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Executive Summary

> There's nothing Tony Ammaturo would like better than to come home from a hard day's work, prop up his feet, pop open a beer and watch an uncut movie over a cable television channel.
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> Ammaturo, who lives in Philadelphia's Germantown section, can't do that, but his neighbor down the street can.
>
> His neighbor lives just across the city line in suburban Montgomery County, where local officials have done something Philadelphia officials have not been able to for almost 20 years--agree on a cable television franchise.[1]

Ammaturo's disappointment is not unique, for the growth of cable television is constrained by municipal officials in cities throughout the country. Where cable is permitted, municipalities extract services such as public access channels in exchange for use of rights-of-way. In recent years, as municipal demands have become increasingly onerous, cable operators have sought legislative relief. To this end, Senate Bill 66, passed in 1983, and H.R. 4103, approved by the House Commerce Committee on June 26, 1984, and currently before the full House, restrict aspects of municipal cable regulation. This paper briefly explores the franchising process, defines the appropriate scope of municipal cable regulation, and examines the likely effects of both bills.

The Process and Problems of Cable Franchising

> "I don't believe the first amendment -- and this is a harsh thing to say -- I don't believe it is the primary concern of cities." Seattle Mayor Charles Royer[2]

Cable franchising in most communities is premised upon the assumption that cable is a natural monopoly. Consequently, most municipalities intervene in the market and do not permit two cable companies to compete directly for subscribers. Instead, municipal officials select the "best" applicant for a government-conferred -- and government-protected -- franchise. Generally, communities begin the franchising process by studying community needs and then issuing a request for proposals, which describes the system and services the community desires, and asks the applicants to submit their financial qualifications, proposed construction plan, rates, and services. After bids are submitted, municipal officials engage in an evaluation of the bids which can be highly subjective and politicized. When a winner is selected, the municipality and successful applicant negotiate a franchising agreement.

Several aspects of cable franchising warrant discussion. Cities exercise monopoly power in the franchising process. Because they are awarding a generally de facto exclusive franchise, they are able to extract extensive nonrevenue-producing services, such as access channels, from the winning firm. In many instances governmental appetites for such services are nearly insatiable, and cable operators cater to those appetites in exchange for a government-protected franchise. This process generally takes place in an unreal economic environment. Drew Lewis, head of Warner Amex Cable Communications, attracted national attention recently by seeking alterations in franchise agreements to avoid multimillion dollar losses. "We promised more than we should have and charged less than we should have, and the bottom line is that we have a serious problem," he stated.[3] A cable consultant blamed both cities and cable companies for the economic problems of recently awarded franchises: "For the companies, the strategy was 'Let's get the franchise now and worry about the costs later.' For the cities, it was a process forced by politicians trying to look good -- pork barrel politics on a local level."[4]

In effect, the municipality and cable company form a partnership, with the city preventing other cable firms from entering the market. Some communities, however, can support competing cable companies or are developing to the point where head-to-head cable competition is possible. Municipal governments are generally unwilling to franchise additional cable companies, in part because competition will lessen the city's market power to demand pork barrel prizes like access channels. Moreover, a city with a significant stake in cable may try to impede the entry of competitors to cable such as SMATV, a video service for apartments.[5] One of the major lessons from the FCC's misguided efforts to protect over-the-air television from cable competition is that it is difficult to make "a sustainable and convincing case for protecting the public from competition."[6] Yet current municipal franchising practices create forces that, if unchecked, might seek to protect the public from competition but thereby inhibit innovation.[7]

Current franchising practices are also a highly inaccurate method of determining which applicant will supply the best mix of price and service. The bids in franchise proposals are based upon projections of market penetration and construction costs. Projections for both factors are combined to determine proposed subscriber rates. The proposed rate is a key factor in selecting the winning applicant. Often the actual market response and construction costs do not conform to the bid projections. For example, in Dallas, Warner Amex's actual construction costs may exceed the projected costs by more than $100 million.[8] When the projections are incorrect, subscription rates must be raised. Consumers may then question whether the city has selected the "best" bid.

Several aspects of cable franchising also violate the First Amendment rights of cable operators.[9] Municipalities commonly assess highly subjective attributes such as an applicant's "character" and the nature of the applicant's proposed programming service. This contrasts with the constitutional doctrine that subjective criteria may not be applied when deciding who uses public rights-of-way for expressive purposes. The evaluation of content also permits the government to discriminate among prospective speakers on the basis of their messages. If a cable applicant proposes nonobscene sexually oriented programming, city officials may select another applicant who offers more "appropriate" programming. This contrasts with the constitutional doctrine that the government must remain neutral in the marketplace and not interfere with the distribution of constitutionally protected expression. Finally, the conditions for granting a franchise often require that the operator surrender some of its freedom to determine the programming offered. Yet the doctrine of unconstitutional conditions requires that the government not grant or deny benefits on a basis that infringes on constitutional rights.

