Spring 1985

The Cable Communications Policy Act of 1984: A Balancing Act on the Coaxial Wires

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THE CABLE COMMUNICATIONS POLICY ACT OF 1984: A BALANCING ACT ON THE COAXIAL WIRES

Michael I. Meyerson*

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INTRODUCTION

The law of cable television has finally caught up with the technology of cable television. After three decades of what Chief Justice Burger termed "the almost explosive development" of cable television, Congress updated the Communications Act of 1934 with the Cable Communications Policy Act of 1984 (the Act). The Act represents the culmination of a "decade long effort to update the Communications Act of 1934 . . . [and] bring our outdated communications laws into the information age."4

The Communications Act of 1934 had been enacted at a time when mass electronic communications meant radio broadcasting. The 1934 Act proved flexible enough to deal with the advent of broadcast television, due in large part to the similarity of the regulatory needs of the two media, both of which were subject to the limitations of the airwaves.5

But cable television created special problems. It did not use the airwaves directly, yet it did carry broadcast signals. Although cable was generally the only wire available to a home for carrying a wide diversity of video programming, it was not treated as a "common carrier" under the 1934 Act. As the Federal Communications

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Commission ruled in 1976, "[I]n our view cable systems are neither broadcasters nor common carriers within the meaning of the Communications Act but rather that cable is a hybrid that requires identification and regulation as a separate force in communication." The 1984 Act, unfortunately, was not drafted to deal effectively with this "separate force."8

Moreover, the regulation of this new medium was complicated by the involvement of local governments. Because cable systems used the streets and public rights-of-way of a city, local governments were inextricably entwined in the regulation of cable. Thus, cable was subject to both an antiquated federal statutory scheme and widely varying regulation at the local level.9 In the words of Senator Barry Goldwater, there was a "patchwork of Federal, State, and local regulations and court decisions . . . . The result has been an unstable regulatory environment that has been bad for the cable industry, bad for the local and State franchising authorities, and bad for consumers."10

After several years of debate,11 a federal cable law was enacted in 1984. The Act is a long and complicated statute.12 The key to understanding it is to recognize that it is, above all else, a compromise. Representatives of the cable industry and the cities negotiated the legislation for over three years.13 The final bill was supported by both the regulators and the regulated.14 One senator

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8 In fact, the Supreme Court had difficulty even in deciding which part of the 1934 Act gave the FCC jurisdiction over cable television. See infra notes 25-44 and accompanying text.
9 Nonetheless, cable was able to grow into a significant communications medium. As of August 31, 1984, there were over 32 million cable subscribers, representing almost 40% of all American households with television sets. Cable Stats, Cablevision, Jan. 21, 1985, at 44.
11 See 130 Cong. Rec. H10,435 (daily ed. Oct. 1, 1984) (statement of Rep. Wirth) ("This legislation has not been put together hastily. It is a carefully crafted set of compromises that has emerged from over 3 years of hearings, discussions, and negotiations by members of the Committee on Energy and Commerce, and representatives of the cities, the cable industry, and many others.").
12 The Act has 28 different sections, covering virtually every aspect of cable regulation.
14 130 Cong. Rec. H10,435 (daily ed. Oct. 1, 1984) (statement of Rep. Wirth) ("Today, we stand before the full House with a compromise bill that both the cities and the cable industry can wholeheartedly support.").
described the Act as "a reasonable compromise which protects the interests of not only the cities and the cable industry, but those of the consumers of cable services as well."\footnote{15}

The Act begins with a list of six purposes, reflecting this intricate compromise. Some of the purposes simply express Congress's general intent for the Act to create a "national policy" for cable, "establish guidelines for the exercise of Federal, State, and local authority," and "promote competition in cable communications."\footnote{16} Other purposes reveal the balancing act that Congress performed. For example, the Act is intended to create franchising standards and procedures that "encourage the growth and development of cable systems." Toward this end, the drafters of the Act wanted to "minimize unnecessary regulation" that might impose an "undue economic burden" on cable systems.\footnote{17} Yet at the same time, the Act is intended to "assure that cable systems are responsive to the needs and interests of the local community."\footnote{18} A similar balance was struck in the area of franchise renewals. Cable operators are protected against "unfair denials of renewal," but only if their performance and future proposals meet federal standards.\footnote{19}

The other stated purpose of the Act recognized the critical role of cable television in enhancing the right of free expression. Thus, the statute was designed to "assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public."\footnote{20} The congressional attempt to fulfill this goal of enhancing the first amendment interest of cable viewers in receiving diverse information permeates the Act.\footnote{21}

The substantive sections of the Act embody Congress's efforts to balance these competing purposes. This Article analyzes the vari-

\footnote{15 130 Cong. Rec. S14,284 (daily ed. Oct. 11, 1984) (statement of Sen. Gorton); see also id. at S14,283 (statement of Sen. Goldwater) ("Nonetheless, this bill is a compromise, and on the whole it is a good bill, and a needed bill. It is proconsumer, procity and procable.").}


\footnote{17 Id. § 601(2).}

\footnote{18 Id. § 601(6).}

\footnote{19 Id. § 601(5).}

\footnote{20 Id. § 601(4) (emphasis added).}

\footnote{21 Cf. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969) (holding that "the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences" is of paramount importance in regulating broadcasting).}
ous, and occasionally conflicting, provisions of the Cable Communications Policy Act of 1984. Part I discusses the new, and newly limited, role of the Federal Communications Commission in regulating cable. Part II explores the new ground rules for local franchising and regulation of cable. The section traces the granting of the franchise, its contents, franchise fees, subscriber rate regulation, modification of franchise terms, and procedures for renewing the franchise. Part III examines the specific provisions in the Act for protecting individual rights relating to cable television: the right of third parties to communicate over a cable system through public or commercial access, the right of individuals to receive cable programming, the subscriber's right to privacy, and the right to equal employment opportunity for cable employees.

I. FEDERAL JURISDICTION OVER CABLE TELEVISION

The Cable Communications Policy Act has radically altered the Federal Communications Commission's jurisdiction to regulate cable television. Instead of being forced to rely on the general provisions of the Communications Act of 1934, which predated the invention of cable television, the FCC now has a defined mandate. Instead of a broad authority derived from analogy to grants of regulatory authority over other media, however, the FCC now has a sharply limited role.

Prior to passage of the new law, the authority for the FCC to regulate cable came from section 152(a) of the 1934 Act. According to that section, the 1934 Act applied to "all interstate and foreign communication by wire or radio." Such communication was

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22 Not all sections of the Act will be discussed. Specifically, the sections on ownership restrictions, Cable Act § 613, and pole attachments, id. § 4, will not be analyzed. Also beyond the scope of this article is the regulation of "non-cable" services, such as home security, data transmission, and private-line voice services that may be provided by a cable company in addition to traditional video programming. For a discussion of the regulation of "non-cable" services, see H.R. Rep. No. 934, 98th Cong., 2d Sess. 60-63 (1984) (hereinafter cited as House Report). The House Report, written when the Act was nearly in its final form, is probably the best statement of legislative intent for the various sections of the Act. See R. Dickerson, The Interpretation and Application of Statutes 158 (1975).


24 Cable Act § 3. See infra text accompanying notes 45-52 (discussing the FCC's new, limited mandate).


26 Id.
defined broadly to include transmission of "writing, signs, signals, pictures, and sounds of all kinds," whether by radio, wire, or cable, "including all instrumentalities, facilities, apparatus, and services . . . incidental to such transmission." 27

The Supreme Court first applied section 152(a) to cable television in United States v. Southwestern Cable Co. 28 In Southwestern Cable, the Court upheld FCC regulations that limited the ability of a cable television operator to import distant broadcast signals to its subscribers. 29 The FCC's authority over cable derived from its well-recognized power over broadcast television: 30 "the authority which we recognize today under § 152(a) is restricted to that reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting." 31

The test for whether an FCC regulation governing cable television was within the agency's power thus became whether the rule was "reasonably ancillary" to the regulation of broadcast television. This test was expanded to encompass even those cases when the rule in question bore no obvious relationship to broadcast television. For example, a rule requiring cable television operators to produce and offer their own programming on their cable systems was found to meet the "reasonably ancillary" test. 32 Although neither the production nor the presentation of this programming would have involved the broadcast airwaves, the Court found that the rule was intended to promote the same "objectives" as classic broadcast regulation—increasing local programming sources. 33 Based on this connection, the rule was held to be reasonably ancillary to broadcasting regulation. 34

Conversely, a FCC rule that required cable operators to provide

27 Id. § 153(a)-(b).
29 Id. at 181. These regulations, codified at 47 C.F.R. § 74-1107(a), were deleted in Report and Order, 57 F.C.C.2d 625 (1975).
31 Southwestern Cable, 392 U.S. at 178.
33 Id. at 667-69 (plurality opinion).
34 Id. at 670 (plurality opinion). The four Justices who formed the plurality were joined by Chief Justice Burger, who noted that the local origination rule "strain[ed] the outer limits" of the FCC's jurisdiction. Id. at 676 (Burger, C.J., concurring in result).
the general public a channel for exhibiting programming was struck down in 1979. The Court said that because section 153(h) of the 1934 Act prohibited the FCC from imposing common carrier obligations on broadcasters, the Commission was barred from imposing public access requirements on cable operators. Despite the lack of guidance from the language of the 1934 Act, the Court applied its broadcasting provisions to cable: "Of course, § 153(h) does not explicitly limit the regulation of cable systems. But without reference to the provisions of the Act directly governing broadcasting, the Commission's jurisdiction under § 152(a) would be unbounded." 

Ironically, just five years after this decision, the Court upheld a FCC cable regulation without reference to either the "provisions of the Act directly governing broadcasting" test, or the "reasonably ancillary" test. In Capital Cities Cable, Inc. v. Crisp, FCC preemption of state regulation of "the signals carried by cable system operators" was found to be valid. The Court held that the FCC possessed "broad responsibilities" to regulate cable to "ensure the achievement of the Commission's statutory responsibilities." The specific responsibility fulfilled by this preemption was to "make available, so far as possible, to all the people of the United States a rapid, efficient, Nationwide and world-wide wire and radio communications service." The goal was not specifically to help broadcasting, but to ensure that "the benefits of cable communica-

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36 Id. at 708. Under the Cable Communications Policy Act of 1984, however, public access, which is specifically authorized, see infra text accompanying notes 249-75, is not considered to be a common carrier obligation since the Act prohibits subjecting a cable system to "regulation as a common carrier," Cable Act § 621(c).
37 Midwest Video II, 440 U.S. at 706.
39 Id.
40 Id. at 2709. The State of Oklahoma had tried to prohibit cable operators from carrying advertisements for alcoholic beverages in their programming, regardless of whether the programming derived from broadcast or nonbroadcast sources. The FCC ruled that this regulation would have violated both the general federal preemption, id. at 2703, as well as specific rules barring cable operators from altering the broadcast signals they carry. Id. at 2704-05 (citing 47 C.F.R. § 76.55(b) (1984)).
41 Id. at 2701 (quoting United States v. Southwestern Cable Co., 392 U.S. 157, 177 (1968)).
42 Id. (quoting FCC v. Midwest Video Corp., 440 U.S. 689, 706 (1979)).
43 Id. at 2705 (quoting 47 U.S.C. § 151 (1982)).
tions become a reality on a nationwide basis.”

The 1984 Act eliminates the need to determine whether the FCC's power over cable is limited to what meets the comparatively narrow standard of being "reasonably ancillary" to broadcasting or extends to virtually any aspect of cable television that affects nationwide wire and radio communications service. Instead, section 152(a) of the Communications Act of 1934 has been amended to specify the source of the Commission's cable authority: "The provisions of this Act shall apply with respect to cable service, to all persons engaged within the United States in providing such service, and to the facilities of cable operators which relate to such services, as provided in title VI.”

Title VI, which is headed "Cable Communications," defines and delimits the power of the FCC over cable television. Rather than giving the FCC broad discretion over cable policy, Title VI precludes Commission regulation in some areas, replaces regulatory standards with explicit statutory requirements in others, and imposes specific obligations on the remaining areas of FCC authority.

Congress had two main reasons for restricting the FCC's discretion. First, the Act's goal of establishing "a national policy concerning cable communications” required the setting of standards that would withstand the changing winds of regulatory behavior.

For example, the Act restricts the FCC's discretion to determine the reasonableness of a franchise fee. See Cable Act § 622; see also infra notes 73-82 and accompanying text.

For example, the Act requires the FCC to determine the scope of subscriber rate regulation by defining when cable systems face "effective competition." See infra notes 142-43 and accompanying text.

The House Report affirms that the cable franchise provisions and the authority for localities to enforce these provisions "must be based on certain important uniform Federal standards that are not continually altered by Federal, state or local regulation." House Report, supra note 22, at 24.
if left unchecked, would both deregulate the cable television industry and preempt state and local authority.51

The resulting law, therefore, assigns the FCC a relatively minor role in determining the framework of cable regulation and deregulation. Indeed, a statutorily created balance now exists that emphasizes “reliance on the local franchising process as the primary means of cable television regulation, while defining and limiting the authority that a franchising authority may exercise through the franchise process.”52

II. THE FRANCHISE: DETERMINING THE RELATIONSHIP BETWEEN THE CABLE OPERATOR AND LOCAL GOVERNMENT

Under the new 1984 Act, most of the obligations imposed on the cable operator will come from local government. Usually local government will mean city government, though sometimes state governments are also involved in the franchising process.53 The Act establishes ground rules for the relationship between the cable operator and the local governmental entity that grants the franchise, the “franchising authority.”54 The granting of the franchise, its permissible contents, and its modification and renewal are among the more important procedures set out in the new law.

51 As one member of the House of Representatives argued, “[I]f the House fails to pass a Federal cable policy, then our cities will be robbed of their control over cable TV. The era of deregulation, affirmed by the FCC and the Supreme Court, has hit cable regulation with a crippling force.” 130 Cong. Rec. H10,444 (daily ed. Oct. 1, 1984) (statement of Rep. Markey). For a discussion of the major deregulatory decisions that preceded the Act, see supra notes 39-44 and infra notes 120-22.

52 House Report, supra note 22, at 19.

53 Even under the Act, cities have the power to regulate cable television only if they are given that power by their state. See Cable Act § 636(b); see also House Report, supra note 22, at 94 (the Act maintains “the traditional relationship between state and local governments, under which a local government is a political subdivision of the state and derives its authority from the state”). In some states, such as Texas, cities are given complete autonomy. See Affiliated Capital Corp. v. City of Houston, 735 F.2d 1555 (5th Cir. 1984). In other states, such as New York, the state supervises and reviews actions of the cities. See N.Y. Exec. Law § 821 (McKinney 1982). And some states, such as Rhode Island, award franchises themselves instead of authorizing their cities to act. See R.I. Gen. Laws § 39-19-3 (1984).

54 Cable Act § 602(9). For states where a city’s grant of a franchise must be approved at the state level, such as New York, both the state and the city are to be considered franchising authorities. House Report, supra note 22, at 45.
A. Granting the Franchise

The franchise is a contract between the franchising authority and the cable operator that authorizes the construction and operation of the cable system.55 The Act proscribes the provision of cable service without obtaining a franchise.56

A key issue of cable franchising, the legality of granting only one franchise for a given geographic area,57 was addressed by the new legislation, though not necessarily resolved. In the past, some cable companies that were denied franchises sued to have the awarding of exclusive franchises by cities invalidated as an antitrust violation.58 The new law specifies that a franchising authority "may award . . . [one] or more franchises within its jurisdiction."59 While this direct grant of authority seems to allow franchising au-

55 Cable Act § 602(8). In some cities, one entity will be responsible for building the system, while a different one will run it. See, e.g., Chesapeake & Potomac See FCC Go-Ahead On Construction, CABLEVISION, Sept. 24, 1984, at 16.
56 Cable Act § 621(b)(1). The law does permit those who were providing cable service without a franchise before July 1, 1984, to continue operation. Id. § 621(b)(2).
57 Several courts have recently stated that cable television has many of the traits of a natural monopoly because of the extremely high fixed costs of constructing a cable system and the low marginal cost for supplying service to each new subscriber. See Affiliated Capital Corp. v. City of Houston, 735 F.2d 1555, 1563 (5th Cir. 1984); Omega Satellite Prod. Co. v. City of Indianapolis, 694 F.2d 119, 126 (7th Cir. 1982) (Posner, J.). And over 99% of the cable systems do not face direct competition from another cable system for subscribers. See Dawson, How Safe is Cable's Natural Monopoly?, CABLEVISION, June 1, 1981, at 340.
58 See, e.g., Community Communications Co. v. City of Boulder, 455 U.S. 40 (1982). Cable companies have also filed lawsuits charging that the denial of a franchise amounted to a violation of their first amendment right of free speech. See, e.g., Community Communications Co. v. City of Boulder, 660 F.2d 1370 (10th Cir. 1981), cert. dismissed, 456 U.S. 1001 (1982). Of course, the Cable Act could not affect the constitutionality of the exclusive franchise.
59 Cable Act § 621(a)(1).

The Ninth Circuit Court of Appeals recently ruled that this section merely permits franchising authorities to minimize disruption of city streets and does not authorize exclusive franchises. Preferred Communications, Inc. v. City of Los Angeles, 764 F.2d 1396 (9th Cir. 1985). In Preferred Communications, the court of appeals overturned a lower court's grant of a motion to dismiss and ordered the city to justify at trial the constitutionality of the exclusive franchise. Because the appellate court reviewed a motion to dismiss, it had to assume that all of the plaintiff's factual allegations were true. Thus, the court assumed that neither physical nor economic factors prevented a second viable cable company in Los Angeles. Id. at 1404. But see supra note 57 (discussing the natural monopoly traits of cable television). The court also rejected the argument that exclusive franchises were necessary to insure that poor as well as wealthy neighborhoods were wired, not on its merits, but because the defendant city had not offered this "cream-skimming" rationale as a justification. Preferred Communications, 754 F.2d at 1406 n.9. Because of its unusual factual and legal components, the Preferred Communications decision may have minimal precedential value.
authorities to award an exclusive franchise, the House Report ambiguously states that the statute "does not . . . revise the Federal antitrust law." Nonetheless, since the plain meaning of the statute seems to grant the franchising authority the discretionary power to choose the number of franchises, most exclusive franchises probably will be validated.

B. Contents of the Franchise

Prior to awarding the franchise, the franchising authority issues a "request for proposal" (RFP), which contains a description of the requirements that the franchising authority believes are necessary for the cable system to best serve the community. Following the issuance of the RFP, cable companies submit competing proposals, building (and usually expanding) on its requirements. After a cable company is selected, negotiations on the franchise between the franchising authority and the cable company may impose additional requirements on the franchisee. Some fundamental aspects of the franchise are not covered by the Act and are thus left to be determined entirely by the cable company and franchising authority. For example, the law does not delineate the duration of the franchise or the timetable for constructing the system.

