NOTES

REGULATING CABLE TELEVISION RATES UNDER THE FCC'S NEW EFFECTIVE COMPETITION STANDARD

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I. INTRODUCTION

Although cable television has entertained and informed Americans since the late 1940s, no uniform policy or regulatory scheme has guided cable's development for nearly thirty-five years. Initial cable regulations hindered the industry's growth by shielding local broadcasters from the threat of cable competition.[1] Finally, after a tremendous amount of political pressure, Congress enacted the Cable Communications Policy Act of 1984[2] ("Cable Act"). The Cable Act was designed as a comprehensive scheme to: (1) establish a national policy regarding cable television, (2) facilitate its development by deregulating the industry, and (3) establish franchising procedures to assure cable consumers' needs were met.[3]

This Note analyzes the application of the Cable Act in terms of its two most significant rate-regulation provisions. The first of these provisions is the Cable Act's prohibition of basic cable service rate regulation by franchising authorities in communities where the cable system is subject to "effective competition."[4] The Cable Act's second major provision directs the Federal Communications Commission ("FCC") to promulgate rules that implement the Cable Act.[5] Pursuant to this mandate, one of the FCC's main directives was to establish the criteria for determining when a cable system is subject to "effective competition."[6] In other words, the FCC was granted the power to decide when a franchising authority can regulate its cable system's basic cable rates. The rules initially established by the FCC prevented almost every cable system from being classified as subject to effective competition.[7] Consequently, almost no cable systems were rate regulated until recently,[8] and cable rates skyrocketed. However, as of October 25, 1991, the FCC's new rules changed the definition of "effective competition" to more accurately reflect the realities of cable competition.[9]

Section II of this Note presents a brief historical overview of the technological and regulatory development of cable television. Section III discusses rate regulation under the Cable Act, and Section IV addresses the responses to, and the effects of, the application of the Cable Act. Finally,

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1. *See infra* text accompanying notes 23-27.
2. Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2780 (1984) (codified at 47 U.S.C. §§ 521-603 (1988)) [hereinafter Cable Act].
3. 47 U.S.C. § 521 (1988).
4. *Id.* § 543(b).
5. *Id.* § 543(b)(1).
6. *Id.* § 543(b)(2).
7. *See* 47 C.F.R. § 76.33(a)(2) (1990).
8. *See infra* text accompanying notes 83-126.
9. Cable Service; Effective Competition Standard for Cable Basic Service Rates, 56 Fed. Reg. 52,479 (1991) (to be codified at 47 C.F.R. § 76) (proposed Oct. 25, 1991).

Section V concludes the FCC's new effective competition standard is a positive step toward ensuring the availability of abundant and competitively priced video programming.

II. A BRIEF HISTORY OF CABLE TELEVISION

A. *The Technological Development of Cable Television*

The first cable television system was a noncommercial operation built in Astoria, Oregon in 1949.[10] The first commercial system was built in the early 1950s to provide three channels to paying subscribers in Lansford, Pennsylvania.[11] These early systems were created as a means to provide television service to isolated areas that were too rural or mountainous to receive regular broadcast signals.[12] Cable operators in those communities simply erected antennae on the highest building or hill and used coaxial cable to distribute to subscribers the programming received by the operators.[13] The systems' operators exercised no discretion over what the subscribers saw because whatever the operators received was sent to the viewers.[14]

Cable's popularity grew quickly. In 1952, there were only seventy cable systems serving 14,000 subscribers in the United States. Just three years later, there were 400 systems serving 150,000 subscribers.[15] The unavailability of off-the-air television signals was undoubtedly a major factor contributing to this early demand for cable. It was estimated that as recently as 1956, "approximately 70% of the population, or one half of the 34 million homes having television, could not receive three network signals. About 20% of the population could not receive any signal without some means of augmenting their reception."[16] Consequently, cable operators

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10. PATRICK PARSONS, CABLE TELEVISION AND THE FIRST AMENDMENT 12 (1987); *see also* H.R. REP. NO. 934, 98th Cong., 2d Sess. 20 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655, 4657.

11. PARSONS, *supra* note 10, at 12; MORTON I. HAMBURG, ALL ABOUT CABLE 5 (1979); *see also* Steven R. Ross & Barrett L. Brick, *The Cable Act of 1984—How Did We Get There and Where Are We Going?*, 39 FED. COMM. L.J. 27, 28 (1987).

12. Laurel L.F. Garrett, Comment, *Public Access Channels in Cable Television: The Economic Scarcity Rationale of* Berkshire v. Burke, 74 KY. L.J. 249, 257 (1985-1986).

13. David J. Saylor, *Municipal Ripoff: The Unconstitutionality of Cable Television Franchise Fees and Access Support Payments*, 35 CATH. U. L. REV. 671, 674 (1986). "In their simplest forms, these early cable systems consisted of a master receiving antenna located favorably for the reception of over-the-air signals, which were amplified and conveyed by means of cable to the subscribers' sets." Ross & Brick, *supra* note 11, at 28.

14. Saylor, *supra* note 13, at 674.

15. PARSONS, *supra* note 10, at 13.

16. HAMBURG, *supra* note 11, at 5.

stepped in to fill the void, and by the end of its first decade, cable boasted over a half million subscribers.[17]

During those early years, both the television sales people, who often operated the cable systems, and the broadcasting industry saw cable as beneficial because it created new markets for their products.[18] Furthermore, the FCC thought these early cable operations were nothing more than a trend that would quickly fade.[19] Because none of these entities saw cable television as a threat, no one initially sought to restrict or regulate its development.

However, cable operators soon acquired movies to transmit to their subscribers, and microwave transmission eventually increased the selection of broadcast channels from which the operators could choose.[20] As a result, cable operators became "quasi-editors" as they chose from this growing selection of available programming.[21] Additionally, cable operators began moving into large city markets in which broadcasters already had audiences. This competition gave broadcasters their first incentive to restrain the burgeoning cable industry.[22]

B. *The Genesis of Cable Regulation*

The path of cable television regulation has ranged "from extensive intervention to virtually complete passivity."[23] One major factor that hindered the development of a consistent cable policy was that the Communications Act of 1934,[24] the basic framework for federal regulation of the mass communications industry, was enacted long before cable television existed and did not address cable issues.[25]

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17. Ross & Brick, *supra* note 11, at 28.

18. PARSONS, *supra* note 10, at 12. For example, an early system in Pottsville, Pennsylvania, was built by a television salesman. HAMBURG, *supra* note 11, at 5-6. Although he only provided two channels, within one year he had over 1000 subscribers. *Id.*

19. PARSONS, *supra* note 10, at 12.

20. Saylor, *supra* note 13, at 674. In 1959 only fifty cable systems were using microwave relays, and they transmitted their signals an average of only 300 miles. Ross & Brick, *supra* note 11, at 28 n.2. By 1964, however, 250 systems were using microwave relays, some of which were capable of transmitting their signals over 665 miles. *Id.*

21. Saylor, *supra* note 13, at 674.

22. PARSONS, *supra* note 10, at 13.

23. Norman M. Sinel et al., *The Lawful Regulation of Cable Television*, *in* COMMUNICATIONS LAW 1986, at 299, 302 (PLI Patents, Copyrights, Trademarks and Literary Property Course Handbook Series No. 231, 1986) (describing the FCC's pattern of cable television regulation from 1966 to 1986).

24. 47 U.S.C. § 151 (1988).

25. Paul S. Ryerson & Norman M. Sinel, *Regulating Cable Television in the 1990's*, 17 STETSON L. REV. 607, 609-10 (1988); *see also* Richard E. Wiley & M. Anne Swanson, *New Cable Act Should Help Stabilize Industry*, LEGAL TIMES, Nov. 12, 1984, at 20, col. 1, *reprinted in*

Furthermore, cable has been subjected to a dual regulatory scheme from the local and federal levels.[26] "In the process, cable has often found itself at odds with government regulators, especially at the municipal level, and in need of both regulatory clarification and relief."[27] For obvious reasons, local governments became involved with the cable industry from its very inception: "The essence of the matter is that cable's very technology—involving the laying of lines, conduits, and cables throughout a given community—in most cases automatically triggers the involvement of the local governmental entity."[28] Frequently, that involvement included regulation of subscribers' rates "to prevent excessive charges to consumers."[29]

At the federal level, the FCC first showed interest in the cable industry in 1952 when it considered, but refused to decide, whether cable communication was a broadcast or a common carrier.[30] In 1958, the FCC again declined to take control over this new industry.[31] The persistence of broadcasters, however, particularly that of the National Association of Broadcasters ("NAB"), prompted Congress and then the FCC to reconsider cable regulation.[32] As a result of this pressure, the FCC acted to protect local broadcasters from the threat of competition from cable. The FCC provided such protection by preventing cable operators who wanted microwave from importing distant signals that duplicated local programming, and requiring them had to provide to their subscribers all local signals.[33]

Despite these restraints, cable grew to an estimated 950,000 subscribers by 1963, and just one year later, subscribership surpassed one million.[34] However, continued opposition from the broadcasting industry led the FCC, in 1966, to further impede cable's development by prohibiting systems from

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JAY RICKS & RICHARD WILEY, THE CABLE COMMUNICATIONS POLICY ACT OF 1984, at 181 (1985).

26. Because of the nature of the industry, this duality is not surprising: "Cable television inherently lends itself to such a dual regulatory program, particularly given the industry's focus in its nascent days on bringing programming to those small communities less favorably located for off-air reception, through a localized non-broadcast entity." Ross & Brick, *supra* note 11, at 28.