Neither S. 66 nor H.R. 4103 corrects the major problems of current franchising practice. Under the provisions of both bills, municipalities have the authority to demand access channels in exchange for use of public rights-of-way.[10] Although both bills prevent municipalities from requiring the provision of particular programs, neither bill prevents local authorities from basing their franchise awards upon subjective factors such as an applicant's character and the nature of the applicant's programming proposal.[11] Finally, although cities are empowered to grant multiple franchises, neither bill requires that they do so when the market is capable of supporting cable competition.[12]

When it favorably reported S. 66, the Senate Commerce Committee observed that the "degree and detail" of municipal cable regulation has increased to the point that "there is no longer a reasonable relationship between local regulation and cable systems' use of streets and rights of way."[13] Unfortunately, both S.66 and H.R. 4103 contain provisions that are not related reasonably to the use of rights-of-way. Before considering the problems created by the bills' franchise fee, rate regulation, and renewal provisions, this paper explores the scope of regulation of other forms of

communication using public rights-of-way.

Regulation of the Public Forum

I have argued that in contrast to the current municipal control of cable entry and extensive regulation, municipal regulation should be confined only to those aspects of cable installation and operation that affect public safety.[14] Instead of selecting among bidders for a single franchise, a city would franchise any firm willing and able to adhere to a construction schedule, comply with public safety requirements, and return streets to good condition. Cities would not be permitted to condition use of rights-of-way upon the surrender of editorial discretion, and criteria such as the nature of an applicant's programming would not be permissible for issuing or denying a franchise. Under this "open entry" policy, the structure of the market would depend upon natural economic forces rather than on the decisions of a city council.

This "open entry" policy is based upon doctrines established in cases involving the public forum, a special type of government property used for expression. Unlike other public properties such as military bases where the government may substantially control expressive activities, in the public forum the government's power is sharply limited. The limited scope of public forum regulation derives from several interrelated principles: first, streets are appropriate places for expression; second, public safety concerns may be protected only through precisely drawn regulations; third, public forum regulation must be content neutral; and fourth, subjective criteria may not be used in controlling access to the forum.

In a very influential opinion, Justice Roberts established the key First Amendment doctrine that certain public facilities are appropriate places for communication:

Wherever the title of streets and parks may rest, they have immemorially been held in trust for use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.[15]

Speakers thus have a constitutional right to facilities, such as streets, that have traditionally been open for expression. The public forum doctrine has also been expanded to include other types of public facilities, such as transit stations, when the expression is compatible with the primary function of the property. The right to use the public forum, however, is not absolute. Public safety concerns may be protected by the government. As Chief Justice Hughes stated, "Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses."[16] Since liberty can be abridged "in the guise of regulation," public safety regulations are constitutional only if they advance that interest in the least restrictive means possible.[17]

Central to the public forum is the doctrine that the forum is available to all, without reference to the content of their expression.[18] The government "may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities."[19] Similarly, when public safety mandates that licenses be used to control access to the forum, the licensing standard must be narrow, objective, and definite.[20] Subjective criteria, such as the character of the applicants or whether the proposed use of the forum will contribute to the public interest, are considered to be unconstitutional prior restraints. When officials have unbridled discretion over a forum's use, the Supreme Court finds the danger of censorship is too great to be permitted. "Our distaste for censorship -- reflecting the natural distaste of a free people -- is deep-written in our law."[21]

The Public Forum Doctrine and the Regulation of Newspaper Racks

All of the public forum principles are illustrated by the regulation of newsracks on city streets and in other public forums. USA Today is a unique national newspaper whose contents are transmitted via satellite to geographically dispersed printing plants. Unlike most newspapers which derive the bulk of their sales through subscriptions, only 30 percent of the nearly 1.2 million daily copies of USA Today are sold to subscribers. Sales through the seemingly ubiquitous USA Today vending machines and newsstands account for 67 percent of the publication's circulation.[22]

Government actions targeted at USA Today's vending machines threaten the economic viability of that enterprise.

In 1983 Gannett, the publisher of USA Today, challenged the New York City Metropolitan Transportation Authority policy governing the placement of newspaper vending machines in transit stations. The MTA had no precise, objective standards governing the licensing and regulation of newsracks. Instead, MTA employees possessed unfettered discretion to attach whatever conditions they preferred on license applicants. If the applicant did not accede to the MTA demands, it would not receive a license to place newsracks at MTA stations.[23]

The United States District Court for the Southern District of New York broke no new ground in finding the MTA practices unconstitutional. The district court drew upon settled principles which establish that the distribution of newspapers via newsracks placed in public forums is protected by the First Amendment,[24] vague licensing and regulatory standards are unconstitutional,[25] and government regulation of newsracks must be confined to content neutral time, place and manner regulation.[26]

Since the placement of newsracks did not interfere with the primary function of transit stations, the property was considered by Judge Connor to be a public forum.[27] Consequently, Gannett had a First Amendment right of access. This finding, however, did not mean that MTA was powerless to regulate the placement of the newsracks; reasonable content-neutral time, place, and manner regulations were permissible so long as the regulations directly advanced a significant interest in the least restrictive means possible.[28]

Judge Connor's remarks on the licensing process are of special importance. Not only were the vague standards an unconstitutional prior restraint, but the process of bargaining for access to the public forum was constitutionally defective:

While the process of negotiation may be a proper, or indeed preferred procedure for the MTA to deal in its proprietary capacity with other commercial vendors, it is an unacceptable practice for regulating the exercise of a constitutionally protected right. One should not have to bargain individually for the privilege of exercising a right guaranteed him by the Constitution of the United States.[29]

It is striking to observe that everything found unconstitutional in the regulation of newsracks is present in current municipal cable regulation. Why is there such a disparity in the regulation of these two media?

