**Calendar No. 138**

| 102D CONGRESS 1st Session | SENATE | REPORT 102-92 |
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# CABLE TELEVISION CONSUMER PROTECTION ACT OF 1991

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Mr. HOLLINGS, from the Committee on Commerce, Science, and Transportation, submitted the following

## REPORT

OF THE

## SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

TOGETHER WITH

## MINORITY VIEWS

ON

## S. 12

JUNE 28 (legislative day, JUNE 11), 1991.—Ordered to be printed

Filed under authority of the order of the Senate of June 28 (legislative day, June 11), 1991

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U.S. GOVERNMENT PRINTING OFFICE

49-010 WASHINGTON : 1991

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# CABLE TELEVISION CONSUMER PROTECTION ACT OF 1991

JUNE 28 (legislative day, JUNE 11), 1991.—Ordered to be printed

Mr. HOLLINGS, from the Committee on Commerce, Science, and Transportation, submitted the following

# REPORT

together with
MINORITY VIEWS

[To accompany S. 12]

The Committee on Commerce, Science, and Transportation to which was referred the bill (S. 12) to amend title VI of the Communications Act of 1934 to ensure carriage on cable television of local news and other programming and to restore the right of local regulatory authorities to regulate cable television rates, and for other purposes, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill as amended do pass.

## PURPOSE

The legislation in general provides for additional governmental oversight of the cable television industry. The purpose of this legislation is to promote competition in the multichannel video marketplace and to provide protection for consumers against monopoly rates and poor customer service. S. 12 also requires the Federal Communications Commission (FCC) to adopt regulations aimed at curbing the cable operators' and programmers' market power and addressing certain technical and technological issues. In addition, this legislation ensures that franchising authorities have the ability to enforce customer service standards and protect the needs and interests of their communities through the franchise renewal process.

Finally, the bill ensures that cable subscribers will have access to local broadcast signals and gives local broadcasters the right to require cable operators to obtain their consent to retransmit their signals.

## Background and Needs

### THE 1984 CABLE COMMUNICATIONS POLICY ACT

> The Communications Act of 1934 * * * was enacted well before the advent of cable television. As a result, there has never been a national policy to guide the development of cable * * *. [This bill] establishes a national policy that clarifies the current system of local, state and Federal regulation of cable television * * *.[1]

Until the 1984 Cable Communication Policy Act, there was no Federal policy for cable television. The FCC had only indirect authority to oversee the cable industry, which it obtained by virtue of its obligation to ensure that broadcasters served the public interest. About a dozen States had laws in effect controlling certain cable activities, and in those States where no law existed, the cities and other local government entities exercised control because cable systems had to pass through rights of way. As a result, no uniform standards for cable regulation were in place.

The 1984 Act changed this cable landscape significantly, by adding a new title VI to the Communication Act of 1934 (the 1934 Act). It defined more precisely the roles of each governmental entity. The State or local authorities continued to regulate rates in the absence of effective competition and to control the franchising process, but under new constraints. The Federal Government controlled basic rate deregulation and technical standards. The 1984 Act's major amendments to the 1934 Act are as follows:

—Rates for basic cable service are regulated by franchising authorities in the absence of effective competition, as defined by the FCC (section 623).

—Franchise fees shall not exceed 5 percent of the cable system's gross revenues (section 622).

—State or local governmental entities will control the franchising process, including the number of franchises to award (section 621), but are constrained in the obligations that can be imposed on cable operators (section 624 and 625).

—Franchising authorities may require cable systems to set aside channels for public, educational, and governmental use (section 611).

—Cable operators are required to set aside a certain number of channels for commercial use by persons unaffiliated with the cable operator (section 612, the so-called leased access provision).

—Standards and procedures are established for the franchise renewal process which first require a determination of whether the existing franchise should be renewed prior to considering competing applications (section 626).

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[1] Committee on Energy and Commerce, "Report on the Cable Franchise Policy and Communications Act," House Report 98–934, p. 19.

—The FCC's rules prohibiting broadcasters from owning a local cable system and prohibiting local exchange telephone companies, except in rural areas, from owning a local cable system in their telephone service areas are codified. (section 613).

The 1984 Act has achieved many of its objectives. Over the past seven years, the cable industry has grown dramatically. Most of America is now wired to receive cable; cable service is available to almost 90% of the homes in the country, and over 60 percent of these households subscribe to cable service. System capacity has inceased; the average cable system offers about 36 channels, and this number is steadily increasing. Programming choices have also grown about 50 percent since the 1984 Act was passed, with many more offerings now being planned. Cable television has become our Nation's dominant video distribution medium.

CABLE INDUSTRY [a]

[In millions]

| | 1990 | 1989 | 1988 | 1987 | 1986 | 1985 |
|---|---|---|---|---|---|---|
| TV households | 93.2 | 90.2 | 88.6 | 87.4 | 85.9 | 84.9 |
| Homes passed | 84.4 | 80.3 | 77.2 | 73.1 | 69.4 | 64.7 |
| Basic subs | 52.0 | 49.4 | 45.7 | 42.6 | 39.7 | 36.7 |
| Pay units | 42.1 | 41.9 | 38.8 | 34.8 | 32.1 | 30.6 |

[a] The source of this data is Paul Kagan Associates. This chart can be found in Time Warner's 1989 Annual Report, p. 29. The firm of A.C. Nielsen has also compiled statistics on the state of the cable industry. These differ somewhat from the Kagan statistics. For June 1990, Nielsen states that there are 92.1 million television households, that 73.9 million of these homes have access to cable, and that 53.2 million subscribe.

Problems have come along with this growth. The effect of the 1984 Act was to deregulate rates for about 97 percent of all cable systems. Actions by the FCC to implement the 1984 Act further freed the industry from regulation. In certain instances, rate increases have been excessive. For many systems, customer service has been abominable. Programmers have argued that they cannot get carried on cable systems without relinquishing control of their product. In addition, competing video distributors allege that these programmers refuse to deal with them. In general, it is argued that the cable industry now possesses undue market power which is used to the detriment of consumers, programmers, and competing video distributors. These concerns are addressed in this legislation.

## CURRENT PROBLEMS IN THE CABLE TELEVISION MARKETPLACE

The Committee began its examination of these issues over 2 years ago. It held three hearings in June 1989 on the general issue of competition in the video programming industry. This was followed by a hearing on October 18, 1989 on cable advertising directed toward children and hearings on the issue of cable carriage of local broadcast stations and oversight on the 1984 Act. In early 1990, the Committee held a hearing on the FCC's reestablishment of the rules permitting television broadcasters to obtain exclusive rights in syndicated programs (the so-called syndicated exclusivity and network nonduplication rules). This was followed by two hearings on S. 1880. In 1991, the Committee held one hearing on S. 12. In all, the Committee held 11 hearings on cable television in the past 2 years. In doing so, the Committee has reviewed provisions in

S. 12, as well as the following measures from the 101st and 102d Congresses:

101st Congress:

S. 168, the Cable Television Programming Competition and Consumer Protection Act, introduced by Senator Pressler;

S. 833, the Cable Television Subscriber Protection Act, introduced by Senator Metzenbaum;

S. 905, the Cable Consumer Protection Act, introduced by Senator Lieberman;

S. 1068, the Cable Competition Act, introduced by Senator Gore; and

S. 1880, the Cable Television Consumer Protection Act of 1990, introduced by Senator Danforth.[3]

102nd Congress:

S. 211, Cable Consumer Protection Act, introduced by Senator Lieberman;

S. 431, Competition in Cable Act of 1991, introduced by Senator Metzenbaum; and

S. 432, Cable Television Subscriber Protection Act of 1991, introduced by Senator Metzenbaum.

The following sections examine the concerns of subscribers and programmers and the overall issue of market power in the cable television industry.

### THE FCC, EFFECTIVE COMPETITION AND RATES

The 1984 Act provided that rates for basic cable service[4] would be deregulated where there was effective competition to the cable system. This provision took effect immediately for new franchises and 2 years after the date of enactment for existing franchises (December 29, 1986). The FCC was directed to conduct a proceeding to define effective competition.

The FCC completed this proceeding in April 1985, and it concluded that a cable system is subject to effective competition if its subscribers can receive three over-the-air broadcast signals.[5] The effect of this standard was to deregulate cable rates for 97 percent of all systems. As noted above, this standard took effect at the end of 1986, even though the FCC's decision was taken to court. The U.S. Court of Appeals generally upheld the FCC's decision.[6]

Subscribers have lived with deregulation for over 4 years. Because of the many claims that the cable industry has used its market power to abuse this freedom, the Chairman of the House Telecommunications Subcommittee, Congressman Edward Markey (D–MA), requested that the General Accounting Office (GAO) survey cable systems to determine how quickly basic cable rates have risen. The first report was completed in August 1989.

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[3] S. 1880 was introduced on November 14, 1989 by Senator Danforth and cosponsored by Senators McCain, Hatch, Gore, Ford, Lieberman, Lott, Warner, Burdick, Pryor, Gorton, Burns, Metzenbaum, Bumpers and Pressler.

[4] Basic cable service is the tier of service that includes retransmitted local broadcast television signals.

[5] Report and Order, MM Docket 84-1296 (May 2, 1985).

[6] American Civil Liberties Union v. FCC, 823 F.2d 1554 (D.C. Cir. 1987), cert. denied, 108 S. Ct. 1220 (1988).

Because of the large number of cable systems (about 11,000), the GAO was not able to obtain information from every system. It sought data from a representative sample of some 2000 systems. Of the systems surveyed, about 75 percent responded. From these responses, the GAO found:

> [T]hat, from December 1, 1986, through October 1988, monthly rates for the lowest priced basic service increased by 29 percent, from an average of $11.23 to $14.48 per subscriber. This rate was accompanied by an increase in the average number of basic channels offered (from nearly 24 to about 30).
>
> By comparison, monthly rates for the most popular basic cable service [that is, the one to which most people subscribed] increased by 26 percent, from an average per subscriber of $11.70 to $14.77. This increase was accompanied, on average, by an increase in the number of basic cable channels offered (from nearly 27 to about 32).
>
> Average monthly rates, per system, for movie premium services decreased, both for three popular individual channels and for combinations of premium channels.

The GAO survey was extensively discussed at the Committee's hearings. Many Members believed that the rate increase of over 25 percent in about 2 years was too great and reflected undue market power. They argued that the FCC needed to impose a more stringent effective competition standard, one based not only on over-the-air signals but also on the reception of multichannel video distributors.

The cable industry responded to these statements by claiming that many rate increases were merely the result of "catching-up" for rate freezes that had been imposed by local franchising authorities. The cable industry also argued that the most telling statistic is price per service, which was $.47/month prior to deregulation and $.48/month afterward in the case of the lower priced basic services. In other words, the industry maintains that cable service remains a good value.

While these arguments have some merit, it is important to note their shortcomings, as well as problems with relying on the GAO survey.

First, many Members wondered whether the GAO survey actually understated the rate increases because (1) the systems with large increases did not respond to the survey; and (2) the systems with no significant increases not only responded in great number but also many of these systems may have received increases from the franchising authority prior to deregulation. An example of this concern is evidenced by Senator Ford's statements at the November 16, 1989, hearing:

> Senator FORD. And GAO sampled 1,950 of 8,908 cable operators at the time, and 499 [did not respond], which was 26 percent—that is, 26 percent [who did not] respond[] to the GAO.
>
> Now, I wonder if among those who failed to respond would have been the cable system in Louisville, because

their rate increase has gone up 204 percent since 1986 * * *.

Well, you just go down through the list: Ashland, 94 percent; Bowling Green, 123 percent; Hazard, 131 percent; Louisville, 204 percent; Madisonville, 95 percent.

Now that's my State. That's right in my back door.

And you come in here and tell us that it's an average of 20 percent or 26 percent. Why it's just not here when you get right down to it in my particular State.

Now how in the world can you take 1,950 and get 499 that fail to respond out of that, and those are voluntary responses, and I doubt seriously that there was an audit. There were very few audits.

Then we come in here and you're telling us that it's 95 percent accurate.[7]

There is little doubt that while the GAO report has some value, it is not definitive. It is for this reason that additional evidence presented at the hearings is important to analyze. The following are statements of several witnesses:

Basic service rates in Newark, in fact, increased by more than 130 percent since FCC deregulation at the end of 1986. (Sharpe James, Mayor, City of Newark, NJ)[8]

* * * * *

Up until early 1988 we were receiving 17 basic channels of service for the price of $14.95. Shortly after Essex was purchased in mid-1988 by a cable group called Multivision, our local cable rates increased by about 40 percent, and with absolutely no additional channels or improvements to service. (Eddy Patterson, Mayor, City of Henderson, TN)[9]

* * * * *

In the 16 years prior to deregulation, Hawaii's systems enjoyed reasonable profits and a statewide penetration rate in excess of 70 percent, while 99 percent of Hawaii's residents were able to receive the best available cable technology.

* * * * *

Rate regulation in 1986 upset this balance. Since then, cable rates have risen geometrically for most of Hawaii's consumers and most of Hawaii's systems have been sold to large multiple-system operators. For consumers living in systems which have been churned, sold two or three times in the last three or four years, rates have risen by as much as 99 percent. (Robert A. Alm, Department of Commerce and Consumer Affairs, Honolulu, HI)[10]

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[7] *"Oversight of Cable TV,"* Hearings Before the Subcommittee on Communications of the Committee on Commerce, Science, and Transportation (101–464), November 16 and 17, 1989, p. 156.

[8] *"Oversight of Cable TV,"* p. 188.

[9] *"Oversight of Cable TV,"* p. 218.

[10] *"Oversight of Cable TV,"* p. 223.

> Monthly charges for basic service in Jefferson City [Missouri] have risen from $6.55 in 1981 to a cost as of May 1, of $21.45. In the last nine years cable rates have increased 186%. (Allen Garner, Counsel for Jefferson City, MO) [11]
>
> * * * * *
>
> During the past year we have seen two rate increases in our community. Our full basic cable service increased to 20.95 per month, a full 40 percent increase over the past 12 months. (David Adkisson, Mayor, Owenensboro, KY) [12]
>
> * * * * *
>
> Last year cable rates increased 13%, more than twice the rate of inflation. In Connecticut, since December 1985, the average price of basic cable service increased 52.35%, and the average price for one company—Cablevision of Connecticut—increased 221.9 percent. Inflation over this period was 20.8%. (Senator Joseph Lieberman) [13]

It is clear from these statements and from other evidence gathered by the Committee that (1) for the past several years the average rate across the country has increased several times greater than the rate of inflation, and (2) rates in certain locations have increased dramatically, such that subscribers are being gouged by cable operators.

On June 14, 1990, 1 week after the Committee ordered reported S. 1880, the GAO released its most recent survey of cable rates. The GAO concluded that the rates for the lowest priced, most popular basic services increased by an average of 10 percent in 1989. While this is lower than increases for previous years, it is still twice the rate of inflation. According to GAO, since deregulation in December 1986, the average monthly rate for basic service has increased by about 40 percent. Thus, cable rates are continuing to rise significantly. Again, these figures were derived from a survey of those systems that choose to respond. (The GAO report is based on a survey of 1,971 cable systems constituting about 60 percent of cable's subscribers.)

To this evidence should be added indications of the direction in which rates are headed.

One indicator of future rates is the prices for which cable systems sell. In the late 1980s, cable systems were selling for greater and greater amounts; the average sales price was increasing each year by hundreds of dollars per subscriber. In 1989, systems were regularly selling for well over $2,000 per subscriber, and some systems were selling as high as almost $3,000 per subscriber.[14] By determining the amount of debt usually involved in these transactions—which for the cable television industry is generally a large percentage of the amount invested [15]—it is possible to make rough

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[11] *Cable TV Consumer Protection Act, Hearings Before the Subcommittee on Communications of the Committee on Commerce, Science, and Transportation (101–702), March 29 and April 4, 1990,* p. 2456.

[12] *See,* Senate Hearing on S. 12, March 14, 1991.

[13] *Id.*

[14] See, Chart later in this section.

[15] According to Paul Kagan Associates, outstanding cable television debt has increased from over $25 billion at the end of 1987 into almost $37 billion at the end of 1989. The cable television industry is generally considered to be highly leveraged with debt financing.

approximations as to the cash flow needed to service this debt and what rates need to be to generate this cash flow. At the selling prices in 1989, it was evident that, at the very least, rates were going to continue to increase to cover the debt load, and that by the end of this decade, basic cable rates on average could be as high as $50 per subscriber, far more than double today's average rate. It must be noted that these calculations are based on actual marketplace transactions; investors bought systems believing they could raise rates to cover debt. Consequently, these calculations must be taken seriously.

The Committee thus has before it evidence about historical rate increases and projected rate increases. This evidence provides the Committee with significant and legitimate reasons to be greatly concerned that subscribers, in a deregulated marketplace, are at the mercy of cable operators' market power.

On June 13, 1991, the FCC revised its definition of effective competition. Under the new standards, effective competition is defined as the existence of either (1) six unduplicated over-the-air broadcast signals, or (2) a competing multichannel video provider available to 50 percent of the homes passed by the existing cable system and subscribed to by at least 10 percent of the homes passed.[16] The Committee does not believe that the FCC's recent decision will afford adequate protection to consumers. According to comments filed by the National Telecommunications and Information Administration (NTIA), this will subject systems serving 18 percent of cable subscribers to rate regulation by local authorities. The National Cable Television Association (NCTA) contends that systems serving 34 percent of the cable subscribers would be subject to rate regulation under this standard. In sum, according to either NTIA or NCTA, only a small percent of the cabled homes would have the protection of rate regulation.

Few cable systems would face competition under the second prong of the FCC's test—the existence of a second multichannel video provider. To date, there are only approximately 300,000 subscribers to "wireless cable" and approximately 2 million home satellite dish owners, most of whom are located in rural areas not served by cable. In addition, only 53 of the over approximately 11,000 cable communities have a second competing cable franchise serving all or part of the community. In contrast, there are approximately 52 million cable homes with cable. Thus, at present there is no significant competition from other multichannel video providers.

*Cable's Market Power*

A cable system serving a local community, with rare exceptions, enjoys a monopoly. The monopoly status of cable systems was asserted, for example, in a legal brief filed on behalf of Telecommunications, Inc.

> Dr. Malone [Chairman and CEO of Telecommunications Inc.] and Mr. Hostetter, [sic] businessmen who operate cable systems, agreed that *a cable operator serving a city has a monopo-*

[16] MM Docket 90-4 FCC News, June 13, 1991.

> *ly in the same sense that customers desiring cable service will have no choice regarding the provider of that service.* (Tr. 57, 63, 135–36)
>
> The value of a cable franchise follows from the protection from the competition that it provides the holder. Since the holder of the franchise will have a monopoly, *the prospective cable operator would be able to generate a cash flow that would result in a supernormal return* on investment in assets other than the franchise (the cable plant, office equipment, going concern value).
>
> Finally, because the franchise limits the customers to a single provider in the market, other "customer-oriented" intangibles relating to the expectation of future patronage do not exist for a cable system. There is a goodwill in a monopoly. *Customers return, not because of any sense of satisfaction with the monopolist, but rather because they have no other choices* [footnotes omitted—emphasis added].[17]

These quotations show that the cable industry itself recognizes that it holds monopoly power. This demonstrates the need to encourage competition and to reimpose regulation of the cable industry, particularly rate regulation, to the overwhelming majority of cable systems in this country which are monopolies and not subject to effective competition.

The Committee recognizes that rates are only one indicator of market power. The Committee has examined this issue in great depth and considered other factors. These other factors add weight to the argument that the cable industry does exercise market power.

The filings from the various parties in FCC's cable proceedings [18] have proven very useful for the Committee in its inquiry of cable's market power. One method for determining market power is to examine the ratio of market value of a company to the replacement cost of the assets. (This is known as Tobin's Q. If the ratio is greater than one, it indicates the presence of market power.) This test was alluded to by the Chairman of the FCC in his November 17, 1989 testimony before the Committee:

> I think the monopoly position that the cable providers have enjoyed has inflated dramatically the per subscriber value.
>
> I am told that maybe a national average per subscriber for putting in the system is about $400, and these franchises are trading something in excess of $2,000 per subscriber. So, it strikes me that is kind of the premium the market places on having that monopoly position.[19]

It is clear that throughout the 1980s the selling prices of cable systems (on a per subscriber basis) tripled:

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[17] Reply brief of Telecommunications Inc. at 147–8, 149–50, and 154. *Telecommunications, Inc. v. Commission of Internal Revenue*, 95 T.C. 36 (November 7, 1990) (Docket No. 268–89).

[18] Reexamination of the Effective Competition Standard for the Regulation of Cable Television Basic Service Rates, MM Docket 90–4; Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service, MM Docket 89–600.

[19] *Oversight of Cable TV, p. 361.*

| Year: | Value/Subscriber |
|---|---|
| 1981 | $793 |
| 1982 | 918 |
| 1983 | 998 |
| 1984 | 919 |
| 1985 | 1,003 |
| 1986 | 1,349 |
| 1987 | 1,734 |
| 1988 | 2,010 |
| 1989 | [20] 2,328 |
| 1990 | [21] 2,056 |

[20] The source of these data is Paul Kagan Associates. So far in 1990, prices have dropped about 20 percent. An April 2, 1990 article in Cable World (p. 36) attributes this drop to "a crunch in the financial markets" coupled with "regulatory uncertainty".
[21] Cable TV Investor, October 19, 1990, p. 5.

While prices have risen greatly, the cost of building a cable system along with programming costs have not increased that much. Data submitted to the FCC by Paul MacAvoy (on behalf of the U.S. Telephone Association) give a replacement value of less than $500 per subscriber.[22] In testimony to the Committee, Gene Kimmelman of the Consumer Federation of America stated that this replacement value is between $600 and $1,000 per subscriber.[23] The Committee also received information from Continental Cablevision at a seminar on April 11, 1990 that the replacement cost varied between high density systems (about $500–$700 per subscriber) and low density systems (about $1,500–$2,000 per subscriber). From these data is it evident that while there are discrepancies, the selling prices far exceed the replacement value.

On this basis, Paul MacAvoy,[24] in the above cited study, estimated a Q ratio for the cable industry of 4.3 as of late 1989. Even if this ratio is somewhat inflated, it indicates the presence of significant market power in the cable industry.

The NCTA submitted a study by Sanford Grossman, "On the Misuse of Tobin's Q to Measure Monopoly Power",[25] that strongly disputes this conclusion. Professor Grossman alleges that this ratio is virtually meaningless in determining market power for the cable industry because of problems in calculating the Q value, the fact that this value does not account for intangible assets, and a variety of other reasons.

While Professor Grossman presents many reasons to discount the value of the Q ratio, other observers believe that it still has some credence, especially when one understands that the key intangible factor is a cable operator's de facto exclusive franchise. The Department of Justice (DOJ), in fact, believes that the Q ratio has some applicability in determining cable's market power. In submitting comments to the FCC on April 2, 1990, DOJ stated:

> Clearly, the Q ratios for the cable industry discussed above are subject to some dispute. However, given the magnitude of the Q ratios, and the likely size of any cor-

[22] See, "Tobin's q and the Cable Industry's Market Power", pp. 21–24.
[23] *"Oversight of Cable TV,"* p. 404.
[24] Paul MacAvoy is the Dean and John M. Olin Professor of Public Policy and Business Administration at the William E. Simon Graduate School of Business Administration, University of Rochester. This study was published on February 28, 1990.
[25] Professor Grossman is the Trustee Professor of Finance at the Wharton School, University of Pennsylvania. This study was published on February 26, 1990.

rections that should be made to them, it is likely that the Q ratios for cable firms are greater than should be expected in industries subject to effective competition. Therefore, these studies provide some support for the conclusion that cable firms possess some degree of local market power.[26]

DOJ then goes on to analyze other studies involving market power in the cable industry, including NCTA's Dertouzos and Wildman study. It then concludes:

> The information before the Commission suggests strongly that neither conventional television broadcast nor any of the alternative technologies presently available are close enough substitutes for basic and pay cable television services to prevent the providers of such cable services from exercising some degree of market power. However, the existence and extent of this market power may vary considerably in local cable markets depending, among other things, on the number and quality of over-the-air television signals available to the community and the number of non-local channels of information and entertainment made available over the cable system. In areas that do not receive clear television signals, the ability to provide clear television signals would, by itself, give the local cable system some degree of market power. Since 1984, however, basic cable tiers have been expanded to carry many channels of non-local programming. Even where consumers get good over-the-air television reception, the ability to provide a relatively large number of non-local signals is likely to give the only provider of such services some degree of market power. That market power may be derived from the local cable system's ability to provide the type of programming currently offered on the basic service tier as well as its ability to provide pay cable services, for there does not appear to be a close substitute for either type of cable services.[27]

It is thus clear that while some number of over-the-air television signals may constrain the market power of cable systems, some further video competition is required. That conclusion is not surprising in light of changes in the video distribution marketplace.

*Effective Competition*

The Committee recognizes that not every cable operator possesses market power. When there are alternative sources of programming reasonably available to the consumer, there will be little need, if any, to regulate a cable system's rates. The question is when are the alternatives sufficient to eliminate cable's market power. In other words, when does a cable system face effective competition?

The FCC's first standard for determining whether there is effective competition to cable systems is: can subscribers receive three

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[26] Reply Comments of the United States Department of Justice in MM Docket No. 89–600, p. 23.

[27] Comments of the Department of Justice, pp. 2–3.

over-the-air local television signals? While that standard may have been appropriate when adopted, it certainly is not appropriate today, as the FCC itself has recognized. Many commenters in recent FCC proceedings have argued that broadcast signals alone do not reflect current market conditions and that some multichannel competitor is required. Even NCTA in its submission argued that a greater number of over-the-air signals, five, is the proper standard.[28]

The NCTA's argument is based on a study commissioned by the NCTA written by James Dertouzos of the Rand Corp. and Steven Wildman of Northwestern University. It concluded, "[F]ive broadcast signals are sufficient to achieve the maximum competitive effect. Additional signals beyond five have no discernible effect on the behavior of cable operators." [29] This statement does not indicate that five signals constitute effective competition, only that they give "the maximum competitive effect." The NCTA recognized this, but it then went on to rely on other studies of dubious quality [30] to reach the conclusion that with five signals, effective competition will exist.

When the FCC adopted its first effective competition standards, the three television networks (and their local affiliates) had close to 80 percent of the prime time market. Today, they have about 60 percent, and further decreases are likely. In a speech on May 7, 1990, Ted Turner, a major cable programmer, said that he believes the three networks will continue to lose market share and that the cable industry will soon match the networks in providing funding for original programming.[31] Further evidence to support this conclusion can be seen, for example, in the Page 1 headline in the March 12, 1990 Multichannel News: "Basic Viewing Passes B'Cast in Total TV Homes". Thus, while over-the-air television may have been effectively competitive with cable in 1985, it has lost a significant amount of market power.

As noted earlier, the Committee does not believe that the FCC's new definition of effective competition is adequate. The new standard would only permit a very limited number (18 percent to 34 percent) of the Nation's cable subscribers to be protected by rate regulation.

The Committee believes that the effective competition test needs to be altered to reflect the fact that almost all cable operators possess significant market power. It believes that the best test for effective competition is whether a sufficient number of over-the-air television signals and a viable multichannel video competitor exist. Because the Committee prefers competition to regulation, and because regulation imposes costs, which may be significant, the Committee examined whether new entry could remedy cable's market power, prior to adopting new regulatory measures.

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[28] See, Comments of the National Cable Television Association in MM Docket No. 89-600, March 1, 1990.

[29] "Competitive Effects of Broadcast Signals on Cable", February 22, 1990, p. 2.

[30] The NCTA principally relies upon a 1989 study by Adam Jaffee and David Kanter for the Harvard Institute of Economic Research. For a description of the deficiencies in this study see the April 2, 1990 comments of the Department of Justice to the FCC, pages 24-25. It should also be noted that the data in this study does not include sales in 1988 and 1989, when selling prices for cable systems increased substantially.

[31] See, Multichannel News, May 7, 1990, p. 19.

*Overbuilds*

There has been much discussion about whether competition to existing cable systems is likely to come from another cable system operating in the same territory (an overbuild). The Chairman of the FCC mentioned this remedy in his testimony on November 17, 1990:

> The legal monopolizing of franchise territories may be the root of many of the current problems. Requiring at least two providers would address the cause, not just the symptoms.[32]

This view, however, is not shared by many other witnesses before the Committee. John Malone, President and Chief Executive Officer of TCI, stated:

> And I believe that it is not economically viable to sustain two wires into the home providing, essentially, equivalent services. Because all you do there is double the capital cost, double the operating expenses, or raise them by 150 percent and split the revenues in half.[33]

DOJ in its April 2, 1990, comments to the FCC supports this view.[34]

According to information submitted to the Committee by the cable industry, out of over 11,000 cable systems, there are only 53 communities where there is currently some overbuild. In 36 of these, there is the potential for a total overbuild. In those communities where there are two competing cable systems, the rates are approximately 20 percent lower and the per-channel prices can be as much as 50 percent lower than in communities with only one cable system.[35] Further, there are 132 communities where second franchises have been awarded or are under study. However, in 62 communities where the threat of an overbuild once existed, there have been mergers of the two cable systems. This scarcity of overbuilds is to be expected in light of the strong national monopoly characteristics of cable systems.

In addition to mergers between an incumbent cable system and a potential competitor, incumbent cable systems often wage legal battles to prevent cities from awarding second franchises or building their own franchises. Warner Cable Communications recently challenged a decision by the city of Niceville, FL, to operate its own cable system. Warner asserted that the city's plan violated Warner's free speech rights because the city of Niceville could not support two cable systems and Warner could not compete against a city-owned cable system. On June 18, 1991 the U.S. Supreme Court refused to hear the case, thus leaving in place a circuit court deci-

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[32] "Oversight of Cable TV", p. 333.
[33] "Oversight of Cable TV", p. 166.
[34] Pp. 31–33.
[35] See, John Merline, "How to Get Better Cable TV at Lower Prices," Consumer Research, May 1990; and Stanford L. Levin, "Cable Television and Competition," presented to the Sixth Conference on New Directions for State Telecommunications Regulation, Salt Lake City, Utah, February 10–13, 1991. See also, Testimony of Alfred Sikes, Chairman of the FCC, Senate 1991 Hearings on S. 12.

sion that the city could build and operate a competing cable system and rejecting Warner's contentions.[36]

Based on the evidence in the record taken as a whole, it is clear that there are benefits from competition between two cable systems. Thus, the Committee believes that local franchising authorities should be encouraged to award second franchises. Accordingly, S. 12 as reported, prohibits local franchising authorities from unreasonably refusing to grant second franchises. The Committee does recognize that this provision alone is not going to result in overnight competition and will not eliminate the need for additional regulation of the cable industry.

*"Wireless Cable"*

Multichannel Multipoint Distribution Service (MMDS)[37] is a service created by the FCC in the early 1980s. It provides line of sight microwave signals carrying video programming, sometimes in combination with other technologies. It is possible in some areas to have up to 33 channels on an MMDS system; however, the number of channels, especially in major cities, may be far less.

Today, wireless cable systems are operating in 45 communities and have about 350,000 subscribers. There are limitations—both governmentally imposed and marketplace driven—that will likely inhibit significant growth. First, the number of MMDS channels is limited. Second, the FCC licensing process is taking much longer than predicted. This means that MMDS operators have to challenge established cable operators, rather than being the first to enter a market. The MMDS operators often find that cable systems are withholding the best programming and without this programming, their future is in jeopardy. This problem was raised at the Committee's 1990 hearings by Robert Schmidt, President of the Wireless Cable Association:

> Despite this healthy and promising prognosis, Wireless Cable is still frustrated from reaching its full potential for a very simple reason: Big Cable has an ever tightening grip on the programming we need to serve consumers. Unfortunately, Wireless Cable still is generally unable to obtain what I call the four crown jewels of satellite television programming—HBO, Showtime, TNT and ESPN . . . Without the ability to offer these most desired programs to consumers, many Wireless Cable systems are unable to get the financial backing necessary to become operational.[38]

At the 1991 hearing Mr. Schmidt testified that although the situation had improved and, with the exception of TNT, programming services were being made available to MMDS operators, they are available only at exorbitant prices. Mr. Schmidt testified that MMDS operators often pay 200 percent more than cable operators for programming. "In the case of CNN we pay about 36, 37 percent more than a cable operator does for the same service." [39]

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[36] See, "High Court Refuses to Stop City-Owned Cable TV System", Washington Post, June 18, 1991.

[37] MMDS operators often call themselves wireless cable.

[38] "Oversight of Cable TV," p. 436.

[39] Testimony of Robert Schmidt, Senate Hearing on S. 12.

While the MMDS industry believes it has the potential to compete with cable throughout the country, the generally held view is that it may only be a niche competitor. This view was stated in the April 20, 1990 comments of the Federal Trade Commission (FTC) to the FCC:

> MMDS, for example, is likely to be a poor substitute for a cable system when there are physical construction (e.g., hills and tall buildings) that would block the former's signal. Entry by MMDS might also be affected by regulatory factors. Moreover, because MMDS has a relatively low channel capacity, its attractiveness to consumers as a substitute for cable will depend on the quality (i.e., number and type of channels) offered by the incumbent cable system.[40]

In addition, just last year, the top MMDS operator in the country, Microband, filed for bankruptcy.

MMDS does have the promise in certain markets to become a competitor to cable. However, this success depends upon far too many uncertain factors. It would be unreasonable for the Committee to assume that MMDS will provide the necessary nationwide competition to cable.

*Broadcasting via Satellite*

There are a variety of ways for video signals to be delivered to the home via satellite. About a decade ago, the FCC permitted private homeowners to have "TV receive only" (TVRO) access to satellite transmissions. Today, there are about two to three million homes that own satellite dishes. Those dishes access primarily C-band satellite transponders and in some instances access Kμ-band transponders. Viewers with satellite dishes receive the same programs sent to cable systems and broadcasters. If that programming is encrypted or scrambled, the programmer controls whether it can be received.

However, satellite dish owners face the same problems and high prices for obtaining programming as MMDS operators. Bob Phillips of the National Rural Telecommunications Cooperative (NRTC), a distributor of programming to the home satellite dish industry, testified that the NRTC "pays $10 wholesale for 18 channels of programming. A cable operator pays $2.25 for the same 18 channels." [41]

In addition to satellite operating in the C and Kμ-bands, the FCC has also set aside frequencies for a Direct Broadcast Satellite (DBS) service. Unlike the larger satellite dishes needed for C and Kμ-band reception, the DBS signal is higher powered and could be received by one foot dishes. While the FCC authorized this service in the early 1980s and licensed a number of providers, to date there has been no DBS service launched. There are some who believe, however, that this situation may soon change.