27. Wiley & Swanson, *supra* note 25, at 20, col. 1.

28. James A. Albert, *The Federal and Local Regulation of Cable Television*, 48 U. COLO. L. REV. 501, 508 (1977).

29. Wiley & Swanson, *supra* note 25, at 20, col. 3.

30. HAMBURG, *supra* note 11, at 6.

31. *See* Frontier Broadcasting v. Collier, 24 F.C.C. 251 (1958). For a detailed summary of the FCC's regulation of cable television, see Joseph R. Fogarty & Marcia Spielholz, *FCC Cable Jurisdiction: From Zero to Plenary in Twenty-Five Years*, 37 FED. COMM. L.J. 113 (1985).

32. PARSONS, *supra* note 10, at 14.

33. *In re* Carter Mountain Transmission Corp., 32 F.C.C. 459 (1962). *See generally* HAMBURG, *supra* note 11, at 11, 14.

34. EDWARD V. DOLAN, TV OR CATV? A STRUGGLE FOR POWER 64 (1984); Ross & Brick, *supra* note 11, at 28 n.2.

entering the nation's major broadcasting markets.[35] Additionally, this decision protected broadcasters by establishing strict requirements on the programming that cable systems could transmit.[36] In effect, this FCC decision kept cable television out of eighty-nine percent of American homes.[37]

C. *From Regulation to Deregulation*

One of the biggest boosts to cable television's potential came in 1972 when the FCC adopted policies allowing qualified private entities to build, launch, and operate satellites.[38] These policies provided a boost to cable television's potential.[39] This development helped to increase cable's subscribership to 7,300,000 by 1973.[40]

In the same year, however, the most comprehensive rules concerning cable television were also enacted by the FCC[41] and upheld by the Supreme Court.[42] These rules served as cable's basic regulatory framework until the Cable Act[43] was passed twelve years later.[44] Prior rules dealt only with cable's relationship with off-the-air television, but "the 1972 rules required operators of cable systems . . . to obtain a certificate of compliance from the FCC prior to operating a system or adding a television broadcast signal to a

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35. *See* Second Report & Order, 2 F.C.C.2d 725 (1966).

36. For instance, the 1966 regulations "required cable systems to carry all local television stations, prohibited cable systems from duplicating programs broadcast by local stations through the importation of distant signals and prohibited cable systems from importing distant signals into major television markets without holding hearings on the probable impact on local broadcasting." Sinel et al., *supra* note 23, at 303. Some commentators have suggested there were other reasons why the FCC reigned in cable in 1966:

> The assigned reasons—to preserve the broadcast television structure because the poor could not afford cable and because cable would jeopardize broadcast television and not wire every market—were perhaps less a sign of protectionism than a manifestation of an unreadiness to deal with new technological developments. The Commission was not prepared for the impact of cable and did not know what to do about it.

Sol Schildhause, *Preferred Communications: Preamble to Breakup of Local Cable Franchising?*, 7 PACE L.REV. 1, 14 (1986) (citing Report & Order 82 F.C.C.2d 375, 375 (1980)). Regardless of the FCC's motives, the Supreme Court upheld these restrictions by reasoning the FCC had jurisdiction to regulate cable when the regulations were "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting." United States v. Southwestern Cable Co., 392 U.S. 157, 178 (1968).

37. PARSONS, *supra* note 10, at 15-16.

38. *See* Second Report & Order, 35 F.C.C.2d 844 (1972); PARSONS, *supra* note 10, at 21.

39. *See* Second Report & Order, 35 F.C.C.2d 844 (1972).

40. DOLAN, *supra* note 34, at 64.

41. Cable Television Report & Order, 36 F.C.C.2d 143, 211 (1972). *See generally* Sinel et al., *supra* note 23, at 304; Ross & Brick, *supra* note 11, at 29.

42. United States v. Midwest Video Corp., 406 U.S. 649 (1972) (Midwest Video I).

43. Cable Act, *supra* note 2.

44. Ross & Brick, *supra* note 11, at 29.

system's signal complement."[45] Furthermore, the 1972 rules clarified the dual regulatory scheme between the federal and local governments, and they granted to both levels a great deal of authority over cable.[46]

Cable regulation was extremely erratic for the remainder of the 1970s. Just a few years after it passed, the FCC did an "about face" and eliminated many of the 1972 rules.[47] In addition, several cases successfully challenged the FCC's authority to regulate cable, causing more of the FCC's cable rules to be invalidated.[48] Due to these developments, "the FCC's role in the cable television field was significantly reduced throughout the remainder of the 1970's."[49] In 1977, the FCC gave cable operators more freedom by allowing them to use small "receive only" satellite dishes.[50] This decision effectively reduced, by seventy-five percent, a cable operator's cost of offering programming received from satellites.[51] These changes added considerably to the operators' program choices, but they also added fuel to the broadcasters' ongoing battle with the cable industry. As a result of the broadcasters' pressure, the FCC again added new rules restricting the cable operators' discretion over program selection.[52]

By the early 1980s it was apparent the communications industry desperately needed clarification and guidance regarding the role of cable television. The FCC's deregulation policies were in effect,[53] but new technologies such as video cassette recorders and home satellite dishes threatened the continued development of cable television. With this background,

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45. *Id.* at 29-30.

46. *Id.* at 30. On the federal level, cable operators who originated their own programming were subject to rules similar to those applicable to broadcasters: sponsorship identification, the Fairness Doctrine, and equal time provisions. Must-carry rules and programming exclusivity rules also prevented cable operators from duplicating local programming. *Id.* At the local level, franchising authorities were allowed to set minimum standards that cable operators had to meet. *Id.* Franchising authorities could impose reasonable franchise fees (i.e., no more than 3% of gross subscriber revenues or, with FCC consent, up to 5% of such revenues) and requirements to keep records on local matters such as billing, service, and customer complaints. *Id.* at 31.

47. Sinel et al., *supra* note 23, at 304 (citing FCC v. Midwest Video Corp., 440 U.S. 689 (1979) (Midwest Video II) (invalidating certain "access channel" requirements as rules that were not "reasonably ancillary" to the FCC's mandate to regulate broadcasting); Home Box Office v. FCC, 567 F.2d 9 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 829 (1977); National Assoc. of Regulated Util. Comm'rs v. FCC, 533 F.2d 601 (D.C. Cir. 1976)).

48. *Id.*

49. *Id.*

50. PARSONS, *supra* note 10, at 22.

51. *Id.*

52. For example, the "must carry rules" required cablecasters to retransmit over their wires all off-the-air signals within a designated proximity to their systems. Garrett, *supra* note 12, at 258 n.77. *See, e.g.*, 47 C.F.R. §§ 76.55, .57, .59, .61, .64, .65 (1985).

53. Sinel et al, *supra* note 23, at 306.

in 1981, Congress began serious efforts to enact cable legislation.[54] As a result, the Cable Act[55] was enacted "to clarify the respective rights of the FCC and local franchising authorities to regulate cable, by setting forth a comprehensive scheme for the regulation of this new economic force in the media marketplace."[56]

III. RATE REGULATION AND THE CABLE COMMUNICATIONS POLICY ACT OF 1984

A. *Enactment of the Cable Communications Policy Act of 1984*

The Cable Act was not quickly or easily passed.[57] Efforts to pass the Act began in 1981, but not until 1983 did the National League of Cities ("NLC") and the National Cable Television Association ("NCTA") reach a compromise that would appease both the cities and the cable industry.[58] Portions of their agreement were incorporated into a Senate bill[59] that was eventually approved in June, 1983.[60]

At the same time, the House was also considering cable legislation similar to the Senate's version.[61] The House version severely limited state and local regulation of cable, and, therefore, was strongly opposed by cities and public interest groups.[62] Nevertheless, the bill had a great deal of support from House members, so it seemed likely this legislation would pass.[63] However, the Chairman of the House Energy and Commerce Committee, Representative John Dingell, Jr., sided with the cities, and in January, 1984, he called for further negotiations between the Conference of Mayors,

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54. For an excellent summary of the struggle to pass the Cable Act, see Ryerson & Sinel, *supra* note 25, at 610-13.

55. 47 U.S.C. §§ 421-459 (1988).

56. Sinel et al., *supra* note 23, at 307. Even with the regulatory burdens that have been imposed on the industry, cable television has continued to grow. In 1983, 37% of all homes in the United States were hooked to cable, and 11% of the viewing audience received its television fare via cable. Richard Zoglin, *Heady Days Again for Cable*, TIME, May 30, 1988, at 52. By 1988, those figures had moved to 51% and 20%, respectively. *Id.* One current estimate indicates that cable reaches about 54 percent of America. Ronald Grover & David Lieberman, *In the Race for Viewers, the Networks Fall Further Behind*, BUS. WEEK, Jan. 9, 1989, at 81. Some believe that by the end of the decade, 58,900,000 homes, accounting for 62% of all television households, will be cable homes. DOLAN, *supra* note 34, at 65.

57. For an excellent summary of the political background regarding the passage of the Cable Act, see Ryerson & Sinel, *supra* note 25, at 610-13.

58. Ryerson & Sinel, *supra* note 25, at 610-11.

59. S. 66, 98th Cong., 1st Sess. (1983); *see* Ryerson & Sinel, *supra* note 25, at 611.

60. 129 CONG. REC. D424 (1983); *see* Ryerson & Sinel, *supra* note 25, at 611.

