Reinventing Rate Regulation

Nicholas W. Allard(*)

Return to the FCLJ, Vol 46, No. 1 Table of Contents

Introduction

"The Case of the Missing Cable Rate Cuts" is a perplexing whodunit playing to standing room only crowds in hearing rooms near you. Accusations fly and suspects abound one year after Congress passed a sweeping law(note 1) to clamp down on cable rates, with news headlines trumpeting the increasing cost of basic cable service and the perception in many quarters that cable prices are not dropping. Did Congress devote years to develop legislation intended to curb monopoly prices only to write a law that actually does the opposite? Did the Federal Communications Commission (FCC or Commission) work around the clock for months promulgating rate regulations(note 2) that unintentionally frustrate the statutory mandate? Are powerful cable multisystem conglomerates gaming a regulatory structure they helped design? Are factions in the industry mounting a public relations campaign and a hardball, grass-roots political effort designed to kill the new law in its crib? Are many local cable operators evading the law? Are news accounts focusing on anomalies and overlooking the overall savings that consumers are already enjoying? Or, like the solution to Agatha Christie's most famous mystery, did all the suspects have a hand in the deed?(note 3)

The impetus of the current controversy is all the more curious in that, as far as can be determined at the time of this writing, the pattern in recent years of cable prices increasing at multiples of the Consumer Price Index has been broken. At this early stage of rate regulation, it is difficult to get a clear picture of the details of rate trends, and none of the controversial rate changes have been reviewed formally, much less approved by any regulator. To date, equipment prices appear to be dropping significantly. Price cuts on the rates of *basic service*, however, range from modest to negligible and many systems have announced large increases in parts of consumers' overall monthly bills along with new charges for items not previously billed to customers. Across the country there remain pockets of potential abuse with which, if illegality is established, the FCC is equipped to deal. These mild, if not mixed, results have nevertheless fueled sharp criticism of cable rate regulation and intense scrutiny of the new regulatory system even before it is fully operational.(note 4)

After concluding a fractious, long struggle over the federal budget, the members of the 103d Congress welcomed their delayed 1993 summer recess and a chance to finally turn to critical policy issues such as implementation of the North American Free Trade Agreement and the historic debate on health care reform. Perhaps the last thing legislators expected upon returning to their districts was "man bites dog" news stories suggesting that the 1992 Cable Act was causing cable rate increases and sharp inquiries from local authorities and consumers pressing them for an explanation.(note 5) Having seemingly just completed years of work on landmark legislation by voting overwhelmingly to enact the 1992 Cable Act over President Bush's veto, this was, after all, an issue members of Congress might not be faulted for believing was at least in remission if not cured.(note 6) Opponents of rate regulation have not been entirely bashful about capitalizing on the regulators' predicament.(note 7) Indeed, the bemusement in some quarters is akin to the glee of the sophomoric prankster who unwraps a Baby Ruth candy bar and throws it in the shallow end of a swimming pool.(note 8) Even false alarms can cause a lot of thrashing and gnashing. Determining whether a false alarm has been signaled on the issue of cable prices, or whether there is a more serious problem requiring further measures to assure the intended cost savings to consumers, is once again a priority of the congressional architects of the Act and the FCC.(note 9)

This Article briefly surveys post-enactment developments by describing the timetable for phasing in rate regulation and summarizing the preliminary results of the FCC's effort to implement the Act. The Article also evaluates the prospects for successful rate regulation by starting at the beginning: analyzing the statutory rate provisions contained in Section 3 of the Act(note 10) and the FCC's implementing regulations.(note 11) In this regard the Article focuses on (1) the methodology that has been established to determine whether regulated cable rates are reasonable, (2) the shared responsibility of the FCC and local franchise authorities for regulating rates, and (3) the complexity of the FCC's approach to rate regulation. The Article concludes that the resulting regulatory framework is workable, albeit imperfect, and can be improved. Over time, regulations should achieve the statutory objective of restraining cable prices until the advent of competition.

The market and the public are experiencing an initial, and understandably confusing, period of adjustment. Short term price reductions, which had been oversold, are significant but not dramatic. Soon, regulatory price caps will help to assure that over the long term rate increases are reasonable. The results of the effort to regulate cable will largely be determined by the compliance and conduct of the cable industry, which ultimately has the greatest stake in helping to demonstrate that its pricing practices are reasonable. Should it be determined that the initial attempt to moderate cable rates is falling short, turning back the clock to an era of unbridled monopoly prices is as politically implausible as it is, in practical terms, unlikely.(note 12) Accordingly, the Article will also discuss some of the options that exist for fine tuning rate regulation, including further rate freezes, adjusting the current rate benchmarks to require lower prices, as well as other steps that might still be taken if necessary to afford consumers the full benefits of reasonable prices until the advent of competition in the multichannel subscription television marketplace.

I. Regulatory Timetable and Initial Results: Cable Rates a Year Later

A. Phased-In Relief

At this writing, not one of the rate increases sparking the present controversy has yet been reviewed formally, much less approved, by either the FCC or a local authority under rate regulations established by the 1992 Cable Act. In order to evaluate the impact of the new law, it is essential to understand the timetable for phased-in rate regulation established both by the Act and its implementing regulations. When the Act became law on October 5, 1992, Congress gave the FCC six months to devise a comprehensive regulatory system for a virtually unregulated industry by requiring the Commission to issue rules for (1) the regulation primarily by local authorities of the basic tier of service and related equipment charges,(note 13) (2) the regulation of other "cable programming services"essentially nonbasic premium tiers of programming not offered on a per channel or per program basisupon complaints by subscribers and local authorities,(note 14) and (3) the prevention of cable systems not subject to effective competition from evading the requirements of the Act.(note 15) The FCC met this deadline by issuing a massive set of regulations on April 1, 1993.(note 16)

The effective date of the FCC's rate regulation was September 1, 1993.(note 17) This date actually only starts the clock on the steps eventually leading to regulation of the basic and premium services. For example, beginning on September 1, local authorities were able to begin filing with the FCC for the approval required by the Act for local authorities to regulate basic service.(note 18) Under the Act, the application for approval is deemed approved unless disapproved by the Commission within thirty days.(note 19) However, local authorities are not able to begin regulating basic rates until they have adopted regulations consistent with the FCC regulations and have procedures in place to provide interested parties an opportunity to comment.(note 20) The local authority has 120 days to satisfy these requirements and then must notify the cable operator in its jurisdiction before it can begin to regulate rates and, if necessary, order refunds.(note 21) The cable operator, for its part, may seek a stay of rate regulation either in a petition for reconsideration within thirty days after the local authority has initially qualified, or at any time thereafter in a petition for revocation.(note 22) Consequently, many if not most local authorities will not commence enforcement of the 1992 Cable Act until several months after the September 1, 1993, effective date of the regulations and perhaps not until 1994.(note 23)

The timetable for regulating other nonbasic programming servicesloosely described as premium servicesis different. The Act provides that rate regulation of such nonbasic cable programming services and related equipment charges will only occur in response to specific complaints filed with the FCC alleging that a particular operator's rates are unreasonable. The FCC started to accept such complaints on September 1, 1993. The premium service regulations apply prospectively to rates paid on or after this date.(note 24) The Act also creates a statute of limitations for complaints about existing rates. Complaints about the rates charged on September 1, 1993, must be filed within 180 days of the effective date.(note 25) With regard to rate increases for premium services, complaints must be filed "within a reasonable period of time following a change in rates initiated after the effective date,"(note 26) which the FCC has set at forty-five days from the time subscribers receive a bill that reflects the rate increase.(note 27)

Upon receipt of a complaint, the Commission will review the complaint to determine whether it meets the minimum showing needed to permit the complaint to go forward. The operator must respond to a complaint within thirty days of service of the complaint, unless the Commission notifies the operator that the complaint is invalid.(note 28) The Commission can order both prospective rate reductions and refunds of excess charges calculated from the date the complaint was filed until the date the rate was reduced to the appropriate level.(note 29) In sum, the separate regulations for nonbasic cable services and related equipment charges will not be, like the regulations for basic services, fully operational until several months after the September 1, 1993, effective date. It will be hardly possible to fairly judge their results at least until 1994.

A fair question is to ask why there has been an outcry over the consequences of the Act if the implementing regulations have only just begun to take effect. In part, and only in part, the answer lies in widespread confusion over the nature of actions intended by the FCC to take account of the long delay before the onset of rate regulation in order to protect subscribers in the interim.(note 30) The first was a temporary rate freeze ordered by the Commission that went into effect when it issued its *Rate Order* in April 1993 and, although initially scheduled to expire six months later in November, has been extended until February 1994.(note 31)

The freeze is actually a "slurpee." Chilled, perhaps, but not frozen solid, individual rate components of monthly bills are free to move. Charges for basic service, nonbasic service, and equipment can change up or down so long as the average subscriber bill maintains the same level.(note 32) After all, the rate increases fueling the current debate over the Act all occurred during the purported rate freeze.(note 33)

The freeze order, which in reality is closer to a revenue freeze than a rate freeze,(note 34) applied to all cable rates not subject to effective competition other than rates for per channel or pay-per-view program services and related equipment.(note 35) During the freeze, the *average* monthly subscriber bill for regulated services and equipment could not increase above the average monthly subscriber bill for such services and equipment under rates in effect on April 5, 1993. The freeze did not preclude operators from adding subscribers, retiering services, unbundling services and equipment, or providing additional services and equipment, so long as the FCC did not find that the cable operator intended to evade the freeze and the average monthly subscriber bill did not increase over the April 5, 1993, level. Moreover, cable operators were able to increase or decrease the charge for a tier or for equipment related services, again so long as the average monthly rate did not increase.(note 36)

The second source of some confusion has been popularly heralded and perhaps oversold as a rate "rollback" to levels existing as of September 30, 1992. Semantical somersaults yes, rollback no: the so-called rollback is in reality a calculation of what reasonable rates would have been at the time the Act became law and then a determination to use this price level in calculating prospectively, with adjustments for inflation, what reasonable rates would be once rate regulations began.(note 37) As far as can be determined, the FCC has not yet rolled back and does not plan simply to roll back current rates to the pre-enactment levels of September 30, 1992, notwithstanding passages in the *Rate Order* and the accompanying press releases to the contrary.(note 38)

In the *NPRM* the FCC sought comment on whether the Act reflects a congressional intent that its regulations yield rates generally lower than those in effect when the Cable Act was enacted, or "*rather a congressional intent that our rules serve primarily as a check on prospective rate increases.*"(note 39) In the *Rate Order* the FCC then concluded that the "initial effort to regulate rates for Cable service should provide for reductions from *current* rates of regulated cable systems with rates above competitive levels. Thus, [the] initial implementation of rate regulation of cable service will generally lead to significant reductions from *current* rate levels for most cable systems."(note 40) The approach adopted by the Commission to accomplish this goal is complicated.

Before issuing its *Rate Order* the Commission conducted a survey of cable system rates as of September 30, 1992. It found that on average, rates of systems not subject to effective competition are approximately 10 percent higher than rates of comparable systems subject to effective competition, as that term is defined by the Act.(note 41) The FCC neither ordered a rollback of cable prices to 1992 levels, nor did it order an immediate 10 percent cut. Nor did the FCC order rates to fall back to benchmarks it found represented competitive rates. Instead, its approach was to enable, once rate regulation became effective,

> local franchise authorities to require rates for the basic tier, and the Commission to require rates for cable programming services on the basis of individual complaints, to fall approximately 10 percent, unless the operator is already charging rates that are at the "competitive" benchmark level or it can justify a higher rate from September 30, 1992 levels, based on costs.(note 42)

The rate formula determines, in individual cases, the initial permitted level of rates once a cable operator becomes subject to rate regulation.(note 43) After September 1, 1993, when a cable operator is charging rates that are below the adjusted 1992 benchmark for that system, the initial permitted regulated rate for that system is the rate in effect on the date the system becomes subject to regulation, regardless of the amount that the rate is below the competitive benchmark.(note 44) After September 1, 1993, rates exceeding the applicable adjusted benchmark are deemed presumptively unreasonable.(note 45) The average rate for such systems can be reduced up to 10 percent, but no lower than the adjusted benchmark.(note 46)

The FCC also expressly declined to require all systems to "now reduce rates to benchmark levels"that is, to rollback the rates.(note 47) Indeed, systems were left free to further adjust their rates to reflect inflation occurring since September 1992 and to make further adjustments if the number of subscribers or channels on the system changed between September 1992 and the time of regulation.(note 48)

B. Initial Results

The FCC has predicted that overall rates would be reduced for between two-thirds and three-quarters of American households receiving cable television.(note 49) In September 1993 it ordered an expedited survey of the twenty-five largest cable multisystem operators to determine whether this forecast was likely to be correct.(note 50) Legislators and regulators have generally agreed that no regulatory modification should be made at least until the FCC has this data in hand.(note 51)

The results of the FCC's survey of the twenty-five largest cable MSOs are mixed and inconclusive.(note 52) The survey directed each of these MSOs to report on rates from the ten largest systems within the MSO that are expected to be subject to rate regulation.(note 53) The FCC survey sought to compare the average per subscriber revenues in effect in September 1993. Operators were also required to provide rate cards and channel line-ups for these two time periods. This information was used to confirm and, "in a number of cases, correct the data" submitted by the cable MSOs.(note 54)

The FCC found that eleven of the twenty-five surveyed MSOs have restructured services in anticipation of rate regulation to offer purportedly unregulated packages of per channel ("a la carte") offerings. Accordingly, pending further analysis of the data from the eleven MSOs that introduced a la carte packages, the FCC initially released results only on the fourteen reporting MSOs that did not choose to offer extensive new a la carte services.(note 55) Analysis of the survey results for the eleven MSOs that introduced a la carte packages will be included in a final report to be released in November 1993.

With respect to the fourteen MSOs that did not introduce a la carte offerings, the FCC reported that approximately 68 percent of subscribers to systems owned by these operators experienced rate reductions for their regulated services (including equipment).(note 56) The average bill for regulated services declined approximately 8 percent while subscribers received, on average, approximately 6 percent more channels.(note 57) The FCC found that the average bill for regulated services offered by these fourteen MSOs declined by about $2, and the number of regulated channels received by subscribers increased by more than two channels.(note 58) The preliminary survey findings also show that equipment charges for subscribers have declined significantly. The monthly charges for remote controls dropped nearly

90 percent, on average, and additional outlet charges dropped approximately 95 percent, on average.(note 59) However, according to the FCC's calculations, about one-third (or approximately 31 percent) of subscribers to these systems experienced an overall rate increase.(note 60)

> The 25 MSOs surveyed provide service to approximately 75 percent of the country's 58 million cable subscribers. The 245 systems for which operators reported data provide cable service to approximately 14 million, or roughly one-quarter, of all subscribers. The fourteen MSOs for which preliminary results are being reported [by the FCC] today serve 23.9 million cable subscribers, and the data they provided covers roughly 8 million of the 14 million subscribers encompassed by the survey.(note 61)

These results are only partially satisfying to the FCC and have prompted the Chairman of the House telecommunications subcommittee to ask for the General Accounting Office (GAO) to conduct an independent survey.(note 62) While the results provide the FCC and the regulated industry with some basis for arguing that the rate regulation is working and that no drastic overhaul is necessary, several serious concerns remain to be addressed.

