DIRECT BROADCAST SATELLITES: PUBLIC ACCESS OR EXCLUSIVE USE

By 1984, direct broadcast satellites (DBS) may be used to bypass the nation's local television stations and transmit television programs directly to viewers' homes.[1] Using current technology, DBS could make available forty or more new channels for nationwide television viewing.[2] The Federal Communications Commission (FCC)[3] has authorized DBS service to begin operating on an experimental basis.[4] It has not decided, however, whether the present television broadcast regulatory structure which governs access to the airwaves[5] and programming content[6] should be applied to DBS following the experimental period.

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[1] A direct broadcast satellite located 22,300 miles above the equator would rotate at the same speed as the earth and thus appear from the earth to be stationary in the sky. A fixed antenna can be used to receive signals from a satellite in this geostationary orbit. DBS signals might cover an entire time zone, or might cover by spot beam smaller areas, such as the New York-to-Boston corridor. For a general description of direct broadcast satellite systems, see J. P. Taylor, Direct-To-Home Satellite Broadcasting (1980) (published by Television/Radio Age).

The first DBS service may be offered by Focus Broadcasting Satellite Co., which has proposed to the FCC that it lease channel time on a satellite to be launched in 1984 by the Western Union Telegraph Company. *Good news, bad news in DBS spacerush*, Broadcasting, July 20, 1981, at 23, 24 [hereinafter cited as *DBS spacerush*]. The application of Focus Broadcasting Satellite Co. to operate a DBS system was accepted by the FCC for consideration. 46 Fed. Reg. 54,796 (1981).

[2] The technical plans submitted by various applicants for DBS service indicate that only approximately 40 channels may be operated by DBS systems in any single time zone. *DBS spacerush*, *supra* note 1, at 23. The number of channels that may be broadcast at any one time, however, is affected by satellite spacing requirements. On October 1, 1981, the FCC proposed reducing the spacing requirements between domestic communications satellites in order to double the number of satellites which could operate. 46 Fed. Reg. 57,067 (1981).

[3] The FCC was established under the Communications Act, Pub. L. No. 73-416, 48 Stat. 1064 (1934) (codified as amended at 47 U.S.C. §§ 151-757 (1976)), and has exclusive jurisdiction over the allocation of the radio spectrum. Section 301 of the Communications Act provides that "no person shall use or operate any apparatus for the transmission of energy or communications or signals by radio . . . except under and in accordance with this chapter and with a license in that behalf granted under the provisions of this chapter." 47 U.S.C. § 301 (1976).

[4] Inquiry Into the Development of Regulatory Policy in Regard to Interim Direct Broadcast Satellite Service, 46 Fed. Reg. 30,124 (1981) [hereinafter cited as FCC DBS Ruling]; Inquiry Into the Development of Regulatory Policy in Regard to Direct Broadcast Satellites for the Period Following the 1983 Regional Administrative Conference, 47 Fed. Reg. 31,555 (1982) [hereinafter cited as FCC DBS Report and Order].

[5] For a description of the broadcast regulatory structure governing access to the airwaves, see *infra* notes 14, 17-18 and accompanying text.

[6] For a description of the broadcast regulatory structure governing program content, see *infra* notes 14-19 and accompanying text.

An FCC staff report on policies for direct broadcast satellites (Policy Report)[7] has recommended that when the FCC adopts permanent regulations governing DBS, it should give the DBS owner exclusive and unregulated control over what can be said and who can say it over his facilities. Under these recommendations, the DBS owner would not be required to comply with access, public interest, or content regulations currently applicable to land-based television broadcasters.

The Policy Report staff formulated these recommendations on the theory that overall competition between television broadcasters and DBS will eliminate the need for the regulation of DBS. This Note contends that the projected competition in television broadcasting is unlikely to serve as an effective regulator of the potential abuses inherent in exclusive control over DBS programming. Without adequate regulation to compensate for this deficiency in marketplace competition, a government grant of exclusive control over DBS programming would be repugnant to the first amendment.[8] This Note proposes that the FCC adopt a new regulatory structure for DBS under which the DBS owner is granted the right to transmit several channels of programming but is required to lease half of these channels to independent programmers on a first-come-first-served basis. Further, both DBS owners and independent programmers should be allowed to broadcast without government content regulations over the channels for which they have programming responsibility. In this way competition within DBS systems would be stimulated by permitting a diverse group of programmers to compete for use of DBS facilities, and the need for content regulation would be eliminated by preventing DBS owners from becoming the sole arbiters of information and viewpoints presented over DBS.

As a background to the question of who should have access to unregulated DBS television programming, Section I of this Note briefly reviews the FCC's current regulations affecting television programming. Section II summarizes and criticizes the Policy Report's analysis of potential competition in the television industry and its effect on the issue of access to and content control over DBS programming. In addition, Section II discusses the impact various regulatory structures may have on the economic viability of DBS. Section III details a proposal for DBS regulation and discusses the reasons why it best accommodates first amendment rights.

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[7] STAFF OF THE FEDERAL COMMUNICATIONS COMMISSION, REPORT ON POLICIES FOR REGULATION OF DIRECT BROADCAST SATELLITES (1980) [hereinafter cited as POLICY REPORT].

[8] The first amendment states, in relevant part: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . . " U.S. CONST. amend. I.

I. Regulatory Control of Public Communication Services

A. *Background*

In 1927, government regulation of the airwaves was conceived as a solution to overcrowding on scarce radio frequencies.[9] At that time there were basically two types of services available: radio broadcasters offered programs to anyone with a receiver at no cost, while telephone and telegraph companies offered private point-to-point transmission of messages for a fee.[10] These distinctions in operating characteristics resulted in substantially different regulatory treatment for these two types of services, both under the Radio Act of 1927[11] and its successor, the Communications Act of 1933.[12] To this day, these distinctions determine who can use and what can be said on a particular frequency.

Those who transmit to nonspecific receivers, such as radio and television stations, are licensed and regulated as broadcasters.[13] Each broadcaster is given exclusive use of a licensed frequency subject to a wide variety of public interest and content regulations. For example, a broadcaster must provide the public an opportunity to reply to editorial comments or personal attacks.[14] In addition, there are re-

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[9] Former FCC Chairman Minow described the situation as follows:

> In the mid-1920's broadcasters had little more than token regulation, as the result of a series of court decisions limiting the scope of the Radio Act of 1912. The result was complete chaos. Stations "jumped" frequencies — interfered with each other at will — and stepped up power to the destruction of other stations' services. Broadcasters petitioned, cajoled and literally begged the Congress to restore order; and the Congress responded with the regulatory pattern we now have.

N. Minow, Equal Time: The Private Broadcaster and the Public Interest 77 (1964).

[10] "Broadcasting consists in the transmission of a message to all who may hear it, in all directions addressed to the public . . . . Relay broadcasting is . . . a point-to-point communication . . . an addressed message, not open to the public." Policy Report, *supra* note 7, at 118 (quoting Transcript of Record at 587-88, Intercity Radio Telegraph Co. v. Fed. Radio Comm'n, 46 F.2d 602 (D.C. Cir. 1931) (explanation of Dr. A.M. Goldsmith of RCA at a Federal Radio Commission Public Hearing on Short Waves, 1928)).

[11] Pub. L. No. 69-632, 44 Stat. 1162 (repealed 1934).

