THE CABLE INDUSTRY: REGULATION REVISITED IN THE CABLE TELEVISION CONSUMER PROTECTION AND COMPETITION ACT OF 1992

"If it moves, regulate it. If it doesn’t move, kick it. Then if it moves regulate it.”
— Alfred C. Sikes

"Doublethink means the power of holding two contradictory beliefs in one’s mind simultaneously, and accepting both of them.”
— George Orwell

For several decades, the Federal Communications Commission (“FCC” or “Commission”), Congress, and the courts have sought to define the boundaries of cable television regulation. Since the FCC first exercised its jurisdictional authority to regulate the cable industry in the 1960s, the Commission has endeavored to balance the imposition of regulatory controls which curtail anticompetitive behavior with deregulatory measures that promote growth and technological advancement.

In the early 1980s, after two decades of regulation, many of the restrictions governing the cable industry were lifted. By the late 1980s, the deregulated cable industry attained a position of substantial power in the video programming market, thereby invoking consumer complaints about high prices and poor service. After several years of failed cable legislation and in the midst of a heated 1992 election year, Congress prevailed in its battle to reregulate the cable industry. On October 5, 1992, in an historic veto override, Congress enacted the Cable Television Consumer Protection and Competition Act of 1992 (“1992 Cable Act”).

The 1992 Cable Act has been a source of controversy for several reasons. First, the Act requires that the FCC implement a rate regulatory regime that balances the establishment of a “reasonable” rate with the assurance of a “reasonable” profit. Those conflicting demands in the 1992 Cable Act are further complicated by the imposition of “must carry,” retransmission consent, customer service and equipment compatibility requirements, all of which impose additional costs on cable systems. Second, opponents of the 1992 Cable Act have claimed that the Act is heavy-handed and unnecessary, in light of increasing competition in the video programming industry. While the purpose of the 1992 Cable Act is to "control further rate increases until more competition develops in the cable industry,” this goal could have been accomplished with more streamlined legislation and further encouragement of competition in the video programming market.

This Comment explores the significance of the 1992 Cable Act. Part I defines “cable television” and outlines the history of cable television regulation. It then discusses how the FCC, Congress and the courts have taken deregulatory action to promote the growth of the cable industry, and how those institutions have found, as a result of such deregulation,

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3 See In re Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service, 5 FCC Rcd. 4962, para. 6 (1990)[hereinafter FCC Cable Report].
5 Some opponents of the 1992 cable legislation maintained that the cable bill, proclaimed as pro-consumer, was being vigorously pursued by the Democratic party in an effort to embarrass President Bush, who vowed to veto the bill in his bid for reelection. See Tom Shales, Unsound Bites To Kill The Cable Bill, WASH. POST, Sept. 14, 1992, at D3.
6 Using the presidential veto power for the thirty-sixth time, President Bush refused to sign the cable legislation into law. However, for the first time during the Bush Administration, Congress overrode the veto and enacted the cable bill. See Mike Mills, Bush Asks for a Sign of Loyalty; Congress Changes the Channel, 50 CONG. Q. 3147-48 (1992).
8 See Mike Mills, Cable TV Reregulation, 50 CONG. Q. 3518, 3518 (1992).
that the cable industry has gained too much power in the video programming market. Part II explains both the FCC's and Congress' strategies for controlling the cable industry's position in the video programming market. Part III analyzes the impact of the 1992 Cable Act on the cable industry and proposes that the onerous and conflicting rate regulation requirements of the Act will do little to reduce consumer rates. It then illustrates that the competitive provisions of the 1992 Cable Act that govern franchising and programming access, as well as recent FCC decisions promoting competition in the cable marketplace, show more promise of effectively controlling cable rate increases and improving cable service. Part IV concludes that a far less comprehensive law would have gone further in fulfilling Congress' stated objectives.

I. HISTORICAL OVERVIEW

A. What is Cable Television?

Cable television, originally known as Community Antenna Television ("CATV"), evolved in 1948 out of the need for television service in areas of poor reception. Cable television is a system of antennas strategically placed in areas of good reception that pick up a broadcast signal and transmit it along a coaxial cable to a subscriber's home. Currently, many cable systems are employing the use of fiber optics, a new technology that increases channel capacity and the quality of the signal.

Cable systems offer many programming options that include local broadcast channels, satellite-delivered programming and locally originated cablecasts. The subscriber pays a service fee that varies depending on the number and type of options selected. There is typically a flat fee for basic service that includes all local stations and community programming. Additional charges may then be assessed for specialty programming such as Home Box Office, Showtime and "pay-per-view" services.

B. History of Cable Regulation

In 1962, the FCC asserted its jurisdictional authority in In re Carter Mountain Transmission Corp. to regulate microwave-served cable television amid concern about the effect that cable television's unlimited importation of distant signals into local broadcast markets might have on local television service. Then, in 1965, the Commission imposed rules upon microwave cable systems that required mandatory signal carriage. Nonduplication of local programming, and limits on the importation of dis-
tistent signals. Less than one year later, the FCC subjected all cable television systems—not just microwave-served cable—to the rules adopted in the First Report and Order.

In the 1968 decision United States v. Southwestern Cable Co., the Supreme Court affirmed the FCC's jurisdiction over cable television systems based on Title I of the Communications Act of 1934. The Court essentially reversed the decision of the Ninth Circuit and held that "the Commission's authority over 'all interstate . . . communication by wire or radio' permits the regulation of CATV systems." Moreover, the Court found that granting the FCC jurisdiction to regulate cable systems was necessary in order to achieve the Commission's goal of ensuring "orderly development" of national television service.

At the same time, however, the Court restricted the FCC's authority to "that reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting." Over the following twenty years, the rules governing cable television went through many modifications as the Commission and the courts attempted to define the boundaries of cable regulation. In 1972, the FCC adopted a comprehensive set of rules governing the regulation and licensing of cable television. The 1972 rulemaking decision developed a dual system of federal-state/local jurisdiction over cable systems. The rules established standards that gave local governments the authority to delineate franchise areas, ensure construction of cable facilities, establish duration of franchises, regulate subscriber rates and handle service complaints. The FCC maintained control over the operational aspects of cable systems and set forth rules for signal carriage, public and leased access channels, syndicated programming exclusivity and technical standards.

In 1979, the Supreme Court narrowed the scope of the FCC's authority to regulate cable television in FCC v. Midwest Video Corp. The Court held that Commission's rules requiring cable operators to make leased access channels available for public, governmental and educational use imposed common carrier obligations upon cable operators and exceeded the FCC's jurisdictional authority. The Court found that the rules were not "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting." Five years later, in Capital Cities Cable, Inc. v. Crisp, the Supreme Court

from duplicating, within a twenty-four-hour period, local broadcast programming by way of importation of a distant broadcast signal. Id. paras. 93-100.

29 Id.


31 United States v. Southwestern Cable Co., 392 U.S. 157 (1968). In the facts of this proceeding, Midwest Television, located in San Diego, had filed a petition with the FCC seeking relief from Southwestern Cable's transmission of signals from the Los Angeles area into the San Diego area. Id. at 159-60.

32 Id. at 178.

33 Id.

34 Id. at 177.

35 Id. at 178.

36 Cable Television Report and Order, supra note 8.

37 Id. paras. 171-88.

38 Id. paras. 177-88.

39 Id. para. 82. The "must carry" rules required all cable systems to carry, on request, "the signals of all stations licensed to communities within thirty-five miles of the cable system's community." Id.