61. H.R. 4103, 98th Cong., 1st Sess. (1983); *see* Ryerson & Sinel, *supra* note 25, at 611.

62. Ryerson & Sinel, *supra* note 25, at 611.

63. *Id.*

the NLC, and the NCTA.[64] Their negotiations resulted in an agreement that was incorporated into the House bill, and in June, 1984, the Energy and Commerce Committee approved the bill and renamed it the Cable Franchise Policy and Communications Act of 1984.[65]

However, because the cable industry was dissatisfied with some of the House bill's provisions, including those affecting rate regulation, the NCTA withdrew its support for the bill a month later.[66] Representative Dingell strongly criticized the NCTA for this move, and the NCTA eventually reduced its demands.[67] Later, the NLC and the Conference of Mayors approved the demands of the NCTA, and the House bill was amended to reflect the changes.[68] The House approved the resulting bill on October 2, 1984.[69]

As a substitute for its bill, the Senate adopted the basic provisions of the House version, renaming it the Cable Communications Policy Act of 1984.[70] After final approval by the House, President Reagan signed the bill into law on October 30, 1984.[71]

It is clear from its history that the Cable Act was not satisfactory to all who negotiated it:

> As the history and timing of passage of the Cable Act demonstrate, the statute, in the form in which it was ultimately enacted, reflected practical compromises that were made by some of the interest groups most directly affected by the legislation—local franchising authorities and the cable industry. Like all compromises, the Cable Act contains provisions that probably did not fully satisfy the participants. From the standpoint of most local governments, however, the critical question is not whether the Cable Act sets forth an ideal regulatory framework, but rather whether it still permits local governments to function responsibly with regard to cable and, particularly, in connection with the franchise renewals that will increasingly demand attention in the coming years.[72]

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64. *Id.*
65. *Id.* at 611-12 (citing H.R. REP. NO. 934, 98th Cong., 2d Sess. 5 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655)).
66. *Id.* at 612. The NCTA's wavering support may have been due, in part, to the fact that its management was in transition in early 1984. Schildhause, *supra* note 36, at 21, 21 n.102.
67. Ryerson & Sinel, *supra* note 25, at 612.
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.* at 612-13.

B. *The Intent Underlying the Cable Communications Policy Act of 1984*

The most significant aspect of the Cable Act is its strikingly pro-cable position. While early attempts to regulate cable were clearly designed to restrain the industry so broadcasting could flourish,[73] it is clear the 1984 Cable Act was intended, at least in part, to encourage and facilitate the growth of cable television. As stated in the report that accompanied the House bill:

> H.R. 4103 establishes a national policy that clarifies the current system of local, state and Federal regulation of cable television. This policy continues reliance on the local franchising process as the primary means of cable television regulation, while defining and limiting the authority that a franchising authority may exercise through the franchise process. The bill establishes franchise procedures and standards *to encourage the growth and development of cable systems*, and assure that cable systems are responsive to the needs and interests of the local communities they serve.[74]

Furthermore, the report noted that "FCC policies in [the] 1960's and early 1970's unfairly inhibited the growth and development of cable."[75] Thus, Congress clearly intended the Cable Act to remove the barriers impeding cable's progress.

One of the greatest barriers Congress removed was the ability of local franchising authorities to regulate the rates that cable systems could charge subscribers.[76] Prior to the Cable Act, many cities heavily regulated cable rates, and they justified this regulation on several grounds. Primarily, such local regulation was a condition on the grant of a cable franchise, and it was useful for enforcing other key provisions in franchise agreements.[77] Cities justified regulation as a measure necessary to prevent unreasonable

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73. *See supra* text accompanying notes 23-37.

74. H.R. REP. NO. 934, 98th Cong., 2d Sess. 5 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655, 4656 (emphasis added).

75. *Id.* at 22, *reprinted in* 1984 U.S.C.C.A.N. at 4659. This intent is embodied in the language of the Cable Act:

> The purposes of this subchapter are to—(1) establish a national policy concerning cable communication; (2) establish franchise procedures and standards which encourage the growth and development of cable systems and which assure that cable systems are responsive to the needs and interests of the local community . . . (6) promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems.

47 U.S.C. § 521 (1989).

76. *See* 47 U.S.C. § 543 (1988).

77. H.R. REP. NO. 934, 98th Cong., 2d Sess. 24 (1984), *reprinted in* 1984 U.S.C.C.A.N. at 4661.

rate hikes in areas in which cable was considered "essential."[78] Congress, however, believed competition, not regulation, would keep rates under control: "The Committee believes that the availability of competing sources of programming in a given market will keep the rates for basic cable services reasonable in that market without the need for regulation."[79]

In addition to trying to resolve the differences between the cable industry and its competitors and regulators, the Cable Act also represents the congressional intent "to balance the rights of the municipal franchising authority, the cable operator and the consumer."[80] Commentators hoped that by aiding the cable industry[81] and protecting consumers,[82] the Cable Act would achieve the purposes that Congress intended. However, because of the way in which the Cable Act was applied, competition did not keep basic cable rates in check, and the consumers' best interests were not served.

C. *Early Rate Regulation Under the Cable Communications Policy Act of 1984*

1. *Initial Rate Regulation by the FCC*

The critical provisions of the Cable Act state that franchising authorities can regulate only basic cable service, and that such service can be regulated only in circumstances in which it is not subject to "effective competition."[83] The Cable Act directs the FCC to promulgate regulations defining

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78. *Id.*

79. *Id.* at 25, *reprinted in* 1984 U.S.C.C.A.N. 4655, 4662.

80. Patrick B. McCauley & Laurie Orlando, *The Rights of the Consumers Under the Cable Communications Policy Act of 1984*, 65 MICH. BUS. L.J. 1112, 1115 (1986).

81. One commentator wrote:

> [T]he new law should help to stabilize an industry that is feeling the effects of competition not only from the well-established and still highly successful broadcast industry but also from [other] emerging home delivery services . . . . [T]he legislation should help to resolve many of the battles that long have raged between the [cable] industry and its various regulators.

Richard E. Wiley & M. Anne Swanson, *New Cable Act Should Help Stabilize Industry*, LEGAL TIMES, Nov. 12, 1984, at 20, col. 1, *reprinted in* JAY E. RICKS & RICHARD E. WILEY, THE CABLE COMMUNICATIONS POLICY ACT OF 1984, at 181 (1985).

82. Because one of the purposes of the Cable Act was to "more clearly delineate the role of cable television in the life of the subscriber/consumer," McCauley & Orlando, *supra* note 80, at 1112, and despite the fact that consumers were relatively passive participants in passing the Act, "Congress nevertheless recognized the importance of protecting individual consumer rights." *Id.* (citing 130 CONG. REC. S14,283 (daily ed. Oct. 11, 1984) (statement of Sen. Goldwater)).

83. 47 U.S.C. § 543(b)(1) (1988).

"the circumstances in which a cable system is not subject to effective competition"[84] and establishing "standards for such rate regulation."[85]

Pursuant to this mandate, the FCC established its first cable television rate regulation rules. In so doing, the FCC commented:

> In developing a definition of effective competition, the [FCC] recognizes the desirability of a standard which can be both easily interpreted and readily applied by a franchising authority within its community (or communities). On the other hand, this should be accomplished in a manner which permits the correct identification of those situations where a cable system may have sufficient market power to take undue advantage of its subscribers.[86]

Accordingly, the FCC noted that, regarding rate regulation, its first determination would have to be what constituted "effective competition,"[87] and that such a decision would depend on "what kinds of signals or services compete with basic cable service."[88] From the outset of this rulemaking, it was clear the FCC considered off-the-air broadcast television as cable's main competition:

> The alternative to transmission of locally viewed signals by cable is off-the-air reception by home receiving antennas. As such, competition to a cable system's basic service would seemingly exist if a subscriber can receive locally viewed broadcast signals off-the-air. If that alternative is readily available, then a subscriber has a direct, self-help remedy to basic service pricing that he finds unreasonable; he can disconnect the cable service and obtain those signals by means of a home antenna.[89]

Based on this rationale, the FCC suggested an "effective competition" standard could be based on "the availability of off-the-air [television] signals in the cable systems community."[90] Although it recognized other technologies should be considered as potential competition,[91] the FCC seemed most con-

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84. *Id.* § 543(b)(2)(A).

85. *Id.* § 543(b)(2)(B). "Within 180 days after [the effective date of the Act], the Commission shall prescribe and make effective regulations which authorize a franchising authority to regulate rates for the provision of basic cable service in circumstances in which a cable system is not subject to effective competition." *Id.* § 543(b)(1).

86. Notice of Proposed Rule Making, 49 Fed. Reg. 48,765, 48,770 (1984).

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* This definition assumes that off-the-air television signals are competitive with cable.

