) also apply to CATV systems.

All corporations must pay a 7.2% corporate income tax. This assessment is based on all taxable income derived from operations within the state. In addition, all corporations -- including public utilities -- must pay a corporate franchise tax based on the number of outstanding capital shares of the corporation. The minimum amount paid by any business is $20; the maximum amount is $110,000. There is no state property tax, but municipalities do collect a property tax. All businesses, including public utilities, fall under this property tax. Mill rates are fixed locally to meet budgetary needs, and all businesses are exempted from having personal property taxed.

Although the Department of Revenue claims that cable is not taxed as a public utility, there is one fee that public utilities must pay to which cable is also subject. Specifically, there are two types of utility taxes in Delaware. Telegraph and telephone companies pay a fee based on wire mileage within the state. In addition, telephone companies must pay a 25¢ surcharge for each telephone located within the state. Over and above these two assessments, intrastate telephone, telegraph, gas and

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[38] See Cable Communications and the States: A Sourcebook for Legislative Decision-Makers (Albany, N.Y.: New York State Senate, 1974), p. 155.

[39] Response to taxation survey by the Delaware Department of Finance.

electricity gross receipts are taxed at 5%. CATV service sales are subject to this tax, although it is passed on to the consumer much like a standard sales tax (i.e. 5% is tacked on to each consumer's bill).[40] This is the only instance in which cable is more heavily taxed than other Delaware ventures, but not quite as hard as telephone companies, which must pay all the taxes cable is subject to, plus a per mileage and per telephone fee. (However, telephone companies do have a guaranteed rate of return.)

Delaware also provides for a fee to be paid by CATV systems to defer the expenses of the Delaware Public Service Commission. This fee can only be collected from CATV systems which are regulated by the PSC, and not all systems are regulated. The PSC is only authorized to franchise and regulate cable systems in unincorporated parts of the state.[41] Therefore, only those systems would be subject to this fee, which is not to exceed 2% of gross subscription receipts. For those systems franchised by the state, there is no municipal franchise and therefore no municipal franchise fee.

2.2.3 Massachusetts

Massachusetts regulates cable television through a separate cable TV commission. CATV is not defined as a public utility and is not taxed as such. The major difference in this case is that cable, taxed as other corporations, is subject to a corporate income tax, while public utilities come under a utilities corporate franchise tax. The standard corporate income tax is $2.60 per $1,000 of the value of Massachusetts tangible property not taxed locally, plus 9.3% of net income.[42] If cable were to

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[40] Delaware Statutes, §5502.

[41] Title 26, §601, <u>et seq</u>., Delaware Statutes.

[42] Chapter 63, §32, Massachusetts General Laws.

be taxed as a public utility, the rate would be 6.5% of net income, or for interstate public utilities, of allocated net income.[43] Due to the existence of the $2.60 per $1,000 property rate for general business corporations, it is hard to define the differential impact of these two income tax rates. The difficulty arises out of the fact that the standard corporation property tax is based on property not taxed at the local level. Various municipalities tax different kinds of property, and therefore, depending upon where the CATV system is located, the value of the property which can be taxed at the state level will differ. But merely focusing on the net income rate, it is obvious that public utilities are taxed less than other intrastate corporations.[44]

According to the New England Cable Television Association (NECTA), the standard 5% sales tax is not applicable to cable television sales of service.[45] This appears to be a substantial benefit derived by being a business that sells neither tangible property (generally taxed at the 5% rate cited above) nor a service or commodity specifically taxed by Massachusetts, such as meals, hotel rooms, alcoholic beverages or cigarettes.

A case which has continued for over four years and was finally resolved in January 1978, has construed that CATV systems are exempted from paying a use tax on materials purchased for direct usage in the

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[43] Chapter 63, §52 A (2), Massachusetts General Laws.

[44] In previous years, interstate corporations were taxed at a rate of 5% of that portion of net income derived from Massachusetts. This meant that interstate corporations were in a more advantageous position than both standard intrastate corporations <u>and</u> public utilities. We suspect that MSO's would have been able to take advantage of this tax benefit. This differential treatment of inter- and intrastate corporations no longer exists.

[45] Letter from Paul Cianelli, General Counsel for the New England Cable Television Association, June 15, 1977.

provision of CATV service. In the Appellate Tax Board's September 27, 1976, decision they stated that:

> ...the sales of materials, tools and fuel, machinery or replacement parts...are used directly in television transmission and are therefore, in the opinion of the Board, exempt from taxation... [46]

Property taxes are levied at the local level with rates fixed to meet budgetary requirements. Real and personal property is also taxed, and therefore head-end equipment, the head-end itself, and any other buildings and land are assessed. Cable and wire are assessed for the property tax, according to the NECTA.[47]

In addition to all of the above taxes, all cable systems pay a fee to the state which is supposed to defer the expenses of the Massachusetts Community Antenna Television Commission.[48] The fee is calculated on a per

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[46] Spectrum Cable Systems, Inc. v. State Tax Commission, Docket #73611 Appellate Tax Board Decision, September 27, 1976. This decision interpreted a state statute, General Laws Chapter 64 H, §6 (R)(S), which provides for sales and use tax exemption of:

> Sales of materials, tools and fuel, or any substitute therefor... consumed and used directly...in the operation of commercial radio broadcasting or television transmission...[and the] sales of machinery, or replacement parts thereof, used directly...in the operation of commercial radio broadcasting or television transmission,...

Although Spectrum argued that they were engaged in broadcasting, the Appellate Tax Board rejected this argument but did decide in favor of Spectrum on the grounds that they engaged in "television transmission". The Appellate Tax Board was upheld by the Supreme Judicial Court's agreement to dismiss the case on January 5, 1978.

[47] Ibid. See note 45, supra.

[48] The original fee per subscriber was outlined in Chapter 166a, §9, and amounted to $.50/subscriber per year which was to be paid to the state and $.50/subscriber per year to be paid to the municipality. The new statute is in Chapter 552, §1, and mandates an $.80 per subscriber per year fee to be paid to the state and $.50 per subscriber per year fee to be paid to the municipality. The municipal fee is in lieu of all other franchising fees which the municipality could be allowed to levy, although it does not affect the municipality's right to tax the CATV system's property.

subscriber basis, and funds collected in this way are not specifically earmarked for Commission operating expenses and are not at all affected by the budgetary needs of the Commission. This is in contrast to the New York case (outlined below in 2.2.4), where fees are based on the budgetary needs of the New York State Commission on Cable Television (although fees cannot exceed 2% of total revenues).

We can determine how this per subscriber fee structure compares with a percent of revenues structure. If, for example, revenues are construed as basic subscriber revenues, then we can calculate the effect on a per subscriber basis. The combined local and state fee per year in Massachusetts amounts to $1.30 per subscriber. If the system was operating in a state with a combined state and local fee equal to 5% per year, for the $1.30 Massachusetts fee to be equal to 5% of subscriber revenues, the system would have to charge $2.16 per month for basic service. For the $1.30 fee to be equal to 2% of subscriber revenues, then the system would have to charge $5.41. The relationship which exists can be stated in the following way: using the Massachusetts system of fee computation, the lower the monthly basic subscriber charge, the higher the percentage of gross subscriber fees taken by the state and municipality.

Therefore, systems with lower monthly subscriber rates are penalized, but if the system is charging above $5.41 per month for basic service, it is paying less than 2% to both the state and municipality. Since almost all of the systems in Massachusetts are charging more than $5.41 per month, it is obvious that per subscriber computation in Massachusetts is benefiting the cable systems in that state. In general, however, a fixed fee per subscriber scheme benefits those systems with higher monthly rates, and therefore it might encourage higher monthly subscriber charges.

It is possible, however, that the benefit derived from the limitation on local fees is illusory. If, for example, local property tax mill rates are computed according to budgetary needs, then the mill rate might be increased to account for this lower local franchise fee. Of course this assumes that the franchise fee would have been taken into account when computing needs. And in addition, the higher mill rate would be evenly distributed among all property taxpayers regardless of whether they are cable subscribers or not.

2.2.4 New York

For taxation purposes, cable systems are classified as public utilities in New York, despite the fact that they are regulated by an independent cable commission. This means that instead of a corporate income tax being assessed, a utility tax based on gross receipts (at a rate of .0075) is imposed. In addition, all utilities and CATV companies must pay a capital stock tax of 1.5 mils per $1 of net value of capital stock.[49]

If CATV was not taxed as a public utility, there would be two major differences. First, there would be a tax on income rather than on gross receipts. It is likely that most CATV systems either presently suffering losses or carrying forward past losses (decreasing net income) would only have to pay the minimum income tax of $250. Secondly, CATV systems would only pay a one-time capital stock tax at the time of incorporation or when capital stock is increased. It appears that for the purposes of this income tax, CATV systems are placed in a disadvantageous position by being classified as a public utility.

[49] Article 9, §§183, 184, of New York Revised Statutes.

Property taxes are not collected at the state level for both general businesses and for public utilities. Property is, however, assessed at the state level, with millage rates set and collected at the local level. There are no differences between businesses and public utilities in terms of what property is taxable.[50]

The State of New York Department of Taxation and Finance decided in 1976 that CATV was subject to a 3% sales tax on the sale of cable television services (which is also applied to sales of telephone and telegraph services). An appeal to the courts by the New York State Cable Television Association reversed this ruling.

The arguments for and against applying this 3% sales tax center around whether cable service could be defined as telephone or telegraph service.[51] The New York State Supreme Court ruled in November 1976 that "at this stage of the development of cable television...it is clear that the cable television subscriber is not purchasing telephony or telegraphy. Instead he is purchasing entertainment or enjoyment, and the purchase of such a service or item is not subject to the sales tax." [52]

The case was appealed further by the Department of Taxation and Finance, and a decision was rendered in August 1977.[53] The New York State Supreme Court Appellate Division upheld the earlier ruling. New York Department of Taxation and Revenue Commissioner James H. Tully indicated, in a statement released subsequent to the Appellate Division decision, that

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[50] Chapter 50-A, Article 1, §17, New York Revised Statutes.

[51] See Article 28 of the New York State Tax Law, §1105, subdivision (b).

[52] New York State Cable Television Association, et al v. State Tax Commission, 388 NYS 2d 560 at 562 (1976).

[53] NYCTA, et al v. State Tax Commission, 397 NYS 2d 205 (aff'd, 1977).

the ruling would not be appealed further. Thus New York State CATV systems have escaped this sales tax imposition, at least for the time being.[54] Concurrently, they have received a court confirmation of their non-telephone/non-telegraph status.

The executive law creating the New York State Commission on Cable Television also mandates that the state collect fees from CATV systems to cover the Commission's expenses.[55] Originally this fee was not to exceed 1% of gross annual receipts. In 1975, the legislature amended this to (not to exceed) 2%. In either instance, the fee is based on the actual expenses of the Commission pro-rated for each system, using the following formula:

$$\frac{\text{Gross annual receipts of cable company}}{\text{Total gross annual receipts of all New York state cable companies}}$$

The fee is predicated upon the gross annual receipts of the cable system, and therefore includes all monies collected by the system: basic subscriber revenues, installation fees, pay and premium revenues, channel leasing payments, etc. This fee basis was the subject of an FCC decision and was determined to be within §76.31(b) of the FCC rules, given that combined local and state fees could be translated into a fee not in excess of 5% of gross subscriber revenues.[56]

The state fee, being based on a percentage of the total state CATV revenues which the cable system collected, would affect larger systems more

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[54] "No Appeal Sought on N.Y. Tax Ruling", VUE, August 29, 1977, p. 12.

[55] §817, Article 28, New York State Revised Statutes.

[56] The Commission has since changed the revenue base on which franchise fees can be collected. The base is now all revenues collected by the cable system and therefore the New York situation would be within the parameters of §76.31(b) if the state and local fees when combined did not exceed 5% of gross receipts, rather than of gross subscriber revenues. See Section 2.1, above, and Report and Order in Docket #21002, 41 RR 2d 885 (1977).

than smaller systems (if the 2% fee was not automatically applied due to Commission expense shortfalls). The effect of this fee structure on larger systems would have been much greater had A.B. 8380-A been signed into law. This bill substantially reduced the regulatory burden, as well as the state fee of small cable systems (defined as those with yearly gross receipts of less than $75,000). Any substantial reduction of small system fees would have to mean an increase in larger system fees because the total amount of money paid by all cable systems must equal the Commission's expenses.

The new formula for small cable systems was to be the following:

$$2\% \times \frac{\text{Total of past three years gross annual receipts}}{\$150{,}000}$$

Therefore, if a system's past three year receipts are on the average $40,000, the fee would be 1.6%, descending to a 0.8% fee if the average was $2,000. Smaller systems, already given a substantial reduction in the amount of money paid for upkeep of the Commission, would have been given an even greater benefit. On August 11, 1977, New York Governor Hugh Carey vetoed the bill, not because he felt that smaller systems did not deserve financial and regulatory relief, but because "the definition of 'small cable television company' is so vague that it would be impossible to determine the point in time at which a small cable television company ceases to qualify as such." [57]

In summary, New York State CATV systems are placed in a financially disadvantaged position (when compared to other New York businesses) in terms of taxation. They pay income taxes based on gross receipts rather than on net income, and they must pay a continuing capital stock tax. To this extent they are treated no differently than other public utilities. Through various

57 "Governor Calls Legislation Vague, Vetoes New York's 'Small CATV Bill'", VUE, August 29, 1977, p. 12.

court decisions, however, CATV has escaped a sales tax which has traditionally been applied to telephone and telegraph services and therefore is favored more than public utilities. On the other hand, CATV must pay a fee for the support of the special state CATV regulatory authority, a burden standard businesses do not have to bear.

2.3 Taxation in "Non-Regulating" States

2.3.1 Research Method

In the states which did not have regulatory programs, several problems were encountered in determining taxation policies. If a state does not tax CATV systems according to some specific statute, it is difficult to determine which taxes apply and which do not. In addition, some states might tax CATV systems as if they were public utilities although they are not regulated as such. Finally, a state might have certain statutes which either limit or authorize municipalities in the taxation of certain classes of corporations. Therefore we decided to send a questionnaire which addressed the above issues (attached as the Appendix) to each state taxation agency as well as each state association of cable TV operators. As a rule, we found the responses from the state agencies more comprehensive and informative than those received from the trade associations. Table 1 lists the responses we received, as well as the answers to questions 1 and 2 concerning specific statutory mentions of CATV and whether the state taxed CATV corporations as public utilities. In reviewing the responses, we found that there has been more activity in several taxation areas than in others. We will review those taxes below, including examples of how specific states apply these taxes.

Table 1

State Taxation of CATV Corporations - 1977 Survey

State	Return from State Agency	Return from State Cable Assoc.	Cable Specifically Mentioned in Tax Statutes*	Taxed as a Public Utility*
Alabama	no	yes	no**	no**
Alaska	yes	no	no	no
Arizona	yes	yes	yes	no
Arkansas	yes	no	yes	yes
California	yes	no	no	no
Colorado	no	yes	—	—
Connecticut	no	yes	yes**	yes**
Delaware	yes	no	no	no
D. of Columbia	no	no	—	—
Florida	yes	yes	yes	no
Georgia	yes	no	no	no
Hawaii	yes	no	no	no
Idaho	yes	no	no	no
Illinois	yes	no	no	no
Indiana	no	no	—	—
Iowa	yes	no	no	no
Kansas	no	yes	—	—
Kentucky	yes	yes	yes	no
Louisiana	yes	no	yes	no
Maine	yes	yes	no	no
Maryland	no	yes	—	—
Massachusetts	no	yes	—	—
Michigan	yes	yes	no	no
Minnesota	no	no	—	—
Mississippi	yes	no	yes	no
Missouri	yes	yes	no	no
Montana	yes	no	no	no
Nebraska	yes	yes	yes	

Table 1 (contd.):

State Taxation of CATV Corporations - 1977 Survey

State	Return from State Agency	Return from State Cable Assoc.	Cable Specifically Mentioned in Tax Statutes*	Taxed as a Public Utility*
Nevada	no	no	—	—
New Hampshire	yes	yes	incomplete	incomplete
New Jersey	no	no	—	—
New Mexico	yes	yes	no	no
New York	no	yes	—	—
N. Carolina	no	yes	—	—
N. Dakota	yes	no	no	no
Ohio	yes	no	no	no
Oklahoma	yes	yes	no	no
Oregon	yes	yes	no	no
Pennsylvania	yes	no	no	no
Rhode Island	yes	yes	yes	yes
S. Carolina	yes	no	no	no
S. Dakota	yes	no	yes	no
Tennessee	yes	no	no	no
Texas	yes	no	no	no (by statute and a.g.)
Utah	yes	no	no	yes
Vermont	no	yes	—	—
Virginia	yes	yes	no	no
Washington	yes	no	no, but in Dept. of Revenue Rules	no
W. Virginia	yes	no	no	no
Wisconsin	yes	yes	yes	no
Wyoming	yes	no	no	no
Total	37 or 74% of states answered	23 or 46% of states answered		

* Unless otherwise noted, information is from State Department of Revenue and/or Taxation.

** Denotes that information is derived from State Cable Association responses to the survey.

2.3.2 Public Utility Taxes [58]

According to the Arkansas Public Service Commission, cable television corporations are taxed as if they were public utilities, although they are not regulated in any other way by the Arkansas PSC.[59] This tax is in addition to a corporate income tax and a corporate franchise tax (which are levied on all other corporations doing business within the state). The public utilities tax is 2/5 of 1% of the companies' gross earnings.

The South Dakota Retail Occupational Tax is applied to CATV systems, as well as to other public utilities such as telephone and teletype services.[60] This is levied at a rate of 4% of gross receipts. While this should not necessarily be construed as a public utility tax (it is more akin to a sales tax; see below), for purposes of this tax, South Dakota has classified CATV along with public utility-type services.

Two states specifically exempt cable systems from public utility taxation: Illinois (by administrative decision) and Texas (by statute). In Illinois, there is a messages tax administered by the Department of Revenue under the Messages Tax Act.[61] It is applied to telephone and telegraph companies within the state and is based on 5% of gross receipts. The Department of Revenue in response to our survey said:

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[58] Throughout this section we will be using the term "gross receipts". The use of this consistent term does not imply that "gross receipts" means the same thing in all of the states mentioned. Each state specifically defines "gross receipts" for its own purposes and in some cases this definition differs for different classes of businesses.

