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Robert K. Hahm

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Comment

REGULATION OF THE VIDEO MARKETPLACE: ACCESS DUTIES UNDER THE VIDEO DIALTONE ORDER & THE CABLE TELEVISION CONSUMER PROTECTION AND COMPETITION ACT OF 1992

ROBERT K. HAHM*

I. INTRODUCTION

The information infrastructure is undergoing a transformation. Advances in communications and computer technology allow greater public access to information. The National Information Infrastructure (NII or Information Superhighway) provides the necessary bridge between the public and the information. The traditional forms of media; newspaper (data),¹ telephone (voice)² and broadcast (video), and their corresponding legal models are no longer appropriate models for information distribution on the NII.³ With advances in communications and computing technologies, these three media forms are converging.⁴ New regulatory models must be developed to deal with this changing environment.⁵

* B.S.E., 1990, University of Pennsylvania; J.D., 1995, Villanova University School of Law. Prior to entering law school, Mr. Hahm worked five years for E.I. Du Pont de Nemours & Co., Inc. His telecommunications experiences at Du Pont included local and wide area networks, in both voice and data communications. This experience provided the basis of information relied upon in this Comment. This Comment is also derived from a paper written for a Computer Science Seminar, taught by Professor Henry H. Perritt, Jr. at Villanova University School of Law.

1. See ITHIEL DE SOLA POOL, *TECHNOLOGIES OF FREEDOM* 7 (1983).

2. The telephone service represents the common carrier model. For an explanation of the common carrier model, see *infra* notes 69-83 and accompanying text.

3. See POOL, *supra* note 1, at 7-8. Professor Pool notes that the "convergence of [the] modes of delivery is bringing the press, journals, and books into the electronic world." *Id.* at 6. For example, newspapers, such as the *Chicago Tribune*, the *Los Angeles Times*, *The New York Times*, *The Washington Post* and *The Wall Street Journal*, are electronically available. Michael Meyer, *The "On-Line" War Heats Up*, *NEWSWEEK*, Mar. 28, 1994, at 38-39.

4. A good example can be found in the cable industry. Cable can provide broadcast services, telephone services and newspaper services.

5. Professor Pool states that the "[c]onvergence of modes is upsetting the trifurcated system developed over the past two hundred years, and questions that had seemed to be settled centuries ago are being reopened . . ." POOL, *supra* note 1,

The NII means different things to different people. To businesses and employers, the NII enhances their competitive edge by allowing greater resource sharing.⁶ To employees, the NII promises to be a new source of flexible work practices, including telecommuting and teleconferencing.⁷ To consumers, the NII provides increased services, including on-line multimedia libraries⁸ and home video services on demand.⁹ These are only some of the possibilities. The potential benefits of the NII are as boundless as the imagination.¹⁰ However, these benefits can only be achieved by allowing access to the NII.

This Comment explores access concerns in one area of the NII, the video marketplace. Three groups want access to the video

at 7-8. For a general discussion on two possible regulatory models, see *infra* notes 42-50 and accompanying text.

6. James W. Grudus, *Local Broadband Networks: A New Regulatory Philosophy*, 10 YALE J. ON REG. 89, 100 (1993). See also Al Gore, *Infrastructure for the Global Village*, 265 SCI. AM. 150, 152 (1991).

7. Telecommuting allows an employee to work at home by using a telephone line. The employee dials and connects to any remote resource the employee needs for his work. Benefits include decreased air pollution (for example, if five percent of commuters in Los Angeles County telecommute one day a week, they would save 47,000 tons of pollutants from being emitted), conservation of fuel (for example, 25% of all motor fuel and 11% of petroleum consumption in 1979 were due to commuting), increased flexibility (for example, a parent can work at home while still taking care of his child) and increased productivity (for example, Bell Atlantic gave 16,000 managers the option to telecommute several days a week, resulting in a dramatic increase in employee productivity). NAT'L TELECOMMUNICATIONS AND INFO. ADMIN., U.S. DEP'T OF COMMERCE, NTIA SPECIAL PUB. NO. 91-26, THE NTIA INFRASTRUCTURE REPORT 3, 73-75 (1991) [hereinafter NTIA Infrastructure Report]; See also Grudus, *supra* note 6, at 105-06 (discussing benefits of telecommuting).

8. On-line multimedia libraries include services such as electronic mail, news, magazines, newspapers, stock quotes, games, travel reservations and shopping services. See Meyer, *supra* note 3, at 38. On-line multimedia library providers include Prodigy, CompuServe, America Online, GENie and Delphi Internet. *Id.*

9. Grudus, *supra* note 6, at 103.

10. Senator Conrad Burns of Montana, in his introduction for the Communications Competitiveness and Infrastructure Modernization Act of 1991, stated that the NII would become:

[E]very American's tool of personal emancipation . . . [by increasing] freedom of speech, freedom of choice, freedom of ideas. This will allow Americans to recapture and expand upon the democratic tradition and community spirit of the early years of this great Nation by freeing Americans from constraints of space and time and will allow civic and economic participation for all members of this great Republic.

137 CONG. REC. S7054 (daily ed. June 5, 1991) (comments of Sen. Burns). Cf. Robert J. Samuelson, *Lost on the Information Highway*, NEWSWEEK, Dec. 20, 1993, at 111 (questioning need for 1000 cable channels and lack of technology to implement network today).

marketplace. They are the pipeline providers,¹¹ the programmers¹² and the consumers. The pipeline providers desire access to the video marketplace because access to the market allows them to compete for their customers — the consumers and programmers. Programmers desire access to the pipeline so that their programs can reach the consumers. The consumers desire access to the pipeline so that they can reach the programs offered by the programmers.

First, this Comment explores the access concerns of each of these three groups. Second, this Comment analyzes two legal models that deal with access concerns in the video marketplace. The models are the Video Dialtone Order¹³ and the Cable Television Consumer Protection and Competition Act of 1992 (1992 Cable Act).¹⁴ Third, this Comment discusses the legal duties and obligations created by each of the two models. Although this Paper discusses access interests in the video marketplace, these models also apply to the broader NII arena.

II. ACCESS CONCERNS OF PIPELINE PROVIDERS, PROGRAMMERS AND CONSUMERS

Three groups desire access to the video marketplace: pipeline providers, programmers and consumers.¹⁵ The desires of each group change as they interact in the video marketplace. The video marketplace can be divided into six areas. They are: the pipeline provider-pipeline provider market, the pipeline provider-program-

11. For purposes of this Paper, pipeline providers provide the communications platform on which video programs are carried to individual homes. Examples of pipeline providers are the telephone companies and the cable operators. A pipeline is composed of channels that carry the video signals. Examples of pipelines are the telephone wires used by the telephone company and coaxial cables used by the cable operators. Telephone wires can carry multiple channels, with each channel carrying one voice conversation.

12. For the purposes of this Paper, programmers provide video services in the cable marketplace. They include on-line libraries, such as CompuServe and Prodigy, and cable television programs, such as CNN, ESPN and HBO. Note that "program" includes on-line libraries and television programs.

13. Telephone Company-Cable Television Cross-Ownership Rules, §§ 63.54-63.58, Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking, 7 F.C.C.R. 5781 (1992) [hereinafter Second Report]; 57 Fed. Reg. 41,106 (1992) (codified at 47 C.F.R. § 63 (1994)) [hereinafter Video Dialtone Order].

14. Pub. L. No. 102-385, 106 Stat. 1460 (codified at 47 U.S.C. §§ 521-555 (Supp. V 1993)) [hereinafter 1992 Cable Act].

15. Professor Henry H. Perritt, Jr., notes that technological innovations have permitted separation of information and its value-added features from the pipeline. Henry H. Perritt, Jr., *Tort Liability, the First Amendment, and Equal Access to Electronic Networks*, 5 HARV. J.L. & TECH. 65 (1992).

mer market,¹⁶ the pipeline provider-consumer market, the programmer-pipeline provider market, the programmer-programmer market and the programmer-consumer market (these markets are shown in Table One).¹⁷

TABLE 1: RELATIONSHIPS WITHIN THE VIDEO MARKETPLACE

MARKET NUMBER	SELLER	BUYER	PRODUCT
1	pipeline provider	pipeline provider	pipeline/channel ¹⁸
2	pipeline provider	programmer	pipeline/channel
3	pipeline provider	consumer	pipeline/channel & content ¹⁹
4	programmer	pipeline provider	program
5	programmer	programmer	program
6	programmer	consumer	program

Generally, a pipeline provider acts as a bridge between a programmer and a consumer. Therefore, all six markets interact with each other. For example, the ability of a programmer in the pipeline provider-programmer market to buy a channel in the pipeline affects the ability of that programmer to sell its program to a consumer in the programmer-consumer market.

Each group has different concerns and goals in desiring access to the products of the video marketplace — the pipeline and program. Also, furthering a goal of one group may hinder the goals of the other two groups. Therefore, the needs of each group must be balanced against the needs of the other groups while maximizing the benefits to each group.

16. For purposes of this Paper, the market is described by listing the seller first, then the buyer of the product. For example, in the pipeline provider-programmer market, the pipeline provider sells its product, channels in a pipeline, to a buyer, a programmer.

17. Markets are usually controlled by supply and demand. ROBERT L. HEILBRONER, UNDERSTANDING MICROECONOMICS 19 (2d ed. 1972). Supply and demand refer to various quantities of goods or services, the "product," that buyers/sellers are willing and able to pay/sell at various prices. *Id.* Both supply and demand are functional relationships of price and quantity. For example, as demand increases, product prices increase. *Id.* As demand decreases, product prices decrease. *Id.*

18. For purposes of this Paper, a channel on a pipeline carries the signals of a program. Generally, a pipeline consists of multiple channels. For example, a pipeline of 50 channels can carry 50 programs.

19. For purposes of this Paper, a pipeline/content denotes programs carried by a pipeline provider.

The interests of these three groups implicate both public and private rights. For example, private parties have a right to enter into any contract they so desire, but such contracts may restrict the public's access to the video marketplace, an important national resource.²⁰

A. Pipeline as a Product

Pipeline providers supply one of the products in the video marketplace — the pipelines. These are the means of delivering video programs. Competitive pipeline providers, programmers and consumers demand access to the pipeline.

Today, there are two types of pipelines available in the video marketplace. They are fixed pipelines and mobile pipelines.²¹ Fixed pipelines include telephone lines, coaxial cable and fiber optics.²² Of these three, fiber optics, which can accommodate the growing demands of the customers, is the most promising pipeline.

20. Professor Henry H. Perritt, Jr., in his response to Assistant Secretary Irving's request for statements regarding the NII, stated that "[t]his electronic super-highway system should go not only to Disney World and Atlantic City but also to Washington, state capitols, and industrial parks. Large market potential for entertainment uses of electronic networks should not eclipse support of democracy and economic productivity." Henry H. Perritt, Statement on the National Information Infrastructure, Nov. 30, 1993 (on file with author).

Historically, access to the media has been divided into print and broadcast. Access rights to the broadcast media are limited because of the scarcity of frequencies. Furthermore, broadcasters have a special responsibility to disseminate a variety of views on issues of public interest. See *FCC v. League of Women Voters*, 468 U.S. 364 (1984) (First Amendment protects right of noncommercial educational broadcasting stations that receive funding from Corporation for Public Broadcasting to editorialize, without governmental interference); *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973) (if broadcaster meets requirement of "fairness doctrine," no obligation to accept editorial advertisements); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) (FCC can impose regulation on radio and television broadcasters to require that both sides of public issue be given fair coverage — "fairness doctrine"). Although the Supreme Court recognized that newspapers have become big businesses and there are far fewer newspapers currently to serve the public, the government cannot require access rights to the press. See *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (statute granting political candidate right to equal space to reply to newspaper criticism violates First Amendment). Today, there is continuing debate to determine if the cable industry should be regulated as print, broadcast or its own media.

21. See Grudus, *supra* note 6, at 96-98.

22. Grudus, *supra* note 6, at 96. A developing area of transport facility is fiber optics. Both cable operators and telephone companies are developing strategies for implementing a fiber optic network. See Mary Lu Carnevale, *Bell Atlantic's Phone Network to Carry Cable*, WALL ST. J., Nov. 17, 1992, at C15 (Bell Atlantic and Sammons Communications gain FCC approval to construct local fiber optic networks in three communities beginning in Spring of 1993).

Fiber optics technology allows larger amounts of information to be transmitted than were previously possible.²³

Mobile pipelines use radio waves to transmit signals.²⁴ Current developments in this area include cellular telephones and Personal Communications Networks (PCNs).²⁵ Another example of a mobile pipeline is satellite communication.

In the pipeline provider-pipeline provider market, the pipeline provider sells channels to its buyer, a competing pipeline provider. The possibility exists that one pipeline provider may have to use another pipeline provider's pipeline to reach its customers. A current example is that of the telephone system. At the local level, telephone service is provided by the Bell Operating Companies (BOCs). When making a long-distance phone call, a consumer must use the local telephone lines to reach the long-distance telephone lines. In essence, the long-distance carrier has no direct link to the consumers, and it must depend upon the local telephone pipeline to connect the long-distance consumer to the long-distance pipeline.

Programmers also want to buy channels supplied by the pipeline providers, creating the pipeline provider-programmer market. In relation to other programmers, a programmer desires equal ability to buy channels on a pipeline. In some instances, a pipeline provider supplies the pipeline and owns a financial interest in a programmer, thereby creating a vertically integrated pipeline provider and programmer.²⁶ A vertically integrated pipeline provider has great incentive to favor its programs over that of its competitors. A non-affiliated programmer, one not associated with the pipeline

23. Assume a customer has to transfer the entire contents of the Library of Congress. By using a standard 14.4 kilobits per second modem over a telephone line, the transfer will take 170 years. By using fiber optics, with a transmission rate of 2.488 gigabits per second, the entire contents can be transmitted in one day. Grudus, *supra* note 6, at 95. For a description of the benefits of fiber optics, see generally *id.* at 94-106.

24. Grudus, *supra* note 6, at 97-98. There is an increasing popularity among consumers to use mobile transmissions. Previously, mobile transmission technology was thought to be saturated because of the limited bandwidth that was available. POOL, *supra* note 1, at 113-16. By 1925, eighty-nine broadcast channels had been allocated, and it was agreed that there was no more room. However, cell technology divides each bandwidth into smaller cells, allowing more people to share the limited bandwidth.

25. A full discussion on fixed and mobile transmissions is beyond the scope of this Paper. For a more extensive discussion of this area, see Grudus, *supra* note 6, at 96-98.

26. 47 U.S.C. § 521(a)(5) (Supp. V 1993). A pipeline provider that supplies the pipeline and the programs is vertically integrated. *Id.* For a discussion on vertical integration, see *infra* notes 178-82.

provider, wants access to the pipeline on an equal and non-discriminatory basis. Equal access assures that fair competition exists among all the programmers, regardless of pipeline provider affiliation.

By ensuring equal access to a pipeline channel, affiliated and non-affiliated programmers can compete fairly to reach the consumers. In essence, the pipeline acts as a bridge between a programmer and a consumer. A programmer needs access to a pipeline so that the programmer can supply its product, the programs, to the consumers. However, a programmer's desire to access the pipeline conflicts with a pipeline provider's desire to control the content carried over its pipeline.²⁷ This conflict affects the pipeline provider-programmer market and the programmer-pipeline provider market.²⁸ In some instances, the pipeline may be of limited size. Thus, a pipeline provider would like to decide which programs it can carry to meet the demands of its customers. Furthermore, if a pipeline provider has a financial interest in a particular programmer, that pipeline provider may not provide access to the pipeline to a competitive programmer.

