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DBS, the FCC, and the Prospects for Diversity and Consumer Sovereignty in Broadcasting, 4 Computer L.J. 551 (1984)

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NOTES

DBS, THE FCC, AND THE PROSPECTS FOR DIVERSITY AND CONSUMER SOVEREIGNTY IN BROADCASTING

I. INTRODUCTION

On September 23, 1982, the Federal Communications Commission (FCC) granted to Satellite Television Corporation, a subsidiary of Communications Satellite Corporation, a construction permit for the first phase of a planned national direct broadcast satellite service.[1] This first phase calls for coverage of the Eastern time zone with a single satellite. Construction of a spare satellite was authorized as well. Regular transmission could begin as early as 1986.[2]

Direct broadcast is defined by the World Administrative Radio Conference for Space Telecommunications as "[a] radiocommunication service in which signals transmitted or retransmitted by space stations are intended for direct reception by the general public."[3] Direct broadcast promises to have tremendous impact on current broadcast systems and economies, both in the United States and worldwide; as with the development of any new broadcast system, it has the potential to increase cultural awareness and educational opportunities, in addition to expanding the reach of international communication.[4]

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1. Pagano, *Satellite-to-Home TV Plan OKd*, L.A. Times, Sept. 24, 1982, § IV, at 1, col. 1; *FCC Gives Go-ahead to STC For Its DBS Plan*, BROADCASTING, Sept. 27, 1982, at 35. On Nov. 4, 1982, the FCC gave construction permits to seven additional companies. Daily Variety, Nov. 5, 1982, at 1, col. 3.

2. Unhappy with the FCC's rejection of its petition to deny the authorization, the National Association of Broadcasters sought to stay construction pending full judicial review. The D.C. Circuit subsequently denied the appeal. Daily Variety, Feb. 17, 1983, at 1, col. 1.

3. Partial Revision of the Radio Regulations, Geneva, 1971 and Final Protocol: Space Telecommunications, July 17, 1971, 23 U.S.T. 1527, 1573, T.I.A.S. No. 7435, at 47 (effective Jan. 1, 1973).

4. *See generally* A. BELENDIUK & S. ROBB, BROADCASTING VIA SATELLITE: LEGAL AND BUSINESS CONSIDERATIONS (1979); A. CHAYES, SATELLITE BROADCASTING (1973); Dauses, *Direct Television Broadcasting by Satellites and Freedom of Information*, 3 J.

Direct broadcast could potentially reach larger areas at less cost than current broadcast methods.[5] In existing systems signals are sent from one land station to another. The earth's curvature requires many such stations. Current orbiting satellites carry signals long distances, but transmissions still begin and end in land stations. A direct broadcast satellite (DBS), which is many times more powerful than existing communications satellites, is capable of beaming signals directly to home receivers, eliminating the need for terrestrial retransmission.[6]

Since DBS will probably be operated as a pay-TV service, it will offer certain service advantages. Under the existing broadcast system, the types of programs that are broadcast are determined by advertisers rather than by those who receive the broadcasts.[7] The program is sold to the advertiser, not to the receiver; the advertiser purchases the program for the receiver. The result, at best, is an approximation of what a majority or minority would choose to watch. Only those programs appearing on everyone's list—not a first choice, but perhaps a third, fourth, or fifth—are purchased, and so predictably most of the programming purchased is not controversial or unique.[8] The programming decisions in a direct broadcast system would not, at least initially, be determined by advertisers, thereby potentially improving the diversity of available programming.[9] Other potential service improvements include expanded service areas, first time service in rural or remote areas that are currently not served, and improved public services such as medical or educational information.[10]

DBS also promises certain technical improvements, such as

SPACE L. 59 (1975); Price, *The First Amendment and Television Broadcasting by Satellite*, 23 UCLA L. REV. 879 (1976); Note, *Recent Developments in the Law of Direct Broadcast Satellites*, 2 BROOKLYN J. INT'L L. 139 (1975); Note, *Direct Broadcast Satellites: FCC Adopts "Open Skies" Policy for Space Age Technology*, 4 COMM/ENT L.J. 749 (1982) [hereinafter cited as *Open Skies*]; Note, *Toward the Free Flow of Information: Direct Television Broadcasting Via Satellite*, 13 J. INT'L L. & ECON. 329 (1979) [hereinafter cited as *Free Flow*]; Comment, *Direct Broadcast Satellites and Freedom of Speech*, 4 CAL. W. INT'L L.J. 374 (1974).

5. *See* Dauses, *supra* note 4.

6. *Free Flow, supra* note 4, at 331-32.

7. Note, *The Listener's Right To Hear In Broadcasting*, 22 STAN. L. REV. 863 (1970).

8. *Id.* at 864.

9. *The Curtain's Going Up On DBS: Television's Next Frontier*, BROADCASTING, Sept. 15, 1980, at 36.

10. *In re* Inquiry Into The Development of Regulatory Policy In Regard to Direct Broadcast Satellites For The Period Following The 1983 Regional Administrative Radio Conference, 86 F.C.C.2d 719 ¶ 26 (1981) [hereinafter cited as Interim Policy Rep.]; NAT'L TELECOMMUNICATIONS AND INFORMATION ADMIN., U.S. DEP'T OF COMMERCE, DI-

sharp improvements in picture and sound quality. High definition television is a unique service that has been proposed.[11] This is a system featuring increased resolution and improved color quality, and could possibly include a wider screen aspect ratio and stereophonic sound. Another unique service features audio transmissions in more than one language.[12]

These economic and technical advantages make the stakes high in the upcoming struggle for control of the DBS market. DBS has the potential to fundamentally alter the economies of broadcasting. Therefore, broadcasters and others in the telecommunications industry, along with federal regulators, can be expected to devote an increasingly large share of their resources to the fight.[13]

II. REGULATORY GOALS FOR DBS

A. DIVERSITY

Diversity in broadcasting refers not only to a varied mix of commercial, educational, political, and entertainment programming,[14] but also to dynamic programming within each of these types. It seeks a range of voices speaking on more or less the same topic in more or less the same context. Diversity in programming helps to assure that more than just majority wants are satisfied. It is thought to be commendable in and of itself since it tends to improve awareness and to stimulate balanced discourse among citizens.

