Public Policy and the Evolution of Cable Television: 1950-1990

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The cable television industry evolved from make-shift configurations of antennae and wires serving fewer than one hundred customers in 1950, to an industry serving 50 million subscribers and generating revenues of almost $18 billion by 1990 [30, 31]. Although entrepreneurial ingenuity and technological innovation provided the foundation for this extraordinary growth, the Federal Communications Commission (FCC), U.S. Congress, courts and municipalities also played critical roles in shaping the evolutionary path of the industry.

Public policy with respect to cable television evolved haphazardly as a result of jurisdictional confusion, conflicting notions of the "public interest" in relation to the industry, and shifts in the relative power of key interest groups. In particular, broadcasters, who perceived the upstart business as a competitive threat, exerted significant pressure over time on policy makers to restrict the growth of cable in the name of protecting "free" (advertiser-supported) television. Yet by the mid-1980s, the cable TV industry had successfully challenged the majority of regulatory constraints inhibiting its development, drawing heavily on freedom-of-speech arguments to support its positions. Yet ironically, by 1990, cable operators found themselves in the role of a media incumbent, aggressively lobbying policy makers for regulatory protections against competitive threats from new wireless technologies and from local telephone companies.

The main body of this paper is organized into four sections. Part I covers the first twelve years of the cable industry's existence; Part II encompasses the era of mounting regulatory intervention in the affairs of the industry through the early 1970s; Part III traces the tremendous advances in cable-related technology along with the steady erosion of public policy constraints during the subsequent decade and a half; Part IV highlights the slippery slope of industry success and excess in the late 1980s.

A Blissful Childhood, 1950-61

The first cable television entrepreneurs were electric appliance store owners located in areas where television reception was poor or nonexistent

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due to hilly or mountainous topography [23]. In order to boost television sales, these retailers would erect an antenna at an unobstructed locale to receive broadcast signals off the air and deliver these signals by wire to individual residences. Customers generally paid a one-time installation fee in addition to a periodic maintenance fee for this service, which was known as Community Antenna Television or CATV.

The first commercial CATV system was established in 1950 in Lansford, Pennsylvania, and within two years, 70 systems, each serving an average of 200 customers, had been constructed [30]. In these early years, municipalities welcomed CATV service and typically granted operators a license or franchise to install wires or coaxial cable along public thoroughfares for a nominal fee.

The initial response of television broadcasters to CATV was somewhat mixed. Since broadcasters relied on advertising revenues to finance their operations, audience expansion resulting from CATV signal carriage was generally welcomed. However, the owners of smaller independent stations worried that nearby CATV systems, with capacity typically limited to 3-5 stations, would choose to carry the signals of larger and/or more distant stations, sourcing such signals through the use of long-distance microwave relay technology. This possibility was particularly worrisome since the installation of CATV service could disable a subscriber's reception of any broadcast signal not carried on the system. Even broadcasters whose signals were carried by CATV systems resented the fact that cable operators could profit from broadcasters' program offerings without paying any of the fees or royalties associated with such programming.

In April 1956, a group of thirteen television broadcast stations filed a complaint with the Federal Communications Commission requesting that the Commission exercise regulatory jurisdiction over CATV systems as "communication common carriers" under the Communications Act of 1934. Two years later, the FCC dismissed the complaint, arguing that CATV systems fit neither the definition of a "common carrier" nor a "broadcaster" and thus fell outside its jurisdiction [20].

However, the FCC was concerned about the possible impact of CATV on the future of "free" television and on the long-run viability of local television stations. Therefore in 1959 the Commission urged Congress to pass legislation that would require cable systems to transmit all local area stations that requested carriage and to obtain prior consent from any station whose signals it intended to carry. Although a bill establishing FCC authority over CATV in these areas reached the Senate floor in May 1960, it was defeated by a single vote after vigorous lobbying on the part of individual cable operators and the National Community Television Association [7].

Meanwhile, broadcasters challenged the activities of cable operators through the courts. Yet they failed here as well in the landmark 1961 *Intermountain* case in which a district appeals court ruled that CATV systems had no obligation to compensate TV stations for the carriage of program signals received off the air [17]. Thus, after eleven years of operation and the addition of some 650,000 subscribers [30], the CATV industry remained

largely free of public policy restrictions. Nevertheless, such freedom was not to last.

