ANTITRUST AND REGULATION IN CABLE TELEVISION: FEDERAL POLICY AT WAR WITH ITSELF

GLENN B. MANISHIN*

I. INTRODUCTION

Although antitrust law and regulation often conflict,[1] one situation in which the two should presumably function in harmony is natural monopoly.[2] Where a single firm can most efficiently supply all the demand in a given market, antitrust has often given way, in large part, to regulation.[3] Electric utilities, for example, are generally considered natural monopolies, and as a consequence, are both protected against competitive entry and subject to universal service obligations.[4] While the antitrust laws cer-

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* J.D. Columbia University, 1981. Mr. Manishin is an associate with Jenner & Block in Washington, D.C., and served as an attorney with the Antitrust Division of the Justice Department from 1982 through February 1985. He initiated or participated in each of the Justice Department's antitrust investigations into cable television system mergers and acquisitions during that time period, and authored the Department's comments in the FCC's 1985 rulemaking implementing the Cable Communications Policy Act of 1984. Mr. Manishin practices primarily in the areas of antitrust, communications, and litigation, and represents MCI Communications Corp. in a variety of forums.

[1] *See, e.g.*, MCI Communications Corp. v. AT&T, 708 F.2d 1081, 1100-11 (7th Cir.) (discussion of cases regarding the conflict of antitrust law and regulation), *cert. denied*, 464 U.S. 891 (1983); United States v. AT&T, 461 F. Supp. 1314, 1321 (D.D.C. 1978); 1 P. AREEDA & D. TURNER, ANTITRUST LAW ¶ 223d (1978); Comment, *The Application of Antitrust Law to Telecommunications*, 69 CALIF. L. REV. 497 (1981).

[2] Natural monopoly can be defined in nontechnical terms as a market "characterized by . . . high economies of scale . . . such that a single firm will be the most efficient supplier of goods or services in the long run at any given level of demand." *Report on Regulatory Reform by the Industrial Regulation Committee of the American Bar Assocation Section of Antitrust Law*, 54 ANTITRUST L.J. 503, 506, 516 (1985) [hereinafter *Regulatory Reform Report*]. The economic definition of natural monopoly is considerably more complicated. *See, e.g.*, Baumol, *On the Proper Cost Tests for Natural Monopoly in a Multiproduct Industry*, 67 AM. ECON. REV. 809, 809-10 (1977). The typical assumption is that "in a market conducive to natural monopoly, . . . only a single firm can survive." *Regulatory Reform Report*, *supra*, at 506; *see also* Fishman v. Estate of Wirtz, 807 F.2d 520, 532 (7th Cir. 1986) (professional basketball in any major city is a natural monopoly since only one team can practically survive).

[3] "In [natural monopoly] markets, traditional utility-type rate regulation is imposed to maintain prices and output at levels that are supposed to approximate the results of effective competition." *Regulatory Reform Report*, *supra* note 2, at 506.

[4] The electric power industry is regulated at both the state and federal levels. *See* 16 U.S.C. § 824 (1982). Other industries in which the natural monopoly rationale have served to justify public utility regulation include railroads, oil and gas pipelines, and telephone service. *Regulatory Reform Report*, *supra* note 2, at 506; *see generally* S. BREYER, REGULATION AND ITS REFORM 15-35 (1982). As in other industries, the precise boundaries of the natural monopoly in the electric power industry have been the subject of dispute. *See, e.g.*, City of Cleveland v. Cleveland Elec. Illuminating Co., 538 F. Supp. 1306 (N.D. Ohio 1980).

tainly apply to efforts to extend natural monopoly power,[5] antitrust and regulation have achieved a workable equilibrium; one firm serves the entire market and its rates are constrained by regulation, typically by prescribing the firm's prices or rate of return.[6] In short, the traditional *quid pro quo* for the *market failure* of natural monopoly is regulation.[7]

In cable television, however, harmony has yet to be achieved. Developments over the past several years have established a legal environment in which cable television is largely subject to neither antitrust nor regulation. First, in implementation of the Cable Communications Policy Act of 1984 ("Cable Act"),[8] the Federal Communications Commission ("FCC") determined that virtually all cable television systems face "effective competition," precluding municipal rate regulation.[9] Second, in aspects such as system design and channel deployment, the Cable Act preempts the major means of nonrate cable regulation through restrictions on enforcement of franchise terms.[10] Finally, after spending nearly

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[5] *E.g.*, Otter Tail Power Co. v. United States, 410 U.S. 366 (1973); City of Mishawaka v. American Elec. Power Co., 616 F.2d 976 (7th Cir. 1980), *cert. denied*, 449 U.S. 1096 (1981).

[6] *See supra* note 3. The natural monopoly justification for regulation can be used strategically by firms and legislatures to promote their own interests; it may be used to shelter a firm from competition and permit subsidized rates for some classes of consumers. R. NOLL & B. OWEN, THE POLITICAL ECONOMY OF DEREGULATION 53-65 (1983).

[7] Some have argued that an unregulated natural monopoly is preferable to an inefficiently regulated natural monopoly. *See* Kahn, *The Passing of the Public Utility Concept: A Reprise*, *in* TELECOMMUNICATIONS REGULATION TODAY AND TOMORROW 3-37 (E. Noam ed. 1983); Posner, *Natural Monopoly and its Regulation*, 21 STAN. L. REV. 548 (1969). Still others have argued that "contestable" natural monopoly markets will behave competitively. *See* Panzar & Willig, *Free Entry and the Sustainability of Natural Monopoly*, 8 BELL J. ECON. 1 (1977). However, the traditional public utility model generally remains valid.

[8] Pub. L. No. 98-549, 98 Stat. 2780 (codified as amended at 47 U.S.C. §§ 521-59 (Supp. III 1985)).

[9] *See infra* text accompanying note 66-69. Section 623(b)(1) of the Cable Act, 47 U.S.C. § 543(b)(1) (Supp. III 1985), directed the FCC to promulgate, within 180 days, "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." The rules ultimately adopted by the FCC prohibit municipal rate regulation for more than 99% of all cable systems. Brief for Intervenors National League of Cities at 13, ACLU v. FCC, 823 F.2d 1554 (D.C. Cir. 1987) (No. 84-1666) [hereinafter National League of Cities Intervenor's Brief].

[10] For example, section 624(b) of the Cable Act, 47 U.S.C. § 544(b)(2)(b) (Supp. III 1985), provides that municipalities may seek and enforce programming requirements only for "broad categories of video programming." This provision prevents enforcement of franchise terms that commit the cable system to carry specified programming services. Similarly, section 625(a)(1), 47 U.S.C. § 545(a)(1) (Supp. III 1985), provides that cable systems can modify extant franchise agreements if: (a) provisions relating to facilities or equipment are "commercially impracticable" or (b) with regard to programming services, the "mix, quality, and level" of service is maintained. Section 625(b), 47 U.S.C. § 545(b) (Supp. III 1985), grants a right to judicial review of denied requests for franchise modification, and section 625(c), 47 U.S.C. § 545 (c) (Supp. III 1985) allows a cable system to drop programming services if the copyright payment is "substantially" increased and "has not been specifically compensated for" by rate increases. Finally,

two years examining both the phenomena of cable system "clustering"[11] and mergers between "overbuilds",[12] the Department of Justice (the "Department") announced in April 1985 that it will defer to municipalities on cable mergers and generally refuse to apply the Clayton Act[13] in light of cable's "natural monopoly characteristics."[14]

Although the FCC and the Department have often disagreed,[15] their positions regarding cable are incompatible. The FCC has apparently concluded that cable systems generally *are not* natural monopolies, and therefore should not be regulated. If so, then antitrust laws should be enforced vigorously to preserve both actual and potential competition in cable television, particularly to prevent mergers among overbuilt systems. However, the Department will not challenge these mergers[16] because it concludes that cable systems generally *are* natural monopolies.

Section 626, 47 U.S.C. § 546 (Supp. III 1985), provides procedural rules for municipal consideration of franchise renewals, and requires franchises to be renewed if, *inter alia*, the cable system has "substantially complied with the material terms" of the franchise and its "quality" of service has been "reasonable in light of community needs." Section 626(e), 47 U.S.C. § 546(e) (Supp. III 1985), also grants a right to judicial review for cable systems of refranchising decisions.

The Cable Act's legislative history clearly indicates that the purpose of these sections was to provide "stability *and certainty* to the renewal process," H.R. REP. No. 934, 98th Cong., 2d Sess. 25 (1984) (emphasis added) [hereinafter HOUSE REPORT]. The Act in effect creates a presumption of franchise renewal. The actual impact of these provisions, however, has yet to be tested significantly in the market. While there are indications that refranchising competition may increase over time, *see id.* at 22; *Rights Wars Growing in Cable TV*, Wall St. J., Aug. 25, 1982, at 21, col. 2, there is no clear trend. *See infra* text accompanying notes 115-16.

[11] "Clustering" is the consolidation of cable systems in adjoining or nearby municipalities. *See* Note, *Product Market Definition For Video Programming*, 86 COLUM. L. REV. 1210, 1217 (1986).

[12] "Overbuild" is the term used in the cable television industry to describe situations in which two or more competing cable systems serve all or part of the same geographic area. Nishimura v. Dolan, 599 F. Supp. 484, 489 n.4 (E.D.N.Y. 1984).

[13] 15 U.S.C. § 12 (1982). Section 7 of the Clayton Act prohibits mergers and acquisitions "against unlawful restraints and monopolies" in any market. *Id.* at § 7.

[14] *See infra* text accompanying notes 72-73.

[15] *See, e.g.*, United States v. AT&T, 552 F. Supp. 131, 170, 187 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 460 U.S. 1001 (1983). The Department of Justice's [hereinafter Department] 1986 support of proposed legislation introducted by Senator Dole, *see* S. 2565, 99th Cong., 2d Sess. (1986), that would have transferred jurisdiction of the *AT&T* decree to the FCC, *see, e.g.*, Remarks by Douglas H. Ginsburg, Assistant Attorney General, Antitrust Division, before the Computer and Communications Industry Association (July 17, 1986), appeared designed, at least in part, to mend the rift between the agencies arising from the *AT&T* litigation. *See also* Report and Recommendations of the United States Concerning the Line of Business Restrictions Imposed on the Bell Operating Companies by the Modification of Final Judgment, United States v. Western Elec. Co., No. 82-0192 (D.D.C. filed Feb. 2, 1987) (recommending major modifications to the *AT&T* decree and increased reliance on FCC regulation).