40 Id. paras. 120-24. The rules governing leased access required cable operators with 3,500 or more subscribers in the top 100 market to have at least twenty channels and to designate at least four of those channels for public, government or educational use. Id.

41 Id. paras. 97-100. The "syndicated exclusivity" rules prohibited duplication of syndicated programming. Id. at 233. The FCC rules defined a syndicated program as "any program sold, licensed, distributed or offered to television station licensees in more than one market within the United States other than as network programming . . . ." 47 C.F.R. § 76.7(hh)(ii) (1991).

42 Cable Television Report and Order, supra note 8, paras. 149-70.


44 Id. at 708-09.

45 Id. (quoting United States v. Southwestern Cable Co., 392 U.S. 157, 178 (1968)). The Court distinguished its earlier decision in United States v. Midwest Video Corp. which upheld the FCC's power to promulgate rules establishing origination requirements for cable systems with 3,500 or more subscribers. Id. (discussing United States v. Midwest Video Corp., 406 U.S. 649 (1972)). The Court in FCC v. Midwest Video distinguished the United States v. Midwest Video decision on the basis that in the former case, the origination requirements permitted the cable operator to maintain control over programming, whereas in the latter case, the access rules did not allow the cable operator any control over the programming content of the mandatory leased access channels. FCC v. Midwest Video Corp., 440 U.S. at 700-01.

46 Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984). An Oklahoma law forbade cable systems operating in the state from transmitting out-of-state signals with programming that contained advertisements for alcoholic beverages. See OKLA. STAT., tit. 37, § 516 (1981). At the time of that proceeding, the FCC had "must carry" rules requiring cable operators to carry certain broadcast signals over their systems. See supra note 29. That requirement conflicted with the Oklahoma law.
expanded the FCC’s jurisdiction over cable and reaffirmed the Commission’s authority to regulate the operational aspects of cable systems. The Supreme Court permitted the FCC to preempt the Oklahoma law that conflicted with the FCC’s “must carry” requirements. The Court found that such preemption was necessary for the FCC to effectively regulate national communications and promote the goal of bringing diverse programming to consumers.

1. Deregulation and the Cable Communications Policy Act of 1984

In the late 1970s and early 1980s, the FCC, the courts and Congress took action to deregulate cable television. The Supreme Court’s decision in FCC v. Midwest Video Corp. required the FCC to eliminate its leased access requirements. The Commission promulgated rules which allocated some jurisdictional authority to the states and abolished franchising requirements. The Court found that such preemption was detrimental to the FCC in its authority to regulate the operational aspects of cable communications and promote the goal of effective competition left many cable systems free to set their own rates in a market in which competition was virtually nonexistent.

Section 621 of the 1984 Cable Act stated that “[a] franchising authority may award . . . [one] or more franchises within its jurisdiction.” However, that language did not prohibit the granting of an “exclusive” franchise in a geographic area. Thus, local franchising authorities were able to discourage competing systems from obtaining a franchise by imposing economic and legal barriers such as a “universal service” requirement and restrictive land and equipment provisions.

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devote at least seven channels to carriage of qualified broadcast systems with twenty to twenty-seven usable activated channels to other stations in the same market; and (3) all stations "significant in the community served; (2) following local broadcast signals: (1) all commercial television stations v. Quincy Cable TV, Inc., 476 U.S. 1169 (1986).

programming, whether or not for profit."

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versal service criteria required a second cable system seeking to carry" rules, which required cable operators to set aside more than fifteen percent of designated channel capacity for commercial use by persons unaffiliated with the cable operator.

Judicial decisions in the mid-1980s led to further deregulation. In Quincy Cable TV, Inc. v. FCC, the United States Court of Appeals for the District of Columbia Circuit held that the FCC's "must carry" rules, which required cable operators to transmit local broadcast signals upon request and without compensation, were unconstitutional and in violation of the First Amendment. The court held that the FCC had failed to establish a substantial governmental interest for the "must carry" rules and that the "broadly drafted" "must carry" rules indiscriminately protected all local broadcasters regardless of whether the broadcaster's viability was threatened by cable. The Quincy decision, however, did not find the "must carry" rules per se unconstitutional and did not prevent the FCC from modifying those rules.

Subsequently, the FCC's revised "must carry" rules were challenged and struck down in Century Communications v. FCC. The D.C. Circuit's decision in Century applied the O'Brien test, and it held that although the FCC's revised rules eliminated the more extreme demands of the "must carry" requirements, the new rules continued to violate the Constitution because the FCC had failed to show that the revised rules furthered a substantial governmental interest that would justify restrictions on the cable operators' rights under the First Amendment.

2. The Effects of Deregulation and the Rise of the Cable Industry

Limited rate regulation, cross-ownership bans, de facto exclusive franchises, as well as the elimination of signals, and cable systems with more than twenty-seven usable activated channels had to devote up to twenty-five percent (25%) of its signal capacity to qualified stations. In re Amendment of Part 76 of the Commission's Rules Concerning Carriage of Television Broadcast Signals by Cable Television Systems, 1 FCC Rcd. 864, paras. 150-51 (1986), recon. denied, 2 FCC Rcd. 3593, rev'd sub nom., Century Communications Corp. v. FCC, 835 F.2d 292 (D.C. Cir.), clarified, 837 F.2d 517 (D.C. Cir. 1987), cert. denied, 486 U.S. 1032 (1988).


In Quincy and Century, the D.C. Circuit applied the O'Brien test to the First Amendment challenge of the FCC's "must-carry" rules. The Supreme Court articulated the O'Brien test as follows:

We think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the government; if it furthers an important or substantial government interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.


Century Communications Co., 835 F.2d at 304.
of rules pertaining to distant signals, syndicated exclusivity and “must carry,” gave cable operators extensive freedoms in a market with little or no direct or multichannel competition. As a result, statistics in the FCC’s 1990 Cable Report to Congress reflected a tremendous growth in the cable industry. According to the FCC Cable Report, available cable programming services had doubled since the 1984 Cable Act and annual spending on programming had tripled. Furthermore, the cable industry’s revenue had more than doubled “from $8.5 billion in 1984 to $17.7 billion in 1989.”

While indicating that there had been an increase in customer complaints regarding the price and quality of service and that the lowest price tier of cable service “had risen faster than the general rate of inflation,” the Commission also noted that the price increases had leveled out since the 15.5 percent increase in 1987. Furthermore, the FCC found that despite the sharp rate increase in 1987, cable rates for all services increased at a rate only slightly higher than inflation and that “the average price of basic cable when measured on a per-channel basis had increased at a rate significantly lower than inflation during [the years 1987 through 1990].” Lack of cost data prevented the Commission from coming to the conclusion that rate increases reflected an abuse of market power. The FCC found that other cost factors such as increases in the number of services, channels and new programming needed to be considered.

The Commission also noted in the FCC Cable Report that potential competitors had complained of anticompetitive conduct on the part of the cable industry due to an increase in vertical integration and horizontal concentration of cable multiple system owners. The FCC acknowledged that deregulation had served its goal of expanded service to consumers, but determined that it was time to review the status of cable systems in the video programming industry. The findings of the FCC Cable Report foreshadowed future regulatory and competitive changes in the video programming market.