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[40] Comment of the Staff of the Bureau of Economics and the San Francisco Regional Office of the Federal Trade Commission in FCC MM Docket No. 89-600, p. 13.

[41] Testimony of Bob Phillips, Senate Hearing on S. 12.

In 1990, a consortium of Hughes Communications, NBC, News Corporation (Rupert Murdoch), and Cablevision announced that these companies would enter the DBS market in 3 years with the potential to provide 108 channels nationwide. However, this group has since disbanded and Hughes is now working with United States Satellite Broadcasting, contemplating launch of the first satellite in 1994.

Another satellite venture, Primestar, consisting of a group of nine cable operators, plans to provide direct satellite service by leasing 10 transponders on a Kμ-band satellite. Primestar plans to offer 10 channels of service initially, which might include the carriage of superstation signals (retransmitted distant broadcast stations) and pay-per-view programming. While a larger dish than for reception of DBS will be required, it should only be three feet in diameter.

In addition to these planned ventures, there are new technologies that will be used in the next generation of C and Kμ-band satellites. These include: higher power transmission, which will mean that smaller dishes can be used, and four to one compression technology, meaning that each transponder can send four signals. These innovations will certainly increase the attractiveness of satellite reception.

Despite all of these plans and innovations, it is far from clear that satellite service can provide the necessary competition to cable. Support for the view can be found in a 1990 trade press story about a speech by Ted Turner and in comments to the FCC by DOT: [42]

> Multichannel News—Turner is not too bullish on the prospects for direct broadcasting satellite service. On the recent DBS announcements, Turner said cable currently enjoys a distinct advantage over DBS, and labeled DBS efforts "too little too late" in terms of attempting to siphon viewers from cable.
>
> "If it had started with cable it might have gotten a portion of the cable business," he said.
>
> If and when the DBS projects get off the ground Turner said, "70 percent of the country will already have cable."
>
> "With cable, you only have one wire and no antennas," he said. "[With] DBS, you have outside antennas, a descrambler . . . and you need a live-in engineer." [43]
>
> Department of Justice—At the present time considerable uncertainty surrounds both of the recently announced DBS joint ventures. The lack of commercial success of previous efforts to utilize DBS technology precludes one from assuming that either or both of the joint ventures will

[42] See also, "Broadcasting," June 18, 1990, which reports:

Questions remains . . . about the true viability of home dishes as small as those proposed by Sky Cable and K Prime, about the notorious Ku rain fade and about the purported ease of pointing a consumer dish in crowded city or forested areas.

And of the potential market, said Roy Bliss, executive vice president of United Video, the 20 million [subscriber] number is "crazy. There are only seven million homes left after homes passed by cable, and that is about half saturated. Certainly, the cream has been skimmed." at p. 55.

[43] May 7, 1990, p. 19.

> produce a cost-effective technology that will in fact effectively rival the current cable distribution systems. Even if either or both of these systems are successful from a cost/technology perspective, they will not carry local television stations and initially at least will have smaller channel capacities than most cable systems. Moreover, it is not clear at this moment whether the DBS systems will be deployed as a rival or as a complement to current cable systems.[44]

This last point raised by DOJ is important to note. One of the joint ventures includes cable operators. The Primestar venture will provide programming not carried on cable systems and is seen as a supplement to cable systems and an easier way to increase programming capacity.

> Tom Rogers, President, NBC Cable & Business Development, and another [one time] Sky Cable partner, said that cable operators would "have a major incentive to be Sky Cable distributors."
>
> While there are "clearly more ways to access Sky Cable than through cable operators," those with infrastructures are the best to distribute Sky Cable, and "those are the operators," said Rogers. And with increasing uncertainty about regulation, said Rogers, operators aren't rushing to invet money." DBS is a way around that, since it's less expensive for the operator, yet increases channel capacity.[45]

There is certainly potential for direct satellite broacasters to become significant competitors to cable at some later date. The problem is that there are, as with MMDS, too many unknowns. The Committee cannot rely on satellite broadcasts today to protect consumers and others from cable's market power.

*Telephone*

The 1984 Act codified the FCC rule prohibiting telephone companies from providing cable service in their franchise areas, except in rural areas. This was intended to address the same concerns that prompted the FCC to adopt the prohibition in 1970—to prevent local exchange telephone companies from engaging in anticompetitive abuse with regard to the provision of television service. Most local telephone companies exercise a monopoly over local phone service. The ban on telephone company ownership of cable programming was enacted out of concern that the telephone companies might use their market power over telephone service, for example, to cross-subsidize an affliated cable operator from their regulated telephone services and from discriminating against unaffiliated cable operators that might need to use the critical bottleneck facilities such as poles and conduit that are owned by the telephone company.[46]

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[44] April 2, 1990 comments, pp. 35–36.
[45] "Broadcasting," April 23, 1990, p. 48.
[46] See, H.R. No. 934, 985h Cong., Sess. 56; See also "In re Aplications for Telephone Companies for Section 214 Certificates" (Final Report and Order), 21 FCC 2d 307, 325–5, reconsideration, 22 FCC 2d 746 (1970), aff'd, *General Telephone Co.* v. *United States*, 449 F.2d 846 (5th Cir. 1971).

Under the 1984 Act, telephone companies clearly cannot control video programming content over their own wires and possibly cannot carry video service over their wires even as a common carrier if they, or their users, do not obtain a franchise. Telephone companies, however, can and do provide the wire over which franchised cable operators provide service. S. 12, as reported, does not change the legal authority of the telephone companies to be involved in cable service in any way.

Currently, the telephone company networks are incapable of carrying video signals to the home. The telephone industry, however, has plans to install optic fiber cable and new generations of switches and transmission equipment to create a broadband network which could transport many video signals. The telephone industry has already invested heavily in optic fiber cable for long distance transmission, major local routes, and in some instances for service to large business. It will soon be economic to lay fiber optic cable to the home for the telephone lines instead of copper wire. It will be some time before it is economic to replace existing copper wire with fiber. However, some believe that time is not that far off.

At the 1990 Committee executive session to consider reporting S. 1880, the Committee decided that the question of whether telephone companies should be permitted to play a greater role in the cable market should be considered separately. This issue was not raised at the 1991 Committee Executive Session on S. 12. However, Senators Burns and Gore have since introduced S. 1200, legislation permitting the telephone companies to provide cable service and own programming. The Committee will consider to examine these issues.

*The Committee Approach*

It has been the longstanding policy of the Committee to rely, to the maximum feasible extent, upon greater competition to cure market power problems; however, the evidence demonstrates that there is no certainty that such competition to cable operators with market power will appear any time soon. The Committee thus is taking steps to encourage competition and to rely on some greater governmental oversight of the cable industry where no competition exists. Such oversight should be the minimum necessary to rein in this market power. It should also reflect the unique nature of the cable industry and the fact that the extent of this market power varies from locality to locality. While there may be regulatory or structural approaches that might better suit the problems, because these involve changing cable's mode of operation, such approaches are impractical. The Committee is not writing on a blank slate. Finally, this oversight should end as soon as cable is subject to effective competition.

The existing statute permits franchising authorities to regulate the rates for basic cable service for those systems not subject to effective competition. The legislation reported by the Committee continues this approach of regulating the tier of service containing retransmitted local broadcast signals. In response to concerns raised about retiering by cable operators to evade regulation, the bill permits the FCC to regulate the rates for the lowest priced tier that is subscribed to by at least 30 percent of the system's subscribers, if fewer than 30 percent subscribe to the basic tier. The Committee also permits regulation of charges for changes in service tiers. Under the legislation, the FCC shall establish rules to ensure that these rates are reasonable. The rationale for giving the FCC initial jurisdiction over the establishment of rate guidelines is that the telecommunications marketplace is global and it is important to establish a national scheme of regulation. In addition, none of cable's current and potential competitors are regulated at the local level. The Committee also recognizes that franchising authorities have a large stake in the operation of cable systems. The legislation thus permits franchising authorities to retain this authority so long as they abide by the FCC's rules.

The Committee believes that permitting regulation of just the basic service offering or the next lowest priced tier will not adequately address the problem of market power, since people subscribe to cable largely for its other program offerings. This fact is supported by the cable industry itself:

> When a viewer subscribes to cable, he's generally not paying for access to the local broadcast stations, because he can get those free without cable. He's paying for the distant signals and nonbroadcast programming that are not available over-the-air (and, possibly, for some enhancement of his reception of local broadcast stations).[47]

Cable operators may simply use this power to charge higher than competitive rates for other service offerings. This view was recently expressed by the FTC:

> If it is determined that some form of explicit rate regulation is necessary to constrain the exercise of market power by cable systems, effective regulation would seemingly require that regulatory authorities be empowered either to control the rates charged for all service tiers, or to impose "minimum quality" controls along with rate controls (e.g., stipulate that "basic" service offer certain specified channels). Absent such regulatory authority, it is unclear that cable rate regulation could effectively constrain the exercise of cable systems' market power should such power be found to exist.[48]

The Committee believes that the alternative suggested by the FTC—to control what should be offered on the basic tier—is not practical and it at least would raise First Amendment concerns. It therefore has included in this legislation regulatory oversight of other cable service offerings that are not offered on a per channel or per program basis. The FCC, after receiving a complaint from a franchising authority or a subscriber, is to ensure that rates for these offerings are reasonable.

The Committee has no desire to regulate programming. However, because cable operators bundle transmission, equipment and programming, it is impossible to contain a cable operator's market power without oversight of this bundled rate. The Committee has

[47] Comments of the National Cable Television Association in MM Docket 89-600, p. 26.
[48] April 20, 1990 Comments to the FCC, p. iv.

tried to make this oversight minimal by: (1) not extending regulation to programs offered on a per channel or per program (unbundled) basis; (2) having a standard of oversight that must be triggered by unreasonable rates; and (3) requiring that the FCC can only review the rates where a complaint has been filed making a prima facie showing that the rates are unreasonable.

Where the cable operator has market power derived from its local bottleneck, it can use this power to charge unduly high rates. It can also provide poor quality service for customers and can exact added advantages over programmers and competitors. The following sections will discuss these concerns.

*Customer Service*

Under the 1984 Act, customer service requirements can be established by the franchising authority.[49] Most franchising authorities have written requirements into their agreements with cable operators. Yet, the Committee has found that many cable operators provide poor service to their customers. Phones are not answsered promptly, if at all. Offices are open for a minimal number of hours. Service calls take far too long.

On February 14, 1990, the NCTA adopted "Recommended Cable Industry Customer Service Standards." The preamble to these standards states:

> The cable industry is dedicated to providing our customers a consistently high level of service. We are committed to ensuring that our customers receive a variety of quality programming; reliable, clear signals; and prompt, courteous service. To that end, we, as an industry, have voluntarily adopted the following Standards of Customer Service.
>
> Each community and each cable system are different and a reasonable flexibility should be employed in applying these standards; rigidity will hamper rather than help good customer service. We are confident, however, that the industry as a whole will implement these voluntary standards by July 1991, and recommend them for overall operational use by that date.

These rules thus are voluntary, and because of antitrust laws, cannot be enforced by the indusry. The expectation of some in the cable industry is that franchising authorities will eventually place these standards in their agreements with cable operators. They will then have an enforceable contractual right. It is unclear whether this will occur, particularly because certain franchising authorities may already believe they have adequate requirements. It should also be noted that not all cable systems belong to the NCTA and thus have not agreed to these standards.

There are also concerns about the value of the NCTA standards. In a March 1, 1990, submission to the Committee, Paul Berra, President, National Association of Telecommunications Officers and Advisors, stated:

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[49] Section 632.

The substance of the NCTA proposed standards is minimal. It is hard to understand why the industry needs 16 months to implement these simple standards. To illustrate my point, I am providing the Committee today a comparison between the standards proposed by NCTA and the standards now contained in the St. Louis city cable ordinance. You will find in every case that St. Louis's city ordinance equals or exceeds the standards proposed. At the same time, I have never heard from my cable operator that our standards are unrealistic, unfair, or unduly burdensome.

Many other State and local governments have set consumer practice standards that have more teeth, are more specific, or are more sensitive to consumer needs than the guidelines recommended by the NCTA . . .

Congress should not be misled. Simple, voluntary consumer service standards are not a substitute for effective governmental oversight of the cable monopoly's behavior.[50]

* * * * * * *

Local franchising authorities, who are closest to the consumers, would be in the best position to effectively address inequitable billing practices, unreasonable responses to cable outages, rebates during outages, time frames for installation and telephone answering services provided by the operator to handle consumer complaints.[51]

While the Committee encourages the cable industry to police itself, the NCTA approach raises concerns, both substantive and procedural. Problems with customer service have been at the heart of complaints about cable television, and strong mandatory requirements are necessary.

The provisions of S. 12 require the FCC to adopt customer service standards, permits franchising authorities to adopt customer service requirements that exceed those adopted by the FCC (subject to the possibility of an FCC public interest review), and grandfather customer service standards in existence on the date of enactment.

More specifically, the amended section 632 requires the FCC, within 180 days, to adopt customer service standards, gives the franchising authorities the power to enforce the FCC standards, and permits a cable operator to file a complaint with the FCC if the operator believes that customer service standards adopted by a franchising authority are not in the public interest. The Committee intends that the FCC, in evaluating complaints by cable operators, consider them on a case-by-case basis, taking into account factors unique to the community involved. Furthermore, the amended section makes clear that State laws, municipal ordinances, and agreements already in effect on customer service are not preempted. Moreover, S. 12 permits franchising authorities to impose new standards that exceed the FCC's standards, if those new standards are in the public interest.

[50] Pp. 9–10 of Mr. Berra's statement.
[51] Senate Hearing on S. 12, testimony of Mayor David Adkisson.

The Committee expects the FCC, in establishing customer service standards, to provide standards addressing the following: hours of operation, and customer service availability; installation, outages, service calls and response times; billing and collection practices; disclosure of all available service tiers, prices (for those tiers and changes in service), and customer rights; and complaint resolution procedures.

*Technical Standards*

In the same vein as concerns about customer service, the Committee has concerns about the technical quality of cable systems. The 1984 Act provided that the FCC may establish technical standards relating to the facilities and equipment of cable systems which a franchising authority may require in the franchise.[52] The FCC implemented this section by retaining its 20-year-old standards for Class I cable channels [53] (retransmitted over-the-air signals) and prohibiting franchising authorities from establishing different standards.[54] As for Class II channels (access channels, channels with satellite delivered programming, and channels used for two way transmission), the FCC has not adopted any signal quality standards and again has prohibited franchising authorities from acting. The U.S. Court of Appeals held that prohibiting franchise authorities from acting on Class II channels in the absence of standards was arbitrary and capricious.[55] The FCC then proposed merely extending its Class I standards in Class II channels.[56]

On June 13, 1991, the FCC announced that it is going to conduct a rulemaking proceeding to aodpt new technical standards for cable systems with 1,000 or more subscribers. The new rules will cover all classes of video programming and color signals. The FCC's new rules will preempt any more stringent standards adopted by local authorities.

The Members of the Committee have received numerous complaints about problems with signals transmitted over cable systems. Cable operators have responded that some of these problems occur during upgrades of systems and that, in any event, the cable industry is rapidly developing its systems and these problems should soon vanish. The Committee recognizes that most cable systems are being upgraded and installing state-of-the-art technology. At the same time, the Committee believes that cable subscribers should be guaranteed quality signal transmission and that this requirement will impose a de minimis burden on cable operators. It will also provide certainty for the equipment industry. The need for technical standards is especially great for systems with some degree of market power, where by definition subscribers have less ability to demand quality signals. The legislation thus requires the FCC to establish minimum technical standards for all classes of video programming signals. The Committee expects the FCC to

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[52] Section 624(e).
[53] "Cable Television Report and Order," 36 FCC 2d 143, 198, 204 (1972).
[54] See, 102 FCC 2d 1372 (1985).
[55] See, City of New York v. FCC, 814 F.2d 720 (D.C. Cir. 1987) aff'd 108 S.Ct. 1637 (1988).
[56] Further Notice of Proposed Rulemaking, In the Matter of Review of the Technical and Operational Requirements of Part 76, Cable Television, MM Docket No. 85f–38 (released October 11, 1988).

adopt these rules as promptly as possible. S. 12 also permits the FCC to adopt requirements for other types of signals.

In adopting these standards, the Committee intends for the FCC to adopt flexible standards which may be adjusted as appropriate for particular circumstances of the local system and the cable community. If, for example, a franchising authority and a cable operator agree on technical standards which they believe are necessary to ensure that cable subscribers receive the signal quality they expected in such a cable community and which are negotiated pursuant to the FCC's rules, such agreements should be enforceable.

*Home Wiring*

This provision addresses the issue of what happens to the cable wiring inside a home when a subscriber terminates cable service. Some cable operators take the position that the wiring inside the home belongs to the operator. Thus, when the subscriber terminates service, these cable operators remove the wiring, often causing damage in the process. These operators do not give the homeowner an opportunity to acquire the wiring. In addition, if a subscriber decides to terminate cable service and later reinstate it or seek service from a different cable company, the subscriber should not have to bear the cost and inconvenience of having new wiring installed.

The FCC permits consumers to remove, replace, rearrange, or maintain telephone wiring inside the home even though it might be owned by a telephone company.[57] The Committee thinks that this is a good policy and should be applied to cable. For cable, however, the FCC should extend its policy to permit ownership of the cable wiring by the homeowner. In doing this, the Committee urges the FCC to adopt policies that will protect consumers against the imposition of unnecessary charges, for example, for home wiring maintenance. The FCC should also require cable operators to describe clearly options concerning home wiring maintenance.

This provision shall not apply to any wiring outside the home.

*Programming Access, Discrimination and Cable's Market Power*

In addition to using its market power to the detriment of consumers directly, a cable operator with market power may be able to use this power to the detriment of programmers. Through greater control over programmers, a cable operator may be able to use its market power to the detriment of video distribution competitors. The Committee was sufficiently concerned about this problem that it adopted five provisions:

Section 6. Nondiscrimination with Respect to Video Programming;
Section 7. Leased Commercial Access;
Section 8. Limitations on (Vertical) Control and Utilization;
Section 15. Retransmission Consent; and
Section 16. Carriage of Local Broadcast Signals.

The report first addresses sections 6 and 8 and then sections 7, 15 and 16 of the legislation.

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[57] See, "Detariffing the Installation and Maintenance of Inside Wiring," (Memorandum, Opinion and Order) FCC 86-513, released November 21, 1986.

*Nondiscrimination with Respect to Video Programming and Limitations on Vertical Integration*

The Committee received much testimony about cable operators exercising their market power derived from their de facto exclusive franchises and lack of local competition. This testimony provided evidence that programmers are sometimes required to give cable operators an exclusive right to carry the programming, a financial interest, or some other added consideration as a condition of carriage on the cable system.

> [T]he major cable companies increasingly insist on owning a financial interest in shows and programs they use on their channels, and since in most cities, the cable system is a local monopoly, they have total control of content, on their terms, both as to the producers and in choices presented to the cable audience.[58]
>
> According to the *Wall Street Journal* (May 4, 1988 at 29), "Cable system owners have taken minority equity interest in virtually every new programming channel that has started in the past two years." As a practical matter, it is almost impossible in the present environment to start a new cable system service without surrendering equity to the owners of the monopoly cable conduits.[59]

When cable systems are not subject to effective competition, such an outcome is not surprising. Programmers either deal with operators of such systems on their terms or face the threat of not being carried in that market. The Committee believes this disrupts the crucial relationship between the content provider and the consumer.

The Committee understands that there are many other factors that affect the bargaining between the programmer and the cable operator. As was stated earlier, the extent of market power in the cable industry varies in each locality. In addition, there are certain major programmers that are more able to fend for themselves. It is difficult to believe a cable system would not carry the sports channel, ESPN, or the news channel, CNN. In addition, the cable operator has an incentive to put on programming that increases subscribership and decreases churn. These factors counterbalance some of the Committee's concerns regarding the market power of the cable operator vis-a-vis the programmer. However, the Committee continues to believe that the operator in certain instances can abuse its locally-derived market power to the detriment of programmers and competitors. The provisions adopted in the legislation reflect that concern.

Moreover, these concerns are exacerbated by the increased vertical integration in the cable industry. Vertical integration occurs when a single firm owns sequential stages of production. A vertically integrated cable company is a company that owns both the

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[58] Testimony of Ben Bagdikian, "Media Ownership: Diversity and Concentration," Hearings Before the Subcommittee on Communications of the Senate Committee on Commerce, Science and Transportation (101–357), June 14, 21, and 22, 1989, p. 88.

[59] Testimony of Preston Padden (INTV), "Media Ownership: Diversity and Concentration," p. 307. See also, testimony of Robert Schmidt (Wireless Cable Association), "Oversight of Cable TV," p. 439.

programming and the distribution system. For example, Viacom owns programming services such as MTV, Showtime, and Nickelodeon, and also owns Viacom Cable Systems, TCI, the largest multiple system operator (MSO), has financial interests in programming services such as American Movie Classics, the Discovery Channel, QVC Networks, Inc., and Encore.

TOP CABLE NETWORKS OWNED BY CABLE OPERATORS [60]

| Network | Ownership | Number of total subscribers (millions) |
|---|---|---|
| Turner Broadcasting | See note below | |
| CNN | | 56.5 |
| Headline News | | 41 |
| Superstation TBS | | 55.3 |
| TNT | | 50 |
| MTV | Viacom | 52.4 |
| Nickelodeon | Viacom | 52.9 |
| Nick-at-Nite | | 52.9 |
| Lifetime | Viacom, ABC, Hearst | 50 |
| Arts and Entertainment | ABC, Hearst, NBC | 48 |
| The Discovery Channel | TCI, Cox, Newhouse, United Artist | 52.9 |
| VH-1 | Viacom | 38.8 |
| Black Entertainment Television | TCI, Time-Warner, Great American Broadcast, Robert Johnson. | 29.1 |
| American Movie Classics | Cablevision, TCI | 28 |
| Pay services: | | |
| HBO | Time-Warner | 17.3 |
| Showtime | Viacom, TCI | 7.3 |

[60] See, Channels, "1991 Players Chart", December, 1990; and New York Times, "Fighting for Visibility in a Proliferating Industry", February 4, 1990, Business Section, p. 10.

Note.—Turner is owned by Ted Turner and a consortium of cable operators including TCI, Time-Warner, United Artists, United Cable, Heritage, Warner, Cablevision, and Continental.

TOP CABLE NETWORKS NOT OWNED BY CABLE OPERATORS

| Network | Ownership | Number of total subscribers (millions) |
|---|---|---|
| ESPN | ABC, RJR Nabisco | 61 |
| USA Network | MCA, Paramount | 43.8 |
| The Family Channel | The Family Channel Inc | 51.8 |
| The Nashville Network | Gaylord Broadcast | 51 |
| The Weather Channel | Landmark Communications | 46 |
| Financial News | In Bankruptcy | 35.4 |
| QVC Network | QVC Network Inc | 35.7 |
| Home Shopping Network | Home Shopping Network, Inc | 21.1 |
| Pay Service: The Disney Channel | Walt Disney Co | 5.2 |

Vertical integration in the cable industry raises two concerns. First, the Committee received testimony that vertical integration gives cable operators the incentive and ability to favor their affiliated programming services. For example, the cable operator might give its affiliated programmer a more desirable channel position than another programmer, or even refuse to carry other programmers.

Because of the trend toward vertical integration, cable operators now have a clear vested interest in the competitive success of *some* of the programming services seeking

> access through their conduit. You don't need a Ph.D. in Economics to figure out that the guy who controls a monopoly conduit is in a unique position to control the flow of programming traffic to the *advantage* of the program services in which he has an equity investment and/or in which he is selling advertising availabilities, and to the *disadvantage* of those services, including local Independent broadcasting stations, in which he does *not* have an equity position.[61]

Second, the Committee received testimony that vertically integrated cable programmers have the incentive and ability to favor cable operators over other video distribution technologies through more favorable prices and terms. Alternatively, these cable programmers may simply refuse to sell to potential competitors. Small cable operators, satellite dish owners, and wireless cable operators complain that they are denied access to, or charged more for, programming than large, vertifically integrated cable operators.

> Restricted access to programming products by a wholesale programmer which is also a retail competitor, reflects the vertically integrated nature of the market and the basic barrier in the development of a competitive market. Without fair and ready access on a consistent, technology-neutral basis, an independent entity like [the National Rural Telecommunications Cooperative] cannot sustain itself in the market.
>
> The programmers pick and choose those outlets to which they will provide distribution rights. But they have not done so based on the quality of an organization's marketing expertise, the financial integrity of the distributor, the size of the potential market, or the lack of cable access (as in rural areas). * * * Programmers which may not be owned in total or directly controlled by cable companies know where the majority of revenues come from and to protect their place in the valuable cable market, they queue-up.[62]

At the 1991 hearing, Ted Turner testified that his company has granted exclusive rights for the sale of TNT to many cable operators and as a result that service is not available to other multichannel video providers. He also testified that larger cable operators are entitled to discounts on his company's programming services that are not available to smaller companies.

On the other hand, cable witnesses testified that there are benefits to vertical integration.

> Vertical integration can be a good thing or a bad thing, and sometimes can be a good thing and a bad thing at the same time. One of the ways, in fact, the primary way it

[61] Testimony of Preston Padden (INTV), "Media Ownership: Diversity and Concentration," p. 308 (emphasis in the original). See also, Mr. Padden's testimony at p. 310; the testimony of Robert Schmidt (Wireless Cable Association), pp. 288–289; the testimony of James Hedlund (INTV) at the hearing on "The Cable TV Consumer Protection Act," p. 196.

[62] Testimony of Bob Phillips (NRTC), "Media Ownership: Diversity and Concentration," p. 359. See also, testimony of Bob Phillips, pp. 347, 355; and testimony of Gene Kimmelman (CFA), pp. 376, 386.

has been a good thing in the cable industry is that vertical integration has been the means by which we have stimulated the development of programming that was necessary to flesh out the promise of cable, the promise of our medium, when nobody else was really willing to step up and put up the money.[63]

But even some members of the cable industry have expressed concern about vertical integration. John Malone, President and Chief Executive Officer of TCI, for instance, testified that "[w]e, and many others, are concerned about the vertical integration going on, for fear of how it affects us." [64]

One way to address the concerns raised by vertical integration is to prohibit it altogether. The 1974 "Cable Report to the President," for instance, recommended a ban on common ownership of content and conduit.

> We recommend adoption of a policy that would separate the ownership and control of cable distribution facilities, or the means of communications, from the ownership and control of the programming or other information services carried on the cable channels.[65]

While this approach has appeal, it would result in a fundamental restructuring of the cable industry and the way it does business. Instead, the Committee has decided to focus on ensuring competitive dealings between programmers and cable operators and between programmers and competing video distributors. The legislation directs the FCC to promulgate regulations limiting the number of channels that can be occupied on a cable system by programmers affiliated with the cable operator. In determining what limitations are reasonable, the FCC should consider the channel capacity of the system as well as consumer interest and the goal of increasing diversity.

To ensure that cable operators do not favor their affiliated programmers over others, the legislation bars cable operators from discriminating against unaffiliated programmers. As a check on the market power of cable operators, the bill also bars operators from requiring a financial interest in a programming service as a condition of carriage.

To address the complaints of small cable operators that cable programmers will not deal with them or will unreasonably discriminate against them in the sale of programming, the legislation requires vertically integrated, national cable programmers to make programming available to all cable operators and their buying agents on similar price, terms, and conditions. A requirement of dealing on similar terms is moderate, as even members of the cable industry have acknowledged. John Malone of TCI testified that:

> [A] number of small cable operators in the Midwest have banded together in a cooperative to try to gain some of the same economies of scale in their joint purchase of cable

[63] Testimony of James Mooney (NCTA), "Oversight of Cable TV," pp. 178–79.
[64] "Media Ownership: Diversity and Concentration," p. 14.
[65] This report is quoted in the testimony of Preston Padden (INTV), "Media Ownership: Diversity and Concentration," p. 311.

> programming. The cooperative has enjoyed success with some programmers, but not with others. I fully support their efforts, and I see no reason why all programmers should not accord the cooperative and others like it the benefits of whatever scale economies they can offer.[66]

To encourage competition to cable, the bill bars vertically integrated, national and regional cable programmers from unreasonably refusing to deal with any multichannel video distributor or from discriminating in the price, terms, and conditions in the sale of programming if such action would have the effect of impeding retail competition. This provision is limited to vertically integrated companies because the incentive to favor cable over other technologies is most evident with them. It is limited to national and regional cable programmers, that is, programmers which license for distribution to more than one cable community to allow nascent programmers to gain a foothold through exclusive arrangements.

To ensure that cable programming is made available to owners of home satellite dishes, the bill requires any cable programmer which scrambles its (C-band) signal to make its programming available for private viewing by receive-only home satellite antenna users.

The bill does not make exclusive contracts per se illegal. The bill does not equate exclusivity with an unreasonable refusal to deal. The Committee does not make any findings with regard to existing exclusive contracts or arrangements.

The Committee believes that exclusivity can be a legitimate business strategy where there is effective competition. Where there is no effective competition, however, exclusive arrangements may tend to establish a barrier to entry and inhibit the development of competition in the market. Thus, the dominance in the market of the distributor obtaining exclusivity should be considered in determining whether an exclusive arrangement amounts to an unreasonable refusal to deal. Other factors include the duration of the exclusivity, and the effect on competition or potential competition in the market.

The Committee recognizes that distributors may undertake different levels of promotion, marketing, billing, and collection, and other efforts that are of value to video programmers, and that these are legitimate business considerations in establishing rates, terms, and conditions in contracts with multichannel video distributors. The Committee intends that video programmers have flexibility in negotiating price, terms, and conditions for distribution, so long as the price, terms, and conditions allow competition to flourish. In determining whether discrimination would have the effect of impeding retail competition, relevant factors include the degree and duration of the difference and the effect of the difference on disfavored distributors.

The bill provides for an expedited administrative remedy for complaints brought under section 640. The goal of this provision is to have programming disputes resolved quickly and without imposing undue costs on the involved parties. Without such a remedy,

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[66] "Oversight of Cable TV," p. 129.

start-up companies, in effect, might be denied relief in light of the prohibitive cost of pursuing an antitrust suit. The FCC is directed to impose penalties for frivolous complaints.

The legislation provides new FCC remedies and does not amend existing antitrust laws. All antitrust and other remedies which can be pursued under current law by multichannel video programming distributors are therefore unaffected by this section. Such existing remedies would still be available to challenge practices of both affiliated and independent programmers.

*Discrimination by satellite carriers*

The Committee received testimony that distributors of satellite-carried programming to home satellite earth stations were being denied access to programming or were being charged as much as four times what cable operators were charged for the same programming.[67] The FCC, at the direction of Congress, already has examined the existence of discrimination by satellite carriers in the provision of superstation and network station signals to home satellite earth station distributors and has determined that such discrimination exists.

The legislation prohibits satellite carriers that provide service pursuant to section 119 of title 17, United States Code (the Satellite Home Viewer Act (SHVA)), from unreasonably refusing to deal with distributors of video programming in the provision of such service to home satellite earth stations. The legislation also prohibits satellite carriers from discriminating in the price, terms and conditions of the sale of such service among such distributors or between such distributors and other multichannel video programming distributors. Satellite carriers violating any of these provisions shall be subject to all sanctions and remedies available to the FCC under the 1934 Act.

Satellite carriers are already prohibited from discriminating against home satellite dish distributors under the Satellite Home Viewer Act (17 U.S.C. 119). This legislation is not intended to conflict with, or alter, the non-discrimination provision contained in title 17. The purpose of this section is to codify the FCC's authority to address this problem under the 1934 Act.

*Cable Channels For Commercial Use*

The 1934 Act (as amended by the 1984 Act) requires cable systems with more than 36 channels to set aside a certain percentage of those channels for lease to programmers.[68] The objective of this requirement is to "assure that the widest possible diversity of information sources are made available to the public".[69] The House Report on the 1984 Act states:

> An important concept in assuring that cable systems provide the public with a true diversity of programming sources is leased access. Leased access is aimed at assurring that cable channels are available to enable program

[67] Testimony of Bob Phillips, National Rural Telecommunications Cooperation, Hearing on S. 12.
[68] Section 612.
[69] Subsection 612(a).

suppliers to furnish programming when the cable operator may elect not to provide that service as part of the program offerings he makes available to subscribers. Thus, section 612 establishes a scheme to assure access to cable systems to third parties unaffiliated with the cable operator, and thereby promotes and encourages an increase in the sources of programming available to the public.[70]

The House Report also contains an elaborate discussion of the First Amendment rationale for this provision.[71]

The legislation reported by the Committee is largely designed to remedy market power in the cable industry. In this context, the leased access provision takes on added importance—in addition to First Amendment concerns. It can act as a safety valve for programmers who may be subject to a cable operator's market power and who may be denied access to be given access on unfavorable terms. The legislation thus contains additional language for the purpose subsection of the leased access provision: "to promote competition in the delivery of diverse sources of video programming."

In its examination of market power in the cable industry, the Committee examined this leased access provision and inquired as to its effectiveness. The record before the Committee demonstrates that this provision has hardly been used:

> [F]ew programmers or businesses have made use of the commercial leased access channels mandated by the Cable Act. (Response of Messrs. Mooney and Robbins to Questions of Senator Inouye)[72]
>
> Unfortunately, this section of the Act has proven to be absolutely useless in seeking to advance the objectives of assuring consumers access to the widest possible variety of video sources and services. (Statement of Preston Padden)[73]

The record also shows why this provision has not been used. The cable industry argues that is because:

(1) The industry has been successful "in meeting the diverse range of viewing needs"; [74] and

(2) Most cable programmers are paid by the cable system for carriage, but, with leased access, it is the programmer who must pay the cable operator. As stated by cable officials, "Such economics would be very uncertain and do not guarantee that (a) an independent producer can generate enough local advertising revenue to cover the costs of paying for a network without separate subscriber fees; (b) have enough money left over to pay the operator for carriage on the leased access channel; and (c) still earn a profit." [75]

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[70] Report No. 98-934, p. 47.
[71] Id., pp. 31-36.
[72] "Oversight of Cable TV," p. 103.
[73] "Oversight of Cable TV," p. 395.
[74] Answers to Questions Submitted to John Malone, "Oversight of Cable TV," p. 146.
[75] Responses of Messrs. Mooney and Robbins to Questions of Senator Inouye, "Oversight of Cable TV," pp. 102-103. See also Response of Mr. Mooney to questions of Sen. Inouye, 1991 Senate Hearing on S. 12.