[59] See 84-103.1 and 103.2..3, Vol. 7B-1975 Supplement Arkansas Revised Statutes.

[60] See 10-45, South Dakota Statutes.

[61] Chapter 120, Par. 467.1 et seq., Illinois Statutes.

> We do not, however, impose the tax on cable TV which broadcasts information, as distinct from the transmission from a source to a particular receiver.

For purposes of this tax, CATV is considered closer in function to radio and television companies (not subject to the tax) than to telephone companies.

The Public Utility Regulatory Act of Texas specifically exempts community antenna television services from being regulated by the Texas PUC.[62] Therefore the Texas Comptroller of Public Accountants treats CATV systems for the purposes of taxes as any other business corporation operating in the state.

2.3.3 Property Taxes

The Arizona Revised Statutes specifically mention cable television as being subject to state property taxes. There has been a continuing controversy between the Arizona Cable Television Association and the Department of Revenue concerning the property tax assessment.[63] This Arizona case is one example of a more generic problem: how do tax assessors value the property of an industry which is in its youth and has only recently come to the attention of taxation authorities? In applying the property tax in Arizona, the assessor estimates the value of cable property using replacement cost, historical cost and some multiple of income. From these three estimates, a final judgment is made as to the full cash value of the cable system. The values assigned to cable properties in the state are now being challenged by several Arizona cable systems which claim that valuations have

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[62] See Texas Revised Civil Statutes, Article 1446, §3(c)(2)(a).

[63] Arizona Revised Statutes, 42-124.03.

included the value of the franchise and good will, on which systems should not, they argue, pay property taxes.

A previous case initiated by the Arizona Cable Television Association was settled when the Department of Revenue agreed that full cash value assessment should not exceed the replacement cost of the system.[64] The current case addresses the same issue because of policy changes at the Department of Revenue. In January 1978, a bill was introduced into the Arizona House of Representatives which would remove the property assessment function from the state level. Instead, property would be assessed at the county level. Although the precise reasons for this action have not been clear, it appears that Arizona cable operators may feel they can receive a "fairer" valuation by the counties than by the state.[65]

Subsequent to this annual assessment, corporations are taxed on a percentage of the full cash value of the property. Cable television falls within the commercial property class and thus is taxed at 25% of full cash value. Millage rates applied to this percentage are determined by estimating the sum of State, County and City budgetary needs and this varies from place to place within the state.

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64 Interview with Don Corbitt, Counsel for the Arizona CATV Association, June 16, 1977.

65 See H.B. 2088, introduced January 11, 1978, by a majority of the Committee on Ways and Means. A different approach to reducing property valuation was taken by the California Cable Television Association (CCTA). In California, property is assessed by localities. In an attempt to standardize the local assessment procedures, the California Board of Equalization began compiling a cable television assessment handbook in 1974. The CCTA appointed a committee to work with the Equalization Board so that the assessment procedures outlined in the handbook would be more favorable to the industry. The CCTA was able to convince the Board that, for example, a valuation of property based upon a value per subscriber approach was too simplified due to many variations in cable plant costs. The resulting handbook is Assessor's Handbook 568, California Board of Equalization, 1977.

In Washington, a property tax is also levied at the state level. This is based on 100% true and fair cash value of real and tangible personal property. The millage rate is set each year; however, there is a constitutional limitation that yearly property taxes may not exceed 1% of full, true and fair value of property.

2.3.4 Sales Taxes

The sales tax is probably the one tax which has been most consistently applied to cable television. It is also the most elusive in its effects. Sales taxes on cable television services are generally collected by the cable operator directly from the consumer and thus these taxes do not directly affect the system owner. Cable operators allege, however, that there is a possibility that the increase in cost to the consumer (i.e. the larger monthly bill) could dissuade some consumers from continuing service and potential consumers from initially subscribing. On the other hand, cable systems do provide a service, and in states which tax classes of services (i.e. travel agents, barber shops, etc.), it may seem congruous that cable services would be taxed.[66] The actual effects of sales taxes on subscriber penetration would be difficult to isolate given the other differences between those states which do and do not apply this tax.

Mississippi, Nebraska and Wisconsin specifically include cable television service sales in their tax statutes. In Mississippi, a 5% of gross

66 There is, of course, another issue concerning whether cable is classified correctly or equitably when either exempted from or subject to a sales tax, i.e. are there services which are similar in nature which are subject to a sales tax while cable is exempted, or vice versa? This issue will be briefly discussed in Section 2.4, below.

income from services tax is applied.[67] It is unclear whether this is based on all income (i.e. from service, installation, pay services and advertising) or only on basic service income. Nebraska imposes a 3% sales tax, but only on the sale of services and not on the cost of installation.[68]

In Wisconsin during the 1975 legislative session, a cable television sales tax bill was passed.[69] This 4% tax is applied to both sales of services and installation charges. In addition, the legislature passed a bill defining what a cable system was for purposes of enforcing the sales tax. They defined a cable system as:

> ...any facility which, for a fee, regularly amplifies and transmits by wire, coaxial cable, lightwave or microwave, simultaneously to 50 or more subscribers, programs broadcast by television or radio station or originated by themselves or any other party.[70]

Master antenna systems transmitting no signals other than those which could be viewed by individuals in the buildings served are exempted from this tax. Given the wording of the statute, it appears as if pay and other premium services are subject to this sales tax. It is unclear whether this definition would include hotel, pay and MDS services.

Arizona cable systems are not subject to sales taxes by an administrative decision of the Department of Revenue.[71] Louisiana specifically exempts CATV from taxes on sales of regular service, installation and

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[67] See Mississippi Code of 1972, §27-65-23.

[68] Nebraska Revised Statutes, 1943. Sales and Use Tax Regulation 1-81, 77-2702 (4).

[69] Wisconsin Revised Statutes, 77.52 (2)(a)(12).

[70] Wisconsin Revised Statutes, 77.51 (28).

[71] Interview with Ivan Johnson, former Executive Director of the Arizona CATV Association, June 15, 1977.

repairs.[72] It does not, however, exempt CATV from having to pay a use tax on purchases of equipment and other tangible goods. This bill, passed in 1974, also prohibits any political subdivision of the state from imposing a sales tax. This can be juxtaposed with the situation in Florida, where the state legislature specifically authorized municipalities to impose an up to 10% tax on cable television service, including pay and installation (see discussion of Florida case in Section 2.2, above). The Florida Cable Television Association (FCTA) has recently lobbied to have the legislature repeal this state authorization.[73] They did not, however, repeal the state sales tax which was passed in 1971.[74] This fee is based on 4% of subscriber sales which, according to Tom Gilchrist of the FCTA, includes sales of pay cable services.[75]

2.3.5 Miscellaneous Taxes

The State of Washington levies a business and occupation tax. It is based on the gross receipts of the business being taxed, and is a percentage based on the type of business being done.[76] By an administrative decision of the Washington Department of Revenue, issued in 1952, cable television gross receipts are subject to this business and occupation tax.[77] The ruling specifically mentions that gross receipts shall include both installation

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[72] Louisiana Revised Statutes, 47:305:16.

[73] Interview with Tom Gilchrist, Executive Director, Florida Cable Television Association, June 17, 1977.

[74] Florida Statutes, 212.05 (5).

[75] Interview with Tom Gilchrist, June 17, 1977.

[76] Revised Code of Washington, 82.02.220 and 82.04.290.

[77] Washington Code Annotated, 458-20-227 (Rule 227).

and monthly fee receipts. In 1952 (an early date for state interest in CATV), these were likely to be the only fees being charged consumers. The ruling has not been revised since 1952, and therefore would exempt from taxation all income derived from pay and premium services, advertising, and channel leasing. In addition, if a cable system leases pole or conduit space from a publicly-owned utility company a 12% excise tax on the yearly rental charges must be paid by the lessee.[78]

In Wisconsin, a statute prohibits any county, city, town or village from adopting a tax on the net income of individuals or corporations.[79] This law, however, does not seem to apply or have been applied to Wisconsin municipalities which have adopted franchise fees based on gross receipts or gross subscriber revenues.[80] This might be due to the fact that most fee clauses within franchises specify gross subscriber revenues, which is distinct from net income (i.e. gross receipts minus expenses including depreciation, etc.).

2.4 Taxation: Equity and Incentives

From the preceding discussion of the various taxes which have recently been applied to cable television, it appears that states are increasingly

[78] Survey returned by the Washington Department of Revenue.

[79] Wisconsin Revised Statutes, 66.70.

[80] This prohibition against income taxes was thought to have applied to franchise fees during the Madison, Wisconsin, refranchising deliberations. In lieu of a franchise fee based on gross receipts, Madison was considering a per pole, per mile or per subscriber franchise fee. They, however, eventually adopted the percentage of gross subscriber revenues formula. See Larry S. Levine, Scrambled Signals, (M.A. thesis, University of Wisconsin - Madison, 1976).

looking towards cable as a source of revenue. One should not construe this statement as meaning that cable television is being singled out for taxation purposes. Other services, both new and old, are also being perceived as untapped or undertapped sources of revenue for the state. Several commentators have traced this trend to several changes in the revenue-raising environment, the most important of which could be the decreased emphasis on property taxes to raise the money to meet budgetary needs.[81]

To make up for this decreased emphasis on property taxes and in order to meet states' needs for larger budgets, states have begun to diversify their revenue sources.[82] Among these newly emphasized taxes are income taxes (which contributed only 8% of total state revenues in 1932, but in 1967 contributed 22.4% of state revenues) and sales taxes (which in 1932 provided less than 1% of the total state revenues, while in 1967 were the most important state revenue source, contributing 28% of the total).[83] When we also see that in terms of local revenue sources (i.e. non-state, non-federal taxes), property taxes still bring in close to 85% of all revenues, the "plight" of cable television appears to be no different from that of other businesses.[84] Where cable television corporations may, however, be placed in a disadvantaged tax position is that in addition to all of the

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81 See note, "Gross Receipts Taxation of Interstate Mass Media", Iowa Law Review, Vol. 55, pp. 1268-85 (1970), at pp. 1268-69; and Jerome Hellerstein, State and Local Taxation, Cases and Materials (St. Paul, Minn.: West Publishing Co., 3rd edition, 1969), pp. 2-3. Hellerstein notes that in 1902, 50% of total state revenues were raised by property taxation; only 2.7% could be attributed to property taxes in 1969.

82 J. Hellerstein concurrently shows that during the same period of time as property tax revenues have decreased (1902 - 1967), total state revenues have increased from under $1 billion to approximately $32 billion. Hellerstein, op. cit., p. 3.

83 J. Hellerstein, op. cit., p. 3.

84 J. Hellerstein, op. cit., p. 2.

taxes businesses must pay, they are subject to local and, in states with comprehensive state regulatory programs, state fees.

In addition to cable being seen as a source of tax and other revenues for the state, the tax environments outlined in Section 2.2 and 2.3 illustrate that cable television is a difficult entity to define. Is cable a service subject to sales taxes, a necessity subject to utility taxes, or a totally new industry subject to specially enacted taxes? We saw that, for example, New York Courts forced the state to define cable as not a telephone service, as did the Illinois Department of Revenue. While this has prevented the state from collecting certain taxes which apply to telephone companies (sales taxes in the New York case and a gross receipts tax in the Illinois case), these decisions have defined cable in terms of what it is not, rather than what it is. Consequently, we can say that from a brief look at the tax status of cable television in several states, <u>CATV seems to "fall between the cracks" in many instances</u>.

This is not to imply that there are not other industries which also "fall between the cracks", but what it does imply is that cable is one of the more recent examples of an undefinable industry. It should also be noted that as cable systems begin to provide other than rebroadcast services, there is an even greater possibility that states will have difficulties in classifying it for taxation purposes. For example, if cable systems begin to provide data transmission services between two branches of a corporation and among these transmissions are digitalized voice communication, would this make the cable system a telephone carrier? Would this also require that for taxation purposes, different services on one cable system be classified differently? This suggests that the crack into which cable might fall in the future may widen and become more elusive.

The definitional issue also has important constitutional implications. The Fourteenth Amendment to the Constitution states that:

> No state shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States...nor deny any person within its jurisdiction the equal protection of the laws.[85]

This has been known as the equal protection clause, and it "...protects an individual from discriminatory state action that imposes a tax liability on one person while not imposing the same tax on others of the same class."[86] But if it is difficult to find one definition of CATV, how is it possible to determine if equal protection rights are being violated?

There are several hypothetical situations which could occur. We outline one below. Let us assume that, for purposes of a sales tax, cable television is defined as a public utility and not assessed this tax, while broadcasters must collect a sales tax on all local advertising which they sell. If we also assume that CATV systems in that state begin to sell advertising on a local basis, then it is obvious that among the factors which a local advertiser might consider in allocating advertising budgets will be the fact that if ads are placed on a local television station (and the cost per thousand homes reached is equal for CATV and broadcaster advertisements), these ads will cost more than if placed on a CATV system. This, of course, puts CATV at a competitive advantage, but the situation could be reversed, and in an individual state sales taxes might apply to CATV while other substitutable advertising outlets would be exempt. Therefore, the defini-

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85 United States Constitution, Fourteenth Amendment, §1.

86 David W. Smith, "Local Taxation of Cable Television Systems: The Constitutional Problems," Catholic University Law Review, Vol. 24, pp. 755-776 (1975), at p. 762.

tional problem is not simply an academic issue, but a legal, constitutional, and ultimately an economic issue as well.[87]

Another constitutional issue involving state taxes concerns the right of the states to tax interstate commerce. Article I, Section 8, Clause 3 of the U.S. Constitution is generally cited as the Commerce Clause which in part states that:

> The Congress shall have power...to regulate commerce with foreign nations, among the several states, and with the Indian Tribes...

The Commerce Clause has been construed as prohibiting the states from regulating interstate commerce or erecting barriers which would put interstate commerce at a disadvantage when competing with local or intrastate commerce.

The United States Supreme Court has issued many decisions which have determined that in some cases, state taxes applied to interstate businesses could erect barriers to interstate commerce. The tests of whether such taxes do in fact erect barriers have been: the direct burden test (i.e. does an individual tax place a heavier burden on interstate than on intrastate commerce);[88] the multiple burden test (i.e. could the tax which was applied by one state potentially be applied by every state which the business

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[87] This definitional issue applied to advertising is similar to one which occurred in the early days of radio when radio broadcasters were competing with magazines and newspapers for advertising dollars. For a general discussion of this topic, see Smith, op. cit., pp. 762-66; note, op. cit., p. 1278; and National Association of Broadcasters, A Primer on State and Municipal Taxation of Broadcast-Related Activities (Washington, D.C.: National Association of Broadcasters, 1978), pp. 29-30.

[88] See Fisher's Blend Station, Inc. v. Tax Commission, 297 U.S. 650 (1936), where the Supreme Court ruled that a Washington occupation tax based on a broadcasting company's gross receipts was invalid; and Freeman v. Hewitt, 329 U.S. 249 (1946), where the Court ruled that a state income tax was void when it was applied to a company's out of state sales.

touched, therefore implying that the same gross receipts could be taxed by several states);[89] and most recently, the non-discriminatory test (i.e. does the tax discriminate against interstate commerce, whether or not it was a direct burden on such commerce or could potentially be determined to be a multiple burden).[90]

Given these specific (yet inconsistent) definitions of state taxes which would be in violation of the Commerce Clause, it is not easy to determine whether any of the specific taxes discussed in Sections 2.2 and 2.3 would fall within the states' right to tax. In the first place, it would be necessary to resolve the issue of whether cable television is, in fact, an interstate business and, if so, whether there are certain cable system configurations which could be considered intrastate in nature. Secondly, it would then be up to state and federal courts to decide if an individual tax, when applied to CATV, passes any or all of the tests described above. It is likely that more court action will be seen in this area in the future.[91]

One final area concerns the effects of taxes on the industry and the consumer. Specifically, this issue can be discussed by referring to incentives. Initially, it should be noted that it is extremely difficult to isolate the effects of individual taxes. This is primarily because one

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[89] See Western Live Stock v. Bureau of Revenue, 303 U.S. 250 (1938).

[90] See Walter Hellerstein, "State Taxation and the Supreme Court: Toward a More Unified Approach to Constitutional Adjudication?" Michigan Law Review, Vol. 75, pp. 1426-55 (1977).

[91] For a full discussion of this Commerce Clause issue, see Smith, op. cit., at pp. 766-71; note, op. cit., at pp. 1271-78; National Association of Broadcasters, op. cit., at pp. 16-27; Walter Hellerstein, "State Taxation of Interstate Business and the Supreme Court, 1974 Term: Standard Pressed Steel and Colonial Pipeline," Virginia Law Review, Vol. 62, pp. 149-92 (1976); and Jerome Hellerstein and Walter Hellerstein, State and Local Taxation, Cases and Materials, (St. Paul, Minn.: West Publishing Co., 4th edition, 1978), pp. 317-20.

tax is applied within a total taxing environment, and in addition taxes are only one element of an overall state economic environment. Nonetheless, one can predict the potential impact of specific taxes.

As we noted above, it appears as if the states have been increasingly looking toward cable television (as well as other businesses) as a source for new revenues. But this is only one way of looking at taxes, albeit the most prominent one currently at the state level. Another way of looking at a particular tax is to determine what incentives this tax provides and how these incentives affect the cable operator's business decisions and ultimately the service which is provided cable consumers.

Incentive analysis can be done in at least two ways. Legislatures can look at individual taxes (and total taxation schemes) and determine the effects on incentives. Having first established cable policy objectives, legislators can then determine if the incentives inherent in the tax or taxes further or hinder these objectives. For example, in the Connecticut taxation scheme outlined in Section 2.2.1 above, we saw that cable systems, having been defined as public utilities, were exempt from local property taxes on tangible personal property while they were non-exempt from real property taxes. It would be useful to inquire whether this taxation scheme affects cable operator's allocation of capital to these two classes of property, and consequently, whether this capital allocation affects the kind or level of services provided to the consumer: If the effects of these tax policies are contrary to broader cable policies, then the legislature might consider adjusting this tax.

