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THE FCC AND FIVE YEARS OF THE CABLE COMMUNICATIONS POLICY ACT OF 1984: TUNING OUT THE CONSUMER?

I. INTRODUCTION

The Cable Communications Policy Act of 1984[1] (the "Cable Act") was a comprehensive amendment to the Communications Act of 1934.[2] The Cable Act established the national policy for the regulation of the cable television industry.[3] The focus of the Cable Act and the administrative rules implementing the act has been on the relationship between franchising municipal authorities and cable television operators.[4] Congress addressed some consumer issues in the Cable Act[5] such as subscriber privacy,[6] commercial access channels,[7] and public, educational, and governmental ("PEG") channels.[8]

While Congress and the Federal Communications Commission ("FCC") assumed that competition between broadcast stations and other competing video media would eliminate the need for rate regulation of cable systems,[9] the Cable Act, in fact, provided a windfall for cable operators.[10]

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1. Pub. L. No. 98-549, § 2, 98 Stat. 2780 (1984) (codified at 47 U.S.C. §§ 521-559 (Supp. V 1987)).

2. 47 U.S.C. §§ 151-611 (1982 & Supp. V 1987).

3. The Cable Act replaced multifarious Federal Communications Commission regulations and rulings. *See infra* notes 28-33 and accompanying text.

4. The Cable Act was primarily the result of intense lobbying efforts by city and cable industry representatives. *See* 130 CONG. REC. S14,283 (daily ed. Oct. 11, 1984) (statement of Sen. Goldwater).

"The key to understanding [the Cable Act] is to recognize that it is, above all else, a compromise [between cities and the cable industry]." Meyerson, *The Cable Communications Policy Act of 1984: A Balancing Act on the Coaxial Wires*, 19 GA. L. REV. 543, 545 (1985) (citing 130 CONG. REC. H10,435 (daily ed. Oct. 1, 1984) (statement of Rep. Wirth)).

5. For a general discussion of consumer issues addressed by the Cable Act, see McCauley & Orlando, *The Rights of the Consumer Under the Cable Communications Policy Act of 1984*, 65 MICH. B.J. 1112 (1986).

6. 47 U.S.C. § 551.

7. *Id.* § 532.

8. *Id.* § 531.

9. One stated purpose of the Cable Act is to "promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems." 47 U.S.C. § 521(6); *see also* 47 U.S.C. § 543(b)(1) (authorizing a franchising authority to regulate cable system rates only if the system is not subject to "effective competition"); *infra* text accompanying notes 44-53 (the FCC's assumption that a cable system is subject to effective competition has created "legal" monopolies which have been challenged).

Cable television programming includes clear reception of at least several local and distant broadcast signals, satellite specialty programming and news, sports, music, and educational

Since the Cable Act deregulated subscriber rates on December 29, 1986,[11] those rates have risen sharply.[12] In addition, rate deregulation has led to bidding wars for existing "properties," where bidders acquire existing franchises at ever increasing prices and pay significant financing costs simply by raising subscriber prices.[13]

This Note demonstrates how the FCC used the Cable Act to protect the cable industry and why the courts should invalidate most exclusive cable franchises. Part II of this Note traces the development of federal regulation of the cable industry and the federal march toward rate deregulation. Part II also illustrates how deregulation operates to maximize cable system revenues at the expense of the consumer welfare. Part III discusses the mechanics of cable franchising and describes economic explanations and political justifications for creating cable monopolies. Part IV discusses legal challenges to the franchise process that are designed to open cable markets to competition, thus suggesting a need for judicial reexamination or federal statutory reform of the exclusive franchise.

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channels. Yet, Congress seems to have accepted the cable industry's proposition that VCR's, movies, and free broadcast television are effective substitutes for cable's programming.

The other stated purposes of the Cable Act are to:

> (1) establish a national policy concerning cable communications;
>
> (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;
>
> (3) establish guidelines for the exercise of Federal, State, and local authority with respect to the regulation of cable systems;
>
> (4) assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public;
>
> (5) establish an orderly process for franchise renewal which protects cable operators against unfair denials of renewal where the operator's past performance and proposal for future performance meet the standards established by [the Cable Act].

47 U.S.C. § 521(1)-(5).

10. This fact seems to indicate that cable's programming choices render alternative video media inadequate substitutes.

11. The effective date of the Cable Act was December 29, 1984. *See* Pub. L. No. 98-549 § 9(a), 98 Stat. 2806 (1984). The Cable Act contained a two-year grandfathering period relative to rate regulation for existing franchises. *See* 47 U.S.C. § 543(c).

12. Barker, *Deregulation Brings Bigger Cable TV Bills Into Sharp Focus*, Wash. Post, Aug. 8, 1989, at D1, col. 1 (basic cable service rates rose 25% nationwide between 1987 and 1988 according to a General Accounting Office report); *Cable-TV Cost Rose 6.7% in Six Months, Survey Says*, Wall St. J., Nov. 24, 1987, at 20, col. 2 (basic cable service prices rose average of 10.6% according to Arthur Andersen & Co. survey).

13. *See, e.g.*, Landro, *Market for Cable TV Systems Heats Up*, Wall St. J., Mar. 9, 1988, at 4, col. 1; Landro, *Cable TV Systems, Since Deregulation, Are Selling at Increasingly Higher Prices*, Wall St. J., May 19, 1987, at 12, col. 2. Cable industry revenues were $3.6 billion in 1984, $3.6 billion in 1985, $4.5 billion in 1986, and $11.4 billion in 1987. BROADCASTING CABLECASTING Y.B., at D-3 (1985, 1986, 1987, 1988).

II. Maximizing Cable Revenues at Consumer Expense: The Development of Federal Regulation and Local Rate Deregulation

A. *Regulation of the Cable Industry Before the Cable Act*

The cable television industry began to develop in the 1950's.[14] From the start, municipalities necessarily regulated certain aspects of local cable systems because coaxial cable networks used public streets and rights of ways.[15] Moreover, the nature of cable systems is intrinsically local, "involving cable equipment through the public streets and ways, local franchises, local intra-state advertising and selling of services and local intra-state collections. In this perspective, a community antenna system is essentially a local business . . . [and] these [services] are subjects which lend themselves naturally to local control and supervision."[16]

Federal regulation, on the other hand, proceeded in an uncertain direction.[17] Initially, the FCC declined to assert regulatory jurisdiction over cable on the grounds that it lacked express statutory authority.[18] How-