The Act, however, does establish strict guidelines for the franchising authority's regulation of "services, facilities and equipment." Although the terms "services, facilities and equipment"
are not statutorily defined, they seem to embody two different types of obligations. "Services," at least in the section of the Act concerning franchise content, means "programming." 66 "Facilities and equipment" include (1) the hardware of the system, such as cables and satellite earth stations to be used; (2) physical capabilities of a cable system, such as channel capacity and the ability to handle two-way communication between the cable operator and the subscriber; and (3) equipment for the production of programming, such as studios and cameras. 66

The Act establishes different standards for franchise requirements concerning "services, facilities and equipment," depending on whether the requirements are proposed by the franchising authority in the RFP or mutually agreed upon in the franchise agreement. Also, different requirements are permitted in franchises that precede the effective date of the law than those that follow. Franchises in effect as of December 29, 1984, are grandfathered, at least as to requirements for specific programming, facilities, and equipment. 67 All eligible franchise provisions concerning these categories may be enforced by the franchising authority, even when the facilities and equipment are unrelated to the cable system.

In new RFP's, the franchising authority may establish any requirement for facilities and equipment, as long as it is "related to the establishment or operation of a cable system." 68 The franchising authority is barred, however, from establishing any programming requirements in the RFP. 69 The final franchise, however, is not limited to the standards in the RFP. The franchising authority and the cable company may agree to additional requirements for facilities and equipment and to "broad categories of video programming." 70 Through these categories, a franchising authority

66 See House Report, supra note 22, at 26, 68-69 ("Th[e] ability to enforce provisions related to program service assures the franchising authority that commitments . . . will be met."). "Services" can also include such cable offerings as home security and two-way communications. See supra note 22. When used in the context of access requirements, "services" has a far different meaning. See infra notes 209-14 and accompanying text.

67 Cable Act § 624(c); see also House Report, supra note 22, at 26. All of these franchise provisions are subject to modification pursuant to § 625. See infra notes 182-214 and accompanying text.

68 Cable Act § 624(b)(1).

69 Id.

70 Id. § 624(b)(2).
may require a cable operator to meet the needs of children, different ethnic groups (through the provision of programming in a particular foreign language or of interest to a particular minority group), or the community at large (such as the need for news, public service, or sports programming). To avoid potential first amendment conflicts, the franchising authority may not require the cable operator to show any specific programming.

C. Franchise Fees

Another important provision in cable franchises involves the franchise fee. In return for the "operator's use of public ways," the franchising authority assesses a fee, which is usually a fixed percentage of revenue from the system.

1. Statutory Guidelines. Prior to enactment of the new law, the FCC had been active in evaluating the validity and reasonableness of franchise fees. The two major areas of FCC regulation established a ceiling on the amount of franchise fees permitted and determined on an ad hoc basis which requirements for either expenditures or "in-kind" payments were subject to the fee ceiling.

Although the FCC's established ceiling was three percent of a cable system's gross revenue per year, the Commission would approve fees up to five percent if they were found "appropriate in light of the planned local regulatory program." In other words, the franchising authority could use the first three percent of the franchise fee for any purpose, whether or not related to the operation of the cable system, but to obtain permission from the FCC for the higher fee, the franchising authority had to prove that the

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71 House Report, supra note 22, at 68-69.
72 Id. at 26. Many existing franchises require the cable operator to provide specific programming such as the Cable News Network or Home Box Office. Id. One criticism of the ban on this type of franchise obligation is that a cable operator who voluntarily promises to carry specific programming in order to win a franchise from competing cable operators cannot be held to that promise. Id. at 132-33 (separate views of Rep. Tauke).
73 Id. at 26.
75 An "in-kind" payment is the direct provision of facilities and equipment to the franchising authority by the cable company in lieu of the payment of money. Some franchises have required, for example, that schools be wired free of charge or that the cable company build and run a studio for community programming. See 1 C. Ferris, F. Lloyd & T. Casey, supra note 62, ¶ 13.15[2].
cost of cable regulation required the increased amount. If the FCC found that the need for the higher fee was not explained with sufficient specificity, or that the fee would "interfere with the effectuation of federal regulatory goals in the field of cable television," it would not waive the three percent ceiling.

The new law rescinds the FCC's power to determine the amount of the franchise fee or its uses. Instead, the Act establishes a statutory ceiling for franchise fees of five percent of the "gross revenues derived... from the operation of the cable system." The Act also specifies that income from franchise fees may be used for any purpose that the franchising authority desires.

The Act leaves unresolved several questions relating to franchise fees. For example, the Act does not define what the phrase "gross revenue" means. The House Report merely adds that the statutory language should not be interpreted as "intending to specify a particular method of accounting." The best guide for interpreting the base from which franchise fees are calculated may be the previous FCC standard, which defined gross revenues as revenues derived "from all cable services in the community." These services included both basic and pay cable, non-cable services, and advertising.

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79 47 C.F.R. § 76.31(a) (1984).

80 Cable Act § 622(i); see also House Report, supra note 22, at 26 ("The FCC is stripped of the authority to limit by regulation the level of this fee other than as provided in the [Act], or to specify the manner in which the income from such fees may be spent."). The FCC has deleted its rules on franchise fee standards and stated that "disputes involving the franchise fee are best resolved through the courts." Implementation of the Provisions of the Cable Communications Policy Act of 1984, 50 Fed. Reg. 18,637, 18,648 (1985) [hereinafter cited as Implementation of Cable Act].

81 Cable Act § 622(b).

82 Id. The withdrawal of the FCC's power to require that franchise fees be used for purposes related to the cable system may cause constitutional problems. See infra notes 100-12 and accompanying text.

83 House Report, supra note 22, at 64.


85 For a discussion of the difference between basic and pay cable, see infra notes 115-19 and accompanying text.

86 For a definition of "non-cable," see supra note 22.
ing, installation, and converter rental.87

Once the base for the franchise fee has been calculated, the next step in determining whether the five percent statutory ceiling has been respected is to decide which charges required by the franchise are part of the franchise fee. The Act defines the fee “as any tax, fee, or assessment of any kind” imposed on a cable operator or subscriber “solely because of their status as such.”88 While taxes imposed solely on cable operators and subscribers are considered part of the fee, taxes of “general applicability” are not.89 A general applicability tax can be a general property, sales, use, or entertainment tax, or a “utility user” tax, which applies to all who are given the right to use the city streets.90 The utility user tax need not treat all utilities the same way before qualifying as a tax of general applicability; the Act only requires that the tax not be “unduly discriminatory” against cable television.91

Nevertheless, one kind of payment, though made only by cable companies, is excluded from the definition of franchise fee. Depending on whether the franchise goes into effect before or after the effective date of the law, all or some of the costs associated with public, educational, or governmental access facilities are omitted from the franchise fee.92

For the older franchises, any payments that the franchise requires the cable operator to make “for or in support of” these access “facilities” are excluded from the fee.93 When discussing access, the Act gives a special, if somewhat circular, definition of the word “facilities”: both channel capacity for access and the “facilities and equipment” for the use of the access channels qualify as access facilities.94 Thus, any payment used either for the “facilities

88 Cable Act § 622(g)(1).
89 Id. § 622(g)(2)(A). Thus, a property tax that does not single out cable television will not be considered part of the franchise fee. See generally Teleprompter Manhattan CATV Corp. v. City of New York, 82 A.D.2d 145, 149, 441 N.Y.S.2d 239, 241 (1981) (holding that a franchise fee could not be deducted from a general property tax).
90 House Report, supra note 22, at 64.
91 Cable Act § 622(g)(2)(A).
92 Id. § 622(g)(2)(C). For a discussion of the other provisions involving public, educational, or governmental access, see infra notes 249-75 and accompanying text.
93 Cable Act § 622(g)(2)(B).
94 Cable Act § 602(13). While “facilities and equipment” are not defined, they presumably have the same meaning for access as they do in § 624, which discusses franchise provisions.
and equipment" themselves or for a staff and organization to assist in the use of this hardware by access programmers is excluded from the franchise fee. The new law effectively overrules earlier FCC rulings that such payments would be subject to the franchise fee ceiling.95

For new franchises, the Act significantly curtails the ability of franchising authorities to exclude access use payments from the franchise fee ceiling. Only payments for "capital costs" of the access facilities are barred from the franchise fees of new franchises.96 Because the law does not define the phrase "capital costs," and because the FCC has never before used the phrase, the exact contours of "capital costs" are difficult to ascertain. At a minimum, it seems logical to assume that the construction of the access facility and the start-up costs associated with the purchase of the necessary equipment would be excluded from the franchise fee. In contrast, payments for staff and other "non-hardware" items would logically be subject to the franchise fee ceiling. However the term "capital costs" is ultimately defined, the Act does create one other means for a franchising authority to insure sufficient support in new franchises for public, educational, or governmental access. The House Report states that the franchise fee "includes only monetary payments made by the cable operator, and does not include as a 'fee' any franchise requirements for the provision of services, facilities or equipment."97 Thus, the only access obligations imposed on the cable company that are subject to the franchise fee ceiling are specific requirements for cash payments. If the franchise instead calls on the cable company to provide services, facilities, and equipment without a direct monetary payment to the franchising authority, the costs associated with fulfilling these requirements are excluded from the franchise fee ceiling.98

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95 See, e.g., City of Miami, 56 RAD. REG. 2d (P & F) 458 (1984).
96 Cable Act § 622(g)(2)(C).
97 House Report, supra note 22, at 65 (emphasis added).
98 If the cable company offers voluntarily to give the franchising authority or a third-party, nonprofit organization payment in support of public, educational, or governmental access facilities, and this offer is not included in the franchise, those payments are also exempt from the fee ceiling. See House Report, supra note 22, at 65.
This dichotomy was created to protect the autonomy of the cable operator. If the cable operator is responsible for supplying the services, facilities, and equipment instead of simply being charged a fee to permit the franchising authority to obtain them, the operator has far greater control over both the type and amount of its expenditure. Economies can be made, for example, if the operator uses its own equipment and staff not only to serve its own interests but also to fulfill access requirements.99

2. Constitutional Limitations. The failure of the Act to restrict the use of franchise fees to the franchising authority’s regulation of the cable system poses potential constitutional problems. In general, taxes on the exercise of speech for the sole purpose of raising revenue for government coffers—which a franchise fee that is not cable related would be—have been found unconstitutional. In *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*,100 the Supreme Court struck down a tax that singled out newspapers by unconstitutionally “burdening rights protected by the First Amendment.”101 The stated governmental interest of raising revenue was insufficient to justify the tax since “the State could raise the revenue by taxing businesses generally, avoiding the censorial threat implicit in a tax that singles out the press.”102 A California court relied on this decision to strike down a state tax on pay subscription television service.103 The court said that because a seller of subscription television service is a “disseminator” of protected speech, the use of a differential tax to raise revenue was unconstitutional.104

In order for a cable television franchise fee to be constitutional,
therefore, it must serve a purpose other than the raising of revenue. Guidance for determining an appropriate purpose may be found in the recent Second Circuit case, *Gannett Satellite Information Network, Inc. v. Metropolitan Transportation Authority.* The *Gannett* court upheld a requirement that newspapers pay a license fee to the governmental agency that controlled the station for the right to place newsracks in a train station. The court held that because the management of a railroad was a “proprietary” function, as opposed to a traditional governmental function, and because the transportation authority needed the revenue raised by the license fee to perform its statutory duty “[t]o provide efficient, economical, self-sufficient commuter transportation,” the authority’s interest outweighed the burden placed on the newspaper’s first amendment rights. The court stressed that this tax differed from traditional licensing of newsracks in that “[a]ny revenue raised by the MTA does not go into the general coffers but is used for the operation of the railroad lines.”

Similarly, a franchise fee, in order to be constitutional, must be used to operate the cable system. Examples of these uses are enforcement of franchise obligations, research and development for a long-term local telecommunications policy, and funding of public, educational, and governmental access channels, facilities, and equipment. Even if the franchise does not state specifically that the fee will only be used for these purposes, a resolution or ordinance of the franchising authority which limits the use of the fees should help prove that the fees are not simply intended to raise general revenue.

While the franchise may require that the franchise fee be paid directly to the franchising authority, it may also be prudent for the

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105 Although it could be argued that a licensing fee in exchange for the right to use public property that is not a constitutionally protected public forum is significantly different from a tax on the exercise of free speech rights, see *Gannett Satellite Information Network, Inc. v. Metropolitan Transp. Auth.*, 745 F.2d 767, 772 (2d Cir. 1984), the censorial danger of singling out one type of speaker, the cable operator, is still present. If there is an exclusive franchise and only one cable company is subject to the power of the franchising authority, the danger is even greater.

106 745 F.2d 767 (2d Cir. 1984).

107 *Id.* at 774-76.

108 *Id.* at 775.

franchising authority to establish a separate nonprofit organization to collect and disburse the income from the franchise fee. Such an organization, with a specific mission of insuring that cable television serve the entire community, both in supplying diverse programming and in giving citizens an opportunity to communicate effectively with the rest of the community, might further insulate the fee from constitutional challenge. If the franchise fee is paid directly to a separate organization with a cable-related mission, it might have the same effect as the Metropolitan Transportation Authority's status as a separate, self-sustaining public benefit corporation: establishing a significant governmental interest in raising revenue for a legitimate regulatory purpose that would outweigh any incidental burden placed on the first amendment rights of the business entity that pays the fee.

D. Subscriber Rate Regulation

One of the most debated issues of cable regulation in Congress concerned the franchising authority's regulation of the rates that a cable company charged its subscribers. While most franchises in effect before the Act provided for some governmental supervision over these rates, the FCC had attempted to preempt the power of franchising authorities to regulate almost all subscriber rates. The new law reverses some aspects of the FCC deregulation, confirms others, and, in still others, expands the scope of federal preemption.

110 See, e.g., Complete Channel TV, Inc., 34 Rad. Reg. 2d (P & F) 1372, 1373 (1975); see also City of Miami, 56 Rad. Reg. 2d (P & F) 458 (1984) (the City of Miami created two agencies, one to regulate and oversee the cable system and the other to administer the access system and develop local programming). For a good discussion of how an access center is established, see Buske, Improving Local Community Access Programming, Pub. Morr., June, 1980, at 12-14.


112 Id. The existence of a fee does not ipso facto prove a constitutional violation. The Second Circuit's observation about the newspaper USA Today applies equally to the cable television operator: "As a large commercial distributor, it should be ready to absorb increases in the cost of doing business." Id. at 774.


114 See Rules Clarification, supra note 77, at 199-200; see also Community Cable TV, Inc., 56 Rad. Reg. 2d (P & F) 735 (1984) (preempting regulation of "non-basic" services); Community Cable TV, Inc., 54 Rad. Reg. 2d (P & F) 1351 (1983). The two Community Cable decisions are often referred to as the Nevada decisions.
1. **FCC Preemption Prior to the 1984 Act.** In 1974, the FCC announced that no governmental agency could regulate the rates of “pay cable.” Pay cable was defined as all programming not regularly provided to all subscribers, including “specialized programming for which a per-program or per-channel charge is made.” The Commission felt that regulation of such services would have a “chilling effect on the anticipated development” of such programming.

The franchising authorities were left with the residual power to regulate “regular subscriber service,” that is, the broadcast channels and mandatory access channels that were provided to all subscribers. Many programming services, however, were neither “pay cable” nor broadcast and access channels; many cable companies offered a “basic tier” of programming, which combined specialized nonbroadcast service with “regular subscriber service.” Similarly, many franchises required a certain number of channels and specific programming in this basic tier and authorized the franchising authority to regulate the rate charged for the entire tier.

The question arose as to whether a franchising authority had the power to regulate these specialized services. An important corollary issue was whether a cable company could remove these services from the basic tier and place them in an unregulated pay tier. The FCC tried to resolve these issues in its *Nevada* decisions. In *Community Cable I*, the FCC held that local regulation of all “non-basic” services had been preempted since 1973 and that this preemption extended to such services whether they were offered individually or packaged along with other services in a tier. In *Community Cable II*, the FCC reaffirmed its earlier decision and

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116 *Notes Clarification*, supra note 77, at 199-200.
117 Id. at 199.
118 Id. at 200.
119 Id. at 199. For a discussion of the FCC’s “must-carry” rules, see 47 C.F.R. §§ 76.51-.61 (1984).
120 *Community Cable TV, Inc.*, 56 Rad. Reg. 2d (P & F) 735 (1984) (*Community Cable II*); *Community Cable TV, Inc.*, 54 Rad. Reg. 2d (P & F) 1351 (1983) (*Community Cable I*).
121 54 Rad. Reg. 2d at 1359.
added that, in defining basic service, a cable company was “free to add, delete, or realign its service as long as the basic service contains all the signals mandated by the Commission’s rules.”  

But the franchise agreement arguably could still limit the cable operator’s freedom to retier. A United States District Court in Louisiana interpreted the Nevada decisions as authorizing only the retiering of non-basic service. The court held that the franchising authority could force the cable company to keep all of the services in the basic tier which the franchise required and regulate the rate for the entire tier: “[L]ocal government franchisors are not preempted from regulating retiering of a basic subscriber service tier, but may hold a cable operator to its contractual duty to provide all promised stations on this tier.”  

2. Rate Regulation After the Law. Section 623 of the 1984 Act creates a new framework for local rate regulation. The FCC and the states are barred from regulating rates for the provision of cable service except as provided by the Act; franchising authorities may only regulate the rates for the provision of cable or any other communications service as provided by the section. Thus, the Act defines the roles of both the federal and local government in regulating the rates for cable programming. Although the Act does not define “communications service,” the use of the phrase in counterpoint to “cable service” will likely be interpreted to mean that the FCC and the states, but not the franchising authority, retain the authority to regulate rates for non-cable services, such as data transmission.