While these reasons may have some foundation, the record provides other rationale. This testimony given by Preston Padden provides an example:

> With the benefit of hindsight, it is apparent that the likely failure of the leased access provision was evident in the text of the Act itself. Section 612(d) explicitly provides that in any action brought challenging the price, terms or conditions for leased access "the court shall not consider the price, term or condition established between an operator and an affiliate for comparable services." This most unfortunate provision is equivalent to providing that when evaluating the reasonableness of Local Exchange Carrier's interconnection with other carriers, the price, terms and conditions of the LECs relationship with its own affiliates should not be considered. Reductio ad absurdam! This provision totally gutted the efficacy of the leased access section, killing any hope of its acting as a curb against anticompetitive activities by vertically integrated operators.
>
> For irrefutable evidence of the failure of the leased access provision, one need look no further than the marketplace. Despite widespread instances of dropping of local broadcast stations and refusals to carry competitive program services, there is no evidence that excluded programmers have been successful in gaining access through Section 612.[76]

The leased access provision (subsection (c)) delegates to the cable operator the task of initially establishing rates, terms, and conditions. If the programmer does not find these reasonable, the programmer may then seek relief at the FCC and in the courts. It does not take much understanding of the incentives of the parties and the nature of the programming market to understand that such an approach has fundamental problems.

The cable operator is almost certain to have interests that clash with that of the programmer seeking to use leased access channels. If their interests were similar, the operator would have been more than willing to carry the programmer on regular cable channels. The operator thus has already decided for any number of reasons not to carry the programmer. For example, the operator may believe that the programmer might compete with programming that the programmer owns or controls. To permit the operator to establish the leased access rate thus makes little sense. In addition, in a market as dynamic as the programming market, giving recourse to the FCC is of little solace. Finally, to be successful, a programmer may well have to be carried on many cable systems and thus have to negotiate leased access rates with many operators. Because of the uncertainty caused by this provision, a programmer would almost certainly see this as a hopeless task.

The cable industry has a sound argument in claiming that the economics of leased access are not conducive to its use. However, the existing provision does not improve the situation. For a programmer to have any chance of success, the programmer must ne-

[76] "Oversight of Cable TV," pp. 396–397.

gotiate many elements—a reasonable rate for access and then for billing and collection and then reach an agreement on key terms and conditions, for example, tier and channel location—and, as stated above, repeat this negotiation for each system.

The Committee believes that the leased access provision is an important safety valve for anticompetitive practices. The Committee also believes the existing provision does not work well and requires revisions. The legislation carries out this intent by requiring that the FCC establish maximum reasonable rates for access to these channels, as well as for billing and collection. The operator and programmer can bargain for a lower rate. The FCC also shall establish reasonable terms and conditions for carriage. By involving the FCC before leases are negotiated, programmers will know the parameters of an agreement, increasing certainty and the use of these channels.

*Horizontal Integration (National and Regional)*

The report so far has examined the cable industry's market power at the local level. The Committee has also received comment that horizontal integration at the regional and national level could present concerns about market power.

Concentration has grown dramatically in the cable industry in the last few years. As late as 1981, no cable operator owning multiple systems had more than two million subscribers. In 1985, about 29 percent of all subscribing households were served by the five largest multiple system operators. As of the end of 1990, TCI, the Nation's largest cable company, owned, controlled, or had investments in systems serving almost 14.3 million subscribers (about 24 percent of cable's total subscribers). Time-Warner's cable subsidiary reaches about 6.4 million subscribers (about 12 percent). The next three largest cable systems—Continental, Comcast, and Cox—reach about 5.8 million subscribers (about 11 percent).[77] The top five firms thus control almost half of the Nation's subscribers.

This increase in concentration raise two major concerns. First, there are special concerns about concentration of the media in the hands of a few who may control the dissemination of information. The concern is that the media gatekeepers will (1) slant information according to their own biases, or (2) provide no outlet for unorthodox or unpopular speech because it does not sell well, or both. This view was expressed forcefully at the Committee's March 29 hearing by James Hedlund, President of the Independent Television Association:

> Should this development [about increased concentration] concern the Congress? Yes! Its traditional concerns with media concentration—promoting diversity of voices and economic competition—are dramatically present in the cable industry.
>
> Separate and antagonistic ownership of the mass media has long been a goal of federal policy makers. The policy has as its foundation the First Amendment goal of promoting a diversity of ideas and speech throughout the country.

[77] The data used here comes from Paul Kagan Associates.

> Federal policy has always been vigilant to restrain concentration when its threatened a diversity of voices even though it did not rise to the level of an anti-trust violation.[78] [79]

The second concern about horizontal concentration is that it can be the basis of anticompetitive acts. For example, a market that is dominated by one buyer of a product, a monopsonist, does not give the seller any of the benefits of competition. For example, if one MSO owned all the cable systems in the United States, it would have tremendous power vis-a-vis the producers of programming. Even with fewer ownership interests, the MSO could still have significant market power.

Witnesses at the hearings testified that, with the increased concentration in the cable industry, the large MSOs have the market power to determine what programming services can "make it" on cable. They also argued that the large MSOs force programmers to buy their way onto cable by giving up an equity interest in their programming.

> Cable operators who control access to a large part of the viewing public * * * can extract concessions from programmers who desperately need to reach a large audience. Because they have market power over consumers, the MSOs pocket these concessions as excess profits, rather than passing them through to consumers. They exercise their monopsony power vis-a-vis programmers and their monopoly power vis-a-vis consumers.[80] (Testimony of Gene Kimmelman, Consumer Federation of America).

While the Committee has concerns about horizontal concentration, we also recognize there are legitimate reasons for integration. These were expressed by John Malone in his November 16, 1989 testimony:

> The media business is driven by the fact that it costs a great deal of money to create the first copy of any media product, be it software, information or entertainment. Once you have created that product, however, the marginal costs of replicating and distributing it is very, very low. It is this simple fact that drives all media companies toward becoming very large—the ability to spread their "first copy costs" over larger and larger number of consumers.
>
> The efficiencies associated with the increased size of cable companies have produced cost savings and contributed to rate stability enjoyed by cable consumers in recent years.[81]

Mr. Malone, however, told the Committee that he believes some limits are appropriate to protect the public interest:

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[78] "Cable TV Consumer Protection Act," p. 192.

[79] See also, the testimony of Ben Bagdikian at the hearings on "*Media Ownership: Diversity and Concentration*," p. 88.

[80] "Media Ownership: Diversity and Concentration, p. 357; See also, Testimony of James Hedlund, Cable TV Consumer Protection Act," p. 9.

[81] "Oversight of Cable TV," p. 129.

Senator GORE. Would you believe that there is some justification for the Congress putting a limit on the number of cable systems that a company like yours can own?

Mr. MALONE. Yes, sir.

Senator GORE. You do?

Mr. MALONE. Yes.

Senator GORE. Where do you think that limit ought to be?

Mr. MALONE. I'm not sure. You know, it depends on how you count, I think, to some degree. But, you know, broadcasters right now I think can own 25 percent of the market with VHF stations and up to 50 with UHF stations. Our technology is different. Clearly, some lower limits are in order for our industry.[82]

Although the FCC has the authority to impose horizontal limitations on the cable industry (both national and regional), it has not done so. In 1968, the FCC proposed, but never took final action on, rules to limit the size of MSOs. It proposed a 50-system limitation, making the assumption that each system would have at least 1,000 subscribers. If other media interests were held (one TV station, two radio stations or two newspapers), then the ownership limit would be 25 systems. The effect of the rules would have been a cap of about two million subscribers.[83] In the mid-1980s, a small cable operator from Montana, Satcom, filed a petition with the FCC to establish rules. Again, the FCC failed to act. Thus, unlike the broadcast industry, no limitations apply to the concentration of ownership in the cable industry.

To address the issue of national concentration in the cable industry and enhance effective competition, the legislation directs the FCC to place reasonable limits on the size of MSOs (by the number of subscribers). The FCC should balance the concerns expressed about concentration with the efficiencies gained by greater integration. The legislation does not imply that any existing company must be divested and gives the FCC flexibility to determine what limits are reasonable and in the public interest.

*Retransmission Consent*

Section 15 of the bill amends section 325 of the 1934 Act (47 U.S.C. 325) to establish the right of broadcast stations to control the use of their signals by cable systems and other multichannel video programming distributors. It adds a new subsection (b) to the existing provision of section 325 of the 1934 Act.

Section 325 now provides, in pertinent part: "nor shall any broadcasting station rebroadcast the program or any part thereof of another broadcasting station without the express authority of the originating station." The Committee believes, based on the legislative history of this provision, that Congress' intent was to allow broadcasters to control the use of their signals by anyone engaged in retransmission by whatever means. Indeed, in discussing what became section 325 during the debates on the Radio Act of 1927,

[82] "Oversight of Cable TV," pp. 160–161.
[83] 33 FR 19028 (1968).

Senator Dill made specific reference to the use of broadcast signals by the "wired wireless," which appears to have been a reference to an early form of cable transmission of radio signals.[84]

Nevertheless, the FCC in 1959 ruled that cable systems need not obtain consent from broadcast stations for retransmission of their signals, based on the reference in section 325 of retransmission by broadcasting stations. *CATV and TV Repeater Services,* 26 FCC 403, 429–30 (1959). At a time when cable systems had few channels and were limited to an antenna function of improving reception of nearby broadcast signals, this interpretation had little practical consequences and did not unreasonably disrupt the rights that broadcasters possess in their signals.

That situation, however, has changed dramatically. Cable systems now include not only local signals, but also distant broadcast signals and the programming of cable networks and premium services. Cable systems compete with broadcasters for national and local advertising revenues. Broadcast signals, particularly local broadcast signals, remain the most popular programming carried on cable systems, representing roughly two-thirds of the viewing time on the average cable system. It follows logically, therefore, that a very substantial portion of the fees which consumers pay to cable systems is attributable to the value they receive from watching broadcast signals. Due to the FCC's interpretation of section 325, however, cable systems use these signals without having to seek the permission of the originating broadcaster or having to compensate the broadcaster for the value its product creates for the cable operator.[85]

The Committee has concluded that the exception to section 325 for cable retransmissions has created a distortion in the video marketplace which threatens the future of over-the-air broadcasting. Using the revenues they obtain from carrying broadcast signals, cable systems have been able to support the creation of cable services. Cable systems and cable programming services sell advertising on these channels in competition with broadcasters. While the Committee believes that the creation of additional program services advances the public interest, it does not believe that public policy supports a system under which broadcasters in effect subsidize the establishment of their chief competitors.

Cable television is now an established service. Cable operators pay for the cable programming services they offer to their customers; the Committee believes that programming services which originate on a broadcast channel should not be treated differently. It is true that broadcasters also benefit from being carried on cable systems, and many broadcasters may determine that the benefits of carriage are themselves sufficient compensation for the use of their signal by a cable system. Other broadcasters may not seek monetary compensation, but instead negotiate other issues with cable systems, such as joint marketing efforts, the opportunity to provide

[84] 68 Cong. Rec. 2880 (1926).

[85] Of course, under the cable compulsory copyright license, 17 U.S.C. 111, the owners of programming on distant signals carried on cable systems receive compensation for their copyright interests through the Copyright Royalty Tribunal. The copyright scheme, however, does not purport to—and in fact does not—provide compensation to broadcasters for their rights in their signals.

news inserts on cable channels, or the right to program an additional channel on a cable system. It is the Committee's intention to establish a marketplace for the disposition of the rights to retransmit broadcast signals; it is not the Committee's intention in this bill to dictate the outcome of the ensuing marketplace negotiations.

Further recognition of their right to consent to retransmission of their signals will not signify any change in broadcasters' status under the 1934 Act. The right to control retransmission and to be compensated for others' use of their signals has always been a part of broadcast regulation. S. 12 does not alter this principle. Further, broadcast signals will remain available over the air for anyone to receive without having to obtain consent; indeed, the intent of S. 12 is to ensure that our system of free broadcasting remain vibrant, and not be replaced by a system which requires consumers to pay for television service.

The amendments to section 325, therefore, close a gap in the retransmission consent provisions which, in the Committee's view, was not intended by the drafters of the 1934 Act. The Committee recognizes, however, that there are established relationships between broadcasters and cable systems, as well as the fact that many broadcasters have had difficulty obtaining carriage at all on local cable systems. The Committee has been careful, therefore, to craft the retransmission consent provision of S. 12 in a manner which will minimize unnecessary disruption to broadcasters and cable operators. The Committee has also sought to avoid any alteration to the compulsory licensing scheme established under the copyright law.

The Committee is careful to distinguish between the authority granted broadcasters under the new section 325(b)(1) of the 1934 Act to consent or withhold consent for the retransmission of the broadcast signal, and the interests of copyright holders in the programming contained on the signal.

The principles that underlie the compulsory copyright license of section 111 of the copyright law (18 U.S.C. 111) are undisturbed by this legislation, but the Committee recognizes that the environment in which the compulsory copyright operates may change because of the authority granted broadcasters by section 325(b)(1).[86]

Cable systems carrying the signals of broadcast stations, whether pursuant to an agreement with the station or pursuant to the provisions of new sections 614 and 615 of the 1934 Act, will continue to have the authority to retransmit the programs carried on those signals under the section 111 compulsory license. The Committee emphasizes that nothing in this bill is intended to abrogate or alter existing program licensing agreements between broadcasters and program suppliers, or to limit the terms of existing or future licensing agreements.

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[86] The drafters of the 1976 Copyright Act anticipated that changes in the communications laws which affected the exercise of the compulsory license would occur. The House Report on the 1976 Act stated that it was not the intent of that bill to influence the development of communications policies governing the use of broadcast signals by cable systems, recognizing that "these matters are ones of communications policy and should be left to the appropriate committees in the Congress for resolution." H.R. Rep. No. 1476, 94th Cong., 2d Sess. 89, reprinted in, 1976 U.S. Code Cong. & Admin. News 5659, 5704.

One year after enactment of S. 12, section 325(b) will extend the requirement of obtaining retransmission consent to any cable system or other multichannel video programming distributor which uses broadcast signals, except where carriage of such signals by the cable operator or other distributor is required under sections 614 or 615, the signal carriage requirements established by S. 12. In order to avoid sudden disruption to established relationships, the new section 325(b)(2) exempts users of broadcast signals that were transmitted by a satellite carrier or common carrier on May 1, 1991. Thus, stations which now operate as "superstations" or whose signals are now delivered to home satellite dishes under the compulsory copyright license established in the SHVA will not be entitled to exercise rights of retransmission consent until January 1, 1995, when the compulsory license for home dish viewing expires. This will avoid any disruption of the settled arrangements for carriage of distant signals. The Committee recognizes that carriers of satellite programming have expressed concerns about access to programming when the NASA expires. The exemption coincides with the duration of the satellite statutory license established by the SHVA. The SHVA grants satellite carriers the right to distribute superstation and network broadcast programming in return for payment of a royalty fee to the Copyright Office.

Imposition of a retransmission consent regime was not countenanced at the time the SHVA was enacted by the Congress. The Committee is concerned, however, that this new regime could subject the satellite industry to a dual level of negotiations and fees in 1995 (one for signal carriage and a second for copyright), and could impede competition. The SHVA made network signals available to home satellite dish owners in areas unable to receive such signals, as well as superstation signals to all satellite viewers.

Since one of the purposes of the SHVA was to make available network programming to unserved areas, the Committee is concerned that the retransmission consent proposal not frustrate this purpose. It is the view of the Committee that the Congress should take into consideration and seriously review the potential that home satellite technology offers the American public as a competitive force in the video marketplace before allowing the statutory license to expire.

S. 12 directs the FCC to commence a rulemaking proceeding to establish procedures for broadcasters to exercise their rights of retransmission consent consistent with the rights granted them for signal carriage and channel positioning under new sections 614 and 615. The Committee intends that the FCC establish regulations which will permit broadcasters to elect periodically between acceptance of signal carriage and channel positioning rights—in which case their signals will be presumed carried—and exercise of their right of retransmission consent. Section 325 makes clear that a station electing to exercise retransmission consent with respect to a particular cable system will thereby give up its rights to signal carriage and channel positioning established under section 614 and 615 for the duration of the 3-year period. Carriage and channel positioning for such stations will be entirely a matter of negotiation between the broadcasters and the cable system. Concomitantly, the FCC's rules should provide that carriage of a station exercising its right of retransmission consent will count towards the number of local broadcast signals that a cable system is required to carry under sections 614 and 615.

S. 12 provides that each television station which has carriage and channel positioning rights under sections 614 and 615 will make an election between those rights and the right to grant retransmission authority for each local cable system before the amendments to section 325 become effective, and every three years thereafter. The bill provides that a broadcaster's election with respect to one cable system will apply to any so-called overbuild systems which serve the same geographic area.

The Committee believes, however, that a broadcaster which elects to exercise its rights to carriage and channel positioning under sections 614 and 615 does so on the expectation that it will in fact be carried by the cable system with respect to which it makes such an election in fulfillment of the cable system's obligations under those sections. In the event that the cable system elects not to carry such a signal in fulfillment of its obligations under sections 614 and 615, the Committee intends that the broadcaster be permitted to reassert its right to require consent before carriage by the cable system under other conditions.

S. 12 provides that the rights granted to stations under sections 614 and 615 will not be affected by the exercise of the right of retransmission consent by another station. For example, the FCC should permit a station negotiating for retransmission rights to contract with a cable system for a channel position to which another station is entitled under section 614 or 615. In most respects, however, the Committee believes that the rights granted to stations under section 325 and under sections 614 and 615 can be exercised harmoniously, and it anticipates that the FCC will undertake to promulgate regulations which will permit the fullest applications of whichever rights each television station elects to exercise.

In that connection, the Committee has relied on the protections which are afforded local stations by the FCC's network non-duplication and syndicated exclusivity rules. Amendments or deletions of these rules in a manner which would allow distant stations to be submitted on cable systems for carriage or local stations carrying the same programming would, in the Committee's view, be inconsistent with the regulatory structure created in S. 12.

*The Carriage of Local Broadcast Signals*

*Background: The Origination of the Rules*

In the early 1060s, the FCC viewed the development of cable television as potentially harmful to local broadcast television service and the ability of these stations to serve the public interest. In 1963, the FCC first acted on this concern in *Carter Mountain Transmission Corp.*[87] requiring carriage of a local television station as a precondition to granting a microwave license to a rural cable system.[88] Three years later, this case was expanded to all micro-

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[87] *Carter Mountain Transmission Corp* v. *FCC*, 321 F.2d 359 (1963).
[88] First Report and Order, 38 FCC 716–719 (1963).

wave-fed cable systems, and a year later, to all cable systems regardless of how signals were imported.[89] In 1972 the FCC refined its must carry rules so that they were campatible with the newly adopted comprehensive rules for regulation of the cable industry.[90]

All of these actions were based on the premise that the 1934 Act sought "to make television service available, so far as possible, to all people of the United States on a fair, efficient, and equitable basis"[91] and that "it was of the utmost importance to the public interest that extensions of television service by the auxiliary facilities of cable be accomplished in a fair and equitable manner and that cable and broadcast facilities have complementary, rather than conflicting, roles."[92] More specifically, the FCC reasoned that where a cable system did not carry a local station, each subsriber gained by the cable system was a viewer lost by the television station. The television station would than face decreased revenues and profits, which would reduce its ability to serve the public interest. The FCC stated that because the consequences could be so severe it was adopting the must carry rules even though it had not been demonstrated that these losses would occur.

*The Quincy Decision*

On July 19, 1985, in the *Quincy*[93] case, the U.S. Court of Appeals (D.C. Circuit) found the must carry rules unconstitutional. The court concluded that the rules infringed upon the cable operator's right to freely exercise editorial discretion in selecting the content of program services. The court reasoned, for example, that the must carry requirements may occupy so much space on a cable system that other programming would not be carried. It also held that the FCC had produced no evidence demonstrating that television stations would actually be harmed by not being carried by cable systems. In sum, the court found the rules overinclusive and indiscriminate in protecting every broadcaster. It concluded, however, that some other version of these rights might be found constitutional.

*The Revised Rules*

The FCC refused to appeal the *Quincy* decision and was prepared to acquiesce in the court's ruling. The Congress and the broadcast community, however, believed the FCC should fashion a new set of rules that could withstand constitutional muster, and together, they forced the FCC to initiate a proceeding in November 1985. Five months later, the cable and broadcast industries reached agreement on new rules. The FCC, however, did not adopt new rules until November 1986.[94]

The FCC's reticence in adopting must carry rules was further demonstrated in its new rules. Rather than simply adopting the in-

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[89] Second Report and Order, 2 FCC2d 725 (1966).
[90] 1972 Rule, 36 FCC2d 214.
[91] 38 FCC at 699.
[92] *Id.*, p. 703.
[93] *Quincy Cable TV* v. *FCC*, 768 F.2d 1434 (1985).
[94] *Report and Order*, MM Docket 85-349 (November 28, 1986). On December 24, 1986, the Commission stayed the effective date of these new rules pending completion of a reconsideration proceeding.

dustry compromise or making minor adjustments to it, the FCC embarked on a much different course. The FCC found that the best solution to the carriage problem would be to require cable operators to install input selector or "A/B" switches. These switches would permit viewers to switch between the cable system and the over-the-air broadcast transmission. The FCC, however, concluded that it would take some time to educate viewers about the switch option and to install switches, and therefore, adopted a modified set of must carry rules with a five year sunset date.

The FCC supported these new rules with the following reasoning:

> [W]e recognize must carry rules are a stringent form of regulation that intrude on cable operators' free speech rights. Although we have found that consumers would have difficulty receiving off-the-air signals at present, the part of our regulatory plan pertaining to input selector switches and consumer education is expected to resolve this problem. Accordingly, we find no need or justification in this proceeding for imposing must carry requirements for more than a five year period. We conclude that must carry regulations are neither desirable nor sustainable as long-term solutions to the problem of cable subscribers' access to broadcast signals and, in fact, would impede our objective of maximizing program choices to viewers.[95]

While the FCC's action was supported by Commissioner Quello, he issued a separate statement finding fault with the FCC's reasoning and proposal:

> I continue to believe that only comprehensive must-carry rules can guarantee full protection to our system of over-the-air television broadcasting and the government's legitimate interest, pursuant to sections 1 and 307(b) of the Communications Act, in fostering a system accountable to the public interest. Cable, once installed, is a geographic bottleneck with, unlike broadcasting, little or no program accountability to any public or government authority * * * The most obvious shortcoming of our Order is that in justifying a must-carry rule, it does not rely on the substantial government interest in protecting the integrity of our Table of Assignments and ensuring public access to stations that have a statutory obligation to serve their local communities. In my view, both interests are substantial enough to justify a must-carry rule, without resort to any notion that broadcasters face economic ruin in the absence of a must-carry rule.[96]

The FCC received 30 petitions to reconsider this decision, with most of the parties concerned about the input selector switch requirement and the reasoning behind it. On May 1, 1987, the FCC issued a new decision.[97] It continued to rely on its previous reasoning, however, and most of the revisions were minor.

[95] *Id.*, p. 23.
[96] *Id.*, p. 49.
[97] Memorandum Opinion and Order, MM Docket 85-349 (May 1, 1987).

*The Century Decision*

This FSS decision was promptly appealed in court. The U.S. Court of Appeals (D.C. Circuit) issued its opinion in December 1987 (the *Century*[98] decision). It found the FCC's new must carry requirements an unconstitutional infringement upon the First Amendment rights of cable operators. The court stated:

> [W]e simply cannot accept, without evidence to the contrary, the sluggish profile of the American consumer that the Commission's argument necessarily presupposes * * * it begs incredulity to simply assume that consumers are so unresponsive that within the span of 5 years they would not manage to purchase an inexpensive hardware-store switch upon learning that it could provide access to a considerable storehouse of new television stations and shows.
>
> Even were we to accept, however, the Commission's view that consumer ignorance cannot be readily eradicated, we have a second fundamental problem with the Commission's judgment that its interim must-carry rules are needed to advance a substantial governmental interest sufficient to support burdening cable operators' first amendment rights. The Commission relies heavily on its assumption that in the absence of must-carry rules, cable companies would drop local broadcasts. Experience belies that assertion.[99]

While the court found the must carry requirements unconstitutional, it should be noted that it did not reach any decision concerning input selector switches and consumer education. These requirements, with some modifications by the FCC, remain in effect. Finally, the court made it clear that must carry requirements are not per se unconstitutional. It simply held "that, in the absence of record evidence in support of its policy" the FCC's newly adopted rules had not been demonstrated to further a substantial governmental interest or to be narrowly tailored to limit any infringement upon speech.

*The Committee Approach*

The Committee strongly supports reinstitution of the must carry requirements. These requirements further the Committee's longtime view, reflected in title III of the 1934 Act, that television broadcasting plays a vital role in serving the public interest. The Committee finds that this role is in jeopardy if cable operators can use their market power either to refuse to carry local television broadcast signals or to extract favorable terms as consideration for carriage of these signals. The Committee also finds that the must carry rules are part and parcel of the Congressionally-mandated compulsory copyright license[100] for cable operators and that provides an additional reason for codification of these rules.

The Committee has been closely involved with the creation of America's system of broadcasting. It is a unique scheme that em-

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[98] *Century Communications Corp.* v. *FCC*, 835 F.2d 292 (D.C. Cir. 1987).
[99] Id., p. 302.
[100] 17 U.S.C. 111.

phasizes responsiveness to the local community and places the broadcaster in the role of public trustee for the frequencies it is permitted to use. There is no doubt that, over the past forty years, television broadcasting has provided vital local service through its programming, including its news and public affairs offerings and its emergency broadcasts. The Committee believes this service should continue; however, it will be jeopardized if cable operators use their market power either to preclude carriage of television broadcast signals or to carry such signals but without proper consideration to the programmer. This view was expressed to the Committee by Edward Fritts, President of the National Association of Broadcasters:

> This system [of local television broadcasting] cannot function properly, of course, unless local television stations have access to the viewers they are licensed and required by the FCC to serve. An "open gate" between local stations and their viewers must be preserved, for stations simply cannot respond to viewers that they cannot reach.
>
> Access to local audiences can be both enhanced by, and frustrated by, cable. As it originally developed, the cable industry was a means to facilitate reception of local over-the-air television stations. Indeed, cable first was called "community antenna television." Today, cable provides many additional kinds of programs, but retransmission of local television signals remains one of cable's most important attractions to subscribers.
>
> Once a home is connected to cable, however, that home becomes extremely dependent upon that cable for reception of local television stations. Even though these signals theoretically are available over-the-air, when a local television station is not carried on a cable system, cable subscribers effectively lose their ability to watch it. The cable becomes a gate over which the local system has control.[101]

There is substantial objective evidence that cable operators have and will continue to deny local broadcasters carriage on their systems. The most prominent study of the cable industry's behavior was performed by the FCC in 1988.[102] Its results demonstrate that, absent legislative action, the free local off-air broadcast system is endangered, thereby threatening diversity of choice not only for cable subscribers, but also for those who do not subscribe to cable.

The Report found, among other things, that:

1. Of the 4,303 cable systems that voluntarily disclosed data to the FCC, 869 systems admitted denying carriage to 704 television stations in 1,820 instances.[103] Moreover 279 of the stations

[101] "Must Carry," Hearing Before the Subcommittee on Communications of the Senate Committee on Commerce, Science, and Transportation (101–427), October 25, 1989, p. 38; See also, the testimony of Preston Padden, for a discussion of the Century decision and the Court of Appeals' rationale. The court stated that it saw no evidence of harm to television broadcasters because it found that few stations had been dropped from cable systems. However, as demonstrated in this testimony and elsewhere in the record, a cable operator can use market power to obtain various types of increased consideration from broadcasters. Thus, it is not correct to base harm merely on whether stations are dropped.

[102] "Cable System Broadcast Signal Carriage Survey," Staff Report by the Policy and Rules Division, Mass Media Bureau, Sept. 1, 1988.

[103] Id., Table 2.

dropped, involving 753 instances of non-carriage, were eligible for must-carry status even under the limited "compromise", post-*Quincy* must-carry rules agreed upon by both the cable and broadcast industries.[104] These figures are extrapolated and therefore approximate.

2. Two hundred and forty one of the reporting cable systems have denied carriage to three or more local stations, and 113 systems have denied carriage to four or more stations.[105]

3. The vast majority of local independent stations dropped by responding cable systems—at least 378 of 485 (78%)—were located within 50 miles of the cable headend.[106]

4. By far the most frequent replacement for a dropped local television station is a basic cable network—the program services in which cable operators often own equity interests and/or profit from local advertising sales.[107]

5. In 236 instances, reporting television stations made cash payments or supplied other consideration (usually equipment) in return for continued carriage on cable. At least 120 of these payments exceeded $45,000 per year.[108] One hundred twenty instances of cash payments and an additional 30 instances of a "combination" of considerations were reported.[109]

Among the systems that came forward, more than 20 percent (869 of 4,303 systems) had dropped one or more local stations from their channel lineups in 1,820 instances. The Committee notes that if one makes the extremely conservative and optimistic assumption that the incidence of non-carriage of local stations on the part of cable systems that did *not* disclose information to the FCC is roughly the same *and* that none of the reporting cable systems understated their non-carriage of local stations, it would mean that approximately 1,700 cable systems have denied carriage of local television stations in approximately 3,600 instances. Thus, regardless of how the numbers are interpreted, the Report reveals clearly that noncarriage of local stations by cable systems is a serious problem numbering in the thousands in terms of both cable systems and incidences of non-carriage.

The Committee also takes note of additional evidence regarding the lack of carriage by cable operators.[110] Indeed, even studies submitted by the cable industry demonstrate that lack of carriage has become commonplace. A study prepared by the NCTA found that 205 cable systems were not carrying, and 2.5 million subscribers were denied access to, all local broadcast stations.

Second, cable operators who carry local broadcast stations have shifted the placement of these stations on their systems. This has the effect of stifling competition. Moreover, it has interfered with

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[104] Id., Table 2A.
[105] Id., Table 4.
[106] Id., Table 7.
[107] Id., Table 8.
[108] Id., Table 14.
[109] Id.
[110] See Testimony of James Hedlund, "The Cable Consumer Protection Act of 1989," pp. 197–201 (citing several studies demonstrating lack of carriage and channel postitioning previously submitted to this Committee including "Free Television Under Siege", May, 1988); and testimony of Edward Fritts, (citing several studies conducted by the NAB.)

the ability of broadcasters to fulfill their statutory obligations to serve their communities.

More specifically, channel repositioning by the cable operator creates two fundamental problems. First, after building an audience on a particular cable channel, repositioning makes it difficult for audiences to locate stations. Second, cable operators have built distribution plants in which not all of the channels are equal. The first twelve channels (2–13) get through to all cable-connected sets. However, the higher channel numbers (14 and above) are not viewable on cable-connected sets that are not "cable ready". Based on data from the "1989 Television Fact Book," approximately 42 percent of television sets in homes today are not "cable ready."

In the FCC's survey, 974 of the cable systems responding admitted that they had shifted positions of one or more local stations in almost 3,000 instances.[111] According to the FCC, 85 percent of the repositionings were done for "marketing reasons". Only 15 percent of these shifts were for "technical" reasons.[112] In almost every instance, the stations shifted have been replaced by a cable program service in which the system operator is selling advertising or in which the operator has an equity interest or both.

In addition to the FCC study, the record before the Committee is replete with evidence of channel repositioning by cable operators. Based on the record, the Committee is persuaded that channel repositioning has a direct and negative impact on the competitive viability of local broadcast stations and thus the ability to serve the needs of local communities. There is ample evidence in the record demonstrating that channel repositioning is accompanied by a significant audience loss.[113] Moreover, repositioning can prevent significant portions of the community from receiving local off-air broadcast signals.

The Committee notes that repositioning of local broadcast signals does not appear to be the result of subscriber preference or marketplace demand. In most instances, the local stations shifted are most popular, as measured by audience rating, than the cable program services that replace them. Shifts are made solely to enhance the competitive position of the cable operator's programming or its advertising availabilities.

The Committee believes that the incentive to engage in such anti-competitive activity will continue. Cable operators will continue to compete with local broadcasters for local advertising revenues. Cable's local advertising revenues are expected to grow at a compound rate of 17.1 percent, from $250 million in 1988 to $550 million in 1993. Moreover, cable operators have acquired, and will continue to acquire, ownership interests in programming services that are exhibited on cable systems. As a result, there will be a continued incentive to deny carriage and reposition local broadcast stations.

The Committee heard testimony that cable could not use its market power to the detriment of television broadcasters since

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[111] FCC Report at Table 10.

[112] Id., at Table 13.

[113] See, Testimony of James Hedlund, "The Cable Television Consumer Protection Act of 1989," p. 207; testimony of Preston Padden, "Must Carry," pp. 73–76; and testimony of Edward Fritts, p. 35.

cable subscribers could still easily receive signals sent over-the-air. The Committee, however, believes the facts belie this view. The Committee received considerable evidence that once individuals subscribe to cable it is rare for them ever to switch to receive an over-the-air signal.[114] Both the cable and the broadcast industries have stated that the A/B switch is not a workable solution to the carriage problem.[115] As the FCC noted, the cable industry encouraged its subscribers to take down their antennas and eliminate their capability to receive signal off-air. Evidence before the Committee demonstrates that fewer than 1 percent of cable subscribers have an outdoor antenna and an A/B switch. Among other problems, 98 percent of cable homes do not have roof top antennas connected to their television sets,[116] and those antennas that remain are often in poor condition. In many areas of the country, terrain problems and buildings preclude adequate reception. Zoning ordinances and restrictive covenants often prevent the installation of antennas. Cable-ready television sets, remote controls, and video cassette recorders make switching back and forth between cable and off-air reception cumbersome or impossible.

The technical and economic complexities involved with an A/B switch make it an unworkable solution. In this regard, despite the FCC's initial optimistic appraisal of its consumer education and A/B input selector switch rules, the Committee now finds that the FCC's approach, in practice, has been ineffective in providing cable subscribers with access to local broadcast signals. Must-carry and channel positioning rules are the only means through which local broadcasters can secure access to cable subscribers. This means that television broadcasters, like other programmers, can be at the mercy of a cable operator's market power.