B. CONSUMER SOVEREIGNTY

Consumer sovereignty means that the buyer determines what will be offered for sale. The seller may control or constrain the choices, but he selects only the products that the buyer wants; the producer remains under the thumb of the consumer. Consumer sovereignty in broadcasting involves the receiver, as the consumer, choosing which programs, the commodity, are broadcast. A broad-

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RECT BROADCAST SATELLITES: POLICIES, PROSPECTS, AND POTENTIAL COMPETITION (1981) [hereinafter cited as NTIA STUDY].

11. HOUSE COMM. ON GOV'T OPERATIONS, DIRECT BROADCAST SATELLITES: INTERNATIONAL REPRESENTATION AND DOMESTIC REGULATION, H.R. REP. NO. 730, 97th Cong., 2d Sess. 17 (1982) [hereinafter cited as HOUSE REP.].

12. *Kwit's Design For DBS: Multichannel Program Mix Showcasing Bilingual Pix'*, Variety, Dec. 22, 1982, at 30, col. 1.

13. *See, e.g., supra* note 2. While the service improvements and technical advantages in a direct broadcast system do not result from advances in broadcast technology, the attraction such features hold for policymakers suggests that the attention given the developing DBS market by federal regulators will increase over time.

14. Pikus, *Legal Implications of Direct Broadcast Technology*, 3 J. SPACE L. 39 (1975).

cast system that emphasizes consumer sovereignty will generate greater financial returns, thus ensuring continued economic viability while contributing to national prosperity.

It is apparent that federal regulation has, at a minimum, two paramount goals: consumer sovereignty and program diversity.[15] Since telecommunications in the United States is generally viewed as a private enterprise, the goal of consumer sovereignty is antecedent in nature, unlike the goal of diversity, which becomes paramount only after a broadcasting system is established.

The various technical limitations, market restrictions, and public service requirements that are promulgated by the FCC serve, implicitly as well as explicitly, to further these two primary goals. These goals complement rather than contradict one another. The airwaves are at once a commercial medium and a conduit for expression. To be consistent with the economic scheme in the United States, broadcasters should be permitted to maximize the return on their investment. To be consistent with the political scheme, both majority and minority tastes should be satisfied.

C. Preliminary DBS Regulation[16]

Unlike the situation in many other countries, in the United States telecommunications is generally seen as the business of the private sector. Nonetheless, many decisions regarding the development and operation of broadcast technologies, as well as program content, are made by the FCC. The FCC operates under certain constitutional[17] and statutory[18] constraints, and is also bound by the terms of any applicable treaties or documents to which the United States is a signatory.[19] The FCC's enabling legislation, the Communications Act of 1934,[20] has been construed by the United States Supreme Court as formulating "a unified and comprehensive regulatory system for the [broadcasting] industry."[21] Thus, despite the fact that direct broadcast technology was unknown to the drafters of

15. Also of great importance is the goal of expanding radio and television services nationwide. It is important for the same reasons as diversity in broadcasting, e.g., improved awareness.

16. For a more complete treatment of the FCC's interim regulatory actions, see generally *Open Skies, supra* note 4.

17. U.S. Const. amend. I.

18. 47 U.S.C. ch. 5 (1976 & Supp. V 1981).

19. *E.g.*, Treaty on Principles Governing The Activity of States in The Exploration and Use of Outer Space, Including The Moon and Other Celestrial Bodies, *open for signature*, Jan. 27, 1967, 18 U.S.T. 2410, T.I.A.S. No. 6347.

20. Ch. 652, 48 Stat. 1064 (codified as amended in scattered sections of 47 U.S.C.).

21. National Broadcasting Co. v. United States, 319 U.S. 190, 214 (1943).

the Act, the FCC will serve as the federal agency primarily responsible for overseeing and regulating the development of direct broadcast systems.

The Communications Act of 1934[22] was modeled in part after the Interstate Commerce Act and embodied much of the Radio Act of 1927.[23] Under its commerce power, Congress delegated to the Federal Communications Commission the task of "regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, nation-wide and world-wide wire and radio communication service with adequate facilities at reasonable charges."[24] The critical phrase establishing the standard to which the Commission must conform is action consistent with the "public interest, convenience, and necessity."[25]

The scope of this congressional delegation of authority is extremely broad. This breadth is evinced in two ways. First, because the Communications Act purports to have "formulated a unified and comprehensive regulatory system for the [broadcasting] industry,"[26] the delegation is facially broad, and second, despite tremendous changes in, and growth of, new broadcast technologies, the Commission has been allowed to function dynamically, regulating technical innovations beyond any imagined by the original drafters of the legislation. Thus, although direct broadcast satellites do not adequately fit either the definition of common carriers or the definition of broadcaster, the legislation allows the Commission to assume jurisdiction.[27]

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22. Ch. 652, 48 Stat. 1064.

23. *Compare* National Broadcasting Co. v. United States, 319 U.S. 190 (1943) (Justice Frankfurter's recounting of the historical developments that led to the enactment of the Act) *with* Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1 (1959) (Professor Coase's account of the developments leading to enactment).

24. 47 U.S.C. § 151 (1976).

25. *Id.* §§ 307(a), (d), 309(a), 310, 312 (1976 & Supp. V 1981).

26. *See supra* note 21.