For the first two years after the effective date of the law, December 29, 1984, franchising authorities may regulate the rates for ba-
sic service,128 if the franchise authorizes that power.129 During the two-year period, the “basic cable service” subject to regulation is defined as “any service tier which includes the retransmission of local television broadcast signals.”130 While in some respects this definition is narrower than the FCC’s earlier definition of “regular subscriber service,” which included must-carry broadcast signals plus mandatory access channels,131 the Act’s definition actually may be much broader. After this transition period has elapsed, a franchising authority will be able to regulate rates only if the cable system is not subject to “effective competition.”132

Section 623(c)(1) of the Act permits regulation of the rates charged for basic service, “including multiple tiers of basic cable service.”133 Therefore, if a franchise specified that the lowest or least expensive tier would only contain local broadcast signals, and that a higher tier would contain local broadcast signals along with distant broadcast signals and nonbroadcast signals, the rates for both tiers could be regulated by the franchising authority.134

The new law also affirms the ruling in Cox Cable, Inc. v. City of New Orleans,135 which limited the scope of the FCC’s Nevada decisions.136 The cable operator may now retier programming only if none of the tiers involved in the change are subject to rate regulation.137 Nevertheless, those cable companies that relied on the Ne-
vada decisions to “lawfully” move programming out of the basic tier cannot be forced to move back that programming, if the change occurred before September 26, 1984. Because the word “lawfully” is used, however, court challenges to such retiering are still permitted.

The Act does not provide any standards for a franchising authority deciding whether to grant a request to increase subscriber rates. Any request, nonetheless, must be ruled on within 180 days or it will be deemed to have been approved. Even without the approval of the franchising authority, the cable operator may increase rates up to five percent a year, unless barred by the franchise.

3. The Search for Effective Competition. After the two-year transition period, the only franchising authorities able to regulate basic service rates will be those in communities where the cable system is not subject to “effective competition.” The Act does
not, however, define what is meant by “effective competition.” The responsibility for determining this elusive condition falls to the FCC, which must define the term within 180 days of the law’s enactment.143

According to the House Report, the standards that the FCC develops should be both objective and applicable on a community-by-community basis.144 The aim is to be able to judge whether each individual cable system faces effective competition within its own community without independently examining the degree of competition within that community.

To decide whether effective competition exists, one must first determine the purpose of “effective” competition. Is it to insure that residents in a community have access to some other electronic programming, to insure a source of programming that delivers a vast array of programming similar to that offered by cable, or to insure fair rates or quality service responsive to the needs of the community? Again, the Act is silent. One approach for determining its purpose is to consider the purposes for current rate regulation which “effective competition” will fulfill. The House Report indicates that there were two main purposes for rate regulation: “to prevent cable operators from charging unreasonably high rates” and “to enforce key provisions of a franchise agreement, such as the obligation to provide service to all residents of the service area.”145

The next step is to determine precisely with what the “effective competition” is to be competing. In other words, the question is

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language authorizing the FCC to prescribe standards for rate deregulation states that the Commission must authorize rate regulation “for the provision of basic cable services.” Id. § 623(b)(1). Thus, the Act does not explicitly deprive a franchising authority from regulating the fees for equipment and services. Even if the equipment necessary to receive basic service is deemed part of basic service and thus protected from regulation, other equipment, such as the “lock boxes” that keep particular programming off a subscriber’s television, could be regulated by the franchising authority pursuant to either § 632 (consumer protection) or § 636 (public health, safety, and welfare). Also, either the FCC, the state, or the franchising authorities may regulate “the installation or rental of equipment which facilitates the reception of basic cable service by hearing impaired individuals.” Id. § 623(f)(2).

143 Id. § 623(b)(1). Within six years of the law’s enactment (by October 29, 1990), the FCC must also prepare a report on rate regulation of cable services based on a study of the effect of “competition in the marketplace.” Id. § 623(h).

144 HOUSE REPORT, supra note 22, at 66.

145 Id. at 24.
what is "basic cable service." The FCC has the task of defining basic service, and not simply relying on the definition in the statute (which was only intended to be used during the two-year transition period). As the House Report states:

The regulations of the Commission under this subsection [determining effective competition] serve a different purpose — defining the circumstances and extent of regulation that may occur beyond the transition period. As such, the Commission may fashion a definition of basic cable services most appropriate to achieve the purpose of the regulations, consistent with the provisions of Title VI.

The definition of basic cable service is therefore not a fait accompli. It is the responsibility of the FCC to devise an appropriate standard.

The standard the FCC ultimately adopted was that, unlike the definition provided in the Cable Act, basic service would be only a single tier. That tier would be the one tier "regularly provided to all subscribers" that included both the must-carry broadcast signals and the access channels, if any, that were required in each specific franchise.

Including access channels in the definition of basic service is consistent both with industry practice and with the underlying policy in favor of access programming. The House Report recognized that access channels are universally considered as part of the basic package of service that a cable operator must offer to serve the interest of a community: "Almost all recent franchise agreements provide for access by local governments, schools, and non-profit and community groups over so-called "PEG" (public, educa-

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146 "Basic cable service" for the transition period is "any service tier which includes . . . local . . . broadcast signals." Cable Act § 602(2); see supra notes 130-31 and accompanying text.

147 House Report, supra note 22, at 66. The Act, however, is silent on the ability of the FCC to alter the statutory definition of "basic service." See supra text accompanying note 130. The plain meaning of the Act defining basic service may well preclude the FCC from changing the definition. But see Implementation of Cable Act, supra note 80, at 18,652 (FCC determination that it does have the power to change the definition).

148 See supra notes 130-34 and accompanying text.

149 Implementation of Cable Act, supra note 80, at 18,653 (to be codified at 47 C.F.R. § 76.5).

150 Id.
tional, and governmental) channels." Additionally, the FCC has repeatedly stated that "the subscribing public should not be required to pay extra fees in order to obtain access to local public service programming."

Even though basic service is defined to include both must-carry and access programming, the FCC states that its standard for effective competition will be based only on the availability of broadcast signals that can be received over-the-air. The FCC ruled that cable operators do not possess "market power" in communities which have three or more over-the-air broadcast signals. Therefore there is "effective competition" (and thus there will be rate regulation) for basic service in any community which can receive at least three broadcast signals without cable. Access programming was omitted from the standard because there was no evidence that access was a "source of market power" for cable companies.

The validity of the FCC's standard will ultimately be decided in court. One question will be whether three broadcast signals, which leaves out, at a minimum, either one of the three commercial networks or a public broadcast station, can fulfill the statutory requirement that competition be "effective."

Second, the Cable Act may not permit the FCC to rely solely on the number of over-the-air broadcast signals that are available. The legislative history of the Act indicated that the FCC would need to look at "various telecommunications services." In fact, the House Report states that the FCC should "consider the number and nature of services provided [by basic cable service] compared with the number and nature of services available from alter-

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103 Implementation of Cable Act, supra note 80, at 18,649-50.
104 Id. In drafting this standard, the FCC rejected a more sophisticated standard based on the actual language used in the statute. Section 623(b)(2)(B) requires the FCC, in its regulations, to "define the circumstances in which a cable system is not subject to effective competition." This provision means that the FCC must look at the package of programming that a cable system offers; without regulating the rates charged for premium pay programming, the FCC must consider that it is only through the purchase of basic service that a cable subscriber can purchase the rich array of premium channels offered.
105 Implementation of Cable Act, supra note 80, at 18,650 n.68.
107 House Report, supra note 22, at 66.
nate sources, and, if so, at what price.” The required comparison to other available services and their prices implies that the FCC should compare basic cable service with the range of possibly competitive technologies, such as direct broadcast satellites, multi-channel multi-point distribution systems, and satellite master antenna systems. In communities where these alternative telecommunications services either are absent or offer only limited or expensive programming, there is no effective competition for cable television and subscriber rates should therefore not be deregulated.

Besides comparing cable to other telecommunications services, the FCC should have considered whether “effective competition” is possible for public, educational, and governmental access channels. The FCC’s statement that access may not add to a cable company’s market power does not end this inquiry. Historically, the access channels have provided the only electronic forum for community programming. In fact, the House Report specifically noted the unique role of the access channels:

Public access channels are often the video equivalent of the speaker’s soap box or the electronic parallel to the printed leaflet. They provide groups and individuals who generally have not had access to the electronic media with the opportunity to become sources of information in the marketplace of ideas.

Congress has thus recognized that access channels provide programming that does not compete with broadcast television. Accordingly, the Commission must recognize that access programming may not face the statutorily required “effective competition” even if the tier that carries broadcast signals does.

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158 Id.
159 The House Report also warns, though, that the FCC is to understand its statutory requirement to call only for a determination as to whether there is “effective competition sufficient to warrant the regulation of rates for basic cable service. It is not intended to invite the Commission to conduct a rulemaking related to effective competition for other video services or mass media services generally.” Id. Therefore, the FCC’s rulemaking must be limited to what programming is offered on cable television and whether sufficient competition exists to protect subscribers.
160 See supra text accompanying note 156.
161 House Report, supra note 22, at 30 (emphasis added). There is similarly no alternative for the type of educational and informational programming which is provided over the governmental and educational access channels.
In 1984, the Supreme Court held that the mere fact that two types of programming may both appear on the television screen does not establish effective competition. In ruling that broadcasts of college football games were a distinct market, the Court found that other types of programming, even other types of sports programming, were unable to "attract a similar audience." In the same manner, broadcast channels, which must reach a mass audience and appeal to advertisers as well as viewers, are unable to attract a "similar audience" to the access channels.

Accordingly, the FCC should have established a two-tiered approach to "effective competition," mirroring the two parts of its definition of "basic service." That is, there would be two distinct tests for "effective competition" to take into account the different programming carried on broadcast and access channels. Irrespective of the availability of broadcast signals, the franchising authority should have been permitted to regulate a tier containing mandatory access channels unless there existed, within the community, meaningful opportunity for individuals and community groups to communicate electronically with their neighbors.

In some communities, the full basic service as defined by the FCC would be regulated. In the majority of communities, however, only the tier containing access programming would be subject to rate regulation. This would permit the cable operator to set the rates for the programming which is most profitable, thereby fulfilling the congressional mandate that the FCC "minimize unnecessary regulation." Until there is actual "effective competition" for access programming, however, the ability of the franchising authority to control rates for access programming will help assure another congressional purpose: "the widest possible diversity of information sources and services to the public."

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163 Id. at 2966; see also International Boxing Club v. United States, 358 U.S. 242, 249-52 (1958) (championship boxing events are "uniquely attractive").
164 See supra text accompanying note 150.
165 See supra text accompanying note 161.
166 Cable Act § 601(6).
167 Id. § 601(4).
E. Other Franchise Terms

The Act authorizes either a state or a franchising authority to enact laws or require in the franchise protections for both consumers\textsuperscript{168} and the public health, safety, and welfare.\textsuperscript{169} The Act does not define the scope of this power except to say that it must be exercised in a manner “not inconsistent with this title.”\textsuperscript{170}

The Act distinguishes, however, between the consumer protection safeguards that may be included in a franchise and those that may be enacted into law. Only “customer service” and “construction-related” requirements are permitted in the franchise.\textsuperscript{171} The House Report notes that “customer service” generally means “the direct business relation between [a] cable operator and a subscriber.”\textsuperscript{172} This definition anticipates regulation of issues such as quality of service, billing, handling of complaints, and interruption and disconnection of service.\textsuperscript{173} Additionally, it indicates that the franchising authority can regulate any fee charged by a cable operator to the subscriber,\textsuperscript{174} except for rates for cable programming that have been deregulated pursuant to section 623.\textsuperscript{175} Any consumer protection law not inconsistent with the rest of the Cable Act may be enacted by either a state or a franchising authority. An example of an inconsistent measure would be the regulation of deregulated subscriber rates.\textsuperscript{176} Beyond such a blatant attempt to avoid the Act’s requirements, though, local governments retain great discretion to protect the interests of cable subscribers as

\textsuperscript{168} Id. § 632.

\textsuperscript{169} Id. § 636.

\textsuperscript{170} Id. § 632(c). The section preserving local authority to protect the public health, safety, and welfare states that this power must be exercised in a manner “consistent with the express provisions of this title.” Id. § 636(a). There is no evidence implying that the use of the double negative in § 632(c) has any different meaning than the positive declaration of § 636(a).

\textsuperscript{171} Id. § 632(a)(1), (2).

\textsuperscript{172} HOUSE REPORT, supra note 22, at 79.

\textsuperscript{173} Id. While localities are responsible for quality-of-service regulation, the FCC is empowered to promulgate its own rules on technical standards for cable. Cable Act § 624(e). These standards would preempt inconsistent local standards. HOUSE REPORT, supra note 22, at 70.

\textsuperscript{174} These regulated fees might be for equipment for the hearing impaired, § 623(f)(2), for keeping potentially offensive programming off a subscriber’s television, § 624(d)(2)(A), or, possibly, for installation and home visits by repair crews. See supra note 142.

\textsuperscript{175} See supra notes 142-67 and accompanying text.

\textsuperscript{176} HOUSE REPORT, supra note 22, at 79.
Local governments possess similar broad powers to protect the public health, safety, and welfare. This umbrella "police power" will permit states and franchising authorities to fill in whatever gaps remain in the regulation of cable television after the Act. A statute enacted after the Act, however, may impose a requirement in the franchise itself only on new franchises and those that come up for renewal.

For franchises existing on the effective day of the Act, the Act grandfathers all provisions "subject to the express provisions of this title" and those requirements that the state or franchising authority is permitted to add. The use of the phrase "express provisions" implies a legislative intent to preserve as many provisions of existing franchises as possible; accordingly, any franchise provision that does not directly contradict an explicit requirement of the Act will be grandfathered.

F. Modification of the Franchise

The franchise, as a contract between the cable operator and the franchising authority, imposes a set of obligations on the cable operator. Because it "may be necessary to adapt to changes in market conditions and consumer demands," however, the Act establishes procedures for modifying the terms of a franchise. Apart from the provisions of section 625 concerning franchise modification, there are two other methods for modifying a franchise.

177 Because the power to enact consumer protection legislation is not limited to "customer service requirements," the power extends beyond the direct business relation between the cable operator and subscribers and includes the interests of the subscriber/consumer in privacy, Cable Act § 631(g), in receiving a diversity of information sources, House Report, supra note 22, at 31, and in the awarding, modification, and renewal of the franchise, Cable Act §§ 621, 625-626.

178 See Cable Act § 636(a), (b); see also House Report, supra note 22, at 94.

179 See House Report, supra note 22, at 94.

180 Cable Act § 637.

181 The word "express," though not defined in the Act, generally means "[c]lear; definite; explicit; plain; direct; unmistakable; not dubious or ambiguous." BLACK'S LAW DICTIONARY 521 (5th ed. 1979). Because "express" is "usually contrasted with 'implied,'" id., a provision which may be "inconsistent" with an interpretation of the Act might not violate an "express provision" of the Act. An example of such an ambiguous provision may be one that regulates the rates charged by a cable company for installing equipment. See supra note 142.


183 Cable Act § 625.
franchise. The alternate (and more desirable) options are either to follow the procedures in the franchise for altering its terms or hold negotiations between the franchising authority and the cable operator for new franchise terms. If the cable operator and the franchising authority are unable to agree on modifying the franchise, section 625 gives the cable operator a right, which is enforceable in court, to change franchise terms. But before exercising the right, the cable operator must first meet one of four different standards, depending on which obligation is being modified.

1. Facilities and Equipment. The first category of obligation is a requirement for “facilities and equipment,” the same term used in section 624, which governs requirements that can be included in a franchise. Even though the Act does not define the term, it presumably has the same meaning in both sections 624 and 625 and thus encompasses the equipment used in the production of programming and the cable system’s hardware and physical capabilities.

A franchise requirement for facilities or equipment may be changed pursuant to section 625 only if the cable operator can prove that it would be “commercially impracticable for the operator to comply with such requirement.” For a provision to become commercially impracticable, the statute requires a change in conditions, beyond the control of the cable operator, that alters a basic assumption on which the provision was originally based. This standard was deliberately taken from section 2-615 of the Uniform Commercial Code, and the drafters of the Act intended it to apply to cable operators in the same manner that it has applied to the sale of goods.

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185 Cable Act § 625(b). The suit must be commenced within 120 days after receiving notice of the franchising authority’s determination and may be brought in either federal district court or state court. Id. § 635(a).
186 Id. § 625(a)(1)(A).
187 See supra text accompanying note 66.
188 See House Report, supra note 22, at 68.
189 Cable Act § 625(a)(1)(A).
190 Id. § 625(f).
191 U.C.C. § 2-615 (1978). The U.C.C. language permits a delay in delivery or nondelivery of goods if “performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made.” Id.
192 See House Report, supra note 22, at 71. The House Report notes that “courts may
Perhaps the most important factor in determining whether a change in circumstances should lead to a finding of commercial impracticability is whether the change was foreseeable when the contract was signed. Comment 8 to U.C.C. section 2-615, which the House Report specifically cites, states that a promisor cannot escape from an obligation if the change in circumstances "is sufficiently foreshadowed at the time of contracting to be included among the business risks which are fairly to be regarded as part of the dickered terms, either consciously or as a matter of reasonable, commercial interpretation from the circumstances."\textsuperscript{193} The courts have assumed that businesspeople who enter into contracts are relatively sophisticated and aware of the world. Thus, businesspeople have been found liable for not foreseeing the possibility of adverse occurrences that resulted from situations known at the time of the signing of the contract, even if such occurrences were unlikely. For example, the closing of the Suez Canal during 1956, although termed an "unexpected development," was held sufficiently foreseeable since there had been political tension in the region:\textsuperscript{194} "We know or may safely assume that the parties were aware, as were most commercial men with interests affected by the Suez situation . . . that the Canal might become a dangerous area."

For cable franchises, the doctrine of foreseeability means that most changes in circumstances that might adversely affect a cable operator could not be the basis for a finding of commercial impracticability. Consider the example of a cable operator who failed to attract the expected number of subscribers because residents of apartment complexes installed their own satellite dishes to receive programming. Because the technology for such use had been used

\textsuperscript{193} U.C.C. § 2-615 comment 8 (1978) (emphasis added). The House Report, in explaining how commercial impracticability was to be determined, stated that "the foreseeability of the change in conditions is a key factor for the Court to consider under the U.C.C.'s doctrine of commercial impracticability." \textit{House Report, supra} note 22, at 71.

\textsuperscript{194} Transatlantic Fin. Corp. v. United States, 363 F.2d 312, 318 (D.C. Cir. 1966).

\textsuperscript{195} Id. (emphasis added); \textit{see also} Maple Farms, Inc. v. City School Dist., 76 Misc. 2d 1080, 1085, 352 N.Y.S.2d 784, 789-90 (Sup. Ct. 1974) (increase in farm prices due to "unanticipated crop failures" held foreseeable because any businessman should have been aware of the chance of crop failures).
prior to the signing of most franchises, the possibility that apartments would install the dishes was "sufficiently foreseeable." Similarly, economic problems resulting from such causes as difficulty in raising capital, overestimation of the percentage of residents who would become subscribers, and delays in reaching an agreement with the telephone company for the use of its utility poles have become so common as to render them foreseeable to the reasonably prudent cable operator at the time of the signing of most existing, and all subsequent, franchises.