[16] Nor has the Department indicated any real willingness to address other current competitive issues in cable television. *See infra* notes 79, 103, 120-24, 132-34 and accompanying texts.

As a result, current federal policy effectively applies neither regulation nor antitrust to cable television.

The conflict between the FCC and the Justice Department is perhaps the clearest example of the present disarray in cable television policy, but it is not the only one. The Supreme Court has recently entered the fray, under the guise of the first amendment, suggesting that cable competition can be *mandated* under certain circumstances by the Constitution.[17] A number of federal courts have applied the antitrust laws to cable mergers and cable franchising competition.[18] While the Department has decided to defer to municipal competitive decisions on cable, the Federal Trade Commission has threatened to sue municipalities for restricting competition in industries such as taxi cabs.[19]

The issue whether cable is a natural monopoly is the subject of debate among economists,[20] but it is somewhat less relevant than the issue of who should make that determination, i.e., whether the FCC, the Department, the federal courts, states, or municipalities should set competitive and regulatory policy in cable televsion. Another issue concerns whether competitive structure of local cable markets should be decided by the market itself. Indeed, if municipalities can determine the number of cable firms that can serve a market, thereby "preempting" the Department's antitrust enforcement role, arguably they should also determine the degree of regulation appropriate to that market, in effect preempting the FCC. The answers to these questions may not be easy. If they remain unresolved, however, the internal tensions in federal cable policy may spark something few observers want: a new round of lobbying on Capitol Hill and, perhaps, a new legislative solution that satifies no one.[21]

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[17] *See* City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488 (1986); *see infra* text accompanying notes 104-14. For a discussion of this case along similar lines, *see* Comment, *Do Cable Operators Want Free Speech or a Free Market? Preferred Communications, Inc. v. City of Los Angeles*, 6 CARDOZO ARTS & ENT. L.J. 161 (1987).

[18] *See infra* notes 96-101 and accompanying text.

[19] *See In re* City of New Orleans, 3 Trade Reg. Rep. (CCH) ¶ 22,149, at 22,997-98 (May 10, 1984).

[20] *See, e.g.*, B. OWEN & P. GREENHALGH, COMPETITIVE POLICY CONSIDERATIONS IN CABLE TELEVISION FRANCHISING (1985); A. SMILEY, DIRECT COMPETITION AMONG CABLE TELEVISION SYSTEMS (1986); Noam, *Economies of Scale in Cable Television: A Multiproduct Analysis*, *in* VIDEO MEDIA COMPETITION: REGULATION, ECONOMICS AND TECHNOLOGY (E. Noam ed. 1985); *see also* Nadel, *Cablespeech for Whom?*, 4 CARDOZO ARTS & ENT. L.J. 51, 62 n.62 (1984) (fewer than 50 cable system overbuilds in existence); "Range Wars", *Cable Television Business*, Sept. 15, 1985, at 21-24 (discussing cable overbuilds).

[21] During the first session of the 99th Congress, Senator Danforth, then Chairman of the Commerce Committee, reportedly suggested that "Congress might be forced to redress some imbalance" in the rules governing must-carry, franchise exclusivity, cable system concentration, and other matters. COMMUNICATIONS DAILY, Aug. 1, 1986, at 3.

II. A Tale of Two Agencies

The FCC's approach to cable television has evolved considerably over the years. In the industry's early history, the FCC imposed a number of restrictive regulations upon cable systems.[22] These regulations were premised on the fear that cable's widespread growth could threaten the economic viability of broadcast television, and correspondingly, the FCC's long-standing broadcast policy favoring localism.[23] With the collapse of this rationale, however, the FCC was forced to reconsider its protectionist approach. Subsequent changes included: preemption of municipal rate regulation of "pay" cable programming;[24] repeal of the syndicated exclusivity and distant signal rules;[25] and finally, preemption of restrictions on the "retiering" of system channel deployment.[26]

The FCC's evolving regulatory approach to cable television roughly corresponded to the evolution of the cable industry itself. Cable began as community antenna television (or CATV)—

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22 These restrictive regulations included: limitations on cable carriage of broadcast television signals; guaranteed exclusivity for syndicated programming carried by local independent broadcast stations; mandated nonduplication by cable systems of broadcast network affiliates; and restrictions on cable system channel capacity. *See generally* S. Rivkin, Cable Television: A Guide to Federal Regulations (1974). The FCC's policies "[i]n combination . . . effectively halted the growth of cable television in major markets." 1 C. Ferris, F. Lloyd, & T. Casey, Cable Television Law ¶ 5.05, at 5-12 (1987).

23 *See generally*, Note, *The Collapse of Consensus: Effects of the Deregulation of Cable Television*, 81 Colum. L. Rev. 612, 615-17 (1981).

24 Clarification of Cable Television Rules, Notice of Proposed Rule Making and Inquiry, 46 F.C.C.2d 175, para. 84 (1974); Establishment of Cable Television Subscriber Rates, Notice of Inquiry, 58 F.C.C.2d 915, para. 2 (1976). "Pay" cable services, which do not carry advertising and frequently offer movies, charge a monthly fee for service in addition to the rate charged for the standard package of "basic" cable channels. Home Box Office, a service of Time, Inc., was the first commercially successful pay cable service. *See infra* text accompanying notes 28-33.

25 Cable Television Syndicated Program Exclusivity Rules, 79 F.C.C.2d 663 (1980), *aff'd sub nom.* Malrite T.V. of N.Y. v. FCC, 652 F.2d 1140 (2d Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982). These rules required cable systems to "black out" syndicated programming if a local independent broadcast station, carried by the cable system, had an exclusive contractual right to that programming, and limited the number of nonlocal broadcast stations cable systems could carry. *Cf.* Geller v. FCC, 610 F.2d 973 (D.C. Cir. 1979) (per curiam). The FCC recently proposed that the syndicated exclusivity rule be reimposed, suggesting that it is anticompetitive and may give cable an unfair advantage over broadcast television. 3 FCC Rule Making Rep. (CCH) ¶ 21,045 (1987).

26 Community Cable TV, Inc., Memorandum Opinion and Order, 95 F.C.C.2d 1204, paras. 18, 21-22 (1983), *reconsideration*, 98 F.C.C.2d 1180, paras. 13, 19, 23 (1984). This FCC decision permitted cable systems to move programming services among different "tiers," *e.g.*, from the basic tier to an intermediate "expanded" tier for which an additional monthly fee is charged, regardless of any contrary provisions of municipal franchises. For a discussion of tiering, *see* 2 C. Ferris, F. Lloyd & T. Casey, *supra* note 22, ¶ 17B.03[1][c][i], at 17B-20-21. Although many cable systems provide various tiers of basic cable service, pay services are generally not available unless the consumer also subscribes to a basic service. *See* Friedman v. Adams Russell Cable Services-N.Y., Inc., 624 F. Supp. 1195 (S.D.N.Y. 1986).

a rudimentary means of collecting broadcast television signals for retransmission in areas where over-the-air reception was negligible or poor.[27] The introduction of Home Box Office,[28] however, ushered in an era during which a host of new satellite-delivered programming services were developed specifically for distribution over cable.[29] These services initially consisted exclusively of studio-produced movies airing before network television first-run exhibition, but later expanded to include the well-known, advertiser-supported "basic"[30] cable services such as ESPN, CNN, and MTV,[31] frequently limited to a single subject and providing round-the-clock programming, and "superstations"[32] such as Atlanta's WTBS.[33] As a result, by the late 1970's, cable system size had increased geometrically, sometimes to 100 channels or more, and competition for cable franchise awards created substantial incentives for even larger systems with increasingly elaborate "bells and whistles."[34] With a seemingly inexhaustible supply of programming, favorable tax treatment,[35] and extraordinarily high cash flow, the industry's future appeared virtually unlimited.[36]

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[27] 1 C. FERRIS, F. LLOYD & T. CASEY, *supra* note 22, ¶ 5.03 n.6, at 5-5.

[28] *See supra* note 24.

[29] *See, e.g.*, Home Box Office, Inc. v. FCC, 567 F.2d 9 (D.C. Cir.) (per curiam) (vacating "anti-siphoning" rule for pay cable), *cert. denied*, 434 U.S. 829 (1977).

[30] *See supra* note 26. Section 602(2) of the Cable Act defines basic cable service as "any service tier which includes the transmission of local television broadcast signals." 47 U.S.C. § 522(2) (Supp. III 1985). *See* HOUSE REPORT, *supra* note 10, at 40. As noted below, the FCC's redefinition of basic cable service was reversed on appeal by the D.C. Circuit. *See infra* note 51.

[31] ESPN is the Entertainment and Sports Programming Network, now owned by ABC. CNN is the Cable News Network, a service of Turner Broadcasting Systems. MTV is Music Television, a music video programming service, owned by Viacom.

[32] Superstations are broadcast television stations distributed to cable systems nationwide by satellite. *See* 2 C. FERRIS, F. LLOYD & T. CASEY, *supra* note 22, ¶ 17B.02[3][c], at 17B-10.

[33] More than forty satellite-delivered cable television programming services are available nationwide. *See* Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1452 (D.C. Cir. 1985), *cert. denied*, 106 S. Ct. 2889 (1986); Scrambling of Satellite Television Signals, Report and Order, 104 F.C.C.2d 1444, 1448-49 (1986).

[34] This colloquial term of art in the cable industry denotes "extra" features, such as sophisticated local origination facilities and two-way data transmission capability, that many cable television companies offered to municipalities to induce the award of a franchise. Extremely heated franchising competition among cable companies, and a number of instances in which cable systems could not supply all of the "bells and whistles" required by their franchising commitments, were the principal reasons cited by Congress to support restricting municipal authority to seek (or enforce) certain types of franchise obligations. *See* HOUSE REPORT, *supra* note 10, at 21-22.