Parental Guidance Requested, 1962-72

In 1962 broadcasters finally scored their first major victory against CATV. In its *Carter Mountain Transmission Corp.* decision, the FCC denied the application of a common carrier to provide microwave relay services to a cable operator unless the operator agreed to guarantee carriage of the local TV station and to forgo the duplication of any of the local station's programming with distant signals [5]. The FCC had routinely approved such applications since 1954, when some CATV systems had begun to augment or replace off-air antenna reception with microwave relay technology. However, by the early 1960s, the Commission, concerned about fulfilling its mandate to ensure "fair, efficient, and equitable broadcasting" and frustrated with Congress's unwillingness to articulate policy with respect to CATV, decided that even if it could not regulate CATV systems directly, it could regulate them indirectly to the extent that they were dependent on common carrier microwave services to receive broadcast signals. This prerogative was upheld in 1963 by the courts [6].

In 1965, the FCC formally adopted the so-called "must-carry" and "nonduplication" rules introduced in the *Carter Mountain* proceeding for all CATV systems served by microwave common carriers. The Commission also initiated an inquiry into the necessity and feasibility of extending the scope of these and perhaps additional regulations to the CATV industry as a whole [12]. The FCC justified this proactive approach in its 1965 Annual Report by stating that:

> The Commission recognizes the valuable contribution of CATV in bringing new or supplementary service to many places and the desirability of furthering the orderly development of these systems. But at the same time, it holds that CATV service should be supplementary to and not cripple local TV broadcast service or impede the growth of TV broadcasting [32, p. 80].

While some observers took such statements by the FCC at face value, arguing that the FCC was acting in the "public interest" to promote diverse and inexpensive programming for consumers, others claimed that the Commission had in effect been "captured" by the broadcasting industry, a development allegedly facilitated by the appointment of sympathetic Commissioners to the FCC on the part of President Lyndon Johnson, whose family had long maintained broadcasting interests [19, pp. 40-41].

In April 1966, after Congress had failed again to reach a consensus on CATV-related legislation, the FCC asserted jurisdiction over all CATV systems, arguing that the Communications Act of 1934, by requiring the Commission to establish and protect geographic zones served by broadcasters, implicitly gave it jurisdiction over activities of cable operators that affected this mandate [26]. The FCC in turn required CATV systems to carry the signals

of all stations located within an administratively-defined local area and prohibited systems operating in the top 100 broadcast markets from importing any distant signals without a prior hearing at the FCC to determine whether or not such carriage would serve the "public interest".[1] The latter provision created enormous disincentives for CATV development in major television markets where potential subscribers, already enjoying access to a variety of off-air signals, would have little reason to purchase cable service if they did not offer distant signals.

Cable operators challenged these rules in the courts and, by late 1967, had received a favorable decision from the California Court of Appeals, which concluded in the *Southwestern* case that the FCC had overstepped its jurisdiction [36]. However, this victory was short-lived: in June 1968 the Supreme Court reversed the lower court decision, yet emphasized that the FCC's jurisdictional authority was "restricted to that reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting" [28].

Ironically, the Supreme Court handed the cable industry a major victory one week later in the *Fortnightly* copyright case [12]. It ruled that CATV operators were under no legal obligation to obtain licenses from or pay fees to any entity holding copyrights to programming received as broadcast signals and delivered to subscribers since each cable system acted as an intermediary "receiver" as opposed to a "performer" of programming [14]. However, the FCC felt that the decision perpetuated "the competitive imbalance between broadcasters who may pay for their program fare and CATV operators who do not pay" [33, p. 66]. To redress this imbalance, the Commission issued an interim order in December 1968 that, in effect, placed a temporary moratorium on new distant signal importation in the top 100 markets while it evaluated a range of policy alternatives [21]. In addition, the FCC issued rules during the following year that required all CATV systems serving over 3500 subscribers to establish so-called "program origination" or "cablecasting" facilities for the local production and presentation of original programs [13].