[12] Pub. L. No. 73-416, 48 Stat. 1064 (1934) (codified as amended at 47 U.S.C. §§ 151-757 (1976)); *see* National Ass'n of Theatre Owners v. FCC, 420 F.2d 194, 200 (D.C. Cir. 1969) ("The present statute governing the Commission's authority over broadcasting services is derived in large part from the Radio Act of 1927 . . . . "), *cert. denied*, 397 U.S. 922 (1970).

[13] Broadcasting is defined in the Communications Act as "the dissemination of radio communications intended to be received by the public, directly or by the intermediary of relay stations." 47 U.S.C. § 153(o) (1976).

[14] 47 U.S.C. § 315(a) (1976) (Licensees are obligated "to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.")

strictions on vulgar and off-color programming[15] and the content of commercial messages.[16] Other regulations impose on a broadcaster an affirmative obligation to provide an outlet for political,[17] local,[18] and, under the fairness doctrine,[19] public affairs programming. The broadcaster bears, and may not delegate, legal responsibility for all material broadcast.[20] Regulations also govern the number of television stations that one organization or individual may own.[21] Altogether, broadcast regulations reflect a desire to minimize the potential abuse inherent in a governmentally approved monopoly over a frequency.[22]

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[15] 18 U.S.C. § 1464 (1976); FCC v. Pacifica Found., 438 U.S. 726 (1978).

[16] *See, e.g.*, 47 C.F.R. § 73.1211 (1981) (broadcasting information about lotteries prohibited).

[17] Broadcasters must provide political coverage and candidates for federal office must be allowed access to equal broadcast time. 47 U.S.C. §§ 312(a)(7), 315 (1976). *See* CBS, Inc. v. FCC, 453 U.S. 367 (1981); New Primer on Political Broadcasting and Cablecasting, 69 F.C.C.2d 2209 (1978).

[18] It is the position of the FCC that the economic structure of television and broadcasting should be responsive to local concerns. The concept of localism, however, is not easily defined. One policy regarding localism reflects the idea that individual choice ought to dictate the nature and content of programming. If programming is to be determined in this way, the theory is that such decisions ought to be made by a member of the community receiving the broadcast, rather than someone outside of it. Another theory of localism focuses on the identity of the community, reflected by the amount of coverage and emphasis placed on community concerns and issues. NETWORK INQUIRY SPECIAL STAFF, FEDERAL COMMUNICATIONS COMMISSION, *Regulation of Television Network Contract Terms*, in NEW TELEVISION NETWORKS: ENTRY, JURISDICTION, OWNERSHIP AND REGULATION IV-31 to -33 (1980).

[19] For a description of the fairness doctrine, see Fairness Report, 48 F.C.C.2d 1 (1974). This 1974 report emphasized two duties of the broadcaster: (1) he must devote a reasonable percentage of time to the coverage of public issues; and (2) his coverage of these issues must be fair in the sense that an opportunity must be provided for the presentation of contrasting points of view. *Id.* at 7. *See also* Rosenfeld, *The Jurisprudence of Fairness: Freedom Through Regulation in the Marketplace of Ideas*, 44 FORDHAM L. REV. 877 (1976).

[20] *See* 47 C.F.R. § 73.658 (1981); National Broadcasting Co. v. United States, 319 U.S. 190, 205 (1943).

The prime time access rule prohibits local station affiliates in the top fifty television markets from airing more than three hours of network programs between 7:00 and 11:00 p.m. 47 C.F.R. § 73.658 (k) (1981).

[21] The FCC has placed great emphasis on assuring a diversity of voices in broadcasting. The FCC, for example, will not grant a television broadcast license to a licensee owning another radio or television station in the same community. 47 C.F.R. § 73.636 (1981). A person may not acquire three broadcast stations where any two are within 100 miles of a third and where there is a primary service overlap of any two of the stations. 47 C.F.R. §§ 73.35, .240 (1981). Ownership of more than seven television stations (UHF and VHF) or five VHF stations nationwide is prohibited. 47 C.F.R. § 73.636(a)(2) (1981). Cross-ownership rules bar owners of daily newspapers from acquiring local broadcast stations. 47 C.F.R. §§ 73.35(c), .240(c), .636(c) (1981). Cable television system owners are prohibited from acquiring local television stations. 47 C.F.R. § 76.501(a)(2) (1981). *See* POLICY REPORT, *supra* note 7, at 46.

[22] The Supreme Court warned of the abuses that might occur if public trustee responsibilities had not been imposed under the Communications Act: "[S]tation owners and a few networks

Those who transmit messages from one point to another for a fee, such as telephone and telegraph companies, are licensed and regulated as common carriers.[23] They make their facilities available on a first-come-first-served basis to anyone who is able to pay for the service.[24] The FCC does not impose content regulations on common carriers because they do not control message content.[25]

B. *Combining Broadcast and Common Carrier Regulations*

Technological advances since 1927 have blurred the once distinct lines between broadcasting and common carriage services. Legislative and administrative initiatives to cope with the rapidly changing communications industry have been contradictory. For example, some subscription television services currently available to the public have characteristics associated with broadcasting, because programs are being offered to the public, and associated with common carriage, because the programs can be received only by those who pay a fee.

The FCC has categorized these mixed services by looking at whether the radio spectrum utilized by the operator offering the new type of service was originally allocated for broadcasting or for common carriage. For example, subscription television (STV) offers pay TV over the frequencies allocated by the FCC for television broadcasting.[26] Multipoint distribution services (MDS), on the other hand, offer pay TV over microwave frequencies allocated by the FCC for common carrier service.[27] These pay television services are so similar that a viewer probably would not be able to distinguish them: each provides television programming that can be received only by persons who have decoding equipment; each broadcasts over one channel; and each is usually available only during prime time.[28] Despite these

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would have unfettered power to make time available only to the highest bidders, to communicate only their own views on public issues, people and candidates, and to permit on the air only those with whom they agreed." Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 392 (1969).

[23] The Communications Act defines the term "common carrier" to mean "any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy . . . ; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier." 47 U.S.C. § 153(h) (1976).

[24] *See* 47 U.S.C. § 202 (1976).

[25] "The Commission does not apply content regulation to common carriers since they do not control message content." POLICY REPORT, *supra* note 7, at 49.

[26] Subscription Television Service, 3 F.C.C.2d 1 (1966).

[27] For a description of MDS, see NETWORK INQUIRY SPECIAL STAFF, FEDERAL COMMUNICATIONS COMMISSION, *Report on Multi-Point Distribution Service* in PRELIMINARY REPORT ON PROSPECTS FOR ADDITIONAL NETWORKS (1980) (by K. Glen) [hereinafter cited as *Glen on MDS*].

[28] POLICY REPORT, *supra* note 7, at 18.

similarities, the FCC has classified STV as a broadcasting service[29] and MDS as a common carriage service,[30] with the MDS operator required to lease half of his transmission time.[31]

The FCC's decision to designate STV as a broadcast service allowed STV to use a frequency reserved for a television broadcast service.[32] The FCC claims, however, that its decision was based on the STV operators' stated intention to reach as many members of the public as possible.[33] MDS was classified as a common carrier service when it commenced operations with a point-to-point communications service which was leased by companies for instructional and business closed-circuit television.[34] Subscription television was later added to the services offered by MDS, and today pay TV has become its financial mainstay.[35]

Cable television offers another example of the problems encountered by the FCC in trying to cast a new television service into either the broadcast or the common carrier regulatory mode. Cable television offers both a subscription and a "free" advertiser-supported television service.[36] Cable systems do not fall, however, into either the broadcast or common carrier statutory classification because they do not transmit over the airwaves. Rather, cable television transmits signals to the viewer's home over coaxial cables. Nonetheless, the Supreme Court held that FCC regulation of the cable television industry is permissible because it is "reasonably ancillary" to the FCC's responsibility for regulating television.[37]

Initially, the FCC required cable companies with 3,500 or more subscribers to originate programming which would meet the public interest obligations required of broadcasters.[38] This regulation was upheld by the Supreme Court in 1972,[39] but repealed by the FCC two years later.[40] The FCC then proposed that cable companies with 3,500 or more subscribers be required to develop a minimum twenty-

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[29] Subscription Television, 15 F.C.C.2d 466, 472 (1968), *aff'd*, National Ass'n of Theatre Owners v. FCC, 420 F.2d 194 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 922 (1970).