91. *Id.* at 48,771. For example, the FCC suggested direct broadcast satellites, low power television, multipoint distribution services, satellite master antenna systems, direct satellite reception, VCRs, and video disks should all be considered. *Id.*

cerned with determining how many broadcast channels would need to be available to constitute "effective competition," and with deciding whether the availability of the three major networks should be a factor.[92]

The FCC also noted that a necessary corollary to these determinations would be a decision as to what constituted "available" for effective competition purposes.[93] The FCC named three alternatives that would qualify a signal as being "available." One alternative standard was based on the FCC's "must-carry" rules, and another counted all signals within a given geographic area.[94] The FCC also suggested a third standard based on the signals that placed "a predicted Grade B signal contour over the cable community."[95] In turn, this standard was dependent on how much of the community would actually have to be covered by the Grade B signal contour.[96]

Finally, although the Cable Act itself defined "basic cable service" as "any service tier which includes the retransmission of local television broadcast signals,"[97] the FCC sought to redefine the term.[98] The FCC asserted Congress intended to grant it the authority to redefine the term.[99] Indeed, the House Energy and Commerce Committee intended "to give the Commission flexibility in promulgating these regulations."[100] It stated that "the Commission may fashion a definition of basic cable services most appropriate to achieve the purposes of the regulations, consistent with the provisions of [the Act]."[101] Accordingly, the FCC proposed that for the purpose of rate regulation, "basic cable service" would be "any service tier(s) which include(s) the retransmission of must-carry broadcast television signals."[102]

After considering the one hundred and forty comments and sixty-three replies that were submitted in response to the proposed rules, the FCC, in April, 1985, promulgated its first set of rules pursuant to the Cable Act's mandates.[103] Although the FCC addressed several issues in the rule-

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92. *Id.* at 48,770-71.

93. *Id.* at 48,771.

94. *Id.*

95. *Id.* A Grade B contour is essentially a measure of the strength of a television broadcast signal. 47 U.S.C. § 522(10) (1988).

96. Notice of Proposed Rule Making, 49 Fed. Reg. 48,765, 48,771 (1984).

97. 47 U.S.C. § 522(2) (1988).

98. Notice of Proposed Rule Making, 49 Fed. Reg. at 48,771.

99. *Id.*

100. H.R. REP. NO. 934, 98th Cong., 2d Sess. 66 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655, 4703.

101. *Id.*

102. Notice of Proposed Rule Making, 49 Fed. Reg. 48,765, 48,771 (1984).

103. Report & Order, 50 Fed. Reg. 18,637, 18,650-51 (1985).

making,[104] the rate regulation portion was undoubtedly the most significant.

Specifically, the "effective competition" issue was hotly debated. In fact, the FCC stressed that "[m]ost of the parties filing comments or reply comments in this proceeding addressed the [effective competition] issues raised in . . . the *Notice*."[105] The FCC noted that although other sources of programming are significant and do compete with cable, "[f]or the most part, programming provided by basic cable service includes local, over-the-air signals and other services."[106] Therefore, the FCC concluded it would adhere to an effective competition standard based on the availability of off-the-air television signals.[107] According to the FCC, this standard "meets the congressional intent of an administratively manageable standard for the Commission, franchising authorities and cable operators."[108]

The FCC's next task was to decide how many off-the-air signals would need to be available to constitute effective competition for cable. In so doing, the FCC balanced the interests of the consumers and the industry,[109] and it considered the arguments of those who supported figures ranging from two channels (proposed by the NCTA and others) to ten channels (supported by the NLC and others).[110]

The FCC also considered statistical evidence. For example, one study indicated that, in markets with only two off-the-air signals, "the viewership share of . . . [cable] programming could be as large or larger than the off-air viewership of the typical local station in such a market."[111] The FCC concluded such a share could "be a source of market power for the cable operator."[112] On the other hand, the FCC found in markets with three off-the-air signals, cable viewership was generally less than off-the-air viewership of one local channel, and that in the "worst case," the impact of adding basic cable service "would be comparable to adding one more competitor to a

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104. For example, the rulemaking established definitions for some of the Cable Act's fundamental terms, and it addressed the use of cable channels, ownership restrictions, franchise requirements and fees, the regulation of service facilities and equipment, and obscenity. *See id*.

105. *Id.* at 18,649.

106. *Id.*

107. *Id.*

108. *Id.*

109. As the FCC emphasized:

> The number of over-the-air broadcast signals required to provide effective competition to basic cable service must be sufficient to allow viewers adequate and significant programming choices. Further, the number of signals should ensure that the basic tier offering does not become a source of market power for the cable operator.

Id.

110. *Id.*

111. *Id.* at 18,650.

112. *Id.*

(three competitor) market."[113] Thus, the FCC concluded that when three or more unduplicated off-the-air signals were available in a cable community, the cable system would be subject to effective competition.[114]

Although the FCC recognized cable systems typically provide more than retransmitted local signals in their basic service tier, it remained steadfast in its position that this does not give cable an advantage over local broadcasters:

> We recognize that many cable systems provide a number of services in addition to the retransmission of off-the-air signals. For example, a cable system may typically provide additional broadcast signals, access channels, and certain satellite delivered programming on its basic cable tier. Nevertheless, we do not believe that a cable system gains significant market advantage by the provision of this additional programming in those markets where there are sufficient (i.e., three or more) off-the-air broadcast signals.[115]

The FCC justified this conclusion with a basic supply and demand argument. Market power, it reasoned, depends on the demand for the product, and because there was no evidence of a great demand for the extra services provided on basic cable, the cable systems could not be gaining market power by providing those extra services.[116]

By choosing the three off-the-air signal availability standard, the FCC also had to decide what constituted an "available" signal. Proposals were submitted by cable interests and franchising authorities.[117] Naturally, the majority of the cable interests argued for a low threshold, counting as many signals as possible as "available."[118] Such a standard would have made most cable systems subject to effective competition, thereby placing them beyond the reach of basic service rate regulation. Conversely, franchising authorities favored standards making few signals count as being "available."[119] Accordingly, their proposals would have

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113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.* at 18,650-51. For example, the NCTA and others argued that if a signal "satisfied any one of a number of criteria, such as Grade B, significantly viewed, 35-mile, or must-carry," it should be counted as "available." *Id.* at 18,650.
119. *Id.* at 18,651. For example, the NLC and the Telecommunications Research and Action Center supported the 35-mile zone criteria. *Id.* The American Civil Liberties Union and the Cable Television Information Center, however, supported a Grade A contour standard. *Id.* Similarly, others demanded a standard based on "actual" rather than "predicted" reception. *Id.*

made few systems subject to effective competition, thereby placing most cable systems within the reach of such regulation.

In response to these suggestions, the FCC noted the dilemma they presented:

> The use of any of the above alternatives will result in some cable systems being judged to have effective competition when in fact reception of three or more signals may not always be possible in the franchise area. On the other hand, some cable systems will be judged, whatever the alternative chosen, to not face effective competition when in fact the majority of homes in the franchise area are receiving more than three broadcast signals.[120]

Finding no compelling arguments supporting any of the proposed alternatives, the FCC deferred to "administrative convenience" and it ruled a signal would be counted as "available" if it "places a predicted Grade B contour over any portion of the cable community or is significantly viewed within the cable community."[121] In support of this ruling, the FCC noted it would be "more appropriate to favor a presumption that competition does in fact exist rather than to assume that consumers will make no efforts to seek out alternatives to basic cable service."[122]

As a result of this rulemaking, a cable television system was subject to effective competition when the cable community it served could receive three off-the-air television signals that placed a Grade B contour over any portion of the community or were significantly viewed in the community. This standard made nearly all cable systems subject to effective competition. Consequently, few franchising authorities could legitimately regulate basic cable service rates.

Finally, the FCC addressed the redefinition of "basic cable service." The FCC believed it had the authority to modify the Cable Act's definition because of the FCC's congressional mandate to encourage the growth of cable television, to ensure the public has a diverse supply of information sources and services, to promote competition in the cable industry, and to minimize "unnecessary regulation that would impose undue economic burden on cable systems."[123] As previously noted,[124] the Cable Act defines "basic cable service" as "any service tier which includes the retransmission of local television broadcasting signals."[125] The FCC, however,

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120. *Id.*

121. *Id.*

122. *Id.* In this regard, the FCC thought it significant some viewers took measures "such as improved antennas, use of rotors and amplifiers" to pick up off-the-air channels. *Id.*

123. Report & Order, 50 Fed. Reg. 18,637, 18,652-53 (1985) (quoting 47 U.S.C. § 521 (1988)).

124. *See supra* text accompanying note 102.

125. 47 U.S.C. § 522(2) (1988).

was concerned this definition would lead to inconsistent results because it would allow a franchising authority to regulate several tiers of cable service when such service marketed its services cumulatively rather than incrementally.[126] The FCC cited two reasons why it thought this outcome would be unreasonable:

> First, if at all possible, a regulation should not be so constructed that its impact depends upon the manner in which the service is marketed or delivered, as would be the case with this proposed definition. Second, this definition would permit rate regulation of services which has [sic] been determined on numerous occasions in the past are best provided on an unregulated basis. Nothing in the statute supports a determination that we must permit the pay services of these cable systems to be rate regulated.[127]

Thus, for rate regulation purposes, the FCC adopted the following definition of "basic cable service":

> Basic cable service is the tier of service regularly provided to all subscribers that includes the retransmission of all must-carry broadcast television signals . . . [or in the absence of at least three must-carry signals, any unaltered broadcast television signals] and the public, educational and governmental channels, if required by a franchising authority. . . .[128]

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126. Report & Order, 50 Fed. Reg. 18,637, 18,653 (1985). To explain the possible inconsistency, the Commission proposed the following hypothetical marketing scheme. Cable system X markets its services incrementally: Tier A includes only access channels and "must-carry" (i.e., local off-the-air) signals; Tier B includes only satellite programming such as ESPN and CNN; Tier C includes only pay channels such as HBO and Showtime. *Id.* On the other hand, Cable system Y markets its services cumulatively: Tier A includes access channels and "must-carry" signals; Tier B includes Tier A plus satellite channels; Tier C includes Tiers A and B plus pay channels. *Id.* Under the statutory definition, the rates of all of system Y's tiers could be regulated because they all include local television broadcasting signals, but only the rates of system X's tier A could be regulated because it alone contains the local channels. *Id.* n.80.

