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The 1992 Cable Act: Just the Beginning

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Table of Contents

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The views expressed in this article are those of Mr. Allard alone and do not necessarily reflect those of his clients or of other parties.

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Introduction

Just weeks before the 1992 election Congress handed President Bush the first and only veto override of his presidency. When Congress overwhelmingly voted to override the veto and enact the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act" or the "Act"),[1] it broke the President's streak of thirty-five successful vetoes. This moment of mild political drama is already a mere footnote in the history of the Bush Administration and the 1992 presidential campaign, but the far-reaching new law completely overhauls the legal rules governing the television marketplace, and its impact will be felt for years to come. Enactment of the 1992 Cable Act was the conclusion of a long, tumultuous legislative process involving enormous stakes and a wide array of competing, and often powerful, interests. Its enactment, however, also marks the beginning of a new regulatory era whose legal features are far from fully defined. The 1992 Cable Act contains complex, interrelated, and often intentionally vague provisions that revise rules pertaining to cable television, broadcast television, and new television technologies such as direct broadcast satellite and wireless cable. It changes the regulatory role of the Federal Communications Commission ("FCC") and local municipal franchise authorities over the video marketplace and affects the rates cable customers will pay. The evolution of the new rules will be determined by several upcoming FCC rulemaking proceedings[2] and the outcome of the many lawsuits that already have

1. Pub. L. No. 102-385, 106 Stat. 1460 (to be codified at 47 U.S.C. §§ 521-555 (1992)). On October 5, 1992, the U.S. Senate voted 74-25 to override the veto. 138 CONG. REC. S16,676 (daily ed. Oct. 5, 1992). The U.S. House of Representatives voted 308-114 to override the veto. 138 CONG. REC. H11,487-88 (daily ed. Oct. 5, 1992). Previously, in September 1992, the respective votes favoring passage of the 1992 Cable Act were 280-128 in the House and 74-25 in the Senate. 138 CONG. REC. H8687 (daily ed. Sept. 17, 1992); 138 CONG. REC. S4616 (daily ed. Sept. 21, 1992).

2. The FCC has initiated or is scheduled to initiate rulemaking proceedings on the following: (1) Program access and program carriage agreements (MM Dkt. No. 92-265, FCC 92-543 (Dec. 24, 1992)); (2) Cable rate regulation (MM Dkt. No. 92-266, FCC 92-544 (Dec. 24, 1992)) (On Apr. 1, 1993, the FCC announced the adoption of the program access and rate regulation rules.) Reports and Orders forthcoming; (3) Restricting children's access to indecent programming on leased access channels, and prohibition of obscene and other material on public, educational, or governmental ("PEG") access channels (MM Dkt. No. 92-258, FCC 92-498 (Nov. 10, 1992)); (4) Cable home wiring (MM Dkt. No. 92-260, FCC 92-500 (Nov. 6, 1992)) (Report and Order, 93-73 (released Feb. 2, 1993)); (5) Must-carry and retransmission consent (MM Dkt. No. 92-259, FCC 92-499 (Nov. 19, 1992)) (On Mar. 11, 1993, the FCC announced the completion of the Must Carry and Retransmission Consent rules.) Report and Order forthcoming; (6) Cable tier "buy-through" prohibition (MM Dkt. No. 92-262, FCC 92-540 (Dec. 11, 1992)) (On Mar. 11, 1993, the FCC announced the adoption of tier "buy-through" regulations.) Report and Order forthcoming; (7) Cable consumer protection and customer service (MM Dkt. No. 92-263, FCC 92-541 (Dec. 11, 1992)) (On Mar. 11, 1993, the FCC announced the establishment of customer service standards that will become effective on

been filed challenging key provisions of the new Act,[3] as well as by related legislation introduced in the 103d Congress.[4]

This article describes and analyzes the major provisions of the 1992 Cable Act in light of its extensive legislative history, focusing on three of the most important statutory provisions: (1) access to cable programming for cable competitors; (2) retransmission of commercial broadcast signals; and (3) regulation of cable rates. The article also identifies several issues that Congress left to be resolved by the FCC and discusses the relevant rulemaking procedures required by Congress in order to implement the 1992 Cable Act. The article suggests solutions to dilemmas confronting the FCC and evaluates the prospects of the 1992 Cable Act to fulfill the stated intent of Congress to stimulate competition and reduce prices for cable consumers.

Overview of the Legislative History

No major legislation is born suddenly and fully-formed like Athena springing from the head of Zeus. The gestation of the 1992 Cable Act was typically long and perhaps unusually arduous. Its key features were developed over five or more years. Mandatory references for examining the 1992 Cable Act include: the Conference Committee Report accompanying S. 12;[5] the floor debates accompanying consideration of the Con-

July 1, 1993.) Report and Order forthcoming; (8) Equal employment opportunity policies and practices (MM Dkt. No. 92-261, FCC 92-539 (Jan. 5, 1993)); (9) Interim Report to Congress on sports migration (due July 1, 1993); (10) Cable ownership rules (MM Dkt. No. 92-264, FCC 92-542 (Dec. 28, 1992)).

3. *See* Turner Broadcasting Sys., Inc. v. FCC, No. 92-2247 (D.D.C. Oct. 5, 1992) (challenges the constitutionality of §§ 4, 5, and 6 of the 1992 Cable Act); Daniel's Cablevision, Inc. v. United States, No. 92-2292 (D.D.C. Oct. 13, 1992) (challenges the constitutionality of §§ 4, 5, and 6 of the 1992 Cable Act); Time Warner Entertainment Co., L.P. v. FCC, No. 92-2494 (D.D.C. Nov. 5, 1992) (challenges §§ 3, 4, 5, 6, 7(b)(4)(b) and (c), 9, 10(d), 11, 15, 19, 24, and 25 of the 1992 Cable Act); Discovery Communications, Inc. v. United States, No. 92-2558 (D.D.C. Nov. 5, 1992) (challenges §§ 3, 9, and 19 of the 1992 Cable Act); and National Cable Television Assoc., Inc. v. United States, No. 92-2495 (D.D.C. Nov. 5, 1992) (challenges §§ 4,5, and 6 of the 1992 Cable Act).

4. For example, House Judiciary Committee opponents of the Retransmission Consent provisions contained in § 6 of the 1992 Cable Act have introduced two bills to amend the new law: H.R. 12, 103d Cong., 1st Sess. (daily ed. Jan. 5, 1993) (introduced by House Intellectual Property Subcommittee Chair William Hughes (D-NJ) and the ranking Subcommittee minority member Carlos Moorhead (R-CA)); and H.R. 190, 103d Cong., 1st Sess. (daily ed. Jan. 6, 1993) (introduced on Jan. 5, 1993, by Subcommittee member Barney Frank (D-MA), which would repeal the new retransmission consent provisions outright).

5. H.R. CONF. REP. NO. 862, 102d Cong., 2d Sess., *reprinted in* 138 CONG. REC. H8308 (daily ed. Sept. 14, 1992) ("Conference Report").

ference Report[6] and the eventually successful veto override;[7] the earlier Senate Commerce, Science, and Transportation Committee report on S. 12;[8] and the House Energy and Commerce Committee report accompanying H.R. 4850.[9]

The formal legislative history of the 1992 Cable Act, extensive as it is, represents just the tip of the iceberg of related legislative materials and events that shaped its final language. For example, as early as the Fourth of July recess of 1989, there were at least a dozen bills pending in Congress that related to the cable television industry.[10] The provisions of

6. 138 CONG. REC. S14,600-16 (daily ed. Sept. 21, 1992); 138 CONG. REC. S14,222-51 (daily ed. Sept. 22, 1992); 138 CONG. REC. H8671-87 (daily ed. Sept. 17, 1992).

Additional floor debates on the 1992 Cable Act include 138 CONG. REC. S400-33 (daily ed. Jan. 27, 1992); 138 CONG. REC. S561-611 (daily ed. Jan. 29, 1992); 138 CONG. REC. S635-97 (daily ed. Jan. 30, 1992); 138 CONG. REC. S711-70 (daily ed. Jan. 31, 1992); 138 CONG. REC. S16,652-77 and H11,477-88 (daily ed. Oct. 5, 1992); and 138 CONG. REC. H6531-44 (daily ed. July 23, 1992).

7. *See* 138 CONG. REC. S16,676 and H8687, *supra* note 1, for the Senate and House override votes.

8. S. REP. NO. 92, 102d Cong., 1st Sess. (1991) ("Senate Report"). The House Bill, H.R. 4850, 102d Cong., 1st Sess. (1991), did not contain a retransmission consent provision, and the conference agreement adopted the Senate retransmission consent language. Therefore the Senate Report is especially important on this issue.

9. H.R. REP. NO. 628, 102d Cong., 2d Sess. (1992) ("House Report").

10. S. 168, 101st Cong., 1st Sess., 135 CONG. REC. 1816-17 (1989) (*The Cable Television Programming Competition and Consumer Protection Act of 1989*, introduced by Senator Pressler (R-SD), prohibited price discrimination and exclusive distributorship for satellite-delivered programming.); S. 177, 101st Cong., 1st Sess., 135 CONG. REC. 1830-31 (1989) (*The Cable Compulsory License Non-Discrimination Act of 1989* provided compulsory licenses only to those cable systems that provided adequate carriage of local broadcast signals. It was introduced by Senators DeConcini (D-AZ), Metzenbaum (D-OH), Simon (D-IL), and Pressler on Jan. 25, 1989. H.R. 109, 101st Cong., 1st Sess. (1989), a companion bill, was introduced by Representative Bryant (D-TX).); S. 833, 101st Cong., 1st Sess., 135 CONG. REC. 5,7006-09 (1989) (*The Cable Television Subscriber Protection Act of 1989* redefined the term "effective competition" under the 1984 Cable Act to allow regulation of basic cable service rates, unless the cable community was served by more than one multichannel (non-broadcast) video programming distributor. It also exempted from rate regulation cable systems that have less than 30% penetration in their franchise areas. This bill was introduced by Senators Metzenbaum and Lieberman (D-CT).); S. 834, 101st Cong., 1st Sess., 135 CONG. REC. 5,7006-09 (1989) (*The Competition in Cable Television Act of 1989* prohibited unreasonable discrimination in the sale of programming to multichannel video programming distributors, and prohibited any one cable company from owning systems that serve more than 25% of the cable subscribers in the country. This bill was introduced by Senators Metzenbaum, Pressler, and Lieberman.); S. 905, 101st Cong., 1st Sess., 135 CONG. REC. 6,7962 (1989) (*The Cable Consumer Protection Act of 1989* amended § 623 of the 1984 Cable Act to allow regulation of cable rates and permitted states or franchising authorities to regulate cable service. The proposal also authorized a state to deny a cable franchise renewal or transfer of ownership or control of a cable system on the grounds of extensive media ownership, and conditioned the granting of compulsory licenses upon carriage of local broadcast signals. The bill was introduced by Senator Lieberman.); S. 1068, 101st Cong., 1st Sess., 135 CONG. REC. 7,9806 (1989) (*The Cable Competition Act* represented the effort of Senator Al Gore (D-TN) to offer a comprehensive, multititle legislative solution to the problems he saw facing the television consumer. This bill allowed franchising

these earlier bills are easily identifiable as forerunners of significant sections of the 1992 Cable Act. Additionally, over thirty pieces of legislation had been introduced in fourteen different states, and an increasing number of cities and other local jurisdictions had ordinances pending or passed that related to cable television.[11] By the time of final passage, the Senate Commerce Committee had held eleven hearings,[12] and the Senate Communications Subcommittee had held thirteen hearings on cable-related issues, including over fifty hours of testimony from 113 different witnesses.[13] The House Subcommittee on Telecommunications held several days of hearings on a predecessor bill, H.R. 1303, which passed the full House in the 101st Congress. Both the House Subcommittee and the

authorities in areas without competition to regulate rates for the so-called "life-line" service, defined as the lowest priced tier including local broadcast signals. It also allowed telephone companies ("telcos") to provide cable services inside and outside their service areas. The bill further required cable operators, including common carriers, to provide access to the system for all programming services, unless it was not feasible due to channel capacity limitations or because the nature of the program and content did not comport with local standards. It also contained provisions to ensure that programming services affiliated with cable operators would be available to all program distributors on a non-discriminatory basis. Senators Gorton (R-WA) and Ford (D-KY) joined Senator Gore as original co-sponsors.); H.R. 1304, 101st Cong., 1st Sess., 135 CONG. REC. 3,3690 (1989) (This bill repealed § 625(d) of the Communications Act, which permitted cable companies operating in communities where rates are deregulated to "rearrange a particular service from one service tier to another." It was introduced by Representative Donnelly (D-MA)); H.R. 1375, 101st Cong., 1st Sess., 135 CONG. REC. 3,4033 (1989) (*The Cable Rate Disclosure Act of 1989* required cable operators to disclose their rates and services to the FCC, and further required the FCC to publish reports on cable rates. The bill was introduced by Representative Schumer (D-NY).); H.R. 2128, 101st Cong., 1st Sess., 135 CONG. REC. 6,7543 (1989) (This bill required cable operators to obtain approval from their franchising authority prior to increasing rates for basic cable service by more than either five percent or the percentage increase in the consumer price index for the previous year. This bill was introduced by Representative Payne (D-VA).); H.R. 2222, 101st Cong., 1st Sess., 135 CONG. REC. 6,8072 (1989) (*The Cable Consumer Protection Act of 1989* amended the 1984 Cable Act to allow reregulation of rates. It was the companion bill to S. 905. It was introduced by Representative Shays.); H.R. 2437, 101st Cong., 1st Sess., 135 CONG. REC. 8,9996 (1989) (*The Cable Competition Act of 1989* was the companion bill to Senator Gore's omnibus measure, S. 1068, but it varied somewhat in that it required a franchise authority to affirmatively find that telco purchase of a local cable system was in the public interest before the phone company could complete a deal. It was introduced by Representative Boucher (D-VA) and fourteen co-sponsors.); H.R. 2363, 101st Cong., 1st Sess., 135 CONG. REC. 7,9406 (1989) (*The Cable Television Consumer Protection Act of 1989*, introduced by Representative Lent (R-NY), amended the 1984 Cable Act to require carriage of local professional sports teams and local broadcast stations. The measure also prohibited exclusive distribution agreements under certain circumstances and would place a 10-year limit on franchise agreements.); and H.R. 2643, 101st Cong., 1st Sess., 135 CONG. REC. 9,11818 (1989) (*The Cable Television Foreign Ownership Act of 1989* was sponsored by House Telecommunications Chairman Markey (D-MA). This bill restricted foreign ownership of cable, wireless cable, and direct broadcast satellite systems.). See discussion of these bills in Nicholas Allard & Deborah Chaskes, *Summer Heat Changes Political Climate*, PRIVATE CABLE, Aug. 1989, at 22, 26-28.

11. Allard & Chaskes, *supra* note 10, at 25-26.

12. *See* Senate Report, *supra* note 8, at 3.

13. 138 CONG. REC. S561 (daily ed. Jan. 29, 1992).

full Energy and Commerce Committee devoted several days of extensive "mark up" sessions prior to reporting the House version of the bill, H.R. 4850,[14] which eventually became law in the 102d Congress. A wide array of other public proceedings, including Congressional Antitrust inquiries in the House in 1987 and in the Senate in 1988,[15] a 1988 National Telecommunications and Information Administration Study,[16] FCC inquiries,[17] activities of the National Association of Attorneys General,[18] and surveys of the U.S. General Accounting Office ("GAO"),[19] also examined developments in the cable television marketplace and expanded the ample record being developed before several Congressional committees. Finally, the rationale and legal analysis underlying the provisions

14. *See* House Report, *supra* note 9, at 74.

15. Office of U.S. Congressman Charles E. Schumer, Cable Television v. The Alternatives: A Study in Antitrust, Sept. 14, 1987 (on file with Congressman Schumer's office); Subcommittee on Antitrust, Committee on the Judiciary, United States Senate, *Survey on the Availability of Programming to Cable Competitors* (Oct. 3, 1988) (on file with the Subcommittee). At least initially fledgling cable competitors found Congress to be more receptive to the antitrust and competition aspects of their problems rather than the communications policy aspects of their failure to expand into the market. The early activity in this area in the respective antitrust subcommittees helped to stimulate the committees with communications jurisdiction, which had been influenced substantially up to that time by established industries, including the cable industry, to exercise their communications jurisdiction and increase their scrutiny of the obstacles blocking would-be cable competitors from entering the market.

16. National Telecommunications and Information Administration Telecom 2000 (Oct. 1988) (available from the U.S. Government Printing Office) ("NTIA Telecom 2000").

17. *See e.g., In re* Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service, *Notice of Inquiry*, 5 FCC Rcd. 362 (1989); Inquiry into the Existence of Discrimination in the Provision of Superstation and Network Station Programming, *Notice of Inquiry*, 4 FCC Rcd. 3883 (1989); Inquiry into the Existence of Discrimination in the Provision of Superstation and Network Station Programming, *Report*, 5 FCC Rcd. 523 (1989); Inquiry into the Existence of Discrimination in the Provision of Superstation and Network Station Programming, *Further Notice of Inquiry*, 5 FCC Rcd. 3760 (1990); Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service, *Report*, 5 FCC Rcd. 4962 (1990); Inquiry into the Existence of Discrimination in the Provision of Superstation and Network Station Programming, *Second Report*, 6 FCC Rcd. 3312 (1991).

