

Fall 1991

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Philip J. Boeckman

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Recommended Citation

Philip J. Boeckman, *Effects of Recent Developments on the TELCO/CATV Cross-Ownership Prohibitions, The*, 56 MO. L. REV. (1991)

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The Effects of Recent Developments on the TELCO/CATV Cross-Ownership Prohibitions¹

On October 24, 1991, the Federal Communications Commission proposed rules allowing the telephone companies to offer a "video dial tone" over telephone lines that would carry programming produced by outside companies.² Although not allowed to produce the programs, the telephone companies would be permitted to package and transmit television programming. The proposed rules do require that telephone companies make their networks available to all programmers.³ The Federal Communications Commission also opened an inquiry on whether to let the telephone companies produce programs.⁴

I. INTRODUCTION

William L. Weiss, chairperson and chief executive officer of American Information Technologies, states "most people [in the United States], and most of our leaders, do not understand the linkage" between the "quality of the public communications network, national prosperity, and global competitiveness."⁵ In the United States, "[we] still don't seem to recognize the connection between our information capabilities and our economic future. Telecommunications belongs near the very summit of our national priorities."⁶

As telecommunications enters its most innovative and costly phase, a core issue in the evolving telecommunications debate is whether we should repeal cross-ownership laws and regulations.⁷ These laws and regulations prohibit

1. This article was presented to the Communication Technology and Policy Division at the 1991 Annual Convention of the Association for Education in Journalism and Mass Communication.

2. Andrews, *Phone Companies Could Transmit TV Under F.C.C. Plan*, N.Y. Times, Oct. 25, 1991, at A1. The proposed rules were unanimously adopted in a 5 to 0 vote and "are likely to be adopted by the [Federal Communications Commission] within a year." *Id.*

3. *Id.*

4. *Id.* at A1 & D16.

5. *Telecommunications Executive Compares U.S. and Foreign Priorities*, 123 No. 2 PUBLIC UTIL. FORTNIGHTLY 17 (Jan. 19, 1989).

6. *Id.*

7. See The Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 2, 98 Stat. 2779, 2785 (codified at 47 U.S.C. § 533(b) (Supp. 1989)); 47 C.F.R.

telephone companies (telcos) from owning cable television (CATV) systems within their telephone service areas. Before analyzing the current cross-ownership prohibitions and the future shape such restrictions might take, it is necessary to provide an overview of how a cable system works and a summary of the cross-ownership laws and regulations.

A cable television operator transmits signals to customers via coaxial cable. The cable operator collects the signals from the airwaves with an antenna or microwave receiver, amplifies and converts them using a "headend" device, and then sends the signals along a branching series of distribution cables until they ultimately reach the homes of individual subscribers.⁸ To secure the access to the utility poles and conduit space necessary for the coaxial cable distribution system, the CATV industry enters leasing arrangements with telephone companies (the owners of the poles and conduits), rather than constructing its own poles or conduits.⁹ Because telephone companies have a natural monopoly over this crucial link in the cable distribution system, cable television operators have been dependent on the telephone companies.

Fearing that telcos owning or affiliating with cable companies used their monopoly over utility poles and conduit space to prevent or hinder competition with independent cable operators, the Federal Communications Commission (FCC) adopted the telephone company/cable television cross-ownership restrictions.¹⁰ The rules prohibit telcos from offering CATV services in their local service areas,¹¹ and from owning any affiliate, subsidiary, or related entity that provides cable television services.¹² The only telco/CATV affiliation allowed by the broad prohibition is the carrier-user relationship.¹³ The restrictions also bar telcos from providing pole or conduit space to affiliated or controlled CATV systems within their telephone service areas.¹⁴

Attempting to ensure that cable television is widely available to the public, the FCC fashioned exceptions to the cross-ownership restrictions. If CATV service cannot exist except through common ownership, or good cause

8. *General Tel. Co. v. FCC*, 413 F.2d 390, 393 (D.C. Cir.), *cert. denied*, 396 U.S. 888 (1969).

9. Comment, *Equal Access to Pole Attachment Agreements: Implications of Telephone Company Participation in the Cable Television Market*, 18 *BALT. L. REV.* 165, 167-69 (1988).

10. 47 C.F.R. §§ 63.54-.58 (1988).

11. Former Bell Operating Companies are banned from providing cable television outside their service areas. *See infra* notes 75-85 and accompanying text.

12. 47 C.F.R. § 63.54(a) (1988).

13. *See id.* § 63.54 n.1.

14. *Id.* § 63.54(b). By contrast, telephone companies must offer independent CATV systems the alternative of pole attachment rights before providing channel distribution services. *Id.* § 63.57.

is demonstrated, the cross-ownership rules are waived if such a waiver is in the public interest.¹⁵ In 1981 the FCC created an exemption for rural areas, provided there already was not an independent cable system under construction or in existence.¹⁶

Perceived as a necessary evil when created, the cross-ownership restrictions are now considered by many as simply an evil. The prohibitions have come under fire in several forums. The FCC recommended lifting the ban. The judiciary has become involved through both Judge Harold Greene's review of the Modified Final Judgment in the American Telephone and Telegraph (AT&T) antitrust action, and *Northwestern Indiana Telephone Company, Inc. v. FCC*,¹⁷ in which an Indiana telco unlawfully affiliated with a CATV company. Several bills dealing with telco entry into cable or reregulating the CATV industry are receiving serious consideration by Congress.

In each forum the telephone companies are in one corner and the cable television operators are in the opposite corner. Claiming to be wearing the white trunks, the telcos argue that the cable industry no longer needs protection, and paint black trunks on the CATV companies.¹⁸ The cable industry is, according to the telcos, an unregulated monopoly that has excessive control over programming and unreasonable consumer leverage.¹⁹ A competitive cable market can lower cable rates and increase diversity in programming and program choices.²⁰ The telcos further claim that "[o]pening up the cable industry to competition would expedite the deployment of new technologies."²¹ Telcos currently feel limited to narrowband distribution systems, or at most, a very slow conversion to broadband networks. The telephone industry argues that with CATV, it can more rapidly upgrade to broadband distribution systems.²² A broadband network is essential to the development of a fiber-optic system, which promises such services as high-

15. *Id.* §§ 64.56(a), (b). *See also In re* Revision of the Processing Policies for Waivers of the Telephone Company-Cable Television "Cross-Ownership Rules," 69 F.C.C. 2d 1097, 1110-11 (1978) (clarification of what constitutes "good cause" under § 64.56(a)).

16. 47 C.F.R. § 63.58 (1988). *See also* Report and Order, CC Docket No. 80-767, 88 F.C.C. 2d 564 (1981).

17. 872 F.2d 465 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 757 (1990).

18. Sodolski, *Elimination of the Cross-Ownership Restrictions Would Serve the Public Interest and Benefit Consumers*, COMM. LAW., at 21-23 (Spring 1989). John Sodolski is President of the United States Telephone Association. *Id.* at 22.

19. *Id.* at 21.

20. *Id.* at 22.

21. *Id.* at 21.