During the early 1970s, the FCC's micro-management of the cable television industry reach its zenith as the Commission increasingly assumed the characteristics of a central planner. In order to promote the "greatest possible diversity of control over local mass communications"[33, p. 62] the agency issued cross-ownership rules in 1970 that prohibited the ownership of CATV systems by telephone companies in their local exchange areas, by television stations in their local broadcast market, and by the national television networks anywhere in the United States. At the same time, the FCC sought to protect the American viewing audience at large from the erosion of "free" television by issuing so-called "anti-siphoning" rules that

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[1]Other provisions included a prohibition of same-day duplication of locally available programming via importation of distant signals; a grandfather clause exempting signals carried by CATV systems prior to 2/15/66; and a blanket exemption from all carriage and nonduplication rules for all systems serving fewer than 50 subscribers.

prohibited cable operators from packaging old movies, previously broadcast sporting events, and television series into pay TV channels [27].

In February of 1972 the FCC issued its long-awaited *Cable Television Report and Order* [4], which encompassed a complex set of rules designed to "open up cable's potential to serve the public without at the same time undermining the foundation of the existing over-the-air broadcast structure."[33, p.60] The Commission ended the freeze on distant signal importation in the top 100 markets yet capped the total number of broadcast signals that a given cable system could carry according to a "sufficient viewing test." For example, in the top 50 markets, systems were limited to a maximum of three network, three independent and, at most, two additional distant signals. In addition, systems were barred from "leapfrogging" past the geographically closest stations to fill their quota of signals. In the top 100 markets, the FCC required all systems to provide so-called "access channels" for use by local government, educational institutions, the general public, and for lease by commercial entities. To ensure that cable systems would have sufficient capacity to meet these requirements, the FCC ordered all new systems in major markets to include 20 channel capacity, including two-way interactive capability. Existing systems, most with only five to twelve channel capacity, were given five years to upgrade to the new requirements. The remaining provisions of the order dealt primarily with the local franchising process. Although franchising bodies retained the right to regulate the rates charged by cable operators, the new FCC rules standardized maximum length of franchise, franchise fees, construction timetables and various technical requirements. To ensure adherence to these provisions, the Commission required that each new and existing cable system obtain a Certificate of Compliance from the FCC or risk termination of service.

The broad scope of the 1972 rules, although not unexpected at the time, seems extraordinary when viewed in light of the virtually unregulated state of the CATV industry just a decade earlier. However, the FCC, at the urging of broadcasters and with the blessings of the Supreme Court, increasingly tightened its hold on the industry while Congress, in effect, quietly acquiesced. Although the FCC strove to ensure that growth in cable would not come at the expense of traditional broadcasting, the cable industry managed to grow at over 20% per year over the decade in terms of subscriber additions. Yet the industry's potential still seemed largely untapped, as less than 10% of U.S. television household were cable customers in 1972 [30].

Transition to Adulthood, 1973-84

In spite of the highly interventionist nature of the FCC's 1972 rules, the repeal of the "top 100 freeze" provided some impetus for the development of cable systems in many previously unserved major markets. In addition, the Commission issued clarifications of its cable television rules in 1973 and 1974 that eased certain restrictions on smaller systems and limited the scope of several franchise stipulations applicable for all systems. Although these initial steps by the FCC to relax the superstructure of cable regulation were small and tentative, they represented a critical shift in the direction of Commission

policy. These changes could be interpreted on the one hand as a defensive reaction to the Supreme Court's 5-4 decision in the *Midwest Video I* case, which narrowly upheld the FCC's program origination rules in June of 1972 [35]. In spite of the Commission's apparent victory, all parties took note of the concurring opinion by Chief Justice Burger, who stated that "candor requires acknowledgement ... that the Commission's position strains the outer limits of even the open-minded and persuasive jurisdiction that has evolved by decisions of the Commission and the courts" [35, p. 675].

Impetus for a change in policy direction flowed from other sources as well, including a highly-publicized cabinet-level Report to the President on cable television, initiated in the summer of 1971 and released in January 1974 [1]. The report criticized the fact that according to prevailing policy, "cable is regarded simply as an extension of, and not a supplement to, the broadcast television industry" and warned that "the perception of cable's multi-channel capacity as a threat to broadcasting could retard cable growth and even limit full use of all its capacity in order to protect broadcasting's viability." The Report's recommendations included a call for the complete repeal of the FCC's regulations on channel capacity, access, and media cross-ownership [1, pp. 13, 67].

Although the Commission did not adopt these recommendations, it continued to ease or eliminate a number of its cable television rules during the mid-1970s. For example, it granted cable operators more latitude in the carriage of distant signals, exempted smaller systems from various requirements, and extended to 1986 the deadline for compliance with channel capacity rules. It should be noted parenthetically that the actions of the FCC over this period paralleled deregulatory trends initiated during the Ford and Carter administrations with respect to other industries such as airlines, railroads, trucking, natural gas, and electric utilities.