Lastly, consumers want to buy both the channels and content available on a pipeline, creating the pipeline provider-consumer market. First, consumers desire access to the pipeline, not for "pure" access to the pipeline but to reach the contents carried on the pipeline. Access to a pipeline without access to the programs would be meaningless to a consumer. A consumer buys access to a pipeline to reach the programs located on the pipeline.

Furthermore, a consumer does not care which pipeline he uses to gain access to programs. As long as the pipeline is transparent to the consumer, access to the programs can be accomplished by any means.²⁹ For example, assume a consumer wishes to watch his favorite television show. It does not matter to a consumer whether

27. Control over content creates First Amendment and liability questions. Both issues are beyond the scope of this Paper. For a discussion of First Amendment concerns and possible attendant liabilities, see Perritt, *supra* note 15; Symposium, *The Congress, the Courts and Computer Based Communications Networks: Answering Questions About Access and Content Control*, 38 VILL. L. REV. 319 (1993) [hereinafter Access and Content Control].

28. Both markets are affected because a pipeline provider may not wish to sell its channel space to a programmer and a programmer may not wish to sell its program to a pipeline provider. However, this Section will only discuss the pipeline provider-programmer market.

29. An example of a transparent pipeline is the long-distance telephone service. When a caller uses a pay-phone and dials long-distance, he wants to be connected to the person at the other end of the call. The caller cares little about the long-distance carrier, whether it be AT&T, MCI or Sprint. Of course this example

the television signals are carried by a broadcast or a cable pipeline.³⁰

In the pipeline provider-consumer market, a pipeline provider wishes to control its ability to sell pipeline content to a consumer. At first, this may seem illogical. But, consider a situation where a consumer lives in a very remote area where the cost of installing coaxial cable to the consumer's home is expensive. In this instance, the pipeline provider may wish to forgo its potential revenues due to the associated installation costs.³¹ These were the same concerns the telephone industry experienced in providing access to rural areas.³²

In addition, a consumer wishes to buy a pipeline channel supplied by the pipeline provider. Examples of channel service include the telephone service and electronic mail.³³ A pipeline provider, however, may wish to control channel access of a consumer. For example, a consumer can send electronic mail messages which contain negative views of a pipeline provider. A pipeline provider would like to restrict access to any consumer who has negative views of that pipeline provider.³⁴

The possibility exists that selling its pipeline channel to a programmer affects the ability of a pipeline provider to sell its pipeline content to a consumer. A pipeline provider sells to programmers and consumers; however, selling a pipeline channel to a programmer affects the content of the pipeline. If the program negatively affects the content of the pipeline, the consumer demand for access to the pipeline will decrease. Therefore, the possibility exists that selling channel space to a programmer will decrease the consumer's demand for the pipeline. Conversely, if a

assumes that the cost and quality of the services are equivalent among the long-distance telephone carriers.

30. Note that this does not factor in picture quality, service and price that a consumer must consider when making a choice between broadcast or cable reception. One of the main reasons for starting the cable industry was poor signal reception via broadcast. For a history of the cable industry, see *infra* notes 158-85 and accompanying text.

31. Ninety percent of homes in the United States now have access to cable. S. REP. NO. 92, 102d Cong., 1st Sess. 3 (1991).

32. The telephone industry, as a common carrier, could not discriminate among its customers. 47 U.S.C. § 202(a) (1988). However, the problem of high installation cost was minimized because the phone company, as a monopoly, could subsidize its operations in rural areas with revenues from cities and businesses.

33. Electronic mail is similar to the mail service but the messages are in electronic form.

34. For a discussion of a recent case of a programmer, CompuServe, threatening to discontinue a user's access, see *infra* note 156.

pipeline provider sells pipeline channels based on consumer demand, a pipeline provider can lose revenue from programmers that are willing to pay the pipeline provider more money for the same channel.

B. Program as a Product

The second product in the video marketplace, the programs, is supplied by the programmers. Pipeline providers, competitive programmers and consumers all want access to the programs.³⁵

In the programmer-pipeline provider market, a pipeline provider desires to buy programs supplied by a programmer. One of the major concerns of a pipeline provider is access to the programs. As mentioned previously, a consumer buys access to a pipeline for the content available on a pipeline and not for "pure" access to a pipeline. Without the ability of a pipeline provider to buy programs, a pipeline provider will not be able to attract consumers to its pipeline.

Similar to the pipeline provider-programmer market, a vertically integrated programmer³⁶ may refuse to sell its programs to a non-affiliated pipeline provider in the programmer-pipeline provider market. For example, assume a vertically integrated programmer and pipeline provider compete with a non-affiliated pipeline provider in the same market. An integrated programmer will be reluctant to sell its programs to a non-affiliated pipeline provider that competes with its affiliated pipeline provider. If the integrated programmer sells its program to a non-affiliated pipeline provider,

35. The programmer's ability to control the content of its programs are beyond the scope of this Paper. With content control, First Amendment and tort liabilities are implicated. For example, if a consumer had posted a message on a bulletin board, such as Prodigy, advertising "Gun for Hire," the question arises whether the programmer would be liable for any injury caused by that message. See generally Access and Content Control, *supra* note 27.

In the publishing context, the United States Court of Appeals for the Eleventh Circuit held *Soldier of Fortune* magazine liable for compensatory damages caused by its negligent publication of an advertisement stating "GUN FOR HIRE," which created a substantial danger of harm to the public. *Braun v. Soldier of Fortune*, 968 F.2d 1110, 1119 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 1028 (1993) (footnotes omitted). See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985) (in private figure-private context, private figure can recover damages in defamation action without showing of actual malice); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (in private figure-public interest context, actual malice not required, but need fault before magazine can be liable for defamation); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (public figure context requires showing of actual malice before damages for defamation will be enforced against newspaper).

36. For a description of vertical integration, see *supra* note 26 and accompanying text and *infra* notes 178-82.

that programmer may sell its program to a non-affiliated pipeline provider for higher discriminatory prices than it would to its affiliated pipeline provider. Therefore, equal access to a program is a strong interest of a non-affiliated pipeline provider.

In the programmer-programmer market, a programmer desires to buy programs offered by a competitive programmer. For example, assume Programmer A provides a menu service which lists a variety of programs which can be accessed on a pipeline. Assume also that the menu service is a very popular feature with consumers. Programmer B would like to have its programs listed on Programmer A's menu to increase its visibility to consumers.

In the programmer-consumer market, a consumer seeks access to programs supplied by the programmers. As stated previously, a consumer is mainly interested in access to a specific program or a wide diversity of programs. Arguably, a diversity of programs serves the public interest by increasing the number of ideas available in the marketplace, increasing citizen participation in government and promoting individual liberty.³⁷

Consumers will choose only those programs they value. If a consumer is a sports fan and watches only sports programs, that consumer may just want access to sports channels. He may not be interested in other programming. In this instance, the consumer is willing to pay for access to the sports channels but not for access to the comedy channels.³⁸ Another consumer, equally a fan of sports, may want the ability to access the sports channels and additional programming. Thus, consumer demand drives the market both for specific and diverse programming.³⁹

A consumer's desire for diversity and choice in programming, however, often conflicts with a programmer's desire to bundle pro-

37. See *Abrams v. United States*, 250 U.S. 616, 629 (1919) (Holmes, J., dissenting) ("the best test of truth is the power of the thought to get itself accepted in the competition of the market.").

38. 47 U.S.C. § 522(19) (Supp. V 1993). Cable operators currently tier or bundle their services for which a separate rate is charged by the cable operator. *Id.* The Basic Service bundle may include broadcast stations. 47 U.S.C. § 522(4) (Supp. V 1993). The Extended Basic Service bundle may include such stations as ESPN, CNN and MTV. Premium services include HBO, Showtime and The Movie Channel. Each bundle is one price and the premium channels are priced individually. 47 U.S.C. § 522(19) (Supp. V 1993). As such, a consumer who pays for access to the Extended Basic bundle will receive all programs within that bundle. The consumer's desire to access some of the programs in that bundle is irrelevant.

39. Wide ranges of choices include diversity of programs (for example: news, sports and comedy programs) and more than one choice per type of program (for example, in the movie-type programs: HBO, Showtime and The Movie Channel).

grams. A programmer⁴⁰ wants to bundle the programs available on the pipeline so that it can tie⁴¹ one program to another program. Generally, a tying-program is a program which a pipeline provider or consumer desires to buy. That program is then sold either with a less popular program or a new program with little notoriety. By tying the two products together, a programmer sells both its popular and unpopular programs in one bundle. This usually restricts the ability of a pipeline provider and a consumer to choose and buy the programs they desire in both the programmer-pipeline provider and programmer-consumer markets.

Pipeline providers oppose tying for efficiency reasons. Without tying, a pipeline provider is free to amass popular shows and to offer a greater diversity in programming. Tied programs hinder a pipeline provider's ability to sell channels to other programs that are in demand, thereby improving pipeline content. Thus, improved pipeline content increases consumer demand for a pipeline provider's services, resulting in increased profits.

III. ANALYSIS OF THE VIDEO DIALTONE ORDER AND THE 1992 CABLE ACT

Today, technological advances in telecommunications are impacting both the practical and regulatory philosophies of the field. These advances have blurred the distinction among print, broadcast and common carriers.⁴² As a result, the regulatory policy has shifted from a philosophy of managed monopoly to one of managed competition.⁴³

The trend in telecommunications is, paradoxically, one of fragmentation and convergence.⁴⁴ The centralized networks of old

40. Bundling of programs involves programmer-pipeline provider and programmer-consumer markets.

41. For the definition of "tying," see *infra* note 60.

42. For a discussion of common carriers, see *infra* notes 69-72 and accompanying text.

43. A very important aspect of any regulation of the video marketplace is the First Amendment. The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press" U.S. CONST. amend. I. Furthermore, the Supreme Court has held that cable providers engage in conduct protected by the First Amendment. *Leathers v. Medlock*, 499 U.S. 439 (1991) (cable is defined as purveyors of messages, not just message bearing electronic impulses).

The First Amendment issues are complex, and most of its ramifications cannot be discussed in this Paper. For a discussion of First Amendment rights, see Perritt, *supra* note 15.

44. MICHAEL K. KELLOGG ET AL., FEDERAL TELECOMMUNICATIONS LAW § 1.1, at 2 (1992 & Supp. 1993).

have fragmented into many smaller and autonomous parts that create more networks, lines and switches.⁴⁵ For example, before divestiture, AT&T controlled the majority of the telephone market.⁴⁶ However, technological innovations, such as microwave and fiber optics, allowed other telephone carriers into the market.

As interconnections among networks proliferate, distinct boundaries in the communications area are disappearing and converging.⁴⁷ For example, television was always described as a wireless broadcast. Today, with cable television, television programs are being transmitted over cable. In contrast, telephone calls were mainly transmitted over telephone lines. Now, telephone calls are crossing into the wireless area with the advent of cellular technology.

Furthermore, the telecommunications market is moving from a heavily regulated market into one favoring competition.⁴⁸ Advances in telecommunications have made this possible. The economy of scale and large investment costs which initially justified the concept of a natural monopoly in the telecommunications field are no longer valid assumptions. As mentioned above, fragmentation has created an environment where many competitors can now co-exist. With increased fragmentation, consumers have a greater choice in selecting the programs they desire.⁴⁹

The Video Dialtone Order and the 1992 Cable Act are new regulatory attempts to provide equal access to the video marketplace. Depending upon the model, certain access rights are emphasized while others are de-emphasized. However, any model chosen is a method of regulating the availability of video services, either by government or private parties.⁵⁰

45. *Id.*

46. For a discussion of the divestiture of AT&T, see *infra* notes 102-15 and accompanying text.

47. KELLOGG ET AL., *supra* note 44, at 2.

48. *Id.* § 1.1, at 3; ROGER G. NOLL, TELECOMMUNICATIONS REGULATION TODAY AND TOMORROW 42 (Eli M. Noam ed., 1983).

49. "The information infrastructure will . . . resemble an old-fashioned village market. A multitude of goods and services will be bought and sold through this new information marketplace . . ." Grudus, *supra* note 6, at 100 n.54 (quoting Michael L. Dertouzos, *Communications, Computers and Networks*, SCI. AM., Sept. 1991, at 62, 67).

50. In the telecommunications arena, of which cable is a subset, many governmental agencies are responsible for its regulation. These include Congress, courts (AT&T's MFJ order), the FCC and the NTIA. Many players are involved in regulating the telecommunications marketplace, therefore, a consistent regulatory message should be adhered to by all parties.

A. Competition, Monopolies and Antitrust

Arguably, competition is the best way to allocate resources.⁵¹ Competition creates the greatest benefit by allocating resources to people or groups that offer the best quality product and services at the lowest price. In addition, competition protects the public from unscrupulous business practices.

In contrast, monopolies frustrate the natural regulation of the business by the marketplace. In a monopoly, there is only one seller of a good or service.⁵² No competition exists, and a monopolistic business can set prices at the highest point where demand is sustained at an acceptable level. Therefore, legal controls or regulations are justified as a substitute to competition.⁵³

A monopoly can create anti-competitive behavior both in adjacent markets that supply the monopolist and in adjacent markets that the monopolist supplies.⁵⁴ Antitrust laws seek to prevent these inefficiencies by ensuring equal access. Furthermore, courts have consistently upheld the argument that competition allocates market resources in the most efficient manner.⁵⁵

To promote competition in the marketplace, Congress passed the Sherman Antitrust Act (Sherman Act).⁵⁶ The Sherman Act was enacted to enforce the belief that "unrestrained interaction of competitive forces will yield the best allocation of our economic re-

51. The United States Supreme Court noted that "the assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain — quality, service, safety and durability — and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers." *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 695 (1978). See generally Grudus, *supra* note 6, at 106-07; John M. Stevens, *Antitrust Law and Open Access to the NREN*, 38 VILL. L. REV. 571 (1993).

52. HEILBRONER, *supra* note 17, at 119.

53. Grudus, *supra* note 6, at 107.

54. For a description of possible anti-competitive behaviors by a monopolist, see *infra* notes 58-63.

55. See *Northern Pac. Ry. v. United States*, 356 U.S. 1 (1958). The Supreme Court stated:

The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic and social institutions.

Id. at 4. See also, *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679 (1978) (discussing suppression of competition between bids for engineering services under the Sherman Act).

56. Sherman Act, ch. 647, 26 Stat. 209 (1890) (codified at 15 U.S.C. §§ 1 *et seq.* (1988 & Supp. V 1993)).

sources, the lowest prices, the highest quality and the greatest material progress”⁵⁷ Five types of anti-competitive monopolistic behaviors have been targeted as unacceptable under the Sherman Act.⁵⁸ They are essential facilities,⁵⁹ tying,⁶⁰ leveraging and refusals to deal,⁶¹ predatory pricing and cross-subsidy⁶² and transfer pricing and self-dealing.⁶³

Initially, the telecommunications industry was subject to common carriage regulation⁶⁴ because it was thought to be a natural

57. *Northern Pac. Ry.*, 356 U.S. at 4.

58. *KELLOGG ET AL.*, *supra* note 44, §§ 3.2.1-2.5, at 139-45.