Cable's Use of Public Rights-of-Way

Despite all the rationales proffered to justify municipal regulation of cable, the true source of municipal authority stems from the power to regulate the use of public rights-of-way. As described above, the government's power to regulate the use of rights-of-way for other means of communication is sharply limited.

The Tenth Circuit Court of Appeals sought to distinguish cable use of rights-of-way from newspaper use in the following manner:

To disseminate information, a newspaper need not use public property in the same way a cable operator does. A newspaper may reach its audience simply through the public streets or mails, with no more disruption to the public domain than would be caused by the typical pedestrian, motorist, or user of the mails. But a cable operator must lay the means of his medium underground or string it across poles in order to deliver his message. Obviously, this manner of using the public domain entails significant disruption, especially to streets, alleys, and other public ways. Some form of permission from the government must, by necessity, precede such disruptive use of the public domain. We do not see how it could be otherwise. A city needs control over the number of times its citizens must bear the inconvenience of having its streets dug up and the best times for it to occur. Thus, government and cable operators are tied in a way that government and newspapers are not.[30]

This analysis warrants criticism. Central to the analysis is the belief that newspaper distribution does not significantly disrupt the public domain or inconvenience the citizenry. Yet the Tenth Circuit only addresses the disruption and inconvenience caused by construction and ignores the effects of newspaper delivery. In most cities, newspapers cause litter that must daily be removed from city streets, sidewalks, and the like; second, old newspapers must be collected

and recycled or disposed of at landfills; and third, newspaper delivery vehicles create wear and tear on city streets and contribute to traffic congestion. When measured in economic terms, these effects are significant. One study found that the public-sector burden on the city of Berkeley, California, and its taxpayers attributable to newspapers was in excess of $1,000,000. In contrast, the costs attributable to the cable firm were $30,000.[31] To claim that only cable "disrupts" and "inconveniences" the public and ignore the effects of newspaper delivery is myopic.

Further, cable's disruption of rights-of-way takes place only for limited periods of time in limited areas of the community.

Once the cable is installed, rights-of-way are not disrupted and the public is not inconvenienced. If the need for some form of cable regulation stems from disruption of rights-of-way, then logically government oversight should cease when construction ceases. The necessity of public safety regulations does not mandate the regulation of any other aspect of the communications activity, whether the activity is a parade, street assembly, distribution of a newspaper, or distribution of information via cable television.

It is without question that some form of permission must accompany the installation of a cable system. Yet the Tenth Circuit commits two fallacies in concluding that this fact lessens the First Amendment rights of the cable operator. The first fallacy is that cable is unique in requiring some form of permission before distribution may occur. Other communication users of rights-of-way require permission. For example, as the Gannett case reveals, the government may license newsracks if narrow, objective criteria are employed. Newspaper delivery vehicles and drivers are licensed. Further, whether the newspaper contains obscenity determines whether it may be mailed. All of these are varying forms of "permission" governing the distribution of a newspaper. The second fallacy is that permission to use the rights-of-way somehow lessens First Amendment protections. The public forum doctrine establishes that when a license is required, constitutional protections do not evaporate or decrease.

The Tenth Circuit's inability to apply settled public forum doctrine to cable is perhaps explained by the perception that cable does not have a tradition of nearly absolute freedom from government control.[32] This is a dangerous idea that may lead to several adverse consequences. If tradition protects a medium, then the government may seek to regulate intensively a new medium to prevent the development of a tradition of full First Amendment freedom. When society permits new media to be closely regulated, the rationales to buttress such regulation may be applied to traditionally unregulated media that acquire the attributes of regulated media. For example, the second-class protections of broadcasters stem from the premise that the use of a government-allocated scarce resource mandates lessened First Amendment protection. This rationale can be easily applied to the newspaper industry. At several points in recent years this country has faced the possibility of government allocation of scarce fuel supplies. In such a situation, would the government be able to impose "public interest" regulations on newspapers in exchange for their use of a scarce, governmentally allocated resource? The pressures for regulation under such circumstances may overwhelm the "tradition" of newspaper freedom. The First Amendment's hostility to government regulation of expression should protect a traditionally unregulated medium when its circumstances change and also should protect new communications media that have yet to develop a tradition of freedom.

There is no compelling reason why cable should be subject to any municipal regulation that is not narrowly designed to protect public safety. Yet, both S. 66 and H.R. 4103 contain provisions that far exceed this boundary.

The First Amendment and Fees

Both S. 66 and H.R. 4103 permit local governments to require cable operators to pay franchise fees, limited to 5 percent of gross revenues. Because the franchise fees may exceed regulatory costs and thus be considered revenue-raising instruments, they are at odds with constitutional principles.