[35] *See* 1 C. FERRIS, F. LLOYD & T. CASEY, *supra* note 22, ¶ 29.01, at 29-2. Until it was eliminated in 1987, the investment tax credit provided cable systems with generous federal tax deductions for the capital costs of system construction. In addition, many cable systems, even among the largest cable companies, are organized as limited partnerships, with the attendant tax advantages associated with that form of ownership.

[36] The balance may now have swung too far in the other direction: favoring cable at

In contrast to the FCC, throughout the 1970's, the Department viewed cable television with almost benign neglect. Although the Department participated in a number of FCC rulemakings, its antitrust enforcement efforts in television focused largely on a series of monopolization lawsuits against the three broadcast networks.[37] As the decade came to a close, however, the Department began to take a more active antitrust interest in the cable industry. In 1980, the Department successfully challenged the formation by a number of leading movie studios of "Premiere," a new movie-driven pay cable service with exclusive first-refusal rights to the studios' output.[38]

The Department's enforcement activity in cable television shifted shortly thereafter from cable programmers to system operators. Beginning in mid-1983, the Department initiated a series of antitrust investigations, covering a half dozen transactions over the course of nearly two years,[39] into the competitive effect of cable system acquisitions, mergers and "swaps."[40] Initially concerned primarily with the phenomenon of clustering and its effects on franchising competition, these investigations were later expanded to include mergers among overbuilt systems[41] and, eventually, well-publicized transactions between several of the

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the expense of other media. One FCC Commissioner has criticized the "disequilibrium" resulting from federal policies which "may give cable television an unwarranted competitive edge in the program delivery market . . . [and have] helped to create the potential for cable to 'bottleneck' reception of off-air and satellite programming." Amendment of Part 76 of the Commission's Rule Concerning Carriage of Television Broadcast Signals by Cable Television Systems, 1 F.C.C. REC. 864, 915 (1986) (statement of Commissioner Dawson).

[37] *E.g.*, United States v. National Broadcasting Co., 449 F. Supp. 1127 (C.D. Cal. 1978) (entering consent decree).

[38] United States v. Columbia Pictures Indus., Inc., 507 F. Supp. 412 (S.D.N.Y. 1980), *aff'd*, 7 Media L. Rep. (BNA) 1342 (2d Cir. 1981). The Premier venture was disbanded following the issuance of a preliminary injunction. Three years later, similar antitrust problems arose in the merger of Showtime and The Movie Channel, two leading pay cable programmers. Under threat of a Department lawsuit, the merger was restructured to eliminate several movie studios as participants in the post-merger venture. *See, e.g.*, 2. C. FERRIS, F. LLOYD & T. CASEY, *supra* note 22, ¶ 24.09[3][c], at 25-27; N.Y. Times, Aug. 13, 1983, § 1, at 29, col. 1; N.Y. Times, July 19, 1983, § D5, col. 5.

[39] In October 1985, James Mooney, then President of the National Cable Television Association, described the Department's "rather consistent interest" in cable system transactions, but observed that the "Justice [Department] is not warming up its paddy wagon to come get us." *Mooney Issues Warning on Antitrust Issues*, Multichannel News, Oct. 21, 1985, at 11, col. 3.

[40] These transactions, which are often structured as like-kind exchanges for tax purposes, involve the exchange of cable systems among cable television companies. The transaction involving Phoenix, Arizona discussed throughout this Article is one example of such a swap. *See infra* text accompanying notes 70-73.

[41] Two of the Department's 1984 investigations focused on mergers between directly competing systems in Slidell, Louisiana and Bryan/College Station, Texas. *See* Multichannel News, Apr. 15, 1985, at 4, col. 1.

largest multiple system operators ("MSOs").[42]

The Department's antitrust policy toward cable television was still in the formative stage when the prospect of cable legislation arose in Congress.[43] Commencing with Senate Bill No. 66, the initial bill introduced by Senator Goldwater,[44] the Department opposed restricting the scope of municipal regulatory authority over cable on the ground that this could undermine the effectiveness of franchise competition. The Department reasoned that in the absence of direct competition between cable systems, competition for the franchise itself served as a surrogate for the competitive discipline of the market.[45] The concerted lobbying of the cable industry, however, coupled with the intuitive appeal of a handful of instances of overreaching by municipalities in the franchising process, were apparently persuasive. The Administration did not advance the Department's objections to Senate Bill No. 66 and, in fact, took no public position on the bill.[46]

In the summer of 1984, a negotiated compromise between the National Cable Television Association ("NCTA") and the National League of Cities[47] revived the legislation, which had stalled in the Senate, and returned the focus in cable television to the FCC. The Cable Act, passed initially in the House and barely amended in conference, eliminated Senate Bill No. 66's standard for rate deregulation of cable systems: the existence of four broadcast stations serving the community.[48] The Cable Act instead delegated the issue to the FCC, directing the FCC to deter-

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[42] Mulitple System Operator ("MSO") is a cable industry term denoting a company that operates more than one cable television system. For the past five years or more, the two largest MSOs have been Tele-Communications, Inc. ("TCI"), and American Television & Communications Corp. ("ATC"), a subsidiary of Time, Inc.

[43] Although the Department investigated a number of cable television system mergers and acquisitions in 1983 and 1984, *see Closed Circuit: Hounds Loose*, BROADCASTING, July 9, 1984, at 9, each of these was either approved by the Department or voluntarily withdrawn by the parties.

[44] S. 66, 98th Cong., 1st Sess. (1983). *See also* S. 2172, 97th Cong., 2d Sess. (1982); 129 CONG. REC. S325-26 (daily ed. Jan. 26, 1983) (statement of Sen. Goldwater); 128 CONG. REC. 3358-61 (1982).

[45] The Department's reasoning on this point was hardly unconventional. *See, e.g.*, Posner, *supra* note 7, at 562 (emphasizing ability of municipalities "to drive a hard bargain with the would-be monopolist").

[46] The Department's objections were forwarded to the Office of Management & Budget as part of the established process of review by executive branch agencies of proposed legislation and bills passed by Congress. The Administration did not explain publicly why it declined to take a position in support of or in opposition to S. 66.

[47] *See* 130 CONG. REC. H10,435, H10,440, H10,442 (daily ed. Oct. 1, 1984); 130 CONG. REC. S14,284 (daily ed. Oct. 11, 1984).

[48] *See* S. 66, 98th Cong., 1st Sess. § 607 (1983); S. REP. No. 67, 98th Cong., 1st Sess. 22-23 (1983).

mine in what circumstances rate regulation is appropriate.[49] Existing franchise provisions permitting rate regulation would be grandfathered until January 1, 1987, after which regulation would be authorized where "a cable system is not subject to effective competition" pursuant to Commission-promulgated rules.[50]

The "effective competition" debate before the FCC was acrimonious. Yet it hinged less on considerations of appropriate regulatory policy and more on the antitrust-oriented issue of product market definition.[51] Beginning from the somewhat tenuous premise that the Act was intended to deregulate most cable systems,[52] the FCC proposed that where four nonduplicated broadcast signals are available, the "subscriber's ability to disconnect" provides effective competition for cable television.[53] The cable industry supported this proposal in full measure, contending that a host of alternative distribution media—including videocassette recorders ("VCRs"), subscription television ("STV"),[54] satellite master antenna television ("SMATV"),[55]

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49 Cable Act § 623, 47 U.S.C. § 543 (Supp. III 1985); *see* HOUSE REPORT, *supra* note 10, at 24-25, 65-68; *supra* note 9.

50 Cable Act § 623(b), (c), 47 U.S.C. § 543(b), (c) (Supp. III 1985).

51 Two issues of statutory interpretation—the scope of "basic cable service" for which the Cable Act authorized regulation (*see* Cable Act § 602(2), 47 U.S.C. § 522(2) (Supp. III 1985)) and the validity of the FCC's decision preempting restrictions on retiering (*see* Community Cable TV, Inc., 98 F.C.C.2d 1180 (1984)) were also the subject of considerable debate. For a discussion of the Commission's redefinition of "basic cable service," see ACLU v. FCC, 823 F.2d 1554, 1565-70 (D.C. Cir. 1987). *Compare* HOUSE REPORT, *supra* note 10, at 40, *with* National League of Cities Intervenor's Brief, *supra* note 9, at 35-36. With regard to retiering, see Cable Act § 625(d), 47 U.S.C. § 545(d) (Supp. III 1985) (the HOUSE REPORT defines "basic cable service" as "any service tier" while the FCC in *Community Cable* restricts "basic service" to a single tier of service); HOUSE REPORT, *supra* note 10, at 24; 130 CONG. REC. S14,286 (daily ed. Oct. 11, 1984) (Act does not affect legal challenge to FCC's 1984 retiering decision).

52 *See* Implementation of the Cable Communications Act of 1984, 50 Fed. Reg. 18,637, 18,650 n.69 (1985) (to be codified at 47 C.F.R. pts. 1, 63, 76 & 78) (Congress intended "to significantly deregulate the provision of cable service"); HEARINGS BEFORE THE SUBCOMMITTEE ON COMMUNICATIONS OF THE COMMITTEE ON COMMERCE, SCIENCE AND TRANSPORTATION UNITED STATES SENATE, 97th Cong., 2d Sess. 193 (1982) (statement of Mark Fowler, FCC Chairman) ("presumption that the marketplace environment in which cable television operates is competitive").

53 Implementing the Provisions of the Cable Communications Policy Act of 1984 in MM Docket No. 84-1296, FCC 84-612, Notice of Proposed Rulemaking, 49 Fed. Reg. 48,765, 48,771 (1984) (to be codified at 47 C.F.R. pts. 1, 63 & 76).

54 STV is a broadcast service generally using UHF frequencies to distribute pay television programming. *See* Subscription Television, Inc. v. Southern Cal. Theatre Owners Ass'n, 576 F.2d 230 (9th Cir. 1978). One example of STV is Oak Industries' "ON-TV," which at one time was a popular service in Southern California. The STV industry has suffered a serious decline in recent years, however, since it is "unable to compete with the multichannel programming diversity cable provides." 2 C. FERRIS, F. LLOYD & T. CASEY, *supra* note 22, ¶ 18.05, at 18-9.