18. In 1989, the National Association of Attorneys General's Antitrust Task Force began an investigation into allegations that members of the cable industry conspired to deny programming to noncable distributors of programming to consumers. The Task Force was made up of members from Maryland, New York, Pennsylvania, Massachusetts, West Virginia, Texas, Ohio, and California. *See* Statement by Charles G. Brown, West Virginia Attorney General (Mar. 15, 1988); Cable Television: Was Regulation Right or Wrong?, ABA section of Antitrust Law, A National Symposium on Competition in the Cable Television Industry (June 12, 1990); *see also* Rachel Thompson, *Attorneys General Threaten Primestar Suit*, MULTICHANNEL NEWS (Jan. 13, 1992); *Subscription Prices Worry Attorney General*, BROADCASTING (Mar. 21, 1988).

19. United States General Accounting Office, *Telecommunications: Nat'l Survey of Cable Television Rates and Services* (Aug. 3, 1989) and GAO, *Follow-up Nat'l Survey of Cable Television Rates and Services* (June 13, 1990).

governing retransmission of broadcast signals evolved from almost thirty years of litigation and rulemaking.[20]

I
Access to Programming

Competition cannot exist if competitors have nothing to sell. The key to success in the cable industry is marketing popular programs to consumers. Contrary to the fundamental premise of the Cable Communications Policy Act of 1984, which essentially deregulated the cable television industry on the assumption that cable would face effective competition,[21] cable has become a monopoly over the local distribution of multiple channels of video programming.[22] In all but a small percentage of communities, the local franchised cable operator is the sole distributor of subscription television,[23] and other potential multichannel video programming distributors,[24] including "wireless

20. *See* discussion of this history in the Senate Report, *supra* note 8, at 34-62, and the House Report, *supra* note 9, at 47-74.

21. One of the stated purposes of the 1984 Cable Act was to "promote competition in cable communications . . . ." Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (1984) (codified at 47 U.S.C. § 521-11 (1992)) ("1984 Cable Act"). The Senate found that "a uniform national policy for broadband telecommunications can serve to eliminate and prevent conflicting and counterproductive regulations so that cable can be a competitive medium . . . ." S. REP. No. 67, 98th Cong., 1st Sess. 17 (1983). *See also* House Report, *supra* note 9, at 30 ("[T]he competition to cable system operators from other providers of video programming that the Committee anticipated during consideration of the 1984 Act, such as wireless and private cable operators, cable overbuilders, the home satellite dish market, and direct broadcast satellite operators, largely has failed to [emerge].").

22. "[M]ost cable television subscribers have no opportunity to select between competing cable systems. Without the presence of another multichannel video programming distributor, a cable system faces no local competition." 1992 Cable Act, *supra* note 1, § 2(a)(2) (to be codified at 47 U.S.C. § 521). *See* Glenn B. Manishin, *Antitrust and Regulation in Cable Television: Federal Policy at War With Itself*, 6 CARDOZO ARTS & ENT. L.J. 75 (1987) (federal policy applied neither regulation nor antitrust to cable television).

23. 1992 Cable Act, *supra* note 1, § 2(a)(2) (to be codified at 47 U.S.C. § 521); Senate Report, *supra* note 8, at 8-11, 13 (discussing monopoly status and power of cable). The Senate Report noted that out of over 11,000 communities with cable systems, there were only 53 with any degree of competition from another cable system (known as an "overbuild"). *Id.* at 13. *See also* the complaint filed in Viacom Int'l, Inc. v. Time, Inc., No. 89-3139 (S.D.N.Y. May 9, 1989) ("Each cable operator is a monopolist in its local market or possesses a monopoly share approaching 100 percent.").

24. A multichannel video programming distributor ("multichannel distributor" or "MVPD") is defined in the 1992 Cable Act as "a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming." 1992 Cable Act, *supra* note 1, § 2(c)(6) (to be codified at 47 U.S.C. § 522(c)(12)) (Wireless cable operators employ microwave spectrum that includes multichannel multipoint distribution services.). This definition is used throughout the 1992 Cable Act: (1) it determines the entities afforded program access (§ 19) and involved in the program coverage rule (§ 12); (2) it defines the entities subject

cable,"[25] Satellite Master Antenna Television ("SMATV" or "private cable"),[26] television receive only ("TVRO" or "home satellite dish"),[27] and direct broadcast satellite ("DBS"),[28] have not yet made significant inroads into the market as head-to-head competitors. These potential cable competitors complained that they were blocked from entering local markets and from providing a competitive service because they were unable to carry the subscription programming that makes cable television so popular with consumers—programs such as HBO, Showtime, Cinemax, TNT, ESPN, regional sports channels, and others. Indeed, Congress found that the cable industry had become highly concen-

to retransmission consent requirements (§ 6); (3) it is used in the effective competition definition while determining rate regulations (§ 3); and (4) it is used in the equal employment opportunity provisions (§ 22).

25. "Wireless cable" systems use the Super High Frequency ("SHF") portion of the radio frequency spectrum to transmit multiple channels of video programming from terrestrial transmitters to small antennas mounted on subscribers' rooftops. Wireless cable is able to provide multichannel programming using a combination of the following services: multipoint distribution service ("MDS"), multichannel multipoint distribution service ("MMDS"), instructional fixed television services ("IFTS"), and the former operational fixed service ("OFS"). Through its combination of services, wireless cable can now provide up to 33 channels. The FCC first allocated spectrum for wireless cable over a decade ago. *See In re* Amendment of Parts 2, 21, 74 and 94 of the Commission's Rules and Regulations in regard to frequency allocation to the Instructional Television Fixed Service, the Multipoint Distribution Service, and the Private Operational Fixed Microwave Service, *Report and Order*, 94 F.C.C.2d 1203, 1228 (1983); *In re* Various Methods of Transmitting Program Material to Hotels and Similar Locations, *Memorandum Opinion and Order*, 99 F.C.C.2d 715 (1983). The FCC's rules and policies governing wireless cable have been significantly modified in recent years. *See In re* Amendment of Parts 1, 2, and 21 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands, *Notice of Proposed Rule Making*, 7 FCC Rcd. 3266 n.8 (1992).

26. SMATV serves private, multi-unit dwellings, hotels, motels, bars, residential developments and subdivisions. An SMATV system connects a master antenna television system ("MATV"), which links, for example, the units in a dwelling to a single external television antenna, and a television receive-only satellite earth station ("TVRO"). In effect an SMATV system is a mini-cable system employing cable that does not cross public rights of way.

27. Television receive-only satellite earth stations, otherwise known as home satellite dishes or backyard dishes, are used to receive satellite-delivered programming. These dishes "access primarily C-band satellite transponders and in some instances access Ku-band transponders." Senate Report, *supra* note 8, at 15. C-band antennas are usually approximately ten feet in diameter. Ku-band antennas are roughly three feet or less in diameter.

28. DBS is a radio communication service in which signals from earth are uplinked and retransmitted by high-power, geostationary satellites for direct reception by small, relatively inexpensive earth terminals. *Inquiry into the development of policy in regard to Direct Broadcast Satellites*, 90 F.C.C.2d 676, 677 n.1 (1982). DBS service will deliver multichannel programming service directly to small home dishes less than two feet in diameter via satellites operating in the DBS band. When DBS becomes operational it is expected to be able to deliver over 100 channels of video programming directly to the home.

trated[29] and that the resulting vertical[30] and horizontal[31] concentration created an imbalance of power between cable operators and programmers, as well as between cable operators and would-be multichannel competitors.[32]

According to cable competitors and some programmers, existing cable systems influence the distribution of programming in two ways. First, cable operators often purchase ownership interests in programmers and thereby directly control the availability of programming. In fact, some cable operators require a financial interest in the programmer as a condition of carriage of its programs.[33] These vertically integrated cable operators have the incentive and the ability to favor their affiliated programmers. This makes it more difficult for unaffiliated programmers to obtain carriage on cable systems.[34] Conversely, Congress found that vertically integrated programmers also have the incentive and the ability to favor their affiliated cable operators over unaffiliated cable operators and other competitors, such as wireless cable, SMATV, and TVRO distributors.[35] Vertically integrated cable programmers often refuse to offer programming to competing cable systems or to alternative technologies, or do so only at discriminatory prices and conditions.[36]

29. 1992 Cable Act, *supra* note 1, § 2(a)(4) (to be codified at 47 U.S.C. § 609); House Report, *supra* note 9, at 40-43.

30. Cable companies often hold ownership interest in programmers. For example, Tele-Communications, Inc. ("TCI"), the largest cable system operator, has financial interests in programming services such as American Movie Classics, the Discovery Channel, QVC Networks, Inc., and Encore. Viacom has a financial interest in MTV, Showtime, Nickelodeon, and VH-1. TCI and Viacom together have an interest in HBO. Senate Report, *supra* note 8, at 24-29; House Report, *supra* note 9, at 41.

31. "Horizontal concentration refers to the share of cable subscribers accounted for by the largest MSOs [Multiple System Operators]." House Report, *supra* note 9, at 42. In 1985, approximately 29% of all cable subscribers were served by the five largest MSOs. As of the end of 1990, the top five MSOs served almost half of the nation's subscribers: TCI serves approximately 24% of cable's total subscribers, Time Warner's cable subsidiary reaches about 12% of the total subscribers, and the next three largest MSOs serve about 11% of the nation's subscribers. Senate Report, *supra* note 8, at 32; *see also* House Report, *supra* note 9, at 42-43.

32. 1992 Cable Act, *supra* note 1, § 2(a)(2) and (5) (to be codified at 47 U.S.C. § 609).

33. 138 CONG. REC. S562 (daily ed. Jan. 29, 1992) (comments of Senator Inouye). *See also* Senate Report, *supra* note 8, at 24; House Report, *supra* note 9, at 41.

34. 1992 Cable Act, *supra* note 1, § 2(a)(5) (to be codified at 47 U.S.C. § 609).

35. *Id.*

36. Chairman Inouye's committee found that "cable operators who own program services have consistently denied dish owners and other multichannel video services programming or made the programming available at prices much higher than those paid by cable operators." 138 CONG. REC. S563-64 (daily ed. Jan. 29, 1992) (comments of Senator Inouye). *See also* Conference Report, *supra* note 5, at 56-58.

Second, in addition to the control afforded by affiliations, cable operators also use their monopsony power to pressure programmers.[37] The top five cable firms control almost half of the nation's cable subscribers.[38] Programmers are fearful of losing their largest customers and of other forms of retribution,[39] and yield to the cable operators' influence by refusing to sell to their competitors, or by demanding that competitors pay an excessive price for the same programs offered to cable operators at reasonable rates.[40]

Recognition by Congress of the possible benefits of both vertical and horizontal integration, such as economies of scale and the financial abil-

37. *See* Senate Report, *supra* note 8, at 23-28 and House Report, *supra* note 9, at 36-40. For example,

> [o]ne company, ESPN, has actually admitted privately that such [economic] pressure has been brought to bear on them. In fact, ESPN has quietly urged one MMDS company to sue them so that they could get out from under the cable pressure and begin to do business with the wireless cable companies.

Office of U.S. Congressman Charles E. Schumer, Cable Television v. The Alternatives, *supra* note 15, at 7.

38. Senate Report, *supra* note 8, at 32.

39. Many examples of the power of cable MSOs are cited in the legislative history of the 1992 Cable Act. *See generally* Senate Report, *supra* note 8, at 14-17, 23-34; House Report, *supra* note 9, at 43-46; Floor Debates, *supra* note 6; Paul Farhi, *Regulating Cable; A Political Response to a Wired Nation*, WASH. POST, Jan. 22, 1992, at A1; Paul Farhi, *Fear, Loathing and Respect for Cable's Leader—TCI's Size Draws Controversy*, WASH. POST, Jan. 23, 1992, at A1; and Paul Farhi, *Fighting For a Leading Edge on the Future*, WASH. POST, Jan. 24, 1992, at A1 (the series of articles in the Washington Post is reprinted in full at 138 CONG. REC. S415-421 (daily ed. Jan. 27, 1992)).

At one time the National Broadcasting Co. (NBC) looked into producing a Cable News channel to compete with CNN, which is partly owned by the cable industry. The cable systems, however, threatened not to carry NBC's news channel; this apparently convinced NBC to scrap its plan to develop this program. Only after changing the format to a financial and consumer news channel, which did not compete with CNN, was NBC able to get onto any cable systems. 138 CONG. REC. S426 (daily ed. Jan. 27, 1992) (statement of Senator Gore).

Similarly, TCI proved formidable when ESPN attempted to raise TCI's rates in 1984. TCI threatened to drop the service, and ESPN backed down. Laura Landro, *Tele-Communications Sets Cable-TV Agenda*, WALL ST. J., Feb. 11, 1986, at 6.

It became virtually impossible to air new programming without allowing cable to take a significant equity position in it. For example, Home Box Office (HBO), which had never before yielded equity to cable MSOs, announced its plan to start up a new comedy channel, and publicly stated its intention to do so on its own without cable equity partners. In the weeks immediately preceding the launch of its new comedy program, however, HBO apparently realized that to succeed, it would have to allow cable MSOs to buy into the service in order to obtain the degree of system penetration sufficient for the venture to survive. *HBO Said To Discuss Sale of Comedy Channel Stake*, WALL ST. J., Nov. 6, 1989, at B6. Landro, *supra*, at B6.

40. The FCC found that "[h]ome satellite dish distributors are paying much higher rates for superstation and network station programming than are other entities, such as cable system operators." 138 CONG. REC. S425 (daily ed. Jan. 27, 1992) (Senator Gore citing an FCC report).

ity to develop new programming,[41] was outweighed by the public interest in jump-starting competition by breaking the bottleneck in the distribution of programming and giving competitors the ability to acquire programming on fair and reasonable terms.[42]

Over five years of effort by would-be cable competitors to secure more favorable access to cable programming networks is embodied in sections 19 and 12 of the 1992 Cable Act.[43]

41. Senate Report, *supra* note 8, at 26-27, 33. Some have argued that it is a myth that cable in fact took a risk and invested in the creation of programming. *Media Ownership: Diversity and Concentration: Hearings Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation*, 101st Cong., 1st Sess. 277 (1989) (testimony of Robert L. Schmidt, President, Wireless Cable Association). In addition, some take issue with the claims that vertical integration results in increased programming. The propensity of cable operators to favor programming services they own has frequently resulted in the discontinuation of programming services that are popular with customers. *Id. See also* Comments of Wireless Cable Association, Inc., at 92, 149 (filed Mar. 1, 1990) and Reply Comments at 34 (filed Apr. 2, 1990) to Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service, *Notice of Inquiry*, MM Dkt. No. 89-600, FCC 89-345 (Dec. 29, 1989) (the Comments and Notice of Proposed Rulemaking are on file with the FCC).

42. Cable's own spectacular growth and success are attributable in significant part to legislation—the cable compulsory license found in the Copyright Act, 17 U.S.C. § 111(d)—that gave it an analogous form of access to programming. Section 111(d) of this act establishes a compulsory licensing program under which cable systems are permitted to make secondary transmissions of broadcast signals carrying copyrighted works only after filing certain notices and statements and paying certain fees. The cable compulsory license system was developed as a means of accommodating two sometimes conflicting federal policies: ensuring the broad dissemination of broadcast programs and protecting the rights of owners of copyrighted materials. 17 U.S.C. § 111(d) (1976). Congress recognized "that it would be impractical and unduly burdensome to require every cable system to negotiate with every copyright owner whose work was retransmitted by a cable system." H.R. REP. NO. 1476, 94th Cong., 2d Sess. 89 (1976).

In the early 1970s, the cable industry was in the throes of battle with broadcasters over the compulsory license. At that time, cable argued that access to programming at reasonable rates was necessary for the fledgling cable industry to compete. Congress granted the cable industry a compulsory license intending to assist this infant industry, by guaranteeing it access to the programming it needed to attract subscribers. *Media Ownership: Diversity and Concentration*, *supra* note 41. The compulsory licensing scheme gave cable operators the opportunity to obtain broadcast programming at below market rates—a form of "access to programming" somewhat analogous to § 19 of the 1992 Cable Act. Section 111 of the Copyright Act put cable operators on footing equal or superior to the broadcast industry, thus providing consumers with a wider choice and facilitating the rapid growth of the cable industry. 17 U.S.C. § 111(d) (1976). *See, e.g.*, 138 CONG. REC. S588 (daily ed. Jan. 29, 1992) (statement of Senator Hollings on S. 12).