The Supreme Court has found certain financial requirements imposed as a condition of the right to speak are unconstitutional prior restraints. In the Court's view, municipal license taxes directed at First Amendment activities are as "potent as the power of censorship...."[33] The only fees considered constitutional in the regulation of First Amendment activity are those that reasonably defray administrative expenses.[34] Courts closely scrutinize the relationship between the fee and regulatory costs, and the government bears the burden of establishing that the fee is precisely related to the costs incurred.[35]

A few examples of the necessary relationship between the fee and the cost of regulation illustrate this constitutional principle. In Moffett v. Killian, a federal district court held that a state could impose fees on lobbyists to cover the cost of collecting, filing, copying, and distributing information relating to their activities, but could not "require payment of an amount in excess of that actually needed for the purpose."[36] Since the fees totaled nearly $18,000 and the regulatory expenses were only $4,103.13, the fee was declared an unconstitutional tax. In Baldwin v. Redwood City, the Ninth Circuit Court of Appeals found that a $1.00 fee for municipal inspection of the size of temporary signs was arbitrary and therefore unconstitutional. The Ninth Court stated:

The only aspect of a temporary sign subject to inspection...is its size, which can be verified in a few moments with a tape measure. A $1.00 fee for checking the size of single poster might be reasonable; but ...a $500 fee for inspecting 500 identical posters would be essentially arbitrary, bearing no relationship to the cost.[37]

Most recently, in the Gannett case previously discussed, the MTA sought to condition the placement of newsracks in transit stations on the payment of a $150 fee per station. The MTA freely admitted that the fee was a revenue-raising mechanism not tied to any administrative costs resulting from placement of the racks. The district court concluded:

While the Court recognizes that defendants [MTA] seek to maximize the value of their resources and to capitalize upon the commercial value of the station locations to newspaper distributors for the purpose of partially subsidizing commuter transportation, such a plan is impermissible when the area sought to be exploited is a public forum.[38]

Cable Franchise Fees

"We're trying to extort a little money out of the cable industry to do business." Thomas Zych, President St. Louis Board of Aldermen[39]

Former New York City Mayor John Lindsay expressed a commonly held attitude when he stated that cable franchises are "urban oil wells under our city streets" and insisted that cities "have the right to develop public income from that asset to be used for the public good."[40] Municipal officials find franchise fees attractive because politically unpopular tax increases can be avoided or reduced when revenue raising is hidden in the cable subscriber's bill.

It is the public, not the cable companies, that ultimately pays the price of revenue raising from franchise fees. Since fees are passed on to the consumer in the form of higher subscription rates, these rates deter some households from subscribing to cable. And when fewer households subscribe, the cost of service per subscriber increases; subscription prices must be increased enough to cover the higher service costs and the fee. Thus, a 3 percent franchise fee may actually raise the price of cable service by 4 percent.[41]

During the early 1970s the FCC found that many municipalities were inhibiting cable's development with excessive franchise fees that ran as high as 35 percent of gross revenues. Currently, fees are generally limited to 3 percent, but the FCC permits a fee of up to 5 percent if the additional funds are necessary to accomplish legitimate regulatory purposes.[42] Despite the FCC's rules, approximately 4 percent of all cable systems pay fees that exceed the legal limit.[43] The illegal fees are not challenged because of a fear of antagonizing the local government body that will one day determine whether the franchise is renewed. For example, Peoria, Illinois, sought a 10 percent franchise fee as a means of raising revenue. The cable operator, GECCO, claimed to be indifferent to paying the 10 percent fee. Judge Posner of the Seventh Circuit clearly grasped the nature of the relationship between the cable operator and the city government when he observed:

We are not so naive as to suppose that GECCO really is indifferent between paying 10 percent of its gross revenues to the City of Peoria and 3 percent; no doubt GECCO is cooperating in the city's efforts to get the [FCC] rule waived in order to increase the probability that the city will renew its franchise, which expires in four years.[44]

To discourage the use of cable as a source of revenue, both S. 66 and H.R. 4103 limit franchise fees to 5 percent of gross revenues.[45] But the fee provisions of the bills are still fundamentally flawed. First, the bills assume that 5 percent fees will accurately reflect the cable-related costs all municipalities will incur. Obviously, the cost of regulation will vary markedly from city to city. Second, the bills assume that the costs of regulation will be the same during each

year of the franchise. Regulatory costs during construction, however, will be higher than when the system is fully installed. Third, there is no requirement that a municipality justify the necessity of the fee. If cable-related expenses are covered by 2 percent of the cable operator's revenues, the bills permit the municipality to collect a 5 percent fee. The additional 3 percent above the costs of regulation can be viewed as a tax imposed as a condition of engaging in expression. Fourth, there is no requirement that municipalities use the fee for cable-related expenses. Consequently, both bills permit fees to be used as revenue-raising instruments.

The argument here is not that cable operators should be exempt from franchise fees or from generally applied forms of taxation. Rather, the argument is that franchise fees must be justified by a municipality as covering only cable-related expenses.[46] Further, any 'taxation" of cable must be evenly applied to other forms of business. As the Supreme Court stated in 1983, differential tax treatment of the press "gives the government a powerful weapon" against the press.[47] Special revenue-raising mechanisms aimed solely at the press present such potential for abuse that they are presumptively unconstitutional.[48] The reasoning of the Court in that case is no less applicable in the setting of cable television.

Although the provisions of both S. 66 and H.R. 4103 permit cable operators to list the franchise fee on subscribers' bills, it is highly questionable that this will create pressure for local governments to lower franchise fees. It is certain, however, that the increased franchise fees permitted by both bills will raise the cost of cable service and deter some households from subscribing. Also, cable operators will be forced to pay a tax as a condition of engaging in expression. This is contrary to the laws affecting any other form of First Amendment activity.