A second key element of commercial impracticability is that the change in circumstances must be caused by events outside the control of the cable operator. If the cable operator's actions or negligence either create the change in circumstances or prevent the foreseeability of an occurrence, the cable operator will be unable to escape franchise requirements for facilities and equipment. Thus, if poor service by the cable operator keeps the penetration rate of a cable company low, or if inadequate research caused a cable company to underestimate the cost of wiring a particular neighborhood, a court will not find commercial impracticability.

Even if the change in circumstances is both unforeseeable and beyond the control of the cable operator, the adverse consequences that result must be substantially more severe than simply increased costs or lowered profits. The change must cause an obligation to be performed in a manner so "vitaly different" from what is anticipated when the contract was signed that the contract "cannot be reasonably considered to govern." For a cable franchise, this requirement of severe harm means that the changed circumstances would have to cause the operator to perform busi-

198 Id.
199 See M. Hamburg, All About Cable 506-08 (1979).
ness in a fundamentally different manner before an obligation concerning facilities and equipment may be modified. For example, if equipment does not function technologically as expected, or if the cable operator is forced to lay cables below the street rather than above ground on utility poles, and the other elements of commercial impracticability are met, relevant franchise requirements may be modified. If the problem is simply lower revenue or higher expenses, the operator can still perform the business in essentially the same manner, and therefore the contractual obligations for facilities and equipment will not be modified.

2. Cable Services. A cable operator can more easily modify franchise requirements for “services,” which in this context mean “programming services.” To change a service requirement, a cable operator need only show that the “mix, quality, and level of services . . . will be maintained after such modification.” This provision seems to apply more to franchises that were in effect on the effective date of the Act, which can require specific programming, rather than to newer franchises, which can only require “broad categories” of programming. Any modification of a requirement for a “broad category” (such as children’s programming or news) would by definition alter the “mix” of services.

3. Retiering. Notwithstanding the provision for modification of service requirements, a cable operator may move, at will, a program from one tier to another, as long as the rates for the tiers concerned are unregulated. If a particular tier is regulated, its programs may only be retiered if the programming offered on the new regulated tier will be of the same “mix, quality and level” as provided in the franchise.

Another provision of section 625 permits a cable operator to retier, replace, or remove a particular program after giving the franchising authority thirty days notice of the change, if “such ser-

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203 See id.; see also supra note 65 and accompanying text (defining “services”).
204 Cable Act § 625(a)(1)(B).
205 See id. § 624(b)(2); see also supra notes 70-72 and accompanying text (discussing the broad categories of programming that a franchising authority can require).
206 Cable Act § 625(d); see supra notes 142-67 and accompanying text.
207 Cable Act § 625(a)(1)(B). It could be argued that the use of the word “level” in this section means that the mix and quality of programming in each “level” or tier must be maintained in order for the operator to modify service requirements.
vice is no longer available to the operator” or the payment of a royalty for that program has increased substantially and the cable operator has not been “specifically compensated” by a rate increase.208 The thirty-day notice requirement may cause some confusion. For example, a cable operator cannot give the required notice if the programming service does not give cable operators thirty days notice before going out of service. Similarly, since the provision permitting retiering at will does not require thirty days notice, it is unclear whether notice must be given before retiering a program on an unregulated tier whose royalty payments have been substantially increased. Neither the law nor the legislative history explain how to resolve such questions.

4. Access Service. There is one type of franchise obligation that the cable operator may not modify unless the franchising authority consents. The Act explicitly preserves all requirements imposed by the franchise for “services relating to public, educational, or governmental access.”209 The term “services” is not defined in the Act, but it cannot have the same meaning for access as it does in section 624 (regulation of services, facilities, and equipment) and section 625(b) (modification of a “requirement for services”).210 “Services” in the latter two sections mean programming offered by the cable operator. Since the cable operator is barred from exercising any editorial control over the access channels,211 a requirement imposed on the cable operator concerning services relating to public, educational, or governmental access cannot be interpreted to mean access programming.

Access services also do not include facilities and equipment such as studios and cameras. “Public, educational, or access facilities or equipment” are included in the definition of “facilities and equipment” which can be modified if a requirement becomes commercially impracticable. In fact, the provision barring modification of access services was amended by the Senate to “clarify that the con-

208 Id. § 625(c)(2)(A)-(B). The royalties paid by the cable operator for carrying broadcast signals are fixed by the Copyright Royalty Tribunal. See 17 U.S.C. § 801(b)(2) (1982).
209 Cable Act § 625(e) (emphasis added).
210 There is still another use of the word “service” in the Act that provides an entirely different meaning. In renewing a franchise, a franchising authority is permitted to consider the “quality of service,” with “service” being defined to include “signal quality, response to consumer complaints, and billing practices,” but not programming. Id. § 626(c)(1)(B).
211 Id. § 611(e); see infra notes 249-55 and accompanying text.
tract modification section does apply to public, educational, and governmental access facilities and equipment provisions in franchises.”

To further confuse the issue, the term “public, educational, or governmental access facilities or equipment” used in the section on modification does not have the same meaning as the term “public, educational, or governmental access facilities” used in another section. The latter term is defined in the Act to mean channel capacity for access use as well as “facilities and equipment for the use of such channel capacity.” Thus, when “facilities” is used in the same phrase as “equipment,” it refers to a subset of the defined term “access facilities” and hence does not include channel capacity.

The channel capacity reserved in the franchise for access use is therefore included in the term “services” as a requirement that may not be modified. This capacity was protected against modification since the “facilities and equipment” for access would be useless without the channels. “Services” was used instead of “channel capacity,” however, because the protection was intended to cover not just channel capacity, but also the provision of other services relating to, and necessary for, access use, such as the staffing of access centers and funding for access programming. Finally, “a requirement for services relating to ... access” also excludes from modification any promise made by the cable operator in the franchise to offer access services on the lowest priced tier.

G. Renewal of the Franchise

Perhaps the most important provision in the Act for cable operators was section 626, which provides a procedure for the renewal of

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212 130 CONG. REC. S14,286 (daily ed. Oct. 11, 1984) (Senate clarifying language). The Senate amendment dropped the word “facilities” from the version passed by the House, which had barred modification under this section for “services relating to public, educational, or governmental access facilities.” See id.

213 Cable Act § 602(13) (emphasis added).

214 This interpretation is consistent with the other section of the Act that discusses access “services.” Section 611(c) permits a franchising authority to enforce franchise provisions providing channel capacity for access and provisions “for services, facilities, or equipment proposed by the cable operator which relate to public, educational, or governmental use of channel capacity.” Id. § 611(c) (emphasis added). The most logical meaning of “services” in this context is services such as staff and funding which, while distinct from the hardware included in “facilities or equipment,” are necessary for the use of access channels.
franchises. With the normal franchise term lasting fifteen years, most franchises granted in the early 1970's have begun to expire, forcing the cable operator to renew the franchise. No uniform national policy on refranchising existed, and many operators were nervous.\textsuperscript{215} Even though cable operators had achieved a nearly perfect record in winning franchise renewals,\textsuperscript{216} the operators did not want to put their great capital investments at risk.

The franchising authorities also had a significant interest in renewal procedures. Renewals present the final opportunity for the franchising authority to review the performance of the cable company and to insure that it is providing adequate service before the company is given the exclusive right to provide cable service for another fifteen years.\textsuperscript{217} Equally important is the fact that renewals may represent the best chance a franchising authority has to require the operator to "upgrade" the system, by modernizing facilities, providing more channels, and, perhaps, offering two-way communications capability.\textsuperscript{218}

The Cable Communications Policy Act tries to protect the interests of both the cable operator and the franchising authority. The Act attempts to create "an orderly process" for renewals that will protect the cable operator against "unfair denials," while permitting the franchising authority to deny renewals if either the cable operator's past performance or proposals for the future do not meet the reasonable needs of the community.\textsuperscript{219}

\textsuperscript{215} See supra note 22, at 25.
\textsuperscript{216} See supra notes 57-58 and accompanying text.
\textsuperscript{217} See supra notes 57-58 and accompanying text.
\textsuperscript{218} See supra note 22, at 25.
\textsuperscript{219} See Cable Act § 601(5); see also House Report, supra note 22, at 25-26, 72-75. Although the Act enunciates specific ground rules covering the denial of a renewal, it does not set out any standards for the revocation of a franchise. (Revocation, however, is envisioned by the Act, since revocation is specifically referred to in § 627(b), which discusses the forced sale of a cable system.) This omission of standards is important for three reasons. First, while a renewal request may be rejected only if the cable operator fails to meet one of four statutorily defined criteria, see infra notes 233-37 and accompanying text, the franchise may be revoked for any reason specified in the franchise or in local or state law. Second, while a renewal denial can be appealed to a state or federal court, see infra notes 239-41 and accompanying text, the Act does not provide for appeal of a revocation of a franchise (although the cable operator could always sue in state court based on state contract law). Finally, if the franchising authority forces a sale of the cable system as a result of a denial of a franchise renewal, even for just cause, the operator must be paid the fair market value of
The Act provides two methods for franchise renewal. One is an informal procedure in which the cable operator submits a proposal that the franchising authority either grants or denies. The only requirement for this procedure is that the public be given "adequate notice and opportunity for comment." Thus, as long as the residents of the franchised area are afforded a meaningful chance to participate in the proceedings, the franchising authority may informally approve the refranchising proposal.

The second method for renewal is a formal procedure that either the cable operator or the franchising authority may invoke. Between thirty and thirty-six months before the franchise expires, either party can initiate the first step of this "proceeding" to review the cable operator's performance and identify the community's prospective cable-related needs and interests. As with the informal renewal method, the only explicit statutory requirements for this proceeding is that it afford "the public in the franchise area appropriate notice and participation."

After this proceeding, the franchising authority can require the cable operator to submit a proposal for the renewed franchise. The

the system as a going concern. Cable Act § 627(a). In the case of a revocation, however, even when made for the same just cause as the denial of renewal, the Act provides the cable operator with merely "an equitable price." Id. § 627(b). For franchises existing on the effective date of the Act, the price after either revocation or denial of renewal will meet the terms of the franchise. Id. § 627(a)(2), (b)(2).

Cable Act § 626(h).

Id. A state may impose additional requirements on this informal procedure. See id. § 636(a), (b); see also House Report, supra note 22, at 94.

If the franchising authority denies the proposal, the cable operator may then use the formal refranchising procedures of the Act. Cable Act § 626(a)-(h); see infra notes 223-38 and accompanying text.

Cable Act § 626(a). This section does not cover franchises that expire within 30 months of the effective date of the Act. The House Report states that this section does not apply to "those franchises which expire [thirty] months or fewer before the date of enactment of the bill." House Report, supra note 22, at 72 (emphasis added). This interpretation (assuming the Report meant after the date of enactment) would leave a two month gap, created by the difference between the date of enactment and the effective date of the Act, which is 60 days later, on December 29, 1984. See Cable Act § 9(a). A cable company could not have invoked the procedures of this section of the Act before the Act itself became effective. Thus, the more logical interpretation is that a franchise that expires within 30 months or fewer of the effective date of the Act is governed solely by the franchise and local law.

Cable Act § 626(a); see supra notes 221-22 and accompanying text. There may be a question whether a cable operator who chooses to use the informal proceeding and is rejected can have a second chance by demanding the formal procedures.
Act does not detail fully what should be in this proposal, although Congress did intend that the franchising authority be permitted to require "an upgrade of the system." Specific sections of the Act authorize the franchising authority to require that the cable operator's proposal provide for facilities and equipment, channel capacity for public, educational, and governmental use, and customer service and construction-related needs. The Act also specifies that the franchising authority may not demand that the proposal "establish requirements for video programming or other information services.

The franchising authority has four months from the completion of the preliminary proceeding to decide the merits of the proposal. After giving "prompt public notice" of the proposal, the franchising authority may either renew the franchise or proceed to the next step of the renewal process. If the franchising authority does not approve the proposal, it must issue a "preliminary assessment" that the franchise should not be renewed. The Act does not say what this preliminary assessment must contain, but, presumably, the franchising authority must make a preliminary finding that either the cable operator's past performance or its proposal for the future is unsatisfactory. This finding, which is not appealable, need not be a definitive ruling; it can merely be an initial statement that the franchising authority may eventually decide

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221 See House Report, supra note 22, at 73; see also id. at 20 (granting "cities affirmative authority to require upgrading of facilities and channel capacity during the renewal process").

226 Cable Act § 624(b)(1).

227 Id. § 611(b).

228 Id. § 624(b)(2). Despite this prohibition, the final negotiated franchise may include requirements for "broad categories of video programming or other services." Id. § 624(b)(2)(B). A similar provision permits the final franchise to contain requirements for "services, facilities, or equipment proposed by the cable operator which relate to public, educational, or governmental use of [access] channel capacity, whether or not required by the franchising authority." Id. § 611(c) (emphasis added). Unlike the former provision dealing with video services, however, there is no corresponding prohibition on placing the latter access-related requirements in the request for renewal proposal. In fact, the phrase "whether or not required by the franchising authority" seems to indicate strongly that Congress intended these requirements to be permitted in the franchising authority's request for renewal proposal as well as in the final franchise.

220 Id. § 626(c)(1).

221 Id.

222 Id.
that the incumbent cable operator should not be granted a renewal, at least not on the terms of the operator's renewal proposal.

After this assessment, the franchising authority, at the request of the cable operator, must hold an administrative proceeding to determine whether the cable operator has actually failed to meet at least one of the four statutorily defined conditions of renewal. These conditions are: substantial compliance with the material terms of the franchise and applicable law, provision of "service" that has been reasonable in light of the needs of the community, submission of a proposal that will "meet the future cable-related community needs and interests, taking into account the cost of meeting such needs and interests," and possession of the financial, legal, and technical ability to meet the promises contained in the proposal. At the hearing, both the franchising authority and

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233 Id. § 626(d); see also id. § 626(c)(1)(A)-(D) (listing the four conditions of renewal). The franchising authority may also commence this administrative proceeding on its own initiative. Id. § 626(c)(1).

234 Id. § 626(c)(1)(A). Violations of the franchise or applicable law and instances of unsatisfactory provision of service which occur after the effective date of the Act may only be considered in a renewal hearing if the franchising authority has given the cable operator both notice of the problem and an opportunity to cure. Id. § 626(d). Also, if the cable operator can prove that the franchising authority either waived its right to object or "effectively acquiesced," the transgressions may not be considered. Id. The Senate added this provision just prior to the Act's passage, but there is no discussion of what acquiescence is. 130 CONG. REC. S14,286 (daily ed. Oct. 11, 1984) (Senate clarifying language). Most likely, a cable operator will have to prove that the franchising authority both knew of the violation and indicated its consent to the cable operator's behavior.

235 Cable Act § 626(c)(1)(B). The term "service" here does not mean "programming," as it does in § 624 and § 625(a)(1)(B). Rather, "service" means the manner in which the cable "product" is delivered to the subscriber or, as described in the House Report, "the services associated with day-to-day operation." HOUSE REPORT, supra note 22, at 74. The statute states that the term "operator's services" includes "signal quality, response to consumer complaints, and billing practices," but excludes "the mix, quality, or level of cable services or other services provided over the system." Cable Act § 626(c)(1)(B).

236 Cable Act § 626(c)(1)(D). To determine if the operator's proposal is "reasonable," the franchising authority must evaluate how well the operator has met the previously enunciated requirements. See supra notes 225-29 and accompanying text. The franchising authority is not limited by its earlier requirements, however, and may consider the proposal in light of all of the terms that the franchise could contain—such as "broad categories of programming," Cable Act § 624(b)(2)(B), and "services, facilities, or equipment... which relate to public, educational, or governmental use of channel capacity." Id. § 611(c). To take into account the costs of required services, facilities and equipment, the franchising authority should consider as one "important factor" whether the cable operator will be able to earn a "fair rate of return" and if the resulting subscriber rates will not be adversely affected in an excessive way. HOUSE REPORT, supra note 22, at 74.

237 Cable Act § 626(c)(1)(C).
the cable operator have the opportunity to question witnesses and introduce evidence and the subpoena power to compel the production of evidence.\(^{238}\) The franchising authority's ultimate decision on whether to renew must be based on the record arising from this hearing. Whether or not the franchise is renewed at the end of the hearing, the franchising authority must issue a written decision explaining the reasons for its actions. If the franchising authority denies a proposal for renewal, the denial must be based on a specific finding that the operator failed to meet one of the four conditions.

The cable operator has a right to appeal to a state or federal court a denial of a renewal proposal or a granting of approval subject to conditions the operator finds unacceptable.\(^{239}\) The court may grant "appropriate relief" if it finds that either the statutory procedures were not followed or the findings of the franchising authority concerning the four conditions were not supported by "a preponderance of the evidence, based on the record of the [administrative] proceeding."\(^{240}\) Because the court's review is limited to evaluating the record established at the administrative hearing, the court is not authorized to conduct a de novo review. Instead, the court must decide whether the cable operator has overcome its burden and proved that a preponderance of the evidence introduced at that hearing did not support the decision of the franchising authority.\(^{241}\)

The law is unclear on whether the granting of a renewal by the franchising authority can be appealed. The statute is silent on this issue, but the House Report states that "[i]f the incumbent is granted renewal pursuant to his proposal, there is no right of appeal by any other party."\(^{242}\) The House Report is not relevant here, however, because the House Report was written before the Senate amended the renewal provision to require public participation in the renewal process.\(^{243}\) Thus, if a franchising authority fails to give

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\(^{238}\) Id. § 626(c)(2). The Act is not clear, however, about who shall be permitted to participate in this hearing. The Act refers to the franchising authority "or its designee." Id. Thus the franchising authority may designate a third party or an intervenor to represent the public for the proceeding.

\(^{239}\) Id. § 635; see also House Report, supra note 22, at 75.

\(^{240}\) Cable Act § 626(e)(2). If the court finds that all four conditions were met by the cable operator, it can even order a grant of renewal. See House Report, supra note 22, at 75.

\(^{241}\) See House Report, supra note 22, at 75.

\(^{242}\) Id.

the public the required notice and opportunity to comment,\(^{244}\) any subsequent granting of a franchise renewal will be subject to legal challenge. Similarly, since the Act recognizes that a renewal decision by a franchising authority may be subject to administrative review,\(^{245}\) a failure to follow the prescribed state or local administrative procedures could also be challenged.

III. INDIVIDUAL RIGHTS AND CABLE TELEVISION

In addition to defining the regulatory roles of the federal and local governments, the 1984 Act also establishes a framework for the protection of the rights of individual members of the community. The Act, though primarily a product of negotiations between the regulated (cable operators) and the regulators (National League of Cities),\(^{246}\) recognizes the additional interests of those who wish to communicate over a cable system, receive information and entertainment from cable service, and work for the cable operator.