How a cable operator's market power will be exercised will depend on the type of broadcasting station, with network affiliates, for example, having more bargaining power than independent stations. These and other factors dictate not only whether a local television station will be carried, but also the terms of carriage. Will the station have to pay for carriage? Will the station be located on a channel different from the one assigned by the FCC for over-the-air service or on a channel location that subscribers rarely view or cannot view without added equipment? In the dynamic video market, these are concerns with enormous consequences. Even for the strongest television stations, it is clear that cable operators with market power can extract some consideration that could not be gained in an effectively competitive marketplace. While such a situation is of concern to the Committee (as demonstrated in the previous sections discussing use of market power to the detriment of programmers), such concern is greatly elevated because of the importance of the American system of broadcasting and what it means to the delivery of information of import to communities. It is for this reason that the legislation incorporates a special provi-

[114] See, e.g., "Must Carry," pp. 39, 80.
[115] See, Joint Petition for Reconsideration by NAB, NCTA & CATA filed before the FCC in MM Docket No. 85–349, December 17, 1986: Joint Request for Stay Pending Reconsideration filed by NAB, NCTA and CATA before the FCC in MM Docket No. 85–349, December 17, 1986.
[116] ELRA Group, Inc. "Outdoor Antennas, Reception of Local Television Signals and Cable Television", January 28, 1986.

sion focusing just on the carriage of local broadcast signals. Moreover, this provision addresses both the primary concern of carriage and the secondary concerns of the terms of carriage. Finally, the Committee believes that this provision, by not including a minimum viewing standard, will help new stations and stations that target special audiences to obtain carriage, thus increasing the diversity of local programming available to viewers.

*Crossownership*

Crossownership of different means of video distribution raises First Amendment concerns as well as economic considerations. First Amendment concerns are involved because common ownership of different media may limit the number of different voices available to the public. Additionally, ownership interests that provide incentives and opportunities to engage in anticompetitive acts raise prices and limit the types of services that are offered. On the other hand, a policy that only focuses on diversity and restricts the ownership of other outlets may ignore important economies of scale or scope, also raising prices and limiting offerings. Thus, the overall objective in reviewing media ownership is to strive for diversity while balancing genuine and significant efficiencies.

The Government's involvement in ensuring media diversity goes back to at least to the beginnings of the 1934 Act. Soon after being created, the FCC began an investigation of ownership of radio networks that resulted in the "Chain Broadcast Rules," which in effect prevented one radio network from owning another radio network.[117] In 1943, the FCC also adopted a rule prohibiting a person from owning more than one broadcast station in a local market (the so-called duopoly policy).[118]

Since then, the FCC has adopted extensive rules governing media ownership. They can be generally grouped into two classes: rules concerning ownerhsip in the local market; and the concentration of control rules regarding regional and nationwide markets. The FCC reiterated its "one station of the same service per person" rule in 1964, and in 1970 extended this policy to ownership of stations of different services (with certain exceptions).[119] This latter rule was relaxed by the FCC, but largely remains in effect. During the 1970s, the FCC also adopted rules limiting the ownership of common television stations and cable television systems,[120] newspaper and broadcast stations,[121] and local exchange telephone companies and cable televison systems.[122]

While the FCC has adopted most of the rules restricting media ownership, as noted above, the Congress has been a crucial participant. The various rules adopted by the FCC were often done at the instigation of the Congress. During the FCC's efforts to repeal rules, the Congress was certainly involved, either in preventing repeal or in urging modification of the proposal. In addition, the Congress has codified certain FCC rules. In the 1984 Act, the Con-

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[117] FCC, Report on Chain Broadcasting (1941).
[118] FCC Rule 73.3555(a).
[119] FCC Rule 73.3555.
[120] FCC Rule 76.501.
[121] FCC Rule 73.3555(c).
[122] FCC Rule 63.54.

gress codified the broadcast/cable cross-ownership rule, prohibiting a person from owning both broadcast and cable stations in a local market, and the telephone/cable cross-ownership rule, prohibiting a telephone company from offering cable television services (controlling the content) where it provides telephone service.[123]

The Committee believes these crossownership rules enhance competition. To further diversity and prevent cable from warehousing its potential competition, this legislation imposes cross-ownership restrictions on cable operators. Under the bill, a cable operator cannot own an MMDS system or a satellite master antenna television (SMATV) system in its franchise area, except that waivers (1) shall be granted for cable operators already owning or having an attributable interest in these systems, or (2) can be granted if necessary to ensure that the community receives video service. When ten percent of the nation receives some form of direct broadcast satellite service, the FCC is required to impose reasonable limitations on the ownership of such services by cable operators and other persons and to impose requirements to access to unaffiliated programmers.

*Franchise Decisions*

The 1984 Act imposed national, uniform procedures for initial franchising and renewal decisions. The 1934 Act as amended by the 1984 Act sets forth elaborate requirements and standards for renewal of a franchise. Some franchising authorities have found that this provision limits their ability to hold cable operators accountable, while some cable operators have found the process too bureaucratic. The Committee received testimony that the renewal provisions are unclear and difficult to administer. In the words of the Honorable Sharpe James, Mayor of Newark, "the renewal provisions are procedurally and substantively complex and severely limit the power of franchising authorities in the renewal process." [124] This legislation makes changes in this section of title VI of the 1934 Act to give franchising authorities more control over the franchise renewal process.

Pursuant to sections 626(c)(1) (A)–(B) of the 1934 Act, a franchising authority may, in determining whether to grant renewal, take into account franchise compliance and the quality of service throughout the franchise term. In a situation where the franchise is transferred from one owner to another and that transfer is approved by the franchising authority, the successor franchisee cannot be held accountable for violations of the franchise agreement prior to the acquisition, unless notice of violations are given to the successor at the time of the transfer by the franchising authority.

For purposes of renewal under section 626(c)(1)(B), a franchising authority may not consider the mix or quality of cable services or other services provided under the system. The Committee does not intend this limitation to prohibit a franchising authority from considering for purposes of renewal whether a cable operator's channel capacity has been reasonable in light of community needs.

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[123] Section 613.
[124] "Oversight of Cable TV," p. 199.

Under section 626(d), a franchising authority cannot deny renewal unless the cable operator has notice and an opportunity to cure, or in any case in which it is documented that the franchising authority waived in writing its right to object. The Committee intends that the franchising authority shall have an affirmative obligation to give notice to cable operators of any violation of the franchising agreement or State or local regulations.

*Requirements for Equipment in Television Sets*

Television sets are sold today with a variety of equipment. Many higher-priced sets are equipped with electronic switches that enable the viewer to switch automatically between over-the-air television stations or cable and video cassette recorders. Television manufacturers are also building more sets with multiple ports for different video inputs.

As indicated elsewhere in this report, there is a variety of video distribution services that may soon be widely available, such as direct broadcast satellite service and MMDS. At that time, if television manufacturers do not install electronic switches that enable viewers to change easily from one video service to another, competition among video services may be inhibited. The Committee believes this would thwart the policies of the legislation. The legislation thus includes authority for the FCC to require the installation of such switches, provided that it determines that such switches are technically and economically feasible. Such a requirement is similar to that of the All Channel Receiver Act.[125] That law created greater competition in the video marketplace by requiring that all television sets have the ability to receive both VHF and UHF signals. Finally, the Committee notes that the presence or absence of these switches does not affect the need for must carry requirements.

*Limitations on Liability*

The purpose of this provision is to limit the franchising authorities' liability for monetary damages for acts taken pursuant to the 1934 Act as amended by the 1984 Act.

> The authority of cities to regulate cable television systems is increasingly challenged in court on various statutory and constitutional grounds. These lawsuits are expensive for [franchising authorities] to litigate and expose them to the possibility of extraordinary monetary judgments * * * including compensatory damages, attorneys' fees, and in some cases punitive damages.[126]

Congress reaffirmed the authority of local franchising authorities to make cable franchising decisions in the 1984 Act. In doing so, Congress never contemplated that local authorities would be sub-

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[125] Public Law 87-529, approved July 10, 1962.

[126] See, "Legislative Proposals to Alleviate Barriers to Effective Regulatory Oversight of Cable Television Systems and to Stimulate Competition in the Provision of Cable Television Service," January, 1990, Submitted to the Commerce Committee by the City of New York, et al. at p. 42; See also, "Oversight of Cable TV," pp. 210, 548-9. For example, cable operators have sought monetary damages, (over legal fees and attorney fees) in suits alleging that the franchise fee permitted under the act was a violation of the operators first amendment rights. In such a case the monetary damages should be limited to attorney fees and legal costs.

ject to liability for monetary damages for carrying out the franchising process that the 1984 Act explicity permitted to be performed. Nevertheless, in the past 6 years, several cities and municipalities have exercised their authority to issue less than all of the cable franchises requested of them, and they have been sued by parties to whom cable franchises were not issued, or who have not been issued franchises on the terms and conditions they wished.

The plaintiffs in these cases claim that the failure of the local franchising authority to grant them franchises, or the failure to issue franchises on the terms and conditions they desire, even if fully consistent with the 1984 Act's amendments to the 1934 Act, violates their First and Fourteenth Amendments rights of free speech, free press, due process and equal protection. Based on an alleged violation of those rights, plaintiffs in these actions seek damages from franchising authorities, typically under the Civil Rights Act of 1871 (42 U.S.C. 1983), and parallel State civil rights laws, as well as injunctive relief.[127]

In the aggregate, the damage claims against franchising authorities have totalled in the hundreds of millions of dollars. Whether the parties are entitled to these damages under existing law is far from clear. However, the mere pendency of these large damage claims has had significant adverse effects on the functioning of local governments. These claims represent a potentially crippling burden on local government treasuries and their taxpaying citizens as well. If successful, these claims could seriously impair, if not disrupt altogether, the vital public services to their citizens. Even if unsuccessful, the mere pendency of these claims threatens to disrupt a local government's ability to obtain credit, insurance, and other critical aspects of municipal governance and operation.

As a result, franchising authorities faced with these lawsuits are having to settle rather than risk large judgments, over and above their legal fees. For example, the cities of Palo Alto and Atherton, CA, settled a suit to protect their taxpayers from an estimated $1 million appeal and a possible $10 to 15 million damage assessment should they lose the appeal.[128] It is the intent of the Committee that local franchising authorities not be subject to punitive or compensatory damages for acts that are authorized under title VI of the 1934 Act and that franchising authorities not be put in the position of having to settle suits to avoid the possibility of such damages. Moreover, it is the intent of the Committee that this section apply to pending proceedings as well as any proceeding initiated after enactment of this legislation.[129]

Section 628 applies to any action expressly authorized or required by title VI of the 1934 Act, including a franchising authority's decision to grant or deny a franchise, renew or not renew a franchise, to approve or deny the transfer of a franchise, amend or

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[127] See, *e.g.*, *Preferred Communications* v. *City of Los Angeles*, No. 83-5846 CBM (Bx) (C.D. Cal.), *Preferred Communications* v. *Herman*, Case No. BC 001558 (Cal. Sup. Ct. Filed May 17, 1990).

[128] See, Multichannel News, Feb. 20, 1989, p. 23; See also, Cable TV Law Reporter, Sept. 26, 1989, p. 6 (the City of Dallas settled an antitrust case for $2.6 million rather than face possible treble damages), Cable TV Franchising, Sept. 27, 1989, p. 5 (the City of Birmingham settled a suit involving franchise fees and renewal issues rather than face an adverse district court decision).

[129] See, *Bradley* v. *School Board of Richmond*, 416 U.S. 696, 711 & n. 14 (1974).

not amend a franchise, or otherwise regulate a cable operator under title VI. The Committee does not intend to protect local franchising authorities from damages where an individual proves discrimination on the basis of race, color, sex, age, religion, national origin or handicap.

In addition, it is not the intent of the Committee to exempt franchising authorities from punitive or compensatory damages when a court of binding jurisdiction has issued a final order, which is no longer subject to appeal, holding that the franchising authority has violated a cable operator's First Amendment rights and the franchising authority repeats or continues the violations. In other words, a franchising authority shall not be immune from damages under this provision if it knowingly violates a ruling of a court of binding jurisdiction that an action or failure to act by the franchising authority violates a cable operator's First Amendment rights.

Thus, in cases such as those pending against the City of Los Angeles,[130] the City would be immune from any kind of monetary damage liability throughout the pending litigation until a final decision is rendered and all appellate review is exhausted. At that time, the municipality would have an opportunity to comply with any declaratory or injunctive relief granted and upheld on appeal. As long as the municipality complies with any declaratory or injunctive relief ultimately granted after exhaustion of appellate remedies, neither it nor its agents may be subjected to liability for monetary damages.

### CONSTITUTIONALITY

As Oliver Wendell Holmes recognized 70 years ago, competition and First Amendment values are closely linked. Policies aimed at promoting competition and preventing market abuses simultaneously advance diversity in the marketplace of ideas. The regulation of the media industry by the FCC and Congress has assumed that the media warrant treatment different from other industries. The rationale for this difference is that media ownership implicates not only issues of economic competition, but the First Amendment as well. The "products" of the mass media industry include thoughts and ideas. Members of the industry are thought to be opinion leaders, creators of social norms, purveyors of culture, and architects of the political agenda.

The Committee has consistently sought to ensure that the public will have access to many diverse and antagonistic sources of information. Much of the structural regulation of the media industry is premised on a theory that little direct regulation of content will be tolerated, but that the First Amendment can be advanced by regulating the structure of the industry. The Committee believes the First Amendment implies an affirmative role for the government to encourage a diversity of voices. In some instances, the First Amendment requires the government to ensure that there will be free competition of ideas and voices.

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[130] *Preferred Communications, Inc. v. City of Los Angeles*, No. 83-5846 CBM (Bx) (C.D. Cal.), and *Preferred Communications, Inc.* v. *Herman*, Case No. BC 001558 (Cal. Super. Ct. filed May 17, 1990).

The Committee believes that the regulation in this legislation does not conflict with the First Amendment principles of free speech and freedom of the press. Evidence demonstrates that market factors, absent government regulation, are unable to cure cable's bottleneck problems and that the Committee's approach of regulating the cable industry—under the Committee's Commerce Clause authority—is directed to the least restrictive means necessary to ensure that the public interest is served.

The cable industry argues that, because cable does not use the broadcast spectrum, it should not be held to broadcast regulations and policies.[131] Cable defines itself as an electronic publisher and asserts that it should be afforded the same First Amendment protection as is awarded to the print media.[132]

The Committee believes that cable must be distinguished from the print media. One primary distinction that differentiates the two media is that cable must be awarded a franchise in order to operate and, similar to the telephone system, it must use governmental property to string its wires, lay its cable in ducts, and obtain necessary rights of way. This distinction has been noted by the U.S. Court of Appeals:

> Common sense dictates that the number of entities that can tear up the streets or use existing poles and ducts is very limited physically * * * [133] If everyone sought to have a cable operation, the result would be a wall of wires creating chaos or interference akin to that which existed in the early days of broadcasting.[134] [135]

In most communities served by cable, viewers have only one cable system available. It is the rare exception to find communities where two systems are competing, especially over a long period of time.

In the case of cable, the Government must therefore grant franchises for speech, and the number of franchises is necessarily limited.[136]

> The central dilemma of cable is that it has unlimited capacity to accommodate as much diversity and as many publishers as print, yet all of the producers and publishers use the same physical plant. * * * If the cable system is itself a publisher, it may restrict the circumstances under which it allows others also to use its system." [137]

Consequently, the Government can and should take reasonable steps to promote diversity.[138] If it were possible to permit everyone who wishes to operate a cable system to do so, there would be no need for any regulation other than of a policing or aesthetic nature. However, in view of the necessarily severely limited

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[131] See, *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 388 (1969).
[132] See, *Miami Herald* v. *Tornillo*, 418 U.S. 241 (1974).
[133] *See, Omega Satellite Products* v. *City of Indianapolis*, 694 F.2d 119, 125 (1982).
[134] Id. at 127.
[135] See, Testimony of Henry Geller, "Cable TV Consumer Protection Act of 1989," p. 9.
[136] See, Omega, supra.
[137] Ithiel de Sola Pool, "Technologies of Freedom" (1983), p. 168.
[138] See, *Associated Press* v. *U.S.*, 326 U.S. 1, 20 (1945); *FCC* v. *National Citizens Comm. for Broadcasting*, 436 U.S. 775 (1977).

number of franchised cable systems able to operate in any one community, it is necessary to ensure that the diversification principle (Associated Press) is not undermined in this increasingly important governmentally franchised medium. Accordingly, the Committee believes that certain structural regulations are necessary.

That is what this Committee has done by requiring the FCC to establish vertical and horizontal limitations on ownership of cable systems and to ensure effective commercial leased access, by establishing crossownership restrictions, and by specifying that franchising authorities may require public, educational and government access channels.[139]

The courts have long recognized the need for regulations designed to promote diversification in the limited electronic industry.[140] There may even be a closer analogy to the regulation of the telephone industry.[141] Like telephone, cable needs a franchise to string its wires under or over streets, and receives considerable governmental assistance in its mission. Thus, the 1984 Act's amendments to the 1934 Act not only require a franchise, but specify that a franchise authorizes construction over public rights-of-way and through easements, with just compensation to property owners where appropriate.[142] As with telephone service, there was initial competition in some communities, but operation has become monopolistic because of apparent economies of scale. Like telephone, there is a need to ensure non-discriminatory service in the governmentally bestowed monopoly (or duopoly in some rare cases). In telephone, there is virtually complete separation of content and conduit, while in cable there is only a limited requirement of separation.[143]

In light of these considerations, the Committee believes that with cable there can be regulations and franchise contractual provisions to advance substantial governmental goals. In cable, these regulations or contract provisions are not content-oriented to the extent reflected in broadcasting.[144] Because it is a different service with much greater channel capacity, the cable regulations are content-neutral ones.

The proposed regulations and provisions pass constitutional muster under the standards set out in *United States* v. *O'Brien*.[145] The regulations are content-neutral (they are not directed to the content of the speech) and are narrowly-tailored means to further substantial governmental interests.

Leased access and public access programming uniquely allow individuals and groups to communicate their messages to the general public. Educational access allows local schools to supplement classroom learning and to reach out to teach those who are beyond school age or unable to attend classes. The governmental channel

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[139] See, 1984 Cable Act, Secs. 611, 612, 613, 47 U.S.C. Secs. 531–533 (1988).

[140] *See, FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775, 801–02 (1975) (upholding the diversification principle in the broadcasting field.

[141] See, Pool, "Technologies of Freedom," p. 168.

[142] See, Secs. 621(a)(2), (b)(1); 47 U.S.C. Secs. 541 (a)(2), (b)(1) (1988); *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

[143] See, 1984 Cable Act, Sec. 612, 47 U.S.C. Sec. 532 (1988).

[144] See, *Red Lion*, supra.; *Office of Communication of the United Church of Christ* v. *FCC*, 707 F.2d 1413 (D.C. Cir. 1983); Compare Sec. 624(f) of the Act.

[145] 391 U.S. 367 (1968).

allows for a local "mini-C-SPAN," thus contributing to an informed electorate, essential to the proper functioning of government. These governmental interests in a free market of ideas and an informed and well-educated citizenry certainly qualify as sufficiently important to pass the first hurdle of the *O'Brien* incidental burden test.[146]

The regulations can also readily meet the second criterion of being narrowly tailored. They are content-neutral and should specify only a reasonable amount of channel capacity for access by other parties. Section 612 is on its face reasonable in this respect; whether particular Public, Educational, and Governmental (PEG) allocations are reasonable would depend on the facts of each case. For example, an allocation of at least three channels on most systems would certainly appear reasonable. This is particularly so with the proviso that unused PEG channels must be allowed to be used by the cable operator for other purposes.[147]

As reported in the "Cabinet Committee on Cable Communications, Report to the President," 15 (1974):

> Cable development has the potential of creating an electronic medium of communications more diverse, more pluralistic, and more open, more like the print and film media than our present broadcast system. It could provide minority groups, ethnic groups, the aged, the young, or people living in the same neighborhood an opportunity to express, and to see expressed, their own views.

In an attempt to cope with the ever-chaning and constantly increasing problems of the booming communications industry, the Committee has formulated the legislation to ensure that the public interest, convenience and necessity is served while allowing the cable industry an opportunity to develop to its maximum potential.

CONSTITUTIONALITY OF THE SIGNAL CARRIAGE PROVISIONS

The Committee recognized that two previous versions of must carry regulations imposed by FCC rulemaking were held unconstitutional by the United States Court of Appeals for the District of Columbia Circuit.[148] The court states, however, that these decisions do not foreclose Congress from crafting valid regulations for cable carriage of local television signals and after extensive review of the record of the developing video marketplace, the Committee is of the firm view that the carriage and channel positioning regulations in S. 12 will withstand any constitutional challenge.

The First Amendment exists to assure "the widest possible dissemination of information from diverse and antagonistic sources." [149] The First Amendment also protects the editorial proc-

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[146] See, H. Report No. 98–934, supra, at 30.

[147] See, 1984 Cable Act, Sec. 611(d); 47 U.S.C. Sec. 531(d) (1988).

[148] *Century Communications Corp.* v. *FCC*, 835 F.2d 292 (D.C. Cir.), *clarified*, 837 F.2d 517 (D.C. Cir. 1987), cert. denied, 486 U.S. 1032 (1988); *Quincy Cable TV, Inc.* v. *FCC*, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986).

[149] *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945). The Communications Act is consistent with this goal, stating that its purpose is to promote the widespread availability of efficient communicatiions technology (47 U.S.C. 151), and directing the FCC to provide for an equitable distribution of communications services (47 U.S.C. 307(b)). See, *FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775, 780 (1978).

ess—the freedom to determine what to speak or whether to speak at all.[150] The signal carriage provisions of S. 12 seek a balance between these two established First Amendment principles. On the one hand, the public's right to receive a diversity of voices is served by ensuring public access to free local broadcast television stations. On the other hand, while cable operators properly have asserted a right to exercise editorial control over their systems, some have viewed this as including the authority to deny carriage to local broadcast signals. The Committee believes that the signal carriage provisions of S. 12 preserve the legitimate interests of broadcasters, cable operators, and the public to the fullest extent possible.[151]

When the 1984 Act was adopted, cable systems were subject to FCC must carry rules. The Committee pointed out that:

> The Committee recognizes the importance of local programming and opposes anything that would undercut that service. While the committee believes that the answer to this issue may ultimately be found in the marketplace, under the current regulatory framework and existing copyright law, the committee sees a need to continue the existing "must carry" rules to protect the public interest.[152]

The subsequent demise of local television, the growth of the cable industry, and the fact that no effective competition to local cable systems has developed in the interim, have created just the competitive imbalance that the Committee feared in 1984.[153] The Congress' broad power under the Commerce Clause provides ample authority for the enactment of legislation, including signal carriage regulations, to create a competitive balance between the cable and broadcast industries which are essential parts of the communications environment.[154]

Neither the *Quincy* nor the *Century* courts held that must carry regulations are per se unconstitutional. To the contrary, both decisions stressed their limited character:

> We have not found it necessary to decide whether any version of the mandatory carriage rules would contravene the First Amendment * * *. Should the Commission wish to recraft the rules in a manner more sensitive to the First Amendment concerns we outline today, it is, of course, free to do so.[155] "We do not suggest that must-carry rules are per se unconstitutional, and we certainly do not mean to intimate that the FCC may not regulate the cable industry so as to advance substantial governmental interests." [156]

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[150] See, e.g., *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974); *CBS* v. *Democratic National Committee*, 412 U.S. 94 (1973).

[151] See, Emerson, "The System of Freedom of Expression," 627–30 (1970): de Sola Pool, "Technologies of Freedom," 244–51 (1983).

[152] S. Rep. No. 67, 98th Cong., 1st Sess. 11–12 (1983).

[153] *Competition, Rate Deregulation, and the Commission's Policies Relating to the Provision of Cable Television Service*, 5 FCC Rcd. 4962, 5037–46 (1990) [hereinafter, the 1990 Cable Report].

[154] Cf., *City of New York* v. *FCC*, 486 U.S. 57, 60–61 (1988); *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 701–04 *(1984)*; *FCC* v. *Midwest Video Corp.*, 440 U.S. 681 (1974); *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968).

[155] *Quincy*, 768 F.2nd at 1463.

[156] *Century*, 835 F.2nd at 304.

As an initial matter, the Committee observes that cable television's First Amendment status remains unresolved. The Supreme Court has concluded that cable systems are entitled to some degree of First Amendment protection, but the Court has not sought to determine whether that protection is the same as that afforded newspapers, or whether cable systems, like broadcasters, have in some circumstances more restricted First Amendment rights.[157] Certainly, there are practical limits on the number of cable franchises which can operate in any community, and at this point, almost all cable systems are the only provider of multichannel video services in their franchise areas. The need for a franchise and the practical or economic limitations which appear to limit the number of cable systems may support a closer analogy to broadcast regulation. Ultimately, cable television will have to be analyzed for First Amendment purposes as a unique medium entitled to a particular balance of First Amendment rights, and these rights will have to be assessed with regard to the particular regulation then at issue.[158]

Whatever conclusion is eventually reached concerning cable television's First Amendment status, economic regulations designed to promote competition and a diversity of voices in communications services have been upheld against First Amendment Challenges. The leading case is *Associated Press* v. *United States,*[159] which upheld the application of the Sherman Act to newspapers. Under *Associated Press* and its progeny, the courts do not apply a heightened First Amendment test to economic regulations, finding instead that government has the power to act even where the affected activity involves communications functions. Indeed, the courts have found that the First Amendment supports such regulations because they enhance the availability of diversity of voices.[160]

In the Committee's view, *Associated Press* provides the most appropriate analysis for signal carriage regulations. In *Associated Press,* access to the association was ordered for members it otherwise might not have wanted because such membership was essential for participation in the market. The signal carriage provisions of S. 12 are economic regulations, similar to the antitrust laws, intended to promote a competitive balance between a cable and over-the-air television as distribution systems, and to strengthen the diversity of voices available to both cable and noncable homes. The "gateway" position of local cable systems and their incentives either not to carry or to reposition the signals of local television stations, ample evidence of which was presented to the Committee,[161] will continue to harm the system of free, universally avail-

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[157] See, *Leather* v. *Medlock*, 59 U.S.L.W. 4281 (April 16, 1991); *City of Los Angeles* v. *Preferred Communications, Inc.*, 476 U.S. 488 (1988).

[158] See, *Kovacs* v. *Cooper,* 226 U.S. 77, 87–89 (1947), (Jackson, J., concurring).

[159] 326 U.S. 1 (1945).

[160] See also, *Metro Broadcasting, Inc.* v. *FCC*, 110 S.Ct. 2997, 2010 (1990); *FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978); *Lorain Journal* v. *United States*, 342 U.S. 143 (1951); *United States* v. *Paramount Pictures*, 334 U.S. 141 (1948); *Committee for an Independent P-I* v. *Hearst*, 704 F.2d 467, 482–83 (9th Cir. 1983).

[161] See, Testimony of James Hedlund, "The Cable Consumer Protection Act of 1989," pp. 197–201, 207; Testimony of Edward Fritts, "Must Carry," p. 88; Comments of the National Association of Broadcasters in MM Docket No. 89-600, March 1, 1990, Exh. 5; Reply Comments of the National Association of Broadcasters in MM Docket No. 89-600, April 2, 1990, at 24–31; see also, "1990 Cable Report," 5 FCC Rcd. 5037–39, 5041, 5043, 5045; Cable System Broadcast Signal Carriage Survey, Staff Report by the Policy & Rules Division, Mass Media Bureau, Sept. 1, 1988.

able, local broadcasting which was central to the scheme created by the 1934 Act.

The Committee has concluded that carriage on cable systems is essential for local television stations to have access to viewers.

> The central dilemma of cable is that it has unlimited capacity to accommodate as much diversity and as many publishers as print, yet all of the producers and publishers use the same physical plant * * * If the cable system is itself a publisher, it may restrict the circumstances under which it allows others also to use its system.[162]

The Congress has the power under the Commerce Clause to ensure that operators of communications facilities not use them in a discriminatory fashion against competitors.[163] The requirement that local signals be carried, therefore, is not at all based on the content of those signals, but instead to counterbalance cable systems' commercial or economic incentives to exclude such signals.[164]

The First Amendment also supports government regulations intended to promote a diversity of voices, even if some incidental loss of editorial discretion results.[165] Local signal carriage regulations ensure that cable subscribers receive a diversity of voices, not just the signals chosen by the cable operator. This is consistent with longstanding communications policies which seek to avoid control by one person over all of the voices available to a community. At the same time, by limiting the number of cable channels which must be used for carrying local signals, and by permitting the cable operator to choose which local signals a system will carry in fulfillment of its obligations, S. 12 preserves the cable operator's editorial discretion. The bill also ensures adequate opportunity for cable program services to gain access to cable audiences. The evidence presented to the Committee on developments in the cable industry indicates that cable system channel capacity is likely to continue to expand, diminishing any incidental restrictions of the availability of cable channels for nonbroadcast programming.[166]

The Committee believes, therefore, that the signal carriage and associated channel positioning regulations it proposes are a reasonable exercise of Congress' power under the Commerce Clause to promote diversity and ensure fair competition in the video marketplace.

Neither the *Quincy* nor the *Century* decisions considered the application of the *Associated Press* doctrine. Instead, applying the test

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[162] de Sola Pool, "Technologies of Freedom," 168 (1983).

[163] See, *United States* v. *Western Electric Co.*, 673 F. Supp. 525 (D.D.C. 1987), *remanded on other grounds*, 900 F2d 283 (D.C. Cir. 1990); see also *United States* v. *CAB*, 766 F.2d 1107 (7th Cir. 1985).

[164] Notably, similar arguments have been made by cable systems to gain access to facilities essential to their reaching subscribers. See, *Community Communications Co.* v. *Boulder*, 455 U.S. 70 (1982); 47 U.S.C. s 224 (regulating the rates which can be charged cable systems for pole attachments). Furthermore, longstanding policies under the Communications Act bar the use of communications facilities to gain an unfair competitive advantage. See, e.g. *Mansfield Journal Co.* v. *FCC*, 180 F.2d 28 (D.C. Cir. 1950).

[165] *Associated Press*, 326 U.S. at 19–20; *FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978).

[166] *See*, "To Fill or Not to Fill," *CableVision*, Feb. 11, 1991 at 24.

established in the *United States* v. *O'Brien*,[167] the *Quincy* and *Century* courts held that the FCC had failed to demonstrate the existence of a substantial governmental interest to which its signal carriage regulations related, and that the regulations were not narrowly tailored responses to the interests which the FCC did identify. Even if subjected to such higher First Amendment scrutiny, the signal carriage regulations will pass constitutional muster.

The Committee is confident that must carry regulations would not be subjected to the most stringent First Amendment analysis, even if it were to be concluded that cable systems are entitled to the same First Amendment protection as print publishers. The core of such First Amendment protection is a bar against regulation directed to suppressing free expression.[168] In making that determination, the issue is whether "the government has adopted a regulation of speech because of disagreement with the message it conveys."[169]

> The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not on others. See, *Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41, 47–48 (1986). Government regulation of expressive activity is content-neutral so long as it is "justified without reference to the content of the regulated speech.[170]

Local signal carriage regulation clearly does not fall within the scope of this most exacting scrutiny. The application of the must carry rules does not depend on whether a cable operator or cable programmer expresses a particular viewpoint or opinion.[171] It also does not apply because of the particular viewpoint or ideas expressed by the broadcasters which may be entitled to carriage. It has nothing to do with the content of any speech and the application of signal carriage rules is not intended to suppress any ideas. Indeed, the great majority of the capacity of any cable system—and the cable operator's discretion to place on those channels the message of its choice—is unaffected by the signal carriage regulations.

Because any effect of the must carry regulations on protected speech is incidental to their purpose, the only applicable First Amendment standard (assuming, arguendo, that *Associated Press* would not be controlling) would be *O'Brien*. The question posed by *O'Brien* is whether "a sufficiently important government interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."[172] The Supreme Court iden-

[167] The analogy between must carry regulations and the type of regulation dealt with in *O'Brien* is questionable. *O'Brien* dealt with the validity of an "incidental" impact on speech of government regulation of nonspeech conduct that is combined with expressive activity. Economic regulation such as that contemplated for the cable industry is quite different from the regulations which have generally been analyzed under *O'Brien*.

[168] *Texas* v. *Johnson*, 109 S.Ct. 2533, 2538–39 (1989); *Boos* v. *Barry*, 485 U.S. 312, 321 (1988).

[169] *Ward* v. *Rock Against Racism*, 109 S.Ct. 2746, 2754 (1989), citing, *Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288, 295 (1984).

[170] *Ward*, 109 S.Ct. at 2754, quoting, *Community for Creative Non-Violence*, 468 U.S. at 293.

[171] It is worth noting that even the statute held unconstitutional in *Tornillo* only applied after a newspaper had taken an editorial stand, thus penalizing it for expressing a particular idea or concept. No analogy could be drawn between the structural regulations created by S. 12 and the penalties for editorial expression which were at issue in *Tornillo*.

[172] 391 U.S. at 376.

tified four subsidiary questions to be considered in making that determination: (a) whether the regulation "is within the constitutional power of the Government"; (b) whether it "furthers an important or substantial governmental interest"; (c) whether that "interest is unrelated to the suppression of free expression"; and (d) whether the "incidental restriction * * * is no greater than is essential to the furtherance of that interest." [173] The *Quincy* and *Century* decisions focused on the second and fourth inquiries—whether the must carry rules furthered a substantial governmental interest, and whether their impact was reasonably limited to achieving that purpose.[174]

Under the first question of the *O'Brien* test to S. 12, there is no doubt of the constitutional power of the government to regulate cable television under the Commerce Clause.[175]

The second inquiry divides itself into two subparts: are the governmental interests which are invoked to support the regulations substantial ones, and do the regulations further those interests. The interests which support the local signal carriage regulations can be summed up as: (1) preserving the benefits of local television service, particularly over-the-air television service; (2) promoting the widespread dissemination of information from diverse sources; and (3) promoting fair competition in the video marketplace.

That these interests are substantial cannot be seriously questioned. Section 307(b) of the 1934 Act which directs the FCC to ensure an equitable distribution of communications facilities across the country was enacted to promote the availability of diverse local service. This allocation system was central to the creation of the American system of free over-the-air broadcasting. Recognizing the importance of localism, the Supreme Court concluded that "[t]here can be little doubt that the comprehensive regulations developed over the past 20 years by the FCC to govern signal carriage by cable television systems reflect an important and substantial federal interest." [176] Indeed, even *Quincy* did not suggest that preservation of local service was not a substantial governmental interest.[177]

The importance of the governmental interest in promoting the greater diversity of views available to the public was central to the Supreme Court's decision in *Metro Broadcasting, Inc.* v. *FCC*. The Court concluded that "the interest in enhancing broadcast diversity is, at the very least, an important governmental objective * * *." [178]

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[173] Id. at 377.