Another incentive example can be drawn from the Massachusetts case outlined in Section 2.2.3. In this situation fees which were paid for support of the Massachusetts Community Antenna Television Commission were based on a flat fee per subscriber per year. We were able to show that, all other things being equal, the higher the subscriber rates, the lower the percentage of yearly revenues per subscriber which would be paid to the state. Therefore, this flat rate method of fee computation could be an incentive for systems to keep rates higher than if the fee was computed on a strict percentage basis.

A second way of using incentive analysis has not to our knowledge been used at the state level for cable television taxation. This incentive analysis would require that states first adopt policy objectives. It would then be up to legislators and other policy makers to determine which objectives could be furthered through the application of tax policies. For example, if one policy objective reached at the state level was that cable systems should provide public access equipment, facilities and personnel, then the state might consider allowing cable operators to deduct the costs of such equipment, etc., from their income. Or, equipment costs could be directly deducted from the system's state income tax liability. Both of these tax policies only serve as examples. What they point to, however, is the value of looking at the incentive implications of taxes rather than simply looking at tax systems as a way to raise state revenues.

3.0 REGIONALIZATION

A frequently-voiced argument for state regulation is that this is the most appropriate level of government to foster and monitor the regional development of cable television. To the extent that cable television is a local communications medium, it can be governed by localities. To the extent that it provides distant signals, which by legal definition are interstate in nature, it falls under federal regulation. But increasingly, the argument goes, cable television is becoming, or will become, a regional medium as well; and accordingly, it should be subject to state-level overview and regulation. Regional systems may enjoy both economies of scale in delivering services and economies of abundance, since larger subscriber bases are likely to support a greater variety of programming and services.

Of the eleven states currently engaged in comprehensive regulation, six have addressed these regional issues. But the approaches have varied. A number of states, New York, Connecticut and Vermont among them, have proposed line extension policies, which encompass inter- as well as intra-community system expansion activities. Two states, Connecticut and Rhode Island, have developed multi-community franchising districts, aimed at ensuring the availability of cable service on a more widespread basis than if only community-based franchising were the rule. In addition, Minnesota, New York and New Jersey are directed by statute to take regional factors into account in approving franchises.

3.1 Why Regionalization?

Before examining several specific approaches, however, it is useful to examine why "regional factors" may be important to the development of cable television.

In the narrowest of terms, issues of regionalization arise whenever any cable system activity involves, or potentially involves, more than one community or franchising entity. This occurs most frequently when a system serving a locality wants to extend its lines to a housing development just across the municipal boundary. Conversely, at the broad end of the scale, regionalization might be the attempt to develop cable television at a regional -- multi-community or even multi-state -- scale, ensuring in the process that this development is consistent with a variety of technical, economic, legal and social objectives and/or standards. In between these two extremes, the concept of "regionalization" may encompass a variety of other situations, including:

- the provision of cable services to two or more franchise territories from a single head-end and/or distribution plant to save costs;
- The location of the antenna of a cable system outside the community it serves for topographical or other reasons (e.g. no high locations in the first community);
- the interconnection of several contiguous or non-contiguous systems for the purpose of providing a shared public access channel or pay TV service;
- the sharing of a microwave relay facility or satellite earth station by more than one system or community;
- the establishment of multi-community cable service districts in order to ensure that normally unprofitable areas are served (e.g. by combining them with profitable ones);

- the interconnection of a school (or some other programming source) located in one community with the cable system in another (e.g. where the school's pupils include residents of the cabled community);
- the provision of cable services on the basis of existing political or governmental service districts (e.g. police, fire, medical, etc.).

Given this variety of applications, the general concept of regionalization does not entail a single-minded objective. It can be advanced by the cable operator who wants to reduce plant expenditures or benefit from shared programming, or simply to grow; by the government, which may want to foster certain social objectives; by an advertiser or program supplier who wants to reach a larger or more specialized market; or by the consumer who might not otherwise have access to cable services. And it can be resisted by an equally diverse number of interests: the newspaper or radio station that wants to limit the advertising reach of cable TV; the local government that wants to maintain exclusive control of its franchise; the media access group, which wants a full, rather than shared, channel for public access programming; the consumer, who does not want to pay for extending cable services to less profitable areas; and the prospective cable operator, who sees fewer franchising opportunities resulting from the carving up of a state into multi-community districts.[92]

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[92] It is the small, local operator that can be most disadvantaged by districting, since larger franchise territories require larger financing packages and are less likely to be subject to local influence. Conversely, multiple system operators have been known to obtain one or two large franchises in a region and then to argue before the town councils of contiguous smaller communities that the only way their citizens could realistically expect to receive cable service would be as part of a regional system, operated by their company. See, for example, Konrad K. Kalba, Larry S. Levine, and Anne E. Birinyi, Regulatory Politics: State Legislatures and the Cable Television Industry, Harvard University Program on Information Resources Policy, Publication P-78-2, August 1978, p. 58.

But, however advanced, the development of regionalization policies often involves several difficult issues, including, among others:

(1) Should regional franchises and/or interconnections be fostered if they produce system economies or increase the flow of programs, even if in the process they lead to consolidation of cable system ownership or to less local control over cable operations?

(2) Should regionalization be fostered in order to increase access to cable services to subscribers who might not otherwise be served, even if this could delay system construction and/or raise subscriber fees?

(3) Should regional franchises and/or interconnection be fostered to maintain regional affinities and/or to increase access to public services, even if this may entail considerable government planning or intervention in cable television operations?

(4) Who should pay for the costs of regionalization (e.g. line extension) and who should gain from its benefits (e.g. economies of scale): cable operators (some operators?), program suppliers, cable subscribers (some subscribers?), the government, or the community at large?

(5) What government entities, utilizing which procedures, should be allowed and/or mandated to foster regionalization in the cable television context?

As this last issue implies, regionalization is not a policy issue that arises only at the state level. Other levels of government -- municipalities, counties and metropolitan planning agencies in particular -- have been conscious of the regional ramifications of cable television and have in some cases fostered its occurrence.[93]

In this report, however, the focus will be on state-level approaches to regionalization. Specifically, we will compare the following four approaches: (1) line extension policies; (2) the subdivision of states into multi-community franchise districts; (3) interconnection policies; and (4) the case-by-case review of local franchising decisions in relation to regional service considerations.

3.2 Regionalization by Line Extension -- Vermont and New York

The most frequent form of state intervention in regional issues is through the handling of line extension proposals. Not all line extension activities impinge, of course, on regionalization, since the most common form of line extension is within a given community (e.g. when consumers in an uncabled portion of the community request service). However, in other instances, cable operators and/or potential subscribers to cable services may request the extension of cable services across a municipal boundary.

This occurs particularly where an area adjacent to a franchised community would like to receive cable, but is part of an unfranchised locality (and one that may not be franchised for some time, if ever). Alternatively, it can occur with respect to an area within a franchised community, which is

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[93] For overviews of how municipalities, counties, regional planning agencies and other governmental jurisdictions have addressed regionalization issues, see Jon Shafer, "Regional Approaches", in Mary Louise Hollowell, ed., Cable Handbook 1975-1976: A Guide to Cable and New Communications Technologies, (Washington: Communications Press, Inc., 1975), and Eric N. Macey, Cable Television and the Franchising Process: An Examination of Regional Alternatives (M.A. thesis, Annenberg School of Communications, University of Pennsylvania, 1975), Chapters V and VI, pp. 88-132.

not receiving cable service, but that is adjacent to another cable system, which is interested in serving the area.

In the past, municipalities and other local franchising authorities have generally dealt with line extension requests on an ad hoc basis, usually granting permission where interest on the part of the operator or area residents has been apparent. In other instances, cable operators have extended their lines across local boundaries without receiving formal approval. This has at times aggravated other cable operators, who in applying for a franchise have found that parts of the community were already being served.

Of the eleven state regulatory agencies, several have examined line extension issues. Typically, their concern has been one or more of the following three questions: Should line extension permits be granted on the same basis as franchises, or should waivers of certain franchising procedures be permitted in order to expedite service delivery to small residential pockets? Should the costs of extending cable lines be borne by existing subscribers, new subscribers (i.e. the ones for which lines are being extended), or some combination of the two? And should regional service factors be taken into account in granting line extension permits?

In the case of Vermont, which regulates cable television as a public utility, line extension permits for crossing local boundaries have been traditionally granted; however, the costs of extension were to be paid primarily by the new subscribers.[94] The effect of this policy was to limit line extension proposals by cable operators, particularly in low-density rural areas (i.e. much of the state, territorially). In 1975, this policy was invalidated, following a challenge in the state courts which determined that line

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[94] Personal interview with Chairman Richard Saudek and staff of the Vermont Public Service Board, March 22, 1977.

extension was statutorily required to be based on an equitable and reasonable tariff.[95]

In November 1976, the Vermont Public Service Board proposed a new line extension policy.[96] If implemented, the policy called for cable operators to cover all construction costs,

> if the requested line extension shall pass a sufficient number of dwelling units so as to yield an average "homes-per-mile" count of sixty (60), or if the CATV system has received thirty-five (35) verified subscriber orders within said one mile extension.[97]

But in other cases, where the above requirements are not met, the party(s) requesting the service would be obligated to cover actual line extension costs, except for a credit for the cost of drop lines to the home (a maximum of 100 feet). The board also noted that if additional subscribers were served by a line extension within eight years of its construction, these would be expected to contribute to its costs (and the earlier subscribers would receive a proportionate refund). Finally, the Board proposed that cable companies charging for line extension

> on a basis other than actual costs, such as average costs, ...shall file a tariff setting forth the basis on which it intends to charge for these extensions.[98]

On December 10, 1976, hearings were held at the PSB on the proposal, which was opposed by cable industry representatives on two grounds. First,

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[95] Prevo's Radio and Appliance Store, Findings in Docket #3814, April 18, 1974; Prevo's Radio and Appliance Store, Findings and Opinion of the Board in Docket #3814, September 19, 1975.

[96] Vermont Public Service Board, Proposed General Order 59.62, November 22, 1976.

[97] Ibid., §3 (e).

[98] Ibid., §5 (e).

they asked that a distinction be made between aerial and underground extensions. Where underground lines were required, the New England Cable Television Association proposed that the new subscribers cover the difference in cost between underground and aerial construction where sixty (or more) homes per mile were involved. Second, the NECTA suggested that the eight-year time limit for new customers to share extension costs would create unreasonable bookkeeping burdens for small cable companies, and therefore should be reduced to three years.[99] No decision has been made (as of May 1978) by the Vermont PSB as to whether to implement or modify the proposed new policy.[100]

The Vermont experience illustrates the complexities of allocating costs for line extension. While the basic formula proposed by the PSB seems reasonable from an economic standpoint, it does not solve the problem of expanding cable service to low-density areas unless, that is, the new subscriber(s) is willing to pay the full costs of expansion. In addition to the possible social merits of a policy fostering service expansion to rural areas, it is arguable that the operator and/or existing subscribers should be willing to cover at least some portion of these costs. In the case of the operator, the reduced investment risk of serving extension subscribers (i.e. the risks are not as great as initiating a cable system, which may or may not prove to be viable, particularly where extension

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[99] New England Cable Television Association, "Vermont Line Extension", The Amplifier, Vol. 9, No. 12, December 1976, pp. 2-3.

[100] Several other state regulatory agencies are in the process of formulating line extension policies; for example, the Minnesota Cable Communications Board, which was given a specific legislative mandate to do so in 1976 (Minn. Laws 1976, Ch. 249, §6, Subd. 17). See also Philip R. Hochberg, The States Regulate Cable: A Legislative Analysis of Substantive Provisions, op. cit., pp. 82-83.

subscribers agree in advance to receive the service) could be offset by a contribution to extension costs in the way of reduced profits.[101] In the case of existing subscribers, the expansion of services to low-density areas or beyond the initial franchise territory could also be of potential benefit, since the resulting increased subscriber base may reduce the per subscriber costs of introducing new programming or other innovations.

While Vermont's line extension policy proposal addresses the question of allocating extension costs, New York's Cable Television Commission has focused on the procedural aspects of granting extension permits and on the geographical criteria for determining which forms of extension are permissible. Since some rural communities are not likely to receive cable service other than by means of extension (thereby alleviating the need for capital investment in head-end, etc.), the New York Commission has sought to facilitate line extension activity. However, it has also been mindful that system extension could become an alternative less costly and less procedurally-sound way for a cable operator to receive the equivalent of franchising rights to a community.

As a result, the Commission has established an Extension Franchising Procedure, (EFP), which is intended to routinize the acquisition of extension permits, but only if four specific criteria are met. These are as follows:

(1) The municipality must have contacted all cable operators (if any) serving municipalities within a 25-mile radius of the proposed service extension area and determined that only the one company is interested in providing the service.

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[101] For a discussion of this point, see Paul Fox, "Cable Line Extension in New York", Washington, D.C.: Cable Television Information Center, March 1976, pp. 8-9.

(2) The municipality must have served notice on all contiguous municipalities of its intention to grant a franchise pursuant to the EFP if authorized to do so by the Commission.

(3) The municipality desiring the extension of service must have demonstrated that the municipality (or the proposed service area within it) would be unable to support an independent cable system offering service similar to that of the proposed franchisee at reasonable rates.

(4) The proposed franchisee must already be serving a contiguous municipality.[102]

In addition, the Commission requires that a public hearing be held by the municipality and that other cable companies have a chance to submit counter-proposals.[103]

While the New York procedure encourages the regionalization of cable subscribers by virtue of criteria (3) and (4), other factors (e.g. of community of interest) are not taken into account. Criterion (2) does provide an opportunity for a second municipality to respond to the extension proposal if, for instance, it feels the area in question should be linked to a different franchise; however, it is not clear what would occur if such a response arose. It is also not clear whether the pocket-by-pocket extension of cable services represents the most economic means for making

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[102] State of New York Commission on Cable Television, Policy Statement and Order Amending Rules, in Docket No. 90039, February 20, 1975, p. 3.

[103] This procedure, though still quite detailed, eliminates three requirements for franchising cable systems in New York State: (1) the creation of a cable television advisory committee; (2) preparation of a formal Request for Proposals; and (3) placement of a Public Notice in national trade journals inviting applications for a franchise.

cable services more generally available. And, as Macey has pointed out, "the most probable consequence of the Commission's action is to provide an incentive for cable operators to seek franchises in municipalities where there are opportunities to extend service to contiguous areas."[104]

3.3 Regionalization by Districting -- Connecticut

Because line extension policies are generally recognized as a means of facilitating service coverage, rather than for achieving regional service objectives, two regulatory agencies have proposed more explicit regionalization policies by means of service area districting.

Connecticut's experience is particularly instructive in that it has been implemented, has withstood a court challenge, and illustrates the conceptual and practical difficulties raised by a districting approach.[105]

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[104] Eric N. Macey, op. cit., p. 40. Another consequence of the New York policy is that it favors within-state cable operators and places more power in the Commission in reviewing extension franchises at the expense of community advisory committees, which can play a substantial role in New York's full-scale franchising procedures. For the New York Commission's approach to allocating line extension costs, see its Guidelines for Cable Television Line Extension Policies, May 9, 1977. Essentially, the Commission requires new subscribers to pay (usually through greater monthly fees) the difference between the costs of extension and the costs of serving existing subscribers. Head-end costs, however, are generally excluded in the comparison.

[105] Rhode Island's Administrator of Public Utilities also instituted nine district franchises for that state in 1971, based on population, density, and other criteria (Rhode Island General Order 48). However, these franchises were ruled invalid in 1975 by the Rhode Island Superior Court, after four disappointed applicants appealed the Administrator's decision. The companies which had been granted the original franchises, however, brought the matter before the Supreme Court of Rhode Island -- a decision is expected in the fall of 1978.

The Connecticut PUC's decision to issue franchises for multi-community districts was rendered on March 21, 1967, following nearly three years of franchise proceedings.[106] The problem that the PUC faced was that over twenty franchise applicants had requested permission to serve various portions of Connecticut, ranging in size from one municipality to the entire state.[107] Of these, seventeen were ultimately awarded a franchise, but not in all cases for the same areas they had expressed an interest in serving. The franchise territories drawn by the PUC consisted of between two and eight municipalities. In the end, 88 of Connecticut's 169 towns were encompassed in the seventeen franchises for an average of approximately five communities per franchise.

The stated PUC rationale for pursuing this imposed districting approach was to better serve the public "through a series of relatively small, independently owned systems" which cut across local jurisdictions and modified the applicant's requests in order to "establish more viable systems".[108] Mitchell adds that:

> The towns were assigned with the idea of "regionalizing cable service". The PUC decided that contiguous territories with a "community of interest" should be served by a single system. The areas assigned were generally composed of a major city and its adjacent towns.[109]

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[106] For discussions of Connecticut's initial franchising process and the criteria used in selecting franchisees, see Michael R. Mitchell, State Regulation of Cable Television, (Santa Monica, Calif.: RAND Corp., October 1971), pp. 4-34; and David L. Nicoll, Connecticut Cable and Public Utility, M.A. thesis, Annenberg School of Communications, University of Pennsylvania, 1975), pp. 58-71.

[107] Connecticut PUC, "Community Antenna Television Systems", March 21, 1967. For a review of Connecticut's entry into cable regulation, see Kalba, et al, Regulatory Politics: State Legislatures and the Cable Television Industry, op. cit., pp. 9-15.

[108] Connecticut PUC, loc. cit., p. 8.

[109] Mitchell, op. cit., p. 17.

However, Nicoll is less confident of the rationality of the process. "Inquiries to present PUC staff," he states, "elicited the explanation that 'the Commissioners got together and drew the lines'." He adds that the disparity of the selected franchise areas (which range in population, for example, from 13,290 to 341,909 and in dwellings per square mile from 22.3 to 796.9) suggests that policy guidelines, whatever they may have been, were not followed very strictly.[110]

Regardless of the specific criteria followed by the Connecticut PUC in arriving at its cable service districts, it is clear that a number of often conflicting factors could be taken into account in the process of drawing regional service boundaries. These include:

(1) the specific area requested by franchise applicants (for whatever reasons), which is certainly a pragmatic factor that should not be dismissed, since alternative districts may not be served as readily by cable operators;

(2) the economies of scale associated with cable systems operations, which, as several studies have pointed out, are not unlimited but drop after a certain point in relation primarily to distance from head-end;[111]

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[110] Nicoll, op. cit., pp. 61-65. Several of the disgruntled applicants appealed the PUC decision as being arbitrary to the Superior Court of Hartford County and the Connecticut Supreme Court, but in both cases the court ruled that the PUC had given adequate notice at its hearings that the awarded franchise areas might not match requested ones. See Connecticut Television, Inc. v. Public Utilities Commission, et al, 159 Conn. 317 (1970).