127. *Id.* (citations omitted).

128. *Id.* Subsequent to this rulemaking, the District of Columbia Circuit Court of Appeals found the FCC's "must-carry" rules to be unconstitutional. Quincy Cable TV, Inc. v. FCC, 788 F.2d 1434 (D.C. Cir. 1985). Consequently, the FCC amended the definition by deleting the "must-carry" language. Memorandum Opinion and Order, 104 F.C.C.2d 386, 400-01 (1986); 51 Fed. Reg. 21,770 (1986) (codified at 47 C.F.R. § 76.5(ii) (1985)). Franchising authorities are permitted to include in their franchising agreements provisions that require cable systems to provide channels for public, educational, and governmental use. 47 U.S.C. § 531 (1988).

2. *Judicial Response to the FCC's Initial Rate Regulation Rulemaking*

Not surprisingly, the FCC's rules were immediately challenged.[129] In 1987, the District of Columbia Circuit Court of Appeals rejected the FCC's signal availability standard and its redefinition of "basic cable service."[130] The court criticized the signal availability standard because it counted a signal as available if it reached *any portion* of the cable community.[131] Because this standard would count signals that reached *any* portion of the cable community, the court reasoned that "a cable system could be labeled as subject to effective competition due to the presence of three broadcast signals *even though at no point within the cable community are all three signals even theoretically available*."[132] Therefore, the court found the standard to be arbitrary and capricious, and it ordered the FCC to either justify the standard or adopt a new one.[133]

Similarly, the court held the FCC did not have the power to redefine "basic cable service" for rate regulation purposes.[134] Although the court conceded some of the Cable Act's legislative history appeared to give the FCC authority to fashion a new definition,[135] the court was not willing to resort to relying on legislative history when it found the Cable Act spoke for itself. The Cable Act defined "basic cable service" as "*any* service tier which includes the retransmission of local television broadcast signals."[136] The FCC's definition, however, contradicted that of the Cable Act because it prevented some tiers of cable service from being classified as basic cable service even though those tiers contained local television broadcast signals. The court held such contradiction was improper because "in leapfrogging ahead to the legislative history without carefully dwelling on the statute itself, the FCC has fallen into interpretive error."[137] Accordingly, the court held the Cable Act's definition should be applied in the rate regulation context.[138]

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129. *See* American Civil Liberties Union v. FCC, 823 F.2d 1554 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 959 (1988).

130. *Id.*

131. *Id.* at 1572-73; *see* 47 C.F.R. § 76.33(a)(2) (1985).

132. American Civil Liberties Union v. FCC, 823 F.2d at 1572 (emphasis added).

133. *Id.* at 1573.

134. *Id.* at 1569.

135. *Id.* at 1567-68 (citing H.R. REP. NO. 934, 98th Cong., 2d Sess. 66 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655, 4703).

136. 47 U.S.C. § 522(2) (1988) (emphasis added).

137. American Civil Liberties Union v. FCC, 823 F.2d 1554, 1568 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 959 (1988).

138. *Id.* at 1570.

3. *The FCC's Revised Rate Regulation Rules*

In response to the court's holding, the FCC amended its rules to conform its definition of "basic cable service" to the Cable Act's definition.[139] The FCC also sought comment on how to amend its signal availability standard.[140] In this regard, the FCC proposed three alternatives. First, a signal could be counted as available only if it covered the entire cable community.[141] Although the FCC noted this would be the easiest standard to apply, it ran the risk of being overinclusive because it could lead to the regulation of cable systems that were, in fact, subject to effective competition.[142]

Second, a broadcast signal could be counted if it reached a designated portion (e.g., seventy-five percent) of the cable community.[143] The FCC emphasized that while this standard would be less likely to be overinclusive, it would be more difficult to apply.[144] Furthermore, the FCC stressed such a standard would not necessarily ensure that the majority of the cable community was actually receiving the three signals; when individual signals are counted if they reach that designated (e.g., seventy-five percent) portion of the community, "less than 75 percent of the area of the cable community [might not be] covered by three signals, since the broadcast signals might not cover the same 75 percent of the cable community."[145]

In light of the perceived weaknesses in those two alternatives, the FCC proposed a third. Under this option, a cable system would be classified as subject to effective competition when "at least 75 percent of the cable community were covered by three or more off-the-air signals."[146] The FCC believed this "standard would reflect a reasonable balance of the need to ensure that a broadcast signal, counted as an effective competitor, in fact covers enough of the cable community to provide competition and our desire to minimize unnecessary regulation of cable systems."[147]

After considering the comments filed in response to these proposals, the FCC adopted a standard incorporating portions of the suggestions but rejecting its own seventy-five percent proposal.[148] The FCC opted for a standard that counted a cable system as subject to effective competition when

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139. *See* Memorandum Opinion & Order, 2 F.C.C. Rec. 5893 (1987).
140. *See* Further Notice of Proposed Rule Making, 2 F.C.C. Rec. 5888 (1987).
141. *Id.* at 5889.
142. *Id.*
143. *Id.*
144. *Id.*
145. Further Notice of Proposed Rule Making, 2 F.C.C. Rec. 5888, 5889 (1987).
146. *Id.*
147. *Id.*
148. Second Report & Order, 3 F.C.C. Rec. 2617, 2622 (1988). Not surprisingly, cable interests favored adoption of a standard limiting the degree of required coverage, thereby classifying few cable systems as subject to effective competition, and the franchising authorities supported more inclusive coverage requirements. *Id.* at 2621.

"multiple signals, some or all of which may provide Grade B service to less than 100 percent of the community, overlap such that all areas of the community are within the Grade B contours of the necessary number of signals."[149] The FCC recognized this standard could be overinclusive, but it ruled this concern was outweighed by two factors. First, the FCC stressed the ease with which the full encompassment standard could be applied.[150] Second, the FCC emphasized "that the portion of the community's population residing within the area covered by a Grade B signal may vary significantly from the portion of the community the area represents on a geographic basis."[151]

Despite the ease with which a cable system could qualify as subject to effective competition under these rules, cable communities were not without a remedy if it appeared their cable systems were not actually subject to effective competition. For example, a cable system could have been found subject to effective competition when tall buildings or other geographical features interfere with off-the-air reception.[152] Therefore, the rules provided that communities could have obtained a waiver if engineering or other studies showed such signals were not, in fact, available within the community.[153] Although it is unclear which standards the FCC would have used in such a waiver proceeding, some commentators predicted a city's chances of

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149. *Id.* at 2622 (codified at 47 C.F.R. § 76.33(a)(2) (1988)). The FCC standard provides in full:

> Only cable systems that are not subject to effective competition may be rate regulated. A cable system will be determined to be subject to effective competition whenever 100 percent of the cable community receives service from at least three unduplicated broadcast television signals. It is not necessary that the same three signals provide service to the entire community. Signals shall be counted on the basis of their predicted Grade B contour . . . or whether they are significantly viewed within the cable community.

Id. at 2626.

To explain the application of this standard, the FCC offered the following hypothetical scenario:

> For example, assume that each of six signals are available to 50 percent of a cable community: signals A, B, and C cover one-half of the cable community; and signals D, E, and F cover the other one-half of the cable community. In this instance, even though no *one* signal covers 100 percent of the community, fully 100 percent of the cable community is within the predicted Grade B contours of three signals and effective competition for the local cable system would exist under the revised standard.

Id. at 2629 n.29.

150. *Id.* at 2622.

151. *Id.*

152. Norman M. Sinel et al., *Local Cable Regulation and the Cable Franchise in 1989*, CABLE TELEVISION LAW: 1989 DEALING WITH THE NEW CHALLENGES 449, 489-90 (1989).

153. 47 C.F.R. § 76.33(3) (1988).

receiving a waiver depended on whether fifty percent of the community was unable to receive three viewable signals.[154]

In summary, the FCC initially made it easy for a television signal to be defined as "available." In turn, it became easy for a cable system to be considered subject to "effective competition." As a result, nearly every cable system was defined as subject to "effective competition." Consequently, most local franchising authorities had no power to regulate the rates charged for basic cable service in their communities.

IV. RESPONSES TO THE APPLICATION OF THE CABLE COMMUNICATIONS POLICY ACT OF 1984

Undoubtedly, the cable industry needed assistance at the time Congress passed the Cable Act. The FCC subordinated cable to broadcasting throughout cable's early history, and it was not until 1984 that the cable industry gained enough influence to secure passage of legislation favorable to its interests. Indeed, one of the aims of the Cable Act is to compensate the industry for the undue regulation to which it had been subjected in the past.[155] Two additional purposes of the Cable Act, however, are to "assure that cable systems are responsive to the needs and interests of the local community"[156] and to "promote competition in cable communications."[157] But, in 1988, after only one year of rate deregulation,[158] many began to argue the Cable Act was not serving those purposes.[159] By the end of that year,

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154. Sinel et al., *supra* note 152, at 490-91.

> If engineering studies reveal that a substantial majority of households served by a cable system can receive three broadcast signals of good quality, it is unlikely that the FCC will grant a waiver. Conversely, if a city can demonstrate that numerous households do not receive three good signals, it should have a realistic chance of convincing the Commission—or a reviewing court—that the cable systems serving those households do not face effective competition.

Id. at 491.

