

THE ROLE OF THE FEDERAL COMMUNICATIONS COMMISSION, CONGRESS AND
THE COURTS IN THE BATTLE BETWEEN COMMERCIAL BROADCASTERS AND
CABLE TELEVISION OPERATORS: MUST-CARRY, THE DIGITAL TRANSITION AND
BEYOND

By

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A DISSERTATION PRESENTED TO THE GRADUATE SCHOOL
OF THE UNIVERSITY OF FLORIDA IN PARTIAL FULFILLMENT
OF THE REQUIREMENTS FOR THE DEGREE OF
DOCTOR OF PHILOSOPHY

UNIVERSITY OF FLORIDA

2010

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To my parents, Thomas and Jo-Ann Deeley—
Without your love, support and encouragement this would not have been possible.

ACKNOWLEDGMENTS

This dissertation caps a lengthy yet successful journey of rediscovery and would not have been possible without the patience, support and understanding of many people. The author would first like to acknowledge the guidance and direction provided by his advisor and dissertation chair, Dr. David H. Ostroff. He also expresses sincere thanks to his committee members: Dr. John W. Wright, Dr. Justin Brown and Professor Lyrissa Lidsky for their incredible patience and guidance over these many years.

The author also wishes to offer his heartfelt thanks to his family and friends. This endeavor has proven more challenging than imagined and without the love and support of family, friends, classmates the successful completion of this dissertation would not have been possible. A final thanks to Dr. David Goff and my colleagues at the University of North Florida for their encouragement, understanding and support during the completion of this study.

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Abstract of Dissertation Presented to the Graduate School
of the University of Florida in Partial Fulfillment of the
Requirements for the Degree of Doctor of Philosophy

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May 2010

Chair: David H. Ostroff
Major: Mass Communication

The competitive nature of the relationship between commercial broadcast television and cable television (CATV) and how to manage and control it has been a focus of the Congress, the Federal Communications Commission (FCC), and the courts for more than fifty years. The FCC's early view of CATV as a technology of convenience for use until broadcasters took advantage of the ultra-high frequency (UHF) channel allotment proved to be short sighted.

As CATV began to develop its own identity as a video content provider the FCC sought to restrict its growth in order to protect broadcasters. Through must-carry rules, market restrictions and signal importation limits, the FCC attempted to tip the competitive scales in broadcasting's favor. These efforts did not hinder, only slowed, CATV's growth.

This study examines the history of this important regulatory relationship between the federal government, broadcasters and CATV operators. It attempts to identify lessons to be learned from this complex and evolving relationship. Advances in

technology now allows consumers to access traditional broadcast or cable content through new platforms that do not easily fit into the existing regulatory framework. This dissertation also explores the challenges of applying policies designed for an analog telecommunications infrastructure to an emerging digitally dominated world that is replacing it.

CHAPTER 1 INTRODUCTION

“...our action today ensures that broadcasters will be able to deliver quality pictures and digital sound to the American public in the not too distant future.”

—FCC Chairman Dennis Patrick¹

The not too distant future Chairman Patrick made reference to regarding the transition from analog to digital broadcast television (DTV) in the United States proved to be overly optimistic. Instead, this important transition turned out to be one of considerable length. The implementation of DTV in the United States proved to be quite challenging for regulators, industry participants and consumers.² The conversion from analog to digital was originally scheduled for completion in 2006.³ However, Congress and the Federal Communications Commission (FCC) determined this date to be overly optimistic and delayed the move until February of 2009 because consumers and broadcasters were not on track to meet deadline criteria.⁴ This long standing “hard date” for the completion of the digital transition was just weeks away when Congress again intervened and passed the *DTV Delay Act* and pushed the final transition to June 12, 2009.⁵

The transition to DTV offered a new twist to the often contentious competitive connection between commercial broadcasters and the cable television (CATV) industry.

¹ Statement of FCC Chairman Dennis Patrick on Advanced Television, Tentative Decision and Further Notice of Inquiry in MM Docket No. 87-268, 3 FCC Rcd 6548 (1988).

² Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, Fifth Report and Order, 12 F.C.C.R. 12809 (1997) (hereinafter *Fifth Report and Order*).

³ *Id.* at 12850-51.

⁴ Deficit Reduction Act of 2005, S. 1932, 109th Cong. § 3002 (2006).

⁵ DTV Delay Act, S. 352, 111th Cong. (2009) (enacted).

This relationship is best chronicled historically through the FCC's repeated attempts over 50 years to enact and enforce must-carry rules on cable operators.⁶ The FCC justified must-carry as essential to protecting the long term viability of broadcasters to serve citizens who relied solely on over-the-air (OTA) reception.⁷ The must-carry/retransmission rules require cable operators to make available their system resources, in the form of bandwidth, to OTA television broadcasters for the carriage of their programming either through must-carry or retransmission consent.⁸

The must-carry rules require CATV operators to distribute the broadcast signal of any full-power commercial television station operating within the same television market as the cable system.⁹ Must-carry can only be triggered by the local broadcaster and requires the CATV operator to honor the request.¹⁰ A broadcaster can choose to waive its must-carry rights and instead enter into negotiations on a retransmission consent

⁶ See *In the Matter of...To Adopt Rules and Regulations Relating to the Distribution of Television Broadcast Signals by Community Antenna Television Systems*, Second Report and Order, 2 FCC 2d 725 (March 4, 1966); *Cable Television Report and Order*, 36 F.C.C. 2d 141 (Feb. 2, 1972); *Cable Communications Policy Act of 1984*, Pub. L. 98-549, 98 Stat. 2779; *Cable Television Consumer Protection and Competition Act of 1992*, Pub. L. No. 102-385, 106 Stat. 1460.

⁷ *Id.*

⁸ See 47 U.S.C. § 325 (2005) (section of the Communications Act of 1934 allowing commercial television broadcasters to decline must-carry and instead elect to negotiate a carriage agreement with cable operators).

⁹ 47 U.S.C. §534 (2009) (section of the Communications Act of 1934 covering the mandatory carriage requirements for local commercial television signals by local cable systems); See *generally* 47 U.S.C. § 535 (2009) (section of the Communications Act of 1934 codifying the mandatory carriage requirements for the carriage of local noncommercial television signals by local cable systems)

¹⁰ *Id.*

agreement.¹¹ If retransmission consent negotiations reach an impasse and prove unsuccessful, the broadcaster can withhold its signal from the cable system.¹²

When a segment of any industry, in this case the electronic media, “must” do something that directly benefits a competitor within the same marketplace, it is safe to assume that such a requirement will be challenged vigorously rather than followed voluntarily.¹³ The cable industry successfully resisted the FCC’s attempts to impose must-carry regulations on it beginning in the 1960s.¹⁴ After this series of failed attempts to enforce various incarnations of must-carry, the Supreme Court in *Turner Broadcast System v. FCC* (1997) (*Turner II*) narrowly ruled in favor of the Commission and determined the must-carry rules were constitutional.¹⁵

Turner II gave the National Association of Broadcasters (NAB) a much sought after victory over an increasingly competitive cable industry and has ruled the broadcast/cable relationship for more than a decade. However, the transition to DTV in general and the addition of multicasting in particular creates a series of new challenges that require the original rules to be amended in order to remain relevant and effective.

¹¹ 47 U.S.C. § 325 (2005) (Section of the Communications Act of 1934 that allows commercial television broadcasters to decline must-carry and instead elect to negotiate a carriage agreement with cable operators).

¹² *Id.*

¹³ See *Quincy Cable TV, Inc. v. FCC*, 248 U.S. App. D.C. 1 12 (1985); *Century Communications Corp. v. FCC*, 835 F.2d 292 304 (1987); *Turner Broadcasting System, Inc. v. FCC* 520 U.S. 180 (1997).

¹⁴ In the Matter of...To Adopt Rules and Regulations Relating to the Distribution of Television Broadcast Signals by Community Antenna Television Systems, Second Report and Order, 2 FCC 2d 725 (March 4, 1966).

¹⁵ *Turner Broadcasting System, Inc. v. FCC* 520 U.S. 180 (1997) (hereinafter *Turner II*) (held that the must-carry provisions under the 1992 Cable Act were consistent with the First Amendment because the rules furthered an important governmental interests and did not burden cable operators speech more than necessary to further those interests).

Unfortunately the regulatory answers to the multicasting challenge have not emerged with the clarity of a high definition television (HDTV) picture.

For more than a decade the relationship between cable operators and commercial television broadcasters has been defined by the Supreme Court's decision in *Turner II*.¹⁶ The Court held that the must-carry rules as written in the Cable Television Consumer Protection Act of 1992 (1992 Cable Act) were an acceptable infringement on the First Amendment rights of cable operators'.¹⁷ The must-carry rules are codified in section 534 of the Communications Act of 1934 and require all cable operators with a system capacity in excess of twelve channels to carry the signals of all local television stations as long as these local signals do not occupy more than one-third of the cable systems total channel capacity.¹⁸ The Court agreed with Congress and the Federal Communications Commission (FCC) that this First Amendment violation was necessary to promote the governments' interest in preserving the future viability of OTA broadcasting for households that did not subscribe to a multi-channel video provider such as cable.¹⁹

¹⁶ *Id.*

¹⁷ Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (codified in various sections of 47 U.S.C.) (hereinafter *Cable Act of 1992*).

¹⁸ See 47 U.S.C. §534 (2009) (section of the Communications Act of 1934 covering the mandatory carriage requirements for local commercial television signals by local cable systems); See generally 47 U.S.C. § 535 (2009) (section of the Communications Act of 1934 codifying the mandatory carriage requirements for the carriage of local noncommercial television signals by local cable systems) .

¹⁹ *Id.* (Congress specified in the Cable Act of 1992 a trio of government interests that are to be served by the must-carry laws: (1) preserving the benefits of local television service; particularly OTA television service; (2) promoting the widespread dissemination of information from diverse sources; and (3) promoting fair competition in the video marketplace).

This significant victory for broadcasters marked a reversal of fortune in more ways than one. First, it ended thirty years of cable industry successes in keeping must-carry from becoming law.²⁰ Second, and more importantly, must-carry as written at the time of the *Turner II* decision includes the added element of retransmission consent.²¹ The Cable Act of 1992 codified this by amending section 325 of the Communications Act of 1934.²² In addition to must-carry, Congress also required a cable operator to gain retransmission consent from the commercial broadcasters in its market to determine whether or not the broadcaster wished to opt for must-carry or instead preferred to negotiate a retransmission agreement.²³ Broadcasters that chose to forgo must-carry and instead opted to negotiate carriage terms with cable operators could now seek benefits that could include cash payments for giving cable systems permission to carry their broadcast signal.²⁴ Retransmission agreements last for three years before they expire and are subject to renegotiation.²⁵ The latest round of renegotiation is proving to be contentious in many media markets as broadcasters seek to maximize the cash

²⁰ See, e.g., *Quincy Cable TV, Inc. v. FCC*, 248 U.S. App. D.C. 1 12 (1985) (held that must-carry rules requiring “cable operators, upon request and without compensation, to transmit to their subscribers every over-the-air television broadcast that is “significantly viewed in the community” or otherwise considered local under the commission’s rules,” violated the First Amendment); *Century Communications Corp. v. FCC*, 835 F.2d 292 304 (1987) (held that the FCC must-carry rules were invalid as unjustified and unduly sweeping and were not justified by the FCC to further a substantial government interest that outweighed the incidental burden on cable operators First Amendment rights).

²¹ See 47 U.S.C. § 325 (2005) (Section of the Communications Act of 1934 that allows commercial television broadcasters to decline must-carry and instead elect to negotiate a carriage agreement with cable operators).

²² *Id.*

²³ 47 U.S.C. § 325 (3)(A) (2005).

²⁴ 47 U.S.C. § 325 (4) (2005).

²⁵ 47 U.S.C. § 325 (3)(B) (2005).

aspect of retransmission.²⁶ With broadcasters eyeing tens of millions of dollars in new revenue through retransmission agreements the cable industry is now preparing to wage “war” in response.²⁷ However, this latest battle between these two long standing foes is also complicated by the transition to Digital Television (DTV).²⁸

When this historic moment came to pass on June 12, 2009 broadcast television in the United States experienced its’ biggest transformation since black and white turned to color over fifty years ago.²⁹ This notable moment was the culmination of a process

²⁶ See generally Robert Marich, *Broadcast’s \$1 Billion Pot of Gold*, Broadcasting & Cable, July 7, 2008, available at <http://www.broadcastingcable.com/index.asp?layout=articlePrint&articleID=CA6575703> (the author sites research that predicts broadcast station revenue derived from retransmission fees is expected to grow from 1.5% today to 10% by 2012); Mike Farrell, *Sinclair Counts Retrans Rewards: Station Group’s Cash-For-Consent Push Pays off in 2007, With More Gains Forecast*, Multichannel News, Feb. 18, 2008 available at <http://www.multichannel.com/index.asp?layout=articlePrint&articleID=CA6533121> (Sinclair retransmission revenue tops \$67 million in 2008, up 14%); Nicholas J.C. Pistor, *St. Louis Television Station and Charter at Impasse*, St.. Louis Post-Dispatch, Dec. 21, 2008 available at <http://www.stltoday.com/stltoday/news/stories.nsf/stlouiscitycounty/story/917A1A632D7934D3862575260003F1D6?OpenDocument> (last visited Feb. 14, 2009) (Belo Corporation owned station KMOV sought to negotiate a retransmission consent agreement with Charter Cable that would have the cable company pay a penny per day per subscriber or \$1.6 million annually).

²⁷ Harry A. Jessell, *NCTA Declares War Over Retrans*, TV Newsday, Sept. 19, 2008 available at <http://www.tvnewsday.com/articles/2008/09/19/daily.8/> (National Cable & Telecommunications President Kyle McSarrow says his organization is preparing to challenge retransmission in response to some broadcasters demanding as much as a 500% increase in fee demands).

²⁸ Ted Hearn, *Lawmakers Troubled by Cable, LIN TV Spat: Claim Dispute Could be Confusing Consumers Ahead of DTV Transition*, Multichannel News, Oct. 22, 2008 available at http://www.multichannel.com/article/87526-Lawmakers_Troubled_By_Cable_LIN_TV_Spat.php (Congress worries that broadcasters and cable operators involved in contested retransmission negotiations that leads to a station being temporarily dropped could confuse viewers and lead them to see unnecessary DTV converter box coupons).

²⁹ See FCC Consumer Facts: Digital Television, at <http://www.fcc.gov/cgb/consumerfacts/digitaltv.html> (last modified Feb. 8, 2009)(the Commission provides answers to frequently asked questions including: what is digital television, why the switch is taking place, what the difference between analog and digital broadcasting is, and what consumers will need to receive digital television).

considerable in both length and complexity.³⁰ The major advantage of the transition to Digital Television (DTV) for the public is improved picture and sound quality.³¹ Additionally, broadcasters can now choose to multicast and simultaneously provide multiple video streams of programming to viewers over a single channel over their transmitters.³² Instead of the one channel equals one program limitation of analog broadcasting, a single broadcast station transmitting digitally could choose to multicast and offer as many as five separate Standard Definition (SD) programs to viewers.³³

The Federal Communications Commission (FCC) identified the new features of DTV and their successful implementation as important to the public interest.³⁴ These features include increased programming choices and improved picture quality.³⁵ It can also be argued that the “vast wasteland” former Federal Communications Commission (FCC) Chairman Newton Minnow described broadcast television as in 1961 is now growing vaster.³⁶

³⁰ 2 FCC Rcd 5125 (1987)

³¹ See PETER B. SEEL & MICHEL DUPAGNE, *Digital Television*, in COMMUNICATION TECHNOLOGY UPDATE 104, 108 (August E. Grant & Jennifer H. Meadows eds., 2004) (standard definition television utilizes 480 active lines of resolution... high-definition television (HDTV) begins with 720 lines of resolution... the current HDTV maximum resolution is 1,080 lines).

³² *Id.* at 105, (“it is feasible for U.S. broadcasters to transmit up to five standard definition television signals (SDTV) instead of one high-definition (HDTV) signal within the allocated 6 MHz digital channel”).

³³ *Id.* at 105.

³⁴ Fifth Report and Order, *supra* note 2.

³⁵ *Id.* at 12811.

³⁶ Newton N. Minnow, Chairman, Fed. Communication Comm’n, Television and the Public Interest, Address at the National Association of Broadcasters Annual Convention (May 9, 1961) (transcript available at www.americanrhetoric.com/speeches/newtonminnow.htm).

The ability to multicast offers broadcasters a unique opportunity to innovate and reinvent themselves in order to retain their long-term relevance in a quickly evolving and increasingly competitive mass media field.³⁷ During the transition from black and white to color, local affiliates of the big three broadcast networks dominated the ratings and faced no threat in the form of non-broadcast video competition.³⁸ The competitive landscape today is much different. Multichannel Video Program Distributors (MVPDs) have evolved in the form of cable operators, Direct Broadcast Satellite (DBS) providers, and telephone companies to compete with broadcasters for viewers.³⁹ Today more than 86 percent of U.S. television households access hundreds of non-broadcast channels through subscriptions to these various MVPDs.⁴⁰ This competition, while currently robust, was slow to develop due to a decade's-long FCC regulatory agenda centered on the protection of local broadcast television through restrictions on the

³⁷ *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Thirteenth Annual Report*, MB Docket No. 06-189, 56, (rel. Jan. 16, 2009) (hereinafter 2006 Video Competition Report) (Multicasting allows a television broadcaster the ability to process and deliver multiple streams of digital television programming simultaneously over a single 6MHz broadcast channel).

³⁸ CHRISTOPHER H. STERLING & JOHN MICHAEL KITROSS, *STAY TUNED: A HISTORY OF AMERICAN BROADCASTING* (Lawrence Erlbaum Associates, Mahwah, New Jersey, 3rd ed. 2002).

³⁹ 2006 Video Competition Report at 5. (Approximately 95.8 million of the 110.2 million TV households in the United States, or almost 87 percent, subscribe to an MVPD service).

⁴⁰ *Id.* at 3 (The FCC offers guidance on what it considers an MVPD... “the cable television industry and other established multichannel video programming distributors (“MVPDs”), including direct broadcast satellite (“DBS”) providers, home satellite dishes (“HSDs”), and broadband service providers (“BSPs”), as well as broadcast television licensees. We also examine other wireline video providers, including local exchange carriers (“LECs”), which have initiated commercial services using copper-based, fiber, and hybrid-fiber coaxial cable distribution technologies for video programming; open video systems (“OVS”);⁴⁰ and electric and gas utilities”).

growth of cable television.⁴¹ However, during the digital transition the FCC's pro-broadcast agenda has started to show signs of erosion.

In February of 2005, the FCC seemed to have put the DTV must-carry issue to rest when under the Chairmanship of Michael Powell it released its *Second Report and Order and First Order on Reconsideration (DTV Must-Carry Order)*.⁴² According to the Commission the rules as applied in *Turner II* failed to address several important issues relevant to this transition including dual carriage, multicast must-carry, and the definition of "primary video." The Commission attempted to resolve these issues in the *DTV Must-Carry Order* by determining digital must-carry would be similar to the current system and would not add additional carriage requirements on cable systems.⁴³

The transition to DTV and how the must-carry/retransmission rules will be applied opens a new chapter in the often adversarial relationship between television broadcasters and cable operators. It also provides an excellent opportunity to examine the FCC's historical performance in regulating these two industries and to determine the Commission's potential effectiveness moving forward in an era of rapid technological change. The FCC regulates both OTA television broadcasting and the cable industry and with oversight from Congress. While the FCC's *Must-Carry DTV Order* is still in effect now that the transition to DTV is complete broadcasters can be expected to

⁴¹ LUCAS A. POWE, *AMERICAN BROADCASTING AND THE FIRST AMENDMENT*, 216 (University of California Press, 1987) ("It took a while before the Commission (FCC) figured out how cable television fit into the scheme of broadcasting, but when it did its attitudes were clear: fear and loathing").

⁴² *Id.*

⁴³ *Id.*

continue to pressure Congress and the FCC to expand them to include additional programming streams.⁴⁴

Purpose

Change is nothing new when it comes to the technologies that power the delivery of media content in the United States. However, the framework governing such technologies has remained relatively static in its evolution as broadcast radio and television and to a lesser degree cable dominated the marketplace for decades. Innovation is proving to be a threat to this domination as new devices that connect to content through high-speed wired or wireless networks combine with increased competition in the MVPD market from direct broadcast satellite services and the entry of telephone providers into the distribution of video content.

This study will examine the competitive relationship between commercial broadcast television and the cable industry, focusing on the issue of must-carry as it relates to the overall governance of the mass media in the United States. We have enjoyed a period of regulatory tranquility that can be attributed to the more than fifty years of dominance of broadcast radio and television. This stability of core transmission technology, along with the long standing influence of the industry players on

⁴⁴ See 47 U.S.C. § 534 (2005) (section of the Communications Act covering the mandatory carriage requirements concerning the carriage of local commercial television signals by local cable systems); 47 U.S.C. § 535 (2005) (section of the Communications Act covering the mandatory carriage requirements concerning the carriage of local noncommercial television signals by local cable systems). And See *Carriage of Digital Television Broadcast Signals: Amendments to Part 76 of the Commission's Rules, Second Report and Order and First Order on Reconsideration*, CS Docket No. 98-120, 3 n.10 (rel. Feb. 23, 2005) (hereinafter *DTV Must-Carry Order*) (citing 47 U.S.C. § 534(b)(4)(B) "when the FCC adopts new standards for broadcast television signals, such as the authorization of broadcast high definition television (HDTV), it shall conduct a proceeding to make any changes in the signal carriage requirements of cable systems needed to ensure that cable systems will carry television signals complying with such modified standards in accordance with the objectives of this section).

government policies has led to little contention. There is a close relationship between industry organizations such as the National Association of Broadcasters (NAB) and Congress, the FCC, and the courts, and these players have embraced the status quo. The recent switch from analog to digital broadcast television provides a prime example of how long standing regulations and analog solutions fail to meet the challenges posed by digital technologies.

This research will explore the roles of the FCC, Congress and the courts in the regulation of cable and broadcast television. It will also examine how the must-carry rules translate into DTV and could be expanded to include the carriage of additional digital broadcast programming. Noticeably absent from this study is the role of the president. The influence of the president on broadcast and cable regulatory policy is dwarfed in comparison to the roles played by the legislative and judicial branches. Absent the president's power to appoint commissioners to the FCC, and designate the chair, the executive branch has largely been a passive bystander to the FCC, Congress and the courts in the areas central to this study.

Literature Review

Many scholars have written about the laws and regulations that govern telecommunications. The literature talks about how these regulations developed historically, how they are created politically, and what effect they have. Different works have looked at the economic perspectives of the businesses, the scientific developments of the different technologies, and the competing interests of the different media. Literature evaluated for this research includes general writings on the history of broadcast and cable, analysis of the First Amendment implications in communication

laws, definitions and studies of the evolution of the public interest standard, and works specifically addressing the must-carry rules.

Broadcast and Cable History

A great deal of research on the history of broadcast regulation has been done. However, much of the analysis begins with the Radio Act. There is much less attention paid to the pre-Radio Act years. Two significant exceptions are Marvin R. Bensman's *The Beginning of Broadcast Regulation in the Twentieth Century* and Erik Barnouw's *A Tower in Babel: A History of Broadcasting in the United States, Volume 1 – to 1933*.⁴⁵ Both authors provide detailed histories of the pre-Radio Act of 1927 era. A major focus of both books is the impact of World War I on radio, the role of Herbert Hoover and the National Radio Conferences, and the legislative debate leading to the passage of the Radio Act of 1927. The difficulty in obtaining much of the primary documentation of the legislative history of the Radio Act of 1927 was aided greatly from the citations contained in these two books.

Barnouw's work is nearly forty years old, but is still considered seminal in the field and is widely cited throughout the literature. Bensman's work is much more recent. While not as widely cited, Bensman is able to draw a useful parallel to early radio and the current Internet regulatory debate.⁴⁶

⁴⁵ MARVIN R. BENSMAN, *THE BEGINNING OF BROADCAST REGULATION IN THE TWENTIETH CENTURY* (McFarland & Co. 2000); ERIK BARNOUW, *A TOWER IN BABEL: A HISTORY OF BROADCASTING IN THE UNITED STATES VOLUME 1—TO 1933* (Oxford University Press 1966) (Barnouw authored two more volumes in his history of broadcasting in the United States, *The Golden Web Volume II – 1933 to 1953* and *The Image Empire Volume III – from 1953*).

⁴⁶ BENSMAN, *supra* note 45 at 222 (looked at the role of Hoover in early radio his concerns about the impact of radio on society is equally relevant to the Internet in the 21st century).

Louise Benjamin's *Freedom of the Air and the Public Interest: First Amendment Rights in Broadcasting to 1935* looks at free speech concerns during the 1920's through the enactment of the Communications Act of 1934.⁴⁷ Benjamin makes numerous references to the "public interest" throughout this period that are equally applicable to the study of the concept of "broadcast localism."⁴⁸ Her earlier essay, *Working it Out Together: Radio Policy from Hoover to the Radio Act of 1927* is even more on point.⁴⁹ She provides an excellent chronological overview of Secretary Hoover's series of Annual Radio Conferences and the high level of consultation between Hoover and the radio industry. Yet, there is not specific mention of localism.

In *Clarence C. Dill: The Life of a Western Politician*, Kerry Irish documents the role of Senator Dill in the drafting of the Radio Act.⁵⁰ Irish devotes an entire chapter of this biography to the subject of Dill's interest in radio and his leadership that led to the eventual passage of the Radio Act. Irish writes of Dill's "unifying the country" and balancing business and government concerns into legislation that helped define the role of broadcasting in American society for decades to come.⁵¹

⁴⁷ LOUISE BENJAMIN, *FREEDOM OF THE AIR AND THE PUBLIC INTEREST: FIRST AMENDMENT RIGHTS IN BROADCASTING TO 1935* (Southern Illinois University Press, 2001).

⁴⁸ *Id.* at 4, 54 (The "public interest" of the 1920s often referred to a pro-industry protection of its economic survival and the promotion of technological advancement. Eventually there would be a realization of the "public interest" of providing "program, issue and political" diversity).

⁴⁹ Louise Benjamin, *Working It Out Together: Radio Policy from Hoover to the Radio Act of 1927*, *Journal of Broadcasting & Electronic Media*, Spring 1998.

⁵⁰ KERRY E. IRISH, *CLARENCE C. DILL, THE LIFE OF A WESTERN POLITICIAN* (Washington State University Press 2000) (chapter six focuses on Dill's involvement and influence on early radio). See Also Donald G. Godrey, *Senator Dill and the 1927 Radio Act*, 23 *Journal of Broadcasting* 477 (1979).

⁵¹ *Id.* at 82.

Several books proved useful in providing a business perspective of the emerging radio industry during its rapid growth during the 1920s including: Robert Sobel's *RCA*⁵², *Looking Ahead*⁵³ by David Sarnoff, Kenneth Bilby's *The General: David Sarnoff and the Rise of the Communication Industry*⁵⁴ and *Big Business and Radio*⁵⁵ by Gleason Archer.

Journal writings from Philip Napoli⁵⁶, Erwin G. Krasnow and Jack N. Goodman⁵⁷, Steven Phipps⁵⁸, C. M. Jansky Jr.⁵⁹, and Robert Corn-Revere⁶⁰ offered multiple voices

⁵² ROBERT SOBEL, *RCA* (Stein and Day 1986) (a comprehensive history of RCA from its formation through the mid-1980's).

⁵³ DAVID SARNOFF, *LOOKING AHEAD: THE PAPERS OF DAVID SARNOFF* (Dr. Jerome B. Wiesner ed., McGraw-Hill 1968) (while Sarnoff is able to present himself in the best possible light, the opportunity to view a body of work that parallels the history of broadcasting in the United States is still valuable).

⁵⁴ KENNETH BILBY, *THE GENERAL: DAVID SARNOFF AND THE RISE OF THE COMMUNICATIONS INDUSTRY* (Harper & Row 1986) (Bilby classified this work as an unauthorized biography of Sarnoff, but he did work with "The General" at RCA for several years).

⁵⁵ GLEASON ARCHER, *BIG BUSINESS AND RADIO* (Arno Press 1971) (this is a broader analysis of the radio industry beyond Sarnoff and RCA).

⁵⁶ Philip M. Napoli, *The Localism Principle in Communications Policymaking and Policy Analysis: Ambiguity, Inconsistency, and Empirical Neglect*, *Policy Studies Journal*, September 22, 2001 (Napoli traces localism to the late 1790's and congressional subsidies for newspapers. He briefly touches on early radio before devoting most of his article to post 1934 broadcasting.)

⁵⁷ Erwin G. Krasnow & Jack N. Goodman, *The "Public Interest" Standard: The Search for the Holy Grail*, 50 *FED. COMM. L.J.* 605 (1998) (the authors begin their chronological view of the public interest standard with the Radio Act of 1912, but the focus of the article is after the Radio Act of 1927 and concludes with the view that while successful, the public interest standard is becoming less relevant as the number of "competing electronic voices" increases).

⁵⁸ Steven Phipps, *"Order Out of Chaos:" A Reexamination of the Historical Basis for the Scarcity of Channels Concept*, 45 *J. of Broad. & Electronic Media* 57 (2001) (Discussing the preference of high-powered stations to see the elimination of low-powered stations to lessen interference during the chaotic period prior to the Radio Act of 1927. The influence of the major radio companies on the government is also examined).

⁵⁹ C. M. Jansky, Jr., *The Contribution of Herbert Hoover to Broadcasting*, 1 *J. of Broad.* 241 (1956-1957) (These are remarks made by Jansky on behalf of Hoover when he accepted the 1957 Award for Distinguished Service from the National Association of Radio and Television

of analysis of this era of broadcasting without specific mention of localism prior to the passage of the Radio Act of 1927. This review also included a series of newspaper articles that parallels the period leading up to the passage of the Radio Act.⁶¹ Several websites provided access to a variety of useful material from the era of radio history covered in this project.⁶²

Broadcasters. The speech included mention of Hoover's view on the importance of a nation-wide broadcasting system).

⁶⁰ Broadcasting and the Public Interest: Hearing Before the S. Commerce, Science and Transportation Comm., 108 Cong. (2003) (statement by Robert Corn-Revere) (Corn-Revere begins his testimony on future recommendations regarding the history of the public interest regulatory model with a brief history that includes the terms origins from the Interstate Commerce Committee).

⁶¹ *Radio Development is One of World's Wonders*, WALL ST. J., Feb. 28, 1922 at 10 (quotes Hoover as realizing the use of radio for communication between single individuals was a "hopeless notion"); *No Danger of a Radio Monopoly*, WALL ST. J., Mar. 26, 1924 at 10 (AT&T president H.D. Thayer told attendees at the company's annual meeting the company was only interested in protecting its patents and was not interested in creating a radio monopoly); *Secretary Hoover Broadcasts His Views on Radio Situation*, N.Y. TIMES, Apr. 13, 1924, at XX17 (Hoover commented on preventing monopolies, censorship of the airwaves and trying to prevent interference); *For Control of Radio: Representative Seller Says He Will Urge Regulation of Broadcasting*, N.Y. TIMES, Sep. 5, 1924 at 16 (Rep. Celler wrote in this editorial that "the use of radio is becoming more and more a public utility, and the public must have a definite voice in its control and operation." He added his concern that AT&T and RCA had to this point been largely uncontrolled.); *Coolidge Favors Federal Control of Air for Radio*, N.Y. TIMES, Oct. 8, 1924 (Coolidge described radio as one of "our greatest blessing, properly safeguarded" and it was important to maintain government control.); *Hoover Opposes U.S. Full Radio Control*, WASH. POST, Dec. 7, 1924, at EF6 (Hoover told Congress he was withdrawing his support of radio regulation because of rapid change in the industry. He said federal regulation should not be established until the "pioneering period" ended.); *Hoover Wants New Check on Radio Stations*, CHRISTIAN SCIENCE MONITOR, Sep. 16, 1925, at 8 (Hoover expressed interest in developing a way to determine how a radiocasting station is serving the public interest.); *Congress Expected to Pass New Bill Regulating Radio*, N.Y. TIMES, Dec. 6, 1925, at XX16.; *Coolidge Opposes More Commissions*, N.Y. TIMES, Apr. 28, 1926, at 24 (President Coolidge was opposed to the creation of an independent commission to regulate radio.); *Radio Control Bill Action Forecast by Senator Dill*, CHRISTIAN SCIENCE MONITOR, May 8, 1926, at 2 (reports on the difference between the Senate and House versions of the radio bill and Dill's support for an independent commission).

⁶² See generally The FCC's Collected Engineering Documents <http://www.fcc.gov/mb/audio/decdoc/engrser.html> (the section on early radio offers access to most documents starting with the Radio Act of 1912)., Herbert Hoover's Introduction to Broadcasting, <http://www.fathom.com/feature/2219/> (provides access to the transcript and audio of an interview with Herbert Hoover discussing his view of broadcast history)., United States

The Politics of Broadcast Regulation is a book that takes an analytical approach to regulation of broadcast. The authors created their own model of the broadcast regulatory process and identified five key participants in the process: the FCC, the broadcast industry, the courts, the public, and the White House.⁶³ Their purpose in creating this model was to create a construct to help explain how telecommunications policy is created and the role of politics in the process.⁶⁴ At the time of publication, little work had been done looking at the political background of telecommunication regulation and this work filled that void. Though the book does not directly address the must-carry rules or digital television, the research is still invaluable in showing how the different players come together to establish communications law.

In *TV or CATV? A Struggle for Power*, Attorney Edward V. Dolan examines the role Congress and the FCC played in the early development of broadcasting and eventually cable television.⁶⁵ He describes a very favorable regulatory climate for the initial commercialization of the airwaves and the successful promotion of the interests of the corporate broadcasting pioneers.⁶⁶ This trend continued as television arrived and became the dominant source for entertainment and news in the United States.⁶⁷ In his view, the relationship between regulators and the industry focused almost exclusively

Early Radio History, <http://earlyradiohistory.us/sec023.htm> (access to html versions of the reports from the four National Radio Conferences).

⁶³ ERWIN G. KRASNOW & LAWRENCE D. LONGLEY, *THE POLITICS OF BROADCAST REGULATION* 23 (St. Martin's Press 1982).

⁶⁴ *Id.* at 2.

⁶⁵ EDWARD V. DOLAN, *TV OR CATV? A STRUGGLE FOR POWER* (National University Publications Associated Faculty Press, Inc. 1984).

⁶⁶ *Id.*

⁶⁷ *Id.*

on serving the private interest of profit at the expense of the public interest.⁶⁸ Dolan describes cable's initial subservient role to the broadcast industry and its eventual evolution into a competitive threat to broadcast television's massive audience.⁶⁹ He also foretells of cable's future development of two-way communication services and the industry's brilliance in following the lead of broadcasters in attempting to lobby for favorable legislative and regulatory treatment from Congress and the FCC.⁷⁰

In *Cable Television and the FCC*, Don R. Le Duc provides an historical overview of the relationship between cable and broadcast television.⁷¹ He begins with the Radio Act of 1927 and proceeds through the advent of broadcast television, and later cable.⁷² The author identifies cable as the first threat to the broadcast regulatory structure.⁷³ He further notes that the justifications for broadcast regulation cannot be applied to cable because cable is unlicensed and does not utilize public airwaves to deliver its content.⁷⁴ Le Duc makes the argument that cable should be freed from the repressive regulatory structure that favored broadcast at cable's expense so that both technologies could fairly compete in the marketplace.⁷⁵ Though Le Duc's book was written in 1973, it is

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ DON R. LE DUC, *CABLE TELEVISION AND THE FCC* (Temple University Press 1973).

⁷² *Id.*

⁷³ *Id.* at 1.

⁷⁴ *Id.* at 72.

⁷⁵ *Id.* at 187-88.

relevant today because it foresaw cable's ability to compete with broadcast and many of the problems that this competition would produce.

Le Duc followed up with a second book, entitled *Beyond Broadcasting: Patterns in Policy and Law*, in which he raises broad questions about the role of regulation in broadcasting.⁷⁶ In his introduction, Le Duc says he hopes to look at what different communications regulations have achieved, and to also consider how regulation has limited competition or hindered the industries that are regulated.⁷⁷ Le Duc studies a broad range of regulations from the licensing process to content control.⁷⁸ The author points out that regulation has had both negative and positive effects within the market, but seems to conclude that some degree of regulation is necessary.⁷⁹

Gary S. Lutzker is a telecommunications analyst with the New York City Department of Telecommunications and Energy. In his 1994 article, *The 1992 Cable Act and the First Amendment: What Must, Must Not, and May Be Carried*, the author discusses provisions of the 1992 Cable Act, specifically "syndex" rules and must-carry rules.⁸⁰ The article provides a history of must-carry dating back to the 1960s and outlines the cable industry's prior successes in overturning the must-carry rules on

⁷⁶ DON R. LE DUC, *BEYOND BROADCASTING: PATTERNS IN POLICY AND LAW* (Longman Inc. 1987).

⁷⁷ *Id.* at 2.

⁷⁸ *Id.* at 43-50 and 57-66.

⁷⁹ *Id.* at 149 and 161.

⁸⁰ Gary S. Lutzker, *The 1992 Cable Act and the First Amendment: What Must, Must Not, and May Be Carried*, 12 *Cardoza Arts & Ent.*, L.J. 467, (1994).

constitutional grounds.⁸¹ The article was written during the time when the 1992 Cable Act was facing major legal challenges and on the eve of the *Turner I* decision.⁸²

Must Carry and the Courts: Bleak House, The Sequel is an analysis of the Court's decision not to rule on the issues raised in the challenge by Turner Broadcasting System over the must-carry retransmission consent rules of the 1992 Cable Act.⁸³ The author, Nicholas W. Allard, an attorney and former advisor to the United States Senate Judiciary Committee, concludes that, regardless of the outcome of the legal challenges to the 1992 Cable Act, the failure of Congress to pass comprehensive reform legislation for the telecommunications media was distressing.⁸⁴ This lack of regulation was detrimental to the transition from a monopoly dominated model of media markets to one of competition by multiple sources.⁸⁵ Allard wrote this article prior to the passage of the Telecommunications Act of 1996 which would address many of the concerns raised in the article. Though now outdated because of significant changes in the law, the article is a well reasoned argument for congressional legislation promoting competition.⁸⁶

Lawrence H. Winer, an Arizona State University Law professor, addresses his perceived failure of the Court to adequately define the First Amendment rights of cable operators in comparison with previous decisions which outlined those rights for the print

⁸¹ *Id.*

⁸² *Id.*

⁸³ Nicholas W. Allard, *Must Carry and the Courts: Bleak House, The Sequel*, 13 *Cardoza Arts & Ent.*, L.J. 139 (1994).

⁸⁴ *Id.*

⁸⁵ *Id.* at 155.