27. The scope of the Commission's power is not unlimited, however. It does not have authority to regulate the entire electromagnetic spectrum allocated to the United States under international treaty. All "radio stations belonging to and operated by the United States" are exempt from the Commission's jurisdiction. 47 U.S.C. § 305 (1976 & Supp. V 1981). The White House Office of Telecommunications Policy regulates radio stations operated by various agencies and departments of the federal government (including the military), and this accounts for approximately one-half of the total available frequency space. *See Metzger & Burrus, Radio Frequency Allocation in the Public Interest: Federal Government and Civilian Use*, 4 DUQ. L. REV. 1 (1966). It should therefore be remembered that the scarcity of spectrum space is not entirely a problem of physics. Even where the Act allows the FCC to exercise jurisdiction, there are areas in which the courts have forbidden it to act. The Commission

On June 1, 1981, in a rulemaking proceeding, the FCC released certain findings regarding interim and permanent regulatory policy for DBS.[28] The development of direct broadcast was found to be in the public interest, convenience, and necessity, and the Commission proposed to allocate a portion of the spectrum for it, following the 1983 Regional Administrative Radio Conference. Relying on a study prepared by the FCC's Office of Plans and Policy,[29] the Commission decided not to classify DBS as either common carriers or broadcasters, and to issue future regulations on an ad hoc basis. This study concluded that minimal technical and market restrictions were warranted because of the riskiness involved and the likelihood of competition. A "hybrid" model was urged for DBS and all unregulated services, based solely on concerns for efficient spectrum use and certain spectrum management responsibilities.[30] The chief advantage was said to be one of allowing the Commission to buy time while it waited to see how the market developed.[31]

Neither Congress nor the Commission has yet decided upon a permanent regulatory classification.[32] Classifying any new multifunctional service has become a difficult legal task. Despite the FCC's broad discretion under the Communications Act, courts have overturned its service classifications.[33] The Staff Report concluded that "broadcasting" could be distinguished from point-to-point communications, and that direct broadcasting might not necessarily fall under the broadcast rubric.[34] At least some commentators have challenged this conclusion, arguing that any service intended to reach a broad segment of the population triggers broadcast regulation.[35] In 1981, the Commission decided to accept proposals with

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may not decide or enforce antitrust issues that are covered as well by the Sherman or Clayton Acts. United States v. Radio Corp. of Am., 358 U.S. 334 (1959). It is, in fact, free to ignore policies favoring competition if to do so would be in the public interest, convenience, or necessity. FCC v. RCA Communications, Inc., 346 U.S. 86 (1953). Similarly, the Commission does not determine whether advertising is false or misleading, because that activity has been delegated to the FTC. *See* H. ZUCKMAN & M. GAYNES, MASS COMMUNICATION LAW 288 (1977).

28. Interim Policy Rep., *supra* note 10.

29. FCC OFFICE OF PLANS & POLICY, POLICIES FOR REGULATION OF DIRECT BROADCAST SATELLITES 115 (1980) [hereinafter cited as STAFF REP.].

30. *Id.* at 87.

31. *Id.* at 88.

32. Winter, *Satellite Broadcasts Pose Quandary for FCC*, 66 ABA J. 837 (1980). A symposium concerned in large part with the legal classification issue appears in 33 FED. COM. L.J. 169-330 (1981).

33. *E.g.*, Functional Music, Inc. v. FCC, 274 F.2d 543 (D.C. Cir. 1958), *cert. denied*, 361 U.S. 813 (1959).

34. STAFF REP., *supra* note 29, at 115.

35. Lyons & Hammer, *Deregulatory Options for a Direct Broadcast Satellite Sys-*

"any or none" of the traditional broadcast, common carrier, or private radio elements.[36] The Commission, however, reserved discretion to impose broadcast regulation on any proposal depending on, inter alia: (1) the method of financing, (2) whether the service will be offered to the general public, and (3) the degree of control over program content. Applicants may nonetheless argue that they are not in fact proposing broadcast services.[37]

Currently, other subscription services are classified in a variety of ways. Subscription FM radio is classified as a hybrid, receiving some, but not all, of the broadcast regulations.[38] Multipoint Distribution Service is classified as a common carrier.[39] Subscription television services are classified as broadcasters,[40] although that classification has been hotly contested.[41] Arguments based on legislative history are adequately summarized in both the staff report and the commentary. Whether the Commission ultimately classifies DBS as a hybrid service and applies regulations ad hoc, or whether it classifies DBS as broadcasting and forebears from most broadcast regulations, it will probably remain equally loyal to congressional intent. What is significant is that the Commission, in applying restrictive rules to direct broadcast, depart from its past practice of first considering the financial well-being of existing stations.[42]

As an industry, broadcasting is financially healthy at present.[43] As expected, economic opposition to support for DBS is strong. Opponents will attempt, for example, by contesting classifications, to persuade the Commission or the courts to adopt policies which will

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tem, 33 FED. COM. L.J. 185 (1981). Statutory authority to forebear from regulation is discussed in Fowler & Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207 (1982).

36. Interim Policy Rep., *supra* note 10, ¶ 89.

37. *Id.* at 750 n.64.

38. *See* FM Table of Assignments, 61 F.C.C.2d 113, 117 (1976).

39. Midwest Corp., 53 F.C.C.2d 294, 297 (1975).

40. Subscription Television Serv., 3 F.C.C.2d 1 (1966), *aff'd*, Fourth Report and Order, 15 F.C.C.2d 466 (1968).

41. Chartwell Communications Group v. Westbrook, 637 F.2d 459 (6th Cir. 1980).

42. Possibly the silliest aspect of a TV license challenge is the solemn consideration of various contenders' financial qualifications. At one point in the subsequent years of litigation [involving a battle for Channel 7 in Boston], it was officially determined (subject to endless review) that the "black" group could not afford to run a TV station. This is like concluding that someone cannot afford to win the Irish Sweepstakes.

Kinsley, *Gifts of the Nation*, NEW REPUBLIC, Oct. 14, 1981, at 21, 23.

43. "[D]ouble digit revenue increases are almost a given in this industry." Value Line Investment Survey, Jan. 7, 1983, at 376 (ranking the industry 17th of 93 for "timeliness"). *See also* Wall St. J., Feb. 22, 1983, at 10, col. 2 (showing a 175% gain in fourth-quarter 1982 earnings for the industry as a whole).

minimize the impact of DBS on the national broadcast system.[44] These actions are desirable only to the extent that diversity is improved or consumer choice is strengthened. The Commission's task will be to consider which regulatory program maximizes both goals.