A. The Right to Speak

One of the major breakthroughs of the 1984 Cable Act was that Congress for the first time explicitly approved the concept of third-party access to cable systems. When the FCC had attempted to require cable operators to set aside channels for the use of community residents in the 1970's, the Supreme Court struck down the FCC rules as beyond the Commission's mandate.\(^{247}\) The Act, in reflecting the specific legislative determination that access require-

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\(^{244}\) Cable Act § 626(a), (c)(1), (b).

\(^{245}\) According to the Act, before a renewal decision of a franchising authority is final, it is necessary that "all administrative review by the State has occurred or the opportunity therefor has lapsed." Id. § 626(f). Therefore, the review procedures of states such as New York, which require a state commission to approve all franchise renewals, N.Y. EXEC. LAW § 821.93 (McKinney 1982), are still valid.


ments are "structural regulations that will ensure a diversity of information sources without government intrusion into the content of programming carried on the cable system,"248 provides two alternative ways for individuals not affiliated with the cable operator to gain access to the cable system: public access, as required by the franchising authority, and commercial access mandated by the statute itself.

1. Public Access. Historically, public access meant channels on a cable system that were set aside for free public use on a first-come, first-served nondiscriminatory basis to exhibit programming without censorship by either the cable operator or the franchising authority.249 The 1984 Act does not define "public access,"250 but apparently intended to continue this traditional concept.

For example, the House Report refers to public access channels as "the video equivalent of the speaker's soap box or the electronic parallel to the printed leaflet."251 In other words, for the access channels, the 1984 Act regards the cable system as the modern counterpart to the city street or, perhaps more precisely, to the streets in a company town.252 Just as the private owner of a company town may not deny residents of a town their right to speak on nominally private property,253 neither can the cable operator deny access programmers their right to free expression over those channels specifically designated for access on the "operator's system."254 Indeed, section 611(e) of the Act explicitly prohibits all

250 In fact, the section that authorizes franchising authorities to require public access uses a different phrase, "public use." Cable Act § 611. Other sections, concerning related issues such as franchise fees, id. § 622(g)(2)(C), and modification of the franchise, id. § 625(a), do use the phrase "public access," as does the House Report when discussing § 611. See House Report, supra note 22, at 30. Apparently, the phrases "public access" and "public use" are synonymous.
253 Id. at 507-08.
254 Section 611(b) permits franchising authorities to require proposals for a franchise or a franchise renewal to designate channels for public, educational, and governmental access use. The cable operator may not charge for the use of these access channels. The primary distinction between public access and commercial access, see infra notes 276-323 and accompanying text, is that public access is provided free of charge while commercial access
editorial control by a cable operator over the access channels.255

The Act also details the obligations the franchising authority may impose on the cable operator concerning the access channels. A cable operator’s proposal for an initial franchise or for renewal may be required to contain specific requirements regarding channel capacity for access programming256 and minimum requirements for facilities, equipment, and support for the access programmer.257 The franchising authority may enforce any provision in the franchise that relates to channel capacity, facilities, equipment, and support for access.258 Access provisions in franchises in effect on the effective date of the Act are also enforceable.259

The Act creates an important distinction between the enforceability of access-related requirements contained in state statutes and those contained in regulations. A state may enforce statutory requirements for all franchises only if the statute was in effect on the effective date of the Act; newer statutes may only be enforced against franchises that were entered into or renewed after the statute was drafted. A regulation promulgated after the Act’s effective date, on the other hand, may be enforced even against existing franchises, if the statute empowering the agency to promulgate the regulation was enacted before the Act.260 The presumed logic behind this retroactive application of regulations is that once the empowering statute had been enacted, the cable operators were on notice that such access-related requirements could be

programmers are charged a negotiated rate. See House Report, supra note 22, at 48.

255 Cable Act § 611(e). The House Report states that “it is integral to the concept of the use of [public access] channels that such use be free from any editorial control or supervision by the cable operator.” House Report, supra note 22, at 47. The only interest the cable operator may have in access programming is to require that obscene programming not be exhibited. See infra notes 335-48 and accompanying text. Nonetheless, as the language of the House Report makes clear, that function may not include “any editorial control or supervision.”

256 Cable Act § 611(b).

257 See supra note 229.

258 Cable Act § 611(c).

259 Id. § 637(a). These access provisions, however, may be enforced only until the end of the then-current franchise term. Id.

260 Id. § 637(a)(2). The section grandfathers “any law of any State . . . in effect on the date of the enactment of this section, or any regulation promulgated pursuant to such law, which relates to [the] designation, use or support of [access] channel[s].” Id. (emphasis added). Thus, there is no requirement that the regulation also have been in effect on the date of the enactment of the Act.
promulgated.

While the Act does not explicitly ban governmental editorial control over public access programming, such a prohibition is implicit in the Act's legislative history and is mandated by the first amendment. In particular, the Act envisions a different framework for the channels designated by a franchising authority for public access and those designated for governmental use.\(^\text{261}\) The governmental access channels could be used, for example, to televise city council meetings or to permit the head of the local department on aging to address a town's senior citizens. These channels are to be programmed as the government sees fit: "There is no limitation imposed on a franchising authority's or other governmental entity's editorial control over or use of channels set aside for governmental purposes."\(^\text{262}\) There is no similar declaration of editorial power over public access channels. Congress apparently envisioned the governmental channel to be specifically subject to governmental control, while the public access channel was to remain free from such supervision.

This freedom from governmental control is consistent with the analogy of access channels to leaflets and soap boxes. Moreover, because franchising authorities have created the access channel as a forum for expressive activity, the government is constitutionally bound "by the same standards as apply in a traditional public forum."\(^\text{263}\) Thus the government may only impose a content-based regulation if it can prove that such a limitation is both necessary to serve a compelling state need and narrowly drawn to serve that need.\(^\text{264}\) The government may, however, impose content-neutral time, place, and manner restrictions on the access channels.\(^\text{265}\) These rules, which are authorized by the Act, must not relate to the specific content of the programming, but be more in the nature of "traffic cop" regulation.\(^\text{266}\) Thus, a franchising authority may de-

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\(^{261}\) Id. § 611(b). The Act also provides for educational channels to be used by local schools. Id.; see also House Report, supra note 22, at 30.

\(^{262}\) House Report, supra note 22, at 47 (emphasis added).


\(^{266}\) Section 611(b) authorizes the franchising authority to make rules and procedures for the use of access channels. Cf. Cox v. New Hampshire, 312 U.S. 569, 576 (1941) (upholding the use of parade permits for the purpose of insuring that all speakers are heard).
cide that the access channel will be used in half-hour or hour long blocks, that some time slots will be reserved for series programming while other slots must be used by different persons each week, and that no individual will be able to monopolize the channels.267

Whether a franchising authority will be able to set aside access channel time for programming on a particular subject matter depends on how many access channels are available. If there are only one or two access channels, and the franchising authority reserves time, particularly prime time, for programming on certain subjects, those who wish to discuss different subjects would be barred by the government from the public channels at the time when they could communicate most effectively with their audience. The franchising authority could thus relegate controversial subjects exclusively to times when the fewest viewers would be watching. As the Supreme Court has warned, “To allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth.”268 If, on the other hand, several access channels are available, there seems to be little harm in setting aside some channels for particular purposes, as long as adequate alternative channels remain for other access programmers.269 In fact, a channel designated for such uses as programming for the elderly or for children’s programming could likely encourage access use by developing viewer expectations and loyalty.

The one rule that the Act requires the franchising authority to promulgate concerns “fallow time,” which is time when there is no

267 Although access to public access channels has traditionally been available free of charge, see House Report, supra note 22, at 48, it may be argued that a franchising authority theoretically can charge a fee for the use of the channels. Any such fee, though, must be kept at a minimum so as not to discourage use by those lacking financial backing, the individuals and groups who are supposed to be helped most by the access channels. See Cable Television Information Center, The Uses of Cable Communications 21 (1973) (“The public access channel, for the first time, guarantees the right of community participation at the individual level, even by individuals without organizational ties or portfolio. The range of possible programming is limited only by production costs. Thus, a wider spectrum of subjects than on any other cable channel is possible.”).


269 In Dallas, for example, the original franchise called for 30 access channels with some set aside for the elderly, children, and minority groups, while others were free for any use. Cf. Heffron v. International Soc’y for Krishna Consciousness, Inc., 452 U.S. 640, 647 (1981) (upholding regulation restricting the distribution of religious material at a state fair to assigned booths).
access programming appearing on the access channel.\textsuperscript{270} This rule must establish procedures under which “the cable operator is permitted to use channel capacity for the provision of other services if such [access] channel capacity is not being used for the purposes designated.”\textsuperscript{271} The rule must also define both the circumstances under which the operator must cease using the access channel and the procedures for removing the operator's programming.\textsuperscript{272} The reasoning behind the required rule is that “the needs and interests of cable subscribers would be better served by allowing unused [access] channel capacity to be used by the operator for the provision of other cable services, rather than those channels remaining ‘dark’ until use of this channel capacity for [access] purposes increases.”\textsuperscript{273} Thus, a franchising authority may establish rules to keep the access channels from being dark, such as the establishment of an electronic bulletin board for community use,\textsuperscript{274} while allowing a fixed period of time for access programming to increase. This tactic would encourage the use of the access channels by the community and at the same time avoid the problem of evicting the cable operator’s programming.\textsuperscript{275} Then, if access programming had not developed after perhaps three or four years, the cable operator could program the access channels, but only until such programming became available.

The franchising authority could also condition this permission to program on the cable operator’s good faith effort to encourage use of the access channels. For example, the franchising authority could require that access channels be placed on the least expensive service tier and that the cable operator help publicize the access programming.

2. \textit{Commercial Access}. In addition to the channels for access use that the cable operator must provide free of charge, the Cable

\begin{itemize}
  \item \textsuperscript{270} See Cable Act § 611(d).
  \item \textsuperscript{271} Id. § 611(d)(1).
  \item \textsuperscript{272} Id. § 611(d)(2).
  \item \textsuperscript{273} House Report, supra note 22, at 47.
  \item \textsuperscript{274} The electronic bulletin board is a simple and inexpensive alpha-numeric display of information for subscribers.
  \item \textsuperscript{275} An unscrupulous operator who wished to discourage access could, for example, place a very popular programming service, such as the Disney Channel, onto a temporarily unused access channel. Then, when the access programming developed, such a great community uproar would develop over removing this popular program that the franchising authority would be forced to permit the operator to retain control of the channel.
\end{itemize}
Act establishes a separate kind of access, termed "commercial access." Depending on the channel capacity of the cable system, section 612 requires cable operators to set aside a certain number of channels, at reasonable rates, for the use of "unaffiliated programmers."

The key to the provision requiring commercial access is the congressional desire to separate "editorial control over a limited number of cable channels from the ownership of the cable system itself." Freed from all control by the cable operator, the commercial access programmer could provide services "which compete with existing cable offerings, or which are otherwise not offered by the cable operator (for political reasons, for instance)."

Before this exceptionally complex section can be interpreted, one must first understand its purpose. Section 612 is the only section of the Act with its own declaration of purpose: the provision of commercial access to "assure that the widest possible diversity of information sources are made available to the public from cable systems in a manner consistent with growth and development of cable systems." Two key observations about the statutory language will help determine how to strike the necessary balance between these goals. First, only one superlative is used—the requirement for the widest possible diversity. This superlative emphasizes the legislative preference for interpreting this section in favor of diversity. The second point is that the section speaks in terms of diversity of information sources, not a diversity of programming. Thus, the section was designed as much to allow competition within an individual cable system as to create the opportunity for diverse programming.

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276 Cable Act § 612. This term is really a misnomer since "commercial access" can be provided by either a commercial or nonprofit entity. See House Report, supra note 22, at 48. The traditional name for such commercial channels was "leased access," but that term was apparently eschewed to emphasize that the relationship between the programmer and the cable operator need not be a classic leasehold. See id. at 47-48.

277 Cable Act § 612(b). For a discussion of the meaning of the term "unaffiliated" in the section, see infra note 280.


279 Id. at 30. The legislative history recognized that the cable operator would not have an economic incentive to offer programming that competed with its own or that represented unorthodox or unpopular social and political views. Id. at 48.

280 Cable Act § 612(a).

281 This desire for competition within a system is consistent with another stated purpose of the Cable Act, to "promote competition in cable communications." Id. § 601(6).
The Act contains a table to determine how many channels a cable operator must set aside for commercial access.\(^{282}\) The sole criterion is the number of "activated channels" in the system.\(^{283}\) A system with fewer than thirty-six activated channels need not set aside any channels.\(^{284}\) If a system has between thirty-six and fifty-four activated channels, the cable operator must set aside ten percent of these channels (not counting channels whose use is mandated or prohibited by federal law and regulation), while operators of systems with fifty-five to one hundred activated channels must set aside fifteen percent of such channels. For systems with more than one hundred channels, the operator must set aside fifteen percent of all activated channels.

An activated channel is one that is available for use, even if currently unused.\(^{285}\) Take, for example, a system that has two cables, each with a seventy-channel capacity, one offering sixty channels of programming, the other lying dormant until there is sufficient demand. Because all of the first cable's seventy channels could be programmed relatively easily, they would be considered "activated." The second cable would not be counted because its channels have not yet been "activated" for subscriber use.\(^{286}\)

For systems with thirty-six to one hundred channels, the number of federally controlled channels is subtracted from the number of activated channels to determine the relevant base figure. Both the federal rules requiring cable systems to carry local broadcast signals and those requiring a system not to use a particular frequency to avoid interference with aeronautical communication are federally controlled.\(^{287}\) Public, educational, and governmental ac-

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282 Id. § 612(b). Except for franchises that predate the Act and require commercial access on systems of fewer than 36 channels, neither the FCC, the states, nor the franchising authorities may require the setting aside of more channels than required in the Act. Id. § 612(b)(2).

283 See infra text accompanying notes 285-86 (describing "activated channels"). As of May 31, 1984, 9.7% of all cable systems, serving 16.5% of the basic cable subscribers, offered between 36 and 53 channels. Three-and-one-half percent of cable systems, representing 9% of the basic cable subscribers, had 54 or more channels. Percent of Systems by Channel Capacity, Cablevision, Sept. 24, 1984, at 62.

284 The only exception is if a franchise that was in effect on October 29, 1984, required the system to set aside channels. Cable Act § 612(b)(1)(D).

285 Id. § 612(b)(5)(A).


287 House Report, supra note 22, at 48.
cess channels, on the other hand, are mandated by the franchising authority and thus are not federally controlled.\textsuperscript{288}

The cable operator does not have to remove any service being offered as of July 1, 1984.\textsuperscript{289} The operator must, however, remove services started after that date and offer for commercial access any channel that subsequently becomes available until the required number of channels is offered.

To insure an actual diversity of programming sources, the Act prohibits "sham transactions," such as when a cable operator leases a channel to a friendly, although officially unaffiliated, service to avoid giving access to truly unaffiliated programmers.\textsuperscript{290} Congress feared that cable operators would, by designating as commercial use programming the services they would have offered anyway, circumvent the legislative mandate to remove the operator's editorial control over a fixed number of channels. Therefore, the cable operator is not permitted to use a programming service that was offered on October 29, 1984, to fulfill its leased access requirements.\textsuperscript{291} The test for whether a newer programming service is to be considered a valid commercial lease is "whether the services might have obtained access to the cable system without recourse to the provisions of [section 612]."\textsuperscript{292}

Assuming a truly unaffiliated programmer wishes to gain access to the cable system, the price, terms, and conditions for use of the channel are to be determined by negotiation between the programmer and the cable operator. The cable operator, however, is not

\textsuperscript{288} Id.

\textsuperscript{289} Cable Act § 612(b)(1)(E).

\textsuperscript{290} HOUSE REPORT, supra note 22, at 55. The Act does not define "unaffiliated." The definition of "affiliate" in § 602(1), referring to common ownership or control, appears to be meant only to determine the rules barring cross-ownership of a cable system and a colocated television broadcast station or common carrier. \textit{See} Cable Act § 613. In order to encourage the widest possible diversity of sources, the term "unaffiliated" for purposes of commercial access must be read in a far broader context to prohibit any economic relationship between programmer and cable operator (aside from the terms of the § 612 lease).

\textsuperscript{291} Cable Act § 612(c)(3). The only time a previously offered service can be counted is if the operator were to terminate the service and that programmer could only regain access through § 612. HOUSE REPORT, supra note 22, at 55.

\textsuperscript{292} HOUSE REPORT, supra note 22, at 55. There does not have to be a "hostile" or "adversary" relationship between the programmer and the cable operator before the service will be considered a valid lease. 130 CONG. REC. H10,441 (daily ed. Oct. 1, 1984) (statement of Rep. Wirth). The cable operator need not be opposed to the programmer, as long as the programmer could not have obtained access but for the commercial access requirement.
given unlimited authority to use its monopoly position unfairly: the statute requires that the price, terms, and conditions all be "reasonable." The setting of the price for commercial access is a particularly delicate matter that is crucial to the creation of a workable system of third-party access. On the one hand, the cable operator must be entitled to set a price that "will not adversely affect the operation, financial condition, or market development of the cable system." At the same time, however, an unlimited freedom to demand even unfair prices could permit the cable operator to effectively block all commercial access. Thus, under section 612, the cable operator is required to charge rates that are reasonably fashioned "to encourage, and not discourage, use of channels set aside under this section."

A fair price, which does not hurt the cable operator and does encourage the access programmer, will not always be easy to determine. The cable operator may feel threatened by a programming service that competes, directly or indirectly, with one currently being offered and assert the right to charge a high price to protect its "market condition." Nonetheless, this competition of programs is precisely what the Act intends.

The purpose of the cable operator's pricing power is not to permit the operator to maximize profits. Instead, Congress was concerned that "[i]f not properly implemented, leased access requirements could adversely impact the economic viability of a cable system, thereby hurting the public." In keeping with this spirit of encouraging competition, the legislative history indicates that unfair competition was the only programming competition from which the cable operator was to be protected:

Concerns have been raised that if a competing program service could obtain access under a scheme that mandated access for a level of compensation beneath that being paid by a simi-

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293 Cable Act § 612(c), (d). Indeed, the establishment of the price, terms, and conditions for commercial use "goes to the heart of the policy objectives which underlie this section." House Report, supra note 22, at 50.

294 Cable Act § 612(c)(1).

295 House Report, supra note 22, at 51.

296 "Third-party commercial access ... assur[es] that sufficient channels are available for commercial program suppliers with program services which compete with existing cable offerings ..." House Report, supra note 22, at 30 (emphasis added).