[111] See, for example, Leland L. Johnson, et al, Cable Communications in the Dayton, Miami, Valley: Basic Report (Santa Monica, Calif.: RAND Corp., January 1972). Another economic factor that can be taken into account in determining service districts is potential demand for cable services. In the Rhode Island case, median family income was used as a surrogate for demand, on the premise that higher income households would be more likely to subscribe. Rhode Island, op. cit., p. 73, ff.

(3) the economies and/or expertise gained from providing a regional focus to cable planning and regulatory activities (vs. the costs or lack of expertise, if each community were to proceed on its own);

(4) the economies that can be achieved in providing various services on cable systems (e.g. public access, educational, pay TV, etc.), if a wider subscriber base is available for distributing service costs;

(5) natural barriers and other factors that may affect the optimal technical configuration of cable distribution plant;

(6) the desire to mix high- and low-density areas in order to encourage service penetration in areas that would not be economically viable unless joined with highly viable areas;

(7) defining districts by "communities of interest" as defined in social, political or cultural terms; an objective which, even if desirable, may be difficult to achieve, given the relatively heterogenous nature of most communities;

(8) jurisdictional boundaries for community services such as education, public safety, and health and hospital districts, which if taken into account in cable districting, could facilitate public service applications;[112]

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[112] According to David Sheehan, staff engineer for the Connecticut Public Utilities Control Authority, it is this factor and the preceding one that are currently given primary consideration by Connecticut in selecting new cable service districts; personal interview, April 6, 1977.

(9) considerations of concentration of ownership vs. responsiveness to local needs, which might argue against extensive consolidation of community-based franchise areas; and

(10) other available or future communications systems, which could be integrated with cable services in providing area-wide services (e.g. translators, satellite terminals, etc.).

To develop service districts sensitive to most of these considerations would involve careful planning and analysis, which was not undertaken when Connecticut made its initial districting decisions.[113] The following brief examination of one franchise district illustrates this conclusion.

The city of Middletown was placed in a service district along with four other communities: Cromwell, East Hampton, Middlefield and Portland (see Figure 1). Seven applicants had requested a franchise for Middletown (with a population of about 38,000), but only one had requested to serve any of the four surrounding townships (with populations of 3200 to 8900).[114] Economically, it is unclear whether a viable cable system can be operated in the city of Middletown; what is clear is that the whole service district is much less viable as a cable operation.[115] From a technical point of view,

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113 The Connecticut districting decisions did not reflect an attempt to mix high- and low-density areas. In addition, attention was paid to media concentration factors. Connecticut's PUCA has not allowed television stations or newspaper publishers to own cable systems within the state.

114 Mitchell, op. cit., p. 17.

115 See Kalba Bowen Associates, Inc., Middletown: Telecommunications Needs, Resources and Potential, Phase I Report, Cambridge, Ma., March 1975. This study noted that the financial viability of a Middletown cable system would be marginal at best unless additional service revenues (e.g. from pay TV) could be generated. Since 1977, the TelePrompTer Corporation has been providing cable services in Middletown, including a pay channel.

<u>Figure 1</u>

The Middletown Cable District

the PUC apparently did not consider that the Connecticut River divides the district roughly in half, which poses considerable plant extension problems, nor that the optimal antenna site is across the river from Middletown. Moreover, the Middletown cable district is not coterminous with local school districts or most other government or service districts.

The point, in short, is that the practice of regional districting is considerably more complex than the theory. As in other cases, the Middletown case illustrates how economic, technical and service issues were not assessed very carefully in the setting of district boundaries. And although other factors were clearly involved, the districting decision certainly contributed to the delays in receiving cable service that Middletown residents experienced.[116] It was not until 1977 that TelePrompTer, the original franchisee, activitated its system, which serves only Middletown to date.[117]

In addition to the selection of districts, the districting approach to regionalization poses at least two other major regulatory problems. First, particularly where substantial low-density areas are included in the district, cable operators find it virtually impossible to comply with the FCC's system construction requirements. These call for extending energized trunk cable to 20% of the franchise area each year until the entire area is covered. And second, the setting of subscriber rates is automatically mired in equity issues. Given disparate service densities, it becomes less reasonable to apply a standard rate. However, as in the case of line extension issues, the basis for arriving at multiple tariff schedules is not easily achieved (see Section 3.2).

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[116] For a discussion of some of the other factors, see Mitchell, op. cit., pp. 27-29. See also Kalba Bowen Associates, Inc., op. cit.

[117] Of Connecticut's 20 franchise districts (the 17 original ones plus three others added subsequently), only 13 have operating systems at present.

Because of these construction and rate-setting difficulties, the Connecticut PUCA proposed a line extension policy in 1976 which would separate service districts into primary and secondary franchise areas.[118] The 20% construction rule would only apply to primary areas, while service in secondary areas would require subscriber contributions to cover extension costs. This proposal recognizes the practical limitations of the districting approach, if applied in a rigid fashion, but also potentially offers a promising modification of the approach. In essence, it allows the relatively viable parts of townships that might not have otherwise been franchised (because of the non-viability of the total area) to receive service by being grouped with adjacent franchised areas. However, Connecticut's line extension proceeding is still ongoing, and the PUCA's proposal has been criticized by the State's Consumer Counsel as an abandonment of "those [rural] areas in perhaps the greatest need for CATV service."[119]

3.4 Regionalization by Interconnection -- New York and Minnesota

As noted earlier, interconnection of cable systems across community boundaries can occur by means of coordinated franchises, which specifically call for interconnection at the municipal or county level. It can also occur by creating multi-community service districts or, on a more modest scale, by line extension into contiguous communities. Finally, it occurs when a cable company or program distributor interconnects two or more

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[118] Connecticut PUCA, Docket No. 760207. In 1976, Connecticut's Public Utilities Commission was replaced by the Public Utilities Control Authority, (PUCA).

[119] *Ibid.*, comments of the Consumer Counsel, December 1, 1976, p. 1. See also "Statement of Position of the Office of Consumer Counsel," June 22, 1976.

systems on a regional, interstate or national scale, using wire, microwave and/or satellite technology.

Given these interconnection alternatives, several state regulatory agencies, notably New York and Minnesota, have sought to utilize interconnection as an instrument for implementing regionalization policies. These are generally agencies that have not chosen or been authorized to pursue a more rigid districting approach, but operate under a legislative mandate to take regional factors into account in reviewing local franchises.[120] However, as stated recently by the New York State Commission:

> This mandate to promote and, under some circumstances, order interconnection of cable television systems, brings with it several difficult questions:
>
> 1) What degree of interconnection is necessary and/or desirable (e.g. interconnection of one channel, several channels, or entire systems)? By what technical means should interconnection by accomplished?
>
> 2) Should the Commission delineate specific interconnection "regions" or should it allow for several different districting alternatives in a given area?
>
> 3) Should financing of system interconnection ordered by the State be provided by the State, regional planning authorities, counties, Federal government, the cable industry, or some combination?
>
> 4) What should be the timetable for system interconnection? Should the Commission wait until a specific need arises, or anticipate that need and order system interconnection to commence immediately? [121]

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[120] See Hochberg, The States Regulate Cable: A Legislative Analysis of Substantive Provisions, op. cit., pp. 80-83.

[121] New York State Commission on Cable Television, Telecommunications in New York State: An Agenda for Government Involvement, Draft - For Public Comment, Docket No. 90112, Albany, N.Y., May 1977, p. 143.

While continuing to assess these policy issues, the Commission has adopted an interim policy of pursuing interconnection in areas of observable need. To date, it has been preoccupied with the use of cable systems by school districts (whose boundaries rarely coincide with municipalities in New York) and government agencies, and the encouragement of system interconnection in the Capitol District and several other regions. The Commission has not divided the entire state into interconnection regions, even though this was contemplated in its enabling legislation.[122]

Similar to the New York case, the Minnesota State Commission on Cable Communications has devoted an increasing amount of its attention to the regional development of cable services in the past two years. In early 1975, it established procedural rules governing interconnection and cable service territories.[123] Under these rules, several multi-community, or "joint powers", franchise areas have been established. In addition, the Commission has required all systems operating in the Twin Cities area to reserve a uniform channel (VHF Channel 6) for regional channel usage on a free of charge basis.[124]

However, the development of detailed regulatory procedures and standards for interconnecting cable facilities has been only a part of the Minnesota Commission's apparent commitment to fostering cable regionalization. In its own words,

> the statutory and regulatory treatment which has been given to the subject of interconnection is necessary

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[122] See §815 (2)(d)(iv) of Article 28.

[123] Minnesota Commission on Cable Communications, Rules, Chapter Twelve, 166-190: Interconnection; and Chapter Sixteen, 221-236: Cable Service Territories.

[124] Ibid., 169.

> in order to guide the development of interconnection in the public interest. But it cannot be emphasized too much that regulation alone will not make interconnection happen. [125]

Increasingly, therefore, the Commission has engaged in a variety of non-regulatory activities that would facilitate interconnection. Specifically, it has sought (1) to create awareness of interconnection needs and opportunities through informational programs, (2) to assess design considerations in providing and extending interconnection facilities by means of technical assistance, and (3) to examine ownership and operation options for interconnection services.[126] In the last instance, the Commission has considered the possibility of public sector involvement in providing interconnection in sparsely populated rural areas as well as for the purpose of providing special public services in the Twin Cities area.[127] It has also encouraged and assisted in several demonstration projects, wherein programming was shared by several cable systems either by means of live interconnection or the "bicycling" of videotapes.

What may be said about the interconnection policies of New York and Minnesota (but especially Minnesota's) is that they have been cast as part

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[125] Minnesota Cable Communications Board, Statewide Development Plan, St. Paul, Minn., April 1977, p. 153.

[126] Ibid., pp. 153-57.

[127] The Commission's Statewide Development Plan, loc. cit., suggests that:

> "options for owning and operating interconnection systems are numerous, ranging from outright government ownership and operation of a "back-bone" trunk network of microwave relay stations or satellite earth stations to publicly subsidized construction or operation of privately controlled systems. Other options might include a system cooperatively owned and operated by a consortium of users or a publicly-owned/privately-operated system. The public sector might even build a system and nurture it through its fragile early years and then sell it to private enterprise once a viable market of users has been developed."

of a broader service strategy, namely, to facilitate the networking, or sharing, of commercial and non-commercial programming among cable systems. In contrast to Connecticut and Rhode Island, the New York and Minnesota regulators have not proceeded to carve up the state into service districts, preferring to see this type of development occur on an evolutionary basis within certain procedural and technical guidelines. At the same time, they have placed a greater degree of emphasis on non-technical activities (e.g. project coordination, promotion, and demonstration), without which, in their views, program and service networking would not occur.

In the Minnesota case, the Commission's ultimate objective is to establish a networking entity that would assist users in program planning and production, serve as a broker of channel time, and help to promote network programs and services. The Commission's role is to bring such an entity into being, without in the process exerting control over its operations:

> by F.Y. 1983, we would hope that things will have jelled to such an extent that the network entity and its users will be able to make it on their own, thus enabling the MCCB to divorce itself from further network development and support activity. It should be emphasized that our mission, as we see it, is to be a catalyst for such developments as networking, rather than to be a permanent operating arm of a programming or networking organization. We do not believe that regulation and permanent operating functions mix particularly well, especially in an area such as communications media, where issues relating to government control are most sensitive. [128]

It remains to be seen, however, whether the ambitious, yet evolutionary, approach to regionalization being pursued in Minnesota will be successful.

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[128] Ibid., p. 195.

As the following New Jersey case illustrates, regionalization policy can be fraught with virtually insurmountable difficulties, if cooperation among cable systems, which the Minnesota approach counts on, does not occur.

3.5 Regionalization on a Case-by-Case Basis -- New Jersey

In New Jersey, the enabling regulatory statute does not call for organizing the state into interconnection regions. However, one provision in the cable television statute specifies that in reviewing and approving franchises, the Public Utilities Board "shall take into consideration the probable effects upon both the area for which certification is sought and neighboring areas not covered in the municipal consents". [emphasis added] [129] The provision further states that:

> If it [the Board] finds that the probable effects, for technical and financial reasons, would be to impede the development of adequate cable television service, or create an unreasonable duplication of service likely to be detrimental to the development of adequate cable television service in any area either within or without the area for which certification is sought, it may deny the certificate or it may amend the certificate in issuing it so as to (1) direct that areas covered in the application be excluded from the area certified or (2) direct that areas not covered in the application be included in the area certified. [130]

In short, New Jersey's regulatory agency is required to deal with regionalization questions (and, by implication, interconnection) on a case-by-case basis rather than by means of a comprehensive state-wide plan.

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[129] N.J. Stat. Ann., 48:5 a - 17 b.

[130] Ibid.

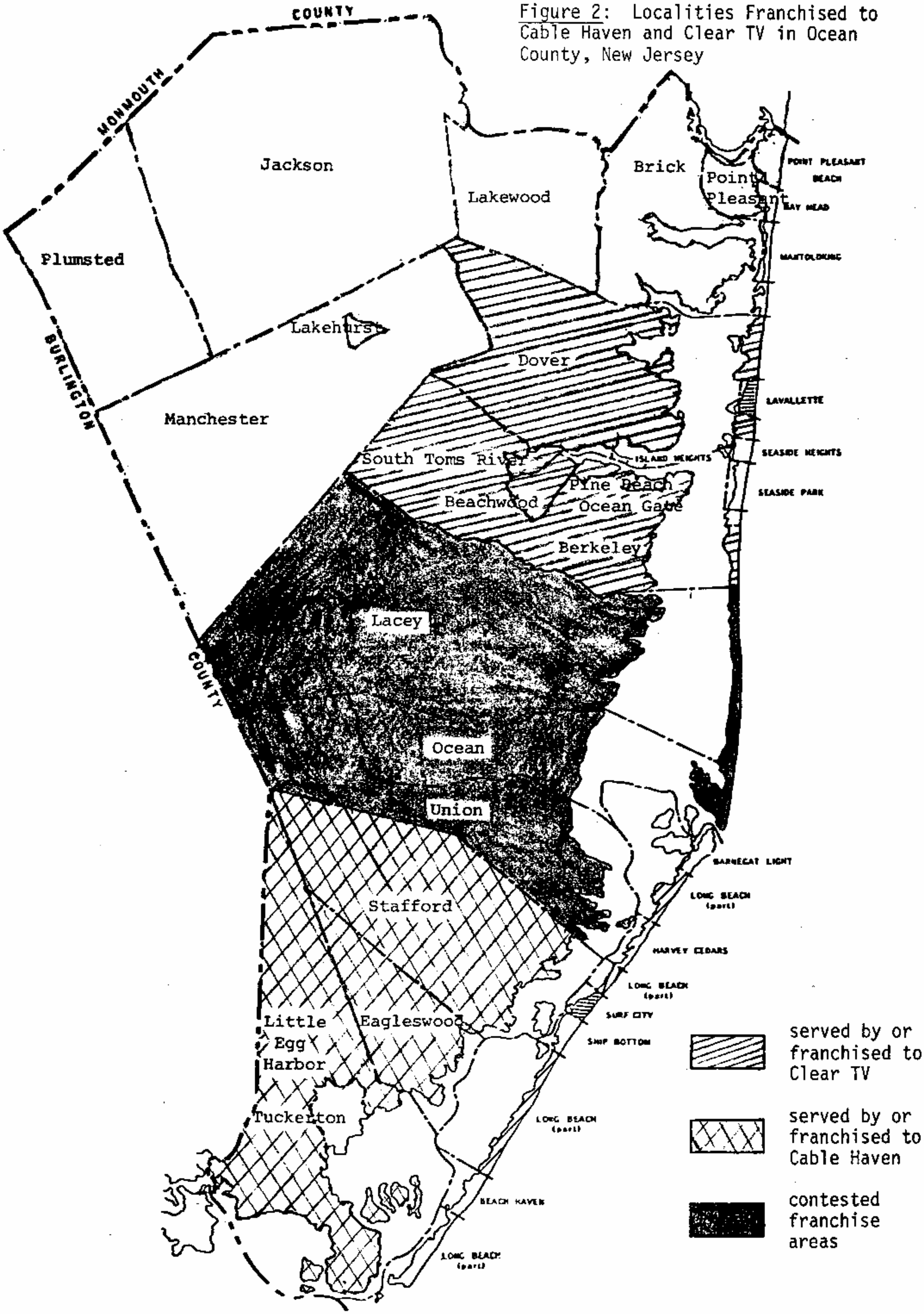
Since the more comprehensive approaches to districting and interconnection have not proved to be entirely successful (i.e. in Connecticut) and/or have not been considered practical (i.e. by the New York Commission), it would appear that an incremental approach, such as the one contemplated in the New Jersey statute, would offer a more administratively feasible answer to achieving regionalization objectives. In fact, however, the New Jersey experience has not been promising in this very respect. A brief review of the difficulties in interpreting New Jersey's regionalization provision with respect to three contiguous franchise areas will illustrate some of the potential problems of the case-by-case approach.

Between 1973 and 1976, the Townships of Lacey, Ocean and Union in Ocean County, New Jersey, granted municipal consent to Cable Haven TV, Inc. (in Lacey and Union) and to Clear Television Cable Corporation (in Ocean) to operate cable television systems. Both Cable Haven and Clear had submitted franchise applications to the three Townships, and in each case the losing applicant applied to the Public Utilities Board to reverse the local decision on grounds of arbitrariness and "regionalization", beginning with Clear's appeal of the Lacey decision on January 30, 1974. The three cases were joined by the Board into a single proceeding, which involved 34 days of hearings, 29 of which pertained to the regionalization aspect.[131]

Initially, it was Clear that pressed the regionalization issue most forcefully, particularly in appealing the Lacey decision. Lacey, it pointed out, shared a high school with Berkeley, a contiguous community to the north, which Clear was already serving (see Figure 2). More generally, Clear

[131] State of New Jersey, Board of Public Utility Commissioners, Hearing Examiner's Report and Recommendations, Docket Nos. 7312 c -5066, 742 c - 6008, 744 c -6017, Trenton, N.J., November 24, 1976, pp. 2-3.