III. POSSIBLE DBS REGULATORY PROGRAMS

There are four possible regulatory programs available for DBS. Where pertinent, the justifications for each will be propounded, the methods traditionally used will be listed, and the effects of DBS will be considered. Finally, the extent to which each program furthers the goals of diversity and consumer sovereignty will be examined. The alternatives include:

A. Traditional broadcast regulation under Title III of the Act,
B. Traditional common carrier regulation under Title II of the Act,
C. Forebearance from regulation, or complete reliance on market forces, and
D. Hybrid regulation, involving a mix of broadcast and common carrier regulations and policies, determined by the effect of the new service on the existing regulated market or the national broadcast system.

A. TRADITIONAL BROADCAST REGULATION

Traditional broadcast regulation under Title III of the Communications Act[45] involves a complex system of rules and procedures, some of which are supported by justifications not consonant with the goals identified above.

1. *Justifications*

Justifications for federal regulation of broadcasting can be grouped into three general areas: technical, economic, and political/social.[46] In general, these justifications are not interrelated. Rather, they are united only in a deeper sense as manifesting a policy judgment that there is a strong federal interest in shaping the structure and behavior of the broadcast industry.

a. *Technical Justifications*

The primary technical justification for broadcast regulation is

44. *See supra* note 13 and accompanying text.
45. Ch. 652, 48 Stat. 1064, 1081 (codified as amended at 47 U.S.C. §§ 301-397).
46. One could add historical. The journalism industry did not regard the media when it was new as a place for "serious" journalism. *See* Bazelon, *FCC Regulation of the Telecommunications Press*, 1975 DUKE L.J. 213, 219-20.

scarcity.[47] Scarcity means two things: first, that there is a finite number of frequencies available for license, and second, that (unlike the print media) no two licensees can occupy the same frequency at the same time.[48] Absent federal regulation, the argument runs, anarchy would ensue as hundreds of broadcasters simply chose their own frequencies. Other spectrum users would be affected, as less crowded bands became desirable. An agency composed of experts, mindful of the public interest, can be viewed as an ideal entity for allocating this social resource. Achieving an efficient use of the spectrum and preventing users from interfering with each other's transmissions are the primary objectives of such an allocation.

b. *Economic Justifications*

The primary economic justification for broadcast regulation is the threat of monopolistic domination. This threat is partly historical.[49] Prior to 1926, the Radio Corporation of America, then owned largely by General Electric, had secured properties and patents from the American Marconi Company and formed a consortium with Westinghouse and A.T.&T., which linked all the necessary patents for radio transmission and reception under one roof. This so-called "radio trust" prompted Secretary of Commerce Herbert Hoover to testify at congressional hearings that radio communication should not "be considered as merely a business carried on for private gain."[50] Despite the coverage of present antitrust laws, the model of the "decreasing cost industry" continues to serve as a justification for the Commission's market structure regulations.[51] This model would justify regulation whenever a single company can provide consumers with the same service at a lower cost than several competing companies, because its average cost decreases as the amount of service it provides increases. In the absence of governmental control, consumers might be vulnerable to whatever service policies the monopolist feels are in its own best interests. Such "market failure" concerns prompt multiple ownership and cross-ownership restrictions.

47. *See* National Broadcasting Co. v. United States, 319 U.S. 190 (1943).

48. It should be noted that a system of private property rights seems well suited to the task of allocating a resource that, by its nature, cannot be occupied by two parties simultaneously. Coase, *supra* note 23, at 14.

49. For a fuller account, see *In re* Deregulation of Radio, 73 F.C.C.2d 457 (1979).

50. *Id.* at 462.

51. Comment, *Public Interest and the Market in Color Television Regulation*, 18 U. CHI. L. REV. 802 (1951); Robinson, *The Federal Communications Commission: An Essay on Regulatory Watchdogs*, 64 VA. L. REV. 169, 253 (1978).

c. *Sociopolitical Justifications*

Central to the sociopolitical justifications for broadcast regulation is the concept of "public trusteeship." The broadcast media, the argument runs, does not function only as a conduit of information, but also as a source of information. Indeed, it is a powerful and pervasive source. There exists a certain "immediacy of person-to-person communications" in broadcasting, and there is to some degree an inadvertence in receiving broadcasts.[52] In a society composed not only of consumers, but also of citizens,[53] there exists a concern that a purely private enterprise system will not, of its own, operate in a manner that maximizes the public interest. As Walter Lippman wrote, "the public interest may be presumed to be what men would choose if they saw clearly, thought rationally, [and] acted disinterestedly and benevolently."[54] Imposing on broadcasters, as public trustees, the obligation to provide programming considered important by the public leads to program content regulation.[55] Finally, imposition of diversity requirements may be supported by the fact that a broadcaster will wish to maximize his audience at any given time, and will thus focus on the most popular topics. In contrast, a newspaper publisher may have good financial reasons to feature some topics which are less popular, and readers interested in these topics must buy the whole paper to read about them.[56]

The methods of traditional broadcast regulation are suggested by the justifications noted above. Technical objectives are served by limitations on maximum allowable power, out-of-band emissions (and other interference rules), waveform specifications, and distortion limits. Economic objectives are served by multiple owner restrictions and cross-ownership rules. Political and social objectives are served by rules requiring service to the local community, as well

52. Bazelon, *supra* note 46, at 221.

53. *See* Sagoff, *At The Shrine Of Our Lady Of Fatima, or Why Political Questions Are Not All Economic*, 23 ARIZ. L. REV. 1283 (1981).

54. W. LIPPMAN, THE PUBLIC PHILOSOPHY 40 (1955), *quoted in* Note, *supra* note 7, at 874.

55. It has been demonstrated that the combination of public interest requirements and the usual judicially applied administrative requirements of consistency, rationality, and fairness inevitably lead to an internally inconsistent choice process. The results are severe: administrative efforts are frustrated, resources are wasted, the risk of corruption or illicit influence increases; public confidence in the process, law, and government are undermined. Spitzer, *Multicriteria Choice Processes: An Application of Public Choice Theory to Bakke, the FCC, and the Courts*, 88 YALE L.J. 717, 754 (1979) (suggesting that reform proposals must result in the relaxation of procedural constraints to be successful).

56. Note, *supra* note 7, at 886 (noting that broadcast programs are sold to advertisers as discrete time segments, while newspapers are sold as a complete package).

as by guidelines for religious, public affairs, and children's programming, by maximum commercial broadcast limits, and by the fairness doctrine.

