Heading off a potential FCC debacle

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A decade ago, Congress decided cable companies and their competitors should allow consumer electronics manufacturers to make "plug and play" set-top equipment that would work with any cable or direct broadcast satellite service. Rather than leasing it, consumers could buy such equipment from multichannel video program distributors.

So it was that Congress authorized regulations in 1996 to ensure that equipment used to access multichannel video programming would be available at retail from entities unaffiliated with cable or direct broadcast satellite service operators.

Congress' goal may have made theoretical sense then in the staid, still fairly monopolistic world that characterized analog communications. However, the rapid changes in technology and the marketplace spurred by the digital revolution require that the FCC revise its equipment regulations, or their costs to consumers will far exceed their benefits.

First, some history.

In 1998, the FCC directed the cable industry to develop a physical device—now called a CableCard--containing the security functions that could be inserted into the equipment of independent manufacturers. That made sure their boxes could be used with cable systems around the country. The FCC thought this separate security device would allow multichannel video program distributors to retain control over the security function while enabling independent entities separately to market navigation devices. The cable industry has so far supplied about 200,000 CableCards for use in more than 140 models of digital cable-ready devices. But the vast majority of cable subscribers continue to use equipment leased from their cable companies.

The FCC went further. In 1998, it required that all multichannel video program distributors stop selling or leasing new devices that integrate both security and non-security functions by 2005. This rule meant that all equipment used to access cable services would rely on common technology--like the CableCard.

However, the agency exempted from this integration ban multichannel video program distributors that support the use of equipment available in unaffiliated retail outlets and that operate throughout the United States.

Direct broadcast satellite service providers were the only multichannel video program distributors that qualified for the exemption. That's because the FCC found that, unlike cable subscribers, subscribers to direct broadcast satellite services could buy a device and use it anywhere in the country. Thus, cable operators were covered by the ban, while their principal competitors were not.

The pace of technological developments has only accelerated since 1998. In March 2005, the FCC extended the integration ban implementation date to July 2007. Now the FCC again is considering requests by cable operators to extend the date. But since the last extension, the landscape has changed even more dramatically.

Verizon and other telephone companies are rushing into the video business. Meanwhile, the two direct broadcast satellite service operators have done an about-face, and are now supporting equipment containing mainly proprietary features. And Congress finally has set a firm February 2009 date for the transition to all-digital broadcast television transmission.

With the changed landscape, this is a case crying out for regulatory relief. Downloadable security should be deliverable within the next few years, but not by July 2007. Implementing the integration ban in the meantime would be very costly to consumers with no real benefits. Both the cable industry and Verizon estimate that the re-engineering required to enable their leased equipment to work with separate security devices will increase the cost for each box by $72 to $95, adding another $2 to $3 to monthly lease charges. With a firm digital TV transition date, it is counterproductive to deter consumers from switching by raising their price. Congress has authorized a fund to subsidize the purchase of non-multichannel video program converter boxes in anticipation of the analog broadcasting cut-off.

But much less funding will be needed if more consumers already have the capability to receive digital transmissions using digital set-tops supplied by multichannel video program distributors. Moreover, requiring cable companies and Verizon to implement physical separation in the coming months would divert technical resources away from the task of implementing a downloadable security solution as quickly as possible.

Competitors should not be treated in a disparate fashion. Even though direct broadcast satellite service operators--which account for more than 25 percent of all multichannel video program distributors' subscribers--have moved almost completely to proprietary set-top boxes, they remain exempt from the ban.

Fortunately, Congress recognized in 1996 that developments might well outrun any FCC mandates. It said the agency must waive any regulation if "necessary to assist the development or introduction of a new or improved multichannel video programming or other service offered over multichannel video programming systems, technology or products." While agencies have considerable inherent authority to waive regulations, Congress usually doesn't include such express waiver authority in particular statutory provisions, unless to make a point.

In the interest of consumers, the FCC should act quickly to extend the integration ban's implementation date for all multichannel video program distributors, while, at the same time, closely monitoring the technological developments in a dynamic marketplace.