59. *Id.* § 3.2.1, at 139. The “essential facilities” doctrine requires a company with a monopoly power in one market to deal fairly with competing firms operating in adjacent markets that depend upon the monopolist for essential inputs. *Id.* at 139-40. This doctrine prevents a monopolist from acquiring power in an adjacent competitive market. *Id.*; See *United States v. Terminal R.R.*, 224 U.S. 383 (1912) (requiring joint owners of railroad switching junction to afford competing railways access to it upon just and reasonable terms). The four elements of the doctrine are as follows: (1) control of an essential facility by a monopolist, (2) a competitor’s inability practically or reasonably to duplicate the essential facility, (3) the denial of the use of the facility to a competitor and (4) the feasibility of providing the facility. *KELLOGG ET AL.*, *supra* note 44, § 3.2.1, at 139.

60. *KELLOGG ET AL.*, *supra* note 44, § 3.2.2, at 140. Justice O’Connor stated that “[t]ying is a form of marketing in which a seller insists on selling two distinct products or services as a package.” *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 33 (1984). See *KELLOGG ET AL.*, *supra* note 44, § 3.2.2, at 142. Justice O’Connor set three criteria as follows: (1) seller must have power in the market tying-product market, (2) threat that seller will acquire market power in the tied-product market which has no other stable sellers or high entry barriers and (3) there must be coherent economic basis for treating the tying and tied products as distinct. *Hyde*, 466 U.S. at 37-39.

61. *KELLOGG ET AL.*, *supra* note 44, § 3.2.3, at 142-43. Antitrust prohibits leveraging and refusal to deal. *Id.* at 142. In leveraging, a monopolist uses its monopoly power in one market to exploit that power in a second market. *Id.* By a boycott or refusal to deal with a company, a monopolist can impede or eliminate competition. *Id.* at 142-43. Market foreclosure is similar to leveraging. *Id.* at 143. A monopolist obtains control over a second market because it supplies the market. *Id.* A monopolist can demand exclusive contracts and withhold necessary supplies from competitors. *Id.*

62. *Id.* § 3.2.4, at 143-44. In predatory pricing, a monopolist sells its products below cost with the intent of driving competition out of the market. *Id.* at 143. However, aggressive pricing is allowed. *Id.* at 144. The United States Supreme Court noted that predation is rarely tried and even more rarely successful. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 595-98 (1986). See generally *KELLOGG ET AL.*, *supra* note 44, § 3.2.4, at 144.

A monopolist is also prevented from cross-subsidization. *Id.* A cross-subsidy occurs when a monopolist subsidizes its interests in other markets with revenues from its monopoly market. *Id.*

63. *KELLOGG ET AL.*, *supra* note 44, at §§ 3.2.1-2.4, at 139-44.

64. See *Mann-Elkins Act of 1910*, Pub. L. No. 61-218, § 7, 36 Stat. 539, 544 (1910) (declaring telephone and telegraph services to be common carriers). A communications common carrier is defined as “[a]ny person engaged in rendering communications service for hire to the public.” 47 C.F.R. § 21.2 (1994). For a detailed discussion on common carriers, see Perritt, *supra* note 15, at 73-91. Other

monopoly.⁶⁵ As a result, common carrier regulations were developed to prevent natural monopolies from taking advantage of their customers.⁶⁶ However, some argue that governmental regulation created the monopoly in the telecommunications industry.⁶⁷

B. Traditional Common Carrier Model (Video Dialtone Order)

The Video Dialtone Order⁶⁸ is analogous to the common carrier regulation in the video marketplace. Before analyzing the Video Dialtone model, this Paper defines common carrier and video dialtone, develops the history of the telephone industry and discusses the provisions of the Video Dialtone Order.

1. *Common Carrier*

Under common law, a firm is designated as a common carrier if it is affected with a public interest, occupies a monopoly position and holds itself open to the general public.⁶⁹ As a common carrier, the firm is required to charge reasonable and nondiscriminatory rates, provide adequate services and accept all customers on the same terms, without discrimination.⁷⁰

common carriers include the transportation industry, including railroads and trucks. *Id.* at 75. They have also been subject to common carriage requirements. *Id.*

65. "Many industry observers describe traditional local telecommunication networks as inherently monopolistic, lacking in any competitive pressure." Grudus, *supra* note 6, at 107. Moreover, the telephone market was viewed as a natural monopoly due to the high cost of the fixed plant, declining average cost of service and the need for all customers to interconnect with one another. KELLOGG ET AL., *supra* note 44, § 1.1, at 1.

A "natural monopoly" is defined as "one resulting where one firm of efficient size can produce all or more than market [sic] can take at remunerative price." BLACK'S LAW DICTIONARY 1007 (6th ed. 1990). See also KELLOGG ET AL., *supra* note 44, § 9.1, at 423.

66. For a description of common carrier regulations, see *infra* notes 69-83 and accompanying text.

67. Some argue that "telecommunications is an 'unnatural monopoly,' that is, a monopoly put in place by government decree." Jack High, *Introduction: A Tale of Two Disciplines, in REGULATION ECONOMIC THEORY AND HISTORY* 1, 11, 15-16 (Jack High ed., 1991), cited in Grudus, *supra* note 6, at 107. See also NOLL, *supra* note 48, at 45. In addition, the possibility exists that pervasive government regulation can be destructive and inefficient in areas of technological innovation. A regulated entity may not innovate for fear of regulatory risk. Grudus, *supra* note 6, at 107 n.102.

68. Telephone Company-Cable Television Cross-Ownership Rules, §§ 63.54-63.58, Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking, 7 F.C.C.R. 5781 (1992).

69. KELLOGG ET AL., *supra* note 44, § 1.3.1, at 12.

70. Perritt, *supra* note 15, at 73. If a common carrier refused to do so, the aggrieved party could bring an action for mandamus or trespass. A mandamus action is used to compel the common carrier to serve the aggrieved party as re-

A court's determination of a firm as a common carrier revolves around the definitions of "common" and "carrier." First, a firm must be found to be a "carrier," and, if so, the "carrier" must be "common." A firm is considered to be a "carrier" if the firm: (1) provides services for hire, (2) engages primarily in the business in question and (3) regularly engages in the transportation service.⁷¹ A firm is considered to be "common" if it: (1) holds itself out to the public as willing to serve all, (2) serves the public without discrimination, (3) performs its transportation function in the public's interest and (4) does not control the content of the goods transported.⁷²

A telecommunications common carrier is subject to the Federal Communications Commission's (FCC) regulation if the entity's service constitutes interstate communications and is rendered to the public for hire.⁷³ Generally, courts look to the common law to apply the definitions of common carriers.⁷⁴

Common carrier regulation by the FCC has the following characteristics: (1) a common carrier files a tariff with the FCC,⁷⁵ which may be subject to FCC approval,⁷⁶ (2) a common carrier may not discriminate unreasonably among its customers in charges, practices, classifications, regulations, facilities or services,⁷⁷ and (3) new firms can enter the common carrier market only by demonstrating

quired by its obligations. *Id.* at 73-74. A trespass action is brought to recover damages caused by failure to serve. *Id.*

71. *Id.* at 81-82.

72. *Id.* at 82-84.

73. *In the Matter of Graphnet Sys., Inc.*, 73 F.C.C.2d 283, 288-89 (1979). Perritt, *supra* note 15, at 85 n.91. The FCC has jurisdiction over communications carriers. See 47 U.S.C. §§ 151, 152 (1988 & Supp. V 1993). "Communications" is defined as "transmission [by wire or radio] of writing, signs, signals, pictures, and sounds of all kinds . . . including all instrumentalities, facilities, apparatus, and services . . . incidental to such transmission." 47 U.S.C. § 153 (1988 & Supp. V 1993).

However, the FCC has limited the scope of statutory common carrier obligations by distinguishing between basic services and enhanced services, and between data processing and communications. Perritt, *supra* note 15, at 87. Basic services and communications systems (e.g., packetizing) are regulated as common carriers, but enhanced services (e.g., anything more substantial than basic transmission) and data processing (e.g., protocol conversion) are not. *Id.* at 87-88.

74. Perritt, *supra* note 15, at 85.

75. 47 U.S.C. § 203 (1988 & Supp. V 1993). A tariff is a public statement of the terms and conditions of service that a public utility provides. See KELLOGG ET AL., *supra* note 44, § 12.10, at 629.

76. See 47 U.S.C. § 201(a), (b) (1988); 46 Fed. Reg. 10,924, 10,926 (1981).

77. 47 U.S.C. § 202 (1988 & Supp. V 1993).

that their entrance into the market serves public convenience and necessity.⁷⁸

The telephone industry is a good example of a common carrier.⁷⁹ The government provides telephone companies with the privilege to run their telephone wires to homes by using the government's eminent domain power. Moreover, the government provides a measure of protection to an existing telephone company against a competing telephone company's entrance into that market. The FCC requires that a competing telephone company planning to enter a market already serviced by a telephone company must show that public convenience and necessity will be served.⁸⁰ This requirement often creates a *de jure* or "unnatural" telephone monopoly in that market because the burden of proof is substantial.

In return, a telephone company must provide telephone service to anyone who wants access.⁸¹ Furthermore, it is unlawful for a telephone company to charge "unjust or unreasonable" rates, and the telephone company must file a tariff which governs the telephone company's relationship with its customers.⁸² Finally, there can be no discrimination, preference or different charges to different customers for like services under like circumstances.⁸³

78. See 47 U.S.C. § 214(a) (1988).

79. The Federal Communications Act of 1934 stated that the telephone company had to provide service to all customers at just and reasonable prices. 47 U.S.C. § 201(a), (b) (1988). In addition, new companies could compete in the telephone market only if they demonstrated public convenience and necessity. *Id.* at § 214(a). The telephone monopoly was required to provide connection to the new companies only if the Commission found such connection necessary or desirable in the public interest. *Id.* at § 201(a). This Act also created the Federal Communications Commission. 47 U.S.C. § 151 (1988).

80. See 47 U.S.C. § 214(a) (1988).

81. As the Supreme Court stated, "[a] common-carrier service in the communications context is one that makes a public offering to provide [communications facilities] whereby all members of the public who choose to employ such facilities may communicate or transmit intelligence of their own design and choosing . . ." FCC v. Midwest Video Corp., 440 U.S. 689, 701 (1979) (footnote omitted). See KELLOGG ET AL., *supra* note 44, § 2.12.1, at 113 n.4. An exception is made if the telephone company can show good cause for not providing the service.

82. 47 U.S.C. § 201(b) (1988).

83. Courts, interpreting 47 U.S.C. § 202, have found absolute obligation of carriers to avoid discrimination in charges with respect to like communication services, regardless of particular customer needs or public objectives. *Western Union v. FCC*, 568 F.2d 1012, 1018 (2d Cir. 1977), *cert. denied*, 436 U.S. 944 (1978); *American Trucking Assoc. v. FCC*, 377 F.2d 121, 130 (D.D.C. 1966), *cert. denied*, 386 U.S. 943 (1967). See KELLOGG ET AL., *supra* note 44, § 2.12.4, at 116.

2. *Video Dialtone*

A metaphor of the video dialtone is the telephone's audio dialtone.⁸⁴ When a telephone consumer wishes to speak to another person, the consumer lifts the telephone hand-set, hears an audio dialtone, dials the number of the person or service he wishes to reach, and the consumer is connected to that service.

A video dialtone performs a function similar to that of an audio dialtone. In the telephone service, a consumer generally wishes to speak to another person.⁸⁵ In the video area, the consumer wants access to the various programs available on the network. These services include on-line data libraries,⁸⁶ sporting events,⁸⁷ movies,⁸⁸ shopping channels⁸⁹ and interactive services.⁹⁰ Likewise, a consumer using a video dialtone⁹¹ "picks up the hand-set" by turning on the television, sees a menu of service options on the television screen, selects a service and connects to that service.

3. *History: Previous Acts, Regulations and Court Decisions*

To fully comprehend the genesis of the Video Dialtone Order, the history and regulation of the telephone company must be understood. There are many players involved in the regulation of the telecommunications market: Congress, the courts and three agencies — the FCC, the National Telecommunications and Information Administration (NTIA)⁹² and the Department of Justice (DOJ). Generally, Congress enacts statutes which authorize agencies to regulate an entity. The 1984 Cable Act⁹³ and the 1992 Cable

84. The audio dialtone lets the consumer know that the telephone is ready to be used. If the consumer hears no sound, then the consumer knows that the call will not be connected.

85. The telephone companies also offer other services, such as call-waiting, party-line and answering services.

86. Examples of on-line data libraries are CompuServe and Prodigy.

87. Sporting events include sports channels, such as ESPN and Pay-Per-View.

88. Movie channels include HBO, Showtime and The Movie Channel.

89. QVC is an example of a shopping channel.

90. Currently, there are no true interactive services available in the video market, but test areas are currently being planned.

91. For a detailed discussion on the video dialtone, see Robert L. Pettit & Christopher J. McGuire, *Video Dialtone: Reflections on Changing Perspectives in Telecommunications Regulations*, 6 HARV. J.L. & TECH. 343 (1993).

92. Congress determined that "[t]elecommunications and information are vital to the public welfare, national security, and competitiveness of the United States." 47 U.S.C. § 901(b)(1) (Supp. V 1993). NTIA has various duties, including the authority to develop and set forth telecommunications policies, conduct studies in telecommunications and coordinate telecommunication activities in the executive branch. See 47 U.S.C. § 902(b)(1)(A)-(T) (Supp. V 1993).

93. 47 U.S.C. §§ 521-559 (1988 & Supp. V 1993).

Act⁹⁴ are examples of such enactments. The Video Dialtone Order is an example of a regulation by the FCC. Courts are involved in the telecommunications arena to determine the validity of statutes and regulations.⁹⁵ In antitrust actions, the DOJ and the courts are involved in deciding whether a firm's actions violate the Sherman Act. An example of a settlement in an antitrust action is the Modification of Final Judgment (MFJ).⁹⁶

The main regulator of the telecommunications industry is the FCC. In 1876, Alexander Graham Bell patented a device which evolved into the modern telephone.⁹⁷ At that time, Bell confidently predicted that "a telephone in every house would be considered indispensable . . ."⁹⁸ During the 1900's, American Telephone and Telegraph Company (AT&T or Bell) became the major supplier of telephone service in the country.⁹⁹ Due to AT&T's enormous market share, the government first regulated AT&T as a common carrier in 1910.¹⁰⁰ As a common carrier, AT&T had to provide service on request, at just and reasonable rates, and without unjust discrimination or undue preference.¹⁰¹

Prior to divestiture, AT&T held eighty-five percent of the local telephone market and ninety percent of the long-distance market.¹⁰² In November 1974, the DOJ filed its third antitrust suit¹⁰³

94. See *supra* note 14.

95. Turner Broadcast Systems, Inc. v. FCC is an example of the cable industry challenging the constitutionality of the 1992 Cable Act in the United States District Court for the District of Columbia. 819 F. Supp. 32 (D.D.C. 1993), *vacated*, 114 S. Ct. 2445 (1994).

96. For a description of the MFJ, see *infra* notes 102-15 and accompanying text.

97. KELLOGG ET AL., *supra* note 44, § 1.2.1, at 6.

98. *Id.* (citing ROBERT W. GARNET, THE TELEPHONE ENTERPRISE: THE EVOLUTION OF THE BELL SYSTEM'S HORIZONTAL STRUCTURE, 1876-1909, at 12 (1985)).