22. *Id.* at 22.

definition television (HDTV), two-way video, and information retrieval.²³ At stake, the telcos believe, is "the reliability and ubiquity of the nation's telecommunications infrastructure."²⁴

Since broadband networks and fiber optics technology are already available, the cable operators question the legitimacy of the need for telco involvement in video programming. The CATV industry contends that broadband systems have not been deployed because there is a lack of consumer demand, not because telcos are forbidden from owning CATV systems.²⁵ According to the cable industry, the telcos want to participate in the video programming business to justify fee increases. Without new capital expenditures, the telephone companies will be forced to reduce their fees as many of their assets have depreciated significantly.²⁶ The cable operators argue that the telcos will use revenues from telephone services to underwrite their ventures into CATV.²⁷ This contention is strengthened by the staggering cost of the technology the telcos want to use to distribute video programming—one estimate places the cost of fiber optics at \$500 billion.²⁸

Citing the telephone companies' long history of anticompetitive behavior, cable television operators believe telcos want to force them out of business. The cable operators are the principal potential competition to the current telco monopoly in interactive services.²⁹ Ringing the first amendment liberty bell, the CATV industry contends that telco entry threatens the principle that speech should be free from government intervention: "The temptation for a heavily regulated industry whose profits are set by government to acced [sic] to government oversight of the editorial process would be frightening."³⁰

Because of the players' financial stake and the public's interest in cable television, decisions affecting the cross-ownership restrictions probably will be made in one or more forums. This Comment analyzes the cable television market and the effects of telco entry on the CATV industry. It attempts to aid the various forums in considering the effectiveness and necessity of the laws on this crucial issue. First, however, it is important to understand the origins

23. Barret, *The Potential of Fiber Optics to the Home: A Regulator's Perspective*, 123 No. 2 PUB. UTIL. FORTNIGHTLY 14 (Jan. 19, 1989).

24. Sodolski, *supra* note 18, at 21.

25. Mooney, *Cross-Ownership Restrictions—The Cable View*, COMM. LAW., at 20 (Spring 1989). Mooney is President and CEO of the National Cable Television Association. *Id.* at 21.

26. *Id.* at 20.

27. *Id.*

28. *Id.*

29. Lloyd, *Telephone Company Entry Into Video Programming* (1989) (WESTLAW, PLI Order No. G4-3826/1).

30. Mooney, *supra* note 25, at 21.

of the cross-ownership prohibitions, current developments in the forums hearing the arguments, and the status of the cable and telecommunications markets.

II. LEGAL BACKGROUND: TO REGULATE OR NOT TO REGULATE

The regulation of telephone company involvement in the cable television industry reflects the efforts of the federal government to strike a balance. Such a balance should effectively serve the interests of the cable and telephone companies, television audiences, and the nation's telecommunications policies.

CATV systems emerged around 1950,³¹ and the FCC did not initially regulate the industry. But in the mid-1960s, after broadcasters recognized cable television as a competitor, the FCC began considering regulation.³² In 1970, following a two-year inquiry, the FCC found an "anomalous competitive situation" between CATV systems owned by, or affiliated with telcos, and independent cable television systems relying upon the telcos for channel service offerings or access to pole attachments.³³ This "anomalous situation" developed from the telephone companies' natural monopoly over the utility pole lines required for cable television distribution.³⁴ The FCC concluded

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31. The [cable television] industry began in 1948 when appliance store owners, anxious to demonstrate television but unable to do so because of weak signals, erected large antennas connected to an amplification and distribution system. Early cable systems grew in communities with weak broadcast reception, either because of natural conditions (such as shading by mountains) or because the communities were at the fringes of the service areas of early TV broadcasters. They became known as Community Antenna Television Systems (CATVs)

GILLMOR, BARRON, SIMON & TERRY, *MASS COMMUNICATIONS LAW* 874 (5th ed. 1990) [hereinafter *MASS COMMUNICATIONS LAW*].

32. Because the primary purpose of early CATV systems was improving a community's reception of available, but hard to receive, over-the-air television programs, additional broadcasting audiences were available, and ergo the broadcasters liked the new systems. When CATV began offering competing services, however, the broadcasters became concerned and "manipulated the policymaking system into several years of regulatory suppression of cable television growth." *Id.* at 875.

33. *In re* Application of Telcos for Section 214 Certificates for Channel Facilities Furnished to Affiliated Community Antenna Television Systems, 21 F.C.C. 2d 307, 323, *reconsid. in part*, 22 F.C.C. 2d 746 (1970), *aff'd sub nom.* General Tel. Co. v. United States, 449 F.2d 846 (5th Cir. 1971).

34. *Id.* at 324. The FCC determined that telcos could use their control of pole and conduit space not only to exclude others from the cable television market, but to

that the public interest dictated prohibiting telcos from engaging in the sale of CATV services within their telephone service areas.³⁵

When the cross-ownership rules were adopted, cable television was in its infancy and was available to only nine percent of the nation's households.³⁶ According to recent accounts in the trade press, cable service is available to about ninety percent of the country. Cable industry revenue was \$17.7 billion in 1989—more than double the \$8.5 billion in revenue in 1984.³⁷

Despite the growth and apparent stability of the cable market since the 1971 passage of the cross-ownership prohibition, Congress codified the cross-ownership rules in section 613(b) of the Cable Communications Act of 1984.³⁸ Apart from instructing the FCC to permit telco ownership of cable systems in rural areas,³⁹ Congress did not independently develop conclusions about the prohibition.⁴⁰ The regulations adopted by the FCC to implement Section 613(b) were essentially the same as the FCC's pre-existing cable television/telephone company cross-ownership rules.⁴¹

extend their monopoly to new broadband services that might otherwise be provided over coaxial facilities by independent operators. *Id.*

35. *Id.* at 325-26. The Commission amended part 63 of its rules to include the telco/cable television cross-ownership rules. See 47 C.F.R. §§ 63.54-.58 (1988). The FCC's decision to adopt the cross-ownership regulations was upheld by the Fifth Circuit Court of Appeals in *General Tel. Co. v. United States*, 449 F.2d 846 (5th Cir. 1971).

36. Telephone Company/Cable Television Cross-Ownership Restrictions (Notice of Inquiry), CC Docket No. 87-266, 2 F.C.C. Rec. 5092, 5093 (Aug. 1987) [hereinafter 1987 Original Notice of Inquiry].

37. *In re* Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service (Report), MM Docket No. 89-600, 5 F.C.C. Rec. 4962, 4966-67 (July 31, 1990).

38. The Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 2, 98 Stat. 2779, 2785 (codified at 47 U.S.C. § 533(b) (Supp. 1989)).

39. Congress intended to permit telco ownership of cable systems in rural areas, regardless of whether service from an independent provider was available. The Commission's previous policy was to limit telephone company ownership of cable systems to those areas where there was no independent cable ownership. See H.R. Rep. No. 934, 98th Cong., 2d Sess. 21, 56-57 (1984); see also 47 C.F.R. § 63.58 (1988).