Figure 2: Localities Franchised to Cable Haven and Clear TV in Ocean County, New Jersey



cited evidence that the residents of Lacey formed a community of interest in terms of shopping, employment, governmental and social services, health services, and entertainment with the communities of Berkeley, Dover, and South Tom's River, all of which were Clear franchise territories. By associating Lacey with these other communities in what would amount to a *de facto* regional franchise, Clear claimed that the interconnection and production costs for it to provide public service programming (i.e. from the high school in Berkeley, the hospital in South Tom's River, and numerous county and voluntary agencies in Dover) to Lacey residents would be considerably lower than for Cable Haven to provide similar programming.[132] Finally, Clear argued that since it was already providing and/or planning to provide such programming in its existing franchise areas, it would be wasteful in both technical and financial terms for Cable Haven to deliver the same cable services to Lacey. And it questioned whether Cable Haven would in fact provide this range of services, given the added costs involved.

In the course of the proceeding, Cable Haven responded that if its franchising rights to Lacey and Union were upheld, Clear would have to interconnect its Ocean system to those it was operating in Berkeley and Dover at considerable expense. Cable Haven consequently suggested that it be allowed to operate in Ocean (i.e. as well as in Lacey and Union), thereby eliminating costly plant duplication. It was also noted during the proceeding that if the Lacey, and possibly the Union, franchises were awarded to Clear on regionalization grounds, this could leave Cable Haven with an insufficient economic base to adequately serve its current subscribers in

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[132] This position was advanced, among others, by one of the authors of this report (Kalba), who served as a consultant to Clear during parts of 1974 and 1975 and who testified in its behalf during the proceeding.

the sparsely populated southern part of Ocean County (see Figure 2).[133] In sum, Cable Haven, which had initially argued against the introduction of regional considerations into the franchise certification process, ended up by appealing to regionalization arguments on its own behalf.

The New Jersey Board concluded this proceeding, which lasted almost three years and cost $300,000 or more, with a decision in favor of Cable Haven.[134] Not only did it certify Cable Haven's local franchise awards in Lacey and Union, but it also reversed Ocean Township's award to Clear on regionalization grounds. Among the justifications presented for the decision were that:

(1) the "community of interest" arguments as to whether Lacey, Ocean and Union were more closely connected to the northern or southern portions of Ocean County were inconclusive;[135]

(2) furthermore, it was not clear whether local public interest programs needed to be provided "live"; they could after all be taped, thereby reducing the need for costly interconnection;[136]

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[133] Hearing Examiner's Report and Recommendations, loc. cit., p. 7.

[134] Ibid., pp. 8-9. The $300,000 figure is our guesstimate based on the likely expenses of the participants in the proceeding (i.e. the Board, Cable Haven and Clear), including staff time; legal, accounting and consulting fees; travel to Newark; stenographic costs; etc. (It is interesting to note that the three franchise areas in question contained less than 15,000 dwelling units at the time the decision was rendered.)

[135] Clear's community of interest argument was possibly strongest with regard to Lacey, the largest of the three communities. By lumping the three together, rather than considering each one separately, the thrust of the Board's position (i.e. concerning "inconclusiveness") may have been enhanced.

[136] However, as Clear had argued, costly duplication would also occur if Cable Haven were to tape programs from Berkeley or Dover, which Clear would also be producing for its existing subscribers.

(3) by awarding the Ocean franchise to Cable Haven, interconnection costs that would be incurred in linking Ocean and Berkeley, and Ocean and Stafford, if Clear maintained the franchise, would be eliminated;

(4) approving the original Ocean Township award (i.e. to Clear) would impede the development of adequate service to existing subscribers in the southern portions of Ocean county, given Cable Haven's shaky financial condition;[137] and

(5) Cable Haven's rights to serve the three communities could be secured by overturning only one municipal consent (i.e. in Ocean).[138]

What the Lacey-Ocean-Union case illustrates is not only the difficulties of the case-by-case process, which if contested can drain substantial public and private resources, but also the difficulties that generally underlie regionalization attempts. Regionalization issues in the cable context are not only economic or technical; they are also social, given the fact that cable systems transmit not only signals but also information. Yet regulatory agencies have traditionally avoided explicit treatment of social concepts such as communities of interest. However, social, economic and technical factors are inevitably intertwined in communications policy

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[137] Ironically, Lacey Township's main reason for awarding municipal consent to Cable Haven rather than to Clear in 1973 was that Cable Haven was the more financially sound of the two organizations.

[138] The implication here is that the only alternative was to allow Clear to serve all three communities, which would have required overturning two municipal consents (i.e. Lacey and Union). Again, the Board did not choose to give equal consideration to the possibility of allowing Clear to serve Lacey but not Union.

setting. By failing to recognize existing communities of interest, regulators may reduce the ability of the cable operator to serve existing audience groups with public service or commercial programming. At the same time, they may engender new communities of interest based on the geographical configuration of the cable systems that are in fact franchised.[139]

In issuing its decision in the Lacey-Ocean-Union case, the New Jersey Public Utilities Board had to contend with a statutory provision that was subject to various interpretations; with the analytical problems of determining the technical, financial and social consequences of alternative regional service configurations; and with its own uncertainties about how many local franchise decisions it wanted to countervene. In the final analysis, the agency concluded that it had to make a decision, given the delays in implementing the Lacey, Ocean and Union franchises that had already occurred and the possibility that Cable Haven's existing subscribers might be harmed by a further delay. How confident it was of its specific decision in favor of Cable Haven was reflected in the words of its own hearing examiners, who simply noted that "the interfacing of the reasonableness of municipal action with the Board's independent duty to consider regional aspects create many troubling problems of proof, policy and ultimate choice." [140]

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[139] Similarly, the FCC did not take communities of interest into account in determining signal power and frequencies for television broadcasting. Yet today TV signal contours may demarcate geographical communities of interest more accurately than municipal boundaries.

[140] Hearing Examiner's Report and Recommendations, loc. cit., p.3.

3.6 The Dilemmas of Regionalization

As the preceding cases demonstrate, the pursuit of regionalization in cable television is a regulatory area fraught with both policy and administrative difficulties. There are obviously potential benefits that can accrue to some cable subscribers and operators by means of regional systems or networking arrangements. However, to achieve these benefits may require a multi-faceted approach, including policy guidelines; a general districting, interconnection and/or line extension plan; the adjudication of conflicts in specific situations on a case-by-case basis; the presence of -- and willingness to apply -- enforcement measures; and, possibly, government involvement in demonstrating or even operating certain cable services on a regional basis.

To implement such a regionalization concept is likely to require considerable staff resources, not to mention patience and perseverance. It is not at all clear from the above cases that the current state regulatory agencies possess the full complement of resources and activities that may be required.[141] Moreover, the implementation of regionalization policies may be costly, runs counter to the locally-based franchising process present in most states, and is likely to incur resistance from the cable industry. Finally, in certain forms, it could foster concentration of ownership, which has traditionally been a major communications policy issue.

In sum, regionalization to be implemented effectively may require considerable orchestration of government resources, resulting potentially

[141] In some respects, state or regional planning agencies are more experienced in undertaking this regionalization function than regulatory agencies. However, planning agencies typically do not have the enforcement powers that may be required.

in government control of a segment of the cable enterprise. Alternatively, the pursuit of regional services and potential economies can be left to the marketplace. But in this case, progress is likely to be gradual and will most likely occur in commercial -- rather than public -- service applications. This is the choice underlying regionalization policy.

It may be that either of the options suggested above are preferable to the muddled compromise that is currently apparent.

4.0 THE REGULATION OF POLE AND CONDUIT RIGHTS AGREEMENTS

The pole attachment issue is simple in definition -- to what do you attach the cables carrying CATV service?[142] Recently, however, it has been variously described as a "grave threat" to the continued existence of the cable television industry,[143] an attempt to obtain a "free ride" at the expense of electricity consumers,[144] and "one of the most difficult problems plaguing federal/state regulators".[145] Perceptions apparently differ according to one's interest in the problem.

To the cable industry, the pole attachment question presents a very thorny issue: payments to utilities for attachments currently total some 60 percent of the pre-tax, pre-pole-rental CATV income,[146] and are imposed by an "unintended and presently unregulated monopoly".[147] Raising the single issue of state regulation for pole attachments, however, suggests

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142 Or alternatively, in what do you lay the cable if it is being buried underground, as are some 5% of all CATV cables?

143 Statement of Amos B. Hostetter, National Cable Television Association, Hearings Before the Subcommittee on Communications of the Committee on Interstate and Foreign Commerce, House of Representatives, 94th Congress, 2nd Session (Serial No. 94-138), p. 801 (hereinafter "House Hearings").

144 Statement of Joseph Dowd, Edison Electric Institute, Hearings Before the Subcommittee on Communications of the Committee on Commerce, Science and Transportation, United States Senate, 95th Congress, 1st Session, on S.B. 1547 (Serial No. 95-36), p. 176 (hereinafter "Senate Hearings").

145 Staff Report, Subcommittee on Communications, House Committee on Interstate and Foreign Commerce, 94th Congress, 2nd Session, "Cable Television: Promise Versus Regulatory Performance", 86 (Subcommittee Print 1976) (hereinafter "Promise Versus Regulatory Performance").

146 House Hearings, op. cit., p. 800; Senate Hearings, op. cit., p. 30. By the same token, however, it remains to be seen what percentage might be represented by other costs, e.g. labor.

147 House Hearings, op. cit. Indeed, while telephone and power companies may be unregulated in pole attachment questions, it is not exactly accurate to imply that they are unregulated utilities in every respect.

the possibility of more total regulation for cable -- a concept contrary to two decades of CATV lobbying.[148] Under this arrangement, regulation would be through an industry with which cable does not feel especially comfortable.[149]

There is some thought that even without the passage on February 8, 1978, of federal legislation in the form of Public Law 95-234,[150] state legislators and regulators would have moved into the pole attachment area, as utilities have always been regulated at the state level and are watchful of issues concerning this area. However, in 1970, the National Association of Regulatory Utility Commissioners (NARUC) urged state commissions to assert comprehensive pole attachment jurisdiction -- yet it took seven years before a state commission took jurisdiction,[151] and that was only by

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[148] Compare House Hearings, op. cit., pp. 795-96, with House Hearings, op. cit., p. 840. For a discussion of lobbying by the cable television industry, see Kalba, et al, Regulatory Politics: State Legislatures and the Cable Television Industry, op. cit.

[149] "There was a strong feeling on the part of those of us in the cable industry that we did not want to be simply thrown into state regulatory review. That was an arena that most of us were very unfamiliar with. We felt that we were going to be going into a forum that had been for years dominated by both the telephone companies and the power companies. We didn't know the names and numbers of the players and we were not at all certain that, as strong a case as we might have, we would be able to make our best case in that forum for what we felt was appropriate allocation of the costs of the poles."

Remarks of David Kinley, Vice President, American Television and Communications, "Poles and Utilities" Seminar, Annual Convention of the National Cable Television Association, Chicago, Illinois, April 20, 1977.

[150] Public Law 95-234 provides for FCC jurisdiction over local pole attachment rates, terms and conditions, until the state asserts jurisdiction. For an analysis of the implications of Public Law 95-234, see pp. 107-110, infra.

[151] Remarks of Alexander J. Kalinski, President, National Association of Regulatory Utility Commissioners, "Poles and Utilities" Seminar, op. cit. A number of regulating states asserted less-than-comprehensive jurisdiction during that period. See text accompanying notes 175-180, infra.

legislation and over the objections of the Commission itself! Nevertheless, given the passage of Public Law 95-234, it would seem quite likely that many states will take whatever specific action is necessary to deny jurisdiction to the FCC.[152]

4.1 The Pole Attachments Issue

As a general rule, cable can distribute its signals in one of three ways: construction of a system in its entirety; a leaseback of facilities constructed by common carriers, such as telephone companies; or attaching to existing common carrier poles or going through existing common carrier ducts.[153]

From an economic standpoint, the first option would appear to be untenable for cable.[154] The second and third were the only practical choices, even initially.[155]

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[152] See, for example, H.B. 5422, signed into law by Massachusetts Governor Michael Dukakis, June 28, 1978; see also letter from Paul Rodgers, General Counsel, National Association of Regulatory Utility Commissioners, Telecommunications Reports, Vol. 44, No. 13, at p. 58.

[153] Given the aforementioned low percent of ducting, all references are to pole attachments.

[154] At the "Poles and Utilities" Seminar, op. cit., one cable operator pointed out that he was acquiring a 100% interest in half the power poles on which he was. He stated that he was unconcerned, therefore, with many of the problems facing cable operators, such as accelerating rates, make-ready engineering costs and application fees. This unique remedy to pole attachment problems (although never consummated) may raise other problems inherent in pole ownership, such as the total responsibility for replacing damaged poles, etc.

[155] General Telephone Co. of the Southwest v. United States, 449 F.2d 846 (5th Cir. 1971). This should not ignore the fact, however, that use of existing facilities often is dictated for esthetic reasons by the local communities.

At first, many telephone companies[156] viewed cable as a source of additional revenues or as a supplement to their existing service. If the cable operation was not owned outright, as least the facilities might be, and then leased back to CATV operators. Complaints were made to the FCC by cable operators, however, that pole attachment arrangements frequently were denied to independent cable operators in favor of telephone-affiliated companies or in favor of lease-back contracts. The Commission eventually effectively curtailed the desire of telephone companies to construct lease-backs by requiring that a cable operator be given the option of pole attachments.[157]

4.1.1 Specific Problem Areas

While the general problem of relationships is continuing, a number of specific areas of controversy have arisen.

- Rates -- The rates charged by the owner of the pole for the right to attach. No set figure is recognized for that right. The charges range from \$.75 to \$16.00 per pole per year[158] on the 10 million utility poles used by the cable industry, with

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[156] There is no evidence that any power companies enter the communications sphere.

[157] Report to Accompany S.B. 1547, S. Rep. No. 95-580, 95th Congress, 1st Session 13 (1977).

[158] According to materials filed with the House of Representatives for a July 22, 1977, hearing, the Santa Fe Telephone & Power Company presently charges systems \$.75 per pole attachment. On the other hand, some poles of the General Telephone Company of Pennsylvania were allowed to earn \$16.00 per year based on three cable attachments. This allegation has, however, been disputed by officials of General Telephone. See letter to Mr. John C. LeGates from Lyle D. Abbott, Assistant Vice President - Regulatory Matters, General Telephone and Electronics, June 12, 1978.

an average of $3.50 per pole per year.[159] Cable operators fear that the alternative to accepting the rate dictated is to be taken off the poles.[160]

- Access -- Is there any flat denial of an opportunity to get on the pole?[161] Is access generally made so difficult on various technical grounds as to create a blanket denial? Likewise, has the right to continue access to the pole been revoked or has the cable owner been forced to vacate space (unreasonably) so as to provide additional space for telephone facilities? What charges for make-ready work may rightfully be billed to the cable system? What about subsequent utility make-ready work necessitated by the cable hook-ups? How much notice may the utility demand?

- Safety considerations -- Does the cable attachment provide any danger to repairmen or to other facilities on the pole? What inspection costs should be borne by the cable operator? Even if indemnification and insurance against negligent

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159 Senate Hearings, op. cit., p. 41.

160 This knife, however, cuts both ways. It was the refusal of a North Carolina cable system to accept a rate increase and the response of Carolina Telephone & Telegraph Co. in cutting off service which led to the introduction of pole attachment legislation in the 94th Congress. House Hearings, op. cit., p. 787. Utilities are not unaware of the public relations "whipsaw". See note 217, infra.

There is some thought that cable may choose to co-own the poles (note 132, supra). It would seem, however, that this cost of entry would be a significant deterrent.

161 At least one major pole owner has referred to this as a "red herring" issue. Senate Hearings, op. cit., p. 238. General Telephone & Electronics said that all major telephone carriers had adopted "liberalized" pole attachment policies.

damage by cable operators is provided for in pole attachment agreements, should the cable operator be required to maintain insurance against damages caused by telephone company employees?

- New poles and relocation -- If new poles must be set, is it reasonable to require the cable operator to pay totally for the setting of new poles? If this payment is made, should the utility continue to own the new pole which has been totally paid for by the cable operator? If facilities must be relocated on a pole, what relocation costs should be paid by the cable operator?

- Legal rights -- Does the cable operator receive the same rights-of-way as the utility? Should the utility bear any responsibility for obtaining for the CATV company the same rights-of-way that the utility has?

The cable operators have charged that the pole attachment agreements are in fact "contracts of adhesion", wherein they have no choice but to sign. Indeed, given legal[162] and esthetic considerations, it would appear extremely unlikely that a cable operator would receive encouragement or permission to erect a duplicate set of poles. And while the cable operator has the apparent alternative of burying the cable, the costs can be so significant as to make this option totally impractical.[163]

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[162] Zoning laws would also proscribe at-will construction of a second set of poles.

[163] Moreover, the laying of cable or the fixing of any outages would cause dislocation on community streets.

4.1.2 Telephone vs. Utility Pole Rates

There is the temptation to view the cable/pole attachment question as an issue between CATV and a potential competitor, the telephone company. The telephone companies, however, have not been solely responsible for pole attachment relationships with cable. Fifty-three percent of the 10 million utility poles leased by the cable systems are controlled by power utilities.[164] Over the past four years, where rates have been raised, electric utilities have raised their pole attachment rates by some 60% -- as opposed to a 47% increase in attachment rates by telephone-affiliated pole owners, according to the National Cable Television Association.[165] Why would utility companies, with no ostensible anti-competitive motive, raise rates in excess of telephone companies, which might benefit if the cable systems do not survive? A number of answers could be posited:

- Electric utilities, not faced with any oversight or anti-competitive legal threats, have raised rates, knowing of cable's virtual inability -- both legal and financial -- to set its own poles;

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[164] Office of Plans and Policy, Federal Communications Commission, The Cable Television Pole Line Attachment Problem: Assessing the Advisability of a Federal Regulatory Response, Staff Report, August 1977 (hereinafter "FCC Staff Report").

[165] House Hearings, op. cit., p. 824. This statement can be grossly misleading. If only one telephone company raised rates and raised them 80%, would it be proper to say that the average increase is 80%?