14. At first, the purpose of cable systems was to bring adequate signals of local broadcast stations to areas with unfavorable reception, either because of distance or adverse terrain. Early cable system operators typically erected antennas at favorable points of reception, usually elevated sites, to receive and amplify local broadcast signals. The operators distributed the signals to subscribers by way of coaxial cable networks. *See* Frontier Broadcasting Co. v. Collier, 24 F.C.C. 251, 252 (1958), *modified*, Carter Mountain Transmission Corp., 32 F.C.C. 459, 465 (1962). Microwave common carrier service enabled cable systems to transmit to subscribers distant signals which were entirely beyond the range of local antennas. Microwave facilities would receive distant stations at points near their location and relay the signals to cable system antennas. *See* Impact of Community Antenna Systems, TV Translators, TV "Satellite" Stations, and TV "Repeaters" on the Orderly Development of Television Broadcasting, 26 F.C.C. 403, 408-09, (1959) (inquiry) [hereinafter CATV and TV Repeater Service]; *rev'd on other grounds*, Carter Mountain Transmission Corp., 32 F.C.C. 459 (1962) (application), *aff'd* 321 F.2d 359 (D.C. Cir.), *cert. denied*, 375 U.S. 951 (1963); *see also* United States v. Southwestern Cable Co., 392 U.S. 157, 161-64 (1968) (Supreme Court affirmed FCC jurisdiction over the cable industry).

15. "The transmission of video signals by wires attached to poles on public property invokes the historic power—indeed the responsibility—of state and local governments to ensure that public streets [and rights of ways] are used for public purposes." Grow, *Cable Television: Local Governmental Regulation in Perspective*, 7 PACE L. REV. 81, 92 (1986) (citing City of New York v. Rice, 198 N.Y. 124, 91 N.E. 283 (1910); American Rapid Tel. Co. v. Hess, 125 N.Y. 641, 26 N.E. 919 (1891)).

16. TV Pix, Inc. v. Taylor, 304 F. Supp. 459, 463 (D. Nev. 1968), *quoted in* Grow, *supra* note 15, at 92 n.54.

17. For a discussion of federal regulation in the cable industry, see Grow, *supra* note 15, at 86-96 and Wadlow & Wellstein, *The Changing Regulatory Terrain of Cable Television*, 35 CATH. U.L. REV. 705 (1986).

18. *See Frontier Broadcasting Co.*, 24 F.C.C. at 254 (declining to assert regulatory jurisdiction under title II of the Communications Act, because cable operators are not communications common carriers), *reconsideration denied* in conjunction with CATV and TV Repeater Service, *supra* note 14, at 427-28; (declining to assert regulatory jurisdiction, because cable systems transmit signals by wire, not airwaves, and because the FCC did not have plenary power over all communications systems).

ever, in the early 1960s the FCC began to reverse its position. First, the FCC regulated the licensing of microwave common carriers that relayed signals from distant broadcast stations to cable system antennas.[19] Additionally, the FCC adopted minimum carriage and nonduplication requirements for cable systems that received microwave service.[20] In 1966, the FCC expanded these regulations to cover all cable systems.[21]

The Supreme Court affirmed the FCC's jurisdiction over the cable industry two years later in *United States v. Southwestern Cable Co.*[22] The Court held that cable television was interstate communication, that the FCC had regulatory authority over all interstate communication by wire or radio, and that the FCC had reasonably concluded that cable regulations were necessary to carry out statutory objectives relative to the broadcast industry.[23] Thus, the FCC could regulate the cable industry so long as the promulgated regulations were "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting."[24]

After the *Southwestern* decision, the FCC promulgated numerous regulations designed to protect the broadcast industry[25] and to increase pro-

19. *See* Carter Mountain Transmission Corp., 32 F.C.C. 459, 465 (1962) (application) (denying license to microwave relay facility due to potential adverse economic impact on local broadcast station), *aff'd*, 321 F.2d 359 (D.C. Cir.), *cert. denied*, 375 U.S. 951 (1963).

20. *See* Amendment of Subpart L, Part 11, To Adopt Rules and Regulations To Govern the Grant of Authorizations in the Business Radio Service for Microwave Stations To Relay Television Signals to Community Antenna Systems, 38 F.C.C. 683 (1965) [hereinafter Rules re Microwave-Served CATV], *aff'd sub nom.* Black Hills Video Corp. v. FCC, 399 F.2d 65 (8th Cir. 1968) (adopting regulations applicable only to cable systems that received microwave service). The FCC noted that it "determined as an initial matter that the Communications Act vests in this agency appropriate rulemaking authority over all CATV systems, including those which do not use microwave relay service. . . ." 38 F.C.C. at 685.

21. *See* Amendment of Subpart L, Part 91, To Adopt Rules and Regulations To Govern the Grant of Authorization in the Business Radio Service for Microwave Stations To Relay Television Signals to Community Antenna Systems, 2 F.C.C.2d 725 (1966) [hereinafter CATV], *aff'd sub nom.* Black Hills Video Corp. v. FCC, 399 F.2d 65 (8th Cir. 1968). The FCC cited 47 U.S.C. § 152(a) among others as authorizing the FCC to regulate all interstate and foreign communications by wire or radio. 2 F.C.C.2d at 733-34.

22. 392 U.S. 157 (1968).

23. *Id.* at 173.

24. *Id.* at 178.

25. *See Carter Mountain*, 32 F.C.C. at 465 (denying license to microwave relay facility due to potential adverse economic impact on local broadcast station); *see also* CATV, *supra* note 21, at 725 (extending carriage and nonduplication rules to nonmicrowave-served cable systems); Rules re Microwave-Served CATV, *supra* note 20, at 683 (adopting minimum carriage and nonduplication requirements for microwave-served systems).

The FCC stated its belief that "the imposition of minimum carriage and nonduplication requirements by rule is required in order to ameliorate the adverse impact of CATV competition upon local stations, existing and potential," Rules re Microwave-Served CATV, *supra* note 20, at 713, and "to avoid unfair competitive disadvantage to and prejudicial effect on existing and potential broadcast service." CATV *supra* note 21 at 745.

gram diversity.[26] In 1972, the FCC issued comprehensive regulations for the cable industry.[27] The 1972 regulations consisted of "must carry" rules,[28] distant signal rules, network and syndicated program exclusivity rules,[29] access channel requirements,[30] technical standards,[31] cross-ownership rules,[32] and franchising and rate regulation rules.[33] This Note focuses

26. *See* Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to Community Antenna Television Systems, 15 F.C.C.2d 417, 421 (1968).