First, it will be necessary to examine and determine how it can possibly be consistent with the intent of the Act for at least a third of subscribers surveyed to experience rate increases. Second, the reported results indicating average rate reductions for a large majority of subscribers will bear closer scrutiny to determine whether the savings are genuine and consistent with the Act, or rather a somewhat illusory consequence of the FCC's methodology. One of the questions that should be examined is simply: Are you better off today than you were before regulation? In other words, the FCC should attempt to determine what the charge was for a certain package of programming before April 1993 and then determine what it would cost a consumer to obtain the same programming today. The FCC should also attempt to inquire about new billing practices that may add charges to subscriber bills that offset or surpass rate reduction. In addition, the FCC should monitor what subscribers are being told by cable companies in order to explain and justify changes in billing practices. Obtaining that information would provide the FCC with some basis for correcting the confusion that now exists in the marketplace. In the meantime, based on the facts now available, it is not possible to conclude definitively whether or not the regulations are in all significant respects upholding the 1992 Act.

II. Congressional Mandate

Above all else, Congress passed the 1992 Cable Act to respond to genuine grass-roots concerns about rising cable television prices compiled in a massive legislative record over several years.(note 63) While various statutory provisions in this complex Act may be subject to differing interpretations, the intent of Congress to protect consumers from monopoly prices is clear.(note 64) Viewed in the context of the whole Act, the approach Congress took demonstrates a strong preference for competition and a reluctance to dictate prices.(note 65) Recognizing that competition would only develop over time, Congress authorized an interim system of rate regulation for the basic tier of programming and for other cable programming approximating what might result from a competitive market.

A. Background

When Congress enacted the 1992 Cable Act, it repealed the deregulatory provisions of the Cable Communications Policy Act of 1984(note 66) (1984 Cable Act or 1984 Act) and directed the FCC to reinvent rate regulation. The 1984 Cable Act embodied the first comprehensive federal policy for cable television. Prior to its enactment, cable television was regulated principally at the local level through the franchise process. The 1984 Act prohibited local authorities from regulating the basic service rates of cable systems that faced "effective competition," as defined by the FCC.(note 67) After deregulation took effect on December 29, 1986, over 97 percent of all cable systems across the country were free from any form of government rate regulation.(note 68) The objective of deregulation was to "enable the cable industry to prosper, benefiting both consumers and industry participants alike."(note 69) A balance was sought between relying on the local franchising process as the primary means of regulation and encouraging the growth of a new industry by leaving it relatively free to set its own rates. Congress expected that the availability of competing programming services would keep rates at reasonable levels and that local franchise authorities would ensure that cable authorities responded to the needs of the community.(note 70)

The 1984 Cable Act achieved many of its objectives. Since that time cable television has grown rapidly and provided consumers a wide array of extremely popular, diverse, and often innovative programming. Cable penetration of 37 percent of households in 1985 grew to 61 percent in 1992.(note 71) Monthly revenue earned by cable operators grew from $18.94 per subscriber in 1984 to $28.02 in 1992.(note 72) Total industry gross revenues (subscriber services plus advertising) grew from $8.3 billion in 1984 to over $24 billion in 1992,(note 73) while total advertising revenues increased almost six-fold from less than $600 million in 1984 to approximately $3.4 billion in 1992.(note 74)

While the cable industry thrived in this era, rapid expansion into a regulatory void was not checked by any significant competition from comparable providers of multichannel subscription television. The competition Congress anticipated during consideration of the 1984 Act, from wireless cable and private cable operators, from the home satellite dish market and direct broadcast satellite, and from cable overbuilders, simply failed to materialize as an adequate counterweight. Cable's competitors now serve, in the aggregate, fewer than 6 percent of American households.(note 75)

B. Deregulated Cable Rates1986-92

In the absence of either local rate regulation or meaningful competition, municipalities, consumer groups, and subscribers urged Congress with increasing intensity to do something about unreasonable price increases in the cost of cable service.

The Chairman of the House Subcommittee on Telecommunications and Finance, Representative Edward J. Markey (D-Mass.), initiated a series of GAO surveys of cable rates released in 1989,(note 76) 1990,(note 77) and 1991.(note 78) Overall, the GAO found that during the first four years of deregulation (November 1986 to April 1991), the monthly charge for the lowest-priced service increased by 56 percent and for the most popular basic service by 61 percentamounting to increases of more than three times the rate of inflation.(note 79) In a 1990 report to Congress, the FCC, like the GAO, also concluded that cable rates rose appreciably.(note 80) The FCC found that between 1986 and 1989, monthly rates for the lowest- priced tier of service increased by 36 percent and for the most popular tier of service by 38 percent.(note 81)

While these studies were not definitive, they nevertheless were found to provide substantial evidence of rate increases at unacceptable levels.(note 82) The House Energy and Commerce Committee concluded:

> [R]ate increases imposed by some cable operators are not justified economically and . . . a minority of cable operators have abused their deregulated status and their market power and have unreasonably raised the rates they charge subscribers. The Committee believes that it is necessary to protect consumers from unreasonable cable rates.(note 83)

Similarly, according to the Senate Commerce Committee, the record of historical and projected rate increases provided "significant and legitimate reasons to be greatly concerned that subscribers, in a deregulated marketplace, are at the mercy of cable operators' market power."(note 84)

The legislative record contains other significant evidence bolstering the conclusions that congressional action was warranted. First, legislators received numerous complaints about particular rate increases that eclipsed, by far, the average increases reported by the GAO and the FCC surveys.(note 85) Several other sources indicated that cable prices are generally about 20 to 30 percent cheaper in the few communities where a cable system faces head-to-head competition than they are where cable systems face no competition.(note 86) Additionally, the Department of Justice calculated that at least 45 to 50 percent of the price increases since deregulation were due to market power rather than to increases in programming costs.(note 87) Finally, there was strong evidence that the price trend would continue to turn up sharply, spurred relentlessly by the imperative of enormous debt service obligations borne by cable operators.(note 88) In the 1980s cable systems sold for rapidly increasing amountsover $3000 per subscriber in many instancesin transactions typically involving very large ratios of debt to equity.(note 89) The future cash flow necessary to service the debt indicated to legislators that basic rates might well, if left unchecked, double to over $50 per subscriber, by the end of the 1990s.(note 90) This then was the case for finding ways to promote competition and, if necessary, to reregulate cable television rates.

C. Congress Acts

The complexity of the rate regulation provisions of the 1992 Act reflects not so much political compromise as it demonstrates an attempt to accomplish a great deal: to preserve the accomplishments of cable television, which delivers diverse programming to over 56 million subscribers; to rely on the marketplace to the extent possible to regulate already competitive markets; and to secure reasonable rates that are fair to consumers without destroying the vitality of the cable industry.(note 91) The congressional preference for competition is stated at the outset of the rate regulation provisions: "If the Commission finds that a cable system is subject to effective competition, the rates for the provision of cable service for such system shall not be subject to regulation by the Commission or by a State or franchising authority . . . ."(note 92)

D. Basic Service and Related Equipment Rates

Under the Act, basic service consists of a separately available service tier that subscribers must purchase to have access to any other tier of service.(note 93) At a minimum, this basic tier, usually the least expensive tier of service, must include (1) "must carry" channels, the signals of local broadcast stations, whose carriage is now required by law; (2) public, educational, and government access channelsthe so-called "PEG" channels; and (3) any other broadcast television signal distributed by the cable operator except for "superstations" such as WTBS, WGN, WPIX, and WORdistant broadcast signals retransmitted by a satellite carrier and carried by the cable operator.(note 94) A cable operator may add additional programming to the basic service tier; however, such additional programming will be subject to the regulations applicable to basic service.(note 95) To prevent retiering schemes designed to evade the regulations applicable to basic service, cable operators are not permitted to require subscription to any other tier of programming as a condition of access to premium programming sold on a per channel or per program basis.(note 96)

The Act establishes the primary, overriding responsibility of the FCC to assure that subscriber rates for basic service are reasonable:

> COMMISSION OBLIGATION TO SUBSCRIBERS.The Commission shall, by regulation, ensure that the rates for the basic service tier are reasonable. Such regulations shall be designed to achieve the goal of protecting subscribers of any cable system that is not subject to effective competition from rates for the basic service tier that exceed the rates that would be charged for the basic service tier if such cable system were subject to effective competition.(note 97)

Pursuant to the regulations that the FCC was required to promulgate in order to meet this obligation, basic service rates are to be determined in the first instance by qualified local franchising authorities.(note 98) Local authorities wishing to regulate basic service and equipment rates must certify in writing to the Commission that (1) it will adopt rules consistent with the FCC's rate regulations; (2) it has the legal authority and the personnel necessary to regulate rates; and (3) its procedures provide interested parties reasonable opportunity to participate in rate regulation.(note 99) Once filed, the certification becomes automatically effective thirty days after filing unless the FCC finds, after notice and reasonable opportunity to comment, that the franchising authority has not met one of the three criteria.(note 100)

If the Commission disapproves or revokes a certification, it must step into the shoes of the local franchising authority and exercise regulatory jurisdiction until the unsuccessful applicant for certification becomes qualified.(note 101) In contrast to such situations involving disapproved or revoked certifications for which the FCC lacks discretion and must directly regulate basic rates, the FCC presumably has the discretionary authority to determine whether or not other circumstances warrant FCC direct regulation. The 1992 Cable Act grants the FCC this discretion in order for the Commission to uphold its statutory obligation to "ensure that rates for the basic service tier are reasonable" and "to achieve the goal of protecting subscribers of *any* cable system that is not subject to effective competition from rates for basic service . . . ."(note 102) This broad authority, for example, would enable the FCC to regulate rates in appropriate circumstances even where franchising authorities had not first sought certification from the Commission.(note 103)

The Act provides the FCC considerable latitude in fashioning the regulations for basic service. Again, the FCC is generally directed to protect subscribers from paying more for basic service than they would if their local cable system were subject to effective competition.(note 104) To meet this obligation, the Act requires the FCC, first, to strive to "reduce the administrative burdens on subscribers, cable operators, franchising authorities, and the Commission."(note 105) Second, the FCC may adopt formulas or other mechanisms and procedures in order to comply with the directive to reduce administrative burdens.(note 106) Finally, the FCC's rate regulations must take into account several factors for gauging the reasonableness of rates, but the comparative weight, if any, and the method for balancing these factors are not specified on the face of the statute.(note 107) These factors include: (1) the rates for cable systems, if any, that are subject to effective competition;(note 108) (2) certain specified cost factors;(note 109) (3) advertising revenues derived from basic service;(note 110) and (4) a reasonable profit.(note 111)

The statute establishes a separate and much more straightforward standard for regulating equipment charges relating to basic service. It directs the Commission to establish standards for setting, *on the basis of actual cost*, the rates for installation and lease of equipment used by subscribers to receive the basic service tier, and installation and lease of monthly connections for additional television receivers.(note 112) The costs of converter boxes, remote control units, and cable home wiring are included in the actual cost calculations.(note 113)

Finally, the statute directs the FCC to establish standards, guidelines, and procedures for implementing and enforcing the basic service rate regulations.(note 114) Other than exhorting the FCC to assure expeditious dispute resolution, to prevent unreasonable charges for changes in a subscriber's selection of services or equipment, and to provide notice to subscribers about the availability of basic service, the FCC is granted virtually unbridled discretion to design a regulatory procedural regime.(note 115)

E. Nonbasic Service and Related Equipment Rates

Rates for other enhanced or nonbasic cable programming services are subject to regulation by the FCC, not by local authorities if, upon complaint, the Commission determines that such rates are unreasonable.(note 116) Such cable programming services are defined broadly to include "any video programming provided over a cable system, regardless of service tier, including installation or rental of equipment used for the receipt of such video programming" other than basic service or programming offered on a per channel or per program basis.(note 117) Thus, the Act does not regulate pay channels for which there is a specific per channel or per program charge.(note 118)

The Act requires the FCC to establish criteria for identifying, in individual cases, unreasonable rates for nonbasic services.(note 119) In establishing such criteria the FCC must consider the following factors: (1) rates for similarly situated systems taking into account similarities in costs and other relevant factors; (2) rates of systems subject to effective competition; (3) the history of rates for the system including their relationship to changes in general consumer prices; (4) the system's rates as a whole for all cable programming, cable equipment, and cable services provided by the system, other than programming provided on a per channel or per program basis; (5) capital and operating costs of the system; and (6) advertising revenues.(note 120) The Act permits the FCC to consider other relevant factors for determining what constitutes reasonable rates for nonbasic services.(note 121) The FCC has flexibility in establishing criteria for reasonable nonbasic service rates because the Act neither specifies a particular way that the FCC is to evaluate the enumerated factors nor prescribes the relative weight the FCC is to accord each factor.(note 122)

The Act directs the Commission to adopt rules establishing "fair and expeditious procedures" for receiving, considering, and resolving complaints from "any subscriber, franchising authority, or other relevant State or local government" entity alleging that rates for cable programming services are unreasonable.(note 123) The subscribers and local authorities are given standing to file a complaint based upon a "minimum showing."(note 124) Significantly, complaints may be filed against existing premium service rates and need not await a rate increase, but such complaints about existing rates may only be filed within 180 days of the effective date of rate regulation.(note 125) In contrast, complaints about rate increases must be filed within "a reasonable period of time" following a change in rates, including a change in rates resulting from a retiering charge.(note 126)

F. Effective Competition

An oddly cut cornerstone, the statutory definition of effective competition,(note 127) supports the entire regulatory structure of the Act. Section 3 of the Act provides that a cable system faces "effective competition" and therefore is not subject to FCC rate regulations(note 128) if (1) fewer than 30 percent of the households in the franchise area subscribe to the service of a cable system; (2) the cable system and another unaffiliated multichannel distributor each offers comparable programming to at least 50 percent of the households in the franchise area, and 15 percent of the households actually subscribe to multichannel distributors other than the largest distributor; or (3) the local franchising authority itself operates a multichannel distributor that offers programming to at least 50 percent of the households in the franchise area.(note 129) Under this definition, most existing cable systems do not face effective competition and are subject to rate regulation.

The rationale for the first alternative prong of the statutory definition is not obvious. It is neither intuitively apparent nor logically possible to deduce how effective competition, under any fair understanding of what that term might mean, can exist when fewer than 30 percent of the households in a franchise area subscribe to cable and there is no other distributor providing a competitive service.(note 130) It helps a bit when analyzing the language to realize that statutes often invoke a suspension of the common meaning of words, and this is a good example of a statutory purpose taking precedence over Webster's preferred usage.(note 131) That is, the definition of effective competition merely describes situations for which Congress on policy grounds does not believe that rate regulation is appropriate; the definition as it evolved in the legislative process reflected the consensus about when regulation should be triggered rather than the views of Congress on the etymology of the term "effective competition."(note 132) In fact, there are two policy rationales for the first part of the effective competition definition. First, this provision creates a "safe harbor" from rate regulation in order to encourage the extension of cable into as yet unwired areas and to encourage the rapid expansion of cable service within a franchise area. Without this exemption, arguably the burdens and limitations of rate regulations might discourage the expansion of cable service to previously unserved households.(note 133) Presumably, the authors of the Act did not want to risk creating new impediments that would further delay cable service for those Americans in largely rural areas who have been the last to enjoy the benefits of cable television. Second, in a franchise area with fewer than 30 percent of the households subscribing, the local cable operator arguably has only limited ability to exert monopoly power. In such situations rate regulation is presumably unnecessary to protect the public.(note 134) It would be a bizarre result of the low penetration definition if cable systems with over 30 percent penetration were able to avoid regulation by reducing their penetration. Attempts to do so through either raising prices or underreporting would, at a minimum, be addressable through the FCC's authority to prevent evasions.(note 135)

III. Can the Reinvention Work? A Look Under the Hood

Before turning to a few of the major issues raised by the FCC's approach to rate regulation and analyzing whether adjustments might yet be required,(note 136) it is appropriate to review what has been accomplished. Even without the new responsibilities of the 1992 Cable Act, the FCC has a bulging agenda that has included developing video dialtone rules, considering local exchange carrier reforms, new regulatory responsibilities for emerging technologies such as personal communications services,(note 137) and completely overhauling its licensing procedures by conducting auctions for spectrum.(note 138) The Cable Act has added to that list by giving the FCC the responsibility for twenty-six additional rulemakings, inquiries, and reports. So far the FCC has issued on schedule almost fifty separate notices of proposed rulemakings, report and orders, orders on reconsideration, and other items relating to the 1992 Cable Act. Only a handful of these deal with rate regulation.