- Telephone company pole attachment rates have been artificially held down by FCC action;[166]

- Since telephone companies in some cases collect and keep all revenue from "communications space" -- regardless of who owns the poles -- the setting of rates is in truth done by the telephone company and ownership by power companies is merely a facade;

- Telephone company rates may have been higher in the period prior to 1973 and utility rates are now merely adjusting to the telephone rates;

- The telephone companies in fact are eager to see cable-related services develop, since some eventual policy will allow telephone companies to move into the field.

4.1.3 Pole Attachments as a State Issue

It is not an untoward assumption that the pole attachment issue might have been preempted by the Federal Communications Commission if all the poles had been owned by interstate telephone companies. In fact, however, only 42% of the poles used by cable systems are telephone company-owned[167]

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[166] On September 29, 1975, American Telephone and Telegraph (AT&T) and the National Cable Television Association (NCTA) entered into an agreement with respect to the calculation of pole attachment rates. The agreement was reached with the assistance of the FCC and its Chairman, Richard W. Wiley. As a result of the AT&T-NCTA agreement, pole attachment rates charged by the Bell companies generally stayed at the same level from 1975, except for modest increases in California and Pennsylvania. The agreement expires January 1, 1979.

[167] See note 164, supra. The remaining 5% of such poles are owned by various other utilities, such as water companies, or by cable companies outright.

(and of those, undoubtedly some percentage is owned by intrastate carriers who might not be directly subject to an FCC jurisdictional assertion).

The failure of the Commission to assert jurisdiction -- or to effectively "jawbone"[168] -- meant that any effective regulation of pole attachments would have to be a result of individual state assertion or federal legislation giving the FCC jurisdiction.[169]

The states traditionally, however, had approached the issue with reluctance, at most. Even in those states where the authority was clearcut, little pole jurisdiction was asserted. For example, there seems to be little doubt that pole attachment jurisdiction exists in states where the PUC has asserted general cable jurisdiction (in addition to, of course, jurisdiction over the more traditional utilities).

Nevertheless, of the six PUC-regulating states,[170] only Hawaii and Connecticut had specifically asserted jurisdiction by the end of 1977. In Hawaii, the Department of Regulatory Agencies has pole attachment jurisdiction.[171] A 1970 decision of the Public Utilities Commission fixed rates at $5.40 per pole per year.[172] This figure was based on the charges paid by the telephone company for attaching to electric company poles.

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[168] House Hearings, op. cit., pp. 819-820.

[169] See text accompanying notes 249-256, infra.

[170] Alaska, Connecticut, Hawaii, Nevada, Rhode Island and Vermont. This paper has adopted the distinctions between states originally set out in Hochberg, The States Regulate Cable: A Legislative Analysis of Substantive Provisions, op. cit.

[171] Hawaii Revised Statutes, §440 G-12 (b).

[172] Decision No. 2667, PUC Docket 1877, October 30, 1977. Decision No. 4190, PUC Docket 2437, March 25, 1976, sets a rate of $.10 per linear foot for duct space.

Hawaii, however, chose to ground jurisdiction solely in the FCC's Section 214 decision covering lease-back facilities.[173] It is questionable as to whether the Hawaii PUC would today assert as comprehensive a jurisdiction, since lease-backs are no longer as common and the FCC has refused to take comprehensive jurisdiction.[174]

Notwithstanding lack of rate oversight, each of the other PUC-regulating states or "hybrid"[175] states (except Delaware) has asserted some sort of pole jurisdiction, and most of these states appear to be expanding their jurisdictional base.[176] For example, Alaska was reported ready to assert jurisdiction in a pending case.[177] The same was true in Nevada[178] and Vermont.[179] The only other non-commission state was Rhode Island, which already requires that copies of pole attachment agreements be submitted with applications to the PUC,[180] perhaps the "mildest" form of jurisdiction assertion.

The "hybrid" state of New Jersey has seen an assertion of jurisdiction by the Board of Public Utilities through the Office of Cable Television.[181]

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[173] General Telephone of the Southwest v. United States, note 155, supra.

[174] The other PUC state which has asserted jurisdiction (Connecticut) is treated in greater detail at text accompanying notes 222-227, infra.

[175] A "hybrid" regulating state has some form of regulation other than a Cable Commission or the PUC. See Hochberg, The States Regulate Cable: A Legislative Analysis of Substantive Provisions, op. cit.

[176] See generally, Sharon Briley, Cable Television: Pole Attachment and State Law and Court Cases, Washington, D.C.: Cable Television Bureau, Federal Communications Commission, March 1977.

[177] For a general jurisdictional basis, see Alaska Statutes, §42.05.311 and .321.

[178] Nevada Revised Statutes, §37.010(16).

[179] Vermont Statutes Annotated, §§ 504 and 209.

[180] Rhode Island General Laws Annotated, §39-19-5.

[181] Order of September 8, 1977.

as being outside the scope of the authority of the Office and solely within the authority of the Board.[182] Beyond this, however, the Office has set up an arrangement unique to New Jersey designed to help the affected industries work out their own problems. On January 1, 1977, a Joint Utility-Cable Committee (JUCC) was formed, the purpose of which was to "minimize operating problems under existing pole-trench agreements".[183] The Committee consisted of local operators and senior utility plant management, meeting in a structured, off-the-record forum which was established to encourage compromises which may have been more difficult to reach through litigation.

Participants in the JUCC meetings included construction supervisors, directors of engineering and vice presidents of cable companies. On the utility side, transmission and distribution senior staff people, as well as joint use supervisors, attended.

Under this arrangement, the cable operator had an opportunity to find out who was in charge of utility operations affecting him/her, while the utility representative had a chance to become sensitized to cable industry problems. The small size, technical sophistication and off-the-record nature of the meeting encouraged frank discussion and created an opportunity for all factions to participate in the planning of construction.

Three subcommittees were established to deal with specific areas:

- Electrical Coordination -- handled problems involving cable's use of electric power and the electrical integrity of joint use facilities;

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182 Petition for Reconsideration in Docket No. 769C-6206, filed by New Jersey Bell Telephone Co., October 3, 1977.

183 Remarks of Paul Dezendorf, Coordinator of State and Local Planning, New Jersey Office of Cable Television, at the New England Cable Television Association Winter Meeting, Newton, Massachusetts, January 11, 1978.

- Make-Ready Scheduling and Performance -- dealt with administrative problems involved with joint use facilities;
- Plant Specifications -- was responsible for physical specifications imposed on joint use of plant or trench.

In the future the JUCC sees more subcommittee work, coupled with added educational opportunities such as scheduling outside speakers from NCTA and AT&T. In 1978, the JUCC plans to become a Steering Committee, meeting on a quarterly basis only to ratify subcommittee proposals.[184]

In the meantime, jurisdiction in the "Commission" states[185] appears, at best, confused. New York has two entities vying for jurisdiction,[186] and Minnesota has statutory authority,[187] but has adopted no effective regulations.[188]

A different question exists in the thirty-nine non-regulatory states. Only six states appear to have treated the question legislatively -- Idaho, Illinois, South Carolina, Utah, and Wyoming.[189] None of these appear to have attempted to regulate rates,[190] but usually seek a more general jurisdiction.

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[184] Ibid.

[185] New York, Massachusetts and Minnesota. See Hochberg, The States Regulate Cable: A Legislative Analysis of Substantive Provisions, op. cit.

[186] See text accompanying notes 208-214, infra.

[187] Minn. Stat. Ann. §238.13.

[188] But see MCCC §§237-243.

[189] The cable industry in the sixth state, California, has enjoyed a unique success which will be discussed in Section 4.2, infra.

[190] See generally, Briley, op. cit., pp. 4-13. However, some seven states other than California had pole legislation introduced in 1977. Of the seven -- Michigan, Missouri, Montana, Oklahoma, Pennsylvania, Washington and Wyoming -- only Oklahoma's was a separate pole bill and not part of comprehensive PUC jurisdiction over cable.

4.2 The Early California Experience

The involvement of the California Public Utilities Commission with pole attachments stretches back nearly 25 years. In a 1954 decision,[191] the PUC held that it had no substantive jurisdiction over pole attachment contracts, but required that these contracts be filed for general oversight purposes.

Twelve years later the California PUC again refused to take jurisdiction, holding that leasing of space on telephone poles was not a public utility service.[192] The telephone company did not hold out pole attachment contracts impartially to the general public,

> or provide any "service" related to the concept of dedication to the public of a communications service or facility which is the hallmark of a public utility calling.[193]

Thus, it was neither an offering nor a "providing of public utility service".

The Public Utilities Commission again refused to assert jurisdiction in 1972.[194] The PUC held that, except for statutorily-mandated jurisdiction over safety standards,[195] cable companies were not subject to regulatory jurisdiction of the PUC.[196] In the decision, the PUC adopted the lengthy

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191 Re Pacific Telephone & Telegraph Co., Decision No. 50258, 53 Ca. PUC 275, 5 PUR 3d 396 (1954).

192 International Cable TV Corp. v. All Metal Fabricators, Inc., Decision No. 71559, 66 PUR 3d 446 (1966).

193 Id. at 193. Private property is "dedicated" when it is appropriated and set apart for public use. See, for example, Western Union Telegraph Co. & Georgia R'way & Banking Co., 227 F. 276 (D.C. Ga. 1915).

194 California Community Television Ass'n v. General Telephone of California and Southern California Edison Co., Decision No. 80168, 73 Cal. PUC 507 (1972).

195 Calif. Public Utilities Code §768.5.

196 See note 194, supra, p. 510.

Proposed Report of Examiner John M. Gregory, which amounted to a complete victory for the utility companies.

Among other conclusions, the Examiner held (and the PUC concurred) that

> ...this Commission presently lacks authority to impose utility-type regulation on defendants' CATV pole space licensing activity.[197]

The decision rejected any comparison of the cost of construction for a cable company with the use of existing facilities; showing of the utilities' actions; and description of the economic basis for government regulation. Examiner Gregory held that legal interpretations were "dispositive",[198] that economic arguments were irrelevent,[199] and that the sole question was the PUC's legal authority to act. Moreover, the Examiner refused to hold that space on the poles had been "dedicated" to the use of CATV systems -- a necessary threshold determination -- since there were varying contracts, conditions and qualifications that had to be met.[200]

Finally, and crucially, the Examiner turned to the nature of the utilities' pole attachment activities, i.e. whether the granting of pole space

> constitutes use of their pole plant "in connection with or to facilitate" either "the transmission of electricity to light, heat, or power", or "communication by telephone"... [201]

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[197] Id. at 519.

[198] Ibid.

[199] Ibid.

[200] Id. at 524-25.

[201] Id. at 528-29.

The Examiner held that the use in fact was not connected with the regulated public service obligations of the utilities and the Public Utilities Code did not otherwise enable him to confer jurisdiction on the PUC.[202] Rather, the pole attachments merely allowed the distribution of television programs, a function having no connection with the utilities' "telephone communication or electric service".[203]

Nevertheless, the Examiner noted that the pole attachments could have some impact on the telephone and electric utilities' public service rates. To that end, the Examiner did order that pole attachment revenues, expenses and related plant accounts be separately maintained.[204]

In retrospect, it is interesting to note the Examiner's discussion of cable television legislation. As he stated:

> We have previously noted that the CATV industry, in California, has successfully resisted efforts by this Commission and the State Legislature to impose public utility status on CATV service. Rather than accept such status -- and we do not question its right to oppose its imposition -- the California CATV industry, here and by its complaint filed simultaneously with the FCC, instead has sought to have both regulatory commissions order defendants to file tariffs for their CATV

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202 Id. at 529-35.

203 Id. at 535.

204 As one (not impartial) observer was to state:

> [That case] illustrates the worst danger of state regulation of CATV pole attachments without statutory guidelines. The California PUC first ruled that it was concerned solely with protecting the users of telephone and electrical utility services. Having found that the rental of pole space was not such a service, but did involve the use of utility property, the California PUC held that pole rentals must be high enough to recover all pertinent costs, but that it had no power to regulate pole attachment rates which were too high.

Senate Hearings, op. cit., p. 41.

> pole attachment activity, and thereby to impose on defendants an obligation to allow CATV's to use their telephone or electric plant as a matter of right rather than of accommodation.[205]

It was nearly this attitude of "having one's cake and eating it too" that was to prevail five years later; cable was able to have jurisdiction asserted, but limited in scope to CATV's pole attachment problem areas.

4.3 Early Federal Involvement

There were some proponents at the FCC who felt that the FCC should assert jurisdiction over pole attachment questions,[206] with the same kind of "ancillary to broadcasting" rationale which allowed for the assertion of cable jurisdiction in the mid-1960's. This opinion, however, did not prevail.[207]

The entire question, of course, might have been mooted if the FCC had asserted jurisdiction -- assuming that the jurisdiction survived legal challenges. Assertion of FCC jurisdiction moved by fits and starts,[208] as it did in other areas of cable regulation.

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[205] Note 194, supra, p. 538.

[206] See Public Notice, August 3, 1973.

[207] See House Hearings, op. cit., pp. 816, 821 and 835.

[208] See Common Carrier Tariffs for CATV Systems, 4 FCC 2d 257, 17 RR 2d 673 (1966); California Water and Telephone, 5 FCC 2d 229 (1966); Associated Bell Systems, 5 FCC 2d 357 (1966); General Telephone Co. of California, 13 FCC 2d 448, aff'd 413 F.2d 390 (D.C. Cir. 1969), cert. denied, 396 U.S. 888 (1969); see also General Telephone Co. of the Southwest v. United States, note 155, supra. Cf. Philip R. Hochberg, "A Step Into the Regulatory Vacuum: Cable Television in the District of Columbia," Cath. L. Rev., Vol. 21, No. 63, pp. 64-71 (1971).

Generally, while the pole issues may have been of small total significance to the utility companies, they were of vast importance to the cable industry, which continued to press for FCC jurisdiction, and eventually succeeded. The relationship envisioned by the telephone industry, which would have made cable merely an adjunct to the common carrier field,[209] was effectively curtailed by the FCC by the early 1970's. Eventually the FCC required that telephone common carriers not offer cable service to the subscribing public in their service areas;[210] divest themselves of existing cable service,[211] and that any offering of distribution facilities had to include a showing that pole attachment rights were available at reasonable charges and without restrictions by the system.[212] As the communications services provided by cable today and its potential for the future could raise competitive questions for telephone companies, these considerations were paramount in the Commission's decisions regarding telephone company involvement in cable television.[213]

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[209] See, for example, Don R. LeDuc, Cable Television and the FCC: A Crisis in Media Control (Philadelphia: Temple University Press, 1973), p. 162.

[210] 47 C.F.R. §§63.54, 64.601.

[211] 47 C.F.R. §63.56.

[212] 47 C.F.R. §63.57. Given the provisions of this section, it may be argued that the Commission has already asserted telephone pole attachment jurisdiction. But see text accompanying note 222, infra.

[213] In addition to the anti-competitive questions,

> ...[T]he Commission inquired into such diverse matters as the possibility and ramifications of common carriers acting as program originators, the effects of CATV affiliation upon regular telephone service consumers, the role of state and local authorities in CATV franchising, and the incentives for independent CATV operators to operate also as common carriers.

General Telephone Co. of the Southwest v. United States, note 155, supra, p. 856, n. 7. See also other cases, cited within note 208, supra.

Although the Commission began studying the question as early as 1966,[214] only in 1973 did it finally begin to come to grips with the nature and extent of its jurisdiction over the policies and practices of the charges to cable companies by telephone common carriers and other utilities.[215]

On September 29, 1975, after negotiations among various interested parties, the NCTA and AT&T entered into an agreement with respect to pole attachment rates charged to cable companies. To aid interested parties who did not participate in the agreement and who were negotiating or renegotiating pole attachment agreements, the Commission released a formula, devised by its staff. to be used in determining reasonable pole attachment rates.[216] The procedure used by the Commission was criticized by various parties, among them the Staff of the House Subcommittee on Communications:

> Although no useful purpose would be served by a discussion of contending legal issues or of the government itself, we must point out the serious flaws which exist in the procedure adopted by the Commission for dealing with this matter. We find the procedure to be hopelessly inadequate for three reasons. First, the FCC appears to have no authority (direct or indirect) to regulate power companies and therefore cannot be relied upon to deal effectively with that segment of pole owners. Second, negotiations between AT&T and NCTA cannot adequately protect specific interests or address peculiar problems which exist in some areas of the country. Furthermore, AT&T cannot speak for the other telephone companies, and NCTA represents less than one-half of all cable system operators. Third, the public interest is not necessarily served by the informal off-the-record, closed-door negotiations which the Chairman of the FCC has been conducting. This style of negotiation

[214] Common Carrier Tariffs for CATV Systems, note 208, supra.

[215] Memorandum Opinion and Order in Docket No. 16928, 40 FCC 2d 1138 (1973).

[216] See FCC Release, Pole Attachment Formula.

> frustrates effective oversight and reflects the basic inability of a federal agency to deal with pole attachment rates.[217]

Some of the problems foreseen by the Commission's critics came to pass. On July 8, 1976, the Commission held it did not have jurisdiction over power company poles,[218] and deferred the question of telephone company poles. But eight months later, it effectively gave up any telephone company pole attachment jurisdiction. In a Memorandum Opinion and Order adopted March 18, 1977,[219] the FCC affirmed its 1976 decision, stating that the mere rental of space was not "communication by wire or radio". More importantly, it was not "incidental" to the communications transmission in the same way as, for instance, "channel service...[where] the service provided involves the transmission of signals between different points...."[220] If jurisdiction was to be asserted, the Commission would need to look at uses of roads, rights-of-way, and "even access and rents for antenna sites."[221]

However, it can be argued that the Commission had already asserted pole attachment jurisdiction. Section 63.57 states:

> Applications by telephone common carriers for authority to construct or operate distribution facilities for channel service to CATV systems shall include a showing...that the independent CATV system proposed to be served, had available, at its option, and within the limitations of technical feasibility, pole attachment rights (or conduit space, as the case may be) at

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217 Promise Versus Regulatory Performance, op. cit., p. 87.

218 California Water and Telephone Co., 37 RR 2d 1166 (1976).

219 California Water and Telephone Co., 64 FCC 2d 753, 40 RR 2d 419 (1977).

220 Id. 40 RR 2d at 425.

221 Id. 40 RR 2d at 426.

> reasonable charges and without undue restrictions on the uses that may be made of the channel by the customer...[222]

This apparent inconsistency with the Commission's March 1977 opinion can te resolved by noting that this pole attachment section refers only to construction of distribution facilities by the telephone company. An equally justifiable explanation of the March 1977 decision was the Commission's unwillingness to attempt to assert jurisdiction over non-telephone utilities. In this case, half a loaf was the same as none.