The FCC's stroll down the path of deregulation, however, was too leisurely for some parties. In October 1977, the Supreme Court refused to review a lower court decision in the *Home Box Office* case which struck down FCC restrictions on pay-cable programming and advertising as a violation of freedom of speech [16]. This decision removed an important barrier to the growth of cable television programming via satellite transmission, the cost of which had fallen dramatically in the mid-1970s. In the 1979 *Midwest Video II* case, the court determined that the FCC's rules with respect to channel capacity and special access were "not reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting" and thus exceeded the Commission's statutory authority [11]. In the wake of this decision, the FCC adopted several additional rule changes, including the elimination of all restrictions on the number of distant signals carried by cable systems and the substitution of a simple registration procedure for the cumbersome certification process [22,25].

In spite of the substantial dismantling of cable regulatory policy by the early 1980s, the area of local franchising remained a sore point for the cable industry. The rates charged by cable systems continued to be subject to approval by franchising bodies, a requirement that, according to operators,

had become increasingly burdensome and inappropriate. Thomas Wheeler, president of the National Cable Television Association, argued that

> Since the relevant market for cable is the market for all entertainment services, then the market is clearly very competitive, with cable competing with over-the-air television and radio, subscription television, [unregulated wireless alternatives such as] multipoint distribution service and satellite master antenna television, video discs and cassettes, movie theaters, and ultimately direct broadcast satellite service [15, p. 215].

In addition to price regulation, cable operators expressed growing concern about the power of franchising bodies in the franchise approval and renewal process. With over half of existing franchises due to lapse in the mid-1980s, operators feared that local regulators would use the threat of nonrenewal to extract a crippling array of monetary and non-monetary concessions from current franchise holders.

The cable industry took it concerns to Congress in 1982, with the goal of securing comprehensive legislation on cable policy in the form of an amendment to the Communications Act of 1934. Although Congress had failed for over two decades to pass such legislation, it had demonstrated in the late 1970s a new-found willingness to address the industry's problems. As part of the Copyright Act of 1976, Congress had included a provision that affirmed cable operators' right to import distant signals by paying periodic but modest royalties to a central copyright fund, thus diffusing broadcasters' long-time charges of unfair competition on the part of the cable industry [10]. In addition, Congress had passed the Pole Attachment Act of 1978 which ensured cable firms access to utility poles at reasonable rates, a provision long sought by operators [9].

Although the struggle for comprehensive cable legislation lasted over two years, on October 30, 1984, the Cable Communications Policy Act was signed into law [2]. The final terms of the law represented an elaborate compromise crafted by key interest groups, including the National Cable Television Association, the National League of Cities, and the U.S. Conference of Mayors [3]. On the one hand, cable operators won a key provision deregulating rates for all cable services by the end of 1986, with the exception of rates for basic cable service in areas in which a cable system was not subject to "effective competition;" the FCC, under the leadership of Reagan appointee Mark Fowler, subsequently determined that the availability of three over-the-air broadcast signals, a characteristic of 96% of U.S. cable markets, constituted "effective competition." The Act also provided cable operators with substantial protection during the franchise renewal process by shifting the burden of proof to franchising bodies to demonstrate that the current operator was unqualified to continue service by virtue of past abuses or inability to provide adequate service in the future.

Local franchising bodies won important concessions as well in the 1984 law. The maximum allowable franchise fee, previously limited by the FCC to

3% of gross revenues per year, was raised to 5%, and the franchiser retained the right to require channel capacity for public, educational, governmental, and commercial use. In addition, the law left all nonrate provisions of existing franchise agreements intact and reassured franchisers that they would not be required to renew franchises automatically.

The Cable Communications Policy Act of 1984 thus represented the culmination of a decade-long liberalization trend in cable television policy, which although dismantling the most restrictive elements of industry regulation, did not completely strip the FCC or franchising bodies of their supervisory authority with respect to cable. Cable subscribership, spurred on both by policy liberalization and by technological advances in satellite transmission and channel capacity, rose dramatically over the period, reaching 31.3 million or 37% of all TV households by 1985 [31].