2. *Effects of DBS on Justifications*

The effects of DBS on the traditional broadcast regulatory justifications are pronounced. In some cases, problems thought to call for such regulation may no longer exist, or may diminish greatly in importance. In at least one area, that of local interest, DBS will do nothing and may exaggerate concern.

a. *Spectrum Scarcity*

Technological advantages in a system of direct broadcast satellites could overcome the spectrum shortage that now purportedly restricts the number of channels available. The number of available frequencies would increase, and, since signal attenuation becomes less of a problem with satellite-to-ground transmission, higher frequencies may become technologically and economically feasible.[57] One account predicts that there will be enough usable spectrum in the 15-100 gigahertz range to provide 100 times the spectrum space now available.[58] Broadcast law has evolved in the context of a scarcity theory.[59] The lack of scarcity means that the federal government's control over broadcasting becomes less compelling.

b. *Undue Concentration of Control*

If a multiplicity of networks becomes feasible, then the problem of concentration of control could be eliminated.[60] As a wider range of program choices become available, the result could be the diminution in importance of mass audience programs and an increase in the success of specialized programs.[61] Alternatively, both types of programs could be significant. In either situation, the industry could become competitive.[62] Since the FCC has authority to consider the structure of the entire video services market,[63] whether or not it pro-

57. R. NOLL, M. PECK & J. MCGOWAN, ECONOMIC ASPECTS OF TELEVISION REGULATION 253 (1973). Currently it appears that the 1983 Regional Administrative Radio Conference will assign the 12.2-12.7 gigahertz range to DBS for Region II, which includes North America.

58. *Id.* at 253.

59. *See supra* note 47 and accompanying text.

60. *See* R. NOLL, M. PECK & J. MCGOWAN, *supra* note 57, at 274.

61. *But see* Levin, *Program Duplication, Diversity, & Effective Viewer Choices: Some Empirical Findings*, 61 AM. ECON. REV. 81 (1971).

62. *See* NTIA STUDY, *supra* note 10, at 32-33.

63. *See* STAFF REP., *supra* note 29.

ceeds on the presumption of a monopolistic industry structure is significant. If the focus of the Commission's inquiry is the market, then presumably the existence of other new video services (such as CATV, MDS, video discs and cassettes) will be taken into account. Rules that tend to operate as barriers to entry would increase the likelihood that a given firm might gain or retain an inordinate share of the market.

c. *Local Interest and Public Trustees*

Perhaps the most significant doctrine developed by the Commission in the area of traditional broadcast regulation is the local interest doctrine.[64] This doctrine requires broadcasters, in their capacity as public trustees, to take local needs and desires into account when making programming decisions.[65] Over the years a great number of rules and regulations have been promulgated, which are designed to insure strong local stations (thought to be responsive to local needs), or extensive awareness of local opinion (through community surveys), and programming that results from responsiveness.[66]

It should be clear that DBS cannot provide locally oriented programming.[67] A growing direct broadcast industry threatens the long run viability of local stations, and so a clear conflict of policies arises.

The Commission probably has the authority to depart from the local interest doctrine without obtaining congressional approval. Section 307(b) of the Act requires that "the Commission . . . make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same." Proponents of localism argue that the doctrine is mandated by this section, and thus any departure from it requires congressional action.[68]

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64. Comment, *The Promising Future of Direct Broadcast Satellites in America: Truth or Consequences?*, 33 FED. COM. L.J. 221, 222 (1981).

65. *See* FCC v. Allentown Broadcasting Corp., 349 U.S. 358 (1954).

66. Rice, *Regulation of Direct Broadcast Satellites: International Constraints & Domestic Options*, 25 N.Y.L. SCH. L. REV. 813, 845 (1980). For a general criticism of this doctrine and a proposal focusing on local interest rather than ownership, see H. FRIENDLY, THE FEDERAL ADMINISTRATIVE AGENCIES 53-74 (1962) (suggesting that communities should have the programs best adapted to their needs).

67. *See* R. NOLL, M. PECK & J. MCGOWAN, *supra* note 57, at 254; HOUSE REP., *supra* note 11, at 19; Rice, *supra* note 66, at 845; Comment, *Direct Broadcast Satelites: Ownership & Access to the New Technology*, 33 FED. COM. L.J. 245 (1981).

68. 47 U.S.C. § 307(b) (1982). Interim Policy Rep., *supra* note 10, ¶ 44.

The arguments against such a construction, however, are more compelling. The words "local" or "localism" do not appear in the statute. A "fair, efficient, and equitable distribution" can be made in the absence of rules requiring operation in or for specific localities. No specific command for local distribution is made. Finally, such a construction would be at odds with the broad discretion mandated by section 151 and contrary to the congressional intent to allot the Commission wide discretion in deciding how best to utilize the airwaves to attain a rapid, efficient, and nationwide radio service. The doctrine is thus a product of agency choice, not of statutory command.

Furthermore, the doctrine is ultimately concerned with local interest, not with local ownership.[69] The financial threat to local stations is only of incidental concern. While detrimental to certain local interests, DBS may well advance other local interests. News and public affairs that affect only a given community will not necessarily find an outlet in such a service, and yet, by making a new source of programming available, existing services may well increase the proportion of programming time devoted to local programming.[70]

Despite the potential increase of local interest programming, local control will be affected to some degree. Even though localism does not carry the force of a congressional policy judgment, it has become an important feature of the current regulatory program. Encouraging the development of nonlocal broadcasting in effect shifts authority from the local level to the national level, replacing community standards with federal standards.

Yet if localism is replaced with a policy emphasizing consumer sovereignty to a greater extent than at present, viewer tastes would not be ignored, and some mix of national, regional, and local stations would develop in whatever proportion the viewers demanded. As the broadcast market becomes more competitive, the need for federal protection of local interest becomes less compelling.

How well does traditional Title III regulation promote diversity? Broadcasters are subject to program content regulation. Should the programming mix in the aggregate become largely indistinguishable or repetitive, it is possible to direct broadcast resources into areas favored by minority tastes, or into areas favored by an overall public interest. Should the programming mix become diverse due to the introduction of new technologies, then such regulation becomes unnecessary.