4.4 Case Studies

4.4.1 Connecticut -- An Approach to Rates

Given the concern expressed by the cable industry for the pole attachment question, it remains to be seen why pole rates have not been subjected to more vigorous regulation in states where general PUC jurisdiction already exists. In fact, only two of the states (Connecticut and Hawaii[223]) have exercised rate jurisdiction.

In Connecticut, pursuant to Sections 16-19 and 16-332, rates for a lease of facilities must be filed with the Public Utility Control Authority. In two 1974 cases, the then-PUC affirmed a rate of $4.50 per pole. In Connecticut Light & Power Co.,[224] the utility proposed a $9 per year rate for 53,000 wholly-owned poles; the same rate was proposed for the 30,000

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[222] 47 C.F.R. §63.57. See also text accompanying note 212, supra.

[223] See text accompanying notes 170-180, supra, for a discussion of pole attachments in Hawaii.

[224] Docket No. 11392, decided March 14, 1974.

wholly-owned poles in Hartford Electric Light Co.[225] The principal arguments made by the Connecticut Light & Power Company (CL&P) related to a new pole investment in 1974 of $208 per pole. For a wholly-owned pole, CL&P allocated 25% (discounted from 50%), resulting in a $50 investment in the pole allocated to cable television. Given an annual carrying charge (i.e. "rental") of 18%, this amounted to $9 per pole per year.

The cable industry, on the other hand, argued that (a) it should not pay based on a longer, stronger and more expensive pole, and (b) pole attachments elsewhere in the United States were not that high.

The PUC rejected the approaches proposed by both parties. In the case of the utility, the PUC's reasoning appeared to reject the use of any new pole cost (i.e. a theory which would have based the charges on the costs avoided by the operator); in the case of cable, the PUC seemed to object primarily to a formula which would have treated every pole individually. Instead, the Commission formulated its own approach:

> (a) The depreciated value of the pole based on the average age of the poles: Using a value of $200 for a 35-foot pole and an average age of 10.5 years results in a depreciated value of $126.73.
>
> (b) A factor reflecting the charge to be apportioned to the CATV franchisee: For the space utilized on the pole, 20%.
>
> (c) A reasonable percentage to cover the annual carrying charges: 18%.
>
> Therefore, using the company's value for a 35-foot pole of $200 and depreciating it based on the average age of the poles in the system would result in a value of $126.73. Applying the 20% factor along with the 18% annual carrying charges to

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[225] Docket No. 11409, decided March 14, 1974.

> this figure would result in a reasonable annual carrying charge applicable to CATV of $4.50 per pole.[226]

On the question of jurisdiction, the PUC stated:

> In Connecticut the General Assembly has specifically provided [pursuant to Section 16-332] that the rates charged public service companies for leasing facilities is subject to this Commission's review under Section 16-19 of the General Statutes.[227]

Since then, there have been no further controversies over pole attachment rates in Connecticut and the affected industries have continued to use the $4.50 per pole per year figure.[228]

4.4.2 New York -- Jurisdictional Controversy

The Empire State presents the most confused situation. In 1969, a New York court held that pole space rental was not subject to regulation by the Public Service Commission.[229] But by 1973, the state of the cable industry in New York had grown to a point where the Public Service Commission ordered an investigation of pole attachments. Shortly thereafter, the New York Commission on Cable Television issued an order providing that its hearing on the same subject proceed on a common record to be heard by a single Hearing Examiner. Three years later, on September 2, 1976, Admin-

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[226] Actually, the formula worked out to $4.56 per pole per year.

[227] Ibid.

[228] While there was some early "grumbling" by utility companies, all parties now seem to have accepted the rate with equanimity. Interview with Robert S. Golden, Jr., Legal Counsel for Connecticut PUCA, January 16, 1978.

[229] Cerrache Television Corp. v. Public Service Commission, 20 PUR 3d 419 (1959), petition for review dismissed, 49 Misc. 554, 267 N.Y. 52d 969 (1959).

istrative Law Judge Matias issued a decision concluding that neither the PSC nor the Commission had jurisdiction over pole attachments but recommended that the PSC seek statutory authorization. However, a month later, the Cable Commission in a Notice of Proposed Rulemaking in Docket No. 90001 proposed to regulate the pole attachment question.[230] Less than five months later, however, the Public Service Commission asserted jurisdiction over pole attachments.[231]

The New York PUC disagreed with the Administrative Law Judge and with the utilities as to its jurisdiction. Contrasting the industry situation of 1960 with that of the mid-1970's, the Commission said:

> ...[O]ur decision to decline jurisdiction in Cerrache over a specific contract relating to a then-fledgling industry provides no basis for declining to assert jurisdiction over pole attachment contracts of telephone and electric companies with CATV companies when it appears, as demonstrated by the present record, that use of pole space by the now burgeoning CATV industry is significant.[232]

Further, the Commission observed that regulation would have a threefold impact:

- Rate discrimination against cable would be avoided;[233]

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[230] See Notice of Proposed Rulemaking in Docket No. 90001, October 4, 1976.

[231] PSC Opinion No. 77-1 in Case No. 26494, issued February 28, 1977. It remains to be seen how bifurcated jurisdiction melds with the federal pre-emption standard. See text accompanying notes 250-257, infra.

[232] PSC Opinion No. 77-1, pp. 2-3.

[233] The proceeding was remanded for further exploration of the rate issue. Id. at 9. The Commission warned, however:

> Those standards are premised on the assumption that annual pole rental rates will remain substantially below fully allocated costs, and that the connection of cable facilities to utility plant should not be allowed to increase the costs borne by utility ratepayers.

- No unnecessary burden on utility ratepayers would be imposed by rates for pole attachment service;[234] and
- Potential disruption of utility service would be avoided.

The jurisdiction of the PSC was affirmed legislative in 1978 when the New York State legislature passed a pole attachment bill.[235]

4.4.3 California -- The Recent Experience

As mentioned before, a significant regulatory concern of the cable industry is that the assertion of pole attachment jurisdiction is one possible way for Public Utility Commissions to enter into the cable regulatory arena. The industry is concerned with the possibility that PUC regulation may eventually not confine itself to pole attachments alone. Traditionally, the industry has taken the position that the pole attachment problems simply are not worth being subjected to traditional-type (i.e. regulation of rates charged) jurisdiction.[236]

The summer of 1977, however, saw the culmination of a legislative effort in California which, because of its success, is likely to be a model for other state cable industries. For the first time, a state legislature passed specific legislation dealing with this one subject and did not place cable under comprehensive PUC jurisdiction.[237]

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[234] Ibid.

[235] See Ch. 703 of 1978 laws. Upon rehearing, the PSC had reaffirmed its position of jurisdiction based on past and potential discriminatory practices (Order in Case No. 26494, August 28, 1977).

[236] See remarks of David Kinley, note 149, supra.

[237] The California PUC already had some jurisdictional powers over "health and safety" aspects of CATV construction and operations. See California Public Utilities Code, §768.5 (1970); see also Hochberg, The States Regulate Cable: A Legislative Analysis of Substantive Provisions, op. cit., p. 1.

Perhaps emboldened by a 1972 PUC decision and a \$2.50 rate which had not changed from the late 1940's until that time in the mid-1970's, Pacific Gas & Electric Company (PG&E), one of the major owners of poles in California, sought to have the rate doubled to \$5 per pole. When negotiations broke down, PG&E terminated its license agreements with various cable systems. Nevertheless, cable systems continued to occupy PG&E's poles.[238] The issue appeared to be coming to a head when another major owner of poles, General Telephone of California, indicated that its pole attachment contracts would be cancelled on January 1, 1978, unless the rates were increased from \$3 to \$5.04 per pole per year.[239]

The California Cable Television Association (CCTA) started a major lobbying effort to have a bill passed that would guarantee continued access to utility poles, while retaining some restrictions on the rates.[240] Senate Bill 177, introduced by State Senator Alfred Alquist, originally gave total jurisdiction to the PUC to regulate (not just when the parties were unable

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[238] In Comments filed on S.B. 177, PG&E appeared to recognize that it was in an awkward posture:

> This [continued occupancy] situation was designed to prompt PG&E to seek injunctive relief to have those firms removed from its poles, thus creating a major "issue" between PG&E and the cable subscribers who would be deprived of service. Such a ploy, it was hoped, would obscure the fact that it is the cable corporation and not their subscribers who have precipitated this situation. PG&E has not taken the bait. We have not demanded the prompt injunctive relief to which we are entitled. As a result, many members of the cable industry have taken a free ride for the last two years; they are trespassing on poles for which they pay nothing.

Comments of Pacific Gas & Electric Company on S.B. 177.

[239] Vue Magazine, July 18, 1977, p. 8; and Variety, July 29, 1977, p. 42.

[240] See, for example, Vue Magazine, September 12, 1977, p. 7; Cable Vision, October 10, 1977, p. 46; Variety, October 12, 1977, p. 68.

to agree) and set a pricing standard which did not take into account the cost of the entire pole.

PG&E felt the legislation was a small issue for the utilities -- certainly in comparison with the importance of the issue to the cable industry.[241]

While a number of parties opposed the passage of S.B. 177, perhaps the most surprising opposition came from the PUC. In part, the opposition of the PUC was based on jurisdiction and the setting of rates for pole attachments, and the staff limitations inherent in the bureaucracy.[242]

The final vote on the California legislation appeared to be so one-sided that the California cable industry must be given credit for an outstanding lobbying effort. Not a single vote was cast against an amended version of S.B. 177 in the entire legislature.[243] While there was some concern that Governor Edmund G. Brown, Jr., might veto the legislation,[244] the bill was signed into law on September 21, 1977.

The legislation itself has three significant provisions. First, it redefines a "public utility" as any entity which controls ducts, conduits, or rights-of-way "used or useful" for wire communication. While obviously

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[241] Interview with Jack Fallin, Jr., Esq., Legal Counsel, Pacific Gas & Electric Co., August 24, 1977.

[242] Interview with James McCraney, Director, and Paul Popenoe, Communications Division, California Public Utilities Commission, August 24, 1977. Given what appears to be a general anti-cable attitude on the part of staff members at the PUC, it would be possible for cable still to suffer detriment depending on the scope of the costs to be included in the pole attachment rate. See text accompanying note 246, <u>infra</u>.

[243] The California Assembly approved the legislation 71 - 0; the California Senate approved the legislation 39 - 0.

[244] See <u>Vue Magazine</u>, September 12, 1977, p. 7. It is generally held that Governor Brown was concerned with the possibility of increased appropriations for the PUC to effect the legislative goal.

this section relates to a telephone or electric utility owning a pole, it would be possible that a private individual with a right-of-way which would be "useful...for wire communication" would also be subject to the terms of the legislation. Originally the bill covered any utility entity, but it was amended to exempt municipally-owned utilities.[245]

The legislation's second section defines a pole attachment as that on or in any "surplus space" of a pole, duct, conduit, etc. The apparent net effect of this kind of language would be to remove the possibility that a cable system might force its way onto a pole or into a conduit where there in fact is no "surplus space". The original bill was amended to include this provision, but the definition of "surplus space" could prove problematic. Given this predicate, it would appear, however, that the California legislature has placed at least some additional (and not unreasonable) burden on a cable system; where "surplus space" (however defined) does not exist, the utilities can demand that the cable system set new poles. Conceivably, this could apply even after a cable operator is attached to a pole and the space is needed by one of the other utilities.

The final section of the legislation provides for a resolution of disputes by the PUC. Where a public utility and a cable system are unable to agree upon terms or conditions for attachments, then the question is thrown to the PUC. Of particular importance, however, is that the PUC's ratemaking authority appears to be severely limited. It may set a rate anywhere between a low rate of the incremental costs ("all the additional costs of providing and maintaining pole attachments") or a high rate of the fully allocated costs ("the actual capital and operating expenses, including

[245] Nationwide, it is estimated that municipally-owned utilities own 11% of the poles. Staff Report, Senate Hearings, op. cit., p. 257.

just compensation, of the public utility attributable to that portion of the pole...used for the pole attachment..."). The legislation was amended during the course of the debate to include a payment factor for support and clearance space.[246]

The principal legislative problem would appear to have been the amendment setting the upper limit on the rate allowed. (No problem existed with the minimum charge, i.e. all additional costs.) The utilities, on one hand, wanted the PUC to be able to charge as much as 1/3 of the entire cost of the pole. On the other hand, the legislation as introduced called for an upper limit charging the cable system only for its portion of the "usable space" on the pole. The legislature compromised, recognizing that the cable system derived benefits not just from the "usable space", but from the underground portion of the pole and the clearance footage. The compromise figure was reached at cable's proportion of the "usable space" in addition to that same proportion of the support and clearance space.[247]

From the standpoint of analysis, a legitimate question may be raised as to the cost saving to the cable industry.[248] Indeed, the cable industry

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[246] "Support space" is that footage underground needed to support the weight of the pole; "clearance space" is footage above ground needed to provide safe passage beneath the lowest wire.

[247] Take the following example: A 35-foot pole, of which 6 feet are underground and 18 feet are used as clearance; of the remaining 11 usable feet, the cable system uses 1, the telephone company uses 3, and the power company uses 7. Without the amendment, the upper limit of the charge would have been fixed at no more than 1/11th of 11/35th of the pole (1/35th of the actual capital and operating expenses of the entire pole). However, with the amendment, the maximum is set at 1/11th of the entire cost of the pole.

[248] For example, one trade publication, Cablevision, October 19, 1977, p. 46, stated that the savings would be between $100,000 and $300,000 per year. Given the more than 1.5 million subscribers to cable in California, the savings amounts to from $.06 to $.18 per subscriber per year -- hardly an earthshaking amount.

was quick to point out that the pole attachment charges have amounted to some 4% of the total revenues of the entire cable industry. Given the fact that costs often cannot be easily passed along to subscribers (since local franchises often limit the subscriber charges or impose difficulties in increasing them), it would appear that the specific dollar amounts are the crucial factor. Nevertheless, the guaranteed access to the poles and the limitation on PUC jurisdiction indeed may be equally important to cable in the future. Preventing the possibility of comprehensive PUC jurisdiction but requiring a limited oversight in an area of importance may turn out to be a classic example of legislative lobbying.

4.5 Congressional Activity and Federal Jurisdiction

There has thus been considerable activity on the state level; federal legislation likely to have a dramatic effect on the states has also just been passed. An analysis of Public Law 95-234 can lead to the conclusion that the most likely result will be a spate of state regulatory actions. The first state law following the enactment of Public Law 95-234 in fact followed by less than five months.[249]

The pole attachment law has a stated pricing standard, but applicable only to federal assertions. Moreover, it would require the FCC to take jurisdiction where the states do not. The FCC must regulate "rates, terms, and conditions" -- with a California-type pricing standard -- only until a state asserts jurisdiction; at that time, the FCC ceases to have jurisdic-

[249] Massachusetts General Laws Annotated, Ch. 166a, §25 A. Specific bills proposing state regulation of pole attachments were introduced in nearly 20% of the states within six months of the federal legislation. Pole attachment provisions were included in general CATV legislation introduced in another five states. See Briley and Kwan, Cable Television State Regulation in 1978, Federal Communications Commission (1978).

tion. But the state assertion can be on any ground with any pricing standard. The federal pricing standard is the same as adopted in the California legislation.[250] The federal assertion of the pricing formula, by the terms of the statute, is repealed after five years.

The legislation enacted, S.B. 1547, will have a much greater impact on state legislation than that originally introduced in the House. The latter would have set a pricing standard for federal and state pole jurisdiction, leaving no incentive in state legislatures for asserting jurisdiction. Under Public Law 95-234, states may set up any pricing standard they wish. New Section 224 (c)(2)(B) does require, however, that a state must "consider the interests of the subscribers of cable television services, as well as the interests of the consumers of the utility services." Absent a certification by the state that it does so regulate, FCC jurisdiction would continue.

Congress recognized that "considering the interests of cable subscribers" in itself could lead to state legislative problems. As Senator Ernest Hollings said in amending this legislation to provide for such consideration:

> ...State or local regulatory bodies in many cases may not feel that their regulatory duties encompass the interests of the consumers of cable television services -- in each case the State will have to determine for itself whether existing statutory or other legal authority is sufficiently broad to permit the regulatory body to act in behalf of CATV as well as utility customers.
>
> Since pole attachment disputes involve cable television as well as utility companies, and ultimately their customers, it is only fair that State or local regulatory forums which will consider pole attachment disputes consider the interests of all parties to a dispute; any forum which undertakes to adjudicate these disputes must consider the interests of the public represented on both sides of the dispute.[251]

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250 See discussion at text accompanying notes 246-248, supra.

251 124 Cong. Rec. S. 967 (January 31, 1978)(daily ed.).

Thereafter, the state body's certification must be accepted by the FCC. Any state certifying that it regulates rates, terms and conditions, and that such regulation takes into account the interests of the cable subscribers, "automatically forecloses" federal jurisdiction.[252] It remains to be seen, however, how a bifurcated New York-type problem[253] melds with the federal legislation. Indeed, if the basis for jurisdiction is consideration of both utility and cable consumers,[254] questions may be raised in any Commission-type state as to the authority of the State Cable Commission in acting to preempt the federal assertion.[255] In the first state adopting a pole attachment law after passage of the federal legislation, Massachusetts placed jurisdiction in the Department of Public Utilities, rather than the Massachusetts Community Antenna Television Commission.

The federal legislation requires that the FCC adopt regulations by the end of August 1978 to cover those situations where states do not regulate pole attachments. In FCC Docket No. 78-144[256] the Commission proposed regulations to adjudicate any pole attachment disputes. The FCC was particularly concerned that it not be perceived as displacing states which are in fact regulating pole attachment disputes. As the Commission said:

> If the rate, term, or condition is regulated by the State, as demonstrated by a State-filed certificate, we would dismiss the petition. If the State has not provided

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[252] Id. at S.B. 968.

[253] See text at notes 229-235, supra.

[254] Note 251, supra.

[255] Also of significance to the cable industry in Public Law 95-234 is the provision giving the FCC the power to levy forfeiture penalties on cable systems which operate in violation of the Commission's rules.