[174] The court pointed out in Quincy: "An agency typically has broad discretion over the manner in which it endeavors to effect its public interest objectives. Once we have determined that the agency action falls within the wide range of constitutionally permissible regulatory options, our task is at an end." 768 F.2d at 1459 (footnote omitted). Of course, the discretion afforded Congress in determining whether its chosen means are tailored to its legitimate ends is even greater than that afforded the FCC. *Metro Broadcasting, Inc.* v. *FCC*, 110 S.Ct. 2997, 3008–09 (1990).

[175] *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968); see, *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691 (1984).

[176] *Capital Cities Cable*, 467 U.S. at 714; see, *Chicago Cable Communications* v. *Chicago Cable Commission*, 879 F.2d 1540, 1549–50 (7th Cir. 1989).

[177] 768 F.2d at 1459.

[178] 100 S.Ct at 3010.

Similarly, the promotion of competition has been accepted as a substantial governmental interest for at least a century since the passage of the Sherman and the Interstate Commerce Acts, a proposition implicit in the *Associated Press* line of decisions. Moreover, the ability of cable systems to retransmit local programming both without any copyright liability and without any responsibility to carry a complement of such signals on reasonable conditions is both unfair and inconsistent with the balance contemplated when the compulsory license was adopted.[179]

These interests are furthered by the signal carriage requirements in the bill. The preservation of local service is advanced by signal carriage regulations in several ways. The most obvious, and the only one addressed in *Quincy,* is maintaining the existence of local broadcast stations and their ability to serve the public. It needs no elaboration that commercial television stations are dependent on advertising revenues for their ability to provide programming, and thus need to have viewers whom advertisers wish to reach. The threat to local broadcasters is real. The FCC's 1988 survey showed that many cable systems, in only the first year after the *Century* decision, were dropping and repositioning hundreds of television stations. The evidence presented to the Committee convincingly demonstrates that cable subscribers will not watch stations that are not carried on the cable system. Further, the lack of stable channel positions on a cable system, even if a station continues to be carried, leads to a steady audience loss by local broadcasters.

Broadcasters which lose substantial portions of their audience will be unable to continue to provide local public service programming, and may be forced to discontinue service altogether. That would not only lead to diminished diversity of opinion, but also to reduced competition in the local video services, contrary to the strong governmental interest in fostering active competition.

The almost 40 percent of American television households which do not have cable service will, as a consequence, be deprived of local program service and the diverse voices that existing local television stations provide. They will either lose this diversity entirely or be forced to become cable subscribers, effectively losing the benefits of the system of free local broadcasting which is at the core of the 1934 Act.

Equally important is the impact of denial of carriage on cable subscribers, a factor ignored in the *Quincy* decision. If local television stations are not carried on their cable system, cable subscribers will be denied access to federally-allocated broadcast stations, and will be deprived of the diversity of voices Congress intended them to have under the 1934 Act. Instead, the programs available to them will be entirely chosen by one cable operator, contrary to the fundamental First Amendment interest in promoting the availability of programming and opinions from diverse sources. Moreover, cable systems are not subject to the wide range of public service obligations imposed on local broadcast stations.[180] Carriage and

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[179] See, "1990 Cable Report," 5 FCC Rcd. at 5039–40, 5041–42.

[180] See, e.g., *Metro Broadcasting,* 110 S.Ct. at 3019–22.

channel positioning regulations, therefore, will further the substantial governmental interests which are involved in the television market.

Whether the access of cable subscribers to any particular viewpoint or the preservation of any individual television station might be placed at risk in the absence of signal carriage regulations is not the issue in determining their constitutionality. "[T]he validity of the regulation depends on the relation it bears to the overall problem the government seeks to correct, not on the extent to which it furthers the government's interests in an individual case." [181] Moreover, we need not wait until widespread further harm has occurred to the system of local broadcasting or to competition in the video market before taking action to forestall such consequences. Congress is allowed to make a rational prediction of the consequences of inaction and of the effects of regulation in furthering governmental interests.[182] Ample evidence was presented to the Committee to support its conclusions that erosion of the local broadcast system has already occurred in the absence of signal carriage requirements and that regulatory action is needed to preserve the values served by the local broadcast system.

The second part of the *O'Brien* test is thus fully met by S. 12. The reasons why the signal carriage and channel positioning regulations meet the third test—that the regulation is unrelated to the suppression of free expression—have been discussed above. The remaining issue, and the other facet of the *Quincy* and *Century* decisions, is whether the regulations do not restrict free expression greater than necessary to achieve the governmental interests at stake. Here again, the decisions since *O'Brien* have emphasized the discretion permitted the government in achieving its ends.

> So long as the means chosen are not substantially broader than necessary to achieve the government's interest, . . . the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative.[183]

The governmental interests at issue here involve the preservation of the system of local television broadcasting and access to local television stations' programming by subscribers to cable television and the substantial minority of consumers who cannot or do not subscribe to cable television. The most effective means of fulfilling these objectives is certainly regulations requiring that cable systems devote a modest portion of their channel capacity to retransmitting local television signals.[184] Because potentially anti-

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[181] *Ward* v. *Rock Against Racism*, 109 S.Ct. at 2759; *Metro Broadcasting*, 110 S.Ct. at 3016–17; *United States* v. *Albertini*, 472 U.S. 675, 689 (1985); *Community for Creative Non-Violence*, 468 U.S. at 293.

[182] *Metro Broadcasting*, 110 S.Ct. at 3008–09, 3011; see *Albertini*, 472 U.S. at 689; *FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. at 796–97; cf. *Lewis* v. *United States*, 445 U.S. 55, 67 n. 9 (1980).

[183] *Ward*, 109 S.Ct. at 2758; *Albertini*, 472 U.S. at 689.

[184] We have noted earlier our conclusion that so-called "A/B switches" and outdoor antennas cannot and should not be relied on as providing a less restrictive means of achieving these governmental interests.

competitive carriage decisions by cable operators present the problem to which the must carry requirements respond, it is an appropriate exercise of Congressional authority to regulate directly the decisions in which Congress has a legitimate interest.[185]

Not only are the means employed in S. 12 directly related to the substantive evils which are Congress' concern, the specific requirements of the bill are tailored to ensure that, unlike the rules addressed in *Quincy,* they are not overly broad. First, the signal carriage regulations do not excessively restrict cable operators' discretion. The obligation to retransmit the signals of local commercial television stations is limited to only one-third of a system's usable channel capacity, leaving the majority of the channels to be programmed as the cable operator wishes and ensuring that cable programmers have an ample opportunity to have their programs carried. Systems with very limited channel capacity which serve only a few subscribers and, therefore, are not likely to be able to increase their channel capacity are permanently exempted from mandatory carriage regulations. The FCC's original must carry rules, by contrast, required carriage of all local signals regardless of the portion of a cable system's capacity that might be occupied.

Further, if there are more local signals than can be accommodated in the channels allocated to carriage of local stations, the cable system retains the discretion to choose which of the local signals it will carry. If there are duplicate signals, the cable operator is not obligated to carry more than one signal, since carriage of duplicate signals would do little to increase the diversity of local voices.

The signals which qualify for carriage are also reasonably related to the goals the Committee has identified. Television stations are only entitled to be carried on cable systems within a 50-mile radius. That encompasses the area in which most television stations' public service programming is directed. By the same token, stations that are close to a cable system are the ones which are most likely to compete with the cable system for local advertising, and thus are the stations which the cable system has the greatest financial incentive to drop from carriage. The same motive is likely to exist where more than one affiliate of a network is qualified for carriage—the closest affiliate is more likely to compete with the cable system; thus the bill requires carriage for that affiliate.

Finally, the channel positioning requirement responds to the governmental interest in promoting strong competition between local television stations and cable systems. Unless local stations are guaranteed channel stability, cable systems have the incentive to reposition their signals, which compete with the cable system for viewers and advertising, to channels which are less desirable and which viewers may have a hard time locating. For the same reason, the requirement that cable systems give affected broadcasters timely notice for any changes in carriage of channel positioning prevents anticompetitive activity by cable systems without imposing any significant hardship.

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[185] See, *City Council* v. *Taxpayers for Vincent,* 466 U.S. 789, 810 (1984). In Metro Broadcasting, the Supreme Court observed that communications policies had never placed exclusive reliance on the marketplace to ensure that the public's needs are served. 110 S.Ct. at 3012.

The signal carriage and channel positioning regulations, therefore, meet the fourth prong of the *O'Brien* standard—their scope is reasonably related to the problem the Congress seeks to remedy. If the *O'Brien* test should be found applicable, the Committee is satisfied that these provisions will not meet the fate of the must carry rules in *Quincy* and *Century*.

Without congressional action, the Committee concludes that the role of local television broadcasting in our system of communications will steadily decline as cable systems take upon themselves the right, in effect, to revamp the Federal broadcast allocation system. Reasonable signal carriage and channel positioning regulations are an important step in ensuring that the local broadcast system which has served the public interest will continue to thrive and that a broad array of views and programs from diverse, competitive, and antagonistic sources is available to all television households, regardless of whether they subscribe to cable service. The carriage and channel positioning provisions of S. 12 are carefully tailored to achieve these goals and are entirely consistent with the Constitution.

## Legislative History

The Committee began its examination of the cable television industry with three hearings in June 1989 on *Media Ownership: Diversity and Concentration*. This was followed by two hearings in October 1989: *Commercial Time on Children's Cable TV* and *Must Carry*. On November 15, 1989, Senator Danforth introduced S. 1880. On November 16 and 17, 1989, the Committee held two hearings on *Oversight of Cable TV* (and the 1984 Act). In early 1990, a hearing was held on the FCC's reinstatement of the "syndicated exclusivity" rule. Finally, the Committee held two hearings in March and April 1990 on S. 1880 and the Committee Staff Draft Substitute. On June 7, 1990, the Committee, by a vote of 18–1, ordered S. 1880 reported favorably, adopting an amendment in the nature of a substitute.

On January 14, 1991, Senator Danforth introduced S. 12; Senator Hollings, Inouye, Gore, Gorton, Metzenbaum, Lieberman, Hatch, and Bumpers cosponsored this legislation. A hearing was held on March 14, 1991. On May 14, 1991 the Committee, by a vote of 16–3, ordered S. 12 reported favorably, adopting an amendment in the nature of a substitute. The substitute included the following changes to S. 12 as originally introduced: a prohibition on rate discrimination; provisions to encourage local franchises to award second franchises; clarification of the remedies in the access to programming provision; and the addition of language giving broadcasters the option of choosing retransmission or must-carry. The Committee also approved an amendment permitting must-carry for low power television stations under certain conditions.

## Summary of Major Provisions

### 1. RATE REGULATION

*When are rates regulated?* Rate regulation is permitted only in the absence of effective competition. Rate regulation sunsets automatically where there is effective competition.

Effective competition is achieved when there is competition from both another "multichannel provider" (such as a competing cable operator, microwave or satellite system) and a sufficient number of over-the-air broadcast signals. The definition of "effective competition" states that a distributor which is owned or controlled by the cable system operator is not deemed to be a "competitor" to the cable system operator.

*Who regulates what?* The FCC establishes guidelines for regulation of the basic tier (the tier of service with broadcast stations) and the equipment used for the provision of that service. Rates for basic service and related equipment must be "reasonable."

A franchising authority (city, county, or State) can obtain jurisdiction over basic rate regulation by certifying to the FCC that it will follow the FCC's procedures and standards. Otherwise, rate regulation authority remains with the FCC. To limit the ability of cable operators to evade regulation by rearranging ("retiering") their service offerings, if fewer than 30 percent of a cable operator's customers subscribe to only the basic tier, the rates for the next tier to which 30 percent subscribe can be regulated.

The FCC can regulate rates for extended basic services, such as CNN and ESPN, if it receives a complaint that rate increases have been unreasonable.

Finally, the substitute amends the provision that permitted franchising authorities to prohibit discrimination among cable customers to make it illegal to discriminate in the rates charged cable subscribers.

### 2. MUST CARRY AND CHANNEL POSITIONING

S. 12 includes a provision that gives broadcasters retransmission consent rights. S. 12 gives broadcasters the right to control the use of their signals. One year after enactment, every broadcaster will have to elect whether it wants to avail itself of must-carry or assert its retransmission rights. Thereafter, broadcasters will have the right to make the election every three years.

The must-carry provisions include special must-carry provisions sought by public broadcasters and agreed to by the cable industry last Congress. Essentially, these agreements require cable operators to carry up to three public broadcast stations, where those stations are not substantially duplicative of one another.

In addition, the legislation requires carriage of all qualified local broadcasters not exercising their retransmission rights and limits the discretion of cable systems to shift channel positions for broadcast signals. It requires cable systems to devote up to one-third of their capacity to broadcast stations. The substitute adds some of the provisions included in the agreement that the broadcasters and cable reached last Congress. For example, cable operators do not have to carry two stations that are duplicative of one another.

S. 12 requires cable operators to carry LPTV stations that originate a substantial amount of local programming, if there are not sufficient full-power broadcast stations to fill the number of channels required to be made available under must-carry.

### 3. CABLE CONCENTRATION AND VERTICAL INTEGRATION

The FCC is required to conduct a rulemaking to prescribe regulations on (1) the number of subscribers a cable operator can reach nationwide, and (2) the number of channels that can be occupied on a cable system by programmers affiliated with the cable operator.

### 4. ACCESS TO PROGRAMMING/PROGRAMMING DISTRIBUTION

National and regional programmers that are affiliated with cable operators are barred from unreasonably refusing to deal with distributors. They also are barred from discriminating in the prices, terms, and conditions of making programming available if that action would impede retail competition. They have an affirmative duty to deal with purchasing groups, such as cable cooperatives, on terms similar to those given to cable systems, but can consider certain factors such as credit worthiness. In addition, a programmer cannot give volume discounts to program distributors unless they are justified by costs or good-faith efforts to meet the prices of competitors. Satellite carriers are barred from unreasonably refusing to deal with distributors and may not discriminate in price, terms, and conditions among distributors to home satellite earth stations, or between such distributors and other multichannel video distributors.

Cable operators are prohibited from requiring a financial interest in a program service as a condition of carriage or requiring exclusive rights against other distributors as a condition of carriage. In addition, in the substitute, the remedies provision has been clarified to provide that cable operators which violate this provision can be required to carry a particular programming service.

### 5. LIMITATIONS ON FRANCHISING AUTHORITY LIABILITY

A franchising authority may not be sued for monetary damages or alleged violations of a cable operator's First Amendment rights when the alleged violation is the result of the franchising authority carrying out its authority under title VI of the 1934 Act. In such cases, they may be subject only to injunctive relief, declaratory relief, or attorneys' fees. Pending and future suits alleging a First Amendment violation are covered by the provision, and judicial orders regarding suits alleging such violations must be final before a cable operator can allege a second First Amendment violation.

### 6. LEASED ACCESS

The Act of 1934 as amended by the 1984 Act allows anyone to lease a channel from a cable company. This right of access has been used rarely because the cable operator itself can set the rate for a leased channel. Under S. 12, the FCC is given authority to establish rates, terms, and conditions for access to cable channels. The number of channels to be set aside for leased commercial access is the same as in the current 1934 Act.

7. CABLE OWNERSHIP OF POTENTIAL COMPETITORS

A cable operator cannot own an MMDS system or a SMATV system in its franchising area. However, waivers can be sought. When 10 percent of the nation receives some form of direct satellite video service, the FCC is required to impose limitations on the ownership of such services by cable operators.

8. CUSTOMER SERVICE

The FCC is directed to establish customer service standards. Franchising authorities may set customer service standards which exceed the FCC's standards. Cable operators may challenge a franchise authority's tougher standards at the FCC. Existing State laws, municipal ordinances and agreements that set customer service standards tougher than the standards established by the FCC are grandfathered.

9. TECHNICAL STANDARDS

The FCC is required to establish minimum technical standards for the operation of cable systems.

10. FRANCHISE RENEWAL STANDARD

The substitute allows the franchising authority to consider in renewal proceedings: (1) whether the cable operator has substantially complied with the material terms of the existing franchise and with applicable law throughout the franchise term; and (2) the level of service provided over the system throughout the franchise term.

The substitute also provides that a franchising authority may deny a renewal if the cable operator has had notice and an opportunity to cure its failure to comply substantially with the franchise agreement, unless the franchising authority has waived its right to object in writing. The substitute further provides that any lawful action to revoke a cable operator's franchise for cause shall not be negated by the initiation of renewal proceedings by the cable operator.

11. TELEVISION SETS

The FCC is given the authority, if it demonstrates the technical and economic feasibility, to require that TV sets are able to switch back and forth among different video distribution media, and as over-the-air broadcast, direct broadcast satellite, and cable.

12. HOME WIRING

The FCC shall establish rules and procedures to permit home owners to retain their wiring when they terminate their cable service.

13. SECOND FRANCHISES

The substitute adds a new provision to S. 12 as introduced that (1) prohibits franchising authorities from unreasonably refusing to award additional franchises, and (2) prohibits franchising authorities from requiring that the second franchisee build the system in an unreasonably short period of time.

### Estimated Costs

In accordance with paragraph 11(a) of rule XXVI of the Standing Rules of the Senate and section 403 of the Congressional Budget Act of 1974, the Committee provides the following cost estimate, prepared by the Congressional Budget Office:

June 27, 1991.

Hon. Ernest F. Hollings,
*Chairman, Committee on Commerce, Science, and Transportation, U.S. Senate, Washington, DC.*

Dear Mr. Chairman: The Congressional Budget Office has prepared the attached cost estimate for S. 12, the Cable Television Consumer Protection Act of 1991. Enactment of S. 12 would not affect direct spending or receipts. Therefore, pay-as-you-go procedures would not apply to the bill.

If you wish further details on this estimate, we will be pleased to provide them.

Sincerely,

Robert D. Reischauer.
*Director.*

#### CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

1. Bill number: S. 12.
2. Bill title: Cable Television Consumer Protection Act of 1991.
3. Bill status: As ordered reported by the Senate Committee on Commerce, Science, and Transportation, May 14, 1991.
4. Bill purpose: S. 12 would require the Federal Communications Commission (FCC) to develop and enforce regulations governing various operations of the cable television and satellite broadcast industries.

The bill would define the conditions under which cable systems would be deemed to be subject to "effective competition," and required the FCC to review the reasonableness of retail rates charged by those not subject to competition. This ratesetting authority could be delegated to state or local franchising authorities under certain conditions. The FCC would also have to consider appeals filed by operators, franchising authorities, or subscribers, and review rates for nonbasic and programming services.

Under S. 12, the FCC would establish and administer guidelines for other aspects of the cable and satellite industries, including: distribution of video programming; terms and conditions for leased commercial access; standards for customer service; limitations on ownership, control, and utilization; requirements for signal carriage, television equipment, and home wiring; and technical standards for signal quality, including high-definition television. The bill also would regulate certain direct broadcast satellite systems, and establish a special study panel to make recommendations on related programming issues.

Other provisions in the bill would amend the procedures and criteria for awarding and renewing franchises, and would limit the legal liability of franchising authorities.

5. Estimated cost to the Federal Government:

[By fiscal year, in millions of dollars]

| | 1992 | 1993 | 1994 | 1995 | 1996 |
|---|---|---|---|---|---|
| Estimated authorization level | 4 | 15 | 7 | 4 | 4 |
| Estimated outlays | 4 | 14 | 7 | 4 | 4 |

The costs of this bill fall within budget function 370.

Basis of Estimate: For the purposes of this estimate, it is assumed that S. 12 will be enacted late in fiscal year 1991, and that the necessary funds would be appropriated for 1992 and subsequent years. Outlays have been estimated on the basis of historical spending patterns.

CBO estimates that regulating cable rates would cost the FCC an estimated $2.8 million in fiscal year 1992 and $12.9 million in 1993, after which costs would decline to about $2.4 million by 1995. The rulemakings, studies, and other regulatory actions required by the bill would increase FCC spending by an estimated $1.6 million in 1992, and similar amounts each year thereafter.

Most of the costs of this bill reflect the additional FCC staff needed in the first two years to implement the new regulatory scheme for cable rates. Based on information from the Commission, we assume that 13,000 franchising authorities would request ratemaking authority (representing about half of the community systems subject to rate regulation), leaving the FCC responsible for reviewing the rates of the other half.

Our estimate assumes that each request for delegation would require a moderately detailed review. The lead time needed for franchising authorities to submit requests suggests that the bulk of the applications would be completed by the second year. Similarly, we assume that the FCC's initial review of rates for systems under its jurisdiction would involve a moderate effort, beginning after the rulemaking proceedings have been completed, probably late in fiscal year 1992. The FCC's costs could deviate from this estimate depending on the level and pace of the Commission's review of delegation requests and cable rates.

6. Pay-as-you-go considerations: The Budget Enforcement Act of 1990 sets up pay-as-you-go procedures for legislation affecting direct spending or receipts through 1995. CBO estimates that enactment of S. 12 would not affect direct spending or receipts. Therefore, pay-as-you-go procedures would not apply to the bill.

7. Estimated cost to State and local governments: S. 12 would allow the FCC to cede responsibility for regulating basic cable rates to state and local franchising authorities. These authorities would not be required to assume this responsibility, but could do so if they met certain guidelines. Those opting to regulate rates would incur additional costs to obtain and exercise this authority, but CBO estimates that the requirements in the bill are not likely to result in significant costs for individual jurisdictions.

Based on information from the FCC, CBO expects that the Commission would cede ratemaking authority to approximately 13,000 state and local franchising authorities, mostly counties and municipalities. Although many of these entities could regulate certain rates under the FCC's June 13, 1991 redefinition of "effective competition," their exercise of that authority is not subject to FCC delegation or oversight. Thus, the procedural requirements for FCC delegation in S. 12 would apply to all states or localities seeking the ratemaking authority established by this bill.

We estimate that state and local franchising authorities would spend, in aggregate, about $10 million over the 1992–1994 period to process delegation requests, if their costs were similar to those estimated for the FCC. Once approved by the FCC, we estimate that franchising authorities nationwide would spend an average of an additional $1 million to $2 million annually to oversee rates, depending on the extent and frequency of reviews. This estimate reflects the assumption that about 60 percent of the 13,000 franchising authorities will begin reviewing rates under the FCC's June 13 rule, even if this bill is not enacted. Because interest in cable rates may be more intense at the local level, it is possible that states and localities would spend somewhat more than this.

8. Estimate comparison: None.

9. Previous CBO estimate: None.

10. Estimate prepared by: Marjorie Miller.

11. Estimate approved by: C. G. Nuckols, for James L. Blum, Assistant Director for Budget Analysis.

## Regulatory Impact Statement

In accordance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee provides the following evaluation of the regulatory impact of the legislation, as reported.

S. 12, as reported, contains a series of FCC requirements and will subject the cable industry to greater oversight by the Government. The rate regulation provision in the legislation overlaps to some extent with current law in providing for the regulation of basic cable service. This service is now largely unregulated. The FCC has recently promulgated rules that would subject a limited number of cable systems to rate regulation by franchising authorities. The legislation makes it certain that all cable systems that face no true competition will have their basic service rates regulated. The rate regulation provision also requires the FCC, upon complaint, to ensure that rates for most other cable programming services are not unreasonable. This will impose a greater regulatory burden on the FCC and cable operators not subject to effective competition. The Committee believes the FCC should carry out this obligation consistently with the policies of the legislation and with the least amount of regulation necessary to accomplish this goal.

The legislation's nondiscrimination in programming provision subjects cable programmers to requirements to ensure they will not act anticompetitively. The FCC is required to adopt rules to carry out this provision and must oversee complaints. The Committee believes that there will be a greater regulatory burden on the FCC because of this provision, but since it is uncertain how many complaints will be filed and how quickly the FCC can resolve them, the extent of the regulatory burden cannot be precisely calculated.

The legislation requires the FCC to conduct numerous rulemakings: for leased access channel rates, terms, and conditions; to establish horizontal and vertical integration limitations; to ensure there are adequate customer service standards; to establish minimum technical service requirements; and to establish rules for home wiring. While the FCC is now gathering information on the integration issues, all of these rulemakings will have to be initiated and completed within a relatively short time, about one year. The Committee recognizes this will require the FCC and outside parties to expend many resources. After the FCC adopts rules, the cable industry will have to comply with them. Many cable companies are already meeting some, if not most, of these requirements. However, there will still be increased regulatory oversight of the cable industry. The Committee expects this oversight to be kept to the minimum necessary to carry out the purposes and policies of the legislation.

## SECTION-BY-SECTION ANALYSIS

### SECTION 1—SHORT TITLE

This section states that the bill's short title is the "Cable Television Consumer Protection Act of 1991."

### SECTION 2—FINDINGS

This section contains congressional findings, summarized as follows:

(1) cable rates have increased significantly;

(2) without a sufficient number of local television stations and another multichannel video programming distributor, cable systems are not subject to effective competition;

(3) there is a substantial governmental and First Amendment interest in promoting a diversity of views through multiple technology media;

(4) the cable industry has become a dominant nationwide video medium;

(5) the cable industry has become highly concentrated;

(6) cable rates other than for basic service should be regulated only in extraordinary circumstances, which may include the need to control undue market power;

(7) the cable industry has become more vertically integrated into programming, which may harm competing programmers;

(8) there is a substantial governmental and First Amendment interest in ensuring that cable subscribers have access to local noncommercial educational stations to further education and promote diversity and alternative telecommunication services;

(9) there is a substantial governmental interest in having all nonduplicative public television stations available on cable systems to: promote education and public service programming; ensure the maximum use of the Federal contributions to public broadcasting; and ensure that citizens have access to the public

service programming responding to their needs and interests which is provided by the public broadcast stations which they help to fund;

(10) there is a substantial governmental interest in ensuring the continuation of locally originated television broadcasting;

(11) television stations are an important source of local programming, especially for local news and public affairs programming;

(12) television broadcasting is especially important for those who cannot afford to pay for video programming;

(13) over the past decade, the market share of cable television has increased, while that of television broadcasting has decreased;

(14) cable television and television broadcasting increasingly compete for advertising, and more advertising will shift to cable television as more households subscribe;

(15) by carrying television broadcast stations, cable operators may increase the viewership of these stations at the expense of programming aired exclusively on cable systems;

(16) as a result, cable operators have an incentive not to carry television broadcast stations, which may jeopardize the future of these stations and the local programming they air;

(17) subscribers to cable television often do not have the equipment necessary to make it easy to switch between viewing cable television and television broadcast signals over-the-air;

(18) cable systems are often the single most efficient distribution system for television programming;

(19) broadcast programming is the most popular programming on cable systems and, as a result, cable operators and programmers derive substantial benefits from the carriage of local broadcast signals; since cable systems can take broadcast signals without the consent of the broadcasters, cable systems now are effectively subsidized by broadcast stations;

(20) franchising authorities had their authority to oversee the cable industry limited by the 1984 Act, especially during franchise renewals;

(21) given the lack of clear guidelines in applying the First Amendment to cable franchise decisions, franchising authorities are unreasonably exposed to liability for monetary damages under the Civil Rights Acts; and

(22) cable systems should be encouraged to carry those low power television stations that carry a substantial amount of local programming.

SECTION 3—STATEMENT OF POLICY

This section states that it is the policy of Congress in this legislation to:

(1) promote information diversity;

(2) rely on the marketplace, to the maximum extent;

(3) ensure that cable systems can continue to grow and develop;

(4) regulate cable system rates where effective competition does not exist; and

(5) ensure that consumers and programmers are not harmed by undue market power of cable operators.

SECTION 4—DEFINITIONS

This section amends section 602 of the 1934 Act to add, among others, the following:

(1) The term "activated channels" means those channels engineered at the headend of a cable system for the provision of services generally available to residential cable subscribers, regardless of whether such services actually are provided, including access channels.

(3) The term "available to a household" or "available to a home" when used in reference to a multichannel video programming distributor means a particular household which is a subscriber or customer of the distributor or a particular household which is actively and currently sought as a subscriber or customer by a multichannel video programming distributor and which is capable of receiving the service offered by the multichannel video programming distributor.

(6) The term "cable community" means all of the households in the geographic area in which a cable system is authorized by a franchising authority to provide cable service, regardless of whether the cable operator is actually providing cable service to such households.

(14) The term "headend" means the location of any equipment of a cable system used to process the signals of television broadcast stations for redistribution to subscribers.

(15) The term "multichannel video programming distributor" means a person who makes available for purchase, by subscribers or customers, multiple channels of video programming. The term "direct broadcast satellite service" used in this definition is not intended to be limited only to the FCC's authorized Direct Broadcast Satellite service, but is intended to include all satellite transmissions direct to home receivers regardless of frequency, including C-band and Kμ-band. Examples of multichannel video programming distributors include wireless cable and satellite master antenna television.

(18) The term "principal headend" means—(A) the headend, in the case of a cable system with a single headend, or (B) in the case of a cable system with more than one headend, the headend designated by the cable operator to the FCC as the principal headend. Cable systems may not designate their principal headend in a manner which would evade the signal carriage obligations created by this section, such as specifying as the principal headend a location unnecessarily far removed from the reference points of local broadcast stations. The Committee intends that the FCC take any needed steps to prevent such abuses or disruption caused by repeated changes in cable systems' designation of the location of their principal headend.

(20)(A) The term "local commercial television station" means any commercial television station licensed and operating on a channel regularly assigned to its community by the FCC that, with respect to a particular cable system, is licensed to a community whose reference point is within 50 miles of the principal headend and that delivers to the principal headend either a signal level of −45 dBm (UHF) or −49 dBm (VHF) at the input terminals of the signal processing equipment or a baseband video signal. Signals that would be considered distant signals under section 111 of title 17, U.S. Code, shall be considered local commercial television stations upon agreement by the station to pay the cable operator the copyright costs of carrying the station.

(B) The term "local commercial television station" does not include television translator stations and other passive repeaters.

(21) The term "qualified non-commercial educational television station" means any television broadcast station which under FCC rules is licensed by the FCC as a noncommercial educational television station and owned and operated by a public agency or a nonprofit private entity, or is owned or operated by a municipality and transmits only noncommercial programs for educational purposes, and which has as its licensee an entity which is eligible to receive a community service grant from the Corporation for Public Broadcasting (CPB) pursuant to section 396(k)(6)(B) of the 1934 Act. Section 396(k)(6)(B) of the 1934 Act charges the CPB to recognize public television stations that serve the public interest by providing noncommercial, educational programming to local audiences. Through the grant process, the CPB carries out the intent of Congress to "encourage and facilitate the expansion and development of noncommercial broadcasting and program diversity".[186] By incorporating the public interest principles already contained in the 1934 Act, this definition provides stations with substantial incentive to provide distinctive, unduplicated services that meet the needs and interests of their local communities.

A "qualified" station also includes any translator which operates at five watts of power or higher and rebroadcasts the signal of a qualified noncommercial educational television station. Translators are particularly important to rural areas than are located far from the principal communities of the main station. Including translators in this definition ensures carriage by cable systems in remote areas not served by the primary public television licensee. It is the intent of this legislation that translators qualifying for carriage should be serving the local community served by the cable system. In addition, the translator must deliver an adequate signal to the cable headend. (22) The term "qualified low power station" means any station that meets the rules for LPTV stations set forth in 47 C.F.R. part 74; and (a) meets the minimum number of broadcast hours set forth in 47 C.F.R. part 73 for television broadcast stations and a significant part of their programming (a) an amount to be determined by the FCC) is locally originated and produced; (b) meets all of the obigations imposed on television broadcast stations in 47 C.F.R. part 73 with respect to the broadcast of nonentertainment programming; programming and rates involving political candidates, election issues, controversial issues of public importance,

[186] Public Broadcasting Act of 1967, P.L. 90–129, S. Rep. No. 222, at 6 (1967).

editorials, and personal attacks; children's programming; and equal employment opportunity; (c) complies with the interference regulations consistent with their secondary status purusant to 47 C.F.R. part 74; (d) the station is located within 35 miles of the cable's principal headend, or no more than 20 miles if the station is located in one of the largest 50 markets and delivers a signal level of −45 dBm for UHF and −49 dBm for VHF stations to input terminals at the cable headend.

(25) The term "usable activated channels" means activated channels of a cable system, except those channels whose use for the distribution of broadcast signals would conflict with technical and safety regulations as determined by the FCC.

(26) The term "video programmer" means a person engaged in the production, creation, or wholesale distribution of a video programming service for sale. This term applies to those video programmers which enter into arrangements with cable operators for carriage of a programming service. For example, the term "video programmer" applies to Home Box Office (HBO) but not to those persons who sell movies and other programming to HBO. It applies to a pay-per-view service but not to the supplier of the programming for this service.

SECTION 5—REGULATION OF RATES

This section amends section 623 of the 1934 Act as follows:

Section 623(a) provides that no governmental authority can regulate the rates for the provision of cable service except to the extent provided in section 623. In addition, franchising authorities may regulate the rates for the provision of cable service, or any other communications services provided over a cable system, but only to the extent provided in section 623.

In the analysis of this section, when the Committee discusses the regulation of rates, it is referring to the retail rates charged subscribers. It does not refer to the wholesale rates paid to programmers by cable oeprators.

Section 623(b)(1) provides that the FCC shall regulate the rates, terms, and conditions for basic cable service on cable systems not subject to effective competition to ensure these rates are reasonable. The FCC's authority shall also extend to the rates, terms, and conditions for installation or rental of equipment, such as converters and remote controls, used for the receipt of basic cable service. If fewer than 30 percent of all subscribers to the cable system subscribe only to basic cable service, then the FCC may regulate the rates of the next lowest priced service tier subscribed to by at least 30 percent of the system's customers.

The Committee recognizes that there is no history of establishing rates for cable service that is analogous, for example, to the process used in the telephone industry. This provision, therefore, gives the FCC broad discretion to ensure rates are reasonable. The FCC can establish rates by broad category and only deal with individual systems when special circumstances exist. In overseeing rates, the FCC shall ensure they reflect the number of over-the-air signals and other programming carried on the tier as well as other local circumstances.

In establishing these rates, the Committee intends for the FCC to take into consideration any impact on cable rates of the exercise of retransmission rights by broadcast stations pursuant to section 325 of the 1934 Act. While the Committee recognizes that the exercise of retransmission rights may impose additional costs of operation on cable operators, the Committee intends for the FCC to ensure that these costs do not result in excessive basic cable rates.