55 SMATV is essentially a private cable system serving apartment complexes and other multiple dwelling units. *See* D. BRENNER & M. PRICE, CABLE TELEVISION § 13.01

multipoint and multichannel multipoint distribution services ("MDS" and "MMDS"),[56] direct broadcast satellite ("DBS"),[57] low-power television ("LPTV"),[58] and satellite or "television receive-only" earth stations ("TVROs")[59]—had developed to present effective competition for the delivery of video programming by cable systems.[60] The industry maintained that cable existed within a far broader market and did not enjoy monopoly power.[61]

Despite Congress' admonition that the existence of alternative distribution media nationwide was an insufficient basis on which to presume that a cable television system is subject to effective competition in any specific market,[62] few industry mem-

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(1986). SMATV is a good example of a technology that on the surface appears to be a substitute for cable television, but in reality is not competitive in many markets. Some respected commentators believe that there is a large potential market for SMATV which "will assure that cable does not hold a monopoly." 2 C. FERRIS, F. LLOYD & T. CASEY, *supra* note 22, ¶ 19.10 at 19-19. Yet the 1982 National Association of Broadcasters study (*id.* ¶ 21.02 n.1, at 21-3), clearly states that SMATV offers only a "selective" threat and is "somewhat threatening to franchised cable *in markets where it becomes available before cable became entrenched.*" H. HOWARD & S. CARROLL, SMATV: STRATEGIC OPPORTUNITIES IN PRIVATE CABLE 179 (1982) (emphasis added). *See also infra* note 130 (cable programmers have refused to deal with SMATV systems).

56 MDS is a point-to-multipoint microwave technology, frequently used to distribute pay television services in areas such as Washington, D.C., that are not served by a cable television system. *See* D. BRENNER & M. PRICE, *supra* note 55, § 16.04[1][a] to [3][a]. MMDS is a multichannel MDS service, authorized by the FCC pursuant to lottery, that has yet to be introduced commercially in most major markets. *Id.* § 16.04[4][b].

57 DBS is a satellite service that involves the transmission of TV signals from the earth to high-powered stationary satellites that permit reception by equipped individual homes. *See* National Ass'n of Broadcasters v. FCC, 740 F.2d 1190, 1195 (D.C. Cir. 1984). DBS is not yet in commercial operation. *See id.*

58 LPTV is a newly authorized UHF broadcast service using transmitters of lower power than those traditionally required for UHF stations.

59 TVROs are the formal name for home earth stations, and are known colloquially as satellite "dishes" or home satellite dishes ("HSDs"). *See* Scrambling of Satellite TV Signals, Notice of Inquiry, 104 F.C.C.2d 1444 (1986).

60 These comments and arguments are summarized in the FCC's decision. *See infra* note 67.

61 Some parties absurdly stretched this position. *See, e.g.*, Comments of Farrow, Schildhause at 3, MM Docket No. 84-1296 (F.C.C. filed Jan. 29, 1985) (cable competes in a market that includes "movie houses, newspapers, radio stations, colleges and universities, legitimate theatres, mail and express services, telephones, stadiums, local opera societies and sports teams, houses of religious worship and more"). Even more restrained members of the industry, however, continue to maintain that "the relevant product market necessarily includes not only video programming delivered by means other than cable [television], such as broadcast television, MDS, SMATV and VCRs, but also other sources of news, information and entertainment which themselves compete with video sources." Reply Memorandum of the Time Defendants at 5 n.5, New York Citizens Comm. on Cable TV v. Manhattan Cable TV, Inc., 651 F. Supp. 802 (S.D.N.Y. 1986).

62 HOUSE REPORT, *supra* note 10, at 25, 66 (The Commission's standards "should apply on a community-by-community basis since the presence nationwide of various telecommunications services does not speak to the availability of such services in a particular community. The Committee thus does not intend that [the Commission should] impose nationwide deregulation, as it has attempted to do in other rulemakings."). *Id.* at 66.

bers offered more than a broad-brush approach to the issue. The Department, for its part, proposed a set of far more restrictive criteria. The Department argued that the "alphabet soup" of alternative delivery technologies had failed to develop as predicted by the cable industry and were effectively confined to relatively small niches in most markets.[63] According to the Department, the economics of broadband cable television systems, specifically the ability to deliver a large number of programming channels at a relatively low cost per subscriber, coupled with the growing array of satellite-delivered cable programming available from few, if any, alternative delivery technologies, often resulted in cable systems enjoying significant market power.[64] In short, the Department had concluded that cable television is a distinct product market.[65]

Not surprisingly, the Department's proposal attracted heated opposition from the cable industry. In April 1985, both the proposal and its underlying analysis were summarily dismissed by the FCC.[66] Relaxing its proposed standard, the FCC concluded that "alternative sources of video programming . . . do, in fact, offer competition to cable services"[67] and that "a

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[63] "In the present technological and economic setting the likelihood of successful future entry by alternative media simply is too speculative to effectively constrain the present pricing behavior of cable operators." Reply Comments of the U.S. Dept. of Justice at 13, MM Docket No. 84-1296 (F.C.C. filed Feb. 11, 1985). For an extensive discussion of the limits to which the "alphabet soup" of alternative delivery technologies has made competitive inroads on cable television, see *The New Order Passeth*, BROADCASTING, Dec. 10, 1984, at 43; see also Noam, *Local Distribution Monopolies in Cable Television and Telephone Service: The Scope for Competition*, in *Telecommunications Regulation Today and Tomorrow* 351, 359 (E. Noam ed. 1983) ("a closer look at each of these ostensible competitors reveals that cable's significant technological and economic advantages will probably make it the dominant medium of the future, barring unforeseen technological or regulatory developments"). *Cf.* Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1439 n.8, 1450 (D.C. Cir. 1985) (noting "cable's virtually unlimited channel capacity"), *cert. denied*, 106 S. Ct. 2889 (1986).

[64] *See* Comments of the U.S. Dept. of Justice at 3, 5, MM Docket No. 84-1296 (F.C.C. filed Jan. 28, 1985) [hereinafter DOJ Comments].

[65] *See id.* at 23 n.43 ("cable systems are likely to be able to exercise significantly greater power over price than is required under the [Department's] Merger Guidelines to conclude that a group of products or services constitute a relevant market"); *id.* at 16 n.26 ("the distinctive competitive characteristics of cable television is the ability to deliver a relatively large number of video channels in a given market at a relatively low cost per channel"). According to Charles F. Rule, then Acting Assistant Attorney General for Antitrust, the Department considers cable television to be a relevant product market and the franchise area to be a relevant geographic market for antitrust purposes. Freeman, *Justice Adopts Hands-Off Stand on Clustering Systems*, Multichannel News, Apr. 15, 1985, at 4, col. 3 [hereinafter *Hands-Off Clustering*].

[66] Amendment of Parts 1, 63 and 76 of the Commission's Rules to Implement the Provisions of the Cable Communications Policy Act of 1984, 50 Fed. Reg. 18,637, 18,649-50 (1985), *reconsideration*, 104 F.C.C.2d 386 (1986), *aff'd in part, rev'd and remanded in part*, ACLU v. FCC, 823 F.2d 1554 (D.C. Cir. 1987).

[67] 50 Fed. Reg. at 18,649.

cable system will be considered to face effective competition whenever the franchise market receives three or more unduplicated broadcast signals."[68] While not expressly ground in antitrust analysis, the Commission's position is clear: cable television competes within a broad "video programming" market and is generally not a monopoly, much less a natural one.[69]

While the "effective competition" rulemaking was pending before the FCC, the Justice Department's antitrust investigations continued. The Department intensively reviewed (for more than eight months) a proposed transaction which was, at that time, one of the largest cable system mergers on record; the "swap" between two major MSOs of cable systems in eight markets valued at approximately $200 million, including the two directly competing, overbuilt systems in Phoenix, Arizona and a nearby suburb.[70] In light of the prominence of the Phoenix overbuilds,[71] it was widely assumed that the Department's decision on

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[68] 50 Fed. Reg. at 18,650.

[69] In affirming the FCC's three-station rule for cable deregulation, the D.C. Circuit did not review the underlying competitive and economic findings asserted by the Commission, stressing rather, "the relatively short time frame within which Congress directed the agency to complete its rulemaking [and that it] fully anticipate[s] that the Commission will carefully monitor the effects of its regulations and make adjustments where circumstances so require." *ACLU*, 823 F.2d at 1565. Indeed, as several parties pointed out, the FCC's belief that a cable system does not gain "significant market advantage" by offering satellite-delivered non-broadcast programming services, 50 Fed. Reg. at 18,650, was "squarely contradicted by the record, which demonstrate[d] that the cable industry experienced explosive growth only after offering these various non-broadcast services." Brief for Intervenors National League of Cities, *supra* note 9, at 25. Moreover, the Commission's exclusive focus on "local broadcast television [does] not reflect the economic realities of basic cable service, [specifically] the fact that 'basic cable service' is marketed and priced as a package that frequently includes far more than must-carry and local access channels." DOJ Comments, *supra* note 64, at 29. As the D.C. Circuit has recognized in a related context, "[c]able television and ordinary commercial broadcast television operate on the basis of wholly different technical and entrepreneurial principles." *Quincy Cable TV*, 768 F.2d at 1438.

[70] *See Times Mirror, Storer Trade Eight Systems in Largest Swap Ever*, Multichannel News, July 9, 1984, at 1, col. 1. The transaction involved nearly 200,000 subscribers and arose in the first instance because the firms "ha[d] been locked in a competitive overbuild situation" in Paradise Valley, Arizona, an affluent Phoenix suburb. *Id.* at 34.