⁸⁶ *Id.*

industry and for broadcasters.⁸⁷ His article, *The Red Lion of Cable, and Beyond? Turner Broadcasting v. FCC*, is a review of the *Turner* case, prior to the Courts' ruling and an argument for clear definitions of the rights of cable operators.⁸⁸ The article discusses how Congress learned from *Quincy* and *Century* and carefully tailored the language used in the 1992 Cable Act to protect it from similar successful legal challenges.⁸⁹ The author concludes however, that beyond congressional word choice, cable technology needed the Court to give cable and future technologies the same First Amendment protections given to print media.⁹⁰ The article acknowledges that its' time was one where technology was rapidly developing and the law was failing to develop at a comparable rate.⁹¹

The Erosion of First Amendment Protections of Speech and Press: The "Must-Carry" Provisions of the 1992 Cable Act was written in 1995 and attacks the must-carry provisions of the 1992 Cable Act.⁹² The author, Michael W. Maseth, contends that must-carry rules were unconstitutional because they were content-based restrictions that infringed on the First Amendment rights of cable operators.⁹³ He notes "although some consumers may be unable to afford cable television, this economic disparity

⁸⁷ Lawrence H. Winer, *Red Lion of Cable, and Beyond? Turner Broadcasting v. FCC*, 15 *Cardoza Arts & Ent.*, 1 (1994).

⁸⁸ *Id.*

⁸⁹ *Id.* at 17.

⁹⁰ *Id.* at 68.

⁹¹ *Id.* at 67.

⁹² Michael W. Maseth, *The Erosion of First Amendment Protections of Speech and Press: The "Must-Carry" Provisions of the 1992 Cable Act*, 24 *Cap. U. L. Rev.* 423 (1995).

⁹³ *Id.*

argument is based on the faulty premise that the public can receive information only through [broadcast] television”⁹⁴ Instead, the author suggests that cable is but one option in a multiple media world.⁹⁵

Taking a historical perspective, *The Cable Communications Policy Act of 1984: A Balancing Act of the Coaxial Wires*, reviews the first amendment of the 1934 Communications Act to include cable-specific regulation.⁹⁶ The article, written by Michael I. Meyerson, is valuable because it discusses the initial response to the emerging technology and the challenges that the advent of cable presented.⁹⁷ Meyerson, a law professor at the University of Baltimore School of Law, was among the first to conclude that cable was a unique entity in communications and must be considered separate from broadcasters and common carriers.⁹⁸

Jerome A. Barron, a professor at the George Washington University School of Law, analyzed the *Turner II* decision, focusing on Justice Breyer’s balancing approach to competing First Amendment interests.⁹⁹ He supports Justice Breyer’s conclusion that new technologies will have new participants, each with their own First Amendment interests.¹⁰⁰ The author agrees with Breyer that the various stakeholders in any First

⁹⁴ *Id.* at 434.

⁹⁵ *Id.*

⁹⁶ Michael I. Meyerson, *The Cable Communications Policy Act of 1984: A Balancing Act of the Coaxial Wires*, 19 Ga. L. Rev. 543 (1985).

⁹⁷ *Id.*

⁹⁸ *Id.* at 545.

⁹⁹ Jerome A. Barron, *The Electronic Media and the Flight From First Amendment Doctrine: Justice Breyer’s New Balancing Approach*, 31 U. Mich. J.L.Ref. 817 (1998).

¹⁰⁰ *Id.*

Amendment debate should each have a voice and, although some freedoms may be infringed, the overall result should be one that balances all interests.¹⁰¹

Much has been written about the evolution of the cable industry. *Pioneers of Cable Television* talks about the birth of cable technology in the hills of Pennsylvania and profiles the ten men who forged the new technology and their entrepreneurial spirit.¹⁰² *Cable Cowboy* documents the growth of cable as a competitor in the media marketplace thanks to the vision of John Malone.¹⁰³ Malone took a small western Texas cable company called TCI and through his aggressive acquisition of additional cable systems, turned TCI into a leader in the cable industry and turned cable into a recognized force in media.¹⁰⁴ Similarly, *Comcasted*, tells the story of Ralph and Brian Roberts who built Comcast, the largest cable operator existing today.¹⁰⁵ Finally, *The Rise of Cable Programming* discusses how cable programming has evolved and how, in the beginning, it simply mirrored or reran broadcast television, but eventually came to make its own, unique contribution to content.¹⁰⁶

Perhaps the most exhaustive study of the cable industry is *Blue Skies: A History of Cable Television*, written by Patrick R. Parsons.¹⁰⁷ Parsons provides a historical

¹⁰¹ *Id.*

¹⁰² BRIAN LOCKMAN & DON SARVEY, *PIONEERS OF CABLE TELEVISION* (McFarland & Company 2005).

¹⁰³ MARK ROBICHAUX, *CABLE COWBOY* (John Wiley & Sons, Inc. 2002).

¹⁰⁴ *Id.*

¹⁰⁵ JOSEPH N. DISTEFANO, *COMCASTED* (Camino Books Inc. 2005).

¹⁰⁶ MEGAN MULLEN, *THE RISE OF CABLE TELEVISION* (University of Texas Press 2003).

¹⁰⁷ PATRICK PARSONS, *BLUE SKIES: A HISTORY OF CABLE TELEVISION*, (Temple University Press 2008).

study of the development of the cable industry.¹⁰⁸ Parsons documents the key players, the major technological developments and the public responses to cable in a chronological order that spans from the 1930s with the beginnings of the technology to the present cable dominated marketplace.¹⁰⁹ This book is essentially an encyclopedia of cable, going so far as to document how and when different channels and programs were introduced.¹¹⁰

In the view of many scholars, the seminal examination of broadcast history in the United States from its inception through the late 1960s is a three volume chronology authored by Erik Barnouw.¹¹¹ In volume one *A Tower in Babel*, the former Columbia University professor looks at broadcasting from its humble beginnings through 1933.¹¹² Barnouw writes about the development of broadcast technologies, their evolution and the eventual rise of the commercial broadcast model.¹¹³ He focuses on the people behind the innovation and those seeking to regulate them.¹¹⁴ He effectively uses historical events to illustrate the impact of broadcasting on American society.¹¹⁵

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ ERIK BARNOUW, *A TOWER IN BABEL: A HISTORY OF BROADCASTING IN THE UNITED STATES VOLUME 1 – TO 1933* (Oxford University Press 1966); ERIK BARNOUW, *THE GOLDEN WEB: A HISTORY OF BROADCASTING IN THE UNITED STATES VOLUME II – 1933-1953* (Oxford University Press 1968); ERIK BARNOUW, *THE IMAGE MAKERS: A HISTORY OF BROADCASTING IN THE UNITED STATES VOLUME III – FROM 1953* (Oxford University Press 1970).

¹¹² *A TOWER IN BABEL*, at 4-5.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

Volume two, *The Golden Web*, chronicles a very active period of growth for network radio that included the passage of the Communications Act of 1934, World War II, and the beginning of broadcast television.¹¹⁶ In his final volume, *The Image Empire*, Barnouw compared the American radio and television broadcast system to the human nervous system.¹¹⁷ He said broadcasting was capable of provoking the spectrum of human emotion as well as inciting people to action.¹¹⁸ He concludes his study with concern that the dominance of the commercial broadcast model on American culture and offers suggestions for strengthening public television as counter balance.¹¹⁹

First Amendment

Cable Television and the First Amendment, also written by Patrick R. Parsons, examines what relationship cable television has with the First Amendment.¹²⁰ In one of the first books to explore this topic, Parsons begins by discussing the development of the industry through the 1970's.¹²¹ The author then goes on to look at the different First Amendment issues in the regulation of cable including unauthorized retransmission, and cable's control of and responsibility for its content.¹²² He then looks at different media and different ways or models of how the First Amendment could apply to cable

¹¹⁶ THE GOLDEN WEB, *supra* note 111 at 3-4.

¹¹⁷ THE IMAGE MAKERS, *supra* note 111 at 3.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 342-344.

¹²⁰ PATRICK PARSONS, CABLE TELEVISION AND THE FIRST AMENDMENT, (Lexington Books 1987).

¹²¹ *Id.*

¹²² *Id.* at 30-32.

television.¹²³ Parsons argues that the print model is best suited to the cable industry but acknowledged that it was unlikely that the government would eliminate all of the regulations already in place.¹²⁴

In *Red Lions, Tigers and Bears: Broadcast Content Regulation and the First Amendment*, former FCC Chairman Charles D. Ferris and Terrence J. Leahy look at the First Amendment as it relates to broadcasting.¹²⁵ The article looks at the legal arguments for and against The Fairness Doctrine and why this contentious policy was upheld by the Supreme Court in *Red Lion*.¹²⁶ The authors reach the interesting conclusion that broadcasters pick and choose when to claim First Amendment protection based on when it best suits their interests.¹²⁷ The authors point out that *Turner* is an excellent example of how broadcasters do not care about the First Amendment rights of other media such as cable, when the exercise of those rights would negatively impact their “preferred position.”¹²⁸

C. Edwin Baker writes in *Media Concentration: Giving Up on Democracy* that media concentration laws have significantly changed in the last two decades.¹²⁹ Baker defines this change in three areas including the reduction in legal restrictions on

¹²³ See PARSONS, *supra* note 120. (The author considers the Broadcast Model, the Print Model, the Public Forum Model, the Public Utility Model, and the Equitable Protection Model).

¹²⁴ *Id.* at 150.

¹²⁵ Charles D. Ferris & Terrence J. Leahy, *Red Lions, Tigers and Bears: Broadcast Content Regulation and the First Amendment*, 38 Cath. U.L. Rev. 299 (1989).

¹²⁶ *Id.*

¹²⁷ *Id.* at 326.

¹²⁸ *Id.* at 326-27

¹²⁹ C. Edwin Baker, *Media Concentration: Giving Up on Democracy*, 54 Fla. L. Rev. 839 (2002).

ownership concentration, the change in criteria used to define objectionable concentration, and a shift in perspective that now has courts viewing media entities as “rights bearing units in their own right”¹³⁰ Baker concludes that these changes are focused on improving the economic success of the various media and do not necessarily reflect policy that is of benefit to public interest.¹³¹

American Broadcast Regulation and the First Amendment: Another Look, written by Charles H. Tillinghast, is an argument for the return of the Fairness Doctrine or a similar policy.¹³² Tillinghast suggests that broadcasters will always be licensees of the government and that therefore they are subject to increased regulation.¹³³ Tillinghast argues that regulations such as the Fairness Doctrine benefit the viewing public.¹³⁴ While his thesis fails to address the argument that other technologies do not have the same licensee status and therefore should not be subject to the type of regulation Tillinghast suggests, this book is particularly valuable for its history of broadcast regulation in America.¹³⁵

In *The Rise and Demise of the Technology Specific Approach to the First Amendment*, Christopher S. Yoo reviews how the Court developed a special

¹³⁰ *Id.* at 841-42.

¹³¹ *Id.* at 875-76.

¹³² CHARLES H. TILLINGHAST, *AMERICAN BROADCAST REGULATION AND THE FIRST AMENDMENT: ANOTHER LOOK*, (Iowa State University Press, 2000)

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

perspective on the First Amendment to be applied only to broadcast technology.¹³⁶ Yoo looks at the spectrum scarcity rationale and the argument that broadcast technology has a “unique pervasiveness and accessibility” and ultimately concludes that these reasons are no longer persuasive to support a unique First Amendment standard for broadcast technology.¹³⁷ Yoo argues that “we must...candidly acknowledge the impact of technological innovations such as digital television, the V-Chip, PVR’s spread spectrum and video on demand” and that modern technology is “making it increasingly possible to convey virtually any type of communication through virtually any means of transmission.”¹³⁸ Yoo concludes that a technology driven approach to the First Amendment like the broadcast model can no longer be applied.¹³⁹

Public Interest

In *Public Interest Regulation in the Digital Age*, Daniel Patrick Graham looks at the applicability of the longstanding public trustee model of media regulation as we transition to digital television.¹⁴⁰ The author points out that the FCC made a conscious choice to allow broadcasters to be the focus of the move to digital programming because of their saturation in the market and because the upgrade of broadcasters would enable them to remain a competitive force in the digital age.¹⁴¹ This article was

¹³⁶ Christopher S. Yoo, *The Rise and Demise of the Technology Specific Approach to the First Amendment*, 91 Geo. L.J. 245 (2003)

¹³⁷ *Id.*

¹³⁸ *Id.* at 355.

¹³⁹ *Id.* at 356.

¹⁴⁰ Daniel Patrick Graham, *Public Interest Regulation in the Digital Age*, 1 CommLaw Conspectus 97 (2003).

¹⁴¹ *Id.* at 100.

particularly valuable for its discussion of transition to digital transmission and why the transition was mandated.¹⁴²

Television and the Public Interest was written in March of 2000 and is Cass Sunstein's discussion of whether the public interest standard continues to make sense in the new media world where broadcasters hold less and less of an elite position.¹⁴³ As the role of broadcasters diminishes, Sunstein questions whether digital broadcasters should have public interest obligations.¹⁴⁴ Sunstein concludes that while some regulation is necessary, it should be guidance as opposed to mandate.¹⁴⁵

In *The "Public Interest" Standard: The Search for the Holy Grail*, the authors, Erwin G. Krasnow and Jack N. Goodman review the history and evolution of the Public Interest standard and attempt to use statutes, case law and regulatory activity to define the indefinable.¹⁴⁶ The authors note that scarcity is becoming less and less of a legitimate rationale for content based regulation such as the Fairness Doctrine.¹⁴⁷ They argue that with the greater number of available voices in media "there is less need for the government to ensure that individual broadcast stations serve particular functions."¹⁴⁸ In examining the role of the Public Interest standard in the digital age, the

¹⁴² *Id.*

¹⁴³ Cass R. Sunstein, *Television and the Public Interest*, Calif. L. Rev. 499 (2000).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 563-64.

¹⁴⁶ Erwin G. Krasnow & Jack N. Goodman, *The "Public Interest" Standard: The Search for the Holy Grail*, 50 Fed. Comm. L.J. 605 (1998).

¹⁴⁷ *Id.* at 634-35

¹⁴⁸ *Id.* at 635

authors champion the “breadth and flexibility” of the law and argue that its adaptability is why it will continue to work and apply in the new media landscape.¹⁴⁹

Must-Carry

Thomas W. Hazlett, the former Director of the Program on Telecommunications Policy, Institute of Government Affairs at the University of California at Davis, wrote a prescient article on the potential dangers of extending must-carry rights of broadcasters to digital television.¹⁵⁰ In *Digitizing “Must-Carry” Under Turner Broadcasting v. FCC* he notes that the decision in *Turner* does not address whether must-carry will apply when the transition to DTV is complete.¹⁵¹ Hazlett is critical of the Court’s decision to apply an intermediate scrutiny standard, and the Court’s failure to limit what media the must-carry rules should apply to.¹⁵² Hazlett suggests that “if digital must-carry rules are imposed and succeed in passing constitutional muster, what’s next? It does not take a crystal ball to forecast the ultimate ‘train wreck’ at the other end of the must-carry tunnel.”¹⁵³ To illustrate this, the author points to the convergence of technologies such as cable, wireless, satellite and wireline telephone systems in the delivery of video content.¹⁵⁴

In *I Want My MTV: The Debate over Digital Must-Carry*, Harris Aaron talks about the transition to digital television and the ability of the government to apply must-carry

¹⁴⁹ *Id.* at 630.

¹⁵⁰ Thomas W. Hazlett, *Digitizing “Must-Carry” Under Turner Broadcasting v. FCC*, 8 Sup. Ct. Econ. Rev. 141 (2000).

¹⁵¹ *Id.*

¹⁵² *Id.* at 202.

¹⁵³ *Id.* at 201.

¹⁵⁴ *Id.* at 201-02.

rules to DTV.¹⁵⁵ Aaron focuses on the difficulties of applying old laws to new technologies.¹⁵⁶ The rules as defined in *Turner*, he argues, do not apply to the technological realities of DTV because they do not account for the multi-casting capability, the quality of signal carriage, or any number of other differences between analog and digital broadcasting.¹⁵⁷ Aaron's conclusions are made early in the transition process; his work argues for the FCC to proactively prepare for the coming of DTV and to look carefully at whether must-carry rules should apply.¹⁵⁸ Written well in advance of the transition, this article serves as a precursor to the current research questions.

Primary Video and its Secondary Effects on Digital Broadcasting: Cable Carriage of Multiplexed Signals Under the 1992 Cable Act and the First Amendment was written in 2004 by Michael M. Epstein.¹⁵⁹ Epstein advocates a broad definition of what primary video is, as written in The Cable Act of 1992 that would require cable operators to carry multiple streams of programming.¹⁶⁰ He argues that without this broad interpretation of primary video, broadcasters that choose to offer additional programming would have no guarantee that such programming would be carried.¹⁶¹ The author expresses concern

¹⁵⁵ Harris Aaron, *I Want My MTV: The Debate over Digital Must-Carry*, 80 B.U.L. Rev, 8985 (2000).

¹⁵⁶ *Id.* at 906.

¹⁵⁷ *Id.* at 888-89

¹⁵⁸ *Id.*

¹⁵⁹ Michael M. Epstein, *Primary Video and its Secondary Effects on Digital Broadcasting: Cable Carriage of Multiplexed Signals Under the 1992 Cable Act and the First Amendment*, 87 Marq. L. Rev. 525 (2004).

¹⁶⁰ *Id.* at 566.

¹⁶¹ *Id.* at 562-64

about a potential chilling effect, and the impact that a limited definition could have on the long term economic viability of broadcasting.¹⁶²

In *Broadcast, Cable and Digital Must Carry: The Other Digital Divide* Joel Timmer examines the constitutionality and practicality of expanding must-carry during the DTV transition to include dual carriage, total carriage and the carriage of program-related content.¹⁶³ While Timmer dismisses the first two, he does advocate flexibility regarding how program-related content is defined moving forward.¹⁶⁴ While total carriage of multiple streams of broadcast programming would not require cable operators to allocate additional resources it would in Timmer's view limit cable operators' ability to fully take advantage of advances in technology.¹⁶⁵ In spite of this, the author does advocate a compromise approach to the expansion of the definition of program-related content.¹⁶⁶ He offers several examples of what the FCC could potentially consider program-related content such as multiple camera angles at sporting events, interactive games, and viewer chats.¹⁶⁷ He concludes that encouraging the development of such examples would serve the public interest.¹⁶⁸

In *Analog and Digital Must Carry Obligations of Cable and Satellite Television Operators in the United States*, Rob Frieden provides a thorough and detailed history of

¹⁶² *Id.*

¹⁶³ Joel Timmer, *Broadcast, Cable and Digital Must Carry: The Other Digital Divide*, 9 Comm. L. & Pol'y 101 (2004).

¹⁶⁴ *Id.* at 146-48.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 148.

¹⁶⁷ *Id.* at 121-22.

¹⁶⁸ *Id.* at 148-49.

the must-carry rules, the legal challenges they faced, and how the courts have balanced First Amendment rights and public policy goals.¹⁶⁹ The article describes how these rules have been applied to digital and satellite television and the possible changes that could be made.¹⁷⁰ The article discusses the Satellite Home Viewer Improvement Act (SHVIA) which required satellite services to follow must-carry and retransmission consent rules similar to those governing cable.¹⁷¹ Frieden concludes that must-carry rules must continue to be applied to cable and satellite providers because the must-carry rule “ensures that broadcasting remains an important medium and sustains the symbiotic relationship between the media and politicians.”¹⁷²

Much has been written about the landmark decision in *Turner Broadcasting Inc. v. FCC*. One such article is a note written by Toni Elizabeth Gilbert, *Economic Regulation of the Cable Television Industry: Reigning in a Giant at the Expense of the First Amendment*.¹⁷³ Gilbert provides a brief study of the basis for First Amendment protections and how they are applied to different media, comparing content neutral and content based regulation, and strict, intermediate and relaxed scrutiny standards.¹⁷⁴ The note goes on to describe how the Court reviewed must-carry rules and the majority’s conclusion that this was a content neutral regulation meriting an intermediate

¹⁶⁹ Rob Frieden, *Analog and Digital Must Carry Obligations of Cable and Satellite Television Operators in the United States*, 15 Media L. & Pol’y 230, 235 (2006).

¹⁷⁰ *Id.* at 237.

¹⁷¹ *Id.* at 241.

¹⁷² *Id.* at 246.

¹⁷³ Toni Elizabeth Gilbert, *Economic Regulation of the Cable Television Industry: Reigning in a Giant at the Expense of the First Amendment*, 45 Cath. U. L. Rev. 615 (1996).

¹⁷⁴ *Id.*

level of scrutiny.¹⁷⁵ Gilbert concludes by arguing that Congress and the FCC were premature in predicting the demise of broadcasters and networks, and argues that without a strong economic rationale of protecting the broadcast industry, the must-carry rules are unjustified and should not withstand a constitutional challenge.¹⁷⁶

R. Matthew Warner also calls for a reevaluation of *Turner* in his note, *Reassessing Turner and Litigating the Must-Carry Law Beyond a Facial Challenge*.¹⁷⁷ Warner describes the must-carry rules as part of the FCC's efforts to protect broadcasters.¹⁷⁸ The note describes the objections and challenges to must-carry regulations including the First Amendment arguments raised by the cable industry in several legal battles.¹⁷⁹ Warner proceeds to analyze the legal issues that could allow must-carry rules to be challenged again and potential arguments that could be made.¹⁸⁰ He notes that the decisions in *Turner I* and *Turner II* were in the context of facial challenges which only required that the law be shown to be constitutionally valid under some scenario.¹⁸¹ If challenged in certain specific markets which are shown to have sufficient levels of competition, Warner argues that the must-carry rules would not be upheld.¹⁸²

¹⁷⁵ *Id.* at 647.

¹⁷⁶ *Id.* at 650.

¹⁷⁷ R. Matthew Warner, *Reassessing Turner and Litigating the Must-Carry Law Beyond a Facial Challenge*, 60 Fed. Comm. L.J. 359 (2008).

¹⁷⁸ *Id.* at 362-63.

¹⁷⁹ *Id.* at 364-76.

¹⁸⁰ *Id.* at 376-87.

¹⁸¹ *Id.*

¹⁸² *Id.* at 389.

Much of the must-carry legal debate focused on the First Amendment rights of CATV operators. Justin Brown and Nissa Laughner expand the must-carry constitutional debate to include a Fifth Amendment argument in their article, *Cable Operators' Fifth Amendment Claims Applied to Digital Must-Carry*.¹⁸³ The Fifth Amendment defense against must-carry has previously been utilized by CATV operators only to have the issue decided solely on First Amendment grounds.¹⁸⁴ The authors conclude there are ambiguities in defining private property rights in a “quasi-public business” context.¹⁸⁵ They anticipate over time as the CATV industry continues to expand and bundle its services cable operators Fifth Amendment claims will be more clearly defined by the courts.¹⁸⁶

Commercial broadcast television is the focus of this study. However, the must-carry rules also extend to public television (PTV). Justin Brown advanced the debate over how must-carry rules should apply to PTV following the digital transition in his article *Digital Must-Carry & The Case for Public Television*.¹⁸⁷ Brown recognized the regulatory and legal difficulty in creating a must-carry advantage for PTV stations over their commercial broadcasting competitors.¹⁸⁸ While illustrating the “public interest” and educational value of viewer access to all programming streams offered by PTV through

¹⁸³ Nissa Laughner & Justin Brown, *Cable Operators' Fifth Amendment Claims Applied to Digital Must-Carry*, 58 Fed Comm. L.J. 281 (2006).

¹⁸⁴ *Id.* at 282.

¹⁸⁵ *Id.* at 321.

¹⁸⁶ *Id.* at 320.

¹⁸⁷ Justin Brown, *Digital Must-Carry & the Case for Public Television*, 15 Cornell J.L. & Pub. Pol'y 73 (2005).

¹⁸⁸ *Id.* at 108.

their CATV operator the need to advance the cause through Congressional or FCC action was negated when the CATV industry reached agreement with public broadcasters to carry multicast programming.¹⁸⁹

Research Questions

This dissertation will attempt to answer the following research questions:

- Why have Congress and the FCC historically protected the interests of broadcasters over those of cable television?
- Does the majority opinion in *Turner II*, when applied to the current media landscape, allow broadcasters to seek an expansion of the must-carry rules in DTV to include multicast carriage?

The examination of these research questions is important in order to explore how the regulatory lessons learned by Congress and the Federal Communications Commission throughout the history of broadcast and cable regulation in general and the must-carry dispute in particular. Prior legislative and regulatory decisions may offer guidance in addressing future regulatory challenges as technology evolves. This will be addressed in detail within the discussion section of Chapter 5.

Methodology

To answer the research questions posed by this study, the author will rely on legal research methodology. Primary resources utilized in this analysis include federal court decisions, federal statutes, legislative histories, administrative law and the United States Constitution. Secondary resources of importance include scholarly legal

¹⁸⁹ See Press Release, National Cable & Telecommunications Association, Boards of APTS, NCTA, and PBS Approve Public Television Digital Cable Carriage Agreement (Feb. 4, 2005) (on file with author); Press Release, National Cable & Telecommunications Association, Public Television and Cable Ratify Digital Cable Carriage Agreement (Apr. 14, 2005) (on file with author).

research and periodicals dedicated to specific coverage of issues germane to the regulation of the broadcasting and cable industries.

Primary Sources

Major primary sources utilized for this research include legal decisions, administrative rules, FCC reports and orders, congressional hearings, federal statutes, and legislative histories. Key laws such as *The Communications Act of 1934* and *The Cable Act of 1992* were located and the legislative history, committee reports, and congressional debates were found using LexisNexis and print and online versions of the Congressional Record. Legal decisions were found using LexisNexis and Westlaw. *Shepardizing* key cases such as *Turner I*, *Turner II*, and *Quincy*, showed the evolution of laws surrounding the public interest standard, broadcast and cable regulation, and must-carry rules. The FCC website was also an invaluable tool, and most of the administrative rules that are promulgated are accessible for downloading. The website also publishes writings and statements made by the commission, notices of proposed rulemakings, and reports and orders.

Secondary Sources

To identify relevant journal articles, the author accessed the LexisNexis electronic database. A search of the *Secondary Legal* section limited specifically to *Law Reviews and Journals* was conducted utilizing a series of search strings. Search strings included various combinations of the terms “must-carry”, “broadcast”, “cable”, “regulation”, “retransmission” and “Turner” within a document. In addition, a title search of “must-carry” was conducted.

To find additional secondary sources, including news coverage of broadcasting and cable regulatory issues, the author accessed the online database search function

from the University of Florida Libraries website. A database search limited to the subject of broadcasting and telecommunication produced a list of twenty-one databases of which three were utilized. Using the previously mentioned search terms the Communication & Mass Media Complete, ABI/INFORM, and ProQuest Dissertations and Theses databases were searched.

Dissertation Outline

Chapter 2 of the dissertation, titled the Birth of Broadcasting, examines the importance of Congress' initial legislative efforts in the formative years of commercial broadcasting, in developing a regulatory framework that remains largely intact to this day. This chapter addresses the fundamental role the terms "public interest" and "localism" play in the regulatory process for commercial broadcasters. It also examines several examples of incumbent broadcasters preserving their dominant market positions through successful lobbying efforts aimed at both Congress and the FCC.

Chapter 3 of the dissertation, titled Broadcasting Blossoms and Cable Comes of Age, discusses the origins of what was then referred to as Community Antenna Television (CATV) in the United States and its evolution from broadcast ally to adversary. This chapter examines the FCC's role in maintaining a competitive imbalance between broadcasters and cable operators that favors broadcasters to mask several past FCC policy shortcomings.

This section also addresses the beginning of the FCC's role as cable regulator and the dominant role the must-carry issue plays from the start. It focuses on the process of identifying the cable industry's place in a regulatory framework established by Congress in 1934 and how the FCC views the relationship between cable and broadcasters. It

also discusses the cable industries early successes in resisting must-carry through a series of judicial victories.

Chapter 4 of the dissertation, titled *Turner and the Test of Time and Technology*, addresses the end of the cable industry's successful resistance to the FCC's must-carry rules. It examines the Supreme Court's First Amendment analysis of the cable industry in *Turner II* and the Court's affirming of the must-carry rules. It discusses the Court's majority opinion and dissent within the context of the present day media marketplace. It also addresses the impact of the DTV transition on must-carry and the judicial questions it raises regarding the application of an analog opinion in an emerging digital world.

Chapter 5, the dissertation's Conclusion, provides a summary of the findings in the preceding four chapters as related to the research questions. Also, a new non-broadcast centric regulatory model for re-defining the broadcast/cable relationship in an evolving digital world is presented. Finally, areas for future research are discussed.

CHAPTER 2 THE BIRTH OF BROADCASTING

“The future possibilities and potentialities of wireless communication from a commercial, educational, social and political point are inconceivable. Its power for good or evil cannot be overestimated.”

—House Committee on Merchant Marine and Fisheries¹

Introduction

In March of 1926 the potential of “wireless communication” seemed both limitless and daunting.² Broadcasting as we now know it was just assuming its identity as a commercial force. Radio’s future role as a transmitter of entertainment and information had not yet been realized. The impact of the decisions made during these formative years still serve as the regulatory bedrock for what became the American broadcasting industry.

The focus of this study is on issues germane to television, must-carry and the digital transition. However, to understand the business of broadcast television and its ascension into the predominant video delivery system, we must begin with an understanding of the history of early radio. The leaders of the radio industry, particularly David Sarnoff at RCA and CBS’ William Paley, were able to amass great power over the broadcast industry through the programming networks they created and controlled and the commercial business model they refined.³ Both men also realized that radio

¹ H.R. REP. NO. 69-464, at 33 (1926).

² See FCC Wireless Telecommunications Bureau, <http://www.wireless.fcc.gov/organization/> (For the purpose of this paper “wireless communication” will refer to what is now known as broadcasting. The FCC currently regulates domestic “wireless communication.” The services now defined as wireless include, amateur radio, cellular, paging, broadband PCS and public safety).

³ See *generally* DAVID SARNOFF, LOOKING AHEAD: THE PAPERS OF DAVID SARNOFF (Dr. Jerome B. Wiesner ed., McGraw-Hill 1968) (while Sarnoff is able to present himself in the best possible

was not an end for broadcasting, just a beginning. They both possessed the vision to see a picture driven version of broadcasting that would incorporate the already developed business model for radio and build upon it.

The broadcast regulatory model developed for radio in the Radio Act of 1927 and carried over into the Communications Act of 1934 would also transcend to television.⁴

The controlling powers in radio from ownership, programming, equipment manufacturing and technological innovation became the same dominant players in television as would the regulations they were governed by.

Congress Cuts the Cord: The Early Regulation of Wireless

Broadcasting began as a wireless extension of telegraphy centered on a future of maritime and international communication.⁵ It proved valuable to the shipping industry not only for general communications, but also for safety. The Wireless Ship Act of 1910 was the first attempt by Congress to regulate radio. It required any ocean-going steamer

light, the opportunity to view a body of work that parallels the history of broadcasting in the United States is still valuable); KENNETH BILBY, *THE GENERAL: DAVID SARNOFF AND THE RISE OF THE COMMUNICATIONS INDUSTRY* (Harper & Row 1986) (Bilby classified this work as an unauthorized biography of Sarnoff, but he did work with "The General" at RCA for several years); ROBERT SOBEL, *RCA* (Stein and Day 1986) (a comprehensive history of RCA from its formation through the mid-1980's); William S. Paley, *As it Happened: A Memoir* (Doubleday 1979); Sally Bedell Smith, *In All His Glory: The Life of William S. Paley, the Legendary Tycoon and his Brilliant Circle* (Simon and Schuster 1990); Lewis J. Paper, *Empire: William S. Paley and the Making of CBS* (St. Martin's Press 1987).

⁴ See Radio Act of 1927, Pub. L. No. 69-632, 44 Stat. 1162 (1927); Communications Act of 1934, 47 C.F.R. § 151 (1934).

⁵ The technological advancement radio added to communication centered on the ability to communicate wirelessly. Radio revolutionized communication because of its point-to-multipoint properties. Originally the application of this technology focused on creating a wireless telephone system, but its limitations in this regard led to the realization that one voice reaching a mass audience with limited competition for the airwaves was the most efficient use of radio spectrum.

to be equipped with a working radio and a competent radio operator.⁶ The lasting impact of the 1910 Act can be found in Section 4 where Congress “empowered the Secretary of Commerce and Labor to make such regulations as may be necessary to secure the proper execution of this Act.”⁷ The passage of this section was the first time government exercised authority over the airwaves.

Congress amended The Act of 1910 just two years later when it passed the Radio Act of 1912.⁸ The 1912 Act was the first regulation to acknowledge that radio technology had uses beyond those of the military.⁹ The law reserved larger frequencies for government use and restricted personal use to smaller frequencies of 200 meters or less.¹⁰ The 1912 Act provided for a licensing system, which eventually proved problematic because Congress failed to grant the Secretary of Commerce the specific authority to establish and enforce additional regulation.¹¹

The 1912 Act, with its many shortcomings, regulated the radio industry for the next 15 years under the authority of the Secretary of Commerce. However, the growth of broadcast radio came to a grinding halt during World War I. A presidential proclamation turned all commercial radio over the United States Navy.¹² The government also mandated the emergency pooling of the patent rights for radio

⁶ Wireless Ship Act of 1910, Pub. L. No. 61-262, 36 Stat. 629 (1910).

⁷ *Id.*

⁸ Radio Act of 1912, Pub. L. No. 62-264, 37 Stat. 302 (1912).

⁹ *See id.*

¹⁰ *Id.*

¹¹ MARVIN R. BENSMAN, THE BEGINNING OF BROADCAST REGULATION IN THE TWENTIETH CENTURY 8-9 (McFarland & Co. 2000).

¹² *Id.* at 11-12.

technology.¹³ This action placed patent disputes on hold and allowed for a government controlled and coordinated period of great technological advancement in radio.¹⁴ Following the War, the Navy recommended the government maintain control of radio.¹⁵ Instead, Congress voted to return radio stations to their original owners.¹⁶

Many of the technological improvements in radio developed during World War I remained dormant because of concerns over patent infringement.¹⁷ The dividing of the patents and the returning of them to their original owners became more difficult with the passage of time and the advancement of technology.¹⁸ The government also maintained an interest in the United States securing a leading role globally in this emerging industry.¹⁹ These factors led to the creation of the Radio Corporation of America (RCA) and set the stage for the evolution of wireless communication into radio as we know it.²⁰ The formation of RCA led to cross-licensing agreements between General Electric, Western Electric and Westinghouse involving almost 1,200 radio patents and “privatized boom in commercial radio.”²¹

¹³ *Id.*

¹⁴ ERIK BARNOUW, *A TOWER IN BABEL: A HISTORY OF BROADCASTING IN THE UNITED STATES VOLUME 1—TO 1933* 47-48 (Oxford University Press 1966).

¹⁵ *Id.* at 52-56.

¹⁶ *Id.*

¹⁷ BENSMAN, *supra* note 11 at 12-13.

¹⁸ *Id.* at 15-16.

¹⁹ LOUISE BENJAMIN, *FREEDOM OF THE AIR AND THE PUBLIC INTEREST: FIRST AMENDMENT RIGHTS IN BROADCASTING TO 1935* 12 (Southern Illinois University Press, 2001).

²⁰ *Id.*

²¹ BENSMAN, *supra* note 11 at 15-16.

The Acts of 1910 and 1912 granted the authority to regulate radio to the Secretary of Commerce. In the years following World War I that power rested squarely with Herbert Hoover. Hoover became Secretary of Commerce on March 4, 1921. He would serve under both Presidents Harding and Coolidge before being elected president himself in 1928. Hoover played a prominent role in the formulation of broadcast policy with the radio industry until Congress eventually passed the Radio Act of 1927.²² His broadcasting legacy would be shaped largely by a series of four National Radio Conferences that he hosted from 1922 through 1925.

The Hoover Years: Conferences, Courts and “Chaos”

The years following the Radio Act of 1912 also were a time of great expansion. During this time, amateur radio operators became the leading users of radio.²³ Between 1920 and 1922, the number of wireless radio receivers owned by the public jumped from just 50,000 to between 600,000 and one million sets.²⁴ Similarly, in 1920 there were only three radio stations broadcasting regularly, but by 1925 the number had grown to 578.²⁵ This rapid growth led to great confusion and a sense of chaos in broadcasting.²⁶

²² Louise Benjamin, *Working It Out Together: Radio Policy from Hoover to the Radio Act of 1927*, *Journal of Broadcasting & Electronic Media*, Spring 1998.

²³ CHARLES H. TILLINGHAST, *AMERICAN BROADCAST REGULATION AND THE FIRST AMENDMENT: ANOTHER LOOK* 41 (2000).

²⁴ *Id.*

²⁵ STEVEN J. SIMMONS, *THE FAIRNESS DOCTRINE AND THE MEDIA* (1978).

²⁶ TILLINGHAST, *supra* note 23.

Congress made 19 unsuccessful attempts to pass new legislation to update the Radio Act of 1912.²⁷ The inability of Congress to pass new radio legislation left Secretary Hoover in charge of the federal government's oversight of radio broadcasting.²⁸ The legislative failures can be traced to inconsistent support from Secretary Hoover and an active radio industry lobby interested in keeping the status-quo while it attempted to secure its dominant position in radio.²⁹ With the airing of the first radio advertisement in 1922 on WEAJ in New York, the business of broadcasting started to evolve into its modern, commercial form.³⁰

With radio rapidly changing and no new radio legislation from Congress in more than a decade, Hoover turned instead to the industry itself for guidance.³¹ According to Marvin Bensman, Hoover was in favor of self-regulation for the radio industry during this period.³²

Though the National Radio Conferences were slow to develop regulation, it is here that we see the beginnings of the theories that are used to regulate the public airwaves today. It is during these conferences that we first hear about localism, the public interest, and retransmission.³³

²⁷ BENJAMIN, *supra* note 19 at 69. See Also *Id.* 256-57 n.1 (lists in detail the legislative history of the nineteen failed attempts in Congress to pass a new law to replace the Radio Act of 1912).

²⁸ *Id.*

²⁹ BENSMAN, *supra* note 11 at 19.

³⁰ BENJAMIN, *supra* note 19 at 48, 117-118.

³¹ *Id.* at 13 (The Radio Act of 1912 did not anticipate broadcasting. It was designed to regulate point-to-point communication).

³² BENSMAN, *supra* note 11 at 19.

³³ *Id.*

The First National Radio Conference (1922)

In 1922, Hoover, at the request of President Harding held the first of what became four annual National Radio Conferences.³⁴ The First Radio Conference featured 13 invited guests including Rep. Wallace H. White (R-Maine).³⁵ White eventually led the effort to pass a new radio act in the House of Representatives although his efforts would prove unsuccessful until 1926.³⁶

Issues discussed during the First Radio Conference included frequency overcrowding, interference, and the pursuit of new legislation to meet the changing needs of the industry.³⁷ Hoover, in his opening remarks to the conference stated that “it becomes of primary public interest to say who is to do the broadcasting, under what circumstances, and with what type of material.”³⁸ After the conference, RCA submitted for the record its acceptance of the notion that radio “is a public utility and as such should be regulated by the federal government in the public interest.”³⁹

Hoover hoped to reach a consensus on new legislation during the First Radio Conference.⁴⁰ While much was discussed and agreed to, ultimately it was the industry

³⁴ *Report of Department of Commerce on Radio Telephony*, RADIO SERVICE BULLETIN, May 1, 1922, at 22-30.

³⁵ *Id.*

³⁶ BENSMAN, *supra* note 11 at 35-36.