43. Any analysis of these principal and most controversial sections of the new statute is well-served by an appreciation of the full legislative context and long evolution of language that reflects the give-and-take of a political process driven by powerful and often conflicting forces. Initial efforts to provide access to programming grew out of bills addressing the myriad of problems confronting the TVRO industry. *See, e.g.*, S. 889, 100th Cong., 1st Sess., 133 CONG. REC. 6,7534 (1987) and accompanying S. REP. NO. 272, 100th Cong., 1st Sess. 2-3 (1987) (summarizing earlier TVRO bills). By 1987, efforts began to broaden this concept to provide access to cable programming for other technologies such as wireless cable. It appears that the first such suggestion was made by Senator Kerry (D-MA) in his comments opposing

Section 19 of the 1992 Cable Act amends Title VI of the Communications Act of 1934, creating prohibitions against restricting the availa-

an early access to programming bill. *See id.* at 24 (1987) (minority views). Ironically, Senator Kerry also opposed the 1992 Cable Act. It was also in 1987 that Senator Pressler (D-SD) first proposed that legislation not only prevent refusals to deal, but also prevent discriminatory prices, terms, and conditions. *Id.* at 25. A litany of subsequent bills and hearings from both the Senate and House make up an extensive legislative history. House Report, *supra* note 9. *See also* S. 1880, 101st Cong., 1st Sess., 135 CONG. REC. S15702 (daily ed. Nov. 15, 1989) (*The Cable Television Consumer Protection Act of 1990*, introduced by Senator Danforth (R-MO)); S. 211, 102d Cong., 1st Sess., 137 CONG. REC. S544 (daily ed. Jan. 15, 1991) (*The Cable Consumer Protection Act*, introduced by Senator Lieberman (D-CT), prohibited local cable companies from unreasonably discriminating among their subscribers, prohibited programming distributors affiliated with cable operators from unreasonably refusing to deal with other multichannel distributors of cable or from charging excessive prices or imposing other terms on their programming that would impede retail competition.); S. 431, 102d Cong., 1st Sess., 137 CONG. REC. S2011 (daily ed. Feb. 20, 1991) (*The Competition in Cable Act of 1991*, introduced by Senator Metzenbaum (D-OH), provided that basic cable rates could be regulated in the absence of effective competition, and prevented cable operators who offer multiple tiers of basic service from forcing consumers to buy channels that they did not want in order to receive those programming services they did want.); S. 432, 102d Cong., 1st Sess., 137 CONG. REC. S2011 (daily ed. Feb. 20, 1991) (*The Cable Television Subscriber Protection Act of 1991*, also introduced by Senator Metzenbaum, required vertically integrated cable programmers to offer their programming to alternative technologies on fair terms and at nondiscriminatory prices, and restricted horizontal concentration in the cable industry by forbidding any one cable company from providing service to more than 25% of cable subscribers in the country.); H.R. 550, 102d Cong., 1st Sess., 137 CONG. REC. H529 (daily ed. Jan. 16, 1991) (This bill prohibited local cable companies from unreasonably discriminating among their subscribers and prohibited programming distributors affiliated with cable operators from unreasonably refusing to deal with other multichannel distributors of cable and from imposing other terms on their programming that would impede retail competition.); H.R. 1303, 102d Cong., 1st Sess., 137 CONG. REC. H1455 (daily ed. Mar. 6, 1991) (This bill facilitated access to programming for multichannel video providers by barring national and regional programmers affiliated with cable operators from unreasonably refusing to deal with distributors in prices, terms, and conditions of programming, and provided for cable rate regulation in the absence of effective competition. This bill was introduced by Representative Markey (D-MA).); H.R. 3420, 102d Cong., 1st Sess., 137 CONG. REC. H6940 (daily ed. Sept. 26, 1991) (This bill required programmers to establish nondiscriminatory prices, terms, and conditions for distribution of their programming through third-party packages, required satellite television programmers who encrypt their services to make those services available to home satellite antenna users, and required programmers to establish reasonable and nondiscriminatory criteria for licensing satellite distributors.); H.R. 3560, 102d Cong., 1st Sess., 137 CONG. REC. E3415 (daily ed. Oct. 17, 1991) (This bill, introduced by Representative Eckart (D-OH), provided for fair access to programming, encouraged multiple franchises, protected against horizontal concentration and vertical integration, and provided for rate regulation.).

The first hearing focusing on the access to programming issue did not occur in a committee with formal jurisdiction over communications. Rather, Senator Metzenbaum, Chairman of the Senate Antitrust Subcommittee, convened a hearing and conducted a survey of anticompetitive practices of the cable industry. *Competitive Issues in the Cable Television Industry: Hearing Before the Subcomm. on Antitrust, Monopolies and Business Rights of the Senate Comm. on the Judiciary*, 100th Cong., 2d Sess. (1988) and 101st Cong., 1st Sess. (1989). The Senator's year-long investigation into the issue led to the introduction of legislation that would prohibit unreasonable discrimination in the sale of programming to multichannel video programming distributors, restrict horizontal expansion, and redefine "effective competition"

bility of programming to cable competitors and related remedies.[44] The stated purposes of this new provision, section 628, are:

> to promote the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video programming market, to increase the availability of satellite cable programming and satellite broadcast programming to persons in rural and other areas not currently able to receive such programming, and to spur the development of communications technologies.[45]

To accomplish these objectives, Congress adopted a sweeping general prohibition in section 628(b) and gave directions to the FCC for implementing the new ban, including four specific examples of prohibited practices, in section 628(c).[46]

Section 628(b) makes it unlawful for any cable operator, "a satellite cable programming vendor *in which a cable operator has an attributable interest*," or a satellite broadcast programming vendor, including a superstation distributor, to engage in unfair methods of competition or unfair or deceptive acts or practices whose "purpose *or* effect" is to "hinder significantly" or to "prevent" delivery of programming by multichannel

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under the 1984 Cable Act. S. 834, 101st Cong., 1st Sess., 135 Cong. Rec. 5,7006-9 (1989). This legislation never passed but, in ensuing years, Senator Metzenbaum was one of the most active and forceful advocates for increased competition in the cable industry.

Some of the other hearings related to access to programming include: *Media Ownership: Diversity and Concentration*, *supra* note 41; *Oversight of Cable TV: Hearings Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation*, 101st Cong., 1st Sess. (1989); *The Cable TV Consumer Protection Act of 1989: Hearings Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation*, 102d Cong., 1st Sess. (1990); *Cable TV Consumer Protection and Competition Act of 1991: Hearings Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 102d Cong., 1st Sess. (1991); *Cable TV Consumer Protection Act of 1991: Hearing Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation*, 102d Cong., 1st Sess. (1991); *Cable Television: Hearings Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 100th Cong., 2d Sess. (1988); *Cable Television Foreign Ownership: Hearing Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 101st Cong., 1st Sess. (1989); *Cable Copyright and Signal Carriage Act of 1982: Joint Hearing Before the Senate Comm. on Commerce, Science, and Transportation and the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. (1982); *Cable Television Regulation: Hearings Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 101st Cong., 2d Sess. (1990).

44. The prohibitions went into effect on December 4, 1992. 1992 Cable Act, *supra* note 1, § 628. Enforcement of the prohibitions must necessarily await completion of the FCC rulemaking related to implementation and remedies.

45. 1992 Cable Act, *supra* note 1, § 628(a) (to be codified at 47 U.S.C. § 548).

46. *Id.* § 628(c)(2)(A)-(D).

video programming distributors ("Multichannel Distributors" or "MVPDs")[47] to subscribers.[48]

Section 628(c) requires the FCC to issue regulations that, at a minimum, prohibit several anticompetitive practices. First, the regulations must establish safeguards to prevent a cable operator that has an attributable interest in a satellite cable programming vendor from *unduly or improperly influencing* the decision of any such vendor to sell satellite cable or broadcast programming, or from unduly influencing the price, terms, and conditions of any such sale to an unaffiliated multichannel distributor.[49] Second, the FCC's new regulations must prohibit discrimination by a programmer in which a cable operator has an attributable interest in the price, terms, and conditions of sales to unaffiliated multichannel distributors.[50] Third, the regulations must prohibit arrangements (including granting exclusive contracts) between a programmer and a cable operator that prevent another multichannel distributor from obtaining programming to serve areas not yet served by a cable operator as of the date of enactment.[51] Fourth, with respect to distribution in areas that are served by a cable operator, the FCC must prohibit for ten years exclusive contracts and similar arrangements unless such arrangements are found by the FCC to be in the public interest.[52] These four

47. *Id.* § 628(a) (emphasis added). See *supra* note 24 for the 1992 Cable Act's definition of "MVPD." *Id.* § 2(c)(6) (a multichannel distributor of subscription television that can potentially offer competition to an established franchise cable distributor).

48. *Id.* § 648(b).

49. *Id.* § 628(c)(2)(A).

50. *Id.* § 628(c)(2)(B). Congress afforded four defenses available against alleged discriminatory pricing. Section 628(c)(2)(B) does not bar:

> (i) imposing reasonable requirements for creditworthiness, offering of service, and financial stability, and standards regarding character and technical quality;
>
> (ii) establishing different prices, terms, and conditions to take into account actual and reasonable differences in the cost of creation, sale, delivery, or transmission of satellite cable programming or satellite broadcast programming;
>
> (iii) establishing different prices, terms, and conditions which take into account economies of scale, cost savings, or other direct and legitimate economic benefits reasonably attributable to the number of subscribers served by the distributor; or
>
> (iv) entering into an exclusive contract [for an area served by a cable operator if such contract is determined by the FCC to be in the public interest].

Id. § 628(c)(2)(B)(i)-(iv).

51. *Id.* § 628(c)(2)(C).

52. *Id.* § 628(c)(2)(D). In considering a request for approval of an exclusive agreement, Congress has mandated that the FCC must consider:

> (A) the effect of such exclusive contract[s] on the development of competition in local and national multichannel video programming distribution markets;
>
> (B) the effect of such exclusive contract[s] on competition from multichannel video programming distribution technologies other than cable;
>
> (C) the effect of such exclusive contract[s] on the attraction of capital investment in the production and distribution of new satellite cable programming;

specific prohibitions are Congressionally-mandated minimums. The FCC is given the discretion to adopt rules that provide redress for any conduct that is intended to or has the effect of hindering competition in the subscription television marketplace under section 628(b).[53]

There remain, however, a myriad of details to be supplied by the FCC that will determine how section 628 will be implemented in practice, and, more fundamentally, whether the Congressional objectives will be achieved. The FCC's mandate was stated in the Conference Report:

> [T]he Conferees expect the Commission to address and resolve the problems of unreasonable cable industry practices, including restricting the availability of programming and charging discriminatory prices to non-cable technologies. The conferees intend that the Commission shall encourage arrangements which promote the development of new technologies providing facilities-based competition to cable and extending programming to areas not served by cable.[54]

The FCC's Notice of Proposed Rulemaking[55] raises a large and, to some, unnecessarily extensive range of issues.[56] Judging from the initial round

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(D) the effect of such exclusive contract[s] on diversity of programming in the multichannel video programming distribution market; and

(E) the duration of the exclusive contract.

Id. § 628(c)(4). This restriction does not affect any contract granting exclusive distribution rights that was entered into on or before June 1, 1990. However, it does affect an exclusive contract entered into on or before June 1, 1990 that is renewed or extended after October 5, 1992. *Id.* § 628(h)(1)-(2).

This prohibition against exclusive contracts for satellite cable programming or satellite broadcast programming between a cable operator and a satellite cable operator and a satellite cable programming vendor in which a cable operator has an attributable interest will cease to be effective on October 5, 2002, unless the FCC finds, in a proceeding conducted prior to the end of that period, "that such prohibition continues to be necessary to preserve and protect competition and diversity in the distribution of video programming." *Id.* § 628(c)(5).

53. *Id.* § 628(c)(1).

54. Conference Report, *supra* note 5, at 93.

55. Implementation of sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution and Carriage, *Notice of Proposed Rule Making*, MM Dkt. No. 92-265, FCC 92-543 (Dec. 24, 1992) ("NPRM") (A summary of the NPRM can be found at 58 Fed. Reg. 328 (1993) but all references in this article will be to the NPRM on file with the FCC.).

56. *See* letter from Senators Hollings (D-SC), Inouye (D-HI), and Danforth (D-MO) to Chairman Quello, MM Dkt. No. 92-259 (criticizing the NPRM for questioning Congressional findings and reopening issues) (on file with the FCC). In many respects, the FCC's NPRM appears to reopen issues debated and decided by Congress. For example, several commentors argue that the FCC lacks authority to reopen the issue of the extent of influence that cable MSOs have over affiliated programmers or whether unjustified differences in programming prices harm competitors providing the same type of services. *See* NPRM, *supra* note 55, at ¶ 10 n.26, ¶ 12; *see also* comments of DirectTV, Inc. at 8 ("DirectTV") and National Rural Telecommunications Cooperative and the Consumer Federation of America at 17 ("NRTC and CFA") to NPRM, *supra* note 55. Furthermore, Congress already found that the types of behavior enumerated in § 628(c) are inherently unfair practices that hinder competitors from providing cable programming to subscribers. Arguably, the FCC may not demand evidence that such behavior is also harmful to competitors. *See* NPRM, *supra* note 55, at ¶ 10;

of comments, these issues will prove to be every bit as contentious as the policy debate leading up to enactment.[57]

A. "Attributable Interest"

The most critical battle left by Congress to the FCC in the section 628 rulemaking may be over the definition of "attributable interest."[58] The section 628 restrictions are generally applicable to programmers in which one or more cable operators have an "attributable interest." The definition of this phrase will largely determine the coverage of section 628.

While not specifically proposing any given standard, the FCC's NPRM asks for comments on whether the attribution threshold generally applicable to the broadcast industry should be adopted[59] and notes

DirectTV at 11-12; Comments of the Wireless Cable Ass'n Int'l, Inc. at 36 ["WCA"]. Finally, Congress already determined that there is no properly functioning marketplace for video programming services, and therefore the FCC need not ask how its implementing regulations under § 628 can rely on "marketplace forces" at this time. *See* NPRM at 12; *see also* comments of DirectTV at 7 and WCA at 20.

57. The comments filed in response to an FCC Notice of Proposed Rulemaking on the access to programming provisions illustrate the impact the FCC rulemaking process will have on the scope and effectiveness of the 1992 Cable Act. The following is a partial list. (The Comments are on file with the FCC (MM Dkt. No. 92-265).): Cablevision Industries Corp., Comcast Cable Communications, Inc., and Cox Cable Communications (joint filers); Continental Cablevision, Inc.; Landmark Communications, Inc.; Liberty Media Corp.; National Cable Television Ass'n, Inc. ["NCTA"]; Tele-Communications, Inc. ["TCI"]; Time Warner Entertainment Co., L.P. ["Time Warner"]; Viacom International, Inc. ["Viacom"]; Arts and Entertainment Network; Discovery Communications; E! Entertainment Television; International Family Entertainment, Inc.; Lifetime Television; Rainbow Programming Holdings, Inc.; Superstar Connection; Turner Broadcasting System, Inc. ["TBS"]; Joint Comments of Bell Atlantic and Pacific Bell Companies; National Rural Telecommunications Cooperative and the Consumer Federation of America ["NRTC and CFA"]; National Telephone Cooperative Ass'n ["NTCA"]; Nynex Telephone Companies; United States Telephone Ass'n; U.S. West Communications, Inc.; Advanced Communications Corp.; Cable America Corp.; Coalition of Small System Operators; Coalition of Concerned Wireless Cable Operators; Competitive Cable Ass'n; Consumer Satellite Systems, Inc.; National Private Cable Ass'n, Maxtel Associates Limited Partnership, MSE Cable Systems and Pacific Cablevision (joint filers); United States Satellite Broadcasting Co.; Wireless Cable Ass'n Int'l, Inc. ["WCA"]; and Attorneys General of Texas, Maryland, Ohio, and Pennsylvania.

58. The Senate Report states that "[i]n determining what is an attributable interest, it is the intent of the Committee that the FCC use the attribution criteria set forth in 47 C.F.R. section 73.3555 (notes) *or other criteria* the FCC may deem appropriate." Senate Report, *supra* note 8, at 78 (emphasis added). Before final passage, however, the House access provision, with amendments, was offered successfully by Congressman Tauzin (D-LA). The resulting House access provision does not define "attributable interest" in either the text or in the accompanying legislative history. The Conference Report does not discuss "attributable interest."

59. *See* Reexamination of the Commission's Rules and Policies Regarding the Attribution of Ownership Interest in Broadcasting, Cable Television and Newspaper Entities, *Report and Order*, 97 F.C.C.2d 997, 1004 (1984); or *Memorandum Opinion and Order*, 1 FCC Rcd. 802, para. 1 (1986).

that the five percent threshold for outstanding voting stock from the broadcast attribution standard has been followed in the recent cable-telco cross ownership proceeding.[60]

Not surprisingly, the record contains comments from the cable industry arguing for a high threshold test that would narrow the applicability of section 628,[61] while the noncable MVPDs from industries and also consumer groups advocate lower thresholds that would make section 628 more universally applicable.[62]

The clear intent of Congress in enacting section 628 was that programming be made available to multichannel distributors who could compete with the local cable franchisee. During the years Congress considered access to programming, it examined the role of vertical integration and the conduct of affiliates in restricting the ability of competitors to obtain commercially viable programming packages.[63] Ultimately,

60. *See* Telephone Company-Cable Television Cross-Ownership Rules, *Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking in CC Docket No. 87-266*, 7 FCC Rcd. 5781, 5819 (1992).

61. For example, Continental Cablevision argues that the attributable interest standard should exempt

> those affiliations between cable operators and programmers in which a single person or entity (other than the cable operator) has a 51% or greater voting share in the programmer. The FCC rules should also exempt situations where the cable operator holds limited partnership interests, non-voting stock, or other interest not deemed attributable under the FCC's Broadcast Attribution Rules. In such cases, the cable operator has no legal ability to exercise any control whatsoever over the programmer.

Continental Cablevision, Inc., *supra* note 57, at 7. *See also* Viacom, *supra* note 57, at 4-9 (An exception should be made for any vertically integrated programmer whose affiliated cable systems account for less than five percent of the programmer's total U.S. subscription base.); TCI, *supra* note 57, at 10-12; and Time Warner, *supra* note 57, at 7-8.