[30] *See* Multipoint Distribution Serv., 34 F.C.C.2d 719 (1972).

[31] 47 C.F.R. § 121.903(b) (1981).

[32] *See* 47 C.F.R. § 73.641 (1981).

[33] *See supra* note 29.

[34] Multipoint Distribution Serv., 34 F.C.C.2d at 720, 722.

[35] *See Glen on MDS*, *supra* note 27, at 2.

[36] For a description of cable operations, see generally M. HAMBURG, ALL ABOUT CABLE (1981).

[37] United States v. Southwestern Cable Co., 392 U.S. 157, 178 (1968).

[38] 47 C.F.R. § 74.1111(a) (repealed 1974).

[39] United States v. Midwest Video Corp., 406 U.S. 649, 673 (1972).

[40] Cable Television Serv., 49 F.C.C.2d 1090, 1105-06 (1974).

channel capacity and to make specific channels available for access by third parties for a prescribed fee as a means of providing an outlet for local programming.[41] The Supreme Court rejected this attempt by the FCC to impose common carrier status on cable systems, pointing out that under the Communications Act, "a person engaged . . . in broadcasting shall not . . . be deemed a common carrier."[42] As a result, access to a cable facility is now controlled by the cable company as if it were engaged in broadcasting. Unlike television broadcast stations, however, cable companies are not required to show or originate public interest programming.

The proposed DBS systems are technologically similar to the currently operating domestic communications satellites (Domsats).[43] Domsats are the link between a programmer, who leases time on the system, and a television broadcast station or pay TV operator, which receive and retransmit programs to their audiences. The transmission service provided by Domsats is regulated as common carriage.[44] The major operating distinction between Domsats and DBS is that a DBS service could eliminate the local broadcasters and pay TV operator as intermediaries between the television programmer and the viewer.[45]

During the DBS experimental operating period, DBS systems operators will be allowed to choose their own operational structures. Once that choice is made, the operators will be governed by the

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[41] Cable TV Capacity and Access Requirements, 59 F.C.C.2d 294 (1976).

[42] FCC v. Midwest Video Corp., 440 U.S. 689, 700 (1979) (quoting 47 U.S.C. § 153(h) (1976)).

[43] Domsats relay voice, computer data, and television programming. A total of 14 Domsats serving North America were in orbit and operational by the end of April 1981. Domsat signals are technologically receivable directly by homeowners. These signals, however, can only be received via a dish antenna costing from $7,000 to $35,000 and measuring 10 or more meters across. Thus, the cost and size of a Domsat antenna makes direct reception impractical for most households. *See* Reregulation of Receive-Only Domestic Earth Stations, 74 F.C.C.2d 205, 218-19 (1979). For a general comparison of Domsats and DBS, see J.P. TAYLOR, *supra* note 1, at 10-17. It is estimated that only 2,000 to 3,000 home terminals have been constructed in the United States to receive Domsat signals. *Id.* at 5.

[44] *See* Southern Satellite Systems, Inc., 62 F.C.C.2d 153, 162 (1976) (the FCC authorized the first proposal to lease Domsat common carrier facilities for the distribution of television broadcast signals to cable television systems). *See generally* NETWORK INQUIRY SPECIAL STAFF, FEDERAL COMMUNICATIONS COMMISSION, *Video Interconnection: Technology, Costs and Regulatory Policies,* in PRELIMINARY REPORT ON PROSPECTS FOR ADDITIONAL NETWORKS 88-122 (1980) (discussing the development of the regulation of common carriage for Domsats). The relay of programming by satellite for retransmission by cable and other television delivery systems has been classified as a point-to-point common carrier service, and not as a broadcasting service. *Id.* at 96.

[45] *See generally* 1 SATELLITE TELEVISION CORPORATION, APPLICATION OF SATELLITE TELEVISION *CORPORATION FOR A SATELLITE-TO-HOME SUBSCRIPTION TELEVISION SERVICE BEFORE THE FEDERAL* COMMUNICATIONS COMMISSION (1980) (overview of proposed system and regulatory framework).

broadcast or common carrier regulations applicable to the type of service they will offer. Of the nine properly filed DBS applications,[46] some applicants have proposed offering a subscription service with exclusive control over programming content,[47] others have proposed offering "free" advertiser-supported programming which they would control,[48] and one has proposed leasing the DBS facilities on a first-come-first-served basis without any control over program content.[49]

By allowing different types of broadcast and common carrier services to be offered by DBS operators in competition with one another, the FCC hopes to be able to evaluate the effect on the home viewer of different operational structures.[50] The television viewer, however, may neither know nor care whether his favorite program is delivered by a television broadcast station, STV, MDS, or a cable company, with or without Domsat relay. On the other hand, the choice of regulatory classification for DBS services following the experimental period will significantly affect how all DBS operators develop and how the operators compete against one another as well as against existing television services. More significantly, the regulatory classification will determine who gains access to DBS television facilities in order to transmit his ideas and views.

While the FCC has postponed its decision on which permanent regulatory policies are to be applied to DBS,[51] it was recommended in the Policy Report that the DBS operator should ultimately have exclusive use of his licensed frequencies, but without any of the public interest obligations currently imposed on broadcasters.[52] These recommendations were based not only on the belief that such content regulations were unnecessary in light of the competitive factors, but

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[46] The nine applications which have been accepted for consideration by the FCC were filed by Satellite Television Corp. (a subsidiary of Communications Satellite Corp.), CBS, Inc., RCA Am. Communications Inc., Western Union Tel. Co., Direct Broadcast Satellite Corp., Graphic Scanning Corp., United States Satellite Broadcasting Co., Vido Satellite Systems, Inc., and Focus Broadcast Satellite Co. *See* 46 Fed. Reg. 54,796 (1981). The application of Focus Broadcast Satellite Company to build its own DBS system was rejected as containing insufficient information; however its application to lease space on the Advanced Westar satellite to be launched by Western Union was accepted for consideration. *Id.* The applications of six other companies were rejected on the grounds that the applications contained insufficient information. *Id.* at 54,797.

[47] For a summary of the applications filed with the FCC by Satellite Television Corp., CBS, RCA, and Western Union in FCC Docket No. 80-603, see *DBS spacerush*, *supra* note 1, at 25.

[48] United States Satellite Broadcasting Co., owned by Hubbard Broadcasting, Video Satellite Systems and Focus Broadcast Satellite proposed offering advertiser supported television programming to be received by homeowners directly as well as by land-based broadcasters who would retransmit to their viewing audiences. *Id.* at 25-26.

[49] *Id.* at 26 (application of Direct Broadcast Satellite Corp. regarding its proposal to offer 42 channels of programming as a common carrier).

[50] *See* FCC DBS Ruling, *supra* note 4, at 30,127; FCC DBS Report and Order, *supra* note 4, at 31,567.