[71] As the chief cable officer for Phoenix stated in 1984, " 'if you want to test competition, this is the best place to do it,' [since there are] three companies [that] operate in the city, and about 10% of Phoenix households can receive service from either Times Mirror or Storer." *Phoenix May Deregulate Rates & Basic Service*, Multichannel News, Apr. 23, 1984, at 21, col. 4. In Phoenix, the award of a multiple franchise followed the failure of the incumbent franchisee to build out its system and was in turn followed by one of the most rapid construction schedules of any major American city. Other overbuilds have followed this pattern. *See, e.g.*, Nishimura v. Dolan, 599 F. Supp. 484, 488-489 (E.D.N.Y. 1984) (Huntington, New York). There are also indications that, in light of rate deregulation, overbuilds will increasingly be encouraged by cities as a means of constraining cable television rates. *See Cable Industry Faces Increased Threat of Overbuilds*, Multichannel News, Sept. 21, 1987, at 20, col. 1; *Patrick Warns Cablers to Steer Clear of Battle with Cities on Overbuilds*, COMMUNICATIONS DAILY, May 21, 1987, at 2; *FL Utility Unit Begins Cable System Overbuilds*, Multichannel News, Aug. 4, 1986, at 1, 35, col. 1; *NYT Exec*

the Phoenix transaction would crystallize its antitrust enforcement policy for cable television.

Unknown to most, however, the Department became increasingly concerned with the relationship between the roles of municipal and federal government in cable system transactions and the federalism implications of antitrust enforcement decisions. In April 1985, just two weeks before the FCC adopted its final "effective competition" rules, the Department terminated its investigation into the Phoenix transaction. In an unusual step, the Department issued a press release announcing that it would generally decline to challenge consolidation of competing systems in light of cable's "natural monopoly characteristics" and, instead, would defer to the decisions of muncipalities as franchisors.[72] As the Department's press release explained:

> [W]here the relevant local government has the authority to deny transfer of a cable television franchise and thereby to prevent consolidation of overbuilt franchises, the Department will generally rely on the municipality's decision and will not bring suit to prevent consolidation unless unusual facts indicate that an exception should be made.
>
> A single firm may be able to provide cable service at lower cost than two or more competing firms. . . . However, cable operators may not necessarily be forced by competitive pressures to return to consumers the benefit of efficiencies that result from consolidation and, in addition, a combination of overbuilt franchises can, at least in the short run, result in higher prices to consumers.
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> The local government responsible for a cable franchise decision usually is in the best position to evaluate the preferences of their citizens in the face of these potentially conflicting economic effects.[73]

Sees Overbuilds in Areas with Classic Systems, Multichannel News, Mar. 3, 1986, at 29, col. 1; *San Diego Proceeding with Overbuild Strategy*, CABLEVISION, July 8, 1985, at 11-12. *See also* COMMUNICATIONS DAILY, Feb. 2, 1987, at 13 (if cable industry continues to prevail on first amendment grounds against municipal franchising authorities, "it could alienate cities to the point that they would grant franchise overbuilds").

[72] Department of Justice Press Release (April 1, 1985) [hereinafter DOJ Press Release]. *See* 2 C. FERRIS, F. LLOYD & T. CASEY, *supra* note 22, ¶ 24.06[4], at 24-20.1; COMMUNICATIONS DAILY, April 2, 1985, at 2. *See also Hands-Off Clustering, supra* note 65, at 4 (interview of then Acting Assistant Attorney General for Antitrust, Charles F. Rule). The Department conceded that, because of "the extent of the overbuild," the transaction would "eliminate substantial competition" in Paradise Valley. DOJ Press Release at 2.

[73] DOJ Press Release, *supra* note 72, at 2-3 (statement of J. Paul McGrath, Assistant Attorney General, Antitrust Division).

III. THE POLICY CONUNDRUM

The degree to which actual and potential competition exists among cable systems in any given market, or between cable and alternative video delivery technologies, is a complex issue necessitating a detailed examination of market-specific evidence. Regardless of one's conclusion as to the existence and economic feasibility of competition, however, it is clear that the competitive policies articulated by the FCC, the Department, and the Congress are almost entirely inconsistent. On the fundamental policy of the role of municipalities in the regulatory process, each approaches the issue from contradictory premises.

The FCC's prophylactic three-station standard for "effective competition," sacrificing accuracy in favor of adminstrative simplicity,[74] leaves no room either for countervailing market-specific evidence or municipal discretion. Coupled with the FCC's prior rulings preempting state and local authority over pay cable rates and cable system tiering,[75] the standard suggests that the FCC believes local government is essentially incompetent to make the economic judgments on which to predicate regulatory decisions or, if given such authority, would likely opt for parochial solutions restricting cable's development. Whether such an approach can weather the Supreme Court's recent retrenchment of the FCC's power to preempt state regulation[76] is unclear. What is evident is that the FCC places little faith in municipalities as policy makers.

The Department has articulated precisely the opposite conclusion. It will decline to prosecute an otherwise meritorious action against a merger of cable systems under the Clayton Act if the municipalities involved approve the necessary franchise transfers.[77] In the Department's view, not only are municipalities competent to make economic judgments on cable's regulatory

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[74] The FCC's similar decision to discontinue deciding cable franchise fee disputes, arising before enactment of the Cable Act, was reversed. Yakima Valley Cablevision, Inc. v. FCC, 794 F.2d 737 (D.C. Cir. 1986). The FCC's decision in the "effective competition" rulemaking was affirmed in part and reversed in part. ACLU v. FCC, 823 F.2d 1554 (D.C. Cir. 1987).

[75] *See supra* notes 24, 26 and accompanying texts.

[76] *Compare* Louisiana Pub. Serv. Comm'n v. FCC, 106 S. Ct. 1890 (1986) (state regulation of depreciation rates was not preempted by FCC regulations) *with* Capital Cities Cable v. Crisp, 467 U.S. 2694 (1984) (state regulation of retransmission by cable television system was preempted).

[77] Ironically, the Commission has reemphasized that it will not review cable system mergers and acquisitions under the antitrust laws, but rather will defer to the antitrust enforcement decisions of the Justice Department. Group W Cable, Inc., ¶¶ 18-19, Mimeo No. 4808 (released May 27, 1986) (acquisition of Group W by TCI, ATC, and other MSOs). *Accord* Policy Regarding Character Qualifications in Broadcast Licensing

and competitive treatment, but since local government "is in the best position to evaluate the preferences of their citizens,"[78] such judgments should be given preclusive effect. Indeed, the Department has seemingly abandoned all antitrust activity with regard to cable mergers since approving the Phoenix "swap" and apparently will even decline to review cable transactions absent some affirmative invitation by the affected municipalities.[79] While the welfare effects of cable system consolidation may be ambiguous in the Department's view, the practical consequences of its deferral policy are clear. Federal antitrust enforcement has been effectively jettisoned.

Congress has appeared to steer a middle course, confirming municipal competence to set regulatory policy while limiting the breadth of its discretion. In the franchising area, for example, the Cable Act provides that while cities may establish a prior franchising requirement, some substantive franchise provisions are unenforceable.[80] The Act also places significant procedural restrictions on the ability of municipalities to refuse franchise renewals and grants a right to judicial review.[81] In the area of rate regulation, Congress similarly provided that municipalities have the competence to regulate rates, but reserved to the federal government the power to define when that authority may be exercised.[82]

On the merits, there are a number of substantial policy issues arising from the fact that despite whatever natural monopoly characteristics they enjoy, "cable operators may not necessarily

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in Docket No. FCC 85-648, 102 F.C.C.2d 1179, at para. 44 (1986); Teleprompter Corp., Memorandum Opinion and Order, 87 F.C.C.2d 531, para. 21 (1981).

78 DOJ Press Release, *supra* note 72, at 3.

79 Senator Metzenbaum, Chairman of the Antitrust Subcommittee of the Senate Committee on the Judiciary, has indicated an interest in examining the issue of cable industry concentration and the Department's merger policies in cable television. *See* COMMUNICATIONS DAILY, Feb. 23, 1987, at 7.

80 *See supra* note 10 (discussion of franchising restrictions). Section 621(a) of the Cable Act, 47 U.S.C. § 541(a) (Supp. III 1985), allows municipalities to grant "1 or more" franchises. Although Congress suggested that the Act's franchising provisions permit municipalities to determine "the number of cable operators to be authorized to provide service in a particular geographic area," HOUSE REPORT, *supra* note 10, at 59, Congress specifically did not intend to revise the antitrust laws. *Id.* Indeed, the Ninth Circuit has stated that these provisions violate the first amendment. Preferred Communications, Inc. v. City of Los Angeles, 754 F.2d 1396, 1411 n.11 (9th Cir. 1985), *aff'd*, 476 U.S. 488 (1986).

81 *See supra* note 10.

82 Cable Act § 623, 47 U.S.C. § 543 (Supp. III 1985). In light of the "growing" number of consumer complaints regarding cable rate increases after rate deregulation became effective on January 1, 1987, there have been suggestions that Congress may step in and revise this balance. *See Markey Warns Cable to Exercise New Rights Cautiously*, COMMUNICATIONS DAILY, Feb. 25, 1987, at 3.

be forced by competitive pressures to return to consumers the benefit of efficiencies that result from consolidation."[83] It may not be correct to assume, for example, that regulatory and antitrust enforcement policy in cable should follow the traditional model for natural monopoly. Even if cable television is a natural monopoly in *every* market, it could plausibly be argued that cable is nevertheless sufficiently different from such essential services as electricity, gas, and local telephone service that treatment as a utility is unwarranted. Similarly, while cable's natural monopoly characteristics may give cable systems market power in a significant number of markets, regulation involves costs and burdens different from, and often greater than, antitrust enforcement. It may therefore be justifiable to tolerate a greater degree of market power before imposing regulation than before using the antitrust laws to restrict mergers and acquisitions among cable systems.[84]

The problem, though, is that these subtle policy issues have only rarely been raised and have never been decided. The fallout of the FCC's virtually complete deregulation of cable rates, coupled with the Department's antitrust policy of nonenforcement, is that cable is treated like a utility for antitrust purposes but treated as a competitive industry for regulatory purposes. Ironically, therefore, while a city can determine that a single cable firm will best serve its citizens, it is stripped of the ability to limit the welfare loss arising from monopoly pricing. While a city can, according to the Department, create or sanction a monopoly in cable television, it cannot, according to the FCC, regulate that monopoly. This policy conundrum means that neither federal nor local government has discretion to apply a compromise between the competitive and public utility models to cable television.