³⁷ *Report of Department of Commerce on Radio Telephony*, *supra* note 33 at 22-30.

³⁸ BENSMAN, *supra* note 11 at 51.

³⁹ *Memorandum of RCA on First Radio Conference*, HHPL 1-I/53, April 17, 1922, at 3.

⁴⁰ *Report of Department of Commerce on Radio Telephony*, *supra* note 33 at 22-30.

that resisted a new radio act and successfully lobbied the Congress to defeat White's bill in 1922.⁴¹

Interference remained a problem as more stations sought space on the airwaves to broadcast. The 1912 Act did not authorize the Secretary of Commerce to reject an otherwise-qualified application for a broadcast license.⁴² Participants at the First Radio Conference agreed that any new legislation should provide more regulatory power to the Secretary of Commerce.⁴³ The interference problem derived from simple supply and demand. More people were interested in broadcasting than there were frequencies to accommodate them. The failure of Congress to pass a new law to limit this overcrowding of the airwaves allowed a period of "chaos" on the airwaves to continue.⁴⁴ A second attempt to reach consensus between the government and radio industry on a future course of action would take place less than a year later.

The Second National Radio Conference (1923)

During the First National Radio Conference the participants agreed the airwaves should serve the public interest. The public interest discussion continued during the Second Radio Conference, but so did the legislative delays.⁴⁵ The development of a

⁴¹ Benjamin, *supra* note 22.

⁴² *Hoover v. Intercity Radio Co.*, 283 App. D.C. 339 (1923) (held that the Radio Act of 1912 did not give the Secretary of Commerce the authority to use discretionary power over the issue of licenses).

⁴³ *Report of Department of Commerce on Radio Telephony*, *supra* note 33 at 22-30.

⁴⁴ Secretary Hoover often used the term "chaos" to describe his view of the state of the unregulated airwaves as overcrowded to the point of ineffectiveness during the years leading up to the Radio Act of 1927. See *Generally* BENSMAN, *supra* note 11 at 49, 104, 129, 139.

⁴⁵ *Report of Department of Commerce on Radio Telephony*, RADIO SERVICE BULLETIN, April 2, 1923, at 9-13.

national broadcasting capability, a prelude to our current network-based broadcast system, turned out to be a more important issue.⁴⁶

Westinghouse executives brought their case to the people in a series of radio addresses prior to the Second National Radio Conference.⁴⁷ During these broadcasts, the company said that the public would best be served by powerful stations in metropolitan areas that could take full advantage of the talent and resources available.⁴⁸ Lower-power stations would serve rural areas.⁴⁹ Louise Benjamin noted a similar plan would eventually be adopted by the Federal Radio Commission (FRC) in 1928.⁵⁰

Hoover held a slightly higher view of the value of smaller broadcasters, but he ultimately recognized the ability to underwrite experimentation and advance radio technology belonged to “those entities having the financial where-with-all” to do so.⁵¹ He realized the larger radio corporations provided the key to the continued growth of radio.⁵²

Hoover’s goal of new legislation to regulate radio remained elusive, often through his own recommendations.⁵³ He willingly withheld support of proposed legislation not

⁴⁶ Benjamin, *supra* note 22.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ BENSMAN, *supra* note 11 at 97-99 (reprinting Hoover’s statement to the House of Representative regarding H.R. 7357 and his reasons for withholding support of the bill).

consistent with his view of how best to regulate radio.⁵⁴ Continued growth in radio, absent new congressional authority, paved the way for a third conference the following year.

The Third National Radio Conference (1924)

Secretary Hoover's opening remarks to the Third National Radio Conference noted that radio had "passed from the field of an adventure to that of a public utility."⁵⁵ Radio started to show traits of its current form. Stations now supplemented the playing of phonographic records with "original speeches, instruction, religion, and political exhortation."⁵⁶

Much of this programming originated locally, but the Secretary did not think it was enough to maintain the interest necessary for the continued support of the industry.⁵⁷ Instead, Hoover proposed that local stations must have the capability to deliver important national programming. This national programming should include matters of national interest as well as "the greatest music and entertainment of the nation."⁵⁸ The national programming would then be supplemented with matters of local interest.⁵⁹ Hoover presented a blueprint for what soon became a network-dominated radio system.

⁵⁴ *Id.*

⁵⁵ Recommendations for Regulation of Radio Adopted by the Third National Radio Conference, October 6-10, 1924 at 2 *available at* <http://earlyradiohistory.us/1924conf.htm> (last visited November 21, 2009).

⁵⁶ *Id.*

⁵⁷ *Id.* at 3.

⁵⁸ *Id.*

⁵⁹ *Id.*

To illustrate his point as he made it, his opening remarks aired live over an interconnected network of radio stations.⁶⁰

The final report of the conference made no mention of Hoover's opening remarks on radio programming and serving the public interest.⁶¹ Most of the conference's final recommendations related to the issue of interference and other technical issues.⁶²

After three national conferences the radio industry continued to evolve into a network dominated business model. The time for new legislation grew closer, but not before one final meeting between government and industry.

The Fourth National Radio Conference (1925)

The rise in popularity and importance of radio in American society could be tracked simply by looking at the attendance figures of the Four National Radio Conferences. Fewer than 30 people attended the first radio conference in 1922.⁶³ The attendance in 1925 at the fourth and final National Radio Conference exceeded 500.⁶⁴

Secretary of Commerce Herbert Hoover's opening remarks did not specifically mention localism, but did outline his view of the broadcasting business in the United States. While many foreign governments opted for total control of its airwaves funded by a tax on listeners, the American model "avoided the pitfalls of political, religious, and

⁶⁰ Benjamin, *supra* note 22.

⁶¹ Recommendations for Regulation of Radio Adopted by the Third National Radio Conference, October 6-10, 1924 *available at* <http://earlyradiohistory.us/1924conf.htm> (last visited November 21, 2009).

⁶² *Id.* at 8-23.

⁶³ Benjamin, *supra* note 22 at 9.

⁶⁴ Proceedings of the Fourth National Radio conference and Recommendations for Regulation of Radio, November 9-11, 1925 at 8 *available at* <http://earlyradiohistory.us/1925conf.htm> (last visited November 21, 2009).

social conflicts” associated with government control and in the process preserved free speech over radio.⁶⁵ The American model would “preserve equality of opportunity and individual rights” and be built on competition over consensus.⁶⁶

The government, on the public’s behalf, must retain the ownership of the channels through the air to foster “freedom and development in service that would otherwise be lost in private monopolies.”⁶⁷ Hoover continued to champion interconnection of stations.⁶⁸ The interconnection of stations referred to the ability of centralized programming to be distributed through telephone lines to stations for retransmission within their communities of service. This was a precursor to what became the delivery mechanism of network radio programming.

In just a year, interconnection between stations became commonplace, “finally giving us universal broadcasting of nation-wide events.”⁶⁹ Hoover illustrated his point by recalling the “joys and sorrows” of listening to the World Series.⁷⁰ He called the broadcast of the event “one of the most astonishing landmarks in radio broadcasting.”⁷¹

Hoover believed radio to be a public medium that must be used for public benefit.⁷² The use of the airwaves by broadcasters is justified “only if there is a public

⁶⁵ *Id.* at 4.

⁶⁶ BENSMAN, *supra* note 11 at 19-20, 208.

⁶⁷ Proceedings of the Fourth National Radio conference and Recommendations for Regulation of Radio, *supra* note 63 at 4.

⁶⁸ *Id.* at 6.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at 7.

⁷² *Id.*

benefit.”⁷³ He referred to the listening public and defined its relationship with broadcasters as mutual, “for without one the other could not exist.”⁷⁴ The primary purpose of broadcasting is the pleasing of the listener and the “public good must overbalance private desire.”⁷⁵

Paul B. Klugh, executive chairman of the National Association of Broadcasters (NAB)⁷⁶ advocated the organization’s preferences for future broadcast legislation to the conference.⁷⁷ He proposed a nonbinding resolution giving full authority to the Secretary of Commerce for licensing.⁷⁸ The NAB wanted any new legislation to “test the broadcasting privilege based upon the needs of the public served by the proposed station.”⁷⁹ The basis for this examination should be “convenience and necessity, combined with fitness and ability to serve”, with due consideration given to existing stations.⁸⁰ All discussion of the concept of localism at the four radio conferences centered on the government’s attempt to balance the threat of monopoly control of the airwaves and the availability of high quality network programming.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 9.

⁷⁶ The National Association of Broadcasters, <http://www.nab.org> (last visited Dec. 10, 2009) The National Association of Broadcasters (NAB) was created in 1923 to help broadcasters mount an organized front in dealing with music licensing disputes. The organization evolved into an important political organization central to the promotion of broadcaster interests in Washington, D.C.).

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

Conference participants took great pride in the fact that the radio industry had been largely self-regulating during the preceding four years.⁸¹ Regardless of any success coming this arrangement, the period of self-governance in radio would soon end. A pair of judicial rulings and a push from Hoover would soon usher in a new era of broadcast regulation.

The End of Hoover's Rule of Radio – Intercity Radio and Zenith

Momentum for a new radio act was slow to build during the National Radio Conferences. The major radio companies enjoyed the freedom to consolidate power and influence developments in the industry⁸². They took full advantage of the current system to help ensure their long-term success.⁸³ After four conferences, the radio industry's most powerful players were firmly entrenched and now needed new legislation to protect their investment by limiting the access of potential competitors.

Hoover knew change needed to occur for the long-term success of radio.⁸⁴ The system of awarding broadcast licenses to every applicant who had enough money to erect a station created the potential for an excessive demand on a limited supply of broadcast frequencies.⁸⁵

A pair of cases highlighted the lack of actual power granted to the Secretary of Commerce in the Radio Act of 1912 to regulate a rapidly changing industry.

⁸¹ *Id.* at 21.

⁸² Benjamin, *supra* note 22 at 5.

⁸³ *Id.*

⁸⁴ Proceedings of the Fourth National Radio conference and Recommendations for Regulation of Radio, *supra* note 63 at 8.

⁸⁵ *Id.*

Government losses in *Hoover v. Intercity Radio (1923)*⁸⁶ and *U.S. v. Zenith (1926)*⁸⁷ served to expedite the need for a new regulatory construct for broadcasting.

The Court of Appeals for the District of Columbia Circuit ruled in *Intercity Radio (1923)* that the Radio Act of 1912 did not give Secretary Hoover the power to deny any application for a broadcast license not otherwise specifically barred by the Act.⁸⁸ In this case, Secretary Hoover denied Intercity Radio a new or renewed license on the grounds that there was not a frequency available that did not interfere with other government and private stations.⁸⁹ The court held that while the Radio Act of 1912 did grant authority to the Secretary of Commerce to assign frequencies, it did not give authority to deny a frequency. The court noted

[T]he duty of naming a wave length is mandatory upon the Secretary. The only discretionary act is in selecting a wave length, within the limitations prescribed in the statute, which, in his judgment, will result in the least possible interference. The issuing of a license is not dependent upon the fixing of a wave length. It is a restriction entering into the license. The wave length named by the Secretary merely measures the extent of the privilege granted to the licensee.⁹⁰

Intercity made it clear that the Secretary's role under the 1912 act was less regulatory and more administrative.

In the *Zenith* case, the U.S. District Court for the Northern District of Illinois ruled against the federal government and dealt a second blow to Hoover's authority.⁹¹ The

⁸⁶ *Hoover v. Intercity Radio Co.*, *supra* note 41.

⁸⁷ *United States v. Zenith Radio Corp.*, 12 F. 2d 614 (1926) (held the Radio Act of 1912 did not give the Secretary of Commerce the authority to establish regulations).

⁸⁸ *Hoover v. Intercity Radio Co.*, *supra* note 41 at 1007.

⁸⁹ *Id.* at 1004.

⁹⁰ *Id.* at 1007.

⁹¹ *United States v. Zenith Radio Corp.*, *supra* note 85 at 10.

court held that the Radio Act of 1912 did not permit the Secretary of Commerce to regulate radio beyond the specific duties found in the Act.⁹² In this case, the Secretary issued Zenith a license that only allowed him to broadcast from ten until midnight on Thursdays.⁹³ The court held that Congress did not grant the Secretary of Commerce the power to establish such regulations.⁹⁴ The Secretary's power pursuant to Section Four of the Radio Act of 1912 was limited to "preventing or minimizing interference" and "furthering the prompt receipt of distress signals."⁹⁵

Following the *Zenith* decision Hoover pointed out that "no one has authority to protect the listening public against utter chaos in the service upon which it has come to rely."⁹⁶ Hoover put pressure on Congress to provide relief when he discontinued the enforcement of all radio regulation.⁹⁷ Hoover purposely allowed chaos, including the overlapping of signals, in order to illustrate to Congress a need for greater regulatory power. Relief would soon follow.

Congressional Regulation

Secretary of Commerce Herbert Hoover's leadership on radio matters is evident by his role in four National Radio Conferences.⁹⁸ Yet, to reach his goal of new legislation to guide the radio industry he needed Congress to act. Much of the delay

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ Radio Act of 1912, *supra* note 8 at § 4.

⁹⁶ BENSAMAN, *supra* note 11 at 171.

⁹⁷ *Id.* at 173-175.

⁹⁸ See Benjamin, *supra* note 22.

can be attributed to the lack of consensus among industry and government interests. Once both sides reached agreement, the path cleared for the passage of new radio regulation.⁹⁹

The Radio Act of 1927

Sen. Clarence C. Dill (D-Wash.) and Rep. Wallace H. White (R-Maine) provided the necessary leadership that would eventually lead to the passage of the Radio Act of 1927. White attended the four radio conferences and sponsored the major radio legislation in the House of Representatives from 1922 through 1927. While Dill did not attend the radio conferences, his interest in radio matters evolved from his sponsorship of a Senate bill that would exempt non-profit broadcasters from having to pay copyright royalties.¹⁰⁰ The major difference between the Senate and House versions of the Radio Act of 1927 centered on whether a new agency should be created to independently oversee communications policy.¹⁰¹

President Coolidge previously expressed his preference that the oversight of radio be delegated to an already existing cabinet position.¹⁰² The House version of the Radio Act sponsored by Rep. White followed this recommendation and proposed to keep radio under the auspices of the Secretary of Commerce.¹⁰³

⁹⁹ BENSMAN, *supra* note 11 at 208.

¹⁰⁰ *Id.* at 70.

¹⁰¹ KERRY E. IRISH, CLARENCE C. DILL, THE LIFE OF A WESTERN POLITICIAN 75 (Washington State University Press 2000).

¹⁰² BENSMAN, *supra* note 11 at 190.

¹⁰³ *Id.* at 185.

The Senate bill sponsored by Sen. Dill proposed the creation of a separate authority to oversee radio.¹⁰⁴ During conference committee debate, Rep. White agreed to the creation of a new agency, but only on a trial basis.¹⁰⁵ This provision became part of the Radio Act of 1927 and created the Federal Radio Commission (FRC).¹⁰⁶ President Coolidge signed the bill into law on February 24, 1927.¹⁰⁷

In addition to creating the FRC, the Radio Act of 1927 gave the FRC the authority to regulate “as public convenience, interest, or necessity requires.”¹⁰⁸ Among the powers granted to the FRC was the power to regulate frequencies, to establish areas or zones to be served by a given station, and to prescribe the nature of services to be rendered by any given station.¹⁰⁹

Congress codified the importance it placed on localism in Section 9 of the Radio Act, which provided:

The licensing authority, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this Act, shall grant to any applicant therefore a station license proved for by this Act... the licensing authority shall make such distribution of licenses, bands, of frequency of wave lengths, periods of time for operation, and of power among the different States and communities as to give fair, efficient, and equitable service to each in the same.¹¹⁰

The passage of the Radio Act of 1927 certainly met the basic needs of the industry. However, it is important to note that many elements of the Radio Act were part

¹⁰⁴ *Id.* at 192-193 (this was Sen. Dill’s second bill (S. 4156)).

¹⁰⁵ *Id.* at 199 (H.R. 9971 otherwise known as the Dill-White Bill).

¹⁰⁶ Radio Act of 1927, Pub. L. No. 69-632, 44 Stat. 1162.

¹⁰⁷ BENSMAN, *supra* note 11 at 199.

¹⁰⁸ Radio Act of 1927, *supra* note 104.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at § 9.

of Rep. White's original bill in 1922.¹¹¹ As Barnouw noted, because of the lengthy delay, radio "would still be governed by a law written for a world that no longer existed."¹¹² The radio industry of 1927 differed greatly from what radio resembled in 1922. It would take Congress a relatively short seven years to update its most "current" effort.¹¹³

The Communications Act of 1934

In 1934 Congress revisited the regulation of broadcasting. Seven years following the enactment of the Radio Act of 1927 it was clear that the commercial interests of the medium were dominating the market.¹¹⁴ The success of commercial radio was a cause of contention for those seeking a viable non-commercial voice on radio.¹¹⁵ Non-profit voices seeking access included educational, religious and agricultural interests.¹¹⁶ After much debate Congress opted not to deal with this issue directly, avoiding the possibility of revoking commercial licenses to create spectrum space to expand non-profit radio, and instead decided to keep much of the Radio Act of

¹¹¹ BARNOUW, A TOWER IN BABEL, *supra* note 14 at 199-200.

¹¹² *Id.* at 200.

¹¹³ See Communications Act of 1934, 47 C.F.R. § 151 (1934).

¹¹⁴ ROBERT W. MCCHESENEY, RICH MEDIA, POOR DEMOCRACY: COMMUNICATION POLITICS IN DUBIOUS TIMES 192 (The New Press 2000) (1999).

¹¹⁵ *Id.* at 189.

¹¹⁶ *Id.* at 190 (The National Committee on Education by Radio (NCER) and the National Advisory Council on Radio in Education (NACRE) were both formed in 1930. The NCER sought structural reform of broadcasting while the NACRE sought to work with NBC and CBS to establish and incorporate public interest ideals into their business models during this formative period for the two major networks); See also BARNOUW, A TOWER IN BABEL, *supra* note 14 at 264 (The NCER and NACRE were both founded to achieve similar objectives in championing education interests in broadcasting, but the two organizations sought to do this through different means and this would polarize the organizations followers and lead to public confusion).

1927 intact with the passage of the Communications Act of 1934.¹¹⁷ With the exception of adding jurisdiction of the telephone industry and replacing the Federal Radio Commission (FRC) with the Federal Communications Commission (FCC), the business of broadcast regulation was unchanged.¹¹⁸

With the business model in place, broadcasting moved into the 1930s. Radio emerged as a primary medium for entertainment.¹¹⁹ News/political content would become more prevalent as President Roosevelt took advantage of the airwaves to communicate with the American people through his “Fireside Chats.”¹²⁰ The radio networks (NBC and CBS) each formed news organizations. Professor Paul Starr, in his book *The Creation of the Media*, points to the Lindbergh kidnapping as an example of early radio news coverage.¹²¹ As radio began to increase news coverage it posed a threat to newspapers.¹²² Newspapers unsuccessfully tried to keep radio in check by exclusively controlling access to the Associated Press.¹²³

¹¹⁷ Communications Act of 1934, *supra* note 111.

¹¹⁸ *Id.* at § 151 (States the Congressional purpose of the creation of the FCC was to regulate interstate and foreign commerce by both wire and ratio); *Id.* at § 154 (Describes the organization and operational guidelines set forth by Congress for the FCC including the method of appointment and approval of commissioners and other administrative functions).

¹¹⁹ BARNOUW, A TOWER IN BABEL, *supra* note 14 at 272-274 (Profits remained high for NBC and CBS in the early 1930's as the United States experienced economic depression. Network programming expanded to add vaudevillian comedy and variety fare to successful serial programs like *Amos' n' Andy*).

¹²⁰ PAUL STARR, THE CREATION OF THE MEDIA 374 (Basic Books 2004).

¹²¹ *Id.* at 376.

¹²² *Id.* at 377.

¹²³ *Id.*

Broadcasting with Pictures: The Technology of Television

With commercial radio now an important part of everyday American life and the regulatory framework for government's role firmly established, major broadcast corporations entered the late 1930s with the opportunity to develop a new technology, television. While the technology changed, the players remained the same. Because the Communications act of 1934 sought to unify all telecommunication media under one administrative agency it was clear that as television developed this new medium would be bound by the same rules as radio.

Reeling in Network Power

With television developing in the background, the business of radio into the early 1940s was booming. At the core of its success was the popularity of nationally distributed network programming.¹²⁴ Network-originated shows could reach as much as 90-percent of the country through their simultaneous airing on affiliated stations located throughout the nation.¹²⁵

The National Broadcasting Company (NBC), the Columbia Broadcasting System (CBS), and the Mutual Broadcasting System (MBS) each entered into affiliation agreements with local stations to maximize their individual national reach.¹²⁶ These affiliation agreements between the networks and local stations governed the terms of

¹²⁴ ERIC BARNOUW, *THE GOLDEN WEB: A HISTORY OF BROADCASTING IN THE UNITED STATES VOLUME II – 1933 TO 1953* 111 (Oxford University Press 1966); ALAN B. ALBARRAN & GREGORY G. PITTS, *THE RADIO BROADCASTING INDUSTRY* 30-33 (Allyn and Bacon 2001).

¹²⁵ *Id.*

¹²⁶ *Report on Chain Broadcasting*, Commission Order No. 37; Docket No. 5060 34-44 (May, 1941).

the network-station relationship.¹²⁷ The FCC already had concerns this relationship was heavily tilted in favor of the networks and began examining regulatory methods to equalize the relationship in 1938.¹²⁸

Three years later, the FCC released its *Report on Chain Broadcasting* containing the Commission's order adopting new regulations to provide oversight into the relationship between broadcast radio stations and network programming sources.¹²⁹ Chain or network broadcasting is defined as the "simultaneous broadcasting of an identical program by two or more connected stations."¹³⁰ The Commission sought to address a pair of matters that in its view were of "special importance, the dominant position of NBC and CBS in chain broadcasting and the nature of the contracts between the broadcast networks and their affiliated stations."¹³¹ While Congress did not grant the FCC specific regulatory authority over the broadcast networks, the Commission achieved its goals indirectly by regulating its will through the local stations it had issued licenses to.¹³² The reaction to the proposals made in the report by the networks was

¹²⁷ *Id.*

¹²⁸ Federal Communications Commission, Order No. 37 (March 18, 1938).

¹²⁹ *Report on Chain Broadcasting*, at 91-92.

¹³⁰ Communications Act of 1934, *supra* note 111 at § 3 (9).

¹³¹ *Report on Chain Broadcasting*, at 30.

¹³² *Id.* at 91-92 (The order contained a total of eight regulations that: (1) allowed a station to program from multiple networks without punishment; (2) allowed stations to carry network programming in their market if the regular network affiliate serving the market opts to not carry a particular program; (3) limited network affiliation contracts to one year in length; (4) allowed stations to not be forced by networks to preempt previously scheduled programming in order to accommodate last minute network time requests; (5) networks were prohibited from preventing local stations from rejecting or refusing to air programming on public interest grounds or substituting programming of local or national interest; (6) limited station ownership to a single station within a market; (7) prevented stations from being affiliated with a network organization

predictably mixed.¹³³ Both NBC and CBS were quick to file suit in response while the weakest of the networks, MBS, approved.¹³⁴ NBC and CBS may have been united in their disdain for the report, but each was motivated by different elements of the proposal to file suit.¹³⁵

As previously mentioned, NBC operated two broadcast radio networks: its flagship NBC-Red network and the NBC-Blue network.¹³⁶ With two networks, NBC was able to occupy powerful stations with NBC-Blue affiliation that may have otherwise been open to affiliating with a network like MBS at the cost of more direct competition to NBC-Red.¹³⁷ The FCC sought to limit this monopolistic-like activity by prohibiting broadcast stations from affiliating with a network that operated more than one network.¹³⁸ If allowed to stand, NBC, as the only multi-network operator, would be forced to divest itself of one of its two networks.

that operated more than one network; (8) gave stations the ability to set local advertising rates for non-network programming without network interference).

¹³³ BARNOUW, THE GOLDEN WEB, *supra* note 122 at 168.

¹³⁴ See *Columbia Broadcasting System v. United States*, 316 U.S. 407 (1942); *National Broadcasting Co. v. United States*, 316 U.S. 447 (1942).

¹³⁵ *Id.*

¹³⁶ *Report on Chain Broadcasting*, at 44-45 (NBC's Red and Blue networks were often indistinguishable. NBC affiliation contracts did not specify a Red or Blue affiliation and programming often overlapped. Organizationally, the two NBC networks were not separate business entities and shared resources with the exception of sales).

¹³⁷ BARNOUW, THE GOLDEN WEB, *supra* note 122 at 170.

¹³⁸ *Report on Chain Broadcasting*, at 70-73 (The report listed advantages multi-network ownership afforded NBC including its use of the Blue network to serve as a buffer to protect its more commercial Red network from competition by occupying station frequencies that would otherwise be available to affiliate with other networks like Mutual. Many markets were served by three or fewer stations leaving Mutual without a potential affiliate).

As part of the CBS network affiliation contract the network retained the right to take over an affiliate's schedule during any time period of its choosing.¹³⁹ This practice of a network having the option of disrupting a local station's schedule was looked upon by the FCC as a detriment to the development of local programming and the Commission viewed such control as a violation of the terms of the broadcast licenses it issued to stations.¹⁴⁰ The new proposal did not eliminate a network from exercising options but it did limit the practice to a single daypart.¹⁴¹ The FCC also gave local affiliates the right to preempt network programming in order to broadcast other programming in the public interest.¹⁴² The *Report on Chain Broadcasting* also marked the beginning of broadcast station ownership limits.¹⁴³ The proposal prohibited networks from owning more than one station in a market while leaving a national ownership cap still to be determined.¹⁴⁴

The separate NBC and CBS cases against the proposals contained in the *Report on Chain Broadcasting* would be litigated, appealed, remanded and eventually

¹³⁹ *Id.* at 62-65 (While NBC focused on challenging the network ownership restriction, CBS was most concerned with changes to the optional-time provision. CBS's option time clause covered the whole broadcast day and allowed the network with 28 days notice to stations require them to carry a network program regardless of its air time. NBC did not add time option language to its affiliation contracts for seven years and did so only to counter a perceived competitive advantage for CBS).

¹⁴⁰ *Id.* at 65 (The FCC felt local stations should maintain sufficient power to meet the broadcast needs of their local communities free through coverage of local events of interest).

¹⁴¹ *Id.* at 92.

¹⁴² *Id.*

¹⁴³ *Id.* at 66-69.

¹⁴⁴ *Id.*

combined for examination by the United States Supreme Court.¹⁴⁵ The Court's majority opinion in the case not only decided the legal merits of the FCC proposals, it also gave birth to one of one of the most important elements of broadcast media law, the scarcity doctrine.¹⁴⁶

Regulating the 'Chain': NBC v. United States

NBC and CBS quickly challenged the FCC's authority to adopt the regulations in the *Report on Chain Broadcasting* on numerous legal grounds including their ultimate constitutionality. These issues were ultimately settled by the United States Supreme Court in *National Broadcasting Co. v. United States* (1943).¹⁴⁷

NBC and CBS built their case before the Court on around a series of legal arguments. First, the networks asserted that the FCC exceeded the legislative authority it was granted by Congress in the Communications Act of 1934 in enacting the rules.¹⁴⁸ Second, even if the Communications Act of 1934 did grant the Commission proper authority, the FCC misinterpreted the scope of the Act.¹⁴⁹ Third, the chain broadcasting rules were "arbitrary and capricious" in nature.¹⁵⁰ Fourth, the rules were an

¹⁴⁵ *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943) (held that the FCC had the regulatory authority to enforce rules governing the relationship between broadcast networks and their local affiliated stations).

¹⁴⁶ *Id.* at 214 (Writing for the majority, Justice Frankfurter introduced the scarcity rationale into broadcast regulation when he described radio as limited. Its (radio's) facilities are limited and "are not available to all who may wish to use them; the radio spectrum simply is not large enough to accommodate everybody. There is a fixed natural limitation upon the number of stations that can operate without interfering with one another").

¹⁴⁷ *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

“unconstitutional delegations of legislative power” by Congress to the FCC.¹⁵¹ Finally, the rules violated the free speech rights of networks’ as protected by the First Amendment of the Constitution.¹⁵²

The Court was left to determine whether Congress had granted the FCC the power to regulate chain broadcasting and if such power is permitted by the Constitution.¹⁵³ In the majority opinion Justice Frankfurter admitted that the Communications Act of 1934 did not explicitly grant the FCC the authority to regulate network practices.¹⁵⁴ However, the Commission did have the authority to issue broadcast licenses and regulate licensees in a manner consistent with protecting the “public interest, convenience, or necessity.”¹⁵⁵ The FCC argued that its chain broadcasting rules were designed to address actions it determined were detrimental to the “public interest.”¹⁵⁶ The Court noted that Congress provided the FCC with broad authority to insure the maximum benefit of radio in the Communications Act of 1934, citing section 303 as an example.¹⁵⁷

Section 303 of the Communications Act of 1934 directs the FCC to “generally encourage the large and more effective use of radio in the public interest”, grants the Commission the “authority to make special regulations applicable to radio stations

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ National Broadcasting Co. v. United States, 319 U.S. 190 (1943).

¹⁵⁴ *Id.* at 219.

¹⁵⁵ *Id.* at 216.

¹⁵⁶ *Id.* at 217.

¹⁵⁷ *Id.*

engaged in chain broadcasting”, and allows it to enact “such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act.”¹⁵⁸ The Court believed this to provide the FCC with sufficient authority to lawfully enact its chain broadcasting rules.¹⁵⁹

The Court also addressed the constitutionality of the chain broadcasting rules as challenged by the networks.¹⁶⁰ NBC and CBS argued that the rules abridged their First Amendment right of free speech.¹⁶¹ It is here that Justice Frankfurter introduced the scarcity doctrine to broadcasting by pointing out radio, by its very nature, abridges free speech.¹⁶² Radio is not available to all who may wish to use it and is thus subject to government regulation.¹⁶³ The process of granting or denying a broadcast licenses is not a denial of free speech as long as the “public interest, convenience or necessity” is served.¹⁶⁴ The loss not only changed the network-affiliate relationship contractually; it also motivated NBC to divest from one of its two networks before being forced to do so.¹⁶⁵ NBC-Blue was sold to Edward J. Noble of Lifesavers Candy fame.¹⁶⁶ Noble paid

¹⁵⁸ Communications Act of 1934, *supra* note 111 at § 303 (g), (i), (r).

¹⁵⁹ *National Broadcasting Co. v. United States*, 319 U.S. 190, 225 (1943).

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 226.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ Gayle Noyes, *American Broadcasting Company*, The Museum of Broadcast Communications, <http://www.museum.tv/archives/etv/A/htmlA/americanbroa/americanbroa.htm>.

¹⁶⁶ STERLING QUINLAN, *INSIDE ABC: AMERICAN BROADCASTING COMPANY’S RISE TO POWER* (Hastings House, 1979).

NBC \$8 million dollars for the network and went on to name his new entity the American Broadcasting Company (ABC).¹⁶⁷

While the decision in *National Broadcasting Co. v. United States* (1943) specifically addresses network practices in radio, its holding would soon be applicable to a new broadcast technology poised for a post-World War II implementation, television. Decades in development, television was forced into a war-induced hibernation that would soon end and mark the beginning of a new chapter for broadcasting in the United States.

The Early Development of Television

Though invention of the television cannot be attributed to any one person, Philo Farnsworth is regularly credited as the Father of Television. In 1922 at his local high school, he stunned his science teacher by asking for advice about an electronic television system he was working on.¹⁶⁸ He completed his first successful television transmission in 1927, airing various images including a dollar sign.¹⁶⁹ While Farnsworth was working on his “Image Dissector” Vladimir Zworkin was working on a similar apparatus for the RCA. Also in 1927, Bell Telephone Labs transmitted both pictures and sound from Washington D.C. to New York.¹⁷⁰ Farnsworth applied for a television patent and RCA attorneys were quick to challenge the patent application but in August of 1930 Farnsworth was granted the patent.¹⁷¹

¹⁶⁷ *Id.*

¹⁶⁸ BARNOUW, THE GOLDEN WEB, *supra* note 122 at 39.

¹⁶⁹ *Id.*

¹⁷⁰ *Television Now Reality; Device Demonstrated*, THE TROY RECORD, Apr. 8, 1927, at 1.

¹⁷¹ BARNOUW, THE GOLDEN WEB, *supra* note 122 at 39.

A major reason for the success of commercial broadcasting in the United States was organization. At the center of this effort was the National Association of Broadcasters (NAB).¹⁷² Founded in 1922, the NAB played an important role in championing commercial interests during broadcasting's formative years prior to the passage of the Radio Act of 1927 and in 1928 successfully lobbied the newly created Federal Radio Commission to pass General Order 40.¹⁷³ This order preserved the most desired frequencies for commercial broadcasters and effectively reduced the competitive threat of non-profit interests seeking to gain entry for their non-commercial agendas and programming.¹⁷⁴ The NAB's efforts would lead to most of its pro-commercial broadcasting agenda becoming law with the eventual passage of the Communications Act of 1934.¹⁷⁵ The NAB originally was formed to provide a unified front for broadcasters in negotiating with the American Society of Composers Authors and Publishers (ASCAP) and future licensing organizations for determining rights fees broadcasters would pay for the use of music and other copyrighted material.¹⁷⁶

In 1930, David Sarnoff became President of RCA. Sarnoff was obsessed with television and certain that it was the future of broadcasting.¹⁷⁷ He knew that in order to

¹⁷² BARNOUW, A TOWER IN BABEL, *supra* note 14 at 120-121.

¹⁷³ Dep't of Commerce, Radio Service Bull. No. 137, Aug. 31, 1928, at 9-10 (This is a reprinting of Federal Radio Commission General Order 40 issued on Aug. 30, 1928. The FRC reallocated the commercial broadcast radio spectrum in order to reduce "interference and clutter" and bring radio into underserved areas of the country. The reallocation of channels sought to equally serve the nations five geographic zones as defined by the Radio Act of 1927).

¹⁷⁴ *Id.*

¹⁷⁵ Henry A. Bellows, *Report of the Legislative Committee*, NAB REPORTS, Nov. 15, 1934, at 618.

¹⁷⁶ BARNOUW, A TOWER IN BABEL, *supra* note 14 at 120.

¹⁷⁷ BARNOUW, THE GOLDEN WEB, *supra* note 122 at 38.

make television marketable nationwide a standard system would need to be developed.¹⁷⁸ It turns out that RCA had such a standard for transmission and reception of signals.¹⁷⁹

In April of 1935 Sarnoff pledged that RCA would spend a million dollars to improve television technology and make it accessible to the public.¹⁸⁰ Sarnoff was determined to have television make its big debut at the 1938 World Fair.¹⁸¹ That vision became reality as President Roosevelt's statement at the opening ceremony was the first televised presidential statement.¹⁸² Televisions went on sale to the public the next day. Prices of televisions ranged from two hundred to six hundred dollars and screen sizes were between five and twelve inches.¹⁸³ On July 1, 1941 the first television commercial aired, a ten second spot showing the face of a Bulova watch.¹⁸⁴ The network made a seven dollar profit on a nine dollar sale.¹⁸⁵ Other networks would soon follow with their own commercial advertising.¹⁸⁶

As the technology of television began to evolve, so too would the role played by the National Association of Broadcasters (NAB). The NAB continued to solidify its role

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 125.

¹⁸² *Id.* at 126.

¹⁸³ *Id.*

¹⁸⁴ Bulova, About Us, <http://www.bulova.com/about/about.aspx#history.aspx> (last visited Sept. 11, 2009).

¹⁸⁵ *Id.*

¹⁸⁶ R.W. Stewart, *Imagery For Profit*, NEW YORK TIMES, July 6, 1941, at A10.

as the main component of industry's largely effective government lobbying efforts.¹⁸⁷

With the FCC preparing to make major decisions regarding the future of television in the United States, the NAB countered by hiring its first paid president in 1938.¹⁸⁸

Television was poised for a rapid rise only to be derailed by World War II. When the United States entered the war, all production of television sets was immediately halted.¹⁸⁹ But, unlike in World War I where there was a substantial decrease in radio advertising, television advertising continued to grow during World War II.¹⁹⁰ After the war, however, production and sales boomed.¹⁹¹

At first, television faced competition for spectrum allocation from emerging FM technology.¹⁹² RCA and Sarnoff saw television as the future, urging its affiliates to apply for television licenses as soon as possible, and eventually successfully lobbied the FCC to move FM to a higher part of the spectrum, making way for TV.¹⁹³ The FCC began issuing television licenses and soon television activity exploded.¹⁹⁴ CBS was behind the times because it was preparing a new technology that would allow for color television, but the method they had developed was incompatible with currently available black and

¹⁸⁷ BARNOUW, THE GOLDEN WEB, *supra* note 122 at 36.

¹⁸⁸ *Id.* at 114.

¹⁸⁹ *Id.* at 127-128.

¹⁹⁰ *Id.* at 176.

¹⁹¹ *Id.* at 243.

¹⁹² *Id.* at 242.

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 243.

white sets.¹⁹⁵ Sarnoff promised the FCC he would have a color system, compatible with black and white sets, within six months.¹⁹⁶ When RCA delivered on this promise, the FCC approved the system, pushing the CBS model aside.¹⁹⁷

By July of 1946, the FCC had issued twenty four new licenses for television.¹⁹⁸ In that same year, networks began working on programming and fighting to attract an audience.¹⁹⁹ Networks used radio profits to pay for television developments.²⁰⁰ Network programming ranged from sports broadcasts to drama serials.²⁰¹ Networks were quick to steal profitable programs from each other.²⁰²

By 1948, there were one hundred and eight television stations broadcasting, but interference problems combined with a shortage of available Very High Frequency (VHF) channel spectrum caused the FCC to announce a moratorium on the issuing of licenses.²⁰³ The Commission released its “freeze order” in September of 1948.²⁰⁴ This “freeze” would last until the spring of 1952.²⁰⁵ During the freeze existing stations were able to continue programming, but the number of stations who were ready to broadcast

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 244.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.* at 245.

²⁰³ *Id.* at 285.

²⁰⁴ Report and Order, FCC 48-2182, Sept. 30, 1948.

²⁰⁵ BARNOUW, THE GOLDEN WEB, *supra* note 122 at 285.

remained small.²⁰⁶ In essence, the "freeze" gave the FCC the opportunity to address the many shortcomings of its initial VHF allocation and determine standards for color television.²⁰⁷ At the same time, the freeze allowed the major networks (NBC and CBS), the only ones truly prepared to broadcast, to strengthen their dominant hold on the television medium and grow their VHF stations free from additional competition.²⁰⁸

In 1952, the FCC released its *Sixth Report and Order* which was an omnibus television package.²⁰⁹ The *Sixth Report and Order* declared that television would now broadcast on both existing VHF channels as well as new Ultra High Frequency (UHF) spectrum.²¹⁰ The Commission determined expanding the VHF spectrum to provide enough available channels was not practical because it would displace other forms of radio already occupying that portion of the spectrum.²¹¹ The FCC also considered and rejected a proposal that would have forced existing VHF stations to abandon their frequencies and migrate to UHF channels.²¹² Instead the Commission decided to take

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 295.