The scope of the rate regulation rulemaking in itself is daunting. After issuing the *Notice of Proposed Rule Making* in December 1992, running over one hundred typewritten pages and twenty pages in the Federal Register, the FCC received extensive comments from 176 parties, and reply comments from 121 parties.(note 139) The April 1993 *Rate Order* and its accompanying materials were 521 typewritten pages and over one hundred pages in the Federal Register. In this effort the FCC has kept to an almost impossible statutory timetable. One cannot review the record of these proceedings without being impressed by the Commission's painstakingly conscientious consideration of the plethora of public comments and myriad of issues they raise. The long hours, the dedication, the professionalism of the individuals involved in this effort should give pause to even the most vigorous critics of the federal bureaucracy and in the view of at least this observer, the responsible FCC staff are hardly overpaid. Perhaps most significant about this track record is what it indicates about the determination and ability of the FCC to follow through, and, if there prove to be unintended consequences of its regulations, to make changes as needed to achieve the statutory objectives.

A. The Ten Percent Solution

If unregulated monopoly cable rates were only 10 percent higher than competitive rates, the 1992 Cable Act never would have become law. The Act was not about charges of twenty-two dollars a month rather than twenty, or eleven dollars a month rather than ten. It was a legislative record depicting much greater industry- wide disparities, as well as persistent reports of overcharges that propelled Congress to enact rate regulation over tremendous opposition and to hand President Bush the only veto override of his presidency. Yet, 10 percent is the difference the FCC has determined,(note 140) and stuck to upon reconsideration,(note 141) that existed between monopoly prices and competitive prices.(note 142)

The Act directed the FCC to adopt standards that produced rates reflecting prices consumers would pay in a competitive marketplace.(note 143) The FCC did not have data on cable costs or the rates charged by competitive systems that would be necessary to determine reasonable rates, and it faced statutory time limits, which limited its ability to collect this data.

Shortly after enactment of the 1992 Cable Act, even before issuing the *Notice of Proposed Rulemaking*, the FCC conducted a survey of a sample of cable systems.(note 144) The Commission surveyed 748 cable systems and received 708 responses, a 94.6 percent response rate, of which 687, or 91.8 percent were deemed to be usable.(note 145) Of this data baseout of a universe of over eleven thousand franchise systems with cable and about thirty thousand different cable community units served by those systemsthere were 141 systems found to meet the statutory definition of systems subject to effective competition: seventy- nine fit the first statutory category (franchise areas with less than 30 percent cable penetration), forty-six fit the second category (at least 50 percent of households passed by both competitors and more than 15 percent subscribing to the smaller competitor), and sixteen fit the third category (municipally-owned cable systems or municipal overbuilds passing at least 50 percent of households).(note 146)

When data from all the systems in the survey were compiled, including the seventy-nine systems with less than 30 percent penetration, the competitive differential was calculated at approximately 10 percent.(note 147) However, when data from systems with less than 30 percent penetration were excluded from the analysis, a competitive rate differential of approximately 28 percent was calculated. This result occurs because many of the low penetration systems in the first category of the defined instances of effective competition reported rates that were significantly higher than the rates of other systems in the survey.(note 148)

The issue that has arisen and been debated with some vigor is whether the FCC went astray by including the low penetration, noncompetitive systems in its calculations. The debate has largely focused on whether the FCC could lawfully exclude the data from its calculations, given the 1992 Cable Act's explicit inclusion of such systems in its definition of effective competition, and thereby increase its finding of the competitive differential from 10 percent to almost 30 percent. The case for excluding the data from such systems, for including the data and discounting it, or even for recollecting and reexamining the data is compelling. The Commission set out on a regulatory snipe hunt, searching for chimerical competitive rates that do not exist, at least not according to legislative history. If competitive rates did exist to any significant degree, the statute would never have been enacted. The Commission's difficult statutory challenge is to determine how best to measure the nonexistent.

The mandatory trigger in the Act for rate regulation is the statutory three-prong definition of effective competition. Cable systems that fall within this definition, including low penetration systems, are exempt from regulation. In contrast, the Act grants the FCC considerable latitude to fashion regulatory standards for most cable systems that will achieve basic tier rates that approximate competitive rates and premium tier rates that are reasonable.(note 149)

Congress left to the Commission the task of determining how to accomplish these objectives. It did not specify any particular methodology nor did it establish any particular test that the FCC was required to apply to measure competitive and reasonable rates. Instead, the Act requires that regulations be designed that "take into account" *seven* enumerated statutory factors, *one* of which is "the rates for cable systems, *if any*, that are subject to effective competition."(note 150) Nothing in the text of the Act or the legislative history instructs the FCC to place more or less weight on any of the enumerated factors in fashioning regulations. Indeed, nothing in the language of the Act mandates that all the factors, much less every element of one factorsystems facing effective competitionbe weighted equally as the Commission implements its rate setting requirements.(note 151) Accordingly, the FCC concluded correctly that

> our regulations will satisfy the standard established in the statute (1) if they establish a measure of reasonableness that takes each factor, including the rates of systems subject to effective competition, into account and (2) if, overall, they are designed to "protect" subscribers from paying rates for their cable service that are higher than if the service were subject to effective competition.(note 152)

The Commission had several options regarding how to take competitive prices into account, none of them satisfying. First, because instances of competition are so rare, and any attempt to measure actual competition so problematic, the Commission could have examined cost data and determined from the data what competitive rates would be. Another option, not required, suggested, or foreclosed by the Act is to review prior regulated rates, those allowed prior to deregulation under the 1984 Act, and project forward, allowing for inflation, and other factors to determine what a current competitive price would look like. Ultimately, the Commission determined that it should rely upon current rate data as a starting point to calculate benchmarks for both competitive and reasonable prices.(note 153) This was, at best, an elusive task. Without becoming too scientific about sampling sizes, it is nevertheless possible to recognize that the instances of competitive services are so few and far between as to provide a survey that cannot in itself be definitive. Certainly, each of the relatively few situations where competition has arisen must be somewhat idiosyncratic and therefore statistically suspect.(note 154)

The Act does not require the FCC to survey the rates of low penetration systems. After having done so, the Act can hardly be read as constraining the Commission's responsibility to evaluate the data and determine its weight, if any, in calculating reasonable rates. The Commission has already exercised its expertise in this manner in several ways, which belies the pretense that it lacks the statutory discretion to discount the survey rates of the low penetration systems. For example, the FCC determined how many and which communities to survey, and elected not to consider many responses that it found were unusable.(note 155) The FCC also has not, for obvious reasons, included in its calculations any factor for completely unwired areas that also fit the definition of low penetration systems.(note 156) The FCC might have just as plausibly concluded that the data from the seventy- nine low penetration systems it surveyed were unrepresentative of the vast majority of low penetration systems where there is no cable service, and declined to use it on that basis. Put another way, the FCC would have been well within the zone of statutory compliance by examining the low penetration systems and concluding, based on the record, that there was no reliable basis for calculating a competitive price level in those situations.(note 157)

The controversy and attendant publicity over the 10 percent calculation has obscured the fact that there are several separate steps in the FCC's determination of initially permitted regulated rates. Each of these steps needs to be carefully scrutinized in order to determine whether in practice it is causing or exacerbating unintended consequences. Fine-tuning the rate regulation may well involve more than adjusting the level of the 10 percent differential.

1. Are the Benchmarks too High?

The FCC has decided to rely on a benchmark approach to implement rate regulation for cable systems not facing effective competition.(note 158) Regulated systems are required to use a formula to compare their current rates to an appropriate benchmark of rates a competitive system would charge.(note 159) A regulated system's benchmark is the rate that a cable system facing competition would charge with the same number of subscribers, same number of channels, and same number of satellite channels. The benchmarks are based on the FCC's survey data, which produced 141 responses from cable systems deemed to satisfy the statutory effective competition definition.(note 160) Given that the benchmark system is the foundation of the new rate regulatory regime, it is critically important for subsequent survey data to be examined to test the accuracy of the benchmarks, and for them to be revised as necessary. Moreover, as competition grows over time, the reliability of the sample should improve.(note 161)

Two twists in the FCC's benchmark system act as brakes on rate reductions. First, rates at or below the benchmark level are presumed to be reasonable, and no reductions are required for such below-benchmark rates at the time the system becomes subject to regulation, even if the rates have increased since enactment.(note 162) The higher the benchmarks, the fewer the number of situations where either a rate reduction will be required or the cable operator will need to try to qualify for a cost-of-service exception. Also, the higher the benchmark, the larger the rate increase that can be charged by a regulated system without triggering a mandatory reduction.

Second, with respect to rates that exceed a cable system's comparable competitive benchmark, the required reduction for these presumptively unreasonable rates is to be only to the benchmarkand no more. This approach compounds any miscalculation that might have been made in determining the competitive differential (10 percent), which is the maximum amount of reduction that will be required.(note 163) Subscribers of regulated systems might receive a 10 percent reduction, but they could receive less or none if the benchmarks are set too high.

2. Are the Per Channel Rate Calculations Being Manipulated?

In order to compare their current rates with the benchmark rates, cable operators must calculate their current per channel rate according to a formula detailed by the FCC in forms and worksheets provided for this purpose.(note 164)

For the sake of analysis, the essence of the required calculation can be summarized in three equations:

Current rate = (monthly revenues)/(number of channels)

per channel

Monthly revenues = (programming) + (equipment) - (recovered franchise fees)

Number of channels = total number of basic + premium channels(note 165)

The cable operator divides the total monthly revenues by the total number of channels on both basic and cable programming tiers.(note 166) To compute total revenues, equipment revenues are added to programming revenues, because they are to be compared to benchmarks, which are based on the survey data base that included equipment revenues.(note 167) Revenues collected to offset franchise fees are subtracted out because the benchmark survey data did not include franchise fees.(note 168) The resulting per channel rate is then compared to the appropriate competitive benchmark.

The rate per channel calculation is intended to be tier neutral in that it is an average across all channels on all tiers. However, it is apparent that the per channel rate can be reduced without lowering or raising rates by increasing the number of channels, to the extent a cable system has additional unused channel capacity. It will be important to determine whether or not this is occurring, and to assess whether the additional channels are an enhancement of the programming offering or merely what some colorfully describe as extra "fireplace networks," channels nobody wants to watch, like one showing burning logs twenty-four hours a day.(note 169)

3. Should Equipment Charges Be Included in the Rate Per Channel Computation?

Under the formula for computing current rates, the numerator is determined by adding equipment charges to charges for the basic tier. The Act describes a separate method for determining regulated rates for equipment used by subscribers to receive the basic tier of service. Unlike the statutory language pertaining to basic programming, equipment charges must be based on actual cost.(note 170) Consequently, under the new rate regulations, in many if not most situations, current equipment charges will fall dramaticallyfar more than 10 percent. If these charges are made as they must be, and the reduced equipment charge is included in the calculation of current rates, then the computation of the rate per channel will be reduced relative to the benchmark without reducing the rate for basic. This in turn may permit significant increases in current rates for basic programming without exceeding the benchmark. The April *Freeze Order* would not preclude such increases because the calculated average monthly rate would not increase. This scenario might prove to be the explanation for the recent numerous reports of rising basic rates. It might also be the cause of the perception that subscribers with the most lavish contracts featuring equipment add-ons and multiple sets are enjoying the largest savings, while those receiving the least expensive service are experiencing the brunt of price increases.(note 171)

This result is hardly required by the Act. In fact a powerful case can be made that Congress intended above all else that all rates charged would approximate competitive ratesthat unreasonable basic rates be reduced to reasonable levels *and* equipment charges be reduced to levels reflecting actual cost. The FCC is required to determine and attribute equipment charges that relate to the use of basic service as distinguished from equipment charges that relate to the use of premium service.(note 172) However, nothing in the Act requires the FCC to calculate per channel rates, much less to do so in a manner that factors in equipment charges when calculating any required reductions for either basic or premium programming. This issue should, and no doubt will, be a priority for the FCC as it examines ways to adjust the regulations to assure greater fairness and to uphold the objectives of the Act.(note 173)

4. Is Ten Percent Enough?

Only in the context of all of the foregoing computations is it possible to get a clear picture of whether a 10 percent reduction of unreasonable rates that exceed the benchmark is sufficient to yield rates that approximate competitive rates. The level of the percentage reduction is in itself especially important because the FCC has determined that 10 percent will be the maximum reduction required.(note 174) In many instances, rates above the benchmark even for the "outlier" systems, where rates far exceed competitive rates, will have regulated rates that remain above the benchmark.(note 175) Accordingly, good reasons exist for determining whether 10 percent is adequate to achieve the statutory objective and whether there should be different percentages, just as there are different benchmarks, to meet a variety of different categories of cable systems. In any event, the need and impact of such a change cannot be gauged accurately without reference to the other parts of the formula that has been established to regulate rates.

