Cable Television Regulation: Promoting Competition in a Rapidly Changing World

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The Cable Act of 1992, the only bill to be passed over a veto during the entire four years of the Bush presidency, was a bipartisan triumph of experience over hope. Cable was deregulated in 1984 with the hope that competition would control rates but experience taught that cable had grown instead into an entrenched monopoly. The Act attacked this situation by giving competitors new legal protection in their fight to compete with cable, and by controlling rates on behalf of consumers as long as the monopoly survived. The strength of this formula is now being tested as the FCC struggles to rein in a powerful industry still characterized by monopoly control.

The Act was careful to reflect the central importance of technological convergence on the industry. Nowhere has the impact of technological growth been more explosive and dramatic than in the field of telecommunications. The convergence of the computer chip, the laser and fiber optics, digitization, and satellites are revolutionizing the telephone, cable, and broadcasting industries and driving our society towards a multimedia future that most of us can only dimly imagine.

In the face of such dramatic change, a fundamental goal of cable regulation must be to continue to foster competitive markets and combat monopolistic tendencies that have characterized cable television distribution as it has matured over the last ten to fifteen years. Only through competition will consumers realize the benefits of lower prices, innovation, and improved service.

Yet the underlying economics of cable television are such that the cable market has notand structurally cannotevolve into a freely competitive market without some regulatory structure to ensure that new competitors and entrants can compete fairly. It is this underlying economic truth that has driven cable regulation in recent years and will continue to animate Congress's view of the industry's needs in the future. In order to properly understand our options for a competitive future in cable television, it is important to understand the road we have travelled to this point.

The 1984 Cable Act

When Congress deregulated the cable television industry in 1984, it was with the expectation that competition from broadcasting, wireless, and satellite-based technologies would keep cable rates reasonable, improve customer service, and promote diversity in programming. It is clear in retrospect that this expectation was premature.

With deregulation, the cable industry experienced a period of unprecedented growth. Between 1984 and 1992 cable subscribership rose from 37 million to 57 million. The percentage of homes passed by a cable wire rose from 71 percent in 1984 to fully 97 percent in 1992, and the number of programming services grew exponentially.

The price consumers paid for this transformation was steep. In a series of studies, the Government Accounting Office (GAO) documented that in the years following deregulation of the cable industry, rates for cable service and equipment increased at more than three times the rate of inflation. Other studies underscored this dismal record. A Department of Justice estimate in 1990 confirmed what many consumers had long suspected: up to 50 percent of basic rate increases since deregulation reflected the cable monopoly's power to charge above-competitive market prices.

Cable industry customer service standards also failed to keep pace with the needs and reasonable expectations of a growing subscriber base. The rising tide of customer service complaints underscored the fact that, as local monopolists, cable operators had little incentive to establish an adequate level of customer service.

Finally, cable operators who controlled both supply and distribution used their control of cable programming services to suppress competition from new wireless technologies such as satellite-based services or terrestrial relay systems. By obstruction and, in some cases, denying access to programming, no new transmission technology could effectively compete with cable.

The 1992 Cable Act

By the early 1990s, it was clear that there was inadequate competition in the cable marketplace to control spiralling rates and that interim regulation was necessary until full competition arrived. It was also clear that additional steps had to be taken if competition were ever to become a reality in the cable marketplace. The political consensus that resulted in passage of the Cable Act of 1992 was broad and bipartisan enough to assure even the two-thirds margin necessary to override the President's veto.

The primary purpose of the 1992 Act is to promote the development of new competition in the delivery of video programming. Competition had been limited by existing cable monopolies such that virtually 99 percent of the country had only one cable operator. The Act also includes interim rate regulation provisions to protect consumers until competition arrives in their market. Once a clearly defined threshold of competition is reached in any market, rate regulation will cease.

The Act requires that programmers provide their product to other forms of video delivery, in addition to cable. Over the years, cable companies that controlled both programming and distribution withheld their product from competitors such as satellite and wireless cable delivery systems. A wireless competitor could not compete if the company did not have access to the most popular entertainment and sports programming. The Cable Act ensures that competitors have access to popular cable programming that they had been denied in the past. Direct broadcast satellite competitors will begin to offer service in the coming year, due in no small measure to this requirement.

The Cable Act also abolishes exclusive franchise agreements. Many cable operators had previously demanded a monopoly franchise from local governments to bar all competitors from offering cable services in the franchise area. The 1992 Cable Act prohibits this practice. These provisions and others successfully eliminate the most obvious anticompetitive practices occurring in the cable industry.

Implementation of the Cable Act

Since the passage of the Cable Act in October 1992, the FCC has issued a series of regulations implementing the Act. Rules mandating equal access to programming by cable's competitors, reordering cable-broadcaster relations, imposing tough new customer service standards, and mandating equipment compatibility have all been enacted promptly and professionally, laying the essential foundation for a fairer, more competitive marketplace for cable television in the years to come.

FCC regulations implementing rate regulation, however, have raised a number of concerns and have been the focus of much public scrutiny. It was quite simply never the intent of Congress that rate regulation result in rate increases for those who have seen unreasonable rate increases year after year. Yet the FCC's formula appears to allow rate increases for approximately one-third of all subscribers. It will be many months before the regulations are completed and enforcement by franchising authorities and the FCC is fully operational. A final assessment of the efficacy of the FCC's effort cannot realistically be made until then. The first series of enforcement letters from the FCC should be going out as this Article reaches publication and represent only the beginning of their efforts to prevent violations and evasions of the regulations.

The FCC asserts that consumers will save at least one billion dollars and the industry estimates are nearly twice that amount. However, the monopoly rent extracted from customers prior to passage of the Act may have been two to three times those estimates, and it remains a critical goal of Congress that the FCC bring regulated rates in line with competitive rates.

Blueprint for the Future

The 1992 Act set the stage for a competitive marketplace in the cable industry. But the rapid succession of telecommunications megamergers over the past few months shows that the telecommunications landscape is undergoing fundamental change. The rapid pace of change in this industry has raised new questions and concerns about the viability of a competitive market for cable television and other telecommunications services.

In addressing these concerns, congressional action must be guided by the fundamental principles that have guided telecommunications policy over the decadesdiversity, universal access, localism, and competition. Congress must above all maximize competition as the only truly effective means simultaneously protecting consumers from unreasonable rates, poor service, and stifled innovation.

The philosophy of fostering competition must also apply to the impending merger proposals between telephone company giants and cable operators that have so occupied the headlines in recent months. Telephone companies, in particular, offer the potential for new and powerful downward pressure on cable rates. However, if they are permitted to simply buy out cable systems within their service territory, we will have lost the benefit of this potential competition and instead simply allowed one monopoly to be replaced with another. Therefore, it is important that Congress set forth the guidelines to cover the entry of telephone companies into the cable business.

The blueprint for a competitive telecommunications marketplace must ensure multiple means of delivering information to the home and office. One company should not control both the phone and the cable wire running down the street. The goal of congressional action should be to preserve a two-wire, competitive world. With two competing wires and the potential for a third wireless option, competitors and entrepreneurs will not be restricted from the market, not be forced to pay a high toll, nor be required to sell out to the owner of the wire.

Only through competition between what we know today as the cable wire, the telephone wire, and new wireless options, as truly competitive and independently-owned delivery systems, will the American public realize the glittering promise and benefits of the Information Age.

Notes

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