40. The legislative history of the Cable Act indicates that it was "the intent of Section 613(b) to codify current FCC rules concerning the provision of video programming over cable systems by common carriers." H.R. Rep. No. 934, 98th Cong., 2d Sess. 21, 56 (1984).

41. See Amendment of Parts 1, 63, and 76 of the Commission's Rules to Implement the Provisions of the Cable Communications Policy Act of 1984, Report and Order, MM Docket No. 84-1296, 50 Fed. Reg. 18,637 (1985).

Although Congress gave the cable television industry a vote of confidence in 1984, the FCC in 1987 began an inquiry to determine whether the restrictions on telco entry actually did encourage competitive provision of cable services.⁴² After examining the comments submitted by fifty-five parties, the FCC in 1988 reached the tentative conclusion that "greater participation in the provision of cable television service by telephone common carriers would result in greater, not lesser, competition in cable television service."⁴³

The FCC based its decision on two findings. First, the FCC determined that the cable industry was no longer a fledgling in need of protection.⁴⁴ According to the FCC, there was no risk of telco preemption of broadband cable services because the existing cable systems were already in operation.⁴⁵ The FCC noted that CATV operators had such favorable profitability, access to programming, and investor interest that they had joined the "major leagues" of American corporations. The cable television industry was capable of holding its own against competition from the telcos.⁴⁶ Finally, the FCC observed, any remaining concerns that telcos might compete unfairly with independent cable operators could be satisfied by means less restrictive than a blanket ban.⁴⁷

Second, the FCC found that the cross-ownership prohibitions were not producing the competition and new services they were intended to produce.⁴⁸ Instead, cable had become a largely unregulated monopoly—within a

42. 1987 Original Notice of Inquiry, *supra* note 36, at 5092.

43. *In re* Telephone Company-Cable Television Cross-Ownership Rules (Further Notice of Inquiry), CC Docket No. 87-266, 3 F.C.C. Rec. 5849, 5849 (1988) [hereinafter 1988 Further Notice of Inquiry].

The FCC also addressed in the 1988 Further Notice of Inquiry whether the cross-ownership prohibitions violated the first amendment. Acknowledging that the prohibition might implicate first amendment rights, the FCC found the prohibition to be "content neutral," and thus can continue to operate while the Commission—and ultimately the Congress—consider eliminating the bar. *Id.* at 5864.

44. *Id.* at 5853.

45. *Id.*

46. *Id.* According to one commentator, telcos might possess an inherent advantage over cable operators with respect to recently developed broadband services (such as data distribution and facsimile transmission). "[B]ecause telephone companies have existing plants and facilities which could be adapted in a relatively short time to provide these services, they have the ability to enter the broadband market very rapidly. Consequently, they would secure the market efficiencies that come with being the first provider in an area."

Comment, *supra* note 9, at 187 n.153.

47. 1988 Further Notice of Inquiry, *supra* note 43, at 5854.

48. *Id.* at 5857.

particular geographic area, the provision of cable service was usually controlled by a single company.⁴⁹ Rates charged by these unregulated cable monopolies had risen rapidly in recent years.⁵⁰ Furthermore, according to the FCC, the cable industry generally had failed to develop any new services.⁵¹ In addition, ownership of cable systems had become dramatically more concentrated,⁵² while simultaneously becoming increasingly vertically integrated.⁵³

The FCC recommended a scheme of nonstructural⁵⁴ and structural⁵⁵ safeguards. These safeguards would allow telco entry into the cable market, but prevent anti-competitive behavior by the telcos. The FCC provided few details about such safeguards, and no regulations were drafted removing the cross-ownership ban.

Several FCC proposals advocated relaxing the prohibition. The FCC suggested that the "good cause" waiver be expanded to include telco proposals for integrated broadband systems.⁵⁶ The FCC also issued a Notice of Proposed Rule Making, sanctioning increased affiliation between a telco and cable system.⁵⁷

49. *Id.* at 5852.

50. According to the General Accounting Office, the average monthly price of basic cable rose twenty-nine percent between December 1, 1986 and October 31, 1988. See General Accounting Office, *Telecommunications: National Survey of Cable Television Rates and Services*, REPORT TO THE CHAIRPERSON, SUBCOMMITTEE ON TELECOMMUNICATIONS AND FINANCE, COMMITTEE ON ENERGY AND COMMERCE, HOUSE OF REPRESENTATIVES (Aug. 3, 1989).

51. 1988 Further Notice of Inquiry, *supra* note 43, at 5853.

52. *Id.* at 5851-52. According to the telephone companies, the top four cable operators serve thirty-five percent of cable subscribers. *Id.* at 5851.

53. *Id.* at 5852.

54. The non-structural safeguards "would allow telephone companies to provide both regulated and unregulated services through one corporate unit, with certain ownership, accounting, and regulatory restrictions imposed to protect consumers and competitors from anti-competitive behavior." Note, *Law and Public Policy On A Constitutional Collision Course: A Regulatory Alternative To The FCC's Telco-Cable Cross-Ownership Proposal*, 40 SYRACUSE L. REV. 1309, 1323 (1989). See also 1988 Further Notice of Inquiry, *supra* note 43, at 5859-60.

55. The structural safeguards require major carriers to provide unregulated services "only through corporate affiliates fully separated from their basic regulated services operations." 1988 Further Notice Of Inquiry, *supra* note 43, at 5858.

56. *Id.* at 5860-61.

57. *Id.* at 5865-66.

III. CURRENT DEVELOPMENTS AND CONFLICTS

A. *Non-Congressional Arenas*

The FCC's 1988 recommendation of telco entry into cable television has been the most unilateral act to date supporting the telephone companies. Support since 1988 from the FCC and the federal judiciary for cross-ownership has been subtle. Such faint backing indicates that both the FCC and judiciary are content to let Congress wrestle with the cross-ownership issue.

1. The FCC

There has been no formal action by the FCC concerning the cross-ownership restrictions since 1988.⁵⁸ This three-year lull fosters the conclusion that the FCC is deferring to Congress on the cross-ownership issue.

The latest FCC development⁵⁹ relevant to cross-ownership was a July 1990 report recommending competition, not rate regulation, as the means for achieving a healthier cable television industry.⁶⁰ The FCC concluded that numerous sources are emerging which are capable of providing competition to the cable television operators.⁶¹ Because competition is materializing in cable television, the Commission discouraged any long-term regulation of cable television rates and services. The FCC expressly declined in the report to speculate on the competitive potential of telcos in cable television.⁶² The FCC noted that deciding the fate of telco involvement in CATV is a separate issue.⁶³ The July 1990 report contained mixed signals for the telcos. FCC

58. Two months after the release of the FCC proposals, the Commission's Office of Plans and Policy (OPP) issued a report critical and contradictory of its own Commission's findings. See Pepper, *Through the Looking Glass: Integrated Broadband Networks, Regulatory Policy and Institutional Change*, 24 OPP WORKING PAPER 103-06 (Nov. 1988).

59. The FCC recently published *Reexamination of the Effective Competition Standard for the Regulation of Cable Television Basic Service Rates, Further Notice of Proposed Rule Making*, 6 F.C.C. Rec. 208, 208 (Dec. 31, 1990) [hereinafter *The Effective Competition Standard*].

