On the stump. Congress should revisit the Cable Communications Policy Act of 1984. That is the message that Preston Padden, president of the Association of Independent Television Stations, is taking on the road. It was the theme of speeches he made last week in Cincinnati before the National Association of Telecommunications Officers and Advisers, an organization representing local cable and telephone regulators, and in Indianapolis before the Indiana chapter of American Women in Radio and Television.

In INTV's judgment, he told the regulators, Congress must decide what cable is. "If Congress determines that cable is a monopoly service, then it must re-regulate the industry to insure against abuses of that monopoly status. If, on the other hand, the Congress finds that cable can become a competitive medium, then it must strip away the monopoly privileges and subsidies currently contained in the law so that cable will compete in the marketplace on a playing field which is not tilted against the other players."

Furthermore, Congress must move quickly, Padden said. "The cable giants are expanding horizontally through acquisition at an alarming rate," and what's more, he said, cable is also "moving rapidly to integrate vertically into programing ventures."

These investments combined with the advantages cable has gained through legislation and in the courts, Padden asserted, have put cable in an "unprecedented position to flex its monopoly muscle, exclude competitors and advance the interests of its own programing channels." He urged the local regulators, who are affiliated with the National League of Cities, to join independent television in persuading Congress to revisit the cable act.

Padden's speech before the AWRT audience was equally critical of cable. "Cable's duplicity is unbounded. Cable fought a massive legislative battle for the right to charge consumers higher prices without rate regulation by local governments. And it risked the enmity of important legislators by scrambling all cable program services to protect the exclusivity of its product," he said. But when it came to the FCC's proposal for "a modest proceeding recently to assure the exclusivity of broadcasters' programing" (referring to a move to reinstate the FCC's syndicated exclusivity rules), the cable industry, he said, quickly labeled the proposal "anticonsumer." Cable, he continued, is to consumers "what the Boston Strangler represented to the ladies of Boston."

ment denies government any power to restrict the public dissemination of indecent material in any circumstances. The state relied heavily on the *Pacifica Foundation* case, in which the Supreme Court in 1978, in a 5-4 decision, held that the commission could regulate the broadcast of indecent material without violating the First Amendment. Utah's position was supported by 10 other states in a friend-of-the-court brief.

The cable interests and viewer groups that had brought the case argued that the law should be overturned simply because it was constitutionally vague. "It offers no guidance as to applicable standards in an area where precision of regulation is required," they said, in opposing the appeal. They also cited the conclusion of the district court, affirmed by the appeals court, that Congress, in the Cable Act, had preempted Utah's ability to control the content of cable programing. And they rejected the argument that *Pacifica* could provide a legal basis for action against cable programing. They noted that cable systems are not subject to FCC licensing and are subscribed to by those seeking a greater variety of programing than is available "from governmentally licensed broadcasters" and whose defining characteristic is virtually unlimited choice.

The statute represents the fourth time the state or one of its subdivisions had attempted to enact legislation banning indecency on cable television. All attempts have now been declared unconstitutional. And the one struck down by the Supreme Court last week was passed by the legislature over the governors's veto.

The National Cable Television Association expressed pleasure with the court's action. "This case underscores the futility of legislatures trying to use so-called 'indecency' statutes to prevent people from watching in their own homes what they can see in their neighborhood movie theaters," said NCTA president James Mooney. "What's involved here is not obscenity; it's mainstream movies for grown-ups who want to make their own judgments about what they can watch."

Despite the victory of the cable interests, there was no certainty some state or local community would not attempt to draft another statute banning "indecent" cable programing that would pass constitutional muster. The Utah attorney general, David Wilkinson, expressed the view that most states would wait to see "what changes take place on the court in the next two or three years" before making another such effort. Rex E. Lee, the former solicitor general who represented the state in the case, noted that states could, under the ruling, ban obscene material.

But there were those who thought the decision would make states consider such legislation long and hard—and not only because of the obvious difficulty of prevailing in court. (The Utah case, lawyers noted, followed one in which the 11th circuit had thrown out an ordinance enacted by Miami to ban cable programing deemed indecent.)

George Shapiro, the counsel for one of the plaintiffs in the case, Home Box Office, noted that the district court has ruled that the plaintiffs are entitled to reimbursement of legal costs by the state.

And now that the state has exhausted its possible judicial remedies, a hearing on the amount that the state will be required to pay the plaintiffs—Community Television of Utah and viewer groups, as well as HBO—will be held. And Utah is understood to have spent $250,000 on its own legal fees. □

FCC lawyers see appeals court defeat as victory too

Procedural setback in decision on authority over cable signal requirements seen as upholding FCC's authority over decisions by local governments

An FCC order prohibiting preempting local franchising authorities' power to adopt technical requirements governing the signal quality of cable television systems was in the main struck down by a three-judge panel of the U.S. Court of Appeals in Washington. But FCC attorneys regard the opinion as a victory in affirming the commission's authority to preempt the regulatory decisions of local governments.

The panel, in a 2-1 decision in a case brought by New York City, was seen as handing the commission a setback on procedural rather than substantive grounds. The panel affirmed the commission's preemption of technical requirements dealing with Class I standards—those affecting channels devoted to delivery of standard broadcast signals. The panel majority said the commission's decision to substitute for franchisers' regulations its own technical standards—"minimal though they may be"—cannot be said to exceed its [the commission's] statutorily delegated preemption authority; that broad authority allows the commission to decide . . . that a certain level of regulation is *all* that is desirable."

Judge Laurence H. Silberman, in the opinion in which he was joined by Judge Ruth B. Ginsburg, thus accepted the commission's argument that Congress did not intend to modify the commission's existing preemption regulation—at least with respect to Class I channels—when it enacted the Cable Communications Policy Act of 1984. "Since Congress legislated against the backdrop of the commission's preexisting preemption regulation without criticizing that regulation, we infer that Congress endorsed it, except where the Cable Act explicitly or implicitly modified its provisions."

But the panel found that the commission's failure to adopt standards for three other classes of cable channels—those involving cablecast programing, encoded cablecast programing and two-way transmission service—was in conflict with the requirement of a section of the cable act setting out procedures that franchisers are to follow in renewing cable licenses. The commission's refusal to enact technical standards for those classes, combined with the policy of barring franchisers from doing so, Silberman wrote, "seems to put franchisers in a 'Catch-22' position." The majority sent the case back to the commission to remedy that defect.

Judge Abner Mikva concurred in the opinion to the extent that it struck down the commission's effort to forbid local franchisers