B. Filling Regulatory Vacuums

When the need to regulate rates is felt at the local level, rates will be regulated even if the local authority is unable to do so itself. In many respects, the Act imposes shared responsibilities on both the FCC and the local franchising authority for the basic service tier. For example, before the basic service tier can be regulated locally, the franchising authority must comply with FCC rules.(note 176) The FCC is explicitly required to regulate basic rates when a local franchising authority has been disapproved for certification or, if its certification has been revoked, until the local authority requalifies.(note 177) The Act, however, is silent as to whether the FCC is to regulate in the first instance should the local franchising authority choose not to file for certification.(note 178)

The FCC concluded that it will initiate regulation of basic service in certain circumstances when the local franchising authority does not itself assert regulatory jurisdiction over basic service.(note 179) The Commission took this action in order to fulfill its overriding obligation "to protect subscribers of any cable system that is not subject to effective competition,"(note 180) and because it concluded that Congress did not intend to create a regulatory vacuum in cases where a local authority was unable to obtain certification.(note 181)

The FCC has stressed that local authorities are to be the primary regulators of basic rates. The FCC will not, therefore, assume jurisdiction in all cases where a local franchising authority does not apply for certification. It will not, for example, step in or override a local decision not to regulate rates if the local authority affirmatively opposes rate regulation. On the other hand, where a local authority cannot meet the certification standards, particularly when it does not have the resources to administer rate legislation or the legal authority to do so, the FCC will regulate. The FCC has struck a reasoned and careful balance. It will presume that local authorities receiving franchise fees have the resources to regulate. Any such authority requesting the FCC to regulate in its stead is required to rebut this presumption by demonstrating why the franchise fees it obtains cannot be used to cover the cost of rate regulation.(note 182) The FCC also will not regulate basic rates where a local authority voluntarily chooses not to seek certification because it is satisfied with the rates charged by the local cable operator.(note 183)

Those decisions about how to share regulatory responsibility could have a major impact on determining how many communities and how quickly local rates are regulated. The decisions will help to assure that the regulatory vacuum created by the 1984 Act now can be filled, even in instances where for a variety of reasons local governments are unable or slow to initiate regulation. It will take time for local franchising authorities to master the complexities of the regulatory regimes and to determine whether they can legally exercise jurisdiction over their local rates. Ultimately, however, the success of rate regulation will depend on a great deal of the work being performed at the local level. Commissioner Duggan drove this point home in a recent speech before the National Association of Telecommunications Officers and Advisors:

> The statute, we need to remember, gives you the prerogative of declining to regulate rates locally. If you choose to exercise that prerogative, I would caution you not to expect the Commission to do the job for you. We will be busy regulating the services over which we have exclusive jurisdiction. I would urge you, therefore, to think carefully about the implications of forbearing from regulation locally.(note 184)

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

C. Getting it Simpler

The rate regulations are too complicated. That is a description about a work in progress, not a statement of blame. No doubt if the FCC had longer, it would have been shorter.(note 185) While the docket items relating to the rulemaking, the *NPRM*, the *Rate Order*, the *Orders on Consideration*, and related items and comments are voluminous,(note 186) the actual regulations and the accompanying forms and worksheets are not impenetrable. Moreover, the initial phase of rate regulation, computing the base level of initially permitted rates, should prove to be the most confusing and most complex stage of regulation. Once rate caps begin to determine subsequent rate levels, the procedure should become appreciably more routinized. More work remains to be done, however, to simplify the process further.

At a time when the Clinton Administration is holding Rose Garden press conferences about putting government regulation on a diet,(note 187) the FCC should be understandably sensitive about issuing cable regulations that require their own forklift. The Act is also quite explicit about simplification. The very first, and one of the only, guidelines in the statute for the content of the regulations for basic rates is that the FCC "shall seek to reduce the administrative burdens on subscribers, cable operators, franchising authorities, and the Commission."(note 188) This language should be taken as an ongoing proscription, not completely discharged upon issuance of the regulations.

The rulemaking record suggests two factors that have contributed, with some irony, to the complexity of the regulations. The first is a strong aversion to a cost-of-service type of ratemaking. The second is the attempt to keep local authorities on a tight rein, enforcing a degree of uniformity by specifying great detail in the regulations and thereby narrowing the discretion of local franchise authorities.

The cable industry vigorously advanced these regulatory principles during rulemaking. Many of the twists, turns, and sharp points in the resulting regulatory briar patch respond to these concerns. The resulting thicket is one in which the industry, at least the larger players, are quite comfortable, notwithstanding complaints about unnecessarily burdensome regulation to the contrary.(note 189)

The FCC's apparent interpretation of the statutory directive to reduce administrative burdens is that it must not, to the extent possible, engage in cost-of-service ratemaking. At the outset of the *Rate Order*, the FCC pointedly noted that the Communications Act continues to provide, as it has since 1984, that cable systems "shall not be subject to regulation as a common carrier or utility by reason of providing any cable service."(note 190) This theme is repeated throughout the *Order* in many different ways. The FCC adopted its benchmark and price caps mechanism as the primary method for regulating rates, with cost-of-service procedures invoked only secondarily if cable operators seek to justify a higher rate.(note 191) The FCC also refused to allow local authorities to use cost-of-service regulation if they chose.(note 192) In specifying the initial price cuts that will be required for systems with current rates above the benchmark, the FCC declined to require reductions for all such systems down to the applicable benchmark, but instead only by 10 percent if that were lower.(note 193) The stated reason is revealing: "[requiring reductions to the benchmarks] would ignore the possibility that some systems' high rate may be based at least in part on higher costs, thus encouraging unweildy [sic] and expensive cost-of-service showings."(note 194)

While the disadvantages of cost-of-service regulation are discussed throughout the record, the problem cited most prominently by the FCC is "it imposes heavy burdens upon regulators and regulatees because of the significant administrative and compliance costs associated with the regulatory model."(note 195) One cannot help but wonder the extent to which this motive colored many different decisions within the Commission during the rulemaking, including the decision to set the competitive differential at 10 percent. With initial reductions of only no more than 10 percent, resulting in many cases with regulated rates still above the benchmarks, the number of cost-of- service proceedings would be far fewer than if the required reduction was in the 20 to 30 percent range, which other sources indicate more accurately represents the differential between monopoly and competitive prices.

Another source of regulatory complexity is the amount of specific direction the FCC provides about how the local authorities must regulate rates. The 1984 Act responded to the cable industry's concerns that uneven, unnecessary, and often excessive local regulation curtailed its growth and vitality.(note 196) The Commission seems intent not to reinvent regulation that returns to those problems.(note 197) Consequently, the regulations provide fairly precise marching orders to the local franchise authorities concerning how to proceed. The good news is that the regulations are very detailedthe local authorities need not fashion rules out of whole cloth. The bad news is that the regulations are very detailedlocal authorities will need, at least initially, to work hard to absorb and learn the mechanics of the new system.

IV. Options

Evaluating appropriate regulatory actions as the FCC's rate regulations begin to have an impact is complicated by the newness of the rate regulations, a lack of comprehensive data about regulated rates, and the dizzying pace of technological and business developments in the marketplace.(note 198) Contrary to early press accounts, preliminary survey results seem to be indicating that large numbers of cable subscribersperhaps 70 percentare already enjoying lower prices, even before price caps take effect.(note 199) Although this evidence would indicate that the regulations are working, it is unlikely to completely satisfy Congress, state and local authorities, and consumers. This is because there apparently are, contrary to the intent of Congress, rate increases occurring for a significant number of consumers and complaints are likely to continue. It is also likely that the regulations are having unintended consequences. For example, the FCC should determine whether or not subscribers on low or fixed incomes are bearing the brunt of rate increases of basic services, while subscribers who can afford luxury high-option packages are enjoying considerable savings. It is also possible that cable systems are manipulating the complex formulas adopted by the FCC in a way that, with restructured service offerings, more "a la carte" offerings, new kinds of charges, and other devices that, although perhaps technically legal, minimize the benefits of rate regulation and frustrate the intent of Congress.(note 200) Determining the best course of future regulatory action will only be possible through the FCC's cable bureau keeping abreast of such practices and devising more accurate ways of measuring cable rate changes.

A. Policy Framework

Future decisions about rate regulation should also be considered in the context of an overall framework for communications policy, rather than in an isolated and reactive manner. It is possible to suggest an illustrative set of principles for communications policy that is both consistent with congressional intent underlying the Cable Act of 1992 and the Administration's telecommunications and overall domestic agenda:(note 201)

Competition in the markets of voice, data, and video is the preferred way to stimulate economic growth and to provide consumers with reasonable prices and choices. However, in many of the relevant markets, including cable video programming sales to consumers, interim regulation is necessary both to constrain monopoly pricing and practices, and also to nurture the development of competitive markets.(note 202)

Communications policy should promote universal access to affordable and fairly priced communications services. The private sector should be encouraged to accomplish this objective through investment in creating an advanced broadband communications network built upon the existing infrastructure of coaxial cable, fiber- optic cable, copperwire, as well as satellite and wireless technology. This network will promote economic growth and permit the universal delivery of many commercial and noncommercial services such as health care, training, and education opportunities. The new advanced network should reach all Americans and the service should be at affordable prices.(note 203)

In light of accelerating change and dramatic convergence in the marketplace, policy should be flexible and comprehensive. Technologically specific regulation and ad hoc reactive decisions will neither keep abreast of market developments nor promote a breakthrough to a new model of competition among traditionally discrete communications technologies. Such a breakthrough would probably require further legislation.

B. Accelerate Competition

Under these principles the most attractive option is to take steps to accelerate the arrival of competition in the subscription television market. There is already considerable activity underway in this direction. First, momentum is building to remove obstacles that prevent the regional Bell Operating Companies from competing with cable television. Last year, the FCC issued rules that telephone companies could act as common carriers of video programming owned by others.(note 204) Further, in August 1993 a federal district court struck down the 1984 Cable Act's restriction barring telephone companies from entering the cable television business in their telephone service areas.(note 205) Subsequently, the court ruled that the decision only applied to the instant case and could not be relied upon by other regional Bell Operating Companies.(note 206) In the meantime, momentum is building in Congress to enact telco entry legislation.(note 207) The Clinton Administration will soon confront the decision of whether or not to endorse telco entry, and if so, on what terms such entry will be permitted. On a parallel fast track are the numerous new combinations of communications companies, including telco and cable mega-deals such as the US West/Time Warner deal, NYNEX's $1.2 billion investment in Viacom, Bell Atlantic's acquisition of TCI, and the BellSouth/PrimeCable transaction. Some observers are questioning whether this spate of corporate marriages will preempt any competitive battle between cable and telco, and that just as Congress acts, oligopoly will emerge rather than competition. On the other hand, it is just as possible that these new, more muscular communications entities are even better equipped to compete amongst themselves and globally. Federal authorities will need to scrutinize these deals to determine what their impact will be on competition.

The FCC also now has the means to push competition from other multichannel video distributors, such as wireless cable and the imminent arrival of direct broadcast satellite television. This can be accomplished through vigorous and efficient enforcement by the FCC of the 1992 Cable Act provisions assuring fair access to programming. Simply put, these provisions are designed to assure that competitors have something to sell.(note 208) The FCC has given programmers until November 15, 1993, to bring their programming contracts into compliance.(note 209) Informal reports seem to indicate that programmers are doing just that, and that the need to resort to the new programming complaint process at the FCC will be atypical. The FCC provides competitors with a simplified and less costly alternative to litigation for the resolution of disputes over the availability and the price of programming. Because the prohibitions in the Act are clear, and because it appears that the FCC will provide swift and certain enforcement of these provisions, the fair access regulations could well become self-enforcing as parties assess the risks and bring their conduct into compliance with the law.

Antitrust enforcement by the Department of Justice, and, as appropriate, exercise of antitrust authority by the FCC under Sections 314 and 315 of the Communications Act of 1934,(note 210) can police serious instances of anticompetitive conduct and provide a useful backstop to the program access provision of the 1992 Cable Act. Finally, the FCC also has authority to prevent evasion of the rate regulations, which enables it to investigate and respond to practices in individual cases that are unreasonable.(note 211) Recently the FCC has begun to exercise this anti-evasion authority by issuing investigative letters of inquiry to certain cable companies.(note 212)

C. Regulatory Adjustments

The primary burden to implement the 1992 Cable Act is squarely on the FCC. Experience may prove that the FCC should modify its rate regulations. While most attention has been focused on the appropriateness of the 10 percent reduction required in some cases for unreasonable rates, and the seductive simplicity of increasing that figure, there are other elements of the FCC's formula for rate regulations that should be considered first, should the case be made that adjustments are necessary.

First, the FCC should periodically review and adjust as necessary its benchmarks that delineate reasonable rates. The statute requires the FCC to report yearly on rates.(note 213) This data will permit the Commission on an ongoing basis to revise the benchmarks to more accurately reflect truly competitive rates. There is also ample reason for the FCC to believe that its initial benchmarks are inaccurate and every effort should be made to seek appropriate corrections as soon as possible. Second, the FCC should carefully examine its inclusion of equipment fees and its use of a per channel rate standard to compute current rates. At a minimum the FCC should devise a way to remove equipment rates from the computation in order to get a better measure of reasonable programming rates. In addition, the FCC should consider how to eliminate the potential for manipulation of its use of a per channel standard. Systems are able to increase the number of channels, thus enabling large rate increases without exceeding the benchmark. Attempting to define and enforce a "quality standard" as a check on increasing the number of channels to avoid rate regulation may prove both difficult and futile.

Finally, the FCC should continue to encourage and assist state and local authorities in fulfilling their primary role of regulating basic service rates. This will ultimately go a long way toward easing the Commission's burden of overseeing rate regulation in almost thirty thousand communities. One consultant to state and local regulators reports:

> The benefits of state ratemaking go beyond the conservation of resources by the FCC. State commissions are closer to the facts of an individual system and inherently more capable for making judgments of financial exigency that provide the only basis to relax traditional accounting principles. By contrast, the FCC necessarily deals with policy decisions whose potential consequences must be "averaged" across the broad range of disparate companies. State [and local] commissions can provide a company specific review as needed.
>
> Although state and local jurisdiction is limited to the basic tier, there are issues of rate design where the local commissioner can credibly claim to determine preferences that may vary from state to state. It would be appropriate, for example, to give state commissions authority to veto moving specific channels from the basic tier to a federally regulated tier, provided that they allowed the company to flow through any exogenous changes in programming cost.(note 214)

The report concludes that:

> [S]tate commissions increase the perception and reality of democratic accountability. Where [local authorities] are willing to assume responsibility for rate regulation, they are closer to the consumer. The perception of increased accountability is particularly valuable given the extent to which the complexity and number of cable companies forces the FCC to rely on [state and local authorities].(note 215)

In practice it will be a great challenge for the FCC to strike a workable balance with local franchise authorities.

Conclusion

Spinmasters, a species that thrives in our nation's capital, can call a horse's tail a leg, but a horse still has four legs. Consumers know what they pay each month for cable television, and they know whether their monthly bill goes up or down. Whatever Jesuitical artifice may convince Washington inside-the-beltway types that cable rates are just fine, whatever other mega- transactions, lawsuits, landmark court decisions, and new legislation might divert the attention of official Washington, the issues of cable rates and quality of service are likely to remain real for the public.

The FCC's report card should read: Good Start. Full marks for effort. Room for improvement. The new regulations and the process of rate regulation are very much a work in progress. The Commission has kicked off a process of change, and like Horatius at the bridge, must now continue to hold off excessive rate increases until competition arrives. The regulated industry will respond, with energy and ingenuity, and the market is hardly static; thus, in order to enforce the Act, the FCC must regulate in an equally fluid and dynamic fashion. Priorities of the Commission should be, first, to reduce the complexity and the murkiness of the regulations and, second, to find ways to encourage and support the state and local authorities in fulfilling their primary role for regulating basic service rates.

The authors of the Act also deserve a good midterm grade. In hindsight, blessed by short-term memory loss of the tremendous political struggle involved in enacting the legislation, it might be said that the provisions could have been better drafted. But in that case, there might well have been no legislation. Faced with a choice between perfection and pragmatism, a common legislative dilemma, Congress opted to try to do something about unregulated monopoly prices. The features of the Act designed to promote competition and to regulate rates fit hand in glove together. This interrelationship is fundamentally the most positive feature of the Act. One of the best-kept secrets of the new law is how well it is working to assure that competitors have something to sell. Every indication is that programmers are making their product available to competitors and that contracts are being adjusted to offer nondiscriminatory prices. Use of the new complaint procedures at the FCC for unfair programming practices might prove to be the exception to the rule. Rate regulation should reinforce this trend. When monopoly prices cannot be maintained, it does not make sense to restrict output. Programmers have every incentive to find more outlets to sell more products and to make their programming more universally available at affordable prices. And as competition emerges, the rate regulation will expire, with no one likely to mourn its passing.