27. *See* Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to Community Antenna Television Systems, 36 F.C.C.2d 143 (1972), [hereinafter Cable Television Report and Order], *aff'd sub nom.*, American Civil Liberties Union v. F.C.C., 523 F.2d 1344 (9th Cir. 1975), *modified sub nom.* Midwest Video Corp. v. F.C.C., 571 F.2d 1025 (8th Cir. 1978). *See generally* Wadlow & Wellstein, *supra* note 17, at 708-11 (discussing legal challenges to various cable regulations).

28. *See* Cable Television Report and Order, *supra* note 27, at 147-81 (codified at 47 C.F.R. §§ 76.55, .57(a), .59(a), .61(a) (1973)). "Must carry" rules require many cable systems to transmit upon request certain local broadcast signals. *See* 47 C.F.R. §§ 76.56, .58, .62, .64 (1988). The purposes of these rules are to assure carriage of local broadcast signals and to gauge and ameliorate the competitive impact of distant broadcast stations. Cable Television Report and Order, *supra* note 27, at 173. The Court of Appeals for the District of Columbia ruled that the FCC failed to demonstrate a substantial governmental interest in protecting local broadcasting and therefore the existing "must carry" regulations were unconstitutional. Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1463 (D.C. Cir. 1985), *cert. denied,* 476 U.S. 1169 (1986). Effective July 14, 1989, the FCC deleted all mandatory carriage requirements for cable systems. Cable systems were to comply with these requirements by November 1, 1989. 47 C.F.R. §§ 76.5, .53 to .70.

29. *See* Cable Television Report and Order, *supra* note 27, at 181-89. Distant signal rules limit the number of distant signals a cable system can carry depending on the size of the television market in which the system operates. *See* 47 C.F.R. §§ 76.59(b)-(e), .61(b)-(f), .63 (1973), *repealed,* Cable Television Syndicate Program Exclusivity Rules, 79 F.C.C.2d 663 (1980), *repeal aff'd sub nom.* Malrite T.V. of N.Y. v. FCC, 652 F.2d 1140 (2d Cir. 1981), *cert denied* 454 U.S. 1143 (1982). Network and syndicated program exclusivity rules require cable systems to delete particular network or syndicated programs if carrying such programs would duplicate a signal already being transmitted by a local broadcast station. *See* 47 C.F.R. §§ 76.91, .93, .95, .97, .151, .153, .155, .157, .159 (1973), *repealed in part,* Cable Television Syndicated Program Exclusivity Rules, 79 F.C.C.2d 663 (2d Cir. 1980), *repeal aff'd sub nom.* Malrite T.V. of N.Y. v. FCC, 652 F.2d 1140 (2d Cir. 1981), *cert. denied,* 454 U.S. 1143 (1982).

30. *See* Cable Television Report and Order, *supra* note 27, at 189-204 (codified at 47 C.F.R. § 76.251 (1973)) (requiring cable operators to dedicate channels for public, educational, and governmental (PEG) uses, and channels for leasing to the general public on a first-come first-serve basis). Without addressing first amendment implications, the Supreme Court determined that access channel requirements exceeded the FCC's authority because they imposed common carrier status on cable operators, which section 3(h) of the Federal Communications Act does not permit. FCC v. Midwest Video Corp. (Midwest II), 440 U.S. 689 (1979), *aff'g,* 571 F.2d 1025 (8th Cir. 1978). The Cable Act contains access channel requirements. *See* 47 U.S.C. §§ 531-532 (Supp. V 1987).

31. *See* Cable Television Report and Order, *supra* note 27, at 198-204 (codified at 47 C.F.R. §§ 76.601, .605, .609, .613, .617 (1973)).

32. 47 C.F.R. § 76.501 (1973). These cross-ownership rules prohibited cable systems from owning, operating, controlling, or having any interest in networks and broadcast stations. *See id.* The Cable Act contains a cross-ownership provision which makes owning a broadcast station and a cable system in the same community unlawful. 47 U.S.C. § 533(a) (Supp. V

on franchising and rate regulation rules which govern cable systems.

B. *Disarming Local Regulators: From the FCC's 1972 Rules to the Cable Act*

In promulgating its 1972 rules, the FCC recognized the need for local involvement resulting from cable's use of streets and ways. The FCC looked to local authorities since they were able to "bring a special expertness" to franchising and other issues of local concern.[34] The FCC recognized the need for a consistent national cable communications policy.[35] Consequently, the FCC created a system of dual jurisdiction requiring cable operators to certify to the FCC that the franchise met certain federal standards relating to the franchise selection process, construction deadlines, duration of the franchise, rate regulation, service complaint procedures, and franchise fees.[36] The rules permitted local governments to grant franchises, approve initial rates and rate increases, and oversee subscriber complaints.[37]

Yet, shortly after these regulations were in place, the FCC moved to deregulate much of the cable industry. In 1974, the FCC limited local rate regulation to "regular subscriber service," which consists of only broadcast and required access channels.[38] The FCC preempted all local rate regulation of pay-channel services and concluded that "there should be no regulation of rates for such services at all by any governmental level."[39] The FCC's purpose for deregulating pay-channel services was to avoid a "chilling effect on the anticipated development" of such services.[40]

In 1977, the FCC repealed virtually all franchise standards contained in

1987). This provision was upheld as not violative of the first amendment in Mársh Media, Ltd. v. FCC, 798 F.2d 772, 776 (5th Cir. 1986), *cert. denied*, 479 U.S. 1085 (1987).

33. *See* Cable Television Report and Order, *supra* note 27, at 171-210 (codified at 47 C.F.R. § 76.31 (1973)).

34. *See id.* at 207.

35. *Id.*

36. *Id.* at 207-09.

37. *See* 47 C.F.R. § 76.31(a)(4) -(5) (1973).

38. Amendment of Part 76 of the Commission's Rules and Regulations Relative to the Advisability of Federal Preemption of Cable Television Technical Standards or the Imposition of a Moratorium on NonFederal Standards, 46 F.C.C.2d 175, 199 (1974) [hereinafter Cable Television] (codified at 47 C.F.R. § 76.31 (1975)).

39. *Id.* The preempted rates included distant broadcast imports, satellite delivered program service such as HBO, Showtime, The Movie Channel, BET, MTV, Nickelodeon, CBN, CNN, and any other video alternatives. *See* Community Cable TV, Inc., 95 F.C.C.2d 1204, 1215-17 (1983) (upholding preemption concerning satellite delivery as well as specialized and auxiliary program service).

40. Cable Television, *supra* note 38, at 199-200. The FCC's authority to preempt local rate regulation was upheld in Brookhaven Cable TV, Inc. v. Kelly, 573 F.2d 765, 767 (2d Cir. 1978), *cert. denied*, 441 U.S. 904 (1979).

the 1972 rules.[41] Local authorities were still permitted to directly regulate regular subscriber rates. An indirect means of regulating subscriber rates and services involved a type of *quid pro quo* where municipalities granted cable operators an exclusive franchise in exchange for some control over rates and services.[42] The Cable Act and the FCC eliminated both of these vehicles for public regulation.