60. *Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service*, 5 F.C.C. Rec. 4962, 4962 (July 26, 1990) [hereinafter *Competition and Rate Deregulation Report*].

61. *Id.* at 5020. Potential sources offering competition to CATV include second cable systems, wireless cable systems, home satellite dishes, direct broadcast satellite services, and satellite master antenna television systems. *Id.*

62. *Id.* at 5019.

63. *Id.*

support for competition indicates that the door is still open for telco entry into CATV; an FCC recommendation of regulation might have foreclosed telco entry. The FCC's finding that other sources offer competition to cable systems, however, decreases the need for telco involvement in cable television. If other multichannel providers can eliminate the monopoly in the cable industry, the FCC may decide there is no need to endure the risks posed by telco-cable.

FCC Chairman Alfred Sikes, in his statement accompanying the report, supported the pro-competition policy.⁶⁴ Sikes' statement ignored the telephone companies as a potential cable television competitor.⁶⁵ But other comments by Commissioner Sikes reveal that he considers telcos a feasible and desirable competitor to CATV systems.⁶⁶ Thus, high level FCC support for telco entry still appears to exist. The timing and tone of the FCC's report indicate that it hoped the release would tilt congressional opinion toward competition. Telco involvement in cable television is a sensitive issue, and the FCC may be currently ignoring the telcos to avoid destroying congressional support for competition.

Although the FCC appears to favor deference to Congress, the Commission is increasingly frustrated by Congress' inaction. According to Chairman Sikes, "we deferred action on [cross-ownership] last fall, stating that Congress seemed to be on the threshold of enacting a cable television bill . . ."⁶⁷ Sikes expected Commission action by the spring of 1991 if Congress' stalemate continued.⁶⁸ However, no such action was taken by the FCC. This inaction compels the conclusion that Chairman Sikes was merely trying to "motivate" Congress.

Although the FCC appears to be awaiting congressional action, it is using its discretion in administering the cross-ownership exceptions to allow increased telco ownership of cable systems. The FCC can approve operation of a cable system by a telephone company in the telco's service area if "good cause" exists or the CATV service can only exist through common ownership.⁶⁹ In 1988 the FCC granted a waiver allowing the General Telephone Company (GTE) to build and partly operate a cable television system in Cerritos, California.⁷⁰ Although a subsidiary (Apollo Cablevision) operated

64. Sikes, *Statement of FCC Chairman Alfred C. Sikes on the Commission's Cable Television Report*, 5 F.C.C. Rec. 5130, 5130 (1990).

65. *Id.*

66. Springfield News-Leader, July 17, 1990, at 1, col. 3 (Springfield Mo.).

67. *Interview with Alfred C. Sikes, Chairman of the Federal Communications Commission*, COMMUNICATIONS LAWYER, Winter 1991, 1, 23.

68. *Id.*

69. 47 C.F.R. § 64.56(a) (1988).

70. *In re Application of General Tel. Co.*, 3 F.C.C. Rec. 2317, 2317 (1988).

most of the cable system, its design, construction, and ownership necessitated GTE leasing the system to Apollo.⁷¹ The leaseback arrangement initially was approved on "demonstrably could not exist" grounds.⁷² After full FCC review of the arrangement, it was concluded that there was "good cause" for the GTE-Apollo affiliation.⁷³ Cerritos represents the first grant of a "good cause" waiver. According to one commentator, "[t]he decision may be the harbinger of increased telephone company ownership of cable systems."⁷⁴

2. The Federal Judiciary

The federal judiciary has been unwilling to overturn or limit the cross-ownership restrictions. Concurring with the FCC, the judiciary appears to consider Congress the proper body to resolve the cross-ownership dilemma.

Judge Harold Greene's decisions on the Modified Final Judgment (MFJ) ban signify the most important judicial developments. The MFJ refers to the consent decree entered, pursuant to federal antitrust laws, in the AT&T antitrust litigation; it prohibits AT&T and former Bell Operating Companies (BOCs) from providing "interexchange telecommunication services or information services."⁷⁵ The cross-ownership includes the operation of cable television systems.⁷⁶ Unless Judge Greene removes the ban on the generation of information services, congressional action is required before AT&T and BOCs can operate cable television systems.

The Justice Department in 1987 recommended rescinding the MFJ prohibition on the provision of information services. The Justice Department considered the FCC structural and non-structural safeguards sufficient protection against pre-divestiture abuses.⁷⁷ Judge Greene, however, rejected the arguments of the Justice Department and the BOCs, and accepted the

71. *Id.* Such an arrangement is termed a "leaseback." GTE originally sought section 214 authorization from the FCC for the leaseback cable system. *Id.*

72. *Id.* at 2323.

73. *In re* Application of General Tel. Co., 4 F.C.C. Rec. 5693, 5693 (1989). The FCC limited the "good cause" waiver to five years and required that GTE contract with another entity to provide the video programming. *Id.*

74. MASS COMMUNICATIONS LAW, *supra* note 31, at 902.

75. *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131, 195 (D.D.C. 1982) [hereinafter *AT&T*], *aff'd sub nom.* *Maryland v. United States*, 460 U.S. 1001 (1983).

76. Information service is defined as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing or making available information, which may be conveyed via telecommunications." *Id.* at 229.

77. *United States v. Western Elec. Co., Inc.*, 673 F. Supp. 525, 528 (D.D.C. 1987) (citation omitted), *rev'd and remanded*, 900 F.2d 283 (D.C. Cir. 1990).

views of the cable and newspaper companies.⁷⁸ Judge Greene found that the cable operators were still dependent on the BOCs for attaching their cables to poles owned by the telcos and sharing conduit space.⁷⁹ The court felt that the BOCs had the same incentive and ability to engage in anti-competitive conduct as they did when the decree was entered in 1982.⁸⁰ Judge Green also regarded the FCC regulatory safeguards inadequate to prevent monopolistic abuses.⁸¹

The Court of Appeals for the District of Columbia reversed and remanded Judge Greene's holding.⁸² The court found that Judge Greene, in reviewing the restrictions on the provision of information services, should not have applied the "substantial possibility of impeding competition" standard. Instead, he should have used the more flexible "public interest" standard.⁸³

Upon remand from the court of appeals, Judge Green reluctantly ruled that the Bell Operating Companies may provide electronic information services.⁸⁴ However the carefully drafted ruling had no effect on the MFJ

78. *Id.* at 567.

79. *Id.* at 564.

80. *Id.* at 565. Types of anti-competitive behavior by telcos the court still feared included: manipulation of the quality of access lines; impairment of the speed, quality, and efficiency of dedicated private lines used by competitors; the shifting of costs to regulated business on a large scale (cross-subsidization); development of new information services to take advantage of planned, but not yet publicly known, changes in the interlying network; and use of the knowledge of the design, nature, geographic coverage, and traffic patterns of competitive information service providers. *Id.* at 566.

81. *Id.* at 567-79.