[51] FCC DBS Ruling, *supra* note 4, at 30,127.

[52] *See infra* notes 55-56.

that they would be detrimental to the economic viability of DBS operations.[53] The ultimate decision on classification of a DBS service, however, should be based on the effect of the regulatory choice on the nation's viewers as well as on the DBS licensees.[54]

II. Summary and Critique of the FCC Staff Recommendations for DBS Regulation

The Policy Report, published before any applications for DBS service had been filed with the FCC, recommended that: (i) the DBS owner have exclusive use of the licensed frequency;[55] and (ii) DBS program content be regulated by marketplace competition alone.[56] The Policy Report rejected common carrier regulation as inappropriate for DBS.[57]

The primary rationale for the FCC staff's recommendations was based on the competitive television environment projected for 1985, when the FCC staff believed that DBS would first become operative.[58] The staff reasoned that there will be a sufficient number of television choices competing with DBS to preclude a DBS operator from abusing a right to exclusive and unregulated use of his licensed frequencies.[59] Thus, the FCC staff argued, program content regulation of DBS would be unnecessary[60] and would result in a waste of

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[53] *See infra* notes 56, 62 and accompanying text.

[54] *See infra* note 127 and accompanying text.

[55] "The staff has recommended that licensees who provide these services be permitted to retain control over the content of programming transmitted to their subscribers . . . . Because licensees will retain control over programming . . . the proposed service clearly falls within the general ambit of service classifications that include broadcasting and broadcast-related services." Policy Report, *supra* note 7, at 115.

[56] "In a competitive programming market such as we anticipate will exist by 1985, program content requirements cannot be justified either to provide programming the viewers want or need, or to ensure that they are exposed to information and opinions on issues of public affairs." *Id.* at 77. "The abundance of programming likely to be available will make program content regulations for DBS superfluous." *Id.* at 91.

[57] The Policy Report stated:

> If the common carrier regulatory model were applied to DBS, most of the traditional regulatory mechanisms, including requirements for Commission approval of service offerings and cost justification for prices, would be inappropriate. The requirement that the system operator reserve capacity for other users would seriously interfere with a programmer's ability to provide a desirable programming package and to use the frequencies assigned efficiently. The defining characteristic of the common carrier model of regulation, the requirement that the carrier hold itself out to all comers, prevents the common carrier model from providing an appropriate regulatory scheme for DBS.

Id. at 93.

[58] "[T]he analysis in this report centers on the period beginning around 1985." *Id.* at 5.

[59] *See supra* note 56.

[60] *Id.* The Policy Report staff also suggested that most forms of regulation now imposed by the Commission will prove unnecessary or counterproductive in establishing a regulatory environment for DBS. Policy Report, *supra* note 7, at 5.

spectrum because the competitive market would meet the programming needs of most groups.[61] The FCC staff also contended that, because DBS start-up costs will involve substantial financial risks, the imposition of major regulatory burdens would mean that a DBS service might not be initiated.[62]

A. *Marketplace Competition*

In recommending that marketplace competition take the place of broadcast regulation, the FCC staff predicted an abundance of television programming by 1985.[63] The staff postulated that if one telecaster would not present certain news or opinions, others would if there were listener interest in the subject.[64] The staff did not, however, project an end to spectrum scarcity,[65] the principal basis on which the Communications Act's public trustee regulatory structure had been premised.[66] Instead, the staff asserted that the concept of a broadcaster as a public trustee of a scarce commodity should not be applied in an abundantly competitive market for television programming.[67] In support of its views, the Policy Report noted that it was the lack of competition in early broadcasting that had originally led to the imposition of public interest regulation.[68]

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[61] *Id.* at 74-75.

[62] "Imposing a minimum of technical and market restrictions on DBS appears desirable in part because DBS seems highly risky. Major additional burdens imposed by a regulatory agency might severely affect the investors' estimates of the service's profitability and might reduce the probability that it would be initiated at all." *Id.* at 88.

[63] It was projected in the Policy Report that by 1984 there will be 45 STV stations in operation; by 1985, the number of pay subscribers to MDS will grow from 250,000 to 2,000,000; video cassette sales will reach 12 million units; and video disc sales will reach 4 million units. *Id.* at 28-29.

[64] "Political candidates or parties that cannot gain access to one channel will have many other alternatives, and if one news organization does not consider an issue newsworthy, another may." *Id.* at 76.

[65] In discussing the need for the FCC to choose among applicants for DBS, the Policy Report noted: "[I]f DBS proves highly successful, more applicants for licenses will appear than can be accommodated, and the Commission will have to use some mechanism for assigning licenses among mutually exclusive applicants." *Id.* at 58.

[66] *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 396-400 (1969).

[67] "[T]he notion of the broadcaster as a public trustee, the central concept of broadcast regulation as applied to advertiser-supported stations, should not be applied in a competitive market, since the service consumers desire most will be produced, and produced most efficiently, by system operators performing in response to economic incentives." POLICY REPORT, *supra* note 7, at 92.

[68] It was explained in the Policy Report that:

> At least two concerns appear to have led to program content requirements: first, that the kinds of programming that viewers want or need be available, whether or not broadcasters find it profitable to present them; and second that concentration of control in broadcasting not prevent the public from hearing important points of view on public issues.

Id. at 70-71.

The FCC faces a conflict in evaluating the competitive impact of DBS on other telecasters. It is charged, on the one hand, with developing spectrum use to "make available, so far as possible, to all the people of the United States a rapid, efficient, nationwide, and worldwide wire and radio communication service."[69] At the same time, the FCC must weigh the competitive effect of a new service on existing broadcasters.[70] The Policy Report staff avoided resolving the conflict between the proposed and existing technologies by assuming that DBS would not be a competitive threat to existing services and, therefore, would not be in a position to abuse market power.[71] The assessment of competition as a regulator of DBS contained in the Policy Report was based, in part, on the premise that DBS signals would be received only by individual residences and that in the beginning few households would own DBS receiving equipment.[72] From this, the Policy Report concluded that DBS itself would not be in a market position to abuse monopoly control of a frequency.[73]

In the Policy Report, written before any applications for DBS service had been filed, it was assumed that only one company, Satellite Television Corporation, would apply to offer a DBS service, and then, probably only on a subscription basis.[74] For this reason, the competitive environment in which DBS service would begin was viewed as being based largely on projected increases in competition among existing pay TV systems. These projections were based primarily on the FCC staff's analysis of current market demands for pay television programs offered by various delivery systems. In the context of pay TV, the FCC staff believed that cable, MDS, and STV would offer substantial competition to a DBS pay TV service because each of these land-based pay TV systems has certain competitive advantages over DBS.[75]

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[69] 47 U.S.C. § 151 (1976).

[70] Carroll Broadcasting Co. v. FCC, 258 F.2d 440, 443 (D.C. Cir. 1958) ("[W]hen an existing licensee offers to prove that the economic effect of another station would be detrimental to the public interest, the Commission should afford an opportunity for presentation of such proof and, if the evidence is substantial . . . should make a finding or findings.").

[71] "Given the intense competition likely, even if there were only a single DBS operator, he would have little if any market power." POLICY REPORT, *supra* note 7, at 32. The FCC subsequently concluded, based on studies that had been prepared before applications for DBS had been submitted, that "the effect of such a [pay] DBS system on local television profits, and on the availability of programming to viewers will also be negligible." FCC DBS Ruling, *supra* note 4, at 30,133.