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69. H. FRIENDLY, *supra* note 66, at 59.

70. HOUSE REP., *supra* note 10, at 19.

As for consumer sovereignty, traditional Title III regulation works at cross purposes. The Commission functions as a consumer surrogate, retaining sovereignty while ostensibly acting in the consumer's name. Conceptually, consumer sovereignty requires that buyer preferences be revealed through actual selection or choice rather than bureaucratic estimation.

B. Traditional Common Carrier Regulation

Title II of the Communications Act[71] vests authority in the FCC to regulate interstate telecommunications services. The Act contains specific controls intended to prevent communications common carriers from using the monopoly positions they hold in local markets in ways that are unfair to consumers. For example, the controls specifically prevent carriers from charging rates far in excess of costs, charging different groups different prices for the same service, or providing services below an acceptable standard of quality. Communications common carriers are loosely defined as firms offering a conduit for the transmission of information, but having no influence over the content of that transmission. The controls which are applied to such firms, similar to those that other earlier regulatory statutes applied to other industries, are, in general, rate of return regulations. They include determination of an allowable rate base, limitation of expenses to those considered allowable and prudent, consideration of revenue requirements, examination and acceptance or rejection of tariffs which are filed, and approval of construction expenditures.[72] The objective of such regulation is the prevention of abuse of strong economic power. It requires a determination by the FCC that the market is not competitive, presumably because in a competitive market no firm would have the ability or incentive to charge too much or provide less service than the public wanted. Until recently, much of the Commission's regulation appeared to presume that the market was monopolistic in nature. The emphasis has now changed, however; regulations are not strictly applied to nondominant firms and competition is promoted in areas of technological change.[73]

Traditional common carrier regulation differs from traditional broadcast regulation in two important ways. Broadcasters are subject to content regulation, while carriers are not, and carriers are subject to open access rules, while broadcasters are not. For regulatory purposes, the distinction is sharp: if a firm is not a broadcaster,

71. Ch. 652, 48 Stat. 1064, 1070 (codified as amended at 47 U.S.C. §§ 201-224).

72. *See* Staff Rep., *supra* note 29, at 44.

73. *Id.* at 48.

then it is a carrier, and vice versa.[74]

Common carrier regulation is often promoted by those who wish to avoid program content regulation. But telecommunications services that operate as common carriers are subject to open access requirements and close federal scrutiny of pricing, expenses, and returns.[75] The basis for such scrutiny is the familiar "market failure" scenario—the perception that competitive conditions do not exist in a given industry, and that protection against abuse is necessary. As noted, such regulation requires a determination that a given market is not competitive. The developing market for DBS is expected to be competitive, however.[76] Therefore, regulation as a common carrier may not be appropriate. In the absence of monopolistic market conditions, there is no principled basis for such a regulatory program, even if the level of scrutiny were reduced and the access requirements were eased. As was shown to be the case with traditional broadcast regulation, the development of DBS would appear to eliminate the conditions that gave rise to the classic regulatory justifications.

Title II regulation does not provide an effective tool for promoting diversity. No restrictions on program content are contemplated here; the programming would be as diverse as the programmers choose it to be. Broadcasters, not restricted in any way, would be free to develop as homogenous a blend of programming as they choose. Such regulatory neutrality does not affirmatively encourage diversity, and denying DBS operators the ability to control their programming, threatens the feasibility of the operations of DBS.[77]

With respect to consumer sovereignty, traditional Title II regulation would be preferable to Title III DBS regulation in that under Title II there would be no program content regulation interfering with programmers' responsiveness to viewer preferences. If regulated as a common carrier, however, there would be no incentive for DBS operators to pay any attention whatsoever to customer wants. Programmers would be free to select programming to suit their own tastes; with a regulated rate of return, the market would be hindered in its capacity to reward programmers who sought to satisfy buyer tastes.

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74. 47 U.S.C. § 153(h) (1976) (a broadcaster "shall not . . . be deemed a common carrier").

75. *See supra* note 5 and accompanying text.

76. See NTIA STUDY, *supra* note 10, at 31-32.

77. *See* Lyons & Hammer, *supra* note 35, at 203. *See also* Ferris, *Direct Broadcast Satellites: A Piece of the Video Puzzle*, 33 FED. COM. L.J. 169, 177 (1981) (suggesting that firms in this position create a separate subsidiary to develop programming).

C. Forebearance From Regulation

A total market approach to regulation involves the creation of private property rights in the electromagnetic spectrum.[78] This approach would confer upon holders of the right the power to act in their self interest. Regulations regarding certain existing technical limitations, such as interference rules or distortion limits, are not inconsistent with this approach and could conceivably be left in place.[79] Other statutory limits or treaty obligations would also circumscribe, to some extent, the property holder's rights. But to policymakers, the paramount feature of this system is the freedom it gives programmers to select and develop material for broadcast. In contrast to conventional broadcasting, DBS programs would develop strictly according to the dictates of the market.

The Commission's authority to forebear from regulation has been discussed and affirmed by commentators.[80] The FCC is free to experiment with new services in this way, and such experimentation is undoubtedly helpful in affirming or reconsidering classic regulatory justifications.

Awarding property rights in frequencies would seem to be consistent with the legal treatment of many other elements of the broadcasting business. Land and equipment, for example, are not licensed but are bought and sold. In addition, selling frequencies maximizes the direct broadcast operator's contribution to public revenue, perhaps even providing a pool of funds for a truly public television outlet.[81]

If property rights were sold to the highest bidder, however, the Commission would forever lose control over the operator's conduct. It is one thing to allow market mechanisms to serve as allocation, information, and efficiency devices; it is quite another to allow such a mechanism to determine the content of public interest requirements. Diversity would become practically nonobtainable for policymakers. Should the programming mix become entirely homogenous, the Commission would be left with no way to improve the offerings.

Consumer sovereignty would be maximized by this approach.

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78. *See generally* Coase, *supra* note 23; A. DeVany, R. Eckert, C. Meyers, D. Ohara, & R. Scott, A Property System Approach to the Electromagnetic Spectrum (1980) [hereinafter cited as Property System Approach].