C. *Rate Deregulation Under the Cable Act*

When Congress enacted the Cable Act, the FCC asserted its longstanding policy of preempting state or local rate regulation of cable, and allowing the free market to set subscriber rates.[43] Under the Cable Act, no franchising authority may regulate the rates for the provision of cable service, or any other communications service provided over a cable system to cable subscribers, except for basic cable services where a cable system is not subject to effective competition.[44]

The cable market is anything but a free market. The FCC's position is that a cable system is subject to effective competition, and therefore is exempt from local rate regulation, if three or more broadcast television signals are available in the cable community.[45] Since nearly every community receives at least three signals, nearly every community is subject to effective competition. Customarily, though, only one cable operator provides cable service in a community, often with a legal monopoly.[46] Yet, by FCC fiat, that cable monopoly is subject to "effective competition" and exempt from rate regulation.

The new deregulatory rate scheme was challenged by numerous groups including the National League of Cities in *American Civil Liberties Union v. FCC*.[47] Opponents of the Cable Act and the FCC claimed the FCC's definition of effective competition was so broad that few, if any, communities could regulate rates. Nevertheless, the *ACLU* court ruled that since the Cable Act failed to establish guidelines on what factors the FCC should use to determine effective competition, and since the legislative history merely suggested that the FCC should *consider* a variety of factors, the effective competition definition was "at a minimum

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41. *See* Amendment of Subparts B and C of Part 76 of the Commission's Rules Pertaining to Applications for Certificates of Compliance and Federal-State/Local Regulatory Relationships, 66 F.C.C.2d 380, 391 (1977) (codified at 47 C.F.R. §§ 76.13, .31 (1978).

42. *See infra* text accompanying notes 66-68.

43. *See supra* notes 38-41 and accompanying text.

44. 47 U.S.C. § 543 (a)-(b) (Supp. V 1987). "Basic cable service" means any service tier which includes the transmission of local television broadcast signals. *Id.* § 522(2) (Supp. V 1987).

45. 47 C.F.R. § 76.33(a)(2) (1988).

46. *See infra* note 59 and accompanying text.

47. 823 F.2d 1554 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 1220 (1988).

'reasonable.' "[48]

The *ACLU* court did find the signal availability test to be "arbitrary and capricious."[49] Under the signal availability test, every signal which placed a Grade B contour[50] over *any* portion of the cable community or which was significantly viewed within the cable community was counted as available.[51] The *ACLU* court, however, found no justification for considering as available to the whole community a signal which might only in fact be available to a small part of the community.[52]

In redefining effective competition after *ACLU*, the FCC adhered to its basic policy position of rate deregulation and protection of the cable industry. The FCC adopted new rules which deem a cable system subject to effective competition where three signals were available over *all* the community.[53] While a few additional communities might be permitted to regulate cable systems under the new definition, the FCC's all-inclusive definition of effective competition means most cable operators are still free to set prices in a protected market.

III. Cable Franchising: Creating the Cable Monopoly

The FCC's entrenched policy of protection for cable operators through preemption means that consumers must look beyond the local regulator for protection. Arguably, consumer interests in diverse programming, quality service, and reasonable prices will be achieved where cable operators in fact compete directly with other cable operators in the same community. Despite the predominance of protected markets, some cable operators are willing to compete with other cable operators if given the opportunity.[54] Before discussing legal challenges to the franchise process that would open protected markets to competition, an explanation of the mechanics of cable franchising and frequently expressed economic explanations and political justifications for monopolies is necessary.

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48. *Id.* at 1564. Petitioners argued that FCC rate regulations were arbitrary and capricious in definitions and criteria regarding "effective competition." *Id.*

49. *Id.* at 1571-73. The signal availability test was used to determine how to measure when a signal was available in a community. *Id.* at 1573.

50. A Grade B contour is one of two field strength contours. Field strength contours indicate the approximate extent of coverage over average terrain in the absence of interference from other television stations. *See* 47 C.F.R. § 76.683 (1988).

51. *See* 47 C.F.R. § 76.33(a)(2) (1988).

52. *ACLU*, 823 F.2d at 1572-73.

53. Amendment of Parts 1, 63, and 76 of the Commission's Rules to Implement the Provisions of the Cable Communications Policy Act of 1984, 3 F.C.C. Rec. No. 9, 2617 (1988).

54. *See, e.g.*, Preferred Communications, Inc. v. City of Los Angeles (Preferred I), 754 F.2d 1396 (9th Cir. 1985), *aff'd in part and remanded*, 476 U.S. 488 (1986).

A. *The Mechanics of Franchising*

The Cable Act requires all cable operators to obtain a franchise.[55] Typically, a franchising authority issues a request for proposals ("RFP") which sets forth facility and equipment requirements relating to the establishment or operation of a cable system[56] which the authority has deemed important. The franchising authority considers submitted proposals, and after making its franchise selection, authorizes construction of a system over public rights-of-way and through easements.[57] The Cable Act authorizes a franchising authority to impose a franchise fee on a cable operator of up to five percent of gross revenues.[58]

B. *The "Why's" and "How's" of Cable Monopolies*

The most striking characteristic of the cable television market is the omnipresence of the exclusive franchise.[59] One cable franchise litigation participant noted, "[I]n virtually every community in the country, cable systems receive a monopoly franchise from local governments. It is in fact a monopoly, even though it is almost always decorated with the sham label of 'non-exclusive franchise.' "[60] Few agree on the explanation or justification for the success of the cable industry in erecting legal barriers.

1. The Economics of Cable Television: A Natural Monopoly?

The cable market is most commonly described as a natural monopoly. Traditionally, a natural monopoly is said to exist where there are economies of scale so persistent that the entire demand within a relevant market can be satisfied at a lower unit cost by one firm rather than by two or more firms.[61] Under the economy of scale theory, a cable monopoly will develop in a given area because the larger a system's market share, the lower the average cost of production becomes. Smaller systems thus compete at a disadvantage and will exit the market until only one firm remains.

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55. 47 U.S.C. § 541(b)(1) (Supp. V 1987).

56. *Id.* § 544(b).

57. *Id.* § 541(a)(1)-(2).

58. *Id.* § 542(a)-(b).

59. "[O]ver 99% of the cable systems do not face direct competition from another cable system for subscribers." Meyerson, *supra* note 4, at 552 n.57 (citing Dawson, *How Safe is Cable's Natural Monopoly?*, CABLEVISION, June 1, 1981, at 340).