From a federalism perspective as well, the FCC and the Department are acting at cross-purposes. If municipalities are in the best position to determine the structure of local cable markets, they should also be in the best position to determine the level of regulation appropriate to that market. In other words, if the federal government is going to defer to municipalities on cable antitrust issues, it should similarly defer on cable regulatory issues. In terms of municipal authority to protect the health, safety, and welfare of consumers, if a city decides its police power justifies limiting cable to a single firm, for example, to avoid pole

[83] DOJ Press Release, *supra* note 72, at 3.
[84] *See* DOJ Comments, *supra* note 64, at 15 n.25.

attachment problems or the repeated inconvenience of underground cable construction, there is little apparent justification for precluding the city from regulating the firm to whom it awards the franchise.

Since the Department has already applied its laissez-faire policy toward cable system consolidation for more than two years, it is unlikely that its current leadership will reconsider that policy in light of the FCC's preemption of municipal ratemaking authority. However, there are a number of compelling reasons for reconsideration. First, under the "state action" exemption to the antitrust laws,[85] municipalities may grant an exclusive franchise, or deny a franchise to a potentially competing system, only if state law has clearly articulated and affirmatively expressed a policy of displacing competition.[86] Municipalities enjoy no inherent right to create a monopoly in any industry.[87] The Department's deferral rule, however, applies regardless of applicability of the state action exemption. This approach effectively produces a balkanization of the antitrust laws,[88] with their applicability to cable acquisitions depending fortuitously on the localities involved in any specific transaction.

Second, the Department's approach is clearly inconsistent with its enforcement policies in most other industries. For example, the Department can (and sometimes has) approved mergers

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85 The state action exemption is a judicially created doctrine that finds its genesis in the Supreme Court's decision in Parker v. Brown, 317 U.S. 341 (1943). With regard to application of the state action doctrine to municipalities, *see* Community Communications Co. v. City of Boulder, 455 U.S. 40 (1982); City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978).

86 *See, e.g.*, Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985).

87 Even if a city enjoys state action immunity, moreover, there is little reason to extend that protection to decisions on mergers. Although one court has applied the state action doctrine to section 7 of the Clayton Act, 15 U.S.C. § 18 (1982 & Supp. III 1985), *see* Cine 42nd St. Theatre Corp. v. Nederlander Org., Inc., 790 F.2d 1032 (2d Cir. 1986), that court misapplied the doctrine. Congress surely did not intend that Delaware, for example, should be able to immunize otherwise unlawful mergers between Fortune 500 firms from antitrust scrutiny. Moreover, whether or not municipal action for approval of a merger is exempt from antitrust liability, the merger itself may still violate the antitrust laws. *Cf.* City Communications, Inc. v. City of Detroit, 650 F. Supp. 1570 (E.D. Mich. 1987) (even where state action doctrine immunizes city from antitrust liability for its award of exclusive cable franchise, state action immunity does not extend to private defendants).

88 *Cf.* Brief for the United States as Amicus Curiae at 15, Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1984) (No. 82-1832) ("What *City of Boulder* recognized was that the sheer number of municipalities and other state instrumentalities that may engage in anticompetitive activities creates a significantly greater risk to the Sherman Act's procompetitive values than that created by granting immunity to the states."). For a contrasting view, see Easterbrook, *Antitrust and the Economics of Federalism*, 26 J.L. & ECON. 23 (1983); Brennan, *Local Government Action and Antitrust Policy: An Economic Analysis*, 12 FORDHAM URBAN L.J. 428, 429 n.137 (1984).

and joint operating agreements between newspapers in the same city despite the opposition of municipal governments. In other instances in which anticompetitive effects are localized, such as price-fixing among retailers and bid-rigging among contractors, the Department apparently does not even consider the views of local governments. There is no indication, moreover, that the Department gives any weight to "federalism" principles in any other aspect of merger policy.[89] Only in cable does the Department rely on "the preferences of citizens"[90] to determine whether competition or monopoly is the appropriate market structure. Furthermore, in the largest and most visible of its recent enforcement actions, the Department litigated against and eventually dismantled the Bell System "despite the fairly clear-cut 'preferences of the citizens.' "[91]

The *AT&T*[92] case well illustrates a final deficiency in the Department's cable competition policy. If the issue is whether an industry is a natural monopoly in a given geographic market, the proper way to resolve that question is the marketplace.[93] It has never been presumed that competition may be eliminated by merger even if the market is a natural monopoly. Rather, the test for natural monopoly is the market itself. If, in fact, competition is not sustainable, only one firm will survive the discipline of competition.[94] Indeed, where the evidence is ambiguous, as in

89 Although the Department's Phoenix decision relied in part on the fact that municipalities may have the power to prevent consolidation, a similar argument can be made with respect to most antitrust violations, which generally contravene state antitrust statutes. It would be surprising for the Department to decline to bring an antitrust lawsuit merely because a state government had the power to, but did not, act to prosecute the alleged violation.

90 *See supra* text accompanying note 73.

91 Owen, *Cable Competition at Sufferance of Cities*, Wall Street J., May 9, 1985, at 28, col. 3.

92 United States v. AT&T, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 460 U.S. 1001 (1983).

93 Thus, in cable television, "monopolistic characteristics may lawfully arise only through an elimination bout *in* the market, not by a City-run auction *for* the market." Brief of Tele-Communications, Inc., Time Incorporated and the New York Times Company as Amici Curiae at 30, City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488 (1986) (No. 85-390) (emphasis in original).

94 The ABA Section of Antitrust Law has suggested that competition in a natural monopoly will, by definition, be "socially wasteful or futile," and therefore that "legislators and regulators" should make the decision whether a market is a natural monopoly. Regulatory Reform Report, *supra* note 2, at 516. It is clear, however, that the market conditions establishing natural monopoly arise only in the long run. *Id.* In the short run, "even if eventual monopoly is inevitable, competition provides an important guarantee that the winner [of competition for the market] will be the most efficient and responsive competitor, thus benefitting consumers during the period of competition and perhaps afterward as well." Owen, *Regulatory Developments in Cable Television Regulation*, Regulatory Reform: Industry Regulation Committee Newsletter 1 A.B.A. SEC. ANTITRUST L. 5 (Dec. 1985).

AT&T itself, the Department has not hesitated in the past to enforce the antitrust laws to maintain potentially competitive markets.[95]

This conclusion is reinforced by the courts' approach to antitrust law and cable competition. If cable's "natural monopoly characteristics" preempt antitrust, it would make little sense for the courts to have considered whether Boulder, Colorado violated the antitrust laws by granting an exclusive franchise,[96] whether a collusive agreement to award a cable franchise in Houston, Texas unreasonably restrained competition,[97] whether an incumbent franchisee in Jefferson City, Missouri monopolized the market by anticompetitive conduct during a refranchising battle,[98] or whether a merger of cable systems in Cobb County, Georgia substantially lessened competition.[99] No court has ruled that natural monopoly is a defense to an antitrust violation.[100] Rather, even *if* the market is a natural monopoly, attempts to limit competition to *become* the monopolist—whether in the franchising process or by means of merger or consolidation—are proscribed by the antitrust laws.[101] The final irony, of course, is that in cable television the fruit of franchising competition, the franchise agreement itself, is largely unenforceable under the Cable Act.[102] Since municipalities can no longer function effec-

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95 AT&T's defense, for example, centered on its alleged efforts to preclude so-called "creamskimming" by long-distance competitors, a slightly more sophisticated version of a "natural monopoly defense." *See* United States v. AT&T, 552 F. Supp. 131, 161-62 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 460 U.S. 1001 (1983).

96 Community Communications Co. v. City of Boulder, 455 U.S. 40 (1982).

97 Affiliated Capital Corp. v. City of Houston, 700 F.2d 226, (5th Cir. 1983), *aff'd*, 735 F.2d 1555 (5th Cir. 1984) (en banc), *cert. denied*, 106 S. Ct. 788 (1986).

98 Central Telecommunications, Inc. v. TCI Cablevision, Inc., 610 F. Supp. 891 (W.D. Mo. 1985) (upholding $36 million verdict against TCI), *aff'd*, 800 F.2d 711 (8th Cir. 1986), *cert. denied*, 107 S. Ct. 1368 (1987). *See* H.R.M., Inc. v. Tele-Communications, Inc., 653 F. Supp. 645 (D. Colo. 1987) (alleging monopolization by one of two cable systems competing in Kearney, Nebraska).

99 Cable Holdings of Georgia, Inc. v. Home Video, Inc., 572 F. Supp. 482 (N.D. Ga. 1983).

100 Calls by architects of the "Chicago school" of antitrust for the creation of a "natural monopoly defense" in merger litigation have gone unheeded. *See* Posner, *supra* note 7, at 585-87.

101 *E.g.*, Fishman v. Estate of Wirtz, 807 F.2d 520, 533, 535 (7th Cir. 1986); Affiliated Capital Corp. v. City of Houston, 700 F.2d at 234 ("[i]f there is to be no competition within a given territory, competition is only possible before the franchise is granted"); Omega Satellite Products Co. v. City of Indianapolis, 694 F.2d 119, 127 (7th Cir. 1982) ("[T]he antitrust laws protect competition not only in, but for, the market—that is, competition to be the firm to enjoy a natural monopoly."). *See also* TV Signal Co. of Aberdeen v. AT&T, 1981-1 Trade Cas. (CCH) ¶ 63,944 at 75,864 (D.S.D. 1981).

102 *See, e.g.*, Tribune-United Cable of Montgomery County v. Montgomery County, 784 F.2d 1227, 1231 (4th Cir. 1986) (Cable Act creates a "federally protected right to modification of commercially impractical [franchise] agreements"). Even those opposing application of the traditional public utility model to cable have stressed that "the

tively as surrogate consumers, the central premise of the Department's Phoenix policy collapses.