79. NTIA Study, *supra* note 10, at 59.

80. *See supra* note 35 and accompanying text.

81. This has been suggested more often of late as budgetary cutbacks have apparently impaired the ability of the Corporation for Public Broadcasting to develop programming.

Consumers would no longer be represented by an agency of the federal government; their preferences could be expected to have a direct impact on the programming they receive.

D. Hybrid Regulation

Hybrid regulation borrows from the broadcast and common carrier models particular requirements and standards, determined by the Commission on a more or less ad hoc basis in response to changing market and political conditions. Its chief feature, and its chief danger, lies in its flexibility. In the past the Commission has applied this system to services that seem to fit neither the traditional broadcast nor the common carrier definition.

Prior to its classification as a common carrier, cable television was regulated in this manner.[82] At first, the Commission declined to assert its jurisdiction over cable television, reasoning that it fit neither the definition of communications common carrier nor the definition of broadcaster. But authority over cable was gradually asserted, beginning in 1962. In 1968, the United States Supreme Court explicitly recognized the doctrine of ancillary jurisdiction in upholding a Commission order restricting the expansion of a cable system in San Diego.[83] Concern had centered upon the impact of cable, not on the public, but on the broadcast industry. The argument advanced by the broadcast industry was that allowing cable to displace the existing broadcast system would result in the loss of local service, rural service, and free service. Such arguments ultimately persuaded the Commission to adopt rules forbidding duplicative programming, rules prohibiting commercial advertising, and regulations aimed at preventing program "siphoning." These rules were later struck down by the District of Columbia Court of Appeals.[84]

It is questionable whether the interests of the broadcast industry are equivalent to the interests of the public.[85] Certain elements of early cable regulation were inimical to diversity and consumer sovereignty. These elements include the weight accorded the perception of possible damage to UHF-TV plans or other service objectives, delay in recognition of the role that some new technology might play in our broadcast system, and an unreasoned application

82. The brief history here is adapted from Robinson, *supra* note 51, at 245-51 (1978). *See* also Comment, *supra* note 67, at 291-93; Besen, *The Economics of the Cable Television "Consensus"*, 17 J. L. & Econ. 39 (1974).

83. United States v. Southwestern Cable, 392 U.S. 157 (1968).

84. Home Box Office v. FCC, 567 F.2d 9 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 829 (1977).

85. Robinson, *supra* note 51, at 246.

of outmoded regulatory justifications and principles to this new technology.

In form, however, nothing prevents hybrid regulation from advancing interests in diversity and consumer sovereignty. If properly developed with an eye toward these goals, hybrid regulation is superior to traditional forms of regulation for new broadcast services.

IV. Regulation of DBS as a Hybrid Service

This Note proposes DBS regulation as a hybrid service. The FCC has agreed to regulate DBS as such for an interim period, adopting a wait-and-see stance until it becomes necessary to adopt a permanent regulatory program. Regulating DBS as a hybrid service has other advantages, apart from buying time while waiting to see how the market develops. It can be shown that permanent regulation as a hybrid best promotes both diversity and consumer sovereignty. Other major regulatory alternatives are not as successful in maximizing these complementary goals. They also rest, at least in part, on justifications that become outmoded following the introduction of direct broadcast services. Only the existing local interest doctrine appears to be in conflict with DBS operations, but even this doctrine is supported by justifications and concerns that are served by the goals of diversity and consumer sovereignty.[86]

It must be pointed out, however, that DBS will co-exist with other telecommunications services. A lightened regulatory burden may give something of an undue economic advantage to direct broadcasting. This advantage may be alleviated by application of certain other competitive principles to the licensing process.

Professor Coase argued in 1959 that, inasmuch as broadcast licenses were in and of themselves a valuable commodity, it was nonsense for the government to give them away for free.[87] Today, when a broadcast station is sold, the price is usually far in excess of the physical assets—a strong recognition of the license's intangible value. Furthermore, for the purchaser, it makes good sense to oppose the licensee's qualifications at the renewal hearing, while simultaneously negotiating the sale. Fearful that the license will be transferred for free, the licensee will seek a compromise involving either a lower price or a promise to end its opposition, or both.[88] As noted, broadcasting is presently lucrative;[89] the society that makes

86. *See supra* note 15 and accompanying text.

87. Coase, *supra* note 23, at 22-24 (failure to charge for the license results in an unfair increase in broadcaster's income).

88. Kinsley, *supra* note 42, at 22.

89. *See supra* note 43; Kinsley, *supra* note 42, at 21.

this success possible is entitled to some share of the returns.

Licenses for DBS frequency slots should be awarded to the highest bidder at an auction-type proceeding.[90] Such a license would include the right to transmit over a particular frequency for a stated period of time.[91] Free transferability would be allowed, and there would be a presumption in favor of renewal.

As an allocation device, an auction results in the awarding of a license between two otherwise comparable applicants on the basis of economic value. As an information device, it tells the Commission which channels are most valued, and can thus assist in the initial block frequency allocations. As an efficiency device, it benefits society by assuring, at probably the lowest cost, that the spectrum will be used in a manner that reflects the highest scarcity value to society.[92] Revenues collected from licensees would minimize any undue DBS financial advantage caused by a lightened regulatory burden.

Such a licensing system is not without some problems, however. The initial value of a license is likely to be low. It is open to question whether there is any necessary equivalency in the costs of regulation and those of obtaining a license. Applicants with superior economic power could conceivably overpower poorer applicants, thus distorting the public interest. Finally, renewal procedures must be considered.

There are at present a number of enterprises interested in beginning direct broadcast services.[93] There are, however, more frequencies available for transmission than there is interest. Thus, until all available frequencies are used, the value of a license is minimal.[94] In the first years of service, then, the costs saved by avoiding regulation would be greatly in excess of the costs of obtaining a license. The political pressure brought upon the Commission by broadcasters as a result would be strong. The answer to this objection is that giving direct broadcast a head start is not inconsistent

90. Accordingly, courts will have to relax the existing requirement that no single criterion determines which applicant is chosen. Spitzer, *supra* note 55, at 745.