62. The Wireless Cable Association argues in its comments that Congress did not intend that only a controlling interest be deemed an "attributable interest," but rather "Congress was concerned about the incentives and opportunities that a cable operator has to exercise undue influence over the suppliers of video programming—incentives and opportunities that exist even when the cable operator does not exercise actual control." WCA, *supra* note 57, at 24. The FCC should find an attributable interest in a programmer or cable operator present when a person is an officer or director or has the ability to designate an officer or director. Finally, a financial interest or element of ownership that affords the holder an opportunity to unduly influence a programmer's conduct should also constitute "attributable interest." *Id.* at 22-28. A sufficient financial interest or element of ownership is present where any party has a financial interest in both entities, except for corporations with more than 50 shareholders. For such corporations, only direct or indirect holdings of one percent or more are "attributable." *Id.* at 26 (citing Telephone Company-Cable Television Cross-Ownership Rules, *supra* note 60, at para. 36). *See also* DirectTV, *supra* note 56, at 12-14; NRTC and CTA, *supra* note 57, at 25-27.

63. *See, e.g.*, 135 CONG. REC. 7,9890-92 (1989) (statement of Senator Gore introducing S. 1068 and text of bill); 135 CONG. REC. E4102 (daily ed. Nov. 21, 1989) (statement of Representative Cooper (D-TN) introducing H.R. 3826); 136 CONG. REC. H7249-66 (daily ed. Sept. 10, 1990) (discussion and text of H.R. 5267) and accompanying H.R. REP. NO. 682, 101st

however, Congress chose to move away from the concepts of formal vertical integration through ownership and control toward a more flexible concept of "attributable interest," in order to embrace the wide variety of relationships in which cable MSOs are able to influence programmers.[64]

In keeping with Congressional intent, the FCC should develop an attributable interest standard that will have broad coverage, and that does not permit the attributable interest threshold to become a significant loophole.[65] Even permitting just a few of the "crown jewels" of the most popular programs to slip through can create a severe impediment to a new entrant's ability to compete.[66] Alternative multichannel distributors must be able to provide their subscribers with a package of programming comparable to the established cable operator.[67]

A vivid example driven home repeatedly throughout Congressional hearings leading up to enactment of the 1992 Cable Act was the critical importance of sports programming.[68] Simply put, it is very difficult, if

Cong., 2d Sess. (1990); S. REP. No. 381, 101st Cong., 2d Sess. (1990) (Senate Report on S. 1880).

64. Significantly, the Community Antenna Television Association ("CATA") representing small and independent cable operators has maintained that the problems associated with imposition of unfair terms and conditions on CATA members are not in any way linked with vertical ownership. Reply Comments of CATA, at 4 (Feb. 16, 1993, MM Dkt. No. 92-265). *See* WCA, *supra* note 57, at 24; DirectTV, *supra* note 56, at 13.

65. For example, the FCC's definition of attributable interest could encompass more than actual financial or voting control over a programmer: "[N]on-voting or minority stockholders may have significant influence over a programmer's contract decision even if they do not have the ability to 'control' the programmer in the sense of voting on the day-to-day business decision of the company, particularly if they are also distributors of the programmer's product." DirectTV, Inc., *supra* note 56, at 12. The goals of § 19 were established in light of Congressional findings that the vertically integrated cable industry had the incentive and ability to favor and influence affiliated cable operators and programming distributors. The five percent broadcast attribution standard suggested by the FCC was created in a different context to address concerns of "control," instead of the broader concern for the potential for undue influence. NRTC and CFA, *supra* note 57, at 24-25.

66. *See* Thomas W. Hazlett, Telco Entry Into Video, at 30 (unpublished paper presented at the Annual Public Utilities Research Center Conferences, Gainesville, Fla., April 24, 1992); *Oversight of Cable TV*, *supra* note 43, at 424, 436-37 (statement of Robert L. Schmidt, President, Wireless Cable Association).

67. *Oversight of Cable TV*, *supra* note 43, at 331, 333 (statement of Alfred C. Sikes, Chairman of FCC, on FCC Cable Television Policy, Recommendations and Initiatives: "Reasonable access to programming is an essential ingredient to facilities-based competition in video service."); NTIA Telecom 2000, *supra* note 16, at 491; Antitrust Subcommittee Survey, *supra* note 15, at 5-7; Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service, *Report*, 5 FCC Rcd. 4962 (1990).

68. *See generally Sports Programming and Cable Television: Hearing Before the Subcomm. on Antitrust of the Senate Judiciary Comm.*, 101st Cong., 1st Sess. (Nov. 14, 1989). *See also Cable TV Consumer Protection Act of 1989: Hearings Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation*, 101st Cong., 2nd Sess. (March 29, 1990) (statement of Joseph W. Hipple III, chief operating officer, People's Choice TV); *Cable TV Consumer Protection Act of 1991: Hearing Before the Subcomm. on Communi-*

not impossible, for a multichannel operator to attract subscribers unless it is able to offer a significant complement of sports programming.[69] Cable MSOs market accordingly and emphasize their exclusive sports arrangements.[70] Throughout consideration of the 1992 Cable Act, there were vigorous efforts by opponents of access legislation to exclude sports from section 628. One of the concerns voiced by proponents of the legislation was that if the various loopholes that would have exempted several sports channels had been adopted, it would have created a powerful weapon for cable to forestall competition, notwithstanding the passage of the 1992 Cable Act.[71] Such loopholes, by creating added incentives to move sporting events to exempted pay channels, could also tend to accelerate the migration of sporting events previously available free over the air to pay cable channels.[72]

The definition of attributable interest also should be inclusive and flexible enough to discourage attempts to escape the requirements of the Act through manipulation of the formalities of the relationship between a cable MSO and a programmer. More fundamentally, programmers would actually benefit from selling to multiple distributors.[73] After all, the ultimate relief under section 628 from the vantage point of the programmer is that the programmer sell its product at fair market price to additional buyers, who will in turn distribute the product to additional subscribers. For these reasons, in fashioning the attributable interest standard, the FCC would be well advised to risk erring on the side of over-inclusiveness rather than under-inclusiveness.

B. The Interplay of the Broad Prohibition of Section 628(b), the Specific Prohibitions of Section 628(c), and Antitrust Law

Another important issue the FCC will address is the operative relationship between the general prohibition against "unfair methods of competition or unfair or deceptive acts or practices" contained in section 628(b) and the specific prohibitions against "undue or improper influence," "discrimination," and "exclusive contracts" contained in section 628(c).[74] The FCC's NPRM inquires "whether Congress intended for

cations of the Senate Comm. on Commerce, Science, and Transportation, 102d Cong., 1st Sess. 280 (1991) (testimony of Robert L. Schmidt, President, Wireless Cable Association).

69. *See, e.g., Sports Programming and Cable Television*, *supra* note 68, at 4-7.

70. *Id.* at 6-7.

71. *See Oversight of Cable TV*, *supra* note 43, at 440-41 (testimony of Robert L. Schmidt).

72. The 1992 Cable Act requires the FCC to conduct an ongoing study of the migration of sports programming, long a subject of Congressional concern, and to report back to Congress. 1992 Cable Act, *supra* note 1, § 26.

73. *See* Hazlett, *supra* note 66, at 33-35.

74. 1992 Cable Act, *supra* note 1, §§ 628(b)-(c) (to be codified at 47 U.S.C. § 548).

the Commission to regulate any additional 'unfair methods of competition or unfair or deceptive acts or practices' beyond those specified in section 628(c)."[75] In addition, the FCC inquires whether practices precluded under various antitrust laws are also encompassed within the section 628 prohibitions and therefore warrant regulation by the Commission.[76] In the NPRM, the FCC also suggests adopting traditional antitrust principles at several points in its proposed rule.[77]

The cable industry, seeking to limit the scope of the restrictions in the access to programming provisions of the new law, argues that section 628(b) contains threshold requirements, such as the need to show "harm"[78] in the relevant geographic markets, and that these requirements must be read into the regulations that the FCC must issue to implement the specific prohibitions in section 628(c).[79] Although according to the cable industry the 1992 Act does not reach practices that are actionable under antitrust law, the cable industry also asserts that the FCC should adhere to various antitrust principles and standards in enforcing the prohibitions of sections 628(b) and (c).[80]

The proponents of the access to programming legislation, including noncable multichannel distributors, interpret the broad language of section 628(b) as reaching practices beyond the specific and, in fact, *per se* violations enumerated in section 628(c).[81] In stark contrast to the cable industry, they view section 628(b) as expanding rather than limiting the reach of the section. Moreover, the proponents of the legislation main-

75. NPRM, *supra* note 55, at ¶ 13 n.32.

76. *Id.* at ¶¶ 10 and 15.

77. *E.g.*, *id.* at ¶¶ 10-11 (geographic market definition), ¶ 22 (Robinson-Patman Act standards to determine price discrimination).

78. Section 628(b) states that the "purpose or effect" of the prohibited conduct must be "to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming to consumers." Note that the plain language hardly requires a demonstration of actual harm. A cause of action exists where a cable operator or programmer has acted with the "purpose" of hindering potential competitors, even if the "effect" of such action fails to achieve its purpose. Congressional intent is expressed in § 628(b) with deliberately broad language in order to end unreasonable cable industry practices. Section 628(b) requires a threshold showing of "hindrance to competitors." The specific enumerated prohibitions in § 628(c) identify behavior that is by definition unfair or hinders competitors. Thus, for complaints under § 628(c) the FCC should not demand additional evidence of harm to competitors. *See* DirectTV, *supra* note 56, at 10-12; NRTC and CFA, *supra* note 57, at 13.

79. *See* TBS, *supra* note 57, at 9, 17; NCTA and CFA, *supra* note 57, at 7-9, 9-16; and Viacom, *supra* note 57, at 10-12. The FCC raised this issue. *See* NPRM, *supra* note 55, at ¶¶ 10, 15, n.26.

80. *See generally* Liberty Media; NCTA and CFA; and TCI, *supra* note 57.

81. *See* NRTC, *supra* note 57, at 13-14; WCA, *supra* note 57, at 20-22; and DirectTV, *supra* note 57, at 9-11. *But cf.* Senate Report, *supra* note 8, at 28 ("[T]he bill does not make exclusive contracts per se illegal."). However, in conference the House access language, with its tougher specific minimum prohibitions, was adopted in lieu of the Senate language.

tain that the section 628 restrictions are in addition to and different from the remedies that parties might seek under antitrust law.[82]

Section 628(b) contains an explicit statutory prohibition:

> It shall be unlawful for a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.[83]

Section 628(c) directs the Commission to adopt regulations to "specify particular conduct that is prohibited by subsection (b)," giving as examples four specific practices that must be prohibited by such regulations.[84]

Section 628(b) is the heart of section 628, making unlawful *any* "unfair methods of competition or unfair or deceptive acts or practices"—whether enumerated in section 628(c) or not—if the FCC finds that the purpose *or effect* of such methods, acts, or practices is to "hinder significantly" or prevent any multichannel distributor from providing programming to consumers. Thus, to state a claim for relief under section 628(b), a complaint needs to allege that a cable operator or covered programmer is engaged in a practice that (1) is unfair or deceptive, and (2) represents or is intended to be a significant hindrance to the provision of programming service to consumers by a multichannel distributor. According to the authors of section 628(b), it was intended to cover refusals to deal[85] as well as other discriminatory and exclusionary conduct beyond the specific minimum prohibitions in section 628(c). Consequently, in issuing its section 628(c) regulations, the FCC should consider not only specifying particular types of claims, but also should reiterate the language of section 628(b) as a catch-all claim that it would recognize in enforcement proceedings. Such a general provision would give the section 628(c) regulations and resulting adjudications needed flexibility. In sum, as a matter of textual analysis, legislative history, and policy, the FCC should conclude that section 628(b) reaches conduct beyond the section 628(c) enumerated minimums and expands rather than limits the scope of section 628.

By enacting the Cable Act of 1992, Congress declined to accept the vigorous arguments, advanced by the Bush Administration among others, that fair access legislation was unnecessary because remedies

82. WCA, *supra* note 57, at 21-22; NRTC and CFA, *supra* note 57, at 14 n.6.

83. 1992 Cable Act, *supra* note 1, § 628(b).

84. *Id.* § 628(c)(1), (c)(2)(B)(i)-(iv).

85. *See* 138 CONG. REC. H6533-34 (daily ed. July 23, 1992) (remarks of Rep. Tauzin (D-LA) (original author of proposed amendment ultimately incorporated as § 19)).

under existing law provide competitors with sufficient recourse in the courts to address anticompetitive conduct.[86] While Congress explicitly preserved antitrust remedies,[87] the legislative history is clear that the FCC is to consider complaints that are also actionable under antitrust laws. For example, the Senate Report explains:

> The bill provides for an expedited administrative remedy for complaints brought under section [628]. The goal of this provision is to have programming disputes resolved quickly and without imposing undue costs on the involved parties. Without such a remedy, start-up companies, in effect, might be denied relief in light of the prohibitive cost of pursuing an antitrust suit.[88]

Indeed, the types of practices prohibited in sections 628(b) and (c), including anticompetitive refusals to deal, price discrimination, and monopolization, have been illegal since the Sherman Antitrust Act[89] and the Robinson-Patman Act,[90] if not before under common law. It follows that the 1992 Cable Act, if it is to make any sense as a matter of policy, is intentionally designed to reduce the transaction costs and shift the burden of proof to enhance the ability of cable competitors to obtain relief from monopolistic conduct.[91]

As a matter of policy, it also makes abundant sense not to infuse section 628 with either the substantive or procedural mechanisms of antitrust litigation. Congress, having concluded that there was a compelling need to promote competition, also concluded that it was impractical and inefficient to rely on the courts to achieve that goal; the cost, time, and

86. *See* 138 CONG. REC. H6536 (daily ed. July 23, 1992) (remarks by Representative Synar (D-OK) during floor debates prior to defeat of Representative Manton's (D-NY) substitute bill supported by the White House, and passage of Representative Tauzin's access language that, but for strengthening amendments in Conference, was ultimately enacted into law.); Todd Buccholz, Associate Director of the Economic Policy Council, Remarks at the Wireless Cable Convention in Orlando, Fla. (July 1992) (arguing that private remedies under existing law were sufficient) (tapes of the convention are available from the Satellite Broadcasting & Communication Association in Virginia). Ironically, this argument was advanced at the same time Vice President Dan Quayle was sharply criticizing the litigiousness of American business.

87. *See* 1992 Cable Act, *supra* note 1, § 27 ("Nothing in this Act or the amendments made by this Act shall be construed to alter or restrict in any manner the applicability of any Federal or State antitrust law.").

88. Senate Report, *supra* note 8, at 28-29.

89. 15 U.S.C. §§ 1-7 (1988).

90. 15 U.S.C. §§ 13-13b, 21a (1988). Arguably the Robinson-Patman Act does not apply to sales of satellite-delivered programming services. *See, e.g.*, Satellite Television & Assocs. v. Continental Cablevision of Virginia, 586 F. Supp. 973 (E.D. Va. 1982), *aff'd*, 714 F.2d 351 (4th Cir.), *and cert. denied*, 465 U.S. 1027 (1983); H.R.M. Inc. v. Tele-Communications Inc., 653 F. Supp. 645 (D. Colo. 1987); Rankin County Cablevision v. Pearl River Valley Water Supply District, 692 F. Supp. 691 (S.D. Miss. 1988); TV Communications Network v. ESPN, 768 F. Supp. 1062 (D. Colo. 1991).

91. The author acknowledges with appreciation University of California at Davis Professor Thomas A. Hazlett's insights on this point.

uncertainty of litigation by market entrants against established companies with tremendously greater resources makes litigation a chimerical option. It is simply not possible for entrepreneurs, who do not yet have a revenue stream from an operational business and who typically cannot obtain financing without providing lenders with signed copies of program carriage agreements, to litigate their way into the market, channel by channel.[92]

There is no indication that Congress intended, nor should the already overburdened FCC desire, to weigh down the administrative machinery for enforcing section 628 with the requirements of traditional antitrust litigation. To the contrary, Congress chose to afford potential competitors a forum in which to bring complaints based on unfair and discriminatory practices, subject to penalties for bringing frivolous complaints, and to receive a prompt determination whether the potential competitors are entitled to relief. For this reason, it would be a serious mistake for the FCC to fashion its section 628 regulations with antitrust principles. To do so would unnecessarily increase the burden on both the FCC and on the parties seeking relief, while jeopardizing the prospect that section 628 would ever achieve its stated objectives.

C. Existing Agreements

The prohibitions of section 628 were effective sixty days after enactment.[93] The FCC NPRM, however, asserts that the 1992 Cable Act is "silent" about enforcement of the antidiscrimination rules with respect to existing contracts and tentatively concludes that section 628 should not be applied "retroactively against existing contracts."[94] This position is advocated by cable interests and opposed by the various non-cable multichannel distributors and consumer proponents of the legislation.[95]

Retroactivity and the need to "grandfather" existing contracts was a highly charged issue considered at great length throughout the long legis-

92. *Cable Television Regulation (Part I): Hearings Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 102d Cong., 1st Sess. (1990) (testimony of Matthew Oristano, Chairman of People's Choice TV Partners).

93. 1992 Cable Act, *supra* note 1, § 28 (to be codified at 47 U.S.C. § 325). This point was recently driven home, for example, in the keynote speech by the Chief Counsel of the Senate Communications Subcommittee, Antoinette Cook. Remarks Before the Tenth Annual Private Cable Show (Nov. 11-12, 1992) (tapes of this convention speech are available from Satellite Broadcasting & Communication Association in Virginia). For a summary of this speech see *Keynote speaker describes work in passage of 1992 Cable Act*, PRIVATE CABLE, Jan. 1993, at 6, 22.

