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D.C. Circuit Strikes Down Cable Ownership Cap

On August 28, 2009, the Court of Appeals for the District of Columbia Circuit issued an opinion in Comcast Corporation v. FCC, which vacated the FCC's 30% limit on the number of subscribers to which a cable operator could offer service.

The 30% cap, created in 1993, was initially intended to promote competition in the cable television market and increase consumer access to diverse network programming. In 1993, however, the cable television market was dominated by large companies that had exclusive monopoly franchises in particular geographic areas. Since that time, the cable television landscape has changed dramatically. Now, direct broadcast satellite companies provide programming to approximately one-third of subscribers, consumers have access to significantly more channels of programming than ever before, competitive wireline providers are expanding rapidly, and alternate transmission methods of video media are playing ever-increasing roles in the lives of consumers.

Despite these fundamental changes, however, the FCC refused to alter or eliminate the 30% subscriber limit to better reflect market realities. Moreover, the FCC applied the cap not only to incumbent cable providers, but to competitive wireline providers – telephone companies providing fiber optic video services – which, ironically, decreased competition by limiting the total number of subscribers to which these new providers could offer service.

Citing to the "substantial competition" in the cable television marketplace today, the D.C. Circuit struck down the FCC's 30% limit as arbitrary and capricious. The Court found the record "replete with evidence of ever increasing competition among video providers," and properly observed that "the broadcast industry is dynamic in terms of technological change; solutions adequate a decade ago are not necessarily so now, and those acceptable today may well be outmoded 10 years hence." Refusing to ignore this "crucial fact about the nature of the video industry," the Court vacated the FCC's 30% subscriber limit.

Though the D.C Circuit did not "think that prospect looms large," the FCC will have another opportunity to justify the 30% limit. In weighing this decision, the FCC would be wise to remember that competitive markets consistently prove themselves superior to regulatory fiat in fostering investment and innovation and in protecting consumers' interests and serving their needs. The FCC thus should promote robust competition and avoid placing unnecessary restrictions on cable operators – particularly competitive wireline providers, who, by definition, have never possessed bottleneck monopoly power over access to video programming. In light of the Court's ruling and the realities of the cable market, it appears unlikely that the FCC will be able to justify any future cap-based regulation.

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