²⁰⁸ *Id.* at 290.

²⁰⁹ Television Assignments, *Sixth Report and Order*, 41 F.C.C. 148 (Apr. 11, 1952).

²¹⁰ *Id.* at 168-169.

²¹¹ *Id.* at 154 (To make additional VHF channels available would require the removal of frequencies from other radio services already occupying them. Lacking formal proposals or technical evaluations of such a policy the FCC concluded there was no basis for pursuing an expansion of television's VHF allocation. The Commission only cited testimony stating a desirability of such a move).

²¹² *Id.* at 155 (Statements were filed with the FCC proposing that the VHF band be abandoned for television and all stations be allocated frequencies in the UHF band. The statements claimed by only allocated television stations in the UHF band serious economic, technological and competitive problems of pursuing a dual band policy could be mitigated. Citing a lack of evidence and a concern that the UHF band alone would not provide enough frequencies the FCC rejected the idea).

an “intermix” approach and use both.²¹³ Channels two through thirteen in the VHF (very-high frequency) band would be joined by seventy new channels in the UHF band.²¹⁴ This was a controversial move because thousands of television sets in the United States were not capable of receiving UHF signals.²¹⁵ With the additional UHF spectrum, the FCC was able to develop a Table of Assignments that provided 2,053 channels to 1,291 communities throughout the nation.²¹⁶

The FCC attempted to meet a pair of objectives with the creation of its Table of Assignments, provide television service to as many people as possible and assign television licenses in a manner that would provide “fair and equitable” distribution of frequencies to the states and communities.²¹⁷ In developing its Table of Assignments the FCC utilized a prioritized list of five principles:

(1) To provide a least one television service to all parts of the United States; (2) To provide each community with at least one television broadcast station; (3) To provide a choice of at least two television services to all parts of the United States; (4) To provide each community with at least two television broadcast stations; and (5) Any channel which remain unassigned under the foregoing principles will be assigned to various communities depending on the size of the population of each community, the geographical location of such community, and the number of television services available to such community from television stations located in other communities.²¹⁸

While the FCC’s intermix approach did expand the number of available frequencies available for television the decision was based on the assumption that UHF

²¹³ *Id.* at 205-209.

²¹⁴ *Id.* at 153-155.

²¹⁵ *Id.* at 583.

²¹⁶ *Id.* at 168.

²¹⁷ Communications Act of 1934, *supra* note 111 at § 1, 303 (b).

²¹⁸ Television Assignments, *supra* note 207 at 167.

stations would become competitive with their VHF counterparts.²¹⁹ Commissioner Jones called this assumption a “pious hope” given what he viewed as excessive co-channel spacing protection to VHF stations without providing the same to UHF stations.²²⁰ Jones illustrated the difficulties facing UHF stations in markets already served by VHF stations.²²¹ Not only would the UHF station owners be facing the standard capital costs of equipping and operating the station; they would also be burdened with the additional expense of audience acquisition through the purchase of UHF converters to gain access to the VHF-only-set owning portion of the potential audience.²²² Echoing a similar tone, Commissioner Hennock also pointed to the lack of UHF tuners in existing sets and additional technological shortcomings that disadvantaged UHF stations.²²³ According to Hennock, UHF stations would be forced to overcome reception problems on what she termed an “experimental portion of the spectrum containing 85% of all TV channels,” to successfully compete reception wise with VHF stations.²²⁴

Conclusion

With the “freeze” ended and adoption of the FCC’s Sixth Report and Order the blueprint for broadcast television in the United States was in place. While the success

²¹⁹ *Id.* at 208 (The FCC was convinced the UHF stations could eventually achieve parity with their VHF counterparts and that UHF would “constitute an integral part of a single, nationwide television service”).

²²⁰ *Id.* at 628.

²²¹ *Id.*

²²² *Id.*

²²³ *Id.* at 582-584.

²²⁴ *Id.*

of television over the coming decades is difficult to deny the broadcast model was far from perfect. Television's inability to duplicate the same level of reception as radio, combined with the FCC's failure to address it, provided an opening for a new service to emerge to bridge the reception gap.

The development of cable television may have started on the top of a mountain, but it would take the industry many decades to reach equivalent heights due to the FCC's reluctance to reexamine its reliance on broadcast television as the sole distributor of video content and the increasing power and influence of the NAB to protect broadcast interests. The next chapter will chronicle the growth of the cable industry and its often adversarial relationship with broadcasters.

CHAPTER 3 BROADCASTING BLOSSOMS AND CABLE COMES OF AGE

[I]f over-the-air television is to fall victim, in some degree or another, to technological change, it is in no different position from any other enterprise... and possesses no greater right than other industries to protection from technological change.

—Sloan Commission on Cable Communications¹

Introduction

While television broadcasters did not have the power to protect themselves from competition from other technologies, the United States Congress and Federal Communications Commission (FCC) were more than happy to provide the industry with just such considerations when it came to restricting the development of cable television as a competitor to broadcasting.² The government viewed over-the-air television, just like radio, as worthy of special protection in order to insure the “public interest” was served.³ This policy of broadcast favoritism continues to play a role in the business of broadcasting as it transitions into digital television (DTV). Exploring the origin and evolution of the special relationship between Congress, the FCC and broadcasters and its role in the development of cable television service in the United States will be the focus of this chapter.

Following the freeze and the FCC’s release of its *Sixth Report and Order* in 1952, the business of commercial broadcast television in the United States found itself

¹ SLOAN COMMISSION ON CABLE COMMUNICATIONS, ON THE CABLE: THE TELEVISION OF ABUNDANCE, 81, (McGraw-Hill, 1971).

² See LUCAS A. POWE, AMERICAN BROADCASTING AND THE FIRST AMENDMENT 216 (University of California Press, 1987) (the FCC’s attitude towards cable in relation to broadcasting was one of “fear and loathing”).

³ *Id.* at 219.

perfectly positioned to dominate the delivery of video content.⁴ Just as they did in radio, the National Broadcasting Company (NBC), Columbia Broadcasting System (CBS) and to a lesser extent the American Broadcasting Company (ABC) controlled the distribution of popular programming through a national network of broadcast affiliates.⁵ In the case of both NBC and CBS, ownership of desirable very-high frequency (VHF) stations in many of the largest U.S. cities, added to their power and influence.⁶ Protecting this preferred position went largely unchallenged for decades, but while established broadcasters were focused on limiting direct competition in the form of new broadcast stations an indirect rival literally grew from the hilltops.

In response to the freeze and reception issues unique to television when compared to radio, entrepreneurs in mountainous areas of Pennsylvania and Oregon searched for ways to bridge not only the line-of-sight reception gap, but the station gap created by the freeze.⁷ Their answer would be a wired one as cable interconnection to a common elevated community antenna allowed areas otherwise unable to receive television signals to now view broadcast programming.⁸

⁴ Television Assignments, *Sixth Report and Order*, 41 F.C.C. 148 (Apr. 11, 1952).

⁵ See Alan Pearce, *The Economic and Political Strength of the Television Networks in NETWORK TELEVISION AND THE PUBLIC INTEREST* 3-8 (Michael Botein & David M. Rice eds., Lexington Books 1980) (illustrates the dominance of network television programming in attracting the largest audiences and the greatest share of advertising revenue).

⁶ *Id.* at 4 (describes the corporate organization of NBC, CBS and ABC and the significant reach each network's ownership of valuable VHF stations in major markets provided).

⁷ PATRICK R. PARSONS, *BLUE SKIES: A HISTORY OF CABLE TELEVISION* 1-2 (Temple University Press 2008) (Introduces the efforts of George Gardner and his associates to receive television signals by carrying equipment up "rocky slopes" to extend the reach of broadcasting to places blocked by topography).

⁸ *Id.* at 77-90 (The origins of cable began as a series of individual entities seeking the same solution, but doing so without much collaboration. Most narrowly focused on simply receiving

Community Antenna Television (CATV) Fills the Broadcast Gap

The greatest motivator for the development of cable service turned out to be as simple as people located outside of television's coverage area not wanting to miss out on the experience broadcast television offered to those in the cities in which it was available.⁹ With the FCC's freeze keeping new stations from the airwaves, the proliferation of television would not follow in radio's footsteps in developing a national footprint.¹⁰ Communities not fortunate enough to have been granted a television license or be located close enough to a locale that did literally took matters into their own hands and invented Community Antenna Television (CATV).¹¹ At least that was the case in Pennsylvania, Oregon and Arkansas.¹²

Before cable television became a multi-billion dollar industry and offered hundreds of channels to tens of millions of households in the United States, it would first be used to extend the reach of broadcast television across miles and over mountains.¹³

television signals and failed to see beyond their local communities and cables applicability and potential).

⁹ BRIAN LOCKMAN & DON SARVEY, PIONEERS OF CABLE TELEVISION 3 (McFarland & Company 2005) (Television received positive coverage from the national press in national magazines like *Time* and as those unable to receive a signal read about what television had to offer they wished to see it for themselves).

¹⁰ *Id.*

¹¹ *Id.* (Many veterans from World War II returned home with training and experience in radar and radio that would prove extremely useful in developing early cable television systems).

¹² *Id.* at 5, 14 (The authors focus on the history of cable in Pennsylvania with only a brief mention of parallel activities taking place in Oregon and Arkansas).

¹³ See generally JOSEPH N. DISTEFANO, COMCASTED: HOW RALPH AND BRIAN ROBERTS TOOK OVER AMERICA'S TV, ONE DEAL AT A TIME (Camino Books 2005) (a detailed history of Comcast Cable from its humble beginnings to its eventual ascension to become the largest cable provider in the United States); MARK ROBICHAUX, CABLE COWBOY: JOHN MALONE AND THE RISE OF THE MODERN CABLE BUSINESS (John Wiley & Sons 2002) (a chronology of the career of cable television pioneer John Malone from his early days with what would become Tele-

CATV's humble beginnings as a community antenna service did not initially foretell its eventual role as competitor to broadcast television.¹⁴ CATV was viewed simply as a complementary service to broadcasting that would only be necessary until broadcasting grew into the national service Congress envisioned.¹⁵ However, it did not take long for cable operators to see a future beyond community antenna service and broadcasters were quick to defend themselves from the threat.¹⁶

The stories of the early pioneers in cable television are surprisingly similar in that they all sought to extend the reach of television to locations it was not yet serving.¹⁷ These pioneers included John Walson of Mahoney City, Pennsylvania.¹⁸ Walson worked full-time as a lineman with Pennsylvania Power and Light and owned an appliance store.¹⁹ He claimed himself to be the builder of the first cable system in the United States in 1948.²⁰ Walson's claim has generated much debate and its accuracy is disputed by some.

Communications, Incorporated (TCI) through his selling of the company to AT&T for \$48 billion and his eventual founding of Liberty Media).

¹⁴ POWE, *supra* note 2, at 219, 225 (the FCC realized it needed to enter the business of cable regulation in order to protect broadcasters from competition from cable after the Commissions' view that UHF development would make cable "unnecessary and uneconomical").

¹⁵ *Id.*

¹⁶ PARSONS, *supra* note 7, at 377-392 (A chronology of major, post-HBO, cable programming including WTBS, CBN, MSG/USA, C-SPAN, ESPN and SIN).

¹⁷ LOCKMAN & SARVEY, *supra* note 9.

¹⁸ *Id.* at 9.

¹⁹ *Id.* at 10-11.

²⁰ *Id.* at 11.

Whether Walson was first or not does not diminish from his successes as a cable pioneer and his story is still compelling.²¹ Walson added televisions to the product line of his appliance store in 1947 and soon realized a substantial obstacle stood between him and the sale of his new inventory of televisions in the form of a mountain range.²² Without line-of-sight to the transmitters from the stations in Philadelphia reception was impossible in his valley location.²³ To begin selling \$500 black and white television sets Walson needed to solve the reception problem and he eventually did.²⁴ He started bringing customers to the top of the mountain to see television at work.²⁵ He soon tired of this laborious chore and eliminated the trip by leaving his antenna atop the mountain and running a cable down into town.²⁶ Eventually the cable would weave its way through town giving residents wishing to subscribe to the service the ability to receive broadcast signals from transmitters roughly 70 miles to the southeast licensed to serve the city of Philadelphia.²⁷

Broadcasters in Philadelphia or any other city would be happy to see their signal reach extended and potential audience grow because of the availability of cable

²¹ PARSONS, *supra* note 7, at 69-71 (Walson's claim to be first is called into question by the historical record not supporting his claim to have established his cable system in 1948).

²² LOCKMAN & SARVEY, *supra* note 9, at 11.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 11-13 (Walson built a portable antenna in the back of a truck and would drive the truck with a generator and television on board to the top of the mountain to demonstrate television to his customers).

²⁶ *Id.*

²⁷ *Id.* at 16-18 (Walson charged customers a \$300 installation fee to access his cable service at first, then reduced it to \$100 with a \$2 monthly fee. He waived the monthly fee for a year if you bought your television set from his store); *See also blue skies.*

television, but there would be a cost. The ability of many CATV systems to receive television signals located beyond their closest stations provided cable operators with their first opportunity to provide additional programming choices to subscribers.²⁸ These programming choices were ones broadcasters preferred cable subscribers not to be able to make at the expense of stations located in closer proximity.²⁹ Before must-carry became the issue of contention it is today, broadcasters aggressively pursued the exact opposite when it came to cable, a must not carry agenda.

Growing Pains: Cable Extends its Reach and Broadcasters Push Back

John Walson's contributions to the early development of cable television included the importation of distant broadcast signals not necessarily intended to directly serve the local community in which the cable system was located.³⁰ In Walson's case his master antenna location was not only capable of receiving stations from Philadelphia but from New York City as well.³¹ Any CATV operator located near multiple television markets could do the same. The ability to import distant signals and potentially "leapfrog" local stations was troublesome for broadcasters and program providers.³² Broadcasters worried about the fragmentation imported signals would cause to the audience and the resulting loss of advertising revenue to local stations.³³ Programmers

²⁸ *Id.* at 20.

²⁹ PARSONS, *supra* note 7, at 217 (The FCC protected broadcasters local market position by implementing carriage and non-duplication regulations on cable systems).

³⁰ LOCKMAN & SARVEY, *supra* note 9, at 20.

³¹ *Id.*

³² PARSONS, *supra* note 7, at 212-214 (defined "leapfrogging" as the importation of signals from distant markets while skipping over a signal from a station closer to the cable system).

³³ *Id.* at 211 (ABC, the weakest of the three networks, was the most aggressive in seeking help from the FCC to limit signal importation).

were also interested in collecting performance and copyright fees from cable operators for their distribution of imported signals.³⁴

Early signal importation was confined to the reception of over-the-air (OTA) broadcast signals for distribution over a cable system.³⁵ New technologies such as microwave repeaters and satellites would eventually complicate the relationship between broadcasters, cable operators, program providers and government, particularly the FCC.³⁶ Cable's relationship with the Commission developed slowly in part because the Communications Act of 1934 did not specifically address cable television.³⁷ Determining how to regulate a wired technology that did not easily fit into the telephone "common carrier" or broadcast licensee regulatory models proved a challenge to the FCC.³⁸ Complicating the issue was a belief that CATV was simply a temporary fix to surmount broadcast television's early shortcomings,³⁹ shortcomings the FCC thought it

³⁴ *Id.* at 221-227 (The issue of copyright and the rights of cable operators to use broadcast signals without permission or providing compensation created an alliance between broadcasters and content providers like United Artists).

³⁵ *Id.* at 212.

³⁶ *Id.* at 197 (The use of microwave repeaters to import broadcast signals was particularly popular in the Western U.S. where there was no other alternative to provide cable customers with programming from all three broadcast networks).

³⁷ *Id.* at 123 (The Communications Act of 1934 gave the FCC the power to regulate broadcasting and common carrier services. The process of determining whether cable could be classified within either category allowed the Commission to avoid entering the battle between broadcaster and cable operators for more than a decade).

³⁸ *Id.* at 123 (The FCC staff thought the commission could regulate cable as a common carrier, but not as broadcasters).

³⁹ PARSONS, *supra* note 7 at 124 (describing the FCC preoccupation with the *Sixth Report and Order* and its belief that the broadcasting system successful development would make services like CATV disappear); POWE *supra* note 2 at 225 (describing the FCC's pre-1970 view that once UHF reached its potential cable would become "an unnecessary and uneconomical adjunct to broadcasting" and cable faced a future of "oblivion").

solved with the release of its *Sixth Report and Order*.⁴⁰ The Commission believed as broadcasting matured and the UHF spectrum became fully utilized cable would become unnecessary.⁴¹ This was an entirely plausible assumption to make in the early 1950s, but one based on two fallacies. First, that broadcast television would achieve its legislative mandate and mirror radio as a truly national service.⁴² The second, and more important, assumed that the cable industry would sit idly by, fail to innovate, and allow local broadcast television stations a clear path to market dominance.⁴³ Neither proved true and led to a very inconsistent early history between the cable industry and the FCC.

The National Association of Broadcasters (NAB)

The Federal Communications Commission's (FCCs) relationship with the cable industry has been complicated since its inception and often influenced by a powerful

⁴⁰ Television Assignments *supra* note 4.

⁴¹ *Id.* at 208 (the FCC was convinced UHF stations could achieve parity with their VHF counterparts and that UHF would "constitute an integral part of a single, nationwide television service").

⁴² See Communications Act of 1934, 47 C.F.R. § 151 (1934) (the FCC would act in a "fair and equitable" manner regarding the distribution of frequencies to the states and communities); Television Assignments *supra* note 4 at 167 (the plan the FCC adopted in its *Sixth Report and Order* in assigning television frequencies followed five principles: (1) To provide a least one television service to all parts of the United States; (2) To provide each community with at least one television broadcast station; (3) To provide a choice of at least two television services to all parts of the United States; (4) To provide each community with at least two television broadcast stations; and (5) Any channel which remain unassigned under the foregoing principles will be assigned to various communities depending on the size of the population of each community, the geographical location of such community, and the number of television services available to such community from television stations located in other communities. With three major broadcast networks (NBC, CBS and ABC) seeking a national audience reception of only one station meant viewers would be unable to access all available national programming).

⁴³ PARSONS, *supra* note 7, at 186 (The development of large scale pay-TV offerings and its potential to generate revenue for cable operators was openly discussed as early as 1957).

third party, broadcasters.⁴⁴ With a thirty year head start on the cable industry, the National Association of Broadcasters (NAB) established itself as a powerful lobby in Washington D.C. with Congress and the FCC for the interests of broadcasters.⁴⁵ The NAB's influence on communications policy relevant to broadcasting is evident in the Radio Act of 1927, the Communications Act of 1934 and the preservation of the VHF television band after the freeze with the release of the *Sixth Report and Order*. This influence would be utilized by the NAB to protect broadcasting from competition from cable.

The National Cable & Telecommunications Association (NCTA)

The cable industry's path to power in Washington, D.C. was a polar opposite journey when compared to broadcasters. Broadcasting was born of the federal government, dominated by centrally produced network programming and given the Congressional mandate to promote localism. Cable television, on the other hand, started as a decentralized local service in small towns in states like Arkansas, Oregon and Pennsylvania.⁴⁶ To overcome this disadvantage in Washington, the industry countered with what is today known as the National Cable & Telecommunications

⁴⁴ *Id.* at 210 (An NAB determined for every 1000 subscribers to a cable system a broadcast station could lose between 10 and 50 percent on net profits).

⁴⁵ National Association of Broadcasters, <http://www.nab.org> (Dec. 10, 2009) The National Association of Broadcasters (NAB) was created in 1922 to help broadcasters mount an organized front in dealing with music licensing disputes. The organization evolved into an important political organization central to the promotion of broadcaster interests in Washington, D.C.; See also The Museum of Broadcast Communications, *National Association of Broadcasters History*, <http://www.museum.tv/archives/etv/N/htmlN/nationalassob/nationalassob.htm> (last visited Aug. 1, 2009).

⁴⁶ PARSONS, *supra* note 7, at 176 (As late as the mid-1960s almost 90 percent of cable systems served communities with fewer than 25,000 residents).

Association (NCTA).⁴⁷ A second trade organization, the Community Antenna Television Association (CATA) has also served as a voice of cable industry interests. The NCTA's evolution into an organization of influence came from learning through direct competition with the NAB and a slow and steady expansion into new markets.

Both the NCTA and NAB have and continue to play a significant role in the legislative and regulatory process regarding telecommunications policy. The actions of both organizations will be an important piece to the historical overview of cable regulation that follows.

Modeling the Broadcast/Cable Regulatory Process

The NAB, NCTA, Congress, FCC and the courts each play an important role in the development and implementation of telecommunications policy. The understanding of the role each plays in the process and its significance is the subject of considerable study.

Erwin Krasnow, Lawrence Longely, and Herbert Terry authored one of the most thorough studies of the regulatory process as it pertains to mass communication.⁴⁸ Their analysis of the broadcast regulatory process identified six major policy determiners.⁴⁹ Their list includes Congress, the FCC, industry, the courts, citizen

⁴⁷ National Cable & Telecommunications Association, <http://www/ncta.com> (last visited Aug. 1, 2009) The National Cable & Telecommunications Association (NCTA) was formed in 1952. It was then known as the National Cable Television Association. The mission on the NCTA is to provide a strong national presence through a coordinated effort to influence issues of interest to the cable industry.

⁴⁸ ERWIN G. KRASNOW & LAWRENCE D. LONGLEY, THE POLITICS OF BROADCAST REGULATION (St. Martin's Press 1982).

⁴⁹ *Id.*

groups, and the White House.⁵⁰ The actions, influences, agendas and biases of each of these participants are central to understanding the process involved in creating much of the law and policy impacting broadcasting and cable.

Philip Napoli expanded the Krasnow model by elevating the determiners into private sector, judicial, political, and bureaucratic tiers from which they interact with one another.⁵¹ He also categorized the relationship between each as either that of principle or agent.⁵² These determiners are the main players in this study of the must-carry issue and the transition to digital television (DTV).

One theory associated with the regulatory process worthy of further discussion is regulatory capture.⁵³ This theory is applicable to any government regulatory agency and has been applied to the FCC and its relationship to the industries it regulates.⁵⁴ Krasnow touches on the concept of regulators, in this case FCC representatives, becoming so close to the entities they regulate they reach a point of bias or “capture.”⁵⁵ He identifies the obvious problematic aspects of “regulatory capture”, but also recognized the importance of regulators possessing the necessary understanding of the

⁵⁰ *Id.* at 33.

⁵¹ PHILIP M. NAPOLI, FOUNDATIONS OF COMMUNICATION POLICY: PRINCIPLES AND PROCESS IN THE REGULATION OF ELECTRONIC MEDIA (Hampton Press 2001).

⁵² *Id.* at 227-229.

⁵³ KRANSOW, *supra* note 48 at 48-50.

⁵⁴ *Id.*

⁵⁵ *Id.*; See also Glen O. Robinson, *The Federal Communications Commission: An Essay on Regulatory Watchdogs*, 64 VA. L. REV. LAW REVIEW 192, (1978)

industries they regulate.⁵⁶ The kind of understanding that can only come from industry experience.⁵⁷

The “capture” in broadcasting can be traced to radio conferences of the 1920s prior to the passage of the Radio Act of 1927 and the creation of the Federal Radio Commission (FRC).⁵⁸ Industry participation in the radio conferences was extensive and led to a significant advisory role in legislative process that created the Radio Act of 1927.⁵⁹ As a newer industry, it took cable decades to develop relationships with regulators equal to those of broadcasting.

The FCC places Cable on the Road to Regulation

CATV growth into the mid-1960s remained steady as the number of cable systems exceeded 1500 and served in excess of 1 million subscribers.⁶⁰ As broadcasters sought to protect their dominant position in the video delivery market, cable operators were the easiest target to vilify, often by complaining of an alleged economic harm caused to broadcasters by cable.⁶¹ The FCC believed that CATV

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ See *Report of Department of Commerce on Radio Telephony*, RADIO SERVICE BULLETIN, May 1, 1922, at 22-30; *Report of Department of Commerce on Radio Telephony*, RADIO SERVICE BULLETIN, April 2, 1923, at 9-13; Recommendations for Regulation of Radio Adopted by the Third National Radio Conference, October 6-10, 1924 available at <http://earlyradiohistory.us/1924conf.htm> (last visited November 21, 2009); Proceedings of the Fourth National Radio conference and Recommendations for Regulation of Radio, November 9-11, 1925 at 8 available at <http://earlyradiohistory.us/1925conf.htm> (last visited November 21, 2009).

⁵⁹ *Id.*

⁶⁰ PARSONS, *supra* note 7, at 175.

⁶¹ *Id.* at 140 (Broadcasters complained that cable would fragment the audience by offering more choice to viewers and placing local stations in economic harm as a result).

threatened the development of UHF television and broadcasters were more than happy to echo that sentiment.⁶²

While the FCC successfully avoided direct regulation of the cable industry Congress, the Commission and the courts did deal with issues that were relevant to cable's interests and future development. However, the FCC did offer its most comprehensive view to date of its potential regulatory role in CATV in 1959 with the release of its inquiry on the impact of CATV on the development of television broadcasting.⁶³

1959 Report and Order

By 1959 broadcasters, with help from the NAB, had effectively made known to the FCC their collective alarm over the "substantial adverse economic impact" CATV and other "auxiliary services" posed to broadcast television stations.⁶⁴ The Commission responded to the concerns of broadcasters when it adopted its Report and Order in docket 12443 in April of 1959.⁶⁵

As part of the 1959 Report and Order the FCC offered four legislative recommendations. Two of the recommendations were specifically directed at CATV.⁶⁶ The first would require CATV systems to obtain retransmission consent from originating

⁶² PATRICK PARSONS, CABLE TELEVISION AND THE FIRST AMENDMENT 16 (Lexington Books 1987) (Parsons also points out critics claimed UHF broadcasters had a bigger threat to success than cable, their more powerful VHF broadcast counterparts).

⁶³ Inquiry into the Impact of Community Antenna Systems, TV Translators, TV "Satellite" Stations and TV "Repeaters" on the Orderly Development of Television Broadcasting, Report and Order, 26 FCC 403, 18 RR 1573 (1959).

⁶⁴ *Id.* at 403 (Auxiliary services included CATV's, "satellite" stations, UHF translators, and VHF repeaters or boosters).

⁶⁵ *Id.*

⁶⁶ *Id.*

stations before offering them to subscribers.⁶⁷ The second sought to require CATV systems to transmit the programming of locally assigned broadcast stations at the station's request.⁶⁸ In April of 1959 the Commission officially introduced the framework for the broadcast/CATV relationship and from the beginning it included elementary versions of must-carry and retransmission consent.⁶⁹

The FCC was not only concerned with CATV's impact on current broadcast stations, but what potential obstacles CATV could pose to the success of future stations as well.⁷⁰ At the time of the release of this Report and Order there were 509 commercial broadcast stations in operation providing service to more than 95 percent of United States households.⁷¹ The number of CATV systems was estimated at 550 with up to 2 million subscribers.⁷²

Broadcasters were united in their assertion that without FCC intervention the adverse effect of CATV on broadcasting would be severe.⁷³ Broadcasters feared the loss of numerous small market stations due to economic hardship caused by CATV.⁷⁴ In the view of broadcasters the additional programming choices offered cable

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* at 405.

⁷¹ *Id.* at 406.

⁷² *Id.* at 408.

⁷³ *Id.* at 411-412.

⁷⁴ *Id.* at 412.

subscribers were a secondary concern over the position of importance of the local broadcast outlets.⁷⁵

The NCTA's counter argument was that both local stations and CATV could simultaneously flourish and that free competition should be allowed to prevail.⁷⁶ In the NCTA's view the complaints of broadcasters amounted to nothing more than a veiled attempt on their part to maintain their monopoly status.⁷⁷ In analyzing the impact of auxiliary services like CATV on broadcasters the record did very little to substantiate the fears of broadcasters.⁷⁸ Of the 96 broadcast television stations that had gone off the air in the preceding seven years only three were located in communities with CATV competition.⁷⁹ While the FCC was still unsure of its regulatory authority over CATV the Commission still concluded that there was an impact on broadcast stations from competition from auxiliary services and the Commission sought to offer broadcasters protection from it.⁸⁰

While still unregulated by the FCC the cable industry would get an indication of things to come on the federal level as the Commission took to the courts in a pair of

⁷⁵ *Id.*

⁷⁶ *Id.* at 412-413.

⁷⁷ *Id.*

⁷⁸ *Id.* at 415.

⁷⁹ *Id.*

⁸⁰ *Id.* at 426, 441 (The FCC identified three legal questions regarding cable regulation and its potential role in it: (1) what basis is there under present law, if any, for our (FCC) assumption of licensing and regulatory powers over CATV systems; (2) would it be legally valid for us to deny authorization for common carrier facilities for transmission of programs to CATV systems on the ground of adverse competitive impact on an existing local or nearby television station; and (3) whether economic injury to a television station can be a valid public-interest justification for denial of authorizations to auxiliary services which compete with such station).

cases that each offered insight into a future of increasing FCC interest and oversight in cable. The days of the FCC's hands-off approach to cable regulation were number the 1959 Report and Order was just a preview of what CATV could expect in the future.

Carroll Broadcasting v. FCC (1958)

The issue of economic harm and the role of the FCC in preventing it were examined by the court in *Carroll Broadcasting v. FCC (1958)*.⁸¹ The Commission believed Congress created an environment of free competition within the broadcasting industry.⁸² The FCC also argued that the Communications Act of 1934 did not require it to analyze the impact of legally conducted competition among broadcasters.⁸³

In this case an existing radio broadcaster appealed to the FCC to reject the application of a second station seeking to transmit within twelve miles of its location.⁸⁴ Carroll Broadcasting argued the FCC failed to analyze the harm a second station would do to its station's ability to continue to serve the public interest.⁸⁵

The court held that the FCC should allow an existing licensee the opportunity to prove the negative economic impact a new station would cause it.⁸⁶ The court acknowledged the competitive nature of broadcasting, but gave more weight to the protection of the public interest and the potential harm additional competition could do

⁸¹ *Carroll Broadcasting Company v. Federal Communications Commission*, 258 F.2d 440 (1958).

⁸² *Id.* at 442.

⁸³ *Id.*

⁸⁴ *Id.* at 442.

⁸⁵ *Id.* at 440.

⁸⁶ *Id.*

it.⁸⁷ Television broadcaster would seek to use this decision to compel the FCC to aggressively protect them for economic harm due to competition with CATV.⁸⁸

Carter Mountain v. FCC (1963)

As previously mentioned, the use of microwave repeaters to receive broadcast stations and redistribute them over a cable system was becoming more popular.⁸⁹ This application of microwave technology allowed cable operators to expand their channel offerings and provide subscribers with programming not otherwise available through local broadcasters.⁹⁰ Broadcasters believed this practice to be a threat to the success of local television stations.⁹¹ The FCC agreed and sought to curb the practice by denying the application of Carter Mountain Transmission Corporation to construct a microwave facility for this purpose in Wyoming.⁹² Carter Mountain challenged the FCC's denial unsuccessfully in court.⁹³

In *Carter Mountain v. FCC (1963)* the FCC successfully argued that it was within its power to deny the application on the grounds that if granted the application would not serve the public interest, convenience, and necessity.⁹⁴ The Commission believed, and

⁸⁷ *Id.* at 443.

⁸⁸ Kenneth Cox, Special Counsel on Television Inquiry. "The Television Inquiry: The Problem of Television Service for Smaller Communities." Staff Report prepared for the Senate Committee on Interstate and Foreign Commerce, 85th Cong., 2nd sess., December 26, 1958, Committee Print.

⁸⁹ PARSONS, *supra* note 7, at 197.

⁹⁰ *Id.* at 198.

⁹¹ *Id.* at 199.

⁹² *Carter Mountain Transmission Corporation v. FCC*, 321 F.2d 359 (1963).

⁹³ *Id.*

⁹⁴ *Id.* at 95.

the court affirmed, by its microwave application denial it was protecting the public interest by protection to the local station from out-of-market completion.⁹⁵

Carter Mountain based its unsuccessful argument before the court on two main points. First, the FCC did not have “direct jurisdiction or authority” over cable systems.⁹⁶ Second, the FCC denial was an unlawful attempt to censor public communications in violation of the First Amendment.⁹⁷ In the court’s opinion the FCC was correct to assume that if it awarded the application there would be serious consequences should the local station cease operations.⁹⁸

Following *Carter Mountain* the days of the FCC ignoring the cable industry were numbered. The Commission viewed cable as a threat to the successful implementation of its national broadcast television plan outlined in its *Sixth Report and Order*.⁹⁹ The FCC would protect this objective and begin to extend its regulatory oversight into cable for the first time in 1965.

The FCC Regulates Cable and Makes the Move to Must-Carry

Following the FCC’s victory in *Carter Mountain* it did not take long for the Commission to try and more widely apply the Court’s ruling. The FCC would attempt to expand its power over CATV with the adoption its First Report and Order in 1965.¹⁰⁰

⁹⁵ *Id.* at 99.

⁹⁶ *Id.* at 97.

⁹⁷ *Id.* at 98.

⁹⁸ *Id.* at 99.

⁹⁹ PARSONS, *supra* note 7, at 153 (Broadcasters complained about economic harm, CATV theft of broadcast property, FCC indifference and the destruction of broadcast localism).

¹⁰⁰ FCC First Report and Order, 38 F.C.C. 683 (April 22, 1965).

The Commission's views on must-carry and retransmission consent contained in the 1959 Report and Order would also continue to be part of the CATV regulatory process.

FCC's First Report and Order

In April of 1965 the FCC's intent to regulate CATV had become everything but official. The FCC adopted a Notice of Proposed Rulemaking that according to Commissioner Loevinger was ill timed.¹⁰¹ Loevinger believed the Commission had already formed its opinion on the subject of CATV regulation and the prevailing view was that CATV occupied a subordinate place in mass communications.¹⁰²

With *Carter Mountain* as a catalyst the FCC expanded its regulatory power over CATV in its First Report and Order.¹⁰³ The Commission sought to deal with two issues of concern in the competitive balance between television broadcasters and CATV operators.¹⁰⁴ The first was to insure the carriage of local broadcast stations by CATV systems.¹⁰⁵ The second was to prevent the duplication of local programming through the importation of distant signals through microwave systems by CATV.¹⁰⁶ The FCC determined that it could act on these matters because it possessed proper authority through the Communications Act of 1934 to regulate all CATV systems, including non-microwave systems.¹⁰⁷ The Commission also recognized the narrow scope of this

¹⁰¹ Notice of Inquiry and Proposed Rulemaking Re All CATV Systems, 1 FCC 2d 453 at 485-486, FCC Docket No. 15971.

¹⁰² *Id.*

¹⁰³ First Report and Order, *Supra* note 92, at 683.

¹⁰⁴ *Id.* at 685.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

Report and Order and acknowledged there were a variety of issues involving CATV beyond carriage and non-duplication that it would need to gather information to address them in the future.¹⁰⁸

The NAB and NCTA both submitted extensive factual studies as part of their respective comment efforts.¹⁰⁹ The NAB, on behalf of broadcasters, continued to harbor the economic adversity caused broadcasters by CATV particularly in smaller markets.¹¹⁰ The NAB expressed concern competition from CATV would lead to broadcast audience loss and directly result in lower revenue potential for stations.¹¹¹ The NAB believed CATV would prevent UHF expansion in the smaller communities it was designed to serve.¹¹² Citing the Fisher Report, the NAB claimed there was a direct correlation between the reduction of audience size and lower station revenue when the audience fragmentation caused by CATV was taken into account.¹¹³

The NCTA, if one was to believe Commissioner Loevinger, was fighting an uphill battle against an FCC that had already made up its mind.¹¹⁴ The NCTA complained

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 684.

¹¹⁰ *Id.* at 688.

¹¹¹ *Id.* at 689.

¹¹² *Id.* at 690.

¹¹³ *Id.* at 691 (Dr. Franklin Fisher, Massachusetts Institute of Technology, conducted this statistical study for the NAB to try and provide a measurement of the impact of CATV systems on broadcast television stations).

¹¹⁴ *Id.* at 749 (Loevinger complained that the FCC approach to the CATV problem was simply the Commission “doing the wrong thing for the wrong reasons in the wrong manner to deal with the wrong problem. Loevinger added that it was time to determine what the function of CATV should be and how to develop the ultimate mode and system that would provide the best service to the most people).

that the Commission was making an “unwarranted assumption” regarding the competitive impact CATV posed to broadcasters.¹¹⁵ As evidence the NCTA pointed out that of the 129 television stations to go off the air in the preceding 12 years only three cited CATV as having an impact.¹¹⁶

While the FCC’s stated a desire for fair and reasonable competition in the marketplace between broadcasters and CATV, the Commission could not ignore its responsibility to protect the public interest served by broadcasters.¹¹⁷ Even if a serious harm to broadcasters by CATV was yet to be documented, the FCC believed there was a potential for such harm and it could not afford to wait until serious harm had already been done before acting.¹¹⁸

The first formal must-carry rule as written in the First Report and Order required CATV systems receiving microwave service to carry all local broadcast channels within the stations predicted grade-A contour.¹¹⁹ CATV unsuccessfully requested that the must-carry rule apply only to systems located within a station’s city of assignment and not the entire broadcast market.¹²⁰ The FCC was cognizant of the limited channel capacity of many CATV systems.¹²¹ The Commission considered an expanded rule

¹¹⁵ *Id.* at 693.

¹¹⁶ *Id.* at 694.

¹¹⁷ *Id.* at 706.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 716.

¹²⁰ *Id.*

¹²¹ *Id.* at 716-717.

requiring CATV systems to carry all grade-B signals, too, but with limited channel capacity in mind, instead opted to require grade-A only.¹²²

The nonduplication rule prohibited CATV systems from carrying programming on imported stations that duplicated what a local broadcaster was airing.¹²³ The FCC sought to preserve broadcast station's program exclusivity within its grade-B coverage area for a 15-day before-and-after period local broadcast of a program.¹²⁴

One area of the duplication debate contained in the First Report and Order examines CATV's desire to be allowed to bypass the nonduplication rules when providing a color version of a program only available locally in black and white.¹²⁵ The FCC was not persuaded by the NCTA's argument, but the concept of such an allowance is of particular significance for this study when considering the lack of high definition (HDTV) programming available in some markets currently raises similar questions.¹²⁶

After staying out of the cable regulation business since the birth of the industry it did not take the FCC long to build upon its initial regulatory effort with the adoption its Second Report and Order less than five month later.¹²⁷ This time the Commission would seek to expend its control to include all CATV systems.

¹²² *Id.*

¹²³ *Id.* at 719.

¹²⁴ *Id.*

¹²⁵ *Id.* at 735.

¹²⁶ *Id.*

¹²⁷ In the Matter of...To Adopt Rules and Regulations Relating to the Distribution of Television Broadcast Signals by Community Antenna Television Systems, Second Report and Order, 2 FCC 2d 725 (March 4, 1966).