[72] POLICY REPORT, *supra* note 7, at 10.

[73] *See supra* note 71.

[74] "A DBS system will probably provide several channels of video programming, probably on a subscription basis . . . ." POLICY REPORT, *supra* note 7, at 88.

[75] *See supra* note 74 and accompanying text; POLICY REPORT, *supra* note 7, at 17-31 (comparative discussion of other pay TV services).

Cable systems have an advantage over DBS in that new cable systems can offer from 52 to 100 or more channels of programming,[76] far more than the currently expected channel capacity of DBS. Cable's great disadvantage, however, is that it is not economically suited to sparsely populated areas because there is a cost disincentive in installing cables in areas having fewer than thirty homes per mile.[77] In these areas it would be more economical for households to obtain individual direct-to-home receiving antennas than to pay a premium to cover the additional cost of cable installation.

STV's main advantage in competing with DBS is that it offers a lower cost alternative to DBS.[78] Whereas DBS may broadcast several channels of television to one community, STV is limited, as are all land-based broadcasters, to one channel in the same community.[79] MDS also is limited in the number of channels it can offer. Although the FCC has proposed increasing the number of MDS channels in a community from two to ten,[80] it was anticipated in the Policy Report that this expansion would increase the number of MDS viewers from 250,000 in 1980, to only 2,000,000 by 1985,[81] approximately one percent of the nation's current population. Additional competition to DBS will be provided by low-power UHF and VHF stations,[82] as well as by video cassette recorders and video discs.[83]

The Policy Report noted a number of DBS's natural competitive advantages over land-based telecasters. These advantages include a means of reaching large, nationwide audiences[84] and the ability to serve rural and low income areas where cable or other systems are too costly to provide.[85] The possibility that DBS signals would be receiv-

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[76] *Id.* at 17; *see* Smith, *The Birth of a Wired Nation*, CHANNELS, Apr.-May 1981, at 32, 35. Cable systems carry all local over-the-air television stations, 47 C.F.R. §§ 76.51-.65 (1981), and may also offer distant over-the-air stations, recent theatrical movies, and sporting events, POLICY REPORT, *supra* note 7, at 21. Because of the large channel capacity available, cable can also offer full-time channels of news, sports and children's programming. *Id.* at 21-22.

[77] *Id.* at 25. Cable may also be unprofitable in densely populated low income neighborhoods where the cost of installing cable is beyond the financial means of residents. *Id.*

[78] STV is offered over low-power stations. Transmitting equipment for a low-power station costs between $6,000 for VHF and $15,000 for UHF. *Id.* at 30.

[79] 47 C.F.R. § 73.636 (1981).

[80] 45 Fed. Reg. 29,323 (1980).

[81] POLICY REPORT, *supra* note 7, at 29.

[82] Low-power television service has been authorized by the FCC. 47 Fed. Reg. 21,468 (1982).

[83] POLICY REPORT, *supra* note 7, at 29.

[84] "Because DBS will serve relatively large geographic areas, it will provide an ideal means for reaching large, nationwide audiences, and may eventually provide programming in competition with the networks." *Id.* at 10.

[85] In authorizing an experimental DBS service, the FCC stated:

> With respect to the ultimate public interest in authorizing DBS services, we believe that the benefits of establishing DBS systems are clear. As pointed out by [Satellite

able by land-based broadcasters and pay TV companies and distributed by them to their audiences was not discussed in the Policy Report.

Although the FCC could prohibit a combination of DBS and land-based systems,[86] the better policy would be to permit this combination to develop. The FCC is required to encourage the development of new technologies which will enhance and promote the delivery of optimal television services to the public.[87] Permitting a cooperative relationship between DBS and land-based television systems would be consistent with this government objective. If DBS signals are picked up and distributed by local pay TV companies, not only might the amount of competition from other television systems be less than expected by the FCC staff, but, in addition, DBS could become a major competitor from its inception.

In addition, the Policy Report's projections of the competitive market in 1985 focused only on DBS's potential for growth in pay television services.[88] The competitive impact of DBS offering "free" advertiser-supported programming or the possibility that DBS signals would be picked up and distributed to households by local broadcast-

> Television Corporation] and the National Telecommunications and Information Administration (NTIA), DBS systems will have a unique capability to provide television and other video services to all the people of the United States, including those in the rural and remote areas that are not now adequately served by the terrestrial broadcast system. For example, [Satellite Television Corporation] notes that there are 1.2 million households in the United States without access to any television service and over 4 million households that receive only one or two channels. Further, the provision of DBS service may provide people throughout the United States with several additional channels of programming and greater diversity of types and sources of programming. The additional demand for programming engendered by the service may also provide incentives for expansion of the program production industry. Moreover, by providing some or perhaps all of its service in a subscription mode, DBS may be able to provide programming for specialized audiences that might not be supported through conventional advertiser-financed programming systems. In addition, DBS has the potential to provide needed public services such as educational programming and the dissemination of medical information. Finally, DBS may provide a vehicle for introduction of new video services, such as high-definition television, to the American public.

FCC DBS Ruling, *supra* note 4, at 30,128 (footnote omitted).

[86] The distribution of television programs from the programmer to cable systems by satellite has been classified as common carriage. *See supra* note 44. The FCC has authority to establish the terms and conditions on which frequencies will be used by licensees and, accordingly, could prohibit a licensee from providing both a common carrier and a broadcast service on the same frequency. *See infra* note 144.

[87] Under the Communications Act, the FCC is required to: "study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest." 47 U.S.C. § 303(g) (1976).

[88] *See supra* note 74.

ers, cable systems, and other pay TV companies were not analyzed in the Policy Report.

Subsequent to the release of the Policy Report, and apparently unanticipated by it, DBS applicants proposed offering only "free" advertiser-supported programming[89] or a combination of "free" and pay TV services.[90] In offering "free" television, DBS may enjoy substantial competitive advantages over the major networks if, as now appears likely, the FCC licenses the DBS operators to transmit several channels of programming simultaneously.[91] Each of the major networks, in contrast, is permitted to control only one channel of programming.[92] A single DBS licensee, with three channels of programming, would control at least half of the over-the-air television channels available to 26.9 million television households.[93] If DBS

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[89] United States Satellite Broadcasting Co., owned by Hubbard Broadcasting, Video Satellite Systems, and Focus Broadcast Satellite proposed offering advertiser-supported television programming to be received by homeowners directly as well as by land-based broadcasters who would retransmit to their viewing audiences. *DBS spacerush*, *supra* note 1, at 24-25.

[90] CBS proposed using one "free" advertiser-supported channel to relay high definition television signals to broadcasters and a second pay TV channel to distribute programming to cable systems and direct-to-home receivers. *Id.* at 24.

[91] The FCC asked applicants to request particular frequencies and orbital positions. FCC DBS Ruling, *supra* note 4, at 30,137.

[92] 47 C.F.R § 73.636(a)(1)-(2) (1981); *see* 47 C.F.R. § 73.658(f) (1981) (indirect means of control are also prohibited).