94. NPRM, *supra* note 55, at ¶ 27.

95. *See, e.g.*, TBS, *supra* note 57, at 2-3; NCTA, *supra* note 57, at 34-37; NRTC and CFA, *supra* note 57, at 32; and WCA, *supra* note 57, at 28-30.

lative history of the 1992 Cable Act.[96] Ultimately, the statutory language enacted by Congress contains one, and only one, narrow grandfather clause exempting a specific type of existing contract from the requirements of section 628. Section 628(h) exempts exclusive contracts entered into prior to June 1, 1990 only to the extent they apply to areas served by a cable operator.[97] This section further specifies that even in the case of such a grandfathered contract, the exemption expires when the contract is renewed or extended.[98]

In the face of this language and the legislative history, it is difficult to find a compelling basis for declining to apply section 628 prospectively to existing contracts. It is at best problematic whether enforcing section 628 would even require abrogating or revising an existing agreement between a programmer and a cable company in any instance other than contractual exclusivity. For example, if a competitor is alleging discriminatory pricing under section 628(c), the FCC can order relief for the competitor, i.e., that it be sold programming at fair prices, without affecting in any respect the contract terms the cable company has with the same programmer. Programming agreements routinely allow the programmer to change pricing on short notice. Programmers can therefore change their pricing to eliminate discrimination without breaching their current agreements.[99] Such contracts typically also require the parties to comply with applicable law, so the programmer should not be liable for breaching an exclusive contract if exclusivity is illegal.[100] To deem all existing contracts exempted would be to seriously limit and de-

96. *See, e.g.*, H.R. REP. No. 682, 101st Cong., 2d Sess. 16 (1990); S. REP. No. 381, 101st Cong., 2d Sess. 26 (1990); *See also* Senate Report, *supra* note 8, at 28. "The Committee does not make any findings with regard to existing contracts or arrangements." *Id.* However, the Senate access language was not adopted in Conference. *See supra* note 81.

97. 1992 Cable Act, *supra* note 1, § 628(h)(1). As this particular exemption was negotiated during the legislative history, it was commonly referred to as the "TNT" exception. Other exemptions and loopholes were also understood to affect specific entities and were debated with this in mind. For example, the proposed so-called "regional sports" exception was designed to limit the applicability of the access provision to national or multistate regional services and arguably exempt regional sports. H.R. REP. No. 682, 101st Cong., 2d Sess. 16, 105 (1990) (report on H.R. 5267); S. REP. No. 381, 101st Cong., 2d Sess. 25, 63 (1990) (report on S. 1880); Senate Report, *supra* note 8, at 27-28, 64; and House Report, *supra* note 9, at 110. The vertical integration requirement of earlier bills' "attributable interest" threshold was similarly known as the "ESPN exception." *See* 1992 Cable Act, *supra* note 1, § 628(b) (definition excluding independents such as ESPN); Senate Report, *supra* note 8, at 77. Taken together, these three exceptions would have essentially exempted most sports programming from the fair access provisions.

98. 1992 Cable Act, *supra* note 1, § 628(h)(2). TBS currently maintains that its grandfathered exclusive contracts grant permanent exclusivity. TBS, *supra* note 57, at 8.

99. Reply Comments of Nat'l Satellite Programming Network, Inc., at 6 (on file with the FCC, MM Dkt. No. 92-265).

100. *Id.*

lay the impact of section 628 on stimulating competition. The way Congress chose to limit section 628 was, in lieu of broad loopholes and exemptions, to sunset the provision after ten years.[101] For these reasons, the FCC should apply section 628 to existing contracts and construe narrowly the grandfather clause for exclusive contracts covering areas actually served by cable.

D. Enforcement Procedures

Section 628(d) of the 1992 Cable Act provides that any multichannel video programming distributor alleging conduct that violates sections 628(b) or (c) may commence an adjudicatory proceeding at the Commission.[102] Section 628(f) requires the Commission to prescribe regulations to implement this section, including provisions for expedited review by the Commission, procedures for data collection, and provision for penalties against any person filing a frivolous complaint.[103]

The FCC proposes adopting rules governing formal complaints that would resolve disputes without a hearing unless there are substantial and material issues of fact.[104] The FCC would require the complainant to establish a *prima facie* case. If the threshold is met, the staff would hold a status conference. Alternative Dispute Resolution ("ADR") proceedings would be possible. Discovery would be limited.[105]

The most critical issues in determining the workability of these enforcement procedures will be the required elements of a *prima facie* case, who bears the burden of proof at different points in the process, and the thresholds for asserting a nonfrivolous complaint. The expedience of the procedures will determine whether potential competitors, who heretofore have not found the federal courts particularly hospitable, are encouraged to seek relief at the FCC. The procedures adopted for enforcement of sections 628(b) and (c) should be realistic in light of the environment in which violations occur. An aggrieved party will have little information available prior to filing a complaint with the FCC, for the party will not be privy to negotiations and agreements between the programmers and

101. 1992 Cable Act, *supra* note 1, § 628(c)(5).

102. *Id.* § 628(d). Upon completion of the adjudicatory proceeding, the FCC is authorized to order "appropriate remedies, including, if necessary, the power to establish prices, terms, and conditions of sale of programming to the aggrieved multichannel video programming distributor." *Id.* § 628(e)(1). These remedies are "in addition to and not in lieu of the remedies available . . . under any other provision of this Act." *Id.* § 628(e)(2).

103. *Id.* § 628(f)(1)-(3).

104. NPRM, *supra* note 55, at ¶¶ 38-45.

105. *Id.* at ¶¶ 45-48.

cable operators.[106] Accordingly, the threshold for a *prima facie* case should be relatively low and, once satisfied, the burden should shift to the responding party, who has access to the relevant information to establish the defenses permitted under the statute.

Generally, thresholds for complaints under section 628(b) alleging different types of misconduct will have to be established on a case-by-case basis, because the practices that can constitute a violation of that section are numerous and can evolve. Among other things, the FCC might well require the section 628(b) complaints to offer evidence that the alleged practice has the purpose or effect of hindering competitors. In contrast, the FCC should recognize that Congress found the specific practices already enumerated in section 628(c) to be so unfair and damaging to competition in the video marketplace that they are explicitly prohibited. The FCC need not demand evidence that such section 628(c) behavior is harmful to competitors—Congress has made this finding.[107]

In contrast to section 628(b), it is possible to discern with specificity the appropriate elements of a *prima facie* case alleging violation of one of the prohibitions enumerated in section 628(c). For example, to establish a *prima facie* case of discrimination under section 628(c)(2)(B), a complaint should show a reasonable basis for believing that the terms and conditions proffered by a programmer in which a cable operator has an attributable interest differ from those the same programmer offers any other multichannel distributer. Such a showing should be sufficient to shift the burden to the programmer to establish either that no such difference exists or that the difference is permissible under the specific exceptions provided for in sections 628(c)(2)(B)(i)-(iv). The complaining party should not be required to establish that the discriminator caused harm either to establish a *prima facie* case or ultimately to prevail on the merits and be entitled to relief.[108]

106. The FCC itself recognizes this problem, asking for example: "[H]ow will a multichannel competitor establish the existence of an exclusive contract if it does not have access to the contract? What if the contract is not written?" NPRM, *supra* note 55, at ¶ 133.

Obviously, if the statutory prohibition of exclusive contracts is to be enforced, it cannot be that an MVPD must establish that an alleged violation is due to an exclusive contract which is *not* in the public interest. Rather, the burden must be on the respondent to establish that a refusal to deal is permissible, because it is a permissible exclusive contract in the public interest, as determined by the five factors set forth in the statute. 1992 Cable Act, *supra* note 1, § 628(c)(4)(A)-(E).

107. *Cf.* Senate Report, *supra* note 8, at 28 ("The Committee believes that exclusivity can be a legitimate business strategy where there is effective competition. Where there is no effective competition, however, exclusive arrangements may tend to establish a barrier to entry and inhibit the development of competition in the market."). Section 628 complaints will presumably involve markets where there is no effective competition.

108. In the NPRM, the FCC proposes to impose on an MVPD aggrieved by discriminatory conduct violative of § 628(c)(2)(B) the burden of not only demonstrating that it has been

Similarly, it should be sufficient to establish a *prima facie* case under the anti-exclusivity provisions of sections 628(i)(2)(C) and (D) if a complaint establishes that an MVPD requested a distribution agreement, but the programmer refused. The burden should then shift to the programmer to demonstrate either that no exclusive agreement exists, or that the refusal to deal is based on an agreement that is in the public interest.[109]

Establishing such a *prima facie* case must also necessarily establish that the case is nonfrivolous, whatever the ultimate outcome. The FCC should not adopt a standard for "frivolous complaints" under section 628(f)(3) that deters legitimate complaints or the prompt administrative resolution of reasonable disputes. Complaints necessarily will be based on simple affidavits from a multichannel distributor attesting to its reasonable belief that, for example, discrimination has occurred, stating facts required by the statute to establish a *prima facie* case. It will not be known by the complaining party whether a defense exists to a reasonable complaint until the programmer produces the relevant factual material to establish a defense. A complaint should not be found to be "frivolous"

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the victim of discriminatory treatment, but also that it has been prevented or significantly hindered in providing programming to consumers as a result. *See, e.g.* NPRM, *supra* note 55, at ¶ 10. Indeed, the FCC implies that an MVPD cannot seek redress for price discrimination if the distributor carries the programming despite the higher price, and suggests that a complainant may have to go so far as to demonstrate that the discrimination threatens the viability of its service offering. *Id.* Simply put, there is absolutely nothing in § 628 or its legislative history to suggest that Congress intended to limit the reach of its non-discrimination provisions in this manner.

The Commission attempts to justify its proposal to require a specific showing of harm by complainants under subsection (c) of § 628 by citing to the requirement under subsection (b) that "the purpose or effect" of the conduct complained of must be "to hinder significantly or to prevent" an MVPD from providing satellite cable programming to consumers. First, § 628(b) itself does not even require a demonstration of actual harm; a cause of action exists where a cable operator or programmer has taken action with the "purpose" of hindering an alternative service provider, even if the "effect" of such action fails to achieve its purpose.

Second, Congress has already found that, unless justified under the factors specifically enumerated in § 628(c)(2)(B)(i)-(iv), the imposition of discriminatory price, terms, and conditions by a programmer in which a cable operator has an attributable interest is a per se violation of § 628. In effect, Congress has found that, unless justified by the specific considerations it found relevant, discrimination has either the purpose or the effect of significantly hindering the emergence of competition.

Parenthetically, there is similarly no basis whatsoever for the FCC's suggestion that some minimum percentage of price differential would be deemed automatically acceptable, in effect a "safe harbor" for price discrimination that does not exceed a certain level to be determined by the FCC. Nowhere in the text of the statute or the entire legislative history of the Act or any related bill was there ever a single mention of such a safe harbor for price discrimination. *See* letter to Chairman Quello, *supra* note 56 (criticizing the NPRM for questioning Congressional findings and reopening issues).

109. Arguably, the statute requires prior FCC approval of exclusive contracts. However, at a minimum, if the FCC relies on the complaint process to address exclusive contracts, the burden should shift to the parties to the contract to establish that the contract is in the public interest.

merely because the complainant does not prevail, particularly if the FCC bases its decision on evidence that the complaining party did not know existed until it was produced by the programmer in the administrative proceeding.

Reasonably low thresholds for *prima facie* cases, minimizing discovery, and shifting evidentiary burdens to respondents to establish affirmative defenses are essential to assure multichannel distributors a relatively swift, low cost, and effective administrative remedy as an alternative to litigation. As the FCC has implied, ease of administration is relevant in adopting these procedures.[110] It is quite likely that the availability of a relatively certain administrative remedy will have a powerful prophylactic effect and will substantially reduce the case load before the Commission.[111]

E. Section 12, Program Carriage Agreements

Section 19 of the 1992 Cable Act, by creating section 628 of the Communications Act of 1934, primarily restricts the activities of programming vendors in which a cable operator has an attributable interest from engaging in anticompetitive practices directed at other multichannel distributors. In contrast, section 12 restricts the activities of cable operators and other multichannel distributors directed at programming vendors.

Section 12 of the 1992 Cable Act amends the Communications Act of 1934 by adding new section 616, which requires the FCC to adopt regulations that will prohibit a cable operator or other multichannel distributor from coercing a video programming vendor into providing exclusivity against other multichannel video programming distributors as a condition of carriage.[112] These section 616 restrictions apply whether or not the programmer is vertically integrated and whether or not a cable operator has an attributable interest in the programmer. Indeed, the legislative record establishes the power of cable MSOs over so-called independent programmers as well as vertically integrated programmers.[113] Section 616 also directs the FCC to adopt rules to prevent a cable opera-

110. NPRM, *supra* note 55, at ¶ 33.

111. Similarly, it is likely that requiring prior approval for exclusive contracts could in practice simplify the workload of the FCC in two ways. First, in light of the narrow grounds in which exclusive contracts could be approved, applications for prior approval might well be relatively few. Second, if the issue arises during the complaint process it may be disposed of with alacrity, i.e., was the exclusive contract in question previously approved by the FCC, or not? If so, the defense stands. If not, it fails.

112. 1992 Cable Act, *supra* note 1, § 616 (to be codified at 47 U.S.C. § 536).

113. *See, e.g.*, House Report, *supra* note 9, at 42-43; Senate Report, *supra* note 8, at 24-26. *See also supra* note 40.

tor or other multichannel distributor from acquiring a financial interest in a program or service as a condition of carriage, or from discriminating against an unaffiliated programmer in favor of an affiliated programmer in selection, terms, or conditions of carriage.[114]

Consequently, even though exclusive contracts by so-called "independent" programmers such as ESPN and USA Network would not automatically be banned by section 616, exclusive arrangements with such "independents" can be attacked under section 616 if it can be demonstrated that the exclusivity was coerced. Section 616 will be extremely important in determining whether competitors are able to assemble a programming package that makes head-to-head competition possible. Those rules could have an impact on the availability of programming that falls outside the FCC section 628 attributable interest standard, and could determine the extent to which parties are able to avoid the full reach of the 1992 Act's fair access provisions by altering their business relationships to escape whatever attributable interest standard the FCC adopts. Moreover, there is no sunset provision in section 12, so its prohibitions would survive and apply to all programming should the ten-year sunset in section 628 go into effect in the year 2002.

II
Must Carry and Retransmission Consent

The so-called "Must Carry" and "Retransmission Consent" provisions of the 1992 Cable Act came to be the most controversial parts of the Act, involving the largest stakes, and mobilizing the largest lobbying efforts on all sides of the issue in the final months leading to enactment. These provisions govern the relationship between multichannel distributors, including cable operators, and the broadcast stations whose signals the MVPDs retransmit to their subscribers. It is essential for any multichannel distributor who intends to deliver a broadcast signal into homes to understand and comply with these complex provisions and to keep abreast of the legal developments, including litigation, FCC rulemakings, and new legislation that will affect the implementation of Must Carry and Retransmission Consent.[115]

114. 1992 Cable Act, *supra* note 1, § 616 (a)(1)-(3).

115. Indeed, the constitutionality of the new Must Carry and Retransmission Consent provisions was challenged in court on the very day of enactment. *See, e.g.*, Turner Broadcasting Sys., Inc. v. FCC, No. 92-2247 (D.D.C. filed Oct. 5, 1992). Also, the effective date of the new provision is delayed 12 months until the FCC promulgates implementing regulations. The 103d Congress will take up copyright legislation based on H.R. 4511 from the last Congress that is closely related and may affect retransmission consent. Two new Retransmission Consent bills have already been introduced. *See supra* note 4.

Under the 1992 Cable Act, broadcasters may either insist on carriage ("Must Carry") or bargain for carriage ("Retransmission Consent"). The Must Carry language contained in sections 4[116] and 5[117] of the 1992 Act gives local commercial and noncommercial television broadcasters the right to mandatory carriage on "cable systems" as defined for the purposes of the Communications Act of 1934,[118] i.e., a traditional coaxial cable operator but not a wireless cable or DBS operator. The Retransmission Consent language contained in section 6 of the 1992 Act prohibits cable operators *and other* multichannel distributors from carrying the signals of television stations without first obtaining the broadcaster's consent.[119] The provisions are interrelated because once effective, broadcasters on a system-by-system basis must opt every three years between the Must Carry and Retransmission Consent regulatory regimes. If Must Carry is selected, then local cable systems are required to retransmit their signal (at no cost to either party). If Retransmission Consent is selected, or if the multichannel distributor is not subject to Must Carry, then the right to retransmit is governed by a negotiated agreement between the broadcaster and the multichannel distributor.[120]

It was only relatively late in the process that the proponents of Must Carry and Retransmission Consent attempted to add language to the major cable vehicles moving through Congress.[121] These provisions, however, had a long evolution, wholly independent of the consumer- and

116. 1992 Cable Act, *supra* note 1, § 4 (to be codified at 47 U.S.C. § 534). This section amends the Communications Act of 1934 (47 U.S.C. § 325) by adding § 614.

117. 1992 Cable Act, *supra* note 1, § 5 (to be codified at 47 U.S.C. § 535). This section amends the Communications Act of 1934 by adding § 615.