FCC's Second Report and Order

The scope of the First Report and Order was limited to only those CATV systems that used microwave facilities or only about 17 percent of systems nationwide.¹²⁸ In its Second Report and Order the FCC expanded its regulatory authority to include all CATV systems whether or not they utilized microwave facilities.¹²⁹

The major impact of the Second Report and Order was to expand the must-carry and nonduplication requirements from the First Report and Order, but the Commission also sought to protect UHF stations in the top-100 media markets from increased competition by prohibiting CATV systems in those markets from importing distant signals.¹³⁰ The FCC attempted to balance economics and competition between CATV and UHF television stations.¹³¹ The Commission feared CATV operations in major markets would provide unfair competition and adversely impact the establishment of new UHF stations and the growth of already operating UHF stations.¹³²

At the same time the FCC was limiting CATV's competitive relevance in the nation's largest and potentially most profitable markets.¹³³ The Commission also started to pose questions relevant to the development of cable in the future.¹³⁴ The Commission sought additional comment on the impact of CATV on UHF independent

¹²⁸ Helen Shaffer, *Community Antenna TV*, EDITORIAL RESEARCH REPORTS, Dec. 16, 1964 at 935.

¹²⁹ FCC Second Report and Order at 725.

¹³⁰ *Id.* at 769.

¹³¹ *Id.* at 770.

¹³² *Id.* at 781.

¹³³ *Id.* at 725-726.

¹³⁴ *Id.*

stations in major cities, signal extension limits, leapfrogging and the potential of CATV systems as program originators.¹³⁵

The issue of color duplication was left undecided in the First Report and Order, but this time citing favorable comment from both broadcasters and CATV, the FCC decided to allow color duplication of local black and white programs.¹³⁶ This allowed out-of-market color broadcast signals to be imported if the local station was not yet capable of broadcasting its programming in color. The Commission sought the wider distribution of color programming and this was one way to achieve that goal.¹³⁷

The support for the Second Report and Order among FCC commissioners was far from unanimous.¹³⁸ Commissioner Bartley did not believe the Communications Act gave the FCC the authority to regulate cable.¹³⁹ He opposed the top-100 market limit on CATV, but also wanted to limit CATV systems' ability to offer pay-TV services.¹⁴⁰ In his view cable should limit itself to the community antenna role it was built on.¹⁴¹ Commissioner Loevinger continued to voice his opposition to the Commission's "quasi-legislative" nature of its actions regarding cable regulation and was also opposed to the top-100 market limit.¹⁴² On the other hand, Commissioner Cox thought the FCC was 14

¹³⁵ *Id.* at 726.

¹³⁶ *Id.* at 750-751.

¹³⁷ *Id.*

¹³⁸ *Id.* at 808.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 819-820.

¹⁴² *Id.*

years too late in assuming its role as cable regulator.¹⁴³ Cox was still hopeful the Commission was acting in time to “prevent serious damage to the fabric of our television service.”¹⁴⁴ His view of the potential of cable programming was nothing short of dismissive calling it “derivative and much less exciting in its possibilities than the over-the-air mode.”¹⁴⁵ Regardless of the reluctance of some commissioners to regulate CATV without express Congressional authority, the question of FCC power would soon be answered not in Congress, but in the courts.

U.S. v. Southwestern Cable Co. (1968)

The FCC was now active in the business of cable regulation, but the Commission had not yet received direct legislative authorization from Congress to do so. Instead the FCC acted on its own to regulate CATV under its existing power to oversee any interstate communications over wire. This extension of FCC regulatory power was challenged on grounds that the Commission had exceeded its authority.

The Supreme Court agreed to hear the case of *U.S. v. Southwestern Cable (1968)* after the Court of Appeals for the Ninth Circuit ruled that the Communications Act of 1934 did not grant the FCC regulatory authority over cable.¹⁴⁶ At issue in this case was the distribution of Los Angeles television signals on a San Diego CATV system.¹⁴⁷ Midwest Television, owner of a San Diego station, contended that allowing signal

¹⁴³ *Id.* at 808.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 809.

¹⁴⁶ *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968)

¹⁴⁷ *Id.* at 160.

importation in this manner negatively affected the station and was inconsistent with the public interest.¹⁴⁸

The Court identified two functions performed by CATV systems.¹⁴⁹ They aid broadcasting by providing adequate reception of local station signals where such reception would be difficult or impossible.¹⁵⁰ CATV systems also can receive and transmit broadcast signals from stations outside of local market.¹⁵¹ In exploring its regulatory function regarding CATV the Commission had previously concluded that cable is not a broadcaster nor is it a common carrier and therefore was not within the power granted by Congress within the Communications Act of 1934.¹⁵²

The Court took a different view of Congress' unwillingness to enact cable specific legislation, suggesting that the FCC already had the necessary regulatory authority over CATV and had instead chosen not to use it.¹⁵³ The Court also echoed the long standing FCC belief that CATV posed a serious threat to the success of UHF and educational broadcasting through audience and revenue fragmentation.¹⁵⁴

The Court viewed Southwestern Cable's signal importation as a threat to localism in the San Diego market and concluded the FCC's regulatory authority over CATV was necessary in this case to allow the Commission to perform its other responsibilities

¹⁴⁸ *Id.* at 161.

¹⁴⁹ *Id.* at 163.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.* at 164.

¹⁵³ *Id.* at 170-171.

¹⁵⁴ *Id.* at 176.

effectively.¹⁵⁵ The Court, while holding the FCC could regulate cable in this manner, did not explore the FCC's regulatory limits regarding CATV.¹⁵⁶

Fortnightly Corporation v. United Artists Television, Inc. (1968)

Seven days later the Supreme Court would once again decide a case involving CATV and add another piece to the emerging regulatory puzzle of how the cable industry fit into the mass communications infrastructure of the United States. This time the issue was copyright and whether or not CATV systems were in violation of copyright law when retransmitting broadcast programming, particularly motion pictures.

The Supreme Court in *Fortnightly v. United Artists (1968)* held that CATV systems, unlike broadcasters, simply carried programming without editing for delivery to their subscribers.¹⁵⁷ In this instance, Fortnightly Corporation operated CATV systems in Clarksburg and Fairmont, West Virginia.¹⁵⁸ Fortnightly provided its subscribers with five stations, three from Pittsburgh and one each from Steubenville, Ohio and Wheeling, West Virginia.¹⁵⁹ United Artists argued that the retransmission of broadcasts programming protected by copyright law counted as a performance and was a violation.¹⁶⁰ United Artists sought damages and injunctive relief.¹⁶¹

¹⁵⁵ *Id.* at 178.

¹⁵⁶ *Id.*

¹⁵⁷ *Fortnightly Corporation v. United Artists Television, Inc.*, 392 U.S. 390 (1968); *See also* *Teleprompter Corporation v. Columbia Broadcasting System*, 415 U.S. 394 (1974) (The Supreme Court extended the holding in *Fortnightly* to apply to programming retransmitted by microwave link from farther distances).

¹⁵⁸ *Id.* at 391.

¹⁵⁹ *Id.* at 392.

¹⁶⁰ *Id.* at 393.

¹⁶¹ *Id.*

The Court also determined that CATV had no role in sponsorship or program content.¹⁶² In the Court's view CATV systems were more like viewers than broadcasters in that the only active role they played in the process was making the reception of a broadcast station possible.¹⁶³ This process was not much different from what a viewer could perform for themselves by installing their own equipment to receive broadcast signals.¹⁶⁴

Also of note in Justice Stewart's majority opinion was the Court's challenge in applying copyright law written in 1909 to a technology that did not exist until the late 1940s.¹⁶⁵ The Court concluded that CATV systems had little in common with broadcasters and carry without editing the content they receive and distribute to their subscribers.¹⁶⁶

Cable's Slow Rise and Reinvention (1970-84)

The 1970s would offer the CATV industry new FCC regulations, program restrictions that would slow growth, copyright clarification and the game changing introduction of satellite program distribution.¹⁶⁷ In spite of a difficult start to the decade

¹⁶² *Id.* at 401.

¹⁶³ *Id.* at 399.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 396.

¹⁶⁶ *Id.* at 400.

¹⁶⁷ History of Cable Television, <http://www.ncta.com/About/About/HistoryofCableTelevision.aspx?source=Resources> (last visited Aug. 1, 2009).

CATV entered the 1980s with almost 16 million subscribers and was poised for exponential growth.¹⁶⁸

In the early 1980s government deregulation was a priority for President Ronald Reagan, and the CATV industry benefited greatly from this initiative.¹⁶⁹ The Cable Act of 1984 ushered in an era of growth and expansion in CATV that would offer increased programming options and catapult the industry into the post community antenna television era.¹⁷⁰ However, the changes were slow in coming as the FCC continued to tinker with CATV and cable operators figured out how to successfully harness the power of satellite distribution to expand their programming beyond the retransmission of broadcast signals.¹⁷¹

Commission Proposals for Regulation of Cable Television (1971)

In 1971 the FCC offered a glimpse of its regulatory plans for cable moving forward.¹⁷² With carriage, duplications and top-100 market UHF station protections in place the Commission changed course and began consideration of exploring CATV's potential to serve the public without undermining broadcasting.

The FCC sought to restrict the carriage of distant signals to a much smaller number of systems.¹⁷³ The aim was to still protect broadcast stations where needed from CATV competition. At the same time the Commission wanted to accelerate the

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ Commission Proposals for the Regulation of Cable Television, 31 F.C.C. 2d 115 (Aug. 5, 1971).

¹⁷² *Id.*

¹⁷³ *Id.* at 116.

development of CATV's nonbroadcast services potential.¹⁷⁴ The FCC also cited evidence that UHF broadcasters were likely to be helped by cable because CATV allowed UHF station to overcome reception problems.¹⁷⁵

The Commission also introduced the idea of requiring CATV to provide channel capacity to serve the local public interest of the franchise location.¹⁷⁶ The FCC proposed opening these new outlets of local expression through a dedicated channel that would be available at all times at no cost to the messenger.¹⁷⁷

Cable Television Report and Order (1972)

In "recognition of the importance and promise of cable development" the FCC released its *Cable Television Report and Order* in early 1972.¹⁷⁸ The FCC once again stated it would be wrong to stunt the development of CATV based on its affect on UHF stations.¹⁷⁹ The Commission believed clearer UHF picture delivery and wider distribution through CATV would counter any concerns.¹⁸⁰

The relaxing of the signal importation restrictions on CATV systems was the most important aspect of this FCC action.¹⁸¹ However, the Cable Television Report and Order signaled an expansion of FCC oversight of cable in several areas worth

¹⁷⁴ *Id.* at 121-122.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 128.

¹⁷⁷ *Id.*

¹⁷⁸ Cable Television Report and Order, 36 F.C.C. 2d 141 (Feb. 2, 1972).

¹⁷⁹ *Id.* at 147.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 173-176..

mentioning.¹⁸² CATV systems would now be required to provide the FCC with annual record keeping and provide local access channels.¹⁸³ The FCC also imposed its broadcast rules on local CATV originated programming and required all new cable systems to have a capacity to distribute at least 20 channels among other new technical requirements.¹⁸⁴

The FCC's attempt to accelerate the growth and development of cable in the early 1970s did not meet with much success.¹⁸⁵ The factors contributing to the slowing of CATV's growth were largely economic as the cost to bring cable to major cities proved great in spite of the FCC attempt to open up such markets to CATV expansion.¹⁸⁶ The easing of signal importation also did little to encourage growth.¹⁸⁷ The key to CATV's future was not going to be giving subscribers more of the same in the form of broadcast programming.¹⁸⁸ A new plan was needed. The fortunes of CATV would soon take a turn to the better as the industry literally launched into the satellite era.

¹⁸² *Id.* at 147.

¹⁸³ *Id.* at 217-219; *See also* FCC v. Midwest Video Corporation, 440 U.S. 689 (1979) (The Court held the FCC exceeded its legislative authority and without specific direction from Congress the Commission was not authorized to impose the access rules requiring CATV systems to make available a channel for public access programming free from its editorial oversight).

¹⁸⁴ *Id.* at 189-190.

¹⁸⁵ PARSONS, *supra* note 7, at 267.

¹⁸⁶ *Id.* at 298.

¹⁸⁷ *Id.* at 301.

¹⁸⁸ *Id.*

HBO, Satellites and Copyright

The number of broadcast signals for a CATV to import was finite and more importantly so was the variety of programming being offered by those stations.¹⁸⁹ To expand its programming base CATV needed to start thinking beyond broadcasting and that process started in the 1972 with the launch of Home Box Office (HBO).¹⁹⁰ Launched as a premium subscription based channel with uncut and commercial free movies, HBO overcame its initial struggles to provide CATV with a satellite-delivered revenue-generating, cable-exclusive channel.¹⁹¹ The birth of the channel signified an important shift in the cable programming model that proved essential in allowing CATV to evolve into the video content provider it is today.¹⁹²

The arrival of HBO and its airing of feature films on a subscription basis were not without objection.¹⁹³ The FCC thought broadcasters would be economically harmed by the showing of movies on pay cable rather than broadcast television.¹⁹⁴ In response the Commission introduced “anti-siphoning” rules that prevented CATV operators from offering feature films less than three years old on pay services such as HBO.¹⁹⁵

HBO objected to the rules and sued the FCC. In *Home Box Office v. FCC (1978)* the Court held that the FCC did not have the authority to issue the “anti-siphoning”

¹⁸⁹ *Id.* at 282-283.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² History of Cable Television, *supra* note 159.

¹⁹³ *Home Box Office v. FCC*, 567 F.2d 9 (1977), cert. denied, 434 U.S. 829 (1977).

¹⁹⁴ *Id.* at 39.

¹⁹⁵ *Id.* at 25 (siphoning refers to the airing on pay cable of a program that was previously available to watch on “free” television).

rules, and the Commission offered no evidence of actual economic harm to broadcasters in order to justify the rules.¹⁹⁶ The victory for HBO served as a catalyst for the addition of similar pay channels to be introduced.

The news was not all positive for CATV. The industry's free ride in the area of copyright came to an end with the passage of The Copyright Act 1976.¹⁹⁷ The first update to copyright law in nearly 60 years required CATV to pay a compulsory license for the airing of all broadcast signals.¹⁹⁸ The fee varied depending on the number of subscribers and market size of each CATV system.¹⁹⁹

According to University of Texas Law Professor Lucas Powe, Jr., cable was largely "ignored" and treated with a "heavy hand" by the FCC for many years.²⁰⁰ By the 1970s, "it had become clear that the FCC's hostility toward cable was aimed solely at advancing the economic interests of broadcasters."²⁰¹ The Commission believed that "oversight [of cable] was imperative lest the "explosive" growth of the cable industry undermine the regulatory framework already established for ordinary broadcast television."²⁰²

¹⁹⁶ *Id.*

¹⁹⁷ PARSONS, *supra* note 7 at 351-352.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ POWE, *supra* note 2, at 195.

²⁰¹ *Id.*

²⁰² Quincy Cable TV, Inc. v. FCC, 248 U.S. App. D.C. 1 12 (1985) (held that must-carry rules requiring "cable television operators, upon request and without compensation, to transmit to their subscribers every over-the-air television broadcast that is "significantly viewed in the community" or otherwise considered local under the commission's rules," violated the First Amendment).

The development of original cable programming sources like HBO, ESPN, CNN and MTV, distributed via satellite, helped cable enhance its broadcast offerings and evolve into the dominant multi-channel video programming distributor (MVPD). This enabled the industry to grow out of the shadows of broadcasting and slowly erode its second class status. Extensive growth during the mid-1980s through late 1990s allowed the cable industry to enter the new century as a significant player in the media business, but not without a few more setbacks in its battle with broadcasters.

The FCC had long ago realized the cable industry's potential. "If permitted to grow unfettered, the Commission feared, cable might well supplant ordinary broadcast television. A necessary consequence of such displacement would be to undermine the FCC's mandate to allocate the broadcast spectrum in a manner that best served the public interest."²⁰³

Cable Act of 1984

The Cable Communications Act of 1984 (Cable Act of 1984) amended the Communications Act of 1934 to officially include federal regulatory oversight of the CATV industry.²⁰⁴ The Act served CATV well as a growth catalyst, and was particularly helpful in the area of rate deregulation.²⁰⁵ The Act marked the return of public access channel requirements that allowed local franchising authorities to negotiate to require CATV operators provide channel capacity for public, educational, or government use.²⁰⁶

²⁰³ *Id.* at 13.

²⁰⁴ Cable Communications Policy Act of 1984, Pub. L. 98-549, 98 Stat. 2779.

²⁰⁵ *Id.* at 47 U.S.C. 543.

²⁰⁶ *Id.* at 47 U.S.C. 531.

In addition the Act capped the yearly franchise fee amount a CATV system could be required to pay at five percent of the cable operator's gross revenues.²⁰⁷

Previously, the FCC, in 1972, had required CATV operators in the top 100 markets to allocate three channels for public, educational and local government use.²⁰⁸ This requirement was overturned by the Supreme Court in *FCC v. Midwest Video Corporation (1979)*.²⁰⁹ The Court said the requirement exceeded the FCC's jurisdiction and was acting beyond the legislative authority granted to it by Congress.²¹⁰ These channels are commonly referred to as PEG channels.

The dawn of a new decade marked a continuation of the cable industry's rapid growth as it expanded its wired web over an increasingly larger percentage of U.S. television households.²¹¹ Basic cable subscribership increased 60-percent in the eight year period between the passage of the Cable Act of 1984 and the enactment of the Cable Television Consumer Protection and Competition Act of 1992 (Cable Act of 1992) from 32.8 million subscribers in 1984 to 54.3 million in 1992.²¹² The number of programming channels exclusive to cable and in competition with broadcasters for

²⁰⁷ *Id.* at 47 U.S.C. 542.

²⁰⁸ Cable Television Report and Order, 36 F.C.C. 2d 141 (Feb. 2, 1972).

²⁰⁹ *FCC v. Midwest Video Corporation*, 440 U.S. 689 (1979) (The Court held the FCC exceeded its legislative authority and without specific direction from Congress the Commission was not authorized to impose the access rules requiring CATV systems to make available a channel for public access programming free from its editorial oversight).

²¹⁰ *Id.* at 708-709.

²¹¹ Basic Cable Subscribers, Kagan Research, LLC, Broadband Financial Databook 2006, available at <http://www.ncta.com/Statistic/Statistic/BasicSubs.aspx> (last visited April 2, 2009).

²¹² *Id.*

viewers also continued to multiply, increasing from just 28 in 1980 to 139 in 1995.²¹³

This expansion paralleled a significant increase in the rates cable customers were being charged.²¹⁴ While the cable industry defended its rising rates as justified to offset years of artificially low rates due to regulation and the cost of acquiring additional programming options, Congress took note and began to rethink its deregulatory approach to cable.²¹⁵

Must-Carry Goes to Court

It would be 1992 before Congress and the FCC would bring CATV back into a more regulated reality, particularly with regard to subscriber fees. In the interim, the spotlight would focus squarely on the battle over the FCC's must-carry rules. This conflict was waged between the FCC, advancing a pro-broadcasting must-carry policy, and CATV. The Commission's must-carry rules endured a series of revisions and court defeats before finally passing judicial review in 1997.

²¹³ The History of Cable Television, <http://www.ncta.com/About/About/HistoryofCableTelevision.aspx?source=Resources> (last visited April 1, 2009).

²¹⁴ Average Monthly Price for Expanded Basic Programming Packages: 1986-2007, <http://www.ncta.com/Statistic/Statistic/AverageMonthlyPrice.aspx> (last visited April 1, 2009) (the average monthly cost of expanded basic programming nearly doubled from 1986 to 1992 from \$10.67 to \$19.08. Expanded basic service consists of basic service (this is also known as lifeline service and only includes local broadcast stations and PEG channels) and additional basic cable channels).

²¹⁵ See Lisa M. Hamm, *Cable Defends Cost Rise*, THE RECORD, Aug. 4, 1989 at 35 (the cost of basic cable service rose 29 percent since deregulation, but the industry countered with the cost per channel offered actually decreased due to an increase in the number of channels available); *Cable TV Prices Rise, But Viewers Get More*, TULSA WORLD, Aug. 4, 1989 at C4; Mary Lu Carnevale, *Danforth Proposes Bill to Re-Regulate Cable-TV Rates*, WALL ST. J., Nov. 16, 1989 at 1 (this was one of more than a dozen congressional attempts at cable reregulation leading up to the passage of the 1992 Cable Act, Danforth's bill included must-carry rules).

Quincy Cable TV, Inc. v. FCC (1983)

Cable must-carry rules date back to the 1960s and went unchallenged in court until *Quincy Cable TV, Inc. v. FCC (1985)*.²¹⁶ In this case, the court held the must-carry rules were unconstitutional as written.²¹⁷ The FCC had recently revised the must-carry rules to require the mandatory carriage of all local stations by CATV rather than the previous carry one-carry all policy.²¹⁸ The court added that the Commission was “free to redraft the rules in a manner more sensitive to the First Amendment.”²¹⁹

This case enjoined two petitions. The first petition was filed by a Quincy, Washington, cable system.²²⁰ This CATV provider’s channel capacity was limited to 12-channels and included broadcast stations from both Seattle and Spokane.²²¹ Quincy decided to drop the Spokane stations in order to provide a trio of specialized cable channels.²²² Fearing a subsequent request for carriage by the dropped Spokane stations Quincy petitioned the FCC for a partial waiver. Quincy’s request was denied and after it failed to return the Spokane stations to its system the FCC placed a \$5000 forfeiture upon them in response to Quincy’s failure to follow the must-carry rules.²²³

²¹⁶ Quincy, *supra* note 194.

²¹⁷ *Id.* at 94.

²¹⁸ FCC Report and Order, FCC 85-179, (Apr. 11, 1985).

²¹⁹ Quincy, *supra* note 194 at 1462.

²²⁰ *Id.* at 1446.

²²¹ *Id.*

²²² *Id.*

²²³ Quincy Cable TV, Inc., 89 FCC 2d 1128 (1982).

The second petition was filed by cable programmer TBS. TBS argued that the must-carry rules created unfair competition for channel space on cable systems.²²⁴ TBS argued that if a CATV system's limited channel space was filled with broadcast signals that required carriage TBS would be unable to compete fairly for access to viewers and would be forced to endure economic hardship.²²⁵

The court concluded that the First Amendment speech rights of CATV systems were violated by the must-carry rules as written by the FCC.²²⁶ The court did not extend its holding in this case to cover amended versions of the must-carry rules should the FCC choose to revise them.²²⁷ The court faulted the FCC for failing to document over the 20-year history of must-carry a record that justified the "purposes and effects" of the rules.²²⁸ In addition, the court pointed out the must-carry rules as written applied to all broadcasters whether or not the station truly provided adequate local content of value to their community of license.²²⁹ In the court's view, without an adequate record to cite, the question of whether or not CATV was a threat to broadcast television or not remained unanswered.²³⁰ The court decided the FCC's must-carry rules as written

²²⁴ Quincy, *supra* note 194 at 1445.

²²⁵ *Id.*

²²⁶ *Id.* at 1462.

²²⁷ *Id.*

²²⁸ *Id.* at 1463.

²²⁹ *Id.*

²³⁰ *Id.*

were “insufficiently tailored to justify their substantial interference with First Amendment rights.”²³¹

FCC Report and Order (1986)

With the court’s encouragement, the FCC issued redrafted must-carry rules in late 1986.²³² In the Report and Order the FCC modified the rules to address some of the concerns raised by the court in *Quincy*.²³³ The Commission attempted to tailor the new must-carry rules to please the court by limiting them in both “scope and duration.”²³⁴

The new rules included limits on the number of broadcast stations a CATV was required to carry based on its total number of available channels.²³⁵ The FCC added an input selector switch rule.²³⁶ This device is commonly referred to as an A/B switch.²³⁷ The purpose of this device is to allow cable subscribers to switch from cable programming to over-the-air broadcasters.²³⁸ The new rules were to be in effect for a five-year transition period at the end of which the FCC believed consumers would have adequate time to adopt direct off-the-air reception capability for the continued reception of broadcast stations regardless of their availability on a CATV system.²³⁹

²³¹ *Id.*

²³² FCC Report and Order, 1 FCC Rcd. 864 (Nov. 28, 1986).

²³³ *Id.* at 1.

²³⁴ *Id.* at 56.

²³⁵ *Id.* at 43.

²³⁶ *Id.* at 40.

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.* at 39.

Century Communications Corporation v. FCC (1987)

In spite of the FCC's efforts its new must-carry rules would meet a similar judicial fate just a year later. In *Century Communications Corp. v. FCC (1987)*, the court examined the revised must-carry rules and held that “the government must be able to produce either empirical support or at least sound reasoning on behalf of its measures” and “reluctantly conclude[d] that the FCC has not done so.”²⁴⁰

The court in *Century* examined competing First Amendment scrutiny arguments.²⁴¹ The CATV industry viewed the must-carry rules as a significant burden on speech and sought the same editorial control protections granted in *Miami Herald Publishing Co. v. Tornillo (1974)*.²⁴² The FCC argued that its must-carry rules were a “commercial regulation” that warranted analysis under the intermediate scrutiny model developed in *United States v. O'Brien (1968)*.²⁴³ While the court recognized the determination of the level of First Amendment protection due to CATV operators was an important issue, it concluded it was not necessary to answer this “vexing question” within the confines of this case.²⁴⁴

Instead the court issued what it referred to as a “narrow” decision in which it held that lacking a record of evidence to justify the FCC's must-carry rules the rules neither furthered a substantial government interest nor were narrowly tailored to satisfy the

²⁴⁰ *Century Communications Corp. v. FCC*, 835 F.2d 292 304 (1987) (held that the FCC must-carry rules were invalid as unjustified and unduly sweeping and were not justified by the FCC to further a substantial government interest that outweighed the incidental burden on cable operators First Amendment rights).

²⁴¹ *Id.*

²⁴² See *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974)

²⁴³ *Century*, at 298.

²⁴⁴ *Id.*

O'Brien test.²⁴⁵ The must-carry rules lacked the “empirical support” or “sound reasoning” to justify infringing the First Amendment rights of CATV operators.²⁴⁶

The cable industry’s successful defeats of the FCC’s two most recent attempts to institute must-carry rules during the 1980’s in *Quincy* and *Century* were far from permanent.²⁴⁷ In both cases, while rejecting the Commission’s must-carry rules on First Amendment grounds, the court made it clear that its decisions were specific to the must-carry rules as written in each case and that the concept of must-carry itself was not necessarily unconstitutional.²⁴⁸ The court’s message to the FCC was a simple one, keep trying.²⁴⁹

1992 Cable Act

The 1992 Cable Act provided a comprehensive update to the cable communications section of the Communications Act of 1934.²⁵⁰ One of the stated

²⁴⁵ *Id.* at 304.

²⁴⁶ *Id.*

²⁴⁷ *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (1985) (held that must-carry rules requiring “cable television operators, upon request and without compensation, to transmit to their subscribers every over-the-air television broadcast that is “significantly viewed in the community” or otherwise considered local under the commission’s rules,” violated the First Amendment); *Century Communications Corp. v. FCC*, 835 F.2d 292, 304 (1987) (held that the FCC must-carry rules were invalid as unjustified and unduly sweeping and were not justified by the FCC to further a substantial government interest that outweighed the incidental burden on cable operators First Amendment rights).

²⁴⁸ *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1463 (1985) (the government failed to demonstrate the FCC’s must-carry rules were “narrowly tailored to serve a substantial [government] interest”); *Century Communications Corp. v. FCC*, 835 F.2d 292, 304 (“We [the court] do not suggest that must-carry rules are per se unconstitutional”)

²⁴⁹ *Century*, 835 F.2d at 304.

²⁵⁰ 47 USC § 521 (in addition to retransmission consent and must-carry the 1992 Cable Act also revised sections Title VI of the Communications Act of 1934 covering rate regulation, video programming distribution, carriage agreements, consumer protection and customer service, overbuilds, leased access, ownership restrictions, anti-trafficking restrictions, technical

objectives of the bill was to promote the continued viability of free over-the-air broadcast television. Congress viewed the competition for advertising dollars between cable operators and broadcasters as an economic incentive for cable systems to “delete, reposition, or not carry local broadcast signals.”²⁵¹

It was left to Congress and the FCC to develop must-carry rules that would survive First Amendment judicial scrutiny. Sections 614 and 615 of the Act require must-carry of commercial and noncommercial signals respectively.²⁵² Congress specified in the Act a trio of government interests that are to be served by the must-carry laws:²⁵³ (1) preserving the benefits of local television service; particularly OTA television service; (2) promoting the widespread dissemination of information from diverse sources; and (3) promoting fair competition in the video marketplace.²⁵⁴

Congress gave an additional benefit to commercial broadcasters in the form of “retransmission consent” that required cable operators to first receive prior consent from a broadcaster before retransmitting their signal.²⁵⁵ By adding this provision to the Act, a commercial broadcaster was allowed to forego must-carry in favor of a negotiated carriage agreement with a cable operator.²⁵⁶ This was done by Congress to recognize

standards, consumer equipment compatibility, indecent programming, subscriber bill itemization and “other provisions”).

²⁵¹ *Id.*

²⁵² 47 U.S.C. 534, 535 (2005).

²⁵³ Harris J. Aaron, “*I Want My MTV*” *The Debate Over Digital Must-Carry*, 80 B.U.L. REV. 885, 895 (2000).

²⁵⁴ See S. Rep. No. 102-92, at 58 (1991), reprinted in 1992 U.S.C.C.A.N. 1133, 1191.

²⁵⁵ 47 U.S.C § 325(b)(3)(B) (2002).

²⁵⁶ *Id.*

that “a very substantial portion of the fees which consumers pay to cable systems is attributable to the value they receive from watching broadcast signals.”²⁵⁷

Broadcasters were equally interested in seeing the cable industry reregulated, but for a different reason.²⁵⁸ After decades of failed FCC regulatory attempts to create must-carry rules capable of surviving First Amendment judicial scrutiny, it appeared Congress was committed to finally getting it right.²⁵⁹ During hearings on new cable regulation before the Senate Subcommittee on Commerce, Science and Transportation in late 1989, Committee Chairman Daniel Inouye (D-Hawaii) made clear his goals for a legislative process what would end up taking nearly three years to complete.²⁶⁰ Inouye sought to develop must-carry legislation that responded to the challenges of the modern mass media while serving the public interest and withstanding judicial review.²⁶¹

Both the National Association of Broadcasters (NAB) and National Cable & Telecommunications Association (NCTA) lobbied Congress extensively during this time. NCTA President James P. Mooney articulated the cable industry’s position in Senate testimony when he attributed the rise in cable rates to a “post-regulatory adjustment”

²⁵⁷ S. Rep. No. 102-92, 102d Cong., 1st Sess. 35 (1991).

²⁵⁸ See Laura Landro, *Airing Grievances: As Cable-TV Industry Keeps Growing, Rivals Demand Reregulation – Broadcasters and Others Call the Competition Unfair*, WALL ST. J, Sept 17, 1987 at 1; *Metzenbaum Vows to Tighten Reins on Cable*, BROADCASTING & CABLE, Jan. 23, 1989, at 139.

²⁵⁹ “*Must-Carry:*” *Hearing before the Subcommittee on Communications of the Senate Committee on Commerce, Science and Transportation*, 101st Cong., 1st Sess. 1 (1989) [hereinafter *Hearing of October 25, 1989*] (statement of Sen. Daniel Inouye, Chairman S. Comm. on Commerce, Science and Transportation).

²⁶⁰ *Id.*

²⁶¹ *Id.*

and increased programming costs.²⁶² On the issue of must-carry, Mooney pointed out that the record was clear. Local cable systems were already carrying nearly all broadcast signals without a federal mandate.²⁶³ Sen. Robert Packwood (R-Oregon) saw no need for the reregulation of cable and opposed the bill.²⁶⁴ In Packwood's view, cable programming like CNN and C-SPAN served the public interest in ways television broadcasters did not.²⁶⁵ Telecommunications Inc. (TCI) Chairman John Malone reminded the committee during his testimony that prior to the Cable Act of 1984, cable prices increased at just two-thirds the rate of inflation as the industry adhered to highly politicized local regulation.²⁶⁶

NAB President Edward O. Fritts countered by equating the unfair competitive effect of cable's rapid growth on television broadcasters to that of an athlete on steroids, calling cable a "virtual gatekeeper" to the video marketplace.²⁶⁷ According to Fritts, must-carry would provide broadcasters with "a voice in who carries our signals, and on

²⁶² *Oversight of the 1984 Cable Telecommunications Act: Hearings before the Subcommittee on Communications of the Committee on Commerce, Science, and Transportation*, 101st Congress, 1st Sess. 10-11 (1989) [hereinafter *Hearings of Nov. 16-17, 1989*] (statement of James P. Mooney, President, National Cable Television [& Telecommunications] Association).

²⁶³ *Hearings of Oct. 25, 1989, supra* note 259, at 5.

²⁶⁴ *Cable TV Protection Act of 1991: Hearings before the Subcommittee on Communications of the Committee on Commerce, Science, and Transportation on S.12*, 102nd Congress, 1st Sess. 104 (1991) [hereinafter *Hearings of Mar. 14, 1991*] (statement of Sen. Robert Packwood, Member, Sen. Comm. on Commerce, Science, and Transportation).

²⁶⁵ *Id.*

²⁶⁶ *Hearings of Nov. 16-17, 1989, supra* note 262, at 9.

²⁶⁷ *Cable Systems Broadcast Signal Carriage Survey Report*, FCC, Policy and Rules Division, Mass Media Bureau, Sept. 1988, 34-36 (statement of Edward O. Fritts, President, National Association of Broadcasters).

what terms.”²⁶⁸ Broadcasters were simply seeking the right to control the retransmission of their signals, something Fritts argued every other player in the video marketplace already had.²⁶⁹ Sen. Al Gore (D-Tenn.) blamed the rise in cable rates beyond the rate of inflation on cable’s monopoly status in most communities.²⁷⁰

This legislative effort concluded with the passage of the Cable Television Consumer Protection Act of 1992 (Cable Act of 1992).²⁷¹ The bill became law on October 3, 1992 as the United States Senate and House of Representatives voted to override, for the only time during his presidency, the veto of President George W. Bush.²⁷²

The National Cable & Telecommunications Association (NCTA) successfully opposed reregulation in previous congressional sessions, but the NCTA did not have enough support in Congress in this instance to sustain President Bush’s veto of the

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ *Hearings of Nov. 16-17, 1989, supra note 262, at 4.*

²⁷¹ Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) (codified in 47 USC § 521).

²⁷² President’s Message to the Senate Returning Without Approval the Cable Television Consumer Protection and Competition Act of 1992, 2 PUB. PAPERS 1751-52 (Oct. 3, 1992) (the President said S.12 “illustrates good intentions gone wrong, fallen prey to special interests” and unfairly requires cable companies to adopt costly “special interest provisions” like retransmission consent and must-carry). See generally Edmund L. Andrews, *President Set to Veto Cable Bill*, N.Y. TIMES, Oct. 3, 1992 at 35 (identified the bill’s most controversial provision, one added to gain the support of broadcasters, as retransmission consent); Edmund L. Andrews, *Bush Rejects Bill That Would Limit Rates on Cable TV*, N.Y. TIMES, October 4, 1992 at 1 (President Bush faces long odds in sustaining veto of cable bill after it passes both houses of Congress by veto proof margins); *Cable Bill Vetoed By President White House Facing Tough Override Fight*, L.A. DAILY NEWS, Oct. 4, 1992 at N1 (quoting Sen. Al Gore (D-Tenn.) “he [President Bush] is standing square with the big cable operators, the monopolies that have been raising rates and squeezing out competition”).

Cable Act of 1992.²⁷³ Sen. Inouye predicted that given the prevailing negative public opinion of the cable industry, future legislation would be even tougher on the cable industry.²⁷⁴ Chairman Inouye proved to be correct, as not only was must-carry a prominent part of the Cable Act of 1992, the new law also gave commercial television broadcasters the additional right to forgo must-carry and instead opt for retransmission consent and negotiate compensation from cable operators for their signal carriage.²⁷⁵ The cable industry quickly challenged this latest version of must-carry in court, but unlike prior efforts judicial relief would prove difficult.

Conclusion

The FCC's oversight of the cable industry was an evolutionary process. When CATV first appeared in the late 1940s, the Commission chose to largely ignore it.²⁷⁶ The FCC viewed cable as a temporary fix to problems with broadcast television it expected to solve with the introduction of UHF channels to fill the gaps created by the lack of adequate space in the VHF spectrum to adequately serve the nation in the same manner broadcast radio did.²⁷⁷ Over time as the CATV industry began to create its own identity beyond that of a simple broadcast signal delivery service the FCC still left cable oversight largely to the local municipalities that negotiated the individual franchise

²⁷³ Mary Lu Carnevale, *Senate Blocks Bid to Regulate Cable Television*, WALL ST. J., Oct. 1, 1990 (quoting Consumer Federation of America Legislative Director Gene Kimmelman, "this year's [1990] bill that was blocked by Sen. Timothy Wirth (D-Col.) was a slap on the wrist for cable, next year's will be a full spanking").

²⁷⁴ *Id.*

²⁷⁵ 47 USC § 536 (contains the regulation of carriage agreements legislation and required the FCC to establish regulations within one year of enactment of the Cable Act of 1992).

²⁷⁶ Television Assignments, *supra* note 4 at 208.

²⁷⁷ *Id.*

agreements with cable operators. However, during this period the Commission did seek to protect broadcasters from economic harm from signal importation from adjacent markets and the use of microwave relay systems to bring in broadcast signals from hundreds of miles away.²⁷⁸

The CATV industry enjoyed nearly a decade of deregulation following the enactment of the Cable Act of 1984.²⁷⁹ The Act not only brought the industry under FCC oversight it also deregulated rates.²⁸⁰ As previously mentioned in this chapter, the rapid rise in cable rates during the late 1980s and early 1990s played a significant role in the debate leading up to the after the passage of the Cable Act of 1992.²⁸¹ In spite of all of the attention given to rising cable rates the reregulation would be short lived. The NCTA successfully lobbied Congress to leave cable rates largely unregulated in the Telecommunications Act of 1996.²⁸² Rate deregulation has paid big dividends to CATV operators as the average price of expanded basic service has more than doubled from \$22.35 to \$49.65 from 1995 to 2008.²⁸³ This represents a nearly 84 percent increase in the cost of expanded basic cable service over the general inflation rate.²⁸⁴ While the

²⁷⁸ PARSONS, *supra* note 7, at 217 (The FCC protected broadcasters local market position by implementing carriage and non-duplication regulations on cable systems).

²⁷⁹ Cable Communications Policy Act of 1984, Pub. L. 98-549, 98 Stat. 2779

²⁸⁰ *Id.* at 47 U.S.C. 543.

²⁸¹ Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) (codified in 47 USC § 521).

²⁸² *Id.*

²⁸³ In the Matter of Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992 (Report on Cable Industry Prices), MM Docket No. 92-266, at 39 (Rel. Jan. 16, 2009).

²⁸⁴ *Id.*

NCTA successfully protected CATV operators against rate regulation must-carry would continue to be a point of contention.

In Chapter 4 the focus of this study will turn to the FCC's must-carry Supreme Court victory in *Turner II* and its First Amendment implications for CATV. The origins, development and implementation of digital television (DTV) in the United States will be examined as a precursor to the exploration of the digitization of the must-carry rules and the applicability of the *Turner II* decision within this new technological standard. Chapter 4 will conclude with an overview of the FCC's approach to digital must-carry and the future implications of the Commission's current view for both CATV and broadcasters.