99. KELLOGG ET AL., *supra* note 44, § 1.3, at 11. AT&T enjoyed its large market share by buying its competitors or not allowing its competitors to use its advanced long-distance technology. *Id.*

100. Mann-Elkins Act of 1910, Pub. L. No. 61-218, § 7, 36 Stat. 539, 544 (1910). Telegraph and telephone carriers were originally regulated by the Interstate Commerce Commission (ICC).

101. Mann-Elkins Act §§ 7, 12. The Act did not require common carrier's obligations to be applied to other carriers. KELLOGG ET AL., *supra* note 44, § 1.3.2, at 15.

102. Grudus, *supra* note 6, at 108.

103. The DOJ had filed two previous antitrust suits against AT&T. KELLOGG ET AL., *supra* note 44, § 4. In the first antitrust suit, the DOJ alleged that AT&T was becoming a monopoly by acquiring all independent phone companies. *Id.* § 4.2, at 200. This resulted in the 1914 Decree, in which AT&T agreed to refrain from acquiring any more competing independent telephone companies. United States v. AT&T, 1 Decrees & Judgments in Civil Federal Antitrust Cases 554 (D. Or.), *modified*, 1 Decrees & Judgments in Civil Federal Antitrust Cases 569 (D. Or. 1914),

against AT&T.¹⁰⁴ Under Judge Greene,¹⁰⁵ AT&T and the DOJ agreed to settle.¹⁰⁶ On January 8, 1982, the DOJ and AT&T filed a stipulation with the District Court of New Jersey, called the Modification of Final Judgment (MFJ).¹⁰⁷ Two years after the MFJ, divestiture of AT&T was complete. By the terms of the MFJ agreement, AT&T kept the long-distance carrier portion of the business, as well as Bell Core,¹⁰⁸ but the local carriers were split into seven independent Regional Bell Operating Companies (RBOCs) or Bell Operating Companies (BOCs).¹⁰⁹ Today, the long-distance service providers have equal access to the local exchanges.¹¹⁰ Furthermore, the seven BOCs continue to be regulated as common carri-

modified, 1 Decrees & Judgments in Civil Federal Antitrust Cases 572 (D. Or. 1918), *modified*, 1 Decrees & Judgments in Civil Federal Antitrust Cases 574 (D. Or. 1922). In 1956, the government brought its second antitrust suit against AT&T. KELLOGG ET AL., *supra* note 44, § 4.3, at 202. The government alleged that AT&T's practices of acquiring and licensing patents on telecommunications equipment and services created a monopoly. *Id.* The case was resolved by the 1956 Decree. United States v. Western Elec. Co., 1956 Trade Cas. (CCH) ¶ 68,246 (D.N.J. 1956). In the decree, AT&T agreed to grant non-exclusive licenses to all interested parties for all existing and future AT&T patents. KELLOGG ET AL., *supra* note 44, § 4.3, at 203-04.

104. United States v. AT&T, 552 F. Supp. 131 (D.D.C. 1982). The complaint alleged that Bell had a monopoly in both long-distance service and manufacture of telecommunications equipment. United States v. AT&T, 524 F. Supp. 1336, 1342 (D.D.C. 1981).

105. The case was initially assigned to Judge Joseph C. Waddy who became terminally ill in 1978. The case was then reassigned to Judge Greene on his first day on the federal bench. KELLOGG ET AL., *supra* note 44, § 4.4, at 207.

106. *Id.* § 4.5, at 211. The antitrust trial started on January 15, 1981. *Id.* at 208. After the government presented its case, AT&T moved for a directed verdict. Judge Greene denied the motion and wrote a lengthy opinion. United States v. AT&T, 524 F. Supp. 1336 (D.D.C. 1981). Shortly after this opinion, AT&T and Assistant Attorney General William Baxter agreed to settle the case. KELLOGG ET AL., *supra* note 44, §§ 4.4-5, at 210-11.

107. United States v. AT&T, 552 F. Supp. 131, 140-41 (D.D.C. 1982) [hereinafter 1982 Decree]. Under the terms of the MFJ, Judge Greene retained jurisdiction to hear triennial reviews on the BOCs restriction to enter certain lines of business. United States v. Western Elec. Co., 900 F.2d 283, 289 (D.C. Cir. 1990).

108. BellCore is the research center for AT&T.

109. 1982 Decree, *supra* note 107, at 229. The MFJ had four basic provisions. KELLOGG ET AL., *supra* note 44, § 4.6, at 221. First, AT&T was required to divest itself of the local Bell telephone operating companies. 1982 Decree, *supra* at 227. Second, the BOCs were required to provide non-discriminatory connections to long-distance carriers. *Id.* Third, BOCs were prohibited from the long-distance, information services and equipment businesses. *Id.* Fourth, it freed AT&T from the restrictions of the 1956 Decree. *Id.* at 226. See generally KELLOGG ET AL., *supra* note 44, § 4.6, at 221 (describing the main provisions of the 1982 Decree).

The seven BOCs that were created were Ameritech, Bell Atlantic, BellSouth, NYNEX, Pacific Telesis, Southwestern Bell and US West.

110. *Id.* § 1.7, at 41. For a detailed discussion on the rise and fall of the Bell System, see *id.* §§ 1.2-7, at 5-48.

ers. There is also a requirement to divide the functions of the local exchanges into separate components.¹¹¹

Even with the break up of AT&T, the BOCs were not allowed into the video marketplace for fear of anti-competitive behavior towards the emerging cable industry.¹¹² This prohibition was formalized by the 1984 Cable Act.¹¹³ Likewise, the FCC ordered all telephone common carriers to stop providing cable service "directly or through their telephone service areas."¹¹⁴ However, telephone companies were allowed to carry video programs to rural areas.¹¹⁵

111. *Id.* § 1.8, at 52. With Open Network Architecture (ONA), the plan is to disaggregate the individual components of a telephone connection (the line, signaling — dial and busy tones — and the switching) into basic service elements that can be priced and sold separately and as a part of an integrated enhanced service. *Id.* The goal of ONA is to vault telephone service from POTS, "Plain Old Telephone Service," to PANS, "Pretty Amazing New Services." *Id.* By disaggregation, ONA hopes to provide consumers and other producers universal access to the telephone network, similar to that in the long-distance market. *Id.*

112. By the terms of the 1956 Consent Decree, the Bell System was prohibited from offering anything other than rate-regulated "common carrier" services. *United States v. Western Elec. Co.*, 1956 Trade Cas. (CCH) ¶ 68,246 (D.N.J. 1956). Furthermore, in *Frontier Broadcasting Co. v. Laramie Community TV Co.*, the FCC determined that cable providers were not common carriers because they determined the content of the programs they transmitted. 24 F.C.C. 251, 254 (1958). A major concern was that the telephone companies could cross-subsidize their video market service with profits from their traditional telephone service.

113. Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2782 (codified at 47 U.S.C. § 521 (1988 & Supp. V 1993)) [hereinafter 1984 Cable Act]. For a discussion on the 1984 Cable Act, see *infra* notes 169-71 and accompanying text. The 1984 Cable Act formalized the cross-ownership ban, forbidding common carriers from providing "video programming" in its service area. "It shall be unlawful for any common carrier . . . to provide video programming directly to subscribers in its telephone service area, either directly or indirectly through an affiliate owned by, operated by, controlled by, or under common control with the common carrier." 47 U.S.C. § 533(b)(1) (1988). It should be noted that this section is commonly described as the "cross-ownership" prohibition, but the 1984 Cable Act only prohibits programming, not ownership. In contrast, the provision prohibits telephone companies from providing programming services, but a cable operator can provide telephone services.

114. 47 C.F.R. § 63.54(a) (1994). The cross-ownership prohibition does not bar telephone companies from owning cable systems outside their service area. Today, BOCs are trying to enter the cable market by buying or merging with existing cable operators. See Andrew C. Barrett, *Shifting Foundations: The Regulation of Telecommunications in an Era of Change*, 46 FED. COM. L.J. 39, 43-47 (1993) (explaining merger and alliances between Bell Atlantic and Tele-Communications, Inc.; Viacom and Paramount; NYNEX and Viacom; US West and Time Warner; Bell-South and Prime Management; and Southwestern Bell and Hauser Communications). However, this merger mania may have subsided with the fall of the Bell Atlantic-TCI merger. The merger is thought to have failed because of the FCC's decision to require cable companies to lower their rates.

115. 47 U.S.C. § 553(b) (1988). The Cable Act of 1992 maintains the rural exemption. "This subsection shall not apply to any common carrier to the extent such carrier provides telephone exchange service in any rural area (as defined by

4. *Video Dialtone Order*

During the 1980's, the FCC recognized the increased market power of cable companies and their monopoly-like dominance in their respective regions.¹¹⁶ The FCC determined that the telephone companies were no longer a threat to the cable industry. The cable industry had developed from an infant industry requiring protection to a dominant power in the video marketplace.¹¹⁷

The FCC wanted to allow telephone companies into the video market, but the FCC was limited by the 1984 Cable Act's prohibition against the telephone companies entrance into the programming market.¹¹⁸ The FCC determined that the 1984 Cable Act prohibited a telephone company from actively participating in the distribution of programs to consumers within the local company's service area.¹¹⁹ However, the FCC also determined that the 1984 Cable Act did not prohibit a telephone company from offering video dialtone services which passively carry programs provided by other programmers.¹²⁰ As a result, the Video Dialtone Order allows the telephone companies to carry programs, but the telephone companies are not permitted to select video programs or determine how the programs will be presented for sale to the customers.¹²¹

the Commission)." 47 U.S.C. § 553(b)(1). See H.R. REP. NO. 934, 98th Cong., 2d Sess. 56 (1984) ("It is the intent of section 613(b) to codify current FCC rules concerning the provision of video programming over cable systems by common carriers, except to the extent of making the exemption for rural telephone companies automatic.").

116. Second Report, *supra* note 13, at 5783; see *infra* notes 172-83 and accompanying text for a discussion of the monopoly-like power of the cable industry prior to the 1992 Cable Act.

117. Second Report, *supra* note 13, at 5783.

118. See Pettit & McGuire, *supra* note 91, at 349. Many people believed that the telephone company was prohibited from providing video dialtone under the 1984 Cable Act's cross-ownership ban. *Id.*

119. Second Report, *supra* note 13, at 5786 (citing 47 U.S.C. § 533(b)(1)).

120. *Id.* at 5783. In determining that the telephone industry could provide the pipeline for the programmers, the FCC first had to determine that the passive transporting of programs was not covered by the 1984 Cable Act. Pettit & McGuire, *supra* note 91, at 349-50. The FCC focused on the definition of "cable service," primarily on the meaning of "transmission." *Id.* at 351-52. The FCC rejected the argument that "transmission" included passively transporting signals generated by a programmer to a subscriber. Telephone Company-Cable Television Cross-Ownership Rules, §§ 63.54-63.58, Memorandum Opinion and Order on Reconsideration, 7 F.C.C.R. 5069, 5071 (1992). Instead, the FCC determined that "transmission" required "active participation in the selection and distribution of video programming." *Id.* See generally Pettit & McGuire, *supra* note 91, at 350-51.

121. Video Dialtone Order, *supra* note 13, at 41,107. The telephone companies are prohibited from "making decisions concerning the bundling or 'tiering,' of the price, terms and conditions of video programming offered to consumers, or otherwise have a cognizable financial interest in, or exercise editorial control over,

Before the FCC issued the Video Dialtone Order, the FCC determined that section 533(b) of the 1984 Cable Act¹²² did not prohibit telephone operators from providing video dialtone.¹²³ The

video programming provided directly to subscribers within their telephone service areas.⁷ *Id.* Non-cognizable telephone company ownership in video programmers was increased from one percent to five percent. *Id.*

122. Section 533(b) of the 1984 Cable Act states:

§ 533. Ownership restrictions

(a) Persons owning or controlling television station licensee; holding license for multichannel distribution or offering satellite service

(1) It shall be unlawful for any person to be a cable operator if such person, directly or through one or more affiliates, owns or controls, the licensee of a television broadcast station and the predicted grade B contour of such station covers any portion of the community served by such operator's cable system.

(b) Common carriers; direct video programming; exception; waiver

(1) It shall be unlawful for any common carrier, subject in whole or in part to subchapter II of this chapter, to provide video programming directly to subscribers in its telephone service area, either directly or indirectly through an affiliate owned by, operated by, controlled by, or under common control with the common carrier.

(2) It shall be unlawful for any common carrier, subject in whole or in part to subchapter II of this chapter, to provide channels of communications or pole line conduit space, or other rental arrangements, to any entity which is directly or indirectly owned by, operated by, controlled by, or under common control with such common carrier, if such facilities or arrangements are to be used for, or in connection with, the provision of video programming directly to subscribers in the telephone service area of the common carrier.

(3) This subsection shall not apply to any common carrier to the extent such carrier provides telephone exchange service in any rural area (as defined by the Commission).

(4) In those areas where the provision of video programming directly to subscribers through a cable system demonstrably could not exist except through a cable system owned by, operated by, controlled by, or affiliated with the common carrier involved, or upon other showing of good cause, the Commission may, on petition for waiver, waive the applicability of paragraphs (1) and (2) of this subsection. Any such waiver shall be made in accordance with section 63.56 of title 47, Code of Federal Regulations (as in effect September 20, 1984) and shall be granted by the Commission upon a finding that the issuance of such waiver is justified by the particular circumstances demonstrated by the petitioner, taking into account the policy of this subsection.

47 U.S.C. § 533(b) (1988).

123. Second Report, *supra* note 13, at 5787 n.21. The United States District Court for the Eastern District of Virginia determined that section 533(b):

prohibits a telephone company from directly providing video programming to subscribers in its service area. Significantly, the statute has not been interpreted to prohibit a local telephone company from providing video transport services. Thus, a telephone company is permitted to run a cable into a subscriber's home and then to lease channels of communications on that cable to unaffiliated entities, such as cable operators. The telephone company only runs afoul of the statute by exercising control or discretion over the programming transported over its facilities.

Chesapeake & Potomac Tel. Co. v. United States, 830 F. Supp. 909, 929 (E.D. Va. 1993) (citations omitted).

1984 Cable Act prohibited common carriers from acting as a cable operator or from providing cable service over a cable system. Therefore, determining the definitions of "cable service,"¹²⁴ "cable system"¹²⁵ and "cable operator"¹²⁶ was crucial in allowing telephone companies to provide video dialtone. The FCC defined these terms narrowly and found that passive transport of programs did not fall within the 1984 Cable Act's prohibitions.¹²⁷ In the future, the question remains whether the telephone companies can actively partici-

124. The 1984 Cable Act defines cable service as "(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection of such video programming or other programming service." 47 U.S.C. § 522(5)(A)-(B) (Supp. V 1993).

125. The 1984 Cable Act defines a cable system as:

a facility consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community, but such term does not include (A) a facility that serves only to retransmit the television signals of 1 or more television broadcast stations; (B) a facility that serves only subscribers in 1 or more multiple unit dwellings under common ownership, control, or management, unless such facility or facilities uses any public right-of-way; (C) a facility of a common carrier which is subject, in whole or in part, to the provisions of title II of this act, except that such facility shall be considered a cable system . . . to the extent such facility is used in the transmission of video programming directly to subscribers; or (D) any facilities to any electric utility used solely for operating its electric utility system.