60. Schildhause, *Preferred Communications: Preamble to Breakup of Local Cable Franchising?*, 7 PACE L. REV. 1, 2 (1986) (citing CATO Institute, Policy Analysis, Mar. 13, 1984, at 4).

61. Posner, *Natural Monopoly and Its Regulation*, 21 STAN. L. REV. 548, 548 (1969).

A more modern approach to natural monopoly focuses on market contestability.[62] According to the market contestability theory, cable systems will exhibit competitive pricing unless capital is unable to freely enter and exit the market.[63] Theoretically, a natural monopoly would develop where capital costs of cable systems are high upon entrance *and* unsalvageable upon exit.[64] Whether the market in fact corresponds to either of these economic theories is a subject of debate. The answer is usually determined by the desired outcome.

2. Justifying the Cable Monopoly: The Magic of the Cable Lobby

In most instances, municipalities grant exclusive franchises on either a de facto or a de jure basis. Both the industry and municipalities assert numerous justifications for granting these exclusive franchises.

a. Consumer Protection: The Public Utilities Argument

The traditional justification for granting exclusive franchises relies on the fact that the cable industry exhibits natural monopoly characteristics.[65] The theory postulates that a cable market will automatically create a monopoly and that the monopoly will then set higher prices and provide subcompetitive services.[66] To prevent such a market condition, Professor (now Judge) Posner suggests that "[a] local community, as a condition to permitting a particular CATV operator the use of public rights-of-way, could bargain with it over the level of rates that the operator would charge subscribers in the community."[67] Therefore, cable operators would have an incentive to bid for the franchise and to accept lower prices in order to be the sole operator chosen.[68]

Professor Hazlett contends, however, that regardless of the merits of Professor Posner's economic analysis, the proposition fails on its own terms because the FCC has preempted almost every community's authority to regulate cable rates.[69] Though a municipality can grant an exclusive franchise, it can no longer bargain on behalf of the consumer.

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62. Hazlett, *Private Monopoly and the Public Interest: An Economic Analysis of the Cable Television Franchise*, 134 U. PA. L. REV. 1335, 1342 (1986).

63. *Id.*

64. *Id.*

65. *See id.* at 1338.

66. *See* Posner, *supra* note 61, at 642.

67. *Id.* at 643.

68. *See id.*

69. Hazlett, *supra* note 62, at 1347.

b. Preventing the Misallocation of Resources

Another justification for granting monopoly franchises also rests on the natural monopoly theory. This argument was asserted by Judge Posner in *Omega Satellite Products Co. v. City of Indianapolis.*[70] Judge Posner argued that if a natural monopoly existed and two or more operators were allowed to compete, then more than one cable grid would be built, but only one operator would survive.[71] Under this line of reasoning, in order to prevent "wasteful duplication of facilities," a municipality should grant one exclusive franchise to the most efficient operator.[72]

c. The Medium Scarcity Rationale

Still another justification relies on the analogy of cable media to broadcast media by comparing limited space on poles and in easements used by cable systems to the limited space on the electromagnetic spectrum that broadcast stations use.[73] Medium scarcity, which alludes to the inherent physical limitations that exist on the number of users of a communications medium, has been a constitutionally permissible rationale for regulating the radio and broadcast industry since *National Broadcasting Co. v. United States.*[74] In such instances, first amendment principles are furthered by having the government allocate these limited resources to select users, with no one having a first amendment right to be the particular person selected.[75]

In reality, the cable-broadcast analogy is tenuous at best. First, most exclusive cable franchises are granted, even though ample space remains on poles and in easements. Second, signals transmitted along two cable wires side-by-side do not interfere with each other, whereas every broadcast signal interferes with every other broadcast signal in the spectrum.

d. Preventing Public Disruption

A different justification for granting exclusive franchises deals with the authority of localities to oversee the use of public streets and rights-of-way. According to the public disruption justification, since building a cable grid often entails digging up streets and constructing lines along easements, local regulators should exercise their police powers to ensure

70. 694 F.2d 119, 126 (7th Cir. 1982).

71. *Id.*

72. *Id.*

73. *See, e.g.,* Community Communications, Inc. v. City of Boulder, 660 F.2d 1370, 1378 (10th Cir. 1981), *cert. dismissed,* 456 U.S. 1001 (1982).

74. 319 U.S. 190, 226 (1943).

75. *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 389 (1969) (wireless broadcast "licensee has no constitutional right to be the one who holds the license").

that disruption of the public domain is minimized.[76] Since an exclusive franchise would require the building of only one cable grid instead of two or more grids, disruption of the public streets will be minimized by the granting of an exclusive franchise.

e. Accumulating "Hidden" Revenue: The Franchise Fee

An additional justification for granting exclusive franchises is that localities are able to raise general revenues through a franchise fee. The Cable Act authorizes franchising authorities to impose franchise fees on cable operators for up to five percent of gross revenues.[77] The costs to localities of granting and regulating cable franchises, however, are minimal. Therefore, localities raise general revenue by a hidden tax. Indeed, localities have an interest in bargaining with operators to offer exclusive franchises and in extracting the five percent maximum. Localities also have an interest in allowing exclusive franchisees to charge monopoly prices, thereby raising gross revenues and total franchise fees. While this justification is rarely made public, it certainly factors into the rationale of local regulators.

Known pejoratively as accumulating "hidden" revenue, the constitutionality of this practice was tested and upheld in *Erie Telecommunications, Inc. v. City of Erie*[78] and *Group W, Cable, Inc. v. City of Santa Cruz*.[79] In both *Erie* and *Group W*, local franchisees claimed that the first amendment prohibits franchising authorities from imposing franchise fees in excess of the legitimate costs of granting and regulating the franchise.[80] The franchisees cited *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*,[81] which struck down a general revenue tax on paper and ink.[82] The local franchisees argued that fees over and above regulatory costs illegally singled them out as cable operators and conditioned their exercise of free speech on the payment of a tax.[83]

In ruling that the fees were permissible, both trial courts distinguished *Minneapolis Star* and relied on *Gannett Satellite Information Network, Inc. v. Metropolitan Transportation Authority*.[84] *Gannett* upheld a revenue-raising fee imposed on newspaper vending machines in Metropolitan Transportation Authority ("MTA") stations because the government was

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76. *See, e.g. Community Communications, Inc.*, 660 F.2d at 1379.

77. 47 U.S.C. § 542(a) (Supp. V 1987).

78. 659 F. Supp. 580 (W.D. Pa. 1987), *aff'd on other grounds*, 853 F.2d 1084 (3d Cir. 1988).