CHAPTER 4
TURNER AND THE TEST OF TIME AND TECHNOLOGY

“...we conclude must-carry is narrowly tailored to preserve a multiplicity of broadcast stations for the 40 percent of American households without cable.”

—Turner v. FCC (1997) ¹

Introduction

The cable industry (CATV) entered the 1990s on the cusp of emerging from its long standing second class status to broadcast television. The deregulation of the 1980s created a ripe environment for consolidation and growth in CATV.² The Cable Act of 1984 sought to encourage the development of CATV and it did.³

CATV also continued to redefine itself beyond its original role as broadcast signal provider by increasing the number of cable originated channels it offered to subscribers.⁴ The addition of CNN, ESPN, Nickelodeon, The Weather Channel and other channels to CATV’s lineup allowed it to forge its own unique identity and begin its slow cannibalization of broadcasting television’s audience.⁵

The number of communities and homes served by cable grew significantly as did the number of channels offered.⁶ The number of cable programming networks

¹ Turner Broadcasting System, Inc. v. FCC 520 U.S. 180 (1997) (hereinafter *Turner II*) (held that the must-carry provisions under the 1992 Cable Act were consistent with the First Amendment because the rules furthered important governmental interests and did not burden cable operators speech more than necessary to further those interests).

² Cable Communications Policy Act of 1984, Pub. L. 98-549, 98 Stat. 2779.

³ 1990 Cable Report, 5 FCC Rcd at 4964-4968 (1990).

⁴ *Id.*

⁵ *Id.*

⁶ In the Matter of Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992 (Annual Assessment of the Status of Competition in the Market for

increased from 61 at the end of 1990 to 72 just three years later.⁷ Cable service was also available to over 96 percent of television households in the United States.⁸

The decade would not pass without some good news for broadcasters. With less regulatory oversight CATV's rapid growth raised a few red flags with members of Congress as well as the FCC.⁹ Cable rates increased almost three times as much as the Consumer Price Index (CPI) between 1984 and 1989.¹⁰ The FCC also noted that while the 1984 Cable Act promoted many successes in the growth of CATV new concerns were emerging.¹¹ The Commission was worried that CATV operators were growing increasingly more powerful, almost monopolistic, in a marketplace that largely lacked relevant competition.¹² As previously discussed these concerns led to new regulation in the form of the Cable Television Consumer Protection Act of 1992 (Cable Act of 1992).¹³

the Delivery of Video Programming), First Report, CS Docket No. 94-48, 9 FCC Rcd 7442 (1994).

⁷ *Id.* at 7566; See also History of Cable & Pay TV Subscribers & Revenues, CABLE TV INVESTOR, Mar. 31, 1994, at 9.

⁸ *Id.* at 7568 (information obtained from Appendix C, Table 4).

⁹ 1990 Cable Report, *supra* note 3.

¹⁰ Cable Television Consumer Protection and Competition Act of 1992 (Hereinafter Cable Act of 1992), Pub. L. No. 102-385, 106 Stat. 1460 (1992) (codified in 47 USC § 521).

¹¹ 1990 Cable Report, at 4972-4973.

¹² *Id.*

¹³ Cable Act of 1992, *supra* note 10.

The Cable Act of 1992 attempted to curb the rise of CATV rates and examine the potential for the development of non-broadcast competition for cable.¹⁴ It also introduced a new incarnation of the must-carry rules designed to protect broadcasters from CATV domination.¹⁵ After decades of mounting a successful defense to the implementation of must-carry, the CATV industry's winning streak would come to an end.¹⁶

In this chapter the Supreme Court's decision in *Turner v. FCC (1997) (Turner II)* will be discussed historically as well as analyzed within the context of the evolving electronic media landscape of the past twelve years. The must-carry rules will also be revisited for their applicability to digital television (DTV) following the successful completion of the transition from analog broadcasting.

Must-Carry Becomes Law

The CATV industry in 1997 continued to prosper and expand. However, competition to cable was developing on two fronts.¹⁷ First, direct broadcast satellite (DBS) services led by DirecTV and EchoStar served almost 10 percent of the total subscribers to multichannel video program distributors (MVPDs).¹⁸ Significant upfront satellite receiving equipment costs to new DBS subscribers of as much as \$400 did

¹⁴ 47 U.S.C. 543 (6)(b)(1) (absent competition the FCC can insure the rates subscribers pay basic cable are "reasonable"); 47 U.S.C. 548 (sought to increase competition and program diversity in multichannel video programming through competition).

¹⁵ 47 U.S.C. 534.

¹⁶ *Turner II*, *supra* note 1.

¹⁷ *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, CS Docket No. 97-141, (rel. Jan. 13, 1998) (hereinafter *1997 Video Competition Report*).

¹⁸ *Id.* at 9.

slow the growth of this emerging technology.¹⁹ Second, the Telecommunications Act of 1996 removed the regulatory restraints barring telephone companies from offering video programming to their voice customers.²⁰ While not very active in 1997 many of these companies would eventually take advantage of the opportunity to offer video programming to their customers.²¹

In spite of the additional competition in the MVPD marketplace CATV continued to dominate. CATV controlled 87 percent of the 56 million MVPD household subscriber base.²² The cable industry's annual revenues in 1997 rose nearly 9 percent to \$27 billion.²³ The number of cable networks grew to 126 as CATVs continued to siphon viewers away from broadcasters.²⁴ Over a nine year period ending in 1997, CATV reduced broadcasters' share of the television viewing audience by more than a fifth from 87.7 percent to 65.5 percent.²⁵

In spite of added competition and shrinking share of the audience the business of broadcasting continued to prosper. The number of stations on the air in 1997 grew by 11 to a total of 1561.²⁶ Advertising revenue for commercial broadcast television also

¹⁹ *Id.* at 40.

²⁰ Pub. L. 104-104, 110 Stat 56 (1996).

²¹ *1997 Video Competition Report, supra* note 17 at 8.

²² *Id.* at 5.

²³ *Id.* at 19.

²⁴ *Id.* at 18.

²⁵ *Id.*

²⁶ *Id.* at 9.

grew by 12 percent to more than \$31 billion.²⁷ The Supreme Court also brightened the broadcast picture with its approval of the must-carry rules in its *Turner II* decision.

Turner v. Federal Communications Commission (1997)

The new must-carry rules in the Cable Act of 1992 were quickly challenged by Turner Broadcasting and reached the U.S. District Court the following year. The court upheld the rules only to have them vacated and remanded by the Supreme Court in *Turner Broadcasting System v. FCC (1994) (Turner I)*. Three years later the Supreme Court reexamined the case and held the must-carry rules were constitutional in *Turner II*.²⁸

In a 5-4 decision, the Court in *Turner I* focused on whether the constitutionality of must-carry was subject to strict scrutiny as a content-based regulation or intermediate scrutiny under the *O'Brien* test as a content-neutral regulation.²⁹ While the Court determined the appropriate level of First Amendment scrutiny to apply to the must-carry rules was intermediate, it still vacated the district court's decision and remanded the

²⁷ *Id.* at 58.

²⁸ *Turner Broadcasting System v. FCC*, 819 F. Supp. 32 (D.D.C. 1993). (held the must-carry rules as a content neutral economic regulation that promoted a significant government interest and were narrowly tailored because cable systems retained control over most of their channel spectrum); *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994) (hereinafter *Turner I*) (held the Cable Act's must-carry rules were content-neutral in application, but vacating and remanding because the government must show that the economic health of local broadcasting was in genuine jeopardy and in need of the protections afforded by the must-carry rules); *Turner II*, *supra* note 1.

²⁹ *United States v. O'Brien*, 391 U.S. 367 (1968) (held the government can infringe on conduct otherwise protected by the First Amendment if (1) it is within the constitutional power of the government; (2) it furthers important or substantial government interest; (3) that interest is unrelated to the suppression of free expression; and (4) the restriction of freedoms is no greater than is essential to the furtherance of that interest).

case so both sides in the dispute could develop and submit to the court a more “thorough factual record.”³⁰

The standard of First Amendment scrutiny applied in *Turner II* is the less stringent intermediate rather than strict.³¹ The Court determined the requirements of must-carry to be content-neutral and subject to intermediate scrutiny, rather than a content-based speech restriction that would have required a strict scrutiny analysis.³² The plurality concluded the must-carry rules did not specify a specific type of broadcast programming be carried by cable operators.³³ Citing *Turner I*, the Court believed the must-carry rules did not promote a particular type of speech, but preserved access to free over-the-air regardless of its content.³⁴

In 1997 the Court revisited the must-carry issue in *Turner II* and this time the rules were deemed constitutional and upheld in a five-to-four decision.³⁵ The Court identified two potential sources of interference with the protected speech of cable operators. First, the provisions of the must-carry rules restrain cable operators’ editorial discretion in creating programming packages by limiting the number of channels in which the CATV owner could exercise editorial control.³⁶ Second, the must-carry rules

³⁰ Joseph Russomanno, *Speaking Our Minds: Conversations With the People Behind Landmark First Amendment Cases* 346 (Lawrence Erlbaum Associates 2002).

³¹ *Turner II*, *supra* note 1 at 385.

³² *Id.*

³³ *Id.* at 385.

³⁴ *Id.* at 386 (citing *Turner I*, at 649).

³⁵ *Id.*

³⁶ *Id.* at 403 (citing *Turner I*, at 637).

make it more difficult for new cable networks to compete for carriage on a cable system's limited remaining channel space.³⁷

The Majority Plus Breyer

Justice Kennedy authored the opinion of the Court. Kennedy was joined by Chief Justice Rehnquist and Justices Stevens and Souter in-full and Justice Breyer in-part. Much of the opinion was based on significant portions of its early decision in *Turner I*. The Court in *Turner I* had already held that the must-carry rules as written in the Cable Act of 1992 were a content-neutral restriction on the speech of CATV operators.³⁸ As content-neutral speech the must-carry rules were then subject to intermediate First Amendment scrutiny under the test developed in *O'Brien*.³⁹ With that point already decided, the Court in *Turner II* sought to determine whether or not the must-carry rules were narrowly tailored in order to promote a substantial government interest.⁴⁰

In *Turner I* the Court noted the must-carry rules were intended to serve three interests: "(1) preserving free over-the-air (OTA) broadcast television, (2) promoting the widespread dissemination of information from a multiplicity of sources, and (3) promoting fair competition in the market for television programming."⁴¹ In order to justify the need for must-carry rules to meet the above interests, the Court focused on data indicating that forty percent of United States television households relied on OTA

³⁷ *Id.*

³⁸ *Turner I*, *supra* note 28.

³⁹ *United States v. O'Brien*, *supra* note 29.

⁴⁰ *Turner II*, *supra* note 1 at 185.

⁴¹ *Turner I*, *supra* note 28 at 662.

broadcast reception as their only source of television programming.⁴² In analyzing the must-carry rules the Court gave deference to the legislative powers of Congress and focused on determining whether or not Congress had based the rules on substantial supporting evidence.⁴³

Justice Kennedy framed much of the evidence in support of must-carry not on any immediate danger facing OTA television broadcasting, but instead focused on the growing power of CATV and the industry's potential to inflict harm on broadcasters in order to expand its audience and revenues.⁴⁴ As noted in the record the vast majority of broadcast stations were economically sound and already being carried by CATV.⁴⁵

Justice Stephen Breyer joined the Court during the interim between the two *Turner* decisions when he replaced Justice Blackmun. Breyer's participation in the must-carry debate centered on a "balancing" of the First Amendment interests of cable, broadcasters and citizens.⁴⁶ Breyer conceded that must-carry extracts a serious First Amendment price.⁴⁷ "It interferes with the protected interests of the cable operators to choose their own programming; it prevents displaced cable program providers from obtaining an audience; and it will sometimes prevent some cable viewers from watching

⁴² *Turner II*, *supra* note 1 at 190.

⁴³ *Id.* at 195.

⁴⁴ *Id.* at 191, 196-197.

⁴⁵ *Id.* at 205.

⁴⁶ See generally Jerome A. Barron, *The Electronic Media and the Flight from First Amendment Doctrine: Justice Breyer's New Balancing Approach*, 31 U. MICH. J.L. REF. 817 (1998).

⁴⁷ Joel Timmer, *Broadcast, Cable and Digital Must Carry: The Other Digital Divide*, 9 COMM. L. & POL'Y 101 126 (2004).

what, in its absence, would have been their preferred set of programs.”⁴⁸ The Court, in Breyer’s concurrent opinion, held that must-carry was narrowly tailored to preserve a multiplicity of over-the-air (OTA) broadcast stations for American households without cable.⁴⁹

Breyer focused his opinion on the preservation of over-the-air broadcasting and the important source of information it represents to those households that do not subscribe to CATV.⁵⁰ Breyer ignored the economic and competitive arguments in the principal opinion pertinent to its analysis of the third government interest: the promotion of fair competition in the delivery of television programming.⁵¹ He instead concluded the First Amendment rights of viewers without CATV to have access to a variety of broadcast programming options outweighed any potential loss of programming CATV subscribers might experience.⁵²

Justice O’Connor’s Dissent

Just as she did in *Turner I*, Justice Sandra Day O’Connor authored the dissenting opinion in *Turner II*.⁵³ O’Connor was again joined by Justices Scalia, Thomas, and Ginsburg.⁵⁴ The dissent focused on a systematic critique of the plurality’s use of what it

⁴⁸ *Turner II*, at 226 (Breyer, J., concurring in part).

⁴⁹ *Id.* at 215-16.

⁵⁰ *Id.* at 226.

⁵¹ *Id.*

⁵² *Id.* at 228-229.

⁵³ *Id.* at 229.

⁵⁴ *Id.*

termed “considerable evidence” in support of its must-carry decision.⁵⁵ O’Connor questioned the continued validity of much of the data the plurality relied on based on the fact that it was prepared some six years before the enactment of must-carry.⁵⁶

O’Connor countered with evidence she believed was dismissed by the Court suggesting the broadcast industry was indeed quite healthy.⁵⁷ The number of stations in the period prior to the enactment of must-carry increased by 263 and broadcast advertising revenue was growing.⁵⁸ In 499 of the 504 media markets the number of commercial broadcast stations in 1992 equaled or exceeded those broadcasting in 1987.⁵⁹

O’Connor did not believe the must-carry rules to be narrowly tailored; neither did she understand Justice Breyer to in his concurring opinion.⁶⁰ She criticized the plurality for “substitute[ing] unstated and untested assumptions” in evaluating the facts regarding an issue of constitutional law.⁶¹ The dissent criticized the plurality for analyzing must-carry data on a national basis rather than market-by-market in order to determine the actual threat must-carry presented to the dissemination of information.⁶² According to O’Connor, a cable operator was unlikely to remove a popular broadcast station from its

⁵⁵ *Id.* at 246.

⁵⁶ *Id.* at 245.

⁵⁷ *Id.* at 249.

⁵⁸ *Id.*

⁵⁹ *Id.* at 248.

⁶⁰ *Id.* at 251.

⁶¹ *Id.* at 232.

⁶² *Id.* at 232-233.

channel lineup because doing so would negatively impact the largest source of a cable operators' revenue, subscriber fees.⁶³

In the dissent's view the Court focuses on cable operators and ignores the second appellant, cable programmers.⁶⁴ The Court utilizes a "highly dubious economic theory" to substantiate must-carry's First Amendment burden on cable programmers and cable operators.⁶⁵ O'Connor concludes by criticizing the Court for failing to define the threat to broadcasters and improperly attributing the results of that threat to the anticompetitive behavior of cable operators.⁶⁶ Given the data as analyzed by the Court it is impossible to conclude whether Congress was addressing an actual problem or one of conjecture in implementing the must-carry rules.⁶⁷ With *Turner II* the must-carry rules were now law, but passage of time and the development of technology would challenge both their relevancy and applicability.

The precedential value of the plurality decision in *Turner II* has yet to be tested, but appears to be weakened by the failure of five justices to agree on a united legal analysis. Justice Breyer chose to ignore the principal opinion's focus on fair competition and economic concerns.⁶⁸ Justice O'Connor believed the issue of fair competition to be the only one fully developed and explained in the principal opinion.⁶⁹

⁶³ *Id.* at 239.

⁶⁴ *Id.* at 257.

⁶⁵ *Id.* at 249.

⁶⁶ *Id.* at 258.

⁶⁷ *Id.*

⁶⁸ *Id.* at 226.

⁶⁹ *Id.* at 258.

Instead, Breyer based his opinion on the preservation of over-the-air television and importance of the widespread dissemination of information to non-cable television viewers.⁷⁰

Must-Carry and Direct Broadcast Satellite (DBS)

Following the Supreme Court's *Turner II* decision Congress sought to extend the must-carry rules to the emerging Direct Broadcast Satellite (DBS) industry. The Satellite Home Viewer Improvement Act (SHVIA) allowed DBS operators to become more competitive with CATV by allowing them to carry local broadcast stations within their individual markets.⁷¹ Congress achieved this by granting DBS operators a royalty-free statutory copyright license to carry local stations.⁷² However, the SHVIA also required DBS operators like DirecTV and Dish Network to obtain consent in the form of retransmission consent or mandatory carriage from local broadcasters whose signals they sought to carry.⁷³

Rather than require DBS operators to carry local broadcast channels, the SHVIA instead gave them the option to provide local stations in the markets of their choosing.⁷⁴ This policy is known as "local-into-local" and requires a DBS operator to offer all local

⁷⁰ *Id.*

⁷¹ The SHVIA was enacted as Title I of the Intellectual Property and Communications Omnibus Reform Act of 1999 ("IPACORA") (relating to copyright licensing and carriage of broadcast signals by satellite carriers, codified in scattered sections of 17 and 47 U.S.C.), Pub. L. No. 106-113, 113 Stat. 1501, Appendix I (1999).

⁷² 47 U.S.C.A. § 325(b).

⁷³ *Id.*

⁷⁴ See The FCC's Satellite Home Viewer Improvement Act Page, <http://www.fcc.gov/mb/shva/>.

broadcast channels in a market once it chooses to begin offering any local station in that specific market.⁷⁵

In 2004 Congress passed the Satellite Home Viewer Extension and Reauthorization Act. (SHVERA).⁷⁶ SHVERA extended and revised the provisions of the SHVIA. DBS has proven to be a very capable competitor to CATV within the multichannel video programming distributor (MVPD) market. Currently only cable giant Comcast serves a larger subscriber base than DirecTV and Dish Network.⁷⁷ DirecTV and Dish Network are second and third in MVPD subscribers served.⁷⁸ The CATV industry has responded to the increased competition from DBS and other MVPDs by expanding channel offerings and offering additional services like high-speed Internet and telephone.⁷⁹

The Digitalization of Broadcast Television

The must-carry rules were written for broadcasting in its analog form and that form at the time of *Turner II* in 1997 was already in the process of being phased out. Broadcasting was in the early stages of what would be a lengthy move to digital television (DTV). Many of the challenges broadcasting faced during its analog development discussed in Chapter Two would be revisited during the DTV switch.

⁷⁵ *Id.*

⁷⁶ Satellite Home Viewer Extension and Reauthorization Act ("SHVERA"), Pub. L. No. 108-447, 118 Stat 2809 (2004) (enacted on December 8, 2004, as title IX of the "Consolidated Appropriations Act, 2005).

⁷⁷ *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Thirteenth Annual Report*, MB Docket No. 0-6-189 (Rel. Jan. 16, 2009) (hereinafter *2006 Annual Report*).

⁷⁸ *Id.* at 5, 39 (DBS accounted for 29.2 percent of total MVPD subscribers and served 27.97 million U.S. households).

⁷⁹ *Id.* at 4.

Technical standards, frequency allocation, licensing, and transition concerns were all part of a debate that started in 1988.

The “not too distant future” former FCC Chairman Dennis Patrick championed in 1988 for the arrival of what was then referred to as advanced television (ATV) turned out to be a twenty-one year odyssey.⁸⁰ Several delays postponed the final transition from analog broadcasting to DTV until the summer of 2009.⁸¹

The Promise of DTV

The FCC began to seriously examine how to transition broadcast television into a higher definition format in 1987.⁸² The digital aspect of the transition would be incorporated later. The earliest ideas considered included improving the current NTSC standard to correct interlaced and color defects within the signal that would only be exaggerated in higher resolution.⁸³ Bell Labs developed an HD system that required twice the bandwidth utilized by analog broadcasting.⁸⁴ The Columbia Broadcasting System (CBS) experimented with HDTV delivery via DBS services.⁸⁵ One early idea that did turn out to be part of the transition was the utilization of the current VHF and UHF spectrum for what would eventually become DTV.⁸⁶

⁸⁰ Statement of FCC Chairman Dennis Patrick on Advanced Television, Tentative Decision and Further Notice of Inquiry in MM Docket No. 87-268, 3 FCC Rcd 6548 (1988).

⁸¹ Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, Fifth Report and Order, 12 F.C.R. 12809 (1997) (hereinafter Fifth Report and Order).

⁸² Notice of Inquiry in MM Docket No. 87-268, 11 FCC Rcd 5125 (1987).

⁸³ *Id.* at 5127.

⁸⁴ *Id.* at 5129.

⁸⁵ *Id.*

⁸⁶ *Id.* at 5130.

The FCC followed up in 1988 by determining that due to the scarcity of spectrum, allocating more than the current 6MHz of spectrum to broadcasters would not be practical.⁸⁷ The Commission identified several goals for what was still being referred to as advanced television (ATV).⁸⁸ (1) The public would benefit from terrestrial use of ATV techniques.⁸⁹ (2) This benefit would be realized most quickly if this technology was implemented by existing broadcasters.⁹⁰ (3) The new system would utilize the same spectrum already allocated to broadcast television.⁹¹ (4) During the transition NTSC analog service would have to continue.⁹² (5) It would not be in the public interest to restrain the benefits of ATV through non-broadcast services like cable and DBS.⁹³

Over the next eight years Congress and the FCC continued to examine DTV standards and implementation methods.⁹⁴ The plans for implementing Digital Television (DTV) began to crystallize in Telecommunications Act of 1996 (Telecom Act of 1996).⁹⁵

⁸⁷ Tentative Decision and Further Notice of Inquiry in MM Docket No. 87-268, 3 FCC Rcd 6520 (1988).

⁸⁸ *Id.* at 6521.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ See First Report and Order in MM Docket No. 87-268, 5 FCC Rcd 5627 (1990); Notice of Proposed Rule Making in MM Docket No. 87-268, 6 FCC Rcd 7024 (1991); Second Report and Order/Further Notice of Proposed Rule Making in MM Docket No. 87-268, 7 FCC Rcd 3340 (1992); Second Further Notice of Proposed Rule Making in MM Docket No. 87-268, 7 FCC Rcd 5376 (1992); Fourth Further Notice of Proposed Rule Making/Third Notice of Inquiry in MM Docket no. 87-268, 10 FCC Rcd 10541 (1995).

⁹⁵ Telecommunications Act of 1996, Pub. LA. No. 104-104, 110 Stat. 56 (1996).

In the Act it was decided that only existing broadcasters would be eligible for the initial DTV licenses.⁹⁶

Telecommunications Act of 1996

The Telecommunications Act of 1996 represented the first major revision of communications law in the United States since the enactment of the Communications Act of 1934. Within the Telecom Act of 1996 was a section that provided guidance for the implementation of advanced television services.⁹⁷

Congress codified a transition that would limit initial participation to existing broadcasters.⁹⁸ The Act permitted licensees to offer additional services to the point as to not derogate their primary television service, including high definition television (HDTV) broadcasts.⁹⁹ Broadcasters upon the receipt of a second channel for digital broadcast also agreed to return either one of their two channels upon the completion of the transition.¹⁰⁰

DTV Implementation

By 1997 the goals and promise for digital television (DTV) began to mirror what the technology would eventually deliver.¹⁰¹ The delivery of high-definition programming,

⁹⁶ *Id.* at § 336 (a) (1).

⁹⁷ *Id.* at § 336 (g) (1) (defines “advanced television services” as those using digital or other advanced technology).

⁹⁸ *Id.* at § 336 (a) (1).

⁹⁹ *Id.* at § 336 (g) (3) (defines “high definition television” as those systems that offer twice the vertical and horizontal resolution of analog technology).

¹⁰⁰ *Id.* at § 336 (c) (“the commission shall, as a condition of such license, require that wither the additional license (DTV) or original license (analog) held by the licensee be surrendered to the Commission for reallocation or reassignment (or both) pursuant to Commission regulation”).

¹⁰¹ In the Matter of on the Existing Television Broadcast Service, MM Docket No. 87-268, 2 FCC Rcd 12809 (Apr. 3, 1997).

the simultaneous delivery of multiple programming streams over a single digital channel, and additional services including data transfer were all identified by the time the FCC adopted its *Fifth Report and Order*.¹⁰² The Commission identified several “ancillary and supplementary services” broadcasters might provide including subscription television, computer and data distribution and transmission, audio programming and other interactive services.¹⁰³ The only limit the FCC placed on broadcasters was that any additional services not interfere with their delivery of free over-the-air (OTA) television at an acceptable resolution.¹⁰⁴ The Commission viewed these additional services as important business opportunities for broadcasters to remain viable to continue providing the public with free programming services.¹⁰⁵

The FCC wished the transition to DTV to be “expeditious and orderly.”¹⁰⁶ Complicating this strategy was the Commission’s wish to maintain analog service in order to allow the public to still use television sets that would not be compatible with DTV without an external converter box.¹⁰⁷ While the FCC previously consider a 15-year transition window for the move to DTV the Commission in its *Fifth Report and Order* decided to accelerate the process and set a 2006 target date for the end of analog television.¹⁰⁸

¹⁰² *Id.* at 12811.

¹⁰³ *Id.* at 12821.

¹⁰⁴ *Id.* at 12820.

¹⁰⁵ *Id.* at 12834.

¹⁰⁶ *Id.* at 12811.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 12851.

Just a few weeks after the Supreme Court issued its ruling in *Turner II* upholding the must-carry rules the FCC began to consider how must-carry and retransmission consent should work in DTV.¹⁰⁹ *Turner II* did not address must-carry in digital television and the FCC decided to seek comment on DTV must-carry in order to start multi-year examination of the issue.¹¹⁰

The FCC allocated current television channels 2 through 51 to serve as the spectrum for DTV service.¹¹¹ During the transition period the FCC's policy was one of replication with each station continuing to broadcast its original analog signal while at the same time starting to provide viewers with digital televisions DTV service.¹¹² The pace that stations were starting to broadcast in DTV was slower than the FCC had hoped.¹¹³ The Commission instituted a 6-month waiver policy for stations that would not be able to meet the May 2002 deadline.¹¹⁴ While the waivers were to only be granted to hardship cases, this stumble in the process would be indicative of how difficult the transition to DTV would be particularly in smaller markets or for those stations with limited financial resources.¹¹⁵

¹⁰⁹ *Id.* at 12852.

¹¹⁰ *Id.*

¹¹¹ Memorandum Opinion and Order on Reconsideration of the Sixth Report and Order, 13 FCC Rcd 7418 (1998).

¹¹² Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television, MM Docket No. 00-39 at 9 (Rel. Nov. 15, 2001).

¹¹³ *Id.* at 40.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

The broadcast side of the DTV transition is only part of the equation. Just as challenging were issues of reception in general and receiver standards in particular. The FCC sought to resolve of these issues in August of 2002.¹¹⁶ The FCC adopted a new standard to replace analog NTSC broadcasting for DTV.¹¹⁷ The ATSC standard for DTV was developed by the Advanced Television Systems Committee.¹¹⁸ By selecting the ATSC standard the FCC was left to figure out DTV tuner requirements, converter options to allow ATSC signals to be viewed on existing NTSC televisions and setting a schedule requiring set manufacturers to deliver for purchase televisions capable of DTV reception.¹¹⁹

The FCC's initial 2006 date for completion of the DTV transition was pushed back to February 17, 2009.¹²⁰ As of April 2007 more than 93 percent of commercial television stations were broadcasting a digital signal.¹²¹ FCC Commissioner Michael J.

¹¹⁶ Review of the Commission's Rules and Policies Affecting the Conversion To Digital Television, Second Report and Order and Second Memorandum Opinion and Order, MM Docket No. 00-39 at (Rel. Aug. 9, 2002).

¹¹⁷ *Id.* at 3.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 5-6.

¹²⁰ Digital Television and Public Safety Act of 2005 ("DTV Act"), which is Title III of the Deficit Reduction Act of 2005, Pub. L. No. 109-171, 120 Stat. 4 (2006) (*codified at* 47 U.S.C. §§ 309(j)(14) and 337 (e)) (DTVAct § 3002(a) amends Section 309(j)(14) of the Communications Act to establish February 17, 2009 as a new hard deadline for the end of analog transmissions by full-power stations. 47 U.S.C. § 309(j)(14)(A). DTV Act § 3002(b) directs the Commission to "take such actions as are necessary to terminate all licenses for full-power television stations in the analog television service, and to require the cessation of broadcasting by full-power stations in the analog television service, by February 18, 2009).

¹²¹ Third Periodic Review of the Commission's Rules and Policies Affecting the Conversion To Digital Television, Notice of Proposed Rulemaking, MB Docket NO. 07-91 at 8 (Rel. May 18, 2007).

Copps identified two keys to DTV transition success.¹²² Broadcasters had to be successfully transmitting digital signals, and consumers needed to have the capability to receive them.¹²³ Copps believed the new DTV deadline to be a “hard deadline” providing all parties a single opportunity to get it right.¹²⁴

This long standing “hard date” for the completion of the digital transition was just weeks away when Congress again intervened and passed the “DTV Delay Act “ and pushed the final transition to June 12, 2009.¹²⁵ This time the transition took place as scheduled and stations turned off their analog transmitters to usher in the DTV only era for broadcasting in the United States.¹²⁶ The digital television transition was delayed several times, but the FCC’s analysis of its must-carry rules and how they would be applied to DTV was ready to go in 2005.

Must-Carry Goes Digital

After several years of comment and debate on the issue of digital must-carry the FCC released its *Second Report and Order* in February of 2005. In this report, the Commission took action on two “significant issues” that were deemed “essential to [its]

¹²² *Id.* at 88 (Statement of Commissioner Michael J. Copps).

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ DTV Delay Act, S. 352, 111th Cong. (2009) (enacted).

¹²⁶ See Press Release, Federal Communications Commission, FCC Chairman Hails New Era in Broadcasting (June 12, 2009) (available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-291377A1.pdf (last visited Sept. 4, 2009)); Statement of Commissioner Jonathan S. Adelstein on The Digital Television Transition (June 13, 2009) (available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-291389A1.pdf (last visited Sept. 4, 2009)); Remarks of Acting FCC Chairman Michael J. Copps in the Wake of the Digital Television Transition (June 13, 2009) (available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-291388A1.pdf (last visited Sept. 4, 2009)).

ongoing efforts to complete the transition from analog to digital television.”¹²⁷ The FCC was interested in answering the following questions: (1) whether cable operators are required to carry both the digital and analog signals of a station during the digital transition (also referred to as “dual carriage”); and (2) how to define “primary video” carriage limitations for commercial and non-commercial broadcasters under the 1992 Cable Act if a broadcaster chooses to broadcast multiple digital television streams (also referred to as “multicasting”).¹²⁸

DTV Must-Carry Order

The FCC conducted a statutory and constitutional analysis of both dual carriage and multicast must-carry. In reviewing dual carriage within the statutory context of the 1992 Cable Act the Commission found the Act is “ambiguous” when it comes to dealing with the issue of dual carriage.”¹²⁹ The FCC believed that mandating dual carriage was not necessary in order “to advance the governmental interests identified by Congress in the Act that were upheld in *Turner II* or to effectuate the DTV transition.”¹³⁰ In the Commission’s view a dual carriage requirement would also likely violate the cable operators’ First Amendment rights.¹³¹

¹²⁷ Carriage of Digital Television Broadcast Signals: Amendments to Part 76 of the Commission’s Rules, Second Report and Order and First Order on Reconsideration, CS Docket No. 98-120, 3 n.10 (rel. Feb. 23, 2005) (hereinafter *DTV Must-Carry Order*) (citing 47 U.S.C. § 534(b)(4)(B) “when the FCC adopts new standards for broadcast television signals, such as the authorization of broadcast high definition television (HDTV), it shall conduct a proceeding to make any changes in the signal carriage requirements of cable systems needed to ensure that cable systems will carry television signals complying with such modified standards in accordance with the objectives of this section).

¹²⁸ *Id.* at 2-3.

¹²⁹ *Id.* at 7.

¹³⁰ *Id.* at 8.

¹³¹ *Id.* at 3. .

Broadcast interests had sought reconsideration on the grounds that since the Act made no distinction between qualifying analog and digital signals, all local television signals must be carried.¹³² They argued that if Congress intended to exclude DTV signals from carriage during the transitional period, it would have so indicated in the Act.¹³³ Broadcasters also believed that dual must-carry would help advance the transition to DTV by “spur[ing] broadcasters to produce digital television programming, which in turn, will convince consumers to purchase DTV receivers.”¹³⁴ The NAB argued that dual carriage was required under the 1992 Cable Act and presented cable with “no unconstitutional burden on its First Amendment interest.”¹³⁵

The FCC decision on multicasting was based on its interpretation of the meaning of “primary video” as used in the context of a broadcaster transmitting multiple program streams. In the view of the Commission “the must-carry provisions were not intended to cover all uses of a signal.”¹³⁶ The Commission held that if a broadcaster elected to split its digital signal into multiple “separate, independent, and unrelated programming streams, only one stream is considered primary and entitled to mandatory coverage.”¹³⁷ The Commission cited a filing by Professor Laurence H. Tribe submitted on behalf of the NCTA in which the constitutional scholar wrote:

¹³² *Id.* at 6-7.

¹³³ *Id.*

¹³⁴ *Id.* at 30.

¹³⁵ *Id.* at 14.

¹³⁶ *Id.* at 15.

¹³⁷ *Id.* at 15-16.

[F]orcing cable operators to carry multiple video streams of digital broadcasters would abridge the editorial freedom of cable operators, harm cable programmers, and invade the rights of audiences to choose what they want to view – all without promoting any of the government interests contemplated by Congress in enacting the must-carry rules, or any of the interests approved by the Supreme Court in *Turner I* and *Turner II*.¹³⁸

Petitions for Reconsideration

The National Association of Broadcasters (NAB) filed a *Petition for Reconsideration I* with the FCC after the *DTV Must-Carry Order* was released.¹³⁹ The NAB cited an “explosion in cable capacity” and “advances in technology” in support of its must-carry position.¹⁴⁰ *Petition I* also applied the capacity issue to multicasting. Broadcasters argued that the 6MHz currently required to carry each analog channel on a cable system is all the capacity that would be needed to carry the full DTV multicast content.¹⁴¹ In 2004, eighty-six percent of cable systems had upgraded to a system capacity of 750 MHz or higher.¹⁴²

¹³⁸ *Id.* at 17. See also NCTA Ex Parte Letter in CS Docket No. 98-120 (Files July 9, 2002). See also Michael M. Epstein, “Primary Video” and its Secondary Effects on Digital Broadcasting: Cable Carriage of Multiplexed Signals Under the 1992 Cable Act and the First Amendment, 87 MARQ. L. REV. 525, 552-67 (2004) (discussion of the Tribe Memorandum).

¹³⁹ See Carriage of Digital Television Broadcast Signals: Amendments to Part 76 of the Commission’s Rules, *Petition for Reconsideration of the National Association of Broadcasters and the Association for Maximum Service Television, Inc.*, CS Docket No. 98-120 (rel. Apr. 21, 2005) (hereinafter *Petition for Reconsideration I*).

¹⁴⁰ *Id.* at 12.

¹⁴¹ *Id.* at 14.

¹⁴² *2006 Video Competition Report*, *supra* note 77, at 17, (according to the report Channel capacity is bandwidth dedicated to video use. Video channel capacity can be increased or decreased on any given system simply by using more or less bandwidth for other services, such as high-speed Internet access services or cable telephony).

Broadcasters appeared to have a multicasting ally in soon-to- be FCC Chairman Kevin J. Martin. In his remarks following the release of the *DTV Must-Carry Order*, then Commissioner Martin wrote “with carriage rights for only one stream, these broadcasters cannot support all of this additional [digital] programming.”¹⁴³ His argument was that the FCC’s denial of multicast must-carry “prevents any broadcaster relying on “must-carry” from investing in multiple programming streams.”¹⁴⁴

The NAB in its *Petition for Reconsideration I* provided several examples of what broadcasters planned to do with multicasting that it claims the Commission failed to mention in its *DTV Must-Carry Order*. Among the examples the NAB cited:

- The ABC affiliate in Fresno, CA aired full screen election results on its second channel during the gubernatorial recall election.
- The CBS affiliate in Toledo, OH is exploring opportunities for multicasting state legislative debates, mayoral press conferences, city council hearings, and school committee hearings.
- KTVB-DT, the NBC affiliate in Boise, Idaho, offers 24-hour local news on a multicast channel.
- NBC affiliates want to multicast weather channels, as well as local alerts and traffic-related information.
- DIC Entertainment has announced plans for a children’s digital TV service that is contingent on mandatory multicasting carriage.¹⁴⁵

Commissioner Adelstein illustrated the opposing side of the must-carry issue when he presented the findings of a 2003 study by the Alliance for Better Campaigns in

¹⁴³ *DTV Must-Carry Order*, *supra* note 117, at 35 (Separate Statement of Commissioner Kevin J. Martin).

¹⁴⁴ *Id.*

¹⁴⁵ *Petition for Reconsideration I*, *supra* note 139, at 22-24.

his *DTV Must-Carry Order* statement.¹⁴⁶ The study found community public affairs programming accounts for less than half of one percent of local TV programming nationwide – compared to 14.4 percent for paid programming.¹⁴⁷ Paid programming accounted for 41 percent of multicast advocate PAX TV’s 2003 revenue.¹⁴⁸

In a separate filing, ABC, CBS and NBC affiliated stations claimed the Commission was “rushed” in reaching its conclusions in the *DTV Must-Carry Order* and made “numerous legal and factual errors”¹⁴⁹ that included: using the wrong legal framework;¹⁵⁰ not adequately considering the importance of multicast carriage to advance important government interests;¹⁵¹ the burden on cable systems would be negligible;¹⁵² and not acknowledging the extensive evidence in the record that private negotiations will not result in adequate carriage of valuable multicast programming.¹⁵³

CATV and Public Television Reach Agreement

As commercial broadcasters continued their aggressive pursuit of a legislative remedy that expands must-carry rules to include more than just a single stream of

¹⁴⁶ *DTV Must-Carry Order*, *supra* note 117, at 41, (Separate Statement of Commissioner Jonathan S. Adelstein).

¹⁴⁷ Alliance for Better Campaigns, “*All Politics is Local*,” available at <http://www.bettercampaigns.org/reports/display.php?ReportID=12>.

¹⁴⁸ PAX TV, 2003 ANNUAL REPORT, available at <http://www.sec.gov/Archives/edgar/data/923877/000100515004000854/0001005150-04-000854.txt>.

¹⁴⁹ Carriage of Digital Television Broadcast Signals: Amendments to Part 76 of the Commission’s Rules, Petition for Reconsideration of the ABC Television Affiliates Association, CS Docket No. 98-120, at 24 (rel. Apr. 21, 2005) (hereinafter *Petition for Reconsideration II*).