After issuing the FCC Cable Report, the Commission modified its definition of “effective competition” so that more cable systems would be subject to basic service rate regulation under the 1984 Cable Act. In place of the three-signal standard, the FCC found that a cable system was subject to effective competition, and thus exempt from rate regulation, if “six unduplicated over-the-air broadcast television signals were available in the entire cable community; or an independently owned, competing multichannel video delivery service was available to 50 percent of the homes passed by the incumbent cable system and subscribed to by at least 10 percent of the homes passed by the alternative system within the incumbent cable system’s service area.” Many other changes in cable regulation were to follow.

II. CURRENT DEVELOPMENTS

A. Increasing Competition in the Cable Marketplace with Other Video Programming Service Providers

In its 1990 Cable Report to Congress, the FCC recommended increasing competition in the cable marketplace, rather than imposing additional regulations on cable operators, in order to reduce the market power problems of the cable industry. Following the issuance of the FCC Cable Report, the FCC modified its rules governing multipoint distribution service (“MDS”), eased the restrictions on network/cable and telephone/cable cross-ownership, promoted direct broadcast satellite (“DBS”) service, and...
considered the new local multipoint distribution service ("LMDS"). In addition, a recent opinion in the U.S. Court of Appeals for the District of Columbia Circuit reduced the number of satellite master antenna television ("SMATV") facilities subject to FCC and local regulatory requirements.\textsuperscript{82}

1. Current Competitors to the Cable Industry

While cable television is the main provider of video programming, technological advancements and special consumer needs resulted in the development of other video programming service providers. SMATV systems arose in 1979 as an outgrowth of satellite-delivery services and the lack of cable in many U.S. apartment complexes.\textsuperscript{83} SMATV employs receive-only satellite earth stations directed at video programming satellites, as well as master antennas to intercept over-the-air broadcast signals and to redirect those signals through wires installed in an apartment building.\textsuperscript{84} SMATV systems generally serve individual residents in apartment buildings, condominium complexes and trailer parks.\textsuperscript{85}

In Beach Communications v. FCC, the court struck down section 602(b) of the 1984 Cable Act and an FCC decision that brought external, quasi-private SMATV facilities—but not internal or wholly-private facilities—within the definition of a "cable system," thus requiring external SMATV providers to obtain a local cable franchise.\textsuperscript{86} The Beach court found that definitional distinction to be unconstitutional under the Equal Protection Clause of the Fifth Amendment.\textsuperscript{87} Thus, the Beach court expanded the number of SMATVs that would not be subject to the FCC service requirements or local franchising requirements, giving some SMATVs a competitive regulatory advantage over cable systems.

Unlike SMATV, which employs larger antennas for "community reception" to be distributed to a group of users via cable, DBS systems use individually-owned antennas that are smaller and pick up satellite signals for direct reception by the subscriber.\textsuperscript{88} High-power transmissions allow DBS systems to deliver video services to remote rural areas that cable systems are unable to reach.\textsuperscript{89} The ability of DBS to compete with cable is limited by the number of channels DBS can provide, the local zoning requirements restricting the size of the antennas, and the high costs associated with such services.\textsuperscript{90} However, future improvements in DBS technology may allow consumers of direct reception programming to use smaller, less expensive dishes.\textsuperscript{91} Currently, DBS utilizes the C-band satellites, which are the same satellites used to transmit cable system programming.\textsuperscript{92} Future DBS technology will be able to use satellites in the Ku-band (12-14 GHz).\textsuperscript{93} The use of those frequencies will allow subscribers to purchase smaller, less expensive satellite dishes.\textsuperscript{94} That may improve the economic viability of DBS in competitive cable markets. DBS's potential ability to carry high definition television may also increase its capability to compete effectively with cable systems.\textsuperscript{95}

Multichannel multipoint distribution service ("MMDS"), although originally envisioned as a business service, has also evolved into a provider of video entertainment programming.\textsuperscript{96} MMDS is an expanded multipoint distribution service ("MDS") that resulted when the FCC reallocated spectrum in the 2.5 - 2.69 GHz band and permitted instructional television fixed services ("ITFS") to lease its excess capacity to MMDS operators, thus making more channels available to MDS.\textsuperscript{97} MMDS is a form of "wireless cable" that provides multichannel video service similar to cable television by using microwave channels instead of coaxial cable.\textsuperscript{98}

\textsuperscript{83} BRENNER & PRICE, supra note 13, § 13.01.
\textsuperscript{84} Id.
\textsuperscript{85} THOMAS F. BALDWIN & D. STEVENS McVOY, CABLE COMMUNICATIONS 340 (2d ed. 1988).
\textsuperscript{86} Beach Communications, 965 F.2d at 1105.
\textsuperscript{87} Id.
\textsuperscript{88} BALDWIN & McVOY, supra note 85, at 332.
\textsuperscript{89} BRENNER & PRICE, supra note 13, § 15.07[1].
\textsuperscript{90} BALDWIN & McVOY, supra note 85, at 334-35.
\textsuperscript{91} Id.
\textsuperscript{92} Id. at 332.
\textsuperscript{93} Id. at 334. Those DBS systems would utilize Ku band (12 - 14 GHz) technology allowing for high-power, high-frequency transponders. Id. Ku band satellites cover only a small portion of the United States, so several satellites would have to be used. Id. at 334-35. The FCC has defined DBS assigned to this 12 GHz band as a "radio communications service in which signals from earth are retransmitted by high power, geostationary satellites for direct reception by small, inexpensive earth terminals." In re Inquiry into the Development of Regulatory Policy in Regard to Direct Broadcast Satellites for the Period Following the 1983 Regional Administrative Radio Conference, Report and Order, 90 F.C.C.2d 676, para. 1 n.1 (1982).
\textsuperscript{94} BALDWIN & McVOY, supra note 85, at 334.
\textsuperscript{95} BRENNER & PRICE, supra note 13, § 15.01.
\textsuperscript{96} Id. § 16.04[1][b].
\textsuperscript{97} BALDWIN & McVOY, supra note 85, at 337; see also In re Instructional Television Fixed Service, Report and Order, 94 F.C.C.2d 1203 (1983).
\textsuperscript{98} In re Amendment of Parts 21, 43, 74, and 94 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and
Although MMDS faces technical problems with line-of-sight transmissions that limit the number of homes it can serve and with the use of unsightly antennas that are susceptible to bad weather, it is less costly than traditional cable service. In 1990, the FCC modified the rules governing MDS in order to "strengthen wireless cable service as a multichannel competitor to cable television service." Some of the more notable rule changes included eliminating the MDS multiple-ownership restrictions, "facilitating modifications to reduce interference for existing MDS stations, thereby accelerating the introduction of service on additional channels," and "prohibiting conventional cable operators from holding licenses or leases for MDS facilities in their franchise areas." A year later, in the same proceeding, the FCC reallocated H-channels designated for private operational fixed microwave to MDS in order to increase the number of channels available for distribution of video entertainment.

Notwithstanding those changes, an enormous backlog of MDS applications at the FCC blocked MDS as a competitive force in the cable marketplace. To ease that backlog, the FCC imposed a freeze beginning April 19, 1992, on the filing of applications for MDS channels. On January 14, 1993, the Commission adopted new MDS rules designed to streamline the filing and processing of MDS applications and to prevent the filing of speculative MDS applications. The FCC modified MDS regulation to "inspire vigorous competition and greater diversity of consumer choices in the multichannel video delivery marketplace."