82. *United States v. Western Elec. Co.*, 900 F.2d 283, 305 (D.C. Cir. 1990), *cert. denied sub. nom. MCI Communications Corp. v. United States*, 111 S. Ct. 283 (1990), *remand*, 767 F. Supp. 308 (D.D.C. 1991), *motion to vacate stay denied*, No. 82-0192 (HHG) (D.D.C. Aug. 9, 1991) (WESTLAW, Allfeds library).

83. *Id.* In reconsidering the information services ban under the "public interest" standard, the court of appeals stated that the trial judge "should determine whether removal of the information-services restriction as applied to the generation of information would be anti-competitive under *present* market conditions. The court should also bear in mind the *flexibility* of the public interest inquiry." *Id.* at 309 (footnote omitted) (emphasis in original).

84. *United States v. Western Elec. Co.*, 767 F. Supp. 308 (D.D.C. 1991). According to Judge Green, "[t]he most probable consequences of such entry . . . will be the elimination of the competition . . . and the concentration of the sources of information of the American people in just a few dominant, collaborative conglomerates with the captive local monopolies as their base." *Id.* at 326.

prohibition on cross-ownership. Judge Green stayed his order pending appeal.⁸⁵

*Northwestern Indiana Telephone Co., Inc. v. FCC*⁸⁶ represents another telco-CATV battle before the FCC and the federal judiciary over the cross-ownership restrictions. The conflict initially involved CCI Cablevision (an Indiana cable company), Northwest Indiana Cablevision, and Northwestern Indiana Telephone Company, Incorporated (NITCO), a telco affiliated with Northwest.⁸⁷ The FCC determined that the affiliation between the two companies violated FCC regulations.⁸⁸ Besides leasing pole space to Northwest, NITCO had constructed and maintained three cable television systems for the cable company.⁸⁹ The FCC's determination was upheld in 1989 by the District of Columbia Court of Appeals.⁹⁰

The NITCO litigation produced a new standard for establishing a carrier-user relationship between a telco and CATV company. In two recent cases (*C & P* and *Ohio Bell*)⁹¹ the FCC granted approval for telco-supported cable systems because the relationship was within the carrier-user exception to the cross-ownership rules.⁹² NITCO and Northwest claimed their affiliation was within the boundaries of the carrier-user relationship.⁹³ The FCC, however, held that NITCO and Northwest did not satisfy the exception because NITCO

85. *Id.* at 333.

86. 872 F.2d 465 (D.C. Cir. 1989) (denying review of *CCI Cablevision v. Northwestern Ind. Tel. Co., Inc.*, 3 F.C.C. Rec. 3096 (1988)) [hereinafter *NITCO II*], *cert. denied*, 110 S. Ct. 757 (1990). The case was originally decided by the FCC in *Comark Cable Fund III v. Northwestern Ind. Tel. Co., Inc.*, 100 F.C.C. 2d 1244, *reh'g denied*, 103 F.C.C. 2d 600 (1985), and remanded back to the FCC for clarification in *Northwestern Ind. Tel. Co., Inc. v. FCC*, 824 F.2d 1205 (D.C. Cir. 1987) [hereinafter *NITCO I*].

87. Before the litigation concluded with the Supreme Court denying certiorari, four major telecommunications players had intervened: the United States Telephone Association, Bell Atlantic Telephone Company, National Cable Television Association, Inc., and United States Cable Television Association, Inc. United States Cable of Northern Indiana also intervened.

88. *NITCO I*, 824 F.2d at 1205-06.

89. *Id.*

90. *NITCO II*, 872 F.2d at 472.

91. *Chesapeake and Potomac Tel. Co.*, 57 Rad. Reg. 2d 1003 (1985) [hereinafter *C & P*]; *Ohio Bell Tel. Co.*, 1 F.C.C. Rec. 942, 942 (1986) [hereinafter *Ohio Bell*].

92. The carrier-user exception is derived from the language of note 1(a) to § 63.54 of the cross-ownership regulations. Note 1(a), which defines "affiliate" in sweeping terms, states that the term "affiliate" does not apply to the carrier-user relationship. 47 C.F.R. § 63.54 n.1(a) (1988). The carrier-user exception traditionally has been limited to the provision of channel distribution services.

93. *NITCO I*, 824 F.2d at 1209.

had not dealt with Northwest on common carrier terms. Unlike the telcos in *Ohio Bell* and *C & P*, NITCO had not evinced a willingness to deal with other cable companies on a common carrier basis.⁹⁴

The FCC's new, broader carrier-user definition encourages telco involvement in cable television; *Ohio Bell* and *C & P* evidence the court's approval of these relationships. Yet the NITCO litigation reveals that the FCC will not tolerate telco/CATV relationships that hinder or prevent competition with independent cable companies. There was no serious effort by NITCO to separate itself from Northwest. Examples of such abusive affiliation were the two companies sharing post office boxes, and NITCO leasing office space to and guaranteeing loans for Northwest. NITCO's behavior clearly violated the cross-ownership rules. It represents the type of telco behavior feared by the cable television companies.

The second reason the NITCO case is significant is that it revealed the judiciary's reluctance to involve itself in the cross-ownership conflict. Three challenges raised by the defendants and the intervenors could have allowed the court of appeals to settle the debate over the effectiveness, necessity and constitutionality of the cross-ownership prohibitions. "Confronted with this rather daunting fusillade," the court of appeals refused "to engage in the invited widened battle."⁹⁵ The court rejected the challenges on procedural grounds.⁹⁶ By refusing to plunge into the cross-ownership feud, the court of appeals adopted a posture of restraint. Except for requesting clarification of the carrier-user relationship, the court respected the Commission's decisions. The court's deference to the FCC demonstrates judicial respect for legislative and agency resolution of domestic political issues such as telecommunication policies.

B. Congressional Consideration

Proposals concerning the cable television industry have flooded the floors of the Senate and House of Representatives. Producing this flood have been the FCC's reconsideration of the cross-ownership ban, the telephone industry's lobbying, and the voters' hope for lower cable rates and improved services. The proposals generally fall into two categories: reregulating the cable industry, or interjecting other sources of competition into the cable market.

94. *CCI Cablevision v. Northwestern Tel. Co., Inc.*, 3 F.C.C. Rec. 3096, 3097 (1988). For example, NITCO refused to offer to a competing cable company terms similar to those granted Northwest. *Id.*

95. *NITCO II*, 872 F.2d at 470.

96. *Id.* at 470-72.

