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## **The Hazards of Prescriptive Regulatory Intervention in a Rapidly Changing Marketplace**

**by**

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In the waning days of August, the U.S. Court of Appeals for the D.C. Circuit wrote yet another chapter in the long, troubled, and potentially unending saga of the FCC's quest for a judicially sustainable cable subscriber cap.<sup>1</sup> Nearly two decades have passed since Congress handed the Commission the unenviable task of "promulgating rules and regulations establishing reasonable limits on the number of subscribers a cable operator may serve."<sup>2</sup> That directive -- just one of the excessively regulatory provisions of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Act")<sup>3</sup> -- was intended to advance the two legislative goals named in the Act's title: protecting consumers "from abusive or unreasonable behavior by the 'bad actors' in the cable industry, while promoting the development of competing multichannel video system operators."<sup>4</sup>

Based on current conditions in the cable television industry and the broader video programming distribution marketplace, it appears that Congress's objectives largely have been achieved. The past two decades of sustained

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subscriber growth and the expanding amount and diversity of programming and other services now available to cable subscribers<sup>5</sup> certainly indicate that the once-maligned cable industry has served consumers well. In addition, as the D.C. Circuit's *Comcast* decision acknowledged, the record in the case was "replete with evidence of ever increasing competition among video providers."<sup>6</sup> Ironically, those positive developments occurred not because of the FCC's cable ownership restrictions but in spite of them. Rather than a great success story, the history of the cable subscriber cap serves as a prime example of the hazards of prescriptive government regulatory intervention in a rapidly changing marketplace.

While a number of provisions of the 1992 Act have been dismantled and much of the FCC's complex and onerous rate regulation scheme<sup>7</sup> has more or less self-destructed, the cable subscriber cap has remained, albeit in occasional regulatory and judicial limbo. From 1992 to 2008, many FCC staff members spent countless hours pouring through reams of public comments and struggling with complicated economic analyses in attempts to devise the "reasonable" cable ownership limits that Congress had mandated. The Commission also devoted additional time and resources defending those limits in court. In 1999, the Commission revised the method for computing the subscriber cap, replacing the limit of 30% of U.S. households passed by a cable system with a limit of 30% all U.S. subscribers to multichannel video programming distribution systems.<sup>8</sup> The Commission made that change in recognition of the growth in subscribers to other forms of multichannel video distribution, in an effort to comply with the Act's provision to "make rules and regulations reflect the dynamic nature of the communications marketplace."<sup>9</sup>

The new formulation attracted another judicial challenge, which again ended in defeat for the Commission. The limit came back to the FCC on remand,<sup>10</sup> and a difficult seven-year "do-over" effort ensued.<sup>11</sup> The court has just ruled in favor of Comcast in that challenge. Although the court vacated the rule in question, the FCC's statutory obligation to adopt "reasonable limits" seemingly remains in force.

A backward glance at the events surrounding passage of the 1992 Act reveals a number of warning signs pointing to the pitfalls the Commission eventually encountered. The Senate and House floor debates preceding passage included some intense disagreements over cable ownership restrictions, with some members raising serious concerns about the potential harm presented by what they claimed to be powerful cable monopolists, and others repeatedly voicing strong concerns about prescribing cable ownership limits in a dynamic market.<sup>12</sup> The administration's strong opposition to the bill culminated in President George H.W. Bush's veto, which prompted additional heated debate and ended in an override by votes of 74 to 25 in the Senate and 308 to 114 in the House.<sup>13</sup>

Legal analyses and commentary closely following passage of the 1992 Act also predicted trouble ahead. In 1994 law review article discussing the confluence of the FCC cable ownership restrictions and antitrust enforcement litigation,

cable antitrust expert David Saylor observed: "Only time will tell whether the best of regulatory enforcement intentions have created a public policy victory or nightmare."<sup>14</sup> Economists Donald Boudreaux and Robert B. Ekelund, Jr. argued: "On its face, empowering the FCC to police against untoward aggregations of monopoly power in the cable industry seems laudable. Unfortunately, though, this provision of the act will not promote consumer welfare. Restricting the number of subscribers to a particular cable system risks sacrifice of possible economies of scale in the distribution of video programming over cable without significantly increasing competition among cable operators."<sup>15</sup> And in this author's own experience, the looming cap sometimes precluded system acquisitions or joint ventures capable of providing the outlay of resources needed for upgrades and expanded program offerings.