47 U.S.C. § 522(7) (Supp. V 1993).

126. The 1984 Cable Act defines a cable operator as "any person or group of persons (A) who provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in such cable system, or (B) who otherwise controls or is responsible for, through any arrangement, the management or operation of such a cable system." 47 U.S.C. § 522(4) (Supp. V 1993).

127. First, the FCC determined that the definition of "cable service" did not include the passive transport of program signals. It noted that the Congressional record showed that "transmission," which was in the definition of cable service, only included "active participation in the selection and distribution of video programming." Memorandum and Opinion and Order on Reconsideration, 7 F.C.C.R. 5069, 5071 (1992). The Video Dialtone Order did not allow the telephone companies to select the programs, therefore, they were not providing cable service.

Second, the FCC concluded that the telephone facilities used to provide video dialtone were not a "cable system." The FCC determined that the telephone facilities were covered by the exemption for common carrier services governed by Title II of the Communications Act. *Id.* at 5072. Therefore, the FCC reasoned that Congress did not intend telephone facilities to be governed by both regulations. *Id.* Moreover, the FCC concluded that telephone facilities did not ordinarily include equipment for signal generation, reception and control, which form the cable system. *Id.* at 5072-73.

Third, the FCC determined that the definition of "cable operator" did not include a telephone company which provided video dialtone. The definition of a "cable system" was a part of the definition for a "cable operator." Because the telephone facilities did not fall within the definition of a "cable system," telephone

pate in the selection and distribution of video programs. The FCC recommended that the 1984 Cable Act be amended to allow telephone companies to provide video programming directly to subscribers.¹²⁸ However, Congress, in its 1992 Cable Act, kept intact the 1984 Cable Act's prohibition against the telephone companies from directly providing programs to consumers.¹²⁹ This prohibition, however, has been held unconstitutional under intermediate First Amendment scrutiny by two federal circuit courts¹³⁰ and three district courts.¹³¹

In *Chesapeake & Potomac Telephone Co. v. United States*,¹³² the Chesapeake and Potomac Telephone Company of Virginia (C&P) and Bell Atlantic Video Services Company, both wholly owned subsidiaries of Bell Atlantic, challenged the legality of sections (1) and (2) of 47 U.S.C. § 533(b)¹³³ which prohibited telephone companies and their affiliates from providing video programming to subscribers within their service area. C&P alleged that the prohibition violated their First Amendment right to free expression.¹³⁴ The United States Court of Appeals for the Fourth Circuit agreed with C&P that section 533(b) was unconstitutional.¹³⁵

The appellate court first determined that the regulation was content-neutral;¹³⁶ therefore, it was subject to the intermediate

companies did not fall within the definition of a "cable operator." See Pettit & McGuire, *supra* note 91, at 349-52.

128. The FCC recommended that § 533(b) be eliminated. In re Telephone Company-Cable Television Cross-Ownership Rules, Further Notice of Inquiry and Notice of Proposed Rulemaking, 3 F.C.C.R. 5849 (1988).

129. Congress believed that the § 533(b) ban enhanced competition in the cable industry. S. REP. NO. 92, 102d Cong., 1st Sess. 18 (1991).

130. *US West, Inc. v. United States*, 48 F.3d 1092 (9th Cir. 1994); *Chesapeake & Potomac Tel. Co. v. United States*, 830 F. Supp. 909 (E.D. Va. 1993), *aff'd*, 42 F.3d 181 (4th Cir. 1994).

131. *NYNEX Corp. v. United States*, No. 92-323-P-C (D. Maine 1994); *Bell-South Corp. v. United States*, 868 F. Supp. 1335 (N.D. Ala. 1994); *Ameritech Corp. v. United States*, 867 F. Supp. 721 (N.D. Ill. 1994).

132. 830 F. Supp. 909 (E.D. Va. 1993), *aff'd*, 42 F.3d 181 (4th Cir. 1994). The *Chesapeake & Potomac* case is used to illustrate the reasoning courts have used to hold § 533(b) as unconstitutional.

133. For the relevant provisions of 47 U.S.C. § 533(b) (1988), see *supra* note 113. Video programming is defined as "programming provided by, or generally considered comparable to programming provided by, a television broadcast station." 47 U.S.C. § 522(19) (Supp. V 1993).

134. *Chesapeake & Potomac*, 42 F.3d at 185.

135. *Id.*

136. A regulation is content-neutral if "the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys." *Turner Broadcasting System, Inc. v. FCC*, 114 S. Ct. 2445, 2459 (1994) (quoting *Ward v. Rock Against Racism*, 491 U.S. 791 (1989)). *Turner* required a two-step analysis to determine whether a regulation was content-neutral. *Chesa-*

level of scrutiny under *United States v. O'Brien*.¹³⁷ The court stated that a content-neutral regulation was constitutional (1) if the interests of section 553(b) were significant, (2) if section 553(b) was narrowly tailored to serve those interests and (3) if section 553(b) left open ample alternative channels for communication of information.¹³⁸ Although the court found that the government did have a significant interest,¹³⁹ the court held that the regulation was not narrowly tailored,¹⁴⁰ and

peake & Potomac, 42 F.3d at 192-93. First, the court held that the regulation, on its face, did not confer benefits or impose burdens based upon the content of the speech it regulated because § 533(b) prohibited a telephone company from providing video programming regardless of the message it conveyed. *Id.* at 193. See *Turner*, 114 S. Ct. at 2459 (whether plain terms of regulation, on its face, confers benefits or imposes burdens based upon content of speech). Second, the court found that the purpose of § 533(b) was not to regulate speech because the regulation was enacted to prevent telephone companies from exercising its monopolistic practices in the cable transport market and to preserve diversity of ownership of electronic means to access to homes and businesses. *Chesapeake & Potomac*, 42 F.3d at 195. See *Turner*, 114 S. Ct. at 2461 (“[A] regulation neutral on its face may be content-based if its manifest purpose is to regulate speech because of the message it conveys.”).

137. 391 U.S. 367 (1968). Under the *O'Brien* analysis, a content-neutral regulation is constitutional if the regulation serves a significant governmental interest and does not burden substantially more speech than necessary to serve these interests. *Id.* at 377. Moreover, the regulation must “leave open ample alternative channels for communication of the information.” *Ward*, 491 U.S. at 791 (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)). See *Chesapeake & Potomac*, 42 F.3d at 198.

138. *Chesapeake & Potomac*, 42 F.3d at 198.

139. *Id.* The goals of § 533(b) were to restrict a telephone company from cross-subsidizing the video market with its telephone operations and to restrict pole-access discrimination. *Id.* Pole-access discrimination is important in the cable market because cable operators initially hung their coaxial cables, the physical transport which carried video signals, from utility poles that were owned solely by local telephone companies. *Id.* at 186. First, the court held that these goals promote the elimination of unfair trade practices. As such, “the government’s interest in eliminating restraints on fair competition is always substantial, even where the individuals or entities subject to particular regulations are engaged in expressive activity protected by the First Amendment.” *Id.* (quoting *Turner*, 114 S. Ct. at 2470). Second, these goals enhanced diversity of ownership outlets. *Id.* “[A]ssuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment.” *Id.* (quoting *Turner*, 114 S. Ct. at 2470). Moreover, the court held that multiplicity of information sources were critical in the cable market because of private control of cable communication through a physical bottleneck — the physical access point of cable into a home or office. *Id.*

140. *Id.* at 202. The court stated that a regulation “‘need not be the least-restrictive or least-intrusive means’ of achieving the government’s goal” to be considered narrowly tailored. *Id.* at 199 (quoting *Ward*, 491 U.S. at 798). The requirement of narrow tailoring is satisfied “so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.” *Id.* (citing *Ward*, 491 U.S. at 799 (footnote omitted) (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985))). However, the regulation may not

it did not provide ample alternative channels for communication.¹⁴¹

5. *Video Dialtone Order: Policy Goals and Effects*

The Video Dialtone Order's policy goals are to "creat[e] opportunities and incentives to develop an advanced telecommunications infrastructure, increas[e] competition in the video marketplace, and enhanc[e] the diversity of video services to the American public in order to promote consumer choice."¹⁴² The FCC used three means to further these goals. First, the FCC extended the existing telephone regulations against discriminatory access¹⁴³ and cross-subsidization to the video dialtone services. Second, additional safeguards can be imposed as part of a section 214 certification process.¹⁴⁴ Third, the FCC will review the Video Dialtone

"burden substantially more speech than was necessary to further the government's legitimate interest." *Ward*, 491 U.S. at 799.

The court found that § 533(b) was not narrowly tailored because the government failed to justify a need for § 533(b) and it burdened more speech than necessary. *Chesapeake & Potomac*, 42 F.3d at 202. In determining whether a regulation was narrowly tailored, the court should afford great deference "to the decisions of Congress and the experience of the [FCC]." *Id.* at 199 (citing *CBS, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 102 (1973)). But this deference was limited to congressional factual findings regarding the need for the regulation, including a determination of whether any less burdensome alternative existed. *Id.* (citing *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1510 n.13 (1993)). First, the court noted that Congress failed to support § 533(b) with any underlying factual findings. *Id.* at 201. Second, the court held that:

[an] 'obvious less-burdensome alternative[]' to Section 533(b) readily presents itself . . . Congress could simply limit the telephone companies' editorial control over video programming to a fixed percentage of the channels available; the telephone companies would be required to lease the balance of the channels on a common carrier basis to various video programmers, without regard to content.

Id. at 202 (quoting *Chesapeake & Potomac Tel. Co. v. United States*, 830 F. Supp. 909, 930-31 (E.D. Va. 1993)).

141. *Chesapeake & Potomac*, 42 F.3d at 203. The court stated that "[w]hether a regulation leaves open ample alternative methods of communication is more than an inquiry as to whether the regulation 'completely silences' the speaker." *Id.* A regulation was constitutional if ample alternative methods of communication were sufficiently similar to the method foreclosed by the regulation. *Id.* However, § 533(b) barred absolutely the ability of telephone companies to enter, with editorial discretion, the cable television market. *Id.*

142. Video Dialtone Order, *supra* note 13, at 41,106.

143. Second Order, *supra* note 13, at 5823. This requirement was met by requiring the telephone companies to provide a common carrier platform with sufficient capacity to service multiple video programmers. *Id.*

144. *Id.* at 5823. In *General Tel. Co. of Cal.*, 13 F.C.C.2d 488 (1968), *aff'd*, 413 F.2d 390 (D.C. Cir. 1969), the FCC held that in order for a telephone company to provide channel service to a cable system, the telephone company was required to seek FCC approval under § 214 of the Communications Act, 47 U.S.C. § 214 (1988 & Supp. V 1993).

Order in three years to ensure that the policy goals are being met.¹⁴⁵

In addition, the Video Dialtone Order shows the FCC's shift in emphasis from "regulated monopolies" to "regulated competition." To reach this goal, the Video Dialtone model is designed to create greater choice for the American consumer in both programs and pipelines, while retaining enough flexibility to accommodate technological advances.

First, the Video Dialtone model increases the number of programs a consumer can access. By increasing the number of potential video pipelines, consumers have the potential to access an increased number of programs. With increased competition, the FCC concluded that consumers will have more choice in content, an increase in responsive customer service and lower prices for video programming.¹⁴⁶

Second, the model provides for increased competition in the existing pipeline. Before the Video Dialtone Order went into effect, one cable operator usually provided all video programs within a geographic region.¹⁴⁷ By allowing telephone companies to carry video programs, a consumer will have at least two pipelines from which to choose: a cable operator or a local telephone company. The telephone company will be a multi channel competitor to the cable operators. However, because the telephone companies are prohibited from owning a cable system, the telephone companies have to build their own broadband networks in order to compete with existing cable systems.¹⁴⁸

Third, the language of the Video Dialtone Order indicates the FCC's flexibility to accommodate technological developments in the video dialtone industry. In addition, the Video Dialtone Order does not violate the FCC's interpretation of section 533(b) of the 1984 Cable Act.¹⁴⁹ Otherwise, the FCC seems content to allow the technology and the market to drive the video dialtone services.¹⁵⁰

145. Second Order, *supra* note 13, at 5823.

146. *Id.* at 5797-98.

147. Congress stated that "most 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." Pub. L. No. 102-385, § 2(a), 106 Stat. 1460 (1992).

148. Telephone companies are not prohibited from ownership of cable operators outside their service area.

149. The prohibition usually prevents a telephone company from being a "cable operator," providing "cable service" through a "cable system."

150. As the FCC stated:

6. *Duties Imposed by the Video Dialtone Order*

The Video Dialtone model is analyzed by determining the duties and rights it creates among the three groups who want access to the model: the pipeline providers, programmers and consumers. It only imposes common carrier duties upon the telephone companies and not upon the cable operators, but, for purposes of this model, this Paper assumes that it creates similar duties for all pipeline providers.

The Video Dialtone Order only regulates one product, the pipeline. Therefore, only three of the six markets are regulated by the Video Dialtone model, the pipeline provider-pipeline provider, the pipeline provider-programmer and the pipeline provider-consumer markets. The ability to buy and sell programs is not addressed by the Video Dialtone Order.

First, the pipeline provider is required to provide nondiscriminatory access to the pipeline to competing pipeline providers, programmers and consumers. If a programmer wants access to a pipeline, a pipeline provider must sell access to the pipeline in a nondiscriminatory fashion.¹⁵¹ The pipeline provider cannot unreasonably refuse to sell available channel space to a programmer. This model defeats the dangers found in vertical integration.¹⁵² If a firm owns both pipeline and program, the potential exists for that company to favor its affiliated programs over that of its competitors. However, the nondiscriminatory access requirement provides equal access to the pipeline both for non-affiliated programmers and affiliated programmers. Likewise, a consumer can buy access to a pipeline in nondiscriminatory fashion. Consistent with common carriage, a consumer must be given access to a pipeline, even if the consumer is located in a remote area. Access to all consumers is

Given the rapid pace of technological development in this area, our policy initially sets only the necessary broad regulatory framework and relies upon the technical and market creativity of those in the private sector responding to market demand and economics to determine the substance of telephone company video dialtone offerings.

Second Further Notice of Proposed Rulemaking, 7 F.C.C.R. 5781, 5788-89 (1992).

151. Video Dialtone Order, *supra* note 13, at 41,107. This assumes that the pipeline has empty channels for the pipeline provider to sell. The Video Dialtone Order does not require a specific number of channels a pipeline provider must have, however, it does state that "the telephone companies provide a common carrier platform containing sufficient capacity to service multiple video programmers." *Id.*

152. In the video marketplace, vertical integration occurs when the video programs and the pipelines used to carry the video signals are owned by the same company.

crucial, given the important role that the video marketplace will have in the distribution of information.¹⁵³

Unlike pipelines, the Video Dialtone Order does not regulate programs. There is no duty for a programmer to sell access to its programs.¹⁵⁴ Three problems arise in this situation. First, a programmer can decide whether to sell a program to a particular pipeline provider. This can create a problem for a pipeline provider. A pipeline provider can sell its pipeline to a consumer only if that pipeline contains content that the consumer wishes to access. If a pipeline does not contain programs that a consumer desires, the consumer will not buy access to that pipeline. Second, a dominant program can gain monopoly-like dominance.¹⁵⁵ The Video Dialtone Order does not address the imbalance of power that can be created among the pipeline providers, programmers and consumers. Third, programmers can arbitrarily refuse to sell their programs to consumers. Without any programmer regulation, a programmer can refuse or cancel a consumer's access to its program.¹⁵⁶

However, any attempts to regulate programmers can run afoul of the First Amendment.¹⁵⁷ In addition, regulation of programmers under a common carrier regulation conflicts with the common law definition of a common carrier. One element in the definition of common carrier requires a firm not to control the content being transported, however, a programmer does control

153. See 47 U.S.C. § 901(b)(2) (Supp. V 1993).

154. Attempts to regulate programmers can implicate First Amendment rights. See generally Perritt, *supra* note 15.

155. Examples of dominant programs are LEXIS/NEXIS and Westlaw in the law database services. In cases of a monopoly, antitrust laws may be implicated to ensure equal access. For a discussion of antitrust law, see *supra* notes 56-63 and accompanying text.