Rate Regulation

> "To be blunt, rate regulation gives us leverage." Frank Grief, Mayor's Office of Cable Communications, Seattle[49]

Municipalities argue that rate regulation is necessary because cable operators are monopolists who can set subscription prices "largely free of all market constraints."[50] The Senate Commerce committee, however, found that many cable systems face competition from a variety of sources,[51] and pro- hibited rate regulation of "basic' service for new franchises awarded in markets where four over-the-air television signals are available.[52] H.R. 4103 prohibits rate regulation for new franchises awarded in markets that the FCC deems to have effective competition.[53] Both bills grandfather rate regulation in all existing franchises, for five years under S. 66 and four years under H.R. 4103, and both allow rate regulation beyond those periods in certain markets. Where rate regulation is permitted, municipal oversight will increase because both bills define "basic" service more expansively than current FCC regulations, which were reaffirmed in July 1984. Also, the rate regulation provisions will permit local governments to influence the programming decisions of cable operators.

Rate regulation in practice often has little to do with preventing monopoly pricing. City councils have little expertise in detecting monopolistic profits; studies indicate that in a recent two-year period, 91.2 % of all rate increase requests were granted in full,[54] and that the rates in deregulated communities were only slightly higher than those charged where rates were regulated.[551 The central importance of rate regulation to municipalities is its use in enforcing the franchise agreement. One municipal official stated that at "rate increase time a city can demand the access channels, the upgrading, or the two-way service an operator had promised, in exchange for granting an increase."[56] Cable rates are not regulated like public utilities; rather, they are negotiated.[57]

Rate regulation does more than insure that cable operators fulfill their franchise agreements. On its dark side, municipal officials entangle themselves in the programming decisions of the cable operator. Rate regulation is inexorably tied to control of content because regulation of rates without some reference to the quality of the product being offered is meaningless. Judge Posner wrote that if price alone is regulated, "the cable monopolist would have a strong incentive to reduce the quality and hence the cost of his programs in order to recapture some of the monopoly profits eliminated by the price control."[58]

The relationship between regulation of price and programming is illustrated by recent events in Boston, where the cable operator attempted to reconfigure its $2 a month basic service. Popular and costly services such as CNN, ESPN, and the USA Network were to be moved from the $2 tier and replaced by less costly services such as the National

Jewish Network, the Eternal Word Network, and the Christian Broadcasting Network. Although the rate would remain the same, the mayor of Boston opposed the change because he saw it as a "reduction in service that would hurt the consumer."[59] The rate was obviously secondary to the issue of program quality. Cable is the only form of mass communication subject to this type of government regulation.

Rate regulation can have coercive effects that endanger the First Amendment. A city council might find that politically unpopular rate increases become politically defensible when increased service offerings are part of the rate increases. It is common for rate increases to be granted only if a particular program service, specified by city officials, is added to the system's offerings. Where religious programming is mandated by a local government, the constitutional separation of church and state is violated. Even where secular programming is prescribed by the government, the marketplace of ideas is violated by the lack of government neutrality.

Since rate regulation takes place in a political forum, pressure can be exerted on city officials to grant rate increases only if certain "offensive" programs are not carried. Well-organized groups that fight sexually oriented cable programming are a highly vocal political force. In response to these groups, franchising authorities have coerced cable operators into "unholy alliances" that deny interested viewers access to constitutionally protected material.[601 Absent government coercion, a cablecaster's decision not to carry the Playboy Channel is permissible because the constitutional guarantee of free speech is a guarantee only against abridgment by the government. When the cablecaster is forced by the government to deny access to the Playboy Channel, such action is no longer merely "private" and violates the First Amendment.

Both S. 66 and H.R. 4103 contain provisions that may lessen the coercive effects of rate regulation. Section 607(f) of S. 66 prohibits government regulation or restriction of cable services, and section 613 prevents governments from requiring the provisions of particular programs. Section 624(f) of H.R. 4103 prevents governments from regulating the content of cable services. This section and section 607(f) of S. 66 are curious, because rate regulation without reference to programming content is meaningless. Moreover, none of these provisions will eliminate entirely the backroom deals between local governments and cable operators that affect cable content. Some cable operators probably will not challenge such illegal deals for fear of reprisals at renewal time. Perhaps most important, neither bill eliminates the chilling effect created by rate regulation.

This chilling effect occurs when government officials can deny a rate increase in retaliation for programs critical of those officials. Our society has a profound commitment to the principle that "debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[61] Furthermore, the Supreme Court is critical of government economic policies that blunt the vigor of the press.[62] Yet cable rate regulation allows government officials, the subjects of a cablecaster's news programs, to affect the economic well-being of the cable system. The chilling effect under S. 66 and H.R. 4103 may be acute, for neither bill specifies the standards for denying rate increases; municipal governments might act in an arbitrary manner.[63] One cable owner whose systems provide coverage of local government described the likely effects of H.R. 4103 in these terms: "Forget about journalistic muscle. It will be more important that we not offend those in local power if we want to save our business."[64] This is hardly the result the First Amendment is designed to foster.

Franchise Renewals

> "The real enforcement ultimately is, do you or do you not have the authority to renew or not renew?"