Senator Jack Danforth (R-Mo.) introduced the Cable Television Consumer Protection Act of 1991,⁹⁷ which restores the right of local authorities to regulate cable television rates if there is an absence of effective competition.⁹⁸ The bill also prohibits exclusive programming arrangements by CATV companies, and directs the FCC to establish new technical standards for quality reception and customer service.⁹⁹ A similar measure was approved by the House of Representatives last year, only to die on the Senate floor.¹⁰⁰ Opposition to the 1990 measure was led by President Bush, who threatened to veto the legislation.¹⁰¹ The Bush Administration favors competition, instead of regulation, to curb the cable industry's power.¹⁰² The Senate Commerce, Science and Transportation Committee, which approved last year's package by a vote of eighteen to one, is currently considering Danforth's legislation.¹⁰³

The death of Danforth's measure in 1990 kept the hope alive for telco entry into cable television.¹⁰⁴ Senator Conrad Burns (R-Mont.) is expected to reintroduce The Communications Competitiveness and Infrastructure Modernization Act of 1990, which provides for telco entry into cable television.¹⁰⁵ During the 101st Congress, the Senate Committee on Commerce, Science, and Transportation reported, without objection, a modified and weakened version of Senator Burns' bill. The Committee's approach required only an FCC examination of telco entry into cable television, but approved of telephone companies offering "video dial-tone" services.¹⁰⁶ Despite White

97. S. 12, 102d Cong., 1st Sess., 137 CONG. REC. 9 § 582 (1990). Senator Joseph Lieberman (D-Conn.) and Representative Christopher Shays (R-Conn.) also have introduced legislation. The Lieberman-Shays legislation "would give the FCC authority to oversee rates in localities currently lacking cable competition." *Communications: Cable Regulation Measures, Top Agenda in 1991*, BNA DAILY REPORT FOR EXECUTIVES, Jan 18, 1991 [hereinafter COMMUNICATIONS].

98. *Id.*

99. *Id.*

100. St. Louis Post-Dispatch, Sept. 29, 1990, at 8A, col. 4. For the House version, see the Cable Television Consumer Protected and Competition Act of 1990, H.R. 5267, 101st Cong., 2d Sess. (1990).

101. Halonen, *Telcos Seen as Beneficiaries of Cable Bill Death*, ELECTRONIC MEDIA, Oct. 29, 1990, at 34.

102. *Id.*

103. St. Louis Post-Dispatch, Jan. 15, 1991, at 4A, col. 2.

104. Halonen, *supra* note 101, at 44-45.

105. S. 2800, Senator Burns' bill in the 101st Congress, included the following requirements for telcos in order to safeguard the cable industry: separate subsidiaries; mandated access for unaffiliated programmers; franchising limitations; and a prohibition on the marketing and selling of video program services.

106. The "video dial-tone" concept received the recommendation of the National Published by University of Missouri School of Law Scholarship Repository, 1991

House approval,¹⁰⁷ Senator Burns' legislation does not enjoy the widespread support accompanying Senator Danforth's reregulation package.¹⁰⁸

IV. ANALYSIS: A RETURN TO REGULATION, OR COMPETITION VIA TELCO ENTRY?

The judiciary and the FCC appear to be awaiting congressional action on the cross-ownership issue. The FCC has been silent on the cross-ownership issue since the 1988 recommendation. The judiciary's stance in the NITCO and AT&T cases reveals that it shares the Commission's "wait-and-see" approach. There is legal precedent supporting the judiciary and the FCC formulating telecommunications policies.¹⁰⁹ Deference to Congress, however, is the proper posture toward cross-ownership between telephone and cable companies. A range of factors must be weighed in determining whether the prohibition against cross-ownership should continue. Congress, through its elaborate committee structure, provides a forum in which all parties can be heard. Congress is cognizant of the rise in cable television rates and increasingly poor CATV service; it is also aware of the telco potential for monopolistic behavior. The involvement of Congress in the debate over the future of CATV makes agency and judicial consideration unnecessary. Of course, Congress typically decides only broad policy. The Commission is usually delegated the power to implement such policy, with the judiciary refining the FCC's standards.

Judicial and FCC deference to the legislature merely delays the question of what policy Congress will and should choose for telephone company

Telecommunications and Information Administration. *Video Program Distribution and Cable Television: Current Policy, Issues and Recommendations*, NTIA Report 88-233 (1988). The system, while barring telcos from controlling the content of the programming they carry, would allow the telephone companies to transport the programming of others. *Id.*

The FCC rejected the NTIA proposal because it believed that without the video programming market, there would be insufficient financial incentives to induce telcos to develop, invest in, and operate the facilities that could be used to provide video entertainment programming and other services. 1988 Further Notice of Inquiry, *supra* note 43, at 5887.

107. Press Release, Burns Introduces Legislation to Spur Competition and Deployment of New Technology in Communications Industry, Sen. Conrad Burns (June 28, 1990).

108. COMMUNICATIONS, *supra* note 97.

109. Examples of such FCC and judicial activism are the original implementation of the cross-ownership regulations and the subsequent court approval of the rules, and the antitrust litigation involving the break-up of AT&T. See text accompanying *supra*

involvement in cable television. To answer that question, the status of the CATV industry must be considered to decide whether industry conditions necessitate legislative and agency intervention. The current cable television market serves as a backdrop for a critique of the two primary cable reform movements: reregulation and telco entry into cable.

A. *The Current Cable Television Market*

Prior to 1986, the cable industry was regulated by municipal authorities.¹¹⁰ Effective December 29, 1986, the Cable Act prohibited municipalities from regulating basic cable rates if "effective competition" existed.¹¹¹ Pursuant to authority granted by the Cable Act, the FCC determined that a cable television system was subject to effective competition, and therefore exempt from local rate regulation, if three or more broadcast television signals were available to the entire geographical area of the cable community.¹¹²

As a result of the Cable Act and the Commission's subsequent adoption of the definition of "effective competition," "basic service rates for all but a few cable systems are generally unregulated."¹¹³ According to a General Accounting Office survey, monthly rates rose more than fifty percent since 1986.¹¹⁴ Furthermore, the average number of channels has decreased by one.¹¹⁵ There has also been a "rising frustration over the poor quality of technical and customer service."¹¹⁶

The lack of regulatory limits on the rates charged by CATV operators has obviously contributed to the monopoly in the cable television industry. The dearth of competition from other entertainment sources has also boosted the

110. *The Effective Competition Standard*, *supra* note 59, at 2.

111. 47 U.S.C. §§ 543(b)(1), (c) (1988).

112. See Report and Order, MM Docket No. 84-1296, 50 Fed. Reg. 18,637-01 (1985), *aff'd in part, rev'd in part sub nom.* American Civil Liberties Union v. FCC, 823 F.2d 1554 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 959 (1988). The FCC, because of changed circumstances in the video marketplace is considering modification of warranted review of the "three signal" standard. See *The Effective Competition Standard*, *supra* note 59, at 215.

113. *In re Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service* (Notice of Inquiry), MM Docket No. 89-600, 55 Fed. Reg. 32631-01, at 9 (Dec. 12, 1989) [hereinafter *Inquiry on Reregulating the Cable Industry*]. The National League of Cities (NLC) states that rate regulation is prohibited in more than ninety-nine percent of its direct member cities. *Id.*

114. *Cable Fees Up 50 Pct. Since 1986*, St. Louis Post Dispatch, July 19, 1991 p. 5B. The General Accounting Office surveyed 1,505 cable television systems. There are about 9,600 cable systems in the nations. *Id.*

115. *Competition and Rate Deregulation Report*, *supra* note 60, at 4968.