2. Future Competitors to the Cable Industry

In another move to promote competition in the cable industry, the FCC modified its network/cable cross-ownership rules. In its 1992 Report and Order, the FCC relaxed the network/cable cross-ownership rules and permitted networks to own cable systems, but restricted network ownership to ten percent of homes passed by cable systems nationwide, and locally to fifty percent of homes passed in an Arbitron area of dominant influence ("ADI"). The local limits did not apply where the network-owned cable system encountered a "competing" system. With that modification of the cross-ownership rules, the Commission sought to foster a "diverse and competitive video marketplace, without cable industry that prevented television networks and broadcast stations from owning cable systems. Id. Section 613(a) of the 1984 Cable Act codified the FCC's broadcast/cable cross-ownership rule that prohibited the licensee of a broadcast television station from becoming a cable operator where the broadcaster's grade B contour covered a portion of a cable system's community. Pub. L. No. 98-549, § 613(a). However, the 1984 Cable Act did not codify the FCC's network/cable cross-ownership rule prohibiting national television networks from owning cable systems. Network/Cable Cross-Ownership Report and Order, infra, para. 2 n.4. Thus, the FCC was able to modify its ban on network/cable cross-ownership to allow the networks entry into cable television ownership.

Network/Cable Cross-Ownership Report and Order, supra note 108, paras. 18-20. ADI is "areas of dominant influence." See Arbitron Ratings: Television, 1986-1987 ADI Market Guide, vol. 1, p. xxiv. Arbitron defines ADI as an "exclusive geographic area consisting of all counties in which the home-market commercial stations, and satellite stations reported in combination with them, receive a preponderance of total viewing hours." Id.

Network/Cable Cross-Ownership Report and Order, supra note 108, para. 20. The Commission calculates the availability of a competing multichannel video delivery system by dividing the number of homes passed by an alternative delivery service by the number of homes passed by the incumbent cable system. 47 C.F.R. § 76.33(a)(2)(ii) (1991). The Commission notes that for purposes of the network/cable cross-ownership rule, a "competing" multichannel competitor also must be capable of providing carriage of local broadcast signals integrated within its service. Network/Cable Cross-Ownership Report and Order, supra note 108, para. 20 n.43.
imposing excessively burdensome restrictions on broadcast networks or cable systems.\textsuperscript{111}

While modification of the network/cable cross-ownership restrictions was easier due to the absence of congressional legislation, the FCC found it more difficult to circumvent the telephone/cable cross-ownership prohibitions. Not only did the FCC's own rules prohibit telephone companies from directly providing video programming to subscribers in their local service area, the Modified Final Judgement ("MFJ") and the codification of the FCC's telephone/cable cross-ownership rules in the 1984 Cable Act also limited the telephone companies' ability to provide video programming.

In 1991, Judge Harold Greene reluctantly lifted the ban that prohibited the telephone companies from providing information services, including cable television.\textsuperscript{112} That decision gave the FCC the option of modifying its telephone/cable cross-ownership rules. Although the 1984 Cable Act had impeded the FCC's capability to revise its rules to allow local exchange carriers ("LECs") to directly own cable systems in their local exchange area,\textsuperscript{113} the FCC asserted its authority in its 1992 Second Report and Order to modify the cross-ownership rules to allow the LECs to provide video programming indirectly via a multiple video programmer.\textsuperscript{114} This service has become known as "video dialtone."\textsuperscript{115} In the future, technological advances in integrated services digital network ("ISDN") and in fiber optics will enable telephone companies to send such video images over telephone wires.\textsuperscript{116} Video dialtone will also contain additional features that will allow the subscriber to select and store programming, replay portions of programming and create tailored menus.\textsuperscript{117}

One of the FCC’s purposes in allowing telephone companies into the cable television market is to promote the implementation of a nationwide broadband fiber network.\textsuperscript{118} Another of the Commission’s main goals in modifying the ownership restrictions is to "increase[e] competition in the video marketplace."\textsuperscript{119} Although the FCC's rules governing video dialtone are an alternative to eliminating the telephone/cable cross-ownership ban, the FCC continues to put pressure on Congress to allow the telephone companies to directly provide video programming in their service areas.\textsuperscript{120} Recently, Congress introduced two bills that proposed to eliminate the telephone/cable cross-ownership restrictions, subject to certain safeguards.\textsuperscript{121}

Furthermore, on December 17, 1992, Bell Atlantic filed a complaint in the United States District Court for the Eastern District of Virginia challenging the constitutionality of section 533(b) of the Communications Act of 1934, which prohibits telephone companies from providing video programming in their service areas.\textsuperscript{122} The Bell Atlantic complaint asserted that section 533(b) was an unconstitutional prior restraint on speech and violated its First Amendment rights.\textsuperscript{123} The complaint also claimed that enforcement of section 533(b) violated the Equal Protection Clause\textsuperscript{124} by discriminating against telephone companies, and deprived the telephone companies of their Fifth Amendment right to use their property for "constitutionally protected expression."\textsuperscript{125} The complaint pointed out that the objec-

\textsuperscript{111} Network/Cable Cross-Ownership Report and Order, supra note 108, para. 1.


\textsuperscript{113} Section 613(b) of the 1984 Cable Act codified the FCC's telephone/cable cross-ownership rule prohibiting any common carrier from owning cable systems. Pub. L. No. 98-549, § 613(b)(1).


\textsuperscript{115} As a provider of video dialtone service, the telephone company is limited to five percent voting or nonvoting ownership of the video programmer. Telephone/Cable Cross-Ownership Second Report and Order, supra note 114, para. 36.


\textsuperscript{117} Telephone/Cable Cross-Ownership Second Report and Order, supra note 114, para. 12.

\textsuperscript{118} See Randall M. Sukow and Joe Flint, FCC poised to ease telco-cable ownership ban, BROADCASTING, July 13, 1992, at 6.

\textsuperscript{119} Telephone/Cable Cross-Ownership Second Report and Order, supra note 114, para. 1.

\textsuperscript{120} Id. para. 135.


\textsuperscript{122} Plaintiffs' Complaint for Declaratory Judgment and Injunctive Relief, Chesapeake and Potomac Tel. Co. of Virginia v. United States, (E.D. Va.)No. 92-1751-A, filed Dec. 17, 1992 [hereinafter Bell Atlantic Complaint].

\textsuperscript{123} Id. at 4-5.

\textsuperscript{124} Id. at 11. The Equal Protection Clause states "[n]o State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend V.

\textsuperscript{125} Bell Atlantic Complaint, supra note 122, at 11-12.
tive of section 533(b)—"prevent[ing] the development of 'local media monopolies'"—has failed given the high concentration of the cable industry and the lack of local competition.\(^\text{126}\)

On December 10, 1992, the FCC initiated a rulemaking proceeding that proposed the introduction of a new, potentially significant competitor to the cable television industry local multipoint distribution service ("LMDS").\(^\text{127}\) The Commission, by redesignating a portion of the 28 GHz band to LMDS, enabled LMDS to utilize high-frequency microwaves to transmit multichannel video programming, local telephone services and interactive two-way video communications that are comparable to the quality and versatility of fiber optics without the need to wire the community.\(^\text{128}\) In its LMDS Notice of Proposed Rule Making, the FCC sought to increase the video programming options and services for consumers while providing additional competition to cable systems.\(^\text{129}\)