New York Mayor Ed Koch[65]

As franchises begin to expire during the 1980s, the attention of the cable industry will turn from winning new franchises to franchise renewal. For cable operators, franchise renewal may be terrifying because some municipalities have arbitrarily decided to replace the existing operator. The president of one of the largest cable companies described the renewal process this way:

[T]he refranchise process has become inordinately costly and politically motivated. It is one of the most disturbing examples of a low-productivity exercise available in today's economy.

An astonishing truth in the current refranchise process is that a cable operator who provides outstanding service to the community may lose his franchise at the whim of the franchising authority. There is no check on arbitrary and capricious renewal decisions.[66]

Even when municipalities do not deny renewal, they often demand increased facilities and services from the cable operator and use the threat of nonrenewal to enforce the existing franchise. The authority to not renew a franchise gives local government "extortionate leverage" over the cable operator.[67]

There are several detrimental consequences of the current refranchising environment. First, many technical components of the system often must be replaced during the last years of the franchise. If there is a high degree of uncertainty about renewal, banks may be unwilling to finance improvements, or the cost of borrowing money may be excessive. In these circumstances a cable operator may defer improvements until the franchise is renewed. In the interim, the quality of service is reduced. Second, since a municipality may arbitrarily deny renewal, the cablecaster will seek to provide programming that does not offend municipal officials. Although the Supreme Court believes that the press serves as a powerful antidote to abuses of power by the government and also as a means of keeping governmental officials responsible to the citizenry, it is highly unlikely that cablecasters facing the threat of nonrenewal will fulfill this function.[68] Finally, the conditioning of renewal upon the provision of certain facilities such as access channels interferes with the First Amendment rights of cable operators.

Both bills seek to stabilize the refranchising process and contain elaborate procedural requirements. The focus on due process, however, does not eliminate the substantive problems posed by two of the standards for renewal set forth in these bills: one, whether the cable operator has substantially complied with the material terms of the existing franchise and with applicable law;[69] and two, whether the operator's proposal to meet future needs of the community is reasonable.[70]

The question of whether the operator has complied substantially with the franchise and applicable law raises provocative First Amendment issues. Both bills permit franchise agreements to specify that content which is unprotected by the First Amendment shall not be provided.[71] Renewal could be denied if a cable operator was convicted of transmitting unprotected expression such as deceptive commercial speech, libel, invasion of privacy, or obscenity. This policy goes against the precedent established by the landmark prior restraint case Near v. Minnesota.[72] Near and subsequent cases stand for the proposition that even where a speaker can be shown to have disseminated unprotected expression in the past, he cannot be prospectively barred from the exercise of First Amendment rights. The First Amendment requires precision of regulation; the remedy for obscenity is a criminal conviction and an injunction against the particular expression found to be obscene. To add nonrenewal of a cable franchise to these penalties sweeps too broadly and conflicts with constitutional precedent.

The second criterion evaluates whether the operator's proposal to upgrade the system is reasonable. This places the operator in a precarious position because the municipal government defines what is "reasonable."[73] The subjectivity in the interpretation of reasonableness may be sufficient to mask motives of revenge for views expressed on the cable system. Thus, if the possibility of forced access to a small number of a newspaper's columns is sufficient to create an impermissible chilling effect, it takes no great leap of imagination to perceive the intimidating nature of the renewal process established under both bills.[74]

When the cable operator disagrees with the municipal definition of reasonableness, there are three courses of action: one, agree to meet the municipal demands for increased facilities, such as access channels, in order to get the franchise renewed; two, refuse to meet the demands and sell the system; and three, challenge the municipality's definition of reasonableness in court. None of these courses is attractive, but the third poses some special hazards. Under H.R. 4103, the cable operator has the burden of proving that the municipality erred in its definition of reasonableness.[75] The difficulty posed by this burden of proof lowers the probability that litigation will be successful. Even if the cable operator is successful in court, he then faces a potentially hostile municipal government that may seek to retaliate by denying rate increases or increasing franchise fees. In light of the hazards of litigation, the most likely course of action for cable operators will be to comply with municipal demands.

The reasonableness provision is also dangerous because cable operators who have substantially complied with the

terms of the existing franchise and are legally, financially, and technically qualified to offer continued service, may face nonrenewal solely because their "upgrade" proposal is considered to be unreasonable.

The renewal provisions of both bills create a procedural facade that does not temper the power wielded by municipal governments that have the authority not to renew a franchise. The criteria for renewal may turn out to be, as one cable operator stated, a "black hole."[76]

Conclusion

> "The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well- meaning but without understanding."

Justice Brandeis[77]

The framers of the First Amendment rejected the theory of the Tudor and Stuart monarchs that protecting the welfare of society justified control of the press, yet today municipalities restrict the freedom of cable operators ostensibly to protect the public welfare. Despite all the rationales that may be advanced to justify these restrictions, the truly animating force in municipal cable policy is a fear of freedom. The framers of the First Amendment, however, did not fear the effects of freedom, for as Justice Brandeis observed, "Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty."[78]

Today's municipal regulation of cable limits the information the public receives, and the two bills currently before Congress won't remedy this. If cable is to fulfill its potential as a means of information, it must be freed from all regulations that are not narrowly tailored to protect public safety.

FOOTNOTES

[1] Michael Sangiacomo, "Politics is Jamming the Picture for Cable TV Firms," Atlanta Journal and Constitution, September 25, 1983, p. 9A.

