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CABLE COMPANY MONOPOLY: COMCAST AND TIME WARNER CONTROL THE BOARD

I. INTRODUCTION

Cable television subscribers can simply look at their cable bills or search for competitive providers in their local communities to discover what lawmakers have known for years—prices are going up, and choices are few and far between.[1]

Unfortunately, while Congress has been debating telecommunications reform, Comcast Corporation and Time Warner Cable Inc. have monopolized the cable industry—often with Federal Communications Commission (FCC) approval.[2] Empowered by sweeping deregulation in the Telecommunications Act of 1996 (Telecom Act),[3] the multimedia giants pushed small competitors (dubbed "overbuilders") out of the cable market and raised prices to artificially high levels.[4]

The Telecom Act effectively left the cable industry in control of itself through deregulation[5] and entrusted the over-politicized and under-staffed FCC with industry oversight. Congress ordered the FCC to provide reliable data and prescribe regulations for the cable industry.[6] However, the regulatory branch has consistently failed to implement statutorily mandated provisions, creating a perpetual quagmire of government

1. *E.g.*, *In re* Implementation of Section 3 of the Cable Television Consumer Prot. & Competition Act of 1992, Report on Cable Indus. Prices, 21 F.C.C.R. 15087, 15120 (rel. Dec. 27, 2006) [hereinafter Report on Cable Indus. Prices] (statement of Chairman Kevin J. Martin).

2. *See* discussion *infra* Parts II.C, IV.B–E.

3. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified in scattered sections of 47 U.S.C. (2000)).

4. *See* Third Amended Class Action Complaint for Violations of the Sherman Antitrust Act at 23, Behrend v. Comcast Corp., No. 03-6604 (E.D. Pa. May 23, 2006), 2006 WL 1760198.

5. *See* COMMON CAUSE EDUC. FUND, ASK YOURSELF WHY . . . CABLE RATES GOT SO HIGH 1 (2006) [hereinafter ASK YOURSELF WHY] ("[The Telecom] Act freed the cable industry from nearly all curbs on rate hikes. . . [and] lifted all regulation on rates for non-basic cable service, effective immediately for most small cable systems, and for all cable companies by 1999.").

6. Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 19, 106 Stat. 1460, 1496–97.

inaction.[7] Unfortunately, as soon as Congress passed the Telecom Act, the same groups that supported the legislation sued to dismantle its provisions and appealed to lawmakers to relax the rules even more.[8] "Between 1991 and 2006 major cable industry interests and their trade groups spent more than $105 million on campaign contributions . . . and on lobbying in Washington."[9] During the same time-period, the FCC contradicted its own findings, reversed its direction, and generally favored industry consolidation. Although news of Comcast's earnings in 2006 exceeded the expectations of Wall Street analysts, cable subscribers were not likely to be so pleasantly surprised.[10]

It is now well established that the Telecom Act failed to achieve its goals[11] to promote competition and secure lower prices for cable subscribers.[12] In its annual *Report on Cable Industry Prices*, the FCC found that cable rates increased ninety-three percent overall since Congress enacted the Telecom Act.[13] Furthermore, in 2006, the cost of basic cable service increased by an annual rate of six percent—more than twice the rate of inflation.[14]

Section 601 of the Telecom Act provides that the law "shall [not] be construed to modify, impair, or supersede the applicability of any of the antitrust laws."[15] Nevertheless, the FCC recently approved the acquisition of Adelphia Communications Corporation (Adelphia) by Comcast and Time Warner—the nation's two largest cable television companies[16]—in apparent violation of the Sherman[17] and Clayton[18] Antitrust Acts (Sherman

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7. *See* discussion *infra* Parts II.B, III.A.

8. *See* CELIA VIGGO WEXLER, COMMON CAUSE EDUC. FUND, THE FALLOUT FROM THE TELECOMMUNICATIONS ACT OF 1996 8 (2005).

9. ASK YOURSELF WHY, *supra* note 5, at 1.

10. *See* Mike Farrell, *Comcast Exceeds Expectations—Even the Company's Own: From Wall Street to Main Street, Cable Giants Deliver on All Fronts*, MULTICHANNEL NEWS, Sep. 25, 2006, at 4A, *available at* http://www.multichannel.com/article/CA6374506.html.

11. *See* Charles B. Goldfarb, Telecommunications Act: Competition, Innovation, and Reform, CRS REPORT FOR CONGRESS, Order Code RL33034, at CRS-1 (2005), *available at* http://www.benton.org/benton_files/CRSTelecom%20Act.pdf.

12. *See* Telecommunications Act of 1996, Pub. L. No. 104-104, pmbl., 110 Stat. 56, 56.

13. Report on Cable Indus. Prices, *supra* note 1, at 15093.

14. *See id.* at 15087.

15. Telecommunications Act of 1996 § 601(b)(1), 110 Stat. at 143 (codified at 47 U.S.C. § 152 note (2000)).

16. *See* National Cable & Telecommunications Association Top 25 MSOs, http://www.ncta.com/ContentView.aspx?contentId=73 (2007) (last visited Feb. 23, 2008) (reporting that there were 24,156,000 Comcast subscribers and 13,308,000 Time Warner subscribers as of Sept. 2007).

17. 15 U.S.C. §§ 1–2 (2000). Section 1 of the Sherman Antitrust Act provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or

Act and Clayton Act, respectively).

The Telecom Act's detrimental effect on cable subscribers and potential competitors is well illustrated in the pleadings of two recent cases filed against Comcast[19] and Time Warner[20] for their alleged violations of antitrust laws.[21] In *Behrend v. Comcast Corp.*, class members claimed, *inter alia*, that Comcast and Time Warner "imposed unreasonable, horizontal market restraints"[22] through a "series of transactions in which they . . . acquired competitors and then 'swapped' customers in one geographic area for customers in another, thereby 'clustering' their cable systems in particular regions."[23] The swapping practices in major-market cities such as Philadelphia, Chicago, Boston,[24] and Minneapolis created local monopolies that "undermine the ability of potential competitors to establish competing cable systems."[25] In *America Channel v. Time Warner Cable*, the plaintiff alleged that the defendants, Time Warner and Comcast, "simultaneously engaged in persistent and extensive discrimination against independent programming networks and have instead favored and carried only programming networks in which they have either a complete or partial

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commerce among the several States, or with foreign nations, is declared to be illegal." *Id.* § 1. Section 2 provides that "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court." *Id.* § 2.

18. 15 U.S.C. § 18 (2000). The Clayton Act provides that "No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital . . . where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." *Id.*

19. *See* Third Amended Class Action Complaint for Violations of the Sherman Antitrust Act, *supra* note 4, at 1.

20. First Amended Complaint at 1, 5, Am. Channel, LLC v. Time Warner Cable, Inc., No. 06-CV-2175-DWF/AJB (D. Minn. Feb. 5, 2007), 2007 WL 412518. Comcast was also a defendant in this case.

21. 15 U.S.C. §§ 1–2 (2000).

22. Third Amended Class Action Complaint for Violations of the Sherman Antitrust Act, *supra* note 4, at 27.

23. *Id.* at 2.

24. *See* Behrend v. Comcast Corp., Nos. 03-6604, 07-218, 07-219, slip op. at 5 (E.D. Pa. Aug. 1, 2007), *available at* 2007 WL 2221415 ("Comcast agreed to swap its Chicago-area subscribers for AT & T Broadband's Philadelphia-area subscribers, removing AT & T Broadband from the Philadelphia market and Comcast from the Chicago market . . . . This conduct, along with Comcast's later acquisition of AT & T Broadband itself, also makes plausible the claims alleging . . . that Comcast monopolized and attempted to monopolize the Philadelphia, Chicago and Boston markets.").

25. First Amended Complaint, *supra* note 20, at 8–9.

ownership interest."[26] Additionally, through their alleged anticompetitive acts, the cable companies caused prices for cable television services to be artificially high.[27]

In *Behrend* and *America Channel*, the primary issue in significant pre-trial actions was whether the plaintiffs satisfied the redefined pleading standard for Sherman Act violations set forth by the United States Supreme Court in *Bell Atlantic Corp. v. Twombly*.[28] In *Bell Atlantic*, the Court held that a plaintiff can survive a motion to dismiss only by pleading enough factual matter to suggest that the challenged anticompetitive conduct stemmed from a contract or conspiracy.[29] If there are sufficient factual bases in the pleadings to raise a reasonable expectation that discovery will reveal evidence of an illegal agreement based on a showing of parallel business behavior, the court shall find plausible grounds to infer an agreement between the defendants.[30]

The National Cable and Telecommunications Association (NCTA), the cable industry's principal trade group, argues that FCC-imposed horizontal ownership caps are unwarranted because Direct Broadcast Satellite (DBS) providers have become well-established proven competitors.[31] Furthermore, incumbent telephone companies such as Verizon Communications Inc. (Verizon) and AT&T Inc. have an advantage over traditional cable companies because they can market their "triple-play services" (voice, video and data) to a larger customer base.[32] On the other hand, consumer groups, such as the Common Cause Education Fund,[33] challenge the notion that there is any real competition in the cable industry, noting that "[r]oughly 98 percent of the households with access to cable are served by only one cable company."[34] Furthermore, ninety percent of the top fifty cable networks are owned by the same parent companies that own the broadcast television networks.[35]

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26. *Id.* at 13.

27. *See* Third Amended Class Action Complaint for Violations of the Sherman Antitrust Act, *supra* note 4, at 23.

28. 127 S. Ct. 1955, 1965 (2007).

29. *Id.*

30. *Id.*

31. Letter from Daniel L. Brenner, Senior Vice President, Law & Regulatory Policy, NCTA, to Marlene H. Dortch, Secretary, FCC 5 (Mar. 16, 2007), *available at* http://www.ncta.com/IssueBrief.aspx?contentId=3054.

32. *Id.*

33. The Common Cause Education fund "seeks to promote open, honest and accountable government through research, public education and innovative programs." WEXLER, *supra* note 8, at 2.

34. *Id.* at 11–12.

35. *Id.* at 12.

This Article will address how the Telecom Act has adversely affected competition and raised prices in the cable industry through unprecedented industry consolidation and market swapping. Despite several attempts by the 109th Congress to address telecommunications reform—such as the Communications, Opportunity, Promotion, and Enhancement Act of 2006 (COPE Act)[36]—the session adjourned without legislative resolution.[37] Additionally, the 110th Congress has largely ignored telecommunications reform to date, instead focusing on issues that drove voters to the polls in the 2006 midterm elections.[38]

Part II of this Article discusses the legislative history of cable regulation beginning in 1984, the goals of the Telecom Act, and the details of post-Telecom Act mergers and acquisitions in the cable industry. Part III examines the current state of competition and prices in the cable industry.[39] Part IV of this Article analyzes: (1) the FCC-approved acquisition of Adelphia by Comcast and Time Warner as a violation of the Sherman and Clayton Acts; (2) recent antitrust claims against the cable giants; and (3) the pleading standard now required for plaintiffs alleging antitrust violations after the Supreme Court ruling in *Bell Atlantic*.[40] Part V concludes that the 110th Congress needs to revisit telecommunications reform in order to curb the flow of costly antitrust litigation. However, in order to fill the void with *meaningful* legislation, Part V suggests imposing a luxury tax on the cable giants as an alternative to traditional rate regulation.

II. BACKGROUND

A. Pre-Telecom Act Regulation

Over the last quarter-century, cable regulation has ebbed and flowed along with political and economic developments. Concerns about competition and choice have dominated the ongoing debate. Throughout,

36. Communications, Opportunity, Promotion, and Enhancement Act of 2006, H.R. 5252, 109th Cong. (as passed by House, June 8, 2006).

37. *See* Ted Hearn, *Democrats in Charge but Not Threatening: Telecom Policy Not Likely to Be on Capitol Radar*, MULTICHANNEL NEWS, Nov. 13, 2006, at 6, *available at* http://www.multichannel.com/article/CA6390451.html.

38. *Id.*

39. Part III highlights a 2003 Government Accounting Office Report. U.S. GEN. ACCOUNTING OFFICE, TELECOMMUNICATIONS: ISSUES RELATED TO COMPETITION AND SUBSCRIBER RATES IN THE CABLE TELEVISION INDUSTRY 1 (2003) [hereinafter GAO].

40. 127 S. Ct. 1955 (2007).

Congress and the Federal Communications Commission (FCC) have been unable to determine the level of market concentration at which cable companies should be regulated.

Historically, the government has regulated cable operators like local telephone companies because they are both classified as "common carriers."[41] Furthermore, the government often regulates common carriers under the same principles as public utilities (such as gas, water and power) because both markets operate as "natural monopolies."[42] Natural monopolies exist where "the entire demand within a relevant market can be satisfied at lowest cost by one firm rather than by two or more."[43] If the market contains more than one company, the industry often consolidates through mergers and failures.[44] Under natural monopoly conditions "the benefits, and indeed the very possibility, of competition are limited."[45] Cable service, unlike other natural monopolies, generally involves some level of consumer choice because entertainment and information are not single commodities like electricity or gas. Therefore, the FCC must consider whether cable subscribers should have options among providers and channels when it determines the appropriate level of cable regulation.

1. The Cable Communications Policy Act of 1984

In 1984, Congress passed the first comprehensive national legislation establishing guidelines and franchise procedures for the cable industry.[46] The Cable Communications Policy Act of 1984 (Cable Act), which amended the Communications Act of 1934 (Communications Act),[47] deregulated the cable industry in order to promote competition and "minimize unnecessary regulation that would impose an undue economic burden on cable systems."[48] The Cable Act granted the FCC express jurisdiction[49] and power to prescribe rules and regulations with respect to

41. *See* Richard A. Posner, *Natural Monopoly and Its Regulation*, 21 STAN. L. REV. 548, 548–49 (1969) ("Common carriers" include "providers of public transportation and telecommunications.").

42. *See id.* at 548.

43. *Id.*

44. *See id.*

45. Omega Satellite Products Co. v. City of Indianapolis, 694 F.2d 119, 126 (7th Cir. 1982).

46. *See* Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 2, 98 Stat. 2779, 2780 (codified at 47 U.S.C. § 521 (2000)).

47. 47 U.S.C. § 151 *et seq.* (2000).