IV. THE EMPEROR'S NEW CLOTHES

Two recent developments suggest that the sands of federal policy toward cable television may be shifting. The first, familiar to industry observers, is the application of the first amendment to municipal franchising decisions. The second, proceeding on a somewhat slower track, is the growing trend toward national and regional concentration among MSOs—sparked in part by the industry's aggressive pace of mergers and acquisitions following the Justice Department's approval of the Phoenix transaction.[103]

A. *Amendment 1 or Section 2?*

In *Preferred Communications, Inc. v. Los Angeles*,[104] a potential entrant challenged the municipality's auction-type franchising process. Preferred alleged that Los Angeles' award of an exclusive cable franchise violated the first amendment.[105] The city, predictably, replied that physical scarcity of pole attachment and conduit space, "economic scarcity" of the medium itself, and the disruptive effect of cable system construction justified restricting cable service to a single company.[106] On appeal from the district court's dismissal of the complaint, the Ninth Circuit reversed.

The Ninth Circuit held that none of these justifications sufficed to limit access by cable systems. Since Preferred alleged that space was available on the poles, the court rejected that basis for excluding a competitor.[107] With respect to "economic scarcity,"[108] the court ruled that even if natural monopoly provided "a basis for some degree of government regulation,"[109] it could

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opportunity of local government, representing the subscribers, to drive a hard bargain with the would-be monopolist may be a viable alternative to conventional methods of regulation." Posner, *supra* note 7, at 562. *See* Easterbrook, *supra* note 88, at 32. Under the Cable Act, however, the bargain is now considerably softer as a matter of law.

[103] In 1986, 340 cable system mergers and acquisitions, involving more than six million subscribers, were consummated. Daniels & Associates, a cable brokerage firm, estimated that the volume of cable transactions nearly doubled from any previous year and equaled the total from 1980 through 1983. *See* COMMUNICATIONS DAILY, Feb. 19, 1987, at 9. One of the largest transactions ever was TCI's $1.25 billion acquisition of United Artists Communications, an MSO serving 740,000 subscribers. *See* Multichannel News, July 21, 1986, at 1.

[104] 754 F.2d 1396 (9th Cir. 1985), *aff'd*, 476 U.S. 488 (1986).

[105] *Id.* at 1399.

[106] *Id.* at 1402.

[107] *Id.*

[108] *Id.* at 1404.

[109] *Id.* at 1405.

not justify the elimination of all competition, particularly where it was alleged that "competition for cable services is economically feasible."[110] Similarly, while the police power justifies some regulation of cable systems, the court held it cannot support the outright exclusion of firms from the market.[111]

The Supreme Court's opinion in *Preferred* is ambiguous because of the case's procedural posture; the underlying facts were never litigated. While confirming that cable television enjoys some modicum of first amendment protection, the Court affirmed and remanded for resolution of the factual issues.[112] Although the Court declined to decide whether cable falls within the much-criticized *Red Lion* doctrine,[113] however, it seems apparent that absolute exclusion of cable entry likely violates the Constitution, *if there is space on the poles.*

The irony is clear. While the Department refuses to enforce the antitrust laws in cable television, either against municipalities or merging cable firms, the first amendment may mandate that competition be permitted—even where a city affirmatively sanctions a cable monopoly. The Ninth Circuit's express rejection of natural monopoly as a justification for excluding potential entrants demonstrates, consistent with the lack of a "natural monopoly defense" to the antitrust laws, that the market should determine whether or not a monopoly is natural.

In short, *Preferred* really should be viewed as an antitrust case in first amendment garb.[114] Indeed, in some ways, it conflicts with first amendment principles, since the ability to restrict entry

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[110] *Id.* at 1404-05.

[111] *Id.* at 1411.

[112] City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488 (1986).

[113] Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969). In *Red Lion*, the Supreme Court upheld the FCC's "fairness doctrine" on the ground that physical scarcity of the broadcast medium justified greater restrictions on broadcasters' first amendment rights than other members of the press. The viability of the *Red Lion* doctrine has recently been called into question. *See* Meredith Corp. v. FCC, No. 85-1723 (D.C. Cir. filed Jan. 17, 1987); Fairness Doctrine Obligations of Broadcast Licensees, 102 F.C.C.2d 143 (1985).

[114] The Ninth Circuit did conclude that the state action antitrust exemption authorized the city to limit its franchise to a single firm. Nonetheless, the effect of *Preferred* is that under the first amendment, competitive principles override municipal authority even where state action provides immunity under the Sherman Act. Indeed, the court discussed the issue of cable as a "natural monopoly" *only* in the constitutional context. *Preferred*, 754 F.2d at 1404-05. As discussed above, furthermore, the critical issue is who decides whether competition should be permitted; the courts, using the first amendment, have acted where the Department declined to act. *See also* Group W Cable, Inc. v. City of Santa Cruz, No. C-84-7456-WWS (N.D. Cal. Sept. 9, 1987) (permanent injuction issued against municipality based on first amendment); Pacific W. Cable Co. v. City of Sacramento, 798 F.2d 353 (9th Cir. 1986); Tele-Communications of Key West, Inc. v. United States, 757 F.2d 1330 (D.C. Cir. 1985); Carlson v. Village of Union City, 601 F. Supp. 801 (W.D. Mich. 1985); Century Fed., Inc. v. City of Palo Alto, 579 F. Supp. 1553

depends primarily on the content involved, *i.e.*, what is transmitted over the cable. It has never been seriously contended that a city or state may not exclude competition for local telephone service. Thus, the only functional way to distinguish cable systems and telephone companies is that the latter provide two-way communication. It is difficult to conclude, however, that the first amendment should turn on how wires are used to communicate.

B. *Concentration and Competition*

There has been a striking increase in concentration among MSOs in recent years. This trend raises a variety of new regulatory and competitive issues, only some of which are addressed in the pending petition for FCC rulemaking to establish rules governing MSO concentration.[115]

Identifying the manner in which MSOs compete presents one issue. While it is clear that franchising competition has often been heated, it is not clear that, with most major franchises already awarded, refranchising competition will prove either substantial or effective. As a matter of merger policy, therefore, it may be premature to impose quantitative or relative limits on MSO cable system holdings. Nonetheless, concentration in cable raises other potentially significant competitive issues, both horizontal and vertical.

As MSOs increase *regional* concentration of cable systems, cable is likely to become a stronger competitor in the television advertising market, able to offer advertisers the audience

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(N.D. Cal. 1984). *See generally* Note, *Access to Cable, Natural Monopoly, and the First Amendment*, 86 COLUM. L. REV. 1663 (1986).

Interestingly, the major MSOs now suggest that they support the use of first amendment principles to encourage direct competition among cable operators. *See* Brief of Tele-Communications, Inc., Time Incorporated and the New York Times Company as Amicus Curiae at 27-28, City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488 (1986) (No. 85-390) ("Even assuming that cable is usually a natural monopoly, the First Amendment dictates that the choice of which company is to receive the monopoly in this form of communication must be made by competition in the marketplace of ideas—not be municipal officials."). *Id.* at 27-28 ("Whatever the current technological limit to the number of systems may be, it is well above four."); *id.* at 16 ("[T]he tendency toward monopoly, if present at all, may well be attributable more to governmental action . . . than to any 'natural' economic phenomenon.") (citing Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1450 (D.C. Cir. 1985), *cert. denied*, 106 S. Ct. 2889 (1986)).

[115] Petition for Rule Making, Amendment of Part 76, Subpart J of the Commission's Rules and Regulations Relating to Multiple Ownership of Cable Television Systems, RM-5475 (Feb. 21, 1986). *See* 1 C. FERRIS, F. LLOYD & T. CASEY, *supra* note 22, ¶ 9.23, at 9-53; *MPAA Leads Charge in Urging Limits on Cable Ownership*, Multichannel News, July 28, 1986, at 1 (Motion Picture Association of America supports MSO concentration limits); *cf.* CATV Multiple Ownership, 91 F.C.C.2d 46 (1982) (rejecting limits on MSO concentration).

volumes now generally possible only on broadcast television.[116] Consequently, cable systems could gain an incentive, acting either unilaterally or through cooperative advertising "interconnects,"[117] to impede competition from broadcast stations for advertising, for example, by denying local stations carriage.[118] *Preferred* suggests that there is room in the continuing first amendment dispute over the must-carry rules[119] for such competitive issues.

Horizontal MSO concentration may also intensify competitive concerns arising in the acquisition of programming. Although the trend may be pro-competitive, as any MSO market power would offset that enjoyed by the dwindling number of programming distributors, it is questionable whether cable programmers can exert significant economic pressure on cable operators. If systems drop their services, satellite-delivered programmers will lose their most important outlet. Indeed, coupled with vertical integration by MSOs (which itself seems on the rise), horizontal concentration could increase incentives for anticompetitive practices aimed at nonintegrated competitors.[120] Several antitrust lawsuits arising out of the refusal by vertically integrated MSOs to supply programming to competing cable systems,[121] or to carry satellite-delivered services offered by competing programmers,[122] are pending.

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[116] *See* COMMUNICATIONS DAILY, Feb. 19, 1987, at 3 (National Association of Broadcasters warns that "[c]able poses potentially serious threat to broadcasters in local retail advertising").

[117] "Interconnects" are technical or reciprocal arrangements among cable systems that provide advertisers access to all systems involved. *See* C. FERRIS, F. LLOYD & T. CASEY, *supra* note 22, ¶ 5.04(d), at 5-12.

[118] Wodlinger Broadcasting Co. v. MTV Networks, Inc., No. H-85-5811 (S.D. Tex. filed 1985) (LPTV station with music video format alleges antitrust violation arising from denial of carriage and advertising access by vertically integrated MSO); *cf.* Midland Telecasting Co. v. Midessa Television Co., 617 F.2d 1141 (5th Cir.) (reversing dismissal of antitrust claim arising from refusal of cable system to carry VHF station that competed with system's parent broadcasting companies), *cert. denied*, 449 U.S. 954 (1980).

[119] *See* Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 106 S. Ct. 2889 (1986); Amendment of Part 76 of the Commission's Rules Concerning Carriage of Television Broadcast Signals by Cable Television Systems, 1 F.C.C. Record 864 (1986). In partially resurrecting a modified version of its must-carry rules, which had been invalidated in *Quincy Cable*, the FCC found that "a competitive market may not lead cable operators to carry all of the television signals that can be received off-the-air in their communities [and that] satellite programmers' current primary means of access to viewers is through cable systems." *Id.* at 881. In early 1987, the FCC stayed the new, modified must-carry rules. *See* 3 FCC Rulemaking Rep. (CCH) ¶ 23,112 (1987).