155. H.R. REP. NO. 934, 98th Cong., 2d Sess. (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655, 4656. For examples of such restrictive regulation, see *supra* text accompanying notes 23-37.

156. 47 U.S.C. § 521(2) (1988).

157. *Id.* § 521(6).

158. The Cable Act became effective on December 30, 1984, but the rate regulation portions of the Act were postponed for two years. *See id.* § 543(c).

159. *See, e.g.*, 134 CONG. REC. E1625 (daily ed. May 19, 1988).

> The 1984 legislation was a good idea in concept, but in many situations cable companies are able to raise rates without fear of reprisal from the city government or citizens. The public is held hostage to increasing rates and is left with little recourse . . . . The average homeowner has two choices: pay whatever the cable company demands or do without.

Id. (statement of Rep. Gallegly); Bob Brewin, *Taming the Cable Beast*, VIDEO, Oct. 1988, at 136 ("Congress, ever willing to listen to a powerful lobby, obliged, and then some, passing legislation that in retrospect looks like a case of favoring the fox in a hen house."); *Cities Want Changes in Cable Act*, BROADCASTING, Oct. 24, 1988, at 34 (report on the NLC's ambition staffers of the House Telecommunications Subcommittee of the Committee on Energy and Finance, and Representative Charles Schumer of New York, were convinced that rather than creating a level playing field, the Cable Act "created a giant with an insatiable appetite . . . for 'inordinate' rate increases."[160]

A. *Congressional Response*

Members of Congress became acutely aware of consumers' complaints about their cable service. Public and congressional sentiment was, perhaps, best echoed by Representative Richard Neal of Massachusetts who introduced a concurrent resolution calling for committee review of the Cable Act and for legislation to correct perceived problems caused by deregulation.[161] As Representative Neal stated in May 1989, "Congress gave a boost to a struggling industry when it adopted the 1984 Cable Act. I do not believe, however, that it intended to create a situation in which the interests of consumers would be forever subordinate to the interests of the owners of cable television systems."[162] As a result, a great deal of legislation was introduced in early 1989 in an attempt to remedy the problems.[163] Most of the legislation was directed at bringing rates under control.

In March 1989, Representative Charles Schumer of New York reported that in 1987, the first year of deregulation, fifty-one cities experienced cable rate increases of fifty percent or more.[164] To combat the problem, Schumer proposed a bill requiring cable companies to submit monthly rate reports to the FCC.[165] Similarly, one month later, Representative Lewis Payne of

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to amend the Cable Act to allow re-regulation of cable rates); Tim Smart, *Setting Cable Free: Did Congress Unleash a Monster?*, BUS. WEEK, June 5, 1989, at 136. Not everyone, however, was convinced that the Cable Act was not working:

> I think as Members of Congress, we have an obligation to let the Cable Act work. All evidence at hand indicates that, on average, rate increases have been reasonable and that cable customers are in fact receiving greater service and more diversity for their dollar. Finally, I believe we should let cable customers be our guide. I believe the cable industry is on track in both its increased focus on customer satisfaction and its goal of increasing the diversity and quality of programming available to cable customers.

134 CONG. REC. E856, E857 (daily ed. Mar. 29, 1988) (statement of Rep. Ritter).

160. Brewin, *supra* note 159, at 136.

161. 135 CONG. REC. H2097 (daily ed. May 24, 1989) (statement of Rep. Neal).

162. *Id.*

163. With the support of such Senate veterans as Wendell H. Ford, Howard Metzenbaum, and Al Gore, about a dozen re-regulation measures were proposed by June 1989. Smart, *supra* note 159, at 136.

164. 135 CONG. REC. E740 (daily ed. March 13, 1989) (statement of Rep. Schumer). At the top of his list, Schumer reported eight communities saw increases of 100% or more, and that rates in Weston, Connecticut jumped 179%. *Id.* Schumer's report was based on statistics compiled by the research firm Paul Kagan & Associates. *Id.*

165. H.R. 1375, 101st Cong., 1st Sess., 135 CONG. REC. E740 (daily ed. Mar. 13, 1989).

Virginia noted basic cable rates in his district had risen as much as eighty-three percent since the passage of the Cable Act, and his constituents had to face the "take it or leave it" attitude of their cable systems.[166] Therefore, Payne suggested cable operators must obtain their franchising authority's approval before implementing a basic service rate increase greater than five percent or greater than any increase in the Consumer Price Index for the preceding year.[167]

More drastic measures were proposed in May 1989 by Senator Joseph Lieberman and Representative Christopher Shays of Connecticut. Lieberman recognized the increase could be attributed to the FCC because it applied the Cable Act in a manner that ensured effective competition would be found nearly everywhere, thereby precluding most rate regulation.[168] Representative Shays also noted monthly rates for basic cable service in his congressional district had jumped from $4.50 in 1984 to $19.95 in 1989.[169] Consequently, Congressmen Lieberman and Shays introduced bills reinstating state and local regulation of cable rates.[170]

Critics also blamed increased concentration of cable ownership and control for skyrocketing cable rates. In response to this problem, Senator Albert Gore of Tennessee and Representative Rick Boucher of Virginia introduced other legislation to control cable rates by increasing competition for cable.[171] Their bill also required Federal Trade Commission investigation of possible unfair rate increases, and made it easier for franchising authorities to regulate certain cable rates.[172]

Although it was clear cable rates increased after deregulation, there were conflicting reports as to the extent of those increases. Therefore, the General Accounting Office ("GAO") surveyed the industry to ascertain the degree of these increases. The results of that survey were released in late July 1989, and they revealed, among other things, that the average price for the lowest priced basic cable service had in fact jumped 28.9 percent from

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166. 135 CONG. REC. E1383 (daily ed. Apr. 26, 1989) (statement of Rep. Payne).

167. H.R. 2128, 101st Cong., 1st Sess., 135 CONG. REC. E1383-84 (daily ed. Apr. 26, 1989).

168. 135 CONG. REC. S4727 (daily ed. May 3, 1989) (statement of Sen. Lieberman).

169. 135 CONG. REC. E1728 (daily ed. May 16, 1989) (statement of Rep. Shays).

170. S. 805, 101st Cong., 1st Sess., 135 CONG. REC. S4728 (daily ed. May 3, 1989); H.R. 2222, 101st Cong., 1st Sess., 135 CONG. REC. E1728-1802 (daily ed. May 16, 1989). When introducing the bill, Senator Lieberman stressed that such a measure only needs to be temporary: "Someday, competition in the cable industry may eliminate the need for this type of legislation. But for now, this bill will provide consumers with the protection from gouging by cable companies that they need and deserve." 135 CONG. REC. S4727, S4728 (daily ed. May 3, 1989) (statement of Sen. Lieberman).

171. S. 1068, 101st Cong., 1st Sess., 135 CONG. REC. S5693 (daily ed. May 18, 1989); H.R. 2437, 101st Cong., 1st Sess., 135 CONG. REC. H2054 (daily ed. May 22, 1989).

172. *Id.*

1986 to 1988.[173] Because this increase was more than four times the inflation rate, the GAO recommended re-regulating the industry.[174]

However, some criticized that the GAO report was inconclusive. Some cable interests argued the increase did not indicate a trend, but was only a temporary increase—a "catch-up"—to compensate for losses suffered due to past regulation.[175] Others suggested the increases were justified because consumers were getting more for their cable dollars.[176] In addition, critics questioned the reliability of the statistics. Specifically, the GAO sent questionnaires to only 1950 of the approximately 9000 cable systems operating in the United States, and only 1450 responded.[177] Because of these criticisms, Representative Ed Markey, Chairman of the House Telecommunications Subcommittee, asked the GAO for a second study.[178]

Despite the possible weaknesses in the GAO report, Congress reacted strongly to it. The response came in November 1989, when the most significant cable rate re-regulation bills were introduced by Senator John Danforth of Missouri and by Representative Jim Cooper of Tennessee.[179] These identical bills were important both substantively and politically.

1. *The Substantive Provisions of Senate 1880 and House 3826*

The substantive provisions of the bills were exceedingly important because they contained five provisions aimed at bringing cable rates under control. First, the most significant of these provisions called for amending the effective competition standard to make more cable systems subject to rate regulation.[180] Senator Danforth argued that as a result of the FCC's present standard, ninety-seven percent of all cable systems had been deregulated.[181] Therefore, the Danforth and Cooper bills classified a cable system as subject to effective competition if fewer than thirty percent of the cable community subscribes to the system's service or if the cable com-

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173. Laura Malt & Kathy Clayton, *Cable Report Fuels Debate on Regulation*, ELECTRONIC MEDIA, Aug. 7, 1989, at 1, 39; Kim McAvoy, *GAO on Cable: Rates OK, but Industry Needs Regulation*, BROADCASTING, Aug. 7, 1989, at 30.

174. Malt & Clayton, *supra* note 173, at 1.

175. *Id.* at 39; McAvoy, *supra* note 173, at 31.