156. Recently, CompuServe has threatened to cancel one of its user's CompuServe accounts. Brian Livingston, *CompuServe Threatens Free Exchange of Ideas over Lawsuit*, INFOWORLD, March 7, 1994, at 25. Currently, CompuServe and Richard S. Patterson are involved in a dispute concerning the trademark right to "Windows Navigator." *Id.* In conjunction with the suit, CompuServe sent the following letter to Mr. Patterson: "[I]t is CompuServe's position that you will be terminated if you mention, discuss, or comment upon the lawsuit or the issues related thereto as part of the CompuServe Information Service. Termination will also result from any other disparagement of CompuServe, its management, employees, or business practices." *Id.* Although it is understandable that CompuServe does not want Mr. Patterson to talk about the pending case, CompuServe should not have the ability to terminate his account for disparaging remarks because termination may implicate First Amendment rights. For a discussion on the First Amendment implications, see Access and Content Control, *supra* note 27.

157. For a discussion of First Amendment concerns, see Perritt, *supra* note 15.

program content. Thus, under traditional common law, a programmer cannot be considered a common carrier.

C. The Cable Television Consumer Protection and Competition Act of 1992

The Cable Television Consumer Protection and Competition Act of 1992 (1992 Cable Act) is another model which has been used to regulate the video marketplace. In analyzing the 1992 Cable Act, the history of cable television, the Cable Communications Policy Act of 1984 (1984 Cable Act) and the access provisions and duties created by the 1992 Cable Act are discussed.

1. *History: Previous Acts, Regulations and Court Decisions*

During the 1940's and 1950's, cable television originated in the mountainous and rural areas, because the terrain made television reception poor or nonexistent.¹⁵⁸ Community antenna televisions (CATV or Cable TV), built on top of hills and tall buildings, were able to receive the television signals.¹⁵⁹ Then, the cable operators distributed the signals to homes by coaxial cable.¹⁶⁰

It was not until 1965 that the FCC exercised jurisdiction over cable television.¹⁶¹ The Communications Act of 1934 applied to "all interstate and foreign communication by wire and radio," and included FCC responsibility to "make available . . . to all the people of the United States a rapid, efficient, nation-wide and world-wide wire and radio communication service."¹⁶² The Supreme Court, in *United States v. Southwestern Cable Co.*,¹⁶³ determined that the FCC could regulate the cable industry because it was "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting."¹⁶⁴

In *Teleprompter Corp. v. CBS, Inc.*,¹⁶⁵ the broadcast companies sued cable systems for violating the broadcasters' copyrights by relaying their broadcasts without paying royalties. The Supreme

158. KELLOGG ET AL., *supra* note 44, § 14.1, at 689.

159. *Id.*

160. *Id.*

161. POOL, *supra* note 1, at 157. The FCC has wide jurisdiction in the telecommunications area. The Communications Act of 1934 gives the FCC power over "all interstate and foreign communication by wire and radio" and the FCC has a duty to "make available . . . to all the people of the United States a rapid, efficient, nation-wide and world-wide wire and radio communication service." *Id.* at 161.

162. 47 U.S.C. § 151 (1988).

163. 392 U.S. 157 (1968).

164. *Id.* at 178.

165. 415 U.S. 394 (1974).

Court held that CATV was an extended antenna for a subscriber of the cable system. As such, cable companies did not have to pay royalties for transmitting signals that were broadcast without charge.¹⁶⁶ In reaction to the Supreme Court's decision, Congress amended the copyright law in 1974. The amendment provided that cable operators had to pay royalties for retransmission of broadcast signals.¹⁶⁷ Also, broadcasters had to give compulsory licenses to the cable operators.¹⁶⁸

Congress deregulated the cable industry by the Cable Communications Policy Act of 1984 (1984 Cable Act).¹⁶⁹ The 1984 Cable Act was enacted to promote "competition in cable communications" because Congress believed that cable would face effective competition from other multichannel video program distributors.¹⁷⁰ In addition, Congress believed that the cable industry needed protection from the well established telephone companies.¹⁷¹

Unfortunately, the 1984 Cable Act did not have its intended effect. Rather than increasing competition in the cable market, the cable industry became the "dominant nationwide video medium."¹⁷² Almost 56,000,000 households, over sixty percent of the total number of households with television, subscribed to cable television.¹⁷³ Additionally, cable service was accessible to almost ninety percent of the nation.¹⁷⁴ "For a variety of reasons, including local franchising requirements and the extraordinary expense of constructing more than one cable television system to serve a particular

166. CATV was free from any copyright liability.

167. Copyright Act of 1976, 17 U.S.C. §§ 111, 119 (1976 & Supp. V 1993).

168. The amendment balanced two federal interests in the video marketplace by ensuring the broadest dissemination of broadcast programs while protecting the rights of copyright owners. 17 U.S.C. § 111(d) (1976 & Supp. V 1993).

169. 47 U.S.C. §§ 521-59 (1988 & Supp. V 1993).

170. Other multichannel video program distributors include wireless cable, Satellite Master Antenna Television (SMATV), television receive only (TVRO or home satellite dish) and direct broadcast satellite (DBS).

171. See *supra* note 113.

172. 47 U.S.C. § 521(a)(3) (Supp. V 1993). In 1970, cable television had about 4.5 million subscribers. KELLOGG ET AL., *supra* note 44, § 14.1, at 690. By 1990, the number of cable television subscribers had increased to 54 million, and over 80 million residents had access to the cable networks. *Id.* The dramatic increase in the penetration of the cable industry compares to that of the telephone market. In 1934, telephone service was available to only one out of three households. By 1984, approximately 98% of American households had at least one telephone. Paul MacAvoy & Kenneth Robinson, *Losing by Judicial Policymaking: The First Year of the AT&T Divestiture*, 2 YALE J. ON REG. 225, 230 n.29 (1985).

173. 47 U.S.C. § 521(a)(3) (Supp. V 1993).

174. S. REP. NO. 92, 102d Cong., 1st Sess. 3 (1991).

geographic area . . . ,” the cable companies became a monopoly with no effective competitors within each of their geographic market areas.¹⁷⁵ As a consequence, the “average monthly cable rate increased almost three times as much as the Consumer Price Index since rate deregulation.”¹⁷⁶

Congress found that the cable industry had become horizontally¹⁷⁷ and vertically¹⁷⁸ integrated.¹⁷⁹ This integration created anti-competitive tendencies between cable operators and programmers and between cable operators and other multichannel competitors. Likewise, integration affected access to the pipeline by programmers and access to programs by pipeline providers. In either case, the total number of programs and pipelines available to the consumers decreased.

Vertical integration causes two problems. First, a vertically integrated cable operator can restrict or condition the ability of programmers to access the pipeline. An integrated cable operator has the incentive and ability to favor its affiliated programmer. This makes it more difficult for non-affiliated programmers to secure carriage on an integrated cable operator’s pipeline.¹⁸⁰ Second, a vertically integrated cable programmer can restrict or condition the access of pipeline providers and consumers to programs. An integrated cable programmer has the incentive to favor its affiliated cable pipeline. Similarly, an integrated programmer can refuse to offer its programs to competing cable pipelines or alternative tech-

175. 47 U.S.C. § 521(a)(2) (Supp. V 1993).

176. *Id.* § 521(a)(1).

177. Horizontal concentration refers to the share of cable subscribers accounted for by the largest Multiple System Operators (MSOs). H.R. REP. NO. 628, 102d Cong., 2d Sess. 42 (1991) [hereinafter House Report]. Nicholas W. Allard, *The 1992 Cable Act: Just the Beginning*, 15 HASTINGS COMM. & ENT. L.J. 305, 313 n.31 (1993). In 1985, approximately 29% of all cable subscribers were served by the top five MSOs. S. REP. NO. 92, 102d Cong., 1st Sess. 32 (1991) [hereinafter Senate Report]. At the end of 1990, the top five MSOs served almost half of the nation’s subscribers. *Id.* Tele-Communications, Inc. (TCI) served approximately 24% of the nation’s subscribers, Time Warner’s cable subsidiary reached 12%, and the next three largest cable operators reached 11%. *Id.*; House Report, *supra* at 42-43; Allard, *supra* at 313 n.31.

178. Vertical integration occurs when a cable operator and a cable programmer have common ownership or financial interests. 47 U.S.C. § 521(a)(5) (Supp. V 1993). For example, TCI, the largest cable system operator, has a financial interest 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. Both TCI and Viacom have a financial interest in Home Box Office (HBO). Senate Report, *supra* note 177, at 24-29; House Report, *supra* note 177, at 41.

179. 47 U.S.C. § 521(a)(5) (Supp. V 1993).

180. *Id.*

nologies for delivering video signals.¹⁸¹ In addition, an affiliated programmer can offer its programs to competing pipelines at discriminatory prices. This has the effect of reducing the diversity of programs available to the public.¹⁸²

Horizontal integration also decreases the availability of pipeline providers and diversity of programs. First, horizontal integration affects program availability to competing pipeline providers. A horizontally integrated cable operator uses its monopoly-like power to control independent programmers. Fearful of losing their largest customer, programmers are willing to enter into exclusive licenses with a horizontally integrated pipeline provider, reducing the number of programs available to competing pipeline providers. In essence, the number of programs and pipelines available to the public decreases. Second, horizontally integrated cable operators can perpetuate the problems of vertical integration. A horizontally integrated operator can condition its carriage of the programmer's program upon the cable operator's ability to acquire a financial interest in a programmer.¹⁸³ Once a cable operator becomes either vertically or horizontally integrated, the cable operator has an incentive to perpetuate the problem. In essence, vertical integration can create horizontal integration, and horizontal integration can cause vertical integration.

Congress reacted to the effects of the 1984 Cable Act by enacting the 1992 Cable Act.¹⁸⁴ Congress enacted the 1992 Cable Act to

181. Senator Inouye commented 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 Sen. Inouye).

182. NBC originally planned to produce a cable news channel to compete with CNN. 138 CONG. REC. S426 (daily ed. Jan. 27, 1992) (statement of Sen. Gore). However, the cable system which partly owned CNN threatened not to carry NBC's new program. *Id.* As a result, NBC did not create a competing news program. *Id.* In this instance, however, a new program format was created. NBC changed the format of the news program to a financial and consumer news channel. *Id.* Because the new program did not compete with CNN, the new program was carried by the affiliated pipeline provider. *Id.*; Allard, *supra* note 177, at 314 n.39.

183. See Senate Report, *supra* note 177, at 23-28; House Report, *supra* note 177, at 36-40.

184. 47 U.S.C. §§ 521-55 (1988 & Supp. V 1993). As an interesting fact, the 1992 Cable Act was the only congressional act passed despite President Bush's veto. 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).

ensure that cable operators faced competition and that the consumers were receiving the best possible service for its cost.¹⁸⁵

2. *The 1992 Cable Act and Its Provisions*¹⁸⁶

The 1992 Cable Act's policy goals were to promote the availability and diversity of views in the video market, use the market as the primary regulatory tool in the video marketplace and protect consumers and programmers by ensuring that cable operators did not have undue market power in relation to the consumers and programmers.¹⁸⁷ In the furtherance of its objectives, the 1992 Cable Act has provisions that address access concerns among pipeline providers, programmers and consumers.¹⁸⁸

185. 47 U.S.C. § 521(b)(1)-(5) (Supp. V 1993). The provision states: Statement of Policy. It is the policy of the Congress in this Act to — (1) promote the availability to the public of a diversity of views and information through cable television and other video distribution media; (2) rely on the marketplace, to the maximum extent feasible, to achieve that availability; (3) ensure that cable operators continue to expand, where economically justified, their capacity and the programs offered over their cable systems; (4) where cable television systems are not subject to effective competition, ensure that consumer interests are protected in receipt of cable service; and (5) ensure that cable television operators do not have undue market power vis-a-vis video programmers and consumers.

Id.

186. Note that this Article will only discuss the 1992 Cable Act's provisions which create access duties. For a detailed discussion of the 1992 Cable Act, see Allard, *supra* note 177.

187. 47 U.S.C. § 521(b)(1)-(5) (Supp. V 1993).

188. Antitrust laws are another way to effectuate the 1992 Cable Act's goals. "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." Pub. L. No. 102-385, § 27, 106 Stat. 1460 (1992).

a. Access

To handle the access problems created by vertical and horizontal integration, sections twelve¹⁸⁹ and nineteen¹⁹⁰ of the 1992 Cable Act were enacted. Section twelve has three provisions that regulate the ability of the pipeline providers to control programmers.¹⁹¹ First, a pipeline provider cannot condition carriage of a

189. Section 12 adds § 616: Regulation of Carriage Agreements, to Part II of Title VI of the Communications Act of 1934. Section 12 provides:

(a) Regulations. Within one year after date of enactment of this section, the Commission shall establish regulations governing program carriage agreements and related practices between cable operators or other multichannel video programming distributors and video programming vendors. Such regulations shall —

(1) include provisions designed to prevent a cable operator or other multichannel video programming distributor from requiring a financial interest in a program service as a condition for carriage on one or more of such operator's systems;

(2) include provisions designed to prohibit a cable operator or other multichannel video programming distributor from coercing a video programming vendor to provide, and from retaliating against such a vendor for failing to provide, exclusive rights against other multichannel video programming distributors as a condition of carriage on a system;

(3) contain provisions designed to prevent a multichannel video programming distributor from engaging in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or nonaffiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors;

(b) Definition. As used in this section, the term "video programming vendor" means a person engaged in the production, creation, or wholesale distribution of video programming for sale.

Pub. L. No. 102-385 § 12, 106 Stat. 1460 (1992) (codified at 47 U.S.C. § 536 (Supp. V 1993)).

190. Section 19 adds § 628: Development of Competition and Diversity in Video Programming Distribution, to Part III of Title VI of the Communications Act of 1934. Section 19 provides:

(a) Purpose. The purpose of this section is to promote the public interest . . . 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.

(b) Prohibition. It shall be unlawful for a cable operator . . . 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.

Pub. L. No. 102-385 § 19, 106 Stat. 1460 (1992) (codified at 47 U.S.C. § 548 (Supp. V 1993)).

191. Note that a pipeline provider can prohibit programs that the "cable operator reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community

program on its acquiring a financial interest in a programmer.¹⁹² This prevents a pipeline provider from using its power to acquire vertical interests in programmers. Second, a pipeline provider cannot condition carriage of a program on its pipeline by requiring an exclusive license to the programs. An exclusive program license makes a program unavailable to competing pipeline providers, causing difficulty for competitive pipeline providers to attract consumers to its pipeline.¹⁹³ Third, vertically integrated programmers and pipeline providers cannot unreasonably restrain an unaffiliated programmer's ability to distribute its programs by discriminatory selection, terms or conditions for carriage of the unaffiliated programs.¹⁹⁴ Although these provisions regulate the relationship between pipeline providers and programmers, the consumers benefit by increased availability of pipelines and programs.