[256] 43 F.R. 19886 (1978).

> certification, the Commission would presume, rebuttably, that the State is not regulating pole attachments.[257] [Emphasis added.]

The FCC also proposed substantive guidelines.

Various cable and utility interests filed comments, but no state agencies or commissions were on record individually. The National Association of Regulatory Utility Commissioners filed a brief statement, generally supporting the FCC approach.

[257] Id. at 19887.

5.0 THE THREE ISSUE AREAS REVISITED

In Section 1.2 above, we discussed several cross-cutting questions which we felt were important in evaluating the three issue cases. In this section, we will draw upon these case studies to determine how much administrative flexibility exists in CATV regulation, as well as address the convergence/divergence question. We will also discuss the emergence of what we see as a trend in state regulation: regulation through legislative actions which deal with specific issues. In addition we will look at the implications of this trend for the content and extent of future state-level involvement with CATV.

5.1 The Balance Between Legislative Dominance and Regulatory Flexibility

When we talk about legislative dominance or administrative flexibility, it is important to distinguish between two different areas: jurisdiction and methods. The jurisdiction question can be posed in the following way: has the legislature required that an agency take jurisdiction in an issue area or has the agency itself taken on the responsibility? The methods question may be phrased in the following manner: where jurisdiction has been mandated or taken on by the agency, how much flexibility exists in applying specific methods? Was the method applied dictated by the legislature or developed by the agency?

In the taxation area, differing amounts of administrative flexibility are apparent with respect to jurisdiction. Sales taxes are an example of this. In Wisconsin we saw that specific legislation required the Department of Revenue to tax cable television service sales. In Louisiana, statutes specifically exempt CATV from sales tax and thus prevent the taxation agency from entering into this area. In other states, however, broad sales tax statutes have been applied to CATV without legislative involvement. In Arizona an administrative decision by the Department of Revenue has exempted CATV service sales from being taxed, while in Washington the state taxation agency administratively applied a general business gross receipts tax to CATV businesses.

In terms of methods, there appears to be a good deal of administrative flexibility in the taxation area. We can define methods, in this case, in two ways: how is cable television defined (i.e. as a general business, a public utility, etc.), and what tax formula is applied (i.e. what revenues are considered taxable, etc.). In New York State, the legislature determined that CATV was not a public utility. But for taxation purposes, CATV is treated as if it were a public utility. In Delaware, however, CATV is regulated by the Public Service Commission, but is taxed as a general business. In Wisconsin, a sales tax is assessed upon all services such as pay and premium, but in Nebraska a 3% sales tax is imposed upon basic services alone.

In the pole attachment area, jurisdiction can also be seen as being controlled by the legislature or an administrative agency, depending on the state. California and Massachusetts are the only states (as of mid-1978) which have specifically enacted pole attachment legislation outside of comprehensive CATV legislation. In Hawaii, however, the Department of Regulatory Agencies asserted jurisdiction over pole attachments without legislation. And in Connecticut, the PUCA was given pole attachment jurisdiction within a more comprehensive public utility jurisdiction. Therefore, we see flexibility in only one out of three states.

In determining pole attachment rates, there is much more administrative flexibility. In both Connecticut and Hawaii, the legislature has not addressed the methods which the agency must use in determining rates. In California, the methods issue has been broached by the legislature, but still leaves much administrative leeway. Although the California statute requires that rates be no higher than fully allocated costs or lower than marginal costs, the Public Service Commission is not required to use a particular method as long as the resulting rates can meet the statutory test.

There appears to be little jurisdictional administrative flexibility in regionalization and districting issues. We have not found any states which have addressed regional CATV issues which were not first given this mandate -- in at least broad terms -- by the legislature. But once a state agency has been given jurisdiction in this area, administrative flexibility abounds. In New York and Vermont, regulatory agencies have created line extension procedures with little or no statutory guidance (but in Vermont there have been some judicial constraints). In Connecticut, the PUC was given the mandate to franchise systems at the state level. It took the initiative, however, in determining that it was most desirable to do this franchising on a district (i.e. multi-community) basis. In New York and Minnesota we saw that the state agencies operate under general statutory language which requires the agency to create regional cable TV plans. In both states, the agency has used this mandate to promote regionalization through interconnection and public service uses.

New York has chosen to take this approach although the statute, in theory, could allow for regional franchising. In this sense, New York has exhibited administrative flexibility. The court's reversal of the Rhode

Island districting decision may be an indication that the agency was being too flexibile in construing its mandate. New Jersey also appears to be moving toward the interconnection approach even though its statute simply requires that regional impact be taken into account in reviewing local franchises.

In short, we have noticed two separate trends. Except in the taxation area, there has been little movement by agencies toward taking on new jurisdictional responsibilities. In fact, in pole attachments, the California PUC resisted early attempts to be forced into taking jurisdiction and the courts concurred. But on the other hand, once jurisdiction has been given to an agency, we have seen that at least in the three issue areas we have studied, there is a good deal of administrative flexibility. If one is concerned about the ability of agencies to rapidly respond to developing technologies, the fact that little jurisdictional flexibility was found may be more important than the existence of administrative flexibility once jurisdiction exists.

5.2 The Convergence of Approaches

A quick glance through the three case studies will show that there is a good deal of policy divergence across states. If we distinguish, however, between policy divergence and jurisdictional divergence, then a different conclusion can be drawn: while there is a good deal of policy divergence, there is less jurisdictional divergence. The regionalization/districting case serves as a useful example.

Of the five states examined in the regionalization section (Section 3.0), we discovered four different approaches. These approaches ranged from having a statewide policy of regional franchising (Connecticut) to a case-by-case approach (New Jersey). In this sense, divergence is the dominant pattern. But a subtle form of convergence emerges. In all of the states which were examined, the regional planning function has been given to the agency which regulates CATV in other ways rather than to regional planning commissions which have authority over land use, transportation, watershed management and other regional issues. In addition, there appears to be only one state without comprehensive CATV regulation which has at all addressed the regionalization issue (the Virginia Public Telecommunications Council). One can usefully ask the question whether a similar divergence of regionalization approaches would have occurred if planning agencies were given jurisdiction? The lack of (recent) experience of regulatory agencies with regional issues may be the cause of the divergent approaches we have noticed.[258]

In the pole attachments area the record is rather sparse. In both of the states which have recently adopted legislation (California and Massachusetts), jurisdiction has been given to the PSC -- even though in one case (Massachusetts) a separate CATV Commission regulates other aspects of cable television. In the other states we have examined, the agency which has jurisdiction over other public utilities has jurisdiction over pole attachment agreements. But in all but one of these states, jurisdiction existed before the federal pole attachments law was enacted. Given §224 (c)(2)(B) of this law, which requires that states which take pole attachment jurisdiction in the future must certify that the agency which has jurisdiction must be able to consider the interests <u>of cable subscribers as well as utility consumers</u>,

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[258] It should also be noted that while planning agencies may have more experience in the planning area, they may have more trouble enforcing planning decisions than agencies with more comprehensive cable jurisdiction.

it is not clear whether jurisdictional convergence will continue. It is also not clear whether California, Connecticut and Hawaii (which have jurisdiction now) would be able to meet this new test. Furthermore, the jurisdictional conflict which exists in New York may be further complicated by §224 (c)(2)(B), because it is unlikely that either agency (the PSC or the New York State Commission on Cable Television) could pass this test.

As far as convergence of pole attachment ratemaking methods is concerned, the convergence of methods in the past may not portend the future. California, Connecticut and Hawaii all use different ratemaking methods. The California high/low limits are similar to the federal regulations. But the California methods or boundaries were worked out as a compromise between the cable industry (which argued for incremental cost pricing) and the utilities (which argued for fully allocated cost pricing). It can be assumed that these positions will remain relatively unchanged, and therefore we are likely to see more states adopting these high/low limits. But in California, we found that the cable industry was powerful.[259] In states with a less powerful cable industry, it is possible that we will see legislation enacted that sets a "low" without a "high" limit.

In the taxation area, jurisdictional convergence is not an issue. Taxing responsibilities for the CATV industry have been given or taken on by the agencies which have responsibility for taxing other businesses (in contrast to planning responsibilities, which have not been allocated to regional planning agencies). In methods, however, we see a good deal of divergence. Some states treat cable as any other business. The differences seem to stem from definitional problems associated with the CATV industry: is it a

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[259] See Kalba, et al, Regulatory Politics: State Legislatures and the Cable Television Industry, op. cit., Sections 4.0 and 7.1.

necessity, a luxury, entertainment, a public service, etc. Depending upon which definition is operative, different taxation schemes will be employed. Even though several administrative taxation decisions have been challenged (see Section 2.2.3 for one such case), it is likely that divergence will be the case in the future because of particular statutory peculiarities in each state.

In the taxation area, however, we perceive another form of convergence which can be called attitudinal. Cable television is increasingly seen as a source of revenues for the state. This is evidenced in the number of states which have recently subjected cable television service sales to a tax. This attitudinal convergence is analogous to attitudinal convergence in two other areas. In the latter part of the 1960's, municipalities began to realize that CATV might have great revenue potential. This realization prompted the FCC to limit local franchise fees, but as outlined above in Section 2.1, it seems unlikely that the FCC will become involved in limiting state taxes. In a companion report on rate regulation, attitudinal convergence was also discussed.[260] In the rate regulation arena, we found that although methods or approaches were quite diverse, there was a mood among several states that rate regulation in general should become less complex and less burdensome for both the industry and the regulatory agency.

One last point should be made concerning convergence. We found that the most convergence of jurisdiction and methods has occurred or is likely to occur in the pole attachments area. In another issue area not examined here (theft of service legislation), a cursory look at the recent statutes enacted reveals a marked similarity in language. Why convergence in these

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[260] 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.

areas? Two hypotheses which warrant further study revolve around the fact that these two areas represent specific legislative or regulatory efforts, rather than being part of more comprehensive regulation. This suggests that specific efforts leave less room for administrative flexibility than specific issues treated in a broader context. Thus convergence may be more likely to occur. Another testable hypothesis is that both of the issues are ones in which the cable industry perceives there to be great stakes (i.e. access to poles at reasonable rates and loss of revenue through service theft). It may be that industry-supported legislation and regulation is more easily circulated from state to state than administratively constructed solutions to problems. One of the prime functions of the National Cable Television Association and its regional and state counterparts has been to inform members across the country of approaches which have benefited or harmed the industry in other states. No equally systematic information exchange occurs between regulatory agencies (the existence of the Conference of State Cable Agencies notwithstanding).

5.3 A Note About Regulation Through Specific Actions

The questions which emerge in this area are (a) why has specific "regulation" been adopted in some cases, rather than more comprehensive regulation; and (b) how effective is regulation by specific statutes when compared to comprehensive regulatory programs?

The first step towards answering these questions is to determine how prevalent are the specific vs. the comprehensive legislative approaches. One measure of this is the number of bills introduced in state legislatures which fall within each category. Table 2 reports these findings for the past four years.

Table 2 [261]

Specific vs. Comprehensive Legislation
Introduced in State Legislatures for 1975 - 1978

	1975	1976	1977	1978
Specific with Comprehensive	45.0% (54)	52.4% (46)	42.1% (48)	39.3% (24)
Specific without Comprehensive	21.6% (26)	23.8% (21)	36.8% (42)	26.2% (16)
Comprehensive	33.4% (40)	23.8% (21)	21.1% (24)	34.5% (21)
Total	100% (120)	100% (88)	100% (114)	100% (61)

Note: All percentages are column percents.

Table constructed from information contained in: Sharon Briley, 1975, 1976, 1977 and 1978 State CATV Regulation, Washington, D.C.: Cable Television Bureau, Federal Communications Commission, mimeographed.

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[261] The definitions of each of the categories are the following:

Specific with comprehensive: This category contains bills introduced in states which have comprehensive regulation. These bills address specific issues either through the state regulatory agency (such as changing rate regulation procedures) or through other agencies (such as taxation or theft of service legislation).

Specific without comprehensive: This category contains bills introduced in states without comprehensive state regulation. These bills address specific issues such as pole attachments, theft of service, taxation, etc.

Comprehensive: These are bills which have been introduced in states with comprehensive regulation (i.e. bills which would substantially change the state regulatory structure, such as altering jurisdiction from a PSC to a separate Commission or vice versa, and bills which would abolish state regulation) or without comprehensive regulation but which would establish such a regulatory program.

Several interesting patterns emerge from these results. In terms of total number of cable bills introduced in legislatures over the past four years, we notice that there is wavering interest in CATV. The greatest number of bills introduced over the past four years was in 1975. In 1976, interest seemed to decrease, but in 1977 there again was an increase of interest. In the 1978 legislative session (which was over at the time of this writing), we see that of the four years analyzed, the smallest number of bills were introduced. In terms of specific vs. comprehensive regulation, if we add the first two rows together, we see that specific legislative attempts far outnumber comprehensive legislative attempts in all four years (i.e. 66.6% in 1975, 76.2% in 1976, 78.9% in 1977, and 65.5% in 1978). Another pattern which emerges is that the number of specific bills introduced in states with comprehensive regulation is larger than the number of specific bills introduced in states without comprehensive regulation.[262] One explanation for this is that the industry, municipalities, or legislators are attempting to fine tune previously legislated comprehensive regulation so that it is more congruent with their interests.

This trend towards piecemeal "regulation" may reflect the growing political strength of the cable industry. As mentioned above, piecemeal "regulation" (i.e. pole attachments, theft of service, prevention of landlord obstruction, etc.) generally benefits the industry. We would tentatively conclude that the industry is becoming aware that it can strategically affect regulation in certain areas, while simultaneously

[262] This difference is considerable, since only eleven states have comprehensive statutes, versus 39 without such regulation.

fending off the more comprehensive regulatory programs.[263] In addition, this trend may reflect the regulatory mood of the times, which has recently been to only regulate where problems actually exist.[264]

In answering the question concerning the comparative effectiveness of specific vs. comprehensive regulation, a major problem arises in defining effectiveness. Does effectiveness mean that certain objectives are being met, i.e. the legislature's objectives? Or can we devise other independent measures such as industry growth, subscriber satisfaction, etc.? And depending upon which definition(s) is used, another intractable question becomes apparent: Is comparison between narrowly defined statutes and broader range regulatory programs at all possible?

If we define effectiveness in terms of satisfying objectives, then the jury is still out on both the specific issue areas and the broad regulatory actions. For example, in the taxation arena, if the objective of taxing cable service sales is to raise revenues, then legislation has most likely been effective. In the theft of service area, however, the data is less distinct. It is not clear how extensive theft of cable service was prior and subsequent to passage of legislation.

As far as more comprehensive programs are concerned, the legislature's objectives are not as easily discerned. The objectives may have been to expand personal or administrative power, to stunt the growth of the industry,

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[263] This could be a reflection of the growing strength and experience of state cable associations as well as evidence of a trend towards the industry responding to legislation with counterproposals rather than attempting to simply defeat legislation. See "The States Move In On Business", Dun's Review, Vol. 111, No. 1, January 1978, for a discussion of this trend in other industries.

[264] See Kalba, et al, Regulatory Politics: State Legislatures and the Cable Television Industry, op. cit., Section 7.3.

to promote the industry, to protect it from competitors, to increase subscriber satisfaction, to insure due process, to control consumer complaint procedures, etc. But in this case we have few measures of these criteria. Industry growth can only be postulated from penetration figures (profit data is well guarded), and analyses done in a companion report have found that penetration rates in regulated and "non-regulated" states do not differ.[265]

A final point about specific legislative actions: if these specific actions are more "industry oriented" than the more comprehensive programs, and if the specific approach is expanding, then we are likely to see a change in the nature of state-level cable regulation. For example, there have been few attempts to specifically deal with franchising procedures outside of a broader regulatory context.[266] It is conceivable, in sum, that state regulation could be shifting from a consumer-oriented perspective to an industry-oriented perspective, primarily because the agenda is being altered.

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[265] See Yale Braunstein, Konrad K. Kalba and Larry S. Levine, The Economic Impact of State Cable Television Regulation, Harvard University Program on Information Resources Policy, Publication P-78-7, October 1978.

[266] There have been, of course, state statutes which delegate franchising authority to municipal or county authorities. Few of these, however, have addressed the franchising procedures issue.

APPENDIX

State Taxation Survey - 1977

IF YOU HAVE THIS INFORMATION IN SOME OTHER FORM WE'D BE HAPPY TO RECEIVE THAT!

1. Are cable television corporations specifically mentioned in the tax statutes of your state? yes ____ no ____

If yes, please cite the section of the statutes in which this reference appears.

2. Are cable television corporations taxed as public utilities in your state? yes ____ no ____

3. Below you will find a table which lists various kinds of state taxes which could apply to cable television corporations. In the first column please put a mark next to all those taxes which apply at the state level to cable television corporations. In the second column write in the source of this tax, i.e. statute or administrative decision interpreting statute. Please be as specific as possible citing the actual section or decision. In the third column write the rate at which cable television corporations are taxed under each specific tax which applies. And use the fourth column for any comments you might have about each tax which applies.

Type of Tax	1 Does Tax Apply	2 Source of Tax	3 Rate	4 Comments
Gross Receipts				
Property				
Income				
Cable Television Service, Sales				
Cable Television Service Installation				
Real Estate				
Amusement				
Franchise				
License				
Securities				
Inspection				
Other (Please Specify)				

4. If a gross receipts tax is levied on cable television corporations, is this tax based on all receipts or are there exemptions? Please explain all exemptions.

5. If a state real estate or property tax is levied on cable television corporations, is this tax based on all property or real estate owned by the corporation, or are there exemptions? Please explain all exemptions.

6. Are municipalities prohibited by the state from imposing certain kinds of taxes or assessing certain kinds of property when taxing cable television corporations? Please explain, giving reference to specific statutes or decisions which are relevant.

7. Are there any pending bills or administrative decisions which would affect the tax status of cable television corporations? If so, please cite the bills or decisions.

8. Do you have any reports or documents which might help us in our study of state taxation policies toward cable television corporations? If so, could you please include their titles and information on how we could obtain copies.

9. Do you have any further comments, suggestions or additions?

Thank you very much for your time and cooperation.

Please return form to: Mr. Larry Levine
Research Associate
Harvard University
200 Aiken
Cambridge, Mass. 02138