297 Id. at 50.
lar existing service, the leased access programmer could unfairly drain audience away from the existing service, and thereby diminish revenue to the cable operator.298

Thus, the cable operator may only set pricing to avoid being undersold, not to create “financial disincentives for third party programmers.”299 Under the Act, competition between programming sources is a virtue to be furthered.

The Act creates an interesting equilibrium between the content of an access program and the price charged by the cable operator for the channel. “The overall purpose of this section is to prohibit any editorial control by the cable operator over the selection of programming provided over channels designated for commercial leased access.”300 The cable operator therefore should have no involvement with the programming offered by unaffiliated programmers on the leased channels.

There is one extremely narrow exception to this separation that requires the cable operator to consider the nature of the content of a programming service in setting a lease price:

A cable operator shall not exercise any editorial control over any video programming provided pursuant to [section 612], or in any other way consider the content of such programming, except that an operator may consider such content to the minimum extent necessary to establish a reasonable price for the commercial use of designated channel capacity by an unaffiliated person.301

This exception was needed because not all types of program services can afford to pay the same price. Congress feared that if the cable operator were required to charge the same price to all programmers, whatever price was set would be an “average” price, one that by definition would be too high for some programmers, especially nonprofit entities.302 Thus, for the purpose of increasing diversity in the cable system, the operator was given “the flexibility to establish a price for commercial use of channel capacity based

298 Id. (emphasis added).
299 Id.
300 Id. at 51.
301 Cable Act § 612(c)(2) (emphasis added).
302 House Report, supra note 22, at 51.
on the nature of the cable service proposed.\textsuperscript{303}

There are important limitations on this power of the cable operator. The cable operator may only establish very broad categories of programming, such as premium movie, news, and educational services.\textsuperscript{304} These broad categories are similar to the "objective standards" that the Post Office uses to determine whether a periodical is eligible for lower-cost second class mail status.\textsuperscript{305} The categories are established in both cases to encourage the dissemination of less profitable, but nonetheless worthwhile and informative material. Neither the Post Office nor the cable operator, however, is permitted even a limited type of censorship.\textsuperscript{306} If the cable operator were permitted to make endless classifications, it would essentially be able to characterize each potential programmer separately, establishing a different price for each and thereby setting prices based on its view of the content of the programming, rather than the nature of the content.

The legislative history stressed the importance of maintaining this distinction: "It is appropriate for a cable operator to look at the nature (but not the specific editorial content) of the service."\textsuperscript{307} The cable operator is barred from even indirectly attempting to influence the editorial policy of the commercial lessee. To deter-

\textsuperscript{303} Id. at 52.

\textsuperscript{304} The House Report discusses only broad categories:

It is therefore appropriate for the cable operator in establishing reasonable price, terms and conditions pursuant to this section to do so on the basis of the nature of the cable service being provided. A premium movie service will obviously warrant a very different and, in all probability, a higher price than a news or public affairs service, and both of these would pose a different pricing situation from an educational or instructional service.


\textsuperscript{306} Id. at 153-54.

\textsuperscript{307} House Report, supra note 22, at 51. The House Report also says that the cable operator may consider the effect of the nature of a service on the operator's marketing, marketing fragmentation, and "any resulting impact that [the service] might have on subscribers or advertising revenues." Id. This is not an unlimited grant of power. A cable operator could say that any program it does not want will adversely affect marketing and subscribers and that competing programs will cause undue market fragmentation. But the statutory mandate is that the cable operator only consider the nature of content "to the minimum extent necessary." Cable Act § 612(c)(2). Thus, the cable operator is not permitted to "frustrate the intent of this section by establishing price, terms and conditions which provide financial disincentives for third party programmers to offer their cable services." House Report, supra note 22, at 50.
mine the ultimate price, terms, and conditions, the cable operator must engage in "content-blind, arm's length negotiations." These negotiations must result in a reasonable offer by the cable operator. To insure that the cable operator does not misuse the monopoly power of being the only conduit for leased programming in a franchised area, and that the price, terms, and conditions offered by the cable operator are fair and reasonable, the Act provides for review by a federal district court.

The Act establishes a presumption that the price, terms, and conditions offered are reasonable. In order to successfully challenge in court the price or conditions set by the operator, the leased programmer must overcome this presumption by "clear and convincing evidence." While the absence of leased programmers by itself does not overcome the assumption, such an absence would be an important element that "may provide a basis for determining whether the cable operator is acting reasonably and in good faith."

In cases that are not that easily discernible, an important indicator of "reasonableness" will be a comparison between the price, terms, and conditions offered the leased programmer and those the operator has established "with comparable cable services being carried over his cable system." In the case of large, multiple-system operators, a court may also examine the price, terms, and conditions offered on comparable systems. For example, if a cable operator is already offering a premium movie channel, the price paid by that service is a ceiling. Similar movie channels may not be charged more, and nonprofit and esoteric programmers must be charged less.

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308 House Report, supra note 22, at 52. Additionally, the cable operator may not consider the nature of a cable service even in setting terms and conditions (other than price). Id. Thus all terms and conditions other than price apparently must be nondiscriminatory.
309 Cable Act § 612(f).
311 House Report, supra note 22, at 51.
312 Id. at 53.
313 Id.
314 The comparison between what the existing service and the leased programmer is charged may be elusive, especially because of the wide range of creative financing schemes that can be arranged. The court's function is simply to make sure that the terms offered the leased programmer are at least equivalent to those of comparable existing programs. For example, if the existing service is not charged a fee but instead divides its revenues with the cable operator, the amount retained by the operator would be the ceiling.
If a court finds that the price, terms, or conditions offered by the cable operator are not reasonable, it has broad authority to fashion an equitable remedy. The court may order the cable operator to permit the programmer to use the system and may set reasonable prices, terms, and conditions.\textsuperscript{311}

The FCC is also authorized to enforce the commercial access provision, but only under limited conditions. If there have been prior adjudicated violations against a cable operator, the Commission can establish a regulatory remedy.\textsuperscript{316} The Act also permits the Commission to promulgate "additional rules necessary to provide diversity of information services,"\textsuperscript{317} but only when cable television is more established: the Act's threshold for further Commission action is when at least thirty-six channels of cable television are available to seventy percent of American households and seventy percent of the eligible households subscribe.\textsuperscript{318}

The role of the franchising authority and the state in encouraging commercial access is unclear. The Act specifically bans only one form of local governmental activity: requiring more channels for commercial use than are provided for in the Act.\textsuperscript{319} Pursuant to the provision of the Act preserving the power of a state or franchising authority to regulate "matters of public health, safety, and welfare to the extent consistent with the express provisions of this title,"\textsuperscript{320} however, local governments may enact laws or draft franchise provisions "to assure that the widest possible diversity of information sources" are made available through the commercial access channels.\textsuperscript{321} For example, local governments can require

\textsuperscript{311} Cable Act § 611(d). The court can award actual damages, such as lost profits, but not punitive damages. \textit{House Report, supra} note 22, at 53.

\textsuperscript{316} Cable Act § 612(d). The one programming service that cannot be used as a yardstick is an affiliated service. Cable Act § 612(d). The reason for this exclusion was that Congress believed that the price charged by a cable operator to an affiliate, due to the intricacies of internal financing, cross-subsidization, and other external factors, would not be useful to determine a reasonable price for a non-affiliate. \textit{House Report, supra} note 22, at 53.

\textsuperscript{317} Cable Act § 612(g).

\textsuperscript{318} \textit{Id}.

\textsuperscript{319} \textit{Id.} § 612(b)(2).

\textsuperscript{320} \textit{Id.} § 636(a).

\textsuperscript{321} \textit{Id.} § 612(a).
that channels set aside for commercial access be placed on the lowest-priced tier\textsuperscript{322} and that time on at least some of these channels be leased in relatively short time segments—as opposed to leasing all of the channels to only one programmer apiece—to permit more programmers to use the system. Similarly, the cable operator could be prohibited from depriving a leased programmer the reasonable use of the operator's facilities, such as access to headend or shared use of converters, if such deprivation would inhibit the growth and viability of leased access.\textsuperscript{323}

3. Obscenity and Indecency. The Cable Act establishes a complex scheme to balance the rights of viewers who want to keep obscene and indecent cable programming off their television sets with the rights of individuals who want to produce and watch such programming. The statutory framework treats obscene and indecent programming differently\textsuperscript{324} and relies heavily on cable technology to solve some of the more delicate constitutional problems of indecent cable programming.

All levels of government may prohibit, limit, and penalize the

\textsuperscript{322} If placing commercial access on the least expensive tier is the only way to make commercial access economically feasible, it may be implied from the Act's requirement that the price, terms, and conditions offered by the cable operator be "reasonable." See id. § 612(d).

\textsuperscript{323} The legislative history indicates that § 612 should not be interpreted as requiring the cable operator to provide "marketing, billing or other such services" to the leased programmer. House Report, supra note 22, at 52. In order for the leased programmer to reach subscribers, the right to share some services, such as use of the cable system's distribution system and converters, must be implied into the Act. Otherwise, the commercial access provisions would be meaningless. Additionally, nothing in the Act prevents a state or franchising authority from requiring that the cable operator share marketing and billing services to effectuate the public's interest in creating a diversity of information sources on cable. The FCC has stated that it does not view the Act as requiring "mandatory access to control systems by third party commercial channel lessees. However, to the extent that a cable system deliberately configured itself technically to preclude commercial access such action would likely be viewed as a direct attempt to thwart Congressional action." Implementation of Cable Act, supra note 80, at 18,642. This standard, which appears to permit a cable operator who does not "deliberately" design hardware to exclude commercial programmers by denying them access to even those facilities that are essential for operation, contradicts the legislative mandate that commercial access be encouraged. See supra text accompanying note 295. Moreover, any FCC discussion of commercial access is beyond the scope of its powers since the FCC is currently barred from rulemaking in this area. See supra notes 316-18 and accompanying text.

\textsuperscript{324} Indecent programming is programming that does not meet the standard for obscenity enunciated in Miller v. California, 415 U.S. 15, 24 (1973), see infra note 329, yet is nonetheless "vulgar and offensive." FCC v. Pacifica Found., 438 U.S. 726, 757 (1978) (Powell, J., concurring).
exhibition of obscene programming on a cable system. The Cable Act provides a stiff federal criminal penalty for the transmission of obscene material: up to two years imprisonment or $10,000 in fines.\footnote{Cable Act § 639.} State and local obscenity laws are not preempted,\footnote{Id. § 638. State and local obscenity laws are preempted only insofar as they relate to a cable operator's liability for programming shown on public, educational, governmental, and commercial access channels. See infra notes 335-36 and accompanying text.} and the franchising authority in a franchise may prohibit the transmission of obscene programming.\footnote{Cable Act § 624(d)(1). Senator Goldwater said that the congressional conferees agreed that the Act overturned the Supreme Court holding in Capital Cities Cable, Inc. v. Crisp, 104 S. Ct. 2694 (1984), in which the Supreme Court held that the FCC preempted state and local control of cable programmers. 130 Cong. Rec. S14,289 (daily ed. Oct. 11, 1984) (statement of Sen. Goldwater).}

The Act did not attempt to resolve the legal controversy over whether the constitutionality of banning indecent radio and television broadcasts extends to a ban on indecent cable programming.\footnote{There is an interesting question, though, as to whether the Cable Act preempts a franchising authority from permitting obscene programming. Section 624(d)(1) authorizes a franchising authority to "specify" in a franchise either that obscene programming shall be prohibited "or shall be provided subject to conditions." If the franchising authority permits obscene programming to be shown "subject to conditions," such as showing such programming only late at night, can a cable operator or programmer be penalized under § 639 for violating the Act's prohibition on obscene programming? If the clause permitting a franchising authority to limit, as well as ban, obscene programming is to have any meaning, it must be read as permitting a franchising authority to immunize, if it desires, a programmer from prosecution under a federal cable obscenity law when that programmer abides by local laws and regulations.} The House of Representatives apparently adopted the obscenity test of \textit{Miller v. California}.\footnote{Cf. FCC v. Pacifica Found., 438 U.S. 726 (1978) (FCC can keep indecent language off the airwaves).} The House Report "note[d] that the Federal Courts have held . . . that an indecency standard may not be constitutionally applied to cable television."\footnote{413 U.S. 15 (1973), cited in \textit{House Report}, supra note 22, at 69. The three-pronged \textit{Miller} obscenity test is: a) whether according to community standards, the work, as a whole, appeals to the "prurient interest"; b) whether the work depicts sexual conduct in a patently offensive way; and c) whether the work, as a whole, "lacks serious literary, artistic, political, or scientific value." 413 U.S. at 24.} Yet Congress did not want to go beyond the Supreme Court in permitting "indecent" cable programming. In other words, if the Supreme Court should in the future invalidate the indecency standard employed on broadcast media, the franchising authority would be able to remove the prohibition from the franchise agreement.\footnote{\textit{House Report}, supra note 22, at 70. The Report cited Cruz v. Ferre, 571 F. Supp. 125 (S.D. Fla. 1983); Community Television v. Roy City, 555 F. Supp. 1164 (D. Utah 1982); and Home Box Office, Inc. v. Wilkinson, 531 F. Supp. 88 (D. Utah 1982).}
Court were to rule that cable television could be treated like broadcast television for the regulation of indecency, the Cable Act would not preempt local indecency laws.\textsuperscript{331}

The Cable Act does, however, create a mechanism for keeping even constitutionally protected indecent programming out of homes where it is not wanted. Every cable operator, upon the request of a subscriber, must provide a so-called “lock box,” a device that blocks out specific channels for specific periods of time.\textsuperscript{332} According to the Act, this requirement was adopted “to restrict the viewing of programming which is obscene or indecent.”\textsuperscript{333} The requirement may influence courts reviewing the constitutionality of the regulation of indecent cable programming, since the existence of the device means that, unlike indecent broadcast programming, indecent cable programming will not intrude unexpectedly on the unwary cable viewer.\textsuperscript{334} Thus, the constitutional basis for permitting the regulation of indecent broadcasting would not apply to cable programming.

The drafters of the Cable Act also found no reason to punish the cable operator for programming that appeared on the public, educational, governmental, and commercial access channels, “since the [Act] otherwise prohibits the operator's editorial control over all such channels.”\textsuperscript{335} Accordingly, the Act protects the cable operator from liability under all federal, state, and local laws and regulations, including those prohibiting obscenity, libel, invasion of privacy, and false advertising, for programming appearing on the access channels.\textsuperscript{336}

Before the Act, some cable operators prescreened and censored access programming.\textsuperscript{337} Although they did not produce the pro-


\textsuperscript{332} Cable Act § 624(d)(2). The cable operator can either sell or lease this device.

\textsuperscript{333} Id.

\textsuperscript{334} As the court in \textit{Cruz v. Ferre} stated, “This opportunity to completely avoid the potential harm to minor or immature viewers sounds the death-knell of \textit{Pacifica}'s applicability in the cable television context.” \textit{Cruz v. Ferre}, 571 F. Supp. 125, 138 (S.D. Fla. 1983); cf. FCC v. \textit{Pacifica} Found., 438 U.S. 726, 748 (1978) (“Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content.”).

\textsuperscript{335} House Report, supra note 22, at 95. The Act specifically prohibits a cable operator from exercising “any editorial control” over either the public, educational, and governmental access channels, Cable Act § 611(e), or the commercial access channels, \textit{id.} § 612(c)(2).

\textsuperscript{336} Cable Act § 638.

\textsuperscript{337} For example, the Manhattan Cable TV Company's agreement with the access pro-
gramming, and even though their censorship contradicted the spirit of the electronic "soap box,"\textsuperscript{338} the operators feared liability because their systems exhibited the programming.\textsuperscript{339} The Act avoids this dilemma by providing that the cable operator will have neither control over access programming nor the resulting liability for violation of the law.

In place of the cable operator's censoring of access programming, the Act creates a two-pronged scheme for preventing obscene programming on the access channels. For commercial access, the franchising authority is given primary responsibility. The statutory language is complicated, but according to the legislative history its meaning is simple. The Act provides that:

Any cable service offered pursuant to this section [commercial access] shall not be provided, or shall be provided subject to conditions, if such cable service in the judgment of the franchising authority is obscene or is in conflict with community standards in that it is lewd, lascivious, filthy, or indecent or is otherwise unprotected by the Constitution of the United States.\textsuperscript{340}

This language does not mean that the franchising authority is now empowered to censor commercial access programming nor that the franchising authority has unlimited discretion to keep out "objectionable" commercial access programming. First amendment considerations notwithstanding, the drafters of the Act described a much simpler function: "[T]his subsection empowers franchising authorities to prohibit or condition the provision of cable services which are obscene or otherwise unprotected by the Constitution."\textsuperscript{341} The extra statutory language, "in conflict with community

\textsuperscript{338} See, e.g., House Report, supra note 22, at 30.
\textsuperscript{339} Manhattan Cable TV Company justified its previewing and censorship of access programming as necessary "solely for the purpose of determining whether transmissions will subject the system to legal liability." 1 C. Ferris, F. Lloyd & T. Casey, supra note 62, ¶ 15.09[1][a]. Because the Act removes such liability, there is no longer any reason for the cable company to prescreen and edit the programming.
\textsuperscript{340} Cable Act § 612(h).
\textsuperscript{341} House Report, supra note 22, at 55. If the franchising authority does attempt to prescreen commercial access programming, it must abide by all of the traditional first
standards in that it is lewd, lascivious, filthy, or indecent or is otherwise unprotected by the Constitution of the United States," merely refers to the contingency of the Supreme Court equating cable programming with broadcast television for purposes of indecency. 342 The Act refers to programming that is indecent, "or is otherwise unprotected by the Constitution of the United States."343 Therefore, until the Supreme Court declares that indecent cable programming is unprotected by the Constitution, a franchising authority may only prohibit legally obscene programming on the commercial access channels.

As discussed earlier, the drafters of the Act intended to permit the franchising authority to have editorial control only over the governmental access channels, and not the public access channels. The subsection banning editorial control of the public, educational, and governmental access channels begins with the modifying phrase "[s]ubject to section 624(d)."344 The relevant portion of section 624(d)(1) states that the Act shall not be interpreted to prevent "a franchising authority and a cable operator from specifying, in a franchise or renewal thereof, that certain cable services shall not be provided or shall be provided subject to conditions, if such cable services are obscene or are otherwise unprotected by the Constitution of the United States."345

Because neither the franchising authority nor the cable operator is permitted to censor the public access channels, section 624(d) must be interpreted at face value—permitting the franchising authority to "specify" in the franchise that obscene material will not be presented and thus binding the two signatories of the franchise, the franchising authority and the cable operator, to the promise not to offer obscene programming on any channel under their con-

amendment procedural safeguards: the governmental agency must rule on the programming within a specified, brief period of time; the governmental agency must go to court promptly, and meet its burden to prove that a program is obscene, before that program can be censored or banned; and any restraint before final judicial determination must be "limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution." Freedman v. Maryland, 380 U.S. 51, 58-59 (1965); see also Southeastern Promotions v. Conrad, 420 U.S. 546, 562 (1976) (requiring procedural safeguards for denying access to municipal theater).