[93] These figures are derived from the following chart:

Total Television Coverage (VHF and UHF): Operational Stations

Number of Stations	Number of Markets	Cumulative Number of Markets	Number of TV Households	Percentage of TV Households	Cumulative Number of TV Households	Cumulative Percentage of TV Households
14	1	1	3,882,800	5.3	3,882,800	5.3
13	0	1	0	.0	3,882,800	5.3
12	0	1	0	.0	3,882,800	5.3
11	0	1	0	.0	3,882,800	5.3
10	1	2	6,375,500	8.6	10,258,300	13.9
9	1	3	1,830,700	2.4	12,089,000	16.3
8	1	4	2,806,600	3.8	14,895,600	20.1
7	2	6	3,310,900	4.5	18,206,500	24.6
6	3	9	2,333,000	3.2	20,539,500	27.8
5	11	20	9,608,900	13.0	30,148,400	40.8
4	32	52	16,831,400	22.8	46,979,800	63.6
3	84	136	21,265,500	28.8	68,245,300	92.4
2	38	174	3,935,600	5.3	72,180,900	97.7
1	38	212	1,720,200	2.3	73,901,100	100.0
0	0	212	0	.0	73,901,100	100.0

operators offered a total of forty channels of programming, as appears possible from the DBS applications,[94] they would dominate the advertiser-supported television market.[95]

Further, the DBS applicants proposed that the DBS signals be received by both individual homeowners and by community telecasters,[96] making it probable that DBS will expand its audience by working with land-based systems. If DBS operators cooperate with land-based systems, DBS programs could be retransmitted through these systems and homeowners could avoid the cost of installing individual DBS receiving equipment.[97] In this way, land-based systems may provide the audience support necessary for DBS to thrive.

B. *Commercial Viability*

The FCC staff asserted that application of either broadcast or common carrier regulations to DBS could "deter investment and prevent it from ever being initiated."[98] According to the Policy Report, subjecting DBS to broadcasting's program content requirements would unnecessarily increase DBS's regulatory costs.[99] Requiring DBS to give common carrier type access to others, the Policy Report stated, "would seriously interfere with a programmer's ability to provide a desirable programming package and to use the frequencies assigned efficiently."[100]

The staff's assessment of the prohibitive costs of content regulation has not proved to be a primary concern to those who subsequently filed applications to initiate DBS services.[101] For example, the first DBS applicant, Satellite Television Corporation, volunteered that it would comply with the fairness doctrine and political access require-

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NETWORK INQUIRY SPECIAL STAFF, FEDERAL COMMUNICATIONS COMMISSION, *Entry Policies and the Prospects for New Networks* in NEW TELEVISION NETWORKS: ENTRY, JURISDICTION, OWNERSHIP AND REGULATION I-45 (1980) (footnote omitted). Of the total 73,901,100 television households in the United States, 26,921,300 or 36.4% receive fewer than four channels of over-the-air television programming. *Id.*

[94] *DBS spacerush*, *supra* note 1, at 23.

[95] *See supra* note 93. Of the total 73,901,100 television households in the United States, only 3,882,820, or 5.3% have access to more than 10 channels of over-the-air programming. *Id.*

[96] *See DBS spacerush*, *supra* note 1, at 24-25.

[97] All DBS applicants propose to make programming available to cable and other pay TV services or broadcasters for transmission to their audiences. *See DBS spacerush*, *supra* note 1, at 24-25; 1 SATELLITE TELEVISION CORPORATION, *supra* note 45, at 7 n.9.

[98] POLICY REPORT, *supra* note 7, at 12.

[99] *Id.* at 77.

[100] *Id.* at 93.

[101] *DBS spacerush*, *supra* note 1, at 23-27 (no applicant requested exemption from the program content or public content regulations applicable to broadcasters).

ments.[102] Satellite Television Corporation asserted, however, that its commercial success was dependent on there being no common carrier type access regulation of its DBS system.[103] Indeed, all but one DBS applicant adhered to this position.[104]

The success of MDS, Domsats, and the major networks contradicts the FCC staff's view that DBS will not be viable if other programmers are given access to DBS channels. Domsats owners, for example, have obtained highly profitable lease terms from independent programmers.[105] Domsats have enabled the development of a number of new networks,[106] some of which are devoted exclusively to news, sports, and minority programming.[107] Moreover, Domsats have allowed certain local broadcast stations to reach nationwide audiences in competition with networks.[108]

Similarly, the MDS common carrier regulatory structure, which permits the MDS owner to program only fifty percent of his transmission time and requires him to lease the remainder on a nondiscriminatory basis[109] has opened new television viewing options and has proved to be commercially viable.[110] Local programming requirements[111] and the prime time access regulation[112] prohibit the three major networks, ABC, CBS, and NBC, from selecting nationwide programming for the entire broadcast day. These networks have

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[102] 1 SATELLITE TELEVISION CORPORATION, *supra* note 45, at 8 ("Furthermore, the Applicant will comply with the statutory obligations imposed on broadcasters, including the fairness doctrine and the reasonable access and equal opportunities requirements with respect to candidates for public office.").

[103] *Id.* at 8-9. Satellite Television Corporation went on to say that "it would be imprudent to proceed with the enterprise without control over this essential element [program scheduling] of business success." *Id.* at 9.

[104] This one exception was the Direct Broadcast Satellite Corporation, which proposed to lease all of its DBS facilities on a first-come-first-served basis. *See DBS spacerush*, *supra* note 1, at 26.

[105] RCA has requested an FCC permit to build and launch Satcom VI, which would give it six Domsats. The cost of placing a satellite in orbit is approximately $80,000,000. RCA sold its entire capacity on Satcom V for $180,000,000. *See RCA asks for another bid*, BROADCASTING, Jan. 11, 1982, at 75.

[106] "Satellite networks are now so accessible that there is nothing preventing any organization from becoming a communications power overnight." *Playing 'The New Television' at Table Stakes*, CHANNELS, Apr.-May 1981, at 52.

[107] Cable News Network, U.S.A. Network (sports), and Black Entertainment TV currently are distributed via Domsats. *Cable's programming cornucopia in the sky*, BROADCASTING, May 3, 1982, at 48, 54.

[108] WOR (TV) New York, WGN (TV) Chicago, and WTBS (TV) Atlanta all reach nationwide audiences via Domsats. *Id.* at 52.

[109] *See supra* note 31.

[110] POLICY REPORT, *supra* note 7, at 29.

[111] *See supra* note 18.

[112] 47 C.F.R. § 73.658(k) (1980).

proved to be commercially viable without the exclusive access to a nationwide audience that Satellite Television Corporation and the FCC staff asserted is economically necessary for DBS. Further evidence that the DBS owner need not control all broadcast time comes from one of the DBS applicants, Direct Broadcast Corporation, which proposed to lease all of its DBS channels on a first-come-first-served basis.[113] While the regulatory structure applied to DBS undoubtedly will affect the development of the industry, the experience of owners of Domsats and MDS systems and the success of programmers, such as the major networks, demonstrate that applying either program content or access requirements to DBS should not prevent a DBS service from developing.

The Policy Report's conclusion that DBS will be an ineffective competitor remains to be proven. Until the ability of the existing and new technologies to compete in the market for television program delivery has been tested, a projection that DBS will not be in a position to abuse a government franchise giving it exclusive use of a frequency is premature. The failure to restrict through regulation this potential for abuse would be contrary to the first amendment right of the television audience to have access to a diversity of ideas.

III. Proposal

This Note proposes that the FCC authorize each DBS owner to operate several channels of programming simultaneously, but that the FCC require the DBS owner to lease half of these channels to others on a first-come-first-served basis.[114] These lessees should be able to operate free from government licensing, public interest, or content regulations. Similarly, the licensed DBS owner should be allowed to deliver programming over the remaining channels free from these content restraints. This regulatory approach would accommodate important first amendment rights of DBS owners, independent programmers, and viewers without imposing undue economic penalties on DBS operators.[115] Further, such access would open new opportunities for competition in DBS programming and a greater diversity of programming ideas.