Section 623(b)(2) provides that the franchising authority may obtain this jurisdiction to regulate cable rates from the FCC, upon written request, if it adopts laws and regulations conforming to FCC procedures, standards, requirements, and guidelines. The FCC shall promptly review the franchising authority's written request to ensure that these State or local laws and regulations do in fact comply with its procedures, standards, requirements, and guidelines and that they provide a level of protection to consumers required by the FCC and that carry out the policy of title VI of the 1934 Act. Upon petition by a cable operator or other interested party, the FCC shall review the regulation of rates by a franchising authority. If the FCC finds that the franchising authority has acted inconsistently with its requirements, it can grant appropriate relief. If the FCC determines that State or local laws and regulations no longer conform to the FCC requirements, it shall revoke the authorization. The Committee does not intend that the FCC revoke the authority of franchising authorities for any minor variance with the FCC standards, but for inconsistencies that will adversely affect the integrity of the rate regulation process. The FCC shall restore a franchising authority's rate regulatory power revoked under section 623(b)(2) once the requirements of that section are satisfied.

Section 623(b)(3), a cable operator has no obligation to put programming other than retransmitted local broadcast signals on its basic service tier. Any obligation imposed by operation of law inconsistent with section 623(b) is preempted and may not be enforced.

Section 623(b)(4) requires the FCC to adopt regulations to implement this section within 120 days of the date of enactment.

Section 623(b)(5) states that a cable operator may file for a basic service rate increase, and such increase shall be granted if it is not acted upon within 180 days of the date of filing. Should the FCC or the franchising authority question the reasonableness of a requested rate increase in a timely fashion and request the cable operator to submit additional information, the cable operator may not delay in the submission of the information in order to have the rate increase automatically go into effect despite the concerns of the FCC or the franchising authority. Section 623(b)(5) does not prevent the cable operator from agreeing to extend the period for a decision on its request.

Section 623(c)(1) provides that, for systems not subject to effective competition, the FCC shall establish reasonable rates for cable programming services (other than basic service and except for that offered on a per channel or per program basis) if it finds the current rates are unreasonable. The FCC may act only upon a complaint that is filed within a reasonable time after a rate increase—no matter how minimal the increase may be—and that properly establishes that rates are unreasonable. Nothing in this legislation shall be interpreted as restricting subscribers, franchising authorities, or State officials from the submission of a complaint. The rates may be unreasonable prior to the passage of the legislation, and the Committee intends that these rates be subject to this provision. However, the FCC shall not review such rates until it receives a properly filed complaint. Prior to establishing reasonable rates, the FCC shall inquire of the cable operator as to the reason for such rates and then determine whether the existing rates can be justified by reasonable business practices. Nothing in this legislation shall be interpreted as restricting the FCC from ordering refunds to subscribers pursuant to its authority under 1934 Act, where the FCC finds that a rate is unreasonable.

"Unreasonable" rates are those that are above those that would occur under effective competition. The Committee derived this standard because it recognized that: (1) for cable systems not subject to effective competition, the degree of market power varies from system to system; (2) there is not a history of regulating cable's rates based on some systematic consideration of costs, rates, and returns; (3) even systematic regulation is not a precise science and imposes costs on consumers; and (4) national guidelines are required. The Committee therefore decided that it was best to include a standard that brought under government oversight those rates that are, with some certainty, unreasonable and above the rates for similarly situated systems.

In determining what constitutes a reasonable rate the FCC may take into consideration a range of factors including those listed in the discussion of section 623(c)(3) below.

Since the legislation permits cable operators to separate basic service from other cable programming services, during a transition time, there may be confusion as to what constitutes "a rate increase for cable programming services." For example, since cable programming service is defined to exclude both basic and per program and per channel offerings, a cable operator could argue that the price of programming previously bundled in an expanded basic tier, which is now separately priced under a regulated basic service tier or at an unregulated per program or per channel rate, should not be considered in determining whether cable programming service rates have increased. Such an interpretation of the term "increase" would clearly thwart the intent of the legislation. That interpretation would permit cable operators to use monopolistic conditions triggering regulation to retier programming to avoid regulatory scrutiny.

To prevent this result, the legislation provides that a rate increase can be deemed to result from a change in the service tiers or a change in the per channel price paid by subscribers. For example, if a cable system charges $20 a month for a package or tier of 20 program services and the system then deletes 10 program services but the price remains $20, that would constitute a rate increase and a change in the per channel cost of the services offered in that package. This language is not intended to cover that situation where a cable operator increases the price of a service offered individually, not as a package containing other program services, such as HBO. The FCC should ensure that rates for similar programming are compared over time to determine whether cable programming service rates have increased.

Section 623(c)(2) provides that, within 180 days after the date of enactment, the FCC shall establish criteria for determining when rates are unreasonable and whether complaints filed within a reasonable time after a rate increase properly establish that rates are unreasonable.

Section 623(c)(3) states that, in establishing criteria for determining whether rates are unreasonable, the FCC shall consider any factor relevant to its public interest determination, including—

(A) the extent to which service offerings are offered on an unbundled basis;

(B) rates for similarly situated cable systems offerings comparable services;

(C) the history of rates for such services offerings of the system;

(D) the rates for all cable programming service offerings taken as a whole; and

(E) the rates charged for services with similar service offerings by cable systems subject to effective competition.

The listing of factors contained in this bill shall not prevent the FCC from considering: the number of signals included in a program package; the costs to the cable operator to provide those signals; compensation received for carriage of signals; local conditions that may affect the reasonableness of rates; and the costs of operation.

Section 623(d) provides that a cable system in a community in which fewer than 30 percent of the households subscribe to the cable system is deemed to be subject to effective competition. A cable system with penetration greater than 30 percent is subject to effective competition if there are: (1) a sufficient number of local television signals, and (2) the presence of an unaffiliated multichannel video competitor offering comparable service at comparable rates that is available to a majority of the homes in the market and is subscribed to by individuals in at least 15 percent of the homes. In determining whether a "sufficient number" of broadcast signals exists, the FCC should consider the number and technical quality of broadcast signals received in the community. The FCC shall periodically review and update the rules it establishes pursuant to this section to reflect changes in the communications marketplace.

Under section 623(e), cable operators must offer uniform rates throughout the geographic area in which they provide cable service. This provision is intended to prevent cable operators from having different rate structures in different parts of one cable franchise. This provision is also intended to prevent cable operators from dropping the rates in one portion of a franchise area to undercut a competitor temporarily.

Section 623(f) is identical to section 623(f) of the existing statute. See, the House Energy and Commerce Committee *Report on the Cable Franchise Policy and Communications Act of 1984* (98–934), p. 68.

Section 623(g) defines the term "cable programming service" as all video programming services, including installation or rental of equipment used in the receipt of those services and rental equipment, other than those offered on the basic service tier and those offered on a per channel or per program basis.

This provision and section 623(c) demonstrate the Committee's belief that greater unbundling of offerings leads to more subscriber choice and greater competition among program services. Through unbundling, subscribers have greater assurance that they are choosing only those program services they wish to see and are not paying for programs they do not desire. With bundling, programmers have an incentive to spend more (for example, for certain types of sports programming) knowing that the cost will be spread across those who do not watch such programming. Contracts that contain provisions that restrict the offering of services on an unbundled basis can impede competition among video services and are inconsistent with the Committee's desire to promote competition.

The Committee also recognizes that there can be legitimate reasons, albeit limited, for bundling. For example, there may also be a need to nurture certain offerings or help market them by exposing them to more subscribers. For example, the television networks carry this out by placing a new program between already highly rated shows. Many of these objectives could be carried out through means other than bundling large amounts of programs together, few of which any single subscriber wants.

Finally, it is important to note that only about one quarter of all cable systems are addressable, having the technology to isolate all channels. While this number will increase as new cable plants are built, there will still be, even in five years, a substantial number of cable systems that are not addressable. This will unfortunately inhibit the Committee's objective, and the Committee urges the creation of this capability.

In sum, one of the prime goals of the legislation is to enhance subscriber choice. Unbundling is a major step in this direction. Cable operators and programmers are urged to work toward this objective, while also seeking to accomplish other legitimate goals.

Section 623(h) provides that, within 120 days of enactment, the FCC shall establish standards, procedures, and guidelines to prevent cable operators from evading the rate regulation provisions of this section. This provision is intended to give the FCC the authority to address changes in the cable industry or the industry's business practices that would thwart the intent of this section.

SECTION 6—NONDISCRIMINATION WITH RESPECT TO VIDEO PROGRAMMING

This section adds three new provisions to the 1934 Act:

New section 640(a): The Committee considers this provision to be crucial to the development of competition to cable. Under this provision, a national or regional cable programmer in which a cable operator has an attributable interest (1) shall not unreasonably refuse to deal with any multichannel video distributor; and (2) shall not discriminate in price, terms, and conditions among multichannel video distributors if such action would have the effect of impeding retail competition.

In determining what is an attributable interest, it is the intent of the Committee that the FCC use the attribution criteria set forth in 47 C.F.R. Section 73.3555 (notes) or other criteria the FCC may deem appropriate.

Under new section 640(b) a national or regional cable programmer in which a cable operator has an attributable interest shall make programming available on similar terms to all cable systems, except that reasonable cost-related conditions and certain other reasonable requirements can be imposed.

New section 640(c) provides that the FCC shall prescribe rules to implement new section 640, including rules for expedited review of complaints made pursuant to section 640.

Under new section 640(d), any programmer who scrambles satellite (C-band) cable programming for private viewing shall make that programming available for private viewing by home satellite dish owners.

Subsection (e) of new section 640 makes it clear that this new section does not apply to television broadcast signals retransmitted by satellite, nor to the internal satellite communications of any broadcaster, broadcast network, or cable network.

Subsection (f) of new section 640 clarifies that a regional programmer is one that distributes one or more programming services to more than one cable community. This provision does not require distribution outside the area where the programming service is currently distributed.

Section 641: This new section provides that a satellite carrier that provides service pursuant to the provisions of section 119 of title 17, U.S. Code:

(1) shall not unreasonably refuse to deal with any distributor of video programming which provides service to home satellite dish subscribers who meet the requirements of section 119; and

(2) shall not discriminate in price, terms, and conditions of the sale of programming among the distributors to home satellite dish owners qualified under section 119 or between such distributors and other multichannel video distributors.

These provisions recognize the Committee's concern regarding discrimination by satellite carriers against distributors of video programming to home satellite earth stations. The FCC, at the direction of Congress, has already examined the existence of discrimination by satellite carriers in the provision of superstations and network signals to home satellite dish distributors and determined that such discrimination exists.[187]

The purpose of this new section 641 is to codify the FCC's authority to address this problem under the 1934 Act. Satellite carriers violating the provisions of this new section shall be subject to all sanctions and remedies available to the FCC under the 1934 Act. Nothing in this bill shall be construed as implying that the FCC does not already possess statutory authority to address this serious problem and to take appropriate corrective action. Rather, this pro-

[187] "Inquiry Into the Existence of Discrimination in the Provision of Superstation and Network Station Programming," Gen. Dkt. No. 89-89, 4 FCC Rcd 3883; Second Report, adopted May 10, 1991.

vision is intended only to remove any ambiguity as to the FCC's authority in this area.

Section 642: This new section requires the FCC to adopt regulations, within one year of enactment, governing program carriage agreements between cable operators and video programmers. The regulations shall:

(1) prohibit a cable operator or other multichannel video distributor from requiring a financial interest from a programmer as a condition of carriage;

(2) prohibit a cable operator or other multichannel video distributor from coercing a programmer to provide exclusive rights as a condition of carriage;

(3) prevent a multichannel video programming distributor from interfering with the ability of an unaffiliated video programmer to compete by discriminating in video distribution on the basis of affiliation or nonaffiliation in the selection, terms and conditions of carriage;

(4) provide for expedited review of any complaints brought pursuant to this section;

(5) provide for appropriate penalties and remedies for violations of this section and clarifying that one of the remedies available to the FCC is to require carriage of the program service; and

(6) provide for the assessment of penalties against persons filing frivolous complaints pursuant to this section.

SECTION 7—LEASED COMMERCIAL ACCESS

This section amends section 612 of the 1934 Act, as follows:

In subsection (a) of this subsection, a new clause is added to the purposes stated in section 612(a), to provide that the purpose of this section is also "to promote competition in the delivery of diverse sources of video programming".

Subsection (b) of this section amends subsection 612(c) of the 1934 Act to require the FCC to establish the maximum reasonable rate and reasonable terms and conditions for use of these commercial access channels and for the billing of rates to subscribers, and for the collection of revenue from subscribers by the cable operator for such use.

As with the rate regulation section, the FCC is given broad discretion in establishing the maximum reasonable rate and reasonable terms and conditions. The FCC should examine any existing lease arrangements as indicators of the cost of carriage. The FCC also should consider other evidence of this cost and the cost of billing and collection. As for terms and conditions, if programmers using these channels are placed on tiers that few subscribers access, the purpose of this provision is defeated. The FCC should ensure that these programmers are carried on channel locations that most subscribers actually use, while also considering the legitimate need of the cable operator to market its product. The Committee has already stressed the importance of this provision, and it is vital that the FCC use its authority to ensure that these channels are a genuine outlet for programmers.

SECTION 8—LIMITATIONS ON CONTROL AND UTILIZATION

This section amends section 613(f) of the 1934 Act, as follows:

Paragraph (1) of amended section 613(f) requires the FCC to establish reasonable limits on (A) the number of cable subscribers that any one cable operator may serve through cable systems owned by the operator or in which the operator has an attributable interest; and (B) the number of channels that can be occupied by a programmer in which a cable operator has an attributable interest.

The FCC is given discretion in establishing the reasonable limits on horizontal and vertical integration; however, the legislation is clear that the FCC must adopt some limitations. The Committee believes it has given the FCC enough direction in the legislation to strike the proper balance. The Committee, therefore, will permit the FCC to establish limits that best serve the public interest. The Committee then will review this decision. Because these markets are dynamic, the FCC should revisit these limitations at appropriate times to ensure they accurately reflect the policies of the legislation.

In determining what is an attributable interest, it is the intent of the Committee that the FCC use the attribution criteria set forth in 47 CFR Section 73.3555 (notes) or other criteria the FCC may deem appropriate.

Amended section 613(f)'s limit on vertical integration is akin to the FCC's one-to-a-market requirement for broadcast licensees.[188] It is designed to increase the diversity of voices available to the public. Some multiple system operators (MSOs) own many programming services. It would be unreasonable for them to occupy a large percentage of channels on a cable system.

The intent of this provision is to place reasonable limits on the number of channels that can be occupied by each MSO's programming services. For example, the FCC may conclude that each MSO should control no more than 20 percent of the channels on any cable system, with a minimum of 6 channels being permissible. The FCC should establish these rules based on the number of activated channels less the numbers of over-the-air broadcast signals carried and the number of public, educational, and governmental and leased access channels carried. On a system with 54 channels, 14 of which are occupied by over-the-air signals or access channels, the limit then would be eight channels that could be occupied by programming owned by an MSO or in which the MSO has an attributable interest. The programming of each other MSO could also occupy eight channels.

Paragraph (2) of amended section 613(f), requires that the FCC, in establishing reasonable limitations pursuant to paragraph (1), shall, among other public interest objectives:

(A) ensure that cable operators alone or in a group do not impede the flow of video programming to the consumer;

(B) ensure that cable operators do not favor their own programming or unreasonably restrict the flow of such programming to other video distributors;

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[188] 47 CFR 73.3555.

(C) take particular account of the market structure, ownership patterns, and other relationships of the cable industry, including the nature and market power of the local franchise, the joint ownership of cable systems and video programmers, and the various types of non-equity controlling interests;

(D) take account of any efficiencies and other benefits gained through integration;

(E) ensure that its rules reflect the dynamic nature of the communications marketplace;

(F) not impose barriers to service in rural areas that do not now have service; and

(G) not impose limitations which would impair the development of diverse and high quality video programming.

SECTION 9—CROSS-OWNERSHIP

This section amends section 613(a) of the 1934 Act by adding a new paragraph (2) which prohibits a cable operator from owning an MMDS or an SMATV in the same areas in which it holds franchise for a cable system.

The Committee does not intend for this prohibition to apply to common ownership of a SMATV system that qualifies as a "cable system" under section 602(6) of the 1934 Act and a stand-alone SMATV system.

Subparagraph (A) of new paragraph (2) grandfathers all existing MMDS and SMATV systems owned by cable operators on the date of enactment.

Subparagraph (B) of new paragraph (2) gives the FCC the authority to grant waivers of the prohibition where necessary to ensure that residents in the cable community receive the cable operator's programming.

This section also amends section 613(c) of the 1934 Act by adding a new paragraph (2) which provides:

If 10 percent of the households in the United States with television sets subscribe to multichannel programming services provided via satellite (regardless of frequency band) direct to home satellite antennae, the FCC shall promulgate appropriate regulations (A) limiting ownership of any distributor of such direct-to-home satellite service by cable operators and other persons having media interests, and (B) requiring access to such service by programmers not owned or controlled by any distributor of such services.

SECTION 10—CUSTOMER SERVICE

This section amends section 632 of the 1934 Act as follows:

(a) It requires the FCC to adopt customer service standards, permits franchising authorities to adopt laws or regulations that exceed those adopted by the FCC, and grandfathers any standards in existence on the date of enactment.

(b) It requires the FCC, within 180 days, to adopt customer service standards, gives the franchising authorities the power to enforce the FCC standards, and permits a cable operator to file a complaint with the FCC if the operator believes that customer service standards adopted by a franchising authority are not in the public interest.

In establishing customer service standards, the Committee expects the FCC to provide standards addressing the following: hours of operation, and customer service availability; installation, outages, service calls and response times; billing and collection practices; disclosure of all available service tiers, prices (for those tiers and changes in service), and customer rights; and complaint resolution procedures.

SECTION 11—FRANCHISE RENEWAL

This section amends section 626 of the 1934 Act to:

(a) clarify when a formal renewal proceeding actually commences;

(b) provide that the formal renewal process can start on the date that the cable operator submits its renewal proposal;

(c) allow the franchising authority to consider in renewal proceedings whether the cable operator has substantially complied with the material terms of the existing franchise and with applicable law throughout the franchise term;

(d) allow the franchising authority to consider the level of service provided over the system throughout the franchise term;

(e) permit a franchising authority to deny a renewal if the cable operator has had notice and an opportunity to cure its failure to substantially comply with the franchise agreement, unless the franchising authority has waived its right to object in writing;

(f) clarify that franchising authorities only should be held responsible for non-compliance with the renewal provisions where a failure to comply actually prejudiced the cable operator; and

(g) provide that any lawful action to revoke a cable operator's franchise for cause shall not be negated by the initiation of renewal proceedings by the cable operator.

SECTION 12—REQUIREMENT FOR CERTAIN EQUIPMENT ON TELEVISION SETS

This section gives the FCC the authority to require that television sets have electronic switches permitting users to change readily among video distributors, provided that the FCC determines that the installation of such switches is technically and economically feasible.

SECTION 13—LIMITATION OF FRANCHISING AUTHORITY LIABILITY

This section amends part III of title VI of the 1934 Act to include a new section 628 which exempts local franchising authorities from liability for damages (except for attorneys' fees and legal costs) in cases where the franchising authorities are charged with violating a cable operator's First Amendment rights arising from actions authorized or required by title VI of the 1934 Act. This provision does not apply to cases where a franchising authority has been found by a final order of a court of binding jurisdiction to have violated a cable operators' First Amendment rights and repeats or continues the violation.

SECTION 14—MINIMUM TECHNICAL STANDARDS

This section amends section 624(e) of the 1934 Act to:

(1) require that, within one year after the date of enactment, the FCC shall establish minimum technical standards to ensure adequate signal quality;

(2) permit the FCC to establish standards for technical operation of cable systems and for any other video signals, including high definition television (HDTV);

(3) give the FCC authority to require compliance with and to enforce the technical standards;

(4) require the FCC to establish procedures for complaints asserting violations of the technical standards against cable operators, except that amended section 624(e) does not preclude other remedies permitted under the franchise agreement or Federal or State law; and

(5) preempt the establishment of any technical standards other than those adopted by the FCC.

SECTION 15—RETRANSMISSION CONSENT

This section amends section 325 of the 1934 Act by adding a new subsection (b), with the following provisions:

(1) One year after the date of enactment, cable systems and other multichannel video programming distributors will be subject to the requirement of obtaining the consent of a broadcaster for the use of its signal, unless carriage of that signal is mandated under new sections 614 or 615 of the 1934 Act. A cable operator is not required to carry in its entirety programming for which it has not received consent to carry such programming as required by this new section 325(b).

(2) Cable systems or other multichannel video programming distributors will not have to obtain retransmission consent until December 31, 1994, from any station whose signal is transmitted by common carrier or satellite carrier on May 1, 1991.

(3)(A) The FCC is required to conduct a rulemaking proceeding to establish rules concerning the exercise of stations' rights to grant retransmission authority under this new section 325(b) and their rights of mandatory carriage under new sections 614 and 615. This rulemaking proceeding is to commence within 45 days after enactment and to be completed within six months. In this rulemaking, the Committee expects the FCC to take into consideration the impact of retransmission rights on rates for basic cable service.

(B) In such rules, the FCC shall require each television station to elect, within one year after enactment, whether to exercise the authority to grant retransmission consent under this new section 325(b) or the rights of signal carriage guaranteed by new sections 614 and 615 of the 1934 Act. In situations where there are competing cable systems serving one geographic area, a broadcaster must make the same election with respect to all such competing cable systems.

(4) This new section 325(b) makes clear that stations which elect to require retransmission consent from a cable system will not have signal carriage rights under section 614 or 615 on that cable system for the duration of the stations' election.

(5) By the same token, the election of certain stations to negotiate with cable systems for retransmission consent will not have any effect on the rights of other stations to signal carriage under section 614 or 615. However, the Committee intends that stations which exercise their retransmission rights and are carried by cable systems will be counted toward the total number of stations required to be carried under sections 614 and 615.

SECTION 16—REQUIREMENT TO CARRY LOCAL BROADCAST SIGNALS

This section of the bill adds a new section 614 to the 1934 Act:

Subsection (a) of new section 614 requires each cable operator to carry the signals of local commercial television stations in accordance with the provisions of this section, except as section 325(b) permits stations to elect to exercise their rights to carriage. While requiring carriage of a complement of qualified local broadcast signals, this section also provides that local operators may, in their discretion, carry any additional broadcast television stations. Under this provision, neither the FCC nor any State or local government entity may require or prohibit the carriage of such additional broadcast television stations or limit the number of such stations that may be carried. Nothing in this provision, however, is intended to affect Federal copyright law nor is this provision intended to affect the FCC's authority to restrict the retransmission by cable operators of particular copyrighted broadcast programs on distant broadcast stations where the local broadcast stations have secured the exclusive local rights.

Subsection (b)(1)(A) of new section 614 requires a cable operator with 12 or fewer usable activated channels to carry at least three local commercial televisions signals, except that a system with 12 or fewer usable activated channels and 300 or fewer subscribers shall not be subject to any carriage requirements under section 614 if that cable system does not delete from carriage the signal of any broadcast station.

Subsection (b)(1)(B) requires that cable operators which have more than 12 usable activated channels carry the signals of local commercial television stations up to one-third of the number of usable activated channels on their systems.

Subsection (b)(2) provides that, in situations where there are more local commercial television signals than a cable operator is required to carry, the cable operator will have the discretion to choose which of the local commercial stations it will carry, except as follows:

(A) a cable operator shall not carry the signal of a qualified low power station instead of the signal of a local commercial station which is entitled to carriage under this new section 614 or would be eligible for carriage had it not elected to exercise its rights of retransmission consent under section 325(b) of the 1934 Act; and

(B) a cable operator which chooses to carry an affiliate of a broadcast network (as defined by the FCC) must, if more than one affiliate of a network qualifies for carriage, carry the affiliate of that network which is closest geographically to the cable system's subscribers and therefore is most likely to be responsive to their local needs and interests.

Subsection (b)(3)(A) requires that a cable system retransmit the primary audio and video signal in its entirety of each local commercial television station carried on the system, and in addition that, if technically feasible, it also retransmit any program-related material transmitted by the broadcaster on a subcarrier or in the vertical blanking interval. The cable operator has discretion on whether to retransmit other material which may be transmitted in the vertical blanking interval or on subcarriers which are unrelated to the main program service. In addition, the cable operator is given the option, if a broadcaster implements signal enhancement technology (such as ghost-canceling) which uses information carried in the vertical blanking interval, to install equipment to use that information to process the signal at the cable headend and thus retransmit an enhanced signal to subscribers.

Subsection (b)(3)(B) requires that cable systems carry the entirety of the program schedule of any television stations carried on the cable system, except where FCC rules governing network nonduplication, syndicated exclusivity, sports programming, or similar regulations require the deletion of specific programs by a cable system and permit the substitution therefor of other programs.

Subsection (b)(4)(A) provides that the signals carried under this new section 614 shall be retransmitted by cable systems without material degradation. The FCC is directed to adopt any carriage standards which are needed to ensure that, so far as is technically feasible, cable systems afford off-the-air broadcast signals the same quality of signal processing and carriage that they employ for any other type of programming carried on the cable system.

Subsection (b)(4)(B) provides that, when the FCC adopts new standards for broadcast television signals, such as the authorization of broadcast HDTV, it shall conduct a proceeding to make any changes in the signal carriage requirements of cable systems needed to ensure that cable systems will carry television signals complying with such modified standards in accordance with the objectives of this new section 614.

Subsection (b)(5) exempts cable systems from the obligation to carry signals that substantially duplicate the signal of another local commercial television station or from having to carry the signal of more than one station affiliated with a particular broadcast network, although the cable system has the discertion to carry such signals if it chooses. This provision is intended to preserve the cable operator's discretion while ensuring assess by the public to diverse local signals. If a cable system chooses to carry duplicating signals of local commercial television stations, all such signals shall be counted towards the cable system's carriage obligations under this section.

Subsection (b)(6) governs the cable system channel position on which signals carried pursuant to this section must be placed. Signals carried pursuant to this section will be carried, at the choice of the station's licensee, on:

(1) the station's on-air channel position; or

(2) the channel on which the station was carried on the cable system on July 19, 1985, except that another station will have the choice of retaining that channel position; or

(3) another channel position mutually agreed upon by the station and the cable operator.

July 19, 1985, is the date of the Court of Appeals' decision in *Quincy* which invalidated the FCC's must-carry regulations. This subsection permits stations whose channel positions have been wrongly manipulated by cable systems in the absence of signal carriage and channel positioning regulations to redress those wrongs.

Subsection (b)(7) provides that the signals carried under this section shall be provided to every subscriber of a cable system, regardless of how the cable operator arranges its signal offerings into tiers. The signals of all local commercial television stations carried under this section shall be viewable by cable on each television receiver that the cable operator connects to the cable system or for which it provides a connector. If the cable operator installs wires for connection to a television set or provides materials to connect a television set to the cable system, it must ensure that all must-carry signals can be viewed on that set. If, however, the cable system authorizes subscribers to connect additional receivers, but neither provides the connections nor the equipment or material needed for such connections, its only obligation is to notify subscribers of any broadcast stations carried on the cable system which cannot be viewed via cable without a converter box, and to offer to sell or lease such a converter at reasonable rates.

Under subsection (b)(8), cable operators are required to identify, to any person making a request, the signals they carry in fulfillment of their obligations under this new section 614.

Subsection (b)(9) provides that cable operators must give written notice to any local commercial television station carried on the system at least 30 days before dropping that station from carriage or repositioning it. A cable operator may not drop or reposition any such station during a "sweeps" persod when ratings services measure local television audiences. The Committee does not intend cable operators to use this subsection as authority for repeated deletion and substitution of different local commercial television stations where there are more such signals than a particular cable system would be required to carry under this new section 614.

Under subsection (b)(10), cable systems are barred from seeking or accepting any consideration, monetary or otherwise, in exchange for carriage in fulfillment of a cable system's must-carry obligations or for carriage on any of the channel positions guaranteed to stations under this new section 614. Three exceptions are provided: (1) a television station may be required by the cable operator to pay any costs necessary for the cable system to receive a good quality signal from the station; (2) a cable operator may accept payments from a local commercial television station carried on the cable system which is a distant signal under section 111 of title 17, U.S. Code, in the amount of the incremental copyright charges incurred by the cable system from carriage of such a station; and (3) if a cable operator and a local commercial television station entered into an agreement relating to carriage or channel positioning prior to June 26, 1990, the cable operator may continue to accept any compensation specified in such agreement for the remaining life of the agreement. In no event, however, shall such agreement or the expiration of such agreement relieve a cable operator of any carriage or channel positioning obligations imposed under this new section 614.

Subsection (c) provides that, if the number of local commercial television stations carried on a cable system, either pursuant to the obligations of this new section 614 or by agreement between the cable operator and particular stations, is less than the number of usable activated channels which may be used for local commercial television station signals under this new section 614, the cable operator shall carry any qualified low power stations up to the maximum number of signals which it may be required to carry under this new section.

Subsection (d)(1) sets forth the procedures to be followed when a cable operator fails to meet the obligations imposed in this new section and the remedies for such failure. If a local commercial television station believes that a cable system is not in compliance with the section either with respect to carriage or channel positioning, it must so notify the cable operator in writing. Within 30 days of being notified, the cable operator must either rectify the noncompliance or explain in writing why it believes that it has complied with the requirements imposed. A television station may seek review of any such response by filing a complaint with the FCC.

Subsection (d)(2) calls for the FCC to provide the cable operator with an opportunity to respond to the complaint and to present data and arguments that it has met its obligations.

Subsection (d)(3) requires the FCC to issue a decision on the complaint within 120 days after it is filed. If the FCC determines that a cable operator has not met its obligations with respect to carriage or channel positioning of one or more local commercial television signals, it shall either order repositioning of a station's signal or order the cable system to carry a signal for at least one year. This subsection is not intended to deprive Federal or State enforcement authorities, consumers, or other private parties of any rights or remedies which they may have under Federal or State laws safeguarding competition or consumer interests, nor is it intended to deprive parties of any contractual remedies they may have under agreements between cable operators and stations.

Subsection (e) prohibits the imposition on cable operators of any responsibility either to provide subscribers with input selector—so-called "A/B"—switches or inform subscribers of them or other similar devices. This is consistent with the evidence presented to the Committee showing that such devices are often cumbersome and ineffective, and create unnecessary burdens for consumers. Accordingly, reliance on such devices would not achieve the goals of this section and would unnecessarily add to the cost of obtaining television service.

Under subsection (f), the FCC is required to conduct a rulemaking and issue regulations implementing the requirements imposed by this new section 614 within 180 days after enactment.

This section of the bill also amends part II of title VI of the 1934 Act to add a new section 615.

Subsection (a) of this new section requires cable operators to carry local public broadcast stations.

Subsection (b)(1) requires cable systems to carry all qualified local noncommercial educational television stations that request carriage of a cable operator. Thus, it relieves cable operators of the burden of canvassing the noncommercial stations in their communities to determine which ones are qualified for carriage under the provisions of this new section.

Subsection (b)(2)(A) specifies that a cable system with 12 or fewer usable activated channels is only required to carry the signals of one qualified local noncommercial educational television station, but such operators must comply with subsection (c) and may carry other noncommercial television stations at their discretion.

Subsection (b)(2)(B) provides that, if there are no qualified local public television stations available, and the operator has 12 or fewer usable activated channels, such operator shall select a qualified noncommercial television station to carry. Such operator shall not be required to move any other programming service carried as of March 29, 1990, to meet the requirements of this section.

Under subsection (b)(3)(A), an operator with 13 to 36 usable activated channels must carry at least one qualified local noncommercial educational television station, but is not required to carry more than three such stations. This subsection does not diminish section 615's general requirements of carriage for all qualified noncommercial educational television stations. Rather, this subsection acts as an affirmative requirement for carriage of up to three such stations which request carriage on cable systems in this category.

Subsection (b)(3)(B) states that cable systems with 13 to 36 channels do have an obligation to carry at least one qualified noncommercial educational television stations if no such local station is available.

Subsection (b)(3)(C) provides that cable systems with 13 to 36 channels which carry the signal of a qualified noncommercial educational television stations affiliated with a State public television network shall not have to carry the signal of additional qualified noncommercial educational television stations affiliated with the same network, if the programming of the additional station substantially duplicates that of the station receiving carriage.

Subsection (b)(3)(D) requires that cable operators which increase the channel capacity of their systems to more than 36 channels after March 29, 1990, shall carry the signal of each qualified local noncommercial educational television station requesting carriage, subject to subsection (e).

Subsection (c) preserves existing carriage arrangements for qualified local noncommerical educational television stations carried on cable systems as of March 29, 1990. This requirement may be waived if agreed to in writing by both the cable operator and the station. The 1934 Act does not mandate carriage of distant public television stations which may currently be imported by certain systems.

Subsection (d) provides that cable operators required to add qualified local noncommerical educational television stations pursuant to this new section 615 may do so by placing them on unused public, educational, or governmental (PEG) channels not in use for their designated purpose. This provision is not intended to limit or modfiy the power franchising authorities currently have under section 611 of the 1934 Act to establish for the designation or use of channel capacity for PEG, or to establish rules and procedures for such use. Franchising authorities, therefore, have the right to approve the use of an unused PEG channel to carry a qualified noncommercial educational television station.

Subsection (e) provides that cable systems with more than 36 usable activated channels which are required to carry three qualified local noncommercial educational television stations shall not be required to carry the signals of additional such stations whose programming substantially duplicates the programming of a qualified local noncommercial educational television station requesting carriage. The FCC shall develop duplication criteria that promote access to distinctive programming. The FCC should adopt objective criteria that avoids subjective judgments.

Subsection (f) provides that a qualified local noncommercial educational television station whose signal is carried on a cable system shall not assert its network nonduplication rights provided in 47 C.F.R. 76.92. Nonduplication rights against stations that are not local are preserved.

Subsection (g)(1) requires that a cable system retransmit the primary audio and video signal in its entirety of each local noncommercial educational television station carried on the system. In addition this subsection requires that, if technically feasible, a cable system also retransmit any program-related material transmitted by the broadcaster on a subcarrier or in the vertical blanking interval necessary for the receipt of programming by handicapped persons or for educational or language purposes. Public television stations have pioneered the use of broadcast spectrum to deliver closed-captioning, descriptive services, language services, and other important program-related services that have served the needs of the visually and hearing impaired. Persons of whom English is a second language and physicially challenged viewers should not lose the valuable services simply because they they rely on cable to gain access to public television programming.