The experience with reinventing rate regulation for cable television has significance beyond this sector of the economy. As the Administration is poised to pursue health care reform, the new cable regulations are the most recent experiment with attempting to impose government price controls on a wholly unregulated industry. The most vivid lesson is that competition is far preferable to the difficulty, cost, and elusive results of rate regulation. Rate regulation is at best a last resort and the justification must be very clear. As compared to regulating cable rates, it would seem that the problems with imposing price controls on the health care industry would be exponentially more complex.

Recently, the Chairman of the House Subcommittee on Telecommunications and Finance noted "the tendency to proceed with debate and deliberation about telecommunications issues as if history began in 1984, with the breakup of AT&T and the passage of the first Cable Act."(note 216) Recent events, the passage of the 1992 Act, the trend toward technological convergence and innovation, and the launch of efforts to build an advanced communications network reaching all Americans, may soon wipe that slate clean. It is once again a beginning, a time to look forward to the telecommunications sector reaching its full potential for stimulating economic growth, generating highly productive jobs, and providing an array of affordable, advanced services to all Americans.

Notes

*Nicholas W. Allard is Government Relations Counsel with the firm of Latham & Watkins. His legislative and regulatory practice in Washington, D.C., includes work on behalf of the Wireless Cable Association and other communications clients involved in subscription television. The Author is a former minority staff counsel to the United States Senate Judiciary Committee and administrative assistant to Senator Daniel Patrick Moynihan (D- N.Y.). A Rhodes Scholar, with degrees from Princeton, Oxford, and Yale, Mr. Allard has written numerous articles and is a frequent speaker on communications issues.

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

The Author is indebted to law librarians Robert K. Oaks and Scott R. Wales, legislative specialist J.O. Wallace, and to Constance C. LaChance of Latham & Watkins for their invaluable assistance.Return to text

1. Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460

(codified in scattered sections of 47 U.S.C.A. 521-611 (West Supp. 1993)) (1992 Cable Act or 1992 Act). Return to text

2. *See* 47 C.F.R. 76.100-.621 (1993); *see also In re* Implementation of Sections of the Cable TV Consumer Protection and Competition Act of 1992, Rate Reg., *Notice of Proposed Rulemaking*, 8 FCC Rcd. 510 (1992) [hereinafter *NPRM*], *amended by Report and Order and Further Notice of Proposed Rulemaking*, 8 FCC Rcd. 5631 [hereinafter *Rate Order*] (to be codified at 47 C.F.R. pts. 0, 76), *aff'd by First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking*, 58 Fed. Reg. 46,718 (1993) [hereinafter *Rate Order on Reconsideration*] (to be codified at 47 C.F.R. pt. 76). Return to text

3. Agatha Christie, Murder on the Orient Express (1933) (originally titled Murder on the Calais Coach in U.S. editions). Return to text

4. *See Oversight Hearing on the Implementation of the Cable Television Consumer Protection and Competition Act of 1992 and Provisions Implementing Rate Regulation Before the House Telecommunications and Finance Subcomm.*, 103d Cong., 1st Sess. (Sept. 28, 1993) [hereinafter *Oversight Hearing*] (statement of Rep. Edward J. Markey (D-Mass.), Chairman, House Telecommunications and Finance Subcomm.), (statement of James H. Quello, Acting Chairman, FCC); *see also* FCC Fact Sheet on Cable Rate Adjustments, *Public Notice* (Aug. 20, 1993) [hereinafter FCC Fact Sheet] (rebutting news articles suggesting that regulations are causing price increases); Letter from Rep. Edward J. Markey (D-Mass.), Rep. Christopher Shays (R-Conn.), and 128 members of Congress to James H. Quello, Acting Chairman, FCC (Sept. 14, 1993) (on file with the *Federal Communications Law Journal*) (107 Democrats, 22 Republicans, and 1 Independent signed the letter urging the FCC to reconsider rate regulations immediately); Letter from Sen. Joseph Lieberman (D-Conn.) to James H. Quello, Acting Chairman, FCC (Sept. 1, 1993) (on file with the *Federal Communications Law Journal*); Ervin S. Duggan, Commissioner, FCC, Cable Regulation and Boozer's Revisions, Remarks before the National Association of Telecommunications Officers and Advisors (Sept. 10, 1993) (transcript on file with the *Federal Communications Law Journal*); Letter from James H. Quello, Acting Chairman, FCC, to Meg Greenfield, Editorial Page Editor, *Washington Post* (Aug. 19, 1993) (on file with the *Federal Communications Law Journal*) (rebutting Paul Farhi, *Cable Rules Will Raise Some Bills*, Wash. Post, Aug. 1, 1993, at A1).

   Controversy over implementation of the 1992 Cable Act is neither unexpected nor unique to the rate regulation provisions. For example, as many as 1.5 million viewers were affected by decisions to drop C-SPAN, which local cable operators indicate is necessary to free up channel space needed to comply with the so- called "must carry" provisions of the Act that require cable Return to text

5. A sampling of news coverage across the country indicates the scope and intensity of the present controversy. *See, e.g.*, Edmund L. Andrews, *G.O.P. Scorches Democrats Over Rising Cable Charges*, N.Y. Times, Sept. 29, 1993, at C1; Marianne Arneberg, *Cable TV Bills Will Bring Ups and Downs*, Orlando Sentinel, Sept. 5, 1993, at K3; *Cable Malarkey*, Wall St. J., Sept. 28, 1993, at A18 (editorial); *Cable Act Takes Effect, Establishing New Rate Structure for Cable Customers*, PR Newswire, Aug. 25, 1993, *available in* LEXIS, Nexis Library, Omni File; *The Cable Rate Shock*, N.Y. Times, Sept. 30, 1993, A18 (editorial); James Cox, *FCC Chief: Too Early to Judge Cable Rates*, USA Today, Sept. 29, 1993, at 2B; *Consumer Advocate Pushes Competition*, Daily Independent (Kannapolis, N.C.), Sept. 2, 1993, at 1A; James Cox, *Static Over Cable TV/New Rules Won't Lower Rates for* operators to carry certain over-the-air broadcast signals. Timothy J. Burger, *Less Congress on Cable, C- SPAN Warns; 1.5 Million Feel Cutbacks After Cable Bill*, Roll Call, Sept. 9, 1992, at 10. Retransmission consent has the potential to be almost as controversial as cable rates if negotiations and agreements break down over compensation to be paid to broadcast stations for carriage on cable systems.

   Five lawsuits challenging the constitutionality of 14 different sections of the Act were filed within days of the bill's enactment and are now awaiting argument in the Supreme Court. *See* Discovery Comm., Inc. v. United States, No. 92-2558 (D.D.C. Nov. 5, 1992) (challenging 3, 9, and 19 of the 1992 Cable Act); National Cable TV Ass'n, Inc. v. United States, No. 92-2495 (D.D.C. Nov. 5, Return to text

6. On October 5, 1992, the U.S. Senate voted 74-25 to override the veto. 138 Cong. Rec. S16,676 (daily ed. Oct. 5,

1992). The U.S. House of Representatives voted 308-114 to override the veto. 138 Cong. Rec. H11,487-88 (daily ed. Oct. 5, 1992). Previously, in September 1992, the respective votes favoring passage of the 1992 Cable Act were 280-128 in the House and 74-25 in the Senate. 138 Cong. Rec. H8687 (daily ed. Sept. 17, 1992); 138 Cong. Rec. S14,616 (daily ed. Sept. 22, 1992). Return to text

7. *See, e.g.*, Andrews, *supra* note 5. Return to text

8. *See* Caddyshack (Orion Pictures 1980). Return to text

9. *Oversight Hearing*, *supra* note 4. Return to text

10. 47 U.S.C.A. 543 (West Supp. 1993) (amending 47 U.S.C. 543 (1988)). Return to text

11. *Rate Order*, *supra* note 2. Return to text

12. It is more likely that momentum will continue to build for legislation to permit telephone company (telco) entry into the subscription television market as a competitive counterweight to Return to text

13. 47 U.S.C.A. 543(b)(1)-(3) (West Supp. 1993). Return to text

14. 47 U.S.C.A. 543(c) (West Supp. 1993). Return to text

15. *Id.* The Act contains a "grandfather clause" exempting from the new rate regulations, rate regulation agreements between a franchise authority and a cable operator entered into before July 1, 1990, where there was no effective competition under the rules then in effect. 47 U.S.C.A. 543(j) (West Supp. 1993). The Act also requires regulations for the collection of financial information from cable operators one year after enactment, and annually thereafter, 47 U.S.C.A. 543(g) (West Supp. 1993), and for the Commission to annually publish reports on average rates for basic and premium services and equipment, 47 U.S.C.A. 543(k) (West Supp. 1993). Return to text

16. *See Rate Order*, *supra* note 2. Return to text

17. The FCC initially announced that its regulations would go into effect on June 21, 1993. *Rate Order*, *supra* note 2, para. 484. However, the effective date was moved to October 1, 1993, because of the Commission's concern that it needed Congress to provide additional resources to fulfill its responsibilities under the Act. *In re* Implementation of Sections of the Cable TV Consumer Protection and Competition Act of 1992, Rate Reg., *Order*, 58 Fed. Reg. 33,560, 73 Rad. Reg. 2d (P & F) 14 (1993) [hereinafter *Freeze Order Extension*] (to be codified at 47 C.F.R. 76.1090). When Congress granted the FCC additional funding on July 6, 1993, the FCC moved up the effective date of the regulations to September 1, 1993. *In re* Implementation of Sections of the Cable TV Consumer Protection and Competition Act of 1992, Rate Reg., *Erratum*, 8 FCC Rcd. 4511, para. 1 (1993). Return to text

18. 47 U.S.C.A. 543(a)(3) (West Supp. 1993). There is no deadline for a local authority to apply. *Rate Order*, *supra* note 2, para. 87. By early November 1993 less than 5000 out of over 30,000 local franchise authorities had contacted the FCC regarding certification. Paul Farhi, *Few Localities Regulate Cable Rates*, Wash. Post, Nov. 11, 1993, at B11; Vincente Pasdeloup, *FCC Extends Freeze*, Cable World, Nov. 1, 1993, at 1, 1. Return to text

19. 47 U.S.C.A. 543(a)(6) (West Supp. 1993); *see Rate Order*, *supra* note 2, paras. 85-93 & app. A paras. 22-27 (new petitions for certification after disapproval or revocation are to Return to text

20. *Rate Order*, *supra* note 2, para. 87.be approved or disapproved within 90 days). Return to text

21. *Id.* Return to text

22. *Id.* paras. 88-90. Such stays will be automatically granted if the petition challenges the approval on jurisdictional

grounds, that is, on grounds that the operator faces effective competition, and may be granted on other grounds, subject to refund liability should the petition be denied. *Id.* paras. 89-90. Return to text

23. There have been reports that some cable operators are encouraging local authorities not to file for certification and that local authorities are intimidated about having responsibility for rate regulation. *Oversight Hearing*, *supra* note 4 (remarks of Rep. W.J. (Billy) Tauzin (D-La.)); Robichaux, *supra* note 5, at A1. Return to text

24. 47 U.S.C.A. 543(c)(1)(C) (West Supp. 1993). The Act only authorizes refunds for premium service overcharges paid after the filing of complaints and, thus, exempts rates paid prior to September 1, 1993. *Id.* Return to text

25. 47 U.S.C.A. 543(c)(3) (West Supp. 1993). Return to text

26. *Id.* Return to text

27. *Rate Order*, *supra* note 2, paras. 336, 338, 356 & app. A paras. 82-85. Return to text

28. *Id.* paras. 332-333. Return to text

29. *Id.* para. 368 & app. A para. 86. Return to text

30. It has also been suggested that changes in the effective date of the regulations, from June 21, 1993, to October 1, 1993, and then back to September 1, 1993, *In re* Implementation of Sections of the Cable TV Consumer Protection and Competition Act of 1992, Rate Reg., *Order*, 58 Fed. Reg. 41,042, paras. 1, 2, 73 Rad. Reg. 2d (P & F) 16 (1993) [hereinafter *Order of July 27*], may also have contributed to the confusion and started the regulatory clock running before the FCC was fully equipped to manage the regulations. *See Oversight Hearing*, *supra* note 4 (statement of James H. Quello, Acting Chairman, FCC) (statement of Andrew C. Barrett, Commissioner, FCC). Return to text

31. *In re* Implementation of Sections of the Cable TV Consumer Protection and Competition Act of 1992, Rate Reg., *Order*, 8 FCC Rcd. 2921 [hereinafter *Freeze Order*] (to be codified at 47 C.F.R. 76.1090), *clarified by In re* Implementation of the Cable TV Consumer Protection and Competition Act of 1992, *Order*, 8 FCC Rcd. 2917, *amended by* Cable TV Act, *Report and Order and Further Notice of Proposed Rule Making*, 58 Fed. Reg. 29,736, 29,753 (1993) [hereinafter *Amended Freeze Order*] (to be codified at 47 C.F.R. 76.900). Originally the rate freeze extended to August 3, 1993. The freeze was extended to November 15, 1993, after the effective date of the regulations was changed. *Freeze Order Extension*, *supra* note 17, para. 1; *Order of July 27, supra* note 30, para. 1; *see supra* note 17 and accompanying text. The FCC has extended the freeze yet again. Paul Farhi, *Few Localities Regulating Cable Rates*, *supra* note 18; *see also* Pasdeloup, *supra* note 18. Return to text

32. The *Amended Freeze Order* provides:

    > (a) The average monthly subscriber bill for services provided by cable operators subject to regulation under Section 623 of the Communications Act shall not increase above the average monthly subscriber bill determined under rates in effect on April 5, 1993, for a period of 120 days.
    >
    > (b) The average monthly subscriber bill shall be calculated by determining for a monthly billing cycle the sum of all billed monthly charges for all cable services subject to regulation under Section 623 of the Communications Act and dividing that sum by the number of subscribers receiving any of those services. The average monthly subscriber bill determined under rates in effect on

    Return to text

33. It is not apparent that there is any specific enforcement mechanism for the freeze, or that any procedures have been formulated to investigate and penalize companies for failure to comply. At this writing, the FCC has apparently issued Letters of Inquiry to several cable companies and several state attorneys general are reportedly investigating cable rate practices under the new Cable Act. *Attorneys General to Probe Cable TV Price*

Increases, Daily Variety, Nov. 19, 1993, at 22. Return to text

34. More precisely, the order freezes revenues per subscriber. If the number of subscribers increases, or if revenues are calculated on a per channel basis, then total revenues can increase notwithstanding the freeze order. Return to text

35. *Freeze Order*, *supra* note 31, paras. 15, 53. The Commission also announced several other steps designed to protect subscribers in the interim between adoption and implementation of its regulations, including investigating the rates of systems whose rates remain well above competitive levels, cost studies of selected cable operators to test the accuracy of the Commission's Return to text

36. *See* FCC Fact Sheet, *supra* note 4 (citing research of Paul Kagan Associates, Inc., estimating that freeze will save consumers between $122 and $200 million).formulas, and conducting further surveys of industry rates to refine its rate formulas as appropriate. *Id.*; *Rate Order on Reconsideration*, *supra* note 2, para. 130; *see also Action in Docket CaseCable System to Reduce Rates to "Competitive" Levels* (MM Dkt. No. 92-266), FCC News, Apr. 1, 1993, at 1 [hereinafter *Action in Docket Case*]. Return to text