¹⁵⁰ *Id.* at 3-6.

¹⁵¹ *Id.* at 6-15.

¹⁵² *Id.* at 15-16.

¹⁵³ *Id.* at 16-19.

“primary video”, the cable industry and non-commercial broadcasters reached an agreement on a more inclusive must-carry policy.¹⁵⁴ A few weeks before the FCC released its *DTV Must-Carry Report* the Boards of Directors of the NCTA, APTV and PBS jointly announced they had approved a new digital must-carry agreement “that will allow U.S. cable customers to enjoy the high-definition, educational and children’s programming provided by the nation’s local Public Television stations.”¹⁵⁵ The Public Television Digital Carriage Agreement (PTDCA) has since been ratified by Public Television stations “serving over 80 percent of U.S. TV households” and cable Multiple System Operators (MSOs) “representing over 80 percent of cable subscribers.”¹⁵⁶

The Public Television Digital Carriage Agreement (PTDCA) “ensures the local Public Television stations digital programming will be carried on cable systems serving the vast majority of the nation’s cable subscribers.”¹⁵⁷ The agreement included three major terms: (1) during the transition when both analog and digital signals are being broadcast, upgraded cable systems that offer HDTV will carry up to “four streams of free non-commercial digital broadcast programming and associated materials from at least one Public Television station in a market;” (2) after the transition to digital is complete, upgraded cable systems that offer HDTV “will carry free non-commercial digital

¹⁵⁴ See generally, Andrew D. Cotlar, *The Road Not Yet Traveled: Why the FCC Should Issue Digital Must-Carry Rules for Public Television “First”*, 57 Fed. Comm. L. J. 49 (2004) (published prior to the PTDCA, this article provides a thorough analysis of the benefits of digital must-carry for Public Television).

¹⁵⁵ Press Release, National Cable & Telecommunications Association, Boards of APTS, NCTA, and PBS Approve Public Television Digital Cable Carriage Agreement (Feb. 4, 2005) (on file with author).

¹⁵⁶ Press Release, National Cable & Telecommunications Association, Public Television and Cable Ratify Digital Cable Carriage Agreement (Apr. 14, 2005) (on file with author).

¹⁵⁷ Press Release, *supra* note 155.

programming of each local must-carry Public Television station. This may include four streams of free non-commercial digital programming and associated material, subject to reasonable programming duplication parameters;” and (3) any Public Television station that decides to go “digital-only before the DTV market transition may choose to have its digital signals carried on the upgraded local cable system at that time.”¹⁵⁸

Commenting on the PTDCA, FCC Commissioner Kathleen Q. Abernathy applauded the negotiated agreement as proof that negotiated carriage can occur and “common sense suggests that most cable operators will want to carry programming that would significantly interest their subscribers.”¹⁵⁹ Commissioner Jonathan S. Adelstein added that this agreement removed one of his “major concerns in the multicasting debate, [because] the public stands to benefit in very tangible ways from this arrangement.”¹⁶⁰

Petition for Reconsideration II offered an analysis of the PTDCA from commercial broadcasters.¹⁶¹ They claim that the agreement did not provide an adequate model for cable operators to use to negotiate similar deals with commercial broadcasters.¹⁶² The competition for advertising dollars between cable operators and commercial broadcasters creates a financial incentive for cable operators that would likely lead to a

¹⁵⁸ *Id.*

¹⁵⁹ *DTV Must-Carry Order*, *supra* note 110, at 31, (Separate Statement of Commissioner Kathleen Q. Abernathy).

¹⁶⁰ *Id.* at 37, (Separate Statement of Commissioner Jonathan S. Adelstein).

¹⁶¹ *Petition for Reconsideration II*, *supra* note 149, at 19.

¹⁶² *Id.*

denial of multicast carriage the digital signals of commercial stations.¹⁶³ The NAB would soon gain a powerful ally in Michael Powell's replacement as FCC Chairman, Kevin Martin. Martin not only favored multicast must-carry for broadcasters but a general reregulation of the CATV industry.

The FCC's Digital Evolution

The Federal Communications Commission (FCC) has been an evolving entity since its inception in 1934.¹⁶⁴ The political party in control of the White House is able to appoint the FCC's chairperson and select three of the five commissioners in order to advance its agenda.¹⁶⁵ However, in some cases the party line is blurred and this was the case following the resignation of FCC Chairman Michael Powell and the decision by President George W. Bush to replace him with Republican commissioner Kevin Martin.¹⁶⁶ Martin would seek to advance a regulatory agenda for CATV not only at odds with his predecessor but his political party as well.

The Martin Era (2005 – 2009)

As previously discussed, Kevin Martin voiced strong support for the extension of the must-carry rules to include multicast carriage in spite of the FCC's conclusion to the contrary in the *DTV Must-Carry Order*.¹⁶⁷ Martin believed that without cable carriage of broadcasters' additional programming there would be a lack of financial incentive for

¹⁶³ *Id.*

¹⁶⁴ See Federal Communications Commission, About the FCC, <http://www.fcc.gov/aboutus.html> (last visited Sept. 16, 2009).

¹⁶⁵ *Id.*

¹⁶⁶ See Federal Communications Commission, Biography of Kevin J. Martin, <http://www.fcc.gov/commissioners/previous/martin/biography.html> (last visited Sept. 16, 2009).

¹⁶⁷ *DTV Must-Carry Order*, *supra* note 110, at 35.

broadcasters to develop these new services to their potential.¹⁶⁸ He concluded that absent a multicast carriage requirement the public would not fully benefit from the expanded programming opportunities made possible by digital signal transmission.¹⁶⁹ In Martin's view with only a single programming stream required to be carried by CATV operator's broadcasters would be reluctant to deliver additional free programming options to viewers.¹⁷⁰

Martin's view on multicast carriage provided a precursor to a series of policy objectives regarding CATV he would pursue during his tenure as FCC chairman.¹⁷¹ In addition to an expansion of the must-carry rules to include all programming streams contained within a broadcasters digital signal, he also aggressively attempted to promote a la carte programming options for cable subscribers and advance the reregulation of CATV through tactics found to be questionable in a Majority Staff Report issued by the U.S. House of Representatives Committee on Energy and Commerce.¹⁷²

The release of the FCC's *2006 Annual Report* assessing the status of competition in the delivery of video programming for 2006 was delayed for more than a year after it

¹⁶⁸ Press Release, Press Statement of Commissioner Kevin J. Martin on Decision to Deny Multicast Carriage Rights to Broadcasters, (Feb. 10, 2005) (on file with author).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ See Jim Puzzanghera, *Criticism of the FCC's Chairman is Widely Aired*, L.A. Times, Dec. 10, 2007; John Eggerton, *NCTA's McSparrow Sees Continuing Troubles with Martin*, BROADCASTING & CABLE, Apr. 1, 2008; Ted Hearn, *Stevens to Martin: Drop A La Carte Effort*, MULTICHANNEL NEWS, Apr. 8, 2008.

¹⁷² MAJORITY STAFF OF H. COMM. ON ENERGY AND COMMERCE, 110TH CONG., DECEPTION AND DISTRUST: THE FEDERAL COMMUNICATIONS COMMISSION UNDER CHAIRMAN KEVIN J. MARTIN (Dec. 2008) (hereinafter *Majority Staff Report*); "A la carte" refers to cable customers having the option of purchasing individual cable channels rather than the current model of CATV operators bundling tiers of channels for purchase in mass.

was adopted in November of 2007.¹⁷³ The *Majority Staff Report* found that Chairman Martin withheld data from the *2006 Annual Report* in order to trigger a rule allowing the FCC to expand cable regulation.¹⁷⁴ The report also suggested Martin manipulated data regarding a Commission report on a la carte and claimed that his leadership style did not afford other Commissioners “direct and unfettered access” to FCC staff.¹⁷⁵

The *Majority Staff Report* claims Chairman Martin omitted data and relied on a single source in preparing the *2006 Annual Report* in order to trigger the 70/70 Rule that would allow significant new regulation of the CATV industry.¹⁷⁶ The full Commission voted not to adopt the *2006 Annual Report* without concluding that the 70/70 Rule threshold had not been reached.¹⁷⁷ Martin included data on the cable industry from a single source, Warren Communications, to determine if the 70/70 Rule had been met.¹⁷⁸

According to Commissioner Robert M. McDowell, the author of the Warren Communications analysis said the data were not intended to provide a basis for determining the CATV industry’s status regarding the 70/70 Test.¹⁷⁹ McDowell, when

¹⁷³ *2006 Annual Report*, *supra* note 77 at 189.

¹⁷⁴ *Majority Staff Report*, at 11-14 (The 70/70 Rule is a statutory threshold that allows the FCC to impose new regulations on CATV operators if cable service with 36 channels or more becomes available to at least 70 percent of all U.S. households and if 70 percent of those households are cable subscribers) See Section 612(g) of the Communications Act of 1984, 47 U.S.C. § 532(g).

¹⁷⁵ *Id.* at 2.

¹⁷⁶ *Id.* at 12.

¹⁷⁷ *Id.* at 13.

¹⁷⁸ *Id.*

¹⁷⁹ *2006 Annual Report*, *supra* note 77 at 206 (Statement of Commissioner Robert M. McDowell Approving in Part, Dissenting in Part).

taking other sources of data relevant to the CATV industry that were omitted in the *2006 Annual Report*, found cable subscription well short of the 70/70 Test.¹⁸⁰

Commissioner Jonathan S. Adelstein was critical of Chairman Martin when he stated the FCC cannot “cook the books” and “steamroll the Commission” in order to advance a political agenda.¹⁸¹ He also voiced concern over the suppression of the FCC’s own data relevant to the percentage of homes passed by cable.¹⁸² Adelstein cited the effort by the Chairman to advance such controversial findings without providing adequate notice to all Commissioners as a major concern relevant to the effectiveness and credibility of the FCC as an agency.¹⁸³

Martin defended his actions in the formulation of the *2006 Annual Report*.¹⁸⁴ According to the Chairman the data from Warren Communications showed that cable penetration and subscription had surpassed the 70/70 threshold.¹⁸⁵ He justified the use of a single source as appropriate because Warren Communications’ data was collected directly from the CATV industry and had been used by the FCC in previous annual reports.¹⁸⁶

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 201-203.

¹⁸² *Id.* at 201.

¹⁸³ *Id.* at 203.

¹⁸⁴ *2006 Annual Report*, *supra* note 77 at 198-199.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

The Commission under Martin's leadership certainly reflected the will of the Chairman in both style and substance.¹⁸⁷ While the FCC chairman may lack significant additional powers in comparison to the remaining commissioners, the chairman is both the Commission's face and voice.¹⁸⁸ According to Krasnow and Longley, the chairman of the FCC can accumulate power through exceptional personal abilities and sheer determination as well as deference from the other commissioners.¹⁸⁹ The lack of deference from the remaining FCC commissioners to Martin's formulation of the CATV data in the *2006 Annual Report* served to derail the Chairman's CATV regulatory ambitions.¹⁹⁰

The Genachowski Era (2009 – Present)

The FCC entered a new era on June 29, 2009 when Julius Genachowski was sworn in as FCC Chairman.¹⁹¹ In addition to Genachowski, Mignon Clyburn and Meredith Atwell Baker also joined the FCC as new commissioners.¹⁹² Genachowski previously served the Commission as a staffer from 1994-97 and has private sector

¹⁸⁷ *Majority Staff Report*, *supra* note 172.

¹⁸⁸ ERWIN G. KRASNOW & LAWRENCE D. LONGLEY, *THE POLITICS OF BROADCAST REGULATION* 44 (St. Martin's Press 1982).

¹⁸⁹ *Id.*

¹⁹⁰ See *2006 Annual Report*, *supra* note 77 at 200-208 (Statements critical of lack of openness and access from the Chairman regarding data relevant to the formulation of the *2006 Annual Report*).

¹⁹¹ See Federal Communications Commission, Biography of FCC Chairman Julius Genachowski, <http://www.fcc.gov/commissioners/genachowski/biography.html> (last visited Sept. 18, 2009).

¹⁹² See Federal Communications Commission, Biography of FCC Commissioner Mignon Clyburn, <http://www.fcc.gov/commissioners/clyburn/biography.html> (last visited Sept. 18, 2009); Federal Communications Commission, Biography of FCC Commissioner Meredith Atwell Baker, <http://www.fcc.gov/commissioners/baker/biography.html> (last visited Sept. 18, 2009).

experience in the technology industry.¹⁹³ With three new faces out of five the FCC is positioned for reorganization and redirection.

With the successful completion of the transition to DTV for full-power television broadcasters the FCC and Congress have shifted attention to the development and implementation of a national broadband policy.¹⁹⁴ Chairman Genachowski outlined his strategy for a formulating a National Broadband Plan in testimony before the U.S. House of Representatives Subcommittee on Communications, Technology and the Internet.¹⁹⁵ In the Chairman's view, broadband development is a major infrastructure challenge for the United States that rivals railroads, the interstate highway system and telephone in scope and importance.¹⁹⁶ While the CATV industry is heavily integrated into the broadband industry, it will be interesting to see how the business of broadcasting fits into an FCC where the priority is focused on broadband issues.

Conclusion

The must-carry debate remains settled in the short-term in large part because broadcasters have failed to take advantage of multicast opportunities to serve the public. According to FCC Commissioner Michael Copps, the opportunity for broadcasters to develop content to serve their local communities on digital subchannels

¹⁹³ Federal Communications Commission, *supra* note 191.

¹⁹⁴ See Broadband.gov, <http://www.broadband.gov/> (last visited Sept. 18, 2009).

¹⁹⁵ *Oversight of the Federal Communications Commission, Hearing Before the Subcomm. On Communications, Technology, and the Internet of the H. Comm. On Energy and Commerce, 111th Cong. (2009)* (statement of Julius Genachowski, Chairman of the Federal Communications Commission).

¹⁹⁶ *Id.*

has largely gone untapped.¹⁹⁷ Should broadcasters innovate and create content that serves and attracts an audience the issue of CATV carriage of these services might once again become a priority for Congress and the FCC.

The relationship between Congress, the FCC, the courts, broadcasters and the CATV industry discussed in this chapter is one with a rich and dynamic history. Looking ahead to the future this relationship is poised to become even more dynamic as new technologies emerge as competition in the delivery of video content to consumers. In the near term, commercial broadcasters appear to be focused on maximizing revenue generated from the negotiation of retransmission fees from CATV operators.¹⁹⁸ The National Cable & Telecommunications Association's response was simply to declare "war" on retransmission consent and introduce a legislative initiative to change the rules to ones more favorable to cable interests.¹⁹⁹

¹⁹⁷ *Oversight of the Federal Communications Commission, Hearing Before the Subcomm. On Communications, Technology, and the Internet of the H. Comm. On Energy and Commerce*, 111th Cong. (2009) (statement of Michael J. Copps, FCC Commissioner).

¹⁹⁸ Robert Marich, *Broadcast's \$2 Billion Pot of Gold*, BROADCASTING & CABLE, July 7, 2008 available at <http://www.broadcastingcable.com/index.asp?layout=articlePrint&articleID=CA6575703>; Mike Farrell, *Sinclair Counts Retrans Rewards*, MULTICHANNEL NEWS, Feb. 18, 2008 available at <http://www.multichannel.com/index.asp?layout=articlePrint&articleID=CA6533121>; Ted Hearn, *Lawmakers Troubled By Cable, LIN TV Spat*, MULTICHANNEL NEWS, Oct. 22, 2008 (on file with author); Nicholas J.C. Pistor, *St. Louis Television Station and Charter at Impasse*, ST. LOUIS POST-DISPATCH, Dec. 21, 2008 (on file with author); Executive Session with Perry Sook, *High Hopes for Cash Retrans, Round II*, TVNEWSDAY, Nov. 25, 2008 (on file with author); Harry A. Jessell, *Sook To Nets: No Free Retrans Money*, TVNEWSCHECK, Sept. 10, 2009 available at <http://www.tvnewscheck.com/articles/2009/09/10/daily.9/>.

¹⁹⁹ Harry A. Jessell, *NCTA Declares War Over Retrans*, TV NEWSDAY, Sept. 19, 2008 available at <http://www.tvnewsday.com/articles/2008/09/19/daily.8/> (National Cable & Telecommunications President Kyle McSlarrow says his organization is preparing to challenge retransmission in response to some broadcasters demanding as much as a 500% increase in fee demands).

CHAPTER 5 CONCLUSION

Introduction

“Digital will do for television what it has done for every other communications technology it touches – make it better, more efficient, more interactive, more competitive, and more exciting than ever before... [I]t’s a win–win for consumers and for the long-term health of the broadcast industry.”

—Acting FCC Chairman Michael J. Copps¹

The long-term health of the broadcast industry that Commissioner Copps refers to is certain to involve change and its continued success will be measured much differently than it was during the industry’s domination of the video delivery market. Currently both broadcast television and cable (CATV) remain the primary choice among viewers for video programming, as well as being significant revenue producers. However, increased competition and new technologies are poised to redefine the media landscape.

Broadcast television’s share of the viewing audience continues its slow erosion to competition from nonbroadcast channels. For the 2005-2006 television season broadcasters accounted for a 45 share of the prime time viewing households with nonbroadcast channels increasing their share to 55.² Almost 87 percent of television

¹ Michael J. Copps, Acting Chairman, Fed. Comm. Comm’n, Remarks in the Wake of the Digital Television Transition (June 13, 2009), available at <http://www.fcc.gov/commissioners/copps/statements2009.html> (last visited Sept. 24, 2009).

² Nielsen Media Research, *Broadcast Calendar (TV Season) Share of Audience Report, Prime Time and Total Day*, Dec. 2006. A share is the percent of all households using television during the time period that are viewing the specified station(s) or network(s). Due to simultaneous multiple-set viewing, Nielsen reports audience shares that exceed 100 percent when totaled. We have normalized the reported audience shares by recalculating them on a base (or denominator) equaling 100 percent, and adjusting the numerators accordingly.

households in the United States subscribe to a multichannel video programming distributor (MVPD) like CATV or direct broadcast satellite (DBS).³

The advertising revenue for commercial broadcasters and CATV is trending in opposite directions. Traditional broadcasting still accounted for \$44.5 billion in advertising revenue in 2007, but this represented a 5 percent decline from the previous year.⁴ CATV's share of the advertising revenue grew by more than 5 percent to \$26.3 billion from 2006 to 2007.⁵ In addition to advertising the CATV industry also generates revenue through subscription fees for programming tiers, Internet, telephone and other enhanced services. When taken in combination CATV revenue exceeds \$80 billion.⁶

In advancing the competition between broadcast television and CATV, broadcasters appear to be at a severe disadvantage. Broadcasting's reliance on advertising as its most significant revenue source creates an incredible challenge for the industry moving forward. Continued loss of audience share only exacerbates the problem.

This study has examined the history of commercial broadcasting and cable television (CATV) in the United States and the role the Federal Communications Commission (FCC), Congress and the courts have played in defining the contentious relationship between the two. The recently completed transition from analog to digital

³ *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Thirteenth Annual Report*, MB Docket No. 06-189, 5, (rel. Jan. 16, 2009) (hereinafter 2006 Video Competition Report).

⁴ Television Bureau of Advertising, *Historical Cross-Media Ad Expenditures for 2007*, at http://www.tvb.org/nav/build_frameset.aspx (last visited Sept. 24, 2009).

⁵ *Id.*

⁶ 2006 Video Competition Report, *supra* note 3 at 23.

broadcast television (DTV) and the evolution of the Internet and other technologies as competition to broadcasting and CATV have created a strain on long-defined roles and established regulatory and judicial constructs.

This chapter will begin with an examination of the protective nature of Congress and the FCC's relationship with broadcasters and its impact on the advancement of communications technologies and competition mandated by the Telecommunications Act of 1996.⁷ It will then offer a historical summary of must-carry as decided in *Turner v. FCC (1997)* and the applicability of the Courts holding to DTV and multicasting.⁸ From there, the overall regulatory history between broadcasters and cable operator will be analyzed for forward guidance in the FCC's future regulation of a rapidly changing digital media environment that extends beyond broadcasting and CATV.

This chapter will answer the Research Questions presented in Chapter One:

- Why have Congress and the FCC historically protected the interests of broadcasters over those of cable television?
- Does the plurality opinion in *Turner II*, when applied to the current media landscape, allow broadcasters to seek an expansion of the must-carry rules in DTV to include multicast carriage?

Chapter Five will conclude with discussion on how the regulatory lessons learned by the actions of Congress and the Federal Communications Commission throughout the history of broadcast and cable regulation in general, and the must-carry dispute in particular, may offer guidance in addressing future regulatory challenges as technology

⁷ Telecommunications Act of 1996, Pub. LA. No. 104-104, 110 Stat. 56 (1996).

⁸ *Turner Broadcasting System, Inc. v. FCC* 520 U.S. 180 (1997) (hereinafter *Turner II*) (held that the must-carry provisions under the 1992 Cable Act were consistent with the First Amendment because the rules furthered an important governmental interests and did not burden cable operators speech more than necessary to further those interests).

evolves. The chapter will then offer suggestions for future research and a summary of this study's findings.

Research Questions

By using legal research methodology, this dissertation will attempt to answer the following research questions:

Why have Congress and the FCC historically protected the interests of broadcasters over those of cable television?

The growth of broadcasting in the United States is a success story that took place with significant oversight from the federal government. The passage of the Radio Act of 1927 created a regulatory framework designed to insure the success of broadcasting as a national service that remains in use.⁹ Congress clarified this mandate further in the Communications Act of 1934 when it created the Federal Communications Commission (FCC) and charged it with providing the people of the United States with a “rapid, efficient and Nation-wide” broadcast service.¹⁰

Congress did not extend this mandate to include what would become cable television (CATV). Unlike broadcasting, CATV began in rural communities in Pennsylvania, Oregon and Arkansas as the answer to major shortcomings in the reception of broadcast television signals.¹¹ Overcoming its small town roots to complete

⁹ Radio Act of 1927, Pub. L. No. 69-632, 44 Stat. 1162.

¹⁰ Communications Act of 1934, 47 C.F.R. § 151 (1934) (In Section 1 of this Act Congress created the Federal Communications Commission... “for the purpose 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...”).

¹¹ See BRIAN LOCKMAN & DON SARVEY, PIONEERS OF CABLE TELEVISION (McFarland & Company 2005); PATRICK R. PARSONS, BLUE SKIES: A HISTORY OF CABLE TELEVISION 1-2 (Temple University Press 2008).

with broadcasting as an economic equal would take the CATV industry decades to achieve. Also, because of broadcasting's unique regulatory connection to Congress and the FCC, political parity would be just as difficult to realize.

The relationship between the FCC, as regulator, and the industries it oversees is a complex one. Erwin Krasnow, Lawrence Longley, and Herbert Terry authored one of the most thorough studies of the regulatory process as it pertains to mass communication.¹² Their analysis of the broadcast regulatory process identified six major policy determiners.¹³ Their list includes Congress, the FCC, industry, the courts, citizen groups, and the White House.¹⁴ The actions, influences, agendas and biases of each of these participants are central to understanding the process involved in creating much of the law and policy impacting broadcasting and cable.

Philip Napoli expanded the Krasnow model by elevating the determiners into private sector, judicial, political, and bureaucratic tiers from which they interact with one another.¹⁵ He also categorized the relationship between each as either that of principle or agent.¹⁶ These determiners are the main players in this study of the must-carry issue and the transition to digital television (DTV).

¹² ERWIN G. KRASNOW & LAWRENCE D. LONGLEY, *THE POLITICS OF BROADCAST REGULATION* (St. Martin's Press 1982).

¹³ *Id.*

¹⁴ *Id.* at 33.

¹⁵ PHILIP M. NAPOLI, *FOUNDATIONS OF COMMUNICATION POLICY: PRINCIPLES AND PROCESS IN THE REGULATION OF ELECTRONIC MEDIA* (Hampton Press 2001).

¹⁶ *Id.* at 227-229.

One theory associated with the regulatory process worthy of further discussion is regulatory capture.¹⁷ This theory is applicable to any government regulatory agency and has been applied to the FCCs and its relationship to the industries it regulates.¹⁸ Krasnow touches on the concept of regulators, in this case FCC representatives, becoming so close to the entities they regulate they reach a point of bias or “capture.”¹⁹ He identifies the obvious problematic aspects of “regulatory capture”, but also recognized the importance of regulators possessing the necessary understanding of the industries they regulate.²⁰ The kind of understanding that can only come from industry experience.²¹

Broadcasters have enjoyed an inclusive relationship with the federal government since the radio conferences predating the passage of the Radio Act of 1927. Robert Britt Horowitz illustrated what he termed “industry capture” in the broadcast licensing process Federal Radio Commission (FRC) in the late 1920s.²² Currently “regulator capture” and the FCC extends beyond broadcasting and now includes cable, direct broadcast satellite (DBS), broadband providers, wireless carriers, and telephone companies.

¹⁷ KRANSOW, *supra* note 12 at 48-50.

¹⁸ *Id.*

¹⁹ *Id.*; See also Glen O. Robinson, *The Federal Communications Commission: An Essay on Regulatory Watchdogs*, 64 VA. L. REV. LAW REVIEW 192, (1978)

²⁰ *Id.*

²¹ *Id.*

²² ROBERT BRITT HOROWITZ, *THE IRONY OF REGULATORY REFORM: THE DEREGULATION OF AMERICAN TELECOMMUNICATIONS* 166-168 (Oxford University Press 1989).

Wireless to Broadcast

The federal government's relationship with wireless communication can be traced back to 1910, more than a decade before radio would discover its potential as a commercial endeavor. The Wireless Ship Act of 1910 required any ocean-going steamer to be equipped with a working radio and a competent radio operator.²³ Within the Act of 1910 Congress also granted the Secretary of Commerce and Labor the power to create the necessary regulations to support it.²⁴

Two years later, Congress passed the Radio Act of 1912. The 1912 Act provided for a licensing system, but failed to give the Secretary of Commerce the specific power to establish and enforce the additional regulation necessary during the rapid expansion of broadcast radio in the mid-1920s.²⁵

During World War I all radio stations were turned over to the control of the United States Navy.²⁶ The government also mandated the emergency pooling of the patent rights for radio technology.²⁷ After the war the Radio Corporation of America (RCA) was created and the network driven broadcast business model that is still in use today was born.²⁸

²³ Wireless Ship Act of 1910, Pub. L. No. 61-262, 36 Stat. 629 (1910).

²⁴ *Id.*

²⁵ Radio Act of 1912, Pub. L. No. 62-264, 37 Stat. 302 (1912).

²⁶ *Id.*

²⁷ MARVIN R. BENSMAN, THE BEGINNING OF BROADCAST REGULATION IN THE TWENTIETH CENTURY 11-12 (McFarland & Co. 2000).

²⁸ *Id.*

Despite numerous attempts by Congress to pass new legislation to update the Radio Act of 1912, fifteen years would pass before new legislation would be enacted.²⁹ In the interim, Secretary of Commerce Herbert Hoover was in charge of the federal government's oversight of broadcast radio. Under Hoover's leadership four national radio conferences were held between 1922 and 1925.³⁰ Absent new legislation the radio industry's most powerful players were able to participate as a government equal during these conferences and exert influence and consolidate power. After doing so, these major broadcast powers sought legislative protection to limit the access of potential new competitors.

The Radio Act of 1927 created the Federal Radio Commission (FRC).³¹ The FRC was granted the licensing authority over radio and the power to regulate in the "public convenience, interest, or necessity."³² This power was extended and expanded by Congress with the passage of the Communications Act of 1934.³³ With commercial radio prospering and television in development the Act of 1934 remained in effect

²⁹ LOUISE BENJAMIN, *FREEDOM OF THE AIR AND THE PUBLIC INTEREST: FIRST AMENDMENT RIGHTS IN BROADCASTING TO 1935* 69 (Southern Illinois University Press, 2001).

³⁰ See *Report of Department of Commerce on Radio Telephony*, RADIO SERVICE BULLETIN, May 1, 1922, at 22-30; *Report of Department of Commerce on Radio Telephony*, RADIO SERVICE BULLETIN, April 2, 1923, at 9-13; Recommendations for Regulation of Radio Adopted by the Third National Radio Conference, October 6-10, 1924 available at <http://earlyradiohistory.us/1924conf.htm> (last visited November 21, 2009); Proceedings of the Fourth National Radio conference and Recommendations for Regulation of Radio, November 9-11, 1925 at 8 available at <http://earlyradiohistory.us/1925conf.htm> (last visited November 21, 2009).

³¹ Radio Act of 1927, Pub. L. No. 69-632, 44 Stat. 1162.

³² *Id.*

³³ Communications Act of 1934, 47 C.F.R. § 151 (1934).

without major amendments until Congress passed the Telecommunications Act of 1996.³⁴

The history of broadcast regulation is rooted in a series of concepts that were developed for radio and would also extend to television. The first was for broadcasting to provide the country with a robust national service.³⁵ While largely achieved in radio it would prove more elusive in television. Broadcasters are also expected to serve the public interest, convenience and necessity through regulation designed to promote a series of principles that include localism, competition and diversity.³⁶ Often the regulation designed to promote these principles involves restrictions to broadcasters. Examples include ownership limits, cross-ownership restrictions, broadcast content regulations limiting indecent content and requiring educational programming targeted at children, and the equal time rules requiring broadcasters to provide federal candidates

³⁴ ERIK BARNOUW, A TOWER IN BABEL: A HISTORY OF BROADCASTING IN THE UNITED STATES VOLUME 1—TO 1933 272-274 (Oxford University Press 1966)(Profits remained high for NBC and CBS in the early 1930's as the United States experienced economic depression. Network programming expanded to add vaudevillian comedy and variety fare to successful serial programs like *Amos 'n' Andy*).

³⁵ See Communications Act of 1934, 47 C.F.R. § 151 (1934) (the FCC would act in a “fair and equitable” manner regarding the distribution of frequencies to the states and communities); Television Assignments *supra* note 5 at 167 (the plan the FCC adopted in its *Sixth Report and Order* in assigning television frequencies followed five principles: (1) To provide a least one television service to all parts of the United States; (2) To provide each community with at least one television broadcast station; (3) To provide a choice of at least two television services to all parts of the United States; (4) To provide each community with at least two television broadcast stations; and (5) Any channel which remain unassigned under the foregoing principles will be assigned to various communities depending on the size of the population of each community, the geographical location of such community, and the number of television services available to such community from television stations located in other communities. With three major broadcast networks (NBC, CBS and ABC) seeking a national audience reception of only one station meant viewers would be unable to access all available national programming).

³⁶ Radio Act of 1927, Pub. L. No. 69-632, 44 Stat. 1162 at § 4 (1927); Communications Act of 1934, 47 C.F.R. at § 303 (1934) (both statutes grant the Commission general powers that included acting “from time to time, as public convenience, interest, or necessity requires”).

with access to commercial time at favorable rates.³⁷ Broadcasters have also benefitted from regulation, especially in matters of competition for licenses, and from entry by new industries.

Radio Turns into Television

The economic success of broadcast radio allowed the same companies to conduct research and development in the technology of television and position themselves to take advantage of it.³⁸ As radio began its transition into television, the FCC sought to protect local broadcasters, in this case radio, from restrictive network affiliation contracts that left program providers like NBC and CBS with significant control over the schedules of local stations.³⁹ NBC and CBS quickly challenged the FCC's authority to regulate in this manner in the courts and while the Communications Act of 1934 did not directly grant the Commission the authority to regulate broadcast networks the Supreme Court affirmed the FCC's chain broadcasting rules in *National Broadcasting Co. v. United States (1943)*.⁴⁰

The Court based its majority opinion on the FCC's authority to issue broadcast licenses and then regulate those licensees in a manner consistent with protecting the

³⁷ See Telecommunications Act of 1996, Pub. LA. No. 104-104, 110 Stat. 56 (1996); FCC Consumer Facts, Obscene, Indecent, and Profane Broadcasts, <http://www.fcc.gov/cgb/consumerfacts/obscene.html>; FCC Consumer Facts, Children's Educational Television, <http://www.fcc.gov/cgb/consumerfacts/childtv.html>; Communications Act of 1934, § 315; codified at 47 U.S.C. § 315.

³⁸ ERIC BARNOUW, *THE GOLDEN WEB: A HISTORY OF BROADCASTING IN THE UNITED STATES VOLUME II – 1933 TO 1953* 244 (Oxford University Press 1966).

³⁹ *Report on Chain Broadcasting*, Commission Order No. 37; Docket No. 5060 34-44 (May, 1941).

⁴⁰ *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943) (held that the FCC had the regulatory authority to enforce rules governing the relationship between broadcast networks and their local affiliated stations).

“public interest, convenience, or necessity.”⁴¹ Justice Frankfurter also introduced the scarcity doctrine in broadcasting when he wrote that radio was not available to all who wished to use it and because of that radio abridged free speech.⁴²

Aiding the success of the transition of radio network model into television was the FCC’s decision to stop issuing new broadcast television licenses in 1948.⁴³ The “freeze order” as it would be known remained in effect for four years and allowed those stations, many network owned-and-operated and most at least network-affiliated, already broadcasting to solidify their competitive standing absent new competition.⁴⁴

The “freeze” ended when the FCC released its’ *Sixth Report and Order*.⁴⁵ To overcome the shortage of Very High Frequency (VHF) channels to meet the needs of broadcast television the FCC opened the Ultra High Frequency (UHF) to provide enough available channels to meet demand.⁴⁶ The UHF spectrum would prove to be troublesome for the FCC and viewers for many years to come. The most critical reason came from UHF reception issues. In 1952, new television sets were not yet required to have a UHF receiver and would not be until the passage of the *All-Channel Receiver Act* in 1962.⁴⁷ UHF stations also were unable to equal the transmission reach of their VHF competition making it more difficult for viewers to receive a quality picture.

⁴¹ *Id.* at 219.

⁴² *Id.* at 226.

⁴³ Report and Order, FCC 48-2182, Sept. 30, 1948.

⁴⁴ BARNOUW, THE GOLDEN WEB, *supra* note 38 at 285.

⁴⁵ Television Assignments, *Sixth Report and Order*, 41 F.C.C. 148 (Apr. 11, 1952).

⁴⁶ *Id.*

⁴⁷ All-Channel Receiver Act of 1962, Pub. L. No. 87-529, 76 Stat. 150 (codified at 47 U.S.C. § 303 (s)).

Cable Television: A Friend and Foe to Broadcasters

The “freeze” combined with the technological challenges facing UHF left many communities unable to receive television signals from some or any network affiliates. These numerous holes in the broadcast television reception map created an opportunity for the growth of Community Antenna Television, the forefather of what is now known as cable television (CATV). At first, CATV was viewed as a complementary service to broadcast television that could temporarily help extend the reach of broadcast signals to communities without stations until UHF could develop and reach its potential. This policy may have succeeded if only the CATV industry subscribed to this subservient role to broadcasters and did not begin pursuing the expansion of programming beyond local stations.

Congress gave the FCC the authority to ensure broadcasting would provide the American people with a national service that would serve the public interest. The FCC was not yet specifically authorized by Congress to oversee the CATV industry and was reluctant to do so. Instead the Commission relied on its special regulatory relationship with broadcasters to address any threats to broadcasting from CATV whether real or perceived.

Issues broadcasters were concerned with regarding their early relationship with CATV operators included signal carriage, the use of large antenna towers or microwave relay systems by CATV systems to import out of market distant signals and protecting their market exclusive programming from duplication from imported stations.⁴⁸ The FCC viewed cable as a threat to the successful implementation of the *Sixth Report and Order*

⁴⁸ See *Carter Mountain Transmission Corporation v. FCC*, 321 F.2d 359 (1963).

and would go to increasing lengths to protect local broadcast stations from any harm posed by cable.

In its *First Report and Order (1965)* dealing with cable the FCC focused on two important issues of concern to broadcasters, signal carriage of local stations by CATV operators, more commonly known as must-carry, and the prevention of program duplication by imported signals.⁴⁹ The Commission would continue on this regulatory track a year later with the release of its *Second Report and Order (1966)*.⁵⁰ The Commission extended and expanded the must-carry and nonduplication rules. The FCC also added what it viewed as additional protection to UHF stations in top-100 markets by prohibiting CATV operators in those markets from importing distant signals.⁵¹

As the FCC began to recognize the potential of CATV and its role as something greater than a simple retransmission provider for broadcast signals, the Commission began to take a more active role in regulating the industry.⁵² Congress eventually provided the FCC with the legislative power to regulate cable with the passage of the Cable Act of 1984.⁵³ The CATV industry emerged from the shadow of broadcast

⁴⁹ FCC First Report and Order, 38 F.C.C. 683 at 685 (April 22, 1965).

⁵⁰ In the Matter of...To Adopt Rules and Regulations Relating to the Distribution of Television Broadcast Signals by Community Antenna Television Systems, Second Report and Order, 2 FCC 2d 725 (March 4, 1966).

⁵¹ *Id.* at 769.

⁵² See Commission Proposals for the Regulation of Cable Television, 31 F.C.C. 2d 115 (Aug. 5, 1971); Cable Television Report and Order, 36 F.C.C. 2d 141 (Feb. 2, 1972).

⁵³ See Cable Communications Policy Act of 1984, Pub. L. 98-549, 98 Stat. 2779; See also Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) (codified in 47 USC § 521); Telecommunications Act of 1996, Pub. LA. No. 104-104, 110 Stat. 56 (1996).

television by first offering non-broadcast programming that would eventually erode nearly half of the prime-time audience of the broadcast networks. Today CATV's business model includes telephone service and high-speed Internet access. The latter service seems to position the CATV industry for the future in a way broadcasters will not be able to duplicate.

Throughout this period of CATV growth Congress and the FCC continued to try and impose must-carry rules requiring the carriage of local stations on CATV systems. CATV successfully fought this effort in the courts until the Supreme Court's decision in *Turner II* affirming must-carry as necessary to insure the preservation of over-the-air (OTA) broadcasting for those households not subscribing to cable.⁵⁴ The *Turner II* decision will be addressed in more detail in the next section of this chapter.

The DTV Transition

The process of moving from analog to digital television (DTV) followed a similar path to what radio did as television developed. Incumbency once again had its privileges. Just as radio successfully expanded its power base to include television in the 1930s and 1940s, Congress and the FCC insured that existing television broadcast licensees would lead the way into DTV.⁵⁵ The allocation of new frequencies for digital broadcasting was limited to those already licensed to broadcast in analog.⁵⁶ While this did make a great deal of sense in terms of future continuity and the preservation of what was a successful broadcast industry, failure to allow minimal entry of new entrants into

⁵⁴ See *Turner Broadcasting System, Inc. v. FCC* 520 U.S. 180 (1997); See also *Quincy Cable TV, Inc. v. FCC*, 248 U.S. App. D.C. 1 12 (1985); *Century Communications Corp. v. FCC*, 835 F.2d 292 304 (1987)

⁵⁵ See Telecommunications Act of 1996, Pub. LA. No. 104-104, 110 Stat. 56 (1996).

⁵⁶ *Id.* at § 336 (a) (1).

DTV was an opportunity missed to infuse much entrepreneurial spirit into a legacy technology in need of innovation.