Section nineteen promotes the public's interests by increasing competition and diversity in the pipeline providers.¹⁹⁵ In furtherance of its goals, section nineteen prohibits a vertically integrated satellite programmer and pipeline provider from selling its programs at discriminatory prices, terms or conditions to nonaffiliated pipeline providers.¹⁹⁶

b. Must Carry/Retransmission Consent

Under the 1992 Cable Act, broadcasters can either insist on carriage ("Must Carry") or bargain for carriage ("Retransmission Consent"). The Must Carry provisions are stated in sections four¹⁹⁷

standards." 47 U.S.C. § 532(h) (Supp. V 1993). Although this provision limits access by a programmer to a pipeline, the United States Supreme Court has held that obscene and indecent language can be regulated. Generally, the Court has not accorded First Amendment protection to obscenity. *See Roth v. United States*, 354 U.S. 476 (1957) (obscenity totally lacks any redeeming social value). It has extended non-protection to include indecent language broadcast over radio stations because its exposure to children cannot be regulated. *See FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) (radio broadcast of George Carlin's "Filthy Words" monologue can be regulated).

192. 47 U.S.C. § 536(a)(1) (Supp. V 1993).

193. *Id.* § 536(a)(2).

194. *Id.* § 536(a)(3).

195. *Id.* § 548(a). Although the purpose of this section and its stated prohibitions seem inconsistent, the only other current method of video program distribution is satellite. For a list of possible alternative pipeline providers, see *supra* note 170.

196. 47 U.S.C. § 548(c)(2)(A)-(B) (Supp. V 1993).

197. Section four amends Part II of Title VI of the Communications Act of 1934 by adding § 614: Carriage of Local Commercial Television Signals. Section four provides:

(a) Carriage Obligations. Each cable operator shall carry, on the cable system of that operator, the signals of local commercial television stations

and five.¹⁹⁸ Retransmission Consent is stated in section six.¹⁹⁹ The

and qualified low power stations as provided by this section. Carriage of additional broadcast television signals on such system shall be at the discretion of such operator

(b) Signals Required. —

(1) In general. (A) A cable operator of a cable system with 12 or fewer usable activated channels shall carry the signals of at least three local commercial television stations, except that if such a system has 300 or fewer subscribers, it shall not be subject to any requirements under this section so long as such system does not delete from carriage by that system any signal of a broadcast television station.

(B) A cable operator of a cable system with more than 12 usable activated channels shall carry the signals of local commercial television stations, up to one-third of the aggregate number of usable activated channels of such system.

Pub. L. No. 102-385, § 4(a)-(b), 106 Stat. 1460 (1992) (codified at 47 U.S.C. § 534(a)-(b) (Supp. V 1993)).

198. Section five, which amends Part II of Title VI of the Communications Act of 1934, by adding § 615: Carriage of Noncommercial Educational Television. Section five provides:

(a) Carriage Obligations [E]ach cable operator of a cable system shall carry the signals of qualified noncommercial educational television stations in accordance with the provisions of this section.

(b) Requirements To Carry Qualified Stations —

(1) General requirement to carry each qualified station. Subject to paragraphs (2) and (3) and subsection (e), each cable operator shall carry, on the cable system of that cable operator, any qualified local noncommercial education television station requesting carriage.

(2)(A) Systems with 12 or fewer channels. [A] cable operator of a cable system with 12 or fewer usable activated channels shall be required to carry the signal of one qualified local noncommercial educational television station

(3) Stations with 13 to 36 channels. (A) Subject to subsection (c), a cable operator of a cable system with 13 to 36 usable activated channels —

(i) shall carry the signal of at least one qualified local noncommercial educational television station but shall not be required to carry the signals of more than three such stations, and

(ii) may, in its discretion, carry additional such stations

(e) Systems With More Than 36 Channels. A cable operator of a cable system with a capacity of more than 36 usable activated channels which is required to carry the signals of three qualified local noncommercial educational television stations shall not be required to carry the signals of additional such stations the programming of which substantially duplicates the programming broadcast by another qualified local noncommercial educational television station requesting carriage

Pub. L. No. 102-385, § 5 (a)-(b), 106 Stat. 1460 (1992) (codified at 47 U.S.C. § 535 (a)-(b) (Supp. V 1993)).

199. Section six governs retransmission consent for cable systems. It provides:

(b)(1) [N]o cable system or other multichannel video programming distributor shall retransmit the signal of a broadcasting station, or any part thereof, except —

(A) with the express authority of the originating station; or

(B) pursuant to § 614 [Must Carry provision], in the case of a station, electing, in accordance with this subsection, to assert the right to carriage under such section.

Must Carry provisions give broadcasters and noncommercial educational programmers²⁰⁰ mandatory carriage rights on a pipeline.

Under section four of the 1992 Cable Act, the number of mandatory broadcast signals carried by a cable operator is determined by the number of available channels in a pipeline. A cable operator with more than twelve channels is required to carry signals of licensed local commercial broadcast television stations if the over-the-air broadcast signals serve the same television market as the cable operator.²⁰¹ However, a cable operator need not devote more than one-third of its active channels to local broadcasts.²⁰² If there are not enough commercial broadcast stations to fill the required one-third set aside, the cable operator has to carry one or two qualified low power broadcast signals.²⁰³ A cable operator with twelve or fewer channels must carry the signals of at least three local commercial broadcast stations.²⁰⁴ However, if a cable operator has 300 or fewer subscribers, the cable operator is exempt from the Must Carry provision.²⁰⁵

Section five requires cable operators to carry signals of noncommercial educational broadcast stations.²⁰⁶ Generally, a cable operator must carry all noncommercial stations that request carriage, unless that station's program substantially duplicates that of a station already being carried by the cable operator.²⁰⁷ However, a cable operator with twelve or fewer channels is required to carry only one noncommercial station.²⁰⁸ Similarly, a cable system with thirteen to thirty-six channels must carry between one and three noncommercial stations.²⁰⁹

The Retransmission Consent provision²¹⁰ prohibits pipeline providers from carrying broadcast television programs without get-

Pub. L. No. 102-385 § 6, 106 Stat. 1460 (1992) (codified at 47 U.S.C. § 325 (Supp. V 1993)).

200. Noncommercial educational television broadcast stations include those owned and operated by a public agency, nonprofit foundation, corporation or association. 47 U.S.C. § 535 (Supp. V 1993). This section amends Part II of Title VI of the Communications Act of 1934 by inserting § 615 after § 614.

201. See 47 C.F.R. § 73.3555(d)(3)(i) (1994).

202. 47 U.S.C. § 534(b)(1)(B) (Supp. V 1993).

203. See 47 C.F.R. §§ 74.701-74.781 (1994).

204. 47 U.S.C. § 534(b)(1)(A) (Supp. V 1993).

205. *Id.*

206. *Id.* § 535(a).

207. *Id.* § 535(b), (e).

208. *Id.* § 535(b)(2)(A).

209. *Id.* § 535(b)(3)(A)(i).

210. Although the Retransmission Consent provision addresses intellectual property concerns and not access concerns, this Paper describes Retransmission

ting the consent of the programmers.²¹¹ The Must Carry and Retransmission Consent provisions are inter-related. A programmer can either insist on mandatory carriage by a pipeline provider at no cost to either party or negotiate an agreement with the pipeline provider on terms of carriage.

The Must Carry/Retransmission Consent provisions are seen by the cable operators as the most problematic provisions of the 1992 Cable Act.²¹² In *Turner Broadcasting System, Inc. v.*

Consent for two reasons. First, Retransmission Consent affects the ability of a pipeline provider to get access to a program. Second, Retransmission Consent and Must Carry are generally discussed together.

211. 47 U.S.C. § 536 (Supp. V 1993).

212. Other provisions of the 1992 Cable Act have also been challenged as invalid. In *Daniels Cablevision, Inc. v. United States*, cable operators and programmers challenged 11 provisions of the 1984 and 1992 Cable Act as "unconstitutionally interfer[ing] with their First Amendment right to 'speak' as they wish through the cable television systems they own, control or use, to the audiences of their choice." 835 F. Supp. 1 (D.D.C. 1993). The challenge to the Must Carry provisions brought in *Daniels Cablevision* was consolidated in *Turner Broadcasting, Inc. v. FCC*, 810 F. Supp. 138 (D.D.C. 1992).

In *Daniels Cablevision*, the cable operators argued that the provisions interfered with "their ability to design the packages of services that they would like to offer their subscribers." 835 F. Supp. at 6. In addition, the programmers argued that the provisions "ma[de] it more difficult for operators to carry the products of certain programmers, and in consequence prevent[ed] the programmers from reaching their optimum audience." *Id.* The United States District Court for the District of Columbia first held that § 7(b) of the 1992 Cable Act (requiring mandatory carriage of public, educational, and governmental programming), § 612(b) of the 1984 Cable Act (leased access provision requiring cable operators to reserve channel capacity for use by commercial programmers that are unaffiliated with the operator), § 19 of the 1992 Cable Act (prohibiting vertical integrators to discriminate in the prices, terms and conditions of sale or delivery of cable programming between cable systems), and § 3 of the 1992 Cable Act (rate regulation) were constitutional. Additionally, the court determined that these regulations were content-neutral. *Id.* at 7. As a content-neutral regulation, the regulation had to serve a significant governmental interest and not burden substantially more speech than necessary to serve these interests. *Id.* at 10 (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)); *United States v. O'Brien*, 391 U.S. 367, 377 (1968). The court held that these provisions met the intermediate level of scrutiny. *Id.* at 11-12. Next, the court held that § 10(d) (abrogating statutory immunity from liability that private cable operators formerly enjoyed for transmission of obscenity), § 7(c) (immunizing municipally owned cable operators from civil liability to private competitors for money damages) and § 6 (Retransmission Consent) failed to implicate significant First Amendment rights. *Id.* at 10-12. However, the court held that three provisions of the 1992 Cable Act were unconstitutional because they impose content-related burdens on speech or they did not serve any identifiable regulatory purpose. Section 25 required that direct broadcast satellite providers allocate four to seven percent of their transmission capacity to noncommercial programming of an educational nature. This failed intermediate scrutiny because it did not serve any significant governmental regulatory or market-balancing function. *Id.* at 8. Section 15 required cable operators to give subscribers at least 30 days advance notice for free preview of premium channels of movies rated X, NC-17 or R by the Motion Picture Association of America. The court found that § 15 was a content-based regulation and failed to meet the strict

FCC,²¹³ Turner Broadcasting System (TBS) challenged the constitutionality of the Must Carry provisions²¹⁴ as a violation of its First Amendment rights.²¹⁵ The United States District Court for the District of Columbia granted summary judgment against TBS and held that the Must Carry provisions did not violate the First Amendment.²¹⁶ Although the Supreme Court agreed with the district court's use of an intermediate standard in determining the constitutionality of the provisions, the case was remanded because the Court held that the district court erroneously granted summary judgment while many factual issues were unresolved.²¹⁷

The Supreme Court held that the appropriate standard to evaluate the constitutionality of the Must Carry provisions was the intermediate level of scrutiny. The intermediate level of scrutiny applies to content-neutral restrictions that impose an incidental burden on speech.²¹⁸ The Court noted that the Must Carry provisions "do not pose such inherent dangers to free expression, or present such potential for censorship or manipulation, as to justify application of the most exacting level of First Amendment scrutiny."²¹⁹ Under

scrutiny standard. The statute was not narrowly tailored to meet substantial governmental interests. *Id.* at 9. Section 11(c) regulated the number of subscribers a cable operator is authorized to reach. The court held that the quota on the number of subscribers a cable operator may reach violated its right to reach the minds of any willing listener. *Id.* at 10.

213. 114 S. Ct. 2445 (1994).

214. Must Carry provisions are embodied in sections four and five.

215. *Turner Broadcasting Sys., Inc. v. FCC*, 819 F. Supp. 32, 37 (D.D.C. 1993). The cable operators asserted three reasons for the unconstitutionality of the Must Carry provisions. First, they claimed that the provisions forced the cable operators to carry certain programs and to decrease the total number of channels available for programs the cable operators wish to carry. *Id.* at 38. Second, they asserted that the provisions inhibited their editorial discretion to determine the message of the programs. *Id.* Third, they asserted that the provisions gave broadcasters preferred speaker status "by awarding them favored cable channel positions." *Id.*

216. *Id.* at 51.

217. *Turner*, 114 S. Ct. at 2472. The Court stated that the factual questions that remained were: (1) jeopardy of the broadcast television industry, (2) actual effects of Must Carry on the speech of cable operators and programmers, (3) the degree to which cable programmers will be dropped from cable systems to make room for local broadcasters, and (4) the extent to which cable operators can satisfy their Must Carry obligations by devoting previously unused channel capacity. *Id.*

218. *Id.* The Court rejected the government's argument that regulation of cable television should be analyzed under the less rigorous First Amendment standard for broadcast television. *Id.* at 2456. The broadcast standard is not applicable to cable television because the physical problems of spectrum scarcity and signal interference existing in the broadcast medium do not exist in the cable context. *Id.* See *FCC v. League of Women Voters*, 468 U.S. 364, 377 (1984); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 395 (1969).

219. *Turner*, 114 S. Ct. at 2469.

United States v. O'Brien,²²⁰ a content-neutral regulation²²¹ will be sustained if "it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."²²² In addition, the regulation need not be the least restrictive method, as long as the regulation "promotes a substantial governmental interest that would be achieved less effectively absent the regulation."²²³

The Court also noted that the government's interest in regulating cable was substantial.²²⁴ These interests were "(1) preserving the benefits of free, over-the-air local broadcast television, (2) promoting the widespread dissemination of information from a multiplicity of sources, and (3) promoting fair competition in the market for television programming."²²⁵ The Court additionally held that none of these interests suppressed free expression.²²⁶

c. Rate Regulation

Section three²²⁷ of the 1992 Cable Act reflects congressional concern with the forty-five to fifty percent increase in cable access fees to the consumers after the 1984 deregulation. However, in the

220. 391 U.S. 367 (1968).

221. The Court held that the Must Carry provisions were content-neutral because the regulation did not distinguish among speakers in the television programming market, and the regulation was based on the manner in which the programmers transmitted their messages, not the messages they carry. *Turner*, 114 S. Ct. at 2460. As stated by the Court, "laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content-neutral." *Id.* at 2459. The Must Carry provisions "on their face, impose burdens and confer benefits without reference to the content of speech." *Id.* at 2460.

222. *O'Brien*, 391 U.S. at 377.

223. *Turner*, 114 S. Ct. at 2469 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)).

224. *Turner*, 114 S. Ct. at 2469.

225. *Id.* (citations omitted).