37. Some of the credit for this approach must go to the cable industry, which apparently suggested the adjustments forward for inflation. Letter from James P. Mooney, President, Nat'l Cable TV Ass'n to Ervin S. Duggan, Commissioner, FCC (Mar. 25, 1993). The National Cable Television Association (NCTA) also initially proposed the benchmark system of rate regulation essentially adopted by the FCC, and demonstrated to the FCC how to correct errors in its survey data. Comments of the National Cable TV Ass'n, Inc. on the Commission's Database to the *Implementation of Sections of the Cable TV Consumer Protection and Competition Act of 1992, Rate Reg.* in MM Dkt. No. 92-266 (Mar. 8, 1993) [hereinafter NCTA Database Comments]; Comments of the National Cable TV Ass'n, Inc. to the *Implementation of Sections of the Cable TV Consumer Protection and Competition Act of 1992, Rate Reg.* in MM Dkt. No. 92-266 (Jan. 27, 1993) [hereinafter Initial NCTA Database Comments]. Return to text

38. The Author freely concedes that, notwithstanding considerable effort, his understanding of the relevant regulatory passages might be flawed. Consider the following passages of the *Rate Order*, *supra* note 2: para. 14 n.29 (rates will be reduced no more than 10% below a system's rates "as of the date of the survey"); para. 15 ("significant reductions from current rate levels"); para. 15 (rates will fall "approximately 10 percent from September 30, 1992 levels, unless the operator can justify a higher rate based on costs"); para. 187 ("By comparing the rate derived by applying the benchmark formula to a cable system's current or September 30, 1992 rates . . . we determine an initial reasonable regulated rate for each cable system."); paras. 213-217 (discussing application of the benchmark to determine initial regulated rate levels); and, especially, para. 216 ("We will not require any reductions for basic tier rates that are at or below the system's benchmark level at the time the system becomes subject to regulation.") and para. Return to text

39. *Rate Order*, *supra* note 2, para. 12 (emphasis added). Return to text

40. *Id.* para. 15 (emphasis added). Return to text

41. *Id.* app. A para. 6. Return to text

42. *Id.* app. A para. 7. Return to text

43. For discussion of this see *id.* app. A paras. 49-53. Return to text

44. *Id.* app. A para. 49. This rule seemed to create an incentive for cable systems with the lowest rates to raise their rates prior to the effective date of regulation. Return to text

45. *Id.* app. A para. 50. Return to text

46. *Id.* app. A para. 51. Return to text

47. *Id.* app. A para. 52. Return to text

48. *Id.* app. A para. 53. Instead, the Commission announced the following steps: (1) further surveys to refine the competitive benchmark and the rate differentials between competitive systems and systems not subject to effective competition; (2) issuing a *Further Notice* or adjusting the competitive benchmark calculation; and (3) investigating rates of cable systems with rates far above Return to text

49. *Id.* para. 15; *see also Action in Docket Case*, *supra* note 35; FCC Fact Sheet, *supra* note 4, at 1. Return to text

50. *In re* Implementation of Sections of the Cable TV Consumer Protection and Competition Act of 1992, Rate Reg., *Order* in Dkt. No. 92-266, FCC 93-446 (Sept. 17, 1993). Return to text

51. *Oversight Hearing*, *supra* note 4. Return to text

52. At the FCC open meeting of October 21, 1993, the FCC announced preliminary results of its survey but declined to release the data until it had an opportunity to analyze the findings further and prepare a more extensive report. *Action in Docket CaseFCC Announces Preliminary Results of Cable Rate Survey* (MM Dkt. No. 92-266), FCC News, Oct. 21, 1993. Return to text

53. *Id.* at 1. The survey thus left considerable discretion to the MSOs in determining reportable rates. Moreover, Return to text

54. *Id.*the scope of the survey, while covering large numbers of subscribers, only reflected rates in large systems. Return to text

55. *Id.* Apparently, the FCC did not attempt to ask the question: What would a subscriber pay now in order to obtain the same programming the subscriber received in April? The FCC is now attempting to reconstruct the data to answer this question. Return to text

56. *Id.* at 2. Return to text

57. *Id.* Return to text

58. *Id.* Return to text

59. *Id.* Apparently, the survey did not examine whether cable systems are offsetting equipment price reductions by new charges for services and features previously not charged to subscribers. Return to text

60. *Id.* Return to text

61. *Id.* at 2. The NCTA performed its own analysis of the data, which was used to brief FCC staff, members of Congress, and the press, but has not been released formally to the public. In general, the NCTA reportedly found that the FCC met its goal of reducing regulated cable rates for three-quarters of subscribers by 10%. Return to text

62. *See* Edmund L. Andrews, *Cable Rates Have Risen for Many, F.C.C. Says*, N.Y. Times, Oct. 22, 1993, at D2; Paul Farhi, *FCC Hedges in Saying Cable Rates Fell*, Wash. Post, Oct. 22, 1993, at B1. There have been indications since that the GAO will work with FCC staff and analyze FCC data as well as assist with the preparation of the first annual report required by the Act rather than prepare an independent study. In a subsequent letter, Chairman Markey called for a further investigation of cable rates noting reports of certain evasive practices. Letter from Representative Edward J. Markey, Chairman, House Subcomm. on Telecommunications and Finance, to James H. Quello, Acting Chairman, FCC (Oct. 26, 1993) (on file with the *Federal Communications Law Journal*). In the October 26 letter to Quello, Markey said: "We must not leave the American cable consumer at the mercy of arbitrary and unreasonable rate practices by cable operators." Markey provided several examples of types of practices that he said appeared to be violations of the law, including: (1)

basic service in one Florida system jumped about 50%, to $21.05 monthly; (2) bill in Indiana for basic service climbed 48%, to $20.64; (3) California system is moving channels to a la carte status to avoid regulation with seven channels that had been part of basic package now offered separately; and (4) system Return to text

63. The relevant committee reports include: H.R. Conf. Rep. No. 862, 102d Cong., 2d Sess. (1992), *reprinted in* 1992 U.S.C.C.A.N. 1231; H.R. Rep. No. 628, 102d Cong., 2d Sess. (1992); S. Rep. No. 92, 102d Cong., 1st Sess. (1991), *reprinted in* 1992 U.S.C.C.A.N. 1133. The House bill, H.R. 4850, 102d Cong., 1st Sess. (1991), did not contain a retransmission consent provision, and the conference agreement adopted the Senate retransmission consent language. Therefore, Senate Report 92 is especially important on this issue.

    The legislative history of the Act also includes the floor debate accompanying the veto override votes. 138 Cong. Rec. S16,676 (daily ed. Oct. 5, 1992); 138 Cong. Rec. H8687 (daily ed. Sept. 17, 1992). See also 138 Cong. Rec. S16,652-77 and H11,477-88 (daily ed. Oct. 5, 1992); the presidential veto message, Message to the Senate Returning Without Approval the Cable Television Consumer Protection and Competition Act of 1992, 28 Weekly Comp. of Pres. Doc. 1860 (Oct. 3, 1992); the floor debates accompanying consideration and passage of Conference Report 862 in the Senate, 138 Cong. Rec. S14,222-51 (daily ed. Sept. 22, 1992) and in the House, 138 Cong. Rec. H8671-87 (daily ed. Sept. 17, 1992); and the floor debates accompanying consideration and passage of the House bill, H.R. 4850, 138 Cong. Rec. H6531-44 (daily ed. July 23, 1992), as well as the Senate bill, S. 12, 138 Cong. Rec. S400-33 (daily ed. Jan. 27, 1992), 138 Cong. Rec. S561-611 (daily ed. Jan. 29, 1992), 138 Cong. Rec. S635-97 (daily ed. Jan. 30, 1992).

    The full extent of the legislative history, including related legislative materials and events over several years, is discussed in Nicholas W. Allard, *The 1992 Cable Act: Just the Beginning*, 15 Hastings Comm/Ent L.J. 305, 307-11 (1993).in Maryland claiming Cable Act did not allow it to offer discounts to senior citizens, when in fact Act specifically does so. *Id.* Return to text

64. For example, prior to consideration of Conference Report 862 in the Senate, the Floor Manager of the bill, Communications Subcommittee Chairman Daniel K. Inouye explained that the "driving force" behind the legislation was excessive consumer rates and Return to text

65. *See* 47 U.S.C.A. 543(c) (West Supp. 1993). Return to text

66. Pub. L. No. 98-549, 98 Stat. 2779 (codified in scattered sections of 47 U.S.C.). Return to text

67. 47 U.S.C. 543(b) (1988). A cable system was considered to be subject to effective competition if the entire community it served could receive three or more unduplicated broadcast signals. S. Rep. No. 92, *supra* note 63, at 4, 1992 U.S.C.C.A.N. at 1136; H.R. Rep. No. 628, *supra* note 63, at 30-31; *see* ACLU v. FCC, 823 F.2d 1554 (D.C. Cir. 1987) (upholding FCC Return to text

68. S. Rep. No. 92, *supra* note 63, at 4, 1992 U.S.C.C.A.N. at 1136; H.R. Rep. No. 628, *supra* note 63, at 30-31. The FCC eventually revised its definition of "effective competition" to be either (1) six unduplicated over-the-air broadcast signals, or (2) competing multichannel video provider available to 50% of the homes passed by the existing cable system and subscribed to by at least 10% of the homes passed. *In re* Reexamination of the Effective Competition Std. for the Reg. of Cable TV Basic Serv. Rates, *Report and Order and Second Further Notice of Proposed Rulemaking*, 6 FCC Rcd. 4545 (1991); *see* S. Rep. No. 92, *supra* note 63, at 8, 1992 U.S.C.C.A.N. at 1140. According to the GAO, however, the rates of only 20% of the nation's cable subscribers would be regulated under the new standard), *cert. denied*, 485 U.S. 959 (1988). Return to text

69. H.R. Rep. No. 628, *supra* note 63, at 29. Return to text

70. *Id.* at 30. Return to text

71. *Id.* at 29. Return to text

72. Paul Kagan Associates, Inc., *Cable TV Investor*, Feb. 12, 1993, at 5. Return to text

73. *See* NCTA, *Cable Television Developments*, at 8-A, 9-A (June 1993) (citing Paul Kagan Associates, Inc., *Cable TV Investor* and *Cable TV Advertising* statistics). Return to text

74. *Id.* Return to text

75. *See* Paul Kagan Associates, Inc., *Kagan Media Index*, Mar. 30, 1993, at 10. Return to text

76. *GAO Cable Rate Survey*, *supra* note 68. The GAO surveyed 1950 of the then existing 8908 cable systems. *Id.* at 47. From 1451 usable responses, it concluded that monthly rates for the lowest-priced basic service increased by 29%. *Id.* at 43. This increase is four times the then prevailing rate of inflation. H.R. Rep. No. 628, *supra* note 63, at 31. The rate increase was accompanied by an increase in the average number of base channels offeredfrom nearly 24 to about 30. Rates for "the most popular cable service" increased by 26%. For this level of service the number of channels increased from 27 to approximately 32. *GAO Cable Rate Survey*, *supra* note 68, at 43. Average monthly rates for movie channels decreased. *Id.* at 45. Return to text

77. GAO Follow-up Survey, *supra* note 68. In this follow- Return to text

78. 1991 GAO Rate Survey, *supra* note 68. The third GAO survey examined rates from December 1989 to April 1991. *Id.* at 2. Approximately 70% of subscribers for the most popular service and 66% for the lowest-priced service received rate increases of more than 10%. *Id.* at 5. Average monthly rates during this period for the lowest-priced basic service increased by 9% while the average number of channels offered decreased by one. Average monthly rates for the most popular service increased by 15%, while the average number of channels available increased by two. *Id.* at 2.up survey, the GAO sampled 1971 cable systems and received 1530 usable responses. *Id.* at 16. The survey was designed with input from the FCC, the NCTA, the National League of Cities, the Community Cable Television Association (small and independent cable operators), the U.S. Conference of Mayors, and congressional staff. *Id.* at 15. The GAO found that basic rates continued to increase at "a rather significant rate." H.R. Rep. No. 628, *supra* note 63, at 32. The GAO concluded that the rates for both the lowest-priced and most popular basic services increased by an average of 10% in 1989 alone. GAO Follow-up Survey, *supra* note 68, at 3. This rate was more than double the rate of inflation. H.R. Rep. No. 628, *supra* note 63, at 32. Return to text

79. H.R. Rep. No. 628, *supra* note 63, at 33. Return to text

80. *In re* Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable TV Serv., *Report*, 5 FCC Rcd. 4962, para. 19 (1990) [hereinafter *1990 Report*]. The FCC analyzed, among other things, GAO raw data collected in the GAO 1990 follow-up survey. *Id.* para. 5 & n.16. Corroborating these results is the FCC survey conducted after the 1992 Cable Act, finding monopoly rates ranging from 10 to 28% higher than competitive rates. *Rate Order*, *supra* note 2, app. E paras. 30-31. A recently released study by the Aerie Group, a private consultant to state and local authorities, sharply criticized the FCC's methodology but concluded that the differential was also in this range22%. Aerie Group, Inc., Realizing Congress's Promise of Effective Rate Regulation for Cable TV Consumers 2, 5 (Sept. 28, 1993). An analysis of the FCC data by Thomas W. Hazlett found that the cable systems that faced competition from other multichannel distributors charged from 32 to 37% less than monopoly systems. *In re* Implementation of Sections of the Cable TV and Consumer Protection Act of 1992, Rate Reg., Affidavit of Thomas W. Hazlett in MM Dkt. No. 92-266, paras. 11, 13 & n.4 (June 17, 1993) [hereinafter Hazlett Affidavit] (accompanying Joint Comments of Bell Atlantic, GTE, and the NYNEX Tel. Cos.). Return to text

81. *1990 Report*, *supra* note 80, para. 21. Return to text

82. The GAO reports were criticized by some as representative of only a small portion of the cable industry and Return to text

83. H.R. Rep. No. 628, *supra* note 63, at 33.for understating the rate increases because the survey was voluntary and cable systems with the largest increases might not have responded. The cable industry argued that the surveys

overstated increases by failing to account for rate changes resulting from "catching-up" after the 1984 Act lifted rate freezes that had been imposed by local franchising authorities. The merits and pitfalls of the data were thoroughly discussed and considered by Congress. *See*, *e.g.*, S. Rep. No. 92, *supra* note 63, at 5-6, 1992 U.S.C.C.A.N. at 1137. Return to text

84. S. Rep. No. 92, *supra* note 63, at 8, 1992 U.S.C.C.A.N. at 1140. Return to text

85. *See, e.g.*, S. Rep. No. 92, *supra* note 63, at 5-6, 1992 U.S.C.C.A.N. at 1138 (remarks of Sen. Wendell Ford (D-Ky.)) (referring to rate increases running as high as 94 to 204%, he states: "[Y]ou come in here and tell us that it's an average of 20 percent or 26 percent. Why it's just not here when you get right down to it in my particular State."); *see also* 135 Cong. Rec. 4040 (1989) (statement of Rep. Charles E. Schumer (D-N.Y.) (citing a list of 51 cities where cable rates increased 50 or more percent in 1987). Return to text

86. A study in *Consumers' Research* of 52 separate markets in 1990 found that in areas where one cable company existed, fewer channels were offered and the cost per channel was 33% higher than in areas with competition. John W. Merline et al., *How to Get Better Cable TV at Lower Prices*, Consumers' Res., May 1990, at 10, 10. The Wireless Cable Association (WCA) reported that where microwave competition existed, cable rates were an average of 25 to 30% lower for subscribers than before competition existed. *Oversight Hearing*, *supra* note 4 (statement of Rep. Edward J. Markey (D-Mass.)); *see Cable Television Regulation (Pt. I): Hearings Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 101st Cong., 2d Sess. 538-41 (1990) (statement of Matthew Oristano, Chairman, People's Choice TV Partners); *id.* at 542-60 (statement of Joseph W. Hipple III, Chairman, Venturers Committee, Pacific West Cable); *see also Cable TV Consumer Protection Act of 1991: Hearing on S. 12 Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation*, 102d Cong., 1st Sess. 280-81 (1991) [hereinafter *Senate Hearing on S. 12*] (statement of Robert L. Schmidt, Pres., WCA) (discussing other impacts of competition); *Cable Television Regulation: Hearings on H1303 and H2546 Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 102d Cong., 1st Sess. 289 (1991) (statement of Robert Bilodeau, Director, WCA).