79. 669 F. Supp. 954 (N.D. Cal. 1987) *reh'g denied*, 679 F. Supp. 977 (N.D. Cal. 1988).

80. *Erie*, 659 F. Supp. at 594; *Group W*, 669 F. Supp. at 972.

81. 460 U.S. 575 (1983).

82. *Id.* at 593.

83. *Erie*, 659 F. Supp. at 594; *Group W*, 669 F. Supp. at 972.

84. 745 F.2d 767 (2d Cir. 1984).

doing nothing more than acting in a proprietary context in renting space it owned.[85] The *Erie* and *Group W* courts held that the franchise fee was like the fee in *Gannett*, which was little more than the permissible practice of receiving reasonable compensation for rental of property owned by the public.[86] The precedential value of the *Erie* opinion is only persuasive; the Third Circuit affirmed on waiver grounds and stated specifically that it did so to avoid ruling on a constitutional issue.[87] Nevertheless, the two opinions are early indications that the five percent maximum franchise fee can be constitutionally used as a general revenue-raising measure.

IV. Opening Cable Markets: Challenging the Franchise Process

Since the Cable Act and the FCC definition of effective competition protect the cable industry by preempting local rate regulation, consumers can only hope that free market competition will protect their interests in diverse programming, quality service, and reasonable subscription rates. But as discussed earlier, the cable market is anything but a free market in which cable operators compete head-to-head in the same area for the same customers.[88] In attempts to open the cable market, some cable operators who have been denied franchises have brought suit against localities and exclusive franchisees, seeking invalidation of exclusive franchises, treble damages under federal antitrust law, and monetary and injunctive relief under 42 U.S.C. § 1983[89] for first amendment violations.

A. *Antitrust Actions Against Franchising Authorities and Exclusive Franchisees*

Arguably, exclusive cable franchises are contracts between municipalities and cable operators to restrain trade and are thus per se violations of section one of the Sherman Act.[90] According to this line of reasoning, federal antitrust laws would permit cable operators who have been denied access to closed markets to seek damages from both municipalities and

85. *Id.* at 775.

86. *Erie*, 659 F. Supp. at 594; *Group W*, 669 F. Supp. at 973.

87. Erie Telecommunications v. City of Erie, 853 F.2d 1084, 1092-93 (3d Cir. 1988), *aff'g on other grounds* 659 F. Supp. 580 (W.D. Pa. 1987). The circuit court ruled that the first amendment rights of cable operators were evident in 1984 for waiver purposes, and activity in previous lawsuits relating to franchise agreements at that time served as waiver of first amendment rights. *Id.* at 1099. Presumably, this would mean the first amendment rights of cable operators were clear in 1984 for purposes of 42 U.S.C. § 1983 (1982).

88. *See supra* text accompanying notes 44-46.

89. 42 U.S.C. § 1983 (1982).

90. 15 U.S.C. § 1 (1988). The Sherman Act provides in part that "[E]very contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal. . . ." *Id.*

exclusive franchisees and to enter the closed cable markets. Proponents of cable overbuild, a situation created by overlapping cable grids owned by two or more competing operators in one area, were heartened by the Supreme Court's decision in *Community Communications, Inc. v. City of Boulder*,[91] though only for a short time.

In *City of Boulder*, Boulder perceived the expansion of a cable company's service area as a threat to a potential exclusive franchise, and therefore attempted to prevent the expansion. However, the Court refused to grant Boulder antitrust immunity under the *Parker* doctrine.[92] *Parker v. Brown*,[93] relying on principles of federalism, established that state legislation mandating anticompetitive behavior does not violate federal antitrust laws.[94] In *City of Boulder*, the Court stated that the *Parker* doctrine immunizes "municipal conduct engaged in 'pursuant to state policy to displace competition with regulation or monopoly public service.' "[95] On the facts of *City of Boulder*, however, the Court could find no "clear articulation and affirmative expression" of a state policy or legislation to displace competition, and held that the general grant of authority given to Boulder under the home rule was insufficient to justify antitrust immunity.[96]

While *City of Boulder* was seen as a tool to challenge exclusive franchises, it was hardly what disaffected cable operators needed to open cable markets on a wide scale, for four reasons. First, eager to provide maximum flexibility to their localities, states either already had or quickly passed legislation to immunize local government officials under the *Parker* doctrine.[97] Thus, the impact of *City of Boulder* was limited.

Second, Congress passed the Local Government Antitrust Act of 1984[98] which prohibits the awarding of damages to plaintiffs if an antitrust violation results from the action of or direction by a local government. In

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91. 455 U.S. 40 (1982). The result of the decision was to place potential competitors at a disadvantage. *Id.* at 45 n.6. However, the Court's holding reasonably could have created liability for both municipalities and exclusive franchisees under the Sherman Act for anticompetitive behavior.

92. *Id.* at 45-46.

93. 317 U.S. 341 (1943).

94. We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.

City of Boulder, 455 U.S. at 49 (quoting Parker v. Brown, 317 U.S. 341, 350-51 (1943)).

95. *Id.* at 51 (quoting City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 413 (1978)).

96. *Id.* at 55.

97. *See, e.g.*, VA CODE ANN. § 15.1-23.1 (Repl. Vol. 1989).

98. Pub. L. No. 98-544, 98 Stat. 2750 (1984) (codified at 15 U.S.C. §§ 34-36 (1988).

City Communications, Inc. v. City of Detroit,[99] the court determined that the exclusive franchisee is entitled to immunity from the antitrust laws as long as the effective "decision maker" is the municipality rather than the private parties.[100] Since City Communications could not show corruption or a delegation of the decision making function, the district court held Detroit to be the effective decision maker, thereby immunizing the exclusive franchisee.[101]

Third, while the *Parker* doctrine and the Local Government Antitrust Act shield states, localities, and their public or private agents, the *Noerr-Pennington* doctrine protects purely private individuals, including monopoly cable franchisees. The *Noerr-Pennington* doctrine arose out of two Supreme Court decisions, *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*[102] and *United Mine Workers of America v. Pennington.*[103] These cases hold that individuals or organizations have a constitutionally protected right to petition the government for favorable treatment, even if such action was motivated by or would amount to a Sherman Act violation.[104]

The *Noerr-Pennington* exception to antitrust liability was held to apply to cable operators seeking exclusive franchises in *Hopkinsville Cable TV, Inc. v. Pennyroyal Cablevision, Inc.*[105] In *Hopkinsville*, a cable operator received a "nonexclusive" franchise and was protected from antitrust liability when sued by a competitor who was denied a franchise.[106]