48. Cable Communications Policy Act of 1984 § 2, 98 Stat. at 2780 (codified at 47 U.S.C. § 521(6) (2000)).

49. *Id.* § 3(a)(1), 98 Stat. at 2801 (codified at 47 U.S.C. § 152 (2000)).

ownership and control of cable systems.[50]

Congress created a safeguard against monopolization through its so-called "70-70 rule," which gave the FCC power to promulgate any additional rules to ensure diversity of information sources.[51] If seventy percent of American homes have access to cable systems with thirty-six channels or more, and seventy percent of those households actually subscribe to those systems, the FCC is authorized to regulate the cable industry to ensure diversity.[52]

Cable franchising is primarily a local issue because franchises generally arise when municipalities grant rights-of-way for cable lines in exchange for a license fee.[53] Section 2 of the Cable Act provides, with some exceptions, that "a cable operator may not provide cable service without a franchise."[54] A cable operator may obtain such a franchise from a "franchising authority," which is defined as "any governmental entity empowered by Federal, State, or local law to grant a franchise."[55] Once issued a franchise, a cable operator is authorized to construct cable systems "over public rights-of-way, and through easements."[56]

2. Cable Television Consumer Protection and Competition Act of 1992

In response to increasing cable rates brought about by the Cable Act, Congress re-regulated the cable industry through the Cable Television Consumer Protection and Competition Act of 1992 (Cable Act of 1992).[57] In Section 2 of the Cable Act of 1992, Congress reported that between 1986 and 1992, "[m]onthly rates for the lowest priced basic cable service . . . increased by 40 percent or more for 28 percent of cable television subscribers . . . almost three times as much as the Consumer Price Index."[58] Furthermore, the cable industry became highly concentrated.[59] As a result, most subscribers had no opportunity to select

50. *Id.* § 2, 98 Stat. at 2785 (codified at 47 U.S.C. § 201 (2000)).

51. *See* Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 2, 98 Stat. 2779, 2784–85 (codified at 47 U.S.C. § 532(g) (2000)).

52. *See id.* (codified at 47 U.S.C. § 532(g) (2000)).

53. *See id.* at 2786–87 (codified at 47 U.S.C. §§ 541, 542(a) (2000)).

54. *Id.* at 2786 (codified at 47 U.S.C. § 541(b)(1) (2000)).

55. *Id.* at 2781 (codified as amended at 47 U.S.C. § 522(10) (2000)).

56. *See* Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 2, 98 Stat. 2779, 2786 (codified at 47 U.S.C. § 541(a)(2) (2000)).

57. *See* Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 3(a), 106 Stat. 1460, 1464 (codified at 47 U.S.C. § 543(a) (2000)).

58. *Id.* § 2(a), 106 Stat. at 1460 (codified at 47 U.S.C. § 521 note (2000)).

59. *Id.* (codified at 47 U.S.C. § 521 note (2000)).

between competing cable systems.[60] Additionally, industry leaders often created barriers to market entry for new programmers.[61]

The Cable Act of 1992 requires the FCC to establish regulations ensuring reasonable rates for basic cable service where the service is not subject to "effective competition."[62] Conversely, a cable service that *is* subject to "effective competition" continues to avoid FCC rate regulation.[63] In order to determine whether a cable system is subject to "effective competition," the FCC calculates the number of households that subscribe to services from all "multichannel video programming distributors" (MVPDs), including Direct Broadcast Satellite service providers.[64] Through the Cable Act of 1992, Congress also granted the FCC authority to regulate any unreasonable rates for upper tiers of service.[65] Such tiers include "bundles" or groups of popular cable networks such as CNN and ESPN, as well as premium pay channels such as HBO and Showtime.[66]

Section 7(a) of the Cable Act of 1992 prevents a franchising authority from granting an exclusive cable franchise and from unreasonably refusing to award an additional competitive franchise.[67] Additionally, in awarding a franchise, the franchising authority must allow overbuilders "a reasonable period of time to become capable of providing cable service to all

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60. *See id.* (codified at 47 U.S.C. § 521 note (2000)).

61. *See id.*

62. *See* Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 3(a), 106 Stat. 1460, 1464 (codified at 47 U.S.C. § 543(a)(2) (2000)).

63. *See id.* (codified at 47 U.S.C. § 543(a)(2) (2000)). As of 2006, 3.4% of nationwide communities having cable systems were subject to the statutory classification of "effective competition." *See* Report on Cable Indus. Prices, *supra* note 1, at 15102 (percentage computed by dividing 1,128 communities relieved from regulation by 32,930 total cable communities).

64. *See* Cable Television Consumer Protection and Competition Act of 1992, § 3(a), 106 Stat. 1464, 1470–71 (codified at 47 U.S.C. § 543(a)(2), (l) (2000)). From 1992 until 1996, a finding of "effective competition" in a franchise area meant only that one of the following conditions existed: (1) less than thirty percent of the households in the franchise area subscribed to cable service (low-penetration test); (2) at least two unaffiliated companies offered comparable video programming service to fifty percent or more of the households in the franchise area, and at least fifteen percent did not subscribe to service from the largest company (competitive provider test); or (3) the franchising authority offered video programming services to at least fifty percent of the households in the franchise area (municipal test). However, beginning in 1996 and still in effect in 2008 "effective competition" can also mean that: (4) a company offers video programming (by means other than Direct Broadcast Satellite) that is comparable to programming offered by a cable provider in the franchise area (local exchange carrier test). 47 C.F.R. § 76.905(b) (2006).

65. *See* Cable Television Consumer Protection and Competition Act of 1992, § 3(a), 106 Stat. at 1464, 1468 (codified at 47 U.S.C. § 543(a)(2)(B), (c) (2000)).

66. *See* GAO, *supra* note 39, at 8.

67. *See* Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 7(a), 106 Stat. 1460, 1483 (codified at 47 U.S.C. § 541(a)(1) (2000)).

households in the franchise area."[68] However, the franchising authority may require adequate assurance that the cable operator is financially, technically and legally qualified to provide cable service and that it will provide adequate public, educational and governmental channel access.[69]

3. Politics Behind the Telecommunications Act of 1996

In 1994, Congress once again took up telecommunications reform.[70] The Democratic-controlled House passed a telecommunications reform bill by a landslide margin (423 to 4), but the bill did not include many of the deregulatory measures included in the Communications Act of 1996 (Telecom Act).[71] The Senate proposed similar legislation, but the bill never came to a vote, largely due to opposition by Minority Leader Bob Dole, a Republican from Kansas.[72]

Under the leadership of House Speaker Newt Gingrich, a Republican from Georgia, Republicans re-introduced telecom reform in 1995 after gaining control of the House.[73] However, the 1995 versions of the Telecom Act proposed sweeping deregulation of the industry.[74] Due to efforts of House Democrats and President Bill Clinton's threatened veto, Congress eventually amended the Telecom Act in order to strengthen FCC oversight of media mergers.[75]

B. The Goals of the Telecommunications Act of 1996

In February 1996, President Clinton signed the Telecom Act, which deregulated competition and prices in all areas of the telecommunications industry, including radio, local telephone, broadcast television, and cable television.[76] The Telecom Act amended the Communications Act, the Cable Act, and the Cable Act of 1992.[77] Congress voted in favor of the Act

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68. *See id.* § 7(b), 106 Stat. at 1483 (codified at 47 U.S.C. § 541(a)(4)(A) (2000)).

69. *See id.* (codified at 47 U.S.C. § 541(a)(4)(B)–(C) (2000)).

70. *See* WEXLER, *supra* note 8, at 9.

71. *See id.*

72. *See id.*

73. *See id.*

74. *See* Telecommunications Competition and Deregulation Act of 1995, S. 652, 104th Cong. (amended 1996); *see also* Edmund L. Andrews, *House Panel Acts to Loosen Limits on Media Industry*, N.Y. TIMES, May 26, 1995, at A1 (The Senate's bill was similar to the House's bill, "though the House measure [was] more hawkishly deregulatory.").

75. *See* WEXLER, *supra* note 8, at 9.

76. *See id.* at 5, 7.

77. 47 U.S.C. § 151 *et seq.* (2000).

by margins of 91 to 5 in the Senate,[78] and 414 to 16 in the House.[79] Certain provisions of the Telecom Act went into immediate effect, while the FCC continues to implement other sections through promulgation of its rules and regulations.[80]

Congress' express purpose for the Telecom Act was "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."[81] Legislators forecasted that the Act would create 3.4 million jobs and save consumers $550 billion over the next ten years, including $78 billion in lower cable bills.[82]

Through the Telecom Act, Congress ordered the FCC to review its ownership rules biennially to determine whether the rules remain necessary to protect the public interest.[83] The Telecom Act also empowered the FCC to "repeal or modify any regulation [that] it determines to be no longer in the public interest" as a result of meaningful competition.[84] In 2004, Congress amended the Telecom Act to require quadrennial ownership reviews because biennial evaluations resulted in an endless review process.[85]

Supporters of the Telecom Act argued that the Act would enable telecommunications competitors to enter markets that were previously restricted under the cross-ownership regulations in the Cable Act of 1992; and that it would also provide significant competition for traditional cable systems.[86] In order to facilitate telephone companies' expansion into the

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78. U.S. Senate, U.S. Senate Roll Call Votes 104th Congress—2nd Session, On the Conference Report (S.652 Conference Report) (1996), http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=104&session=2&vote=00008 (yeas 91, nays 5, not voting 3).

79. OFFICE OF THE CLERK, U.S. HOUSE OF REPRESENTATIVES, FINAL VOTE RESULTS FOR ROLL CALL 25 (1996), http://clerk.house.gov/evs/1996/roll025.xml (yeas 414, nays 16, not voting 4).

80. *See, e.g., In re* Implementation of Cable Act Reform Provisions of the Telecomms. Act of 1996, Order & Notice of Proposed Rulemaking, 11 F.C.C.R. 5937 (rel. Apr. 9, 1996) [hereinafter Order & Notice of Proposed Rulemaking].

81. Telecommunications Act of 1996, Pub. L. No. 104-104, pmbl., 110 Stat. 56, 56.

82. *See* 142 CONG. REC. S687, S703–S704 (1996) (statements of Senators Domanici and Ford, citing a study conducted by the Wharton Econometrics Forecasting Association at the Wharton School of Business regarding potential full competition in telecommunications).

83. Telecommunications Act of 1996 § 202(h), 110 Stat. at 111–12.

84. *Id.*

85. *See* Consolidated Appropriations Act, Pub. L. No. 108-199, § 629(3), 118 Stat. 3, 100 (2004) (amending the Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 111).

86. *See* WEXLER, *supra* note 8, at 11.

video deployment market, Section 302 of the Telecom Act repealed the Cable Act of 1992's telephone company restrictions.[87] Therefore, telephone companies can now provide video programming to subscribers in their telephone service areas.[88]

The Telecom Act permitted local exchange carriers to become certified as "open video system" (OVS) providers rather than "cable service" providers, thereby qualifying them to bypass the franchise approval process typically required for cable operators.[89] The Act also set forth a new "effective competition" test[90] that applies to telephone companies seeking franchises under the new OVS provision.[91]

Congress directed the FCC to prescribe open video system regulations within the six months after the Telecom Act's enactment.[92] However, the FCC struggled to implement an adequate OVS framework without conflicting with state laws.[93] Even though the Telecom Act allows telephone companies to bypass the local franchise approval process through OVS certification, some states still require local exchange carriers to apply for franchise licenses. The Telecom Act's plain language expressly forbids FCC regulations that conflict with state law.[94] Thus, certain OVS provisions were successfully challenged in the Fifth Circuit Court of Appeals in 1999.[95] The court held that the FCC "exceeded its statutory authority in exempting OVS operators from local franchise requirements."[96] Eventually, the FCC amended several of its rules in order to comply with the Fifth Circuit decision.[97]

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87. *See* Telecommunications Act of 1996, Pub. L. No. 104-104, § 302(a), 110 Stat. 56, 118–19 (codified at 47 U.S.C. § 571 (2000)).

88. *See id.* (codified at 47 U.S.C. § 571 (2000)).

89. *See id.* at 121–22 (codified at 47 U.S.C. § 573(a)(1) (2000)).

90. *See id.* § 301(b) (codified at 47 U.S.C. § 543(l)(1) (2000)) (applies in franchise areas where a company offers video programming, by means other than Direct Broadcast Satellite, that is comparable to programming offered by a cable provider in the franchise area).

91. *See id.* § 302(a) (codified at 47 U.S.C. §§ 571, 573(c) (2000)).

92. *See id.* § 302(a), 110 Stat. 56, 123 (codified at 47 U.S.C. § 573(b)(1) (2000)).

93. *See generally* Norman M. Sinel et al., *Recent Developments in Cable Law,* 889 PRACTISING L. INST. 9, 78–85 (2007) (describing the FCC's open video system framework implementation process and successful court challenges).

94. *See* City of Dallas v. FCC, 165 F.3d 341, 347 (5th Cir. 1999) (citing Section 601(c)(1) of the Communications Act of 1934 (codified as amended by Section 601 of the Telecommunications Act of 1996 at 47 U.S.C. § 152 note (2000) (stating that the Telecom Act "shall not be construed to modify, impair, or supersede Federal, State, or local law")).

95. *See id.* at 359–60.

96. *Id.* at 347.

97. *See In re* Implementation of Section 302 of the Telecomms. Act of 1996, Open Video Syss., Order on Remand, 14 F.C.C.R. 19700 (rel. Nov. 19, 1999) (codified as amended at 47 C.F.R. § 76.1501, 76.1502–03 (2006)).