The cable operator has discretion whether to retransmit other material which may be transmitted in the vertical blanking interval or on subcarriers which are unrelated to the main program service. In addition, the cable operator is given the option, if a broadcaster implements signal enhancement technology (such as ghost-canceling) which uses information carried in the vertical blanking interval, to install equipment to use that information to process the signal at the cable headend and thus retransmit an enhanced signal to subscribers.

Subsection (g)(2) requires cable operators to provide each qualified local public television station with bandwidth and technical capacity equivalent to that provided the commercial television broadcast stations carried on the their systems. The signals carried under this new section 615 shall be retransmitted by cable systems without material degradation. The FCC is directed to adopt any carriage standards which are needed to ensure that, so far as is technically feasible, cable operators afford off-the-air broadcast signals the same quality of signal processing and carriage as they employ for any other type of programming carried on their cable systems.

Subsection (g)(3) requires cable operators to give written notice to any local noncommercial educational television station carried on their systems, at least 30 days before dropping that station from carriage or repositioning it. The Committee does not intend cable operators to use this subsection as authority for repeated deletion and substitution of different local noncommercial educational television stations where there are more such signals than a particular cable system would be required to carry under section 615.

Subsection (g)(4) provides that a cable operator is not required to carry the signal of a station that does not deliver to the cable system's headend a signal of good quality for purposes of retransmission.

Subsection (h) requires cable operators that ensure signals carried pursuant to section 615 are available to every subscriber on the system's lowest priced tier that contains local broadcast signals.

Subsection (i)(1) bars cable operators from seeking or accepting any consideration, monetary or otherwise, in exchange for carriage in fulfillment of their must-carry obligations or for carriage on any of the channel positions guaranteed to stations under this new section. However, qualified local noncommercial educational television stations may be required by the cable operator to pay any costs necessary for its cable system to receive a good quality signal from the station.

Subsection (i)(2) permits a cable operator to accept payments from a local noncommercial educational television station carried on its cable system where that station is a distant signal under section 111 of title 17, U.S. Code, in the amount of the incremental copyright charges incurred by the cable system from carriage of such a station;

Subsection (j)(1) provides that a qualified local noncommercial television station may file a complaint with the FCC if the station believes that a cable operator is not complying with the provisions of section 615.

Subsection (j)(2) requires the FCC to give cable operators an opportunity to respond and present data, views, and arguments to refute any allegations contained in such complaints.

Subsection (j)(3) provides that the FCC shall resolve any complaints pursuant to section 615 within 120 days.

Subsection (k) requires cable operators to identify, to any person making a request, the signals they carry in fulfillment of their obligations under section 615.

Subsection (l) defines "qualified local noncommercial television station" as a qualified noncommercial educational television station (A) that is licensed to a community whose reference point, as set forth in 47 C.F.R. 76.53 is within 50 miles of the principal headend of the cable system or (B) whose grade B contour, as defined in 47 C.F.R. 73.683(a), encompasses the principal headend of the cable system.

SECTION 17—JUDICIAL REVIEW

This section of the bill amends section 635 of the 1934 Act by adding at the end a new subsection:

New subsection (c)(1) provides that any civil action challenging the constitutionality of section 614 (Carriage of Local Broadcast Signals) shall be heard by a district court of three judges convened pursuant to the provisions of section 2284 of title 28, U.S. Code. New subsection (c)(2) states that an interlocutory or final judgment, decree, or order of the court of three judges under paragraph (1) holding section 614 unconstitutional shall be reviewable as a matter of right by direct appeal to the Supreme Court. Any such appeal shall be filed not more than 20 days after entry of such judgment, decree, or order.

SECTION 18—HOME WIRING

This provision adds a new subsection at the end of section 624 of the 1934 Act, which requires that, within 120 days after the date of enactment, the FCC shall prescribe rules concerning the disposition of cable-installed wires within the home when the subscriber terminates service.

SECTION 19—AWARD OF FRANCHISES

This section amends section 621(a)(1) of the 1934 Act to add a new provision prohibiting franchising authorities from unreasonably refusing to award additional franchises. It shall not be considered unreasonable for purposes of this provision for local franchising authorities to deny the application of a potential competitor if it is technically infeasible. However, the Committee does not intend technical infeasibility to be the only justification for denying an additional franchise.

SECTION 20—FRANCHISE REQUIREMENTS

This provision amends section 621(a) of the 1934 Act to add a new provision which requires franchising authorities to give a competing cable operator reasonable time to build its system and provide service to the entire geographic area. This provision is intended to ensure that the purpose of section 19 is not thwarted. The provision requires local franchising authorities to grant the second or third cable system in a community sufficient time actually to construct its system and provide service. For purposes of this section, a reasonable period of time would include a period of time comparable to that taken for the incumbent cable operator to construct its cable system for a comparably sized franchise area.

SECTION 21—DIRECT BROADCAST SATELLITE SYSTEMS

Subsection (a) requires the FCC, within 180 days after the date of enactment of this legislation, to initiate a rulemaking proceeding to impose, with respect to any DBS system that is not regulated as a common carrier under the 1934 Act, public interest or other requirements on such systems providing video programming. Any regulations prescribed pursuant to such rulemaking shall, at a minimum, apply the access to broadcast time requirement of section 312 of the 1934 Act and the use of facilities requirements of section 315 of the 1934 Act to DBS systems providing video programming. The Committee does not intend for the FCC, in formulating any additional public interest obligations, to impose retroactively common carrier status on any DBS system not regulated as a common carrier at the time such regulations are enacted. The FCC also is directed to examine the implications of the establishment of DBS systems for the principle of localism under the 1934 Act and the methods by which such principle may be served through technological and other developments in, or regulation of, such systems.

Subsection (b)(1) mandates that the FCC require, as a condition of any initial authorization, or renewal therefor, for a DBS service providing video programming, that the provider of such service reserve not less than 4 percent or more than 7 percent of the channel capacity of such service exclusively for noncommercial public service uses. The Committee intends that the FCC consider the total channel capacity of DBS system operators in establishing reservation requirements. Accordingly, the FCC may determine to subject DBS systems with relatively large total channel capacity to a greater reservation requirement than systems with relatively less total capacity. In determining a DBS system's channel capacity, the FCC may consider the availability of or the use by a DBS operator of compression technologies. This subsection permits a provider of such service to use any unused channel capacity designed pursuant to this subsection until the use of such channel capacity is obtained, pursuant to a written agreement, for public service use. This subsection defines "public service uses" to include programming produced by (1) public telecommunications entities, including programming furnished to such entities by independent production services; (2) public or private educational institutions, or entities for educational, instructional, or cultural purpsoes; and (3) any entity to serve the disparate needs of specific communities of interest, including "linguistically distinct" groups, minority and ethnic groups, and other groups.

Subsection (b)(2) also establishes a study panel, comprised of a representative of the CPB, NTIA, and the Office of Technology Assessment selected by the head of each such entity. This subsection requires such study panel, within two years after the date of enactment of this legislation, to submit a report to Congress containing recommendations on (1) methods and strategies for promoting the development of programming for transmission over the public use channels reserved pursuant to this subsection; (2) methods and criteria for selecting programming for such channels that avoids conflicts of interest and the exercise of editorial control by the DBS service provider; and (3) identifying existing and potential sources of funding for administrative and production costs for such public use programming.

Subsection (c) defines the term "direct broadcast satellite system" to include satellite systems licensed under part 100 of the FCC's rules and high power Ku-band fixed service satellite systems providing video service directly to the home and licensed under part 25 of the FCC's rules.

SECTION 22—SEPARABILITY

This section states that if any provision of this legislation or application of such provision to any person or circumstances, shall be held invalid, the remainder of this legislation, or the application as to which it is held invalid, shall not be affected thereby.

SECTION 23—EFFECTIVE DATE

This section provides that except as otherwise specified in this legislation the requirements of this legislation shall be effective 60 days after the date of enactment. The FCC may promulgate such regulations as it determines necessary to interrept such requirements that are not inconsistent herewith.

## ROLLCALL VOTES IN COMMITTEE

In accordance with paragraph 7(c) of rule XXVI of the Standing Rules of the Senate, the Committee provides the following description of the record votes during its consideration of S. 12:

Senator Inouye, as Communications Subcommittee chairman, offered an amendment in the nature of a substitute to S. 12. Senator Ford offered an amendment to the substitute concerning must-carry rights for low power television stations. The Ford amendment was agreed to by voice vote. At the close of debate on S. 12, the Chairman announced a rollcall vote on the bill as amended by the amended substitute. On a rollcall vote of 16 yeas and 3 nays as follows, the bill as amended was ordered reported:

| YEAS—16 | NAYS—3 |
|---|---|
| Mr. Hollings | Mr. Packwood |
| Mr. Inouye | Mr. Stevens |
| Mr. Ford | Mr. Burns |
| Mr. Exon | |
| Mr. Gore | |
| Mr. Rockefeller | |
| Mr. Bentsen | |
| Mr. Kerry [1] | |
| Mr. Breaux | |
| Mr. Bryan | |
| Mr. Danforth [1] | |
| Mr. Pressler | |
| Mr. Kasten [1] | |
| Mr. McCain | |
| Mr. Gorton | |
| Mr. Lott | |

[1] By proxy.

## MINORITY VIEWS OF MESSRS. PACKWOOD, STEVENS, AND BURNS

We cannot support S. 12 as reported or the heavy measure of re-regulation that it proposes for our Nation's cable industry. Cable operators and programmers are preparing for the 21st century by continuing to expand viewer choices and to develop new technologies. In its current form, S. 12 would not further these efforts.

While problems in the cable industry exist, S. 12 goes well beyond what is needed to adequately address these problems. We will work with the leadership of the Committee and our other colleagues in the Senate to ensure that if legislation must move forward, it is narrowly crafted to address genuine problems through competitive, market-oriented means and without creating intrusive and unnecessary government regulation.

### PURPOSES OF THE CABLE ACT

Eight years ago, this Committee recommended to the Senate that Congress establish a national policy for the cable industry. The Congress did so with passage of the Cable Communications Policy Act of 1984 (S. 66, Senate Report 98–67), which had as its stated purposes the following:

1. to establish a national policy concerning cable communications;
2. to establish franchise procedures and standards which encourage the growth and development of cable systems and which assure that cable systems are responsive to the needs and interests of local communities;
3. to establish guidelines for the exercise of Federal, State, and local authority with respect to the regulation of cable systems;
4. to assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public;
5. to establish an orderly process for franchise renewal which protects cable operators against unfair denials of renewal where the operator's past performance and proposal for future performances meet the standards established by this title; and
6. to promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems (PL 98–549, section 601).

### THE FCC'S 1990 REPORT TO CONGRESS ON THE EFFECT OF THE CABLE ACT

The Cable Act of 1984 required the FCC to report within five years on the success of deregulation and the status of competition in the cable industry. In July 1990, the Commission voted unanimously to submit a report to Congress which concluded as follows:

> In compiling and analyzing the record leading to this Report, we have found that since the Cable Act of 1984, the cable television industry and cable television subscribers have benefited significantly from the regulatory certainty and economic freedoms contained in the Act. Cable operators have expanded their systems—both in terms of service area and channel capacity—deployed new technology and invested in new programming, thereby increasing choices for consumers. The Cable Act was intended to establish a national policy concerning cable communications that would promote competition, minimize unnecessary regulations imposing undue economic burdens on cable systems, and encourage the provision of the widest possible diversity of information sources and services to the public. In many respects these fundamental purposes of the Cable Act are being accomplished. (FCC Report 90–276, p. 99)

In its discussion of the Cable Act's goals and accomplishments, the FCC observed the following:

> The Cable Act sought industry growth, and the number of communities and homes served by cable has increased significantly. The Cable Act sought cable industry development, and cable has further developed its multichannel services beyond retransmission, changing the expectations of most Americans about television viewing options. The Cable Act also sought competition to cable operators, however, and the competition within the video industry is just beginning to expand and include alternative multichannel providers. Thus, the cable industry, and the newer alternative multichannel video providers beginning to compete with cable, are still evolving.
>
> * * *The growth and development that the cable industry has experienced since the Cable Act are readily measurable. First, the cable industry has invested in expanding its plant to the point where it now offers multichannel video service to about 90 percent of Americans; before the Cable Act, cable was available to about 70 percent of American households. Second, the cable industry has significantly expanded its channel capacity—now offering substantially greater viewing choices to the American public. While almost 60 percent of all cable subscribers were served by cable systems with at least 30 channels before the Cable Act, that number has grown to about 90 percent of cable subscribers today. The cable industry has significantly increased its annual investment in new and expanded capacity by 55 percent, from $1.1 billion in 1984 to $1.7 billion in 1989. Third, the cable industry has tripled annual spending on programming from $302 million to $965 million during this same period.
>
> * * * The American public has clearly welcomed the wider viewing options that the cable industry has provid-

> ed. The number of cable subscribers has grown from 37 million in 1984 to 53 million in 1989 * * *
>
> * * * Congress intended to free cable operators from the constraints of unnecessary local rate regulation, subject to an appropriate definition of "effective competition" to be adopted by the Commission. The Cable Act was designed, inter alia, to allow the substantial investments necessary for expanded system capacity and new programming—and these have occurred. (ibid., pp. 5–6; footnotes omitted)

As with the Commission, we favor the development of competition over regulation. But with regard to reregulation, the FCC report was quite clear:

> * * * In light of the developing field of existing and potential multichannel competitors to cable, and evidence that even direct competition between cable operators may increasingly occur, we do not recommend any drastic or long-term regulation of cable rates and services * * * (ibid., p. 100)

We believe S. 12 is contrary to this recommendation by the FCC. The need for rate reregulation is even more doubtful in light of the FCC's current proceeding to redefine effective competition.

THE FCC'S EFFECTIVE COMPETITION RULEMAKING

Under the Cable Act, the FCC is responsible for determining the extent of local rate regulation through its definition of "effective competition." Where cable systems are subject to "effective competition," their rates are not subject to regulation by franchising authorities. The FCC has announced its intention to issue a new definition of effective competition on June 13, 1991. It is expected that this new definition (probably based on a 6 broadcast signal standard) would subject more than half of the cable systems in America to reregulation.

It is still unclear why this Committee took up cable legislation before the impact of the FCC's decision could be evaluated. That concern notwithstanding, a majority of cable systems are about to be reregulated, substantially eroding one of the central rationales for S. 12.

CABLE RATES: THE HISTORICAL CONTEXT

When looking at proposals to reregulate rates, we need to consider two questions: what are consumers paying for cable service, and what are they getting for their money? In both instances, the record before this Committee demonstrates that cable is a good value and that consumers have benefited considerably from deregulation.

A great deal has been made by some witnesses before this Committee about "excessive" double-digit increases in cable rates that occurred after deregulation. The fact that cable rates have exceeded the Consumer Price Index (CPI) since 1987 largely reflects the fact that rates were kept artificially low prior to deregulation.

Using 1972 as a benchmark, cable rates today are still less than they would have been had they simply matched inflation. In 1972, when the FCC first affirmed local rate regulation, the average price of basic cable service was $5.85. In December 1989, it was $16.33—6 percent less than the $17.33 consumers would have paid if cable rates had simply kept up with the CPI.

In addition, basic service has expanded over the past 17 years. Purchasers of basic cable service are not receiving the same five or six channels they received in 1972; rather, they now receive an average of 34 channels. As such, the cost per channel has dropped from about $1 in 1972 to 49 cents in 1989.

### CONCLUSION

Spurred by the Cable Act, the cable industry has increased channel capacity and developed a host of unique services not previously available. When one looks beyond percentage rate increases to consider the cost of cable service, cable is a good consumer value.

We are deeply concerned that the net, albeit unintended, effect of many of S. 12's provisions—including rate reregulation and program access—would be to curtail greater investment in increased channel capacity, new technologies, and programming. In the end, consumer choice could be drastically reduced. This should not be the goal of this Committee.

We hope that if cable legislation is ultimately enacted, it will strive to build on the Cable Act by enhancing competition and avoiding unnecessary regulation. We should not hamstring an industry that has contributed so much to our entry into the information age.

BOB PACKWOOD.
TED STEVENS.
CONRAD BURNS.

## CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new material is printed in italic, existing law in which no change is proposed is shown in roman):

### COMMUNICATIONS ACT OF 1934

### Section 303 of that Act

#### GENERAL POWERS OF COMMISSION

SEC. 303. Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires shall—

(a) through (r) * * *

(s) Have authority to require that apparatus designed to receive television pictures broadcast simultaneously with sound be capable of adequately receiving all frequencies allocated by the Commission to television broadcasting, *and be equipped with an electronic switch permitting users of the apparatus to change readily among all video distribution media,* when such apparatus is shipped in interstate commerce, or is imported from any foreign country into the United States, for sale or resale to the public, *except that such electronic switch shall be required only if the Commission determines that the installation of the switch is technically and economically feasible.*

(t) * * *

### Section 325 of that Act

#### FALSE DISTRESS SIGNALS; REBROADCASTING; STUDIOS OF FOREIGN STATIONS

SEC. 325. (a) * * *

*(b)(1) Following the date that is one year after the date of enactment of this section, no cable system or other multichannel video programming distributor shall retransmit the signal of a broadcasting station, or any part thereof, without the express authority of the originating station, except as permitted by sections 614 and 615.*

*(2) Until December 31, 1994, the provisions of this section shall not apply to retransmission of a signal of a broadcasting station transmitted by a satellite carrier or common carrier which carried that signal on May 1, 1991. For the purposes of this subsection, the term "satellite carrier" means an entity that uses the facilities of a satellite or satellite service licensed by the Commission to establish and operate a channel of communications for point-to-multipoint distribution of television signals.*

*(3)(A) Within 45 days after the date of enactment of this subsection, the Commission shall commence a rulemaking proceeding to establish regulations to govern the exercise by television stations of the rights to grant retransmission authority under this subsection and the right to signal carriage under sections 614 and 615. Such rulemaking proceeding shall be completed within six months after its commencement.*

*(B) The regulations required by subparagraph (A) shall require that television stations, within one year after the date of enactment of this subsection and every three years thereafter, make an election between the right to grant retransmission authority under this subsection and the right to signal carriage under sections 614 and 615. Such election shall apply to all cable systems within the jurisdiction of any franchising authority.*

*(4) If an originating television station elects under paragraph (3)(B) to exercise its right to grant retransmission authority under this subsection, the provisions of sections 614 and 615 shall not apply to the carriage of the signal of such station by such cable system.*

*(5) The election by a local commercial television station to exercise its right to grant retransmission authority under this subsection shall not interfere with or supersede the rights under sections 614 and 615 of any station electing to assert the right to signal carriage under that section.*

[(b)] *(c)* No person shall be permitted to locate, use, or maintain a radio broadcast studio or other place or apparatus from which or whereby sound waves are converted into electrical energy, or mechanical or physical reproduction of sound waves produced, and caused to be transmitted or delivered to a radio station in a foreign country for the purpose of being broadcast from any radio station there having a power output of sufficient intensity and/or being so located geographically that its emissions may be received consistently in the United States, without first obtaining a permit from the Commission upon proper application therefor.

[(c)] *(d)* Such application shall contain such information as the Commission may by regulation prescribe, and the granting or refusal thereof shall be subject to the requirements of section 309 hereof with respect to applications for station licenses or renewal or modification thereof, and the license or permission so granted shall be revocable for false statements in the application so required or when the Commission, after hearings, shall find its continuation no longer in the public interest.

Title VI of that Act

## TITLE VI—CABLE COMMUNICATIONS

### Part I—General Provisions

#### PURPOSES

Sec. 601. * * *

#### DEFINITIONS

Sec. 602. For purposes of this title—

*(1) the term "activated channels" means those channels engineered at the headend of a cable system for the provision of services generally available to residential subscribers of the cable system, regardless of whether such services actually are provided, including any channel designated for public, educational, or governmental use;*

[(1)] *(2)* the term "affiliate", when used in relation to any person, means another person who owns or controls, is owned or controlled by, or is under common ownership or control with, such person;

*(3) the term "available to a household" or "available to a home" when used in reference to a multichannel video programming distributor means a particular household which is a subscriber or customer of the distributor or a particular household which is actively and currently sought as a subscriber or customer by a multichannel video programming distributor;*

[(2)] *(4)* the term "basic cable service" means any service tier which includes the retransmission of local television broadcast signals;

[(3)] *(5)* the terms "cable channel" or "channel" means a portion of the electromagnetic frequency spectrum which is used in a cable system and which is capable of delivering a television channel (as television channel is defined by the Commission by regulation);

*(6) the term "cable community" means the households in the geographic area in which a cable system provides cable service;*

[(4)] *(7)* the term "cable operator" means any person or group of persons (A) who provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in such cable system, or (B) who otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system;

[(5)] *(8)* the term "cabie 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 of such video programming or other programming service;

[(6)] *(9)* the term "cable system" means a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community, but such term does not include (A) a facility that serves only to retransmit the television signals of 1 or more television broadcast stations; (B) a facility that serves only subscribers in 1 or more multiple unit dwellings under common ownership, control, or management, unless such facility or facilities uses any public right-of-way; (C) a facility of a common carrier which is subject, in whole or in part to the provisions of title II of this Act, except that such facility shall be considered a cable system (other than for purposes of section 621(c)) to the extent such facility is used in the transmission of video programming directly to subscribers; or (D) any facilities of any electric utility used solely for operating its electric utility systems;

[(7)] *(10)* the term "Federal agency" means any agency of the United States, including the Commission;

[(8)] *(11)* the term "franchise" means an initial authorization or renewal thereof (including a renewal of an authorization which has been granted subject to section 626), issued by a franchising authority, whether such authorization is designated as a franchise, permit, license, resolution, contract, certificate, agreement, or otherwise, which authorizes the construction or operation of a cable system;

[(9)] *(12)* the term "franchising authority" means any governmental entity empowered by Federal, State, or local law to grant a franchise;

[(10)] *(13)* the term "grade B contour" means the field strength of a television broadcast station computed in accordance with regulations promulgated by the Commission;

*(14) the term "headend" means the location of any equipment of a cable system used to process the signals of television broadcast stations for redistribution to subscribers;*

*(15) the term "multichannel video programming distributor" means a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who make available for purchase, by subscribers or customers, multiple channels of video programming;*

[(11)] *(16)* the term "other programming service" means information that a cable operator makes available to all subscribes generally;

[(12)] *(17)* the term "person" means an individual, partnership, association, joint stock company, trust, corporation, or governmental entity;

*(18) the term "principal headend" means—*

*(A) the headend, in the case of a cable system with a single headend, or*

*(B) in the case of a cable system with more than one headend, the headend designated by the cable operator to the Commission as the principal headend, except that such designation shall not undermine or evade the requirements of section 614;*

[(13)] *(19)* the term "public, educational, or governmental access facilities" means—

(A) channel capacity designated for public, educational, or governmental use; and

(B) facilities and equipment for the use of such channel capacity;

*(20)(A) the term "local commercial television station" means any television broadcast station, determined by the Commission to be a commercial station, licensed and operating on a channel regularly assigned to its community by the Commission that, with respect to a particular cable system—*

*(i) is licensed to a community whose reference point, as defined in section 76.53 of title 47, Code of Federal Regulations, or any successsor regulations thereto, is within 50 miles of the principal headend of the cable system; and*

*(ii) delivers to the principal headend of the cable system either a signal level of −45 dBm for UHF signals and −49*

*dBm for VHF signals at the input terminals of the signal processing equipment, or a baseband video signal;*

*where such a television broadcast station would be considered a distant signal under section 111 of title 17, United States Code, it shall be deemed to be a local commercial television station upon agreement to reimburse the cable operator for the incremental copyright costs assessed against such operator as a result of being carried on the cable system;*

*(B) the term "local commercial television station" shall not include television translator stations and other passive repeaters which operate pursuant to part 74 of title 47, Code of Federal Regulations, or any successor regulations thereto;*

*(21) the term "qualified noncommercial educational television station" means any television broadcast station which—*

*(A)(i) under the rules and regulations of the Commission in effect on March 29, 1990, is licensed by the Commission as a noncommercial educational television broadcast station and which is owned and operated by a public agency, nonprofit foundation, corporation, or association; or*

*(ii) is owned or operated by a municipality and transmits only noncommercial programs for educational purposes; and*

*(B) has as its licensee an entity which is eligible to recieve a community service grant, or any successor grant thereto, from the Corporation for Public Broadcasting, or any successor organization thereto, on the basis of a formula set forth in section 396(k)(6)(B) (47 U.S.C. 396(k)(6)(B));*

*such term includes (I) the translator of any noncommercial educational television station with five watts or higher power serving the cable community, (II) a full service station or translator if such station ot translator is licensed to a channel reserved for noncommercial educational use pursuant to section 73.606 of title 47, Code of Federal Regulations, or any successor regulations thereto, and (III) such stations and translators operating on channels not so reserved as the Commission determines are qualified as noncommercial educational stations;*

*(22) the term "qualified low power station" means any television broadcast station conforming to the rules established for Low Power Television Stations contained in part 74 of title 47, Code of Federal Regulations, only if—*

*(A) such station broadcasts during at least the minimum number of hours of operating required by the Commission for television broadcast stations under part 73 of title 47, Code of Federal Regulations, and a significant part of their programming, in an amount to be determined by the Commission, is locally originated and produced;*

*(B) such station meets all obligations and requirements applicable to television broadcasting stations under part 73 of title 47, Code of Federal Regulations, with respect to the broadcast of nonentertainment programming; programming and rates involving political candidates, election issues, controversial issues of public importance, editorials, and personal attacks; programming for children; and equal employment opportunity;*

*(C) such station complies with interference regulations consistent with their secondary status pursuant to part 74 of title 47, Code of Federal Regulations; and*

*(D) such station is located no more than 35 miles from the cable system's headend, or no more than 20 miles if the low power station is located within one of the 50 largest Standard Metropolitan Statistical Areas, and delivers to the input terminals of the signal processing equipment at the cable system headend a signal level of −45 dBm for UHF stations and −49 dBm for VHF stations;*

*nothing in this paragraph shall be construed to grant any low power station primary status for spectrum occupancy;*

[(14)] *(23)* the term "service tier" means a category of cable service or other services provided by a cable operator and for which a separate rate is charged by the cable operator;

[(15)] *(24)* the term "State" means any State, or political subdivision, or agency thereof; [and]

*(25) the term "usable activated channels" means activated channels of a cable system, except those channels whose use for the distribution of broadcast signals would conflict with technical and safety regulations as determined by the Commission;*

*(26) the "video programmer" means a person engaged in the production, creation, or wholesale distribution of a video programming service for sale; and*

[(16)] *(27)* the term "video programming" means programming provided by, or generally considered comparable to programming provided by, a television broadcast station.

## PART II—USE OF CABLE CHANNELS AND CABLE OWNERSHIP RESTRICTIONS

### CABLE CHANNELS FOR PUBLIC, EDUCATIONAL, OR GOVERNMENTAL USE

SEC. 611. * * *

### CABLE CHANNELS FOR COMMERCIAL USE

SEC. 612. (a) The purpose of this section is *to promote competition in the delivery of diverse sources of video programming and* to assure that the widest possible diversity of information sources are made available to the public from cable systems in a manner consistent with growth and development of cable systems.

(b)(1) through (4) * * *

[(5) For the purposes of this section—

[(A) the term "activated channels" means those channels engineered at the headend of the cable system for the provision of services generally available to residential subscribers of the cable system, regardless of whether such services actually are provided, including any channel designated for public, educational, or governmental use; and

[(B) the term "commercial use" means the provision of video programming, whether or not for profit.]

*(5) For the purposes of this section, the term "commercial use" means the provision of video programming, whether or not for profit.*

(6) * * *

(c)(1) If a person unaffiliated with the cable operator seeks to use channel capacity designated pursuant to subsection (b) for commercial use, the cable operator shall establish, consistent with the purpose of this section *and with rules prescribed by the Commission under paragraph (4),* the price, terms, and conditions of such use which are at least sufficient to assure that such use will not adversely affect the operation, financial condition, or market development of the cable system.

(2) through (3) * * *

*(4)(A) The Commission shall have the authority to—*

*(i) determine the maximum reasonable rates that a cable operator may establish pursuant to paragraph (1) for commercial use of designated channel capacity, including the rate charged for the billing of rates to subscribers and for the collection of revenue from subscribers by the cable operator for such use; and*

*(ii) establish reasonable terms and conditions for such use, including those for billing and collection.*

*(B) Within 180 days after the date of enactment of this paragraph, the Commission shall establish rules for determining the maximum reasonable rate under subparagraph (A)(i) and for establishing terms and conditions under subparagraph (A)(ii).*

(d) through (h) * * *

OWNERSHIP RESTRICTIONS

SEC. 613. (a)*(1)* It shall be unlawful for any person to be a cable operator if such person, directly or through 1 or more affiliates, owns or controls, the licensee of a television broadcast station and the predicted grade B contour of such station covers any portion of the community served by such operator's cable system.

*(2) It shall be unlawful for a cable operator to hold a license for multichannel multipoint distribution service, or to offer satellite master antenna television service separate and apart from any franchised cable service, in any portion of the cable community served by that cable operator's cable system. The Commission—*

*(A) shall waive the requirements of this paragraph for all existing multichannel multipoint distribution services and satellite master antenna television services which are owned by a cable operator on the date of enactment of this paragraph; and*

*(B) may waive the requirements of this paragraph to the extent the Commission determines is necessary to ensure that all significant portion of the affected cable community are able to obtain video programming.*

(b) * * *

(c)*(1)* The Commission may prescribe rules with respect to the ownership or control of cable systems by persons who own or control other media of mass communications which serve the same community served by a cable system.

*(2) If ten percent of the households in the United States with television sets subscribe to service provided by multichannel video programming distributors directly via satellite to home satellite antennae, the Commission shall promulgate appropriate regulations (A) limiting ownership of any such distributor by cable operators or any*

*person having other media interests and (B) requiring access to such satellite service by unaffiliated video programmers.*

(d) through (e) * * *

[(f) this section shall not apply to prohibit any combination of any interests held by any person on July 1, 1984, to the extent of the interests so held as of such date, if the holding of such interests was not inconsistent with any applicable Federal or State law or regulations in effect on that date.]