342 See supra note 331 and accompanying text.
343 Cable Act § 612(h) (emphasis added).
344 Id. § 611(e).
345 Id. § 624(d)(1) (emphasis added).
trol. A second, consistent interpretation is that "[i]n order to restrict the viewing of programming which is obscene or indecent," section 624(d) permits the franchising authority to "specify" in the franchise that public access channels be blocked out by the "lock box."

The Act permits two other limited mechanisms to police the public access channels. First, the Act does not prevent the entity running the public access channels, whether it is the government, the cable operator, or an independent third party, from requiring in its agreement with the access programmer that the programmer promise not to present obscene programming. Second, any access programmer who does present obscene programming will be liable not only under the federal penalties of fine or imprisonment, but also under state and local penalties.

B. The Right to Receive Cable Information

In addition to supporting the creation of a diverse marketplace of ideas on the cable system, the drafters of the Act also intended to protect and encourage the ability of viewers to receive this diversity of programming. "The First Amendment's guarantee of a free flow of diverse ideas will be reduced to an empty promise if access to information is not available to all of our citizens."

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346 Id. § 624(d)(2).
347 Section 624(d)(2) requires that "lock boxes" be made available to subscribers. See supra notes 332-34 and accompanying text. Because § 611(e), which discusses the only limits on public access programming, refers to § 624(d) generally and not just to subsection 624(d)(1), it appears that Congress considered the "lock box" required by subsection 624(d)(2) as a primary means to deal with obscene and indecent public access programming. Incredibly, and without stating any justification, the FCC has declared that lock boxes do not have to block out access programming, only programming for which the cable operator is responsible. Implementation of Cable Act, supra note 80, at 18,655. Not only does the FCC have no authority under § 624 to make such a ruling, but the ruling also directly conflicts with the congressional intent that lock boxes be made available to subscribers in order to protect privacy interests and the right of free speech of both the cable operator and those who wish to communicate over the cable system. As the House Report declared, the lock box "provides one means to effectively restrict the availability of [obscene and indecent] programming, particularly with respect to child viewers, without infringing the First Amendment rights of the cable operator, the cable programmer, or other cable viewers." House Report, supra note 22, at 70 (emphasis added).
348 Cable Act §§ 638, 639; see supra notes 325-26 and accompanying text.
349 House Report, supra note 22, at 36. While the section of the House bill that would have specifically permitted cable television operators access to all apartment buildings was removed, 130 Cong. Rec. S14,286 (daily ed. Oct. 11, 1984) (Amendment No. 15) (Senate
Act fulfills that promise through a guarantee of universal service, the preservation of the right of local governments to regulate Satellite Master Antennae Television systems, the partial legalization of private reception of satellite signals, and the right of cable companies to use private easements to reach potential subscribers.

1. Universal Service. Universal service has been an essential principle of United States communications policy since at least 1934. The 1934 Communications Act requires the FCC to promulgate its regulation of electronic communications “so as to make available, so far as possible, to all people of the United States a rapid, efficient, Nation-wide and world-wide wire and radio communication service with adequate facilities at reasonable charges.” In the same spirit, a 1972 FCC rule required cable operators to wire their entire franchised area.

Although the rule was deleted when the FCC began to defer most construction-related franchise requirements to local governments, the requirement of universal service generally continued. According to the House Report accompanying the Cable Act, one of the key provisions of most cable franchises is “the obligation to provide service to all residents of the service area.” The Cable Act makes this requirement mandatory in all cable franchises. Section 621(a)(3) imposes on each franchising authority the duty to “assure that access to cable service is not denied to any group of potential residential cable subscribers because of the income of the residents of the local area in which such group resides.”

This duty should be interpreted quite broadly to prevent a cable operator from depriving cable service to residents of economically depressed areas on “facially neutral” grounds. The scope of the clarifying language), the principle of encouraging reception of cable service permeates the Act.

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351 47 C.F.R. § 76.31(a)(2) (1976), repealed by Applications for Certificate of Compliance, 66 F.C.C.2d 380, 392-93 (1977). The purpose of this rule “was to assure that no ‘cream-skimming,’ wiring just the economically lucrative portions of a franchise area, would take place.” Rules Clarification, supra note 77, at 192.
354 Cable Act § 621(a)(3). The goal of universal service is affirmed in the Act’s legislative history. The Act “requires that cable service be made available in all areas of a city, so that residents of lower income areas are not deprived of cable service.” House Report, supra note 22, at 20.
355 An excuse such as the high cost of wiring a low-income neighborhood should not be
Act's requirement is unmistakable: to prevent a cable operator from "denying service to lower income areas," the franchising authority "shall require the wiring of all areas of the franchise area."\textsuperscript{356}

2. \textit{Satellite Master Antennae Television.} Satellite Master Antennae Television (SMATV) systems are in essence cable television systems that do not use the public rights-of-way. They primarily serve private, multi-unit residential buildings and offer the residents both over-the-air broadcast signals and satellite-delivered services.\textsuperscript{357} Because SMATV requires lower capital costs by wiring only selective buildings, some local cable regulators, fearing the danger of "cream skimming," wanted to regulate SMATV in order to insure universal cable service.\textsuperscript{358}

In 1983, the FCC preempted all state and local regulation of SMATV.\textsuperscript{359} The Commission argued that such regulation would slow or limit the development of SMATV systems. In discussing its jurisdiction for regulating SMATV, the Commission stated that "[s]ection 303 of the [1934 Communications] Act gives the Commission such numerous powers so that no doubt exists as to the extent of this regulatory scheme."\textsuperscript{360} Section 303, which covers broadcast radio and television, had indeed been interpreted quite broadly.\textsuperscript{361} In a case that was briefed and argued before the passage of the Cable Act, the Court of Appeals for the District of Columbia upheld the FCC's preemption.\textsuperscript{362}

\textsuperscript{356} House Report, supra note 22, at 59. A franchising authority can fulfill its responsibility by authorizing multiple franchises, as long as all of the areas within the franchising authority's jurisdiction will be wired by at least one franchisee. Id.


\textsuperscript{358} Id. at 1430.

\textsuperscript{359} Id.

\textsuperscript{360} Id. at 1432.

\textsuperscript{361} See Capital Cities Cable, Inc. v. Crisp, 104 S. Ct. 2694 (1984); see also supra notes 38-44 and accompanying text (discussing the Capital Cities decision).

\textsuperscript{362} New York State Comm'n on Cable Television v. FCC, 749 F.2d 804 (D.C. Cir. 1984). Although the decision was issued on November 30, 1984, one month after the Cable Act was signed into law, the fact that the Act was not mentioned in the decision indicates that its provisions relating to Satellite Master Antennae Television were not considered by the court.
Despite contradictory language in the House Report, the Cable Act appears to deprive the FCC of its previous power to preempt local regulation of SMATV systems. The Act states that section 303 is no longer a source of authority for the FCC over cable television and that the FCC derives jurisdiction over cable only from the Cable Act (which has been designated "Title VI"). The section of the Cable Act that defines the Commission's jurisdiction modifies the scope of the 1934 Communications Act by adding the following language: "The provisions of this [the Communications] Act shall apply with respect to cable service, to all persons engaged within the United States in providing such service, and to the facilities of cable operators which relate to such service, as provided in title VI."

That Title VI was intended to be the sole source of Commission power over cable service is made apparent by comparison with an earlier draft of the Cable Act. The original Senate version stated that "[e]xcept to the extent otherwise specifically provided in title VI of the Communications Act of 1934 . . . the Federal Government shall have exclusive jurisdiction over broadband telecommunications regarding matters covered by or otherwise within the purview of such title." The final version of the Cable Act passed by Congress contains no similar broad grant of power, but instead limits the Commission's power over cable service to those powers "provided in title VI."

The phrase "cable service" in the Cable Act encompasses SMATV. "Cable service" is defined quite broadly, to include: "A) the one way transmission to subscribers of (i) video programming, or (ii) other programming service, and B) subscriber interaction, if any, which is required for the selection of such video programming or other programming service." Since SMATV provides one-way
video programming,\textsuperscript{367} it is a "cable service" for purposes of the Act. Additionally, although SMATV systems are specifically exempted from most of the Act's regulation of cable systems,\textsuperscript{368} SMATV is treated like a cable service in the Act's section on equal employment opportunity: "For purposes of this section, the term 'cable operator' includes any operator of any satellite master antenna television system."\textsuperscript{369}

If the Commission's power over cable service, including SMATV, is limited to that "provided" in the Cable Act, and if the Cable Act only gives the Commission power over SMATV in the area of equal employment, then it would appear that the Commission no longer has the authority to preempt local regulation of SMATV. The House Report attempts to avoid this conclusion by stating: "The Committee does not intend anything in this title to affect the FCC's decision [on SMATV], or to affect any review of this decision by the courts."\textsuperscript{370} On the other hand, section 621 explicitly preserves local autonomy over SMATV:

\begin{quote}
Nothing in this title shall be construed to affect the authority of any state to license or otherwise regulate any facility or combination of facilities which serves only subscribers in one or more multiple unit dwellings under common ownership, control, or management and which does not use any public right-of-way.\textsuperscript{371}
\end{quote}

While directly protecting the authority of states over SMATV, this language does not similarly preserve the authority of the FCC over such facilities. Although it may not have been the express intent of the House Committee to affect judicial review of the Commission's original preemption of local SMATV regulation, it may be appropriate for the Commission to reconsider its regulatory basis for such action. Ultimately, the courts must decide whether the reference in the House Report to the Commission's power so contradicts the plain meaning of the Act, particularly the preservation of state authority over SMATV, as to deprive the report of probative

\textsuperscript{367} See supra note 357 and accompanying text.
\textsuperscript{368} Cable Act § 602(6)(B).
\textsuperscript{369} Id. § 634(h)(1).
\textsuperscript{370} House Report, supra note 22, at 63.
\textsuperscript{371} Cable Act § 621(e).
value on the interpretation of this issue.\footnote{372}

3. Home Earth Stations. Despite the growth of cable television, houses in many areas of the country are located too far apart to be wired economically. When the Cable Act was passed, twenty-five million of the country's ninety million television households did not have access to cable television service.\footnote{373} It was estimated that by 1990, eleven million of these homes would still be unable to subscribe to cable television.\footnote{374}

Many residents who wanted to receive the programming services offered by cable, but did not live in an area with cable service, turned to satellite dishes. From 1980, when home satellite reception was limited to a few scattered hobbyists, to the passage of the Act in 1984, the growth of these dishes, which could pick up over 100 channels, was phenomenal. The growth was due to the reduction in the size of the dishes to six to twelve feet in diameter and the reduction in price to $1000 to $2500. By the end of 1984, there were an estimated one million dishes in use, with 40,000 to 60,000 more being sold each month.\footnote{375}

The Cable Act contains strict provisions prohibiting both the theft of cable service and the unauthorized reception of satellite signals.\footnote{376} The drafters of the Act, however, also wanted to protect the private dish owner to preserve "the free flow of information and ideas."\footnote{377} Accordingly, the Act protects "the rights of individuals . . . to view unscrambled services in the privacy of their dwellings."\footnote{378} This protection was established by creating an exception to the general ban on receiving unauthorized satellite signals. It is legal under the Act for an individual to receive such signals without paying the programmer, if the signals are not "encrypted" and no marketing system has been established for selling the program to that individual.\footnote{379}

\footnote{372} See generally R. Dickerson, supra note 22, at 141 ("Another reason for downgrading legislative history is that much of it is unreliable in the specifics of application.").


\footnote{374} Id.


\footnote{376} Cable Act §§ 633, 705 (amending § 705 of the 1934 Communications Act).


\footnote{378} Id.

\footnote{379} Cable Act § 5. This exemption only applies to "cable satellite programming," which is
To encrypt signals in order to remove them from the exemption, the programmer must modify or alter the signals in an effort to prevent their unauthorized reception.\footnote{Cable Act § 5(e)(3).} The programmer need not use any particular form of scrambling the signal; the test is whether the programmer has taken “some reasonable measure to ensure that no person may simply tune in and receive the signal in intelligible form” without acquiring the necessary decoding equipment.\footnote{130 Cong. Rec. S14,288 (daily ed. Oct. 11, 1984).} If a signal is not encrypted, unauthorized possession is still illegal if there is a valid marketing plan for that signal. The theory is that dish owners are only permitted to receive a signal free of charge if there is no one offering to sell them the service. Congress was concerned, however, that the marketing system be a “good faith” system.\footnote{130 Cong. Rec. H10,446 (daily ed. Oct. 1, 1984) (statement of Rep. Rose).} In other words, to remove unencoded signals from the exemption, a programmer must make a realistic effort to sell the signals to dish owners; any attempt to set up a system merely to inhibit the use of the dishes will be unenforceable.

In some ways, the attempt by the Act to protect both dish owners and programmers trying to market their unencrypted signals was doomed. Almost as soon as the Act was passed, the major pay television networks announced plans to begin scrambling their signals.\footnote{Landro, supra note 373, at 33.} Thus, one of the biggest attractions of the satellite dish, free reception of movie services, may soon be unavailable, with other services sure to follow. On the other hand, the protection provided for unscrambled signals with a marketing plan is an empty promise. If individuals purchase a satellite dish legally,\footnote{While the Act prohibits the selling of devices for receiving unauthorized signals, Cable Act § 5(d)(4), “[o]bviously, this is not intended to apply to manufacturers or dealers who are acting lawfully in providing satellite earth station equipment designed to receive unencrypted video programming.” 130 Cong. Rec. S14,288 (daily ed. Oct. 11, 1984).} there is no way to tell what signals they are watching. Therefore, owners of satellite dishes can ignore even the fairest marketing plan and continue to receive unencoded signals without paying the
programmer.

4. **Tenants' Access to Cable.** Even if a cable operator wants to market its service to willing individuals in an area, property owners may attempt to keep their tenants away from the cable company. Landlords or mobile home operators may want to block cable service so that they can arrange for an alternate SMATV system to serve the property and receive payments from the SMATV operator for delivering a captive audience.\(^{385}\)

Prior to the Act, some states passed laws to require landlords to permit cable companies to wire their property.\(^{386}\) The original House version of the Cable Act would have established a similar federal requirement.\(^{387}\) All multi-unit buildings and mobile home park owners would have been required to permit cable operators to provide service to tenants, unless the property owner made available “a diversity of information sources and services equivalent to those offered by the [local] cable system.”\(^{388}\) The section containing this requirement was removed during the Senate-House conference on the cable bill.\(^{389}\) The issue, however, does not end here. A different section of the bill enacted into law may provide cable operators a form of access to property.

In authorizing franchising authorities to award franchises, section 621 of the Act defines the rights of the holder of a cable franchise.\(^{390}\) A cable operator, after obtaining a franchise, has the right to use both public rights-of-way and “easements . . . which have been dedicated for compatible uses.”\(^{391}\) These easements include contracts between private property owners and suppliers of gas, electricity, or other utilities.\(^{392}\) According to the legislative history: “Any private arrangements which seek to restrict a cable sys-

\(^{385}\) See *House Report*, supra note 22, at 80.

\(^{386}\) E.g., N.Y. Exec. Law § 828 (McKinney 1982). Although the Supreme Court ruled that any such law must provide for just compensation to the landlord, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982), the Court stated that the basic requirement was constitutionally permissible. In determining just compensation, the New York State Cable Commission established a rate of one dollar per building.


\(^{388}\) Id. § 633(h)(1).

\(^{389}\) Id. § 633(h)(1).

\(^{390}\) Id. § 633(h)(1).

\(^{391}\) Id.

tem's use of such easements or rights-of-way which have been
granted to other utilities are in violation of this section and not
enforceable."

There are several conditions to the cable operators' access. Each
cable operator must insure that the safety, functioning, and ap­
pearance of the property are not adversely affected, that all costs
associated with the cable operator's use of the property are borne
by either the operator or the cable subscriber, and that the prop­
erty owner is justly compensated by the cable operator for any
damages.

The language of the statute and its legislative history could be
read to require that all property owners who have created ease­
ments for the use of utility companies, including owners of multi­
unit buildings and mobile home parks, must permit the local cable
operator access to those easements. When the section discusses
easements, it refers to property owners, not merely public rights­
of-way.

There is an alternative view to the section on easements. Argua­
bly it only grants a right to use property outside the building, with
no corresponding right for the cable operator to enter a building
unless the property owner consents. Since this section had coex­
isted with the section in the original House bill that had granted
access to buildings, the two sections must have meant different
rights of access.

There are two answers to the latter interpretation limiting the
scope of "easements." First, the Act itself contains no such limita­
tion on the right. Second, the right of access under the Act differs
from the right to buildings under the House bill. The House bill
would have permitted cable operators access to all buildings and
mobile home parks. In contrast, the Act only permits access if
the easement is "dedicated for compatible uses." Accordingly, a
cable operator can only gain access to a building through an ease­

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393 Id. The FCC has ruled that § 621(a)(2) creates a right of "mandatory access," if the
statutory conditions, see infra text accompanying note 394, are met. Implementation of
Cable Act, supra note 80, at 18,647.

394 Cable Act § 621(a)(2)(A)-(C). These are the same conditions that applied to explicit
rights of access to property contained in the original House bill.

395 The only exception was if the property owner had made service equivalent to cable
television available to tenants.

396 Cable Act § 621(a)(2).
ment if there is room left by the preexisting user.

C. The Right to Privacy

The technology of cable television makes possible uses of cable far more complex than the one-way transmission of video programming. Interactive cable television, so called "two-way" systems, permits services such as banking and shopping at home, home security, and polling. Moreover, advanced cable systems are able to monitor continually the viewing choices of each cable household. This capability presents a serious potential for invading the privacy of the cable subscriber. Not only can intimate information be gleaned easily by the cable operator, but an unprecedented amount and variety of information about an individual can also be inexpensively accumulated from one source—the cable system.

To prevent cable from turning the television set into an Orwellian nightmare, the Act creates a framework for the protection of subscriber privacy. The basic elements of this framework limit the collection and disclosure of information and guarantee the subscribers' right both to know what information is being maintained and to insure its accuracy.