Of course, a sham exception to the *Noerr-Pennington* doctrine exists.[107] For example, the Eighth Circuit upheld a jury award of $10,800,000 in antitrust damages in *Central Telecommunications, Inc. v. TCI Cablevision.*[108] In *Central Telecommunications*, the successful bidder used illegal influence to win an exclusive franchise, and the trial court applied the sham exception to the *Noerr-Pennington* doctrine.[109] The appellate court stated that since the successful bidder's intent was not to influence gov-

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99. 695 F. Supp. 911 (E.D. Mich. 1988), *aff'g* 650 F. Supp. 1570 (E.D. Mich. 1987).
100. *See id.* 914.
101. *Id.* at 914-16.
102. 365 U.S. 127 (1961).
103. 381 U.S. 657 (1965).
104. *See Pennington*, 381 U.S. at 669-72; *Noerr Motor*, 365 U.S. at 135.
105. 562 F. Supp. 543 (W.D. Ky. 1982).
106. *Id.* at 545-48.
107. There may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified.

Noerr Motor, 365 U.S. at 144.

108. 800 F.2d 711 (8th Cir. 1986), *cert. denied*, 480 U.S. 910 (1987).
109. *Id.* at 724.

ernment, but rather to injure a competitor, the sham exception applied.[110] However, cases like *Central Telecommunications* are really instances of improper lobby activities, conflicts of interest, and breaches of public trust rather than genuine attempts to open closed cable markets.

Finally, the Cable Act is ambiguous in its discussion of the issues of awarding one or more franchises within its jurisdiction.[111] On one hand, the House Report contains the statement that the statute "does not . . . revise the Federal antitrust law."[112] On the other hand, the Cable Act states that a franchising authority "may award . . . [one] or more franchises within its jurisdiction."[113] Seemingly, if Congress intended this section to preempt federal antitrust laws, it would have been more explicit. However, one commentator suggests that "since the plain meaning of the statute seems to grant the franchising authority the discretionary power to choose the number of franchises, most exclusive franchises probably will be validated."[114]

Given the vast array of exceptions and limitations which have swallowed the antitrust rules, and given the ambiguity surrounding the Cable Act itself, disappointed cable bidders have focused franchise litigation on first amendment principles. Yet the Supreme Court has afforded the circuits little guidance in applying first amendment principles.

B. *Implicating the First Amendment*

The Supreme Court held that cable operators are entitled to first amendment protection in *City of Los Angeles v. Preferred Communications, Inc. (Preferred II)*.[115] However, the Court specifically left open the question of which first amendment standard to apply in evaluating franchise process regulations.[116] Different news media have received different degrees of first amendment protection. For example, broadcast media are subject to extensive federal regulation, justified by physical scarcity, due to the inherent limitation of the electromagnetic spectrum to accommodate only a certain number of users.[117] In contrast, print media have received broad protection from governmental interference.[118]

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110. *Id.* at 723.

111. 47 U.S.C. § 541(a) (Supp. V 1987).

112. H.R. REP. No. 934, 98th Cong., 2d Sess. 59, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 4655, 4696 (1984); *see* Meyerson, *supra* note 4, at 552-53.

113. 47 U.S.C. § 541(a).

114. Meyerson, *supra* note 4, at 553.

115. 476 U.S. 488 (1986).

116. *Id.* at 496 (Blackmun, J., concurring).

117. *See, e.g.*, Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 389 (1968); National Broadcasting Co. v. United States, 319 U.S. 190, 226 (1943).

118. *See* Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 258 (1974) ("right of reply" statute held to violate first amendment rights of a newspaper).

In *Preferred Communications, Inc. v. City of Los Angeles (Preferred I)*,[119] Preferred, a disaffected cable franchisee, challenged the granting of single franchises on first amendment grounds.[120] In reversing the lower court's dismissal of the case, the Ninth Circuit stated that cable operators have greater protection from regulation than broadcast media.[121] Consequently, it applied the strict test articulated in *United States v. O'Brien*,[122] to weigh regulation of non-communicative aspects of first amendment conduct.[123] The Supreme Court, while upholding the judgment and remanding the case to the trial court, did not decide "whether the characteristics of cable television make it sufficiently analogous to another medium to warrant application of an already existing standard or whether those characteristics require a new analysis."[124]

1. Circuit Split on Appropriate First Amendment Standard

Three circuits have applied simple balancing tests to determine if single franchises violate cable operators' first amendment rights. In *Community Communications Co. v. City of Boulder*,[125] the Tenth Circuit balanced a cable operator's interest in communicating against the franchising authority's need to minimize disruption of public resources, and upheld the regulation of entry into the market.[126] In *Omega Satellite Products v. City of Indianapolis*,[127] the Seventh Circuit balanced an operator's interest against the burden to public resources and, given that cable is a natural monopoly, upheld regulation of entry.[128] In *Central Telecommunications, Inc. v. TCI Cablevision, Inc.*,[129] the Eighth Circuit, though refusing to reach the first amendment issue because of antitrust claims, accepted the Tenth and Seventh Circuits' rationale and upheld regulation.[130]

Particularly troublesome about these three cases is the courts' reliance on protecting consumer welfare by regulating natural monopolies and minimizing disruption of the public domain. The former can no longer be

119. 754 F.2d 1396 (9th Cir. 1985), *aff'd in part and remanded*, 476 U.S. 488 (1986).

120. *Id.* at 1401.

121. *See id.* at 1403.

122. 391 U.S. 367, 377, *reh'g denied*, 393 U.S. 900 (1968). The test required the Court to consider the constitutional power of the government, the government's interest in the case, the relationship between the government's interest and the suppression of expression, and the degree of restriction of freedom of expression. *Id.*

123. *Preferred I*, 754 F.2d at 1405-06.

124. *Preferred II*, 476 U.S. at 496 (Blackmun, J., concurring).

125. 660 F.2d 1370 (10th Cir. 1981), *cert. dismissed*, 456 U.S. 1001 (1982).

126. *Id.* at 1375-80.

127. 694 F.2d 119 (7th Cir. 1982).

128. *Id.* at 127-29.

129. 800 F.2d 711 (8th Cir. 1986), *cert. denied*, 480 U.S. 910 (1987).

130. *Id.* at 713-17.

a basis for regulation, since most localities cannot regulate the rates of cable systems.[131] The latter requires restrictions that have no rational nexus with the goal of minimizing disruption. Since one cable system should disrupt the public domain no more than any other system would, some other criteria must be used to select the one operator that will receive the exclusive franchise.