B. Reregulation and the Cable Television Consumer Protection and Competition Act of 1992

Although the FCC has implemented policies seeking to increase competition in the video programming market, Congress, on October 5, 1992, enacted the Cable Television Consumer Protection and Competition Act of 1992, which imposed wide-ranging regulations on the cable industry.\(^\text{130}\) The 1992 Cable Act went beyond the recommendations set forth in the 1990 FCC Cable Report. In section 2 of the 1992 Cable Act, Congress stated its findings with regard to the cable industry's increase in monthly rates,\(^\text{131}\) lack of local competition,\(^\text{132}\) barriers to entry,\(^\text{133}\) affiliate favoritism,\(^\text{134}\) deprivation of services\(^\text{135}\) and threat to free television.\(^\text{136}\)

1. Congressional Objectives

Congress stated that its main purposes in implementing the 1992 Cable Act were to control cable rates, improve customer service and promote competition in the video programming market.\(^\text{137}\) In section 2 of the 1992 Cable Act, Congress stated that it sought to protect consumer interests where cable systems were not subject to effective competition and to ensure that cable operators did not have undue market power.\(^\text{138}\) Legislators and industry participants opposed to the 1992 Cable Act questioned the Act's purported objectives and asserted that attempts by Democrats in Congress to pass the allegedly "pro-consumer" cable bill and to override President Bush's veto were aimed at embarrass President Bush in a very heated 1992 election year.\(^\text{139}\) Nonetheless, advocates of the 1992 Cable Act maintained that it was "pro-consumer" and "pro-competitive."\(^\text{140}\)

\(^\text{126}\) Id. at 7.

\(^\text{127}\) In re Rulemaking to Amend Part 1 and Part 21 of the Commission's Rules to Designate the 27.5 - 29.5 GHz Frequency Band and to Establish Rules and Policies for Local Multipoint Distribution Service, Notice of Proposed Rule Making, Order, Tentative Decision and Order on Reconsideration, CC Dkt. No. 92-297, FCC 92-538, (Jan. 8, 1993)[hereinafter LMDS NPRM]. The FCC found that LMDS was distinct from other types of multipoint distribution services in light of the unique cellular distribution format technology of LMDS. Id. para. 4.

\(^\text{128}\) Id. para. 8; see also Jube Shiver, Jr., TV's New Frontier: FCC Proposes Cellular-Style Delivery System, L.A. TIMES, Dec. 11, 1992, at B5.

\(^\text{129}\) LMDS NPRM, supra note 127, paras. 3, 16.


\(^\text{131}\) Id. sec. 2(a)(1). Congress found that the monthly rates of the lowest priced service increased forty percent for more than twenty-eight percent of cable customers since deregulation of the cable industry. Id.

\(^\text{132}\) Id. sec. 2(a)(2). Congress found that the extensive costs involved in constructing more than one cable facility in a geographic area limited a subscriber's options in selecting a competing cable company. Id.

\(^\text{133}\) Id. sec. 2(a)(4). Congress found that the cable industry was highly concentrated, thus creating barriers to entry for new programmers which, in turn, reduced the diversity of media voices available to the consumer. Id.

\(^\text{134}\) Id. sec. 2(b)(5). Congress found that the cable industry was vertically integrated and that many cable systems and programming entities had common ownership. Congress noted that horizontal concentration and vertical integration encouraged affiliate operators and programmers to favor one another and exclude nonaffiliates from carriage. Id.

\(^\text{135}\) Id. sec. 2(a)(6), (7). Congress found that, absent carriage requirements, consumers would be deprived of a diversity of viewpoints that could be obtained with "multiple technology media." Id. Consumers would also be deprived of access to local noncommercial educational programs. Id.

\(^\text{136}\) Id. sec. 2(a)(12). Congress found that the increase in cable television service had lead to a reallocation of advertising revenue from broadcast to cable systems which threatened the viability of local broadcast stations. Id. sec. 2(a)(13). It also determined that the government had a substantial interest in maintaining free local television programming, particularly because not all consumers could afford cable television as an alternative to terrestrial broadcast programming. Id. sec. 2(a)(17).

\(^\text{137}\) See Mike Mills, In Senate, A Strong Majority Again Bucks Regulation, 50 CONG. Q. 2925, 2926 (1992).


\(^\text{139}\) See Mike Mills, Bush Asks for a Sign of Loyalty, Congress Changes the Channel, 50 CONG. Q. 3147, 3147-48 (1992).

\(^\text{140}\) Id.
2. "Pro-Consumer" Provisions of the 1992 Cable Act

The 1992 Cable Act, in amending section 623 of the Communications Act of 1934, require the FCC to establish regulations ensuring "reasonable rates" for the basic service tier within six months of the passing of the Act by Congress. As in the 1984 Cable Act, cable systems subject to effective competition would not be governed by FCC rate regulations. In the 1992 Cable Act, however, Congress implemented a definition of effective competition that is broader than the FCC's 1991 definition so as to subject virtually all cable systems to rate regulation.

The 1992 Cable Act mandates that basic tier service at a minimum consist of the following: (1) any signal of any television broadcaster that was provided to the subscriber by the cable operator (not including superstations); (2) public, educational and governmental access programming ("PEG"); and (3) "must carry" local commercial and noncommercial broadcast stations. In order for subscribers to obtain access to any other tier service, the 1992 Cable Act requires subscription to the basic service tier. The 1992 Cable Act also contains a buy-through prohibition that prevents a cable operator from insisting that a customer subscribe to a tier, other than the basic tier, as a condition to accessing video programming offered on a per-channel or per-programming basis.

In implementing the aforementioned rate regulations, Congress requires that the FCC take into account the rates charged by cable systems subject to effective competition; the direct costs of providing signals carried on basic service tiers; revenues obtained from advertising for programming on basic service tiers; costs associated with franchise fees and with the provision of PEG programming; and reasonable profits for cable systems. In addition to basic tier rate regulation, Congress gave the FCC the authority to regulate any "unreasonable" rates for higher-tiered services. Moreover, the 1992 Cable Act requires the FCC to consider several factors when adjudicating complaints of "unreasonable" rates on the higher tiers, including: the rates of similarly situated cable systems, the rates of cable systems subject to effective competition, the rate history of the suspect cable system, its capital and operating costs and its revenues.

Another "pro-consumer" provision in the 1992 Cable Act is the requirement that cable systems carry the signals of local commercial and noncommercial television stations. These mandatory signal carriage requirements are similar to the "must carry" rules found unconstitutional in Quincy and Century. However, the number of signals that cablecasters would be compelled to carry vary under the 1992 Cable Act depending on the number of useable activated channels on the cable system. For...

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141 Pub. L. No. 102-385, sec. 3, § 623. Franchising authorities may regulate the rates of cable service in their area by submitting a written certification to the FCC. If the certificate is approved, a franchising authority must still be regulate the cable system's rates in accordance with the FCC's rules. Furthermore, the FCC can deny the certificate and preempt the franchising authority for that franchise area

142 Id. sec. 3, § 623(a).

143 Id. sec. 3, § 623(b)(1). The 1992 Cable Act defines "effective competition" as:

(A) fewer than 30 percent of the households in the franchise area subscribe to the service of a cable system;

(B) the franchise area is-
   (i) served by at least two unaffiliated multichannel video programming distributors each of which offers comparable video programming to at least fifty percent of the households in the franchise area; and
   (ii) the number of households subscribing to programming services offered by multichannel video programming distributors other than the largest multichannel video programming distributor exceeds fifteen percent of the households in the franchise area; or
   (C) a multichannel video programming distributor operated by the franchising authority for that franchise area offers video programming to at least 50 percent of the households in that franchise area.