The key provision on collecting and disseminating information is the protection of "personally identifiable information," data that "identify particular persons." The cable operator is limited to collecting personally identifiable information for two purposes: to obtain information that is "necessary" for providing a service to the subscriber and to search for the unauthorized reception of cable service. If the cable operator is serving as a conduit be-

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398 See N.Y. State Comm'n on Cable Television, Cable Communications in New York State 149 (1981).

399 For an excellent discussion of the potential threat to personal privacy presented by cable television, see Perry, Threats to Informational Privacy Posed by Interactive Cable Television, in Policy Research in Telecommunications 349-63 (V. Mosco ed. 1984).

400 See Cable Act § 631.

401 Id. § 631(a)(2). Because the Act uses the phrase "particular persons," data that can be used to identify a specific household, as well as a specific individual, are within the definition of "personally identifiable information." Aggregate data that cannot be used to identify particular subscribers or households can be freely collected and disseminated.

402 Id. § 631(b)(2).
between a service provided and the subscriber, the operator is barred from “listening in” on the communications between the other two parties.403

An additional limitation restricts the length of time that the cable operator may store information. The operator must destroy personally identifiable information as soon as that information is no longer needed for the specific purpose for which it was acquired.404 This provision would permit an operator to retain information after a service has been rendered only for a specified, limited time, to insure that there are no complaints with the delivery of the service.

The Act defines several situations under which personally identifiable information may be disclosed. First, the cable operator may disclose information “necessary” either to render a service to the subscriber or to conduct “a legitimate business activity related to, a cable service . . . provided by the cable operator to the subscriber.”405 This business activity must be actually related to the service provided to the subscriber whose data is being disclosed, for example, disclosure to a debt collection agency for the collection of unpaid cable bills.406 The transfer of information between a cable system and its parent company would not relate to the service provided to the subscriber and thus would not be permitted.

A second type of disclosure concerns information given to a governmental entity for valid law enforcement purposes. The drafters of the Act were concerned that personal information acquired through a cable system “should not be accessible to government unless a compelling governmental interest outweighing the individual’s interest to be free from government intrusion can be shown.”407 Thus, before a court may issue an order for personally identifiable information, the governmental entity making the request must prove by clear and convincing evidence that “the sub-

403 House Report, supra note 22, at 77.
404 Cable Act § 631(e). The only exception is if there is a pending request to see the information either by the subscriber or by a governmental entity pursuant to a court order. See infra text accompanying notes 407-10 & 419-21.
405 Cable Act § 631(c)(2)(A).
406 House Report, supra note 22, at 77.
ject of the information” is reasonably suspected of engaging in criminal activity and that the information sought would be “material evidence.” Moreover, “the subject of the information” must be given notice of the request and the opportunity to contest it. The phrase “subject of the information” refers only to a cable subscriber or a member of a subscriber’s household. It does not include others suspected of criminal activity, since the right to contest the request for a court order obviously is meant to protect subscribers and their families.

In one celebrated case, the owner of an “adult” movie theatre in Columbus, Ohio, was arrested on charges of obscenity and sought a court order to obtain the names of cable subscribers who watched similar movies on the local cable system. The cable company finally agreed to provide aggregate data on the number of such viewers without disclosing the names of individuals. Under the Cable Act, all personal data would have been shielded, since the movie theatre owner, and not the individual subscribers who were the “subject of the information,” was the party suspected of the criminal activity.

The final way personally identifiable information may be disclosed is through the prior consent of the cable subscriber. In general, any approval by a subscriber must be given by “positive consent” and cannot be implied by the subscriber’s failure to respond to a request for permission to disclose. The Act states that a subscriber’s consent may be either written or electronic.

There is a great danger in permitting electronic consent, since there is no way to determine which member of the subscriber’s family pressed the button at the moment the request for consent was flashed on the screen. A young child, watching alone, could easily signal consent without parental knowledge or approval. Since the Act requires the consent to be that of the cable sub-

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408 Cable Act § 631(b)(1).
409 Id. § 631(c)(2)(B), (h)(2).
410 See Qube to Give Sex Film Data, Columbus Dispatch, June 10, 1984, at B-7. This case is described in D. Nash & J. Smith, supra note 397, at 52-57.
411 House Report, supra note 22, at 77.
412 This had been the rule in New York before the Act. The only exception to the Act’s ban on the use of a “negative option” is for mailing lists. See infra text accompanying notes 414-15.
413 Cable Act § 631(c)(1).
scriber, and not simply of any member of the subscriber's household, the use of electronic consent should be limited to one-time disclosures of information that directly involve the program or service being presented at the time the electronic consent is given. To insure that the consent is from the actual subscriber, any broader consent for disclosure of information should be considered valid only if it is in writing.

The one exception to the requirement of "positive consent" is for the limited purpose of general mailing list information. If a cable operator annually gives subscribers the opportunity, in writing, to prohibit such disclosure, the operator may distribute their names and addresses. The permissible disclosure here is extremely limited: the operator may not disclose any information that reveals, or could be used to determine, the "extent of any viewing or other use" of a cable system's service or the "nature of any transaction" made over the system. Thus, a cable operator could not disclose the particular programs or channels the subscriber watched or subscribed to, or even when and for how long the subscriber watched or otherwise used the cable system. Similarly, the details of any "transaction," whether a business transaction such as a shop-at-home or home banking service, or a personal transaction such as a response to a public opinion poll, may not be disclosed under the mailing list provision. Only general information can be provided, such as the fact that an individual subscribes to the cable system or to some of the services offered.

Subscribers also have the right to see personally identifiable information the cable operator maintains on them. Although this

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414 Id. § 631(c)(2)(C); see House Report, supra note 22, at 78.
415 Cable Act § 631(c)(2)(C)(i), (ii).
416 House Report, supra note 22, at 78.
417 Because of the impersonal aura created when a machine is asking the questions, many persons assume that their anonymity will be protected and therefore they reveal personal information. The dangers of polling were illustrated by a poll on drug and alcohol addiction conducted by a psychiatrist on a two-way cable system. When almost half of those responding to the poll admitted to having an addiction, the doctor said, "I was shocked by the number. . . Addicts are a population of deniers. One of the hardest things I find in treating them is getting them to admit the problem in the first place." Almost Half of Sample in a Poll Reports 'Addiction,' N.Y. Times, Jan. 27, 1981, at C1, col. 1.
418 See House Report, supra note 22, at 78. Of course, any information concerning services must not be susceptible to an analysis that could reveal which particular services a subscriber used. Id.
419 Cable Act § 631(d). The cable operator must provide access to the information at rea-
right includes the additional right to learn who has received this information, there is no federal requirement that the cable operator keep a listing of information recipients. Thus, a subscriber only has the right to his or her name if the cable operator maintains such information.

In addition to being allowed to see the information, the Act requires that the subscriber be "provided reasonable opportunity to correct any error in such information." The legislative history does not discuss the scope of this "opportunity." Presumably, the Act envisions a mechanism similar to other federal laws permitting individuals to correct files containing information concerning them. For example, under the Fair Credit Reporting Act, if a consumer disputes the accuracy of information, the credit agency must recheck its information, and if the dispute is still not resolved, the consumer must be given the opportunity to place a statement in the file explaining the consumer's view of the dispute. Thus, if a subscriber informs the cable operator of incorrect personal information, the operator must either correct or recheck the information. If, after rechecking, the operator continues to believe the information is accurate, the subscriber should be permitted to require that any party receiving the disputed information also receive the subscriber's opposing statement.

An integral part of the privacy protection of the Act is that subscribers receive actual notification of their rights. When a subscriber signs up for service, and at least once a year after that, the cable operator must provide written notice of: (a) the nature of the information to be collected and its uses, (b) the "nature, frequency, and purpose" of any disclosure of information, including the "types" of people who will receive the information, (c) how long the information will be maintained, (d) the times and places at which the subscriber will be able to review the information being

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sonable times and at a location, within the franchised areas, that is convenient to subscribers. Id.; see also House Report, supra note 22, at 78.

420 House Report, supra note 22, at 78.

421 Because the inability to discover who has received erroneous information would frustrate the interests served by the right to correct errors in one's file, see infra text accompanying notes 422-23, courts may imply a duty to maintain a list of recipients of personal information for a reasonable time. Similarly, a state or franchising authority may choose to impose this requirement affirmatively. See infra note 429.

422 Cable Act § 631(d).

maintained, (e) the Act's limitations on collection and dissemination of information, and (f) the rights of the subscriber to enforce the Act.\textsuperscript{424} This annual notice must give subscribers the opportunity to delete their names from mailing lists.\textsuperscript{425} Though not required by the Act, the operator may also want to ask for the subscriber's "positive consent" for the disclosure of mailing list information.

In addition to the federal cable privacy protection provisions, states and franchising authorities may enact additional requirements "consistent" with the Act.\textsuperscript{426} This ability to supplement the federal law will be important, since there are several gaps in its protection. Most notably, the Act's privacy provisions do not restrict the behavior of persons other than the cable operator who may provide services over the cable system.\textsuperscript{427} These other persons will also be able to require much personal information about the subscribers and violate their privacy by disclosing it. For example, if all of the programmers, other than the cable operator, may disclose who is watching their programming, a subscriber's private viewing choices could be widely disseminated.\textsuperscript{428}

Ironically, the protections against invasions of privacy by the cable operator may ultimately mislead subscribers. Since the services provided by third parties may be similar to those offered by the cable operator, the subscriber receiving a notice of rights might easily be confused into believing that all cable transactions are protected. To insure full protection for cable subscribers, a local government may want to extend the federal law to apply to third-party users as well as the cable operator or, at a minimum, to all information concerning a subscriber's viewing preferences.

A related gap in the Act is that it does not explicitly require that the cable operator take all reasonable steps to protect the information that passes through the system. Thus, a state may want to

\textsuperscript{424} Cable Act § 631(a)(1).
\textsuperscript{425} House Report, supra note 22, at 78.
\textsuperscript{426} Cable Act § 631(g).
\textsuperscript{427} House Report, supra note 22, at 77. The rationale for this omission was that other laws geared to the particular service could protect privacy.
\textsuperscript{428} This dissemination could become an increasing danger as programming services turn to "pay-per-view" systems in which subscribers select individual movies to watch. See Landro, Pay-per-View Is Gaining Subscribers As Fixed-Schedule Cable Loses Favor, Wall St. J., Jan. 10, 1985, at 29, col. 4.
require the cable company to create reasonable safeguards to in­
sure the physical and electronic security of personally identifiable
information.429

There are also several "gray areas" in the Act, which a locality
may want to clarify in favor of greater privacy protection. For ex­
ample, it is not clear whether an employee of a cable company who
sells private information will be subject to the Act's civil penal­
ties.430 Similarly, the Act does not state whether a "blanket
waiver," a one-time statement by a subscriber, can waive all pri­
vacy protection for as long as that person is a subscriber. While the
Act may be interpreted broadly to protect privacy more effectively,
a local government may choose to establish clearer, more compre­
hensive cable privacy protection.431

D. Equal Employment Opportunity

The Act contains special equal employment provisions for the
cable industry that expand those provided in other federal statutes
for employers in general.432 Congress believed not only that the
principles of nondiscrimination are central to American society,
but also that the societal interest in fair employment practices is
especially great for communications industries: "[E]qual employ­
ment opportunity requirements are particularly important in the
mass media area where employment is a critical means of assuring
that program service will be responsive to a public consisting of a
diverse array of population groups."433

Before the Act, the FCC had adopted its own equal employment

429 Such a requirement was contained in a 1984 proposal before the New York State Leg­
islature. See A.11921, § 833-b(2) (introduced June 26, 1984).

430 Cable Act § 631(f). Cable operators that violate the privacy provisions will be liable for
actual damages (not less than the greater of $1000 or $100 a day for each day of violation),
punitive damages, plus attorney's fees and litigation costs. Id.

431 Other possible areas for state privacy protection would be a specific delimitation on
how long information could be maintained and a requirement that the cable operator main­
tain a list of all persons to whom the operator distributed personally identifiable
information.


433 HOUSE REPORT, supra note 22, at 85. There is a direct correlation between employment
by diverse groups and the availability of programming for those groups: "[I]nteresting the
amount of cable programming designed to address the needs and interests of minorities and
women is fundamentally related to the number of minority and women employees in the
upper level positions within media companies." Id. at 85-86.
These rules prohibited discrimination by cable operators and required positive attempts by cable operators to recruit and promote minority and female employees. The Act "codifies and strengthens the Commission's existing equal employment opportunity regulations." The Act's coverage of the equal employment provisions. Both the FCC regulations and the Act include cable systems and those parent companies that are "engaged primarily in the management or operation of any cable system." The Act, however, also includes SMATV systems within its definition of cable systems, even if they serve only commonly owned buildings and do not use public rights-of-way.

The original House bill would have required that cable systems employ women and members of minority groups at "parity levels," a minimum level based on the percentage of women and minority members in the local work force. While the final Act does not contain such specific numerical goals, there are still a number of equal employment requirements. In addition to barring discrimination based on race, color, religion, national origin, or sex, the Act imposes an affirmative duty on cable operators to conduct "a continuing program" to exclude "prejudice or discrimination" and to "adopt positive recruitment, training, job design, and other measures needed to ensure genuine equality of opportunity." It is...

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435 47 C.F.R. § 76.311 (1984). Despite the FCC regulations, studies still found that not only were women and minorities underrepresented in the cable work force, but they also had not attained the level of employment in cable that they had in other areas of mass communication, notably broadcast radio and television. J. ENGSBERG, A. WALTERS & G. NETTINGHAM, CABLE SYSTEM EMPLOYMENT—1980-1981: A REPORT ON THE STATUS OF MINORITIES AND WOMEN vii (Office of Communication, United Church of Christ Nov. 1982).

436 House Report, supra note 22, at 86.

437 See Cable Act § 634(a); 47 C.F.R. § 76.311(a), (c) (1984). Both the FCC regulations and the Act exempt systems with fewer than 50 subscribers. See Cable Act § 634(h)(2); 47 C.F.R. § 76.5(a)(1) (1984).

438 Cable Act § 634(h)(1). SMATV systems had been exempted from the FCC regulations. 47 C.F.R. § 76.5(a)(2) (1984).


440 The parity provisions were removed by Senate amendment. 130 Cong. Rec. S14,282 (daily ed. Oct. 11, 1984) (Amendment No. 7106).

441 Cable Act § 634(b), (c)(4), (c)(5) (emphasis added).
not merely enough for a cable operator to claim the cable system does not discriminate; the operator must also actively try to provide equal opportunity.

The primary governmental entity responsible for enforcing equal employment opportunity is the FCC. The FCC must promulgate regulations governing the equal employment practices of cable operators, investigate individual complaints against cable systems, and punish the systems when warranted. Perhaps the most important employment responsibility of the FCC, however, is to certify that each cable system is fulfilling its statutory and regulatory employment obligations. Every year the FCC must certify that each cable operator is in compliance with these requirements. The certification process includes a review of each cable system's annual statistical employment report and other relevant information, such as individual complaints or reports from either the franchising authority or other organizations.

In addition to the annual certification review, the FCC must "investigate the employment practices" of every cable system at least once every five years. The Act does not describe how comprehensive this investigation must be, although it obviously must be more strenuous than the annual investigation. The legislative history of the Act indicates that the FCC "shall conduct field audits of a random sample of entities" as part of its investigation. For those cable systems for which a field audit is not conducted, the FCC will still have to conduct a detailed review of employment practices.

There are several possible penalties for a cable system that violates the equal opportunity provisions. First, the Commission can impose a penalty of $200 per day per violation. Second, the

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442 Id. § 634(d), (e). This enforcement responsibility sharply contrasts with the general congressional intent to reduce and restrict the FCC's role in regulating cable television. See supra notes 46-52 and accompanying text.

43 Cable Act § 634(e)(1); see also House Report, supra note 22, at 88. The annual statistical report, which must be filed by any cable system with more than five full-time employees, identifies by race and sex the number of employees by job category. Cable Act § 624(d)(3).

44 Cable Act § 634(e)(2).


446 Cable Act § 634(f)(2). The Act requires that the Commission provide public notice of any penalty. Id. § 634(f)(4). In determining the amount of the penalty, the Commission must consider the extent and gravity of the violations, the cable system's history of prior
Commission has the power to suspend licenses to operate a Community Antenna Relay Service station until the violation has been corrected. Perhaps the strictest penalty is that if the Commission finds that a cable system has "willfully or repeatedly without good cause" violated the employment provisions, such violation "shall constitute a substantial failure to comply with this [Act]." The significance of a finding of a substantial failure to comply with the Act is that a franchising authority can use it as grounds for denying a franchise renewal. Thus, a single willful or three unintentional violations of equal employment obligations can cost a cable system its right to operate.

CONCLUSION

The Cable Communications Policy Act of 1984 represents a delicate balance between the rights of the cable operators to pursue their business, the rights of the franchising authorities to regulate in the interests of their communities, and the rights of individuals in what is potentially the most important communications technology area. The Act reins in the FCC, sharply limiting its regulatory role. The franchising authorities are permitted to regulate cable, but only in a manner that recognizes the valid interests of the cable operator. Finally, Congress has strongly indicated its desire that cable television serve a vital role in the electronic marketplace of ideas. The cable operator, the nonaffiliated programmer, and the residents of a community are all to be given the opportunity to communicate to that community over the cable system.

The history of cable television indicates that the technology violations, its ability to pay, and "any such other matters as justice may require." 47 U.S.C. § 503(b)(2) (1982) (applied to cable penalties by Cable Act § 634(f)(3)).

47 Cable Act § 634(f)(2). A Community Antenna Relay Service station is used to transmit, via microwave, broadcast and satellite, cable service signals from either a satellite dish, cable studio, or other distribution point to a cable system's headend. See generally 47 C.F.R. part 78 (1984).

48 Cable Act § 634(f)(1). "Repeatedly" is defined as three or more violations within a seven-year period. Id. Because the Act uses the language, "willfully or repeatedly," one willful violation by itself will be sufficient to constitute a "substantial failure to comply." The Act also states that the failure of a cable system to receive the annual certification "shall not itself" constitute a substantial failure. Id.

49 Id. § 626(c)(1)(A); see supra notes 233-37 and accompanying text. A state or franchising authority is also permitted to impose additional equal opportunity obligations, Cable Act § 634(i), including "more stringent employment standards." House Report, supra note 22, at 93.
grows and changes at a rapid pace, with the laws and regulations struggling to catch up. As the future will undoubtedly bring about still more unanticipated technological advancements, the hope is that the Cable Act has established a rational and flexible framework for future, as well as present, regulation.