*(f)(1) In order to enhance effective competition, the Commission shall, within one year after the date of enactment of the Cable Television Consumer Protection Act of 1991, conduct a rulemaking proceeding to prescribe rules and regulations establishing—*

*(A) reasonable limits on the number of cable subscribers a person is authorized to reach through cable systems owned by such person, or in which such person has an attributable interest; and*

*(B) reasonable limits on the number of channels on the cable system that can be occupied by a video programmer in which a cable operator has an attributable interest.*

*(2) In prescribing rules and regulations under paragraph (1), the Commmission shall, among other public interest objectives—*

*(A) ensure that no cable operator or group of cable operators can unfairly impede, either because of the size of any individual operator or because of joint actions by a group of operators of sufficient size, the flow of video programming from the video programmer to the consumer;*

*(B) ensure that cable operators affiliated with video programmers do not favor such programmers in determining carriage on their cable systems or do not unreasonably restrict the flow of such programming to other video distributors;*

*(C) take particular account of the market structure, ownership patterns, and other relationships of the cable television industry, including the nature and market power of the local franchise, the joint ownership of cable systems and video programmers, and the various types of non-equity controlling interests;*

*(D) account for any efficiencies and other benefits that might be gained through increased ownership or control;*

*(E) make sure rules and regulations reflect the dynamic nature of the communications marketplace;*

*(F) not impose limitations which would bar cable operators from serving previously unserved rural areas; and*

*(G) not impose limitations which would impair the development of diverse and high quality video programming.*

(g) * * *

*CARRIAGE OF LOCAL COMMERCIAL TELEVISION SIGNALS*

*SEC. 614. (a) Each cable operator shall carry, on the cable system of that operator, the signals of local commercial television stations and qualified low power stations as provided by this section. Carriage of additional broadcast television signals on such systems shall be at the discretion of such operator, subject to section 325(b).*

*(b)(1)(A) A cable operator of a cable system with 12 or fewer usable activated channels shall carry the signals of at least three local*

*commercial television stations, except that if such a system has 300 or fewer subscribers, it shall not be subject to any requirements under this section so long as such system does not delete from carriage by that system any signal of a broadcast television station.*

*(B) A cable operator of a cable system with more than 12 usable activated channels shall carry the signals of local commercial television stations, up to a maximum of one-third of the aggregate number of usable activated channels of such system.*

*(2) Whenever the number of local commercial television stations exceeds the maximum number of signals a cable system is required to carry under paragraph (1), the cable operator shall have discretion in selecting which such signals shall be carried on its cable system, except that—*

*(A) under no circumstances shall a cable operator carry a qualified low power station in lieu of a qualified local commercial broadcast station otherwise entitled to carriage under this section; and*

*(B) if the cable operator elects to carry an affiliate of a broadcast network (as such term is defined by the Commission by regulation), such cable operator shall carry the affiliate of such broadcast network whose city of license reference point, as defined under section 76.53 of title 47, Code of Federal Regulations (as in effect on January 1, 1991), or any successor regulation thereto, is closest to the principal headend of the cable system.*

*(3)(A) A cable operator shall carry in its entirety, on the cable system of that operator, the primary video and accompanying audio transmission of each of the local commercial television stations carried on the cable system and, to the extent technically feasible, program-related material carried in the vertical blanking interval, or on subcarriers. Retransmission of other material in the vertical blanking interval or other non-program-related material (including teletext and other subscription and advertiser-supported information services) shall be at the discretion of the cable operator. Where appropriate and feasible, the operator may delete signal enhancements, such as ghost-canceling, from the broadcast signal and employ such enhancements at the system headend or headends.*

*(B) The cable operator shall carry the entirety of the program schedule of any television station carried on the cable system unless carriage of specific programming is prohibited, and other programming authorized to be substituted, under section 76.67 or subpart F of part 76 of title 47, Code of Federal Regulations (as in effect on January 1, 1991), or any successor regulations thereto.*

*(4)(A) The signals of local commercial television stations that a cable operator carries shall be carried without material degradation. The Commission shall adopt carriage standards to ensure that, to the extent technically feasible, the quality of signal processing and carriage provided by a cable system of the carriage of local commercial television stations will be no less than that provided by the system for carriage of any other type of signal.*

*(B) At such time as the commission prescribes modifications of the standards for television broadcast signals, the Commission shall initiate a proceeding to establish any changes in the signal carriage requirements of cable television systems necessary to ensure cable*

*carriage of such broadcast signals of local commercial television stations which have been changed to conform with such modified standards.*

*(5) Notwithstanding paragraph (1), a cable operator shall not be required to carry the signal of any local commercial television station that substantially duplicates the signal of another local commercial television station which is carried on its cable system, or to carry the signals of more than one local commercial television station affiliated with a particular broadcast network (as such term is defined by regulation). If a cable operator elects to carry on its cable system a signal which substantially duplicates the signal of another local commercial television station carried on the cable system, or to carry on its system the signals of more than one local commercial television station affiliated with a particular broadcast network, all such signals shall be counted toward the number of signals the operator is required to carry under paragraph (1).*

*(6) Each signal carried in fulfillment of carriage obligations of a cable operator under this section shall be carried on the cable system channel number on which the local commercial television station is broadcast over the air, or on the channel on which it was carried on July 19, 1985, at the election of the station, or on such other channel number as is mutually agreed upon by the station and the cable operator. Any disputes regarding the positioning of a local commercial television station shall be resolved by the Commission.*

*(7) Signals carried in fulfillment of the requirements of this section shall be provided to every subscriber of a cable system. Such signals shall be viewable via cable on all television receivers of a subscriber which are connected to a cable system by a cable operator or for which a cable operator provides a connection. If a cable operator authorizes subscribers to install additional receiver connections, but does not provide the subscriber with such connections, or with the equipment and materials for such connections, the operator shall notify such subscribers of all broadcast stations carried on the cable system which cannot be viewed via cable without a converter box and shall offer to sell or lease such a converter box to such subscribers at reasonable rates.*

*(8) A cable operator shall identify, upon request by any person, the signals carried on its system in fulfillment of the requirements of this section.*

*(9) A cable operator shall provide written notice to a local commercial television station at least 30 days prior to either deleting from carriage or repositioning that station. No deletion or repositioning of a local commercial television station shall occur during a period in which major television ratings services measure the size of audiences of local television stations. The notification provisions of this paragraph shall not be used to undermine or evade the channel positioning or carriage requirements imposed upon cable operators under this section.*

*(10) A cable operator shall not accept or request monetary payment or other valuable consideration in exchange either for carriage of local commercial television stations in fulfillment of the requirements of this section or for the channel positioning rights provided to such stations under this section, except that—*

*(A) any such station may be required to bear the costs associated with delivering a good quality signal to the headend of the cable system;*

*(B) a cable operator may accept payments from stations which would be considered distant signals under section 111 of title 17, United States Code, as reimbursement for the incremental copyright costs assessed against such cable operator for carriage of such signal; and*

*(C) a cable operator may continue to accept monetary payment or other valuable consideration in exchange for carriage or channel positioning of the signal or any local commercial television station carried in fulfillment of the requirements of this section, through, but not beyond, the date of expiration of an agreement thereon between a cable operator and a local commercial television station entered into prior to June 26, 1990.*

*(c) If there are not sufficient signals of full power local commercial television stations to fill the channels set aside under subsection (b), the cable operator shall be required to carry qualified low power stations until such channels are filled.*

*(d)(1) Whenever a local commercial television station believes that a cable operator has failed to meet its obligations under this section, such station shall notify the operator, in writing, or the alleged failure and identify its reasons for believing that the cable operator is obligated to carry the signals of such station or has otherwise failed to comply with the channel positioning or repositioning requirements of this section. The cable operator shall, within 30 days after such written notification, respond in writing to such notification and either commence to carry the signal of such station in accordance with the terms requested or state its reasons for believing that it is not obligated to carry such signal or is in compliance with the channel positioning and repositioning requirements of this section. A local commercial television station that is denied carriage or channel positioning or repositioning by a cable operator may obtain review of such denial by filing a complaint with the Commission. Such complaint shall allege the manner in which such cable operator has failed to meet its obligations and the basis for such allegations.*

*(2) The Commission shall afford such cable operator an opportunity to present data and arguments to establish that there has been no failure to meet its obligations under this section.*

*(3) Within 120 days after the date a complaint is filed, the Commission shall determine whether the cable operator has met its obligations under this section. If the Commission determines that the cable operator has failed to meet such obligations, the Commission shall order the cable operator to reposition the complaining station or, in the case of an obligation to carry a station, to commence carriage of the station and to continue such carriage for at least 12 months. If the Commission determines that the cable operator has fully met the requirements of this section, it shall dismiss the complaint.*

*(e) No cable operator shall be required—*

*(1) to provide or make available any input selector switch as defined in section 76.5(mm) of title 47, Code of Federal Regulations, or any comparable device, or*

*(2) to provide information to subscribers about input selector switches or comparable devices.*

*(f) Within 180 days after the date of enactment of this section, the Commission shall, following a rulemaking proceeding, issue regulations implementing the requirements imposed by this section.*

*CARRIAGE OF NONCOMMERCIAL EDUCATIONAL TELEVISION SIGNALS*

*SEC. 615. (a) In addition to the carriage requirements set forth in section 614, each operator of a cable system (hereafter in this section referred to as an "operator") shall carry the signals of qualified noncommercial educational television stations in accordance with the provisions of this section.*

*(b)(1) Subject to paragraphs (2) and (3) and subsection (e), each operator shall carry, on the cable system of that operator, each qualified local noncommercial educational television station requesting carriage.*

*(2)(A) Notwithstanding paragraph (1), an operator of a cable system with 12 or fewer usable activated channels shall be required to carry the signal of only one qualified local noncommercial educational television station; except that an operator of such a system shall comply with subsection (c) and may, in its discretion, carry the signals of other qualified noncommercial educational television stations.*

*(B) In the case of a cable system described in subparagraph (A) which operates beyond the presence of any qualified local noncommercial educational television station—*

*(i) the operator shall carry on that system the signal of one qualified noncommercial educational television station;*

*(ii) the selection for carriage of such a signal shall be at the election of the operator; and*

*(iii) in order to satisfy the requirements for carriage specified in this subsection, the operator of the system shall not be required to remove any other programming service actually provided to subscribers on March 29, 1990; except that such operator shall use the first channel available to satisfy the requirements of this subparagraph.*

*(3)(A) Subject to subsection (c), an operator of a cable system with 13 to 36 usable activated channels—*

*(i) shall carry the signal of at least one qualified local noncommercial educational television station but shall not be required to carry the signals of more than three such stations, and*

*(ii) may, in its discretion, carry additional such stations.*

*(B) In the case of a cable system described in this paragraph which operates beyond the presence of any qualified local noncommercial educational television station, the operator shall import the signal of at least one qualified noncommercial educational station to comply with subparagraph (A)(i).*

*(C) The operator of a cable system described in this paragraph which carries the signal of a qualified local noncommercial educational station affiliated with a State public television network shall not be required to carry the signal of any additional qualified local noncommercial educational television station affiliated with the*

*same network if the programming of such additional station is substantially duplicated by the programming of the qualified local noncommercial educational television station receiving carriage.*

*(D) An operator of a system described in subparagraph (A) which increases the usable activated channel capacity of the system to more than 36 channels on or after March 29, 1990 shall, in accordance with the other provisions of this section, carry the signal of each qualified local noncommercial educational television station requesting carriage, subject to subsection (e).*

*(c) Notwithstanding any other provision of this section, all operators shall continue to provide carriage to all qualified local noncommercial educational television stations whose signals were carried on their system as of March 29, 1990. The requirements of this subsection may be waived with respect to a particular operator and a particular such station, upon the written consent of the operator and the station.*

*(d) An operator required to add the signals of qualified local noncommercial educational television stations to a cable system under this section may do so by placing such additional stations on public, educational, or governmental channels not in use for their designated purposes.*

*(e) An operator of a cable system with a capacity of more than 36 usable activated channels which is required to carry the signals of three qualified local noncommercial educational television stations shall not be required to carry the signals of additional such stations the programming of which substantially duplicates the programming broadcast by another qualified local noncommercial educational television station requesting carriage. Substantial duplication shall be defined by the Commission in a manner that promotes access to distinctive noncommercial educational television services.*

*(f) A qualified local noncommercial educational television station whose signal is carried by an operator shall not assert any network non-duplication rights it may have pursuant to section 76.92 of title 47, Code of Federal Regulations, to require the deletion of programs aired on other qualified local noncommercial educational television stations whose signals are carried by that operator.*

*(g)(1) An operator shall retransmit in its entirety the primary video and accompanying audio transmission of each qualified local noncommercial educational television station whose signal is carried on the cable system, and, to the extent technically feasible, program-related material carried in the vertical blanking interval, or on subcarriers, that may be necessary for receipt of programming by handicapped persons or for educational or language purposes. Retransmission of other material in the vertical blanking interval or on subcarriers shall be within the discretion of the operator.*

*(2) An operator shall provide each qualified local noncommercial educational television station whose signal is carried in accordance with this section, with bandwidth and technical capacity equivalent to that provided to commercial television broadcast stations carried on the cable system and shall carry the signal of each qualified local noncommercial educational television stations without material degradation.*

*(3) The signal of a qualified local noncommercial educational television station shall not be repositioned by an operator unless the*

*operator, at least 30 days in advance of such repositioning, has provided written notice to the station and all subscribers of the cable system. For purposes of this paragraph, repositioning includes (A) assignment of a qualified local noncommercial educational television station to a cable system channel number different from the cable system channel number to which the station was assigned as of March 29, 1990, and (B) deletion of the station from the cable system.*

*(4) Notwithstanding the other provisions of this section, an operator shall not be required to carry the signal of any qualified local noncommercial educational television station which does not deliver to the cable system's principal headend a signal of good quality, as may be defined by the Commission.*

*(h) Signals carried in fulfillment of the carriage obligations of an operator under this section shall be available to every subscriber as part of the cable system's lowest priced service that includes the retransmission of local television broadcast signals.*

*(i)(1) An operator shall not accept monetary payment or other valuable consideration in exchange for carriage of the signal of any qualified local noncommercial educational television station carried in fulfillment of the requirements of this section, except that such a station may be required to bear the cost associated with delivering a good quality signal to the principal headend of the cable system.*

*(2) Notwithstanding the provisions of this section, an operator shall not be required to add the signal of a qualified local noncommercial educational television station not already carried under the provisions of subsection (c), where such signal would be considered as a distant signal for copyright purposes unless such station reimburses the operator for the incremental copyright costs assessed against such operator as a result of such carriage.*

*(j)(1) Whenever a qualified local noncommercial educational television station believes that an operator of a cable system has failed to comply with the signal carriage requirements of this section, the station may file a complaint with the Commission. Such complaint shall allege the manner in which such operator has failed to comply with such requirements and state the basis for such allegations.*

*(2) The Commission shall afford such operator an opportunity to present data, views, and arguments to establish that the operator has complied with the signal carriage requirements of this section.*

*(3) Within 120 days after the date a complaint is filed under this subsection, the Commission shall determine whether the operator has complied with the requirements of this section. If the Commission determines that the operator has failed to comply with such requirements, the Commission shall state with particularity the basis for such findings and order the operator to take such remedial action as is necessary to meet such requirements. If the Commission determines that the operator has fully complied with such requirements, the Commission shall dismiss the complaint.*

*(k) An operator shall identify, upon request by any person, those signals carried in fulfillment of the requirements of this section.*

*(l) For purposes of this section, "qualified local noncommercial educational television station" is defined as a qualified noncommercial educational television station—*

*(A) which is licensed to a principal community whose reference point, as defined in section 76.53 of title 47, Code of Federal Regulations (as in effect on March 29, 1990), or any successor regulations thereto, is within 50 miles of the principal headend of the cable system; or*

*(B) whose Grade B service contour, as defined in section 73.683(a) of such title (as in effect on March 29, 1990), or any successor regulations thereto, encompasses the principal headend of the cable system.*

PART III—FRANCHISING AND REGULATION

GENERAL FRANCHISE REQUIREMENTS

SEC. 621. (a)(1) A franchising authority may award, in accordance with the provisions of this title, 1 or more franchises within its jurisdiction; *except that a franchising authority may not unreasonably refuse to award an additional competitive franchise. For purposes of this subsection, refusal to award a second franchise on the grounds of technical infeasibility shall be deemed not to be unreasonable. Any applicant whose application for a second franchise has been denied by a final decision of the franchising authority may appeal such final decision pursuant to the provisions of section 635 for failure to comply with this subsection.*

(2) through (3) * * *

*(4) In awarding a franchise, the franchising authority shall allow the applicant's cable system a reasonable period of time to become capable of providing cable service to all households in the geographic area within the jurisdiction of the franchising authority.*

(b) through (e) * * *

FRANCHISE FEES

SEC. 622. * * *

[REGULATION OF RATES

[SEC. 623. (a) Any Federal agency or State may not regulate the rates for the provision of cable service except to the extent provided under this section. Any franchising authority may regulate the rates for the provision of cable service, or any other communications service provided over a cable system to cable subscribers, but only to the extent provided under this section.

[(b)(1) Within 180 days after the date of the enactment of this title, the Commission shall prescribe and make effective regulations which authorize a franchising authority to regulate rates for the provision of basic cable service in circumstances in which a cable system is not subject to effective competition. Such regulations may apply to any franchise granted after the effective date of such regulations. Such regulations shall not apply to any rate while such rate is subject to the provisions of subsection 9(c).

[(2) For purposes of rate regulation under this subsection, such regulations shall—

[(A) define the circumstances in which a cable system is not subject to effective competition; and

[(B) establish standards for such rate regulation.

[(3) The Commission shall periodically review such regulations, taking into account developments in technology, and may amend such regulations, consistent with paragraphs (1) and (2), to the extent the Commission determines necessary.

[(c) In the case of any cable system for which a franchise has been granted on or before the effective date of this title, until the end of the 2-year period beginning on such effective date, the franchishing authority may, to the extent provided in a franchise—

[(1) regulate the rates for the provision of basic cable service, including multiple tiers of basic cable service;

[(2) require the provision of any service tier provided without charge (disregarding any installation or rental charge for equipment necessary for receipt of such tier); or

[(3) regulate rates for the initial installation or the rental of 1 set of the minimum equipment which is necessary for the subscriber's receipt of basic cable service.

[(d) Any request for an increase in any rate regulated pursuant to subsection (b) or (c) for which final action is not taken within 180 days after receipt of such request by the franchising authority shall be deemed to be granted, unless the 180-day period is extended by mutual agreement of the cable operator and the franchising authority.

[(e)(1) In addition to any other rate increase which is subject to the approval of a franchising authority, any rate subject to regulation pursuant to this section may be increased after the effective date of this title at the discretion of the cable operator by an amount not to exceed 5 percent per year if the franchise (as in effect on the effective date of this title) does not specify a fixed rate or rates for basic cable service for a specified period or periods which would be exceeded if such increase took effect.

[(2) Nothing in this section shall be construed to limit provisions of a franchise which permits a cable operator to increase any rate at the operator's discretion; however, the aggregate increases per year allowed under paragraph (1) shall be reduced by the amount of any increase taken such year under such franchise provisions.

[(f) Nothing in this title shall be construed as prohibiting any Federal agency, State, or a franchising authority, from—

[(1) prohibiting discrimination among customers of basic cable service, or

[(2) requiring and regulating the installation or rental of equipment which facilitates the reception of basic cable service by hearing impaired individuals.

[(g) Any State law in existence on the effective date of this title which provides for any limitation or preemption of regulation by any franchising authority (or the State or any political subdivision or agency thereof) of rates for cable service shall remain in effect during the 2-year period beginning on such effective date, to the extent such law provides for such limitation or preemption. As used in this section, the term "State" has the meaning given it in section 3(v).

[(h) Not later than 6 years after the date of the enactment of this title, the Commission shall prepare and submit to the Congress a report regarding rate regulation of cable services, including such legislative recommendations as the Commission considers appropriate. Such report and recommendations shall be based on a study of such regulation which the Commission shall conduct regarding the effect of competition in the marketplace.]

*REGULATION OF RATES*

*SEC. 623. (a) Any Federal agency, State, or franchising authority may not regulate the rates for the provision of cable service, or for the installation or rental of equipment used for the receipt of cable service, except to the extent provided under this section and section 612. Any franchising authority may regulate the rates for the provision of cable service, or any other communications service provided over a cable system to cable subscribers, but only to the extent provided under this section.*

*(b)(1) If the Commission finds that a cable system is not subject to effective competition, the Commission shall ensure that the rates for the provision of basic cable service, including for the installation or rental of equipment used for the receipt of basic cable service, or charges for changes in service tiers, are reasonable; except that if fewer than 30 percent of all customers to that cable system subscribe only to basic cable service, the Commission also shall ensure that rates are reasonable for the lowest-priced tier of service subscribed to by at least 30 percent of the cable system's customers.*

*(2)(A) Upon written request by a franchising authority, the Commission shall review the State and local laws and regulations governing the regulation of rates of cable systems under the jurisdiction of such franchising authority. The Commission shall authorize such franchising authority to carry out such regulation pursuant to paragraph (1) in lieu of the Commission if the Commission finds that—*

*(i) such State and local laws and regulations conform to the procedures, standards, requirements, and guidelines prescribed under paragraph (4) and any interpretive rulings, decisions, and orders of the Commission that relate to rate regulation under this subsection; and*

*(ii) such franchising authority will provide the level of protection to consumers required by the Commission and that carries out the national policy established in this title.*

*(B) Upon petition by a cable operator or other interested party, the Commission shall review such regulation of cable system rates by a franchishing authority authorized under this paragraph. If the Commission finds that the franchising authority has acted inconsistently with the requirements in subparagraph (A), the Commission shall grant appropriate relief. If the Commission, after the franchising authority has had a reasonable opportunity to comment, determines that the State and local laws and regulations are not in conformance with subparagraph (A) (i) or (ii), the Commission shall revoke such authorization.*

*(3) A cable operator may add to or delete from a basic cable service tier any video programming other than retransmitted local television broadcast signals. Any obligation imposed by operation of law inconsistent with this subsection is preempted and may not be enforced.*

*(4) Within 120 days after the date of enactment of the Cable Television Consumer Protection Act of 1991, the Commission shall pre-*

*scribe by rule procedures, standards, requirements, and guidelines for the establishment of reasonable rates charged for basic cable service by a cable operator not subject to effective competition.*

*(5) A cable operator may file with the Commission, or with a franchising authority authorized by the Commission under paragraph (2) to regulate rates, a request for a rate increase in the price of a basic cable service tier. Any such request upon which final action is not taken within 180 days after such request shall be deemed granted.*

*(c)(1) When a franchising authority or a subscriber of any cable system found by the Commission not to be subject to effective competition files, within a reasonable time after a rate increase for cable programming service of that system, including an increase which results from a change in that system's service tiers or from a change in the per channel rate paid by subscribers for a particular video programming service, a complaint which establishes a prima facie case that rates for such cable programming service are unreasonable based on the criteria established by the Commission, the Commission shall determine whether such rates for cable programming service are unreasonable. In making its determination, the Commission shall inquire of the cable operator of such system as to the reasons for such rates. If the Commission finds that such rates cannot be justified under reasonable business practices, the Commission shall establish reasonable rates.*

*(2) Within 180 days after the date of enactment of the Cable Television Consumer Protection Act of 1991, the Commission shall prescribe by rule—*

*(A) the criteria for determining whether rates for cable programming service are unreasonable, and*

*(B) criteria for determining that (i) a complaint described under paragraph (1) is filed within a reasonable period after a rate increase and (ii) the complaint establishes a prima facie case that rates for cable programming service are unreasonable.*

*(3) In establishing the criteria for determining whether rates for cable programming service are unreasonable pursuant to paragraph (2)(A), the Commission shall consider, among other factors—*

*(A) the extent to which service offerings are offered on an unbundled basis;*

*(B) rates for similarly situated cable systems offering comparable services, taking into account, among other factors, similarities in facilities, regulatory and governmental costs, and number of subscribers;*

*(C) the history of rates for such service offerings of the system;*

*(D) the rates for all cable programming service offerings taken as a whole; and*

*(E) the rates for such service offerings charged by cable systems subject to effective competition, as defined in subsection (d).*

*(d) Under this section, a cable system shall be presumed to be subject to effective competition if—*

*(1) fewer than 30 percent of the households in the cable community subscribe to the cable service of such cable system; or*

*(2) the cable community is served by a sufficient number of local television broadcast signals and by more than one multichannel video programming distributor.*

*For purposes of paragraph (2), a cable community shall be considered as served by more than one multichannel video programming distributor if (A) comparable video programming is available at comparable rates to at least a majority of the households in the cable community from a competing cable operator, multichannel multipoint distribution service, direct broadcast satellite program distributor, television receive-only satellite program distributor, or other competing multichannel video programming distributor, and (B) the number of households subscribing to programming services offered by such competing multichannel video programming distributor, or by a combination of such distributors, is in the aggregate at least 15 percent of the households in the cable community. No competing multichannel video programming distributor serving households in a cable community which, directly or indirectly, is owned or controlled by, or affiliated through substantial common ownership with, the cable system in that cable community, shall be included in any determination regarding effective competition under this subsection.*

*(e) A cable operator shall have a rate structure, for the provision of cable service, that is uniform throughout the geographic area in which cable service is provided over its cable system.*

*(f) Nothing in this title shall be construed as forbidding any Federal agency, State, or franchising authority from—*

*(1) prohibiting discrimination among customers of cable service; or*

*(2) requiring and regulating the installation or rental of equipment which facilitates the reception of cable service by hearing-impaired individuals.*

*(g) For purposes of this section, the term "cable programming service" means all video programming services, including installation or rental of equipment not used for the receipt of basic cable service, regardless of service tier, offered over a cable system except basic cable service and those services offered on a per channel or per program basis.*

*(h) Within 120 days of enactment of this subsection, the Commission shall, by regulation, establish standards, guidelines, and procedures to prevent evasions of the rates, services, and other requirements of this section.*

REGULATION OF SERVICES, FACILITIES, AND EQUIPMENT

SEC. 624. (a) through (d) * * *

[(e) The Commission may establish technical standards relating to the facilities and equipment of cable systems which a franchising authority may require in the franchise.]

*(e)(1) The Commission shall, within one year after the date of enactment of the Cable Television Consumer Protection Act of 1991, establish minimum technical standards to ensure adequate signal quality for all classes of video programming signals provided over a cable system, and thereafter shall periodically update such minimum standards to reflect improvements in technology.*

*(2) The Commission may establish standards for technical operation and other signals provided over a cable system including but not limited to high-definition television (HDTV).*

*(3) The Commission may require compliance with and enforce any standard established under this subsection, adjusted as appropriate for the particular circumstances of the local cable system and cable community.*

*(4) The Commission shall establish procedures for complaints or petitions asserting the failure of a cable operator to meet the technical standards and seeking an order compelling compliance; except that nothing in this subsection shall be construed to limit the ability of a complainant or petitioner to seek any other remedy that may be available under the franchise agreement or State or Federal law or regulation.*

*(5) After the establishment of technical standards by the Commission pursuant to this section, neither a State or political subdivision thereof, nor a franchising authority or other governmental entity of State or political subdivision thereof, shall—*

*(A) establish any technical standards described in this subsection;*

*(B) enforce any such standards that have not been established by the Commission; or*

*(C) enforce any such standards that are inconsistent with the standards established by the Commission.*

(f) * * *

*(g) Within 120 days after the date of enactment of this subsection, the Commission shall prescribe rules and regulations concerning the disposition, after a subscriber to a cable system terminates service, of any cable installed by the cable operator within the premises of such subscriber.*

MODIFICATION OF FRANCHISE OBLIGATIONS

SEC. 625. * * *

RENEWAL

SEC. 626. (a) During the 6-month period which begins with the 36th month before the franchise expiration, the franchising authority may on its own initiative, and shall at the request of the cable operator, commence proceedings which afford the public in the franchise area approprate notice and participation for the purpose of—

(1) identifying the future cable-related community needs and interests; and

(2) reviewing the performance of the cable operator under the franchise during the then current franchise term.

*Submission of a timely written renewal notice by the cable operator specifically requesting a franchising authority to initiate the formal renewal process under this section is required for the cable operator to invoke the renewal procedures set forth in subsections (a) through (g); except that nothing in this section requires a franchising authority to commence the renewal proceedings during the 6-month period which begins with the 36th month before the franchise expiration.*

(b) * * *

(c)(1) Upon submittal by a cable operator of a proposal to the franchising authority for the renewal of a franchise *pursuant to subsection (b)*, the franchising authority shall provide prompt public notice of such proposal and, during the 4-month period which begins on the [completion of any proceedings under subsection (a)] *date of the submission of the cable operator's proposal pursuant to subsection (b)*, renew the franchise or, issue a preliminary assessment that the franchise should not be renewed and, at the request of the operator or on its own initiative, commence an administrative proceeding, after providing prompt public notice of such proceeding, in accordance with paragraph (2) to consider whether—

(A) the cable operator has substantially complied with the material terms of the existing franchise and with applicable law *throughout the franchise term*;

(B) the quality of the operator's service, including signal quality, response to consumer complaints, and billing practices, but without regard to the [mix, quality, or level] *mix or quality* of cable services or other services provided over the system, has been reasonable in light of community needs *throughout the franchise term*;

(C) through (D) * * *

(2) through (3) * * *

(d) Any denial of a proposal for renewal *which has been submitted in compliance with subsection (b)* shall be based on one or more adverse findings made with respect to the factors described in subparagraphs (A) through (D) of subsection (c)(1), pursuant to the record of the proceeding under subsection (c). A franchising authority may not base a denial of renewal on a failure to substantially comply with the material terms of the franchise under subsection (c)(1)(A) or on events considered under subsection (c)(1)(B) in any case in which a violation of the franchise or the events considered under subsection (c)(1)(B) occur after the effective date of this title unless [the franchising authority has provided the operator with notice and the opportunity to cure, or in any case in which it is documented that the franchising authority has waived its right to object, or has effectively acquiesced.] *the operator has notice and opportunity to cure, or in any case in which it is documented that the franchising authority has waived in writing its right to object.*

(e)(1) Any cable operator whose proposal for renewal has been denied by a final decision of a franchising authority made pursuant to this section, or has been adversely affected by a failure of the franchising authority to act in accordance with the procedural requirements of this section, may appeal such final decision or failure pursuant to the provisions of section 635.

(2) The court shall grant appropriate relief if the court finds that—

(A) any action of the franchising authority is not in compliance with the procedural requirements of this section *and such failure to comply actually prejudiced the cable operator*; or

(B) in the event of a final decision of the franchising authority denying the renewal proposal, the operator has demonstrated that the adverse finding of the franchising authority with respect to each of the factors described in subparagraphs (A) through (D) of subsection (c)(1) on which the denial is based is not supported by a preponderance of the evidence, based on the record of the proceeding conducted under subsection (c).

(f) through (h) * * *

*(i) Notwithstanding the provisions of subsections (a) through (h), any lawful action to revoke a cable operator's franchise for cause shall not be negated by the initiation of a renewal proceedings by the cable operator under this section.*

CONDITIONS OF SALE

SEC. 627. * * *

*LIMITATION OF LIABILITY*

*SEC. 628. (a) In any court proceeding pending on the date of enactment of this section, or initiated after such date, involving any claim under the Civil Rights Acts asserting a violation of First Amendment constitutional rights by a franchising authority or other governmental entity or by any official, member, employee, or agenty of such authority or entity, arising from actions expressly authorized or required by this title, any relief shall be limited to injunctive relief, declaratory relief, and attorney's fees and legal costs, except as provided in subsection (b).*

*(b) The limitation required by subsection (a) shall not apply to actions that, prior to such violation, have been determined by a final order of a court of binding jurisdiction, no longer subject to appeal, to be in violation of constitutional rights under the First Amendment or of the Civil Rights Acts.*

PART IV—MISCELLANEOUS PROVISIONS

PROTECTION OF SUBSCRIBER PRIVACY

SEC. 631. * * *

CONSUMER PROTECTION

SEC. 632. (a) A franchising authority *may establish and* may require, as part of a franchise (including a franchise renewal, subject to section 626), provisions for enforcement of—

(1) customer service requirements of the cable operator *that (A) subject to the provisions of subsection (e), exceed the standards set by the Commission under this section, or (B) prior to the issuance by the Commission of rules pursuant to subsection (d)(1), exist on the date of enactment of the Cable Television Consumer Protection Act of 1991;* and

(2) construction schedules and other construction-related requirements of the cable operator.

(b) through (c) * * *

*(d)(1) The Commission, within 180 days after the date of enactment of this subsection, shall, after notice and an opportunity for comment, issue rules that establish customer service standards that ensure that all customers are fairly served. Thereafter the Commission shall regularly review the standards and make such modifications as may be necessary to ensure that customers of the cable industry are fairly served. A franchising authority may enforce the standards established by the Commission.*

*(2) Notwithstanding the provisions of subsection (a) and this subsection, nothing in this title shall be construed to prevent the enforcement of—*

*(A) any municipal ordinance or agreement in effect on the date of enactment of this subsection, or*

*(B) any State law,*

*concerning customer service that imposes customer service requirements that exceed the standards set by the Commission under this section.*

*(e) In the event that a particular franchising authority, pursuant to its authority under subsection (a), requires provisions for enforcement of customer service requirements of the cable operator that exceed the standards established by the Commission, the cable operator may petition the Commission for a declaration, after notice and hearing and based upon substantial evidence, that the particular franchising authority's requirements are not in the public interest. In determining whether a particular franchising authority's provisions for enforcement of customer service requirements are not in the public interest, the Commission shall consider the needs of the local area served by the particular franchising authority.*

UNAUTHORIZED RECEPTION OF CABLE SERVICE

SEC. 633. * * *

EQUAL EMPLOYMENT OPPORTUNITY

SEC. 634. * * *

JUDICIAL PROCEEDINGS

SEC. 635. (a) Any cable operator adversely affected by any final determination made by a franchising authority under section *621(a)(1),* 625 or 626 may commence an action within 120 days after receiving notice of such determination, which may be brought in—

(1) the district court of the United States for any judicial district in which the cable system is located; or

(2) in any State court of general jurisdiction having jurisdiction over the parties.

(b) The court may award any appropriate relief consistent with the provisions of the relevant section described in subsection (a).

*(c)(1) Notwithstanding any other provision of law, any civil action challenging the constitutionality of section 614 of this Act or any provision thereof shall be heard by a district court of three judges convened pursuant to the provisions of section 2284 of title 28, United States Code.*

*(2) Notwithstanding any other provision of law, an interlocutory or final judgment, decree, or order of the court of three judges in an action under paragraph (1) holding section 614 of this Act or any provision thereof unconstitutional shall be reviewable as a matter of right by direct appeal to the Supreme Court. Any such appeal shall be filed not more than 20 days after entry of such judgment, decree, or order.*

COORDINATION OF FEDERAL, STATE, AND LOCAL AUTHORITY

SEC. 636. * * *

EXISTING FRANCHISES

SEC. 637. * * *

CRIMINAL AND CIVIL LIABILITY

SEC. 638. * * *

OBSCENE PROGRAMMING

SEC. 639. * * *

*NONDISCRIMINATION WITH RESPECT TO VIDEO PROGRAMMING*

*SEC. 640. (a) A video programmer in which a cable operator has an attributable interest and who licenses video programming for national or regional distribution—*

*(1) shall not unreasonably refuse to deal with any multichannel video programming distributor;*

*(2) shall not discriminate in the price, terms, and conditions in the sale of the video programmer's programming among cable systems, cable operators, or other multichannel video programming distributors if such action would have the effect of impeding retail competition.*

*(b) A video programmer in which a cable operator has an attributable interest and who licenses video programming for national or regional distribution shall make programming available on similar price, terms, and conditions to all cable systems, cable operators, or their agents or buying groups; except that such video programmer may—*

*(1) impose reasonable requirements for creditworthiness, offering of service, and financial stability;*

*(2) establish different price, terms, and conditions to take into account differences in cost in the creation, sale, delivery, or transmission of video programming;*

*(3) establish price, terms, and conditions which take into account economies of scale or other cost savings reasonably attributable to the number of subscribers served by the distributor; and*

*(4) permit price differentials which are made in good faith to meet the equally low price of a competitor.*

*(c) The Commission shall prescribe rules and regulations to implement this section. The Commission's rules shall—*

*(1) provide for an expedited review of any complaints made pursuant to this section; and*

*(2) provide for penalties to be assessed against any person filing a frivolous complaint pursuant to this section.*

*(d) Any person who encrypts any satellite cable programming for private viewing shall make such programming available for private viewing by C-band receive-only home satellite antenna users.*

*(e) This section shall not apply to the signal of an affiliate of a national television broadcast network or other television broadcast signal that is retransmitted by satellite and shall not apply to any internal satellite communication of any broadcaster, broadcast network, or cable network.*

*(f) For purposes of this section, any video programmer who licenses video programming for distribution to more than one cable community shall be considered a regional distributor of video programming. Nothing contained in this section shall require any person who licenses video programming for national or regional distribution to make such programming available in any geographic area beyond which such programming has been authorized or licensed for distribution.*

*NONDISCRIMINATION WITH RESPECT TO SATELLITE CARRIERS*

*SEC. 641. A satellite carrier that provides service pursuant to section 119 of title 17, United States Code—*

*(1) shall not unreasonably refuse to deal with any distributor of video programming in the provision of such service to home satellite earth stations qualified to receive such service under section 119 of title 17, United States Code; and*

*(2) shall not discriminate in the price, terms, and conditions of the sale of such service among distributors to home satellite earth stations qualified to receive such signals under section 119 of title 17, United States Code, or between such distributors and other multichannel video programming distributors.*

*AGREEMENTS BETWEEN CABLE OPERATORS AND VIDEO PROGRAMMERS*

*SEC. 642. Within one year after the date of enactment of this section, the Commission shall establish regulations governing program carriage agreements and related practices between cable operators and video programmers. Such regulations shall—*

*(1) include provisions designed to prevent a cable operator or other multichannel video programming distributor from requiring a financial interest in a program service as a condition for carriage on one or more of such operator's systems;*

*(2) include provisions designed to prohibit a cable operator or other multichannel video programming distributor from coercing a video programmer to provide exclusive rights against other multichannel video programming distributors as a condition of carriage on a system;*

*(3) contain provisions designed to prevent a multichannel video programming distributor from engaging in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programmer to compete fairly by discriminating in video programming distribution on the basis of affiliation or nonaffiliation in the selection, terms, or conditions for carriage of video programmers;*

*(4) provide for expedited review of any complaints made by a video programmer pursuant to this section;*

*(5) provide for appropriate penalties and remedies for violations of this subsection, including carriage; and*

*(6) provide penalties to be assessed against any person filing a frivolous complaint pursuant to this section.*

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