C. Post Telecom Act Cable Industry Mergers and Acquisitions

Freed from pre-Telecom Act regulatory constraints, Comcast acquired several cable service operators between 1996 and 2002, gaining millions of new subscribers.[98] Concurrently, AT&T Corporation (AT&T), Comcast's most significant competitor at the time, acquired several cable operators (dubbed "multiple cable system operators" or "MSOs").[99] The FCC approved cable system swaps between Comcast, AT&T, and Adelphia in Florida, Indiana, Michigan, New Jersey, New Mexico, Pennsylvania, and Washington, D.C.—consolidating several regional clusters.[100] On November 18, 2002, the FCC approved a merger between AT&T and Comcast, which consolidated both cable businesses into Comcast.[101] As a result of the merger, Comcast acquired AT&T's cable systems and more than thirteen million AT&T cable subscribers.[102]

Between July 2004 and June 2005, the cable industry announced a total of twenty-two transactions valued at approximately $48.7 billion.[103] Together, these transactions further consolidated regional clusters and affected almost thirteen million subscribers.[104] As of July 2006, Comcast also held attributable ownership interests in nine national video programming networks, eight regional sports networks (RSNs) and three team-specific sports networks.[105] In addition to cable systems, Time Warner owned several other media businesses, including "online interactive services, filmed entertainment, television networks, and

98. *See, e.g.*, Comcast, Comcast Timeline: A Look at Our History, http://www.comcast.com/corporate/about/pressroom/corporateoverview/comcasttimeline/comcasttimeline.html (last visited Feb. 23, 2008) [hereinafter Comcast Timeline].

99. *See* Third Amended Class Action Complaint for Violations of the Sherman Antitrust Act, *supra* note 4, at 17–19.

100. *See* Comcast Timeline, *supra* note 98.

101. *See In re* Applications for Consent to the Transfer of Control of Licenses from Comcast Corp. & AT&T Corp., Transferors, to AT&T Comcast Corp., Transferee, Memorandum Opinion & Order, 17 F.C.C.R. 23246, 23249–50 (rel. Nov. 14, 2002).

102. *See id.* at 23250.

103. *See In re* Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Twelfth Annual Report, 21 F.C.C.R. 2503, 2509 (rel. Mar. 3, 2006) [hereinafter Twelfth Annual Report].

104. *See id.*

105. *See In re* Applications for Consent to the Assignment and/or Transfer of Control of Licenses: Adelphia Commc'ns Corp., Assignors, to Time Warner Cable Inc., Assignees; Adelphia Commc'ns Corp., Assignors & Transferors, to Comcast Corp., Assignees & Transferees; Comcast Corp., Transferor, to Time Warner Inc., Transferee; & Time Warner Inc., Transferor, to Comcast Corp., Transferee, Memorandum Opinion & Order, 21 F.C.C.R. 8203, 8209–10 (rel. July 21, 2006) [hereinafter Memorandum Opinion & Order].

publishing."[106] Time Warner also owns several RSNs.[107]

On July 13, 2006, by a four to one vote, the FCC approved the roughly $17 billion acquisition of Adelphia by Time Warner and Comcast.[108] The FCC consented to the assignment or transfer of Adelphia's assets, which were under bankruptcy court supervision, for a total exchange of $12.7 billion in cash and the remainder in publicly traded stock.[109] The FCC also ordered Comcast to divest its 17.9% equity interest in Time Warner Cable and its 4.7% limited partnership interest in Time Warner Entertainment.[110]

The FCC placed several explicit conditions on its approval of the acquisition.[111] However, Comcast and Time Warner have yet to certify total compliance, despite several extensions.[112] The lone dissenter in the FCC's vote, Democratic Commissioner Michael J. Copps, concluded that the total effect of the transactions was unmistakable: "Big Media" got bigger, and consumers were left holding the bag.[113]

In their applications to acquire the assets of Adelphia (formerly the fifth largest MSO), Time Warner and Comcast also proposed to swap other cable systems between themselves[114]—a *per se* violation of antitrust laws.[115] Pursuant to FCC approval, Time Warner received Comcast systems located in Los Angeles, Cleveland, and Dallas, while Comcast received Time Warner cable systems serving portions of Philadelphia and former Adelphia systems located in seventeen states.[116] As a result of the

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106. *Id.* at 8210.

107. *See id.* at 8211.

108. *See FCC Approves Purchase by Comcast and Time Warner*, WALL ST. J., July 14, 2006, at A7.

109. *See* Memorandum Opinion & Order, *supra* note 105, at 8206–07.

110. *See id.* at 8213.

111. *See id.* at 8233.

112. *See In re* Applications for Consent to the Assignment and/or Transfer of Control of Licenses: Adelphia Commc'ns Corp., Assignors, to Time Warner Cable Inc., Assignees; Adelphia Commc'ns Corp., Assignors & Transferors, to Comcast Corp., Assignees & Transferees; Comcast Corp., Transferor, to Time Warner Inc., Transferee; & Time Warner Inc., Transferor, to Comcast Corp., Transferee, Order Granting Additional Request for Further Extension of Time, 22 F.C.C.R. 16939, 16940–41 (rel. Sep. 19, 2007) [hereinafter Order Granting Further Extension of Time].

113. *See* Memorandum Opinion & Order, *supra* note 105, at 8366 (dissenting statement of Michael J. Copps).

114. *See id.* at 8212–13.

115. *See* Third Amended Class Action Complaint for Violations of the Sherman Antitrust Act, *supra* note 4, at 4, 26.

116. *See* Memorandum Opinion & Order, *supra* note 105, at 8212–13 (listing California, Colorado, Connecticut, Florida, Georgia, Kentucky, Massachusetts, Maryland, North Carolina, New Hampshire, New York, Pennsylvania, Tennessee, Virginia, Vermont, Washington, and West

system swaps, Time Warner gained approximately 2.2 million subscribers *from* Comcast, and transferred approximately 2 million subscribers *to* Comcast.[117] Comcast, already the nation's largest cable operator, was expected to grow to 26.8 million subscribers after the merger.[118] Time Warner was expected to become the second largest MSO, growing to 16.6 million subscribers.[119]

III. CONGRESS NEEDS TO AMEND THE TELECOMMUNICATIONS ACT OF 1996

In 2003, John McCain, a Republican from Arizona and the Chairman of the Senate Committee on Commerce, Science, and Transportation, asked the Government Accounting Office (GAO) to investigate why cable rates were still rising.[120] In his inquiry, Senator McCain noted: "Either cable is regulated or there is meaningful competition. And so far there doesn't seem to be real meaningful competition."[121] In response, the GAO agreed to: (1) examine the impact of competition in the cable industry; (2) assess the reliability of the Federal Communication Commission's (FCC) annual cable rate report and its "effective competition" classification; (3) examine causes of cable rate increases; (4) assess whether vertical ownership of cable networks such as CNN and ESPN indirectly affects cable rates; (5) discuss why cable operators sell channels in tiers, rather than letting customers subscribe to channels, "à la carte"; and (6) discuss options to address cable rate increases.[122]

The GAO acknowledged that regulation has become significantly more complex since Congress passed the Telecommunications Act of 1996 (Telecom Act).[123] The marketplace continues to evolve and expand so rapidly that every time the FCC tries to refresh the record with additional comments, the data it collects becomes stale before rules can be adopted.[124] Today, video providers use a wide array of platforms to transmit various

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Virginia).

117. *See id.*

118. *See id.* at 8206.

119. *See id.*

120. *See* ASK YOURSELF WHY, *supra* note 5, at 2.

121. *See id.*

122. *See* GAO, *supra* note 39 at 1, 3 (using "data on cable network revenues and programming expenses that [it] acquired from Kagan World Media, which is a private communications research firm that specializes in cable industry data").

123. *See id.* at 40.

124. *See* Letter from Daniel L. Brenner, *supra* note 31, at 1.

communications services.[125] The development of innovative technologies has raised the issue of whether these new services fall within the current statutory definition of "cable service."[126] Regulators, therefore, must contemplate which services and providers to regulate.[127]

A. The Impact of Competition in the Cable Industry

Congress designed the Telecom Act, in part, to foster the expansion of Direct Broadcast Satellite (DBS) service and to remove historical barriers for telephone companies wishing to enter the video distribution market.[128] Growing availability of satellite service has positively influenced cable rates.[129] Specifically, cable rates are fifteen percent lower in communities where multiple cable system operators (MSOs) compete with satellite companies.[130] Furthermore, cable operators often provide more channel choices, more discounts, and higher quality services in order to compete with satellite companies.[131] Yet, in 2002, the FCC and the Department of Justice (DOJ) denied a proposed merger between satellite providers DirecTV, Inc. and EchoStar Communications Corp., despite the widely held belief that the merger could have established an even stronger competitor against cable giants Comcast and Time Warner.[132] Although fighting the effects of cable mergers with greater consolidation may not be an ideal solution, at least the proposed transaction would have been consistent with other FCC-approved mergers.[133]

Existing competition in the cable industry, while strong in isolated areas, is generally weak because small overbuilders and telephone companies have not significantly expanded their market share as the Telecom Act drafters predicted.[134] Local franchise authorities often impose

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125. *See* GAO, *supra* note 39, at 40.

126. *See* Sinel et al., *supra* note 93, at 210; *see also* 47 U.S.C. § 522(6) (2000) ("[T]he term 'cable service' means—(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service.").

127. *See* GAO, *supra* note 39, at 40.

128. *See* WEXLER, *supra* note 8, at 11.

129. *See* Twelfth Annual Report, *supra* note 103, at 2506; *see also* GAO, *supra* note 39, at 10.

130. *See* GAO, *supra* note 39, at 3.

131. *See id.* at 11.

132. *See* ASK YOURSELF WHY, *supra* note 5, at 2.

133. *See id.* (In 2006, the FCC allowed a $17.6 billion merger in which Time Warner and Comcast absorbed the cable operations of Adelphia Communications Corp., despite the cable companies' increasing monopolies); *see also* discussion, *supra* Part II.C.

134. *See* Memorandum Opinion & Order, *supra* note 105, at 8239.

cost-prohibitive conditions for new entrants into the market, making it difficult for overbuilders to effectively compete with media giants.[135] Furthermore, competition from telephone companies has been erratic, often halting expansion or discontinuing service soon after entrance into the market.[136] Citing a 2002 FCC video competition report, the GAO noted that the four largest telephone companies largely abandoned the cable industry.[137]

However, telephone companies are finally beginning to positively impact the video market's competitive landscape.[138] Several local exchange carriers are building fiber networks that will carry "triple-play" services (voice, video, and data).[139] For instance, "Verizon began test marketing its television product, FiOS TV, in 2004."[140] It is now available in at least 500 communities in twelve states.[141] In those areas where FiOS TV is offered, incumbent cable companies have lowered rates anywhere from twenty-eight to forty-two percent.[142] Unfortunately, Verizon reported that it will take at least five years to build fiber-optic infrastructure in just fifty percent of its telephone coverage area.[143] Furthermore, AT&T's triple-play offering, U-Verse, has grown at an even slower rate than FiOS TV.[144] U-Verse is currently available in only a handful of markets.[145] Although Congress intended to create competition through the Telecom Act, it is likely that two decades will have elapsed before the telephone companies' triple-play services legitimately rival incumbent cable systems.

Section 11 of the Cable Television Consumer Protection and Competition Act of 1992 (Cable Act of 1992) required the FCC to

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135. *See In re* Implementation of Section 621(a)(1) of the Cable Commc'ns Policy Act of 1984 as Amended by the Cable Television Consumer Prot. & Competition Act of 1992, Notice of Proposed Rulemaking, 20 F.C.C.R. 18581, 18585 (rel. Nov. 18, 2005) [hereinafter Notice of Proposed Rulemaking].

136. *See* GAO, *supra* note 39, at 1.

137. *See id.* at 10 (citing *In re* Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming, Ninth Annual Report, 17 F.C.C.R. 26901, 26904 (rel. Dec. 31, 2002)).

138. *See* Sinel et al., *supra* note 93, at 23.

139. Michael Learmonth, *Slow Growth Dings Cabler*, DAILY VARIETY, Oct. 26, 2007, at 5.

140. *See* Sinel et al., *supra* note 93, at 17.

141. *See* Press Release, Verizon Communications Inc., Verizon Seeks to Expand Availability of FiOS TV Service in North Texas (Oct. 11, 2007), *available at* Media Newswire Press Release Distribution, http://media-newswire.com/release_1055892.html (last visited Feb. 16, 2008).

142. *See* Sinel et al., *supra* note 93, at 23.

143. *See* Farrell, *supra* note 10, at 4A.

144. *See id.*

145. *See id.*

prescribe rules and regulations establishing reasonable "horizontal limits"—the maximum number of subscribers a cable operator is authorized to reach through its cable systems.[146] The FCC was to take particular account of the market structure and ownership patterns, especially where cable systems and video programmers were jointly owned.[147] In 1993, the FCC imposed a thirty percent horizontal limit on the number of subscribers a cable system could serve.[148] Six years later the rule was amended, defining the relevant market to include all multichannel video programming distributor subscribers, including DBS customers.[149]

Time Warner and AT&T challenged the horizontal limit in federal court, arguing that the regulation was in excess of the FCC's statutory authority.[150] The court found that "the promotion of the diversity in ideas and speech," and "the preservation of competition" both qualified as important governmental interests in support of horizontal limits.[151] Yet, the court reversed and remanded the regulation because the FCC did not present substantial evidence of anticompetitive behavior or any evidence that collusion between the cable operators had occurred or was likely to occur.[152] The court did not vacate the FCC's rules.[153] Nevertheless, the FCC was unable to comply with the court's directives, citing the difficulty in "ascertain[ing] how hypothetical market conditions might affect competition and diversity."[154]

After failed attempts in 2001 and 2003 to amend its ownership rules pursuant to the Cable Act of 1992, the FCC issued its *Second Further Notice of Proposed Rulemaking* in 2005, seeking to update the record based

146. *See* Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 11(f), 106 Stat. 1460, 1487 (codified at 47 U.S.C. § 533(f)(1)(A) (2000)).

147. *See id.* at 1488 (codified at 47 U.S.C. § 533(f)(2)(C)) (2000)).

148. *See In re* Implementation of Sections 11 & 13 of the Cable Television Consumer Prot. & Competition Act of 1992 Horizontal and Vertical Ownership Limits, Second Report & Order, 8 F.C.C.R. 8565, 8567 (rel. Oct. 22, 1993) [hereinafter Second Report & Order].

149. *See In re* Implementation of Section 11(c) of the Cable Television Consumer Prot. and Competition Act of 1992 Horizontal Ownership Limits, Third Report & Order, 14 F.C.C.R. 19098, 19101 (rel. Oct. 20, 1999); *see also* 47 C.F.R. § 76.503(a) (2005) (The category "MVPD subscribers" includes consumers that subscribe to cable service and customers that subscribe to Direct Broadcast Satellite service.).