116. *Id.*

cable monopoly. Cable systems encounter competition from such sources as broadcast television and video cassette recorders (VCRs). But this competition is only indirect, and thus is not sufficient to limit cable's overall market power.¹¹⁷

An unregulated monopoly usually results in high consumer rates and poor consumer service. Both conditions exist in the current cable television market. Less visible signs of the cable monopoly are the slow pace in introducing innovative new services, such as fiber optics and HDTV, and the forgone opportunity of improving the nation's telecommunications infrastructure.¹¹⁸ Without competition, cable operators have little or no incentive to invest in expensive new technology or to provide new services.

B. The Proposals to End Cable's Monopoly

The proposals for CATV reform generally fall into two categories: (1) reregulating the cable industry, particularly cable rates, or (2) allowing telephone company entry into the CATV industry, so as to introduce direct competition into cable television markets. An effective proposal will cure not only the visible symptoms of the cable monopoly (such as the skyrocketing rates and poor customer service), but also the less visible woes, such as the slow pace in introducing innovative new services and the failure to improve the nation's telecommunications infrastructure.

1. Reimposing Regulation

Cable television was a regulated industry prior to the passage of the 1984 Cable Act. The aim of the Cable Act was to foster competition by eliminating regulation. Because the Cable Act achieved a monopolistic, instead of competitive, marketplace, many are urging a return of regulation.

There are two primary types of regulation: structural and economic. Structural regulation addresses issues such as broadcast signal carriage, channel positioning, third-party access, vertical integration, and concentration of control in the cable industry. The critics of the CATV industry seem to agree that structural regulation is needed to cure both the visible and less visible symptoms of the cable television monopoly. Congressman Rick Boucher (D-Va.), a critic of most forms of reregulation, concedes that any

117. *Id.* at 4994-5003.

118. Representative R. Boucher, *Cable Competition v. Cable Regulation*, White Paper On Telecommunications Policy 5 (Feb. 22, 1990) (unpublished report) [hereinafter *Boucher White Paper*]. Boucher prepared the report for the Senate Energy and Commerce Committee.

cable industry reform must include structural reregulation.¹¹⁹ The reregulation legislation introduced by Senator Jack Danforth includes "must carry" rules. These rules limit the discretion of cable television systems to shift channel positions. They also bar national and regional cable programmers from discriminating against distributors in the price, terms, conditions or availability of their programming.¹²⁰ The almost universal support for structural regulation indicates that provisions similar to those in the Danforth measure will be enacted.

Economic regulation addresses only issues such as the rates cable companies can charge or the profits they can earn. Economic regulation can be reimposed under three methods: (1) traditional municipal regulation; (2) rate-of-return regulation; and (3) price regulation. While each approach would restrict the market power of cable operators, the implementation of each presents significant problems.

The traditional municipal regulation, which existed prior to 1984, would invite many of the same problems encountered previously.¹²¹ Foremost among these problems is the absence of adequate standards for setting rates. Negotiation of the rates in a heavily-politicized environment worsens this rate-setting problem.¹²² Municipal regulation is also flawed because it regulates only the basic rates, leaving the cable companies free to charge whatever they wish for other services.¹²³ Finally, municipal officials often lack the specialized experience necessary to successfully administer a regulatory scheme.¹²⁴

Rate-of-return regulation limits the profits that a firm can earn to a reasonable level. Establishing the appropriate initial-rate base requires determination of the true value of a cable television system. Calculating the market value of a cable system proves difficult because of the inflated value of many systems. Rate-of-return regulation allows a firm to recover its expenses. As a result, there is little incentive to cut costs.¹²⁵

The third option for economic regulation is to control cable rates. Because cable rates are currently unregulated, the appropriate starting point for rates is difficult to establish.¹²⁶ Various sources report that some cable

119. *Id.* at 9.

120. S. 1880, 101st Cong., 1st Sess. 11, 28 (1989).

121. Boucher White Paper, *supra* note 118, at 10.

122. *Id.* at 11.

123. *Id.*

124. *Id.*

125. *Id.* at 12-13.

126. *Id.* at 13-14.

operators, anticipating rate-cap regulation based on current rates, raised their rates to increase their locked-in returns.¹²⁷

Setting aside problems in implementation, economic regulation is inadequate because it ignores many of the difficulties resulting from cable's unconstrained market power. Reregulation does not encourage improvement in customer service. Firms have little incentive to improve such service because market share is unimportant.¹²⁸ Economic regulation also neglects the introduction of new services, as significant expenditures are made unattractive by fixed rates or fixed profits.

Senator Danforth's Cable Television Consumer Protection Act of 1991¹²⁹ proposes economic reregulation as a solution to the cable industry's woes. The legislation reimposes traditional municipal regulation unless the cable system faces competition from another multichannel provider.¹³⁰ Although Danforth's proposal produces the immediate and pleasurable result of lower cable rates, it does not consider the broader goals of cable television reform.

2. The Alternative to Reregulation: Telco Entry

The alternative to reregulation is direct competition. Both the Bush Administration and the FCC favor competition as the solution to the cable industry's woes. The Communications Competitiveness and Infrastructure Modernization Act is expected to be reintroduced in 1991 by Senator Conrad Burns. This legislation seeks to provide direct competition to the cable operators by permitting telephone companies to provide video programming.¹³¹

a. The Need for Competition

Competition provides strong incentives for improving products, lowering rates, and introducing innovative services. In a purely competitive environment, resources are maximized and costs are minimized. As a result, consumers benefit by efficient management, competitive prices, and greater variety.

Resources apparently are not being maximized in the cable industry. The Consumer Federation of America reports consumers are paying as much as six

127. *Id.* at 14. See Reregulation Fears Could Spur More Cable Rate Increases, COMM. DAILY, at 8 (Oct. 5, 1989).

128. Boucher White Paper, *supra* note 118, at 15.

129. S. 12, 102d Cong., 1st Sess. (1990); see 137 CONG. REC. 9 § 582 (1990).

130. *Id.*

131. For Senator Burns' 1990 Package, see S. 2800, 101st Cong., 2d Sess. (1990).

billion dollars for the cable industry's inefficiency.¹³² Consumers historically have benefitted from competition in various telecommunications markets, including satellite video systems and long distance telephone services.¹³³ In 1972 the FCC determined that any qualified applicant could operate a domestic satellite system. Prior to that determination, FCC regulation and a lack of innovation limited competition in the satellite systems industry.¹³⁴ But since the 1972 "open skies decision," satellite systems have become smaller and less expensive. Broadcasters, cable operators and private dish owners have options not previously available. The introduction of competition in the mid-1970s to the long distance telephone market similarly accelerated the adoption of new technology. Firms are now vying to provide customers with the least expensive, highest quality voice and data transmission.¹³⁵

With the exception of a few cable overbuilds, the cable industry does not face direct competition in the distribution of services.¹³⁶ Cable's current rivals—broadcast television, wireless cable, the home satellite industry, and VCRs—only provide indirect competition.