226. *Id.*

227. Section three, which amends § 623 provides that:

(2) Preference for competition. If the Commission finds that a cable system is subject to effective competition, the rates for the provision of cable service by such system shall not be subject to regulation by the Commission or by a State or franchising authority under this section. If the Commission finds that a cable system is not subject to effective competition — (A) the rates for the provision of basic cable service shall be subject to regulation by a franchising authority, or by the Commission if the Commission exercises jurisdiction

Pub. L. No. 102-385 § 3, 106 Stat. 1460 (1992) (codified at 47 U.S.C. § 543 (Supp. V 1993)).

furtherance of Congress' goal of managed competition, cable operators are not subject to rate regulation if effective competition exists.²²⁸

3. *Duties Created by the 1992 Cable Act*

The 1992 Cable Act model is analyzed by determining the duties and rights it creates on the three groups who want access to the video marketplace — the pipeline providers, programmers and consumers. Generally, the 1992 Cable Act allows the marketplace to regulate the cable industry.²²⁹ However, this act imposes a duty to correct any imbalance of power or discriminatory behavior among cable operators, programmers and consumers.²³⁰ The 1992 Cable Act regulates only the cable operators; however, this Comment assumes that the 1992 Cable Act regulates the consumers, programmers and pipeline providers in the video marketplace.

A pipeline provider has differing duties to programmers, competitive pipeline providers and consumers. Generally, a pipeline provider cannot condition carriage of a program upon three criteria.²³¹ First, a pipeline provider is prevented from requiring a financial interest in a programmer as a condition of carriage of a program. This provision prevents further vertical integration in the cable industry. Second, a pipeline provider is prohibited from requiring exclusive rights to a program as a condition of carriage.

228. *Id.* A cable operator faces effective competition if: (1) fewer than 30% of households in the franchise are subscribers to the service of a cable system; (2) cable systems and other unaffiliated multichannel distributor each offer comparable programming to at least 50% of the households in the franchise area, and 15% of the households actually subscribe to multichannel distributors other than the largest distributor; or (3) local franchising authority itself operates a multichannel distributor that offers programming to at least 50% of the households in the franchise area. *Id.* Under these rules, most cable systems today are not subject to effective competition and are subject to rate regulation. Allard, *supra* note 177, at 351.

229. Unlike the common carrier model, the 1992 Cable Act is more complex. For example, in the common carrier model, a pipeline provider is required to provide nondiscriminatory access to all programmers. Under the 1992 Cable Act model, the duties of a pipeline provider to a programmer are more complex. Under this model, a pipeline provider must set aside a certain number of its pipeline channels for "favored" programs, but is under no obligation to provide access to all programmers. However, the pipeline provider cannot discriminate based upon affiliation or non-affiliation with the pipeline provider, when choosing the programs it will carry.

230. In the cable industry, a cable operator can provide both the pipeline and program, resulting in vertical integration.

231. Although these provisions regulate the relationship between a pipeline provider and programmer, the provisions also increase the number of pipelines and programs available to the consumers.

Third, a pipeline provider cannot discriminate on the basis of affiliation or non-affiliation with the pipeline provider in the selection, terms or conditions of carriage of a program.²³² This provision allows programmers nondiscriminatory access to a pipeline, regardless of their affiliation with the pipeline provider.

In addition, certain programmers, such as local commercial television stations, qualified low power stations and noncommercial educational programmers, are given special carriage rights on the pipeline.²³³ These programmers can invoke the Must Carry provision and require the pipeline provider to carry their signals.²³⁴ A pipeline provider cannot request payment for carriage.²³⁵

Furthermore, a pipeline provider cannot carry a signal of a broadcast programmer without its approval. The Retransmission Consent provision allows the pipeline provider to require a fee for carriage of a program. Other than these restrictions, a pipeline provider is free to choose the programs it carries.

The 1992 Cable Act also regulates the relationship between a pipeline provider and competitive pipeline providers. The pipeline provider-pipeline provider relationship is regulated to promote competition and increase the number of pipeline providers.²³⁶ The 1992 Cable Act promotes increased competition among the pipeline providers by increasing the number of programs available to competing pipeline providers.²³⁷ Section 536(2), which prohibits exclusive program licensing as a condition for carriage, increases

232. This provision corrects the problems associated with a vertically integrated pipeline provider by requiring a pipeline provider to provide access in a nondiscriminatory fashion to non-affiliated programmers.

233. Congress determined that it has a substantial interest in making these programs available on the cable system. 47 U.S.C. § 521(a)(2)(7)-(9) (Supp. V 1993).

234. A pipeline provider must reserve a certain number of channels to carry the preferred programs. That number is dependent upon the total number of channels available on the pipeline, but the total number of reserved channels does not have to exceed one-third of the pipeline's total channel capacity.

235. 47 U.S.C. § 534(b)(10) (Supp. V 1993). The pipeline provider can request compensation for costs associated with delivering a quality signal to the principal head of the cable system, carrying distant signals which result in increased copyright liability or continuing carriage of agreement entered into prior to June 26, 1990. *Id.* § 543(b)(10)(A)-(C).

236. Increasing competition among the pipeline providers also benefits the consumers. Consumers will have increased choice in selecting a pipeline and its associated programs.

237. For a pipeline provider to succeed, it must offer programs to which consumers desire access. For example, a college whose curriculum only consists of unpopular courses would not be able to compete effectively with a school that offers a broad curriculum, which includes courses in business, engineering and fine arts.

the total number of programs available to competitive pipeline providers. Likewise, a cable operator, or a cable operator with an attributable interest in a satellite cable programming vendor, cannot use unfair methods of competition or unfair acts to hinder distribution of programs on a satellite pipeline.

To correct the disparity in power between a cable operator and a consumer, the 1992 Cable Act includes a provision on rate regulation. Congress expressed a preference for competition to control the rates. Absent effective competition, the provision authorizes the regulation of rates. However, noticeably missing is any equal access obligation to the pipeline.²³⁸ A consumer does not have a right to request equal access to a pipeline.

The 1992 Cable Act regulates the programmer-pipeline provider relationship to a small degree.²³⁹ A satellite cable programmer²⁴⁰ cannot “engage in unfair methods of competition or unfair or deceptive acts or practices”²⁴¹ that hinder significantly a satellite pipeline provider from reaching its subscribers. Congress has again recognized the importance of the availability of programs in a pipeline provider’s ability to compete effectively with other pipeline providers.

Otherwise, a programmer is free from regulation. Unlike its affiliated pipeline provider, a vertically integrated programmer may discriminate.²⁴² A programmer can refuse to allow a nonaffiliated pipeline provider from carrying its signals. No provisions prohibit a programmer from requiring a financial interest in a pipeline provider as a condition of carriage of its program. Likewise, a programmer can coerce a pipeline provider not to carry competing programs.

238. The 1992 Cable Act does include a provision which states that “[n]othing in this subchapter shall be construed as prohibiting any Federal agency, State, or a franchising authority from — (1) prohibiting discrimination among subscribers and potential subscribers to cable service” 47 U.S.C. § 543(e) (Supp. V 1993). Therefore, it is possible that a future regulation will guarantee equal access to the pipeline to the consumers.

239. Regulation of programmers can conflict with First Amendment rights as a content-based regulation. A discussion of First Amendment rights and programmer control are beyond the scope of this Paper. See generally Perritt, *supra* note 15; Access and Content Control, *supra* note 27.

240. Satellite cable programmers include satellite cable programmers in which a cable operator has an attributable interest and satellite broadcast programmers.

241. 47 U.S.C. § 548(b) (Supp. V 1993).

242. A vertically integrated pipeline provider is prohibited from discriminating against nonaffiliated programmers.

The consumers are protected against the market power of a pipeline provider by the threat of rate regulation in the absence of competition, but the 1992 Cable Act does not provide consumer protection against programmers. A possibility exists that some programs may become crucially important to the public, such as the telephone system.²⁴³ The telephone service in the electronic media is electronic mail.²⁴⁴ Customers pay for access to electronic mail to communicate electronically to other users on the service. By severing access to electronic mail, the programmer has cut off the ability of consumers to communicate to others.²⁴⁵ Although these problems are of concern, regulating programmers can run afoul of First Amendment rights.²⁴⁶

IV. COMPARISON OF THE VIDEO DIALTONE ORDER AND THE 1992 CABLE ACT IN THE PIPELINE PROVIDER-PROGRAMMER MARKETPLACE

As a comparison of the Video Dialtone Order and the 1992 Cable Act,²⁴⁷ this Comment describes the duties created in one market, the pipeline provider-programmer market. In the pipeline provider-programmer market, a pipeline provider sells the channels available on its pipeline to programmers. Hypothetically, consider a situation where a pipeline provider, TCI, has a pipeline capacity of thirty-six channels where six of its channels are currently used to carry programs of local commercial television stations. TCI also owns a financial interest in a sports programmer called Sports

243. In essence, the telephone companies provided the pipeline, channels and programs, resulting in the service necessary to allow two people to talk to each other.

244. Some would consider a termination from an electronic mail account as equivalent to "solitary confinement." Livingston, *supra* note 156, at 25. For a discussion of CompuServe threatening to cancel a user's account, see *supra* note 156.

245. This would be similar to telephone companies providing a channel without the ability to speak with other users on the pipeline.

246. Regulation of programmers can conflict with the First Amendment. Requiring access to a program is different than content-based regulation. By allowing access to a program, the availability of ideas to the public is increased, and furthers the First Amendment goals of "uninhibited, robust, and wide-open" debate on public issues. See *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). A full discussion of First Amendment implications and programmer control are beyond the scope of this Paper. See generally Perritt, *supra* note 15; Access and Content Control, *supra* note 27.

247. Keep in mind that the Video Dialtone Order regulates the telephone companies in the video marketplace, and the 1992 Cable Act regulates the cable operators in the video marketplace. For purposes of this comparison, this Paper assumes that the Video Dialtone Order and the 1992 Cable Act regulates both the telephone and cable industries.

R US. Programmers ESPN and WPVI²⁴⁸ desire to purchase channels on the pipeline. ESPN is a sports programmer. WPVI is a programmer with special status as a local commercial broadcast station.²⁴⁹

Under the Video Dialtone Order, TCI has to sell its available channels both to ESPN and WPVI. ESPN and WPVI are treated similarly. Under common carrier requirements, the price of a channel is set by a tariff filed with the FCC, and TCI may not discriminate unreasonably among its customers in charges, practices, classifications, regulations, facilities or services.

The Video Dialtone Order does not have a specific channel capacity requirement. It does require TCI to have "sufficient capacity to service multiple video programmers."²⁵⁰ Nonetheless, TCI can decline to carry either ESPN or WPVI if TCI does not have any available channel capacity. Note also that TCI cannot actively participate in selecting the programs available on its pipeline.

Under the 1992 Cable Act, TCI's obligation to sell available channels on its pipeline is more complicated. First, TCI must determine if a programmer has special carriage status. TCI does owe a special carriage duty to WPVI because it is a local commercial broadcast station.²⁵¹ As such, WPVI can invoke the Must Carry provision²⁵² and require TCI to carry its program. Under Must Carry, TCI is required to transmit the signals of local commercial television stations, up to one-third of the total number of usable activated channels in the pipeline.²⁵³ TCI has thirty-six channels and must devote up to twelve channels, if necessary, to local commercial television stations. Currently, TCI carries six local commercial television stations; therefore, it must carry WPVI's programs.²⁵⁴

248. WPVI provides ABC broadcast programs in the Philadelphia, PA vicinity.

249. For purposes of clarity, this Paper uses commonly known pipeline providers and programmers. These could be any number of pipeline providers and programmers.

250. Video Dialtone Order, *supra* note 13, at 41,107.

251. Programmers that are given special carriage rights are local commercial television stations, qualified low power stations and noncommercial educational programmers.

252. In *Turner Broadcasting Sys., Inc. v. FCC*, cable operators challenged the constitutionality of the Must Carry provisions as violative of their First Amendment rights. 114 S. Ct. 2445 (1994). For a discussion of *Turner*, see *supra* notes 213-26 and accompanying text.

253. If TCI had 12 or fewer channels, TCI would be required to carry at least three local commercial television stations. However, if TCI had twelve or fewer channels and had 300 or fewer subscribers, TCI would be exempt from section four. Noncommercial educational programmers are covered under section five.

254. If TCI already carried 12 local commercial broadcast stations, TCI could refuse to carry WPVI's programs. Note that the 1992 Cable Act does not prohibit

However, WPVI does not have to insist on carriage. Under the Retransmission Consent provision, WPVI can bargain for carriage²⁵⁵ because the provision prohibits TCI from distributing WPVI's programs without WPVI's consent. Prior to the 1992 Cable Act, TCI could carry WPVI's signal without prior authorization by WPVI.

While TCI owes both a special and general duty to WPVI, TCI only owes a general duty to ESPN. First, TCI cannot condition carriage of ESPN on TCI's ability to gain a financial interest in ESPN. Second, TCI cannot condition carriage of ESPN upon ESPN granting TCI an exclusive carriage agreement. Third, TCI cannot discriminate against ESPN in the selection, terms or conditions of carriage which unreasonably restrain ESPN's ability to compete fairly in the distribution of programs against TCI's affiliated programmer, Sports R US. Other than these three restrictions, TCI has the freedom to decide whether to sell a channel to ESPN, to choose its pipeline content and to determine the contractual relationship between TCI and the programmers.

The 1992 Cable Act customarily gives a pipeline provider greater flexibility in choosing the content of the programs carried by its pipeline. Moreover, under the 1992 Cable Act, a pipeline provider does not have to file a tariff governing the terms of carriage between a pipeline provider and programmer. The 1992 Cable Act, however, is more complex than the Video Dialtone Order in determining the duties of a pipeline provider to sell its channels to a programmer. Under the Video Dialtone Order, a pipeline provider is required to provide common carriage access.

V. CONCLUSION

As Vice President Al Gore stated, "[g]iven the pace at which networking technology is changing, our efforts will demand more than just vision, leadership and commitment. Flexibility and a willingness to change the details of the plan while constantly moving forward will be required."²⁵⁶ Accordingly, three key principles must be kept in mind when regulating the video marketplace.

TCI from using more than one-third of its channels for local commercial broadcast stations. Therefore, if TCI currently carried 12 local commercial broadcast stations, which fulfills its requirement to use one-third of the channels for local commercial broadcast stations, TCI can still carry ABC.

255. Although this Paper discusses Retransmission Consent as an access provision, it deals primarily with intellectual property concerns.

256. Gore, *supra* note 6, at 153.

First, any regulation must recognize the importance of competition in the marketplace. Competition fosters lower prices, innovation and improved services. Second, when no competition exists, regulation must balance the market power among the pipeline providers, programmers and consumers. Third, the regulation must be flexible.

Today, there is a convergence of the cable and telephone markets. "With digitalization all of the media become translatable into each other — computer bits migrate merrily — and they escape from their traditional means of transmission. A movie, phone call, letter, or magazine article may be sent digitally via phone line, coaxial cable, fiber optic cable, microwave, satellite, the broadcast air, or a physical storage medium such as tape or disk."²⁵⁷ This convergence in technology requires that the regulation be flexible to accommodate innovations.

The Video Dialtone Order and the 1992 Cable Act are a good start in this direction. Both signify a shift in congressional and FCC regulatory policy in the telecommunications market from a managed monopoly to managed competition.²⁵⁸ Congress has noted the importance of the marketplace but balances competition against the public policy goals of access. These models have relevance in the video market place and the broader NII, therefore, they should be kept in mind as the NII strategy is developed.

257. KELLOGG ET AL., *supra* note 44, § 14.2, at 695 (citing OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, CRITICAL CONNECTIONS: COMMUNICATIONS FOR THE FUTURE 50 (1990)).

258. "For better or worse, we are moving toward a new regulatory paradigm, one of competition rather than quarantine, competition rather than price regulation, plenty rather than scarcity." *Id.* § 1.11, at 75. Regulation should be imposed when competition does not work.