150. *See* Time Warner Entm't Co. v. FCC, 240 F.3d 1126, 1128 (D.C. Cir. 2001).

151. *Id.* at 1130 (quoting Time Warner Entm't Co. v. U.S., 211 F.3d 1313, 1319 (D.C. Cir. 2000); Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 663 (1994)).

152. *See id.* at 1130–33.

153. *See id.* at 1144.

154. *See In re* the Comm'n's Cable Horizontal and Vertical Ownership Limits, Second Further Notice of Proposed Rulemaking, 20 F.C.C.R. 9374, 9384 (rel. May 17, 2005).

on evidence submitted by interested parties.[155] Over an eighteen month period ending in 2007, the FCC held six public hearings across the country to address media ownership issues, and spent almost $700,000 on ten independent studies.[156] As 2007 drew to a close, the media ownership debate became especially contentious and politically divisive as opposition grew in the wake of News Corp.'s acquisition of The Wall Street Journal and the sale of Tribune Co.[157] FCC Democrats and consumer groups urged Republican FCC Chairman Kevin J. Martin to complete newspaper ownership studies on localism before rushing to a vote.[158] Additionally, a large bipartisan group in the Senate introduced eleventh-hour legislation in a futile attempt to delay the FCC.[159] Days before the FCC's scheduled vote, Representative John Dingell, a Democrat from Michigan and Chairman of the House Committee on Energy and Commerce, called Chairman Martin (and other FCC commissioners) to testify and respond to tough criticism before a telecommunications panel, wherein Congressman Dingell referred to the FCC as "broken."[160] However, Chairman Martin rejected the proposed delay and pushed ahead, noting that the issue was "ripe for decision."[161]

Finally, on December 18, 2007, Chairman Martin concluded "that it won't ever be possible to . . . reach consensus on the media ownership issue,"[162] and ended the six year ownership evaluation process by casting two separate deciding votes.[163] In one vote, Chairman Martin joined fellow Republicans and relaxed the newspaper-broadcaster cross-ownership ban to pave the way for the Tribune Co. and Wall Street Journal acquisitions.[164] In another vote, the Chairman oddly joined FCC Democrats and re-instituted the same thirty percent horizontal cable ownership cap that was

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155. *See id.* at 9385.

156. *See* Press Release, FCC, Press Statement of Chairman Kevin J. Martin, at 1–2 (Dec. 18, 2007) (on file with FCC), *available at* http://www.fcc.gov/kjm121807-ownership.pdf [hereinafter Martin Press Release].

157. *See id.* at 4.

158. *See* Jim Puzzanghera, *Media Vote May Be Delayed*, L.A. TIMES, Nov. 1, 2007, at C2.

159. *See* Jim Puzzanghera, *Panel Sends Message on FCC Vote*, L.A. TIMES, Dec. 5, 2007, at C3.

160. *See* William Triplett, *House Hearing Puts Martin on Hot Seat: FCC Chair Martin Gets Big Grilling*, DAILY VARIETY, Dec. 6, 2007, at 35.

161. *See* Martin Press Release, *supra* note 156, at 6.

162. *Id.*

163. *See* Stephen Labaton, *F.C.C. Reshapes Rules Limiting Media Industry*, N.Y. TIMES, Dec. 19, 2007, at A1.

164. *See id.*; *see also* Press Release, FCC, FCC Adopts Revision to Newspaper/Broadcast Cross-Ownership Rule (Dec. 18, 2007) (on file with FCC), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-278932A1.pdf.

remanded by the D.C. Circuit Court in 2001.[165] The FCC's *Fourth Report and Order and Further Notice of Proposed Rulemaking* attempts to comply with the 2001 Circuit Court ruling by providing adequate justification for the horizontal cap.[166] However, Republican dissenters Deborah Taylor Tate and Robert McDowell both argued against the cap, noting that the marketplace changed dramatically since the 2001 ruling, including satellite television's growth from eighteen to thirty percent.[167] House Commerce Committee's senior Republican, Representative Joe Barton from Texas,[168] was baffled by Chairman Martin's votes, noting the inconsistency in "eliminat[ing] regulations for some segments of industry because of increased competition and at the very same time refus[ing] to deregulate or even impos[ing] more regulation on segments of industry that are creating that very competition."[169]

After six years of ownership review, the FCC wasted significant valuable tax dollars by reinstituting the thirty percent cap because the issue returned to where it started—federal court.[170] Comcast, which (according to current data) is just under the thirty percent limit, appealed the FCC's ruling to the United States Court of Appeals for the D.C. Circuit in March

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165. *See* Press Release, FCC, FCC Adopts Rules to Promote Video Programming Diversity by Ensuring New Video Programmers Can Enter and Compete in Video Market: Order Will Increase Diversity in Programming and Choices for Consumers (Dec. 18, 2007) (on file with FCC), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-279038A1.pdf; *see also* Labaton, *supra* note 163, at A1.

166. *See In re* The Comm'n's Cable Horizontal & Vertical Ownership Limits; Implementation of Section 11 of the Cable Television Consumer Prot. & Competition Act of 1992; Implementation of Cable Act Reform Provisions of the Telecomms. Act of 1996; Review of the Comm'n's Regulations Governing Attribution of Broad. & Cable/MDS Interests; Review of the Comm'n's Regulations & Policies Affecting Inv. in the Broad. Indus.; Reexamination of the Comm'n's Cross-Interest Policy, Fourth Report and Order and Further Notice of Proposed Rulemaking, MM Docket No. 92-264, CS Docket No. 98-82, CS Docket No. 96-85, MM Docket No. 94-150, MM Docket No. 92-51, MM Docket No. 87-154, FCC 07-219, at 88 (rel. Feb. 11, 2008) (statement of Chairman Kevin J. Martin), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-07-219A1.pdf.

167. *See* Ted Hearn, *FCC Adopts 30% Cable Ownership Cap: Move Stops Comcast from Acquiring More Cable Systems*, MULTICHANNEL NEWS, Dec. 18, 2007, http://www.multichannel.com/article/CA6513846.html.

168. Rep. Joe Barton, a Republican from Texas, sponsored the House COPE Act in 2006. *See* GovTrack.us, H.R. 5252 [109th]: Advanced Telecommunications and Opportunities Reform Act, http://www.govtrack.us/congress/bill.xpd?bill=h109-5252&page-command=print (last visited Feb. 16, 2008).

169. Brooks Boliek, *Hill Pot Shots Hit FCC 'On-Ramp': Dems' Barrage on Ownership Change Targets Martin*, HOLLYWOOD REP., Dec. 6, 2007, at 39.

170. *See* Ted Hearn, *Comcast Appeals FCC's 30% Cable Cap: Ruling Will Impact Cable Giant's Long-Term Broadband, Voice Strategy*, MULTICHANNEL NEWS, Mar. 12, 2008, *available at* http://www.multichannel.com/article/CA6540488.html.

2008.[171]

The events of December 2007 strongly illustrated that Congress needs to amend the Telecom Act. However, as theorized by Judge Richard A. Posner, the FCC should consider alternatives to ownership regulation such as collecting a "luxury tax" from cable operators who rise above a predetermined market share, rather than continuing to waste tax dollars on years of circular evaluation and review.[172]

B. The FCC's Data Is Unreliable

In 2003, the GAO determined that data in the FCC's annual cable rate report[173] was unreliable.[174] By randomly sampling and evaluating 100 of approximately 750 cable operators that responded to the FCC's 2002 cable rate survey, the GAO discovered several concerns.[175] For instance, the respondents were often confused by the survey and did not answer consistently; important cost factors may not have been reflected in the FCC's data; and the number of franchises designated under the "effective competition" classification did not accurately reflect actual competitive conditions.[176]

Under the Telecom Act, local franchising authorities may not regulate cable rates where cable operators are subject to effective competition.[177] Thus, "[a] franchise should not simultaneously be listed as facing effective competition and having regulation of basic rates."[178] However, "of 262 franchises in [the] FCC's survey classified as facing effective competition, 40 [cable operators] also reported that the franchising authority regulated their basic service rates."[179] Therefore, "the lack of reliable information in [the] FCC's cable rate report" compromises Congress' capacity to make

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171. *See id.*

172. *See* Posner, *supra* note 41, at 639–40 (discussing the use of a tax as a possible alternative to traditional natural monopoly regulation); *see also infra* Part V.

173. *See In re* Implementation of Section 3 of the Cable Television Consumer Prot. & Competition Act of 1992, Report on Cable Indus. Prices, 17 F.C.C.R. 6301 (rel. Apr. 4, 2002).

174. *See* GAO, *supra* note 39, at 2.

175. *See id.* at 13–18.

176. *See id.*

177. *See id.* at 17; *see also* 47 U.S.C. § 543(l)(1) (2000) (defining "effective competition"). Through implementation of Telecom Act provisions, the FCC placed a burden on cable operators to petition for determination of "effective competition" status. Order & Notice of Proposed Rulemaking, *supra* note 80, at 5944; Order on Reconsideration, 17 F.C.C.R. 7609, 7624 (rel. Apr. 22, 2002); *see also* 47 C.F.R. § 76.906 (2006) ("In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.").

178. GAO, *supra* note 39, at 17.

179. *Id.*

crucial policy decisions.[180]

Andrew S. Fishel, Managing Director of the FCC, officially replied to the GAO report and justified the FCC's questionable data by explaining shortcomings in the statutory framework.[181] Mr. Fishel also cited the lack of resources necessary for the FCC to monitor the entire cable industry and update designations of effective competition on a rolling basis.[182]

C. Causes of Cable Rate Increases

Cable operators cite several key factors to justify increasing rates for their services. The GAO acknowledged the high costs associated with updating infrastructure to enable new technologies, such as digital channels and broadband Internet access, and the rising cost of programming.[183] According to industry sources, the cable industry spent $100 billion between 1996 and 2005 upgrading its infrastructure by installing digital equipment and replacing degraded coaxial cable with fiber-optics.[184] Furthermore, some cable industry executives cited the rising prices of broadcasting rights for sports programming and existing syndicated programming.[185] However, one expert noted that higher costs associated with advanced service upgrades do not justify higher rates for those customers who only subscribe to basic cable services.[186] This is especially true in light of cable operators' successes in offsetting higher costs with additional local advertising revenue.[187]

Under current FCC rules that require cable operators to obtain individual franchise agreements, overbuilders argue that negotiation with local governments can take as long as three years.[188] Furthermore, the agreements are often filled with prohibitive conditions.[189] Overbuilders may have to spend several years and millions of dollars to build infrastructure without bringing in any revenue.[190] By the time municipal

180. *See id.* at 19.

181. *See id.* at 71 (Letter from Andrew S. Fishel, Managing Director, FCC, to Mark Goldstein, Acting Director, Physical Infrastructure Issues, GAO (Sept. 24, 2003)).

182. *See id.* at 71–73 (Letter from Andrew S. Fishel, Managing Director, FCC, to Mark Goldstein, Acting Director, Physical Infrastructure Issues, GAO (Sept. 24, 2003)).

183. *See id.* at 20.

184. *See* Twelfth Annual Report, *supra* note 103, at 2524.

185. *See* GAO, *supra* note 39, at 23.

186. *See id.* at 25–26.

187. *See id.* at 24.

188. *See* Notice of Proposed Rulemaking, *supra* note 135, at 18584–85 (citing Comments of BellSouth Corp., et al., MB Docket No. 05-255, at 3).

189. *See id.* (citing Comments of Alcatel, MB Docket No. 05-255, at 19).

190. *See id.* (citing Comments of the Broadcast Service Providers Ass'n, MB Docket No.

conditions have been satisfied by wiring entire communities, the technology may be out of date.[191] Conversely, large media companies such as Comcast and Time Warner are able to absorb upgrade costs over a longer period of time.[192]

Several states recently passed legislation to replace the traditional municipal process with a streamlined state registration.[193] Texas was the first state to pass a statewide franchising law in September 2005.[194] Since then, a number of states passed similar legislation, including California, Indiana, Kansas, New Jersey, North Carolina and South Carolina.[195] Virginia passed legislation that requires local jurisdictions to impose equal requirements on franchise fees.[196]

The 109th Congress introduced several bills in order to address franchising issues in the cable industry, such as the Communications, Opportunity, Promotion, and Enhancement Act of 2006 (COPE Act).[197] The COPE Act, which passed the House with overwhelming majority support,[198] attempted to foster competition through a streamlined national franchising process.[199] The COPE Act also proposed to significantly redefine the term "cable service" for the first time since 1984.[200] The Senate version of the COPE Act, the Advanced Telecommunications and Opportunities Reform Act,[201] was placed on the Senate Legislative

05-255, at 19).

191. *See id.* at 18585.

192. *See id.* at 18584–85 (citing Comments of the Broadcast Service Providers Ass'n, MB Docket No. 05-255, at 19).

193. *See* Sinel et al., *supra* note 93, at 211.

194. *See id.*

195. *See id.*

196. *See id.*

197. Communications, Opportunity, Promotion, and Enhancement Act of 2006, H.R. 5252, 109th Cong. (as passed by House, June 8, 2006).

198. *See* OFFICE OF THE CLERK, U.S. HOUSE OF REPRESENTATIVES, FINAL VOTE RESULTS FOR ROLL CALL 241 (June 8, 2006), http://clerk.house.gov/evs/2006/roll241.xml (yeas 321, nays 101, not voting 11).

199. *See* H.R. 5252, § 101.

200. *See id.* § 102 (proposing to add, *inter alia*, to the definition of cable service the following: "the transmission to subscribers of video programming or other programming service provided through wireline facilities located at least in part in the public rights-of-way, without regard to delivery technology, including Internet protocol technology, except to the extent that such video programming or other programming service is provided as part of . . . a commercial mobile service . . . or . . . an Internet access service.").

201. *See* Press Release, United States Senate Committee on Commerce, Science, & Transportation (June 28, 2006), http://commerce.senate.gov/public/index.cfm?FuseAction=PressReleases.Detail&PressRelease_id=248635 (combined the House COPE Act and the Senate Communications, Consumer's Choice, and Broadband Deployment Act of 2006).