176. McAvoy, *supra* note 173, at 31.

177. Kim McAvoy, *Gore Seeks More Review of Cable Rates*, BROADCASTING, Aug. 14, 1989, at 60.

178. *Id.*

179. S. 1880, 101st Cong., 1st Sess. (1989); H.R. 3826, 101st Cong., 1st Sess. (1989).

180. S. 1880, 101st Cong., 1st Sess. § 4(a) (1989); H.R. 3826, 101st Cong., 1st Sess. § 4(a) (1989).

181. 135 CONG. REC. S15702, S15703 (daily ed. Nov. 15, 1989) (statement of Sen. Danforth).

munity is served by more than one multichannel video distributor.[182] Senator Danforth noted two advantages to this change:

> First, it protects consumers from monopolistic pricing unless there is a true alternative to the cable system operator. Rates for basic cable services, that is, the service tier on which local broadcast signals are retransmitted, can be regulated if there is no true competition. Second, it provides an incentive for the cable industry to allow competition to develop: if there is a second provider, the cable operator's rates are deregulated.[183]

Other commentators voiced similar criticisms of the FCC's three off-the-air signal standard:

> Despite the fact that the new standards will allow a greater number of cable operators to set rates, the Commission's three-signal standard still does not properly satisfy the FCC's statutory obligation to determine the circumstances under which a cable system is faced with effective competition. An appropriate effective competition standard should take into account the diversity and amount of programming supplied by typical cable systems, *for which three broadcast television signals rarely, if ever, provide an effective substitute.*[184]

Thus, it is clear many no longer deemed it reasonable to compare cable service to available off-the-air signals.

Second, because cable systems serve as "gatekeepers" who decide what programming subscribers receive, the Danforth and Cooper measures also limited a cable operator's discretion in program selection and channel placement by requiring the carriage of certain local broadcast stations.[185] Such a requirement was added to ensure local subscribers had access to

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182. S. 1880, 101st Cong., 1st Sess. § 4(a) (1989); H.R. 3826, 101st Cong., 1st Sess. § 4(a) (1989). A multichannel video programming distributor is defined as "a person such as, but not limited to, a cable system, a multichannel multipoint distribution service, or a television receive-only satellite program distributor who makes available for purchase, by subscribers or customers, multiple channels of video programming." S. 1880, 101st Cong., 1st Sess. § 3(c) (1989); H.R. 3826, 101st Cong., 1st Sess. § 3(c) (1989).

183. 135 CONG. REC. S15702, S15703 (daily ed. Nov. 15, 1989) (statement of Sen. Danforth).

184. Sinel et al., *supra* note 152, at 488 (emphasis added).

185. S. 1880, 101st Cong., 1st Sess. § 5 (1989); H.R. 3826, 101st Cong., 1st Sess. § 5 (1989); *see* 135 CONG. REC. S15703 (daily ed. Nov. 15, 1989) (statement of Sen. Danforth). Senator Danforth said, "I think the worst thing in the world is to have one gatekeeper, meaning the cable company, controlling information to the home." Doug Halonen, *Cable Gets More Flak on the Hill*, ELECTRONIC MEDIA, Nov. 20, 1989, at 1.

local stations.[186] Third, the bills made it easier for a franchising authority to revoke a franchise or to deny a franchise renewal.[187]

The fourth provision was intended to combat the problems of vertical integration in the cable industry. As a result of the common ownership of cable program suppliers and cable operators, problems arose when the programmers favored their affiliated operators over other video providers.[188] Therefore, the measures would have barred cable programmers from discriminating against nonaffiliates regarding price, terms, conditions, or program availability.[189]

Finally, the bills attempted to curb horizontal integration. The cable industry is dominated by a few "multiple system operators" ("MSO"),[190] so the measures would have capped the size of any MSO at fifteen percent of the country's cable subscribers.[191]

2. *The Political Significance of Senate 1880 and House 3826*

Both bills received a tremendous amount of bipartisan support, and Senator Danforth, as the ranking Republican on the Senate Commerce Committee, was in a position to guide his bill through Congress.[192] Furthermore, in light of mounting consumer dissatisfaction,[193] the timing

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186. 135 CONG. REC. S15702, S15703 (daily ed. Nov. 15, 1989) (statement of Sen. Danforth).

187. S. 1880, 101st Cong., 1st Sess. § 6 (1989); H.R. 3826, 101st Cong., 1st Sess. § 6 (1989).

188. 135 CONG. REC. S15702, S15703 (daily ed. Nov. 15, 1989) (statement of Sen. Danforth).

189. S. 1880, 101st Cong., 1st Sess. § 9 (1989); H.R. 3826, 101st Cong., 1st Sess. § 9 (1989). Testimony before Senate Commerce Committee hearings revealed that some cable programmers "cut off, or significantly restricted, the supply of desirable programming to [companies that attempted to provide alternatives to cable programming]." 135 CONG. REC. S15702, S15704 (daily ed. Nov. 15, 1989) (statement of Sen. McCain).

190. The top five MSOs feed 42% of the cable market, which is more than one-half of all television households in the United States. Smart, *supra* note 159, at 136.

191. S. 1880, 101st Cong., 1st Sess. § 10 (1989); H.R. 3826, 101st Cong., 1st Sess. § 10 (1989).

192. Doug Halonen, *Senator Danforth Plans Stringent Cable Legislation*, ELECTRONIC MEDIA, Nov. 6, 1989, at 1. Cable re-regulation also has the apparent support of Senate Communications Subcommittee Chairman Senator Daniel Inouye, a Democrat from Hawaii: "All of our mailbags have been extremely heavy with complaints about shoddy service and excessive rate hikes. We can't close our ears to the shouts from our constituents." Halonen, *supra* note 185, at 1. Comments supporting the House version of the bill basically echo those made in support of Senate 1880. *See, e.g.*, 135 CONG. REC. E4102 (daily ed. Nov. 21, 1989) (statement of Rep. Cooper); 135 CONG. REC. E4121 (daily ed. Nov. 21, 1989) (statement of Rep. Shays).

193. "Some senators have garnered so many complaints from constituents about cable rates and service that legislation will move even if cable limits further rate hikes and improves service." Harrell A. Jessell, *Voices from Hill Differ on Likelihood of Cable Dereg Bill*, BROADCASTING, Dec. 18, 1989, at 45; *see* Doug Halonen, *Deregulation Stirs Trading, Rate*

was right for popular support for this legislation. Finally, powerful lobbies, such as the National Association of Broadcasters and the Association of Independent Television Stations, backed Senator Danforth's measure.[194] Therefore, there appeared to be a substantial likelihood that these bills, or variations of them, would become law.[195] Nevertheless, the bills died on their respective floors, and the focus shifted to the FCC's response.

B. *FCC Response*

Pursuant to the Cable Act, the FCC was required to review the competitive effects of the Act and to submit to Congress, before October 30, 1990, a report regarding rate regulation of cable services.[196] This inquiry began with a Notice of Inquiry ("NOI") in December 1989, and was scheduled to be completed by July 31, 1990.[197] In conjunction with the NOI, the FCC and the GAO were to conduct an expanded rate survey.[198]

Contrary to congressional efforts to re-regulate the industry, the FCC appears to favor controlling rates by injecting more competition into the market. In the NOI, the FCC noted rates could be controlled either by removing restrictions on cable's competitors or by directly re-regulating the industry, but the FCC stressed its belief "that in the long-term, competitive market forces will best promote the interests of viewers or consumers."[199] Furthermore, FCC Chairman, Al Sikes, apparently preferred increased competition over re-regulation and supported allowing telephone companies to compete with cable.[200]

Increases, ELECTRONIC MEDIA, Jan. 1, 1990, at 28 (Although cable has prospered under the Cable Act, "many believe the regulatory brakes will be applied in the 1990s.").

194. *Cable Regulation*, BROADCASTING, Jan. 1, 1990, at 107.

195. One other proposal, in a bill reportedly being drafted by Senator Inouye and Senator Ernest Hollings of South Carolina, would create a price-capped "basic-basic" tier of service with just local off-the-air signals and access channels. *FCC Moves to Reregulate Cable*, BROADCASTING, Jan. 15, 1990, at 55-56. Conflicting reports exist, however, as to the likelihood that re-regulation will occur. While some aides to the Senate Commerce Committee believe such legislation is likely, minority counsel for the House Telecommunications Subcommittee is less optimistic. *See Voices from Hill Differ on Likelihood of Cable Deregulation Bill*, BROADCASTING, Dec. 18, 1989, at 45.

196. 47 U.S.C. § 543(h) (1988).

197. *See* Notice of Inquiry, 5 F.C.C. Rec. 362 (1989).

198. *Id.* at 364.

199. *Id.* at 363. Obviously, the cable interests such as the NCTA favor the FCC's position over that of Congress while broadcasting interests such as the National Association of Broadcasters ("NAB") support the congressional initiatives. Doug Halonen, *FCC Starts Cable MSO Scrutiny*, ELECTRONIC MEDIA, Dec. 18, 1989, at 6; *see* Harry A. Jessell *Cablecasters Go West to Contemplate a Reregulatory Future*, BROADCASTING, Dec. 18, 1989, at 43 (California Cable Television Association contended the return of regulation "would mean the end of the steady improvement in programming and program choices since the deregulation.").