[120] *See* United States v. Columbia Pictures Indus., Inc., 507 F. Supp. 412, 424 (S.D.N.Y. 1980); Kahn, *supra* note 7, at 24; Noam, *supra* note 20, 353.

[121] *E.g.*, Nishimura v. Dolan, 599 F. Supp. 484 (E.D.N.Y. 1984); Mobile Cablevision v. Group W Cable, No. 86-0043-H-S (S.D. Ala. filed Jan. 10, 1986).

[122] *E.g.*, New York Citizens Comm. on Cable TV v. Manhattan Cable TV, Inc., 651 F. Supp. 802 (S.D.N.Y. 1986) (denying motion to dismiss monopolization claim against

These issues cannot be dismissed as mere long-run concerns, but it appears they will not be addressed in the FCC's MSO concentration proceeding.[123] That proceeding, however, has already produced at least one surprise. The Department, in opposing regulatory restrictions on horizontal concentration, repeatedly emphasized the role of antitrust law in policing anticompetitive mergers.[124] While the Department did not cite, let alone harmonize, its decision in the *Phoenix* case, one may wonder whether there has been a retrenchment. Given the Department's failure to act on recent large MSO mergers, however, its reliance on antitrust enforcement exhibits a rather hollow ring.

V. THERE AND BACK AGAIN

Those without an understanding of cable television history may find that history repeated in policy issues likely to arise in the future. A case in point is scrambling.[125] While the headlines abound with the political battles between satellite dish retailers, cable operators, and cable programmers over scrambling,[126] a key competitive issue has not been resolved. Indeed, if cable systems, including vertically intergrated MSOs, control the retail distribution of satellite-delivered programming, then the definition of the product market applicable to cable[127]—the basic source of the conundrum in antitrust and regulatory policy—may make a practical difference.

The antitrust concern is that, whether or not alternative distribution technologies are now "effective competition" for cable

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vertically integrated MSO arising out of refusal to carry unaffiliated pay cable services). For a discussion of a 1983 lawsuit regarding the refusal by Group W, which at that time was a vertically integrated MSO operating a competing cable news service, to carry CNN, see 2 C. FERRIS, F. LLOYD & T. CASEY, *supra* note 22, ¶ 24.07[3], at 24-24.

[123] *See supra* note 115 and accompanying text.

[124] Comments of the United States Department of Justice In the Matter of Amendment of Part 76 at 2, 7, 8, 9, RM-5475 (F.C.C. filed July 21, 1986). In a curious, off hand remark, the Department also opined that the proposed limits on MSO concentration "might unnecessarily confuse the relationship between the antitrust laws and FCC regulations (for example, by raising questions of primary or exclusive jurisdiction) that might actually weaken the antitrust laws' ability to prevent anticompetitive acquisitions." *Id.* at 2.

[125] Scrambling is the coding, or encryption, of satellite television signals so that receipt is possible only through purchase and use of specialized equipment. *See* Cable Act § 605, 47 U.S.C. § 605 (Supp. III 1985).

[126] *See, e.g.*, *Gore Seeks FTC Probe of Cable Program Marketing to Dish Users*, COMMUNICATIONS DAILY, Feb. 24, 1987, at 2; Ivey, *Angry 'Dish' Owners Try to Fight Off Scrambled Signals*, BUS. WK., Jan. 13, 1986, at 120.

[127] If and when these antitrust issues reach the courts, "[i]t is quite clear [that the issue of product market definition] will be heavily litigated [and] is likely to lead to difficult and potentially conflicting decisions." 2 C. FERRIS, F. LLOYD & T. CASEY, *supra* note 22, ¶ 24.09[2], at 24-25 to 24-26.1.

systems, the industry appears determined to grant cable systems the exclusive right to "descramble" satellite-delivered programming. For example, in 1985, NCTA proposed that a consortium limited to cable operators would market decoders to satellite earth station owners.[128] Yet, while this approach remedies some fairly obvious antitrust concerns,[129] there is little reason to believe that vertically integrated MSOs will allow unaffiliated dish retailers or SMATV or MDS operators to distribute satellite programming also carried on owned-and-operated cable systems.[130] A little strategic anticompetitive behavior, therefore, could go a long way to ensure that cable retains its inherent economic advantage as a multichannel, broadband distribution medium.[131]

The Department has apparently continued its lengthy and well-publicized antitrust investigation into the distribution of satellite programming.[132] While it appears that there may be no

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[128] *See Noting Problems, Antitrust Experts Praise NCTA's Scrambling Plan*, Multichannel News, Aug. 5, 1985, at 3, col. 1.

[129] For example, earlier proposals included express provisions that would have prohibited cable systems from marketing descrambled satellite programming within the franchise areas of any other systems. *Id.*

[130] For a discussion of several antitrust cases involving the refusal of cable programmers to sell to SMATV operators, see 2 C. FERRIS, F. LLOYD & T. CASEY, *supra* note 22, ¶ 24.09[4] at 24-30. For examples of cable operators' efforts to preclude competition from satellite dish retailers, SMATV operators, and other potentially competitive technologies, see e.g. Rollins Cablevue, Inc. v. Saienni Enter., 633 F. Supp. 1315 (D. Del. 1986); Air Capital Cablevision, Inc. v. Starlink Communications Group, Inc., 601 F. Supp. 1568 (D. Kan. 1985).

[131] *See A Cable Cartel?*, FORBES, Feb. 10, 1986, at 82; N.Y. Times, Jan. 13, 1986, at A16, col. 1.

[132] *See, e.g., Justice Continues Inquiry into Scrambling, SMATV/MMDS Policies*, Multichannel News, Dec. 22, 1986, at 1. Throughout 1986 and 1987, however, the focus of scrambling issues appeared to be moving away from the Department's antitrust investigation and toward the regulatory and legislative arenas. The FCC began its own inquiry into scrambling issues, eventually reporting that "markets are evolving [which will] likely prove efficient and workably competitive." Scrambling of Satellite Television Signals and Access to Those Signals by Owners of Home Satellite Dish Antennas, 2 F.C.C. Record 1669, 1671 (1987). There was also increased activity in Congress. *See Senate Committee Blisters Cable Industry*, Multichannel News, Aug. 4, 1986, at 6. In 1986, Senator Gore introduced a bill to require cable programmers to market to dish owners and to preclude discrimination against non-cable distributors of decryption technology. S. 2823, 99th Cong., 2d Sess. (1986). Senator Gore argued that "it does not take a year-long general study by [the] Justice Department or the FCC to realize that the distortions in this marketplace are severe and need immediate remedy. We simply cannot wait forever for those agencies to study the problem to death." 132 CONG. REC. S9,898 (daily ed. July 30, 1986) (statement of Sen. Gore). This bill was defeated by a close 54-44 vote near the end of the 99th Congress. *See* 132 *Cong. Rec.* S14,674 (daily ed. Oct. 2, 1986). Opposition to the bill was based, in part, on the ground that it was premature because "the cable industry's market power is being studied by the FCC, and allegations of unlawful, collusive conduct is under active investigation by the Justice Department." 132 CONG. REC. S14, 671 (daily ed. Oct. 2, 1986) (remarks of Sen. Wilson). Shortly after the FCC's 1987 report, bills similar to Senator Gore's 1986 legislation were introduced into both houses of Congress. *See* S. 889, 100th Cong., 1st Sess. (1987); H.R. 1885, 100th Cong., 1st Sess. (1987). Senator Gore characterized the FCC's conclusions as "cursory

easy answers to these issues under prevailing antitrust law—and little direct precedent in reported cases—scrambling could eventually become the Department's vehicle for limiting the reach of its *Phoenix* decision. If *Phoenix* represents a judgment by the Department that antitrust essentially does not apply to cable television, then cable systems could squelch "intermodal" competition[133] from alternative delivery technologies with little restraint. In that event, of course, the dispute about the product market will have proved irrelevant; even if the FCC's broad video programming market were correct, cable will have monopolized.

Without access to the evidence, it is impossible to decipher the precise issues now being examined by the Department or assess the competitive reasonableness of restrictions involved in the various scrambling scenarios implemented since 1986.[134] This much appears self-evident, however. Whether cable systems are subject to competition depends on the nature and number of alternative programming sources available in the market in question.[135] If anticompetitive means are used to exclude some of that programming, serious antitrust issues are presented. Even if cable is a natural monopoly, therefore, it must abide by the antitrust laws in its relations with competitors—at least some of them, some of the time.

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and ideologically colored." *Satellite "Fair Marketing" Bills Introduced in House, Senate*, Multichannel News, Apr. 6, 1987, at 38, col. 2. In July 1987, the Department suggested that its investigation into scrambling was continuing but offered little hope of quickly reaching a definitive conclusion. *See infra* note 134.

[133] This term refers to competition among different modes of delivering goods or services, *e.g.*, between cable systems and alternative delivery technologies such as SMATV. *See* Scrambling of Satellite TV Signals, Notice of Inquiry, 104 F.C.C.2d 1444, para. 2 (1986).

[134] In July 1987, the Department announced that its scrambling investigation had not of date uncovered any "significant evidence" of collusion among cable programmers or cable operators. *Hearings Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 100th Cong., 1st Sess. 2-3 (1987) (statement of Charles F. Rule, Acting Assistant Attorney General). The Department's investigation into restrictions imposed on the distribution of scrambled programming, which is typically limited only to cable system operators, apparently continues. In the mean time, at least one antitrust suit has already been brought by those involved in the home earth station market alleging that cable programmers have conspired to restrain competition from third-party "packagers" of satellite programming. Personal Preference Video v. Home Box Office, Inc., No. CA-40-86-235-K (N.D. Tex. filed Mar. 25, 1986).

[135] *See* House Report, *supra* note 10, at 66 ("effective competition" determined by "consider[ing] the number and nature of services provided [by the cable system], compared with the number and nature of services available from alternative sources and, if so, at what price").