Calendar for consideration on September 29, 2006,[202] but never came to a vote.[203] After a power shift in the November 2006 General Election,[204] bill co-sponsor Senator Ted Stevens, a Republican from Alaska, was unable to assemble the sixty votes needed to overcome a filibuster.[205]

Given the local nature of cable service, Congress' national franchising provisions are better left in theory. Furthermore, proposed reliance on further FCC oversight seems counter-productive given the FCC's inability to fulfill its existing obligations.

D. The Effect of Vertical Integration on Cable Rates

Industry representatives and experts argue that two primary relationships affect the cost of cable programming: (1) "relationships between cable networks and cable operators,"[206] and (2) "relationships between cable networks and [television] broadcasters."[207] In 1992, the FCC asked Congress to repeal the vertical "network-cable cross-ownership rule,"[208] which was originally promulgated in 1970 "to curb network dominance of the video marketplace and to protect the cable industry in its incipient stage of development."[209] The FCC reported that the vertical limitation no longer served the public interest two decades after the rule went into effect.[210] Moreover, networks' vertical integration with cable systems serves the public interest "by encouraging the development of

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202. *See* GPO Access, A Service of the U.S. Government Printing Office, Senate of the United States, 109th Congress, Calendar of Business, Final Issue, No. 652, at 61, http://www.gpoaccess.gov/calendars/dailysenate/2006/sc18de.pdf (last visited Feb. 16, 2008).

203. *See* GovTrack.us, H.R. 5252 [109th]: Advanced Telecommunications and Opportunities Reform Act, http://www.govtrack.us/congress/bill.xpd?bill=h109-5252&page-command=print (last visited Feb. 16, 2008).

204. *See* Carl Hulse, *Democrats Weigh New Power as Leaders*, N.Y. TIMES, Nov. 10, 2006, at A26.

205. *See, e.g.*, Susan Fratkin, *policy@edu: The 110th Congress: An Eye to the Past and the Future*, EDUCAUSE REV., Jan./Feb. 2007, at 70–71.

206. GAO, *supra* note 39, at 27.

207. *Id.*

208. 47 C.F.R. § 76.501(a)(1) (2002) (repealed by 68 Fed. Reg. 13,236-01 (2003)) (originally enacted as 47 C.F.R. § 74.1131 (1970)) ("[n]o cable television system (including all parties under common control) shall carry the signal of any television broadcasting station if such system directly or indirectly owns, operates, controls, or has an interest in a TV broadcast station.").

209. *See In re* Amendment of Part 76, Subpart J, Section 76.501 of the Commission's Rules & Regulations to Eliminate the Prohibition on Common Ownership of Cable Television Sys. & National Television Networks, Report & Order, 7 F.C.C.R. 6156, 6157 (rel. July 17, 1992) [hereinafter Report & Order], *aff'd on recon.*, Memorandum Opinion & Order, 8 F.C.C.R. 1184, 1185 (rel. Feb. 23, 1993).

210. *See id.* at 6168.

additional cable programming."[211]

Section 202 of the Telecom Act permits "a person or entity to own or control a network of broadcast stations *and* a cable system,"[212] thereby comporting with the FCC's 1992 request to repeal the vertical network-cable cross-ownership rule.[213] Time Warner currently owns and operates several cable networks, such as TBS, TNT, Cartoon Network, CNN, and HBO.[214] Comcast also owns and operates several cable networks, including E! Entertainment Television, The Style Network, and The Golf Channel.[215] Consumer groups argue that vertical ownership relationships between cable operators and cable networks reduce competition and diversity in the marketplace.[216] However, Congress acknowledged that vertical relationships in the cable industry have also resulted in significant benefits.[217] In particular, the House cited innovative channels including C-Span, CNN, BET, Nickelodeon, and the Discovery Channel, which "would not have been feasible without the financial support of cable system operators."[218]

While the GAO found little evidence in its 2003 report that license fees are higher for cable networks owned by either cable operators or broadcasters, "[t]here was a particular concern . . . regarding retransmission consent agreements."[219] License agreements between cable operators and broadcasters often contain provisions that require MSOs, in lieu of cash payments, to carry additional cable networks owned by the broadcasters that they might not otherwise license.[220] For instance, in the 1990s, television networks such as ABC and NBC included terms in their broadcast consent agreements requiring cable operators to license their newly launched affiliated cable networks such as ESPN2 and MSNBC.[221] The GAO reported that retransmission consent agreements can make it

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211. *Id.* at 6165.

212. Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(f), 110 Stat. 56, 111 (emphasis added).

213. *See* Report & Order, *supra* note 209, at 6168.

214. *See* Memorandum Opinion & Order, *supra* note 105, at 8211 n.43–44.

215. *See id.* at 8209 n.31.

216. *See id.* at 8250.

217. *See* Second Report & Order, *supra* note 148, at 8584.

218. *See id.* (quoting a 1990 House report).

219. GAO, *supra* note 39, at 29 (emphasis removed) ("using a regression analysis ([the FCC's] cable license fee model) [the FCC held] constant other factors that could influence the level of the license fee").

220. *Id.*

221. *See id.* at 43.

difficult for independent networks to gain carriage with cable operators.[222] Furthermore, cable operators "were more likely to carry cable networks that were majority-owned by either cable operators or by broadcasters than to carry other cable networks."[223] Although it could not find direct evidence connecting the provisions with higher rates, the GAO concluded that "rates *could* be affected by the carriage patterns."[224]

E. À La Carte Pricing and Alternatives

Former Senate Commerce Committee Chairman John McCain and current FCC Chairman Martin, are long-time advocates for à la carte pricing.[225] Under the proposed system, subscribers would have the choice to receive and pay only for networks that they want to watch.[226] Industry representatives argued (and the GAO agreed) that à la carte pricing would negatively impact the cable industry business model by reducing advertising revenues; adding costs for new equipment, such as technologically required addressable converter boxes; and adding customer and technical service costs to monitor and manage the increased number of transactions that would occur under an à la carte system.[227] Furthermore, even though the GAO found that à la carte cable systems would provide more individual choices to subscribers, some à la carte customers would actually pay higher rates.[228]

In response to inquiries by members of Congress, the Media Bureau of the FCC released a report in 2004 (First Report) addressing technical, economic and legal issues relating to "the efficacy of providing [à] la carte and themed-tier services to cable and satellite subscribers."[229] The Bureau based its First Report on a six month study where it collected nearly 400 comments, *ex parte* communications, letters, and testimony.[230] Contributors to the report were cable operators (including Comcast and Time Warner), DBS providers, program networks, consumer groups,

222. *See id.*

223. *Id.* at 5.

224. *Id.* at 44 (emphasis added).

225. *See generally* GAO, *supra* note 39, at 1.

226. *Id.* at 30. "In fact, a 2000 Nielsen Media Research Report indicated that households receiving more than 70 networks only watch, on average, about [seventeen] of these networks." *Id.* at 31.

227. *See id.* at 32–35.

228. *See id.* at 30.

229. FCC Media Bureau, *Report on the Packaging & Sale of Video Programming Servs. to the Pub.*, MB Docket No. 04-207, at 3 (rel. Nov. 18, 2004), *available at* http://fjallfoss.fcc.gov/edocs_public/attachmatch/DOC-254432A1.pdf.

230. *See id.* at 5.

government officials, and consumers.[231] The Bureau concluded that, under a pure or mandatory à la carte regime, the average household would likely face a monthly cable rate *increase* of between fourteen and thirty percent.[232] Thus, à la carte would not produce the desired result of lowering rates for most pay-television households.[233] Replying to the Bureau's report, Senator McCain disappointedly noted, "the industry has been successful once again in distracting policy makers with a 'parade of horribles' that they allege would result from a mandatory [à] la carte offering."[234]

However in 2006, the FCC issued a second report (Further Report), which invalidated most of its First Report, concluding that it "relied on problematic assumptions and presented incorrect and biased analysis."[235] In direct contradiction, the Further Report concluded "that [à] la carte could be in consumers' best interests."[236] The 2006 report also examined alternatives to pure à la carte pricing, including "mixed bundling," "themed tiers," and "subscriber-selected tiers."[237]

The current practice of selling cable channels in tiers inevitably gives consumers more choices. Although there is no clear-cut evidence that the proposed switch to à la carte pricing would raise cable rates, eliminating tier-grouping would harm cable subscribers because infant cable networks would quickly perish without guaranteed carriage.[238] Therefore, tier-

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231. *See id.* at 5 n.5.

232. *Id.* at 6 (citing the "Booz Allen Hamilton" economic study, which analyzed à la carte's potential affect on advertising revenue).

233. *See id.*

234. Frank Ahrens, *FCC Says A La Carte TV Would Cost More: Advocates Fault Pricing Study*, WASH. POST, Nov. 20, 2004, at E01, *available at* http://www.washingtonpost.com/wp-dyn/articles/A63948-2004Nov19.html (quoting Sen. McCain).

235. FCC Media Bureau, *In re* À La Carte & Themed Programming & Pricing Options for Programming Distrib. on Cable Television & Direct Broad. Satellite Syss., Further Report on the Packaging & Sale of Video Programming Servs. to the Pub., MB Docket No. 04-207, at 3 (rel. Feb. 9, 2006), *available at* http://fjallfoss.fcc.gov/edocs_public/attachmatch/DOC-263740A1.pdf.

236. *Id.*

237. *Id.* at 6 ("In the first alternative, called 'mixed bundling,' multichannel video programming distributors (MVPDs) would provide all of the digital networks that they currently carry on an [à] la carte basis, in addition to providing any bundles they choose to offer. Under the second alternative, MVPDs would introduce one or more additional tiers composed of channels that are currently being transmitted in digital format and that are related to a particular theme (such as family friendly programming), so-called 'themed tiers.' Pursuant to the third alternative, 'subscriber-selected tiers,' MVPDs would give consumers the option of buying a small or larger number of digital networks, where the consumers select the networks from among those available on the system. In the context of an increasingly competitive MVPD marketplace, presenting such options should help MVPDs compete for consumers, while enhancing overall consumer welfare.").

238. GAO, *supra* note 39, at 36.

grouping benefits consumers overall by fostering the growth of smaller channels that cable subscribers might not otherwise select under an à la carte regime, thereby maintaining diversity in cable programming.[239]

F. À La Carte and Ownership Developments

Representative Daniel Lipinski, a Democrat from Illinois, co-sponsored the Family and Consumer Choice Act of 2007 (Family Act), which includes the current à la carte provision.[240] If enacted, the Family Act would require cable and satellite providers to offer a "family programming tier,"[241] and issue credits for channels that subscribers elect to block.[242]

Concurrent with committee meetings and Family Act debates in the House, consumers filed an antitrust class action suit in the Central District of California against major media companies challenging traditional tier group pricing.[243] The putative class members allege, *inter alia*, that defendants, including Comcast and Time Warner, force consumers to acquire channels that they would not otherwise acquire if channels were offered à la carte.[244] Plaintiffs further allege that the bundling practice violates the Sherman Act by depriving consumers of choice, and results in significant overcharges.[245]

Attempting to pressure the cable industry to adopt à la carte pricing, FCC Chairman Martin announced in November 2007 that the cable industry crossed over the 70-70 threshold of market dominance, thereby triggering the FCC's dormant power under the Cable Communications Policy Act of 1984 to ensure competition and diversity through regulation.[246] The National Cable and Telecommunications Association argued that the FCC lacks authority to impose à la carte pricing.[247]

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239. *See id.*

240. Family and Consumer Choice Act of 2007, H.R. 2738, 110th Cong. (2007).

241. *Id.* § 3(b) (proposing to amend 47 U.S.C. § 522 (2006)) (defining "[f]amily tier of programming" as including all channels on the expanded basic tier, except those that carry programs rated TV-14 or TV-MA during designated hours).

242. *Id.* § 4 (proposing to amend scattered sections of 47 U.S.C.).

243. *See* Press Release, Blecher & Collins, P.C., Consumers File Antitrust Class Action (Sep. 20, 2007), http://www.blechercollins.com/news/cable-suit/index.html.

244. *See* Class Action Complaint for Damages and Injunctive Relief for Violations of the Sherman Antitrust Act at 12, Brantley v. NBC Universal, Inc., No. CV-07-06101 (C.D. Cal. Sep. 20, 2007), *available at* http://www.blechercollins.com/media/cable.pdf.

245. *See id.* at 14.

246. *See* William Triplett, *Cablers Assail FCC Push for a la Carte*, DAILY VARIETY, Nov. 15, 2007, at 4.

247. *See id.*

Furthermore, in a letter to Chairman Martin, House Republican leader John Boehner, from Ohio, said, the 70-70 rule "was not intended to grant the FCC carte blanche to impose other types of regulation . . . . Moreover, it was drafted more than [twenty] years ago as a mechanism to respond to decreases in sources of content, and that clearly is not a problem today."[248]

While it is well established that cable systems offering at least thirty-six channels are now available in almost 100% of the country, industry representatives and legislators disagreed with Chairman Martin when he unilaterally announced that more than seventy percent of those households actually subscribe to cable.[249] Several independent analyses showed that the cable industry has not reached the seventy percent threshold.[250] In fact, the FCC's own 2006 reports (released after Chairman Martin's announcement) estimated that the cable subscription rate was between 54% and 55.2%.[251]

Under intense pressure from lawmakers, Chairman Martin divulged where he found the 71.4% rate that he used to determine cable market dominance.[252] However, officials from Warren Communications, publishers of the annual *Television and Cable Factbook*, announced that their calculations did not include all cable operators.[253] Thus, the data was ill-suited for determining the 70-70 threshold.[254] Consumer groups charged that the cable industry manipulated the data in order to avoid triggering the threshold, and that the FCC manipulated the data to suit its policy goals.[255] According to FCC Commissioner Jonathan Adelstein, a Democrat, Chairman Martin attempted "to cook the books" in his report.[256]

Prompted by widespread criticism of the FCC, Representative John Dingell, a Democrat from Michigan and Chairman of the House Committee

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248. William Triplett, *Pols Perturbed by Martin*, DAILY VARIETY, Nov. 27, 2007, at 24 (quoting a letter from John Boehner, House Republican leader to Kevin J. Martin, FCC Chairman).

