

## Court rejects cap on cable market share -- again

August 28 2009, By DEBORAH YAO , AP Business Writer

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(AP) -- An appeals court overturned a rule that said a cable TV company could not serve more than 30 percent of the nation's subscribers. The verdict Friday was a victory for the largest cable company, Comcast Corp., which has 25 percent share and sued to block the rule.

It was an embarrassing decision for the [Federal Communications Commission](#), which had already seen the cap rejected and imposed it again. Friday's ruling from the U.S. Court of Appeals for the District of Columbia Circuit called the limit "arbitrary and capricious," and threw it out.

Fearing a cable [monopoly](#), Congress in 1992 directed the FCC to set limits on how many customers cable TV operators could reach nationwide. The FCC set the 30 percent limit, but that was thrown out twice by the courts. Two years ago, under then-FCC Chairman Kevin Martin, the same cap was reinstated, prompting the new challenge from Comcast.

In the ruling, the [appeals court](#) noted - at times with sarcasm and thinly veiled incredulity - that the FCC sought to justify the previously rejected cap by recalculating its formula. But the outcome remained the same at 30 percent.

"The Commission concluded no cable operator could safely be allowed to serve - mirabile dictu (roughly "it's a wonder to say") - more than 30 percent of all subscribers," the court said. The ruling then quoted the

French expression that translates as "The more things change, the more things stay the same."

The FCC had argued that a cable TV operator with enough market clout could choose not to carry a cable channel, thereby causing it to fail and diminishing the diversity of programming available to consumers.

But the court noted that the FCC admitted its analysis did not fully reflect the impact of satellite TV companies, which now serve about a third of households with pay TV and could carry a network if major cable operators did not. Moreover, phone companies are offering TV services now and also could carry cable channels and contribute to their survival.

The court said that in its 2001 rejection of the same cap, it instructed the FCC to consider such competitors to cable. "The Commission nonetheless failed to heed our direction and we are again faced with the same objections to the rationale for the cap," Friday's ruling said.

[Comcast](#) and the cable industry applauded the decision. Ken Ferree, president of The Progress & Freedom Foundation, a think tank that supports market-oriented policies, said the FCC's cable cap "was nothing more than `abracadabra - here's the limit.' That's no way to run a government."

The FCC, which is now led by Obama appointee Julius Genachowski, said the commission is reviewing the decision and will take it into account on future actions to implement the law.

One FCC commissioner, Robert McDowell, was more vocal, saying he had disagreed with the decision to re-impose the cap in 2007. He said he felt the rule was vulnerable to a challenge given that it had already been overturned. He said that the commission's cap was based on "aging data

and questionable assumptions" that didn't adequately reflect the entry of new competitors to cable operators.

"In the future, outcomes in our proceedings should be driven by the facts and law, rather than the other way around," McDowell said in a statement.

But Media Access Project, an advocacy law firm that represented parties who joined the side of the FCC in the lawsuit, said it was disappointed by the ruling and will consult with the commission whether a Supreme Court review is feasible. If not, it will ask Congress to pass laws to insure more choice and lower cable TV prices.

"This is not the end of the fight," said CEO Andrew Jay Schwartzman.

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