144 Compare Effective Competition Standard, supra note 79, para. 1 with 1992 Cable Act, supra note 142.

145 "Superstations" are stations that secondarily transmit their signals beyond the local service area. Pub. L. No. 102-385, sec. 3, § 623(b)(7)(i).

146 Id. sec. 3, § 623(b)(7)(A).

147 Id. sec. 3, § 623(b)(8). "Tiering" is the packaging and sale of programming, usually in a cumulative fashion, that forces subscribers to "buy-through successive tiers in order to subscribe to each higher-tiered service . . . ." In re Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992, Tier Buy-Through Prohibitions, Notice of Proposed Rule Making, MM Dkt. No. 92-262, FCC 92-540, para. 2 (Dec. 11, 1992).

148 Id. sec. 3, § 623(b)(2)(C).

149 Id. sec. 3, § 623(c).

150 Id. sec. 3, § 623(c)(2).

151 Id. sec. 4, § 614.

152 See supra notes 62-68 and accompanying text.

153 Pub. L. No. 102-385, sec. 4, § 614(b). The 1992 Cable Act defined "activated channels" as "those channels engineered at the headend of a cable system for the provision of services generally available to residential subscribers of the cable system, regardless of whether such services actually are provided, includ-
cable systems with more than twelve useable activated channels, the cable operator is required to carry local commercial television signals on up to one-third of its channel capacity.\(^{154}\) Cablecasters are only obligated to carry low power stations if there is not a sufficient number of local commercial stations to fill the required channel capacity.\(^{155}\) Additionally, certain cable operators are required to carry a minimum number of local non-commercial educational stations.\(^{156}\)

As an alternative to “must carry,” the 1992 Cable Act allows broadcasters to negotiate with cable operators for retransmission consent.\(^{157}\) The 1992 Cable Act states that, one year after the enactment of the 1992 Cable Act, a cable operator is not permitted to retransmit the signal of a broadcast station without either the express consent of the originating station or a decision by the broadcast station to carry its signal under section 614.\(^{158}\) The 1992 Cable Act does not prohibit the broadcaster from requesting fees for the right to retransmit its signals.\(^{159}\)

The 1992 Cable Act also requires the FCC to issue rules governing customer service requirements.\(^{160}\) The rules must include standards for “(1) cable system office hours and telephone availability; (2) installations, outages and service calls; and (3) communications between the cable operator and the subscriber (including standards governing bills and refunds).”\(^{161}\) Local franchising authorities are to enforce the standards issued by the FCC and may even impose additional standards that exceed the Commission’s requirements.\(^{162}\)

3. “Pro-Competitive” Provisions of the 1992 Cable Act

To promote competition in the video programming industry, the 1992 Cable Act contains provisions governing the award of franchises, ownership restrictions and program access. Under earlier regulations, a cablecaster had to obtain a cable franchise from the local authority in order to operate its cable system.\(^{163}\) In cases where the 1984 Cable Act did not prohibit the granting of de facto exclusive franchises, cable systems were permitted to operate in a relatively uncompetitive marketplace.\(^{164}\) Thus, the 1992 Cable Act amends section 621 and prohibits a franchising authority from granting an exclusive franchise to a cable operator and from “unreasonably refusing to award” an additional competitive franchise.\(^{165}\) Furthermore, the 1992 Cable Act permits local or municipal authorities affiliated with franchising authorities to operate cable systems.\(^{166}\) The municipal authority, unlike other cable operators, is not required to obtain a franchise in order to provide cable service under the 1992 Cable Act.\(^{167}\)

Another pro-competitive provision in the 1992 Cable Act sets forth new requirements for video programming distribution.\(^{168}\) The provision requires the FCC to prescribe regulations that prohibit cable operators with an attributable interest in the provision of satellite cable programs from “unduly or improperly” influencing the program provider regarding “prices, terms and conditions of sale” of programming to unaffiliated multichannel video programming vendors.\(^{169}\) The cable operator’s affiliated network is also prohibited from discriminating in the “prices, terms and conditions of sale” among mul-

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154 Id. sec. 4, § 614(b)(1)(B).
155 Id. sec. 4, § 614(c)(1). That provision of the 1992 Cable Act was not effective until the FCC completed its rulemaking procedure on the mandatory commercial carriage requirements. See Self-effectuating Provisions of the Cable Television Consumer Protection and Competition Act of 1992, Public Notice (Nov. 5, 1992). In contrast, the 1992 Cable Act provision that required cable operators to carry a minimum number of local noncommercial educational systems became effective December 4, 1992, sixty days after the new law’s enactment. Id.
156 Pub. L. No. 102-385, sec. 5, § 615. Cable systems with thirteen to thirty-six usable activated channels had to carry the signal of at least one local noncommercial educational television station. Id. sec. 5, § 615(a)(3). Moreover, cable systems with more than thirty-six usable activated channels had to carry the signals of three local noncommercial educational stations. Id. sec. 5, § 615(c).
157 Id. sec. 6, § 325(b)(1)(B).
158 Id.
159 Id.
160 Id. sec. 8, § 632(b).
161 Id.
162 Id. sec. 8, § 632(c)(2).
164 Id. § 621(a)(1).
166 Id. sec. 7, § 621(f)(1).
167 Id. sec. 7, § 621(f)(2).
168 Id. § 628.
169 Id. § 628(c)(2)(A).
tichannel video distributors, with some exceptions.\textsuperscript{170} Furthermore, exclusive contracts between cable operators and satellite programming providers are prohibited in areas unserved by cable as of the date of enactment of section 628 of the 1992 Cable Act.\textsuperscript{171} In areas served by cable, exclusive contracts will be granted only if the FCC finds that it is in the public interest.\textsuperscript{172}

The 1992 Cable Act also contains an ownership restriction provision that is aimed at promoting competition within the cable industry.\textsuperscript{173} As amended, section 613 prohibits cable operators from owning MMDS and SMATV systems “separate and apart from any franchise cable service, in any portion of the franchise area served by that cable operator’s system.”\textsuperscript{174} Ownership of SMATV and MMDS systems existing as of the date of enactment of section 613 of the 1992 Cable Act is exempt from that restriction.\textsuperscript{175} Amendments to section 613 also require the FCC to impose subscriber and channel occupancy limits upon cable system owners.\textsuperscript{176}

III. MEETING CONGRESSIONAL OBJECTIVES WITH MORE STREAMLINED CABLE LEGISLATION

A. The FCC and the Conflicting Demands of the 1992 Cable Act

The FCC faces a monumental task in complying with the 1992 Cable Act. The Commission must establish reasonable rates for cable subscribers while, at the same time, ensuring reasonable profits for the cable companies.\textsuperscript{177} While certain provisions of the 1992 Cable Act mandate rate regulation to meet the Act’s goal of establishing “reasonable” rates, other provisions impose additional costs upon the cable industry which will make it difficult for the FCC to lower cable rates and ensure cable operators’ “reasonable” profits. The extent to which the FCC balances the 1992 Cable Act’s conflicting demands in the rules it promulgates will ultimately determine the impact of the Act on the cable industry.

1. “Pro-Consumer” Objective: “Reasonable” Rates

Section 623 of the 1992 Cable Act requires the FCC to formulate a “reasonable” rate for the basic service tier of cable systems.\textsuperscript{178} Section 623 also directs the Commission to establish criteria for identifying, on a case-by-case basis, “unreasonable” rates on cable programming services\textsuperscript{179} beyond the basic service tier.\textsuperscript{180} Those requirements create several conflicts for the FCC.