249. *See* Jim Puzzanghera, *FCC May Find It Has the Power to Reregulate Cable*, L.A. TIMES, Nov. 13, 2007, at C1 [hereinafter Puzzanghera, *FCC May Find*]; *see also* Jim Puzzanghera, *Cable Regulator Bid Delayed*, L.A. TIMES, Nov. 28, 2007 at C1 [hereinafter Puzzanghera, *Cable Regulator*] (discussing the 70-70 threshold of market dominance).

250. *See id.*

251. *See In re* Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming, Thirteenth Annual Report, MB Docket No. 06-189, at 1 (rel. Nov. 27, 2007) (statement of Commissioner Jonathan S. Adelstein), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-278454A4.pdf.

252. *See* Puzzanghera, *Cable Regulator*, *supra* note 249.

253. *See id.*

254. *See id.* (citing officials from Warren Communications News).

255. *See* Puzzanghera, *FCC May Find*, *supra* note 249.

256. Id. (quoting FCC Commissioner Jonathan Adelstein).

on Energy and Commerce, ordered an FCC inquiry by the Subcommittee on Oversight and Investigations.[257] Congressman Dingell described the events of late 2007 in a scathing letter to Chairman Martin as a breakdown in proper procedure.[258] He expressed concern that, by short-circuiting procedural norms, the FCC was not acting fairly, openly and transparently, and thus not performing "its core mission: . . . to serve the public interest."[259]

Bowing to pressure, the FCC extended the deadline for cable operators to re-submit their market-share data to determine whether the cable subscription rate is approaching seventy percent.[260] Therefore, each cable operator was required to re-submit its data to the FCC by January 26, 2008 under penalty of perjury.[261] Nevertheless, Chairman Martin probably has enough partisan support in the FCC to further his own political agenda.[262] However, if the FCC imposes an à la carte regulation in 2008, the likely result will be a challenge by the cable industry in federal court[263]—another clear indication that the failed Telecom Act needs to be amended.

IV. THE ADELPHIA TRANSACTIONS VIOLATED ANTITRUST LAWS

In June 2002, Adelphia filed for bankruptcy reorganization under Chapter 11 of the U.S. Bankruptcy Code, after a highly publicized accounting and looting scandal that ultimately sent its founder, John Rigas, and his son, Timothy Rigas, to prison.[264] On May 18, 2005, Comcast and Time Warner filed applications with the Federal Communications Commission (FCC)[265] to acquire most of the cable systems owned or

257. *See* Letter from John D. Dingell, Chairman, U.S. House of Rep., Comm. on Energy & Commerce, to Kevin J. Martin, Chairman, FCC, at 1 (Dec. 3, 2007), *available at* http://energycommerce.house.gov/Press_110/110-ltr.120307.FCC.Martin.transparency.pdf.

258. *See id.*

259. *See id.* at 1–2.

260. *See In re* Extension of Time to File Comments & Reply Comments on the Review of the Comm'n's Program Access Rules & Examination of Programming Tying Arrangements, Pub. Notice, MB Docket No. 07-198, at 2 (rel. Nov. 20, 2007), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-07-4688A1.pdf.

261. *See* Press Release, FCC, FCC Adopts 13th Annual Report to Congress on Video Competition & Notice of Inquiry for the 14th Annual Report (Nov. 27, 2007) (on file with FCC), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-278454A1.pdf.

262. *See* Jim Puzzanghera, *Tribune Future Hinges on FCC*, L.A. TIMES, Nov. 14, 2007, at C1.

263. *See id.*

264. *See* Peter Grant & James Bandler, *Time Warner, Comcast Weigh Bid for Adelphia*, WALL ST. J., Sep. 28, 2004, at B1.

265. Applications were filed pursuant to sections 214 and 310(d) of the Communications

managed by co-applicant Adelphia.[266] Comcast and Time Warner also proposed to swap unrelated cable systems between themselves in order to consolidate their markets.[267] For instance, Comcast proposed to transfer its market share in Los Angeles, Dallas, and Cleveland in exchange for Time Warner's market share in Philadelphia—Comcast's home-base.[268]

Cable television is technically not a monopolistic market, but rather an oligopolistic market because a few firms account for a majority of the sales rather than only one.[269] However, as a result of the transactions, Comcast and Time Warner were able to create individual regional monopolies in many key markets including New York, Los Angeles, and Washington, D.C.—the financial, entertainment, and political capitals of the United States.[270]

A. Applications, Petitions, and Comments

After Comcast, Time Warner and Adelphia (collectively "Applicants") filed their applications, the FCC collected public comments and invited those with "party-in-interest" standing to file petitions to deny the transactions.[271] The FCC collected over 26,000 informal comments and recognized certain interested parties[272] who submitted sworn declarations pursuant to the Communications Act of 1934 (Communications Act)[273] and FCC regulations.[274] The FCC classified opposition groups such as Free Press as "parties-in-interest" based upon their specific factual allegations that granting the applications "would be *prima facie* inconsistent with the public interest."[275]

In order to obtain FCC approval for the asset acquisitions and transfers (collectively "Adelphia Transactions"), the Applicants had the burden to demonstrate by a preponderance of the evidence that the proposed transactions would serve the "public interest, convenience and necessity."[276] The FCC evaluated the "public interest" factor by weighing

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Act of 1934, 47 U.S.C. §§ 214, 310(d) (2000).

266. *See* Memorandum Opinion & Order, *supra* note 105, at 8205, 8206, 8214.

267. *See id.* at 8212–13.

268. *See id.* at 8213.

269. *See* Posner, *supra* note 41, at 559.

270. *See* Memorandum Opinion & Order, *supra* note 105, at 8251.

271. *See id.* at 8214–15.

272. *See id.* at 8214–16.

273. *See* 47 U.S.C. § 309(d)(1) (2000).

274. *See* 47 C.F.R. § 78.22 (2000).

275. Memorandum Opinion & Order, *supra* note 105, at 8215–16.

276. *Id.* at 8207.

potential harms against potential benefits.[277] The fact-specific inquiries were rooted in the "broad aims of the Communications Act," as amended by the Telecommunications Act of 1996 (Telecom Act), including preserving and enhancing competition in relevant markets; accelerating private sector deployment of advanced services; and ensuring diversity of information sources and services to the public.[278] The FCC also considered the nature, complexity, and speed of technological and market changes, as well as overall trends within the communications industry.[279] The FCC based its competitive analysis on antitrust principles and regulatory policies that govern the interactions of cable operators.[280]

At the outset, the FCC recognized that the "transaction[s] may lead to both beneficial and harmful consequences."[281] For instance, consolidating assets may allow the cable operators to reduce transaction costs and offer new products, but it may also enhance barriers to market entry by overbuilders.[282] The FCC also evaluated the transactions pursuant to the thirty percent horizontal ownership limit.[283] Based on the FCC's calculations, Comcast's post-transaction subscribership would consist of 28.7% of all multichannel video programming distributors' (MVPDs) subscribers in the United States, thereby comporting with the thirty percent horizontal rule.[284]

The FCC also noted that the Federal Trade Commission (FTC) approved both the acquisition of Adelphia and the related swap agreements on January 31, 2006.[285] According to the U.S. Department of Justice and the FTC, the Sherman Act forbids mergers and acquisitions if they constitute a "contract, combination . . . or conspiracy in restraint of trade."[286] The Clayton Act also prohibits mergers and acquisitions if their effect may "substantially . . . lessen competition, or . . . tend to create a

277. *See id.* at 8217.

278. *See id.* at 8218 (citing 47 U.S.C. §§ 521(6), 521(4), 532(a) (2000); Telecommunications Act of 1996, Pub. L. No. 104-104, § 706, 110 Stat. 56, 118–119).

279. *See* Memorandum Opinion & Order, *supra* note 105, at 8218.

280. *See id.*

281. *Id.* at 8219.

282. *See id.*

283. *See id.* at 8225 (citing Second Report & Order, *supra* note 148, at 8567); *see also* discussion *supra* Part III.A.

284. *See id.* at 8231 ("MVPD subscribers" include those that subscribe to cable service and those that subscribe to Direct Broadcast Satellite service.).

285. *See* Memorandum Opinion & Order, *supra* note 105, at 8216–17.

286. U.S. DEPARTMENT OF JUSTICE & THE FEDERAL TRADE COMMISSION, HORIZONTAL MERGER GUIDELINES, § 0 (1992) [hereinafter HORIZONTAL MERGER GUIDELINES] (quoting 15 U.S.C. § 1 (2000)).

monopoly."[287] The FTC concluded "that the proposed transactions were unlikely to substantially lessen competition in any geographic region in the United States."[288]

B. Potential Harms

Petitioners opposing the Adelphia Transactions argued that the proposed system swaps between Comcast and Time Warner would reduce competition in the cable industry by deterring overbuilders from entering the market.[289] The Applicants rebutted the petitioners' arguments by citing competitive pressures from Direct Broadcast Satellite (DBS) providers and emerging competition from telephone companies.[290]

The FCC evaluated "potential harms" in relation to horizontal and vertical integration concerns,[291] noting "that antitrust law and economic analysis have viewed vertical transactions more favorably than horizontal transactions."[292] Vertical transactions "do not directly reduce the number of competitors;" whereas, horizontal transactions directly concentrate market share.[293] However, while vertical transactions may allow for greater efficiencies, a vertically integrated cable company that competes in upstream and downstream markets may prevent rivals from licensing "essential" channels or may unreasonably overcharge for carriage rights.[294]

Opponents to the Adelphia Transactions argued that Comcast's vertical integration is particularly harmful to consumers and overbuilders in Philadelphia and Chicago,[295] where Comcast controls the cable markets and several sports entertainment interests.[296] For instance, Comcast controls a majority interest in the National Hockey League's Philadelphia Flyers, the National Basketball Association's Philadelphia 76ers, and Philadelphia's

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287. *Id.* (quoting 15 U.S.C. § 18 (2000)).

288. Memorandum Opinion & Order, *supra* note 105, at 8219 (citing the statement of Chairman Majoras, Commissioner Kavacic, and Commissioner Rosch Concerning the Closing of the Investigation Into Transactions Involving Comcast, Time Warner, and Adelphia Communications, File No. 051-0151, *available at* http://www.ftc.gov/os/closings/ftc/0510151twadelphiamajoras_kovacic_rosch.pdf (Jan. 31, 2006)).

289. *See id.* at 8238.

290. *See id.* at 8244.

291. *See id.* at 8237.

292. *Id.* at 8238.

293. *See id.* at 8238.

294. *See* Memorandum Opinion & Order, *supra* note 105, at 8238, 8256–57.

295. *See* Third Amended Class Action Complaint for Violations of the Sherman Antitrust Act, *supra* note 4, at 1–4.

296. *See* Memorandum Opinion & Order, *supra* note 105, at 8262.

two major indoor sports arenas.[297] It also owns majority interests in Comcast SportsNet Philadelphia and Comcast SportsNet Chicago—regional sports networks (RSNs) that exclusively air a significant number of games in their respective cities.[298]

Historically, the FCC has classified regional professional sports programming as "essential" or "must have" for distributors and subscribers.[299] Thus, the FCC weighs a lack of RSNs' availability more heavily than a lack of non-essential channels because consumers value local sports programming more than other cable content.[300] According to the FCC, "there is no readily acceptable substitute" for RSNs, because cable subscribers cannot change the channel to watch their favorite local sports teams.[301] Therefore, in its evaluation of the Adelphia agreements, the FCC found that the Adelphia Transactions may ultimately increase "the likelihood of harm in markets" where Comcast or Time Warner hold an ownership interest in regional sports networks by increasing retail prices for consumers and limiting consumer choice.[302]

Specifically, the FCC found that the Adelphia Transactions might enable Comcast and Time Warner to engage in anticompetitive behavior in cities such as Chicago and Philadelphia through "stealth discrimination" and foreclosure of RSN programming.[303] Therefore, the FCC imposed remedial conditions on the Adelphia Transactions.[304] The FCC required that Comcast and Time Warner "refrain from engaging in specific unfair practices," and offer their RSNs "to all MVPDs on a non-exclusive basis and on nondiscriminatory terms and conditions."[305] Furthermore, "[f]or enforcement purposes, aggrieved MVPDs may bring program access

297. *See* Third Amended Class Action Complaint for Violations of the Sherman Antitrust Act, *supra* note 4, at 28; *see also* Deni Kasrel, *Comcast: High Hopes for Sports*, PHILA. BUS. J., Aug. 29, 1997, http://philadelphia.bizjournals.com/philadelphia/stories/1997/09/01/story2.html.

298. *See* Third Amended Class Action Complaint for Violations of the Sherman Antitrust Act, *supra* note 4, at 29.

299. *See In re* Implementation of the Cable Television Consumer Prot. & Competition Act of 1992; Development of Competition & Diversity in Video Programming Distribution: Section 628(c)(5) of the Commc'ns Act; Sunset of Exclusive Contract Prohibition, Report & Order, 17 F.C.C.R. 12124, 12149, 12156 (rel. June 28, 2002) [hereinafter Sunset of Exclusive Contract Prohibition]; *see also* Memorandum Opinion & Order, *supra* note 105, at 8227.

300. *See* Memorandum Opinion & Order, *supra* note 105, at 8279.

301. *See* Sunset of Exclusive Contract Prohibition, *supra* note 299, at 12149.

302. *See* Memorandum Opinion & Order, *supra* note 105, at 8256.

303. *See id.* at 8261.

304. *See id.* at 8207.

305. *Id.* at 8274 (prohibition against exclusivity contracts codified at 47 C.F.R. 76.1002(c) (2007)). On October 4, 2007, the FCC extended its non-exclusivity provision through 2012. *See* Specific Unfair Practices Prohibited, 72 Fed. Reg. 56,661 (Oct. 4, 2007) (to be codified at 47 C.F.R. § 76.1002).

complaints against Comcast and Time Warner . . . using the [arbitration] procedures set forth in the Commission's program access rules."[306]

In opposition to the Adelphia agreements, the petitioners and commenters argued that the transactions were "intended to eliminate head-to-head competition between Time Warner and Comcast in the country's most desirable [markets]."[307] To evaluate the Adelphia Transactions' horizontal effects, the petitioners argued that the FCC should use the Herfindahl-Hirschman-Index (HHI) to analyze the competitive effects of the transactions.[308] The HHI accounts for the number of firms in the market and the degree of inequality among firms' market shares.[309] Based on the commenters' HHI calculations, the proposed increases in national and regional cable market concentration were sufficient to raise competitive concerns.[310]

The index was "designed for application to industries where participants compete directly."[311] However, the FCC refuses to apply HHI calculations in horizontal concentration analyses unless the companies in question compete at a national level.[312] Although Comcast and Time Warner theoretically compete nationally for advertising and market share, they do not compete locally because they control non-overlapping, non-competing regions.[313] When the FCC evaluates competition in the cable distribution market, it uses "the household" as the relevant geographic measuring unit.[314] Therefore, using "the household" as a benchmark, Comcast and Time Warner argued that the Adelphia Transactions could not possibly reduce the level of competition because they did not directly

306. Memorandum Opinion & Order, *supra* note 105, at 8274 (arbitration procedures codified at 47 C.F.R. § 76.1003 (2007)).