200. Halonen, *supra* note 185, at 1; *Cable Regulation*, BROADCASTING, Jan. 1, 1990, at 107.

On the issues of cable rates and service, the NOI sought to determine how rates had changed since the promulgation of the Cable Act and since the implementation of the FCC's effective competition standard.[201] The NOI also sought to compare these changes to the inflation rate and to the change in availability of cable channels.[202] Furthermore, the FCC sought comments on the experience of cable consumers in regard to the provision of their cable service.[203]

In regard to potential competitors and the relevant markets, the FCC sought other information. For example, the FCC asked which delivery systems should be taken into account when measuring the relevant market for cable competition.[204] The FCC also inquired into whether market power should be determined by accounting for other media or just other cable systems, and it asked how those other media and their potential availability exerted competitive pressure on cable systems.[205] Finally, the FCC wanted to know how the availability of those alternatives had changed since the Cable Act had been passed, and how the availability of alternatives would spur cable's development in underserved and unserved areas.[206]

After considering more than 180 comments, nearly 70 reply comments, detailed ownership information from the top MSOs, 3 field hearings, written responses to the hearings, a joint FCC-GAO survey, and additional information from other parties, the FCC concluded more regulation would not be the appropriate remedy for this rate control problem.[207] In this regard, the FCC noted:

> [W]hile we desire to deal effectively with specific anti-competitive abuses, we find in this Report no need to encumber the cable industry with a harsh new regulatory regime. Rather, we propose to foster a more competitive marketplace for the distribution of multichannel video services. Our Report therefore proposes, first, the removal of certain undue regulatory barriers to multichannel service competition and, second, certain targeted and generally temporary restraints on certain cable industry practices which directly or indirectly impede such competition.[208]

Based on this conclusion, the FCC recommended Congress enact measures that would avoid re-regulation and would encourage competition in the

201. Notice of Inquiry, 5 F.C.C. Rec. at 364.
202. *Id.* at 364-65.
203. *Id.* at 365.
204. *Id.*
205. *Id.*
206. *Id.*
207. Broadcast Services; Cable Television Inquiry, 55 Fed. Reg. 32,631 (1990).
208. *Id.*

video marketplace.[209] Unfortunately, the 101st Congress was unable to pass any cable legislation during 1990.[210]

It is clear the FCC is willing to recognize the changes that have occurred in the media marketplace and to recognize those changes have not benefitted the consumers. The major change the FCC is willing to acknowledge is that prior to deregulation, basic cable service consisted mainly of local broadcast signals.[211] After deregulation, however, cable systems shifted attractive programming to the basic tier to make it more appealing to consumers.[212] As a result,

> while three off-the-air broadcast television signals may have been an appropriate measure of "effective competition" when the basic service tier consisted primarily of signals available over the air, local broadcast signals may no longer be a good substitute for the full range of programming now included on the basic tier. . . . The tentative conclusion appears to be reinforced by the fact that under the existing "effective competition" standard, rates for basic cable service have increased substantially.[213]

Thus, the FCC concurred with Danforth and Cooper in their belief that effective competition could no longer be based on the three-signal standard.

In addition to the FCC's six-year review mandated by the Cable Act,[214] the FCC was also required to periodically review and amend its rate regulation rules in light of technological developments.[215] Recognizing the three-signal standard was no longer an accurate measure of effective competition, in January 1990, the FCC issued a Notice of Proposed Rule Making and a Further Notice of Proposed Rule Making to reexamine that standard.[216]

The first alternative suggested by the FCC increased the number of available off-the-air signals received by a community before a cable system would be classified as subject to effective competition.[217] The FCC noted, however, that this proposal assumed cable customers subscribe to get better

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209. *Id.*

210. *See* 136 CONG. REC. S18, 071-101 (daily ed. Oct. 24, 1990) (statement of Sen. Danforth).

211. Harry Jessell, *FCC Moves to Reregulate Cable,* BROADCASTING, Jan. 15, 1990, at 55.

212. *Id.*

213. *Id.* (quoting Marcia Glauberman, FCC Mass Media Bureau attorney).

214. 47 U.S.C. § 543(h) (1988).

215. *Id.* § 543(b)(3).

216. *See* Notice of Proposed Rule Making, 5 F.C.C. Rec. 259 (1990); Further Notice of Proposed Rule Making, 6 F.C.C. Rec. 208 (1991). *See generally* 55 Fed. Reg. 4208 (1990); 56 Fed. Reg. 406 (1991).

217. Notice of Proposed Rule Making, 5 F.C.C. Rec. 259, 262-63 (1990); Further Notice of Proposed Rule Making, 6 F.C.C. Rec. 208, 209 (1991).

reception of off-the-air signals.[218] Second, the FCC sought comment on alternative delivery systems that provide adequate competition for cable.[219] This proposal recognized that no matter how many off-the-air signals were available, those channels may not be adequate substitutes for cable.[220] Third, noting a high penetration of cable service may be indicative of undue market power, the FCC also inquired into ways of distinguishing between high penetration as undue market power and high penetration as an indication of the provision of a valuable service in a generally competitive market.[221] Fourth, the FCC proposed requiring cable systems to provide service on an unbundled (i.e., per channel) basis.[222] According to the FCC, "[s]uch a marketing scheme would afford consumers greater choice in their purchase of cable service because it would permit them to purchase only those channels they specifically desire rather than a tier of service that includes signals they may not want."[223] Finally, the FCC emphasized the standard could be based on a combination of off-the-air and other video services.[224]

C. *The FCC's Current Rate Regulation Rules*

These notices generated considerable response. The resulting record led the FCC to conclude the three-signal effective competition standard "no longer reflects the realities of the cable industry and the broader video market place."[225] As a result, the FCC promulgated a new effective competition standard that allows for alternative ways of determining whether a cable system is subject to effective competition.[226] Under these present rules, cable systems will be determined to be subject to effective competition if either of the following conditions are met:

> (i) 100 percent of the cable community receives service from at least six unduplicated broadcast television signals. It is not necessary that the same six signals provide service to the entire community. . . .
>
> . . .
>
> (ii) An independently owned, multichannel video delivery service is available to at least 50 percent of the homes passed by the incumbent

218. Notice of Proposed Rule Making, 5 F.C.C. Rec. at 262; Further Notice of Proposed Rule Making, 6 F.C.C. Rec. at 209.

219. Notice of Proposed Rule Making, 5 F.C.C. Rec. at 262; Further Notice of Proposed Rule Making, 6 F.C.C. Rec. at 210-13.

220. Notice of Proposed Rule Making, 5 F.C.C. Rec. at 262.

221. *Id.* at 262-63.

222. *Id.* at 263.

223. *Id.*

224. *Id.*

225. 47 C.F.R. § 76 (1991).

226. *Id.* § 76.33(a)(2).

> cable system . . ., and at least 10 percent of the homes passed by the alternative system within the incumbent cable system's service area actually subscribe to the service. Video delivery services that may be counted include a competing cable system, a multichannel, multipoint distribution system (MMDS), satellite master antenna television (SMATV), home satellite dishes (HSD), and direct broadcast satellite services (DBS). It is not necessary that the same multichannel video delivery service be available throughout the area. . . .[227]

V. APPLICATION OF THE NEW EFFECTIVE COMPETITION STANDARD

Under the present rules, a cable system can be subject to effective competition if at least six unduplicated over-the-air broadcast signals are available in the cable community.[228] Commercial stations, noncommercial stations, satellite stations, television translators, and low power television stations will all be counted to determine whether six unduplicated over-the-air broadcast signals are available in the cable community.[229] The FCC hopes this standard will "be conservative enough to ensure a complement of signals adequate to provide effective competition to the signal retransmission function of the basic tier, yet not so conservative as to cause unnecessary regulation."[230]

As an alternative, a cable system may also be subject to effective competition if another multichannel video provider is available to at least half of the homes passed by the incumbent cable system.[231] The wide variety of multichannel video providers that the FCC will consider indicates the FCC's belief that "these alternatives provide a variety of programming services with many of the characteristics of local stations and provide for reception of local over-the-air stations."[232]

These new rules reflect the FCC's realization that comparing cable to over-the-air broadcast signals simply does not reflect the realities of the video marketplace. Accordingly, the FCC has allowed alternative means for determining whether a cable system is subject to effective competition. In effect, these regulations should reduce the number of systems subject to effective competition, thereby making more cable systems subject to rate regulation.

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227. *Id.*
228. *Id.* § 76.
229. *Id.*
230. *Id.*
231. *Id.*
232. *Id.*

VI. CONCLUSION

The Cable Act was enacted with two goals. First, the Act sought to foster the development of the cable television industry. Clearly, this has been accomplished. Cable television is fast becoming one of the most pervasive media in the United States. In 1980, 17.7 million, or 22 percent, of America's television households subscribed to cable.[233] By 1989, those figures grew to 52.5 million and 57 percent.[234] As previously noted, there has also been a corresponding increase in cable rates.[235] Moreover, it was projected that in 1990, the average monthly rate for basic cable service would increase to $16.94.[236] That figure is expected to be $24.00 by 1995.[237]

Second, the Act sought to ensure cable systems would be responsive to their subscribers' needs and interests. The industry has responded by providing many new video services for cable consumers. By initially promulgating standards that made nearly every cable system subject to effective competition, however, the FCC made it nearly impossible for communities to regulate the basic cable rates their systems charge. Consequently, cable rates skyrocketed to the consumers' detriment.

The FCC's current effective competition standard should remedy this problem. This standard should ensure that only cable systems subject to truly *effective* competition will be free from regulation. In addition, this standard should induce the cable industry to encourage the growth of alternative multichannel video providers because once such providers develop, the industry will be free from rate regulation. This should ensure the consumers' needs and interests are served because the new standards will help provide consumers abundant video programming at competitive rates.

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233. Kathy Clayton, *Cable Leaps and Bounds into the 1990's*, ELECTRONIC MEDIA, Jan. 1, 1990, at 25; *see* Margaret E. Kriz, *Cable's Comeuppance*, 20 NAT'L J., Mar. 26, 1988, at 807, 808.

234. Clayton, *supra* note 233, at 25.

235. *See supra* text accompanying notes 166-84.

236. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 548 (1989).

237. *Id.*