91. The Staff Report recommends equating the duration of the license with the lifespan of the satellite. STAFF REP., *supra* note 29, at 60.

92. *See* STAFF REP., *supra* note 29, at 59 (recommending an auction approach). There is a substantial amount of literature suggesting that rights to broadcast be auctioned. *See, e.g.*, Coase, *supra* note 23, at 23-24, 30-35; PROPERTY SYSTEM APPROACH, *supra* note 78; Levin, *Spectrum Allocation Without Market*, 60 AM. ECON. REV. 209 (1970); Botein, *Comparative Broadcast Licensing Procedures and The Rule of Law: A Fuller Investigation*, 6 GA. L. REV. 743, 759 (1972).

93. *See supra* note 1. Prudential Insurance has invested $45 million in United Satellite Communications, Inc. Daily Variety, Feb. 3, 1983, at 1, col. 1.

94. STAFF REP., *supra* note 29, at 60.

with the larger goals of increasing diversity and enhancing consumer sovereignty. Furthermore, the effect is temporary. If lucrative, all the available spectrum space will soon be used, and the price of a license will increase sharply.

A disparity may continue to exist however, if there is no necessary equivalency between regulatory costs and broadcast license prices. Regulatory costs exist as a function of current definitions of the public interest and its requirements; beyond reacting to changing economic conditions, these costs are affected by changing social perceptions. Is there any reason to assume a correlation between regulatory costs and prices set by the market? The answer is yes, for the following reason: Costs, particularly those which are not susceptible to direct control, are a factor which is taken into account when a firm chooses a line of business to pursue.[95] Apart from factors such as expertise and overall strategic objectives, capital budgeting decisions are made on the basis of an expected rate of return and other measures of financial feasibility, which are affected by costs.[96] Compared with the level of regulatory costs imposed upon conventional broadcasters, the price that a firm would be willing to pay for a direct broadcast license would not be high enough to make conventional broadcasting a relative bargain. If the price were too low, an influx of bidders could be expected to drive it up. This is not to say that other factors (such as cheaper transmission costs) will not determine the license price, but only that some equivalency can be expected.

Instituting an auction system may result in applicants with superior economic leverage overpowering poorer applicants who propose less common or unique programming. Professor Coase anticipated this argument, and responded by saying:

> [I]t must be observed that resources do not go, in the American economic system, to those with the most money but to those who are willing to pay the most for them. The result is that, in the struggle for particular resources, men who earn $5,000.00 per annum are every day outbidding those who earn $50,000 per annum.[97]

In addition, any concerns directed at an undue accumulation of licenses would be met by existing antitrust law.[98]

The most problematic element in an auction system for direct

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95. This assumes that the same concerns would be interested in both pursuits, a tenable assumption given the nature of the entertainment industry. *See, e.g., What's Gone Wrong At Black Rock*, N.Y. Times, Oct. 31, 1982, § 3, at 1, col. 1.

96. For a general overview see T. COPELAND & J. WESTON, FINANCIAL THEORY AND CORPORATE POLICY (1979).

97. Coase, *supra* note 23, at 19.

98. *See supra* note 27.

broadcast licenses is the basis for renewal of the license.[99] Hearings to determine the "qualifications" entitling the licensee to continued possession provide an opportunity for competitors or prospective purchasers to put pressure on the license holder, substantially driving up costs and/or driving down the price.[100] Enumerating the qualifications—giving content to the phrase "public interest, convenience, and necessity"—is difficult, and the Supreme Court has announced that it will give wide deference to the Commission's conclusions, provided that a rational explanation exists and that procedural requirements are met.[101]

In one sense, awarding licenses through auctions is simply adding a payment to the present system.[102] In another sense, however, it is a device by which the FCC can work to assure adherence to public interest requirements. A license allows the Commission to condition continued operation upon adherence to stated minimum normative rules.[103] It is thus a compromise position, which allows the Commission some flexibility in ensuring that the public interest (e.g., diversity of program choices) is maintained. Renewal of the license should ordinarily follow as a matter of course, although the Commission might reserve the right to examine the diversity of services provided, or the adequacy of the distribution of services.[104] As noted, there is a difference between the interests and the values of consumers and of citizens.[105] Widely held political and social values are not maximized by public reliance on consumer conduct.

The Commission's task in such a regime is comparatively simple.[106] Frequency assignments for direct broadcast licenses will be made by auction, with only a minimum of procedural requirements. Licensees will have a strong presumption in their favor at the time of renewal; the Commission will reserve the right to withhold renewal if substantial adherence to certain general guidelines is lack-

99. The staff suggested simply holding another auction. STAFF REP., *supra* note 29, at 60.

100. In addition, the path may be opened for Government manipulation of the media. Bazelon, *supra* note 46, app.

101. FCC v. WNCN Listener's Guild, 450 U.S. 582 (1981).

102. Coase, *supra* note 23, at 25.

103. Both licenses and property rights involve the right to exclude, but licenses have a finite duration, and exist without the same constitutional protection as property rights. U.S. CONST. amend. V.

104. Alternatively, the Commission could limit itself to general prospective rulings, for example, only when it has determined that the market as a whole is deficient in diversity.

105. *See supra* note 53 and accompanying text.

106. For an argument that the public would generally benefit from increased market reliance by the Commission, see Fowler & Brenner, *supra* note 35.

ing. Such guidelines would have as their purpose the attainment of diversity in program offerings and the effectuation of consumer choice in the entire broadcast market. The continued financial health of existing broadcasters would not be a factor.

CONCLUSION

The development and prosperity of direct broadcast technology promises to drastically improve our national broadcast system. Simultaneously, the range of program choices could be expanded and the ability of consumers to select the programs offered could be firmly established. This development offers a good opportunity for us to pause and rethink our philosophy of broadcast regulation, and to consider whether existing standards and methods of regulation comport with the state of the broadcast industry as it will likely exist once direct broadcast systems are in place. Neither skepticism nor the economic self-interest of current broadcasters should become obstacles to selecting the appropriate system of regulation. We should learn from the mistakes of the past, and reconsider the criticisms of the existing regime before we apply federal regulatory law to this exciting new technology.

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