Does the majority opinion in *Turner II*, when applied to the current media landscape, allow broadcasters to seek an expansion of the must-carry rules in DTV to include multicast carriage?

The history of must-carry regulation has paralleled a relationship of mutual dislike between commercial broadcasters and CATV operators. At one time the relationship was much easier to define. Broadcasters provided programming and cable operators provided audience via a clear signal over coax. The emergence of cable-exclusive networks like HBO, CNN and ESPN helped cable strengthen its economic position to the point that it now commands over fifty percent of the daily television audience. Cable no longer offers just audience access to broadcasters, but serious competition as well.

If the government is going to expand must-carry in the “public interest” it might be necessary for Congress and the FCC to infringe upon the First Amendment rights of broadcasters too and set guidelines for what would constitute a must-carry multicast stream. Commissioner Adelstein detailed the potential “public interest” inequity in his statement following the release of the *Second Report and Order* when he wrote:

If broadcasters want to be treated as an integral public square in our modern-day digital platforms, then they must realize the public has a right to be squarely involved in that endeavor. To grant multicasting carriage without any protection for the public would test the willingness of the broadcasting industry to serve the public ends as never before. It’s a risk the recent record does not justify taking.⁵⁷

Broadcasters’ fully understandable interest in maximizing profits in light of making monetary investments in serving the “public interest” that Commissioner Adelstein

⁵⁷ *Carriage of Digital Television Broadcast Signals: Amendments to Part 76 of the Commission’s Rules, Second Report and Order and First Order on Reconsideration*, CS Docket No. 98-120, 43 (Separate Statement of Commissioner Jonathan S. Adelstein) (rel. Feb. 23, 2005) (hereinafter *DTV Must-Carry Order*).

mentions may provide the CATV industry with its most effective defense against expansion of the must-carry rules to include multicast carriage.

The First Amendment and Must-Carry

The First Amendment's application across media is far from uniform. The Court's media specific approach has led to various degrees of First Amendment protection for print, broadcasting, cable and the Internet.⁵⁸ The level of First Amendment protection afforded CATV was decided by the Court in *Turner v. FCC (1997)(Turner II)* in a 5-4 plurality that held that CATV's First Amendment rights could be infringed through the enforcement of must-carry rules to insure the viability of broadcasting television in the future.⁵⁹

The Court determined the must-carry rules were content-neutral and thus subject to intermediate scrutiny under *O'Brien*.⁶⁰ The plurality agreed the must-carry rules passed the *O'Brien* test and were narrowly tailored and advanced two substantial government interests: (1) the preservation of free over-the-air broadcast television, and

⁵⁸ See *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (Court held that the editors of a publication control all decision making regarding content and there is no First Amendment right for a citizen, even with government legislation or policy, to have his/her views published); *Red Lion v. Federal Communications Commission*, 395 U.S. 367 (1969) (Court held that because broadcasting utilized scarce public airwaves the Fairness Doctrine did not violate the First Amendment rights of broadcasters); *Federal Communications Commission v. Pacifica Foundation*, 438 U.S. 726 (1978) (Court held the FCC could restrict indecent speech on broadcast stations during certain times during the day because the broadcast signal is "pervasive" and "uniquely accessible to children"); *Reno v. ACLU*, 521 U.S. 844 (1997) (Court held that the Internet was not "scarce" like radio and television and instead should have "the highest protection from government intrusion." The Court overturned all aspects of the Communications Decency Act (CDA) except the ban on obscene materials).

⁵⁹ *Turner II*, *supra* note 8.

⁶⁰ *United States v. O'Brien*, 391 U.S. 367 (1968) (held the government can infringe on conduct otherwise protected by the First Amendment if (1) it is within the constitutional power of the government; (2) it furthers important or substantial government interest; (3) that interest is unrelated to the suppression of free expression; and (4) the restriction of freedoms is no greater than is essential to the furtherance of that interest).

(2) the widespread delivery of information to the public from a variety of sources.⁶¹ A third interest, the promotion of fair competition in television programming, while agreed to by four justices in Justice Kennedy's opinion was ignored by Justice Breyer in his separate concurring opinion.⁶² Breyer ignored the economic factors of fair completion between broadcasters and CATV and instead focused on the importance of preserving over-the-air television and the diversity of voices it represents to those viewers without CATV service.⁶³ Breyer determined the potential loss of over-the-air broadcast programming for non-cable viewers posed a greater threat than any loss of cable originated programming would to cable subscribers⁶⁴

As discussed in Chapter Four, Justice O'Connor, in her dissenting opinion, did not agree that the must-carry rules were content-neutral and instead believed them to be content-based and subject to strict First Amendment scrutiny.⁶⁵ O'Connor did not believe the must-carry rules to be narrowly tailored; neither did she understand Justice Breyer to believe that in his concurring opinion.⁶⁶ She criticized the plurality for "substitute[ing] unstated and untested assumptions" in evaluating the facts regarding an issue of constitutional law.⁶⁷ The dissent criticized the plurality for analyzing must-carry data on a national basis rather than market-by-market in order to determine the actual

⁶¹ Turner II, *supra* note 8 at 189.

⁶² *Id.*

⁶³ *Id.* at 228.

⁶⁴ *Id.* at 229.

⁶⁵ *Id.* at 229.

⁶⁶ *Id.* at 251.

⁶⁷ *Id.* at 232.

threat must-carry presented to the dissemination of information.⁶⁸ According to O'Connor, a cable operator was unlikely to remove a popular broadcast station from its channel lineup because doing so would negatively impact the largest source of a cable operators' revenue, subscriber fees.⁶⁹

The precedential value of the plurality decision in *Turner II* has yet to be tested, but appears to be weakened by the failure of five justices to agree on a united legal analysis. Justice Breyer chose to ignore the principal opinion's focus on fair competition and economic concerns.⁷⁰ Justice O'Connor believed the issue of fair competition to be the only one fully developed and explained in the principal opinion.⁷¹ Instead, Breyer based his opinion on the preservation of over-the-air television and importance of the widespread dissemination of information to non-cable television viewers.⁷²

The expansion of must-carry in any form beyond the FCC's rules as affirmed in *Turner II* would likely trigger an immediate judicial challenge from the CATV industry and non-broadcast channels owners. The FCC examined how applicable the must-carry rules affirmed in *Turner II* would be regarding multicast must-carry when it released its' *DTV Must-Carry Order*.⁷³

⁶⁸ *Id.* at 232-233.

⁶⁹ *Id.* at 239.

⁷⁰ *Id.* at 226.

⁷¹ *Id.* at 258.

⁷² *Id.*

⁷³ DTV Must-Carry Order, *supra* note 57 at 15.

The Commission concluded that the must-carry rules as written by Congress did not expressly indicate how the “primary video” requirement would apply to multicasting.⁷⁴ The Commission also analyzed a multicast must-carry requirement through the two interests the Court sought to advance in *Turner II*: (1) preserving the benefits of free, over-the-air local broadcast television for viewers, and (2) promoting ‘the widespread dissemination of information from a multiplicity of sources.’⁷⁵

In the FCC’s estimation the expansion of must-carry to include multicasting would not advance either goal.⁷⁶ The analog argument that the viability of free over-the-air broadcasting required carriage on CATV did not translate into multicast carriage.⁷⁷ The Commission also concluded the record did little to advance the idea that multicast must-carry would promote “the widespread dissemination of information from a multiplicity of sources.”⁷⁸

Regardless of the impact of the fractured plurality in *Turner II* on the precedential weight of the Court’s decision the applicability of its logic when applied to digital broadcast television creates some potential conflict. Multicast broadcast programming could also pose a significant challenge to the Courts’ content-neutral argument in *Turner II*. While the Court determined must-carry to provide over-the-air programming to viewers regardless to content, broadcasters’ multicast offerings now include news,

⁷⁴ *Id.* at 18-19.

⁷⁵ *Turner II*, *supra* note 8 at 189-190 (quoting *Turner v. FCC*, 512 U.S. at 662); *see id.* at 225-226 (opinion of Breyer, J., concurring in part).

⁷⁶ DTV Must-Carry Order, *supra* note 57 at 19.

⁷⁷ *Id.*

⁷⁸ *Id.* at 20.

weather and shopping programming that may be viewed as content-based and in direct completion to cable programming.

The media-specific First Amendment cases remain, but the reality is the dividing lines utilized to differentiate each platform constitutionally whether it be print, broadcast, cable or the Internet are blurring. For example, the scarcity of broadcast spectrum, while still true, rings hollow in a world that affords people a variety of new options, not subject to the scarcity argument, to acquire the same content. Maintaining an antiquated understanding of broadcasting from the 1940s mirrors the inability of the recording industry to embrace the digital distribution of music. Just as the consumers' wishes eventually prevailed in music, the same will be true with video content that was once exclusively available via television. Broadcast television's exclusive relationship with the American people has passed. The perpetuation of policies that place the industry at a competitive disadvantage against new technologies immune from such oversight may be constitutional, but no longer in the public interest. Congress will have to join the FCC in evolving to reflect changes in the industry that require a broader understanding of broadcast television's place in a technology-driven, changing and highly competitive marketplace.

The Numbers Game

The *Turner II* decision, as pointed out by Justice O'Connor in her dissenting opinion, relied on data to justify the affirmation of the must-carry rules that failed to directly address the potential harm broadcasters would face without the protection of must-carry.⁷⁹ O'Connor took particular aim at a 1988 FCC study that the plurality

⁷⁹ *Turner II*, *supra* note 8 at 233 (the Court provides some raw data on adverse carriage decisions, but it never connects that data to markets and viewership. Instead, the Court

criticized in *Turner I* only to cite as evidence of adverse carriage examples faced by broadcasters.⁸⁰ She added that the FCC study failed to indicate if any of the stations denied carriage would qualify for carriage under must-carry.⁸¹

The plurality placed great emphasis on the fact that 40 percent of television households did not subscribe to CATV.⁸² The Court used data from the 1992 Cable Act in which Congress found that 60 percent of television households subscribed to CATV to calculate its' 40 percent threshold.⁸³ While 40 percent of television households may have relied solely on over-the-air broadcast television in 1992, five years later, at the time of the *Turner II* decision, this number had significantly changed. Nine months after the decision the FCC released its' *1997 Annual Report* showing the percentage of television households that relied entirely on over-the-air television fell to 23 percent, well below the 40 percent figure the Court cited so prominently in its decision.⁸⁴

Any attempt to quantify the importance of broadcast television moving forward is not only going to have to take into account competition from CATV, DBS and other MVPD's but Internet based, wireless and mobile distribution platforms as well.

Commercial broadcasting remains an important technology in the distribution of video

proceeds from the assumptions that adverse carriage decisions nationwide will affect broadcast markets in proportion to their size; and that all broadcast programming is watched by viewers. Neither assumption is logical or has any factual basis in the record).

⁸⁰ *Id.* at 240-241; see Cable System Broadcast Signal Carriage Survey, Staff Report by the Policy and Rules Division, Mass Media Bureau (Sept. 1, 1988) (app. 37).

⁸¹ *Id.* at 241.

⁸² *Id.* at 190.

⁸³ See H.R. Rep. No. 102-862, at 2 (1992).

⁸⁴ Annual Assessment of the Status of Competition in the Markets for the Delivery of Video Programming, Fourth Annual Report, CS Docket No. 97-141 (Rel. Jan. 13, 1998) (hereinafter 1997 Annual Report).

based information and entertainment, but it is a shell of its former self and a return to its former dominant state is highly unlikely.

The FCC and Digital Must-Carry

The problem with the broadcast argument for multicast carriage is that commercial broadcasters have yet to prove that their multicasting content will be worthy of mandated carriage. As the Public Television Digital Carriage Agreement (PTDCA) demonstrated, the negotiation of multicast carriage between broadcasters and cable operators can work. As previously noted in Chapter 4, commercial broadcasters were critical of the agreement in *Petition for Reconsideration II*, but they did concede the agreement may provide a model for a requirement that cable carry their multicast programming and suggested any such multicasting carriage arrangement needed to be codified in a Commission regulation.⁸⁵

Another difference between digital and analog must-carry, as the Court in *Turner II* found, is that the result of analog must-carry on cable operators was minimal.⁸⁶ Most cable systems did not have to add a single broadcast channel because of analog must-carry.⁸⁷ The Court also noted the must-carry burden “was likely to diminish as channel capacity [on cable] expanded in the future.”⁸⁸ Scarcity of bandwidth is no longer an issue. This is now strictly a question of access.

⁸⁵ Carriage of Digital Television Broadcast Signals: Amendments to Part 76 of the Commission’s Rules, *Petition for Reconsideration of the ABC Television Affiliates Association*, CS Docket No. 98-120, at 19 (rel. Apr. 21, 2005) (hereinafter *Petition for Reconsideration II*).

⁸⁶ *Turner II*, *supra* note 8 at 188.

⁸⁷ *Id.*

⁸⁸ *Id.*

The dilemma for commercial broadcasters is that without expanding must-carry to include multicast, the onus is on them to create new programming that warrants carriage. If new DTV program streams offer consumers content of value, there will be a demand for it. Cable systems will seek to carry high-demand programming in order to satisfy their subscribers. A free pass for broadcasters is not the answer. Without an incentive to create quality programming in order to justify carriage, we could be left with what former NCTA President Robert Sachs feared would be a plethora of “infomercials, home shopping channels and low-budget programming.”⁸⁹

In analyzing the digital must-carry issue, it is often hard to see the “public interest” through posturing by both broadcasters and cable operators to maximize profits. One of the stated goals of the Court in *Turner II* was to insure the viability of OTA broadcasting for those households unable to afford cable television and instead had to rely on broadcasters for their television viewing.⁹⁰ In 2006 less than 14 percent of television households fell into this category.⁹¹ This represents a 65 percent reduction from the 40 percent of television households that were limited to OTA television viewing in 1992 as cited in *Turner II*.

There are must-carry issues for broadcasters that extend beyond competition with cable operators. Direct Broadcast Satellite (DBS) has already established itself as an important player in the MVPD market, and many telephone companies are investing in

⁸⁹ Edmund Sanders, *TV Firms Split Over Multicasting*, L.A. TIMES, Dec. 14, 2003, at C1.

⁹⁰ *Turner II*, *supra* note 8 at 189.

⁹¹ 2006 Video Competition Report, *supra* note 3 at 8.

fiber optic networks that could be used to deliver video programming similar to cable.⁹²

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Discussion

Congress and the Federal Communications Commission have spent more than 80-years exercising a hands-on approach to the oversight of broadcasting and cable. This history is now explored in order to identify possible lessons to be learned that may be applicable to the current and future challenges posed by technological changes that may not fit into existing regulatory models.

The most significant change facing the FCC is the speed of technological change. The introduction of broadcast television and CATV equated to regulatory stability that could be measured in decades. Moving forward, the FCC will be challenged to adapt and properly oversee rapid change to existing technologies as well as innovation and the implementation of new ones.

⁹² *Id.* at 6, (As of June 2006, approximately 28 million U.S. households subscribed to DBS services. This represents an increase of 7.1 percent over the previous year. DBS comprised approximately 29 percent of all MVPD subscribers).

⁹³ Thomas W. Hazlett, *Digitizing “Must-Carry” Under Turner Broadcasting v. FCC (1997)*, 8 S. CT. ECON. REV. 141 201-02 (2000).

⁹⁴ *Id.* at 202.

The FCC has protected broadcasters throughout much of its existence. First, the Commission shielded incumbents from increased competition from those seeking access to the broadcast spectrum, then it provided broadcasters with decades of protection from outside competition like CATV.⁹⁵ This was a rather natural instinct for the Commission when one factors in that Congress, with input from the industry, established the regulatory structure that allowed the commercial broadcasting model to flourish.⁹⁶ It also created the regulatory agencies responsible for the oversight of broadcasting; first the Federal Radio Commission, then the FCC.⁹⁷ Each operated under the mandate to insure broadcasting reached its potential to serve the “public interest, convenience and necessity.”⁹⁸

A History of Broadcast Protection

Broadcasting’s biggest advantage over CATV is that it is a creation of the United States Congress and is subject to federal oversight from the FCC. Broadcasting also benefited from the powerful vision and leadership of David Sarnoff and William Paley during its’ early development.⁹⁹ The development of CATV followed a much different

⁹⁵ See generally MARVIN R. BENSMAN, THE BEGINNING OF BROADCAST REGULATION IN THE TWENTIETH CENTURY 8-9 (McFarland & Co. 2000); Louise Benjamin, *Working It Out Together: Radio Policy from Hoover to the Radio Act of 1927*, Journal of Broadcasting & Electronic Media, Spring 1998.

⁹⁶ *Id.*

⁹⁷ Radio Act of 1927, Pub. L. No. 69-632, 44 Stat. 1162 at § 3 (1927); Communications Act of 1934, 47 C.F.R. at § 4 (1934) (the Federal Radio Commission was composed of five commissioners, while the original Federal Communications Commission included 7 commissioners).

⁹⁸ Radio Act of 1927, Pub. L. No. 69-632, 44 Stat. 1162 at § 4 (1927); Communications Act of 1934, 47 C.F.R. at § 303 (1934) (both statutes grant the Commission general powers that included acting “from time to time, as public convenience, interest, or necessity requires”).

⁹⁹ See generally DAVID SARNOFF, LOOKING AHEAD: THE PAPERS OF DAVID SARNOFF (Dr. Jerome B. Wiesner ed., McGraw-Hill 1968) (while Sarnoff in able to present himself in the best possible

path than that of broadcasters. The CATV industry began in rural areas unable to receive broadcast signals without the benefits of a community antenna service.¹⁰⁰

Unlike Sarnoff and Paley, the early pioneers of cable operated in isolation from one another and were more interested in concentrating on individual system success than the politics of Congress.¹⁰¹ This disconnect among early CATV operators in organizing gave broadcasters an advantage that was maximized through the efforts of the National Association of Broadcasters (NAB).¹⁰²

During the 1920s, then-Secretary of Commerce Hoover followed a policy of self-regulation for radio and the industry embraced it.¹⁰³ Radio broadcasters did not seek formal federal regulation until increased competition began to crowd the airwaves

light, the opportunity to view a body of work that parallels the history of broadcasting in the United States is still valuable); KENNETH BILBY, *THE GENERAL: DAVID SARNOFF AND THE RISE OF THE COMMUNICATIONS INDUSTRY* (Harper & Row 1986) (Bilby classified this work as an unauthorized biography of Sarnoff, but he did work with “The General” at RCA for several years); ROBERT SOBEL, *RCA* (Stein and Day 1986) (a comprehensive history of RCA from its formation through the mid-1980’s); William S. Paley, *As it Happened: A Memoir* (Doubleday 1979); Sally Bedell Smith, *In All His Glory: The Life of William S. Paley, the Legendary Tycoon and his Brilliant Circle* (Simon and Schuster 1990); Lewis J. Paper, *Empire: William S. Paley and the Making of CBS* (St. Martin’s Press 1987).

¹⁰⁰ See BRIAN LOCKMAN & DON SARVEY, *PIONEERS OF CABLE TELEVISION 3* (McFarland & Company 2005); PATRICK R. PARSONS, *BLUE SKIES: A HISTORY OF CABLE TELEVISION 1-2* (Temple University Press 2008) (Introduces the efforts of George Gardner and his associates to receive television signals by carrying equipment up “rocky slopes” to extend the reach of broadcasting to places blocked by topography).

¹⁰¹ *Id.*

¹⁰² The National Association of Broadcasters, <http://www.nab.org> (last visited Dec. 10, 2009) The National Association of Broadcasters (NAB) was created in 1923 to help broadcasters mount an organized front in dealing with music licensing disputes. The organization evolved into an important political organization central to the promotion of broadcaster interests in Washington, D.C.).

¹⁰³ BENSMAN, *supra* note 27 at 19.

and create what Hoover referred to as “chaos” of the airwaves.¹⁰⁴ The Radio Act of 1927 did not only require those that wished to broadcast to acquire a license, the Act also provided a barrier to future competition for those already in the industry.¹⁰⁵

Examples of incumbent broadcasters exercising power over policy continued as radio transitioned into television. NBC’s utilization of spectrum allocated to FM radio for television also derailed the development of FM as competition to the AM empires of NBC and CBS.¹⁰⁶ The FCC’s initial allocation of the very-high frequency (VHF) band proved to be grossly inadequate to the development of a national television broadcasting service that would rival radio.¹⁰⁷ Incumbent broadcasters not only successfully lobbied Congress and the FCC to not have to vacate VHF and move to the more expansive ultra-high frequency (UHF) band they also benefited from the four year “freeze” that prevented new competitors from entering the business.¹⁰⁸ This appeasement of VHF broadcasters created a chasm between VHF and UHF stations that limited the growth of UHF and permitted major market VHF stations to dominate the network driven era of television.¹⁰⁹

¹⁰⁴ Secretary Hoover often used the term “chaos” to describe his view of the state of the unregulated airwaves as overcrowded to the point of ineffectiveness during the years leading up to the Radio Act of 1927. See *Generally* BENSMAN, *supra* note 27 at 49, 104, 129, 139.

¹⁰⁵ Radio Act of 1927, Pub. L. No. 69-632, 44 Stat. 1162 (1927).

¹⁰⁶ ERIC BARNOUW, *THE GOLDEN WEB: A HISTORY OF BROADCASTING IN THE UNITED STATES VOLUME II – 1933 TO 1953* 242 (Oxford University Press 1966).

¹⁰⁷ Report and Order, FCC 48-2182, Sept. 30, 1948.

¹⁰⁸ Television Assignments, *Sixth Report and Order*, 41 F.C.C. 148 (Apr. 11, 1952).

¹⁰⁹ *Id.* at 155 (Statements were filed with the FCC proposing that the VHF band be abandoned for television and all stations be allocated frequencies in the UHF band. The statements claimed by only allocated television stations in the UHF band serious economic, technological and competitive problems of pursuing a dual band policy could be mitigated. Citing a lack of evidence and a concern that the UHF band alone would not provide enough frequencies the

While CATV may have helped UHF compete with VHF by providing subscribers with UHF reception and signal quality equal to that of VHF the relationship between broadcasters and CATV operators would not significantly improve. Broadcasters' early concerns with CATV centered on signal importation and carriage issues and they had allies in Congress and the FCC to promote a pro-broadcast agenda.¹¹⁰

The FCC's early view of CATV was that it was nothing more than a transitory technology that would be of little use once UHF prospered and filled the gaps VHF alone could not.¹¹¹ The potential of CATV to not only compete with broadcasters, but to offer enhanced services beyond television was discussed by the Sloan Commission in the early 1970s.¹¹² It just took time for the industry to realize this potential.

The development of nonbroadcast channels to compete directly with broadcasters and provide CATV with exclusive content allowed the industry to evolve into the powerful media player it is today. Consolidation, rate deregulation and expanded services like broadband and telephone have positioned CATV to be a major factor in the electronic media moving forward in ways broadcasters are not equipped to be.

FCC rejected the idea); See also Alan Pearce, *The Economic and Political Strength of the Television Networks in NETWORK TELEVISION AND THE PUBLIC INTEREST 4* (Michael Botein & David M. Rice eds., Lexington Books 1980) (describes the corporate organization of NBC, CBS and ABC and the significant reach each network's ownership of valuable VHF stations in major markets provided).

¹¹⁰ See Inquiry into the Impact of Community Antenna Systems, TV Translators, TV "Satellite" Stations and TV "Repeaters" on the Orderly Development of Television Broadcasting, Report and Order, 26 FCC 403, 18 RR 1573 (1959).

¹¹¹ See LUCAS A. POWE, *AMERICAN BROADCASTING AND THE FIRST AMENDMENT* 219, 225 (University of California Press, 1987) (the FCC realized it needed to enter the business of cable regulation in order to protect broadcasters from competition from cable after the Commissions' view that UHF development would make cable "unnecessary and uneconomical").

¹¹² See SLOAN COMMISSION ON CABLE COMMUNICATIONS, *ON THE CABLE: THE TELEVISION OF ABUNDANCE*, (McGraw-Hill, 1971).

The affirmation of the must-carry rules in 1997 by the Supreme Court in *Turner II* provided broadcasters with a long awaited victory, but at what cost?¹¹³ As Justice O'Connor wrote in the Court's dissent, the plurality set a rather low bar for affirming the must-carry rules considering the constitutional considerations in question.¹¹⁴ In her view, infringing on the constitutionally guaranteed First Amendment rights of CATV operators should require more compelling evidence than a concern for what might happen.¹¹⁵

The transition to DTV included additional examples of policies favorable to existing broadcasters at the expense of reducing "scarcity" and increasing competition. The allocation of DTV frequencies was limited to existing broadcasters.¹¹⁶ In addition, the FCC's decision to allocate 6MHz per DTV station missed an opportunity to create the space for additional frequencies to be assigned in the largest markets and densely populated regions of the nation. Given the current trends in technology and economics it is highly unlikely that there would be great demand for increased capacity within the broadcast television spectrum, but it is important to note that the technological means exists for each station to be allotted less spectrum and still provide a HD broadcast signal to viewers.

Broadcasters have benefited from their special relationship with Congress and the FCC, especially in restricting the growth of CATV as a competitor. However, this

¹¹³ *Turner II*, *supra* note 8.

¹¹⁴ *Id.* at 234 ("we ordinarily do not substitute unstated and untested assumptions for our independent evaluation of the facts bearing upon an issue of constitutional law").

¹¹⁵ *Id.*

¹¹⁶ Telecommunications Act of 1996, Pub. LA. No. 104-104, 110 Stat. 56 at § 336 (a) (1) (1996).

relationship has also resulted in disadvantages. While the Fairness Doctrine is no longer enforced, broadcasters are still subject to content regulation limiting indecent programming as well as rules mandating the airing of certain amounts of educational children's programming each week. Ownership restrictions, while relaxed as a result of the Telecommunications Act of 1996, still restrict broadcasters from exceeding certain caps and prohibit the cross-ownership of broadcast stations and newspapers in the same market. Broadcasters were also required to make the transition into digital television whether they wanted to or not. In spite of these disadvantages, the benefits enjoyed by broadcasters have so far exceeded their regulatory burden. However, the future of this relationship in its current form is much more difficult to predict.

The more important argument in favor of releasing broadcasters from the shackles of the scarcity doctrine going forward is to develop a holistic approach to telecommunications regulation that recognizes that consumers are no longer limited to broadcast television as their only source of video programming or their living room television set as the only platform from which to access it. The means to acquire content are expanding and for broadcasters to remain relevant and competitive it may be necessary to release the industry from its protective regulatory cocoon and insist that it innovate to insure its future success.

FCC Reform and the Move from Broadcast to Broadband

With the digital transition in broadcast television complete the FCC is shifting its focus to reforming itself and developing a national broadband policy. Broadcasters should be concerned this change in emphasis may indicate a permanent shift in the Commission's priorities. While commercial broadcasting still attracts a significant

audience the future points to an Internet driven distribution model that services various devices over multiple platforms.

According to FCC Chairman Julius Genachowski, the Commission seeks to insure that every American can access the Internet through “open and robust” broadband connections.¹¹⁷ In addition to the obvious business opportunities, the Internet also provides what the Chairman described as “an unprecedented platform for speech and democratic engagement.”¹¹⁸ Protecting the latter from the former is a paramount concern for the Commission as it looks ahead to formulating a comprehensive national broadband policy.

The FCC identified four principles from which to develop Internet policy: “Network operators cannot prevent users from accessing the lawful Internet content, applications, and services of their choice, nor can they prohibit users from attaching non-harmful devices to the network.”¹¹⁹ Genachowski proposed two additional principles, non-discrimination of applications and content by broadband providers and transparency by broadband providers regarding their network management practices.¹²⁰ In Genachowski’s words these principles seek to preserve “the openness and freedom of the Internet” to ensure both economic growth and democratic interaction in the future.¹²¹

¹¹⁷ Julius Genachowski, Chairman, Fed. Comm. Comm’n, Prepared Remarks at The Brookings Institution: Preserving a Free and Open Internet: A Platform for Innovation, Opportunity, and Prosperity (Sept. 21, 2009) *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-293568A1.pdf,%20Acrobat%20Format.

¹¹⁸ *Id.* at 4-5.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.* at 7.

The issue of net neutrality, while being championed by the FCC, is a point of contention for broadband providers, like CATV operators, that seek more content control over their broadband networks. The National Cable & Telecommunications Association (NCTA) wishes to keep the government out of the network management business. The NCTA argues government intervention in network management will slow broadband innovation.¹²² Instead, the NCTA wants Congress to leave broadband providers with the power to manage their individual networks as they see fit.¹²³

While broadcasters are positioned to utilize the Internet to distribute content, the CATV industry is a major player in its development, implementation and management. CATV is in a similar position to broadcasters during the transition from radio to television. The industry enjoys a significant stake in the distribution of video content to television viewers, while also being situated to prosper in the broadband sector as well. However, unlike the transition to from radio to television, CATV will face competition from telephone and wireless providers that broadcasters did not.

Advancing the broadcast-centric regulatory framework of the past eighty-years at the expense of taking full advantage of the potential the Internet is something the FCC seems determined to avoid under the chairmanship of Julius Genachowski. In addition, the Commission appears to recognize it must also look within and reform itself to meet the challenges of providing oversight to a technology based communications industry.

¹²² *The Future of the Internet: Testimony Before the Committee on Commerce, Science and Transportation*, 110th Cong. 3 (Apr. 22, 2008) (testimony of Kyle McSlarrow, President and CEO National Cable & Telecommunications Association) *available at* <http://www.ncta.com/DocumentBinary.aspx?id=730>.

¹²³ *Id.* at 11.

The regulatory foundation for broadcasting was built in the 1920s to oversee an industry created in large part by the government itself. The FCC's method of oversight for this largely passive platform has been central to the Commission's role in the broadcast/cable relationship. However, a new culture of change is taking root at the FCC and moving forward priorities are changing and so will the way the Commission responds to them.

Chairman Genachowski envisions a reformed Commission that is retooled to encourage and facilitate participation by all stakeholders and engages in decision making that is driven by "robust, reliable, and relevant" data.¹²⁴ The Court in *Turner II* and the FCC under Chairman Martin regarding CATV and the 70/70 rules could have been more diligent in this area.

Future Research

This dissertation summarized the regulatory and judicial history of broadcasting and CATV with a focus on must-carry, the digital transition and new technology. These issues stemmed from a long standing pro-broadcast agenda advanced by Congress and the FCC. Limitations of this study include the difficulty in projecting the findings of this study into the future and predicting how technology will evolve, how such evolution will change the way the public accesses and distributes content and what the legislative, regulatory and judicial response to these changes will be. The need to create and advance a more inclusive multiplatform approach to telecommunications regulation

¹²⁴ *Oversight of the Federal Communications Commission, Hearing Before the Subcomm. On Communications, Technology, and the Internet of the H. Comm. On Energy and Commerce, 111th Cong. (2009) (statement of Julius Genachowski, Chairman of the Federal Communications Commission).*

creates several areas for future research and raises additional research questions

including:

- How does commercial broadcasting adapt and succeed should the programming networks opt for a nonbroadcast delivery option?
- How does the new role of the individual citizen as both media consumer and creator change the legacy media's role in the future?
- How does the participation of the individual in new media impact issues of privacy, access and control?
- What are the implications of current media ownership and cross-ownership restrictions on a technologically converging industry?
- What are the First Amendment implications of expanding broadcast style content regulations to CATV, DBS and the Internet?
- How does the practice of "bundling" multiple services like cable, high speed Internet access and phone service affect market competition within each individual service?
- Is it possible to adapt the "public interest" model from broadcasting to meet the challenges of new communication technologies like the Internet and wireless?

These questions can be answered using a variety of research methods. While this dissertation relied on legal research, future scholarship could utilize both quantitative and qualitative methods to expand. Beyond law and regulation there are social and cultural elements of mass media development and usage worthy of further study. A historical analysis of economic data relevant to the financial health of commercial broadcast stations could be useful in determining the presence of actual economic harm to stations due to competition from cable. Such an analysis could also prove useful in examining the impact of ownership change on the financial health of a station. This could include looking at financial records before and after the sale of a station from a single station owner to a group owner or holding company. Quantitative studies could utilize content analysis of relevant court decisions for examination. Qualitative methods

might include focus groups to measure media consumer behavior to better understand media usage beyond traditional television ratings. Also, in-depth interviews of FCC officials, lawmakers and legal experts who participated in the regulatory and legislative process could be conducted to provide a better understanding of the historical development of broadcast and cable policy, particularly during the DTV transition.

This study identified several instances where Congress and the FCC followed pro-broadcast policies at the expense of the development of new technologies like CATV. In the future, without robust study and discussion of the issues raised above these mistakes can be repeated.

Conclusion

Once upon a time broadcast television delivered what everyone wanted to watch. Absent competition this victory by broadcasters was largely by default. The current advantage for CATV is enhanced not just by increased viewership, but the fact that its' viewers also pay a monthly subscription fee for the opportunity to watch. Congress and the FCC's history of protecting broadcasters from CATV competition has left the industry largely absent of innovation, particularly during the transition to DTV.

Commercial broadcasters seem more interested in maximizing retransmission consent revenue and holding out for an eventual, but so far unlikely, expansion of the must-carry to include multicast carriage. This strategy may provide short term revenue from CATV retransmission agreements to help offset the loss of network compensation, but it does little to improve broadcasters' ability to compete against new distribution platforms like the Internet and wireless.

The success of broadcast television in the future goes well beyond continuing to fight against cable. The industry requires a reigniting of the entrepreneurial spirit it

displayed during its' formative years. The network distribution model developed during radio can no longer be counted on to provide broadcasters with mass appeal programming indefinitely. Network programming is now available from network websites, online services like hulu and nonbroadcast channels like USA and TNT.¹²⁵ How does broadcasting respond to this challenge? The industry seems content to fade into irrelevance and without a seminal change in direction irrelevance it shall find.

Requiring the CATV industry to preserve the viability of broadcasting through expanded must-carry and retransmission consent without requiring broadcasting itself to face an equal burden to insure its own future success is not only unfair but it's an increasingly ineffective strategy. The delivery of video content extends beyond broadcasting, CATV and DBS and now includes platforms and devices that are multipurpose and difficult to classify using past regulatory structures.

Must-carry for full power commercial broadcast signals is largely a moot issue. The vast majority of CATV systems have the excess capacity to continue to carry broadcast signals without having to deny carriage to nonbroadcast channels. Retransmission consent amounts to a success tax on the CATV industry for the benefit of popular broadcast stations. The vast majority of the audience broadcasters seek to reach subscribes to CATV. Must-carry gives broadcasters access to this audience and that should be enough. Unlike nonbroadcast channels CATV operators have no

¹²⁵ See *generally* National Broadcasting Company, <http://www.nbc.com/> (last visited Oct. 6, 2009); Fox Broadcasting <http://www.fox.com/> (last visited Oct. 6, 2009); hulu <http://www.hulu.com/> (last visited Oct. 6, 2009); USA Network <http://www.usanetwork.com/> (last visited Oct. 6, 2009);Turner Network Television <http://www.tnt.tv/> (last visited Oct. 6, 2009) (each website offers visitors the ability to watch full episodes of broadcast network programming. In addition, USA and TNT air recently broadcast episodes within weeks of their original broadcast airdate).

opportunity to insert cable advertisements within broadcast station programming to offset the cost of retransmission consent. CATV operators can not alter the primary video of a broadcaster in any way. They simply provide a community antenna television service and serve as a delivery conduit between the station and the viewer.

Viewing trends support broadcast television's continued slow march towards marginalization. If one were to look at all mass communication methods and their importance moving forward, broadcast television has more in common with the newspaper industry than it does with the broadband and wireless industries. This study does not conclude the death of commercial broadcasting is imminent, but only that its importance is declining. The DTV transition has provided broadcasters with the opportunity to reinvent themselves, not just through multicasting, but also through the development of entirely new digitally based services that can allow the industry to evolve and position itself for future success. The industry needs its next David Sarnoff to step forward and lead the innovation.

The evolution of communications technology and the FCC's reluctance to evolve along with it regarding its regulation of broadcasting and CATV appears to be being addressed under Chairman Genachowski through agency reform and a shift in the Commission's focus to broadband issues. However, Congress also plays an important role in this process and weaning the legislative branch from its intoxicating fascination with broadcasting will also need to be addressed. Short of minimal children's programming requirements and indecency issues most Congressional action has been of a protective nature to the industry. The industry's long term health would be better served with less protection and more prodding. The relaxation of ownership limits,

elimination of cross-ownership restrictions and the development of equitable and fair indecency and content rules are just three areas Congress and the FCC can act to assist broadcasters in remaining competitive moving forward.

If blame need be assigned for the failure of broadcast television to achieve the same effectiveness as radio as a national service the FCC, Congress and broadcasters themselves would head the list. Frequency allocation issues from the very beginning were flawed and the FCC's inability to address those issues in an equitable way that allowed UHF to flourish rather than protected incumbent VHF broadcasters created the chasm that CATV filled and did so with great success. However, the CATV industry has grown into a dominant position of power from its once small town underdog status and is not immune from criticism.

CATV enjoys a dominant position in the delivery of video content as well as broadband services. This accumulation of corporate and technological power requires government oversight. Network neutrality is just one example where the CATV industry is opposed to the policy direction the FCC has taken. Challenges to ownership limits and the potential for further media consolidation will create new challenges Congress and the FCC will need to face in a way that is timely and takes into consideration the increased reliance on Internet and wireless services the public is incorporating into daily life for information, entertainment and personal interaction.

To begin to apply the implications of this research one needs to look no further than the pending purchase of NBC-Universal by Comcast. Should this transaction take place the nation's largest cable provider would not only add valuable cable channels like USA, Bravo and The Weather Channel to its portfolio, but the NBC television network

and its ten owned-and-operated broadcast stations as well. This consolidation of distribution and content not only has implications for the viewing public, but competing media companies too. Providing oversight to a cable operator that would also own a television network and broadcast stations could provide the FCC with market challenges that create competitive imbalances that are difficult reverse.

Simultaneously the Commission is transitioning its focus from broadcasting to broadband. Trying to extend broadcast content regulation to the Internet has already failed judicial review.¹²⁶ This should push Congress and the FCC to instead focus on ensuring all Internet communication remains equal through net neutrality regulation. The Internet is positioned to not only continue its rapid growth as an important avenue of political speech, but its role as a pillar to future economic growth cannot be understated. Internet service providers (ISP's) such as Comcast and AT&T already enjoy a privileged position that largely protects them from the development of any new wired competition. Allowing ISP's to also have the power to discriminate against certain types of Internet content would raise serious First Amendment issues for individual citizens as well as Internet-based business interests.

The future of the "public interest" is evolving. The public is now becoming an active participant rather than a passive receiver. This may force changes to the FCC's longstanding top-down regulatory structure in order to meet new challenges unique to new technologies. However, much of what has been learned over the last century of electronic media regulation can serve as an important guide to Congress and the

¹²⁶ Reno v. ACLU, 521 U.S. 844 (1997) (Court held that the Internet was not "scarce" like radio and television and instead should have "the highest protection from government intrusion." The Court overturned all aspects of the Communications Decency Act (CDA) except the ban on obscene materials).

Commission as they attempt to meet a future that extends beyond broadcasting and cable.

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