Broadcast television offers only limited competition. In almost all markets, the local broadcast stations (over-the-air channels) are outnumbered by the average thirty-six channels available on local cable systems.¹³⁷ The ability of broadcasters to compete directly with cable television is further limited by FCC rules and the 1984 Cable Act. Both of these prohibit local broadcasters from owning cable systems and broadcast stations in the same market.¹³⁸ Technical and regulatory limitations prevent wireless cable from offering a practical alternative to cable television.¹³⁹ There are currently only forty-five wireless cable systems serving 350,000 subscribers nationwide.¹⁴⁰ In contrast, approximately ninety percent of American homes are cable-ready.¹⁴¹

132. Boucher White Paper, *supra* note 118, at 16 (citing testimony of Gene Kimmelman and Mark Cooper, Consumer Federation of America, on *Competitive Issues in the Cable Television Industry*, before the Senate Subcommittee on Antitrust, Monopolies and Business Rights).

133. *Id.* at 17.

134. *Id.* (citation omitted).

135. *Id.* at 18 n.30 (quoting Tucker, *Spinning Webs of Fiber Optics Across the U.S.*, Washington Post, Mar. 31, 1987, at 1).

136. See text accompanying *supra* note 49.

137. Boucher White Paper, *supra* note 118, at 20.

138. See, e.g., 47 U.S.C. § 533(a) (1988).

139. Boucher White Paper, *supra* note 118, at 21.

140. *Id.* at 22.

141. *Competition and Rate Deregulation Report*, *supra* note 60, at 4966.

The home satellite industry, hindered by federal regulations, is in its initial stages; only 2.8 million Americans own satellite dishes.¹⁴² Recent technological breakthroughs, such as the development of a 12-inch by 18-inch satellite dish that perches on a window ledge,¹⁴³ may allow satellite dishes to directly compete with cable systems. But such developments are not yet widely available, and decisions concerning CATV should be based on the current marketplace. Despite at least one VCR in sixty-three percent of all homes containing televisions, VCRs are only a limited alternative to cable; neither pay television nor basic services are available on videotape.¹⁴⁴

The dramatic increases in cable television rates reveal that this diverse group of program distribution services only provide indirect competition. Reregulation cures merely short-term woes, and current market forces are ineffective at curbing the other elements of the cable monopoly. Direct competition remains the only solution for lower rates and improved technology.

b. Telco Competition with Cable is Most Promising

Unlike cable television's indirect competitors, telephone companies and cable systems operate in the same markets. The fiber optics systems deployed by the telcos to transmit video programming¹⁴⁵ would not be encumbered by any radio reception problems interfering with over-the-air video transmissions.¹⁴⁶ Because telephone companies can deliver the same product as the cable operators, can participate in a broad market, and can avoid reception interference problems, telcos can directly compete with CATV systems.

The potential for new technologies and new services makes telco entry even more appealing. Programming would provide telephone companies with the additional revenues needed for expensive new technologies. The FCC estimates that fiber optics installation will cost over \$100 billion.¹⁴⁷ Without the promise of a second stream of revenue, telcos have difficulty justifying such a capital outlay.¹⁴⁸

There are risks associated with telephone company entry into cable television. The most frightening possibility is the cross-subsidization of cable

142. Boucher White Paper, *supra* note 118, at 23 (citing Satellite Broadcasting and Communications Association of America, *Satellite TV: Facts at a Glance* (Jan. 1990)).

143. *Dishing Out The Programs*, TIME, Mar. 5, 1990, at 45.

144. Boucher White Paper, *supra* note 118, at 23-24.

145. *Id.* at 24.

146. *Id.* at 24-25.

147. Pepper, *supra* note 58, at 7-9.

148. See Stodolski, *supra* note 18, at 132.

programming by telephone revenues.¹⁴⁹ Independent cable operators are particularly vulnerable to cross-subsidizing telephone companies. Other risks of telco entry include a lack of access to telco systems and traditional telco anti-competitive behavior. The ultimate danger posed by telco-supplied video is the powerful and wealthy telephone companies eventually controlling most means of video communication.

Although such fears are legitimate, implementation of the appropriate safeguards can minimize the possibility of these nightmares becoming reality. The structural and non-structural safeguards recommended by the FCC are the primary protection.¹⁵⁰ Requiring the telcos to provide detailed information regarding costs and charges can prevent cross-subsidization. Non-affiliated program providers can be assured of access to the integrated network through a "video gateway" requirement.¹⁵¹ The separate subsidiary requirement can prevent telco strength from overwhelming the independent cable operators.¹⁵²

V. CONCLUSION

Implementation of the cross-ownership rules in the early 1970's by the FCC and congressional approval of the rules in 1984 were proper responses to the developing cable television industry. Without bans on telco entry into cable television, it is doubtful there would be as many strong independent cable systems as there are today. But because the cross-ownership restrictions provided the cable market with time to establish a solid foundation, and the 1984 Cable Act relieved cable companies of local government regulation, the cable market in the late 1980's evolved into a monopoly, with increasing rates and poor customer service. The most frightening cable monopoly woe is the slow pace maintained by the telephone and cable companies of introducing new technologies.

The cable television monopoly prompted Congress to debate whether reregulation or telco entry is the appropriate measure of reform. Reregulation seems to be the approach favored by the legislators. Reimposing economic regulation, however, can only accomplish the goal of decreasing cable television rates. The introduction of competition via telco entry can, besides decreasing cable rates and enhancing customer service, improve the nation's telecommunications infrastructure.

149. According to Senator Danforth's office, cross-subsidization is the primary reason his legislation does not provide for telco entry into cable. Telephone interview with Jeanna Kenney, assistant to Senator Jack Danforth (Mar. 4, 1990).

150. See *supra* notes 54-55 and accompanying text.

151. Boucher White Paper, *supra* note 118, at 28-29.

152. *Id.* at 29.

Congress probably will be the forum in which the cross-ownership feud is settled. The FCC and the judiciary are deferring to the judgment of the elected leaders on this delicate issue. It is questionable whether Congress will decide the fate of telco-supplied cable television in the current session. Congress may hesitate to take any action concerning the cable industry since the comprehensive Cable Act was passed only in 1984. Laws affecting telecommunications quickly become out-dated, however, as telecommunications technology changes rapidly.

Congress is urged to resolve quickly the cross-ownership debate. Cable rates, customer and technical services, and the introduction of new technology suffer until the debate is concluded. A nation's telecommunications infrastructure is critical to competing in the global marketplace, as the statements of William L. Weiss, presented at the beginning of this Comment, reveal. Japan is deploying a "family computer" that will educate Japanese children.¹⁵³ France's Minitel system enables French citizens to access electronically, at millions of terminals nationwide, directory services and to obtain information.¹⁵⁴ Japan and France have recognized the value of telecommunications, and both are accomplishing tasks beyond the current capacity of the United States. Cross-ownership of cable television systems by telephone companies can help America achieve a stronger telecommunications system, and consumers and the nation should not be denied such a benefit.

PHILIP J. BOECKMAN

153. *Id.* at 4 (quoting Alfred C. Sikes, Chairman, Federal Communications Commission).

154. *Id.* at 5.
<https://scholarship.law.missouri.edu/mlr/vol56/iss4/5>