First, the Commission must establish an accurate rate regulation methodology while simultaneously keeping administrative burdens low.\textsuperscript{181} Second, the FCC must balance the determination of a “reasonable” rate with the assurance of a “reasonable” profit, where the 1992 Cable Act imposes additional costs on the cable industry.\textsuperscript{182} Third, the Commission may have to limit its regulation of “unreasonable” rates on cable programming services or risk losing the premium services on higher tiers, where the cable operators’ revenue is constrained by basic tier requirements.

While it is uncertain whether Congress intended the FCC to lower existing cable rates or to primarily control prospective rate increases, it is clear that the FCC must establish a “reasonable” rate.\textsuperscript{183} The 1992 Cable Act does not define what is meant by a “reasonable” rate. Pursuant to the 1992 Cable Act, the FCC issued its Notice of Proposed Rule Making

\textsuperscript{170} Id. § 628(c)(2)(B). The affiliated vendor was not prohibited from establishing different prices, terms and conditions which take into account differences in costs of creation, sale, delivery, transmission of satellite cable programming, as well as economies of scale, cost savings and other direct and legitimate economic benefits associated with the distributor’s number of subscribers. Id.

\textsuperscript{171} Id. § 628(c)(2)(C).

\textsuperscript{172} Id. § 628(c)(2)(D).

\textsuperscript{173} Id. sec. 11, § 613.

\textsuperscript{174} Id. sec. 11, § 613(a)(2).

\textsuperscript{175} Id. sec. 11, § 613(a)(2)(A).

\textsuperscript{176} Id. sec. 11, § 613(f)(1)(A). Section 613 requires the FCC to prescribe rules that establish “reasonable limits on the number of cable subscribers a person is authorized to reach through cable systems owned by such person, or in which such person has an attributable interest.” Id. Section 613 also requires the FCC to prescribe rules that establish “reasonable limits on the number of channels on a cable system that can be occupied by a video programmer in which a cable operator has an attributable interest . . . .” Id. sec. 11, § 613(f)(1)(B).

\textsuperscript{177} Id. sec. 3, § 623(b)(2)(C)(viii).

\textsuperscript{178} Id. sec. 3, § 623(b)(1).

\textsuperscript{179} “Cable programming service” is defined as “any video programming provided over a cable system . . . other than video programming carried on the basic service tier . . . and video programming offered on a per channel or per program basis.” Id. sec. 3, § 623(k)(1)(2).

\textsuperscript{180} Id. sec. 3, § 623(c)(1)(A).


\textsuperscript{183} Id. para. 5.
governing rate regulation which tentatively concluded that Congress intended the Commission to establish a standard for reasonable basic tier rates that balances the statutory goals and the factors listed in section 623(b)(2)(C)(i-vii). These factors are the rates charged by cable systems subject to effective competition, direct costs of providing signals carried on the basic service tier (including retransmission consent, revenues obtained from advertising for programming on the basic service tier, cost associated with franchise fees, and the provision of PEG programming) and a reasonable profit for the cable system.

In its Rate Regulation NPRM, the Commission surmised that it would not employ a cost-of-service (or rate-of-return) methodology to determine “reasonable” rates for cable systems. Based on its experience, the FCC held that cost-of-service regulation would provide little incentive for cable operators to improve their efficiency and quality of service. Instead, the Commission considered establishing a “benchmark” price with which the cable system’s basic tier rate would be compared.

In creating the rate regulation methodology, however, the FCC determined that it must also consider the 1992 Cable Act mandate that requires the FCC to minimize the administrative burdens on subscribers, cable operators, franchising authorities and the Commission itself. Thus, in trying to calculate a “reasonable” rate, the FCC must deal with the conflict between the need to establish an accurate benchmark and the need to minimize administrative burdens. Although a benchmark designed to more accurately reflect the attributes of individual systems would require costly collection of data, a benchmark based on a more simplified formula would risk miscalculation, which in turn could “allow low-cost systems to charge rates substantially above cost or require higher cost systems to charge below-cost rates.” The FCC recognized that this conflict could lead to a trade-off between such costs. Hence, the Commission suggested that cost-of-service analysis could be used by high-cost systems that may be forced to set rates below costs. Such an analysis could serve as a “safety valve” to prevent confiscatory rates.

The FCC must also consider how its rate regulation regime will affect the programming on the basic and higher tiers. If the FCC allows recovery of the direct costs of channels in the basic tier, this could provide an incentive for the cable operator to retain highly valued programming on the basic tier. If recovery is not permitted, the consumers could lose highly valued programming on the basic subscription level. However, implementation and calculation of these expenditures would be more burdensome and costly to cable systems, the FCC and consumers.

The Commission’s task of establishing a “reasonable” rate is further undermined by the 1992 Cable Act’s imposition of additional costs on the cable industry. Section 624A of the 1992 Cable Act mandates the FCC to assure that cable operators make their equipment compatible with the equipment used in other consumer electronic mediums such as televisions and video cassette recorders. Not only will this increase costs for cable operators, but it will also increase the risk of theft of service. Furthermore, section 632 of the 1992 Cable Act requires the FCC to impose customer service requirements on cable systems that expand office hours, increase telephone availability and improve service governing installations, power outages and service calls. In addition to the costs of complying with the 1992 Cable Act, the FCC must also consider the other related costs created by the mandatory signal carriage and franchise requirements.

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184 Id. para. 31. “The goal of Section 623(b) is to protect subscribers of any cable system that is not subject to effective competition from rates that exceed the rates that would be charged if such a cable system were subject to effective competition.” Id. para. 16 n.31. 185 Id. para 31. 186 Pub. L. No. 102-385, sec. 3, § 623(b)(2)(C). 187 “Cost-of-service” regulation establishes a formula to ensure that the company gains enough revenue to recover its costs of providing the service. See In re Policy and Rules Concerning Rates for Dominant Carriers, Notice of Proposed Rule Making, 2 FCC Rcd. 5208, para. 17 (1987). 188 Rate Regulation NPRM, supra note 182, para. 58. 189 Id. para. 33. The FCC compared this benchmark rate to the price cap methodology by pointing out that where the benchmark is not based on costs, there is an increased incentive to improve efficiency and quality of service so as to increase savings (or profit). Id. para. 36. 190 Pub. L. No. 102-385, sec. 3, § 623(b)(2)(A). 191 Rate Regulation NPRM, supra 182, para. 36. 192 Id. 193 Id. 194 Id. The FCC has expressed its concern that certain applications of rate regulation could violate the Fifth Amendment’s prohibition on the taking of property without just compensation. Id. para. 33 n.66. 195 Id. para. 54. 196 Id. para. 36. 197 Pub. L. No. 102-385, sec. 17, § 624A(b). 198 Rate Regulation NPRM, supra note 182, para. 60 n.90. 199 Pub. L. No. 102-385, sec. 8, § 632(b). 200 Id. sec. 4, § 623(b)(2)(C)(ii).
In its calculation of a “reasonable” rate, the FCC must also examine the costs, if any, associated with the retransmission consent requirements of the 1992 Cable Act. The FCC stated that this obligation would be met by its consideration of direct costs in providing signals to subscribers. In its Broadcast Signal Carriage NPRM, the FCC tentatively concluded that fees given by cable companies in exchange for retransmission would qualify as direct costs. Where the 1992 Cable Act does not prohibit broadcasters from receiving fees for retransmission of their signals, retransmission consent may impose additional costs on the cable operator to provide popular broadcast channels to consumers. Not only is that a direct contravention to the 1992 Cable Act’s goal of lowering cable rates, it also makes it even more difficult for the FCC to establish both a “reasonable” rate and a “reasonable” profit for the cable systems.