118. *See* Definition of a Cable Television System, *Report and Order*, 5 FCC Rcd. 7638, 7635-41 (1990), *revised on other grounds sub. nom.* Beach Communications v. FCC, 965 F.2d 1103 (D.C. Cir. 1992), *cert. granted*, U.S.L.W. (Nov. 30, 1992) (No. 92-603). Note that there is a different, more expansive definition of a cable system in § 111 of the Copyright Act of 1976 that governs the coverage of the cable compulsory license.

119. The 1992 Cable Act, *supra* note 1, § 6 amends § 325 of the Communications Act of 1934 (47 U.S.C. § 325). The language of § 6 gives a broadcaster the right to invoke must carry against cable operators while electing retransmission consent for other MVPDs. *Id.* § 325(b)(5).

120. The required FCC regulations to implement these provisions are scheduled to go into effect October 4, 1993. *Id.* § 325(b)(1). There are several statutory exceptions to Retransmission Consent. It does not apply to: (1) noncommercial broadcast stations; (2) retransmission directly to home satellite antennae of certain broadcast signals; and (3) certain retransmissions of superstations. *Id.* § 6(A) (to be codified at 47 U.S.C. § 325 (b)(2)(A)-(D)).

121. Senator Daniel Inouye (D-HI), Chair of the Senate Communications Subcommittee, added a retransmission consent provision to the amended version of S. 12 during the full committee mark up of the bill, which was favorably reported out of the Senate Committee on Commerce, Science, and Transportation on June 28, 1991. H.R. REP. No. 92, 102d Cong., 1st Sess. (1992). *See also* 138 CONG. REC. S400-408 (daily ed. Jan. 27, 1992) (first day of consideration of S. 12). The House did not vote on Retransmission Consent until it approved the Conference Report. 138 CONG. REC. H8671 (daily ed. Sept. 17, 1992).

competitor-driven momentum that challenged the monopoly power of the unregulated cable industry.[122]

A. Evolution

Cable retransmission began to come to a head as a copyright issue in 1965.[123] In hearings before a House Judiciary Subcommittee, broadcasters argued for full copyright liability for cable retransmission of broadcast signals.[124] Around the same time, the FCC initiated its role as the regulator of cable television by implementing the first Must Carry rules.[125] These rules required cable system operators to transmit to their subscribers, upon request and without compensation, each and every over-the-air broadcast signal that was "significantly viewed in the community" or otherwise considered local by the FCC.[126]

As the copyright debate continued in Congress, the Supreme Court handed down two important cases impacting the retransmission issue. The first case established the FCC's authority over the cable industry.[127] In the second case, the Supreme Court held that cable retransmission of local broadcast signals was wholly outside the copyright laws.[128] In 1974, the Supreme Court held that cable systems were not liable under copyright laws for retransmitting either distant or imported signals.[129] This, along with the *Fortnightly* decision, made the absolution of copyright liability for cable retransmission complete.

122. For example, the Must Carry provisions of the 1992 Act reinstitute a version of the FCC's mandatory carriage rules that applied from 1965-1985, but were invalidated by the U.S. Court of Appeals for the D.C. Circuit in Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986). *See also* Century Communications Corp. v. FCC, 835 F.2d 292 (D.C. Cir. 1987), *revised*, 837 F.2d 517, *and cert. denied*, 488 U.S. 1032 (1988). Subsequently, the FCC opened another Must Carry inquiry, which, in light of the Cable Act of 1992, it has terminated. *See Second Further Notice of Proposed Rule Making*, 6 FCC Rcd. 4545, 4564 para. 99 (1991).

123. *See The Cable and Satellite Carrier Compulsory Licenses: An Overview and Analysis*, A Report of the United States Register of Copyrights, at 7 (March 1992) ("Copyright Office Report").

124. *Id.*

125. *Second Report and Order in Docket 14895*, 2 F.C.C.2d 725 (1966); *First Report and Order in Docket 14895*, 38 F.C.C. 683 (1965). *See also* Carter Mountain Transmission Corp. v. FCC, 321 F.2d 359 (D.C. Cir. 1963), *cert. denied*, 375 U.S. 95 (1963), which upheld 32 F.C.C. 459 (1966), requiring cable systems to carry local broadcast signals as a condition for granting a microwave license to a rural cable system.

126. *Second Report and Order in Docket 14895*, 2 F.C.C.2d at 746.

127. United States v. Southwestern Cable Co., 392 U.S. 157 (1968).

128. Fortnightly Corp. v. United Artist Television, Inc., 392 U.S. 390, *reh'g denied*, 393 U.S. 902 (1968).

129. Teleprompter Corp. v. Columbia Broadcasting Sys., Inc., 415 U.S. 394 (1974). *See also* Copyright Office Report, *supra* note 123, at 22-23.

Finally in 1976, Congress took matters into its own hands by amending the 1909 Copyright Act and establishing a licensing system for cable retransmission.[130] The thrust of the new licensing scheme, called compulsory licensing, was to guarantee cable operators the right to conduct their business free from the threat of liability as long as they complied with FCC regulations and paid their proper royalties.[131] Cable systems were allowed to carry local signals at no charge, but had to pay royalties for retransmitting distant signals. The statutory compulsory licensing system attempted to balance the competing interests of copyright holders with those of the cable operators, or any other operator retransmitting their work, by allowing them to retransmit works from broadcasters without having to negotiate with the copyright holder of each work.[132]

The courts again complicated the ongoing debate when the D.C. Circuit Court held that Must Carry rules violated cable operators' First Amendment rights.[133] Although the court ruled that the existing Must Carry rules were unconstitutional, it did not hold that Must Carry was *per se* unconstitutional. Thereafter, the FCC attempted to refashion the Must Carry rules,[134] but the D.C. Circuit Court again struck them down as unconstitutional.[135]

The Must Carry provision of the 1992 Cable Act is the first legislative attempt since the *Century Communications* case to construct a set of Must Carry rules that can survive judicial scrutiny. At the urging of the broadcasters, Senator Inouye first introduced a bill that included Must

130. Copyright Act of 1976, 17 U.S.C. §§ 111 and 119 (1976 and Supp. 1992) (Cable systems are permitted to make secondary transmissions of copyrighted works contingent on the filing of certain notices and statements and the payment of certain fees. The program was developed as a means of accommodating two sometimes conflicting federal policies: ensuring the broad public dissemination of broadcast programs, while at the same time protecting the rights of owners of copyrighted materials.)

131. Copyright Office Report, *supra* note 123, at 24.

132. *Id.* at 23-24.

133. Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986).

134. These scaled-back Must Carry rules limited the number of broadcast stations a cable system was required to carry, established a minimum viewership standard for stations to be eligible for carriage, permitted cable systems to refuse carriage of more than one broadcast station affiliated with the same commercial broadcast network, and limited the number of noncommercial stations a cable system was required to carry. The rules were to remain in effect for only five years and then be eliminated entirely. Amendment of Part 76 of the Commission Rules Concerning Carriage of Television Broadcast Signals by Cable Television Systems, *Report and Order*, 1 FCC Rcd. 864, 889 (1986).

135. Century Communications v. FCC, 835 F.2d 292 (D.C. Cir.), *cert. denied*, 486 U.S. 1032 (1987). The court concluded that the FCC had not demonstrated a substantial governmental interest in some aspects of the rules to satisfy First Amendment requirements and that, in any event, the rules were overly broad.

Carry and Retransmission Consent in 1990,[136] but he made it clear that this was not to be taken at that time as an indication of his endorsement of the proposal.[137]

Meanwhile, in the House, the principal opponents of Retransmission Consent, including the National Cable Television Association and various Hollywood interests spearheaded by the Motion Picture Association of America, had a major impact. A jurisdictional dispute erupted between the House Energy and Commerce Committee, where the cable legislation originated, and the House Judiciary Committee, which insisted on referral of any cable bill containing Retransmission Consent language. In the view of the Judiciary Committee leadership, Retransmission Consent implicated the Judiciary Committee's jurisdiction over copyright matters. The Committee was, and still is, considering what it viewed as related legislation to revise the cable compulsory license.[138] In all likelihood, referral to the House Judiciary Committee of the House cable bill would have killed the chances of passing cable legislation in the 102d Congress, and certainly would have eliminated the possibility of Retransmission Consent becoming law.[139] In a tactical maneuver, the Energy and Commerce Committee reported a substitute bill,[140] H.R. 4850,[141] passed by the full House, that contained only Must Carry but not Retransmission Consent language.

The tactical gamble was that Retransmission Consent, which had been stripped from the House bill, would be added back in Conference by the Senate where support for the proposal was stronger. The proponents of Retransmission Consent assumed that, without a negative vote in the House in either Committee or on the floor, the House Conferees chosen from the Energy and Commerce Committee would be able to agree to the Senate Amendment to add Retransmission Consent to the legislation. In effect, the sponsors of the House Cable bill were willing to delay the fight

136. *See* 136 CONG. REC. S3405 (daily ed. Mar. 28, 1990) (statement of Senator Inouye, text of S. 2357, section-by-section analysis of this bill, and letter from National Association of Broadcasters to Senator Inouye regarding this legislation). No action was taken on S. 2357 and it died in the 101st Congress.

137. Under S. 2357 cable operators would have been given the option of not carrying local commercial broadcast signals, but if they elected to engage in such carriage, they would have to comply with the fee payments and must carry provisions of the bill. Cable systems would have had to submit a retransmission fee to the FCC, which would annually distribute the fees to broadcasters, networks, and copyright holders. *Id.*

138. H.R. 4511, *The Copyright Broadcast Retransmission Licensing Act of 1992*, 138 CONG. REC. H1379 (daily ed. Mar. 19, 1992) (would amend 17 U.S.C. §§ 111, 119).

139. *See* Randall M. Sukow, *House Pushes Cable License Reform*, BROADCASTING, Nov. 18, 1991, at 59.

140. House Report, *supra* note 9.

141. H.R. 4850, *Cable Television Consumer Protection and Competition Act of 1992*, 138 CONG. REC. H6523 (daily ed. July 23, 1992).

over Retransmission Consent until the full House would take up the Conference Report, and, in effect, force a vote on whether or not Congress was to have any cable legislation enacted before the November 1992 elections. The tactic worked. In Conference, the Senate and House Conferees adopted the Senate Retransmission Consent provision,[142] which finally passed when both the Senate and the House approved the Conference Report.[143]

B. The Interplay Between Retransmission Consent and the Cable Compulsory License

For multichannel distributors subject to Retransmission Consent, section 6 of the 1992 Cable Act only affects the relationship between the multichannel distributor and the broadcast station whose signal the MVPD negotiates to transmit. This new provision does not affect the multichannel distributor's relationship with the copyright holders in the programming, which is governed instead by the cable compulsory license.

The 1992 Cable Act expressly provides that Retransmission Consent is not to be construed as modifying the compulsory license.[144] As the Conference Report explains, multichannel distributors carrying the signals of broadcast stations, whether pursuant to Must Carry or to Retransmission Consent, will continue to have the authority to retransmit the programs carried on those signals under the section 111 compulsory license of the Copyright Act of 1976.[145] Nor does the 1992 Cable Act affect existing or future program licensing agreements between broadcasters and program suppliers.[146] This means that broadcasters do not have to obtain the consent of copyright holders before authorizing multichannel distributors to retransmit their signals.[147]

Nevertheless, both the Conference Report and the Senate Report acknowledge that enactment of Retransmission Consent "may change the environment in which the compulsory copyright operates."[148] This, it would seem, is an artful understatement. During the time section 6 of the 1992 Cable Act was considered, and to this day, many players, in-

142. Conference Report, *supra* note 5, at 76.

143. *See supra* note 5.

144. 47 U.S.C. § 325(b)(6) (1993).

145. Conference Report, *supra* note 5, at 76; Senate Report, *supra* note 8, at 36.

146. 47 U.S.C. § 325(b)(6); Conference Report, *supra* note 5, at 46-47; Senate Report, *supra* note 8, at 76.

147. *But cf.* Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues, *Notice of Proposed Rule Making*, MM Dkt. No. 92-259, FCC 92-499 (Nov. 19, 1992), at ¶ 65 ("Retransmission/Must Carry NPRM").

148. Conference Report, *supra* note 5, at 76. Senate Report, *supra* note 8, at 37 and n.86.

cluding the U.S. Register of Copyrights, viewed the two concepts as utterly incompatible.[149] Others contend that, at a minimum, both were inextricably interrelated,[150] and the comprehensive revision of the cable compulsory license system underway in Congress cannot progress without regard to rules for Retransmission Consent.[151] For example, if Congress acts to phase out or to substantially revamp the cable compulsory license, copyright rates for multichannel distributors would most likely be negotiated with the copyright holders in a free market or through some clearinghouse mechanism. In that case, the distributors would have to negotiate twice for the same signal under two different statutes: first, with the broadcaster for the right to carry the signal under section 6 of the 1992 Cable Act, and second, with the copyright holders for the right to distribute their creative works.[152] In other words, Congress should not act to replace the current compulsory license without looking at the overall context of all the transactions and costs the multichannel distributors would face in order to deliver their signals to their customers.

At another, more basic level, when the retransmission consent/copyright debate is stripped of its legalisms and rhetoric, it begins to resemble a naked struggle between different industries over the apportionment of subscription television's huge revenue pie. Copyright holders, represented in Washington by the Motion Picture Association of America and others, seek larger copyright royalties from cable and other multichannel operators than they are presently paid under the existing compulsory license system. They also seek a portion of what a broadcaster might be able to charge a multichannel distributor for retransmitting a copyrighted work. In the view of the Motion Picture Association of America, subscribers do not turn to a broadcast signal because the network transmits a "lovely" signal, but rather because they wish to view the creative work carried by the signal.[153] Broadcasters, in contrast, seek

149. *See* Copyright Office Report, *supra* note 123, at 156.

150. *See* 138 CONG. REC. H6505 (daily ed. July 23, 1992) (remarks of Rep. Hughes) ("Make no mistake, retransmission consent is nothing more than a copyright in sheep's clothing of the communications statute. The U.S. Copyright Office has agreed, stating that retransmission alters the fundamental principle of the compulsory licensing scheme.").

151. *See* H.R. 4511, *The Copyright Broadcast Retransmission Licensing Act of 1992*, *supra* note 138 (introduced in the 102d Congress by Representative Hughes (D-NJ), who chairs the House Judiciary Intellectual Property Subcommittee). A version of this bill is expected to be reintroduced in the 103d Congress.

152. *See Cable Television Consumer Protection and Competition Act of 1991: Hearing Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 102d Cong., 1st Sess. (1991) (statement of Charles C. Hewitt, President, Satellite and Communications Association).

153. *Hearing on H.R. 4511, Hearings Before the Subcomm. on Intellectual Property and Judicial Administration of the House Comm. on the Judiciary*, 102d Cong., 2d Sess. (Apr. 1,

compensation for the added value they contribute to assembling and retransmitting their programming. Broadcasters complain that cable has built its success by using broadcast programming without paying for it. They also resist yielding to the copyright holders a portion of the revenue they feel they are entitled to for retransmission of their broadcast signal. The multichannel distributors, including cable, quite naturally seek to minimize the payments they must make to either the copyright holders or the broadcasters. In the end, perhaps the central reason for the contentiousness surrounding the subject matter is that it is all about money—a very large amount of money.[154] It is, therefore, virtually a certainty that the courts and Congress will continue to revisit the issue.

C. Litigation and Future Legislation: Prospects

The Must Carry and Retransmission Consent provisions of the 1992 Cable Act have the greatest likelihood of being significantly impacted by either subsequent litigation or legislation. A suit filed by Turner Broadcasting within hours of enactment and soon joined by several other parties[155] attacks Must Carry as a violation of the cable operators' First Amendment right of free speech and alleges that Must Carry is, in fact, more expansive than the FCC's Must Carry rules invalidated by the court in *Quincy*[156] and *Century*.[157] In addition, TBS essentially argues that Retransmission Consent is unconstitutional because it cannot be severed from the Must Carry provisions of the Act.[158]

1992) (statement of Jack Valenti, President, Motion Picture Association of America) (forthcoming).

154. Billions are at stake. Total cable revenue for 1992 was estimated at $19 billion. *See* Anthony Ramirez, *Ameritech Offers to End Monopoly*, N.Y. TIMES, Feb. 23, 1993, at D3. Under the cable compulsory license, cable operators have paid more than $1.1 billion in royalties over the past 13 years and over $150 million in each of the last 5 years. Harry Jessell, *Congress' Compulsory License Cauldron*, BROADCASTING, Nov. 11, 1991, at 56. CBS alone claims that retransmission consent fees would generate at least $72 million in additional revenues for CBS and its affiliates. COMMUNICATIONS DAILY, June 4, 1991, at 8.

155. Turner Broadcasting Sys., Inc. v. FCC, No. 92-2247 (D.D.C. Oct. 5, 1992). In its amended complaint, filed Nov. 5, 1992, Turner Broadcasting ("TBS") was joined as plaintiff by several other owners of cable program networks: Arts & Entertainment Network, Black Entertainment Television, E! Entertainment Television, Hearst/ABC-Viacom Entertainment Services, International Family Entertainment, National Cable Satellite Corp., QVC Network, The Travel Channel, and USA Networks.

156. Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986).

157. Century Communications Corp. v. FCC, 835 F.2d 292 (D.C. Cir. 1987), *revised*, 837 F.2d 517, *and cert. denied*, 486 U.S. 1032 (1988).