[2] U. S. Congress, House, Diversity of Information: Hearings Before the Subcomm. on Telecommunications, Consumer Protection and Finance of the Comm. on Energy and Commerce, 97th Cong., 1st sess., 1981, p. 199.

[3] Laurie Cohen, "Cable-Television Firms and Cities HaggLe Over Franchises That Trail Expectations," Wall Street Journal, December 28, 1983, p. 34.

[4] Ibid.

[5] See generally Earth Satellite Communications, Inc., 55 RADIO REGULATION 1427, 1433 (1983) (FCC concludes that state or local government control of entry will impede SMATV growth).

[6] Stanley Besen and Robert Crandall, "The Deregulation of Cable Television," Law and Contemporary Problems 44 (1981):78.

[7] Irwin Stelzer,"The Economics of Cable Franchising" (London: National Economic Research Associates, International, 1983), pp. 14, 26.

[8] Cohen, p. 34.

[9] For an elaboration of the themes presented here, see William Lee, "Cable Franchising and the First Amendment," Vanderbilt Law Review 36 (1983): 867.

[10] S. 66, 98th Cong., 1st sess., sec 606 (a) (1983); H.R. 4103, 98th Cong., 2d sess., sec. 611 (b) (1984). Unlike S. 66, section 612 of the House bill contains a provision for leased access channels. For a discussion of the problems of leased access, see Stanley Besen and Leland Johnson, An Economic Analysis of Mandatory Leased Channel Access

for Cable Television Santa Monica: Rand Corporation, 1982).

[11] S. 66, sec. 613 (a); H.R. 4103, sec. 624 (b) (1).

[12] S. 66, sec. 604 (2); H.R. 4103, sec. 621 (a) (1?.

[13] S. Rep. No. 67, 98th Cong., 1st sess. 6 (1983).

[14] Lee, pp. 923-26. For a similar approach to the First Amendment rights of cable operators, see George Shapiro, Philip Kurland, and James Mercurio, "CableSpeech' (New York: Harcourt Brace Jovanovich, 1983).

[15] Hague v. C.I.O., 307 U.S. 496, 515 (1939).

[16] Cox v. New Hampshire, 312 U.S. 563, 574 (1941).

[17] Hague v. C.I.O., 307 U.S. 496, 516 (1939).

[18] Of course certain categories of unprotected expression such as obscenity may be excluded from the public forum. See Police Dept. v. Mosley, 408 U.S. 92, 103 (1972) (Chief Justice Burger concurring). In limited forums, such as school board meetings, the government may engage in content regulation that limits the topics but not the viewpoints discussed. See Perry Educ. Assn. v. Perry Local Educators Assn., 103 S. Ct. 948, 955 (1983).

[19] Police Dept. v. Mosley, 408 U.S. 92, 96 (1972).

[20] Shuttlesworth v. City of Birmingham, 394 U.S. 147, 151 (1968).

[21] Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 553 (1975).

[22] "Gannett's USA Today Has Circulation Audited at Close to 1.2 Million," Wall Street Journal, June 25, 1984, p. 6.

[23] Gannett Satellite Information Network v. Metropolitan Transp. Auth., 10 Med. L. Rptr. 1308, 1314 (S.D.N.Y. 1984).

[24] See, e.g., Southern New Jersey Newspapers, Inc. v. New Jersey, 542 F. Supp. 173 (D. N.J. 1982); Philadelphia Newspapers Inc. v. Borough of Swathmore, 381 F. Supp. 228 (E.D. Pa. 1974).

[25] See, e.g., Minnesota Newspaper Assn. v. City of Minneapolis, 9 Med. L. Rptr. 1234 (1982).

[26] Westchester Rockland Newspapers Inc. v. Village of Briarcliff Manor, 5 Med. L. Rptr. 1696 (1979); Kash Enter. Inc. v. City of Los Angeles, 138 Cal. Rptr. 53, 562 P. 2d 1302 (1977).

[27] 10 Med. L. Rptr., 1313.

[28] Ibid.

[29] Ibid., 1314-15.

[30] Community Communications Co. v. City of Boulder, 660 F. 2d 1370, 1377--78 (1Oth Cir. 1981).

[31] "Public Sector Costs For Newspapers and Cable TV in the City of Berkeley" (study prepared by Brobeck Corporation, Berkeley, for Farrow, Schildhause, Wilson & Rains, 1983), p. 1.

[32] 660 F.2d at 1379. The Tenth Circuit considered cable's traditional lack of freedom, in combination with its use of rights-of-way and natural monopoly tendencies to possibly justify diminished First Amendment protection. For criticism of this view, see Lee, "Cable Franchising and the First Amendment," pp. 878-98; Jordan Stanzler, "Cable Television Monopoly and the First Amendment," Cardozo Law Review 4 (1983):219-28.

[33] Murdock v. Pennsylvania, 319 U.S. 105, 113 (1943).

[34] Cox v. New Hampshire, 312 U.S. 569 (1941).

[35] See, e.g. Wendling v. City of Duluth, 495 F. Supp. 1380 (D. Minn. 1980); Bayside Enter., Inc. v. Carson, 470 F. Supp. 1140 (M.D. Fla. 1979).

[36] 360 F. Supp. 228, 232 (D. Conn. 1973).

[37] 540 F. 2d 1360, 1371 (9th Cir. 1976).

[38] 10 Med. L. Rptr. at 1315.