307. *Id.* at 8239 (citing Free Press Petition at 9, Rose Decl. at 11–13).

308. *See id.* at 8240 (noting that the DOJ and FTC often use the HHI).

309. HORIZONTAL MERGER GUIDELINES, *supra* note 286, § 1.5 ("The HHI is calculated by summing the squares of the individual market shares of all the participants . . . reflect[ing] both the distribution of the market shares of the top four firms and the composition of the market outside the top four firms.").

310. *See* Memorandum Opinion & Order, *supra* note 105, at 8242.

311. *In re* Implementation of Section 11 of the Cable Television Consumer Prot. & Competition Act of 1992; Implementation of Cable Act Reform Provisions of the Telecomms. Act of 1996; The Comm'n's Cable Horizontal & Vertical Ownership Limits & Attribution Rules; Review of the Comm'n's Regulations Governing Attribution of Broad. & Cable/MDS Interests; Review of the Comm'n's Regulations & Policies Affecting Inv. in the Broad. Indus.; Reexamination of the Comm'n's Cross-Interest Policy, Further Notice of Proposed Rulemaking, 16 F.C.C.R. 17312, 17342 (rel. Sep. 21, 2001) [hereinafter Further Notice of Proposed Rulemaking].

312. *See* Memorandum Opinion & Order, *supra* note 105, at 8244.

313. *See id.* at 8242; *see also* WEXLER, *supra* note 8, at 11–12.

314. *See* Memorandum Opinion & Order, *supra* note 105, at 8242.

compete before the proposed transactions.[315] In other words, the Applicants persuaded the FCC that there was little risk of lessening competition in the cable industry through the Adelphia Transactions because consumers never had a choice between cable operators.[316]

The FCC observed that incumbent cable operators partially derive their local market power from their national size.[317] Multiple cable system operators (MSOs) are then able to leverage their local market power on an inter-market basis and thus, have the ability to take anticompetitive actions against programmers or overbuilders.[318] In 2001, the FCC considered using the HHI to measure national market power in the cable industry.[319] Furthermore, as recently as 2006, the FCC found that the HHI was a "useful tool to follow trends" in MVPD concentration from year to year.[320] However, despite its own continued endorsement of HHI calculations in other proceedings, the FCC quickly dismissed the commenters' HHI calculations in its evaluation of the Adelphia Transactions.[321]

The FCC also dismissed a strong argument made by Marco Island Cable (MIC), a private overbuilder in Florida.[322] MIC alleged that Comcast and Time Warner directly competed for customers in two Florida counties prior to the Adelphia Transactions.[323] Therefore, the proposed transfer of Time Warner's facilities in Collier and Lee Counties would diminish head-to-head competition.[324] However, the MSO Applicants argued that the Adelphia proceeding was an improper forum to address the petitioner's arguments given that MIC's antitrust claims were pending in a Florida federal court.[325]

Marco Island Cable, Inc. v. Comcast Cablevision of the South, Inc., originally filed in January 2004, has been a lengthy and intensely litigated case, focusing on exclusivity agreements between condominium associations and cable operators.[326] The court found in favor of defendant

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315. *See id.*

316. *See id.*

317. *See* Further Notice of Proposed Rulemaking, *supra* note 311, at 17343.

318. *See id.* at 17342–43.

319. *Id.* at 17342.

320. *See* Twelfth Annual Report, *supra* note 103, at 2573–74.

321. *See* Memorandum Opinion & Order, *supra* note 105, at 8241–42.

322. *See id.* at 8247.

323. *See id.* at 8244–45.

324. *See id.* at 8247.

325. *See id.* at 8245.

326. *See* Marco Island Cable, Inc. v. Comcast Cablevision of the South, Inc., No. 2:04-CV-26-FTM-29DNF, slip op. at 1 (M.D. Fla. May 16, 2007), *available at* 2007 WL 1455937; *see also* Marco Island Cable, Inc. v. Comcast Cablevision of the South, Inc., No. 2:04-CV-26-FTM-

Comcast on several of plaintiff MIC's claims at the summary judgment stage, holding that under the *Noerr-Pennington* doctrine, Comcast was immunized from antitrust liability because of its litigation-related conduct.[327] Under the *Noerr-Pennington* doctrine, a defendant is immune from Sherman Act liability if the defendant has made concerted efforts to petition the government to pass legislation to restrain or monopolize trade in its favor.[328] Defendants who petition through administrative or judicial proceedings are also immune from liability.[329]

In *Marco Island Cable*, the court held that because Comcast had filed a previous lawsuit against Cozumel Condominium Association and sent letters threatening to sue others to enforce its exclusivity contracts, it had engaged in conduct that immunized it from antitrust liability.[330] However, a jury eventually found in favor of plaintiff MIC on its remaining claims under the Florida Deceptive and Unfair Trade Practices Act (FDUTPA).[331]

Apparently, the jury wanted to send a message to Comcast. MIC was awarded $3.26 million in damages, which was over two million dollars more than the plaintiff overbuilder requested in its case-in-chief.[332] However, the court found the damages excessive and ordered a new trial.[333] The court held that even though "a reasonable jury could find that Comcast committed acts prohibited by [the] FDUTPA," the jury's $3.26 million award was "grossly excessive and shock[ed] the conscience."[334]

In its evaluation of the Adelphia Transactions, the FCC concluded that the potential anticompetitive conduct alleged by MIC was "[in]sufficient to create a material risk of public interest harm."[335] Despite acknowledging that opposing arguments were relevant, the FCC deferred to the Florida district court to assess MIC's specific claims and deferred to its own cable ownership proceeding to dismiss other arguments.[336] Illustrating

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29DNF, 2006 WL 1814333, at *2 (M.D. Fla. Jul. 3, 2006) (ordering a new trial).

327. *See Marco Island Cable*, 2006 WL 1814333, at *10.

328. *See* Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127, 136 (1961); *see also* United Mine Workers v. Pennington, 381 U.S. 657, 670 (1965).

329. *See* Andrx Pharm., Inc. v. Elan Corp., PLC, 421 F.3d 1227, 1233 (11th Cir. 2005) (citing Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972)).

330. *See Marco Island Cable*, 2006 WL 1814333, at *9–*10.

331. *See* Marco Island Cable, Inc. v. Comcast Cablevision of the S., Inc., No. 2:04-CV-26-FTM-29DNF, slip op. at 1 (M.D. Fla. May 16, 2007), *available at* 2007 WL 1455937.

332. *See id.* at 1.

333. *See id.* at 3.

334. *Id.* at 2–3.

335. Memorandum Opinion & Order, *supra* note 105, at 8247.

336. *See id.* at 8246, 8293. The Cable ownership proceeding concluded on Dec. 18, 2007 without specifically addressing MIC's claims. *See generally* Martin Press Release, *supra* note 156, at 6.

the FCC's recurring habit of inaction and delay, the FCC generally ignored MIC's claims, and instead encouraged parties alleging specific claims of anticompetitive pricing to follow FCC complaint filing procedures or seek redress in court.[337]

When Congress empowered the FCC to oversee the cable industry, legislators did not intend for the regulatory group to re-assign its responsibilities to the over-crowded court system. Moreover, judicial proceedings are not well-adapted to sifting through complex financial data to resolve sophisticated economic issues such as the web of swap agreements within the Adelphia Transactions.[338]

C. Potential Benefits

The FCC believed that Applicants met their required burden by showing that the Adelphia Transactions would result in a significant number of public interest benefits that outweighed potential harms.[339] For instance, Comcast and Time Warner argued that the proposed transactions would accelerate deployment of advanced services, such as Voice over Internet Protocol telephone service (VoIP), high-speed Internet, and Video on Demand programming;[340] facilitate the resolution of the Adelphia bankruptcy proceeding;[341] and enhance competition and achieve pro-consumer efficiencies by clustering their respective cable systems.[342] The FCC assessed potential benefits based on the following criteria: (1) the transactions must likely accomplish the claimed benefits; (2) the evidence offered by Applicants must be verifiable and non-speculative; and (3) the benefits must flow to consumers.[343]

In support of their benefit claims, Comcast and Time Warner flexed their financial muscles. The Applicants detailed their projected collective $800 million investment to upgrade Adelphia's systems.[344] Their sales-pitch cited past accomplishments in economic terms in order to prove their future financial commitment.[345] For example, "Comcast spent nearly $8 billion to upgrade systems it acquired from AT&T Broadband in 2002."[346]

337. *See* Memorandum Opinion & Order, *supra* note 105, at 8246.

338. *See* Posner, *supra* note 41, at 629.

339. *See* Memorandum Opinion & Order, *supra* note 105, at 8207.

340. *See id.* at 8307.

341. *See id.* at 8207.

342. *See id.* at 8315–16.

343. *See id.* at 8307–08.

344. *See id.* at 8311.

345. *See* Memorandum Opinion & Order, *supra* note 105, at 8308.

346. *Id.*

In 1991, Time Warner "was the first MSO to complete a digital upgrade of all of its cable systems," and has invested a total of five billion dollars since 1996.[347]

The FCC found that the Adelphia Transactions were likely to accelerate the deployment of advanced services because MSOs have the incentive to compete with new services provided by telephone companies.[348] Furthermore, the FCC concluded that benefits would likely flow to Adelphia customers after the transactions because Comcast and Time Warner were financially committed.[349]

The Applicants also argued that approving the transactions would resolve the complicated Adelphia bankruptcy proceedings, thereby maximizing recovery to creditors.[350] The FCC concluded that resolution of the bankruptcy proceedings would provide a public service benefit by compensating creditors and avoiding "expense[s] associated with arranging an alternative disposition of Adelphia's assets."[351] However in doing so, it valued the benefit less than it might have if the swap agreements were not included in the proposal.[352] The FCC noted that by swapping assets, Comcast and Time Warner requested approval for "purposes unrelated to the Adelphia bankruptcy proceeding."[353] Thus, potential benefits flowing from its resolution were only tangentially related to the swap agreements.[354]

Comcast and Time Warner insisted that the proposed swap agreements would lead to several public interest benefits, yet they failed to show how the alleged benefits would flow to consumers.[355] For instance, Applicants claimed that by further clustering their cable systems they would be better positioned to effectively compete against DBS providers and telephone companies.[356] Furthermore, the location of Applicants' cable systems provided a unique opportunity for Comcast and Time Warner to achieve efficiencies and increase rollout of advanced services.[357] Lastly, Applicants argued that they would be able to advertise more efficiently, thereby improving cable penetration rates.[358]

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347. *Id.*

348. *See id.* at 8315.

349. *See id.* at 8315.

350. *See id.* at 8321.

351. Memorandum Opinion & Order, *supra* note 105, at 8324.

352. *See id.* at 8324.

353. *Id.*

354. *See id.* at 8321.

355. *See id.* at 8315.

356. *See id.*

357. *See* Memorandum Opinion & Order, *supra* note 105, at 8316.

358. *See id.* at 8316

The FCC dismissed most of the benefits that Comcast and Time Warner projected would flow from their clustering practices because the evidence that they submitted was both speculative and insufficient.[359] Moreover, lower costs associated with clustering "are not . . . passed along to subscribers in the form of lower monthly rates."[360] Therefore, the possibility that Comcast and Time Warner could improve their own cost structures through efficient advertising and marketing were considered irrelevant to the FCC.[361] However, reiterating its earlier analysis, the FCC found one narrow benefit that would flow to Adelphia customers—rapid deployment of advanced services such as cable delivered telephone service or VoIP and local Video on Demand.[362]

D. The FCC Approval and Conditions Imposed

The FCC employed a sliding scale approach to weigh potential public interest harms against benefits.[363] Thus, the evaluation considered degrees of likelihood and magnitude.[364] However, despite significant evidence put forth by interested parties showing that the proposed transactions may lead to anticompetitive harms, the FCC concluded that the Adelphia Transactions "would serve the public interest, convenience, and necessity."[365] The FCC granted the applications, along with specific, narrowly-tailored conditions.[366] For instance, Comcast and Time Warner were required to certify compliance with the FCC's "cable/SMATV cross-ownership rule"[367] within sixty days.[368] However, at press time, the MSOs had not certified total compliance despite the FCC granting several extensions.[369]

359. *See id.* at 8318–19.

360. *Id.* at 8318 (quoting commenter DIRECTV).

361. *See id.* at 8319.

362. *See id.* at 8327.

363. *See* Memorandum Opinion & Order, *supra* note 105, at 8327.

364. *See id.* at 8327.

365. *Id.* at 8328.

366. *See id.* at 8219.

367. 47 C.F.R. § 76.501(d), (e) (2007) (explaining that the "cable/SMATV cross-ownership rule" prohibits cable operators from offering satellite master antenna television service separate and apart from any franchised cable service in any portion of a franchise area served by the cable operator or its affiliates, unless the service is offered in accordance with the terms of a cable franchise agreement).

368. *See* Memorandum Opinion & Order, *supra* note 105, at 8233.

369. *See* Order Granting Further Extension of Time, *supra* note 112, at 16940–41.