158. The case is currently before a district court of three judges with a right of direct appeal to the Supreme Court as required by § 23 of the 1992 Cable Act (to be codified at 47 U.S.C. § 555(c)(1) and 28 U.S.C. § 2285). All of the pending cases challenging various provisions of the 1992 Cable Act were consolidated before the three judge court (Williams, J., Presiding, Sporkin, J., and Jackson, J.) (Oct. 13, 1992). Pursuant to § 23, the three judge court

It would seem that TBS has a reasonable prospect of prevailing on its Must Carry challenge, if based on nothing else but that such rules have twice previously been thrown out by the United States Court of Appeals for the District of Columbia.[159] This problem was certainly anticipated in both the Senate and the House where the respective Committee Reports took great pains to argue the constitutionality of the new Must Carry provisions.[160]

The attack on Retransmission Consent would appear to be on weaker footing. First, even allowing for the procedural delays in hearing the case,[161] TBS is asking the court to decide its challenge before the FCC concludes its section 6 rulemaking. In effect, TBS is asking the court to conclude that no Retransmission Consent regulations that the FCC could issue would be constitutional. In addition, even if Must Carry fails, it is obviously possible for Retransmission Consent to operate. This is apparent because some multichannel distributors such as wireless cable operators are not, by definition, subject to Must Carry.[162] A local broadcaster cannot force a wireless cable operator to retransmit its signal over its wireless cable channels. However, all wireless cable operators will have to obtain Retransmission Consent under section 6. Therefore, the statutory framework itself contemplates that Retransmission Consent can operate with or without Must Carry.

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subsequently retained jurisdiction along with TBS of all of the claims in the consolidated cases challenging the Must Carry provisions of §§ 4 and 5 of the Act, and to the extent related, Retransmission Consent in § 6 (Nov. 13, 1992). All other claims have been assigned to Judge Jackson who will hear argument on cross-motions for summary judgment filed February 12, 1993. In this later proceeding, a serious question of ripeness arises because the challenges presage the completion of the FCC's various rulemakings. Judge Jackson has denied plaintiff's request for declaratory judgment and injunctive relief in part based on the absence of implementing regulations and the speculative nature of injury (Order Jan. 22, 1993). Whether or not dismissed for lack of ripeness, it is expected that the issues will be relitigated when the inevitable appeals are filed challenging the FCC's upcoming rules.

159. *Quincy Cable TV*, 768 F.2d at 1434; *Century Communications*, 835 F.2d at 292.

160. Senate Report, *supra* note 8, at 53-62; House Report, *supra* note 9, at 58-74.

161. The briefing schedule and oral argument were delayed, for example, because the Justice Department under the outgoing Bush Administration initially indicated that it would not defend against the Must Carry challenges. The basis for this position was presumably that the Department had advised the President to veto the legislation because it concluded that the Must Carry provision was unconstitutional. Upon the motion of several parties, and with Congress itself procedurally unable to defend the statute until it reconvened and could formally approve such participation in the litigation, the court postponed hearing the merits of the case. Under the Clinton Administration, the Justice Department has reversed its position and has filed a brief defending Must Carry. The day before the Justice Department entered this case, the Senate passed a resolution to file an amicus curiae brief in defense of Must Carry. 139 CONG. REC. S1145-47 (daily ed. Feb. 3, 1993).

162. *See supra* note 118 and accompanying text.

Whatever the outcome in court, Retransmission Consent will be a subject of Congressional scrutiny once again in the 103d Congress.[163] All the parties involved in the court challenges and the FCC rulemakings will have an opportunity and can be expected to continue to pursue this issue vigorously in the legislative venue as well.

D. Retransmission Exclusivity—The Trojan Horse

Although the focus of section 6 is the relationship between broadcast stations and multichannel distributors and not the problems associated with the power of cable MSOs and unregulated cable monopolies at the local level, section 6 should be implemented in a manner that advances and does not impede competition—one of the principal goals of the 1992 Cable Act. Specifically, the FCC should guard against cable operators extracting exclusive retransmission consent agreements from local broadcasters or requiring local broadcasters to discriminate against emerging competitors on the basis of price or any other terms or conditions governing retransmission. This possibility arises because section 6 of the 1992 Cable Act does not explicitly prevent a broadcaster from granting retransmission consent on an exclusive basis, nor does it prohibit a cable operator from coercing a broadcaster into such an arrangement. This omission might create a loophole that would encourage conduct comparable under section 6 in its nature and effect to the practices barred by the fair access provisions and carriage requirements of section 19 and section 12 of the Act. The possibility of exclusive retransmission consent is the trojan horse of the 1992 Cable Act, posing the single most serious threat to the success of the legislation in fostering competitive multichannel operators nationwide.[164]

Until enactment of the 1992 Cable Act the availability of popular broadcast programming to alternative multichannel distributors was not a concern. Those multichannel distributors who engaged in retransmission of broadcast signals could do so freely without interference from the

163. *See supra* notes 4 and 151.

164. *See* letter from Representative Boucher (D-VA) to Chairman Quello, MM Dkt. No. 92-259 (expressing concern over the possibility of retransmission exclusivity and urging a 10-year ban on exclusivity) (on file with the FCC). A further indication that this concern is more than idle speculation is the vigorous opposition of at least one major cable operator to the efforts of some local officials to pass legislation that would close the retransmission consent loophole and bar exclusive broadcast carriage agreements. Bill 26-92, Cable Communications—Increased Competition, sponsored by Councilmember Michael Subin, Montgomery County Council, Maryland, and Legislative Analysis prepared by E. Beninger, Feb. 1, 1993, at 3 ("Should prohibition on exclusive retransmission agreements be added to bill, recommending amendment.").

cable industry.[165] Unfortunately, cable operators now have the incentive and opportunity under section 6 to repeat the behavior they previously exhibited with nonbroadcast programmers by attempting to extract exclusivity or discriminatory provisions in retransmission consent agreements with local broadcasters.

Many broadcasters are particularly vulnerable to cable's market power. Cable operators have the market power to extract considerations from even the strongest television stations that could not be gained in an effectively competitive marketplace.[166] If tolerated by the FCC, cable operators could be expected to negotiate for the exclusive right to carry a local broadcaster and, in the absence of price competition, could pass along to the consumer the cost of acquiring exclusivity by raising the rates for basic service. Cable operators could also penalize broadcasters who opt for retransmission consent and who deal with competitive technologies.[167]

Whatever else can be said about the Congressional intent underlying this landmark legislation, it is certain that Congress intended to stimulate competition and that it did not intend to create new obstacles for emerging competitors such as wireless cable, TVRO, and DBS. If unchecked, cable's incentive and ability to pressure broadcasters who make their signal available to competing technologies could completely derail the efforts of Congress and the FCC to generate competition and diversity in the marketplace. Local broadcast signals represent roughly two-thirds of the viewing time on the average cable system. Consumers expect that their local multichannel video programming distributor will provide access to local broadcast signals and, indeed, no cable or other multichannel distributor could succeed without them.[168] Because of the popularity

165. The 1992 Act does not affect situations where *retransmission* is not involved, i.e., no consent is required where the local broadcast signals are received off the air on a standard UHF/VHF antenna. Senate Report, *supra* note 8, at 26.

166. *Id.* at 45.

167. Cable operators might, for example, (1) refuse carriage to uncooperative broadcasters; (2) reposition broadcasters to channels that cannot be received on many television sets without special converters leased at extra cost from the cable system; (3) program converter boxes so that they automatically display a channel other than the broadcaster's when first turned on; and (4) bias the ratings of uncooperative broadcasters through manipulation of knowledge as to which subscribers are metered. *See* WCA, *supra* note 57, at 23 (prepared by Paul J. Sinderbrand and Dawn G. Alexander).

168. Cable subscribers spend the majority of their time watching broadcast programming. James Hedlund, President of the Association of Independent Television Stations, Inc., has stated that "free off-air broadcasting accounts for 74% of the audience share points in cable households [and that] Independent Television alone receives a 21% prime time audience share in cable households." *Cable Television Regulation: Hearing Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 101st Cong., 2d Sess. 182 (1990) (statement of James B. Hedlund, President, Association of Independent Television Stations, Inc.) (emphasis omitted).

of the local broadcast stations, consumers simply will not subscribe to the multichannel programming distribution services that cannot deliver the same local broadcast signals as cable.[169]

Section 6 requires the Commission to consider when implementing rules "the impact that the grant of retransmission consent by television stations may have on the rates for the basic service tier and shall ensure that the regulations prescribed under this subsection do not conflict with the Commission's obligations under section 623(b)(1) to ensure that the rates for the basic service tier are reasonable."[170] The price benefits to consumers of competition can not develop unless the Commission protects the ability of nascent competitors to negotiate retransmission consent agreements. This is because, in order to compete effectively, cable system competitors must be able to provide their subscribers with a channel lineup similar to that of cable system operators—this includes both broadcast programs and non-broadcast programs.

For this reason the FCC could, for example, ban cable operators from either securing exclusive retransmission agreements with broadcasters or including in retransmission agreements provisions that would require the broadcaster to discriminate against emerging competitors with respect to price or any other terms or conditions governing retransmission.[171]

According to the press release announcing the FCC's completion of its Retransmission Consent rulemaking, the FCC has, in fact, decided to bar retransmission consent exclusivity, and to reexamine the issue in three years.[172] At this writing the official report and order have not yet been issued, and it is not possible to discern the basis for the FCC's important decision. In taking this action, the FCC, however, apparently has declined to invoke its authority under section 325(b) concerning the impact of that section on basic rates. Rather, the Commission indicates that it will address this issue pursuant to section 623(h)(3) and its rate regulation proceeding.[173] Should the FCC be asked to reconsider its ban

169. A survey conducted for NAB and NTA found that 43% of cable subscribers polled would drop their cable service and 23% would consider canceling if broadcast networks were dropped from their offerings. *Viewers See Networks as Essential Cable Offering, Roper Study Finds*, COMMUNICATIONS DAILY, May 2, 1991, at 5.

170. 1992 Cable Act, *supra* note 1, § 325(b)(3)(A).

171. As Representative Boucher has suggested, in keeping with the sunset provision placed on the comparable prohibitions in the fair access language of § 19, this proposed prohibition could be limited to a period of 10 years, after which time the Commission could consider whether the marketplace is sufficiently competitive to justify eliminating the prohibition. *Id.* § 628(c)(5).

172. FCC News Release, MM Dkt. No. 92-259 (Mar. 11, 1993), Report and Order forthcoming.

173. *Id.*; Retransmission/Must Carry NPRM, *supra* note 147, at ¶¶ 66-69.

on exclusivity, or the decision be challenged in court, it would be appropriate to rely on the additional authority it has under the provision. The legislative history indicates ample concern about the direct impact of retransmission consent on basic rates.[174] Moreover, the FCC's authority under the 1992 Act to regulate basic rates arises only in the absence of effective competition in the local market. The FCC must not and should not ignore its authority and responsibility in the first instance to safeguard effective competition by assuring the availability of retransmitted broadcast programming to cable competitors. Otherwise, Congress' goal of promoting competition in the monopolized cable industry will never be achieved. Should efforts be launched to overturn the FCC's ban on retransmission consent exclusivity, the advocates of competition would be well advised to use the various upcoming legislative vehicles relating to this issue as an opportunity to clarify the statute by closing the retransmission exclusivity loophole.[175]

III
Rate Regulation

When the opponents of the Cable Act of 1992 criticized the legislation as an unwarranted and onerous re-regulation of the cable industry, they were necessarily referring to the rate regulation provisions in what became section 3 of the Act.[176] It was, in fact, the inability of the cable industry to fully recognize or deflect the genuine grassroots concern communicated by cable subscribers to legislators about the increasing cost of

174. As Senator Inouye has stated:

> Cable has also asserted that retransmission will cause cable rates to increase .... On the contrary, the Committee Report specifies that in its proceeding implementing transmission consent, the FCC must ensure that local stations' retransmission rights will be implemented with due concern for any impact on cable subscribers' rates .... In addition, the FCC is also required to regulate the rates for the basic tier—this is the tier that contains the broadcast signals—to make certain that those rates remain reasonable. Thus, the FCC has a clear mandate to ensure that retransmission does not result in harmful rate increases that we have seen flourishing throughout this nation.

135 CONG. REC. S563 (daily ed. Jan. 29, 1992) (comments of Senator Inouye); *see also* 138 CONG. REC. S14603 (daily ed. Sept. 22, 1992) (remarks of Senator Bradley (D-NJ)); 138 CONG. REC. H1477 (daily ed. Oct. 5, 1992) (veto message from President Bush).

175. Another legislative approach would be for fledgling competitors to be granted a statutory exception to Retransmission Consent modeled after the FCC's 1959 decision that enabled cable operators to retransmit without permission. *CATA and T.V. Repeater Services*, 26 F.C.C. 403, 429-30 (1959).

176. Section 3 of the 1992 Cable Act, *supra* note 1, amends § 623 of the Communications Act of 1934, 47 U.S.C. § 543 (1981). This provision not only affects the subscription rights to basic and cable programming, but also the terms of leased commercial access and all aspects of cable service. It is beyond the scope of this article to address each of these aspects of § 3 in detail.

cable service that, more than any other single factor, led to enactment.[177] Even if section 3, as implemented by the FCC, creates a regulatory briar patch, it may be a thicket in which cable operators are relatively comfortable and a situation at least preferable to facing competition—despite their protests to the contrary during the legislative process.

Viewed in the context of the whole Act, the rate regulation provisions demonstrate a strong reluctance to dictate prices and a corresponding preference for competition.[178] In sum, until other measures yield a more competitive market, Congress seeks to establish a system of rate regulations that would result in prices for basic and cable programming more closely approximating what might result from competitive market prices. Moreover, when the extremely complicated, but ultimately relatively modest, rate regulation provisions are applicable, their coverage is so problematic and possibly so limited as to cast doubt on whether they ultimately will generate significant consumer savings. The answer will be found in the details of the FCC's herculean effort to issue regulations on this, the most massive rulemaking initiative of the 1992 Act.[179] If, for example, the FCC is able to enforce even a very modest price reduction of as little as ten to fifteen percent off the price of basic service, it could immediately save consumers a billion dollars.

A. Genesis, Exodus, Numbers

The 1984 Cable Act[180] is the initial reference point for the legislative history of the rate regulation provisions in the 1992 Cable Act. The 1984 Cable Act was the first comprehensive federal policy for cable television. Prior to its enactment, cable television was regulated principally at the local level through the franchise process.[181] The 1984 Cable Act prohibited local authorities from regulating the basic service rates of cable systems.[182] Congress hoped deregulation would "enable the cable industry to prosper, benefiting both consumers and industry participants alike."[183]

177. *See, e.g., Competitive Problems in the Cable Television Industry, Hearing Before the Subcomm. on Antitrust, Monopolies, and Business Rights of the Senate Comm. on the Judiciary*, 101st Cong., 1st Sess. 161-201 (1989) (testimony and remarks of James P. Mooney, President and C.E.O. of National Cable Television Ass'n).

178. 1992 Cable Act, *supra* note 1, § 3(a) (codified as amended, § 623(a), 47 U.S.C. § 543(c) (1980)).

179. *See* Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation, *Notice of Proposed Rule Making*, MM Dkt. No. 92-266, FCC 92-544 (Dec. 24, 1992) ("Rate Regulation NPRM"). FCC 92-544 is itself almost 100 pages long. The submissions from just the initial round of the comment period which were available to the author weighed over 40 pounds and totaled over 3,500 pages.

180. *See generally* 1984 Cable Act, *supra* note 21.

181. House Report, *supra* note 9, at 29.

182. Senate Report, *supra* note 8, at 4.

183. House Report, *supra* note 9, at 29.

Legislators intended to find a balance between the local franchising process as the primary means of regulation while also encouraging the growth of a new industry. Congress believed that the availability of competing sources of programming would keep rates down and that local franchising authorities would ensure that cable operators responded to the needs of the community.[184]

Since the 1984 Cable Act, cable television has experienced tremendous growth. Cable penetration of thirty-seven percent of households in 1985 grew to sixty-one percent in 1992.[185] Although the growth in the cable industry has provided viewers with increased quality and diversity in programming, the Senate and House committees became increasingly concerned with the way cable systems treated consumers and abused their market power in this deregulated atmosphere.[186] Additionally, anticipated competition from alternative sources of video programming, such as wireless and the home satellite dish market, has failed to become a force in the marketplace. Currently, cable competitors serve approximately five percent of American households.[187]

The 1984 Cable Act deregulated rates for basic cable service where there was "effective competition" as defined by the FCC.[188] A cable system was considered to be subject to effective competition if the entire community it served could receive three or more unduplicated broadcast signals.[189] Under this standard, cable systems in approximately ninety-seven percent of all communities were not rate regulated.[190] After four years of deregulated cable service, the Chairman of the House Telecommunications Subcommittee, Congressman Edward Markey (D-MA), requested that the GAO survey cable systems to determine the effect of deregulation on rates.[191] The GAO surveyed 2,000 of the then existing 11,000 cable systems. From 1,500 responses it concluded that monthly rates for the lowest priced basic service increased by twenty-nine percent and rates for the most popular basic cable service increased by twenty-six percent.[192]

The GAO report was criticized by some as representative of only a small portion of the cable industry and by others as unrepresentative of

184. *Id.* at 30.
185. *Id.* at 29.
186. *Id.*
187. *Id.* at 30.
188. 47 U.S.C. § 543(b) (1988).
189. Senate Report, *supra* note 8, at 4; House Report, *supra* note 9, at 30-31.
190. Senate Report, *supra* note 8, at 4; House Report, *supra* note 9, at 30-31.
191. Senate Report, *supra* note 8, at 4; House Report, *supra* note 9, at 30-31.
192. *See generally* GAO Reports, *supra* note 19; Senate Report, *supra* note 8, at 5; House Report, *supra* note 9, at 32.

the worst cases of rate increases by some cable systems, which ran as high as 94 to 204%.[193] GAO surveys conducted in 1990 and 1991 again showed cable rates increasing at a rate at least twice that of inflation.[194] Overall, the GAO found that during the first four years of deregulation, the monthly charge for the lowest priced service increased by fifty-six percent and for the most popular basic service by sixty-one percent—increases of more than three times the rate of inflation. Additionally, at least forty-five to fifty percent of the price increases since deregulation were due to market power rather than to increases in costs.[195]

The FCC eventually revised its definition of "effective competition" to be "either (1) six unduplicated over-the-air broadcast signals, or (2) a competing multichannel video provider available to 50 percent of the homes passed by the existing cable system and subscribed to by at least 10 percent of the homes passed."[196] According to the GAO, however, the rates of only twenty percent of the nation's cable subscribers would be regulated under the new definition.[197] Customers and cable competitors continued to complain that the FCC's new standard did not obviate the need for a legislative approach to protect consumers, because cable systems continued to enjoy a constructive monopoly in the local markets.