2. Ninth Circuit *O'Brien* Test: Gaining Momentum?

While all out of the Ninth Circuit, three recent cases since *Preferred I* and *Preferred II—Century Federal, Inc. v. City of Palo Alto*,[132] *Group W Cable, Inc. v. City of Santa Cruz*,[133] and *Pacific West Cable Co. v. City of Sacramento*[134]—point to a rejection of the simple balancing test, in favor of the *O'Brien* test.[135] All three cases involved cable operators who were denied franchises in favor of competing operators, who received either de jure or de facto exclusive franchises.[136] Each plaintiff challenged the franchise processes of the cities which resulted in the selection of single cable franchisees.[137] In each case, the district courts held that the first amendment gives as much protection to cable media as to print media. The courts applied the *O'Brien* test, and held that as a matter of law exclusive cable franchise processes did not further substantial governmental interests.[138] This stricter *O'Brien* test is beneficial in that it has none of the disadvantages of the simple balancing test described above,[139] and it will afford a higher degree of protection for first amendment conduct until the Supreme Court clearly articulates a guiding principle.

C. *Congressional Reform on the Horizon?*

The Cable Act and the FCC's definition of "effective competition"[140] have often stifled cable competition, and the courts have refused to invalidate cable monopolies under antitrust laws and the first amendment. These limitations have caused consumer pressure on some members of Congress, leading to the introduction of three bills which would restore

131. *See supra* text accompanying notes 44-53.

132. 648 F. Supp. 1465 (N.D. Cal. 1986), *appeal dismissed*, 108 S. Ct. 1002 (1988).

133. 669 F. Supp. 954 (N.D. Cal. 1987).

134. 672 F. Supp. 1322 (E.D. Cal. 1987).

135. *See Pacific West*, 672 F. Supp. at 1332; *Group W*, 669 F. Supp. at 962; *Century Federal*, 648 F. Supp. at 1475.

136. *Pacific West*, 672 F. Supp. at 1325; *Group W*, 669 F. Supp. at 957-58; *Century Federal*, 648 F. Supp. at 1467.

137. *Pacific West*, 672 F. Supp. at 1330; *Group W*, 669 F. Supp. at 957-58; *Century Federal*, 648 F. Supp. at 1467-68.

138. *Pacific West*, 672 F. Supp. at 1332-41; *Group W*, 669 F. Supp. at 962-966; *Century Federal*, 648 F. Supp. at 1474-79.

139. *See supra* text accompanying note 122.

140. *See supra* note 53 and accompanying text.

rate-setting authority to local governments.[141] Congress needed several years to pass the Cable Act, and new legislation will likely meet resistance from the cable lobby. In addition, the scope and complexity of the issues suggest that legislation will undergo many permutations. At the same time, the severity of the consumer's problem suggests that some form of restoration of rate-setting authority will emerge.

Senate Bill 805[142] has four primary components. First, section 3 of the bill terminates the limitations that 47 U.S.C. § 543[143] places on states and franchise authorities to regulate rates, permits states to confer common carrier status on cable systems, and after notice and an opportunity for a hearing, permits states and franchising authorities to change cable rates if a cable system rearranges a service tier.[144] Arguably, the permissible rate regulation could extend to all satellite delivered program services such as HBO, Showtime, MTV, and the like. This result is possible because the Cable Act was a comprehensive policy and regulatory act, thereby superceding the earlier FCC preemption of non-basic cable services.[145] Thus, the bill's specific repeal of the comprehensive limitations in the Cable Act could allow states and franchise authorities to regulate the rates of all aspects of cable service. Second, section 4 of the bill permits states and franchise authorities to review ownership patterns and deny franchise renewal or transfer of ownership or control of a cable system on the ground of extensive media ownership.[146] Third, section 5 links a system's copyright protection to old "must-carry" regulations.[147]

Senate Bill 1068 provides additional assistance in franchising regulations.[148] First, section 3 of the bill would permit a state or franchising authority to regulate, in areas not being served by at least two "lifeline" service cable operators, who essentially provide the basic cable service tier.[149] Second, section 4 of the bill authorizes telephone companies to provide video and cable services, with the rationale that telephone companies could become sources of competition for entrenched cable systems.[150] This section also authorizes the FCC to prescribe regulations that allocate costs in a manner which protects basic ratepayers from cross-

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141. S. 1068, 101st Cong., 1st Sess., 135 CONG. REC. S5692-94 (daily ed. May 18, 1989); S. 805, 101st Cong., 1st Sess., 135 CONG. REC. S4727-28 (daily ed. May 3, 1989); H.R. 1304, 101st Cong., 1st Sess., 135 CONG. REC. H563 (daily ed. Mar. 8, 1989).

H.R. 1304 was not reprinted in the Congressional Record upon its introduction and is not discussed here.

142. S. 805, 101st Cong., 1st Sess. 135 CONG. REC. S4727-28 (daily ed. May 3, 1989).

143. 47 U.S.C. § 543 (Supp. V 1987).

144. S. 805 at § 3.

145. *See supra* note 39 and accompanying text.

146. S. 805, 101st Cong., 1st Sess. § 4, 135 CONG. REC. S4728 (daily ed. May 3, 1989).

147. *Id.* § 5.

148. *See* S. 1068 101st Cong., 1st Sess., 135 CONG. REC. S5693 (daily ed. May 18, 1989).

149. *Id.* § 3.

150. *Id.* § 4, 135 CONG. REC. S5693.

subsidization of cable service.[151] Third, section 5 requires cable operators to provide access to their systems on a nondiscriminatory basis to all program services, unless precluded from doing so by capacity or unacceptable program content.[152] Fourth, section 6 requires programming services that are affiliated with a cable operator to be made available to all programming distributors on a nondiscriminatory basis.[153] "This provision is aimed at addressing the complaints of [owners and users] of satellite [dishes] and wireless [cable, satellite dishes, SMATV, and the like] . . . who are denied the right[s] to purchase programming at competitive rates."[154]

V. Conclusion

Though touted as a pro-consumer compromise between municipalities and the cable industry, the Cable Act had anti-consumer effects and resulted in outright protectionism of established cable companies. The FCC moved to protect cable interests by eliminating the ability of local regulators to bargain on behalf of consumers. Federal antitrust laws failed to achieve their stated purposes because of broad exceptions and protectionist legislation. It is possible, through the first amendment, that the Constitution will effectuate what Congress and the FCC should have done long ago, namely, open the cable markets. Fortunately for consumers, Congress will also likely return some form of rate-setting authority to states and franchising authorities.

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151. *Id.*
152. *Id.* § 5.
153. *Id.* § 6.
154. 135 Cong. Rec. S5694 (daily ed. May 18, 1989) (statement of Sen. Gorton).