E. *Antitrust Analysis of the Adelphia Transactions*

Even though the FCC suggested that it would evaluate the Adelphia Transactions in light of antitrust principles, after it dismissed the petitioners' HHI calculations, consideration of antitrust law was notably absent from the FCC's *Memorandum Opinion and Order*.[370] According to the FCC, the swap agreements were "tangential" to the transfer of Adelphia's assets.[371] Yet, they also appear to violate the Sherman and Clayton Antitrust Acts. However, because Comcast and Time Warner are accomplished monopolists, they are able to cloak their anticompetitive conduct so that opponents are unable to prove actual evidence of dramatic anticompetitive behavior.[372]

The swap agreements between Comcast and Time Warner were *per se* violations of the Sherman Act because they were contracts inherently designed to restrain trade and eliminate competition for individual households (the FCC's relevant measuring unit).[373] Furthermore, by clustering their cable systems through swap agreements, the MSOs monopolized the relevant markets.[374]

The FCC noted that the Adelphia Transactions may increase the likelihood of harm in regions where Comcast and Time Warner also own Regional Sports Networks (RSNs).[375] Therefore, in Philadelphia, where Comcast owns the local cable sports channel, the swap agreements should not have been approved because the exchange violates the *Horizontal Merger Guidelines*[376] and the Clayton Act.[377] Furthermore, the FCC's arbitration provision, which was intended to prevent RSN foreclosure by Comcast and Time Warner,[378] is a useless remedial measure for overbuilders in Philadelphia because antitrust claims are already pending in

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370. *See generally* Memorandum Opinion & Order, *supra* note 105, at 8242–8333.

371. *See id.* at 8324.

372. *See* Posner, *supra* note 41, at 603.

373. *See* 15 U.S.C. § 1 (2000); *see also* Behrend v. Comcast Corp., Nos. 03-6604, 07-218, 07-219, slip op. at 1 (E.D. Pa. Aug. 1, 2007), *available at* 2007 WL 2221415 (determining "that the *per se* rule applie[s] to the swap agreements because they allegedly constituted horizontal market allocations").

374. *See* Posner, *supra* note 41, at 588–89 ("One could argue that the implicit threat of predatory conduct, even if never implemented or implemented so sporadically as to escape detection, should be enough to keep competitors in line and give the firm that monopolizes other markets considerable market power in the competitive market, although not a complete monopoly.").

375. *See* Memorandum Opinion & Order, *supra* note 105, at 8326.

376. HORIZONTAL MERGER GUIDELINES, *supra* note 286, § 1.5.

377. *See* 15 U.S.C. § 18 (2000).

378. *See* Memorandum Opinion & Order, *supra* note 105, at 8274–75.

Federal court.[379]

F. Proper Pleading for Antitrust Claims in Federal Court

Among the named plaintiffs in a pending antitrust claim against Comcast is overbuilder RCN Telecom Services, Inc. (RCN)[380]—one of the commenters who opposed the Adelphia Transactions.[381] The court has certified two separate classes in *Behrend v. Comcast Corp.*: the "Philadelphia cluster" and the "Chicago cluster."[382] At press time, the motion to certify the putative Boston class had not been considered.[383] All three cases, while related to separate FCC-approved swap agreements, involved similar alleged antitrust violations by Comcast.[384] Therefore, the cases were consolidated into one proceeding in the Eastern District of Pennsylvania.[385] The plaintiffs' suit survived motions to dismiss and a motion for a judgment on the pleadings[386] after the Supreme Court redefined its pleading standard for antitrust claims in *Bell Atlantic Corp. v. Twombly*.[387] Thus, the class action complaint contained "enough factual matter (taken as true) to suggest that" Comcast and Time Warner made an illegal agreement, and "raise[d] a reasonable expectation that discovery will reveal evidence of [an] illegal agreement."[388] In other words, the facts alleged regarding the cable operators' parallel conduct were suggestive enough to show that a Sherman Act conspiracy was "plausible."[389]

Plaintiffs alleged, *inter alia*, that "[a]s a result of . . . unlawful swap agreements" between Comcast and Time Warner (and previous FCC-approved swaps), Comcast's "actual and potential competitors were removed from the Philadelphia and Chicago clusters and defendants were able to exclude actual and potential competitors from, and raise prices

379. *See* Behrend v. Comcast Corp., Nos. 03-6604, 07-218, 07-219, slip op. at 1 (E.D. Pa. Aug. 1, 2007), *available at* 2007 WL 2221415.

380. *See id.* at 5 n.6.

381. *See* Memorandum Opinion & Order, *supra* note 105, at 8239.

382. *See Behrend*, No. 03-6604, slip op. at 1 (E.D. Pa. Oct. 10, 2007), *available at* 2007 WL 2972601.

383. *See Behrend*, Nos. 03-6604, 07-218, 07-219, slip op. at 1 n.1.

384. *See Behrend*, No. 03-6604, slip op. at 1.

385. *See* Behrend v. Comcast Corp., Nos. 03-6604, 07-218, 07-219, slip op. at 1 (E.D. Pa. Aug. 1, 2007), *available at* 2007 WL 2221415.

386. *See id.*

387. *See* Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1965 (2007).

388. *Behrend*, Nos. 03-6604, 07-218, 07-219, slip op. at 5 (quoting *Bell Atl. Corp.*, 127 S. Ct. at 1965).

389. *Id.* (citing *Bell Atl. Corp.*, 127 S. Ct. at 1965).

within, the Philadelphia and Chicago clusters."[390] Furthermore, Comcast engaged in conduct preventing competition in Philadelphia when it initially denied plaintiff RCN access to Comcast SportsNet Philadelphia.[391] Although Comcast eventually granted RCN transmission rights on a short-term basis,[392] the plaintiffs alleged that "Comcast . . . substantially interfered with RCN's access to contractors needed by RCN to build and offer competing cable television services in [the] Philadelphia cluster."[393] Furthermore, Comcast allegedly "prevented, or attempted to prevent, key contractors . . . from doing business with RCN by entering into or enforcing non-compete clauses . . . and threaten[ed] contractors with loss of work."[394] The combined cases appear to be headed for litigation. However, several of the claims could have been averted if the FCC had not approved the swap agreements.

In a separate suit filed in the District of Minnesota against Time Warner and Comcast,[395] plaintiff America Channel, who was denied certification as a "party-in-interest" petitioner in the Adelphia proceeding,[396] was also denied a trial in court.[397] Unlike the *Behrend* court, the *America Channel* court dismissed the plaintiff's antitrust claims based on the *Bell Atlantic* pleading standard.[398] This ruling is currently being appealed by America Channel.[399]

Based on FCC findings and allegations put forth by plaintiffs in *Behrend* and *America Channel*, swap agreements are harmful to overbuilders.[400] Clustering is beneficial to MSOs, but detrimental to

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390. Third Amended Class Action Complaint for Violations of the Sherman Antitrust Act, *supra* note 4, at 22.

391. *See id.* at 29.

392. *See id.* at 28–30, 33.

393. *Id.* at 30.

394. *Id.*

395. *See* Am. Channel, LLC v. Time Warner Cable, Inc., No. 06-2175 (DWF/SRN), slip op. at 1, 7 (D. Minn. June 28, 2007), *available at* 2007 WL 1892227.

396. *See* Memorandum Opinion & Order, *supra* note 105, at 8216 (referring to The America Channel as "TAC," the FCC stated that "the pleadings filed by . . . TAC fail[ed] to meet the requirements of section 309(d)(1) because [the] group [did not] attach[] a sworn statement as required by statute. Thus, [the FCC] conclude[d] that . . . TAC [was] appropriately treated as [an] informal objector[] in the . . . proceeding pursuant to Commission Rule 1.41").

397. *See Am. Channel*, No. 06-2175 (DWF/SRN), slip op. at 7.

398. *See id.* at 3, 7.

399. *See* Notice of Appeal, Am. Channel, LLC v. Time Warner Cable, Inc., No. 06-2175 (DWF/SRN) (D. Minn. July 9, 2007) (Notice signed by the plaintiff's attorney, Daniel R. Shulman, stating, "Notice is hereby given that The America Channel, LLC, Plaintiff . . . hereby appeals to the United States Court of Appeals for the Eighth Circuit from this Court's Memorandum Opinion and Order dated June 28, 2007 and Judgment entered July 2, 2007.").

400. *See* discussion *supra* Parts IV.B, E.

competition—especially in markets where cable operators own regional sports networks.[401] Therefore, Congress should impose heightened scrutiny on future mergers and acquisitions involving swap agreements. When the FCC and FTC consider future agreements, there should be a legal presumption that the swap agreements are *prima facie* inconsistent with the Sherman and Clayton Acts. Therefore, MSOs requesting approval for swap agreements should have the burden to show that there is a compelling public interest in approving the agreements, and the compelling public interest cannot be accomplished through any less anticompetitive means. Heightened scrutiny by the FCC and FTC should protect overbuilders and consumers against anticompetitive clustering practices, thereby easing the burden on the courts.

V. CONCLUSION

The failed deregulatory Telecommunications Act of 1996 (Telecom Act) is at the root of many legal issues in the cable industry. However, re-regulation is not the best solution. In the interest of forward thinking, it would be illogical and inefficient for Congress to completely rewrite the Telecom Act. Satellite television providers and telephone companies are beginning to provide some regional competition to the cable industry.[402] Furthermore, history has shown that lawmakers have trouble analyzing and interpreting data to set limits that accurately reflect competitive conditions.[403] However, given the Telecom Act's unworkable structure—evidenced by the Federal Communication Commission's (FCC) inability to implement its provisions to the satisfaction of the courts—it is time for Congress to consider alternative solutions.

In 1969, the cable industry was in its infancy. Judge Richard A. Posner—considered an expert in the area of legal economics[404]—published

401. *See* discussion *supra* Part IV.B.

402. *See* discussion *supra* Part III.A.

403. *See* discussion *supra* Part III.A; *see also* Posner, *supra* note 41, at 629 (discussing "the institutional limitations of judicial and administrative processes").

404. "Following his graduation from Harvard Law School, Judge Posner clerked for Justice William J. Brennan Jr. From 1963–65, he was assistant to Commissioner Philip Elman of the Federal Trade Commission. For the next two years he was assistant to the solicitor general of the United States. Prior to going to Stanford Law School in 1968 as associate professor, Judge Posner served as general counsel of the President's Task Force on Communications Policy. He first came to . . . the [University of Chicago] Law School [faculty] in 1969, and was Lee and Brena Freeman Professor of Law prior to his appointment in 1981 as a judge of the U.S. Court of Appeals for the Seventh Circuit. He was the chief judge of the court from 1993 to 2000." Richard Posner, [Faculty], The Law School, Univ. of Chicago Website, http://www.law.uchicago.edu/faculty/posner-r/ (providing a brief biography of Judge Posner)

his theoretical Comment on the regulation of natural monopolies.[405] Judge Posner suggested then (and re-affirmed thirty years later) that the natural monopoly's inherent disposition toward consolidation makes common carrier regulation unlikely to bring about competitive pricing.[406] Overwhelmingly, regulators are "ignorant of the principles of economics."[407] Furthermore, their staffs are exposed to strong pressures from special-interest groups because regulatory commissions such as the FCC are required to be intimately involved in the affairs of the industries that they regulate.[408] From an ethical standpoint, regulators are unable to distinguish between companies who extract large profits through lawful efficiency and those who profit because they are natural monopolies.[409] Additionally, Judge Posner cited two primary arguments against regulation of natural monopolies: (1) regulators lack information and incentive, and (2) regulated firms often neutralize regulation or "bend it to their advantage."[410]

Therefore, Congress and the FCC should consider scrapping arbitrary horizontal ownership caps and their "effective competition" classification. Instead, the FCC can strike a bargain with the cable industry whereby excess-profits taxes (or so-called "luxury taxes") will be used as a substitute for regulation. As Judge Posner pointed out:

> [a] tax would minimize the disincentive and other perverse effects of profit regulation . . . because it would permit the regulated firm to keep a substantial portion of any profits it could make. At the same time, the tax would require the regulated firm to divide its monopoly profits with the public.[411]

Luxury taxes would provide two primary benefits: (1) a steady revenue stream for local municipalities to use for public purposes, and (2) a way to level the playing field between video distributors that has fewer

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(last visited Feb. 23, 2008).

405. *See* Posner, *supra* note 41. Although Judge Posner wrote his article before cable television became a common commodity, he correctly predicted that the cable industry "may have sufficient natural monopoly characteristics to invite extension of the regulatory principle to them." Posner, *supra* note 41, at 549.

406. *See* RICHARD A. POSNER, NATURAL MONOPOLY AND ITS REGULATION, at vii (Cato Inst. ed., 1999) (1969) (noting that regulation of natural monopolies "is more likely to produce distortions than to bring about a reasonable simulacrum of competitive pricing and output").

407. Posner, *supra* note 41, at 623.

408. *See id.* at 624.

409. *See id.* at 563.

410. POSNER, *supra* note 406, at vii.

411. Posner, *supra* note 41, at 639–40.

undesirable side effects than rate-ceilings.[412]

Comcast should be familiar with luxury tax provisions given its vast financial interests in the sports world.[413] Similar economic structures have been implemented in professional sports to maintain a level playing field in the form of salary caps and luxury taxes. For instance, in Major League Baseball, some teams that benefit from greater market share are required to redirect revenue to smaller market teams to balance league competition.[414] The level at which the teams are "taxed" for their market share was pre-determined and mutually agreed upon through collective bargaining.[415] However, if a luxury tax is applied to the cable industry, excess profits will not be redistributed to the competition (as it is in Major League Baseball). Instead, the money would flow directly to the public—where it belongs.

FCC Chairman Martin appears to appreciate a good sports analogy. In December 2007, responding to widespread criticism, he shifted blame to others, comparing his efforts to a football player trying to cross the goal line as the goal posts were moved.[416] In fact, sports analogies are quite appropriate under the current circumstances in the cable industry. In professional sports, balanced competition leads to a better overall product for consumers. Similarly, in the cable industry, greater competition leads to lower prices for consumers and a wider range of choices. Therefore, Congress and the FCC should end the debate on regulation, set politics aside and call it a tie with the cable industry by considering a luxury tax. The regulation debate has been extended for too many extra innings.

Gary Wax[*]

412. *See id.* at 640.

413. *See* discussion *supra* Part IV.B.

414. *See, e.g.*, Stefan Fatsis, *Baseball Pact Is Ratified By Owners*, WALL ST. J., Nov. 27, 1996, at A3.

415. *See id.*

416. *See* Martin Press Release, *supra* note 156, at 6.

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