Impending Mid-Life Crisis, 1985-1990

The passage of the Cable Act unleashed a period of frenzied investment activity in the cable industry in the mid-1980s, a trend that was encouraged even further by a 1985 court decision striking down the FCC's must-carry and nonduplication rules [24]. Acquisition prices for existing cable systems rose dramatically, from less than $1000 per subscriber to over $2500 per subscriber [18], and horizontal integration proceeded briskly as large multi-system operators (MSOs) such as TCI, ATC, and Warner acquired smaller operators. The rapid pace of industry consolidation, reminiscent in some ways of the tremendous growth in public utility holding company systems in the 1920s, resulted by 1990 in the control of over 50% of all cable subscribers by ten companies [29]. At the same time, MSOs pursued horizontal integration to increase their bargaining power vis-a-vis programming and equipment suppliers and to take advantage of scale economies in managerial and technical expertise. They also expanded vertically into program production.

From 1985 to 1990 the number of cable systems in the United States rose 40% and total subscribership reached almost 50 million or 54% of American television households [31]. Over the same period, however, basic cable rates rose by over 60% or triple the rate of increase of the Consumer Price Index [34]. Consumer advocacy groups and cable franchising bodies, outraged by these rapid price increases and by evidence of poor customer service on the part of cable operators, appealed to Congress for reregulation of the industry. The cable television industry, however, defended its record, claiming that the price *per channel* of cable service had actually declined in real terms since 1985 and that the majority of customer service problems could be attributed to the adjustment pressures of explosive growth in subscribers over the period.

Nevertheless, industry critics maintained that cable operators continued to benefit from quasi-monopolistic conditions in their service territories, given the highly imperfect nature of substitute products and services; they also warned that continued vertical integration threatened to extend monopoly control to the programming arena as well. Proposals for policy reform ran

the gamut from the reauthorization of price regulation to quantitative restrictions on horizontal and vertical integration to the repeal of the ban on local telephone company competition in cable television. Some municipalities, taking matters into their own hands, threatened to issue competing franchises for cable service or to construct cable systems themselves in direct competition with existing franchisees [8,37].

Although cable policy reform bills were introduced in Congress in 1990, the likelihood of swift passage of cable legislation appeared remote, given legislators' inability to agree on whether the revival of restrictions or, alternatively, the opening up of competition would best serve the public interest. Yet in spite of these contrasting perspectives, one thing was clear: the cable television industry, long seen a plucky underdog struggling to achieve its potential, had by 1990 become the epitome of the haughty diva in the eyes of consumers and policy makers.

Conclusion

When viewed over its forty year history, policy-making with respect to the cable television industry can be seen as an on-going struggle to reconcile the potential benefits of advances in technology with the costs such advances impose on established interest groups. In this respect, the history of public policy in this sector of the economy mirrors the evolution of policy with respect to many other areas of the U.S. economy, including the transportation, public utility, telecommunications, and financial services sectors.

Through much of the 1950s, Community Antenna Television was a small-scale enterprise perceived by most observers as little more than an novel means for delivering broadcast signals to households that would otherwise go without television service. By the 1960s, however, CATV posed a growing threat to local broadcasters who feared that cable operators would choose increasingly to devote their limited channel capacity to the carriage of broadcast signals from high profile stations in major metropolitan markets. The FCC, charged by Congress with oversight of the broadcasting industry, in time issued rules that imposed substantial restrictions on the signals carried by cable systems in the name of preserving outlets for local self-expression and access to "free" television for those households for which cable was either unavailable or unaffordable.

By the early 1970s, the FCC and local franchise bodies had come to view the cable industry as a technological wonder ripe for exploitation and proceeded to harness these benefits through a wide array of additional regulatory prescriptions, including the mandating of minimum channel capacity, access channels, and other fees and services. However, this intrusive public policy regime came under increasing pressure from both the executive branch and the judiciary over the following decade and, in 1984, Congress provided the capstone to the deregulatory movement with the passage of the Cable Communications Act.

The performance of the cable television industry in the late 1980s raises difficult questions for the future of public policy. While growth in the number of systems, services, and subscribers has been spectacular, cable operators

appear to face only a limited degree of effective competition in their market areas, as reflected by changes in price levels and service quality during this period. In the end, the cable television industry may be forced to accept direct competition from telephone companies and other would-be franchisees or face the reimposition of regulations designed to curb the excesses of natural monopolies.

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