After years of grappling with the 1992 Act's ownership mandate, the FCC ended up reimposing essentially the same 30% cap, although it took a different route to reach that result. Commissioners understandably were less than enthusiastic about the decision. Even former Commissioners Michael Copps and Jonathan Adelstein, the Commission's foremost free market skeptics, were less than optimistic about the decision to devise new limits. Commissioner Copps stated: "I recognize that setting a prophylactic limit like this is never easy, and inevitably involves some line-drawing that can always be second guessed."<sup>16</sup> The best that Commissioner Adelstein could say of the effort was, "Given the contentious nature of this proceeding and its history in the courts, we put our best foot forward in defense of this difficult task."<sup>17</sup>

Once again, the D.C. Circuit in *Comcast* has invalidated the FCC's attempt at prophylactic line drawing. The ball is back in the FCC's court. Independent regulatory commissions like the FCC exist, at least in theory, in part for their ability to promulgate rules to implement congressional policy more efficiently and expeditiously than Congress can on its own. The long and frustrating history of the cable subscriber cap illustrates how the administrative process should not work. Basically, Congress gave the FCC the difficult task of prescribing a regulatory limit on growth in a rapidly changing market. The process has consumed a tremendous amount of time and resources with no real consumer benefit, and, at least in the last go-round, the FCC compounded the difficulty of its task by stubbornly refusing to acknowledge the extent to which competition now characterizes the video marketplace.

If the FCC follows the court's guidance to take into account today's competitive marketplace environment for video programming distribution, the Commissioners may well ask whether "no limits" are "reasonable limits" under the statute. Absent Congressional action to rescind the mandate, they may wonder whether a failure to redraw the line will place them at odds with a regulatory-prone Congress. It is high time for both FCC and Congress to learn from past experience and try a different approach. One hopes that whatever course they pursue will have a much lighter regulatory touch.

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<sup>1</sup> *Comcast Corp. v. FCC & USA*, No. 08-1114 (D.C. Cir., Aug. 28, 2009)

<sup>2</sup> Pub. L. No. 102-385, 106 Stat. 1460 § 614 (f) (1)(A)

<sup>3</sup> Pub. L. No. 102-385, 106 Stat. 1460

<sup>4</sup> H.R. Rep. No. 101-682, 101<sup>st</sup> Cong., 2d Sess. 28 (Sept. 6, 1990)

<sup>5</sup> In 1992 there were 55.2 million basic cable subscribers; in 2008 there were 63.7. In 1992 there were 139 cable programming networks; today the number approaches 600. *See* National Cable Television Association Industry Data, <http://www.ncta.com/Stats/BasicCableSubscribers.aspx>.

<sup>6</sup> *Comcast* at 14

<sup>7</sup> When stacked on the desk of the CFO of a cable television company, notebooks containing the FCC reports and orders, further notices, and orders on reconsideration adopted in response to the 92 Act's rate regulations measured at least four feet in height.

<sup>8</sup> § 613 (f) (2) (E), 47 U.S.C. §533 (f) (2) (3)

<sup>9</sup> *Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992 Horizontal Ownership Limits*, 14 FCC Rcd 19098 , 19101 (1999).

<sup>10</sup> *Time Warner Entertainment v. FCC*, 240 F. 3d 1126 (D.C. Cir. 2001).

<sup>11</sup> *Fourth Report and Order and Further Notice of Proposed Rulemaking*, 23 F.C.C.R. 2134, 73 Fed. Reg. 11,048 (2008).

<sup>12</sup> *See, e.g.*, 138 Cong. Rec. H8671 (Sept. 17, 1992) (statements of Rep. Markey and Rep. Lent)

<sup>13</sup> 138 Cong. Rec. 32159-60 (Oct. 5, 1992).

<sup>14</sup> David J. Saylor, "Programming Access and Other Competition Regulations of the New Cable Television Law and Primestar Decrees: A Guided Tour Through the Maze," 12 *Cardozo Arts & Ent. L.J.* 321, 386 (1994).

<sup>15</sup> Donald J. Boudreaux and Robert B. Ekelund, Jr. "Cable Regulation," 14 *The Cato Journal* (Spring/Summer 1994) at 99.

<sup>16</sup> *Id* at 2222.

<sup>17</sup> *Id* at 2224.