Even if additional costs of compliance do not force up basic rates, the subscriber may ultimately suffer in terms of the variety and quality of the programming he will receive. This is because where the FCC must balance a “reasonable” rate with a “reasonable” profit by imposing restrictions on the basic tier rate, that mandate may force the FCC to accept higher prices on other tiers. That would undermine the “pro-consumer” objective of providing subscribers with a “diversity of views and information” by increasing prices on higher-tiered programs and stifling the growth of new cable programming services. As a result, the Commission will have to balance its regulations governing “unreasonable” rates on higher tiers with the public interest objective of providing subscribers with a variety of viewpoints and information, given the cable systems revenue constraints on basic tier service.

2. “Pro-Competitive” Objective: Increasing Competition

The 1992 Cable Act’s modification of the requirements governing the award of franchises, ownership restrictions and program access will spur competition and thus be more effective in reducing rates and improving cable service than the provisions on rate regulation, “must carry” and retransmission consent—particularly in light of the conflicting demands of these latter requirements. Section 7 of the 1992 Cable Act does not permit franchising authorities to grant exclusive franchises to cable systems, and it further provides that a local authority may not unreasonably refuse to award an additional franchise. That section also allows municipal authorities to operate cable systems. The introduction of cable systems that can directly compete with systems that presently operate under “exclusive” franchises may significantly influence the rates that cable operators charge their customers. Indeed, the FCC Cable Report stated that “where cable systems compete head-to-head, per channel rates for basic service are generally significantly lower than the national average.” In addition to lowering customer rates, the increased competition can lead to improved service for subscribers.

Section 19 of the 1992 Cable Act, which places restrictive requirements on the cable operators with regard to programming access, may increase the ability of SMATV, MDS and DBS to compete effectively with the cable industry. Under section 612 of the 1992 Cable Act, those multichannel video programming providers that are not affiliated with cable operators cannot be subject to discrimination with regard to prices, terms and conditions of sale of programming. Furthermore, a cable operator is prohibited from influencing the decisions of its affiliated program provider on prices, terms and conditions of sale of programming that the affiliated vendor provides to an unaffiliated distributor. Although studies indicate that more programming has been made available to “wireless cable” services, the FCC concluded that some network programmers continue to negotiate on disparate terms and conditions with the wireless services. In response, section 612, as amended by the 1992 Cable Act, will allow unaffili-
ated distributors in the SMATV, MMDS and DBS services more access to programming, thus increasing the variety of services that those distributors can provide and making them more attractive to subscribers.

Furthermore, section 11 of the 1992 Cable Act restricts cross-ownership between cable operators and SMATV/MMDS systems within their franchise areas and reflects Congress’ “concern that common ownership of different means of video distribution may reduce service competition.” In its Ownership Limits NPRM, the FCC pointed out that it had already promulgated rules restricting cross-ownership of cable systems and MMDS. The Commission proposed the adoption of similar rules to restrict common ownership of cable systems and SMATV. Such cross-ownership prohibitions could be beneficial in promoting competition among video program providers in a given market, as long as the restrictions do not prevent the provision of video service to consumers where cross-ownership may be the only means of distributing video programming in a franchise area.

B. The Impact of FCC Decisions Promoting Competition in the Cable Marketplace

While Congress imposed regulations on the cable industry to stem what it perceived as anticompetitive behavior, the FCC continued to promote the idea of addressing those concerns by promoting competition in the marketplace. The FCC’s relaxation of the network/cable cross-ownership rules may provide some immediate relief in terms of increasing competition in the cable market. The impact of the rule modification will be measured by how quickly and efficiently the networks can obtain additional revenue and apply that revenue to the diversification and distribution of video programming.

The FCC’s modification of its telephone/cable cross-ownership rules also opens the door to competition in the video programming market. The telephone companies’ provision of video programming via a multichannel program provider promises to present direct competition to cable companies. Although video dialtone is still in the developmental stage and may not be a viable competitor to cable for several years, telephone companies such as Bell Atlantic are already experimenting in providing this video service. Furthermore, if the Virginia court takes action supporting Bell Atlantic’s complaint, or if Congress passes legislation allowing the telephone companies to provide video programming to subscribers in their service area, then the telephone companies will be able to offer a more competitive means for providing video programming to consumers in addition to video dialtone.

Although the FCC has made some changes in the rules governing MDS and has reallocated spectrum to accommodate more MDS licensees, an enormous backlog of MDS applications has required the FCC to place a freeze on any additional applications. However, the Commission’s decision to streamline the MDS application process may speed up the implementation of more MMDS systems and provide more competition to cable operators. In addition, the FCC has recently endorsed LMDS as a potentially strong competitor to cable systems due to its low costs and ability to provide services on par with fiber optics in terms of increased channel capacity and interactive video capabilities. Like MMDS, LMDS may have problems with transmission interference. Nevertheless, if the technical difficulties can be overcome, LMDS will not only be a viable competitor to cable, but to other wireless services and telephone companies as well.

In addition to the aforementioned competitors, DBS is also emerging as a serious contender in the video programming market. Hughes Communications Galaxy, Inc. (“Hughes”) and United States Satellite Broadcasting Company, Inc. plan to launch DBS satellites by early 1994 with a potential 180-channel service capacity. The Hughes’ satellite

§ 5.08.


213 Id. para. 25.

214 Id. para. 26. The FCC interpreted the legislative history of the 1992 Cable Act as not prohibiting cross-ownership of SMATV systems classified as “cable systems” under section 602(7) of the Communications Act of 1934. Id.

215 Id. para. 27.

216 Network/Cable Cross-Ownership Report and Order, supra note 108, para. 1.

217 Id. para 11.

218 See Paul Farhi, Blockbuster, Bell Atlantic Discussing ‘Video-on-Demand’ Deal, WASH. POST, Jan. 20, 1992, at G1.

219 MDS Report and Order, supra note 98, para. 19.

220 LMDS NPRM, supra note 127.


222 Id.

has already signed on programmers, including Disney Channel and Paramount Pictures. DBS will be particularly competitive in the smaller rural markets and will be able to offer subscribers a lower fee than cable systems.

IV. CONCLUSION

The FCC, Congress and the courts have struggled for decades to balance regulation and deregulation of the cable industry in order to avoid anticompetitive behavior on the one hand, and to encourage growth and investments in the industry on the other. When deregulation of the cable industry in the 1980s resulted in a decrease in competition in the video programming market, the FCC responded by taking measures to increase competition among video program providers. Congress reacted by imposing new regulations on the cable industry with the implementation of the 1992 Cable Act.

While Congress’ objective of promoting competition in the cable marketplace is met through the “pro-competitive” provisions governing ownership restrictions, program access and franchise awards, the rate regulation provisions—coupled with the potential costs imposed by retransmission consent, “must carry,” customer service, and equipment compatibility requirements—undermine Congress’ “pro-consumer” objectives. The rate regulation provisions place difficult and conflicting demands on the FCC in its implementation of regulations in compliance with the 1992 Cable Act. Less ambitious cable legislation would have proven sufficient to control cable rates while allowing for the natural development of competition in the cable marketplace.

Kathy L. Cooper

224 Id.

225 Id.