Through its broadcast licensing provisions, the Communications Act empowers the government to determine who shall have the right

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[113] *DBS spacerush*, *supra* note 1, at 26.

[114] This regulatory structure is currently applied to MDS systems which are regulated as common carriers, with the MDS owner required to lease at least fifty percent of his transmission time. *See supra* notes 30-31 and accompanying text.

[115] *See* Policy Report, *supra* note 7, at 91.

to speak and to affect what is said over the airwaves.[116] Because the Communications Act combines frequency regulation with content regulation, the government has become the "ultimate arbiter and guardian of the public interest" in broadcasting.[117] Although the constitutionality of the Communications Act is not in question,[118] its content regulations stand in uneasy contradiction to basic principles of free speech for both those who receive and those who are denied a license to broadcast. These regulations, however, provide the means by which the government attempts to balance the various conflicting first amendment interests of broadcast licensees, broadcast aspirants, and the public.[119]

The FCC staff opposed, on first amendment grounds, applying both content and access regulations to DBS.[120] This opposition was based on the arguments advanced by some broadcasters that requiring broadcasters to give access to their facilities to others either for political purposes or to reply to the broadcasters' viewpoints violates the broadcasters' first amendment rights[121] and imposes on them a severe economic penalty.[122] From the broadcasters' perspective, the fairness doctrine and limited access rights granted under the Communications

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[116] *See supra* note 3.

[117] Columbia Broadcasting Sys. Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 117 (1973).

[118] The constitutionality of the Communications Act was first upheld in National Broadcasting Co. v. United States, 319 U.S. 190 (1943).

[119] *See Red Lion*, 395 U.S. 367.

[120] "Content regulations . . . impose serious limitations on broadcasters' rights of free expression under the First Amendment." POLICY REPORT, *supra* note 7, at 91. "[B]roadcasters are . . . required to use air time to present points of view and types of programs with which they may have no sympathy. Similar restrictions could not be placed on newspapers, for instance, under the Constitution . . . ." *Id.* at 76. *See supra* note 57, regarding the Policy Report's comments on access regulations.

[121] POLICY REPORT, *supra* note 7, at 76.

[122] One of the most compelling arguments against access is that there are detrimental economic consequences of requiring a broadcaster to provide access to others pursuant to content regulations.

> In the context of traditional broadcasting, an access obligation consumes an unreclaimable portion of the finite time available for generating revenues, tends to reduce the audience for subsequent programming (further reducing revenues), and, in effect, piggybacks on the mass audience drawing power of the broadcaster's regular programming. Thus, the chilling effects of contingent access obligations are severe for broadcasters. In traditional broadcasting, the access user seeks an audience who is not drawn to his or her message and not even aware in advance that the access message is coming.

B. SCHMIDT, FREEDOM OF THE PRESS VS. PUBLIC ACCESS 212-13 (1976). These objections, however, would not be relevant if access channels were separated from the channels on which the DBS owner would provide programming. The access channels would not be piggybacking on the audience of the DBS licensee. The three major networks, ABC, CBS and NBC, have demonstrated that programmers can build an audience without station ownership and without the right to exclude all others from access to the airwaves. *See supra* note 21.

Act interfere with the broadcast station owners' journalistic freedom. "Their contention is that the First Amendment protects their desire to use their allotted frequencies continuously to broadcast whatever they choose, and to exclude whomever they choose from ever using that frequency." [123]

Broadcast access proponents contend that the existing "exclusive use" broadcast licensing system represents the "ultimate prior restraint on speech" because it prohibits all electronic speech except by those few who hold licenses.[124] Although the Supreme Court has upheld the broadcast licensing system, it has avoided satisfying either side of the constitutional debate between broadcasters and access proponents by emphasizing, first in 1969[125] and again in 1981,[126] that "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount . . . . It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here." [127]

Contrary to the Supreme Court's focus on the first amendment rights of the public, the Policy Report staff, broadcasters, and most of the DBS applicants have ignored the television viewer's perspective. A concomitant of the freedom to speak and the freedom to publish is the opportunity to hear and to read. The first amendment thus reaches beyond the broadcaster's and the publisher's right to communicate by "prohibit[ing] the government from limiting the stock of information from which members of the public may draw."[128] In evaluating the propriety of the government regulation of first amendment rights, the Court has looked to the opportunity for the public to "receive suitable access to social, political, esthetic, moral, and other ideas and experiences,"[129] to have "access to discussion, debate and the dissemination of information and ideas,"[130] and to have "ample alternative channels of communication."[131] The Court's view of first amendment freedoms concludes that they "are not for the benefit of the press so much

For a discussion of the economic costs of access created by content regulations and the impact of these costs on programming decisions, see COMMUNICATIONS FOR TOMORROW, POLICY PERSPECTIVES FOR THE 1980s 198-203 (G. Robinson ed. 1978).

[123] *Red Lion*, 395 U.S. at 386.

[124] *Dingell puts brakes on deregulation*, BROADCASTING, Dec. 14, 1981, at 28 (statement of Samuel A. Simon, Executive Director of the National Citizens Committee for Broadcasting).

[125] *Red Lion*, 395 U.S. 367 (1969).

[126] CBS, Inc. v. FCC, 453 U.S. 367 (1981).

[127] *Id.* at 395 (quoting *Red Lion*, 395 U.S. at 390).

[128] First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 783 (1978).

[129] *Red Lion*, 395 U.S. at 390.

[130] *Bellotti*, 435 U.S. at 783.

[131] Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 771 (1976).

as for the benefit of all of us. A broadly defined freedom of the press assures the maintenance of our political system and an open society." [132]

The Communications Act "seeks to preserve journalistic discretion while promoting the interests of the listening public."[133] Adoption of the Policy Report's recommendations would alter the balance between broadcasters and viewers struck under the Communications Act, and would give DBS operators, through unregulated exclusive use of DBS facilities, the same right of unlimited private censorship enjoyed by newspapers.[134] This editorial privilege afforded newspapers was based on the Supreme Court's view that the medium and the message are inextricably intertwined.[135] The Supreme Court had previously expressed a different view as to broadcasters. In *Red Lion Broadcasting Company v. FCC*, the Court held that there is no first amendment requirement that the broadcaster be given the exclusive use of a frequency.[136] Moreover, the Court stated with respect to broadcasting that, "[t]here is no sanctuary in the First Amendment for unlimited private censorship operating in a medium not open to all." [137] The Supreme Court's distinction between newspapers and broadcasters has been based largely on the natural limits on spectrum available for broadcasting.

The FCC, as well as broadcasters, now argues that this justification for regulating broadcasters differently from newspapers is no longer valid because broadcast stations are more numerous than newspapers.[138] Marketplace forces, says the FCC, will replace the need

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[132] Herbert v. Lando, 441 U.S. 153, 188 (1979) (quoting Time, Inc. v. Hill, 385 U.S. 374, 389 (1967)).

[133] FCC v. WNCN Listeners Guild, 450 U.S. 582, 596 (1981).

[134] *See* Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 254-57 (1974).

[135] *Id.* In *Tornillo*, a Florida statute which gave individuals a right of reply to newspapers was found unconstitutional because it interfered with the editorial rights of newspaper publishers, which are protected under the first amendment. The Court stated:

> [T]he Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors. A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment.

Id. at 258 (footnote omitted).

[136] "There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others . . . ." *Red Lion*, 395 U.S. at 389.

[137] *Id.* at 392.