The FCC Regulatory Report projected prices falling 20% from monopoly to competitive levels. These various reports have generally been supported by post-enactment studies. *See Rate Order*, *supra* note 2, app. E para. 31; *see also* Aerie Group, *supra* note 80 Return to text

87. 138 Cong. Rec. S413, S425 (daily ed. Jan. 27, 1992) (statements of Sen. John C. Danforth (R-Mo.) and Sen. Albert Gore (D-Tenn.)) (referring to Department of Justice study: *Market Power and Price Increases for Basic Cable Services Since Deregulation* (Aug. 1991)).(finding a 22% differential). Return to text

88. S. Rep. No. 92, *supra* note 63, at 7-8, 10, 1992 U.S.C.C.A.N. at 1139-40, 1142 (chart on per subscriber values for cable systems). Return to text

89. *Id.* at 7, 1992 U.S.C.C.A.N. at 1139. Return to text

90. *Id.* Opponents of the Act argued and Congress presumably considered that regulations requiring rate cuts could curtail the ability of some cable companies to service their debt. Operators are able under the present regulations to attempt to justify higher rates needed to service debt in cost-of-service proceedings. In the future, the allowance for debt service will likely prove to be one of the most important and hotly contested aspects of the cable rate cost of service proceedings. It is a subject that, in itself, merits close study. Return to text

91. *See* 47 U.S.C.A. 543 (West Supp. 1993). *See also* the statutory policy statements, 1992 Cable Act, Pub. L. No. 102-385, 2(b), 106 Stat. 1460, 1463. It is possible to find better drafted statutes than the rate regulation provisions of the Act. Unlike the access to programming provisions designed to stimulate competition contained in 12 and 19 of the Act, which were largely derived from the House bill, H.R. Conf. No. 862, *supra* note 63, at 82-83, 93, 1992 U.S.C.C.A.N. at 1264-65, 1275, and language originally offered by Representative W.J. (Billy) Tauzin (D-La.), *id.* at 93, 1992 U.S.C.C.A.N. at 1275, or the retransmission consent language that was adopted in Conference from the Senate bill, *id.* at 76-77, 1992 U.S.C.C.A.N. at 1258-59, the rate regulation language of the

1992 Cable Act was both an amalgam and, in important respects, a significant revision of the relevant portions of both the Senate bill and the House bill. The resulting text, drafted at the staff level during Conference was first scrutinized and debated upon floor consideration of the Report of the Conference Committee. Return to text

92. 47 U.S.C.A. 543(a)(2) (West Supp. 1993). Return to text

93. 47 U.S.C.A. 543(b)(7)(A) (West Supp. 1993). Return to text

94. *See id.* Return to text

95. 47 U.S.C.A. 543(b)(7)(B) (West Supp. 1993). Return to text

96. 47 U.S.C.A. 543(8)(A) (West Supp. 1993). This buy-through prohibition does not apply to cable systems that lack the technology to sell premium channels in this manner. 47 U.S.C.A. 543 (b)(8)(B) (West Supp. 1993). The Act also establishes regulations pertaining to many other aspects of cable service such as the geographic structure of rates and rate discrimination within a franchise area, prohibitions against negative option billing, and the collection of information about rates and billing. 47 U.S.C.A. 543(d)-(g) (West Supp. 1993). Return to text

97. 47 U.S.C.A. 543(b)(1) (West Supp. 1993). This language was formulated in Conference. Working from the House bill's language and format, Conference Report 862 adopts the Senate bill's basic rate regulation standard (i.e., that the FCC ensure that rates are reasonable) and establishes a new standard for defining what is Return to text

98. 47 U.S.C.A. 543(a)(2)(A) (West Supp. 1993). Return to text

99. 47 U.S.C.A. 543(a)(3)(A)-(C) (West Supp. 1993). Return to text

100. 47 U.S.C.A. 543(a)(4) (West Supp. 1993). Return to text

101. 47 U.S.C.A. 543(a)(6) (West Supp. 1993). The FCC must act on refilings for certification within 90 days of filing of the resubmission. *Id.* Return to text

102. 47 U.S.C.A. 543(b)(1) (West Supp. 1993) (emphasis added). Return to text

103. *See NPRM*, *supra* note 2, paras. 51-56; *see also Amended Freeze Order*, *supra* note 31, at 29,754-55. Return to text

104. 47 U.S.C.A. 543(b)(1) (West Supp. 1993). Return to text

105. 47 U.S.C.A. 543(b)(2)(A) (West Supp. 1993). Return to text

106. 47 U.S.C.A. 543(b)(2)(B) (West Supp. 1993). Return to text

107. 47 U.S.C.A. 543(b)(2)(C) (West Supp. 1993). The conferees adopted and tightened the factors the House bill had required the FCC to take into account to ensure reasonable basic Return to text

108. 47 U.S.C.A. 543(b)(2)(C)(i) (West Supp. 1993).rates, including limitations on costs that may be allocated and recovered in the rates charged for basic service. H.R. Conf. No. 862, *supra* note 63, at 62, 1992 U.S.C.C.A.N. at 1244. Conference Report 862 further limits the portion of franchise fees, taxes, and other charges imposed by state and local authorities on cable operators and other costs that may be recovered through basic rates. *Id.* at 63, 1992 U.S.C.C.A.N. at 1245. Conference Report 862 also modifies the House bill's "reasonable profit" provision allowing the FCC to consider the profit on nonbasic services when determining a reasonable profit for basic service. *Id.* Return to text

109. 47 U.S.C.A. 543(b)(2)(C)(ii), (iii), (v), (vi) (West Supp. 1993). Return to text

110. 47 U.S.C.A. 543(b)(2)(C)(iv) (West Supp. 1993). Return to text

111. 47 U.S.C.A. 543(b)(2)(C)(vii) (West Supp. 1993). Return to text

112. 47 U.S.C.A. 543(b)(3) (West Supp. 1993). Return to text

113. *Id.* Return to text

114. 47 U.S.C.A. 543(b)(5) (West Supp. 1993). Return to text

115. *See id.* Return to text

116. 47 U.S.C.A. 543(c) (West Supp. 1993). The conferees worked from the House bill to draft the statutory provisions applicable to premium service and related equipment charges. H.R. Conf. No. 862, *supra* note 63, at 64, 1992 U.S.C.C.A.N. at 1246. Return to text

117. 47 U.S.C.A. 543(*l*)(2) (West Supp. 1993). This definition effectively exempts pay channels and single premium channels from any rate regulation. Return to text

118. *Id.* Return to text

119. 47 U.S.C.A. 543(c)(1)(A) (West Supp. 1993). Return to text

120. 47 U.S.C.A. 543(c)(2) (West Supp. 1993). Return to text

121. *Id.* Return to text

122. The FCC has determined that it will apply a "reasoned balancing of the statutory factors" and that it will give primary weight to the rates of systems subject to effective competition. *Rate Order*, *supra* note 2, para. 387. Consequently, the FCC has decided to apply to premium rates the same benchmark system and formulas it will use to regulate basic rates. *Id.* para. 396. Return to text

123. 47 U.S.C.A. 543(c)(1)(B) (West Supp. 1993). Return to text

124. *See id.* This standard was adopted in Conference in lieu of the language in both the Senate and the House bills that would have required that a complaint demonstrate a "prima facie case." H.R. Conf. No. 862, *supra* note 63, at 64, 1992 U.S.C.C.A.N. 1246. Return to text

125. 47 U.S.C.A. 543(c)(3) (West Supp. 1993). This provision was adopted from the House bill, in place of the Senate proposal to permit complaints only about rate increases. H.R. Conf. No. 862, *supra* note 63, at 65, 1992 U.S.C.C.A.N. at 1247. Return to text

126. 47 U.S.C.A. 543(c)(3) (West Supp. 1993). Return to text

127. 47 U.S.C.A. 543(*l*)(1) (West Supp. 1993). This definition replaces the definitions of effective competition the FCC adopted pursuant to the 1984 Cable Act. Return to text

128. 47 U.S.C.A. 543(a)(2) (West Supp. 1993). An issue arises as to whether the exemption applies to more than just regulation of the rates of the basic tier of service and regulating unreasonable rates of other cable programming services. It could be argued that an exempted cable operator is not exempt from the related requirements of Section 3, which deal with uniform rate structure, discriminatory pricing, negative option billing, etc. At present it is likely this issue will be of limited significance. Return to text

129. 47 U.S.C.A. 543(*l*)(1) (West Supp. 1993). Return to text

130. In Senate hearings, the President of the NCTA declined to explain or defend the logic of the low penetration

exemption "because I do not understand the logic of it." *Senate Hearing on S. 12*, *supra* note 86, at 193 (testimony of James P. Mooney). He elaborated:

> If you have more than 50 percent penetration it may be simply as a result of providing good service, offering a good programming Return to text

131. Examples of counterintuitive and perhaps oxymoronic statutory definitions used to trigger regulatory coverage are not uncommon. *See, e.g.*, United States v. Bacto-Unidisk, 394 U.S. 784 (1969) (statutory definition of a drug under the Federal Food, Drug and Cosmetic Act (FFDCA) includes device-like disks). The statutory definition of "drug" in the FFDCA is intended to broaden coverage of the Act beyond what any strict medical definition of "drug" might otherwise allow. Nor is it unprecedented for a federal agency to apply a statutory definition in an odd way. Recall, for example, the flap over the changes in the school lunch program that would have listed ketchup and pickle relish as vegetables, doughnuts as bread, and soybean cakestofuas hamburger meat. *See* Ward Sinclair, *Q: When is Ketchup a Vegetable? A: When Tofu is Meat*, Wash. Post, Sept. 9, 1981, at A7; Mary Thornton & Martin Schram, *U.S. Holds the Ketchup in Schools*, Wash. Post, Sept. 26, 1981, at A1. Such definitional conundrums could provide first-year law students a worthwhile lesson on the difficulties of gleaning rational intent solely on the basis of textual analysis of a statute or a regulation.lineup and doing good marketing. There is nothing to say that above or below 50 percent, or for that matter any number arbitrarily chosen, is indicative of anything with respect to market power or competition.

Id. at 193-94. Return to text

132. A cynic might suggest that this prong of the definition is one of the many lamb's wool-cloaked loopholes foisted by the opponents of the Act to restrict its general applicability. In Return to text

133. *See, e.g.*, *Senate Hearing on S. 12*, *supra* note 86, at 386-87 (written statement of USA Cablesystems, Inc.) (rate regulation would have disproportionately adverse effect on small systems and could interfere with serving remote rural areas); 137 Cong. Rec. S555 (daily ed. Jan. 15, 1991) (statement of Sen. Joseph Lieberman (D-Conn.)). Some of the possible rationales and consequences of including low penetration systems in the definition of effective competition are discussed in *Rate Order on Reconsideration*, *supra* note 2, para. 129. Return to text

134. However, about 50 to 60% of systems with under 1000 subscribers are affiliated with cable multisystem operators such as TCI. Meeting with Alexandra Wilson, Cable Division Acting Chief, FCC (Sept. 7, 1993). Low penetration is attributable to many factors other than the presence of competition or the absence of monopoly power. *See* Hazlett Affidavit, *supra* note 80, para. 15 (analyzing in detail each of the 79 low penetration systems falling in the first category of the effective competition definition). Ironically, the 76 systems surveyed by the FCC that fit the low penetration definition were found to have higher than average prices. *Rate Order*, *supra* note 2, app. E. In fact, Hazlett Return to text

135. *See generally* 47 U.S.C.A. 543(h) (West Supp. 1993).calculates that these systems had rates 10% higher than *monopoly systems*, Hazlett Affidavit, *supra* note 80, para. 10, and surmises that high rates are a reason for low penetration, *id.* paras. 12, 15. Return to text

136. *See, e.g.*, *Rate Order*, *supra* note 2, paras. 2, 10, app. A para. 2; *Rate Order on Reconsideration*, *supra* note 2, para. 130; *id.* (separate statements of James H. Quello, Acting Chairman, FCC, and Andrew C. Barrett, Commissioner, FCC (April 1, 1993)); *see also Oversight Hearing*, *supra* note 4 (testimonies of James H. Quello, Acting Chairman, FCC; Andrew C. Barrett, Commissioner, FCC; and Ervin S. Duggan, Commissioner, FCC). Return to text

137. *See In re* Telephone Co.-Cable TV Cross-Ownership Rules, 63.54-63.58, *Second Report and Order, Recommendation to Congress, and Second Notice of Proposed Rulemaking*, 7 FCC Rcd. 5781 (1992)

[hereinafter *Video Dialtone Order*]; *see also In re* Amendment of the Commission's Rules to Establish New Personal Communications Services, *Second Report and Order* in Gen. Dkt. No. 90-314, FCC 93-451 (Sept. 23, 1993); *In re* Amendment of the Commission's Rules to Establish New Narrowband Personal Communications Services, *First Report and Order*, 8 FCC Rcd. 7162 (1993). Return to text

138. *See In re* Implementation of 309(j) of the Communications Act Competitive Bidding, *Notice of Proposed Rulemaking* in PP Dkt. No. 93-253, FCC 93-455 (Oct. 12, 1993). Return to text

139. *Rate Order*, *supra* note 2, app. B. Return to text

140. *Id.* para. 15, app. A para. 5. Return to text

141. *Rate Order on Reconsideration*, *supra* note 2, paras. 7-13. Return to text

142. A discussion of the statutory and policy issues surrounding the FCC's selection of the 10% standard are found in *Rate Order*, *supra* note 2, paras. 171-232, and *Rate Order on Reconsideration*, *supra* note 2, paras. 21-30, 124-131. *See also Rate Order*, *supra* note 2, at 6149-50 nn.6-8 (separate statement of Andrew C. Barrett, Commissioner, FCC). Return to text

143. 47 U.S.C.A. 543(b)(1) (West Supp. 1993). Return to text

144. *In re* Implementation of the Cable TV Consumer Return to text

145. *Rate Order*, *supra* note 2, app. E para. 8 (420 of the 687 responses included information about a unique second community unit within the same system, making a total of 1107 usable community unit responses).Protection and Competition Act of 1992, Rate Reg., *Order*, 8 FCC Rcd. 226 (1992) [hereinafter Survey]. The Survey results and methodology are summarized in *Rate Order*, *supra* note 2, app. E. The components of the survey included (1) a random 1% sample of 300 cable community units from the universe of active cable community units (29,963); (2) lists of cable systems competing with other systems compiled from industry data books and trade associations, including the NCTA and the WCA; (3) a list of low penetration systems provided by the NCTA from Nielsen Media Research; and (4) cable community units in the 100 largest cable systems. *Id.* app. E paras. 1-2 nn.1-5. The methodology and results were the subject of spirited debate among the commenters and within the Commission. *See id.* paras. 472-477; *see also id.* para. 8; *id.* at 6148 (separate statement of Andrew C. Barrett, Commissioner, FCC). Return to text

146. *Id.* app. E para. 11. Return to text

147. *Id.* app. E paras. 29-31; *Rate Order on Reconsideration*, *supra* note 2, para. 124. Return to text

148. *Rate Order on Reconsideration*, *supra* note 2, para. 124. Hazlett found these systems to have prices 10% higher than monopoly rates. Hazlett Affidavit, *supra* note 80, para. 10. This anomaly is reinforced by the difference between the way penetration is usually measured, that is, percent of subscribers compared to homes passedor able to receive cablein contrast to the systems that fit the statute's unusual use of "penetration," percentage of subscribers compared to the entire franchise community whether wired or not. *Id.* para. 7. Return to text

149. The FCC's analysis is unpersuasive, that its hands are tied by ACLU v. FCC, 823 F.2d 1554 (D.C. Cir. 1987) (holding that the statutory definition of basic cable service was itself clear and unambiguous and would not be overridden by legislative history), *cert. denied sub nom.*, Connecticut v. FCC, 485 U.S. 959 (1988). *See Rate Order on Reconsideration*, *supra* note 2, para. 127 (suggesting that the Commission has authority to redefine basic service).