B. Leviticus

The resulting legislation, section 3 of the 1992 Cable Act, is designed to encourage competition and to rely on greater governmental oversight of the cable industry where no competition exists.[198] The 1992 Cable Act repeals the deregulatory framework of the 1984 Cable Act and imposes rate regulations on systems found not to be subject to "effective competition."[199] Section 3 establishes two separate rate regulatory systems. First, rates for the "basic service tier" will be subject to regulation in almost every cable community, provided that the FCC certifies that the local franchise authorities have adopted regulations consistent with

193. Senate Report, *supra* note 8, at 5-6; *see also Oversight of Cable TV*, *supra* note 43, at 156, 188, 218, and 223; *Cable TV Consumer Protection Act of 1989*, *supra* note 43, at 456; *cf.* Senate Report, *supra* note 8, at 94-98 (minority views of Senators Packwood, Stevens, and Burns, arguing that increases were due to rates being kept artificially low prior to deregulation).

194. *See generally* GAO Reports, *supra* note 19; House Report, *supra* note 9, at 32.

195. 138 CONG. REC. S413, S425 (daily ed. Jan. 27, 1992) (statements of Senators Danforth and Gore citing an Aug. 1991 Justice Department study, *Market Power and Price Increases for Basic Cable Service Since Deregulation*).

196. *Re-examination of the Effective Competition Standard for the Regulation of Cable Television Basic Service Rates*, 6 FCC Rcd. 4545 (1991). *See* Senate Report, *supra* note 8, at 8.

197. *See generally* GAO Reports, *supra* note 19; House Report, *supra* note 9, at 33-34.

198. House Report, *supra* note 9, at 24.

199. 1992 Cable Act, *supra* note 1, § 623(a)(2).

FCC rules.[200] Second, rates for "cable programming services other than programming carried on the basic tier will be regulated by the FCC if, upon complaint, the FCC finds that such rates are 'unreasonable.' "[201] Programming offered on a per channel or per program basis is exempt from such regulation. The Act also prohibits operators from imposing "buy through" requirements,[202] and establishes regulations pertaining to many other aspects of cable service such as the geographic structure of rates and rate discrimination within a franchise area, negative option billing, and the collection of information about rates and billing.[203]

Unlike the access to programming language that was largely derived from the House bill and language originally offered by Representative Billy Tauzin (D-LA),[204] or the Retransmission Consent language that was adopted in conference from the Senate bill,[205] the rate regulation language of the 1992 Cable Act was a complete amalgam and a revision of the relevant portions of both the Senate bill and the House bill.

The explanation of these changes in the Conference Report is essential to understanding the nature of the resulting compromise language.[206] When analyzing the resulting language it is imperative to keep track of the prior source of the language and to determine accurately which prior statements, if any, in the legislative history are relevant to Congressional intent in incorporating specific language drafted by the conferees and enacted into law. For example, working from the House bill's language and format, the Conference Report adopts the Senate bill's basic rate regulation standard (i.e., that the FCC ensure that rates are reasonable)[207] and establishes a new standard for defining what is reasonable (i.e., regulated basic rates should not exceed competitive market prices).[208]

The conferees adopted and tightened the factors the House bill had required the FCC to take into account to ensure reasonable basic rates, including limitations on costs that may be allocated and recovered in the

200. *Id.* § 623(b). If the local franchise authority fails to gain certification, or the FCC subsequently revokes its certification, then the FCC is to regulate the basic service tier in that community. *Id.*

201. *Id.* § 623(c).

202. *Id.* § 623(b)(8).

203. *See generally id.* § 623.

204. Conference Report, *supra* note 5, at 93.

205. *Id.* at 76-77.

206. *Id.* at 58-66. The following discussion closely tracks the analysis of the Consumer Federation of America, which through its Legislative Director Gene Kimmelman was perhaps the chief "outside" architect of § 3. *See* Comments to Rate Regulation NPRM of Consumer Federation of America ["CFA"], at 5-11.

207. Conference Report, *supra* note 5, at 62.

208. *Id.*

rates charged for basic service.[209] The Conference Report further limits the portion of franchise fees, taxes, and other charges imposed by state and local authorities on cable operators and other costs that may be recovered through basic rates.[210] The Conference Report also modifies the House bill's "reasonable profit" provision,[211] allowing the FCC to consider the profit on nonbasic services when determining a reasonable profit for basic service.

In establishing procedures to determine whether the rates for nonbasic or "cable programming services" are unreasonable, the conferees worked from the House bill. Cable programming that is offered on the basic service tier would already be governed by the FCC reasonable rate regulation and would not be subject to complaints of unreasonable rates.[212] Cable subscribers are given standing to file a complaint based upon a "minimum showing," rather than the requirement in both the Senate and the House bills that a complaint demonstrate a "prima facie case."[213] Significantly, the Conference Report adopts the House bill's provision allowing complaints to be filed against existing rates for cable programming services 180 days after basic rate regulation goes into effect.[214] Complaints need not await a rate increase, as was proposed in the Senate bill.[215]

Finally, the Conference Report adopted with modifications the House language giving the FCC broad residual authority to prevent evasions of rate regulation, including evasions that result from so-called "retiering."[216]

C. Effective Competition

The linchpin of the rate regulations is the section 3 statutory definition of "effective competition."[217] Under the Act, a cable system faces "effective competition" and therefore is not subject to rate regulations[218]

209. *Id.*
210. *Id.* at 63.
211. *Id.*
212. *Id.* at 64.
213. *Id.*
214. *Id.* at 61; 1992 Cable Act, *supra* note 1, § 623(d).
215. Conference Report, *supra* note 5, at 64; 1992 Cable Act, *supra* note 1, § 623(c)(3).
216. Conference Report, *supra* note 5, at 65; 1992 Cable Act, *supra* note 1, § 623(h).
217. 1992 Cable Act, *supra* note 1, § 623(a)(1). This definition replaces the definition of the term that the FCC adopted pursuant to the 1984 Cable Act.
218. *Id.* § 623(a)(2). An issue arises as to whether the exemption applies just to regulation of the rates of the basic tier of service and regulating unreasonable rates of other cable programming services. It could be argued that an exempted cable operator is not exempt from the related requirements of § 3, which deal with uniform rate structure, discriminatory pricing, negative option billing, etc. At present it is likely this issue will be of limited significance

if: (1) fewer than thirty percent of the households in the franchise area subscribe to the service of a cable system; (2) the cable system and another unaffiliated multichannel distributor each offer comparable programming to at least fifty percent of the households in the franchise area, and fifteen percent of the households actually subscribe to multichannel distributors other than the largest distributor; or (3) the local franchising authority itself operates a multichannel distributor that offers programming to at least fifty percent of the households in the franchise area.[219] Under this definition, most existing cable systems are not subject to effective competition and would face rate regulation.

The possible rationale behind the first alternative prong of this statutory definition is not obvious. It is not intuitively clear how there is "effective competition" when fewer than thirty percent of the households in a franchise area subscribe to cable. In fact, there are two rationales for this somewhat odd part of the definition. First, this provision creates a "safe harbor" from rate regulation in order to encourage the extension of cable into unwired areas and to encourage the rapid expansion of cable service within a franchise area. Without this exemption, it could be argued that section 3 might discourage the expansion of cable service to previously unserved households. Second, in a franchise area with fewer than thirty percent of the households subscribing, the local cable operator arguably has only limited ability to exert the monopoly power that would justify rate regulation. Thus, the first prong of the definition does not cover real-world situations where competition exists, and consequently such "fewer than thirty percent" markets should not be referred to by the FCC in calculating what prices would look like in markets where effective competition exists.

There are a host of issues involved in applying the new "effective competition" definition in practice: for example, the information that will be required to be submitted about subscribers and how, on a case-by-case basis, it will be determined that multichannel distributors within a franchise area are competing by virtue of offering "comparable programming."

The tentative approach of the FCC is to make its required "finding" of effective competition by deferring to the determination of the local franchising authority on the issue.[220] The FCC's view requires that the local authority's initial finding should be submitted as part of the re-

because the number of cable systems that face effective competition is tiny. If, however, the 1992 Cable Act succeeds in stimulating competition the question will become more pressing.

219. *Id.* § 623(l)(1).

220. Rate Regulation NPRM, *supra* note 179, at ¶ 17. Some issues, however, the FCC is likely to decide, such as whether the statutory phrase "offered" means "available." *Id.* at ¶ 8.

quired certification process, designed to make the local authority eligible to regulate rates. The FCC reasons that this is appropriate because the absence of effective competition is a prerequisite to the legal authority and, therefore, to the certifiability of the local authority to regulate rates.[221] In addition, it contends that franchising authorities are in a superior position to gather the facts necessary to make an effective competition finding. Apparently, the FCC is considering resolving disputes that might arise over local effective competition determinations through the certification revocation proceedings provided for in section 3.[222] This approach by the FCC demonstrates an important way in which section 3 is often ambiguous when determining whether regulatory authority over cable operators will reside at the federal or local level.

D. Shared Regulatory Responsibility

In many respects section 3 imposes shared responsibilities on both the FCC and the local franchising authority. For example, before the basic service tier can be regulated locally, the franchising authority must be certified by the FCC, and only local rate regulations must comply with FCC rules.[223]

The FCC is authorized to regulate basic rates after a franchising authority has been disapproved for certification or if its certification has been revoked, until the local authority requalifies.[224] The statute, however, is unclear whether the FCC has authority to regulate basic rates should the local franchising authority choose not to file for certification. The FCC tentatively concludes that it lacks independent authority to initiate regulation of basic service rates when the local franchising authority does not assert regulatory jurisdiction over basic cable service.[225] Some commentators make a convincing argument to the contrary based on the Conference Report and the floor debate on the rate regulation provisions.[226] However, the FCC's proposed reliance on the local authority to

221. *Id.*

222. *Id. See also* 1992 Cable Act, *supra* note 1, § 623(a)(5) (to be codified at 47 U.S.C. § 543(a)(5)).

223. 1992 Cable Act, *supra* note 1, § 623(a)(2)-(3). Other examples include the FCC's minimum customer service standards that local authorities may exceed. *Id.* § 632. In addition, the FCC will decide the minimum contents of transfer requests that are, under the statute, to be decided by the local authority. *Id.* § 617(d).

224. 1992 Cable Act, *supra* note 1, § 623(a)(6).

225. Rate Regulation NPRM, *supra* note 179, at ¶ 20.

226. *See, e.g.*, CFA, *supra* note 206, at 124-28 (describing floor debates). The Conference Report states that "section 623(b) is amended to state that the Commission shall, by regulation, ensure that rates for the basic service tier are reasonable, and the goal of such regulations is to protect subscribers of *any* cable system that is not subject to effective competition . . . ." Conference Report, *supra* note 5, at 62 (emphasis added).

make the threshold determination of effective competition strongly suggests that it does not plan to engage in regulation of basic rates where the local authority is itself inactive.[227] This decision, if adhered to by the FCC in its final rule, could have a major impact on determining how many communities and how quickly local rates are regulated. If, for example, a large number of local governments for a variety of reasons do not initiate the certification process, this will create a regulatory vacuum that the FCC will decline to enter. This is precisely the problem that the 1992 Cable Act rate regulation provisions were designed to address.

While the tandem arrangement in the statute for regulatory responsibility may have some practical advantages, it further complicates the intricacies of the new rate regulation system. At a minimum, a significant period of adjustment and experience will be necessary to determine whether the regime implemented by the FCC under the 1992 Cable Act is workable and yields regulated rates that approximate rates in a competitive marketplace.

Conclusion

Some of the more cynical wags out and about Capitol Hill have dubbed the 1992 Cable Act the "Lawyer's Full Employment Act of 1992." An uncharitable barb—but one that may bear some truth considering the legal battalions and giga-reams of paper already devoted to issues arising over its implementation. And, in defending some of the less elegant, more Rube Goldbergesque provisions of this ambitious new law, one is tempted to dust off the aphorisms about the legislative process concerning "staying out of the kitchen at fine restaurants," and the advice to sausage aficionados about not watching the tasty links being made. None of this is to say that the 1992 Cable Act is not an important, timely, and in many respects, impressive effort by Congress grappling with serious problems in the video marketplace.

If implemented in a manner at all consistent with Congressional intent, the access to programming provisions of the Act will yield a marketplace that is substantially more hospitable to cable competitors and will deliver the benefits of competition to consumers. If the FCC provides competitors with anything resembling a simplified and less costly alternative to litigation for resolving disputes over their ability to obtain desirable programming, this result can be achieved. The prohibitions in the Act against anticompetitive practices are themselves clear and, should competitors find any reasonable enforcement procedure available at the FCC, the Act's access provisions could well become self-enforcing

227. Rate Regulation NPRM, *supra* note 179, at ¶ 15.

as parties assess the risks and bring their conduct into compliance. There has been, and will continue to be once the FCC rulemaking concludes, vigorous opposition in court to the implementation of the access provisions. Such challenges are to be expected and, when the dust settles, might well have little impact on the applicable rules governing the ability of competitors to obtain fair access to programming. The extensive record amassed by Congress over many years is compelling, and the statutory approach is rather measured in light of some of the plausible alternatives (e.g., compulsory license, divestiture) that might have been enacted to promote competition. The prospects for overturning in court the more modest access provisions that Congress instead adopted appear remote. Over the long run the access to programming provisions may prove to be the most important parts of the Act in terms of delivering to consumers the lasting benefits of competition.

In contrast, the 1992 Cable Act certainly will not be the last word on the Must Carry/Retransmission Consent/Compulsory License saga. This controversy is one of those fights that at times looks like a dispute between the wealthy and the very rich. All the participants are likely to carry on in court and in Congress no matter what the forthcoming FCC report and order on this subject requires, and whatever the outcome of the pending constitutional challenge to sections 4, 5, and 6 of the Act. This has been so for the industries touched by these issues for the last three decades, and it might well be so for decades to come.

It is considerably more difficult to forecast the future of the new rate regulation rules. They were enacted with the best intentions and might in time accomplish the objective of moderating cable pricing practices. One particular problem with the rate regulations is that they address a market which, even since the very recent enactment of the Act, is changing at a dizzying pace.[228] Innovations and the possibilities of competition from new sectors of the telecommunications industry,[229] such as the telephone industry, might make the rate regulations of the 1992 Cable Act outmoded before they can be truly tested. On the other hand, the FCC will be challenged to breathe flexibility and life into these regulations and

228. *See, e.g.*, Paul Farhi, *Time-Warner Plans 2-Way Cable System*, WASH. POST, Jan. 27, 1993, at F1.

229. *See, e.g.*, Harry Jessell, *The Telcos are Coming*, BROADCASTING & CABLE, Mar. 1, 1993, at 10 (summary of various forays into video services by Bell Atlantic, GTE, NYNEX, Pacific Telesis, Southwestern Bell, and USWest); Rich Brown, *Southwestern Bell Makes First RBOC Cable Entry for $650 Million*, BROADCASTING, Feb. 15, 1993, at 3; Geraldine Fabrikant, *Phone Company Breaks Ground By Buying Into Cable Television*, N.Y. TIMES, Feb. 10, 1993, at A1; Paul Farhi, *Baby Bell Seeks Speedier Deregulation*, WASH. POST, Feb. 23, 1993, at D1; Anthony Ramirez, *Ameritech Offers to End Monopoly*, N.Y. TIMES, Feb. 23, 1993, at D5.

into the rest of the Act to keep apace of the breakneck technological change.

In many ways the enactment of the 1992 Cable Act represents Congress at its best. There were many architects of this complex new law in both the Senate and the House of Representatives who all deserve credit for their creativity, skill, and perseverance. While the Act may remind one of a building constructed by many different hands and in many different stages, its interrelated structure should work as a whole. The FCC is laboring mightily and is conscientiously adhering to the almost impossible timetable set by Congress for issuing regulations to implement the Act. Every indication is that the FCC is shouldering this challenge with dedication and professionalism, and the result may well also provide an example of a federal agency at its best. Consequently, the end of the era of an unregulated cable monopoly is in sight. In its place is the beginning of a new legal regime that will govern the changing television marketplace on into the next century.