[39] Robert Goodrich, "Urges Cities to Back Cable Bill," St Louis Post-Dispatch, Sept. 14, 1983, p. 3A.

[40] Albin Krebs, "Cities Reassured on Cable-TV Rights," New York Times, February 6, 1973, p. 73.

[41] William Shew, "Costs of Cable Television Requirements" (study prepared by National Economic Research Associates, White Plains, for the National Cable Television Association, 1984).

[423 47 C.F.R. sec. 76.31 (1982). See generally Cable Television Report and Order, 36 FCC 2d 143, 209-210 (1972).

[43] Cable Television Franchise Fee Compliance, 55 RADIO REGULATION 896 (1984).

[44] City of Peoria v. General Electric Cablevision Corp., 690 F. 2d 116, 119 (7th Cir. 1982).

[45] S. 66, sec. 608 (1983); H.R. 4103, sec. 622 (1984). See generally S. Rep. No. 67, 98th Cong., 1st sess. 25 (1983). The Senate Commerce Committee feared that without a check on franchise fees, municipalities might be tempted to solve their fiscal problems by a discriminatory tax not levied on cable's competitors.

[46] Cable franchise fees that are not for purely revenue raising purposes are commonly assessed for two purposes, compensation for the costs of necessary regulation. Charles Ferris, Frank Lloyd, and Thomas Casey, Cable Television Law vol. 1 (New York: Matthew Bender, 1983), pp. 13-49. For reasons that are too elaborate to set out here, I question whether it is constitutional to require cable operators to pay for anything other than the costs of necessary regulation. Even if cable companies can pay "rents" and the costs of regulation, it is highly likely that such fees in most communities would be less than the 5 percent fee permitted under S. 66 and H.R. 4103.

[47] Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue, 103 S. Ct. 1365, 1372 (1983).

[48] Ibid., 1375.

[49] U. S. Congress, Senate, Cable Television Regulation: Hearings Before the Comm. on Commerce, Science, and Transportation, 97th Cong., 2d sess., 1982, pt. 1, p.8.

[50] Nicholas Miller and Alan Beals, "Regulating Cable Television," Washington Law Review 57 (1981): 100.

[51] S. Rep. No. 67, 98th Cong., 1st sess. 20 (1983).

[52] S. 66, sec. 607 (d) (1). Both S. 66 and H.R. 4103 define "basic" cable service in a more expansive manner than current FCC regulations. See CommunitY Cable TV, Inc., 54 RADIO REGULATION 1351 (1983). The FCC reaffirmed its rate regulations in July 1984. Broadcasting, July 16, 1984, p. 29.

[53] H.R. 4103, sec. 623 (b) (1).

[54] "Studies Dispute Need for Regulation," CableVision, April 23, 1984, pp . 47-48.

[55] Pricing Flexibility and Consumer Satisfaction: Rate Deregulation Works, (Washington, D.C.: National Cable Television Association, 1984). See also Besen and Johnson, An Economic Analysis of Mandatory Leased Channel Access for Cable Television, p. 42 (rate regulation has had little effect on cable prices).

[56] David Stoller, "The War Between Cable and the Cities " Channels, April/May 1982, p. 36.

[57] Alfred Kahn and Irwin Stelzer, "Communications Regulation in New York State," (study prepared by National Economic Research Associates, White Plains, for Gov. Hugh Carey, March 25, 1981), p. 9.

[58] Richard Posner, "The Appropriate Scope of Regulation in the Cable Television Industry," Bell Journal of Economics and Management Science 3 (1972): 107.

[59] "Boston Mayor Halts Reformat," CableVision, January 23, 1984, p. 18.

[60] "Tricky Questions Abound Over Cable's First Amendment Rights," Broadcasting, December 19, 1983, pp. 56, 60.

[61] New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

[62] Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue, 103 S. Ct. 1365 (1983).

[63] Section 623 of H.R. 4103 does require that the FCC establish standards for rate regulation. If the agency adopts subjective standards, municipal governments may be able to mask their true motives for denying a rate increase.

[64] Multichannel News, June 18, 1984, p. 29.

[65] Options for Cable Legislation, p. 220.

[66] Ibid., 223.

[67] Ibid., 266.

[68] Mills v. Alabama, 384 U.S. 214, 219 (1966).

[69] S. 66, sec. 690 (a) (1); H.R. 4103, sec. 626 (c) (1) (A).

[70] S. 66, sec. 609 (a) (3); H.R. 4103, sec. 626 (c) (1) (D).

[71] S. 66, sec. 607 (h); H.R. 4103, sec. 624 (d) (1).

[72] 283 U.S. 697 (1931).

[73] Although S. 66 permits a hearing before an independent examiner, it does not require such a proceeding. H.R. 4103 requires proceedings that feature due process but does not refer to an independent examiner. City governments place such high importance on cable franchise decisions that it is unlikely they will permit an independent examiner to render decisions on renewal.

[74] Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974).

[75] H.R. 4103, sec 626 (3) (2) (B).

[76] "House Commerce Panel Addresses Cable Issues," CableVision, June 25, 1984, p. 15.

[77] Olmstead v. United States, 277 U.S. 438, 479 (1928) (Justice Brandeis dissenting).

[78] Whitney v. California, 274 U.S. 357, 375 (1927) (Justice Brandeis concurring).

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