In contrast, the present debate does not concern altering or reinterpreting the statutory definition of effective competition. Once the FCC determines that regulation is required by the statutory definition, the lawfulness of the FCC's calculation of competitive rates hinges on whether its methodology and the weight it gives to various factors is reasonable, is based on substantial evidence, and can withstand a challenge asserting that the results

Return to text

150. 47 U.S.C.A. 543(b)(2)(C) (West Supp. 1993) (emphasis added). This point also applies to the several factors the FCC is instructed to consider in regulating premium rates. 47 U.S.C.A. 543(c)(2). The Commission has decided to give primary weight to one factorthe rate changes by competitive systemsand to essentially calculate reasonable premium rates the same way it does basic. *Rate Order*, *supra* note 2, para. 180.are arbitrary and capricious and an abuse of the agency's discretion. In other words, did the FCC, exercising its administrative expertise, give serious consideration to all Return to text

151. *See Rate Order*, *supra* note 2, para. 179. Return to text

152. *Id.* Return to text

153. *Id.* paras. 475-477. Return to text

154. *See* Hazlett Affidavit, *supra* note 80, para. 5 (with accompanying data entitled Summary of Systems attached). The NCTA was virtually the only commenter to find the FCC's survey data to be useful and reliable, and even it submitted an economic paper suggesting how to clean up the data. NCTA Database Comments, *supra* note 37 (with preliminary analysis of survey data by Economists, Inc. attached). Return to text

155. *Rate Order*, *supra* note 2, app. E paras. 8-13. Return to text

156. Every unwired area in the country not served by a cable system fits the strict definition of a "low penetration" system. By choosing not to consider those unwired situations in its calculations, the FCC has demonstrated the discretion it has to interpret and apply the statutory definition so as to avoid absurd results. Return to text

157. Another approach would be to use the figures from low penetration systems in determining separate benchmarks and required reduction for certain classes of systems subject to rate regulation, rather than including the data in the calculations for all systems. It may be possible to match up the low penetration systems with categories of regulated systems on the basis of population (where number of subscribers is less than 1000), recent status as a low penetration system, or other market characteristics. The challenge in pursuing this approach would be to ensure that it did not unfairly delay or diminish the benefits of rate regulation for any category of subscribers. Return to text

158. *Rate Order*, *supra* note 2, para. 199. Return to text

159. *Id.* para. 215. Subsequently, increases are determined by price caps above the initial regulated rate, which in turn is based on the benchmark, so later adjustments of the initial benchmarks could, prospectively, have an impact on the level of increases that would eventually be permitted in newly- regulated systems if the price caps were adjusted accordingly. Return to text

160. *Id.* app. E para. 11. Return to text

161. Ongoing correction of the benchmarks will remain worthwhile for all regulated systems because there is no time limit on when a local authority can file its certification to initiate regulation, and complaints about premium service may be filed after any future increase, within a reasonable time. Return to text

162. *Rate Order*, *supra* note 2, para. 216; *see also*, *id.* para. 219 (discussing rates below benchmarks on Sept. 30, 1992, but above benchmark on date regulation begins; required reduction limited to benchmark and increases up to benchmark may be retained). Return to text

163. The stated justification for making the benchmark the floor for rate reductions is to avoid cost-of-service showings that might otherwise result. *Rate Order*, *supra* note 2, para. 219. Return to text

164. *See id.* para. 215 n.541; *see also id.* app. D (FCC Form 393, Worksheets 1 through 6 (Request for Rate

Approval)). Return to text

165. *Id.* app. D. at 6094-104 (FCC FormPart II, Worksheets and Instructions for Calculating Maximum Initial Permitted Rates for Regulated Cable Programming Services). Return to text

166. Both the components of revenues in the numerator and the components of number of channels are weighted to reflect the number of subscribers relating to each component. *Id.* app. D at 6098 (instructions for completing line 104 of Worksheet 1). Return to text

167. *Id.* para. 215 n.541. Return to text

168. *Id.* Return to text

169. Hazlett, *supra* note 5. *But see* Duggan, *supra* note 4; *Oversight Hearing*, *supra* note 4 (statement of Ervin S. Duggan, Commissioner, FCC) (discussing indications that quality channels are being added in service offerings). Return to text

170. 47 U.S.C.A. 543(b)(3) (West Supp. 1993). Another way of looking at the different statutory treatment is that Congress intended that rates for both programming and equipment approximate reasonable competitive rates. This may be done more readily for equipment because the cost to the cable system of equipment is relatively simple to determine. It is the cost the cable system pays to the manufacturer to purchase the equipment. In contrast, Congress gave the FCC greater latitude in determining how to calculate competitive rates for programming. Return to text

171. It is estimated that between 6% and 9% of subscribers nationwide subscribe to the "stripped down" basic service. *Oversight Hearing*, *supra* note 4 (statement of James H. Quello, Acting Chairman, FCC). Speculation that these subscribers are predominately low income and fixed income households experiencing a disproportionate share of rate increases under the new regulations raises concerns about the fairness of the regulations. This trend could also be exacerbated by the weighting the calculations give according to the number of subscribers. Return to text

172. *See* 47 U.S.C.A. 543(*l*)(2) (West Supp. 1993). This statutory definition of "cable programming service" includes the "installation or rental of equipment used for the receipt of such video programming . . . ." *Id.* Thus, cable programming rate complaints may involve allegations of unreasonableness with respect to charges for equipment installation and rent. *Rate Order*, *supra* Return to text

173. A better benchmark data base or an adjustment to current benchmarks would permit eliminating equipment charges from the per channel rate calculation. Return to text

174. *Rate Order*, *supra* note 2, para. 219. Return to text

175. The FCC's approach is asymmetrical in the sense that systems below the benchmark can raise rates up to the benchmark. Return to text

176. 47 U.S.C.A. 543(a)(2)-(3) (West Supp. 1993). Return to text

177. 47 U.S.C.A. 543(a)-(b) (West Supp. 1993). Return to text

178. *See Rate Order*, *supra* note 2, para. 53 n.166. Return to text

179. *Id.* paras. 17, 53. Return to text

180. *Id.* para. 53 (quoting H.R. Conf. Rep. No. 862, 102d Cong., 2d Sess. at 62). Return to text

181. *Id.* Return to text

182. *Id.* paras. 17, 55-56. Return to text

183. *Id.* para. 17. Return to text

184. Duggan, *supra* note 4, at 6; *see also* Edmund L. Andrews, *Enforcement Problems May Help Cable Systems Sidestep Rate Rules*, N.Y. Times, Nov. 11, 1993, at A1; Farhi, *Few Localities Regulate Cable Rates*, *supra* note 18. Return to text

185. Although he has often been misquoted, it is doubtful that Lincoln ever actually offered this apology for a long letter. Ralph Keyes, *Famous Misquotations*, Toronto Star, Dec. 5, 1992, at D1. It was French philosopher Blaise Pascal who said, "I have made this letter longer than usual because I lack the time to make it short." John Bartlett, Familiar Quotations 299 (Emily Morison Beck et al. eds., 15th ed. 1980). Return to text

186. The rulemaking record and regulations are comparable to the scope of other significant regulatory proceedings such as the new food labeling regulations under the Nutrition Labeling and Education Act of 1990, Food Labeling, *Final Rule*, 58 Fed. Reg. 2079 (1993) (to be codified at 21 C.F.R. pts. 1, 101). Nor is regulatory Return to text

187. *See* Al Gore, *From Red Tape to Results, Creating a Government that Works Better & Costs Less, Report of the National Performance Review*, *reprinted in* U.S. Newswire, Sept. 7, 1993, *available in* LEXIS, Nexis Library, Omni File; *see also* Cindy Skrzycki, *Riled About Cable Rates? You'd Best Be in Good Form*, Wash. Post, Nov. 23, 1993, at C1. Return to text

188. 47 U.S.C.A. 543(b)(2)(A) (West Supp. 1993). Return to text

189. Indeed, the regulatory model of benchmarks and comparative differentials adopted by the FCC closely tracks the approach proposed by the NCTA in its comments. *See* Initial NCTA Database Comments, *supra* note 37; NCTA Database Comments, *supra* note 37. Return to text

190. *Rate Order*, *supra* note 2, para. 8 (quoting 47 U.S.C. 541(c) (1988)). Return to text

191. *Id.* paras. 181-188 (discussing advantages of benchmarking over cost-of-service). Return to text

192. *Id.* paras. 189-191. Return to text

193. *Id.* para. 219; *see id.* paras. 390-396 (applying the same rule to unreasonable premium service rates). Return to text

194. *Id.* para. 219. Return to text

195. *Id.* para. 186. Return to text

196. *See, e.g.*, 47 U.S.C. 521(6) (1988). One of the purposes of the 1984 Act was to "promote competition . . . and minimize unnecessary regulation that would impose an undue economic burden on cable systems." H.R. Rep. No. 628, *supra* note 63, at 10. Return to text

197. *See, e.g.*, *Rate Order*, *supra* note 2, para. 6. Return to text

198. The Bell Atlantic Corp./Tele-Communications, Inc. transaction is one of the more recent, dramatic examples. *See The Cable-Phone Revolution*, N.Y. Times, Oct. 19, 1993, at A14 (editorial); Geraldine Fabrikant, *Bell Atlantic's Acquisition Presented as a Quantum Leap*, N.Y. Times, Oct. 14, 1993, at D11; Paul Farhi & Cindy Skrzycki, *Bell Atlantic, Cable TV Giant Joining Forces*, Wash. Post, Oct. 13, 1993, at A1. Return to text

199. Paul Farhi, *New FCC Rules Cut Most Cable TV Bills; Fears That Law Backfired Dissipate Survey Indicates*, Wash. Post, Oct. 13, 1993, at A1. Return to text

200. This possibility was raised by Acting Chairman Quello in his recent testimony. *See Oversight Hearing*, *supra* note 4; *see also* Andrews, *supra* note 5, at C1 (reporting FCC Acting Chairman James H. Quello's concern about valuable loopholes in the law). The FCC's most recent survey found that 11 of the largest 25 cable MSOs had engaged in significant increases in a la carte offerings making price comparisons difficult. *Action in Docket CaseFCC Announces Preliminary Results of Cable Rate Survey* (MM Dkt. No. 92-266), FCC News, Oct. 21, 1993 (At the time of this writing the FCC had not issued its final report.). Return to text

201. *See* Information Infrastructure Task Force, The National Information Infrastructure: Agenda for Action (Sept. 15, 1993) Return to text

202. Both the rate regulation section of the 1992 Cable Act, 47 U.S.C.A. 543 (West Supp. 1993), and the fair access to programming sections, 47 U.S.C.A. 536, 548 (West Supp. 1993), are examples of such interim regulation.

According to Chairman Markey:

> My overarching policy objective has been to create jobs and choices for the American people. For this reason I have consistently opposed monopolies and worked to rein in monopoly power and abuses wherever they arise. Why? Because monopolies limit choices. Monopolies retard technological development. Monopolies do not avail consumers of the lowest prices and highest quality.
>
> Competition has consistently been the preferred vehicle toward bringing affordable and high quality telecommunications technologies to the American consumer.
>
> . . . .
>
> One of the things people don't realize is that you first have to create the marketplace. Congress and the courts and the FCC *created* the long distance marketplace through the antitrust case and a series of public policy decisions designed to promote the viability of competitors to AT&T. Congress and the FCC created the cellular industry by giving it the necessary breathing room on the airwaves. Congress had to force telephone companies to give the cable industry access to telephone poles by passing a law. Congress, with the passage of the Cable Act of last year which banned exclusive franchises and gave potential competitors access to video programming, will essentially create the Direct Broadcast Satellite industry. And the bill that John Dingell, chairman of the full committee, and I recently passed to reallocate 200 Megahertz of radio frequency spectrum will help to create the PCS industry and promote competition between PCS and cellulartwo byproducts of government intervention to create markets and industries.

Markey, USTA Statement, *supra* note 12, at 1-3.[hereinafter NII]; *see also* Bill Clinton & Al Gore, Putting People First (1992). See also the agenda espoused by House Subcommittee on Telecommunications and Finance Chairman Markey in his speech to the United States Telephone Association's Annual Convention. Markey, USTA Statement, *supra* note 12. Return to text

203. *See, e.g.*, NII, *supra* note 201, at 6-12; Clinton & Gore, *supra* note 201, at 9, 10, 144; Markey, USTA Statement, *supra* note 12. It is axiomatic that monopoly pricing and restricted output go hand in hand. To the extent that programming prices are lowered, programmers will have the incentive to sell to more subscribers, thus advancing the principle of universal access at affordable prices. Return to text

204. *See Video Dialtone Order*, *supra* note 137. Return to text

205. Chesapeake and Potomac Tel. Co. of Va. v. United Return to text

206. Gautum Naik, *Judge Says Bell Atlantic Cable Ruling Doesn't Apply to Other Phone Carriers*, Wall St. J., Oct. 4, 1993, at B6.States, 830 F.Supp. 909 (E.D. Va. 1993). Return to text

207. *See Video Dialtone Order*, *supra* note 137 and accompanying text; *see also* Markey, USTA Statement, *supra* note 12, at 6-7 (endorsing conditional telco entry). Return to text

208. See Allard, *supra* note 63, at 332-33, for an analysis of the access to programming provisions found in 12 and 19 of the 1992 Cable Act. Return to text

209. *In re* Implementation of 12 and 19 of the Cable TV Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution and Carriage, *First Report and Order*, 8 FCC Rcd. 3359 (1993). Return to text

210. 47 U.S.C. 314-315 (1988 & Supp. III 1991). Return to text

211. 47 U.S.C.A. 543(c)(1) (West Supp. 1993). Return to text

212. *See* Press Statement by Chairman James H. Quello (Nov. 16, 1993) (on file with the *Federal Communications Law Journal*). Return to text

213. 47 U.S.C.A. 543(k) (West Supp. 1993). Return to text

214. Aerie Group, *supra* note 80, at 7. Return to text

215. *Id.* at 7-8; *see also* Duggan, *supra* note 4. Return to text

216. Markey, USTA Statement, *supra* note 12, at 1. Return to text