[138] In a speech at an International Radio and Television society luncheon in New York City on Sept. 23, 1981, FCC Chairman Mark S. Fowler stated that the spectrum argument which was originally used to justify the trusteeship model is "not valid in a day when, in New York City, for instance, residents have a choice of nine television signals off the air, 50 radio stations and only three newspapers." *Fowler out to slay Big Brother*, BROADCASTING, Sept. 28, 1981, at 19-20.

for regulation.[139] The Supreme Court, however, did not measure spectrum scarcity in terms of the number of broadcasters.[140] Instead, spectrum scarcity was viewed in the light of frequencies available for potential users.[141] In this context spectrum scarcity had not ended in 1969, when *Red Lion* was decided, nor will DBS technology eliminate the need for the government to allocate frequencies. The natural restraint of spectrum scarcity on marketplace forces and the resulting need to balance first amendment rights remains. Indeed, the FCC has already rejected the applications of six companies to operate experimental DBS systems, in part because there is inadequate spectrum to accommodate all applicants.[142] Under the first amendment, the Congress is free to require licensees of the airwaves to provide access to others.[143] Thus, the FCC has ample discretion to establish a regulatory classification for DBS which requires the owner to operate as a conduit for others.[144]

Gene F. Jankowski, President of the CBS Broadcast Group, has reported on nationwide broadcasting and newspaper statistics: "Today there are more than 9,000 radio stations, nearly 800 commercial television stations, and 269 noncommercial stations. This compares to about 1,750 daily newspapers." Jankowski, *Fairness and Equal Time: Should We Scrap the Rules?*, CHANNELS, Dec.-Jan. 1981-82, at 6.

The FCC has approved for submission to the Congress proposed changes in the Communications Act which would delete the statutory basis for the fairness doctrine and the political access requirements. *See* FCC, News Release No. 5068 (Sept. 17, 1981); FCC, News Release No. 5069 (Sept. 23, 1981).

[139] For a discussion of the legal and policy considerations underlying the substitution of market forces for government regulation in broadcasting, see Deregulation of Radio, 73 F.C.C.2d 457 (1979).

[140] "Before 1927, the allocation of frequencies was left entirely to the private sector, and the result was chaos. It quickly became apparent that broadcast frequencies constituted a scarce resource whose use could be regulated and rationalized only by the Government." *Red Lion*, 395 U.S. at 375-76.

[141] "*Some present possibility for new entry by competing stations is not enough, in itself, to* render unconstitutional the Government's effort to assure that a broadcaster's programming ranges widely enough to serve the public interest." *Red Lion*, 395 U.S. at 400. "Nothing in this record, or in our own researches, convinces us that the [spectrum] resource is no longer one for which there are more immediate and potential uses than can be accommodated, and for which wise planning is essential." *Id.* at 399. *See* NBC v. United States, 319 U.S. 190, 226 (1943) ("Freedom of utterance is abridged to many who wish to use the limited facilities of radio. Unlike other modes of expression, radio inherently is not available to all.").

[142] 46 Fed. Reg. 54,796 (1981).

[143] "Rather than confer frequency monopolies on a relatively small number of licensees, in a Nation of 200,000,000, the Government could surely have decreed that each frequency should be shared among all or some of those who wish to use it, each being assigned a portion of the broadcast day or the broadcast week." *Red Lion*, 395 U.S. at 390-91.

[144] NETWORK INQUIRY SPECIAL STAFF, FEDERAL COMMUNICATIONS COMMISSION, *Direct Broadcast Satellites: Legal and Policy Options*, in PRELIMINARY REPORT ON PROSPECTS FOR ADDITIONAL NETWORKS (1980) (by David M. Rice). ("[T]he Commission is broadly empowered to place conditions on the manner in which the spectrum may be used.") The FCC could limit access to a frequency for DBS use only to persons who will offer to lease the frequency to others and regulate

Changes in the technological capabilities and attributes of a communications system should have a major influence in balancing first amendment rights under the Communications Act.[145] By permitting access to fifty percent of the DBS channels, as proposed here, the government would no longer need to assure that those whom it selects to operate DBS systems will do so in the public interest. By making channels available to independent programmers, a proliferation of programming ideas and opinions will occur and the public will then be in a position to choose from a multitude of offerings.[146] Moreover, opening access to only half of the DBS channels would allow the DBS owner to avoid the economic penalty that the owner of only one channel bears as a result of public interest and content regulations.[147] The DBS owner would still have the right to program his remaining channels free of government interference under this proposal, thus giving the owner full first amendment freedoms. The emergence of DBS therefore makes possible a more equitable balance of the first amendment rights of broadcasters and viewers than would result from the Policy Report's recommendations.

Conclusion

The exclusive use broadcast doctrine adopted by the Congress in 1927 reflected the realities of a time when the nation's technological sights were set on Lindbergh's flight 3,600 miles across the Atlantic,

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the manner in which a frequency allocation may be used. *Id.* at 41. *See* Philadelphia Television Broadcasting Co. v. FCC, 359 F.2d 282 (D.C. Cir. 1966); ACLU v. FCC, 523 F.2d 1344 (9th Cir. 1975); National Ass'n of Regulatory Util. Comm'rs v. FCC, 525 F.2d 630 (D.C. Cir. 1976).

[145] The Court of Appeals for the Tenth Circuit noted:

> [T]he degree to which the First Amendment shields the editorial discretion of wireless broadcasters differs substantially from the degree to which newspaper publishers are shielded from governmental interference. *Compare Red Lion Broadcasting Co. v. FCC*, 395 U.S. 369, 89 S.Ct. 1794, 23 L.Ed.2d 371 (1969), *with Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 94 S.Ct. 2831, 41 L.Ed.2d 730 (1974). The Supreme Court has repeatedly emphasized that "[e]ach medium of expression, of course, must be assessed for First Amendment purposes by standards suited to it," *Southeastern Promotion, Ltd. v. Conrad*, 420 U.S. 546, 557, 95 S.Ct. 1239, 1245, 43 L.Ed.2d 448 (1975), for "differences in the characteristics of news media justify differences in the First Amendment standards applied to them." *Red Lion*, 395 U.S. at 386, 89 S.Ct. at 1804.

Community Communications v. City of Boulder, Colo., 660 F.2d 1370, 1377 (10th Cir. 1981).

[146] Congressman J. Dingell has stated: "Until the time when there is real and robust diversity in the channels available to the population, and structural controls such as access channels are in place and shown to be meaningful, the Fairness Doctrine and political access requirements remain important and needed rights of the public." Jankowski, *supra* note 138 at 7.

[147] *See supra* note 122.

not on satellites 22,300 miles above the earth. DBS is a dynamic new technology which should not be locked into what is fast becoming an outdated regulatory mode. By literally expanding the horizons of expression, these satellites will offer the opportunity to make available to the public a diversity of ideas and opinions and, hence, the means for real and robust debate. The economics and the technology of DBS make it possible for all DBS programming to enjoy full first amendment journalistic freedoms. It is proposed here that the DBS owner be licensed to operate several channels of programming simultaneously on the condition that the DBS owner lease fifty percent of these channels to independent programmers. This will accomplish the first amendment goals enunciated by the Supreme Court of providing the public with alternative channels of communications. There would be no need to impose on DBS owners the fairness doctrine, political access rules or other requirements which ameliorate the potential abuses inherent in an earlier technology if DBS channels were divided between owner programming and independent access. Through the DBS regulatory structure proposed here, program content regulation can be eliminated and the first amendment rights of the public can best be served.

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